



## Indiana Public Defender Council

# GUIDE TO ALIBI DEFENSE IN INDIANA

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## I. GENERALLY

The most convincing evidence the accused may be capable of offering to establish his innocence is to establish by reliable witnesses that he was elsewhere when the offense was committed. Brown v. State, 436 N.E.2d 285 (Ind. 1982). When a defendant fails to file notice of alibi pursuant to statutory requirements, the trial court shall exclude any alibi evidence offered by the defendant. Lee v. State, 694 N.E.2d 719 (Ind. 1998). See also Jones v. State, 569 N.E.2d 975 (Ind. Ct. App. 1991).

**NOTE:** *The trial court may allow the defendant's own testimony regarding alibi, even if notice is not filed; see section IV.A.1 on page 16.*

### A. Definition

The term "alibi" means "elsewhere" or "in another place." Black's Law Dictionary 95 (rev. 4<sup>th</sup> ed. 1968). Alibi is a line of proof by which a defendant demonstrates that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime. 21 Am.Jur.2d Criminal Law 192 (1968).

Courts have defined alibi evidence as "rebuttal evidence directed to that part of the State's evidence which tends to identify the defendant as the person who committed the alleged crime." Kappos v. State, 465 N.E.2d 1092 (Ind. 1984) (quoting Witt v. State, 185 N.E. 645 (Ind. 1933)).

### B. Applicability

The alibi statute does not apply to accomplice liability theories because an accessory is still liable for the acts of a principal even if the accessory did not participate in them. Kappos v. State, 465 N.E.2d 1092 (Ind. 1984) (alibi defense does not apply to "murder by hire" cases).

However, alibi statutes apply to criminal conspiracy cases. State v. Lee, 328 N.E.2d 745 (Ind. Ct. App. 1975).

Evidence that defendant was not at the crime scene is not alibi evidence; rather, it is a rebuttal of the prosecution's contention that the defendant was present and thus capable of committing the crime. Edwards v. State, 930 N.E.2d 48 (Ind. Ct. App. 2010) (an eyewitness at a crime scene who indicates only that a defendant was not at the scene is not an alibi witness).

The defendant must file a notice of alibi where he admits being present at the crime scene for a portion of the time but claims that he was elsewhere during the remaining portion of the time. Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990).

### C. Constitutional Claims

Under Article 1, Section 13 of the Indiana Constitution, a defendant has the right to present an alibi by his or her own testimony regardless of whether a timely alibi notice is filed. Exclusion of a defendant's own testimony under the alibi notice statute impermissibly infringes upon the right of the accused to testify under Article 1, Section 13. Campbell v. State, 622 N.E.2d 495 (Ind. 1993).

The procedures contained within the alibi statute are sufficient to provide a defendant an opportunity to present an alibi defense and therefore do not violate the defendant's constitutional right to due process. McCallip v. State, 580 N.E.2d 278 (Ind. Ct. App. 1991); Bruce v. Duckworth, 659 F.2d 776 (7th Cir. 1981). But see Wardius v. Oregon, 412 U.S. 470 (1973) (alibi statute violated due process because the State had no obligation to respond and thereby limit its proof).

The deadlines imposed by the alibi statute cannot be enforced so as to deny the defendant due process rights if the defendant proffers an acceptable reason for violating the statute's time requirements. Harrison v. State, 644 N.E.2d 1243 (Ind. 1995).

Requiring defendants to file notice in order to present alibi testimony does not violate the right to remain silent or to be free from self-incrimination. Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990) (defendant's alibi included admission that he was at victims' apartment for portion of time during which crimes were allegedly committed).

Denying defendant the opportunity to present alibi evidence as a result of failure to file statutorily-required notice of alibi does not violate confrontation rights. Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990) (although testimony could have also been considered impeachment evidence, it was still alibi evidence, and thus notice was required by statute).

## **D. Judicial Discretion to Admit Evidence Despite Failure to Comply with Statutory Requirements**

Where a defendant shows good cause for failing to meet the alibi statute's requirements, the trial court has discretion to admit alibi evidence. See Seay v. State, 529 N.E.2d 106, 110 (Ind. 1988) and Hartman v. State, 376 N.E.2d 100, 104 (Ind. Ct. App. 1978).

Determination of good cause for purposes of compliance with the notice requirements of the alibi statute is a matter within the trial court's sound discretion. Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990).

## **E. Burden of Proof**

Although the filing of notice of alibi defense makes time of the offense critical or of the essence, mere filing of alibi defense does not impose a greater burden of proof on the State than would be otherwise required absent such filing. Sangslund v. State, 715 N.E.2d 875 (Ind. Ct. App. 1999). See also Jennings v. State, 514 N.E.2d 836 (Ind. 1987).

The State has no burden to present defendant's alibi witnesses; but once alibi is invoked, the State has the burden to show that the defendant was present at the scene of the crime. Harris v. State, 617 N.E.2d 912 (Ind. 1993).

## II. NOTICE

Where time is not of the essence of the offense, the State is not restricted to proving commission of the offense upon the date alleged in the indictment or information. Evans v. State, 68 N.E.2d 546 (Ind. 1946). See also Aikens v. State, 289 N.E.2d 152 (Ind. Ct. App. 1972). While time is not of the essence in proving most criminal offenses, if the alibi statute is properly invoked, time becomes of the essence when proving the commission of the crime charged and the State's answer to the alibi notice restricts the State to proof of the date in the answer. Shelton v. State, 290 N.E.2d 47 (Ind. 1972); McNeely v. State, 529 N.E.2d 1317 (Ind. Ct. App. 1988). The mere fact that a defendant raises the alibi defense does not necessarily make time an essential element of the offense. Sangslund v. State, 715 N.E.2d 875 (Ind. Ct. App. 1999).

### A. Purpose of Alibi Statute

One purpose of the alibi statute is to advise the State in advance of the exact place the accused claims to have been when the offense was committed so that the State might investigate the alibi and either dismiss the charges before trial, if it is discovered that the wrong person is accused, or secure evidence to prove the alibi false if that is the case. Harvey v. State, 542 N.E.2d 198 (Ind. 1989). Another purpose is to narrow the factual issues of time and place to the degree practicable, thereby protecting the defendant's ability to establish the defense. Clifford v. State, 474 N.E.2d 963 (Ind. 1985); Griffin v. State, 664 N.E.2d 373 (Ind. Ct. App. 1996). Notice of alibi statute is not intended to compel exclusion of evidence or mandate retrials for merely technical errors. Id. The discovery provided by the statute is both reciprocal and meaningful. Brown v. State, 436 N.E.2d 285 (Ind. 1982).

### B. Defendant's Notice of Alibi Defense

Whenever a defendant in a criminal case intends to offer in his defense evidence of alibi, the defendant shall file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense. Ind. Code § 35-36-4-1. The notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information. Id.

If the defendant fails to file notice in accordance with Ind. Code § 35-36-4-1, and does not show good cause for such failure, then the court shall exclude evidence offered by the defendant to establish an alibi. Ind. Code § 35-36-4-3(b).

#### 1. Requirements

##### a. Specificity

The alibi notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information. Harvey v. State, 542 N.E.2d 198 (Ind. 1989).

Hartman v. State, 376 N.E.2d 100 (Ind. Ct. App. 1978) (exclusion of alibi evidence upheld when defendant's alibi notice was substantively defective in that it failed to

include specific information regarding defendant's whereabouts at the time the crime was committed).

Graham v. State, 464 N.E.2d 1 (Ind. 1984) (statement that defendant was in Indianapolis at time of the crime was inadequate notice of alibi).

Ridgeway v. State, 422 N.E.2d 410 (Ind. Ct. App. 1981) (notice defective which merely stated that defendant was at his home in Kokomo, "among other places").

Harvey v. State, 542 N.E.2d 198 (Ind. 1989) (defendant was properly precluded from introducing alibi testimony concerning his whereabouts at addresses not listed in alibi notice given to the State; although address on alibi notice was construction business defendant was working at, court rejected argument that it was "obvious" defendant would be working at other locations given the nature of the business).

In addition to the requirement that a notice of alibi contain specific information on where a defendant was at a relevant time, the court may also require the defendant to give the names of any potential alibi witnesses and their addresses. Alkhalidi v. State, 753 N.E.2d 625 (Ind. 2001).

## **b. Strict Compliance with Filing Deadline and Service Requirements**

Strict compliance with the dictates of statutes governing notice of alibi and the State's response is not required. Brown v. State, 436 N.E.2d 285 (Ind. 1982). However, defendants must strictly comply with the ten-day time period of Ind. Code § 35-5-1-3. Id. The statute also requires notice to be filed in the clerk's office of the court within the time limitation, and service on the prosecuting attorney. Cockerham v. State, 204 N.E.2d 654 (Ind. 1965). Service on the prosecuting attorney with such time without filing with the clerk's office is not sufficient. Id.

Bullock v. State, 382 N.E.2d 179 (Ind. Ct. App. 1978) (strict adherence to the requirements of proper service are required in the utilization of the alibi notice statutes).

Denney v. State, 524 N.E.2d 1301 (Ind. Ct. App. 1988) (trial court was justified in excluding alibi evidence, where the defense made no timely effort to comply with this section and no belated effort to rectify the failure).

## **c. Time Requirements**

Pursuant to Ind. Code § 35-36-4-1, whenever a defendant in a criminal case intends to offer in his defense evidence of alibi, the defendant shall file his notice of alibi no later than: (1) twenty days prior to the omnibus date if the defendant is charged with a felony; or (2) Ten days prior to the omnibus date if the defendant is charged only with one or more misdemeanors. If the trial court moves an omnibus date, which effectively creates at least a twenty-day period between the initial notice of alibi filing date and the subsequent omnibus date, then the purposes of the alibi statute are served by treating



the initial notice as timely filed, even if done so within twenty days of the initial omnibus date. Griffin v. State, 664 N.E.2d 373 (Ind. Ct. App. 1996).

The essence of the time requirements is to ensure that the parties have adequate time to prepare for trial and to confront the adversary's factual claims concerning the defendant's whereabouts at the time the crime was committed. Brown v. State, 436 N.E.2d 285 (Ind. 1982).

Absent a showing of good cause by either party who fails to comply with the time limitations, the court should exclude the evidence offered by that party in support of the tardy alibi pleading. Brown v. State, 436 N.E.2d 285 (Ind. 1982). Defendants must strictly comply with the ten-day time period of Ind. Code § 35-5-1-3. Id.

Mitchell v. State, 398 N.E.2d 1254 (Ind. 1979) (trial court properly excluded alibi evidence where defendant filed his notice of alibi only one day prior to trial without any showing of good cause).

## 2. Sample Notice

[CAPTION]

### **NOTICE OF ALIBI DEFENSE**

The Defendant, by counsel, pursuant to Ind. Code § 35-36-4-1, notifies the Prosecuting Attorney of the Defendant's intention to offer defense of alibi in this cause.

The Defendant states that on the date of the alleged offense as charged, the Defendant was at the following place: [insert location].

The Defendant requests that the Prosecutor file a specific statement in regard to the exact date, time, and location of the offense charged in this cause.

(Signature)

## 3. Defective Notice – Discretion to Exclude Evidence or Grant Continuance

The trial court may exclude all evidence of alibi or may allow some at the trial court's discretion. Wells v. State, 568 N.E.2d 558 (Ind. Ct. App. 1991). The court may also grant a continuance. If either the defendant or the prosecutor fails to file or serve statements in accordance with Ind. Code § 35-36-4-2, the judge may extend the time for filing. Ind. Code § 35-36-4-3(a).

Miller v. State, 372 N.E.2d 1168 (Ind. 1978) (where defendant first suggested to his attorney that he had an alibi defense only four days before trial, but ten months following his arrest and six weeks after attorney had begun representing the defendant,

trial court's refusal to grant the defense attorney's motion for a continuance was not an abuse of discretion).

Graham v. State, 464 N.E.2d 1 (Ind. 1984) (trial court properly offered defendant a continuance to rectify defect in his alibi notice after State failed to respond to his notice).

Yager v. State, 437 N.E.2d 454 (Ind. 1982) (trial court did not abuse its discretion in denying continuance sought to procure testimony of absent alibi witness where defendant had not even filed alibi notice at time of trial).

Middleton v. State, 391 N.E.2d 657 (Ind. Ct. App. 1979) (lack of specificity in the State's answer to defendant's untimely notice of intent to offer an alibi did not entitle defendant to a continuance; given fact that notice was filed only seven days before trial, prosecution had no obligation to file a specific statement regarding exact date on which alleged offense was committed).

#### 4. Showing Good Cause for Failure to File Notice

Where the defendant shows good cause for failing to comply with the alibi statute's requirements, the trial court may admit alibi evidence as a matter of discretion. See Seay v. State, 529 N.E.2d 106, 110 (Ind. 1988) and Hartman v. State, 376 N.E.2d 100, 104 (Ind. Ct. App. 1978). The defendant bears the burden of demonstrating good cause to put aside statutory requirements. Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990). Whether a defendant has established good cause is a matter for the trial court's sound discretion. Payne v. State, 495 N.E.2d 183 (Ind. 1986). A defendant's belief that testimony constitutes impeachment rather than alibi evidence is not good cause for waiving the alibi statute's notice requirements. Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990).

Seay v. State, 529 N.E.2d 106 (Ind. 1988) (because defendant had over five months to prepare for trial yet waited until the State had concluded its presentation of the evidence to provide a notice of alibi, trial court did not err in excluding evidence).

Mitchell v. State, 398 N.E.2d 1254 (Ind. 1979) (trial court properly excluded alibi evidence where defendant filed his notice of alibi only one day prior to trial without any showing of good cause)

Baxter v. State, 522 N.E.2d 362 (Ind. 1988) (being in jail, being in hospital, becoming separated from wife, and fact that defense counsel was out of town for one week did not constitute the good cause required to allow tardy notice of alibi).

Washington v. State, 840 N.E.2d 873 (Ind. Ct. App. 2006) (counsel's reason for failing to file alibi defense that defendant had multiple attorneys and that there had been a mix-up at the counsel's office after representation had begun did not constitute good cause for failure to timely file notice of alibi defense).

Webster v. State, 579 N.E.2d 667 (Ind. Ct. App. 1991) (defendant's claim that failure to timely file notice of alibi was unavoidable because the witness was unsure as to the date he picked the defendant up at a bus station was not good cause).

Payne v. State, 495 N.E.2d 183 (Ind. 1986) (where State filed notice that it would call one of the accomplices as a witness did not provide "good cause" for the defendant to have an alibi witness despite untimely filing of notice of alibi, since State's naming of accomplice did not change material allegations regarding charge, date, place, or victim).

Williams v. State, 406 N.E.2d 241 (Ind. 1980) (trial court did not err in refusing to exclude evidence where defendant had originally filed notice of alibi defense in first trial, but did not file such notice on retrial, the State's delayed response in filing a response did not result in a surprise to the defendant, since it was just a renewal of the first notice during the first trial).

Harvey v. State, 621 N.E.2d 362 (Ind. Ct. App. 1993) (defendant failed to show good cause despite contention that late filing was due to state's delay in responding to discovery requests; information specifically listed date on which offense allegedly occurred, and defendant failed to explain why he did not check his whereabouts on the date as soon as he read the information).

Haun v. State, 451 N.E.2d 1072 (Ind. 1983) (where defendant filed his notice of alibi in irregular manner and prosecutor maintained that he had not received such notice, trial court did not err in denying defendant's motion to suppress evidence for State's failure to respond to notice of alibi). See also Bullock v. State, 382 N.E.2d 179 (Ind. Ct. App. 1978).

Dooley v. State, 428 N.E.2d 1 (Ind. 1981) (where oral notice of alibi was given only eight days before the trial, the notice was never put into writing, the defendant failed to show good cause for his failure to file notice of alibi and had ample time to file his notice of alibi, the trial court was justified in excluding alibi evidence).

## 5. Withdraw of Notice

A defendant may file a request to withdraw the notice of alibi, but if a defendant chooses to re-assert the alibi defense, he or she must refile the notice of alibi within the statutory guidelines. Kroegher v. State, 774 N.E.2d 1029 (Ind. Ct. App. 2002) (where defendant filed notice of alibi, filed motion to withdraw the notice, but a year later at trial, attempted to introduce alibi evidence, court properly suppressed alibi evidence).

### C. Prosecutor's Reply

If a defendant files a notice of alibi defense, and the State chooses to answer, its answer limits the State to proof of the date in the answer; however, the State is not required to respond if it intends to rely on the date and place as alleged in the indictment or the information. Joyner v. State, 678 N.E.2d 386 (Ind. 1997). See also McNeely v. State, 529 N.E.2d 1317 (Ind. Ct. App.

1988). Furthermore, the State has no duty to narrow the time frame in the charging information if the date of the alleged offense is contested.

Sisson v. State, 985 N.E.2d 1 (Ind. Ct. App. 2012) (State's failure to narrow the time frame from "the entire month of June" to exclude the time during which the defendant was incarcerated was not fundamental error; State's failure to reply to notice of alibi did not prejudice defendant).

Time, not otherwise of the essence of the crime, becomes of the essence after invocation of alibi statute, but the date that becomes essential is the date fixed by the State in complying with the alibi notice. Quillen v. State, 391 N.E.2d 817 (Ind. 1979). Changing the date for the charged crime from that stated in the indictment is permissible where the alibi statute is invoked by the defendant. Webster v. State, 426 N.E.2d 1295 (Ind. 1981).

In Tyree v. State, 143 N.E.3d 991 (Ind. Ct. App. 2020), the trial court did not abuse its discretion in denying Defendant's motion to dismiss in response to the State's refiling of charges (including additional charges) in response to defendant's Notice of Alibi and Motion to Elect Specific Act. The defendant was charged with a single count of sexual misconduct with a minor. After he filed a Notice of Alibi, the State expanded the range of dates alleged and the defendant filed another, also expanded, Notice of Alibi. The defendant also filed a "Motion for State to Elect Specific Act for Which State of Indiana Intends to Seek Conviction," which trial court granted after State agreed its charging information was flawed or "sloppy." Subsequently, the State charged defendant with three counts of sexual misconduct with a minor under a new cause number, refiling the original charge and adding two additional counts. At the probable cause hearing, the trial court denied defendant's motion to dismiss the new cause number and sua sponte dismissed the prior cause. Distinguishing Davenport v. State, 689 N.E.2d 1226 (Ind. 1997), affirmed on reh'g 696 N.E.2d 870 (Ind. 1998), the Court of Appeals affirmed because the defendant brought an interlocutory appeal with no set trial date and the refiling of charges did not prejudice his ability to defend himself against the original or additional charges. Additionally, the charges in the new cause number involved the same complaining witness and roughly the same time frame.

## 1. Requirements

Per Ind. Code § 35-36-4-2(a), when a defendant files a notice of alibi, the prosecuting attorney shall file with the court and serve upon the defendant, or upon his counsel, a specific statement containing: (1) the date the defendant was alleged to have committed the crime; and (2) the exact place where the defendant was alleged to have committed the crime that the prosecutor intends to use at trial. However, the prosecuting attorney need not comply with this requirement if he intends to present at trial the date and place listed in the indictment or information as the date and place of the crime. Ind. Code § 35-36-4-2(a).

## a. Adequacy

Inexactness in the prosecutor's answers to the alibi notice does not necessarily cause the response to fail absent a lack of good cause and prejudice to the defendant.

Wireman v. State, 432 N.E.2d 1343 (Ind. 1982).

## b. Timing

If a reply by the prosecuting attorney is required by Ind. Code § 35-36-4-2(a), the prosecuting attorney shall serve such a statement upon the defendant, or his counsel, within seven days after the filing of the defendant's first notice of alibi. Ind. Code § 35-36-4-2(b).

Absent a showing of good cause by either party who fails to comply with the time limitations, the court is to exclude the evidence offered by that party in support of the tardy alibi pleading. Brown v. State, 436 N.E.2d 285 (Ind. 1982). See also Miller v. State, 405 N.E.2d 909 (Ind. 1980) and Shelton v. State, 290 N.E.2d 47 (Ind. 1972). While a defendant MUST strictly comply with the ten-day time period of Ind. Code § 35-5-1-3., the prosecutor may get away with late responses unless the defendant can prove some prejudice inured to the defendant by virtue of the delay. Id.

Brown v. State, 436 N.E.2d 285 (Ind. 1982) (defendant failed to show prejudice from the one or two-day delay in the State's response, which it claimed was attributable to an oversight or a miscalculation of time, nor did the defendant attempt to avail himself of the potential remedy of a continuance). See also Garrison v. State, 575 N.E.2d 700 (Ind. Ct. App. 1991) and Wallace v. State, 426 N.E.2d 34 (Ind. 1981).

Reed v. State, 188 N.E.2d 533 (Ind. 1963) (trial court properly granted two-day extension for prosecutor where the state could not file on the date required because it fell on a Saturday).

Trial courts do allow amended responses to notice of alibi to relate back to original filing, if original filing was done so within the time frame required by statute. Thurston v. State, 472 N.E.2d 198 (Ind. 1985).

**PRACTICE POINTER:** If the State is late filing a response to a notice of alibi defense, file a continuance and argue that the State's delay in filing the reply has created the need for a continuance. To preserve the issue for appeal, a defendant must attempt to avail himself of any possible remedies to mitigate the harm caused by the State's delay. Brown v. State, 436 N.E.2d 285 (Ind. 1982).

## c. Specificity

The State is not always required to give the exact date or location of the crime. It is required only to state the time of the offense with such reasonable specificity as the circumstances of the case allows. Bruce v. State, 375 N.E.2d 1042 (Ind. 1978). See also

Hampton v. State, 359 N.E.2d 276 (Ind. Ct. App. 1977) and Monserate v. State, 352 N.E.2d 721 (Ind. 1976).

Alkhalidi v. State, 753 N.E.2d 625 (Ind. 2001) (State was not required to be more specific than “on or about May 3, 1999” where there were no eyewitnesses to the crime and the medical testimony was inconclusive as to the exact time of death).

Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (State’s response to defendant’s alibi notice, indicating that it intended to rely on date as alleged in indictment, was sufficiently specific; circumstances of alleged murder indicated that the victim’s body was not discovered until approximately six weeks after her family reported her disappearance).

Bixler v. State, 537 N.E.2d 21 (Ind. 1989) (a defendant is not entitled to a more specific allegation of the date than the circumstances will allow).

Vail v. State, 536 N.E.2d 302 (Ind. Ct. App. 1989) (despite defendant’s notice of alibi, indictment charging defendant with child molesting, which alleged only year of offense and county in which it occurred, stated offense with sufficient certainty).

Clifford v. State, 474 N.E.2d 963 (Ind. 1985) (where victim knew that she had run away from home on December 22, knew that her father had committed criminal deviate conduct on her a few days before that date on a day when her mother had been called to return to work but victim could not pinpoint the exact date, circumstances did not allow a determination of time of the offense more exact than “on or about the 21<sup>st</sup> day of December 1981,” and defendant was not entitled to a more specific statement of the date).

Thurston v. State, 472 N.E.2d 198 (Ind. 1985) (where proof showed weekly and repeated offenses, State’s response to notice of alibi was not overbroad because it encompassed a two-month period rather than indicating the specific date of the offense; victim was unable to recall exact dates of offenses either). See also Vail v. State, 536 N.E.2d 302 (Ind. 1989).

Wallace v. State, 426 N.E.2d 34 (Ind. 1981) (in conspiracy to commit murder prosecution, State’s response to alibi was sufficient where it stated that the alleged conspiracy began around November and ended sometime time after the following March).

Grooms v. State, 379 N.E.2d 458 (Ind. 1978) (for purposes of the alibi statute, exact time of the killing does not have to be given, only the date).

## 2. State’s Duty to Disclose Rebuttal Witnesses

Although the alibi statutes do not explicitly impose upon parties an affirmative obligation to disclose alibi and rebuttal witnesses, the State’s knowing failure to disclose the identity of alibi rebuttal witness may violate due process. In Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1987), the trial court’s discovery order requiring the defendant to list all his witnesses

should have triggered a corresponding and reciprocal obligation by the State to list all its potential witnesses, despite the defendant's failure to specifically request disclosure of specific rebuttal witnesses.

### 3. Restrictions or Variations of Proof

In Dew v. State, 416 N.E.2d 1245 (Ind. 1981), the trial court committed reversible error in allowing the State, over the defendant's objection, to introduce evidence in conflict with the defendant's notice of alibi when the State had failed to file an answer and demonstrated no good cause for its failure.

Any variance by the State during offering of proof or argument as to the date and time or place of the alleged offense from that alleged by the State in response to an alibi notice must be of such a substantial nature as to mislead the accused in preparing or maintaining his defense in order to constitute reversible error. Smith v. State, 439 N.E.2d 634 (Ind. 1982). See also Mitchell v. State, 360 N.E.2d 221 (Ind. Ct. App. 1977) (or be of such a degree as would likely place defendant in second jeopardy for the same offense).

Where the State's answer to defendant's notice of alibi and evidence points exclusively to a specific date and the defendant presents a defense based on that date, the jury's consideration of defendant's guilt should be restricted to that date. Sangslund v. State, 715 N.E.2d 875 (Ind. Ct. App. 1999). However, the alibi defense does not necessarily compel the State to limit its response to that time answered by the alibi; the State retains flexibility in presenting relevant evidence that yet does not coincide with the alibi notices and charging information. Gadacz v. State, 426 N.E.2d 376 (Ind. 1981).

Sangslund v. State, 715 N.E.2d 875 (Ind. Ct. App. 1999) (variance between time frame alleged in information and that established by State's proof at trial did not circumvent or nullify defendant's opportunity to assert alibi defense, where State specified a three-day period, but proof at trial established an 11-day period, and defendant's asserted alibi covered both the 3-day period and 11-day period).

Schwartz v. State, 379 N.E.2d 480 (Ind. Ct. App. 1978) (variance in the exact location of the offense between the State's answer and evidence at trial was harmless where defendant did not show prejudiced by notice stating "County Road 75 West" versus "County Road 675 West" at trial).

Aikens v. State, 289 N.E.2d 152 (Ind. Ct. App. 1972) (because trial took place on September 20, 1971 and mistaken date in answer to notice of alibi was October 31, 1971, defendant could not have been misled or harmed by the reference to a date 6 weeks into the future; such an error was so apparent that to seriously advance the proposition that evidence of the date of the commission of the crime charged in the affidavit was inadmissible was at best preposterous).

Riddle v. State, 275 N.E.2d 788 (Ind. 1971) (where defendant admitted in notice of alibi that he was in vicinity of the particular hotel at approximate time of robbery, variance



between state's reply that they intended to prove the crime occurred in the bus station across the street from the hotel and proof that the robbery took place on the outside steps of the hotel was not a fatal variance).

## 4. Failure to Reply

The State does not need to respond to a notice of alibi if it intends to present evidence consistent with the date and place listed in the information as the date and place of the crime. Garrison v. State, 575 N.E.2d 700 (Ind. Ct. App. 1991). See also Ind. Code § 35-36-4-3(c) and Mayes v. State, 467 N.E.2d 1189 (Ind. 1984). Furthermore, the State has no duty to narrow the time frame in the charging information if the date of the alleged offense is contested.

Sisson v. State, 985 N.E.2d 1 (Ind. Ct. App. 2012) (State's failure to narrow the time frame from "the entire month of June" to exclude the time during which the defendant was incarcerated was not fundamental error; State's failure to reply to notice of alibi did not prejudice defendant).

Tolbert v. State, 459 N.E.2d 1189 (Ind. 1984) (since defendant had already procured from the victim at a deposition the date and time and place of the offense alleged, the defendant suffered no prejudice from the State's failure to timely file an answer to the defendant's notice of alibi).

The purpose of the alibi statute is not to compel the exclusion of evidence or mandate for retrials for purely technical errors; rather, reversal is not required unless the accused was misled in the preparation or maintenance of his defense or was likely to be placed in double jeopardy. Brown v. State, 436 N.E.2d 285 (Ind. 1982) (it would amount to an elevation of form over substance were the trial court unable to include the potential prejudice, or lack thereof, to a party in its assessment of whether to impose exclusionary sanctions; that is particularly true where the pleading was filed only one or two days beyond the deadline required by statute). See also Tolbert v. State, 459 N.E.2d 1189 (Ind. 1984).

**PRACTICE POINTER:** If the State is late filing a response to a notice of alibi defense, file a continuance and argue that the state's delay in filing the reply has created the need for a continuance. A defendant must attempt to avail himself of any possible remedies to mitigate the harm caused by the state's delay, or they may lose out on an argument that the defendant was prejudiced. Brown v. State, 436 N.E.2d 285 (Ind. 1982).

### a. Good Cause

The State does not have to prove good cause when responding to a belated notice of alibi. Middleton v. State, 391 N.E.2d 657 (Ind. Ct. App. 1979).

Bruce v. State, 375 N.E.2d 1042 (Ind. 1978) (fact that defendant did not file notice of alibi until 11 days before trial, immediately before holiday weekend, and prosecutor erroneously assumed necessity of obtaining approval of response required from



special judge before serving it was sufficient basis for finding of good cause; good cause is not synonymous with physical impossibility).

Whether or not the State can prove good cause is immaterial unless the defendant can prove that he was denied a fair trial due to the delay in the State's response. Miller v. State, 405 N.E.2d 909 (Ind. 1980).

## **D. Defendant's Second Statement of Alibi**

If the prosecuting attorney's statement to the defendant contains a date or place other than the date or place stated in the defendant's original statement, the defendant shall file a second statement of alibi if the defendant intends to produce at trial evidence of an alibi for the date or place contained in the prosecutor's statement. Ind. Code § 35-36-4-2(c).

Within four days after the filing of the prosecuting attorney's statement, the defendant shall: (1) file the second statement with the court; and (2) serve the second statement upon the prosecuting attorney. Ind. Code § 35-36-4-2(c).

The second statement must contain the same details required in the defendant's original statement. Ind. Code § 35-36-4-2(c). For more on the detail requirement, see section II.A.1, Defendant's Notice of Alibi Defense – Requirements.

## **E. Waiver**

A defendant who fails to file a notice of alibi or otherwise raise the issue at trial waives the right to appellate review. Sisson v. State, 985 N.E.2d 1 (Ind. Ct. App. 2012). See also Wray v. State, 547 N.E.2d 1062 (Ind. 1989) and Schwartz v. State, 379 N.E.2d 480 (Ind. Ct. App. 1978).

Failure to seek a continuance where applicable constitutes waiver of the relevant issue. Owens v. State, 333 N.E.2d 745 (Ind. 1975).

Willis v. State, 411 N.E.2d 696 (Ind. Ct. App. 1980) (where an attorney declines an offer of continuance and admits that the defendant was not prejudiced by the delay in state's response to notice of alibi, defendant waived any error in the state's failure to respond).

Defendant's failure to timely file his notice of intention to prove alibi forecloses assertion of rights created by the statute with respect to the State's obligation to file a specific statement as to the time and place where the alleged act was committed. Shelton v. State, 290 N.E.2d 47 (Ind. 1972).

## III. EVIDENCE

Filing notice of alibi in compliance with the alibi statute does not constitute evidence. Thomas v. State, 147 N.E.2d 577 (Ind. 1958).

### A. Exclusion of Evidence

The purpose of the Indiana alibi statute is not to compel the exclusion of evidence or mandate retrials for purely technical errors. Baxter v. State, 522 N.E.2d 362 (Ind. 1988). The sanction for non-compliance by the defendant is designed to protect the State from fabrication of defenses and enable prosecutors to prepare adequately for trial. Riggs v. State, 376 N.E.2d 483 (Ind. 1978). Thus, the trial court must exclude any alibi evidence offered by the defendant if the defendant fails to file a notice of alibi. Jones v. State, 569 N.E.2d 975 (Ind. Ct. App. 1991). See also Ind. Code § 35-36-4-3(b). Further, if the prosecutor fails to file and serve his reply statement, without a showing of good cause, the court shall exclude evidence offered by the prosecutor to show that the defendant was at a different place or the crime alleged occurred at a different time other than that stated in the charging information or indictment. Ind. Code § 35-36-4-3(c).

#### 1. Defendant's Own Testimony

An accused who improperly files a notice of alibi may still offer his own alibi testimony under his constitutional right to testify in his own defense. Baxter v. State, 522 N.E.2d 362 (Ind. 1988). However, a trial court may exclude a defendant's alibi testimony under the alibi statute where a defendant purposely suppresses alibi evidence to gain some advantage in the prosecution. Id.

Surprise testimony by the accused is rarely overwhelming, and should the accused choose to offer his testimony as sole evidence of alibi without notice, the State should be permitted a continuance to meet the situation. Campbell v. State, 622 N.E.2d 495 (Ind. 1993).

Baxter v. State, 522 N.E.2d 362 (Ind. 1988) (where the corroborative evidence of a defendant's alibi was a simple matter to obtain, but the defendant did not make any attempt to do so before filing a notice of alibi a day before the omnibus date, exclusion of the defendant's own testimony at trial was appropriate).

#### Suppression of Defendant's Own Testimony

Baxter v. State, 522 N.E.2d 362 (Ind. 1988).

##### Defendant's Own Testimony Allowed

Where the defendant or defense counsel files a tardy or inadequate notice of alibi simply because neither has aggressively pursued that defense and their failure does not deprive the State of sufficient time and information to investigate and respond.

##### Defendant's Own Testimony NOT Allowed

Where the defendant purposely suppresses alibi evidence to gain some advantage in the prosecution.

Palmer v. State, 654 N.E.2d 844 (Ind. Ct. App. 1995) (while it was error for the trial court to exclude defendant from testifying as to his own alibi, the error was harmless in light of the substantial evidence the State presented to the contrary).

## 2. Third-Party Evidence

The accused is not similarly constitutionally entitled to enter into evidence third-party alibi testimony, as with the defendant's own testimony. Preston v. State, 644 N.E.2d 585, 587-89 (Ind. Ct. App. 1994). See also Talley v. State, 400 N.E.2d 1167 (Ind. Ct. App. 1980).

Griffin v. State, 664 N.E.2d 373 (Ind. Ct. App. 1996) (when defendant testified regarding alibi, but all other alibi evidence was excluded by trial court's erroneous determination that notice of alibi was untimely filed, excluded evidence is not merely cumulative evidence so as to support finding that error was harmless).

Where a defendant testifies on direct that he was at a different place when the crime allegedly occurred, a prosecutor's cross-examination testing the veracity of that statement does not allow the defense to bring in third-party evidence to support his claim without having filed a notice of alibi properly. Stapp v. State, 287 N.E.2d 252 (Ind. 1972).

An accused, who properly files a notice of alibi, is permitted to introduce any evidence of any type which tended to establish alibi and is not restricted to direct evidence. Vaughn v. State, 19 N.E.2d 239 (Ind. 1939).

## 3. Evidence Consistent with Charging Information

If the State fails to respond to a defendant's notice of alibi statement, the State may continue to rely on evidence tending to support the claims made in the charging information. Hubbell v. State, 754 N.E.2d 884 (Ind. 2001).

### B. Prior bad acts

Properly admissible evidence of prior acts is not affected by the alibi notice statute. Woods v. State, 235 N.E.2d 479 (Ind. 1968).

### C. Evidence Contradicting Alibi

Where the State fails to respond to a defendant's timely notice of alibi, the state is precluded from introducing evidence contradicting the alibi or information. Dew v. State, 416 N.E.2d 1 (Ind. 1981).

### D. Variance

In Johnson v. State, 734 N.E.2d 530 (Ind. 2000), it was not error to permit the State to prove the crime occurred during the early morning hours of April 23, where the State alleged in its charge that murders occurred on or about April 22 and that State had not responded to defendant's alibi notice covering April 22. The filing of an alibi notice does not impose a greater burden of proof on the State than would otherwise exist. While an alibi filing does render the time of the offense "of the essence," it is also well settled that a variance, in order to be fatal, must be of such substantial nature as to mislead the accused in preparing his/her defense. While the

information alleged April 22, the probable cause affidavit alleged a time range between 10:00 p.m. on April 22 and 7:34 a.m. on April 23. The variance was not material. See also Sangslund v. State, 715 N.E.2d 875 (Ind. Ct. App. 1999).

Testimony of events outside time and spatial limits raised by alibi is admissible if it circumstantially proves commission of a particular crime within the limits. Collison v. State, 333 N.E.2d 787 (Ind. Ct. App. 1975) and Kappos v. State, 465 N.E.2d 1092 (Ind. 1984).

## **E. Use of Alibi Evidence**

Depending upon the circumstances of the utterance, a defendant's false alibi statements may be found relevant and admissible as part of the State's case in chief. In McKinstry v. State, 660 N.E.2d 1052 (Ind. Ct. App. 1996), the defendant made false alibi statements to police officers at a time when attention was focused upon the defendant as a suspect. This evidence was admissible to establish the defendant's consciousness of guilt. The State may refer to the defendant's alibi notice during cross-examination and admit the notice into evidence.

Holderfield v. State, 578 N.E.2d 661 (Ind. 1991) (admission of defendant's notices of alibi to impeach alibi witness presented at trial did not violate his right against self-incrimination, nor did admission impermissibly call attention to the fact the defendant did not testify).

## IV. INSTRUCTIONS

### A. Failure to Instruct on Alibi Defense

It is not error to instruct upon the statute of limitations when an alibi notice had been introduced into the case. Fisher v. State, 291 N.E.2d 76 (Ind. 1973).

A defendant who files an alibi notice is not entitled to an instruction listing the time of the offense as an element of a crime where the State at trial restricts its proof to the time frame alleged in the information or within the answer to a notice of alibi. Stewart v. State, 521 N.E.2d 675 (Ind. 1988).

### B. Bar to instructions on lesser included offenses.

Presenting an alibi defense does not automatically bar instructions on a lesser included offense. Young v. State, 669 N.E.2d 252, 256 (Ind. 1998) (whether a defendant raises an affirmative defense bears only tangibly on the issue of whether there is a serious evidentiary dispute regarding the state's case in chief). Both the prosecution and the defense are entitled to a lesser included offense instruction if there is a serious evidentiary dispute justifying it. Webb v. State, 963 N.E.2d 1103 (Ind. 2012).

### C. Model Instructions

**Note:** Ind. Code § 35-36-4-1 provides for the alibi defense; however, the Indiana Pattern Instruction Committee has withdrawn the former pattern instruction, stating:

The alibi instruction formerly appearing here has been withdrawn. In reviewing the former instruction and considering the alibi defense, the Committee concluded that by far the most important aspect of alibi is the effect it may have in some cases of narrowing the time frame in which the State must prove the defendant committed the crime. This narrowing effect does not necessarily occur whenever the defendant files a notice of alibi, but in cases where it does the State must prove the defendant was present at the time and place in its answer to defendant's alibi notice: . . . [T]he mere fact that a defendant raises an alibi defense does not necessarily make time an essential element of an offense. However, where the State's answer to the notice of alibi and evidence points exclusively to a specific date, and the defendant presents a defense based on that date, the jury's consideration of the defendant's guilt should be restricted to that date. Sangslund v. State, 715 N.E.2d 875, 878-79 (Ind. Ct. App. 1999), transfer denied.

If a conventional alibi instruction is requested and the judge decides one ought to be given, the Committee suggests that the term alibi not be used, first to avoid having to define it and second because it may have a negative connotation for the jury. The Committee also recommends that the instruction not use the term defense, because alibi is not an affirmative defense but rather consists of evidence on defendant's presence at the crime, an essential element the State has to prove beyond a reasonable doubt.

The Committee suggests the following instruction if an instruction is deemed appropriate:

You have heard evidence that at the time of the crime charged the accused was at a different place so remote or distant [or that such circumstances existed] that he could not have committed the crime. The State must prove beyond a reasonable doubt the accused's presence at the time and place of the crime.