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Criminal Law - Alibi - Affirmative Defense in Iowa

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to have been the intention of the Court in this case to remove any discrepancies between state and federal court procedural rights to counsel, as was done regarding illegal search and seizure in *Mapp v. Ohio*.[21] What the minimum charges shall be to warrant this "right to counsel" must await future litigation.[22]

GENE LEBRUN

CRIMINAL LAW—ALIBI—AFFIRMATIVE DEFENSE IN IOWA—The defendant was indicted for second degree murder. Under Iowa's disclosure statute[1] defendant gave notice of his intention to plead alibi. On appeal, the Iowa Supreme Court *held*, three judges dissenting, that the trial court properly instructed the jury that the defendant was under a burden to establish his alibi by a preponderance of the evidence; yet, if the evidence as a whole left a reasonable doubt of guilt, the jury must acquit. The dissent argued that this instruction was contradictory, and that it denied the defendant his presumption of innocence by making him prove his non-presence. *State v. Stump*, 119 N. W. 2d 210 (Iowa 1963).

Iowa's stringent alibi rules have been severly criticized,[2] even though the state claims all the common safeguards of "reasonable doubt" in its criminal prosecutions.[3] If the accused pleads not guilty, he denies that he participated in the commission of the crime, and he need only raise a reasonable doubt of this fact.[4] But if he goes further and says that he was so far away that he could not possibly have committed the crime, he must prove it by a preponderance of the evidence,[5] in order to be acquitted on that ground

21. 367 U.S. 643 (1961).
22. In another recent decision, Douglas v. People of State of California, 83 Sup. Ct. 814 (1963), the United States Supreme Court held that an indigent defenant charged and convicted of a felony had a right to a court-appointed counsel for an appeal.

1. Iowa Code Ann., tit. 36, § 777.18 (1962). "Where the defendant pleads not guilty and proposes to show insanity as a defense, or that he relies on an alibi or that he was at some other place at the time of the alleged commission of the offense charged, he shall, at the time he pleads or at any time thereafter, not later than four days before the trial, file a written notice of this purpose. . . ." See State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953).
2. See State v. Reed, 62 Iowa 40, 17 N.W. 150 (1883); State v. Hamilton, 57 Iowa 596, 11 N.W. 5 (1881). See also 27 Mich. L. Rev. 702 (1929).
3. State v. Red, 207 Iowa 69, 151 N.W. 831, 832 (1880).
4. State v. Bosworth, 170 Iowa 329, 151 N.W. 581, 586 (1915).
5. **Ibid.**

alone.[6] Iowa regards this type of evidence, known as alibi,[7] with suspicion.[8] Iowa courts may disparage such evidence by instructing that it is easily fabricated.[9] In making alibi an affirmative defense[10] the Iowa decisions imply that the state need not prove the defendant's presence beyond a reasonable doubt *if* he claims to have been elsewhere, while nonetheless denying this logical conclusion.[11] When the alibi evidence does no more than raise a reasonable doubt of the defendant's presence at the scene of the crime, the jury may convict or acquit by choosing between two contradictory instructions. No jury may follow both.[12] Trial courts have often recognized this anomaly, and have given more liberal instructions.[13]

The majority of jurisdictions, however, hold that the defendant need prove nothing, and that the state must prove the presence of the accused at the time and place of the commission of the crime.[14] It is sufficient to warrant acquittal if the alibi evidence merely raises a reasonable doubt of guilt.[15] It has been called "the most effective of the exculpatory defenses,"[16] yet is not a defense at all.[17] Analytically, it is a plea of not guilty, with a rebuttal of the essential element of the defendant's presence at the scene of the crime.[18] It naturally follows that all the evidence introduced to show that the accused was elsewhere tends in the same degree to show that he was not at the scene of

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6. State v. Debner, 205 Iowa 25, 215 N.W. 721, 722 (1927).
7. See State v. Glass, 29 N.D. 620, 151 N.W. 229, 234 (1915).
8. State v. Banoch, 193 Iowa 851, 186 N.W. 436 (1922); State v. Blunt, 59 Iowa 468, 13 N.W. 427 (1882).
9. State v. Blunt, 59 Iowa 468, 13 N.W. 427 (1882). But the court may not single out the testimony of a particular alibi witness and cast suspicion on it. State v. Boyd, 196 Iowa 226, 194 N.W. 177, 178 (1923).
10. State v. McCumber, 202 Iowa 1382, 212 N.W. 137 (1927).
11. State v. Red, 207 Iowa 69, 4 N.W. 831 (1880).
12. See State v. Hamilton, 57 Iowa 596, 11 N.W. 5 (1881) (dissenting opinion of Adams, C. J.).
13. See State v. Thomas, 135 Iowa 717, 109 N.W. 900, 902 (1906) "The jury was told to acquit if the evidence as to alibi 'raises a reasonable doubt of the defendant's presence at the time and place of the commission of the crime.' The instruction was more favorable to defendant than it should have been." See also State v. Hassan, 149 Iowa 518, 128 N.W. 960, 965, 966 (1910).
14. **E.g.,** Newton v. State, 229 Miss. 267, 90 So. 2d 375 (1956); State v. Bridgers, 233 N.C. 577, 64 S.E.2d 867 (1951); Roen v. State, 182 Wis. 515, 196 N.W. 825 (1924).
15. People v. Roberts, 122 Cal. 377, 55 Pac. 137 (1898); People v. Silverman, 252 App. Div. 149, 297 N.Y. Supp. 449 (1937).
16. 2 UNDERHILL, CRIMINAL EVIDENCE § 440 (5th ed. 1959).
17. See State v. Brauneis, 84 Conn. 222, 79 Atl. 70 (1911); Peyton v. State, 54 Neb. 188, 74 N.W. 597 (1898). See also 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 121 (1957).
18. See State v. Schweitzer, 17 Conn. 532, 18 Atl. 787 (1889). See also 1 WHARTON, CRIMINAL EVIDENCE § 23 (12th ed. 1955).

the crime when committed. Alibi evidence differs from an affirmative defense such as insanity by attempting to cast doubt on the defendant's presence rather than to escape criminal liability.[19] A defendant is presumed to have been sane, but he cannot be presumed to have been present without denying him his presumption of innocence. While some courts have held that the burden of proof is upon the defendant with respect to alibi,[20] this has usually meant the burden of introducing evidence in its support.[21]

North Dakota is among the most liberal jurisdictions on the matter of alibi.[22] It has no disclosure statute, and has had no case law on the subject since 1924.[23]

RICHARD BOARDMAN

DAMAGES—INJURIES TO THE PERSON—IMPAIRMENT OF EARNING CAPACITY—COLLATERAL SOURCE RULE—Plaintiffs, members of the U. S. Air Force, were involved in an automobile accident and brought suit to recover damages for personal injuries. The Supreme Court of New Hampshire, in a unanimous decision, *held* that plaintiffs were entitled to recover for loss of earning capacity even though they continued to receive their pay from the government during the period of disability. *Bell v. Primeau*, 104 N.H. 227, 183 A.2d 729 (1962).

The measure of damages in personal injury cases may be stated generally as that amount which will compensate for all the detriment proximately caused by the wrongful act or breach of duty.[1] Specifically, in actions of tort for personal injuries, damages are recoverable for loss of capacity

19. 20 Am. Jur., **Evidence** § 153 (1939).
20. People v. Weiss, 367 Ill. 580, 12 N.E.2d 652 (1937); Commonwealth v. Choate, 105 Mass. 451 (1870).
21. State v. Brauneis, 84 Conn. 222, 79 Atl. 70 (1911); State v. Thornton, 10 S.D. 349, 73 N.W. 196 (1897).
22. A recent example of the liberality on alibi in North Dakota courts is found in State v. MacDonald (N.D. Dist. 1963) in which Redetzke J. instructed, "It is sufficient to justify an acquittal if the evidence on that point raises a reasonable doubt as to the presence of the accused at the time and place of the commission of the crime."
23. See State v. Gates, 51 N.D. 695, 200 N.W. 778 (1924).

1. See, **e.g.**, N.D. Cent. Code § 32-03-20 (1961).