6.26. Impeachment of Alibi Testimony

(1) Neither a defendant nor a defense witness who gives testimony, inconsistent with a notice of alibi filed pursuant to statute but withdrawn before trial or disavowed at trial, may be impeached by that notice of alibi on cross-examination or by introduction of that notice in rebuttal.

(2) A defendant or witness who gives alibi testimony may be impeached by a statement the defendant or witness, as the case may be, made prior to or following the filing of a notice of alibi inconsistent with the alibi testimony.

(3) (a) A witness who testifies at trial to an alibi may be impeached for failure to have timely presented the alibi to law enforcement authorities, provided the witness's failure to do so was not pursuant to the advice of defense counsel and the court has so determined before permitting questions.

(b) The foundation for the impeachment will normally include demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant, and was familiar with the means to make such information available to law enforcement authorities.

Note

Subdivision (1) is derived from *People v Burgos-Santos* (98 NY2d 226 [2002] [where the notice of alibi had been withdrawn prior to trial it was error to use that notice of alibi to cross-examine the defendant in order to impeach his testimony that he was present at the crime scene but was an innocent victim of an assault rather than the perpetrator]) and *People v Rodriguez* (3 NY3d 462 [2004] [where the notice of alibi was disavowed at trial on defendant's case, it was error to introduce the notice of alibi in rebuttal to impeach the defendant's alibi witnesses who testified to an alibi other than the one in the notice]; *see also People v Gray,*

125 AD3d 1107, 1107 [3d Dept 2015] ["The Court of Appeals has unequivocally established that the People may not use a defendant's notice of alibi for impeachment purposes on cross-examination where the defendant has withdrawn such notice prior to trial"]; *see* Fed Rules Crim Pro rule 12.1 [f] ["Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention"]).

By CPL 250.20, a defendant who intends to present an alibi defense is compelled to file a notice of alibi within 20 days of arraignment. That "compulsion" is not in violation of the Federal Constitution because, "[a]t most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial" (*Williams v Florida*, 399 US 78, 85-86 [1970]). Use of that compelled notice of alibi to impeach a defendant or the defendant's defense when it has been withdrawn or disavowed, however, raised a constitutional concern in both *Burgos-Santos* and *Rodriguez*. The Court did not decide the constitutional issue. Instead, the Court disallowed the notice as impeachment evidence, explaining that CPL 250.20 specified the remedies for a violation of the statutory requirements and those remedies did not include impeachment of the defendant or defendant's witnesses.

The facts in *Rodriguez* suggest a broad definition of what constitutes a disavowal of an alibi notice and when that disavowal is timely. In *Rodriguez*, the defendant did not withdraw the notice of alibi; instead "it became obvious from the [defense witness's] surprise testimony that defendant was presenting a new and different alibi" (*Rodriguez* at 465).

Subdivision (2) is derived from *People v McGraw* (40 AD3d 302, 302-303 [1st Dept 2007]). Absent the compulsion inherent in the filing of a notice of alibi, a defendant or defense witness who testifies to an alibi may be impeached by a statement, made prior to the filing of a notice of alibi, that is inconsistent with the testimony given at trial. As *McGraw* explained:

> "The court properly admitted the rebuttal testimony of defendant's former counsel concerning preindictment statements made by him to the District Attorney's Office with defendant's consent, regarding defendant's whereabouts at the time of the robbery, which directly conflicted with the alibi defendant presented at trial. A statement made by an agent of a party, acting within the scope of his authority, is admissible as an admission against the party. This is not a case of using defendant's withdrawn alibi notice to impeach him or his case, since there never was an alibi notice relating to the first alibi; instead, the first alibi was volunteered in an effort to forestall indictment. We reject defendant's argument that the statement made by defendant's original attorney to the prosecutor's office was the

equivalent of an alibi notice. On the contrary, counsel did not provide this statement as a form of disclosure mandated by CPL 250.20" (*McGraw* at 302-303 [citations omitted]; *see People v Johnson*, 46 AD3d 276, 278 [1st Dept 2007] [absent a notice of alibi having been filed, the defendant was properly impeached during cross-examination by her attorney's statements made at a prior bail application given "a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony"]; *cf.* Guide to NY Evid rules 8.03, Admission by Party and 6.14, Impeachment by Evidence Improperly Obtained).

Subdivision (3) is derived from *People v Dawson* (50 NY2d 311 [1980]). While permitting cross-examination of an alibi witness for failure to come forward before trial to law enforcement authorities, *Dawson* added some cautionary notes:

> "[T]he Trial Judge should inform the jurors, upon request, that the witness has no civic or moral obligation to volunteer exculpatory information to law enforcement authorities and that they may consider the witness' prior failure to come forward only insofar as it casts doubt upon the witness' in-court statements by reason of its apparent inconsistency. Finally, when such questioning begins, the Trial Judge should call a bench conference to ascertain whether the witness refrained from speaking under the advice of defense counsel, for in such a case examination on the issue of the witness' postconsultation silence would be improper and could well result in a mistrial" (*Dawson* at 322-323; *see People v Jenkins*, 88 NY2d 948, 950 [1996] [an alibi witness was properly impeached because a close relative or friend's "knowledge that defendant is incarcerated pending trial may be reasonably found to be inconsistent with the witness' failure to come forward with exculpatory evidence which might result in the accused's being freed"]; *cf. People v Burgos*, 50 NY2d 992, 993-994 [1980] ["It was error for the Trial Judge to refuse to advise the jury that defendant's alibi witnesses had no duty to volunteer exculpatory information to law enforcement authorities" and it would have been "best had the court stricken the entire line of questioning" when it was apparent that defense counsel had advised the witness that the witness had no duty to advise the authorities of the alibi]).

Dawson at 321 n 4 sets forth the foundational elements for a cross-examination:

> "In most cases, the District Attorney may lay a 'proper foundation' for this type of cross-examination by first demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory

> information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law enforcement authorities."

Impeachment of an alibi witness may include rebuttal testimony (*see People v Knight*, 80 NY2d 845, 848 [1992] [The People properly presented rebuttal evidence "to rebut the alibi witnesses' testimony about their postarrest statements to police by calling the police officer to testify that such statements were never made"]; *People v Patterson*, 194 AD2d 570, 571 [2d Dept 1993] ["Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness's general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this (threshold) is met, the fact that the evidence also tends to impeach the witness' credibility does not render the evidence collateral" (citation and internal quotation marks omitted)]).