

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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**Appendix**

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## **Appendix A**

*United States v. Romero-Lobato,*  
No. 20-10280, Dkt. 79 (9th Cir. Oct. 7, 2022),  
Order denying petition for rehearing en banc

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
ERIC ROMERO-LOBATO,  
Defendant-Appellant.

No. 20-10280

D.C. Nos.  
3:18-cr-00049-LRH-CLB-1  
3:18-cr-00049-LRH-CLB  
District of Nevada,  
Reno

ORDER

Before: LEE and BRESS, Circuit Judges, and FITZWATER,\* District Judge.

Judges Lee and Bress voted to deny the petition for rehearing en banc, and Judge Fitzwater so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc, Dkt. No. 78, is **DENIED**.

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\* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

## **Appendix B**

*United States v. Romero-Lobato,*

No. 20-10280, Dkt. 75-1 and 75-2 (9th Cir. July 1, 2022),

Memorandum Disposition

**NOT FOR PUBLICATION****FILED****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
v.  
ERIC ROMERO-LOBATO,  
Defendant-Appellant.

No. 20-10280

D.C. Nos.  
3:18-cr-00049-LRH-CLB-1  
3:18-cr-00049-LRH-CLB

**MEMORANDUM\***

Appeal from the United States District Court  
for the District of Nevada  
Larry R. Hicks, District Judge, Presiding

Argued and Submitted May 18, 2022  
Pasadena, California

Before: LEE and BRESS, Circuit Judges, and FITZWATER, \*\*\* District Judge.

In this consolidated appeal following two separate jury trials, Eric Romero-Lobato appeals his convictions for conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, discharging a firearm during a crime of violence, carjacking, using a firearm during a crime of violence, and possession of a firearm

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\*\* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

by a felon. We have jurisdiction under 28 U.S.C. § 1291. Based on the Supreme Court’s intervening decision in *United States v. Taylor*, --- S. Ct. ---, 2022 WL 2203334 (2022), we vacate Romero-Lobato’s Count Three conviction under 18 U.S.C. § 924(c)(3)(A) and remand for resentencing. But we affirm his remaining convictions.

1. The district court did not abuse its discretion, *Wendell v. GlaxoSmithKline*, 858 F.3d 1227, 1231 (9th Cir. 2017), in admitting testimony by Steven Johnson as an expert witness in the field of firearm and toolmark analysis. A witness “who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if,” *inter alia*, “the testimony is based on sufficient facts or data,” “the testimony is the product of reliable principles and methods,” and “the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589–95 (1993). In assessing whether an expert’s proposed testimony is reliable, the district court may consider “(1) whether the method has been tested; (2) whether the method ‘has been subjected to peer review and publication;’ (3) ‘the known or potential rate of error;’ (4) whether there are ‘standards controlling the technique’s operation;’ and (5) the general acceptance of the method within the relevant community.” *United States v. Johnson*, 875 F.3d 1265, 1280 n.10 (9th Cir. 2017) (quoting *Daubert*, 509 U.S. at 592–95).

The district court did not abuse its discretion in finding that Johnson was qualified to testify as an expert in firearms and toolmark analysis based on his extensive experience in this field, including through the Washoe County Sheriff's Office, the National Firearms Examiner Academy, and the Association of Firearms and Toolmark Examiners. The district court also did not abuse its discretion in concluding that Johnson's testimony was "the product of reliable principles and methods . . . reliably applied . . . to the facts of the case." Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592. Based on the record before it, the court permissibly concluded that the toolmark method is testable, has been subjected to publication and peer review, has a low error rate, and has long been an accepted method in the forensic science community. Therefore, although the method may involve a degree of subjectivity, the district court was within its discretion to admit this evidence. *See Johnson*, 875 F.3d at 1281 (holding that district court did not err in allowing an expert to testify on the toolmark method). Contrary to Romero-Lobato's argument, Johnson did not testify to a "scientific certainty" about his findings. *United States v. Cazares*, 788 F.3d 956, 988 (9th Cir. 2015). Thus, the district court did not err in allowing Johnson's testimony.

2. We review *de novo* whether Joel Becerra-Macias's in-court identification of Romero-Lobato was so suggestive that it violated due process. *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996). To show a due process

violation, Romero-Lobato must demonstrate that “unnecessarily suggestive circumstances arranged by law enforcement” prompted Becerra-Macias’s testimony and created “a substantial likelihood of misidentification.” *Perry v. New Hampshire*, 565 U.S. 228, 239 (2012).

Romero-Lobato did not make this showing. 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. Romero-Lobato has not demonstrated that Becerra-Macias’s in-court identification, which was subject to cross-examination, was insufficiently reliable so as to violate due process.

3. The district court acted within its discretion, *United States v. Lemus*, 847 F.3d 1016, 1024 (9th Cir. 2016), by denying Romero-Lobato’s request for a mistrial based on Brittney Chilton’s testimony about DNA testing. Any suggestion from Chilton that defense counsel had an obligation to agree to destructive testing of a sweatshirt was cured through the court’s instructions to the jury and its reading of a stipulation that the parties had prepared on this point. *See id.* (“[A] mistrial is appropriate only where there has been so much prejudice that an instruction is unlikely to cure it.”) (quotations omitted). Chilton’s testimony also did not violate *Napue v. Illinois*, 360 U.S. 264 (1959), because it was not false and, regardless, was cured by the stipulation and other instructions.

4. The government's statements during closing argument did not constitute prosecutorial misconduct. Because Romero-Lobato failed to object at trial, we review for plain error. *United States v. Luong*, 965 F.3d 973, 987 (9th Cir. 2020). The government did not vouch for a witness, *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007), misstate the evidence, *United States v. Preston*, 873 F.3d 829, 844 (9th Cir. 2017), or "denigrate the defense as a sham," *United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999). The prosecution instead asked the jury to draw permissible inferences from facts in the record. *See United States v. McChristian*, 47 F.3d 1499, 1507 (9th Cir. 1995) (noting the government's "reasonably wide latitude" during closing).

5. We review de novo whether the evidence was sufficient to convict Romero-Lobato of attempted robbery. *United States v. Mincoff*, 574 F.3d 1186, 1191 (9th Cir. 2009). To determine if the evidence was sufficient, we ask whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1164–65 (9th Cir. 2010) (quotations omitted). Here, the government produced evidence demonstrating that Romero-Lobato likely possessed the weapon during a later crime, his family owned the getaway car, surveillance footage featured a man who looked "remarkably similar" to Romero-Lobato (with Facebook photos matching that footage), and the

restaurant owner identified him as the shooter. While Romero-Lobato argues that Becerra-Macias's identification was incorrect, a jury could reasonably have disagreed when presented with competing evidence. *Nevils*, 598 F.3d at 1164–65.

6. In *United States v. Taylor*, --- S. Ct. ---, 2022 WL 2203334 (June 21, 2022), the Supreme Court held that attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A). Romero-Lobato's Count Three § 924(c) conviction and resulting 120-month mandatory consecutive sentence therefore lack a lawful predicate. As a result, we vacate Romero-Lobato's § 924(c) conviction and sentence and remand for resentencing.

7. Admitting the carjacking victim's identification of Romero-Lobato did not violate due process. We review the constitutionality of pretrial identification procedures de novo. *United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021). To determine if a pretrial identification procedure violates due process, we ask “whether the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Id.* at 891. Assuming without deciding that the identification procedure was impermissibly suggestive, Leticia Henriet's testimony was sufficiently reliable. *Id.* Henriet had a clear view of Romero-Lobato during the carjacking. Henriet's testimony was also consistent with her account to the police and her description of the suspect. And her initial identification was made hours after the carjacking occurred, making it more reliable. See *Neil v. Biggers*,

409 U.S. 188, 199–200 (1972).

8. The government did not commit prosecutorial misconduct during closing argument of the carjacking trial. We review for plain error because Romero-Lobato failed to object to the contested statements at trial. *Luong*, 965 F.3d at 987. The prosecution did not vouch for Henriet or misstate the evidence. The government also did not give a false statement or “propound inferences” it had “very strong reason to doubt” when it discussed the import of the gun found on the passenger seat of Henriet’s car. *United States v. Reyes (Reyes II)*, 660 F.3d 454, 462 (9th Cir. 2011). Finally, the government did not denigrate the defense as a sham when it criticized Dr. Laney’s research as not involving real-life victims. The prosecutor’s characterization reflected the government’s position that Dr. Laney’s opinions were no substitute for Henriet’s first-hand observations. *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (the prosecutor may “strike hard blows based on . . . all reasonable inferences from the evidence”). Regardless, none of the challenged statements “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Alcantra-Castillo*, 788 F.3d 1186, 1191 (9th Cir. 2015).

9. We review *de novo* whether a jury instruction creates an unconstitutional presumption or inference. *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005). Here, the challenged jury instructions on proof of intent were

lawful. The instructions properly stated that the jury may infer intent from circumstantial evidence such as “objective facts and the actions of the defendant.” *United States v. Hernandez*, 952 F.2d 1110, 1114 (9th Cir. 1991). They also spoke in the permissive. *See Francis v. Franklin*, 471 U.S. 307, 314–15 (1985) (holding that a permissive-inference instruction does not violate the Due Process Clause when “the suggested conclusion” is supported by “reason and common sense . . . in light of the proven facts before the jury”). In this case, the conclusion that Romero-Lobato intended to cause death or serious bodily injury to Henriet flowed naturally from the proven fact that he pointed a gun at her.

10. Carjacking is a crime of violence under 18 U.S.C. § 924(c). *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) (per curiam). Romero-Lobato acknowledges that circuit precedent has resolved this question against him, and he raises it only to preserve the issue for future review.

11. Because Romero-Lobato did not object, we review for plain error his challenge to a condition of supervised release permitting warrantless searches. *United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012). We have previously upheld a supervised-release condition that is analogous to Romero-Lobato’s. *United States v. Betts*, 511 F.3d 872, 876 (9th Cir. 2007). The district court was also not required to state further its specific reasons for the condition in question. *See Wolf Child*, 699 F.3d at 1090 (a district court “is ordinarily not

required to explain on the record its reasons for imposing each condition of supervised release”). Accordingly, Romero-Lobato has not demonstrated plain error.<sup>1</sup>

**AFFIRMED in part; VACATED and REMANDED in part.**

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<sup>1</sup> Because we vacate Romero-Lobato’s sentence and remand for resentencing in light of *Taylor*, we do not address his argument that his sentence is substantively unreasonable.

## **Appendix C**

*United States v. Romero-Lobato,*

3:18-cr-00049-LRH-CLB, ECF No. 75-2 (D. Nev. Aug. 26, 2020),

**Judgment**

AUG 26 2020

## UNITED STATES DISTRICT COURT

District of Nevada

BY: **JUDGMENT IN A CRIMINAL CASE**

DEPUTY

UNITED STATES OF AMERICA

Plaintiff,

v.

ERIC ROMERO-LOBATO  
Defendant.Case Number: 3:18-cr-00049-LRH-CLB  
USM Number: 33923-048  
Christopher Frey, AFPD  
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 through 7 of the Indictment filed 5/30/2018  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 § 1951	Conspiracy to Commit Interference with Commerce by Robbery	3/4/2018	1
18 § 1951	Attempted Interference with Commerce by Robbery	3/4/2018	2

The defendant is sentenced as provided in pages 2 through 8 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.

8/20/2020

Date of Imposition of Judgment



Signature of Judge

Larry R. Hicks, United States District Judge

Name and Title of Judge

8/25/20

Date

DEFENDANT: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB

### ADDITIONAL COUNTS OF CONVICTION

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 § 924(c)(1)(A)(iii)	Discharge of a Firearm During and in Relation to a Crime of Violence	3/4/2018	3
18 § 922(g)(1) and 18 § 924(a)(2)	Felon in Possession of a Firearm	3/4/2018	4
18 § 2119	Carjacking	5/14/2018	5
18 § 924(c)(1)(A)(ii)	Use of a Firearm During and in Relation to a Crime of Violence	5/14/2018	6
18 § 922(g)(1) and 18 § 924(a)(2)	Felon in Possession of a Firearm	5/14/2018	7

DEFENDANT: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB**IMPRISONMENT**

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

**115 MONTHS as to Counts 1, 2, 4, 5 and 7; plus 120 MONTHS CONSECUTIVE as to Count 3;  
plus 84 MONTHS CONSECUTIVE as to Count 6, for a total of 319 MONTHS.**

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

FCI Sheridan;  
FCI Victorville.

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 \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:

**3 YEARS as to Counts 1, 2, 4, 5 and 7; and 5 YEARS as to counts 3 and 6; all concurrent.****MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB

### SPECIAL CONDITIONS OF SUPERVISION

1. **Search and Seizure** - You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release.
2. **Deportation Compliance** - If you are ordered deported from the United States, you must remain outside the United States, unless legally authorized to re-enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return.

DEFENDANT: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB**CRIMINAL MONETARY PENALTIES**

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

<b>TOTALS</b>	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$ 700.00	\$	\$	\$	\$

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.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
U.S. District Court, Clerks Office Attention: Finance Department 333 Las Vegas Blvd. South, Room 1334 Las Vegas, NV 89101			

Case No. 3:18-cr-00049-LRH-CLB

<b>TOTALS</b>	\$ <u>0.00</u>	\$ <u>0.00</u>
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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:

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\*\* 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: ERIC ROMERO-LOBATO  
CASE NUMBER: 3:18-cr-00049-LRH-CLB**SCHEDULE OF PAYMENTS**

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

**A**  Payment of \$700.00 due

not later than \_\_\_\_\_, or  
 in accordance with  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:  
 Special Assessment shall be paid at a monthly rate of not less than 10% of any income earned during incarceration and/or gross income while on supervision.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

## **Appendix D**

*United States v. Romero-Lobato,*  
3:18-cr-00049-LRH-CLB (D. Nev. Nov. 12, 2019),  
Excerpt from Trial 2 Transcript, Day 1

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE LARRY R. HICKS, SENIOR DISTRICT JUDGE  
---o0o---

UNITED STATES OF AMERICA, :  
Plaintiff, : No. 3:18-CR-49-LRH-CBC  
-vs- : November 12, 2019  
ERIC ROMERO-LOBATO, : Reno, Nevada  
Defendant. : Volume 1

TRANSCRIPT OF JURY TRIAL

## **APPEARANCES:**

FOR THE PLAINTIFF: MEGAN RACHOW and PENELOPE BRADY  
Assistant United States Attorneys  
Reno, Nevada

FOR THE DEFENDANT: CHRISTOPHER FREY and LAUREN GORMAN  
Assistant Federal Public Defenders  
Reno, Nevada

CERTIFIED INTERPRETERS: OLIVIA REINSHAGEN-HERNANDEZ and VANESSA LOPEZ

**Reported by:** Margaret E. Griener, CCR #3, FCRR  
Official Reporter  
400 South Virginia Street  
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1                   THE COURT: All right.

2                   MR. ROMERO: Thank you.

3                   THE COURT: Thank you very much.

4                   MR. FREY: Your Honor, the defense would have  
5 one matter.

6                   THE COURT: All right. Go ahead, please.

7                   MR. FREY: Your Honor, on Friday we received a  
8 report that was yet to be Bates stamped. It reflected a  
9 pretrial interview with the owner of the Aguitas. The owner  
10 of the Aguitas was the victim in this case, he was attacked by  
11 a man who jumped over the bar.

12                  He later was presented with a photo lineup and  
13 asked to make an identification. The photo lineup contained a  
14 picture of Mr. Jesus Romero, and on that occasion the bar  
15 owner could not make an identification.

16                  Last Friday apparently the same photo lineup was  
17 presented to the bar owner, and he related to the detective  
18 and I believe to Ms. Rachow that now he believes that that  
19 photo lineup contains a photo of the suspect from the Aguitas  
20 robbery.

21                  I say this to lay a foundation for a renewal of  
22 the motion to suppress that I filed early on in the  
23 litigation. One of the components of the motion was in  
24 essence to have excluded any in-court identification by  
25 Mr. Becerra-Macias, the owner of the Aguitas Bar and Grill.

1 One of the reasons was because he failed to make an  
2 out-of-court identification of Mr. Romero-Lobato.

3                   Hence, the issue for the Court is whether or not  
4 the in-court identification of Mr. Romero-Lobato by the bar  
5 owner would be impermissibly suggestive and would fall below  
6 constitutional standards under the Fifth Amendment.

7                   I made the constitutional argument, I made an  
8 evidentiary argument under 403. The Court denied that and I  
9 believe ruled that in essence it would go to the weight.

10                  I would just renew the motion on these new facts  
11 because it appears as if just four days ago Mr. Becerra-Macias  
12 identified definitively the wrong man. If, indeed,  
13 Mr. Becerra-Macias is going to take the stand and say that it  
14 was Mr. Romero-Lobato, that he will be identifying a person  
15 who is not in that photographic lineup.

16                  So what I'm suggesting to the Court is that  
17 there is almost an unmistakable likelihood here that  
18 Mr. Becerra-Macias will mistakenly identify Mr. Romero Lobato  
19 in contradiction to the person he identified just four days  
20 ago.

21                  So it appears as if the risk of  
22 misidentification has fully ripened, and I believe that the  
23 identification on the stand will be impermissibly suggestive.  
24 It will be reflective of the risk that I just mentioned, and I  
25 believe that Mr. Becerra-Macias could be precluded from making

1 an in-court identification of Mr. Romero-Lobato.

2 THE COURT: All right. Ms. Rachow?

3 MS. RACHOW: Your Honor, as Mr. Frey correctly  
4 told the Court, when Mr. Becerra-Macias was doing a pretrial,  
5 he was looking through the photo lineup, and he thought that  
6 he now saw one of the men who robbed him.

7 As the Court is well aware, there are two  
8 individuals who attempted to rob the Aguitas Bar. As alleged,  
9 it's Mr. Eric Romero-Lobato is the one who fired the gun, but  
10 the other attempted robber is the one who went over the  
11 counter and was wrestling with Mr. Becerra-Macias.

12 Mr. Becerra-Macias did not identify to us anyone  
13 in the photo lineup. We moved on to the next subject.

14 The defendant himself is not in the photo  
15 lineup, and at this point we do not know if Mr. Becerra-Macias  
16 will be able to identify the defendant or not from the stand,  
17 but, again, it does go to the weight.

18 The information has been turned over to the  
19 defense so that they can adequately cross-examine  
20 Mr. Becerra-Macias, and it's up to the jury to decide whether  
21 or not they believe an in-court identification, if one should  
22 occur in this case, or not.

23 THE COURT: All right.

24 MR. FREY: Your Honor, if I could just  
25 supplement that?

1                   THE COURT: Yes.

2                   MR. FREY: My understanding is that because  
3 Mr. Becerra-Macias was being held from behind by the person  
4 who jumped over the bar, Mr. Becerra-Macias told the police  
5 that he could not identify that person, but rather could  
6 identify the shooter who was on the opposite side of the bar.

7                   And I can be corrected if I'm wrong. I believe  
8 that's my recollection of Mr. Becerra-Macias' statement.

9                   Therefore when he's presented with a lineup at  
10 the U.S. Attorney's office, the implication is, "Well, now can  
11 you identify the only person that you said you could who is  
12 the shooter?

13                   So there does not appear to be any confusion  
14 about the person he was asked to identify. He's being asked  
15 to identify the man who was holding the gun, not a man who had  
16 him in a choke hold behind him.

17                   THE COURT: Ms. Rachow?

18                   MS. RACHOW: Your Honor, both of the men  
19 approached Mr. Becerra-Macias and sat at the bar and had  
20 ordered beers. There's a time period of approximately ten  
21 minutes that the men are in the bar before the actual  
22 attempted robbery occurs.

23                   The individual who jumped the counter was  
24 somebody that Mr. Becerra-Macias was conversing with. That  
25 individual asked Mr. Becerra-Macias if Mr. Becerra-Macias was

1 looking for security. That individual wrote down his name and  
2 phone number and gave it to Mr. Becerra-Macias.

3 Mr. Becerra-Macias had an opportunity of  
4 approximately ten minutes to observe both men, speak to the  
5 one man, so any identification will not be unduly prejudicial  
6 in the courtroom.

7 Once again, it's subject to cross-examination,  
8 and the defense has been provided with that information.

9 THE COURT: All right. The Court's view of this  
10 is that it goes to the weight, not to the admissibility, but I  
11 will allow the defense to renew the objection depending upon  
12 the testimony of course. It hasn't been presented.

13 But just to give you a fair heads-up, it's the  
14 Court's view that this would go to weight, not to the  
15 admissibility.

16 Is there anything else?

17 MS. RACHOW: Not on behalf of the government.

18 MR. FREY: Not from the defense, your Honor.

19 THE COURT: All right. Okay. Let's bring in  
20 the prospective jurors, please, and, Madam Clerk, please let  
21 me know when they're here.

22 THE CLERK: Thank you, your Honor.

23 (A recess was taken.)

24 (The venire of prospective jurors is  
25 present.)

THE COURT: Good morning. Please have a seat.

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1 when you are here.

2 So I would caution you again not to read or see  
3 or expose yourself to any information that may concern this  
4 case, not to discuss it in any way among you. Of course, you  
5 can talk about anything else, but I would suggest staying away  
6 from politics, but, in any event, I just make the point not to  
7 discuss the case.

11 You may go ahead and step down.

12 (The jury was excused from the  
courtroom.)  
13 (The evening recess was taken.)

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16 I certify that the foregoing is a correct  
17 transcript from the record of proceedings  
in the above-entitled matter.

18 /s/Margaret E. Griener 12/13/2020  
19 Margaret E. Griener, CCR #3, FCRR  
Official Reporter

## **Appendix E**

*United States v. Romero-Lobato,*

3:18-cr-00049-LRH-CLB, ECF No. 59 (D. Nev. Feb. 25, 2019),

Order re: Daubert Hearing and Motion to Sever

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 3:18-cr-00049-LRH-CBC

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ORDER

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v.

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ERIC ROMERO-LOBATO,

Defendant.

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Defendant Eric Romero-Lobato has filed several substantive pre-trial motions. First, he has filed a motion to sever his charges in this case<sup>1</sup> into two separate trials. (ECF No. 25). Defendant seeks to sever his first four charges (conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, discharge of a firearm during a crime of violence, and felon in possession of a firearm) from his latter three charges (carjacking, brandishing of a firearm during a crime of violence, and felon in possession of a firearm). Second, he filed a motion to suppress two identification statements: any potential in-court identification that might be made by the Hobbs Act robbery victims and the out-of-court show-up identification made by the carjacking victim. (ECF No 26). Third, defendant filed a motion to dismiss his third charge (discharge of a firearm during a crime of violence) because he asserts that neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery qualifies as a crime of violence. (ECF No. 27). Fourth, defendant filed a *Daubert* motion to preclude the testimony of firearms expert Steven Johnson, a witness for the

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<sup>1</sup> Defendant has also been charged in this Court with illegal reentry by a previously-deported alien in a separate case (Case No. 3:18-cr-00047-LRH-CBC).

1 government. (ECF No. 51). Fifth, defendant filed a motion requesting that the potential jurors be  
 2 required to fill out a written questionnaire because of the nature and circumstances of his case.  
 3 (ECF No. 32). Defendant requested an evidentiary hearing on his motion to suppress and motion  
 4 to preclude and oral argument on his motion to sever. The Court will address several of defendant's  
 5 motions here.

6 **Motion to Suppress**

7 After considering the record and the pleadings in this case, the Court will deny defendant's  
 8 motion to suppress without prejudice. As to the in-court identification, defendant essentially seeks  
 9 to suppress statements that have yet to be made and may never be made. He argues that the  
 10 "atmosphere of the trial is inherently suggestive," that "neither witness can describe the  
 11 perpetrator's [features]," and that the robbery victims may have seen his picture in an online news  
 12 story covering his arrest. (ECF No. 26 at 8–10). As to his first argument, inherent suggestiveness  
 13 is not, by itself, enough to justify the exclusion of identification testimony. *See Neil v. Biggers*,  
 14 409 U.S. 188, 197 (1972) (requiring suppression of identification testimony when the suggestive  
 15 procedure gives rise to a "very substantial likelihood of misidentification"). The latter two  
 16 arguments are little more than speculation at this point. The robbery victims have not yet testified  
 17 in court, so defendant cannot know that if given the opportunity, they would identify him as one  
 18 of their attackers. When presented with an opportunity to identify their attackers from a photo  
 19 lineup, the robbery victims indicated that none of the photos matched their recollection of their  
 20 attackers, including a photo of defendant's brother (who allegedly has a similar appearance). (ECF  
 21 No. 26 at 2). Defendant also speculates as to whether the victims saw defendant's picture in online  
 22 news articles reporting on his arrest, and he freely admits that he does not know if they did. (ECF  
 23 No. 26 at 9–10). In any event, these arguments speak more to the credibility of the robbery victims'  
 24 testimony rather than the admissibility of their testimony. Defendant is free to make these  
 25 arguments to the jury or to renew his motion to suppress at the appropriate time during trial.

26 As to the portion of defendant's motion to suppress the show-up identification, in lieu of  
 27 making an innocent carjacking victim undergo the rigors of testifying on two separate occasions,  
 28 the Court will reconsider defendant's motion upon hearing the testimony of the law enforcement

1 officers involved in the show-up followed by the victim or witnesses during trial. The Court will  
 2 also consider hearing individual identification evidence outside the presence of the jury before  
 3 ruling on its admissibility.

4 **Motion for a Juror Questionnaire**

5 Defendant has also filed a motion requesting the use of a case-specific questionnaire,  
 6 whereby he and the government would submit a series of written questions to each prospective  
 7 juror prior to jury selection. (ECF No. 32 at 4). He argues that such a procedure is necessary in  
 8 this case because the fact that he is Hispanic may invoke racial prejudices in prospective jurors.  
 9 (*Id.* at 2). Defendant also asserts that it is necessary because the two predicate crimes he is charged  
 10 with – armed robbery and carjacking – are severe enough that the jury’s “strong feelings” for these  
 11 crimes may automatically prejudice them against him. (*Id.*) These arguments are unpersuasive.  
 12 Defendant has been charged with two violent predicate crimes – armed robbery and carjacking –  
 13 and has not pointed to anything other than the charged crimes themselves to support the usage of  
 14 a questionnaire. Defendant’s argument about his race is also without merit, as it presumes that  
 15 prospective jurors harbor animus towards Hispanics. The jury selection process is specifically  
 16 designed to remove jurors from the juror pool who have inappropriately strong feelings about  
 17 members of the defendant’s race and the offenses he is charged with. Defendant has not  
 18 demonstrated how questioning by the Court during jury selection would be insufficient to discover  
 19 any biases residing within the prospective jurors and rehabilitate them, or, failing that, excuse them  
 20 from the juror pool. Vague allegations of potential implicit bias are insufficient to convince the  
 21 Court that juror questionnaires are needed. As always, defendant may submit questions for the  
 22 Court to consider during jury selection.

23 ***Daubert* Hearing on Firearms Expert**

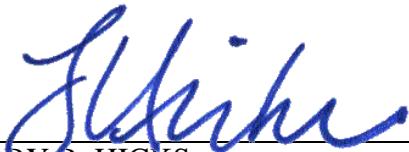
24 Defendant requests that the Court preclude the government’s firearms expert, Steven  
 25 Johnson, from testifying regarding the ballistic similarities between a firearm found in defendant’s  
 26 car following a high-speed chase and a spent shell casing found at the scene of the Hobbs Act  
 27 robbery. (ECF No. 51 at 3–4). Defendant argues that “firearms analysis is neither scientifically  
 28 valid nor reliable,” and that several recent studies have cast doubt on the reliability of ballistics

1 comparisons. (*Id.* at 4, 6-7). The government filed an objection to defendant's request for a  
2 *Daubert* hearing, arguing that the science of ballistics comparison has been used for several  
3 decades and admitted by numerous courts without issue. (ECF No. 55 at 1). Based on the Court's  
4 review of recent cases involving ballistics comparisons, the Court will hold a *Daubert* hearing to  
5 determine the reliability of Johnson's method of comparing the ballistic markings from the spent  
6 shell casing and the barrel of the gun found with defendant. *See, e.g., U.S. v. Otero*, 849 F. Supp.2d  
7 425 (D.N.J. 2012); *U.S. v. Monteiro*, 407 F. Supp.2d 351 (D. Mass. 2006).

8 As to defendant's motion to sever, the Court will schedule oral argument on the motion at  
9 the same time and following the *Daubert* hearing and argument. Based on the undersigned's  
10 limited availability in March 2019, the Court will schedule the *Daubert* hearing and oral argument  
11 on the motion to suppress for **Wednesday, April 10, 2019, at 1:30 pm**. Finally, the Court will  
12 address the motions not decided in this order with a written order before or from the bench at the  
13 pre-trial calendar call.

14 IT IS SO ORDERED.

15 DATED this 25th day of February, 2019.

16   
17 LARRY R. HICKS  
18 UNITED STATES DISTRICT JUDGE  
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