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Recent Case: Criminal Law - Self-Incrimination and Right to Jury Trial - Pretrial Notice of Alibi and Six-Man Jury [*Williams v. Florida*, 399 U.S. 78 (1970)]

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The result of *Gault* and *Winship* is that juvenile court proceedings where criminal acts are alleged must be considered criminal in nature, and those procedural safeguards necessary for "fair treatment" must be applied as in adult criminal courts. These decisions infer that the juvenile courts, because of their lack of sufficient safeguards, have failed to fully provide the benevolent custodial care and treatment that the reformers envisioned. The states, however, are left with the problem of determining what safeguards, besides those set out in *Gault*[19] and *Winship*, are necessary to insure fair treatment.

CRIMINAL LAW — SELF-INCRIMINATION AND RIGHT TO JURY TRIAL — PRETRIAL NOTICE OF ALIBI AND SIX-MAN JURY

Williams v. Florida,
399 U.S. 78 (1970)

Accused of robbery by the State of Florida, petitioner filed two pretrial motions. The first was for a protective order to free himself from the requirements of the Florida notice-of-alibi rule. This rule requires a defendant, on written demand by the prosecutor, to give pretrial notice if he contemplates claiming an alibi, and to supply the State with information about the place he will claim to have been and the names and addresses of the witnesses he intends to use.[1] The second motion was to impanel a 12-man jury rather than the six-man jury provided by Florida law in all but capital cases.[2] The trial court denied both motions, and the defendant was convicted and sentenced to life imprisonment. The Florida District Court of Appeals affirmed,[3] and the United States Supreme Court granted certiorari. The Court affirmed the conviction,[4] holding that the Florida notice-of-alibi rule did not deprive the petitioner of due process, a fair trial, or his privilege against self-incrimination,[5] and that the use of a six-man jury did not violate his right to trial by jury.[6]

Mr. Justice White, speaking for the Court, quickly disposed of petitioner's argument that the alibi discovery deprived him of due

the statutory standard concerning the sufficiency of proof, most juvenile judges have tacitly applied the highest standard of proof in delinquency proceedings. *Id.* at 551.

[19] *See* note 8 *supra.*

process or a fair trial. He observed that the rule provides for reciprocity by requiring the State to disclose the names and addresses of the witnesses it plans to use in rebuttal to the alibi. Furthermore, Florida permits additional discovery of the State's case by permitting a defendant access to such information as his own written statements, physical examination, and grand jury testimony.[7] This exchange of information in advance of trial is intended to facilitate an accurate determination of guilt or innocence and is consistent with the purposes and rationale of the due process model which the Court has developed.

Petitioner's second argument was that the requirement that he disclose the name and address of his alibi witness violated his rights against self-incrimination by forcing him to be a witness against himself. Mr. Justice White pointed out, however, that petitioner had the right to either present an alibi or remain silent. In spite of the practical pressures which may have induced petitioner to present an alibi, the decision was his own and thus the alibi disclosure was not "compelled" testimony within the meaning of the fifth amendment. The notice-of-alibi rule merely requires pretrial disclosure of what the defendant intends to reveal during trial. The Court found nothing in the Constitution which gives a defendant the right to conceal his defense until the conclusion of the State's case. Moreover, a continuance would be available to the State if it could show surprise because of the introduction of an alibi during the trial. Florida's notice-of-alibi rule only permits the State to achieve before trial what it could accomplish by a continuance during trial, thus avoiding the delay and inconvenience that accompany the latter.[8]

At least 15 states besides Florida have alibi-notice requirements.[9]

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[1] FLA. R. CRIM. P. 1.200.

[2] FLA. STAT. ANN. § 913.10(1) (1967).

[3] Williams v. Florida, 224 So. 2d 406 (Fla. Dist. Ct. App. 1969).

[4] Williams v. Florida, 399 U.S. 78 (1970).

[5] The fifth amendment's protection against self-incrimination was made applicable to the states through the 14th amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

[6] In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court held that the 14th amendment guarantees a right to trial by jury in all criminal cases which would come within the sixth amendment's guarantee if they were tried in a federal court.

[7] FLA. R. CRIM. P. 1.220. *See also* FED. R. CRIM. P. 16.

[8] Mr. Justice Black and Mr. Justice Douglas dissented on the notice-of-alibi question. They argued that the majority's approval of the notice-of-alibi rule was a dangerous departure from both history and the fifth amendment right of a defendant in a criminal case to remain silent while the state attempts to prove its case without his assistance. 399 U.S. at 108.

[9] ARIZ. R. CRIM. P. 192(B); IND. ANN. STAT. §§ 9-1631 to -33 (1956) IOWA CODE § 777.18 (1962); KAN. GEN. STAT. ANN. § 62-1341 (1964); MICH.

The Court made it clear, however, that its decision in *Williams* should not be construed as approval of the other states' statutes. It stated that each such statute would have to be examined in its own context with emphasis on whether the defendant is granted reciprocal discovery against the state.[10] Provisions such as Iowa's requirement that the defense indicate what it expects to prove by the testimony of each alibi witness,[11] and Kansas' mandatory exclusion of alibi evidence when the defendant fails to comply with the statutory provisions,[12] raise significant problems concerning who bears the burden of proof in a criminal case and whether a defendant can receive a fair trial when part of his defense is inadmissible.[13] Some states with questionable provisions may conform their statutes to the Florida model, but others will await specific challenges to the validity of particular requirements.

The broad, reciprocal pretrial discovery which *Williams* portends will aid in the removal of the elements of surprise and error from the quest for criminal justice. Full disclosure of witnesses by each side,[14] along with discovery of grand jury testimony,[15] medical records,[16] and other information in advance of trial, should result in earlier, more valid pleadings to more equitable charges in cases which presently clog court dockets. Neither the prosecutor nor the accused, knowing the information he will have to disclose during pretrial discovery, will be likely to overcharge or underplea his case if

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COMP. LAWS §§ 768.20-.21 (1948); MINN. STAT. § 630.14 (1961); N.J. CT. R. 3:5-9; N.Y. CODE CRIM. P. § 295-*1* (1958); OHIO REV. CODE ANN. § 2945.58 (Page 1953); OKLA. STAT. tit. 22, § 585 (1961); PA. R. CRIM. P. 312; S.D. CODE § 34.2801 (Supp. 1960); UTAH CODE ANN. § 77-22-17 (1964); VT. STAT. ANN. tit. 13, §§ 6561-62 (1959); WIS. STAT. § 955.07 (1961). *See generally* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29 (1964).

10 399 U.S. at 82 n.11.

11 IOWA CODE § 777.18 (1962).

12 KAN. GEN. STAT. ANN. § 62-1341 (1964).

13 *See* Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966). In *Rider*, a habeas corpus action by a state prisoner, the court held that refusal to permit the accused to present evidence of an alibi because he failed to give the State proper notice in accordance with Kansas' statute did not deprive him of due process of law. Most states, however, including Florida, give the trial judge discretion to admit the evidence even though statutory provisions have not been complied with. The *Williams* Court emphasized that the question of the validity of the threatened sanction of exclusion of alibi evidence for failure to give notice was not in issue, and that such a practice would raise sixth amendment problems. 399 U.S. at 83 n.14.

14 *See* N.J. CT. R. 3:5-11; FLA. R. CRIM. P. 1.220. Both rules provide for an exchange of witness lists with sanctions for nondisclosure which include the exclusion of undisclosed evidence.

15 *See* CAL. PEN. CODE § 938.1 (West 1969).

16 *See* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); 76 HARV. L. REV. 838 (1963).

it is unsubstantiated by discoverable evidence. Furthermore, each side, as it discovers the strengths and weaknesses of the other's case, will be inclined to engage in plea bargaining to avoid trial.[17] The defendant who would normally languish in jail unable to meet bail,[18] only to plead guilty eventually to a lesser offense, should welcome the chance to have his case resolved early in the process, thus avoiding "deadtime."[19]

The second issue in *Williams* involved the constitutionality of Florida's six-man jury statute.[20] The Court began its discussion with the basic premise that the 14th amendment carries over to the states the sixth amendment right to trial by jury in all criminal cases.[21] Since the sixth amendment makes no reference to jury size, the Court looked at the common law and found that the requirement of 12 jurors was "a historical accident, unrelated to the great purposes which gave rise to the jury in the first place."[22] The Court pointed out that not every common law jury feature was carried over into the Constitution. In fact, an earlier version of the sixth amendment had gone to a conference committee with several common law provisions,[23] and was returned without them. Subsequently, whenever the First Congress desired to incorporate characteristics of the common law jury system into any legislation, its language precisely indicated the features to be included — for example, the insertion of the vicinage requirements in the Judiciary Bill which was signed by the President the same day Congress agreed to the final form of the Bill of Rights.[24] Thus, the Court concluded that a jury "should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community."[25] It

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[17] *See, e.g.*, Siler, *Guilty Plea Negotiations*, in CRIMINAL DEFENSE TECHNIQUES ch. 13 (R. Cipes ed. 1969).

[18] *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 37-38 (1967).

[19] *See, e.g.*, Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970).

[20] FLA. STAT. ANN. § 913.10(1) (1967).

[21] *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

[22] 399 U.S. at 89-90.

[23] The original House version of the amendment provided, in part: "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites." 1 ANNALS OF CONG. 435 (1789). For further discussion of the common law provisions, see 399 U.S. at 94-98.

[24] 399 U.S. at 97.

[25] *Id.* at 100.

found a six-man jury capable of performing these functions. The Court did not, however, hold that six was the minimum number necessary for a jury to reach a just verdict. It left Congress and the states free to experiment in this area.

Since the Court refused to incorporate into the Constitution the federal standard of a 12-man jury in all criminal cases,[26] both that federal standard and the state practice of providing 12-man juries for all capital cases will endure only as long as the respective legislatures so choose. The Court, however, has indicated that particular components do remain essential elements of the jury trial, such as the requirement that guilt must be established beyond a reasonable doubt.[27] But whether the traditional right to a unanimous verdict remains an essential part of due process is now questionable. The Court discussed the unanimous verdict's possible value in insuring that the prosecutor bear the greater burden of proof, but several states presently use nonunanimous verdicts in specific kinds of felony cases,[28] and *Williams* could encourage further inroads into this area.

In addition to the *Williams* decision's precedential effect on the constitutional stature of other components of the jury trial, the Court's holding will indirectly affect the continued significance of those components, particularly jury unanimity. Sociological and psychological studies have indicated that there are a variety of restraints on individual participation, depending upon group size, and that an individual is more likely to reexamine his position when exposed to a variety of opinions and solutions.[29] It might be argued that smaller juries are therefore more prone to render unanimous verdicts. Eventually, the Court will have to decide at what minimum point the number of jurors begins to diminish the intended function of the jury in the judicial process.

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[26] FED. R. CRIM. P. 23(b). Mr. Justice Marshall, dissenting in part, argued that the defendant had a right to a 12-man jury because, under Duncan v. Louisiana, 391 U.S. 145 (1968), "the *same* 'trial by jury' is guaranteed to state defendants by the Fourteenth Amendment as to federal defendants by the Sixth." 399 U.S. at 116.

[27] *In re* Winship, 397 U.S. 358, 364 (1970).

[28] *See* LA. CODE CRIM. P. ANN. art. 782 (1967); ORE. REV. STAT. §§ 17.355, 136.330, 136.610 (1953). *But cf.* Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953). In *Hibdon* it was held that the right to a unanimous verdict could not be waived. The Supreme Court has recently decided to review whether the sixth amendment requires unanimity for conviction. *See* State v. Johnson, 230 So.2d 825 (La. 1970), *prob. juris. noted*, 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970) (No. 5161); State v. Apodaca, 462 P.2d 691 (Ore. Ct. App. 1969), *cert. granted*, 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970) (No. 5338).

[29] Kelley & Thibaut, *Experimental Studies of Group Problem Solving and Process*, in HANDBOOK OF SOCIAL PSYCHOLOGY 735, 762, 771 (G. Lindzey ed. 1954).