

June 21, 2024

U.S. Supreme Court Allows Prosecutors a Game-Changing Weapon: Broad Expert Testimony on Criminal Intent

Client Bulletins

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Federal Rule of Evidence 704(b) provides that experts in criminal cases cannot state an opinion about the defendant's *mens rea*. That is, the expert 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." That question is "for the trier of fact alone." Fed. R. Evid. 704(b). But the U.S. Supreme Court just held in *U.S. v. Diaz*, **Case No. 21-14, 602 U.S. ____ (2024)**, in a 6-3 opinion authored by Justice Clarence Thomas, that this rule does *not* prevent expert testimony about the mental state of "most people" in a group facing a similar situation as the criminal defendant.

This client bulletin provides an overview of the case and how it affects cases moving forward.

The *U.S. v. Diaz* Decision:

While at the US-Mexico border, Delilah Diaz's vehicle was searched by a patrol officer, leading to the discovery of more than 54 pounds of methamphetamine concealed in her car. Diaz was charged with importing methamphetamine—including charges that required the prosecutors to prove that Diaz "knowingly" transported drugs. Diaz argued she was unaware of the drugs hidden in her car. To challenge this contention, the prosecution called a special agent expert witness to testify that drug traffickers *generally* do not place large amounts of drugs with individuals who are unaware of their transport. The jury found Diaz guilty, and the trial court sentenced her to 84 months of imprisonment.

The Supreme Court considered—as did the trial court and the Court of Appeals—the issue of whether the testimony of the special agent witness violated Rule 704(b). On June 20, 2024, the Supreme Court affirmed that such broad testimony from an expert witness does not violate Rule 704(b). The Court held the fact that the expert witness merely made a statement that *most*—not *all*—people have a state of mind is not an opinion about the defendant and thus does not violate Rule 704(b). That is, the special agent witness, "did not state an opinion about whether petitioner [Diaz] herself had a particular mental state" as he was merely speaking to what usually happens in similar situations.

Takeaways:

As a result of the *Diaz* decision, expert witnesses now have greater latitude to provide opinions that get *close* to the mental state of defendants—so long as the expert only opines that "most people" in a group have a particular mental state. This rule has the potential to influence juries' decisions on whether the defendant had the requisite intent or knowledge to commit a crime. And this ruling may alter the way prosecutors, defense attorneys and judges approach testimony about *mens rea*.

- **Prosecutors:** As Justice Neil Gorsuch articulates in his dissent, this decision gives prosecutors a "new tool in [their] pocket"—an expert who "apparently has the convenient ability to read minds alone." No doubt the Government will use the *Diaz* decision to introduce expert testimony about the

mental state of “most people” in a criminal defendant’s shoes. The most cynical view of the potential impact of this holding is that the decision will allow prosecutors to upend Rule 704(b) and put the thumb on the scale against defendants, thus shifting the burden of proof to defendants.

- **Defense Attorneys:** Similarly, this ruling may and should also impact defense strategies, as defense attorneys will want to consider using expert testimony more frequently to demonstrate their clients lacked the requisite intent—particularly if defendants can now expect the prosecution to bring competing expert testimony to trial. Justice Kentaji Brown Jackson’s concurrence notes that this ruling can actually provide an important tool for defendants in certain criminal cases, such as cases involving individuals affected by domestic violence. Her concurrence also reminds defense attorneys of other important tools in their toolbelt to protect against overexpansive expert testimony, including Rules 401 and 402 (governing relevance), 403 (governing prejudicial evidence) and 702 (governing the admissibility of expert testimony).
- **Juries:** The impact of this ruling extends not only to the prosecution and defense, but to the juries as well. Juries will face the task of hearing more detailed and complex expert testimony on a defendant’s mental state, which could result in longer and more complicated trials.
- **Judges:** As a result of this holding, judges will need to give clear guidance on interpreting expert testimony about a defendant’s mental state. And of course, courts will have to continue to vigorously exercise their gatekeeping function to protect juries against unreliable expert testimony under Rule 702.

Conclusion:

Overall, Thursday’s ruling has the potential to make expert witness testimony a more centralized component in trials involving questions regarding a defendant’s mental state, thereby potentially affecting the outcomes of numerous cases. The U.S. Supreme Court has just provided the government with another tool to help prove *mens rea*. Those representing criminal defendants should be aware of this potential tool and be prepared to work up defensive expert testimony in response.

Further, the rule in *Diaz* does not alter Rule 704(b)’s mandate that a criminal expert cannot state an opinion about the defendant’s *mens rea*. Defense counsel should continue to be vigilant against expert testimony that opines directly on a defendant’s mental state but purports to mask as a *Diaz* opinion. Such an opinion is still prohibited by the rules.

If you have questions regarding the *Diaz* decision and its impact on expert testimony, please contact Benesch’s White Collar team. We stand ready to assist with proficient experience in investigations and litigation.

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