STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Notice of Alibi in Criminal Actions

October 1960

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make 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. The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Mr. John J. Wilson of Los Angeles, a member of the California State Bar.

Roy A. Gustafson, *Chairman*
John R. McDonough, Jr., *Vice Chairman*
James A. Cobey, *Member of the Senate*
Clark L. Bradley, *Member of the Assembly*
George G. Grover
Herman F. Selvin
Vaino H. Spencer
Thomas E. Stanton, Jr.
Ralph N. Kleps, *Legislative Counsel, ex officio*

John H. DeMoully
Executive Secretary

October 1960

TABLE OF CONTENTS

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 and 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 of an alibi defense, 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 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 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 because the indictment or information need not state the precise time and specific place at which the offense was committed. 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.

2. The demand of the prosecuting attorney for the notice of alibi should 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, 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 in 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.

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

* 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.

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 4.5 (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 4.5 (commencing with Section 1028.1) is added to Title 6 of Part 2 of the Penal Code, to read:

CHAPTER 4.5. 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 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 4.5 (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 this chapter 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) Authorize or require 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 to include such name and address.

1028.6. 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 to include such information.

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

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. 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 this chapter.

A STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS*

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, 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 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 who has written:

> That the manufactured alibi is one of the main avenues for 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 assertion.[2]

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

> Time and 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 afforded 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 had been notice that an alibi 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 have offered perjured alibi testimony if the prosecution had investigated the alibi and the witnesses who were called.

---

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

[1] Alibi is defined as "the plea of having been, at the alleged time of the commission of an act, elsewhere than at the alleged place of commission." WEBSTER, NEW INTERNATIONAL DICTIONARY 65 (2d ed. unabr. 1956).

[2] Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L., C. & P. S. 344, 350 (1920).

[3] Esch, *Ohio's New "Alibi Defense" Law*, 9 PANEL 42 (Sept.-Oct. 1931).

On the basis of this reasoning several states have enacted statutes that 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] However, it does 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

Fourteen states now 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. For example, Minnesota requires the accused to 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] Iowa, in addition, 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] The statutes all require that the notice be in writing;[11] and they are all limited in their application to criminal proceedings.[12]

Most of the alibi 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 provides that when alibi testimony is offered without prior notice, or notice is filed less than four days before trial, the county attorney may move for a continuance

---

[4] Notice of alibi statutes have been enacted in Arizona, Indiana, 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. RENTON & BROWN, CRIMINAL PROCEDURE 260 (3d ed. Watt 1956). Currently the accused must plead the defense prior to trial showing the place he will prove to have been when the crime was committed. Summary Jurisdiction (Scotland) Act, 1954, 2 & 3 Eliz. 2, c. 48, § 32.

[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. 408, the plea was: "I am not guilty. I reserve my defence." 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] ARIZ. CRIM. PROC. RULES 192 (1956); IOWA CODE § 777.18 (1958); IND. ANN. STAT. §§ 9-1631—9-1633 (Burns 1956); KAN. GEN. STAT. ANN. § 62-1341 (1949); MICH. COMP. LAWS §§ 768.20, 768.21 (1948); MINN. STAT. ANN. § 630.14 (1957); N.J. RULES 3:5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1; OHIO REV. CODE ANN. § 2945.58 (Page 1954); OKLA. STAT. 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. § 955.07 (1957).

[7] MINN. STAT. ANN. § 630.14 (1957).

[8] ARIZ. CRIM. PROC. RULES 192 (1956); IND. ANN. STAT. § 9-1631 (Burns 1956); N.J. RULES 3:5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1; OHIO REV. CODE ANN. § 2945.58 (Page 1954); OKLA. STAT. tit. 22, § 585 (1951); S.D. CODE § 34.2801 (1939); UTAH CODE ANN. § 77-22-17 (1953); WIS. STAT. § 955.07 (1957).

[9] ARIZ. CRIM. PROC. RULES 192 (1956); IOWA CODE § 777.18 (1958); KAN. GEN. STAT. ANN. § 62-1341 (1949); MICH. COMP. LAWS § 768.20 (1948); N.J. RULES 3:5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1; WIS. STAT. § 955.07 (1957).

[10] IOWA CODE § 777.18 (1958).

[11] In State v. Selbach, 268 Wis. 538, 68 N.W.2d 37 (1955), it was held not reversible 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).

in order to investigate the alibi.[13] 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] In Oklahoma when alibi evidence is offered without prior notice 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 noncompliance with the statute the defendant should be allowed to introduce alibi evidence for the limited purpose of impeaching the prosecution witnesses, but the Ohio 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 endorsement 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 inasmuch as evidence was cumulative the trial judge's exercise of discretion would be upheld. The case of *People* v. *Fleisher* [19] involved the Michigan statute which requires 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 in 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 when the defendant fails to adhere strictly to the provisions of the statute.[20] 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, New Jersey and Minnesota have somewhat different provisions. The New York statute requires that, upon demand of the prosecuting attorney, the defendant must give notice of his intent to offer alibi testimony and file a bill of particulars that sets forth the place or places defendant claims to have

[13] IOWA CODE § 777.18 (1958).
[14] State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953).
[15] OKLA. STAT. 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 (1948).
[20] The offered evidence usually takes the form of alibi testimony, but a time sheet 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. Longaria, 333 Mich. 696, 53 N.W.2d 685 (1952). See also State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952).

been, together with the names of the alibi witnesses upon whom the defendant intends to rely to prove his presence elsewhere than at the scene of the crime at the time of its commission. Without action by the prosecution the alibi evidence may be admitted.[21] Similarly, the New Jersey statute requires the defendant to furnish a bill of particulars of his alibi only upon written demand by the prosecution, and in the absence of such a demand the alibi evidence may not be excluded.[22] 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.[23] Minnesota is another state with an alibi statute that provides that defendant must furnish a notice of alibi only after application by the prosecuting attorney.[24]

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*,[25] 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.[26] The New York statutes have been construed,[27] and the Kansas statute[28] expressly provides, that when the indictment does not set forth a specific time or place where the crime was committed the defendant may obtain from the prosecuting attorney a bill of particulars setting forth the times and places of the offense so that the defendant may raise his defense of alibi and give the required notice. The Indiana statute[29] deals with the problem by providing that the defendant's notice can require the prosecuting attorney to furnish a bill of particulars giving the exact time and place of the offense committed by defendant that the prosecution intends to establish at the trial.

---

[21] N.Y. CODE CRIM. PROC. § 295-l.
[22] N.J. RULES 3:5-9 (1953); State v. Wiedenmayer, 128 N.J.L. 239, 25 A.2d 210 (1942).
[23] N.J. RULES 3:5-9 (1953).
[24] MINN. STAT. ANN. § 630.14 (1957).
[25] 124 Ohio St. 1, 176 N.E. 656 (1931).
[26] N.J. RULES 3:5-9 (1953).
[27] N.Y. CODE CRIM. PROC. §§ 295-h, 295-i, 295-l; People v. Wright, 172 Misc. 860, 16 N.Y.S.2d 593 (1940).
[28] KAN. GEN. STAT. ANN. § 62-1341 (1949).
[29] IND. ANN. STAT. § 9-1632 (Burns 1956).

CONSTITUTIONAL PROBLEMS

It has been said that statutes requiring notice of alibi are generally held to be constitutional,[30] 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 accused's testimony when he has not complied with the alibi 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 below.

Exclusion of Defendant's Own Testimony of Alibi

In *People* v. *Rakiec,*[31] 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 the defendant 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,*[32] but it was later held in Ohio in *Smetana* v. *State,*[33] 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.[34] In California the accused is made competent to testify by statute,[35] and the result reached in the *Smetana* case might be reached here should California adopt an alibi law that 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 that 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.,* the hearsay rule and the best evidence rule 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

[30] See Annot., *Notice of Alibi—Statute,* 30 A.L.R.2d 480 (1953).
[31] 289 N.Y. 306, 45 N.E.2d 812 (1942).
[32] 124 Ohio St. 1, 176 N.E. 656 (1931).
[33] 22 Ohio L. Abs. 165, *appeal dismissed,* 131 Ohio St. 329, 2 N.E.2d 778 (1936).
[34] 8 WIGMORE, EVIDENCE § 2268, p. 392 (3d ed. 1940).
[35] CAL. PEN. CODE § 1323.5; People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952).

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 makes a distinction between excluding the testimony of witnesses and excluding the testimony of the accused, but two bills recently introduced before the California Legislature expressly reserved the right of an accused to testify in his own behalf whether or not he complied with the notice requirements of the proposed alibi statutes.[36]

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 to list the witnesses he intends to call he is forced to become a witness against himself. But the courts construing alibi statutes have rejected this contention.[37] Thus, in *People* v. *Schade*, [38] a New York case, the court stated that:

> [T]here is nothing about the section [§ 295-*l* 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.[39]

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 from the defendant is not as to matters which the defendant says may incriminate him but as to matters which the defendant says will exonerate him." [40] Because alibi evidence must come, if at all, voluntarily from the defense there appears to be little doubt that the statutes do not violate the privilege against self-incrimination.

---

[36] 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.

[37] 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).

[38] 161 Misc. 212, 292 N.Y.S. 612 (1936).

[39] *Id.* at 215, 292 N.Y.S. at 615.

[40] *Ibid.*

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*,[41] 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 noncompliance 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 that would appear to be far more burdensome to the defendant than any of the alibi laws.[42] Finally, it seems likely that if a serious due process question were 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 that 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.[43] 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

[41] 268 Wis. 538, 68 N.W.2d 37 (1955).

[42] In Leland v. Oregon, 343 U.S. 790 (1952), the Supreme Court, with Justices Black and Frankfurter dissenting, upheld an Oregon statute that 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." *Id.* at 799.

In Adamson v. California, 332 U.S. 46 (1947), the Supreme 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." [Emphasis added.] *Id.* at 50 and 55. 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 that the accused was not denied due process.

[43] WASH. REV. CODE § 10.37.030 (1956).

name was not furnished to the opposing counsel.[44] In *State* v. *Sickles*,[45] the Supreme Court of Washington said that if the statute were mandatory and the accused were 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*,[46] 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,[47] 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.[48] 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.[49] 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 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 constitutions of California[50] and the United States[51] 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.[52] 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,[53] and although by statute the defendant may compel attendance of witnesses outside the state,[54] 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 nationwide[55] and under certain circumstances extends to foreign countries.[56] 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.[57]

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.[58] If the right is one granted by the legislature,

[44] State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931); State v. Sickles, 144 Wash. 236, 257 Pac. 385 (1927).
[45] 144 Wash. 236, 257 Pac. 385 (1927).
[46] 165 Wash. 180, 4 P.2d 880 (1931).
[47] *Ibid.*
[48] 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).
[49] State v. Willis, 37 Wash.2d 274, 223 P.2d 453 (1950).
[50] CAL. CONST. art. I, § 13.
[51] U.S. CONST. Amend. VI.
[52] *In re* Bagwell, 26 Cal. App.2d 418, 79 P.2d 395 (1938).
[53] CAL. PEN. CODE § 1326.3; 40 CAL. JUR.2d *Process* § 5 (1958); 72 C.J.S. *Process* §§ 7, 8 (1951).
[54] Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, CAL. PEN. CODE §§ 1334-1334.6.
[55] FED. RULE CRIM. P. 17(e).
[56] 28 U.S.C. § 1783 (1958).
[57] FED. RULE CRIM. P. 17(b).
[58] CAL. PEN. CODE §§ 686, 866.

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.[59] 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.[60] One survey of states having notice of alibi statutes revealed that 96.5 percent of the attorneys questioned were of the opinion 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.[61]

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[62] and the resulting acquittals give rise to the need for remedial legislation.[63] Organized

[59] See Esch, *Ohio's New "Alibi Defense" Law*, 9 PANEL 42 (Sept.-Oct. 1931).

[60] "It has been noted in the courts of Detroit *since the passage of this act that alibi defenses 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 witnesses committed perjury. Several perjury convictions have resulted on that score in Detroit." Toy, *Michigan Law on Alibi and Insanity Defenses Reduces Perjury*, 9 PANEL 52 (Nov.-Dec. 1931).

[61] Stayton & Watkins, *Is Specific Notice of the Defense of Alibi Desirable?*, 18 TEXAS L. REV. 151 (1940).

[62] See text at notecall 3 *supra*.

[63] See Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L., C. & P.S. 344, 350 (1920). See also People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (1936), in which the court stated:

"[N]o 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 of criminals in manufacturing alibi defenses 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, 124 Ohio St. 1, 176 N.E. 656 (1931).

crime has made repeated and successful use of the false alibi in metropolitan areas where criminal syndicates operate.[64]

It must be recognized, however, that alibi statutes have been subjected to considerable opposition and criticism.[65] A report on a survey conducted by the University of Texas Law School states in part:

> Those [44.9 percent 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 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.[66]

In an article approving 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 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.[67]

---

[64] "Another serious feature of the trial . . . of these organized criminals is the defense of the 'hip-pocket alibi,' an alibi that is always ready 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 at 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 (1936).

See also Reid, *Wisconsin Adopts New Alibi Rule,* 13 PANEL 3 (Jan.-Feb. 1935).

[65] The New York alibi statute was voted down three times by the legislature before its adoption. Dean, *Advance Specifications 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. Comment, 39 J. CRIM. L., C. & P.S. 629 (1949). In a nationwide survey conducted in 1938 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 & Watkins, *supra* note 61.

[66] Stayton & Watkins, *supra* note 61 at 154.

[67] Millar, *The Statutory Notice of Alibi,* 24 J. CRIM. L., C. & P.S. 849, 859 (1933).

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. The prosecution need not reveal its evidence to the defendant but the notice destroys the defendant's 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 [68] and the committing magistrate.[69] At some point unilateral discovery would be procedurally unfair. It has been argued that pretrial notice of the names of defense witnesses may lead to their intimidation by the prosecution.[70] In the hands of the overzealous 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 the same in this area.

The ultimate inquiry in deciding whether to adopt alibi legislation is whether a criminal defendant may comply with the statute and still receive a fair trial. By permitting a pretrial 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 (nonfatal) 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.

AUTHOR'S RECOMMENDATION

The writer recommends that a notice of alibi statute be enacted in California. Carefully drawn and wisely applied, the alibi law will be a useful tool in the successful prosecution of criminals. Alibi laws have met with general approval in those jurisdictions where they have been adopted, and appear to have been successful in meeting the problems for which they were designed. Writers have favored these laws,[71] and Chief Justice Earl Warren, when District Attorney of Alameda County, approved the Crime Commission's recommendation

[68] CAL. PEN. CODE § 938.1.
[69] CAL. PEN. CODE §§ 864, 869, 870.
[70] Comment, 39 J. CRIM. L., C. & P.S. 629, 632 (1949).
[71] See notes 2, 9, 60, 61, 67 *supra*, and 72 *infra*.

to the Legislature for the enactment of an alibi statute.[72] A recent article appearing in the *California State Bar Journal* suggests the adoption of several provisions relating to pretrial discovery in criminal cases[73] including a notice of alibi statute.[74] Two such bills were introduced in 1959 by Senator Donald Grunsky but did not become law.[75]

The writer proposes that the following recommendations be embodied in a proposed notice of alibi statute for California.

While some of the alibi laws of other states limit the notice to superior or municipal courts the writer suggests the proposed statute should require notice in all criminal cases. This notice should be in writing and should be filed and served.

The proposed statute should apply to "evidence" rather than "testimony" in order to bring evidence of an alibi in any form within its provisions.

The proposed statute should contain the phrase "for any purpose whatever" relating to offered alibi evidence. This will avoid the issue raised in the *Thayer* case.[76] In that case the defendant failed to give the required notice and sought to introduce alibi evidence to impeach the prosecution's witnesses.

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 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.

There should be a provision in the statute requiring the prosecution, after receipt of the alibi notice, to furnish the defendant with the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the crime. Such a provision should effectively meet any criticism of the statute based on the theory that the accused is deprived of the surprise element in his defense while the prosecution is not required to divulge the names of its own witnesses. In California the defendant is furnished with a transcript of all grand jury proceedings, depositions and testimony taken at the preliminary hearing. To some extent, therefore, defendant 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. However, there is no grand jury proceeding or preliminary hearing in a misdemeanor case, and in felony cases there may be a waiver of the preliminary hearing. Furthermore, when a matter is brought before the grand jury the prosecution may

[72] Chief Justice Earl Warren, when district attorney, 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." 1931 CAL. CRIME COMM'N REP. at 10.

In 1926, the Section on 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. CAL. BAR ASSOC. PROC. 248 (1925-1926) and 1931 CAL. CRIME COMM'N REP. at 10.

[73] Carr & Lederman, *Criminal Discovery*, 34 CAL. S.B.J. 23 (1959).

[74] *Id.* at 36.

[75] See note 36 *supra*.

[76] See discussion in text at J-11, at notecall 16.

only present enough evidence to obtain an indictment. As a result, the defendant cannot be certain of the names of all witnesses that may be called to refute his alibi. The proposed statute should allow him to obtain this additional information.

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 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. To alleviate the problem raised by a nonfatal variance, the proposed statute should 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 provision should be made to give the prosecution a continuance in the above situation.

The proposed statute should provide 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 should be 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.

Finally, the defendant should be allowed to give alibi testimony himself notwithstanding his failure to file and serve the required notice. A provision of this nature is not necessary for a constitutional alibi statute, but 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 appear that 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.

o

printed in CALIFORNIA STATE PRINTING OFFICE

16444 4-60 2M