Date of Meeting: August 28-29, 1959
Date of Memo: August 10, 1959

Memorandum No. 5

Subject: Approval of Payment of Consultant on Study No. 40 - Notice of Alibi.

Study No. 40 is not on the Agenda for Commission action. However, it is suggested that the Commission decide if the research consultant's study meets the standards of the Commission and, if so, approve payment of the amount to which he is entitled.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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S. B. No. 530 Introduced by Sen. Grunsky

An act to add Section 1112 to the Penal Code, Relating to defenses in criminal trials.

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

SECTION 1. Section 1112 is added to the Penal Code, to read:

1112. Whenever a defendant in a criminal case shall propose to offer in his defense testimony to establish an alibi or a mental condition, other than legal insanity, which is claimed to have rendered the defendant incapable of committing the crime or crimes charged, such defendant shall, at the time of arraignment or within 10 days thereafter but not less than four days before the trial of such cause, file and serve upon the prosecuting attorney in such cause, a notice in writing of his intention to claim any of the aforesaid defenses, including in said notice the names and addresses of witnesses to such defense, if known, and where the defense of alibi is claimed, specific information as to the place where the defendant claims to have been at the time of the alleged offense. Said notice shall further state a time and place in court, prior to the date of trial, when any books, records, or other physical evidence proposed to be used by the defendant in connection with the aforesaid defenses, may be examined by the prosecutor.

In the event of the failure of a defendant to file the written

notice prescribed in the preceding paragraph, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing such defense, excepting that the defendant can testify in his own behalf as to such defense. For good cause shown, the court may relieve a defendant of his failure to give such notice, and in such event, the court shall upon oral motion by the prosecution order the disclosure of such defense, names and addresses of witnesses, books, records and other physical evidence proposed to be used, and shall allow the prosecution a reasonable continuance or recess to investigate and obtain evidence to meet such defense.

LEGISLATIVE COUNSEL'S DIGEST

S. B. 530 as introduced, Grunsky (Jud.). Notice of defense in criminal trials. Adds Sec. 1112, Pen.C.

Provides that where a defendant in a criminal trial proposes to urge the defense of alibi or the defense of an incapacitating mental condition, other than legal insanity, he shall so advise the prosecuting attorney, before trial, in a notice setting forth the particulars of the defense. 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.

S.B. 531 Introduced by Sen. Grunsky

An act to add Section 1112 to the Penal Code, relating to defenses in criminal trials.

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

SECTION 1. Section 1112 is added to the Penal Code, to read:

1112. Whenever a defendant in a criminal case shall propose to offer in his defense testimony to establish an alibi, such defendant shall, at the time of arraignment or within 10 days thereafter but not less than four days before the trial of such cause, file and serve upon the prosecuting attorney in such cause, a notice in writing of his intention to claim the aforesaid defense, including in said notice the names and addresses of witnesses to such defense, if known, and specific information as to the place where the defendant claims to have been at the time of the alleged offense. Said notice shall further state a time and place in court, prior to the date of trial, when any books, records, or other physical evidence proposed to be used by the defendant in connection with the aforesaid defense, may be examined by the prosecutor.

In the event of the failure of a defendant to file the written notice prescribed in the preceding paragraph, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing such defense, excepting that the defendant can testify in his own behalf as to such defense. For good cause shown, the court may relieve a defendant of his failure to give

such notice, and in such event, the court shall upon oral motion by the prosecution order the disclosure of such defense, names and addresses of witnesses, books, records and other physical evidence proposed to be used, and shall allow the prosecution a reasonable continuance or recess to investigate and obtain evidence to meet such defense.

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S. B. 532 Introduced by Sen. Grunsky

An act to add Section 1112 to the Penal Code, relating to defenses in criminal trials.

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

SECTION 1. Section 1112 is added to the Penal Code, to read:

1112. Whenever a defendant in a criminal case shall propose to offer in his defense testimony to establish a mental condition, other than legal insanity, which is claimed to have rendered the defendant incapable of committing the crime or crimes charged, such defendant shall, at the time of arraignment or within 10 days thereafter but not less then four days before the trial of such cause, file and serve upon the prosecuting attorney in such cause, a notice in writing of his intention to claim the aforesaid defense, including in said notice the names and addresses of witnesses to such defense, if known. Said notice shall further state a time and place in court, prior to the date of trial, when any books, records, or other physical evidence proposed to be used by the defendant in connection with the aforesaid defense, may be examined by the prosecutor.

In the event of the failure of a defendant to file the written notice prescribed in the preceding paragrpah, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing such defense, excepting that the defendant can

testify in his own behalf as to such defense. For good cause shown, the court may relieve a defendant of his failure to give such notice, and in such event, the court shall upon oral motion by the prosecution order the disclosure of such defense, names and addresses of witnesses, books, records and other physical evidence proposed to be used, and shall allow the prosecution a reasonable continuance or recess to investigate and obtain evidence to meet such defense.

LEGISLATIVE COUNSEL'S DIGEST

S. B. 532 as introduced, Grunsky (Jud.). Notice of defense in criminal trials. Adds Sec. 1112, Pen.C.

Provides that where a defendant in a criminal trial proposes to urge the defense of an incapacitating mental condition, other than legal insanity, he shall so advise the prosecuting attorney, before trial, in a notice setting forth the particulars of the defense. 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.

(#40) 7/17/59

A STUDY TO DETERMINE WHETHER A DEFENDANT IN A CRIMINAL ACTION SHOULD BE REQUIRED TO GIVE NOTICE TO THE PROSECUTION OF HIS INTENTION TO RELY UPON THE DEFENSE OF ALIBI*

* This study was made at the direction of the California Law Revision Commission by Mr. John J. Wilson, a member of the State Bar.

A STUDY TO DETERMINE WHETHER A DEFENDANT IN A CRIMINAL ACTION SHOULD BE REQUIRED TO GIVE NOTICE TO THE PROSECUTION OF HIS INTENTION TO RELY UPON THE DEFENSE OF ALIBI*

Introduction

The defense of alibi frequently has been used successfully in criminal actions. The accused seeks to establish that he was at some place other than the scene of the crime at the time the criminal act took place, and, therefore, that he could not have committed the crime alleged in the indictment or information.[1] At the trial the accused may produce several witnesses to testify that when the crime was committed he was at a different place. Usually the alibi testimony is presented at the close of the defendant's case and comes without prior notice to the prosecution. That this type of surprise alibi testimony, when based on perjury, may often lead to an unjust acquittal is attested by Professor Millar of Northwestern University School of Law who has written:

> That the manufactured alibi is one of the main avenues of escape of the guilty needs no demonstration. Moreover, the amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked, and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertation.[2]

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And Leona Esch, Operating Director for the Cleveland Association for Criminal Justice, commenting on Ohio's notice of alibi statute stated:

> Time and time again in the courtrooms of this State I have seen "reasonable doubt" thrown on the testimony of state witnesses by the conflicting testimony of alibi witnesses for the defense, brought into the courtroom at almost the last minute and at a time that offered the state little or no opportunity to check either the credibility of the witnesses or the accuracy of their statements.[3]

In many cases an investigation by the prosecution in advance of trial could determine the merits of the alibi if there were notice that the defense would be asserted. In such instances the charges against the accused would be dismissed where the alibi is shown to be true. If, however, the alibi is without merit the investigation might disclose this fact and the prosecution would have sufficient time in which to prepare a rebuttal. In most cases the accused would not offer perjured alibi testimony where the prosecution had investigated the alibi and the witnesses who are to be called.

On the basis of this reasoning several states have enacted statutes which require, inter alia, that an accused who intends to offer alibi evidence give notice of such intention to the prosecution prior to trial.[4] A statute of this nature represents a departure from the traditional criminal procedure whereby the prosecution is required to establish the guilt of the accused without the benefit of advance notice of his defense.[5] It does, however, do much to eliminate the surprise element in many alibi defenses, and if the alibi statute has no constitutional infirmities it may be extremely useful.

Existing Law

At present fourteen states have statutes providing that an accused who intends to rely upon alibi as a defense must give notice of his intention to the prosecution a specified number of days prior to trial.[6] All of these statutes have additional requirements. Thus, Minnesota requires that the accused state the county or municipality where he claims to have been when the crime was committed.[7] Several states require the defendant to name the specific place where he claims to have been when the crime took place.[8] Seven states require the accused to list the names of the witnesses he intends to call in support of his alibi,[9] while Iowa imposes the maximum burden on the defendant by requiring him to set out the substance of what he intends to prove by each witness.[10] All states require the notice to be in writing[11] and their application is limited to criminal proceedings.[12]

Most statutes provide that failure to comply with their requirements may result in the exclusion of alibi testimony of persons other than the defendant. The Iowa statute states that when alibi testimony is offered without prior notice the county attorney may move for a continuance in order to investigate the alibi,[13] and while this statute does not expressly provide for the exclusion of alibi evidence it has been held that such exclusion was not error where the defendant failed to give the required notice.[14] When alibi evidence is offered without prior notice in Oklahoma the court may, upon motion of the prosecutor, grant a postponement "for such time as it may deem necessary to make an investigation of the facts in relation to such evidence."[15] In Ohio it was argued that

despite non-compliance with the statute the defendant should be allowed to introduce alibi evidence for the limited purpose of impeaching the prosecution witnesses, but the Supreme Court rejected this theory, stating that to hold otherwise would nullify the statute.[16]

All alibi statutes thus far enacted either by express provision or by construction place the exclusion of alibi evidence within the discretion of the trial judge. In several cases the rather strict exercise of this discretion has been upheld. Thus, in the Kansas case of State v. Rafferty[17] where the defendant filed the required notice and sought to endorse the name of an additional alibi witness on the notice on the day of trial the court refused to allow the indorsement and excluded the testimony of the additional witness. This was held not to be error on the ground that the evidence would have been cumulative and the matter was within the sound discretion of the trial judge. In State v. Berry,[18] another Kansas case, the testimony of one "Marva Bond" was held to have been excluded properly where the notice, due to a typographical error, listed the name of "Mary Bond." Again the court held that where the evidence was cumulative the trial judge's exercise of discretion would be upheld. People v. Fleisher[19] involved the Michigan statute which required notice to be filed four days prior to trial. On the last day for filing the defendant moved for a continuance on the ground that his wife, an alibi witness, was ill and would not recover in time to testify at the trial. Several days later the motion was denied and trial began. The wife was called as a witness by the defendant and her alibi testimony was excluded on the ground that the motion for a continuance was not strict compliance with the notice

requirements of the statute. These cases demonstrate that the trial judge has wide discretion in admitting or excluding alibi evidence[20] when the defendant fails to adhere strictly to the provisions of the statute. No case has been found where such an exercise of discretion has been upset on appeal.

Most states place the initial burden of giving detailed information relating to his alibi on the accused but New York and New Jersey have made somewhat different provisions. The New York statute simply requires the defendant to give notice of his intent to offer alibi testimony.[21] Without further action by the prosecution the evidence may be admitted. However, upon receipt of the notice the prosecuting attorney may file a demand for a bill of particulars from the defendant stating the names of the alibi witnesses to be called and the times and places which the defendant will seek to prove. Similarly, New Jersey requires the defendant to furnish a bill of particulars of his alibi only upon written demand by the prosecution,[22] and in the absence of such a demand the alibi evidence may not be excluded.[23] New Jersey also provides that the prosecution must furnish the accused with a list of the names of the witnesses it will call to establish the presence of the accused at the scene of the crime when the accused furnishes the prosecution with his list of alibi witnesses.

Some difficulty has been encountered under alibi statutes when the accusatory pleading is not definite as to when and where the offense occurred. In many cases the prosecution may be unable to establish with certainty the time and place of the commission of the offense and must frame the indictment in terms that the crime took place "on or about"

a certain date "at or near" a certain place. The accused is then faced with the problem of accounting for his whereabouts over an indefinite period of several hours or days without notice as to what specific times and places the prosecution intends to establish at the trial. This places a heavy burden on the accused under an alibi statute and may at times make it impossible for him to comply fully with its notice requirements. In State v. Thayer,[24] an Ohio case, the writer of the concurring opinion took the position that to apply the statute under these circumstances would result in a denial of due process. The majority did not consider this question, perhaps because the conviction was reversed on other grounds.

The problem of indefiniteness of the indictment as to times and places is somewhat alleviated in New Jersey where the accused is entitled to the names of the witnesses that the prosecution will call for the purpose of establishing his presence at the scene of the crime.[25] The New York[26] and Kansas[27] statutes provide that when the indictment does not set forth a specific time or place where the crime was committed the defendant may obtain a bill of particulars so that he may raise his defense of alibi and give the required notice. The Indiana statute[28] deals adequately with the problem by providing that upon receipt of the defendant's notice the prosecuting attorney must furnish a bill of particulars giving the exact time and place which the prosecution intends to establish at the trial.

Constitutional Problems

It has been said that statutes requiring notice of alibi are

generally held to be constitutional,[29] but no federal court has yet been called upon to rule on the question. For the most part the state courts have dealt with only two constitutional issues: first, whether the trial court may properly exclude the testimony of the accused himself when there has not been compliance with the statute, and second, whether the alibi statute infringes upon the accused's privilege against self-incrimination. These and other possible constitutional objections to notice of alibi statutes are considered in the material which follows:

Exclusion of Defendant's Own Testimony of Alibi. In People v. Rakiec,[30] a New York case, the defendant himself was not allowed to testify concerning his alibi where he had failed to give the required notice. On appeal he claimed that the statute as thus applied denied him due process of law. The New York Court of Appeals reversed his conviction but avoided the constitutional issue by construing the statute to exclude only the testimony of witnesses, not that of the accused himself. A similar result was reached in the Ohio case of State v. Thayer[31] but it was later held in Ohio in Smetana v. State[32] that the alibi testimony of the defendant was properly excluded where the required notice had not been given.

In the Smetana case the court stated that the right of an accused to testify in his own behalf is not a constitutional right but one given by statute and concluded that the legislature, in passing the alibi law, had merely attached conditions under which the right could be exercised. At common law an accused was considered to be incompetent

to testify at his own trial and it became necessary to pass statutes to abrogate this harsh rule.[33] In California the accused is made competent to testify by statute,[34] and the result reached in the Smetana case might be reached here should California adopt an alibi law which did not expressly reserve the right of an accused to testify.

There does not appear to be any substantial constitutional difference between excluding only the testimony of a witness on the one hand and that of the accused on the other, at least in states such as California where the right of the accused to testify is granted by statute. Presumably, the legislature which granted the right could attach reasonable conditions to its exercise. An accused does not have a constitutional right to present all the evidence which may tend to establish his innocence in light of the many rules of evidence, e.g., hearsay rule, best evidence rule, which exclude relevant evidence which may show the accused to be innocent.

However, exclusion of the testimony of the accused under certain circumstances may violate due process by depriving the accused of a fair trial. For example, where the accused has no alibi witnesses and hopes to establish his alibi solely by his own testimony his failure to give notice may be based on a reasonable presumption that the statute requires notice only when alibi witnesses will be called. It may be argued that under these circumstances denying the accused the right to testify will deprive him of a fair trial.

The problem could easily be avoided by limiting the exclusionary rule to the testimony of witnesses other than the accused. The prime objective of this type of legislation is the elimination of the parade

of alibi witnesses at the close of the trial at a time when the prosecution is unable to investigate the alibi or the credibility of the witnesses. The value to the accused of an uncorroborated alibi would be negligible and, therefore, the objective of the statute would be realized even though the accused were permitted to give alibi testimony himself. None of the existing alibi statutes make any distinction between excluding the testimony of witnesses and excluding the testimony of the accused but two bills recently introduced before the California legislature expressly reserve the right of an accused to testify in his own behalf whether or not he has complied with the notice requirements of the proposed alibi statutes.[35]

Privilege Against Self-Incrimination. Another constitutional issue considered by the courts concerns the privilege against self-incrimination. It may be argued that by requiring the accused to give advance notice of his defense and the witnesses he intends to call he is forced to become a witness against himself. Thus far the courts construing alibi statutes have rejected this contention.[36] Thus, in People v. Schade,[37] a New York case, the court stated that:

> There is nothing about [section 295-1 of the Code of Criminal Procedure] which compels the defendant to incriminate himself nor is there anything which compels him to give any information to the district attorney, unless he voluntarily and for his own benefit intends to use an alibi defense.[38]

In the same case the court observed that both the Federal and State Constitutions provide that "No person . . . . shall be compelled in any criminal case to be a witness against himself," and held that its alibi law does not violate the privilege because "the information sought

by the district attorney is not as to matters which the defendant says may incriminate him but as to matters which the defendant says may exonerate him."[39] Because alibi evidence must come, if at all, voluntarily from the defense there seems little doubt that the statutes do not violate the privilege against self-incrimination.

Denial of Due Process of Law. The question may be raised whether a criminal defendant has a constitutional right to surprise the prosecution. If he does, it would be abrogated in part by a notice of alibi statute. No case has been found wherein the theory is advanced that a defendant is denied a fair trial and hence due process in violation of the Fourteenth Amendment if he is deprived of the surprise element of his evidence. However, the issue of due process was raised in State v. Selbach,[40] a Wisconsin case, where the defense attorney failed to give the required notice because he did not learn of the alibi statute until the day of trial. The prosecuting attorney had received verbal notice of the alibi defense on the day of trial and defense counsel referred to the alibi in his opening statement. The Supreme Court of Wisconsin rejected the defendant's argument that under these circumstances the exclusion of the alibi evidence deprived him of a fair trial.

In attacking the constitutionality of an alibi statute the defendant would have to show that requiring notice of an alibi defense or excluding alibi evidence because of his non-compliance with the statute deprived him of a fair trial and was a denial of due process. The United States Supreme Court has not ruled on the constitutionality

of any alibi statute but it has upheld state legislation which would appear to be far more burdensome to the defendant than any of the alibi laws.[41] Finally, it seems likely that if a serious due process question is inherent in these laws it would have been advanced to the courts by now.

Violation of Right to Have Compulsory Process to Obtain Witnesses. A final argument against the constitutionality of these laws is that the accused is entitled to have compulsory process of the court for obtaining witnesses, that this right must necessarily include the right to have those witnesses heard at the trial, and that any statute which deprives the accused of his right to call a witness to the stand and question him infringes on his constitutional right to compulsory process. This argument has been successful in limiting the scope of a Washington statute similar to the alibi laws. That statute requires the prosecution and defendant to furnish each other prior to the trial with a list of the witnesses each intends to call.[42] The leading cases have held that the statute is not mandatory and that the trial judge has discretion to determine whether or not to exclude the testimony of a witness whose name was not furnished to the opposing counsel.[43] In State v. Sickles,[44] the Supreme Court of Washington said that if the statute were mandatory and the accused was denied the right to call and examine a witness solely because his name had not been furnished to the prosecution the statute would deprive the accused of a fair trial and be unconstitutional. Similarly in State v. Martin[45] the court held that the right to have compulsory process for obtaining witnesses carries

with it the implied right to have those witnesses heard, and that unless the statute were construed as discretionary it would deprive the accused of a constitutional right. Recognizing that the purpose of the statute is to eliminate the surprise witness,[46] the Washington cases now require a showing of surprise before the testimony of a witness whose name was not furnished the opposition may be excluded.[47] If a showing is made the surprised party is entitled to ask for a continuance and the failure to grant it has been held an abuse of discretion.[48] The Washington statute does not give the prosecution advance notice of the accused's defense but it does allow the State the opportunity to question the defense witnesses and obtain evidence for impeachment. It is very similar to the alibi laws and if a valid constitutional argument has been made against the Washington law it may apply to alibi legislation as well.

However, our examination of the compulsory process principle suggests that it does not bar a notice of alibi statute. The Constitution of California[49] and the United States[50] give the criminal defendant the right to have compulsory process for obtaining witnesses in his behalf. Although the language of these provisions is clear the right is not of unlimited scope.[51] For example, a witness desired by a defendant may be outside the state yet the process of the court may not issue beyond the territorial boundaries of the court's jurisdiction,[52] and while by statute the defendant may compel attendance of witnesses outside the state,[53] the matter rests within the discretion of the court. This limitation is less pronounced in the federal courts since process in federal criminal actions may issue nation-wide[54] and under certain

circumstances extends to foreign countries.[55] But the right of an indigent defendant in a Federal case to compel the attendance of witnesses without cost to himself is greatly restricted by statute.[56]

The right to call and examine a witness which the Washington court implied from the right to compulsory process is granted by statute in California.[57] If the right is one granted by the Legislature, the Legislature may, of course, withdraw or condition the right by the enactment of an alibi statute. But even if the right is part of the constitutional guarantee of compulsory process it should be as subject to reasonable regulation as is the right to have process itself. In any event it would appear that any constitutional infirmities of this nature in the statute would be obviated by placing the exclusion of alibi testimony within the discretion of the trial court. The courts would still be free to admit the testimony or to set aside a conviction where the exclusion of the alibi testimony would deprive the accused of a fair trial.

Policy Considerations

In those jurisdictions where alibi legislation has been adopted the results appear to be satisfactory. It is reported that there was an immediate reduction in the number of alibi defenses in Ohio following enactment of its statute and that within a few months the defense appeared in a minimum of cases.[58] A similar result was observed in Michigan where a substantial increase in the number of convictions obtained in cases where alibis were presented has been attributed to the fact that the prosecution, by virtue of the alibi law, had ample time

to investigate the alleged alibi and prepare its defense.[59] One survey of states with these laws revealed that 96.5% of the attorneys questioned felt that the statute prevented many acquittals secured by false alibis and that time and money were saved by eliminating many trials where the prosecution's investigation revealed that the alibis were true.[60] It is the writer's belief, therefore, that a notice of alibi statute should be enacted in California.

Alibi legislation should be designed to limit the defendant's ability to use a false alibi successfully without upsetting the balance of procedural fairness in a criminal trial. The false alibi is often used to create reasonable doubt as to the defendant's guilt[61] and the resulting acquittals give rise to the need for remedial legislation.[62] Organized crime has made repeated and successful use of the false alibi in metropolitan areas where criminal syndicates operate.[63]

It must be recognized, however, that alibi statutes have been subjected to considerable opposition and criticism.[64] A survey conducted by the University of Texas Law School states in part:

> Those [44.9% of the attorneys questioned] who were of the opinion that [alibi evidence should be admitted without prior notice to the prosecution] based that opinion principally upon the idea that, as a matter of fact, alibi evidence rarely if ever came as a surprise to the state, and that the state should be able, if its case were properly prepared to rebut any false alibi that might be offered. Other considerations supporting this opinion were: that the presumption of innocence granted to an accused should protect him from having to reveal any of his defenses in advance; that the state is bound to prove its case in all its material parts and that the presence of the defendant is necessarily one of the elements which the state should prove, regardless of whether the defendant later chooses to raise the issue of alibi. And one attorney gave as his reason for opposing [a notice of alibi statute] that ambitious

> prosecuting attorneys were already stooping to every available means of securing convictions and that the [proposed alibi law] would be giving them one more weapon of persecution.[65]

In an article approving of notice of alibi statutes but questioning the advisability of a requirement that the defendant furnish the prosecution with the names of his alibi witnesses, Professor Millar of the Northwestern School of Law has written:

> The information in question [names of alibi witnesses] no doubt, would render the notice more effective, but, without specification of the witnesses, the requirement of notice has satisfactorily accomplished its purpose in Michigan and Ohio, as well as in Scotland. In our judgment, the additional advantage to the State accruing from such specification is not sufficient to warrant exposing the measure to the opposition which this more radical requirement invites.[66]

In most cases the prosecution must prove each element of the offense without the benefit of any prior disclosure by the defendant. By requiring advance notice of a defense the prosecution gains a distinct advantage at the trial. It need not reveal its evidence to the defendant but it destroys his element of surprise. This, however, is not altogether true in California where the defendant is entitled to a transcript of the testimony taken before the grand jury[67] and the committing magistrate.[68] At some point unilateral discovery would be procedurally unfair. It has been argued that pre-trial notice of the names of defense witnesses may lead to their intimidation by the prosecution.[69] In the hands of the over-zealous prosecutor the alibi statute may be misused but this should not be enough to defeat an otherwise acceptable statute. Courts have effectively restrained the use of third-degree interrogation and coerced confessions through the due process clause and could do likewise in this area.

The ultimate inquiry in deciding whether or not to adopt alibi legislation is whether a criminal defendant may comply with the statute and still receive a fair trial. By permitting a pre-trial investigation of the claimed alibi and the elimination of the surprise element in the defense, the statute would appear to aid the jury in its determination of the true facts. At the same time, by placing the exclusion of alibi evidence within the discretion of the trial judge the effects of the statute could be avoided in those cases where a strict application might result in an unfair trial. Thus, for example, a defendant who failed to give the required notice and learned of the name of an alibi witness too late to comply with the statute might be permitted to introduce the testimony of this witness through the exercise of the trial court's discretion. Similarly, where the proof at the trial shows that the crime was committed at a time or place at variance (non-fatal) with that alleged in the indictment or information the court could allow the defendant to introduce alibi evidence for the new time or place without complying with the statute. The Legislature is free to adopt reasonable means to eliminate the use of false alibis and statutes of this type do not appear to be unreasonable.

Conclusions and Recommendations

Alibi laws have met with general approval in those jurisdictions where they have been adopted and they appear to have been successful in meeting the problems for which they were designed. A previous attempt to adopt alibi legislation in California was unsuccessful,[70] but the problem may be more acute today than it was in the past. A recent article

appearing in the Journal of the State Bar of California suggests the adoption of several provisions relating to pre-trial discovery in criminal cases[71] including a notice of alibi statute[72] and two such bills have been introduced by Senator Grunsky and referred to the Committee on Judiciary.[73] The writers have favored these laws,[74] and Chief Justice Earl Warren, when District Attorney of Alameda County, recommended an alibi statute to the legislature.[75] Carefully drawn and wisely applied the alibi law is a useful tool in the successful prosecution of criminals.

Proposed Legislation

991. Alibi defense; notice required; evidence may be excluded.

Whenever a defendant in a criminal case intends to offer, for any purpose whatever, evidence to establish an alibi on his behalf, he shall, at the time of arraignment or within ten (10) days thereafter but not less than four (4) days prior to the commencement of the trial, file and serve upon the prosecuting attorney a notice in writing of his intention to rely upon an alibi. The notice shall include specific information as to the place where the defendant claims to have been at the time stated in the indictment or information as the time when the alleged offense was committed, together with the names and addresses of the witnesses to be called in support of the alibi. The notice shall be required only for the day or days specified in the indictment or information, notwithstanding that the time thus specified is preceded by the words "on or about" or is otherwise accompanied by words of extension.

If the defendant fails to file and serve the notice as prescribed herein the court may in its discretion exclude evidence offered, for any purpose whatever, by the defendant to establish an alibi, excepting that the defendant may testify in his own behalf as to such alibi.

If during the trial the prosecuting attorney seeks to establish that the alleged offense was committed at a time or place other than as set forth in the indictment or information evidence of alibi with respect to such time shall, if otherwise, admissible, be admitted without regard to the provisions of this section, in which event the court shall, upon oral motion, allow the prosecuting attorney a reasonable continuance to investigate the alibi.

Comments on the Proposed Legislation

The writer suggests that a proposed alibi law may appropriately be added as Section 991 of the Penal Code. The Code does not now contain such a section and the statute in this location would be the final section of Title 6, which is entitled "Pleadings and Proceedings Before Trial."

The proposed statute requires notice in all criminal cases. While some of the alibi laws of other states limit the notice to superior or municipal courts the writer prefers to follow the language of the proposed Senate Bills set forth in the study.

The proposed statute contains the phrase "for any purpose whatever" relating to offered alibi evidence. This is inserted in

the first and second paragraphs to avoid the issue raised in State v. Thayer where the defendant who failed to give the required notice sought to introduce alibi evidence to impeach the prosecution's witnesses.

The proposed statute uses the word "evidence" rather than testimony in order to bring evidence in any form within its provisions.

The writer has used the time requirements which are found in Senate Bills 530 and 531 together with the common provisions that the notice be filed and served and that it be in writing.

The study indicates that there has been some criticism of statutes which require the defendant to disclose the names of his alibi witnesses and the places where he will seek to prove as his whereabouts when the crime took place. The writer feels, however, that without such provisions the statute would be of little value. In California the accused is furnished with a transcript of all Grand Jury proceedings, depositions, and testimony taken at the preliminary hearing. Necessarily he is informed of the nature of the prosecution's case and the names of the witnesses who, in all probability, will be called to establish his presence at the scene of the crime. It would seem, therefore, that the proposed provision would merely balance out a procedure already weighted in favor of the defendant.

The last sentence in the first paragraph is aimed at alleviating the problem raised by a non-fatal variance. Generally time is not of the essence in criminal actions and the prosecution is not bound by the times stated in the indictment or information.

Where an alibi statute is involved a harsh result may occur in those cases where the defendant gives notice for the days stated in the indictment or information and the prosecution then shows that the crime may have been committed at some other time. Not having filed notice for the new time the court may exclude the alibi evidence. The writer feels that the burden of accurately stating the time and place in the indictment or information is not unfairly placed on the prosecution. However, in order to raise his alibi defense the defendant must base it on the time and place named in the indictment or information. Therefore, the proposed provision together with the final paragraph would permit the defendant to give alibi evidence for any time or place that the prosecution may show at the trial so long as he has given notice for the time and place stated in the indictment or information. In order to preserve the objects of the statute a provision is made to give the prosecution a continuance in the above situation.

The second paragraph of the proposed statute provides that alibi evidence may be excluded if the defendant fails to file the required notice. Without such a provision an alibi statute is of little value as the court would have inherent power to grant a continuance to the prosecution if it saw fit to do so. The exclusion is made discretionary with the trial judge as is the practice in all states having alibi laws. The study indicates that the statute would not be unconstitutional if such a provision were omitted but without it an accused may, in certain circumstances, be denied a fair trial in violation of due process. The courts should exercise

this discretion only in those cases where such a violation would otherwise occur. The discretionary clause appears in the proposed Senate Bills 530 and 531.

Finally, the proposed statute would allow the defendant to give alibi testimony himself notwithstanding his failure to file and serve the required notice. As with the discretionary clause the study indicates that a provision of this nature is not necessary for a constitutional alibi statute. However, the writer feels that the purpose of this type of legislation is to eliminate false alibi witnesses other than the accused. If the uncorroborated alibi testimony of the defendant resulted in an acquittal it would seem that either the prosecution had not properly prepared its case or the accused should not have been indicted. In any event the prosecution could hardly claim surprise in such a case and had notice been given that only the defendant would give alibi testimony there would be nothing further for the prosecution to investigate. The suggested provision appears in Senate Bills 530 and 531.

FOOTNOTES

1. "The plea of having been, at the alleged time of the commission of an act, elsewhere than at the alleged place of commission." Websters New International Dictionary (2d ed., Unabr. 1955).

2. Millar, The Modernization of Criminal Procedure, 11 J. Crim. L. & Criminology 344, 350 (1920).

3. Esch, Ohio's New "Alibi Defense" Law, 9 Panel 42 (1931).

4. Notice of alibi statutes have been enacted in Arizona, Indianna, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wisconsin. See Note 6 infra.

   An alibi statute was first enacted in Scotland in 1887. Currently the accused must plead the defense prior to trail showing the place he will prove to have been when the crime was committed. 1954 Summary Jurisdiction (Scotland) Act § 32; Renton & Brown; Criminal Procedure 260 (3d ed. Watt 1956).

5. The trial judge in England is allowed to comment on the defendant's failure to disclose his intention to raise the defense of alibi. In Rex v. Littleboy, [1934] 2 K.B. 402, the plea was: "I am not guilty, I reserve my defense." At the trial alibi evidence was introduced. The judge commented to the jury that by his failure to inform the prosecution of his intended defense the defendant had prevented the authorities from making an inquiry into the truth of the alibi. The verdict of guilty was affirmed.

6. 17 Ariz. Rev. Stat. Ann. Rule 192 (1956): Iowa Code § 777.18

(1958); Ind. Ann. Stat. §§ 9-1631 - 9-1633 (Burns 1956); Kan. Gen. Stat. § 62-1341 (1949); 25 Mich. Stat. Ann §§ 28.1043, 1044 (1954); Minn. Stat. Ann. § 630.14 (1947); N.J. Court Rule 3:5-9 (1953); N.Y. Code Crim. Proc. § 295-1; Ohio Rev. Code Ann. § 2945.58 (Page 1954); Okla. Stat. Ann. tit. 22, § 585 (1951); S.D. Code § 34.2801 (1939); Utah Code Ann. § 77-22-17 (1953); Vt. Stat. Ann. tit. 13, §§ 6561, 6562 (1958); Wis. Stat. Ann. § 955.07 (West 1958).

7. Minn. Stat. Ann. § 630.14 (1947).

8. 17 Ariz. Rev. Stat. Ann. Rule 192 (1956); Ind. Ann. Stat. § 9-1631 (Burns 1956); N.J. Court Rule 3:5-9 (1953); N.Y. Code Crim. Proc. § 295-1; Ohio Rev. Code. Ann. § 2945.58 (Page 1954); Okla. Stat. Ann. tit. 22, §585 (1951); S.D. Code § 34.2801 (1939); Utah Code Ann. § 77-22-17 (1953); Wis. Stat. Ann. § 955.07 (West 1958).

9. 17 Ariz. Rev. Stat. Ann. Rule 192 (1956); Iowa Code § 777.18 (1958); Kan. Gen. Stat. Ann. § 62-1341 (1949); 25 Mich. Stat. Ann. § 28.1043 (1954); N.J. Court Rule 3:5-9 (1953); N.Y. Code Crim. Proc. § 295-1; Wis. Stat. Ann. § 955.07 (West 1958).

10. Iowa Code § 777.18 (1958).

11. In State v. Selbach, 269 Wis. 538, 68 N.W.2d 37 (1955), it was held not reversable error for the trial judge to exclude the alibi testimony of a defense witness where only verbal notice was given to the prosecutor.

12. However, the Michigan statute was applied in a bastardy action which is not, strictly speaking, a criminal proceeding. People v. McFadden, 347 Mich. 357, 79 N.W.2d 869 (1956).

13. Iowa Code § 777.18 (1958).

14. State v. Rourick, 245 Ia. 319, 60 N.W.2d 529 (1953).

15. Okla. Stat. Ann. tit. 22, § 585 (1951).

16. State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931).

17. 145 Kan. 795, 67 P.2d 1111 (1937).

18. 170 Kan. 174, 223 P.2d 726 (1950).

19. 322 Mich. 474, 34 N.W.2d 15 (1952).

20. The offered evidence usually takes the form of alibi testimony, but a time card purporting to show that the accused was at work when the offense was committed was held to have been properly excluded where the notice requirements of the statute had not been complied with. People v. Longeria, 333 Mich. 696, 53 N.W.2d 686 (1952).

21. N.Y. Code Crim. Proc. § 295-1.

22. N.J. Court Rule 3:5-9 (1953).

23. State v. Wiedenmayer, 128 N.J.L. 239, 25 A.2d 210 (1942).

24. 124 Ohio St. 1, 176 N.E. 656 (1931).

25. N.J. Court Rule 3:5-9 (1953).

26. N.Y. Code Crim. Proc. § 295-1.

27. Kan. Gen. Stat. Ann. § 62-1341 (1949).

28. Ind. Ann. Stat. § 9-1632 (Burns 1956).

29. See Note, 30 A.L.R.2d 480 (1952).

30. 289 N.Y. 306, 45 N.E.2d 812 (1942).

31. 124 Ohio St. 1, 176 N.E. 656 (1931).

32. 22 Ohio L. Abs. 165, appeal dismissed, 131 Ohio St. 329, 2 N.E.2d 778 (1936).

33. 8 Wigmore, Evidence § 2268 at 392 (3d ed. 1940).

34. Cal. Pen. Code § 1323.5; People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952).

35. Senate Bills Nos. 530 and 531, introduced February 4, 1959 read in part as follows:

> In the event of the failure of a defendant to file the written notice prescribed in the preceding paragraph, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing such defense, excepting that the defendant can testify in his own behalf as to such defense.

36. People v. Rakiec, 289 N.Y. 306, 45 N.E.2d 812 (1942); People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (1936); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); Burns v. Amrine, 156 Kan. 83, 131 P.2d 884 (1942) (by implication).

37. 161 Misc. 212, 292 N.Y.S. 612 (1936).

38. Id. at 215, 292 N.Y.S. at 615 (1936).

39. Ibid.

40. 268 Wis. 538, 68 N.W.2d 37 (1955).

41. In Leland v. Oregon, 343 U.S. 790 (1952), the Court, with Justices Black and Frankfurter dissenting, upheld an Oregon statute which required the defendant both to give notice of his intent to prove insanity and to prove that he was insane beyond a reasonable doubt. The statute in question placed a far greater burden of proof on the defendant than any other state had imposed. Nevertheless, the majority held that Oregon's policy with respect to the burden of proof on the issue of insanity does not violate "generally accepted concepts of basic standards of justice."

In Adamson v. California, 332 U.S. 46 (1947), the Court, in

a five to four decision, upheld a California statute which allowed counsel and the court to comment on the defendant's "failure to explain or deny by his testimony any evidence or facts in the case against him . . . ." The defendant had several prior convictions which, under California law, could not have been placed in evidence. If he took the stand to testify, however, these prior convictions were admissible for impeachment. If he failed to take the stand the court and counsel could comment on his failure to deny or explain evidence against him. The Supreme Court held that the trial and conviction were not unfair and the accused was not denied due process.

42. Wash. Rev. Code § 10.37.030 (1952).

43. State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931); State v. Sickles, 144 Wash. 236, 257 Pac. 385 (1927).

44. 144 Wash. 236, 257 Pac. 385 (1927).

45. 165 Wash. 180, 4 P.2d 880 (1931).

46. Ibid.

47. State v. Anderson, 46 Wash.2d 864, 285 P.2d 879 (1955); State v. Hoggatt, 38 Wash.2d 932, 234 P.2d 495 (1951); State v. Willis, 37 Wash.2d 274, 223 P.2d 453 (1950).

48. State v. Willis, 37 Wash.2d 274, 223 P.2d 453 (1950).

49. Cal. Const. Art. I, § 13.

50. U.S. Const. Amend. VI.

51. Ex Parte Bagwell, 26 Cal. App.2d 418, 79 P.2d 395 (1938).

52. Cal. Pen. Code § 1326.4; 40 Cal. Jur.2d Process § 37 (1958); 72 C.J.S. Process § 7.8 (1951).

53. Uniform Act to Secure Attendance of Witnesses from without the State in Criminal Cases, Cal. Pen. Code § 1334 et. seq.

54. 18 U.S.C. Rule 17 (e) (1952).

55. 28 U.S.C. § 1783 (1952).

56. 18 U.S.C. Rule 17 (b) (1952).

57. Cal. Pen. Code §§ 686, 866.

58. See Esch, "Ohio's New 'Alibi Defense' Law," 9 Panel 42 (1931).

59. "It has been noted in the courts of Detroit since the passage of this act that alibi defense are becoming less. Those offered almost always prove faulty and convictions follow. The great increase in convictions where alibis have been offered since the passage of the act is attributed by police and prosecuting officials to the statutory notice given them, which permits an inquiry into the alleged facts of the alibi prior to trial and the refutation and destruction of a false alibi.

"Instances have arisen where an alibi has been offered as a defense after notice given under the Alibi act and the police and prosecuting officials have been able to prove that the alibi witness committed perjury. Several perjury convictions have resulted on that score in Detroit." Toy, Michigan Law on Alibi and Insanity Defense Reduces Perjury, 9 Panel 52 (1931).

60. Stayton & Watkin, Is Specific Notice of the Defense of Alibi Desirable? 18 Texas L. Rev. 151 (1939).

61. See text at notecall 3, supra.

62. See note 2 supra. See, also, the following:

The court in People v. Schade, supra note 37 stated:

". . . no one who is familiar with the activities of criminals in their use of 'alibi defenses' can help but realize the necessity and the value of this provision of the Code of Criminal Procedure. Manufactured alibis have too long thwarted the administration of justice . . . ." Id. at 213, 292 N.Y.S. at 614.

"Certain it is that no innocent person can in any manner be injured by this statute. It is equally certain that the activities will be seriously checked, and we will no longer have the spectacle of a defendant suddenly and brazenly flaunting a manufactured alibi in the face of the court and of the jury . . . ." Id. at 218, 292 N.Y.S. at 619.

"The bringing into the courtroom of 'phoney alibi' witnesses at the eleventh hour and at a time which, in practice, affords the prosecutor no opportunity to check either the credibility of the witnesses or the accuracy of their statements is avoided by the alibi statutes." Id. at 216, 292 N.Y.S. at 617.

To the same effect see State v. Thayer, supra note 24.

63. "Another serious feature of the trail of these organized criminals is the defense of the 'hip-pocket alibi', an alibi that is always to be produced on short notice. Most criminal syndicates can quickly arrange a false alibi through friendly poolroom proprietors, barbers, men about town. This alibi is produced in the final hours of the trial without warning. In it a parade of witnesses will claim that the accused was in Omaha, or Peoria, or San Francisco or some other distant point. Before the prosecution has an

opportunity to investigate and demonstrate the falsity of the alibi, the trial is over, and a dangerous menace to society may have been set free." Stassen, The Show Window of the Bar, 20 Minn. L. Rev. 577, 580-581 (1936).

See also Reid, Wisconsin Adopts New Alibi Rule, 13 Panel 3, 10 (1935).

64. The New York alibi statute was voted down three times by the legislature before its adoption. Dean, Advance Specificiations of Defense in Criminal Cases, 20 A.B.A.J. 435, 437 (1934). An alibi bill was introduced in the House of Representatives of the Illinois State Legislature during the 1947 session. It was referred to the House Judiciary Committee, and died there. Note, 39 J. Crim. L. & Criminology 629 (1949). In a nationwide survey a majority of attorneys questioned (55.1%) favored alibi legislation, but a substantial minority (44.9%) felt that the state should be able to disprove a false alibi if its case was properly prepared. Stayton & Watkin, supra note 60.

65. Stayton & Watkin, supra note 60 at 154.

66. Note, 24 J. Crim. L. & Criminology 849, 859 (1933).

67. Cal. Pen. Code § 925 (1956).

68. Cal. Pen. Code §§ 864, 869, 870.

69. Note, 39 J. Crim. L. & Criminology 629, 639 (1949).

70. In 1926, the Section of Criminal Law and Procedure of the California Bar Association recommended the adoption of an alibi statute but the efforts of this committee, the district attorneys of the state, and the California Crime Commission were unavailing when the

legislature met in 1931. Report, Cal. Crime Comm. (1931) p. 10 (1933) p. 18.

71. Carr & Lederman, Criminal Discovery, 34 Journal of the State Bar of California 23 (1959).

72. Id. at 36.

73. See note 35 supra.

74. See notes 2, 58, 59, 60, 66, 71, supra.

75. District Attorney Earl Warren stated as follows: "I am heartily in favor of the provision of law which requires the defendant to give five days notice of intention to rely upon the defense of alibi. I have been in favor of this bill since it was first considered by the Crime Commission and I can see no reason why a defendant who was not present at the time of the commission of the alleged offense should hide the fact from the prosecuting officer or the court. I am sure a law of this kind in California would have a salutary effect." Report, Cal. Crime Comm. (1931) p. 10.