Justices' Intent Witness Ruling May Be Useful For Defense Bar

By **Jack Sharman and Rachel Bragg** (July 31, 2024)

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Queen Elizabeth I supposedly said that she had "no desire to make windows into men's souls." But the U.S. Supreme Court in its recent Diaz v. U.S. opinion may have done just that.

In Diaz, the court expanded Rule 704(b) of the Federal Rules of Evidence to allow experts to testify about the mental state of criminal defendants in federal court.[1]

The June 20 decision gives prosecutors a new tool but, at a deeper level, it may also provide new advocacy platforms for white collar criminal defense counsel before, during and at the close of business-crime trials.

In this article, we briefly sketch Rule 704(b) practice before Diaz and then summarize the opinion. We conclude by offering tactical and strategic options that counsel in a business-crimes case may wish to consider in a post-Diaz world.

Experts and Intent in Federal Criminal Cases Before Diaz

Since its enactment in 1975, Federal Rule of Evidence 704(b) has prohibited experts in criminal cases from testifying about whether the defendant did or did not have the requisite mental state, requiring that these matters be left to the jury to determine.[2] However, experts have served other meaningful uses in criminal cases.

In addition to the traditional use of technical experts — those who may offer testimony on specific forensic and scientific matters, such as fingerprints, crime scene reconstruction, ballistics and the like — experts are generally permitted to offer testimony, under Rule 704(a), about the "ultimate issues" of a federal criminal case.[3] This rule allows testimony about the core issues the jury must ultimately decide to reach a conclusion.

Even before Diaz, Rule 704(b) did not bar all testimony about a defendant's intent; rather, it barred only conclusive expert opinions about a defendant's mental state when a certain mental state is a required element of the crime charged or defense.[4]

Experts at federal criminal trials historically have been, and will continue to be, permitted to testify about facts giving rise to inferences about whether the defendant had the requisite mental state.

Experts and Intent After Diaz

In Diaz, the court went a step further.

In the underlying case, law enforcement stopped Delilah Diaz at the border and, finding her in possession of methamphetamine, charged her under Title 21 of the U.S. Code, Sections 952 and 960. Those provisions require that the government prove that the defendant knowingly transported drugs. Diaz denied knowledge of the drugs in her car.

The government called a U.S. Department of Homeland Security employee, Agent Andrew Flood, as an expert. The agent testified that drug traffickers generally do not entrust large quantities of drugs to people who are unaware they are transporting the drugs.

Writing for the majority, Justice Clarence Thomas held that Flood's testimony did not run afoul of Rule 704(b) because "[e]xpert testimony that 'most people' in a group have a particular mental state is not an opinion about 'the defendant.'"[5] In other words, the majority held, because Flood did not express an opinion about Diaz herself, the testimony was permissible.

The majority opinion reflects the holding of the case, but defense counsel would do well to study Justice Ketanji Brown Jackson's concurrence, and the dissent by Justice Neil Gorsuch. What the dissent notes, and what the concurrence seems to hope, is that "what is good for the goose is good for the gander," and that this reinterpretation of Rule 704(b) may ultimately benefit the defense.[6]

It will take time for courts and practitioners to see how much the goose benefits, and how much the gander. In particular, one may reasonably ask how well the federal courts will discharge their gatekeeping duties under Rule 702, the Supreme Court's 1999 Kumho Tire Co. v. Carmichael decision, and its 1993 Daubert v. Merrell Dow Pharmaceuticals Inc. decision — factors that the majority opinion, the concurrence and the dissent all invoke as safeguards against undue invasion of the jury's right to discern intent.[7]

Federal judges are generally comfortable with experts in civil lawsuits. Indeed, complex intellectual property or toxic tort cases involve battalions of experts on both sides. On the other hand, our legal system has historically been leery of experts in the criminal arena, focusing — as the dissent points out at length — on the jury as the final arbiter, not only of guilt and innocence, but also of crucial elements such as intent.

Good Acts, Complete Context and Trials to Try Out an Expert

After Diaz, defense counsel should not be so leery, and should consider whether the opinion ushers in a new opportunity for more "reverse 404(b)" evidence and its near cousin, the so-called Hurn factors, articulated in the U.S. Court of Appeals for the Eleventh Circuit's 2011 U.S. v. Hurn decision.[8]

"Reverse 404(b)" evidence refers to a situation where a defendant seeks to introduce evidence of other crimes, wrongs or acts committed by a third party in order to cast doubt on the defendant's guilt.

This practice contrasts with the more common use of Rule 404(b), where prosecutors introduce evidence of the defendant's prior bad acts.[9]

As a practical matter, however, the government pretrial often attacks proffered evidence of a lack of wrongful intent as inadmissible "reverse 404(b)" evidence.

As Justice Jackson implies in the concurrence, it may be permissible under Diaz for an expert to offer testimony demonstrating a lack of wrongful intent. Thus, there may be additional opportunities to offer expert testimony surrounding the defendant's "good acts."

"Good acts" are important for the defense in business-crime cases, where the defendant's professional or business practices — including practices adjacent to the allegedly wrongful

acts — have been "good," if not exemplary. A critical part of the theory of defense is that the jury needs to hear the context of the allegedly awful conduct that the government presents. This impulse is not a mere trial tactic, but rather is grounded in the U.S. Constitution.

As the U.S. Court of Appeals for the Eleventh Circuit pointed out in Hurn, in a passage worth quoting in full:

> A district court's exclusion of a defendant's evidence violates [the] Compulsory Process and Due Process guarantees in four circumstances. First, a defendant must generally be permitted to introduce evidence directly pertaining to any of the actual elements of the charged offense or an affirmative defense. Second, a defendant must generally be permitted to introduce evidence pertaining to collateral matters that, through a reasonable chain of inferences, could make the existence of one or more of the elements of the charged offense or an affirmative defense more or less certain. Third, a defendant generally has the right to introduce evidence that is not itself tied to any of the elements of a crime or affirmative defense, but that could have a substantial impact on the credibility of an important government witness. Finally, a defendant must generally be permitted to introduce evidence that, while not directly or indirectly relevant to any of the elements of the charged events, nevertheless tends to place the story presented by the prosecution in a significantly different light, such that a reasonable jury might receive it differently.[10]

All four circumstances can arise at white collar trials. Diaz may give new energy to the defense's ability to place into context the prosecution's selective allegations.

What types of cases in might benefit from a Diaz defense expert? Consider these examples.

Public Corruption

In a public corruption case, is the payment a lawful payment for consulting services pursuant to a consulting agreement, or is it an unlawful bribe of an official?

The defense might call a business lawyer or a consultant to testify that the people who enter into such consulting contracts generally do so for the business purposes stated on the face of the document.

Healthcare Fraud

In a healthcare fraud case, is the payment one made pursuant to a lawful compensation program, or is it an unlawful kickback?

The defense might call CPA or a benefits expert to testify that such contractual programs are common and accepted in the industry; known to the industry's regulators; and that the parties generally enter into them not as an improper volumetric incentive, for example, but as reasonable payment for the market value of services rendered.

Government-Contracting Fraud

In a case involving government-contracting fraud and an allegedly false certification involving vague terms such as "essentially equivalent research," is the design at issue a lawful use of prior existing and disclosed components? Or is it an undisclosed copy of material previously submitted to the government?

The defense might call a design engineer to testify that the design is not essentially equivalent to one previously submitted, and that, in the industry, most people submitting or receiving it would have no reason to believe otherwise.

Tools to Consider Before, During and at the End of Trial

The principles set out in Diaz may appear in the courtroom in unlooked-for ways, but here are three things defense trial counsel should consider.

Motions in Limine

Relying on Diaz, the defense can file motions to either limit the government's experts or expand the use of defense experts, or both.

As always, the downside of a motion in limine is that it can give one's adversary additional ideas, but the Diaz landscape is so new that plowing it may not be so dangerous.

Cross-Examination

The court in Diaz puts too much emphasis on the power of cross-examination to clean up an evidentiary spill, but a Diaz-informed scope of cross should be particularly broad and allow defense counsel to demonstrate the bias of a government witness who has no pretense of independence, but is firmly on the government payroll.

Closing Argument

Diaz principles could fit nicely with either a "gap" theme (that is, the government theory has such a big hole in it about intent that they had to get one of their employees to try and fill it in) or an "overreach" theme (in other words, the government is not satisfied with the actual evidence, but rather had to go create some in-house).

Conclusion

At first, Diaz will give prosecutors a new tool. With some thought and hard work, however, defense counsel may be able to use the same tool to their own advantage.

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[1] Diaz v. United States, 144 S. Ct. 1727, 1735 (2024).

[2] Federal Rule of Evidence 704(b) states that, "[i]n 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 defnese. Those matters are for the trier of fact alone."

[3] 704(a) states: "An opinion is not objectionable just because it embraces an ultimate issue."

[4] Diaz, 144 S. Ct. at 1735.

[5] Id.

[6] Id. at 1743 (Gorsuch, J., dissenting) ("[T]hanks to the Court's opinion today, defendants will now recruit their onw warring experts."); see also id. at 1737 (Jackson, J., concurring) ("Thus, far from disserving our criminal justice system ... the type of mental-state evidence that Rule 704(b) permits can be of critical assistance to lay factfinders tasked with determining a defendant's mental state as an element of the alleged crime (or defense).")

[7] See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (holding that expert testimony in federal courts must be reliable, based on widely accepted principles, and in alignment with the Daubert standards); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (establishing the federal standards for admissibility of expert testimony).

[8] United States v. Hurn, 368 F.3d 1359, 1363 (11th Cir. 2004) (establishing the four types of evidence critical to a defendant's right to a fair trial).

[9] Federal Rule of Evidence 404(b)(1) states that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, 404(b)(2) carves out an exception that permits the use of this type of evidence "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

[10] Hurn, 368 F.3d at 1363.