

Meeting

Memorandum No. 14(1960)

Subject: Study No. 40 - Notice of Alibi

The revised recommendation and proposed statute on notice of alibi are attached.

In the recommendation, the two complete paragraphs on page 2 could be deleted and the following inserted:

Fourteen states, by statute or court rule, require the defendant to give notice a specified number of days prior to trial if he intends to rely upon an alibi defense. These notice of alibi laws have met with general approval and appear to be successful in meeting the problems for which they were designed. Therefore, the Commission believes that under certain circumstances the defendant in a criminal action should be required to give notice of his intention to rely upon an alibi.

In the recommendation, page 6, a paragraph should be included justifying the provision of the statute which makes the demand and notice of alibi inadmissible as evidence.

The statute has been substantially revised since the Commission last considered its provisions. Note that the following provisions, not heretofore considered by the Commission, have been added:

Paragraph (c) of Section 1028.5 is new. This provision authorizes the prosecution to use a witness not included in the demand if the defendant does not rely upon alibi evidence at the trial.

Paragraph (b) of Section 1028.7 is new. This paragraph requires that the defendant be granted a continuance for not less than five days if the prosecution serves a demand for a notice of alibi and then, at the trial, attempts to establish a different time or place than specified in the demand.

If the defendant makes an affidavit that he has an alibi for the new time and place, the court is required to grant him a continuance.

Section 1020 of the Penal Code provides:

1020. All matters of fact tending to establish a defense other than one specified in the third, fourth, and fifth subdivisions of Section 1016, may be given in evidence under the plea of not guilty.

Section 1020 has not been amended in the attached bill. It could be amended to insert an introductory provision like the following: "Subject to Chapter 4a (commencing with Section 1028.1) of Title 6 of Part 2 of the Penal Code, all" It should be recognized that Section 1020 is also subject to the qualification that hearsay evidence or testimony by a wife against her husband, for example, will not be admitted as evidence.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Notice of Alibi in Criminal Actions

A defendant in a criminal action may attempt to establish by an alibi that he was at some place other than the scene of the crime at the time the crime took place and, therefore, that he could not have committed the crime. The testimony concerning the alibi may take the prosecution completely by surprise. This surprise alibi testimony, when based on perjury, may result in an unjust acquittal. For example, at the trial the defendant may, for the first time, claim that he was outside the state or the community at the time the crime was committed. If the defendant makes such a claim the prosecution has little or no opportunity to investigate the facts surrounding the alibi. There may be no time to check either the credibility of the alibi witnesses or the accuracy of their statements. It may be impossible, for lack of time, to procure the necessary witnesses to disprove the fictitious alibi.

On the other hand, if the prosecution has sufficient notice that an alibi defense will be asserted at the trial, an investigation can be made of the alibi prior to the trial. In many cases the investigation will reveal whether or not the alibi is true. If the defendant has a bona fide alibi he will not be harmed by giving previous notice of his intention to rely on it. In fact, by so doing, he may be relieved of the burden and annoyance of a trial. If the investigation establishes

that the alibi is true, the criminal action can be dismissed. On the other hand, if the alibi is without merit, the investigation may disclose that fact and the prosecution will have sufficient time to prepare a rebuttal.

The study of the research consultant indicates that 14 states, by statute or court rule, require the defendant to give notice a specified number of days prior to trial if he intends to rely upon an alibi defense. Nine states require the defendant to name the specific place where he claims to have been when the crime took place; another state requires that the defendant state the county or municipality where he claims to have been when the crime was committed. Seven states require the defendant to list the names of the witnesses he intends to call in support of his alibi and one of these requires, in addition, that the defendant set out in his notice the substance of what he intends to prove by each witness. Under the New Jersey procedure the prosecution, on demand of the defendant, is required to furnish the defendant with a list of names of the witnesses it will call to establish the presence of the defendant at the scene of the crime. If the defendant fails to give the required notice of alibi, the statutes in the other states authorize the trial court, in its discretion, to exclude alibi evidence. Some statutes specifically authorize a continuance or postponement of the trial to permit investigation of the alibi if the required notice has not been given.

Alibi laws have met with general approval in those states where they have been adopted and appear to be successful in meeting the problems for which they were designed. Therefore, the Commission believes that under certain circumstances the defendant in a criminal action should be required to give notice of his intention to rely upon an alibi.

Most states having notice of alibi statutes require the defendant to give

a notice of alibi in any case where he intends to rely upon an alibi. However, in California generally the indictment or information need not state the precise time at which the offense was committed and, even where the indictment or information does state a specific time as the time of the commission of the crime, the time thus specified usually is preceded by the words "on or about" or is otherwise accompanied by words of extension. Thus the defendant has no assurance that the prosecution will show at the trial that the crime was committed at the time stated in the indictment or information. In some cases, it is not possible even at the trial to determine precisely the time of the alleged offense. For example, in a sex offense case where a young child is involved the exact date of the offense may not be specified in the accusatory pleading and may not be established at the trial. The Commission has concluded that the prosecuting attorney should be required to take the initiative if he believes the case is one where the defense of alibi might be used and he desires to make an advance investigation of the alibi. Therefore, the Commission recommends that the defendant be required to give a notice of alibi only in those cases where the prosecuting attorney makes a written demand which includes a statement of the specific time and place the prosecution intends to present at the trial as the time when and place where the defendant participated in or committed the crime. The statute recommended by the Commission authorizes the prosecuting attorney to specify more than one time and place in his demand for a notice of alibi if there are several acts material to the crime which occurred at different times and places.

The statute recommended by the Commission requires that the defendant's notice of alibi include (1) the place at which the defendant claims to have been

at the time stated in the prosecuting attorney's demand and (2) the name and address of each witness upon whom the defendant intends to rely for alibi evidence. The prosecution cannot make a satisfactory investigation of the claimed alibi unless it is furnished with this information.

The Commission recommends that the demand of the prosecuting attorney for the notice of alibi also state the name and address of each witness upon whom the prosecution intends to rely to establish the defendant's presence at the scene of the crime. If the defendant is required to reveal the identity of his alibi witnesses, the Commission believes that the prosecution should be required to reveal the identity of the witnesses the prosecution will use to establish the presence of the defendant at the scene of the crime. The Commission recognizes that the defendant is entitled to a transcript of the testimony given at the grand jury proceeding or a transcript of the depositions and testimony taken at the preliminary examination. However, this does not necessarily mean that the defendant is informed of the identity of the prosecution's witnesses. There may be a waiver of the preliminary examination or, if the offense is one triable in an inferior court, there will be no grand jury proceeding or preliminary examination. Furthermore, in those cases where there is a grand jury proceeding or a preliminary examination, the prosecution very often presents only enough evidence to obtain an indictment or to support an information and this, being the minimum, does not necessarily include all the witnesses who will be presented at the trial to establish the presence of the defendant at the scene of the crime.

Under the procedure used in some states, the prosecution is not required to give the names of its witnesses until after the defendant has filed his notice of alibi. However, the Commission believes that the prosecution should be

required to list its witnesses in its demand for a notice of alibi. This is a practical way of keeping the procedure from becoming too cumbersome. Moreover, since the demand is a discretionary matter with the prosecution, the prosecutor need not make the demand if he concludes that the disclosure of the names of his witnesses is not worth the information he may receive in return. Since this is true the Commission believes that the proposed statute is fair to both the defendant and the prosecution, even in those cases where the defendant does not intend to rely on an alibi.

The Commission recommends that alibi evidence be excluded at the discretion of the trial court if the defendant fails to file the required notice of alibi after receiving the demand from the prosecuting attorney. By placing the exclusion of alibi evidence within the discretion of the trial judge the effect of the statute can be avoided in those cases where a strict application might result in an unfair trial.

The alibi statutes in other states make no distinction between excluding the testimony of witnesses and excluding the testimony of the defendant. But the Commission believes that the defendant should be allowed to give alibi testimony himself, notwithstanding his failure to file and serve the required notice of alibi. The notice of alibi is intended only to preclude the use of surprise alibi witnesses when the prosecution has insufficient time to investigate the credibility of such witnesses and their statements. The prosecution should be able to make an adequate investigation of the credibility of the defendant without a notice of alibi. An uncorroborated alibi will be of slight value to the defendant and, therefore, the objective of the statute will be realized even though the defendant is permitted to give alibi testimony himself.

The Commission recommends that, if the defendant serves a notice of alibi,

the trial court should be authorized, in its discretion, to exclude the testimony of any witness for the prosecution concerning the presence of the defendant at the time and place specified in the demand for the notice of alibi unless such witness was listed in the demand. The prosecution should be subject to the same sanction as the defendant to insure compliance with the terms of the statute.

[Paragraph justifying the provision making demand and notice of alibi inadmissible as evidence and prohibiting reference or comment as to the fact that a demand or notice was served or to the contents thereof.]

2/13/60

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 4a (commencing with Section 1028.1) to Title 6 of Part 2 of the Penal Code, relating to evidence in criminal actions.

The people of the State of California do enact as follows:

SECTION 1. Chapter 4a (commencing with Section 1028.1) is added to Title 6 of Part 2 of the Penal Code, to read:

CHAPTER 4a. NOTICE OF ALIBI

1028.1. As used in this chapter, "alibi evidence" means evidence that the defendant in a criminal action was, at the time specified in the demand for a notice of alibi, at a place other than the place specified in the demand; but "alibi evidence" does not include testimony of the defendant himself as to an alibi.

1028.2. Not less than 10 days before the day set for trial, the prosecuting attorney may serve on the defendant or his attorney a demand that the defendant serve and file a notice of alibi if the defendant is to rely in any way upon alibi evidence at the trial. The demand shall:

(a) State the time and place that the prosecuting attorney intends

to present at the trial as the time when and place where the defendant participated in or committed the crime. If the prosecuting attorney intends to present at the trial more than one time and place where the defendant participated in or committed the crime, the demand may state each such time and place.

(b) State the name and residence or business address of each witness upon whom the prosecuting attorney intends to rely to establish the defendant's presence at each time and place specified in the demand.

(c) State that the defendant is required by Chapter 4a (commencing with Section 1028.1) of Title 6 of Part 2 of the Penal Code to serve and file a notice of alibi if he is to rely in any way upon alibi evidence at the trial.

(d) Be signed by the prosecuting attorney.

1028.3. If a demand for a notice of alibi is served pursuant to Section 1028.2 of this code and the defendant is to rely in any way upon alibi evidence, he shall, not less than five days before the day set for trial, serve on the prosecuting attorney and file a notice of alibi which shall:

(a) State the place or places where the defendant claims to have been at the time or times stated in the demand.

(b) State the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence.

(c) Be signed by the defendant or his attorney.

1028.4. At any time before trial, the court before which the criminal action is pending may, in its discretion, upon good cause shown:

(a) Order that the time of service of the notice of alibi be shortened.

(b) Order the amendment of the demand for a notice of alibi or the amendment of the notice of alibi.

The party who obtains the order shortening the time of service of the notice of alibi or authorizing or requiring the amendment shall promptly serve a copy of the order on the opposing party.

1028.5. If the defendant serves a notice of alibi, the court may, in its discretion, exclude testimony of a witness offered by the prosecuting attorney to establish the presence of the defendant at a time and place specified in the demand for a notice of alibi unless:

(a) The name and residence or business address of the witness was included in the demand; or

(b) Good cause is shown why the demand failed to include the name and residence or business address of the witness and why the demand was not amended under Section 1028.4 of this code to include such name and address; or

(c) The defendant does not rely upon alibi evidence at the trial.

1028.6. Subject to Sections 1028.7 and 1028.8 of this code, if a notice of alibi is required to be served by the defendant under this chapter, the court may, in its discretion, exclude alibi evidence offered by the defendant unless:

(a) The information required by Section 1028.3 of this code was included in the notice of alibi; or

(b) Good cause is shown why the notice of alibi was not served or, if a notice of alibi was served, good cause is shown why it failed to include the information required by Section 1028.3 of this code and was not amended under Section 1028.4 of this code to include such information.

1028.7. If the prosecuting attorney at the trial seeks to establish that the defendant participated in or committed the crime at a different time or place than the time and place specified in the demand for the notice of alibi:

(a) The testimony of a witness offered by the defendant shall not be excluded because the defendant failed to comply with the provisions of this chapter; and

(b) Upon motion, verified by the affidavit of the defendant, showing that the defendant has an alibi for the time and place sought to be established at the trial as the time and place the defendant participated in or committed the crime, the court shall continue the case for not less than five days.

1028.8. The defendant may offer evidence by his own testimony without complying with the provisions of this chapter.

1028.9. Neither the notice of alibi nor the demand for a notice of alibi is admissible as evidence. No reference or comment may be made before the jury concerning:

(a) The contents of a notice of alibi or the contents of a demand for a notice of alibi.

(b) Whether or not a notice of alibi or a demand for a notice of alibi was served and filed.

Nothing in this section is intended to prevent the court from examining a notice of alibi and demand for a notice of alibi for the purpose of ruling on the exclusion of evidence under Sections 1028.5 and 1028.6 of this code.

(40)

mtg.
Revised 2/18/60
2/13/60
1/11/60

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Notice of Alibi in Criminal Actions

A defendant in a criminal action may attempt to establish by an alibi that he was at some place other than the scene of the crime at the time the crime took place and, therefore, that he could not have committed the crime. The testimony concerning the alibi may take the prosecution completely by surprise. This surprise alibi testimony, when based on perjury, may result in an unjust acquittal. For example, at the trial the defendant may, for the first time, claim that he was outside the state or the community at the time the crime was committed. If the defendant makes such a claim the prosecution has little or no opportunity to investigate the facts surrounding the alibi. There may be no time to check either the credibility of the alibi witnesses or the accuracy of their statements. It may be impossible, for lack of time, to procure the necessary witnesses to disprove the fictitious alibi.

On the other hand, if the prosecution has sufficient notice that an alibi defense will be asserted at the trial, an investigation can be made of the alibi prior to the trial. In many cases the investigation will reveal whether or not the alibi is true. If the defendant has a bona fide alibi he will not be harmed by giving previous notice of his intention to rely on it. In fact, by so doing, he may be relieved of the burden and annoyance of a trial. If the investigation establishes

that the alibi is true, the criminal action can be dismissed. On the other hand, if the alibi is without merit, the investigation may disclose that fact and the prosecution will have sufficient time to prepare a rebuttal.

Fourteen states, by statute or court rule, require the defendant to give notice a specified number of days prior to trial if he intends to rely upon an alibi defense. These notice of alibi laws have met with general approval in the states where they have been adopted and appear to be successful in meeting the problems for which they were designed.

The Commission has concluded that under certain circumstances the defendant in a criminal action should be required to give notice of his intention to rely upon an alibi and makes the following recommendations:

1. The defendant should be required to give notice of alibi only in those cases where the prosecuting attorney makes a written demand for a notice of alibi. The demand should include a statement of the specific time and place the prosecution intends to present at the trial as the time when and place where the defendant participated in or committed the crime. The prosecuting attorney should be authorized to specify more than one time and place in his demand for a notice of alibi if there are several acts material to the crime which occurred at different times or places.

Most states having notice of alibi statutes require the defendant to give a notice of alibi in any case where he intends to rely upon an alibi. However, in California generally the indictment or information need not state the precise time at which the offense was committed and, even where the indictment or information does state a specific time as the time of the commission of the crime, the time thus specified usually is

preceded by the words "on or about" or is otherwise accompanied by words of extension. Thus the defendant has no assurance that the prosecution will show at the trial that the crime was committed at the time stated in the indictment or information. The Commission has concluded that, if the prosecuting attorney believes the case is one where the defense of alibi might be used, he should be required to initiate the proceedings by making a written demand specifying the time and place the prosecution intends to present at the trial as the time when and place where the defendant participated in or committed the crime. The defendant can then give a notice of alibi if he has an alibi for the time and place specified in the demand.

2. The demand of the prosecuting attorney for the notice of alibi also should state the name and address of each witness upon whom the prosecution intends to rely to establish the defendant's presence at the scene of the crime. If the defendant is required to reveal the identity of his alibi witnesses (as the Commission recommends), the Commission believes that the prosecution should be required to reveal the identity of the witnesses the prosecution will use to establish the presence of the defendant at the scene of the crime. The Commission recognizes that the defendant is entitled to a transcript of the testimony given at the grand jury proceeding or a transcript of the depositions and testimony taken at the preliminary examination. However, this does not necessarily mean that the defendant is informed of the identity of the prosecution's witnesses. There may be a waiver of the preliminary examination or, if the offense is one triable in an inferior court, there will be no grand jury proceeding or preliminary examination. Furthermore, in those cases where there is a grand

jury proceeding or a preliminary examination, the prosecution very often presents only enough evidence to obtain an indictment or to support an information and this, being the minimum, does not necessarily include all the witnesses who will be presented at the trial to establish the presence of the defendant at the scene of the crime.

Under the procedure used in some states, the prosecution is not required to give the names of its witnesses until after the defendant has filed his notice of alibi. However, the Commission believes that the prosecution should be required to list its witnesses in its demand for a notice of alibi. This is a practical way of keeping the procedure from becoming too cumbersome. Moreover, since the demand is a discretionary matter with the prosecution, the prosecutor need not make the demand if he concludes that the disclosure of the names of his witnesses is not worth the information he may receive in return. Since this is true the Commission believes that this recommendation is fair to both the defendant and the prosecution, even in those cases where the defendant does not intend to rely on an alibi.

3. The defendant's notice of alibi should include (1) the place at which the defendant claims to have been at the time stated in the prosecuting attorney's demand and (2) the name and address of each witness upon whom the defendant intends to rely for alibi evidence. The prosecution cannot make a satisfactory investigation of the claimed alibi unless it is furnished with this information.

4. Alibi evidence should be excluded at the discretion of the trial court if the defendant fails without good cause to file the required notice of alibi after receiving the demand from the prosecuting attorney. By

placing the exclusion of alibi evidence within the discretion of the trial judge the effect of the statute can be avoided in those cases where a strict application might result in an unfair trial.

5. The defendant should be allowed to give alibi testimony himself, notwithstanding his failure to file and serve the required notice of alibi. The alibi statutes in other states make no distinction between excluding the testimony of witnesses and excluding the testimony of the defendant. But the notice of alibi is intended only to preclude the use of surprise alibi witnesses when the prosecution has insufficient time to investigate the credibility of such witnesses and their statements. The prosecution should be able to make an adequate investigation of the credibility of the defendant without a notice of alibi. An uncorroborated alibi will be of slight value to the defendant and, therefore, the objective of the statute will be realized even though the defendant is permitted to give alibi testimony himself.

6. If the defendant serves a notice of alibi and relies upon alibi evidence at the trial, the trial court should be authorized, in its discretion, to exclude the testimony of any witness for the prosecution concerning the presence of the defendant at the time and place specified in the demand for the notice of alibi unless such witness was listed in the demand or good cause is shown why such witness was not so listed. The prosecution should be subject to the same sanction as the defendant to insure compliance with the terms of the statute.

7. The notice of alibi and demand for the notice of alibi should be inadmissible as evidence and no reference or comment should be allowed in the presence of the jury as to the fact that a notice or demand was served

or as to the contents thereof. Under a notice of alibi statute, the defendant is forced to give a notice of alibi at a time prior to the trial in any case where he believes that he may rely upon an alibi at the trial. The Commission believes that, if the defendant decides at the trial that he does not want to rely upon an alibi defense, the fact that he gave a notice of alibi to protect his right to use alibi testimony should not be used against him. For example, after giving a notice of alibi, the defendant may discover that his alibi witness has a criminal record and a poor reputation. Under these circumstances, the defendant may decide not to use the alibi defense because it might cause the jury to discount his entire case. The defendant should be similarly protected where he uses an alibi defense at the trial but decides not to use one of the witnesses listed in his notice of alibi. The defendant may discover, for example, that one of the witnesses he listed in his demand has a bad reputation and might cause the jury to reject the testimony of all the alibi witnesses.