Supreme Court to consider permissible scope of expert testimony about *mens rea*

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On March 19, 2024, the Supreme Court will hear argument in *United States v. Diaz* about the scope of Federal Rule of Evidence 704(b), which provides that, in criminal cases, "an expert witness must not state an opinion about whether the defendant did or did not have a mental state … that constitutes an element of the crime charged."

The Petitioner, Delilah Diaz, was arrested at the Mexico-United States border with 55 pounds of methamphetamine hidden in the doors and panels of the car she was driving. Diaz claimed she did not know the drugs were in the car and presented a "blind mule" defense.

While this case arises in the context of cross-border drug smuggling, it could have a broader effect, including in white-collar prosecutions where, as practitioners well know, the central issue at trial is very often the defendant's mental state.

At Diaz's trial, the Government was permitted to rebut her claim with expert testimony from a Homeland Security Investigations Special Agent to the effect that most drug couriers know that they are carrying drugs. On appeal, the 9th U.S. Circuit Court of Appeals rejected Diaz's argument that the Agent's testimony was the functional equivalent of an opinion about her mental state prohibited by Rule 704(b), holding that the Rule only prohibits "explicit opinions" about the defendant's mental state.

The Supreme Court took up the case to resolve a split between the 9th Circuit and the 5th Circuit, which does not permit expert witnesses to offer such opinion testimony about the likely knowledge of drug couriers.

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Background and proceedings below

Diaz's case presents a seemingly common case of drug smuggling. In August 2020, Diaz drove a Ford Focus through the Ysidro Port from Mexico to the United States. During a routine inspection, a border patrol agent searched the vehicle and found 56 individually wrapped packages hidden in various doors and panels. The packages contained approximately 55 pounds of methamphetamine, with an estimated value of more than $350,000.

After her arrest, Diaz made a post-*Miranda* statement denying that she knew there was methamphetamine in the vehicle. She told agents that, while she was in Mexico, she borrowed the vehicle from her boyfriend, who offered to let her drive it home to the United States.

The Government highlights several suspect statements made by Diaz during this interview, including that she had only met her alleged boyfriend two or three times, that she did not know his phone number or address, and that she had left his house — in a town an hour-and-a-half from the border — seven hours earlier. Brief for the United States ("Gov't Brief") at 2-3. Diaz also admitted that she received a locked cell phone from an unidentified friend but said that she would "rather not say" to whom the phone belonged. *Id.* at 6.

A federal grand jury charged Diaz with "knowingly and intentionally" importing methamphetamine, in violation of 18 U.S.C. §§ 952, 960.

Diaz then proceeded to trial, where the sole issue was whether she knew that the drugs were hidden in the vehicle. Over Diaz's objection, the government was allowed to call a Homeland Security Investigations Special Agent to testify on the structures and practices of drug trafficking organizations and whether they use unknowing couriers.

In response to a question about whether "large quantities of drugs [are] entrusted to drivers that are unaware of those drugs," the Agent testified, "No … in most circumstances, the driver knows they are hired. It's a business. They are hired to take the drugs from point A to point B." Brief for Petitioner ("Pet. Brief") at 10-11.

During closings, in its rebuttal to Diaz's argument that she was an unknowing courier, the Government told the jury, based on the Agent's testimony, that, "generally, couriers are compensated. Generally, you don't use unknowing couriers." *Id.* at 11-12. Diaz was convicted and sentenced to seven years' imprisonment.

On appeal to the 9th Circuit, Diaz argued that the Agent's testimony violated Rule 704(b) prohibition against "stating an opinion about whether the defendant did or did not have a mental state ... that constitutes an element of the crime charged." (Fed. R. Evid. 704(b)).

While acknowledging that the 5th Circuit takes a different approach (*See United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002), the 9th Circuit affirmed Diaz's conviction, holding that as long as an Agent does not state an "explicit opinion" about the particular defendant's mental state, testimony about the practices of drug trafficking organizations is not prohibited by Rule 704(b). *See United States v. Diaz*, No. 21-50238, 2023 WL 314309 (9th Cir. Jan. 19, 2023), *cert. granted*, 144 S. Ct. 392 (2023).

The arguments before the court

Diaz couches her arguments to the Court in terms of the text of Rule 704(b), but her argument is more practical than it is textual. Diaz characterizes the Agent's testimony in her case as "classwide *mens rea* testimony," by which she means testimony to the effect that "individuals like the defendant always or generally have a guilty mind." *See* Pet. Brief. at 3.

Even if such testimony does not single out the particular defendant on trial, Diaz argues that it violates Rule 704(b) because "juries naturally understand [it] as expressing an opinion about the defendant's state of mind." *See* Pet. Brief at 14. By contrast, Diaz characterizes the 9th Circuit's "explicit opinion" rule as "hyper-formalistic" and "overly rigid."

Diaz also appeals to the history and purpose behind Rule 704(b). She argues that to permit "classwide *mens rea* testimony" is inconsistent with the "Anglo-American tradition of ensuring that people are not deprived of their liberty unless they are morally blameworthy." *Id.* She further argues that such expert testimony conflicts with the Sixth Amendment's requirement that juries make the determination whether the defendant has the requisite mental state to be guilty of the charged crime.

The Government likewise appeals to the text, history and design of Rule 704(b). The government argues that the text of the Rule bars only "a direct opinion on the specific defendant's own mental state," while permitting "testimony that embraces a mental state issue in other ways" and "provides a basis from which the jury could infer that the defendant had the requisite mental state." *See* Gov't Brief at 15.

Here, the Government cites an earlier iteration of Rule 704(b), before the Rule was re-drafted for stylistic reasons, that set out an exception to Rule 704(a)'s general rule that expert testimony may "embrace[] an ultimate issue" that arguably tracks the Government's interpretation more closely. (Fed. R. Evid. 704(a)).

The stakes

The issue presented in *Diaz* is arguably quite narrow: What is the scope of expert testimony the government can use to prove a drug smuggling case? However, as Diaz argues to the Court, there are risks to allowing expert testimony based on generalizations about the knowledge held by a group of people. Indeed, while this case involves a drug courier, one could imagine how "classwide *mens rea* testimony" could be used to prosecute other defendants, including in the white-collar context.

For example, in a fraud case involving a high-value transaction, a defendant CFO who claimed a tax benefit might argue that she did not know that the transaction lacked economic substance, meaning that the transaction lacked a substantial economic or business purpose other than providing a tax benefit. If the Government is permitted to offer expert testimony "relevant to mental state," as long as the testimony "leaves the final step in the inferential process to the jury," could the Government call an expert to testify that based on his training and experience, CFOs and controllers who review such high-value transactions usually know whether they have economic substance? *See Gov't Brief* at 16.

Or, as Diaz herself posits, imagine an executive at an investment bank charged under 18 U.S.C. § 1001 for making false statements to an FBI agent who claims that she did not know her statements were false. Could the government call an expert to testify that "whenever high-level bank executives submit to an FBI interview, they extensively review all of the bank's financial records" and that, therefore, "the chances that a banking executive in this setting would unknowingly make a false statement are exceedingly rare"? *See* Pet. Brief at 22.

It would seem, under the 9th Circuit's — and the Government's — view, as long as the expert does not testify about the "specific [CFO's or the bank executive's] own mental state[,]" such testimony would be admissible. Such an outcome should be of concern not only to the criminal defense bar, but to anyone who seeks to hold the Government to proving every element of an offense to the jury beyond a reasonable doubt.

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