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By **Daigle Law Group**

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DAIGLE LAW GROUP

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Couriers, Consciousness, and the Court: Deciphering Delilah Diaz's Dilemma in *United States v. Diaz* at the Supreme Court

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In recent developments at the Supreme Court, the High Court granted certiorari in *United States v. Diaz*, a case that promises to reshape our understanding and application of expert testimony in drug trafficking cases. This case sheds light on the admissibility of expert law enforcement testimony, particularly its role in supporting the prosecution's theory that the defendant was consciously aware she was transporting drugs.

Arising out of a routine border crossing in August 2020, the defendant, Delilah Diaz, attempted to return to California after a trip to Mexico. Her return took an unexpected turn when she was approached by a border patrol agent. When the defendant rolled down her window to speak to the officer, a "crunch-like sound" coming from the door raised red flags for the agent, causing the officer to request backup. The officers examined her vehicle, focusing their efforts on the car's door panels by using a buster (meaning "a specialized tool for measuring density"). The result of the search turned over two cell phones and about 28 kilograms of methamphetamine, priced at almost \$350,000. Diaz acted surprised, claiming that she didn't know about the hidden drugs. During an investigative interview, she told the officers that she went to Mexico with her daughter to visit her boyfriend, Jessie. She said her daughter took their car back home the day before, and Jessie lent her his car for her trip back, planning to pick it up later. Diaz continued to claim that she was unaware of the drugs in the car. However, her story raised doubts: she couldn't provide Jessie's address or phone number, one cell phone was from someone she refused to name, and she claimed she couldn't drive back the previous night because she struggles to see in the dark, even though she was stopped at 2 a.m.

At the trial, prosecutors called a law enforcement officer, Agent Flood, to testify as an expert witness. Diaz argued against the admissibility of the expert opinion, but the Court ruled against her objections. Agent Flood testified that, in most cases, drug couriers know they are transporting large quantities of drugs across the border. The expert also offered testimony stating that traffickers rarely risk the potential of large losses on "blind mules" – meaning couriers who are not aware of what they're carrying. When the trial ended in a guilty verdict, Diaz used a "safety valve proffer" to avoid the mandatory minimum, receiving a sentence reduction to seven years. As a condition of the deal, Diaz admitted that she knew there were drugs in the car, that the boyfriend "Jessie" never existed, and that

she had previously transported drugs. Diaz challenged her conviction, seeking review by the Ninth Circuit. In her appeal, she argued that the agent's testimony violated FRE 704(b), which bars experts from offering opinions on whether a defendant had a specific mental state.

Relevant for all experts are the rules that govern the scope of permissible expert opinions and testimony. First, FRE Rule 704(a) allows expert witnesses to discuss the ultimate issue in a case. Rule 704(b) acts as a limit on that rule, barring experts from offering opinions on whether a defendant had a specific mental state that acts as an element of the offense they're charged with. Expert testimony must meet certain minimum standards to be admissible. The testimony of the expert must be reliable enough to satisfy the Daubert standards, aid the jury in their understanding under Rule 702, and per Rule 403, its value must outweigh its potential prejudice. The key focus of this case is FRE 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. Those matters are for the trier of fact alone."

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the conviction. The Court rejected Diaz's argument that the agent's testimony violated Rule 704(b). The Court relied on its prior ruling in the 2013 case, *United States v. Gomez*, that held, "so long as the expert refrains from expressing 'any 'explicit opinion' of [the defendant's] state of mind or knowledge of his transportation of drugs,' such expert testimony is admissible." Applying that principle to this current case, the Ninth Circuit found that Agent Flood's testimony was admissible because it did not "provide an explicit opinion on the defendant's state of mind."

In its ruling, the Ninth Circuit recognized the difference in its interpretation of Rule 704(b) when compared to the approach used by the Fifth Circuit. The opinion by the Ninth Circuit acknowledged that if the Fifth Circuit were to hear this case, that Court would have likely found a violation of 704(b) because Agent Flood's testimony indirectly suggested the defendant's mental state. The basis of the Fifth Circuit's approach stems from a 2002 case, *United States v. Gutierrez-Farias*, where the court has held "that testimony that drug trafficking organizations rarely use unknowing couriers is the 'functional equivalent' of a prohibited opinion on mental state."

The Federal Circuit Courts are split on how Rule 704(b) is applied when it comes to expert testimony in drug trafficking cases. The prevailing split exists between the approach of the Fifth Circuit compared to the approach taken by the Ninth, Eighth, and Eleventh Circuits. The Fifth Circuit takes a strict stance, interpreting Rule 704(b) to ban both direct opinions about a defendant's mental state and any testimony that acts as an indirect opinion on the defendant's possible mental state. The Ninth Circuit, joined by the Eighth and Eleventh, adopts a broad approach, allowing expert testimony that indicates that

couriers are typically aware that they are carrying drugs. Because these conflicting rules cause opposite results among the Circuits, clarification by the Supreme Court is necessary. The Supreme Court granted certiorari in November 2023, planning to take up the case in the coming months.

On March 19th, 2024, the High Court heard oral argument in the case, attempting to settle the existing Circuit Split. In doing so, the Court considered the question of whether, in a prosecution for drug trafficking, where an element of the offense is that the defendant knew she was carrying illegal drugs, FRE 704(b) permits a government expert witness to testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters. Looking ahead, the Supreme Court decision in this case is expected in the coming months. This decision will address the current split among federal circuits, likely having significant implications for law enforcement and potentially bringing far-reaching changes to the admissibility of law enforcement testimony in expert witness cases across the nation. Officers should stay informed and follow this case, as it could reshape our approach to future investigations and prosecutions in drug-related offenses and will surely clarify the many questions we are left with.

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