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THE RISE AND FALL OF CALIFORNIA'S NOTICE OF ALIBI RULE: PROCEDURAL INNOVATION YIELDS TO JUDICIAL RESTRAINT

I. INTRODUCTION

The defense of alibi[1] in criminal prosecutions has long been a source of vexation and annoyance to the state.[2] Unlike other affirmative defenses, alibi is a positive assertion by the accused that directly denies any involvement in the criminal act. Employed in the latter stages of the defendant's case-in-chief, after the prosecution has rested, it can provide an element of surprise and create sufficient uncertainty among the jurors to produce an acquittal. If not promptly and effectively impeached, the last minute alibi defense can create the requisite degree of doubt in the collective mind of the jury to prevent the prosecution from establishing guilt beyond a reasonable doubt.[3]

To prevent the defense from injecting a surprise alibi defense into the latter stages of a criminal proceeding, a number of states have adopted statutes requiring the defendant to disclose before trial his intent to assert an alibi defense.[4] The prosecution is thus alerted and prepared to meet the defense on its merits.

Until the recent holding of *Reynolds v. Superior Court*,[5] California had employed a notice of alibi procedure that was completely the product of judicial decision-making. The alibi procedure had developed almost unnoticed as part of a larger system of court-supervised

1. Alibi is defined as follows: "The plea of having been at the time of the commission of an act elsewhere than at the place of the commission." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (3d ed. 1964). "A rebuttal of evidence of the prosecution that the accused was elsewhere than at the alleged scene of the offense at the time of the offense." BALLENTINE'S LAW DICTIONARY (3d ed. 1969). "It means that at the time of commission of the crime charged in the indictment, defendant was at a different place so remote or distant or under such circumstances that he could not have committed offense." BLACK'S LAW DICTIONARY (4th ed. 1954).

2. *See, e.g.*, Millar, *Modernization of Criminal Procedure*, 11 J. CRIM. L.C. & P.S. 344, 350 (1920) [hereinafter cited as Millar].

3. The United States Supreme Court has established that due process requires conviction in any criminal proceeding be permitted only upon proof beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 364 (1970).

4. *See, e.g.*, IOWA CODE ANN. § 777.18 (1958); KAN. STAT. ANN. § 62-1341 (1954); MICH. STAT. ANN. § 28-1043 (1972); OHIO REV. CODE ANN. § 2945.58 (1954); S.D. COMP. LAWS § 23-75-5 (Supp. 1974); UTAH CODE CRIM. PROC. § 77-22-18 (Supp. 1975); VT. R. CRIM. P. 12.1 (1974); WIS. STAT. ANN. § 955.07 (1958).

5. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

criminal discovery.[6] This system was the product of judicial enthusiasm for the civil discovery mechanisms which were implemented in part to remove the element of gamesmanship from the trial process and facilitate the truth-finding function of the adversarial system.[7] The *Reynolds* decision announced a judicial retreat from court-made notice of alibi rules, declaring that henceforth, in the absence of statute, the courts were without power to issue such orders.[8] In part, the decision to abandon the court-made rules was a result of tension between the notice procedure and the constitutional privilege against self-incrimination.[9] It reflected a judicial desire to retreat from promulgating a procedural rule that was arguably of social utility but constitutionally suspect.[10]

In *Reynolds*, the court abdicated the judicial power to promulgate notice of alibi rules leaving the possibility of subsequent notice of alibi procedures to the legislature. The problem facing California legislators after *Reynolds* may be defined by tracing the origin and development of California's unique judicial notice procedure, by comparing it with analogous procedures in other states, by analyzing its constitutional limitations, and by reviewing past legislative efforts to enact notice of alibi statutes in California.

II. HISTORICAL DEVELOPMENT OF NOTICE OF ALIBI PROCEDURE

In several respects, alibi is unique among affirmative defenses. It directly refutes the prosecution's case by removing the defendant from the scene of the crime,[11] thus forcing the prosecution to concentrate upon affirmatively establishing, by evidence that is often circumstantial, that the defendant was present at the time and place of the crime. The alibi defense, unlike other defenses such as former jeopardy, insanity, or diminished capacity, can be easily fabricated by defendants fearful of

6. *See, e.g.*, Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970); People v. Pike, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969); People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

7. *See, e.g.*, Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

8. Reynolds v. Superior Court, 12 Cal. 3d 834, 837, 528 P.2d 45, 46, 117 Cal. Rptr. 437, 438 (1974). *See* note 95 *infra* and accompanying text.

9. *See* note 97 *infra* and accompanying text.

10. *See* note 97 *infra* and accompanying text.

11. By comparison, the other affirmative defenses such as insanity, self-defense, former jeopardy, diminished capacity, or former pardon admit the perpetration of the criminal act but deny culpability. While a notice procedure could be created for each affirmative defense, the need for notice in the case of non-alibi affirmative defenses is far less urgent. *See* Millar, *supra* note 2, at 351.

conviction. While statistical studies on the frequency and effectiveness of manufactured alibi defenses are perforce nonexistent, criminologists and prosecutors have long viewed the alibi defense with considerable suspicion, particularly when asserted without warning and late in the actual trial.[12]

The concept of requiring the defendant to give pretrial notice of his intent to assert an alibi was developed to control the potential for exploitation of the alibi defense.[13] Pretrial disclosure of intent to raise the defense affords the prosecution ample time to investigate the factual basis of the defense and to locate witnesses and evidence sufficient to rebut the manufactured alibi. In the United States, the notice procedure was hailed as a salutory innovation[14] and adopted by statute or court rule in fourteen states between 1927 and 1942.[15] While the notice procedures varied in their specific requirements, each was basically designed to counter the surprise impact of an unannounced alibi defense and to discourage sham alibis.[16]

The statutory notice of alibi procedures adopted in the United States require the accused to make disclosure of his alibi defense at various times before trial.[17] Notice is given either automatically[18] or upon

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12. *See, e.g., id.* at 350:

> 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 crimes.

13. The concept of requiring pretrial notice of the affirmative defenses apparently originated in Scotland, which singled out the defenses of alibi, insanity at the time of the act, self-defense, commission of the act by another, and "sleep or temporary mental disassociation or hysterical amnesia" for the notice requirement. Wilson, *A Study Relating to Notice of Alibi in Criminal Actions*, 3 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES J-9 to J-10 (Oct. 1960) [hereinafter cited as LAW REVISION COMM'N].

14. Earl Warren, then serving as District Attorney of Alameda County, endorsed an early and unsuccessful notice of alibi measure:

> I am heartily in favor of the provision of the law which requires the defendant to give five days notice of his intention to rely upon the defense of alibi . . . . [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 officers or the court.

LAW REVISION COMM'N, *supra* note 13, at J-20. *See also* Millar, *The Statutory Notice of Alibi*, 24 J. CRIM. L.C. & P.S. 849 (1933).

15. *See* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29, 30 (1964).

16. *See, e.g.*, Esch, *Ohio's New Alibi Defense Law*, 9 PANEL 52, (Sept.-Oct. 1931); Millar, *supra* note 2, at 350-51.

17. *See, e.g.*, IOWA CODE ANN. § 777.18 (1950); KAN. STAT. ANN. § 62-1341 (1964); MICH. COMP. LAWS § 768.20 (1948); OHIO REV. CODE ANN. § 2945.58 (1950).

18. *See, e.g.*, IOWA CODE ANN. § 777.18 (1950); KAN. STAT. ANN. § 62-1341 (1964); MICH. COMP. LAWS § 768.20 (1956); OHIO REV. CODE ANN. § 2945.58 (1954).

written demand filed by the prosecution.[19] The required notice is served in writing, and depending upon the jurisdiction, sets forth the accused's precise location at the date and time of the offense,[20] the names and addresses of all alibi witnesses he intends to call to support the defense,[21] and the intended testimony of each such witness. If the accused fails to disclose either the intent to assert an alibi or the name of a particular alibi witness, in most jurisdictions he may be barred from presenting the defense or the testimony of the particular witness.[22]

California's own notice of alibi procedure, as it existed before *Reynolds*, did not develop from a particular prosecutorial distrust of alibi defenses. Instead, it emerged, as previously indicated, from a period of judicial infatuation with and expanded reliance upon discovery mechanisms in criminal as well as civil litigation.[23] The California Supreme Court implemented limited discovery rights for the accused, recognizing that such rights, although not constitutionally mandated,[24] promoted the expeditious and orderly ascertainment of truth. Having created discovery rights for the accused,[25] the prosecution was likewise granted limited discovery against the defendant. The uniqueness of California's notice of alibi procedure, aside from its purely judicial origin, lies in its rationale. Other states considered notice of alibi as a shield to protect the prosecution against surprise and fabricated alibi defenses. California, however, recognized the device as a sword, albeit a very specialized

19. *See, e.g.*, MINN. STAT. ANN. § 630.14 (1947).

20. *See, e.g.*, OHIO REV. CODE ANN. § 2945.58 (1954).

21. *See, e.g.*, IOWA CODE ANN. § 777.18 (1950); KAN. STAT. ANN. § 62-1341 (1964); MICH. COMP. LAWS § 768.20 (1956); N.Y. CRIM. PROC. § 250.20 (McKinney Supp. 1974).

22. *See, e.g.*, FLA. R. CRIM. P. § 3.220 (1974); IOWA CODE ANN. § 777.18 (1950); MICH. STAT. ANN. § 28.1044 (1974); MINN. STAT. ANN. § 630.14 (1947); N.Y. CRIM. PROC. § 250.20 (McKinney Supp. 1974); OHIO REV. CODE ANN. § 2945.58 (1954); S.D. COMP. LAWS § 23-37-5 (1967); UTAH CODE ANN. § 77-22-18 (1953). California courts appeared to follow the majority rule as illustrated by the appellate record. *See, e.g.*, Reynolds v. Superior Court, 12 Cal. 3d 834, 837-39, 528 P.2d 48-51, 117 Cal. Rptr. 437, 440-44 (1974).

23. For an analysis of California's civil discovery mechanisms and the philosophy behind civil discovery see Justice Peters' majority opinion in Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

24. *See, e.g.*, People v. Riser, 47 Cal. 2d 566, 585, 305 P.2d 1, 13 (1956).

25. *See, e.g.*, People v. Estrada, 54 Cal. 2d 713, 716, 355 P.2d 641, 642, 7 Cal. Rptr. 897, 898-99 (1960); People v. Cooper, 53 Cal. 2d 755, 768-71, 349 P.2d 964, 972-74, 3 Cal. Rptr. 148, 156-57 (1960); Cash v. Superior Court, 53 Cal. 2d 72, 74-76, 346 P.2d 407, (1959); Funk v. Superior Court, 52 Cal. 2d 423, 424-25, 340 P.2d 593, 594 (1959); Priestly v. Superior Court, 50 Cal. 2d 812, 819, 330 P.2d 39, 43 (1958); Powell v. Superior Court, 48 Cal. 2d 704, 706-09, 312 P.2d 698, 699-701 (1957); People v. Riser, 47 Cal. 2d 566, 585-88, 305 P.2d 1, 13 (1956).

one, for probing the defendant's case. Because of this conceptual distinction, constitutional tensions that went virtually unperceived in other jurisdictions[26] were created in the California procedure.

A. Jones v. Superior Court: The Opening Phase of Prosecutorial Discovery

The broad question of whether the prosecution was entitled to conduct discovery was answered in *Jones v. Superior Court*,[27] a case that had nothing whatever to do with alibi defenses or procedures, but nonetheless became the cornerstone upon which California's judicial notice of alibi rules were constructed. It is essential to review the facts and reasoning behind the *Jones* decision in order to understand the subsequent development and eventual decline of California's judicial notice of alibi procedure.

Jones involved a defendant charged with rape. On the date set for trial, counsel moved for a continuance in order to gather further medical evidence to support a defense of impotency. The trial court granted the continuance, whereupon the prosecution moved for and obtained a discovery order requiring the defendant to provide the district attorney with the names and addresses of all doctors who treated the defendant before trial and all medical reports and x-rays pertaining to the accused's medical condition. The defendant challenged the discovery order by a writ of prohibition on the grounds that it violated his constitutional privilege against self-incrimination as well as the attorney-client privilege.[28] In reviewing the order, the supreme court for the

26. *See, e.g.*, State v. Thayer, 176 N.E. 656 (Ohio 1931). The court affirmed Ohio's notice of alibi statute, among the first enacted in the United States, declaring that the procedure

> gives the state some protection against false and fraudulent claims of alibi often presented by the accused so near the close of the trial as to make it quite impossible for the state to ascertain any facts as to the credibility of the witnesses called by the accused.

Id. at 657.

27. 58 Cal. 2d 56, 327 P.2d 919, 22 Cal. Rptr. 879 (1962). In language recalling People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), Justice Traynor in *Jones* concluded that, absent a valid claim of privilege, the accused had "no valid interest in denying the prosecution access to evidence that can throw light on issues in the case." 58 Cal. 2d at 59, 372 P.2d at 921, 22 Cal. Rptr. at 881.

28. Although the court went on to uphold the basic right of the prosecution to conduct a limited form of discovery, it did grant petitioner's writ insofar as the trial court sought medical reports of all doctors who treated the defendant before trial. Some of these reports, reasoned the majority, were privileged from discovery under the attorney-client privilege. 58 Cal. 2d at 60-61, 372 P.2d at 921-22, 22 Cal. Rptr. at 881-82, *citing, inter alia*, San Francisco Unified School Dist. v. Superior Court, 55 Cal. 2d 451, 455, 359 P.2d 925, 928, 11 Cal. Rptr. 373, 376 (1961).

first time acknowledged a right to limited prosecutorial discovery, which later would be judicially extended to notice of alibi orders and sanctions.[29]

The *Jones* court rejected the defendant's argument that any court order compelling him to supply information to the prosecution violated his constitutional privilege against self-incrimination.[30] Justice Traynor reasoned that the order merely required the petitioner to *presently* disclose information the existence of which he had openly announced in seeking a continuance.[31] Justice Traynor further analogized the order to disclosures of the type required under notice of alibi statutes existing in other jurisdictions which had been upheld against similar self-incrimination challenges.[32] The trial court's order was, like the notice of alibi statutes, simply a procedural pleading requirement for a limited form of pretrial disclosure where the intent to disclose at trial had been openly announced.[33]

The *Jones* majority, having disposed of the constitutional issue raised by the defendant, went on to explain the basis for the trial court's authority to fashion discovery orders compelling disclosures by the accused.[34] The judiciary, reasoned Justice Traynor, had the inherent

29. 58 Cal. 2d at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

30. *Jones* was decided before the United States Supreme Court ruled that the privilege against self-incrimination of the fifth amendment to the United States Constitution was applicable to the states. Malloy v. Hogan, 378 U.S. 1 (1964). The petitioner in *Jones* relied upon the analogous state statutory and constitutional privileges: "In criminal prosecutions, in any court whatever, . . . [n]o person shall . . . be compelled, in any criminal case, to be a witness against himself." CAL. CONST. art. I, § 13 (West 1954). *See also* CAL. EVID. CODE § 940 (West 1966) (formerly CAL. PEN. CODE § 1323).

31. Insofar as the trial court's order herein requires petitioner to reveal the names and addresses of witnesses he intends to introduce in evidence to support his defense of impotence, it does not violate the privilege against self-incrimination. . . . It simply requires petitioner to disclose information that he will shortly reveal anyway. 58 Cal. 2d at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

32. Justice Traynor's opinion noted N.Y. CODE CRIM. PROC. § 295-*l* (McKinney 1936) (later declared unconstitutional in People v. Busch, 308 N.E.2d 451 (N.Y. 1973)); OHIO REV. CODE ANN. § 2945.58 (1954) (upheld in State v. Thayer, 176 N.E. 656 (Ohio 1931)), and WIS. STAT. ANN. § 955.07 (1958) (upheld in State v. Kopacka, 51 N.W.2d 495 (Wis. 1952)). 58 Cal. 2d at 61, 372 P.2d at 882, 22 Cal. Rptr. at 922.

33. 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882. The "intent to disclose at trial" rationale frequently was used to justify prosecutorial discovery procedures in the face of a self-incrimination challenge. Not all scholars, however, agreed that notice would be required for all affirmative defenses or should include the names and addresses of those witnesses the defendant intended to call at trial. *See, e.g.*, Millar, *supra* note 2, at 351 (suggesting notice should be limited to the defenses of insanity, self defense, and alibi); Millar, *The Statutory Notice of Alibi*, 24 J. CRIM. L.C. & P.S. 849, 859 (1933) (reasoning that requirement of pretrial notice of defense is sufficient without specification of names of alibi witnesses).

34. 58 Cal. 2d at 59-60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

power to promulgate rules for the orderly ascertainment of truth.[35] The present order, since it was limited to information which the defendant intended to disclose at trial, was within the purview of such rules. The court noted the absence of a statutory criminal discovery procedure[36] and recalled its own earlier decisions which had created limited discovery rights for the accused.[37] Those earlier decisions were not based upon constitutional considerations, but rather upon a recognition that, absent some constitutional or statutory privilege, the prosecution had no reason to deny the accused access to information which could assist in the orderly ascertainment of truth.[38] Having determined that no constitutional protections barred the trial court's order, the *Jones* court concluded that criminal discovery was not a "one way street" available solely to the accused.[39]

Two of the seven justices rejected Traynor's disposition of the self-incrimination issue raised in *Jones*.[40] Justice Peters, while concurring in the result, expressly rejected the majority's two-way street argument[41]

35. Although not cited in the opinion itself, the court was undoubtedly aware of the California Law Revision Commission's report which recommended adoption of a statutory notice of alibi procedure. *See* LAW REVISION COMM'N, *supra* note 13. The court's only allusion to the recent legislative concern over notice of alibi proposals in the state legislature was a brief passage confirming that in the case of criminal discovery for the prosecution it was "appropriate . . . for the courts to develop rules governing discovery in the absence of express legislation authorizing such discovery." 58 Cal. 2d at 59, 372 P.2d at 920-21, 22 Cal. Rptr. at 880-81. Some twelve years later the court was less certain as to the appropriateness of its rule-making powers. Reynolds v. Superior Court, 12 Cal. 3d 834, 837, 528 P.2d 45, 46, 117 Cal. Rptr. 437, 438 (1974) (noting that complex issues of federal and state constitutional rights counsel against judicial rule-making in this area).

36. 58 Cal. 2d at 59, 372 P.2d at 922, 22 Cal. Rptr. at 882.

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

38. *Id.* at 59, 372 P.2d at 921, 22 Cal. Rptr. at 881. *See also* People v. Riser, 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).

39. 58 Cal. 2d at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881. The "one-way street" language of the majority became a commonly employed metaphor for describing the need to keep discovery a two-sided process. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470, 475 (1973) ("discovery must be a two-way street").

40. Justice Peters viewed the privilege against self-incrimination as "fundamental, unlimited, and absolute." 58 Cal. 2d at 63, 372 P.2d at 923, 22 Cal. Rptr. at 883 (concurring opinion).

41. "The simple fact is that our system of criminal procedure is founded upon the principle that the ascertainment of facts *is* a 'one-way street.'" *Id.* at 64, 372 P.2d at 924, 22 Cal. Rptr. at 84. The basic difference between Justice Peters' position and that of the majority can best be understood by separating the privilege into its two constituent parts, that of any person not to answer questions that tend to incriminate and the privilege of a defendant to avoid all questions by refusing to take the stand. *Compare* CAL. EVID. CODE § 930 (West 1966), *with id.* § 940. Justice Peters, unlike the majority, included in the privilege the traditional view that a defendant may remain silent because

and the analogy between the trial court's order and notice of alibi procedures existing in other states.[42] Instead, he preferred to await the legislature's enactment of a comprehensive criminal discovery system.[43] Justice Dooling's dissent accurately foresaw that *Jones* had opened the door for the prosecution to make unlimited inquiry into any defense the accused would present at trial.[44]

Jones established a prosecutorial right to discover information the defendant intended to disclose at trial.[45] The trial court's authority to order such discovery stemmed from the inherent power of the courts to promulgate rules governing procedural and pleading matters. *Jones*, however, did not specifically set forth guidelines on the nature and scope of future discovery orders to be fashioned by trial courts, nor did it explain whether the prosecution would be permitted to compel the defendant to disclose the intent to rely upon specific affirmative defenses. The dissent, and perhaps even the majority, clearly felt that the decision impliedly approved orders that would compel the defendant to state all affirmative defenses in advance of trial.[46] Although *Jones* on its facts presented a situation where the defendant himself made a

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no compulsion to disclose information arises until the prosecution has presented a prima facie case against him. *See generally* United States v. Housing Foundation, 176 F.2d 665, 666 (3d Cir. 1949) (cited by Justice Peters).

42. Those statutes, Peters argued, were unsupported by federal rulings on their constitutional validity (58 Cal. 2d at 67, 372 P.2d at 926, 22 Cal. Rptr. at 886) and in addition, the existence of a statutory scheme requiring notice of alibi in some jurisdictions was scarcely a basis for implementing in California a "similar rule as to affirmative defenses generally." *Id. Cf.* United States v. Mulinsky, 19 F.R.D. 426 (S.D.N.Y. 1956) (holding that criminal discovery under federal rules was not analogous to civil discovery).

43. Justice Peters thus agreed with the lower appellate court's ruling on the alibi order. That court had held:

> "[T]he legislature has not elected to tackle the ticklish problems of discovery in criminal cases directed against the defendants and within that inconsiderable area bounded by the constitutional privilege against self-incrimination. I do not find any inherent judicial power to preempt this excursion into procedural reform."

58 Cal. 2d at 68, 372 P.2d at 926, 22 Cal. Rptr. at 886, *quoting* Jones v. Superior Court, 17 Cal. Rptr. 575, 578 (1962) (concurring opinion) (vacated).

44. 58 Cal. 2d at 68-69, 372 P.2d at 926, 22 Cal. Rptr. at 886. Justice Dooling's dissent anticipated the far-reaching consequences of *Jones* when it posed the question:

> [A]re we opening the door, as Justice Peters suggests, to a general inquiry by the prosecution whether the defendant intends to rely on any affirmative defense and if so what the nature of such affirmative defense may be?

Id. at 69, 372 P.2d at 927, 22 Cal. Rptr. at 887.

45. The rationale used by the *Jones* court concerning the intent to disclose at trial was previously employed in other jurisdictions to support notice of alibi procedures. *See, e.g.*, People v. Rakiec, 23 N.Y.S.2d 607, 612 (App. Div. 1940); Simos v. Burke, 163 N.W.2d 177, 181 (Wis. 1968).

46. *See* note 44 *supra* and accompanying text.

voluntary pretrial disclosure of his intent,[47] it was to become apparent that the case supported trial court orders that *compelled* the accused to disclose his intent. Notice of alibi orders were to emerge among the procedures impliedly sanctioned by the *Jones* decision.

B. Judicial Creation of Notice of Alibi Procedure

In *People v. Lopez*,[48] the California Supreme Court confronted the issue of prosecutorial discovery in the specific context of a notice of alibi order. Two defendants were prosecuted for murder and a host of lesser offenses in the armed robbery of a west Los Angeles discount store. Both the defense and the prosecution moved for and received pretrial discovery orders. The prosecution's order required the defendants to state the names, addresses, and written statements of each alibi witness they intended to call. Affirming the order and the defendants' subsequent conviction, the supreme court determined that *Jones* had given the prosecution the right to discover defense evidence "within certain narrow limitations."[49] Without alluding precisely to what those limitations were, the majority held that *Jones* authorized the trial court to issue the alibi order.[50]

Lopez, however, did more than just extend the *Jones* rationale to court orders for discovery of an intended alibi defense. While *Jones* had involved an accused who had *voluntarily* disclosed his intent to assert an affirmative defense,[51] in *Lopez*, since the order preceded the defendant's declaration, there was no voluntary disclosure by the defendants. Subsequently, in *People v. Dugas*,[52] *Lopez* was construed to include notice of alibi orders within prosecutorial discovery. There the First District Court of Appeal affirmed a conviction where the trial court issued a discovery order requiring the disclosure of names and

47. In *Jones*, the prosecution learned of the defendant's affirmative defense from the defendant's attorney who, in seeking a continuance on the day of trial, informed the court of the nature of the defense. Had *Jones* been limited to permitting discovery under these rare circumstances, the case would have had far less impact in the development of notice procedure. This potentially limited application of *Jones* was noted in Justice Dooling's dissent. 58 Cal. 2d at 69, 372 P.2d at 927, 22 Cal. Rptr. at 887.

48. 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963).

49. *Id.* at 244, 384 P.2d at 28, 32 Cal. Rptr. at 436.

50. The majority opinion, written by Justice Schauer, was also careful to note that neither the trial record nor the briefs of either party gave any indication that the defendants had, in fact, complied with the trial court, and thus the defendants could show no prejudice resulting from the order. *Id.*

51. *See* note 47 *supra*.

52. 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966).

addresses of all intended defense witnesses supporting "*any affirmative defense*, such as alibi."[53] Citing *Lopez*, Judge Shoemaker's majority opinion concluded that it did not matter that the order was issued before the defendants indicated their intent to rely upon a particular affirmative defense, so long as the defendants did in fact subsequently so rely.[54]

Three years after *Lopez*, the California Supreme Court reviewed notice of alibi procedure in *People v. Pike*.[55] There the defendants appealed a conviction for first-degree murder, contending, *inter alia*, that a pretrial discovery order requiring them to reveal the names, addresses, and expected testimony of *all* defense witnesses was prejudicial and required reversal. Justice McComb's majority opinion sustained the blanket pretrial discovery order, concluding that such orders were permitted by *Jones*, enabled the prosecution to function more effectively, and did not abridge the "defendant's right of privacy, freedom from self-incrimination or the attorney-client privilege."[56] Although the dissent in *Pike* bitterly assailed the majority's conclusory holding and its failure to properly apply *Jones*,[57] it was apparent from the majority's brief consideration of the issue that the California Supreme Court was content to expand *Jones*.[58] *Pike* assured trial courts that notice of alibi or other orders mandating prior notice of affirmative defenses could be freely issued by judges without reference to a defendant's voluntary disclosures or declared intentions. The First District Court of Appeal in *Ruiz v. Superior Court*[59] applied *Pike* without hesitancy in determining that the trial court had the right to "require defense counsel to supply the names and addresses and expected testimony of defense witnesses without limitation to affirmative defenses."[60]

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53. *Id.* at 249, 51 Cal. Rptr. at 481.

54. *Id.* The decision was devoid of any supporting authority for its blanket assertions. For a critical analysis of the court's failure to analyze the appellants' arguments see McMullen v. Superior Court, 6 Cal. App. 3d 224, 227 n.1, 85 Cal. Rptr. 729, 731 n.1 (1970).

55. 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969).

56. *Id.* at 605, 455 P.2d at 781-82, 78 Cal. Rptr. at 677-78.

57. In Justice Peters' view:

> This statement of the prosecution's right to pretrial discovery is far too broad, is not supported by *Jones* and demonstrates a callous disregard of a defendant's constitutional, statutory and common law rights.

Id. at 610, 455 P.2d at 784, 78 Cal. Rptr. at 680.

58. In a decision released one day after the expansive *Pike* decision, the Second District Court of Appeals held that discovery orders under *Jones* were limited to discovery of affirmative defenses. McGuire v. Superior Court, 274 Cal. App. 2d 583, 597, 79 Cal. Rptr. 155, 162-63 (1969).

59. 275 Cal. App. 2d 633, 80 Cal. Rptr. 523 (1969).

60. *Id.* at 635, 80 Cal. Rptr. at 524.

C. *Prudhomme v. Superior Court: The Transition*

Prudhomme v. Superior Court[61] marked a fundamental shift away from the California Supreme Court's expansive application of *Jones* and profoundly altered California's judicially adopted notice of alibi procedure. Like *Jones*, the case did not involve a notice of alibi order per se but was to have significant impact on alibi procedure. The defendant was ordered through her attorney to provide the prosecution with the names, addresses, and expected testimony of each witness she intended to call. It was apparent that the trial court judge was relying upon the intent-to-disclose-at-trial rationale from *Jones*, which had been given expansive application in *Pike*.[62]

Justice Burke, speaking for six members of the supreme court,[63] held that the order exceeded the trial court's power and was thus void.[64] It was not enough, said Justice Burke, that the order was based upon "whether the information sought pertains to an affirmative defense, or whether the defendant intends to introduce or rely upon the evidence at trial."[65] The court must additionally determine whether the disclosure "might conceivably lighten the prosecution's burden of proving its case in chief."[66] This factor, which had been summarily disposed of in *Jones* and scarcely dealt with in *Pike*, was the *sine qua non* in determining whether or not discovery should be permitted.[67] The trial court's order in *Prudhomme* was defective because it was not limited to any particular defense and did not permit the trial judge to determine the possible incriminatory effect of any disclosures made thereunder.[68]

Underlying *Prudhomme's* departure from the expansive *Lopez* and *Pike* decisions was the concern for the defendant's constitutional privi-

61. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

62. *See* note 45 *supra* and accompanying text. The appellate record in both *Pike* and *Prudhomme* does not reveal the precise terms of the trial court orders in each case, but it is apparent that the orders in each instance required disclosure of the names and addresses of all witnesses which the accused intended to call. Prudhomme v. Superior Court, 2 Cal. 3d 320, 322, 466 P.2d 673, 674, 85 Cal. Rptr. 129, 130 (1970); People v. Pike, 71 Cal. 2d 595, 605, 455 P.2d 776, 781-82, 78 Cal. Rptr. 672, 677-78 (1969).

63. 2 Cal. 3d at 322, 466 P.2d at 674, 85 Cal. Rptr. at 130. Justice Peters concurred in a separate opinion, adding that *Jones* and *Pike* should be "forthrightly disapproved and not given a further uncertain and confused life." *Id.* at 328, 466 P.2d at 678, 85 Cal. Rptr. at 134.

64. *Id.* at 322, 466 P.2d at 674, 85 Cal. Rptr. at 130.

65. *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133, *citing* Jones v. Superior Court, 59 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

66. *Id.*

67. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 133.

68. *Id.*

lege against self-incrimination. Justice Burke noted "certain significant developments in the law since *Jones*" which obligated the court to limit that case to its facts until the court considered the effects that a discovery order would have upon accused's rights and privileges, "especially his fundamental right not to be compelled to be a witness against himself."[69] Among the developments cited by the majority were the United States Supreme Court's decision expanding the fifth amendment privilege against self-incrimination to state criminal proceedings;[70] the limited nature of prosecutorial discovery under recently enacted rule 16(c) of the Federal Rules of Criminal Procedure;[71] the recent disapproval by a federal district court within the Ninth Circuit of California's prosecutorial discovery procedures;[72] and the United States Supreme Court's recent grant of *certiorari* to review Florida's notice of alibi procedure.[73] These developments, coupled with California's recognition that the fifth amendment privilege was a mainstay of the accusatorial system,[74] prompted the *Prudhomme* court to disapprove of its prior expansive reading of *Jones*.[75]

The effect of *Prudhomme* upon California's notice of alibi procedure was far from certain. The majority opinion did not bar prosecutorial

69. *Id.* at 323, 466 P.2d at 675, 85 Cal. Rptr. at 131.

70. Malloy v. Hogan, 378 U.S. 1 (1964).

71. Rule 16(c), enacted in 1966, created a limited form of prosecutorial discovery of certain tangible evidence which the defendant intended to introduce at trial. FED. R. CRIM. P. 16(c). The *Prudhomme* court was reluctant to sanction a procedure that would go beyond the limited federal procedure. 2 Cal. 3d at 324, 466 P.2d at 676, 85 Cal. Rptr. at 131.

72. 2 Cal. 3d at 324-25, 466 P.2d at 676, 85 Cal. Rptr. at 132. The case referred to was Cantillon v. Superior Court, 305 F. Supp. 304 (C.D. Cal. 1969), *remanded*, 442 F.2d 1338 (9th Cir. 1971), which involved a habeas corpus action by the attorney for the defendant. The defense counsel refused to comply with the trial court's notice of alibi order and was jailed for contempt. The federal court adopted the spirit of Justice Peters' dissent in *Jones* declaring:

> This Court is familiar with the decisions of the California courts as well as the decisions from other jurisdictions cited by respondents in support of their claim that the names of alibi witnesses can be obtained by pretrial discovery from a defendant in a criminal case. This Court however, respectfully is of the opinion that to require such discovery from this defendant is a violation of such defendant's Fifth Amendment right to remain silent when such attempted discovery is sought.

305 F. Supp. at 307. Following Williams v. Florida, 399 U.S. 78 (1970), *Cantillon* was remanded with the circuit court cautiously noting "the Supreme Court placed express limitations on the [*Williams*] holding." 442 F.2d at 1338.

73. Williams v. Florida, 399 U.S. 78 (1970). The case was argued March 4, 1970, some three weeks before the *Prudhomme* decision was announced. The respondent's brief cited *Jones* as authority for the proposition that not all evidence obtained from a defendant is protected by the fifth amendment. Brief for Respondent at 23, Williams v. Florida, 399 U.S. 78 (1970).

74. 2 Cal. 3d at 325, 466 P.2d at 676-77, 85 Cal. Rptr. at 132-34.

75. *Id.* at 327 n.11, 466 P.2d at 677-78 n.11, 85 Cal. Rptr. at 134-35 n.11.

discovery.[76] Prosecutorial discovery of factual information pertaining to specific affirmative defenses was permissible where the demand was (1) for information which the defendant intended to introduce at trial, and (2) the trial judge determined the disclosure would not be self-incriminatory.[77]

California's lower appellate courts applied *Prudhomme's* standard[78] to court-fashioned notice of alibi orders with divergent results. The Second District Court of Appeal, in *People v. Hall*,[79] approved a trial court order which called for disclosure of the identity of all intended alibi witnesses and penalized failure to disclose by barring the defendant's non-noticed alibi testimony and evidence.[80] Justice Thompson, considering *Prudhomme's* impact upon prosecutorial discovery, declared that there was "no way in which the disclosure would have lightened the prosecution's burden of proving its case in chief."[81]

The First District Court of Appeal in *Rodriguez v. Superior Court*,[82] took a position directly opposed to that of *People v. Hall* by invalidating a trial court order requiring disclosure of the names, addresses, and

76. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

77. *Id.*

78. The standard referred to is that set forth in the *Prudhomme* majority opinion:

> We do not intend to suggest that the prosecution should be barred from *any* discovery in this, or any other, case. 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. However, unless those criteria are met, discovery should be refused.

Id. (footnotes omitted).

79. 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (1970).

80. *Id.* at 566, 86 Cal. Rptr. at 506-507. The constitutional validity of preclusion of the defendant's alibi evidence and witnesses is an issue hotly debated by critics of notice of alibi procedures. *See, e.g.*, Comment, *Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972) [hereinafter cited as *Preclusion Sanction*].

81. 7 Cal. App. 3d at 566, 86 Cal. Rptr. at 506-07. It was apparent from this decision that Justice Thompson felt *Prudhomme* permitted the notice of alibi orders because they pertained to a particular affirmative defense and sought only information which the defendant intended to rely upon at trial. This is the first factor which the trial judge must consider under *Prudhomme*. 2 Cal. 3d at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134. The second factor (*i.e.*, whether it appears that the disclosure might conceivably lighten the prosecution's burden) was summarily dealt with in *Hall* by simply indicating *Prudhomme* would be no bar to notice of alibi orders. 7 Cal. App. 3d at 566, 86 Cal. Rptr. at 506-07. *Prudhomme* itself gave some indication that notice of alibi orders might be acceptable under its standards. *See* note 76 *supra* and accompanying text.

82. 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970).

expected testimony of all alibi witnesses. The court noted that, although the United States Supreme Court in *Williams v. Florida*[83] had recently upheld Florida's notice of alibi procedure, the *Prudhomme* holding specifically disapproved of earlier California cases upon which judicial authority for notice of alibi orders was based.[84] Absent a statutory enactment which guaranteed reciprocal discovery rights for the accused, *Rodriguez* concluded that there was no authority under the *Prudhomme* rationale for a trial court to order pretrial disclosures of the defendant's alibi witnesses.[85]

The split between the first district's *Rodriguez* decision and the second district's holding in *Hall* was to remain until *Reynolds v. Superior Court*.[86] The first district continued to read *Prudhomme* as having eliminated authority for judicial notice of alibi orders.[87] The second district, on the other hand, continued to hold that discovery orders could be fashioned to assist the prosecution in locating and impeaching alibi witnesses without violating the privilege against self-incrimination.[88]

D. Reynolds v. Superior Court: The Judicial Retreat

In *Reynolds v. Superior Court*,[89] the California Supreme Court declared an end to judicially created notice of alibi procedure. At issue

83. 399 U.S. 78 (1970).

84. 9 Cal. App. 3d at 495-96, 88 Cal. Rptr. at 155. *Prudhomme* disapproved People v. Pike, 71 Cal. 2d 959, 455 P.2d 776, 78 Cal. Rptr. 672 (1969); Ruiz v. Superior Court, 275 Cal. App. 2d 633, 80 Cal. Rptr. 523 (1969); McGuire v. Superior Court, 274 Cal. App. 2d 583, 79 Cal. Rptr. 155 (1969); and People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966), to the extent those cases were inconsistent with the holding of that case. 2 Cal. 3d at 328, 466 P.2d at 678, 85 Cal. Rptr. at 134.

85. 9 Cal. App. 3d at 496-97, 88 Cal. Rptr. at 155-56.

86. 12 Cal. 3d 834, 837 n.1, 528 P.2d 45, 46 n.1, 117 Cal. Rptr. 437, 438 n.1 (1974).

87. *See, e.g.*, People v. Bais, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973), where the First District Court of Appeal reversed defendant's armed robbery conviction because the trial court had granted the prosecution's motion to discover statements made by alibi witnesses to a public defender's investigator.

88. In a case later withdrawn from publication, Justice Older attempted to harmonize the divergent results in the districts' applications of *Prudhomme* by explaining:

> [T]he statement in *Bais* that discovery must be denied if it will conceivably lighten the burden which the prosecution bears in "bringing about the conviction of the accused" is not to be taken literally. Impeaching matter is discoverable although impeaching the credibility of a defense witness aids the prosecution in bringing about a conviction. It is only if the statement contains "other non-impeaching collateral matter which might be of assistance to the prosecution in proving its case" that any question of self-incrimination is raised under *Prudhomme*.

People v. Cox, Crim. No. 22284 (Cal. App. Ct., 2d Dist., June 27, 1974) (opinion appearing at 40 A.C.A.3d 259 (1974) ordered withdrawn from publication by California Supreme Court Aug. 21, 1974).

89. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

was a trial court order which required the defendant to give to the state pretrial notice of the names and addresses of each of his alibi witnesses. The prosecution, in turn, was required to list the witnesses it would call to impeach the defendant's alibi witnesses.[90] The testimony of witnesses from either side whose identity had not been disclosed before trial would be excluded.[91] Citing "complex and closely balanced questions of Federal and State constitutional law," the court held that the trial court lacked authority to issue the order.[92]

The unanimous *Reynolds* decision did not apply *Prudhomme's* construction of the fifth amendment privilege against self-incrimination or declare that judicial notice of alibi orders were constitutionally void. Instead, the court reviewed the history of prosecutorial discovery[93] orders in California through *Prudhomme*, contrasted it with the apparent lack of concern for the privilege against self-incrimination shown by the United States Supreme Court, and concluded that California, as a result of *Prudhomme*, was "on record as being more solicitous of the privilege against self-incrimination than federal law currently requires."[94] The court concluded the order was an unauthorized exercise of the trial court's limited rule-making power.[95]

The *Reynolds* holding narrowly circumscribed judicial rule-making power. California courts, unlike jurisdictions in which the judicial branch of government is specifically granted the quasi-legislative power to enact rules of judicial procedure,[96] had no such power. Notice of

90. *Id.* at 836, 528 P.2d at 45-46, 117 Cal. Rptr. at 437-38. Note that the prosecution was not required to disclose the identity of those witnesses whom it intended to call to establish the defendant's presence at the scene of the crime. *But see, Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271, 292-95 (1974) (proposed rule 12.1).

91. 12 Cal. 3d at 836, 528 P.2d at 45-46, 117 Cal. Rptr. at 437-38. Neither the trial court nor the supreme court decided whether this preclusion sanction was intended to apply to the defendant's own testimony as well. Even staunch advocates of notice of alibi orders, however, have felt there was little or no justification for applying the preclusion sanction to bar the defendant's own alibi testimony. *See, e.g.*, LAW REVISION COMM'N, *supra* note 13.

92. 12 Cal. 3d at 837, 528 P.2d at 46, 117 Cal. Rptr. at 438.

93. *Id.*

94. *Id.* at 837-43, 528 P.2d at 46-51, 117 Cal. Rptr. at 438-43.

95. The court admitted its power to create judicial rules necessary to protect constitutional rights but hesitated to employ its rule-making power to create "judicial procedures which are in no way required by higher law but which may seem to some socially desirable . . . ." *Id.* at 846, 528 P.2d at 52, 117 Cal. Rptr. at 444.

96. *See, e.g.*, 18 U.S.C. § 3771 (1970) (giving the United States Supreme Court the power to promulgate rules of procedure, subject to congressional approval); ARIZ. CONST. art. VI, § 5.5 (giving the Arizona Supreme Court power to make all rules of procedure); N.J. CONST. art. VI, § 2(3) (supreme court to make all rules govern-

alibi orders, the court concluded, while socially desirable from the standpoint of preventing surprise and assisting the state's prosecutorial function, were not among the courts' inherent powers.[97]

III. CONSTITUTIONAL ISSUES PRESENTED BY NOTICE OF ALIBI RULES

Reynolds effectively concluded prior judicial controversy and uncertainty as to the validity of judicial notice of alibi procedures, but it offered neither proposals nor guidance as to a statutory notice procedure. By failing to rule upon the constitutional infirmities of notice of alibi procedures, the court did not determine what type of notice procedure would comport with *Prudhomme's* fifth amendment mandate that court-ordered disclosures must not "possibly tend to incriminate."[98] The issue of the scope of prosecutorial discovery had been initiated in *Jones*.[99] *Prudhomme* had limited *Jones'* potentially wide-open rule of disclosure by emphasizing the privilege against self-incrimination;[100] however, no court has articulated or specifically applied *Prudhomme's* standard to notice of alibi procedures. Thus, legislative drafters must examine the constitutional issues in order to develop a statutory notice procedure which will comport with *Prudhomme*, yet retain the utility of a notice procedure.

A. Privilege Against Self-Incrimination

Opponents of notice of alibi procedures have long maintained that the procedures violate the accused's constitutional privilege against self-incrimination.[101] Justice Bradley, writing for the Supreme Court in 1886, declared unequivocally that a discovery order compelling an accused to furnish information to be used to convict himself of a crime was "contrary to the principles of a free government."[102] Requiring the

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ing practice and procedure); PA. CONST. art. V, § 10(c) (supreme court to make such rules as are consistent with constitution).

97. 12 Cal. 3d at 849-50, 528 P.2d at 55, 117 Cal. Rptr. at 447.

98. *See* notes 69-70 *supra* and accompanying text.

99. For a discussion of the application of *Jones* in the context of prosecutorial discovery see generally D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY 900-02 (2d ed. 1972).

100. *See* note 69 *supra* and accompanying text.

101. U.S. CONST. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The privilege, embodied in the fifth amendment and directly applicable to the states through the fourteenth amendment, forbids the prosecution from compelling the defendant to be a witness against himself. U.S. CONST. amend. XIV; Malloy v. Hogan, 378 U.S. 1 (1964).

102. Now it is elementary knowledge that one cardinal rule the court of chancery

defendant to inform the prosecution of his intent to rely upon an alibi and to furnish the names and addresses of alibi witnesses to be called forces the defendant to assist in his own prosecution.[103] The information which the defendant furnishes to the state alerts the prosecution to the alibi issue, permitting the prosecution to strengthen its case against the accused. The state is able to further investigate its case and locate witnesses who will rebut the alibi defense and/or impeach the defendant's alibi witnesses.

Proponents of notice of alibi procedures contend that, since the defendant freely elects to rely upon an alibi defense, there is no compulsion under the order other than to accelerate the timing of the disclosure.[104] Procedural notice of alibi is nothing more than a pleading requirement conditioning the alibi plea upon prior notice. Moreover, disclosures required by alibi orders are evidentiary, not testimonial, and the fifth amendment does not prevent such compulsory disclosures even if they prove incriminatory.[105] Furthermore, proponents closely reason that an alibi defense is exculpatory rather than inculpatory; therefore, there is no self-incriminatory effect to the rule.[106] Finally, the proponents rest their argument with the observation that the salutory

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> is never to decree a discovery which might tend to convict the party of crime or to forfeit his property. And any compulsory discovery by extorting the party's oath or compelling production of his private books and papers to convict of a crime . . . is contrary to the principles of a free government.

Boyd v. United States, 116 U.S. 616, 631-32 (1886).

103. *See generally* Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965); Smith & McCollum, *Counterdiscovery in Criminal Cases: Fifth Amendment Privileges Abridged*, 54 A.B.A.J. 256 (1968); Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 910-17 (1968).

104. *See, e.g.*, People v. Schade, 292 N.Y.S. 612 (Queens County Ct. 1936), which upheld New York's early notice of alibi law, reasoning, *inter alia*, that such a rule merely directs a defendant to give information where he intends to rely upon the defense of alibi.

105. The United States Supreme Court in a series of decisions has established that the privilege against self-incrimination applies only to testimonial as opposed to evidentiary disclosures and thus does not apply to such evidentiary activities as compelling the defendant to try on clothing allegedly worn by the suspect (Holt v. United States, 218 U.S. 245 (1910)), to submit to a line-up and give voice samples (United States v. Wade, 388 U.S. 218 (1967)), to submit to a blood test (Schmerber v. California, 384 U.S. 757 (1966)), or to provide specimens of handwriting, (Gilbert v. California, 388 U.S. 263 (1967)).

106. In People v. Schade, 292 N.Y.S. 612 (Queens County Ct. 1936), the court per Judge Colden remarked:

> Certain it is that no innocent person can in any manner be injured by this [notice of alibi] statute. It is equally certain that the activities of criminals in manufacturing alibi defenses will be severely checked . . . .

Id. at 619.

effects of such rules so far outweigh the self-incrimination privilege that the procedures should be upheld under a balancing analysis.[107]

Most courts have accepted the proponents' arguments and have ruled that notice of alibi procedures, whether statutory or judicially promulgated, do not violate the privilege against self-incrimination.[108] The rationales advanced are not entirely convincing because a notice of alibi order does compel the defendant to assess in advance of trial whether he will need to employ an alibi defense. He cannot elect to wait for trial, view the effect of the prosecution's case, and then assert this defense.[109] Furthermore, disclosures required by the rule would appear testimonial, rather than evidentiary, because it is the accused who must prepare a list of names, addresses, and, in some jurisdictions, the intended testimony of his alibi witnesses.[110] Finally, it is by no means certain that disclosure of an honest alibi defense cannot be incriminatory; it may be that the state, with the time to prepare afforded by notice requirements, will be able to so effectively attack the credibility of the accused's alibi witnesses or to intimidate the defendant's witnesses as to destroy their effectiveness.[111] Conversely, the alibi witnesses may prove to be sources of information concerning other unrelated and uncharged criminal activity. For these reasons, it is apparent that notice of alibi procedures are not entirely devoid of self-incriminatory consequences.

The United States Supreme Court in *Williams v. Florida*[112] summarily dealt with the self-incrimination issue, denying that alibi notice violat-

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107. Comment, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135, 140 (1963) (noting that the privilege has lost much of its utility in a modern context where the criminal defendant usually elects to testify and thereby submits to cross-examination because his failure to speak appears suspicious).

108. *See, e.g.*, State v. Angeleri, 241 A.2d 3, 5 (N.J. 1968); People v. Schulenberg, 112 N.Y.S.2d 374 (App. Div. 1952); State v. Thayer, 176 N.E. 656 (Ohio 1931); Simos v. Burke, 163 N.W.2d 177, 180 (Wis. 1968). *See also* Williams v. Florida, 399 U.S. 78 (1970).

109. *See, e.g.*, Jones v. Superior Court, 58 Cal. 2d 56, 66, 372 P.2d 919, 925, 22 Cal. Rptr. 879, 885 (1962) (Peters, J., dissenting):

> Until today, in California, a defendant could weigh his proposed defense against the prosecution's case, and not make up his mind until he heard the strength or weakness of the case against him whether he would rely on a straight not guilty defense or urge an affirmative defense.

110. *See, e.g.*, ARIZ. R. CRIM. P. 15.2(c) (1974); IOWA CODE ANN. § 777.18 (1950).

111. This point was recognized by Justice Burke:

> It requires no great effort of imagination to conceive of a variety of situations wherein the disclosure of the expected testimony of defense witnesses could easily provide an essential link in a chain of evidence underlying the prosecution's case in chief.

Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970).

112. 399 U.S. 78, 83 n.13 (1970).

ed the privilege. Noting that nothing in the Florida notice of alibi statutory procedure forced the defendant to adhere to an alibi defense if he wished to later change strategy,[113] Justice White found no more compulsion to make pretrial disclosure than would be present at trial[114] were the accused to rely upon an alibi. The fifth amendment did not enable the accused to wait until the prosecution presented its case "before announcing the nature of his defense."[115] In concluding its decision, the Court noted that even without a notice rule, the prosecution could move for a continuance to further investigate should an unexpected alibi defense be asserted, and therefore it was permissible under the fifth and fourteenth amendments to accomplish the same result through pretrial discovery.[116] The *Williams* holding on the self-incrimination issue has precluded this avenue of constitutional challenge to notice of alibi procedures.[117]

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113. *Id.* at 84.

114. *Id.* at 84-85.

115. *Id.* at 85.

116. *Id.* at 86. The dissent in *Williams*, written by Justice Black in which Justice Douglas joined, opposed the majority's treatment of the self-incrimination issue. *Id.* at 106-16. They reasoned that at the pretrial phase, the defendant could only guess what the state's case might be and the notice rule forced him to gamble as to the desirability of pleading alibi. *Id.* at 109. Furthermore, the procedure could prejudice the defendant even should he later abandon the defense, because it compelled him to disclose names and addresses of persons having knowledge about the defendant and his activities. *Id.* at 110. It was therefore error to assume the accused's pretrial disclosure through the notice rule was the same as requiring the defendant to plead alibi in his case in chief because he had not yet seen the prosecution's case. *Id.* at 110. To this extent, Justice Black's opinion was similar to Justice Peters' dissent in Jones v. Superior Court, 58 Cal. 2d 56, 62-68, 372 P.2d 919, 922-26, 22 Cal. Rptr. 879, 882-86 (1962). *See also* People v. Talle, 111 Cal. App. 2d 650, 667, 245 P.2d 633, 643 (1952) (terming any effort to compel the accused to give testimony prior to the establishment of a prima facie case against him a "shocking and prejudicial invasion of appellant's constitutional rights"). The *Williams* dissent concluded that the notice procedure violated the privilege against self-incrimination and could not be justified on the grounds that it facilitated the ascertainment of truth. 399 U.S. at 113-14.

117. Where the issue has been raised, state courts have declined to rule that notice of alibi orders violate the state's constitutional or statutory right to be heard and the right to remain silent. *See, e.g.*, Sikora v. District Court, 462 P.2d 897 (Mont. 1969) (holding that the notice order merely required disclosure of information to be used at trial). The arguments advanced by both sides are the same as those made with respect to the self-incrimination issue discussed *supra*. *See generally* Annot., 45 A.L.R.3d 958, 971 (1972). The results have been the same whether the asserted right was guaranteed by the state constitution or by a state statute. *Compare* Simos v. Burke, 163 N.W.2d 177 (Wis. 1968) (holding that Wisconsin's notice of alibi statute did not violate the defendant's state constitutional right to be heard), *with* Smetana v. State, 2 N.E.2d 778 (Ohio App. 1936) (holding, *inter alia*, that where the right to be heard was created by statute, it could similarly be limited by a subsequent statute prescribing notice of alibi rules).

B. Due Process

Due process attacks have been made against notice procedures based upon the fundamental unfairness of requiring the accused to reveal information in advance of trial thus assisting the prosecution in meeting its burden of proof.[118] To require the defendant to make detailed disclosures where the prosecution is under no reciprocal duty[119] to furnish information to the accused, and to require advance disclosure as to the nature of his defense, is to require the defendant to assist in the prosecution's task of establishing each element of the crime charged.

Williams quickly disposed of the due process challenge to Florida's notice of alibi rule.[120] The court first noted that the Florida procedure, unlike that of many other jurisdictions, was "carefully hedged with reciprocal duties requiring state disclosures to the defendant" and advanced important state interests.[121] The court concluded that a procedure which furthered the truth-finding function of the trial process by permitting both the defendant and the state to investigate certain facts relating to guilt or innocence was not fundamentally unfair.[122] The due process issue received further treatment by the United States Supreme Court in *Wardius v. Oregon*.[123] Writing for the majority, Justice Marshall invalidated Oregon's notice of alibi statute on due process grounds for failure to expressly require reciprocal disclosures by the

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118. *See* U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."; U.S. CONST. amend. XIV, § 1: "[N]or shall any state deprive any person of life, liberty or property, without due process of law . . . ." The due process issue presented by notice of alibi procedures is, to this extent, akin to the fundamental fairness procedural guarantees set forth in Rochin v. California, 342 U.S. 165 (1952).

119. The concept that requiring reciprocal disclosures from the state and the accused would satisfy due process is based on a waiver rationale. It is reasoned that the accused could elect to waive his constitutional protections to obtain discovery from the prosecution, and that the prosecution's right to obtain discovery from the accused is conditioned upon prior disclosures given to the defense. 39 F.R.D. 317 (1966).

The waiver rationale, used to satisfy due process, has been challenged by critics of prosecutorial discovery, including Justice Douglas who questioned whether it was any less a violation of the accused's constitutional rights that his right to conduct discovery was "conditioned on the abandonment of constitutional rights." *Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure*, 39 F.R.D. 69, 277 (1966) (Douglas, J., dissenting in part).

120. 399 U.S. at 81-82.

121. "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh hour defense is both obvious and legitimate." *Id.* at 81.

122. *Id.* at 82.

123. 412 U.S. 470 (1973).

state and the defendant.[124] While heralding the beneficial impact of notice of alibi and admitting that due process places no limits on the scope of discovery available to both sides, *Wardius* held that due process mandates a "balance of forces between the accused and the accuser."[125] Justice Marshall reduced due process to its essence in holding that "it was fundamentally unfair to require the defendant to divulge the details of his own case" and then subject him to the risk of surprise concerning refutation of the very evidence he had been obliged to disclose.[126] While the opinion did not elaborate upon the extent of reciprocal disclosures required, Justice Marshall did state that the reciprocity demanded by due process included more than "merely informing the defendant of the time and place of the crime."[127]

The *Wardius* decision had an immediate impact upon those states with notice of alibi statutes or rules that did not provide reciprocal discovery rights.[128] It was not sufficient that existing notice statutes might be judicially interpreted to provide reciprocal rights; *Wardius* had specifically rejected this argument.[129] Many statutes were promptly amended or rewritten.[130] In long term effect, however, *Wardius* did not constitute a victory for opponents of notice of alibi procedures because, as Justice Douglas maintained, although the procedure prescribed by the Court increased the evidence available to both sides, it altered the balance between the accused and the state "as struck by the Constitution."[131]

C. *The Right to Compulsory Process*

The sixth amendment guarantees the accused the right to have compulsory process to summon witnesses.[132] The clause has been construed

124. *Id.* at 476-79.

125. *Id.* at 474.

126. *Id.* at 476.

127. *Id.* at 478 n.12.

128. In addition to Oregon, virtually all states with notice of alibi rules failed to provide expressly for reciprocal discovery obligations. *See, e.g.*, IOWA CODE ANN. § 777.18 (1950); KAN. STAT. ANN. § 62-1341 (1964); MINN. STAT. ANN. § 630.14 (1947); OHIO REV. CODE ANN. § 2745.58 (1954). Following *Wardius*, New York declared its existing notice of alibi procedure unconstitutional (People v. Bush, 308 N.E.2d 451 (N.Y. 1973)) and Pennsylvania repealed PA. RULE CRIM. PROC. § 312 (Supp. 1974).

129. 412 U.S. at 477.

130. Following the decision in *Bush* (see note 128 *supra*), New York enacted a new statute expressly providing for reciprocal disclosures aimed at meeting the *Wardius* requirement. N.Y. CRIM. PROC. LAW § 250.20 (McKinney Supp. 1974). To date, other jurisdictions have not followed suit.

131. 412 U.S. at 479-80 (Douglas, J., concurring).

132. U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses . . . ."

by the United States Supreme Court to afford the defendant in state and federal prosecutions the right to present all relevant and material testimony and evidence in his behalf.[133] Notice of alibi statutes and rules in most state courts and rule 12.1 in the federal district courts permit the trial court, in its discretion, *to preclude* the defense presentation of the testimony of *any* alibi witness whose identity has not been disclosed in advance to the prosecution.[134] Notice of alibi opponents attack this sanction as an unconstitutional abridgment of the defendant's right to have compulsory process.[135] The sixth amendment at minimum dictates that less drastic sanctions be employed to effect compliance with disclosure orders, such as granting the state a continuance, imposing criminal contempt sanctions on the accused or his attorney, or permitting comment upon the defendant's failure to comply.[136]

State courts have held that preclusion of the defendant's alibi evidence to penalize non-compliance does not violate the right to have compulsory process. The Arizona Supreme Court in *State v. Dodd*[137] concluded that its preclusion sanction merely prescribed conditions under which an alibi witness could testify, and did not prevent a defendant from compelling attendance of witnesses. The Pennsylvania Supreme Court in *Commonwealth v. Vecchiole*[138] determined that the sanction merely imposed reasonable conditions for the presentation of alibi witnesses. Such decisions are based in part upon recognition that only possible preclusion of the alibi defense is sufficiently severe to assure compliance with the disclosure order.[139]

The United States Supreme Court has not ruled upon the constitutional validity of the preclusion sanction present in federal and in most state alibi notice procedures.[140] Most defendants elect to comply with

133. Washington v. Texas, 388 U.S. 14 (1967), established that the compulsory process clause of the sixth amendment afforded the accused in a state criminal proceeding the right to present all relevant and material testimony on his behalf.

134. *See, e.g.*, FED. R. CRIM. P. 12.1. The rule, however, does not bar the accused himself from presenting alibi testimony regardless of his failure to give notice. As for the exclusion of the other witnesses, the Advisory Committee felt that the sanction was essential to the success of the procedure. *See Proposed Amendments to the Federal Rules of Criminal Procedure Rule 12.1, Advisory Committee Note*, 62 F.R.D. 271, 294 (1973).

135. *See, Preclusion Sanction, supra* note 80, at 1352.

136. *Id.* at 1364.

137. 418 P.2d 571 (Ariz. 1966).

138. 224 A.2d 96 (Pa. 1966).

139. *See, e.g.*, LAW REVISION COMM'N, *supra* note 13, at J-17 (stating that the right to compulsory process is not unlimited in scope and, in any event, constitutional infirmities would be overcome by making preclusion discretionary).

140. The issue of preclusion was raised in *Williams*. *See* Brief for Virgil Jenkins as

the notice order when it is issued[141] and raise constitutional issues on appeal or else to challenge the notice before complying by use of an extraordinary writ. Defense attorneys are reluctant to deliberately withhold the names of alibi witnesses and have their testimony excluded from trial in the hope that a resulting conviction will be reversed at some distant date upon appeal to the nation's highest court.[142] The continued reluctance is particularly understandable in view of the United States Supreme Court's recommendation that Congress adopt rule 12.1's notice of alibi provisions, which include a discretionary preclusion sanction.[143] The Court's decision to propose a comprehensive notice of alibi rule for federal courts and the subsequent enactment of rule 12.1[144] support the belief that the Court not only favors notice of alibi procedure rules, but accepts preclusion as a necessary sanction to assure compliance with alibi orders.[145]

D. Equal Protection

Illinois' notice of alibi rule[146] was challenged as violative of the accused's right to equal protection.[147] In *People v. Halliday*,[148] the defendant urged that the rule discriminated unfairly against defendants with alibi defenses by compelling them to make pretrial disclosures not required of other defenses. The Illinois Supreme Court rejected the argument, holding there was reasonable justification for the special classification based upon the ease with which alibi defenses may be fabricated and the surprise potential of unanticipated alibi defenses.[149]

Amicus Curiae at 17-26, Williams v. Florida, 399 U.S. 78 (1970). The Court, however, found it unnecessary to decide the validity of the sanction because the defendant had elected to comply with the trial court order. *See* 399 U.S. at 83 n.14.

141. Many appellate challenges to the orders in California were made in the form of extraordinary writs. *See, e.g.*, Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974). Only rarely did the defendant or his counsel ignore the order and risk contempt or preclusion. *See, e.g., In re* Marciano, 2 Cal. 3d 329, 466 P.2d 679, 85 Cal. Rptr. 135 (1970).

142. *See, e.g., Preclusion Sanction, supra* note 80, at 1346.

143. *See Proposed Amendments to the Federal Rules of Criminal Procedure Rule 12.1, Advisory Committee Note*, 62 F.R.D. 271, 292 (1973); FED. R. CRIM. P. 12.1(d).

144. The new federal alibi procedure was enacted on July 31, 1975, along with amendments and other additions to the Federal Rules of Criminal Procedure. Pub. L. No. 94-64, 89 Stat. 370 (July 31, 1975).

145. *See Proposed Amendments to Federal Rules Criminal Procedure Rule 12.1, Advisory Committee Note*, 62 F.R.D. 271, 293-95 (1973).

146. ILL. REV. STAT. § 114-14 (1968) (held unconstitutional in People v. Cline, 311 N.E.2d 599 (Ill. 1974), for failure to provide reciprocal discovery rights).

147. U.S. CONST. amend. XIV, § 1.

148. 265 N.E.2d 634 (Ill. 1970).

149. *Id.* at 635.

The equal protection argument is not likely to be well received in other jurisdictions. The alibi defense is distinct from other affirmative defenses such as insanity, diminished capacity, and former jeopardy, and this special character of the alibi defense justifies its special treatment among affirmative defenses.[150]

IV. CALIFORNIA EFFORTS TO PASS NOTICE OF ALIBI RULES

Prudhomme has made it difficult to formulate a statutory notice of alibi procedure because it raised the privilege against self-incrimination as a potential barrier to all prosecutorial discovery by limiting such discovery to matters which "cannot possibly have a tendency to incriminate the [defendant]."[151] This high regard for the privilege against self-incrimination, expressly reaffirmed in *Reynolds*, contrasts with the summary treatment of the privilege in other jurisdictions.[152]

Reynolds is a clear mandate for legislative enactment of a notice of alibi procedure, but the legislative history of prior attempts indicates a general reluctance to do so. The initial effort to enact a statutory notice procedure in California was made in 1926 with the support of the State Bar.[153] The 1931 *California Crime Commission Report* voiced strong support for a statute, but no measure was enacted.[154] In 1961, the California Law Revision Commission undertook an extensive study of alibi rules, recommending adoption of a statutory scheme analogous to that later established under rule 12.1 of the Federal Rules of Criminal Procedure.[155] Bills were introduced in both the Senate and the Assembly in response to the Commission's report, yet neither measure passed in the face of strong opposition from the State Bar, which feared intimidation of defense witnesses by the prosecution would result from

150. *See* note 11 *supra* and accompanying text.

151. Although no court to date has so construed *Prudhomme*, the language of the decision is vague enough to support arguments of both advocates and opponents of the notice procedure. Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 677-78, 85 Cal. Rptr. 129, 133-34 (1970).

152. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 82 (1970). *See also* Annot., 45 A.L.R.3d 958 (citing cases in other jurisdictions holding that notice of alibi procedure does not infringe upon the privilege against self-incrimination).

153. CAL. BAR ASSOC. PROC. 248 (1925-1926). Chief Justice Earl Warren, then serving as Alameda County District Attorney, endorsed the proposal. See note 14 *supra*. 1931 CAL. CRIME COMM'N REP. 10, 2 Appendix to J.S. SEN. & ASSEM. (1933 Reg. Sess.).

154. *Id.*

155. Wilson, *A Study Relating to Notice of Alibi in Criminal Actions*, in LAW REVISION COMM'N, *supra* note 13, at J-9.

the advance disclosures.[156] Subsequent efforts to enact the Law Revision Commission's draft have also been unsuccessful.[157]

The 1961 Law Revision Commission's proposed statutory notice of alibi procedure meets the federal constitutional requirements set forth in *Williams* and *Wardius*[158] and provides a model of one type of procedure that could be enacted. It permits the prosecution to initiate the disclosure process by serving the accused with a written demand for notice of defendant's intent to assert an alibi defense.[159] The prosecution's written demand is accompanied by a list containing the names of all witnesses upon whom the prosecution intends to rely to establish defendant's presence at the scene of the crime.[160] In return, the defendant's notice gives his precise location at the date and time of the offense and the name and address of each individual upon whom the defendant intends to rely at trial to establish his alibi defense.[161] Failure to comply with the notice requirement by either party, permits the trial court to exclude the testimony of any witness whose name is not disclosed, with the exception of the defendant himself.[162]

Because of the reluctance of *Reynolds* to set forth constitutional guidelines and give substantive meaning to *Prudhomme's* language proscribing all possible self-incriminatory consequences of compelled prosecutorial discovery, it is uncertain whether the Law Revision Commission's proposal would pass constitutional muster in California.

In *Scott v. State*,[163] a decision elaborately noted by the *Reynolds'* court,[164] the Alaska Supreme Court structured a notice of alibi procedure far more restricted than that proposed by the California Law Revision Commission's 1961 draft. Alaska's comprehensive prosecutorial discovery rule had required the defendant to disclose the names, addresses, and statements of *all* defense witnesses with special advance

156. St. Bar Comm. on Crim. Law and Proc., *Criminal Law and Procedure*, 36 CAL. STATE BAR J. 480, 487 (1961).

157. *See, e.g.*, S. 1387, 2 SEN. J. 2592-94 (1970 Reg. Sess.) (an amended version of Senator Cologne's bill that was virtually a verbatim text of the Law Revision Commission's proposal).

158. The Commission's proposal provides for reciprocal disclosures from both defense and prosecution. For analysis of the Commission's research see LAW REVISION COMM'N, *supra* note 13, at J-8 to J-19.

159. *Id.* at J-5.

160. *Id.* at J-7.

161. *Id.* at J-7, J-8.

162. *Id.*

163. 519 P.2d 774 (Alas. 1974).

164. *See* 12 Cal. 3d at 842, 528 P.2d at 49-50, 117 Cal. Rptr. at 441-42.

notice required of alibi witnesses.[165] The state supreme court, faced with a challenge to the rule based upon, *inter alia*, the privilege against self-incrimination, concluded that the privilege prevented the trial court from ordering any testimonial disclosure from the accused.[166] The defendant could thus be required to plead his alibi defense before trial, but he could not be compelled to assist the prosecution by providing it with names and addresses of his witnesses.

Scott presents an appealing solution to the problem of how to reconcile *Prudhomme*'s concern for the privilege against self-incrimination with the need for pretrial notice of alibi. The disclosure required presents a minimal risk of self-incrimination, yet permits the prosecution to anticipate an alibi defense at time of trial. There is no danger that the defendant's alibi witnesses will be harassed by zealous prosecution assistants or that collateral incriminatory materials will be uncovered. The right of the defendant to remain silent until the prosecution has argued its case, where such right exists by statute or constitutional provision, is impaired; however, the potential for self-incrimination is tremendously reduced. While *Scott's* notice procedure is far more akin to a procedural pleading requirement than a discovery tool, notice of alibi, as originally conceived, was never intended to serve as a discovery device.[167] Because the Law Revision Commission so closely approximates recently enacted rule 12.1 of the Federal Rules of Criminal Procedure,[168] it is more probable that the legislature will enact it or a similar proposal, rather than the *Scott*-suggested measure, should it decide that a statutory scheme is needed.

V. CONCLUSION

California's experience with notice of alibi procedure is unique in many respects. It alone elected to implement the procedure by judicial decision. It did so almost inadvertently, beginning with the principle that the state was entitled to discover any information which the accused intended to disclose at trial. The general assertion was then greatly pared down by *Prudhomme's* recognition that the privilege against self-

165. ALAS. R. CRIM. P. 16(c).

166. 519 P.2d at 787.

167. *See* note 26 *supra* and accompanying text.

168. *Compare* LAW REVISION COMM'N, *supra* note 13, at J-7, J-8 *with* FED. R. CRIM. P. 12.1. Both measures are carefully hedged with reciprocal disclosure requirements, neither precludes the defendant's own alibi testimony regardless of his failure to give notice, and both permit the trial court in its discretion to preclude the prosecution or defense alibi witnesses for whom no notice has been given.

incrimination bars compelled disclosures that might aid the prosecution in establishing the defendant's guilt. Unable to satisfactorily apply this rule specifically to its notice of alibi procedure and unwilling to retreat from the rule, the court in *Reynolds* simply abandoned the procedure.

What remains is an unsteady silence. On one hand the California Supreme Court has deferred to the legislature to enact a statutory notice of alibi procedure. On the other hand, the court has declined to rule upon the constitutional validity of the principle of notice of alibi orders. *Prudhomme*'s language was broad enough and sufficiently equivocal to support either an affirmative or negative ruling on the abstract question of whether the privilege against self-incrimination includes the right of the accused to remain absolutely silent until the prosecution's case has been presented.

The statutory solution will depend upon the type of disclosure the accused is required to make. Under *Prudhomme*, the defendant cannot, within the confines of the privilege against self-incrimination, be compelled to "assist the prosecution in proving its case." Yet the United States Supreme Court in *Williams* said there is no constitutional right to surprise the prosecution. Between these two extremes lies a middle ground of compelled disclosure limited to a mere statement of intent to assert an alibi. The prosecution is thus provided with notice, the accused does not become the state's assistant, and the constitutional balance between the accused and the state remains most nearly unimpaired.

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