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CRIMINAL DISCOVERY IN OKLAHOMA: A CALL FOR LEGISLATIVE ACTION

RODNEY J. UPHOFF*

Introduction

In *Allen v. District Court*,¹ the Oklahoma Court of Criminal Appeals outlined new procedures governing pretrial discovery in all state criminal cases.² For the past three years judges in Oklahoma have struggled to implement *Allen's* mandate that pretrial discovery in criminal cases be "a two-way street."³ Unfortunately, the *Allen* procedures have not led to the systemic improvements the court envisioned, but instead have further snarled traffic in Oklahoma's criminal courts. The time has arrived for the Oklahoma legislature to take up the challenge and construct an efficient and fair criminal discovery code.⁴

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1. 803 P.2d 1164 (Okla. Crim. App. 1990).

2. *Allen* did not make clear if these new procedures applied only in felony cases or if the decision extended to all criminal cases. In *Wilkerson v. District Court*, 839 P.2d 659, 660 (Okla. Crim. App. 1992), the court expressly held that misdemeanor cases are governed by *Allen*.

3. *Allen*, 803 P.2d at 1164. The "two-way street" metaphor is taken from Justice Marshall's opinion in *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). Nonetheless, neither the *Wardius* decision nor the other U.S. Supreme Court cases cited in *Allen* support the proposition that discovery procedures must be symmetrical or that all statutorily mandated defense disclosure provisions are constitutionally inoffensive. As the Oklahoma Court of Criminal Appeals subsequently observed, "[T]he [discovery] requirements to be placed on the State and a defendant are distinctly different . . ." *Richie v. Beasley*, 837 P.2d 479, 480 (Okla. Crim. App. 1992). For a critical assessment of the constitutional problems with certain *Allen* provisions requiring defense counsel's disclosures, see Rodney J. Uphoff, *The New Criminal Discovery Code in Oklahoma: A Two-Way Street in the Wrong Direction*, 44 OKLA. L. REV. 387 (1991).

4. There have been numerous bills introduced in recent years seeking to enact a criminal discovery code. See David Lee, *The Need for A New Criminal Discovery Code in Oklahoma State Courts Requiring Disclosure of Investigative Reports to Defendants*, 60 OKLA. B.J. 2259 (1989). See *infra* notes 6, 96.

This article first explores the *Allen* decision and the extent to which *Allen* changed the law of criminal discovery in Oklahoma. Next, the article examines some of the theoretical and practical problems with the *Allen* procedures as well as the efforts of the Oklahoma Court of Criminal Appeals to address some of the troublesome questions generated by *Allen*. Finally, the article discusses the need to replace the *Allen* provisions with a legislative framework that facilitates pretrial access to information and minimizes "trial ambush," but without compromising the fair and efficient operation of the adversary system.

Allen's New Discovery Procedures

Since 1982, civil discovery in Oklahoma has been governed by a statutory framework similar to the Federal Rules of Civil Procedure.⁵ Yet despite repeated efforts, the Oklahoma legislature has never enacted a comprehensive code of criminal discovery.⁶ Prior to *Allen*, very little discovery in criminal cases was mandated by statute. The prosecution was required by statute to endorse witnesses,⁷ to provide the defense with sworn statements⁸ and to give defense counsel a copy of any relevant grand jury testimony.⁹ The defense only had to notify the prosecution of an alibi defense¹⁰ and of a mental illness or insanity defense.¹¹ Neither the prosecution nor the defense had the right to use interrogatories or depositions, the discovery tools commonly utilized by civil practitioners.

Nevertheless, some criminal defendants prior to *Allen* were able to learn a considerable amount about the State's case. In those instances in which the State's witnesses could be persuaded to talk, such interviews often provided a major source of information to the defense.¹² In felony cases, the preliminary hearing also could

5. 12 OKLA. STAT. §§ 3224-3237 (1991 & Supp. 1993).

6. Uphoff, *supra* note 3, at 389. In the 1993 legislative session several discovery bills failed. See H.R. 1530, 44th Leg., 2d Sess. (Okla. 1993) (provisions substantially tracked *Allen* by mandating State and defense disclosures; empowered court to order sanctions for noncompliance); S. 117, 44th Leg., 1st Sess. (Okla. 1993) (also specified disclosures as well as sanctions similar to those required by *Allen*).

7. 22 OKLA. STAT. § 303 (1991 & Supp. 1993).

8. *Id.* § 749.

9. *Id.* § 340.

10. *Id.* § 585.

11. *Id.* § 1176.

12. Locating and then persuading the State's witnesses to submit to an interview can be a time-consuming and often fruitless venture. See *infra* notes 54-57 and accompanying text. Lack of investigative assistance, especially in misdemeanor cases, often places the burden on the defense lawyer to conduct such interviews. Conducting one's own interviews, however, creates real danger that the lawyer may become a necessary witness and, therefore, precluded from ultimately representing the defendant at trial. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1993); see also ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.3(e) (1991) [hereinafter ABA STANDARDS] (stating that defense counsel should avoid interviewing prospective witness except in presence of third person). Unfortunately, defense counsel, especially a solo practitioner, may not have a viable alternative. Defense counsel has a duty to provide competent representation which includes undertaking an adequate investigation. See *id.* 4-4.1. The failure to attempt to interview crucial witnesses may constitute ineffective assistance of counsel. See *Chambers v. Armontrout*, 907 F.2d 825, 828-31 (8th Cir.) (en banc), *cert. denied*, 498 U.S. 950 (1990).

be used to gain a fairly detailed look at much of the State's case.¹³ Moreover, defense lawyers who were fortunate enough to receive police reports gained perhaps the best access to the State's case. Such access, however, was not required by law but depended on the fairness and generosity of individual prosecutors.¹⁴

Case law before *Allen* did require prosecutors to reveal certain evidence to the defense. In a series of cases beginning in 1957 with *State ex rel. Sadler v. Lackey*,¹⁵ the Oklahoma Court of Criminal Appeals obligated prosecutors to make pretrial disclosure of certain evidentiary aspects of their cases.¹⁶ Although neither the Oklahoma Court of Criminal Appeals nor the U.S. Supreme Court recognized a general constitutional right to discovery,¹⁷ both courts relied on due process concerns to grant defendants access to some of the prosecution's evidence in order to allow defense counsel to adequately prepare for trial.¹⁸

At the time of the *Allen* decision, therefore, a criminal defendant in Oklahoma generally had the right to pretrial access to technical and scientific reports within the prosecutor's possession and control.¹⁹ The defendant also was entitled to a

13. See *Beard v. Ramey*, 456 P.2d 587, 589 (Okla. Crim. App. 1969) (stating that preliminary hearing is for defendant's benefit in that it gives defendant the opportunity to discover the evidence to be used against him at trial). Both prior to and since *Allen*, the preliminary hearing at times has been a useful discovery vehicle. Yet, because a defendant has not been entitled to, and has rarely received, police reports before the preliminary hearing, defense counsel frequently has been ill-prepared to effectively utilize this hearing. Despite the systemic benefits of mandating some discovery before the preliminary hearing — encouraging earlier resolution of cases, eliminating need for some preliminary hearings, clarifying facts before hearing to allow for more efficient use of the hearing, minimize need to call certain witnesses — the *Allen* court reiterated its previous position that a trial judge could not order discovery before the preliminary hearing. *Allen*, 803 P.2d at 1169.

14. Prior to *Allen*, the Oklahoma Court of Criminal Appeals consistently held that reports generated by police officers and other law enforcement agents were only discoverable if such reports contained exculpatory material. See, e.g., *Van White v. State*, 752 P.2d 814, 819 (Okla. Crim. App. 1988). In a post-*Allen* case, *Amos v. District Court*, 814 P.2d 502 (Okla. Crim. App. 1991), the court indicated that pursuant to a defendant's discovery motion a district judge should review OSBI reports and determine whether "the reports are relevant and discoverable in a criminal proceeding." *Id.* at 502. *Amos* certainly does not mandate that all relevant police reports be turned over to the defense. But the decision also fails to offer any real guidance as to when or why a relevant police report is not discoverable. *Amos* does reaffirm the principal that all exculpatory material in an OSBI report must be disclosed to the defense. For a discussion of the prosecutor's duty to disclose exculpatory evidence, see *infra* notes 24-28, 118 and accompanying text.

15. 319 P.2d 610 (Okla. Crim. App. 1957).

16. *Lackey*, 319 P.2d at 613. For a more detailed account of the law of discovery prior to *Allen*, see Christen R. Blair, *Oklahoma Criminal Discovery After Allen*, 28 TULSA L.J. 69 (1992); see also Uphoff, *supra* note 3, at 388-99.

17. See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (noting that "no general constitutional right to discovery [exists] in a criminal case").

18. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Moore v. State*, 740 P.2d 731 (Okla. Crim. App. 1987).

19. *McCarty v. State*, 765 P.2d 1215, 1217 (Okla. Crim. App. 1988) (forensic report); *Stafford v. District Court*, 595 P.2d 797, 799 (Okla. Crim. App. 1979) (autopsy report); *Hamm v. State*, 516 P.2d 825 (Okla. Crim. App. 1973) (ballistics report); *Layman v. State*, 355 P.2d 444, 447-51 (Okla. Crim. App. 1960) (engineer's report); *Moore*, 740 P.2d at 731, 735-36 (chemist's report). But see *Pierce v. State*, 786 P.2d 1255, 1263 (Okla. Crim. App. 1990) (holding that an expert's report need not disclose

timely pretrial inspection of any physical evidence in the State's hands.²⁰ In addition, defense counsel had a right to obtain prior to trial a copy of the defendant's own written statement and a summary of any oral statements the defendant made to a law enforcement officer.²¹ Defense counsel also could require the prosecutor to provide a copy of the criminal records of the State's witnesses.²² Finally, the prosecutor was required to disclose at least ten days before trial (any prosecutor's) intent to use "other crimes" or "bad acts" evidence pursuant to title 12, section 2404 of the Oklahoma Statutes.²³

Since the 1963 landmark case of *Brady v. Maryland*,²⁴ prosecutors also were obligated to turn over to the defense all exculpatory information or evidence known to the prosecutor.²⁵ Some Oklahoma prosecutors, consistent with the guidance provided by the ABA Standards on the Prosecution Function, disclosed "all material that is even possibly exculpatory"²⁶ and did so "at the earliest feasible opportunity."²⁷ Many prosecutors, however, took a very narrow view of what constituted exculpatory evidence and only infrequently made pretrial disclosure of evidence on *Brady* grounds.²⁸

all of her opinions).

20. The prosecutor must provide timely access to physical evidence so that defense has a fair and meaningful opportunity to conduct a competent examination of that evidence. *See, e.g., McCarty*, 765 P.2d at 1217 (hair samples).

21. *See id.* For a recent post-*Allen* decision reiterating that due process and fundamental fairness require that an accused be afforded a fair and adequate opportunity to make a competent independent pretrial examination of physical evidence and technical reports, see *Miller v. State*, 809 P.2d 1317, 1319 (Okla. Crim. App. 1991).

22. *See Stevenson v. State*, 486 P.2d 646, 650 (Okla. Crim. App. 1971), *cert. denied*, 404 U.S. 1040 (1972).

23. *Burks v. State*, 594 P.2d 771, 774 (Okla. Crim. App. 1979); *see also Freeman v. State*, 767 P.2d 1354, 1357 (Okla. Crim. App. 1988).

24. 373 U.S. 83 (1963).

25. *Id.* at 87. Numerous Oklahoma cases have recognized the disclosure requirements mandated by *Brady*. *See, e.g., McDona'd v. State*, 553 P.2d 171 (Okla. Crim. App. 1976). In addition, the prosecutor's duty to disclose exculpatory evidence is spelled out in ABA STANDARDS 3-3.11 (1992) and by OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1993). The OKLAHOMA CODE OF PROFESSIONAL RESPONSIBILITY DR7-103 (1984) also contained a similar obligation. The Oklahoma Rules of Professional Conduct are codified at 5 OKLA. STAT. ch. 1, app. 3-A (1991).

26. ABA STANDARDS 3-62 commentary (1986).

27. ABA STANDARDS 3-3.11 (1992).

28. The number of appellate cases raising *Brady* issues, in part, evinces the begrudging attitude of many prosecutors regarding the disclosure of material that is arguably exculpatory. *See, e.g., Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), *cert. denied*, 479 U.S. 962 (1986). A few prosecutors actually hide exculpatory evidence. *See, e.g., People v. Jackson*, 538 N.Y.S.2d 677 (Sup. Ct. 1988) (overturning conviction on grounds that prosecutor in murder-arson case failed to disclose expert testimony that fire was not arson-related but result of electrical malfunction).

More commonly, however, prosecutors simply misunderstand the true scope of their disclosure obligation or adopt an attitude of selective ignorance. *See infra* note 121 and accompanying text. For a further examination of the causes and consequences of the serious systemic problem of prosecutorial nondisclosure of exculpatory evidence, *see, e.g., Bennett L. Gershman, The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987).

Prior to *Allen*, then, criminal defendants had varied, but often limited, pretrial access to the prosecutor's case. Oklahoma prosecutors had virtually no access to the defense case. Defense counsel, of course, has no ethical or constitutional duty to disclose inculpatory evidence to the prosecution.²⁹ Indeed, prior to *Allen*, defense counsel had no obligation to provide the prosecutor any details or information whatsoever about the defendant's case, other than providing notice of an alibi or insanity defense.³⁰

In the *Allen* decision, the Oklahoma Court of Criminal Appeals created radically new disclosure obligations for defense counsel while at the same time only minimally expanding the prosecutor's duty to disclose information about the State's case. The court declared that the pretrial discovery procedure it was mandating "will expedite the trial of criminal cases and will help alleviate the pressing problem of pre-trial disclosure."³¹ The *Allen* procedures, however, have not had the desired positive effect on the fair and efficient performance of the criminal justice system in Oklahoma.

Before discussing *Allen's* impact, it is important to review what *Allen* actually requires. According to *Allen*, the prosecutor shall, upon the defendant's request, disclose all of the material and information within the prosecutor's possession or control, including but not limited to:

29. Justice White eloquently summarized the special role the criminal defense lawyer plays in the American adversary system:

Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part).

Although defense counsel may not conceal evidence, counsel is under no duty to divulge the location of inculpatory evidence. *Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986). If defense counsel takes possession of physical evidence, however, counsel generally has an ethical duty to turn over that evidence to the prosecution or the court even though the evidence is adverse to the defense. ABA STANDARDS 4-4.6 (1991); *see also* CHARLES WOLFRAM, MODERN LEGAL ETHICS § 3.5 (1986). For an excellent examination of various aspects of this difficult ethical issue, *see* Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897 (1986).

30. *See supra* notes 10, 11.

31. *Allen*, 803 P.2d at 1167. The court also observed that these criminal discovery procedures will ensure that trials "will be a process to seek justice by providing the defendant and the State access to appropriate pre-trial discovery material." *Id.* at 1169.

- (a) the names and addresses of witnesses, together with their relevant oral, written or recorded statement, or summaries of same;
- (b) any written or recorded statements and the substance of any oral statements made by the accused or made by a co-defendant;
- (c) any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
- (d) any books, papers, documents, photographs, tangible objects, buildings, or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused;
- (e) any record of prior criminal convictions of the defendant, or of any codefendant; and
- (f) OSBI or FBI rap sheet/records check on any witness listed by the State or the defense as a possible witness who will testify at trial.³²

Allen imposes very similar disclosure requirements on the defense. The defense must disclose:

- (1) (a) The names and addresses of witnesses, together with their relevant oral, written or recorded statement, or summaries of same;
- (b) the name and address of any witness, other than the defendant, who will be called to show that the defendant was not present at the time and place specified in the information [or indictment], together with the witnesses statement to that fact;
- (c) the names and addresses of any witness the defendant will call, other than himself, for testimony relating to any mental disease, mental defect, or other condition bearing upon his mental state at the time the offense was allegedly committed, together with the witnesses statement of that fact, if the statement is redacted by the court to preclude disclosure of privileged communication
- (2) Upon the prosecuting attorney's request after the time set by the court, the defendant shall allow him access at any reasonable times and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control and which:
 - (a) the defendant intends to offer in evidence, except to the extent that it contains any communication of the defendant; or
 - (b) is a report or statement as to a physical or mental examination or scientific test or experiment made in connection with the particular case prepared by and relating to the anticipated testimony of a person whom the defendant intends to call as a witness, provided the report or

32. *Allen*, 803 P.2d at 1167-68.

statement is redacted by the court to preclude disclosure of privileged communication.³³

The *Allen* court went on to spell out the sanctions a trial court could utilize against a party for noncompliance with a discovery order. A trial court could specifically require either side to comply, grant additional time or a continuance, prohibit the introduction of specific evidence or witnesses, dismiss the charges, or declare a mistrial.³⁴ *Allen* also contains a provision which gives a party facing a sanction prohibiting the introduction of specific evidence or a witness the opportunity to show good cause why that party failed to comply.³⁵

Allen's Procedural Gaps: A Flawed Framework

From the start, the *Allen* procedures were flawed.³⁶ Admittedly, the Oklahoma Court of Criminal Appeals faced a daunting challenge in trying to draft a comprehensive code of criminal discovery.³⁷ Nevertheless, gaps in the procedural framework created by *Allen* have left many trial judges, prosecutors and defense lawyers unsure as to how pretrial criminal discovery really is to work.

First, the *Allen* court left unclear whether the procedures it was mandating applied in other than felony cases. The decision stated that the court was addressing "the issue of the right of pre-trial discovery in a felony criminal case."³⁸ The court empowered a trial judge to issue a discovery order "at any stage of the proceedings following the bindover."³⁹ Because bindovers occur only in felony cases, the procedures outlined apparently applied only in such cases. Yet, the opinion ended by indicating that the discovery procedures set forth were to apply "to all cases pending in the district courts of the State of Oklahoma."⁴⁰

33. *Id.* at 1168.

34. *Id.* at 1169. Additionally, in cases of prosecutorial noncompliance, the court can relieve the defendant from making a required disclosure. *Id.*

35. *Id.*

36. The defense disclosures mandated by *Allen* raise significant constitutional questions. A full discussion of the constitutional problems of compelling a criminal defendant to provide information and assistance to the prosecution is beyond the scope of this article. For a discussion of these issues in the context of *Allen*, see Uphoff, *supra* note 3, at 400-28. For a thorough and insightful discussion of the constitutional problems of mandating defense disclosures, see Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986).

37. Given the difficulty of the task it could be argued that the court should have followed the course suggested by Judge Lane in his concurring and dissenting opinion in *Allen* and the lead of the California Supreme Court by leaving to the legislature the job of drafting such a code because of the "primacy of the Legislature in the field of creating rules of criminal procedure." *People v. Collie*, 634 P.2d 534, 539-40 (Cal. 1981); see also *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that the task of drafting broad discovery rules is seemingly more appropriately tackled by legislative rather than the judicial branch). On the other hand, legislative inaction may well have driven the Oklahoma Court of Criminal Appeals to take up the challenge. See *supra* notes 4, 6 and accompanying text.

38. *Allen*, 803 P.2d at 1167.

39. *Id.*

40. *Id.* at 1169.

This confusion was largely eliminated in *Wilkerson v. District Court*,⁴¹ when the court explicitly held that *Allen* applied to all criminal cases in Oklahoma district courts, including misdemeanors.⁴² The court further noted that the only limitation upon *Allen*'s application in a criminal case was that any discovery orders in a felony case must follow the bindover order.⁴³ Subsequently, in *Bourland v. State*,⁴⁴ the court overturned a district court's refusal to apply the *Allen* procedures to an acceleration hearing.⁴⁵ Accordingly, if counsel makes a proper discovery motion, then a defendant facing an acceleration proceeding is entitled to the discovery recognized by *Allen*.⁴⁶ It remains to be seen if *Allen* will be extended to include certain municipal cases pending before a district court for a de novo hearing.⁴⁷

A more significant gap in the *Allen* framework is the absence of a well-defined process for achieving the pretrial discovery mandated by the decision. The procedures appear to be designed for the typical felony case. That is, after the bindover and at the formal arraignment, the court will issue a discovery order with a

41. 839 P.2d 659 (Okla. Crim. App. 1992).

42. *Id.* at 660.

43. *Id.*

44. 848 P.2d 580 (Okla. Crim. App. 1993).

45. *Id.* at 581. An acceleration hearing is a proceeding in which the prosecution attempts to revoke a defendant's deferred sentence by showing that the defendant violated the conditions of his or her probation. See 22 OKLA. STAT. § 991c (Supp. 1993).

46. *Bourland*, 848 P.2d at 581.

47. Neither *Allen* nor any subsequent case indicates that the *Allen* procedures are to apply to municipal cases. In *Wilkerson*, the court stated that the *Allen* procedures were to be applied to all criminal cases in district courts. *Wilkerson*, 839 P.2d at 660. It is not clear, however, whether a municipal case carrying a potential jail sentence that is appealed to a district court constitutes a criminal case covered by *Allen*. See *Wheatly v. State*, 139 P.2d 809 (Okla. Crim. App. 1943) (holding that a violation of a city ordinance did not constitute a crime if the defendant's conduct did not also constitute a violation of a state statute).

The issue is complicated further by the fact that a defendant convicted in a municipal court has two possible avenues of review, dependent upon whether the municipal court is a court of record. A conviction in a court of record — currently only the municipal courts in Oklahoma and Tulsa County are courts of record — is appealable to the Oklahoma Court of Criminal Appeals pursuant to title 18, § 1051 of the Oklahoma Statutes, and Oklahoma Criminal Appeals Rule 1.2(1). Clearly, if such a defendant has not obtained discovery prior to the municipal court trial, the opportunity and right to do so is lost since the appeal goes directly to the appellate court.

Alternatively, a defendant convicted in a municipal court which is not of record is allowed to appeal to district court and provided a de novo hearing. 11 OKLA. STAT. §§ 27-129 (1991). Since the case is now in district court, *Wilkerson* suggests that the parties are entitled to the discovery mandated by *Allen*. *Wilkerson*, 839 P.2d at 660.

Such a reading raises two important issues. First, the holdings in *Wilkerson* and *Bourland* (providing that *Allen* applies to misdemeanors and acceleration hearings) do not resolve the question as to whether all cases in district court are governed by *Allen*. Second, extending the right to criminal discovery only to those municipal defendants who initially were convicted in a court not of record seems to treat similarly situated persons differently. This raises a serious question of fairness and equality in administering justice. See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 282 [hereinafter Brennan, *Quest for Truth?*]. Arguably, sound policy dictates that no formal discovery be mandated in any municipal court cases, but that police reports be freely provided to all municipal defendants to ensure fair notice of the charges against them.

timetable ensuring that both sides enjoy timely access to discoverable material. Problems are to be sorted out at least ten days before trial. Theoretically, the parties will be prepared, a timely trial held and the smooth administration of justice served.

Unfortunately, felony cases frequently get sidetracked. Witness problems, delays in obtaining expert reports, motions to withdraw, illness, and court congestion are among a myriad of reasons why cases do not proceed as smoothly in practice as the court might hope. Moreover, the process described in *Allen* does not translate well when applied to misdemeanor cases. Many defendants charged with misdemeanors appear at their initial appearance or arraignment without counsel. In Cleveland County, for example, the next scheduled court appearance in a misdemeanor case after a defendant's initial appearance is the sounding or call docket. Thus, once defense counsel is retained or appointed, counsel must file a discovery motion and then secure a motion date for a discovery hearing.⁴⁸ In many instances, counsel will be appearing at the sounding docket without having received any discovery from the State or having had an opportunity to schedule a discovery hearing. In view of the fact that trials in Cleveland County are set three to four weeks after the sounding docket, defendants have little time to obtain their discovery order, receive the requested discovery, respond to the prosecution's motion for discovery and finalize trial preparation — all at least ten days before trial or risk serious sanctions for noncompliance. As a result, cases get continued to the next call docket or the lawyers go to trial without discovery and, frequently, without adequate preparation.⁴⁹

The *Allen* procedures hamper rather than facilitate timely access to pretrial information by failing to provide a simple but ordered process for obtaining

48. In some cases, the lawyer will enter a case only a week or so before the sounding docket, leaving counsel unable to schedule a hearing before the sounding docket.

49. The most plausible explanation for a defense lawyer not filing a discovery motion is that the State has voluntarily made all of the information and evidence mandated by *Allen* available. Occasionally, defense counsel may decline to pursue formal discovery because counsel feels that the defense stands to give up more than will be gained if a reciprocal discovery order is granted. In many cases, however, counsel's failure to seek discovery to which the defense is entitled opens counsel up to a claim of ineffective assistance of counsel. See *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 498 U.S. 950 (1990). The decision to interview a witness is not a decision related to trial strategy, but a question of adequate preparation. The *Chambers* court stated that a defense attorney has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)); see also *Mason v. Balcom*, 534 F.2d 1407 (5th Cir. 1976), reh'g denied, 534 F.2d 1407 (5th Cir. 1976) (holding that a defense lawyer has duty to investigate even when the client just wants to plead guilty); ABA STANDARDS 4-4.1(a) (1991).

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the court found that defense counsel's failure to conduct discovery constituted ineffective assistance of counsel. The Court, citing earlier decisions, stated that "such a complete lack of pretrial preparation puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution' and the reliability of the adversarial testing process." *Id.* at 385 (citation omitted) (quoting *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 275 (1942)).

Unquestionably, a defense lawyer's failure to conduct a proper investigation or to adequately prepare also violates OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1993). See, e.g., *In re Lewis*, 445 N.E.2d 987 (Ind. 1983); *Florida Bar v. Morales*, 366 So. 2d 431 (Fla. 1978).

discovery. It makes little sense to insist upon a judicial order as a necessary triggering step in the discovery process. Rather, the prosecution should first be required to provide certain specified discovery material merely upon the defense's request without the need for court intervention.⁵⁰ Once such discovery is provided, the prosecution should then be able to demand the discovery to which the prosecutor is entitled. A discovery hearing and order should only be necessary if a disagreement develops over a specific request.

In addition, the *Allen* procedures do not clearly specify that defense disclosures must follow instead of being exchanged simultaneously with the prosecution's discovery. In the vast majority of cases, most of the State's investigation has been completed prior to charges being issued. The prosecution has identified its witnesses, knows generally what those witnesses will say, and possesses sufficient admissible evidence to support its theory of the case.⁵¹ There is no sound policy reason for not requiring the prosecutor to make early disclosure of the material mandated by *Allen*.⁵² Early prosecutorial disclosure will foster the prompt resolution of cases and, if cases are going to be tried, the preparation of both sides for that trial.⁵³

If a prosecutor is permitted to substantially delay turning over discovery material to the defense, defense counsel's investigation and trial preparation will be sorely hampered. In turn, defense counsel will not be able to comply in any meaningful way with the required disclosures that the defense must make. Hence, either the trial will be delayed, the prosecution will not receive the requisite disclosures or the defense will suffer one of the sanctions provided by *Allen*.

At present, *Allen* affords the trial judge too much flexibility and too little guidance. The trial judge may issue a discovery order at virtually any time compelling compliance according to a schedule the judge deems appropriate as long

50. Compare, for example, FED. R. CRIM. P. 16(a)(1)(A), which provides that the prosecution upon request provide the defense certain discovery material without the need for a motion and court order. See also Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 198-201 (1992) (stating that judges lack time and inclination to closely supervise and resolve discovery disputes, so judicial procrastination increases delay).

51. It is improper for a prosecutor even to file or permit the continued pendency of charges in the absence of sufficient admissible evidence. ABA STANDARDS 3-3.9 (1992). It follows, then, that the prosecutor's superior access to information about a case is magnified during the earliest stages of the case. See Gershman, *supra* note 28, at 449. For a discussion of the State's inherent advantages in marshalling evidence, see *Wardius v. Oregon*, 412 U.S. 470, 476 n.9 (1973). See *infra* notes 54-57, 101-04 and accompanying text.

52. Early discovery facilitates the goals of a fair and efficient discovery system. See *infra* note 116.

53. See Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641 (1989) (granting defendant improved pretrial access leads to more informed pleas without adversely affecting the State's ability to obtain convictions). More importantly, in those cases in which the defendant has been erroneously charged, early disclosure may allow defense counsel to conduct a more prompt investigation and secure quicker dismissals of unwarranted prosecutions. See Brennan, *Quest for Truth?*, *supra* note 47, at 279. Additionally, broad discovery would benefit prosecutors by increasing the numbers of cases disposed of without the necessity of trial. *Id.* at 287.

as all discovery issues are resolved at least ten days before trial. As a result, trial judges are interpreting and applying *Allen* in very different ways.

Furthermore, the *Allen* procedures gloss over the significant burdens that defense lawyers confront in meeting *Allen's* disclosure requirements, especially in a timely manner. Few criminal defendants can afford to retain private investigators to assist defense counsel.⁵⁴ Defense counsel often must conduct his or her own investigation. Because defense counsel generally does not get involved until weeks, or even longer, from the date of the offense, counsel faces greater difficulty in locating witnesses, increased instances of faded memories and a reduced chance of uncovering favorable evidence.⁵⁵ Defense counsel encounters the same reluctant witnesses the State does, but counsel for the criminally accused finds it even harder to persuade those witnesses to submit to an interview.⁵⁶ In addition, the defense's inability to gain pretrial access to the prosecution's case is exacerbated if the State's witnesses are "encouraged" to exercise their right to refuse to be interviewed.⁵⁷

54. Numerous commentators and studies have decried the inadequate resources and extremely limited investigative assistance provided lawyers defending the poor. See, e.g., NORMAN LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* (1982). Yet, it is also clear that even those persons who are able to retain counsel can rarely afford investigators and other experts. See William J. Genego, *The New Adversary*, 54 *BROOK. L. REV.* 781, 794-95 (1988). The absence of investigative assistance may seriously compromise the quality of counsel's representation. "The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal witness or a necessary document . . ." *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting), *vacated*, 352 U.S. 565 (1957); see also Brennan, *Quest for Truth?*, *supra* note 47, at 286. Unfortunately, it also is clear that defense lawyers in Oklahoma have struggled without adequate resources to defend indigents charged with crimes. See *FINAL REPORT OF THE SPANGENBERG GROUP ON OKLAHOMA INDIGENT DEFENSE* (1988).

55. See Genego, *supra* note 54, at 795, 797. The Court in *Doggett v. United States*, 112 S. Ct. 2686 (1992), cited earlier cases recognizing that impairment of one's defense is a form of prejudice because of "time's erosion of exculpatory evidence and testimony." *Id.* at 2692-93. For an excellent discussion of the importance of a timely and thorough defense investigation, see ANTHONY G. AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* §§ 106-122 (1988).

56. Many people simply do not want to get involved, especially if they think they may have to go to court. But even reluctant witnesses tend to feel compelled to talk to the police. Witnesses do not feel similarly compelled to talk with defense counsel or a defense investigator. For a discussion of the additional pressures which the State can bring to bear to encourage cooperation, see Gershman, *supra* note 28, at 416-17.

57. See Brennan, *Quest for Truth?*, *supra* note 47, at 286. The Oklahoma Rules of Professional Conduct forbids a prosecutor from instructing a witness not to talk to the defense. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.4(f) (1993); see also ABA STANDARDS 3-3.1(d) (1992) (stating that prosecution should not discourage or obstruct communication between witness and defense); ABA CTR. FOR PROFESSIONAL RESPONSIBILITY, *ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* 401-02 (2d ed. 1992); *United States v. Lopez*, 989 F.2d 1032 (9th Cir. 1993).

On the other hand, a prosecutor may explain to a witness that he or she is free to refuse to speak with the defense should the witness so desire. Some prosecutors provide this explanation in a manner so as to discourage witnesses from talking with the defense. This practice has been condemned. See ABA STANDARDS 3-3.1(d) (1992); *United States v. Carrigan*, 840 F.2d 599 (10th Cir. 1986); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *State v. Simmons*, 203 N.W.2d 887 (Wis. 1973). A defense

Again, defense counsel's investigation and preparation is more difficult in a misdemeanor case because the defense has no right to a preliminary hearing in such cases. A preliminary hearing gives defense counsel a significant preview of the State's case even though the prosecutor usually seeks to achieve a bindover while disclosing as little of the State's case as possible. Defense counsel, on the other hand, uses this hearing to discover as much information as possible about the prosecutor's case.⁵⁸ Because counsel does not have access to police reports or other discovery before the preliminary hearing, the defense often will only learn the broad parameters of the prosecution's case at this hearing. Moreover, the preliminary hearing seldom reveals much about the credibility of the prosecution's witnesses, their motivations or their biases. This type of impeachment testimony must be generated by defense counsel's own efforts. Assuming that such evidence is uncovered, does *Allen* require that it be disclosed?

The answer is not as straightforward as it first would seem. *Allen*, as clarified by *Richie v. Beasley*,⁵⁹ requires the defense to disclose only those witnesses "whom the defense intends to call at trial."⁶⁰ Impeachment witnesses may or may not be called, depending on the testimony of the prosecution's witness. For example, if a prosecution witness admits certain facts on cross-examination, testimony of an impeachment witness may be unnecessary. Counsel's intention to call such an impeachment witness, therefore, is conditioned on the State's case-in-chief and the testimony of the prosecution's witnesses.

A fundamental problem with the defense disclosures mandated by *Allen* is that, aside from affirmative defenses where the defense bears the burden of production, the presentation of the defense case is usually conditioned on the testimony actually elicited in the State's case-in-chief. It follows, therefore, that the defense case necessarily consists largely of testimony offered to rebut the State's case. It is difficult to provide pretrial notice of an intent to use what is really rebuttal evidence until the defense actually hears the State's witnesses testify and determines the need for defense testimony.⁶¹

lawyer also is subject to discipline for advising a person other than a client not to talk with the prosecution unless the person is a relative, employee or other agent of a client and the lawyer reasonably believes the person's interests will not suffer as a result of refusing to talk. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.4(f) (1993); ABA STANDARDS 4-4.3(d) (1991); see also *United States v. Fayer*, 523 F.2d 661 (2d Cir. 1975) (affirming a defense lawyer's conviction for advising a represented witness not to voluntarily appear before a grand jury investigating lawyer's client).

58. *Beard v. Ramey*, 456 P.2d 587, 589 (Okla. Crim. App. 1969) (stating that the defense has a right to call witnesses and produce evidence at a preliminary hearing where discovery is an appropriate goal); see also *Wyrick v. District Court*, 839 P.2d 1376, 1377 (Okla. Crim. App. 1992) (following *Beard* and citing 22 OKLA. STAT. §§ 257, 259 in holding that both the defense and prosecutor may subpoena witnesses to testify at preliminary hearing).

59. 837 P.2d 479 (Okla. Crim. App. 1992).

60. *Id.* at 480.

61. As Justice Black correctly insisted, "[a]ny lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about." *Williams v. Florida*, 399 U.S. 78, 109 (1970) (Black, J., concurring in part and dissenting in part). Because it is so difficult to predict what witnesses will actually

The Oklahoma Court of Criminal Appeals has explicitly recognized this problem in holding that the prosecution need not endorse rebuttal witnesses.⁶² As the court observed, "[T]he State was not required to give pretrial notice because the State cannot know with certainty prior to trial what evidence may become relevant for rebuttal."⁶³ Unquestionably, there will be many cases in which the prosecutor will not ascertain, until defense witnesses actually testify, that a need exists to call a specific person or elicit particular testimony. The ebb and flow of trial practice makes it impossible for even the most prepared prosecutor in many cases to anticipate in advance of trial all the testimony that will be needed to respond to the other side's case.

Yet, it is hard to fathom why the task is any easier for the defense. Indeed, given the imbalance of investigatory resources and the limited discovery provided even under *Allen*, defense counsel often will not learn critical facts about the prosecution's case until the State's witnesses actually testify at trial. To then limit the defense to witnesses identified in the defendant's discovery response raises serious questions of fairness as well as possible violations of the defendant's right to the effective assistance of counsel, compulsory process, and the right to present a defense.⁶⁴

say or how they will respond on cross-examination, it is hard to know with any certainty what testimony will be needed to rebut one's opponent or corroborate one's own witnesses. Thus, limiting a defendant to calling only those witnesses disclosed before the defendant received full disclosure of all the State's witnesses, including potential rebuttal witnesses, may well run afoul of the due process concerns identified in *Brooks v. Tennessee*, 406 U.S. 605, 608-13 (1972) (recognizing that a state rule requiring defendant to testify first at trial before the defense has an opportunity to evaluate actual worth of defense evidence violates due process). *But see Taylor v. Illinois*, 484 U.S. 400 (1989) (recognizing that under some circumstances it is constitutionally permissible to preclude defense testimony as sanction for discovery violation).

62. *Honeycutt v. State*, 834 P.2d 993 (Okla. Crim. App. 1992), is the latest in a series of cases holding that the State need not endorse a witness if the testimony given is clearly rebuttal. Rebuttal testimony may be offered to "explain, repel, counteract, disprove, or destroy facts given in evidence by an adverse party, as well as to clarify a disputed point." *Lavicky v. State*, 632 P.2d 1234, 1237 (Okla. Crim. App. 1981).

63. *Honeycutt*, 834 P.2d at 997; *see also Freeman v. State*, 681 P.2d 84, 85 (Okla. Crim. App. 1984) (observing that "the State cannot know with certainty prior to trial what evidence may become relevant for rebuttal").

64. *See Wardius v. Oregon*, 412 U.S. 470 (1973); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Scott v. State*, 519 P.2d 774 (Alaska 1974). For a further discussion of the constitutional ramifications of compelling defense disclosures which ease the State's burden of proof, adversely affect defense strategy or restrict the defendant's ability to present testimony not previously disclosed, *see generally Mosteller, supra* note 36; *Uphoff, supra* note 3, at 406-25. *Taylor v. Illinois*, 484 U.S. 400 (1988), does recognize that the compulsory process clause does not constitute an absolute bar to the preclusion of a defense witness as a sanction for violating a discovery provision. *Id.* at 401. Nonetheless, it also is clear the preclusion of defense witnesses or testimony is the most severe sanction which should be reserved for cases involving flagrant discovery violations. *Id.* at 416-17; *see also Wilkerson v. District Court*, 839 P.2d 659, 661 (Okla. Crim. App. 1992). For a recent case in which the Oklahoma Court of Criminal Appeals agreed that preclusion of defense witnesses would be inappropriate because defense counsel's actions, not the defendant's, had prevented compliance with a discovery order, *see Morgan v. District Court*, 831 P.2d 1001, 1005 (Okla. Crim. App. 1992). For a more detailed look at the arguments against penalizing a defendant for the failings of defense counsel, *see John W. Heiderscheit, Taylor v. Illinois:*

The *Allen* decision never addressed the issue of rebuttal witnesses. According to *Richie v. Beasley*, *Allen* requires a prosecutor to provide the defense "the names and addresses of all persons known to the State having knowledge of relevant facts or information about the case."⁶⁵ Such a broad requirement certainly could be interpreted to include all rebuttal witnesses because they are persons with relevant information.⁶⁶ On the other hand, until the defense disclosures are made, the State may not even have known about or have located certain rebuttal witnesses. Thus, it is unlikely that *Allen* would be read to require the disclosure of such witnesses unless the prosecutor has a continuing duty to supplement his or her initial discovery response.

Allen does not clearly define the duties of each side to provide supplemental discovery. The defense is required to inform the prosecutor if the defense subsequently gains possession or control of evidence or a report the defense intends to introduce at trial.⁶⁷ Other than this specific continuing disclosure obligation, however, *Allen* is silent about the parties' need to supply additional information and material to the other side as such information is uncovered. Although such continuing disclosure obligations may be warranted and sound policy,⁶⁸ the *Allen* decision leaves unanswered the question of the trial judge's authority to impose and enforce a duty on both the prosecution and the defense to provide supplemental disclosures to their initial discovery responses.⁶⁹

Thus, neither *Allen* nor any subsequent case clearly indicates whether a prosecutor is, in fact, now required to disclose rebuttal witnesses.⁷⁰ If the prosecutor can avoid identifying such witnesses and need not provide any disclosure about such rebuttal

The New and Not-So-New Approach to Defense Witness Preclusion Sanctions for Criminal Discovery Violations, 23 GA. L. REV. 479, 498-504 (1989).

65. *Richie*, 837 P.2d at 480.

66. Some rebuttal testimony goes only to impeach the credibility of the defendant or defense witnesses and may not go directly to the facts of the case. Arguably, then, it is not "information about the case." Such a narrow interpretation seems unduly strained. If impeachment by a rebuttal witness is allowed, it must be because it is relevant. *Richie*, therefore, seemingly requires prosecutors to identify and to disclose to the defense all potential witnesses with relevant impeachment testimony. *Id.* This obligation, however, is not clearly defined in *Allen*. See *infra* notes 70-75 and accompanying text.

67. *Allen*, 803 P.2d at 1168.

68. See ABA STANDARDS 11-4.2 & cmt. (1986).

69. The Federal Rules of Criminal Procedure impose a specific duty on both parties to supplement discovery stating that "if, prior to or during the trial, a party discovers additional evidence . . . which is subject to discovery . . . such party shall promptly notify the other party." FED. R. CRIM. P. 16(c). *Allen* contains no similar provision. Nevertheless, the prosecution's obligation to turn over *Brady* material is a continuing one and extends even after the defendant's trial. *Bowen v. State*, 715 P.2d 1093, 1099 (Okla. Crim. App. 1984), cert. denied, 473 U.S. 911 (1985) (holding that throughout the course of trial evidence may be discovered which puts prosecution on notice of duty to disclose such evidence to the defense *sua sponte*).

70. In *Allen v. State*, 862 P.2d 487 (Okla. Crim. App. 1993), the court reaffirmed its position that the decision to admit rebuttal testimony is within the trial court's discretion. The court noted that the defendant complained he was not given "proper notice" of the rebuttal witness' testimony. *Id.* at 492. The decision, however, did not directly address the question whether the *Allen* procedures as modified by *Richie* require the prosecutor to give pretrial notice of any potential rebuttal witness together with a summary of that person's statement.

testimony, the *Allen* procedures leave the defense open to increased ambush under the guise of rebuttal testimony. Indeed, given the court's broad definition of rebuttal testimony,⁷¹ a clever prosecutor merely could designate certain witnesses as rebuttal and thereby "hide" a significant part of the State's case from the defense.

It is very difficult to square *Allen*'s increased defense disclosure obligations with the proposition that the State need not disclose rebuttal testimony especially in light of the State's burden of proof and the constitutional protections traditionally afforded criminal defendants in the American adversarial system of criminal justice.⁷² Put simply, allowing the State to keep its rebuttal witnesses secret gives the prosecution an unfair, impermissible tactical advantage thereby offending the balance of forces central to the adversary system.⁷³ If the *Allen* procedures do not mandate that a prosecutor disclose intended rebuttal testimony, the procedures violate due process in the same way that the alibi rule did in *Wardius v. Oregon*.⁷⁴ "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."⁷⁵

Perhaps the Oklahoma Court of Criminal Appeals expects trial judges to compel prosecutors to reveal rebuttal witnesses and rebuttal material in a timely manner and to preclude prosecutors from using rebuttal witnesses to surprise the defense. Certainly the court's conclusion in *Richie v. Beasley* that the disclosure requirements are distinctly different for the State and the defense such that the prosecution must disclose all persons with relevant facts while the defense need only identify intended witnesses supports such action by the trial judge.⁷⁶ Yet, in a recent decision, *Allen*

71. See, e.g., *Wooldridge v. State*, 659 P.2d 943, 947 (Okla. Crim. App. 1983) (stating that "rebuttal testimony may be offered to explain, repel, disprove or contradict facts given in evidence by an adverse party, regardless of whether such evidence might have been introduced in the case in chief and regardless of whether the testimony is somewhat cumulative").

72. For a summary of the basic principles underlying the American adversary system of criminal justice, see WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 1.6 (1985); see also DAVID LUBIN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 58-63 (1988) (stating that constitutional rights afford defendants little real protection in light of harsh realities of overburdened system and that adversary system is designed to handicap the State in order to check abuses of power and protect civil liberties of all).

As Justice Black observed, the adversary system and the constitutional protections granted all defendants do require that the State shoulder a difficult burden in establishing guilt beyond a reasonable doubt. Undoubtedly,

That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in 'efficiency' that resulted.

Williams v. Florida, 399 U.S. 78, 113-14 (1970) (Black, J., concurring in part and dissenting in part).

73. *Wardius v. Oregon*, 412 U.S. 470, 471-74 (1973).

74. In *Wardius* the Supreme Court struck down an Oregon notice of alibi statute that forced the defense to disclose its alibi witnesses without requiring the prosecutor to respond by identifying witnesses who would rebut that alibi. *Id.*

75. *Id.* at 476.

76. *Richie*, 837 P.2d at 480.

v. State,⁷⁷ the court brushed aside the defendant's complaint that he was not given proper notice of rebuttal testimony. Without directly addressing the issue, the court merely restated its previous position that the admission of rebuttal testimony lies within the sound discretion of the trial judge.⁷⁸ As a result, trial judges may well hesitate to preclude the State's use of undisclosed rebuttal testimony even though defendant's are ambushed by such testimony.

On the other hand, if rebuttal witnesses need now be identified and appropriate disclosures made, prosecutors will face problems similar to those facing the defense. In particular, it may be impossible for a prosecutor to make timely disclosure of all the State's rebuttal testimony in response to defense disclosures made shortly before trial. Again this will lead to delay or the State being unfairly precluded from calling a witness discovered on the eve of trial.

Nonetheless, it is far better to mandate disclosure of rebuttal witnesses as soon as discovered, and, if necessary, to grant a pretrial or even midtrial continuance, than to allow the prosecutor to surprise the defense with undisclosed rebuttal witnesses.⁷⁹ To permit the prosecutor broad use of a rebuttal witness exception to *Allen's* disclosure obligations is to provide the State a significant, albeit constitutionally offensive, tactical advantage.⁸⁰ This rebuttal exception not only subjects criminal defendants to an increased risk of ambush at trial, it will aggravate the already growing number of discovery issues on appeal.⁸¹

The related problems of the defendant providing a timely, detailed summary of all proposed defense testimony, primarily rebuttal in nature, and of the prosecutor in turn giving timely notice of all the State's rebuttal testimony reflect the fundamental shortcoming of the *Allen* decision. *Allen* represents a bold but unsuccessful effort to reorder the criminal trial process in Oklahoma so that it more closely resembles the civil system. In theory, then, the court's new procedures were designed to "expedite the trial of criminal cases" and to ensure "a process to seek justice" by providing each side access to pretrial discovery material.⁸²

The *Allen* court's attempt to dramatically alter the nature and the dynamics of criminal practice simply is not warranted. First, the *Allen* court's emphasis on creating procedures to expedite trials is misplaced. The vast majority of criminal

77. 862 P.2d 487 (Okla. Crim. App. 1993). This case affirms the conviction of the defendant whose case prompted the decision creating the *Allen* procedures.

78. *Id.* at 492.

79. See *Wooldridge v. State*, 659 P.2d 943, 947 (Okla. Crim. App. 1983) (recognizing that "if an unendorsed witness' testimony will require a defendant to produce additional evidence or other rebuttal witnesses, the defendant is entitled to a continuance of sufficient time to prepare to defend against the rebuttal testimony").

80. See *supra* note 73 and accompanying text.

81. Ironically, the court addressed the "pressing problem of pretrial disclosures" and enacted the *Allen* procedures in part because the court "is continually confronted with issues on appeal relating to compliance with pretrial discovery." *Allen*, 803 P.2d at 1167. The *Allen* procedures have increased, not reduced, discovery issues for trial judges and the Oklahoma Court of Criminal Appeals.

82. *Id.* at 1167-69.

cases settle.⁸³ Although improved trial preparation is a worthy goal, discovery procedures must, above all, facilitate the prompt and fair resolution of cases and ensure quick and easy access to information with as little need for judicial intervention as possible.⁸⁴ The flawed *Allen* procedures, especially the need for a discovery order, hinder timely access to discoverable material.⁸⁵

In addition, the *Allen* disclosure requirements are part of an incomplete framework which serves to encourage each side to minimize the information provided to one's opponent. Although the court mandated that each side make certain disclosures, it did not provide the parties the discovery tools needed to follow up on those initial disclosures. Hence, a prosecutor or defense lawyer can avoid turning over a witness statement by instead providing a brief, but not terribly informative, summary.⁸⁶

These superficial summaries do provide notice that a particular person will testify, but they do not enable a party to readily discover what the opponent's witnesses will say. Unlike civil practice, neither the State nor the defense can use interrogatories or dispositions to probe for details concerning what the other side's witnesses know and are likely to say at trial. Without such tools, *Allen* does not ensure substantial pretrial access to the testimony to be adduced at trial by the other side.⁸⁷

Furthermore, it is unrealistic to expect that either party will provide a complete and detailed account of the anticipated testimony of each witness to be called.⁸⁸

83. LAFAVE & ISRAEL, *supra* note 72, § 20.1.

84. ABA STANDARDS 11-1.1 (1986).

85. Both discovery bills introduced in the 1993 session of the Oklahoma legislature contained procedures which substantially tracked *Allen*. See H.R. 1530, 44th Leg., 2d Sess. (Okla. 1993); S. 117, 44th Leg., 1st Sess. (Okla. 1993). Both bills, however, allowed the defense access to statements and reports, including OSBI reports, in the prosecutor's possession prior to the preliminary hearing. Such a provision would significantly improve defense counsel's timely access to information and increase the likelihood of informed plea bargaining before the preliminary hearing.

86. *Allen*, 803 P.2d at 1167-68. Moreover, the well-documented problems and abuses in the civil system suggest that it is highly unlikely, without substantial effort and cost, that most advocates will provide helpful and meaningful summaries to their adversaries. See, e.g., Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 829, 836-38 [hereinafter Brazil, *Lawyers' Views*]; Gerald R. Powell, *The Docket Movers: A Critique of Proposed Amendments to the Federal Rules of Civil Procedure*, 1 J. AM. BOARD TRIAL ADVOC. 1, 14-15 (1991).

87. This does not mean, however, that it is desirable to actually provide those tools or to mandate more expansive discovery in criminal cases. See *infra* notes 98, 100 and accompanying text. But see William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 8 (1990) [hereinafter Brennan, *Progress Report*] (arguing that it is desirable to give judges the discretion to order discovery depositions in appropriate cases).

88. See Petition for Writ of Mandamus at 1, *State ex rel. Wideman v. Beekman*, 839 P.2d 661 (Okla. Crim. App. 1992) (No. O 92-0907), in which the prosecutor sought a writ to direct the district court to order defense counsel to provide "a complete and accurate summary of the specific testimony to be offered by each witness for the defendant." Although the writ was granted, defense counsel was ordered only to provide the relevant oral, written or recorded statements or summaries of the same, not a complete account of the witnesses' entire proposed testimony. *Wideman*, 839 P.2d at 662. *Allen's* mandate that a summary of a statement be provided does not render any support for the unworkable

The realities of criminal trial practice — understaffed prosecutors' offices with too many cases, most of which must be and are plea-bargained,⁸⁹ frequent problems locating and securing the cooperation of witnesses,⁹⁰ and the late nature of much prosecutorial trial preparation once a case has been identified as going to trial — make it extremely unlikely that prosecutors could ever provide defense lawyers detailed scripts of their witnesses' testimony. Given that fact, it is constitutionally offensive to mandate that the defense provide such detailed summaries of the testimony of defense witnesses.⁹¹

Unquestionably, the *Allen* procedures have improved the prosecutor's trial preparation. The State now has the right to learn in advance about the existence of defense witnesses. Even though defense witnesses summaries may be brief, the prosecutor still learns the evidence intended to be introduced by the defense at trial.⁹² In many cases, especially when law enforcement agents are then able to interview defense witnesses, the prosecutor is less likely to be surprised by, and more ready to challenge, defense testimony.

It is highly questionable, however, that the defendant's access to pretrial information has really increased under *Allen*. As already noted, the prosecutor's duty to disclose rebuttal witnesses is unsettled.⁹³ Police reports, except those containing exculpatory material, need not be turned over if the prosecutor chooses to rely on witness summaries.⁹⁴ Although trial judges should be requiring prosecutors to turn over the names and addresses of all persons with relevant information about the defendant's case, not simply the names of the State's intended witnesses, it is unclear to what extent this requirement is currently being enforced. As to the other prosecutorial disclosures called for by *Allen*, the defendant already could obtain most of this information under existing case law.⁹⁵ *Allen*, therefore, has not significantly enhanced a defendant's pretrial access to the State's evidence or facilitated defense counsel's trial preparation.

proposition that either counsel must give to the other side a "complete" statement. *See supra* note 86.

89. *See supra* notes 83.

90. *See supra* notes 49-57 and accompanying text.

91. *See Wardius v. Oregon*, 412 U.S. 470, 475 (1973) ("The State may not insist that trials be run as 'a search for the truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses.").

92. *Allen* requires such disclosure pursuant to 2(a) & (b) of its mandated procedures. *Allen*, 803 P.2d at 1168.

93. *See supra* notes 62-63, 65-66, 70-75 and accompanying text.

94. *See Fritz v. State*, 811 P.2d 1353, 1358 (Okla. Crim. App. 1991) (stating that unsworn statements of witnesses in police reports need not be disclosed). *See supra* note 14. Although prosecutors may choose to turn over police reports to comply with *Allen* and *Richie*, some prosecutors will opt only to provide summaries of witnesses statements but not investigative reports. Police reports generally provide a more useful summary of information than a prosecutor's sanitized summary of a statement a witness gave to the police. Nonetheless, police reports rarely contain a complete and accurate account of the witness' knowledge of an incident or the circumstances surrounding an incident.

95. *See supra* notes 13-23 and accompanying text.

Replacing Allen: The Need for Legislative Action

It is time for the Oklahoma legislature to assume the responsibility for creating a statutory framework to replace the *Allen* procedures. Unfortunately, the bills introduced in the 1993 legislative session substantially track the *Allen* procedures.⁹⁶ Although the *Allen* procedures should be replaced, the answer does not lie in creating a more structured code allowing for even greater discovery. Nor should the parties be provided more discovery tools. Rather, the new procedures must be simple, fair, and largely free of judicial supervision.⁹⁷ In short, the legislature should not follow the *Allen* court's lead and try to make the criminal system more like the civil system.

Neither the *Allen* procedures nor last session's legislative equivalents will efficiently and effectively produce the desired goals of evenhanded pretrial access to information and adequately prepared lawyers. Without significantly reworking or adding to the *Allen* procedures, *Allen's* incomplete framework provides too much opportunity for gamesmanship and ambush. But the solution is not to add costly procedural mechanisms so as to restructure the criminal system making it more like the civil system. Simply stated, mandating more discovery will not produce more justice.⁹⁸

96. See *supra* note 6. It is not surprising that House Bill 1530 bears a considerable resemblance to *Allen* in view of the fact that Judge Lumpkin of the Oklahoma Court of Criminal Appeals served as the chairperson of an Oklahoma Bar Association Criminal Law Committee formed to draft the legislation which ultimately became House Bill 1530.

97. For a proposed Oklahoma criminal discovery code modeled on the *ABA Standards*, see Uphoff, *supra* note 3, at 431-41.

98. Indeed, the adversarial and competitive nature of trial practice makes it more likely that formalizing criminal discovery will lead to more gamesmanship rather than justice. As Wayne Brazil insists:

The unarticulated assumption underlying the modern discovery reform movement was that the gathering and sharing of evidentiary information should (and would) take place in an essentially nonadversarial environment. That assumption was not well made. Instead of reducing the sway of adversary forces in litigation and confining them to the trial stage, discovery has greatly expanded the arenas in which those forces can operate. It also has provided attorneys with new weapons, devices, and incentives for the adversary gamesmanship that discovery was designed to curtail. Rather than discourage "the sporting or game theory of justice," discovery has expanded both the scope and the complexity of the sport

Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295, 1303-04 (1978) [hereinafter Brazil, *Adversary Character*]; see also, e.g., Edwin W. Green & Douglas S. Brown, *Back to the Future: Proposals for Restructuring Civil Discovery* 26 U.S.F. L. REV. 225 (1992) (criticizing expensive and unworkable civil discovery system which has failed to facilitate access to information or end ambush at trial); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 155-56 (1991) (disagreeing that additional rule-making will ameliorate discovery problems); *Federal Rule 26 Amendments: Wrong Medium for Discovery Problems*, 58 DEF. COUNS. J. 454, 455 (1991) (criticizing new proposed disclosure requirements as adding significant systemic costs without concomitant systemic benefits).

Mandating more detailed disclosures or providing for interrogatories and depositions will only serve to exacerbate the problems of the already under-resourced and overtaxed criminal justice system.⁹⁹ Thus, even though the framework created by the *Allen* procedures is incomplete, adding to that framework only increases systemic costs without significant benefits to the fair and efficient administration of justice. In light of the claims of many observers that discovery abuses are a major cause of delay and added expense in the civil system,¹⁰⁰ new legislation creating more formalized criminal discovery procedures is particularly unwise and fiscally unsound.

In addition, the more formalized criminal discovery becomes the less likely it will be utilized effectively by counsel representing the indigent or near-indigent defendant.¹⁰¹ Making discovery more difficult or more expensive to obtain increases the gap in the quality of representation provided wealthy and indigent defendants.¹⁰² Indigent defendants and those able to obtain counsel for a modest retainer would be unable to afford to schedule depositions. Undoubtedly, the State will balk at bearing the cost of defense requested depositions.¹⁰³ Yet, making these

99. No knowledgeable observer of the criminal justice system can deny that the system lacks the resources to cope with the increasing demands made on all of the system's players. *See, e.g.*, RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* (1993); ABA SECTION ON CRIMINAL JUSTICE, *CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES* (1988).

100. In recent years there have been numerous articles detailing the widespread abuse of civil discovery procedures and the increasing imposition of sanctions. *See, e.g.*, Dudley, *supra* note 50; BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, *JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION 6-7* (1989); Louis Harris & Assocs., Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731 (1989); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); David O. Stewart, *The Year of Sanctioning Litigants*, 77 A.B.A. J. 34 (1991). *See supra* note 98.

101. Ironically, Justice Brennan's call for more liberal discovery in criminal cases in his often-quoted article, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, was prompted largely by his recognition of the need to offset the imbalance of power between the State and lawyers representing the poor. *See* Brennan, *Quest for Truth?*, *supra* note 47, at 285.

102. Some defendants, especially drug kingpins and white collar defendants, can afford investigators and other defense experts who enable them to wage a vigorous defense. *See* Genego, *supra* note 54, at 787, 797; KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 5* (1985). In contrast, many defense lawyers are constrained by serious resource problems which limit their zeal and effectiveness. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 901 (1986-87); LUBIN, *supra* note 72, at 58-63. *See supra* note 54.

As Justice Brennan noted in his seminal article on discovery in criminal cases, "we must all agree that the opportunity for discovery on equal terms should either be the right of all accused, or the right of none." Brennan, *Quest for Truth?*, *supra* note 47, at 282.

103. The discovery bills introduced in the 1993 legislative session generally required the requesting party to pay discovery costs. Although § 9 of House Bill 1530 did provide that if a defendant "is indigent and without funds to pay the cost of reproduction of the required items, the cost shall be paid by the Indigent Defender System," it did not specify that deposition costs were covered. H.R. 1530, 44th Leg., 2d Sess. § 9 (Okla. 1993). Similarly, § 9 of Senate Bill 117 contained almost identical language requiring the Indigent Defense System to pay copying, duplication, and reproduction expenses. S. 117, 44th Leg., 1st Sess. § 9 (Okla. 1993). Even if indigents are given the right to freely utilize depositions,

discovery tools available, but not providing defendants who are indigent or barely able to afford counsel the means to utilize such tools, raises serious equal protection and due process concerns.¹⁰⁴

Not only would it be too costly to reorder the criminal system to mirror the civil system, such an effort ignores basic differences in the two systems. A criminal trial is a search for truth, but that search is subject to constitutional constraints not applicable in civil cases.¹⁰⁵ Because of the constitutional guarantees afforded all criminal defendants, the two sides in a criminal case are not governed by the same rules.¹⁰⁶ Indeed, unlike civil litigants, the advocates in the criminal justice system

many Oklahomans of extremely limited means are found not indigent and compelled to exhaust their resources merely to retain counsel. See Rodney J. Uphoff, *The Right to Appointed Counsel: Why Defendants in Oklahoma Still are Unrepresented*, 64 OKLA. B.J. 918, 926 (1993). These defendants would not be able to avail themselves of the discovery procedures afforded the State and other criminal defendants.

104. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (stating that fundamental fairness dictates indigent defendants be provided with the "basic tools of an adequate defense"). For a discussion of the adverse effects of the high costs of discovery on litigants with small civil cases, see Green & Brown, *supra* note 98, at 231.

105. The Oklahoma legislature would do well to heed the warning of Justice Douglas who reminded the majority in *Wardius* that the growth of discovery devices may be hailed by some as a "salutary development" but that development has altered the balance struck by the Constitution.

The Bill of Rights does not envision an adversary proceeding between two equal parties.

If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the court to change that balance.

Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

The civil defendant does not enjoy the same protections afforded a criminal defendant. Thus, the defendant in a civil case cannot refuse to answer incriminating questions or decline to submit to a deposition. See *Graham v. Miracle*, 556 P.2d 605 (Okla. 1976) (ruling that a defendant in civil cause of action could not refuse to testify absent valid Fifth Amendment privilege against self-incrimination). But the United States Constitution sets limits on how far a state legislature can go in mandating procedures designed to further the search for truth.

Therefore, even if the legislature were to permit discovery depositions, the legislature could not require that the defendant submit to a deposition. As Justice Brennan observed, "it remains true that the privilege against self-incrimination prevents full discovery of a defendant's case, so that, for example, if a rule were adopted permitting depositions in criminal cases, it could not require the defendant to submit to being deposed by the prosecutor or to answer interrogatories." Brennan, *Progress Report*, *supra* note 87, at 5.

106. Charles Wolfram states:

The most striking difference between a prosecutor and a defense lawyer or any nongovernmental lawyer is that the prosecutor is much more constrained as an advocate. The assigned objective of a partisan advocate is to obtain litigational success for his or her client, to 'win'. The prosecutor's required objective is emphatically different. It is to secure the result, whether conviction or acquittal, indicated by a good faith inspection of the facts and the law.

WOLFRAM, *supra* note 29, § 13.10.4. "The prosecutor cannot assume the same role vis-a-vis the state that defense counsel assumes vis-a-vis the client; he cannot concentrate solely on an adversary role and adopt the degree of partisanship characteristic of attorneys in civil proceedings." NATIONAL PROSECUTION

are assigned different roles reflecting their different missions.

The prosecutor, as a minister of justice, must try to secure convictions while at the same time seeing to it that justice is served.¹⁰⁷ The criminal defense lawyer has no such mandate. The role of the criminal defense lawyer is to zealously represent the defendant by vigorously testing the accuracy and credibility of the State's witnesses.¹⁰⁸ "In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any relation to the search for truth."¹⁰⁹

Many criminal defense lawyers readily embrace their responsibility to provide zealous representation. High caseloads, inadequate resources, or financial disincentives do limit the zeal of some defense lawyers.¹¹⁰ But almost all criminal defense lawyers share a view of their role which rejects the notion that defense counsel is obligated to assist the State in any way in successfully prosecuting counsel's client. Thus, defense counsel's sense of partisanship reinforces the system's traditional protections provided all criminal defendants. It is not surprising, therefore, that Oklahoma criminal defense lawyers begrudgingly comply — and in as limited a fashion as possible — with *Allen's* disclosure obligations.¹¹¹

STANDARDS Standard 13.5 commentary, at 177 (Nat'l District Attorneys Ass'n 1977) (citing *Frye v. State*, 218 P.2d 643 (Okla. 1950)); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 89 (1991) (stating that the "obligation to do adversarial justice thus imposes limits on the prosecution that do not apply fully to the defense"). Compare ABA STANDARDS 4-7.6 (1991) (permitting defense counsel to attempt to discredit the truthful witness through cross-examination) with ABA STANDARDS 3-5.7(b) (1992) (stating that a prosecutor may not utilize cross-examination to discredit a truthful witness).

107. OKLAHOMA RULES OF PROFESSIONAL CONDUCT 3.8 cmt. (1993); ABA STANDARDS 3-1.2(c) (1992). Recalling Justice Sutherland's often-quoted description of the prosecutor's special role in *Berger v. United States*, 295 U.S. 78, 88 (1935), Justice Douglas observed that "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristofaro*, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting). For a similar description of the role of the Oklahoma prosecutor, see *McCarty v. State*, 765 P.2d 1215, 1221 (Okla. Crim. App. 1988). In practice, however, it is frequently difficult for even the most conscientious prosecutor to be simultaneously a zealous advocate and a minister of justice. For an excellent analysis of the ambiguity of this directive to "do justice" and the difficulties prosecutors have in adhering to this command, see Zacharias, *supra* note 106.

108. See ABA STANDARDS 4-1.2 (1991); see, e.g., *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (positing that defense counsel best serves the public by advancing the interests of the accused).

109. *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part). For the full text, see *supra* note 29.

110. See *supra* notes 54, 99 and accompanying text. The Oklahoma Indigent Defense System, created in 1991, utilizes contracts with private attorneys to deliver defense representation to most of the State's indigent defendants. Because the contract system being used creates an economic disincentive for those lawyers to hire investigators, it is questionable that the overall quality and zeal of indigent defense representation has been significantly improved under the Indigent Defense System. A full examination of the problems of the delivery of defense services in Oklahoma is beyond the scope of this article. For a preliminary look at some of the problems of the Oklahoma Indigent Defense System, see Uphoff, *supra* note 103.

111. Most defense lawyers adhere to the view expressed by Justice Black in *Williams v. Florida* that

Despite the theoretical differences in their roles, many prosecutors approach their prosecutorial tasks with the same single-minded partisanship displayed by defense counsel.¹¹² Prosecutors often find it difficult to restrain their advocacy or to voluntarily make defense counsel's job easier.¹¹³ Not surprisingly, then, there are prosecutors who view their responsibility to provide only that discovery which, using the most restricted definition possible, they must by law disclose and nothing more. The *Allen* procedures permit prosecutors to adhere to an overzealous, unduly partisan attitude.¹¹⁴

disclosure requirements such as those mandated by *Allen* are a "radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its call without any assistance of any kind from the defendant himself." *Williams v. Florida*, 399 U.S. 78, 108 (1970) (Black, J., concurring in part and dissenting in part). Even absent constitutional considerations, a lawyer's responsibilities as advocate and partisan do not easily mesh with a corresponding duty to provide helpful information to the opposing party. See Brazil, *Adversary Character*, *supra* note 98, at 1311, 1313-15, 1320-26, 1329-31; see also Brazil, *Lawyers' Views*, *supra* note 86, at 829-39 (describing tactics lawyers use to minimize providing information to other side). As Justice Scalia recently noted in criticizing several proposed changes to the Federal Rules of Civil Procedure which would impose on civil litigants a continuing duty to voluntarily disclose certain information relevant to disputed facts, such a disclosure duty

does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decision maker. By placing upon lawyers the obligation to disclose information damaging to their clients — on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but requires the exercise of considerable judgment — the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.

61 U.S.L.W. 4392, 4393 (Apr. 27, 1993). Justice Scalia's dissenting statement to the Court's order of April 22, 1993, adopting amendments to the Federal Rules of Civil Procedure is reprinted at 42 AM. U. L. REV. 1513 (1993).

112. See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98 (1975); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 198-202 (1988). As Fred Zacharias observes, the vague ethical command to "do justice" places the prosecutor in an ambiguous position. "Telling government lawyers that they sometimes must act noncompetitively complicates their self-image; it eliminates their traditional adversarial benchmark . . ." Zacharias, *supra* note 106, at 103. Yet, because the minister of justice role is so vague and inherently contradictory to the prosecutor's role as advocate, the prosecutor will minimize her responsibilities to "do justice." It follows, therefore, that "[o]nce the pattern of prosecutorial behavior settles at a low ethical level, institutional and peer pressure to obey a higher standard of conduct naturally will disappear." *Id.*

For examples of prosecutors whose remarks suggest unbounded zeal, see Marvin E. Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 470-71 (1976) ("Man's greatest experience is the act of lovemaking. I sometimes wonder, if the moment when the jury foreman rises to utter those sweet words of verdict — 'we the jury find the defendant guilty as charged' — is not as satisfactory an experience."); Gershman, *supra* note 28, at 456 ("Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.").

113. See Zacharias, *supra* note 106, at 70-73 (arguing that while "do justice" mandate compels prosecutor to take some remedial action to prevent the systemic breakdown caused by an ineffective defense lawyer, even ethical prosecutors generally resist the option of assisting defendants).

114. For an extended discussion of the systemic factors contributing to prosecutorial overreaching and misconduct, see generally Gershman, *supra* note 28. This is not to say that prosecutors ought not strike "hard blows" in seeking to secure convictions. Prosecutors as zealous advocates often are warranted in striking hard blows. For a discussion of the importance of prosecutors carrying out their

Although their roles are not the same, prosecutors and defense lawyers plainly share a similar distaste for providing helpful information to the other side. Because the culture in the civil system is similarly adversarial, it is not surprising to find that civil lawyers engage in a variety of tactics to resist or withhold discoverable information.¹¹⁵ Lawyers in the criminal justice system are as adept as their civil counterparts in hide-the-ball tactics. Accordingly, disclosure provisions like those mandated by *Allen* will not ensure access to information, but only increase the expense and delay in the system as parties litigate disputed terms and struggle to disgorge discovery from parties determined to provide as little information as possible. An alternative solution is needed.

Proposed Legislation: Simple, Fair, and Cost-effective

In light of the general prosecutorial reluctance to assist the defendant by providing the defense with easy and timely access to information and material in the State's possession, the first and most cost-effective step the legislature must take to improve the fair and efficient operation of the system is to impose a mandatory open file policy on the prosecution. Such an obligation serves the systemic goals identified by the ABA Standards¹¹⁶ and does so without any appreciable systemic

role as zealous advocates, see H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973); Zacharias, *supra* note 106, at 56-57. Nonetheless, a prosecutor's blows must be ethically sound, not "foul ones." See *Berger*, 295 U.S. at 88. Hindering or obstructing defense counsel's timely access to discoverable material is a low, and often foul, blow. See ABA STANDARDS 3-3.11 (1992), 3-62 cmt. (1986); see also *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring) ("No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.").

115. According to Brazil, "[t]he pursuit of victory psychologically dominates all other objectives of litigation. . . . The means employed by litigators to achieve victory for their clients regularly involve manipulating people and the flow of information in order to present their clients' positions as persuasively and favorably as possible." Brazil, *Adversary Character*, *supra* note 98, at 1311, 1313. Brazil describes at length the obstructionist tactics taken by lawyers to avoid providing discoverable material to their adversaries:

The dysfunctional effects that adversary pressures have on discovery are even more obvious in the ways litigators respond to interrogatories, demands for documents, and requests for admission. The principal goals of the responding attorney tend to be completely adversarial: to provide as little information as possible, and to make the process of acquiring that information as expensive and difficult as possible for the opposing party and lawyer.

Id. at 1313; see also Brazil, *Lawyers' Views*, *supra* note 86, at 829; Dudley, *supra* note 50, at 191-98.

116. Standard 11-1.1 states that a discovery system should be designed to:

- (i) promote an expeditious as well as a fair disposition of the charges, whether by diversion, plea, or trial;
- (ii) provide the accused with sufficient information to make an informed plea;
- (iii) permit thorough preparation for trial and minimize surprise at trial;
- (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
- (v) eliminate as much as possible the procedural and substantive inequities among

costs. There is no evidence to suggest that an open file policy will adversely affect the State's ability to secure convictions. Perhaps in a limited number of the small percentage of cases which are actually tried, a better informed and better prepared defense lawyer will achieve an acquittal in a case which would otherwise have been a conviction. Such a result only confirms the wisdom and fairness of the open file policy, especially if the policy prevents the conviction of an innocent person.¹¹⁷ Equally important, however, such a policy restricts the State's ability to secure convictions by taking advantage of ill-prepared defense counsel.

Not only would a mandatory open file policy increase the adequacy of defense counsel's representation, such a policy would substantially limit litigation in the trial and appellate courts over discovery issues. Except in those instances in which the prosecutor has sought and been granted a protective order,¹¹⁸ everything in the prosecutor's possession and control would have to be logged in and promptly provided to the defendant.¹¹⁹ A true open file policy would eliminate prosecutorial nondisclosure on the grounds that certain material was not relevant or not exculpatory. Simply put, all material in the prosecutor's file, save the lawyer's own work product as narrowly defined,¹²⁰ must be given to the defense. This also assumes, of course, that the mandated open file policy requires prosecutors to establish appropriate procedures with those investigative agencies with whom the prosecutors regularly work so that all discoverable material, in fact, is turned over to the prosecutors.¹²¹

similarly situated defendants; and

(vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings.

ABA STANDARDS 11-1.1 (1986).

117. See *Lee*, *supra* note 4, at 457 (arguing that a major reason for requiring an open file policy is to lessen the possibility of innocent people being wrongly convicted). See *infra* note 125 and accompanying text.

118. If the legislature decides to fashion a new discovery code, it should include a provision authorizing the court to grant a protective order restricting or conditioning discovery upon a showing of good cause by either party. See ABA STANDARDS 11-4.4, 11-4.6 (1986); see also *Uphoff*, *supra* note 3, at 439.

119. See *Uphoff*, *supra* note 3, at 434 n.242 (noting that the prosecutor may have to make special provisions for the unrepresented defendant or the indigent defendant to ensure that access to discovery is provided in an inexpensive, meaningful manner).

120. See ABA STANDARDS 11-2.6 (1986).

121. See, e.g., *People v. District Court*, 793 P.2d 163, 163-67 (Colo. 1990) (holding that a prosecuting attorney shall ensure flow of information maintained between investigating personnel and district attorney's office); ABA STANDARDS 11-2.2 (1986). A prosecutor has a constitutional duty to preserve evidence that the prosecutor expects might play a significant role in a suspect's case. *California v. Trombetta*, 467 U.S. 479, 488 (1984). A prosecutor does not have a duty to pursue all leads which ultimately may produce evidence helpful to the defense. *United States v. Gallo-Roman*, 816 F.2d 76 (2d Cir. 1987). On the other hand, "[a] prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." ABA STANDARDS 3-3.11(c) (1992); see, e.g., *Owens v. Foltz*, 797 F.2d 294 (6th Cir. 1986) (stating that the prosecution's failure to investigate may be violative of due process because it is tantamount to suppression of evidence). A prosecutor cannot faithfully discharge her ethical responsibilities merely by searching for exculpatory

If, as mandated, prosecutors readily and fully complied with a mandatory open file policy, the systemic benefits would be enormous.¹²² Enabling defense counsel to have easy access to more information should ensure that counsel is better able to assess defendant's case and lead to more informed plea bargaining. It may, in fact, lead to fewer trials as defense counsel can more realistically apprise the defendant of the risks of proceeding to trial. Moreover, some untenable or weak cases undoubtedly would be identified and resolved sooner possibly saving prosecutorial resources, but definitely saving judicial time. Furthermore, it would eliminate reliance on the preliminary hearing primarily as a discovery proceeding thereby substantially reducing the number and length of those hearings. This too would save prosecutorial and judicial resources.¹²³

The reliability of the trial process also would be enhanced by providing the defense access to the prosecutor's entire file.¹²⁴ Obviously, the system benefits greatly if, by improving the defendant's ability to prepare for trial, fewer innocent people are wrongly convicted.¹²⁵ Even if the prosecution loses a few more cases in which the defendant was "probably guilty" because the defense effectively utilizes discovery material to successfully challenge the State's case, such results confirm and reinforce the basic values of the adversary system.¹²⁶ Convictions are to be

evidence in her own file. Rather, a prosecutor's duty to disclose exculpatory material includes a duty to search possible sources for information and that duty to search extends to files of other law enforcement agencies. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992); *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1985); *United States v. Bailleaux*, 685 F.2d 1105, 1113 (9th Cir. 1982); *see also Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.").

122. Prosecutorial noncompliance would be a violation of the OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1993). Prompt action by the courts and the Oklahoma Bar Council against prosecutors who withheld discovery surely would discourage future noncompliance. Although commentators have chided disciplinary agencies for their lax treatment of prosecutors who have failed to disclose exculpatory evidence, *see, e.g., Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987), violation of a straightforward mandatory policy presents an easier case for disciplinary action. *See infra* notes 129-31 and accompanying text.

123. For a further discussion of the systemic benefits of eliminating the need to use preliminary hearings for basic discovery purposes, *see Lee, supra* note 4, at 459-61.

124. The entire file, however, does not include a prosecutor's legal research or that part of any written documentation containing the prosecutor's opinions, theories or conclusions.

125. As Justice Harlan declared, it is a "fundamental value determination of our system that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). There is no question but that at times, an innocent person is wrongly convicted. The unanswered — and empirically unanswerable — question is how widespread is this unfortunate result. For a thought-provoking study which examines this problem by reviewing a series of 350 death penalty cases in which, the authors contend, innocent people were convicted, *see Hugo A. Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

126. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best

secured in accordance with fair procedures that provide criminal defendants due process. Indeed, the State should not be permitted to benefit by concealing material evidence from the defense. Convictions of "probably guilty" defendants obtained because their defense lawyers were "kept in the dark," "ambushed" or simply inadequately prepared blemishes rather than benefits the criminal justice system.¹²⁷

A mandatory open file provision also is a more efficient and less costly legislative solution to the serious problem of inadequate investigative resources for those defense lawyers representing defendants with limited or no assets.¹²⁸ Unquestionably, the overstrapped defense lawyer operating without the assistance of an investigator will be hard-pressed to mount much of an investigation. Without access to information about the State's case, defense counsel's preparation and performance suffer and the reliability of the outcome of the criminal process becomes subject to question. Thus, the simple step of mandating that a prosecutor's file be open should improve the performance of some defense lawyers and significantly decrease the number of legitimate claims of ineffective assistance of counsel and prosecutorial misconduct resulting from discovery-related problems.¹²⁹

To ensure that this mandatory open file policy is fully complied with and that other required disclosures are made, the legislature also must create a specific statutory penalty to be assessed against a lawyer in a criminal case who fails to provide or divulge the required discovery. Giving the trial judge the ability to impose a financial sanction directly against the offending lawyer greatly increases the likelihood that appropriate discovery will be provided.¹³⁰ This assumes, of

promote the ultimate objective that the guilty be convicted and the innocent go free.").

127. As the Oklahoma Court of Criminal Appeals has long recognized:

It matters not what the officers may think of the guilt of a defendant, the law presumes that he is innocent until his guilt has been legally pronounced by an impartial jury in a fair trial. It matters not how humble, poor, or friendless he may be, or how strong and influential the feeling against him, it is his absolute right to have a fair opportunity to prepare for trial and to present his defense. The law is not hunting for victims or seeking to offer up vicarious atonements. Punishment should never be inflicted as such before a conviction, and there should be no conviction, unless it be legally established to the satisfaction of the jury, beyond a reasonable doubt, that the defendant is guilty of the crime charged against him. No attempt to railroad any man to the penitentiary or to the gallows, it matters not how guilty he may be, should for one moment be tolerated by any court. If a defendant cannot be convicted without denying him a reasonable opportunity to prepare for trial and a fair trial, he should not be convicted at all. Any other rule would make a myth of justice and a snare and delusion of courts.

State *ex rel.* Tucker v. Davis, 130 P. 962, 964 (1913).

128. See *supra* note 54 and accompanying text. This does not mean, however, that the creation of a mandatory open file policy eliminates the need to increase resources for the defense for investigative and expert services. See ABA STANDARDS 5-1.4 (1990) (stating that support services necessary for an adequate defense should be available to all defendants who are unable to afford it themselves). Improving easy access to the State's evidence, however, will significantly reduce the amount needed to adequately fund such services.

129. Brennan, *Quest for Truth?*, *supra* note 47, at 286-87.

130. Financial sanctions against lawyers have not necessarily worked in civil cases, in part because in certain cases the enormous judgements at stake encourage lawyers to engage in "hardball" and "hide the ball" tactics even in the face of monetary sanctions. See Dudley, *supra* note 50, at 191. Prosecutors

course, that the penalty provision is kept simple and easy to employ.¹³¹

A conscientious prosecutor will want to review all the law enforcement reports which are reasonably related to a particular offense. A mandatory open file policy will require that all of these reports be made available to the defense. Accordingly, if a prosecutor fails to obtain all the investigative material reasonably related to a particular offense and make it readily available to the defense in a timely manner, the prosecutor would be subject to a monetary sanction. A prosecutor's good faith would not excuse her failure to make a report available to the defense, but it should mitigate the severity of the penalty to be imposed.¹³² Excusing prosecutorial negligence would defeat the very purpose of the sanction provision — compelling lawyers to take seriously their disclosure obligations. Assuredly, those prosecutors who purposefully hide or conceal discoverable material should be subject to even harsher discipline as should any defense lawyer who engages in such tactics.

A more subtle, but much more pervasive tactic which significantly interferes with the ability of both the prosecution and the defense to prepare for and present each's case is the deliberate attempt to discourage a witness from talking to the other side.¹³³ Such a tactic serves only to frustrate or prevent one's opponent from uncovering evidence and to make that opponent easier to ambush. The desire or need to win will drive lawyers at times to engage in tactics that simply cannot be tolerated because such conduct compromises the proper functioning of the adversary system.

Prospective witnesses are not partisans; they should be regarded as impartial spokesmen for the facts as they see them. Because witnesses do not 'belong' to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that he not

on fixed salaries, however, are likely to be very responsive to a financial penalty which they would have to pay.

131. Defense counsel must be permitted to resist disclosures on constitutional grounds without risking the imposition of a monetary sanction. Nevertheless, a defense lawyer who engages in dilatory tactics as in *Morgan* should be sanctioned as well as subject to contempt and a disciplinary action. *Morgan v. District Court*, 831 P.2d 1001, 1005 (Okla. Crim. App. 1992).

132. It also is essential that the mandatory open file policy not allow a prosecutor to screen reports and then to turn over only "relevant" reports. Such a policy would invite the same type of narrow construction of what is "relevant" as is now the case with the term "exculpatory." See Gershman, *supra* note 28, at 449-51. Moreover, such a policy defeats two key goals of the open file policy; the elimination of needless litigation over what must be disclosed and the facilitation of defense review of material which counsel may deem to be potentially exculpatory. See Brennan, *Progress Report*, *supra* note 87; see also *Dennis v. United States*, 384 U.S. 855, 874-75 (1966) (stating that defense counsel in best position to review voluminous grand jury testimony to determine possible use by defense).

133. See *supra* note 57 and accompanying text. Any lawyer who seeks to discourage a witness from testifying or blockades a witness from an adversary runs a serious risk of contempt, disciplinary action or even criminal prosecution. See, e.g., *Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir.), *cert. denied*, 114 S. Ct. 94 (1993) (holding that *ex parte* communications which restrict the flow of discovery by "planting implied threats in the minds of potential witnesses" threaten the integrity of the proceedings); *North Carolina State Bar v. Graves*, 274 S.E.2d 396 (N.C. 1981) (finding that defense lawyer acted unethically by attempting to influence potential witness not to testify); see also WOLFRAM, *supra* note 29, § 12.4.2.

submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness¹³⁴

Although existing ethical rules¹³⁵ and case law¹³⁶ already forbid prosecutors and defense lawyers from instructing witnesses not to talk with the other side, too many witnesses, either explicitly or implicitly, receive those exact instructions.¹³⁷ Surely the best method for eliminating this problem would be for both prosecutors and defense lawyers to tone down their excessive partisanship and behave in accordance with established ethical directives.¹³⁸ Absent a significant change in the present adversarial climate, the mere prospect of disciplinary action is unlikely to deter or to curb excessive partisanship.¹³⁹

The legislature, therefore, should amend title 21, section 546 of the Oklahoma Statutes to specifically provide that a prosecutor, defense lawyer, or any person in an investigative capacity for either side in a criminal case would be guilty of a misdemeanor for requesting that a witness refrain from voluntarily giving information to the other side. Consistent with Rule 3.4(f) of the Oklahoma Rules of Professional Conduct, the defendant and any relative, employee, or agent of the defendant would not be included under the statute. By creating a specific offense, the legislature would send a clear and direct message to lawyers that neither they nor their agents¹⁴⁰ could create obstacles for their opponents by volunteering

134. *State v. Simmons*, 203 N.W.2d 887, 892 (Wis. 1973); see also ABA STANDARDS 3-3.1(d) (1992).

135. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rules 3.4(a), (f) (1993).

136. See, e.g., *United States v. Lopez*, 989 F.2d 1032 (9th Cir. 1993); *United States v. Carrigan*, 804 F.2d 599 (10th Cir. 1986); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969); *In re Blatt*, 324 A.2d 15 (N.J. 1974).

137. See *supra* note 57 and accompanying text. See also *State v. York*, 632 P.2d 1261, 1263-65 (Or. 1981) (finding prosecutor acted improperly in advising witnesses of negative consequences of talking with the defense and that "it would be better if they didn't say anything"); *People v. Steele*, 464 N.E.2d 788 (Ill. App. Ct. 1984) (recognizing that although prohibited from advising persons with relevant information to refrain from talking with defense, prosecutor could advise potential witness of right to decline to speak to defense).

138. For a discussion of many facets of the problem of prosecutorial misconduct and of a proposed solution involving the creation of an independent watchdog, see Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984); see also Gershman, *supra* note 28, at 455-58 (urging that the present overzealous prosecutorial attitude be replaced by a new professional ethos consistent with prosecutor's role as minister of justice).

139. For a discussion of the deficiencies of existing disciplinary mechanisms in curbing prosecutorial misconduct, see, e.g., Rosen, *supra* note 122; Gershman, *supra* note 28. Numerous commentators have observed that despite widespread prosecutorial misconduct disciplinary authorities rarely initiate disciplinary action against a prosecutor. See WOLFRAM, *supra* note 29, § 13.10 n.48; Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Misconduct in Illinois: Is It Time To Start Prosecuting the Prosecutors?* 19 LOY. U. CHI. L.J. 39, 56 (1987); Zacharias, *supra* note 106, at 49, 105-07. For a discussion of the reasons bar grievance agencies are hesitant to seek discipline against prosecutors, see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 670-73 (1972). Defense lawyers, however, are a more vulnerable and frequent target of disciplinary actions and criminal prosecution for interfering with witnesses or obstruction the State's access to evidence. See Zacharias, *supra* note 106, at 104-07.

140. A defense lawyer may well be held responsible for improper advice given out by an

advice to a witness that cooperation with the other side is unwise. Finally, such a statute also must include a provision requiring that any explanation given to a witness concerning a witness's options be given in a neutral manner so as not to discourage communication with the other side.¹⁴¹

In addition to creating a statutory provision discouraging "game playing" with lay witnesses, the legislature should include in any new discovery legislation a provision increasing pretrial access to the experts each party intends to call at trial.¹⁴² Under the *Allen* procedures, expert reports must be turned over to the other side, but prosecutors and defense lawyers can avoid disclosure merely by instructing their experts not to prepare a report.¹⁴³ Further, both the State and the defense can severely restrict the ability of one's opponent to meaningfully prepare for cross-examination by requesting their experts to keep their reports short and conclusory.¹⁴⁴

investigator acting on behalf of the lawyer. See OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1993). A lawyer plainly cannot utilize another to circumvent an ethical rule. *Id.* Rule 8.4(a). Thus, defense counsel may be held accountable if counsel's investigator attempts to influence a witness not to testify or to testify falsely. See, e.g., *In re Allen*, 344 P.2d 609 (Cal. 1959). Similarly, the prosecutor is responsible for the activities of law enforcement officers acting at his or her behest. See *Evans v. Kropp*, 254 F. Supp. 218, 222 (E.D. Mich. 1966); *United States v. Ryan*, 903 F.2d 731 (10th Cir. 1990); *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); ABA STANDARDS 3-3.1(c)(d) (1992).

141. Certainly a prosecutor or police officer should be able to respond to a witness's inquiry regarding her options if approached by the defense, but any explanation must be couched in neutral terms. See *United States v. Rich*, 580 F.2d 929, 933-34 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978). Defense lawyers and investigators are in a more difficult position and must be very careful to provide only a brief explanation and then caution the witness that they cannot render any legal advice because of their role as counsel for the accused. See OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1993) (stating that in dealing with an unrepresented person, "[a] lawyer shall not give advice to such a person other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client"). Like the prosecutor, defense counsel can provide a brief neutral explanation of a witness's rights as long as counsel does not influence or advise that witness how to exercise those rights. See *McNeal v. Hollowell*, 481 F.2d 1145 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *But see State v. Martindale*, 527 P.2d 703 (Kan. 1974) (censuring defense lawyer for truthfully telling State witnesses not required to wait at courthouse if not subpoenaed); *United States v. Fayer*, 523 F.2d 661 (2d Cir. 1975) (finding defense counsel's motive "corrupt," thus counsel was guilty of obstructing justice for advising represented person not to voluntarily appear at grand jury investigating lawyer's client). Absent a corrupt motive, a defense counsel may inform a prospective witness of the witness' right against self-incrimination. Wolfram, *supra* note 29, § 12.4.2; ABA STANDARDS 4-4.3(c) (1991).

142. See Uphoff, *supra* note 3, at 431, 437. For an excellent discussion of the need to provide pretrial access to experts, including those offering nonscientific evidence, see Linda Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 N.C. L. REV. 577 (1989).

143. *Allen*, 803 P.2d at 1168. Both Oklahoma discovery bills, House Bill 1530 and Senate Bill 117, also only require reports to be disclosed. *But see In re Serra*, 484 F.2d 947 (9th Cir. 1973) (affirming the trial court's order finding a defense lawyer in contempt for instructing expert to deviate from normal practice and not prepare a report so as to avoid having to disclose report to the prosecutor).

144. In *Allen v. State*, the defense counsel complained about the conclusory nature of the expert's report and the failure to provide him the expert's work papers. Although the court agreed that defendant's complaint had some merit, it declined without explanation to expand *Allen* to require such disclosures.

It is not enough merely to have access to an expert's report or a brief summary of the expert's testimony. The absence of detailed information about a prospective expert's testimony allows for surprise, frustrates counsel's ability to prepare and increases the likelihood of an unreliable result at trial by hampering counsel's ability to challenge the expert on cross-examination. The need for such pretrial access is especially great given the highly technical, novel, or complex nature of much expert testimony, which can only be understood and challenged by a lawyer who is adequately informed and prepared.¹⁴⁵

The new discovery code, therefore, must ensure that defense lawyers and prosecutors have full access to all experts who will testify at trial. Full access includes any report or statement made by an expert in connection with the particular case, along with the result of physical or mental examinations, scientific tests comparisons, or experiments. Even if a report is not prepared, counsel should be required to provide the name and address of each expert witness expected to testify together with a statement detailing the expert's proposed testimony. This statement should set forth the substance of the facts and opinions to which the expert is expected to testify as well as a summary of the grounds for each opinion and the names of any other experts on whom the testifying expert is relying to support his or her conclusions.¹⁴⁶

Full access also should include the right of both the prosecutor and defense counsel to depose the other side's expert witnesses.¹⁴⁷ The complexity as well as persuasive power of expert testimony demand that lawyers be given as much opportunity as possible to prepare in order to challenge such testimony.¹⁴⁸ Hence, the added systemic costs of permitting this tool seems warranted in the case of expert witnesses. This assumes, of course, that indigent defendants are guaranteed equal access to discovery depositions.¹⁴⁹

Allen v. State, 862 P.2d 487, 491 (Okla. Crim. App. 1993).

145. See Miller v. State, 809 P.2d 1317, 1319 (Okla. Crim. App. 1991) (observing that in order to be able to provide "effective" assistance of counsel, defense lawyer needs "time to prepare, time to consult with experts and time to be ready for effective cross-examination of the State's expert"). For a good summary of the preparation necessary to effectively cross-examine an expert, see J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 333-66 (2d ed. 1993).

146. See Uphoff, *supra* note 3, at 431, 437 (proposing disclosure provision modeled after FED. R. CIV. P. 26).

147. See N.H. REV. STAT. ANN. § 517:13 (1991) (specifically granting either party in a felony case the right to take a discovery deposition of any expert who may be called to testify by the other party). My position on the merits of discovery depositions of experts has changed since my earlier article. See Uphoff, *supra* note 3, at 431 n.232; see also Eads, *supra* note 142, at 622 (arguing that courts should be given discretion to permit discovery depositions).

148. Social science research and most trial lawyers agree that expert testimony can be highly persuasive and difficult to combat. See, e.g., Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 390 (1990).

149. See *supra* note 103-04; see also FED. R. CRIM. P. 15 (providing depositions only in exceptional circumstances but ensuring that if taken at the behest of a defendant "unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the

As in the case of lay witnesses, both parties should be precluded from discouraging their experts from talking with the other side.¹⁵⁰ This holds particularly true for the prosecutor given the superior access to expert assistance the State possesses in most criminal cases.¹⁵¹ If lawyers are able to informally talk with the other side's experts it may eliminate the need for some depositions and persuade the lawyers in other cases to reconsider the strength of their case. Moreover, it does not follow that allowing an opponent to talk with one's experts will necessarily adversely affect a lawyer's own case. Finally, if improved access does, in fact, permit a lawyer to successfully attack the other side's experts, the search for truth plainly has been advanced.

Although the prosecutor should have equal access to the experts intended to be used by the defense, that access should not extend to an expert hired by the defense as a consultant. If the defense expert is not going to be called as a witness, the defense is under no obligation to reveal to the State information learned from that expert. As the court acknowledged in *Richie v. Beasley*,¹⁵² the disclosure requirements for the State and defense are distinctly different.¹⁵³ Just as defense counsel need not disclose the names of fact witnesses counsel uncovers but chooses not to call, the defense cannot be required to disclose the names of experts used when counsel does not intend to call such witnesses to testify.¹⁵⁴

On the other hand, the State should be required to inform the defense of the names and addresses of persons who performed tests, experiments, or comparisons in connection with the case even though the prosecution does not intend to call such persons at trial. In addition, the prosecutor should be compelled to disclose the report of such an expert, or, if no report was prepared, a summary of the experts findings. Although such information is likely to be in the prosecutor's file and, thus, discoverable pursuant to the mandatory open file policy, a specific provision requiring such a disclosure — even if the expert only orally reported to the prosecutor — will ensure compliance.

deposition shall be paid by the government").

150. See *supra* notes 138-41 and accompanying text. See also *Schindler v. Superior Court of Madera County*, 327 P.2d 68, 73-74 (Cal. Ct. App. 1958) (holding that the state improperly urged pathologist not to cooperate with the defense).

151. See *Wardius v. Oregon*, 412 U.S. 470, 476 n.9 (1973) (recognizing that the State has greater resources to investigate and scientifically analyze evidence).

152. 837 P.2d 479 (Okla. Crim. App. 1992).

153. *Id.* at 480.

154. *Id.* Consultations between defense counsel and a defense expert are protected by both the "work product" doctrine and the Fifth and Sixth Amendments. See, e.g., *United States v. Nobles*, 422 U.S. 225 (1975); *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987); *State v. Mingo*, 392 A.2d 590 (N.J. 1978). In some instances, however, the prosecutor may be permitted to call at trial an expert initially retained by the defense. See, e.g., *Noggle v. Marshall*, 706 F.2d 1048 (6th Cir. 1983). A full discussion of this issue is beyond the scope of this article.

Conclusion

In an earlier article,¹⁵⁵ I argued that the *Allen* procedures were constitutionally suspect in that they undercut constitutional protections afforded the criminally accused by the adversary system. That article further warned that gaps in the *Allen* procedures would spawn increased litigation, uncertainty, and widely disparate handling of discovery problems.¹⁵⁶ Although many of the article's predictions have come to pass, the article did not foresee the extent to which the rebuttal witness exception would provide the prosecution such a significant tactical advantage. The article concluded by urging the legislature to adopt a proposed discovery code for Oklahoma substantially modeled on the ABA Standards,¹⁵⁷ which provides fair and efficient pretrial access to information within a framework cognizant of the differing obligations and rights of the two sides in a criminal case.

The legislature has not, as of yet, enacted any discovery code. The bills under consideration last session, however, would have created procedures which substantially mirror the *Allen* procedures.¹⁵⁸ If the legislature is committed to devising a fair and efficient system, it must avoid following *Allen's* lead and resist the push to remake the criminal adversary system more like the civil system. Rather, the legislature should enact a criminal discovery code which fosters pretrial access to information instead of encouraging prosecutors and defense lawyers to play costly discovery games.

A simple discovery code modeled on the ABA Standards together with the statutory amendments suggested in this article facilitates pretrial access to information and the fair resolution of cases before trial, but without dramatically increasing the costs of securing that information. Trial preparation will be enhanced and undue surprise or ambush will be minimized. In turn, trial reliability will be improved without compromising the constitutional rights of the accused or radically altering the adversary system.

If the legislature decides, despite the costs, to follow the road taken by the *Allen* court, then I would urge the legislature to take only a few steps down that road. More formalized procedures, together with discovery depositions, only should be mandated for capital cases. Because "death is different,"¹⁵⁹ the cases are more likely to be tried, often involve expert witnesses and generally are fought more vigorously both at the trial and appellate levels. Moreover, because every aspect of a capital case is already going to be contested on appeal, the courts will have ample opportunity to review the workings of the new discovery code without generating new appeals. Thus, limiting the procedures to capital cases would provide the

155. Uphoff, *supra* note 3.

156. *Id.* at 401, 426.

157. *Id.* at 428-41.

158. *See supra* note 96.

159. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (stating that "death is a punishment different from all other").

legislature an opportunity to study the merits of a new code without the expense and systemic disruption of implementing the code for all criminal cases.¹⁶⁰

Indeed, it is time for the legislature to act, but it cannot afford to enact a code based on *Allen* that is inefficient, costly, skewed in the prosecutor's favor, and susceptible to abuse. Instead, the legislature must create criminal discovery procedures that balance fairness and efficiency while respecting the constitutional framework that has served this society so well for so long.

160. It could be argued that, given the stakes involved, capital cases present the worst cases for experimenting with new discovery procedures. If, however, more formalized procedures are to be tested on the premise that, despite the costs, they will lead to better lawyering and more accurate results, then capital cases, above all others, warrant such procedures.