

He bases this contention on the fact that each photograph shows the height of the subject, in inches, and that the witnesses were therefore aware that three of the five other subjects were three to five inches shorter than the defendant. The defendant further contends that the remaining two individuals are sufficiently different in body type, hair style and complexion from him so as to lead the witnesses to identify him as the person who committed the robbery.

All of the photographs shown to the witnesses were of African-American adult males, seen against an identical background. The defendant points to no circumstances outside the choice of the photographs themselves that were calculated to lead the witnesses to identify the defendant. Although three of the five non-suspects are significantly shorter than the defendant, the witness who told the police that the robber was at least six feet tall was the only witness who was unable to identify the photograph of the defendant. Thus, I cannot agree with the defendant that the choice of photographs led the witnesses to identify him based on height. I find nothing in the choice of photographs that renders the identification procedure “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384 (1968); *see also United States v. Guzman-Rivera*, 990 F.2d 681, 682-83 (1st Cir. 1993) (noting that even an impermissibly suggestive identification is admissible in certain circumstances). Accordingly, I recommend that the defendant's motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 23rd day of January, 1995.

*David M. Cohen
United States Magistrate Judge*