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## ADVANCE NOTICE OF ALIBI\*

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In the following article, Mr. Epstein observes that there is considerable current interest in statutes requiring the defendant in a criminal case to give advance notice to the prosecution when he intends to use alibi as a defense. What is the history of success or failure of alibi rules in jurisdictions which have adopted them? How do the existing rules differ? What specific terms thereof seem best suited to accomplish the purpose of the statutes? And what legal issues have been raised pertaining thereto? In an attempt to answer these and related questions, Mr. Epstein has not only reviewed the relevant constitutional, statutory, and case law, but has also conducted a field survey in jurisdictions with alibi rules to ascertain the nature of their operation.—EDITOR.

Pretrial discovery in civil suits is now an accomplished fact. Its philosophy—preventing surprise and improving fact ascertainment—is as applicable in criminal as in civil cases. Yet, pretrial discovery in criminal cases is practically nonexistent.<sup>1</sup>

Defendants seeking discovery have been met with three arguments: (1) no common law basis;<sup>2</sup> (2) fear of perjury and intimidation of witnesses;<sup>3</sup> and (3) “unfairness” to the prosecution.<sup>4</sup> While the first two of these have been adequately answered,<sup>5</sup> the third, because of the self-incrimination protection, remains a substantial obstacle. Neither prosecutors nor trial judges will agree to criminal discovery unless it is a two-way street; thus provisions must be made for prosecutors to receive information from defendants before they will agree to give it.

This paper concerns one of these provisions—

advance notice to the prosecution when defendant intends to present an alibi at trial.

At common law all defenses except *autrefois* acquit, *autrefois* convict, and former pardon were admissible under a plea of not guilty.<sup>6</sup> As a result, a difficult problem faced the prosecutor, who could not be prepared to meet any and all defenses. In 1887, Scotland tried to rectify this situation and required that the defendant give notice when his defense would be alibi, insanity at the time of the act, commission of the act by another named and designated, self-defense, sleep or temporary mental disassociation, or hysterical amnesia.<sup>7</sup> In 1920, Professor Robert W. Millar proposed a similar rule for American law.<sup>8</sup> He singled out alibi as the area in greatest need of change. Alibi, he observed, was “one of the main avenues of escape of the guilty”; moreover, he noted, a great amount of unpunished perjury was committed each year in connection with the defense.<sup>9</sup>

\* Acknowledgement is made to Professor Caleb Foote of the University of Pennsylvania Law School and to Judge Joseph Sloane, Chairman, and Martin Vinikoor, Executive Director, of the Criminal Procedural Rules Committee of the Supreme and Superior Courts of Pennsylvania for the opportunity to write this article and for their aid and guidance.

<sup>1</sup> See Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 CALIF. L. REV. 56 (1961); Goldstein, *The Status of the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149 (1960); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960).

<sup>2</sup> *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

<sup>3</sup> *State v. Tune*, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953).

<sup>4</sup> *State v. Rhodes*, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910).

<sup>5</sup> *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

<sup>6</sup> Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L. & C. 344, 350 (1920).

<sup>7</sup> Defendant was not competent to give testimony or state a defense unless notice was given at a preliminary hearing or upon cause shown, two days before trial. Also, he could not use other witnesses or exhibits unless written notice of the names of the witnesses and the designation of exhibits was given three days before the jury was sworn. If the defendant showed a prior inability, the court was to allow the witnesses or exhibits and continue or postpone the case.

The Summary Jurisdiction (Scotland) Act, 1908, 8 Edw. VII, c65, §35, is a similar provision relating only to alibis in summary proceedings. Defendant must give the time, place, and witnesses he will use prior to the examination of the first witness for the prosecution. Upon such notice the prosecution is entitled to an adjournment of the case.

<sup>8</sup> Millar, *supra* note 6, at 350.

<sup>9</sup> *Ibid.*

Other writers in the field also singled out alibi for special attention,<sup>10</sup> and their efforts first bore fruit in 1927 when Michigan passed the first statute dealing with alibi.<sup>11</sup> Ohio followed in 1929,<sup>12</sup> and by 1942 twelve other jurisdictions had adopted some version of it.<sup>13</sup> In December, 1962, an alibi rule was recommended for adoption as a Federal Rule of Criminal Procedure,<sup>14</sup> and such a rule has also been submitted to the Supreme and Superior Courts of Pennsylvania.<sup>15</sup> It is this apparent rebirth of interest in a rule requiring advance notice of alibi, plus the importance such a rule bears to the larger context of criminal discovery, which has prompted the investigation reported in this paper.

Because the case law is not informative, a field research project was conceived to ascertain the utility of this rule. A questionnaire, set out in Appendix A, was sent to prosecuting attorneys in each of the 14 jurisdictions having this rule. The eight most populous counties in New York and New Jersey and the seven most populous counties in the other jurisdictions were chosen. Seventy-nine responses were received, and 76 of them supplied data. The percentage figures from these responses are included with the questionnaire.

The data gathered are referred to at appropriate places throughout the paper and are also summarized in Appendix A for easy reference. Repre-

sentative cases from jurisdictions with alibi rules are set forth in Appendix B.

#### HISTORY OF THE ALIBI RULE

Fourteen states adopted some version of this rule between 1927 and 1942.<sup>16</sup> In 1952 a model provision was adopted by the National Conference of Commissioners on Uniform State Laws,<sup>17</sup> and it has been recommended by various Attorneys-General of the United States<sup>18</sup> as well as various national committees and commissions.<sup>19</sup> Along with this history of success of the alibi rule, however, run several instances of its failure.

In 1926 it was recommended by the California State Bar Association and endorsed by the Attorney General of California and the California Crime Commission, but it was defeated in the California Assembly in 1931.<sup>20</sup> In New York its rejection in four successive legislative assemblies, between 1931 and 1935, brought forth a flow of editorials and articles in the *Panel*, a local publication concerned with criminal law.<sup>21</sup> Perhaps because of them, it was passed in 1935.

The rule was introduced in both the United States Senate and House of Representatives in 1939. Both bills were referred to committee and were never reported out.<sup>22</sup> In 1944 the United States Supreme Court struck two alternate alibi provisions from the then proposed Federal Rules of Criminal Procedure. An unresolved split over the terms of the rule in the committee submitting these rules to the Court probably caused this action.<sup>23</sup>

The rule was next considered in Illinois in 1947, where a bill to adopt it was defeated in the Illinois House Judiciary Committee. The bill was reintro-

<sup>10</sup> Burdick, *Possibility of Improvement by Statutory Changes and Constitutional Amendments Affecting Procedure*, 11 A.B.A.J. 510 (1925); Willoughby, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 450-51 (1929). See also *Criminal Law Recommendations to State Bar Associations* IV(b), 59 A.B.A. REP. 112, 129 (1934); *Committee on Jurisprudence and Law Reform, House of Delegates (Second Session, 1939)*, 25 A.B.A.J. 657, 661; *UNIFORM RULES CRIM. PROC.* §26 (1952).

<sup>11</sup> MICH. STAT. ANN. §§28.1043, 28.1044 (1954).

<sup>12</sup> OHIO REV. CODE ANN. §2945.58 (Page, 1953).

<sup>13</sup> Arizona Supreme Court Rule of Criminal Procedure §192; IND. ANN. STAT. §§9-1631, 9-1632, 9-1633 (1956); IOWA CODE ANN. §777.18 (1958); KAN. GEN. STAT. ANN. §62-1341 (1949); MINN. STAT. ANN. §630.14 (1947); N.J. SUPERIOR AND COUNTY COURT CRIMINAL PRACTICE RULE 3:5-5 (1948); N.Y. CODE CRIM. PROC. §295-L (1935); OKLA. STAT. ANN. tit. 22, §585 (1937); S.D. CODE 34.2801 (1939); UTAH CODE ANN. 77-22-17 (1953); VT. STAT. ANN. tit. 13, §6561, 6562 (1958); WIS. STAT. ANN. §955.07 (1958).

<sup>14</sup> ADVISORY COMMITTEE ON CRIMINAL RULES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Rule 12 (a) (Dec. 1962).

<sup>15</sup> SUPREME AND SUPERIOR COURTS OF PENNSYLVANIA, CRIMINAL PROCEDURAL RULES COMMITTEE, PROPOSED RULE 312 (Feb. 1963).

<sup>16</sup> In chronological order they are: Michigan, 1927; Ohio, 1929; New Jersey, 1934; Indiana, 1935; Kansas, 1935; Minnesota, 1935; New York, 1935; Oklahoma, 1935; South Dakota, 1935; Utah, 1935; Vermont, 1935; Wisconsin, 1935; Arizona, 1940; Iowa, 1941.

<sup>17</sup> *UNIFORM RULES CRIM. PROC.*, §26 (1952).

<sup>18</sup> ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (Cummings): 1 (1933); 2 (1936); 11 (1937); 9 (1938). *Id.* (Murphy): 7 (1939).

<sup>19</sup> NAT'L COMM'N OF LAW OBSERVANCE AND ENFORCEMENT (Wickersham Commission), REPORT ON CRIMINAL PROCEDURE 47 (1931); PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 453 (1934).

<sup>20</sup> Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435, 437 (1934).

<sup>21</sup> E.g., *Elect Assemblymen Who Will Pass the Alibi Bill*, 9 PANEL 38 (1931); *Will Assembly Lawyers Kill Alibi Bill Again?*, 9 PANEL 50 (1931).

<sup>22</sup> S. 187, 76th Cong., 1st Sess. (1939) (Ashurst); H.R. 1995, 76th Cong., 1st Sess. (1939) (Summers).

<sup>23</sup> See text at note 66 *infra*.

duced without a provision requiring defendant to name his alibi witnesses, but it failed to pass.<sup>24</sup>

Finally, in 1960 the California Law Revision Committee recommended to the legislature that a rule on alibi be adopted.<sup>25</sup> An alibi bill was introduced in the assembly early in 1961,<sup>26</sup> but unlike 1931,<sup>27</sup> the California Bar Association took a stand against the proposal "on the ground [that the requirement that the names of witnesses be given] would cause the harassment and intimidation of alibi witnesses by public officers."<sup>28</sup> The bill failed to pass.

It is submitted that the record reviewed above is a good record for what is admittedly a radical idea in criminal procedure, at least in the sense that it has slim antecedents in the common law.<sup>29</sup> In California, it appears that the rule was rejected because of the "witness" requirement; in most instances, however, it appears that the rule has been rejected mainly because of the continuing dominance of the common law tradition that defendant need not disclose his defenses until trial.<sup>30</sup> A recent California case may influence our attitude toward that tradition.

In *Jones v. Superior Court*,<sup>31</sup> the Supreme Court of California, Judge Traynor writing for the majority, granted discovery to the prosecution of the names of witnesses the accused intended to call and any reports and x-rays he intended to introduce in support of his announced defense. The court relied on the fact that the defense was an affirmative one and cited the cases upholding the alibi statutes to refute the argument of self-incrimination.<sup>32</sup> If this case is a harbinger, then perhaps defendant's right to nondisclosure is being broken down, at least in the area of affirmative defenses. This development may lead to the adoption of more alibi statutes in particular and more statutes dealing with disclosure of affirmative defenses in general.

An additional reason why the alibi rule has not been more widely adopted is that criminal procedure has been a neglected area of the law. Most

jurisdictions just have not thought about this problem. For example, a committee of the Supreme and Superior Courts of Pennsylvania is in the process of recommending Pennsylvania's first statewide body of rules of criminal procedure. The committee has decided to include an alibi rule in its package.<sup>33</sup>

#### REASONS IN FAVOR OF AN ALIBI RULE

Five reasons have been advanced in support of adoption of a requirement of advance notice of alibi.

*One.*—Foremost is the idea that the statute prevents surprise. Alibi has been termed a "hip pocket" defense because of the ease with which it can be manufactured for introduction in the final hours of trial.<sup>34</sup>

*Two.*—The statute acts to deter false alibis because defendants know that the information furnished will be investigated before trial. (Only one out of 73 district attorneys responding to the questionnaire said he did not make a pretrial investigation.)

The deterrent effect is borne out by the field survey. Eighty per cent of the district attorneys reported that alibis were offered in zero to 15 per cent of the cases in their jurisdiction. Sixteen per cent said it arose in 16 to 30 per cent of the cases, and only four per cent reported that it arose more frequently. (Appendix A, sub 4.)

Similar results were reported in Ohio and Michigan soon after their statutes were adopted. Ohio reported that alibis were reduced to a minimum. The reduction was attributed to the realization that an alibi refuted in open court is worse than no defense at all.<sup>35</sup> Detroit, Michigan, reported that the defense was used less, and where used, it was almost always proved false. It was also noted that convictions where an alibi was offered had greatly increased since passage of the act.<sup>36</sup>

The field survey yielded similar results with regard to increase in convictions. Eighty-one per cent reported that when alibis were offered, they were only occasionally successful; eleven per cent said they were successful about half the time; only eight per cent reported more frequent success. (Appendix A, sub 5.)

<sup>24</sup> Note 39 J. CRIM. L. & C. 629, 630 (1949).

<sup>25</sup> CAL. LAW REVISION COMM., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS (1960).

<sup>26</sup> Assembly Bill 484, introduced Jan. 17, 1961.

<sup>27</sup> See text at note 20.

<sup>28</sup> 36 CAL. STATE B.J. 480, 487 (1961).

<sup>29</sup> Millar, *supra* note 6.

<sup>30</sup> Fletcher, *supra* note 1, at 315.

<sup>31</sup> 22 Cal. Repr. 879, 372 P.2d 919 (1962).

<sup>32</sup> A fuller treatment of the self-incrimination privilege will be found in the text at notes 44-45 *infra*.

<sup>33</sup> Note 15 *supra*.

<sup>34</sup> Stassen, *The Show Window of the Bar*, 20 MINN. L. REV. 577, 580-81 (1936).

<sup>35</sup> Esch, *Ohio's New "Alibi Defense" Statute*, 9 PANEL 42 (1931).

<sup>36</sup> Toy, *Michigan Law on Alibi and Insanity Defenses Reduces Perjury*, 9 PANEL 52 (1931).

*Three.*—Pretrial investigation results in a saving of money and trial time. This occurs in two ways. (1) If, after the investigation, the district attorney is satisfied that the alibi is true, the case should be dismissed;<sup>37</sup> (2) the district attorney is not surprised at trial by the alibi defense, and there is no need for a continuance<sup>38</sup> to investigate and prepare. The pretrial investigation may indicate that the alibi probably is false and/or that defendant's witnesses are not credible. The district attorney can prepare his case accordingly.

Here the field survey is particularly interesting. Nineteen per cent reported no cases dismissed after pretrial investigation, 58 per cent said a few, 15 per cent said one-half, and only eight per cent said many. (Appendix A, sub 8.) The fact that comparatively few cases are dismissed as the result of a pretrial investigation is entirely consistent with our notion of alibis—they are *usually* false. This result is also consistent with the answers to the questionnaire reported above indicating that alibis enjoy comparatively little success where advance notice is required.

*Four.*—Alibis which are presented at trial will be accorded more respect. Alibi, because of the ease with which it can be manufactured, is treated by some jurisdictions as a "second-class" affirmative defense, and when an alibi is in issue and the jury is charged, the judge is allowed to disparage the defense.<sup>39</sup> This rule should make disparagement less necessary.<sup>40</sup>

*Five.*—Finally, as previously developed, this rule is important in the context of more liberal discovery in criminal cases.

<sup>37</sup> In the field survey a few district attorneys reported that they never dismiss under these circumstances, because credibility is for the jury. However, if the district attorney is satisfied as to the truth, this does not seem to be a sufficient reason for subjecting the defendant to a trial.

<sup>38</sup> In addition to a loss of time and money, a continuance is detrimental because it comes *after* the prosecution has presented its case and thus its evidence gets "cold."

<sup>39</sup> *Commonwealth v. White*, 271 Pa. 584, 115 Atl. 870 (1922); *People v. Tice*, 115 Mich. 219, 73 N.W. 108 (1897). *Contra*, *Asher v. State*, 201 Ind. 353, 168 N.E. 456 (1929).

<sup>40</sup> In *State v. Waid*, 92 Utah 297, 67 P.2d 647 (1937), a Utah court said that this statute was a recognition by the legislature that this defense lends itself to fraud and perjury, and that with the safeguards the statute provides, alibis should be given more weight since investigation has failed to refute them. *People v. Woolworth*, 148 Kan. 180, 81 P.2d 43 (1938), and *People v. Marcus*, 253 Mich. 410, 235 N.W. 202 (1931), are *contra*.

## LEGAL ISSUES PERTAINING TO ALIBI RULES

Following is an analysis of the legal issues presented by a requirement of advance notice of alibi.

### *Constitutional Issues*

*Self-incrimination.*—While the Fifth Amendment of the United States Constitution does not apply in state courts,<sup>41</sup> most state constitutions extend the privilege against self-incrimination and follow the federal example by couching it in terms of compulsion.<sup>42</sup> Therefore, when the argument is made that advance notice of alibi violates one's privilege against self-incrimination, it is answered that the prosecution must still establish defendant's presence at the scene of the crime and that defendant need not establish that he was somewhere else. Only if defendant voluntarily decides to present an alibi at trial must he give the required information. If there is compulsion, it is only as to the time when the prosecution learns of the defense, because in no event is defendant compelled to give information he was not otherwise planning to present at trial.<sup>43</sup>

Two other answers to this argument are: (1) the rule is one of pleading, and defendant is not giving evidence against himself; (2) the information given is exculpatory, not incriminating.<sup>44</sup>

In apparently the only case in which the issue was raised, *People v. Schade*,<sup>45</sup> all three answers to the argument were presented, and the statute was upheld as constitutional.

*Due Process.*—The due process issue has been raised in two slightly different forms. First it has been argued that the requirement of advance notice deprives defendant of the advantage of surprise he formerly enjoyed.<sup>46</sup> As a practical matter, however, if continuances are given to the prosecution when there is surprise, this advantage is quickly dissipated. If there is a true advantage, this statute represents a procedural, not a substantive change in the law, and the defendant is not entitled to one form of procedure in exclusion

<sup>41</sup> *Knapp v. Schweitzer*, 357 U.S. 371, 374 (1958).

<sup>42</sup> U.S. CONST. amend. V: "...nor shall be compelled in any criminal case to be a witness against himself...."

<sup>43</sup> Dean, *supra* note 20, at 440.

<sup>44</sup> Millar, *Statutory Notice of Alibi*, 24 J. CRIM. L. & C. 849, 852 (1934).

<sup>45</sup> *People v. Schade*, 161 Misc. 212, 292 N.Y.S. 612 (Queens County Ct. 1936).

<sup>46</sup> This is the thrust of the argument the dissent makes in *Jones v. Superior Court*, *supra* note 31, at 885.

of all others. In *People v. Hickman*,<sup>47</sup> defendant argued that the recently-adopted changes in the California procedure for placing insanity in issue violated due process. This argument was rejected, the court saying:

"It does not follow that merely because something has been actual law of the land from time out of mind, it is therefore due process. (*Hurtado v. California*, 110 U.S. 516, 529.) The common law is only one of the forms of the law and is no more sacred than any other."<sup>48</sup>

Secondly, it may be argued that when defendant is required to give advance notice in order to present his defense and is precluded from presenting this defense when he fails to give notice, he is denied due process. Again the argument is that the change is substantive, not procedural.

Defendant is entitled to present his defenses provided he follows a reasonable requirement calculated to speed the trial and facilitate the fact-finding process. Thus, in *People v. LaCrosse*,<sup>49</sup> defendant failed to follow the California procedure for raising the defense of insanity and was precluded from offering evidence. The court said: "There has been no denial of the Constitutional guarantee of due process, but merely a failure to use due process provided for the defendant's benefit."<sup>50</sup> In an earlier case, *People v. Troche*,<sup>51</sup> it was held that due process may include new methods of procedure, provided they are in harmony with the tradition of the common law—they must be orderly and provide for reasonable notice and opportunity to be heard.<sup>52</sup>

#### Non-Constitutional Issues

*Alibi as Rebuttal.*—May defendant offer evidence as to his whereabouts, not by way of an affirmative defense of alibi, but in rebuttal to the prosecution's evidence?

Obviously an affirmative answer here would nullify the effect of the advance notice rule, and this issue was quickly disposed of in *State v. Thayer*,<sup>53</sup> in Ohio. The court pointed out that an alibi, by definition, rebuts the prosecution's evi-

dence, since except where the charge is aiding and abetting, the state must offer proof placing defendant at the scene of the crime.<sup>54</sup>

*Defendant's Right To Testify.*—May the defendant be precluded from testifying as to his whereabouts?

At common law the defendant was not allowed to testify because of the fear he would perjure himself.<sup>55</sup> Most jurisdictions, either by statute<sup>56</sup> or by constitution,<sup>57</sup> have made the defendant a competent witness.

When the enabling provision is in the constitution, it is clear that the defendant cannot be denied the right to testify. The legislature cannot by statute modify a constitutional provision. Where, however, it is statutory, the courts have split on the issue. On the one hand, *People v. Rakiec*<sup>58</sup> held that the New York provision on alibi did not affect defendant's statutory right to testify on his own behalf. The court stated that the alibi provision and the testimonial provision would be construed as compatible in the absence of clear legislative intent to the contrary. On the other hand, in *Smetana v. State*,<sup>59</sup> the Ohio Court of Appeals held that defendant's statutory rights could be altered by the legislature and that adoption of the alibi statute signified legislative intent to alter the earlier provision.

As a matter of policy, allowing the defendant to testify will not nullify the effect of the alibi statute. The statute's main thrust concerns the parade of alibi witnesses for the defendant. The latter's testimony, standing alone, is unlikely to receive much credit by a jury.

*Comment by the Prosecutor.*—May the prosecution comment on the fact that the defendant has given notice and then failed to introduce evidence of alibi?

In *People v. Mancini*,<sup>60</sup> defendant gave notice that four witnesses would establish his alibi. None appeared. It was held error for the prosecution to

<sup>47</sup> *Id.* at 4, 176 N.E. at 658.

<sup>48</sup> *Harper v. State*, 106 Ohio St. 481, 483, 140 N.E. 364 (1922); *Brown v. United States*, 56 F.2d 997, 999 (9th Cir. 1932).

<sup>49</sup> *E.g.*, 18 U.S.C. §3481 (1951); N.Y. CODE CRIM. PROC. §393 (1935); OHIO REV. CODE ANN. 2945.43 (Page 1954).

<sup>50</sup> *E.g.*, PA. CONST. art. 1, §9.

<sup>51</sup> *People v. Rakiec*, 260 App. Div. 452, 23 N.Y.S.2d 607, *aff'd*, 289 N.Y. 306, 45 N.E.2d 812 (1942).

<sup>52</sup> 22 Ohio L. Abs. 165 (Ohio Ct. App. 1936).

<sup>53</sup> 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (N.Y. Ct. App. 1959).

<sup>47</sup> *People v. Hickman*, 204 Cal. 470, 268 Pac. 909 (1928).

<sup>48</sup> *Id.* at 479, 268 Pac. at 913.

<sup>49</sup> 5 Cal. App. 2d 696, 43 P.2d 596 (1935).

<sup>50</sup> *Id.* at 698, 43 P.2d at 597.

<sup>51</sup> 206 Cal. 35, 273 Pac. 767 (1928).

<sup>52</sup> *Id.* at 42, 273 Pac. at 770.

<sup>53</sup> 124 Ohio St. 1, 176 N.E. 656 (1931). See also *State v. Nooks*, 123 Ohio St. 190, 174 N.E. 743 (1930).

attempt to establish that the notice given by the defendant required that he produce the witnesses and to attempt to cross examine him on his failure to do so. In *State v. Cocco*,<sup>61</sup> an Ohio court held that defendant was prejudiced when the prosecuting attorney read defendant's notice of alibi to the jury during preliminary argument.

#### BASIC COMPONENTS OF THE ALIBI RULES

In all but two<sup>62</sup> of the 14<sup>63</sup> jurisdictions requiring advance notice of alibi, the rule is statutory. In the others, the rule is promulgated by the judiciary. This section includes a discussion of the terms of these rules and how they vary

*Demand by the Prosecutor.*—Minnesota, New York, and New Jersey require that the district attorney make demand on the defendant for his notice. Failure to make this demand has been held to relieve the defendant from his obligation.<sup>64</sup> The remaining jurisdictions require that defendant give notice without any request.

The question whether the prosecution should be required to act first is the issue which split the original committee recommending Federal Rules of Criminal Procedure.<sup>65</sup> Rule 17 in the preliminary draft required that the government give notice and specify with reasonable certainty its contention as to the date and time the offense was committed. Defendant was then required to give notice if he intended to offer an alibi. Rule 16 in the second draft altered this. It required the defendant to initiate the process by moving to have the government state with greater particularity the time and place it would rely on, and upon receipt of this, defendant was to give his notice. This change was vehemently objected to by five members of the committee, and both rules were submitted to the Supreme Court with accompanying memoranda. Herbert Wechsler wrote for the minority and argued that if the government gave notice first, uncounseled defendants as well as uninformed attorneys would be advised of the requirement, and no penalty would attach to ignorance of the law. He also argued that prior notice by the government was desirable as a matter of tactics. He pointed out that a defendant may fail to give notice on purpose, so that when the prosecutor's

objection to the evidence is sustained, the jury may think that defendant is being deprived of proof. Such a maneuver could decide a close case. To refute the majority's contention that the prosecutor would have to serve notice in all cases to avoid the risk of failure to do so, Wechsler maintained that the prosecutor knows when to expect an alibi and can make demand when necessary.<sup>66</sup>

Alexander Holtzhoff answered these arguments in the majority's memorandum. He argued that the court would have discretion in applying the sanction and could relieve the ignorant defendant. He also argued that when the government is the initiator, it is inviting the defense.<sup>67</sup>

I believe the minority's is the more salutary provision, but for reasons in addition to those advanced in the committee. Before they are discussed, however, brief reference must be made to the problem of insuring that defendant is informed of the precise date and time the prosecution will rely on at trial.<sup>68</sup>

In most cases the indictment or information charging the crime includes the date to be relied on, though the qualification "on or about" usually appears therewith. The accused, then, is able to give notice on the basis of the information so furnished. Occasionally, however, the prosecution is not able to pinpoint the date and time, and the indictment or information includes only an approximation. The defendant, then, must request particulars. Usually the district attorney provides the information willingly.<sup>69</sup> Sometimes, however, the defendant must make a formal motion, resulting in a loss of time and money.

The rule proposed by the committee majority, as well as the practice in the majority of states, may thus involve three steps for the defense: (1) asking the district attorney for the date and time he will rely on; (2) moving for a bill of particulars, if necessary; (3) giving notice. Under the minority rule, however, two of these three steps are eliminated; the defendant need not give notice unless

<sup>66</sup> Federal Rules of Criminal Procedure, Second Draft 239-40 (1944).

<sup>67</sup> *Id.*, at 241-42.

<sup>68</sup> This is to be distinguished from the issue which arises when the proof at trial varies from the time stated in the indictment or information. Usually defendant would be allowed a continuance on the ground of surprise or would be allowed to present his alibi for the new time without prior notice.

<sup>69</sup> Ninety per cent of the district attorneys who responded to the questionnaire said they cooperate with defendants' attorneys and give the requested information.

<sup>61</sup> 73 Ohio App. 182, 55 N.E.2d 430 (1943).

<sup>62</sup> Arizona and New Jersey.

<sup>63</sup> Notes 11, 12, 13 *supra*.

<sup>64</sup> *State v. Wiedenmayer*, 128 N.J.L. 239, 25 A.2d 210 (N.J. Sup. Ct. 1942).

<sup>65</sup> See text at note 23 *supra*.

and until he has received a request along with the requisite information from the district attorney. The minority proposal, for this reason, is a more efficient procedure. The current Advisory Committee on the federal rules plans to recommend an alibi rule in the form of the original minority proposal.<sup>70</sup>

*Deadline.*—The deadline for giving notice varies from two to ten days before trial. If the information is specific enough, even the relatively short time of two days should be sufficient.

*Place and Time of Whereabouts.*—All except Iowa and Minnesota require that defendant give specific information as to the place he claims to have been at the time of the alleged crime. Iowa district attorneys receive the same information, however, because defendant's notice must contain the names of witnesses and a statement of what he expects to prove by the testimony of each of them. Minnesota, however, requires only that he specify the county or municipality in which he claims to have been; therefore, only after defendant has elaborated on the information contained in his notice, through testimony, can the prosecutor investigate the alibi. Consequently, Minnesota prosecutors are in about the same position as if no notice requirement existed.<sup>71</sup>

*Names of Witnesses.*—The most controversial issue has been the provision contained in some versions of the rule requiring the defendant to supply the names of his alibi witnesses. Professor Millar thought that such a provision was responsible for New York's initial failure to adopt the rule.<sup>72</sup> The California Bar Association recently recommended that a bill be defeated because of this provision.<sup>73</sup> Nevertheless, one-half<sup>74</sup> of the 14 states have this requirement. District attorneys favor it, maintaining that it facilitates investigation and preparation. Defense attorneys oppose it, contending there is a danger of intimidation.

No clear policy position recommends itself with regard to the witness requirement. A comparison of field survey results from jurisdictions with and without this requirement fails to reveal any significant factors to resolve the issue. The statute, however, appears to be effective even if witnesses

need not be named. Consequently, an assessment of legislative attitude seems in order, and if inclusion of the witness requirement would endanger passage, it should be eliminated to save the measure. The advantages of an alibi rule without the witness requirement are greater than no rule at all.

New Jersey has attempted to resolve this issue by a kind of compromise. Under its provision, defendant must name his witnesses, but can also demand the names of witnesses whom the prosecution intends to call to place him at the scene of the crime. This solution, however, may be a paper solution, only, from the defendant's point of view. Without sanctions, it is likely to be ineffective. Moreover, the defendant may not have the opportunity, financial or otherwise, to make much use of the information he receives.

*Sanctions.*—Most important is the sanction imposed for failure to give notice within the requisite time. Two approaches have been used:

(1) All but Iowa and Oklahoma provide that alibi evidence may be excluded, but provide that the trial court, for good cause shown, may admit the testimony, usually with a continuance granted to the prosecution. Kansas varies this provision and allows late filing until the jury is sworn and then makes exclusion mandatory.

(2) Iowa and Oklahoma provide that when notice is not given, upon motion of the district attorney, the court may grant a continuance.<sup>75</sup>

Excluding the evidence has proved effective. Eighty-one per cent of the district attorneys thought that the rule was generally obeyed and timely notice given. With the responses from Oklahoma excluded,<sup>76</sup> this figure rises to 86 per

<sup>75</sup> In *State v. Rourick*, 245 Iowa 319, 60 N.W.2d 529 (1953), after the prosecution rested, defendant presented alibi witnesses. The prosecution's objection was sustained, because there had been no notice. Defendant asked for permission to give notice and for a continuance, which were also denied. On appeal, no error. The court held that the Iowa statute provided for a continuance only if notice was late, but *before* trial. If notice was not given before trial, alibi was not an issue in the case, and defendant's witnesses were properly excluded because their testimony was not relevant to any issue in the case.

This case has had the effect in Iowa of acting as an exclusionary rule for alibis presented at trial without prior notice. The field survey results were consistent with those from the jurisdictions which have a statutory rule of exclusion.

<sup>76</sup> Four out of seven Oklahoma County Attorneys said the rule was not enforced in their jurisdiction, and a fifth, who shall go unnamed, was not aware of its existence. This figure was far above the average from all the jurisdictions.

<sup>70</sup> Note 14 *supra*.

<sup>71</sup> Stassen, *supra* note 34, at 581.

<sup>72</sup> Millar, *supra* note 44, at 858. His prophesy proved incorrect; the rule was subsequently adopted with the witness requirement in it.

<sup>73</sup> Note 28 *supra*.

<sup>74</sup> Arizona, Iowa, Kansas, Michigan, New Jersey, New York, and Wisconsin.



cent. In contrast, the threat of a continuance is not a sanction at all; the prosecution would be granted a continuance on the ground of surprise, even without the statutory direction. If all the defendant risks is a continuance, he will purposely not give notice because the continuance is valuable to him. When it is granted, it comes after the prosecution has presented its evidence and allows it to get cold. The effect of using continuance as a "sanction" is also *contra* the deep concern of the bench and bar with trial delay.

These thoughts were best expressed by an Oklahoma County Attorney who wrote:

"[The statute] is of no practical value in the enforcement of the law in this state. [The 5-day provision is ignored and this] renders the statute a vehicle for a continuance which the prosecution, with witnesses brought in for trial, does not want. . . . The statute should bar alibi as a defense unless the 5-day notice is given—period. . . . I would favor a 5-day notice statute which could be seriously and honestly enforced."<sup>77</sup>

#### THE FIELD SURVEY

The questionnaire used in the field survey is set forth in Appendix A. Percentages for the various responses are presented both for all responses received and for responses from the 20 most populous counties polled. The latter responses were tabulated because some district attorneys who responded stated that they had little actual experience with alibi. The 20 counties selected all had populations exceeding 400,000. Their responses thus may be more accurate and revealing than those from the remaining areas.

#### SUMMARY

As the field study indicates, rules requiring advance notice of alibi are, for the most part, operating as intended. Alibis are not relied on as often as in the past; when they are presented, the surprise element is removed and the prosecutor is prepared to rebut them. Similar benefits could also be derived from rules requiring information concerning other affirmative defenses, such as insanity and self-defense. Perhaps one rule could take care of them all. However, it would be unfair to the defendant to require such information unless the prosecution is prepared to make concessions as well. This brings us back to our starting point. Pretrial criminal discovery is a desirable goal. The

alibi rule could be part of a package which would represent a step toward that goal.

#### APPENDIX A

##### FIELD SURVEY QUESTIONNAIRE AND RESPONSES FROM PROSECUTORS IN JURISDICTIONS WITH RULES REQUIRING ADVANCE NOTICE OF ALIBI\*

1. The case law on these statutes is very sparse. Would you say this is because:

11 % <sup>†</sup>	(6%) <sup>††</sup>	a) the statute is not enforced in your jurisdiction.
81 %	(94%)	b) the statute is generally avoided and defendants give timely notice when evidence of an alibi is to be offered.
8 %	(—)	c) other reasons (please elaborate).

(Some of the responses to (c) were "defendants don't appeal," "the case law is not sparse," "statute is ineffective.")

2. When timely notice is not given and defendant wishes to introduce an alibi at trial, is it the usual case that:

37 %	(30%)	a) a continuance is granted to the prosecution?
20 %	(30%)	b) your office does not press the statute and allows the evidence to come in?
35 %	(40%)	c) the evidence is excluded?

(8% of the overall responses were that the evidence comes in over the prosecuting attorney's objection.)

(It is in this phase of the process that tactics dictate a given course, and this accounts for the divergence of answers. If notice is late but before trial, then either exclusion or a continuance is in order. If notice comes *after* the prosecution has rested its case, a continuance will have the effect of making the prosecution's evidence stale. Exclusion could raise sympathy for the defendant, which could determine a close case. The point is that there is no one answer here. This is not a reason for rejecting this rule, however, because as

\* This questionnaire was sent to prosecuting attorneys in the eight most populous counties in New York and New Jersey and the seven most populous counties in the 12 remaining jurisdictions. Seventy-six responses containing data were received.

<sup>†</sup> Percentage of total responses received.

<sup>††</sup> Percentage of responses from the 20 most populous counties polled (all over 400,000 in population).

<sup>77</sup> Letter to author from Chester D. Silvers, County Attorney, Comanche County, Lawton, Oklahoma.

the responses to question one indicate, in the great majority of cases, this question is never reached.)

3. If the legislature in your jurisdiction were to repeal this statute, would your successful prosecution of cases:

28% (37%) a) be seriously affected?

53% (52%) b) be partially affected?

19% (11%) c) not be affected at all?

4. It has been said that these statutes are essential because alibis are commonly relied on as a defense. In your jurisdiction is an alibi offered in:

80% (74%) a) 0-15%

16% (21%) b) 16-30%

4% (5%) c) 31-60%

— (—) d) 61-100%

of the cases, excluding guilty pleas, which go to trial?

5. Is it your experience that when alibis are presented, they are successful:

81% (89%) a) occasionally?

11% (11%) b) about one-half?

8% (—) c) frequently?

6. Although these statutes do have the sanction of exclusion, there are few cases where this has actually been invoked. In your jurisdiction, when timely notice is not given and an alibi is offered, is evidence of alibi excluded:

26% (19%) a) never?

26% (44%) b) seldom?

2% (4%) c) about one-half?

25% (33%) d) frequently?

21% (—) e) always?

(This question is very similar to question two, and the divergence of answers here is consistent with the results for that question.)

7. One of the advantages of these statutes would seem to be that they lead to a speedy disposition when notice is given and the alibi is investigated and found to be true. As a practical matter, how realistic is the view? In your jurisdiction

— (—) a) investigations are not made.

32% (32%) b) investigations are made but are not fruitful.

68% (68%) c) investigations are made and are fruitful.

(Only one out of 73 responses said he did not investigate.)

8. If your investigations are fruitful, how many cases can be expected to be nolle prossed or similarly disposed of after investigation of alibis?

19% (13%) a) None

58% (63%) b) Few

15% (5%) c) About one-half

8% (19%) d) Many

(Many responses expressed the view that most alibis are false and that few were dismissed after investigation for this reason.)

9. What is the approximate number of indictments returned in your jurisdiction in a twelve-month period?

(This question was to be used to try to gauge whether practices were different in the busier counties. Because procedures vary so widely, this plan did not work out, and instead, as noted, the 20 most populous counties were separately tabulated.)

10. It has been said that one of the difficulties with these statutes is that defendant is indicted "on or about" a day certain and doesn't know the exact day or time of the crime. Is it your practice to grant a bill of particulars upon demand from defendant?

90% (92%) a) Yes!

10% (8%) b) No!

11. (This pertains only to those jurisdictions which require the prosecuting attorney to initiate this procedure by requesting notice.)

Which of the following procedures is used?

a) A standard form is presented to each person arrested and/or indicted for a crime other than a summary offense.

b) This is done only with major felonies (violent crimes).

c) Some other criteria are used. (Please elaborate.)

(Of 13 responses from three states with this requirement, six chose (a), four chose (b), and three chose (c). Elaboration on (c) consisted mainly of statements that the prosecutor used his judgment.)

State \_\_\_\_\_

County \_\_\_\_\_

## APPENDIX B

### REPRESENTATIVE CASES IN JURISDICTIONS HAVING ALIBI RULES

Below are representative cases, where available, indicating how the jurisdictions have enforced

their rules. The scarcity of the cases indicates the importance of the field survey.

*Arizona*—no cases.

*Indiana*—Indiana courts have been strict in their administration of this rule. In *Thomas v. State*, 237 Ind. 537, 147 N.E.2d 577, 578 (1958), it was held that the rule was a "statutory condition precedent to the introduction of evidence on the question of alibi." (The Indiana rule says the evidence shall be excluded in the absence of a showing of good cause for failure to give notice.) In *Pearman v. State*, 233 Ind. 111, 117 N.E.2d 362 (1954), the tables were turned. Indiana requires the prosecution to give defendant notice when the date it will rely on is different from the one for which defendant gave notice. Prosecution's evidence concerning the second date was excluded when notice was not given and no good cause shown for failure.

*Iowa*—*State v. Rourick*, note 75 *supra*. If notice is late but before trial, a continuance is granted to the prosecutor.

*Kansas*—In *State v. Osburn*, 171 Kan. 330, 232 P.2d 451 (1951), it was held that "compliance with the requirement of this section of the statute is a prerequisite to the admission of the testimony of alibi witnesses." (Kansas allows a late filing in the discretion of the trial judge until the jury is sworn, and then exclusion is mandatory in the absence of notice.) In *State v. Leigh*, 166 Kan. 104, 199 P.2d 504 (1948), the trial court distinguished "faraway" alibis and alibis in the "same vicinity and in the same county or in the same city" and

applied the statute only to the latter. This interpretation was rejected on appeal. See also *Burns v. Amrine*, 156 Kan. 83, 131 P.2d 884 (1942); *State v. Parker*, 166 Kan. 707, 204 P.2d 584 (1949), *cert. denied*, 338 U.S. 860; and *State v. Trams*, 189 Kan. 393, 369 P.2d 223 (1962).

*Michigan*—In *People v. McFadden*, 347 Mich. 357, 79 N.W.2d 869 (1956), testimony was excluded, and in *People v. Longaria*, 333 Mich. 696, 53 N.W.2d 685 (1952), an exhibit was excluded which would have established an alibi. In neither was notice given.

*Minnesota*—No cases.

*New Jersey*—No cases.

*New York*—In *People v. Schade*, note 45 *supra*, and *People v. Rakiec*, note 58 *supra*, no notice was given and evidence was excluded.

*Ohio*—In *Balzhiser v. State*, 10 Ohio L. Abs. 666 (Ohio Ct. App. 1931), oral notice was held insufficient and evidence was excluded. In *State v. Payne*, 104 Ohio App. 410, 149 N.E.2d 583 (Ohio Ct. App. 1957), the statute was held to be "mandatory" in its terms.

*Oklahoma*—No cases.

*South Dakota*—No cases.

*Utah*—No cases.

*Vermont*—No cases.

*Wisconsin*—In *State v. Selbach*, 268 Wisc. 538, 68 N.W.2d 37 (1955), there was no written notice, but oral notice was given shortly before trial. The lawyer pleaded ignorance of the law, but the evidence was excluded and the ruling was affirmed on appeal.