High Court's Expert Ruling May Help Health Fraud Defendants

By **Steven Block, Eddie Jauregui and Allison Luzwick** (July 30, 2024)

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The U.S. Supreme Court released a decision last month in Diaz v. U.S. that could alter the landscape for expert mens rea testimony in criminal healthcare fraud and other white collar cases.[1]

A defendant's mens rea, or intent, is generally the most contested element in criminal healthcare fraud cases that frequently arise out of complex legal and regulatory regimes. Establishing whether a defendant acted knowingly or intentionally is often what separates wrongful from innocent conduct. Within a statute, this element is commonly known as the scienter provision.

The U.S. Supreme Court has rightly noted the importance of such provisions in criminal healthcare fraud cases, stating in Ruan v. U.S. in 2022 that "[a] strong scienter requirement helps to diminish the risk of 'overdeterrence,' i.e., punishing acceptable and beneficial conduct that lies close to, but on the permissible side of the criminal line."[2]

The Supreme Court decided two cases in recent years, Ruan, as well as U.S. ex. rel. Schutte v. SuperValu, that focused on the importance of scienter elements in statutes commonly used to prosecute healthcare fraud.

In Ruan, a criminal prosecution under the Controlled Substances Act, a unanimous court rejected the notion that it is enough for a physician to merely violate objective standards of care, holding that criminal liability under the Controlled Substances Act requires that a defendant knowingly or intentionally acted in an unauthorized manner.[3]

Therefore, if a defendant produces evidence that he or she was authorized to dispense controlled substances, the government has the burden to prove that the doctor knew or intended that the prescription was unauthorized.[4]

SuperValu, another unanimous decision, clarified the scienter requirement of the False Claims Act. The False Claims Act imposes liability on anyone who knowingly submits a false claim to the government.[5]

In Supervalu, the court held that "knowingly" refers to a defendant's knowledge and subjective beliefs — not to what an objectively reasonable person may have known or believed.[6]

As such, if a defendant correctly understands the relevant standard — in SuperValu, the meaning of "usual and customary" drug prices — and nevertheless knowingly submits a false claim, the scienter element is satisfied. This is true even if those claims could have been based on an objectively reasonable interpretation of the standard.

Now, in Diaz, a drug trafficking case decided in June, the Supreme Court **opened the door** to using expert testimony to prove or disprove mens rea, which could lead to a significant role for expert witnesses for the prosecution and defense in establishing — or refuting — the critical scienter element in future healthcare fraud cases.

Diaz v. U.S.

After a jury trial, Delilah Diaz was convicted of importing illegal drugs in violation of Title 21 of the U.S. Code, Sections 952 and 960, after attempting to enter the U.S. from Mexico in a car that held over 54 pounds of methamphetamines hidden in door panels and under the trunk carpet.[7]

At the time of her arrest and at trial, Diaz claimed she was driving her boyfriend's car and did not know about the concealed drugs.[8] Thus, the primary defense was that she lacked the mental state required to convict.[9]

To rebut this defense, the government called U.S. Department of Homeland Security agent Andrew Flood as an expert witness on drug trafficking.[10] Flood, who had no role in the underlying investigation, testified that most drug couriers know they are transporting drugs, saying that, "in most circumstances, the driver knows they are hired … to take the drugs from point A to point B."[11]

To use an unknowing courier, Flood opined, would expose the drug-trafficking organization to substantial risk and significant financial loss.[12] On appeal, Diaz challenged Flood's testimony under Federal Rule of Evidence 704(b).

Federal Rules of Evidence 704(a) and 704(b)

Federal Rule of Evidence 704(a) allows witnesses to testify as to their conclusions on the ultimate issues of a case, stating that "[a]n opinion is not objectionable just because it embraces an ultimate issue."[13] Under Rule 704(a), witnesses can directly state their opinions regarding the same elements that a jury must resolve to decide the case.

Rule 704(b), however, creates an exception to Rule 704(a). Rule 704(b) was created in the wake of the attempted assassination in 1981 of President Ronald Reagan by John Hinckley Jr. and the subsequent criminal trial.[14]

Hinckley raised an insanity defense at trial, resulting in both the prosecution and defense offering competing expert testimony as to Hinkley's state of mind at the precise moment he pulled the trigger. As a result, and much to the public's shock, Hinckley was found not guilty by reason of insanity.

Shortly thereafter, Congress adopted Rule 704(b) to specifically prohibit expert witness testimony in a criminal case that states opinions "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."[15]

Rule 704(b) is narrow. It does not apply in civil cases or affect lay witness testimony. It only prohibits expert witness testimony, in criminal cases, about a particular person, the defendant, regarding a particular ultimate issue — a mental state or condition that is an element of the crime charged or of a defense. This exception was designed to preserve the jury's overarching role in determining the key element of intent.

On appeal, Diaz challenged Flood's testimony under Rule 704(b), arguing that Flood's statement that couriers generally transport drugs knowingly amounted to an expert opinion about whether Diaz knowingly transported the drugs.[16] Because this was a critical element of her defense, Diaz reasoned, Flood's testimony amounted to impermissible expert witness testimony under Rule 704(b).

In a 6-3 opinion, with Justices Neil Gorsuch, Sonia Sotomayor and Elena Kagan dissenting, the court rejected this argument, holding that expert testimony that most people in a group have a particular mental state is not an opinion specifically about the defendant, and thus does not violate Rule 704(b).

Probabilistic Assessment of Mental State

The court found that Flood did not express an opinion about whether Diaz herself knowingly transported drugs. Rather, Flood testified about the knowledge of most drug couriers, an opinion that does not necessarily describe Diaz's mental state, as she may or may not be like most drug couriers.

At her trial, Diaz argued that an alleged boyfriend had tricked her into transporting the drugs and presented an automobile mechanics expert who testified that it was possible to drive the car without knowing the drugs were hidden within.

On Flood's cross-examination, Diaz's counsel clarified that unknowing couriers existed and that the government was aware of cases involving such carriers. The court reasoned that the jury was well informed that unknowing couriers exist and that Diaz could be a member of that group, but it determined that the evidence pointed to a different conclusion: that Diaz knowingly transported the drugs.

The court drew a bright line between expert testimony concerning the state of mind of most couriers versus all couriers — the latter is absolute and would necessarily speak directly to Diaz's state of mind, while the former leaves the ultimate decision for the jury.

It remains for the jury, the court reasoned, to weigh all evidence and decide whether Diaz's mental state conformed with that of most couriers or whether she belonged to the group of unknowing couriers.

Under Rule 704(b), therefore, expert testimony is precluded only if it draws direct conclusions about a defendant's mental state. Testimony that abstractly discusses ultimate mens rea issues is admissible.

At first, Diaz appears to give the government a powerful new tool, opening the door to overreliance on expert witness testimony to establish criminal scienter elements.[17] It allows the government to call its own agents as expert witnesses to help establish a defendant's state of mind, witnesses who may carry with them the "imprimatur of the [g]overnment," and, therefore, hold greater weight with the jury.[18]

As Justice Ketanji Brown Jackson noted in her concurrence, however, the narrow reading of Rule 704(b) in Diaz is party-agnostic and provides a potential benefit to both the prosecution and defense.[19]

Or, as Justice Gorsuch quipped in the dissent, "what is good for the goose is good for the gander."[20] Justice Gorsuch expressed concern over this outcome, stating that the court's decision could lead defendants to hire their own warring experts.[21]

In his view, this could result in criminal mens rea determinations devolving into a competing game of "I say so," thereby reducing "the vital role that juries are meant to play in criminal trials."[22]

Justice Jackson took a more positive view on this same result, however, explaining that the court's ruling opens the door for highly probative expert testimony for both parties, while leaving the ultimate issue of the defendant's mental state to the jury.

While Justice Gorsuch does not share this optimistic view, his dissent provides a useful discussion of other, more traditional checks on expert testimony proffered under the expanded reading of Rule 704(b) — namely that any evidence must be relevant under Rule 402, and not excludable under Rule 403 due to its probative value being substantially outweighed by potential unfair prejudice.[23]

In Justice Gorsuch's view, any government expert testimony allowed under the court's interpretation of Rule 704(b) in Diaz will have difficulty withstanding the dual test of Rules 402 and 403.

Ultimately, the practical outcome of Diaz is that defense counsel may have a new arrow in the defense quiver, particularly in criminal healthcare fraud and other white collar criminal cases that arise in a complex legal or regulatory environment.

To address the all-important scienter provisions in criminal healthcare fraud prosecutions, all parties may now seek to introduce new, critical expert testimony in light of Diaz. For example, expert testimony may be elicited to establish that a defendant — or rather that most practitioners — does or does not know a prescription was unauthorized under the Controlled Substances Act, or that a claim violated the correct definition of "medical necessity," or that a current procedural terminology code was incorrect.

This type of testimony may help to create a battle of experts that could make it difficult for the government to meet its burden of proving intent beyond a reasonable doubt.

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[1] Diaz v. United States , 219 L. Ed. 2d 240 (2024).

[2] Xiulu Ruan v. United States , 597 U.S. 450, 451 (2022) (quoting United States v. United States Gypsum Co. , 438 U. S. 422, 441 (1978)).

[3] Id. at 450 (2022).

[4] Id. at 475.

[5] 31 U.S.C. § 3729(a).

[6] United States ex rel. Schutte v. SuperValu Inc. , 598 U.S. 739, 740 (2023).

[7] Diaz, 219 L. Ed. 2d at244 (2024).

[8] Id.

[9] Id.

[10] Id. at 245.

[11] Id.

[12] Id.

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

[14] Diaz, 219 L. Ed. 2d. at 247.

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

[16] Diaz, 219 L. Ed. 2d. at 245.

[17] Id. at 253.

[18] Id. at 260 (quoting United States v. Young , 470 U.S. 1, 18 (1985)).

[19] Id. at 250.

[20] Id. at 258.

[21] Id.

[22] Id. at 259.

[23] Justice Gorsuch added that such evidence may be excluded under Fed. R. Evid. 702(a), which requires expert testimony to be helpful to the trier of fact in "understand[ing] the evidence" or determining a fact in issue. Justice Gorsuch noted that he "struggle[d] to see how a witness claiming to offer an opinion about another person's (or class of persons) thoughts at a particular moment in the past can meet any of those standards." Id. at 260.