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Oklahoma Criminal Discovery after Allen

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OKLAHOMA CRIMINAL DISCOVERY AFTER *ALLEN**

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I. INTRODUCTION

Oklahoma has long provided for extensive pretrial discovery in civil cases.[1] Traditionally, however, discovery in criminal cases has been much more limited.[2] In fact, statutory discovery in criminal cases is almost nonexistent.[3] The rather minimal discovery available has primarily been the result of a progression of decisions by the Oklahoma Court of

1. *See* OKLA. STAT. tit. 12, §§ 3201-3232 (1991). For more on the history and nature of civil discovery in Oklahoma, see generally 5 Okla. Discovery Prac. Manual (Butterworth Legal Publishers) (1992); Charles W. Adams, *Civil Discovery in Oklahoma: Depositions*, 17 TULSA L.J. 179 (1981); Charles W. Adams, *Civil Discovery in Oklahoma: The Discovery Tools*, 16 TULSA L.J. 658 (1981); Charles W. Adams, *Civil Discovery in Oklahoma: General Principles*, 16 TULSA L.J. 184 (1980); Bruce W. Bowman, Note, *Procedure: Pre-Trial Discovery*, 2 OKLA. L. REV. 100 (1949); R. Dale Vliet, *Oklahoma Discovery Procedures*, 2 OKLA. L. REV. 294 (1949).

2. *See* David W. Lee, *The Need For A New Criminal Discovery Code In Oklahoma State Courts Requiring Disclosure of Investigative Reports to Defendants*, 60 OKLA. B.J. 2259 (1989).

3. *See* OKLA. STAT. tit. 22, § 303 (1991) (requiring the prosecutor to endorse on the information the "names and last-known address of all witnesses known to him at the time of the filing of the same, intended to be called by him at a preliminary examination or at trial [and] . . . the names and last-known addresses of such other witnesses as may afterwards become known to him . . . at such time as the court may by rule prescribe"); OKLA. STAT. tit. 22, § 384 (1991) (providing for prosecutions by indictment, the prosecutor must endorse on the indictment the names (but not the addresses) of the witnesses examined before the grand jury); *see also* OKLA. STAT. tit. 22, § 749 (1991) (entitling the defendant to a copy of a "sworn statement of any person having knowledge of such criminal offense" if such a statement has been obtained by the district attorney or any peace officer).

In addition to these statutory provisions, the *Oklahoma Constitution* requires that "in capital cases, at least two days before the case is called for trial, [the accused] shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses." OKLA. CONST. art. II, § 20. Only two statutes currently require the defendant to provide any information to the prosecution: OKLA. STAT. tit. 22, § 585 (1991) (requiring the defendant to give five days notice of an alibi defense although the only sanction for noncompliance is to give the prosecution a continuance) and OKLA. STAT. tit. 22, § 1176 (1991)

Criminal Appeals.[4] On December 20, 1990, that progression culminated in the most comprehensive and far-reaching criminal discovery decision in the history of Oklahoma, *Allen v. District Court of Washington County.*[5] The *Allen* decision made significant changes in the discovery process, primarily affecting the types of information discoverable in criminal cases and, to a lesser extent, the procedure for obtaining such information.

This article provides a comprehensive examination of pretrial criminal discovery in Oklahoma subsequent to the *Allen* decision. The first section discusses the procedural background of the *Allen* decision. The following two sections discuss procedural and substantive changes resulting from *Allen* in Oklahoma criminal discovery. Particular attention is paid to the source of the language used in the *Allen* decision and to areas of ambiguity that need to be addressed by the court of criminal appeals. The final section discusses miscellaneous discovery provisions not specifically provided for in the *Allen* decision.

II. BACKGROUND OF THE *ALLEN* DECISION

Indicted for murder in the District Court of Washington County, Stephen Allen asked the district court to grant certain discovery requests[6] prior to the preliminary examination.[7] Citing two opinions of the Oklahoma Court of Criminal Appeals, the district court granted some of the discovery requests but denied the rest.[8] Allen then filed a petition for

(requiring the defendant to give notice of a mental illness or insanity defense at least twenty days before trial).

4. *See generally* Lee, *supra* note 2; 5 Okla. Crim. Prac. Manual (Butterworth Legal Publishers) 7-1 to -22 (1992).

5. 803 P.2d 1164 (Okla. Crim. App. 1990). One other article has been written about the *Allen* decision. *See generally* Rodney J. Uphoff, *The New Criminal Discovery Code in Oklahoma: A Two Way Street in the Wrong Direction*, 44 Okla. L. Rev. 387 (1991). The article is primarily a criticism of the *Allen* decision's adverse impact on the adversary system and the defendants' privilege against self-incrimination. The article also urges the Oklahoma legislature to adopt a proposed alternative discovery code.

6. The *Allen* opinion fails to state the specific information requested by the defendant.

7. OKLA. CONST. art. II, § 17 states that: "No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination." *Id.* Since the term "preliminary examination" is used in the *Oklahoma Constitution*, that term will be used instead of "preliminary hearing." The actual preliminary examination is governed by OKLA. STAT. tit. 22, §§ 251-264 (1991). The traditional purpose of the preliminary examination is to determine: "(1) whether the crime charged has been committed and (2) whether there is probable cause to believe the accused committed it." *Id.*; Allen v. State, 527 P.2d 204, 207 (Okla. Crim. App. 1974). For more on the preliminary examination in Oklahoma, see Charles L. Cantrell, *An Overview of the Preliminary Hearing in Oklahoma*, 39 OKLA. L. REV. 457 (1986).

8. *Allen*, 803 P.2d at 1165 (citing State v. Benson, 661 P.2d 908, 909 (Okla. Crim. App. 1983)

writ of mandamus in the court of criminal appeals seeking an order directing the court to grant his requests for pre-preliminary examination discovery.[9] Thus, the central issue presented to the court of criminal appeals was essentially procedural: Whether an examining magistrate possesses the authority to grant a discovery request prior to a preliminary examination. As discussed below, the court not only resolved that issue, but also used *Allen* as a vehicle for making substantial changes regarding material subject to pretrial discovery.

The court began its discussion of discovery procedure with an analysis of the historical development of Oklahoma's court system, including discourse concerning the old system of courts of limited and general jurisdiction as compared to the current unified system. The court recognized that its previous decisions "failed to interpret and apply the existing statutory provisions as we transitioned into a unified court system."[10] As a result, its jurisprudence was "confusing" and had "bent the statutory procedure to the present breaking point."[11]

Prior to the adoption and implementation of the current unified court system,[12] the Oklahoma court system comprised a combination of constitutional and statutory courts of both limited and general jurisdiction. The *Oklahoma Constitution* established the district courts, county courts, courts of the justice of the peace, and municipal courts.[13] The legislature created the court of common pleas and the superior court.[14] Once the unified system was adopted, each of the these constitutional and statutory courts were consolidated into the current district courts which are courts of general jurisdiction.[15] District judges and associate district judges became general jurisdiction judges of the district courts.[16] Special

(supporting the denial of pre-preliminary examination discovery due to prematurity) and Stafford v. District Court of Okla. County, 595 P.2d 797, 798 (Okla. Crim. App. 1979) (indicating the lack of authority possessed by a magistrate to compel production of discovery material)).

9. *Allen*, 803 P.2d at 1164.

10. *Id.* at 1165.

11. *Id.*

12. The current unified court system was adopted by a vote of the people on State Question No. 448, Legislative Referendum No. 164 on July 11, 1967. The system became effective on January 13, 1969.

13. OKLA. CONST. art. VII, § 1 (amended 1981).

14. OKLA. STAT. tit. 20, § 651 (1961) (creating the court of common pleas); OKLA. STAT. tit. 20, § 141 (1961) (creating the superior courts).

15. OKLA. CONST. art. 7, § 7(a) (providing that the district court possesses unlimited original jurisdiction in all justiciable controversies).

16. OKLA. CONST. art. 7, § 8(d) (providing that district court judges and associate district judges "shall exercise all jurisdiction in the District Court except as otherwise provided by law").

judges, however, are still limited jurisdiction judges although they preside in courts of general jurisdiction.[17]

The confusion over whether the judge presiding over a preliminary examination possesses the authority to order pre-preliminary examination discovery stems from the fact that the statutes which regulated preliminary examination in the days of courts of limited jurisdiction still regulate preliminary examination in the days of courts of general jurisdiction. For instance, the statutes regulating preliminary examination[18] refer to the various duties of a "magistrate" although that term is not used in the constitutional provisions establishing the current unified court system.[19] The only judicial officers referred to in the current provisions are district judges, associate district judges, and special judges.[20] The repealed sections of the constitution establishing county courts and courts of the justice of the peace specifically provide that such courts "shall also have and exercise the jurisdiction of examining and committing magistrates in all criminal cases."[21] Thus, the current difficulty emanates from the need, or at least the perceived need, to reconcile the use of the antiquated term "magistrate" in the statutes governing preliminary examinations with the provisions establishing the modern unified system which do not use the term.

Under the old system of limited jurisdiction county courts and courts of the justice of the peace, it was quite reasonable for the court of criminal appeals to hold that the judges possessed limited jurisdiction with respect to conducting pre-preliminary examination. For example,

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17. *See* OKLA. CONST. art. VII, § 8(h) (providing that jurisdiction of special judges may be limited as prescribed by statute); OKLA. STAT. tit. 20, § 123A (1991) (limiting the jurisdiction of special judges to specific actions in criminal cases). Section 123A states:

> 5. Misdemeanors, except that special judges who are not lawyers may not hear criminal actions where the punishment prescribed by law exceeds a fine of Two Hundred Dollars ($200.00), or imprisonment in a county jail for thirty (30) days, or both such fine and imprisonment except by written consent of all parties.
>
> 6. Felonies involving a second and subsequent offense of driving, operating, or being in actual physical control of a motor vehicle while under the influence of alcohol or any other intoxicating substance, including any controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act, to a degree that renders the defendant incapable of safely driving or operating a motor vehicle, except that nonlawyer special judges may not hear such matters . . . .
>
> 8. Issuance of writs of habeas corpus, but this paragraph shall not embrace nonlawyer special judges.
>
> 9. Perform the duties of magistrate in criminal cases.

OKLA. STAT. tit. 20, § 123A (1991).

18. OKLA. STAT. tit. 22, §§ 251-276 (1991).

19. OKLA. CONST. art. VII, §§ 7, 8.

20. *Id.*

21. OKLA. CONST. art VII, §§ 17, 18 (repealed 1961).

the court of criminal appeals indicated "[i]n felony cases the jurisdiction of a justice of the peace is either to discharge the accused or else hold him to answer the felony charged or some other felony (which the evidence may disclose the accused to have committed) within the territorial limits of the county."[22] The Supreme Court of Oklahoma similarly stated that: "[C]onstruing all of the statutes together, we hold that the justices of the peace have no power to try and determine any criminal action excepting such as they are by specific enactment given power to try and determine."[23] Although district court judges, except special judges, no longer have limited jurisdiction, the court of criminal appeals continues to apply such limited jurisdiction pursuant to the present statutory scheme for conducting preliminary examinations.[24] The primary reason for this seems to be the fact that the preliminary examination statutes, essentially the same as when they were passed in 1910, still refer to the person presiding over the examination as a "magistrate." And, as just noted, magistrates possessed limited jurisdiction. Thus, whenever a judge sitting in a court of general jurisdiction presides over a preliminary examination, the judge is treated as a judge of limited jurisdiction.

Reconciliation between the antiquated system and the current unified system seemed possible at the beginning of the *Allen* decision.[25] In fact, the court initially intimated that it might reverse itself on the issue of whether a judge presiding at a preliminary examination could order discovery prior to the preliminary examination. However, after a somewhat lengthy discussion of the procedural issue, the court concluded by simply stating that the statutory scheme regulating preliminary examinations did not allow the court to "interpret them in such a manner as to approve discovery prior to preliminary examination."[26] As a result, the court denied the requested writ of mandamus.[27]

22. West v. State, 217 P. 1067, 1068 (Okla. Crim. App. 1923).

23. R.M. Collier v. Territory of Oklahoma, 37 P. 819, 822 (Okla. 1894).

24. OKLA. STAT. tit. 22, §§ 251-280 (1991); *see also* State v. Gorelick, 746 P.2d 677, 678 (Okla. Crim. App. 1987); Moss v. Hicks, 738 P.2d 155, 156 (Okla. Crim. App. 1987); State v. Benson, 661 P.2d 908, 909 (Okla. Crim. App. 1983); State v. Kile, 250 P.2d 233, 234 (Okla. Crim. App. 1952).

25. *Allen*, 803 P.2d at 1165.

26. *Id.* (citing Stafford v. District Court of Okla. County, 595 P.2d 797 (Okla. Crim. App. 1979)).

27. Although the court felt constrained by statutory provisions with respect to the timing of pretrial discovery, it did not feel constrained with respect to the information required to be disclosed. For this reason, Judges Lane and Brett dissented from the portion of the *Allen* decision which, in effect, created a new criminal discovery code. Judges Lane and Brett expressed reservations about constructing a new discovery code, which is arguably an infringement on the role of the Oklahoma legislature. In a post-*Allen* decision the court of criminal appeals reaffirmed that "our previous order in *Allen* was not unconstitutional nor did it violate or exceed the authority of the Court of Criminal

III. PROCEDURE FOR OBTAINING PRETRIAL DISCOVERY

This section first discusses the major procedural issue addressed in the *Allen* decision: the timing of pretrial discovery. Next, this section considers the continuing validity of several procedural issues not addressed in *Allen*. These issues include: the required specificity of a discovery request, the continued availability of information prior to the preliminary examination, and whether the court might enforce discovery more forcefully on appeal.

Due to the limited nature of the preliminary examination and the lack of authority possessed by the presiding judge, pretrial discovery may not be ordered prior to the preliminary examination. The court found that upon entry of the bindover order,[28] the district court is empowered to hear any pretrial motions, including requests for discovery. Although the court recognized that the assigned judge may issue a discovery order at any time following the bindover, it suggested that the most appropriate time to do so is at the formal arraignment.[29] The court further stated that the trial judge "should enter a written order setting forth discovery, inspection and copying requirements for each party and a time for compliance."[30] The significant procedural difference between *Allen* and previous law is *Allen*'s requirement that discovery be completed ten days prior to trial.[31] Former procedure, in contrast, allowed the judge discretion to compel discovery within a reasonable time before trial.[32]

Since the *Allen* opinion did not address other procedural aspects of pretrial discovery, it is unclear whether those procedures remain unchanged. For example, in a previous case, *Watts v. State*,[33] the court addressed the issue of specificity of a discovery request and held that a blanket discovery request would generally not be granted.[34] Specifically, the court held that a request for "the following papers, to wit: any and all

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Appeals . . . ." State v. Blevins, 825 P.2d 270, 272 (Okla. Crim. App. 1992). Any further discussion of the court's authority to issue the *Allen* decision is beyond the scope of this article.

28. OKLA. STAT. tit 22, § 264 (1991) (providing that if it appears from the examination that any public offense has been committed, and sufficient cause exists to believe the defendant committed such offense, the magistrate must endorse an order on the complaint ordering the defendant to be held to answer the charge, otherwise known as a bindover order).

29. OKLA. STAT. tit. 22, §§ 451-470 (1991) (governing formal arraignments); *see also* 5 Okla. Crim. Prac. Manual (Butterworth Legal Publishers) 4-3 to -16 (1992).

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

31. *Id.*

32. State v. Benson, 661 P.2d 908, 909 (Okla. Crim. App. 1983).

33. Bettlyoun v. State, 562 P.2d 862, 866 (Okla. Crim. App. 1977); Wing v. State, 490 P.2d 1376, 1383 (Okla. Crim. App. 1971).

34. 487 P.2d 981 (Okla. Crim. App. 1971).

statements made by defendant herein," was not a request for the content of oral statements.[35] Thus, under previous law, discovery requests needed to be sufficiently specific in order to be granted. Whether such specificity will be required after *Allen* is not clear. Under *Allen*, the prosecuting attorney must disclose "all of the material and information within the state's possession or control . . . ."[36] Since this is apparently intended to create an open file policy,[37] a continued requirement of rigid specificity would seem to defeat it.

Although the *Allen* decision reaffirmed that discovery is not available until after the preliminary examination, the decision did not address issues relating to the continued availability of information required to be disclosed *prior* to the preliminary examination. Previously, the court of criminal appeals held that conviction records of witnesses called to testify at the preliminary examination would be available to defendants.[38] In addition, the court indicated that grand jury transcripts would also be accessible to defendants.[39] It is not clear from the *Allen* decision whether such information will continue to be disclosed prior to the preliminary examination or whether it need only be made available at the same time as other discoverable information.

It is also not clear what prerequisites for relief a defendant must satisfy on appeal in the event requested information is not disclosed pretrial. Previous law made it difficult for a defendant to obtain relief, even when the state did not disclose the limited information previously required. The first requirement is that the defendant not have independent knowledge or access to the requested information.[40] Second, it must be proven that the denial of the requested information substantially prejudiced the defendant.[41] The factors considered in assessing prejudicial effect seem designed to preclude relief. These factors include: (1) whether the defendant requested a continuance;[42] (2) whether the

35. *Id.* at 986.

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

37. *See infra* notes 58-66 and accompanying text.

38. Stafford v. District Court of Okla. County, 595 P.2d 797, 798-99 (Okla. Crim. App. 1979); Stevenson v. State, 486 P.2d 646, 650 (Okla. Crim. App. 1971).

39. English v. District Court of Adair County, 492 P.2d 1125, 1126 (Okla. Crim. App. 1972).

40. Castleberry v. Crisp, 414 F. Supp. 945, 950 (N.D. Okla. 1976); Hammer v. State, 760 P.2d 200, 204 (Okla. Crim. App. 1988); Hall v. State, 751 P.2d 1091, 1093 (Okla. Crim. App. 1988); Wilhite v. State, 701 P.2d 774, 777 (Okla. Crim. App. 1985); Gregg v. State, 662 P.2d 1385, 1388 (Okla. Crim. App. 1983).

41. *Hall*, 751 P.2d at 1093; Silver v. State, 737 P.2d 1221, 1225 (Okla. Crim. App. 1987); Farmer v. State, 565 P.2d 1068, 1073 (Okla. Crim. App. 1977); Wing v. State, 490 P.2d 1376, 1382-83 (Okla. Crim. App. 1971); *Stevenson*, 486 P.2d at 650.

42. Ziegler v. State, 610 P.2d 251, 256 (Okla. Crim. App. 1980); *Wing*, 490 P.2d at 1383.

defendant sought a writ of mandamus before the court of criminal appeals;[43] and (3) whether the information was ultimately revealed at trial.[44]

The *Allen* decision may indicate that the court is willing to alter these almost insurmountable prerequisites for appellate relief. Such willingness is evidenced by two primary factors which motivated the court of criminal appeals to decide *Allen*: "the pressing need to fill the gaps which currently exist within our statutory framework," and, presumably, to resolve the problem that the court "is continually confronted with issues on appeal relating to compliance with pre-trial discovery."[45] While the *Allen* decision is clearly designed to resolve these motivating issues at the trial level by requiring increased disclosure, *Allen* may also be a signal that the court intends to alter its previous role in discovery and enforce discovery more forcefully on appeal.

IV. INFORMATION SUBJECT TO DISCLOSURE

Statutory discovery has been and remains rather limited in Oklahoma.[46] Most of the required discovery arises from case law.[47] Even before *Allen*, the court of criminal appeals required the state to

43. *Ziegler*, 610 P.2d at 256; *Wing*, 490 P.2d at 1383.
44. Nauni v. State, 670 P.2d 126, 132 (Okla. Crim. App. 1983); *Stevenson*, 486 P.2d at 650.
45. *Allen*, 803 P.2d at 1167.
46. *See supra* note 3 and sources cited therein.
47. *See supra* note 4 and sources cited therein.

disclose to the defendant scientific and technical reports,[48] tangible evidence,[49] exculpatory evidence,[50] the defendant's own custodial statements and the substance of oral ones,[51] criminal records of witnesses,[52] evidence of lineups,[53] evidence of other crimes,[54] and the terms of a plea bargain between the district attorney and a witness.[55] Despite the previous availability of such information, the *Allen* decision significantly increased the amount and the nature of the information required to be disclosed through pretrial discovery. This section discusses the information subject to disclosure after the *Allen* decision. Specifically, the section discusses two categories of required disclosures delineated by *Allen*: disclosures required of the State and disclosures required of the defendant.[56]

A. *Disclosures by the State*

1. Material and Information Within the State's Possession or Control

The section of *Allen* requiring disclosure by the State provides that,

48. Moore v. State, 740 P.2d 731, 735 (Okla. Crim. App. 1987) (concerning test results of alleged controlled substance); Bettlyoun v. State, 562 P.2d 862, 866 (Okla. Crim. App. 1977) (containing general statement of the law); Abshire v. State, 551 P.2d 273, 274 (Okla. Crim. App. 1976) (referencing results of breathalyzer test pursuant to OKLA. STAT. tit. 47, § 752 (1971)); Hamm v. State, 516 P.2d 825, 826 (Okla. Crim. App. 1973) (referencing ballistics report); Shapard v. State, 437 P.2d 565, 594 (Okla. Crim. App. 1968) (containing medical report in rape case).

49. *Moore*, 740 P.2d at 735; Ziegler v. State, 610 P.2d 251, 255-56 (Okla. Crim. App. 1980) (requiring sperm slides in a rape case); Stafford v. District Court of Okla. County, 595 P.2d 797, 799 (Okla. Crim. App. 1979) (requiring fingerprints); Melton v. State, 512 P.2d 204, 205 (Okla. Crim. App. 1973) (requiring the film subject to an obscenity prosecution); Stevenson v. State, 486 P.2d 646, 649 (Okla. Crim. App. 1971) (requiring death weapon).

50. Van White v. State, 752 P.2d 814, 819 (Okla. Crim. App. 1988). *See generally* Brady v. Maryland, 373 U.S. 83 (1963) and *infra* notes 116-28 and accompanying text.

51. Stout v. State, 693 P.2d 617, 624-25 (Okla. Crim. App. 1984); Watts v. State, 487 P.2d 981, 986 (Okla. Crim. App. 1971). However, disclosure is not required where the statement is not the product of police custodial interrogation. *See* Hollan v. State, 676 P.2d 861, 864 (Okla. Crim. App. 1984); Jones v. State, 660 P.2d 634, 641 (Okla. Crim. App. 1983). The defendant is not entitled to notes taken by a detective when questioning the defendant. Perez v. State, 614 P.2d 1112, 1115 (Okla. Crim. App. 1980).

52. Housley v. State, 785 P.2d 315, 316 (Okla. Crim. App. 1989); *Stafford*, 595 P.2d at 798-99; *Bettlyoun*, 562 P.2d at 866; *Stevenson*, 486 P.2d at 650. Although other discoverable information need not be disclosed prior to preliminary examination, case law prior to *Allen* required that the conviction record of intended witnesses be provided prior to such hearing. *Stafford*, 595 P.2d at 798-99; *Stevenson*, 486 P.2d at 649-50.

53. Thompson v. State, 438 P.2d 287, 289 (Okla. Crim. App. 1968).

54. Holt v. State, 774 P.2d 476, 477 (Okla. Crim. App. 1989); Burks v. State, 594 P.2d 771, 774 (Okla. Crim. App. 1979).

55. Binsz v. State, 675 P.2d 448, 451 (Okla. Crim. App. 1984); Mays v. State, 594 P.2d 777, 779 (Okla. Crim. App. 1979).

56. *Allen*, 803 P.2d at 1167 (referencing the required disclosure provisions).

upon the defense's request, "the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control."[57] This provision is followed by a list of specific items required of the State, discussed in the following sections. Although this list of specific disclosures marks a significant change from previous law, the more general provision promises to have a greater impact on the extent of defense discovery in Oklahoma by requiring an open file policy of the State.

Although the ultimate meaning of this pronouncement may be difficult to discern, it appears to require the State to have an "open file" policy in dealing with the defense. Even though the provision is followed by a list of specific items that must be disclosed, the list is not exhaustive because it is preceded by the phrase "including but not limited to."[58] Thus, the *Allen* decision clearly contemplates that the required disclosures are not limited to the list of specific items.

This interpretation is supported by comparing the language of State disclosure requirements with the language of defense disclosure requirements. While the court requires the State to disclose "all" of the material in its possession, no such requirement is imposed on the defense. Instead, by enumerating the items subject to disclosure, *Allen* limits the information the defense must relinquish.[59] Moreover, the court does not state that the defendants' list is inclusive rather than exclusive. Thus, the court imposes a broader obligation on the State to disclose information.

Furthermore, in interpreting the meaning of the court's statements, it is helpful to look to the sources of the language used. The *Allen* court relied on the American Bar Association's *Standards for Criminal Justice* (*ABA Standards*) relating to pretrial discovery and the appropriate scope of discovery.[60] In fact, the language in *Allen* discussed above is taken

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

58. *Id.*

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

60. *See generally* STANDARDS FOR CRIMINAL JUSTICE 11-1.1 to 11-5.4 (2d ed. 1980) [hereinafter ABA STANDARD]. The court also stated that it looked to other authorities, including the *Model Penal Code*, for guidance. However, the *Model Penal Code* does not contain any provisions relating to discovery. Thus, it would appear that the court actually meant to refer to the *Uniform Rules of Criminal Procedure*, which, like the *Model Penal Code*, are proposed by the National Conference of Commissioners on Uniform State Laws. *See generally* UNIFORM RULES OF CRIMINAL PROCEDURE, 10 U.L.A. 15 (Master ed. 1976 & Supp. 1988) [hereinafter UNIFORM RULES]. In addition, the *Allen* decision does in fact borrow some language from the *Uniform Rules*. *See infra* notes 163, 178, 222, and 229 and accompanying text.

verbatim from standard 11-2.1.[61] According to the commentary accompanying standard 11-2.1, "upon a defense request, the prosecutor is to provide *open file disclosure* and include an illustrative (but not exhaustive) list of items that the prosecutor is to routinely disclose to defense counsel."[62] The *Allen* court did "not adopt those recommended procedures by reference"[63] but drew upon them in determining the procedure to be followed. Thus, it is possible that the court qualified its use of the *ABA Standards* to avoid being bound by the commentary or by other interpretations of those standards.

The significance of this "open file" disclosure provision is further enhanced by the requirement articulated in *Allen* that this and subsequent disclosures extend to material and information "in the possession or control of members of the prosecutor's staff and of any others who regularly report or, with respect to the particular case, have reported to the prosecutor's office."[64] Although not verbatim, *Allen*'s language is essentially derived from the *ABA Standards*.[65] The commentary to this section states that "[t]he 'possession and control' requirement protects the state against the claim that the state is responsible even for information not uncovered and protects the defendant against the claim that the prosecutor was personally unaware of the material or information."[66]

2. Witnesses and Witness Statements

The first specific category of material to be disclosed by the State is "the names and addresses of witnesses, together with their relevant oral, written or recorded statement, or summaries of same."[67] While this is based on the *ABA Standards*, the requirement in *Allen* goes significantly beyond the *ABA Standards* by requiring the disclosure of oral statements made by the witnesses.[68] This addition would seem to give the defendant

61. ABA STANDARD 11-2.1.

62. *Id.* (emphasis added).

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

64. *Id.* at 1168.

65. ABA STANDARD 11-2.1(d). Section 11-2.1(d) provides:

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

Id. (the emphasized phrase is not in the *Allen* opinion).

66. *Id.*

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

68. ABA STANDARD 11-2.1(a)(i) (requiring disclosure of "the names and addresses of witnesses, together with their relevant written or recorded statements").

access to any statements made by State witnesses without the necessity of quibbling over the form in which the statement was made.

This provision marks a significant departure from previous Oklahoma law. Previous law only required the disclosure of the "sworn statement of any person having knowledge of such criminal offense" if such a statement had been obtained by the district attorney or any peace officer.[69] Unsworn statements of witnesses constituted work product and were not generally discoverable.[70] Under previous law, no statements had to be disclosed to the defense unless the statements were taken under oath.[71] *Allen*, on the other hand, asserts that irrespective of whether the statement is under oath, the State must disclose all relevant "oral, written or recorded statements."[72]

The *Allen* decision does not incorporate the ABA standard relating to grand jury minutes,[73] presumably because Oklahoma law already makes grand jury transcripts available to the defendant.[74] This provision is also applicable to grand jury proceedings under the *Multicounty Grand*

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69. OKLA. STAT. tit. 22, § 749 (1991). Section 749 provides:

A. In the investigation of a criminal offense, the district attorney or any peace officer may take the sworn statement of any person having knowledge of such criminal offense. Any person charged with a crime shall be entitled to a copy of any such sworn statement upon the same being obtained.

B. If a witness in a criminal proceeding gives testimony upon a material issue of the case contradictory to his previous sworn statement, evidence may be introduced that such witness has previously made a statement under oath contradictory to such testimony.

Id.

70. Nauni v. State, 670 P.2d 126, 133 (Okla. Crim. App. 1983); Ray v. State, 510 P.2d 1395, 1399 (Okla. Crim. App. 1973); State *ex rel.* Fallis v. Truesdell, 493 P.2d 1134, 1137 (Okla. Crim. App. 1972); Shapard v. State, 437 P.2d 565, 594 (Okla. Crim. App. 1967).

71. To the extent that a witness used a previous statement to refresh his memory either while testifying or before testifying, the *Oklahoma Evidence Code* provides for the disclosure of such statements to the adverse party after the witness has testified. OKLA. STAT. tit. 12, § 2612 (1991). This disclosure during the course of the trial is, of course, not considered traditional discovery. Previous law might also have required disclosure of an unsworn statement if the statement tended to negate the guilt of the defendant or reduce the punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963).

72. *But see* Fritz v. State, 811 P.2d 1353, 1358 (Okla. Crim. App. 1991) (representing a post-*Allen* case in which the court is unclear as to the prosecutor's duty to disclose unsworn statements of witnesses made to law enforcement officers).

73. ABA STANDARD 11-2.1(a)(iii) (providing for disclosure of "those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses").

74. OKLA. STAT. tit. 22, § 340 (1991). Section 340 provides:

A qualified court reporter shall be present and take the testimony of all witnesses and upon request a transcript of said testimony or any portion thereof shall be made available to an accused or the district attorney, at the request of the requesting party or officer, and, in the event of an indigent accused, at the expense of the state.

Id.

Jury Act.[75] A defendant charged by information is entitled to a transcript of grand jury testimony even when the grand jury returns no indictment against the defendant.[76]

The required disclosure of witnesses is consistent with current Oklahoma statutes and constitutional provisions. Title 22, section 303 of the *Oklahoma Statutes* requires the prosecutor to endorse the names and addresses of intended witnesses on the information. When the prosecution is by indictment, a similar provision requires the prosecutor to endorse on the indictment the names (but not the addresses) of the witnesses examined before the grand jury.[77] Article II, section 20 of the *Oklahoma Constitution* provides that in capital cases the accused be furnished a list of intended witnesses. A defendant is charged with notice that a codefendant may testify, and thus it is unnecessary to endorse the codefendant's name as a witness.[78] In addition, the court has held that the prosecutor is not required to endorse a witness whose testimony is clearly offered in rebuttal.[79] Whether these limitations on the State's duty to disclose witnesses have survived the *Allen* case remains to be decided.

Under these statutory witness disclosure provisions, the trial court has discretion to permit the endorsement of the names of additional witnesses at any time, even after the trial has commenced.[80] Such late endorsement of witnesses will not be a ground for reversal unless it affirmatively appears that the defendant experienced prejudice in the preparation and presentation of his defense.[81] If the defendant is surprised by the endorsement of additional witnesses and such endorsement requires additional time for preparation, the defendant should withdraw any announcement of being ready for trial and seek a postponement or continuance by setting out facts constituting the surprise and any other evidence which could be produced to rebut the testimony of such witness

75. OKLA. STAT. tit. 22, §§ 350 (1991); Rush v. Blasdel, 804 P.2d 1140, 1141 (Okla. Crim. App. 1991).

76. *Rush*, 804 P.2d at 1191 (overruling State *ex rel.* Fallis v. Miracle, 494 P.2d 676 (Okla. Crim. App. 1972)); *see also* English v. District Court of Adair County, 492 P.2d 1125, 1127 (Okla. Crim. App. 1972) (establishing procedures for actually obtaining the transcript).

77. OKLA. STAT. tit. 22, § 384 (1991).

78. Ashley v. State, 520 P.2d 686, 689 (Okla. Crim. App. 1974); Schneider v. State, 501 P.2d 868, 870 (Okla. Crim. App. 1972).

79. Johnston v. State, 673 P.2d 844, 849 (Okla. Crim. App. 1983); Martin v. State, 596 P.2d 899, 901 (Okla. Crim. App. 1979).

80. Probst v. State, 807 P.2d 279, 286 (Okla. Crim. App. 1991).

81. *Id.*

if the case were continued.[82] Failure to do so will be considered a waiver of any surprise or error which may have existed.[83]

3. Statements by Defendant or Codefendant

The State is also specifically required to disclose "any written or recorded statements and the substance of any oral statements made by the accused or . . . a codefendant."[84] Previous law only required the disclosure of statements made to law enforcement officers, not statements made to private citizens.[85] Since the court of criminal appeals previously made a distinction between statements made to law enforcement officers and statements made to others, it would appear that the failure of the court to make such a distinction in the *Allen* case indicates a desire to abandon that distinction. Thus, defendants' and codefendants' statements seem to be subject to disclosure irrespective of to whom they were made.

This position is further supported by the fact that this specific required disclosure is contained in a general provision that requires the state to disclose the entirety of material and information within the control or possession of the prosecutor. Any continued limitation on the disclosure of statements made to persons other than law enforcement officers would obviously be inconsistent with this general "open file" policy.

4. Reports and Statements Made by Experts

Under *Allen*, other specific disclosures required of a prosecutor include "any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons."[86] This language is taken verbatim from the *ABA Standards*.[87] The commentary to those standards states that if such reports or statements are made in connection with the particular case,[88] the reports must be disclosed whether or not

82. Thomas v. State, 811 P.2d 1337, 1341-42 (Okla. Crim. App. 1991).

83. *Id.*

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

85. Hollan v. State, 676 P.2d 861, 864 (Okla. Crim. App. 1984); Jones v. State, 660 P.2d 634, 641 (Okla. Crim. App. 1983). Previously, a defendant was not entitled to notes taken by a law enforcement officer while questioning the defendant. Perez v. State, 614 P.2d 1112, 1115 (Okla. Crim. App. 1980); Smith v. State, 462 P.2d 328, 330 (Okla. Crim. App. 1969).

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

87. ABA STANDARD 11-2.1(a)(iv).

88. The requirement that reports be made in connection with a particular case was adopted from former Rule 16(a)(2) of the *Federal Rules of Criminal Procedure*. FED. R. CRIM. P. 16(a)(2)

the contents of the reports help the State and whether or not the State intends to use the reports at trial.[89] The commentary further suggests that the type of reports discoverable pursuant to this standard would include "autopsy reports, reports of medical examinations of victims, of any psychiatric examination of the accused, of chemical analyses, of blood tests . . . and the like."[90]

This requirement of *Allen* comports with previous law in Oklahoma. The court of criminal appeals previously mandated disclosure of technical reports such as highly technical and lengthy engineering and laboratory reports,[91] ballistics reports,[92] and the results of breathalyzer tests.[93] However, the court characterized police investigative reports as "non-technical work product" not subject to disclosure.[94]

5. Documents and Tangible Objects

The State must also disclose to a defendant "any books, papers, documents, photographs, tangible objects, buildings, or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused."[95] Like other provisions in *Allen*, this language is derived from the *ABA Standards*.[96] Other similar disclosure provisions do not require the disclosure of such items be tied to the State's intent to introduce the evidence. For example, the *Federal Rules of Criminal Procedure* (*Federal Rules*) authorize disclosure when the items are "material to the preparation of" the defense.[97] The *Uniform Rules of Criminal Procedure* (*Uniform Rules*) require disclosure of such items that are "related in any way to the case."[98] The commentary to the *ABA Standards* diminishes the significance of this difference in language by pointing out that "the standard's shift to open file disclosure

(1966). The limitation in the current rules indicates that reports "material to the preparation of the defense or . . . intended for use by the government as evidence in chief at the trial" are the pertinent documents. FED. R. CRIM. P. 16(a)(1)(D).

89. ABA STANDARD 11-2.1(a)(iv) cmt.

90. *Id.*

91. Pierce v. State, 786 P.2d 1255, 1262 (Okla. Crim. App. 1990); Moore v. State, 740 P.2d 731, 732-34 (Okla. Crim. App. 1987); Layman v. State, 355 P.2d 444, 446 (Okla. Crim. App. 1960).

92. Hamm v. State, 516 P.2d 825, 826 (Okla. Crim. App. 1973).

93. OKLA. STAT. tit. 47, § 752 (1991); Abshire v. State, 551 P.2d 273, 274 (Okla. Crim. App. 1976).

94. Trowbridge v. State, 502 P.2d 495, 503-04 (Okla. Crim. App. 1972); *see also* Bettlyoun v. State, 562 P.2d 862, 866 (Okla. Crim. App. 1977); State *ex rel.* Fallis v. Truesdale, 493 P.2d 1134, 1136 (Okla. Crim. App. 1972).

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

96. ABA STANDARD 11-2.1(a)(v).

97. FED. R. CRIM. P. 16 (a)(1)(C).

98. UNIFORM RULES 421(a) (Supp. 1987).

has the effect of making available to the defense any relevant objects that are within the prosecutor's possession or control."[99]

The requirement in *Allen* that the prosecutor disclose such documents and tangible objects marks a departure from prior Oklahoma case law. The court of criminal appeals has long required the disclosure of this type of evidence. Specifically, the court requires disclosure of an alleged death weapon and any reports concerning a weapon,[100] documents,[101] sperm slides in a rape case,[102] a film which is the subject of an obscenity prosecution,[103] a sample of an alleged controlled substance for use in an independent chemical analysis,[104] and copies of fingerprints.[105]

6. Criminal Records of Defendants and Codefendants

Allen also requires the disclosure of "any record of prior criminal convictions of the defendant, or of any codefendant."[106] This requirement is also taken verbatim from the *ABA Standards*.[107] This standard expands the *Federal Rules* and the *Uniform Rules*, both of which require only the disclosure of the prior criminal record of the defendant.[108] The commentary to the *ABA Standards* points out that while the disclosure of the defendant's criminal record in no way disadvantages the State, such information is important to the defense on such issues as whether the defendant should plead guilty, testify at trial, or move to exclude the use of prior convictions for impeachment purposes.[109]

The requirement that the state disclose the prior criminal record of the codefendant is new to Oklahoma law. Prior law only required the disclosure of the criminal record of intended witnesses.[110] The requirement in *Allen* that a codefendant's record be disclosed is not contingent

99. ABA STANDARD 11-2.1(a)(v).

100. Stevenson v. State, 486 P.2d 646, 649 (Okla. Crim. App. 1971); Doakes v. District Court of Okla. County, 447 P.2d 461, 464 (Okla. Crim. App. 1968).

101. *In re* Killian, 338 P.2d 168, 169 (Okla. Crim. App. 1959).

102. Ziegler v. State, 610 P.2d 251, 255-56 (Okla. Crim. App. 1980).

103. *See generally* Melton v. State, 512 P.2d 204, 205 (Okla. Crim. App. 1973).

104. Moore v. State, 740 P.2d 731, 734 (Okla. Crim. App. 1987).

105. Stafford v. District Court of Okla. County, 595 P.2d 797, 799 (Okla. Crim. App. 1979).

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

107. ABA STANDARD 11-2.1(a)(vi).

108. FED. R. CRIM. P. 16(a)(1)(B); UNIFORM RULES 422(b) (Supp. 1987). Although the *Uniform Rules* do not specifically authorize the discovery of the criminal record of codefendants, such records may be discoverable pursuant to Rule 422(a) which requires the disclosure of "all matters . . . which relate in any way to the case." *Id.*

109. ABA STANDARD 11-2.1(a)(vi).

110. Housley v. State, 785 P.2d 315, 316-17 (Okla. Crim. App. 1989); Stafford v. District Court of Okla. County, 595 P.2d 797, 799 (Okla. Crim. App. 1979); Bettlyoun v. State, 562 P.2d 862, 865-66 (Okla. Crim. App. 1977); Stevenson v. State, 486 P.2d 646, 650 (Okla. Crim. App. 1971).

on the intended use of the codefendant as a witness. This point is made particularly clear by the fact the *Allen* decision contains a separate provision requiring the disclosure of the record of intended witnesses.[111]

7. Record Check of Possible Witnesses

In addition to requiring the disclosure of the criminal record of the defendant and any codefendant, *Allen* requires the disclosure of "OSBI or FBI rap sheet/records check on any witness listed by the State or the Defense as a possible witness who will testify at trial."[112] This provision goes beyond the *ABA Standards* which require disclosure of such records only if the prosecutor already has the prior record on hand.[113] The *Uniform Rules* only require the State to provide the criminal record of intended State witnesses and only "so far as reasonably ascertainable by the prosecuting attorney."[114] This provision seems to impose on the State the duty to actually conduct a record check of the possible witnesses rather than limit the disclosure to information within the prosecutor's actual knowledge. This provision goes beyond prior law and the *Uniform Rules* by requiring the disclosure of the criminal record of defense witnesses in addition to State witnesses.[115]

8. *Brady* Material

Finally, the *Allen* decision states that the "prosecuting attorney shall disclose to defense counsel any material or information within the prosecutor's possession or control[116] which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused."[117] Once again, this language is taken directly from the *ABA Standards*.[118] Those standards adopt the definition of exculpatory material from *Brady v. Maryland*[119] which held that "[t]he suppression by the prosecution of evidence favorable to an accused

Although other discoverable information need not be disclosed prior to the preliminary examination the conviction record of intended witnesses must be provided prior to such examination. *Id.*

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

112. *Id.*

113. *See* ABA STANDARD 11-2.1(a)(vi) cmt.

114. UNIFORM RULES 422(b)(2) (Supp. 1987).

115. Stafford v. District Court of Okla. County, 595 P.2d 797, 799 (Okla. Crim. App. 1979).

116. The *Allen* decision extends this obligation "to material and information in the possession or control of members of the prosecutor's staff and of any others who either regularly report or, with respect to the particular case, have reported to the prosecutor's office." *Allen*, 803 P.2d at 1168. For more on this obligation see *supra* notes 64-66 and accompanying text.

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

118. ABA STANDARD 11-2.1(c).

119. 373 U.S. 83 (1963).

upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[120]

Although the other disclosures are required only upon request, this provision does not contain a request requirement. This may indicate an attempt to be consistent with the current constitutional requirement for disclosure of exculpatory material which seems not to be dependent on a request for the exculpatory material.

In *Brady*, the defendant made a specific request for exculpatory material, and, in *United States v. Agurs*,[121] the Court emphasized the importance of making a specific request for disclosure of material evidence by fashioning different tests for materiality depending on the specificity of the request. If a specific request for information is denied, that information will be considered material if it "might have affected the outcome of the trial."[122] In contrast, if no specific request has been made and the State fails to disclose some exculpatory information, that information will be considered material only if it can be said that "the omitted evidence creates a reasonable doubt that did not otherwise exist."[123] Although the determination whether a request is specific or general must generally be made on a case by case basis, the *Agurs* court did state that a request for "all *Brady* material" would be treated as though no request had been made.[124]

In *United States v. Bagley*,[125] however, the Supreme Court cast considerable doubt on the *Agurs* distinction between specific and general requests. Although there was no majority opinion, five justices seemed to agree that the appropriate test for "materiality," in *all* instances of prosecutorial failure to disclose exculpatory evidence, should be whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[126] While three justices found it unnecessary to address the relevance of the specificity of the defense request, the other two reasoned that, in applying that standard, a court must take into account the greater potential for prejudice in a specific request case.[127] More importantly, though, the

120. *Id.* at 87.
121. 427 U.S. 97 (1976).
122. *Id.* at 104.
123. *Id.* at 112.
124. *Id.* at 107.
125. 473 U.S. 667 (1985).
126. *Id.* at 682.
127. *Id.* at 685 (Burger, C.J., White, J., and Rehnquist, J., concurring).

court of criminal appeals considers *Bagley* to have created a single test for materiality in those cases where the defendant makes a specific request, a general request, or no request for *Brady* material.[128]

B. *Disclosures by the Defense*

The section of the *Allen* decision requiring the defense to disclose certain information represents a major departure from previous Oklahoma law. Under prior law, the only information required to be disclosed by the defense was a notice of alibi[129] and notice of a mental illness or insanity defense.[130] Of course, the State could still take advantage of various investigative techniques such as lineups, interrogation, and searches and seizures, but these are not generally considered discovery devices.

Although the required defense disclosures under *Allen* are substantial, they are not nearly as extensive as the disclosures required of the State. For example, the defense disclosure section does not contain language requiring the defense to disclose "all of the material and information" in its possession, as does the State disclosure provision.[131] Instead, the decision simply includes a list of the specific items subject to disclosure, which are discussed in the following sections.

1. Witnesses and Witness' Statements

The first specific category of material to be disclosed by the defense is "the names and addresses of witnesses, together with their relevant oral, written or recorded statement, or summaries of same."[132] This language is identical to the language used to describe the State's duty to disclose and appears to have been chosen to provide some symmetry to the discovery scheme.[133]

Although the *ABA Standards* provide a somewhat comparable requirement for the State,[134] *Allen*'s provision goes considerably beyond

128. Fritz v. State, 811 P.2d 1353, 1358 (Okla. Crim. App. 1991).

129. OKLA. STAT. tit. 22, § 585 (1991).

130. OKLA. STAT. tit. 22, § 1176 (1991). This section contains no specific sanctions for failure to comply with the notice provision. Since it is contained in a group of statutes concerned with the determination of competency to stand trial, it seems arguable that the failure to give the required notice has nothing to do with the introduction of evidence of mental illness or insanity at the trial itself. *Id.*

131. *See supra* notes 58-66 and accompanying text.

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

133. *Id.* at 1167.

134. *See supra* notes 67-68 and accompanying text.

what the *ABA Standards* require of the defense. The *ABA Standards* only require the defense to disclose the names and addresses of witnesses intended to be called with respect to an alibi or mental condition. Absent is a requirement that any statements of those witnesses be disclosed.[135] Although the *ABA Standards* do not require the disclosure of witness' statements, a number of states do require such disclosures.[136]

The ABA Standard requiring disclosure of defense witnesses on alibi and mental condition specifically states that only those persons "the defense intends to call as witnesses for testimony" need be disclosed.[137] It has been suggested that the *Allen* court's failure to use similar language indicates that this disclosure provision "extends to all witnesses regardless of whether the defense intends to call such witnesses at trial."[138] However, it seems much more likely that the provision will only require the disclosure of intended witnesses. As noted above, the language requiring defense disclosure of witnesses is the same as that requiring prosecution disclosure, which in turn comes from the *ABA Standards*.[139] Although the *ABA Standards* themselves do not refer to the witnesses as those intended to be called at trial, the commentary refers to such witnesses as "prospective."[140] Certainly the use of the word "prospective" refers to the witness' status as a future trial witness rather than as simply one who might have information about the case. In addition, any requirement that the defendant disclose witnesses who will not be called at trial is most likely unconstitutional since the Supreme Court's primary rationale for upholding such defense disclosure requirements is the simple acceleration of time in which the defendant would be disclosing at trial anyway.[141]

2. Alibi Witnesses and Statements

The defense is also required to disclose the names and addresses of

135. ABA STANDARD 11-3.3.

136. *See, e.g.*, ARIZ. R. CRIM. P. 15.2c(1); FLA. R. CR. P. 3.220(d)(2)(i); HAW. R. PEN. P. 16(c)(2)(i); ILL. SUP. CT. R. 413(d)(i); MASS. R. CR. P. 14 (a)(3); MINN. R. CR. P. 9.02(I)(3) NEB. REV. STAT. § 29-1916(1); N.J. R. CRIM. P. 3:13-3(b)(3); OHIO. R. CRIM. P. 16(d) (requiring disclosure only after witness has testified on direct examination at trial); WASH. R. SUP. CT. CRIM. P. 4.7(b)(1).

137. ABA STANDARD 11-3.3.

138. Uphoff, *supra* note 5, at 413.

139. ABA STANDARD 11-2.1(a)(i) (requiring the prosecution to disclose "the names and addresses of witnesses").

140. *See* ABA STANDARD 11-2.1(a)(i) cmt.

141. Williams v. Florida, 399 U.S. 78, 85 (1970). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 863-67 (West 2d ed. 1992).

alibi witnesses.[142] This requirement is also based on the *ABA Standards*,[143] but the *ABA Standards* do not require the disclosure of the statements of any witnesses.[144]

There is a difference between the general witness disclosure provision and the alibi witness disclosure provision. The general witness disclosure provision requires the disclosure of the witness' "relevant oral, written or recorded statement, or summaries of same."[145] In contrast, the alibi provision only requires the disclosure of the witness' testimony regarding the alibi.[146] Although this difference could be significant, it seems more likely the difference in language was simply an oversight on the part of the court. This seems likely because the general requirement to disclose "oral, written or recorded statement(s)" would also seem to apply to alibi witnesses. Since the court is trying to provide symmetry between State and defense disclosures, it does not follow that the court intended less disclosure of witness' statements for alibi witnesses than for other types of witnesses.[147]

It is also not clear whether the defense is actually required to give notice of the intention to raise an alibi defense. The language of *Allen* only requires the disclosure of possible alibi witnesses.[148] Language that would require disclosure of an alibi defense and the witnesses supporting it is contained in title 22, section 585 of the *Oklahoma Statutes.* Section 585 refers in part to "notice of the intention of the defendant to claim such alibi, which notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense . . . ." However, section 585 only provides for a continuance of the trial for the State to investigate the alibi if the defendant has not given notice of the alibi defense.[149] Therefore, neither the current alibi

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

143. ABA STANDARD 11-3.3(a)(i).

144. *See supra* note 135 and accompanying text.

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

146. *Id.*

147. Another possible interpretation is that the court intends for the defense to generate a statement from the alibi witness specifically for the purpose of providing it to the prosecution. The use of the phrase "statement to that fact" could imply such a requirement. This interpretation seems unlikely, however, since one would expect that such a unique requirement of creating a statement solely for the purpose of disclosure would be stated in less cryptic terms.

148. Although ABA Standard 11-3.3(a)(i) requires only the disclosure of alibi witnesses, not the defense itself, the commentary to that section refers in several places to the disclosure of "contemplated defenses." The significance of such language may not be too great, however, since the *ABA Standards* only require the disclosure of alibi and mental condition witnesses, and, thus, any disclosure of witnesses is tantamount to a disclosure of the particular defense.

149. OKLA. STAT. tit. 22, § 585 (1991).

statute nor the language of *Allen* specifically requires the defendant, under the threat of any real sanction, to disclose the intention to raise an alibi defense.[150]

If the court did not intend to require such a disclosure, why did it bother to include a specific section dealing with the disclosure of alibi witnesses in addition to the general witness disclosure provision? One possibility is that the court intends for the defense to separately list the witnesses as alibi witnesses and, in effect, provide notice of the alibi defense in that way. Alternatively, the court could be assuming that the disclosure of the witness' statements will provide the State with the notice of the alibi defense. In any event, the current language of *Allen* and the alibi statute are likely to cause some confusion and will probably have to be clarified.[151]

3. Mental Condition Witnesses and Statements

In addition to alibi witnesses, the defense is required to disclose

> the names and addresses of any witness the defendant will call, other than himself, for testimony relating to any mental disease, mental defect, or other condition bearing upon his mental state at the time the offense was allegedly committed, together with the witness' statement of that fact, if the statement is redacted by the court to preclude disclosure of privileged communication.[152]

Although the *ABA Standards* require disclosure of mental condition witnesses,[153] the standards do not require disclosure of any witness' statements.

The language of this provision raises the same problem as the alibi provision with respect to the nature of the witness' statement that must be disclosed. The general witness disclosure provision requires disclosure of the "oral, written or recorded statement(s)" of the witness, while this provision only refers to the disclosure of the witness' "statement of that fact." While it is certainly not clear, it seems most likely that the court intended the same degree of disclosure for all types of witnesses and the difference in language is simply an oversight.

As is the case with the alibi provision, the *Allen* decision does not

150. Connery v. State, 499 P.2d 462, 465 (Okla. Crim. App. 1972).

151. Another issue that the court will have to address is the court's authority to, in effect, alter the application of the current alibi statute. OKLA. STAT. tit. 22, § 585 (1991).

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

153. ABA STANDARD 11.3.3(a)(ii).

make it clear whether the defense has to provide any notice of an intention to rely on mental condition at the trial or is just required to disclose witnesses who will testify to such condition. Again, the existence of a statutory provision probably creates confusion relating to this issue. Title 22, section 1176 of the *Oklahoma Statutes* requires the defendant to file an application with the court at least twenty days before trial "if the defendant intends to raise the question of mental illness or insanity at the time of the offense." Although that statute would seem to require the disclosure of a mental condition defense, the rest of the statute is primarily concerned with a procedure for determining whether the court should provide an indigent defendant with the services of a qualified mental health professional. In addition, the statute contains no specific sanctions for failure to make the application, other than the implicit one that an indigent who does not comply will not be provided with the appropriate mental health services. Thus, the question of whether a defendant must specifically disclose, under threat of sanction, a mental condition defense remains unresolved.

The *Allen* court did not address the question of whether the sanctions discussed in the decision may be applied to a defendant who fails to provide notice of mental illness or insanity under title 22, section 1176 of the *Oklahoma Statutes.* The *Allen* court did not expressly require that notice be given. As with the alibi provision, the court may have intended for the defense to specifically delineate only those witnesses who will testify to the defendant's mental condition, or the court may have intended the required disclosure of such statements to, in effect, provide the notice that such a defense will be raised.

This disclosure provision, unlike the others discussed above, contains a specific provision that the statement be "redacted by the court to preclude disclosure of privileged communication."[154] Although the failure to include such an admonition in the other provisions might lead to the conclusion that privileged communications do not have to be redacted from those statements, it is doubtful that the court intended such a result.

In another section of the opinion, the *Allen* court specifically requires the trial judge to "ensure that all discovery orders do not violate the defendants' right against self-incrimination."[155] Although the phrase "privileged communication" is certainly broader than the privilege

154. *Allen*, 803 P.2d at 1168.
155. *Id.*

against self-incrimination, it is clear that at least communications that are privileged under the Fifth Amendment[156] should be redacted from all witness statements, regardless of whether the specific provision contains specific language about the redaction. Furthermore, the *Oklahoma Evidence Code* provides a defendant with a number of confidential communication privileges,[157] and the *Allen* decision does not suggest that such privileges are to be abrogated in the name of discovery. Instead, it appears that the court made specific reference to the redaction of privileged communications in the context of mental condition witness statements simply because those are the statements most likely to include privileged communications.

4. Documents and Tangible Objects

In addition to the disclosure of witnesses and their statements, the defendant is also required, upon request of the prosecuting attorney, to allow access "at any reasonable times and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control."[158] This particular provision was not taken from the *ABA Standards*,[159] but from the *Federal Rules*[160] and the *Uniform Rules*.[161] The *Uniform Rules* and the *Federal Rules*, however,

156. The privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. art. V.

157. The confidential communication privileges contained in the *Oklahoma Evidence Code* are the Attorney-Client Privilege; the Physician and Psychotherapist-Patient Privilege; the Husband-Wife Privilege; and the Religious Privilege. OKLA. STAT. tit. 12, § 2502-2505 (1991).

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

159. There is no comparable ABA standard. The only similar disclosure required of the *ABA Standards* is the disclosure of medical and scientific reports that the defense intends to use at a hearing or trial. ABA STANDARD 11-3.2.

160. FED. R. CRIM. P. 16(b)(1)(A). Section 16(b)(1)(A) provides:

> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

Id.

161. UNIFORM RULES 423(i) (Supp. 1987). Rule 423(i) provides:

> If the defendant has requested and received discovery under Rule 421 or 422(b), the defendant, upon the prosecuting attorney's written request after the time set under Rule 411, shall allow the prosecuting attorney access at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made upon any book, paper, document, recording, photograph, or other tangible object within the defendant's possession or control which the defendant intends to offer in evidence.

make the defendant's duty to disclose such information contingent on the defendant having at least requested similar information from the State. The *Allen* decision appears to require the defendant to allow access to such information, regardless of whether the defendant has sought such information from the State.

The *Allen* decision follows the *Federal Rules* and the *Uniform Rules* which only require the defendant to allow access to such items the defendant intends to offer in evidence.[162] Similarly, *Allen* includes an exception which also appears in the *Federal Rules*[163] and the *Uniform Rules*.[164] *Allen* requires the defendant to allow the State access to "a report or statement as to a physical or mental examination or scientific test or experiment made in connection with the particular case prepared by and relating to the anticipated testimony of a person whom the defendant intends to call as a witness."[165] Thus, as long as such a report or statement is prepared by and relates to the testimony of an intended witness, access is required regardless of whether the report or statements themselves are intended to be offered in evidence. This provision therefore makes such reports or statements available for cross examination in the same way that *Allen* makes witness statements available under the witness' statement disclosure provisions.[166]

Note that except for the word "recording," the rest of this provision is essentially the same as Rule 16(b)(1)(A) of the *Federal Rules of Criminal Procedure. Id.*

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

163. FED. R. CRIM. P. 16(b)(1)(B). Rule 16(b)(1)(B) provides:

> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

Id.

164. UNIFORM RULES 423(g) (Supp. 1987). Rule 423(g) provides:

> If the defendant has requested and received discovery under Rule 421 or Rule 422(b), the defendant, upon the prosecuting attorney's written request after the time set under Rule 411, shall furnish the prosecuting attorney a copy of any report or statement regarding a medical examination or scientific test, experiment, or comparison if the report or statement;
>
> (1) was made in connection with the particular case;
>
> (2) was prepared by an expert whom the defendant intends to call as a witness at hearing or trial; and
>
> (3) relates to the witness' anticipated testimony.

Id.

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

166. *See supra* notes 132-141 and accompanying text.

Although these provisions generally follow the scheme of the *Federal Rules* and the *Uniform Rules*, *Allen* makes explicit what is implicit in those rules. The *Allen* decision specifically excludes from disclosure any document "to the extent that it contains any communication of the defendant."[167] In addition, any reports or statements relating to physical or mental examination, scientific tests, or experiments must be "redacted by the court to preclude disclosure of privileged communication."[168] This use of different language indicates another possible area of ambiguity the court of criminal appeals may have to clarify. The language makes it clear some reports must still be disclosed so long as redaction of privileged communications occurs. However, it could be argued that any item containing communication of the defendant is completely immune from disclosure, even if such communication could be redacted.

V. REGULATION OF DISCOVERY

A. *Use of Disclosed Information*

The *Allen* decision does not restrict the defendant's use of information disclosed by the State. However, *Allen* significantly limits the State's use of information disclosed by the defendant.

With respect to the various statements disclosed to the State, the *Allen* decision provides such statements are "not admissible in evidence at trial."[169] The decision further provides that information obtained as a result of the filing of such a statement is likewise not admissible in evidence at trial "except to refute the testimony of a witness" whose identity was required to be disclosed.[170] This limitation is taken from the *ABA Standards*.[171] The commentary to the *ABA Standards* states that the "provision has been added to ensure that the defendant who chooses not to call the named witness will not be penalized for changing strategy."[172]

The *Allen* decision seems to make a conscious distinction between the use of a witness' statement and the use of "information obtained as a

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167. *Allen*, 803 P.2d at 1168.
168. *Id.*
169. *Id.*
170. *Id.*
171. ABA STANDARD 11-3.3(b). Standard 11-3.3(b) provides:

> (b) Information disclosed pursuant to paragraph (a) is not admissible in evidence at a hearing or trial. Information obtained as a result of disclosures made pursuant to paragraph (a) is not admissible in evidence except to refute the testimony of a witness whose identity is required to be disclosed pursuant to paragraph (a).

Id.
172. ABA STANDARD 11-3.3(b) cmt.

result of the filing of such a statement." In the event a defense witness testifies inconsistently with the disclosed statement, the State would apparently be permitted to cross examine the witness about such inconsistencies based on the "information obtained as a result of the filing of such a statement." If, however, the witness denies making the prior inconsistent statement, it appears that the disclosed statement itself would "not [be] admissible in evidence at trial" to refute the witness' denial;[173] whereas "[i]nformation obtained as result of the filing of such a statement" apparently could be.

The *Allen* decision places a similar restriction on the use of information disclosed with respect to documents, reports, and tangible objects. In similar language, the decision holds that information obtained as a result of the disclosure of such information is not admissible in evidence at trial except to refute the matter disclosed.[174]

The *Allen* decision also provides that "the fact that the defendant . . . has indicated an intent to offer a matter in evidence or to call a person as a witness is not admissible in evidence at trial."[175] This otherwise straightforward limitation is ambiguous because of where it is placed in the opinion. The defense disclosure provisions are contained in two subdivisions. Subdivision 1(a), (b), and (c) regulate disclosure of witnesses and witness' statements. Subdivision 2(a) and (b) regulate disclosure of documents, reports, and tangible objects. At the end of each of these subdivisions, language appears referring to "this subdivision." The prohibition against using the defendant's intention to call a witness at trial appears after subdivision 2(b) in a sentence referring to disclosures made under "this subdivision." Since the subdivision requiring the disclosure of witnesses does not contain such a prohibition, one could argue the State is not prohibited from offering into evidence a defendant's disclosed intention to call a person as a witness under that section.

Although a literal reading of *Allen* might support this interpretation, it seems doubtful that the court intended such a result. First, subdivision 2 does not require the disclosure of the defendant's intention to

173. Under the *Oklahoma Evidence Code*, it would otherwise be permissible for the prosecutor to introduce extrinsic evidence of the witness' prior inconsistent statement. OKLA. STAT. tit. 12, § 2613 (1991). *Allen* simply seems to prevent the prosecutor from using the statement itself as the extrinsic evidence.

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

175. *Id.*

call any witnesses. Subdivision 1 requires that disclosure. Thus, the language in subdivision 2 referring to the defendant's intention to call a witness would be useless unless it was meant as a limitation on the use of information obtained pursuant to subdivision 1. Second, the language the court uses to limit the use of a defendant's disclosure is substantially similar to the *Uniform Rules*, which apply to all of the defendant's disclosures, not just those in certain subdivisions.[176] Thus, despite the unfortunate wording of some of the opinion, it seems fairly clear the court intended to limit the State's use of all disclosed information to refuting the matter disclosed and did not intend to allow the State to use it in any affirmative manner.

B. *Protection of Privileged Material*

The *Allen* decision does not envision trial judges issuing generic orders to defendants requiring them to disclose everything listed in the order. Rather, the decision requires close scrutiny of the material that might be required to be disclosed to ensure protection of privileged information.

As noted above,[177] the *Allen* decision emphasizes in several places the importance of preventing disclosure of privileged information. Any statements of intended mental condition witnesses must be "redacted by the court to preclude disclosure of privileged communication."[178] In addition, any reports or statements as to any physical or mental examination, or scientific test or experiment must be similarly redacted.[179]

Most importantly, the decision requires that "the trial judge shall ensure all discovery orders do not violate the defendants' right against self-incrimination."[180] In another section of the decision, the court notes that the State may have access to various papers and documents the defendant intends to introduce at trial "except to the extent that [they]

176. UNIFORM RULES 423(l) (Supp. 1987). Rule 423(1) provides:

> The fact that the defendant, under this Rule, has indicated an intention to offer specified evidence or to call a designated witness is not admissible in evidence at a hearing or trial. Evidence obtained as a result of disclosure under this Rule is not admissible at trial except to refute:
>
> (1) the evidence disclosed if the defendant introduces it; or
>
> (2) the testimony of a witness whose identity this Rule requires to be disclosed.

Id.

177. *See supra* notes 154-167 and accompanying text.

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

179. *Id.*

180. *Id.*

contain any communication of the defendant."[181] Thus, although the *Allen* decision requires significantly increased disclosures on the part of the defendant, the decision does not stand as an invitation to the trial courts to abrogate the defendant's constitutional privilege against self-incrimination.[182] In guarding against any such violations, the trial courts must be careful not to enforce blanket discovery orders without first determining, on a case by case basis, the impact on the defendant's privilege against self-incrimination.

C. *Continuing Duty to Disclose*

The *ABA Standards*,[183] the *Uniform Rules*,[184] and the *Federal Rules*[185] all provide for a continuing duty to disclose otherwise discoverable material even if it is not discovered until after other required disclosures have been made. The *Allen* decision does not contain such a general provision, but instead has just one specific reference to a continuing duty to disclose which only applies to the disclosure of documents, reports, and tangible objects by the defendant. That section provides that "if the defendant subsequently ascertains that he has possession or

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181. *Id.*

182. The *Allen* decision has been challenged as violating the defendants' privilege against self-incrimination. *See* Uphoff, *supra* note 138, at 387. Although there is certainly the potential for violations in individual cases, it should be noted that in states which have similar witness statement disclosure provisions, self-incrimination objections to such required disclosures have generally been rejected in light of two Supreme Court decisions. *See* United States v. Nobles, 422 U.S. 225 (1975); Williams v. Florida, 399 U.S. 78 (1970). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 522-24 (West. 1984). Any further analysis of the privilege against self-incrimination is beyond the scope of this article.

183. ABA STANDARD 11-4.2. Standard 11-4.2 provides:

> If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party shall promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court shall also be notified.

Id.

184. UNIFORM RULES 421(c) (Supp. 1987). Rule 421(c) provides: "If any matter relating to the case, other than legal work product specified in subdivision (b)(1), comes within the prosecuting attorney's possession or control after the defendant has had access under this Rule, the prosecuting attorney shall promptly inform the defendant." *Id.*; UNIFORM RULES 423(j) (Supp. 1987). Rule 423(j) provides: "If the defendant discovers a matter specified in this Rule after the time set by Rule 11: (1) the defendant shall promptly furnish it to the prosecuting attorney; and (2) the court, on motion of the prosecuting attorney, may grant additional time, a continuance, or other appropriate relief." *Id.*

185. FED. R. CRIM. P. 16(c). Rule 16(c) provides:

> If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

Id.

control of such a matter, he shall promptly so inform the prosecuting attorney."[186] Despite the fact that the *Allen* decision does not contain any other general provision requiring a continuing duty to disclose, it would appear that both the prosecutor and defendant are still under a continuing duty to disclose required information regardless of when it is discovered.

In the language used to describe the information required to be disclosed by both the State and defendant, no language exists indicating either party is only required to disclose information discovered at a particular time. Rather, the language is quite broad in simply requiring the parties to disclose certain information. The only real timing restriction comes in the section of the opinion dealing with when discovery should be provided. That section requires that "all issues relating to discovery will be completed at least ten days (10) prior to trial."[187] This language simply addresses the obvious necessity that pretrial discovery must end sometime before the trial starts. It does not mean that anything discovered after that time is therefore immune from disclosure. Such an interpretation would defeat the purpose behind requiring pretrial discovery by encouraging delays in the discovery of information until after the time it has to be disclosed.

Any ambiguity that might exist because of the lack of a general provision requiring a continuing duty to disclose can be resolved in the discovery order issued to both parties by the trial judge. The *Allen* decision specifically suggests the "judge should enter a written order setting forth discovery, inspection and copying requirements for each party and a time for compliance."[188]

D. *Work Product Exception*

The *Allen* decision specifically provides that "the discovery order shall not include discovery of legal work product of either attorney which is deemed to include legal research or those portions of records, correspondence, reports, or memoranda which are only the opinions,

186. This language follows section 2(a) and (b), which generally refers to the disclosure by the defendant of documents, reports, and tangible objects. Thus, the phrase "such a matter" likely refers to all of the items mentioned in that section. However, the language *immediately* follows the part of section two that refers to reports or statements relating to physical or mental examinations or scientific tests and experiments. Thus, it might be possible, although not probable, that "such a matter" refers only to these more limited items from section two. *Allen*, 803 P.2d at 1168.

187. *Id.* at 1167.

188. *Id.*

theories, or conclusions of the attorney or the attorney's legal staff."[189] The *ABA Standards*,[190] the *Uniform Rules*,[191] and the *Federal Rules*[192] contain exclusions for what is essentially the same type of information.

The court previously adopted the work product exception contained in the *ABA Standards*.[193] Even prior to that adoption, the court recognized a work product privilege.[194] It appears, however, that the application of the exception may be different under *Allen*. For example, the court previously held that work product included reports compiled by a

189. *Id.* at 1169.

190. ABA STANDARD 11-2.6(a). Standard 11-2.6(a) provides: "Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of the prosecutor's legal staff." *Id.*; ABA STANDARD 11-3.2(b). Standard 11-3.2(b) provides: "Disclosure shall not be required: (i) of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the defense attorney or members of the defense legal staff; or (ii) of any communications of the defendant. *Id.*

191. UNIFORM RULES 421(b)(1) (Supp. 1987). Rule 421(b)(1) provides:

> The prosecuting attorney need not allow access to portions of records, correspondence, reports, recordings, or memoranda to the extent that they are:
> (i) legal research; or (ii) opinions, theories, or conclusions of the prosecuting attorney, a member of the prosecuting attorney's staff, or an agent of the prosecuting attorney not intended to be called as a witness.

Id.

> Rule 403(k)(1) provides:
> The defendant need not furnish any portion of a report, statement, or recording to the extent it is:
> (i) legal research;
> (ii) an opinion, theory, or conclusion of the defendant's lawyer, a member of the lawyer's staff, or an agent of the lawyer not intended to be called as a witness; or
> (iii) a communication of the defendant.

UNIFORM RULES 423(k)(1) (Supp. 1987).

192. FED. R. CRIM. P. 16(a)(2), (b)(2). Rule 16(a)(2) provides:

> Except as provided in paragraphs (A),(B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

Id.

> Rule 16(b)(2) provides:
> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

Id.

193. Moore v. State, 740 P.2d 731, 736 (Okla. Crim. App. 1987).

194. Nauni v. State, 670 P.2d 126, 133 (Okla. Crim. App. 1983); Perez v. State, 614 P.2d 1112, 1115 (Okla. Crim. App. 1980); State *ex rel.* Fallis v. Truesdell, 493 P.2d 1134, 1135-37 (Okla. Crim. App. 1972).

law enforcement agency in the course of its investigation[195] and unsworn witness statements obtained by the prosecuting attorney and police officers.[196] In the case where the court previously adopted the *ABA Standards*, the court emphasized that in order to qualify as work product the paper or document must have been prepared by the prosecuting attorney or a member of the legal staff; this seems to exclude reports prepared by law enforcement agencies.[197] In a post-*Allen* decision, the court seems to have backed off of the blanket exclusion of law enforcement reports by holding that the trial court should not summarily overrule a discovery request for such law enforcement reports (such as those of the OSBI), but should determine from a review of the reports whether they are relevant and discoverable.[198] In *Allen*, the court eliminated the work product protection for unsworn statements by requiring disclosure of the names and addresses of witnesses "together with their relevant oral, written or recorded statement, or summaries of same."[199]

E. *Protective Orders*

The *ABA Standards*,[200] the *Uniform Rules*,[201] and the *Federal*

195. *State ex rel. Fallis*, 493 P.2d at 1136.

196. *Id.* at 1135-38; Nauni v. State, 670 P.2d 126, 133 (Okla. Crim. App. 1983); Ray v. State, 510 P.2d 1395, 1398-99 (Okla. Crim. App. 1973); Shapard v. State, 437 P.2d 565, 593-94 (Okla. Crim. App. 1967).

197. *Moore*, 740 P.2d at 736.

198. Amos v. District Court of Mayes County, 814 P.2d 502, 503 (Okla. Crim. App. 1991).

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

200. ABA STANDARD 11-4.4. Standard 11-4.4 provides:

> Upon a showing of cause, the court may at any time order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in time to permit counsel to make beneficial use of the disclosure.

Id.

201. UNIFORM RULES 421 (b)(3) (Supp. 1987). Rule 421(b)(3) provides:

> (i) The court may permit the prosecuting attorney to defer access for a specified time to the extent earlier access would create a substantial risk to any person of physical harm, intimidation, or bribery or to the extent justified by the need to protect the integrity of a continuing investigation. Deferral may not be permitted if it prejudices a right of the defendant or allows insufficient time before trial for the defendant to make beneficial use of the information sought, including any additional pretrial discovery thereby necessitated.
> (ii) The court may impose reasonable conditions as to manner of inspection, photographing, copying, or testing, to the extent necessary to protect the evidentiary value of any matter to which the defendant seeks access or the prosecuting attorney proposes to test.

Id.

UNIFORM RULES 423(k)(3) (Supp. 1987). Rule 423(k)(3) provides:

> Upon a showing of good cause, the court may order that the furnishing of a report, statement, document, recording, or object may be denied, restricted, or deferred for a specified time. The court may order the defendant to disclose promptly to the prosecuting attorney a

Rules[202] specifically authorize courts to issue protective orders regulating the timing and disclosure of discoverable information. However, *Allen* does not specifically mention protective orders. Despite the failure of the court to specifically authorize such orders, it would appear trial courts in Oklahoma are still authorized to issue them. The decision clearly implies that trial courts play a regulatory role in the discovery process by specifically requiring trial courts to redact privileged communications[203] and ensure that all discovery orders do not violate the defendant's privilege against self-incrimination.[204] In addition, trial courts possessed the authority to so regulate discovery even prior to the *Allen* decision, and nothing in the decision suggests that they do not retain that authority.[205]

F. *Sanctions*

The *Allen* decision lists separate sanctions which may be imposed on the State and/or defense for failure to comply with a discovery order. One section common to both prosecution and defense sanctions, however, prohibits "either party from introducing specified evidence or calling a specified witness."[206] The decision states that such sanction "relates to items or persons required to be disclosed by the court's discovery order"[207] and requires the "party against whom the sanction is sought . . . to comply with the order or show good cause as to why the party failed to comply."[208] It would appear the inclusion of such language ensures that the severe sanction of exclusion of evidence is reserved

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list of the sources of information relied upon in any report the furnishing of which has been denied, restricted, or deferred.

Id.

202. FED. R. CRIM. P. 16(d)(1). Rule 16(d)(1) provides:

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such a showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Id.

203. *Allen*, 803 P.2d at 1168; *see supra* notes 177-182 and accompanying text.

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

205. For example, in Moore v. State, 740 P.2d 731 (Okla. Crim. App. 1987), the court of criminal appeals held that the defendant was entitled to have an expert examine and test the samples of an alleged illegal substance that were actually examined by the State's experts. The court then stated that such a rule does not "forbid the trial court from placing conditions on the examination designed to adequately safeguard the integrity of the evidence." *Id.* at 735.

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

207. *Id.*

208. *Id.*

for willful violations of discovery orders.[209]

One problem created by the language used in the two sections on sanctions is determining what constitutes a violation warranting the imposition of sanctions. The sections themselves refer to a failure "to comply with the discovery order."[210] That language would seem to indicate that an actual discovery order is a prerequisite to the imposition of sanctions. However, the sections of the decision that relate to the disclosures simply state that the prosecution and the defense "shall" make certain disclosures or "shall" allow access to certain items. That language would seem to indicate a requirement to make such disclosures even in the absence of an order. In fact, the *Federal Rules*,[211] the *ABA Standards*,[212] and the *Uniform Rules*[213] are designed to operate without obtaining a discovery order. In another section of the decision, however, the court indicates that "the judge should enter a written order setting forth discovery, inspection and copying requirements for each party."[214] Any ambiguity about the necessity of having a discovery order can obviously be resolved by obtaining such an order from the trial court.

The possibility of imposing sanctions directly on the attorneys is not specifically addressed in *Allen*. The *ABA Standards* expressly authorize the imposition of such sanctions.[215] In addition to the specifically mentioned sanctions discussed below, trial courts, under *Allen*, have the authority to "grant appropriate relief"[216] which might include the imposition of sanctions on the attorneys. The comment to the *Uniform Rules* indicates that sanctions against counsel might be "other appropriate relief" even though such a sanction is not specifically mentioned in the *Uniform Rules*.[217]

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209. Such exclusion sanctions have not generally been favored by the *ABA Standards* and the *Uniform Rules*. *See infra* notes 228-234 and accompanying text. Although the Supreme Court has approved of the sanction of the exclusion of defense evidence, the willfulness of the violation is an important factor in determining the appropriateness of such a sanction. Michigan v. Lucas, 111 S. Ct. 1743, 1747-48 (1991); Taylor v. Illinois, 484 U.S. 400, 409-16 (1988).

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

211. FED. R. CRIM. P. 16(d)(2) (indicating that it is the rule and not an order that triggers the obligation to make the required disclosures).

212. ABA STANDARD 11-4.7 (implying that the rules are, in effect, self executing).

213. UNIFORM RULES 421(e), 422(d), 423(m) (Supp. 1987) (indicating that an "order" is not necessary to the imposition of discovery sanctions).

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

215. ABA STANDARD 11-4.7.(b) (providing that "the court may subject counsel to appropriate sanctions upon a finding that counsel willfully violated the rule or order").

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

217. UNIFORM RULES 423(m) cmt. (Supp. 1987).

1. Against the Prosecution

In addition to specifying the information subject to pretrial disclosure, the *Allen* decision specifies the sanctions that may be imposed on the State for noncompliance with a discovery order. Trial courts are empowered to grant "appropriate relief, which may include one or more of the following: "[R]equiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by court pursuant to these rules, prohibiting the prosecuting attorney from introducing specified evidence or calling specified witnesses, and dismissing charges."[218] This language is taken directly from the 1974 version of the *Uniform Rules*.[219] However, the list of possible sanctions in the 1987 version is not as exhaustive. For instance, the 1987 version does not specifically mention the following sanctions: relieving the defendant from making a disclosure, excluding the State's evidence, or granting a mistrial. Those provisions are simply replaced with a provision that the court may "grant other appropriate relief."[220]

Although the *ABA Standards* also generally allow the trial court to grant appropriate relief,[221] the actual list of what might be appropriate in

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

219. UNIFORM RULES 421(e), 422(c) (1976). Both provide:

> If the prosecuting attorney fails to comply with this Rule, the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by Rule 423, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges.

Id.

220. UNIFORM RULES 421(e), 422(d) (Supp. 1987). Both provide:

> If the prosecuting attorney fails to comply with this Rule, the court, on motion of the defendant or its own motion, shall require the prosecuting attorney to comply, grant the defendant additional time or a continuance, grant a mistrial, or grant other appropriate relief.

Id.

The comment to these rules does not mention what significance, if any, should be attached to the fact that the 1987 version no longer specifically mentions exclusion of evidence or excusing the defendant from making a disclosure. The comment to Rule 423(m), which deals with sanctions for defense noncompliance, states that "although this subdivision does not specifically rule out exclusion of evidence as a sanction, neither does it list it and it generally would be inappropriate." UNIFORM RULES 423(m) (Supp. 1987). Whether it would also generally be inappropriate to exclude the prosecuting attorney's evidence is not clear.

221. ABA STANDARD 11-4.7. Standard 11-4.7 provides:

> If an applicable discovery rule or an order issued pursuant thereto is not promptly implemented:
> (a) the court may:
> (i) order the noncomplying party to permit the discovery of the material and information not previously disclosed;

Allen goes considerably beyond the *ABA Standards*. The commentary to the sanctions provision of the *ABA Standards* specifically states that "the general authority to enter an appropriate order is not intended to endorse sanctions that punish nondisclosure of one party by canceling the other party's duty to disclose, or that exclude from evidence any discoverable, but nondisclosed, items."[222] The *Federal Rules* provide for the exclusion of evidence,[223] but do not specifically allow for relieving the other party from making a disclosure; however, the court is authorized to "enter such other order as it deems just under the circumstances."[224]

2. Against the Defense

The *Allen* decision also outlines the sanctions potentially applicable to defendants who fail to comply with discovery orders. The section provides that the court, on motion of the prosecuting attorney or on its own motion, "shall grant appropriate relief, which may include one or more of the following: "[R]equiring the defendant to comply, granting the prosecuting attorney additional time or a continuance, prohibiting the defendant from introducing specified evidence or calling specified witnesses, and granting a mistrial based on manifest necessity due to the acts of the defendant."[225] This language is generally based on the *Uniform Rules*.[226] The *Uniform Rules*, however, do not contain the provision allowing the exclusion of the defendant's evidence or witnesses. The language of the *Allen* decision stating that the mistrial must be based on manifest necessity is also not in the *Uniform Rules*.[227]

(ii) grant a continuance; or
(iii) enter such other order as it deems just under the circumstances; or
(b) the court may subject counsel to appropriate sanctions upon a finding that counsel willfully violated the rule or order.

Id.

222. ABA STANDARD 11-4.7(a) cmt.

223. FED. R. CRIM. P. 16(d)(2). Rule 16(d)(2) provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

Id.

224. *Id.*

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

226. UNIFORM RULES 423(m) (Supp. 1987). Rule 423(m) provides: "If the defendant fails to comply with this Rule, the court, on motion of the prosecuting attorney or its own motion, shall require the defendant to comply, grant the prosecuting attorney additional time or a continuance, grant a mistrial, or grant other appropriate relief." *Id.*

227. It would appear that the "manifest necessity" language was added because of the double

Both the *Uniform Rules* and the *ABA Standards* specifically reject the sanction of excluding the defendant's evidence. The commentary to both the *Uniform Rules* and the *ABA Standards* states that the "exclusion sanction is not recommended because its results are capricious. [E]xclusion of defense evidence may lead to an unfair conviction [which] would defeat the objectives of discovery."[228] The *Uniform Rules* and the *ABA Standards* also reject the exclusion of defense evidence because it "raises significant constitutional issues"[229] which have since been essentially resolved.[230]

Sanctions applicable to defendants do not include excusing the prosecuting attorney from making a required disclosure. As indicated above, that is a sanction that can be imposed for the State's failure to comply.[231] Although the court does have the authority to "grant appropriate relief," the specific exclusion of this sanction from the defense section when it was included in the prosecution section indicates that it is not an appropriate sanction. Neither the *ABA Standards*[232] nor the *Uniform Rules*[233] approve of the sanction of relieving the prosecuting attorney from making an otherwise required disclosure.

VI. MISCELLANEOUS DISCOVERY PROVISIONS

The *Allen* decision clearly dominates the field of pretrial criminal discovery in Oklahoma. However, there are a few other statutory and case law provisions that serve the same function of providing pretrial information in a criminal case.

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jeopardy prohibition against retrying a defendant following a mistrial, unless the mistrial was granted because of a "manifest necessity." *See* Arizona v. Washington, 434 U.S. 497, 505-06 (1978); United States v. Jorn, 400 U.S. 470, 485 (1971); LAFAVE & ISRAEL, *supra* note 141, at 1065-73 (discussing mistrials and manifest necessity).

228. UNIFORM RULES 423(m) cmt. (Supp. 1987) (quoting from commentary to ABA Standard 11-4.7).

229. *Id.*

230. In Taylor v. Illinois, 484 U.S. 400 (1988), the Supreme Court rejected the argument that the exclusion sanction constituted a per se violation of the defendants' Sixth Amendment right to compulsory process. *Id.* at 402. The Court held that where the defendants' failure to comply with a discovery requirement "was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal testimony, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony." *Id.* at 415.

231. *See supra* notes 218-224 and accompanying text.

232. ABA STANDARD 11-4.7 cmt.

233. UNIFORM RULES 423(c) cmt. (Supp. 1987).

A. *Depositions*

Although depositions are commonplace in civil litigation,[234] their use in criminal cases is much more limited. Only about ten states allow depositions to be used as a basic discovery device.[235] Most states, including Oklahoma, only allow the use of depositions in criminal cases as a method of preserving the testimony of a witness who is likely to be unavailable at trial.[236]

Oklahoma statutes provide two separate procedures for taking a witness' deposition in a criminal prosecution. Title 22, sections 761-771 of the *Oklahoma Statutes* govern the taking of depositions of in-state witnesses. Section 762 provides that such depositions may be taken "[w]hen a material witness in any criminal case is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be able to attend the trial . . . ." Although both the State and the defendant may apply for an order to take the deposition of an in-state witness,[237] only the defendant can apply for an order to take the deposition of an out-of-state witness pursuant to title 22, sections 781-783. Although the deposition may be read into evidence if the witness is unable to attend the trial,[238] potential unavailability is not a prerequisite to taking the deposition.[239]

B. *District Attorney Subpoenas*

In addition to the two deposition procedures mentioned above, title 22, section 258 of the *Oklahoma Statutes* allows district attorneys to obtain subpoenas in felony cases to depose witnesses. However, this procedure cannot be used for investigative purposes where charges have not been filed.[240]

C. *Notice of Intention to Use Evidence*

1. Other Crimes Evidence

The *Oklahoma Evidence Code* provides, as did the common law, for the admission of evidence of crimes other than those charged to prove

234. *See* OKLA. STAT. tit 12, §§ 3201-3237 (1991).
235. LAFAVE & ISRAEL, *supra* note 141, at 845.
236. *Id.*
237. OKLA. STAT. tit. 22, § 762 (1991).
238. *Id.* § 793.
239. *Id.* § 783.
240. Isaacs v. District Court of Okla. County, 818 P.2d 1247, 1249-50 (Okla. Crim. App. 1991).

motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident.[241] Because of its concern with the number of cases in which error was committed through the introduction of such other crimes evidence, the court, in *Burks v. State*,[242] established procedures to be followed whenever the State seeks to introduce other crimes evidence. The court also held that notice is required when the State seeks to introduce evidence of other acts of the defendant that do not constitute crimes.[243]

These procedures require the State, within ten days before trial or at a pretrial hearing, whichever occurs first, to furnish the defendant with a written statement of the other offenses or acts it intends to prove, described with the same particularity required of an indictment or information.[244] This notice requirement is designed, at least in part, to provide the defendant an opportunity to obtain a pretrial determination on the admissibility of such evidence through the filing of a motion *in limine*. Under certain circumstances, failure to give proper notice of an uncharged crime that is proved at trial may bar any future prosecution for that crime.[245]

The requirement of pretrial notice is not applicable to the evidence of other crimes sought to be admitted on rebuttal, but in such event, the trial court should conduct an *in camera* hearing to determine the admissibility of the evidence.[246] Likewise, *Burks* notice is not required with respect to other offenses which are actually a part of the *res gestae* of the crime charged.[247] Regardless of whether notice is required, the trial court must give a limiting instruction with respect to the other crimes evidence if requested by the defendant.[248]

241. OKLA. STAT. tit. 12, § 2404(B) (1991).
242. 594 P.2d 771 (Okla. Crim. App. 1979).
243. Coates v. State, 773 P.2d 1281, 1284 (Okla. Crim. App. 1989); Freeman v. State, 767 P.2d 1354, 1357 (Okla. Crim. App. 1988).
244. Burks v. State, 594 P.2d 771, 774 (Okla. Crim. App. 1979).
245. Hainey v. State, 740 P.2d 146, 152 (Okla. Crim. App. 1987); Byrne v. State, 620 P.2d 1328, 1334 (Okla. Crim. App. 1981).
246. *Burks*, 594 P.2d at 775.
247. *Id.* at 774; Williams v. State, 754 P.2d 555, 556 (Okla. Crim. App. 1988); Parsons v. State, 740 P.2d 167, 169 (Okla. Crim. App. 1987); Bolton v. State, 702 P.2d 1040, 1042 (Okla. Crim. App. 1985); Caffey v. State, 661 P.2d 897, 901 (Okla. Crim. App. 1983).
248. *See* Jones v. State, 772 P.2d 922 (Okla. Crim. App. 1989) (overruling Landtroop v. State, 753 P.2d 1371 (Okla. Crim. App. 1988) and Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979) which required a limiting instruction on other crimes evidence even if not requested by the defendant).

2. Statements of Children with Respect to Physical Abuse or Sexual Contact

In criminal and juvenile proceedings, the *Oklahoma Evidence Code* provides for the admission of certain statements made by a child twelve years of age or younger which describe any act of physical abuse against the child or any act of sexual contact performed with or on the child by another.[249] The court must find that the time, content, and circumstances of the statement provide sufficient indicia of reliability.[250] In order to provide the adverse party with an opportunity to prepare an answer to such a statement, the proponent must notify the adverse party of his intention to offer the statement and the particulars of the statement at least ten days in advance of the proceedings.[251] Failure to provide such notice is fundamental error,[252] although constructive notice may be sufficient.[253]

3. Hearsay "Catchall" Exceptions

The *Oklahoma Evidence Code* provides two "catchall" exceptions to the hearsay rule under which statements not specifically covered by any other exception might be admitted if sufficiently trustworthy.[254] In order to allow the adverse party a fair opportunity to prepare to meet such statements, both provisions require the proponent to give notice to the adverse party of her intention to offer the statement and the particulars of the statement, including the name and address of the declarant.

4. The Best Evidence Rule

The best evidence rule requires that the original be used to prove the contents of a writing, recording, or photograph except as otherwise provided.[255] One situation in which the original is not required and other evidence of the contents of a writing, recording, or photograph is admissible is when the original is under the control of the party against whom it is offered, and that party does not produce the original at the hearing.[256] In order to take advantage of this provision, however, the party

249. OKLA. STAT. tit. 12, § 2803.1 (1991). This provision has been held constitutional. *Jones*, 781 P.2d at 328.
250. OKLA. STAT. tit. 12, § 2803.1(A)(1) (1991).
251. *Id.* § 2803.1(B).
252. Spears v. State, 805 P.2d 681, 682-83 (Okla. Crim. App. 1991).
253. *Id.*; *In re* W.D., 709 P.2d 1037, 1043 (Okla. 1985).
254. OKLA. STAT. tit. 12, §§ 2803(24), 2804(B)(5) (1991).
255. *Id.* § 3002.
256. *Id.* § 3004(3).

against whom the evidence is offered must have been put on notice by the pleadings or otherwise, that the contents of the original would be a subject of proof at the hearing.[257]

D. *Preliminary Examination*

The defendant has a right to a preliminary examination pursuant to article II, section 17 of the *Oklahoma Constitution*.[258] Although the traditional purpose of the preliminary examination is to determine "(1) whether the crime charged has been committed and (2) whether there is probable cause to believe the accused committed it,"[259] the court of criminal appeals has also specifically held that another purpose of the preliminary examination is to provide discovery for the defendant.[260] As a result, the court has required the defendant be given wide latitude in cross-examination of the State's witnesses and in obtaining relevant exculpatory evidence.[261] Because of the lack of pretrial discovery prior to the *Allen* decision, defense attorneys necessarily utilized the preliminary examination as their primary discovery device.[262] As a result, the preliminary examination has been criticized as "expensive, inefficient, and unsatisfactory for the prosecution, the defense, and the judiciary."[263] It has been suggested that with increased pretrial discovery, the preliminary examination can be scaled back.[264] It remains to be seen whether the *Allen* case will have that effect.

VII. CONCLUSION

The *Allen* decision made significant changes in criminal discovery in Oklahoma. Although defendants are now entitled to more information, the most far-reaching aspect of *Allen* is the extent to which defendants must now provide information to the State. However, trial courts and

257. *Id.*

258. OKLA. CONST. art. II, § 17.

259. Allen v. State, 527 P.2d 204, 207 (Okla. Crim. App. 1974).

260. Perkins v. State, 695 P.2d 1364, 1369 (Okla. Crim. App. 1985) (Parks, J., concurring); Hampton v. State, 501 P.2d 523, 527 (Okla. Crim. App. 1972); Beaird v. Ramey, 456 P.2d 587, 589 (Okla. Crim. App. 1969).

261. *Beaird*, 456 P.2d at 589-90; *see also* OKLA. STAT. tit. 22, § 259 (1991) (providing that the defendant, as well as the State, may produce witnesses at the preliminary examination).

262. Lee, *supra* note 2, at 2261.

263. *Id.*

264. *Id.*

the court of criminal appeals must carefully monitor the discovery process to avoid violating the defendant's privilege against self-incrimination.

Having revolutionized the criminal discovery process, the court of criminal appeals must now clarify the remaining ambiguities after *Allen*. For example, the court must determine whether defendants must provide notice of alibi and mental condition defenses and, if so, the nature of that notice. In addition, since these defenses are already regulated by statute, the court must determine whether the *Allen* sanctions may appropriately be applied for noncompliance. Perhaps the greatest decision awaiting the court, though, is the extent to which the expanded pretrial discovery provided for in *Allen* should result in the diminution of the preliminary examination as a discovery device for defendants.