'Diaz' and Gorsuch's dissent: seeking other provisions to bar expert testimony on criminal defendant's mental state

By Nicole Boeckmann, Esq., and Meagan Maloney, Esq., Bracewell LLP

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In June 2024, the United States Supreme Court held that Federal Rule of Evidence 704(b) does not prohibit an expert witness from offering testimony relating to a criminal defendant's mental state, so long as the testimony does not conclusively state whether the defendant did or did not have the requisite mental state to commit a crime. The decision is likely to increase the use and reliance on expert witnesses to establish or refute mens rea in criminal cases.

Aware or not aware?

Diaz v. United States involved the drug-trafficking prosecution of a defendant who asserted a "blind mule" defense, arguing she was unaware of the drugs hidden in her car when she crossed the Southern border into the United States. To secure a conviction, the Government had to prove that Diaz "knowingly" transported the drugs into the United States.

It attempted to do so, in part, using an expert witness who would testify that most drug traffickers do not entrust large quantities of drugs to people who are unaware of what they are transporting and that, as such, most couriers are aware that they are transporting drugs.

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Diaz objected to the expert's testimony under Federal Rule of Evidence 704(b), which provides:

> "In a criminal case, 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. Those matters are for the trier of fact alone."

According to Diaz, the expert opinion testimony that most drug-couriers know they are transporting drugs was the functional equivalent of an opinion as to whether Diaz herself knew she was transporting drugs, an ultimate issue of fact for the jury. After both the District Court and Court of Appeals ruled against her on this issue, Diaz appealed to the Supreme Court.

Writing for the majority, Justice Clarence Thomas concluded that the expert testimony did not violate Rule 704(b) and affirmed Diaz's conviction.

Writing for the dissent, Justice Neil Gorsuch makes a compelling case for a much broader interpretation of the exception than that adopted by the majority.

Justice Thomas started his analysis with the history of Rule 704, which departed from the common law "ultimate issue" rule. At common law, the "ultimate issue" rule barred witness testimony that answered an ultimate issue in the case — one that must be decided by a jury — but allowed witnesses to offer testimony *related to* an ultimate issue.

The challenge of 'ultimate issue'

Initially designed to prevent witnesses from usurping the jury's role as the ultimate-fact finder, commentators soon realized that in practice, the "ultimate issue" rule did not serve its intended purpose. Rule 704 thus abolished the common law rule in federal court and permitted all witness testimony on ultimate issues without exception.

It wasn't until after the acquittal of John Hinckley Jr. for the attempted assassination of President Ronald Reagan — a trial that quickly digressed into a battle of experts concerning Hinckley's mental state — that Congress introduced Rule 704(b).

According to the majority, Rule 704(b) was intended as a "narrow" exception to the Rule allowing ultimate issue testimony, which by its terms only bars "expert opinions in a criminal case that are about a particular person ('the defendant') and a particular ultimate issue (whether the defendant has 'a mental state or condition' that is 'an element of the crime charged or of a defense')."

Diaz and 704(b)

Applying this framework to the *Diaz* facts, the Court held that the exception found in Rule 704(b) did not preclude the expert testimony at issue because it concerned the state of mind of drug-couriers as a group, rather than the state of the mind of the individual defendant.

In other words, the Court made a distinction between expert testimony that *most* drug-couriers know they are transporting drugs and expert testimony that *all* drug-couriers know they are transporting drugs, which necessarily includes Diaz despite not mentioning her by name.

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According to the dissent, because the plain language of Rule 704(b) bars opinions "about" whether the defendant had a particular mental state, it should encapsulate *any* expert opinions on the subject of *mens rea*, including those that are probabilistic ("most") rather than conclusory ("all" or "none"). Any other interpretation is neither necessary nor appropriate under the text of 704(b), which explicitly states that "matters" of mens rea "are for the trier of fact alone."

Opening for expert witnesses

In her concurring opinion, Justice Kentanji Brown Jackson points out that the prohibitions of Rule 704(b) apply equally to the Government and the defense. So although the rule worked against Diaz in this case, defendants in future cases may call their own expert witnesses to testify that they likely did not have the requisite mental state based on their membership in a particular group.

While the majority holding is generally consistent with the purpose of Rule 704 in that it leaves the ultimate issue of whether the defendant shared the state of mind of "most" similarly situated individuals to the jury, it is likely to greatly expand the use of expert testimony concerning the defendant's state of mind by both parties in criminal cases.

There is also legitimate concern, raised in both the concurrence and the dissent, that jurors give disproportionate weight to the testimony of law enforcement agents frequently testifying as experts for the prosecution, as opposed to those experts called by the defense.

Bias, reliance and expert witnesses

Defense attorneys should be mindful of this bias in selecting expert witnesses and consider other tools at their disposal to combat the government's increased reliance on expert testimony to prove *mens rea*. Defense attorneys may look to Justice Gorsuch's dissent.

The Justice writes that defense attorneys may employ other Federal Rules of Evidence to exclude expert testimony concerning the defendant's mental state that is either irrelevant (Rule 402) or prejudicial (Rule 403), despite that the evidence is otherwise not precluded under the Court's narrow reading of Rule 704(b).

About the authors

Nicole Boeckmann (L), a former division chief at the Eastern District of New York, is a partner in the **Bracewell** government investigations and enforcement practice. She can be reached at nicole.boeckmann@bracewell.com. **Meagan Maloney** (R) is an associate in the firm's Austin office and focuses on white collar criminal defense, government investigations and regulatory compliance.

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