

ALIBI

*David Crump**

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* A.B. Harvard University. J.D., University of Texas School of Law. John B. Neibel Chair in Law, University of Houston.

INTRODUCTION

Imagine a defendant is charged with three bank robberies. The Government has just rested its case. Immediately, attention shifts to the defense lawyer. There are six alibi witnesses in the hallway, two for each crime. Will the lawyer call them? Everyone wonders what the defense lawyer will do— including the defense lawyer.¹

Alibi is a defensive theory that raises conflict and paradox. It is easy for the defendant to find himself worse off with the presentation of an alibi. It depends, in part, on the precise instruction that the judge will give to the jury, which is as yet unknown.² It depends on whether the defendant has given the proper kind of notice before trial.³ It depends on the strength of the prosecution's case, usually involving on-scene identification witnesses, and it depends on the capability of the Government's lawyer, or state's lawyer, in countering the alibi.⁴

This article is an effort to analyze alibi: the law, the defensive theory, and the practicalities. Part II describes this defensive theory. Alibi is not a defense in the proper sense of the term, but a rebuttal to the prosecution's case. Part III deals with the interplay of notice of alibi requirements with the Fifth Amendment to the U.S. Constitution. Part IV considers issues involved in imperfect or absent notice as contemplated by the Federal Rules of Criminal Procedure.

¹ See *infra* Part VI (exploring the defense lawyer's dilemma, including reasons for not calling alibi witnesses at all).

² See *infra* Part VII (considering alibi instructions).

³ See *infra* Part IV (discussing the required notice of alibi).

⁴ See *infra* Part V (discussing presentation and countering of the alibi).

Part V explores the practical aspects of presenting or countering an alibi. The defense is the flip side of an attack on the Government's or state's eyewitnesses, and it requires strategy and capable presentation from both sides. Part VI develops issues surrounding a defense attorney's strategic decision to omit presenting an alibi. Part VII considers the court's instructions to the jury on alibi. Finally, Part VIII sets out the author's conclusions, which deal with possible improvements to notice-of-alibi requirements, exclusion of witnesses, and the defense lawyer's professional decision to avoid presenting an alibi that will hurt his client—a subject more complex than it might appear.

I. ALIBI: THE NATURE OF THE DEFENSIVE THEORY

A. *What Kind of Defensive Issue Does Alibi Raise?*

In common vernacular, alibi is often called a defense,⁵ and in a sense, it is; alibi requires the input of evidence separate from the Government's case. However, alibi is not a defense in the stricter sense. Instead, it is a defensive theory. In essence, it is a failure of proof theory, or a rebuttal to the Government's or state's case.⁶

The Model Penal Code identifies what it calls “affirmative defenses.”⁷ These defenses involve elements that are separate and unconnected to those that the Government or state has charged.⁸ But then, there are true defenses, which have to be raised by the defendant. But if they are raised, then the Government must then disprove them.⁹

The Model Penal Code provides definitions that fit these categories. Moreover, it stipulates that all elements of a crime must be proved beyond a reasonable doubt.¹⁰ However, this requirement does not apply to an affirmative defense, which does not require

⁵ See DAVID CRUMP & JOHN T. PARRY, *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 338 (4th ed. 2020) (explaining alibi as a defensive theory”).

⁶ See *id.*

⁷ See MODEL PENAL CODE § 1.12 (AM. L. INST., 1985).

⁸ See, e.g., CRUMP & PARRY, *supra* note 5, at 229-30 (using *Patterson v. New York*, 432 U.S. 197 (1977) to illustrate different results if an element is recharacterized as a defense or an affirmative defense).

⁹ See *id.* at 230-31.

¹⁰ MODEL PENAL CODE § 1.12(1) (AM. L. INST., 1985).

disproof by the prosecution.¹¹ By implication then, any defense other than an affirmative one requires disproof beyond a reasonable doubt by the prosecution.¹²

For example, self-defense is not labeled as an affirmative defense;¹³ rather, it is an example of a defense that, if raised by the defense, must be disproved by the prosecution beyond a reasonable doubt.¹⁴ Self-defense is justified when there is a reasonable doubt about whether the defendant acted sincerely and reasonably under a belief that another party was imminently likely to use force against the defendant.¹⁵ These requirements do not rebut any of the elements of assault or murder,¹⁶ the principal crimes against which self-defense is designed to defend. Conversely, entrapment is an affirmative defense that must be proved by the defendant by the preponderance of the evidence.¹⁷

Alibi is different. It is a rebuttal to an element of the Government's case.¹⁸ Every crime includes an element that the defendant on trial is the one who committed it.¹⁹ The state is required to prove this element beyond a reasonable doubt. Alibi is a counter to this element, raising the possibility that the defendant could not have committed the crime because he was somewhere else.²⁰ The word alibi itself is a Latin word meaning "in another place."²¹

¹¹ *Id.* at § 1.12(2).

¹² *Id.* at § 1.12 (not defining such defenses but leaving defenses other than affirmative defenses subject to the proof requirements of § 1.12(1)).

¹³ *See id.* At § 3.04.

¹⁴ *See* CRUMP & PARRY, *supra* note 5, at 336 (discussing burdens of proof for true defenses).

¹⁵ *See* MODEL PENAL CODE §§ 3.04(1), 3.09 (AM. L. INST., 1985).

¹⁶ Compare *id.* at § 3.04(1), *with* §§ 210.2 (murder); 211.1 (assault).

¹⁷ *Id.* at § 2.13.

¹⁸ *See* CRUMP & PARRY, *supra* note 5, at 338.

¹⁹ Crump & Parry, *supra* note 5, at 38 n.1.

²⁰ *See id.*

²¹ *Alibi*, DICTIONARY.COM, <https://www.dictionary.com/browse/alibi> [<https://perma.cc/7HC6-NM8K>] (last visited Jan. 23, 2025).

Incidentally, the Model Penal Code does not contain a general defense of alibi. Neither do state codes patterned on the Model Penal Code, even though they may carefully define the burden of proof that surrounds all elements of a crime.²² But the linkage of alibi to the identification of the defendant has several implications: the judge's instructions to the jury may be considered sufficient even though they include nothing about alibi.²³ And an instruction requiring proof beyond a reasonable doubt that the defendant was the perpetrator may be enough under the law.²⁴

An alibi usually does not stand by itself. It is ordinarily accompanied by an attack on the credibility of the eyewitnesses who have identified the defendant.²⁵ Sometimes, the jury may wrongly decide that the issue is whether the alibi is proved, rather than whether the defendant's identification has been proved beyond a reasonable doubt.²⁶

B. The Supreme Court Cases and the Model Penal Code

The Supreme Court has considered the issues raised by different defensive theories. In *Mullaney v. Wilbur*,²⁷ the Court held that Maine's system for distinguishing between murder and manslaughter was unconstitutional. Maine defined manslaughter as a passion killing, in which the passion element rebutted the element of malice required for murder.²⁸ But Maine also put the burden of proving the passion element on the defendant.²⁹ Thus, the defendant had to disprove malice, which was one of the elements of murder. The Court held that instead, all elements of a crime must be proved by the prosecution.³⁰

²² See, e.g., TEX. PENAL CODE ANN. §§ 2.01-.04 (West 1994) (defining burdens of proof for elements, exceptions, defenses, and affirmative defenses).

²³ See *infra* Part VII (discussing court's instructions).

²⁴ See discussion *infra* Part VII.

²⁵ See *infra* Part V(C) (discussing methods of attacks upon eyewitnesses).

²⁶ See *infra* Part VII (discussing instructions to counteract these jury impressions).

²⁷ *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

²⁸ *Id.* at 686.

²⁹ *Id.* at 686-87.

³⁰ *Id.* at 696, 702, 704 (affirming the decision of the court of appeals, which affirmed the grant of a writ of habeas corpus).

New York's hierarchy of homicides defined the passion element in manslaughter differently. It was a separate issue: an "affirmative defense" rather than an element of any crime, and if proved by the defendant, it could lower the grade of the crime to manslaughter.³¹ New York, thus, avoided the placement of the burden of proof of elements of murder or manslaughter on the defendant. In *Patterson v. New York*, the Supreme Court upheld this system of crime definition.³² Critics rightly pointed out that the Maine and New York definitions of manslaughter accomplished the same thing; they were functionally equivalent.³³ However, the New York system placed the burden of proof of all elements of murder and manslaughter on the prosecution, and even if the difference between the states amounted to legislative legerdemain, the important point—the prosecution's burden of proof—was preserved.

C. Alibi and the Burden of Proof: A Rebuttal to an Element of the Crime

So, what about alibi as a defensive theory? It is not an affirmative defense. In short, it is a rebuttal to the crime element that requires that the defendant be the person who committed the crime.³⁴ It is analogous to *Mullaney* rather than to *Patterson*. Therefore, it requires that the burden of proof beyond reasonable doubt be placed on the prosecution, but establishment of an alibi requires affirmative evidence from the defendant. As a result, there sometimes is confusion in jury instructions about the placement of the burden of proof, and sometimes a trial court's confusion will require reversal.³⁵

³¹ *Patterson v. New York*, 432 U.S. 197, 199-201 (1977).

³² *Id.* at 216.

³³ *Id.* at 220-21 (Powell, J., dissenting); CRUMP & PARRY, *supra* note 5, at 230 (discussing the comparison between *Mullaney* and *Patterson*). However, The Court continued to follow *Patterson*. See, e.g., *Martin v. Ohio*, 480 U.S. 228 (1987) (upholding placement of burden upon defendants claiming self-defense).

³⁴ See CRUMP & PARRY, *supra* note 5, at 338.

³⁵ See *infra* Part VII.

II. NOTICE OF ALIBI AND THE FIFTH AMENDMENT

Does a notice of alibi requirement violate the defendant's right against self-incrimination, since it provides the Government with information that it will use to convict him? In *Williams v. Florida*,³⁶ the Supreme Court upheld Florida's notice-of-alibi rule against a constitutional attack based on the Fifth Amendment. The Court explained,

Given 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. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. 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.³⁷

The Court then explained the effect of notice-of-alibi requirements:

At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.³⁸

If the trial court determines that the notice of alibi is insufficient and disallows witnesses from testifying about the alibi, questions arise regarding the defendant's right to present a defense. The Supreme Court recognized this right in *Chambers v. Mississippi*.³⁹ However, the defendant's right to present a defense is not without exception; at its most basic, for example, it does not

³⁶ *Williams v. Florida*, 399 U.S. 78, 78 (1970).

³⁷ *Id.* at 81-82 (footnotes omitted).

³⁸ *Id.* at 85.

³⁹ *Chambers v. Mississippi*, 410 U.S. 284, 284 (1973).

allow testimony that violates the Federal Rules of Evidence. “⁴⁰ In addition, in *Michigan v. Lucas*⁴¹ and *Taylor v. Illinois*,⁴² the Court recognized the constitutionality of excluding alibi witnesses in the event of an insufficient notice.⁴³ The reasons for this result include the prevention of surprise at trial and the discouragement of false alibis.⁴⁴

But the right to present a defense still lingers. The requirement of a notice of alibi does not apply to the defendant’s testimony.⁴⁵ He or she has the right, in spite of potential surprise and the possibility of a perjured defensive theory, to testify to an alibi that is raised for the first time during trial. The reason for the omission of the defendant from the requirement is probably the defendant’s right to present a defense.⁴⁶ And if other witnesses are attacked as disclosed only by an inadequate disclosure, or even not at all, the trial court’s discretion includes consideration of the defendant’s right to offer a defense as a weight factor.⁴⁷

III. INSUFFICIENCY OF THE NOTICE AND EXCLUSION OF WITNESSES

A. *Rule 12.1—The Federal Rule Requiring Notice*

The Federal Rules of Criminal Procedure require pretrial notice of alibi to be given by the defense to the Government upon request. Specifically, Rule 12.1 provides that the Government has the right to demand that the defendant give written notice of an intent to use an alibi defense. So that the defendant can know what

⁴⁰ *Id.* at 302 (“the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.”).

⁴¹ *Michigan v. Lucas*, 500 U.S. 145, 154 (1991).

⁴² *Taylor v. Illinois*, 484 U.S. 400, 411 n.16, 412 n.17 (1988).

⁴³ *Michigan v. Lucas*, 500 U.S. 145, 154 (1991); *Taylor v. Illinois*, 484 U.S. 400, 411 n.16, 412 n.17 (1988).

⁴⁴ *See Taylor*, 484 U.S. at 411 n. 16, 412 n.17 (preventing surprise); *see also State v. Deffebaugh*, 89 P.3d 582 (Kan. 2004) (preventing “last minute, easily fabricated defenses.”).

⁴⁵ FED. R. CRIM. P. 12.1(e) (omitting defendant from requirements).

⁴⁶ FED. R. CRIM. P. 12.1, Advisory Committee Notes.

⁴⁷ *See infra* Part IV.B. (discussing the trial court’s options in the event of an insufficient notice).

to provide, the demand must include the “time, date, and place of the alleged crime.”⁴⁸

Within fourteen days of the demand, or at another time set by the court, the defense must provide the required notice.⁴⁹ The notice has to set out the place or places that the defendant alleges he was at the time of the crime, as well as the name, address, and telephone number of each alibi witness.⁵⁰ If the defendant does not comply with this requirement, the court may exclude the alibi witness’ testimony. However, the court may not exclude the defendant’s own testimony.⁵¹ The reason is probably the defendant’s right to present a defense.⁵²

Then, if the defendant serves a counter-demand on the Government, it must disclose the name, address, and telephone number of each witness, not a victim, who was present at the scene of the crime, upon whom the Government intends to rely to establish that the defendant was present, as well as each witness that it intends to use in rebuttal to the alibi.⁵³ Victims are not included in this disclosure requirement in compliance with the Crime Victims’ Rights Act, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for their dignity and privacy.⁵⁴

The trial court has authority to exclude any nondisclosed witness other than the defendant.⁵⁵ In other words, the defendant can establish an alibi even if nothing is disclosed. The requirement of notice extends until trial with a continuing duty to disclose.⁵⁶ The court has discretion to modify any part of these duties.⁵⁷

⁴⁸ FED. R. CRIM. P. 12.1(a)(1); *see generally* STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 12:16 (2023-24 ed.) (2023 update) (explaining Rule 12.1).

⁴⁹ Fed. R. Crim. P. 12.1(a)(2).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See supra* Part III (discussing the right to present a defense).

⁵³ FED. R. CRIM. P. 12.1(b)(1)(A).

⁵⁴ FED. R. CRIM. P. 12.1(b)-(c), Notes on the 2008 Amendments (2008) (citing Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1)-(8)).

⁵⁵ FED. R. CRIM. P. 12.1(e).

⁵⁶ FED. R. CRIM. P. 12.1(c).

⁵⁷ FED. R. CRIM. P. 12.1(d).

B. What Is an Alibi to which the Requirement Applies?

Some courts, in applying the notice requirement, have faced the question, “What is an alibi?”. If the defense that is presented is not covered by the rule or statute at issue, no notice is required. For example, in *State v. Deffebaugh*,⁵⁸ the defendant offered a witness who would have testified that he was at the controlled buy of cocaine that was the basis of the criminal charge, but the defendant “was not there.” The state objected because the defendant had failed to provide a notice of alibi. The trial court agreed with the state and excluded the witness.

The Kansas Supreme Court reversed the conviction. Case law had not addressed the question, “[W]hat is an alibi subject to the notice requirement?”⁵⁹ The notice statute was ambiguous.⁶⁰ The court cited case authority saying that “an alibi places the defendant at the relevant time in a different place than the scene involved.”⁶¹ The statute requiring notice said that the defendant must state “where the defendant contends he was at the time of the crime,”⁶² implying that the notice requirement applied to an alibi in which the defendant specified his location at the time of the crime. Ultimately, the court decided that the witness at issue “was not an alibi witness.”⁶³

The court’s decision in *Deffebaugh* could have deprived the state of the opportunity to investigate what the questioned witness was prepared to say.⁶⁴ He may have been unknown to the prosecution, and he may have been allied with the defendant or otherwise inclined to provide a false story. However, as a matter of statutory interpretation, the *Deffebaugh* decision seems correct.

⁵⁸ *State v. Deffebaugh*, 89 P.3d 582, 584 (Kan. 2004); accord *State v. Greene*, 329 P.3d 450 (Kan. 2014).

⁵⁹ *Deffebaugh*, 89 P.3d at 585.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 586.

⁶³ *Id.*

⁶⁴ See CRUMP & PARRY, *supra* note 5, at 340-41. In this case, it arguably did not deprive the state of this opportunity because the excluded witness was arrested along with Deffebaugh. But in other cases, the bystander might be someone unknown to the state. Even in *Deffebaugh*, the state might not have considered that the witness would testify that Deffebaugh was not there, because the crime was a controlled buy with marked money and because of the arrest of the witness with Deffebaugh. See 89 P.3d at 586.

The court candidly stated that the statute was ambiguous, and it used relevant authorities in deciding what the statute meant.

But the problem remains: There are infinite ways that similar questions might be raised, because the word “alibi” is itself ambiguous. For example, in *United States v. Llinas*,⁶⁵ the defendant offered documents showing that he was at work at the time of the crime. The court decided that documents were not “witnesses” and that the notice requirement did not apply even though there would have been a live “alibi” witness to authenticate the documents. On the other hand, in *United States v. Ford*,⁶⁶ a witness who testified that it would have been psychologically impossible for the defendant to have committed the bank robbery at issue was held to have been an alibi witness. It is an understatement to say that the cases are inconsistent and unpredictable.

C. Sufficiency of the Notice

To be sufficient, the Rule says that the notice must contain four items: the place where defendant claims to have been at the time of the offense, the name of the witness, his or her address, and telephone number.⁶⁷ In *United States v. Hemphill*,⁶⁸ the court granted a motion to strike the first two paragraphs of the notice, which included the following:

On May 22, 2010, the Defendant was in Chicago, Illinois. Timothy Whitfield, address and telephone unknown, Mrs. Whitfield (mother of Timothy Whitfield), address unknown, Michael Powell, 13831 South Michigan, Riverdale, Illinois, Telephone 773-575-5181.⁶⁹

The court did not explain its cutting of the alleged witness Michael Powell, whose disclosure seems to have included all required items. But it refused to strike the third paragraph of the notice, which contained the name of a witness and all other required items.

⁶⁵ *United States v. Llinas*, 373 F.3d 26, 34-36 (1st Cir. 2004).

⁶⁶ *United States v. Ford*, 683 F.3d 761 (7th Cir. 2012).

⁶⁷ FED. R. CRIM. P. 12.1(a)(2).

⁶⁸ *United States v. Hemphill*, No. 3:12-CR-128(7), 2013 WL 833192 (N.D. Ind. Mar. 5, 2013).

⁶⁹ *Id.* at *1.

This interpretation of the Rule is likely to make representing an accused defendant impractical for many lawyers, particularly in federal court. The busiest lawyer may have as many as a hundred or more pending matters, all in various stages of development. An early request for alibi information from the Government will require the attorney to diligently find out about all four required items quickly. If the defendant does not know the particulars about the witnesses—imagine, for example, a store clerk who can furnish an alibi but is no longer employed where the defendant encountered her—the defense lawyer may need to hire an investigator. But money to do so often will be scarce, especially if the lawyer is appointed to represent the client.

In that event, the lawyer will need to move the court to provide funds to pay an investigator. This step alone may take enough time to prevent the filing of a notice of alibi within the limit of fourteen days. And it will be wasteful if the attorney is negotiating a settlement. In this event, the lawyer may find that the prudent course is to file a notice resembling the one struck in *Hemphill*, with the intention of supplementing the initial notice when it is possible, a practice mentioned in Rule 12.1.⁷⁰

⁷⁰ See FED. R. CRIM. P. 12.1(d) (providing that defendant has a continuing duty to supply the required information).

In *May v. Romanowsky*,⁷¹ the court explained that there was no written notice at all:

It is undisputed that Petitioner never filed a Notice of Alibi Witness. It is further undisputed that Reanta Carter, Petitioner's proposed alibi witness, was never identified as an alibi witness until the morning of the second day of trial Although his name was listed on Petitioner's . . . witness list, there was no indication on that list that Carter would be called as an alibi witness. Furthermore, Carter was only listed on the witness list by name; no address or phone number was given other than to indicate that Carter lived in "Ohio."⁷²

The court added, "[t]he only indication ever given about any possibility of any alibi witnesses was at a hearing that was held on defense counsel's pretrial motion for leave to hire a private investigator . . . more than four months prior to trial."⁷³ In presenting that motion to the trial court, defense counsel indicated that he wanted to hire a private investigator "to go out and talk to at least six witnesses that I've been made aware of and they would be testifying as to the whereabouts of the Defendant at the time of these incidences."⁷⁴ But the defense attorney did not mention Reanta Carter during the hearing. The investigator was unable to locate Mr. Carter until the second day of trial.⁷⁵

The trial court held that the notice was insufficient and excluded Carter's testimony.⁷⁶ The case shows not only typical problems with providing notice but also the difficulty of dealing with unlocatable witnesses.

⁷¹ *May v. Romanowski*, No. 2:05-CV-72558, 2009 WL 366037, at *5 (E.D. Mich. Feb. 11, 2009).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *6.

In *Baxter v. Duckworth*,⁷⁷ the defendant asserted only that he was “somewhere in Pennsylvania” at the times of two of the offenses.⁷⁸ The victims were unable to specify the exact dates of the crimes, and although the court asserted that it would have been a “simple matter”⁷⁹ for the defendant to have subpoenaed driving logs that would have shown the dates and times of the alibis, he did not.⁸⁰ This circumstance prompted the court to remark that “the risk of fabrication was considerable.”⁸¹ More to the point, “[t]he state’s opportunity to investigate or rebut such a vague alibi was minimal.”⁸² The notice, said the court, was insufficient.⁸³ The *Baxter* case shows both the difficulty of providing all of the information required for the notice and the problem created for the Government or state by inadequate information.

D. Exclusion of Witnesses When Notice of Alibi Is Inadequate

What happens if the defendant violates the requirement of notice of alibi but, nevertheless, proceeds to call witnesses to establish an alibi? It depends on the nature, willfulness, and prejudice of the violation. If, for example, the defendant has omitted the telephone number of a witness and the Government has been unable to locate that witness, the court may still decide not to exclude the witness. Moreover, if the defendant fails to notice a witness at all, the court is authorized by the Rule to exclude or not to exclude the witness. What will the court do within its broad discretion? It depends on the judge.

⁷⁷ *Baxter v. Duckworth*, 761 F. Supp. 576 (N.D. Ind. 1989).

⁷⁸ *Id.* at 583.

⁷⁹ *Id.* (This was the court’s assertion. The subpoenaing of documents may not be a simple matter).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 584.

Specifically, in *United States v. White*,⁸⁴ the court identified five factors that should be considered in excluding testimony:

“(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant’s guilt, and (5) other relevant factors arising out of the circumstances of the case.”⁸⁵

This list has survived in cases in various circuits and dates near the present day.⁸⁶ However, the list is ambiguous, and the cases concerning exclusion show mixed results. In *United States v. Dye*,⁸⁷ for example, the court excluded one late-disclosed witness but refused to exclude another. The court explained that the prejudice against the United States regarding the excluded witness was serious since the disclosure was made only a few days before trial, leaving little time to investigate.⁸⁸ The Government conceded that the prejudice regarding the other witness was lesser because she had been identified in another case against the same defendant for the same kind of crime.⁸⁹ Therefore, the court allowed this witness.⁹⁰

Sometimes, a court’s response to the defendant’s failure to provide full notice seems like mere wordplay. In *United States v. Rodgers*,⁹¹ for example, the court declined to exclude witnesses because the Government had not offered arguments about prejudice and because the case was at the pretrial stage.⁹² The court, therefore, stated that it would allow an objection during trial. Cryptically, the court added, “Rule 12.1 does not allow the Court to

⁸⁴ *United States v. White*, 583 F.2d 899, 902 (6th Cir. 1978).

⁸⁵ *Id.* at 902.

⁸⁶ *See, e.g.*, *United States v. Edwards*, No. 18-CR-162-JDP, 2020 WL 549288, at *3 (W.D. Wis. Feb. 4, 2020) (creating a shorter list); *see also*, *United States v. Dye*, No. 1:10CR221, 2011 WL 1981066, at *2 (N.D. Ohio May 19, 2011); *United States v. Creamer*, 721 F.2d 342, 344 (11th Cir. 1983) (listing the same factors).

⁸⁷ *United States v. Dye*, 2011 WL 1981066, at *2.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *United States v. Rodgers*, No. 2:08-CR-56, 2009 WL 3498801 (W.D. Mich. Oct. 26, 2009).

⁹² *Id.* at *6.

exclude the presentation of an alibi *defense*; it merely allows the Court to exclude the *testimony* of undisclosed witnesses.”⁹³

Sometimes, however, discretion is harsher. In *United States v. Pearson*,⁹⁴ the court held that the defense counsel had been diligent even though he filed the defendant’s notice of alibi late. The court said the defendant had been negligent in failing earlier to inform his lawyer that he had an alibi.⁹⁵ The defendant must have known of the alibi long before the prosecution’s demand for notice of alibi. Counsel’s diligence did not supply good cause in light of the defendant’s lack of it. The court, therefore, upheld the exclusion of the alibi witnesses.⁹⁶

E. Gamesmanship

Rule 12.1 also provides that the defendant may withdraw an earlier-filed notice of alibi.⁹⁷ If the defendant does so, the Government may not comment on the notice or its withdrawal.⁹⁸ In other words, the defendant can freely file and withdraw a notice without the jury’s knowledge of either step.

This provision creates the possibility of a dirty trick for the overly aggressive defense lawyer. Hypothetically, this attorney has no intention of using an alibi defense because the potential witnesses are not credible, or are impeachable with prior convictions, or both. Yet, the defense lawyer files a notice of alibi that contains six or eight names. The witnesses might be friends of the defendant and may supply an alibi to investigating prosecutors, or they may refuse to talk. Nothing in Rule 12.1 requires alibi witnesses to cooperate with the Government.⁹⁹

⁹³ *Id.* (emphasis in original).

⁹⁴ *United States v. Pearson*, 159 F.3d 480, 484 (10th Cir. 1998).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See* FED. R. CRIM. P. 12.1(f).

⁹⁸ *Id.*

⁹⁹ The Government conceivably could call such witnesses before a grand jury, but that process would involve delay and complexity that probably would make the idea impractical.

The point would be to lead the Government into a lengthy but pointless investigation, hoping that it will cause something else that the Government would otherwise have done to slip by. In fact, the Supreme Court recognized such a dirty trick in *Taylor v. Illinois*¹⁰⁰ by saying, “the inference that [the defense lawyer] was deliberately seeking a tactical advantage is inescapable.”¹⁰¹

A reader can understand this problem for the Government or state by considering a student studying for a final examination. The student somehow misunderstood the exam coverage. He or she spent many hours studying material that will not be covered. All of the other students in the class have studied the right material, and so has this student; however, the student also spent a lot of time and effort on subjects that do not matter. The student will surely have studied the covered material less than if the distracting material had not existed. The Government or state would similarly be distracted from its proper task by its investigation of a nonexistent alibi.

If this tactic has been used, it is unlikely to ever appear in any case report. The defendant would provide and withdraw the notice, having ostensibly a perfect right to take both actions.¹⁰² Perhaps a court might detect that the notice was given in bad faith with the hope that it might get the Government or state to spend effort on a fruitless task.¹⁰³ However, evidence to sustain such a basis for sanctions would be virtually impossible to find. Not only would the willfulness of the defense lawyer remain locked in the defendant’s head, but, as the courts sometimes acknowledge, alibi is easy to fabricate.¹⁰⁴ The defense cannot control the credibility of the witnesses or the need for them, all of which makes sanctions for the tactic impractical.

¹⁰⁰ *Taylor v. Illinois*, 484 U.S. 400 (1988).

¹⁰¹ *Id.* at 417.

¹⁰² See FED. R. CRIM. P. 12.1(f) (providing that withdrawal of alibi notice cannot be commented upon by the Government).

¹⁰³ See *Taylor*, 484 U.S. at 417 (recognizing this situation).

¹⁰⁴ See, e.g., *United States v. Robinson*, 602 F.2d 760, 762 (6th Cir. 1979).

This tactic might or might not greatly affect the federal system. Government lawyers and the FBI have resources that would allow for the investigation of several alibi witnesses and other trial preparations. However, state systems do not always have such resources. To the surprise of many citizens, the author of this article, who was once an assistant district attorney, found that steps as simple as bringing willing out-of-state witnesses to the courtroom entailed more expense than the county would allow.¹⁰⁵ It is not difficult to imagine that a notice of alibi that is never intended to be the foundation of a defense would press a state's attorney. Incidentally, the same underhanded tactic could conceivably be employed by a Government lawyer in listing rebuttal witnesses, although closer supervision and the unusual nature of rebuttal witnesses make it less likely.

A further tactic might involve late filing of the notice, even close to the eve of trial. Some federal district judges have softer hearts than others.¹⁰⁶ It is easy to know which judges would be more tolerant of late filing. Further, even if the judge is hard-hearted, the late-filing tactic might work in getting the prosecution to perform unnecessary tasks by the filing of a notice when the defense has no intention of using an alibi defense in the first place.

¹⁰⁵ Author experience (1974).

¹⁰⁶ Cf. *United States v. Dye*, No. 1:10CR221, 2011 WL 1981066, at *2 (N.D. Ohio May 19, 2011) (permitting late-disclosed witness).

IV. THE PRACTICAL ASPECTS OF PRESENTING OR COUNTERING AN ALIBI

A. Deciding upon and Gathering Proof for an Alibi

“It’s difficult for the client to put together an alibi,” a coauthor and defense attorney told this author, “unless, of course, it’s perjurious.”¹⁰⁷ Additionally, a federal appeals court stated, “an alibi . . . is often as difficult to establish firmly as it is easy to fabricate.”¹⁰⁸ This is true because the indictment is often the first signal that tells the defendant about the charge, and it may be filed months or years after the event on trial. ~~And~~ the planning of the alibi usually awaits the hiring of a defense lawyer and the sufficiency of his work on the case to make him aware that an alibi might exist. Then, the demand for notice of alibi tells the defense lawyer the date, time, and place of the crime. Next, the defense lawyer must learn where his client claims to have been at that moment and who, if anyone, can (and is willing) to testify to the alibi.

If willing witnesses appear, the defense lawyer sets them to thinking about what they were doing on that day, which by now is long ago. A reader can appreciate the difficulty of this task by asking, “what was I doing at 11 a.m. on August 23 of last year?” Then, the issue becomes, “did I connect with the defendant on that day?” and “did I see him at approximately that time on that day?”

This author recalls, during his time in the criminal courts, seeing two kinds of bad alibis, which might be called the false document alibi and the wrong-day alibi. Sometimes, defendants and their alibi witnesses cobble together documents that purport to show that the defendants were somewhere other than the crime scene. A transparent example appears in a publication of which this author is a coauthor.¹⁰⁹ A wrong-day alibi occurs because many

¹⁰⁷ Interview with William J. Mertens, Washington, D.C. (2001). The lawyer may even suspect that the alibi is fabricated but not know of it.

¹⁰⁸ *United States v. Robinson*, 602 F.2d 760, 762 (6th Cir. 1979).

¹⁰⁹ DAVID CRUMP & WILLIAM J. MERTENS, *THE STORY OF A CRIMINAL CASE: THE STATE V. ALBERT DELMAN GREENE* 96-97 (1984) (depicting the document, which was a hospital release of one of the defendant’s alibi witnesses and noted his return, which in turn was used to fix the time during which the witness saw the defendant. Unfortunately

crimes occur at night, shortly after midnight. Alibi witnesses can easily mistake the date and think that the crime occurred on the next night, which begins on the date of the crime.¹¹⁰

All of these issues make for controversies during the presentation and cross-examination of the alibi witnesses. The defense lawyer is often trying to get the jury to credit the alibi by developing something unusual that happened that day. This tactic is intended to show that the witnesses' memories are accurate about the day and time. Sometimes the alibi turns out to be the defendant's mother, who says, "He was watching the news on TV with me at that time," which is not particularly credible but may be the best the witnesses can present. The Government or state's lawyer tries to show that the events of the day were not very memorable. For example, they may ask "you were watching the news at 6 o'clock instead of being with your friends?"

B. The Pretrial Investigation after the Notice of Alibi

Usually, the defendant's notice of alibi triggers an investigation by the Government or state, although it may not if the state is short-handed or overwhelmed with cases. Sometimes, the investigation occurs hurriedly during trial.¹¹¹ The investigation will attempt to learn how the named witnesses learned of the need for an alibi, how they decided upon the events leading to the alleged absence of the defendant from the crime scene, and credibility factors.

Sometimes, witnesses refuse to talk to investigators. It is usually impractical to force them to be interviewed (a grand jury subpoena is probably the only way, but it is not typically practical). The point, then, is for the investigator to carefully preserve the words of refusal so that they are capable of being clearly presented at trial. Then, the witness's noncooperation can be treated at trial as what it is: an effort to keep the Government in the dark and surprise it at trial, showing a bias toward the defendant.

for the defendant, it also contained the name of the defendant's lawyer, written in handwriting that duplicated the crucial handwriting in the release).

¹¹⁰ See *id.* at 98 (reflecting testimony of alibi witness who could not recall the date of her alibi); see also *id.* at 102 (showing alibi on the wrong date).

¹¹¹ See *id.* at 102 (depicting a truncated investigation during trial).

C. Attacks on an Identification

The first step in presenting an alibi is to attack the eyewitness identification. Usually, this kind of tactic is accomplished by cross-examination. This author has listed in another publication several different ways to undermine an identification, including:

- ❖ The witness is of a class of persons jurors will believe are unable to identify reliably (children, the aged, persons with heavier eyeglasses).
- ❖ The witness's mental condition precludes accurate identification (fright, consumption of alcohol).
- ❖ Conditions were not conducive to accurate identification (distance, brevity, lighting).
- ❖ The defendant belongs to a class of persons the jury will believe are difficult for the witness to identify (a person of another race, unremarkable face).
- ❖ Discrepancies in identification among witnesses (facial hair, words spoken).
- ❖ Discrepancies in statements of the same witness (produced by detailed questioning of the witness prior to trial).
- ❖ Improper motive of the witness (to conceal cash shortages, to see someone convicted, to obtain a reward).
- ❖ Taint of the identification (suggestive lineup, suggestions from officers or others).
- ❖ The opinion nature of the identification (inability to particularize facial characteristics).
- ❖ The witness's own past expressions of certainty or uncertainty.
- ❖ The time taken for the identification at the lineup (was it immediate, or did it take longer?).¹¹²

¹¹² See *id.* at 67.

The last item can be used universally. If the identification was immediate, one can argue that the witness allegedly failed to consider it fully; if after a time, the witness allegedly was uncertain.¹¹³ Few cases will present all of these issues, but defense lawyers are good at picking out the ones that tend to shake an identification.¹¹⁴

What does an assistant district attorney (“ADA”) do in response to these tactics? First, during the voir dire examination, the ADA may have explained the traps in cross examination to the potential jurors. On re-direct, the ADA can consult the same list and bring out the issues to which the answers will be favorable to the prosecution. “Was the lighting good, so that you could see well? Were you close enough to see him well? And did the defendant have the same mustache as he has today in the courtroom, as an identifying characteristic?”¹¹⁵

D. Presenting and Contesting an Alibi Before a Jury

The defense attorney, of course, attempts to present the alibi in a credible manner. First, the lawyer may attempt to personalize the witnesses by drawing out their backgrounds: schools, jobs, marital status, children, and the like. Then, the defense will ask the witnesses about the alibi: where the defendant allegedly was and why he was there. During this part of the evidence, the defense lawyer will attempt to elicit a sound reason for the witnesses’ memory of the events involved. This last part is the most difficult. In this author’s publication mentioned above, there appears an effort by the defense lawyer to perform this step.¹¹⁶

¹¹³ *Id.*

¹¹⁴ *See id.* at 50-55 (containing pretrial examination of principal witness, including his age of fourteen, absence of particular facial features, his waiting for a time to make the identification so that it was allegedly uncertain, alleged taint from the lineup in which defendant was the first suspect in line and was not wearing shoes, etc.).

¹¹⁵ *Id.* at 92 (showing that the ADA, on cross examination, asked the principal witness, “[the defense lawyer] asked when you made up your mind you were positive. . . . Did you ever, at any time, have any serious doubt that this was the man who had robbed you?” To which the witness replied, “No, sir.”).

¹¹⁶ *Id.* at 97 (reporting testimony by alibi witness to the effect that he was in the hospital that day because of a car wreck but checked himself out because “my son [the defendant] had the pickup truck and was driving it and he’s not supposed to.”).

The ADA's response is to attempt to shake the alibi. "You now claim¹¹⁷ you were at your mama's house watching *Gunsmoke*? That TV program is so old it's in black and white, isn't it? Your mama wasn't also interested in *Gunsmoke*, was she?" This is done with other cross-examinations about the details of the program, the reason for his being at his mother's home instead of his own apartment, and similar questions.

E. The Importance of Investigating the Alibi

The subparts above show why investigating an alibi is important. The investigator may learn why the time and date of the crime alleged were memorable to the alibi witnesses. The investigation may show a date that is inconsistent with the date of the crime or a false document upon which the alibi is founded.¹¹⁸ It may develop inconsistencies among alibi witnesses that tend to show that the alibi is perjurious. It may demonstrate bias in favor of the defendant, sources of impeachment, and conflicting statements. It may even show that the alleged alibi allows time for the defendant to have committed the crime because the two places are close to each other.

These subparts also raise issues about what the trial judge should do about undisclosed alibi witnesses. Before allowing testimony after an insufficient defense, the court should carefully examine a last-minute witness's testimony and consider what information might have been available for cross-examination but now is missing.

¹¹⁷ This "you now claim" formula has various purposes for the prosecution. The witness "now" claims what he says, with the implication that he has told other stories before or at least has never brought this testimony to light. The now "claim" phrase implies that the witness is not going to be a truth teller — "but let's hear it anyway."

¹¹⁸ See *supra* Part V(C).

V. DECLINING TO PRESENT THE ALIBI

In addition to considering how to find the information for a notice of alibi and filing the required document, the defense lawyer has to mud-wrestle with the question whether to present an alibi for which there are available witnesses. The attorney's involvement has probably included meeting with the witnesses to discuss how to remember the alibi. On this date and time, the lawyer will ask, where were you, and did you see the defendant then? And how do you recall this date and time? Naturally, the early encounters with such witnesses are likely to raise suspicion.

If the witnesses provide documents, the lawyer needs to probe whether the documents have been created by the witnesses or the defendant and whether the documents present discrepancies clear enough to make their presentation to a jury inadvisable, if not unethical.¹¹⁹ The attorney also needs to be careful to avoid having the witnesses alibi the defendant on the wrong day.¹²⁰

But a bigger consideration lies in whether to present the alibi at all. Frequently, alibis are based on testimony of friends, relatives, or associates of the defendant. And it is possible, then, that the alibi can be derogated in credibility to the point that it is harmful to the defendant rather than helpful.

The courts have recognized the dangers in presenting an alibi. In *Henry v. Poole*,¹²¹ the court observed, “[I]t is generally acknowledged that an attempt to create a false alibi constitutes evidence of the defendant’s consciousness of guilt. . . . Many jurors regard a false alibi as an admission of guilt;” and in *DeCicco v. Ercole*,¹²² the court said that a “jury might react negatively” to conflicts in an alibi.

¹¹⁹ See *supra* Part V(A) (explaining the false-document alibi).

¹²⁰ See *id.* (explaining the wrong-day alibi).

¹²¹ *Henry v. Poole*, 409 F.3d 48, 65 (2d Cir. 2005).

¹²² *DeCicco v. Ercole*, Civ. No. 9:07-CV-1030 (GLS/RFT), 2010 WL 7884568, at *11 (N.D.N.Y. Dec. 22, 2010).

In addition, presentation of an alibi may make unpleasant evidence admissible. The simplest case to imagine is one in which an alibi witness who is a friend and associate of the defendant has a felony conviction that can be used to impeach him.¹²³ The conviction may then besmirch the defendant too.¹²⁴ And an alibi may shift the balance toward admitting other crimes against the defendant to establish his identity.¹²⁵ A robbery defendant, for example, may find himself defending multiple crimes beyond the one for which he is indicted.

The *DeCicco* court added that “defense counsel’s failure to file a notice of alibi or pursue an alibi defense . . . falls within the wide range of professional assistance considered reasonable”¹²⁶ However, a lawyer who does so faces potential problems. First, his client may not agree and may insist on raising the defense against his attorney’s advice. The lawyer then has a battle with his client, who may have the last word. The lawyer faces the later possibility of a disciplinary-rule complaint, then, from his client for presenting the defense.

Difficulty with his client is not the only kind of trouble faced by the lawyer who declines to present an alibi. The lawyer faces the possibility of an accusation of inadequate assistance of counsel: a claim of incompetence. The law usually is favorable to the lawyer, as *DeCicco* says, but defending oneself from the accusation is time-consuming and awkward.

The incident may prompt public criticism. In at least one case, such figures as actor Danny Glover and singer Kenny Rogers lambasted a defense lawyer publicly for omitting to call alibi witnesses and created nationwide publicity against the lawyer.¹²⁷ “Public accusations of ineffectiveness are acutely damaging to defense lawyer, and the risk of being found ineffective could lead to

¹²³ See FED. R. EVID. 609(a)(1) (allowing this kind of impeachment in proper cases).

¹²⁴ See FED. R. EVID. 609(a)(1)(A) (stating that the conviction “must” be admitted unless barred by FED. R. EVID. 403, which admits evidence unless the prejudice substantially outweighs the probative value).

¹²⁵ See FED. R. EVID. 404(b) (allowing other-crimes evidence for the purpose of establishing the defendant’s identity).

¹²⁶ *DeCicco*, 2010 WL 7884568, at *11.

¹²⁷ *Kenny Rogers Offers to Pay for Graham Retrial*, UPI ARCHIVES (June 1, 1993), <https://www.upi.com/Archives/1993/06/01/Kenny-Rogers-offers-to-pay-for-Graham-retrial/1858738907200/> [<https://perma.cc/U4GU-MFLS>].

decisions that are contrary to rational defense strategies about presenting alibis.”¹²⁸ In other words, defense attorneys may present to jurors alibis that are so weak that they may actually damage defendants’ cases.

In fact, the defense lawyer faces a no-win situation in such cases. For example, in *Clinkscale v. Carter*,¹²⁹ a concurring judge invited the defendant to file another petition for habeas corpus saying that his lawyer was ineffective because he presented an alibi that the jury was unlikely to believe. However, in *Jacobs v. State*,¹³⁰ the court granted a hearing to determine whether a defense lawyer was ineffective for failing to present an alibi. The courts might as well be saying to defense lawyers, “Heads I win, tails you lose.”

VI. THE COURT’S INSTRUCTIONS TO THE JURY ON ALIBI

A wide assortment of courts holds that the trial court is not obligated to give an instruction on alibi to the jury in the absence of a request. Therefore, the failure to do so in the absence of a request is reviewed only for plain error.¹³¹ In these cases, an instruction placing the burden of proof on the state is sufficient because it means that the alibi must be disproved beyond a reasonable doubt.¹³²

However, the connotation of the word alibi is generally negative,¹³³ and the jury may have heard the term during the trial. Therefore, counsel should usually request an instruction explaining

¹²⁸ CRUMP & PARRY, *supra* note 5, at 341.

¹²⁹ *Clinkscale v. Carter*, 375 F.3d 430, 447-50 (6th Cir. 2004) (McKeague, J. concurring in part and dissenting in part); *see generally* CRUMP & PARRY, *supra* note 5, at 341 (explaining the dilemma).

¹³⁰ *Jacobs v. State*, 880 So. 2d 548, 554-55 (Fla. 2004).

¹³¹ *Kellum v. Pierce*, 24 F. Supp. 3d 390, 403 (D. Del. 2014); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003); *Parrott v. State*, 254 S.E.2d 497 (Ga. Ct. App. 1979).

¹³² *See* CRUMP & PARRY, *supra* note 5, at 341-42 (“Strictly speaking, this instruction is unnecessary . . .”).

¹³³ *See Alibi Ike*, WIKIPEDIA, https://en.wikipedia.org/wiki/Alibi_Ike [<https://perma.cc/M7UH-TT7P>] (last visited Nov. 13, 2024). The disfavor of alibi may have started with a short story that featured alibis as excuses for one’s own mistakes. RING LARDNER, *ALIBI IKE* (1915). It was later made into a movie. Then, in 2006, there was a movie called *The Alibi*, later released as *Lies and Alibis*. *See The Alibi*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Alibi [<https://perma.cc/V5VB-YP9Z>] (last visited Nov. 13, 2024). These stories are merely indicative of the connotation of alibis.

alibi in a more positive way. The following is an example of an instruction on alibi:

A defense raised by the evidence in this case is what is known as an alibi; that is, that if the offense was committed, the defendant was, at the time of the commission thereof, at another and different place from that at which such offense was committed, and therefore, was not and could not have been the person who committed the same. Now if you have a reasonable doubt as to the presence of the defendant at the place where the offense was committed, if an offense was committed, at the time of the commission thereof, then you will find him not guilty.¹³⁴

This instruction treats an alibi as a legitimate defense and properly places the burden of proof on the Government or state. It forms a basis for final argument by the defense to the jury.

On the other hand, there are cases that indicate that the court should provide an alibi instruction even without a request. These cases consider factors such as whether the alibi is the defendant's principal or only defense,¹³⁵ the seriousness of the charged crime,¹³⁶ and the strength of the alibi.¹³⁷ One could argue that the court's duty to give the instruction is then a consequence of the defendant's right to present a defense.¹³⁸

Sometimes, instructions on alibi can confuse the burden of proof. It is easy for the de facto issue to become, in a trial, whether the alibi is proved rather than whether the state's case is proved beyond a reasonable doubt. The courts therefore are usually attentive to the placement of the burden of proof. For example, in *Commonwealth v. Berth*,¹³⁹ the trial court told the jury "you either believe one side or you believe the other side as to what took

¹³⁴ CRUMP ET AL., *supra* note 105, at 115.

¹³⁵ See *Marshall v. State*, 583 S.E.2d 884, 888 (Ga. 2003) (requiring instruction in such a case).

¹³⁶ See *State v. Corn*, 54 S.E.2d 559, 562 (S.C. 1949) (holding that where defendant's life was at stake, stronger case for requiring instruction arose).

¹³⁷ See *McNeese v State*, 316 S.E.2d 564, 567 (Ga. Ct. App. 1984) (holding that fact that alibi was "vague" weighed against duty of court to instruct).

¹³⁸ See *supra* Part III (discussing defendant's right to present a defense).

¹³⁹ 425 N.E.2d 766 (Mass. App. 1981).

place.”¹⁴⁰ The appellate court held that this comment, apparently in spite of other correct instructions, was reversible error because it inadvertently placed the burden on the defendant.¹⁴¹ Actually, the range of ways in which a trial court can misplace the burden of proof on alibi is wide.¹⁴²

Some cases allow the courts to give cautionary instructions on alibi in ways that favor the Government.¹⁴³ For example, here is such a charge:

“An alibi is easy to prove and hard to disprove, and testimony offered to prove this defense should be subjected, like all other evidence in the case, to rigid scrutiny for the reason that witnesses, even when truthful, may be honestly mistaken of, or forgetful of times and places.”¹⁴⁴ Other courts have disapproved such a cautionary instruction because it is “unnecessary at best, and potentially unfairly harmful.”¹⁴⁵

CONCLUSION

The treatment of alibi in the courts should be improved on several fronts. First, it would be a positive step if the alibi defensive theory were made a part of criminal codes with clear directions that the burden requires the prosecution to disprove an alibi beyond a reasonable doubt. Such a provision is unnecessary, strictly speaking, because this is the burden of proof on the whole case, but it might prevent confusion of the burden.¹⁴⁶ The jury instruction provided in Part VII of this article could serve as a basis for such a provision. Second, trial judges should rigorously follow available pattern jury instructions on alibi, especially those approved by the state’s appellate courts or by state bar associations.

The provision in Rule 12.1(f) disallowing comment before the jury, about defendant’s having filed and withdrawn a notice of alibi,

¹⁴⁰ *Id.* at 767.

¹⁴¹ *Id.*

¹⁴² *See, e.g.,* Cangelosi v. United States, 19 F.2d 923 (6th Cir. 1927) (finding reversible error where court correctly placed burden on Government but then stated that alibi must be established by clear and convincing evidence).

¹⁴³ *See* CRUMP & PARRY, *supra* note 5, at 341 (asserting that some courts give this kind of instruction, which “weakens” the alibi).

¹⁴⁴ *See id.* at 342.

¹⁴⁵ United States v. Robinson, 602 F.2d 760, 762 (6th Cir. 1979).

¹⁴⁶ *See supra* Part VII (discussing court’s charge on alibi).

should be removed. As it stands, the provision allows the kind of gamesmanship that is described in this article,¹⁴⁷ by which the defense can tie up the Government's or state's investigators with futile and distracting rabbit trails. This issue may not be so serious in federal courts, because the FBI is able to undertake such investigations, but it would be important in some state courts, where states' attorneys often have little in the way of investigative resources.¹⁴⁸

Judges would be wise to always instruct on alibi if this defensive theory is raised by the evidence. Requirements of appellate courts for such an instruction, even in the absence of a request, are unpredictable.¹⁴⁹ Since, as is shown in Part VII of this article, the factors courts use to so decide are malleable, an instruction on alibi is an insurance policy against the possibility of an appellate reversal on this ground.

The requirement in Rule 12.1 of a notice of alibi, and the elements of such a notice, are clear enough. However, a provision should be added allowing the defendant to file a notice without the address and telephone number of a given witness who could not be located, as in fact occurs today.¹⁵⁰ Criminal defendants often are not perfect suppliers of information to their lawyers, witnesses move and sometimes absent themselves because they fear involvement, and defendants may not be able to supply telephone numbers and addresses. Counsel may be diligent but, nevertheless, not be able to locate persons who can substantiate an alibi.

Such a change in the notice rule should require the defense to describe the diligent efforts by both defendant and lawyer as well as in providing the information available about witnesses for the prosecution to begin a search. The resulting notice may, in a proper case, then be sufficient to enable witnesses to testify if they are found.

The notice-of-alibi rule or statute should be amended to provide that an attorney who either decides to present an alibi, or decides *not* to present an alibi, is not ineffective. Only a flat rule to this effect, without exceptions for negligence, will work. First, it is

¹⁴⁷ See *supra* Part IV(D) (discussing gamesmanship).

¹⁴⁸ See *id.*

¹⁴⁹ See *supra* Part VII (discussing court's charge).

¹⁵⁰ See *supra* Part IV(C).

unfair to the honest defense lawyer to second-guess this professional decision.¹⁵¹ Second, and more importantly, the possibility of second-guessing can often push the lawyer into a decision that disserves the client.¹⁵² The lawyer who declines to put on alibi witnesses because professional judgment says that the alibi will be harmful to the client deserves to be able to make this decision free of repercussions.¹⁵³

Finally, trial courts should favor a colloquy between the court and a defense lawyer, outside the presence of the jury, in which a lawyer can put on the record, if desired, the basis for a decision to avoid presenting an alibi. A lawyer can face serious criticism for declining to call alibi witnesses.¹⁵⁴

The danger of an alibi is that it can boomerang; it can hurt the defendant. The reasons for alibis to be recognized as false are infinite. Some surprising examples are contained in Part VI of this article. A lawyer who sees the danger of an alibi and realizes that such danger is greater than any potential benefit still has a potential motivation toward presenting the alibi, and the lawyer, who wants instead to help the client, deserves freedom to do his or her job and avoid the temptation.¹⁵⁵

¹⁵¹ *See supra* Part VI (discussing the lawyer's dilemma).

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*