

1/13/60

Memorandum No. 7 (1960)

Subject: Study No. 40 - Notice of Alibi

Attached are a proposed recommendation and a proposed statute relating to notice of alibi.

You will recall that the last action that the Commission took on this matter was to reject a previous draft and to request that the staff prepare a draft along the lines of the enclosed draft. In order to save time for the Commission, the staff has prepared this material in a form which, if the Commission accepts the policy suggestions, can be revised and then sent to the State Bar.

The recommendation gives the reasons for the various policy decisions embodied in the proposed statute.

One matter not discussed in the recommendations is the reason for the location of the proposed new section as Section 1112 of the Penal Code. Title 6 (entitled in West Code - Pleadings and Proceedings before Trial) Part II, of the Penal Code, is one area where the new provision could be located. If it were located in that title, a new chapter would have to be created and logically it should be located somewhere in the area between chapters 4 and 7 of Title 6. However, we can look upon the new section

as one relating to evidence in criminal actions and as such locate it in chapter 2 of Title 7, Part II, of the Penal Code. This permits easy insertion of the new section in a logical place in the Penal Code as Section 1112. It is not necessary to create a new chapter 7-A, for example, in Title 6, Part II of the Penal Code. The recommended statute is designated as Section 1112 of the Penal Code.

Respectfully submitted,

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Executive Secretary

## RECOMMENDATION OF THE CALIFORNIA LAW

## REVISION COMMISSION

Relating to Notice of Alibi in Criminal Actions

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

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

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

Therefore, the Commission recommends that, upon written demand of the prosecuting attorney, the defendant in a criminal action should be required to give notice of his intention to rely upon an alibi. The statute recommended by the Commission requires that the notice of alibi include (1) the specific place or places at which the defendant claims to have been at the time stated in the prosecuting attorney's demand and (2) the name and address of each witness upon whom the defendant intends to rely for alibi evidence. The prosecution cannot make a satisfactory investigation of the claimed alibi unless it is furnished with this information.

Some states have notice of alibi statutes that require the defendant to give a notice of alibi in any case where he intends to rely upon an alibi. However, even where the indictment or information states a specific time as the time of the commission of the crime, the time thus specified usually is preceded by the words "on or about" or is otherwise accompanied by words of extension. Furthermore, 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. Thus the defendant has no assurance that the prosecution will show at the trial that the crime was committed at the time stated in the indictment or information. In some cases, it is not possible even at the trial to determine precisely the time of the alleged offense. For example, in a sex offense case where a small child is involved the exact date of the offense may not be specified

in the accusatory pleading and may not be established at the trial. A bank embezzlement may occur over an extended period of time and it may not be possible to determine the exact date of each criminal act. The Commission has concluded that the prosecuting attorney should be required to take the initiative if he believes the case is one where the defense of alibi might be used and he desires to make an advance investigation of the alibi. Therefore, the Commission recommends that the defendant be required to give a notice of alibi only in those cases where the prosecuting attorney makes a written demand which includes a statement of the specific time and place the prosecution intends to present at the trial as the time when and place where the crime was committed.

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

indictment or to support an information and this, being the minimum, does not necessarily include all the witnesses who will be presented at the trial to establish the presence of the defendant at the scene of the crime.

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

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

The alibi statutes in other states make no distinction between excluding the testimony of witnesses and excluding the testimony of the defendant. But the Commission believes that the defendant should be allowed to give alibi testimony himself, notwithstanding his failure to file and serve the required notice of alibi. The notice of alibi is intended only

to preclude the introduction of surprise alibi witnesses when the prosecution has insufficient time to investigate such witnesses and their statements. The prosecution should be able to make an adequate investigation of the credibility of the defendant without a notice of alibi. An uncorroborated alibi will be of slight value to the defendant and, therefore, the objective of the statute will be realized even though the defendant is permitted to give alibi testimony himself.

The Commission recommends that, if the prosecuting attorney makes a demand for a notice of alibi from the defendant, the trial court should be authorized, in its discretion, to exclude the testimony of any state witness concerning the presence of the defendant at the scene of the crime unless such witness was listed in the demand. The prosecution should be subject to the same sanction as the defendant to insure compliance with the terms of the statute.

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

An act to add Section 1112 to the Penal Code, relating to evidence in criminal actions.

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

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

1112. (1) As used in this section, "alibi evidence" means evidence that the defendant in a criminal action was at a place other than the scene of the crime at the time the crime was committed.

(2) In a criminal action, the prosecuting attorney may, not less than 10 days before the day of the trial, serve on the defendant or his attorney and file a written demand that the defendant furnish a notice of alibi if the defendant is to rely in any way upon alibi evidence at the trial. The demand shall include:

(a) The specific time which the prosecution intends to present at the trial as the time when the defendant committed the crime.

(b) The specific place or places which the prosecution intends to present at the trial as the place or places where the defendant committed the crime.

(c) The name and residence or business address of each witness upon whom the prosecution intends to rely to establish the defendant's



presence at the scene of the crime at the time of its commission.

(d) A statement that the defendant is required by Section 111.2 of the Penal Code to furnish a notice of alibi if he is to rely in any way upon alibi evidence at the trial.

(3) If a demand is served pursuant to subsection (2) of this section and the defendant is to rely in any way upon alibi evidence, he shall, not less than five days before the day of the trial, serve on the prosecuting attorney and file a notice of alibi which shall:

(a) State in detail the place or places where the defendant claims to have been at the time stated in the demand; and

(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.

(4) The court before which the criminal action is pending may, in its discretion, upon good cause shown:

(a) Shorten the time of service of the notice of alibi.

(b) Order the amendment, amplification or reduction of the information mentioned in subsections (2) and (3) of this section.

(5) If the prosecuting attorney serves a demand for a notice of alibi, [~~If the defendant serves a notice of alibi pursuant to this section,~~] the court may, in its discretion, exclude evidence offered by the prosecuting attorney to establish the defendant's presence at the scene of the crime at the time of its commission unless:

(a) The name and residence or business address of the witness was included in the demand [~~of the prosecuting attorney for the notice of alibi~~]; or

(b) Good cause is shown why the demand failed to include the information required by subsection (2) of this section.

(6) Subject to subsections (7) and (8) of this section, if a notice of alibi is required to be served by the defendant pursuant to this section, the court may, in its discretion, exclude alibi evidence offered by the defendant unless:

(a) The name and residence or business address of the witness is included in the notice of alibi; or

(b) Good cause is shown why a notice of alibi was not served or, if a notice of alibi was served, good cause is shown why it failed to include the information required by subsection (3) of this section.

(7) If the prosecuting attorney serves a demand for a notice of alibi and at the trial seeks to establish that the crime was committed at a time or place other than as set forth in the demand, alibi evidence shall not be excluded because the defendant has not complied with the provisions of this section.

(8) The defendant may testify in his own behalf as to his alibi without complying with the provisions of this section.