
No. 23-6177

IN THE
SUPREME COURT OF THE UNITED STATES

SYLVIA OLIVAS, PETITIONER,
vs.
UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

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**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT
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Pursuant to Rule 15.8, Sylvia Olivas files this supplemental brief in support of her petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit. The brief addresses the impact of this Court’s recently filed opinion in *Diaz v. United States*, No. 23-14.

STATEMENT

The facts and expert testimony in the present case are fully set out in the Petition, but two aspects of the expert testimony are particularly relevant in light of the *Diaz* opinion. First, the expert here, unlike the expert in *Diaz*, testified without qualification; when asked, “How much do secretaries know about the activities of the crew,” he answered, “Everything. Everything goes through them.” Pet. App. A111. Second, when asked about Petitioner, the expert testified, “She’s a secretary.” Pet. App. A166-67.

ARGUMENT

In light of the *Diaz* opinion, this Court should grant the Petition and either consider Petitioner’s case itself or vacate the court of appeals judgment

and remand to the court of appeals for further consideration in light of the *Diaz* opinion. The government acknowledged in its Brief in Opposition in the present case that “the Court’s decision in Diaz may bear on the correct resolution of this case.” BIO, at 1. And while the Court affirmed the court of appeals judgment in *Diaz*, the expert testimony at issue here went further than the expert testimony there. While the testimony in *Diaz* was only that drug courier defendants like the defendant there know they are carrying drugs “in most circumstances,” *Diaz* slip op., at 3, the testimony here was not so limited. The expert here was asked, without qualification, “How much do secretaries know about the activities of the crew,” and answered, again without qualification, “Everything. Everything goes through them.” *Supra* p. 1 (quoting Pet. App. A111).

This is a crucial distinction under *Diaz*. The limitation of the expert testimony in *Diaz* to “most” defendants like the defendant there was fundamental to the Court’s holding. As the Court explained at the very beginning of its discussion of the expert testimony:

Agent Flood instead testified about the knowledge of *most* drug couriers. Specifically, he explained that “in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B.” (Citation omitted.) That opinion does not necessarily describe Diaz’s mental state. After all, Diaz may or may not be like most drug couriers.

Diaz slip op., at 7 (emphasis in original).

The Court reemphasized this distinction elsewhere in its opinion. At the end of the opinion, in the conclusion, the Court stated its holding as: “An 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).”

Id. at 11.

The Court also emphasized the distinction between “most” defendants and “all” defendants in the midst of the opinion. It explained, “The jury was thus well aware that unknowing couriers exist and that there was evidence to suggest Diaz could be one of them.” *Id.* at 8. Then, it drew the distinction again in rejecting the argument made by Diaz and in the dissent. First, it noted, “That argument mistakenly conflates an opinion about *most* couriers with one about *all* couriers.” *Id.* at 9 (emphasis in original). It then went on to offer a hypothetical about “why this distinction matters under Rule 704(b).”

Take for example an expert who testifies at an arson trial that all people in the defendant’s shoes set fires maliciously (the mental state required for common-law arson). Although the expert never spoke the defendant’s name, the expert nonetheless violated Rule 704(b). That is because the expert concluded that the defendant was part of a group of people that all have a particular mental state. The phrase “all people in the defendant’s shoes” includes, of course, the defendant himself. So, when the expert testified that all people in the defendant’s shoes always set fires with malicious intent, the expert also opined that the defendant had the mental state. The expert thus stated an opinion on the defendant’s mental state, an ultimate issue reserved for the jury, in violation of Rule 704(b).

*Id.*¹ The Court then contrasted the expert testimony in *Diaz*.

Here, by contrast, Agent Flood 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-

¹ That the opinion here was about the mental state of the defendant herself is even more clear than in this hypothetical. Where the expert in the hypothetical “never spoke the defendant’s name,” the expert here did directly speak of the defendant, testifying, “She’s a secretary.” *Supra* p. 1 (quoting Pet. App. A166-67).

numerous-but-still-existent couriers who unwittingly
transport drugs?

Id. (emphasis in original).²

The expert testimony in the present case left nothing like this choice. The expert here did not testify that secretaries “may or may not know” everything and just “the majority” know everything. The expert was asked, without qualification, “How much do secretaries know about the activities of the crew,” and he answered, again without qualification, “Everything. Everything goes through them.” *Supra* p. 1 (quoting Pet. App. A111). There was no “less-numerous-but-still-existent” group of secretaries in which the jury could place Petitioner. Rather, all secretaries know everything and so defendant herself knew everything.

* * *

² Even the government agrees that an opinion that *all* defendants have a culpable mental state is barred by Rule 704(b). *See Diaz*, Opinion of Gorsuch, J., dissenting (noting government’s concession in its brief).

CONCLUSION

The Court should grant the Petition in this case and either consider Petitioner's case itself or vacate the court of appeals judgment and remand to the court of appeals for further consideration in light of the *Diaz* opinion.

Respectfully submitted,

DATED: June 24, 2024

s/ Carlton F. Gunn
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CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 24th day of June, 2024, a copy of Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

June 24, 2023

s/ Carlton F. Gunn

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