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Outside Counsel

Is Limited Remand Procedure Unconstitutional?

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In *People v. Wortham*, 2021 WL 5451365, which the New York Court of Appeals decided this November, Judge Wilson, in dissent, argued that a limited remand for a *Frye* hearing—a hearing that should have been held in the first instance but wasn't—was unconstitutional. Judge Wilson is always thoughtful. As best one can tell, however, no judge—state or federal—has previously reached that conclusion. Was he right?

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In May 2011, the police executed a search warrant at a Brooklyn apartment and recovered weapons, drugs and drug paraphernalia from a back bedroom and arrested Tyrone Wortham, who lived in the apartment. Prior to trial, defense counsel moved (1) to preclude expert testimony regarding the probability that Wortham was a contributor to a multiple-source DNA sample taken from evidence in the apartment, a statistic derived from the use of a sophisticated "FST procedure," or (2) for a *Frye* hearing on the general acceptance (or lack thereof) of that procedure. The trial court denied the motion without a *Frye* hearing, and Wortham was convicted on all counts.

In the Court of Appeals, Wortham raised his *Frye* hearing claim and this time prevailed. Relying on its 2020 decision in *People v. Williams*, 35 N.Y.3d 24 (2020), the majority held that the FST procedure was sufficiently novel that a *Frye* hearing should have been held. In *Williams*, the *Frye* error was found harmless; in *Wortham*, it was not.

Having found non-harmless error, the majority turned to the question of remedy and ordered a limited remand for a *Frye* hearing. It wrote this: If the trial court "determines, after a *Frye* hearing, that the DNA evidence derived from the use of the FST is not admissible, defendant is entitled to a new trial. If the court determines after a *Frye* hearing that the evidence is admissible, defendant may challenge that determination on appeal." The majority pointed to five prior cases involving the failure to conduct (or properly conduct) pre-trial suppression hearings, in which the court had employed a similar limited-remand procedure.

Judge Wilson dissented on the remedy issue. As he saw it, "[w]hen a conviction [is] based on material evidence lacking a basis for admission at the time of trial, the remedy is not to enforce the erroneously obtained conviction while giving the People a freestanding chance to demonstrate admissibility"; it is to reverse the conviction and remand for a new trial. "Having determined that material incriminating evidence was improperly admitted at trial," Judge Wilson wrote, "the failure to vacate [the defendant's] conviction immediately is, quite simply, unconstitutional." In support of his position, Judge Wilson cited several cases, state and federal, in which courts have reversed convictions for failure to conduct a *Frye* (or *Daubert*) hearing and then remanded for a new trial.

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Was Judge Wilson right that a limited remand procedure is unconstitutional? Several points bear note:

(1) Judge Wilson overlooked the fact that the U.S. Supreme Court has employed a limited remand procedure on several occasions. In *United States v. Wade*, 388 U.S. 218 (1967), for example, the court held that the presence of defense counsel is a requisite at a post-indictment lineup. It then turned to the question of remedy—"whether the denial of Wade's motion to strike the courtroom identification by the bank witness at trial because of the absence of [Wade's] counsel at the lineup requires … the grant of a new trial at which such evidence is to

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be excluded." In answering that question, the court observed that the witness's in-court identification might not have been influenced by the defective lineup procedure. It therefore concluded that the "appropriate procedure to be followed" was to vacate the conviction pending a hearing to determine whether the in-court identification had an independent source and for the trial court to reinstate the conviction or order a new trial, as may be proper. Thus, a limited remand for a taint hearing was ordered.

In *Waller v. Georgia*, 467 U.S. 39 (1984), the court followed a similar course. There, it held that closure of the courtroom during a suppression hearing was unconstitutional. It then turned to the question of remedy and directed a new suppression hearing be conducted. It wrote:

We do not think [the violation] requires a new trial in this case. Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant and not in the public interest … . A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in position of the parties.

In *Wade* and *Waller*, no Justice questioned the propriety of a limited remand procedure.

(2) The propriety of a limited remand procedure has been extensively considered in the Ninth Circuit in a series of cases. The first was *Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002). Mukhtar, a Black professor who was denied tenure, brought a civil rights action, claiming that the denial was because of his race. After a nine-day trial, a jury found in his favor and awarded him $637,000. On appeal, the panel reversed that outcome, ruling that the trial judge had failed to make explicit her reasons, under *Daubert*, for allowing a defense expert to testify on the issue of racial bias. It ordered a new trial on the ground that a limited remand would "not protect the purity of the trial, but instead create[] an undue risk of post hoc rationalization."

Professor Mukhtar then sought en banc review, which was denied with 11 judges dissenting. The dissenting opinion, authored by Judge Reinhardt, bitterly complained that the panel's new trial remedy "took away a substantial verdict from a prevailing civil rights litigant without having any idea whether the testimony at issue was admissible under *Daubert* and without even permitting the district court to supply the reasons for its admission." As the en banc dissenters saw it: "*Daubert* determinations are often crucial to the disposition of the most complex and lengthy trials. In cases in which weeks or months (or even nine days) of trial are effected by an implicit evidentiary ruling that may well be correct, there is simply no justification for this court to impose so burdensome a process on the district court and the parties. Especially is this so when well established alternatives exist for reaching the merits of the admissibility issue—procedures that would save everyone involved immeasurable time, effort, and money." 319 F.3d 1073, 1078 (9th Cir. 2003).

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Mukhtar was not the Ninth Circuit's last word on the subject. In 2012, there was *Barabin v. AstenJohnson*, 700 F.3d 428 (9th Cir. 2012), in which the panel concluded (1) that the trial court had abused its discretion in failing to conduct a *Daubert* hearing before admitting an expert's testimony on the relationship between occupational exposure to asbestos and mesothelioma and (2) that, under *Mukhtar*, the only permissible remedy was a new trial. Two of the three panel members expressed disagreement with that remedy, asking this question: if the district court on remand finds that the expert testimony is reliable, "[w]hat purpose is served by empaneling a new jury and conducting another lengthy trial the outcome of which will likely be identical to the one already concluded?"

Sitting en banc in *Barabin*, a divided court, 6 to 5, held with little reasoning that a limited remand was not appropriate. The five dissenters favored a limited remand, emphasizing that if the disputed expert testimony was found to be admissible under *Daubert*, "the system [should] not be unreasonably burdened with a retrial." 740 F.3d 457, 471.

Round three in the Circuit came in 2020 in *United States v. Ray*, 956 F.3d 1154 (9th Cir. 2020), in which the defendants were convicted of stabbing a fellow inmate. The panel held that the district court had abused its discretion in precluding, on relevance grounds, the testimony of a defense expert that was offered to support a defendant's insanity defense. Finding that the expert's proposed testimony was relevant, the panel made clear that before admitting the testimony, the district court should conduct a *Daubert* inquiry to ensure its reliability. (*Daubert* requires reliability, not just relevance.) Under the constraint of *Barabin*, it ordered a new trial.

All three panel members then took the unusual step of joining a separate concurrence "to highlight how wasteful of judicial resources [a new trial] remedy potentially [was]." (Judge Rakoff was a panel member, sitting by designation.) The

concurring opinion said this: "What if, on remand, the district court decides that Dr. Karim's testimony is insufficiently reliable, and thus must be excluded once again? If that occurs, why in the world should the court hold a new trial at which a second jury will hear the same evidence heard by the jury at the first trial?"

Because that "eminently sensible procedure [was] forbidden by existing Circuit precedent," the three concurring judges "reluctantly" joined their own majority opinion.

The final chapter in this protracted story came in December 2020, when the Ninth Circuit, sitting en banc in *Ray*, overruled its prior cases and held that if a panel "concludes that a district court has committed a non-harmless *Daubert* error," it has discretion to order a limited remand. 979 F.3d 766. The opinion for the en banc court was unanimous.

(3) Judge Wilson cites 25 cases, state and federal, in which courts, having concluded that evidence was admitted without a proper foundation, remanded for a new trial. Two points are noteworthy about these cases. First, in none is there any discussion of the propriety (or impropriety) of a limited remand or any suggestion that the issue was briefed or argued. That does not make for sturdy precedents.

Second, many of the cases that Judge Wilson cites are instances in which evidence was held inadmissible because a sufficient foundation was not presented *to the jury* to establish authentication or accuracy. Take *People v. Price*, 29 N.Y.3d 472 (2017), for example. There, the court held that a photograph purportedly showing the defendant holding a firearm and money should not have been admitted because there was insufficient proof before the jury that the web page on which the photograph was found belonged to the defendant. In such a case, a limited remand will not do. A new trial is required at which the prosecution must link the webpage to the defendant or forgo use of the image. (The judge has a limited screening function—see Fed. R. Evid. 104(b)—but the foundation proof must be presented to the jury.) By contrast, a pre-trial suppression hearing requires the prosecutor to present evidence to the court, not the jury.

(4) Perhaps the most surprising aspect of Judge Wilson's dissent is his discussion of *People v. Leahy*, 8 Cal. 4th 587 (1994). In *Leahy*, the California Supreme Court found that the trial court erred in admitting a novel field sobriety test without first conducting a *Frye* hearing. It wrote: "We accept, however, the People's suggestion that an entire retrial of the case may be unnecessary. Instead, we will direct the Court of Appeal to reverse defendant's conviction and remand the case to the trial court for a [*Frye*/*Daubert*] hearing in accordance with our opinion. If, at the conclusion of the hearing, the trial court concludes there is sufficient basis to admit the HGN testimony previously presented, the court should reinstate the judgment without reintroducing such testimony. If the trial court determines the HGN evidence is inadmissible … the court should order a new trial if the People so elect."

In his dissent, Judge Wilson deemed the California Supreme Court's approach permissible because the defendant's conviction was reversed and thus he "was not subject to an improperly obtained conviction pending the ordered [*Frye*] hearing." Which begs this question: As Judge Wilson sees it, is the failure to reverse Wortham's conviction (and not the limited remand procedure) the constitutional infirmity in the majority's approach? Put differently, does Judge Wilson believe that a limited remand is permissible provided the judgment is first reversed? If so, much of his dissent seems off point.

(5) There is reason for considering the propriety of a limited remand procedure at such length. Trials are vanishing. Nationwide, we try 3% of felony cases (down from 15% 30 years ago), and plea bargain the rest. Part of the reason for the paucity of trials is that trials are costly. There is truth to Prof. John Langbein's lament that jury trials have become "so complicated and time-consuming that they are unworkable as the routine disposition procedure." If we lack the resources to try many cases, why should we countenance retrials that duplicate what came before? Reruns have no place in a well-run criminal justice system.

Moreover, retrials harm crime victims by denying them closure. Many DNA cases involve sex crimes in which victims must recount the horrors of their abuse. If DNA evidence was erroneously admitted because a *Frye* hearing was not held and if, on remand, a *Frye* hearing is held and the evidence found admissible, why should we require a new trial that puts the victim, once again, through the ringer? Even the most thoughtful judge would have difficulty explaining to a victim why a "do over" was required in such circumstances.

The Supreme Court had it right in *Waller*: "[a] new trial need be held only if a new … hearing results in the suppression of material evidence not suppressed in the first trial, or in some other material change in position of the parties." There is nothing unconstitutional about that approach.