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8/9/60

Memorandum No. 72(1960)

Subject: Study No. 40 - Notice of Alibi in Criminal Actions.

The Recommendation on Notice of Alibi in Criminal Actions herewith is presented to the Commission for final approval prior to printing the Recommendation and Study. This Recommendation and Study are scheduled to be printed after the August meeting of the Commission.

1. Attached as Exhibit I is the Recommendation (including the proposed statute). The Recommendation is set forth as approved by the Commission, with one revision: A technical change in the proposed statute has been made in accordance with a suggestion of the office of the Legislative Counsel. This change is shown in Exhibit I by underscored material and by strike-out type. With reference to the proposed statute, the only comment of the Legislative Counsel was:

Section 1028.8 provides that "Nothing in this chapter prevents the defendant from testifying as to an alibi or as to any other matter." We suggest the possibility of tacking on this language at the end of Section 1028.1, with the aim of reducing the number of sections in the new chapter to be added by the bill. It may at some future date become necessary to add more sections to the chapter, and it would be desirable to avoid having to use section numbers carried out to the second decimal point.

Does the Commission wish to make this revision in its proposed statute?

2. Attached as Exhibit II is a letter from the District Attorneys' Association concerning the tentative recommendation and proposed statute on notice of alibi in criminal actions. The district attorneys object to the requirement that the demand for a notice of alibi include the names and addresses of the witnesses upon whom the State intends to rely to

establish defendant's presence at the time and place where the defendant is alleged to have committed the crime. The district attorneys would prefer a statute that requires the defendant to initiate the proceedings and declare his alibi defense or at least that the details of the prosecution's proof on time and place not be required to be furnished to the defendant until the alibi defense has been declared.

3. Attached as Exhibit III is a letter from the Chairman of the State Bar Committee on Criminal Law and Procedure. As his letter indicates, the Northern Section of the Committee disapproved the Commission's bill and the Southern Section of the Committee approved Senate Bill 531 (1959). Senate Bill 531 provides that where a defendant in a criminal action proposes to urge the defense of alibi he shall so advise the prosecuting attorney, before trial, in a notice setting forth the particulars of the defense. It allows pretrial examination of physical evidence to be used in support of the defense and permits a court to exclude all evidence on the issue, save the defendant's own testimony, in cases where such notice has not been given. The Board of Governors of the State Bar has not received a report from the Committee on Criminal Law and Procedure.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

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 an alibi - that he was at some place other than the scene of the crime and therefore could not have committed it. 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 because the prosecution has little or no opportunity to investigate the credibility of the alibi witnesses and their statements. On the other hand, if the prosecution has sufficient notice that an alibi defense will be asserted at the trial, the pretrial investigation will often reveal whether or not the alibi is true. If the defendant has a bona fide alibi, the charges against him can be dismissed. If his alibi is false, the investigation may disclose that fact and the prosecution will have sufficient time to secure rebuttal evidence.

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, upon demand by the prosecution, the defendant in a criminal action should be required to give notice of his

intention to rely upon alibi testimony of witnesses other than himself.

Accordingly, the Commission makes the following recommendations:

1. The defendant should be required to give notice of alibi only if the prosecuting attorney makes a written demand therefor. The demand should include a statement of the specific time and place the prosecution intends to establish at the trial as the time when and place where the defendant participated in or committed the crime. The demand is necessary to provide the defendant with the information he needs to enable him to determine whether he has an alibi for the time and place that will be established at the trial. It may be argued that such a demand is unnecessary because the time and place of the crime is alleged in the indictment or information. However, the indictment or information need not state the precise time and specific place at which the offense was committed and, even where it does state a precise time, the time thus specified is usually preceded by the words "on or about" or is otherwise accompanied by words of extension. Thus there is no assurance that the indictment or information will inform the defendant of the specific time and place the prosecution will establish at the trial.

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, including witnesses whose testimony will be limited to the authentication of documentary evidence. If the defendant is required to reveal the identity of his alibi witnesses, it seems only fair to require the prosecution to reveal the identity of the witnesses it will use to establish the presence of the defendant at the scene of the crime. The fact that the defendant is entitled to a transcript of the testimony at the grand jury proceeding or at the

preliminary examination does not necessarily mean that he is informed of the identity of the prosecution's witnesses. If the offense is one triable in an inferior court there will be no grand jury proceeding or preliminary examination. If it is one triable in the superior court there may be a waiver of the preliminary examination or, if there is a grand jury proceeding or a preliminary examination, the prosecution may present only enough evidence to obtain an indictment or to support an information.*

3. The defendant's notice of alibi should state the place at which the defendant claims to have been at the time stated in the prosecuting attorney's demand and the name and address of each witness other than himself upon whom the defendant intends to rely for alibi evidence, including witnesses whose testimony will be limited to the authentication of documentary evidence. The prosecution cannot make a satisfactory investigation of the alleged alibi unless it is furnished with this information.

4. Alibi testimony of persons other than the defendant 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 such testimony 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.

* 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, requiring the prosecution to list its witnesses in its demand for a notice of alibi eliminates an extra step in the procedure and thus keeps it from becoming too cumbersome. Moreover, invoking this procedure is discretionary with the prosecution; a demand need not be made if the prosecutor concludes that the disclosure of the names of his witnesses is not worth the information he may receive in return.

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 the testimony of witnesses and the testimony of the defendant. However, the purpose of a notice of alibi statute is 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 whereabouts of the defendant and his credibility without a notice of alibi. Moreover, it might be thought to be unfair to preclude the defendant from testifying personally as to any matter material to his defense. In any event, an uncorroborated alibi will be of slight value to the defendant.

6. 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 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 the proposed 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. 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, the defendant may decide not to use his alibi defense if he discovers, after giving a notice of alibi, that his only alibi witness has a criminal record and bad reputation. 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 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. (a) 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.

(b) Nothing in this chapter prevents the defendant from testifying as to an alibi or as to any other matter.

1028.2. Not less than 10 days before the day set for trial, the prosecuting attorney may serve on the defendant or his attorney and file 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 establish at the trial as the time when and place where the defendant

participated in or committed the crime. If the prosecuting attorney intends to establish more than one time and place where the defendant participated in or committed the crime, the demand shall 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) State that the defendant need not serve or file a notice of alibi if he is to rely only upon his own testimony to establish an alibi.

(e) Be signed by the prosecuting attorney.

1028.3. If a demand for a notice of alibi is served pursuant to Section 1028.2 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 to include such name and address.

1028.6. Subject to Section[a] 1028.7 and [~~1028.6~~] to subdivision (b) of Section 1028.1, 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 relating to such evidence was included in the notice of alibi as required by Section 1028.3; 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 relating to such evidence as required by Section 1028.3 and why it was not amended under Section 1028.4 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 time or place other

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 of the defendant, the court may grant a continuance as provided in Section 1050.

~~[1028.8.--Nothing-in-this-chapter-prevents-the-defendant-from-testifying-as-to-an-alibi-or-as-to-any-other-matter.]~~

[~~1028.9.~~] 1028.8. Neither the notice of alibi nor the demand for a notice of alibi is admissible as evidence in the criminal action. 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.

EXHIBIT II

COUNTY OF SAN MATEO
Keith C. Sorenson District Attorney
Hall of Justice and Records, Redwood
City, Calif.

July 6, 1960

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: Law Revision Commission Study on Alibi Law

Dear Mr. DeMouilly:

Pursuant to your Committee's courteous invitation to the District Attorneys' Association to review its tentative proposed recommendation concerning legislation on the above subject, the Legislative Committee of our Association met and considered same at our recent Convention in Carmel Valley. I had furnished each member of the Legislative Committee with a copy of the tentative proposed statute and the accompanying study supplied by you.

Our Committee was very enthusiastic in its reception of the work done on this subject by your Commission and were very happy that your Commission had reached a tentative recommendation in favor of a "Notice of Alibi" law. Several members indicated that they had encountered specific instances where such a law would have aided the interests of justice either by allowing this defense to be exploded by investigation or prompting a dismissal of the criminal prosecution on the basis of facts made known.

We, therefore, wholeheartedly agreed that such a law is necessary and desirable in California but wish to urge the Commission to seriously consider revising its tentative proposal to remove the necessity of the District Attorney first making a demand and therein furnishing the defendant with the names of witnesses upon whom he intends to rely to establish the defendant's presence at the time and place where the defendant is alleged to have committed the crime. The requirement in your proposed statute that this information first be furnished the defendant, before he has even evidenced an intention to use alibi as a defense, seems to be entirely too much of a gratuity. The District Attorneys believe that under the recent rules of criminal discovery pronounced by the Courts, they have already been forced to unilaterally disclose more of their case than is fair in advance of trial, inasmuch as the prospects of obtaining reciprocal information are extremely small. It is noted in perusing Mr. Wilson's study that most states, if not all, having alibi laws provide that the accused institute the procedure and do not require information from the prosecution until the defendant has first detailed his alibi defense. We realize that the discretion is in the District Attorney under the proposed statute as to whether he would wish to initiate the procedure. In each case, the District Attorney would have to determine,

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without any knowledge as to the possibility of an alibi defense, whether he should furnish the defendant with the meat of the prosecutor's case, including names and addresses of witnesses, in the off-chance that he may uncover an alibi defense. The possibility of harrassment of witnesses in advance of trial is something to consider when one is dealing with criminal cases.

In short, the District Attorneys' Association is very much in favor of a Notice of Alibi Law but would much prefer to have the procedure either reversed to provide that the defendant must initiate the proceedings and declare his alibi defense or at least that the details of the prosecution's proof on time and place not be required to be furnished to the defendant until the alibi defense has been declared.

Please express our appreciation to the Law Revision Commission for its comprehensive work and our thanks for the opportunity to review and report on its recommendation.

Sincerely yours,

S/ Keith C. Sorenson
KEITH C. SORENSON,
District Attorney.

KCS:LB

8/9/60

EXHIBIT III

LEO R. FRIEDMAN
Attorney at Law
690 Market Street
San Francisco 4, California

August 8, 1960

California Law Revision Commission
School of Law
Stanford, California

Dear Sirs:

As Chairman of the Committee on Criminal Law and Procedure, I received a letter from Mr. Jack A. Hayes, Secretary of the State Bar, requesting that I forward to you the comments of the Committee on your Commission's tentative recommendation that the law be revised to require a defendant to give notice of the defense of alibi in criminal actions.

This matter came before the Northern Section of the Committee on January 30, 1960 upon consideration of Senate Bill 531 relative to the same matter. At that time, the Northern Section of the Committee disapproved the bill on the grounds that the Committee was opposed to any legislation that required a defendant to disclose his defense in advance of trial. On May 11, 1960 the Southern Section of the Committee approved Senate Bill 531 on the basis of the report of the California Law Revision Commission. The report of the Southern Section stated, "It affords pretrial discovery to the prosecution as well as an opportunity to investigate so that justice may not be defeated by a false alibi based upon perjury." The Northern Section at a later meeting approved its prior stand.

There has been no joint meeting of the Northern and Southern Sections.

Very truly yours,

S/ Leo R. Friedman

LEO R. FRIEDMAN

LRF:ab