No. 19-6277

IN THE SUPREME COURT OF THE UNITED STATES

MARIO RUVALCABA-GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly affirmed petitioner's conviction after determining that the district court committed a harmless error in the course of admitting expert testimony.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Ruvalcaba-Garcia, No. 16-cr-2363 (Aug. 11, 2017)

United States Court of Appeals (9th Cir.):

United States v. Ruvalcaba-Garcia, No. 17-50288 (May 10, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15)[1] is published at 923 F.3d 1183. An additional opinion of the court of appeals (Pet. App. A16-A19) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 354.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2019 (Pet. App. A1). A petition for rehearing was denied on July 17, 2019 (Pet. App. B1). The petition for a writ of certiorari

[1] Appendix A to the petition for a writ of certiorari is not sequentially paginated. This brief treats it as if it were, beginning with page 1 following the cover page.

was filed on October 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of unlawful reentry into the United States following removal, in violation of 8 U.S.C. 1326. Judgment 1. The district court sentenced petitioner to five years of probation. Judgment 2. The court of appeals affirmed. Pet. App. A1-A19.

1. In September 2016, a U.S. Border Patrol agent in California tracked four sets of footprints from an area approximately 12 miles north of the United States/Mexico border, until he encountered petitioner in a group of four individuals sitting in heavy brush. Pet. App. A4; C.A. E.R. 84-90. Petitioner, who is a citizen of Mexico without legal authorization to enter or remain in the United States, was arrested. Pet. App. A4; C.A. E.R. 90.

Petitioner waived indictment and was charged by information with illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326. D. Ct. Doc. 10, at 1-2 (Oct. 13, 2016); D. Ct. Doc. 11 (Oct. 13, 2016). That charge was based on petitioner's previous removal from the United States in June of 2015. Pet. App. A4. The 2015 removal documents identified the individual removed as "Mario Ruvalcaba-Garcia AKA Marcias-Garcia, Juan," and were all signed with the name "Juan Macias-

Garcia" or the initials "JMG." Ibid. The documents also included a "Verification of Removal" form that contained a signature, a photograph, and a fingerprint from the removed individual. Ibid.

2. Before petitioner's trial, the government provided the defense with notice that it intended to call as an expert David Beers, a fingerprint examiner who had prepared a report concluding that petitioner's fingerprints matched those on the 2015 form. See Pet. App. A5. Petitioner's counsel objected to the expert testimony. Id. at A5-A6. Beers began his testimony at trial by describing his qualifications and methodology, establishing that he had worked as an FBI fingerprint technician and instructor for 33 years, had reviewed more than 300,000 fingerprints, and had testified as an expert more than 200 times. Id. at A5. On cross-examination, Beers acknowledged that he had not taken continuing education courses in fingerprint analysis, was not a member of certain trade groups related to fingerprint analysis, and did not have another fingerprint technician independently verify his work in this case. Id. at A5-A6. The district court determined that Beers could offer his expert opinion, and Beers testified that petitioner's fingerprint matched the fingerprint on the 2015 Verification of Removal. Id. at A6.

The jury was unable to reach a verdict, and the court declared a mistrial. Pet. App. A7. Petitioner was retried a week later, and Beers testified again. Ibid. After eliciting preliminary testimony from Beers that largely tracked his testimony from the

first trial, the government "move[d] to have Mr. Beers qualified as an expert fingerprint technician." Ibid. (brackets in original). The court responded, "[t]hat's a determination for the jury." Ibid. Following defense cross-examination, the government again moved to qualify Beers an expert, and the court responded, "[a]gain, that's an issue for the jury." Ibid. The court then overruled defense counsel's renewed objection to qualifying Beers as an expert 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." Ibid. (brackets in original).

Following this exchange, and aided by a newly annotated and enlarged fingerprint from the 2015 immigration file, Beers testified about his fingerprint analysis. Pet. App. A7. The jury subsequently found petitioner guilty. Id. at A8.

3. The court of appeals affirmed. Pet. App. A1-19.

As relevant here, the court recognized that under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), "[b]efore admitting expert testimony into evidence, the district court must perform a 'gatekeeping role' of ensuring that the testimony is both 'relevant' and 'reliable' under" Federal Rule of Evidence 702. Pet. App. at A8 (quoting Daubert, 509 U.S. at 597). The court of appeals stated that district courts have some discretion in how to conduct that analysis, but do not have "'discretion to abandon the gatekeeping function' altogether," id. at A10 (quoting Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 158-159 (1999)

(Scalia, J., concurring)). And the court of appeals concluded that at petitioner's second trial, "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." Id. at A11.

While the government contended that petitioner's claim was subject only to plain-error review because he did not press a specific objection to the adequacy of the district court's gatekeeping function below, Gov't C.A. Br. 12-14, the court of appeals declined to reach that argument, instead determining that petitioner's challenge failed "even under harmless error review," Pet. App. A8 n.2. The court explained that under harmless-error review, "[t]he government bears the burden to show [the] harmlessness" of the district court's error, and that the government could satisfy its burden by showing either that the jury would likely have reached the same verdict had the testimony not been admitted, or that "the admitted 'expert testimony [was] relevant and reliable' under Daubert based on 'the record established by the district court.'" Id. at A12 (quoting Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 467 (9th Cir.) (en banc) (third set of brackets in original), cert. denied, 574 U.S. 815 (2014)). The court rejected petitioner's contention that it could 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."

Ibid. The court explained that when "'the record is sufficient to determine whether [the] expert testimony is relevant and reliable,'" the court "'may make such findings' on appeal." Ibid. (quoting Barabin, 740 F.3d at 467) (brackets in original). The court then determined that the record in this case was "sufficient for us to determine that Beers's testimony had a reliable basis in the knowledge and experience of the relevant discipline," such that the district court's admission of Beers's testimony without an explicit reliability determination was harmless. Id. at A13-14 (citation and internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals erred in finding the admission of expert testimony without an explicit reliability determination harmless because the record showed that the testimony was sufficiently reliable. The court of appeals' methodology is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Under Federal Rule of Evidence 702, a qualified witness may provide expert opinion testimony if the witness's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; "the testimony is based on sufficient facts or data"; "the testimony is the product of reliable principles and methods"; and the witness "has reliably applied the principles and methods to

the facts of the case." Ibid. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), this Court explained that, faced with a proffer of expert scientific testimony under Rule 702, the trial judge should first determine whether the proffered testimony is based on reliable "scientific knowledge" and whether it "will assist the trier of fact to understand or determine a fact in issue." Id. at 592. The Court expanded on "this basic gatekeeping obligation" in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), applying it to all expert testimony. Id. at 147. Under Kumho, where the "factual basis, data, principles, methods, or their application" reflected in any proffered expert testimony "are called sufficiently into question, * * * the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline'" before admitting it. Id. at 149 (quoting Daubert, 509 U.S. at 592) (brackets in original).

When a district court deviates from these procedures, the courts of appeals have "treat[ed] the erroneous admission of expert testimony the same as all other evidentiary errors, by subjecting it to harmless error review." Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 464 (9th Cir.) (en banc), cert. denied, 574 U.S. 815 (2014). That is consistent with Federal Rule of Criminal Procedure 52(a), which states that "[a]ny error * * * that does not affect substantial rights must be disregarded." See also 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari

in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). Thus, when a defendant has preserved a claim of error in the district court, the government has the burden of establishing under Rule 52(a) that the error was harmless because it did not affect substantial rights. United States v. Davila, 569 U.S. 597, 607 (2013).

2. The court of appeals correctly applied those principles in affirming petitioner's conviction notwithstanding his claim that the district court committed Daubert error at his second trial. The court of appeals correctly recounted the requirements of Daubert and Kumho, see Pet. App. A8-A10, before concluding that the district court had failed to fulfill its "gatekeeping duty" during petitioner's second trial, id. at A11. The court then properly examined whether any error was harmless, explaining that the government could prove harmlessness in either of two ways: by demonstrating that the result of petitioner's trial would likely have been the same without Beers's testimony, or by demonstrating that the testimony should have been admitted under a proper application of Daubert and Rule 702. Id. at A12. And the court found that here, "[b]ecause the record demonstrates that Beers's testimony satisfied the admissibility requirements under Daubert," the "'lack of an explicit finding of reliability was harmless.'" Id. at A14 (quoting United States v. Jawara, 474 F.3d 565, 583 (9th Cir. 2007)).

Petitioner does not dispute that, in general, harmlessness analysis applies to Daubert errors. See Pet. 13. Indeed, this Court has recognized only "a very limited class" of "structural errors" that cannot be reviewed for harmlessness, United States v. Marcus, 560 U.S. 258, 263 (2010) (citation omitted), and errors in admitting expert testimony are not among them. Rather, petitioner contends (Pet. 11-12) that when the district court has failed to explicitly fulfill its gatekeeping function under Daubert, the court of appeals' harmlessness analysis cannot include consideration of whether the expert testimony was, in fact, properly admitted.

Petitioner does not, however, identify any legal doctrine or case law establishing the impropriety of a court of appeals finding the admission of expert testimony harmless because the record shows that the testimony rested on a sufficiently reliable methodology. See Pet. 11-14. Instead, petitioner argues (Pet. 11-12) that such harmless-error analysis is "not feasible because it violates basic notions of a 'reviewing court'" and is too "arduous and time-consuming." But harmlessness review often entails a detailed counter-factual analysis of lower court proceedings as they might have existed without some error that occurred. Indeed, even the harmlessness review that petitioner supports here -- focusing on whether the verdict would have differed without the challenged testimony -- is fact-intensive and performed in the first instance by the court of appeals.

This Court has recognized that harmlessness analysis must be flexible and context-dependent, and has "warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." Shinseki v. Sanders, 556 U.S. 396, 407 (2009) (citing Kotteakos v. United States, 328 U.S. 750, 760 (1946)). The federal rules and statutes establishing harmless-error review "seek[] to prevent appellate courts from becoming 'impregnable citadels of technicality'" that reverse and remand cases for inconsequential errors. Id. at 407-408 (quoting Kotteakos, 328 U.S., at 759). The courts of appeals should therefore analyze harmlessness "without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not." Id. at 408.

The court of appeals followed that flexible, case-specific approach here. The court recognized that, in some instances -- if "the record is too sparse to conduct a proper admissibility analysis and decide whether the admission itself was erroneous" -- a Daubert gatekeeping error could require a new trial. Pet. App. A12 (quoting United States v. Christian, 749 F.3d 806, 813 (9th Cir. 2014)). But in a case like this one, when the "record shows that the expert's testimony 'satisfied the requirements for admission,'" the court properly determined that any error in the absence of an explicit reliability finding during petitioner's

second trial was harmless. Id. at A12-A13 (quoting Jawara, 474 F.3d at 583). Petitioner does not dispute the court of appeals' conclusion that, based on the record below, Beers's fingerprint testimony was admissible under the correct legal standard. See Pet. App. A13. Beers had 33 years of experience as a fingerprint technician, had analyzed 300,000 fingerprints, and had testified in roughly 250 criminal cases. Ibid. No sound reason existed to reverse petitioner's conviction and remand for a new trial, expending judicial resources and imposing on yet another civilian jury.

3. No conflict exists in the circuit courts on the question presented. Contrary to petitioner's contentions (Pet. 7-9), the courts of appeal have properly applied a flexible approach to harmless-error review of Daubert gatekeeping errors, and the different remedies ordered in different cases reflect that flexible approach rather than conflicting legal rules.

a. Petitioner first contends (Pet. 8) that harmlessness analysis in the Fifth and Tenth Circuits considers only "whether the expert testimony affected the outcome of the trial"; if it did, petitioner claims, the Fifth and Tenth Circuits remand for a new trial without considering whether the testimony was, in fact, admissible. But neither case cited by petitioner establishes or applies such a rule; instead, both are simply examples of cases in which a court of appeals was unable to make a harmlessness determination on the basis of the record before it.

In Carlson v. Bioremedi Therapeutic Sys., Inc., 822 F.3d 194 (2016), the Fifth Circuit found it impossible to "assess on appeal" whether an expert had the "relevant expertise to support his opinions," and therefore remanded "for further proceedings" in the district court. Id. at 201-202. The Fifth Circuit's opinion did not suggest that such an approach was mandatory, or that it was institutionally incapable of conducting a Daubert analysis. And, contrary to petitioner's assertion (Pet. 8), the Fifth Circuit did not in fact order a new trial. On remand, consistent with the Fifth Circuit's order of "further proceedings," the district court first conducted a new Daubert hearing; only after finding the expert testimony inadmissible did the district court order a new trial. See 12-cv-1717 D. Ct. Doc. 163 (S.D. Tex. Jan. 13, 2017); 12-cv-1717 D. Ct. Doc. 169 (S.D. Tex. Feb. 17, 2017). Carlson therefore does not support petitioner's proposed rule, nor is it even an example of the approach petitioner favors.

In Dodge v. Cotter Corp., 328 F.3d 1212, cert. denied, 540 U.S. 1003 (2003), the Tenth Circuit likewise found the record insufficient to determine an expert's reliability in the first instance. See id. at 1229 ("[W]e do not have before us the findings required to determine definitely if the court abused its discretion."). The Tenth Circuit remanded for a new trial, viewing that remedy as more appropriate than a remand for further Daubert analysis in light of the "overwhelming temptation to engage in post hoc rationalization of admitting the experts" in that very

complex case. Ibid. The Tenth Circuit did not, however, hold that every Daubert gatekeeping error must be treated the same way. And other Tenth Circuit cases appropriately reflect a different approach. See, e.g., Storagecraft Tech. Corp. v. Kirby, 744 F.3d 1183, 1190–1191 & n.2 (10th Cir. 2014) (Gorsuch, J.) ("[A] district court's insufficient gate-keeping findings may not warrant reversal if the appellee can persuade us the error was harmless. If, for example, it is readily apparent from the record that the expert testimony was admissible, it would be pointless to require a new trial at which the very same evidence can and will be presented again.").

The approaches of the Fifth and Tenth Circuits thus do not conflict with the decision below, in which the court of appeals recognized that "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." Pet. App. A12 (quoting Christian, 749 F.3d at 813). And the decisions cited by petitioner do not indicate that either the Fifth or Tenth Circuit would have reversed petitioner's conviction when the record made clear that the admitted expert testimony met the Daubert standards.

b. Petitioner next suggests (Pet. 8) that the Fourth, Sixth, Seventh, and Eleventh Circuits invariably "act[] as the original Daubert 'gatekeeper'" by reviewing the record to

determine whether expert testimony was properly admissible. Again, none of the cases cited by petitioner establish such an inflexible rule; instead, they reflect individualized, case-specific harmlessness determinations. In three of the cited cases, the court of appeals reviewed the record evidence supporting reliability under Daubert after finding that the district court had failed to do so, but did not suggest that such an approach was mandatory or always appropriate. See Nease v. Ford Motor Co., 848 F.3d 219, 230-233 (4th Cir.), cert. denied, 137 S. Ct. 2250 (2017); Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 760 (7th Cir. 2010), cert. denied, 563 U.S. 903 (2011); McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1255 (11th Cir. 2005). In the fourth case, United States v. Smithers, 212 F.3d 306 (2000), the Sixth Circuit remanded for a new trial when the district court had failed to conduct a Daubert hearing before excluding a criminal defendant's proffered expert testimony. Id. at 318. While the Sixth Circuit's decision offered some guidance about the Daubert analysis, it ultimately remanded for the district court to conduct the Daubert inquiry in the first instance. See id. at 315-317. Smithers thus disproves petitioner's contention that the Sixth Circuit invariably assesses the reliability evidence itself.

Petitioner also contends (Pet. 8-9) that the First, Third, and Federal Circuits "proceed[] with the initial Daubert determination when the record is sufficiently developed and remand[] to the trial court when it is not." As explained above,

that appears to be the same case-specific approach that other circuits -- including the court below here -- follow. In Smith v. Jenkins, 732 F.3d 51 (2013), the First Circuit conducted a Daubert analysis of two categories of expert testimony and remanded for further consideration of a third category, without suggesting that such an approach was mandatory or appropriate for all cases. Id. at 65-69. In Elcock v. Kmart Corp., 233 F.3d 734 (2000), the Third Circuit -- much like the Sixth Circuit in Smithers -- conducted a demonstrative Daubert analysis of proffered expert testimony but declined to reach a firm conclusion given the lack of a complete record, and remanded for a Daubert hearing in the district court. Id. at 748-750. Finally, in Libas, Ltd. v. United States, 193 F.3d 1361 (1999), the Federal Circuit expressed strong doubts that expert testimony could satisfy the Daubert standard, but remanded for "[f]urther evidentiary hearings" on the matter. Id. at 1369. Again, none of these cases support petitioner's claimed circuit conflict.

c. Only one case cited by petitioner, the Ninth Circuit's en banc decision in Barabin, explicitly discusses the question presented. See Pet. 9. Barabin's discussion confirms that court's flexible, case-specific approach to harmlessness review. The court there explained that when the district court fails to conduct a Daubert analysis, "a reviewing court should have the authority to make Daubert findings based on the record established by the district court" if the "record is sufficient" to do so; if "the

record * * * is too sparse," however, remand may be warranted. Barabin, 740 F.3d at 467. Petitioner has identified no circuit case stating a different rule or under which he would be entitled to relief on this record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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