The Burger Court Opinion Writing Database

Wardius v. Oregon

412 U.S. 470 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

S

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

I, too, find the proposed opinion one I cannot join. I will await Justice Rehnquist's dissent before I come to rest.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

B file

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 30, 1973

Re: No. 71-6042 - Wardius v. Oregon

MEMORANDUM TO THE CONFERENCE:

I join Mr. Justice Powell's concurring and dissenting opinion, except as it concurs with Part II of the plurality opinion. While I favor, as a policy matter, "truly reciprocal pretrial disclosure of evidence," see Williams v. Florida, 399 U.S. 78, 105-106 (1970), (concurring opinion), I simply cannot make reciprocity into a constitutional right imposed by the Due Process Clause on the states.

> ". . .[A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in Moore v. Dempsey, supra, that the proceeding is more a spectacle (Rideau v. Louisiana, 373 U.S. 723, 726) or trial by ordeal (Brown v. Mississippi, 297 U.S. 278, 285) than a disciplined contest."

United States v. Augenglock, 393 U.S. 348, 356 (1969. See Cicenia v. Lagay, 357 U.S. 504, 510-511 (1958).

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

Please show me as joining in the result by whatever language this is usually done. You should get credit for 1.75 opinions on this!

Regards,

Mr. Justice Marshall

Copies to the Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 29, 1973

Dear Thurgood:

In No. 71-6072 - Wardius v. Oregon - would you kindly add at the end of your opinion:

Mr. Justice Douglas concurs in the result for the reasons stated by Mr. Justice Black, dissenting in Williams v. Florida, 399 U. S. 78, 107-116, in which he joined.

W. O. D.

Mr. Justice Marshall

cc: Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Douglas, J.

Circulated: 5-4-73

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[May —, 1973]

MR. JUSTICE DOUGLAS, concurring in the result.

In *Williams* v. *Florida*, 399 U. S. 78, 106. I joined Mr. Justice Black in dissent from that part of the Court's decision which upheld the constitutionality of Florida's "notice of alibi" rule. We concluded that the decision was "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." *Id.*, at 108. One need not go far for the textual support for this position. The Fifth Amendment, written with the inquisitorial practices of the Star Chamber firmly in mind, provides that "[n]o person . . . shall be compelled to be a witness against himself." It seems difficult to quarrel with the conclusion that a "notice of alibi" provision contravenes this clear mandate, for the State would see no need for the rule unless it believed that such notice would ease its burden of proving its case or increase the efficiency of its presentation. In either case, the defendant has been compelled to aid the State in his prosecution.

The Court views the growth of "such discovery devices" as a "salutory development" because it increases the evidence available to both parties. *Ante*, at —. This development, however, has altered the balance

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Douglas, J.

Circulated:

Recirculated: 6-8-73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[June 11, 1973]

MR. JUSTICE DOUGLAS, concurring in the result.

In *Williams* v. *Florida*, 399 U. S. 78, 106, I joined Mr. Justice Black in dissent from that part of the Court's decision which upheld the constitutionality of Florida's "notice of alibi" rule. We concluded that the decision was "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." *Id.*, at 108. One need not go far for the textual support for this position. The Fifth Amendment, written with the inquisitorial practices of the Star Chamber firmly in mind, provides that "[n]o person . . . shall be compelled to be a witness against himself." It seems difficult to quarrel with the conclusion that a "notice of alibi" provision contravenes this clear mandate, for the State would see no need for the rule unless it believed that such notice would ease its burden of proving its case or increase the efficiency of its presentation. In either case, the defendant has been compelled to aid the State in his prosecution.

The Court views the growth of "such discovery devices" as a "salutary development" because it increases the evidence available to both parties. *Ante*, at —. This development, however, has altered the balance

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 13, 1973

RE: No. 71-6042 Wardius v. Oregon

Dear Thurgood:

Please join me.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

WD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1973

RE: No. 71-6042 Wardius v. Oregon

Dear Thurgood:

Please join me in your latest circulation.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 28, 1973

71-6042 - Wardius v. Oregon

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 9, 1973

71-6042 - Wardius v. Oregon

Dear Thurgood,

I cannot agree with some of the new matter on page 17 of your recirculation of today. Specifically, I cannot subscribe to the thought that the State must show that the defendant himself was unaware of the alibi defense rule before it can impose sanctions. I know that there are a couple of cases that have made the distinction between a defendant's knowledge and his lawyer's knowledge, but I have not agreed with them. It seems to me that this dichotomy is totally at odds with the rationale of such cases as Johnson v. Zerbst and Gideon v. Wainwright to the effect that only a lawyer can be expected to know and understand such rules, and that the Constitution requires that only he should call the shots.

In the interest of achieving a Court opinion in this case, I would be agreeable to the deletion of all of Part III, and to resting our holding solely on the lack of reciprocity in the Oregon statute.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 1, 1973

Re: No. 71-6042, Wardius v. Oregon

Dear Thurgood,

This will confirm that I am glad to join your opinion for the Court as recirculated on April 25.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

WO

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 22, 1973

71-6042 - Wardius v. Oregon

Dear Thurgood,

I have no idea how your proposed opinion for the Court now stands in this case, and neither, I guess, do you. I write this note not to add to the confusion, but to try to clarify the situation, at least so far as I am concerned.

As I understand it, three issues were briefed and argued with respect to this "notice of alibi" statute. At the Conference I expressed the view that such a statute, to be valid, (1) must provide for reciprocal discovery, and (2) cannot, as a sanction for non-compliance, exclude the testimony of the defendant himself, but (3) may impose as a sanction other evidence offered by the defendant for the purpose of proving his alibi. It was my understanding that this view was shared by a majority.

One of your circulations, i.e., that of April 9, did decide all three issues in the manner suggested above. In my note of the same date I advised you of my objections to the narrowness of the holding on the third issue, and also said that, in the interest of achieving a Court opinion, I would be agreeable to resting our holding solely on the lack of reciprocity in the Oregon statute.

Your subsequent circulations have dealt with only the first two issues. In my note to you of May 1, I indicated that I would be willing to join an opinion deciding only those two issues, in the interest of achieving an opinion of the Court.

Lewis has now circulated a separate opinion that expresses my views as to the third issue, and which, indeed, decides that issue in basic accord with your circulation of April 9. Your circulation of May 18 explicitly rejects that disposition, or, indeed, any disposition of that issue. With matters in this posture, I could not join your opinion, but, for the reasons outlined above, would join the separate opinion that Lewis has circulated.

I continue to hope, however, that your opinion will either dispose of all three issues, or, if there is not a Court for that result, will confine decision to the reciprocity issue in the interest of achieving a Court opinion.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1973

Re: No. 71-6042, Wardius v. Oregon

Dear Thurgood,

As I have previously indicated to you, I would be willing to join an opinion that deals only with reciprocity, if that is the only way to achieve a Court opinion. Accordingly, I would join your circulation of today on that basis. As I have also indicated, however, my views on the merits of the other two issues coincide with what Lewis Powell has written in his separate opinion.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

(3)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 4, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

I have had problems similar to those of Lewis Powell in connection with this case and I shall await the outcome of your discussions.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 16, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

We must and should soon decide the issue in any event, but I have had second thoughts about reaching in this case the question of the validity of excluding third party witness testimony as a sanction for failure to comply with alibi notice requirements. Perhaps you would be willing to confine your opinion to the reciprocity issue as Potter suggests or to that issue and the impermissibility of excluding the testimony of the defendant himself.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

M 5

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1973

Re: No. 71-6042 - WARDIUS v. OREGON

Dear Thurgood:

Please join me in your April 25, 1973, circulation.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

7

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 21, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

Your addition to footnote 17 concerns me. Would it be at all possible for you to go back to your previous form?

Sincerely,

Byron

Mr. Justice Marshall

cc: Mr. Justice Powell

9

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

Please join me in your June 4 circulation.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAR 9 - 1973

Recirculated: _____

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the sanctions which a State may impose to enforce a valid "notice of alibi" rule and the right of a defendant forced to comply with such a rule to reciprocal discovery.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we upheld the constitutionality of Florida's notice-of-alibi rule which required criminal defendants intending to rely on an alibi defense to notify the prosecution of the place they claimed to be at the time in question and of the names and addresses of witnesses they intended to call in support of the alibi.[1] In so holding, however, we emphasized that "this case does not involve the question of the validity of the threatened sanction, had petitioner chosen

[1] The requirement was attacked as a violation of the defendant's due process right to a fair trial and an invasion of his privilege against self-incriminaton. But the Court found that "[g]iven 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." 399 U. S., at 81. Moreover, we held that "[t]he privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." 399 U. S., at 83.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 23, 1973

MEMORANDUM TO THE CONFERENCE

Re: 71-6042 - Wardius v. Oregon

Herewith is a re-draft of the opinion in Wardius - #71-6042. I have deleted the objectionable language -- I hope.

Sincerely,

T.M.

pp. 2, 3, 8, 9, 10, 11, 12, 14, 15, 16, 17

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Marshall, J.

Circulated:

Recirculated: MAR 23 1973

SUPREME COURT OF THE UNITED STATES

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the sanctions which a State may impose to enforce a valid "notice of alibi" rule and the right of a defendant forced to comply with such a rule to reciprocal discovery.

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B

5, 9, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: MAR 27 197

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the sanctions which a State may impose to enforce a valid "notice of alibi" rule and the right of a defendant forced to comply with such a rule to reciprocal discovery.

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WO

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 9, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 71-6042 - Wardius v. Oregon

I have once again substantially revised my opinion in this case in light of Lewis's suggestions. Specifically, the opinion as presently drafted holds that the State may constitutionally keep a defendant from putting alibi witnesses on the stand when he deliberately violates an otherwise legitimate notice of alibi rule. I have also made some other changes to meet most of Lewis's objections.

Although I share Justice Powell's view that it would be best to decide the sanction issue in this case, if there is still not a court for the opinion, I would be inclined to excise all of part III and rest our holding solely on the lack of reciprocity under the Oregon statute without reaching the question of sanctions.

I welcome your suggestions and comments.

T.M.

5

4, 11, 12, 15, 17

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-6042

Recirculated: APR - 9 19

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. | On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the sanctions which a State may impose to enforce a valid "notice of alibi" rule and the right of a defendant forced to comply with such a rule to reciprocal discovery.

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(W)

4, 15, 16

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-6042

Recirculated: APR 25 19

Ronald Dale Wardius, Petitioner, *v.* State of Oregon.	On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

From: Marshall, J.

Circulated:

Recirculated: MAY 2 1973

SUPREME COURT OF THE UNITED STATES

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the sanctions which a State may impose to enforce a valid "notice of alibi" rule and the right of a defendant forced to comply with such a rule to reciprocal discovery.

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5

16, 17

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

From: Marshall, J.

Circulated:

Recirculated: MAY 18 1973

SUPREME COURT OF THE UNITED STATES

No. 71-6042

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the sanctions which a State may impose to enforce a valid "notice of alibi" rule and the right of a defendant forced to comply with such a rule to reciprocal discovery.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we upheld the constitutionality of Florida's notice of alibi rule which required criminal defendants intending to rely on an alibi defense to notify the prosecution of the place they claimed to be at the time in question and of the names and addresses of witnesses they intended to call in support of the alibi.[1] In so holding, however, we emphasized that "this case does not involve the question of the validity of the threatened sanction, had petitioner chosen

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VD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 71-6042 - Wardius v. Oregon

Since the Court appears hopelessly splintered on the disposition of petitioner's contentions concerning the state's exclusionary rule, I have decided that it may be best to leave this question for another day. I have therefore excised Part III of the draft opinion and rested the holding solely on the state's failure to provide reciprocal discovery. This holding is sufficient to dispose of the case and it is one, I trust, upon which all members can agree. At this juncture, I know of nothing else I can do to accommodate the views of the conference.

Sincerely,

T.M.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

8th DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: JUN 4 1973

No. 71-6042

Ronald Dale Wardius, Petitioner, v. State of Oregon. | On Writ of Certiorari to the Supreme Court of Oregon.

[March —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the right of a defendant forced to comply with a "notice of alibi" rule to reciprocal discovery.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we upheld the constitutionality of Florida's notice of alibi rule which required criminal defendants intending to rely on an alibi defense to notify the prosecution of the place they claimed to be at the time in question and of the names and addresses of witnesses they intended to call in support of the alibi.[1] In so holding, however, we emphasized that the constitutionality of such rules might depend

OMISSION

[1] The requirement was attacked as a violation of the defendant's due process right to a fair trial and an invasion of his privilege against self-incriminaton. But the Court found that "[g]iven 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." 399 U. S., at 81. Moreover, we held that "[t]he privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." 399 U. S., at 83.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1973

MEMORANDUM FOR THE CONFERENCE

Re: Case Held for Wardius v. Oregon, No. 71-6042 --
Kelsaw v. Oregon, No. 72-6012

This case was held for our decision in Wardius v. Oregon, No. 71-6042. On its facts, the case is very similar to Wardius. Petitioner was indicted for narcotics offenses and failed to give a notice of alibi as required by the same Oregon statute involved in Wardius. Consequently, his alibi testimony was held inadmissible.

Since the Oregon statute did not guarantee petitioner reciprocal discovery, our decision in Wardius makes plain that petitioner's alibi evidence may not be excluded because he failed to comply with the rule. There are, however, two additional factors in this case which make it somewhat more complicated than Wardius.

First, the Oregon Court of Appeals held that in order to give the notice of alibi statute a "rational interpretation" it must be read as "providing that unless the record clearly and unequivocally shows that the defendant was given timely reciprocal information as to time and place, good cause exists as a matter of law for not requiring the defendant to have given the statutory notice of alibi as a condition precedent to producing alibi evidence." In this case, the court nonetheless upheld the conviction because the record showed that petitioner had been provided with information as to the time and place of the alleged crime. But in Wardius, we expressly referred to the Kelsaw holding and stated that "merely informing the defendant of the time and place of the crime does not approach the sort of reciprocity which due process demands." Consequently, I doubt that the limited reciprocity which the state court has now read into the Oregon statute is sufficient to shield it from due process attack.

WJB

Secondly, the opinion of the Court of Appe states that "on February 29, 1972, defendant's counsel given access to the district attorney's files and . . . these files disclosed . . . the names of all the witne that were called by the state in the subsequent trials. Of course, if petitioner was given access to both the t and place of the alleged offense and the names and addr of the state's rebuttal witnesses, he would have been a complete reciprocal discovery. It appears, however, th what was in fact provided to him may have fallen somewh short of this. Since petitioner was not permitted to in duce alibi evidence, it was unnecessary for the State t call rebuttal witnesses to discredit his alibi claim. (sequently, the mere fact that petitioner was provided w the names of "the witnesses that were called by the stat in the subsequent trials" does not mean that he was prov with the names of the witnesses which the state would ha called if it had been necessary to refute an alibi defen

It is possible, of course, that petitioner w provided with the names and addresses of all witnesses w the State had available and that he knew that the State provided him with complete reciprocal discovery at the t he failed to give the notice of alibi. But it is impossi to determine from this record whether or not that is so. Therefore, I intend to vote to vacate and remand for re-consideration in light of Wardius.

T.M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 2, 1973

Re: No. 71-~~6072~~ 6042 - Wardius v. Oregon

Dear Lewis:

I have now had an opportunity to study Thurgood's recirculation of March 27.

My original vote at Conference was an uneasy decision to affirm. I was not so positive in my attitude as, perhaps, Bill Rehnquist was in his. On further reflection, I may well be able to join a narrowly drawn opinion that (a) upholds the defendant's right to testify regardless of the state's alibi rule and (b) reaches a contrary result with respect to witnesses other than the defendant provided that the state's procedural rules are fair and that reciprocal discovery rights are granted.

On this basis I could not join Thurgood's original circulation of March 9, and I would have great difficulty in joining his recirculation of March 27. I have particular trouble with footnote 15. If that footnote means that a state has the ability to preclude testimony by witnesses, it is less than clear to me. Furthermore, the reaching of this result, in my view, ought to be in the text itself and should be clearly outlined there.

The language of the opinion, as a whole, seems to me to be too sweeping in general. The language on page 12 is an example. I am troubled also by the material beginning at the bottom of page 12. I do not know whether that statement would mean, for example, that a defendant who intentionally absented himself from trial could not be convicted.

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 2, 1973

Re: No. 71-6072 - Wardius v. Oregon

Dear Thurgood:

I, as did others, encountered difficulty with your original circulation of March 9. I find that I still have trouble with the recirculation of March 27. I, therefore, shall wait for any dissent, in whole or in part, that may be forthcoming.

Sincerely,

H.A.B.

Mr. Justice Marshall

Copies to the Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 1, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

I have read with interest your 5th draft circulation of April 25.

My strong preference is to have the opinion in this case cover all three points, that is, reciprocity, the defendant's right to testify, and witnesses' right to testify. All three have been presented and argued and are ready for decision, and it seems to me somewhat inconsistent to reach and decide the question whether the defendant's testimony is to be excluded but not to reach and decide the question whether testimony of witnesses is to be excluded. Technically, one could say that neither of these last two issues demands decision here inasmuch as the reciprocity holding would dispose of the case. Nevertheless, I prefer to cover all three issues. In the alternative -- and for me it is a weak alternative -- I could join an opinion restricted to the reciprocity issue.

All this appears generally to coincide with Lewis' position as described in his letter to you of April 16.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

(7)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 29, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

My letter of May 1 indicated my posture with respect to your fifth draft circulation of April 25. I have carefully considered the changes made by your sixth and seventh drafts.

This note is to advise you that my further work on the case leads me to about the position Potter has expressed, by way of conclusions, on page 2 of his letter of May 22 to you. In other words, my preferences are: (1) that the Court decide all three issues; (2) if there is no Court for that result, that the opinion confine itself to the reciprocity issue; (3) if neither of these results can be obtained, I may join the opinion Lewis has circulated.

Sincerely,

Harry

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 5, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

I join your recirculation of June 4 if, as Potter has stated, that is the only way to achieve a Court opinion. As I stated in my note of May 29 to you, my preference is that the Court decide all three issues.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
E LEWIS F. POWELL, JR.

March 13, 1973

No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

This refers to your extremely well written opinion in the above case.

Although my notes are not explicitly clear in every instance, they corroborate my recollection as follows: the seven of us who voted for reversal agreed that, consistent with due process, a defendant could not be deprived of his right to testify in his own behalf merely because he failed to comply with a state alibi statute. I think we also were in accord that an alibi statute should provide for reciprocal discovery information, such as that provided by the Florida law.

But I did not understand that a majority of the Court agreed that an otherwise properly drawn alibi statute could not impose, as a reasonable sanction, a right on the part of the state to exclude alibi witnesses (other than the defendant himself) where there had been a clear violation by the defendant of the alibi reciprocal requirements.

My own view was that the Sixth Amendment right to compel testimony in one's behalf is subject to reasonable procedural requirements provided they are fairly structured. I just do not see how an alibi statute can serve its obviously just and desirable purpose if a defendant is subject to no effective sanction at the trial when he has deliberately violated it.

It is entirely possible, Thurgood, that I misunderstood the vote, and of course all voting is tentative. But I thought I should bring my recollection (and personal view) to your attention.

Sincerely,

L.F.P.

Mr. Justice Marshall

cc: The Conference

4/0

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 3, 1973

No. 71-6042 Wardius v. Oregon

Dear Thurgood:

This refers to your recent inquiry as to whether your circulation of March 27 (third draft) had met the points which have been giving me trouble. I'm afraid that it does not.

My own views (as expressed at the Conference), and stated in oversimplified terms, are as follows: A properly drawn "notice of alibi" statute is valid where it (i) provides for reciprocal discovery; (ii) does not exclude, as a sanction for noncompliance, the testimony of the defendant himself; but (iii) allows the state to exclude, as a proper sanction for violation of the rule, other evidence offered by the defendant for the purpose of proving his alibi. I consider this formulation to be within the rationale of Williams v. Florida, although - as you correctly point out - the question as to sanctions was left open in Williams.

In this case the Oregon statute made no provision for reciprocal discovery. It is therefore, in my opinion, an invalid statute. It would be possible for us to decide this case on the first point set forth above, namely, the failure of the Oregon statute to provide for reciprocity. We would then not reach the sanction issues as such. We would simply reverse on the ground that, in the absence of a valid notice of alibi rule, the defendant was entitled to ignore it - as he did - and introduce alibi witnesses as well as testify himself.

But I would not favor electing to decide the case on such a narrow basis. We have the opportunity here that was not clearly available in Williams to enunciate the basic principles which distinguish a valid from an invalid notice of alibi rule. We should encourage mutual pre-trial discovery to the extent possible under constitutional limitations, as discovery promotes the reliability of the truth finding process of a trial. Your opinion addresses the sanction aspect of the problem with respect to the defendant's testimony, but leaves open - rather tenuously

it seems to me (Note 15) - the equally important issue as to the sanction with respect to other evidence (witnesses) sought to be introduced by a noncomplying defendant. I think we should deal, explicitly and in the text, with both of the sanction issues. This was my understanding of the majority views expressed at the Conference. Unless we do this, we are not affording state legislatures the most helpful type of guidance.

As a peripheral comment, I add that some of the language in the draft seems to me to be unnecessarily sweeping, and might give us trouble in the future. For example, the long paragraph beginning at the bottom of page 12 gives me some difficulty. I am not quite sure how far it is intended to go. It seems to say that failure of a defendant to comply with procedural or evidentual rules constitutes some "unrelated wrong," for which no sanction can be imposed that would deprive "a defendant of the right to make a defense" on his own behalf. I would have difficulty with such a sweeping generalization, as violation of a valid alibi notice rule would not be an "unrelated wrong" as to the trial in question.

Also, as a matter of historical accuracy, it does not seem to me that Mr. Justice Field's statement in Galpin v. Page ("a rule as old as the law") can be applied to the right of a defendant to testify. See Ferguson v. Georgia, cited on page 10 of your opinion.

I hesitate to put you to the trouble of possibly reconsidering an opinion on which already you have devoted such a fine effort. But in view of your inquiry I have tried to summarize the essence of my continued reservations.

I thank you for this opportunity.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 16, 1973

Re: No. 71-6042 Wardius v. Oregon

Dear Thurgood:

I must say that I am embarrassed to have caused trouble for you and others on this case.

Byron's note of April 16 has just come to my desk. I note that he would join an opinion dealing only with the reciprocity point, or with that and the exclusion of testimony of the defendant himself.

I do not know what the "nose count" is at this time. My Conference notes still persuade me that a majority of the Court was willing to address, and decide, all three points along the lines of my prior memoranda to you.

For reasons similar to those stated by Potter, I am afraid I cannot join your latest draft.

Nor can I join an opinion, as suggested by Byron, that deals only with the first two points. The third point is the one which really will "hang up" state legislatures. If our opinion is to afford any useful guidance, I think it should address all three of these.

But if there is no court for this view, I would join an opinion limited only to the reciprocity point. I would hope, simultaneously, we could find - upon examination - that one of the pending cases would enable us to decide the other two points later.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 71-6042

Circulated: MAY 11 1973

Recirculated: _____

Ronald Dale Wardius, Petitioner, *v.* State of Oregon. } On Writ of Certiorari to the Supreme Court of Oregon.

[May —, 1973]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I concur in Part II of the plurality opinion, which holds that to accord with due process a notice of alibi rule must provide for reciprocal discovery. I also concur in the result in Part III insofar as it holds that a State may not bar the accused from taking the stand in his own defense as a sanction to enforce a constitutionally valid notice of alibi rule. I disagree, however, with the resolution of only half of the sanctions issue. I would reach, as the plurality opinion does not, the question whether a valid rule could be enforced by excluding a defendant's alibi witnesses, and would hold that, under proper circumstances, this is a permissible sanction.

I

In *Williams* v. *Florida*, 399 U. S. 78 (1970), the Court upheld Florida's notice of alibi rule, but because the defendant there had complied with the rule, "[t]he validity of the exclusion sanction was . . . not before the Court." *Ante*, at 2 n. 2. In the case before us today, however, the defendant did not comply with the State's rule and was subjected to its sanctions. The Oregon trial court invoked both of the statute's sanctions: it barred the defendant's alibi witness, Colleen McFadden, from testifying in his behalf, and it pre-

May 18, 1973

No. 71-6042 Wardius v. Oregon

Dear Chief:

Although you have not voted in this case, my Conference notes indicate that you and I were together at the time.

I write this note to be sure that you see note 17 (page 16) as enlarged and revised in Thurgood's 7th draft, recirculated today. His revised note 17 departs from the prior posture of neutrality with respect to the validity of excluding witnesses under an otherwise valid alibi statute. Instead, of simply leaving the issue open, he now leans clearly in the direction of invalidity. He characterizes this question as "more difficult" and as being "far more complex".

Although Thurgood has a Court, my understanding is that one or more of the Justices joined him only because he was leaving this issue genuinely open. I believe that the reformulation of his note 17 will cast serious doubt - in the minds of legislators and lower courts - as to all alibi statutes which impose reasonable limitations with respect to witnesses. This disturbs me for all of the obvious reasons, as the criminal justice system badly needs wider discovery.

I am sending copies of this letter to Harry and Bill Rehnquist, as I believe both of them also were with you and me on this issue, even though Bill may have had a different view as to the defendant himself testifying.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Blackmun
Mr. Justice Rehnquist

May 18, 1973

No. 71-6042 Wardius v. Oregon

Dear Byron:

As I have missed you on the telephone, and am leaving for Williamsburg in a few minutes, I write this note.

I have just read note 17, page 16, of Thurgood's recirculation (May 18) in Wardius, and it gives me a good deal of concern. He has expanded the note to respond to my concurring opinion, but in the process has changed its tone from being relatively neutral to casting genuine doubt as to the validity of a reasonable alibi rule with respect to witnesses. He now characterizes this as a "difficult question", and as being far more complex than the two questions which he addressed in his opinion.

I appreciate, of course, that you have joined Thurgood. I had understood from our several conversations, however, that you agreed with the substance of my position but were joining Thurgood in view of his willingness to leave this question open. I am afraid that his revised and expanded note (abandoning neutrality), will be construed by legislatures and lower courts as meaning that at least a majority of this Court has serious doubts as to the constitutionality of any rule, however reasonably drawn, that excludes witnesses when a defendant has wilfully violated the notice of alibi requirement.

Sincerely,

Mr. Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1973

No. 71-6042 Wardius v. Oregon

Dear Thurgood:

Please join me in your recirculation of June 4.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

lfp/gg

S

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Chief:

I voted to affirm in this case at Conference, but before writing a dissent to Thurgood's proposed opinion I think I will wait and see if anything narrower, along the lines suggested in Lewis' memorandum to the Conference, is written.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

WB
WO

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Ready

June 6, 1973

Re: No. 71-6042 - Wardius v. Oregon

Dear Thurgood:

Your most recent circulation in this case has achieved the dubious distinction of enlisting my support. Please join me.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference