MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 11:00 a. m./~~p.m.~~, on January 18, 1978.

All members were present except: Senators Gaar and Hess

The next meeting of the Committee will be held at 11:00 a. m./~~p.m.~~ on January 19, 1978.

~~All bills or resolutions~~ were considered, corrected and approved.

Chairman

The conferees appearing before the Committee were:

Charles Hamm - Department of Social and Rehabilitation Services
Kathleen Sebelius - Kansas Trial Lawyers Association
Lynn Johnson - Kansas Trial Lawyers Association, Kansas City

Staff present:
Art Griggs - Revisor of Statutes
Paul Purcell - Legislative Research Department
Jerry Stephens - Legislative Research Department

Senate Bill No. 551 - Annual hearings for persons committed after a finding of not guilty because of insanity.

Mr. Charles Hamm presented statistics on the number of patients in the state hospital who were committed after being found not guilty by reason of insanity. He explained the procedure involved in the hospitalization of such persons. He stated the statutes are written in such a way that there are problems with the whole subject. When a person is no longer dangerous to other people, the patient can be transferred to any state hospital. The patient can later be granted a leave or discharge. In some instances, the court has found that the patient is still dangerous even though the hospital has said the patient should be discharged. This bill is designed to spell out the rights of the patient to have an annual court review. He stated that his department is finding themselves in court quite often. At Larned State Hospital, they have a staffing problem when people are called out of town to appear in court, which also incurs expenses to the state. The professional people are spending a tremendous amount of time in court. They estimate that this bill would result in needing at least one additional professional person and probably additional legal personnel. He stated he feels the whole subject needs study. When asked for his suggestion as to what would help the situation, he said it would to do away with the verdict of not guilty by reason of insanity. In response to a question, he indicated it would be of assistance to say that the hearing would be in the county where the hospital is located.

Committee discussion followed.

continued -

Senate Bill No. 552 - Court costs in criminal actions.
No one appeared in support of or in opposition to this bill.

Kathleen Sebelius, Executive Director, Kansas Trial Lawyers Association, appeared to discuss with the committee the possibility of the committee introducing a bill to eliminate the doctrine of interspousal immunity. She introduced Lynn Johnson, from Kansas Ctiy, who discussed the matter. Following committee discussion, Senator Hein moved that the committee introduce such a bill; Senator Hess seconded the motion, and the motion carried.

The chairman called the attention of the committee to the material which staff had distributed concerning the amendment of the alibi statute, the Kansas Supreme Court decision, and the U.S. Supreme Court decision which was relied upon by the Kansas Supreme Court.

The meeting adjourned.

These minutes were read and approved by the committee on 2-7-78.

1-18-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Charles V. Hamm	State Office Bldg	SRS
Bruce Roby	State Office Bldg.	SRS
Matthew Benson	State office Bldg	
Kathleen Selsdens	Columbian Bldg	KTLA
Mark A. Johnson	Kansas City, Ks.	[redacted]
Tyson E. Johnson	" "	KTLA
Robert Hartsock	Topeka, Ks	KTLA
Jeff Wampler	Manhattan, Ks.	Ks. Farm Bureau
Bill Henry	Topeka	Governor's Office

1-18-78

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER AMENDING K.S.A. 22-3218 OF THE CODE OF CRIMINAL PROCEDURE

Pursuant to the authority vested in the Kansas Supreme Court by the provisions of K.S.A. 1976 Supp. 22-4601, K.S.A. 22-3218 is hereby amended to read as follows:

22-3218. Plea of alibi; notice. (1) In the trial of any criminal action where the complaint, indictment or information charges specifically the time and place of the crime alleged to have been committed, and the nature of the crime is such as necessitated the personal presence of the one who committed the crime, and the defendant proposes to offer evidence to the effect that he was at some other place at the time of the crime charged, he shall give notice in writing of that fact to the prosecuting attorney except that no such notice shall be required to allow testimony as to alibi, by the defendant himself, in his own defense. The notice shall state where defendant contends he was at the time of the crime, and shall have endorsed thereon the names of witnesses he proposes to use in support of such contention.

(2) On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto applicable to allowing the prosecuting attorney to endorse names of additional witnesses on an information. The notice shall be served on the prosecuting attorney at least seven days before the commencement of the trial, and a copy thereof, with proof of such service, filed with the clerk of the court. For good cause shown the court may permit notice at a later date.

Within seven days after receipt of the names of defendant's proposed alibi witnesses, or within such other time as is ordered by the court, the prosecuting attorney shall file and serve upon the defendant or his counsel the names of the witnesses known to the prosecuting attorney which the state proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the case. Both the defendant and the prosecuting attorney shall be under a continuing duty to disclose promptly the names of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided by this section so that reciprocal discovery rights are afforded both parties.

(3) In the event the time and place of the crime are not specifically stated in the complaint, indictment or information, on application of defendant that the time and place be definitely stated in order to enable him to offer evidence in support of a contention that he was not present, and upon due notice thereof, the court shall direct the prosecuting attorney either to amend the complaint or information by stating the time and place of the crime, or to file a bill of particulars to the indictment or information stating the time and place of the crime; and thereafter defendant shall give the notice above provided if he proposes to offer evidence to the effect that he was at some other place at the time of the crime charged.

(4) Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the crime charged. In the event the time or place of the crime has not been specifically stated in the complaint, indictment or information, and the court directs it be amended, or a bill of particulars filed, as above provided, and the prosecuting attorney advises the court that he cannot safely do so on the facts as he has been informed concerning them; or if in the progress of the trial the evidence discloses a time or place of the crime other than alleged, but within the period of the statute of limitations applicable to the crime and within the territorial jurisdiction of the court, the action shall not abate or be discontinued for either of those reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the crime.

Done by order of the court this 10th day of May, 1977, to become effective when filed with the clerk of this court and published in the advance sheets of the supreme court reports.

1-18-78

Talley v. State

No. 48,190

ABRAHAM TALLEY, *Petitioner*, v. STATE OF KANSAS, *Respondent*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Criminal Law—Alibi Evidence—Reciprocal Discovery Rights.* The due process clause of the Fourteenth Amendment forbids enforcement of a state statute requiring that a criminal defendant give pretrial notice to the prosecution as to his intention to introduce alibi evidence and as to the identity of his alibi witnesses, unless reciprocal discovery rights are given to the defendant. (Following *Wardius v. Oregon*, 412 U.S. 470, 37 L. Ed. 2d 82, 93 S. Ct. 2208.)
2. STATUTES—*Alibi Statute—Constitutionality—Reciprocal Discovery Rights.* K.S.A. 22-3218, read alone or in conjunction with 22-3201 (6), is unconstitutional as a denial of due process of law since it requires a defendant to furnish the prosecutor with a timely notice of alibi with the names of defendant's witnesses endorsed thereon but does not afford the defendant reciprocal discovery of the rebuttal witnesses the state plans to use to refute the alibi defense.

Appeal from Shawnee district court, division No. 4; ADRIAN J. ALLEN, judge. Opinion filed May 14, 1977. Reversed and remanded with directions.

Joseph D. Johnson, assistant public defender, argued the cause, and *Charles E. Worden*, assistant public defender, was with him on the brief for the petitioner.

Gene M. Olander, district attorney, argued the cause, and *Curt T. Schneider*, attorney general, was with him on the brief for the respondent.

The opinion of the court was delivered by

PRAGER, J.: This is a postconviction proceeding filed pursuant to K.S.A. 60-1507. On August 17, 1973, Abraham Talley was tried in Shawnee county district court and convicted of aggravated robbery (K.S.A. 21-3427). Talley attempted to take a direct appeal from his conviction but the appeal was dismissed for want of jurisdiction since the notice of appeal was not filed within the time allowed by statute. At the trial Talley denied committing the offense and testified to an alibi. When he attempted to introduce the testimony of other witnesses in support of his alibi, the district attorney objected because of the failure of the defendant to give timely notice of plea of alibi in accordance with K.S.A. 22-3218. That section in pertinent part provides as follows:

"22-3218. **Plea of alibi; notice.** (1) In the trial of any criminal action where the complaint, indictment or information charges specifically the time and place of the crime alleged to have been committed, and the nature of the crime is such as necessitated the personal presence of the one who committed the crime, and the

defendant proposes to offer evidence to the effect that he was at some other place at the time of the crime charged, he shall give notice in writing of that fact to the prosecuting attorney except that no such notice shall be required to allow testimony as to alibi, by the defendant himself, in his own defense. The notice shall state where defendant contends he was at the time of the crime, and shall have endorsed thereon the names of witnesses he proposes to use in support of such contention.

"(2) On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto applicable to allowing the prosecuting attorney to endorse names of additional witnesses on an information. The notice shall be served on the prosecuting attorney at least seven days before the commencement of the trial, and a copy thereof, with proof of such service, filed with the clerk of the court. For good cause shown the court may permit notice at a later date.

"(3) . . . . . .

"(4) Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the crime charged. In the event the time or place of the crime has not been specifically stated in the complaint, indictment or information, and the court directs it be amended, or a bill of particulars filed, as above provided, and the prosecuting attorney advises the court that he cannot safely do so on the facts as he has been informed concerning them; or if in the progress of the trial the evidence discloses a time or place of the crime other than alleged, but within the period of the statute of limitations applicable to the crime and within the territorial jurisdiction of the court, the action shall not abate or be discontinued for either of those reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the crime."

The district court sustained the state's objection, ruling that since no notice had been given by defendant as required by the statute evidence other than the testimony of defendant supporting a defense of alibi would not be received into evidence. In this proceeding Talley attacks the constitutionality of K.S.A. 22-3218 as a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. In view of the ruling in *Wardius v. Oregon*, 412 U.S. 470, 37 L. Ed. 2d 82, 93 S. Ct. 2208, we hold that K.S.A. 22-3218 is unconstitutional as violative of due process. Hence, the conviction and sentence must be vacated and a new trial granted Talley in the prior criminal proceeding.

In *Wardius* the court reversed a criminal conviction of an accused who was denied the opportunity to introduce alibi evidence because of failure to give timely notice of alibi as required by an Oregon statute. In the opinion the court stated:

"We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed." (p. 472.)

While there are some differences between the Oregon alibi statute and 22-3218, these differences are without legal significance. The Oregon statute and the Kansas statute are significantly similar in that neither provides for reciprocal exchange of alibi evidence. K.S.A. 22-3218, although requiring a defendant to furnish the prosecutor with a timely notice of alibi with the names of defendant's witnesses endorsed thereon, contains no provision requiring the state to furnish the nanes of witnesses it plans to use to refute the alibi defense.

In its brief the state concedes that K.S.A. 22-3218, within itself, does not provide for reciprocal discovery. It maintains, however, that the Kansas code of criminal procedure must be viewed as a whole. It directs our attention to K.S.A. 22-3201 (6) which requires the state to endorse on the information the names of all witnesses known to the prosecuting attorney at the time of filing the same. That statute further provides that the prosecuting attorney may endorse thereon the names of other witnesses who may afterwards become known to him as the court may by rule prescribe. It is the position of the state that the provisions of K.S.A. 22-3201 (6) are intended to provide for discovery by the defendant of rebuttal witnesses to the same extent as the discovery of state witnesses to be used by the state in its case in chief. Hence, it is argued that full reciprocal discovery rights of witnesses are allowed the defendant even though they are not provided for in the alibi notice statute itself.

K.S.A. 22-3201 was enacted as a part of the new code of criminal procedure effective July 1, 1970. Its predecessor was K.S.A. 62-802 (Corrick) which provided as follows:

"62-802. **Informations; duties of prosecuting attorney.** Informations may be filed during term time or in vacation in any court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. He shall subscribe his name thereto, and *endorse thereon the names of the witnesses known to him at the time of filing the same.* He shall also endorse thereon the names of such other witnesses as may afterward become known to him, at such times before the trial as the court may by rule or otherwise prescribe. All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person." (Emphasis supplied.)

A comparison of 22-3201 (6) with 62-802 does not reveal any significant differences. Both statutes require the prosecuting attorney to endorse on the information the names of the witnesses known to him at the time of the filing of the same. In each statute the prosecuting attorney may be permitted to endorse the names of other witnesses as may afterward become known to him within the discretion of the trial court.

The difficulty with the state's position is that throughout our judicial history we have consistently held that a prosecuting attorney is not required to endorse on the information the names of rebuttal witnesses and that a rebuttal witness may testify even though his nane has not been endorsed upon the information. (*State v. Dickson*, 6 Kan. 209; *State v. Wood*, 118 Kan. 58, 233 Pac. 1029; *State v. Bean*, 181 Kan. 1044, 317 P. 2d 480.) Following the lead of these cases the trial courts of this state have usually not required the names of rebuttal witnesses to be endorsed on the information or to be furnished to the defendant or his counsel in advance of such witnesses being called on rebuttal.

Our former alibi statute, K.S.A. 62-1341 (Corrick), is quite similar to K.S.A. 22-3218. It was challenged as an unconstitutional denial of due process in *State v. Rider*, 194 Kan. 398, 399 P. 2d 564; and in *Jenkins v. State*, 211 Kan. 593, 506 P. 2d 1111. Both of these cases were determined prior to the decision in *Wardius* and upheld the constitutionality of 62-1341. After Jenkins was denied relief in this court, he filed a habeas corpus petition in the United States District Court challenging the constitutionality of 62-1341, relying upon *Wardius* which had been handed down in the interim. In an unpublished opinion (*Virgil Jenkins v. Atkins*, No. L-2738) Judge Arthur J. Stanley, Jr., ruled on the constitutionality of 62-1341 holding it unconstitutional for failure to provide for reciprocal discovery. Immediate relief was, however, denied to bring to the Kansas supreme court's attention the decision in *Wardius*. Jenkins appealed the denial of immediate relief to the 10th Circuit Court of Appeals. That court found it unnecessary to pass on the constitutionality of the statute since the state of Kansas had not appealed from the district court's finding that the alibi statute (62-1341) is unconstitutional. The court of appeals reversed the case with directions to the district court to issue a writ of habeas corpus, reserving the right of the

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state of Kansas to retry the petitioner on the robbery charge if it should wish to do so. (*Jenkins v. Atkins*, 515 F. 2d 1078 [10th Cir. 1975].)

In this case we are faced with the same situation encountered by appellate courts in other states having similar alibi statutes. Following *Wardius*, they have held such statutes unconstitutional. (*Allison v. State*, 62 Wis. 2d 14, 214 N. W. 2d 437 [1974]; *Commonwealth v. Contakos, Appellant*, 455 Pa. 136, 314 A. 2d 259 [1974]; *People v. Fields*, 59 Ill. 2d 516, 322 N. E. 2d 33 [1974].) It is clear to us that K.S.A. 22-3218, read alone, or in conjunction with 22-3201 (6), does not require the prosecuting attorney to furnish to defendant the names of witnesses it plans to use to refute an alibi defense. Since 22-3218 does not require reciprocal discovery, that statute is unconstitutional as a denial of due process of law. This case must therefore be reversed and remanded to the trial court with directions to vacate the conviction and sentence and to grant Abraham Talley a new trial on the original charge of aggravated robbery.

In order to preserve the alibi notice requirement this court, by order entered May 10, 1977, pursuant to the authority of K.S.A. 1976 Supp. 22-4601, has amended K.S.A. 22-3218, Section (2), to provide for reciprocal discovery by requiring the state to file and serve on the defendant or his counsel the names of witnesses known to the prosecuting attorney which the state proposes to offer in rebuttal to discredit the defendant's alibi at the trial of a criminal case. Specifically 22-3218 (2) has been amended to read as follows:

"22-3218. Plea of alibi; notice.

. . . . . .

"(2) On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto applicable to allowing the prosecuting attorney to endorse names of additional witnesses on an information. The notice shall be served on the prosecuting attorney at least seven days before the commencement of the trial, and a copy thereof, with proof of such service, filed with the clerk of the court. For good cause shown the court may permit notice at a later date.

"Within seven days after receipt of the names of defendant's proposed alibi witnesses, or within such other time as is ordered by the court, the prosecuting attorney shall file and serve upon the defendant or his counsel the names of the witnesses known to the prosecuting attorney which the state proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the case. Both the defendant and the prosecuting attorney shall be under a continuing duty to

disclose promptly the names of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided by this section *so that reciprocal discovery rights are afforded both parties.*" (Emphasis supplied.)

In accordance with K.S.A. 1976 Supp. 22-4601 the amendment to 22-3218 shall take effect upon its being filed with the clerk of the supreme court and upon its publication in the advance sheets of the Kansas Reports.

In view of our holding in this opinion it is not necessary to consider the other point raised by Talley in his 60-1507 petition.

The judgment of the district court is reversed and the case is remanded with directions to vacate the conviction and sentence and grant the petitioner Abraham Talley a new trial.

WARDIUS *v.* OREGON

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 71-6042. Argued January 10, 1973—Decided June 11, 1973

At petitioner's criminal trial, a witness' alibi evidence was struck as a sanction for petitioner's failure to file a notice of alibi in accordance with Oregon's statutory requirement, and petitioner himself was not allowed to give alibi testimony. Following petitioner's conviction the appellate court, affirming, rejected his constitutional challenge to the state statute, which grants no discovery rights to criminal defendants. *Held:* Reciprocal discovery is required by fundamental fairness and it is insufficient that although the statute does not require it, the State might grant reciprocal discovery in a given case. In the absence of fair notice that petitioner will have an opportunity to discover the State's rebuttal witnesses, petitioner cannot, consistently with due process requirements, be required to reveal his alibi defense. Pp. 473–479.

Reversed and remanded; see 6 Ore. App. 391, 487 P. 2d 1380.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., concurred in the result. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 479.

J. Marvin Kuhn argued the cause and filed a brief for petitioner.

W. Michael Gillette, Assistant Attorney General of Oregon, argued the cause for respondent. With him on the briefs were *Lee Johnson,* Attorney General, *John W. Osburn,* Solicitor General, and *John H. Clough,* Assistant Attorney General.*

**Jerome B. Falk, Jr.,* filed a brief for Virgil Jenkins as *amicus curiae* urging reversal.

[1] MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the right of a defendant forced to comply with a "notice-of-alibi" rule to reciprocal discovery.

In *Williams* v. *Florida,* 399 U. S. 78 (1970), we upheld the constitutionality of Florida's notice-of-alibi rule which required criminal defendants intending to rely on an alibi defense to notify the prosecution of the place at which they claimed to be at the time in question, and of the names and addresses of witnesses they intended to call in support of the alibi.[1] In so holding, however, we emphasized that the constitutionality of such rules might depend on "whether the defendant enjoys reciprocal discovery against the State." *Id.,* at 82 n. 11.[2]

In the case presently before us, Oregon prevented a criminal defendant from introducing any evidence to support his alibi defense as a sanction for his failure to comply with a notice-of-alibi rule which, on its face,

[1] The requirement was attacked as a violation of the defendant's due process right to a fair trial and an invasion of his privilege against self-incriminaton. But the Court found that "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." 399 U. S., at 81. Moreover, we held that "the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." *Id.,* at 83.

[2] The Florida rule provided:

"'Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.'" See 399 U. S., at 104.

made no provision for reciprocal discovery.[3] The case thus squarely presents the question left open in *Williams*, and we granted certiorari so that this question could be resolved. 406 U. S. 957 (1972).

We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed.[4]

I

On May 22, 1970, petitioner was indicted under Ore. Rev. Stat. § 474.020 for unlawful sale of narcotics. The sale allegedly occurred the previous day. At trial, after the State had concluded its case, petitioner called one

[3] Ore. Rev. Stat. § 135.875 provides:

"(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

[4] Petitioner also argues that even if Oregon's notice-of-alibi rule were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial. But in light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced. Cf. *Williams* v. *Florida*, *supra*, at 83 n. 14.

Colleen McFadden who testified that on the night in question, she had been with petitioner at a drive-in movie. The prosecutor thereupon brought to the judge's attention petitioner's failure to file a notice of alibi, and after hearing argument the trial judge granted the State's motion to strike McFadden's testimony because of this failure. Petitioner himself then took the stand and attempted to testify that he was at the drive-in with McFadden at the time when the State alleged the sale occurred. Once again, however, the State objected and the trial judge again refused to permit the evidence.

Petitioner was convicted as charged and sentenced to 18 months' imprisonment. On appeal, the Oregon Court of Appeals rejected petitioner's contentions that the Oregon statute was unconstitutional in the absence of reciprocal discovery rights and that the exclusion sanction abridged his right to testify in his own behalf and his right to compulsory process. 6 Ore. App. 391, 487 P. 2d 1380 (1971). In an unreported order, the Oregon Supreme Court denied petitioner's petition to review. See App. 21.

II

Notice-of-alibi rules, now in use in a large and growing number of States,[5] are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279; American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before

[5] See *Id.*, at 82 n. 11; Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense, 81 Yale L. J. 1342 n. 4 (1972).

Trial 23–43 (Approved Draft 1970); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams*, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U. S., at 82 (footnote omitted).

Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady* v. *Maryland*, 373 U. S. 83 (1963), it does speak to the balance of forces between the accused and his accuser. Cf. *In re Winship*, 397 U. S. 358, 361–364 (1970).[6] The *Williams* Court was therefore careful to note that "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defend-

[6] This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. See, *e. g.*, *Washington* v. *Texas*, 388 U. S. 14, 22 (1967); *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). Cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149, 1180–1192 (1960).

ant." 399 U. S., at 81 (footnote omitted). The same cannot be said of Oregon law. As the State conceded at oral argument, see Tr. of Oral Arg. 19, Oregon grants no discovery rights to criminal defendants, and, indeed, does not even provide defendants with bills of particulars.[7] More significantly, Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.[8]

We do not suggest that the Due Process Clause of its own force requires Oregon to adopt such provisions. Cf. *United States* v. *Augenblick*, 393 U. S. 348 (1969); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958). But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.[9]

[7] As the Oregon Court of Appeals has recently pointed out, "Oregon's criminal code is almost completely lacking in pretrial discovery procedures." *State* v. *Kelsaw*, 289 Ore. App. 295, 502 P. 2d 278, 280–281 (1972), pet. for cert. pending, No. 72–6012.

[8] The only discovery rights Oregon appears to permit are the rights to view written statements made by state witnesses and by the defendant, in the hands of the police. See *State* v. *Foster*, 242 Ore. 101, 407 P. 2d 901 (1965); Ore. Rev. Stat. §§ 133.750, 133.755. Cf. *State* v. *Kelsaw*, *supra*.

[9] Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. As one commentator has noted:

"Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by

It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Indeed, neither the respondent nor the Oregon Court of Appeals contests these principles. Nor does the State suggest any significant governmental interests which might support the lack of reciprocity. Instead, respondent has chosen to rest its case on a procedural point. While conceding that Oregon law fails to provide for reciprocal discovery on its face, the State contends that if petitioner had given notice of his alibi defense, the state courts might have read the Oregon statute as requiring the State to give the petitioner the names and addresses of state witnesses used to refute the alibi defense. Since petitioner failed to give notice, his alibi defense was not permitted and there were, therefore, no state rebuttal witnesses whose testimony tended to disprove the alibi. Since no such testimony was intro-

the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018–1019 (1972) (footnotes omitted).

duced, respondent argues that Oregon's willingness to permit reciprocal discovery remains untested. The State says, in effect, that petitioner should not be permitted to litigate the reciprocity issue in the abstract in federal court after bypassing an opportunity to contest the issue concretely before the state judiciary.[10]

It is, of course, true that the Oregon courts are the final arbiters of the State's own law, and we cannot predict what the state court might have done had it been faced with a defendant who had given the required notice of alibi and then sought reciprocal discovery rights. But it is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

For this reason, had petitioner challenged the lack of reciprocity by giving notice and then demanding discovery, he would have done so at considerable risk. To be sure, the state court might have construed the Oregon

[10] Before this Court, respondent presses the related argument that petitioner failed to object to the exclusion of his alibi testimony at trial and that his conviction therefore rests on an independent state procedural ground. See Brief for Respondent 5 n. 2. But, as the transcript makes clear, the issue arose when the trial court sustained the State's objection to introduction of the alibi testimony. Petitioner then proceeded to make an "offer of proof" in order to protect the record on appeal. Respondent cites us to no Oregon cases which would require petitioner to object to the sustaining of an objection in this context, and the state appellate court's willingness to reach the merits of petitioner's federal claims provides convincing proof that the judgment does not rest on adequate state grounds. See *Warden* v. *Hayden*, 387 U. S. 294, 297 n. 3 (1967).

statutes so as to save the constitutionality of the notice requirement and granted reciprocal discovery rights. But the state court would also have had the option of reading state law as precluding reciprocal discovery. If the court adopted this latter alternative, it would have had to strike down the notice-of-alibi requirement. But petitioner would have had only a Pyrrhic victory, since once having given the State his alibi information, he could not have retracted it. Thus, under this scenario, even though the notice-of-alibi rule would have been invalidated, the State would still have had the benefit of nonreciprocal discovery rights in petitioner's case—the very result which petitioner wishes to avoid by challenging the rule.

The statute as written did not provide for reciprocal discovery, and petitioner cannot be faulted for taking the legislature at its word.[11] Indeed, even at this stage of the proceedings, the respondent has made no representation that the State would in fact provide reciprocal discovery rights to a defendant who complied with the notice-of-alibi scheme. Respondent says only that the State *might* have granted such rights.[12] But the

[11] Nor did petitioner's attorney rest entirely on his own reading of Oregon's discovery provisions. As the attorney argued at trial, "Several weeks ago this came up again—this came up in the Circuit Court here with Judge Perry, and Judge Perry allowed the alibi testimony in based upon [*Williams* v. *Florida*] and said that he at that time, based on our statute and based on this opinion, that he didn't feel that our criminal code and our statute should allow a substantive evidence [*sic*] that the defendant might have to be kept out due to this, and that is the reason that notice was not given. I relied somewhat upon that and my own interpretation of this case also." App. 6.

[12] The State cites us to *State* v. *Kelsaw, supra,* a recent Oregon Court of Appeals decision holding that a defendant must be given reciprocal information as to the time and place of the alleged offense before he can be required to comply with the notice-of-alibi rule. But merely informing the defendant of the time and place of the crime does not approach the sort of reciprocity which due process demands. Moreover, in view of the fact that *Kelsaw* was decided after petitioner's trial, it cannot be suggested that the decision gave him notice that even this limited reciprocity would be granted.

State cannot constitutionally force compliance with its scheme on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language. Thus, in the absence of fair notice that he would have an opportunity to discover the State's rebuttal witnesses, petitioner cannot be compelled to reveal his alibi defense.

Since the trial court erred and since there is a substantial possibility that its error may have infected the verdict, the conviction must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

THE CHIEF JUSTICE concurs in the result.

MR. JUSTICE DOUGLAS, concurring in the result.

In *Williams* v. *Florida,* 399 U. S. 78, 106, I joined Mr. Justice Black in dissent from that part of the Court's decision which upheld the constitutionality of Florida's "notice of alibi" rule. We concluded that the decision was "a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself." *Id.,* at 108. One need not go far for the textual support for this position. The Fifth Amendment, written with the inquisitorial practices of the Star Chamber firmly in mind, provides that "[n]o person . . . shall be compelled . . . to be a witness against himself." It seems

difficult to quarrel with the conclusion that a "notice of alibi" provision contravenes this clear mandate, for the State would see no need for the rule unless it believed that such notice would ease its burden of proving its case or increase the efficiency of its presentation. In either case, the defendant has been compelled to aid the State in his prosecution.

The Court views the growth of "such discovery devices" as a "salutary development" because it increases the evidence available to both parties. *Ante,* at 474. This development, however, has altered the balance struck by the Constitution. The Bill of Rights does not envision an adversary proceeding between two equal parties. If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the Court to change that balance. See *Williams* v. *Florida, supra,* at 111–114 (Black, J., dissenting).

I agree with the Court that petitioner's conviction must be reversed, but for the reasons stated by Mr. Justice Black in his dissent in *Williams.* To reverse it because of uncertainty as to the presence of reciprocal discovery is not to take the Constitution as written but to embellish it in the manner of the old masters of substantive due process.

MATTZ *v.* ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 71–1182. Argued March 27–28, 1973—Decided June 11, 1973

Petitioner, a Yurok, or Klamath River, Indian, intervened in a forfeiture proceeding, seeking the return of five gill nets confiscated by a California game warden. He alleged that the nets were seized in Indian country, within the meaning of 18 U. S. C. § 1151, and that the state statutes prohibiting their use did not apply to him. The state trial court found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity," and concluded that the area was not Indian country. The State Court of Appeal affirmed, holding that since the area had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. Indian country is defined by § 1151 as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The Klamath River Reservation was established by Executive Order in 1855 and included the area in question. In 1891, by Executive Order, the Klamath River Reservation was made part of the Hoopa Valley Reservation. The Act of June 17, 1892, provided that "all of the lands embraced in what was Klamath River Reservation" reserved under the 1855 Executive Order, are "declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights . . . *Provided,* That any Indian now located upon said reservation may, at any time within one year . . . apply to the Secretary of the Interior for an allotment of land . . . . And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract . . . upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians." The Act further provided that proceeds from the sale of the lands "shall constitute a fund . . . for the maintenance and education of the Indians now residing on said lands and their children." *Held:* The Klamath River Reservation was not

INTERSPOUSAL TORT IMMUNITY

A POSITION PAPER PREPARED

BY THE

KANSAS TRIAL LAWYERS ASSOCIATION

JANUARY 18, 1978

INTERSPOUSAL TORT IMMUNITY

In the 1975 Legislative Session, H.B. 2011, which changed Kansas laws with regard to loss of consortium and provided that either spouse should be allowed to recover for the loss of such companionship where it is impaired by an injury by a third party, was passed and signed into law. The original bill contained an amendment to K.S.A. 23-205 which reads as follows: "...nor shall a spouse be prohibited from suing one another for any cause." This clause, which was amended out by a Senate Legislative Committee after passing the House of Representatives, would remove the common law doctrine of interspousal tort immunity.

K.T.L.A. supports the abrogation of interspousal immunity and urges consideration of this issue by the Senate Judiciary Committee. The doctrine of interspousal tort immunity is a carry-over from early English common law, and at one time was recognized in virtually all states. Now however, as the original rationales for the doctrine are disappearing, a majority of states have substantially eroded or totally abolished the doctrine. Following are the major historic reasons for the creation of interspousal immunity and questions as to their continuing validity.

A. MARRIED COUPLES AS A CONCEPTUAL UNITY

The original reason for the doctrine of interspousal immunity was the common law view that a married couple was a conceptualistic unit: in other words a couple was one, and that "one" was the husband. Married women could not sue in their own name, and suits were brought on their behalf by their husbands. Therefore, a suit between spouses would have resulted in the

husband being both plaintiff and defendant, and in effect, suing himself.

However, all states passed acts which gave married women those rights denied them at common law, including the rights to own their own property and to sue and be sued. (In Kansas, these rights were granted in the Married Women's Act, K.S.A. 23-201, et. seq.) The passage of these acts had two effects on interspousal immunity: Suits were now permitted between spouses on contracts or to determine property rights, and the idea that a married couple was a conceptual unit was totally removed, thus removing the original basis for the interspousal immunity doctrine.

B. MARITAL DISHARMONY

Despite the fact that the original rationale for interspousal immunity was statutorily removed and interspousal suits were permitted to determine property and contract rights, states still maintained a prohibition on interspousal suits for tort claims. A new rationale which was developed to justify interspousal tort immunity was that to allow tort suits between spouses would create marital disharmony.

This argument has been widely rejected by state legislatures and courts. One typical example of a tortious action between spouses is the beating of a wife by a husband, often occurring when the couple is separated. In the first place, when intentional torts like this are committed, marital harmony has already been disrupted by the acts themselves. Secondly, many family authorities contend that although the desire of one spouse to sue the other may create marital disharmony, the ability to carry out this desire will not make the situation any worse.

Finally, it is sometimes contended that spouses do not need actions in tort, because they may sue for divorce or bring criminal charges for intentional torts. This argument does nothing to justify interspousal tort immunity, since a divorce petition or a criminal complaint is at least, if not more, as disruptive to marital harmony than a tort action.

C. COLLUSION

A final argument advanced in favor of interspousal tort immunity by insurance interests is that permitting suits between spouses would lead to collusive suits designed to defraud insurance companies. This contention ignores several facts. In the first place, having insurance doesn't create liability. Both liability and injury would have to be established in any action between spouses, as it would in any other case. Second, courts must always guard against and watch for collusive or fraudulent actions, and there is no reason why this duty would become impossible if interspousal suits were permitted.

Another typical example of interspousal torts is the automobile accident in which a husband or wife is injured by the negligence of their spouse, and is denied recovery. As one legal authority expressed it, a head of a household may protect everyone in the world from his negligence through insurance, except those nearest to him.

D. THE LAW IN OTHER STATES

Because the rationales for interspousal immunity have disappeared or are no longer viable, many states have sought to soften the injustices of the doctrine by creating numerous exceptions to it. Spouses may bring

criminal actions against each other, and suits in property and contract. And in the remaining remnant of the doctrine, interspousal tort immunity, significant inroads have also been made. In Kansas, as in Illinois and Nebraska, spouses may bring actions for pre-marital torts. Spouses may bring actions against each other for torts occurring during the marriage following an annulment in Tennessee and Massachusetts; and following separation in Ohio and Utah. Actions may be brought against the estate of a dead spouse in Illinois. New Mexico and Oregon permit interspousal suits for willfull torts, and Vermont includes negligence as exceptions to the doctrine. In other states the doctrine of spousal immunity may not be used as a defense in an action against a spouse's employer, partnership, or other business entity.

The five states of Arizona, Louisiana, Missouri, Oregon, and Virginia have substantially modified the doctrine of interspousal tort immunity and have succeeded in eroding most of its effect. Other states, having begun by making exceptions to the immunity doctrine, have finally totally abolished interspousal immunity. They include Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Washington, and Wisconsin. K.T.L.A. urges the Senate Judiciary Committee to join with these states in removing the out-moded and inequitable doctrine of interspousal tort immunity.

E. PROPOSED LEGISLATION

The Kansas Trial Lawyers Association supports amending K.S.A. 23-205 to add the clause, "nor shall a spouse be prohibited from suing another for

any cause." This would abrogate the antiquated doctrine of interspousal tort immunity and complete the task begun by the 1975 Legislative Session which made a series of amendments to the Married Women's Act, K.S.A. 23-201, et. seq., provided for in the draft of H.B. 2011, which passed the House of Representatives. These statutes legislatively granted to married women rights which they did not have at common law. The abrogation of interspousal tort immunity is needed to correct the inequities which continue to exist in the Kansas laws.

KANSAS WOMEN'S POLITICAL CAUCUS

TESTIMONY ON INTERSPOUSAL TORT IMMUNITY

BEFORE

THE SENATE JUDICIARY COMMITTEE

JANUARY 18, 1978

My name is Judy Teusink and I am the registered lobbyist for the Kansas Women's Political Caucus. I am here today with the Kansas Trial Lawyers Association to urge the Senate Judiciary Committee to favorably consider the introduction of a bill to abrogate interspousal tort immunity.

In the 1975 Session, KWPC supported H.B. 2011, which added further amendments to the Married Women's Act, to restore rights to women which had traditionally been denied in this country. We feel that the removal of the prohibition for spouses to sue one another should have been accomplished during that Session, but since it was not, would urge this Committee to complete that task.

Not only is interspousal tort immunity based on an inequitable and, we feel, long outmoded tradition, but recent consciousness of the plight of battered women brings this issue to the forefront. As the Shawnee County Battered Women's Task Force, which also endorses this measure, can confirm, most battering situations occur between spouses, prior to a divorce settlement. Presently, women have an extremely difficult time pursuing any criminal action and they have no recourse in civil court. Given the recognized seriousness of this problem and the lack of remedies or safeguards which now exist, we believe that the abrogation of interspousal

tort immunity is a necessary change in the Kansas Statutes which can help to protect the victims of batterment.

The main arguments against this abrogation of potential collusion and heightened marital disharmony, we find unconvincing. Surely, in a situation where a spouse would have just and reasonable cause to sue another for an intentional tort, the disharmony already exists. In the case of accidents, it seems that spouses should be able to offer one another the same protection and remedies that they can offer to a stranger. It is extremely difficult for us to believe that spouses would plot to injure one another in order to recover funds.

The Kansas Women's Political Caucus would, again, urge the Senate Judiciary Committee to introduce KTLA's suggested amendments to K.S.A. 23-205 to add the phrase "nor shall a spouse be prohibited from suing another for any cause." We feel that this would help to rectify what is still an inequitable doctrine in the Kansas Statutes.