

No.

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**In The Supreme Court Of The United States**

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Eric Romero-Lobato,

*Petitioner,*

v.

United States of America,

*Respondent.*

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

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**Petition for a Writ of Certiorari**

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RENE L. VALLADARES  
Federal Public Defender

\*CRISTEN C. THAYER  
AARIN E. KEVORKIAN  
Assistant Federal Public Defenders  
Office of the Federal Public Defender  
411 E. Bonneville, Ste. 100  
Las Vegas, Nevada 89101  
(702) 388-6577  
Cristen\_Thayer@fd.org  
Aarin\_Kevorkian@fd.org  
\*Lead Counsel for Petitioner

Dated: January 5, 2023

## Question Presented for Review

I. Due process prohibits any “suggestive and unnecessary identification procedure” that does not possess “sufficient aspects of reliability.” *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977). In particular, the “practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.” *Stovall v. Denno*, 388 U.S. 293, 302 (1967), *abrogated on other grounds by United States v. Johnson*, 457 U.S. 537 (1982).

Days before Petitioner Eric Romero-Lobato’s federal robbery trial, the government’s key eyewitness identified another man as the perpetrator to the lead detective and prosecutor. The district court declined to assess the reliability of the witness’s expected first time in-court identification of Romero-Lobato, dismissing the issue as one of weight. On appeal, the Ninth Circuit failed to address the district court’s abdication of its gatekeeping role and instead affirmed by making its own factual finding that the identification was sufficiently reliable.

The question presented is whether the subsequent in-court identification violated Romero-Lobato’s due process rights given the district court’s failure to conduct its gatekeeping duty.

## **Related Proceedings**

The United States District Court for the District of Nevada entered a judgment of conviction and sentence against Petitioner Eric Romero-Lobato on August 26, 2020. App. C. Romero-Lobato appealed to the Ninth Circuit, challenging his convictions based on unreliable eyewitness identification. The Ninth Circuit affirmed on July 1, 2022, and denied rehearing on October 7, 2022. App. A, B.

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## **Petition for Certiorari**

Eric Romero-Lobato petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **Opinions Below**

The decisions of the court of appeal are not published or reprinted in the Federal Reporter. App. A, B. The judgment and orders of the district court are not published or reprinted in the Federal Reporter. App. C, D, E.

### **Jurisdiction**

The Ninth Circuit Court of Appeals entered final judgment denying rehearing on October 7, 2022. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Sup. Ct. R. 13.1.

### **Constitutional and Statutory Provisions Involved**

U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

### **Statement of the Case**

#### **I. In the absence of any witness identification or forensic evidence, the government charged Romero-Lobato with attempted robbery.**

In March of 2014, two men entered the Aguitas Bar and Grill in Sparks, Nevada—a local spot for food, drink, and music—and owner Joel Becerra-Macias served each a can of Bud Light. Ninth Circuit Opening Brief, p. 4 (OB-4). Becerra-Macias chatted with one of the men at the bar, while the other man went and stood by the front door. OB-4-5. Suddenly, the man speaking with Becerra-Macias

jumped over the counter and attacked him. OB-5. The man at the door pointed a gun, saying “give me all the money.” OB-5. Becerra-Macias’s wife, also working in Aguitas, yelled and the couple’s son ran from the back. OB-5. While Becerra-Macias and his son struggled with the attacker, the man by the door fired a gunshot into the ceiling, allowing both strangers to escape in a getaway car. OB-5.

The police investigation that ensued initially failed to yield any definitive suspects. OB-5–7. Eyewitnesses could only provide general descriptions of the men. OB-5. Officers found the getaway car abandoned and learned it was registered to Jesus Romero-Lobato—Petitioner Eric Romero-Lobato’s very similar looking brother. OB-6. The day after the Aguitas incident, officers showed Becerra-Macias and his son identical six-pack photograph lineups containing Jesus’s photo. OB-6. Becerra-Macias’s son identified a man other than Jesus. OB-6. Becerra-Macias could not identify anyone. OB-6.

Two months later, Romero-Lobato was arrested after a car accident resulting from a police pit maneuver during an unrelated investigation. OB-8. The police never asked the Aguitas eyewitnesses to identify Romero-Lobato. OB-8. After further investigation—including Jesus and his wife’s self-serving statements, unreliable toolmark analysis attempting to connect a gun found in the crashed car and the bullet fired at Aguitas, shifting eyewitness statements, and a lack of inculpatory DNA evidence—Romero-Lobato was federally charged with conspiracy to commit robbery, attempted robbery, discharging a firearm in connection with the conspiracy and the attempted robbery, and prohibited person in possession of a

firearm. OB-8-9.<sup>1</sup> The government did not identify anyone as the suspect who jumped over the bar and attacked Becerra-Macias.

**II. The district court declined to assess the reliability of the attempted robbery victim's first-time, in-court identification of Romero-Lobato.**

Despite the lack of witness identification, Romero-Lobato anticipated the prosecutor would request that Becerra-Macias attempt a first-time in-court identification at trial. Ninth Circuit Excerpts of Record, Volume 4, pp. 816–819, 847–848 (4-ER-816–819, 847–48). Romero-Lobato moved to suppress any such identification, and alternatively requested a hearing outside the jury's presence to establish whether Becerra-Macias could reliably and competently identify Romero-Lobato. 4-ER-816–19, 847–48; *see also* Fed. R. Evid. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.”). The district court denied the request without prejudice believing the arguments raised “speak more to the credibility of the robbery victims' testimony rather than the admissibility of their testimony.” App. E, p. 2.

Four days before trial, Becerra-Macias prepared to testify with prosecutors and the lead detective on the case. App. D. He reviewed the original photographic six-pack shown to him the day after the robbery that excluded Romero-Lobato's photograph. App. D. This time, Becerra-Macias told prosecutors and the lead

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<sup>1</sup> Romero-Lobato was also federally charged with carjacking and brandishing a firearm related to the crashed vehicle. 4-ER-863–69. He stood trial separately for those charges. 2-ER-237–39.

detective: “At the time I looked, I didn’t know. Now that I’m looking, I saw him in there.” 6-ER-1277-78.

The government did not seek to learn which photograph Becerra-Macias identified. Instead, the government “moved on to the next subject.” App. D, p. 7.

At the start of the trial, Romero-Lobato renewed his request to suppress any attempted in-court identification by Becerra-Macias of Romero-Lobato. App. D. Romero-Lobato alerted the district court that, just days before, Becerra-Macias identified someone other than Romero-Lobato while in trial preparation with the government. App. D, p. 5. The district court still declined to address the reliability of the expected first-time in-court identification outside of the jury’s presence, stating a witness’s identification “goes to the weight, not to the admissibility.” App. D, p. 9.

Becerra-Macias testified and denied identifying someone else just days before trial. 5-ER-1051-53. Sitting in front of the only man accused of attempting to rob him, Becerra-Macias identified Romero-Lobato for the first time as the shooter in response to the prosecution’s leading questions. 5-ER-1026. Becerra-Macias also revealed his daughter showed him two photographs of Romero-Lobato at some point before trial, one being a mugshot displayed by the news, and claimed he identified Romero-Lobato as the shooter. 5-ER-1028-30, 1034-37; 8-ER-1957. The jury convicted Romero-Lobato on all counts. 2-ER-184-86.

**III. Ignoring the fact that the witness identified someone other than Romero-Lobato days before trial, the Ninth Circuit determined the identification was reliable.**

Romero-Lobato appealed. As relevant here, he challenged the government's presentation of Becerra-Macias's unreliable first-time in-court identification as violating due process. OB-51-54. The Innocence Project, the California Innocence Project, and the Rocky Mountain Innocence Project filed an amicus curiae brief in support of Romero-Lobato, highlighting the significance of judicial gatekeeping when it comes to introducing witness identifications produced by unnecessarily suggestive government procedures as occurred here. Ninth Cir. Dkt. 40.

The Ninth Circuit denied amici's unopposed request to share time with Romero-Lobato at oral argument. Ninth Cir. Dkt. 69. After argument, the Court affirmed the conspiracy, attempted robbery, and illegal firearm possession convictions, finding that Becerra-Macias's in-court identification of Romero-Lobato was reliable because "Becerra-Macias witnessed the crime occur, independently identified Romero-Lobato in a news article provided by his daughter, and he had compared that photo to surveillance footage from the restaurant." App. B, pp. 3-4.<sup>2</sup>

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<sup>2</sup> The Ninth Circuit vacated Romero-Lobato's conviction for discharging a firearm during a crime of violence given this Court's decision that attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A) and remanded for resentencing. App. B, p. 3 (citing *United States v. Taylor*, 142 S. Ct. 2015 (2022)).

## Reasons for Granting the Petition

### I. The district court failed to fulfill its gatekeeping function to assess the reliability of an eye-witness identification that is the product of suggestive circumstances created by law enforcement.

The Due Process Clause guarantees every defendant the right to a trial that comports with the basic tenets of fundamental fairness. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24-25 (1981). Time and again, this Court has confirmed that due process bars admission of unreliable witness identifications of criminal defendants that are the product of an impermissibly suggestive identification procedure created by state action. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 198–99 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977); *see also Perry v. New Hampshire*, 565 U.S. 228, 248 (2012) (holding that due process does not require a pretrial reliability inquiry when there is no “state action” involved in the suggestive procedure). Reliability is the “linchpin in determining the admissibility of identification testimony.” *Manson*, 432 U.S. at 114. Of specific concern are identifications produced through one person show-ups. “The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.” *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

Here, just days before the trial the witness identified someone other than Romero-Lobato to the lead detective and prosecutor. Becerra-Macias reviewed the original photographic six-pack shown to him the day after the robbery that excluded Romero-Lobato’s photograph and said, “Now that I’m looking, I saw him in there.”

6-ER-1277-78; App. D. The lead detective and prosecutor did not seek to learn

which photograph Becerra-Macias identified or follow up in any way. Instead, they turned a blind eye, “moved on to the next subject,” and sought to have the witness identify Romero-Lobato as the shooter for the first time while on the stand in front of the jury. App. D, p. 7. The government’s involvement in this out-of-court identification tended to undermine the reliability of any future identification of Romero-Lobato, especially an in-court identification that is inherently suggestive and the equivalent of a one-person show up. Thus, the district court should have fulfilled its reliability gatekeeping function before allowing the in-court identification to occur in front of the jury. But the court did nothing, instead allowing the government to ensure the witness would identify Romero-Lobato during trial.

In the analogous context of assessing expert testimony reliability, the Circuits have recognized that “[t]hough the district court has discretion in how it conducts the gatekeeper function, . . . it has no discretion to avoid performing the gatekeeper function.” *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003); *see also Smith v. Jenkins*, 732 F.3d 51, 64 (1st Cir. 2013); *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007); *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 833 (3d Cir. 2020); *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017); *Carlson v. Bioremedi Therapeutic Sys., Inc.*, 822 F.3d 194, 201 (5th Cir. 2016); *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1069 (9th Cir. 2017); *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158–59 (1999) (Scalia, J. concurring)

(“[T]rial-court discretion in choosing the manner of testing expert reliability ... is not discretion to abandon the gatekeeping function ... [or] to perform the function inadequately.”). The same rule should apply here. When an unnecessarily suggestive identification that is the product of state action is at issue, the district court must do something to assess reliability before allowing the government to present the identification to the jury. To ensure Romero-Lobato’s and future criminal defendants’ due process rights are properly protected, this Court should grant review and instruct the lower courts that the reliability of a first-time identification produced through a suggestive identification procedure must be determined by the district court before the identification is presented to the jury.

## **II. The Ninth Circuit improperly placed itself in the role of fact finder to assess reliability.**

The Ninth Circuit did not acknowledge the district court’s failure to make any reliability determination before allowing Becerra-Macias to identify Romero-Lobato for the first time in front of the jury. Instead, the Circuit found facts to support the post-hoc reliability of the identification, affirming because “Becerra-Macias witnessed the crime occur, independently identified Romero-Lobato in a news article provided by his daughter, and he had compared that photo to surveillance footage from the restaurant.” App. A, pp. 3–4. But such “[f]actfinding is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.” *Pullman-Standard v. Swint*,

456 U.S. 273, 291–92 (1982) (quoting *DeMarco v. United States*, 415 U.S. 449, 450, n. (1974)) (second alteration in original).

The Ninth Circuit’s holding broke with this Court’s and its own precedent that place the duty to make reliability findings with the district court. This Court has recognized that appellate courts do not make reliability determinations in the first instance. *See, e.g., Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 622 (1993) (holding that before the appellate courts can review whether a party has met its burden, “the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty”). The Ninth Circuit similarly holds. *See, e.g., Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 935 (9th Cir.), *opinion amended on denial of reh’g*, 313 F.3d 1093 (9th Cir. 2002) (declining to affirm exclusion of evidence on alternative grounds because “[t]heir ultimate reliability is, of course, a question of fact, on which we do not pass in the first instance”). That is because “[w]ith respect to evidentiary questions . . . , a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008).

These principles apply with equal force when the reliability of an eyewitness identification in a criminal trial is at issue. The considerations underlying an ultimate reliability conclusion “are all questions of fact” for the district court to resolve. *Sumner v. Mata*, 455 U.S. 591, 597 (1982); *id.* at 597 n.10 (noting “the

factors to be considered in evaluating the likelihood of misidentification” set forth in *Neil*, 409 U.S. at 199–20, each “require[] a finding of historical fact”). The district court was therefore required to assess the reliability of the first time in-court identification before allowing the government to present the identification evidence to the jury.

The district court abdicated its critical constitutional function however, rejecting Romero-Lobato’s repeated requests for preclusion or a hearing on the matter outside of the presence of the jury by summarily concluding the reliability of the identification went to weight, rather than admissibility. App. D, E. And instead of vacating and remanding for a new trial, before which the district court must assess the reliability of the identification before admitting the testimony, the Ninth Circuit made its own ultra vires reliability determination, abdicating its reviewing function. The Court should grant review to make clear to the lower courts that when a district court fails to make any findings as to reliability before admitting trial witness identification produced through an unnecessarily suggestive identification procedure, the remedy is to remand for the district court to assess reliability in the first instance.

**III. Even if the record supported first-time appellate fact finding, the Ninth Circuit erroneously applied this Court’s caselaw.**

Even if an appellate court may make a determination of a witness’s reliability in the first instance, the Ninth Circuit did not properly do so under this Court’s framework. When assessing the reliability of an identification produced through a suggestive identification procedure, courts must consider all relevant

circumstances, including identified salient factors. *United States v. Montgomery*, 150 F.3d 983, 993 (9th Cir. 1998). The ultimate assessment determines whether the identification procedure corrupted the reliability of the identification such that it may not be admitted: “[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself.” *Manson*, 432 U.S. at 114.

Conducting a true totality of the circumstances analysis here demonstrates Becerra-Macias’s first-time, in-court identification of Romero-Lobato did not possess sufficient aspects of reliability. When describing the shooter to police after the attempted robbery, Becerra-Macias could not provide many details about the shooter, including his height, weight, or whether he had facial hair. 5-ER-1031-34. And the government never showed Becerra-Macias a lineup that included Romero-Lobato’s image. Rather, at some point before trial and before Becerra-Macias identified another man to the government, Becerra-Macias’s daughter showed him Romero-Lobato’s mugshot, and an unidentified photograph taken from Facebook. 5-ER-1028-30, 1034-37; 8-ER-1957. But critically, days before the trial Becerra-Macias identified someone other than Romero-Lobato to the government after looking at a photographic array that did not include Romero-Lobato. App. D, p. 5.

Furthermore, the government’s culpability in creating the substantial risk of misidentification weighs against reliability. The Third Circuit has recognized that, while not essential to proving an identification is unreliable, “the government’s intent may be one factor in determining the risk of misidentification.” *United States v. Emanuele*, 51 F.3d 1123, 1129 (3d Cir. 1995). “[E]vidence that the government

intended and arranged such an encounter would be a substantial factor in the court’s analysis.” *Id.* Here, the government never showed Becerra-Macias a photographic lineup that included Romero-Lobato. And when the government was preparing Becerra-Macias for his trial testimony against Romero-Lobato and Becerra-Macias indicated he saw the perpetrator in a lineup that did not include Romero-Lobato, the government simply “moved on to the next subject.” App. B, p. 7. The government’s actions and inactions created an unnecessarily suggestive first-time in court identification that lacked sufficient aspects of reliability given Becerra-Macias’s inconsistent pretrial identifications. Becerra-Macias’s first-time in court identification of Romero-Lobato as the shooter should have been excluded from trial. This Court should grant review to ensure the Ninth Circuit faithfully applies this Court’s legal framework for suggestive identifications.

**IV. This case presents an excellent vehicle for review as the constitutional error was not harmless.**

Romero-Lobato’s case is the proper vehicle for this Court to address the issues raised in this petition because the government failed to prove harmlessness beyond a reasonable doubt. The government must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967). “To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

The government cannot meet that burden here. Eyewitness identification testimony is particularly impactful on jurors. Ninth Circuit Amicus Brief, pp. 8–9 (citing sources); *Perry*, 565 U.S. at 264 (Sotomayor, J., dissenting) (noting “jurors routinely overestimate the accuracy of eyewitness identifications” while “plac[ing] the greatest weight on eyewitness confidence in assessing identifications”). “And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.” *United States v. Wade*, 388 U.S. 218, 235 (1967).

Becerra-Macias’s unreliable testimony was crucial evidence on the robber’s identity, the only issue at trial. Given the scant remaining evidence—shifting and contradictory witness statements, exculpatory DNA results, and subjective and non-replicable ballistics results—no court can conclude his testimony was unimportant in relation to everything else the jury considered on the issue. OB-43-51 (detailing insufficient evidence). The constitutional error here was not harmless.

### Conclusion

This Court should grant Romero-Lobato’s petition.

**Dated:** January 5, 2023.

Respectfully submitted,  
RENE L. VALLADARES  
Federal Public Defender

/s/ Cristen C. Thayer

Cristen C. Thayer  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577

Cristen\_Thayer@fd.org  
Lead Counsel for Petitioner

*/s/ Aarin E. Kevorkian*

---

Aarin E. Kevorkian  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
Aarin\_Kevorkian@fd.org