10-21-1985

10-21-1985 Correspondence from O'Connor to Stevens

Sandra Day O'Connor
US Supreme Court Justice

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 21, 1985

No. 85-214 Delaware v. Fensterer

Dear John,

You describe Agent Robillard's testimony as involving "an implied prior representation of which the declarant disclaims present knowledge," on the grounds that his qualification as an expert implied that "he had a valid reason for reaching that conclusion at the time of his investigation." But the question reserved in Green involved an express prior representation specifically introduced by the prosecution as substantive evidence. I see nothing in our cases that would justify embarking on the difficult and questionable enterprise of deciding when there has been an implied representation. In any event, in this case, Agent Robillard openly admitted at voir dire that he could not recall which reason was the basis for his conclusion. App. to Brief in Opposition A-1-A-2. That admission would seem to preclude finding any implied representation. Thus, unless the Confrontation Clause required the trial court to refuse to qualify Robillard as an expert witness because of his lapse of memory, your analysis would not affect the resolution of this case.

I think it clear that allowing Robillard to qualify as an expert witness did not offend the Confrontation Clause. The defense did not object to his qualification on these grounds, instead urging that Robillard's adoption of the follicular tag theory should disqualify him. App. to Brief in Opposition A-8. Even if the defense had objected, I continue to believe, for the reasons stated in the circulating draft, that the Confrontation Clause does not forbid the admission of an otherwise qualified expert's opinion, arrived at through his ordinary testing processes, solely because he is unable to recall which of the test results was "positive."

You also suggest that because this case would present a situation analogous to Green had the prosecution introduced

Dr. DeForest's testimony as to Robillard's out-of-court statement, we should not rely on this testimony to conclude that the admission of Robillard's opinion did not deny respondent a fair trial. I disagree. Given that the admission of Robillard's opinion did not violate the Confrontation Clause, there is no basis for holding the state responsible for the introduction of Dr. DeForest's testimony, which defense counsel deliberately chose to elicit. Even were we to assume that the state could somehow be held responsible as a matter of due process, I would not then leap back to the Confrontation Clause and reach the Green question: I would ask whether the defendant might have been denied a fair trial. In fact Dr. DeForest's testimony accomplished precisely what the defense hoped--it put before the jury the acknowledgment that Robillard said he could not make, and heightened the usefulness to the defense of Dr. DeForest's attack on the validity of the follicular tag theory. It also tended to call into question the truthfulness of Robillard's professed lapse of memory. Under these circumstances, it seems to me proper both to suggest that due process may have a role to play in situations to which the Confrontation Clause does not speak and to explain why that possibility does not help respondent's cause.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference