In the

Supreme Court of the United States

RONALD DALE WARDIUS,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

No. 71-6042

Washington, D. C.
January 10, 1973

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Wednesday, January 10, 1973

The above-entitled matter came on for argument at 10:53 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

J. MARVIN KUHN, ESQ., Deputy Public Defender, 110 Labor & Industries Building, Salem, Oregon 97310, for the Petitioner.

W. MICHAEL GILLETTE, ESQ., Assistant Attorney General, 100 State Office Building, Salem, Oregon 97310, for the Respondent.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-6042, Wardius against Oregon.

Mr. Kuhn, you may proceed.

ORAL ARGUMENT OF J. MARVIN KUHN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KUHN: Mr. Chief Justice, may it please the Court:

Petitioner in the instant case was convicted for the sale of narcotics and sentenced to 18 months imprisonment. During the trial of his case, he was not permitted to present alibi testimony through an alibi witness and his own testimony, because he failed to comply with the requirements of ORS 135.875, Oregon's notice of alibi statute.

Pursuant to the requirements of this statute, the defendant, not less than five days prior to trial, must file a written intent of notice to rely on alibi evidence. The notice must include within it the place or places the accused claimed to have been at the time the crime was alleged to have been committed, plus the names and addresses of the witnesses he intends to call.

The sanctions levied upon a defendant for failure to comply, that the witness or witnesses are not allowed to testify as to an alibi defense and under the construction of

the Oregon Court of Appeals the defendant himself is not permitted to take the stand and give testimony as to his whereabouts at the time the crime was alleged to have been committed.

In the instant case, both the defendant's prospective witnesses' testimony and his own were stricken. Petitioner believes that this Oregon statute and as construed by the Oregon Court of Appeals is unconstitutional in that it denies him due process of law, because it fails, one, to provide any reciprocity on the part of the state in that it gives no discovery rights to the defendant.

Q If it had, would you be here?

MR. KUHN: If it had, I believe we would have been here, Your Honor, perhaps not on that issue but on the others. I believe we would have been.

Q But not on the attack on the alibi statute?

MR. KUHN: On the alibi statute, yes, on the other grounds. However, on the reciprocity probably not on that particular issue, no, sir.

Q What would be left if this provided reciprocity?

MR. KUHN: I believe that what would be left in this particular case, Your Honor, is the fact that the Oregon statute applies to the defendant's testimony and that the requirement that he file a written notice as to his

whereabouts prior to trial as a condition of his taking the stand would get us here.

Q Did you ask for any disclosure that you did not get?

MR. KUHN: I was not the trial attorney, but from the record there was no request.

Q Did not the Oregon Court of Appeals say that they just had no occasion to pass on the extent to which reciprocity would be required, since the record did not raise the issue?

MR. KUHN: Yes, Your Honor, the Court of Appeals held that they would not reach this issue because the state did not offer any rebuttal evidence. However, the petitioner does not feel that that is valid in this case because the state was not required to offer any rebuttal evidence because the defendant's alibi testimony was stricken from the record. So, there would be no reason for the state to offer rebuttal evidence. That was the reason given by the Oregon court.

Petitioner also believes that the statute denies him due process in that it prevents the defendant from testifying in his own behalf if he fails to give notice as required by the Oregon statute. Also that it denies him his Fifth Amendment right not to incriminate himself because of the written notice required as a condition precedent to his

taking the stand and giving alibi testimony, and that it denies him right to Sixth Amendment rights of compulsory process.

This Court in Williams v. Florida did uphold the alibi statute from the State of Florida. However, one of the main bases, as petitioner reads the case, was that Florida did provide for a liberal reciprocity in their statute that the Oregon statute does not. Under the terms of the Florida statute, both the defendant and the state were required to submit the names of their proposed alibi witnesses: the defendant for his alibi, the state for any prospective rebuttal witnesses they may wish to call.

If either party under the Florida statute failed to give the required notice, that party, including the state, would not be allowed to call their alibi witnesses. The Florida statute was therefore equal in placing the duty, responsibility, as well as the sanction equally among the parties for failure to comply with it. The Oregon statute places the entire obligation on the part of the defendant and requires nothing on the part of the state. The state has no duty to disclose any rebuttal witnesses, nor is there any sanction applied against the state for failure to do so.

Q Just from a reading from this one section of the Oregon statute, is it not possible to read the Oregon Court of Appeals opinion here as saying that had a request

been made to apply this same rule to the date, that very likely as a matter of its interpretive authority it might have applied that rule to the state?

MR. KUHN: It may have, Your Honor. However, I could not answer that.

A recent case has come down. The statute has been further interpreted. It is cited in the state's supplemental brief, State v. Kelsaw. In that case the Oregon Court of Appeals has recently held that a defendant does not have to require with the Oregon alibi statute now unless and until the state supply him with the specific time and place that the crime was alleged to have been committed. If the state fails to do this, either by way of indictment or information relayed to the defendant's attorney by the district attorney, the defendant does not have to comply with the statute.

However, I believe that although that may alleviate the problem somewhat in Oregon, I do not believe it is going to solve it because once the state has given this information to the defendant, the defendant then is in the same boat that the petitioner here is in that he must then comply with the statute. If he does not comply with it, he is not permitted to testify nor any of his witnesses permitted to testify.

Q The omission of any reciprocity provision, is this an argument on the basis of that?

MR. KUHN: Yes, Your Honor.

Q The Court of Appeals refused to reach the question since there had been no demand for reciprocity by trial counsel; is that right?

MR. KUHN: Not because there was no demand, although that may have been included in it. They said specifically because the state had not offered any rebuttal testimony in the instant case.

Q Were you in the Court of Appeals?

MR. KUHN: Yes, Your Honor.

Q Did you make the argument on the face of the statute?

MR. KUHN: Yes, Your Honor.

Q I do not quite understand the basis upon which your Court of Appeals refused to consider it.

MR. KUHN: Neither do I, Your Honor. I do not understand either.

Q You are telling us you did, in the Court of Appeals, make the argument on the face of the statute?

MR. KUHN: Yes, Your Honor, that the statute was unconstitutional because there was reciprocity on the face of the statute, unlike the Florida statute in Williams v. Florida.

Q Mr. Kuhn, do you contend that if reciprocity is to be accorded by Oregon law it has to be in the same section of the statute as the one in which this requirement is imposed on the defendant?

MR. KUHN: No, Your Honor, I do not believe it has to be in the same section. However, Oregon has no discovery at all.

Q But it could be by judicial decision--

MR. KUHN: Yes, Your Honor.

Q --and accord your client the right he claims, could it not?

MR. KUHN: Yes, Your Honor, it could be by judicial decision. We have taken one small step towards that by the recent decision in State v. Kelsaw. However, I do not feel it has gone quite far enough as yet.

As I indicated, as of now the defendant does not have to comply with the statute if the state gives him specific time and place of the date the crime was alleged to have been committed. However, the Oregon law--

Q That is this Kelsaw case?

MR. KUHN: Yes, Your Honor.

Q In the respondent's supplemental brief filed today or filed this week?

MR. KUHN: Yes, Your Honor.

Q Is that available,502 Specific 2nd; what is that, in the advance sheets?

MR. KUHN: That is Specific Report.

Q Right, thank you.

Q In Oregon, without that statute, do you not

have a right to find that out by a bill of particulars?

MR. KUHN: No, Your Honor.

Q You do not have a bill of particulars in Oregon?

MR. KUHN: No, we do not.

There are practically no discovery procedures available in Oregon on the part of the defendant.

Q Would not the indictment? What does that tell?

MR. KUHN: The indictment, up until the Kelsaw decision, gives the date and the county in which the crime was committed.

Q And what more now?

MR. KUHN: The state now must tell them the specific time the crime was alleged to have been committed.

Q The hour of the day?

MR. KUHN: Approximately the date. The date, I believe, is probably the way it is going to be construed as well as the specific place, such as an address. In this case, they would probably have alleged or given to the defendant the specific house number and location of where the sale is made.

Q And then the state will have the burden of proving that date and that place?

MR. KUHN: The law in Oregon is and under Kelsaw

remains to be that the state is not bound by the date alleged in the indictment and that a defendant, by filing a notice of alibi or by claiming alibi cannot make time material.

Q I do not frankly understand what you say is the small step that the Supreme Court of Oregon has taken in the direction of discovery.

MR. KUHN: That is it, Your Honor.

Q That does not sound to me as if it is anything, the way you have stated it.

MR. KUHN: I do not feel that it aids the defendant or assists in this problem very much at all, because it is easy for the state to give this information to the defendant. The defendant is then right back under the terms of this statute.

Q Mr. Kuhn, I share this confusion. Would you repeat for my benefit precisely what the holding in the Kelsaw case is now?

MR. KUHN: The Kelsaw case held that a defendant in Oregon does not have to comply with the terms of the Oregon alibi statute if the district attorney supplies to the defendant the specific time and place where the alleged crime was committed, and that is the holding.

Q The defendant has to comply only if, and he does not have to comply unless, the prosecutor does furnish that information?

MR. KUHN: Correct, Your Honor.

Q I do not follow it, though. Why is that not complete reciprocity? As I understand it, what you are now telling us is that defendant does not have to provide anything the statute calls for unless the prosecutor gives him what the state claims to be time and place of the offense.

MR. KUHN: Yes, Your Honor, that is correct.

Q If they give him the time and place of the offense, what more is he entitled to even if there is an express reciprocity provision?

MR. KUHN: Without the reciprocity provision, which there still would not be under the terms of the Kelsaw decision--

Q What more, if there were a reciprocity provision, would he be entitled to, the names of the state's witnesses?

MR. KUHN: Yes, Your Honor. Specifically the names and addresses of the state's witnesses.

Q Anything else?

MR. KUHN: That is what we believe the Florida statute indicated was fair.

Q Since the whole focus of your case is on the alibi statute and the Kelsaw case now takes care of disclosure with respect to that subject, why are these other matters relevant in the abstract?

MR. KUHN: Because if, as I read the Kelsaw case, it only gives the time and place, is it. Once the state has furnished that, we have the alibi statute coming into full play again where the defendant, should he wish to call alibi--

Q As to name the witness, the state does not?

MR. KUHN: Yes, Your Honor, correct.

Q But if Kelsaw went on to say also that the state must in addition give the names of the state's witnesses in support of those allegations in the indictment, then what would your situation be?

MR. KUHN: Then I would not have a case on the reciprocity issue.

Q But only on that issue?

MR. KUHN: Yes, Your Honor, on the reciprocity issue.

Petitioner also feels that under the terms of this Oregon Specific Statute and as interpreted by the Oregon Court of Appeals, that he has been denied due process in that he has not been allowed to take the stand and testify in his own behalf because he has failed to give the state the required notice specifically saying where he was at the time the crime was alleged to have been committed. This is made a condition precedent to taking the stand and giving alibi testimony.

Q You say that is an unconstitutional condition?

MR. KUHN: I believe that is an unconstitutional--

Q Under what provision of the Constitution?

MR. KUHN: --condition. I believe that under a very general due process clause, Fourteenth Amendment, I believe that it is a denial of a due process.

I realize that this Court has not held that the defendant has an unfettered constitutional right to take the stand and testify in his own behalf. However, petitioner believes that this should be a right of a defendant any time he is charged with crime.

Q Is that completely consistent with Williams against Florida, the argument you are making now?

MR. KUHN: I believe so, with the theory of it; perhaps as to Williams, I believe that Williams, the defendant, actually as a matter of fact, did testify.

Q Is my recollection faulty about Williams against Florida; is not the defendant exempt from the requirement--

MR. KUHN: Yes, Your Honor, the defendant in Florida is exempt specifically under the terms of the Florida statutes and that the failure to file notice under a Florida statute does not affect his right to take the stand and give testimony. Oregon does not have that provision. And I believe that this Court in Specht v. Patterson has indicated that the defendant in a criminal case has a right

to be heard, has a right to be confronted with the witnesses against him, the right to cross-examine, the right to offer evidence of his own. Petitioner believes that the right to be heard and to offer evidence of his own must necessarily include the right of the defendant himself to take the stand so that he may tell his side of the story. I think that any time a person is charged with a crime he should have this right.

And that the Oregon statute unconstitutionally abridges this right, because it requires the defendant, prior to trial, to tell the state what his trial testimony is going to be as a condition precedent of his getting up on the stand and testifying. I believe that this is an unconstitutional abridgment of his right to testify. Both New York and Iowa have held that the notice of alibi statutes in those states do not apply to the defendant's testimony of his, unlike Oregon. Petitioner feels that the sanction under the Oregon alibi statute is simply not justified because the defendant is denied the right to testify on a material issue that goes to the very heart of his case and as in the determination as to whether or not he is going to be deprived of his loss of liberty.

I believe that the defendant's right against self-incrimination is violated by this statute for precisely the same grounds again, in that since the statute does apply to

a defendant's testimony and not just witnesses' testimony, he must tell the state prior to trial what his alibi testimony is going to be as a condition precedent to his taking the stand and giving that testimony. And if it applied only to the witnesses, perhaps there would be no denial of the right against self-incrimination, as this Court held in Williams v. Florida.

However, I do believe that this is a distinguishing feature of the Oregon statute in this case, vis-a-vis the Williams decision in that the defendant in Williams was specifically excluded from the terms of that statute. Here he is not. He must reveal his testimony prior to the time of trial, whereas the police would have no right to that testimony under decisions of this Court unless the defendant voluntarily wished to waive his right against silence and--

Q Under Oregon procedure, does the giving of that sort of notice by the defendant commit him in any way to take the stand, or is the statement that he makes there independently usable by the state if he does not take the stand?

MR. KUHN: He does not have to take the stand, Your Honor, and the issue has not come up. However, I am certain under Oregon law this could be classified as an admission and could be introduced into evidence against him.

Q But you have no law to that effect?

MR. KUHN: There is no law. The issue has never arisen, to my knowledge, in Oregon.

We just do not believe that the legislature should be able to force a defendant to reveal his testimony, alibi testimony, prior to trial when the police would have no right to that testimony themselves, unless the defendant voluntarily wished to waive his Fifth Amendment rights.

Finally, petitioner believes that he was denied his rights to compulsory process in this case under the terms of this Court's decision in Washington v. Texas, where the Court held that the right to compulsory process was, in plain terms, the right to present a defense and was a fundamental element of due process of law. Petitioner believes that here, because his witness was in court, was physically able to testify, had knowledge of a material fact that for the Court to strike the testimony was a denial of the Sixth Amendment right to compulsory process.

Q The statute talks about good cause--

MR. KUHN: Yes, Your Honor.

Q --excusing it from the requirement. Are there many cases deciding what good cause is?

MR. KUHN: There has been only one, and that is the Kelsaw decision--

Q That is all?

MR. KUHN: --and they ruled there that there was

not good cause.

Q In this case, of course, they ruled there was not good cause.

MR. KUHN: Yes, Your Honor. However, that was not an issue as to whether there was good cause shown. The issue in the Court of Appeals was the constitutionality of the statute.

Q But your state court put it in terms of whether or not there was good cause.

MR. KUHN: Yes, Your Honor, the court did indicate on that basis that there was not good cause.

Q But except for Kelsaw in this case, there is no case law on what is or is not good cause?

MR. KUHN: No, Your Honor, those are the only two cases in Oregon. In State v. Blake, however, it does not indicate any--it adds nothing new.

MR. CHIEF JUSTICE BURGER: Mr. Gillette.

ORAL ARGUMENT OF W. MICHAEL GILLETTE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GILLETTE: Mr. Chief Justice, and may it please the Court:

Questions have arisen this morning with respect to Oregon procedure, and I should like for a moment, if I may, to attempt to clarify a little further for Justice Brennan the present status of Oregon law with respect to discovery.

First of all, there is no general discovery statute in Oregon with respect to the rights of criminal defendants. And included in that, there is no right to a bill of particulars as the law now stands. I believe that after the legislature has concluded its work at the present time, there will be one. But there is not at the moment.

The Kelsaw case represents really the first major step by any Oregon Court of Appeals, whether the Supreme Court or the Court of Appeals, to establish any right of discovery on the part of criminal defendants. And that case only goes as far as it does, I believe, because that is all it was called to do in that particular case.

It establishes the right of a defendant to refuse to comply with the alibi statutes unless that defendant is in possession at the time the compliance is called for--is in the possession of information supplied by the state which tells him the time, the date in which the crime is alleged to have occurred, and the place where it is alleged to have occurred. And this ruling is made on the basis of a theory of fundamental fairness to the effect that a defendant cannot be held responsible for disclosing that he was at place X until he knows that he is charged with having been at place Y.

The Court of Appeals went no further because there was no need in the Kelsaw case to go any further.

Q There was disclosed in Kelsaw the names of

witnesses?

MR. KUHN: No, sir, there was not. But I would submit to the Court that in an appropriate case where a defendant applied at the time he gave the notice--applied for an order from the court requiring the state to disclose to the defendant the names of any witnesses it proposed to call in rebuttal to his alibi testimony, their names and addresses and so on, that he would be granted that, and I think that would be called for on the basis of this Court's decision in Williams v. Florida.

The point is the Oregon courts have not yet had a chance to deal with this question and when they are given the chance to deal with this question, I believe they will deal with it in the same way they dealt with the Kelsaw problem. They will analyze it. They will take this Court's decision in Williams, and they will apply it. And one of the points that I want to urge upon the Court this morning is that state courts in general and the Oregon courts in particular are capable of taking constitutional decisions of this Court and applying them to their own statutes--

Q Has there been any request for a bill of particulars in any case before the Oregon Supreme Court as of now?

MR. GILLETTE: Yes, there has.

Q And they turned it down?

MR. GILLETTE: Yes, they have.

Q So, how do we get all these great hopes about what that court will do?

MR. GILLETTE: Those cases were decided prior to Williams, and I am speaking only with respect to what is going to happen under notice of alibi case. I am not trying to suggest that in general defendants are going to be granted broad discovery powers.

Q Do you think that Oregon could pass a statute requiring the defendant to advise the state of what his defense will be?

MR. GILLETTE: No.

Q What is the difference between that statute and this one?

MR. GILLETTE: The rationale of alibi statutes, as I understand them and as I believe they are explained in the Williams case is that the alibi defense is a peculiar kind of defense. It offers opportunities for surprise, but a general defense does not. And the state has a special interest in avoiding the kind of surprise that an alibi defense represents.

Q Assuming that applies to other witnesses, that does not apply to the defendant, does it?

MR. GILLETTE: An alibi is just as surprising when the defendant raises it by himself as when he calls other

witnesses to establish it.

Q What could the state do to counteract it?

MR. GILLETTE: Call witnesses to show that either the defendant was somewhere else or call witnesses who were at the place where the defendant claims to have been to show that he was not there.

Q This is almost unbelievable. I can understand why you want to examine the other witnesses, but the defendant himself I thought had a right to do one of three things, not testify, testify, and to take any position he wants to take at that moment, which could be directly contrary to the position he wanted to take before the trial. Am I right or wrong?

MR. GILLETTE: I think you are right.

Q But this is one instance where he cannot?

MR. GILLETTE: No, sir. No, sir, this statute does not interfere with the defendant's ability to take any position at trial. There is no authorization in this statute--

Q You mean he can testify as to an alibi, defendant can?

MR. GILLETTE: No, I am sorry. Perhaps I misunderstand your question. As I understand what you are saying, you are suggesting that his disclosure of his intention to offer evidence of alibi binds him to that defense, and it

does not.

Q No, I did not say that. I said that unless he made it, he could not do it.

MR. GILLETTE: Yes, sir, that is right.

Q When he went to trial, he might have said, "I am not going to take the witness stand," which he has a right to do. And during the trial he changes his mind and says, "I want to take the stand and I want to put my alibi in." He is prevented from doing that.

Do you not agree that that interferes with his right to testify?

MR. GILLETTE: I do not think it interferes with his right to testify if, during the time limit provided by the statute, prior to trial, he was aware and he had informed his counsel of the fact that he had alibi testimony to offer. If he kept that information to himself and did not tell his counsel until the case had actually proceeded and he finally--and this happens, I am told, by colleagues who are in the defense business--if he finally after the trial has proceeded first turns to his counsel and says, "Look, I will now tell you what I was doing, I was with a girlfriend somewhere and I did not want to bring her name up but the case is going badly and I have obviously got to," if that occurred, I think that would constitute good cause for the waiver of the alibi notice.

Q But there is no law to that effect?

MR. GILLETTE: No, there is not, not one way or the other at this point.

Q Are you dealing with a constitutionally protected right to testify or not testify?

MR. GILLETTE: If you are saying we are dealing with an absolute right to testify, then I do not think this Court has said that. I think that is the issue before the Court. Is the right absolute or can it be qualified by a reasonable requirement of disclosure.

Q You do not believe that the defendant has an absolute right to testify to save his neck?

Q I think that you would not be here arguing if you agreed that there was an absolute right to testify.

MR. GILLETTE: That is right, we would not.

Q Did not the Williams holding settle some of these questions, Mr. Gillette?

MR. GILLETTE: I think the Williams holding settled the question of whether or not the notice of alibi is constitutional. I thought that was settled.

Q As against a Fifth Amendment claim.

MR. GILLETTE: Yes, sir, but only against a Fifth Amendment claim.

Q That is applicable only to third party witnesses.

MR. GILLETTE: That is right. Neither of the two issues--

Q Not to defendant.

MR. GILLETTE: Right. Neither the issue as to the defendant himself nor the issue of the exclusion of the testimony was before the Court at that time.

Q This settled whether or not giving notice of the alibi violated the defendant's Fifth Amendment rights against self-incrimination.

MR. GILLETTE: That is the way I understood the case, yes, sir.

Q I would like to make one more point with respect to Oregon procedure, if I can return to that for the moment. A question arose from one of the justices, I believe it was Mr. Justice Rehnquist, with respect to rebuttal testimony. Perhaps I have already finished that statement, but the question of whether or not the defendant is entitled to that information, information which the Florida statute called for with respect to the names, addresses, nature of the testimony from the rebuttal witnesses, the question of whether the defendant is entitled to that is not settled, but it seems to me that the conclusion the Oregon courts would have to reach is pretty well dictated by the language of Williams. And I would have thought that at the very least it would be of value for the Oregon courts

to be given an opportunity to settle that question on their own, based upon an appropriate motion by the defense.

Q Do you agree with your brother that the question of the constitutionality of the statute on its face was raised before your Court of Appeals?

MR. GILLETTE: No, sir, I really do not. I feel the entire content of that argument which Mr. Kuhn and I made was the question whether the statute was constitutional as applied in that case, and there was no real issue of unconstitutionality on the face of the statute.

Q Then do you suggest that question is not before us in consequence?

MR. GILLETTE: I really do not think it is. I really think the Court is faced here with the question of whether the statute is constitutional as applied.

Q Could you just tell me what the state's interest is in having this alibi statute?

MR. GILLETTE: Yes. It is the same interest that is referred to in the Williams case. The alibi defense is one which involves--usually involves--surprise to the state, because it develops the testimony in an entirely new line. The testimony for the prosecution goes to whether the defendant was at a certain place, where he performed certain acts. The alibi testimony gives a right turn to the entire proceeding. It is surprising by definition. And the

interest that is referred to in Williams is the interest of full and fair disclosure of all the issues which go to the guilt or innocence of the accused.

Q What interest of Florida is lost if at the time an alibi witness is offered that has not previously been disclosed, the trial is adjourned so that the state may accomplish its aims of investigation and avoidance of surprise and of fraud and perjury?

MR. GILLETTE: I think the concern there shifts. The concern then becomes concluding the business of that particular trial, particularly in jurisdictions with crowded dockets, without being faced an arbitrary and really a surprising delay due to the fact that the defendant did not make a disclosure at a time when he was aware that he could have made it.

Let me put it this way. Let us suppose that a matter is being tried before a jury. This case was not. But I think it is fair to say that whatever the Court decides today, it will apply to both trials to juries and trials to the court.

If a case is being tried to a jury and the jury spent about two weeks hearing testimony in a relatively complicated criminal matter, and the defense for the first time at the end of those two weeks discloses that they intend to offer evidence of alibi, and they make available the names

of four or five witnesses and the state is then granted a continuance, you are asking a jury which could be used under other circumstances to hear other cases--and the panel frequently is limited in jurisdictions, such as the one I come from in Portland--you are asking that jury to sit on its hands until the state has concluded its investigation. They cannot be assigned to any other case, because they may not be available to reconvene the trial. You are asking that the judge be made available. You are asking that those things occur, those delays occur, which could have been avoided by supplying the information ahead of time. You are asking that the judicial system, the system of trying to take care of crowded dockets, be interrupted for that period of time.

It is easier with a judge than with a jury. It is much more complicated with a jury, because they ought to be available to do other things.

Q What do you suppose a state will do if we disagree with you and sustain the position of your colleague? I suppose there will be adjournments, will there not?

MR. GILLETTE: Yes, sir, they will do what they are told.

Q There will be adjournments. Nobody would tell them to adjourn; if they did not want to avoid surprise, they do not need to avoid surprise. But do you suppose they

would actually start adjourning trials?

MR. GILLETTE: Yes, I think that is what would be done.

Q How long as a practical matter can you adjourn a criminal trial?

MR. GILLETTE: The Ellsberg case on which this Court heard preliminary hearings adjourned a long time.

Q They had to pick a new jury then.

MR. GILLETTE: That is true. They had to.

Q They tried it and it did not work.

MR. GILLETTE: I can only suggest to the Court, based upon my own limited experience, that it is impractical to adjourn matters like that for any extended length of time.

Q Like what, ten days?

MR. GILLETTE: I think it is impossible to identify the period of time. I think ten days is too long, but I have no idea what the period of time would be.

Q When does the defendant have to give notice of alibi under the--

MR. GILLETTE: Five days prior to trial.

Q That is all the state really needs, is five days?

MR. GILLETTE: That is what the statute apparently theorizes.

Q They would not need any more than that during

trial would they?

MR. GILLETTE: No, unless they find witnesses they have to give notice to the defendant to, in which case I assume he is entitled to longer.

Q In Oregon, do you know, is it customary to adjourn a criminal trial more than 24 to 48 hours?

MR. GILLETTE: No, it is not.

Q Of course, most states do not have an alibi statute.

MR. GILLETTE: Sixteen states have them.

Q Thirty-four get along without it and take their risk on adjournment.

MR. GILLETTE: Yes, sir.

Q Sixteen states have some kind of an alibi statute. How many prevent the defendant himself from testifying without prior notice?

MR. GILLETTE: I am not sure of the exact number. I think five or six.

Q Most of them, or at least some of them, a large percentage of them, only prevent third party witnesses from testifying; is that correct?

MR. GILLETTE: That is right. Some of them have a specific exemption with respect to the defendant.

Q Himself.

MR. GILLETTE: Some of them do not provide for

exclusion in any case.

Q What sanction do they impose?

MR. GILLETTE: Sometimes a continuance. In fact, I think a continuance is usually the sanction imposed. The statutes are a classic example of various states experimenting with procedure. And, in fact, the Oregon statute, as I recall, is the most recent of the statutes.

Q When was this one enacted?

MR. GILLETTE: It was enacted in 1969. It makes it far more recent than the majority of them, which were enacted during the thirties.

Q Did you have anything akin to this before 1969?

MR. GILLETTE: No, we did not.

Q Nothing.

MR. GILLETTE: No.

Q Mr. Gillette, I go back again to this question of whether the constitutionality of the statute on its face is before us. What is the argument procedure by which you raise a question in the appellate court? Is this by a point raised in the brief, or do you have some assignment of errors or something?

MR. GILLETTE: Oregon law requires that the issue of the constitutionality of the statute, either on its face or as applied, be raised in the trial court and that a record be made of that. And it becomes one of the designated

matters on appeal.

Q And are you telling us that this was not raised in trial court on its face when it is applied?

MR. GILLETTE: The manner in which this whole question came up is set out at length in the appendix, and I think it is of some significance. What occurred was, this trial happened about two or three months after this Court's decision in Williams v. Florida, and I think it is evident from the transcript, if you examined it, in the appendix that the trial court was aware neither of the alibi statute nor of this Court's decision in Williams, so that both of those things came as a surprise to the trial court.

On the other hand, the defendant was aware of both of them because, as the transcript shows, the defense counsel gave a copy of the Williams decision to the prosecutor during a noon recess and he came in in the afternoon and proceeded to put on his alibi testimony, which was really the only testimony offered by the defense. And the first time that the court was aware there was an alibi statute or that there was a problem with an alibi statute was when the prosecution entered an objection.

So, what occurred after that is not particularly clear. The defendant was given an opportunity to make a showing of good cause why the requirements of the statute should be waived, and his offering was to the effect that at

first he thought that the date on the indictment was wrong and he was prepared to offer alibi witnesses on a different date. But, of course, he had not offered notice of those either. And then secondly he also said that he was not aware of the name of his alibi witness, and again the transcript shows that even if he was not aware of it, his defendant was. He dated the girl for a number of years. So, neither of those showings was particularly clear.

Q I think you told me earlier your Court of Appeals did determine a question of the constitutionality of the statute as applied; is that not right?

MR. GILLETTE: It is difficult for me to ascribe any particular posture to that opinion, quite frankly.

Q You mean you cannot say whether the Court of Appeals decided any constitutional question addressed to the statute?

MR. GILLETTE: They decided that with respect to the Fifth Amendment issue, with respect to whether requiring disclosure was constitutional, that that was proper under this Court's decision in Williams.

Q But the trial court did consider the constitutional points and did consider Williams, right?

MR. GILLETTE: It had Williams before it, yes.

Q Did it not consider it and did it not write on it on page 15? And he says he admits that the defendant

raised the point that it denies him the effective benefit of his right to compulsory process to obtain witnesses in his own behalf, abridges his right to testify. And then in the next paragraph he said, "We will consider these contentions in order." And the first line is Williams against Florida. How do you interpret that?

MR. GILLETTE: That is a Court of Appeals decision.

Q Is that a Court of Appeals?

MR. GILLETTE: Yes, sir.

Q So, they did consider it, did they not?

MR. GILLETTE: They considered the Fifth Amendment issue, yes, but with respect to the other issues we are talking about, this is the point I am trying to make, they were not even clearly raised in the trial court. The issue, for instance, with respect to the sanction to be imposed, is really not raised in the trial court. There is no discussion--

Q Your position is that he was banking on the point that this change in date excused him from complying with the statute, and that was his only complaint; is that what you are saying?

MR. GILLETTE: No, because he says one other thing in that transcript. He says essentially the statute is not constitutional because of Williams v. Florida. He simply offered the court the decision that here is the statute and

you can lay one beside the other and that is the end of it, and I suppose in that sense you could say that the issue of the constitutionality of the statute on its face was more properly raised before the trial court than on appeal.

Q He was really trying to get under the good cause point.

MR. GILLETTE: No, I do not think so. He was trying to get out of complying with the statute, never mind what the reason was, whether he had good cause or not. He was just saying the statute was inapplicable, period.

Q Inapplicable or unconstitutional?

MR. GILLETTE: Unconstitutional. I misspoke. Right.

Q The state at least is not here telling us there is not any constitutional question before us?

MR. GILLETTE: No, sir; no, sir.

Q What would you suppose the interest of the defendant would be in not notifying of an alibi if he was reasonably confident that if he did not notify and nevertheless offered alibi witnesses during the trial, the trial would be adjourned? If he anticipated an adjournment, if he offered unannounced witnesses, what would be his interest in not notifying before trial?

MR. GILLETTE: I think the adjournment procedure makes available to a defendant at the close of a state's case a period of time in which he can figure out what to do.

If he serves a notice of alibi by which he is not bound, he simply gets himself a five-day recess or whatever the period of time is, in which he can sit down, perhaps even get full transcripts of all the testimony and go over all the testimony and plan what it is he is going to do. It is a kind of built-in five-day delay in the trial process.

Q If he plans to offer alibi.

MR. GILLETTE: But he does not have to. He can conclude after the five-day recess that he chooses not to offer the alibi testimony. He is not bound by that in any sense.

Q I know, but if he gave notice ahead of time before trial, in compliance with the statute, there would not be any adjournment during the trial?

MR. GILLETTE: No, there would not.

Q But if he does not give notice, he is going to have to offer some alibi witnesses then before there is going to be any adjournment. He is going to have to decide to offer some alibi witnesses, and when he offers them, then the state would ask for an adjournment. Let us assume that the defendant knew that if the state requested an adjournment it would be granted. What interest would he have in not complying with the statute?

MR. GILLETTE: I think the answer is the same. The fact that he has called a witness--and, in fact, I do not

think he would have to do that. I think he would simply have to advise the Court, "At this time we wish to serve notice of alibi." I do not think the sterile process of calling the witness and asking the first question and receiving the objection and having the jury sent out and then giving the notice--

Q He is not just going to have to give notice. He is going to have to say who his witnesses are.

MR. GILLETTE: That is right.

Q And name the witnesses.

MR. GILLETTE: That is right.

Q Under Oregon law could the prosecutor properly argue the belated disclosure of alibi?

MR. GILLETTE: To the jury?

Q Yes.

MR. GILLETTE: Oh, I think not. I think not.

Q And do you think that would be precluded by Oregon law or by some provision of the Federal Constitution?

MR. GILLETTE: I think it would be precluded by Oregon law. The courts in Oregon, of course, have been rather severe about comments to the jury on anything that is not directly in evidence, and that would constitute testifying if the matter is not in evidence.

Q It is something the jury--they do see the alibi witness ultimately. And your point is that it would be

testimonial to develop the fact that that was a late tactic.

MR. GILLETTE: Yes, I think so.

Q Then I take it too that if the prosecutor got up and objected on the grounds that it was a belated tender that he would be in the same trouble.

MR. GILLETTE: He would be running the same difficulty. I think it might well serve as grounds for mistrial at that point, if he did it in the presence of the jury.

Q If I may, Your Honor, I would like to finally refer to the question of compulsory process which counsel has referred to when he specifically cited the Washington v. Texas case, and I would submit that the difference between this case and the difference between the problem posed by this case and the line of cases represented by Washington v. Texas, Pointer v. Texas, Ferguson v. Georgia, and the like, is that in those cases witnesses were incompetent, period. The statute made them unavailable to the defendant no matter what he did. He simply could not qualify them as witnesses. Washington, you may recall, involved a situation where a defendant could not call an accomplice to testify, a co-principal, to testify at all. He was deemed incompetent by a Texas statute.

In this case, the only step that the defendant needs to take to make the witness competent is to serve the notice.

The power to make the witness competent lies within his own hands, and I would submit that that makes this statute, as applied, significantly different than the entire line of cases represented by Washington v. Texas.

Unless the Court has further questions, that concludes my remarks. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gillette. do you have anything further, Mr. Kuhn?

MR. KUHN: No, Your Honor.

Q Could I ask you, Mr. Kuhn--

MR. KUHN: Yes, Your Honor.

REBUTTAL ARGUMENT OF J. MARVIN KUHN, ESQ.,
ON BEHALF OF THE PETITIONER

Q You are representing a defendant?

MR. KUHN: Yes, Your Honor.

Q Do you know ahead of trial that if you offer a surprise alibi witness, the state is going to have an opportunity to investigate the named witnesses?

MR. KUHN: Yes, that is correct.

Q And you know that that is going to happen if you do not comply with the statute and rather than comply offer the witness unannounced. What would be your choice, to comply with the statute or to wait?

MR. KUHN: I think that I would probably tell the district attorney that I was going to have an alibi.

Q And why would you do that? You do not see any particular advantage in waiting then if you are going to have to be subject to an adjournment anyway?

MR. KUHN: No, Your Honor. However, whether there would be an adjournment or not, a lot of that depends.

Q I know, but assume there would be.

MR. KUHN: If there would be--although I would probably offer no more than the fact there would be an alibi defense and not comply with the remaining terms of the statute, assuming we had this statute.

Q Oh, you would not give the names of the witnesses?

MR. KUHN: No, Your Honor.

Q But you would have to call them sooner or later if you were going to call them?

MR. KUHN: Yes.

Q And as soon as you call them the state would ask for and would get an adjournment?

MR. KUHN: Yes. In that case I would see no reason not to give the names and addresses of the witnesses.

Q Ahead of time?

MR. KUHN: If I could obtain an agreement to get them back. However, I would not submit the defendant's testimony as to where he was at the time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:40 o'clock a.m. the case was submitted.]

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