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CRIMINAL PROCEDURE — CONSTITUTIONAL LAW — REFUSAL TO ALLOW DEFENDANT TO INTRODUCE TESTIMONY OF ALIBI WITNESS WAS NEITHER AN ABUSE OF DISCRETION NOR A VIOLATION OF DUE PROCESS WHEN THE DEFENDANT FAILED TO COMPLY WITH PROCEDURAL NOTICE OF ALIBI RULE. *Taliaferro v. State*, 295 Md. 376, 456 A.2d 29, *cert. denied*, 103 S. Ct. 2114 (1983).

Defendant was indicted for robbery with a deadly weapon and use of a handgun in the commission of a felony.¹ At trial, he attempted to call an alibi witness following the conclusion of the prosecution's case.² The prosecution argued that this testimony should be excluded because of the defendant's failure to identify the alibi witness following a request by the prosecution under Maryland Rule 741.³ The prosecution nevertheless offered to withdraw its objection to the alibi testimony if the court would grant a continuance, thereby affording the prosecution a fair opportunity to investigate the alibi witness's background and his proposed testimony.⁴ The trial judge refused to grant a continuance after learning that the terms of six of the jurors would expire prior to the resumption of the case.⁵ The trial judge thus excluded the proffered alibi testimony,⁶ and the defendant was convicted.⁷ In an unreported opinion, the court of special appeals affirmed the conviction.⁸ In *Taliaferro v. State*,⁹ the Court of Appeals of Maryland upheld the actions of the trial judge since the alibi witness was not identified until the last

1. *Taliaferro v. State*, 295 Md. 376, 399, 456 A.2d 29, 42, *cert. denied*, 103 S. Ct. 2114 (1983). Although the defendant was indicted for other related offenses, these offenses were not pressed by the state.

2. *Taliaferro*, 295 Md. at 381, 456 A.2d at 32.

3. Referred to as the notice of alibi rule, Maryland Rule 741(d)(3) provides that the defendant must furnish the name and address of each individual he intends to call as a witness to show the defendant was not present at the time, place, and date designated by the state. MD. R.P. 741(d)(3) (Supp. 1983).

4. *Taliaferro v. State*, 295 Md. 376, 400, 456 A.2d 29, 42, *cert. denied*, 103 S. Ct. 2114 (1983).

5. *Taliaferro*, 295 Md. at 400, 456 A.2d at 42.

6. A trial court may exclude alibi evidence under Maryland Rule 741(g). Rule 741(g) provides:

Upon motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. All material and information to which a party is entitled must be disclosed in time to permit beneficial use thereof.

MD. R.P. 741(g) (Supp. 1983).

7. *Taliaferro v. State*, 295 Md. 376, 377-78, 456 A.2d 29, 30-31, *cert. denied*, 103 S. Ct. 2114 (1983).

8. *Taliaferro*, 295 Md. at 378, 456 A.2d at 31.

9. *Taliaferro v. State*, 295 Md. 376, 456 A.2d 29, *cert. denied*, 103 S. Ct. 2114 (1983).

day of trial.¹⁰ Therefore, the court concluded that the preclusion of the testimony was neither an abuse of discretion nor a violation of due process.¹¹

Notice of alibi rules essentially require that a defendant submit to a limited form of pretrial discovery by the state whenever he intends to proffer an alibi defense at trial.¹² Since 1927,¹³ a majority of jurisdictions have adopted notice of alibi provisions¹⁴ and have advanced several reasons for their justification.¹⁵ First, notice of alibi provisions serve to prevent surprise at trial.¹⁶ Second, the notice requirement deters false alibis because defendants are aware that the information furnished will be investigated before trial.¹⁷ Third, "pretrial investigation results in a saving of money and trial time."¹⁸ For example, a prosecutor may dismiss the case premised upon the sufficiency of the alibi evidence.¹⁹ Fourth, "alibis which are presented at trial are accorded more respect."²⁰ Finally, notice of alibi statutes provide more liberal discovery in criminal cases²¹ because both parties have the opportunity to discover the other party's witnesses and thereby reduce the possibility of surprise at trial.

In the majority of states that have adopted the notice of alibi rule,

10. *Id.* at 378, 456 A.2d at 31.

11. *Id.* "Due process" in this context means the application to the states through the due process clause of the fourteenth amendment of the defendant's sixth amendment rights to compulsory process for obtaining witnesses. Brief for Appellant at 7, *Taliaferro v. State*, 295 Md. 376, 456 A.2d 29, *cert. denied*, 103 S. Ct. 2114 (1983).

12. *Williams v. Florida*, 399 U.S. 78, 80 (1970).

13. *Id.* at 81. In 1927 Michigan passed the first statute concerning alibis. See MICH. STAT. ANN. §§ 28.1043 to .1044 (1954); Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L., CRIMINOLOGY & POL. SCI. 29, 30 n.11 (1964).

14. A requirement for notice of an alibi defense currently exists in 35 states and in the District of Columbia. For a complete list of these jurisdictions, see *Taliaferro v. State*, 295 Md. 376, 387-88 nn.10-14, 456 A.2d 29, 35-36 nn.10-14, *cert. denied*, 103 S. Ct. 2114 (1983).

15. One author has compiled reasons justifying the notice of alibi requirement from his survey of decisional law. Epstein, *supra* note 13, at 31-32. The Court of Appeals of Maryland accepted these reasons in *Taliaferro v. State*, 295 Md. 376, 385-86, 456 A.2d 29, 34-35, *cert. denied*, 103 S. Ct. 2114 (1983).

16. See *Wardius v. Oregon*, 412 U.S. 470, 473 (1973) (state statute that did not provide for reciprocal discovery deemed unconstitutional since justice is best served by a system of liberal discovery that gives both parties the opportunity to discover the other party's witnesses and thereby reduces the possibility of surprise at trial); see also Epstein, *supra* note 13, at 31.

17. See *State v. Davis*, 63 Hawaii 191, 624 P.2d 376 (1981) (defendant's alibi witness was not permitted to testify because defendant failed to notify the state of his intention to rely on an alibi defense); see also Epstein, *supra* note 13, at 31.

18. *State v. Davis*, 63 Hawaii 191, 194, 624 P.2d 376, 379 (1981); see also Epstein, *supra* note 13, at 32.

19. In addition, since the prosecutor will not be surprised at trial by the alibi witness, there is no need for a continuance at trial. Epstein, *supra* note 13, at 32.

20. *Id.*; see *State v. Waid*, 92 Utah 297, 67 P.2d 647 (1937) (notice of alibi safeguards the defense from fraud and perjury).

21. Epstein, *supra* note 13, at 32.

a defendant's failure to comply with that procedural rule permits the exclusion of the alibi testimony.²² In *United States v. Myers*,²³ the United States Court of Appeals for the Fifth Circuit enumerated the following factors a court should consider in determining the propriety of the trial court's discretionary exclusion of the alibi testimony:²⁴

- (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.²⁵

The *Myers* factors were applied by the Sixth Circuit in *United States v. White*.²⁶ At issue in *White* was whether the district court abused its discretion in precluding an alibi witness's testimony based on the defendant's failure to comply with the notice of alibi rule.²⁷ The defendant attempted to justify his noncompliance based upon his ignorance as to the witness's current location.²⁸ The *White* court rejected this justification and concluded that the defendant was required to name the potential witness. As a result, the district court did not abuse its discretion in excluding the alibi testimony.²⁹

The Supreme Court has expressly reserved decision on the constitutionality of excluding alibi testimony based on the defendant's failure to comply with a notice of alibi rule.³⁰ Other federal and state courts have held that an exclusion sanction does not violate a person's consti-

22. Of the 36 jurisdictions that employ a requirement for notice of an alibi defense, only Maine, Minnesota, and Washington lack an express statutory provision permitting the trial judge to exclude the testimony of an alibi witness. *Taliaferro v. State*, 295 Md. 376, 387 n.10, 456 A.2d 29, 35 n.10, *cert. denied*, 103 S. Ct. 2114 (1983). In addition, the Federal Rules of Criminal Procedure permit exclusion of the testimony as a sanction. FED. R. CRIM. P. 12.1 (d) (federal notice of alibi provision). The federal notice of alibi rule is essentially the same as the comparable Maryland rule. *Middleton v. State*, 49 Md. App. 286, 289 n.1, 431 A.2d 734, 736 n.1, *cert. denied*, 291 Md. 779 (1981).

23. 550 F.2d 1036 (5th Cir. 1977).

24. *Id.* at 1043. The Court of Special Appeals of Maryland adopted the *Myers* factors in 1981. *Middleton v. State*, 49 Md. App. 286, 289-90, 431 A.2d 734, 736, *cert. denied*, 291 Md. 779 (1981).

25. *United States v. Myers*, 550 F.2d 1036, 1043 (5th Cir. 1977).

26. 583 F.2d 899 (6th Cir. 1978).

27. *Id.* at 900. The notice of alibi provision in *White* was FED. R. CRIM. P. 12.1, the applicable rule in federal criminal cases.

28. *White*, 583 F.2d at 901-02. Similarly, *Taliaferro's* justification for not complying with the notice provision was that he did not know the whereabouts of the alibi witness. *Taliaferro v. State*, 295 Md. 376, 384, 456 A.2d 29, 33-34, *cert. denied*, 103 S. Ct. 2114 (1983).

29. *White*, 583 F.2d at 902.

30. *Wardius v. Oregon*, 412 U.S. 470, 472 n.4 (1973); *Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). The Court, however, has recognized that it "is a question raising sixth amendment issues which we have no occasion to explore." *Id.* at 83 n.14; *see infra* note 35.

tutional right to compulsory process for obtaining witnesses in his own behalf.³¹ These courts reason "that the alibi rule does not prevent a defendant from compelling the attendance of witnesses; rather, the rule provides reasonable conditions for the presentation of alibi evidence."³²

Originally, the source of the right to compulsory process was the due process clause of the Constitution.³³ In *Washington v. Texas*,³⁴ however, the Court held that the right to compel the attendance of witnesses and offer their testimony constitutes the right to present a defense that is guaranteed by the sixth amendment.³⁵ In so holding, the *Washington* Court announced that sixth amendment rights apply to state criminal proceedings through the fourteenth amendment.³⁶

In *Taliaferro v. State*,³⁷ the Court of Appeals of Maryland was presented with the threshold question of whether the trial judge abused his discretion in imposing the sanction of exclusion to the defendant's alibi witness.³⁸ In analyzing this question, Judge Rodowsky³⁹ focused on the trial court's reasoning that the defendant was far from diligent in his efforts to provide the state with his alibi witness's name and address.⁴⁰ Maryland Rule 741(g)⁴¹ clearly empowered the trial judge to exclude the testimony of the defendant's alibi witness.⁴² The defendant

31. See, e.g., *United States v. Smith*, 524 F.2d 1288 (D.C. Cir. 1975); *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *Hartman v. State*, 176 Ind. App. 375, 376 N.E.2d 100 (1978); *Bush v. State*, 203 Kan. 494, 454 P.2d 429 (1969); *People v. Jackson*, 71 Mich. App. 395, 249 N.W.2d 132 (1976); *State v. Smith*, 88 N.M. 541, 543 P.2d 834 (1975). Compulsory process means that the state is prohibited from prosecuting a defendant without supplying him the power to compel the attendance of witnesses in his favor. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 587 (1978).
32. *Taliaferro v. State*, 295 Md. 376, 389, 456 A.2d 29, 36, cert. denied, 103 S. Ct. 2114 (1983); see also *State v. Dodd*, 101 Ariz. 234, 237, 418 P.2d 571, 574 (1966); *State v. Roberts*, 226 Kan. 740, 744, 602 P.2d 1355, 1358 (1979); *State v. Smith*, 88 N.M. 541, 543, 543 P.2d 834, 836 (1975).
33. *Specht v. Patterson*, 386 U.S. 605, 610 (1967). The fifth amendment is the due process clause for the federal government. U.S. CONST. amend. V; see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The fourteenth amendment encompasses the due process clause for the states. U.S. CONST. amend. XIV, § 1. See generally *Fuentes v. Shevin*, 407 U.S. 67 (1972) (seizure of personal property without prior notice or opportunity to challenge the seizure violated the due process clause of the fourteenth amendment).
34. 388 U.S. 14 (1967).
35. *Id.* at 19. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.
36. *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).
37. 295 Md. 376, 456 A.2d 29, cert. denied, 103 S. Ct. 2114 (1983).
38. *Taliaferro*, 295 Md. at 378, 456 A.2d at 30-31.
39. Judge Rodowsky wrote the majority opinion for a divided court. Judges Cole and Davidson joined in Judge Eldridge's dissenting opinion.
40. *Taliaferro*, 295 Md. at 383-85, 456 A.2d at 33-34.
41. MD. R.P. 741(g) (Supp. 1983). For the full text of this rule, see *supra* note 6.
42. *Taliaferro*, 295 Md. at 378, 456 A.2d at 30-31.

decided not to testify⁴³ and was subsequently convicted of various offenses.⁴⁴

The *Taliaferro* court reasoned that abuse of discretion is the appropriate standard for reviewing a sanction imposed by a trial judge for noncompliance with a notice of alibi rule.⁴⁵ The court concluded that since the trial judge had the authority to exclude the proffered alibi testimony, he did not abuse his discretion.

The *Taliaferro* decision comports with the majority of those jurisdictions that apply the notice of alibi rules. Courts have consistently held that a trial court's refusal to circumvent the notice requirement is neither an abuse of discretion nor a violation of due process.⁴⁶ When the defendant violates a notice of alibi provision, any sanction rests within the sole discretion of the trial judge.⁴⁷ Accordingly, appellate courts are reluctant to overturn a trial judge's ruling absent a clear abuse of discretion.⁴⁸ Indeed, appellate courts rarely find an abuse of discretion when the trial judge precludes alibi testimony based on noncompliance with a notice requirement.⁴⁹

In *Taliaferro*, the adversarial system imposed an obligation on the defendant to comply with the Maryland procedural rule prior to being afforded his constitutional protections. Courts have occasionally found justification for the infringement of a person's constitutional rights if the infringement satisfies a compelling state interest.⁵⁰ Arguably, the state has a compelling interest in notice of alibi provisions because alibis can easily be fabricated.⁵¹ The state must therefore be protected against a party who conceals his witnesses until trial.⁵² In addition, the

43. *Id.* at 383, 456 A.2d at 33.

44. The defendant was convicted of robbery with a deadly weapon and use of a handgun in the commission of a felony. *Id.* at 377, 456 A.2d at 30.

45. *Id.* at 388, 456 A.2d at 36.

46. *See supra* note 31; *infra* note 48.

47. *Taliaferro v. State*, 295 Md. 376, 388, 456 A.2d 29, 36, *cert. denied*, 103 S. Ct. 2114 (1983). In *State v. Lindsey*, 284 N.W.2d 368 (Minn. 1979), the court stated that "the trial court is in the best position to determine whether any harm has resulted from the particular violation and the extent to which the harm can be eliminated or otherwise alleviated." *Id.* at 373.

48. *See United States v. White*, 583 F.2d 899 (6th Cir. 1978); *United States v. Gillings*, 568 F.2d 1307 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978); *State v. Hunt*, 118 Ariz. 431, 577 P.2d 717 (1978).

49. *See Cox v. State*, 219 So. 2d 762, 765 (Fla. Dist. Ct. App. 1969); *State v. Selbach*, 268 Wis. 538, 540, 68 N.W.2d 37, 38 (1955). *But see Williams v. State*, 97 Nev. 1, 2, 620 P.2d 1263, 1264 (1981) (a court's preclusion of defendant's alibi testimony because his alibi notice was belatedly filed constituted an abuse of discretion); *see also infra* note 61 (Maryland case holding the trial judge abused his discretion in precluding alibi testimony because of the defendant's failure to comply with the Maryland notice requirement).

50. Comment, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342, 1353 (1972).

51. *Williams v. Florida*, 399 U.S. 78, 81 (1970); *see Epstein, supra* note 13, at 32.

52. *Williams v. Florida*, 399 U.S. 78, 81 (1970).

state unquestionably has an interest in ensuring the reliability of testimony.

Even when an interest is deemed compelling, it remains the court's function to determine whether adequate alternative sanctions exist to stimulate the pretrial disclosure of an alibi witness.⁵³ One alternative to excluding evidence is the granting of a continuance.⁵⁴ Courts will only grant a continuance, however, if a defendant shows good cause for his failure to comply with the notice of alibi provisions.⁵⁵ In Maryland, a court will not grant a continuance unless the defendant can show that he made diligent and proper efforts to secure the evidence.⁵⁶ In *Taliaferro*, the trial court found a lack of diligence by the defendant because of his failure to provide the state with the name and address of his alibi witness.⁵⁷ The defendant's only justification was his inability to locate his alibi witness; the trial court concluded that this explanation was unsatisfactory.⁵⁸

The *Taliaferro* decision is consistent with those jurisdictions holding that continuances will not be granted absent a showing of good cause for noncompliance with the applicable notice of alibi provision.⁵⁹ Continuances are of limited feasibility in jury trials⁶⁰ because of the substantial time interval between the presentation of the state's evidence and the defendant's evidence of an alibi. A continuance disrupts the judicial process and, quite possibly, may affect the ultimate disposition of the case.⁶¹ In *Taliaferro*, the facts were too outrageous to justify

53. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 137-38 (1974); Comment, *supra* note 50, at 1353. See generally Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

54. Maryland Rule 741(g) permits the court to grant a continuance. For the full text of the rule, see *supra* note 6.

55. *Id.*; see also FED. R. CRIM. P. 12.1(e) (same requirement in federal criminal cases).

56. Jackson v. State, 288 Md. 191, 194, 416 A.2d 278, 281 (1980) (citing Jackson v. State, 214 Md. 454, 459, 135 A.2d 638, 640 (1957), cert. denied, 356 U.S. 940 (1958)). In addition, "the party requesting the continuance should show: that he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some reasonable time, that the evidence was competent and material, and he believed the case could not be fairly tried without it. . . ." Jackson v. State, 288 Md. 191, 194, 416 A.2d 278, 281 (1980).

57. Taliaferro v. State, 295 Md. 376, 394, 456 A.2d 29, 39, cert. denied, 103 S. Ct. 2114 (1983).

58. *Taliaferro*, 295 Md. at 392, 456 A.2d at 38.

59. Colorado, Indiana, Iowa, Montana, Oregon, South Dakota, Vermont, and Wisconsin have expressed good cause exceptions in their notice of alibi statutes. *Id.* at 387-88 n.12, 456 A.2d at 36 n.12.

60. Reznick, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276, 1293 (1966).

61. In a recent decision the court of appeals held that a trial judge had abused his discretion by excluding the testimony of an undisclosed alibi witness because of the defendant's failure to comply with the notice requirement of Maryland Rule 741(d)(3). Colter v. State, 297 Md. 423, 466 A.2d 1286 (1983). In *Colter*, the trial judge applied a "hard and fast rule of not granting a continuance." *Id.* at 428, 466 A.2d at 1289. The *Colter* court cited *Taliaferro* and distinguished the two by de-

the granting of a continuance. A jury was involved and the state had presented its case prior to the motion for a continuance. Under these particular circumstances, the granting of a continuance was not a viable alternative because the state would have been severely prejudiced.

In *Taliaferro*, the defendant's clear failure to comply with the notice provisions precluded any protracted discussion of the constitutional considerations. Thus, the *Taliaferro* court set no standard for determining the weight of an individual's sixth amendment right to compulsory process. In light of the facts of *Taliaferro*, any constitutional weighing process was unnecessary. Had disclosure been made a few weeks prior to trial, however, the court would have had to analyze the constitutional issue. Under these circumstances, the right of a defendant to present a defense would clearly outweigh any procedural interest of the state. Therefore, the constitutional implications of the preclusion of alibi testimony would have to be judicially resolved.

With respect to an individual's sixth amendment rights, the Supreme Court has stated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."⁶² A defendant's right to present evidence on his own behalf, while fundamental, is not absolute. In the exercise of this right, the defendant must comply with the applicable procedural rules.⁶³ A defendant's right to present evidence on his own behalf is not a right to ignore otherwise reasonable rules of procedure designed to ascertain guilt and innocence.⁶⁴ After all, the sixth amendment does not confer the right to present testimony "free from the legitimate demands of the adversarial system."⁶⁵

In *Taliaferro v. State*, the legitimate demands of the adversarial system required the defendant to comply with the Maryland procedural rule to be guaranteed his constitutional protections. The Supreme Court must reach the issue of what effect an exclusionary order has on a defendant's right to obtain witnesses in his own behalf, and thereby eliminate the constitutional confusion presented by notice of alibi provisions.

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claring that in *Taliaferro* "the trial court gave thorough consideration to a continuance before rejecting that alternative." *Id.* at 429, 466 A.2d at 1290. In contrast, the trial judge in *Colter* did not consider the factors enumerated in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), when determining the propriety of the trial court's discretionary exclusion of alibi testimony. *See supra* text at note 25. The court distinguished *Colter* from *Taliaferro* by examining the methodology by which the trial court reached its decision to exclude the witness. *Colter*, 297 Md. at 429, 466 A.2d at 1289.

62. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

63. *Id.*

64. *United States v. Nobles*, 422 U.S. 225, 241 (1975).

65. *Id.*