No. 12-7958

IN THE SUPREME COURT OF THE UNITED STATES

JOHN A. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in its harmless-error analysis by focusing solely on the weight of the properly admitted evidence without considering the potential effect of the error on the jury.

2. Whether the court of appeals erred in addressing harmless error when the government did not press that argument.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 683 F.3d 761.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2012. A petition for rehearing was denied on September 21, 2012 (Pet. App. 18a). The petition for a writ of certiorari was filed on December 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of bank robbery by force, violence, and intimidation, in violation of 18 U.S.C. 2113(a). He was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-17a.

1. On November 20, 2007, petitioner forced his way into a U.S. Bank branch in Palatine, Illinois, as it was closing for the day. Pet. App. 4a; Gov't C.A. Br. 3. Petitioner was holding a handgun and wearing a dust mask that partially covered his face. Ibid. Petitioner pointed the handgun at several tellers and at the bank's manager and shouted that he was robbing the bank. Gov't C.A. Br. 3; Presentence Investigation Report (PSR) 4. Petitioner ordered the bank's manager to take him to the vault; the manager explained that employees could not open the vault. Gov't C.A. Br. 3-4; PSR 4. Petitioner then demanded access to the bank's safe deposit boxes, and the manager replied that employees could not access them, either. Gov't C.A. Br. 4; PSR 4. Petitioner directed bank employees to take the cash from an open teller drawer and put it into a pillowcase he had brought. Ibid. Petitioner fled the bank with the money from the drawer ($1,146), running out the back door and then along a fence. Gov't C.A. Br. 4.

Petitioner's robbery of the bank was captured on surveillance cameras. Gov't C.A. Br. 4. The bank manager also stayed within four to six feet of petitioner throughout the robbery; he focused on the robber "[p]retty much the whole time" and got a good look of the robber's eyes, neck, and the "entire side of [his] face." Ibid. (quoting trial transcript).

Immediately after the robbery, the bank's manager described the robber to a 911 responder as a white man, about 5'10", with "a very pale complexion" and "light colored eyebrows and freckles around his eyes." Pet. App. 4a, 11a; see Gov't C.A. Br. 5. The manager also described petitioner's clothing and stated that he was wearing a "medical mask" or "surgical mask" during the robbery. Gov't C.A. Br. 5.

The police arrived at the scene and searched along the fence where the robber had run. Gov't C.A. Br. 5. The police found a discarded dust mask about 150 feet from the bank's back door. Pet. App. 4a. The bank manager told the police the mask looked just like the one worn by the robber. Gov't C.A. Br. 6. The police reviewed the surveillance tape and confirmed that description. Ibid. DNA found on the mask matched petitioner's DNA. Pet. App. 4a. (Petitioner's DNA was in a law enforcement database because he previously had been convicted of bank robbery. Ibid.) At petitioner's trial, the forensic examiner testified that the

likelihood that the DNA on the mask belonged to someone other than petitioner was 1 in 29 trillion. Id. at 12a.

After the DNA match was found, Officer Bice, the investigating detective, prepared a six-photograph array of photos that included petitioner's photo and showed it to the bank manager and to three tellers. Pet. App. 4a-5a. Before showing the array to each witness, Officer Bice told the witness not to assume that the array contained a photograph of the suspect. Id. at 6a. The bank manager "immediate[ly]" identified petitioner as the robber; none of the three tellers identified anyone. Gov't C.A. Br. 6; see Pet. App. 10a.

2. A grand jury in the United States District Court for the Northern District of Illinois returned an indictment charging petitioner with one count of bank robbery by force, violence, and intimidation, in violation of 18 U.S.C. 2113(a). Indictment 1. Petitioner moved to suppress the bank manager's identification on the ground that the identification process used was impermissibly suggestive and violated his due process rights. Pet. App. 5a; see Mot. to Suppress Identification Evidence 2-4.

After a hearing, the court denied the suppression motion, concluding that the photo array was not unduly suggestive and in fact was "one of the fairest ones" it had seen. 9/21/2010 Hr'g Tr. 53, 57. The court also concluded that the bank manager's

identification was reliable because, among other things, the bank manager "was right next to the robber for several minutes and looked at him fairly closely." Id. at 54. The court explained that the defense could attempt to cast doubt on the identification by "cross-examining the witness at trial." Id. at 56-57.

At trial, the bank manager testified about his prior photographic identification but did not attempt an in-court identification. Pet. App. 5a. In addition to this identification, the government introduced the DNA found on the mask, the manager's description of the robber, and surveillance pictures of the robbery. Id. at 11a.[1]

The jury found petitioner guilty, and the district court sentenced him to 240 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1a, 19a-21a.

3. The court of appeals affirmed. Pet. App. 1a-17a. The court first stated that, in its view, "[t]he photo array was suggestive" because the officer presented the photos simultaneously, rather than sequentially; none of the photographs

[1] Petitioner sought to introduce the testimony of a personal training client. Pet. App. 2a. The district court excluded the testimony on the ground that it was alibi evidence for which petitioner had failed to provide sufficient notice. Id. at 2a-4a; see Fed. R. Crim. P. 12.1(a). The court of appeals agreed, Pet. App. 2a-4a, and petitioner does not challenge that ruling in this Court.

included a dust mask like that worn by the robber; the investigating officer both prepared the array and showed it to the witnesses; and "none [of the people in the other five photographs] is pale or has freckles." Id. at 5a-9a. The court acknowledged that "the police officer told the manager not to assume that a photo of a suspect would be among the photos shown him" -- a "recommend[ed]" practice that "reduces the risk of misidentification" -- and that three other witnesses to the robbery had viewed the photo array and had failed to identify petitioner. Id. at 6a, 10a. But the court concluded, relying on various social science studies, that the photo array could have been done better. Id. at 6a-10a.

The court then observed that not every identification tainted by police suggestion violates due process; instead, exclusion on due process grounds is required only when there is "a very substantial likelihood of irreparable misidentification." Pet. App. 10a (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)). The court did not assess whether there was such a substantial likelihood; instead, it concluded that even if there was constitutional error, any error was harmless beyond a reasonable doubt. Id. at 10a-14a. The court explained that the "unimpeached" and essentially conclusive DNA evidence, combined with the bank manager's description of the robber and the

confirming surveillance photos, "would have persuaded any reasonable jury beyond a reasonable doubt that [petitioner] was the robber." Id. at 12a-14a. The court noted that although the government had not pressed a harmless error argument, the court had the power to decide the case on that ground because recognizing harmless errors protects the third-party interests in avoiding unnecessary retrials that delay justice in other cases. Id. at 15a.

Judge Tinder concurred in the result but did not join the court's opinion. Pet. App. 16a.

4. Petitioner filed a petition for rehearing en banc, which was denied, with no judge in active service requesting a vote on the petition. Pet. App. 18a.

ARGUMENT

Petitioner contends (Pet. 6-15) that the court of appeals applied the wrong harmless-error standard and should not have addressed harmlessness sua sponte. The court of appeals applied the correct standard and permissibly exercised its discretion to recognize that any error with the identification was harmless. Its decision therefore does not warrant this Court's review.[2]

[2] The first question presented is also presented in Acosta-Ruiz, petition for cert. pending, No. 12-6908 (filed Oct. 22, 2012).

1. a. 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 must be disregarded." See also 28 U.S.C. 2111. Outside of the narrow category of "structural errors," see Neder v. United States, 527 U.S. 1, 7-8 (1999), the requirement that an error "affect substantial rights" to warrant reversal requires the reviewing court to examine "the district court record * * * to determine whether the error was prejudicial," i.e., whether it "affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)); see United States v. Mechanik, 475 U.S. 66, 72 (1986).

This Court has established an objective test for harmlessness that asks whether "a rational jury would have found the defendant guilty absent the error," Neder, 527 U.S. at 18, eschews "a subjective enquiry into the [actual] jurors' minds," Yates v. Evatt, 500 U.S. 391, 404 (1991), and disregards errors that should not have altered the trial's "outcome" even though they might have

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Petitioner observes (Pet. 6) that this Court granted certiorari on a similar question in Vasquez v. United States, 132 S. Ct. 759 (2011) (No. 11-199), but dismissed the writ of certiorari as improvidently granted after oral argument, 132 S. Ct. 1532 (2012) (per curiam). Analysis of the cases indicates no conflict warranting review and, in any event, this case would not be an appropriate vehicle for review.

"altered the basis on which the jury [actually] decided the case," Rose v. Clark, 478 U.S. 570, 582 n.11 (1986). See Pope v. Illinois, 481 U.S. 497, 503 n.6 (1987); Harrington v. California, 395 U.S. 250, 254 (1969) ("probable impact" on an "average jury"). That test requires "weigh[ing] the probative force of [all the] evidence" properly before the jury to determine whether the error was sufficiently "unimportant in relation to everything else" that it would not have altered the verdict. Yates, 500 U.S. at 403-405; see United States v. Lane, 474 U.S. 438, 448 n.11 (1986). An error of constitutional proportions judged under the standard in Chapman v. California, 386 U.S. 18 (1967), is harmless if the evidence is "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]." Yates, 500 U.S. at 405 (applying Chapman). The Court has thus repeatedly made clear that such an error will be harmless where the evidence of guilt is so strong that "the jury verdict would have been the same absent the error." Neder, 527 U.S. at 17; see also, e.g., Schneble v. Florida, 405 U.S. 427, 430 (1972); Harrington, 395 U.S. at 254.

b. Petitioner argues (Pet. 7–10) that the proper standard for harmless constitutional error requires clarification, because, he contends, some courts consider "the prejudicial effect of th[e] tainted evidence" on the jury's deliberations, while others look to

the strength of the other evidence against the defendant. That is incorrect. The two purportedly distinct approaches reflect the same underlying concept. Although this Court has articulated the harmless-error standard as whether the error in question "contributed to the conviction," Chapman v. California, 386 U.S. 18, 23 (1967) (citation omitted); see also Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) (same), that formulation is just another way of asking whether a reasonable jury would have acquitted the defendant absent the error. For as the Court explained in Neder, if "a reviewing court concludes beyond a reasonable doubt" that the evidence of guilt is so strong "that the jury verdict would have been the same absent the error," the "error 'did not contribute to the verdict obtained.'" 527 U.S. at 17 (quoting Chapman, 386 U.S. at 24). Similarly, the Court explained in Harrington that the Confrontation Clause error before it was "harmless error under the rule of Chapman" because the other evidence of guilt was "overwhelming." 395 U.S. at 253, 254. See also, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (citing Harrington and Schneble as examples of cases applying Chapman's standard).

None of the decisions petitioner cites (Pet. 7-10) reflects a conflict warranting this Court's review. Like this Court, each circuit has articulated the harmless-error standard to include consideration of both the effect of the error and the weight of the

remaining evidence. That some decisions focus more on the error's effect, or more on the weight of the evidence, reflects the different facts in different cases.

Contrary to petitioner's contention, the court in United States v. Nash, 482 F.3d 1209 (10th Cir.), cert. denied, 552 U.S. 1084 (2007), did not ignore the effect of the erroneously admitted evidence. To reach its conclusion that "the jury would have returned the same verdict absent the error," the Nash court considered how the erroneously admitted evidence "was used at trial" and "how it compare[d] to the properly admitted evidence." Id. at 1219. The court reasoned that "[a]lthough the [erroneously admitted] statements were no doubt incriminatory, the properly admitted evidence of [the defendant's] participation in the offenses of conviction was so overwhelming, and the prejudicial effect of the [erroneously admitted] statements so insignificant by comparison," that the error was harmless beyond a reasonable doubt. Ibid. (internal quotation marks omitted).

Petitioner is likewise mistaken in relying (Pet. 10) on United States v. Fuentes, 50 F.3d 1567 (11th Cir.), cert. denied, 516 U.S. 933 (1995). The court did not discuss the relevant legal standard in any detail and it did not hold that it would consider only the weight of the properly admitted evidence and not the error's effect on the verdict. Instead, the court concluded, in a one-paragraph

discussion, that error in admitting certain irrelevant evidence was harmless on the record in that case, and the court noted the "overwhelming evidence" of the charged conspiracy in support of that conclusion. Id. at 1577-1578. Although the court did not expressly discuss the effect of the erroneously admitted evidence, the court has focused on that inquiry in other cases. See, e.g., United States v. McGarity, 669 F.3d 1218, 1249-1250 (11th Cir. 2012).

Similarly, the Seventh Circuit in this case did not purport to adopt a new legal standard for harmless-error analysis. The court did not say that the analysis could only consider the weight of the evidence, and not the effect of the error. Moreover, the court's analysis in this case belies petitioner's assertion (Pet. 9) that court failed to consider the effect of any error. The court of appeals determined, based on its own review of all of the record evidence, that "a reasonable jury would not have acquitted had the [erroneously admitted] evidence been excluded." Pet. App. 12a, 14a. That determination necessarily implies that, after considering the assumed error in its review of the entire record, the court concluded that it did not affect the verdict. And in other cases, the Seventh Circuit has discussed the nature and

importance of the relevant error when articulating its harmless-error analysis.[3]

Just as the Seventh, Tenth, and Eleventh Circuits have considered both the effect of the error and the strength of the other evidence, so too have the other circuits. For example, petitioner cites (Pet. 7–8) cases from the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and D.C. Circuits that contain language describing the harmless-error standard as including consideration of the impact the error might have had on the jury. But each of those courts has also looked to how a reasonable jury would have responded to the remaining evidence and routinely found errors to be harmless based on the strength of the other evidence.[4]

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[3] See, e.g., United States v. Foster, 652 F.3d 776, 786 (7th Cir. 2011) (considering the "strength of the [government's] case" and the error's "effect on the jury's verdict"), cert. denied, 132 S. Ct. 2702 (2012); United States v. Boling, 648 F.3d 474, 481 (2011) (considering "prejudice from the erroneous admission of evidence" and the "overall strength of the government's remaining evidence"); United States v. Lee, 558 F.3d 638, 648-649 (2009) (considering the "prejudicial impact" of the erroneously admitted evidence on the jury and the "abundance of other evidence" of guilt).

[4] See, e.g., United States v. Hicks, 575 F.3d 130, 143 (1st Cir.), cert. denied, 130 S. Ct. 647 (2009); United States v. Curley, 639 F.3d 50, 58 (2d Cir. 2011); United States v. Christie, 624 F.3d 558, 571, 572 (3d Cir. 2010), cert. denied, 131 S. Ct. 1513 (2011); United States v. Cole, 631 F.3d 146, 154-155 (4th Cir. 2011); United States v. Rice, 607 F.3d 133, 140-141 (5th Cir.), cert. denied, 131 S. Ct. 356 (2010); United States v. Hardy, 643 F.3d 143, 153-154 (6th Cir.), cert. denied, 132 S. Ct. 762 (2011); United States v. Samuels, 611 F.3d 914, 919 (8th Cir. 2010), cert.

Further review of the first question presented is therefore unwarranted.

2. Petitioner next contends (Pet. 10-15) that the court of appeals erred in considering harmlessness sua sponte. The government did not argue harmlessness in its brief to the court of appeals, and the government attorney stated at oral argument that "a reasonable case could be made for harmless error" but that the government had not made a harmlessness argument because it appeared that the eyewitness testimony was a "substantial part" of the case. Oral Arg. 14:00-14:35 (Apr. 25, 2012) (available at http://media.ca7.uscourts.gov/oralArguments/oar.jsp) (No. 11-2034). For his part, petitioner noted in his court of appeals reply brief that the government had not argued that any identification error was harmless, but he acknowledged that the court "does have discretion to conduct a harmless-error analysis of its own accord." Pet. C.A. Reply Br. 19.

a. The court of appeals correctly concluded that it had the discretion to address harmlessness sua sponte. The courts of appeals have a "well-recognized authority" to "uphold judgments of district courts on alternate grounds." Cochran v. Morris, 73 F.3d

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denied, 131 S. Ct. 1583 (2011); United States v. Cardenas-Mendoza, 579 F.3d 1024, 1032-1033 (9th Cir. 2009); United States v. Kayode, 254 F.3d 204, 212 (D.C. Cir. 2001), cert. denied, 534 U.S. 1147 (2002).

1310, 1315 (4th Cir. 1996) (en banc). Particularly in light of Rule 52's admonition that a harmless error "must be disregarded," Fed. R. Crim. P. 52(a), the courts of appeals have the authority to decide sua sponte that an error is harmless.

As the court of appeals explained, sound interests of the judicial system may make it appropriate for the court to address harmlessness despite the government's failure to raise it. See Pet. App. 15a (relying on United States v. Giovannetti, 928 F.2d 225, 226-227 (7th Cir. 1991)). The court is "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" harmlessness was not argued. Giovannetti, 928 F.2d at 228. The court noted that if "the error did not affect the outcome," reversal will not change the ultimate outcome but will simply lead to delay, which may provide "undeserved benefits" to the defendant and "will hurt others" such as "innocent third parties" who are seeking access to the courts. Ibid. Accordingly, at least where "the harmlessness of the error is readily discernible without an elaborate search of the record," it is appropriate for the court to address harmlessness sua sponte. Id. at 227.

Numerous other courts of appeals have reached this same conclusion and have considered harmlessness even when the

government did not press that argument.[5] Petitioner does not contend that any disagreement exists in the circuits on the question whether a court may consider harmlessness sua sponte, and that alone counsels against further review.

b. Petitioner contends (Pet. 10-12) that Wood v. Milyard, 132 S. Ct. 1826 (2012), precluded the court of appeals from considering harmlessnesss. He is mistaken. The question in Wood was whether the court of appeals had abused its discretion in deciding a habeas case on statute of limitations grounds when the State had twice announced that it would "not challenge" the petition's timeliness. Id. at 1830-1831. The Court began its analysis by noting that in civil litigation, "a statutory time limitation is forfeited if not raised in a defendant's answer," and "[a]n affirmative defense" that has been forfeited is "exclu[ded] from the case" and "cannot be asserted on appeal." Id. at 1832 (internal quotation marks omitted; citing Fed. R. Civ. P. 8(c),

[5] See, e.g., Gover v. Perry, 698 F.3d 295, 399-401 (6th Cir. 2012); United States v. Ghane, 673 F.3d 771, 787-788 (8th Cir.), cert. denied, 133 S. Ct. 477 (2012); United States v. Gonzalez-Flores, 418 F.3d 1093, 1100 (9th Cir. 2005); United States v. Torrez-Ortega, 184 F.3d 1128, 1136 (10th Cir. 1999); United States v. Rose, 104 F.3d 1408, 1414-1415 (1st Cir.), cert. denied, 520 U.S. 1258 (1997); Horsley v. Alabama, 45 F.3d 1486, 1492 n.10 (11th Cir.), cert. denied, 516 U.S. 960 (1995); United States v. Pryce, 938 F.2d 1343, 1348 (D.C. Cir. 1991) (opinion of Williams, J.), cert. denied, 503 U.S. 941, 988 (1992); id. at 1350 (Randolph, J., concurring).

12(b), and 15(a)). Based on those rules, the Court determined that, in the particular circumstances of Wood, the court of appeals abused its discretion in considering the timeliness of the habeas petition. Id. at 1834.

Wood is inapposite for several reasons. First, this is a criminal case, governed by the Federal Rules of Criminal Procedure, which provide that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a) (emphasis added). Thus, in contrast to the rules governing statute of limitations defenses in habeas cases, the rule establishing harmless-error review sets out the strong policy in favor of disregarding harmless errors. Compare ibid. (requiring harmless errors to be disregarded), with Wood, 132 S. Ct. at 1832 (setting out the "ordinar[y]" rules in civil litigation). Petitioner does not identify any court of appeals that has read Wood as he does, to prohibit consideration of harmlessness when the government has not pressed that issue.

Second, unlike a limitations defense, which is a threshold question that a party might "strategically" waive to encourage a court to reach the merits of an issue, see Wood, 132 S. Ct. at 1834, harmlessness is a post-merits question that does not require any further development of the record. Unlike Wood, this is not a case where the government "deliberately steered the [lower court]

away from the [threshold] question and towards the merits." Id. at 1835. The court of appeals found that the government had a "misunderstanding of the harmless-error rule," Pet. App. 12a, and appropriately characterized the government's actions in this case as a "forfeit[ure]," id. at 14a, rather than a waiver. That distinction was "key to [the] decision" in Wood, 132 S. Ct. at 1832 n.4: The Court recognized that the court of appeals had the authority to consider a forfeited statute of limitations argument, but it held that the court should not have considered the defense in circumstances where it had been expressly waived, id. at 1833, 1835.

Further, petitioner was not prejudiced. The court of appeals decided to address harmlessness because it was "readily discernible without an elaborate search of the record." Pet. App. 15a (internal quotation marks omitted). Even though the government had not made a harmless-error argument in its appellate brief, petitioner spent several pages of his reply brief arguing that the error was not harmless. See Pet. C.A. Reply Br. 20-22. This is not a case in which petitioner was "deprived of the opportunity of having his appellate counsel present harmless error arguments." Pet. 14.

Finally, the Woods Court itself recognized that "the bar to court of appeals' consideration of a forfeited habeas defense is

not absolute" and that courts may consider a forfeited defense when the defense "'implicate[s] values beyond the concerns of the parties.'" 132 S. Ct. at 1833 (quoting Day v. McDonough, 547 U.S. 198, 205 (2006)). The court of appeals found that this is just such a case, because failing to recognize the error's harmlessness would impose "[c]osts to third parties," such as "other users of the court system, whose access to that system is impaired by additional litigation." Pet. App. 14a-15a; see also Granberry v. Greer, 481 U.S. 129, 135 (1987) (noting that the resolution of a case is clear, it is in the interests of all parties and the court system to dispose of it once and for all without encouraging further proceedings).

3. In any event, this case would provide a poor vehicle for considering the questions presented because no error occurred in the first place and any error would be harmless.

a. This Court has explained in determining whether a witness's identification of a defendant violates the defendant's due process rights, a court should first determine whether the identification was unnecessarily suggestive. Perry v. New Hampshire, 132 S. Ct. 716, 720 (2012). If so, the court should then determine whether, under the totality of the circumstances, the identification itself is reliable. Ibid.; see also Manson v. Brathwaite, 432 U.S. 98, 116 (1977). The court should exclude the

identification only when "there is 'a very substantial likelihood of irreparable misidentification'" -- one that has been so "infected by improper police influence" that the jury should not be allowed to "determine its worth." Perry, 132 S. Ct. at 720 (quoting Simmons, 390 U.S. at 384).

The identification procedure used here was not unduly suggestive. The array included six photographs of the same size, all in color. See Pet. App. 17a; see also United States v. Carter, 410 F.3d 942, 948-949 (7th Cir. 2005) (photo arrays containing "six photos arranged in two equal rows" were not unduly suggestive). All the individuals pictured were middle-aged white men with a medium build, light skin, and moderate facial hair. Pet. App. 17a. The array could not provide a perfect match on all traits; identical photos would afford no basis for a witness to make a selection. The array did, however, provide a fair selection of similar individuals matching the descriptions given. Indeed, the district court called this "one of the fairest" photo arrays it had seen. 9/21/2010 Hr'g Tr. 53.

In presenting the array, the officer instructed each witness both orally and in writing that the suspect may or may not be present; that the witness should select a photograph only if he or she were sure it was the robber; and that not identifying anyone was an acceptable response. Trial Tr. 126-128; 9/21/2010 Hr'g Tr.

10-12; see United States v. Williams, 522 F.3d 809, 811-812 (7th Cir. 2008) (finding that "police acted prudently" in giving these instructions). Officer Bice then left the room to allow the witness to consider the photographs free from any police influence. 9/21/2010 Hr'g Tr. 12, 31; see Manson, 432 U.S. at 116 (approving use of such a procedure). Although the court of appeals expressed a preference for a sequential, rather than simultaneous, photo array, showing the witness all of the photos at once did not entail any improper police suggestion. That the photo array was not unduly suggestive was confirmed by the fact that three other witnesses to the crime viewed the same photo array, presented by the same police officer, and did not select petitioner. See Pet. App. 10a; 9/21/2010 Hr'g Tr. 54.

Even if the array were unnecessarily suggestive, the district court correctly concluded that petitioner had not shown "a very substantial likelihood of irreparable misidentification." Perry, 132 S. Ct. at 720 (quoting Simmons, 390 U.S. at 384). Whether such a likelihood exists depends on "the opportunity of the witness to view the criminal at the time of the crime"; "the witness'[s] degree of attention," "the accuracy of his prior description of the criminal," his "level of certainty," and "the time between the crime and the confrontation." Brathwaite, 432 U.S. at 114. Here, although the identification took place 16 months after the crime,

Pet. App. 4a, every other factor shows that the identification was reliable. The bank manager was face-to-face with the robber for several minutes. 9/21/2010 Hr'g Tr. 54-55. He got a good look at the robber, made eye contact with him, and was not distracted by the robber's gun. Ibid. His description of the robber immediately after the robbery as 5'10", white, pale, freckled, with light eyebrows, and between 180 and 190 pounds matched petitioner. C.A. App. B13, B20, B31-B32; Trial Tr. 60. He "immediate[ly]" selected petitioner from the photo array and expressed a high degree of confidence that petitioner was the robber. Gov't C.A. Br. 6. Accordingly, this was not a case in which police suggestion tainted the identification so substantially that due process required that it be withheld from the jury.

b. In any event, any error would be harmless beyond a reasonable doubt. As the court of appeals explained, based on a review of the entire record, "[t]he combination * * * 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 [petitioner] was the robber." Pet. App. 14a. Given that evidence, whatever incremental value the photo identification may have had did not have any substantial effect on the verdict. For this reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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