Cooley

A Sword and A Shield: How SCOTUS Expert Testimony Rulings May Benefit Corporate Defendants

August 22, 2024

The US Supreme Court decided several criminal procedure cases during the 2023 – 2024 term – including ***Diaz v. United States*, 144 S. Ct. 1727 (2024)** and ***Smith v. Arizona*, 144 S. Ct. 1785 (2024)** – which have relevance and strategic value to corporate defense, despite being facially outside the realm of white collar case law.

The first case, *Diaz*, holds that expert testimony about the mental state of **most people** in a group collectively, rather than the defendant individually, does not violate the Federal Rules of Evidence. Although the decision was a win for the prosecution in that case, SCOTUS opened the door to a category of testimony that may benefit defendants in certain cases, as discussed below.

In the second case, *Smith*, the Supreme Court relied on the Sixth Amendment's Confrontation Clause to hold that the prosecution may not introduce the findings of a forensic analyst at trial through the testimony of a surrogate analyst except in limited cases. This decision reaffirms the constitutional right of any defendant to test critical evidence at trial through cross-examination – a right equally essential in white collar matters.

Expert testimony about mental state of 'most people' permissible under Federal Rules of Evidence

In *Diaz v. United States*, border patrol officers searched a car and discovered more than 50 pounds of methamphetamine within the vehicle. The driver, Diaz, was charged with importing methamphetamine in violation of federal law. Those charges required the government to prove that Diaz "knowingly" transported drugs. In her defense, Diaz insisted that she was unaware of the drugs in the car.

The parameters of satisfying this "knowing" burden ultimately percolated up to the Supreme Court. In the district court, the government gave notice that its expert witness would testify about the "common practices of Mexican drug-trafficking organizations." This expert was expected to testify about drug traffickers' general distrust of sending "large quantities of drugs to people who are unaware they are transporting them." Diaz objected to the testimony under Federal Rule of Evidence 704(b), which provides that an expert witness in a criminal case cannot opine about "whether the defendant did or did not have a mental state that constitutes an element of the crime charged or of a defense." The district court ultimately disallowed expert testimony about what **all** couriers know when transporting drugs – but permitted such testimony about what **most** couriers know when transporting drugs. The government's expert went on to testify that, "in most circumstances, the driver knows they are hired to take the drugs from point A to point B."

The jury convicted Diaz, and she received a prison sentence. On appeal, the US Court of Appeals for the Ninth Circuit affirmed the conviction, holding that only an "explicit opinion" on a defendant's state of mind ran afoul of Rule 704(b). The expert testimony in question did not violate that rule.

The Supreme Court agreed, explaining that "n expert's conclusion that 'most people' in a group have a particular mental state is not an opinion about 'the defendant' and thus does not violate Rule 704(b)."

Situating its analysis, the Supreme Court chronicled the history of the "ultimate-issue" rule – a common law rule barring witnesses from infringing on the role of the jury by stating their conclusions on an issue – followed by the evolution of Rule 704. SCOTUS explained that when Rule 704 was adopted in 1975, it permitted all ultimate-issue opinions. Then, following the trial of John Hinckley Jr. (found not guilty by reason of insanity after his assassination attempt on then-President Ronald Reagan), Congress carved out an exception that a witness must not state an opinion about whether the **defendant** had the mental state aligning with an element of the crime or a defense.

In *Diaz*, the Supreme Court held that, because the government's expert "did not express an opinion about whether Diaz herself knowingly transported methamphetamine," the testimony did not violate Rule 704(b). In its analysis, SCOTUS also highlighted each party's opportunity to present and cross-examine witnesses. Indeed, Diaz raised the unknowing courier defense before the jury, even presenting an expert who testified about the difficulty of suspecting or knowing about drugs hidden within a car. The Supreme Court reasoned that the jury, having heard both experts, was in the

position to decide the ultimate issue of Diaz's mental state:

asserted that Diaz was part of a group of persons that may or may not have a particular mental state. Of all drug couriers – a group that includes Diaz – he opined that the majority knowingly transport drugs. The jury was then left to decide: Is Diaz like the majority of couriers? Or, is Diaz one of the less-numerous-but-still-existent couriers who unwittingly transport drugs?

The Supreme Court confirmed the Rule 704(b) exception is a narrow one, given that Rule 704 "as a whole makes clear that an opinion is 'about' the ultimate issue of the defendant's mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic."

As seen in several Justices' separate writings in *Diaz*, the effects of the majority opinion may be far-reaching – potentially affecting defense strategy in cases involving alleged corporate misconduct. *Diaz* applies to any crime that turns on a defendant's state of mind. And as Justice Ketanji Brown Jackson's concurrence makes clear, Rule 704(b) is "party agnostic" – meaning the government and defense counsel alike may use expert testimony "on the likelihood" of a defendant having a certain mental state. In a white collar criminal trial, the central dispute often focuses on the defendant's mental state, i.e., their intent. In turn, the question of intent might depend on what a corporate executive defendant knew. In that case, *Diaz* allows the defendant to present expert testimony on what "most" people in their position would know. Even in a case where the government and defense both present expert testimony on this issue, competing expert opinions may reduce the risk of a unanimous guilty verdict. Thus, *Diaz* may prove an effective sword for defendants, while also providing a shield to prevent the prosecution from putting up an expert to testify about a particular defendant's supposed state of mind.

Surrogate expert testimony may implicate Confrontation Clause.

Smith v. Arizona, too, began with drugs – but unlike in *Diaz*,the majority's analysis turned on federal constitutional rights, not rules of evidence. In *Smith*, a large quantity of what appeared to be drugs and drug-related items were found during a search warrant execution. The defendant, Smith, was charged with drug offenses and pleaded not guilty.

In preparation for trial, seized items were sent to a government laboratory, where a lab analyst ran tests and generated notes and a signed report detailing her findings regarding the identities and quantities of drugs at issue. At trial, the prosecution made a last-minute decision to present this evidence through a different analyst—not the one who had performed the tests. (The Supreme Court stated that the original analyst had since stopped working at the lab "for unexplained reasons.") The replacement testifying analyst relied on the original analyst's records to come to the same conclusion regarding drug identities and quantities.

Smith was convicted and appealed. On appeal, he argued that the prosecution's use of "substitute expert" testimony violated the Sixth Amendment's Confrontation Clause, which "guarantees a criminal defendant the right to confront the witnesses against him," and "bars the admission at trial of 'testimonial statements' of an absent witness unless 'unavailable to testify, and the defendant ha had a prior opportunity' to cross-examine ." The Arizona Court of Appeals disagreed and affirmed, reasoning that the underlying facts were used only to show the basis for the in-court witness's opinion. The Arizona Supreme Court denied discretionary review of this decision.

The US Supreme Court took up the question of how the Confrontation Clause is implicated when an expert witness restates the factual assertions of an absent lab analyst to support their own opinion testimony. The Supreme Court held that "hen an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statement come into evidence for their truth." As such, if the statements are testimonial, the Confrontation Clause renders them inadmissible.

In arriving at this conclusion, SCOTUS first looked to whether the testifying lab analyst's statements were hearsay (i.e.,used"for the truth"). The answer was yes. The Supreme Court explained that the truth and value of the original lab analyst's statements were interrelated; only if the underlying basis of the expert's testimony was **true** would it hold any **value** for the prosecutors. Put differently, "those statements were conveyed to show used certain standard procedures to run certain tests, which enabled identification of the seized items."

With this holding, the Supreme Court foreclosed an "end run" around the Confrontation Clause and confirmed a defendant's right to cross-examine forensic experts delivering testimonial lab reports – specifically the right to confront the expert with firsthand knowledge (not the one merely reading from another's records). In doing so, SCOTUS explained that substitute experts could still testify to other topics drawing on personal knowledge, such as how the lab functioned and chain of custody, among others.

As with *Diaz*, criminal defense counsel should take note of the near-universal applicability of this expert testimony ruling. Counsel should be mindful that *Smith* applies broadly to any type of forensic testing – including the work of forensic accountants and others similarly situated – and may implicate any defendant's rights under the Confrontation Clause. They also should take note of the potential downstream effects of *Smith*. If the Supreme Court is, in fact, moving away from a "mainstream conception" of hearsay – as outlined in Justice Samuel Alito's dissent – and, in some cases, sidelining the Federal Rules of Evidence, that also may have considerable practical impacts for trial practice.

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