

The evidence against him really hasn't changed over the last few years.

>> Well, I don't want to belabor this particular issue.

I mean he was either going to listen to this as a court --

There is something wrong with that scheme.

Some of the key evidence in the case has been destroyed.

And by constitutional provisions you back that up but your

comments about the weight of the evidence in this case I think

gets immediately into the second issue for this court and I

respectfully disagree with you as to the strength of the

evidence against Mr. Waterhouse.

The second issue in this case, a false claim of newly-discovered

evidence where an additional witness came forward upon

reading about this impending execution, read it in the "Tampa

Bay Times," came forward, saw a statement in that article and

that Mr. Waterhouse was seen by witnesses leaving the bar with

the victim.

He came forward and said no, that's not true.

I saw him leave with two males.

>> Let's look at the whole transcript, can we not, as we look at the evaluation of this different evidence.

We must look at the entire trial and in going through that, I

mean we began yesterday.

It seems to me that the witness Vasquez also said that he left

with two men, correct?

>> Correct.

>> But Vasquez also puts them back at the lounge after leaving

with those two men in the vehicle that he came back to the

lounge, did he not?

>> He also saw them leaving.

>> No I don't think Vasquez --

Vasquez saw him leaving again?

>> Yes, Sir.

He dropped off one individual

with the alleged drug dealer.

>> Where in the record is that because I'm sorry I don't read the record in that fashion.

Could you help me with that?

Is that in your brief?

Specifically?

>> What I will do is I will have her look for that portion in the record but my recollection is that Mr. Vasquez saw him return to the lounge but then drop off the one individual and then leave and he talked about the one individual coming in and buying some drinks and hanging around but Waterhouse had left and said, I mean that's in the record so I can answer that.

>> I understand.

It's my understanding though and I can tell you this may be an important piece, Vasquez saw him come back into the parking lot area and I don't know, does he address whether he's inside the bar again?

>> Actually, these records are numbered so poorly.

The old print 3805 for the original was 1943.

He talked on that page about when they came back he then says Waterhouse and his friend continued on in the car.

>> Okay.

>> And so, you know, clearly the evidence of Mr. Waterhouse -- there was a bartender by the name of Kyo Ginn who claims she saw Mr. Waterhouse with the victim, leaving the bar with the victim.

Mr. Vasquez contradicted that.

>> But that's not necessarily contradictory because the times here are unclear and people are coming and going and there are things that can be seen from one part of the bar that cannot be seen from another part of the bar.

Is that correct?

>> Well I think you have to look at the big picture.

This Ginn was fairly certain in her testimony at the time she had Mr. Waterhouse sitting with a woman the woman for half an hour and had them leaving together at a specific time. When you look at the testimony of Mr. Vasquez when Mr. Waterhouse left he never went back in the bar.

And Judge Lewis' question, and we were able to cite that in the record -- Mr. Waterhouse drove off and this was late in the evening.

There was no evidence, I mean they have burden of proof beyond a reasonable doubt that he started to speculate that yes it was Ginn and maybe it was wrong. That is speculation.

That does not put him with the alleged victim.

>> But the newly discovered evidence the judge granted an evidentiary hearing and we we are not speculating about what Sotolongo who comes with his testimony 32 years after the murder, and the judge made a finding of credibility in his statement about what he thinks he saw that evening were not credible.

Now was that credibility determination made by the judge?

>> I think we have to look at the nuance.

He found his testimony was material and he didn't completely discount it.

But he simply looked at -- as far as the Brady claim he didn't feel that the police officer misrepresented the evidence but he did find it -- the testimony -- was material.

>> So do you think this is newly discovered?

>> Yes.

>> What is the standard you have to meet in order to -- in this case.

>> The newly discovered evidence which I feel is obvious, number

two we have to show that it was likely a trial, a retrial.

>> We are really talking about that there is nothing that has happened in 32 years that changed the bartender's testimony.

Vasquez did testify in the original case and had a chance to present that.

We also have, has come out of the statements to the police in a series of, whether you call them confessions, is essentially where he admitted that what happened was that he was having sex with her and he went crazy. That has not changed or are now we saying that the statements are really not what happened?

>> Well I think if you actually, and I think there are two different statements by Waterhouse.

Those of law enforcement and one of the jailhouse snitches in this case.

And if you actually read the statement versus what they have characterized in the 32 years this case has been around, when you actually read the statement, they are very equivocal.

They are not any type of direct admission.

They can be subject to many different interpretations.

>> Let's start with the one.

Did he know her?

He first said he didn't know her, and then he admitted he knew her and knew her for several months.

Waterhouse was not a stranger to the bar.

He was a regular there.

So we start with the fact that there was opportunity and she was at the bar that night.

He knew her and is that correct that they knew each other or he knew her?

>> Somebody like Mr. Waterhouse with his background except by the police is a suspect in a

murder case initially denying he is a victim and later saying yeah I really do know her.

>> Alright so he's not alone.

Not alone and then what does he say about his sexual act with the victim?

>> He did admit to a sexual act with the victim.

He talked about some nebulous victim but he never admitted on the night of the incident having sex with this specific woman.

I mean it's almost like you know when you look at a jailhouse snitch young, even in this court's opinion he has been characterized as him admitting to putting a Coke bottle in the victim's hand.

That is not what Mr. Young's testimony said.

He made some nebulous comments about how -- we have no idea in the context of that event who he was talking about, what female he was talking about.

There was testimony --
[INAUDIBLE]

>> Is what we are talking about here is now newly discovered evidence claims, whether the nature of Sotolongo's testimony is such that it would produce an acquittal at the trial.

In that sense we do look at all the other evidence.

Now, individually we must look at the blood that is found in Mr. Waterhouse's vehicle, if there is blood there.

You may say maybe it wasn't the victim's blood inside his vehicle, correct?

>> There is blood in his vehicle, correct.

>> A lot of blood.

>> Blood that was DNA tested.

>> It wasn't consistent with the victim's blood was it?

>> This was DNA testing with enzymes.

>> Are we saying that maybe he killed someone else in the car? Did he say it was an animal,

that he had an animal in his car?

Blood is indicative of a violent struggle in the vehicle.

>> Not knowing who's blood that is, I mean I can't sit here and tell you what my clients explanation was.

I know there was some investigation in this case that he and his friends used to get into bar fights and get injured and would bleed in the car.

>> Speaking of what your client said, has he ever said I am innocent of this?

>> He has had only had one opportunity to do that and that would have been in the original trial.

>> But I'm just asking, not in the postconviction when there were attacks on the former council?

>> He did not testify at his postconviction hearing.

He did sign a sworn motion asserting his innocence when we asked about DNA testing but when you look at the statements to the police, I mean you can draw a conclusion from them but the bottom line is they are applicable and open to different interpretations.

Statements to the jailhouse snitch is equivocal and open to interpretation and the jailhouse snitch is impeached by deals he was offered because that was suppressed initially and that was to be harmless error in his first postconviction, yet that person had been offered deals and was not impeached by it. The statements are equivocal.

>> I mean, what kind of late do you place on the discussion of current or physical condition that evening and the way she was found and all of that?

That doesn't seem as though it's just coincidence though, does it?

>> By the time he was questioned

by the police and we are dealing with the record.

The trial was the trial.

If I tried that case I would have done a million things different.

>> But this evidence is what we must deal with.

We don't mention this to make it store it.

It's a unique circumstance to be discussed, the physical circumstances.

>> What you have to understand is before he was questioned by the police he made the statements, he had already been questioned by them once and it was many days later.

It was all over the media.

In terms of that, frankly I would have presented evidence it was reported in the media and that she had been or developed evidence with the police officer so they could tie him with that type of thing but they are equivocal statements.

I look at that it from somebody who I see as having been imprisoned for 9 or 10 years.

He was being focused on an investigation by the police.

The mentality of that type of person is that the police think I did it.

I'm going to be in trouble.

He is trying to swing a deal with with them or say hey could you talk to me as a friend?

He was trying to do damage control at that point in my opinion and that is how I would argue some of the statements he was making.

He was simply trying to play with the cops to see if he could work out some kind of a deal.

There are other ways to interpret his statement.

And I just can't get past the point, when you go down the list of evidence against him, the jailhouse snitch was never impeached by his deal because it

was not disclosed.

The blood evidence has been destroyed.

It was a classic characteristic of the ultimate evidence destroyed.

The fiber evidence was destroyed.

Although one witness claimed he saw scratches and numerous other people never reported scratches and then you have the testimony of the bartender.

That is the evidence.

Every single area of evidence in this case is a taxable and now we have one more piece of the puzzle that says the person who put him with the victim was wrong.

Mr. Sotolongo does not carry the baggage, Mr. Vazquez did where the prosecutors get up there and confront him with the fact that you have no respect for the law. You made a joint deal and his credibility in the eyes of 12 jurors would have gone down from there.

Mr. Sotolongo did not carry that baggage.

So I would submit to the court that when you analytically, you can't just sit here and you know there was this evidence in this evidence.

You have to look at how much weight do you get that evidence? What way is that evidence attackable and was attacked and one thing we haven't talked about yet is Jones.

We talked about Jones but this aspect of Jones --

>> You are well into your rebuttal.

>> I will save it for rebuttal. Thank you.

That is how much time I have left.

>> For a total.

>> May it please the court, Attorney General Stephen Ake on behalf of the state of Florida. The defendant suppressed motion

as untimely under the rule of criminal procedure under subsection D-2.

The trial court found to the first issue it aired in finding the criminal threshold requirement of establishing due diligence under subsection D-2A of the rule.

The trial judge in this case focused on trial counsel's due diligence and failing to discover the evidence regarding Sotolongo and ignored collateral councils diligence requirement under that rule.

I would like to address that part of it.

>> Lets stick let's stick with, before we get to --

Because we do have someone investigating so let's first focus on, let's take the Sotolongo did testify now.

Did he have any motive for himself relying on this?

>> Sotolongo gave a statement for days after the murder to a detective in the case and was turned over to trial counsel. We have known for the last 32 years.

He now came in and said something different.

>> Is the record clear that Sotolongo's statement was turned over?

Nothing was turned over because he didn't have anything to say?

>> The police report from Detective Hitchcox was turned over to trial counsel.

>> As I read the beginning right before the trial started and the selection of the jury, it appeared to to me that Vazquez' name was delivered late and the state was arguing that these were not inconsistent or impeaching witnesses, that they really had nothing to do, what they had to say was not really immaterial and I don't remember Sotolongo being presented at that time.

>> The issue you are talking about Your Honor for the dealt with Vazquez as the person who went with Waterhouse to buy marijuana.

That is an issue that has been litigated for year about the state turning that over.

This police report trial counsel admitted they had this police report was Sotolongo's name on it.

There is no question that they have that.

>> Is the police record in the record for this proceeding?

>> Correct her on her.

It was attached to our answer to the motion and also part of the record in the evidence --

I believe it is a nine-page long report from detect give Hitchcox that basically chronicles from the time they find the body until Waterhouse and I would point out that only four witnesses are discussed in this report that were at the lounge on the night of the murder, two of which were the couple that drove the victim to the lounge and ended up dropping her off and the other one was the bartender, the witness in this case and then you have Sotolongo.

This report was turned over, Sotolongo says I know Waterhouse and I recognize the victim but I didn't remember when Waterhouse left because that's not something I would keep track of. That is what was said in the report.

32 years later he is coming in and testifying basically that he still doesn't know what time he left.

He gave statements all are with the board basically as to when he got there, whether he was working that night or what have you but he still doesn't know what time Waterhouse left but he now claims I told Detective

Hitchcox Waterhouse left with two other males.

>> Let's assume and trying to get to where we are looking at whether this is an acquittal on second or third, let's assume that it is the most favorable to the defendant and he verifies --

[INAUDIBLE]

That would be consistent with Vazquez's statement that at some point that night he left to buy marijuana.

[INAUDIBLE]

>> I know the state wants to litigate 32 years later and unfortunately it's the nature of the death penalty but you know you look and you just want to make sure that we are excluding a person who committed a crime and is not innocent of the crime.

That is why I want to make sure we focus on the Sotolongo defense.

Saying that Waterhouse left sometime that evening and what probably happened is he went to buy marijuana.

>> Right and Vazquez' testimonies are far more defense-friendly.

Vasquez had timelines.

He said that Waterhouse and his friend left five or 10 minutes before 12 and were gone for about 45 minutes.

As Justice Lewis was asking questions Vasquez then said they returned and drop Spitzig off after 45 minutes which would need 12:45, give or take, and Spitzig reentered the lounge and Vasquez said Waterhouse and his friend stayed in the car and drove around the corner.

He conceded on cross-examination that they may have welcomed back into the bar and Vasquez was working one bar of the door and their multiple entrances to it.

We have the bartender, Ginn, testifying around 12:30 the victim starts hanging out with

Waterhouse and having drinks.
The bartender serving them and recalls what they were drinking, White Russians for Waterhouse. Waterhouse confirms that, I was drinking White Russians that night.

>> The couple, they were all going to leave and the victim wanted to stay and they left and left her alone.

>> Correct.

>> So they don't have any information with regard to any connection after that.

>> Right and they never testified about knowing Waterhouse.

Their testimony, they left right about midnight and shortly thereafter that is when the victim hooked up with Waterhouse.

>> So it's the bartender that place is Waterhouse with the victim but Waterhouse also admits that he met the victim that night.

Did they know each other previously?

>> Right, he originally says -- and subsequently he says I know her and we have had relations for a few months, had sexual relations in the past.

>> The idea that they would be together that night would be consistent with what Waterhouse told the police?

>> I think a lot of it is consistent with what Waterhouse told the police but I think Waterhouse made several incriminating statements directly linked to what happened in this case.

He talked about his drinking and drinking in excess that evening and he had eight years before he went to the lounge and had four or five White Russians which Ginn testified to serving and White Russians and he became frustrated when I woman was menstruating and like flipping a

switch that he would get violent in the terrible things.

That happened on the night of the murder.

He told the police officer that and he also told him why do you think I quit drinking after that?

That all is consistent with what happened in this case, the problems with the woman menstruating and he shoved a tampon down her throat.

She had been savagely beaten. Waterhouse testified he had seen at higher iron inside of Waterhouse's car a week before the murder and that was not there when the police impounded the car.

There was blood spattered all throughout the car and there were photos introduced into evidence.

I think the trial judge in this case and analyzing the merits of those correctly found that there is no way the Sotolongo's testimony would produce an acquittal in this case but I still want to talk about the due diligence problem because I think this court needs to find that this is an untimely motion under the rule.

Sotolongo's name has been out there since 1980 and easily would have been discovered.

The whole theory in this case -->> Have we addressed at any time in our precedent circumstances where a witness tells the police officer, I know nothing?

And then later on, that witness says you know the more I think about it I do know something and that we have held that in counsel's performance and it's not diligent and there is an effective assistance.

Are not investigating witnesses who are saying I don't know anything?

>> No Your Honor, not specifically.

>> So to get there we would have to the same basically diligence for initial defenders and collateral counsel, they will of necessity be required to speak with everybody who's name is ever mentioned.

>> No, no, Your Honor.

You have to look at the circumstances in this case.

>> Where does that lead us to? I'm just asking because you are saying this name is there and it should have been discovered at the time.

The reason that it wasn't I am assuming is because everything indicated the witness didn't know anything.

>> Your Honor, Your Honor again, that is definitely what the attorney said in the affidavit and the only representation the collateral ever made is that I relied on the voracity of what was in the report.

What our position is given the fact of this case the whole defense area that Detective Hitchcox was not accurately recording information and it was incumbent on counsel to investigate who Detective Hitchcox talk to.

>> So you are saying, in every case in every defense counsel no matter what stage would be required to go behind every document and investigate?

>> That is what you just said.

>> No Your Honor, in the generic sense now but in the specific sense of this case I think yes. In a regular murder case I think it would be prudent for counsel to go and talk to all the witnesses but admittedly if there is a police report, it may not be requirement to talk to that person.

>> That would only be in hindsight then.

After-the-fact the state says ah-ha due diligence.

>> The trial counsel didn't

investigate one of the four witnesses listed in the report. Realistically trial counsel should have spoken to Sotolongo especially when they're presenting evidence.

They called Vasquez to the stand and Vasquez said I told Detective Hitchcox this and he did not want to listen to it. He said I'm not here to build their defense case.

Based on that they had a report from Detective Hitchcox and they should've talked to Sotolongo at that time.

The fact that nobody's done it in the last 30 years shows that counsel has not been diligent in this case.

>> But I guess, so you are saying Vasquez testified differently than what Hitchcox said he said?

>> Vasquez said I was interviewed by Detective Hitchcox.

I told them I saw Waterhouse league with these two men and he said he didn't want to hear it.

>> The state recalled to detectives, Detective Long and Detective Hitchcox.

Detective Long said I spoke to Vasquez and he told me he was leaving with two individuals and I wrote a police report to that effect.

We called Detective Hitchcox and he said I got information about Vasquez and I interviewed him and he told me that they left around 10:00 or so at night.

Detective Hitchcox said Vasquez was telling him that Waterhouse was seen at 10:00 at night.

He denied he had ever said A, I don't want to hear about this, the state rebuttal testimony to refute Vasquez' claim.

>> So you are saying that because there was reason to doubt Hitchcock's initial report back than then the original trial counsel should have

investigated?

The problem is, this case you have too made a stronger argument is this does not meet the Jones standard.

I would think this is where really it is different.

Assumed the Sotolongo who has no prior police record, comes forward and says you know, I actually saw the victim leave with another man, and it's credible.

You would have him say we are going to disregard that and this man may be put to death because the original trial counsel back then didn't investigate him.

That rule that is so raw that the procedural bar that even in a case recently from the U.S. Supreme Court, we just have to be careful where we are going to fault lawyers when we have got somebody who is on death row. That is my concern here, that you may have a point and maybe we should say that lawyers should need questioning everybody or maybe we should say prosecutors should be pushing everybody in the police report so we make sure the police report is accurate.

I don't know where it is but I'm concerned about that rule here.

>> That is why it needs to be done on a case-by-case basis and you have to look at what transpired.

In this case it is defining due diligence because I agree with what your honors are saying that there may be cases where it may not, you may not want to set the bright line rule the council has to go out and interview every single person again but in this case dealing with the fact that this case with Detective Hitchcox it's incumbent on the trial counsel or any of the counsel and the past 32 years that have been reviewing this record to see the argument by

trial counsel and in addition to presenting a bad testimony from Vasquez that Hitchcox was not listening to he argued in his closing argument that Detective Hitchcox was not listening. Sotolongo come forward when he saw that the death warrant had been signed?

>> No, he came forward after seeing a newspaper report.

>> But isn't that sort of important because the idea is that he is a citizen of this state.

I don't understand why he waited.

He saw something that a guy is going to be executed and he comes forward as a citizen and what we are saying really is that Mr. Norgard who is, who has always been in excellent advocate should have figured that out eight years ago and trial counsel should have figured that out 32 years ago when the guy comes forward on his own volition.

>> I can't attest to why Sotolongo came forward so late. He testified that he had been friends with Vasquez for the past 30 something years.

He knew Vasquez testified to this and he and Sotolongo were not there --

>> But does this end up evaluating by Judge Beach?

He waited 32 years and I don't find his real credible and his memory is not good so the system looks at that witness and now says, it's really lacking the kind of voracity in terms of imputing the verdict and that is what happens usually with these late you know, these late witnesses but normally we have a jailhouse snitch the comes forward and at the last minute they say I really didn't mean it.

Here we have got somebody who has no reason to come forward

now, other than his conscience bothered him or something.

>> That was his testimony Your Honor and he basically said that is why he came forward but again he is known about this.

He knew Waterhouse -- back in 1980.

>> So should we punish the lawyer?

Should we punish Waterhouse for the fact that a citizen waits to come forward?

>> I don't think necessarily you are punishing them.

>> You are saying we should never have even heard was Sotolongo had to say.

That is what you are saying.

>> I'm saying they had an opportunity of the evidentiary hearing to establish their diligence and they fail to do that at the time.

That is what I'm saying Your Honor, under the rule unless you want to open the floodgates years later that will always be the case that you will not require any kind of diligence in raising this claim under successive motions.

That is why that rule is there because otherwise counsel comes in 30 years after-the-fact raising something that should have been raised years before.

>> Opposition suggests the question from Justice Pariente that there is some question whether this trial judge actually rejected the credibility of this witness or that it is unclear in this final order with regard to finding materiality and with regard to voracity of that kind of thing.

What is your position and would you tell us why?

>> I don't think it's unclear at all Your Honor.

He said the testimony as unreliable given the passage of time and that he found Detective Hitchcox was accurate when he

testified that had the statement been made to him he would have put it in the report.

He made a strong determination based on conflicting testimony from both Sotolongo and Hitchcox at the hearing and that is, don't have the record, I'm sorry.

Page 21 of his final order denying his claim where he basically says that Hitchcox is a more reliable witness in this case and his information was reduced to writing at the time and he credits Detective Hitchcox and not Sotolongo.

>> That is the bottom line and this court accepts that.

>> It does as any type of Brady claim, yes Your Honor.

>> The destruction of evidence is radian destroys Jones, all of those.

>> Right and I think when you look at it in comparing Sotolongo's testimony versus what you have a trial and don't think there is any question that the trial court properly denied this case based on the materiality aspect of it.

I have gone over the statements as to the blood spattered and all that.

I don't think there's any question that had the jury heard Sotolongo he would have rejected his testimony just like they projected Vasquez' testimony which was far more detailed.

As far as the first issue I just want to point out the court has noted that this was an issue that was previously raised.

The only new argument in this case is basically that the death warrant has been signed.

This is something counsel should have argued that when he was presenting this case in 2003.

My time is up so I ask this court to affirm the trial court's point.

Thank you.

>> I will talk fast.

On the issue of Sotolongo's credibility the judge found is the first prong of Brady now that his testimony was material. Where he got into digressing from Sotolongo's credibility was between Hitchcox memory about the report of Sotolongo and he found Sotolongo's testimony and material.

There are five blocks of evidence in this case.

You have Mr. Waterhouse's statement that is equivocal and a jailhouse snitch which is equivocal and impeachable although it was not a Brady violation.

Evidence which is now been destroyed, the scratches were seen by one person despite -- And what the prosecutors back in the day argued was critical evidence.

Kyoe Ginn and Mr. Waterhouse. In their closing arguments that was extremely important. Including Mr. Waterhouse being the victim.

Now we have not only one witness but two and when the state says that Mr. Vasquez testimony was rejected by a jury I don't think it would have been rejected by the jury if they had Sotolongo to cooperate and he was not subject to the same impeachment as Vasquez.

That's an extremely important witness.

Thank you.

>> We thank you both for your arguments.