NO._____

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL CHRISTIN KISSENTANER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court clarify its prior decision in *Diaz* v. *United States*, 144 S. Ct. 1727 (2024), to resolve the ongoing circuit split concerning the interpretation of Federal Evidence Rule 704(b)?

PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

RELATED PROCEEDINGS

- *United States* v. *Cheryl Christin Kissentaner*, No. 22-cr-157, U.S. District Court for the Southern District of Texas. Judgment entered July 25, 2023.
- *United States* v. *Cheryl Christin Kissentaner*, No. 23-20348, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Aug. 27, 2024.

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PRAYER

Petitioner Cheryl Christin Kissentaner prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as the Appendix ("Pet. App.") 1a–10a. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment and opinion were entered on August 27, 2024. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

RELEVANT STATUTORY PROVISION

Rule 704 of the Federal Rules of Evidence provides as follows:

> (**a) In General – Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
>
> **(b) Exception.** 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.

Fed. R. Evid. 704.

STATEMENT OF THE CASE

A. Factual background.

Ms. Kissentaner was a tax preparer at a Houston office, First Financial Tax Service. Pet. App. 2a; C.A. ROA.1727.[1] She had been a tax preparer for over fifteen years. C.A. ROA.1731. She filed taxes for her customers using a unique tax preparer identification number ("PTIN"). C.A. ROA.1729.

In 2019, IRS agents determined that tax returns filed using Ms. Kissentaner's PTIN reflected higher refunds than the national average, and a higher percentage of certain credits and deductions. C.A. ROA.1742–45. These statistics prompted the IRS to investigate Ms. Kissentaner further. Pet. App. 2a; C.A. ROA.1745. Agents first conducted an undercover investigation. Pet. App. 2a; C.A. ROA.1746. As part of that investigation, an undercover agent visited Ms. Kissentaner's office, pretended to be a customer, and asked her to prepare his tax forms. Pet. App. 2a; C.A. ROA.1746–53. Ms. Kissentaner prepared those forms correctly and the undercover did not observe any misconduct. C.A. ROA.1752–53.

The IRA then conducted interviews of Ms. Kissentaner's customers, including Olga Rangel and Javier Rodriguez; Laura and Arturo Ruiz; Elizabeth Potts; and Renel Anthony. C.A. ROA.1754. These interviewed customers verified that they had each received large tax refunds during the years they used Ms. Kissentaner's tax preparer services. C.A. ROA.1754–57. They had paid Ms. Kissentaner a flat fee of under $1000 for each tax

[1] "C.A. ROA" refers to the record before the Fifth Circuit.

return, but the customers kept the rest of the tax refund money for themselves. C.A. ROA.1842, 1850, 1988, 1990, 2172, 2181. Finally, they admitted the information on their tax forms was false, but claimed they did not provide that false information to Ms. Kissentaner. C.A. ROA.1840–42, 1954–65, 1975–77, 1985–86, 2168–79, 2189–208.

B. Procedural History.

1. District Court Proceedings.

The government charged Ms. Kissentaner with fifteen counts of aiding and assisting in the preparation of false tax returns. *See* 26 U.S.C. § 7206(2); Pet. App. 2a. These charges required the government to prove that the defendant knew the statement in the return was false and that she acted with intent to violate a known legal duty. *See* 26 U.S.C. § 7206(2). Throughout her proceedings, Ms. Kissentaner maintained that these elements were not satisfied.

There were two trials in this case. The case proceeded to the first trial on twelve counts, after the district court granted the government's motion to dismiss Counts 13–15. C.A. ROA.110. At trial, the government presented testimony from IRS agents and witnesses who were former customers of Ms. Kissentaner and whose tax returns were named in the indictment. C.A. ROA.387–1203. The lead case agent, IRS Special Agent Meyer, was the government's last witness. C.A. ROA.1367. He testified about the failed undercover investigation but did not offer explanations as to why it had failed. C.A. ROA.1393–94.

The jury was unable to reach a unanimous verdict on any of the twelve charges against Ms. Kissentaner. C.A. ROA.145. The prosecutor and defense counsel motioned

the district court for a mistrial, which it granted. C.A. ROA.145.

After the mistrial, the case proceeded to trial on Counts 1–3 and 7–12, renamed Counts 1–9 when submitted to the jury in the second trial. C.A. ROA.311–13, 1616, 1919, 2258–59.

At the second trial, the government again presented witnesses that included IRS special agents and customers of Ms. Kissentaner. This time, the government called IRS Agent Meyer as its first witness. Pet. App. 2a. It asked him to provide more information about the unsuccessful undercover investigation. Pet. App. 2a. Based on his experience investigating other cases, Agent Meyer testified that he was not surprised that the undercover operation into Ms. Kissentaner had failed. C.A. ROA.1752. The court asked why Agent Meyer was unsurprised. C.A. ROA.1752. Agent Meyer responded: "Well, undercover operations fail for a few reasons. On that initial form [provided by Ms. Kissentaner,] she was asking for a referral. Oftentimes a return preparer will not meet with a new client and place false items on that return unless that client provides a name of one of her previous clients." C.A. ROA.1752. The court then asked, "In your experience, why is that?" C.A. ROA.1753. Agent Meyer answered, "Because they're aware that they're preparing returns incorrectly, and they're nervous." Pet. App. 3a; C.A. ROA.1753.

After reviewing the undercover agent's body worn camera with Agent Meyer, the prosecutor then asked, "Is it fair to say that[,] based on what we just saw on that video[,] that the defendant actually knows how to prepare a correct return?" C.A. ROA.1817. Agent Meyer replied: "That's correct." C.A. ROA.1817.

The jury found Ms. Kissentaner not guilty on Count 2 (tax year 2016 for Anthony) and Count 4 (tax year 2015 for Rangel / Rodriguez). C.A. ROA.2409. It found her guilty on Counts 1, 3, and 5–9. C.A. ROA.2409–10.

The district court ultimately sentenced Mr. Kissentaner to 12 years in prison. Pet. App. 4a.

2. Fifth Circuit Proceedings.

Petitioner appealed her conviction and sentence on several grounds. As relevant here, she challenged Agent Meyer's testimony that tax preparers often do not prepare false forms for individuals who do not mention being referred by an existing customer, and that Ms. Kissentaner knew how to prepare tax forms correctly, arguing this testimony violated Rule 704(b). C.A. Dkt. No. 31at 24–38; C.A. Dkt. No. 85 at 1–2.[2]

The Fifth Circuit rejected her arguments. It held that Agent Meyer's testimony was admissible because it "left room for the jury to decide whether Kissentaner had the requisite mental state." Pet. App. 6a (citing *United States* v. *Diaz*, 144 S. Ct. 1727, 1733–35 (2024)).

[2] "C.A. Dkt." refers to the Fifth Circuit docket.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case to resolve the proper interpretation of Federal Evidence Rule 704(b). This Court recently granted certiorari in *Diaz* v. *United States*, 144 S. Ct. 1727, 1733–35 (2024), to address a circuit split that emerged over the proper interpretation of that rule. But *Diaz* created additional ambiguities. This case presents a good vehicle for addressing those ambiguities, because the Rule 704(b) issue was outcome-determinative in the Fifth Circuit opinion, and the case involves multiple types of testimony that implicate Rule 704(b) concerns. The Fifth Circuit's decision below was also wrong. This Court should grant certiorari, clarify its prior decision in *Diaz*, and reverse.

A. This Court's recent *Diaz* decision did not resolve ambiguity surrounding the application of Federal Evidence Rule 704(b).

In its last term, this Court granted certiorari in *Diaz* to address the interpretation of Rule 704(b) of the Federal Rules of Evidence. *Diaz*, 144 S. Ct. at 1733–35. Specifically, the Court addressed the question of whether, "[i]n a prosecution for drug trafficking—where an element of the offense is that the defendant knew she was carrying illegal drugs—does Rule 704(b) permit a governmental 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?"

Prior to *Diaz*, a circuit split had emerged regarding the proper interpretation of Rule 704(b). That rule generally prohibits expert witnesses from stating 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." Fed. R. Evid. 704(b). The Fifth Circuit had interpreted Rule 704(b) as prohibiting an expert witness from expressing an opinion that "amount[ed] to the functional equivalent" of a statement that the defendant had acted with criminal intent. *United States* v. *Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002). An expert would violate this "functional equivalent" rule by making a statement about what most people in the defendant's situation know. *See id.* Meanwhile, the Eighth, Ninth, and Eleventh Circuits had interpreted Rule 704(b) to only prohibit an expert witness from giving an "explicit opinion" regarding the defendant's "state of mind or knowledge." *United States* v. *Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) (quoting *United States* v. *Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001), *cert denied*, 535 U.S. 948 (2002)); *United States* v. *Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988); *United States* v. *Urbina*, 431 F.3d 305, 311–12 (8th Cir. 2005) (quoting *United States* v. *Martinez*, 358 F.3d 1004, 1010 (8th Cir. 2004)). An expert would only violate this "explicit opinion" rule by making a direct statement about the defendant's knowledge. *See Gomez*, 725 F.3d at 1128. The two rules generated opposite outcomes, with expert testimony permitted in one jurisdiction and prohibited in another.

This Court sought to resolve this conflict in *Diaz*. There, the government had called a Homeland Security Investigations agent to testify that drug traffickers "generally do not entrust large quantities of drugs to people who are unaware they are transporting them." *Diaz*, 144 S. Ct. at 1731. The Court concluded this testimony did not violate Rule 704(b). *Id.* at 1735. It reasoned that the agent's testimony did not involve "an opinion about whether Diaz herself knowingly transported methamphetamine." *Id.* at 1733. The

testimony also did not "functionally" involve such an opinion, because the agent "asserted that Diaz was part of a group of persons that *may or may not* have a particular mental state." *Id.* at 1734 (emphasis in original). The Court concluded that the agent's testimony still allowed the jury to decide whether Diaz "in fact knew about the drugs in her car," and it therefore was permitted under Rule 704(b). *Id.* at 1734.

However, *Diaz* did not clear up the ambiguity surrounding the proper interpretation of Rule 704(b). For one, it did not resolve the circuit split. As noted above, the courts of appeals were split into two camps prior to *Diaz*, with the Eighth, Ninth, and Eleventh Circuits following an "explicit opinion" rule and the Fifth Circuit following a "functional equivalent" rule. *Diaz* did not pick a side. It simply held the agent in that case did not state an explicit opinion about the defendant's mental state or the functional equivalent of such an opinion. *See id.* at 1733–35. It explained that a probabilistic assessment about *most* people in the defendant's situation was not functionally equivalent to an opinion about the defendant's mental state and would not violate Rule 704(b); but that an assessment about *all* people in the defendant's situation would violate that rule. *See id.* at 1734. Thus, while the Court embraced a narrow view of Rule 704(b) (like the Eighth, Ninth, and Eleventh Circuits), it also suggested the rule will—in certain circumstances—not permit expert testimony that is functionally equivalent to an opinion about the defendant's mental state (like the Fifth Circuit). Ultimately, it is not clear what case law survives *Diaz*. The split therefore remains.

And *Diaz* created additional ambiguities. The Court held that the probabilistic assessment involved in that case did not violate Rule 704(b). But uncertainty remains about

what types of probabilistic assessments, if any, will violate Rule 704(b). *See Diaz*, 144 S. Ct. at 1742 (Gorsuch, J., dissenting). Can an expert testify, consistent with *Diaz*, that fifty-five percent of people in the defendant's shoes have a culpable mental state? Seventy-five percent? Ninety-nine percent? There is also uncertainty about whether frequency-based assessments will violate Rule 704(b). *Diaz* held that an expert cannot testify that "*all* people in the defendant's shoes *always*" have a culpable mental state. *Diaz*, 144 S. Ct. at 1734. But it is not clear whether an expert can testify that *all* people in the defendant's shoes *often* have a culpable mental state—the question presented in Ms. Kissentaner's case. Only the Court can resolve these ambiguities.

B. This is an important issue worthy of the Court's review.

Rule 704(b) is an important evidentiary rule, and its interpretation significantly affects both tax prosecutions and other criminal cases. The importance of this rule is well-established. As this Court recognized in *Diaz*, the rule is rooted in this country's historical tradition of protecting the jury's role as the trier of fact. *Diaz*, 144 S. Ct. at 1732–33. "Prior to Rule 704, many States applied what was known as the 'ultimate issue rule,'" which categorically barred witnesses from stating conclusions on issues the jury needed to resolve to decide the case. *Id.* at 1732. While the Federal Rules relaxed these narrow restrictions, Rule 704(b) sticks to the historical tradition in the sensitive area of mens rea in criminal cases.

Rule 704(b) has a particularly significant impact on tax cases like this one. For one, it greatly impacts how tax cases are prosecuted. The government prosecutes hundreds of

tax crimes each year.[3] These cases commonly arise in the Fifth, Ninth, and Eleventh Circuits.[4] In these cases, as with all criminal cases, the government bears the burden to prove all elements of the crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). But tax cases are unique in that they involve an elevated mens rea requirement. *See Cheek* v. *United States*, 498 U.S. 192, 200 (1991). The government must prove not simply that the defendant acted knowingly, but also that she acted willfully. *See id.* This means that a tax preparer will not face criminal consequences if she makes an honest mistake; only if she knowingly disregards her tax duties. *See id.* Prosecutors often rely heavily on expert witnesses when proving these mens rea requirements, in light of the technical nature of tax cases. *See United States* v. *Thompson*, 518 F.3d 832, 859 (10th Cir. 2008). They use experts to present the complex tax documents involved in these cases, to assist with the technical analysis of these documents, and to "link pieces of evidence together." Linda S. Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 N.C. L. REV. 577, 600 (1989). The scope of Rule 704(b) thus significantly affects tax prosecutions.

Rule 704(b) also significantly affects defendants in tax cases. Cases regularly arise where defendants charged with tax crimes maintain they did not knowingly or willfully put false information in their forms. *See, e.g.*, *United States* v. *Crandell*, 72 F.4th 110, 114–

[3] U.S. Sentencing Comm'n, Quarterly Data Report, Fiscal Year 2024 at 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY24.pdf

[4] U.S. Sentencing Comm'n, Quick Facts: Tax Fraud Offenses, Fiscal Year 2023 at 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY23.pdf

15 (5th Cir. 2023). In such cases, the government's use of experts can make it extraordinarily difficult for defendants to convince the jury that they did not have a guilty state of mind. This is especially true when that testimony "carries with it the imprimatur of the Government," as with testimony from federal agents. *United States* v. *Young*, 470 U.S. 1, 18–19 (1985); *see also Diaz*, 144 S. Ct. at 1737 (Jackson, J., concurring) (noting that "there are serious and well-known risks of overreliance on expert testimony—risks that are especially acute in criminal trials.").

The impact of this rule goes far beyond tax cases. Whether or not a defendant had a guilty state of mind is often the key issue in many types of criminal prosecutions, and prosecutors frequently call expert witnesses to help persuade the jury that the defendant acted with a culpable mens rea. *Diaz*, 144 S. Ct. at 1738 (Gorsuch, J., dissenting). Such testimony is particularly common in drug trafficking cases, where disputes can emerge about whether a defendant knowingly possessed or trafficked drugs. To prove a defendant knowingly possessed drugs, the government often elicits "modus operandi" testimony explaining the typical roles within a drug trafficking organization. *United States* v. *Sosa*, 897 F.3d 615, 619–20 (5th Cir. 2018); *see also United States* v. *Richard*, 969 F.2d 849, 845–55 (10th Cir. 1992). To prove a defendant knowingly trafficked drugs, the government often elicits expert testimony about the quantities of drugs that correlate with an intent to distribute. *United States* v. *Soler-Montalvo*, 44 F.4th 1, 14 (1st Cir. 2022); *United States* v. *Watson*, 260 F.3d 301, 308–10 (3d Cir. 2001). This type of testimony implicates Rule 704(b) as well.

C. This case is an ideal vehicle to evaluate the reach of Rule 704(b).

This case presents an excellent vehicle for addressing the proper interpretation of Rule 704(b). First, the Rule 704(b) issue was outcome-determinative in Ms. Kissentaner's case. While the Fifth Circuit reviewed this issue for plain error, the appellate court directly addressed the merits of the Rule 704(b) issue. It detailed its interpretation of Rule 704(b) and *Diaz*, explaining its view that *Diaz* only prohibits testimony that "definitively address[es] the defendant's mental state" rather than testimony that "leaves room for the jury to determine whether the defendant herself had that mental state." Pet. App. 6. It then decided that Agent Meyer's testimony presented "no error, plain or otherwise." *Id.* at 6. And while the Fifth Circuit determined that other issues raised by Ms. Kissentaner on appeal amounted to harmless error, it never reached that conclusion as to the Rule 704(b) issue. *See id.* at 6–7. In other words, the appellate court never held that the Rule 704(b) issue did not impact Ms. Kissentaner's substantial rights or that it did not seriously affect the fairness, integrity or public reputation of judicial proceedings. *See id.*

Second, this case offers multiple types of expert testimony that implicate Rule 704(b) concerns. Agent Meyer provided testimony that directly commented on Ms. Kissentaner's knowledge of the tax laws. *See* C.A. ROA.1817 ("Q: Is it fair to say that based on what we just saw on that video that the defendant actually knows how to prepare a correct return? A: That's correct"). He also provided probabilistic testimony about why all people in the defendant's shoes often have a culpable mental state. *See* C.A. ROA.1752–53 ("Oftentimes a return preparer will not meet with a new client and place false items on that return unless that client provides a name of one of her previous clients.

. . . [b]ecause they're aware that they're preparing returns incorrectly, and they're nervous."). This case therefore allows the Court to fully consider the ambiguities in the *Diaz* decision and to resolve the disagreement among the court of appeals.

D. The Fifth Circuit's decision was wrong.

The Fifth Circuit decided this case incorrectly. It affirmed Ms. Kissentaner's conviction after finding that Rule 704(b) permitted Agent Meyer to testify that Ms. Kissentaner knew how to prepare taxes correctly, and that criminal tax preparers often do not prepare false forms for individuals who do not mention being referred by an existing customer. Both of those findings conflict with the plain text of Rule 704(b) and this Court's decision in *Diaz*.

First, the Fifth Circuit was wrong when it held that Rule 704(b) allowed Agent Meyer to testify that Ms. Kissentaner knew how to prepare taxes correctly. The plain text of Rule 704(b) prohibits any direct opinion about the defendant's state of mind. Fed. R. Evid. 704(b). This Court also explained in *Diaz* that Rule 704(b) prohibited the expert in that case from directly opining on the defendant's mental state. Specifically, it held that testimony "express[ing] an opinion about whether Diaz herself knowingly transported methamphetamine" would violate Rule 704(b). *Diaz*, 144 S. Ct. at 1733. Here, Agent Meyer's opinion about Ms. Kissentaner's tax law knowledge went directly to proving the willfulness of her conduct, an element of the crime charged. 26 U.S.C. § 7206(2). It was therefore impermissible under Rule 704(b) and *Diaz*, and the Fifth Circuit was wrong to find otherwise.

The Fifth Circuit was also wrong when it held that Rule 704(b) allowed Agent Meyer to testify that criminal tax preparers often do not prepare false tax forms for individuals who fail to mention being referred by an existing customer. According to the Fifth Circuit, that testimony did not violate Rule 704(b) because it "[did] not definitively address the defendant's mental state" and therefore "[left] room for the jury to determine whether the defendant herself had that mental state." Pet. App. 6a (citing *Diaz*, 144 S. Ct. at 1733–35).

But Rule 704(b) prohibits more than definitive opinions as to a criminal defendant's mental state. Rule 704(b) provides that, in criminal cases, an expert witness must not "state an opinion about" whether the defendant had a mental state constituting an element of the crime charged or a defense." Fed. R. Evid. 704(b) (emphasis added). "About" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." *About*, Oxford English Dictionary (3d ed. 2009). Rule 704(b) therefore prohibits something more than a direct statement of whether the defendant had a certain mental state—it extends to testimony that *concerns* whether the defendant possessed that mental state. The words surrounding "about" further inform that word's meaning. *See Smith* v. *United States*, 508 U.S. 223, 223 (1993). The rule targets "opinion[s]," suggesting the testimony must "reach a particular conclusion." *Diaz*, 144 S. Ct. at 1735. However, the rule does single out a particular type of conclusion. It does not narrowly target direct, explicit opinions about the defendant's state of mind, as opposed to opinions that are functionally equivalent. *Diaz*, 144 S. Ct. at 1742 (Gorsuch, J., dissenting). This context therefore makes clear that Rule

704(b) addresses more than just direct opinions regarding a defendant's mental state, contrary to the Fifth Circuit's opinion below.

This Court, in *Diaz*, also held that Rule 704(b) prohibits something more than explicit opinions about the defendant's state of mind. To be sure, the *Diaz* Court held that an explicit opinion about the defendant's state of mind would violate Rule 704(b). *Diaz*, 144 S. Ct. at 1733. But it also explained that an expert could violate Rule 704(b) even if they "never spoke the defendant's name"—for example, by saying that "all people in the defendant's shoes always" have a culpable mens rea. *Diaz*, 144 S. Ct. at 1734. The Fifth Circuit's decision in this case disregards that language in *Diaz*. It indicates that any expert opinion that "does not definitively address the defendant's mental state" will be permitted under Rule 704(b). That conclusion goes far beyond the rule set forth by this Court in *Diaz*.

The Fifth Circuit's broad interpretation of Rule 704(b) and *Diaz* has significant implications. As noted above, prosecutors carry a heavy burden of proof in criminal cases. To show a defendant is guilty, the government must prove every element of the relevant crime beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364 . It may not seek to "shift the burden of proof to the defendant." *Patterson* v. *New York*, 432 U.S. 197, 215 (1977). The government's burden to prove mens area is especially important, and courts generally construe criminal statutes to include mens rea requirements even when the statutory text is silent. *See Rehaif* v. *United States*, 588 U.S. 225, 233 (2019). The reason that our justice system affords criminal defendants such broad protections is because of the severe consequences that flow from a criminal conviction. *Morissette* v. *United States*, 342 U.S.

246, 251–52 (1952). A conviction can result in a person losing their liberty and other fundamental rights, and our legal system will generally only impose these harsh consequences on individuals who consciously do wrong. *See id.* at 250.

The Fifth Circuit's interpretation of Rule 704(b) and *Diaz* undercuts the government's burden to prove this culpable state of mind. It invites "junk science in the courtroom," raising the prospect of warring experts who will offer their own competing opinions about the defendant's knowledge or intent. *Diaz*, 144 S. Ct. at 1743 (Gorsuch, J., dissenting). And it "reduces the vital role juries are made to play in trials," permitting them to rely on opinions offered by expert witnesses instead of forming their own conclusions, as required by Rule 704(b). *Id.* These were precisely the consequences that Justices Gorsuch, Sotomayor, and Kagan warned about in dissenting from the majority's opinion in *Diaz*. This Court should grant certiorari to clarify its *Diaz* decision and resolve the remaining ambiguity about the proper interpretation of Rule 704(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: November 25, 2024

Respectfully submitted,

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 23-20348

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CHERYL CHRISTIN KISSENTANER,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CR-157-1

Before JOLLY, SOUTHWICK, and DUNCAN, *Circuit Judges*.

E. GRADY JOLLY, *Circuit Judge*:[*]

A jury convicted Cheryl Kissentaner, under 26 U.S.C. § 7206(2), on seven counts of aiding and assisting in the preparation and presentation of false tax returns. The district court imposed an above-guidelines sentence of 144 months of imprisonment and one year of supervised release. The district court also ordered restitution to begin immediately. On appeal, Kissentaner challenges her conviction, term of imprisonment, and the order of restitution.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

We AFFIRM the conviction and sentence, and MODIFY restitution as provided in this opinion.

I.

A.

Cheryl Kissentaner owned a Texas-based tax preparation business. On March 30, 2022, she was indicted on 15 counts of aiding and assisting in the preparation and presentation of false tax returns under 26 U.S.C. § 7206(2). ROA.23-29. Upon arrest, she was released on bond, conditioned on her submission to supervision, seeking fulltime employment, and not assisting with tax preparation. ROA.34, 38-43. The district court later revoked her bond and committed her to custody for failing to comply with these terms. ROA.157-64, 3146-47.

At trial, IRS agent Greg Meyer set the stage for the government's investigation into Kissentaner. ROA.1728. Meyer testified to irregularities in Kissentaner's clients' tax returns compared to national averages. Furthermore, he testified that Kissentaner used false information in these filings. ROA.1728-38. Meyer testified that 98 percent of Kissentaner's clients received refunds, while the national average is 77 percent; that 13 percent of her clients received a fuel tax credit for commercial vehicles compared to 0.2 percent nationwide; and that 38 percent of her clients received Schedule A itemized deductions compared to 30 percent nationwide. ROA.1743-45. The court admitted into evidence tax returns prepared by Kissentaner from 2015 to 2018 for these clients.

Agent Meyer further testified that the IRS had sent an undercover agent to Kissentaner's business under the guise of having his tax return prepared. ROA.1746-47. Kissentaner had him fill out a new client information sheet. The undercover agent, however, left the client referral section blank, which signaled to Kissentaner that the "new client" was not

part of her network. ROA.1749-52. Meyer testified that the operation failed when the undercover agent's return showed no reliance on false financial information. Meyer offered the opinion that this failure likely occurred because the agent had not included a client referral. ROA.1752. When the court itself asked Meyer why the operation failed, Meyer responded that this sort of operation often fails "[b]ecause they're aware that they're preparing returns incorrectly, and they're nervous." ROA.1753. Meyer then listed discrepancies that he found in the returns of five of Kissentaner's clients. ROA.1753-61.

These same five clients testified at trial that Kissentaner used false financial information in preparing their tax returns instead of the information they had provided her. ROA.1832-51, 1891-96, 1905, 1928-96, 2034-35, 2082, 2089-2111, 2125-26, 2159-93, 2217, 2221. We note the following examples. Two returns included tens of thousands of dollars of business loss deductions for individuals who did not own businesses. ROA.1838-40, 2168-69, 2178-79. Credits were listed on forms electronically submitted to the IRS that were different from those listed on the forms given to the client. ROA.1845-46. One client's return included $98,601.00 in itemized deductions one year and $84,754.00 the next, none of which were authorized by the client. ROA.1953-55, 1961. One client's returns listed $119,398.00 in business losses over a three-year period for a business that was profitable. ROA.1960-61, 1972-82. Clients further testified to receiving much larger tax returns when using Kissentaner compared to other tax preparers. ROA.1849-50; 1896; 1930-31; 2117; 2129-30; 2211-12. One client testified to receiving a tax refund for years in which he had paid no federal income tax. ROA.2167-93; 2228-33.

There was also testimony that Kissentaner was forgetful about her own tax obligations. This failure had other adverse consequences for Kissentaner. IRS agent Natasha March testified that Kissentaner failed to file her personal tax returns between 2012 and 2017. ROA.2263. March

testified further that an individual must be tax compliant in order to be issued a Preparer Tax Identification Number (PTIN), which is required to prepare tax returns for others. ROA.2265.

During her closing argument, Kissentaner's attorney made the most of damning evidence: she conceded that the tax forms were false, but she argued that Kissentaner had been tricked into using false information provided by her clients. ROA.2363. The jury was not receptive to her arguments; it convicted Kissentaner on seven counts. ROA.311-12, 329-35.

B.

And then came the sentencing. Kissentaner's offense level and criminal history score resulted in a guidelines range of 41 months to 51 months of imprisonment, one year of supervised release for each count, and restitution. ROA.3111-19. Kissentaner requested a downward variance, but the government was having none of that; it argued for an upward variance. ROA.3157-63, 3271-87. The district court ultimately sentenced Kissentaner to 144 months of imprisonment and one year of supervised release. In imposing this sentence, the court explained that the guidelines addressed neither her past criminal history nor her failure to comply with her pretrial release conditions.[1] ROA.2443-44. The district court further imposed restitution of $71,810.00 as a term of supervised release; the court, however, erroneously ordered restitution payments to begin immediately. ROA.322-23, 335, 2444-45.

II.

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[1] Kissentaner has four previous convictions: (1) failure to stop and give information for striking a victim with a vehicle and fleeing; (2) carrying a weapon while on probation; (3) evading arrest when an officer was investigating a shooting; and (4) retaliation, which involved assisting in killing a man to prevent him from testifying at trial. ROA.3112-14.

We focus on the merits of Kissentaner's appeal. She asserts errors based on: agent Meyer's "overview testimony" relating to the falsity of the client tax returns;[2] agent Meyer's testimony explaining why he believed the undercover operation failed; and the testimony of her failure to file timely her own personal taxes. She further challenges the reasonableness of her sentence and the legality of the restitution order. We proceed to address each challenge.

A.

We first turn our attention to Kissentaner's arguments that the district court erred by allowing agent Meyer to testify (1) that information in her clients' tax returns was "false" and (2) why tax sting operations focusing on tax preparers often fail. Appellant's Br. at 12-19. Kissentaner concedes that she did not preserve these arguments for appeal. Appellant's Br. at 12. We review such unpreserved issues for plain error. *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014). To establish plain error, an appellant must show (1) an error (2) that is "clear or obvious" and (3) that affects "substantial rights." *Puckett v. United States*, 556 U.S. 129, 135 (2009). If these showings are made, this court has discretion to correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

At trial, agent Meyer testified to the falsity of the information in Kissentaner's clients' tax returns before the jury heard the clients' testimony about the falsity of their respective tax returns. ROA.1728-45. Kissentaner's attorney, however, conceded at trial that the information, which Kissentaner

[2] Overview testimony refers to testimony in which a witness summarizes evidence that has not yet been presented to the jury . *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003).

had inserted in the tax returns, was "false." By such admission that the information was false, Kissentaner has waived her challenge to this testimony.

Agent Meyer's testimony concerning the reasons why undercover operations sometimes fail is at issue, however. To summarize the facts relevant: the district judge asked agent Meyer why the operation failed, and Meyer responded that such operations often fail when the target becomes nervous because he or she is sensitive to the illicit nature of the business. ROA.1752-53. Kissentaner argues that the admission of this evidence violated Federal Rules of Evidence 704(b), which prohibits expert testimony regarding whether a defendant acted with a mental state when the mental state is an element of a charged crime. Fed. R. Evid. 704(b). The Supreme Court, however, recently addressed a similar question. The Supreme Court held testimony that "most" criminals have a particular mental state relative to crime at issue is not prohibited by Rule 704(b), because such testimony does not definitively address the defendant's mental state; thus, such testimony leaves room for the jury to determine whether the defendant herself had that mental state. *United States v. Diaz*, 144 S.Ct. 1727, 1733-35 (2024). Agent Meyer's testimony, i.e., his opinion why sting operations *often* fail, left room for the jury to decide whether Kissentaner had the requisite mental state; thus, the testimony did not violate Rule 704(b) under *Diaz*. Accordingly, there was no error, plain or otherwise.

B.

Kissentaner next argues that the district court erred by allowing agent March to testify that Kissentaner had failed to file timely her own personal tax returns. She contends that the admission of this evidence violated Rule

404(b).[3] Appellant's Br. at 27-40. Kissentaner timely objected to this evidence. For our own purposes today, we will assume that the district court abused its discretion by admitting this evidence. But even if the district court erred, we further ask whether the error was harmless, i.e., "any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *United States v. Ricard*, 922 F.3d 639, 653 (5th Cir. 2019) (internal quotation marks and citations omitted).

To determine whether an error is harmless, we "review the facts of the case and the evidence adduced at trial to determine the effect of the unlawfully admitted evidence upon the other evidence adduced at trial and upon the conduct of the defense." *United States v. Watkins*, 741 F.2d 692, 695 (5th Cir. 1984) (internal quotation marks and citations omitted). An error is harmless if, absent the impermissible taint, "the [other] evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt." *Id.*

We find such overwhelming evidence here that supports the verdict of guilt: specifically, we refer to the testimony of five of Kissentaner's clients. All testified to criminal malfeasance by Kissentaner, including preparation of their tax returns with fanciful financial information that the clients had not provided. Even more flagrant, though, was a client's testimony that Kissentaner delivered to her a copy of her return, but submitted a completely different return to the IRS on her behalf. ROA.1845-46. This testimony, together with evidence of many thousands of dollars of willful and fraudulent deductions, was overwhelming. Consequently, the admission of evidence that Kissentaner had not timely filed her own returns was harmless in the

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[3] "Evidence 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." FED. R. EVID. 404(B).

light of the overwhelming evidence of her guilt of the crimes for which she was convicted. In short, the district court committed no reversible err by admitting evidence of Kissentaner's failure to file timely her own tax returns.

C.

We now turn to Kissentaner's sentence. She argues that the sentence was substantively unreasonable. Appellant's Br. at 41-49. Instead of sentencing her within the guidelines range of 41 to 51 months, the district court imposed a sentence of 144 months of imprisonment. ROA.2443-43.

We review the reasonableness of a sentence for abuse of discretion. This standard of review is "highly deferential" to the district court. *United States v. Hernandez*, 876 F.3d 161, 166 (5th Cir. 2017) (citation omitted). As we have said before, "the sentencing court is in a better position to find facts and judge their import under the § 3553(a) factors with respect to a particular defendant."[4] *Id.* The district court is required to impose a sentence that is sufficient but not greater than necessary to comply with the sentencing aims of 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). A sentence outside the guidelines range unreasonably fails to reflect the Section 3553(a) factors where it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the

[4] The Section 3553 factors, which are to be considered in imposing a sentence, include, inter alia, "the nature and circumstances of the offense and the history and characteristics of the defendant…the need for the sentence imposed…the kinds of sentences available…the kinds of sentence and the sentencing range established for…any pertinent policy statement…the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and…the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a).

sentencing factors." *United States v. Fraga*, 704 F.3d 432, 440 (5th Cir. 2013) (internal quotation marks and citation omitted).

Here, the district court accounted for the criminal sentencing factors we have noted in Section 3553(a). It then observed that "the guideline sentence did not take into consideration the history and characteristics of this defendant, including prior criminal history which were not considered[,]" such as her delinquent personal taxes, use of an illicit PTIN, and failure to cooperate with the pretrial conditions. ROA.2442-43. Kissentaner's four earlier convictions—one of which involved assisting in killing a man to prevent his testifying at an upcoming trial—were not accounted for in the guideline range. ROA.3112-13. District judges may appropriately consider all of these factors when imposing a sentence. *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006); *United States v. Harris*, 702 F.3d 226, 230-31 (5th Cir. 2012). Accordingly, we hold that, in confecting Kissentaner's sentence, the district court properly weighed and balanced the relevant factors. *Fraga*, 704 F.3d at 440.

Kissentaner further argues her sentence warrants reversal because it is above the average sentence imposed for this sort of criminal conduct. This argument lacks persuasive punch because an "above average" length of a sentence does not require reversal. *United States v. Willingham*, 497 F.3d 541, 544-45 (5th Cir. 2007). We thus conclude that Kissentaner has failed to show that the district court abused its discretion in imposing her sentence.

D.

Kissentaner's final argument is that the district court erred in ordering restitution to begin immediately.[5] We review de novo the legality of

[5] Kissentaner does not challenge the order of restitution or the amount ordered.

restitution. *United States v. Penn*, 969 F.3d 450, 458 (5th Cir. 2020). Here, the district imposed, as a term of supervised release, a restitution order of $71,810.00. Furthermore, the court separately ordered restitution payments to begin immediately. ROA.322-23, 335, 2444.

Although not authorized by statute, district courts may impose restitution, as here, for Title 26 offenses as a term of supervised release. *United States v. Miller*, 406 F.3d 323, 329 (5th Cir. 2005). In such cases, however, restitution may only begin at the commencement of the term of supervised release. *United States v. Howard*, 220 F.3d 645, 647 (5th Cir. 2000). It follows that the district court exceeded its statutory authority by ordering restitution to begin immediately. The proper remedy for this error is to modify the judgment to make clear that restitution is not required until the beginning of her term of supervised release. *United States v. Westbrooks*, 858 F.3d 317, 328 (5th Cir. 2017), vacated on other grounds, 138 S. Ct. 1323 (2018).

III.

In sum, the judgment of the district court is, in all respects, AFFIRMED as to Kissentaner's conviction and sentence. However, we hereby MODIFY the order of restitution to provide that no restitution is due until the beginning of Kissentaner's term of supervised release.

AFFIRMED, AS MODIFIED.