

SCOTUS Changes Admissibility of Expert Testimony In Criminal Cases

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Last week, the Supreme Court issued a ruling in *Diaz v. United States* that changed the landscape for the type of testimony an expert witness can give regarding whether a criminal defendant had the requisite mental state to commit the crime of which he is accused—the type of “ultimate issue” evidence that has been deemed inadmissible in criminal cases for almost half a century. *Diaz v. United States*, No. 23-14, 2024 WL 3056012 (U.S. June 20, 2024).

Delilah Guadalupe Diaz was arrested for attempting to smuggle in a car door a large quantity of methamphetamines over the U.S.-Mexico border. Diaz claimed that she had no idea that the drugs were in her car and thus denied *knowingly* attempting to smuggle drugs, an element of the charged offense—methamphetamine importation. To combat Diaz’s “blind mule” defense, the prosecution offered as an expert in drug smuggling an agent from the Department of Homeland Security (DHS) who testified that “in most circumstances, [drug traffickers] knows they are hired ... to take the drugs from point A to point B.” *Id.* at *3 (quoting App. to Pet. for Cert. 15a). As he explained, drug dealers generally do not risk moving large quantities of drugs through unknowing smugglers because they have no guarantee the product will be delivered. On appeal, the defendant argued that the DHS agent’s testimony ran afoul of Federal Rule of Evidence 704(b), which bars expert witnesses in criminal cases from “stat[ing] 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.” *Id.* (quoting Fed. R. Evid. 704). The Supreme Court rejected this argument in a 6-3 holding.

Writing for the majority, Justice Thomas explained that Rule 704(b) “proscribes only expert opinions in a criminal case that are about a particular person ... and a particular ultimate issue.” *Id.* at *4. Had the expert in *Diaz* stated that *all* drug couriers, which would necessarily include the defendant, trafficked drugs knowingly, Rule 704(b) would have been violated. However, because the DHS agent opined on the mental state of only *most* couriers, a decision on the “ultimate issue” of whether Diaz had the requisite

knowledge or intent for a conviction remained with the jury, which had to decide whether the defendant fell into the class of “most couriers.”

Interestingly, Justice Jackson, a former federal public defender, joined most of the Court’s conservative bloc in voting with the majority. Justice Jackson penned a concurrence in which she noted that the Court’s interpretation of Rule 704(b) could aid defense attorneys going forward as much as it could prosecutors. Justice Jackson provided as an example expert testimony regarding a defendant’s mental health condition; by informing a jury that most people with schizophrenia as severe as the defendant’s do not appreciate the wrongfulness of their actions, for instance, a mental-health expert can help provide context to a mental illness that jurors may otherwise have trouble understanding. Justice Jackson also emphasized that there are procedural safeguards to prevent the misuse of expert testimony, such as cross-examination or an admissibility challenge based on relevance or undue prejudice grounds. And trial courts can instruct jurors on the appropriate use of expert testimony in deciding ultimate issues.

In dissent, Justice Gorsuch, joined by Justices Sotomayor and Kagan, wrote that Rule 704(b) prevents expert witnesses not only “from stating a *definitive* opinion about the defendant’s mental state,” but also “from offering *any* opinion on the subject.” *Id.* at *12 (Gorsuch, J., dissenting). In the minority’s view, the expert’s opinion that most drug traffickers have knowledge that they are transporting drugs was functionally equivalent to testimony that the defendant herself knew that she was trafficking drugs. Because Rule 704(b) prohibits experts from opining on whether a specific defendant had the requisite mental state, it makes little sense to allow an expert witness to testify to the likelihood that a given person within a class of people to which defendant belongs has that same mental state. Justice Gorsuch warned that the Court’s interpretation of Rule 704(b) could pose line-drawing problems: what if the DHS agent had stated that 99% of drug traffickers knowingly transport drugs? Despite the dissent’s fear of the possible consequences of the majority’s decision, Justice Gorsuch maintained that such consequences are not inevitable. Like the concurrence, the dissent points out that parties will still have to prove how expert testimony about the mental state of a particular group of people is relevant to the specific defendant’s mental state without being unduly prejudicial. Opposing counsel can likewise challenge the reliability of testimony given by an expert “claim[ing] the power to conjure ... [others’] past thoughts.” *Id.* at *14 (Gorsuch, J., dissenting).

While the Court’s holding still does not permit expert witnesses to directly opine on a given criminal defendant’s mental state during the commission of a crime, the ruling does allow experts to provide testimony that comes much closer to answering this question. As Justice Jackson’s concurrence illustrates, the Court’s clarified interpretation of Rule 704(b) provides a new tool—as well as a new threat—for both prosecutors and defense attorneys.

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