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10-18-1985 Correspondence from Stevens to O'Connor

John Paul Stevens
US Supreme Court Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 18, 1985

Re: 85-214 - Delaware v. Fensterer

Dear Sandra:

In his concurring opinion in California v. Green, the Chief Justice emphasized "the importance of allowing the states to experiment and innovate, especially in the area of criminal justice." 399 U.S. at 171. Because I believe that comment is applicable to the Delaware court's consideration of the question that is functionally equivalent to the question left open in Green (and discussed in footnote 18 on page 169), I adhere to my vote to deny cert.

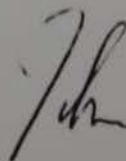
As you noted at pages 5-6 of your circulating per curiam, in Green the Court left open the question of the admissibility of the statement "of a witness who disclaims all present knowledge of the ultimate event." It seems to me that this case presents a very similar question. The witness, FBI agent Robillard, disclaimed all present knowledge of the basis for his opinion that one of the victim's hairs had been forcibly removed. And yet his qualification as an expert implied that he had a valid reason for reaching that conclusion at the time of his investigation. Robillard's present inability to recall that reason at trial deprived the defendant of an opportunity to challenge the agent's testimony (at least if one accepts the Delaware Supreme Court's finding that "[w]ithout an acknowledgment of the basis of his opinion, defense counsel's cross-examination of the Agent was nothing more than an exercise in futility," App. B to Pet. for Cert. at B-9 to B-10). Because I would be inclined to decide the Green situation, involving an express prior statement of which the declarant disclaims present

knowledge, the same way I would decide this case, which to my mind involves an implied prior representation of which the declarant disclaims present knowledge, I would not resolve this case without full argument.

Interestingly, as you remark at page 2 of your opinion, the defense called upon Dr. DeForest to testify that sometime before trial Robillard had told him that he (Robillard) had relied on the follicular tag theory to conclude that the hair was forcibly removed. If Dr. DeForest's testimony had been introduced by the prosecution instead of the defense, we would have a situation perfectly parallel to that presented in Green because the officer in Green, like Dr. DeForest in this case, testified to the declarant's prior, out-of-court statement which the declarant now disavows at trial. Because of this analogy, I would hesitate to rely on Dr. DeForest's testimony to bar the Delaware Supreme Court from invalidating the conviction on some other constitutional ground, as you seem to imply in your penultimate paragraph. This comment is not needed to support the disposition you seek and is hazardous considering that the record is not before us.

If the Court does conclude that the issue should be resolved in this case, I would vote to grant cert rather than to have the case decided summarily.

Respectfully,



Justice O'Connor

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