

Discussion

In deciding *Veasley*, the court relied on the *Bruen* decision, which eliminated means-end analysis when considering constitutional challenges to gun legislation. Means-end analysis, which weighs individual rights versus state interests, is a standard approach in judicial reasoning, and it is particularly helpful in cases involving constitutional rights. The post-*Bruen* judicial approach to evaluating constitutionality in these cases instead relies on Second Amendment language and 16th to 18th century history and precedent. There are several problems with this approach, many of which are set forth by Justice Breyer in his dissenting opinion in *Bruen*. Justice Breyer was most concerned with whether “the Court’s approach [will now] permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history” (*Bruen*, p 107). In addition to Justice Breyer’s concerns, the text and history approach does not allow for consideration of evolving scientific knowledge.

The *Bruen* decision provided a basis for the *Veasley* court’s text and history approach. Instead of looking directly at the history of gun restrictions, the *Veasley* court labeled modern drugs as the “unprecedented” concern that needed to be addressed through analogy with historical precedent. This ignored an unprecedented concern likely more relevant to § 922 (g)(3): risks posed by modern guns. Section 922(g)(3) regulates gun possession, not drug use or persons with mental illness. A logical analogy to historical precedent would consider gun legislation. The *Veasley* court’s reasoning instead suggests people with mental illness are dangerous and need to be regulated.

Despite a lack of strong scientific footing (similarity across a few symptoms of intoxication and mental illness does not mean similarity in organic cause), the *Veasley* court equates intoxication with mental illness based on stigmatizing historical descriptions and inhumane treatment of persons with mental illness from centuries ago. Contrary to popular belief, mental illness is not the root cause of most gun violence in the United States (O’Brien E. Changing the narrative . . . Psychiatr Times. 2023; 40(4)). It does, however, provide an overly reductive explanation to the complex challenges of gun violence. And without the ability to introduce scientific evidence, there is a real risk that this stigmatizing judicial approach will persist. In the extreme, tenuous connections made between dangerousness and mental illness may

themselves be dangerous in terms of how people with mental illness are perceived and the rights and freedoms they are granted (O’Brien, p 4).

Addressing Mental States in Expert Witness Testimony

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Expert Witness Testimony That Addresses General Mental States in a Group of People Is Not Impermissible Ultimate Issue Testimony

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Key words: expert witness; testimony; mental state; evidence; ultimate issue

In *Diaz v. United States*, 144 S. Ct. 1727 (2024), the U.S. Supreme Court ruled that expert witness testimony opining that most people in a group have a particular mental state is admissible, even if that mental state is an element of a charged crime. Such testimony is not a direct opinion about the mental state of the defendant and thereby does not violate Federal Rules of Evidence (Fed. R. Evid.) 704(b).

Facts of the Case

Delilah Diaz was stopped at a border checkpoint entering the United States from Mexico, where officers found 54 pounds of methamphetamine hidden in her car. She was charged with importing methamphetamine, a charge which required the government to prove that she “knowingly” transported drugs. Ms. Diaz asserted what is known colloquially as a “blind mule” defense, claiming she was unaware that the drugs were concealed in the car, which belonged to her boyfriend.

The prosecution introduced expert witness testimony from a Homeland Security agent, who testified about common practices of Mexican drug-trafficking organizations, including that cartels “generally do not entrust large quantities of drugs to people who are unaware they are transporting them” (*Diaz*, p 1731). The defense challenged this testimony, arguing it violated Fed. R. Evid. 704(b): which “In a

criminal case, an expert witness must not state an opinion about whether Ms. Diaz did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense" (*Diaz*, p 1731, citing Fed. R. Evid. 704(b)). The district court granted that, although the agent could not testify in absolute terms about whether all couriers knowingly transport drugs, his testimony that most couriers know they are transporting drugs was admissible. Ms. Diaz was found guilty.

On appeal, the defense again challenged the agent's testimony under Rule 704(b), and the Ninth Circuit Court of Appeals found that the rule prohibits only "an 'explicit opinion' on the defendant's state of mind" (*Diaz*, p 1731).

Ruling and Reasoning

The U.S. Supreme Court affirmed the Ninth Circuit finding that, because the expert did not state an opinion about whether Ms. Diaz had a particular mental state, the testimony did not violate Fed. R. Evid. 704(b).

The ruling clarified Fed. R. Evid. 704, which allows expert witnesses to offer opinions that address an ultimate issue (matters that the jury must resolve to decide the case), with the exception described in Rule 704(b). The exception was deemed applicable only to opinions about the defendant, leaving testimony about the mental states of a general group of people admissible. In this case, the expert's testimony left open the possibility that Ms. Diaz was not like most drug couriers and left the decision on the ultimate *mens rea* question to the jury. The Court also noted that Rule 704(b) does not apply in civil cases or affect lay witness testimony.

Justice Jackson wrote a concurring opinion, noting that the ruling is party agnostic and allows both the government and the defense to call experts offering opinions about general mental states of groups of people under Rule 704(b). She agreed that such evidence would not deprive the jury of its role in resolving ultimate issues, i.e., if the defendant had the requisite *mens rea*. Justice Jackson wrote that, in crafting Rule 704(b), "Congress . . . did not preclude experts from contextualizing a defendant's mental health condition, including by explaining the likelihood that those with a particular condition would have a particular mental state" (*Diaz*, p 1737).

Dissent

Justice Gorsuch, joined by Justices Sotomayor and Kagan, dissented, raising concern that prosecutors

could use this ruling to sway juries to convict using expert testimony that "most" people think a certain way by simply convincing the jury that the defendant is like most people. They raised concern that the ultimate question of a culpable *mens rea* must be decided by a jury and that allowing expert witnesses to testify on this shifts the burden from the prosecutor to the defendant. They argued that Fed. R. Evid. 704(b) prohibits not only definitive opinions about the defendant's mental state but rather any opinion.

Discussion

This ruling clarifies the limits of expert testimony under Fed. R. Evid. 704(b). Even when the mental state in question is an element of the crime charged or of a defense, general opinions about the mental state of most people in a given group are permissible under federal law so long as the testifier does not provide a definitive opinion about the defendant's mental state. This preserves a key role of psychiatric expert witnesses in providing opinions based on their expertise in mental disorders, which by their very nature speak to mental states.

The finding in *Diaz* is congruent with prior findings regarding the matter of expert testimony affecting ultimate issues in that it allows expert witnesses to testify on mental states to aid the jury, so long as that testimony is not so specific or directive that it reduces their latitude in addressing the ultimate issue.

Medical Malpractice and Ordinary Negligence Cases Share Same Standard for Causation

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Medical Malpractice Cases Do Not Require Plaintiffs to Meet a More Stringent Burden of Proof Than Ordinary Negligence to Establish Causation

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