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**Presentation on Career Criminal Program Planning
to the Wyoming Prosecutors Association**

November 5, 1987

Consultant:

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I. Introduction

This technical assistance report consists of a transcript of remarks made by Andrew Sonner, State's Attorney for Montgomery County, Maryland, to the Wyoming Prosecuting Attorneys Association meeting in Cheyenne, Wyoming on November 5, 1987.

Ms. Sonner discusses the emperical and legal basis for the career criminal program and discusses the key components of program development, implementation and operation. He concludes that there are sufficient legal, emperical and common sense justifications for a program that seeks to remove the most dangerous and criminally active offenders from the general population whether they be located in the largest or the smallest jurisdictions.

II. Remarks by Mr. Sonner

It's a pleasure to be here on behalf of the Bureau of Justice Assistance and the EMT Group to talk to you today about how to go after career criminals; what we as prosecutors can do in our offices to give the public better protection and at the same time use public resources more wisely. All of us want to do that. We have in the past several years made substantial strides in learning how to pick out who are the worst criminals and what works best in putting them away. There is nothing magic about what I am going to talk about today. In other words, there is nothing mysterious about prosecutors' "career criminal programs." There are just two parts to a successful career criminal program:

1. Identification of the "bad guys." That is, those offenders whose incarceration will reduce crime.
2. Marshaling the best efforts and proven techniques in the office to put them away.

Stated another way, career criminal programs match the best efforts in the office to put the worst criminals away.

The first part, that is, the identification of the bad guys, is called "targeting" and the second part, that is, the marshaling of the efforts in the office, are called "career criminal programs." Most of us prosecutors do that presently, but we do it unscientifically. We don't have departments of research and planning as police do. What we prosecutors must do, is rely upon our own experience, to target offenders and then we try to match the best attorneys to the most important cases. I am here today to talk about some scientific studies that we can learn about that will help us define who are the worst criminals. Then I'm going to talk about some experiences that

prosecutors' offices have had with procedures that have achieved the best results in putting them away, more than just matching top attorneys to important cases. In other words, paying attention to the research and paying attention to the experience of other prosecutors helps us do a better job.

That's why BJA and EMT asked me to come here to tell you about that research, so that you can do a better job of identifying the bad guys, and maybe adopt some new approaches to putting them away.

First, a candid word or two about research in criminology. Most of us who are trained in the law view behavioral scientists with a great deal of suspicion. Criminology is far from an exact science. When we have seen behavioral scientists in the courtroom, we have usually seen them there on behalf of some rehabilitation program, or maybe they are in the courtroom to try to help some defendant get off--avoid the consequences of his crime. When we've heard them speak outside the courtroom, we've heard them say such things as, "...The criminal justice system should be used as a means to funnel programs to the poor, to overcome the deprivation of certain groups of people, and to overcome their lack of opportunity." Those comments don't sit well with us when we see the misery that criminals cause innocent victims every day. As prosecutors, we mistrust criminologists and incline toward suspecting the research and rejecting their findings and advice. There is more to it than that. We believe that social scientists, particularly criminologists, march to different drummers...that somehow they inhabit an unreal world, while those of us who see crime and the effects of crime inhabit the real world.

As in life, when we become familiar with those against whom we have prejudice, we overcome the prejudice. I've had an opportunity to be the only prosecutor on a National Academy of Science 20-person panel which was composed primarily of criminologists. I can tell you they have a great deal of research that can help us. When you are close up you can see that they vary as much as any other group of professionals. Criminologists today are producing studies that, if we pay attention to their teachings, can help us.

Even though they use such arcane and, to us, confusing methods as "regression analysis" and "least squares calculation," their research can be useful and can give some solid support for policies that will help us do a better job. The research is also encouraging because in many instances it reinforces what we have known all along!

Their studies do support the idea that putting away the bad guys is good for the country--not only because the bad guys deserve it--but because it will reduce crime.

Their studies also tell us some good methods for how to do that. It's like Mark Twain once said about Wagner's music, "It's better than it sounds!"

Before I get into their studies, let me pause for a mini-course on criminal justice terminology. We are all used to working with crime-rate statistics. The FBI comes out periodically with figures indicating that the rate is going up or down--usually up. Those figures are expressed in raw numbers with percentage increases, or else in rates per one-hundred-thousand population. When it comes to career criminal research, the criminologists are interested in three other statistical measures. The terminology for these other statistical measures is simple. They sound like what they describe!

One is participation. That is the rate, usually a percentage, of those who participate in crime. For instance, a rate of participation would be that X percentage of white females have been arrested for armed robbery during their lifetime, or Y percentage of urban males have been convicted for Part 1 crimes before their 30th birthdays. That's participation.

A second measure is frequency. That's also relatively simple. That is the rate at which participants commit crime during a particular period, usually a year. For example, the felony frequency rate for adult males presently incarcerated in the year before they were jailed was Z.

Lastly, a measure the criminologists use is career length. That is, the length of time, usually in years, that a participant is active. For example, the average career length for an adult male who has been arrested for a felony before his 21st birthday is Q years. High frequency participants who have long career lengths are career criminals--the bad guys that we want to put away.

Before I leave terminology, let me give you two more terms to handle. Again, they are not difficult, they also sound like what they define.

The first is "collective incapacitation." This is what the researchers refer to as a "strategy" and they define it as giving the same sentence to all defendants convicted of the same offense. Selection incapacitation is the strategy of incarcerating particular offenders based upon something like predictions that they would commit offenses at a high rate if they remained on the street. The recent research has concentrated on trying to determine who those high-rate offenders are.

There are two methods that the researchers have used to try to predict who these high-risk, high-frequency offenders are. The first is the study of a "cohort" or group, following the cohort over a period of time, and examining official arrest reports to see which ones get into trouble. The second is the gathering and study of "self reports,"

usually structured interviews of prisoners. Both approaches have methodological defects and benefits, and there are many who have substantial and thoughtful reservations about the methods, as well as the conclusions that the researchers extract from the studies. Nevertheless, the studies are proceeding at this very minute all over the United States. Practically every university with a department of criminology is carrying on some study to try to identify who are the high volume offenders, what makes them that way, and how we can predict who they are.

The most famous cohort is the one known as the "Philadelphia cohort," or the "Wolfgang cohort," named for Marvin Wolfgang, the highly respected criminologist who devised the method. He studied 10,000 youths born in Philadelphia in 1945 and followed them forward for the next forty-some years. He analyzed official records and identified those who participated, those who participated frequently, and those who persisted. In other words, he studied the participation rate, the frequency rate, and the career length of those people in the cohort. Now, as I said before, there are a number of methodological flaws in such a study. There are variations in police arrest policies, the data is compromised through plea bargaining, and, of course, there is no way to adjust for the offender's skill in avoiding detection. Nevertheless, this study contains lessons that we as prosecutors should pay attention to. I'll say more about that later.

The second major study, using the other method, that is, the self-report studies, is the Rand Study coming to us from the Rand Corporation of California. They extensively interviewed a number of inmates in California, Texas, and Michigan. Then they used some statistical methods of analysis, put the information into a computer, and looked for common characteristics of the group who participate, to separate out those whose frequency rate was high. In other words, they interviewed a group of participants, analyzed their frequency and then, of course, studied their career lengths. This kind of a study also has methodological flaws. It is subject to distortion and exaggeration by the interviewees (they were not Boy Scouts) and there is no foolproof system to validate most of the data.

As I said before, there are a number of other studies going on, using a combination of the two methods and the two methods are being refined continuously to make them more sophisticated and reliable to try to validate the results.

For instance, there is a new Philadelphia cohort under study right now which shows that this new generation has a higher rate of participation, a higher frequency rate, and it is more violent.

But now let's take a look at some of the two studies' basic findings. One is that

there is a higher rate of blacks, males, and teenagers who participate than there is participation from other groups. That's no surprise to us. However, the participation rate is higher than some might predict. For example, one-third of all urban males have been arrested by the time they are eighteen for non-traffic offenses. About 15% of all urban males were arrested for the FBI index crimes of auto theft, larceny, murder, rape, robbery, and aggravated assault. About one half of those ever arrested during their lifetimes are arrested before they are eighteen.

In researching the common characteristics of those who participate, and comparing that group with those who do not participate, the research shows that those who do participate are more likely to have the following:

1. Adverse family influence, such as violent discipline, poor parent-child communication, parental history of delinquency and criminality, parental discord and break-up, large-sized family coupled with poor economic conditions.
2. Early anti-social behavior.
3. Escalating serious anti-social behavior.
4. Low socio-economic status.

All those factors have long been suspected causes of crime, but now research gives us statistical support for their existence.

How do we prosecutors use this information? Well, there are some important policy implications such as:

1. What can we do to identify prospective offenders? Do we use this information, together with other refined information and treat what appears to be a high-risk group?
2. If we treat, what do we do? Intervene in the family? Teach each parent skills? Improve economic conditions of the families?
3. What are the ethical concerns for any intervention when one is not charged with crime? The best predictive data is only about 50% accurate. About half will never be involved in crime if left totally alone.

The studies also measured offending frequencies. Frequency is, you recall, the number of crimes committed by active offenders in a given period. The study showed that those who participate commit about two to four violent crimes a year and five to ten non-violent crimes a year. That's the median. The Randy Study showed inmate participants committed 15 to 20 robberies per year and 45 to 50 burglaries a year.

Most importantly, the frequencies varied considerably across offenders and is highly skewed. It is the median (typical crook) that commits only a handful per year, while a small percentage commit 100 or more per year. There is another very important finding for prosecutors who are concerned about due process, and we all ought to be. After one is identified as a participant there is very little correlation of race and sex with high frequency. That is, if we are looking for the high-frequency offenders, race and sex are not good predictors. Males and blacks are more likely to be participants, but once they are identified as participants they are no more likely to be high-frequency participants than females or whites.

Researchers have studied those who had high frequency rates for their common characteristics. Both the Philadelphia research and the Rand study did this. One finding is that there is high correlation between high-frequency offenders and those who begin at an early age. In other words, "age of onset," as they call it, is a good predictor of future high-frequency participation. A second finding is that heavy drug users while on drugs commit crimes at about six times the rate of other participants. In other words, heavy drug use is a good predictor of high-frequency participation. Three, the length of time unemployed is a significant factor. With two years or more of unemployment, there is a high correlation with high frequency. Or, in other words, unemployment for two years or more is a good predictor of high frequency. A fourth is high frequency in the past is a good indicator of high frequency today. In other words, if they have been high frequency offenders before, that is a good predictor of high frequency tomorrow.

The research on career length is also helpful. The average for participants is five years, but the graph again is skewed by some who desist quickly, and by the few who persist. Those still active in their thirties have a median remaining of ten years! They have the lowest termination rate. Many of us believe that those whom we arrest in their thirties are already slowing down. The research indicates otherwise. There are fewer 30-year-old participants than 20-year-olds, but those who are still participating in their thirties are real persisters. Also career length correlates with the same factors as high frequency. This means that those factors that we use to predict high frequency we can also use to predict career length.

That, in a little less than a nutshell, is where the present research has brought us so far. But before I leave these findings, let me say that we are clearly on the threshold of an explosion of information. The researchers are using computer technology to assure the accuracy of their tabulations and to speed up the analysis. By

devising a number of programs, they can very quickly tease from the data the kind of information that researchers using tally marks would take months to come up with. They are overcoming the methodological defects of former studies and reacting to the criticism of them. They will design better and better studies and extract better and better information. And they are increasing their ability to validate the data through the use of the improved NCIC arrest records and other methods.

What we may see in the future is the incorporation of a number of other factors into the research to find the correlations between the new factors and participation, frequency, and career length. They now can correlate defendants' IQ's, psychological test scores, success in school, social history, blood chemistry, DNA and chromosome analysis, levels of income, and any other factors that the researchers' imagination can come up with, including one's Zodiac sign and success or failure at early toilet training.

I have recently seen a study of the correlation of head injuries with aggressive behavior. I am told that almost all juveniles who have been convicted of capital crimes and are awaiting death have serious head injuries in their backgrounds. We are just taking the very first steps in this research and it raises substantial challenges.

There are a number of troubling policy implications for prosecutors. We exercise an enormous amount of unstructured, unsupervised discretion, much of which is shared with the police and with other government agencies. But, by and large, the prosecutors are the key actors in the criminal justice system. We help decide who is arrested. We decide what we will do with them pre-trial. For example, do we put them into diversion programs, or do we release them on bond? We decide whom we prosecute or whom we take to trial or with whom we negotiate a plea bargain. We decide whom we file three-time loser or habitual offender charges on, or whom we select out for capital punishment. We decide what sentence to bargain for or recommend, or how many charges or counts to file. And we decide whom we oppose for release on parole.

The criminal justice system and we prosecutors are currently motivated at various stages by traditional factors. For example, in the decisions to arrest or not--what is good for the public order or is it helpful to seize evidence? On the bail decision, will the defendant appear in court? At trial, will we get a conviction of the perpetrator? At sentence, do we impose the deserved punishment? At parole hearings will we maintain public order and a reasonably-sized prison population?

The researchers tell us that we can do something else in making these decisions. They suggest that it may be possible to modify criminal careers by using the information. That is, we can modify behavior through standard methods of behavior

modification. We can stop substance abuse, and we can improve employment prospects. This is a very optimistic point of view of the use of criminal justice material. It does run counter to a 1980 study by the National Academy of Science. In that study they found that there was no technique that was broadly effective at reducing crime through behavior modification. There were a few encouraging results from intensive drug monitoring, but they found no successful American program for upgrading employment skills for re-entry of ex-inmates into the community. However, the National Academy study called for further longitudinal studies, and I think all of us hold out hope that there may be ways to modify criminal careers before they become entangled in the law.

What the researchers are telling us is that we prosecutors can reduce crime by putting high-frequency violators in jail. Their research is complicated and hard to understand. I don't pretend to be a statistician, but I have looked at the bottom line, and trust me, here's what it says. They say by taking a look at collective incapacitation--remember, that is putting people away based upon the crimes they committed--that the incarceration policy we had in existence in 1970 reduced the crime rate by approximately 15% from what it would have been had those inmates stayed on the street. In other words, in 1970 the criminal justice system, by putting certain criminals in jail, prevented 15% of the crime that was going to be committed had those criminals stayed free.

By 1982, we doubled the inmate population in the nation's prisons, and we reduced crime from what it would have been by approximately 35%. In other words, had the prison population stayed the same in 1982 as it had been in 1970, there would have been 35% more crime.

Now they tell us that if we double the prison population again, we can count on reducing crime by another 10%. They also tell us that if we selectively incarcerate and improve the criteria by which we decide to put somebody away, that we can reduce crime by the same 10% without an increase in the prison population. They tell us that if we change the methods by which we select whom to concentrate our efforts on, that is, "target," it will reduce crime.

Currently, their studies show, and I agree, that when we prosecutors select which cases deserve the most attention, the most important single consideration is the seriousness of the charge. After that, the most important consideration is the criminal record of the defendant.

The researchers tell us that there are additional factors that we can consider that will better enable us to predict which defendants we put in jail will reduce crime. By

getting at the high-volume offenders, the most frequent offenders, and the ones who have the longest career length, we can lower the crime rates.

Now that raises substantial ethical questions that I don't mean to gloss over. Should we consider such factors that are not blameworthy, such as the defendant's child abuse history? Whether or not the parents were divorced? The criminal record of the parent or of siblings? The defendant's employment record or his parents' employment record? Did the defendant have a head injury? What is his race and what is his sex? And then there are some other factors that we may consider that may have predictive force, such as the defendant's juvenile record (including arrests), and his school record. There are some other factors where there is more agreement that they are blameworthy, such as drug use and uncharged criminal record. These ethical issues are substantial and troubling. We are only beginning to use some structured scales paying formal attention to these predictive criteria. Let's take a look at one of them. The Rand Corporation has come out with a list incorporating some of the material that I have mentioned above that they believe we can use. Rand says that we prosecutors should consider:

1. The prior conviction for the same charge.
2. Whether or not the defendant was incarcerated for more than 50% of time in the two preceding years.
3. Whether the defendant was convicted before age 16.
4. Whether he served time in a state juvenile facility.
5. Whether he used drugs in the preceding two years.
6. Whether he used drugs as a juvenile.
7. Whether or not he was employed less than 50% of the time in the two preceding years.

The more risk factors that we identify about a defendant, the more we should attempt to imprison them, deny them bail, sentence them longer, try harder to convict them, oppose parole. These factors predict future high volume criminality.

The proponents argue that it's ethical to use these factors because when defendants are already charged and we now make judgments about their future we do it unscientifically. It is therefore not unethical to do it scientifically. They argue that it is much better to develop selective incarceration policies based on research, intelligence and science.

Those who argue against prediction say punishment should be meted out to those who deserve it for what they did. Defendants who commit the same offenses deserve the same punishments. Secondly, they argue it is unfair to punish for future crimes--crimes not yet committed. Thirdly, prediction is too often wrong (the Rand Scale is only about 55% to 60% accurate--that means 40% to 45% inaccurate!). Lastly, it is unfair to use some variables, such as arrests not resulting in convictions, juvenile record, employment history, and so forth.

Let us now leave targeting and address what we do with defendants after we have them targeted. This is the other part to career criminal programs, the best methods prosecutors use to make sure the bad guys don't get away. Most of the ideas came out of the career criminal programs that were started in prosecutors' offices in the early 70's, primarily with federal government support through the now defunct Law Enforcement Assistance Administration - the LEAA. I believe the first such program started in the Bronx under the late Mario Marolo. Very soon thereafter similar programs started in San Diego and New Orleans. The administrators and those in charge of dispensing money at the LEAA studied them and pronounced them successes and encouraged their adoption in other offices throughout the land. When I say they encouraged them, they financed them by giving local jurisdictions the funds to try certain categories of cases with improved resources and policies.

The programs varied somewhat, but there were a number of common characteristics in these special units. For instance, the assistants in the units had lower caseloads. They abolished or restricted plea bargaining. They expedited the trials and reduced delay, and they had a number of preparation enhancements, such as victim/witness coordinators, early involvement with the police, vertical prosecution--that meant that the prosecutor who first became involved with the case stayed with it until the end--and a number of other advantages, such as law clerks, expert witnesses demonstrative evidence, and so forth.

What these career criminal units provided, in essence, was first-class prosecution for selected defendants. Under the LEAA program, each office was more or less at liberty to select who the targeted population would be, and they varied from office to office. The only restriction was that the unit could not be just a felony unit--it had to target defined career criminals. I believe in Detroit, in order to qualify for the first-class treatment a defendant had to have eight previous arrests. In my own Montgomery County, with less crime, we used one previous violent crime conviction for which the defendant had gone to jail.

Most of the units targeted crimes of violence. New Orleans, on the other hand, had only the requirement that the targeted defendants have crimes of violence convictions, and once identified as a violent criminal, New Orleans prosecuted them for any crime, including minor misdemeanors.

The LEAA program led to the establishment of more than one hundred programs around the country and the agency watched them. The methods of evaluation, however, were crude, and looking back on them it is no wonder that they were pronounced successes. They did such things as compare the conviction rates for the career criminal cases with the rest of the cases in the office. Since the crimes were violent crimes, it was not surprising that they had a higher conviction rate. It is easier to get convictions for violent crimes. Another measure was the length of jail time that career criminals received over the criminals prosecuted by the rest of the office. Crimes of violence usually get more time than non-violent crimes and the targeted defendants had criminal records. Thus, it was not surprising that the career criminal units were measured as successes under those methods of evaluation.

All prosecutors wanted to see the programs pronounced successes so that they could assure local funding to continue the units after the federal government's two or three years of funding was terminated. However, when the LEAA funds dried up and the LEAA controls disappeared so did many of the career criminal units. New Orleans abandoned its program entirely, although it was considered to be one of the most successful in the country. Many of the units simply folded into the felony units, and if they kept their names or their separate identities, they usually did that for public relations purposes or for political considerations. But the career criminal units did give some useful experience with enhanced trial techniques, and they gave us our offices an opportunity to do some research as to what makes us successful and, importantly, what makes us unsuccessful. How and why we win, how and why we lose.

Why do we lose cases? Basically, what we learned is that we lose cases for two basic reasons. One, because of lack of witness cooperation, and two, because of poor preparation. The career criminal programs were designed to overcome these two basic defects in prosecutors' offices.

Let's look at the first cause--poor witness cooperation. Why do we have poor witness cooperation? One reason is because there is poor witness coordination. We did not prepare witnesses properly, and we frequently did not include the witnesses into the process efficiently.

Secondly, why were we poorly prepared? One obvious reason was the deputies

were overloaded. Another is that the cases are assigned late to the deputies. These cases were frequently not the personal responsibility of the deputy until assigned for trial. Cases were delayed so frequently that it was inefficient to prepare too soon. Such a high percentage of the cases were plea bargained that deputies did not expect to go trial. All these factors contribute to poor preparation.

Of course, there were the other reasons that we lost cases or didn't prepare well, such as poor morale, poor police/prosecutor relations, poor leadership in the office, or general underfunding.

What the career criminal units did was work on ways of preventing the losses in those special cases with targeted defendants. The career criminal programs developed techniques for overcoming the two principal reasons for losing cases. Let's now review for a few minutes what we have learned about the best way to achieve success. As I have said before, there is nothing "magic" about career criminal programs. There is nothing really "new" about the methods they employ. In many ways all they involve is good solid lawyering, the kind of successful approaches that lawyers have used since the beginning of the Inns of Court. What is different is that the techniques are frequently frustrated by the governmental, bureaucratic, and institutional environment of public prosecutors' offices. The career criminal approach is the means to overcome those frustrations.

To get the best results, prosecutors need to develop close working relations with the police. Some units put deputies on call with beepers, who could go the crime scene and work with the police during the early stages of the investigation, advise the police on the law, assist in the development of search warrants, help with line-ups, interview witnesses, and generally give the investigation the trial perspective of overcoming reasonable doubt rather than just developing a probable cause. As a consequence, the career criminal cases were better prepared, had fewer legal problems, and had the prosecutor early on committed to prosecution and familiar with the facts. In cases where it was worthwhile, the prosecutor could use the power of the grand jury to subpoena witnesses, bank records and so forth.

This leads to another characteristic of the career criminal unit, that is vertical assignment. As I said before, vertical assignment means having the deputy who is first assigned to the case stay with it to the very end. The deputy who responds to the call stays with the case at the bond hearing, the arraignment, the preliminary hearing, the grand jury indictment, the pre-trial motions, the trial, and, of course, the sentencing. Contrast that method with the method in many overloaded offices where, indeed, a

different assistant might appear at each one of those important stages and have to familiarize himself or herself with the case at every stage.

Another characteristic of the career criminal units is expedited trial. Cases mean more to the community if they can trial, for they be tried as quickly as possible after the crime. The punishment, of course, is more meaningful and may have greater general deterrent effect if it occurs while the crime is fresh in the public mind. In addition, the witnesses are more interested and can better recollect the facts when the case is tried sooner rather than later. Career criminals who are on bond are a threat to the community every day that they are free. Expedited processing of the cases is therefore an integral part of the career criminal units. The methods for accomplishing this varies from jurisdiction to jurisdiction. In some jurisdictions it is possible to convince the courts to give favorable treatment to the career criminal cases and set them in early. In other counties the burden is more on the prosecutor who must vigorously oppose continuances and resolve pre-trial matters, such as discovery, with dispatch. The benefits, however, are clear. The quicker the case goes to trial the more likely the conviction.

Overloaded deputies do not prepare as well and are forced to pick and choose which cases they try, which they settle, which they prepare well, and which they prepare less than well. Since the career criminal units assign fewer cases per deputy this encourages more thorough preparation, better research on the law, more interviews with witnesses, and overall better lawyering. There is no question that there is a correlation between the number of cases per deputy and how well they perform. The career criminal units, by establishing lower caseloads for the career criminal staff improve the performance before trial and at trial with the result, of course, of more convictions.

Another characteristic of many of the career criminal units was a substantially restricted or reduced plea bargaining policy. Plea bargaining will always be controversial and is a political and public relations problem in any office that does it. On the other hand, eliminating or decreasing the expectations of the defense bar sends a message. Establishing a tough stance on plea negotiations for identified career criminals can have a very salutary effect upon the administration of justice. By restricting the authority of deputies to negotiate plea, the focus of the unit changes from simply disposing of cases to the trial of cases. The presumption about a career criminal case in a unit is that the case is going to trial, not that it is going to be pled out. Eliminating or decreasing the expectations of the defense bar sends a message. It

also encourages the deputies to prepare for trial and not presume a plea. That improves performance.

Civil attorneys when they take important cases frequently put no budget limitations on the preparation and trial. A widow whose husband died in an automobile accident or through medical malpractice would not want to have an attorney who said we cannot afford to do the research, cannot afford to have a second attorney try the case, cannot afford to prepare this exhibit, acquire this demonstrative evidence, etc. Many of the offices provide the same kind of preparation and support for the most important cases--the career criminal cases.

Until recently, victims and witnesses were the forgotten people in the criminal justice system. Twenty years ago judges would consider the wishes of the defendant in setting their case for trial and ignore those of the victim. That's all been changed for many reasons, including the militancy of the victims' movement. They are no longer the forgotten people in the criminal justice system. But along the way, we have as prosecutors devised a number of programs to assist victims and witnesses before trial, during trial, and after trial. The career criminal programs pioneered with victim/witness coordinators to keep track of the victims and witnesses before trial, to assist them in getting to the courthouse, to keep them on call rather than waiting around through days and days of maneuvering and waiting for other witnesses. After the trial, the career criminal programs kept the victims informed of sentencing dates and the results.

Much of police work is involved with the identification of the victims and witnesses and the interviewing of them in preparation for trial. After the reports are furnished to the prosecutor's office, the police understandably go about closing the cases and don't have the resources or regard themselves as having the responsibility to look out for the interests of the victim. The career criminal programs find that coordinators fill the gap between the closing of the police investigation and going to trial. Most importantly, however, victim/witness programs assured that cases would not fall apart because of the system's indifference or witness disappointment or even hostility.

Even cases that are well prepared and have good witness cooperation can be lost at the sentence hearing. There is a natural tendency on the part of the prosecutor to close the case after verdict and ignore the value of preparation for sentence. Career criminal units know that winning the verdict is only part of the battle. The prosecutor must, in preparation for sentencing, document the convictions, obtain the frequently grisly details of other convictions, and gather testimony, reports, or memoranda

involving the impact of the crime upon the victim or victims. It may be helpful in increasing the sentence to have thoughtful judges read the recent research that I referred to earlier about the risk factors involving defendants that the judge has before him or her. A general sentencing memo describing the Rand and Wolfgang research may convince the judges of the value to the community of putting particular defendants away, and thereby reducing the crime rate by selective incarceration of high-risk offenders.

All of us are lawyers and some of you--maybe all of you--are wondering about the legal ramifications involved in the creation of career criminal units. Does it violate the defendant's constitutional protection to select him out for vigorous concentrated prosecution? Does selective prosecution violate a defendant's Fourteenth Amendment right to equal protection of the laws? The most effective prosecution program possible is, of course, no good at all if it is unconstitutional.

To start off with, the Supreme Court has not ever considered the narrow question of whether any career criminal unit is constitutional. In spite of the fact that over one hundred career criminal units started over ten years ago, the Supreme Court has never certified or decided an equal protection issue involving them.

Some state courts have, however. North Carolina's Wake County prosecutor started a unit in his office and employed some of the standard tactics--swift prosecution, opposition to bail, abolished plea bargaining, and argued for severe punishment. When one F.E. Rudolph was prosecuted and convicted, he challenged the constitutionality of the unit on equal protection grounds. The Supreme Court of North Carolina upheld the conviction and said that career criminal units are "well within the broad prosecutorial discretion and not based upon impermissible motives such as bad faith, race, religion, or the desire to exercise a constitutionally guaranteed right."¹

The decision is sound and in keeping with a host of other decisions that have reviewed prosecutors' decisions in connection with filing habitual offender or three-time-loser charges. Those state cases have uniformly held that prosecutors can exercise some selectivity where the selection is not based upon unjustified standards such as race, religion, or exercising the right to free speech.²

The Supreme Court has also approved prosecutors' selectively filing habitual

¹250 SE2d 318 (1979)

²Maine v. Heald, 282 a2d 290 (1978)
Nebraska v. Bartlett, 317 NW2d 102 (1982)

offender charges in Oyler v. Boles.³ And in Bordenkirchen v. Hayes, the Supreme Court even approved the selective use of the habitual offender statute to try to force a guilty plea, as long as the selection did not use an impermissible basis of selection like race or religion.⁴

In the few cases that the Supreme Court has taken so far involving the use of prediction criteria, the challenges have been unsuccessful. In Schall v. Martin, the Court upheld a New York statute that allowed pretrial detention of juveniles accused of delinquency if there is a "serious risk" that the juvenile would commit another delinquent act during the time before trial. The Court said in that decision:

"From a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct..." "...Such a judgement forms an important element in many decisions, and we have specifically rejected the contention...that it is impossible to predict future behavior and that the question is so vague as to be meaningless."⁵

Barefoot v. Estelle, a 1983 Supreme Court case, approved a Texas capital punishment statute which considered future dangerousness and rejected an attack on the medical or psychological testimony on future dangerousness given at the trial.⁶

It seems, then, that there is little danger that the Supreme Court or any Court would disapprove on U.S. Constitutional grounds any career criminal unit's selective prosecution of selected defendants whom the prosecutor scientifically predicts will be high-frequency offenders with long careers. But then predicting the Supreme Court's direction can be dangerous, given past research and the non-reliability of the changing criteria! As Yogi Berra once said, "You shouldn't make predictions, especially about the future!"

³368 U.S. 448, 82 S.Ct. 501, 7 L.Ed 446 (1962)

⁴434 U.S. 357, 98 S.Ct. 663, 54 L.Ed 2d 604 (1978)

⁵Schall v. Martin, 467 U.S. 253, 104, S.Ct. 2403 81 L.Ed 2nd 207 (1984)

⁶103 U.S. 3043 463 U.S. 880 103SC 338377 L.Ed 2nd 1090 (1983)