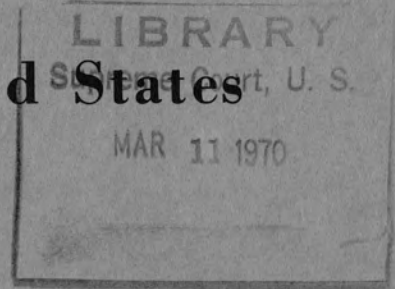


Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

Docket No. 927

JOHNNY WILLIAMS,
 Petitioner

vs,

THE STATE OF FLORIDA,
 Respondent,

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 Date March 4, 1970

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ORAL ARGUMENT OF:

P A G E

By Richard Kanner, Esq.
on behalf of Petitioner

2

By Jesse J. McCrary, Jr., Assistant
Attorney General of Florida,
on behalf of Respondent

21

NHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

)	
JOHNNY WILLIAMS,)	
)	
Petitioner)	
)	
vs)	No. 927
)	
THE STATE OF FLORIDA,)	
)	
Respondent)	
)	

The above-entitled matter came on for argument at 11:14 o'clock a.m., on Wednesday, March 4, 1970.

BEFORE: WARREN E. BURGER, Chief Justice
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments in
3 Number 927, Williams against the State of Florida.

4 MR. Kanner, you may proceed whenever you are ready.

5 ORAL ARGUMENT BY RICHARD KANNER, ESO.

6 ON BEHALF OF PETITIONER

7 MR. KANNER: Thank you, Mr. Chief Justice, and may it
8 please the Court: Your Honors, this case involves the validity
9 of the Florida procedural rule requiring the defendant in a
10 criminal case, to, upon proper notice, to give the prosecuting
11 attorney the names and addresses of any alibi witnesses which
12 the defendant might use.

13 Your Honors, the case also involves the validity of
14 Florida's six-man criminal trial jury. The facts are not in
15 the least bit dispute. They are reflected both in my brief and
16 in the State's brief without any dispute. I will not dwell on
17 that here, other than to note the State apparently acknowledges
18 that the questions were properly raised and preserved below and
19 the State apparently acknowledges now that the Fifth and Sixth
20 Amendments apply to the States.

21 Your Honors, as I will discuss the interpretation of
22 the terms "witness, compulsion," and "against himself in dis-
23 cussing the Fifth Amendment right, and I will also discuss w
24 reasons why Your Honors, in my opinion, the number 12 is fun-
25 damental to the jury system in this country.

1 Q In the State of Florida does the statute re-
2 quire the prosecution to furnish a list of its witnesses?

3 A Your Honor, we have a procedural rule which is
4 the effect as a statute, which when I offer to disclose all my
5 witnesses, it is then required to disclose all of their wit-
6 nesses.

7 Q But it is conditional -- =

8 A It is conditional, Your Honor on --

9 Q -- on defense counsel making that offer?

10 A Yes, Your Honor. We have another statute that
11 is not conditional, Your Honor, that the State, without any
12 condition on our part, must disclose the name of their witness
13 upon whom the information is based, as distinguished from their
14 witnesses in the case.

15 Q That would be the chief prosecuting witness,
16 if he were the victim of the offense? presumably?

17 A Presumably; yes, sir.

18 Q Do you proceed only by information in Florida,
19 not by indictment at all?

20 A Your Honor, the statutes in Florida provide
21 for indictment on capital cases; on noncapital cases, Your
22 Honor, the prosecutor of the State, which has a right to pro-
23 ceed by any information, or least it's been in my experience in
24 celebrated cases; even in misdemeanors sometimes, that they are
25 proceeded on by indictment; but this is strictly up to the

1 prosecuting authorities.

2 Your Honors, the Fifth Amendment is starkly simple:
3 "No person shall be held to be a witness against himself."
4 Your Honors, whatever this prohibition means, and I am going to
5 get to this in a minute; this prohibition, Your Honor, is
6 utterly and completely without qualification or exception;
7 absolutely.

8 This prohibition, the Fifth Amendment has absolutely,
9 positively never, ever ever subject to competing public in-
10 terest, regardless how vast these public interests might be.

11 Q Are you talking about it now in the context
12 of --

13 A Alibis.

14 Q -- well, I'm thinking of the defendant himself,
15 when you say it's absolute and subject to no qualifications,
16 do you mean that no one can make him take the stand under oath
17 and testify, or not under oath and testify?

18 A I mean, Mr. Chief Justice, that the Fifth
19 Amendment says this. The cases of this Court, I think, which
20 I have cited in my brief --

21 Q I was wondering what scope you were giving it.

22 A Only the scope that this Court has given it,
23 Your Honor, because the State has argued in its brief that the
24 reason for the alibi rule is to combat perjury; that the
25 reason for the alibi rule, Your Honors, is that in the quest

1 for the search for truth, and in arguendo, Your Honors, I
2 concede of this; absolutely, for the sake of this argument.

3 But I would also concede, Your Honors, if they would
4 ask, and without being utterly facetious about it, that the
5 alibi rule would stop pollution and stop the war and anything
6 else, because, Your Honors, I think it's not subject to reason-
7 able question, that whatever comes within the scope of the
8 Fifth Amendment it is not subject to competing state interests.
9 The State has not been able to show a solitary case which came
10 within the Fifth Amendment that this Court or any other court
11 has said -- at least this Court has said, "well, even though
12 this comes within the Fifth Amendment, the rights of the State
13 in this context is so great that we're going to bring it out of
14 the Fifth Amendment."

15 Your Honors, I suggested in my brief, or at least
16 cited in my brief, an early case of Boyd versus the United
17 States, which had to do with the forfeiture of goods. But, in
18 Boyd, this Court quoted from an English trespass case and there
19 the English Justice noted: "that trespass in the civil nature is
20 just absolute." And I suggest that at least whatever the Fifth
21 Amentment says, that's true here.

22 As the English case says, if you are going to have an
23 invasion of this privilege, you've got to go back to the common-
24 law principles and find some justification for it and the
25 silence of the books, according to the English Justice, is the

1 authority against the invasion. The case has not been able to
2 cite a solitary case of this Court or any case in principle,
3 in history, which would sanction the use of an alibi witness.
4 The fact that I note, parenthetically that the alibi witness
5 rule has been proposed twice in the Federal Rules and rejected
6 but I don't think that that is determinative at all.

7 Q Well, isn't it rather incumbent upon you to
8 show us why this is constitutionally invalid? Here's a
9 statute or rules of law of the State of Florida which you say,
10 quite rightly, if it does violate the Fifth Amendment to the
11 constitution, even if you might think it is a good or wise
12 rule, is a violation of the constitution. But that, as I under-
13 stand your argument, is what you've told us so far. And,
14 isn't it incumbent upon you to tell us why it why it violates
15 the constitution.

16 A Yes, Your Honor, I'm going to --

17 Q It's not up to Florida to find cases; it's
18 up to you to find the precedents.

19 A I agree. I believe I cited them in my brief.
20 But, I'm going to discuss now the interpretation of these
21 words in the Fifth Amendment, "compelled to be a witness
22 against yourself," and let's see what these words mean.

23 Let's take the first one, which I think is the
24 easiest and that is "witness." I believe, Your Honors, that the
25 State concedes that this alibi notice rule falls within the

1 term "witness," and I think they correctly concede that.
2 While they cite in their brief some of the physical test cases,
3 Schmerber versus California, the blood alcohol test, I believe
4 they may not cite the fingerprint test cases, all going out-
5 side the Fifth Amendment privilege, and properly so.

6 As I understand the rationale of those cases, the
7 Court said that the Fifth Amendment is related solely to
8 communications and that physical tests, not being communica-
9 tions, or not be documents, are not within the Fifth Amendment.

10 And I only suggest to the Court that this rationale
11 should not be expanded a day, because since the State appar-
12 ently concedes that the notice of alibi rule is within the
13 purview of the category of witness, let's leave it at that.

14 I note that one case that I cited in my brief,
15 Albertson versus Subversive Activities Control Board, was the
16 case which this Court said that Communists need not register.
17 This is the same thing. The mere fact that it's a document,
18 a pleading prior to trial by counsel should not take this
19 Court -- or this case, rather, out of the term of "witness."

20 Q The Communist case, of course, turned, to a
21 large extent, on the fact that there was an incriminatory as-
22 pect to the registration; did it not?

23 A Yes, sir; that's --

24 Q What do you see as the incriminatory aspect of
25 furnishing the names of witnesses?

1 A Your Honor, the Fifth Amendment doesn't say
2 "incriminatory," Your Honor. The Fifth Amendment says: "No one
3 shall be compelled to be a witness against himself."

4 Q Well, doesn't "against himself" imply the same
5 thing?

6 A Your Honor, this is a position that the State
7 takes. The State says this, that the alibi rule is not in-
8 criminating, but it's exonerating.

9 Q You're going to bring this witness in to help
10 you --

11 A You're going to bring this witness in to trial
12 you any way, and the mere acceleration of the disclosure, of
13 notifying the State Attorney as to when this witness is going
14 to come in, can only exonerate you.

15 Well, Your Honors, as I read --

16 Q Mr. Kanner, assuming a case where the defen-
17 dant never talks to anybody, the police or anybody else, and
18 does not testify at the trial; how do you get that under the
19 Fifth Amendment "witness" word?

20 A Your Honor --

21 Q He's never been a witness.

22 A The State says this --

23 Q He's never been a witness; has he?

24 A The defendant has never been a witness.

25 Q Well, that's the only one he can put the claim

1 on.

2 A Your Honor, the State says this, in answer to
3 your question, Mr. Justice, they say that should I, the defen-
4 dant, give the names of my witnesses prior to trial to the
5 prosecuting attorney is according to the procedural rule that
6 no notice can ever be given to the jury by way of opening or
7 closing argument. "Here the defendant supplied the State with
8 the names of the alibi witnesses; where are those alibi wit-
9 nesses?"

10 Your Honors, the State says that there can be no
11 argument like that to the jury. They have not cited any cases
12 and I have not found the first case, Your Honor, which would
13 support their contention that should I comply with the statute
14 that this alibi witness will not become known to the jury.

15 And I believe, Your Honor, that that is a context --

16 Q Don't you think that before we pass on that,
17 we should have a case like that; shouldn't we?

18 A Yes, sir, Your Honor.

19 Q It wasn't done in this case, was it?

20 A No, Your Honor, it was not done in this case,
21 Your Honor.

22 Q Well, how is it before us that some prosecutor
23 might do it.

24 A I only suggested this is what the --

25 Q If we try to stop what some lawyers might do in

1 the future, it will be a very long opinion.

2 A No, Your Honor; I'm not suggesting that. I'm
3 only suggesting, Mr. Justice, that in answer to your question:
4 how, if the defendant would not testify, how the alibi notice
5 rule would be a witness. I'm only trying to suggest a possi-
6 bility that the State in arguing opening and closing arguments
7 to the jury, will announce to the jury that "the defendant has
8 an alibi; we do not believe that this alibi is proper."

9 This is the other --

10 Q That assumes that a prosecutor would say it
11 and the judge will let him say it, and that the State Court
12 won't upset it. That's four assumptions.

13 A These are assumptions made by the State in its
14 brief, Your Honor.

15 Q Well, which side are you arguing?

16 A I'm arguing my side, Your Honor. The only
17 possible way that the witness rule can apply is if the defen-
18 dant does not testify he is in the context of what I am sug-
19 gesting. Now, the State apparently concedes in its brief that
20 the alibi notice rule comes within the purview of witnesses;
21 at least as I understand that brief.

22 Q That doesn't bind us, anyway.

23 A No, Your Honor, but I only suggest that re-
24 gardless of whether their brief binds the Court, I suggest that
25 in the Communist case and the Schmerber versus California, this

1 Court held that witnesses mean "any communication." And I
2 feel that the alibi notice rule is a communication within the
3 Fifth Amendment scope of "be a witness."

4 Q Well, what this requires the defendant to do,
5 as I understand it, a specified number of days before trial,
6 ten days, is to give the prosecution a list of people who are
7 going to testify on behalf of the defendant, on his behalf and
8 in his favor, in support of his alibi defense.

9 A Only alibi.

10 Q That's what I mean. How does this -- I don't
11 really -- certainly these people are going to be witnesses.
12 The defendant says they are going to be witnesses; there is no
13 problem about that, but how does this requirement violate the
14 defendant's right against, or anybody else's right against
15 self-incrimination?

16 A It's --

17 Q Or the constitutional right not to be held to
18 be a witness against himself?

19 A Your Honor, As I read the cases, I, or at least
20 I, as counsel, have the full right of determining when I am
21 going to make this judgment as to when to put forth my alibi
22 witness.

23 Q Well, perhaps that's true and it is true in
24 many jurisdictions, but what does that have to do with the self-
25 incrimination clause of the Fifth Amendment?

1 A As I read the cases that I have cited in my
2 brief --

3 Q Schmerber doesn't decide that.

4 A No. Schmerber only says what is a witness. I
5 didn't cite Schmerber. As I read the cases --

6 Q I wouldn't suppose you would -- I thought the
7 dichotomy in Schmerber was testimonial and nontestimonial.

8 A Those weren't made by me, Your Honor.

9 Q They were; weren't they? That's rather dif-
10 ferent; isn't it? The test is not whether it's a violation of
11 an amendment to communicate something in advance of trial,
12 whether it's testimonial or nontestimonial; isn't it? As far
13 as the privilege is concerned.

14 A Your Honor, I possibly used the term "testi-
15 monial" and "communicative," synonymously.

16 Q How does this disclosure become testimony in
17 any sense? I notice the terms of "giving evidence," "becoming
18 a witness. That's what you have left me in the dark on so far.

19 A Your Honor, the test as I read the cases,
20 Your Honor, is not whether the disclosure is incriminating.
21 As I read the cases, Your Honor, the test is whether this
22 evidence is going to be used or whether this information can be
23 used by the State at trial.

24 Q Well, I did not include in my question, any
25 incriminatory aspects. I just said, "How is it that giving

1 evidence and becoming a witness, how does this test the Fifth
2 Amendment in its precise language? You said you were depending
3 on the precise language.

4 A Yes, sir, Your Honor.

5 Q How does it test this?

6 A One, I feel that the cases here bring notice
7 of alibi statute within the term of witness. I feel that it
8 brings the language -- the cases that I have cited brings the
9 notice of alibi rule within the language of "witness against
10 himself," because as I read, particularly like Garrity versus
11 New Jersey, Brown versus Walker, the defendant's absolute
12 right to remain silent. And the test of "against himself,"
13 at least as I read the cases, is not whether it is
14 incriminating. True, that in most all instances, every in-
15 stance that I am aware of the rationale has been that the
16 testimony or communication was incriminating, but I don't read
17 the Fifth Amendment like that.

18 As I read the Fifth Amendment and as I read the cases,
19 without taking things out of context, the test of "against
20 himself," is whether evidence from the defendant's own lips is
21 to be used against him at his trial.

22 Garrity against New Jersey, as I recollect, was a
23 case where some policemen testified at a civil service hearing
24 and then this evidence was used in their trial. Well, the
25 record does a disclosure on it, but theoretically, these

1 policemen would not have testified at the civil service
2 hearing anything but what they thought would have exonerated
3 them.

4 So, I don't feel, Your Honors, that the test of
5 "against himself," is necessarily incriminating and it may --

6 Q I gather, for example, that fingerprints that
7 are taken before a trial are used by the prosecution against
8 the defendant at trial. That's information they obtained for
9 the purpose of using it against the defendant at trial. And
10 you would not claim that that in any way violated the privilege?

11 A Not in the least, bit, Mr. Justice.

12 Q Nor the blood test?

13 A Not in the least, Mr. Justice.

14 Q So, you really have to, here, to establish
15 that in giving the notice and the name of the witness this is
16 testimonial in the sense that they drew a distinction between
17 testimonial and nontestimonial in Schmerber and the other
18 cases.

19 A Yes, sir, Mr. Justice.

20 Q That's what the whole thing comes down to;
21 doesn't it?

22 A Well, I believe that the State has conceded
23 that it's testimonial. I think the State says, though, that
24 it's not compulsion and the reason that they say it is not
25 compulsion, I believe it was either the Chief Justice raised

1 or maybe Justice Marshall raised the question that since this
2 alibi witness was going to be used at trial anyway, there is
3 no compulsion about it.

4 And my answer to this, Your Honor is, quite simply,
5 that I, as counsel, have got the absolute, positive right to
6 wait until the conclusion of the State's case before I want to
7 make a decision as to whether I wish to put an alibi witness
8 on.

9 We have, without a doubt --

10 Q Well, you don't have to put him on because you
11 have disclosed his name, though. Your decision is not im-
12 paired, except on this hypothesis that you went on with, that
13 it might be used in argument by the Prosecutor, but as Justice
14 Marshall said, that case isn't here today.

15 How are you injured in this sense by disclosing the
16 name when you come to the decision of whether you are going to
17 put on witnesses?

18 A Mr. Justice, I don't believe that the Fifth
19 Amendment requires that I incriminate myself. I believe that
20 the Fifth Amendment says that I cannot be compelled to be a
21 witness against myself and I believe that your point is cer-
22 tainly the most difficult that I have to overcome. That is:
23 what is the test of "against himself?" I believe that that is
24 the strongest argument that the State has that this is really
25 not against himself. And the only answer that I have to this,

1 Your Honor, is I feel that I have an absolute right to remain
2 silent up until the very close of the State's case, that there
3 are factors that are going to be apparent only at trial, even
4 the composition of the jury that I am going to base my decision
5 on.

6 There may not be anything incriminating, and I be-
7 lieve that analogy is reasonable, if we uphold the alibi
8 notice rule the State can come back and ask a question of the
9 defendant by a procedural rule: "Are you going to testify?"

10 Well, I dont believe there would be any question
11 about that, as being invalid. I believe that if we uphold the
12 alibi notice rule the State can come back with a procedural
13 rule, "Give me the names of your character witnesses if you
14 are going to use them."

15 Q Your argument goes so far to say that there
16 can be no criminal discovery of any kind against the defendant
17 in a criminal case?

18 A Not quite, Mr. Justice, but almost. The only
19 criminal discovery that I would sanction against the defendant
20 is the notice of insanity and the reason that I believe that
21 the notice of insanity rule is good. Notice of insanity is
22 very similar to the alibi in Florida, and I believe it's
23 predominant throughout the state. If a defendant is going to
24 rely on insanity, he advises the State a certain amount of
25 days before trial with the names of his witnesses. But there,

1 Your Honors, there is always a presumption of sanity and once
2 you file a -- show that you are insane, this gives the State
3 an additional burden of proof, other than the facts set out in
4 the information, while, of course, the alibi notice rule
5 does not.

6 Mr. Justice, in answer to your question: the notice
7 of insanity rule is the only criminal discovery that I, as a
8 trial attorney would allow.

9 Q Well, it's not what you might allow; it's what
10 in your opinion, the Fifth Amendment allows.

11 A Yes, Your Honor; I'm sorry.

12 Q Suppose the defendant refused to give the
13 names, what could be done to him?

14 A Mr. Justice, the statute provides that the
15 alibi witness cannot testify. The defendant in Florida can
16 testify at all times. There is also a provision in the rule
17 that the judge, if the circumstances warrant, can excuse the
18 defendant from the provisions of the alibi notice.

19 Q You mean they would decline to permit a
20 relevant witness to testify in his favor?

21 A Your Honor, we're getting into the Sixth
22 Amendment right here, which I notice in my brief, of Washington
23 versus Texas. And I'd like to only make this comment: that I
24 raised the point and I suggested in my brief, that Washington
25 versus Texas, which was a case in which a defendant tried

1 to subpoena a co-defendant who was not on trial and the Texas
2 procedure apparently was that a co-defendant could not testify.

3 I'm going to answer your question, Your Honor. This
4 Court held that the Sixth Amendment right of compulsory atten-
5 dance of witnesses was inapplicable to the States. Now, as
6 I did not specifically raise the Sixth Amendment during trial,
7 but I have always relied on the 14th Amendment, and I suggest
8 only that this Sixth Amendment right, in the context, Your
9 Honors, that I have presented it here today, is similar to our
10 Fifth Amendment right against self-incrimination.

11 In answer to your question, Mr. Justice, the law of
12 the procedural rule in Florida is clear that should there not
13 be notice given the defendant, or the witness, rather is not a
14 competent witness at trial unless the judge within the exer-
15 cise of his own discretion ---

16 Q Well, that didn't happen in this case?

17 A No, Your Honor, because I complied -- I re-
18 ceived the notice of alibi form; I moved for a protective
19 order on the Fifth Amendment grounds and also the Florida
20 Declaration of Rights ground in the 14th Amendment and my
21 motion for protective order was denied, which was how this case
22 got here today.

23 Yes, sir, Your Honor.

24 Q At trial did you present your alibi witnesses?

25 A Yes, sir, Your Honor.

1 Q So, how did it hurt you, even if this did
2 violate the Fifth Amendment?

3 A Your Honor, we get down here to the -- I see
4 here that my time is about running out. I'm going to answer
5 your question --

6 Q Well, that's all right; you go ahead and argue
7 the jury point, I would assume.

8 A Yes, sir. It only takes five minutes to argue
9 the jury point.

10 Q Go ahead.

11 A Your Honors, my initial reaction on this jury
12 point was that, Florida being a Spanish-named -- our six man
13 jury came from that. IN the words of the vernacular, Your
14 Honors, "It just isn't so." My research that there are four
15 States with less than 12-man juries. Of the four, Your Honor,
16 only Utah has had a six-man jury from the inception. South
17 Carlina in its 1776 constitution, on up to 1865, had a 12-man
18 jury. Florida had Andrew Jackson's first order when he was
19 territorial governor, said that all criminal cases shall be
20 tried according to the principles of the common law.

21 Louisiana, Your Honor, there is a specific Federal
22 statute when Louisiana was admitted to the territory, that
23 said that in all criminal cases there shall be a jury of 12.

24 So, Your Honors, I feel that the number 12, whether
25 it's good or bad or regardless, the number 12 is sufficient in

1 -- rather it's fundamental to our jury system.

2 Your Honors, I can only suggest --

3 Q Why is it fundamental just because, histori-
4 cally it has always been 12?

5 A Yes, sir, Mr. Justice --

6 Q Do we know why?

7 A I did, during this period of time while the
8 case was pending, I did a great deal of reading to try and
9 answer your question, but I have not been able to find any-
10 where, Mr. Justice --

11 Q Well, what was the size of the jury in the
12 original hundreds when the jury system got started?

13 A Your Honors, as I read it, the jury was always
14 12 or more and the reason the 12 came out --

15 Q In Socrates' trial it was 500.

16 A At least in the common law, Mr. Justice, that
17 at least 12 persons had to agree and if they couldn't get 12
18 persons to agree they threw out some of the jurors and they
19 brought in some more jurors until 12 could agree. I believe
20 that, at least historically is how I read it, but I don't know
21 the number of 12.

22 Your Honors, I'd only suggest here that the Bill of
23 Rights were enacted, not to protect the guilty -- or rather, to
24 protect the innocent, but rather they were made by our founders
25 to protect the innocent; and the reasons which dictated the

1 Bill of Rights 200 years ago, that is that all governments want
2 to get rid of all troublemakers as quickly as possible, is
3 certainly as true today as it was way back then.

4 Your Honors, the Bill of Rights being to protect the
5 guilty and to shield the guilty from the powers of the State,
6 I feel that it's incumbent upon this Court to read them in the
7 manner in which they were written.

8 And in answer to one of the justices there is no
9 criminal discovery in a -- against the defendant unless we're
10 going to change the literal terms of the Fifth Amendment,
11 "compelled to be a witness against himself."

12 MR. CHIEF JUSTICE BURGER: Thank you.

13 Mr. McCrary.

14 ORAL ARGUMENT BY JESSE J. MC CRARY, JR.,

15 ASSISTANT ATTORNEY GENERAL OF FLORIDA,

16 ON BEHALF OF RESPONDENT

17 MR. MC CRARY: May it please the Court: Respondent
18 would like to respectfully address itself to the issues as they
19 have been raised in our brief.

20 The first issue being: "Are the due process clauses
21 of the 14th Amendment and the Fifth Amendment privilege
22 against self-incrimination violated by a/requirement that a
23 defendant disclose ten days prior to trial, his intent to
24 rely on alibi defenses?"

25 First I would like to say that Florida's rule of

1 notice of alibi, as we will refer to it, is fundamentally fair
2 and is not unconstitutional.

3 The rule is not designed in any way for a defendant
4 to say anything against himself. The rule is a rule of pro-
5 cedure.

6 Now, the constitution, I do not think, does not
7 grant to a defendant the right to so have the kind of defense
8 so that the State cannot check the veracity of that defense,
9 and that's what he's suggesting here. All that the constitu-
10 tion or all that we proffer to the Court today is that upon a
11 written demand by the prosecuting attorney and we want to
12 straighten out a few of the concessions that we were supposed to
13 have made, must be a written demand by the prosecuting attorney
14 first to a defendant, asking whether or not he intends to rely
15 on an alibi defense. If he so does, then and only then is he
16 required to give the names of the witnesses as are known to him
17 who will testify for him.

18 Q Why does the State need that?

19 A Well, I think it's necessary during a time when
20 we are trying to modernize criminal law, in its search for
21 truth and I don't think --

22 Q Search for truth?

23 A Yes, sir.

24 Q To know who's going to be witnesses for an
25 alibi?

1 A Yes, sir; I think it is. Mr. Justice, I think
2 it helps to avoid the popping up of phony alibis.

3 Q How would it?

4 A How would it?

5 Q Yes.

6 Q Because the State has an opportunity or the
7 State knows of the witnesses that the defendant intends to use
8 as an alibi, and the alibi statute probably states that if
9 the alibi, the defendant was not at a particular place at a
10 particular time, therefore he could not have committed a crime.
11 It give the state an opportunity then, if nothing else, to
12 nolle prosequere, or dismiss the matter.

13 Q Well, I surely wouldn't be looking forward so
14 much to a nolle prosequere, as I would to investigating the wit-
15 ness and the people around him.

16 A I think that you are correct, sir. I think
17 that the State is looking to find out the truth of the matter;
18 whether or not the person did commit a crime.

19 Q Do you think that the State has a right to talk
20 to those witnesses?

21 A Your Honor, I think the State does have a right
22 to talk to those witnesses.

23 Q Do you think it's unethical?

24 A No, sir; I do not.

25 Q For a lawyer to talk to a witness on the other

1 side?

2 A I don't think it's unethical, Mr. Justice. I
3 find that in the same rule that the State does provide that we
4 are obligated to give to you the names of all of our witnesses
5 and we are under a continuing obligation to give to the
6 defendant --

7 Q Well, why would you say that a rule of Florida
8 that a defendant must, 15 days before trial divulge the name
9 and addresses of every witness he intends to use?

10 A Your Honor, this is not the rule.

11 Q I agree, but would that rule be all right?
12 Wouldn't you get more truth that way?

13 A You may get more truth, Your Honor --

14 Q But you wouldn't --

15 A I wouldn't advocate that rule to the Court
16 today.

17 Q You don't think it would stand up, either; do
18 you?

19 A I am not sure.

20 Q You prefer to stick with the alibi?

21 A Yes, sir.

22 Q I suppose your position would be then that the
23 Florida constitutionally could have a statute which simply says
24 that every accused shall, ten days before the trial, provide the
25 prosecutor with the names and addresses of all the witnesses he

1 expects to call in his defense?

2 A Your Honor, I don't want to go that far over on
3 on the --

4 Q Why not? What's your theory; why can you do
5 it here?

6 A I think we can do it here because it's an
7 attempt to modernize and it's a reciprocal kind of discovery.
8 I see nothing unconstitutional about it. There is no abridg-
9 ment of his right to remain silent. It's not testimonial.

10 Q Well, then, your answer is that constitutionally
11 the State could go that far?

12 A Yes, sir; but this does not abridge his right
13 that he maintains under the Fifth Amendment. remain
14 silent. When we look at the rule, the rule is absolutely
15 reasonable and constitutional.

16 Q Remain silent about what?

17 A He is not required in any way to say anything
18 that will incriminate himself.

19 Q About what?

20 A About the crime or the --

21 Q Not the trial.

22 A About the trial.

23 Q About the witnesses?

24 A Well, I don't think that talking about the
25 witnesses, Your Honor, has anything to do with incriminating him.

1 Or, it's not testimonial to the extent that the Fifth Amendment
2 would cover that situation.

3 All he is doing at this point is tendering the names
4 of witnesses that he is going to use for one instance: alibi.

5 Q Well, it wouldn't give him the right to remain
6 silent, then.

7 A He has that right.

8 Q No; he couldn't remain silent if the State can
9 go and say: "Now, what witnesses are you going to bring in here
10 to prove you are not guilty?" And they can force him to do it;
11 he doesn't have a right to remain silent, does he?

12 A He has a right to remain silent as I understand
13 this Court's decision in Malloy versus Hogan.

14 Q About what?

15 A He has the unfettered right to remain silent
16 about incrimination and what he gives to the state in terms of
17 witnesses does not incriminate him and what they are suggesting
18 to us is that we ought to make criminal law --

19 Q It weakens his hand, of course.

20 A Your Honor, it does not weaken his hand.

21 Q I think that is a very valuable thing for a
22 prosecutor to have in advance, the names of any alibi witnesses.

23 A Your Honor, I think it is very valuable.
24 Additionally, I think it's very valuable to a defendant to have
25 the names of the witnesses that the State will use to rebut this

1 case.

2 Q Well, I think a lot of the constitutions re-
3 quire that; doesn't they? I think maybe there are a lot of
4 state laws or constitutions that do require that the state
5 give the names.

6 A Yes, sir; the State of Florida does, too. I
7 would suggest --

8 Q But, I presume that nothing in the constitution
9 says a State shall not be compelled to give any testimony on
10 either side in advance.

11 A I don't remember anything in the constitution
12 saying that. As we discuss this, I am reminded of Snyder
13 versus Massachusetts where a former Member of this Court, Mr.
14 Justice Cardozo said that: "While due process is due to the
15 accuser it is also due to the accused." And that's precisely
16 what we are talking about.

17 But we are not abridging him of any right to remain
18 silent under the Fifth Amendment.

19 Q Mr. McCrary, Mr. Kanner suggested that you
20 conceded that this information notice and the names of witnesses
21 was testimonial; do you?

22 A No, sir; the State of Florida does not concede
23 that it's testimonial.

24 What I think we're talking about here is that
25 Petitioner is probably trying to make criminal law like a poker

1 game, so that the person who has the biggest surprise at trial
2 then should win, and probably would in many instances, but we
3 have cases, and this Court or other inferior courts, probably
4 have suggested that the whole purpose of trial in both criminal
5 and civil proceedings is the search for truth. Now, we are
6 not suggesting in any way that this defendant should be re-
7 quired to get on the stand or not get on the stand.

8 We are simply saying that if you intend to use alibi--

9 Q Why don't you put him on the stand when you re-
10 quire that he give the names of the witnesses he intends to use?

11 A Your Honor, this would be a clear violation of
12 all the cases that this Court has tried if we forced a man to
13 testify, and we're not suggesting --

14 Q Well, would this force him to testify?

15 A No, sir; it does not.

16 Q That is, maybe not something relevant to the
17 actual commission of the crime, but it certainly does make him
18 testify to give the names of the witnesses he intends to use.

19 A Your Honor, I respectfully --

20 Q I'm not saying that's good or bad; I'm just
21 saying it does make him do that.

22 A Your Honor, I respectfully disagree with the
23 Court, well, Mr. Justice, with you on that position. It does
24 not, in my opinion, require him to testify, because --

25 Q Well, what does it require him to do?

1 A It simply requires him to disclose the names of
2 the witnesses.

3 Q That he intends to use.

4 A For alibi alone.

5 Q If they can do it about alibi, why couldn't
6 they do it about everything?

7 A Your Honor, I suppose they could do it about
8 everything, and I don't think I'm in a position to discuss the
9 constitutionality of that principle on this occasion.

???????
RAFT? 10 Q But the real problem I have with the draft
11 is: do you agree that at that stage, Florida has no right to
12 ask him and require him to answer anything other than his
13 alibi witnesses?

14 A I would agree.

15 Q Why the alibi witness?

16 A Under this rule, Your Honor.

17 Q Well, I thought under all of the decisions of
18 this Court, he doesn't have to tell you anything.

19 A He does not have to give any information that
20 will incriminate him and this --

21 Q He doesn't have to tell you anything. He
22 doesn't have to give you his name.

23 A I would agree, Your Honor --

24 Q He can stand absolutely silent.

25 A He can stand mute.

1 Q But on this one question he can't stand silent.

2 A Your Honor, the rule does provide that he can
3 stand silent.

4 Q But he can't use an alibi.

5 A Oh, no; the rule does not go that far, as Mr.
6 Kanner said. The rule, to answer Mr. Justice Black's question,
7 specifically provides that if he does not comply with the rule,
8 the trial judge may exclude the testimony. It does not say that
9 he cannot use that --

10 Q And yet there is another provision in the
11 constitution which says that a man shall be entitled to summon
12 witnesses that know things that are relevant, to testify on
13 his behalf.

14 A Mr. Justice Black, I will quite agree, and I
15 think that the same court that decided this case, the Third
16 District Court of Appeals, is mindful of this, and we cited it
17 at page 14 in our brief, Cacciatore versus the State of Florida
18 and Wilson versus the State of Florida and the defendant did
19 not comply with the notice of alibi rule, and the court still
20 let those witnesses testify.

21 Q So that the rule is not an unreasonable rule, because
22 you say --

23 Q Well, how do you know the next judge wouldn't
24 do differently and make him?

25 A Well, I have to assume from my position that

1 judges are fair and that they are knowledgable and reasonable
2 and that they will apply --

3 Q Well, then you would be saying then that the
4 fairest thing a judge could do would be not to enforce the
5 rule.

6 A Oh, no, sir. I certainly am not saying that.
7 I'm simply saying that the Florida cases that have been decided
8 on this rule, the judge has allowed the alibi witness to testify
9 even where the defendant, in some instances, did not comply
10 with the request.

11 Q Why did he do that?

12 A He thought it was the proper thing to do.

13 Q Well, that was a violation of the rules, wasn't
14 it?

15 A No, sir; it's not a violation of the rule,
16 Your Honor, because it provides that the judge may exclude the
17 testimony. It does not say he cannot.

18 Q Oh, he has the right to do it if he wants to.

19 A Yes, sir.

20 Q Well, your friend seems to have conceded, if I
21 heard him correctly, that it does not violate the constitution
22 to require the defendant to give advance notice of the claim of
23 insanity by way of defense. I take it insanity is an affirma-
24 tive defense in Florida.

25 Now, do you see any distinction between the advance

1 notice which he concedes is constitutional; and the advance
2 notice on alibis, which he argues is unconstitutional?

3 A Your Honor, I think that they are both the same;
4 they are identical, except for the defenses, you know, the
5 names of the defenses. The purpose is the same. If one is
6 going to plead insanity he would be required to give notice of
7 that intent.

8 Q Suppose the law should provide that he's com-
9 pelled to give the State the names of all witnesses that he
10 claims witnessed the crime?

11 A Well, once again, Mr. Justice, I think this
12 Court has decided that the defendant can remain absolutely mute,
13 and say nothing.

14 Q But he can't remain absolutely mute if he has to
15 give the names of the witnesses he's going to use.

16 A Yes; he could remain mute under this situation
17 and we have had cases where it's been done. They remained mute
18 in Cacciatore versus the State of Florida.

19 Q Well, the State Court might tell him then he
20 can't put on these witnesses.

21 A Mr. Justice, once again, I'm not in a position
22 to say what those gentlemen will do; I don't know what the
23 State Court will do; I can only --

24 Q They can under the rule; can't they?

25 A Mr. Justice, I assume that they could, but I can

1 only go by at this point of what they have done, and I'd have
2 to --

3 Q You mean they have always violated the rule?

4 A No, sir; I'm not saying that. I'm saying that
5 the Appellate Courts of Florida have, when they have had
6 appeals in situations like this, they have said it was not
7 error for this person to testify and the trial judge properly
8 let him testify under the provisions of the rule, even though he
9 didn't comply.

10 And I think that I would be simply speculating to
11 this Court if I said that they would rule some other way. I
12 would have to abide by the precedents that they have set down
13 here.

14 Q You mean we'd have to assume that they would
15 always hold that he didn't have to give the names?

16 A Your Honor, I think that I have to assume at
17 this point.

18 Q Have they always never enforced it?

19 A I can't go that far and I think that I would
20 simply back myself in a corner and never get out if I said
21 that.

22 Q I should think in your argument that you would
23 almost have to assume that if the names weren't given the
24 defendant couldn't use those witnesses in his behalf. That's
25 what the statute provides can happen and that's what the

1 constitutional issue really is; isn't it?

2 A Yes, sir.

3 Q That might give us another case some other day.

4 A Sir?

5 Q That might give us another case on a different
6 point some other day.

7 A It very well may, Your Honor. At this point I
8 don't think that this is the question before this Court; or I
9 donot understand it as being the question before this Court.

10 Q Here the names were given and the witnesses
11 were used.

12 A Were

13 Q Isn't that correct?

14 A Yes, sir. And if we talk about the trial
15 strategy, there was nothing that prohibited the defendant from
16 testifying in his own behalf if he wanted to, at any time during
17 that trial. What we are really talking about is a bit of truth.

18 Now, he can determine at the close of the State's
19 case whether he wants to put on alibi witnesses or he can de-
20 termine 15 days before trial that he wants to put or does not
21 want to put on alibi witnesses.

22 Now, the way it harms him is absolutely foreign to
23 me and there is not any violation anywhere of the Fifth Amend-
24 ment here, because he is not required to put on anybody on the
25 stand. He is not required to testify or not to testify in his

1 own behalf.

2 Q Well, that's quite a different argument from
3 the one you've been making up to date; isn't it?

4 A No; I don't think it's a different argument,
5 Mr. Justice, I think that --

6 Q It seems to me to be entirely different to say,
7 "Well, if that is the rule it wasn't broken and certainly he
8 couldn't have been harmed by it."

9 A Your Honor, what had happened here is that
10 defendant did comply with the rule.

11 Q That's right.

12 A He complied with the rule.

13 Q Maybe it's not an issue in this case at all.

14 A It may not be. The noncompliance is not at
15 issue, I submit to the Court. The fact is that he did comply;
16 that he did, as a matter of trial strategy, decide to put on
17 his alibi witnesses.

18 Q Maybe he did it because he thought he'd have
19 to under the rule.

20 A Mr. Justice, I certainly cannot stand here and
21 say that I can make up counsel's mind.

22 Q Now, you only have about three minutes left and
23 we haven't got to the six-man jury question. After lunch we
24 hope you will address yourself to that.

25 A Yes, sir.

(Whereupon, at 12:00 o'clock p.m. the argument was
recessed to resume at 12:30 p.m. this day)

1 (After the recess, the argument resumed) 12:30 P.M.

2 MR. CHIEF JUSTICE BURGER: MR. McCrary, I misled
3 you when I said you have three minutes remaining. I don't know
4 what happened, but you have 12 minutes.

5 MR. MC CRARY: Thank you, sir.

6 MR. CHIEF JUSTICE BURGER: So, you have 12 minutes
7 to deal with six jurors.

8 MR. MC CRARY: Yes, sir. I'd just like to make one
9 concluding statement relative to the question here before the
10 Court. The first issue, is that certainly it's not incrimina-
11 ting. What might have happened is not before this Court and as
12 suggested by Mr. Justice Brennan and Mr. Justice Stewart, in
13 the total effect of it here, it's absolutely harmless to the
14 defendant to have those witnesses testify before he complied
15 with the rule.

16 The second issue as raised in our brief is: Do the
17 14th Amendment due process clause and the Fifth Amendment en-
18 title the defendant to a trial by a 12-man jury?

19 Of course, I to understand or for us to get to the
20 core of this problem, we first must, necessarily talk about the
21 12-man jury or the purpose of jury trial as defined by this
22 Court's decision in Duncan versus Louisiana. I think the
23 majority opinion stated that the purpose of the jury in the
24 Anglo-American system was protection against arbitrary power.
25 The jury of the peers gave this kind of safeguard from

1 overzealous prosecutors and overzealous Federal and State
2 Governments.

3 Secondly, there have been decisions in this Court
4 saying that the Federal standard only requires that we adhere
5 to the essentials of the common-law jury. And to number the
6 essentials, we think that the essentials are: (1) That a
7 person's needs should have a right to a jury trial in serious
8 offenses; another essential of the jury system is, we think,
9 the unanimous verdict, as defined by this Court in Patton
10 versus the United States.

11 And the older decisions tend to say -- Maxwell
12 versus Dow and Thompson versus Utah, suggest that 12 men is an
13 essential of the jury system.

14 Q That's putting it mildly, to say they suggested
15 it.

16 A Yes, sir. That word "suggest" did not -- I
17 didn't mean suggest. The Court said or held. But they were
18 only applied then in terms of the Federal standard.

19 Now, we have to look at what are the essentials of
20 the jury system. Sears versus Petty(?) we think that this is
21 essential, because of the possible confinement, a unanimous
22 jury, and Florida complies with this.

23 But when we talk about the 12-man jury, that is
24 nothing; there is no particular reason for having 12 men on a
25 jury, as opposed to six men. We find that the common law --

1 the reason that we have 12 is merely a carry-over of the common
2 law at the time we adopted the constitution in 1789.

3 Q Why does Florida distinguish by having 12 men
4 for some offenses and six for others?

5 A Your Honor, the State of Florida does provide
6 for 12-men juries, or 12-person juries, I meant to say, in
7 capital offenses.

8 Q Well, why the distinction? All other offenses
9 are six-men juries.

10 A Your Honor, I truthfully think that's a
11 vestigial remain of the common law. That's all, and it's
12 nothing more.

13 Q Well, even if it isn't that or if it's that, it
14 may also be just a matter of line drawing. They might have
15 drawn the line of defenses over one year or offenses over two
16 years, or as some other states have.

17 A Your Honor, they have the line-drawing in the
18 12 versus 6 in the State of Florida. In the capital offenses,
19 these are the offenses at the time it was drawn and at the
20 present time, carry the death penalty.

21 Q But this petitioner got life imprisonment;
22 didn't he?

23 A Yes, sir.

24 Q So you get up to life before a six-man jury,
25 and that's involved, with a 12-man jury.

1 A Yes, sir. I would like to point out to the
2 Court that Florida does provide for a 12-man jury in eminent
3 domain cases as cited in our brief.

4 Q Really?

5 Q Do you know of anyplace in the country where
6 there are fewer than the 12 persons on the jury?

7 A Your Honor, I'm not familiar with anyplace
8 where there is less than 12 on a capital offense.

9 Q Then I suppose if your position is sustained,
10 the State will be free to --

11 A I think they would be, sir.

12 Q As few as three?

13 A Your Honor, I don't know where we can draw
14 the line in terms of the numbers game. And I think that this is
15 what it is; it's a numbers game. I look at it to say a jury
16 of peers, which would suggest to me --

17 Q A jury of what?

18 A Sir?

19 Q A jury of what?

20 A One should be tried by a jury of his peers,
21 which would suggest to me the plural of the word "peers," would
22 mean more than one. Historically we have seen, and I think it's
23 lost in history that sometimes people were tried by 500 as has
24 been suggested today down to as many as three when this jury
25 system was developing. But there is no statistical data

1 available that has been presented by the Petitioner that would
2 suggest that a man tried by 12 is going to receive a fairer
3 trial than a man tried by six.

4 Q Is it true that if you have 12 jurors as
5 compared to six, you lose the opportunity of six on-votes for
6 a hung jury?

7 A You --

8 Q If you have 12 you only have to convince one
9 out of 12 to get a hung jury.

10 A Yes, sir.

11 Q And if you have six you only have six chances
12 to find that one.

13 A Mr. Justice, you are absolutely correct, but I
14 think that we come back to a numbers game, and this --

15 Q Well, it would be better to have 25 under my
16 theory.

17 A But, Your Honor, we could took this to a large
18 group of -- we ought to have the population of Washington sitting
19 sitting on one case. So long as we provide, as this Court said:
20 of the jury system: "A buffer between overzealous prosecutors
21 -- overzealous state officials and be provided by a fair and
22 impartial manner." I think that this is all that's required,
23 and if we play the numbers game, I suggest that we shouldn't
24 use 12.

25 Q Well, were there any fewer than 12-man juries

1 anywhere in the States when the constitution was adopted?

2 Was anyone trying civil cases where a jury trial was required
3 with any fewer than 12?

4 A Your Honor, my research does not reveal that.
5 It does reveal that in Thompson versus Utah, before they were
6 a State, and I think this was about 1898, decided by this Court,
7 stated that Thompson wanted to be tried by eight people, some
8 number less than 12, and the Court said that the State of Utah
9 -- not the State, the Territory of Utah could not do this,
10 because they were under Federal jurisdiction.

11 To me, the dicta sort of indicated that had they not
12 been under the Federal jurisdiction that he would have been
13 allowed, it would have been okay to try him by eight people,
14 by a number less than 12.

15 Q They use six now, don't they; or they did --

16 A Your Honor, I think the State of Utah uses
17 six and I think that there are some 12 states that at some
18 trial proceedings throughout, from the lowest court up to the
19 highest trial court, use less than six on one occasion or
20 another.-- less than 12 on one occasion or another.

21 Q In Utah, it historically was a lack of manpower.

22 A Your Honor, historically, I think that
23 Florida might have gotten this rule, too. Its legislative
24 history --

25 Q When did it adopt a six-man jury law?

1 A Sir, it first appears in the Constitution of
2 1875, by constitutional amendment.

3 Q That was the reconstruction constitution,
4 wasn't it?

5 A Yes, sir.

6 We suggested in our brief, or we put in our brief,
7 joined with Mr. Justice Harlan's words, that "there is nothing
8 significant about the number 12," that we have come to get this
9 number based on the antiestablishment clause, that it's basic
10 reference comes from the Bible. The 12 disciples, the 12
11 stones, the 12 tribes of Israel, the 12 gates to Jerusalem.
12 And there is nothing significant about it.

13 And that six people could provide what Mr. Justice
14 White did say, that we want to provide a buffer between govern-
15 ment and the people so that this kind of oppression it not
16 put on people by overzealous prosecutors or overzealous govern-
17 ments.

18 There have been some statistical studies shown and
19 in Worcester, Massachusetts District Court, the legislature
20 authorized there a six-man jury and the report said that: "It's
21 been found that six-member juries render the same kinds of
22 verdicts that 12-member juries render; or they render the same
23 kinds that lawyers would expect from 12-member juries."

24 We also found this to be true in the State of New
25 Jersey.

1 To quote Mr. Justice Holmes, in our position, he
2 says that "It's revolting that we have no better reason for
3 keeping the rules than that rule was laid down at the time of
4 Henry V." He says that "It's more revolting that the grounds
5 upon which it was laid down long vanished and the rule persists
6 from the blind imitation of the past."

7 We think that the 12-man jury should not be required
8 on the states; additionally, we think that the numbers game is
9 not essential to fulfilling the purpose that this Court pro-
10 nounced in Duncan versus the United States -- versus Louisiana.

11 The sole purpose of the jury is to protect the
12 public and whether that number is six or 12 it is fulfilled and
13 there is nothing violative of the 14th Amendment, Sixth Amend-
14 ment, when you use six men on a jury trial.

15 We respectfully urge this Court on both issues, to
16 affirm the District Court of Appeals and to hold particularly
17 that a six-man jury does not violate the Constitution and that
18 a notice of alibi does not violate the Fifth Amendment, nor
19 the due process clause of the United States Constitution.

20 Thank you.

21 MR. CHIEF JUSTICE BURGER: Thank you, Mr. McCrary.

22 MR. KANNER: Your Honors, unless the Court has any
23 questions, I have no further argument.

24 MR. CHIEF JUSTICE BURGER: I guess not. Thank you
25 for your submissions, Mr. Kanner and Mr. McCrary. The case is

1 submitted.

2 (Whereupon, at 12:45 o'clock p.m. the argument in
3 the above-entitled matter was concluded.)

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