More Than Drugs At Stake In High Court's 'Blind Mule' Case

By **Kenneth Notter** (February 22, 2024)


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The U.S. Supreme Court will soon hear argument in a so-called **blind mule case** — a drug trafficking prosecution where the defendant claims she did not know that she was transporting drugs. The case, Diaz v. U.S., asks whether an expert witness may testify that most defendants caught with drugs at the border know they are transporting drugs.

How the court answers that question may have implications far beyond drug trafficking cases. In recent decades, the government has increasingly relied on testimony from officer experts to prosecute everything from complex financial crimes to gun and drug cases.

And because many jurors and judges defer to law enforcement testimony, the rules governing when and on what issues an officer expert may testify can often determine the outcome at trial.

Legal Background

Courts traditionally prohibited witnesses — including experts — from offering opinions on any ultimate issue to be decided by the jury, such as whether a defendant acted negligently or whether a company's product was defective.[1] To allow an expert to do so, the thinking went, would allow experts to take the jury's place and usurp its role as factfinder.[2]

Congress rejected that common law prohibition by enacting Federal Rule of Evidence 704. Originally, the rule provided that an "opinion is not objectionable just because it embraces an ultimate issue."[3]

But when a jury found President Ronald Reagan's would-be assassin, John Hinckley, not guilty by reason of insanity after experts opined directly on Hinckley's sanity, Congress modified Rule 704 in hopes of limiting psychiatric opinion testimony about a defendant's sanity.[4]

The text Congress enacted, however, addressed more than just psychiatric opinion testimony. Instead, in its current form, Rule 704(b) 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.[5]

The courts all agree that this rule stops experts from explicitly opining that a specific criminal defendant possessed the mens rea — or guilty mind — required for the crime charged.[6]

Diaz

The Diaz case, decided by the U.S. Court of Appeals for the Ninth Circuit in 2023, tests the limits of Rule 704(b)'s prohibition on expert testimony regarding a defendant's mens rea.

The case began at the border between the U.S. and Mexico. A U.S. border agent stopped

Delilah Diaz as she was driving her boyfriend's car into the U.S. After a short search, the border agent found 28 kilograms of methamphetamine hidden in the car's door panels. Diaz told agents that she did not know any drugs were in the car.

The government charged Diaz with importation of methamphetamine. To convict her of that crime, the government had to prove that she knew that she was transporting drugs.

To do so, the government called a federal agent as an expert witness. The agent opined that drug trafficking organizations rarely use so-called blind mules or unwitting couriers to transport drugs. He also testified that in his experience, most defendants apprehended with drugs at the border know they are transporting drugs. The jury convicted Diaz after deliberating for two days.

On appeal, Diaz argued that the agent's testimony violated Rule 704(b). She pointed out that the U.S. Court of Appeals for the Fifth Circuit has held that testimony that drug trafficking organizations rarely use blind mules violates Rule 704(b) because it is the functional equivalent of an opinion about the defendant's mental state.[7]

She argued that the agent's testimony did exactly that, by stating an opinion that almost all individuals caught with drugs know that they are transporting drugs.

The Ninth Circuit disagreed. It interpreted Rule 704(b) as prohibiting only "an 'explicit opinion' on the defendant's state of mind."[8] And because the agent testified only that defendants generally know they are transporting drugs, the court ruled that the testimony was appropriate. The court did, however, note that the same testimony would have been impermissible under the Fifth Circuit's interpretation of Rule 704(b).

The U.S. Supreme Court granted Diaz's petition for a writ of certiorari to resolve that split between the Fifth and Ninth Circuits.

Implications

Whether the court agrees with the Fifth or Ninth Circuit may influence thousands of cases even outside the drug trafficking context.

Once a rare sight, expert testimony by law enforcement officers has become a staple of criminal trials.[9] These officer experts typically qualify as experts based exclusively on their generalized training and experience.

From that experience, they often opine on ultimate mens rea issues, such as whether possessing drug paraphernalia indicates an intent to distribute drugs or whether a typical corporate executive would unintentionally make a false statement about the company's financial reports to the FBI.

Courts have long recognized "the danger inherent in law enforcement officers' expert testimony," as commented on in the U.S. District Court for the District of New Mexico's 2018 decision in U.S. v. Baca.[10]

According to the court, because that testimony derives from amorphous experience, it is easy to "pass off suspicion, speculation and intuition as real expertise."[11]

And because there is "no objectively ascertainable or empirically supportable measure of personal experience," as expressed in the Ninth Circuit's 2022 decision in U.S. v.

Holguin,[12] there is little way for defendants to challenge an officer expert's opinions.

Yet for jurors, opinions from a law enforcement expert carry immense power. Law enforcement witnesses as a whole enjoy a silent presumption of reliability that other witnesses — particularly defendants — do not.[13]

That presumption is even stronger for officers who receive the added "aura of special reliability and trustworthiness surrounding expert testimony," to quote the U.S. District Court for the District of Columbia in U.S. v. Williams in 2016.[14]

Thus, when an officer expert gives an opinion on whether an individual in the defendant's shoes has the mens rea necessary for a conviction, there is a palpable risk that the jury will convict out of deference to the officer expert.

A ruling for the government in Diaz would exacerbate that risk. As Diaz argues, an officer expert opining that most people in the defendant's position know they are transporting drugs is materially indistinguishable from an opinion that the defendant herself knew she was transporting drugs.

Indeed, the generalization may be worse because it invites jurors to make conclusions about the defendant based on one officer's qualitative expert, but untestable, opinions about the mens rea of an entire class of people. And when that opinion comes with the imprimatur of a law enforcement expert, there is a grave risk that jurors will substitute the officer expert's judgment for their own.

On the other hand, a ruling for Diaz may create uncertainty regarding what Rule 704(b) does and does not prohibit.

As the government's brief points out, Rule 704(b) ostensibly prohibits only testimony about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged.[15]

And generalized opinions about the mens rea of individuals in the defendant's position is a step removed from an opinion about the defendant specifically. That may be an empty distinction that unfairly benefits the government, but it is at least a clear distinction.

By contrast, reading Rule 704(b) to bar any opinion from which a jury could infer that the defendant had the required mens rea would render the rule difficult to administer and require tough line-drawing to identify opinions that are sufficiently close to an opinion about a defendant's mental state to fall within the rule.

Conclusion

No matter which way the Supreme Court rules, Diaz will offer guidance on Rule 704(b)'s limits and the permissibility of expert opinions touching on a defendant's mens rea. That guidance on such a critical issue, apart from any further implications, makes Diaz a case that practitioners should watch closely.

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[1] See 1 McCormick on Evidence §16 (8th ed. rev. 2022) (describing common-law rule).

[2] Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 52 (1901).

[3] Fed. R. Evid. 704(a).

[4] See 29 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §6281 (2d ed. rev. 2023).

[5] Fed. R. Evid. 704(b).

[6] Mens Rea, Black's Law Dictionary (11th ed. 2019).

[7] United States v. Gutierrez-Farias, 294 F.3d 657, 663 (5th Cir. 2002).

[8] United States v. Diaz, No. 21-50238, 2023 WL 314309, at *2 (9th Cir. Jan. 19, 2023).

[9] See Joëlle Anne Moreno, What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?, 79 Tul. L. Rev. 1, 4 (2004) ("The most common prosecution expert witness is a police officer or a federal agent."); Anna Lvosky, The Judicial Presumption of Police Expertise, 130 Harv. L. Rev. 1995, 2016-22 (2017) (tracing the rise of the officer expert witness).

[10] United States v. Baca, No. 16-cr-1613, 2018 WL 6602216, at *18 (D.N.M. Sept. 17, 2018).

[11] Id. at *19.

[12] United States v. Holguin, 51 F.4th 841, 867 (9th Cir. 2022) (Berzon, J., concurring in part and dissenting in part).

[13] David Dorfman, Proving the Lie: Litigating Police Credibility, 26 Am. J. Crim. L. 455, 498 (1999).

[14] United States v. Williams, 827 F.3d 1134, 1161 (D.C. Cir. 2016) (per curiam).

[15] Gov't Br. 19-24, Diaz v. United States, No. 23-14 (U.S. Jan. 26, 2024).