WILLIAMS v. FLORIDA[1]
SUPREME COURT OF THE UNITED STATES
399 U.S. 78
June 22, 1970

OPINION: Mr. Justice WHITE…Prior to his trial for **robbery** in the State of Florida, petitioner filed a 'Motion for a Protective Order,' seeking to be excused from the requirements of Rule 1.200 of the Florida Rules of Criminal Procedure. That rule requires a defendant, on written demand of the prosecuting attorney, to give **notice in advance** of trial if the defendant intends to claim an **alibi**, and to furnish the prosecuting attorney with information as to the **place** where he claims to have been and with the names and addresses of the **alibi witnesses** he intends to use. In his motion petitioner openly declared his intent to claim an alibi, but objected to the further disclosure requirements on the ground that the rule compels the Defendant in a criminal case to be a witness against himself in violation of his **Fifth** and **Fourteenth** Amendment rights. The motion was denied. Petitioner also filed a pretrial motion to impanel a **12-man** jury instead of the s**ix-man jury** provided by Florida law in all but capital cases. That motion too was denied. Petitioner was convicted as charged and was sentenced to life imprisonment. The District Court of Appeal affirmed, rejecting petitioner's claims that his Fifth and Sixth Amendment rights had been violated. We granted certiorari.

I know we have already covered "self-incrimination," but this case is such an interesting nuance of that topic that I thought it best to include it.

Florida's notice-of-alibi rule is in essence a requirement that a defendant submit to a limited form of pretrial discovery by the State whenever he intends to rely at trial on the defense of alibi. In exchange for the defendant's disclosure of the witnesses he proposes to use to establish that defense, the State in turn is required to notify the defendant of any witnesses it proposes to offer in rebuttal to that defense. Both sides are under a continuing duty promptly to disclose the names and addresses of additional witnesses bearing on the alibi as they become available. The

[1] Justice Blackmun did not participate.

threatened sanction for failure to comply is the exclusion at trial of the defendant's alibi evidence—except for his own testimony—or, in the case of the State, the exclusion of the State's evidence offered in rebuttal of the alibi.

In this case, following the denial of his Motion for a Protective Order, petitioner complied with the alibi rule and gave the State the name and address of one Mary Scotty. Mrs. Scotty was summoned to the office of the State Attorney on the morning of the trial, where she gave pretrial testimony. At the trial itself, Mrs. Scotty, petitioner, and petitioner's wife all testified that the three of them had been in Mrs. Scotty's apartment during the time of the robbery. On two occasions during cross-examination of Mrs. Scotty, the prosecuting attorney confronted her with her earlier deposition in which she had given dates and times that in some respects did not correspond with the dates and times given at trial. Mrs. Scotty adhered to her trial story, insisting that she had been mistaken in her earlier testimony. The State also offered in rebuttal the testimony of one of the officers investigating the robbery who claimed that Mrs. Scotty had asked him for directions on the afternoon in question during the time when she claimed to have been in her apartment with petitioner and his wife.

We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or a 'fair trial.' Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. **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. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.**

Petitioner's major contention is that he was 'compelled…to be a witness against himself' contrary to the commands of the Fifth and Fourteenth Amendments because the notice-of-alibi rule required him to give the State the name and address of Mrs. Scotty in advance of trial and thus to furnish the State with information useful in convicting him. No pretrial statement of petitioner was introduced at trial; but armed with Mrs. Scotty's name and address and the knowledge that she was to be petitioner's alibi witness, the State was able to take her deposition in advance of trial and to find rebuttal testimony. Also, requiring him to reveal the elements of his defense is claimed to have interfered with his right to wait until after the State had presented its case to decide how to defend against it. **We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses.**

The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their

identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, **it cannot be considered 'compelled'** within the meaning of the Fifth and Fourteenth Amendments…

In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. 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…

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In *Duncan v. Louisiana*[2] we held that the Fourteenth Amendment guarantees a right to trial by jury in all criminal cases that were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Petitioner's trial for robbery on July 3, 1968, clearly falls within the scope of that holding. **The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth.**

We had occasion in *Duncan v. Louisiana*, to review briefly the oft-told history of the development of trial by jury in criminal cases. That history revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement. That same history, however, affords little insight into the considerations that gradually led the size of that body to be generally fixed at 12. Some have suggested that the number 12 was fixed upon simply because that was the number of the presentment jury from the hundred, from which the petit jury developed.

Other, less circular but more fanciful reasons for the number 12 have been given, 'but they were all brought forward after the number was fixed,' and rest on little more than mystical or superstitious insights into the significance of '12.' Lord Coke's explanation that the 'number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.,' is typical. In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical

[2] Case 6A-J-3 on this website.

accident, unrelated to the great purposes which gave rise to the jury in the first place. The question before us is whether this accidental feature of the jury has been immutably codified into our Constitution.

This Court's earlier decisions have assumed an affirmative answer to this question. The leading case so construing the Sixth Amendment is *Thompson v. Utah*. There the defendant had been tried and convicted by a 12-man jury for a crime committed in the Territory of Utah. A new trial was granted, but by that time Utah had been admitted as a State. The defendant's new trial proceeded under Utah's Constitution, providing for a jury of only **eight** members. This Court reversed the resulting conviction, holding that Utah's constitutional provision was an ex post facto law as applied to the defendant. In reaching its conclusion, the Court announced that the Sixth Amendment was applicable to the defendant's trial when Utah was a Territory, and that the jury referred to in the Amendment was a jury 'constituted, as it was at common law, of twelve persons, neither more nor less.' Arguably unnecessary for the result, this announcement was supported simply by referring to the Magna Carta, and by quoting passages from treatises which noted—what has already been seen—that at common law the jury did indeed consist of 12. Noticeably absent was any discussion of the essential step in the argument: namely, that every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.' Subsequent decisions have reaffirmed the announcement in *Thompson* often in dictum and usually by relying where there was any discussion of the issue at all—solely on the fact that the common-law jury consisted of 12.

While 'the intent of the Framers' is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution. Provisions for jury trial were first placed in the Constitution in Article III's provision that 'the Trial of all Crimes…shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.' The 'very scanty history (of this provision) in the records of the Constitutional Convention' sheds little light either way on the intended correlation between Article III's 'jury' and the features of the jury at common law. Indeed, pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage.' That concern, as well as the concern to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments. As introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that:

> 'The trial of all crimes…shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites…'

The Amendment passed the House in substantially this form, but after more than a week of debate in the Senate it returned to the House considerably altered. While records of the actual debates that occurred in the Senate are not available, a letter from Madison to Edmund Pendleton on September 14, 1789, indicates that one of the Senate's major objections was to the 'vicinage'

requirement in the House version. A conference committee was appointed. As reported in a second letter by Madison on September 23, 1789, the Senate remained opposed to the vicinage requirement, partly because in its view the then pending judiciary bill—which was debated at the same time as the Amendments—adequately preserved the common-law vicinage feature, making it unnecessary to freeze that requirement into the Constitution. 'The Senate,' wrote Madison:

> 'are…inflexible in opposing a definition of the locality of Juries. The vicinage they contend is either too vague or too strict a term; too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the county. It was proposed to insert after the word Juries, 'with the accustomed requisites,' leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained…The Senate suppose, also, that the provision for vicinage in the Judiciary bill will sufficiently quiet the fears which called for an amendment on this point.'

The version that finally emerged from the Committee was the version that ultimately became the Sixth Amendment, ensuring an accused:

> 'the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law…'

Gone were the provisions spelling out such common-law features of the jury as 'unanimity' or 'the accustomed requisites.' And the 'vicinage' requirement itself had been replaced by wording that reflected a compromise between broad and narrow definitions of that term, and that left Congress the power to determine the actual size of the 'vicinage' by its creation of judicial districts.

Vicinage : area; region; vicinity where a crime takes place.

Three significant features may be observed in this sketch of the background of the Constitution's jury trial provisions. First, even though the vicinage requirement was as much a feature of the common-law jury as was the 12-man requirement, the mere reference to 'trial by jury' in Article III was not interpreted to include that feature. Indeed, as the subsequent debates over the Amendments indicate, disagreement arose over whether the feature should be included at all in its common-law sense, resulting in the compromise described above. Second, provisions that would have explicitly tied the 'jury' concept to the 'accustomed requisites' of the time were eliminated. Such action is concededly open to the explanation that the 'accustomed requisites' were thought to be already included in the concept of a 'jury.' But that explanation is no more plausible than the contrary one: that the deletion had some substantive effect. Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit 'vicinage' requirement, the latter explanation is, if anything, the more plausible. Finally, contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect. Thus, the Judiciary bill, signed by the President

on the same day that the House and Senate finally agreed on the form of the Amendments to be submitted to the States, provided in certain cases for the narrower 'vicinage' requirements that the House had wanted to include in the Amendments. And the Seventh Amendment, providing for jury trial in civil cases, explicitly added that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'

We do not pretend to be able to divine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789. It may well be that the usual expectation was that the jury would consist of 12, and that hence, the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today. But there is absolutely no indication in the intent of the Framers of an explicit decision to equate the constitutional and common-law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. **Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.**

The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan*. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.

It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal. What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.

Similarly, while in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to

be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.' *Duncan*. To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group. In capital cases, for example, it appears that no State provides for less than 12 jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty. Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury. Consistent with this holding, **we conclude that petitioner's Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were not violated by Florida's decision to provide a six-man rather than a 12-man jury. The judgment of the Florida District Court of Appeal is Affirmed.**

CONCURRENCE: Mr. Chief Justice BURGER…I see an added benefit to the notice-of-alibi rule in that it will serve important functions by way of disposing of cases without trial in appropriate circumstances—a matter of considerable importance when courts, prosecution offices, and legal aid and defender agencies are vastly overworked. The prosecutor upon receiving notice will, of course, investigate prospective alibi witnesses. If he finds them reliable and unimpeachable he will doubtless re-examine his entire case and this process would very likely lead to dismissal of the charges. In turn he might be obliged to determine why false charges were instituted and where the breakdown occurred in the examination of evidence that led to a charge.

On the other hand, inquiry into a claimed alibi defense may reveal it to be contrived and fabricated and the witnesses accordingly subject to impeachment or other attack. In this situation defense counsel would be obliged to re-examine his case and, if he found his client has proposed the use of false testimony, either seek to withdraw from the case or try to persuade his client to enter a plea of guilty, possibly by plea discussions which could lead to disposition on a lesser charge.

In either case the ends of justice will have been served and the processes expedited. These are the likely consequences of an enlarged and truly reciprocal pretrial disclosure of evidence and the move away from the 'sporting contest' idea of criminal justice.

CONCURRENCE/DISSENT: Mr. Justice BLACK/DOUGLAS…[As Justices Black and Douglas agree with the six person jury, that discussion is not provided.]

…The Court also holds that a State can require a defendant in a criminal case to disclose in advance of trial the nature of his alibi defense and give the names and addresses of witnesses he will call to support that defense. This requirement, the majority says, does not violate the Fifth Amendment prohibition against compelling a criminal defendant to be a witness against himself. Although this case itself involves only a notice-of-alibi provision, it is clear that the decision means that a State can require a defendant to disclose in advance of trial any and all information he might possibly use to defend himself at trial. This decision, in my view, is a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself.

The core of the majority's decision is an assumption that compelling a defendant to give notice of an alibi defense before a trial is no different from requiring a defendant, after the State has produced the evidence against him at trial, to plead alibi before the jury retires to consider the case. This assumption is clearly revealed by the statement that 'the pressures that bear on a defendant's pre-trial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts.' **That statement is plainly and simply wrong as a matter of fact and law, and the Court's holding based on that statement is a complete misunderstanding of the protections provided for criminal defendants by the Fifth Amendment and other provisions of the Bill of Rights.**

When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind. Before trial the defendant knows only what the State's case might be. Before trial there is no such thing as the 'strength of the State's case'; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at the trial itself. Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

The Florida system, as interpreted by the majority, plays upon this inherent uncertainty in predicting the possible strength of the State's case in order effectively to coerce defendants into disclosing an alibi defense that may never be actually used. Under the Florida rule, a defendant who might plead alibi must, at least 10 days before the date of trial, tell the prosecuting attorney that he might claim an alibi or else the defendant faces the real threat that he may be completely barred from presenting witnesses in support of his alibi. According to the Court, however, if he

gives the required notice and later changes his mind 'nothing in such a rule requires him to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice.' **Thus in most situations defendants with any possible thought of pleading alibi are in effect compelled to disclose their intentions in order to preserve the possibility of later raising the defense at trial. Necessarily few defendants and their lawyers will be willing to risk the loss of that possibility by not disclosing the alibi. Clearly the pressures on defendants to plead an alibi created by this procedure are not only quite different from the pressures operating at the trial itself, but are in fact significantly greater. Contrary to the majority's assertion, the pretrial decision cannot be analyzed as simply a matter of 'timing,' influenced by the same factors operating at the trial itself.**

The Court apparently also assumes that a defendant who has given the required notice can abandon his alibi without hurting himself. Such an assumption is implicit in and necessary for the majority's argument that the pretrial decision is no different from that at the trial itself. I, however, cannot so lightly assume that pretrial notice will have no adverse effects on a defendant who later decides to forgo such a defense. Necessarily the defendant will have given the prosecutor the names of persons who may have some knowledge about the defendant himself or his activities. Necessarily the prosecutor will have every incentive to question these persons fully, and in doing so he may discover new leads or evidence. Undoubtedly there will be situations in which the State will seek to use such information—information it would probably never have obtained but for the defendant's coerced cooperation.

It is unnecessary for me, however, to engage in any such intellectual gymnastics concerning the practical effects of the notice-of-alibi procedure, because the Fifth Amendment itself clearly provides that **'no person…shall be compelled in any criminal case to be a witness against himself.**' If words are to be given their plain and obvious meaning, that provision, in my opinion, states that a criminal defendant cannot be required to give evidence, testimony, or any other assistance to the State to aid it in convicting him of crime. The Florida notice-of-alibi rule in my opinion is a patent violation of that constitutional provision because it requires a defendant to disclose information to the State so that the State can use that information to destroy him. It seems to me at least slightly incredible to suggest that this procedure may have some beneficial effects for defendants. There is no need to encourage defendants to take actions they think will help them. The fear of conviction and the substantial cost or inconvenience resulting from criminal prosecutions are more than sufficient incentives to make defendants want to help themselves. If a defendant thinks that making disclosure of an alibi before trial is in his best interest, he will obviously do so. And the only time the State needs the compulsion provided by this procedure is when the defendant has decided that such disclosure is likely to hurt his case.

I'm not sure I understand. Why would any defendant ever assert an alibi defense unless he were **sure** he had witnesses that, on balance, helped his cause?

It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a 'poker game' or 'sporting contest,' for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those

powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. A defendant, they said, is entitled to notice of the charges against him, trial by jury, the right to counsel for his defense, the right to confront and cross-examine witnesses, the right to call witnesses in his own behalf, and the right not to be a witness against himself. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!'

The Bill of Rights thus sets out the type of constitutionally required system that the State must follow in order to convict individuals of crime. That system requires that the State itself must bear the entire burden without any assistance from the defendant. This requirement is clearly indicated in the Fifth Amendment itself, but it is equally apparent when all the specific provisions of the Bill of Rights relating to criminal prosecutions are considered together. And when a question concerning the constitutionality of some aspect of criminal procedure arises, this Court must consider all those provisions and interpret them together. The Fifth Amendment prohibition against compelling a defendant to be a witness against himself is not an isolated, distinct provision. It is part of a system of constitutionally required procedures, and its true meaning can be seen only in light of all those provisions. 'Strict construction' of the words of the Constitution does not mean that the Court can look only to one phrase, clause, or sentence in the Constitution and expect to find the right answer…It is only through sensitive attention to the specific words, the context in which they are used, and the history surrounding the adoption of those provisions that the true meaning of the Constitution can be discerned.

This constitutional right to remain absolutely silent cannot be avoided by superficially attractive analogies to any so-called 'compulsion' inherent in the trial itself that may lead a defendant to put on evidence in his own defense. Obviously the Constitution contemplates that a defendant can be 'compelled' to stand trial, and obviously there will be times when the trial process itself will require the defendant to do something in order to try to avoid a conviction. But nothing in the Constitution permits the State to add to the natural consequences of a trial and compel the defendant in advance of trial to participate in any way in the State's attempt to condemn him.

A criminal trial is in part a search for truth. But it is also a system designed to protect 'freedom' by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in 'efficiency' that resulted. Their decision constitutes the final word on the subject, absent some constitutional amendment. That decision should not be set aside as the Court does today.

On the surface this case involves only notice-of-alibi provisions, but in effect the decision opens the way for a profound change in one of the most important traditional safeguards of a criminal defendant. The rationale of today's decision is in no way limited to alibi defenses, or any other type or classification of evidence. The theory advanced goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial. In each case the justification will be that the rule affects only the 'timing' of the disclosure, and not the substantive decision itself. This inevitability is clearly revealed by the citation to *Jones v. Superior Court*. In that case, the theory of which the Court today adopts in its entirety, a defendant in a rape case disclosed that he would rely in part on a defense of impotency. The prosecutor successfully obtained an order compelling the defendant to reveal the names and addresses of any doctors he consulted and the medical reports of any examinations relating to the claimed incapacity. That order was upheld by the highest court in California. There was no 'rule' or statute to support such a decision, only the California Supreme Court's sense of fairness, justice, and judicial efficiency. The majority there found no barrier to the judicial creation of pretrial discovery by the State against the defendant, least of all a barrier raised by any constitutional prohibition on compelling the defendant to be a witness against himself.

The dangerous implications of the *Jones* rationale adopted today are not, however, limited to the disclosure of evidence that the defendant has already decided he will use at trial. In *State v. Grove* the Washington Supreme Court, relying on *Jones*, held that a defendant in a murder trial could be compelled to produce a letter he had written his wife about the alleged crime, even though he had no thought at all of using that evidence in his own behalf. These cases are sufficient evidence of the inch-by-inch, case-by-case process by which the rationale of today's decision can be used to transform radically our system of criminal justice into a process requiring the defendant to assist the State in convicting him, or be punished for failing to do so.

I'm just wondering if any of you are surprised at how far the law goes to protect the guilty. There are certainly reasons for doing so, but I can't help but wonder about the victim's place in our justice system.

There is a hint in the State's brief in this case—as well as, I fear, in the Court's opinion—of the ever-recurring suggestion that the test of constitutionality is the test of 'fairness,' 'decency', or in short the Court's own views of what is 'best.' Occasionally this test emerges in disguise as an intellectually satisfying 'distinction' or 'analogy' designed to cover up a decision based on the wisdom of a proposed procedure rather than its conformity with the commands of the Constitution. Such a course, in my view, is involved in this case. This decision is one more step away from the written Constitution and a radical departure from the system of criminal justice that has prevailed in this country. Compelling a defendant in a criminal case to be a witness against himself in any way, including the use of the system of pretrial discovery approved today, was unknown in English law, except for the un-lamented proceedings in the Star Chamber courts—the type of proceedings the Fifth Amendment was designed to prevent. For practically the first 150 years of this Nation's history no State considered adopting such procedures compelling a criminal defendant to help convict himself, although history does not indicate that our ancestors were any less intelligent or solicitous of having a fair and efficient system of

criminal justice than we are. History does indicate that persons well familiar with the dangers of arbitrary and oppressive use of the criminal process were determined to limit such dangers for the protection of each and every inhabitant of this country. They were well aware that any individual might some day be subjected to criminal prosecution, and it was in order to protect the freedom of each of us that they restricted the Government's ability to punish or imprison any of us. Yet in spite of the history of oppression that produced the Bill of Rights and the strong reluctance of our governments to compel a criminal defendant to assist in his own conviction, the Court today reaches out to embrace…a most dangerous departure from the Constitution and the traditional safeguards afforded persons accused of crime. I cannot accept such a result and must express my most emphatic disagreement and dissent.

DISSENT: Mr. Justice MARSHALL…Since I believe that the Fourteenth Amendment guaranteed Williams a jury of **12** to pass upon the question of his guilt or innocence before he could be sent to prison for the rest of his life, I dissent from the affirmance of his conviction…