

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

7

8

9

United States of America,

) CR 09-678-PHX-JAT

10

Plaintiff,

) **ORDER**

11

vs.

12

Stephen Ross Raboy; Karl John Caschetta,

13

Defendants.

14

15

16

Defendants in this case are charged with multiple counts of bank robbery (and other charges). Witnesses from the banks were presented photo lineups of the Defendants and identified the Defendants as the robbers (in separate robberies¹). Both Defendants have moved to suppress their respective photo lineup. Defendant Raboy’s lineup is at Doc. 103-1. Defendant Caschetta’s lineup is at Doc. 106-1.

21

I. Out-of-court identification

22

If a pretrial identification procedure is so impermissibly suggestive that it results in a “likelihood of misidentification,” that procedure violates the defendant’s right to due process. *U.S. v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). The Court should exclude from trial a pretrial identification procedure, “only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

27

28

¹ The Defendants have been severed for trial.

1 misidentification.” *Id.* at 992 (internal quotations omitted). “An identification procedure is
2 suggestive when it emphasizes the focus upon a single individual thereby increasing the
3 likelihood of misidentification.” *Id.* (internal quotations omitted). However,

4 “[T]he fact that a suspect’s photograph is distinguishable on the basis of one
5 physical characteristic does not necessarily require suppression of a
6 subsequent identification. *See, e.g., United States v. Bubar*, 567 F.2d at 198-
7 99 (photo array not suggestive where, inter alia, appellant’s photograph
8 showed, longer, darker hair and a darker bushier mustache than the other
9 photos); *Cronnon v. Alabama*, 587 F.2d 246, 249-50 (5th Cir. 1979)
10 (petitioner’s photograph was the only one of six photographs which depicted
11 an individual with blonde hair).”

12 *Heggs v. Harris*, 1984 WL 361, *3 (S.D.N.Y 1984); *see also United States v. Robertson*, 606
13 F.2d 853, 857 (9th Cir. 1979) (“Mere variations in appearance among persons or photographs
14 presented to a witness do not automatically invalidate a pretrial identification.”).²

15 **A. Raboy**

16 Defendant Raboy moves to suppress both the out-of-court photo lineup in which he
17 was identified and any in-court identification of him at trial. Doc. 103. Defendant Raboy
18 identifies one distinction between his photo and the other photos, which he claims makes the
19 lineup impermissibly suggestive. Specifically, he claims that he has long hair pulled back
20 into a ponytail and the other men in the photos have short hair. *Id.* Mr. Raboy argues this
21 distinction is particularly problematic in this case because the witnesses had identified the
22 robber as having long hair. *Id.*

23 The Government responds and cites many cases from the Ninth Circuit Court of
24 Appeals wherein the Court held that variations in hair style did not make the lineup unduly
25 suggestive. Doc. #111. For example, in *United States v. Nash*, the defendant argued that the
26 photo lineup should be suppressed because only the defendant and one other person had
27 “afro” hairstyles. 946 F.2d 679, 681 (9th Cir. 1991). The Court of Appeals concluded that
28 the photospread was not suggestive even in light of the fact that the witness had identified

² If the Court finds the out-of-court identification to be impermissibly suggestive, the Court should then consider whether the in-court identification is sufficiently reliable to be allowed at trial. *Montgomery*, 150 F.3d at 993 (9th Cir. 1998).

1 the suspect as having an “afro” haircut. *Id*; see also *United States v. Beck*, 418 F.3d 1008,
2 1012 (9th Cir. 2005) (finding lineup not unduly suggestive when four of the six people had
3 similar length hair and were otherwise similar in appearance); *United States v. Carbajal*, 956
4 F.2d 924, 929 (9th Cir. 1992) (finding photospread was not impermissibly suggestive when
5 Defendant was the only person with bruises on his face).³

6 As stated in *Nash*, this Court must consider the totality of the surrounding
7 circumstances in determining whether the out-of-court identification was so impermissibly
8 suggestive that it tainted any subsequent identification testimony (concerning either the photo
9 lineup or the in-court identification by the witness). *Nash*, 946 at 681.⁴ In this case, all of
10 the men have similar skin color, similar hair color, similar facial hair, and are approximately
11 the same age. Further, while Defendant Raboy appears to have long hair pulled back into a
12 ponytail, a viewer cannot be certain that other men do not have long hair. Given how similar
13 the pictures are, and to the extent the hair length can be seen as a difference, the Court finds
14 that the photospread is not impermissibly suggestive. Thus, neither the out-of-court
15 identification nor the in-court identification will be suppressed.

16 **B. Caschetta**

17 Defendant Caschetta argues that both the out-of-court identification and any in-court
18 identification should be suppressed because his photo lineup was unduly suggestive. Doc.
19 #106 at 5. Specifically, Caschetta argues the photo lineup is unduly suggestive because (1)
20 in the pictures he is the only one wearing clothing matching the description of the clothing
21 given by the witnesses, (2) one of the six individuals (not Caschetta) has a tattoo, (3) his hair

22
23 ³ The Government also cites *United States v. Johnson*, 820 F.2d 1065, 1073 (9th Cir.
24 1987), *United States v. Barrett*, 703 F.2d 1076, 1085 (9th Cir. 1983), and *United States v.*
25 *Burdeau*, 168 F.3d 352, 357-58 (9th Cir. 1999), to support that a single distinction in hairstyle
is not impermissibly suggestive.

26 ⁴ If the Court concludes the procedure was impermissibly suggestive, the Court next
27 decides whether the identification testimony (with regard to an out-of-court identification or
28 a subsequent in-court identification) is nonetheless sufficiently reliable that it can be admitted
into evidence. *Nash*, 946 F.3d 681.

1 is pulled back which is consistent with the witnesses statement that the robber was wearing
2 a skull cap or bald, the other people are younger than him, and the lighting in each picture
3 is different.

4 **1. Clothing**

5 First, generally, because the average witness would know people can easily change
6 clothes, it would be unusual for variations in clothing to be unduly suggestive. Moreover,
7 although Defendant argues that his clothing is consistent with one witness's description, the
8 Government points out that Cascketta's clothing is inconsistent with two of the witnesses'
9 descriptions. Doc. 112 at 3-4. The Court agrees with the Government that the clothing worn
10 in the photos is not unduly suggestive given the witnesses varying memories and the fact that
11 the clothing described by the one consistent witness (two shirts) is not so unique that even
12 matching clothing would be unduly suggestive.

13 **2. Tattoo**

14 Defendant argues that the one person in the photo lineup with a tattoo was necessarily
15 eliminated by the witnesses because they did not describe a neck tattoo. Therefore,
16 Defendant argues the lineup was unduly suggestive because it was effectively only five
17 pictures. The Government responds are argues that the tattoo would not have been visible
18 to the witnesses at the time of the robbery based on their descriptions of the robber's clothing
19 (a collar shirt). Therefore, the witnesses would not know whether there was a tattoo. The
20 Court agrees with the Government that this feature is not suggestive given the clothing
21 description.

22 **3. Hairstyle**

23 Defendant argues only his photo and one other photo show a person with his hair
24 pulled back. Thus, Defendant argues that the lineup was unduly suggestive because the
25 witnesses described the robber as being bald or wearing a skull cap. The Government
26 responds and argues that all three witnesses stated that because the robber was wearing a hat
27 of some sort, none of them could describe his hair. Doc. 112 at 5. The Court agrees with the
28 Government that considering that all of the men in the photos have hair of a similar color,

1 and given that none of the witnesses could describe the robber's hair, the hair in the photo
2 lineup is not unduly suggestive.

3 **4. Age**

4 Defendant argues the lineup is unduly suggestive because the other men in the lineup
5 appear to be younger than him. First, the Court has reviewed the lineup and disagrees that
6 the men in the lineup appear to be younger than Defendant. In the Court's opinion all the
7 men in the photos appear to be approximately the same age. Second, even if the ages were
8 slightly different, such difference would not render this lineup unduly suggestive where all
9 the men have the same color hair, similar skin color, the same facial hair, and if there is an
10 age difference, it is barely discernable. *See generally United States v. Johnson*, 820 F.2d
11 1065, 1073 (9th Cir. 1987) (photo lineup was held to not be unduly suggestive even though
12 Defendant was the only one in the photos who was over thirty years of age).

13 **5. Lighting**

14 Finally, Defendant argues that his photo has different lighting than the other photos,
15 therefore the lineup is unduly suggestive. The Court has reviewed the copy of the lineup
16 attached to Defendant's motion (Doc. 106) and finds the lighting to be basically the same in
17 all the photos. Therefore, the Court rejects the factual premise of this argument.

18 **6. Conclusion as to Caschetta**

19 Given the totality of the surrounding circumstances, the Court finds that the photo
20 lineup was not unduly suggestive. *See Nash*, 946 at 681. Specifically, all of the men in the
21 photos have the same color hair, similar skin color, the same facial hair, and are
22 approximately the same age. None of the men stands out from the others. Thus, neither the
23 out-of-court identification nor the in-court identification will be suppressed.

24 **II. Conclusion**

25 Based on the foregoing,

26 **IT IS ORDERED** that Raboy's motion to suppress photo identification (Doc. 103)
27 is denied.

28 ///

