EXPERT OPINION

Dealing with 'Diaz': How Defendants Can Combat and Use Expert Testimony Regarding Group Mental State

Quinn Emanuel partners Michael Packard and Daniel Koffmann discuss the recent decision in 'Diaz v. United States,' where the Supreme Court has given prosecutors the green light to prove defendants' criminal intent by offering expert testimony about the mental state of people "like" the defendant.

September 04, 2024 at 10:00 AM

Evidence

By Michael Packard and Daniel Koffmann | September 04, 2024 at 10:00 AM

The Supreme Court recently gave prosecutors a green light to prove defendants' criminal intent vicariously, by offering expert testimony about the mental state of people "like" the defendant.

At the tail end of its recent term, the court held in *Diaz v. United States* that while Rule 704(b) of the Federal Rules of Evidence prohibits an expert from testifying that a *particular* defendant had a culpable state of mind when engaged in allegedly criminal conduct, that rule does not bar an expert from testifying that "*most people*" have a guilty mental state when they engage in the same activity.

"The upshot," observed the dissenting justices, is that "[p]rosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what 'most' people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like 'most' people and convict." In so holding, *Diaz* put "a powerful new tool in the government's pocket."

But playing on a tilted field is nothing new for criminal defense attorneys, who as a matter of course must find creative ways to overcome structural inequities and, when possible, turn them against the government.

This article discusses ways to do both. After summarizing *Diaz*, we identify ways defendants can combat the government's introduction of prejudicial, group mental state testimony, as well as ways for defendants to flip the script—using *Diaz* to introduce exculpatory testimony of the same ilk. As long as *Diaz* is the law of the land, defense counsel must be prepared to do both.

The 'Diaz' Decision

Diaz concerned the prosecution of an alleged drug mule, Delilah Diaz. Border patrol stopped her as she was driving into the United States from Mexico, and authorities then found more than 54 pounds of methamphetamine hidden within the car's doors and under the carpet in the trunk. Diaz was charged with "knowingly" transporting those drugs in violation of 21 U.S.C. §§952 and 969.

Diaz countered with a “blind mule” defense—that she had no idea the drugs were hidden in the car, which belonged to her boyfriend. To rebut that argument at trial, the government offered expert testimony—from a federal law enforcement agent—that “in *most* circumstances, the driver knows they are hired…to take the drugs from point A to point B.”

Diaz sought to exclude that testimony under Rule 704(b), which states, “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.” But the district court overruled her objection, the testimony came in, and the jury convicted. Diaz appealed to the U.S. Court of Appeals for the Ninth Circuit, but it affirmed the trial court’s ruling. Diaz then filed a *cert* petition, which the Supreme Court granted.

The Supreme Court affirmed admission of this testimony on the theory that “Rule 704(b) applies only to opinions about the defendant. Because [the agent] did not express an opinion about whether Diaz herself knowingly transported methamphetamine, his testimony did not violate Rule 704(b). [The agent] instead testified about the knowledge of most drug couriers.… That opinion does not necessarily describe Diaz’s mental state. After all, Diaz may or may not be like most drug couriers.”

Combatting Government Experts

Although *Diaz* held that Rule 704(b) is not a barrier to the government’s introduction of damaging expert testimony regarding group mental state, defense counsel have other tools to exclude such testimony or undermine its impact.

‘Daubert’/Rule 702. Defendants may use traditional motions under *Daubert* and Rule 702 to exclude these so-called experts. Such attacks could focus on the expert’s experience with—or knowledge about—the group or class of people at issue, as well as the reliability of the expert’s principles and methods. Has any publication—let alone a scientific study—validated the expert’s opinion? If the opinion is based on an expert’s personal experience, has the expert actually had enough exposure to folks like the defendant to testify reliably about their mental states? Or has the expert’s analysis failed to consider known or knowable countervailing facts?

Rule 402. Defendants may also launch foundational attacks on the relevance of the expert’s proposed testimony under Rule 402. In so doing, defendants may argue it is irrelevant what *most* people would think in a general set of circumstances, given that the question for the jury is what *this* defendant thought based on their *personal* experiences in a *particular* set of circumstances—which are inherently unique. As Justice Gorsuch noted in his *Diaz* dissent, “if the government is right that an expert opinion about the mental state of ‘most’ people like the defendant is not ‘about’ the defendant’s mental state, it is hard to see how that opinion might be relevant.” Such an attack may have particular appeal if the expert is poised to opine on what most folks think in a mine-run scenario, when the circumstances of the case are obviously distinct from that scenario.

Rule 403. In connection with any Rule 402 argument, defendants can raise companion arguments under Rule 403, that any marginal relevance is substantially outweighed by the potential for unfair prejudice. Why? Perhaps because such evidence is unduly prejudicial and threatens to confuse the jury, in that it would lead jurors to substitute the *mens rea* of a group for the *mens rea* of the defendant, even if instructed otherwise. When the government’s expert is a law enforcement agent or other government employee, such an argument may have extra heft, since that government affiliation may increase the risk of jurors giving the expert’s testimony undue weight. Or perhaps evidence of what “most people” think is a waste of time—or cumulative—when the record already contains ample evidence to show what the defendant personally thought when engaged in the conduct at issue.

Ultimately, even if such attacks do not result in a total bar of the government’s expert, they can help chisel the proffered testimony into a less damaging form and set the stage for jury instructions that expressly delimit the testimony’s impact.

Cross-examination. These arguments also point to potential cross-examination topics and jury themes. For example, cross-examination should make clear that the expert's opinions do not account for the unique circumstances facing the defendant on trial. That line of cross could provide a convenient vehicle for defense counsel to recite exculpatory or mitigating facts about the defendant that the expert cannot have considered, consistent with the prohibition on offering an opinion about the defendant. This would enable defense counsel to highlight key facts and discuss defense themes in the middle of the government's case, while undermining the credibility of its witnesses.

Such crosses are also likely to attack, as much as possible, the basis for the opinion—for example, probing the sample size on which the opinion is based, pointing out the lack of scientific basis for the claim, highlighting the expert's failure to interview or otherwise develop personal familiarity with the defendant, exposing the witness's biases, redefining the category against which the defendant is referenced, and all manner of other familiar forms of cross-examining an expert. And, of course, any testimony that "most people" think a certain way enables a defendant to make the core point that "most" does not mean "all"—so, the expert should admit that there are, in fact, people who engage in the conduct in question *without* a culpable mindset.

Using Defense Experts

Diaz is certainly a boon to prosecutors, but its holding cuts both ways. As Justice Ketanji Brown Jackson explained in her concurrence, the court's holding provides defendants with the same opportunity as the government to introduce expert testimony about group mental states. There are innumerable circumstances in which such a tactic might be helpful, but here are a few examples of situations where defendants might consider it.

Bribery. In most bribery cases, the key question is not *whether* a defendant gave (or received) something of value, it's *why*—was it a *quid pro quo*? So, for example, a real estate developer alleged to have bribed a city council member might find an expert to testify that developers frequently give substantial sums to their local politicians and *most* do so for purely innocent reasons. Or an elected official might offer testimony that politicians receive large donations from local business leaders during every election cycle and *almost never* accept contributions with strings attached. Likewise, a foreign bribery defendant might introduce testimony that, in the defendant's native culture, gifts like those at issue are commonplace or even expected, and that *most* people convey them without an illicit *quid pro quo* in mind.

Accounting Fraud. In accounting fraud cases, the key question typically is not how the company booked a transaction, but *why*—were the executives trying to deceive, or did they innocently misapply the accounting rules? In such a case, a CFO charged with cooking the books might have an expert testify that *most*—or at least *some*—accountants in the relevant industry or with the CFO's particular training would view the accounting treatment as appropriate, even if it is technically wrong as a matter of GAAP. Or consider a prosecution in which a non-accountant operations executive is wrapped up in an alleged accounting fraud conspiracy—he might call an expert to testify that *most* operational employees have no knowledge of the relevant accounting principles or involvement in their companies' accounting function.

Securities Fraud. So too in securities fraud cases, where the key question often is not whether a defendant omitted certain information from a corporate disclosure, but *why*—did she intend to hide material information? In such a case, the defendant might call an expert to testify that *most* officers of similar station would not vet the accuracy of the information given to them by their underlings and would instead trust that work, or that *most* officers in that industry would not view the sort of information omitted as being material. And what if there is a damaging email informing the executive of information that arguably put her on notice that certain statements would be false or misleading? Well, there must be an expert who could testify that *many* busy corporate executives are so inundated with emails and other information that they do not—and cannot—assimilate to their knowledge every communication they receive. Or perhaps an expert in human cognition could offer testimony—based in part on a statistical analysis of the volume of the defendant's daily, work-related emails, texts, Slack messages, and other communications—that *most* people would be unable to process and retain the volume of information that the defendant received.

Money Laundering. With the exception of certain sting operations, prosecutions for money laundering generally must show that the defendant knew he was dealing with the proceeds of unlawful activity. In cases where the underlying unlawful activity is the defendant's own conduct—for example, the defendant routes a bribe payment through offshore entities in order to obscure the flow of money—establishing the defendant's knowledge often will rise and fall with the proving the underlying criminal conduct. But what about an allegedly complicit bank manager charged only with money laundering? Or a hawala broker or other nontraditional currency trader? These defendants could introduce testimony that *most* transactions that have characteristics similar to the alleged money laundering are lawful and otherwise unremarkable, so there would be no reason for *most* people in their shoes to know that they were dealing in proceeds of illicit conduct.

Willful Blindness. Any prosecution premised on a theory that the defendant ignored red flags and consciously avoided determining the truth provides opportunities for defense-friendly group mental state evidence. Willful blindness is a doctrine that permits the government to establish that a person has knowledge of a particular fact when he is aware of a high probability of its existence but consciously avoids confirming that fact, typically so that he can deny knowledge. So like the bank manager defending against money laundering charges, any defendant facing a willful blindness theory should be able to present evidence that people confronted with the supposed red flags *typically* would *not* infer that a particular fact was highly probable. For example, an expert might testify that a construction executive need not have raised an eyebrow at a consultant's 2% fee (part of which, it turns out, the consultant passed on as bribes), because *many* large infrastructure contracts involve legitimate consulting fees. Or an expert might explain that use of offshore bank accounts would not be suspicious because citizens of developing countries *routinely* maintain accounts in countries with more established banking systems—not to commit crimes, but for security or other legitimate reasons.

Tax Fraud. The willfulness standard for criminal prosecution of tax crimes—a "voluntary, intentional violation of a known legal duty," *Cheek v. United States*, 498 U.S. 192, 200 (1991)—provides plenty of opportunities for expert mental-state testimony. *Most* people are not familiar with the Byzantine rules relating to deductions, or in-kind income, or whatever the particular issue is. *Most* people rely on their accountants to sort out what should be reported and what the ultimate tax bill is. *Most* people file tax returns that contain at least few errors. And so on.

And what about defendants charged with non-white collar crimes? Opportunities exist for them, too. For example, in felon-in-possession cases where state "misdemeanors" provide the predicate offense, an expert might testify that *most* people would not be aware that such convictions are sufficient to implicate felon-in-possession laws. Or a defendant charged with possession of a narcotic with intent to distribute could call an expert to testify that *many* drug users do, in fact, purchase and possess such amounts of drugs solely for personal use, and not for distribution.

Conclusion

There can be no doubt that *Diaz* gives prosecutors a "powerful new tool." But it may be blunted through effective motion practice, cross-examination, and jury addresses. And it may cut both ways, with defense counsel introducing exculpatory expert testimony about how *most* people in the defendant's circumstances would not have had a criminal mental state when in engaged in the same conduct as the defendant. The possibilities for such expert testimony appear to be limited only by defense counsel's imagination and the existence of credible supporting evidence.

Michael Packard *and* Daniel Koffmann *are partners at Quinn Emanuel Urquhart & Sullivan.*