6. Pre-Trial Criminal

Section 6.1
Pre-Trial Supervision

Hon. Veronica Alicea-Galvan

6.1.1 Introduction

Predicting human behavior has been a scientific pursuit since the inception of civilization. From weighing down suspected witches with stones, to forecasting the likelihood of criminal conduct by measuring a forehead or classifying physical features, science has sought to provide tools upon which we can reasonably rely in the interest of community safety. While today "scientific" studies such as phrenology[1] are considered absurd, years ago these scientific hypotheses were used to justify many of the policies and practices of our criminal justice system. That being said, science and technology can provide us with tools to assist judicial officers in weighing community interests of safety with those of an individual's right to be free of restraints. In this section we will explore the pros and cons of monitoring technology in the pre-trial context. We will also discuss the use of predictive technology, such as pre-trial risk assessments, and what courts should consider before using these tools.

Monitoring Technology can generally be classified into two categories--location monitoring and substance use monitoring.

6.1.2 Location Monitoring Technology

Location monitoring technology is used to ensure that an individual stays in a dedicated place, i.e. home, or can ensure someone does not go near a certain person or place.

Electronic Home Monitoring (EHM) or **Electronic Home Detention** (EHD) may be used both in the pretrial and post-conviction arena.

> **Pros:** Allows an individual to remain in the community where they may work, access support systems, provide support for their families, or attend school, while being monitored through electronic means. Use of this technology may also help address overcrowding issues in local jails saving local jurisdictions money and resources.
>
> **Cons**: Does not, in and of itself, prohibit individuals from engaging in other criminal conduct within the confines of the permitted

location, nor from ingesting lawful or unlawful substances absent additional monitoring capabilities. Escape is as easy as cutting off the monitoring device. Requires staffing to monitor individuals on release.

Global Positioning Systems (GPS) can provide 24 hour location monitoring for individuals.

Pros - The same as EHM and EHD, but provides a little more freedom of movement. Additionally, GPS may assist in ensuring compliance with distance restrictions from certain locales such as schools, residences or work areas. It is particularly useful in situations involving sex offenders, or in domestic violence cases.

Cons - Same as EHM and EHD. As with all technologies, maintenance and potential malfunctions are always a concern.

6.1.3 Substance Use Monitoring

Substance Use Monitoring is often a way to ensure that an individual is abstaining from using both legal and illicit substances. This type of monitoring is often used in cases of driving while impaired but can also be helpful in other instances where there is a nexus between use of the substances and the underlying criminal conduct.

Transdermal alcohol monitoring systems, breath testing, ignition interlock devices (IID), urinalysis, and hair follicle testing are the least invasive methods to ensure individuals are not using alcohol or non-prescribed mood altering substances. Other more invasive methodologies for measuring substance use, i.e., blood tests, exist, however may not necessarily be appropriate in the pre-trial context.

Transdermal alcohol monitoring allows for continuous monitoring of alcohol consumption and is based upon measuring alcohol secreted through the skin.[2]

Pros - This type of monitoring is continuous as opposed to a specific point in time. As such, a broader picture of use is developed. This type of monitoring can easily be combined with GPS, IID or EHM

monitoring. The monitors must be worn at all times but can be less obtrusive than other monitors. They may act as an inhibitor when the individual knows that monitoring is constant.

Cons - At this time, only alcohol use is measured. They cannot account for use of other substances and reporting time may lag behind an actual consumption event. They do not, standing alone, prohibit an individual from driving a vehicle or engaging in other criminal conduct. Malfunctioning devices or user error may cause erroneous results. They may require the individual to have a cell phone or land line to download results on a regular basis.

Breath testing allows for random checks for alcohol consumption events.

Pros- Breath testing instruments are ubiquitous and easy to use. They can be used at home and randomized so an individual does not know when they will be required to provide a sample; alternatively they can be used on demand or on a particular schedule. They can be used in conjunction with other monitoring devices such as IID, GPS and EHM. They provide easy access and results are downloaded quickly when the test is completed. They can also be done promptly at a set location pre-determined by the jurisdiction, i.e., probation office.

Cons – They can malfunction, there can be user error, they require individuals to have certain devices available to download information or may require them to travel to and from a facility. They do not prohibit driving or criminal conduct.

IIDs prevent a vehicle from starting if the device detects pre-set levels of alcohol as measured through a breathalyzer or transdermal monitoring.

Pros – IIDs prevent driving of a vehicle if the individual has an alcohol concentration above set standards. They can also be equipped with a camera to show who is blowing into the machine.

Cons – They can malfunction. There is always a danger of circumventing the mechanism by having others blow into machine or disconnecting it altogether. However, tampering should be detected by the device's monitoring system.

6.1.4 Risk Assessment Tool

The most ubiquitous form of predictive technology used in the criminal pretrial context is the **risk assessment tool**. The risk assessment tool uses demographic data and algorithms to provide information regarding the "risk" (high, low, moderate) associated with releasing an individual charged with a criminal offense.[3]

Pros – Pre-trial risk assessment tools provide additional information for the court to consider in making release decisions and have been shown to be better predictors of risk than judicial decision making alone. These tools can also lead to better outcomes across varied populations.[4]

Cons – Release decisions need to be individualized, and the PTRA tools currently available use aggregated data to provide an analysis of risk. There are significant concerns that bias and disproportionality that have been a part of our justice system are baked in to such a degree, that the data relied upon by these tools is suspect. A tool that works for one jurisdiction may not work for another; a lot of preliminary work should be engaged in before deciding what, if any, PTRA tool a jurisdiction will use.[5]

Science and technology are tools in the arsenal of justice that continue to evolve. As artificial intelligence, predictive analytics, and monitoring technologies become more accurate and easier to use, it is tempting to think that judicial discretion will go the way of the dinosaurs. However, we need not hang up our black robes quite yet. As judicial officers, we are still in the best position to ascertain and address the unpredictability of the human element that we see in our courts daily. We are not yet at the point where we ask "Hey Siri, what pretrial conditions should I impose?" Our own humanity continues to be the greatest tool we own.

6.1.5 Endnotes

1. Phrenology is defined as the detailed study of the size and shape of the cranium as an indication of character and mental abilities used to predict criminality of certain individuals.

2. Nancy P. Barnett, et al., *Predictors of Detection of Alcohol Use Episodes Using a Transdermal Alcohol Sensor*, 22 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 1, 86-96 (2014).

3. Phillip Knox & Peter Keifer, *The Risks and Rewards of Risk Assessments*, TRENDS IN ST. CTS., (2017) https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/The-Risks-and-Rewards-of-Risk-Assessments.aspx

4. National Institute of Corrections Community Collaborative Network, Series 2, Project number 16C5012, (March 2017), https://nicic.gov/library/032859.

5. Intisar Surur & Andrea Valdez, *Washington State Pretrial Reform Task Force: Final Recommendations Report*, (February, 2019), http://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf

6. Pre-Trial Criminal

Section 6.2
Pre-Trial Discovery

Hon. Louis B. Butler, Jr. (Ret.)

6.2.1 Introduction

This portion of the Bench Book, addressing general rules of discovery, consists of three parts:

6.2.2 General rules of discovery and inspection, which can vary from state to state.

6.2.3 When discovery motions need to be filed by either statute or court rule.

6.2.4 The types of discovery provided.

A trial judge should be aware that while many jurisdictions have discovery rules that are similar in scope and design, there are differences and nuances that the judge needs to be aware of in using this Bench Book. For uniformity's sake, this section largely tracks the federal rules. Each judge needs to follow the rules of his or her own jurisdiction.

For a sampling of Discovery Orders, see *Appendix 2*.

6.2.2 General

"Discovery" is a term used to refer to the legal process by which parties in litigation obtain information from each other. In criminal cases, discovery is generally much more limited than in civil cases. Most states recognize a "clear legal right" to pretrial discovery by statute, but there is no federal constitutional right to discovery.[1] Discovery emphasizes the defendant's right of access to evidence necessary to prepare a defense, which is not constitutional. Disclosure, on the other hand, emphasizes the state's duty to disclose exculpatory evidence to a defendant, and may be constitutional as decided on a case-by-case basis.

Federal criminal discovery is generally governed by Rule 16 of the Federal Rules of Criminal Procedure ("FRCP") and Supreme Court cases governing evidence that materially exonerates the defendant. Under FRCP Rule 16, once a defendant makes

a demand for discovery on the government, the government is required to produce items such as the defendant's oral, written, and recorded statements, criminal record, reports of examinations and tests, documents or other physical objects the government intends to introduce at trial, expert witnesses, and more. In state prosecutions, limited discovery and inspection is generally provided for by state statutes and/or court rules.

A prosecutor has no constitutional duty to routinely allow the inspection of or deliver the entire prosecution file to defense counsel.[2]

Some jurisdictions have a standing order on pretrial discovery requiring government disclosure of all material covered by the discovery rules, statutes, and state and federal constitutions, called an "Open File Policy."[3] Under that policy, the government would disclose, without defense motion, all information and materials listed in FRCP 16(a)(1)(A), (B), (C), (D), (E), and (F). That includes the defendant's oral, written, and recorded statements, prior criminal record, reports of examinations and tests, and documents or other physical objects that is in the government's possession, custody or control and that the government intends to introduce at trial. Unless these items include exculpatory material, open file materials do not ordinarily include material under FRCP 16(a)(1)(G) (which governs written summaries of expert witnesses), government attorney work product and opinions, privileged materials, material identifying confidential informants, or reports of witnesses who will not be called in the government's case-in-chief and grand jury transcripts. The government retains authority to redact from the open file material anything that is:

1. Not exculpatory
2. Not relevant to the prosecution
3. Would jeopardize safety of someone other than defendant
4. Would jeopardize an ongoing criminal investigation.

In all jurisdictions, regardless of whether an open file policy is in place or not, disclosure is required as a matter of due process, when evidence is in exclusive possession of state, and:

1. Such evidence is favorable to the accused;[4] and,

2. Such evidence is material to either guilt or punishment for purposes of trial.[5]

The *Brady* rule concerning exculpatory evidence is inapplicable at the guilty plea stage.[6] Evidence that goes to the credibility of state's witnesses is considered exculpatory under *Brady*.[7] The *Brady* rule also includes impeachment evidence.[8] This includes evidence known to the police, even if not known by the prosecutor.[9] The *Brady* rule includes *in camera* inspection of confidential records by the trial judge to determine whether potential evidence contains exculpatory information.[10] The duty of the state to disclose applies whether defendant makes no request for exculpatory information, a general request, or a specific request, and the state is not the arbiter of weight, credibility, and exculpatory nature of the evidence.[11] Exculpatory evidence must be made available to defense in time to make reasonable use of it.[12]

There is no duty for a state (absent a local rule) to preserve specimen samples, even if useful to the defendant

6.2.3 Timing of Statutory or Court Rule Discovery Motions

Specific deadlines for discovery demand and discovery motions depend on the jurisdiction. They are set by statute, court rule, or local rule, and may be different for felonies and misdemeanors. They will often be included in the trial court's scheduling order. Generally, discovery demands must be made before trial, with the court setting the deadline at or shortly after the arraignment for parties to make pretrial motions. The court may extend time for filing motions, but if a party does not meet the deadline for filing pretrial motion for discovery, the motion is considered untimely. The motion may be considered by the court if good cause is shown.

6.2.4 Types of Statutory or Court Rule Discovery Provided

6.2.4.1 Discovery Allowed

The government has a duty to disclose to defendant, upon request, within reasonable time before trial if within possession, custody, or control of the government, the following:

1. The substance of any relevant oral statement made by defendant.[13]
2. Any written or recorded statement by defendant.[14]
3. Depending on the rules for each jurisdiction, any written summaries of all oral statements of defendant intended to be used at trial and names of witnesses to those statements.
4. Defendant's prior criminal record.[15]
5. Depending on the rules for each jurisdiction, a list of all witnesses and their addresses, except those to be called for impeachment or rebuttal.
6. Depending on the rules for your jurisdiction, any relevant or recorded statements of witnesses to be called at trial.[16]
7. Permit defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof if:
    a. the item is material to the defense;
    b. state intends to use in case-in-chief, or
    c. was obtained from or belongs to defendant.[17]
8. There is no duty for state (absent a local rule) to preserve specimen samples, even if useful to defendant, unless defendant shows:
    a. bad faith destruction by state,

b. evidence had apparent exculpatory value prior to its destruction, and

c. no comparable evidence on same subject matter is available to defendant.[18]

9. Permit defendant to inspect and copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

   a. item is within state's possession, custody, or control;

   b. the attorney for state knows or should have known of the item exists; and

   c. item is material to defense or state intends to use item in case-in-chief.[19]

10. Written summary of any expert testimony state intends to use at trial during its case in chief under rules of evidence, and must include the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.[20]

    a. Witness who is qualified as an expert by knowledge, skill, experience, training, or education may give opinion testimony if:

       i. expert's scientific, technical, or other specialized knowledge will assist trier of fact;

       ii. testimony is based on sufficient facts or data;

       iii. testimony is product of reliable principles and methods; and,

       iv. expert has reliably applied the principles and methods to the facts of the case.[21]

    b. Expert opinion may be based on facts or data in the case that the expert has been made aware of or personally observed.

i. Facts or data need not be admissible for opinion to be admitted if reasonably relied upon by expert in forming opinion;

ii. If facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if probative value substantially outweighs their prejudicial effect; and,

iii. Unless court orders otherwise, an expert may state an opinion, including the reasons for it, without first testifying to the underlying facts or data, but may be required to disclose those facts or data on cross-examination.[22]

6.2.4.2 Reciprocal Discovery

The defendant has a reciprocal duty to the state within a reasonable time before trial, to permit state to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof, if the item is within the defendant's possession, custody, or control, and the defendant intends to use the item in defendant's case-in-chief at trial.[23]

The defendant is also required to permit the state to inspect and copy or photograph the results or reports of any physical or mental exam and of any scientific test or experiment, if the item is within the defendant's possession, custody, or control; and the defendant intends to use the item in defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.[24]

Defendant must, upon request, give to the state a written summary of the expert testimony the defendant intends to use at trial, and must include the expert witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.[25]

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may give opinion testimony if:

1. expert's scientific, technical, or other specialized knowledge will assist trier of fact;

2. testimony is based on sufficient facts or data;
3. testimony is product of reliable principles and methods; and,
4. expert has reliably applied the principles and methods to the facts of the case.[26]

Depending on the jurisdiction, defendant may be required to produce a list of all witness to be used in the defendant's case-in-chief, which may include any relevant written or recorded statements of a witness, and the criminal record of any defense witness.

The attorney-client privilege and work-product doctrine limit states' rights to reciprocal discovery.[27] However, requiring disclosure of a defense investigator's report before allowing the investigator to testify to impeach a prosecution witness does not violate the Fifth or Sixth Amendments nor the work product rule.[28]

6.2.5 Protective Order

At any time, upon motion of either party, the court may, for good cause, order that discovery, inspection, or the listing of witnesses be denied, restricted, or deferred. The court may permit a party to show good cause by a written statement to be inspected by the court *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.[29] If a party fails to comply with the rules, the court may order that party to permit the discovery or inspection, grant a continuance, prohibit that party from introducing the undisclosed evidence, or enter any other order that is just under the circumstances.[30] The court may exclude any witness not listed or evidence not presented for inspection or copying that is required unless good cause is shown for failure to comply.[31] The Court may also advise the jury of any failure or refusal to disclose by way of jury instruction.[32]

6.2.6. Continuing Duty to Disclose

If before or during trial, a party discovers additional material or the names of additional witnesses which are subject to discovery, inspection, or production, that party shall promptly notify the other party of its existence.[33]

6.2.7 Endnotes

1. Weatherford v. Bursey, 429 U.S. 545 (1977).
2. Arizona v. Youngblood, 488 U.S. 51 (1988); United States v. Agurs, 427 U.S. 97, 106 (1976).
3. *See, e.g.*, United States District Court for the Eastern District of Wisconsin Local Rule 16(a), as amended September 9, 2015.
4. *Agurs*, 427 U.S. at 112-113. (Prosecution must affirmatively ascertain).
5. Brady v. Maryland, 373 U.S. 83 (1963).
6. United States v. Vonn, 535 U.S. 55 (2002).
7. Giglio v. U.S., 405 U.S. 150 (1972).
8. United States v. Bagley, 473 U.S. 667 (1985).
9. Youngblood v. West Virginia, 547 U.S. 867 (2006).
10. Pennsylvania v. Ritchie, 480 U.S. 39 (1987)
11. Kyles v. Whitley, 514 U.S. 419 (1995).
12. U.S. v. Pollack, 534 F.2d 964 (D.C. Cir. 1976).
13. *Compare* Fed. R. Civ. P. 16(a)(1)(A).
14. *Compare* Fed. R. Civ. P. 16(a)(1)(B).
15. *Compare* Fed. R. Civ. P. 16(a)(1)(D).
16. *But see* 18 U.S.C §3500, for federal rule that disclosure is not required until the witness has testified on direct examination.
17. *Compare* Fed. R. Civ. P. 16(a)(1)(E).
18. California v. Trombetta, 467 U.S. 479 (1984).
19. *Compare* Fed. R. Civ. P. 16(a)(1)(E).
20. *Compare* Fed. R. Civ. P. 16(a)(1)(G).
21. *See* Section 7. *Trial*.
22. *Id*.

23. *Compare* Fed. R. Civ. P. 16(b)(1)(A).

24. *Compare* Fed. R. Civ. P. 16(b)(1)(B).

25. *Compare* Fed. R. Civ. P. 16(b)(1)(C).

26. *See* Section 7. *Trial*.

27. Upjohn Co. v. United States, 449 U.S. 383 (1981).

28. United States v. Nobles, 422 U.S. 225 (1975).

29. *Compare* Fed. R. Civ. P. 16(d)(1).

30. *Compare* Fed. R. Civ. P. 16(d)(2).

31. Taylor v. Illinois, 484 U.S. 400 (1988).

32. *Id*.

33. *Compare* Fed. R. Civ. P. 16(c).