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THE NEW CRIMINAL DISCOVERY CODE IN OKLAHOMA: A TWO-WAY STREET IN THE WRONG DIRECTION

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Introduction

In *Allen v. District Court*,[1] the Oklahoma Court of Criminal Appeals devised a new system of criminal discovery to "fill the gaps that currently exist within our statutory framework."[2] With only a summary discussion of the reasons for doing so, the court fashioned new comprehensive guidelines governing pre-trial discovery in all state criminal cases.[3] These new procedures, mandating broad disclosures by the prosecution and the defense, reflect the *Allen* court's underlying assumption that pre-trial discovery should be "a two-way street." By obligating defense counsel to provide extensive discovery to the prosecution, however, *Allen* dramatically alters the role and the responsibilities of counsel in the defense of a criminal case. Not only does the *Allen* decision gloss over the constitutional implications of compelling defendants to disclose pre-trial information, the decision also completely ignores the impact of mandating such disclosures on certain fundamental principles underlying the adversary system.

This article first examines criminal discovery in Oklahoma prior to the *Allen* decision. Next, section II of the article explores *Allen* and the court's

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

2. *Id.* at 1167.

3. It is questionable, however, that the *Allen* procedures extend to misdemeanor cases. *See infra* notes 201-05 and accompanying text.

justifications for creating a reciprocal discovery system. The article reviews the *Allen* procedures and similar pre-trial discovery provisions contained in the American Bar Association's Standards for Criminal Justice[4] and questions whether *Allen*'s new discovery system will achieve the desired results. Section II also focuses on the constitutionality of the defendant's disclosure obligations and the adverse effects of mandating such disclosures on the adversary system. Finally, section III of the article proposes an alternative discovery code based largely on the ABA Standards and argues that the Oklahoma legislature should adopt such a code because it appropriately balances the defendant's constitutional rights with the state's interest in a fair, efficient system of pre-trial discovery.

I. Discovery in Oklahoma Before Allen

On June 15, 1990, Stephen Lee Allen was charged in Washington County with the first degree murder of his wife, Sandra Jo Allen. A preliminary hearing was scheduled to begin on August 13, 1990, before Judge Myrna Lansdown. At the hearing, the prosecution would be required to introduce sufficient evidence to convince Judge Lansdown that Allen should be bound over for trial.[5] On August 2, 1990, Allen's attorney, Alan Carlson, filed an extensive discovery motion requesting that the prosecutor be ordered to provide the defense reports, statements, records, and other information in the prosecution's possession, before the preliminary hearing.[6] Carlson argued that he needed access to test results, technical and physical evidence, and the defendant's statements prior to the preliminary hearing in order to enable him to represent his client effectively at the preliminary examination and to protect Allen's right to a fair trial.[7] Judge Landsdown denied Carlson's motion, claiming that she was without authority to order discovery before the preliminary hearing.[8] Allen then took an interlocutory appeal to the Oklahoma Court of Criminal Appeals, which in turn used the case as

4. STANDARDS FOR CRIMINAL JUSTICE 11-1.1 to 11-5.4 (2d ed. 1980) [hereinafter ABA STANDARDS].

5. To bind a defendant over for trial, the judge must be satisfied that the state presented sufficient evidence at the preliminary hearing to show that a crime had been committed and that the defendant probably committed the crime. State v. Weese, 625 P.2d 118 (Okla. Crim. App. 1981).

6. Carlson's nine-page motion detailed forty-nine specific requests covering all the information and material likely to be found in the prosecution's file or in the possession of any of the investigative agencies or experts working with the prosecution in this murder case. *See* Response to Petitioner's Writ of Mandamus and/or Writ of Prohibition at exhibit 4, Allen v. District Court, 803 P.2d 1164 (Okla. Crim. App. 1990) (No. 0-90-0825).

7. *See* Brief in Support of Petitioner's Writ of Mandamus and/or Writ of Prohibition at 13-14, *Allen* (No. 0-90-0825).

8. *Allen*, 803 P.2d at 1165. *Stafford v. State* and *State v. Benson* seemingly limited a defendant's access to discovery material before the preliminary hearing to conviction records of prospective witnesses. Stafford v. State, 595 P.2d 797 (Okla. Crim. App. 1979); State v. Benson, 661 P.2d 908 (Okla. Crim. App. 1983). Nonetheless, title 22, § 749 of the Oklahoma Statutes also entitled a defendant to sworn witness statements "upon the same being obtained." 22 OKLA. STAT. § 749 (1981). If such statements were obtained before charges were filed, a defendant should be provided copies before the preliminary hearing.

a vehicle to issue a sweeping opinion setting forth the procedures governing discovery in all Oklahoma criminal cases.[9] Before examining that decision, it is necessary to review briefly the history of criminal discovery in Oklahoma before *Allen*.

Although discovery in civil cases in Oklahoma is governed by a statutory scheme modeled after the Federal Rules of Civil Procedure,[10] the Oklahoma legislature has never adopted a comprehensive code of criminal discovery.[11] Thus, at the time of the *Allen* decision, there were very few statutory provisions relating to discovery in criminal cases.

Since 1895, the prosecution has been obligated by statute to endorse the names of the state's witnesses on the information, the charging document filed in a criminal case.[12] It was not until 1969, however, that a statute was enacted requiring prosecutors to give defense counsel copies of any sworn statements made to a peace officer or prosecutor by any person having knowledge of the case.[13] Nonetheless, that statute — title 22, section 749 — provided little real benefit to criminal defendants because the court repeatedly refused to extend it to cover written or recorded statements of witnesses.[14] The state, therefore, could restrict defense counsel's access to the prosecution's case simply by limiting its use of sworn statements. Additionally, if the defendant had been indicted by a grand jury, defense counsel was entitled to a copy of any relevant grand jury testimony.[15] Yet

9. *Allen*, 803 P.2d at 1167-69.

10. 12 OKLA. STAT. §§ 3224-3237 (1981).

11. There have been, however, numerous attempts to create a criminal discovery code in Oklahoma. *See* 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). Following *Allen*, House Bill 1755 and Senate Bill 396 were introduced, each proposing a comprehensive criminal discovery statute with features similar to those created by *Allen*. Each bill passed and was sent to a conference committee to reconcile the differences. The legislative session ended in May 1991 without any bill being reported out of this committee. H.R. 1755, 43d Leg., 1st Sess.; S. 396, 43d Leg., 1st Sess.

12. 22 OKLA. STAT. § 303 (1981). This statute also requires the prosecutor to include the witnesses last known addresses and to endorse additional witnesses as they become known. The statute does not require the prosecutor to disclose all witnesses because rebuttal witnesses need not be endorsed. Martin v. State, 596 P.2d 899, 901 (Okla. Crim. App. 1979); Lavicky v. State, 632 P.2d 1234, 1237 (Okla. Crim. App. 1981); *see also* 22 OKLA. STAT. § 384 (1981) (dating back to 1890, requiring the prosecutor to endorse names of witnesses on an indictment) OKLA. CONST. art. II, § 20 (which gives a defendant in a capital case the right to a list of witnesses to be called in the state's case-in-chief).

13. 22 OKLA. STAT. § 749 (1981).

14. State *ex rel.* Fallis v. Truesdell, 493 P.2d 1134, 1136-37 (Okla. Crim. App. 1972); Farmer v. State, 565 P.2d 1068, 1073 (Okla. Crim. App. 1977); Jones v. State, 660 P.2d 634, 641 (Okla. Crim. App. 1983). In a recent post-*Allen* decision, the court reiterated its long-standing position that unsworn statements of witnesses made to law enforcement officers need not be disclosed. Fritz v. State, 811 P.2d 1353, 1358 (Okla. Crim. App. 1991). Investigation reports containing *Brady* material, however, must be disclosed to the defense. Amos v. District Court, 814 P.2d 502 (Okla. Crim. App. 1991). Moreover, under the new *Allen* guidelines, a defendant is entitled to at least a summary of witnesses' oral statements and arguably the investigative report itself. *Id.* at 2260.

15. 22 OKLA. STAT. § 340 (1981). The court refused to permit the state to deprive a

the value of this statutory provision was limited, given the minimal use of the grand jury in Oklahoma. Accordingly, Carlson had little statutory authority to rely on to compel the Washington County prosecutors to divulge information in their possession.

Carlson could point, however, to a series of Oklahoma and federal decisions requiring prosecutors to turn over to the defense certain evidentiary items. Although neither the prosecution nor the defense had any right to discovery in a criminal case at common law,[16] the Oklahoma Court of Criminal Appeals — and appellate courts across the county — began in the 1960s and 1970s to expand the criminal defendant's right to pre-trial discovery. Much of this expansion followed in the wake of the United States Supreme Court's decision in *Brady v. Maryland*.[17] The Warren Court's efforts to enhance the rights of the accused and the fairness of the criminal process led many courts around the country, including the Oklahoma Court of Criminal Appeals, to reject the notion of a criminal trial as a "game of hide and seek" and to grant the defendant greater pre-trial access to the prosecution's case.[18]

In 1957, the Oklahoma Court of Criminal Appeals, in *State ex rel. Sadler v. Lackey*,[19] first recognized that a trial court has the authority to compel a prosecutor to provide a criminal defendant access to some of the state's evidence.[20] In *Lackey*, the court initially reaffirmed the general proposition

> that absent statutory authority, a defendant had no absolute right of pre-trial inspection or to compel the state to produce docu-

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defendant of the benefit of this statute by dismissing an indictment and instead filing an information. English v. District Court, 492 P.2d 1125, 1126 (Okla. Crim. App. 1972). In State *ex rel.* Fallis v. Miracle, 494 P.2d 676, 677 (Okla. Crim. App. 1972), however, the court declined to extend the statute or find any other basis for providing the defendants with transcripts of witnesses who previously testified in front of a grand jury investigating the same crime. Rather the court held that because the defendants were not indicted by the grand jury, they were not "an accused" under the statute, and therefore, not entitled to the transcripts. *Id.* at 677. *But see* Rush v. Blasdel, 840 P.2d 1140 (Okla. Crim. App. 1991) (overruling *Miracle* and providing a defendant access to transcripts of a prior grand jury).

If a witness' grand jury testimony is materially inconsistent with that witness' later testimony at a hearing or trial, the prosecutor clearly is obligated promptly to provide defense counsel the grand jury transcript or notify counsel of the existence of the inconsistency. Napue v. Illinois, 360 U.S. 264, 269 (1959); Hall v. State, 650 P.2d 893, 897 (Okla. Crim. App. 1982).

16. State *ex rel.* Sadler v. Lackey, 319 P.2d 610, 613 (Okla. Crim. App. 1957).

17. 373 U.S. 83 (1963).

18. *See* Wing v. State, 490 P.2d 1376, 1383 (Okla. Crim. App. 1971), *cert. denied*, 406 U.S. 919 (1972). For a summary of the arguments in favor of expanding the defendant's pre-trial access to the prosecution's case, see Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. L.Q. 229. Justice Brennan's influential article was relied on by the drafters of the initial ABA Standards relating to discovery, published in 1970. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (1970). The article was also cited by Justice Marshall in Wardius v. Oregon, 412 U.S. 470, 473 (1973). For a discussion of *Wardius*, see *infra* notes 101-05 and accompanying text.

19. 319 P.2d 610 (Okla. Crim. App. 1957).

20. *Id.* at 613.

> ments and reports that may be beneficial to the defendant . . . [nor] an inherent right to examination of the state's evidence, merely in the hope that something may turn up which would aid his defense or supply clues for gathering evidence.[21]

Nevertheless, the court went on to find that fair play demanded that the prosecutor provide the defendant a copy of an FBI report analyzing paint scrapings taken off the defendant's car which allegedly had been involved in a fatal hit-and-run accident.[22] In carving out this exception to the general ban on pre-trial inspection, the court emphasized the unfairness of forcing the defendant to wait until the trial to learn if the paint scrapings indeed did connect him with the accident.[23] Armed with the report, the defendant might elect to waive a jury trial or even plead guilty. Without it, the defendant's defense would be one of "speculation and surmise."[24]

Three years later in *Layman v. State*,[25] the Oklahoma Court of Criminal Appeals again faced the issue of whether a criminal defendant should have pre-trial access to a technical report in the prosecution's possession. In *Layman*, the defendants sought to inspect an engineer's report, the key piece of evidence in a construction fraud case. Echoing its concern that the state "not be permitted to draw one drop of blood through unfairness or the medium of unjust surprise," the court ordered the prosecution to allow the pre-trial inspection the defendants sought.[26] The court stressed that defense counsel needed the report in advance of trial to be able to conduct an intelligent cross-examination. If counsel could not conduct an adequate cross-examination, then the defendants may be denied their right to a fair trial.[27] Additionally, permitting the pre-trial inspection of technical reports served the court's interest in promoting orderly, expeditious trials.[28] The court concluded, therefore, that even though a trial judge had broad discretion to grant or refuse the pre-trial inspection of technical reports, it was an abuse of discretion not to provide pre-trial access to this report.[29]

Thus, at the time Carlson made his discovery motion on behalf of Allen, a criminal defendant generally obtained pre-trial access to technical and

21. *Id.*

22. *Id.* at 614-15.

23. *Id.* at 615. The court stressed that this was a "hardship case" where the report was the defendant's only source of information and no useful purpose would be served by denying inspection. It noted that in other cases where inspection would greatly hamper the prosecution, however, inspection should be denied. *Id.*

24. *Id.*

25. 355 P.2d 444 (Okla. Crim. App. 1960).

26. *Id.* at 449. In addition to the report itself, the exhibits supporting the report, which included motion pictures, photographs, charts, graphs, and computations, were also to be produced for defense inspection. *Id.*

27. *Id.* at 448-49. Focusing on the technical nature of the report and its importance to the state's case, the court concluded it would be unfair to permit the state to "ambush" the defendant with the report leaving defense counsel time only for a cursory examination before conducting cross-examination. *Id.*

28. *Id.* at 449.

29. *Id.* at 450-51.

scientific reports within the prosecutor's possession or control.[30] It also was clear that a defendant had the right to a pre-trial inspection of the state's physical evidence.[31] Moreover, the prosecutor had to provide that inspection in a timely manner, thereby affording the defendant a fair and meaningful opportunity to conduct a competent, independent examination of the physical evidence.[32] In addition, defense counsel was entitled to obtain before trial a copy of the defendant's own written statement and a summary of any oral statements the defendant made to law enforcement officers.[33] Finally, the court relied on the ABA Standards to impose on Oklahoma prosecutors the duty to provide defendants the criminal records of the state's witnesses.[34]

Neither the Oklahoma Court of Criminal Appeals nor the United States Supreme Court explicitly recognized a general constitutional right to discovery.[35] Nonetheless, criminal defendants were granted access to various aspects of the prosecution's case based on notions of fundamental fairness and due process as well as judicial concerns about the orderly, efficient administration of justice. Thus, in *Moore v. State*,[36] the court stressed that allowing defense counsel to review scientific results and reports before trial was required by due process. Moreover, such pre-trial access reinforced the defendant's constitutional right to confront witnesses, to exercise the right of compulsory process, and to enter a knowing and intelligent plea of guilty.[37] The court employed similar reasoning in *Burks v. State*[38] when it

30. See *Layman*, 355 P.2d at 447-51 (engineer's report); Hamm v. State, 516 P.2d 825 (Okla. Crim. App. 1973) (ballistics report); Moore v. State, 740 P.2d 731, 735-36 (Okla. Crim. App. 1987) (chemist's report); 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). *But see* Pierce v. State, 786 P.2d 1255, 1263 (Okla. Crim. App. 1990) (an expert's report need not disclose all of her opinions).

31. *McCarty*, 765 P.2d at 1217 (hair samples); *Stafford*, 595 P.2d at 799 (fingerprints); *Moore*, 740 P.2d at 735 (a sample of the alleged controlled substance); Doakes v. District Court, 447 P.2d 461, 464 (Okla. Crim. App. 1968) (alleged death weapon); Melton v. State, 512 P.2d 204 (Okla. Crim. App. 1973) (alleged obscene film).

32. See *McCarty*, 765 P.2d at 1217. 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 pre-trial examination of physical evidence and technical reports, see Miller v. State, 809 P.2d 1317, 1319 (Okla. Crim. App. 1991).

33. *See Doakes*, 447 P.2d at 465 (defendant's written confession to be disclosed); Watts v. State, 487 P.2d 981, 986 (Okla. Crim. App. 1971) (state should reveal contents of defendant's oral statement). *But see* Jones v. State, 660 P.2d 634, 641 (Okla. Crim. App. 1983); Hollan v. State, 676 P.2d 861, 864 (Okla. Crim. App. 1984) (restricting the oral statements which needed to be disclosed to those made to law enforcement officers during a custodial interrogation).

34. Stevenson v. State, 486 P.2d 646, 650 (Okla. Crim. App. 1971) (citing with approval ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 2.1 (an earlier version of the present ABA STANDARDS 11.2.1)), *cert. denied*, 404 U.S. 1040 (1972).

35. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (Court specifically noted that there is no general constitutional right to discovery). Like many courts, however, the Oklahoma Court of Criminal Appeals held that due process required certain pre-trial disclosures be made to the defendant. *See, e.g., Moore*, 740 P.2d at 735; *McCarty*, 765 P.2d at 1217.

36. 740 P.2d 731 (Okla. Crim. App. 1987).

37. *Id.* at 734-35.

38. 594 P.2d 771 (Okla. Crim. App. 1979), *overruled*, Jones v. State, 772 P.2d 922 (Okla.

established guidelines requiring the prosecution to disclose, ten days before the trial, the prosecutor's intent to use other crimes' evidence.[39] The court maintained that these new guidelines for the use of other crimes' evidence would enhance judicial efficiency and would minimize trial error. It also emphasized that such pre-trial notice comported with due process by giving the defendant the opportunity to adequately prepare a defense and to confront and cross-examine the prosecution's witnesses.[40]

Nevertheless, while declaring it was "committed to the concept of full pre-trial discovery where reasonable and practical,"[41] the Oklahoma Court of Criminal Appeals steadfastly limited the defendant's access to other pre-trial information which certainly would have enhanced the defendant's ability to prepare a defense.[42] The court broadly interpreted the "work-product" doctrine so as to shield most police reports from the defense.[43] At times the court criticized the prosecution for its tardiness in complying with pre-trial disclosures, which denied the defense the time to prepare, consult experts, and effectively cross-examine the prosecution's witnesses.[44]

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38. 594 P.2d 771 (Okla. Crim. App. 1979), *overruled*, Jones v. State, 772 P.2d 922 (Okla. Crim. App. 1982).

39. *Id.* at 775. Other crimes evidence is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. 12 OKLA. STAT. § 2404 (Supp. 1987). The *Burks* notice requirement also has been extended to include "bad acts" by the defendant. Freeman v. State, 767 P.2d 1354, 1357 (Okla. Crim. App. 1988).

40. *Burks*, 594 P.2d at 776.

41. Wing v. State, 490 P.2d 1376, 1383 (Okla. Crim. App. 1971).

42. In Jones v. State, 660 P.2d 634, 641 (Okla. Crim. App. 1983), the Oklahoma Court of Criminal Appeals held that the prosecutor did not err in withholding from the defense the defendant's statements to his cellmate and to his probation officer despite the trial court's pre-trial order that defendant's oral statements be disclosed. The court justified non-disclosure by finding that the pre-trial order should have been understood only to cover statements to law enforcement officers. *Id.* The court easily could have announced that to avoid confusion and surprise and achieve other goals, including enhancing the defendant's ability to prepare a defense, it was adopting ABA Standard 11-2.1(a)(ii) and requiring in the future that all defendant's statements be disclosed prior to trial. Instead, the court noted only that defendant had notice that his cellmate was a potential witness and "it was his responsibility to determine what the substance of that testimony would be." *Id.* If the cellmate exercises his right and refuses to be interviewed, however, the defense is not in a position to make any such determination. Rather, the defense will have to proceed to trial with only speculation to go on as to the cellmate's testimony. For other cases in which the court restricted defense access, see Farmer v. State, 565 P.2d 1068 (Okla. Crim. App. 1977) (tape recorded statements of witnesses); Hickerson v. State, 565 P.2d 684 (Okla. Crim. App. 1977) (police report containing initial description of robber); Perez v. State, 614 P.2d 1112 (Okla. Crim. App. 1980) (police officer's notes of interview with defendant).

43. State *ex rel.* Fallis v. Truesdell, 493 P.2d 1134, 1136-37 (Okla. Crim. App. 1972); Curtis v. State, 518 P.2d 1288, 1291 (Okla. Crim. App. 1974); Nauni v. State, 670 P.2d 126, 133 (Okla. Crim. App. 1983). Under Oklahoma law prior to *Allen*, therefore, police investigative reports were not discoverable unless they contained *Brady* material. Van White v. State, 752 P.2d 814, 819 (Okla. Crim. App. 1988). For a useful article criticizing the court's refusal to require disclosure of police reports and urging the adoption of a discovery code compelling open discovery of the prosecution's evidence, see Lee, *supra* note 11.

44. *See supra* note 32. *See also* Pierce v. State, 786 P.2d 1255, 1266 (Okla. Crim. App. 1990) where the court chastised the state for failing to provide hair samples to the defendant

More often, however, the Court of Criminal Appeals vindicated a prosecutor's nondisclosure by characterizing the defense's discovery request as too general or too speculative.[45] As a result, criminal defendants obtained uneven, but usually limited, access to information because access depended largely on the individual prosecutor's sense of fairness or unwillingness to risk reversal for a failure to disclose.

Prior to *Allen*, then, an Oklahoma prosecutor was obligated only to disclose exculpatory evidence and certain specific items to the defense before trial. There clearly was no obligation to make a complete and detailed account to the defense of all police investigation done on a case.[46] Furthermore, *Stafford v. District Court*[47] clearly held that only the criminal records of prospective witnesses need be disclosed prior to the preliminary examination.[48] Hence, Carlson faced an uphill battle in his effort to convince the court to overrule *Stafford* and provide discovery before the preliminary hearing.

Carlson did convince Judge Lansdown that the prosecution was obligated to disclose exculpatory evidence to the defense as soon as that evidence became known.[49] Unquestionably, due process required state prosecutors to

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for examination, but concluded that the defense waived any error by proceeding to trial without requesting a continuance.

45. *See* Bettyoun v. State, 562 P.2d 862, 866 (Okla. Crim. App. 1977); Stevenson v. State, 486 P.2d 646, 650 (Okla. Crim. App. 1971); *Wing*, 490 P.2d at 1383; Hall v. State, 751 P.2d 1091, 1093 (Okla. Crim. App. 1988). *Curtis v. State* illustrates the problems facing the defendant and the court when the prosecutor does not provide the defense pre-trial access to the state's evidence. In *Curtis*, the defendant was denied a copy of his own fingerprints or a photo of a fingerprint taken from an envelope found at the scene of the crime. The Oklahoma Criminal Court of Appeals found no error because, on appeal, the defendant did not show that the print was "other than how Agent Jones testified." Curtis v. State, 518 P.2d 1288, 1292 (Okla. Crim. App. 1974). The agent had testified that he had been advised by a laboratory technician shortly before taking the witness stand by telephone that no comparison could be made of the print.

The court rightfully does not want to reverse a conviction only on the possibility that the print may have been exculpatory. However, it is impossible without access to the print and examination by a defense expert for the defendant to realistically challenge Agent Jones' testimony and to make the requisite showing demanded by the court. The defendant should not have had to accept at face value the agent's testimony but should have been provided access to this evidence. Rather than point out that fairness and sound policy dictate giving future defendants access to such evidence, the court simply focused on the defendant's inability to prove the exculpatory nature of the evidence. The state should not be permitted to interfere with the defendant's ability to mount a defense by the imposition of a requirement which the state's own actions have rendered impossible to fulfill. Hilliard v. Spalding, 719 F.2d 1443, 1446-47 (9th Cir. 1983).

46. Winterhalder v. State, 728 P.2d 850, 852 (Okla. Crim. App. 1986).

47. 595 P.2d 797 (Okla. Crim. App. 1979).

48. *Id.* at 799. *But see supra* note 8 and accompanying text.

49. *Allen*, 803 P.2d at 1164. Although the opinion is not clear on this point, Judge Lansdown seemingly required the disclosure of *Brady* material even before the preliminary hearing. *But see* Stafford v. District Court, 595 P.2d 797, 799 (Okla. Crim. App. 1979) (*Brady* material need not be turned over until after the preliminary examination).

disclose to the defense favorable information and documents in the prosecution's possession or control, including prior inconsistent statements of prosecution witnesses and any agreements made with those witnesses.[50] In addition to due process, most ethics codes, including the Oklahoma Rules of Professional Conduct, mandate that prosecutors disclose exculpatory evidence to the defense.[51]

At the time of the *Allen* decision, however, no "bright-line" clearly established what constituted timely disclosure. The ABA Standards and its drafters urged prosecutors to disclose exculpatory evidence "at the earliest feasible opportunity" and "to disclose all material that is even possibly exculpatory."[52] Unfortunately, the Oklahoma Court of Criminal Appeals generally has maintained an unduly narrow view of the prosecutor's responsibility to disclose exculpatory evidence.[53] Nevertheless, while disagree-

50. Brady v. Maryland, 373 U.S. 83, 87 (1963). For examples of cases in which the prosecutor's failure to disclose violated due process, see Binsz v. State, 675 P.2d 448 (Okla. Crim. App. 1984) (due process violated when prosecutor failed to correct the false testimony of defendant's accomplice which concealed a favorable plea bargain between the prosecutor and the accomplice); Giglio v. United States, 405 U.S. 150 (1972) (due process violated when prosecutor failed to correct the false testimony of a co-conspirator who denied being promised anything for his testimony when in fact he had been granted immunity).

51. The prosecutor in a criminal case shall

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1988). This rule is identical to MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983) [hereinafter MODEL RULES]. A similar provision can be found in MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-103 (1981).

52. ABA STANDARDS 3-3.11, 3-62 commentary.

53. The court stated that "requiring the State either to determine or disclose information which is arguably exculpatory, or which may become beneficial, or may lead to exculpatory material, is neither within the spirit or letter of the *Brady* doctrine." Winterhalder v. State, 728 P.2d 850, 852 (Okla. Crim. App. 1986). Many courts and commentators disagree; instead, in keeping with the true spirit of *Brady*, urge prosecutors "to disclose all material that is even possibly exculpatory as a prophylactic against reversible error and possible professional misconduct." ABA STANDARDS 3-62, 11-28; *see also infra* note 94 and accompanying text.

For a case which highlights the Court of Criminal Appeals' narrow view of a prosecutor's duty, see Bowen v. State, 715 P.2d 1093 (Okla. Crim. App. 1984), *cert. denied*, 473 U.S. 911 (1985). In *Bowen* the court held that the prosecutor's failure to disclose evidence about three other suspects in a triple murder case was not violative of due process because there was insufficient evidence to link these suspects to the murders when compared to the evidence against the defendant. *Id.* at 1098. The court concluded, therefore, that the prosecutor was not on notice of a duty to reveal the withheld information about other suspects. *Id.* at 1099.

The federal district judge granted a writ of habeas corpus, however, overturning the defendant's conviction as a result of the state's failure to disclose. On appeal, in *Bowen v. Maynard*, the court found that a specific oral request for all other suspects had been made to which the prosecutor had responded by asserting there were none. Bowen v. Maynard, 799 F.2d 593, 610 (10th Cir. 1986) Thus, unlike the Oklahoma Court of Criminal Appeals, the Tenth Circuit correctly concluded that a specific request for exculpatory evidence had been made. *Id.* at 611. Furthermore, in the Tenth Circuit's view, even if a specific request had not

ment existed about the proper scope of *Brady*,[54] there was little question that *Brady* and its progeny imposed a significant obligation on the prosecutor to reveal to the defense information that an advocate often would not wish to disclose.

The prosecutor, of course, is not simply an advocate. As an administrator or minister of justice, the prosecutor's duty is to seek justice, not merely to secure convictions.[55] The special role played by the prosecutor in our adversary system was summarized eloquently by Justice Sutherland in *Berger v. United States*:[56]

> [T]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[57]

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been made, the withheld evidence in this case should have been disclosed given its clear materiality. The undisclosed evidence concerning one suspect, Lee Crowe, would have enabled the defense to challenge the eyewitness identifications and raise a reasonable doubt as to the defendant's involvement. *Id.* Further, this evidence "could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders." *Id.* at 612.

54. Compare Justice Fortas' broad view of a prosecutor's *Brady* obligation in Giles v. Maryland, 383 U.S. 66 (1967), with the view expressed in Justice Harlan's dissent. In Fortas' view, "[N]o respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses." *Id.* at 98 (Fortas, J., concurring). To Harlan, however, the prosecutor's obligation was satisfied as long as the prosecutor did not knowingly use or fail to correct false testimony which may have had an effect on the trial's outcome. *Id.* at 116-18 (Harlan, J., dissenting).

55. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC7-13 (1981); *see also* ABA STANDARDS 3-3.1 & commentary; OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment. The National District Attorneys Association published a set of standards in 1977 acknowledging that the prosecutor's duty to seek justice calls for a different sort of advocacy. "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 proceeding." NATIONAL PROSECUTION STANDARDS 177 (National District Attorneys Association 1977) (citing Frye v. State, 91 Okla. Crim. 326, 218 P.2d 643 (1950)).

56. 295 U.S. 78 (1935), *overruled*, 361 U.S. 212 (1960).

57. *Berger*, 295 U.S. at 88. *See also* McCarty v. State, 765 P.2d 1215, 1221 (Okla. Crim. App. 1988) (urging Oklahoma prosecutors to heed Justice Douglas, who cited the same quote

The criminal defense lawyer, however, is not a minister of justice. The lawyer for a criminal defendant is obligated to be a zealous advocate, testing the state's case even at the expense of truth.[58] The role of the criminal defense lawyer in our adversary system is fundamentally different than that of the prosecutor.[59] Unlike the prosecutor, the defense attorney has no

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from Justice Sutherland while similarly describing the role of the prosecutor in Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting)); United States v. Peyro, 786 F.2d 826, 831 (8th Cir. 1986) (prosecutor's "special duty as the government's agent is not to convict, but to secure justice.").

58. "The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law." ABA STANDARDS 4-1.1. *See also* Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948) (right to counsel demands undivided allegiance and service devoted solely to the interests of the client). There is no question that our adversary system requires the defense lawyer to be a zealous advocate pursuing the client's best interests. *See* M. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 65-73 (1990). As Charles Wolfram notes in his authoritative text on legal ethics, "the American lawyer's professional model is that of zeal: a lawyer is expected to devote energy, intelligence, skill and personal commitment to the single goal of furthering the clients' interests as those are ultimately defined by the client." C. WOLFRAM, MODERN LEGAL ETHICS 585 (1986). Even those who argue that there ought to be moral limits on a lawyer's zeal, generally acknowledge that the criminal defense lawyer zealously must purse the defendant's interests even at the expense of an accurate outcome. D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 58-63 (1988). As a zealous advocate, defense counsel indeed may be legitimately frustrating the truth. *See* M. FREEDMAN, *supra*, at 161-71. Justice White summarized defense counsel's role and contrasted it with the prosecutor's role:

> But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission . . . . 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).

59. The two sides of the contest are not governed by the same rules, for the interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done; whereas the role of defense counsel is not only to prevent the conviction of the innocent, but to represent his client diligently and skillfully, whether he is innocent or guilty, using all legitimate forensic means to obtain an acquittal.

ABA STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE FUNCTION OF THE TRIAL JUDGE

ethical responsibility to reveal unfavorable evidence to the other side.[60] Rather, the ethics codes enshrine the principle of partisanship and demand that defense counsel maintain the client's confidences and function as a zealous advocate regardless of the client's guilt or innocence.[61] Unlike the prosecutor, defense counsel actually may be frustrating truth while pursuing a vigorous but ethical defense.[62]

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introduction at 3 (Approved Draft 1972); *see also supra* note 55; M. FREEDMAN, *supra* note 58, at 213-15.

60. Espousing the principles of zealous partisanship, the ethics code generally permits a criminal defense lawyer to withhold information or even create a misleading impression. For a discussion of the limited extent to which the ethics codes restrain defense counsel's zealous advocacy, see C. WOLFRAM, *supra* note 58, at 588-89, 641, 650-51; A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 2-327 (1984); M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 79-80 (1975). In a limited number of situations, courts have found that a criminal defense lawyer, as an officer of the court, must divulge to the court adverse information regarding a client. J. BURKOFF, Criminal Defense Ethics 6-49 to 6-60 (1986). *See, e.g.*, Evans v. Kropp, 254 F. Supp. 218, 220-21 (E.D. Mich. 1966) (critical information regarding a client's competency must be disclosed); Commonwealth v. Maguigan, 511 Pa. 112, 511 A.2d 1327, 1333-37 (1986) (requiring disclosure of client's whereabouts). Other courts have been wary of obligating defense counsel to temper her advocacy because of any duty as an officer of the court. *See, e.g.*, United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (lawyer may not volunteer unsubstantiated opinion that client is committing perjury). For a brief look at the widely diverging views of a defense lawyer's responsibilities as an officer of the court, compare Nix v. Whiteside, 475 U.S. 157, 168 (1986) (Chief Justice Burger's view emphasizing defense counsel's role as an officer of the court) with Jones v. Barnes, 463 U.S. 745, 761-62 (1983) (Brennan, J., dissenting) (view of Justice Brennan in stressing that counsel must function as an advocate as opposed to a friend of the court). *See also* United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) (defense lawyer's mission not to ascertain or present the truth); Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948) (Justice Black's view that right to counsel demands undivided allegiance and service devoted solely to the interests of the client); Polk County v. Dodson, 454 U.S. 312, 318 (1981) (Justice Powell's view that defense counsel best serves the public by advancing the individual interests of the accused); COMM'N ON PROF. RESP. OF THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUND., THE AMERICAN LAWYER'S CODE OF CONDUCT preamble (1982) ("It is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.").

Defense counsel generally does have an ethical duty, however, to turn over physical evidence, albeit unfavorable to the defendant, if the defense takes possession of that evidence. *See infra* note 198 and accompanying text. Defense counsel has no duty to disclose but rather has a duty to refuse to divulge privileged information about the location of physical evidence as long as the defense does not take possession of that evidence. Clutchette v. Rushen, 770 F.2d 1469, 1472 (9th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986).

61. *See supra* notes 58, 60. *See also* State *ex rel.* Tucker v. Davis, 9 Okla. Crim. 94, 130 P. 962 (1913) (by statute and settled common law, lawyer has duty to maintain client's confidence and preserve client's secrets).

62. "The procedural and legal system are supposedly designed to produce results based on just laws fairly applied on the basis of accurate facts; but a lawyer's objective within that system is to achieve a result favorable to the lawyer's client, possibly despite justice, the law, and the facts." C. WOLFRAM, *supra* note 58, at 585. As David Mellinkoff observes,

> [A] substantial part of the major criticism of the lawyer—his presumed indifference to truth—is rooted in fundamental misconception of the lawyer's mission.

In addition to the ethics codes, constitutional principles mandate that defense counsel's role and responsibilities be different. As will be explored more fully in the next section, the fifth amendment privilege against self-incrimination, the sixth amendment right to effective assistance of counsel, and the due process clause, which imposes the burden of proof on the state while affording the defendant the presumption of innocence, all combine to shape the defense lawyer's role.[63] Thus, there is no corresponding duty similar to that set forth in *Brady* requiring defense counsel to disclose inculpatory evidence because the due process clause protects individuals, not the state.[64]

It is not surprising, therefore, that at the time of the *Allen* decision, defense counsel in Oklahoma had only a very limited obligation to disclose any information to the prosecution prior to trial. In fact, the prosecution had only a statutory right to receive notice, pursuant to title 22, section 585, of an alibi defense and notice of a mental illness or insanity defense, pursuant to title 22, section 1176.[65] Although both statutes call for notice to the prosecutor, neither requires defense counsel to identify witnesses in support of the defense or provide any additional documentation to the prosecutor.[66] Other than providing notice of these specific defenses, defense counsel in Oklahoma at the time of *Allen* did not have any obligation to provide the prosecutor any details or information about the defendant's case.[67] Furthermore, there were no reported decisions in Oklahoma authorizing a trial court to grant additional discovery to a prosecutor.[68]

> The lawyer does not exist to spread the word of truth and goodness to the ends of the earth. Somewhat more limited, the lawyer's mission is the nonetheless awesome task of trying to make a realty of equality before the law.

D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 272 (1973). *See also supra* note 58. For examples of cases in which defense counsel's efforts may frustrate truth or efficiency, see State v. Brown, 644 S.W.2d 418, 421 (Tenn. Crim. App. 1982) (a lawyer may seek to cast blame on a co-defendant regardless of the lawyer's personal belief in the co-defendant's guilt); People v. White, 57 N.Y.2d 129, 440 N.E.2d 1310, 454 N.Y.S.2d 964 (1982) (defense counsel has no duty to produce alibi witness even though earlier revelation would have benefitted the efficient administration of justice).

63. *See infra* notes 108-37, 142-62 and accompanying text.

64. United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part); *see also* Levin v. Katzenbach, 363 F.2d 287, 295 (D.C. Cir. 1966) (Burger, J., dissenting), *cited with approval in* Middleton v. United States, 401 A.2d 109 (D.C. 1979).

65. *See* 22 OKLA. STAT. §§ 585, 1176 (1981).

66. Defense counsel is not even obligated under title 22, § 585 of the Oklahoma Statutes to file an alibi notice. The statute merely gives the prosecutor the right to ask for a continuance to investigate an alibi defense where it is raised at trial without prior notice. Connery v. State, 499 P.2d 462 (Okla. Crim. App. 1972); *see also infra* notes 185-86 and accompanying text.

67. In Brecheen v. Dycus *ex rel.* Court of Rec., Okla. City, 547 P.2d 980 (Okla. Crim. App. 1976), the court rejected municipal court rules which mandated, among other requirements, that the defense make known to the prosecutor all evidence intended to be introduced at trial. The court held that such disclosure requirements violate the fifth amendment, as well as title 22, § 15 of the Oklahoma Statutes and article 2, § 21 of the state constitution. *Id.* at 982 (citing 22 OKLA. STAT. § 15 (1971); OKLA. CONST. art. 2, § 21).

68. *See* Mills v. Tulsa County Dist. Court, 770 P.2d 900, 901 (Okla. Crim. App. 1989)

II. The Allen Decision: Oklahoma's New Criminal Discovery Code

What is surprising about the *Allen* decision is the Oklahoma Criminal Court of Appeals' willingness to reach out to utilize this case to draft a new criminal discovery code for Oklahoma. The judicial branch usually is reluctant to engage in such sweeping reform, especially when the case before the court can be disposed of easily in light of settled precedent.[69] While the adoption of the new discovery procedures may not have violated the separation of powers doctrine,[70] there is no question that the legislative branch is better-suited to engage in such extensive rule making.[71] Judicial restraint is particularly appropriate when the issue of mandating broad defense disclosures under the guise of reciprocal discovery — the cornerstone of the

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(court rejected the state's attempt to secure a criminal defendant's psychiatric records before trial concluding that there was no statutory authority allowing for such pre-trial discovery).

69. *See* Roberson v. State, 91 Okla. Crim. App. 217, 218 P.2d 414, 423 (1950) ("It is not our place to legislate but to interpret. If the legislature finds the rule of evidence herein involved out-moded as a vehicle of justice they may change the same by laying down a new and different rule."); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) (discussing judicial restraint and the policies behind the doctrine); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

70. Article 4, § 1 of the Oklahoma Constitution states:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

OKLA. CONST. art. 4, § 1.

The separation of powers doctrine as embodied in article 4, § 1 reflects the American constitutional scheme that governmental powers must be shared by three separate but co-equal branches with interdependent as well as independent responsibilities. Sterling Ref. Co. v. Walker, 165 Okla. 45, 25 P.2d 312, 318 (1933); Mistretta v. United States, 488 U.S. 361 (1989). There is no doubt that the legislative branch has the power to regulate the practice and procedures of the courts. *Walker*, 25 P.2d at 318; *Mistretta*, 488 U.S. at 364. Moreover, the legislative has the power to delegate rule making authority to the judicial branch. Sibbach v. Wilson & Co., 312 U.S. 1 (upholding the congressional grant of power to the judiciary to promulgate the federal rules of civil procedure), *reh'g denied*, 312 U.S. 715 (1941). There is a serious question, however, absent any delegation of power by the legislature, whether the judiciary has the power to adopt broad discovery rules with substantive and political implications when that task seemingly would be more appropriately addressed by the legislative branch. Morrison v. Olson, 487 U.S. 654, 695 (1988); *Mistretta*, 488 U.S. at 385. A full discussion of the separation of powers issue is beyond the scope of this article.

71. As the California Supreme Court observed in declining to uphold a trial court's order compelling production of defense evidence, the issue of prosecutorial discovery is more appropriately left to the legislature for initial consideration because of the "primacy of the Legislature in the field of creating rules of criminal procedure." People v. Collie, 30 Cal. 3d 43, 54, 634 P.2d 534, 540, 177 Cal. Rptr. 458 (1981). In addition, once the legislature adopts a comprehensive solution, it will be the court's task to review that legislation to ensure that it meets constitutional muster. "As the heirs of that institutional obligation, we must be reluctant to step out of our traditional role by undertaking to define in the first instance procedures that upon reflection may appear to undermine the foundational principles it is our primary responsibility to protect." *Id.*, 634 P.2d at 541.

decision — barely was mentioned by the parties in their briefs.[72] The court was deprived, therefore, of a full discussion of the problems and issues involving criminal discovery and of the insights which other interested parties may have contributed had these issues fully been briefed and argued.[73]

In his brief, the defendant urged the court to overrule *Stafford* and accelerate the defendant's access to information, especially scientific and technical reports, which the defendant needed to challenge the state's evidence at the preliminary hearing and later at trial.[74] The state's response focused on the extent to which defense lawyers were subverting the "true purpose" of preliminary examinations and turning these hearings into practice trials.[75] The prosecution suggested that the court re-evaluate its holding in *Beaird v. Ramey*[76] and restrict the scope of the preliminary hearing.

The court instead saw a "pressing need" to draft a new set of procedural rules which would "expedite the trial of criminal cases and . . . help alleviate the pressing problem of pre-trial disclosure."[77] The opinion offers no explanation as to what these pressing problems are or why the need is so pressing, other than a brief reference to the fact that the court continually confronts appellate cases regarding compliance with pre-trial discovery.[78] There is no basis for expecting, however, that the new *Allen* procedures will reduce the amount of appellate litigation involving pre-trial discovery issues. Rather, unresolved procedural questions and serious constitutional problems with the new procedures undoubtedly will spawn increased litigation.

72. Although the defendant's two briefs argue at length for liberalizing discovery for the defendant, it contains only a limited argument against reciprocity. Supplemental Brief in Support of Petitioner's Writ Concerning Discovery at 16, Allen v. District Court, 803 P.2d 1164 (Okla. Crim. App. 1990) (No. 0-90-0825). The state's brief merely notes that if discovery is to be changed, fairness dictates that it should be a "two-way street" with both sides given access to information. Response to Petitioner's Writ of Mandamus and/or Writ of Prohibition at 3, *Allen* (No. 0-90-0825).

73. Both the Oklahoma District Attorneys' Association and the Oklahoma Criminal Defense Lawyers' Association surely would have filed amicus briefs as they did, for example, in Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979).

74. *See* Brief in Support of Petitioner's Writ of Mandamus and/or Writ of Prohibition at 13-14, *Allen* (No. 0-90-0825).

75. *See* Response to Petitioner's Writ of Mandamus and/or Writ of Prohibition at 9, *Allen* (No. 0-90-0825).

76. 456 P.2d 587 (Okla. Crim. App. 1969).

77. *Allen*, 803 P.2d at 1167. In fact, a review of recent cases suggests that the primary discovery problems confronting the Oklahoma Court of Criminal Appeals involve prosecutorial non-compliance or tardy compliance with discovery orders and prosecutorial non-disclosure of possible exculpatory material. *See, e.g.*, McCarty v. State, 765 P.2d 1215 (Okla. Crim. App. 1988); Pierce v. State, 786 P.2d 1255 (Okla. Crim. App. 1990); Miller v. State, 809 P.2d 1317 (Okla. Crim. App. 1991); Fritz v. State, 811 P.2d 1353 (Okla. Crim. App. 1991). Compelling Oklahoma prosecutors to maintain an open file policy will minimize needless litigation as long as meaningful sanctions are applied if prosecutors do not satisfy their disclosure obligations. *See infra* notes 82-85, 221-28 and accompanying text. The recent cases do not demonstrate, however, that there is any need for expanded defense disclosures.

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

The court in *Allen* states that it drew upon, but chose not to adopt, the ABA Standards in determining the appropriate pre-trial discovery procedures for Oklahoma.[79] Once again, the absence of any discussion makes it impossible to ascertain the court's rationale for deviating from the ABA Standards. Presumably, the court decided that its goals of expediting criminal trials and alleviating the unarticulated pressing problem of pre-trial disclosure would be best achieved by its modified version of the ABA Standards. Nonetheless, by adopting only certain provisions of the ABA Standards, the court ignored the drafters' warning that the Standards were designed as an integrated whole to be adopted in their entirety.[80] As a result, the *Allen* procedures have some serious gaps which require further clarification. Before examining these gaps, a review of the disclosures mandated by *Allen* is warranted.

Allen requires that the prosecution, upon the defendant's request, disclose all of the material and information within the prosecutor's possession or control, including but not limited to:

> (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.[81]

The adoption of this language, which substantially tracks ABA Standard 11-2.1(a), represents a significant shift in the attitude of the Oklahoma Court of Criminal Appeals toward discovery. Instead of limiting the prosecutor's duty to disclose only to certain specified material, the *Allen* decision now requires the prosecutor to adopt what essentially is an open file policy.[82]

79. *Id.* The court stated that it also looked to other authorities, including the Model Penal Code, for guidance. The Model Penal Code, however, does not contain any provisions relating to pre-trial discovery.

80. *See* ABA STANDARDS 11-6.

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

82. In choosing to follow the approach spelled out in ABA STANDARDS 11-2.1 (a), the *Allen* court apparently was persuaded, as was the ABA, that the open file concept promotes

The enumerated items constitute the information which routinely will be turned over to the defense, but the listed items are only illustrative, not exhaustive.[83]

By mandating even broader prosecutorial disclosures than recognized under prior Oklahoma law, the court presumably agrees with the drafters of the ABA Standards that this open file policy indeed will expedite the handling of cases while minimizing the need for judicial supervision of routine discovery. Moreover, providing the defense more information should allow defense counsel to plea bargain more intelligently and exercise the rights of confrontation and compulsory process more effectively.[84] Above all, the open file approach is essential if the criminal justice system is going to begin to make meaningful the indigent defendant's rights to effective assistance of counsel. Without easy pre-trial access to the prosecution's case, few defense lawyers can conduct an adequate investigation or be prepared to do more than a cursory cross-examination of the state's witnesses. Enhanced access should improve the quality of representation provided many criminal defendants as well as reduce the number of ineffective assistance of counsel claims.[85]

The *Allen* court's enumerated list mirrors ABA Standard 11-2.1(a) with only minor variations. *Allen* appropriately tracks Standard 11-2.1(a)(iv) and requires disclosure of all reports and statements of experts, not just those the prosecutor intends to introduce at trial. *Allen* does not include ABA Standard 11-2.1(a)(iii) relating to grand jury minutes because title 22, section 340 already makes grand jury transcripts available to the defendant.[86] *Allen*

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many systemic goals at little to no cost to the state's ability to secure convictions. In the exceptional case where pre-trial disclosure is problematic, the state may seek a protective order. For a further discussion of the advantages of the open file concept, see ABA STANDARDS 11-16 to 11-18.

83. *Id.* 11-15.

84. *Id.* 11-17 to 11-18. The court previously relied on this commentary in holding that a defendant was entitled to lab results and reports pertaining to the alleged controlled substance he was charged with possessing. Moore v. State, 740 P.2d 731, 735 (Okla. Crim. App. 1987); *see also* 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) (arguing that providing the defendant greater opportunity to discover state's case leads to better informed pleas without any appreciable loss to the state in its ability to secure convictions).

85. There certainly are a number of able criminal defense lawyers who provide excellent representation. Nonetheless, commentators overwhelmingly agree that many criminal defendants are represented by overworked, inexperienced, and underpaid public defenders or appointed lawyers who lack the investigative resources, expert services and time to function as competent, zealous advocates. *See* D. LUBAN, *supra* note 58, at 60-61; A. BLUMBERG, CRIMINAL JUSTICE (1967); Monahan, *Who is Trying to Kill the Sixth Amendment?*, CRIM. JUST., Summer 1991, at 24. For an overview of the gap between the adversarial rhetoric of Gideon v. Wainwright, 407 U.S. 25 (1972), and the reality of indigent defense, see McConville & Mirsky, *Criminal Defense of the Poor in New York City*, 15 REV. L. & SOC. CHANGE 581, 652-63 (1986-87). *See also infra* notes 160-62, 167, 180-83 and accompanying text.

86. *See supra* note 15.

wisely requires disclosure of OSBI or FBI rap sheets/record checks, which are discretionary items under the ABA Standards.[87] Furthermore, *Allen* explicitly states that all oral statements of witnesses or summaries of these statements need to be disclosed, presumably to signal a clear departure from prior Oklahoma law.[88] Finally, *Allen* follows the ABA recommendation that all statements of the accused and any codefendants be disclosed.[89] This also represents a deviation from prior law in that now a defendant's statements to third parties and non-custodial statements must be disclosed.[90] This "bright-line" rule should allow for more timely severance motions and a more orderly pre-trial resolution of questions regarding the admissibility of defendants' statements.[91]

Allen also contains a provision, using language identical to that in ABA Standard 11-2.1(c), which requires the prosecutor to disclose any exculpatory material.[92] As *Allen* acknowledges by not conditioning this disclosure on the defendant's request, a prosecutor is obligated to disclose evidence which is clearly exculpatory even where the defense has not made a specific request.[93] Competent defense counsel should make as specific and detailed a request for exculpatory evidence as possible.[94] Although a prosecutor may

87. OSBI refers to the Oklahoma State Bureau of Investigation, the local counterpart to the Federal Bureau of Investigation. *See* ABA STANDARDS 11-2.5 & commentary (rationale for not making such records automatically available in every case). The *Allen* approach saves judicial time, eliminates needless motions and forces the prosecutor routinely to obtain records of all witnesses. This should eliminate, or at least minimize, cases such as Housley v. State, 785 P.2d 315 (Okla. Crim. App. 1989) (conviction reversed because state failed to disclose criminal records of state witnesses).

88. For a discussion of prior Oklahoma law, see *supra* notes 14, 43 and accompanying text. Pre-trial disclosure of witness statements decreases the need for repeated trial recesses, minimizes ineffective cross-examination and improves trial preparation. *See* ABA STANDARDS 11-75. Moreover, the *Allen* provision enhances the defendant's ability to mount a defense by requiring the prosecutor to disclose statements of all persons known to the prosecution to have knowledge of the facts relevant to the defendant's case not just witnesses intended to be called at trial.

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

90. ABA STANDARDS 11-2.1(A)(iii) & commentary; *see also supra* note 33.

91. ABA STANDARDS 11-20.

92. *Allen*, 803 P.2d at 1168. "The prosecuting attorney shall disclose to defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused." *Id.* The language mirrors the *Brady* definition of exculpatory evidence.

93. United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985); Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986), *cert. denied*, 479 U.S. 962 (1986); *see also* ABA STANDARDS 11-27 to 11-28. The prosecutor's duty as defined in the ethical rules cited in *supra* note 51 also does not turn on a defense request.

94. The problem, of course, is that when defense counsel is unaware of the existence of certain evidence it is often impossible to make any sort of specific request. As Justice Fortas observed, "[I]f the defense does not know of the existence of the evidence, it may not be able to request its production." Giles v. Maryland, 386 U.S. 66, 102 (1966) (Fortas, J., concurring). *See also* Chaney v. Brown, 730 F.2d 1334, 1340-44 (10th Cir. 1984) (discussing the difficulty of formulating a specific *Brady* request and holding that a request for statements of witnesses interviewed by any governmental agency in connection with the case was specific enough to give the prosecutor notice of exactly what the defense required).

be unsure of the exculpatory nature of certain material, "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[95]

The final paragraph in *Allen*, outlining the prosecutor's disclosure obligations, extends the prosecutor's disclosure responsibility to material and information in the possession and control of the prosecutor's staff or of those who regularly report, or in the particular case, reported to the prosecutor's office.[96] This language differs slightly from that in ABA Standard 11-2.1(d) in that it seemingly does not extend the prosecutor's obligation to cover an investigative entity who may have participated in some aspect of the case without reporting to the prosecutor.[97] The court's rationale for this modification is unclear.

The Oklahoma Court of Criminal Appeals' first major departure from the ABA Standards occurs in *Allen* when the court examines the defendant's disclosure obligations. According to *Allen*, a defendant shall be required to 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

95. *Agurs*, 427 U.S. at 108. *See also* ABA STANDARDS 3-3.11 & commentary (urging prosecutors to disclose all material that is even possibly exculpatory and reporting that many experienced prosecutors habitually make most if not all evidence available to the defense). Nonetheless, prosecutorial withholding of potentially exculpatory material remains a serious systemic problem. *See* Rosen, *Disciplinary Sanctions Against Prosecutors for BRADY Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 694 (1987).

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

97. Standard 11-2.1(d) reads:

> The prosecuting attorney's obligations under this standard extend to material and information in the possession or control of members of the prosecutor's staff and of any others *who have participated in the investigation or evaluation of the case and* who either regularly report or, with reference to the particular case, have reported to the prosecutor's office.

ABA STANDARDS 11-2.1(d). The italicized portion was left out of the *Allen* definition. Even without this clause, a prosecutor under *Allen* is still responsible for disclosing all relevant material in the possession of any law enforcement office or government agency which dealt with the prosecution with respect to a particular case. *See, e.g.*, United States *ex rel.* Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964); 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").

> 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 statement is redacted by the court to preclude disclosure of privileged communication.[98]

Unlike the ABA Standards, the *Allen* court does not condition these disclosure obligations upon a prior defense request followed by a request by the prosecutor.[99] Rather, the language "defense shall be required to disclose" implies an affirmative duty to disclose the items identified in paragraphs 1(a), (b), and (c) even absent a request or court order. Apparently, reports, statements, or intended evidence need only be disclosed if specifically requested by the prosecutor.

The *Allen* decision offers little justification for the court's dramatic expansion of a criminal defendant's obligation to divulge information to the state. Rather, the court simply concludes that the proper administration of justice necessitates the adoption of meaningful pre-trial discovery for each party in a criminal case.[100] This conclusion is based on a cursory, unhelpful discussion of three United States Supreme Court decisions: *Wardius v. Oregon*,[101] *Williams v. Florida*,[102] and *Taylor v. Illinois*.[103] The *Allen* court quotes Justice

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

99. *See* ABA STANDARDS 11-2.1 & commentary.

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

101. 412 U.S. 470 (1973). The trial court denied the defendant an opportunity to present alibi witnesses or offer his own alibi testimony because of his failure to file a notice of alibi pursuant to an Oregon statute. Since the statute did not grant reciprocal rights to defendant, defendant's right to due process was violated by enforcing a facially invalid statute. *Id.* at 472.

102. 399 U.S. 78 (1970). The defendant claimed that his fifth amendment privilege against self-incrimination was violated when he was compelled by Florida's notice-of-alibi statute to furnish the names of his alibi witnesses or suffer the exclusion of his alibi evidence. The Court rejected this claim holding that requiring pre-trial discovery of alibi witnesses did not constitute compulsion within the meaning of the fifth and fourteenth amendments. *Id.* at 86.

103. 484 U.S. 400 (1988). The Court found that the compulsory clause of the sixth amendment did not constitute an absolute bar to the preclusion of a defense witness as a sanction for violating an Illinois notice-of-alibi statute requiring the pre-trial identification of alibi witnesses. *Id.* at 409. Preclusion was an appropriate sanction in light of defense counsel's blatant and willful violation of the rule. *Id.* at 416.

Marshall in *Wardius* to the effect that discovery must be a two-way street.[104] *Wardius* provides little guidance, however, as to how far that street can extend and still be within constitutional limits. The actual holding in *Wardius*, striking down Oregon's notice-of-alibi statute on due process grounds because it made no provision for reciprocal disclosures to the defendant, certainly does not support the sweeping proposition that all defense-ordered disclosures are constitutional as long as the prosecution has similar disclosure obligations.[105]

Similarly, neither *Williams* nor *Taylor* offers much insight into the constitutionality of granting the prosecution broad pre-trial access to the defendant's case. It is true that both decisions contain language applauding the growth of pre-trial discovery for each party in a criminal case. Yet the holding in each case is quite narrow. Despite Justice Black's powerful dissent, *Williams* does demonstrate that not all defense-ordered pre-trial disclosures offend the fifth amendment.[106] And *Taylor* shows that precluding

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

105. Whatever discovery rights are provided the defense, the prosecution's rights will be limited given the defendant's constitutional protections. Standefer v. United States, 447 U.S. 10, 22 (1980). In fact, in a footnote to the exact language relied on by *Allen*, Justice Marshall observed, "[I]ndeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Wardius*, 412 U.S. at 475 n.9.

106. According to Justice Black, the *Williams* decision was 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 case without any assistance of any kind from the defendant himself." *Williams*, 399 U.S. at 108 (Black, J., concurring in part and dissenting in part).

To Black, all compelled pre-trial discovery from the defense violates the fundamental principles underlying the fifth amendment. *Id.* at 109-14. In Black's view, White's reading of the fifth amendment unduly compromised the privilege against self-incrimination.

> This constitutional right to remain absolutely silent cannot be avoided by superficially attractive analogies to any so-called "compulsion" inherent in the trial itself that may lead a defendant to put on evidence in his own defense. Obviously the Constitution contemplates that a defendant can be "compelled" to stand trial, and obviously there will be times when the trial process itself will require the defendant to do something in order to try to avoid a conviction. But nothing in the Constitution permits the State to add to the natural consequences of a trial and compel the defendant in advance of trial to participate in any way in the State's attempt to condemn him.
>
> A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. 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.

Id. at 113-14.

Several courts have relied on Black's dissent to hold that their state constitutional counterpart to the fifth amendment protects the defendant from being ordered to disclose information to the state which might lighten the prosecution's burden of proof or assist the state in securing a conviction. *See, e.g., In re* Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569

a defense witness from testifying because of counsel's failure to comply with a notice-of-alibi rule may be warranted and constitutionally inoffensive even though such a sanction may have an adverse impact on the defendant's sixth amendment right to compulsory process and to present a defense.[107] Nonetheless, *Williams* and *Taylor* also leave unanswered significant constitutional questions regarding the extent to which a criminal defendant may be forced to provide to the prosecutor, before trial, information beyond that relating to an alibi defense.

The *Allen* decision glosses over any serious constitutional analysis by summarily concluding that compelling a defendant to make pre-trial disclosures is "merely a matter of timing."[108] In *Williams* Justice White did argue that the notice-of-alibi rule only compels a defendant to accelerate a disclosure which would otherwise be made at trial when the alibi witnesses actually were called.[109] Since a continuance could be granted to allow the prosecution to meet surprise alibi testimony at trial without offending the fifth or fourteenth amendment, White reasoned that forcing the defendant to make an earlier pre-trial disclosure, thereby avoiding disrupting the trial, is also permissible.[110]

The *Allen* court's reliance on Justice White's timing argument to justify additional pre-trial defense disclosures, however, is unwarranted. Given the specific facts in *Williams*, the defendant's disclosure of an alibi defense did not provide any incriminating evidence which was used to lessen the state's burden of proof, to impeach the defendant's testimony, or to adversely impact the defendant's ability to present a defense. The timing of the defendant's disclosure in *Williams*, therefore, had no practical or constitutional significance. In other cases, however, timing will matter and therefore assume constitutional significance because a defendant compelled to make pre-trial disclosures will, in fact, be incriminated by those disclosures. Accordingly, Justice White's timing argument cannot be read expansively because it fails to adequately consider the fact that a defendant forced to

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(1985); Scott v. State, 519 P.2d 774 (Alaska 1974). *But see, e.g.*, State *ex rel.* Carkulis v. District Court, 229 Mont. 265, 746 P.2d 604 (1987); State v. Yates, 765 P.2d 291 (Wash. 1988); Izazaga v. Superior Court, 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991).

107. Taylor v. Illinois, 484 U.S. 400 (1988); *see also* Michigan v. Lucas, 111 S. Ct. 1743 (1991) (holding that a Michigan statute requiring defense counsel to give notice of an intent to use evidence of a prior sexual relationship with the complainant in a rape case was not per se unconstitutional and that preclusion of defense testimony as a penalty for a discovery violation may be appropriate in some cases).

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

109. *Williams*, 399 U.S. at 85.

110. Justice White stated:

> Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Williams, 399 U.S. at 85.

make disclosures before trial often is in a markedly different position from that of the defendant after the prosecution has rested.[111]

Moreover, this timing argument underplays the fact that our adversary system has placed the entire burden of proof on the state and extended to the defendant the presumption of innocence while also guaranteeing the defendant the right to effective assistance of counsel. Forcing a defendant to disclose witnesses to the prosecution before the trial creates the risk that the prosecution may gain additional incriminating evidence from its follow-up investigation. This evidence then will be used to lessen the state's burden of proof in its case-in-chief.[112] Advance notice of witnesses may not only allow the prosecution to shore up its own case, but also may give the prosecutor, who possesses superior investigative forces, even more time to secure impeachment evidence and to challenge the defense's case.[113]

111. As Justice Black accurately observes,

> When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind. Before trial the defendant knows only what the State's case might be. Before trial there is no such thing as the "strength of the State's case"; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at trial itself. Any 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.

Id. at 109 (Black, J., concurring in part and dissenting in part). For a similar criticism of White's argument, see Van Kessel, *infra* note 113, at 877. *See also* Scott v. State, 519 P.2d 774, 783 (Alaska 1974) (rejecting as unpersuasive White's timing rationale).

112. In a self-defense case, for example, defense counsel may wish to wait until the conclusion of the state's case to decide if counsel wants to call a particular witness located by the defense because that witness' testimony is incriminating as well as exculpatory. If the state's case-in-chief is weak, counsel may choose not to call that witness and no disclosure would ever occur. The pre-trial identification of this witness, however, gives the state the option to use this witness to buttress its own case. For an excellent discussion of the constitutional problems created when the state is permitted to use compelled defense disclosures in its case-in-chief, see Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1587-88, 1623-35 (1986). *See also infra* notes 149-52 and accompanying text for a discussion of the court's efforts in *Allen* to limit the state's use of information obtained from the defendant.

113. For a discussion of the imbalance in favor of the state in criminal cases and the extent to which prosecutorial discovery will aggravate the defendant's disadvantages, see Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. CAL. L. REV. 461 (1977). Among the problems facing defense counsel is the difficulty of securing the cooperation of witnesses to testify on behalf of a defendant. Pre-trial identification of witnesses means an increase in police interviews of those witnesses which in turn decreases the willingness of many already reluctant people to continue to be involved. Although the prosecution also has witness problems, the state has more means at its disposal to encourage cooperation. For example, a defense witness with an outstanding warrant for parking tickets may refuse to come to court for fear of arrest. A prosecution witness with the same problem is not similarly intimidated. Parking tickets, transportation problems and child care concerns deter even friendly witnesses from testifying for the indigent defendant.

Additionally, hampered by inadequate investigative resources and time pressures, the defense may be very uncertain as to what defense to assert in a notice.[114] The defendant subsequently may feel locked into a particular defense as a result of a notice given before the defense investigation was complete. Fear of being impeached directly or indirectly by one's own premature disclosures, therefore, may affect adversely the defendant's decision to take the witness stand at trial.[115] Not surprisingly, some state courts rejected *Williams* and concluded that compelling the defendant to make certain pre-trial disclosures violated the state constitutional counterpart to the fifth amendment.[116]

Indeed, a broad reading of *Williams* threatens fundamental values traditionally protected by the fifth amendment. As the Supreme Court detailed in *Murphy v. Waterford Commission*,[117] the fifth amendment reflects:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[118]

But see Van Kessel, *Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation*, 4 HASTINGS CONST. L.Q. 855 (1977) (arguing that although state often has superior resources, it is not unfair to give prosecutor chance to investigate and prepare, despite threat of intimidation to defense witnesses, as long as prosecutorial use limited to rebuttal or impeachment).

114. *See* Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CALIF. L. REV. 935, 949-52 (1978). The uncertainty felt by the defendant who has to provide an alibi notice and list of witnesses in some cases can be similar to the uncertainty faced by the defendant in Brooks v. Tennessee, 406 U.S. 605 (1972) (unfettered choice to take the witness stand impermissibly burdened by state statute controlling the timing of the defendant's testimony). *See infra* notes 125-36 and accompanying text. Defense uncertainty is exacerbated by limited investigative assistance, difficulty in locating witnesses, and the refusal of many witnesses to agree to testify for the defense.

115. The *Allen* court attempted to deal with this problem by including a provision making the disclosure statement itself inadmissible against the defendant. *See infra* notes 149-51 and accompanying text.

116. *See, e.g., In re* Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985); Scott v. State, 519 P.2d 774 (Alaska 1974).

117. 378 U.S. 52 (1964).

118. *Murphy*, 378 U.S. at 55 (citations and footnotes omitted).

The fifth amendment also preserves our adversary system of criminal justice, which is "undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosure."[119] In light of the United States Supreme Court's long-standing commitment to fifth amendment values,[120] *Williams* must be read narrowly so as to not compromise those values. Supreme Court cases both before and after *Williams* shed additional light on the proper interpretation of *Williams*.

Prior to *Williams*, the Supreme Court, in *Griffin v. California*,[121] held that a California practice permitting the court and prosecutor to comment on the defendant's failure to testify violated the fifth amendment because it penalized the defendant for exercising a constitutional privilege.[122] This California practice undermined fifth amendment values inherent in the adversary system by unduly burdening the defendant's assertion of the right to remain silent.[123] The practice, therefore, was unconstitutional because "it cut[] down on the privilege by making its assertion costly."[124]

Unlike the defendant in *Griffin*, however, the defendant in *Williams* did not pay any cost or suffer any adverse consequence by being compelled to make a pre-trial disclosure. The defendant in *Williams* still maintained the unfettered choice to call his witnesses at trial, which he did without penalty. Because none of Williams' fifth amendment values were, in fact, adversely impacted to any appreciable extent, the compulsion to provide the alibi notice was not sufficiently burdensome so as to warrant constitutional protection.

In *Brooks v. Tennessee*,[125] however, the Court found that a Tennessee statute requiring a criminal defendant desiring to testify to be the first defense witness or be barred from taking the witness stand constituted an "impermissible restriction on the defendant's right against self-incrimination."[126] The defendant was deprived of his fifth amendment right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[127] Because the statute interfered with the ability of criminal defendants to control the timing of their own testimony, it violated the fifth amendment.[128]

Without expressly doing so, the *Brooks* decision rejects the *Williams* timing analogy. As *Brooks* points out, trial uncertainties are such that

119. Garner v. United States, 424 U.S. 648, 655-56 (1976).

120. Miranda v. Arizona, 384 U.S. 436, 458-63 (1966); Maness v. Myers, 419 U.S. 449, 461 (1975). For an interesting discussion of the moral basis for the right of self-incrimination arguing that notions of human dignity require granting criminal defendants this right, see D. LUBAN, *supra* note 58, at 177-97.

121. 380 U.S. 609 (1965).

122. *Id.* at 610, 615.

123. *Id.* at 613.

124. *Id.* at 614.

125. 406 U.S. 605 (1972).

126. *Brooks*, 406 U.S. at 609.

127. *Id.* at 609 (citing Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

128. *Id.*

defendants often will not know at the end of the state's case whether their testimony will be needed or helpful.[129] Unable to realistically assess whether to testify, a defendant may choose not to testify. Yet applying Justice White's timing analysis, defendants should not have the right to control when they are going to make certain disclosures despite their uncertainties.[130] Since the Tennessee statute arguably only controls the timing of a defendant's testimony, it should be constitutional.

Wrong, says *Brooks*. The fifth amendment ensures that the defendant has the "unfettered choice" to decide when, as well as if, to take the witness stand to testify. As a result of the statute, the defendant in *Brooks* no longer had an "unfettered choice" when the time came to decide whether to testify.[131] Rather, the statute imposed "a heavy burden on a defendant's otherwise unconditional right not to take the stand."[132] In short, the statute violated the fifth amendment because it "cut[] down on the privilege [to remain silent] by making its assertion costly."[133]

Brooks also held that the Tennessee statute infringed on the defendant's right to due process. The Court again observed that the defense ought to be able to make the important decision whether the defendant will testify, after the defense has had the opportunity to evaluate "the actual worth of their evidence."[134] By forcing the defense to make a premature choice, the statute unduly restricted defense planning.[135] Accordingly, "the accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense."[136] Due process, as well as the privilege against self-incrimination, demands that the defendant, not the state, should control the timing of defense disclosures which may significantly affect the defendant's case.[137]

Without apparently considering *Brooks*, the Oklahoma Court of Criminal Appeals looked to the flawed timing argument in *Williams* to justify procedures compelling criminal defendants to make extensive pre-trial disclosures.[138] Perhaps the court had other reasons for mandating greater pre-trial disclosures by defendants. Indeed, the new *Allen* procedures may represent the court's careful consideration of some difficult constitutional and policy questions. Similarly, the court may have significant reasons for deciding to increase the prosecution's disclosure obligation by adopting the open file approach suggested by the ABA Standards.[139] Yet the *Allen* decision offers little evidence that the court engaged in a careful analysis of the constitu-

129. *Id.* at 609-10.
130. *See supra* notes 108-10 and accompanying text.
131. *Brooks*, 406 U.S. at 610.
132. *Id.*
133. *Id.* at 611 (quoting Griffin v. California, 380 U.S. 609, 614 (1965)).
134. *Id.* at 612.
135. *Id.*
136. *Id.* at 612-13.
137. *Id.*
138. *Allen*, 803 P.2d at 1167.
139. ABA STANDARDS 11-2.1 & commentary.

tional implications of the new discovery procedures. *Allen* fails to adequately discuss the reasons for its new procedures, or to identify with any precision the policies to be served by adopting such procedures. Accordingly, trial judges, prosecutors, and criminal practitioners have little guidance when implementing and interpreting these new rules. Again, this lack of guidance will only increase, not minimize, appellate litigation of criminal discovery issues.

Although the imposition of a limited defense disclosure obligation may be both constitutional and appropriate when the defendant is raising an alibi or mental capacity defense,[140] the *Allen* procedures do not stop at the boundaries of *Williams*. Rather, *Allen* creates a rule compelling a defendant to provide to the prosecution before trial the names, addresses, and statements of all witnesses.[141] This disclosure rule not only represents an unwarranted expansion of *Williams*, it also infringes on rights guaranteed an accused by the fifth, sixth, and fourteenth amendments.

The most serious flaw in this disclosure provision is that it extends to all witnesses regardless of whether the defense intends to call such witnesses at trial.[142] Obligating a defendant to provide the prosecutor the name of a witness who the defense has no intention of calling because of the incriminating nature of that witness' testimony blatantly violates the privilege against self-incrimination guaranteed by the fifth amendment and article II, section 21 of the Oklahoma Constitution.[143] It simply is not constitutionally permissible to compel a defendant by threat of sanctions to supply the prosecution a statement which in turn may be used to establish the defendant's guilt.[144] The fifth amendment clearly protects citizens from being

140. Williams v. Florida, 399 U.S. 78 (1970). Disclosures relating to a defendant's mental capacity defense have been justified because the defendant arguably is the only reliable source of evidence as to defendant's true mental state. United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968). Nonetheless, the state's use of the defendant's disclosures generally has been restricted to rebuttal. *See* Mosteller, *supra* note 112, at 1612-16.

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

142. It may be that the court only intended, in 1(a), to require disclosure of witnesses the defense intends to call. Yet in 1(b) and 1(c), the *Allen* court included specific language indicating these provisions only apply to witnesses to be called. *Id.* The absence of that language in 1(a) suggests a broader disclosure obligation.

143. Malloy v. Hogan, 378 U.S. 1, 7-8 (1964); *In re* Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985). Reflecting on the fifth amendment's "ancient roots," Chief Justice Burger observed, "This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, 419 U.S. 449, 461 (1975).

Article II, § 21 of the Oklahoma Constitution provides in part that "[n]o person shall be compelled to give evidence which will tend to incriminate him . . . ." OKLA. CONST. art. II, § 21. The Oklahoma Supreme Court also declared that the privilege against self-incrimination under article II, § 1 should be accorded a "liberal construction in favor of the right it was intended to secure." Oklahoma Dep't of Pub. Safety v. Robinson, 512 P.2d 128, 133 (Okla. 1973). The privilege may be claimed when an answer "will, or might become a link in the chain of evidence to prove the commission of a crime by the witness, or would be a source from which evidence of his commission of a crime might be obtained." *Id.* at 33.

144. Fisher v. United States, 425 U.S. 391 (1976); *see also* Van Kessel, *supra* note 113, at 882.

compelled to produce a testimonial communication which later may be used against them in a criminal action.[145] Moreover, this protection extends to any information which would be a source of incriminating evidence or "which would furnish a link in the chain of evidence that could lead to prosecution . . . ."[146]

Thus, *Allen's* first defense disclosure requirement offends the fifth amendment because it compels the defendant to make a testimonial assertion which may be incriminating. Furthermore, the requirement is offensive to traditional fifth amendment principles because it extracts evidence from the "mouth of the defendant" instead of requiring the state to "shoulder the entire load."[147] Finally, the disclosure requirement sufficiently burdens the defendant's privilege against self-incrimination so that any legitimate benefit gained by the state through the imposition of this disclosure procedure is far outweighed by the costs.[148]

It is not enough that the Oklahoma Court of Criminal Appeals included a provision in *Allen* stating that a

> statement filed under subdivision 1.(a) (b) or (c) is not admissible in evidence at trial. All information obtained as a result of a statement filed under this subdivision is not admissible in evidence at trial except to refute the testimony of a witness whose identity this subdivision requires to be disclosed.[149]

This provision forbids the prosecution from using any evidence in its case-in-chief which directly or indirectly was the product of the defendant's compelled disclosure. It also prohibits the prosecution from using a disclo-

145. *Id.* at 408; *see also* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Arndstein v. McCarthy, 254 U.S. 71, 72-73 (1920).

146. *Maness*, 419 U.S. at 461. *See also Robinson*, 512 P.2d at 133.

147. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). For other cases recognizing that among the many values protected by the fifth amendment is the principle that the fifth amendment preserves the integrity of the adversary system by forcing the prosecution to shoulder the entire load in establishing the defendant's guilt, see Tehan v. Shott, 382 U.S. 406, 414-15 (1966), *limited on other grounds*, Johnson v. State, 384 U.S. 719, 732 (1966); Garner v. United States, 424 U.S. 648, 655-56 (1976).

148. The disclosure rule arguably benefits the state by improving efficiency and minimizing unfair surprise. There is no solid evidence, however, that such a defense disclosure requirement produces more efficiency or really is necessary to achieve the desired ends. Mosteller, *supra* note 112, at 1607-09.

Even if the disclosure rule would achieve more efficiency, our adversary system and constitutional protections ensure that the state performs the difficult task of proving the defendant guilty beyond a reasonable doubt. Admittedly,

> 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).

149. *Allen*, 803 P.2d at 1168. ABA STANDARDS 11-3.3(b) contains substantially similar wording.

sure statement to impeach a defendant who chooses, for example, to abandon an alibi defense.[150] Certainly the fifth amendment demands no less.[151]

Nonetheless, even if this provision limiting the evidentiary use of defense disclosures saves the disclosure requirement from violating the fifth amendment, compelled production of names of witnesses and their statements will generate more needless and wasteful litigation regarding the source of testimony introduced at trial. Judicial time and energy will be spent deciding whether the state's witnesses were discovered as a result of defense disclosures or leads furnished as a result of those disclosures. Testimony of the state's witnesses will have to be scrutinized to determine if it was influenced by defense disclosures relied upon by the prosecutor when preparing the witnesses for trial. Any marginal gain to the prosecutor in discovering new information will be offset by the difficulties and administrative costs in proving that the evidence presented in the state's case-in-chief was not the "tainted" product of a defense disclosure.[152]

It is not only the fifth amendment, however, which must be considered in assessing the constitutionality of *Allen*'s new discovery provisions. The sixth amendment right to the effective assistance of counsel is also adversely affected by these disclosure obligations. The sixth amendment ensures criminal defendants that their lawyers will function as zealous advocates on their behalf.[153] The sixth amendment overlaps with the fifth amendment as well as with the attorney-client privilege and the work-product doctrine to protect

150. The use of a compelled discovery statement to impeach a defendant's trial testimony surely violates fifth amendment principles set forth in *Garner v. United States* and *Brooks v. Tennessee*. Garner v. United States, 424 U.S. 648, 655-56 (1976); Brooks v. Tennessee, 406 U.S. 605, 609-13 (1972). A number of other state cases hold that the state's use of an abandoned notice is unconstitutional. *See, e.g.*, State v. Curby, 553 S.W.2d 566, 568-69 (Mo. Ct. App. 1977); State *ex rel.* Sikora v. District Court, 154 Mont. 241, 462 P.2d 897, 903 (1969). *But see, e.g.*, State v. Meadows, 635 S.W.2d 400, 405 (Tenn. Crim. App. 1982) (impeachment of defendant due to failure to call listed alibi witness permitted because state statute did not expressly forbid such impeachment). Given the problems which frequently delay or frustrate defense investigation, such as the defendant's incarceration, inability to locate witnesses and secure their cooperation, and lack of investigative assistance, the defense may be forced to make a premature disclosure which subsequently turns out to be inaccurate. As in *Brooks*, a criminal defendant should not be penalized for making an early uncertain disclosure. This is especially so because even under *Williams*, the defendant has "an unfettered choice" to abandon a defense. *Williams*, 399 U.S. at 110. The choice is hardly "unfettered" if a defendant could be impeached by means of an abandoned alibi statement. For a recent case in which the Oklahoma Court of Criminal Appeals acknowledged the impropriety of a prosecutor's use of a withdrawn notice of alibi, see Jackson v. State, 808 P.2d 700 (Okla. Crim. App. 1991).

151. Mosteller, *supra* note 112, at 1619. For a more expansive view of the fifth amendment, see *supra* note 106 and *In re* Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985). In holding that a California statutory provision requiring disclosure of defense witness statements violates a defendant's constitutional privilege against self-incrimination, the California Supreme Court in *Misener* declared "there is no doubt that the evisceration of a defense 'incriminates' the defendant." *Id.*, 698 P.2d at 556.

152. *See* Mosteller, *supra* note 112, at 1632-35; Van Kessel, *supra* note 113, at 896-98.

153. Strickland v. Washington, 466 U.S. 668, 685 (1984).

defense communications and trial preparation from state interference.[154] Defense counsel cannot be obligated, therefore, to identify incriminating witnesses when counsel's knowledge of their existence is based on confidential communications with the client. The attorney-client privilege allows an attorney to refuse to produce or disclose incriminating information when the client would have been privileged under the fifth amendment to refuse to divulge that information.[155] Even if defense counsel learns of incriminating witnesses through counsel's own effort or those of an investigator working on the defendant's behalf, counsel cannot be obligated to reveal these adverse witnesses, under existing ethical and constitutional principles.[156]

The sixth amendment right to the effective assistance of counsel is meaningful only if a defendant's communications with counsel are protected and a defendant's lawful preparation for trial is secure against government intrusion.[157] The defendant has a right to insist that the state conduct its own investigation and that the defense not be forced to do the prosecution's work. This is particularly so, given the tremendous investigative advantages

154. This overlapping of constitutional protections with various fundamental principles of the adversary system has been described as creating a "shield of confidentiality." Allis, *supra* note 113, at 483. The attorney-client privilege, a common law creation, ensures criminal defendants that their communications with their attorneys will be kept confidential. The privilege was designed to promote the "full and frank" discourse between lawyer and client so as to enable counsel to provide "sound legal advice or advocacy." UpJohn Co. v. United States, 449 U.S. 383, 389 (1981). Similarly, courts have provided protection to a client's communications with counsel or counsel's agents under the sixth amendment. *See, e.g.*, United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Warrant Authorizing the Interception of Oral Communications, 521 F. Supp. 190 (D.N.H. 1981), *vacated on other grounds*, 673 F.2d 5 (1st Cir. 1982); State v. Pratt, 284 Md. App. 516, 398 A.2d 421 (1979). *See also* Weatherford v. Bursey, 429 U.S. 545 (1977) (Marshall, J., dissenting) (arguing that the sixth amendment establishes an independent right to confidential communications with defense counsel).

For a discussion of the work-product doctrine, see *infra* notes 163-67 and accompanying text.

155. Fisher v. United States, 425 U.S. 391, 404 (1976).

156. M. FREEDMAN, *supra* note 58, at 87-108. Defense counsel does have an ethical duty not to knowingly offer false evidence. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1988). *See also supra* notes 58-64 and accompanying text.

157. In State *ex rel.* Tucker v. Davis, 9 Okla. Crim. 94, 130 P. 962 (1913), the Oklahoma Court of Criminal Appeals recognized that a defendant has an absolute right to consult with defense counsel free of state interference. *Id.* at 963. In waxing eloquently about "the fundamental and universal principles of American criminal law," the court observed that

> if the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete . . . there can be no such thing as due process of law where a party to a case has been deprived of an opportunity to prepare for trial . . . the right to be heard by counsel would, in the language of Saint Paul, 1 Cor. 13,1, "become as sounding brass, or a tinkling cymbal," if it did not include the right to a full and confidential consultation with such counsel with no other person present to hear what was said. This is a material, substantial right, essential to justice.

Id. at 963-64. *See also* State v. Sugar, 84 N.J. 1, 417 A.2d 474 (1980) (premature disclosure of trial strategy or inhibition of free exchange between attorney and client constitutes substantial infringement on defendant's right to counsel), *cert. denied*, 122 N.J. 187, 584 A.2d 247 (1990).

the state possesses and the difficulties facing the defense in conducting an adequate investigation.[158] Forcing defense counsel to turn over the fruits of counsel's labor constitutes unwarranted government intrusion and interference with the attorney-client relationship, in violation of the sixth amendment.[159] Indeed, compelling defense counsel to become an agent of the state, assisting in the gathering of information which may be used against the defendant, thereby chills defense investigation and weakens the defendant's confidence and trust in counsel.

Many criminal defendants, especially indigents with assigned or appointed counsel, are reluctant to trust their lawyers.[160] Yet it is clear that trust between lawyer and client is essential if counsel is to provide effective representation to the client.[161] Restructuring the defense lawyer's role to make counsel less of an advocate only will exacerbate existing strains on the relationship between counsel and the criminal defendant.[162] Further handicapping the already beleaguered defense lawyer struggling to represent the indigent defendant will not improve the quality of justice. Rather, weakening the attorney-client relationship will hamper counsel's ability to effectively represent the accused and add to the growing number of ineffective assistance of counsel claims.

In addition to the attorney-client privilege, the work-product doctrine provides added protection to defense counsel's efforts on behalf of a criminal client. As the Court noted in *United States v. Nobles*,[163] the work-product doctrine still plays an important role "in assuring the proper functioning

158. *See infra* note 167 and accompanying text. For cases insisting that the defendant has a right to require the prosecution to investigate its own case and not rely on defense counsel's efforts, see, e.g., Miller v. District Court, 737 P.2d 834 (Colo. 1987); United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973); State v. Williams, 80 N.J. 472, 404 A.2d 34 (1979).

159. *See* State v. Williams, 80 N.J. 472, 404 A.2d 34 (1979) (requiring defense counsel to disclose victim's identification of defendant when interviewed by defense violates defendant's sixth amendment right to effective assistance of counsel); State v. Mingo, 77 N.J. 576, 392 A.2d 590 (1978) (compelled disclosure of inculpatory defense expert's report chilled effective assistance of counsel).

160. *See* Jones v. Barnes, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). As Ted Schneyer has observed, there are many forces at work in the criminal justice system that tempt criminal defense lawyers to be or, at least appear to their clients to be, "unreliable advisors or indifferent advocates." Schneyer, *Some Sympathy for the Hired Gun*, J. OF LEGAL EDUC., Mar. 1991, at 11, 23-24. In light of the inadequate representation provided to many defendants, the lack of trust is hardly surprising. *See infra* notes 180-82 and accompanying text. For an excellent study empirically demonstrating that clients mistrust appointed lawyers, especially public defenders, and analyzing the reasons for this mistrust, see J. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE (National Institute of Law Enforcement and Criminal Justice, 1978).

161. For an excellent discussion of the importance of trust and confidentiality to the attorney-client relationship and to the adversary system, see M. FREEDMAN, *supra* note 58, at 87-108.

162. Numerous commentators have detailed the difficult hurdles the defense lawyer must overcome to establish a relationship of trust with a defendant, especially when counsel is appointed, not retained. *See, e.g.*, Allis, *supra* note 113, at 477-78. *See generally* J. CASPER, *supra* note 160.

163. 422 U.S. 225 (1975).

of the criminal justice system . . . ."[164] The practical realities of our adversary system require that lawyers rely on investigators and other agents to assist in the preparation of a defense. *Nobles* recognizes that the work-product doctrine acts to safeguard the premature disclosure of a lawyer's effort in preparing for trial.[165] This does not mean, however, that the protections of the work-product doctrine should be applied equally. Rather, broader protection must be given to defense counsel's trial preparation if the defendant's constitutional rights and the policies underlying our adversary system are to be adequately served.[166] Moreover, the vast advantages enjoyed by the prosecution in the investigation and presentation of a criminal case dictate that defense counsel be able to plot trial strategy, consult with experts, and interview witnesses without fear that the state will be allowed pre-trial discovery which will undermine counsel's efforts.[167]

Unlike *Allen*, the ABA Standards do not require the defense to identify all witnesses or turn over any witness statements to the prosecution. The

164. *Id.* at 238. Although *Nobles* is cited often as a case supportive of the constitutionality of defense-mandated discovery, the case really says little about compelling pre-trial disclosures. Rather, the defendant in *Nobles* sought to offer the testimony of a defense investigator at trial. By voluntarily calling the witness, the defendant waived his right to shield that witness from producing a document generated by that witness. *Id.* at 239.

165. The Court did not detail the full scope of the work-product doctrine because the defendant waived the protection of the doctrine by calling the investigator as a witness. *Id.*

166. *See* Middleton v. United States, 401 A.2d 109, 116 (D.C. 1979); State v. Whitaker, 202 Conn. 259, 520 A.2d 1018, 1023 (1987); *In re* Sealed Case, 754 F.2d 395, 403 (D.C. Cir. 1985) (Mikva, J., concurring).

167. Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearances before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant.

Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018-19 (1972) (footnotes omitted). Justice Marshall cited this same quote in Wardius v. Oregon, 412 U.S. 470, 476 n.9 (1973). Except in the rarest of cases, the state has a tremendous edge in resources and investigative tools. *See* Nakell, *Criminal Discovery for the Defense and the Prosecution — The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 439-42 (1972); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960); Rosen, *supra* note 95, at 694.

drafters of the ABA Standards sought to craft their procedures so as to avoid undercutting the defendant's presumption of innocence or lessening the prosecution's obligation to prove the defendant's guilt beyond a reasonable doubt without the compelled assistance of defense counsel. ABA Standard 11-3.3 requires the defendant to provide only notice of the names and addresses of intended defense witnesses when the defendant seeks to raise an alibi or mental capacity defense.[168] These two defenses have been singled out because they demand special preparation and advance investigation by the prosecution and, in the case of the insanity defense, rebuttal information largely is in the possession or control of the defense. In addition, disclosure of these defenses at trial is more likely to unfairly surprise a prosecutor, necessitating delay or a continuance.[169]

Nonetheless, even ABA Standard 11-3.3 goes too far. Although compelling a defendant to disclose the names and addresses of alibi and mental capacity witnesses may survive constitutional challenge,[170] such a requirement still adversely impacts important protections long afforded criminal defendants in our adversary system. The benefits of such a disclosure requirement are far outweighed by the costs.[171]

The adversary system is designed to provide the criminal defendant a zealous advocate who, combined with a host of constitutional guarantees, safeguards the accused from the power of the state. Respect for the dignity of the individual and concern about state misuse of its awesome power to convict and punish influenced the development of this country's adversary

168. ABA STANDARDS 11-3.3 also contains a provision limiting the state's use of information obtained as a result of a defense disclosure to its case-in-chief and barring use of the disclosure as evidence.

169. Although eliminating all surprise at trial is neither a feasible nor desirable goal of a discovery scheme, alibi and mental capacity defenses pose unusual difficulty for the state and present the strongest case for allowing pre-trial prosecutorial discovery. *See* ABA STANDARDS 11-55.

170. Williams v. Florida, 399 U.S. 78 (1970). *But see supra* notes 110-20 and accompanying text. The Oklahoma Court of Criminal Appeals decided that the different language in article 2, § 21 of the Oklahoma Constitution did not grant any broader protection than that embodied within the fifth amendment privilege against self-incrimination. State v. Thomason, 538 P.2d 1080, 1086 (Okla. Crim. App. 1975). Nonetheless, the court has the authority to disregard *Williams* and to interpret Oklahoma's privilege against self-incrimination so as to bar the compelled disclosure of witnesses even in alibi or mental capacity cases. *See, e.g.*, Heitman v. State, No. 1380-89 (Tex. Ct. Crim. App. June 26, 1991) (Texas Court of Criminal Appeals decided it was no longer bound by decisions of the United States Supreme Court when interpreting its state counterpart to the fourth amendment).

171. *See supra* note 151-52 and accompanying text. The prosecution benefits from advance notice of these witnesses by being able to interview those witnesses thereby improving the prosecutor's ability to rebut the defense. Having the witnesses' names helps focus the investigation but notice of the defense by itself provides sufficient direction to the state. There is no empirical evidence demonstrating a prosecutorial need for assistance in combatting bogus alibi or mental capacity defenses. Rather, legislative inaction in Oklahoma supports the argument that the state has little need for the names of defense witnesses. For an additional discussion of the lack of the prosecutor's need for these disclosures, see Mosteller, *supra* note 112, at 1631-35; Van Kessel, *supra* note 113, at 898.

system of criminal justice.[172] This adversary system relies on the defense lawyer's efforts as well as procedural and substantive protections such as the burden of proof, presumption of innocence, and due process to ensure that citizens are not wrongly or unjustly convicted. "Wrongly convicted" speaks to our society's fundamental concern that innocent people not be convicted.[173] "Unjustly convicted" reflects society's equally vital concern that individual dignity be respected and that the state secures the conviction of an accused person only by fair and just means.[174] The result, of course, is that on occasion our system allows a guilty person to escape conviction. Our system tolerates some lost efficiency, however, as a cost of "preserving respect for human dignity" and "freedom from an overreaching government."[175]

Moreover, the adversary system has been designed to somewhat balance the impressive advantage which the state possesses when it chooses to unleash the forces of criminal prosecution against an individual.[176] Accordingly, the system is structured deliberately so that the rights and responsibilities of the state and the defense are not equal or balanced. As already discussed,[177] the prosecutor has a special obligation to serve the cause of justice. So also,

172. For an excellent summary of the basic principles underlying the American adversary system of criminal justice, see W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 24-32 (1985) and M. FREEDMAN, *supra* note 58, at 13-42. *See also* D. LUBAN, *supra* note 58, at 58-63 (adversary system attempts to handicap the state so as to curb abuses of power and protect civil liberties of all citizens).

173. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (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.").

174. Almost eighty years ago in State *ex rel.* Tucker v. Davis, 9 Okla. Crim. 94, 130 P. 962 (1913), the Oklahoma Court of Criminal Appeals emphasized the importance of ensuring that fair means were employed by the state in seeking a conviction. In chastising law enforcement officers for interfering with the defendant's right to consult with counsel, the court declared:

> 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.

Id., 130 P. at 964.

175. W. LAFAVE & J. ISRAEL, *supra* note 172, at 30.

176. *See supra* notes 85, 167 and accompanying text. *See also* D. LUBAN, *supra* note 58, at 60-61 (arguing that criminal defendants enjoy no real advantages and that their rights mean little because of the plea bargaining process and the harsh realities of the criminal justice system).

177. *See supra* notes 55-57 and accompanying text.

defense counsel has a special role to play in the adversary system.[178] It is the defense lawyer who stands with the accused to ensure that the state indeed affords the defendant the rights guaranteed by the adversary system and the Constitution.[179]

The reality of the criminal justice system, however, is that all too often defense counsel does little more than stand with the defendant.[180] Overworked public defenders and inadequately compensated appointed lawyers struggle to provide even minimally competent representation. Too many

178. As Justice Powell observed:

> [T]he duty of the lawyer, subject to his role as an "officer of the court," is to further the interests of his clients by all lawful means, even when these interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.

In re Griffiths, 413 U.S. 717, 724 n.14 (1973). *See also supra* note 58-62 and accompanying text.

179. The Model Code states:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.
>
> Lawyers, as guardians of the law, play a vital role in the preservation of society.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1981). *See also* Fare v. Michael C., 442 U.S. 707, 719 (1979) ("lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts").

180. In their thorough study of indigent representation in New York City, Michael McConville and Chester Mirsky conclude that

> lawyers for the poor in criminal cases infrequently test the State's case and insufficiently protect defendant's rights. Investigation and adjudicative fact-finding is generally absent. Attorneys conduct these day to day activities without client interviews and with little regard for their clients' concerns. The rights of poor people charged with crime have a life only in the rhetoric of the system.

McConville & Mirsky, *supra* note 85, at 901. Unfortunately, as McConville and Mirsky also point out, the crisis in New York mirrors the crisis in the delivery of adequate defense services across the United States. *Id.* at 583. Among the many other studies detailing the inadequacies of much of the representation provided criminal defendants, see N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (1982); NATIONAL LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE (1973); R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT (1986). Moreover, a recent report prepared by the United Nations Development Program identified the inadequacy of representation provided the poor as a significant shortcoming in the United States' Freedom Index. *Land of the Semi-Free? America Ranks 13th in Liberty, U.N. Says*, Washington (D.C.) Times, May 23, 1991, at A1. *See also supra* note 79.

Finally, while there are dedicated lawyers striving to provide quality services, the representation provided many defendants in Oklahoma reflects the same poor quality afforded most defendants nationally. *See* FINAL REPORT OF THE SPANGENBERG GROUP ON OKLAHOMA INDIGENT DEFENSE (1988).

lawyers plead their clients guilty without adequately investigating the facts or the law. Few criminal defense lawyers spend sufficient time talking with their clients. Thus, deals are struck and pleas are entered with defendants only partially understanding what is happening. In addition, inexperienced defense lawyers routinely waive issues and rights with defendants frequently bound by counsel's decisions, despite the client's lack of input into the decision-making process. Lack of investigative help, limited or no access to experts, and the pressures of an overburdened, underfunded system driven by plea bargaining make zealous advocacy by a defense lawyer the exception, not the rule.[181] For many criminal defendants, then, the sixth amendment right to effective assistance of counsel remains only an abstract promise, not a reality.[182]

The fact that society presently is unsuccessfully struggling to make the sixth amendment meaningful for all of its citizens does not diminish the importance of the right to effective assistance of counsel. It is a significant variable to consider, however, in determining whether to make structural changes in the criminal justice system. Expanding prosecutorial discovery of the defense case is a significant structural change creating additional pressure on defense counsel without any clear showing of need on the part of the prosecution for this change.[183] The right to a zealous advocate ought not be compromised, but should rather be reaffirmed.

Fortunately, the Oklahoma legislature has not embraced this effort to diminish a defendant's right to an effective, zealous advocate.[184] It was not until 1935 that the Oklahoma legislature adopted a limited notice-of-alibi rule, a provision merely granting the prosecution the opportunity to obtain a postponement of the trial if the defense introduced an alibi without having given any prior notice to the prosecutor.[185] Despite *Williams* and the Oklahoma legislature's consideration of various criminal discovery bills, this

181. *See* Mitchell, *The Ethics of the Criminal Defense Attorney — New Answers to Old Questions*, 32 STAN. L. REV. 293, 319-20 (1980); Rakoff, *How Can You Defend Those Crooks?*, CHAMPION, Aug. 1991, at 12, 14; *supra* note 85.

182. McConville & Mirsky, *supra* note 85, at 582-83.

183. Although there is a demonstrated need to expand defense discovery to improve the poor quality of defense representation afforded to many defendants, there is no solid evidence of any real need for prosecutorial discovery. As the court noted in *Middleton v. United States*, in holding that the trial judge erred in ordering defense counsel to give the prosecutor before trial witness statements obtained by her investigator, "however appealing the notion of full disclosure may be in the abstract, important constitutional and societal interests affected by the criminal discovery process counsel against a casual acceptance of such a major revision of the established statutory schemes." Middleton v. United States, 401 A.2d 109, 121 (D.C. 1979).

184. Moreover, the passage of the new Indigent Defense Act reflects the Oklahoma legislature's recognition that there is a need to improve the quality of representation provided to indigent criminal defendants. Indigent Defense Act, 22 OKLA. STAT. § 1355 (Supp. 1990). Although an analysis of the strengths and weaknesses of this new statute is beyond the scope of this article, it remains to be seen whether adequate funding will be provided to the new Indigent Defense System so that it indeed will enhance the quality of defense services in Oklahoma.

185. 22 OKLA. STAT. § 585 (1981); *see also supra* note 66.

statute has not been amended.[186] Moreover, in its 1985 enactment of title 22, section 1176 requiring notice of an insanity defense, the Oklahoma legislature again could have required the defendant to include a list of defense witnesses, but did not.[187] Legislative inaction reflects sound public policy militating against a significant reordering of the criminal defense lawyer's role.

The *Allen* court erred in relying on the two-way street analogy[188] to justify imposing additional disclosure obligations on the defense. The concept of symmetrical discovery rests on the faulty assumption that the primary task of the defense and the state is the same: to achieve an accurate determination of the guilt or innocence of the defendant. Clearly that is an important goal of the system. It is not, however, the primary goal of the accused or the defense lawyer, nor should it be under our constitutional system.[189] By focusing too heavily on the search for truth, the Oklahoma Court of Criminal Appeals in *Allen* requires too much from the defense.

The defense should be limited, then, to providing the prosecution notice of an alibi or mental capacity defense, but should not be required to provide the name of any witness or any statements. Although mandating defense disclosure of names of alibi and mental capacity witnesses arguably is unsound policy, forcing the defense to provide witness statements before trial is even worse. If the prosecutor is to be given the names of defense alibi and mental capacity witnesses, unfair surprise is no longer an issue. With its investigative advantages and ability to compel cooperation,[190] the prosecution can interview these witnesses or conduct whatever investigation the prosecutor deems necessary. If defense counsel takes a statement from a prospective alibi witness, counsel frequently will choose to disclose that statement during negotiations. If counsel decides for whatever reason not to provide the prosecutor that statement, counsel should not be forced to do so at the expense of the attorney-client relationship and the defendant's right to an effective defense simply to ease the prosecutor's investigative task or enhance the cross-examination of defense witnesses. The limited

186. This is so despite the fact there have been frequent efforts to enact new statutory provisions regarding criminal discovery. Lee, *supra* note 11, at 2259.

187. *See* 22 OKLA. STAT. § 1176 (Supp. 1990). As the Oklahoma Court of Criminal Appeals recognized, "the Legislature, within whose exclusive province it is to enact laws governing public policy, addressed itself to the subject and when the Legislature had considered the subject, this Court is by law powerless to modify or extend that statutory enactment in matters which are criminal in nature." Freshour v. Turner, 496 P.2d 389, 393 (Okla. Crim. App. 1972), *overruled on other grounds*, Dean v. Crisp, 536 P.2d 961, 963 (Okla. Crim. App. 1973). Since the Oklahoma legislature has enacted provisions covering alibi and mental capacity defenses, the *Allen* court's effort to expand defense disclosure requirements as to these defenses constitutes judicial rule-making, arguably violative of the separation of powers doctrine. *See supra* notes 69-73 and accompanying text.

188. *See supra* notes 104-116 and accompanying text.

189. *See supra* notes 58-63 and accompanying text. *See also* Scott v. State, 519 P.2d 774 (Alaska 1974) ("two-way street" analogy fails because of defendant's constitutional rights and prosecutorial advantages).

190. *See supra* note 167.

benefit the prosecutor would obtain by receiving pre-trial statements of the defense witnesses certainly does not justify such a radical departure from traditional notions of the proper role of defense counsel in the adversary system.[191]

Nevertheless, the defense should be required to disclose expert reports as called for in paragraph 2(b) of the *Allen* procedures.[192] Like defense counsel, the prosecutor needs time prior to trial to review statistics and other technical information in order to adequately respond to expert testimony. Advance disclosure also aids the efficient and orderly presentation of expert testimony at trial. *Allen* wisely includes provisions limiting the use of these defense disclosures to rebuttal[193] and disallowing cross-examination of the fact that the defense did not offer certain evidence or call a particular witness.[194] *Allen* does not restrict the disclosure of expert reports and statements as carefully as does ABA Standard 11-3.2. ABA Standard 11-3.2 only applies to statements and reports which the defendant intends to introduce at trial, and they need not be supplied to the prosecutor unless the defendant first has made a request and received discovery from the state.[195] Realistically, the defense will not know and should not be forced to decide whether it intends to call an expert at trial until it has received information from the state. The *Allen* provision is problematic because it does not condition defense disclosure on prior receipt of the prosecution's discovery.

Even more troublesome, however, is paragraph 2(a) of the *Allen* procedures requiring the defense to provide pre-trial access to the evidence defendant intends to introduce at trial.[196] In light of *Brooks*, the work-product doctrine, and the sixth amendment right to the effective assistance of counsel, such a provision is constitutionally suspect. Again, such a requirement interferes with the defense's trial preparation and mandates the disclosure of information, which undoubtedly will reveal aspects of defense counsel's trial strategy. Moreover, it infringes on the defense's ability to control the timing of important decisions such as whether the defendant will testify. As demonstrated in *Brooks*, the defendant should have the right to make trial choices unfettered by previously compelled disclosures.[197]

191. As *supra* note 164 and the accompanying text indicate, *U.S. v. Nobles* does not support the proposition that a defendant should be compelled prior to trial to provide the prosecutor witness statements obtained by the defense. *See also* Van Kessel, *supra* note 113, at 898 (arguing that the harm to judicial efficiency and prosecutorial freedom may be too great a cost to pay for the "incremental benefits" received from mandating defense disclosures).

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

193. "Information obtained as a result of disclosure under this subdivision is not admissible in evidence at trial except to refute the matter disclosed." *Allen*, 803 P.2d at 1168. ABA STANDARDS 11-3.2 uses substantially the same wording. *But see infra* notes 199-200 and accompanying text.

194. "The fact that the defendant, under this subdivision, has indicated an intent to offer a matter in evidence or to call a person as a witness is not admissible in evidence at trial." *Allen*, 803 P.2d at 1168. ABA STANDARDS 11-3.2 also contains substantially the same language. *See also supra* notes 150-52 and accompanying text.

195. ABA STANDARDS 11-3.2(a).

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

197. *See supra* notes 125-32 and accompanying text.

Forcing the defendant to disclose evidence before trial will, at the very least, shape the presentation of the state's case, which in turn will affect the defendant's choices. Thus, compelled pre-trial disclosure of all intended real evidence may be unconstitutional.[198] The requirement certainly does not reflect sound policy.

The *Allen* provision limiting the admissibility of all disclosed evidence to the state's case-in-chief once more helps to blunt the offensiveness of this disclosure requirement.[199] Nonetheless, this provision creates even more complications for the prosecutor and the courts. Assume, for example, that a defendant is charged with negligent homicide as a result of a traffic accident. Pursuant to *Allen*, defense counsel must provide the prosecutor photographs which were taken by the defense shortly after the accident. The photographs show certain skid marks which the defense intends to use to rebut the claim that the defendant crossed over the centerline. Having seen the photographs, the prosecutor talks again with the state's witnesses about their testimony. If the trial testimony of those witnesses were influenced or affected by the prosecutor's use of the compelled disclosures to prepare them to testify, or the prosecution tailored its evidence in the state's case-in-chief to meet anticipated defense evidence, then the inadmissibility provision built into *Allen* will have been thwarted. If a constitutional issue is then raised, the court will have a time-consuming and nearly impossible task of determining whether the prosecutor's case-in-chief indeed was tainted.[200]

In addition to the constitutional problems, other aspects of *Allen* are troublesome and warrant clarification. That clarification must begin by clearly spelling out whether the new *Allen* procedures apply in misdemeanor cases. The court initially states that it is addressing the issue of the right

198. Take, for example, a case in which the defense has some potentially incriminating photographs which counsel is uncertain about introducing at trial. The decision largely turns on the strength of the state's case-in-chief and whether the defendant will testify. Obviously under *Brooks*, the defense wants to see the state's case unfold in its entirety before deciding whether to offer the photographs into evidence. By being forced to disclose them before trial, the defense may be providing the state the means to secure the defendant's conviction. The state then may go out and secure additional evidence which it would not have obtained but for the lead supplied by the photographs. Neither the Constitution nor the principles underlying the adversary system tolerate such a result. *See supra* notes 116-30, 142-67 and accompanying text.

If the defense takes possession of physical evidence relating to a case, a different result is warranted. Under these circumstances, a defense attorney generally is obligated to turn over that physical evidence to the state. *See* C. WOLFRAM, *supra* note 58, at 645-46. For an interesting discussion of the difficult ethical issues facing a defense attorney when physical evidence is involved, see Burkoff, *What Do You Do When Your Client Tosses the Murder Weapon on Your Desk?*, CHAMPION, Dec. 1986, at 5.

199. "Information obtained as a result of disclosure under this subdivision is not admissible in evidence at trial except to refute the matter disclosed." *Allen*, 803 P.2d at 1168. *But see supra* notes 152-67 and accompanying text.

200. Depending on the strength of the state's case, the defendant may choose not to introduce any photographs or put on any testimony. Thus, absent the compulsion of the disclosure requirement, the potentially damaging photographs may never come into the possession of the state. *See also supra* notes 149-52 and accompanying text.

of pre-trial discovery in a "felony criminal case."[201] The court also notes that a district court judge is empowered to act on a discovery motion upon the entry of a bindover order, which only applies in felony cases.[202] Yet the opinion ends by stating that the procedures "apply to all cases pending in the district courts . . . ."[203] It simply is not clear whether the court intends these procedures to apply in all felony and misdemeanor cases.

The ABA Standards recommend that discovery procedures be applied in all serious criminal cases.[204] By serious cases, the drafters meant to include all felony and serious misdemeanors, with each jurisdiction to set the point at which misdemeanors become serious enough to justify use of the full procedures.[205] Unfortunately, *Allen* does not establish that clear point.

Allen also fails to spell out in much detail the procedures to be followed to ensure compliance with the new discovery code. Unlike the ABA Standards, which delineate a three-stage process designed to achieve stated goals,[206] *Allen* merely indicates that at some point after the bindover, most appropriately at the arraignment, the trial judge should issue a written order setting forth the discovery requirements so that all discovery issues are resolved at least ten days before trial.[207] In an effort to keep its new procedures simple, however, the *Allen* court misses the mark. For as the drafters to the ABA Standards observe, the establishment of detailed regularized procedures will allow for the development of specific routines for the pre-trial processing of cases which will inure to the overall benefit of the criminal justice system.[208] The system will be more orderly, efficient, and economical, which in turn will improve the preparation of all the actors in the system, lead to earlier disposition of cases, allow for a more efficient use of trial time, and enhance the effectiveness of assigned counsel.[209]

The *Allen* procedures invite too much flexibility, which will result in widely disparate handling of discovery problems and other pre-trial issues.[210] Rather than standardization, trial judges across Oklahoma will grapple with different mechanisms for responding to *Allen*, resulting in increased uncertainty for the various actors in the criminal justice system. Again, procedural uncertainties generate more error, more inefficiencies, and more waste.

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

202. *Id.* at 1167. There is no preliminary hearing in misdemeanor cases. 22 OKLA. STAT. § 258 (1981).

203. *Allen*, 803 P.2d at 1169.

204. ABA STANDARDS 11-1.2.

205. *See id.* at 11-13.

206. *See id.* at 11-5.1 & commentary to 11-5.4 & commentary.

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

208. ABA STANDARDS 11-73.

209. *Id.*

210. Giving judges substantial discretion in granting discovery also leads to inequality among similarly situated defendants. People v. Williams, 90 Ill. App. 3d 158, 413 N.E.2d 118 (1980), *rev'd on other grounds*, 87 Ill. 2d 161, 429 N.E.2d 487 (1981); *see also* ABA STANDARDS 11-12 (recognizing need to keep procedures simple, equally available and reasonably efficient to ensure that similarly situated defendants are more likely to receive similar treatment).

Allen also includes a sentence stating that "if the defendant subsequently ascertains that he has possession or control of such a matter, he shall promptly so inform the prosecuting attorney."[211] Because this sentence is contained in a paragraph including references to "this subdivision," it appears that this continuing disclosure obligation only applies to evidence and reports described in paragraphs 2(a) and (b). The rationale for providing such a limited continuing disclosure obligation and then only applying it to the defense is unclear.[212] A better approach would be to spell out a specific continuing duty for both sides, thereby eliminating confusion and repeated discovery requests.[213]

Allen also fails to include any provision for a protective order. Certainly there will be instances when the state will want to seek such an order to deny the defense access to information which the prosecutor feels should not be disclosed.[214] The court may have concluded that there was no need to spell out a specific procedure because it was implicit under Oklahoma law that a party could seek a protective order.[215] Nevertheless, the inclusion of a specific provision regarding protective orders would provide more guidance to prosecutors, criminal defense lawyers, and trial judges as to the procedures and policies to be applied.

Finally, the *Allen* decision ends by expressly limiting the new procedures so that discovery cannot be ordered before the preliminary examination.[216] The court contends that it cannot allow discovery before the preliminary hearing because "the provisions of 22 O.S.1981, § 251 et seq. are specific as to the purpose and scope of a preliminary examination."[217] If the court

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

212. If the disclosure of expert reports were the court's primary concern, then clearly the state should also have the same continuing disclosure obligation. This is particularly so in light of the number of recent cases involving the state's failure to provide timely expert reports. *See supra* note 77.

If the court's primary concern were physical evidence, defense counsel already is obligated to turn over such evidence in the possession of counsel or a defense investigator. *See supra* note 198.

Perhaps the court felt that such a continuing disclosure provision was unnecessary for the state because it was mandating an open file policy. Even so, a provision clearly spelling out the prosecutor's continuing obligation should have been included in order to avoid unnecessary confusion and litigation.

213. *See* ABA STANDARDS 11-4.2 & commentary; *infra* note 251.

214. One example would be an investigative report containing information about a confidential informant whose testimony is not germane to the defendant's case.

215. Prior to *Allen*, a trial judge had broad discretion to grant or refuse pre-trial discovery. Stout v. State, 693 P.2d 617, 624 (Okla. Crim. App. 1984), *cert. denied*, 472 U.S. 1022 (1985). The trial judge further was empowered "to take necessary action to ensure the rights of each party are preserved and the court's orders are obeyed." State *ex rel.* Suttle v. District Court, 795 P.2d 525, 527 (Okla. Crim. App. 1990) (Lumpkin, J., concurring). Presumably, the trial judge also is empowered to grant a protective order. This power is acknowledged by Oklahoma Rule 3.8 which requires a prosecutor to disclose exculpatory material except "when the prosecutor is relieved of this responsibility by a protective order of the tribunal." OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1988).

216. *Allen*, 803 P.2d at 1169.

217. *Id.*

indeed has the "inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction,"[218] thereby allowing it to fashion these new discovery procedures, it surely has the power to require the prosecutor to make disclosures before the preliminary hearing.[219]

Moreover, there are sound policy reasons for requiring early disclosure by the prosecutor. Because the prosecutor generally has most of the discovery material in the file before charges are issued, there is no reason why such material routinely cannot be provided to the defense soon after criminal charges have been filed and before the preliminary hearing. This may encourage the early resolution of some cases and the elimination of some time-consuming preliminary hearings. The preliminary hearings that are held should be more efficient as defense counsel will not have to spend time simply learning basic facts. Court time and judicial resources will be saved because many law enforcement officers, technicians, and other witnesses will no longer be needed.[220]

Finally, it is difficult to see how the state's interests are served if defense counsel is not prepared adequately for the preliminary hearing. If the state's evidence is so weak that it cannot overcome an adequately prepared defense lawyer, no interest is served by allowing the case to linger on and further clog an already overburdened system. The marginal inconvenience to the prosecution of providing discovery before the preliminary hearing and the occasional delay caused because defense counsel wants additional time to prepare for a hearing are greatly outweighed by the overall systemic benefits obtained.

III. After Allen: The Legislative Task Ahead

What, then, should be the pre-trial procedures governing criminal discovery in Oklahoma? Before describing the features of the discovery code which the Oklahoma legislature should adopt, it is necessary to identify the goals that a new system will be designed to achieve. The ABA Standards set forth an excellent summary of the objectives of a fair, efficient discovery system.[221] That 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;

218. *Id.* at 1167 (citing Inverarity v. Zumwalt, 97 Okla. Crim. 294, 262 P.2d 725, 730 (1953)).

219. It is impractical, unnecessary, and constitutionally suspect to require a defendant to disclose any information before the preliminary hearing. Because discovery need not, nor should not, be symmetrical, the lack of a defense obligation before the preliminary hearing does not resolve the question of whether the prosecution should be so obligated.

220. David Lee raises similar arguments in his article calling for defense access to investigative reports. Lee, *supra* note 11, at 460-61.

221. *See* ABA STANDARDS 11-1.1 & commentary.

> (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 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.[222]

With these goals in mind, procedures must be developed which will allow for increased discovery in criminal cases consistent with the special protections afforded criminal defendants in the adversary system of criminal justice. As discussed in the preceding section, this means the prosecution should be required to disclose substantially more information than the defense. There is nothing unfair about an open file policy for the prosecution; many prosecutors already follow such a policy. Obligating the prosecutor to maintain an open file policy undoubtedly serves the best interests of the criminal justice system because such a policy increases the likelihood that the goals identified above will be attained.[223] No legitimate interest is served when the prosecution holds back information from the defense simply to improve the prosecutor's chances of winning at trial. It is the task of the prosecutor to do justice, not merely secure convictions.[224]

Although expanded defense discovery will improve the fair operation of the system without any significant cost, the same claim cannot be made for expanding prosecutorial discovery. Obtaining such discovery may improve the prosecutor's ability to cross-examine defense witnesses, thereby exposing false defenses. There is no evidence to suggest, however, that the use of false defenses is a serious systemic problem.[225] Any marginal gain to the prosecution by obtaining such discovery is far outweighed by the potential negative impact on the quality of representation provided criminal defendants. Compelling defense counsel to disclose names of witnesses, provide statements, and identify evidence prior to trial all serve to weaken the attorney-client relationship, the defendant's constitutional rights, and the adversary system. "In short, while the goal of full presentation of all the facts is laudable, it cannot be satisfied at the expense of the defendant's constitutional rights."[226]

222. ABA STANDARDS 11-1.1.

223. *See also supra* notes 82-85 and accompanying text.

224. *See supra* note 55 and accompanying text.

225. The alibi and mental capacity defense pose special problems for the state so that disclosure of the nature of the defense is appropriate. *See supra* notes 140, 168-69 and accompanying text.

226. *In re* Misener, 38 Cal. 3d 543, 553, 698 P.2d 637, 643, 213 Cal. Rptr. 569, 575 (1985).

Nonetheless, limited defense disclosures, particularly of expert reports, are warranted. Affording the prosecutor pre-trial access to expert material the defense intends to utilize at trial will generally enhance the accurate presentation of expert testimony without infringing upon the defendant's constitutional rights or compromising the attorney-client relationship. Moreover, the system must be designed to enable the prosecutor to withhold information when special circumstances warrant. Hence, the proposed code must allow for protective orders in appropriate cases.

The open file approach, therefore, is the key feature if the new discovery code is to enhance the quality of justice meted out by the criminal justice system. Three major problems burden the criminal justice system nationally, problems which also plague Oklahoma: the number and complexity of pre-trial issues, inexperienced defense lawyers, and the volume of post-conviction litigation.[227] The open file policy routinely will provide defense counsel more information. Access to such discovery will not be so dependent on defense counsel's skill, experience, or relationship with the prosecutor. Armed with more information, defense counsel will be better able to negotiate an informed plea for the defendant or mount an adequate defense. More discovery will also allow constitutional issues, such as the admissibility of a statement or a pre-trial identification, to be identified and, if necessary, litigated before trial. The goal, of course, is to eliminate defense counsel's untimely identification of issues which result in the trial's disruption and a host of unduly complicated post-conviction motions and hearings.

It is particularly important to structure the discovery system so that the prosecution is encouraged to provide discovery material to the defense as soon as possible. As discussed earlier, the systemic benefits of mandating prosecutorial disclosures before the preliminary hearing are substantial.[228] Even in misdemeanor cases, the sooner discovery is provided to the defense, the quicker most cases can be resolved. The vast majority of criminal cases are, of course, resolved by means of a negotiated plea.[229] Providing defense counsel with early discovery will lessen, at least to some extent, uncertainties about the state's case so that counsel and client can more meaningfully discuss plea negotiations. Not only does early full discovery facilitate informed plea bargaining, it may also improve the defendant's perception of the fairness of the process. Additionally, more informed pleas may reduce post-conviction claims, especially those involving ineffective assistance of counsel.

The following proposed code, therefore, is structured to maximize the flow of discovery material to the defense so as to promote the systematic goals just discussed. It borrows heavily from the ABA Standards and in part from *Allen*.

227. *See* ABA STANDARDS 11-8; FINAL REPORT OF THE SPANGENBERG GROUP ON OKLAHOMA INDIGENT DEFENSE (1988).

228. *See supra* notes 219-20 and accompanying text.

229. Clennon, *supra* note 84, at 668.

Section 2000: Short Title, Applicability and Purpose

Sections 2000 through 2014 of this title shall be known and may be cited as the Oklahoma Criminal Discovery Code. This code shall govern the procedures for all criminal cases in all courts in the state.[230] The provisions of this code shall be interpreted so as to promote the fair, expeditious processing of criminal cases by facilitating the exchange of information and material within an adversary framework protecting the constitutional rights of all defendants.

Section 2001: Prosecutorial Disclosures[231]

> 1. Upon the request of the defense, the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control including but not limited to:
>
> (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 codefendant;
>
> (c) the name and address of any expert witness expected to be called, together with a statement of the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, including the identity of any other experts upon whom the trial expert expects to rely. In addition, 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, shall be disclosed;[232]

230. Fairness dictates that the prosecutor provide full and open discovery in misdemeanor cases. Because the defense rarely has adequate resources to conduct a thorough investigation and the defendant has no right to a preliminary hearing, counsel defending a misdemeanor charge has only a limited ability to assess the strength of the state's case without adequate discovery. Unrepresented clients or those defendants with limited funds are especially disadvantaged by a system without easy access to the prosecution's case. Because the vast majority of misdemeanor cases settle, most such cases can be handled routinely by simply providing the defense with police or investigative reports which set out the bulk of the state's case. Protective orders can be obtained in the exceptional case. The majority of the cases still will settle, but the pleas will be more informed at little cost to the state. *See also* Clennon, *supra* note 84, at 667-74 (arguing that broader discovery will enhance fairness and the efficiency of the system without adversely effecting the number of guilty pleas or the rate of successful prosecutions).

231. Except as noted, these procedures track *Allen* and ABA STANDARDS 11-2.1.

232. This modification of both *Allen* and ABA STANDARDS 11-2.1 is designed to meet several problems identified in Eads, *Adjudication by Ambush: Federal Prosecutors Use of Nonscientific*

(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;

(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; and

(g) any investigative report generated by a law enforcement agency in connection with the investigation of the crime with which the accused is charged or a related charge if material within that report is relevant to the charge pending against the defendant. If the prosecutor does not wish to disclose a particular report because it contains confidential or highly sensitive material, the prosecutor must seek a protective order under Section 2012 of this code.[233]

2. When the information is within the prosecutor's possession or control, the prosecuting attorney shall inform defense counsel:[234]

(a) if relevant recorded grand jury testimony has not been transcribed;

(b) if the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping);

Experts in a System of Limited Criminal Discovery, 67 N.C.L. REV. 577 (1989). First, the present *Allen* provision enables prosecutors to avoid having to identify any expert where no report or statement was prepared thereby allowing the defense to be "ambushed" by an expert counsel is unprepared to cross-examine. Second, some reports are so brief that defense counsel is left without a meaningful opportunity to prepare to cross-examine the expert. Obviously, such inadequate reports frustrate the very purpose of requiring pre-trial disclosure. As Professor Eads demonstrates, there are no sound policy arguments for not requiring the disclosure of expert evidence. *Id.* at 623-25. Rather, as the court noted in Pierce v. State, 786 P.2d 1255, 1263 (Okla. Crim. App. 1990), "justice is certainly better served when a defendant is provided with the most detailed information possible." This modification differs from that proposed by Professor Eads in that it does not include a provision allowing the court to permit depositions. Arguably in an ideal system, the discretionary use of depositions would be desirable. In the present woefully underfunded criminal justice system, there is not enough money to adequately compensate defense lawyers, hire experts or pay for investigative services. Depositions are a luxury the criminal justice system in Oklahoma simply cannot afford. Finally, if society is unable or unwilling to provide indigent defendants ready and equal access to this discovery tool, the tool should not be available only to wealthy defendants and the state.

233. This provision is added so as to avoid any possible confusion about the status of investigative reports. *See supra* notes 14, 43, 88. All investigative reports are to be disclosed subject to the prosecutor's right to seek a protective order. The onus is squarely on the prosecutor to seek that protective order. Finally, it sets up a specific procedure to be followed in the event the prosecutor feels that a particular report should not be disclosed.

234. This provision is taken from ABA STANDARDS 11-2.1(b). It is included to encourage the resolution of certain issues before trial by ensuring that defense counsel has clear notice of potential issues. The aim again is to avoid mid-trial or post-trial litigation of complex issues often with constitutional implications. *See* ABA STANDARDS 11-25 to 11-27.

(c) if the prosecutor intends to conduct scientific tests, experiments, or comparisons which may consume or destroy the subject of the test, or intends to dispose of relevant physical objects; and

(d) if the prosecutor intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other crimes.[235]

3. At the earliest feasible opportunity,[236] the prosecutor shall disclose to defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused. If a prosecutor is uncertain whether certain material or information falls within the scope of this provision, the prosecutor shall either disclose the material or seek a protective order.[237]

4. The prosecuting attorney's obligations under this standard extend to material and information in the possession or control of members of the prosecutor's staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to the prosecutor's office.[238]

5. If the defendant is unrepresented, the prosecutor shall inform the accused of the right to obtain discovery by making a simple request. Upon that request, discovery shall then be provided in accordance with this code.[239]

235. While *Burks* already requires such notice to the defense, see *supra* note 38 and accompanying text, the provision is included to provide clear notice to inexperienced defense lawyers and prosecutors.

236. This provision modifies *Allen* and ABA STANDARDS 11-2.1 (c) by including the "earliest feasible opportunity language." That language was borrowed from ABA STANDARDS 3-3.11 and is included to encourage prompt disclosure.

237. This sentence is added to make it clear to prosecutors that disclosure of even questionable exculpatory material is desirable. Given the large number of appellate cases in Oklahoma and across the country in which claims are raised regarding exculpatory evidence, a clear mandate is needed if the system indeed is going to minimize needless litigation and expedite the fair disposition of cases. Again, no policy is served by not requiring the material to be turned over since the prosecutor can seek a protective order if disclosure presents a specific problem.

238. This provision follows ABA STANDARDS 11-2.1(d) instead of the *Allen* modification because it more clearly defines the scope of the prosecutor's obligation. *See supra* notes 96-97 and accompanying text. Together with provision 3 of § 2002, this provision is structured to make it the specific responsibility of the prosecutor to ensure that the various investigative agencies working on a case provide the prosecution any exculpatory evidence. It is up to the prosecutor to make sure that the police are not withholding exculpatory information from the prosecutor's office for that police practice violates a defendant's right to due process regardless of the prosecutor's lack of knowledge of the information. James v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988); Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

239. Despite the sixth amendment right to counsel, many defendants appear in Oklahoma

Section 2002: Prosecutor's Performance of Disclosures[240]

> 1. The prosecuting attorney shall provide disclosure under Sections 2001 and 2003 of this code, prior to the preliminary hearing in a felony case if so requested, and in other cases, as soon as practicable following the defense request for disclosure but not later than the date designated for the discovery motion hearing set pursuant to Section 2014 of this code.
> 2. Disclosure may be accomplished in any manner mutually agreeable to the prosecutor and the defense, or the prosecutor may:
> (a) notify the defense that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and
> (b) make available to the defense at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.
> 3. The prosecutor shall ensure that:
> (a) a flow of information is maintained between the various investigative personnel and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information relevant to the accused and the offense charged;[241]
> (b) a defendant's indigency does not restrict access to discoverable material.[242]

Section 2003: Additional Disclosures Upon Specific Request[243]

> Upon the request of defense counsel, the prosecuting attorney shall disclose and permit inspection, testing, copying, and pho-

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courts without a lawyer. Access to discovery should not turn on whether a defendant is represented by counsel. Because a simple request will trigger discovery, the prosecutor should be obligated to inform the defendant of this fact. Alternatively, the trial judge could inform the defendant at the initial appearance of the right to discovery. This uses valuable court time, however, and is not the best way to communicate with the unrepresented defendant, many of whom are bewildered by what goes on in a courtroom. An easier solution is to have the prosecutor give the unrepresented defendant at the initial appearance a slip briefly describing how to obtain discovery.

240. This provision is substantially similar to ABA STANDARDS 11-2.2.

241. "It is incumbent upon the prosecutor to promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation." People v. District Court, 793 P.2d 163, 167 (Colo. 1990). *See also* State v. Wisniewski, 103 N.M. 430, 708 P.2d 1031 (N.M. 1985); *supra* note 238.

242. This clause is added to ensure that copying charges are not utilized to prevent an indigent defendant from gaining access to discoverable material. If a prosecutor's office is going to impose copying charges, such charges must be reasonable. Yet for many indigent defendants even minimal copying charges are too much. The prosecutor must provide the indigent defendant materials without cost or make them readily available for inspection.

243. This provision tracks ABA STANDARDS 11-2.3. The disclosure of this information will

tographing of any relevant material and information regarding:

(a) searches and seizures specified by the defense;

(b) the acquisition of specified statements from the accused;

(c) lineups, showups, picture or voice identification of the accused, and any other procedures described in Section 2007 of this code; and

(d) the relationship, if any, of specified persons to the prosecuting authority.

Section 2004: Material Held by Other Government Personnel[244]

Upon defense counsel's request for, and designation of, material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel. If the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

Section 2005: Discretionary Disclosures[245]

Upon showing that an additional item is material to the preparation of the defense, the court may order disclosure to defense counsel of the specified material or information.

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facilitate the timely resolution of suppression motions, an important systemic goal identified in ABA STANDARDS 11-1.1. *See also* ABA STANDARDS 11-33.

244. The investigative shortcomings of most defendants together with limited subpoena power frequently leave the defense without access to information in the hands of other government agencies. This provision follows ABA STANDARDS 11-2.4. It provides clear authority to the trial judge to order the disclosure of information, where appropriate, even though another statute declares that certain records be kept confidential. Accordingly, such a provision gives the trial court the express authority to issue an order to inspect records of the Department of Human Services despite the fact that another statutory provision limits access to those records. *See* State *ex rel.* Suttle v. District Court, 795 P.2d 523 (Okla. Crim. App. 1990) (holding that trial court lacked authority to permit defense inspection of Human Services records except for *in camera* review by trial judge for exculpatory evidence). This provision also addresses the concerns expressed by Judge Lane in Amos v. District Court, 814 P.2d 502 (Okla. Crim. App. 1991) (arguing that except for *Brady* material OSBI reports are confidential and not discoverable absent explicit statutory authority). Moreover, by specifying a procedure to be followed, guidance is provided so that cases such as *Zeigler v. State* can be eliminated. Zeigler v. State, 610 P.2d 251 (Okla. 1980). In *Zeigler*, the trial court denied the defendant's motion to obtain sperm slides suggesting instead that the defense subpoena the doctor who examined the slides. The Oklahoma Court of Criminal Appeal recognized, however, that the defendant's subpoena power was limited and the court erred in denying defendant's motion. *Id.* at 256. This code is designed to ensure that a defendant like Zeigler is afforded easy access to material either through § 2004 or, if necessary, through § 2005.

245. This is a modified version of ABA STANDARDS 11-2.5. It is included to make it clear

Section 2006: Matters Not Subject to Prosecutorial Disclosure[246]

1. Disclosure shall not be required of legal research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of the prosecutor's legal staff.
2. Disclosure of an informant's identity shall not be required where such identity is a prosecution secret and where a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied of the identity of witnesses to be produced at a hearing or trial.

Section 2007: Disclosures by the Accused[247]

1. After the initiation of judicial proceedings, the defendant must, upon the prosecutor's request, appear within five (5) business days, or within such other time as is mutually convenient for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the accused. Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and accused's counsel. Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for the accused's release.
2. Notwithstanding the initiation of judicial proceedings and after appropriate notice to the defendant, a judge may order the accused to participate in a procedure enumerated in paragraph three for the purpose of disclosing nontestimonial evidence, if the judge finds:
(a) there is good cause to believe that the evidence sought may be relevant and material to the determination of whether the defendant committed an offense charged in the accusatory instrument;
(b) the procedure is reasonable and will be conducted in a

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that the court has the power to order such disclosures subject, of course, to the prosecutor's right to argue for an appropriate protective order.

246. This section is identical to ABA STANDARDS 11-2.6 except that it drops subsection (c) of that standard relating to national security. If an Oklahoma prosecutor has a claim involving national security, the matter can be raised by way of a motion for a protective order.

247. This provision substantially tracks ABA STANDARDS 11.3.1. It allows the prosecutor to obtain access to non-testimonial evidence after charges have been filed. While constitutional questions may be appropriately raised in certain cases, these procedures generally provide a fair, reasonable process for resolving issues of prosecutorial access. For a further discussion of this provision, see ABA STANDARDS 11-43 to 11-50.

manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and

(c) the request is reasonable.

3. An order issued pursuant to paragraph two may direct the accused to:

(a) appear, move, or speak for identification in a lineup, but if a lineup is not practicable, then in some other reasonable procedures;

(b) try on clothing or other articles;

(c) permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails;

(d) permit the taking of samples of other materials of the body;

(e) submit to a reasonable physical or medical inspection, including x-rays, of the body; or

(f) participate in other procedures which comply with the requirements of paragraph two.

4. The request or order shall specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

Section 2008: Disclosure of Defense Expert Reports[248]

1. Any defendant who has requested and received discovery pursuant to Sections 2001, 2003, 2004 or 2005 of this code shall, upon the request of the prosecutor, disclose to the prosecutor, and permit the prosecutor to inspect and copy or photograph, any reports or statements, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, which were made by experts in connection with the particular case and which the defense intends to use at a hearing or trial. If the defense intends to call an expert who has not prepared a statement or report, the prosecutor shall be provided a statement of the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, including the identity of any other experts upon whom the trial expert expects to rely.[249]

248. Section 2008 substantially follows ABA STANDARDS 11-3.2 with the inclusion of the words "on rebuttal" to emphasize that the evidence should not be used in any way in the state's case-in-chief. For a discussion of the reasons prosecutorial access must be carefully limited, see *supra* notes 193-200 and accompanying text.

249. This provision is similar to that contained in § 2001. *See supra* note 232. The prosecutor,

2. Disclosure shall not be required:

(a) of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the defense attorney or members of the defense legal staff; or

(b) of any communications of the defendant.

3. The fact that the defendant has indicated an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial. Information obtained as a result of disclosure pursuant to this standard is not admissible in evidence at trial except on rebuttal to refute the matter disclosed.

Section 2009: Notice of Alibi and Mental Capacity Defense[250]

1. At least twenty (20) days before trial, the defendant shall disclose to the prosecutor:

(a) a notice of intention to claim an alibi defense pursuant to 22 O.S. § 585; or

(b) an application raising the question of the defendant's mental condition at the time of the offense pursuant to 22 O.S. § 1176.

2. The notice or application disclosed pursuant to paragraph one is not admissible in evidence at a hearing or trial. Information obtained as a result of disclosures made pursuant to paragraph one is not admissible in evidence at trial except in rebuttal to refute the defendant's defense.

Section 2010: Continuing Duty to Disclose[251]

If, after providing discovery pursuant to this code, a party discovers additional material or information which is subject to disclosure, the other party shall promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court shall also be notified.

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like defense counsel, needs the opportunity to prepare to meet expert testimony. If defense counsel anticipates that pre-trial disclosures pose a legitimate risk of supplying incriminating information to the prosecutor, counsel should seek a protective order.

250. Consistent with existing Oklahoma statutes, this provision only requires notice of the two defenses generally recognized to pose unusual problems for the prosecution. *See supra* notes 168-69 and accompanying text. As discussed earlier in the article, neither the Constitution nor sound public policy is served by mandating additional disclosures. *See supra* notes 170-91 and accompanying text.

251. This language is virtually identical to that in ABA STANDARDS 11-4.2. Unlike *Allen*, it applies to both sides. *See supra* notes 211-13 and accompanying text. It is designed so that neither party needs to make repeated requests. *See* ABA STANDARDS 11-58, 11-59.

Section 2011: Custody of Materials[252]

> Any materials furnished to an attorney pursuant to this code shall remain in that attorney's exclusive custody, shall be used only for the purposes of conducting that attorney's case, and shall be subject to such other terms and conditions as the court may provide.

Section 2012: Protective Orders and In Camera Proceedings[253]

> 1. Upon a showing of cause, the court may at any time order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in time to permit counsel to make beneficial use of the disclosure.
> 2. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made *in camera*. A record shall be made of both in court and *in camera* proceedings. Upon the entry of an order granting relief following a showing *in camera*, the entire record of the *in camera* portion of the showing shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

Section 2013: Sanctions[254]

> 1. If a provision of this code or applicable court order is not promptly implemented, the court may:
> (a) order the noncomplying party to comply and provide the material or information not previously disclosed;
> (b) grant a continuance;
> (c) exclude or limit testimony or evidence;
> (d) dismiss the case;[255] or

252. This provision tracks ABA STANDARDS 11-4.3 It is included to minimize concerns about the unnecessary dissemination of discovery materials.

253. This section combines ABA STANDARDS 11-4.4 and 11-4.6. It creates an ex parte procedure which at times will be utilized to permit counsel to bring a discovery matter to the court for resolution without "letting the cat out of the bag." *See* State *ex rel.* Carkulis v. District Court, 229 Mont. 265, 746 P.2d 604, 615 (1987).

254. This provision borrows from ABA STANDARDS 11-4.7, *Allen* and Taylor v. Illinois, 484 U.S. 400, 417-18 (1988) (Brennan, J., dissenting), *reh'g denied*, 485 U.S. 983 (1989). It is designed to provide the court a range of possible sanctions to impose.

255. This remedy, like that of excluding defense witnesses, should be rarely used. *See* People v. District Court, 793 P.2d 163 (Colo. 1990); ABA STANDARDS 11-67 to 11-68. If the prosecutor has willfully or repeatedly violated discovery requirements, contempt or disciplinary proceedings generally are more appropriate and more likely to be effective in encouraging future compliance.

(e) grant a mistrial.

2. In determining the appropriate sanction to impose against the defense, the court shall not prohibit the defendant from introducing evidence or witnesses material to the defense unless the defendant willfully caused the discovery violation.[256]

3. Any person who willfully disobeys a provision of this code or applicable court order may be subject to contempt or other appropriate sanctions.

Section 2014: General Discovery Procedures[257]

1. At the initial appearance in a misdemeanor case and at the arraignment following a bindover in a felony case, the judge shall set a date for a discovery hearing. The time set shall be sufficient to enable each side to complete unsupervised discovery in accordance with this code.

2. Prior to the discovery hearing, both sides shall complete all required disclosures and make a good faith effort to resolve any discovery dispute. If a dispute cannot be resolved, a written motion should be filed prior to the hearing identifying the material sought with appropriate authority in support of the motion.

3. At the discovery hearing, the court shall:

But see Rosen, *supra* note 95 (demonstrating that disciplinary action at present is infrequently used sanction and discussing need for disciplinary bodies to take more aggressive action to curb prosecutorial misconduct).

256. In Taylor v. Illinois, 484 U.S. 400 (1988), the Court imposed the "severest sanction" of precluding several defense witnesses from testifying because of the "willful and blatant" misconduct of defense counsel in meeting his discovery obligation. *Id.* at 417. As Justice Stevens noted in a footnote to his majority opinion, "the reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense." *Id.* at 417 n.23. Given the constitutional implications and severity of the exclusion sanction, the proposed provision adopts the reasoning of Justice Brennan in his dissent in *Taylor* and expressly limits the sanction to those few cases where a defendant's deliberate actions are responsible for the violation. *Id.* at 436 (Brennan, J., dissenting). For a further discussion of the unfairness and costs of holding clients responsible for their lawyers' sins, see Heiderscheitt, *Taylor v. Illinois: The New and Not-So-New Approach to Defense Witness Preclusion Sanctions for Criminal Discovery Violations*, 23 GA. L. REV. 479, 498-504 (1989). If the defense lawyer is responsible for a discovery problem, sanctions against counsel are more appropriate and more likely to reduce violations.

257. This provision modifies the more formalized structure spelled out in ABA STANDARDS 11-5.2, 11-5.3, and 11-5.4. It is designed to encourage the resolution of all discovery matters informally like in the civil system. The discovery hearing should be used to monitor compliance and resolve disputes when necessary. In most instances, the hearing will be brief, and if the court's calendar permits, may be used to take guilty pleas. The hearing should force both sides to take a serious look at their case before the hearing and engage in more meaningful plea negotiations sooner. If the case is not going to be settled, the hearing is useful to identify problems and get them resolved in an orderly manner. Although a framework is provided, the procedures are flexible enough to allow local jurisdictions to accommodate local practice.

(a) determine if discovery is completed or if there are issues which need to be resolved. An itemized list logging the discovery material provided the other side shall be filed with the clerk at the hearing. If additional preparation, evidence, or argument is needed to reach a fair resolution of discovery issues, the hearing shall be continued.

(b) determine if any suppression motions or other pre-trial hearings need be set and if so, a date shall be set; and

(c) set a date for trial or for a pre-trial conference if one is to be held.

IV. Conclusion

In *Allen*, the Oklahoma Court of Criminal Appeals created a criminal discovery scheme granting both the defendant and the state pre-trial access to certain materials with the goal of ensuring that the trial process indeed seeks justice. Under the guise of evenhandedness, however, the *Allen* court demands too much from the defense. Justice will not be attained by radically altering the adversary system and diminishing the constitutional protections afforded the criminal defendant. Justice demands that the fundamental principles underlying our system be affirmed, not compromised. The Oklahoma legislature must take a careful look at *Allen* and the goals of a fair, constitutionally sound discovery system and then draft a new code which promotes the fair and expeditious resolution of criminal cases in this state without undermining the rights of the accused.