

No. 18-50120

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICK JOHN BACON,
Defendant-Appellant.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 17-159-PA-1*

**GOVERNMENT'S PETITION FOR REHEARING EN BANC
(Decided April 28, 2020—Watford, Bennett, Rakoff)**

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GOVERNMENT'S PETITION FOR REHEARING EN BANC

I

INTRODUCTION

Harmless errors must be disregarded. Fed. R. Crim. P. 52(a).

Circuit precedent violates that command. When a district court erroneously analyzes admissibility of expert testimony, this Court requires a new trial even if the admission or exclusion may have been correct. *United States v. Ray*, 956 F.3d 1154, 1160 (9th Cir. 2020) (per

curiam). The rule elevates a lowly class of analytical errors to the category of structural errors that evade harmless review.

That is what happened here. Defendant Patrick Bacon—a prisoner who repeatedly stabbed his fellow inmate with a shank—was precluded from calling an expert psychologist because the district court deemed the testimony irrelevant. *Id.* at 1157-58. That relevance finding was wrong, but the exclusion may have been right. *Id.* at 1159-60. The government raised “very real reliability issues” regarding the proffered testimony—issues the district court must address on remand. *Id.* at 1160. If unreliable, the testimony will remain inadmissible, and the erroneous relevance analysis will be harmless: the wrong path to the right result. Even in that instance, however, this Court’s precedent mandates a retrial with the same evidence. *Id.* at 1160-61.

All three judges on the panel disagreed with that remedy. *Id.* at 1161 (Watford, J., concurring, joined by Bennett, J., and Rakoff, J.). The “far more sensible procedure” would be to vacate the judgment conditionally and remand for the district court to reassess admissibility. *Id.* at 1161. If it found the expert unreliable, the district court would reinstate the jury’s verdict. *Id.* at 1161-62.

Both Congress and the Supreme Court endorse the concurrence's proposal. *See* 28 U.S.C. § 2106; *Waller v. Georgia*, 467 U.S. 39, 50 (1984); *United States v. Wade*, 388 U.S. 218, 242 (1967); *Jackson v. Denno*, 378 U.S. 368, 394 (1964). When an appellate court identifies a flaw in the process by which evidence was assessed but the trial court reaches the same admissibility ruling on remand, “a new trial presumably would be a windfall for the defendant, and not in the public interest.” *Waller*, 467 U.S. at 50.

This Court, too, conditionally vacates judgments in multiple contexts, including flawed suppression analyses, *United States v. Fomichev*, 899 F.3d 766, 773-74 (9th Cir.), *amended* 909 F.3d 1078 (9th Cir. 2018); alleged discovery violations, *United States v. Alvarez*, 358 F.3d 1194, 1209 (9th Cir. 2004); and claims of misconduct, *United States v. Rutherford*, 371 F.3d 634, 645 (9th Cir. 2004). There is no reason to prohibit the same procedure here.

Many other judges have agreed the conditional-vacatur remedy makes sense; its prohibition does not. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 468-71 (9th Cir. 2014) (en banc) (Nguyen, J. (five-judge partial dissent)); *Estate of Barabin v.*

AstenJohnson, Inc., 700 F.3d 428, 434 (9th Cir. 2012) (Graber, J. (two-judge concurrence)); *Mukhtar v. Cal. State Univ.*, 319 F.3d 1073, 1075-78 (9th Cir. 2003) (Reinhardt, J. (eleven-judge dissent)). Circuit law is “seriously flawed.” *Barabin*, 740 F.3d at 468 (Nguyen, J., dissenting).

It is time to correct the flaw. This Court should hold that it has discretion to order a conditional vacatur in cases involving the admission or exclusion of expert testimony.

This case should be reheard en banc.

II

BACKGROUND

A. Conviction

Defendant Bacon and his co-defendant Daniel Ray¹ attacked another inmate with a metal shank. *Ray*, 956 F.3d at 1157. Ray supplied the shank, and Bacon used it to stab the victim in his head and chest, fracturing his sinus cavity. *Id.* At trial, both defendants were

¹ Ray’s appeal, CA No. 18-50115, was separately briefed. His convictions were affirmed, and his case was remanded for resentencing. *United States v. Ray*, --- F. App’x ---, 2020 WL 2045847 (9th Cir. 2020). The government does not seek rehearing of Ray’s appeal.

convicted of assault with a dangerous weapon and assault resulting in serious bodily injury. *Id.*

B. District Court Ruling

Before trial, Bacon proffered an insanity defense. *Id.* The government moved to preclude his expert psychologist, Dr. Nadim Karim, arguing that Karim’s testimony was irrelevant and unreliable because he “did not opine that Bacon suffered from ‘any mental health disorder’ on the date of the assault, his opinion about a ‘dissociative state’ was not based on medical literature, he did not explain the results of tests he administered to Bacon, and his opinions appeared to have been based on hearsay.” *Id.* at 1157-58.

The district court granted the government’s motion. *Id.* at 1158. The court’s analysis “start[ed] and end[ed] with the question of relevance.” *Id.* Karim’s opinion, the court reasoned, did not satisfy the insanity standard. *See id.* Whereas the law requires proof a defendant was “unable” to appreciate the nature and quality of his acts, 18 U.S.C. § 17, Karim opined that Bacon only had “difficulty understanding” that nature and quality. *Id.* The court therefore deemed Karim’s testimony

irrelevant. *Id.* “In the alternative,” the court excluded the testimony under Federal Rule of Evidence 403. *Id.*²

C. Panel Opinion

The district court’s relevance analysis was flawed. *Id.* at 1159-60. It incorrectly “focused on Dr. Karim’s bottom-line opinions, rather than his proposed expert *testimony*.” *Id.* at 1159 (quoting *United States v. Christian*, 749 F.3d 806, 811 (9th Cir. 2014)). Because Karim could not have opined at trial that Bacon was unable to appreciate the nature and quality of his acts, “the absence of an opinion to that effect in his report [was] not a valid reason to preclude his testimony.” *Id.* (citing Fed. R. Evid. 704(b)). The panel also rejected the district court’s reliance on Rule 403. *Id.* at 1160.

The panel did “not hold,” however, “that the district court must admit Dr. Karim’s testimony on remand.” *Id.* The proponent of expert testimony must demonstrate it is not only relevant but also reliable. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-92 (1993). Accordingly, the district court must assess reliability on

² The district court observed in passing that Karim’s opinions were also “unreliable.” *Ray*, 956 F.3d at 1158.

remand. *Ray*, 956 F.3d at 1160. The government had “raised a number of very real reliability issues” below, but the record was “too sparse” to adjudicate them on appeal. *Id.*

Even though it could not determine whether Karim’s testimony was reliable, the panel analyzed harmlessness by assuming it was admissible. *See id.* Because the testimony would have permitted Bacon to introduce an insanity defense, the exclusion was “not harmless.” *Id.*

The panel ordered a new trial even if the district court excludes Karim’s testimony on remand. *Id.* at 1160-61. That is mandated under *Barabin*, 740 F.3d at 466, and *Christian*, 749 F.3d at 814. *Ray*, 956 F.3d at 1161.

D. Panel Concurrence

In a unanimous concurrence, the panel disagreed with the remedy. *Id.* at 1161 (Watford, J., concurring). Another trial may be very “wasteful of judicial resources.” *Id.* If the district court now excludes Karim’s testimony as unreliable, “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?” *Id.*

The concurrence identified “the far more sensible procedure”:
“conditionally vacate the judgment and remand to the district court with instructions to determine whether the disputed expert testimony was admissible.” *Id.* (quoting *Barabin*, 740 F.3d at 471 (Nguyen, J., dissenting)). If the district court determines the testimony remains inadmissible, “it would simply reinstate the judgment.” *Id.* at 1161-62
“Since this eminently sensible procedure is forbidden by existing precedent,” all three judges “reluctantly join[ed] the court’s disposition.” *Id.* at 1162.

III

EN BANC REHEARING IS WARRANTED

A. The Compulsory New-Trial Remedy Violates Harmless-Error Review

Courts must disregard errors that do not affect substantial rights. Fed. R. Crim. P. 52(a); Fed. R. Civ. P. 61. The rule specifically encompasses evidentiary errors. Fed. R. Evid. 103(a). And it is mandatory. “Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions.” *Bank of Nova Scotia v. United*

States, 487 U.S. 250, 255 (1988). In fact, harmless-error review is *also* required by statute. 28 U.S.C. § 2111.

Only structural errors—those that undermine the criminal proceeding as a whole—evade harmless review. *United States v. Davila*, 569 U.S. 597, 611 (2013); *Neder v. United States*, 527 U.S. 1, 8 (1999). Otherwise, retrial is appropriate only when an “error affected the ‘outcome of the district court proceedings.’” *United States v. Marcus*, 560 U.S. 258, 263 (2010).

1. *An error in analyzing admissibility of expert testimony is not structural*

An error in analyzing admissibility of expert testimony may be harmless for multiple reasons.

First, despite an error in its antecedent analysis, the district court may reach the right result in admitting or excluding testimony. Where, for example, the court admits expert testimony without making relevance and reliability determinations, the error is harmless if the appellate court can make those determinations itself. *See, e.g., United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190-91 (9th Cir. 2019) (per curiam); *see also Barabin*, 740 F.3d at 467 (authorizing procedure). Likewise, an error in excluding testimony as irrelevant is harmless if

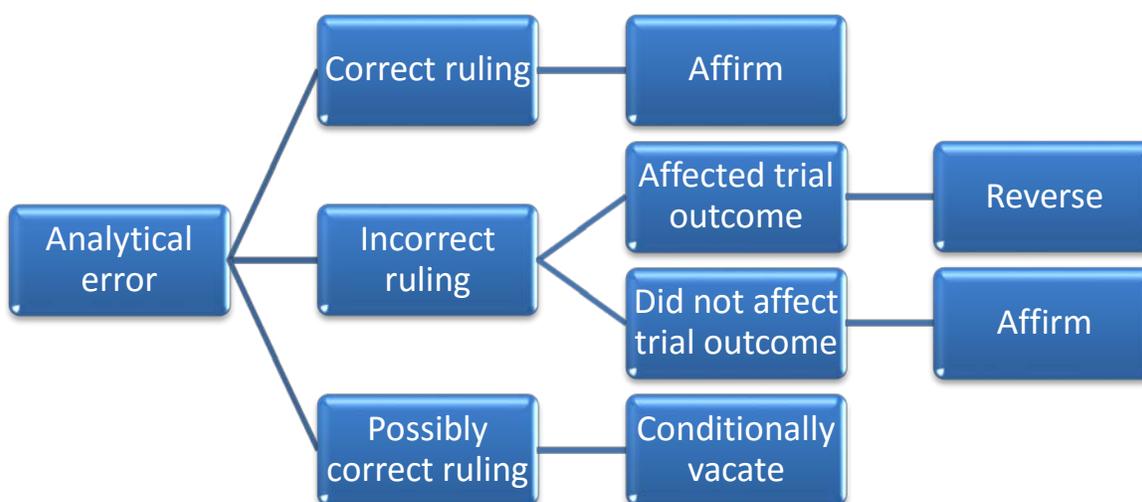
the appellate court can conclude the testimony was unreliable. *See, e.g., United States v. Tetiouxhine*, 725 F.3d 1, 8 (1st Cir. 2013); *see also United States v. Orm Hieng*, 679 F.3d 1131, 1141 (9th Cir. 2012) (court may affirm on any ground supported by record); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 367-69 (9th Cir. 1992) (affirming exclusion of expert testimony on alternative ground).

Second, even where an erroneous analysis yields an incorrect ruling admitting or excluding expert testimony, the ruling is harmless if it did not affect the outcome of trial. *See Barabin*, 740 F.3d at 465. In *United States v. Laurienti*, 611 F.3d 530 (9th Cir. 2010), erroneously excluding portions of an expert's testimony was harmless because it did not likely affect the verdict. *Id.* at 548-49. Similarly, in *United States v. Vera*, 770 F.3d 1232 (9th Cir. 2014), this Court assumed testimony should have been excluded but held that its admission was harmless because it did not affect the verdict. *Id.* at 1240.

This case falls into a third category of analytical error: where a district court incorrectly analyzes admissibility of expert testimony, but the appellate court cannot determine prejudice because the record leaves open the possibility that admission or exclusion was correct.

Ray, 956 F.3d at 1160. In these circumstances, the Court should be permitted to conditionally vacate the judgment with instructions to the district court to redo its analysis and then either reinstate the judgment or order a new trial. *Id.* at 1161-62 (Watford, J., concurring). If correct analysis yields the same ruling, then the analytical error was harmless—the wrong path to the right result—“no harm, no foul.” *Barabin*, 740 F.3d at 469 (Nguyen, J., dissenting).

A three-tiered model demonstrates the possible pathways stemming from an analytical error and reflects the wisdom of providing a conditional-vacatur remedy as part of harmless review:



By adopting that model, the Court properly would assess prejudice arising from the district court’s *ruling*—admission or exclusion of expert

testimony. Focusing only on the antecedent analytical error runs afoul of the rule that appellate courts review judgments, not reasoning. *See Jennings v. Stephens*, 574 U.S. 271, 277 (2015).

Moreover, vacating a judgment conditionally complies with authorities that prohibit treating errors as presumptively prejudicial. *See Davila*, 569 U.S. at 611. Even the admission of unconstitutionally obtained evidence does not rise to the level of structural error. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). A mere antecedent error in analyzing admissibility of evidence does not nearly fit the bill.

2. *This Court's mandatory-vacatur rule improperly assumes prejudice*

Although purporting to conduct harmless-error review, this Court's precedent collapses the analysis of error and prejudice in a manner that requires reversal in contexts where a defendant may suffer no prejudice at all. *See, e.g., Ray*, 956 F.3d at 1160; *Christian*, 749 F.3d at 813; *Barabin*, 740 F.3d at 464-67. Here, “[b]y skipping over the question of admissibility and heading straight for prejudice,” the Court orders a new trial based on an exclusion that may have been correct. *Barabin*, 740 F.3d at 469 (Nguyen, J., dissenting). That approach incorrectly mandates reversal even where error was harmless.

B. The Compulsory New-Trial Remedy Is Inconsistent with Congressional Authorization and Supreme Court Practice

1. Statute authorizes the conditional-vacatur remedy

No statute requires a new trial absent a record demonstrating prejudicial error. An appellate court “may affirm, modify, vacate, set aside or reverse any judgment, decree, or order . . . and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. That “broad” supervisory authority is “at its apex” when this Court gives direction to district judges. *United States v. Rubio-Villareal*, 967 F.2d 294, 298 & n.6 (9th Cir. 1992) (en banc).

Section 2106 empowers this Court to avoid “a waste of judicial resources,” *Felder v. United States*, 543 F.2d 657, 671 (9th Cir. 1976), and to advance “considerations of sound judicial administration” by avoiding “entirely unnecessary proceedings below,” *Grosso v. United States*, 390 U.S. 62, 71-72 (1968). That is exactly what the concurrence hoped to achieve but Circuit precedent prohibits. *Ray*, 956 F.3d at 1161-62. Precedent thus disregards the discretionary regime Congress enacted and also fails to heed the Supreme Court’s warning against

“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).

2. *The Supreme Court uses the conditional-vacatur remedy*

The compulsory new-trial remedy also contradicts Supreme Court practice. In *Waller*, the trial judge closed a suppression hearing, violating the defendants’ public-trial right. 467 U.S. at 48. That flaw in the process of assessing evidentiary admissibility did not automatically necessitate a new trial. *Id.* at 49-50. “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.” *Id.* at 50. “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 the positions of the parties.” *Id.*

The logic is not limited to public-trial violations. In *Jackson*, where the trial court employed an impermissible process for determining the voluntariness of a confession, the required remedy was

not an automatic retrial but a hearing to correctly assess whether the confession was coerced. 378 U.S. at 394-95. If the trial court found on remand that the confession was voluntary, then there was no error; the jury simply relied upon admissible evidence and “was entitled to do so.” *Id.* at 394. *Jackson’s* reasoning mirrors the *Barabin* dissent: if testimony is incorrectly analyzed but correctly admitted, “the jury simply reached a verdict based on evidence it was properly permitted to consider.” 740 F.3d at 470 (Nguyen, J., dissenting).

The same reasoning generated the same result in *Wade*. There, the defendant was denied his constitutional right to counsel at a lineup, but the Supreme Court could not determine whether in-court identifications were tainted by the constitutional defect. 388 U.S. at 236-37, 242. If “the in-court identifications had an independent origin,” the antecedent constitutional violation would not be grounds for a new trial. *Id.* at 242. “[T]he appropriate procedure to be followed” was “to vacate the conviction” and instruct the district court to assess the in-court identifications, evaluate possible “harmless error,” and “reinstate the conviction or order a new trial, as may be proper.” *Id.*

The Supreme Court has employed the same remedy where it cannot determine whether the government's failure to produce evidence was prejudicial error. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Goldberg v. United States*, 425 U.S. 94 (1976); *Killian v. United States*, 368 U.S. 231 (1961); *Campbell v. United States*, 365 U.S. 85 (1961). The criminal defendants in each of those cases alleged they were denied material exculpatory or impeachment information; each time, the Court rejected the argument that a new trial was automatic. If the trial court determined on remand that the claimed discovery violation was not error or was harmless, the conviction would remain intact. *Ritchie*, 480 U.S. at 58; *Goldberg*, 425 U.S. at 111-12; *Killian*, 368 U.S. at 244; *Campbell*, 365 U.S. at 98-99.

C. The Compulsory New-Trial Remedy Conflicts with Precedents in This Circuit and Others

Compulsory new-trial precedents also create inter- and intra-circuit splits.

In two published opinions where district courts excluded experts without conducting the requisite admissibility analysis, this Court declined to mandate new trials: *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997), and *United States v. Amador-Galvan*, 9 F.3d 1414 (9th

Cir. 1993). Both times, this Court remanded, instructing the district courts to perform the correct analysis and then retry the defendants only if their experts should have been admitted. *Cordoba*, 104 F.3d at 229-30; *Amador-Galvan*, 9 F.3d at 1418.

Barabin swept those decisions aside, dismissing them as idiosyncrasies in an unsettled post-*Daubert* regime. 740 F.3d at 467 & n.8. But they were no outliers. This Court conditionally vacates judgments in comparable contexts. Other circuits do too.

1. *This Court conditionally vacates judgments in analogous circumstances*

This Court has conditionally vacated convictions where flawed suppression analyses result in admission of contested evidence. In *Fomichev*, the district court applied the sham-marriage exception to deny the defendant's motion to suppress statements he made to his wife. 899 F.3d at 769-70. Application of the exception was error, but the ruling admitting the statements might not have been. *Id.* at 772-73. They remained admissible if "the marriage was irreconcilable as of the time the challenged statements were made." *Id.* at 773. This Court remanded "for the district court to rule on irreconcilability" and reconsider the defendant's new-trial motion. *Id.* at 773-74; *see also*

United States v. Moreno, 891 F.2d 247, 250 (9th Cir. 1989) (vacating suppression order with instruction to conduct new trial only if confession was involuntary).

This Court also routinely employs the conditional-vacatur remedy to address alleged discovery violations. In *Alvarez*, the district court failed to conduct an *in camera* review to determine whether probation files contained *Brady* material. 358 F.3d at 1206-09. Unable to assess whether any materials were subject to disclosure, this Court “vacate[d] the defendant’s conviction and remand[ed] the case to the district court with instructions to conduct the review.” *Id.* at 1209. If no disclosure was necessary or if nondisclosure was harmless, “the court shall reinstate the judgment of conviction.” *Id.*; see also *United States v. Thomas*, 726 F.3d 1086, 1098 (9th Cir. 2013) (similar); *United States v. Budziak*, 697 F.3d 1105, 1111-13 (9th Cir. 2012) (similar); *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (similar).

This Court also conditionally vacates judgments to resolve claims of government misconduct. In *Rutherford*, the district court applied the wrong standard of proof to evaluate a claim that federal agents had improperly influenced the jury. 371 F.3d at 644. This Court remanded,

instructing the district court to apply the correct standard, assess the facts, and evaluate whether the verdict was tainted. *Id.* at 645. If no misconduct occurred, the district court would “reinstate the judgment.” *Id.*; see also *United States v. Bernal-Obeso*, 989 F.2d 331, 336-37 (9th Cir. 1993) (vacating and remanding for evidentiary hearing to determine whether alleged misconduct warranted new trial, dismissal of indictment, or reinstatement of conviction).

There is no reason to treat expert testimony differently. If this Court cannot determine whether admission or exclusion of expert testimony was prejudicial error, it should be permitted to conditionally vacate the conviction, with instructions to the district court to redo its analysis and reinstate the conviction if the initial ruling stands. The inconsistency in Circuit precedent is inexplicable.

2. *Other circuits employ the conditional-vacatur remedy in analyzing expert testimony*

Prohibiting the conditional-vacatur remedy in cases involving expert testimony also conflicts with the decisions of at least four other circuits. See *United States v. Childress*, 58 F.3d 693 (D.C. Cir. 1995) (per curiam); *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995); *United*

States v. Lee, 25 F.3d 997 (11th Cir. 1994) (per curiam); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985).

Childress is substantively indistinguishable. There, as here, the district court excluded one defendant's mental-capacity expert testimony as irrelevant. 58 F.3d at 727. There, as here, the relevance analysis was wrong; the district court applied an incorrect standard. *Id.* at 728-29. The D.C. Circuit remanded for the district court to reassess the excluded testimony under the correct standard. *Id.* at 730. If the court concluded the evidence was admissible, it would "vacate [the defendant's] conviction and grant him a new trial." *Id.* If it determined that the evidence was "irrelevant or unreliable, then [the] conviction may stand." *Id.* That is exactly the procedure the concurrence proposed here. *Ray*, 956 F.3d at 1161.

Shay, *Lee*, and *Downing* are in accord. In *Shay*, the First Circuit held that expert psychiatric testimony was improperly excluded under Rule 702, but the circuit remanded for consideration of whether the testimony was excludable under Rule 403. 57 F.3d at 132-34. The district court's analysis on remand would determine whether a new trial was necessary. *See id.* at 134. In *Lee*, the Eleventh Circuit

remanded for reassessment under *Daubert*. 25 F.3d at 999. If the district court determined that the evidence was properly admitted, it could affirm its prior admissibility ruling. *Id.* And in *Downing*, where the district court conducted neither a Rule 702 nor a Rule 403 analysis before excluding expert testimony, the Third Circuit remanded, explaining that the error “will become harmless if on remand the district court, in the exercise of its Rule 702 or 403 discretion, decides that the proffered testimony is not admissible.” 753 F.2d at 1242-43. In that case, the conviction would be reinstated. *Id.* at 1244. The panel here should be allowed to employ the same remedy.

D. The Compulsory New-Trial Remedy Is Unjustified

This Court’s current precedent barring conditional vacatur rests on nothing more than dim skepticism regarding district judges—specifically, fear that judges will not faithfully reassess the admission or exclusion of expert testimony but will instead engage in “post-hoc rationalization.” *Mukhtar*, 319 F.3d at 1074; accord *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1229 (10th Cir. 2003).

That fear is misplaced. District courts routinely reconsider their rulings, including when they evaluate new trial motions after a jury’s

verdict. *See* Fed. R. Crim. P. 33; Fed. R. Civ. P. 59. Furthermore, as the authorities discussed above reveal, the Supreme Court, this Court, and other circuits conditionally vacate judgments in many other contexts, trusting that district judges will do their job. That trust comports with the Supreme Court’s preference for district courts to reconsider evidentiary rulings “in the first instance” if they exclude evidence on an erroneous ground. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). Trusting district courts also aligns with the limited sentencing-remand procedure this Court authorized in *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc). *See Barabin*, 700 F.3d at 434 (Graber, J., concurring).

In fact, even *Christian* recognized that “a limited remand remains available” where the record does not permit this Court to determine whether an expert’s exclusion affected the outcome of trial. 749 F.3d at 813 n.3. There is no reason that district courts can be trusted to make prejudice findings on a limited remand but cannot be trusted to make admissibility determinations.

Moreover, statutory discretion to select between a new trial or a conditional vacatur, 28 U.S.C. § 2106, supplies a safeguard against any

legitimate concern regarding post-hoc rationalization. Where, for instance, a district court’s analytical error in excluding a defense expert reflects “gamesmanship” by the court and “a troubling disregard” for the defendant’s rights, *see United States v. Smithers*, 212 F.3d 306, 314-15 (6th Cir. 2000), a new trial may well be warranted. Section 2106’s “choice of remedies (including whether to require a new trial or merely remand for further findings)” will permit this Court to tailor relief to particular circumstances without employing a categorical bar that violates harmless-error rules, is inconsistent with Supreme Court precedent, and creates illogical splits between cases. *See Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 88 (1st Cir. 1998).

///

///

IV

CONCLUSION

This case should be reheard en banc.

DATED: June 9, 2020

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO NINTH CIRCUIT RULE 35-4 and 40-1**

I certify that:

1. Pursuant to Circuit Rules 35-4(a) and 40-1(a), the attached petition for panel rehearing or rehearing en banc contains 4,104 words, excluding the parts of the brief exempted by Fed R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: June 9, 2020

/s/ Bram M. Alden

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United States v. Ray,
956 F.3d 1154
(9th Cir. 2020) (per curiam)

956 F.3d 1154
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Daniel RAY, AKA Popeye, AKA Daniel T. Ray,
AKA Daniel Thomas Ray, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Patrick John Bacon, Defendant-Appellant.

No. 18-50115, No. 18-50120
|
Argued and Submitted January
6, 2020 Pasadena, California
|
Filed April 28, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Central District of California, Percy Anderson, J., of assault with a deadly weapon with intent to do bodily harm and assault causing serious bodily injury. Defendant appealed.

Holdings: The Court of Appeals held that:

district court abused its discretion by precluding expert's testimony because expert did not opine that defendant was unable to appreciate the nature and quality of his acts at the time of the assault due to defendant's mental disease and defect;

district court abused its discretion in finding that expert's testimony was not relevant;

defendant's substantial rights were affected by district court's error in excluding expert's testimony, and thus exclusion of expert's testimony was not harmless error; and

vacatur of conviction and remand for a new trial was warranted for district court's non-harmless error.

Vacated and remanded.

Watford, Circuit Judge, filed concurring opinion, in which Bennett, Circuit Judge, and Rakoff, District Judge, sitting by designation, joined.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

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Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding, D.C. No. 17-CR-00159-PA-2, D.C. No. 17-CR-00159-PA-1

Before: Paul J. Watford and Mark J. Bennett, Circuit Judges, and Jed S. Rakoff, * District Judge.

OPINION

PER CURIAM:

*1157 Patrick Bacon and Daniel Ray were convicted of assault with a deadly weapon with intent to do bodily harm and assault causing serious bodily injury. 18 U.S.C. § 113(a) (3), (6). They were sentenced to 120 months and 100 months, respectively. On appeal Bacon argues that the district court should have allowed his forensic clinical expert psychologist, Dr. Karim, to testify, which would have allowed him to present his insanity defense to the jury. We hold that the district court abused its discretion in excluding Dr. Karim's testimony because the testimony was relevant to Bacon's defense.¹ Because this error was not harmless, and we cannot tell from the record whether the testimony was reliable, we must vacate Bacon's conviction and remand for a new trial.²

I.

Bacon and Ray were both incarcerated at Victorville Federal Prison in California. Bacon stabbed inmate Anthony Grecco with a metal shank, fracturing Grecco's sinus cavity and causing stab wounds to his head and chest. Security cameras recorded the attack and events beforehand.

Bacon had entered a housing unit, and when questioned by correctional officers, lied and said he was housed there. He met with Ray, and they both walked to Ray's cell. Ray took a book from the cell. Defendants walked to a table, where Ray put the book in front of Bacon and walked away. Bacon took the book apart. Ray returned and stood next to Bacon, until Bacon left holding something below his waist. Bacon then stabbed Grecco with the shank. Guards responded, broke up the assault, and recovered the shank and book.

A grand jury indicted Bacon and Ray under 18 U.S.C. § 113(a)(3) (assault with a deadly weapon with intent to do bodily harm) and (a)(6) (assault causing serious bodily injury). After a two-day trial, a jury found defendants guilty of both counts.

Prior to trial Bacon gave notice, pursuant to Federal Rule of Criminal Procedure 12.2, that he would assert an insanity defense. The government then moved in limine to preclude Bacon's expert, Dr. Karim. Among other conclusions, Dr. Karim opined: (1) "that a review of Mr. Bacon's psychosocial history confirms that he has suffered from a severe and chronic mental illness (or defect) throughout the course of his adult life" and "he presents with long-standing and chronic mental health disorders"; (2) "there are elements of a downward spiral of isolation, depression, paranoia, and anxiety that resulted in a dissociative state for Mr. Bacon prior to the conduct itself" and (3) as a result "it would be reasonable to conclude with a high degree of clinical certainty that an individual who was suffering from the myriad of severe mental health disorders that Mr. Bacon was facing on October 18, 2016 would have had difficulty understanding the nature and quality of his actions at the time of the offense conduct." Dr. Karim acknowledged that Bacon has "a history of aggression and physical assaults," but concluded that Bacon's psychological *1158 deterioration during the months before the assault impacted his ability to "differentiate his actions" at the time of the assault. Dr. Karim further suggested that Bacon's "largely unplanned and

unsophisticated criminal history" could be explained by "a diagnosis of an Unspecified Bipolar disorder."

The government moved to preclude Dr. Karim's testimony. The government argued the expert testimony was irrelevant and unreliable under *Daubert* and Federal Rule of Evidence 702, because Dr. Karim did not opine that Bacon suffered from "any mental health disorder" on the date of the assault, his opinion about a "dissociative state" was not based on medical literature, he did not explain the results of tests he administered to Bacon, and his opinions appeared to have been based on hearsay.

The district court granted the motion, finding that under Rule 702, Dr. Karim's opinion was not relevant because it would "not help the trier of fact to understand the evidence or determine the issue of sanity." After explaining the *Daubert* and Rule 702 standards, and summarizing Dr. Karim's opinions, the district court stated: "We start with the question of relevance. In fact, we start and end with the question of relevance." The court found that "Dr. Karim's opinion that an individual who was suffering from a myriad of severe mental health disorders that Mr. Bacon was facing would have had difficulty understanding the nature and quality of his action at the time of the offense conduct is equivocal and will not help the trier of fact to understand the evidence or determine the issue of sanity." The court also stated that Dr. Karim's testimony does "not satisfy the threshold standard of relevance" because "Dr. Karim is unwilling or cannot opine that as a result of Mr. Bacon's mental health issues he was unable, as opposed to [had] difficulty understanding, [or] appreciat[ing] the nature and quality of his acts" Thus, according to the district court, Dr. Karim's testimony did not "satisfy the standard to entitle the defendant to [assert] an insanity defense according to the law of this circuit."³ The court ultimately found "that Dr. Karim's opinions, therefore, are speculative, irrelevant, and unreliable."

In the alternative, the district court found that "Dr. Karim is precluded from testifying as an expert witness because whatever probative value the proffered testimony may have [is] substantially outweighed by undue prejudice, confusion of the issues, and undue waste of time under [Federal Rule of Evidence] 403."⁴ Because the district court precluded Dr. Karim from testifying, it barred Bacon's insanity defense, under 18 U.S.C. § 17, the Insanity Defense Reform Act ("IDRA").⁵

We have jurisdiction under 28 U.S.C. § 1291.

II.

We review “the district court’s exclusion of expert testimony” for abuse of discretion. *United States v. Christian*, 749 F.3d 806, 810 (9th Cir. 2014). We first “consider whether the district court identified the correct legal standard for decision *1159 of the issue before it” and then we “determine whether the district court’s findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.” *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

A.

Bacon argues that the district court abused its discretion by refusing to allow Dr. Karim’s testimony even though it was relevant and reliable. “The admissibility of expert testimony is generally governed by Federal Rule of Evidence 702, which requires district courts to ‘perform a gatekeeping function to ensure that the expert’s proffered testimony is both reliable and relevant.’ ” *Christian*, 749 F.3d at 810 (quoting *United States v. Redlightning*, 624 F.3d 1090, 1111 (9th Cir. 2010)). Here the district court focused exclusively on relevance when evaluating Dr. Karim’s testimony: “We start with the question of relevance. In fact, we start and end with the question of relevance.”⁶

The correct legal standard is for the district court “to determine the relevance of the *psychological* evaluation the expert conducted and the *medical* diagnoses he made, not his ultimate *legal* conclusion regarding the defendant’s mental state.” *Christian*, 749 F.3d at 811. Here, the district court instead focused on Dr. Karim’s bottom-line opinions, rather than “his proposed expert *testimony*,” *id.*, contrary to our guidance in *Christian*. There, we emphasized “that a district court deciding whether to admit expert testimony should evaluate whether that *testimony* ‘will assist the trier of fact in drawing its own conclusion as to a fact in issue’ and should not limit its consideration to ‘the existence or strength of an expert’s *opinion*.’ ” *Id.* (quoting *United States v. Rahm*, 993 F.2d 1405, 1411 (9th Cir. 1993)). We explained this is necessary because the doctor there could not have testified that the defendant “lacked the capacity to form the specific intent to threaten,” *id.* at 812 (citing Fed. R. Evid. 704(b)), and “[i]t would make little sense to require a conclusive opinion

in determining admissibility, and then absolutely to forbid expression of the opinion in testimony,” *id.* (quoting *Rahm*, 993 F.2d at 1411 n.3). So too here. Dr. Karim could not have testified to the jury that Bacon’s mental disease and defect prevented him from appreciating the nature and quality or wrongfulness of his acts, because “an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.” Fed. R. Evid. 704(b). Thus “the absence of an opinion to that effect in his report is not a valid reason to preclude his testimony.” *Christian*, 749 F.3d at 812.

Dr. Karim’s report demonstrates that his evaluation of Bacon was relevant to Bacon’s insanity defense. For example, Dr. Karim concluded that Bacon “was suffering from a myriad of severe mental health disorders,” and that Bacon “would have had difficulty understanding the nature and quality of his actions at the time of the offense conduct.” If admissible, testimony about these “severe” mental health disorders and their impact on Bacon’s perception at the time of the assault “may well have been helpful to the jury in deciding,” *Christian*, 749 F.3d at 812, whether Bacon was insane at the time.

*1160 Accordingly, the district court abused its discretion by precluding Dr. Karim’s testimony because he did not opine that Bacon was unable to appreciate the nature and quality of his acts at the time of the assault.⁷ This was the wrong legal standard. Instead, the district court should have focused on whether Dr. Karim’s testimony would have assisted the jury “in drawing its own conclusion as to a ‘fact in issue,’ ” *id.* at 811—the impact of any serious mental health disease or defect on Bacon’s ability to appreciate the nature and quality of his acts.

If otherwise admissible, Dr. Karim’s expert testimony “would have been highly probative” of Bacon’s mental state and “unlikely to cause significant confusion with the jury if properly constrained by compliance with the rules of evidence.” *United States v. Cohen*, 510 F.3d 1114, 1126–27 (9th Cir. 2007). Thus, even if the district court had explained the Rule 403 exclusion, it likely would have abused its discretion. With no explanation, it clearly did so.

We do not hold that the district court must admit Dr. Karim’s testimony on remand, only that the district court abused its discretion in finding the testimony was not relevant to Bacon’s insanity defense. On remand, to fulfill

its “gatekeeping function” under Rule 702 and *Daubert*, the district court should consider whether Dr. Karim’s testimony is reliable. *See Christian*, 749 F.3d at 810 (quoting *Redlightning*, 624 F.3d at 1111). The government, in its *Daubert* motion, raised a number of very real reliability issues with Dr. Karim’s expert testimony, including that Dr. Karim did not explain his reasoning or methodology in arriving at his conclusions and cited no medical literature showing that a “dissociative state” or other mental health disorders suffered by Bacon at the time of the offense are considered mental diseases or defects. We cannot express any view on the admissibility of Dr Karim’s testimony under Rule 702 “because the record before us is too sparse to determine whether the expert testimony is ... reliable.” *Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 466 (9th Cir. 2014) (en banc).

B.

We must decide whether the exclusion of Dr. Karim’s testimony was harmless error. *See United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc). It was not. If the district court had admitted Dr. Karim’s testimony, Bacon’s insanity defense would have gone to the jury. Given Bacon’s prior mental health diagnoses, an expert witness may have “provided some evidentiary basis for inferring ... a link between [Bacon’s] obvious mental illness and [his] sole defense.” *Christian*, 749 F.3d at 813. Without this testimony Bacon was unable to present his insanity defense to the jury. Thus, the error was not harmless, and Bacon’s “substantial rights were affected by the district court’s error.”⁸ *Id.*; *see also Rahm*, 993 F.2d at 1415–16.

III.

We now turn to the proper remedy for the district court’s non-harmless error of precluding Bacon’s expert testimony:

***1161** We must vacate the conviction and remand for a new trial. *See Christian*, 749 F.3d at 814. In *Christian*, we explained that “*Barabin* extended a general evidentiary rule requiring a new trial ‘[w]hen the district court has erroneously admitted or excluded prejudicial evidence’ to the admission of expert testimony.” *Id.* (quoting *Barabin*, 740 F.3d at 466 (alteration in original)). While acknowledging that “*Barabin* involved the admission of expert testimony in a civil trial,” the *Christian* court held “that *Barabin*’s analysis applies with equal force to” criminal cases in which the district court

excluded expert testimony. *Id.* Absent intervening Supreme Court authority, we are bound by the prior decisions of this Court. *See Miller v. Gammie*, 335 F.3d 889, 893, 899–900 (9th Cir. 2003) (en banc). Accordingly, we vacate Bacon’s conviction and remand for a new trial.⁹

VACATED and REMANDED.

Per Curiam Opinion; Concurrence by Judge Watford

WATFORD, Circuit Judge, joined by BENNETT, Circuit Judge, and RAKOFF, District Judge, concurring:

I agree with my colleagues that circuit precedent requires us to remand this case to the district court for a new trial. *See United States v. Christian*, 749 F.3d 806, 813–14 (9th Cir. 2014); *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 466–67 (9th Cir. 2014) (en banc). I write separately to highlight how wasteful of judicial resources that remedy potentially is. *See Estate of Barabin*, 740 F.3d at 469 (Nguyen, J., concurring in part and dissenting in part).

Our panel does not hold that Dr. Karim’s testimony must be admitted at the new trial. We merely hold that his testimony may not be excluded on the ground originally given by the district court (relevance), and we remand the case so that the district court can assess the other grounds on which Dr. Karim’s testimony might still be excluded, most notably as not meeting the standard for reliability imposed by Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). 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?

As Judge Nguyen argued in *Estate of Barabin*, the far more sensible procedure would be to “conditionally vacate the judgment and remand to the district court with instructions to determine whether the disputed expert testimony was admissible pursuant to the requirements of Rule 702 and *Daubert*.” 740 F.3d at 471 (Nguyen, J., concurring in part and dissenting in part). Under that procedure, if the court determined on remand that Dr. Karim’s ***1162** testimony is inadmissible, it would simply reinstate the judgment. Only if the court determined that Dr. Karim’s testimony *is* admissible, and therefore was wrongly kept from the jury at the first

trial, would there be a need for a retrial. Since this eminently sensible procedure is forbidden by existing circuit precedent, I reluctantly join the court's disposition.

All Citations

956 F.3d 1154, 20 Cal. Daily Op. Serv. 3743, 2020 Daily Journal D.A.R. 3902

Footnotes

- * The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.
- 1 In a concurrently filed memorandum disposition, we resolve the remaining issues in the case.
- 2 We deny Bacon's request to assign this case to a different district court judge on remand. The record does not show that the district judge was biased or that other unusual circumstances were present. *See United States v. Peyton*, 353 F.3d 1080, 1091 (9th Cir. 2003), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc); *see also Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").
- 3 The district court also noted that "Dr. Karim's opinions, in part, violate 704."
- 4 Bacon timely objected to the district court's ruling precluding Dr. Karim from testifying.
- 5 The IDRA requires the defendant, by clear and convincing evidence, to prove that "he suffered from a serious mental disease or defect at the time of the crime" and that "his mental disease or defect must have prevented him from appreciating the nature and quality or wrongfulness of his acts." *United States v. Knott*, 894 F.2d 1119, 1121 (9th Cir. 1990).
- 6 While the district court did conclude that "Dr. Karim's opinions ... are speculative, irrelevant, and unreliable," the court's analysis under Rule 702 focused exclusively on relevance and did not consider reliability at all.
- 7 To the extent the district court ruled that Rule 704 precluded Dr. Karim from testifying, it abused its discretion. *See Christian*, 749 F.3d at 812 n.2 (Rule 704(b) "limit[s] the scope of [an expert's] testimony" but does not "prohibit[] him from testifying at all.").
- 8 We do not reach Bacon's challenge that excluding Dr. Karim's testimony violated Bacon's constitutional right to present a defense because we "reverse on the basis of the nonconstitutional evidentiary error." *United States v. Rahm*, 993 F.2d 1405, 1416 n.6 (9th Cir. 1993).
- 9 We note two issues that may arise again on remand. First, if Bacon's insanity defense goes to the jury, his father's lay testimony about Bacon's mental health history would not be per se irrelevant even if the proffered testimony goes to events that occurred several years before the assault. *See, e.g., Crawford v. City of Bakersfield*, 944 F.3d 1070, 1079 (9th Cir. 2019) (finding under Rule 701 that as long as a mother "stopped short of opining that [the son] had a mental illness, she was competent to testify about her own observations of and experiences with" her son's past behavior).
Second, if Bacon again testifies and the government seeks to impeach him with evidence of his prior convictions, the district court should consider the five factors we noted in *United States v. Hursh*, 217 F.3d 761 (9th Cir. 2000), when "balancing the probative value of evidence of a defendant's prior convictions against that evidence's prejudicial effect," *id.* at 768. We express no view on the merits of any challenges to that impeachment.

U.S.C.A. No. 18-50120

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICK JOHN BACON,
Defendant-Appellant

Appeal from the United States District Court for the Central District of California,
The Honorable Percy Anderson, Presiding
D.C. No. 17-CR-00159-PA-1

**APPELLANT BACON'S OPPOSITION TO THE APPELLEE
UNITED STATES' PETITION FOR REHEARING EN BANC**

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I. INTRODUCTION

In its petition for rehearing *en banc*, appellee United States (the “government”) argues for limited remand hearings instead of new trial orders to address *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) errors, with the district court having the option to affirm the conviction. This argument is based on its false claim that erroneous expert testimony rulings result in “mandatory” new trials, without reviews for prejudice, that purportedly waste resources.

Contrary to the government’s position, this Court remands for a new trial only when the benefiting party cannot show that the *Daubert* error did not affect the aggrieved party’s substantial rights. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014) (*en banc*) (overruling in part *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003)). Limited remands are available but not when the error is prejudicial. *See United States v. Christian*, 749 F.3d 806, 813 n.3, 814 (9th Cir. 2014) (also finding that *Barabin*’s analysis applies with equal force to the exclusion of expert testimony in a criminal trial). *See also United States v. Ruvalcaba-Garcia*, 923 F.3d 1183 (9th Cir. 2019) (applying *Barabin* and *Christian* to affirm conviction despite erroneous admission of government’s expert because error was harmless).

Here, the district court erroneously excluded as “irrelevant” defendant Patrick Bacon’s psychologist and, with it, his insanity defense. *United States v.*

Ray, 956 F.3d 1154, 1160 (9th Cir. 2020). Because the government failed to show the error it had a hand in causing was purportedly harmless, the remand for a new trial was the proper remedy and consistent with this Court’s precedent. It is also consistent with Supreme Court precedent, the law in the majority of sister courts of appeal, and 28 U.S.C. §§ 2106, 2111.

The suggestion for a limited remand with the district court having the option to affirm would be especially inappropriate here because the district court also found, without any analysis, the same erroneously excluded expert to be purportedly unreliable. *Ray*, 956 F.3d at 1159 n. 6, 1160. The remand for a new trial deters against an undue risk of post-hoc rationalization and maintains the purity of the legal process and trial. *Mukhtar*, 319 F.3d at 1074; *Barabin*, 740 F.3d at 467 (rejecting a “post-hoc *Daubert* hearing”).

The majority of sister circuit courts of appeal agree with this Court and remand for a new trial when the erroneous exclusion of expert testimony results in prejudicial error. Therefore, *en banc* review is not justified. *See* Circuit Rule 35-1. The government’s petition should be denied.

II. STATEMENT OF THE CASE

A. *Ray*’s Facts and Opinion

Bacon’s jury trial included the details of Bacon’s assault, the victim’s injuries and parts of Bacon’s interview with the investigating agent. *Ray*, 956 F.3d

at 1157. The district court excluded any mention of Bacon's mental health defects that contributed to him being insane at the time of the offense and excluded testimony from Dr. Karim, the defense forensic psychologist, in support of such a defense. *Ray*, 956 F.3d at 1158. The district court erroneously ruled that Dr. Karim's testimony was irrelevant because he was unable to opine as to the ultimate question regarding Bacon's insanity – which would have violated Federal Rule 704 anyway. *Id.* Consequently, the district court also excluded the insanity defense. *Id.* at 1158, 1160. After the guilty verdicts, the district court sentenced Ray and Bacon to 100 months and 120 months in prison, respectively. *Ray*, 956 F.3d at 1157.

The *Ray* court stated that the government in its *Daubert* motion had “raised a number of very real reliability issues with Dr. Karim's expert testimony, including that he did not explain his reasoning or methodology in arriving at his conclusions and cited no medical literature showing that a ‘dissociative state’ or other mental health disorders suffered by Bacon at the time of the offense are considered mental diseases or defects.” *Ray*, 956 F.3d at 1160. Yet, the *Ray* court could not “express any view on the admissibility of Dr. Karim's testimony under Rule 702 ‘because *the record before us is too sparse* to determine whether the expert testimony is . . . reliable.’” *Id.* (citing *Barabin*, 740 F.3d at 466) (emphasis added).

However, Dr. Karim's report (and expected testimony) included his qualifications, experience, methods used in arriving at his opinions, description of

the records including Bacon's long mental health history records starting from childhood and sources of information he relied on including diagnoses by prior mental health practitioners. In Dr. Karim's opinion, Bacon suffered from mental health disorders (defects) including chronic schizotypal personality disorder and a dissociative state at the time of the offense. *See* Dr. Karim's Preliminary Psychological Evaluation dated December 3, 2017 (CR 109); Dr. Karim's Supplemental Psychological Evaluation dated January 10, 2018 (CR 136). BOP clinicians had also diagnosed Bacon with schizotypal personality disorder in 2015 and 2016, and right after this incident. ER 85-86. *See United States v. Long*, 562 F.3d 325 (5th Cir. 2009) (schizotypal personality disorder is a severe mental disease or defect). Bacon's mania at the time of the offense was consistent with the bipolar disorder that other clinicians opined Bacon also suffers from. ER 90. CR 109; CR 136.

Dr. Karim's reports cited his reliance on the Diagnostic Statistical Manual, Fifth Edition (DSM-V). Contrary to the government's claim, the DSM-V refers to dissociative disorders and a dissociative state involving depersonalization and derealization. DSM-V at 291 to 307.

While Bacon raised a constitutional objection to the exclusion of his insanity defense, ER 70, 155, *Ray* reversed based on the "nonconstitutional evidentiary error." *Ray*, 956 F.3d at 1160 n. 8. However, the panel recognized that "[w]ithout

this testimony [from Dr. Karim,] Bacon was unable to present his insanity defense to the jury. Thus, the error was not harmless, and Bacon’s substantial rights were affected by the district court’s error.” *Id.* (citing *United States v. Rahm*, 993 F.3d at 1405, 1415-1416 (9th Cir. 1993)). Applying *Barabin* and *Christian*, the panel vacated Bacon’s conviction and remanded for a new trial. *Ray*, 956 F.3d at 1161.

III. ARGUMENT

A. This Court’s Cases Consistently Apply the New Trial Remedy for Expert Admissibility Errors that Are Prejudicial

When a district court erroneously excludes relevant expert testimony causing prejudicial error and the record is “too sparse” or does not show the error was harmless, a remand for a new trial is appropriate – not a limited remand for a post-hoc *Daubert* hearing with the district court having the ability to affirm the conviction despite its prior prejudicial error. *Barabin*, 740 F.3d 457; *Christian*, 749 F.3d 806 (extending *Barabin* to criminal cases and the erroneous exclusion of expert testimony; confirming limited remand available but not when the record is unclear as to admissibility); *Ruvalcaba-Garcia*, 923 F.3d 1183. This Court’s case law on this issue is uniform.

A remand for a new trial deters against prejudicial errors caused by a district judge’s erroneous decisions and the party who leads the district court into committing such errors. However, a limited remand giving an opportunity to the

district court to affirm the tainted conviction would only reward the party who benefitted from the exclusion in the first place.

In *Mukhtar*, this Court reversed a verdict in favor of the plaintiff in a racial discrimination case because the judge failed to make an explicit *Daubert* ruling. *Mukhtar*, 299 F.3d at 1066. The *Mukhtar* court ordered a new trial rather than a limited remand for a post-trial *Daubert* determination because:

To remand for an evidentiary hearing post-jury verdict undermines *Daubert's* requirement that some reliability determination must be made by the trial court before the jury is permitted to hear the evidence. Otherwise, instead of fulfilling its mandatory role as a gatekeeper, the district court clouds its duty to ensure that only reliable evidence is presented with *impunity*. A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of *post-hoc rationalization*. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny.

319 F.3d at 1074 (emphases added).

In *Barabin*, this Court, sitting *en banc*, held that where the erroneous admission of expert testimony actually prejudices a defendant, the appropriate remedy is a new trial. 740 F.3d at 460. In *Barabin*, the district court first excluded an expert's testimony based on his "dubious credentials and lack of expertise" but then reversed its decision without a *Daubert* hearing. *Id.* at 464. The court also did not make relevancy and reliability findings as to another expert it allowed to testify. This Court announced that it would treat the erroneous admission of expert testimony like all other evidentiary errors, by subjecting it to harmless error

review. *Id.* (citing *Rahm*, 993 F.2d at 1415). This Court would reverse “only if the error affect[ed] a substantial right of the party.” *Id.* (citing Fed. R. Evid. 103(a)).

The “burden is on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.” *Id.* (citing *Obrey v. Johnson*, 400 F.3d 691, 700 (9th Cir. 2005)); *see also Kotteakos v. United States*, 328 U.S. 750, 760 (1946) (where substantial rights are affected, the government has the burden of sustaining the conviction on appeal).

The “erroneous admission of expert testimony, ***absent a showing the error was harmless***, requires a new trial.” 740 F.3d at 464 (citing *Mukhtar*, 299 F.3d at 1066-67)) (emphasis added). “To the extent *Mukhtar* requires anything more, it is overruled.” *Id.*

“If the reviewing court decides the record is sufficient to determine whether expert testimony is relevant and reliable, it may make such findings. If it ‘determines that evidence [would be inadmissible] at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case[,]’ the reviewing court may direct entry of judgment as a matter of law.” *Id.* (citing *Weisgram v. Marley Co.*, 528 U.S. 440, 446-47 (2000)). However, the record in *Barabin* was “too sparse to determine whether the expert testimony is relevant and reliable.” *Id.* at 467.

Like in *Mukhtar*, 319 F.3d 1073, the *Barabin* court found that a limited remand for a “post-hoc *Daubert* hearing...would not be appropriate under the circumstances here, where the district court abused its discretion by erroneously admitting expert testimony, ***and the evidence was prejudicial.***” *Id.* at 467 (emphasis added).

The *Barabin* dissent argued for a limited remand. “If the testimony was admissible [on remand as in the previous trial], the district court ***may*** reinstate the verdict. If, however, the testimony was inadmissible, the district court should ascertain whether the wrongful admission of that expert testimony prejudiced the defendants and, if so, order a new trial. ***In the former case***, the system will not be unreasonably burdened with a retrial. In either case, the parties retain their right to appeal.” *Id.* at 471 (emphases added).

However, a district court that affirms its prior expert admissibility decision in all likelihood would affirm the conviction, rather than order a new trial because there would be no error warranting the new trial. In fact, the available subsequent history of the government’s cited cases show the unlikelihood of a district court granting a new trial after a limited remand for a *Daubert* hearing. *See e.g., United States v. Cordoba*, 95-0093-GT (C.D. Cal.), Doc. 158 (order finding polygraph evidence inadmissible and reinstating conviction); *United States v. Amador-Galvan*, 91-cr-00203-JGZ (D. Ariz.), Doc. 239, 330 (orders denying expert

testimony and denying new trial); *United States v. Lee*, 92-cr-06070-WJZ (S.D. Florida), Doc. 137 (order granting motion to re-impose final order of judgment).

A limited remand with the option to affirm creates an undue risk of post-hoc rationalization and raises the likelihood of denying the defendant's Sixth Amendment Right to a Jury Trial and Right to Present a Defense. On the other hand, a remand for a new trial deters against the possibility of a predetermined outcome by the district court and upholds the fairness of the proceedings.

In *Christian*, as in *Ray*, because the record was sufficient to determine that the district court's error "actually prejudiced the defendant" but was "too sparse to conduct a proper admissibility analysis," the appropriate remedy was a new trial. 749 F.3d at 813.

The *Christian* court agreed with *Barabin* that earlier cases allowed a limited remand as to expert admissibility errors to "'grappl[e] with the effects of *Daubert*[,] were impliedly overruled '[a]fter the dust of *Daubert* had settled.'" *Christian*, 749 F.3d at 814 n.4 (distinguishing *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997) and *United States v. Amador-Galvan*, 9 F.3d 1414 (9th Cir. 1993)) (internal citation omitted). In response to the remand for a new trial, the government did not petition for rehearing or rehearing *en banc* in *Christian* to seek the limited remand remedy.

In *Ruvalcaba-Garcia*, this Court had no issue following the precedent set in *Barabin* and *Christian*. *Id.* In *Ruvalcaba-Garcia*, the “district court abused its discretion by admitting the expert's testimony without first finding it relevant and reliable.” *Id.* The district court's “failure to make these gateway determinations was an abuse of discretion.” *Id.* (citing *Barabin*, 740 F.3d at 467). But, *Ruvalcaba-Garcia* found the error harmless because “the *record [was] sufficient* to determine [that the] expert testimony [was] relevant and reliable,” and affirmed the conviction. *Id.* (citing *Christian*, 749 F.3d at 813) (emphasis added).

Here, the government failed to show the alleged harmless in the district court's erroneous exclusion of the expert the government sought excluded and so the remand for a new trial remedy was appropriate and consistent with *Ruvalcaba-Garcia*, *Barabin* and *Christian*. *See also* 28 U.S.C. §§ 2106, 2111.

B. The Government's Cited Cases Are Distinguishable and Support the New Trial Remedy Here

The government's cited cases, although distinguishable, in fact support the defendant's cause and the new trial remedy in this case. In *Waller v. Georgia*, 467 U.S. 39 (1984), the issue was whether a pretrial suppression hearing should have been open to the public – not the exclusion of a relevant trial witness. The Supreme Court reversed to the trial court to hold a new suppression hearing with appropriate portions open to the public on remand. Indeed, the defendant originally

had sought the public suppression hearing remedy and the Supreme Court made clear that "the remedy should be appropriate to the violation." *Id.* at 50.

Here, the appropriate remedy for the improper exclusion of an expert witness from trial, and with it, the defendant's defense theory, which exclusion the government could not show to be harmless, is a new trial.

In *Jackson v. Denno*, 378 U.S. 368 (1964), it was unknown if the jury's verdict was based on the confession or not, and so the conviction was reversed for the trial judge to hold a pre-trial voluntariness of statements hearing in the first instance that the defendant "had not yet had." *Id.* at 394. In *United States v. Wade*, 388 U.S. 218 (1967), the conviction was reversed for a hearing by the trial court to determine if the in-court identification was tainted by the post-arrest identification done without counsel's presence. The trial court had not held a hearing in the first instance and therefore a limited remand was appropriate. *Id.* at 242.

Unlike in *Denno* and *Wade*, the district court in *Ray* already held a *Daubert* hearing and made the erroneous decision to exclude a relevant defense expert witness and with it, the defendant's defense. Because the government could not show the error it benefitted from was harmless, a new trial is appropriate.

The government's cited cases in which reviewing courts issued limited remands rather than remands for new trials are easily distinguishable from *Ray*. Some of the cited cases did not involve the admissibility of expert testimony. *See*

United States v. Fomichev, 899 F.3d 766, 772-73 (9th Cir. 2018) (district court improperly extended sham marriage exception to the marital communications privilege without making findings about whether the subject marriage was irreconcilable); *United States v. Moreno*, 891 F.2d 247, 250 (9th Cir. 1989) (vacating for district court to have hearing on voluntariness of statements in the first place and make specific findings).

The government's remaining cited cases were decided before *Daubert* reconfigured the law on expert testimony admissibility (see *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997) (expert admissibility decision remanded for reconsideration in light of *Daubert*); *United States v. Amador-Galvan*, 9 F.3d 1414 (9th Cir. 1993) (same); *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) (same); *United States v. Lee*, 25 F.3d 997 (11th Cir. 1994) (per curiam) (same); *United States v. Smithers*, 212 F.3d 306, 314 (6th Cir. 2000) (criticizing *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), as “not meet[ing] *Daubert's* standard for determining whether scientific evidence is admissible.”)); or were remanded because the district court did not conduct any hearing on the expert's admissibility in the first place (see *United States v. Childress*, 58 F.3d 693, 729 (D.C. Cir. 1995) (per curiam) (remanding because district court to determine admissibility because district court “never exercised” its discretion in the first place); *Moreno*, 891 F.2d at 250)).

C. The Majority of Sister Circuit Courts of Appeal Agree with the New Trial Remedy when an Erroneous Expert Admissibility Decision Is Prejudicial

The reversal for a new trial remedy when the erroneous exclusion of expert testimony is not harmless is also the law in the majority of the nation's circuit courts of appeal. *See United States v. Velarde*, 214 F.3d 1204, 1211-1212 (10th Cir. 2000) (remanding for new trial because government failed its burden to show harmlessness in district court's errors in failing to make *Daubert* reliability findings before admitting both government's experts); *United States v. Lankford*, 955 F.2d 1545, 1553 (11th Cir. 1992) (reversed for a new trial because district court erred in excluding defense expert testimony and the error was not harmless); *Huss v. Gayden*, 571 F.3d 442, 546 (5th Cir. 2009) (same); *United States v. West*, 813 F.3d 619 (7th Cir. 2015) (same); *United States v. Smithers*, 212 F.3d 306, 308 (6th Cir. 2000) (same); *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 788 (3rd Cir. 1996) (same); *United States v. Litvak*, 808 F.3d 160, 184 (2nd Cir. 2015) (same).

As the First Circuit Court of Appeals aptly explained after it found the exclusion of a defense expert to be non-harmless error, "we are persuaded that vacation of the judgment, rather than a remand for further findings, is the fairest course. A new trial will allow a judge appropriately to ascertain the admissibility of expert testimony and a jury armed with all reliable and relevant evidence to

weigh issues[.]” *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 88 (1st Cir. 1998). The same reasoning remains true in this case.

IV. CONCLUSION

For the reasons set forth above, this Court should deny the government’s petition for rehearing *en banc*.

Dated: July 22, 2020

Respectfully submitted,

s/ Shaun Khojayan

Attorney for *Defendant-Appellant*

PATRICK JOHN BACON

CERTIFICATE OF RELATED CASES

Appellant is not aware of any cases pending in this Circuit that are related to this appeal.

Dated: July 22, 2020

Respectfully submitted,

s/ Shaun Khojayan

Attorney for Defendant-Appellant

PATRICK JOHN BACON

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C)
AND CIRCUIT RULE 32-1 FOR CASE NUMBER **18-50120**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached answer to appellee's petition for panel rehearing/petition for rehearing en banc is:

proportionately spaced, has a typeface of 14 points or more and contains 3,140 words (petitions and answers must not exceed 4,200 words).

or

monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

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in compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

July 22, 2020
Date

s/ Shaun Khojayan
Shaun Khojayan

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on July 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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