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Implications of SCOTUS Expert Intent Ruling for the White-Collar Bar

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In August 2020, Delilah Diaz was arrested when she drove her boyfriend's car, laden with over $350,000 of hidden methamphetamine, across the U.S. border from Mexico. Her criminal trial tested the permissible scope of expert testimony as to a defendant's intent, ultimately resulting in a decision by the U.S. Supreme Court that has significant implications for criminal cases far beyond the specifics of her drug-trafficking case.

In *Diaz v. United States*, 144 S.Ct. 1727 (2024), the court held that expert testimony in a criminal case, as to whether "most people" similar to the defendant have a particular mental state, does not run afoul of Federal Rule of Evidence 704(b)'s prohibition against expert opinion evidence about whether a criminal defendant had or lacked the mental state required for conviction. Particularly in white-collar cases, where the defendant's intent is often the central disputed issue, the implications of *Diaz* may be far-reaching.

'Diaz: "Most People" vs. the Defendant

Diaz was stopped at the U.S.-Mexico border, where officers found 54 pounds of methamphetamine hidden in her car, which she claimed belonged to her boyfriend, who had loaned her the car to drive home to California. Charged with importing methamphetamine, Diaz claimed ignorance of the drugs.

At trial, the Government sought to have a Homeland Security Investigations Special Agent offer expert testimony that drug traffickers typically do not entrust large quantities of

drugs to unknowing couriers. Diaz objected, citing Rule 704(b), which bars expert opinion evidence about a criminal defendant's mental state, where that mental state is an element of the crime charged.

The trial judge overruled the objection and allowed the agent to testify that "most" couriers know they are transporting drugs, and that specifically, "in most circumstances, the driver knows they are hired… to take the drugs from point A to point B." *Diaz,* 144 S.Ct. at 1731. Diaz was convicted and appealed, arguing that the agent's testimony violated Rule 704(b), and the Ninth Circuit Court of Appeals affirmed the conviction.

The Supreme Court also affirmed. Writing for a 6-3 majority, Justice Clarence Thomas held that an expert's conclusion that "most people" in a group have a particular mental state is not an opinion about the defendant in particular, and therefore does not violate Rule 704(b). The agent's testimony therefore did not infringe on the jury's role of determining the ultimate issue in the case—Diaz's intent—because he testified only as to the knowledge of *most* drug couriers, and not about whether Diaz herself knowingly transported methamphetamine. *Id.* at 1733.

In a vigorous dissent joined by Justices Sonia Sotomayor and Elena Kagan, Justice Neil Gorsuch condemned the majority's embrace of an expert's probabilistic testimony about a criminal defendant's mental state (i.e., "most" people like the defendant would know X), and explained that the text of Rule 704(b) precludes *all* expert testimony "about" the defendant's mental state, regardless of whether that testimony is probabilistic or a definitive opinion on the defendant's *mens rea*.

The dissent criticized the majority's opinion for carving a path around Rule 704(b) that put a "powerful new tool" in the government's pocket, allowing a prosecutor to offer an expert with "the convenient ability to read minds," to tell the jury how "most people" like the defendant think. *Id.* at 1738 (Gorsuch, J., dissenting). In the dissenters' view, the majority's interpretation of Rule 704(b) functionally usurped the jury's role as the sole arbiter of a criminal defendant's *mens rea,* encouraging the jury's "lazy assumption" that the defendant must think just like most other people in the same situation. *Id.* at 1743.

Sauce for the Goose—and the Gander, Too?

While Justice Gorsuch observed that the majority's holding gives prosecutors a powerful tool, it may also offer strategic advantages to the defense. Indeed, Justice Ketanji Brown Jackson, in her concurrence, described the majority's decision as "party agnostic." In her view, rather than serve solely as a tool for prosecutors, the decision also could be helpful to defense counsel. For example, she argued, in a criminal case involving a defendant's mental health condition, more expert testimony, from both parties, could help overcome biases, stereotypes, and unequal knowledge about these conditions.

And in domestic violence cases, the majority's expansion of permissible Rule 704(b) testimony could be critical in disproving the *mens rea* of a defendant who is a domestic violence victim and establishing defenses such as

duress and self-defense. *Id.* at 1737 (Jackson, J., concurring).

The dissent recognized that the *Diaz* decision will likely result in an explosion of expert testimony—"what is good for the goose is good for the gander," in the words of Justice Gorsuch—as defense lawyers recruit their own expert witnesses to opine that their clients are unlike most similarly situated defendants. *Id.* at 1743 (Gorsuch, J., dissenting).

Opportunities for this kind of dueling expert testimony abound. For example, in the recent successful federal prosecution of Gordian Ndubizu, a longtime Drexel University accounting professor who was charged with tax fraud relating to his failure to report income from a pharmacy he co-owned with his wife, the defendant's intent was the key issue. His counsel argued that despite being an accounting professor, Ndubizu was not a tax expert and knew nothing about taxes.

In the wake of *Diaz*, such a case would be ripe for the government to seek to offer expert testimony that *most* accounting professors would know that they were cooking the books of an outside business by inflating the cost of goods sold and underreporting profits.

The defense, in turn, could recruit its own expert to opine that most similarly situated defendants—accounting professors—would *not* have that knowledge or awareness. One could imagine these questions playing out in cases addressing market manipulation, securities fraud, healthcare fraud, and a panoply of other business crimes where the defendant's mental state is a crucial issue before the jury.

The goose-and-gander metaphor also applies to the way jurors may evaluate expert testimony on intent. *Diaz* may serve as a weapon for the government if jurors place undue weight on the testimony of a law enforcement officer who serves as an expert. But at the same time, the defense could use law enforcement officer testimony to create reasonable doubt, for example by arguing that the government so lacks any actual or objective proof of intent, that it needs to get one of its own employees to testify about it.

Defense Counsel Vigilance

As Justice Gorsuch noted, the *Diaz* opinion opens a can of worms: an expert's testimony about the mental state of "most people" in the defendant's shoes is permissible, but what about testimony that "people like defendant generally know" or "almost always know" or "99% of people like defendant know"? Will such testimony be admissible? *See Diaz,* 144 S.Ct. at 1742 (Gorsuch, J., dissenting). In eliciting expert testimony, the phrasing of the prosecutor's questions will be critical to an admissibility determination, and may impact whether the anticipated testimony runs afoul of the newly expanded, still-amorphous boundaries of permissible Rule 704(b) testimony. This means that defense lawyers will need to pay close attention to the questions a prosecutor asks and be prepared to lodge timely objections to questions that go beyond what *Diaz*, strictly construed to allow only an expert opinion about "most people," permits.

Defense lawyers will also need to reach for other guardrails in the Federal Rules of Evidence

to prevent the admission of expert testimony on "mindreading" that the *Diaz* dissenters fear. For example, *Diaz* puts Rule 702 in the spotlight, reinforcing the significance of the judge's role as gatekeeper to ensure that expert testimony admitted at trial is not junk science, but is reliable and helpful to the jury.

Defense counsel must also focus on relevance, the precondition to admissibility under Rules 401 and 402. If the government is eliciting testimony on the mental state of most people *like* the defendant, but not the defendant herself, defense counsel should be prepared to object that the testimony is not relevant to determining whether the defendant herself had the requisite *mens rea*.

Likewise, Rule 403 affords another potential safeguard, as it requires the exclusion of evidence whose probative value is substantially outweighed by the danger of, *inter alia,* unfair prejudice and misleading the jury. Where the expert testimony concerns what *most* people think, but the issue for the jury is what *this* defendant thinks, defense counsel may be able to argue that the probative value of the expert testimony is relatively low. Also, such testimony may have low probative value because jurors have for centuries decided the ultimate issue of a defendant's mental state without the aid of expert testimony.

On the other side of the scale, the prejudice from such testimony may be substantial for several reasons. First, expert testimony about "most people" may invite the jury to indulge the impermissible inference that "birds of a feather" flock together. *See Krulewitch v. United States*, 336 U. S. 440, 454 (1949) (Jackson, J., concurring). Second, it may lull jurors into inappropriate reliance on the expert and discourage them from making their own decision on the ultimate issue. Third, and relatedly, where the expert is a law enforcement officer, jurors may give undue weight to that testimony because it appears to have the government's imprimatur.

A post-*Diaz* surge in competing expert testimony concerning a criminal defendant's mental state likely means that juries in criminal trials will face more, and more detailed and complicated, expert testimony. In this environment, defense counsel will need to be ready to cabin the government's use of expert opinion beyond the express limits of *Diaz*, and also mine the strategic advantages that *Diaz* may yet offer.

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