No. 12-

IN THE

Supreme Court of the United States

JOHN A. FORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 20, 2012

QUESTIONS PRESENTED

I. Whether a proper harmless error analysis may ignore the prejudicial effect of evidence erroneously admitted at a trial and focus only on whether other evidence from the trial is convincing enough to sustain a conviction?

II. May a Court of Appeals override the Government's express waiver of the harmlessness inquiry and engage in *sua sponte* harmless error review?

PARTIES TO THE PROCEEDING

Petitioner is John A. Ford, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below

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PETITION FOR WRIT OF CERTIORARI

Petitioner John A. Ford respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 683 F.3d 761 (7th Cir. 2012) and is reproduced in the appendix to this petition at Pet. App. 1a.

JURISDICTION

The Seventh Circuit entered judgment on June 6, 2012, Pet. App. 1a, and denied Ford's petition for rehearing en banc on September 21, 2012, Pet. App. 18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance that does not affect substantial rights shall be disregarded."

STATEMENT OF THE CASE

A. Introduction

This case raises two questions of exceptional importance. First, this Court once again is presented with the opportunity to resolve the important and persistent twelve-circuit split presented last term in *United States* v. *Vasquez*, 635 F.3d 889 (7th Cir. 2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 1532 (2012). The split concerns the proper test for harmless error. The circuit courts disagree on whether a

court of appeals should gauge the prejudicial effect of the error evidence at trial for potential impact upon the jury's decision-making. And unlike the *Vasquez* case, Ford's case is the proper vehicle to address the question; not only did the reviewing court recognize a significant error, but it ignored an indisputable sign from Ford's jury that the error affected its deliberation. This question is critical to the resolution of almost all criminal appeals, as it governs how courts of appeals should review jury decisions in criminal trials. The split is 9-3, with nine circuits examining the entirety of the record to determine how the error may have prejudiced the result of the trial. The minority approach in three circuits—which the court below adopted—allows courts of appeal to act as second juries, evaluating evidence anew with no deference to the original jury's decision-making. This Court should grant review and resolve this deep circuit split.

In addition to square presentation of the *Vasquez* question, this case presents a second, and related, question—the answer to which would help to clarify the law. The court of appeals overrode the Government's express waiver of harmless error review and took up the issue *sua sponte*, which directly contravenes this Court's decision in *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012). In instituting harmless error review without prompting from the parties, the Seventh Circuit effectuated a standard that sidesteps the adversarial process entirely. Because the Seventh Circuit's approach contravenes this Court's precedent and because this Court is the only forum that can adequately address and clarify this confused area of appellate review, review is warranted.

B. Factual Background

On November 20, 2007, the U.S. Bank in Palatine, Illinois was robbed. Employees in the bank described the offender as a white man who was dressed in all black, wearing a floppy hat and a white dust mask. Pet. App. 25a. His hair and most of his face was covered by the hat and mask. Pet. App. 27a-28a. The robbery lasted four to five minutes. Pet. App. 2a-3a. Bank manager Dannie Thomas spoke to the robber during the encounter and was the only employee who was able to offer any identifying information about him. Pet. App. 4a. Even so, Thomas's additional details were scant; he said only that the robber had pale, freckled skin and pale eyebrows. *Id.*

The police found a dust mask along the fence behind the bank. After investigating for several months and unearthing no viable suspects, the police sent the mask for forensic testing. Pet. App. 30a, 43a-44a. The lab, using DNA testing, determined that some of the DNA alleles recovered from the mask matched the DNA profile of a man named John Ford. Pet. App. 4a, 14a.

After receiving the DNA results, the police compiled a six-person photo lineup that included a photo of Ford. In March 2009—sixteen months after the crime—Detective Robert Bice, who had been one of the initial investigating officers the night of the crime, presented the photo array to the bank employees. Of the six photos, only the photo of Ford depicted a pale, freckled individual. Pet. App. 17a. Thomas identified Ford.

C. Proceedings Below

On December 10, 2009, a federal grand jury indicted Ford for taking $1,146 from a bank employee by force and violence and intimidation in violation of

18 U.S.C. 2113(a). Before his trial, Ford moved to suppress Thomas's identification, arguing that the lineup was unduly suggestive and Thomas's identification was unreliable. The district court denied Ford's request. Thomas was the government's star witness at trial. In fact, Thomas was the only substantive witness the government called who was not a police officer or lab technician. During trial, Thomas stated that he was "100 percent" certain that Ford was the robber. Apart from Thomas's testimony, the parties focused upon the quality of the DNA evidence, which defense counsel vigorously questioned. Pet. App. 31a-47a. The jury deliberated for three hours. During that time the jury requested, but was refused, additional photos of Ford. Pet. App. 49a. The jury ultimately returned with a guilty verdict and Ford was sentenced to 240 months in prison and three years of supervised release.

Ford appealed his conviction, arguing as relevant here that the photo array was unduly suggestive and Thomas's testimony was unreliable, in violation of his due process rights. The government responded that the photo array was not suggestive and Thomas was a reliable witness, but did not argue that any error was harmless.[1] Ford, in his reply, pointed out the government's waiver of harmless error, and then, at oral argument, the government affirmatively conceded that Thomas's testimony would have constituted harmful or prejudicial error. *United States* v. *Ford*, No. 11-2034 (7th Cir. June 6, 2012) (oral argument at 14:13) *available at*

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[1] The government *did* argue that other errors—aside from the lineup issue—raised in Petitioner's appellate brief were harmless.

http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=11-2034&submit=showdkt&yr=11&num=2034.[2]

In an opinion written by Judge Posner, the Seventh Circuit held that the photo array was impermissibly suggestive and Thomas's identification was likely unreliable.[3] Pet. App. 5a-9a. Noting that the government lawyer admitted during oral argument that it chose not to argue the error was harmless because of its belief that there was "substantial doubt" that the jury would have convicted Ford without the eyewitness identification, the court nevertheless elected to engage harmless error analysis *sua sponte* without soliciting input from the parties. The panel ultimately concluded that this Court's decision in *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012) licensed it to override the government's conscious decision not to argue harmless error. Pet. App. 14a-16a. Characterizing defense counsel's "vigorous challenge" to the DNA evidence as an attempt to "throw dust in the jurors' eyes," the court engaged in a lengthy, abstract discussion of the probative value of DNA evidence, repeatedly crediting the testimony of the government's forensic scientist that there was a "1 in 29 trillion" chance that the DNA on the dust mask did not belong to Ford. Pet. App. 13a-14a. Concluding that the admission of the suggestive lineup identification was harmless error primarily due to the presence of the DNA evidence, the Seventh Circuit affirmed the Ford's conviction. Pet. App. 10a-11a, 14a-16a.

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[2] The percise quote appears at page 11 *infra*.

[3] Judge Tinder concurred in the result without joining the opinion of the court. He did not write an opinion explaining the reasons for his concurrence.

REASONS FOR GRANTING THE PETITION

I. THE *VASQUEZ* SPLIT

A sizable majority of the courts of appeals—the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and D.C. circuits—apply a harmless error test that examines how the error might have affected the deliberation of the jury during a criminal trial. In this case, the Seventh Circuit reaffirmed its endorsement of the minority approach, along with the Tenth and Eleventh circuits, that focuses solely on untainted evidence and ignores the prejudicial effect of the error. Last term, the Court granted review of the same question in *Vasquez*, only to later dismiss the case; *Vasquez* involved an imperfect vehicle, because the parties failed to focus on whether courts should ever examine the prejudicial effects of these errors.[4] Ford's case provides the proper vehicle to resolve this persistent and important issue. The error in this case prejudiced Ford's jury, yet the Seventh Circuit completely ignored that error and assessed the remaining evidence in an appellate vacuum. The wide division on application of this standard among the circuits, leaving within its wake an unfair result

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[4] At oral argument in *Vasquez*, Justice Kagan simultaneously identified the confusion over Petitioner's presentation of the question in *Vasquez* and the central issue in this case: "If I ask the question whether an error altered the verdict, it seems to me I'm asking pretty much the same question as whether without that verdict the—whether without that error, the verdict would be the same. That seems like just two ways of saying the same thing. Now, if what you're saying is . . . there are lots of courts that are doing something wrong, which is that they're not looking at the error and its possible prejudicial effect at all, then I understand the argument; but then I ask the question, well, is that what this court did?" Oral Argument at 17–18, *United States* v. *Vasquez*, 132 S. Ct. 759 (2012) (No. 11–199).

in this case among countless others, deserves this Court's review.

A. The Conflicting Standards Among the Courts of Appeal Require Resolution

The majority approach to harmless error provides fair evaluation of what happened at trial and prevents the court of appeals from "becom[ing] in effect a second jury." *Neder* v. *United States*, 527 U.S. 1, 19 (1999) (internal citation omitted). Nine circuits squarely hold that the remaining evidence cannot be assessed in a vacuum and that, where a prosecutor's principal evidence was admitted in error, the prejudicial effect of that tainted evidence must be assessed. *See, e.g.*, *United States* v. *Jadlowe*, 628 F.3d 1 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 1833 (2011) (finding error harmless by considering not what a hypothetical jury might have held about the remaining evidence, but the actual jury instructions that required jurors to look at circumstantial evidence beyond the erroneously-admitted identifications); *United States* v. *Gomez*, 617 F.3d 88, 95 (2d Cir. 2010) (weighing "prosecutor's conduct with respect to the improperly admitted evidence" and "importance of the wrongly admitted testimony" in determining harmless error (quoting *United States* v. *Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007)); *Virgin Islands* v. *Martinez*, 620 F.3d 321 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1489 (2011) ("We are compelled to reiterate that constitutional harmless-error analysis is not merely a review of whether the jury 'could have' returned a verdict absent the constitutional error. Such an analysis improperly conflates sufficiency-of-the-evidence review with the appropriate *Chapman* standard."); *United States* v. *Mouzone*, 687 F.3d 207 (4th Cir. 2012), *petition for cert. filed*, (U.S. Nov. 16, 2012) (No. 12-7408) ("[T]o find a district court's error harm-

less, we need only be able to say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."); *United States* v. *El-Mezain*, 664 F.3d 467 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2010) (presenting the correct test as "the likely effect of any error in the case before us based on the totality of the circumstances in this trial," a "fact-specific and record-intensive" review); *United States* v. *Rayborn*, 491 F.3d 513, 518 (6th Cir. 2007) ("The harmless error standard calls for reversal when the appellate court lacks a fair assurance that the outcome of a trial was not affected by evidentiary error. We shall, therefore, reverse the lower court only if we are firmly convinced that a mistake has been made."); *United States* v. *Worman*, 622 F.3d 969 (8th Cir. 2010), *cert. denied*, 132 S. Ct. 369 (2011) ("In determining harmlessness, this court considers the effect of the erroneously-admitted evidence in the overall context of the government's case."); *United States* v. *Wilson*, 690 F.2d 1267, 1274–75 (9th Cir. 1982) ("[W]e must judge the magnitude of the error in light of the evidence as a whole to determine the degree of prejudice to the defendant resulting from the error."); *United States* v. *Wilson*, 605 F.3d 985 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 843 (2010) (requiring that erroneously admitted evidence be evaluated "in the context of the whole trial," specifically determining "whether 'the error had substantial and injurious effect or influence in determining the jury's verdict'" (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946))).

But the Seventh Circuit and two other circuits have persisted in an approach that sets aside consideration of the prejudice wrought by the error and evaluates

other evidence as if the error never existed. Under such a standard, the jury's service is rendered superfluous, and a defendant's conviction is sustained without accounting for errors that may have infected that conviction. This standard "is not and cannot be the test" for harmless error. *Kotteakos*, 328 U.S. at 767.

Vasquez was also a Seventh Circuit case. There, although the Seventh Circuit acknowledged that the trial judge had "made the wrong call" in admitting recordings of a defense witness and a co-defendant, 635 F.3d at 897–98, it nevertheless affirmed the defendants' conviction by finding the error harmless in light of the other evidence in the case. *Id.* at 898. Judge Hamilton, in dissent, reasoned that the reviewing court should have looked at the entire record, specifically "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 901. (quoting *Neder*, 527 U.S. at 19). In *Vasquez*, the government's case against the defendant, while "legally sufficient," was "far from a slam-dunk," *id.* at 902. In Judge Hamilton's view, remand was warranted because it was not beyond a reasonable doubt that the jury would have convicted the defendant absent the prejudicial evidence. *Id.* at 904–05.

Here, the Seventh Circuit reaffirmed its adherence to this approach. The court's application of the same harmless error standard allowed it to gloss over a "strong signal that the jury viewed the case as a close one." *Vasquez*, 635 F.3d at 903 (Hamilton, J., dissenting). Despite concluding that the "demanding" test for excluding the identification evidence was likely satisfied here, the Seventh Circuit chose to ignore the prejudicial effect of this "suggestive" evidence. Pet. App. 5a, 10a-11a. Instead, the court determined that

contested DNA evidence by itself was sufficient for a conviction. Pet. App. 14a. Two other circuits have adopted this very same approach. *See, e.g.*, *United States* v. *Nash*, 482 F.3d 1209, 1219 (10th Cir. 2007) (ignoring the prejudicial effect of improperly admitted evidence that was "no doubt incriminatory" because the appellate court found other evidence to be overwhelming); *United States* v. *Puentes*, 50 F.3d 1567, 1577–78 (11th Cir. 1995) (finding overwhelming evidence sufficient on its own to overwhelm an admission error and render it harmless).

Harmless error analysis is presented in virtually every criminal appeal today. And yet, defendants convicted with tainted evidence in circuits that apply the minority approach are subjected to a sufficiency-of-the-other-evidence test, completely divorced from the actual harm caused by the tainted evidence. The issue is presented clearly in this case.

II. THE SEVENTH CIRCUIT'S DECISION TO PROCEED *SUA SPONTE* DESPITE THE GOVERNMENT'S WAIVER CONFLICTS WITH THIS COURT'S PRECEDENT

Despite expressly relying on this Court's opinion in *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012), the Seventh Circuit ignored the forfeiture versus waiver distinction that controlled the result in *Wood*. In *Wood*, this Court held that a Court of Appeals has the authority to address the timeliness of a habeas petition *sua sponte*. *Id.* at 1834. However, noting that "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system," this Court held that it is an abuse of discretion for a court to use its *sua sponte* authority to override a State's deliberate waiver of a defense. *Id.* at 1833–34; *see also Day* v. *McDonough*, 547 U.S. 198, 209 n.11 (2006).

In the instant case, the government elected to waive any argument that the suggestive lineup was harmless. The government's brief argued that another error asserted by Petitioner was harmless but did not argue harmlessness in response to Petitioner's assertion that the lineup was suggestive. Gov't Brief at ii–iii, 34, 43–57. This waiver was reiterated at oral argument. When Judge Posner asked why the government had not argued harmless error, counsel for the government responded:

> Our, the reason we didn't argue it is because, reviewing the trial transcript, it does seem that the [] the eyewitness identification was a substantial part of the case. We think there is a reasonable argument that can be made it's nonetheless harmless. But, given the beyond a reasonable doubt standard for [] given that it's a due process issue, we haven't made a harmlessness argument with respect to that.

United States v. *Ford*, No. 11-2034 (7th Cir. June 6, 2012) (oral argument at 14:13) *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=11-2034&submit=showdkt&yr=11&num=2034 This is precisely the same conduct that this Court found sufficient to constitute a waiver in *Wood*:

> [T]he state after expressing its clear and accurate understanding of the timeliness issue deliberately steered the District Court away from the question and towards the merits of Wood's petition. In short, the State knew it had an "arguable" statute of limitations defense, yet it chose, in no uncertain terms, to refrain from interposing a timeliness "challenge" to Wood's petition.

Wood, 132 S. Ct. at 1835 (internal citations omitted). In both *Wood* and the case at bar, the government

acknowledged a possible argument that it *could* have made, but then expressly denied that it *was* making the argument. In such circumstances there can be no doubt that a waiver is knowing and voluntary. Yet the Seventh Circuit, despite noting the government's waiver and citing *Wood*, proceeded to raise the issue of harmless error *sua sponte*. Pet. App. 14a-16a. The Court of Appeals thus cited *Wood* while in the same breath it engaged in the same conduct that this Court held to be an abuse of discretion. *See Wood,* 132 S. Ct. at 1835.

The Seventh Circuit's judicial coup would create a broad license for appellate courts to litigate from the bench despite this Court's admonition that courts should only exercise their *sua sponte* authority rarely. *Wood,* 132 S. Ct. at 1833-34. Reasoning that *Wood* stands for the proposition that "a court can base decision on a ground forfeited by a party if the ground is 'founded on concerns broader than the parties,'" the Seventh Circuit concluded that it was authorized to override the government's waiver to protect other users of the court system from delay. Pet. App. 14a-16a. Yet this reasoning applies to any judicial decision that prolongs an ongoing case, eviscerating the balance between efficiency and respect for the adversarial process protected by this Court's forfeiture versus waiver jurisprudence. *Cf. Wood,* 132 S. Ct. at 1834 (noting that appellate courts should exercise their *sua sponte* authority only in "exceptional cases.")

To be sure, *Wood* involved a Court of Appeals' ability to raise threshold defenses in habeas proceedings whereas the instant case involves *sua sponte* harmless error review on direct appeal. This distinction, however, is immaterial. *Sua sponte* harmless error review, which necessarily involves review of the en-

tire record without input from the litigants, is a far greater intrusion into the adversarial process than the limited review of the record required to evaluate the merits of threshold defenses in habeas proceedings. Consequently, the concerns about departure from the adversarial model that led this Court to adopt the forfeiture versus waiver distinction in *Wood* are even stronger in the instant case. Furthermore, this Court has repeatedly applied the forfeiture versus waiver distinction outside of the habeas context. *See e.g., United States* v. *Olano,* 507 U.S. 725, 733 (1993) (differentiating between forfeiture and waiver on direct appeal of a federal criminal conviction); *Freytag* v. *Comm'r.*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases, many of which involve federal criminal convictions, illustrating forfeiture versus waiver distinction).

The instant case is a good vehicle for addressing this issue because the Seventh Circuit's analysis illustrates the problems inherent in giving an appellate court broad power to conduct *de novo* appellate fact finding without input from the parties. The Seventh Circuit's opinion includes a lengthy, inaccurate[5] ex-

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[5] The Seventh Circuit's *sua sponte* fact-finding regarding the probative value of DNA evidence is inaccurate in several respects. First, the probability generated in DNA profiling is the likelihood that a randomly selected person from the general population would genetically match the trace evidence as well as the defendant. Contrary to the Seventh Circuit's findings, it does not represent the probability that someone other than the defendant is the source of the trace. Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers*, 76 JUDICATURE 222, 224 (1993). The court's analysis does not account for the probability of a false match caused by human error. See *Dist. Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 80-81 (2009) (Alito J., concurring)

planation of DNA profiling, apparently based on information the court found in a *Wikipedia* article. Pet. App. 13a-14a.

In addition, the Seventh Circuit's *sua sponte* harmless error analysis imposed an additional constraint on Petitioner's due process and jury trial rights. Not only was Petitioner deprived of the right of having a jury of his peers evaluate the strength of the case against him absent the suggestive lineup identification, he was also deprived of the opportunity of having his appellate counsel present harmless error arguments on his behalf to the Seventh Circuit to assist its harmless error determination. *Cf. Day*, 547 U.S. at 210 (District court may raise statute of limitations defense *sua sponte*, but "…before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions").

The decision below is also important because it is likely to have a significant effect on criminal appellate practice. Criminal practitioners are effectively forced to present arguments as to why any potential error is *not* harmless without the benefit of responding to briefing on harmlessness from the government.

(noting the possibility of human error, suboptimal samples, and equipment malfunctions in DNA testing); Koehler, *supra* at 229 (estimating a false positive error rate of 1-4% using publically available data); Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 CALIF. L. REV. 721, 772–73 (2007) (collecting examples of DNA evidence tampering in forensic laboratories). Given that the "1 in 29 trillion" number cited by the state's expert is not a realistic representation of the probability that Petitioner was not the source of the DNA evidence, it would certainly have been reasonable for a jury not to credit the expert's testimony.

Under the Seventh Circuit's ruling, practitioners cannot even rely on a Court of Appeals to uphold an affirmative waiver by the government. This practice effectively inverts the well-settled rule that the government bears the burden of establishing the harmlessness of Constitutional errors beyond a reasonable doubt by shifting the burden to the defendant to prove a negative. *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991); *Chapman* v. *California*, 386 U.S. 18, 24, 26 (1967).

Finally, this Court is the only forum—other than a possible petition for rehearing—where the limits on the *sua sponte* authority of the Courts of Appeals will be subject to the adversarial process. As many courts have noted, a Court of Appeals' willingness to engage in *sua sponte* harmless error analysis can affect the behavior of litigants appearing before the court. *Day*, 547 U.S. at 202 (noting the possibility of the government withholding a defense for strategic reasons); *United States* v. *Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991) (same). Despite the implications of their decisions on the behavior of litigants appearing before them, the Courts of Appeals that have considered the limits of their *sua sponte* authority have typically done so without briefing from the parties. *See e.g.*, *United States* v. *Pryce,* 938 F.2d 1343, 1352 (D.C. Cir. 1991) (Randolph, J., concurring) (noting that the issue dividing the court was not briefed by the parties). Resolution in this Court will permit this issue to be briefed by the Petitioner and the government, subjecting *sua sponte* review to the benefits of our adversarial system. *See Greenlaw* v. *United States,* 554 U.S. 237, 243–44 (2008).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Petition Appendix

In the
United States Court of Appeals
For the Seventh Circuit

No. 11-2034

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, Eastern Division.
No. 09 CR 846-1—**Robert W. Gettleman**, *Judge*.

ARGUED APRIL 25, 2012—DECIDED JUNE 6, 2012

Before POSNER, SYKES, and TINDER, *Circuit Judges*.

POSNER, *Circuit Judge*. A jury convicted the defendant of armed bank robbery, 18 U.S.C. § 2113(a), and the judge sentenced him to the statutory maximum of 240 months, *id*., in part because of his previous convictions for that crime. The appeal presents two issues; we begin with the lesser one, which involves the exclusion of a witness for the defense on the ground that he was an alibi witness and the defense had not given the pros-

ecution the notice required before trial by Fed. R. Crim. P. 12.1(a). The defendant argues that the witness he wanted to call was not an alibi witness and so the rule doesn't apply.

The robbery occurred in Palatine, Illinois. The defendant was a personal trainer in Chicago, and had an appointment for a training session with one of his clients that began two hours after the robbery. The distance from the bank to the gym where the defendant did his personal training is only 28 miles, a distance easily covered by car in a good deal less time than two hours; and the defendant does not claim that extreme weather conditions, or an accident or other untoward event, might have prevented his arriving at the gym within two hours after leaving Palatine—in which event he could not have been the robber. So the client could not have given the defendant an alibi in the usual sense. This should make one wonder why the defendant wanted to call him. He argues that the client would have testified that the defendant was "calm, friendly and professional" at *all* their training sessions (the client did not recall the particular session that had taken place the evening of the robbery, which occurred almost two years before he was approached by the defendant's lawyer), and that he would not have been calm, etc., had he committed an armed bank robbery only two hours earlier. Actually such testimony would have had no probative value even if the client had remembered the defendant's deportment at the session after the robbery. No one had been hurt in the robbery, which had lasted all of five minutes, and

why would one expect the robber, having committed what he thought a successful crime that had enriched him, albeit modestly (his take was only $1146), to be visibly agitated two hours later, far from the scene of the crime and not pursued by police (he was not arrested until two years later)? And he was an experienced bank robber—the presentencing investigation report states that he admitted having committed 11 bank robberies between 1981 and 1985.

In any event it *was* alibi evidence that the defendant wanted to offer by calling his client as a witness, albeit alibi evidence of an unusual sort. The usual alibi evidence, if believed, proves that it was physically impossible for the defendant to have committed the crime that he's been accused of; suppose the training session had been held in Los Angeles rather than Chicago and there was a record of his having attended it. But the alibi in this case would have been that it was *psychologically* impossible for him to have committed the crime, because had he done so he would have been visibly agitated two hours later yet the alibi witness would have testified that he was never visibly agitated at their training sessions. This would be the obverse of evidence that the robber had been "nervous" and "jumpy" an hour after the robbery, as in *United States v. Turner*, 474 F.3d 1265, 1278 (11th Cir. 2007). It would have been weak evidence of innocence, as we said—"the fact that [the defendant] was not nervous and that he did not act violently is easily explained, because it would not have been in his interest to act in those ways," *United States v.*

Boulanger, 444 F.3d 76, 89 n. 17 (1st Cir. 2006)—but still evidence.

Notice to the prosecution of proposed alibi evidence is required because an alibi defense is at once compelling if accepted and easy to concoct, so the prosecution is justified in wanting an opportunity to investigate it in advance of trial. *Williams v. Florida*, 399 U.S. 78, 81 (1970); *United States v. Pearson*, 159 F.3d 480, 483 (10th Cir. 1998). That is true of alibi evidence premised on psychological impossibility as well as the more common type. And so the district judge was right to exclude the evidence because of the defendant's failure to have complied with Rule 12.1(a).

We move to the second and more substantial issue—a challenge to the photo array shown the bank's manager, whom the robber had confronted after forcing an entry into the bank shortly after the bank had closed for the day. When police arrived after the robbery the manager had told them that although the robber had worn a dust mask that covered his nose and mouth, the manager could tell that the robber was a white man with "a very pale complexion" and "light colored eyebrows and freckles around his eyes."

The dust mask was found shortly after the robbery 150 feet from the bank. DNA found on the mask was eventually matched with DNA that had been taken from a convicted bank robber named John Ford, the defendant in this case. In March 2009, 16 months after the robbery, a police officer presented the bank

manager with an array of six head shots that included one of Ford; we attach a photo of the array at the end of this opinion. The manager picked the man in the middle of the top row as the robber; it was Ford. He was eventually arrested and at a suppression hearing in September 2010 challenged the bank manager's identification on the ground that the photo array had been irreparably suggestive. The district judge refused to suppress the identification, and at the trial, held one month later, the manager testified that he had indeed identified the defendant as the bank robber in the photo array.

The photo array *was* suggestive. First, instead of showing the six photographs to the bank manager one by one, the police officer placed them on a table in front of him all at once, side by side in two rows, as in the photo at the end of this opinion (except that that's a photo of all six photos, and what the manager was shown was the separate photos—but as he was shown them all at once, what he saw was equivalent to our composite photo).

The officer asked the manager whether he recognized the robber. The objection to this procedure is that the manager would probably think that one of the photos was of the robber, or at least of the person whom the police suspected of being the robber, which might have led the manager to pick the one who most resembled the robber even if the resemblance was not close, especially since so much time had elapsed since he had seen the robber and the robber had been masked when he saw him.

It is true that the police officer told the manager not to assume that a photo of a suspect would be among the photos shown him, a disclaimer that the cases recommend. See *United States v. Williams*, 522 F.3d 809, 811 (7th Cir. 2008); *United States v. Saunders*, 501 F.3d 384, 391 (4th Cir. 2007); *United States v. Gibson*, 135 F.3d 257, 260 (2d Cir. 1998) (per curiam). Several studies suggest that such a disclaimer indeed reduces the risk of misidentification. See, e.g., Gary L. Wells & Deah S. Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later," 33 *Law & Human Behavior* 1, 6-7 (2009); Beth Schuster, "Police Lineups: Making Eyewitness Identification More Reliable," 258 *Nat'l Institute of Justice Journal* 2, 3 (2007). But whether it eliminates the risk created by a simultaneous array may be doubted. A witness is likely to think that the array *must* include a suspect as otherwise there would be no point in showing it to the witness, unless the witness's verbal description was of such an unusual-looking person that only a handful of people in the area in which the crime took place could possibly match it; in that case the police could show him all the look-alikes, confident that one was the criminal and hopeful that he differed enough from the others that the witness would be able to pick him out of the array.

The array would have been less suggestive had the manager been shown the photos one by one (a "sequential" array). *United States v. Brown*, 471 F.3d 802, 804-05 (7th Cir. 2006); see N.C. Gen. Stat. § 15A-284.52(b)(2); Wis. Stat. § 175.50(5)(b); Letter from N.J. Attorney General

John J. Farmer, Jr., to All County Prosecutors *et al*. (Apr. 18, 2001), www.state.nj.us/lps/dcj/agguide/photoid.pdf (visited May 31, 2012). Witnesses shown a sequential lineup are more likely to compare each person in it only with their memory of the offender, rather than choose whichever person looks the most like what the witness remembers. Schuster, *supra,* at 4; Gary L. Wells & Elizabeth A. Olson, "Eyewitness Testimony," 54 *Ann. Rev. Psychology* 277, 288-89 (2003); Dawn McQuiston-Surrett et al., "Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory," 12 *Psychology, Public Policy & Law* 137, 138-39 (2006); Nancy Steblay et al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison," 25 *Law & Human Behavior* 459, 468 (2001); but see *United States v. Lawrence*, 349 F.3d 109, 114-15 (3d Cir. 2003).

The accuracy of a sequential array can be improved by making it appear to the witness that there are more persons in the array than he's been shown. The officer presenting the array could pause after showing the witness the first five photos and ask whether he'd spotted the robber yet. For if after having looked at the first five photos in an array of six (as in this case) the witness knew he was looking at the last one in the array, he might infer, if he hadn't identified any of the first five, that the sixth photo was of the robber, or at least of the man who the police thought was the robber. But we suspect that even with the suggested adjustment the risk of misidentification is greater when the witness is looking from photo to photo, because they're side by side, in an attempt to pick out the one that most resembles his recollection of the robber.

And since the robber had been masked, the men in the photos (including Ford) should have been shown wearing dust masks similar to the one the police had found. Furthermore, the same detective from the Palatine police department investigated the case, compiled the photo array, and showed the array to the bank manager. Assigning other officers (with a smaller stake in nailing Ford) to compile the photo array and show it to the manager would have reduced the likelihood of an officer's signaling him to identify Ford as the robber.

Still another respect in which the array was suggestive was that the other five men don't look like the robber, because, although all are adult Caucasian males of approximately the same age, none is pale or has freckles. The only description that the manager had given the police was that the robber was very fair and had freckles, and only Ford's photo matches that description. Of course the Palatine police department's collection of photos of suspicious-looking characters (all the photos in the array were mugshots) may not have contained photos of any light-complexioned men with freckles except Ford. But the department should have been able to borrow such photos from a larger police department, such as the Chicago Police Department—and Palatine is a Chicago suburb.

Of course it's impossible to find photos of persons who are identical to a suspect (unless he has an identical twin)—and also undesirable, because then the witness wouldn't be able to identify the suspect. But Ford's appear-

ance is so unlike that of the other men in the photo array—and unlike them with respect to the only two features that the bank manager recalled of the masked robber—that the array suggested to the manager which photo he should pick as the one of the robber. See *United States v. Downs*, 230 F.3d 272, 275 (7th Cir. 2000); *United States v. Wiseman*, 172 F.3d 1196, 1209-10 (10th Cir. 1999); compare *United States v. Howard*, 142 F.3d 959 (7th Cir. 1998) (per curiam).

As awareness of the frequency of mistakes in eyewitness identification has grown (see, e.g., Jon B. Gould & Richard A. Leo, "One Hundred Years Later: Wrongful Convictions After a Century of Research," 100 *J. Crim. L. & Criminology* 825, 841-42 (2010); Innocence Project, "Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification" 3-4 (2009), www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (visited May 31, 2012); Richard A. Wise et al., "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case," 42 *Conn. L. Rev.* 435, 440-41 (2009); Sandra Guerra Thompson, "Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony," 41 *U.C. Davis L. Rev.* 1487, 1490-91, 1497-98 (2008); Brandon L. Garrett, "Judging Innocence," 108 *Colum. L. Rev.* 55, 60 (2008); Samuel R. Gross et al., "Exonerations in the United States 1989 Through 2003," 95 *J. Crim. L. & Criminology* 523, 542 (2005)), so has the need for judges to be especially wary about suggestive arrays shown potential witnesses, especially when as in this case the suspect was masked and a long time had elapsed between the crime and the display of the array to the witness.

It is true that the three other employees of the bank who were present when the robbery occurred could not identify the defendant from the photo array, and this is some evidence that the array was not suggestive. See *United States v. Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998); *Millender v. Adams*, 376 F.3d 520, 525 (6th Cir. 2004). But unlike the bank manager they had not gotten a close look at the robber; so far as appears, they didn't realize he was light-skinned and freckled.

"An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is 'a very substantial likelihood of irreparable misidentification,' *Simmons v. United States*, 390 U.S. 377, 384 (1968), the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Perry v. New Hampshire*, 132 S. Ct. 716, 720 (2012). This is a demanding test for exclusion, but may have been met in this case, and if so it was a mistake to allow the bank manager to testify at the trial about his previous identification of the defendant as the robber. (He did not attempt to identify the defendant as the robber in person, that is, at the trial.)

But we think the error was harmless. There was no doubt that the dust mask found outside the bank was the robber's, and the DNA found on the dust mask

matched the defendant's DNA. Moreover, even if not permitted to identify the defendant as the robber, the manager would have been permitted to testify that the robber was a pale-visaged freckled white man, for that is what he had told the police immediately after the robbery; and the jurors could have compared the description with the defendant sitting in front of them. The jury also could have compared the bank manager's description with the pictures of the robber taken by the bank's surveillance camera during the robbery and shown at the trial. The manager had described the robber to the police as 5'10" and he testified at trial that the robber was close to his own height of 5'10". Still frames from the surveillance footage reveals that the two men are indeed of approximately the same height.

The defendant makes much of the fact that the day after the robbery the bank manager had thought he recognized the robber among the bank's customers, and that the police had investigated and determined that the man in question was not the robber. It is not surprising that the day after being held up at gunpoint the manager was nervous and would make such a mistake. Another possibility, we grant, is that he was overconfident of his ability to identify the robber—but his initial mistake should have made him less confident later, when he viewed the array.

Oddly, though, the government does not argue harmless error. When asked at argument why not, the government's lawyer replied that there was "substantial" doubt that the jury would have convicted the defendant

without the eyewitness identification. The defendant's lawyer added that at trial the DNA evidence had been challenged, although a forensic scientist from the Illinois State Police testified that the probability that the DNA on the dust mask was not the defendant's was only 1 in 29 trillion.

The lawyers' statements indicate a misunderstanding of the harmless-error rule. An error can be harmless even if, had it not been committed, the defendant would have been acquitted. The criterion of harmlessness is whether a *reasonable* jury might have acquitted; if not, the error was harmless. The cases usually say a "rational" jury rather than a "reasonable" jury, but they are using "rational" to mean "reasonable." It would not necessarily be "irrational" for a jury to vote to convict a person whom it did not think guilty beyond a reasonable doubt—the jury might think the government's burden of having to prove guilt beyond a reasonable doubt too heavy. But it would be "unreasonable" because it would be flouting the judge's instructions.

It is because not all juries are reasonable that prosecutors sometimes take out insurance against erroneous acquittals by presenting evidence (if the judge permits) that should have been excluded. The evidence reduces the likelihood of acquittal, and does so without providing grounds for reversal, provided that a reasonable jury would not have acquitted had the evidence been excluded as it should have been, though because some juries are unreasonable (or dominated by an unreasonable member or unreasonable members) the actual

jury might have acquitted. See Alexandra White Dunahoe, "Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors," 61 *NYU Annual Survey of American Law* 45, 93-94 (2005); Bennett L. Gershman, "The New Prosecutors," 53 *U. Pitt. L. Rev*. 393, 429-31 (1992).

Although the defendant's lawyer tried to throw dust in the jurors' eyes by a vigorous challenge to the DNA evidence, and might have succeeded with another jury, the challenge had no merit. What is involved, very simply, in forensic DNA analysis is comparing a strand of DNA (the genetic code) from the suspect with a strand of DNA found at the crime scene. See "DNA Profiling," *Wikipedia*, http://en.wikipedia.org/wiki/DNA_profiling (visited May 31, 2012). Comparisons are made at various locations on each strand. At each location there is an allele (a unique gene form). In one location, for example, the probability of a person's having a particular allele might be 7 percent, and in another 10 percent. Suppose that the suspect's DNA and the DNA at the crime scene contained the same alleles at each of the two locations. The probability that the DNA was someone else's would be 7 percent if the comparison were confined to the first location, but only .7 percent (7 percent of 10 percent) if the comparison were expanded to two locations, because the probabilities are independent. Suppose identical alleles were found at 10 locations, which is what happened in this case; the probability that two persons would have so many identical alleles, a probability that can be computed by multiplying together the probabilities of an identical allele at each location,

becomes infinitesimally small—in fact 1 in 29 trillion, provided no other comparisons reveal that the alleles at the same location on the two strands of DNA are different. This is the same procedure used for determining the probability that a perfectly balanced coin flipped 10 times in a row will come up heads all 10 times. The probability is $.5^{10}$, which is less than 1 in 1000.

Because the DNA sample taken from the dust mask was incomplete, 10 was all the locations that could be profiled; but that was enough to enable a confident estimation (the 1 in 29 trillion) that the probability that DNA on the dust mask was not the defendant's was exceedingly slight. No evidence was presented to cast doubt on the validity of the DNA test conducted in this case or on the odds stated by the government's expert witness; nor did the cross-examination of the witness, though vigorous, undermine his testimony. The combination in this case of the unimpeached DNA evidence with the bank manager's description of the robber would have persuaded any *reasonable* jury beyond a reasonable doubt that the defendant was the robber.

It might seem that by failing to argue harmless error the government forfeited that ground for affirming and so we must reverse. Normally that would be true. But *Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012), confirming the Supreme Court's earlier decision in *Granberry v. Greer*, 481 U.S. 129, 134 (1987), states that a court can base decision on a ground forfeited by a party if the ground is "founded on concerns broader than those of the parties," *id*. at 1833, and that is true of harmless error—and so we

and other courts have sometimes affirmed a criminal judgment on the basis of the harmless-error rule even though the government had not invoked it. As we explained in *United States v. Giovannetti*, 928 F.2d 225, 226-27 (7th Cir. 1991) (per curiam) (citations omitted), in accordance with *Granberry*, "we are authorized, for the sake of protecting third-party interests including such systemic interests as the avoidance of unnecessary court delay, to disregard a harmless error even though through some regrettable oversight harmlessness is not argued to us. If it is certain that the error did not affect the outcome, reversal will not help the party arguing for reversal beyond such undeserved benefits as he may derive from delay. And reversal will hurt others: not merely the adverse party, whose failure to argue harmlessness forfeits his right to complain about the injury, but innocent third parties, in particular other users of the court system, whose access to that system is impaired by additional litigation. Costs to third parties are an established reason for a court's declining to honor an agreement by the parties, and the same principle applies when a court is belatedly requested to decline to give effect to a forfeiture—which is the equivalent of an implied agreement. When these third-party costs are taken into account, reversal may be an excessive sanction for the government's having failed to argue harmless error, at least if the harmlessness of the error is readily discernible without an elaborate search of the record." See also *United States v. Hatfield*, 591 F.3d 945, 951 (7th Cir. 2010); *Jenkins v. Nelson*, 157 F.3d 485, 494 n. 1 (7th Cir. 1998); *United States v. Ghane*, 673 F.3d 771, 787 (8th Cir.

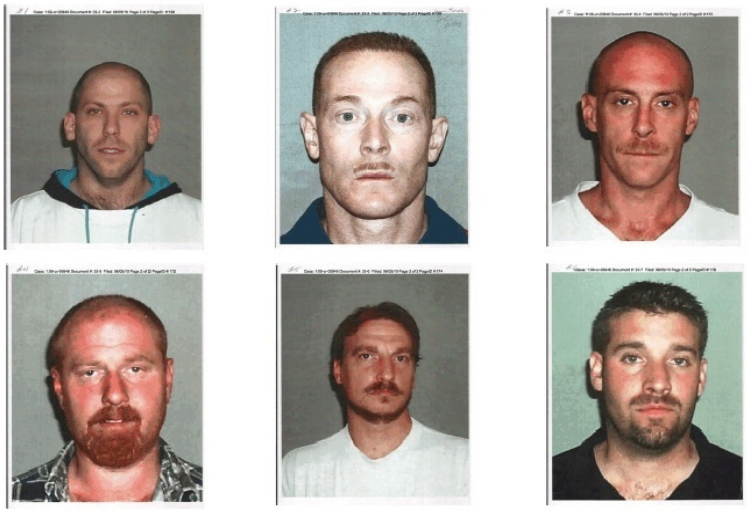
2012); *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005); *United States v. Rose*, 104 F.3d 1408, 1414-15 (1st Cir. 1997).

The judgment is therefore

AFFIRMED.

TINDER, *Circuit Judge*, concurs in the result.

Demonstrative Compilation of Exhibits A, A1, A2, A3, A4, A5[1]



6-6-12

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 21, 2012

Before

RICHARD A. POSNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 11-2034

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, Eastern Division.

No. 09 CR 846-1

Robert W. Gettleman, *Judge*.

O R D E R

On August 1, 2012 defendant-appellant filed a corrected petition for rehearing and petition for rehearing *en banc*, and on September 6, 2012 plaintiff-appellee filed a response to the petition. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

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

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
JOHN A. FORD

JUDGMENT IN A CRIMINAL CASE

Case Number: 09 Cr 846 -1

USM Number: 02162028

Michael J. Petro
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

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

The defendant is adjudicated guilty of these offenses:

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

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

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

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

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

4/21/2011
Date of Imposition of Judgment

Signature of Judge

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

4/21/2011
Date

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

IMPRISONMENT

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

TWO HUNDRED FORTY (240) MONTHS.

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

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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

SUPERVISED RELEASE

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

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

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$ 1,146.00

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

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

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

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

TOTALS	$ 1,146.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

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

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

SCHEDULE OF PAYMENTS

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

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

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

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

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

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

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

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

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

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 09 CR 846
vs.	)	Chicago, Illinois
	)	October 12, 2010
JOHN A. FORD,	)	1:30 p.m.
	)	
Defendant.	)	

VOLUME 1

EXCERPT OF PROCEEDINGS - TRIAL

BEFORE THE HONORABLE ROBERT W. GETTLEMAN

AND A JURY

APPEARANCES:

For the Plaintiff: HON. PATRICK FITZGERALD
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
BY: MS. CAROL A. BELL
MR. RICK YOUNG

For the Defendant: MICHAEL J. PETRO AND ASSOCIATES
53 West Jackson Boulevard
Suite 324
Chicago, Illinois 60604
BY: MR. MICHAEL J. PETRO
MS. QUINN A. MICHAELIS

Official Reporter: JENNIFER S. COSTALES, CRR, RMR
219 South Dearborn Street
Room 1706
Chicago, Illinois 60604
(312) 427-5351

A. Standing, which she was like against the wall where I was standing and saw her was probably about 8 feet or so.
Q. And was the man that you saw by Merlyn Agravante wearing any sort of disguise?
A. Generally he was dressed all in black. He had on like a floppy kind of fisherman, congo hat sort of thing. He was also wearing like a painter's mask, you know, on, like one of those respiratory masks or painter's masks.
Q. Did the man have any weapons?
A. He had a gun. It appeared to be it was black in his right hand, like maybe a 9 millimeter. It was a handgun, an automatic.
Q. And you mentioned that when the man saw you he said something like, "This is a robbery. Let's go, big boy, fat boy." How did you react to that?
A. Well, immediately I was startled. But I put my hands up and kind of like, okay, you know, just trying to agree with him, you know, try to stay as calm as I could be, but just kind of like: Okay, okay. Take it easy. You know, just kind of waited for his directions.
Q. What, if anything, did the robber direct you to do?
A. Well, at that point when he started walking towards me, just kind of standing with my hands up, he was basically said, you know, "Let's go to the vault. Where is the money?" You know, basically, "I want to get the money from the vault and take me to the vault" basically.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 09 CR 846
vs.	)	Chicago, Illinois
	)	October 13, 2010
JOHN A. FORD,	)	10:00 a.m.
	)	
Defendant.	)	

VOLUME 2

TRANSCRIPT OF PROCEEDINGS - TRIAL

BEFORE THE HONORABLE ROBERT W. GETTLEMAN

AND A JURY

APPEARANCES:

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BY: MR. MICHAEL J. PETRO
MS. QUINN A. MICHAELIS

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A. Again, I don't recall the day afterwards. You know, it's very vague. I can't -- I'm comparing, trying to compare the person that happened on the date, because that's very etched in my brain, and vaguely trying to match up the person next, you know, the following day, not the reverse.
Q. Now, the photo you identified, Photo 4-B, is that correct?
A. Yes, I suppose.
MR. PETRO: Let me see 4-B again. Do you have it there?
BY MR. PETRO:
Q. With respect to this photo, is it fair to say at least from your testimony that you can't see any part below the nose, is that correct?
A. Of the bridge of the nose and the mouth, no. But with the mask, you could see the side of his face and down his neck, his eyes, part of his forehead.
Q. But you couldn't see his ears, could you?
A. I don't recognize the ears, no.
Q. And you couldn't see the forehead, is that correct?
A. Part of the forehead you could, yes.
Q. But you couldn't see the color of the hair, is that correct?
A. His eyebrows, not the hair.
Q. Well, wasn't there a hat that the person that took the money was wearing on that day?
A. He was wearing a hat, yes.
Q. And with respect to the photo that you, in fact, identified,

would it be fair to say, sir, that this would fairly and accurately describe what portion of the person that you could identify from the person that took the money, is that correct?
A. That portion alone, because you've blocked out the side of his face, his neck and like chin area, I was able to see that, too.
Q. But that wasn't an important part of your identification, was it, sir?
A. It was, because it's part of the skin tone and the freckles and, you know --
Q. Well, you testified previously in this case, and you testified that you couldn't be 100 percent sure that the person that took the money was Caucasian, is that correct?
A. I didn't -- I don't believe I said that.
Q. And you also said that you couldn't be 100 percent sure what the height of the person was, is that correct?
A. An estimate, not an exact.
(Discussion off the record.)
BY MR. PETRO:
Q. Sir, I'm showing you another picture. What is that other picture of, sir? Do you know?
A. Somebody's eyes.
Q. Do you know whose eyes?
A. I would say no, not really.
THE COURT: Do you want to mark this as an exhibit so

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 09 CR 846
vs.	)	Chicago, Illinois
	)	October 15, 2010
JOHN A. FORD,	)	10:00 a.m.
	)	
Defendant.	)	

VOLUME 4

TRANSCRIPT OF PROCEEDINGS - TRIAL

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should I call? I'll call just to be on the safe side is just what he told you, and he did. This wasn't the robber. If it had been the robber, if he knew that was the robber, he would have gotten on the phone right away.

Ladies and gentlemen, you know John Ford was the robber, because you've heard the testimony of Dannie Thomas, the man who stood face to face with him for minutes on that horrible day, that traumatic event. But that's not all you've heard. You have more. You have the mask, the mask that was found that night as he fled through the darkness down that path. The robber dropped the mask he had used, the paper dust mask he had used on that night. And it was recovered by the Palatine Police Department.

You heard how the detectives searched that fence line behind the bank that night, searched the fence line. And down that path you saw images of it, the path between that double fence, where the double fence line began, they found the mask. An hour after the robbery, they were searching that fence line. They didn't find anything else. You didn't hear anything about debris and paper items or paper bags. They found a mask, the mask that the robber had dropped.

And you heard what they did with that mask. They submitted it for DNA analysis. And you had a little introduction to forensic science right here in court in Chicago. You heard three forensic scientists from the Illinois State Police testify about what they did with that mask after it was recovered by the

of that mask. We've all been to the doctor. We've all been to the hospital.

Was it a medical mask? The 911 caller then asks him: "A surgical mask?" He says: "Yes, a surgical mask." This is a small point, but it's a very, very valuable point, because it tells you, face to face, face to face, if there is one thing that he could see, it would be whether it's a dust mask or a medical mask. You may not think that it's important, you might think I'm quibbling, but it's important. There is a difference. And if it's not the mask, you can't consider the DNA.

The other thing I want to bring up and I want to get this out of the way right away, there is a Ms. Boge that Bice talks to, Detective Bice talks to first. She's the first person he talks to. Check your recollection, but Ms. Boge never came in and sat in that chair and said "That's the mask. She saw the mask."

MR. YOUNG: Objection, not in evidence.

THE COURT: I believe that's correct.

MR. PETRO: But there were also three other people inside that bank. Ms. Agravante, you saw her picture in the photos. Ms. Sisso, you saw her picture in the photos. Ms. Pathare. Ms. Pathare, Ms. Sisso, Ms. Agravante never came into court and said that that was the mask that was worn by the robber. This is important, because if it's not the mask worn by the person that entered the bank, then you don't even get to the

DNA. But I'm going to help you through the DNA.

Now, we had, you know, 1 in 29 trillion. I didn't even know how many zeros it was until I took, until I took a look at the evidence. But apparently there is 12 zeros. 1 in 29 trillion. But that makes it too complicated. All these rules, all these product rules and things like that, it makes it too complicated for you folks, because the analysts told you what the rule is, the simple rule. One dissimilarity at any location, one dissimilarity at any location, and you have to exclude John Ford. You have to. That's the rules.

And I kept saying over and over and over explaining the one dissimilarity rule as best as I possibly could. 27 trillion is a magnificent number, but we all learned in grade school that if you multiply any number by zero, you get zero. One dissimilarity, the odds are zero.

So let's look at it closely. Now, I know I belabored, I labored hard to show you chart after chart, graph after graph. I showed you 5 second runs. I showed you 10 second runs. I showed you positive controls. I showed you negative controls. I showed you Profiler Plus. I showed you COfiler. I showed you a lot of graphs. And it may seem daunting, but I'm going to make it easy for you. Or I have manipulation brakes and negative controls, I have that on here, too.

But the only thing that you have to remember from all those charts is one simple thing, it's called the one

dissimilarity rule. If one allele doesn't match between the match and the profile of Mr. Ford, it's not a match. It's zero. I don't care how big the number is, go quadrillion, quintillion. Google, I think google means 100 zeros. It could be 1 google. It doesn't matter. One dissimilarity from these 13 profiles, not a match.

I remember when I was a kid, and some of you look about my age, and some of you look younger or older, but we used to watch a show, my brother and I, it was our favorite show, come on in the afternoon, it was a game show called Let's Make a Deal. And this guy named Monte Hall was the MC. And Monte Hall, he always started the show, he would run out, everyone was clapping real loud, and he would say, "Who wants $500?" Someone, "I want it. I want it." He would pick someone at random. And then he would offer that person, "You can keep this $500 and sit down, or you can guess, you can take what is behind the curtain over here." Or he would say, "You can take this $500 or you can choose what's behind the box over here."

And it was always my favorite part of the show, because me and my brother, we hated the box. The curtain, you always got something good. But the box -- but sometimes they would pick that box. And when they would pick that box, they would roll it away. And lo and behold, sometimes it was a washing machine. But sometimes it was a donkey. It was a donkey. The person just gave up their $500 for a donkey.

But in this particular case, the reason why I'm talking about Let's Make a Deal is because in this particular case, we have five boxes.

All right. And I just want to go through this quickly. At D18S51, here is a box here. At D7S20, there is no determination, so you're missing two alleles here. And then at CSF1PO, there is two alleles missing here.

You have five boxes in this case that you don't know what's behind them. And there could be a donkey at any one of them. There could be a donkey at any one of them. They want you to believe that you have $500, and there is no chance at getting a donkey. But there is a real risk of getting a donkey, and I'm going to get to it, because at any one of those locations, if they get a donkey, if they get an allele that doesn't match the standard from John Ford, then the one dissimilarity rule kicks into effect, 1 in 27 trillion means absolutely nothing. It is zero. Mr. Ford is excluded.

Now, I just want to comment, if you look at it, I'll just point to this real quickly, right here there is an 11,11. It looks like there is two alleles at that location. But if you remember the graphs, and I'm going to show you the graphs in a few minutes, at that particular location there is only one allele. So it's an 11,11. But there is only one allele.

And they have some type of formula that they go through, but at sometimes when they only have one allele, like at 17,INC

right here, it's not an allele. It's inconclusive. That's not a 17,17. They're not going to call it a 17,17, because if they call it a 17,17, I want to make this clear, the standard from John A. Ford says 16,17, so if you applied the same standards that got to this 11,11 to this allele right here (indicating), John Ford is excluded.

Now, I want you to focus, and I'm going to talk about this in two ways, I want you to bear with me, but we talked, I talked specifically with Mr. Aper about this "INC" right here. And if you can remember the conversation with him, I asked him if it was inconclusive. He said: Yes, it's inconclusive. But then I said: Well, but what's the range of possibilities right here for this second allele?

And he told us the range of possibilities. He told us that the range of possibilities for that second allele was 9 or 10 or 11 or 12 or 13 or 14 or 15 or 16 or 17 or 18 or 19 or 20 or 21 or 22 or 23 or 24 or 25 or 26. 17 different combinations right here. Right here, 17 different combinations right here. And I said them all to make a point, because I want you to remember this.

And actually, you know, I looked at it a little bit closer, there is actually alleles at 13.2 and 14.2. There is actually 19 different combinations at that particular location, but I'm going to keep it simple.

As a simple calculation, if you divide 1 by 17, the odds

of getting a match, just purely statistical odds, is 6 percent. The odds of a 16 showing up by purely statistical odds is 6 percent. 27 trillion is starting to look a lot like doubt, because if there is a 6 percent chance of getting a 16, that means there is a 94 percent chance, a 94 percent chance that that allele is not going to match.

And I could go through for D7SA20 and do the same thing with those two alleles, the number of combinations there, and CSF1PO, but it's not $500. It's a donkey.

Now I want to go a little bit further. We talked about population frequencies, population frequencies. What percentage of the population at a particular location has the population frequency for getting a 16 allele. Do you see this right here? You need a 16 to call it a match. And if you look through the manual, the manual that's provided, it gives you statistics regarding population frequencies. And you know what the population frequency is at that particular allele for a Caucasian male? 14 percent, 14 percent. That means there is an 86 percent chance at that particular allele that John Ford is not the person. There is a 14 percent chance that that INC is a 16, 86 percent that it isn't. That 27 trillion ain't looking so good. You can do the math. You're smart people. You go back and do it yourself.

That's doubt, plain and simple. When you hear numbers like 94 percent that it's not him, doubt plain and simple. When

you hear numbers like --

MR. YOUNG: Objection. He's misstating the burden, Your Honor, doubt, or defining the burden.

THE COURT: Overruled.

MR. PETRO: Now, I want to go a little bit farther. I'm going to really, really go at this D18S151, because the one thing that comes through the testimony from the analysts is that it is subjective, it is a subjective determination as to whether to call that an INC or a 17,17. There is one allele there.

Now, I'm going to go through this as quickly as possible, but I'm going to start with a couple of different alleles. And I just want to move through it quickly and try to make the best point I can here. And I think you'll follow along. It's more scary than it actually is.

Now, what I am going to show you here is page 34 of 56. And this is Government Exhibit No. 21. Now, this is the 5 second run of Ms. Brown.

Can you just slide over a little bit so they can verify that it's the 5 second run of Ms. Brown?

Do you see right here W05-9271A. That means it's the mask. Profiler Plus, Keia Brown.

And if you go to the bottom right here, it will even tell you 5 seconds.

Now, I want you to look at this real close, because common sense is always something that you can consider when you

are a juror.

Go ahead and put it on here for me, Ms. Michaelis.

I want you to look closely at the allele on the left there, all right? It says it's a 9, a 178. Now, I want you to look at the allele on the right. The allele on the right, if you notice, is a little bit smaller. They call the allele on the left because it looks like a male and female allele pattern, what they do at that particular location, what they do at that particular location is they amplify it further.

Can you show us the same allele? And just go through once again, if we can show --

Once again, W 08-9271A P-Plus KB. And if you go to the bottom, it's the 10 second run.

Go to that one again, please.

They amplify it a little bit further. And look, you can see it's a 9 and a 13, two alleles right there. Do you see how those two alleles are right there.

Now, if you can just give me a full screen view, I just want to demonstrate this for the jury, because I don't think I made it clear.

When you are talking about a degraded sample -- just use the second column, that's fine, if you use the second column.

When you are talking about a degraded sample, it's important to look at it, because what you are going to see is, for instance, on top right here, remember when I was asking what

that 119.56 is, that's actually the length of the allele. If you look on top there is a graph on top. It says 70, 140, 210, 280, 350. I don't know what the particular significance of those numbers, but the shorter ones are on the left.

And, remember, the shorter ones don't degrade, because they're much shorter. It's the longer ones over here that degrade, because they're much longer. They can break apart much, much easier. I want you to notice the pattern.

And just show them the first column.

This is the first column. Look at on the left there, for instance, 14,15, see how it's tall, short. 15,16, tall, short. 21,23, tall, short.

Now go to the next column.

XY, tall, tall. But then 13,14, tall, short. 28,31, tall, short. And then 17. That's because as it gets more and more degraded, it goes tall, short, tall, short, and then it gets down here where the long ones is, and they're degraded.

Now I want you to show me if you could Mr. Aper's D16S539. Just bear with me. Now, right here, could you just identify the document for them, please? This is document number 39 of 56. It's on Government's Exhibit No. 21. Could you just show them what that is for for me, please.

Now, we know that Blake Aper only did a 5 second run. But once again W08927-2, which means it's from the buccal swab, 1-29-10 at 8:01 a.m.

Now, I want to look at this 11 up close, because I remember I showed it to Mr. Aper. And some people it seemed were disbelieving. But if you look at it, I want you to look at it not so much -- it's one allele, it's an 11. And if you look at the government's chart right here -- could you just put that up real quick -- if you look at the government's chart from that same exact location, even though there is one allele at that particular location, look at the standard from John Ford. It's an 11,11. All right. So even though there is one allele at that location, see, they have the discretion or the subjective ability to call that an 11,11.

There is not two boxes there. There is one box there. But they're saying because of the way or their interpretation of blah, blah, blah, blah, blah, it's an 11,11. If it was an 11,12 or an 11,10, it wouldn't match John Ford. John Ford would be excluded.

Could you just zoom in on it a little bit for me, please?

Now look closely. I remember I showed this yesterday to the analyst. Do you see right there that little bump right before the 11. You can see the line going up to the 11. That's called the allele. That's a true allele right there. Do you see that little bump right before there? It's important, because when you see a bump, if you go through the charts when you get back there, the bump is always going to be right in front of the

allele.

All right. Can we go to these two D18S51.

This is the chart I just showed you a second ago. But we have -- no, no, no. Not the big one. The one of the whole line.

Maybe I should lay a little bit of a foundation. This is a blow-up of the chart I just showed you a few minutes ago. I've blown it up a little bit so that you can see it. And I want you to see it -- could you just move it a little bit this way, please.

I want you to see it, and I want you to apply your common sense, okay. Right here, short, high. As it goes this way, it degrades. See how it is degrading right there like that?

Now, right here at 17, you have this allele right here and this allele right here. But they're saying apparently that this one is inconclusive. But don't believe them. Don't believe them for a second, because if you look when the sample degrades, see how it's tall, short; tall, short. Short, tall? Short, tall? That's not a true allele. That's not inconclusive. That is a bump.

Remember the bump I just showed you in 11? It was right before the allele. But I'm going to help you out even further. This right here, same row, same run, what is that? That's a bump. That's what he testified to. It's a bump. Right here, look at it before, look at it right here, right before the two

alleles right here, bump, bump.

Look at it right here, it's kind of small, but you'll see it, bump, allele, bump, allele.

And what is this right here? Well, that's a bump. That is a bump. It ain't inconclusive. You can see it with your own eyes, it is not inconclusive. That is a bump. It looks just like this bump here that was labeled and this bump here that was labeled and this bump here that was labeled. It is a bump. It is not inconclusive. And if it's not inconclusive, well, you remember 11, bump, allele, 11,11. Well, this is a 17,17. And a 17,17 at that particular location excludes John Ford. It excludes him.

And when you go back and you consider my comments, use your common sense. But I also want you to remember one thing. The analysts that come in, they have a job to do. And one of the analysts told you specifically what that job was, their job, our goal is to try to find a match. That's what their goal is. Don't believe for one second that they're impartial. Their goal is to try to find a match. That's what the analyst told us.

They have worked very, very, very hard to turn an obvious conclusion that this is a 17,17 into something that it's not. But it's not true. It's not inconclusive. You're smart enough to look at the graphs and determine that it's not true.

Now, the government makes a lot of hay that we don't need a profile at each and every location. But the bottom line

is they do. There is billions and billions of loci in these strands of DNA, billions. They picked the junk ones, whatever that means. They hope there is no interdependence between them. But the bottom line is they need all 13 alleles, because if you have less than 13 alleles, you have to have evidence that supports those alleles. You have to have evidence. The evidence drives the DNA. The DNA doesn't drive the evidence. The evidence drives the DNA.

The biggest problem in this particular case, and if they tell you that you don't have to have a full trial, maybe that's true if there is evidence there, but there is one thing I want you to consider: Who caused this DNA to degrade? Who caused it to degrade? It was recovered on November 20th, November 20th of 2007.

But what do they do with it? They all talked about how the environment can degrade it. But what do they do? They put it in a bag, and they leave it in a police station until February 5th of 2008, three months later, two and a half months later. They let it degrade for two and a half months. And they don't need a full profile?

But what do they do then? Well, once it gets to the Illinois State Police lab, it apparently sits till October 24th of 2008, 11 months later, the whole time degrading. We've heard what causes degradation. There is dirt, there is dirt on it. Rain, clearly it was rained on.

They caused -- and then the first analysis is obviously on December 8th, almost 13 months later, after the DNA was recovered. But it's the government's fault that this is degraded. And I'm not blaming anyone personally. But you can't come in here and tell us it doesn't matter when you are the one that's in control of that particular aspect of the preservation of the evidence. You can't do it.

Other evidence, there is other forensic evidence, the palm print at the door. They say that the person that came in to the bank had gloves on. That's for you to decide. But there is other people besides Dannie Thomas that can come in. He doesn't say that he has gloves. He doesn't remember gloves. But there was other people inside that bank that could have come in and told us whether there was gloves on his hands, Ms. Sisso, she still works at the bank, apparently what the one guy said; Ms. Agravante, she still works at the bank; Ms. Pathare. They never came in and said he had gloves on.

Now we've got to trust Dannie Thomas, which gets us to the last piece of evidence in the case. He never IDed John Ford in court. He lost his nerve apparently. He identified another person the day after the robbery.

Ms. Michaelis, do you have the stipulation and the photo?

We had that stipulation. Remember, it was agreed by the parties that the photo depicted in Defendant's Exhibit No. 1

represents the photo of John Theiler. And I showed you the photo. I showed you it very, very early on. I showed you it yesterday. Well, look at that photo and tell me, that's not John Ford. It's John Theiler. They have got the wrong John. And he's a hundred percent accurate, a hundred percent accurate 18 months later looking at a photo? I don't think so. Guess early, guess often, I guess.

But also look at these photos. What part of the person that came in the bank is visible? A very, very small portion.

You guys have had an opportunity to look at me more than five minutes. If I turn around, I don't know how many of you remember what color my eyes are or what color my eyebrows were or whatever.

But the only ID that was made in this case was from a suggestive photo lineup. I put the two pictures up there. You've got one with a big head like this and a couple of them with little heads like this. That's the only identification in this case.

He never came in like Mr. Young pointed at John Ford and said, "That's the guy. That's the guy." He never even, he never did that. He never did that. Only Mr. Young did that. Remember that, only Mr. Young did that.

Now, the last thing, I just want to go over this one last time. There is three other witnesses inside the bank, and there is one other witness outside the bank. Not one -- not

Ms. Sisso, she never identified the mask. She never identified Mr. Ford. Ms. Agravante, no identification of the mask, no identification of Mr. Ford. Ms. Pathare, no identification of the mask, no identification of Mr. Ford.

And I want you to remember one last thing. This photo came in in my case. It came in in my case. It wasn't something that the government volunteered. I guess I was just blessed enough to find this photo.

MR. YOUNG: Objection, Your Honor, misstatement. The photo was provided to the defense by the government.

THE COURT: That's argument, counsel.

MR. PETRO: The last thing, there was one last stipulation. I don't know if I talked about the palm print, but it says it's stipulated between the parties. The palm print is the only other piece of forensic evidence in this case, and it does not match John Ford. But those same women, Sisso, Ms. Sisso, Ms. Agravante, Ms. Pathare, they could have come in and testified whether there was gloves. They could have come in and maybe they saw whether or not they saw the person touched the bank at that particular location. But we've never heard from them.

So in the end, I want to conclude, the first thing you have to decide is: Is this the mask that was worn by the person in the bank? The 911 call, make sure you listen to it. You'll get the mask yourselves. That mask has been there for months and

months. The detective, remember, he said he put it in his pocket because he was afraid it was going to blow away. Well, it might have been blown away for a long, long time.

DNA, the statistics are easy. 1 in 27 is an illusion. That's the $500 that Monte Hall gives you. There is a lot of boxes that might have donkeys behind them. I've shown you where the donkeys are. I've explained it to you. I've explained degradation. I've explained it all to you.

Look at the charts. That is not a 17,Inconclusive. That is a 17,17. That excludes him. That excludes Mr. Ford. They make it sound like it's 1 in 27 trillion. Well, that's a great way to add things together. You just get to add all the good stuff and not do anything with the bad stuff. Focus on that one allele. I've made it easy for you. There is 17 possible combinations. We know 17 possible combinations. The odds of it being a right number, 6 percent. Go back and divide 17, 1 by 17, you'll get the 6 percent.

But they do population studies, too. They do population studies. The man of the government, when they get up here, they should explain, they should explain to you if the odds of that being a 16 are only 14 percent, why are you hiding it from us? We need that information to make this decision. A man's life hangs in the balance here.

I always sum up by saying one thing: What's the right thing to do? What's the right thing to do? Are there clues as

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NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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	)	
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	)	No. 09 CR 846
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	)	October 15, 2010
JOHN A. FORD,	)	2:40 p.m.
	)	
Defendant.	)	

VOLUME 5

TRANSCRIPT OF PROCEEDINGS - TRIAL

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AND A JURY

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(Proceedings in open court. Jury out.)

THE COURT: Good afternoon, folks.

We have a question from the jury. The foreperson is Katrina Herring, just so you know. And the question is this:

"The jury foreman wants to know if there are any other photos of John Ford."

I'm tempted just to say "No," a single word, or to say that all of the photographs admitted -- that the jury has all the photographs admitted into evidence, something like that. I don't want to say anything suggesting that any photo other than the one that we all know is John Ford was or was not the only photo of John Ford, because the question is: Is the person in the bank John Ford? That's the issue they have to decide.

MS. BELL: Right. The government agrees with your second suggestion, if you wanted to word it that way, that they have all the photos which are in evidence.

MR. PETRO: I like "No." But that's why you're a judge.

THE COURT: Well, I mean, I don't want to be rude to them either. They're obviously asking a question.

MR. PETRO: Okay. Well, I'm sympathetic to that.

THE COURT: All right. I'll get you copies of the question and the letter. I'll just say that the jury has all of the photographs that were admitted into evidence. Okay.

MS. MICHAELIS: Your Honor, I'm sorry, can we just have that response written on the note then too when we get a copy of