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, No. 09-CR-846
The Honorable Robert W. Gettleman, *United States District Judge.*

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Defendant-Appellant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by excluding testimony purporting to establish defendant's whereabouts the evening of the robbery where defendant failed to timely disclose his alibi witness upon the government's request as required by Federal Rule of Criminal Procedure 12.1.

2. Whether the admission of an eyewitness identification violated defendant's due process rights where the identification was obtained using a six-person photographic array that the district court considered "one of the fairest" it had ever seen, and where the eyewitness had carefully viewed the robber from close range during the several minute encounter.

STATEMENT OF THE CASE

On October 16, 2009, defendant John Ford was charged by criminal complaint with robbing U.S. Bank—a bank insured by the Federal Deposit Insurance Corporation located at 1586 North Rand Road, Palatine, Illinois. R.1.[1/] On December 10, 2009, the Grand Jury returned a one-count indictment,

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[1/] Citations to the Original Record on appeal are designated as "R." followed by the docket and page number. Citations to defendant's brief are designated as "Br.," citations to defendant's short appendix are designated as "App. A," citations to the defendant's long appendix are designated as "App. B," and citations to the trial transcript are designated as "Tr.," each followed by the page number. Citations to transcripts of other proceedings are designed as "Tr.," preceded by date and followed by page number.

charging Ford with taking approximately $1146 belonging to U.S. Bank by force, violence, and intimidation, in violation of 18 U.S.C. § 2113(a). App. A1.

Ford moved to suppress the eyewitness identification by U.S. Bank manager Dannie Thomas. R. 24. After an evidentiary hearing, the district court denied the motion. R. 46. The court denied Ford's oral motion to reconsider following the government's discovery and disclosure of additional information pertaining to Thomas. R. 58.

On the third day of trial, defense counsel informed government counsel for the first time that Ford would call a witness who would testify about Ford's whereabouts the evening of the robbery. R. 74 at 11. The government objected on the ground that Ford had failed to comply with Federal Rule of Criminal Procedure 12.1 governing disclosure of an alibi defense. Relying on Ford's description of the planned testimony, the district court sustained the government's objection and excluded the testimony. Tr. 385.

The jury found Ford guilty of Count 1. R. 66. The district court sentenced Ford principally to a term of 240 months of imprisonment. App. A4-A8. Ford now appeals his conviction.

STATEMENT OF THE FACTS

The Robbery

On November 20, 2007, at approximately 5:25 p.m., U.S. Bank employee Merlyn Agravante walked toward the back entrance of the U.S. Bank branch in Palatine, Illinois, to go home. Tr. 32-33; App. B17. The bank's lobby was closed for the night, but its drive-through window remained open, all of the bank's lights were on, and three other employees, including bank manager Dannie Thomas, were inside. Tr. 30-32. As Agravante opened the door, she was confronted by a man holding a handgun, which he pointed in her face. App. B17. The man, who was white, was dressed in black with a floppy cargo hat on his head and a dust mask covering his mouth. Tr. 34, 59-60. He grabbed the door from Agravante, forced his way into the bank, and pushed Agravante to the floor. App. B17.

Having heard Agravante scream, Thomas ran from his office toward the back entrance where he saw Agravante on the ground with the man standing over her. Tr. 33. The man approached Thomas and, standing about eight feet away, informed Thomas that "[t]his is a robbery" and warned him to "stand back, big boy, fat boy." *Ibid.* The robber then demanded that Thomas bring him to the bank's vault. Tr. 34-35. Thomas walked with the robber through the lobby toward the front door where the vault was located. As they were walking,

Thomas explained that the vault was inaccessible after regular business hours. Thomas was about four to six feet away from the robber. Tr. 35-36.

When Thomas and the robber approached the vault, the robber noticed safe deposit boxes and directed Thomas to open them. Thomas explained that these too were inaccessible. Tr. 36-37. Thomas and another employee insisted to the robber that the only money available was at the teller station. Tr. 37. The robber ordered the teller to empty the drawer, which contained approximately $1146, into a pillowcase he had brought. Tr. 38-39; App. B13, B16.

After trying again to make Thomas open the vault, the robber walked back through the lobby and left through the back door. Tr. 40-41. Although it was dark, Thomas saw the robber run south along a fence before disappearing. Tr. 57-58; App. B13. The entire incident lasted approximately four to five minutes. App. B13. Throughout the encounter, the robber was in Thomas's view and was generally about four to six feet away. Tr. 38. Thomas focused on the robber "[p]retty much the whole time." Tr. 57. He attempted to engage the robber, make eye contact, and keep the robber calm to divert the robber's attention from the other employees. Tr. 53. Although the dust mask covered part of the robber's face, Thomas observed the robber's eyes, neck area, and the "entire side of [his] face." 9/21/2010 Tr. 55. Images of the robbery were captured by bank surveillance cameras. Tr. 47.

The Investigation

Immediately following the robbery, Thomas spoke to a 911 responder and described the robber as a white male who was about 5'10", weighed approximately 180 to 190 pounds, and had "very pale skin" with freckles. App. B31-B33. Thomas also stated that the robber wore a black peacoat, a floppy hat, boots, and a mask, which Thomas described as a "medical mask" or a "surgical mask." *Ibid.* The Palatine Police Department responded to the scene and Officer Garth Martino took Thomas's statement. In the statement, Thomas reiterated that the robber "was wearing all black clothing, a dark colored fishing hat, and a white dust mask over his face." App. B13. Thomas further stated that the robber had a very pale complexion, with light colored eyebrows and freckles around his eyes. *Ibid.* A supplemental identification report recorded, among other things, Thomas's description of the robber as a white male who was approximately 5'10" and weighed approximately 185 pounds. App. B20. The other employees provided statements to Detective Bice, as did a customer who had been at the bank's drive-through window during the robbery. App. B15-B17.

Detective Bice, Officer Martino, and two other detectives searched along the fence where the robber had run. Bice discovered a white dust mask about 150 feet from the bank's back entrance (Tr. 116-117), and he placed the mask

inside a paper bag to allow it to dry after having been in the rain (Tr. 122). Thomas told the police that the mask was just like the one worn by the robber. R. 32 at 12. The police later reviewed surveillance images of the robbery and confirmed that description. *Ibid.*

The dust mask was placed in police custody and subsequently sent to the Illinois State Police Crime Laboratory in Rockford, Illinois, for forensic analysis. Tr. 123. After swabbing the mask to obtain a DNA sample, the laboratory developed a partial DNA profile based on the DNA markers that were present. Tr. 173-177, 214-217. That profile matched a DNA profile on file in the Combined DNA Index System database: the profile of defendant John Ford. R. 13 at 4-5.

After the DNA match, Detective Bice assembled an array of six color photographs including Ford's photograph for the robbery witnesses to view. Tr. 125. When Dannie Thomas viewed the array, he "immediate[ly]" picked out the photograph of Ford. 8/24/2010 Tr. 30. Thomas identified Ford's photograph based on Ford's skin tone and the appearance of his eyes, with Thomas observing that Ford had the "kind of freckle-ish, pale skin" and "intens[e] . . . eyes" that he remembered from the robber. 8/24/2010 Tr. 31, 58.

On December 9, 2009, Ford was arrested (R. 7), and on December 15, 2009, he was arraigned in the Northern District of Illinois (R. 12). After Ford

was in custody, a search warrant was issued to collect his cellular material for further DNA analysis. R. 17. Forensic analysis determined that the DNA profile obtained from skin cells left on the dust mask matched Ford's DNA profile at all available DNA markers. Tr. 295-297, 329-330.

Proceedings in the District Court

After holding a two-day suppression hearing during which both Thomas and Detective Bice testified, the district court denied Ford's motion to suppress Thomas's identification. 9/21/2010 Tr. 57. The court held that the photographic array had not been unduly suggestive and was in fact "one of the fairest ones" it had ever seen. 9/21/2010 Tr. 53. The court also found Thomas's identification reliable because, among other things, Thomas "was right next to the robber for several minutes and looked at him fairly closely." 9/21/2010 Tr. 54.

The trial commenced on October 12, 2010, and lasted four days. Thomas recounted the circumstances of the robbery, his descriptions of the robber and subsequent interactions with the police, and his identification of Ford. Tr. 30-43, 47-68. Detective Bice described his recovery of the dust mask, as well as the photographic array he assembled and administered. Tr. 114-131. The government also presented detailed testimony from three forensic scientists who conducted the DNA analysis. One forensic scientist testified about extracting a DNA sample from the mask (Tr. 173-177), and another described how she

completed a partial DNA profile from that sample, recording DNA sequences at 10 of 13 DNA markers (Tr. 213). A third forensic scientist testified that the DNA sample obtained from Ford following his arrest matched the profile of the mask sample at all 10 locations. Tr. 329-330. Based on his statistical analysis, the analyst stated that the probability of such a match was one in 29 trillion. Tr. 342.

The defense called Officer Martino who testified about a lead provided by Dannie Thomas the day following the robbery when Thomas observed a man in the bank whom he believed resembled the robber. Tr. 388-390. The defense also attempted to call one of Ford's former personal-training clients, Russell Martin, who would have testified that he had an entry in his personal notebook of an appointment with Ford the evening of the robbery. Tr. 379-380. The district court excluded Martin's testimony due to Ford's failure to comply with Federal Rule of Criminal Procedure 12.1, which governs disclosure of an alibi defense. Tr. 385.

The jury found Ford guilty of the bank robbery charge. R. 63. Ford filed a motion for a new trial, which the district court denied. R. 75. Applying the advisory Career Offender Guideline and noting Ford's history as a repeat bank-robbery offender, the district court sentenced Ford to 240 months of imprisonment, to be followed by three years of supervised release.

See 10/21/2011 Tr. 11-12; App. A4-A8. The court also required Ford to pay $1146 in restitution. App. A7.

SUMMARY OF THE ARGUMENT

1. Under Federal Rule of Criminal Procedure 12.1, Ford was required to provide timely written notice of an intended alibi defense and to disclose any witnesses on whom he intended to rely to support that defense. See Fed. R. Crim. P. 12.1(a)-(c). The district court correctly found that Ford violated Rule 12.1 when, despite knowing about an alibi witness's planned testimony at least one week before trial, Ford's counsel waited until the third day of trial to orally inform the government that the defense would call a witness who had records of a personal training appointment with Ford on the evening of the robbery. Although Ford maintains that the intended testimony was not technically an alibi, the district correctly recognized that the testimony had no other relevant purpose. Tr. 385. Contrary to Ford's argument on appeal, he never suggested to the district court that the testimony would establish his demeanor on the evening of the robbery, and the record demonstrates that the witness could not have offered such testimony.

The district court also did not plainly err by exercising its discretion to exclude the alibi testimony as a result of Ford's Rule 12.1 violation. A defendant's Sixth Amendment right to introduce relevant evidence must "bow

to accommodate other legitimate interests in the criminal trial process," *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987) (citation omitted), and the Supreme Court has specifically held that, in appropriate cases, courts may exclude alibi testimony for non-compliance with notice requirements, see *Taylor* v. *Illinois*, 484 U.S. 400 (1988). In this case, exclusion was not plainly erroneous given the absence of any excuse for Ford's violation, the existence of record evidence strongly suggesting Ford's counsel withheld disclosure deliberately, and the prejudice Ford's eleventh-hour defense would have caused the government.

In any event, any error in excluding the testimony was harmless. The evidence of guilt—DNA evidence connecting Ford to the dust mask found near the crime scene, as well as an eyewitness identification—was overwhelming while the testimony of Ford's witness—who had no memory of the evening and could have offered only speculative testimony based on an entry in his personal calendar—was extremely weak.

2. The district court correctly denied Ford's motion to suppress the eyewitness identification of Dannie Thomas. First, the photographic array was not unduly suggestive. The array consisted of Ford and five other white men of roughly the same age with similar pale skin tones, similar builds, and similar looking facial hair, who generally matched witness descriptions of the robber. The pictures, which came from different sources, were not identical,

but the minor discrepancies Ford identifies fall well short of undue suggestion. The police administration of the array was also not suggestive, and in fact Detective Bice took steps to avoid misidentification, such as by instructing Thomas that the suspect might not be in the array. Tr. 126-128; 9/21/2010 Tr. 11; App. B8. Second, the identification was reliable because, as the district court found, Thomas took advantage of his opportunity to view the robber from close range during the four to five minute encounter. 9/21/2010 Tr. 55. Thomas's descriptions of the robber were also accurate, and he expressed confidence about the identification.

The district court also did not err by denying Ford's renewed suppression motion following disclosure of a police report indicating that Thomas reported a suspicious individual the day after the robbery. That new evidence did not affect whether the photographic array was suggestive, and it did not significantly impair the identification's reliability because Thomas did not identify the suspicious individual as the robber and other indicia of reliability were strong.

ARGUMENT

I. The District Court Permissibly Excluded Alibi Testimony Because of Defendant's Failure to Comply with Federal Rule of Criminal Procedure 12.1.

A. Standard of Review

A district court's decision whether to exclude evidence for a discovery violation is ordinarily reviewed for abuse of discretion. See *United States* v. *Stevens*, 380 F.3d 1021, 1025 (7th Cir. 2004) (reviewing denial of motion to exclude evidence under Federal Rule of Criminal Procedure 16 for abuse of discretion); *United States* v. *Buchbinder*, 796 F.2d 910, 914 (7th Cir. 1986) (reviewing exclusion of the defendant's expert testimony under Federal Rule of Criminal Procedure 12.2(b) for abuse of discretion); see also Wright & Leipold, Federal Practice & Procedure: Criminal 4th § 202, at 473 (2008) ("Review of the district court's application of Rule 12.1 is on an abuse-of-discretion standard."). In this case, although Ford did contend that Rule 12.1 was inapplicable to Martin's testimony, he neither argued that exclusion was an inappropriate sanction nor suggested alternative measures to the district court. Accordingly, Ford's new contention that excluding his witness's testimony was improper *even if* it was alibi evidence is reviewed for plain error. See Fed. R. Crim. P. 52(b). To establish plain error, Ford must show that "(1) the error complained of actually occurred; (2) the error was clear or obvious; (3) the error affected his

substantial rights (i.e., he probably would not have been convicted absent the error); and (4) the error seriously impugned the judicial proceeding's fairness, integrity, or public reputation." *United States* v. *Tanner*, 628 F.3d 890, 898 (7th Cir. 2010).

B. Background

On January 15, 2010, the government requested in a discovery letter that Ford provide "[n]otice of any alibi or similar defense that [he] intends to raise, including but not limited to . . . any defense asserting the defendant's unavailability on or near the dates named in the indictment." R. 74 Ex. A at 4. On September 24, 2010, the government renewed its request by letter, asking Ford to provide:

> Notice of any alibi or similar defense that defendant intends to raise . . . and any defense asserting the defendant's unavailability on or about November 20, 2007, at approximately 5:25pm, at or near 1586 North Rand Road, Palatine, Illinois, . . . pursuant to Rule 12.1.

R. 74 Ex. B at 1-2. Ford never responded to these requests.

At the time of the robbery, Ford worked as a personal trainer for Fit Chicago in Chicago, Illinois. R. 72 at 5. On October 5, 2010, defense counsel emailed Russell Martin, one of Ford's former clients, asking Martin to "[p]lease

search records" for the date of the robbery, November 20.[2/] R. 74 Ex. D at 1. Martin responded within minutes:

> I was not using an electronic calendar in 2007, but I did find my paper calendar stuffed away in my desk for that year. On Tuesday, November 20, 2007, I have written down in my calendar that I have an appointment at the gym at 7:30 and that it was session #6 of the 10 I had purchased in a block. John [Ford] was the only person I was training with, so it must have been with him. I always trained in the evening so it would have been 7:30 p.m.

Ibid. In a second email sent the same day, Martin noted that he had not written down where he and Ford had trained that evening and that he "obviously c[ould]n't remember back that far," but he guessed that they likely met at a gym either in Chicago or Evanston, Illinois. *Id.* at 1-2. Martin added that he would

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[2/] Ford's contention (Br. 12) that he did not learn about Martin until a belated disclosure of Jencks Act material is unfounded. In September 2010, FBI officers obtained documents from Ford's former employer. R. 74 at 15. Among the documents were positive client testimonials about Ford, including an email testimonial by Martin. R. 74 Ex. E. Martin's email, which was addressed to Ford and forwarded to Ford's employer, makes no reference to the dates of any specific personal training appointments. The record does not reflect when these documents were disclosed. Subsequent review of government files indicates that the government disclosed these testimonials along with other records to defense counsel on October 8, 2010.

Because the government never intended to call Martin as a witness, his email testimonial was not subject to the Jencks Act's disclosure obligations, which are triggered when the defense moves for disclosure after direct examination of a government witness. See 18 U.S.C. § 3500. More to the point, Ford's suggestion that he first learned about Martin, his own former client, through the government's disclosure of an email Martin originally sent to Ford is entirely unsupported and unconvincing. In fact, the email records indicate that defense counsel contacted Martin on October 5, 2010, at least three days before the government's disclosure.

be willing to testify at Ford's trial. *Id.* at 2. On October 9—three days before Ford's trial—defense counsel emailed Martin again, asking him to testify. *Ibid.*

Defense counsel then waited until the end of a recess during the direct examination of the government's final witness to orally inform government counsel that Martin would testify about a personal training appointment with Ford on the evening of the robbery. R. 74 at 11.[3/] After the recess, the government completed its direct examination of forensic scientist Blake Aper. During cross-examination, defense counsel asked Aper—who had testified that the odds of a random match between Ford's DNA profile and the DNA profile from the dust mask sample was one in 29 trillion (Tr. 342)—how he would account for evidence suggesting a mistake. Specifically, counsel asked Aper, "For instance, say someone had an alibi for the time of a particular offense, but you said it was a match. How would you account for that in your statistics?" Tr. 372-373. Defense counsel withdrew the question after the government objected. Tr. 373.

During the next recess, government counsel apprised the district court of Ford's intention to introduce alibi testimony and objected based on Ford's failure to follow Rule 12.1. Tr. 378-379. The government argued that the testimony

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[3/] During the first day of trial, defense counsel did indicate orally that he might call Martin as a witness, but he did not disclose that Martin would testify about a personal training appointment with Ford on the evening of the robbery. R. 74 at 15.

was only relevant to the extent it tended to support an alibi, and it noted that defense counsel had already laid the groundwork for an alibi defense when cross-examining Aper. Tr. 380, 383. Defense counsel argued that the testimony was "not technically an alibi" because it did not establish where Ford was at 5:30 p.m. on the evening of the robbery. Tr. 379, 381. The district court repeatedly questioned defense counsel about what relevance Martin's testimony would have other than to suggest that Ford was not at U.S. Bank in Palatine at the time of the robbery:

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

Tr. 381. Defense counsel also asserted that because the government had been aware that Martin was one of Ford's personal training clients, it would suffer no prejudice from the testimony. Tr. 379, 382. The government, however, explained that it had "big problems with [Ford] 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." Tr. 383.

While awaiting the district court's ruling, the government interviewed Martin during what remained of the recess. R. 74 Ex. C. According to

the government's report of the interview, Martin did not remember his meeting with Ford on November 20, 2007. As a result, Martin did not recall when Ford had supposedly arrived, what Ford had been wearing, or how Ford had appeared. *Ibid.*

Following the recess, the district court ruled that Martin's testimony should be excluded. Tr. 385. Noting that the government had requested notice of an alibi witness but that Ford had failed to provide it, the court indicated that Rule 12.1 "favor[ed] not permitting [the] alibi witness." *Ibid.* The district court further stated that even though Ford insisted Martin was not an alibi witness, it could not "see any other purpose" for Martin's testimony. *Ibid.*

C. Analysis

1. Rule 12.1 imposes reciprocal disclosure obligations with respect to any alibi defense.

Notice-of-alibi rules have a long history in this country and are now used in most jurisdictions. See Wayne R. LaFave et al., Criminal Procedure § 20.5(b) (3d ed. 2007). As the Supreme Court has recognized, "[g]iven the ease with which an alibi can be fabricated," the government's "interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." *Williams* v. *Florida*, 399 U.S. 78, 81 (1970). That interest is "one component of the broader public interest in a full and truthful disclosure of critical facts." *Taylor* v.

Illinois, 484 U.S. 400, 412 (1988). Notice-of-alibi rules are "based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." *Wardius* v. *Oregon*, 412 U.S. 470, 473 (1973).

In the federal system, Federal Rule of Criminal Procedure 12.1 sets forth reciprocal discovery obligations for alibi defenses. When the government requests in writing that the defendant provide notice of "any intended alibi defense," the defendant must give the government written notice within 14 days specifying where the defendant claims to have been at the time of the alleged offense and providing the names and contact information for each witness on whom the defendant intends to rely. Fed. R. Crim. P. 12.1(a). Within an additional 14 days, the government must provide the defendant with the names and contact information for each witness on whom it intends to rely either to establish the defendant's presence at the crime scene or to rebut the defendant's alibi. Fed R. Crim. P. 12.1(b). In cases where the government or the defendant first learns about a witness who falls within Rule 12.1's disclosure obligations outside of the applicable 14-day window, Rule 12.1(c) imposes a continuing duty to "promptly disclose" the witness in writing.

When either party fails to comply with these requirements, Rule 12.1(e) gives the district court discretion to "exclude the testimony of any undisclosed witness regarding the defendant's alibi." The Advisory Rules Committee concluded that such a sanction was "essential if the notice-of-alibi rule is to have practical significance." Fed R. Crim. P. 12.1 Notes of Advisory Committee on Rules—1974.

2. The proffered testimony concerning Ford's whereabouts the evening of the robbery was subject to Rule 12.1.

Russell Martin's proposed testimony was offered to prove an alibi defense and was therefore subject to Rule 12.1. The government twice requested in writing that Ford disclose "any alibi or similar defense" that would assert his "unavailability on or about" the date and time of the charged robbery at U.S. Bank in Palatine. R. 74 at 11. Yet Ford never notified the government that he intended to argue that he was elsewhere that evening working with a personal training client miles from the bank. Furthermore, when defense counsel learned that Martin would testify that he had a training session with Ford the evening of the robbery, counsel failed to "promptly disclose in writing" this planned testimony as required by Rule 12.1(c). Although email correspondence between Martin and defense counsel demonstrates that defense counsel knew the contents of Martin's testimony no later than October 5, 2012—seven days

before the trial—defense counsel waited until the third day of the trial at the close of the government's case to finally provide the government with oral notice. R. 74 at 11. Ford never suggested, and the district court did not find, any basis for a good-cause exception to Ford's clear violation of Rule 12.1's requirements. See Fed. R. Crim. P. 12.1(d).

Ford argues on appeal, as he did in the district court, that Martin's testimony that he had a personal training appointment with Ford at 7:30 p.m. (in either Chicago or Evanston) was not "technically" an alibi because, even if true, it would not have made it impossible for Ford to be at U.S. Bank in Palatine at 5:25 p.m. See Br. 17-18. But as the district court correctly recognized, the fact that Martin's testimony would have been weak circumstantial alibi evidence does not exempt it from Rule 12.1 where the testimony's only relevance was its tendency to make it less likely that Ford could have been present at the robbery. Cf. *United States* v. *Portela*, 167 F.3d 687, 704-705 (1st Cir. 1999) (assuming that testimony was subject to the district court's alibi defense discovery order and concluding that any error in applying exclusion as a sanction was harmless because the testimony would not have precluded the defendant's participation in the charged drug transaction). Martin's testimony was intended to show by inference that Ford was, to use his definition of an alibi, "in a location other than the scene of the crime at the

relevant time," Br. 17 (quoting Black's Law Dictionary 84 (9th ed. 2009)), because it would have been unlikely that someone robbed a bank in Palatine, Illinois, at 5:25 p.m. and then arrived at a gym at least 20 miles away for the appointment with Martin at 7:30 p.m. Without this inference, the fact that Ford was at a personal training session on November 20, 2007, at 7:30 p.m. in Evanston or Chicago would have had no probative value. His defense therefore falls within Rule 12.1's text.

Ford's interpretation is also at odds with Rule 12.1's purpose. Jurisdictions require notice of an alibi defense because the defense is easily invented and generally requires independent investigation. See *Williams*, 399 U.S. at 81-82. Absent disclosure, the eleventh-hour presentation of an alibi defense results in unfair surprise and risks a verdict based on "incomplete, misleading, or even deliberately fabricated testimony." *Taylor*, 484 U.S. at 411-412. These concerns 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.

In addition to arguing that Martin's testimony did not technically support an alibi, Ford now contends that Martin's testimony was offered to describe Ford's calm demeanor at the training session shortly after the robbery and

to suggest that such a demeanor is inconsistent with an individual who had just robbed a bank. Br. 17. That contention suffers from two fundamental flaws.

First, because Ford never suggested this purpose to the district court, he failed to preserve the argument for appellate review. See Fed. R. Evid. 103(a)(2); *United States* v. *Muoghalu*, 662 F.3d 908, 913 (7th Cir. 2011). When the district court asked defense counsel to describe the purpose of Martin's testimony, counsel stated that it was intended "to show on that, date, time, and location, that John Ford was in the Chicago area at 7:30 that night." Tr. 381. In other words, the testimony was offered to show where Ford was at 7:30 p.m., not how he appeared at that time. It was the district court that suggested it might treat the testimony differently if the testimony established that Ford "was acting inconsistent with the demeanor of someone who just robbed a bank at gunpoint." Tr. 382. But defense counsel never indicated that Martin could offer such evidence; counsel instead suggested weakly that a personal trainer's demeanor would "by default" be inconsistent with the demeanor of someone coming from robbing a bank. *Ibid.* In his motion for a new trial, Ford also never argued that Martin's testimony would establish Ford's demeanor the evening of the robbery. Rather, he repeated his insistence that Martin was not "technically" an alibi

witness and he claimed for the first time that Martin would have testified about Ford's "height and weight." R. 72 at 2-3.[4/]

Second, Martin would not have been able to offer relevant testimony concerning Ford's demeanor the night of the robbery because he had no recollection of their supposed training session. In his first email to defense counsel, Martin stated that the training session recorded in his calendar "must have been with" Ford because he was not using another trainer at that time, and in his second email, Martin indicated that he could only guess as to location because he "obviously c[ould]n't remember back that far." R. 74 Ex. D at 1. Martin also acknowledged his lack of memory in his brief interview with government counsel, as he conceded that did not remember meeting with Ford and did not recall the exact time Ford had arrived, what Ford had been wearing, or how Ford had appeared. R. 74 Ex. C. Martin's memory evidently improved

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[4/] Ford alludes to this supposed purpose in passing on appeal (Br. 23), but it is unclear whether he intends to press the argument. See *McCoy* v. *Maytag Corp.*, 495 F.3d 515, 525 (7th Cir. 2007) ("[C]ursory and undeveloped arguments are deemed waived."). In any event, the argument lacks merit. Ford never indicated during trial that Martin's testimony would be used to establish Ford's height and weight at the time of the crime, and his post-trial invocation of this purpose came too late. See Fed R. Evid. 103(a)(2). Such testimony would have also lacked relevance because Martin's description of Ford did not differ materially from eyewitness accounts of the robber's height and weight. Compare R. 72 at 6 (Martin affidavit describing Ford's height as about 5'10" and his weight as about 190 to 200 pounds), with App. B31-B32 (Thomas's 911 call describing Ford's height as about 5'10" and his weight as "maybe 180, 190 pounds"). Finally, Ford suffered no prejudice from the exclusion of Martin's testimony for this purpose because Ford could have easily called other witnesses to describe his height and weight as of November 2007.

somewhat by the time he swore an affidavit to support Ford's motion for a new trial because he was now able to specify the gym at which he and Ford had trained. R. 72 at 5. But even in this affidavit, Martin could only describe Ford's "usual demeanor" during their training sessions. *Ibid.*

3. The district court did not plainly err by excluding the alibi testimony due to Ford's Rule 12.1 violation.

Having found that Ford did not provide notice as required by Rule 12.1, the district court exercised its discretion under Rule 12.1(e) to exclude the alibi testimony. That decision was not an abuse of discretion let alone reversible plain error. Ford offered no excuse for his failure to comply with Rule 12.1's minimally burdensome requirements, and the record strongly suggests defense counsel made a tactical decision to delay disclosure to maximize the surprise defense's impact. Ford also cannot establish that excluding the testimony affected his substantial rights or seriously compromised the fairness, integrity, or public reputation of the trial.

The Sixth Amendment guarantees a criminal defendant the right to present relevant testimony in his defense. See *Simonson* v. *Hepp*, 549 F.3d 1101, 1106 (7th Cir. 2008). But that right "is not without limitation," and it "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987) (citation omitted).

In *Taylor* v. *Illinois*, the Supreme Court held that a defense witness's testimony may be excluded consistent with the Sixth Amendment where the defendant violated pretrial discovery rules, such as notice-of-alibi requirements. 484 U.S. at 410-411 & n.16. Although the Court recognized that the Sixth Amendment constrains a trial court's authority to exclude relevant testimony as a discovery sanction and that alternative remedies will often be adequate and appropriate, it reasoned that lesser sanctions are "less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the [government] and the harm to the adversary process." *Id.* at 413.

In rejecting the petitioner's argument that preclusion is always impermissible, the Court declined "to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* at 414. The Court did, however, set forth guideposts, directing courts to balance the defendant's right to call favorable witnesses with "countervailing public interests," including "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. Furthermore, the Court indicated that in a case where a party's failure to comply

with a notice request "was willful and motivated by a desire to obtain a tactical advantage," exclusion would be appropriate. *Id.* at 415. Finally, the Court added that "[t]he simplicity of compliance with the discovery rule is also relevant." *Id.* at 415-416 & n.21 (citing notice-of-alibi rules as an example of a type of rule that adds little burden to the "routine demands of trial preparation").

In the face of this balancing framework, Ford argues that preclusion is appropriate *only* "when there is a strong suspicion of willful misconduct" as in cases of fabrication or manipulation. Br. 19. But neither the Supreme Court nor this Court has ever held that bad faith is necessary for the district court to exclude alibi testimony for discovery violations. See *United States* v. *Vitek Supply Corp.*, 144 F.3d 476, 484 (7th Cir. 1998) (indicating that this Court has "not yet had to define the limits of the district court's power to use the exclusion of evidence as a sanction in a criminal trial"); *Tyson* v. *Trigg*, 50 F.3d 436, 445 (7th Cir. 1995) (stating that this Court "has yet to take a position on the question" whether exclusion of a helpful defense witness is permissible only if the discovery order was violated deliberately, and that *"Taylor* itself appears to leave the question open"). Because Ford never argued to the district court that exclusion is permissible only in cases of willful misconduct, this would be an inappropriate case to impose new limits on the district court's Rule 12.1

discretion. See *Tanner*, 628 F.3d at 898 (explaining that to establish plain error, the defendant has the burden of showing that the error was "clear or obvious").

If this Court does address *Taylor*'s scope, Ford's approach is unsupported and undesirable. Evidence of willful misconduct is certainly relevant to the remedy for a discovery violation and will generally suffice to support exclusion. See *Taylor*, 484 U.S. at 415 (indicating that where the defendant's explanation of a discovery violation reveals it was "wilful and motivated by a desire to obtain a tactical advantage . . . it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony"). But "any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the *Taylor* Court's reference to trial court discretion and its extended discussion of the relevant factors." *United States* v. *Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992); see also *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 37 (1st Cir. 2003) ("This court has never restricted the application of the sanction of exclusion to discovery violations that are willful or intended to gain a tactical advantage."). Moreover, limiting the district court's authority to enforce discovery requirements like Rule 12.1 would undermine the rule's effectiveness because "rules are empty if they cannot be enforced, and weak if they can be enforced only against willful violators." *Tyson*, 50 F.3d at 445 (rejecting a willfulness requirement in the state habeas context). And such

a prerequisite to district court discretion would impose an undesirable and impractical one-size-fits-all requirement on "the highly situation-specific character of the judgment that the trial judge is called upon to make in the hurly-burly of trial." *Ibid.*[5/]

[5/] In addition to *Taylor* and *Michigan* v. *Lucas,* 500 U.S. 145 (1991)—in which the Court applied *Taylor* to reverse a state court's per se rule prohibiting exclusion for violations of the notice-and-hearing requirements of the State's rape-shield statute, *id.* at 152-153—Ford also invokes this Court's decision in *Alicea* v. *Gagnon*, 675 F.2d 913 (1982). His reliance is misplaced. In *Alicea*, this Court addressed whether a state's notice-of-alibi statute could be constitutionally applied to prevent a criminal defendant from testifying absent evidence that the defendant intentionally suppressed alibi evidence to gain an advantage. *Id.* at 923-925. As this Court expressly recognized, that question is distinct from whether it is permissible to exclude testimony by a defense witness other than the defendant, see *id.* at 917 n.6, and there are good reasons to believe that the public interests at stake, such as the prevention of unfair surprise, apply differently in the two scenarios, see *id.* at 924. In this case, Ford was free to testify as to his whereabouts the evening of the robbery despite contravening Rule 12.1. See Fed. R. Crim. P. 12.1(e) ("This rule does not limit the defendant's right to testify.").

In *Tyson,* this Court suggested that some courts of appeals have held that exclusion of defense witnesses is permissible only for deliberate discovery violations. See 50 F.3d at 445 (citing *Bowling* v. *Vose*, 3 F.3d 559 (1st Cir. 1993), *United States* v. *Peters*, 937 F.2d 1422 (9th Cir. 1991), and *Escalera* v. *Coombe*, 852 F.2d 45 (2d Cir. 1988) (per curiam)). Both the First and Second Circuits, however, have since made clear that they have not adopted such a categorical rule. See *Nelson-Rodriguez*, 319 F.3d at 37; *Noble* v. *Kelly*, 246 F.3d 93, 100 n.3 (2d Cir. 2001). As to the Ninth Circuit, in *Peters* that court reversed the district court's exclusion decision on the ground that the defendant had not violated any discovery order, with the court holding that absent a discovery violation, a defendant's tactical decision not to disclose witnesses does not warrant suppression. See 937 F.2d at 1424-1426. Since *Peters*, the Ninth Circuit has indicated that exclusion is generally inappropriate for non-willful discovery violations, but it did so in a case where, unlike here, the government had received notice of the basic content of the witness's testimony and the testimony had "decisive value" for the defendant. See *United States* v. *Finley*, 301 F.3d 1000, 1017-1018 (9th Cir. 2002). The Ninth Circuit has not since elaborated on that standard.

In any event, the record strongly suggests that Ford's "omission was willful and motivated by a desire to obtain a tactical advantage." *Taylor*, 484 U.S. at 415; see also *United States* v. *Hamilton*, 128 F.3d 996, 1001-1005 (6th Cir. 1997) (upholding exclusion of evidence following the defendant's discovery violation based on, among other things, the court of appeals' conclusion that the record provided evidence of a willful attempt to gain a tactical advantage by the defense, even though the district court justified exclusion on a different ground). Ford's counsel was clearly aware of the government's disclosure requests. In addition to the two written requests, the government raised the issue when objecting to Ford's motion to continue the trial date at the end of the suppression hearing. See 9/21/10 Tr. 59. While Ford insists that his discovery violation could not have been willful because he sought a continuance in part to find alibi witnesses, he elides the fact that his attorney knew of Martin's planned testimony at least one week before trial but waited until the third day of trial at the end of the government's case to unveil the surprise witness. See *United States* v. *Davis*, 40 F.3d 1069, 1076 (10th Cir. 1994) (upholding exclusion of alibi testimony where defense counsel "knew the name of the alibi witness one week prior to trial, but failed to give the government notice of his intention to call the alibi witness").

Defense counsel's conduct leaves the unmistakable impression that he delayed disclosure to try to catch the government off-guard and frustrate its ability to challenge Martin's alibi testimony through effective cross-examination and rebuttal evidence. That impression is reinforced by counsel's attempt to plant a seed for an alibi defense with the jury during cross-examination of the government's final witness. Tr. 372-373.

Beyond the willful nature of Ford's disregard of Rule 12.1's simple requirements, his failure to disclose Martin's planned alibi testimony also compromised "[t]he integrity of the adversary process" and the trial's "truth-determining function," *Taylor*, 484 U.S. at 414-415. The mid-trial disclosure impaired the government's ability to investigate, prepare for, and counter Ford's defense. Had Ford timely disclosed his alibi defense and the witness on whom he intended to rely, government prosecutors would have been able to thoroughly interview Martin before the trial about his recollection of the evening of the robbery and his relationship with Ford, prepare evidence about the likely travel time between U.S. Bank and the gyms at which Martin indicated he may have trained with Ford, and attempt to track down witnesses who might have been able either to corroborate or impeach Martin's account. Instead, the government had no opportunity to anticipate Martin's testimony in its case-in-

chief and would have had to base its cross-examination on a brief interview hastily arranged during a trial recess. R. 74 Ex. C.

As a result, even assuming Martin had no intention to lie, allowing him to testify would have distorted the trial's search for truth. See *Chappee* v. *Vose*, 843 F.2d 25, 31 (1st Cir. 1988) ("[D]etermining the truth is a complicated business, and its achievement can be thwarted as easily by 'springing' surprise testimony on an unsuspecting opponent . . . as by presenting perjured testimony."). Thus, although prejudice to the prosecution is not required to justify exclusion for discovery violations, see *Taylor*, 484 U.S. at 416-417, there was substantial prejudice here.

Ford denies that the government suffered prejudice because he asserts, incorrectly, that the government was aware of Martin a year before trial. Br. 21. Although the government did obtain Martin's email testimonial about Ford a few weeks before trial, see note 2, *supra*, it never had any reason to believe that Martin would offer alibi testimony. As the Advisory Committee Notes to Rule 12.1 explain,

> There are cases in which the identity of defense witnesses may be known, but it may come as a surprise to the government that they intend to testify as to an alibi and there may be no advance notice of the details of the claimed alibi. The result often is an unnecessary interruption and delay in the trial to enable the government to conduct an appropriate investigation. The objective of rule 12.1 is to prevent this by providing a mechanism which will enable the parties to have specific information in advance of trial to prepare to meet the issue of alibi during the trial.

Fed R. Crim. P. 12.1 Notes of Advisory Committee on Rules—1974. The prejudice the government suffered is accordingly within Rule 12.1's heartland. Ford also suggests that if there was prejudice, a continuance would have been the appropriate remedy. Br. 22. Even leaving aside that Ford never suggested this course of action to the district court, the possibility that an alternative measure might have mitigated the government's prejudice does not make exclusion an abuse of discretion. "[U]se of exclusion as a sanction" does not require "some sort of 'least restrictive alternative' analysis." *Johnson*, 970 F.2d at 911. Indeed, "[t]he Court in *Taylor* expressly upheld the exclusion there '[r]egardless of whether prejudice to the prosecution could have been avoided in th[e] particular case' by a lesser penalty." *Ibid.* (quoting *Taylor*, 484 U.S. at 417). Granting a continuance in a jury trial, moreover, is far from costless, see *Tyson*, 50 F.3d at 446 ("Delay in a jury trial is a serious matter"), which is precisely why Rule 12.1 requires pre-trial notice in the first place.

Given the foregoing circumstances, the district court did not abuse its discretion by excluding Martin's testimony, and Ford's Sixth Amendment rights were therefore not infringed. See *United States* v. *Russell*, 109 F.3d 1503, 1509 (10th Cir. 1997) (explaining that under *Taylor*, "[e]xcluding witnesses for failure to comply with discovery orders, if not an abuse of discretion, does not violate a defendant's Sixth Amendment right to compulsory process."). Certainly, Ford

cannot show on this record that any error the district court committed in selecting a remedy was "clear or obvious." *Tanner*, 628 F.3d at 898. Ford criticizes the district court for failing to expressly balance competing interests on the record or to consider alternative sanctions before precluding Martin's testimony. Br. 20-22. But the district court can hardly be faulted for these omissions given that Ford never offered any argument as to why exclusion would be inappropriate if he did transgress Rule 12.1. Nor should the district court's statement that Rule 12.1 "favors not permitting an alibi witness" when the rule is violated (Tr. 385) suggest that the court failed to exercise its discretion. The district court deliberated about exclusion after hearing extended argument from the parties, during which the government explained that Martin's testimony would prejudice its case (Tr. 383) and pointed to evidence that defense counsel's omission was tactical (Tr. 380, 383). This Court "presume[s] that district court judges know and understand the law," and does "not disturb that presumption by mere inference." *United States* v. *Egwaoje,* 335 F.3d 579, 588 (7th Cir. 2003). There is no basis to disturb that presumption here based on the district court's choice of words.

Ford also cannot meet the remaining elements of plain error review. As discussed in the next section, see pp. 34-37, *infra*, excluding Martin's testimony did not affect Ford's substantial rights because it did not affect the trial's

outcome. See *Tanner*, 628 F.3d at 898. Any error, moreover, would not "seriously impugn[] the judicial proceeding's fairness, integrity, or public reputation," *ibid.*, because Ford never provided an explanation for his noncompliance with procedural rules and the record strongly suggests his counsel withheld disclosure deliberately.

4. Any error in excluding Martin's testimony was harmless.

If this Court concludes that the district court erred by excluding Martin's testimony, Ford's conviction should still stand because any error was harmless regardless of whether the standard for ordinary evidentiary errors or constitutional errors applies. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 683-684 (1986) (applying constitutional harmless error analysis, which requires showing that the error was harmless beyond a reasonable doubt, to a Confrontation Clause violation involving the improper exclusion of evidence); *United States* v. *Cavender*, 228 F.3d 792, 799 (7th Cir. 2000) ("An error in the refusal to admit evidence is harmless if the evidence of guilt was overwhelming and the defendant was allowed to put on a defense, even if that defense was not as complete as the defendant might have preferred."). Exclusion of the alibi witness was harmless beyond a reasonable doubt because the evidence against Ford was overwhelming and the proposed testimony was weak.

At trial, the government introduced forensic evidence directly linking Ford to the robbery. Detective Bice testified that during the search of the crime scene, he discovered a white dust mask about 150 feet from U.S. Bank's back entrance. Tr. 116-117. The mask was found along the robber's escape route, and it matched witness descriptions of the mask worn by the robber. Tr. 58, 117. Subsequent DNA analysis, about which three forensic scientists with direct knowledge testified, established a match between cellular material left on the mask and Ford's DNA profile. Forensic scientist Blake Aper testified that the probability of such a match was 1 in 29 trillion. Tr. 342.[6/] In addition, the government introduced Dannie Thomas's eyewitness identification. Thomas testified that he viewed the robber from close range throughout the four to five minute robbery (Tr. 38, 51), that the bank was well lit (Tr. 32), that he deliberately engaged the robber and made eye contact with him (Tr. 53-54), and that, despite the dust mask, he could see the robber's eyes, neck area, and skin tone (Tr. 59).

On the other side of the leger, Martin's testimony was characterized by uncertainty. Martin had no recollection of seeing Ford the evening of the robbery

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[6/] Ford's bald speculation (Br. 23) that because the jury asked during its deliberations if there were additional photographs of Ford—a question the district court answered in the negative, Tr. 457-458; R. 65—it must have found the DNA evidence inconclusive is entirely unsupported and unpersuasive.

and would have based his testimony entirely upon an entry in his personal calendar. R. 74 Ex. C. Accordingly, Martin would have been unable to testify as to the time Ford had arrived that night, what Ford had been wearing, or how Ford had appeared. *Ibid.* Given his lack of memory, Martin would not have been able to rule out the possibility that he and Ford had rescheduled the session or that he had recorded the appointment incorrectly. And although the testimony was subject to Rule 12.1 because it was offered to support an alibi defense, it would not have established Ford's innocence even if credited by the jury. Indeed, because Ford now disavows any alibi purpose for Martin's testimony (Br. 17), Ford cannot consistently maintain that the testimony would have suggested to the jury that it was unlikely he could have been at U.S. Bank in Palatine at the time of the crime.

Finally, although excluding Martin's testimony made Ford's defense less complete than he "might have preferred," *Cavender*, 228 F.3d at 799, it did not prevent Ford from offering a defense. Although he elected not to testify, nothing precluded Ford from testifying about his whereabouts on the night of the robbery. See Fed. R. Crim. P. 12(e) (providing that the exclusion sanction does not apply to the defendant's testimony). Ford's counsel was also able to challenge government witnesses and attempt to rebut evidence placing Ford at the crime scene. Furthermore, to the extent Ford truly wished to use Martin's testimony

to establish Ford's height and weight around the time of the robbery (Br. 23), he could have easily provided alternative proof. See note 4, *supra*.[7/]

II. The District Court Correctly Admitted the Eyewitness Identification of Defendant.

A. Standard of Review

Review of the district court's denial of Ford's motion to suppress Thomas's eyewitness identification is de novo, "but with due deference to the trial court's findings of historical fact." *United States* v. *Benabe*, 654 F.3d 753, 774 (7th Cir. 2011) (internal quotation marks omitted).

B. Background

1. The photographic array

As noted above, see p. 6, *supra*, after DNA analysis matched cellular material from the dust mask to Ford's DNA profile, Detective Bice assembled a photographic array for the robbery witnesses to view. Tr. 125. Bice located a headshot photograph of Ford on the Michigan Department of Corrections website. 9/21/2010 Tr. 7-8; App. B35. He then selected five additional headshot photographs from a database of arrest mugshots, choosing photographs that

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[7/] If this Court concludes that exclusion, if erroneous, would not have been harmless and determines that it needs specific findings and on-the-record balancing to evaluate whether the district court clearly abused its discretion, then it should remand for the limited purpose of allowing the district court to exercise its discretion under Rule 12.1(e) expressly. See *Johnson*, 970 F.2d at 912.

looked similar to Ford based on race, age, skin tone, facial hair, and general appearance. Tr. 168; 9/21/2010 Tr. 8. Because the source photograph for Ford was sized differently than the other photographs and would have "stood out," Bice used a scanner to alter the size of each photograph and make them appear more uniform. 9/21/2010 Tr. 8, 19. Bice testified that making such alterations was "standard procedure" for the police department. Tr. 160. He also testified that he did not make any other enhancements to Ford's photograph or alter its contrast. Tr. 161; 9/21/2010 Tr. 20. The six photographs were printed on the same size paper (8 1/2" by 11") and were presented in color. App. B18.

All four U.S. Bank employees who were present at the robbery met separately with Detective Bice to view the array. App. B18. On March 24, 2009, the array was presented to Dannie Thomas at the Palatine Police Department. App. B22. Before showing Thomas the array, Bice asked Thomas to read and sign the Department's standard advisory form, which explains that "the suspect may or may not be in the lineup/photo spread," that the witness is "not required to make an identification," and that the witness should "not assume that the person administering the lineup/photo spread knows which person is the suspect." Tr. 126-127; App. B8. Bice supplemented the form with verbal instructions, telling Thomas that he should not identify a suspect if he was unsure and that it was acceptable not to identify anyone. Tr. 128;

9/21/2010 Tr. 11. Thomas stated that he understood these instructions. 9/21/2010 Tr. 11; 8/24/2010 Tr. 28-29.

Detective Bice laid the six photographs on the table together. 8/24/2010 Tr. 54-55. He then left the room for about two minutes to let Thomas make an identification. 9/21/2010 Tr. 12, 31. After Bice left, Thomas "immediate[ly]" selected the second picture in the array, the photograph of Ford. 8/24/2010 Tr. 30. Thomas recognized Ford's photograph because he had the "kind of freckle-ish, pale skin" and "intens[e] . . . eyes" that he remembered from the robber. 8/24/2010 Tr. 31. After Bice returned to the room and following the identification, Thomas asked Bice a few questions "out of curiosity," including whether the individual he had selected was the suspect. Bice stated that Thomas had selected the suspect. He also indicated to Thomas that the investigation was ongoing and that the Department was working with DNA evidence. 9/21/2010 Tr. 12; 8/24/2010 Tr. 31-32, 56; App. B21.

None of the three other U.S. Bank employees made an identification. App. B18. Detective Bice presented the same array in the same way for each of the four witnesses. *Ibid.*

2. The district court's findings

Finding "absolutely no reason to conclude that th[e] photo array was suggestive," the district court denied Ford's suppression motion.

9/21/2010 Tr. 56-57. The district court noted that it had "seen a number of" photo array cases and that "this one appears to be one of the fairest." 9/21/2010 Tr. 53. The district court acknowledged that there were differences in the photographs, but it concluded that Detective Bice, whom the court found "very credible," had done "his best to . . . conduct an honest photographic array." *Ibid.* The court specifically rejected Ford's argument that the photographs were meaningfully different in size. *Ibid.* With respect to the array's administration, the district court stated that it was "good police work" for Bice to explain to Thomas that he was not expected to make an identification and that the suspect might not be in the array. 9/21/2010 Tr. 56. The court also "believe[d]" Bice's testimony that he made no suggestions to Thomas before the identification and only answered Thomas's identification question "after the fact." *Ibid.*

The district court further held that Thomas's identification was reliable. As an initial matter, the court found Thomas "highly credible." 9/21/2010 Tr. 54. Turning to the encounter, the district court referenced images from bank surveillance cameras, which showed that at multiple points "Thomas and the robber were face to face" and only "a couple [of] feet" apart. 9/21/2010 Tr. 54-55. As a result, Thomas, the court found, "had lots of time to observe the robber." 9/21/2010 Tr. 54. Unlike the other employees who were "almost diverting their attention at times because of the trauma [the robbery] was causing," Thomas

"kept his eye on [the robber] for the entire time he was there." 9/21/2010 Tr. 55. In fact, even as the robber pointed a gun at him, Thomas "look[ed] right at" the robber." *Ibid.* While recognizing that the robber wore a mask, the district court found that the robber's "entire face, except for the mouth that's covered by the mask, [was] visible to . . . Thomas." *Ibid.* Finally, in addition to the evidence showing that Thomas had a "good . . . opportunity to observe [the robber] and took advantage of it," the court noted that Thomas was "very comfortable" with his identification and was "confident" about its accuracy. *Ibid.*

3. Ford's renewed motion to suppress

On October 4, 2010, in preparation for trial, the government learned of an undisclosed Palatine Police Department report from the day after the robbery App. B23. The report, entered by Officer Martino, recorded a statement by Thomas who had called the police to provide additional information. App. B27. In the statement, Thomas indicated that he watched an individual cash a check that day at U.S. Bank who reminded him of the robber and who had acted evasively by refusing to make eye contact. *Ibid.* Thomas kept a check the individual cashed, which included his thumbprint, and provided it to Martino. App. B24.

The government immediately produced this report to the defense and then promptly filed it with the district court along with a photograph of the individual

Thomas had observed. App. B24. At a subsequent pretrial conference, Ford orally renewed his motion to suppress Thomas's identification. 10/8/2010 Tr. 12-13. Rejecting the motion, the district court concluded that the report did not show that Thomas's identification was so unreliable as to justify "barring the testimony of an eyewitness who . . . was eyeball to eyeball with the bank robber." 10/8/2010 Tr. 13, 15.

At trial, Thomas testified that he contacted the Palatine Police Department because he was suspicious of the individual since he "fit the description somewhat" of the robber and refused to make eye contact. Tr. 63-65. Accordingly, because the police had told the bank employees to report "any suspicion or just any gut feelings," Thomas contacted the police as "a security precaution." Tr. 63-64. Thomas stated, however, that he had been unable to get a good look at the individual and that he had never expressed any certainty that "[t]his [was] the guy." Tr. 65, 76. During cross-examination, Thomas explained that he had not testified about this interaction with the police during the suppression hearing because he had forgotten about it. Tr. 69, 73. Thomas

further stated that, after giving his statement to Officer Martino, he had not seen the police report until the day before the trial. Tr. 73.[8/]

C. Analysis

1. The Due Process Clause provides a limited right against the introduction of unreliable identification evidence resulting from unduly suggestive identification procedures.

To determine whether introduction of an eyewitness identification obtained from a police-orchestrated identification procedure violates the defendant's due process rights, this Court "undertake[s] a well-settled, two-pronged analysis." *United States* v. *Recendiz*, 557 F.3d 511, 524 (7th Cir. 2009). First, the defendant must establish that the identification procedure was "unduly suggestive." *United States* v. *Carter*, 410 F.3d 942, 948 (7th Cir. 2005). Then, even if the identification procedure is found unduly suggestive, the identification "can still be admissible so long as the [identification] testimony was reliable, given the totality of the circumstances." *United States* v. *Moore*, 115 F.3d 1348, 1360 (7th Cir. 1997).

[8/] Despite this unequivocal testimony, Ford maintains (Br. 39-41) that Thomas must have relied on the report at the suppression hearing even though government prosecutors were themselves unaware of the report at this time. Ford offers no support for this suspicion beyond the fact that Thomas's descriptions of the robber in his testimony matched descriptions he had made in the report. That fact is far more easily explained by the general consistency of Thomas's recollections over time. Moreover, the contention that Thomas perjured himself is inconsistent with the district court's finding that Thomas was "highly credible," 9/21/2010 Tr. 54—a finding the court did not disturb after disclosure of the day-after report.

This Court's due process inquiry is narrow. See *Recendiz*, 557 F.3d at 524 ("[W]e must remember that our purpose is only to determine whether the district court properly permitted the jury to hear the identification testimony. We will not assess the accuracy of the actual identification, for that is the exclusive province of the jury."); see also *Perry* v. *New Hampshire*, No. 10-8974 (S. Ct. Jan. 11, 2012), slip op. 15 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."). Suppression is appropriate only where "there is a *very substantial* likelihood of . . . misidentification" resulting from unnecessary police suggestion. *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977) (emphasis added, internal quotation marks omitted). "Short of that point, such evidence is for the jury to weigh." *Ibid.*

2. The photographic array used to identify Ford was not unduly suggestive.

Authorities conducting identification procedures "are required only to make reasonable efforts under the circumstances to conduct a fair and balanced presentation." *United States* v. *Traeger*, 289 F.3d 461, 474 (7th Cir. 2002). The photographic array used to identify Ford, which the district court called "one of the fairest" it had seen (9/21/2010 Tr. 53), easily passes that threshold. Whatever imperfections there may have been with either the array or its administration, Ford cannot meet his burden of showing that the identification

was unduly suggestive. Ford's burden is particularly difficult to satisfy given that three other witnesses viewed the same array, which was administered by the same detective, and did not identify Ford. See *United States* v. *Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998) (holding that lineup identifications of a bank robber were not unduly suggestive, which was "best exemplified by the fact that two [witnesses] identified someone other than [the defendant] as the robber").

The photographic array contained six photographs arranged in two equal rows. "Six is a sufficient number of photos for such a line-up" when the photographs are similar. *Carter*, 410 F.3d at 948 (collecting cases); see also *United States* v. *Harris*, 281 F.3d 667, 670 (7th Cir. 2002) (indicating that an array with four similar photographs was "reasonable"). Here, the photographs were all printed in color on the same size paper (App. B18), and they were similar shots showing the subjects' heads and necks, cutting off either just above or just below the shoulders (App. B7). See *Moore*, 115 F.3d at 1360 (holding that an array was not unduly suggestive where, among other things, "all of the pictures were black and white glossy photos of the same size, and each photo showed the individual from the shoulders up"). The subjects, including Ford, were all white men of roughly the same age with similar pale skin tones, similar builds, and similar looking facial hair. App. B7. This Court has repeatedly held that

comparable arrays and lineups were not unduly suggestive. See *Harris*, 281 F.3d at 670 (collecting cases).

Moreover, contrary to Ford's assertions (Br. 26-27), the array Detective Bice assembled reflected the witness's descriptions of the robber. In his descriptions, Thomas emphasized that the robber had pale, freckled skin and light eyebrows. See App. B13, B20, B31-B32. All of the subjects in the photographic array have light complexions mirroring this description and at least two of the subjects other than Ford have skin that is quite pale. App. B1, B3. Furthermore, at least four of the five men have light-colored eyebrows. App. B1, B3-B5. In addition, although the photographs provided no basis to discern height, the subjects' appearance from above the shoulders is generally consistent with Thomas's description of the robber as weighing between 180 and 190 pounds. App. B20, B31-32. Finally, as Ford points out (Br. 26 n.3), a different employee described the robber as possibly being "in his 40s" (App. B16). All of the subjects appear to be around that age. The remaining differences Ford describes, such as that his skin is somewhat more freckled than the others, do not rise to the level of suggestiveness. See *United States* v. *Funches*, 84 F.3d 249, 253-254 (7th Cir. 1996) (rejecting the defendant's argument that a line-up was suggestive because he was shorter and less heavy than the other participants and

he was the only one who had a slight build and dark complexion as described by a robbery witness).

In addition to challenging the fairness of the photographs Detective Bice selected, Ford contends that Bice's alterations made Ford's picture stand out by making his face appear bigger and brighter. Br. 28-29. These arguments run contrary to the district court's findings of fact. The court concluded that Ford's photograph was not meaningfully bigger than other photographs in the array, and it specifically pointed out that at least two photographs were about the same size as Ford's. 9/21/2010 Tr. 53. As to Ford's insistence that Bice must have altered the contrast of Ford's photograph to make it brighter, Bice denied making any such changes (Tr. 161; 9/21/2010 Tr. 20) and the district court found him "very credible" (9/21/2010 Tr. 53).

In any event, whatever differences existed between Ford's photograph and the others either because of or despite Bice's alterations can hardly be considered *"unduly* suggestive." *Carter*, 410 F.3d at 949. Ford has never claimed that the police could have reasonably obtained a different photograph of him other than the one available on the Michigan Department of Corrections website. That photograph looked somewhat different than the photographs available in the Palatine Police Department's mugshot database, and Bice accordingly did his best to adjust the photographs to make them appear uniform. 9/21/2010 Tr. 8,

19. The result is not perfect: some of the photographs are a bit lighter than others, the backgrounds vary somewhat in color, and the head sizes are slightly different. But these minor, inevitable differences are insufficient to make a generally fair array unduly suggestive. See *Carter*, 410 F.3d at 949 (acknowledging that the defendant pointed to an "imperfection in the . . . array" because the backgrounds of two photographs were darker than the other four, but concluding that the array was not unduly suggestive where the subjects in the darker photos were still recognizable and the defendant presented no evidence that witnesses would necessarily be drawn to the lighter pictures); *United States* v. *L'Allier*, 838 F.2d 234, 239-240 (7th Cir. 1988) (rejecting the defendant's argument that "differences in the exposure and the quality of the photographs" made the array unnecessarily suggestive).

Nor was Detective Bice's administration of the photographic array suggestive. The district court credited Bice's testimony that "he didn't make any suggestion or anything else." 9/21/2010 Tr. 56. In fact, Bice attempted to avoid a mistaken identification by instructing Thomas that the suspect might not be present in the array, that he was not expected to make an identification, and that the array administrator did not necessarily know the suspect's identity. Tr. 126-128; 9/21/2010 Tr. 11; App. B8. As this Court has recognized, studies suggest

that such instructions reduce the risk of misidentification. See *United States* v. *Williams*, 522 F.3d 809, 811-812 (7th Cir. 2008).

Neglecting to mention these instructions, Ford objects to the fact that the identification procedure in this case did not incorporate other practices suggested in academic literature, such as double-blind administration and sequential, rather than simultaneous, display of photographs. Br. 29-30. Although this Court has suggested in dicta that these methods are desirable, see *United States* v. *Brown*, 471 F.3d 802, 804-805 (7th Cir. 2006), it has never intimated that they are necessary to avoid undue suggestion. To the contrary, this Court has repeatedly held that identifications using the same procedures that were used in this case were *not* unduly suggestive. See, *e.g.*, *Carter*, 410 F.3d at 948-949 (concluding that photo arrays containing "six photos arranged in two equal rows" were not suggestive); *United States* v. *Sleet*, 54 F.3d 303, 307-309 (7th Cir. 1995) (finding that the simultaneous photographic array administered by the investigating FBI agent was not unduly suggestive).

In fact, debate about identification procedures is ongoing, with some recent research suggesting that sequential administration is not necessarily superior

to simultaneous administration.[9/] Moreover, the claim that the administering officer may leak his hypothesis concerning the defendant to the eyewitness is based on studies that are of limited value under the facts of this case.[10/] Indeed, at least one study suggests that "police may be able to reduce false identifications by *either* using a sequential lineup or reducing contact." Ryan M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110 (2004) (emphasis added). Here, Bice minimized his contact with Thomas while Thomas made the identification, significantly diminishing the possibility that Bice conveyed any inadvertent cues. In short, elevating unsettled academic research to a matter of due process is unnecessary and particularly inappropriate here given the district court's finding

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[9/] See, *e.g.*, Curt A. Carlson et al., *Lineup Composition, Suspect Position, and the Sequential Lineup Advantage*, 14 J. Experimental Psychol.: Applied 118, 119 (2008) ("[R]ecent findings and additional analyses . . . have suggested that sequential lineups may not be superior to simultaneous lineups."); Scott D. Grolund et al., *Robustness of the Sequential Lineup Advantage*, 15 J. Experimental Psychol.: Applied 140, 141-142, 149 (2009) (surveying research questioning the sequential lineup advantage and concluding, based on a study involving 24 separate experiments, that "the sequential advantage does not appear to be a robust finding").

[10/] See, *e.g.*, 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, 76 (2008) (finding knowledge of student lineup administrators had the greatest influence on witnesses when conducting a simultaneous lineup "using biased instructions"); Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. Applied Psychol. 940 (1999) (finding photoarray administrator's knowledge of the suspect had the greatest biasing effect in sequential identification procedures with an observer present).

that Detective Bice conducted a fair array and did not make any suggestions. See 9/21/2010 Tr. 56.[11/]

3. The eyewitness identification of Ford was reliable.

Even if Ford could meet his burden of establishing that the photo array identification was unduly suggestive, the district court properly admitted the identification because it was reliable. To assess whether an identification is reliable under the totality of the circumstances, this Court considers five factors:

> (1) the opportunity of the witness to view the criminal at the time of the crime . . . , (2) the witness's degree of attention during such an opportunity, (3) the accuracy of the witness's prior description of the criminal . . . , (4) the level of certainty demonstrated at the time of the identification, and (5) the time between the crime and the identification.

Recendiz, 557 F.3d at 525. In this case, all but the last of these factors support the reliability of Thomas's identification. Considered as a whole, they preclude any finding of "a very substantial likelihood of . . . misidentification" as would be needed to justify taking evaluation of the identification's reliability away from the jury. *Brathwaite*, 432 U.S. at 116.

[11/] Ford never contends that the feedback Bice provided *after* Thomas selected Ford's photograph makes the identification unduly suggestive, and any such argument is accordingly forfeited. See *Dye* v. *United States*, 360 F.3d 744, 751 n.7 (7th Cir. 2004). In any event, Ford is correct to treat the issue as relevant to assessing Thomas's confidence for purposes of reliability (Br. 36) as opposed to making the identification retroactively suggestive. See *Gregory-Bey* v. *Hanks*, 332 F.3d 1036, 1046-1047 (7th Cir. 2003) (rejecting the defendant's argument that photo array identifications were unduly suggestive because police officers allegedly reinforced the witness's identification "*after they had selected* [the defendant's] *picture from the photographic lineup*").

First, Thomas had a good opportunity to view the robber. U.S. Bank was well lit during the robbery (Tr. 32; 8/24/10 Tr. 8), and Thomas was close to the robber throughout the four to five minute encounter. After Thomas confronted the robber at the back door, he stayed with the robber throughout the robbery—following him through the bank, toward the vault and teller drawers, and back to the rear door—and then watched him flee. Tr. 33-41. Based on Thomas's testimony and the surveillance images, the district court found that Thomas "had lots of time to observe the robber" because he was "right next to the robber for several minutes" and stood "face to face" with him at multiple points during the encounter. 9/21/2010 Tr. 54-55. These findings strongly support reliability. See, *e.g.*, *United States* v. *Griffin*, 493 F.3d 856, 866 (7th Cir. 2007) (finding an identification reliable where the witness came "face-to-face" with the robber and then walked with the robber to the back of the currency exchange); *United States* v. *Curry*, 187 F.3d 762, 769 (7th Cir. 1999) (finding an identification reliable where the witness looked the robber "straight in the face as he stood across the counter from her" even though she "had only a short time to view him").

Ford objects that Thomas's opportunity to view the robber was limited because the robber wore a dust mask and a hat and because the encounter only lasted a few minutes. Br. 32. The dust mask did partially obscure the robber's face, but the district court found that that the robber's "entire face, except for

the mouth that[] [was] covered by the mask, [was] visible to . . . Thomas." 9/24/10 Tr. 55. Thus, the dust mask and the floppy hat did not significantly impair Thomas's opportunity to view the robber. See *United States* v. *Downs*, 230 F.3d 272, 273, 275 (7th Cir. 2000) (concluding that the witness had an adequate opportunity to view the robber, who was wearing sunglasses and a hat, because the witness "could see the lower half of the robber's face, and this was the basis of her identification"). As to the robbery's duration, this Court has held that shorter encounters provided witnesses an adequate opportunity to view the perpetrator. See, *e.g.*, *Traeger*, 289 F.3d at 474 (encounter that lasted two or three minutes provided "ample opportunity" to view the robber); *Downs*, 230 F.3d at 273, 275 (witness had approximately 50 seconds to view the robber); *Killebrew* v. *Endicott*, 992 F.2d 660, 664 (7th Cir. 1993) (witness had "between thirty seconds and three minutes to observe the robber").

Second, as the district court found, Thomas "took advantage" of his opportunity to observe the robber. 9/21/2010 Tr. 55. Thomas testified that he focused on the robber "[p]retty much the whole time" and deliberately made eye contact with the robber to attract the robber's attention to him and away from his employees. Tr. 53, 56-57. Attempting to call Thomas's attention into question, Ford relies on studies describing how research subjects *typically* react to stressful encounters, and he argues based on these studies that Thomas's attention must

have been diverted because the robbery was highly stressful and the robber was carrying a gun. Br. 33. But "the simple fact that people are statistically more likely to do something cannot normally, and does not here, undermine the specific testimony" that Thomas was highly attentive. *United States ex rel. Kosik* v. *Napoli*, 814 F.2d 1151, 1158 (7th Cir. 1987). The district court found that unlike many of his fellow employees, Thomas "kept his eye on [the robber] for the entire time he was there," even while the robber pointed a gun at him. 9/21/2010 Tr. 55. Moreover, although Ford urges this Court to weigh the stressful nature of the encounter against reliability, this Court has regularly done precisely the opposite. See, *e.g.*, *Griffin*, 493 F.3d at 866 ("As the subject of an armed robbery after the close of business, [the witness's] attention on [the robbers] was high."); *Traeger*, 289 F.3d at 474 (stating that the witness's "attention was likely sharpened by the fact that she was being robbed"); *Downs*, 230 F.3d at 275 ("Although 50 seconds may not sound like much, under conditions of great stress they can pass quite slowly.").

Third, Thomas's previous descriptions of the robber in the 911 call after the robbery and in subsequent interviews with the police were generally consistent with his later testimony and match Ford's appearance. Thomas initially described the robber as a white male with very pale skin, freckles around his eyes, and light eyebrows who was about 5'10" and weighed between 180 and

190 pounds. App. B13, B20, B31-B32. He repeated those descriptions in his testimony at the suppression hearing and at trial (Tr. 60; 8/24/10 Tr. 31, 47), and the descriptions correspond well to Ford who is 5'10", weighs about 190 to 200 pounds, and has pale, freckled skin (App. B2; R. 72 at 6). Thomas also provided detailed, consistent, and (based on surveillance images) generally accurate descriptions of the clothing worn by the robber, indicating that he wore black clothing, a white mask, and a floppy hat. App. B13, B20, B32-B33.

As Ford correctly points out, Thomas's initial descriptions of the robber's dress did contain a few inaccurate details. See Br. 35 (noting that Thomas indicated that the robber was wearing gloves during the 911 call but later stated that he was unsure if the robber was wearing gloves, and that Thomas said the robber was wearing black boots whereas the robber was actually wearing white athletic shoes). But such minor discrepancies, which were not the basis for Thomas's identification, provide no reason to doubt that the identification was sufficiently reliable to be admitted. See *Mann* v. *Thalacker*, 246 F.3d 1092, 1100 (8th Cir. 2001) (minor inaccuracies in a victim's statement go to evidentiary weight, not admissibility).

Fourth, Thomas expressed certainty about the accuracy of his identification. Tr. 68. It is possible that Detective Bice's post-identification confirmation could have affected Thomas's later assessments of his certainty, and

it is generally undesirable for an administrator to provide feedback to the witness before obtaining a contemporaneous confidence assessment. See U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 33 (Oct. 1999). Nevertheless, there is evidence that Thomas was confident about the identification before Bice answered Thomas's questions about the case. Thomas testified that he made the selection of Ford "immediate[ly]" (8/24/2010 Tr. 30), and there is no indication in the record that he expressed any doubts to Bice. See App. B18 (report by Bice indicating that Thomas "quickly picked" Ford from the lineup).

The final factor, the length of time between the crime and the identification, does weigh to some degree against reliability. But on its own, that factor is insufficient to undermine the reliability of an identification made by an eyewitness who carefully observed the robber from close range for an extended period of time in a well-lit room, subsequently provided accurate descriptions of the robber, and immediately picked that robber out of a photographic array. Were the rule otherwise, then, contrary to this Court's precedents, in-court identifications would be almost categorically unreliable because they often post-date the crime by a significant amount of time. See *Recendiz*, 557 F.3d at 526 (holding that an in-court identification was reliable

even though "the trial occurred approximately two years after" the witness last interacted with the defendant).

Thus, even if the photographic array was unduly suggestive, the district court was correct to admit it based on the substantial indicia of reliability supporting Thomas's identification. To the extent the identification had weaknesses, they were "customary grist for the jury mill." *Brathwaite*, 432 U.S. at 116.

4. The district court did not err by rejecting Ford's renewed motion to suppress.

The district court properly held that the November 21, 2007 report describing Thomas's report of a suspicious person to the Palatine Police Department the day after the robbery did not warrant suppression of Thomas's identification. 10/8/2010 Tr. 15. To begin with, the report had no bearing on whether the photographic array was unduly suggestive. Because the district court correctly held that the array was not suggestive, the court had no reason to reconsider its ruling. See *McGowan* v. *Miller*, 109 F.3d 1168, 1173 (7th Cir. 1997) (explaining that the two steps of the due process analysis for eyewitness identifications are "two separate inquiries that should be approached sequentially").

With respect to reliability, the report at most called into question the accuracy and consistency of Thomas's pre-identification descriptions. But

the report's significance for that factor is relatively minor and does not undermine other strong indicia of reliability. Contrary to Ford's characterization of the report (Br. 38), Thomas did not identify another person as the robber the day after the crime. Rather, he noticed an individual who resembled the robber and who was acting suspiciously by refusing to make eye contact. Following the police officers' directive to report anything unusual, Thomas called the police and provided a description of the individual. Tr. 63-65. The fact that Thomas believed another individual whom he was unable to look directly in the eyes might be the robber does not provide a basis to bar the testimony of a witness who stood "eyeball to eyeball with the bank robber" (10/8/2010 Tr. 13). Cf. *United States* v. *Cord*, 654 F.2d 490, 493 (7th Cir. 1981) (finding identification sufficiently reliable even where the witness had initially selected two possible photographs from an array). That is especially so because the individual Thomas observed at the bank does bear a general resemblance to John Ford (Tr. 81), and thus Thomas's suspicion of him is not inconsistent with either his initial descriptions of the robber or his later identification of Ford.

Evidence that Thomas had previously suggested, however tentatively, that another individual looked like the robber was clearly relevant and the government properly disclosed the report immediately upon discovering it. 10/8/2010 Tr. 15; App. B24. This allowed defense counsel to make extensive use

of the report during the trial cross-examination of Thomas, the direct examination of Officer Martino, and the opening and closing statements. Tr. 22-23, 68-81, 388-390, 433-434. Evaluation of reliability was then appropriately left to the jury.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court affirm Ford's conviction.

Respectfully submitted,

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RULE 32 CERTIFICATION

I HEREBY CERTIFY, pursuant to Fed. R. App. P. 32(a)(7)(C) and 7th Cir. R. 32(b), that the foregoing Brief for the United States is set in a proportionally spaced typeface (Century Schoolbook, 13-point type in the body, and 12-point type in the footnotes) and that it contains 13,873 words, as determined by WordPerfect 12 software.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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