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Alibi Defenses: Millstone or Key to the Jailhouse Door?

Alibis always sound so delightfully healthy, but they crack-up dreadfully easily.... Whatever the truth about his defence, Dave Anstey it seemed had total faith in it. As for me, I'm not sure that I like cast iron alibis. They're the sort that sink quickest, to the bottom of the sea.

— Horace Rumpole (attorney), *Mortimer*,
THE TRIALS OF RUMPOLE (1979)

Is an alibi defense the key to the jailhouse door, or is it a millstone? The DNA exoneration cases suggest the latter. In about two-thirds (68 percent) of the DNA exoneration cases, the innocent defendants offered an alibi that was not believed by law enforcement; worse, prosecutors used weak alibis as incriminating evidence at trial.¹ Of the 140 exonerees who presented an alibi, 121 had witnesses, the remainder had only their own testimony.² Many were unemployed and

Editor's Note: This article is adapted from Lisa Steele, *Investigating and Presenting an Alibi Defense*, 56:6 CRIM. L. BULL. 1083 (2020).

did not have co-workers or employment records to establish their whereabouts on weekdays. Others had only family members who said the defendant was at home at the time of the crime. Prosecutors argued that weak alibis were false and a sign of the defendant's efforts to deceive the jury. Even strong alibis were not enough — one exoneree had 11 alibi witnesses to establish that he was at a two-day long sports competition, supported by credit card receipts for his travel, meals, and purchases on the trip. The prosecutor successfully argued that the witnesses were liars or mistaken. Prosecutors have been known to expand an offense date to evade an airtight alibi (i.e., when the defendant was in jail on the date the crime was committed).

Some trial defense attorneys decline to offer alibi defenses. The post-conviction dockets are littered with defendants who claim trial counsel was ineffective for not investigating or not presenting alibi witnesses.

In *Johnson v. Commissioner*,³ for example, trial counsel said:

My belief about alibis is that unless they are solid, they can get you into trouble. It's the last thing the jury hears if you have a good prosecutor who's a good cross-examiner and can try to kind of attack either a family member who's an alibi witness or some other vulnerability to the alibi. To me, it pulls attention away from the weaknesses in the state's case, and it kind of develops jurors' focus on the weaknesses in the alibi. So, it's just been my practice to shy away from alibis unless they're solid, and I had some concerns about the alibi in this case.

BY LISA J. STEELE

In *Outing v. Commissioner*,⁴ trial counsel “testified that she had ultimately concluded, on the basis of her experience as a trial attorney, that the presentation of an incomplete alibi defense, bolstered only by friends and relatives of the accused, often undermines the defendant’s defense in a murder trial.” In both cases, the habeas and the appellate courts found the attorney to have made a reasonable tactical decision.

So what can defense counsel do to improve alibi defenses?

The Suspect at the Station

My heart started pounding. ... I had gotten my weekends confused. Which meant the alibi I gave to the police was not going to check out at all.

— Ronald Cotton
(exonerated defendant)⁵

First, it helps to think about the alibi from an innocent suspect’s perspective. When questioned or arrested, law enforcement officers asked the suspect about a date and time that might have been days, weeks, or months earlier.⁶ The innocent suspect had no reason to pay specific attention to where he was, when he was there, and who was with him. He had no reason to retain a receipt or other physical evidence.⁷

If the suspect gives police an alibi during the interview, he, like Ronald Cotton, risks misremembering and looking like a liar.⁸ If he waits to think about it or to check with his family and friends, he looks like he is fabricating the alibi.⁹

The Reid manual¹⁰ suggests asking suspects to “please tell me everything you did from noon on Friday until you went to bed.” If the suspect gives a general alibi, like “I was driving alone in my car that night,” then the manual suggests asking for details about the route the suspect drove, places he visited, and approximate times of arrival and departure at any place he visited. The reader may wish to consider how well he or she could provide similar details on short notice.

To test an alibi, the Reid manual suggests the following:

- ❖ ask the witness about a fictional event, like a car accident, that supposedly happened at the time and place mentioned to see if the sus-

pect will believe the false event is true and add it to his story;¹¹ and/or

- ❖ ask the witness for a detailed description of his activities and then to recount the alibi in reverse chronological order.¹²

Again, the reader should consider how well he or she would fare in this test.

In practice, observers have noted that if a suspect offers an alibi “the interrogator will attack it as inconsistent, contradicted by all of the case evidence, implausible, and/or simply impossible — even if none of these assertions are true.”¹³

Once a suspect makes a mistake, it may be nearly impossible for him to convince anyone of his innocence.¹⁴ (The one exception seems to be if the defendant lies and then provides a salacious alibi.¹⁵) Changes, even changes that genuinely strengthen the alibi, tend to weaken how fact-finders perceive it.¹⁶

It is not surprising that innocent suspects have trouble providing alibis during interrogations; the surprising part is what happens when they do.

The Alibi Witness and Investigators

Unless I could break this guy’s alibi, a murderer might be walking on the street. There was such a small window of opportunity, I had to act fast.

— Prosecutor’s remark to the press¹⁷

What happens when the police investigate the suspect’s alibi?¹⁸ Disinterested witnesses, those most likely to be credited, are also those most likely to forget having seen the defendant.¹⁹ The police may interpret a witness’s inability to recall the suspect as a lie by the suspect, further convincing them that the suspect is guilty.

The witness may explain that he was with family or friends — the people with whom the suspect was most likely to be on an ordinary day, at an ordinary time.²⁰ Police may investigate, but law enforcement tends to discount alibis from family and friends because they are perceived as biased.²¹

If the witness does provide an alibi, police may not believe the witness.²² Disbelieving investigators may challenge the witness with coercive interrogation techniques²³ or threaten the witness with perjury or obstruction

of justice charges.²⁴ Investigators may also confront witnesses with other evidence of guilt, which can lead witnesses to weaken or disavow their alibi.²⁵

Police may find that witnesses can provide only incomplete alibis. For example, witnesses may not be certain about the exact time the suspect arrived and departed, or they may not be sure that he was with them the entire time.²⁶ Investigators may conclude that the suspect could have committed the crime when a witness was not paying attention, or that the witness was wrong about when the suspect arrived or left. The alibi witness may also place the suspect near the scene of the crime around the time that it occurred — as much a boon to the prosecution as to the defense.

Police may have trouble getting the witness to cooperate. Some witnesses do not want to be involved with the police.²⁷ In *State v. Ghere*,²⁸ the Connecticut Supreme Court stated:

Although we do not believe that an alibi witness has a duty to report an alibi story to the police or, for that matter, to any other person, a witness in many instances naturally may be expected to convey such information, especially when the witness is friendly with the accused. ... Failure of the witness to do so would, under [those] circumstances, constitute grounds for impeachment [because the failure to report an alibi under such circumstances is] relevant on the issue of credibility or, more specifically, the issue of fabrication.

Another court observed that “it is a lamentable but undeniable fact of modern society that some of our citizens harbor a mistrust for law enforcement authority which leads them to shun contact with the police even when the avoidance of contact is not in their own best interest.”²⁹ Witnesses may be afraid of the police in general, or they may have immigration issues, child custody issues, or pending criminal charges that make them particularly concerned about contradicting the police narrative. If the case has received significant media attention, the witness may be afraid of becoming part of the story. The witness may be afraid of disapproval from the victim’s family or friends.³⁰

If the defendant does not offer an alibi or police disbelieve the alibi wit-

nesses, then the suspect becomes a defendant. Now defense counsel must decide how to proceed.

Alibis and the Defense Attorney

An alibi is not a traditional affirmative defense — it is a response to the prosecution's case. Logically, an accurate alibi means that the prosecutor's witnesses have misidentified an innocent defendant either through good-faith eyewitness identification mistakes or through deliberate lies by co-offenders or cooperating witnesses.³¹ Alibi

Even a strong alibi is not enough. One exoneree, who could not have been at the crime scene because he was attending a two-day sports competition, had 11 alibi witnesses as well as credit card receipts for his travel, meals, and trip purchases. The prosecutor successfully argued that the witnesses were liars or mistaken.

defenses may work well when combined with arguments about mistaken eyewitnesses, lying informants, cooperating witnesses, and investigative failures or omissions, including a rush to judgment and ignoring exculpatory evidence in the investigation. But, as noted at the outset, a weak alibi may divert the jury's attention from a weak prosecution case.

Defense counsel is obligated to make all reasonable efforts to identify and interview potential alibi witnesses.³² This includes reasonable efforts to identify and locate witnesses, even if the defendant does not know their full names. "[C]ounsel reasonably cannot limit the pretrial investigation of a case to only those leads offered by the client himself. ... Counsel has an independent duty to investigate potentially important witnesses not suggested by the client, including, of course, potentially important alibi witnesses."³³ This means following those leads and documenting the results.

Commentators warn defense counsel to "exercise extreme caution" in choosing alibi witnesses and "take pains" to ensure that the alibi witness's testimony is consistent with other defense witnesses.³⁴ However, "a decision by counsel to forgo an investigation into the possible testimony of a potentially significant witness is constitutionally impermissible unless counsel has a sound justification for doing so; speculation, guesswork or

uninformed assumptions about the availability or import of that testimony will not suffice."³⁵

In *Skakel v. Commissioner*, the Connecticut Supreme Court set out four factors to consider in reviewing the reasonableness of trial counsel's decision not to investigate and/or present alibi witnesses. They include: "(1) the importance of the alibi to the defense; (2) the significance of the witness's testimony to the alibi; (3) the ease with which the witness could have been discovered; and (4) the gravity of

the criminal charges and the magnitude of the sentence that the petitioner faced."³⁶ A trial attorney who ignores these factors risks a finding of ineffective assistance of counsel.

Counsel should caution the defendant's family or friends about seeking out alibi witnesses or encouraging them to meet with defense counsel or an investigator. The prosecution may argue that the defendant's allies pressured or influenced the alibi.³⁷ Counsel should also warn incarcerated defendants about trying to contact witnesses themselves or discussing contacting witnesses with family. Incarcerated defendants' phone calls and mail are routinely recorded and monitored. A recording of a defendant's call or copy of a letter, seeming to create a false alibi, would be devastating to the defense and may lead to additional charges of tampering and/or obstruction of justice, as well as a jury instruction about consciousness of guilt.

Counsel should also look for any evidence to support the alibi — receipts, security videos, and cellphone records, for example — and carefully document how the supporting evidence was obtained and preserved.

Once the defense becomes aware of potential alibi witnesses, then counsel needs to review the jurisdiction's notice of alibi rules and make sure to comply with disclosure requirements. If counsel is not certain that he or she will offer an alibi defense, then counsel

may be able to defer notice until closer to trial.

Some jurisdictions permit defense counsel to suggest that witnesses not talk to the prosecutor and/or police,³⁸ but others view this as potentially obstruction or tampering. Counsel needs to be familiar with the ethics rules in their jurisdiction.

If the witness refuses to meet with the prosecutor and/or police, expect the witness to be cross-examined about this at trial. At minimum, counsel can suggest that if an alibi witness wants to talk to the police and/or prosecutors, then counsel can ask for any interview to be recorded from start to finish so that there is an objective record of what was said and how it was said. Counsel can then request a copy of the recording through discovery.

As discussed at the outset, offering an alibi defense is risky. While the jury will be instructed that the defendant does not need to prove the alibi is true and that the prosecutor must disprove it to prove its case beyond a reasonable doubt, jurors may nevertheless perceive the alibi as pitting the credibility of the alibi witnesses against the prosecutor's witnesses.³⁹ In some cases, jurors may even be instructed that if they find the alibi witnesses testified falsely, then they can infer the defendant's consciousness of guilt for manufacturing a false alibi.

Therefore, counsel needs to prepare alibi witnesses to respond to typical cross-examination ploys.⁴⁰ Expect questions about the following:

1. The witness' relationship with the defendant.
2. The timing of the witness coming forward.
 - ❖ When did the witness realize the defendant had been arrested?
 - What does the witness know about the crime?
 - Is the witness aware of other incriminating information, such as a confession, eyewitnesses, or forensic evidence?
 - ❖ When did the witness realize he could provide an alibi, and who did he first approach?
3. If the witness did not go directly to the police or prosecutors, why not?

4. How is the witness sure about the alibi?

- ❖ Could the witness have confused the day or time of day?
- ❖ Does the witness have any supporting physical evidence?
- ❖ If there was supporting evidence not under the witness's control, did he or she tell anyone about it?

The jury will be wondering about the witness's motives, memory, and whether he or she talked to police before trial.⁴¹ It may be more persuasive to explore those issues in direct examination rather than leaving these questions to the prosecutor in cross. Counsel may also wish to consider expert testimony about perception, memory, and good-faith error to help the jury understand what it can realistically expect from an accurate, truthful alibi witness.

Counsel should also be alert during closing argument to attacks on the alibi witness,⁴² vouching for the prosecution's witnesses, improper comments on the prosecutor's belief in the alibi witness's credibility, improper suggestions that defense counsel has offered a perjured alibi, suggestions that the witness had a duty to come forward, and shifting the burden of proof to the defense. Counsel should object as appropriate to preserve the record on appeal and ask the trial court to act if it is possible to cure the improper argument.

Conclusion

Alibi is an important defense for the innocent defendant. Prosecutors and judges are overly skeptical of alibi witnesses. Defense attorneys seem reluctant to offer all but the most rock solid of alibis. The result may be a loss of accurate, truthful alibi testimony supporting innocent defendants.

Defense counsel should investigate alibi witnesses — even if he or she is skeptical about using an alibi at trial — and document that investigation. If counsel decides to present an alibi defense, then he or she should prepare the witness for contact from the prosecutor and/or police after disclosure and for inevitable cross-examination questions at trial. Counsel should be prepared for a vigorous closing argument and alert for prosecutorial misconduct or impropriety in cross-examination or

closing. Counsel should consider expert testimony about perception, memory (particularly autobiographical memory), suggestion and after-acquired information, and good-faith mistake in appropriate cases.

The exoneration cases show the risks of presenting alibi witnesses, but with solid preparation and an understanding of growing research into alibis and witness memory, perhaps the defense can do better.

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Notes

1. See BRIAN CUTLER, CONVICTION OF THE INNOCENT 239-40 (2012); BRANDON GARRETT, CONVICTING THE INNOCENT 156-58 (2011); William Crozier, Deryn Strange & Elizabeth Loftus, *Memory Errors in Alibi Generation: How an Alibi Can Turn Against Us*, 35:1 BEHAV. SCI. & L. 6 (2017); Jennifer Dysart & Deryn Strange, *Beliefs About Alibis and Alibi Investigations: A Survey of Law Enforcement*, 18:1 PSYCH., CRIME & L. 11, 11-12 (2012); Elizabeth Olson & Gary Wells, *What Makes a Good Alibi? A Proposed Taxonomy*, 28:2 L. & HUM. BEHAV. 157, 157-58 (2004).

2. BRANDON GARRETT, CONVICTING THE INNOCENT 156-58 (2011).

3. 330 Conn. 520, 544 n.4, 198 A.3d 52 (2019).

4. 190 Conn. App. 510, 522, 211 A.3d 1053 (2019).

5. JENNIFER THOMPSON-CANNIO, RONALD COTTON & ERIN TORENO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 86 (2009).

6. In *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), the defendant first learned he was a suspect in a murder when he was arrested 18 months after it occurred. His mother and aunt repeatedly told police that he was with them at a sports bar on the night of the murder and asked them to contact the bar to see if it still had video recordings to prove Dickson's alibi. Police did not contact the bar, which had a fire six months after Dickson's arrest.

7. Alibis supported by strong physical evidence are rare. CUTLER, CONVICTION OF THE INNOCENT 240 (2012) (14 percent of alibis offered in survey of American and Canadian cases were supported by physical evidence). This may be changing. Cellphone location history, apps, and call records may document a witness or defendant's location at key times. Admittedly, these locate the device, not who is holding it, but it may be persuasive corroboration even if not absolute. Smart speakers and assistants that capture voices at critical times would be harder to fabricate. Litigation about geo-fencing warrants (searches of past location history) is still in its

infancy. See Valentino-DeVries, *Tracking Phones, Google Is a Dragnet for the Police*, N.Y. TIMES (4/13/19) available at <https://www.nytimes.com/interactive/2019/04/13/us/google-location-tracking-police.html>; Jon Schuppe, *Police Used Google Location Data to Find an Accused Bank Robber. He Says That's Illegal*, ABC NEWS (11/20/19) available at <https://www.nbcnews.com/news/us-news/police-used-google-location-data-find-accused-bank-robber-he-n1086836>.

8. Elizabeth Olson & Steve Charman, *But Can You Prove It? Examining the Quality of Innocent Suspects' Alibis*, 18:5 PSYCH., CRIME & L. 453, 459-64 (2012). See Scott Culhane et al., *Generation and Detection of True and False Alibi Statements*, 20:4 PSYCH., PSYCHOL. & L. 619 (2013); Jennifer Dysart & Deryn Strange, *Beliefs About Alibis and Alibi Investigations: A Survey of Law Enforcement*, 18:1 PSYCH., CRIME & L. 11, 13 (2012).

9. *Outing*, *supra*, note 4, at 522. The defendant was arrested four days after a shooting. He could not recall where he was during his interrogation. The next morning, he provided police with a list of alibi witnesses. (He was incarcerated overnight — there was no evidence that he'd had any contact with possible alibi witnesses before providing the list to police.) Trial counsel believed that *Outing's* inability to immediately provide an alibi would undercut an alibi defense.

10. Fred Inbau et al., CRIMINAL INTERROGATION AND CONFESSIONS 18, 85, 156, 444 (5th ed. 2013). The manual suggests that “[i]nformation that is volunteered during a response to an open question — for example — a subject's alibi — will probably all be truthful, although perhaps incomplete,” and then gives an example of a truthful answer implying an alibi, but not actually committing to it. *Id.* at 86-87.

11. *Id.* at 175-76. (The authors assume that the suspect has a clear memory of the evening and “there would be no delay” in saying that the event did not happen. *Id.* at 76.)

12. *Id.* at 180. (“A person who has related a truthful account,” it posits, “will have little difficulty doing this, because their memories are based on factual occurrences.” *Id.*)

13. Steven Drizen & Richard Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C. L. REV. 891, 915 (2004).

14. Elizabeth Olson & Steve Charman, *But Can You Prove It? Examining the Quality of Innocent Suspects' Alibis*, 18:5 PSYCH., CRIME & L. 453, 456 (2012).

15. See Ricardo Nieuwkamp et al., *A Lie and a Mistress: On Increasing the Believability of Your Alibi*, 23:5 PSYCH., PSYCHOL. & L. 733 (2016).

16. See Scott Culhane & Harmon Horsch, *Changed Alibis*, *Current Law*

Enforcement, Future Law Enforcement, and Layperson Reactions, 39:7 CRIM. J. & BEHAV. 958, 974 (2012).

17. John Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881, 889 (2013).

18. See Jennifer Dysart & Deryn Strange, *Beliefs About Alibis and Alibi Investigations: A Survey of Law Enforcement*, 18:1 PSYCH., CRIME & L. 11, 17-19 (2012) (in survey of police officers, less than half (49.2 percent) said that a thorough investigation of an alibi is always conducted before an arrest warrant is prepared or the defendant arrested, 38.1 percent said it is often investigated; 7.9 percent said it is sometimes investigated; and 4.8 percent said it is rarely or never investigated before the warrant is prepared or the defendant is arrested).

19. Steve Charman et al., *The (Un)reliability of Alibi Corroborators: Failure to Recognize Faces of Briefly Encountered Strangers Puts Innocent Suspects at Risk*, 35:1 BEHAV. SCI. L. 16 (2017); see T. Gilovich et al., *The Spotlight Effect in Social Judgement: An Egocentric Bias in Estimates of the Salience of One's Own Actions and Appearance*, 78 J. PERSONALITY & SOC. PSYCH. 211 (2000) (people overestimate the extent to which others notice them). See also A. Daniel Yarmey, *Eyewitness Recall and Photo Identification: A Field Experiment*, 10:1 PSYCHOL., CRIME & L. 53 (2004) (discussing relatively poor witness performance identifying a person they briefly interacted with four hours earlier).

20. R. Nieuwkamp, R. Horselenberg & P. Van Koppen, *The Illusion of the Perfect Alibi: Establishing Base Rate of Non-Offenders' Alibis*, 14 J. INVESTIG. PSYCH. OFFENDER PROFIL. 23 (2016). This study of over 800 volunteers drawn from the community asked about their whereabouts no more than a week earlier, 90 percent of subjects reported that they could support their alibi with at least one witness — 65 percent could provide a motivated, familiar person, 16 percent could provide an acquaintance or stranger. About 25 percent could provide an item of physical evidence (typically a receipt); only 7 percent believed they could find video recordings to support their claim. Alibis were weakest at night and on the weekends — the times when a person was most likely to be at home, with friends, or at a movie and strongest when the person was at work or in class.

21. See Jennifer Dysart & Deryn Strange, *Beliefs About Alibis and Alibi Investigations: A Survey of Law Enforcement*, 18:1 PSYCH., CRIME & L. 11, 17 (2012) (police least likely to believe friends and family members, most likely to believe acquaintances and strangers). See also Scott Culhane et al., *Generation and Detection of True and False Alibi Statements*, 20:4 PSYCH.,

PSYCHOL. & L. 619, 634 (2013); Harmon Hosch et al., *Effect of an Alibi Witness's Relationship to the Defendant on Mock Jurors' Judgments*, 35 L. & HUM. BEHAV. 127, 139 (2011) (subjects more skeptical of kin than of those with social relationship); Scott Culhane & Harmon Hosch, *An Alibi Witness's Influence on Mock Jurors' Verdicts*, 34:8 J. APP. SOC. PSYCH. 1604, 1606-07 (2004) (mock jurors skeptical of both kin and those with a personal relationship with defendant); Elizabeth Olson & Gary Wells, *What Makes a Good Alibi? A Proposed Taxonomy*, 28:2 L. & HUM. BEHAV. 157, 159, 161 (2004).

22. See generally D. KIM ROSSMO, CRIMINAL INVESTIGATIVE FAILURES 282-83 (2009). See also BRANDON GARRETT, CONVICTING THE INNOCENT 266 (2011) (“[w]hen police form a hunch that a suspect is guilty, they may then without realizing it discount any evidence that does not jibe with their prior belief in the suspect’s guilt.”); Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WIS. L. REV. 291, 329, 331 (2006) (the prosecutorial role “inevitably fosters tunnel vision,” “ethical prosecutors feel a pressure to push hard to obtain convictions, because only a conviction serves the interest of justice”).

23. See Laura Fallon & Brent Snook, *Beyond Common Sense and Human Experience: Lay Perceptions of Witness Coercion*, 47:2 CRIM. J. & BEHAV. 208, 210 (2020) (“rampant” coercive interview methods used in Canadian case led to alibi witnesses recanting); Timothy Moore, Brian Cutler & David Shulman, *Shaping Eyewitness and Alibi Testimony with Coercive Interview Practices*, THE CHAMPION, October 2014, at 34 (coercive techniques used in specific case lead to retraction from alibi witness).

24. See *People v. Henne*, 165 Ill.App.3d 315, 326 (1988) (police arrested alibi witness and charged her with obstruction of justice; witness then hedged her previous answers. The court faulted the defense for not calling the alibi witness at trial. “For all we know, she did not testify due to her susceptibility of impeachment by her inconsistent statements, or was not called by the defendant for fear of her truthful answers.”); *People v. Chen*, 256 A.D.2d 75, 682 N.Y.S.2d 145 (N.Y. 1998) (prosecutor’s interview with alibi witness in which prosecutor explained the legal consequences of perjury did not improperly intimidate the witness). But see *United States v. Vavages*, 151 F.3d 1185, 1190-91 (9th Cir. 1998) (prosecutor substantially interfered with witness’s decision whether to testify when warnings about committing perjury were intimidating and intended to stifle witness’s testimony; prosecutor made “an unambiguous statement of his belief that [witness] would be lying if she testified in support of [defendant’s] alibi” and

threatened to withdraw witness’s plea agreement in unrelated case if she testified in support of defendant’s alibi); *People v. Pena*, 175 N.W.2d 767 (Mich. 1970) (improper for prosecutor to send alibi witnesses a letter quoting the state’s perjury statute). See generally Kevin Sali & John Robb, *Fighting Governmental Witness Tampering*, THE CHAMPION, June 2017, at 34 (potential alibi witness might be told, for example, “that the investigation is still open, the prosecution may ultimately bring charges against additional suspects, and continuing to maintain that the defendant was somewhere else sounds like the kind of thing an accomplice would say”).

25. See S.B. Marion et al., *Lost Proof of Innocence: The Impact of Confession on Alibi Witnesses*, 40:1 L. & HUM. BEHAV. 65 (2016) (over half of witnesses retracted an alibi when falsely told that an innocent confederate confessed).

26. See *Dickson*, supra note 6, at 459 where court discounted two alibi witnesses because neither “testified unequivocally that the defendant had been in the sports bar with his family at 9:30 p.m. on January 9, 2010, when the crime occurred. Moreover, to the extent that the testimony of the defendant’s mother and aunt would support that conclusion, both witnesses had a clear motive to attempt to convince the jury that the defendant was in the bar at that time.” See also *Johnson v. Commissioner*, 330 Conn. 520, 198 A.3d 52 (2019) (jury could have concluded that defendant snuck out of house, committed crime at nearby location, and returned without his absence being detected by busy family members); *Spearman v. Commissioner*, 164 Conn. App. 530, 138 A.3d 378 (2016) (relatives’ alibi testimony in arson case that defendant was asleep in his room when fire was set would have left open possibility that defendant had set the fire and run across the street to his home before the alibi witnesses first saw him there); *LaPointe v. Commissioner*, 316 Conn. 225 (2015) (witness could not provide “complete” alibi, because could not account for defendant’s whereabouts for 45 minutes while she was getting her son to bed, a period in which the crime could have occurred).

If the police fail to follow up on alibi information, the defendant could combine an alibi defense with a claim of an investigative failure or omission, arguing that a jury that could find reasonable doubt if jurors conclude that “the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits.” *State v. Wright*, 322 Conn. 270, 322, 140 A.3d 939

(2016) citing *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 801, 906 N.E.2d 299 (2009). This may be especially important to counter jurors' inherent belief that if a case makes it to trial, then there is a reason not to trust an alibi witness — if police had believed the alibi, the case would not have progressed to trial. Samuel Sommers & Amy Douglass, *Context Matters: Alibi Strength Varies According to Evaluator Perspective*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 41 (2007).

27. See *People v. Steede*, 149 A.D.2d 744, 540 N.Y.S.2d 528 (2d Dep't 1989) (witness explained that "there's reasons why you don't go down to that precinct to volunteer, because if they see you in the presence of other people, they may lock you up too for no reason."). This is not an unreasonable fear; Kory Wise, one of the defendants in the Central Park jogger case, became a suspect and falsely confessed to the crime after having gone to the station as an alibi witness for Yusef Salaam. See generally Chris Smith, *Central Park Revisited*, N.Y. MAGAZINE (October 21, 2002).

28. 201 Conn. 289, 304, 513 A.2d 1226 (1986). A review of the *Ghere* briefs shows that this assertion is based on judicial experience; neither party provided the court with research into how alibi witnesses behave.

29. *People v. Conyers*, 52 N.Y.S.2d 454, 458 (1981).

30. If an alibi witness comes forward late, consider a motion in limine to preclude cross-examination of an alibi witness about the timing of the witness disclosure until the prosecutor demonstrates that "the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law enforcement authorities." See *People v. Dawson*, 50 N.Y.2d 311, 321 n.4, 406 N.E.2d 771 (1980). See *State v. Bryant*, 202 Conn. 676, 705-06, 523 A.2d 451 (1987); *Commonwealth v. Brown*, 11 Mass. App. 288, 416 N.E.2d 218 (1981). The witness should be questioned outside of the jury's presence if there is any concern that the witness was reluctant to come forward because of otherwise inadmissible personal concerns or fear of the defendant or victim's family.

31. See *Griffin v. Warden*, 970 F.2d 1355, 1359 (4th Cir. 1992) ("[e]yewitness identification evidence ... is precisely the sort of evidence that an alibi defense refutes best"); *State ex rel. Weary v. Cain*, 161 So.3d 620, 621-22 (La. 2015) (same).

32. *Skakel v. Commissioner*, 329 Conn. 1, 36, 188 A.3d 1 (2018); the *Skakel* case and *Gaines v. Commissioner*, 306 Conn. 664, 51 A.3d 948 (2012) are rare examples of

successful habeas claims that trial counsel was ineffective for not investigating or presenting an alibi witness.

33. *Skakel*, *supra* note 32, at 55 (internal citations omitted).

34. Thomas Sullivan, *Presentation of the Defense*, 62:2 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 153, 160 (1971). See *Skakel*, *supra* note 32, at 64 ("[t]here is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even [when] the prosecution's case is weak").

35. *Skakel*, *supra* note 32, at 24-35.

36. *Skakel*, *supra* note 32, at 37 (internal citations omitted).

37. Counsel should, of course, caution both defendants and their families against actually tampering with witnesses or evidence, obstruction of justice, and perjury, which can lead to separate prosecutions or arguments that such efforts show consciousness of guilt.

38. See *Foster v. State*, 35 So.3d 112 (Fla. Dist. Ct. App. 2010) (proper for attorney to give his office address as contact address for alibi witnesses).

39. See, e.g., *Spearman v. Commissioner*, 164 Conn. App. 530, 548 n.12, 138 A.3d 378 (2016) where defense counsel did not offer alibi witnesses because:

[It was] my fear ... that the jurors would potentially compare the two — the two versions and see that maybe [the petitioner's] family had a greater motive to protect him and * * * compare that [version to] [the prosecutor's witness'] motive for a couple hundred dollars and say, well, the [defendant's witnesses] have a greater motive and maybe water down the proof beyond a reasonable doubt standard and not hold the state to that — to that high standard, so I was — I made — you know, made the decision that it was — that we had done enough on cross-examination and didn't want to take that risk of — to having the jury water down the standard of proof beyond a reasonable doubt. And that was only made after — after the state rested.

40. See *State v. Briggs*, 179 Conn. 328, 333, 426 A.2d 298 (1979) ("[w]here a defendant proposes an alibi as his defense, one permissible method of determining whether the alibi was fabricated is to inquire into the specific details and the surrounding circumstances of the alibi on cross-examination in an attempt to show

inconsistencies in the testimony of the various alibi witnesses, since the claim of alibi is subject to searching scrutiny").

41. The thrust of the cross-examination is often that the witness is lying for the defendant. See Stephanie Marion & Tara Burke, *False Alibi Corroboration: Witnesses Lie for Suspects Who Seem Innocent, Whether They Like Them or Not*, 37:2 LAW & HUM. BEHAV. 136, 136 (2013) (62 percent of jury-eligible participants felt a biologically related alibi witness would be most likely to lie for a defendant; 50 percent felt the same about someone related by marriage, and 32 percent felt the same about witnesses socially related to the defendant). Marion and Burke found that 23 percent of participants were willing to corroborate a false alibi, regardless of how much they liked the suspect. Witnesses were less likely to lie when the witness had seen evidence pointing to the suspect's guilt than when there was ambiguous evidence of guilt.

Alternately, the prosecutor may imply that the alibi witness has made a good-faith mistake — confusing the date, time, location, or the identity of the defendant. See Steve Charman et al., *The (Un)reliability of Alibi Corroborators: Failure to Recognize Faces of Briefly Encountered Strangers Puts Innocent Suspects at Risk*, 35:1 BEHAV. SCI. L. 16, 19 (2017); William Crozier, Deryn Strange & Elizabeth Loftus, *Memory Errors in Alibi Generation: How an Alibi Can Turn Against Us*, 35:1 BEHAV. SCI. & L. 6, 10 (2017); Karim Kassam et al., *Misconceptions of Memory: The Scooter Libby Effect*, 20:5 PSYCH. SCI. 551 (2009) (motivation to recall does not help if the original event was not memorable).

42. See *People v. Henderson*, 77 N.E.3d 1046 (Ill. App. 2017) (alibi witness were as credible as believing in "the Easter Bunny"); *State v. Lazo*, 209 N.J. 9, 34 A.3d 1233 (2012) (prosecutor described alibi as "convenient"); *Hamilton v. State*, 396 P.3d 1009 (Wyo. 2017) (alibi defense was "nonsense"). ■

About the Author

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