Santa Clara Law Review

Volume 11 | Number 1 Article 10

1-1-1970

The Alibi Witness Rule: Sewing Up the Hip Pocket Defense

Nicholas C. Fedeli Jr.

THE ALIBI WITNESS RULE: SEWING UP THE "HIP POCKET" DEFENSE

There exists in California a critical deficiency in criminal procedure which allows implementation of a "hip pocket" defense, the fabricated alibi. The solution to this problem lies in the legislative enactment of a notice-of-alibi statute. Several states currently have alibi statutes in force. There are several points from these statutes that should be included in the formulation of an effective and workable California statute. The critics of these statutes attack their constitutionality; however upon review they have withstood the careful scrutiny of the United States Supreme Court.[1] A significant advantage of the notice-of-alibi statute is a reduction of trial time and expense by elimination of frequent motions for continuances. The reciprocal nature of a notice-of-alibi statute provides extensive benefits for both the prosecution and defense and significantly improves the administration of criminal justice.

Alibi witnesses have been used frequently and successfully as a defense in criminal actions. In such a defense the defendant establishes that he was at a different location at the time the alleged crime occurred. He therefore argues that he could not have been the perpetrator of the crime.[2] The defense of alibi is usually presented at the close of the trial after the state has presented its case. When this defense is fabricated and is presented at the last minute of the trial, the prosecution can be surprised, resulting in many unjust acquittals if a continuance is not granted.

A half century ago the "manufactured alibi" was considered a primary loophole in the law.[3] The perjury committed with this defense provides a major escape for guilty defendants; however a fabricated alibi would be virtually impossible if the prosecution had the time to make an adequate investigation into the credibility of the witness and the truth of the alibi assertion.

A reasonable doubt can easily be aroused in a jury when they hear the testimony of an alibi witness that conflicts with the evidence of the prosecution. When this witness takes the stand at the last minute, the state has little or no opportunity to verify or refute the testimony. With advance knowledge of the alibi defense, the prosecution could dismiss those cases in which the alibi is valid. If the alibi is fabricated, advance notice would enable the prosecution to prepare

---

1 Williams v. Florida, 90 S. Ct. 1893 (1970).

2 Logan v. State, 43 Wis. 2d 128, 168 N.W.2d 171 (1969).

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

a proper rebuttal. The fear of a thorough inquiry by the prosecution into the validity of the alibi would tend to eliminate the offering of perjured alibi testimony.

The notice-of-alibi statute digresses from the common law.[4] Traditional criminal procedure allowed innumerable defenses to be admitted except *autrefois acquit*,[5] *autrefois convict*[6] and former pardon.[7] At common law the prosecutor was faced with the difficult task of preparing to meet any number of these defenses. Consequently, seventeen states have concurred with proponents of the notice-of-alibi statute and have enacted statutes requiring defendants to give the prosecution notice of the alibi defense.[8] California does not have such a statute, thus perpetuating a crucial inadequacy in criminal procedure in this state.

PRESENT LAW IN CALIFORNIA

In all states the broad discovery provisions of civil procedure are limited to civil cases and cannot apply in criminal trials.[9] In *Jones v. Superior Court*,[10] California broadened the area of discovery in criminal cases. In this rape case, the Supreme Court of California required the defendant to reveal the names and addresses of those witnesses he intended to call and to produce reports and x-rays he intended to introduce in evidence to support his defense of impotence. The court noted that the defendant intended to disclose this information at the trial and consequently rejected the assertion that this forced disclosure was violative of the defendant's privilege against self-incrimination.[11] In ascertaining truth, discovery can be used in criminal as well as civil cases.[12]

The ruling in *Jones* was extended in several cases[13] before the

---

4 Commonwealth v. Gonzales, 210 Pa. Super. 57, 231 A.2d 414 (1967).

5 Formerly acquitted.

6 Formerly convicted.

7 Millar, *supra* note 3, at 350.

8 ARIZ. R. CRIM. P. 192 (1956); FLA. R. CRIM. P. 1.200 (1968); ILL. REV. STAT. Ch. 38, § 114-14 (1967); IND. ANN. STAT. §§ 9-1631-33 (1956); IOWA CODE ANN. § 777.18 (1958); KAN. GEN. STAT. ANN. § 62-1341 (1949); M.C.L.A. § 768.20 (1968); MINN. STAT. ANN. § 630.14 (1947); N.J.R.R. 3.5-9 (1957); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970); OHIO REV. CODE ANN. § 2945.58 (1953); OKLA. STAT. ANN. Tit. 22, § 585 (1960); PA. R. CRIM. PROC. 312, 19 P.S. App. (1970); S.D.C.L. § 23-37-5 (1967); UTAH CODE ANN. § 77-22-17 (1953); VT. STAT. ANN. §§ 13-6561-62 (1958); WIS. STAT. ANN. § 955.07 (1958).

9 People v. Lindsay, 227 Cal. App. 2d 482, 38 Cal. Rptr. 755 (1964); Clark v. Superior Court, 190 Cal. App. 2d 739, 12 Cal. Rptr. 191 (1961).

10 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

11 *Id.* at 61, 372 P.2d 922, 22 Cal. Rptr. 882.

12 *Id.* at 58, 372 P.2d 920, 22 Cal. Rptr. 880.

13 *See* People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966).

Supreme Court of California gave the broadest interpretation of the prosecution's right to discovery in *People v. Pike*.[14] The court held that it was not prejudicial error to require the defendant to supply names, addresses and expected testimony, of all defense witnesses. The court reasoned that this information would be disclosed at the trial when these witnesses were cross-examined. However, this argument assumes that the defense will call all its witnesses to testify; there always remains a possibility that a witness will not be called.

It appeared from *Pike* that the Supreme Court of California gave the prosecution unlimited and unrestricted ability to discover the defendant's witnesses in criminal cases. However, the scope of this ruling was narrowed in *Prudhomme v. Superior Court*[15] and its companion cases.[16] The California Supreme Court ruled that a discovery order that required the disclosure of the names, addresses and expected testimony of the defense witnesses was beyond the trial court's jurisdiction and void. However, the court did not bar the prosecution from discovery altogether. The court noted that:

> A reasonable demand for factual information which, as in *Jones*, pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial, may present no substantial hazards of self-incrimination and therefore justify the trial judge in determining that under the facts and circumstances in the case before him it clearly appears that disclosure cannot possibly tend to incriminate defendant.[17]

Unless the above criteria were met, discovery should be denied. The court realized that *Jones* was being applied too broadly and attempted to narrow the scope of its application, fearing that the broad application overlooked the defendant's fifth amendment rights.[18] However, as will be seen in the forthcoming discussion of the constitutional issues, information obtained by a notice-of-alibi statute does not violate a defendant's privilege against self-incrimination.

The ruling in the *Pike* case was further qualified in *Rodriquez v. Superior Court*.[19] Despite the United States Supreme Court's

---

14 71 A.C. 617, 455 P.2d 776, 78 Cal. Rptr. 672 (1969).

15 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

16 *In re* Marcario, 2 Cal. 3d 329, 466 P.2d 679, 85 Cal. Rptr. 135 (1970); Bradshaw v. Superior Court, 2 Cal. 3d 332, 466 P.2d 680, 85 Cal. Rptr. 136 (1970).

17 Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 678, 85 Cal. Rptr. 129, 134 (1970).

18 Some commentators have concluded that the constitutional limits were reached or exceeded in *Jones*. See 63 COLUM. L. REV. 361 (1963); 15 STAN. L. REV. 700 (1963); Wilder, *Prosecution Discovery and the Privilege Against Self-Incrimination*, 6 AM. CRIM. L.Q. 3 (1967).

19 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970).

approval of the Florida statute which requires disclosure of the names of alibi witnesses,[20] the *Rodriquez* court ruled that an order requiring the defendant to provide the prosecution with a list of alibi witnesses was invalid in the absence of a statute requiring such disclosure. The court stated that there were no cases which support enforced disclosure of alibi witnesses. The court articulated the extreme care judges must exercise in approaching compulsory discovery for the benefit of the prosecution in order to protect the accused's privilege against self-incrimination.

The *Rodriquez* court felt that the Supreme Court's holding in *Williams v. Florida*,[21] affirming the validity of the Florida alibi statute, was inapplicable because it ruled upon a particular statute which defined the rights of the parties and outlined a specific procedure. It did not solve the question raised in *Rodriquez*, where a state does not have a statute requiring disclosure of the names of alibi witnesses. The *Rodriquez* court noted that there is a monumental difference between a statute which outlines rules of procedure and a court order made on an individual case basis.[22] The court also relied upon the fact that the California legislature had rejected notice-of-alibi legislation.[23] Applying the doctrine of judicial abstention, the California court would not adopt new and important procedural devices which its legislative body has considered and refused.[24]

With reference to the *Jones* case, the *Rodriquez* court emphasized the rarity of a defense of impotence and concluded that no "common law" procedure was established to govern the case at bar. The alibi defense is too common to allow a procedural change, initiated by a court covering a rare defense, to expand into the area of the alibi defense.

Finally, the court in *Rodriquez* stated that a court order is inadequate because sufficient sanctions are not available. A citation for contempt appears to be the only sanction. Exclusion of witnesses is impossible because, "except as otherwise provided *by statute,* every person is qualified to be a witness."[25]

Besides disallowing court orders requiring disclosure of alibi witnesses, the *Rodriquez* case pointed out a large flaw in these court orders. Without a provision for excluding witnesses from testifying, there is no effective method of preventing a defense attorney from calling a witness. Since some lawyers would risk contempt to intro-

---

20 Williams v. Florida, 90 S. Ct. 1893 (1970).

21 *Id.*

22 Rodriquez v. Superior Court, 9 Cal. App. 3d 493, 497, 88 Cal. Rptr. 154, 156 (1970).

23 Cal. A.B. 464, Reg. Sess. (1961); Cal. S.B. 530 & 531, Reg. Sess. (1959).

24 Rodriquez v. Superior Court, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970).

25 CAL. EVID. CODE § 700 (West 1966) [emphasis added].

duce alibi witnesses, a contempt proceeding would be ineffective because the real purpose of the order would be defeated.

Subsequent to *Rodriquez* there are two courses of action open to the prosecution when the accused introduces alibi witnesses. The prosecutor can rely upon his initial evidence, assuming that he has presented a strong enough case to withstand the testimony of alibi witnesses. Theoretically, a case properly prepared and presented should not be discredited by any false alibi claims.

As an alternate course of action, the prosecution could ask for a continuance after an alibi witness is presented. At this point of the trial, the prosecutor can obtain the name and address of the witness. If a continuance is granted, the prosecution can then investigate the witness fully and present rebuttal evidence.

Continuances in criminal trials are allowed by statute in California[26] and are within the discretion of the trial judge.[27] In criminal cases they have been granted during a trial[28] and can be granted without support of an affidavit.[29] Of course, if a continuance is granted, the result is a delay in the already overburdened calendar of the courts;[30] but it is the only weapon in California to combat a last minute parade of false alibi witnesses.

The continuance is not a very effective or efficient weapon however; the system remains at a status quo, depending entirely upon the discretion of a trial judge to grant a continuance which, when granted, lengthens the time of a trial. This delay in the trial may have a detrimental effect upon the defendant's case as well as the prosecution's. The evidence presented by both sides becomes "cold." Instead of deliberating upon the evidence immediately, the trier of fact is forced to wait until a thorough investigation can be completed.

California should adopt its own notice-of-alibi statute to eliminate these very substantial problems. Besides liberalizing discovery in criminal cases, this statute would prevent the use of the "hip pocket" defense[31]—that defense created in the final hours of the

---

26 CAL. PEN. CODE § 1050 (West 1970).

27 People v. Buckowski, 37 Cal. 2d 629, 233 P.2d 912 (1951); People v. Gaines, 1 Cal. 2d 110, 34 P.2d 146 (1934); People v. Loomis, 170 Cal. 347, 149 P. 581 (1915); People v. Farley, 267 Cal. App. 2d 214, 72 Cal. Rptr. 855 (1968); People v. Clemmons, 208 Cal. App. 2d 696, 25 Cal. Rptr. 467, (1962); People v. Mason, 183 Cal. App. 2d 168, 6 Cal. Rptr. 649 (1960); People v. Maddox, 65 Cal. App. 2d 45, 149 P.2d 739 (1944); People v. Singh, 78 Cal. App. 476, 248 P. 981 (1926); People v. Ponchette, 30 Cal. App. 399, 158 P. 338 (1916).

28 People v. Gedney, 10 Cal. 2d 138, 73 P.2d 1186 (1937); People v. Lafuente, 6 Cal. 202 (1856); People v. Lyons, 80 Cal. App. 257, 251 P. 648 (1926).

29 People v. Lyons, 80 Cal. App. 257, 251 P. 648 (1926).

30 TIME, Nov. 9, 1970, at 60.

31 Stassen, *The Show Window of the Bar*, 20 MINN. L. REV. 577, 580-81 (1936).

trial to conflict with the evidence of the prosecution. A notice-of-alibi statute also deters false alibis because defendants are aware that the prosecution will investigate the information before trial. A refuted alibi at a trial would normally have an adverse effect upon the outcome for the defense. The time and expense of trials would be reduced by the employment of such a statute. If, after a pretrial investigation, the alibi is verified, the state can dismiss the charges and stop prosecution. Also, if the prosecutor is prepared for an alibi, it will not be necessary for him to move for a continuance to investigate the alibi. Additionally, when an investigation has failed to refute an alibi, the defense is supported by the fact that the alibi appears more reputable. In view of these considerations, it is evident that California should adopt a notice-of-alibi statute.

CURRENT NOTICE-OF-ALIBI STATUTES

Several states currently have in force alibi statutes similar to the one this comment proposes for California. A review of the requirements and application of these statutes will indicate elements to be drawn upon in the formulation of a California statute.

The states that have alibi statutes require the accused to notify the prosecution of his intention to use the alibi defense within a certain number of days of his trial.[32] All of the statutes have additional requirements.

Eleven states require the defendant to name the specific place where he allegedly was at the time of the crime.[33] Nine states require the names of witnesses that the accused intends to call to support his defense,[34] and several also require the addresses of these witnesses.[35] Iowa places a heavy burden upon the defendant, requiring him to supply a statement of the substance of that which he expects

---

[32] ARIZ. R. CRIM. P. 192 (1956); FLA. R. CRIM. P. 1.200 (1968); ILL. REV. STAT. Ch. 38, § 114-14 (1967); IND. ANN. STAT. §§ 9-1631-33 (1956); IOWA CODE ANN. § 777.18 (1958); KAN. GEN. STAT. ANN. § 62-1341 (1949); M.C.L.A. § 768.20 (1968); MINN. STAT. ANN. § 630.14 (1947); N.J.R.R. 3.5-9 (1957); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970); OHIO REV. CODE ANN. § 2945.58 (1953); OKLA. STAT. ANN. Tit. 22, § 585 (1960); PA. R. CRIM. PROC. 312, 19 P.S. App. (1970); S.D. CODE § 23-37-5 (1967); UTAH CODE ANN. § 77-22-17 (1953); VT. STAT. ANN. §§ 13-6561-62 (1958); WIS. STAT. ANN. § 955.07 (1958).

[33] ARIZ. R. CRIM. P. 192 (1956); FLA. R. CRIM. P. 1.200 (1968); ILL. REV. STAT., Ch. 38, § 114-14 (1967); IND. ANN. STAT. § 9-1631 (1956); N.J.R.R. 3.5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970); OHIO REV. CODE ANN. § 2945.58 (1954); OKLA. STAT. Tit. 22, § 585 (1960); S.D.C.L. § 23-37-5 (1967); UTAH CODE ANN. § 77-22-17 (1953); WIS. STAT. § 955.07 (1957).

[34] ARIZ. R. CRIM. P. 192 (1956); FLA. R. CRIM. P. 1.200 (1968); ILL. REV. STAT., Ch. 38, § 114-14 (1967); IOWA CODE § 777.18 (1958); KAN. GEN. STAT. ANN. § 62-1341 (1949); M.C.L.A. § 768.20 (1968); N.J.R.R. 3.5-9 (1953); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970); WIS. STAT. § 955.07 (1957).

[35] FLA. R. CRIM. P. 1.200 (1968); ILL. REV. STAT., Ch. 38, § 114-14 (1967).

to prove by the testimony of each witness.[36] Each statute requires the defendant to give the prosecution written notice, and the courts have upheld the trial court's discretion in excluding evidence when written notice is not given.[37]

A majority of the statutes provide that failure to comply with the provisions may result in the exclusion of alibi testimony from everyone but the defendant. Florida allows a court to waive the provision for good cause shown.[38] Iowa and Oklahoma allow the prosecutor to obtain a postponement to investigate an alibi presented without adequate prior notice.[39] Ohio has even gone so far as to reject alibi evidence intended for the impeachment of a state witness when the defendant failed to comply with the statutory requirements.[40]

The alibi statutes, either by express provision or by construction, give the trial judge broad discretion as to the fulfillment of the requirements and application of the rule. This enables the judge to waive any requirements for good cause shown or to exclude evidence not disclosed in accordance with the rule. This discretion depends upon his good judgment. The strict exercise of this discretion is almost always upheld.[41] In two Kansas cases,[42] in which the

---

[36] IOWA CODE § 777.18 (1958).

[37] Gray v. State, 40 Wis. 2d 379, 161 N.W.2d 892 (1968); defendant's wife was not allowed to testify as to the time her husband returned home because advance notice of the alibi was not given to the prosecution. *See generally* Jensen v. State, 36 Wis. 2d 598, 153 N.W.2d 566 (1967); State v. Selbach, 268 Wis. 538, 68 N.W.2d 37 (1955).

[38] FLA. R. CRIM. P. 1.200 (1968).

[39] IOWA CODE § 777.18 (1958); OKLA. STAT. Tit. 22, § 585 (1951); State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953).

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

[41] For cases upholding the trial court's use of discretion, see State v. Dodd, 101 Ariz. 234, 418 P.2d 571 (1966); Cox v. State, 219 So.2d 762 (Fla. Dist. Ct. App. 1969); People v. Jones, 118 Ill. App. 2d 189, 254 N.E.2d 843 (1969); Herman v. State, 247 Ind. 7, 210 N.E.2d 249 (1965); Cockerham v. State, 246 Ind. 303, 204 N.E.2d 654 (1965); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964); State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953); Bush v. State, 203 Kan. 494, 454 P.2d 429 (1969); State v. Trams, 189 Kan. 393, 369 P.2d 223 (1962); State v. Coin, 189 Kan. 108, 368 P.2d 43 (1962); State v. Osburn, 171 Kan. 330, 232 P.2d 451 (1951); State v. Parker, 166 Kan. 707, 204 P.2d 584 (1949); Burns v. Amrine, 156 Kan. 83, 131 P.2d 884 (1942); People v. Longaria, 333 Mich. 696, 53 N.W.2d 685 (1952); People v. Fleisher, 322 Mich. 474, 34 N.W.2d 15 (1948); People v. Crawford, 16 Mich. App. 92, 167 N.W.2d 814 (1969); People v. Chamberlain, 15 Mich. App. 541, 166 N.W.2d 815 (1969); People v. Morris, 12 Mich. App. 411, 163 N.W.2d 16 (1968); People v. Williams, 11 Mich. App. 62, 160 N.W.2d 599 (1968); People v. Johnson, 5 Mich. App. 257, 146 N.W.2d 107 (1940); People v. Wright, 172 Misc. 860, 16 N.Y.S.2d 593 (Columbia County Ct. 1940); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); Jones v. State, 453 P.2d 393 (Okl. Crim. App. 1969); Commonwealth v. Vecchiolli, 208 Pa. Super. 483, 224 A.2d 96 (1966); State v. Plucker, 71 S.D. 78, 21 N.W.2d 280 (1946); State v. Escobedo, 44 Wis. 2d 85, 170 N.W.2d 709 (1969); Gray v. State, 40 Wis. 2d 379, 161 N.W.2d 892 (1968); Jensen v. State, 36 Wis. 2d 598, 153 N.W.2d 566 (1967); State v. Selbach, 268 Wis. 538, 68 N.W.2d 37 (1955).

[42] State v. Berry, 170 Kan. 174, 223 P.2d 726 (1950); State v. Rafferty, 145

evidence was cumulative,[43] minor deviations from statutory requirements lead to the exclusion of alibi testimony. However, it appears that if cumulative evidence had not been involved, the court would have been forced to find this exclusion an abuse of discretion.[44]

In many states the defendant who intends to submit an alibi defense is responsible for making the intention known in order to fulfill the requirements of the statute. However, Florida, Illinois, Minnesota, New Jersey and New York operate under different provisions.[45] Illinois requires the prosecuting attorney to file and serve upon the defendant a written request. Defendant must then file an intention to assert an alibi and must include specific information as to his whereabouts at the time of the alleged offense and the names and addresses of witnesses whom he intends to call. Without the request of the prosecution, the alibi evidence may still be admitted.[46] In New Jersey the failure of the prosecution to make this demand has been held to relieve the defendant of his obligation.[47] Florida, Minnesota and New York have similar provisions requiring action by the state.[48] Florida and New Jersey require the prosecution to furnish the defendant with the names and addresses of witnesses it will offer as rebuttal to the alibi witnesses.[49] Florida provides that both the defendant and the prosecuting attorney have a continuing responsibility to promptly notify the other party if there are additions to the lists.[50]

Because indictments are not always definite as to when and where an offense is committed, the alibi statutes can present a problem. When the prosecution cannot frame its indictment in specific terms, it uses terms such as "on or about" for the time and "at or near" for the location. This requires the defendant to account for his time and location for an indefinite period without knowing exactly what the state has in the way of proof as to the specific time and place of the alleged offense. This may make it impossible for the defendant to fulfill the requirements of the statute.[51]

Kan. 795, 67 P.2d 1111 (1937). *See also* People v. Jones, 188 Ill. App. 2d 189, 254 N.E.2d 843 (1969); Bush v. State, 203 Kan. 494, 454 P.2d 429 (1969).

[43] *See* 32A C.J.S. *Evidence* § 1016 (1964) for a treatment of cumulative evidence.

[44] *But see* People v. Fleisher, 322 Mich. 474, 34 N.W.2d 15 (1948).

[45] FLA. R. CRIM. P. 1.200 (1968); ILL. REV. STAT., Ch. 38, § 114-14 (1967); MINN. STAT. ANN. § 630.14 (1947); N.J.R.R. 3.5-9 (1957); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970).

[46] ILL. REV. STAT., Ch. 38, § 114-14 (1967).

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

[48] FLA. R. CRIM. P. 1.200 (1968); N.J.R.R. 3.5-9 (1957); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970); MINN. STAT. ANN. § 630.14 (1947).

[49] FLA. R. CRIM. P. 1.200 (1968); N.J.R.R. 3.5-9 (1957).

[50] FLA. R. CRIM. P. 1.200 (1968).

[51] A concurring opinion in *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931),

This problem is alleviated by statute in Illinois and New York.[52] If the time and place of the alleged offense are not specifically stated in the pleadings, the defendant may request definite information. New Jersey and Florida go even further and entitle the defendant to a list of the names and addresses of witnesses the state plans to call to prove the presence of the defendant at the scene of the crime.[53]

Upon consideration of the alibi statutes in effect in other jurisdictions, it is evident that there are elements of these statutes that should be utilized in the formulation of an acceptable and operable California statute.

RECOMMENDATION FOR CALIFORNIA

In order to incorporate the advantages of the statutes already existing in the other states, the proposed statute should contain the following elements: The prosecution must make a written demand upon the defendant and include a statement as to the time and place that the alleged offense occurred. This is necessary because, in California the information or indictment need not state the precise time and specific place of the alleged offense. The statute would enable the defendant to prepare his defense for the exact time and place in question.

The written notice must also include the names and addresses of witnesses the prosecution intends to introduce to establish the defendant's presence at the scene of the crime. This not only fulfills the reciprocal nature of the statute required in *Williams*,[54] but also eliminates a procedural step that many other states have.

The defendant's notice-of-alibi must state the place at which he claims to have been at the time stated in the demand for such notice; it must include a list of the names and addresses of each witness the defendant intends to introduce to prove his whereabouts.

Both the defense and the prosecution would be under a continuous duty to promptly disclose any change in this information and any additional names to be added to the list.

The exclusion of any alibi testimony from witnesses must be

---

said that requiring the defendant to account for his time and location for an indefinite period in order to fulfill the requirements of a notice-of-alibi statute would be a denial of due process.

52 ILL. REV. STAT. Ch. 38, § 114-14 (1967); N.Y. CODE CRIM. PROC. § 295-1 (McKinney 1970); People v. Kamps, 4 Misc. 2d 518, 161 N.Y.S.2d 211 (Suffolk County Ct. 1956); People v. Fort, 141 N.Y.S.2d 290 (Sup. Ct. 1956); People v. Wright, 172 Misc. 860, 16 N.Y.S.2d 593 (Columbia County Ct. 1940).

53 FLA. R. CRIM. P. 1.200 (1968); N.J.R.R. 3.5-9 (1953).

54 Williams v. Florida, 90 S. Ct. 1893, 1896 (1970).

within the discretion of the trial court. When good cause is shown, exceptions to the statute may be allowed.

Therefore, California's notice-of-alibi statute should read:

> Upon the written demand of the prosecuting attorney, specifying, as particularly as is known to such prosecuting attorney, the place, date, and time of the commission of the crime or crimes charged, and the names and addresses of the witnesses upon whom the prosecuting attorney intends to rely to establish the defendant's presence, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a written notice of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness, as particularly as is known to defendant or his attorney, is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness, as particularly as is known to the prosecuting attorney, is not stated in such notice. For good cause shown the court may waive the requirements of this rule.

CONSTITUTIONAL ISSUES RAISED BY ALIBI STATUTES

Self-Incrimination

Consideration of a notice-of-alibi statute raises fundamental constitutional questions. Alibi statute critics argue that requiring a defendant to give prior notice of his alibi and a list of his witnesses is compelling him to be a witness against himself. This, it is argued, is contrary to the rule against self-incrimination guaranteed by the fifth and fourteenth amendments.[55] However, the United States

[55] *Id.* at 1911 (dissenting opinion).

Supreme Court concluded otherwise in *Williams v. Florida*.[56] There the Court held, as has every court that has considered the issue, that the privilege against self-incrimination is not violated by the requirements of an alibi statute.[57] In *Williams*, the defendant was required to give the state the name and address of his alibi witness prior to the trial. Williams, who was accused of robbery, argued that this furnished the state with information useful in his conviction. The state was able to take a pre-trial deposition from the witness and acquire rebuttal testimony. The defendant also claimed that the disclosure of the elements of his defense interfered with his right to wait until after the prosecution had presented its case to decide his defense. The Supreme Court rejected both of these arguments. The defendant in a criminal trial is sometimes forced by circumstances to testify himself and to introduce other witnesses to prevent his conviction. By introducing these witnesses, he must reveal their identity and submit them to cross-examination, which may prove incriminating. The defendant's dilemma, to remain silent or to present a defense, has never been considered an invasion of the right against self-incrimination.

> The pressures generated by the State's evidence may be severe but they [the generated pressures] do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However "testimonial" and "incriminating" the alibi defense proves to be, it cannot be considered "compelled" within the meaning of the fifth and fourteenth amendments.[58]

The notice-of-alibi rule cannot be said to affect the crucial decision that the defendant must make. "At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial."[59] A defendant is not entitled to await the end of the prosecution's case before announcing the nature of his defense any more than he is able to await the jury's verdict before deciding whether to testify himself.

---

[56] 90 S. Ct. 1893 (1970).

[57] *See also* Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966); State v. Dodd, 101 Ariz. 234, 418 P.2d 571 (1966); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963); Commonwealth v. Vecchiolli, 208 Pa. Super. 483, 224 A.2d 96 (1966); State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968); State v. Baldwin, 47 N.J. 379, 221 A.2d 199, *cert. denied*, 385 U.S. 980 (1966); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607 (1940); People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (Queens County Ct. 1936); State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952).

[58] Williams v. Florida, 90 S. Ct. 1893, 1897 (1970).

[59] *Id.* at 1898.

One must remember that if the alibi defense was a surprise to the prosecution, a reasonable continuance could be granted to investigate and prepare a rebuttal. A continuance at this point would not violate the privilege against self-incrimination.[60]

In order to be unconstitutional, the notice-of-alibi statute must "compel" the defendant to be a witness against himself. First of all, the information sought by the statute does not pertain to matters which may incriminate the defendant but to matters that may exonerate the accused. However, it could be argued that information provided to exonerate oneself may provide a link to evidence that convicts. Still there is nothing compulsory in the notice-of-alibi statute; it merely gives the prosecution the right to demand information in regard to a specific defense, the alibi, and directs the defendant to surrender that information if he intends to use alibi witnesses.

> Certain it is that there is nothing about the section [statute] 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.[61]

Due Process

The due process issue is also raised by the alibi statute. This has evolved in several different forms. It has been argued that the defendant loses any advantage of surprise by giving advance notice.[62] Practically speaking, this impact of surprise is eliminated if a continuance is granted at the request of the prosecution. As noted above, no constitutional question would be raised if a continuance was granted as soon as the alibi witness was called.[63] Any change made by adopting a statute is only a procedural change, not an alteration of the substance of the law; it is not up to the defendant to determine the procedure of the trial.[64]

A due process issue is also raised in the exclusion of evidence at the trial because the defendant failed to comply with the statutory requirements. In *Williams*[65] the Court rejected the argument that this was violative of due process. Mr. Justice White, writing for the majority, felt there was ample room in the adversary system of

---

[60] Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

[61] People v. Schade, 161 Misc. 212, 215, 292 N.Y.S. 612, 615 (Queens County Ct. 1936).

[62] Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (dissenting opinion).

[63] Traynor, *supra* note 60, at 228.

[64] Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29, 32 (1964).

[65] Williams v. Florida, 90 S. Ct. 1893, 1896 (1970).

trial for a notice-of-alibi statute "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."[66] Seeing the ease with which an alibi could be fabricated, the Supreme Court saw a state interest in protecting against "an eleventh hour" defense.[67]

Compulsory Process

The Defendant's sixth amendment right to have compulsory process to obtain witnesses raises a final constitutional issue.[68] Statutes that would prohibit a defendant from calling a witness to the stand violate his constitutional right. Such an argument limited the scope of a statute similar to alibi laws in the State of Washington. Washington requires each side to provide the other with a list of witnesses it intends to call.[69] Washington courts hold that this is not a mandatory statute, and the trial judge can exclude or retain the testimony of a witness whose name is not listed.[70] In a Washington case, the court stated that if the statute was determined to be mandatory and the defendant was not allowed to call a witness because he was not listed, the statute would be unconstitutional because it deprived the accused of a fair trial.[71] The right to have compulsory process for obtaining witnesses includes an implied right to have those witnesses testify, and the statute is unconstitutional unless it is discretionary.[72] Realizing that the purpose of the statute was to eliminate surprise,[73] the cases now require that surprise be shown before testimony of an unlisted witness can be excluded.[74] The surprised party can ask for a continuance, and failure to grant one has been held to be an abuse of discretion.[75] Although the Washington witness statute does not give the prosecution notice of a defense, it allows the state to examine defense witnesses and gather evidence

---

66 *Id.* at 1896.

67 *Id.*

68 U.S. CONST. amend VI; CAL. CONST. art I, § 13.

69 WASH. REV. CODE § 10.37.030 (1956).

70 State v. White, 74 Wash. 2d 392, 444 P.2d 661 (1968); State v. Badda, 68 Wash. 2d 50, 411 P.2d 411 (1966); State v. Sickles, 144 Wash. 236, 257 P. 385 (1927). *But see* State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931).

71 State v. Sickles, 144 Wash. 236, 257 P. 385 (1927).

72 State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931).

73 State v. White, 74 Wash. 2d 392, 444 P.2d 661 (1968); State v. Shelby, 69 Wash. 2d 295, 418 P.2d 246 (1966); State v. Williford, 64 Wash. 2d. 787, 394 P.2d 371 (1964).

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

75 State v. Willis, 37 Wash. 2d 274, 223 P.2d 453 (1950); State v. McCaskey, 97 Wash. 401, 166 P. 1163 (1917).

for impeachment. This statute is broader than an alibi statute because it allows the state to examine all defense witnesses. It was held to be constitutional as long as it was not mandatory. Therefore, as long as the application of an alibi statute's sanctions are not mandatory, it would not violate the sixth amendment right to have compulsory process to obtain witnesses.

Furthermore, despite the precise language of the Constitution, there are qualifications of the sixth amendment right of compulsory process for obtaining witnesses.[76] For instance, if a witness is outside the state, the power of the court to obtain the witness does not extend beyond the state line,[77] and even if by statute the court may subpoena a witness outside the state,[78] the matter rests within the discretion of the trial court.[79] A notice-of-alibi statute would only be another permissible regulation of the exercise of the right to compulsory process;[80] it would not eliminate the right.

Consequently it is evident that a properly constructed notice-of-alibi statute does not violate the constitutional rights of the accused.

CONCLUSION

As stated earlier, the accused as well as the prosecution would benefit from the adoption of a notice-of-alibi statute in California. As a practical matter, such a statute would be effective in eliminating false alibis and efficient in reducing trial time. Additionally, when an investigation has failed to refute an alibi, the defense is supported by the fact that the alibi appears more reputable to the jury. Finally, adoption of a statute would liberalize discovery in criminal cases, an area that has lagged far behind its civil counterpart. The adoption of a notice-of-alibi statute in California would better equip the courts of this state for their task of determining truth and administering justice.

Nicholas C. Fedeli, Jr.

---

[76] *In re* Bagwell, 26 Cal. App. 2d 418, 79 P.2d 395 (1938).
[77] CAL. PEN. CODE § 1326 (West 1970).
[78] *Id.* § 1334.
[79] *Id.* § 1334.2.
[80] Myers v. Frye, 401 F.2d 18 (7th Cir. 1968); Moore v. State, 59 Fla. 23, 52 So. 971 (1910).