No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARIO RUVALCABA-GARCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

When a trial court errs by failing to exercise its "gatekeeping" role of determining whether expert testimony is relevant and reliable under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), should the reviewing court remedy the error by:

- remanding for a new trial if the error was not harmless, as the Fifth and Tenth Circuits do;
- making the initial *Daubert* decision itself, as the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits do; or
- remanding for the trial court to make the initial *Daubert* determination, as the First, Third, and Federal Circuits do.

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

Petitioner Mario Ruvalcaba-Garcia respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 17, 2019.

OPINIONS BELOW

On May 10, 2019, the Ninth Circuit Court of Appeals issued a published opinion affirming Mr. Ruvalcaba's conviction for illegal reentry under 8 U.S.C. § 1326. *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183 (9th Cir. 2019) (attached here as Appendix A). Mr. Ruvalcaba then filed a petition for panel rehearing and rehearing en banc. On July 17, 2019, the panel denied Mr. Ruvalcaba's petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

On May 10, 2019, the Court of Appeals affirmed Mr. Ruvalcaba's conviction. *See* Appendix A. On July 17, 2019, the Court of Appeals denied rehearing. *See* Appendix B. The Court thus has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Evidence 702 states:

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:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

INTRODUCTION

The Court's watershed decisions in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), bestowed a "gatekeeping" role on trial courts, requiring them to vet expert witnesses to ensure that their testimony rests on relevant and reliable principles and methods. But judges are human, and they sometimes fail to fulfill this "gatekeeping" role. In the heat of trial, such errors are understandable and perhaps even inevitable.

What is *not* inevitable or understandable, however, are the divergent approaches the courts of appeals have taken to remedy this error. When a trial court fails to make a *Daubert* determination, two courts of appeals determine whether the admission or exclusion of the evidence was harmless; if not, they remand for a new trial. Five courts of appeals step in to assume the role of a factfinder, poring over the evidence to decide in the first instance whether the expert testimony was relevant and reliable. And three courts of appeals adopt a hybrid approach, acting as factfinder when the record contains sufficient evidence and remanding for the trial court to make a *Daubert* determination when it does not.

These three approaches lead to very different results and frequently control the outcome of the case. Not only that, they raise serious questions about the fundamental role of appellate judges as courts of first review or factfinders in the first instance. To avoid the landmines inherent in two of these approaches, the Court should resolve this circuit split by holding that when a trial court abdicates its *Daubert* "gatekeeping" role, and the admission or exclusion of the expert testimony was not harmless, the proper remedy is to remand for a new trial.

STATEMENT OF THE CASE

In 2016, a Border Patrol agent arrested Mr. Ruvalcaba north of the international border between the United States and Mexico. The Government charged him in a one-count information with illegally reentering the United States after a prior deportation under 8 U.S.C. § 1326, and the case proceeded to trial.

At the first trial, the prosecutor presented prior deportation documents for a person named "Juan Macias-Garcia," claiming that Mr. Ruvalcaba used this name as an alias. The documents also contained a nearly-blacked-out photo and a barely-visible fingerprint. To establish that this fingerprint belonged to Mr. Ruvalcaba, the prosecutor sought to admit the testimony of a fingerprint expert, David Beers.

During voir dire, Mr. Beers testified that he had worked as a fingerprint technician for over thirty years. He admitted, however, that he had never earned a specific license or certification as a fingerprint technician. He also admitted that he had never taken any tests or had his conclusions in any cases independently verified. He confirmed that he was not a member of any relevant professional organizations or groups and that he was not required to undergo any continuing legal education in the field. He also admitted that his analysis of the fingerprints in this case had not complied with a standard process known as "ACE-V." Finally, Mr. Beers acknowledged that he did not know how many points of comparison existed in the fingerprints analyzed in this case and that he had no documentation stating as much. At the end of voir dire, defense counsel objected that Mr. Beers's expert testimony was not reliable under *Daubert.*

After some additional questioning, the trial court overruled defense counsel's objection to Mr. Beers's testimony. The court did not go through the *Daubert* factors or make any findings of fact. Instead, it simply stated, "I find that there's a basis for Mr. Beers to offer an opinion on the basis of his fingerprint comparison in this case." The district court instructed the jury to give Mr. Beers's testimony "as much weight

as you think it deserves" and permitted him to testify as an expert. The jury could not reach a unanimous verdict, and the case ended in a mistrial.

In the second trial, when the prosecutor again sought to admit Mr. Beers as an expert witness, the court stated, "That's a determination for the jury." Defense counsel then conducted the same voir dire and elicited the same answers from Mr. Beers. At the conclusion of voir dire, the following exchange occurred:

> Prosecutor: [The] government moves to qualify [Mr. Beers] as an expert, a fingerprint technician.
>
> Judge: Again, that's an issue for the jury. Do you have any objection to the – [prosecutor] eliciting opinions?
>
> Defense: Yes, Your Honor, we would object to the qualifying as an expert.
>
> Judge: The objection is overruled. Ladies and gentlemen, it's up to you to decide whether the witness by virtue of his experience and training is qualified to give opinions . . . .

At the end of trial, the second jury returned a guilty verdict. Mr. Ruvalcaba appealed his conviction to the Ninth Circuit Court of Appeals.

In a published opinion, the Ninth Circuit agreed with Mr. Ruvalcaba that the trial court had improperly delegated its *Daubert* "gatekeeping" role to the jury. *See* Appendix A at 11. But the Ninth Circuit disagreed with Mr. Ruvalcaba about the proper remedy for this error. Mr. Ruvalcaba had pointed to the Ninth Circuit's decision in *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (en banc), which held that when a trial court fails to make a *Daubert* determination, "we remand for a new trial." 740 F.3d at 466; *see also id.* at 460 (holding that when "the erroneous admission of evidence actually prejudiced the defendant, such that

the error was not harmless, the appropriate remedy is a new trial"). But the panel disagreed, pointing to language in *Barabin* that when the record is "sufficient to determine whether [the] expert testimony is relevant and reliable," an appellate court "may make such findings" on appeal. Appendix A at 12. The panel then took on *Daubert*'s "gatekeeping" role in the first instance, looking to evidence of Mr. Beer's training, experience, and methodology in the record to find his testimony reliable. Appendix A at 13-14. Because "Beers's testimony satisfied the admissibility requirements under *Daubert*," the panel concluded that "the lack of an explicit finding of reliability was harmless" and affirmed Mr. Ruvalcaba's conviction. Appendix A at 14 (quotations omitted).

Mr. Ruvalcaba filed a petition for panel rehearing and rehearing en banc. In this petition, he argued *inter alia* that the panel's approach of making its own initial *Daubert* finding violated fundamental notions of a "reviewing court." He also contended that remanding for the trial court to fulfill its "gatekeeping" role would invite *post-hoc* rationalizations to permit the original result of the trial to stand. The only workable option, Mr. Ruvalcaba argued, was to determine whether the admission or exclusion of the expert testimony affected the outcome of the trial and to remand for a new trial if it did.

The Ninth Circuit denied Mr. Ruvalcaba's petition for rehearing. *See* Appendix B. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeal Currently Employ Three Different Remedies to Correct a Trial Court's Failure to Fulfill Its *Daubert* "Gatekeeping" Role.

A quarter century ago, this Court held that when a party proffers testimony from an expert witness, the judge must play a "gatekeeping role" by ensuring that the testimony "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. Such a role is necessary because experts are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Id.* at 592. To fulfill this "gatekeeping" role, judges look to four factors set forth in Federal Rule of Evidence 702 or the factors listed in *Daubert*[1] itself. *See id.* at 592-94. In applying these factors, judges should be concerned "not [with] the correctness of the expert's conclusions but the soundness of his methodology." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010).

But it is not uncommon for courts to fail to fulfill their *Daubert* gatekeeping role due to legal error, a busy court schedule, or a witness who goes beyond the scope of their anticipated testimony. The question then becomes: how should a reviewing court remedy this error?

---

[1] *See United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (describing the *Daubert* factors as: "1) whether a theory or technique can be tested; 2) whether it has been subjected to peer review and publication; 3) the known or potential error rate of the theory or technique; and 4) whether the theory or technique enjoys general acceptance within the relevant scientific community") (citing *Daubert*, 509 U.S. at 592-94).

The Courts of Appeal have taken three different approaches. The first approach (adopted by the Fifth and Tenth Circuits) considers whether the expert testimony affected the outcome of the trial—i.e., whether its admission or exclusion was harmless. See *Carlson v. Bioremedi Therapeutic Sys., Inc.*, 822 F.3d 194, 202 (5th Cir. 2016) ("Even where a district court abuses its discretion, we will still affirm if the error did not affect the substantial rights of the complaining party."); *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1229 (10th Cir. 2003) (considering whether "the erroneous admission of this expert testimony was harmless"). If the error *was* harmless, the inquiry ends. But if it was *not* harmless, the Fifth and Tenth Circuits remand for a new trial. *See Carlson*, 822 F.3d at 202; *Dodge*, 328 F.3d at 1229.

In the second approach (adopted by the Fourth, Sixth, Seventh, and Eleventh Circuits), the reviewing court acts as the original *Daubert* "gatekeeper." Judges in these circuits will comb the record to glean details of highly technical and scientific testimony and use them to decide whether the expert is relevant and reliable. *See Nease v. Ford Motor Co.*, 848 F.3d 219, 231-34 (4th Cir. 2017); *United States v. Smithers*, 212 F.3d 306, 315-17 (6th Cir. 2000); *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760-63 (7th Cir. 2010); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1238-55 (11th Cir. 2005). Because no judge has ever made an initial finding on the expert's relevance or reliability, these courts of appeals thus act as the primary factfinder.

The third approach (adopted by the First, Third, and Federal Circuits) proceeds with the initial *Daubert* determination when the record is sufficiently

developed and remands to the trial court when it is not—often doing both in the same case. For instance, in *Smith v. Jenkins*, the First Circuit conducted a *Daubert* analysis on two categories of expert testimony but "le[ft] the third to the district court to consider on remand after performing a *Daubert* analysis." 732 F.3d 51, 65 (1st Cir. 2013). *See also Elcock v. Kmart Corp.*, 233 F.3d 734, 749–50 (3d Cir. 2000) (finding that the expert's testimony was unreliable on the first and fourth *Daubert* factors but remanding for an evidentiary hearing on the remaining ones); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1369 (Fed. Cir. 1999) (same). In other words, if the court of appeals *can* make an initial *Daubert* determination, it will; otherwise, it will remand.

Confusion over these different approaches also creates *intra*-circuit splits, as seen by the Ninth Circuit's own fractured precedent. Addressing the remedy issue en banc, the Ninth Circuit appeared to adopt the first approach, stating that "'[w]hen the district court has erroneously admitted or excluded prejudicial evidence, we remand for a new trial.'" *See Barabin*. at 466. But in Mr. Ruvalcaba's case, the Ninth Circuit backtracked, adopting the second approach and claiming that when "the record is sufficient to determine whether the expert testimony is relevant and reliable," a reviewing court "*may* make such findings" on appeal. *Ruvalcaba-Garcia*, 923 F.3d at 1190 (emphasis added). So even when a circuit appears to have adopted one approach, some judges may abandon it and apply another under different circumstances. In other words, the lack of guidance from this Court promotes both inter- and intra-circuit splits.

II. These Differing Remedies Lead to Widely Inconsistent Results on Important Trial Issues.

This issue is important because it affects the outcomes of thousands of cases across the country. Presentation of expert evidence is the norm in a vast majority of civil trials and a good number of criminal ones. But given the expanding dockets and heavy case loads of many jurisdictions, a significant number of overworked judges may neglect their *Daubert* gatekeeping role, take shortcuts, or forget about it altogether. Indeed, the judge in Mr. Ruvalcaba's case who failed to make *Daubert* findings was a seasoned veteran, having spent twelve years as a federal prosecutor and over two decades on the bench. So even though this issue arises repeatedly, no path to resolution exists absent the Court's intervention.

III. This Case Provides an Ideal Vehicle to Resolve the Question.

Not only is a grant of certiorari necessary to resolve this inter-circuit conflict, Mr. Ruvalcaba's case provides the ideal vehicle to do so. Because Mr. Rosales raised and argued this issue at every stage of proceedings, it has been fully exhausted. What's more, the admission of Mr. Beers's expert testimony was undeniably prejudicial—even *with* his testimony the first jury could not agree that the deportation documents related to Mr. Ruvalcaba. And *without* his testimony, all the jury would have had to connect him to the prior deportation was a set of documents in another man's name with a nearly-blacked out photograph. Because the Court's resolution of this issue unquestionably affected the outcome in Mr. Ruvalcaba's case, it is a perfect vehicle for review.

IV. The Court Should Adopt the Fifth and Tenth Circuit's Approach of Remanding for a New Trial if the Error Was Not Harmless.

As discussed, the courts of appeals have taken three distinct approaches to remedying a trial court's failure to fulfill its *Daubert* "gatekeeping" role. But upon further examination, the only workable remedy is the first approach of remanding for new trial when the error is prejudicial.

The second option of permitting appellate courts to make a *Daubert* finding in the first instance (which the Ninth Circuit did here) is not feasible because it violates basic notions of a "reviewing court." A reviewing court is "not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Particularly where an inquiry is "highly fact-dependent," a district court is in the "best position to resolve it in the first instance." *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1256 (9th Cir. 2008). *See also Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011) ("[W]e believe that it would be improper for us to rule on the issue before any consideration by the district court ."). After all, an appellate court's decision "will be better informed and more accurate" when it first obtains the district court's findings. *United States v. Ameline*, 409 F.3d 1073, 1082 (9th Cir. 2005) (en banc). And ultimately, a court of appeals is "a court of review, not of first view." *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005)

Permitting appellate courts to function as factfinders also leads to inconsistent and results-oriented decisions. In *Barabin*, for instance, the "massive" motion in limine hearing on expert testimony resulted in two notebooks "about eight inches thick" of *Daubert* evidence. *See* Oral Argument, Case No. 10-36142, at 4:13, 23:04, 23:29. Despite this, the *Barabin* court found that "the record before us is too sparse to determine whether the expert testimony is relevant and reliable." *Id.* Yet in Mr. Ruvalcaba's case, the *Daubert* evidence consisted of a scant 20 pages of voir dire transcript, which the Ninth Circuit found "sufficient" to make a reliability determination. Appendix A at 13. How could the *Barabin* record have been "too sparse" to make a *Daubert* finding while Mr. Ruvalcaba's record was "sufficient"? The only answer is that the *Barabin* panel did not want to reach the *Daubert* issue while Mr. Ruvalcaba's panel did. So leaving this determination up to the reviewing court has the perverse effect of allowing appellate judges to cherry-pick the cases where they prefer to act as a factfinder.

Furthermore, conducting a *Daubert* fact-finding is an arduous and time-consuming process. In *McClain v. Metabolife Int'l, Inc.*, for instance, the Eleventh Circuit had to undertake a tedious 17-page examination of multiple expert witnesses to fulfill the "gatekeeping" role. 401 F.3d 1238-55. Conducting an initial examination of this magnitude takes substantially more resources than reviewing the conclusions of a previous factfinder. So adopting the second approach of having an appellate court act as the *Daubert* "gatekeeping" factfinder is unsound as both a matter of principle and practice.

Nor should the Court adopt the third approach of permitting a remand for the trial court to make a *Daubert* finding. Such an approach "undermines *Daubert*'s requirement that *some* reliability determination must be made by the trial court *before* the jury is permitted to hear the evidence." *Mukhtar v. Cal. State Univ., Hayward*, 319 F.3d 1073, 1074 (9th Cir. 2003), *overruled by Barabin*, 740 F.3d 457 (emphasis in original). Furthermore, if the appellate court remands for the trial court to decide *only* whether the expert's testimony was reliable, the trial court will be strongly tempted to make a *Daubert* decision that permits the original result of the trial to stand. As the Tenth Circuit explained, "no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts." *Dodge*, 328 F.3d at 1229. *See also Mukhtar*, 319 F.3d at 1074 (stating that remand for a *Daubert* decision "creates an undue risk of post-hoc rationalization").

Because the second and third approaches are unworkable, the Court should adopt the approach of the Fifth and Tenth Circuits—remanding for a new trial if the admission or exclusion of the expert testimony was prejudicial. Given that most errors will be harmless, courts will only employ this remedy in a small percentage of cases, which will not unduly burden lower courts or expend resources unnecessarily. This approach will also avoid saddling appellate courts with the task of combing through copious trial records to render findings of fact in the first instance—a job they were never designed to do. To resolve this intractable inter-circuit split, the Court should hold that the remedy for a trial court's failure to fulfill its *Daubert*

gate-keeping role is to remand for a new trial when the admission or exclusion of the expert testimony caused prejudice.

CONCLUSION

For these reasons, the Court should grant Mr. Ruvalcaba's petition for a writ of certiorari.

Respectfully submitted,

Date: October 9, 2019

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MARIO RUVALCABA-GARCIA, *Defendant-Appellant.*	No. 17-50288 D.C. No. 3:16-cr-02363-LAB-1 OPINION

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, Chief District Judge, Presiding

Argued and Submitted April 11, 2019
Pasadena, California

Filed May 10, 2019

Before: Susan P. Graber and Jay S. Bybee, Circuit Judges,
and M. Douglas Harpool,* District Judge.

Per Curiam Opinion

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* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed a conviction for illegally reentering the United States after having been removed, in a case in which the defendant argued that the district court abused its discretion by admitting expert testimony that a fingerprint taken during the underlying removal proceedings belonged to the defendant.

The panel held that the district court abused its discretion by failing to make an explicit reliability finding before admitting the fingerprint analyst's expert testimony, as required under *Daubert v. Merrill Dow Pharm, Inc.*, 509 U.S. 579 (1993), and Fed. R. Evid. 702, but that the error was harmless because the record is sufficient to determine that the testimony had a reliable basis in the knowledge and experience of the relevant discipline.

The panel addressed remaining arguments in an accompanying memorandum disposition.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Kara Hartzler (argued), Federal Defenders of San Diego Inc., San Diego, California, for Defendant-Appellant.

Zachary J. Howe (argued) and Nicole Ries Fox, Assistant United States Attorneys; Helen H. Hong, Chief, Appellate Section; Adam L. Braverman, United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff-Appellee.

OPINION

PER CURIAM:

Mario Ruvalcaba-Garcia was convicted of violating 8 U.S.C. § 1326(a) for illegally reentering the United States after having been removed. His conviction was predicated on a removal order from 2015, and his defense at trial was that he was not the person removed in 2015. To prove he was that person, the government called as an expert witness a fingerprint analyst who testified that a fingerprint taken during the 2015 removal proceedings belonged to Ruvalcaba.

Ruvalcaba argues on appeal that the district court abused its discretion by admitting the expert's testimony without first finding it "relevant" and "reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *see* Fed. R. Evid. 702. We agree that the district court's "failure to make these gateway determinations was an abuse of discretion." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014) (en banc). But because "the record is sufficient to determine [that the] expert testimony [was]

relevant and reliable," *id.*, we conclude that the error was harmless and affirm.[1]

I

Ruvalcaba is a native and citizen of Mexico who does not have legal authorization to enter or remain in the United States. In September 2016, he was apprehended by Border Patrol agents a few miles north of the port of entry at Tecate, California. He was arrested and charged with illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326(a), a crime that requires the government to prove "that the defendant 'left the United States under order of exclusion, deportation, or removal, and then illegally reentered.'" *United States v. Raya-Vaca*, 771 F.3d 1195, 1201 (9th Cir. 2014) (quoting *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1079 (9th Cir. 2011)).

The government predicated the illegal-reentry charge on an expedited removal order from June 2015. *See* 8 U.S.C. § 1225(b). Although the documents from the 2015 removal proceedings identify the person removed as "Mario Ruvalcaba-Garcia AKA Macias-Garcia, Juan," the documents are all signed with the name "Juan Macias-Garcia" or the initials "JMG." Ruvalcaba's primary defense to the illegal-reentry charge was that the government could not prove that he was the person removed in 2015. Among the 2015 removal documents, however, was a Verification of Removal form that contained not only a signature but also a photograph and a fingerprint of the removed individual.

[1] We address Ruvalcaba's remaining arguments in an accompanying memorandum disposition.

Before trial, the government produced an expert report by David Beers, a fingerprint analyst, who would testify that the fingerprint on the 2015 Verification of Removal matched a fingerprint he had taken from Ruvalcaba. At a pretrial motions hearing, Ruvalcaba requested an opportunity to challenge the admissibility of Beers's expert testimony. Although the district court had previously admitted Beers as an expert in several other cases, Ruvalcaba wanted to take "a crack at it." The court agreed and explained that, after the government laid the foundation for Beers to testify as an expert, Ruvalcaba would be permitted to question him about "the foundation of his expertise, before we get to his ultimate opinion, if we do."

The case proceeded to trial. The government introduced into evidence a copy of the 2015 Verification of Removal, but the quality of the copy was quite poor and the photograph and fingerprint were nearly indiscernible. The government then called Beers to testify about his fingerprint analysis. The parties questioned Beers about his qualifications and methodology, with Ruvalcaba noting at the outset that he was "doing this with an eye towards Daubert." Beers testified that he had worked as an FBI fingerprint technician and instructor for 33 years, reviewing more than 300,000 fingerprints and testifying as an expert more than 200 times. He had never "not been qualified [in any proceeding] as an expert in fingerprints." He uses "the Henry system of classification and identification," which he described as the prevailing fingerprinting methodology that analyzes fingerprints according to unique points of identification. On cross-examination, Beers testified that he had not taken continuing education courses in fingerprint analysis, and he confirmed that was he not a member of the International Association for Identification ("IAI") or the Scientific Working Group on

Friction Ridge Analysis, Study, and Technology ("SWGFAST"). He also acknowledged that he did not strictly follow the "ACE-V" method of fingerprint analysis, which is endorsed by SWGFAST and stands for analysis, comparison, evaluation, and verification. *See United States v. Herrera*, 704 F.3d 480, 484–85 (7th Cir. 2013) (describing the ACE-V method). Although Beers followed the "ACE" part of the method, he did not have another fingerprint technician independently verify his conclusions. Nor did he know how many points of identification he used to match Ruvalcaba's fingerprint.

At the conclusion of his cross-examination, Ruvalcaba "object[ed] to the admission of Mr. Beers as an expert in this case." After some additional questioning, the court overruled Ruvalcaba's objection, stating: "I find that there's a basis for Mr. Beers to offer an opinion on the basis of his fingerprint comparison in this case." At the same time, the court instructed the jury that Beers's testimony should "be judged like other testimony" and given "as much weight as you think it deserves, taking into consideration the witness' education, the witness' experience, the reasons given for the opinion and all of the other evidence in this case."

Beers went on to testify that, in his opinion, the fingerprint he took from Ruvalcaba matched the fingerprint on the 2015 Verification of Removal. He acknowledged, however, that the copy presented in court was "so diminished" that he "wouldn't be able to make an identification off of that." The government also presented additional evidence from other witnesses but stressed during closing arguments that Beers was "important because he tells you that . . . the fingerprint on the document is the

defendant's fingerprint." The jury was unable to reach a verdict, and the court declared a mistrial.

Ruvalcaba was retried a week later. This time, Beers annotated the fingerprint on the 2015 Verification of Removal to identify six matching points of identification, and the government made an enlarged copy of the annotated fingerprint for Beers to use while he testified. As in the first trial, the government first questioned Beers about his qualifications and methodology. After eliciting testimony that largely tracked that presented in the first trial, the government "move[d] to have Mr. Beers qualified as an expert fingerprint technician." The court responded, "That's a determination for the jury." Ruvalcaba then cross-examined Beers, again establishing that he was not a member of IAI or SWGFAST and that, although he followed the "ACE" part of the ACE-V method—which is simply "a verbalization of what fingerprint technicians have been doing for over a hundred years"—he did not have another analyst independently verify his conclusions. Once Ruvalcaba finished his cross-examination, the government again "move[d] to qualify [Beers] as an expert," and the court responded, "Again, that's an issue for the jury." Ruvalcaba then "object[ed] to the qualifying" of Beers "as an expert." The court overruled the objection and instructed the jury: "[I]t's up to you to decide whether the witness by virtue of his experience and training is qualified to give opinions and give his testimony whatever weight you think it deserves in light of that testimony, the reasons given for the opinion, all other evidence in this case."

Beers then testified about his fingerprint analysis in this case, now with the help of the annotated and enlarged fingerprint from the 2015 Verification of Removal. After the

government presented additional witnesses and evidence, the jury returned a guilty verdict. The district court sentenced Ruvalcaba to five years of probation.

II

On appeal, Ruvalcaba challenges the admission of Beers's expert testimony, arguing that the district court impermissibly abdicated its "gatekeeping" role under *Daubert* and Federal Rule of Evidence 702. We review the district court's decision to admit expert testimony for an abuse of discretion. *United States v. Flores*, 901 F.3d 1150, 1155–56 (9th Cir. 2018). If the district court abused its discretion, we will reverse if the error was not harmless. *United States v. Christian*, 749 F.3d 806, 813 (9th Cir. 2014) (citing *Barabin*, 740 F.3d at 460, 466–67).[2]

A

Before admitting expert testimony into evidence, the district court must perform a "gatekeeping role" of ensuring that the testimony is both "relevant" and "reliable" under Rule 702.[3] *Daubert*, 509 U.S. at 597. "Relevancy simply

[2] The government contends that Ruvalcaba's challenge to the admission of Beers's expert testimony may be reviewed only for plain error because he did not specifically raise a "gatekeeping" objection below. We decline to reach that issue because Ruvalcaba's challenge fails even under harmless error review.

[3] Rule 702 provides:

> 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: (a) the expert's

requires that 'the evidence logically advance a material aspect of the party's case.'" *Barabin*, 740 F.3d at 463 (citation and internal alterations omitted). Ruvalcaba does not dispute the relevancy of Beers's testimony, as it connected Ruvalcaba to the person removed in 2015.

The issue here is "reliability," which requires that the expert's testimony have "a reliable basis in the knowledge and experience of the relevant discipline." *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)). The district court must assess whether "the reasoning or methodology underlying the testimony is scientifically valid" and "properly can be applied to the facts in issue," *Daubert*, 509 U.S. at 592–93, with the goal of ensuring that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire*, 526 U.S. at 152. "The test 'is not the correctness of the expert's conclusions but the soundness of his methodology,' and when an expert meets the threshold established by Rule 702, the expert may testify and the fact finder decides how much weight to give that testimony." *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)).

> scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The reliability analysis is "a malleable one tied to the facts of each case," and "district courts are vested with 'broad latitude' to 'decide *how* to test an expert's reliability' and '*whether or not* an expert's relevant testimony is reliable.'" *Murray v. S. Route Mar. SA*, 870 F.3d 915, 922–23 (9th Cir. 2017) (quoting *Kumho Tire*, 526 U.S. at 152–53). Although *Daubert* identifies several factors that may be used for evaluating the reliability of an expert—whether the scientific theory or technique has been tested, peer reviewed, identified as having a particular rate of error, and generally accepted in the scientific community, *see* 509 U.S. at 592–94—district courts are not required to consider all (or even any) of these factors, nor are they required to hold a "*Daubert* hearing." *Barabin*, 740 F.3d at 463–64.

Nevertheless, district courts do not have "discretion to abandon the gatekeeping function" altogether, *Kumho Tire*, 526 U.S. at 158–59 (Scalia, J., concurring), for "Rule 702 'clearly contemplates *some* degree of regulation of the subjects and theories about which an expert may testify,'" *Barabin*, 740 F.3d at 464 (quoting *Daubert*, 509 U.S. at 589). We have thus held that a district court abuses its discretion when it either "abdicate[s] its role as gatekeeper" by failing to assess "the scientific validity or methodology of [an expert's] proposed testimony," or "delegate[s] that role to the jury" by "admitting the expert testimony without first finding it to be relevant and reliable." *Id.*; *see also City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1069 (9th Cir. 2017) (holding that the admission of an expert's testimony without making "any findings regarding the efficacy of [the expert's] opinions constituted an abdication of the district court's gatekeeping role, and necessarily an abuse of discretion").

Here, the district court abused its discretion by failing to make any findings regarding the reliability of Beers's expert testimony and instead delegating that issue to the jury. Indeed, the district court made this error three times during Ruvalcaba's second trial. After the government conducted an initial voir dire of Beers and "move[d] to have [him] qualified as an expert fingerprint technician," the court responded, "That's a determination for the jury." After Ruvalcaba cross-examined Beers and the government again "move[d] to qualify him as an expert," the court responded, "Again, that's an issue for the jury." And when Ruvalcaba "object[ed] to the qualifying [of Beers] as an expert," the court overruled the objection and told the jury that it was up to them "to decide whether the witness by virtue of his experience and training is qualified to give opinions."

The government argues that the district court fulfilled its gatekeeping duty at Ruvalcaba's first trial by overruling Ruvalcaba's objection to Beers's testimony and declaring that "there's a basis for Mr. Beers to offer an opinion on the basis of his fingerprint comparison in this case." But the district court's ruling at most "suggests an implicit finding of reliability," which is not sufficient. *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007). To satisfy its "'gatekeeping' duty" under *Daubert*, the court must "make an explicit reliability finding." *Id.* at 582–83 (quoting *Daubert*, 509 U.S. at 597); *cf., e.g.*, *Flores*, 901 F.3d at 1165 (affirming the admission of Beers as an expert where the district court "ma[de] an explicit finding regarding the scientific validity of Beers's testimony"). The district court's failure to make an explicit reliability finding before admitting Beers's expert testimony in this case constituted an abuse of discretion.

B

Because the district court abused its discretion by admitting Beers's testimony without having performed its gatekeeping function, we must next determine whether the error was harmless. *Christian*, 749 F.3d at 813. The government bears the burden to show harmlessness, a burden it can sustain in this context by showing either that "it is more probable than not that the jury would have reached the same verdict even if the [expert testimony] had not been admitted," *Barabin*, 740 F.3d at 465 (citation omitted), or that the admitted "expert testimony [was] relevant and reliable" under *Daubert* based on "the record established by the district court," *id.* at 467.

Ruvalcaba contends that, under *Barabin*, we may not "consider in the first instance whether the expert's testimony was admissible under *Daubert*" and must instead remand for a new trial if the testimony may have impacted the verdict. That is incorrect. "Under *Barabin*, a new trial is warranted when evidence admitted through an erroneous analysis prejudices the opposing party but the record is too sparse to conduct a proper admissibility analysis and decide whether the admission itself was erroneous." *Christian*, 749 F.3d at 813 (citing *Barabin*, 740 F.3d at 466–67). When, however, "the record is sufficient to determine whether [the] expert testimony is relevant and reliable," *Barabin* makes clear that we "may make such findings" on appeal. 740 F.3d at 467; *see id.* (overruling *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003), "to the extent that it required that *Daubert* findings always be made by the district court"). And when the record shows that the expert's testimony "'satisfied the requirements for admission,'" we may conclude that the district court's failure

to make "an explicit finding of reliability was harmless." *Jawara*, 474 F.3d at 583 (internal alteration omitted) (quoting *United States v. Rahm*, 993 F.2d 1405, 1412 (9th Cir. 1993)); *see United States v. Figueroa-Lopez*, 125 F.3d 1241, 1247 (9th Cir. 1997).

In this case, the record is sufficient for us to determine that Beers's testimony had "a reliable basis in the knowledge and experience of the relevant discipline." *Barabin*, 740 F.3d at 463 (quoting *Kumho Tire*, 526 U.S. at 149). Beers testified without contradiction that he had amassed 33 years of experience as a fingerprint technician and instructor with the FBI, analyzing more than 300,000 fingerprints and testifying as an expert in some 250 criminal cases, including in proceedings before this district judge. His testimony, moreover, was based on the Henry system, a methodology of fingerprint classification that "ha[s] been tested in the adversarial system for roughly a hundred years." *United States v. Calderon-Segura*, 512 F.3d 1104, 1109 (9th Cir. 2008). As we recently explained in another illegal-reentry case affirming the admission of Beers's testimony, his methodology "is far from junk science—it can be tested and peer reviewed and is generally accepted by the relevant scientific community." *Flores*, 901 F.3d at 1165.

To be sure, the fact that Beers has testified as an expert in other cases does not provide the "sole basis" for determining the reliability of his testimony in this case. *United States v. Alatorre*, 222 F.3d 1098, 1105 (9th Cir. 2000). Beers testified extensively on direct and cross-examination about the methodology he employed in this case, including describing the side-by-side comparison of the fingerprints in this case and the points of identification he found. The only evidence presented by Ruvalcaba to undermine the reliability

of Beers's testimony falls far short. Although Ruvalcaba established during cross-examination that Beers did not belong to certain professional organizations or engage in continuing education, the absence of "specific credentials" does not necessarily render an expert "unfit to provide expert testimony." *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010) (citation omitted). Also unavailing is the fact that Beers did not strictly follow the ACE-V method, a widely validated method. *See Herrera*, 704 F.3d at 484 (referring to ACE-V as "the standard method for determining whether two fingerprints are from the same person"); *United States v. Pena*, 586 F.3d 105, 110 (1st Cir. 2009) ("Numerous courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable under *Daubert*."). As Beers explained, he deviated from the ACE-V method only by not having another fingerprint analyst verify his conclusions in this case, and questions about the correctness of an expert's conclusions "are a matter of weight, not admissibility." *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1199 (9th Cir. 2014); *see Daubert*, 509 U.S. at 595 ("The focus [of Rule 702] must be solely on principles and methodology, not on the conclusions that they generate."). In any event, an expert may offer "testimony based on methodologies that differ from the standards that the federal government or fingerprinting trade organizations desire." *Flores*, 901 F.3d at 1165 n.22.

Because the record demonstrates that Beers's testimony satisfied the admissibility requirements under *Daubert*, we conclude that the "lack of an explicit finding of reliability was harmless." *Jawara*, 474 F.3d at 583.

III

The district court abused its discretion in admitting Beers's expert testimony without first finding it relevant and reliable under *Daubert* and Rule 702. But because the record is sufficient for us to make that determination, the error was harmless. For these reasons and those given in the accompanying memorandum disposition, Ruvalcaba's conviction is **AFFIRMED**.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIO RUVALCABA-GARCIA, Defendant-Appellant.	No. 17-50288 D.C. No. 3:16-cr-02363-LAB-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted April 11, 2019
Pasadena, California

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,** District Judge.

Mario Ruvalcaba-Garcia appeals his conviction for illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326(a), which is predicated on a prior expedited removal order from 2015. In an opinion filed

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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 M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

concurrently with this memorandum disposition, we address the district court's admission of a fingerprint expert's testimony. Here, we address Ruvalcaba's remaining challenges to his conviction. We affirm.

1. The district court did not abuse its discretion by admitting enlarged and enhanced copies of documents from Ruvalcaba's "A-file" as documentary exhibits. *See United States v. Estrada-Eliverio*, 583 F.3d 669, 672–73 (9th Cir. 2009). The government was not required to introduce the original documents from the A-file, which is an official record that may be proved by a "copy [that] is certified as correct . . . by a witness who has compared it with the original." Fed. R. Evid. 1005; *see also* Fed. R. Crim. P. 44(a). Moreover, the government introduced the copies through witnesses who testified that they accurately reproduced the originals, *cf.* Fed. R. Evid. 1001(e), and Ruvalcaba was free to cross-examine those witnesses about the accuracy of the copies, but he did not do so. Although he argues in his reply brief that he would have liked to cross-examine the prosecutor about the creation of the copies, he waived this argument by failing to present it to the district court or raise it in his opening brief. *See United States v. Nickerson*, 731 F.3d 1009, 1015 (9th Cir. 2013).

2. The district court correctly denied Ruvalcaba's motion to dismiss his indictment under 8 U.S.C. § 1326(d), a decision we review de novo. *United States*

v. Flores, 901 F.3d 1150, 1155 (9th Cir. 2018). We need not reach the question whether the 2015 expedited removal proceedings violated Ruvalcaba's due process rights because he has failed to show "prejudice"—i.e., that he had "'plausible grounds for relief' from the removal order." *Id.* at 1162 (quoting *United States v. Raya-Vaca*, 771 F.3d 1195, 1206 (9th Cir. 2014)).

The only relief conceivably available to Ruvalcaba in 2015 would have been withdrawal of his application for admission, but withdrawal relief is discretionary, and the six factors used by the agency in exercising that discretion all weigh against relief in this case. *See id.* First, Ruvalcaba's "immigration violation was relatively serious" given his "history of illegal reentries." *Raya-Vaca*, 771 F.3d at 1208. Second, Ruvalcaba has several prior findings of inadmissibility. Third, Ruvalcaba "intended to violate the law, as evidenced by his prior unlawful entries and the fact that he entered the United States by 'walking through the mountains.'" *Id.* Fourth, Ruvalcaba concedes that he had no ability to overcome his inadmissibility. Fifth, Ruvalcaba was only 38 years old at the time of his removal and "does not allege that he was in poor health." *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1090 (9th Cir. 2011). And sixth, "humanitarian and public interest concerns" counsel against withdrawal relief, as Ruvalcaba has relatively few ties to the United States and a prior felony conviction for illegally

transporting aliens for financial gain. *See Flores*, 901 F.3d at 1163. We therefore find it implausible that Ruvalcaba would have received relief from the 2015 expedited removal order underlying his illegal-reentry conviction.

* * *

For these reasons and those given in the accompanying opinion, Ruvalcaba's conviction is **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIO RUVALCABA-GARCIA, Defendant-Appellant.	No. 17-50288 D.C. No. 3:16-cr-02363-LAB-1 Southern District of California, San Diego ORDER

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,* District Judge.

The panel judges have voted to deny Appellant's petition for panel rehearing. Judges Graber and Bybee have voted to deny Appellant's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, Appellant's petition for panel rehearing and rehearing en banc (Dkt. No. 49) is **DENIED**.

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* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.