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Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions in Arkansas Criminal Cases

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CAN'T WE JUST TALK ABOUT THIS FIRST?: MAKING THE CASE FOR THE USE OF DISCOVERY DEPOSITIONS IN ARKANSAS CRIMINAL CASES

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INTRODUCTION

"[T]he quest for better justice is a ceaseless quest, that the single constant for our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice."[1] From time to time, it is important that we take stock of our legal surroundings and ask ourselves if our procedures are still properly serving us, or if there is need for change and improvement. In this Article, I argue that the time has come for Arkansas to provide the criminal defense bar with the affirmative power to conduct discovery depositions. Arkansas criminal defendants currently proceed largely in the dark with light only being shed on the case as the prosecutor chooses to provide material to the defense.[2]

A fair trial is a search for the truth,[3] and discovery is how we get to that truth.[4] Expanding our tools of discovery expands our

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1. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 (1963).

2. *See infra* Section II.A.

3. Lopez v. United States, 373 U.S. 427, 440 (1963) ("The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant."); Estes v. Texas, 381 U.S. 532, 540 (1965) ("Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial.").

4. Brennan, *supra* note 1, at 291 ("We must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape. Discovery,

ability to find the truth. Currently, Arkansas does not require that the State disclose witness statements, expected testimony, or police reports.[5] Rather, the law currently holds that such disclosures are made merely at the benevolence of the prosecutor.[6] The result is that criminal defendants are the only litigants in Arkansas who are forced to proceed to trial in the dark subject to surprise testimony.[7] Allowing for depositions in criminal cases will allow defense attorneys to affirmatively turn on the light and go and find the truth for themselves rather than wait for the prosecution to trickle out pieces of its investigation. If the truth is the truth, then there should be no harm in expanding the ways we can find the truth by allowing defense attorneys to be a part of the discovery process.

Part I of this Article discusses the limited federal constitutional requirements for criminal discovery. Part II provides an overview of the current Arkansas criminal discovery rules as related to the discovery of witness statements and police reports. Part III takes a brief look at the historical origins of both the Federal Rules of Criminal Procedure and the Arkansas Rules of Criminal Procedure and how those histories can inform our modern review of the rules. Part IV examines discovery practices of other states, including the thirteen states which currently allow for discovery depositions in criminal cases. Part V addresses policy arguments both in favor of and in opposition to criminal discovery depositions. Finally, Part VI provides a list of goals and objectives for what any proposed rule or legislation in Arkansas regarding criminal discovery depositions should address.

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basically a tool for truth, is the most effective device yet fashioned for the reduction of the aspect of the adversary element to a minimum.").

5. *See infra* notes 14-16 and accompanying text; Section II.A.

6. *See infra* Section II.A.

7. *See infra* Section II.A.

I. THE CONSTITUTIONAL FLOOR FOR DISCOVERY—OR LACK THEREOF

"There is no general constitutional right to discovery in criminal cases . . . ."[8] The United States Supreme Court has only recognized two express rights to criminal discovery. The first being that a defendant is entitled to receive all material exculpatory and impeachment evidence.[9] The second being that when the State permits discovery *against* the defendant, the defendant must be given reciprocal discovery rights against the State.[10] Otherwise, the "right" to pretrial discovery in criminal cases has been left to the states to "experiment[]" with as they see fit.[11] Thus, with few federal guidelines, the question becomes, what discovery rights does Arkansas currently provide?

II. THE RESTRICTED STATE OF CRIMINAL DISCOVERY IN ARKANSAS

Arkansas's written discovery rules have been categorized as existing somewhere in between the most restrictive models of "closed-file" discovery and the most liberal models of "open-file" discovery.[12] The most restrictive, textualist reading of the

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8. Weatherford v. Bursey, 429 U.S. 545, 559 (1977); Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .").

9. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972) (holding material evidence relating to the credibility of a witness falls under the scope of *Brady*).

10. *See Wardius*, 412 U.S. at 472, 474 n.6, 479 (holding an Oregon law requiring the defendant to disclose his alibi witnesses without requiring the State to provide reciprocal discovery of its rebuttal witnesses to be unconstitutional and noting the "Court has [] been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial"); Williams v. Florida, 399 U.S. 78, 82 n.11 (1970) (suggesting that the constitutionality of a state's alibi-notice rule will depend on "an inquiry . . . into whether the defendant enjoys reciprocal discovery against the State").

11. *See Wardius*, 412 U.S. at 474. For a comprehensive, empirical analysis of the differences among state discovery schemes as relates to plea bargaining, see generally Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016).

12. *See* Turner & Redlich, *supra* note 11, at 303-06, app. B at 400. Professors Turner and Redlich categorized jurisdictions that do not require disclosure of witness names, witness statements, or police reports as "closed-file" systems and jurisdictions that do require disclosure of such materials as "open-file" systems. *Id.* at 303-06. Jurisdictions like

Arkansas discovery rules and statutes provides a criminal defendant with limited access to a select few pieces of the State's file.[13] Defense counsel in Arkansas does not have any "right" to receive either witness statements[14] or police reports,[15] nor does it have the power to depose witnesses to discover such information independently.[16]

A. Limited Mandatory Disclosures

Currently, the Arkansas Rules of Criminal Procedure do not require that a prosecutor disclose witness statements or expected testimony before trial.[17] However, by statute, a defendant has the right to demand the State produce "any statement" of a witness once the witness has testified on direct examination at trial.[18] The effect being that the defendant has no pre-trial discovery right to witness statements, but merely a *mid-trial* discovery right requiring cross-examinations to be concocted in the hallways of the courthouse during a recess.[19] However, if that handicapping

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Arkansas that require disclosure of some but not all of these materials were categorized as "intermediate" systems. *Id.* at app. B at 400. As noted by Turner and Redlich, Arkansas Rule of Criminal Procedure 17.1 requires discovery of witness names but not witness statements (other than those of co-defendants) or police reports. *Id.*

13. *See infra* Sections II.A.-B.

14. Thompson v. State, 322 Ark. 586, 588, 910 S.W.2d 694, 696 (1995) (holding the State is under no obligation to provide non-expert, non-exculpatory witness statements before trial).

15. While it would seem unfathomable that a defense attorney could adequately investigate his client's case without access to the relevant police reports and equally suspicious that a prosecutor would refuse to disclose such reports, it must be acknowledged that Arkansas Rule of Criminal Procedure 17.1 very plainly does not mandate discovery of police reports. *See* ARK. R. CRIM. P. 17.1; *see, e.g.*, Goodwin v. State, 263 Ark. 856, 867-68, 568 S.W.2d 3, 10 (1978) (holding the defendant was not entitled to receive non-exculpatory reports from a detective). Because the Arkansas courts routinely engage in a narrow reading of Rule 17.1, I include police reports in this discussion as another commonsense piece of discovery withheld from defense counsel with no legitimate policy justification.

16. *See infra* Section II.B.

17. *See* ARK. R. CRIM. P. 17.1.

18. ARK. CODE ANN. § 16-89-115(b) (2005) (so long as the statement relates to the subject matter of the witness's testimony).

19. *See* ARK. CODE ANN. § 16-89-115(c)(5) ("Whenever any statement is delivered to a defendant pursuant to this section, the court, in its discretion and upon application of the defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of the statement by the defendant and his or her preparation for its use in the trial.").

of defense counsel were not enough, then one could take comfort from the fact that not every "statement" from a witness is subject to disclosure under the statute. A witness "statement" is narrowly defined as "[a] written statement made by the witness and signed or otherwise adopted or approved by him" or a "substantially verbatim recital of an oral statement made by the witness to an agent of the state and recorded contemporaneously with the making of the oral statement."[20] In determining whether a statement is "substantially verbatim," the courts look to "the extent to which it conforms to the language of the witness, the length of the written statement in comparison to the length of the interview, whether quotations may be out of context, and the lapse of time between the interview and the transcription[.]"[21] The result is that witness statements are not subject to disclosure if the prosecutor or police officer interviewing the witness does not take sufficiently detailed notes.[22]

For example, in *Harper v. State*, the defendant was charged with raping and sexually assaulting his stepdaughter, K.S.[23] According to the defendant, K.S. recanted her allegations on four separate occasions to multiple individuals, including law enforcement.[24] The defendant then asked that the prosecutor produce his notes from an interview with K.S. held shortly before trial.[25] The defendant wanted the notes "to determine '[w]hat was said to make K.S. change her story, and what K.S. said prior to changing her story.'"[26] Ultimately, despite the fact that the notes included remarks outlined in quotation marks, the Arkansas Court of Appeals held that the notes were not subject to disclosure because: (1) "[t]he prosecutor stated that she 'did not write down verbatim what [K.S.] said[]'";[27] (2) there was no guarantee that

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20. ARK. CODE ANN. § 16-89-115(e).

21. Harper v. State, 2020 Ark. App. 4, at 6, 592 S.W.3d 708, 712 (internal quotation marks omitted) (quoting Winfrey v. State, 293 Ark. 342, 345, 738 S.W.2d 391, 392 (1987)).

22. *See id.* at 6-7, 592 S.W.3d at 712-13.

23. 2019 Ark. App. 163, at 1-2, 573 S.W.3d 596, 598.

24. *Harper*, 2020 Ark. App. 4, at 3, 592 S.W.3d at 711.

25. *Id.* at 3, 3 n.1, 592 S.W.3d at 711 (Harper's first trial ended in a mistrial and the interview in question occurred before the first trial).

26. *Id.* at 3, 592 S.W.3d at 711 (quoting *Harper*, 2019 Ark. App. 163, at 10, 573 S.W.3d at 602).

27. *Id.* at 4, 592 S.W.3d at 711 (quoting *Harper*, 2019 Ark. App. 163, at 10, 573 S.W.3d at 603).

the portions in quotation marks were accurate or in context;[28] and (3) the prosecutor only took three pages of notes for a two-hour interview.[29] While the holding in *Harper* may fit the specific facts of that particular case, the ultimate import of the case is that the State's burden is lessened by poor investigative work. If a prosecutor or police officer takes very thorough notes of a witness interview, then those notes should qualify as a statement under the statute.[30] However, as *Harper* illustrates, where a prosecutor or police officer fails to take notes or takes only incomplete notes of a witness interview, the defendant is left without a remedy.[31] This scheme incentivizes the State to not memorialize witness statements lest they be discoverable at trial.[32]

Alternatively, many Arkansas prosecutors elect to forego the rigid text of the codified discovery provisions and engage in open-file discovery.[33] The Arkansas Supreme Court has outlined a simple black-letter rule for open-file discovery:

> If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practicable effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file.[34]

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28. *Id.* at 6-7, 592 S.W.3d at 713. Despite the fact that the court did not address the inverse proposition that there is no guarantee that the quoted portions were *inaccurate*, this reasoning leads to the conclusion that statements may be withheld on the basis of poor investigative work by the State.

29. *Harper*, 2020 Ark. App. 4, at 7, 592 S.W.3d at 713.

30. *See supra* notes 20-22 and accompanying text.

31. *See Harper*, 2020 Ark. App. 4, at 5-7, 592 S.W.3d at 712-13.

32. *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 586, 601 (2006) (noting that open-file policies can also incentivize police and prosecutors "to not reduce their knowledge to writing[,]" therefore excluding it from what must be disclosed).

33. *See, e.g.*, Smith v. State, 352 Ark. 92, 107, 98 S.W.3d 433, 442 (2003); Rogers v. State, 2014 Ark. App. 133, at 4, 6, 2014 WL 668207, at *2-3. Arkansas Rule of Criminal Procedure 17.2 gives prosecutors the choice to comply with discovery through an "open-file" policy by notifying defense counsel that material held by the prosecutor may be inspected. ARK. R. CRIM. P. 17.2(b). Open-file policies are often carried out by the prosecutor simply delivering his entire file to defense counsel. *See* THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2 (2007). Note that the Arkansas courts and practitioners use a different set of definitions for "open-file" and "closed-file" than do Turner and Redlich. *See supra* note 12.

34. *Smith*, 352 Ark. at 107, 98 S.W.3d at 442.

Furthermore, "[m]erely because the prosecutor declares that the files in the case are open, it cannot be taken to mean that he has fulfilled his discovery obligations."[35] For example, a prosecutor may not cite an open file but also direct defense counsel to seek discoverable materials from other government agencies or personnel.[36]

Thus, while the black-letter rules of discovery provide for a narrow list of discoverable materials, prosecutors may relieve themselves of the burden of sifting through their files and picking which materials are actually responsive to a discovery request by simply allowing full disclosure of their case files to defense counsel.[37] Unfortunately for defense counsel in Arkansas, the Arkansas courts have seemed to reject the spirit and plain language of the rule that open-file discovery be "complete." While not yet explicitly stated, the Arkansas courts have provided dicta or holdings that lend support to the proposition that even under an "open-file policy," the State is merely obligated to make sure the open file contains the specifically enumerated materials listed in Rule 17.1 rather than actually be "complete" with *all* materials held by the State.[38]

For example, in *Hathcock v. State*, when presented with defense complaints of "surprise" testimony in a case where the State provided an open file, the State argued it "was not obligated to outline the exact course of potential testimony of its witnesses."[39] The Arkansas Supreme Court agreed and cited case law stating Rule 17.1 only obligates disclosure of witness *names* and not witness *statements*.[40] Similarly, in *Woods v. State*, the

35. Bussard v. State, 295 Ark. 72, 79-80, 747 S.W.2d 71, 75 (1988); *see also* Earl v. State, 272 Ark. 5, 13, 612 S.W.2d 98, 102 (1981) (discussing how the prosecution's open-file policy "may be a time saver for both the State and the defense; however, [] it often results in the court being unable to determine whether discovery has been complied with under the Arkansas Rules of Criminal procedure [sic].").

36. Dever v. State, 14 Ark. App. 107, 112, 685 S.W.2d 518, 520-21 (1985).

37. *See Rogers*, 2014 Ark. App. 133, at 5-6, 2014 WL 668207, at *3-4 (finding the defendant did not show that he was prejudiced by the State's failure to list a witness on the witness list as required under Rule 17.1 where the witness's name and statement were provided to the defendant in the State's open file).

38. *See* Hathcock v. State, 357 Ark. 563, 573-74, 182 S.W.3d 152, 159 (2004); Woods v. State, 323 Ark. 605, 609-10, 609 n.3, 916 S.W.2d 728, 730-31 (1996).

39. 357 Ark. at 573, 182 S.W.3d at 159.

40. *Id.*

State sought to introduce opinion testimony from a detective regarding bullet holes.[41] The State argued it had an open file but conceded that the testimony was based on conversations between the prosecutor and the detective and not contained in a police report in the "open" file.[42] Ultimately, the Arkansas Supreme Court did not reach the merits of the objection, holding it was not properly made at trial; however, the court did provide a footnote citation stating the "[s]ubstance of testimony by *witnesses* is not required under Rule 17.1."[43]

Again, while neither *Hathcock*, *Woods*, nor another case has yet to explicitly hold that an "open" file need not actually be "complete" and include witness statements, there is clearly a common thread demonstrating that the courts dismiss complaints about the adequacy of "open" files by relying on the narrow language of Rule 17.1. Because the Arkansas Appellate Courts have not yet fully articulated what it means for a file to be "open" in regard to witness statements, police reports, or surprise testimony in general, defense counsel access to witness statements and police reports may be a mere courtesy extended by the benevolence of our local prosecutors.[44]

B. Statutorily Permitted Depositions in Criminal Cases

If defense counsel does not have a firm procedural or statutory claim to discover witness statements or police reports, the question then becomes to what extent may defense counsel independently discover such material? As a threshold matter, unfortunately, one of the Arkansas defense bar's most invaluable tools, the Arkansas Freedom of Information Act ("FOIA"),[45] cannot aid in the discovery of police reports or witness statements

41. 323 Ark. at 609-10, 916 S.W.2d at 730-31.

42. *Id.*

43. *Id.* at 609 n.3, 610, 916 S.W.2d at 730-31.

44. *See generally* Prosser, *supra* note 32, at 606-07 (noting how open-file policies do not solve problems related to discovery of information not "reduced to writing").

45. ARK. CODE ANN. §§ 25-19-101—112.

included therein.[46] Police reports relating to open and ongoing criminal investigations are not discoverable under FOIA.[47]

Now, a defense attorney obviously has the freedom to contact any potential witness or police officer to see if she is willing to discuss the case. However, two problems still exist. First, we have to acknowledge that defense attorneys do not always represent popular clients, and in many cases, the most vital witnesses are actually the victims of the defendant. Witnesses may have legitimate reasons to be unwilling to talk with defense counsel.[48] Second, even if a witness does talk with defense counsel, a preservation problem arises. If the witness changes her testimony at trial from what she initially told defense counsel, how does the attorney address the discrepancy without making himself a witness in the case? While a diligent defense attorney's investigation of a case should routinely involve contacting witnesses, there is still the sober reality that witnesses are not always as free to discuss the case with defense attorneys as they are with prosecutors,[49] and an effective cross-examination is not built on a line of impeachment where the attorney is forced to pit his credibility against the witness's in front of the jury.

Then, if a defense attorney cannot obtain witness statements or police reports in a discovery request to the prosecutor, *and* he cannot obtain them through a FOIA request, *and* the witnesses are reluctant to talk with the defense attorney, can he possibly depose them to obtain their statements? To be blunt, no.

"In Arkansas, 'the right to take depositions rests upon statutory authority and in no case can the right be exercised unless

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46. In criminal investigations, witness statements in the government's possession are primarily going to have been made to law enforcement officers and therefore included in police reports.

47. ARK. CODE ANN. § 25-19-105(b)(6) (2021) (exempting from public inspection "[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity"); Martin v. Musteen, 303 Ark. 656, 660, 799 S.W.2d 540, 542 (1990) ("[I]f a law enforcement investigation remains open and ongoing it is one meant to be protected as 'undisclosed' under the act.").

48. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1095 (2014) (noting defense counsel is free to conduct informal discovery requests of witnesses but "there is also no right to a response").

49. *See infra* note 78 and accompanying text.

the authority therefor exists.'"[50] Arkansas law currently only provides for two types of perpetuation depositions, as opposed to general discovery depositions.[51]

1. Depositions of Child Sex Offense Victims

First, prosecutors are allowed to petition the court for leave to take a videotaped deposition of any alleged victim of a sexual offense or attempted sexual offense under the age of seventeen.[52] This limited manner of deposition requires both the physical presence of the defendant and his attorney and cross-examination of the witness.[53] It is a limited tool to preserve and present the testimony of a child sex crime victim without requiring the child to testify live in a courtroom full of strangers.[54] However, this is a one-sided tool allowing the State to request the deposition in lieu of live testimony at trial—it does not give the defendant or his attorney any greater advantage in preparation as to what the testimony of the witness may be until it is already being taken on the record.

2. Depositions of Absent Material Witnesses

Second, both parties may move for permission to take a deposition of a material witness who is anticipated to be unable to testify at trial.[55] Again, this type of deposition is of no use as a discovery tool because it merely allows a defendant to *preserve* already known testimony from a witness. A defendant would seemingly only use this tool to depose one of his own witnesses. Although, perhaps, there may be the rare circumstance where this manner of deposition is invoked by the State for one of its

50. McDole v. State, 339 Ark. 391, 399, 6 S.W.3d 74, 79 (1999) (quoting Russell v. State, 269 Ark. 44, 47, 598 S.W.2d 96, 97 (1980)).

51. Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 856 n.82 (1995) ("Perpetuation depositions are allowed to preserve the testimony of witnesses who may be unavailable for trial."); William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 487 (2021) ("Discovery depositions, as their name suggests, are tools for discovering new information from or about the deponent.").

52. ARK. CODE ANN. § 16-44-203(b) (1983).

53. ARK. CODE ANN. § 16-44-203(b).

54. *See* ARK. CODE ANN. § 16-44-203(c)-(d).

55. ARK. CODE ANN. §§ 16-44-201(a), 202(a) (1979 & 2005).

witnesses, allowing the defendant to discover the witness's testimony before trial. However, even though the testimony would be discovered before trial, it would still be discovered "live" to the defense attorney during the deposition, and therefore, still fraught with all the burdens of fashioning a defense in the middle of trial.

Accordingly, Arkansas currently only allows for preservation depositions of child sex offense victims and absent material witnesses—neither of which is generally of any investigative use to the defense bar.

C. Discretionary Authority to Order Depositions Under Ark. R. Crim. P. 17.4

Although there is no mandatory authority to compel a witness deposition, the Arkansas Rules of Criminal Procedure provide a discretionary catch-all provision allowing the court to order additional discovery of "other relevant material and information upon a showing of materiality to the preparation of the defense."[56] Thus far, the Arkansas appellate courts have hinted that depositions fall under this authority but have ultimately been reluctant to accept arguments that depositions are ever actually appropriate under Rule 17.4.[57] The decisions discussing the discretionary grant of depositions are plagued by vagueness and lack any guidance to trial courts or defense counsel as to when—if ever—a deposition may be appropriate under Rule 17.4.

In *Sanders v. State*, the defense attorney requested permission to depose two out-of-state witnesses who refused to speak with him.[58] He naturally claimed their refusal to speak with him inhibited his ability to prepare for trial.[59] However, the Arkansas Supreme Court summarily rejected his argument, noting that he was allowed to cross-examine the witnesses at trial

56. ARK. R. CRIM. P. 17.4(a).

57. *See* Sanders v. State, 276 Ark. 342, 344-45, 635 S.W.2d 222, 223 (1982); Hoggard v. State, 277 Ark. 117, 120-21, 640 S.W.2d 102, 104-05 (1982); Caldwell v. State, 319 Ark. 243, 247-48, 891 S.W.2d 42, 45 (1995); Spencer v. State, 285 Ark. 339, 339-40, 686 S.W.2d 436, 437 (1985); Misskelley v. State, 323 Ark. 449, 472-73, 915 S.W.2d 702, 714 (1996).

58. 276 Ark. at 344, 635 S.W.2d at 223.

59. *Id.*

and that he did not argue that he was not provided with their statements after they testified on direct examination, pursuant to statute.[60] The court simply stated, "neither the statutes nor the rule [17.4] provides for the taking of a deposition under the circumstances present in this case."[61]

Noticeably missing from the court's analysis is what circumstances *would* warrant the taking of a deposition—especially considering the facts present of non-cooperative out-of-state witnesses.[62] Unfortunately, this theme has continued through the limited body of cases denying defense requests to conduct discovery depositions. The Arkansas Supreme Court has indirectly acknowledged this lack of clarity noting, "we said there might be some case in which a deposition might be required, but we have never been presented with such a case."[63]

However, perhaps the most egregious example of the lack of guidance from the Arkansas courts on this point comes from *Misskelley v. State*.[64] The defendant wanted to depose the officers who interrogated him as part of a broader defense strategy to suppress statements made during his interrogation.[65] The trial court "offered to make the officers available for questioning, but would not require them to submit to depositions."[66] The Arkansas Supreme Court held the trial court did not abuse its discretion with this proposal,[67] and in a vacuum, or as a matter of pragmatism, this conclusion is likely sound. If the goal is to obtain information from a witness through compulsory discovery processes, the additional procedural dressings of a stenographer and an oath at an interview to elevate it to a deposition may have

60. *Id.* at 344-45, 635 S.W.2d at 223.

61. *Id.* at 345, 635 S.W.2d at 223.

62. *See id.* at 344-45, 635 S.W.2d at 223.

63. Caldwell v. State, 319 Ark. 243, 248, 891 S.W.2d 42, 45 (1995); *see also* Hoggard v. State, 277 Ark. 117, 120-21, 640 S.W.2d 102, 104-05 (1982) ("We prefer to leave the decision . . . to the trial judges to be exercised on a case-by-case basis . . . ."); Spencer v. State, 285 Ark. 339, 339-40, 686 S.W.2d 436, 437 (1985) (citing *Hoggard* and failing to articulate any standard for when a deposition may be warranted).

64. 323 Ark. 449, 472-73, 915 S.W.2d 702, 714 (1996).

65. The defendant in *Misskelley* raised a detailed and multi-faceted argument about the voluntariness of his confession. *Id.* at 464-72, 915 S.W.2d at 710-14.

66. *Id.* at 472, 915 S.W.2d at 714.

67. *Id.* at 472-73, 915 S.W.2d at 714.

little extra value.[68] However, the grave problem with *Misskelley* is not the conclusion but, once again, the analysis—or lack thereof. The Arkansas Supreme Court stated:

> We have never held that a defendant should be allowed to depose interrogating officers. The public policy considerations alone dictate that depositions of police officers should not be taken as a matter of routine, but only in rare cases, subject to the trial court's discretion. A defendant's discovery needs are ordinarily met by the broad access given to him by the Rules of Criminal Procedure.[69]

The court readily cited "public policy considerations" as justification alone to make deposing police officers presumptively unreasonable.[70] Yet, the court failed to explain *what* public policy considerations it is referring to. This conclusion is completely devoid of any support. The court presents what appears to read as a black-letter rule without *any* supporting analysis or discussion.[71] The opinion nakedly cites "public policy considerations" and ends the conversation. Fortunately, this passage may simply be one of those obscure lines of dicta present in our case law without any real consequence because this language does not appear to have been cited or repeated in the twenty-five years since it was first published.

Thus, while Rule 17.4 theoretically supports a trial court permitting defense discovery depositions, there is no clear guidance as to what circumstances would warrant such an exercise of discretion.

D. Prosecutor's Subpoenas (read: Depositions)

Of course, criminal discovery in Arkansas is not a balanced system, as the State currently enjoys the power to conduct discovery depositions of prospective witnesses. Arkansas prosecutors are afforded the privilege of issuing what are

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68. *But see* ARK. R. EVID. 801(d)(1) (allowing the use of prior statements given at a deposition as substantive evidence for the truth of the matter asserted rather than merely as impeachment material).

69. *Misskelley*, 323 Ark. at 472-73, 915 S.W.2d at 714.

70. *See id.* at 472, 915 S.W.2d at 714.

71. *See id.* at 472-73, 915 S.W.2d at 714.

colloquially referred to as "prosecutor's subpoenas."[72] Since Arkansas allows for charge by information[73] or indictment,[74] a prosecutor's subpoena is designed as an investigative procedural equivalent to examining a witness before a grand jury.[75] However, this power to examine witnesses is actually greater than that inherent in examining a witness before a grand jury because a prosecutor may subpoena and examine a witness not only in the initial investigation of a case, but also in preparation for trial *after* charges have been filed.[76] Perhaps the most unbalanced aspect of this investigative power is that prosecutors are free to subpoena and question defense witnesses before trial.[77] In fact, doing so would actually be the most natural use of the prosecutor's subpoena—to examine the defense's witnesses—because a prosecutor ordinarily would have little need to use the formal process to question the State's witnesses.[78] Indeed, the prosecutor's subpoena is a powerful tool allowing the State to unilaterally discover the details of the defendant's defense.[79] Although not titled as "depositions," the prosecutor's subpoena allows the prosecutor to compel a witness to attend at a certain time and place and give testimony under oath.[80] That checks all

72. ARK. CODE ANN. § 16-43-212(a) (2005); Holt v. McCastlain, 357 Ark. 455, 467, 182 S.W.3d 112, 120 (2004).

73. ARK. CODE ANN. § 16-85-302 (1947).

74. ARK. CODE ANN. § 16-85-401 (1947).

75. ARK. CODE ANN. § 16-43-212(a) ("Such oath when administered by the prosecuting attorney or his or her deputy shall have the same effect as if administered by the foreman of the grand jury."); *Holt*, 357 Ark. at 467, 182 S.W.3d at 120 (noting the prosecutor's subpoena is a functional equivalent to questioning before a grand jury).

76. Todd v. State, 283 Ark. 492, 493, 678 S.W.2d 345, 346 (1984).

77. *See* Neal v. State, 320 Ark. 489, 495, 898 S.W.2d 440, 444 (1995) (no error to allow the State to subpoena and examine defense witnesses one month before trial).

78. David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 87, 89-90 (1961) (discussing the psychological advantage enjoyed by the State with regard to witness cooperation and how "[l]ikely the reason that one does not hear proposals to allow the [S]tate to take discovery depositions of witnesses other than defendant is that realistically there is no need of such depositions because the informal availability of witnesses to the [S]tate's interrogation is generally satisfactory").

79. *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1191-92 (1960) ("Fairly clearly, pretrial discovery by the prosecution is far-reaching. And it cannot in any sense be said to be matched by what is available to the defendant or by what he can keep from the prosecution . . . .").

80. ARK. CODE ANN. § 16-43-212(a) (2005).

the boxes of a deposition,[81] and is in essence, a de facto deposition.

Simply put, in Arkansas, prosecutors can conduct discovery depositions, but defense attorneys cannot.

Let's reset the table here to collect our rules. First, the United States Constitution only mandates the discovery of exculpatory and impeachment material[82] and that the State's discovery rules be reciprocal in favor of the defendant.[83] Second, Arkansas defendants are only entitled to discover witness names and addresses but not witness statements or police reports,[84] and voluntary disclosure under open-file discovery may not necessarily broaden these requirements.[85] Third, Arkansas defendants are only entitled to receive "substantially verbatim" prior statements of witnesses in the middle of trial.[86] Fourth, Arkansas defendants are only entitled to take perpetuation depositions under narrow circumstances.[87] Fifth, Arkansas defendants may seek discretionary permission to engage in witness depositions, but the only guidance ever provided on the propriety of such depositions states that as a matter of "public policy," police officers should rarely be deposed.[88] Sixth, Arkansas prosecutors are allowed to subpoena (effectively depose) any witness, including the defendant's witnesses, and thereby discover the nature of the defense before trial.[89] Bottom line, an Arkansas defense attorney has no right to see a witness statement before trial or compel a witness to speak with him, whereas an Arkansas prosecutor can compel defense witnesses to appear for questioning and discover the nature of their prospective testimony. But wait, how does the prosecutor subpoena comply with the first rule about reciprocity?

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81. *See* ARK. R. CIV. P. 30 (a), (c) (setting out the procedures and requirements for a deposition).

82. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-54 (1972).

83. *See supra* note 10 and accompanying text.

84. *See supra* notes 12-15 and accompanying text.

85. *See supra* notes 38-44 and accompanying text.

86. *See supra* notes 17-22 and accompanying text.

87. *See supra* notes 50-55 and accompanying text.

88. *See supra* notes 64-71 and accompanying text.

89. *See supra* notes 72-81 and accompanying text.

In *Wardius v. Oregon*, the United States Supreme Court held that an Oregon notice-of-alibi statute was unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment because it did not provide for reciprocal discovery rights for the defendant.[90] The Oregon statute required the defendant to give the State notice of the nature of his alibi defense and the names and addresses of witnesses who would testify in support of the alibi without requiring the State to disclose rebuttal witnesses.[91] Because the defendant did not properly give the State notice of his alibi pursuant to the statue, both he and another witness were not permitted to testify as to the defendant's whereabouts, and the defendant was ultimately convicted.[92]

The Court recognized notice-of-alibi rules "are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."[93] The Court also acknowledged that "increasing the evidence available to both parties, enhances the fairness of the adversary system."[94] Yet, this principle is currently absent from the Arkansas scheme of criminal discovery. The Court then readily distinguished the nature of the Oregon statute with the notice-of-alibi rule upheld in *Williams v. Florida*, explaining that the Florida rule was "carefully hedged with reciprocal duties requiring state disclosure to the defendant."[95] Unlike the Florida rule, the Oregon statute required the defendant to disclose the names and addresses of his alibi witnesses, but did not require the State to disclose the names and addresses of witnesses it planned to use in rebuttal.[96]

The Court's holding in *Wardius* is founded on a simple idea of reciprocity and "balance":

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be

90. 412 U.S. 470, 472 (1973).
91. *Id.* at 471-72, 472 n.3.
92. *Id.* at 472-73.
93. *Id.* at 473.
94. *Id.* at 474.
95. *Wardius*, 412 U.S. at 474-75 (quoting Williams v. Florida, 399 U.S. 78, 81 (1970)).
96. *Id.* at 470, 472 n.3.

> afforded, it does speak to the balance of forces between the accused and his accuser . . . . [I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.[97]

The Supreme Court's language is clear and simple. Where a state imposes discovery obligations to the detriment of the defendant, due process demands he receive a reciprocal benefit from discovery against the State. The Court's reasoning is founded in both common sense and the practical reality of the logistical disparity between the State and the individual:[98] "Indeed, 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."[99]

Accordingly, *Wardius* says in plain language that it is "fundamentally unfair" for a defendant to be required to disclose the details of his defense without reciprocal discovery of the State's rebuttal.[100] How then, may a prosecutor subpoena and examine defense witnesses under oath, but a defense attorney may not subpoena and examine state witnesses under oath? The short answer is that the Arkansas courts have grievously erred on this point and failed to properly apply the import of *Wardius*.

The Arkansas Supreme Court first examined a complaint that the unilateral prosecutor's subpoena power violated due process under *Wardius* in *Alford v. State*.[101] The defendant in *Alford* argued it was unfair that the State was able to subpoena a witness and obtain his statement before trial whereas the defendant could only obtain a prior statement of the witness after

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97. *Id.* at 474-76 (internal citation omitted).
98. *See id.* at 475 n.9.
99. *Id.*
100. *Wardius*, 412 U.S. at 476.
101. 291 Ark. 243, 250, 724 S.W.2d 151, 155 (1987).

he testified on direct.[102] Because the witness in question was called in the defense's case-in-chief, the defendant argued the prosecutor's subpoena enhanced the State's cross-examination capabilities.[103] The Arkansas Supreme Court rejected the defendant's challenge stating that the State did not abuse its subpoena power "in an effort to obtain witnesses against the appellant or to secrete their testimony from him before trial."[104] The court summarily rejected the defendant's citation to *Wardius* by stating that the witness in question was a defense witness, and therefore, not a witness "against the appellant."[105]

The Arkansas Supreme Court next revisited this topic in *Parker v. State*, decided just a few months after *Alford*.[106] The defendant in *Parker* raised the same argument that he was denied reciprocal subpoena power over the State's witnesses when the State subpoenaed and examined his expert witness.[107] The court again summarily rejected the argument stating, "[a]s in *Alford*, the only witness subpoenaed by the [S]tate was called by the defense to testify, rather than by the prosecution, and there is no indication of abuse by the prosecutor of the subpoena power or that any testimony was hidden from Parker."[108] Again, the Arkansas Supreme Court dismissed the appeal to *Wardius* because the only witness subpoenaed was a defense witness.

A more unique claim was presented in *Armstrong v. State*, where the defendant argued that because he was not given reciprocal subpoena power, the charges against him should have been dismissed.[109] Aside from rejecting this claim based on a lack of authority for the proposition that the appropriate remedy for such a violation would be a dismissal of the charges, the Arkansas Court of Appeals went on to rely on the familiar reasoning from *Alford* and *Parker*.[110] The Court of Appeals noted that "all but one" of the subpoenaed witnesses were called by the defense

102. *Id.*
103. *Id.*
104. *Id.* at 251, 724 S.W.2d at 155.
105. *Id.* at 250-51, 724 S.W.2d at 155.
106. 292 Ark. 421, 430-31, 731 S.W.2d 756, 761 (1987).
107. *Id.* at 430-31, 731 S.W.2d at 761.
108. *Id.* at 432, 731 S.W.2d at 761.
109. 45 Ark. App. 72, 81, 871 S.W.2d 420, 426 (1994).
110. *Id.* at 82, 871 S.W.2d at 426.

rather than the State and the defendant did not claim any surprise as to the testimony of the one witness called by the State.[111]

In all three instances when the Arkansas courts have examined this issue regarding *Wardius* and the prosecutor's subpoena, the courts have failed to address both the actual substance of *Wardius* and the claims of the respective defendants.[112] The overriding theme in each opinion's brief analysis is that *Wardius* has no application when it is the defense's witnesses that are subpoenaed.[113] This emphasis on the fact that defense witnesses were subpoenaed is absolutely contradictory to the plain reading of *Wardius*. *Wardius* held it was unfair for the State to require a defendant to disclose the names of his alibi witnesses, so that the State may then interview those witnesses and prepare a rebuttal, without requiring the State to disclose the names of its rebuttal witnesses.[114] The *Wardius* Court held it was unfair to require the defendant to give up his case but remain subjected to surprise refutation by the State.[115] This is the entire point that has yet to be squarely addressed by the Arkansas courts. It is unfair for the State to have a deposition power over the defense's witnesses, to question them and learn the nature and details of the defense, while requiring the defendant to remain blind as to the State's case-in-chief.[116]

By deposing defense witnesses, a prosecutor gains not only knowledge of the defensive strategy, but also invaluable cross-examination material. If a defense witness's testimony deviates however slightly from what he previously stated under oath to the prosecutor, the prosecutor has free ammunition to shoot down the

111. *Id.*

112. *See supra* notes 101-11 and accompanying text.

113. *See supra* notes 101-11 and accompanying text.

114. Wardius v. Oregon, 412 U.S. 470, 475-76 (1973).

115. *Id.*

116. The Utah Supreme Court has indicated its agreement on this point. In *Gutierrez v. Medley*, the Utah Supreme Court held that under Utah's parallel "Subpoena Powers Act," a prosecutor could only issue subpoenas *prior* to charges formally being filed but not *after*, as is allowed in Arkansas. 972 P.2d 913, 917 (Utah 1988). Citing to *Wardius*, the court noted that if the prosecutor could issue such subpoenas, the act would be constitutionally suspect: "Furthermore, we note that had the legislature clearly stated that the Act applied after the filing of charges without adding other substantive provisions permitting a defendant to present evidence, confront the witness, and engage in reciprocal discovery, the Act might have then been of questionable constitutional validity." *Id.* at 917 n.3.

defense. More importantly, the prosecutor will likely have this information well in advance of trial, giving him plenty of time to outline and strategize his attack. Conversely, the best a defense attorney can hope for is that someone wrote down a "substantially verbatim" record of a previous statement by the witness and that he can cobble together an effective line of questioning in the halls of the courthouse before the trial resumes.[117]

While not explicitly outlined in *Alford*, *Parker*, or *Armstrong*, each opinion's reference to surprise and the subpoenaing of defense witnesses seems to suggest a misapplication of *Wardius*. The Arkansas courts seem to have rejected the *Wardius* challenges to prosecutor's subpoenas based on an improper framing of the nature of the challenges. The courts seem to frame the challenge not as a complaint that the State is able to subpoena defense witnesses, but rather, as a complaint that the defendant is unable to also subpoena his own witnesses. There is an implied reasoning in the cases that the defendant does not also need the ability to subpoena his own witnesses because he can avoid surprise by talking to his witnesses and asking them about what happened during their depositions with the prosecutor or by receiving a copy of their recorded statements. However, this misses the point. The real *Wardius* challenge is not that it is unfair for a prosecutor to subpoena a defense alibi witness without allowing the defendant to depose that same witness. The true application of *Wardius* is to say that it is unfair for the prosecutor to subpoena a defense alibi witness without allowing the defendant to equally depose the *State's* witnesses.[118] *Wardius*, at its simplest reading, holds that when the defendant has to turn over his witnesses' names, the State has to turn over its witnesses' names too.[119] Currently, the Arkansas courts have not yet squarely addressed how, under *Wardius*, the defense has to turn over its witnesses' testimony, but the State is allowed to conceal its witnesses' testimony.

Accordingly, it is my position that Arkansas's current law, which essentially allows prosecutors to conduct discovery

117. *See supra* notes 18-32 and accompanying text.
118. *See Wardius*, 412 U.S. at 471-72.
119. *Id.* at 475-76.

depositions of defense witnesses without allowing defense attorneys to conduct discovery depositions of State witnesses, is unjust, unfair, and unconstitutional under *Wardius*.

E. *McDole v. State* and a Failed Constitutional Challenge to Arkansas Criminal Discovery

The leading case in Arkansas discussing the disparity between civil litigants and criminal litigants and the use of discovery depositions is *McDole v. State*.[120] In *McDole*, the Arkansas Supreme Court rejected the argument that it violates a criminal defendant's rights to provide compulsory depositions in civil cases but not in criminal cases.[121] The court rejected the defendant's attack on multiple fronts. The court began its analysis by noting that Arkansas law only allows for depositions to preserve material testimony "but does not allow a criminal defendant to simply set up depositions at will and compel attendance as in a civil case."[122] The court emphasized the historical underpinning of this scheme, stating, "[a]pparently, this has always been the law in Arkansas."[123] The court then turned to the Compulsory Process Clause of the Arkansas Constitution[124] and provided a line of citations for three seemingly inapposite propositions: (1) that the Compulsory Process Clause does not require that *every* witness testify at trial; (2) that *specific* witnesses do not have to testify if the same facts can be established through other witnesses; and (3) that witnesses without relevant testimony are not required to testify.[125] The court then turned to "the federal side" and cited *Wardius* for the familiar proposition that there is no general constitutional right to pretrial discovery.[126] Lastly, and most relevantly, the court examined the claim that it violated the Equal Protection Clause to

120. 339 Ark. 391, 398, 6 S.W.3d 74, 79 (1999).
121. *Id.* at 400-01, 6 S.W.3d at 80-81.
122. *Id.* at 398-99, 6 S.W.3d at 79.
123. *Id.* at 399, 6 S.W.3d at 79.
124. ARK. CONST. art. 2, § 10.
125. *McDole*, 339 Ark. at 400, 6 S.W.3d at 80.
126. *Id.*

allow depositions in civil cases but not in criminal cases.[127] In rejecting this claim, the Arkansas Supreme Court stated:

> Equal protection does not require that persons be dealt with identically; it only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that their treatment be not so disparate as to be arbitrary. The issue of equal protection involves "whether people in the same situation are being treated differently . . . ." While both criminal and civil defendants may be called litigants, they are far from similarly situated.[128]

What is missing from the court's holding is the reasoning as to exactly *why* and *how* civil and criminal litigants are differently situated to justify the disparate treatment.[129] To forego lofty metaphors or analogies about the principles of justice, it is easier to just imagine a simple hypothetical case. A man is accused of getting into a drunken brawl at a bar. He is simultaneously charged by the State with criminal battery and served a civil complaint by the alleged victim for tortious battery. The defendant is the same in both cases. Although the "plaintiff" is a separate entity in both matters, the complaining and chief witness is the same. The relevant facts and witnesses will be the same. Indeed, the testimony produced at each trial should be identical. What then, is the justification for allowing the defendant to depose the alleged victim and any bystander witnesses in the civil suit but not in the criminal case? This is the question *McDole* fails to satisfy. *McDole* reaches a conclusion but fails to explain exactly what legal alchemy takes place that presents a real and substantial policy justification to allow the same person to depose the same witnesses over the same matter to retrieve the same testimony, possibly even in the same court[130] and in front of the

127. *Id.* at 401, 6 S.W.3d at 80.

128. *Id.* at 401, 6 S.W.3d at 80-81 (internal citations omitted).

129. *See id.*

130. Arkansas Supreme Court Administrative Order 14 directs the circuit courts to establish separate divisions for criminal, civil, juvenile, probate, and domestic relations cases. Order 14. Administration of Circuit Courts, (2012). However, "[t]he designation of divisions is for the purpose of judicial administration and caseload management and is not for the purpose of subject-matter jurisdiction. The creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court." *Id.* Accordingly, civil and criminal cases may be heard in the same circuit court.

same judge,[131] for his civil suit but not his criminal suit. How does the man in our hypothetical example become "far from similarly situated" from himself?[132]

We might stereotypically imagine civil litigation as "white-collar" contract disputes between businesses and criminal litigation as "blue-collar" disputes about acts of violence. However, as a general proposition, victim-oriented behavior is equally tortious and criminal. Battery and assault are both torts and crimes.[133] Trespass is a tort and a crime.[134] Theft is a tort and a crime.[135] In fact, Arkansas law currently provides for a catch-all cause of action for any felonious behavior.[136] Under the catch-all statute, not only is the relevant evidence the same, the elements of the cause of action would also be the same, as the civil plaintiff has to prove the elements of the underlying felony.[137] So what justification is there that if a homeowner alleges residential burglary and seeks to take the defendant's money, the defendant is allowed to depose the homeowner and any other potential witnesses, but if the local prosecutor alleges residential burglary and seeks to take the defendant's liberty, the defendant must not be permitted to compel witnesses to speak with him?

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131. Administrative Order 14 states, "[c]ases in a subject-matter division may be exclusively assigned to particular judges, but such assignment shall not preclude judges from hearing cases of any other subject-matter division." *Id.* Indeed, in rural circuits with only one judge, every type of case would have to go in front of the same judge.

132. There is an inherent paradox when comparing the scope of civil and criminal discovery and the respective stakes of each proceeding. *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 25 (2015) ("If the civil *plaintiff*, who seeks primarily the payment of money, must share his evidence in advance of a trial, then surely the *prosecutor*, who seeks the defendant's loss of liberty or life, ought to suffer the same obligations.").

133. Ark. Model Jury Instr., Civil AMI 418 (tort of battery); Ark. Model Jury Instr., Civil AMI 417 (tort of assault); ARK. CODE ANN. §§ 5-13-201—207 (crimes of battery and assault).

134. Barrows/Thompson, LLC v. HB Ven II, LP, 2020 Ark. App. 208, at 20, 599 S.W.3d 637, 649 (listing elements of tort of trespass); ARK. CODE ANN. § 5-39-203 (2021) (crime of trespass).

135. Ark. Model Jury Instr., Civil AMI 425 (tort of conversion); ARK. CODE ANN. § 5-36-103 (2021) (crime of theft).

136. ARK. CODE ANN. § 16-118-107(a)(1) (2011) ("Any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct.").

137. ARK. CODE ANN. § 16-118-107(a)(1)-(2).

Underlying the conclusion in *McDole* is the recognition that "this has always been the law in Arkansas."[138] *McDole* reaches a conclusion that civil and criminal litigants are different because we say they are, but it does not answer the question—*why* do we say they are different? The reality is that the historical support for denying criminal discovery depositions in Arkansas rests on shaky ground and reluctance to change rather than concrete policy.

III. HISTORICAL ORIGINS OF CRIMINAL PROCEDURE

In our modern legal landscape, we accept as a matter of course, the distinction between civil procedure and criminal procedure. This unquestionable tenet surely led to the conclusion in *McDole* that civil litigants and criminal litigants are "far from similarly situated."[139] However, while it may be the natural position today that criminal discovery and civil discovery are different, there is no satisfactory answer as to "why" they must be so different. As this section explores, criminal discovery is only in the limited position it is in today because of a historical desire to favor efficient prosecution of the guilty rather than protection of the innocent, a lack of organized input from the defense bar during the drafting of the modern rules, and a lasting reluctance to update our shared standards of justice.

The Federal Rules of Criminal Procedure have been largely influential on the states,[140] and prior to the adoption of the Arkansas Rules of Criminal Procedure, the Arkansas courts often turned to the federal rules for guidance.[141] For that reason, I begin with a discussion of the history of the Federal Rules of Criminal

138. McDole v. State, 339 Ark. 391, 399, 6 S.W.3d 74, 79 (1999).

139. *Id.* at 401, 6 S.W.3d at 81.

140. Meyn, *supra* note 48, at 1103-04; Turner & Redlich, *supra* note 11, at 303 (categorizing jurisdictions that restrict criminal discovery as following the federal discovery scheme).

141. *See, e.g.*, Lane v. State, 217 Ark. 428, 429, 230 S.W.2d 480, 480 (1950) (citing Fed. R. Crim. P. 46(a)(2) "as illustrative of the reason of our conclusion" in a case involving bail on appeal); Cabbiness v. State, 241 Ark. 898, 900-02, 410 S.W.2d 867, 869-70 (1967) (citing Fed. R. Crim. P. 41(e) in holding it was reversible error for a trial court to hear a suppression motion in the presence of the jury).

Procedure and then turn to a corollary discussion of the history of the Arkansas Rules of Criminal Procedure.

A. Reformation of Common Law Criminal Procedure in Federal Courts

For centuries, under the common law, civil and criminal procedure operated in parallel to each other, judged by the same standards.[142] However, as Professor Ion Meyn reports in his detailed account of the adoption of the Federal Rules of Criminal Procedure, the modern schism between civil and criminal procedure was a concerted effort driven in part by ineloquent prejudices and a lack of representation from defense counsel.[143]

In the early part of the twentieth century, civil procedure underwent a fundamental transformation from the two-stage process of formulaic, technical pleading and a subsequent trial by surprise to an entirely new phase of litigation called discovery in search of factual transparency.[144] The United States Supreme Court heaped praise upon the "innovations" of the expanded discovery procedures stating:

> Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.
>
> . . .
>
> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be

142. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 701 (2017).

143. *Id.* at 727-34. Professor Meyn identifies the forces that he contends influenced the ultimate rejection of the civil reforms for federal criminal procedure as: (1) the strong pro-prosecutor agenda represented by certain members of the committee and a lack of any balancing concerted representation from the defense bar and (2) a historical resistance to change and progressivism in favor of the accused. *Id.* at 727-32.

144. *Id.* at 705-06.

> compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[145]

The reforms were widely accepted and praised, and initially, scholars noted their expectations that the same procedural rules could apply in criminal cases.[146]

In fact, when the United States Supreme Court and Congress turned their attention to promulgating a counterpart set of rules for criminal procedure, the first draft of the Federal Rules of Criminal Procedure adopted the civil discovery rules almost entirely.[147] For instance, the first draft included "depositions, document requests, physical and mental examinations, and requests for admission."[148] Unfortunately, such proposals were met with skepticism, seemingly born not out of reason, but rather, out of the antiquated notion that because we have never done this before, we should not do it now.[149] Professor Meyn's accounting provides a familiar but disappointing line of argument among the committee members: one member argued that depositions make sense in a civil case because you want to find out what the other side is going to say at trial, and another member replied, "that is the trouble. I think you have the idea of civil practice injected into the criminal procedure. To . . . go into the other side's case to examine anybody . . . before trial . . . is a thing you would never think of in a criminal case."[150] This reasoning persists today and is just as unsatisfying. The objection to depositions was merely "that is not the way we do it." If that same logic carried the day when the Federal Rules of Civil Procedure were being considered, then nothing would have ever changed. While we once did not have depositions in civil cases, we eventually saw the wisdom in the better practice of revealing all relevant information during discovery.[151]

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145. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947).

146. Meyn, *supra* note 142, at 709.

147. *Id.* at 706, 720.

148. *Id.* at 720.

149. *See id.* at 712-13.

150. *Id.* at 721.

151. Professor Meyn notes, "Over 50 years ago, the United States Supreme Court stated, '[m]utual knowledge of all the relevant facts *gathered by both parties* is essential to proper litigation.' [Yet, c]riminal law has been spared of this wisdom." Meyn, *supra* note 48, at 1140 (emphasis added) (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

As Professor Meyn accounts, the ultimate decision to leave criminal procedure steeped in vestiges of the common law rather than adopt the wisdom of the civil procedure reform is due largely to one pro-prosecutor committee member's "force of personality" shoving the conversation in one direction[152] and the lack of representation from the defense bar during the discussions to effectively push back.[153] The committee members with criminal litigation experience were almost exclusively prosecutors.[154] With a strong prosecutorial-centered agenda represented at the meetings without an equally concerted agenda on behalf of the defense, the resulting rules skewed heavily in favor of the prosecution.[155] The resulting "reform" was merely to adopt the civil reforms that eased the prosecution's burden, such as relaxed pleading standards, and reject the civil reforms meant to protect the defendant and improve transparency and accuracy, such as formalized discovery procedures.[156]

Not surprisingly, the Supreme Court rejected the committee's first request to distribute a draft to the public because the committee failed to provide a clear rationale for the rules.[157] The truth was, many members of the committee operated under the belief that "criminal law was just different."[158] It was not until later that the leading personality of the committee elaborated that

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152. Meyn, *supra* note 142, at 736. Professor Meyn's article is full of many examples of untenable positions of the Committee's Secretary, Alexander Holtzoff, an Assistant Attorney General. *Id.* at 707-08. Meyn's article repeatedly provides accounts of Holtzoff doing his best to preserve prosecutorial discretion and power and voicing stern opposition to any proposed rules that would slow the criminal justice system. *Id.* at 714-17, 719, 727, 734-35. For example, one of the more egregious positions held by Holtzoff was his approval of three-day dockets in rural courts where, essentially, indictments are on Mondays, pleas are on Tuesdays, and trials are on Wednesdays. *Id.* at 716-17. Holtzoff incredulously argued that it was to a defendant's benefit to be indicted on a Monday and convicted on a Tuesday. *Id.* at 717. Meyn notes, "even today, reading from a flat transcript, Holtzoff flies off the page as relentless." *Id.* at 727.

153. *Id.* at 728-29 (only two members of the committee noted any experience in criminal defense).

154. *Id.* at 728.

155. *Id.* at 724.

156. Meyn, *supra* note 142, at 725-26, 734 ("Led by Holtzoff, the reform of criminal procedure integrated civil rules that increased efficiency, like notice pleading and liberalized joinder, but rejected countermeasures designed to ensure accuracy, like judicial intervention and discovery tools.").

157. *Id.* at 732-33.

158. *Id.* at 733.

the rules were driven by his "tough on crime" philosophy[159] rather than a search for efficiency and truth, as was the rationale for civil procedure reform.

Accordingly, when first up for consideration, the starting point for the Federal Rules of Criminal Procedure was to largely mirror the Federal Rules of Civil Procedure, especially with regard to a robust, formal phase of discovery.[160] However, resistance to change and ineloquent fears of "delay" carried the moment and largely preserved the status quo for criminal litigants, except where benefits for the prosecution could be gained.[161] It cannot be emphasized enough that the affirmative decision to leave criminal trials in the dark was not born out of reasoned policy, but rather, tough on crime sentiments and intuitions that criminal trials are "just different."

B. Origins of the Arkansas Rules of Criminal Procedure

There are also lessons to be learned from the history of the Arkansas Rules of Criminal Procedure. Mainly, we should remind ourselves what standards guided our initial drafting of the rules and what interests were most represented during the process.

In 1971, three workshops were engaged to study the American Bar Association's "Minimum Standards for the Administration of Criminal Justice" and criminal procedure in Arkansas.[162] The procedural committee of the Arkansas Criminal Code Revision Commission set out to draft a codified set of rules

159. *Id.* at 733-34 (quoting Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 121 (1944)) (Holtzoff believed formulating the Rules of Criminal Procedure, "[i]n a larger sense . . . must necessarily crystallize a philosophy of administration of criminal justice . . . . [I]t must be conducive to a simple, effective, and expeditious prosecution of crimes. Perpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. Criminals should not go unwhipped of justice because of technicalities having no connection with the merits of the accusation. The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed.").

160. *Id.* at 698, 705, 720.

161. *See supra* notes 152-56 and accompanying text.

162. *In re* Ark. Crim. Code Revision Comm'n, 259 Ark. 863, 863, 530 S.W.2d 672, 672 (1975).

of criminal procedure for the state.[163] The procedural committee was guided by four goals: "(1) substitution of simple comprehensible language for archaic, verbose phraseology; (2) elimination of procedural practices which are redundant, needless or inconsistent; (3) realignment of procedural rules with constitutional requirements; and (4) development of a fairer, more efficient criminal justice process."[164] While worded differently, these original cornerstones are also reflected in the text of the rules.[165]

In 1971, as this work was first being undertaken, we turned to the American Bar Association's Standards as our guiding light.[166] In 1970, the ABA Standards did not recommend discovery depositions concluding that, on balance, the costs of depositions outweighed what were thought to be marginal benefits.[167] However, the ABA's position has evolved, and today, the ABA's "Standards for Criminal Justice: Discovery" currently calls for allowing both parties to conduct discovery depositions upon leave of court "to prevent unjust surprise at trial."[168] The ABA currently recommends that depositions be allowed upon a showing that the current information or materials disclosed do not adequately apprise the party of the witness's knowledge to prevent surprise at trial and the witness has refused to cooperate in giving a voluntary statement to the moving party.[169] Although, as argued in Part VI *infra*, discovery standards should go even further,[170] the ABA Standards at least recognize some use of discovery depositions in criminal cases. Nothing has changed in Arkansas's personal experience as a state since 1971 that says we

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163. *Id.* at 863, 530 S.W.2d at 673.

164. Petition for Promulgation of Rules of Criminal Procedure at 1, *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (No. 74-345).

165. ARK. R. CRIM. P. 1.3 ("These rules are intended to provide for a just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public interest.").

166. *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. at 863, 530 S.W.2d at 672.

167. John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 678-79 (1988).

168. ABA STANDARDS FOR CRIM. JUST.: DISCOVERY, STANDARD 11-5.2 (AM. BAR ASS'N 2020).

169. *Id.* at 11-5.2(a)(ii)-(iii).

170. *See infra* Part VI.

should no longer pay any heed to the suggestions of the ABA. The ABA's Standards served us in 1971, and they can still serve us today.

Moreover, similar to the circumstances of the drafting of the Federal Rules of Criminal Procedure, it appears that prosecutorial interests were more zealously represented than the interests of the defense bar in crafting the Arkansas Rules of Criminal Procedure, at least as public comment was involved. While the Arkansas Prosecuting Attorneys' Association ("APAA") filed various petitions and briefs offering suggestions to the rules, there were no corresponding petitions from any organizations representing the Arkansas defense bar.[171] Most notable is the now flipped position once held by Arkansas prosecutors. In 1975, the United States Supreme Court decided *United States v. Nobles*, which gave a somewhat unremarkable holding that a federal trial court did not abuse its discretion by requiring the defense to provide the prosecution with limited portions of a private investigator's report for specific impeachment material regarding the investigator's conversations with key prosecution witnesses.[172] However, the APAA took that case-specific holding and argued it led to a broader proposition: "It is clear as a matter of federal constitutional law, defendants can constitutionally be compelled to disclose their defenses, their witnesses *and expected testimony*."[173] In 1975, the Arkansas prosecution bar was arguing that the defense should have to disclose the expected testimony of their witnesses. However, any cursory review of contemporary discovery litigation will reveal the prosecution's current vehement objections to revealing the expected testimony of its witnesses.[174] Of course, the APAA's lobbying for defense witness statements was unnecessary because prosecutors have

171. *See* Case Docket, *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (No. 74-345).

172. Supplemental Brief at 1, *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (No. 74-345).

173. *Id.* at 2 (emphasis added).

174. *See, e.g.*, Thompson v. State, 322 Ark. 586, 588, 910 S.W.2d 694, 696 (1995) (agreeing with the State that the State is under no obligation to provide non-expert witness statements before trial).

long enjoyed the ability to essentially depose defense witnesses.[175]

Looking at the formulation of our discovery rules in Arkansas tells us a couple of things. It reminds us of the goals of fairness and protection of the individual we ought to seek in our ongoing refinement of the rules. It reminds us that we once looked to the ABA Standards for guidance, and we would be well served to keep those same standards in mind today. It reminds us that there was not an equal organized effort to shape the rules by the defense bar as there was by the prosecution, so we should be mindful of what agendas may have tilted the scales at inception. Lastly, it reminds us that there has long been a shared interest by both sides of criminal litigation for valid reasons to discover the anticipated testimony of witnesses. Neither the prosecution nor the defense stands to benefit from surprise at trial, but currently, our rules only seek to protect the prosecution.

IV. PRACTICES AND LESSONS IN OTHER STATES

Because criminal discovery is largely left to the states,[176] it is helpful to see what other jurisdictions are doing in their experiments and what practices might be adopted here in Arkansas.

A. States that Allow Passive Discovery of Witness Statements and Police Reports

A nationwide survey of criminal discovery rules found that currently thirty-four states allow for discovery of witness statements and eighteen states allow for discovery of police reports.[177] However, the list is actually broader than the black-letter rules would indicate. For instance, Iowa and Nebraska do not provide for discovery of witness statements or police reports, and Missouri, Vermont, Indiana, North Dakota, Montana, and Washington all do not provide for discovery of police reports.[178]

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175. *See supra* Section II.D.
176. *See supra* note 11 and accompanying text.
177. Turner & Redlich, *supra* note 11, at app. B at 400-08.
178. *Id.* at app. B at 401-08.

However, as discussed further below, these eight states all allow for defense discovery depositions, which would presumptively allow for discovery of the same information.[179] Similarly, Iowa also requires that when the prosecutor proceeds by information, the defense be given "a full and fair statement of [a witness's] expected testimony."[180] Conversely, while Louisiana allows for discovery of witness statements, it only compels disclosure "immediately prior to the opening statement at trial,"[181] which is only marginally better than the Arkansas mid-trial statute,[182] and therefore, easily discounted. By including the deposition states and excluding Louisiana because of the insufficient timing, it can be said that thirty-five states effectively allow for discovery of witness statements and twenty-six states effectively allow for discovery of police reports.[183] Accordingly, a super-majority of the states require discovery of witness statements, and slightly more than a simple majority require discovery of police reports. Arkansas's restrictive criminal discovery scheme is in the minority on both counts.

B. States that Allow Affirmative Defense Discovery Depositions

In total, thirteen states currently allow for discovery depositions in criminal cases.[184] Seven states allow for depositions as a matter of right and six states require court approval.[185] Vermont, Florida, Indiana, Missouri, Iowa, North Dakota, and New Mexico all allow defense attorneys to conduct discovery depositions as a matter of right without prior court

179. *See infra* Section IV.B.

180. Turner & Redlich, *supra* note 11, at app. B at 402 n.412 (quoting IOWA R. CRIM. P. 2.5(3)).

181. *See* LA. CODE CRIM. PROC. ANN. art. 716(D)(2) (2014) (stating that the "[S]tate need not provide the defendant any written or recorded statement of its witnesses until immediately prior to the opening statement at trial").

182. *See supra* notes 18-19 and accompanying text.

183. In 1990, Justice William Brennan reported that only fourteen states permitted discovery of witness statements as of right, and another eight states permitted such discovery upon leave of court. Brennan, *supra* note 1, at 10-11. This illustrates the reality that across America there has been a trend to increase criminal discovery.

184. *See infra* notes 186-89.

185. *See infra* notes 186-87.

approval.[186] New Hampshire, Texas, Arizona, Nebraska, Montana, and Washington all allow for discovery depositions upon leave of the court for good cause.[187] These jurisdictions generally allow for depositions when a defendant can show a deposition is necessary to avoid surprise testimony[188] or because the witness refuses to voluntarily speak with defense counsel.[189]

While Indiana has the broadest rule, stating in its entirety, "[t]he [S]tate and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure,"[190] the other jurisdictions contain various restrictions on the use of depositions, even when available as of right. For example, Vermont and Florida both limit the use of depositions as of right to felony prosecutions and require the defendant to show "good cause" for a deposition in a misdemeanor prosecution.[191] Florida even provides for further categorization,

186. VT. R. CRIM. P. 15(a); FLA. R. CRIM. P. 3.220(h)(1); IND. CODE § 35-37-4-3 (1981); MO. SUP. CT. R. 25.12(a); IOWA R. CRIM. P. 2.13(1); N.D. R. CRIM. P. 15(a); N.M. R. CRIM. P. DIST. CT. 5-503(B). Technically, the New Mexico rule only allows for depositions if the parties agree or upon court order "to prevent injustice," and the commentary to the rule indicates the right is therefore "limited to the situation where the person will be unable or unwilling to attend the trial or a hearing." N.M. R. CRIM. P. DIST. CT. 5-503(B)(2), *commentary*. However, a separate portion of the same rule allows for defendants to subpoena witnesses to give "[s]tatements." N.M. R. CRIM. P. DIST. CT. 5-503(A). One scholar has noted that the rule effectively allows for a less formal version of a deposition: "In New Mexico, parties may issue a pretrial subpoena and take a recorded statement—an affordable 'dirty deposition' subject to wide use, more cost-effective than a traditional deposition, and a tool that demonstrates how innovations to formal investigatory tools might respond to concerns particular to the criminal justice system." Meyn, *supra* note 48, at 1110. New Mexico also gives defendants the same ability to subpoena witnesses for interviews for low-level offenses in front of metropolitan or magistrate courts. N.M. R. CRIM. P. METRO. CT. 7-504(C)(1); N.M. R. CRIM. P. MAGIS. CT. 6-504(D). For these reasons, I include New Mexico among the jurisdictions that allows for discovery depositions as a matter of right.

187. N.H. REV. STAT. ANN. § 517:13(II)(b) (2004); TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 2005); ARIZ. R. CRIM. P. 15.3(a); NEB. REV. STAT. § 29-1917(1) (2020); MONT. CODE ANN. § 46-15-201(1)(c) (1993); WASH. SUPER. CT. CRIM. R. 4.6(a).

188. *See, e.g.*, N.H. REV. STAT. ANN. § 517:13(II)(b) (allowing depositions "[t]o ensure a fair trial, avoid surprise or for other good cause shown").

189. *See, e.g.*, ARIZ. R. CRIM. P. 15.3(a)(2) (allowing a deposition where a witness's testimony is material or necessary for preparation of the defense, the witness was not previously examined at a preliminary hearing, and the witness "will not cooperate in granting a personal interview"); WASH. SUPER. CT. CRIM. R. 4.6(a)(2) (allowing depositions where "a witness refuses to discuss the case with either counsel and the witness's testimony is material and necessary").

190. IND. CODE § 35-37-4-3.

191. VT. R. CRIM. P. 15(e)(4); FLA. R. CRIM. P. 3.220(h)(1)(D).

allowing for unilateral depositions of certain types of witnesses, such as eyewitnesses, investigating officers, or expert witnesses, but requires leave of court to depose other, less substantial witnesses.[192] However, Vermont and Florida both prohibit deposing law enforcement officers who engage in only minor "ministerial" roles or whom the prosecution does not intend to call at trial.[193]

Also, in an effort to curb witness intimidation, Vermont, Florida, Missouri, and Arizona all place restrictions on the physical presence of the defendant at the deposition.[194] Conversely, North Dakota allows defendants to be present except when they are in custody, where they must obtain leave of court.[195] Relatedly, while many of the states have broad catch-all language regarding protective orders to prevent embarrassment or harassment,[196] Vermont, Florida, and New Hampshire all have explicit provisions concerning the depositions of children or other sensitive witnesses. Vermont creates a presumption that children

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192. FLA. R. CRIM. P. 3.220(h)(1)(A) (allowing for unilateral deposition of "Category A" witnesses); FLA. R. CRIM. P. 3.220(h)(1)(B) (requiring leave of court to depose "Category B" witnesses). Category A witnesses include:

> (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

FLA. R. CRIM. P. 3.220(b)(1)(A)(i).

193. VT. R. CRIM. P. 15(e)(3)(A); FLA. R. CRIM. P. 3.220(b)(1)(A)(iii) (defining Category C witnesses as those "who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense"); FLA. R. CRIM. P. 3.220 (h)(1)(C) (prohibiting depositions of Category C witnesses).

194. VT. R. CRIM. P. 15(b); FLA. R. CRIM. P. 3.220(h)(7); MO. SUP. CT. R. 25.12(c); ARIZ. R. CRIM. P. 15.3(a)(2), (e) (excluding the defendant's right to be present at a discovery deposition of a witness that would not previously cooperate in granting a personal interview).

195. N.D. R. CRIM. P. 15(f)(1).

196. *See, e.g.*, N.D. R. CRIM. P. 15(a)(4) (providing for the court to address concerns of annoyance, embarrassment, oppression, or burden to the deponent by disallowing the deposition or otherwise limiting the scope and manner of the deposition).

sex-crime victims should not be deposed[197] and the depositions of children and other sensitive witnesses should generally be reached through careful agreement of the parties or intervention by the court.[198] Florida's rule offers the simple solution of having the depositions of children and sensitive witnesses be video recorded or conducted in front of the trial judge or a special magistrate,[199] presumptively to reduce the odds that a defendant or his counsel would seek to intimidate the witness. However, New Hampshire provides the simplest scheme, prohibiting deposing any person under the age of sixteen.[200] Relatedly, though not limited to children, North Dakota and Arizona give *all* alleged victims the right to refuse to submit to a deposition by the defendant.[201]

There is plenty of variation among how these states have chosen to execute criminal discovery depositions, but one conclusion is clear: these states have all decided that the interest in increasing fairness and factual transparency in criminal litigation outweighs the concerns of delay or bad faith on behalf of defendants.[202] Furthermore, the varied schemes adopted by the states shows us that there are numerous ways to address any concerns of abuse of the deposition process rather than simply prohibiting the practice entirely. Most importantly, these states show us that the fears of doomsday opponents of criminal depositions are not realistic. These states have all allowed defense discovery depositions and they have not yet fallen into a void of chaos and misery. They continue to operate and thrive in spite of providing criminal defendants a fairer process.

V. POLICY ARGUMENTS

For over sixty years, scholars and jurists—no less than Supreme Court Justice William Brennan—have called for the use

197. VT. R. CRIM. P. 15(e)(5).
198. VT. R. CRIM. P. 15(f)(2).
199. FLA. R. CRIM. P. 3.220(h)(4).
200. N.H. REV. STAT. ANN. § 517:13(V) (2003).
201. N.D. R. CRIM. P.15(a)(5); ARIZ. R. CRIM. P. 39(b)(12).
202. *See* H. Morley Swingle, *Depositions in Criminal Cases in Missouri*, 60 J. MO. BAR 128, 134 (2004) (noting that despite the financial burdens of depositions, neither Florida nor Missouri have yet to discard criminal depositions).

of depositions in criminal cases.[203] The use of depositions in criminal cases would have tremendous benefits. Discovery depositions would aid the search for truth by bringing relevant facts to light and they would do so in a more expedient manner. Depositions would enhance the fairness of our adversarial system by treating the defense and the prosecution as truly equal opponents, thereby improving defense counsel's ability to provide effective representation and enhancing our faith in the legitimacy of case outcomes. Lastly, depositions would give defense counsel an affirmative role to play in pre-trial discovery rather than his current role as a passive participant receiving curated disclosures from the prosecution's investigation.

While opponents to depositions have historically raised concerns of perjury or witness intimidation as reasons to forego the practice,[204] those concerns are not borne out by any empirical foundation. More importantly, rather than allowing generalized fears to control the approach, such concerns of abuse of the process can and should be readily addressed by the trial court on a case-by-case basis.

A. Depositions Aid the Search for the Truth

It is a fundamental tenet of the law that the truest, most just outcomes are best achieved by encouraging rather than restraining relevant evidence.[205] "The admission of every light which reason and experience can supply for the discovery of truth, and the rejection of that only which serves not to guide but to bewilder

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203. *See generally* Brennan, *supra* note 1 (calling for the extension of civil pre-trial discovery to criminal cases); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192-93 (1960).

204. *See generally* discussion *infra* Sections V.C.-D.

205. Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (citing United States v. Nixon, 418 U.S. 683, 709 (1974)) ("We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.").

and mislead, is the great principle that ought to be the foundation of every system of evidence."[206] A criminal trial "is a quest for truth."[207]

The Arkansas Supreme Court has already recognized that essential to the quest for truth is the need for defense counsel to have access to witnesses with relevant information:

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial . . . . In a criminal case, the district attorney should not hesitate to show his entire file to the defendant. It is not the primary duty of the district attorney to convict a defendant. It is his primary duty to see that the defendant has a fair trial, that justice be done.[208]

The court's language originates from the D.C. Circuit Court of Appeals in *Gregory v. United States*, where the court held that it was unlawful for the prosecution to instruct witnesses not to speak with anyone, which obstructed defense counsel.[209] The court noted, "[w]itnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them."[210] Without free access to the witnesses, the defense could not evaluate what the witnesses would testify to or

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206. Heard v. Farmers' Bank of Hardy, 174 Ark. 194, 206, 295 S.W. 38, 43 (1927) ("But to exclude relevant evidence by any positive and arbitrary rule must be not only absurd in a scientific view, but, what is worse, frequently productive of absolute injustice. It may safely be laid down that the less the process of inquiry is fettered by rules and restraints, founded on supposed considerations of policy and convenience, the more certain and efficacious will it be in its operation. Formerly the very means devised for the discovery of truth and advancement of justice were not unfrequently perverted to the purposes of injustice, and made the instruments of the most grievous and cruel oppression.").

207. Birchett v. State, 289 Ark. 16, 20, 708 S.W.2d 625, 627 (1986) (quoting State v. Manus, 597 P.2d 280, 288 (N.M. 1979)); David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 494-95 (1992) (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 33 (2d ed. 1982)).

208. *Birchett*, 289 Ark. at 20, 708 S.W.2d at 627 (internal citations omitted).

209. *Id.*; Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

210. *Gregory*, 369 F.2d at 188.

"how firm they were in their testimony."[211] Limiting a defendant's access to witnesses is inherently prejudicial because, as the United States Supreme Court and "[c]ommon sense" tell us, interviewing potential witnesses is a routine part of criminal defense.[212]

Depositions would allow defense counsel to fill in the gaps of the prosecutor's file by deposing police officers and witnesses. Officers and witnesses are human. They are not perfect archivists and we can blamelessly expect them to omit relevant information from time to time. An investigating officer could be deposed to fill in the gaps for what he may have left out of his report, such as steps in the investigation he did not think were of significance. Also, to the extent any witness statement is voluntarily provided in discovery to the defense, a witness can only answer the questions asked of her. A deposition would allow the defense attorney to ask follow-up questions to gain a more complete understanding of the case. Also, oftentimes, police reports contain merely the officer's secondhand account of what the witness told him. Depositions would allow for defense counsel to test the accuracy of the reporting officer's information. More importantly, if the prosecutor fails to disclose *any* witness statements, resting on the protections of Rule 17.1,[213] then depositions would allow the defense counsel to learn *anything* about the case he is defending aside from the limited facts in the information.

Additionally, depositions could facilitate the plea-bargaining process by more speedily revealing the strengths and weaknesses of the case.[214] Broad pre-plea discovery in general can reduce disputes among the parties and speed up the negotiating process.[215] Another advantage to be gained is that

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211. *Id.* at 189.

212. Montoya, *supra* note 51, at 851 ("Common sense would suggest, and trial advocacy experts agree, that the pretrial interrogation of a potential witness is an essential prerequisite to calling the witness at trial."); Taylor v. Illinois, 484 U.S. 400, 415-16 (1988) ("Routine preparation involves location and interrogation of potential witnesses . . . .").

213. *See supra* notes 17-19 and accompanying text; ARK. R. CRIM. P. 17.1.

214. Prosser, *supra* note 32, at 612-13; *see also* Meyn, *supra* note 48, at 1091-92 (noting how civil discovery works to empower both litigants to equally assess liability during the pre-trial phase).

215. *See* Turner & Redlich, *supra* note 11, at 290-91.

providing defense counsel with the ability to depose witnesses would actually reduce the prosecutor's burden.[216] Arkansas case law routinely cites the standards that a defendant cannot rely on the State's file as a substitution for his own investigation[217] and that under an open-file scheme, the defense attorney bears the burden of checking the file for new material.[218] Allowing the defense to conduct depositions fits squarely within those standards. Depositions would allow defense counsel to build his own file rather than rely on the State's. Instead of the defendant crafting specific discovery requests asking about what a witness did or did not say, the defendant could simply go ask the witness himself. Allowing defense depositions would reduce the defendant's reliance on the prosecutor for information.

Ultimately, the civil practice has long recognized the utility in deposing adverse witnesses.[219] Prosecutors also enjoy that benefit.[220] Currently, the criminal defendant is the only litigant in Arkansas who does not have the power to conduct discovery depositions. He is the only litigant who is subjected against his will to a "quest for truth" but his search must be done blindfolded.

B. Depositions Increase Trust in the Criminal Process

Additionally, investigating and interviewing witnesses falls squarely under the umbrella of defense counsel's obligation to provide "effective" assistance of counsel.[221] The Eighth Circuit

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216. One criticism of open-file discovery is that it places an administrative burden on prosecutors and law enforcement to compile the information. *Id.* at 311.

217. *See, e.g.*, Thomerson v. State, 274 Ark. 17, 20, 621 S.W.2d 690, 692 (1981) ("A defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation.").

218. *See, e.g.*, Findley v. State, 64 Ark. App. 291, 297, 984 S.W.2d 454, 457 (1998) (holding the trial court did not abuse its discretion in finding no discovery violation occurred when defense counsel and the prosecutor disagreed as to whether and when certain exhibits offered at trial were contained in the State's open file because there was no assurance that the defense attorney had checked the State's file sixty days before trial).

219. *See generally supra* notes 143-50 and accompanying text.

220. *See supra* Section II.D.

221. Montoya, *supra* note 51, at 862; Strickland v. Washington, 466 U.S. 668, 686 (1984). For a discussion of why broad pre-trial discovery should be encouraged and analyzed under the doctrine of effective assistance of counsel, see generally Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004).

has squarely rejected the notion that the decision of whether or not to interview a witness is a matter of trial strategy, instead stating squarely, "Counsel has '*a duty* . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence.'"[222] Moreover, the entire rationale behind requiring "effective" assistance of defense counsel and adequate pre-trial investigation is to ensure the legitimacy of the outcome of the case.[223] Currently, the defense bar is confounded by a legal paradox. Defense counsel has a legal and ethical duty to vigorously investigate his client's case, but he has no tools to fulfill this duty.[224] A defendant has the right to subpoena a witness to attend at trial, but he does not have the right to first subpoena and examine that witness before the trial to ascertain his testimony.[225]

Cross-examination is often lauded as a "crucible"[226] and ultimately the greatest truth-seeking device known to our justice system,[227] but such claims are mere rhetoric when viewed in light of the fact that members of the Arkansas defense bar are being asked to conduct cross-examinations with one arm tied behind their backs. Cross-examination is only useful to the extent that the examining party has access to relevant information with sufficient time to prepare to properly utilize it.[228]

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222. Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991) (emphasis added) (quoting Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990)).

223. Roberts, *supra* note 221, at 1104-05 ("[T]he right to effective assistance advances the same goal as that of the criminal justice system more generally: fairness within the adversary process, with the ultimate objective that the guilty are convicted and the innocent are acquitted."); *Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

224. *See* Prosser, *supra* note 32, at 591 ("It would be anomalous to impose a duty to investigate, on one hand, and on the other to make a real investigation impossible to conduct.").

225. *See* Montoya, *supra* note 51, at 866-67.

226. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004).

227. Watkins v. Sowders, 449 U.S. 341, 349 (1981) ("[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth."); *id.* at 349 n.4 ("As Professor Wigmore put it, '[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.'") (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367, at 32 (rev. 1974)).

228. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 472 (1998); Prosser, *supra* note 32, at 579 ("[R]ules that do not allow discovery

> Cross-examination is designed to cement, not uncover, a narrative. Trial does not provide the optimum forum to refresh a witness' recollection, a process that can result in long periods of silence as a witness reviews documents. Trial is in part a public spectacle, roles have already been assigned, the script finalized. If a defendant has not adequately investigated the incident by the eve of trial, it is too late for defendant. He will lose.[229]

As far as crucibles go, a system of cross-examination where the examiner only has a short time to prepare immediately after the witness testifies on direct examination and where the examiner has no power to submit the witness to an interview of any sort prior to trial to glean any information about the boundaries of her testimony seems like a pretty comfortable "crucible."

Furthermore, it should not be a controversial claim to point out that limited discovery encourages wrongful convictions and unfair punishments.[230] More specifically, because we currently operate in a system of plea bargaining,[231] we have to acknowledge that the defense bar's ability to provide effective representation and advice during the negotiation process is directly restricted by limited discovery.[232] The criminal defense bar currently assumes the daunting task of negotiating with the State under a system of "information asymmetry"—meaning the defense is forced to

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of the prior statements of government witnesses until after the direct examination of those witnesses curtail the ability of counsel to conduct an investigation based on the contents of the statements, and to effectively impeach the witnesses with inconsistencies."); *see also* J. Thomas Sullivan, Brady-*Based Prosecutorial Misconduct Claims,* Buckley*, and the Arkansas* Coram Nobis *Remedy*, 64 ARK. L. REV. 561, 562-563 (2011) ("Often missed in the *Brady* analysis is the impact that suppression of favorable evidence can have on trial counsel's ability to effectively represent the defendant at trial, yet *Brady* claims are not analyzed in terms of the Sixth Amendment effective-assistance guarantee. Defense counsel can hardly develop appropriate strategic or tactical options without having access to favorable evidence.").

229. Meyn, *supra* note 48, at 1134.

230. Prosser, *supra* note 32, at 549-50.

231. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.") (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); Lafler v. Cooper, 566 U.S. 156, 157 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

232. Prosser, *supra* note 32, at 558-61; Baer, *supra* note 132, at 25 ("[C]riminal discovery's information asymmetry severely undermines the integrity and reliability of the plea-bargaining process.").

negotiate based on what facts the prosecutor chooses to reveal and what he chooses to conceal.[233] Most importantly, asymmetrical plea-bargaining encourages factually innocent defendants to accept plea offers.[234] Innocent defendants, being generally more risk averse than guilty defendants, are much more susceptible to the pressures of the plea bargaining process where they are faced with the impossible choice between pleading guilty to a crime they did not commit or risking the steeper penalties if found guilty at a trial.[235]

One of the justifications given for limiting the scope of *Brady* litigation and overall criminal discovery is a focus on the adversarial nature between the prosecution and the defense.[236] However, this reasoning is self-defeating. After all, if we want the criminal justice system to be "adversarial" and we want cross-examinations to be "crucibles" designed to elicit the truth, should we not enhance the armaments of each side?[237] This is the reasoning in civil discovery. Civil procedure allows for broad discovery through a multitude of different mechanisms, including subpoenas, depositions, interrogatories, and requests for production.[238] The reason for enhancing and broadening civil discovery was the recognition that proper litigation is best served by full revelation of all relevant facts and not by surprise and ambush at trial.[239] Again, if we want the criminal justice system to be adversarial and we believe that such adversariality is our best means of ensuring that the truth is ferreted out, the guilty are convicted, and the innocent go free, then why are we asking members of the defense bar to rise to the fight with one arm tied

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233. *See* Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 40-41 (2014); Meyn, *supra* note 48, at 1091-92 ("A criminal defendant, having no discretion to compel pretrial discovery and permitted but a keyhole view of the State's evidence, is the only litigant relegated to darkness.").

234. Turner & Redlich, *supra* note 11, 289-90.

235. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004).

236. Prosser, *supra* note 32, at 564; Montoya, *supra* note 51, at 876.

237. *See* Montoya, *supra* note 51, at 874-78 (arguing empowering defense fact-gathering powers under the Compulsory Process Clause will enhance the adversarial nature of criminal litigation).

238. ARK. R. CIV. P. 26-36.

239. Prosser, *supra* note 32, at 581 (citing Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947)).

behind their backs?[240] Allowing defense depositions would increase the amount of relevant information available to both sides before trial, therefore enhancing the fairness and functionality of our adversarial trial system.[241] If we can trust that a defense attorney had all the necessary tools at his disposal, his client's guilt can more confidently be viewed as the result of the truth rather than the result of the weight of the system.

C. Fears of Perjury

One of the historic arguments against allowing depositions as well as broadening criminal discovery in general is that it will lead to perjury.[242] The argument goes that if the defendant is aware of the nature of the prosecution's case, he will fabricate evidence to conjure a defense.[243] However, this argument is essentially outdated fearmongering, as the exact same concerns of perjury were raised and ultimately proven unfounded when civil discovery was reformed and broadened in the early twentieth century.[244] Moreover, this argument erroneously assumes that all criminal defendants are corrupt bad guys[245] and all prosecutors and police are honest good guys.[246] It is flawed to assume that depositions will lead defendants to commit perjury while ignoring

240. *See* Meyn, *supra* note 48, at 1095 ("These asymmetrical privileges to information create a dynamic unique to criminal law. The prosecutor assesses the particular facts that executive agents forward to her, releases facts she determines a defendant should view, and adjudicates the dispute through a plea offer that is supported by facts she selects. Though a criminal defendant has no structurally assigned role in the investigation, he is subjected to an adversarial process. If the integrity of the adversarial system depends on testing the pretrial conclusion made by the executive in its investigation, the failure to create the conditions for a counter-investigation undermines that integrity.").

241. *See* Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 69-70 (2017) (arguing broad discovery in general improves the adversary system).

242. Brennan, *supra* note 1, at 289; Roberts, *supra* note 221, at 1151.

243. Brennan, *supra* note 1, at 289.

244. *See* Roberts, *supra* note 221, at 1151; Brennan, *supra* note 1, at 291.

245. *See* Prosser, *supra* note 32, at 583 ("While those who object to broad discovery rarely openly acknowledge that they presume that the accused are guilty, the reasons that have been advanced for denying, delaying, or limiting discovery clearly reflect that presumption."); *see also* Brennan, *supra* note 1, at 287 (arguing limiting pre-trial discovery disregards and jeopardizes the presumption of innocence).

246. *See* Prosser, *supra* note 32, at 583-84.

a recorded history of police and prosecutors committing or suborning perjury.[247]

More importantly, this argument does a disservice to members of our defense bar who are bound by the same rules of ethics as any other lawyer.[248] It is a baseless and insulting conclusion that implies these members are inherently dishonest and untrustworthy. If the fear that defense attorneys would allow their clients to fabricate evidence and present perjury holds any weight, then it must also be said that the defense bar in its entirety must immediately be disbarred. If defense attorneys present such a dangerous risk to the inherent fairness of our justice system, they have no right to continue practicing law lest they wreak more havoc and fraud on the courts.

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247. Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 221 (2000) ("Police perjury has become very common in brutality cases, primarily because of the pressures an officer receives from his colleagues. Police perjury is a widely known problem in the legal system, but it is almost impossible to define the scope and depth to which it occurs."); Gabriel J. Chin & Scott C. Wells, *The* "*Blue Wall of Silence*" *as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234 (1998) ("[I]n New York, 'the practice of police falsification . . . is so common in certain precincts that it has spawned its own word: "testilying."'") (quoting REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 36 (1994)); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 358 (1994) ("In criminal cases, the proclivity of prosecutors to tolerate police perjury is widely acknowledged."); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 348 (2005) ("The anecdotal evidence suggests that prosecutors often ignore manifestations of police corruption."); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 272-77 (2017) (providing several anecdotal examples of reported police perjury). Recently, here in Arkansas, the Little Rock Police Department has been caught filing false affidavits to obtain search warrants. Hannah Grabenstein, *Lawsuit: Little Rock Police Lied to Conduct Drug Raids*, AP NEWS (Oct. 15, 2018), [https://perma.cc/4AAS-HJUW]. One affidavit stated that three officers saw an informant walk up to the door of an apartment and make a controlled purchase of cocaine. *Id.* However, the resident's security footage showed that he was not even home at the time, and nobody ever opened the door for the informant. *Id.* Nevertheless, the Little Rock Police filed the affidavit (committing perjury) and violently executed the search warrant using explosives to gain entry into the apartment. *Id.*

248. Brennan, *supra* note 1, at 291-92.

D. Fears of Witness Intimidation

Another common argument against criminal depositions is the concern that they may be used to intimidate or harass victims and witnesses, especially the vulnerable ones, such as children.[249] However, this overgeneralized fear is likely the result of circular logic or a "feedback loop" rather than actual experiences of such abuse.[250] In a traditionally restrictive jurisdiction, denying a criminal defendant discovery tools reinforces a perception of the defendant as dangerous, lawless, and untrustworthy.[251] A survey of Virginia and North Carolina prosecutors provides an excellent example of this process. In Virginia, a restrictive closed-file discovery state, roughly forty-seven percent of prosecutors were concerned that open-file discovery encourages witness intimidation or manipulation.[252] Conversely, in North Carolina, a state with broader open-file discovery, only ten percent of prosecutors shared this concern.[253] This is the feedback loop. The rules of the system inform our expectations of what a "just" system should look like and thereby undermines the legitimacy of alternatives.[254]

Yet, notably, fears of witness intimidation and manipulation are not unique to the criminal case. If a rape victim also sues her rapist, she can be deposed in the civil suit, and the experience is surely just as nerve-wracking. There is nothing per se in the law that says certain subject matters excuse a witness from a deposition. There is no legal alchemy that makes a witness immune to pressures from the deposition process simply because the case title on the transcript designates the matter as civil rather than criminal. After all, in our example, the defendant is an

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249. *Id.* at 289; Ortman, *supra* note 51, at 501-02.

250. *See* Meyn, *supra* note 48, at 1822-23 (describing how criminal discovery rules create feedback loops of expectations based on what the rules say is permissible).

251. *Id.*

252. Turner & Redlich, *supra* note 11, at 297, 359.

253. *Id.* at 359.

254. *See* Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1413-14 (2000) ("[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.") (quoting Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984)).

alleged rapist either way. There is no logical explanation as to how our hypothetical rapist presents such a generalized fear of intimidation in the criminal case to bar depositions, yet he retains the right to depose the victim in the civil suit. Case stylings do not impact human emotion.

E. Fears of High Costs

Perhaps the most salient objection to criminal discovery depositions is the concern that they will simply present too great of a financial and administrative burden.[255] After all, subpoenas will have to be served, witnesses will need to be compensated for their time, police officers will have to take time away from regular duties, stenographers will need to be paid, and transcripts will need to be prepared. However, there are two problems with this concern.

First, we cannot be so prideful to think that Arkansas is the only state with an interest in balancing the budget. The thirteen aforementioned states have all made the policy decision that the benefits of discovery depositions justify the accompanying costs.[256] For example, on two occasions, the Florida deposition practice came under heavy attack for its costs, but both times the system prevailed with the recognition that the depositions provide too great of a contribution to the fairness and efficacy of the criminal justice system as a whole.[257]

Relatedly, "[t]hat something isn't free tells us virtually nothing about whether it is worthwhile."[258] The issue here is whether depositions will increase the accuracy and fairness of our criminal system. If better justice is the benefit of the bargain, then the incident costs are wholly justified.[259] Over sixty years ago, the United States Supreme Court recognized, "[t]here can be no equal justice where the kind of trial a man gets depends on the

255. Ortman, *supra* note 51, at 496-97.

256. *See* discussion *supra* Section IV.B.; *see, e.g.*, Swingle, *supra* note 202, at 134 (noting that despite the financial burdens, neither Florida nor Missouri have yet to discard criminal depositions).

257. Ortman, *supra* note 51, at 497-98.

258. *Id.* at 496.

259. *See* Prosser, *supra* note 32, at 613.

amount of money he has."[260] There is certainly room for pragmatism, and it is incontrovertible that resources are not infinite. However, we cannot let money entirely dictate the justice we merit out. Otherwise, we have to ask if we are comfortable assigning a dollar value to a person's liberty.

F. Any Fears Should Govern Exceptions, Not the Rule

Fears of perjury, witness intimidation, or other misconduct should guide how we handle exceptions and not the rule. Rather than closing off the discovery of the truth to the innocent defendant and honest defense counsel because of perceived fears of the guilty and the unethical, we should reframe the procedure. Rather than have the defendant plead why he should be allowed to investigate his case, we should open the doors to discovery and put the burden on the prosecution to articulate specific concerns as to why the doors should be closed or left only ajar.[261] As discussed above, other states have already found numerous mechanisms, ranging from detailed to broad, to handle case-specific restrictions on depositions to curb case-specific concerns of abuse.[262] This is the pattern in civil procedure where we allow discovery but reserve the court's authority to issue protective orders to maintain the integrity of the process.[263] There is no reason such a system cannot be expected to work just as well in criminal cases. "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself."[264]

VI. PROPOSALS FOR NEW LEGISLATION/RULES

Based on the foregoing arguments in favor of allowing defense discovery depositions in criminal cases and the lack of

260. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

261. *See* Prosser, *supra* note 32, at 595-96 (arguing the State should carry the burden of showing the need for a protective order to limit discovery).

262. *See supra* Section IV.B.

263. *See* ARK. R. CIV. P. 26(c).

264. Brennan, *supra* note 1, at 291 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940)).

any empirical-based policy rationale to keep Arkansas in the minority of jurisdictions favoring criminal trials by surprise, I recommend that the Arkansas Supreme Court amend the Arkansas Rules of Criminal Procedure to provide for defense discovery depositions.[265] The burden of drafting a properly worded amendment to the rules is best left to the Arkansas Supreme Court Committee on Criminal Practice. Therefore, I will simply provide a list of goals I believe any proposed rule should aim to achieve.

First, depositions should be permitted to be conducted as a matter of right rather than by leave of court. Any concerns of abuse of the process and delay caused by unnecessary depositions ignores the fact that defense attorneys have their own schedules to keep. The defense bar is no more interested in wasting time than the State is. This is particularly true of our overburdened public defenders who do not have the luxury of time to waste on needless inquisitions. Because a defense attorney should only be expected to resort to a deposition when it is truly needed, requiring prior court approval would only serve to delay the proceedings.

Second, defendants not in custody should be permitted to be present at the deposition absent a showing of good cause by the State as to why the defendant's presence would be prejudicial to the State or the witness. Our criminal justice system operates on a right to confront one's accusers.[266] It admittedly takes courage to stand in front of one's abuser, but it also takes courage to lie while staring a man in the eye.[267] A witness will have to give his testimony in front of the defendant at trial anyway, so absent particularized concerns raised by the State, the defendant's presence at the deposition should be permitted. Relatedly, defendants in custody should be permitted to appear via video or telephone. Just because an individual cannot afford bail does not mean that should be held against him for depositions.

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265. The same reforms could also be achieved through the Arkansas Legislature.

266. U.S. CONST. amend. VI, cl. 5.

267. Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly.").

Third, depositions of children should be permitted with leave of court. Rather than a whole cloth prohibition of depositions of children, defendants should have to first establish a particularized need to depose the child, for example, by providing what information is being sought and explaining how the current discovery materials fail to cover such information. Of course, children should be permitted to have parents or an ad litem present. By having the trial court approve the deposition, the court can address any concerns for the child's best interests and impose any restrictions necessary as to the scope and manner of the deposition.

Fourth, alleged victims should not be given a right to refuse a deposition. While it may be harrowing for a victim to be deposed by his abuser, confrontation takes courage. Any legitimate concerns of intimidation, harassment, or embarrassment could easily be remedied by a motion from the State to restrict or remove the defendant's presence at the deposition rather than disallowing the deposition altogether. Victims should certainly be allowed to be accompanied by the prosecutor and an advocate for emotional support. Victims should also be allowed to have independent counsel present.

Fifth, subpoenaed witnesses should be compensated for their time in the same manner as currently done under Arkansas Rule of Civil Procedure 45(e).[268] However, any witness should only be subjected to being deposed one time. In the case of codefendants, the examination time of any individual witness should be shared amongst the codefendants.[269] The State should bear the expenses for indigent defendants, including compensation for witnesses, the costs of having a stenographer or videographer present, and the costs of having transcripts prepared.

Sixth, aside from alleged victims, prosecutors should not be permitted as a matter of right to sit in on depositions unless a reciprocal right is given to defense counsel to sit in on prosecutor subpoenas. If the goal is to truly open up criminal discovery, then

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268. ARK. R. CIV. P. 45(e) (providing that witnesses shall be paid $30 a day for their attendance and $0.25 per mile for travel from the witness's residence to the place of the deposition).

269. *See, e.g.*, VT. R. CRIM. P. 15(e)(1)-(2).

depositions could certainly be conducted similar to civil depositions with both parties present.[270] However, unless prosecutors are willing to invite defense attorneys to sit in on their depositions, it is unfair to ask defense attorneys to save a seat for prosecutors.

Seventh, any witness deposed should be permitted to be represented by independent counsel.[271] Such counsel's interference with the deposition should be restricted to the same manner of opposition and witness counseling currently permitted in civil depositions.[272]

Eighth, depositions should be permitted in both felony and misdemeanor cases. While we might think of misdemeanors as "petty" and therefore deserving of less procedure, the reality is that the vast majority (roughly eighty percent) of our criminal dockets are misdemeanor offenses.[273] More importantly, although misdemeanors are "petty" compared to felonies, misdemeanor convictions still carry many of the same collateral consequences as felony convictions, ranging from employment discrimination, restricted voting rights, loss of public benefits, and other general stigmatization.[274] The need to protect innocents and increase transparency to promote the legitimacy of the process is just as significant for misdemeanor cases as with felony cases.

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270. *See* ARK. R. CIV. P. 30.

271. *See* Ortman, *supra* note 51, at 488 (noting prosecutors do not represent witnesses or victims, so independent counsel may be warranted in some circumstances).

272. *See* ARK. R. CIV. P. 30(d).

273. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (noting there are approximately ten million misdemeanor cases filed every year in the U.S. compared to 2.3 million felony cases, misdemeanors make up roughly eighty percent of state dockets, and they are typically the entry point into the criminal justice system for most Americans); *see also* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), [https://perma.cc/2Q4Y-D92X] (estimating approximately 10.5 million misdemeanors were prosecuted in 2006); Mahoney v. Derrick, 2022 Ark. 27, at 10, 2022 WL 404182, at *5 (Hudson, J., concurring) ("Moreover, our district courts are often the only interaction that the public has with the judiciary. Therefore, it is critical that we are mindful of the practices and procedures in district courts that may undermine public confidence in the administration of fair and impartial justice.").

274. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1323-27 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297-303 (2011).

CONCLUSION

The law and our notions of what justice and fairness require evolve over time. The history of criminal procedure is a clear picture of a slow but steady march toward equity and protection of the accused.[275] Not everything in the law is as it always was. The right to appointed counsel, now the cornerstone of criminal defense, once had to be fought for.[276] The right to be informed of *Miranda* warnings before being interrogated once had to be fought for.[277] The right to not have phone calls eavesdropped on by the government once had to be fought for.[278] Arkansas has its own specific history of recognizing additional protections against the State beyond what the Federal Constitution requires. Arkansas has recognized the right to be informed of the right to refuse consent to entry into the home,[279] the right to be protected from nighttime knock-and-talks by officers,[280] the right to be free from pre-textual arrests,[281] and the right to not have a vehicle on private property searched without a warrant absent exigent circumstances.[282] These few examples illustrate that Arkansas is

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275. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1642 (2005).

276. *Id.*; *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

277. Miranda v. Arizona, 384 U.S. 436 (1966).

278. Katz v. United States, 389 U.S. 347 (1967).

279. State v. Brown, 356 Ark. 460, 474, 156 S.W.3d 722, 732 (2004).

280. *See* Griffin v. State, 347 Ark. 788, 800, 67 S.W.3d 582, 590 (2002) (finding an illegal search occurred when officers stealthily approached a defendant's basement door in the nighttime with flashlights and inspected the premises, noting there is "no authority for a 'knock and *search*' doctrine holding that after knocking, it is permissible to begin a warrantless search before anyone comes to the door"); Rikard v. State, 354 Ark. 345, 353, 123 S.W.3d 114, 118 (2003) (citing *Griffin* with a parenthetical explanation stating "nighttime incursions on a defendant's curtilage [are] illegal under Art. 2, § 15, of [the] Arkansas Constitution"); *see also* Keenom v. State, 349 Ark. 381, 396-97, 80 S.W.3d 743, 753 (2002) (Brown, J., dissenting) (differentiating the protections afforded by the Arkansas Constitution and caselaw from those afforded under the Fourth Amendment, noting that the Arkansas Supreme Court "has shown a sensitivity to abuses caused by nighttime searches," yet "federal jurisprudence does not require the exigent circumstances for a nighttime search warrant set out in [Arkansas] Rule 13.2, much less that those exigent circumstances be required for a nighttime knock-and-talk").

281. State v. Sullivan, 348 Ark. 647, 652, 74 S.W.3d 215, 218 (2002).

282. ARK. R. CRIM. P. 14.1(a)(iii). The United States Supreme Court has only ever stated in a plurality opinion that officers may not search an automobile on private property without a warrant absent exigent circumstances beyond the inherent mobility of the vehicle

no stranger to redefining the boundaries of criminal process as our shared understanding of fairness and justice evolves. "Law's evolution is never done, and for every improvement made there is another reform that is overdue."[283]

There is no reason our criminal procedure has to be written in stone, forever unyielding to progress. The time has come to ask if our current procedures are still the best means of achieving our guiding principles of increasing transparency and fairness and protecting the individual against the awesome power of the State. If we truly aim to discover the truth, then let Arkansas defense attorneys do just that—discover it. Let us achieve "better justice."[284]

itself. *See* Coolidge v. New Hampshire, 403 U.S. 443, 460-62 (1971). The Arkansas Rules clearly agree with the plurality and provide Arkansans with this additional protection.

283. Brennan, *supra* note 183, at 2.

284. Brennan, *supra* note 1, at 279.