

BY NINA MARTIN PHOTOGRAPHS BY JEFFREY BRAVERMAN

INNOCENCE LOST

SPECIAL INVESTIGATION

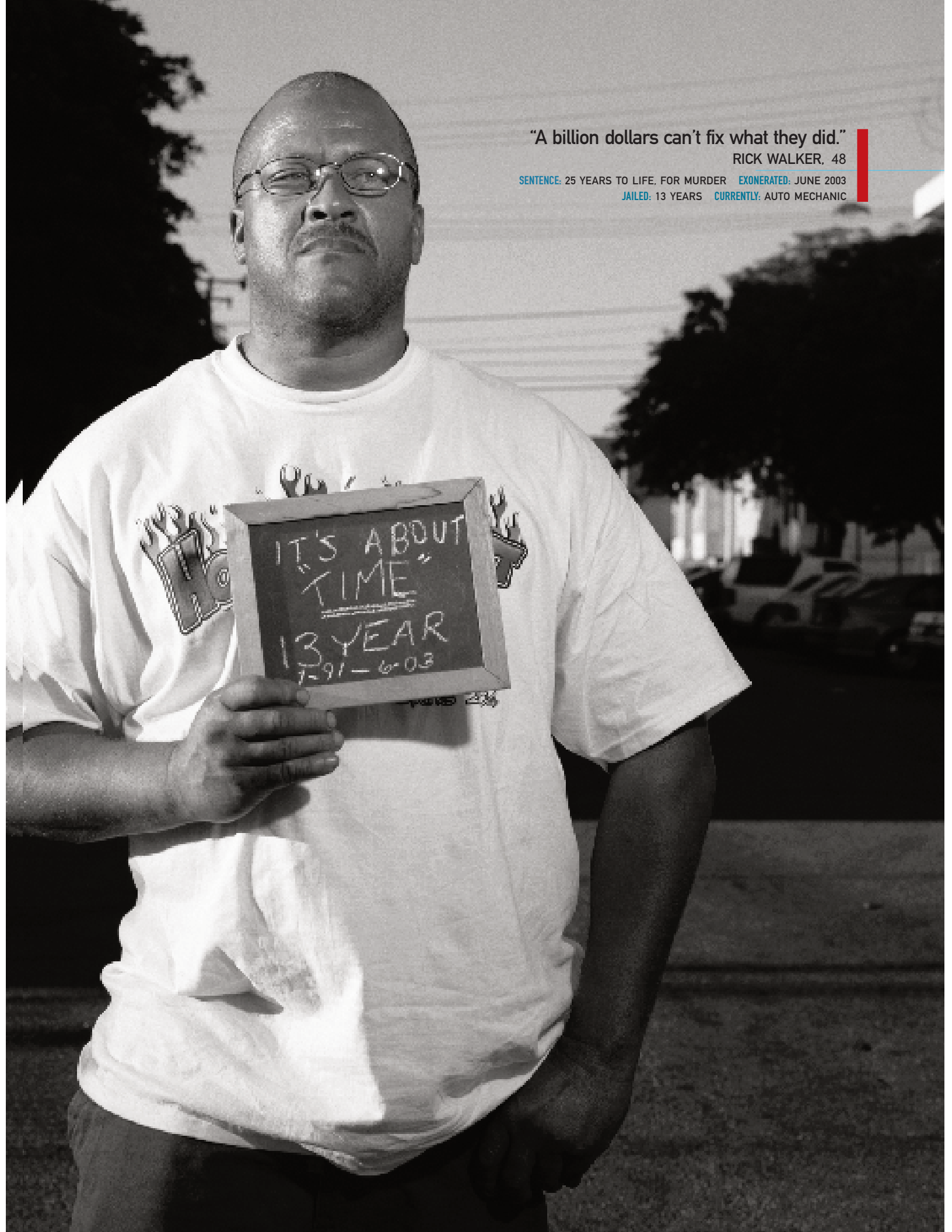
WHAT HAPPENS
WHEN THE
TOUGHEST
CRIMINAL JUSTICE
SYSTEM IN THE
WORLD KEEPS
LOCKING UP
THE WRONG
PEOPLE—
FOR LIFE

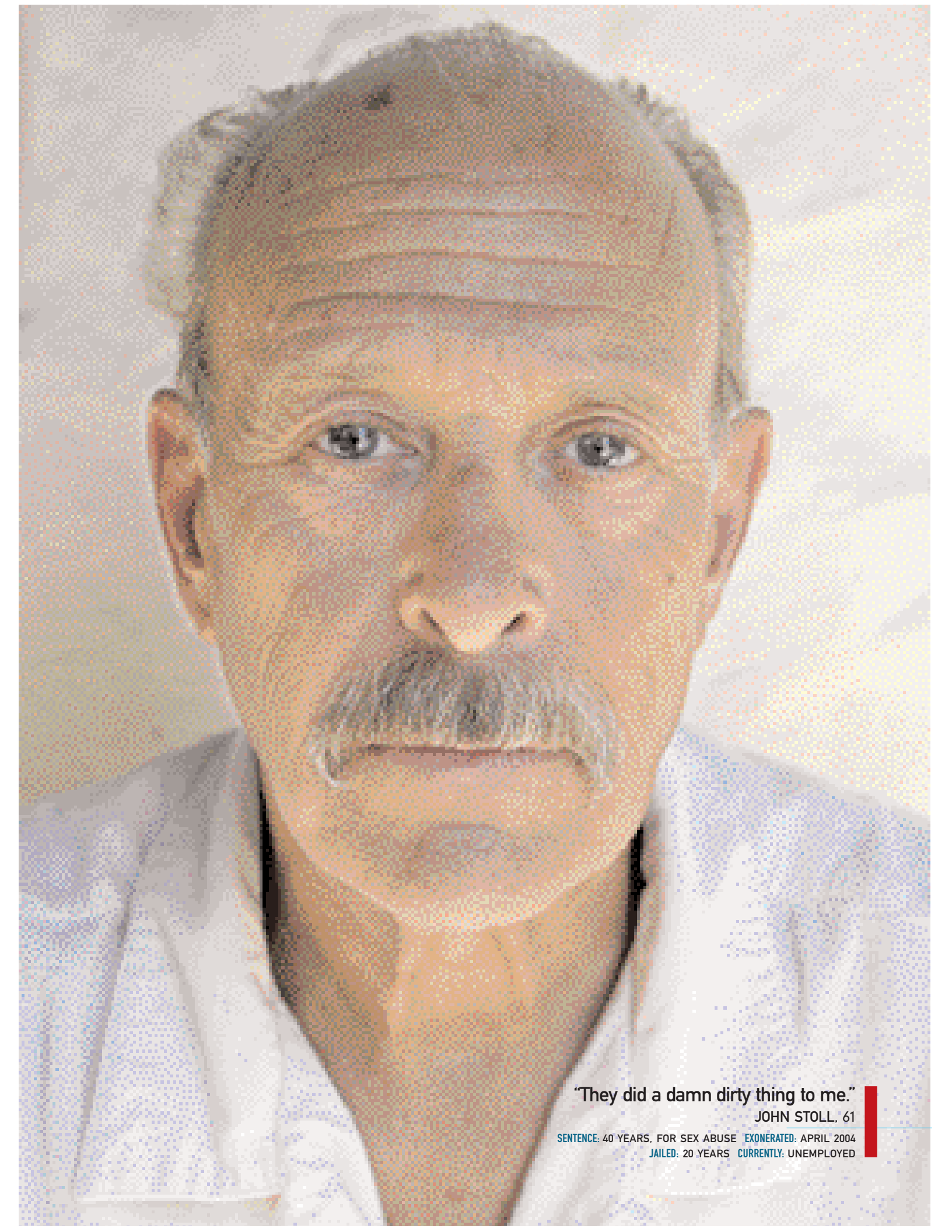
"A billion dollars can't fix what they did."

RICK WALKER, 48

SENTENCE: 25 YEARS TO LIFE, FOR MURDER EXONERATED: JUNE 2003

JAILED: 13 YEARS CURRENTLY: AUTO MECHANIC


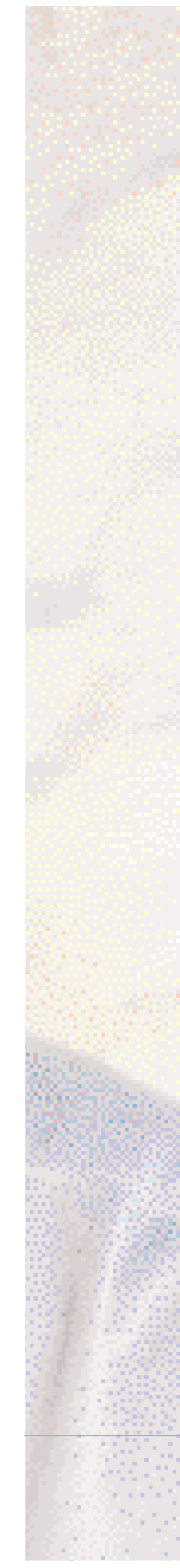




“They did a damn dirty thing to me.”

JOHN STOLL, 61

SENTENCE: 40 YEARS, FOR SEX ABUSE EXONERATED: APRIL 2004
JAILED: 20 YEARS CURRENTLY: UNEMPLOYED



The strangest thing happened to John Stoll this past spring. After 20 years in jail for an infamous crime he did not commit, a judge said it had all been a mistake, and he was set free. “You win some, you lose some,” the prosecutor shrugged, refusing to offer any admission of error or hint of an apology for all that her office had put Stoll through. None of his family was in the courtroom; they were all dead or far away and not terribly interested in what happened to him anymore. **He was released from custody on his 61st birthday;** after treating him to filet mignon and chocolate cake, his lawyers took him to buy socks and underwear, and then they took him to live with them in San Jose, because he had nowhere else to go and barely a penny to his name.

John Stoll met only one other man in prison he is certain is innocent, though he is sure the California penal system is full of them—he just never asked. For one thing, the places where he was incarcerated—San Quentin, Avenal, Tehachapi, Mule Creek—were teeming with meth freaks, white supremacists, desperadoes, guys he had nothing in common with and did not especially want to get to know. Nor did he want to talk about his own ordeal; it would be asking for a knife in his back. Back in 1984, when he was a carpenter and foreman at a gas plant in Bakersfield, he had been accused of leading a child-sex-abuse ring whose supposed victims included his own five-year-old son. It was a weird, weird time in Kern County, with dozens of men and women accused of ritual sexual abuse by the same whacked-out group of cops, social workers, and

prosecutors, but judges and jurors bought into the hysteria, and Stoll was lucky that his sentence for 17 counts of child molestation was only 40 years. (Some people got 400 years.) Over the next decade, most of those convictions were overturned after the child witnesses recanted or courts found that their testimony had been coerced; in one of the stranger twists, the man who had prosecuted Stoll was stabbed to death by a police investigator who suspected he was having an affair with the cop's son. Two of Stoll's codefendants won their state appeal 15 years ago; his own appeal was denied in part because of a mistake his lawyer had made during the trial—failing to introduce a psychologist's finding that Stoll showed none of the telltale traits of a pedophile. In 20 years, Stoll told only six other inmates this story. “I did not need people thinking I was a child molester,” he says. At one

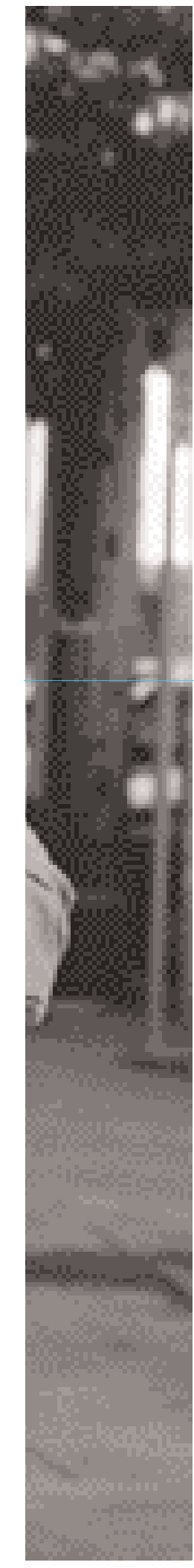


"I want to walk around and shake every person's hand and say, 'Enjoy your freedom.'"

JOHN TENNISON, 33

SENTENCE: 25 YEARS TO LIFE, FOR MURDER EXONERATED: AUGUST 2003

JAILED: 14 YEARS CURRENTLY: CLERK, SAN FRANCISCO PUBLIC DEFENDER'S OFFICE



prison, he went to the library and razored all traces of his case from a law book so no one would discover his secret.

Every few years, Stoll would try to interest someone on the outside—a famous lawyer, a pro bono legal group—in helping him pursue another round of appeals. “I wrote to the ACLU. I wrote to everybody like that. The ACLU told me they weren’t working on that particular type of case at that time. Then I saw that they were suing some city because of a manger scene in a park. And I’m thinking—what the hell! Here I am sitting in prison and you’re worried about how Christmas is run.” Eventually he lost heart. “It gets to be like picking open a scab, telling that story 20 times,” Stoll says. “You’ve got to put it away.” So when the lawyer who had won his codefendants’ appeal found someone to help him, Stoll wasn’t sure he wanted to cooperate. “Because after 18 years, you know, it’s pretty much: Do I want to do this again?”

It took another two years for lawyers at Santa Clara University School of Law’s Innocence Project, part of a national pro bono movement dedicated to exonerating innocent inmates, to track down witnesses, put together a habeas petition, and persuade a state judge to free him. The hardest part of the process was seeing his son, Jed, for the first time since his 1985 trial. Of the six kids who had testified against Stoll then, five—now grown—recanted at a hearing last winter. Only Jed, not even in kindergarten at the time of the arrest, continued to insist that his father had molested him, though under questioning he could give no details. The boy Stoll remembers—happy, trusting, bewildered to have his father ripped from his life—had become a wary and troubled young man, himself the father of a child Stoll expects never to meet. Stoll was unrecognizable, too—still handsome, with penetrating blue eyes, but balding and gray. “He didn’t have any idea who I was,” Stoll recalls sadly. “The only reason he knew I was probably his father was because I was sitting in the defendant’s chair. Oh my God...that was worse than the conviction—having him there and thinking I did something to him. Because I really love that little guy, you know? And I didn’t do nothing to him. But if he...if he is going to believe it, I can’t help it. There’s nothing I can do.”

Stoll says he talked to a child psychologist, who told him that Jed faced a heartbreaking dilemma: either his father had molested him, or he had been wrongfully imprisoned and Jed was to blame. “And to protect your sanity, you’re going to say your dad did something,” Stoll says. “The damn shame is—it’s not his fault. He was a five-year-old child when this started, for God’s sake. I had people say, ‘Aren’t you angry at your son?’ How in the hell could I be mad at a five-year-old child that I loved to death?” There are tears in his eyes.

Stoll looks around the sun-filled cottage behind his lawyers’ house, his home for a year while he gets back on his feet—the big, inviting bed; the new computer he is teaching himself to use; the calla lilies lounging by the door—and it’s clear: none of this makes any more sense

than anything else that’s happened to him in the past 20 years. You wish you could tell him that it had all been a dream, that in the garden just outside, a lost little boy waits for his father to come out and play. But the afternoon is hot and still and the garden is empty.



John Tennison used to see Rick Walker and Albert Johnson all the time in the yard at Mule Creek State Prison, in the dusty town of Lone, 30 miles southeast of Sacramento. All three were African American

men from the Bay Area doing very long sentences—Tennison and Walker for murder, Johnson for rape. “But we never knew much about each other’s stories,” Tennison says, a handsome 33-year-old with a proud, wary face. “I didn’t speak about my case to other inmates. I didn’t pry about theirs.”

Keeping quiet was something inmates learned early. Prisons are full of desperate people willing to snitch on each other for favors, better living conditions, a sentence reduction. “There’s no telling what someone might get out of the conversation and use against you,” he says. Not that anyone would have believed him if he had told his story. Tennison was innocent of the murder—a San Francisco gang killing in the late 1980s—for which he was serving a life term, with little possibility of early release. “You hear a lot of people say they’re innocent. I would take it with a grain of salt.”

Yet it turned out the other two men were innocent, too. Johnson was the first to be exonerated; he was serving 39 years for two 1992 rapes in the Richmond area when DNA testing cleared him in October 2002. The following summer, Walker was set free after the Santa Clara County prosecutor’s office finally conceded that he did not suffocate and mutilate a former girlfriend during a 1991 robbery-murder; he had been framed by his codefendant, one of the real killers, and convicted by a prosecutor who made secret deals with witnesses who turned out to be liars. Tennison was the last to get out, in August 2003, when a federal magistrate ruled that San Francisco police and prosecutors had violated his right to a fair trial by withholding evidence that pointed to someone else as the shooter; his codefendant, Antoine Goff, was exonerated as well. Now Tennison checks in with the others regularly, though he wouldn’t call them close. “These guys are people who have walked in my shoes,” he says. “We’re trying to fit back into society the best way we can. It’s like we were just dropped off on another planet.”

Extraordinary as it may seem, yet another Bay Area man who’d been scheduled to spend the rest of his life in prison was freed last year, for a total of five exonerations

in an 11-month period—hardly the kind of record you'd expect in a place as liberal as this. Glen "Buddy" Nickerson Jr. was convicted of killing two San Jose men during a 1984 robbery. Within a few years, the evidence that had seemed clear-cut to prosecutors and jurors started to crumble as police investigators came under scrutiny and the real killers insisted he had nothing to do with the crime. Still, it took until March 2003 to persuade a federal judge to set Nickerson free. He had spent almost 19 years behind bars.

In a recent essay, this is how Innocence Project founders Barry Scheck and Peter Neufeld characterized the wave of exonerations that has swept across the country in the last few years, shattering faith in the criminal justice system's ability to protect the innocent: "Nothing comparable has ever happened in the history of American jurisprudence; indeed, nothing like it has happened to any judicial system anywhere." Of the hundreds of wrongful convictions that have come to light, revelations about innocent people on death row have caused the greatest loss of confidence—116 capital convicts exonerated around the country, forensic lab chaos in the Texas county that sentences more people to death than anywhere else, an Illinois system so riddled with error that a Republican governor commuted 167 death sentences in one stroke. In California, juries are handing out fewer death sentences and the state Supreme Court is scrutinizing them more carefully than at any time since the late 1980s. Last February, squeamishness about the state's capital system came to this: convicted quadruple-murderer Kevin Cooper was within 3 hours and 45 minutes of being executed by lethal injection at San Quentin when a federal appeals court ruled that his lawyers could do state-of-the-art DNA testing on incriminating hair and bloodstains, based on the *theoretical* possibility that traces of a preservative chemical found in earlier tests might have indicated evidence tampering.

Yet as circumspect as California has become about meting out the death penalty, it's been almost cavalier when it comes to locking people up for a very long time—"death by incarceration," some call it. By the end of June 2004, an astounding 30,492 state inmates—twice as many as in the entire European Union, which has a population over 12 times bigger—carried life sentences; of these, 7,500 are serving 25-to-life terms under the three-strikes initiative (over half of them people whose third strike was not a violent or serious crime). Some 17 percent of California inmates are lifers, compared with 9 percent of prisoners in the United States as a whole.

All this despite the fact that the same kinds of problems that lead to wrongful convictions in death penalty cases also result in sending innocent people like Stoll, Tension, and Goff to prison for the rest of their lives. Few criminal justice experts doubt that California, whose penal system is thought to be the third largest in

the world, has put more innocent people behind bars than any other state. In the past 15 years, with surprisingly little fanfare, at least 200 Californians have been freed after courts found they were unjustly convicted—nearly twice the number of known exonerations as in Illinois and Texas combined. Just a handful were death row inmates, versus dozens of men and women sentenced to very long terms. California's innocence problem, it turns out, is primarily a matter of life, not death.

Implicit in the state's lock-'em-up stance is a fundamental assumption: that the criminal justice system is just, and that in the rare cases when innocent people are sent to jail, the system corrects the error. This impression—aided and abetted by *Law & Order* reruns, 11th-hour death penalty appeals, even the brief blast of publicity that attends each new exoneration—turns out to be wrong. As California has put the screws on the guilty,

At least 200 Californians have been freed—almost twice the number of exonerations as in Illinois and Texas combined.

it's also gotten much tougher on the innocent.

San Francisco has spent the last year reviewing California's largely unexamined record on wrongful convictions, going back to 1989, the year of the country's first DNA exoneration. We've spoken to dozens of lawyers, prosecutors, judges, and criminal justice experts. We've read through thousands of pages of court documents in 30 cases. What we've learned about how the system treats innocent people facing life or very long terms should dismay anyone, liberal or conservative, who values decency, fairness, and the rule of law. California's legal system has its own inexorable momentum, which pushes for conviction even when the evidence should give serious pause. Once an innocent person lands in jail, the mistake becomes almost impossible to undo. For those convicted of the worst crimes, even parole is unlikely.

At every stage, the safeguards in place to protect the innocent seem small, considering the severity of a long or life sentence. Defendants facing the death penalty get two court-appointed trial lawyers plus funds for investigators and expert witnesses. If they are convicted, the state pays for multiple appeals in the California Supreme Court, then the federal courts. Lifers, on the other hand, are entitled to a single lawyer at trial and then another one for a state court appeal, with almost no chance of review by the state Supreme Court; after that, they're on their own. The state pays to reinvestigate cases that result in death sentences, but not botched cases that result in life. Capital cases get a decade or more of appellate scrutiny; lifer cases, just a year or two. As the U.S. Supreme Court sees it, "actual innocence" is reason in and of itself to reverse a conviction only if someone is on death row—not if the sentence is life.


In short, an innocent Californian convicted of murder is almost better off being sentenced to death than to

“Believe me, if this could happen to someone like me, it can happen to anyone.”

GLORIA KILLIAN, 58

SENTENCE: 32 YEARS TO LIFE, FOR MURDER EXONERATED: MARCH 2002 JAILED: 18 YEARS

CURRENTLY: FOUNDER, THE ACTION COMMITTEE FOR WOMEN IN PRISON;
PLANS TO TAKE CALIFORNIA BAR EXAM



Gloria
KILLIAN
18 YEARS STOLEN



“Sometimes I can’t stand to be around people. It’s hard to know what to say.”

BUDDY NICKERSON, 49

SENTENCE: LIFE FOR MURDER EXONERATED: MARCH 2003 JAILED: 19 YEARS
CURRENTLY: UNEMPLOYED

life in prison—at least the case will get a long, hard look. Lawyers find death cases more glamorous, too. When he was the lawyer for John Tennison, Jeff Adachi, now San Francisco’s public defender, tried to line up pro bono legal assistance to free his client. Several big law firms initially expressed interest. Then they learned Tennison was only a lifer. They declined to get involved.

How many innocent people are sitting in California prisons, unable to get anyone’s attention or too beaten down even to try? How many millions of dollars does the state waste incarcerating people who’ve done nothing wrong? How many violent crim-

inals continue to prey on an unsuspecting public because someone else is doing their time? The answers are mostly hidden, and expensive and time-consuming to uncover, so no one knows—and, it sometimes seems, not many people want to know. Around the state, a handful of small Innocence Projects exist to investigate these cases, and they have been overwhelmed, with an estimated 1,000 requests for help each year. The advent of DNA testing has revealed a higher error rate than most anyone suspected: in one eye-opening FBI study, out of 18,000 sexual assault cases in which biological evidence was available, pretrial



testing cleared over 25 percent of the government's prime suspects, often after they'd already been arrested and arraigned. Among academics, the most conservative estimates put the wrongful conviction rate across the country at no less than 1 in 200 and probably 1 in 100; most experts believe a truer rate is between 1 in 50 and 1 in 20. By these estimates, the judicial system catches the right person 95 to 99.5 percent of the time—not a bad record, unless you happen to be one of the mistakes.

Judges, D.A.s, police, lawmakers—even many defense attorneys—defend California's legal system as among the nation's

most careful and sophisticated and deny that lifelong incarcerations of innocent people are a major problem. Yet if the experts are correct, in a state with 163,500 inmates, up to 8,000 are not guilty of the crimes for which they were imprisoned. Meanwhile, the number of those innocent lifers who can expect to die in prison eventually—of disease, despair, violence, old age—is at least 150 and, if you believe the most dire estimates, as high as 1,500.

There's a temptation to look at the ones like John Tennison and John Stoll who do get out as proof that the system works. They're flukes. There's a temptation to see the confluence of events that put them in prison and kept them there as freak accidents. But so many accidents in such run-of-the-mill cases involving such a wide range of ordinary people mean something has gone seriously wrong. Some might look at these cases and conclude that California's criminal justice system is filled with reckless men and women who don't care when they do harm. But most of them—police, prosecutors, lawyers, judges—were just trying to do their job the best way they knew how. It's the system itself that has become the problem—enormous, impersonal, legalistic, myopic, and fueled by fear and wrath. Unable to admit its failures, unwilling to hold itself accountable, it is destined to perpetuate its injustices and repeat its mistakes. This is the system *we* created. But is it really what we had in mind?



"ALL I WANTED WAS SOMEBODY TO ANSWER ONE SIMPLE QUESTION—WHO SEEN THE 430-POUND FAT GUY?" —BUDDY NICKERSON

THE CONVICTION > Buddy Nickerson spent the most important night of his life sleeping off a hangover. Earlier in the evening of September 14, 1984, he'd attended a party at a friend's house. Instead of going home, he'd dozed off in his pickup in the friend's driveway. As usual, he made a vivid impression: his bare feet—big, like everything else about him—were hanging out the window, and his boots, which were in the house, stank. It wasn't till the next day that he heard about the murder of an acquaintance named John Evans on the rough edges of San Jose. Evans was the kind of guy whose high school class might have voted him "most likely to die in a blaze of gunfire." When he wasn't manufacturing and selling meth, he was a car painter of the naked-babe-on-the-hood variety, known for his ugly temper and the wads of cash he kept stashed around his house. According to his close friend Mike Osorio, three armed robbers—white guys of average build, wearing ski masks—had broken into the house where Osorio had fallen asleep watching TV with Evans's half brother. The assailants pistol-whipped the two men, then lay in wait for Evans, who returned home after midnight, sensed something was wrong, and started shooting. Evans and his half brother died at the scene; Osorio survived a point-blank bullet to the head. Neigh-

bors reported seeing three normal-sized men fleeing in different directions, including one who—though wounded and bleeding—escaped over a fence.

Santa Clara County sheriff's investigators immediately pegged Nickerson, then 29, as one of the killers. Barely a month before, Evans had beaten up one of Nickerson's brothers so badly that he had been permanently paralyzed. Nickerson had a minor record, a reputation as a hothead, and an impressive collection of racist tattoos. But he wasn't too worried, even after he was arrested. Besides his alibi, there was the matter of his size: he weighed 430 pounds, twice as big as any of the men fleeing from the scene. There wasn't a hair or thread, not a fingerprint or drop of blood, tying him to the killings. Even if he had been able to exert himself in the way the cops claimed, surely someone his size would have left a trace. Nickerson was so sure the system would see the error of its ways that, with the death penalty on the table, he turned down an amazingly sweet deal: 12 years for

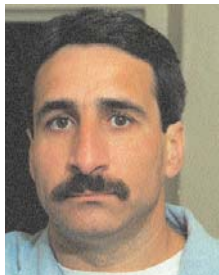
a guilty plea. Why should he admit to something he didn't do?

The real murderers had left behind plenty of evidence of their involvement. Over the next few months, police picked up three more suspects, including a guy Nickerson knew named Murray Lodge, who had planned the robbery and shot the victims. Lodge thought it was hilarious that Nickerson had been arrested, since the two men hated each other's guts. Still, he told his own defense lawyer that Nickerson was innocent.

With no physical evidence tying Nickerson to the crime, the detectives had to find witnesses who could make their case for them. In the end, they came up with two credible enough to convince a jury. After initially telling the deputies that he had no idea who his attackers were, Osorio, the sole survivor—still dazed from the beating, the shooting, and the surgery to remove the bullet—changed his story and said Nickerson had been one of them. Osorio's new version was bolstered by a young man named Brian Tripp, who lived nearby. He had originally

NOT GUILTY AFTER ALL ANALYZING CALIFORNIA'S

How does someone get sent away for decades for a crime he (or she) didn't commit? To answer that question statistically, we started with California's more than 200 exonerations since 1989, narrowing our focus to 30 cases. (Twenty of those exonerees are shown below.) Virtually all involved life or very long sentences; all concluded with a hard-eyed, frequently conservative judge releasing



Ken Marsh
MURDER (OF A CHILD)
21 YEARS IN PRISON



Elmer Pratt
MURDER, KIDNAPPING
27 YEARS IN PRISON



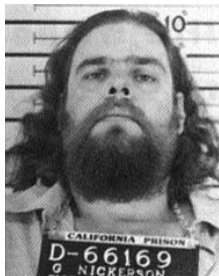
John Tension
MURDER
14 YEARS IN PRISON



Mark Diaz Bravo
RAPE
3 YEARS IN PRISON



Albert Johnson
RAPE OF TWO WOMEN
11 YEARS IN PRISON



"Buddy" Nickerson
DOUBLE MURDER
19 YEARS IN PRISON



Herman Atkins
RAPE
12 YEARS IN PRISON



Benny Powell
MURDER (POLICEMAN)
17 YEARS IN PRISON



Gloria Killian
MURDER
18 YEARS IN PRISON



Ronald Reno
THIRD STRIKE
6 YEARS IN PRISON

THE FINDINGS IN BRIEF: > 60% of the wrongful convictions involved at least one mistaken eyewitness. > 63% entailed police error or misconduct. > 20% featured a snitch who committed perjury. > 50% included prosecutorial error or misconduct. > 93% of the wrongful

described the man he'd seen running from the scene as 200 pounds and apparently wounded, with a mustache. But after repeated discussions with investigators, he, too, identified Nickerson—hugely obese, uninjured, with a full, shaggy beard.

The story of how Buddy Nickerson came to be convicted of first-degree murder illustrates the most common problem leading to wrongful convictions in California: eyewitness error. In our analysis of 30 such cases (see below), 60 percent involved at least one key witness who identified the wrong person. (When intentional perjury is included, the figure is 87 percent.) The reasons are familiar to anyone who's ever watched a TV crime show: everything from poor visibility and stress (Osorio's brain trauma definitely counts) to the surprising difficulty humans have distinguishing faces, especially those of another race. Witnesses don't just get it wrong when the suspect

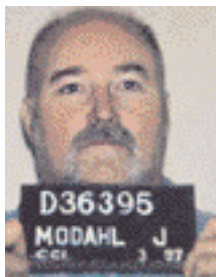
is a stranger and the crime occurred some distance away. A Los Angeles janitor named Jason Kindle was sentenced to 70 years to life for an armed robbery at the Office Depot where he mopped floors after five of his coworkers incorrectly identified him as the heavily disguised man who'd forced them to the floor

California has more lifers than the entire European Union, which has a population over 12 times bigger.

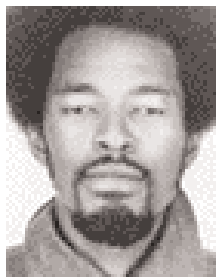
and fled with \$22,000. In all six California rape convictions later overturned by DNA testing, the victim's mistaken ID was the most important factor in sending an innocent person to prison for a very long time. The most striking error involved Kevin Green, a marine living in Orange County who was mistaken *by his own wife* for the attacker who raped and beat her, putting

WRONGFUL CONVICTION CRISIS

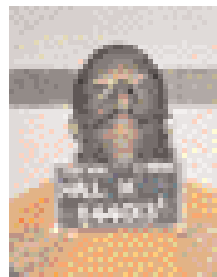
the prisoner after carefully weighing old and new evidence. We left out most of the Bakersfield sex-abuse cases from the 1980s because they would slant the sample (nearly all involved coerced child witnesses). Nor did we include the 100-plus exonerations in the infamous 1990s rampage by rogue cops in Los Angeles's Ramparts district, which mostly involved shorter sentences.



Jeffrey Modahl
CHILD SEX ABUSE
15 YEARS IN PRISON



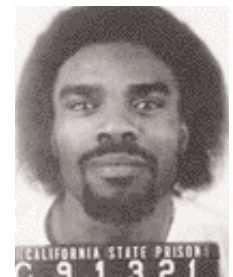
Clarence Chance
MURDER (POLICEMAN)
17 YEARS IN PRISON



Harold Hall
MURDER
19 YEARS IN PRISON



Thomas Goldstein
MURDER
24 YEARS IN PRISON



Frederick Daye
RAPE, KIDNAPPING
10 YEARS IN PRISON



Oscar Lee Morris
MURDER
16 YEARS IN PRISON



Kevin Green
MURDER (UNBORN CHILD)
16 YEARS IN PRISON



Antoine Goff
MURDER
14 YEARS IN PRISON



Jason Kindle
THIRD STRIKE
2 YEARS IN PRISON



Thomas Merrill
DOUBLE MURDER
5 YEARS IN PRISON

convictions were upheld on direct appeal. > 87% involved no relevant DNA evidence. > The exonerees spent 13 years, on average, in prison. FOR A SYNOPSIS OF EACH OF OUR 30 CASES, GO TO WWW.SANFRANMAG.COM.

her in a coma, shattering her memory, and killing their unborn child. The real assailant, identified by a DNA hit 16 years later, turned out to be the “Bedroom Basher,” responsible for at least five other murders in the area. Even after the real attacker confessed, Green’s ex-wife insisted Green did it.

Yet to call it “eyewitness error” is a mistake in itself; police lineups and other investigative techniques often help steer the witness toward a suspect who later proves blameless. Kindle’s colleagues, for example, continued working around him for seven weeks after the robbery without pointing the finger at him; only after police detained him at the store, letting everyone know he was a suspect, did they pick him out of a photographic lineup. Herman Atkins spent 12 years in prison for rape in part because the victim saw his face on a wanted poster for another crime just before viewing him in a lineup. Even a clear-headed guy like Brian Tripp is vulnerable. Several years after Nickerson’s trial, Tripp—by then a deputy sheriff in Colusa County—recanted and insisted Nickerson was not the suspect he’d seen after all. Tripp’s explanation for his retraction: his law enforcement experience made him realize that the sheriff’s investigators had subtly cajoled him to shape his story to fit their theory. “I began to feel that they had a suspect in mind that I was close to, um, helping them convict. I remember questions such as, ‘Couldn’t he have been larger?’ or ‘Are you sure he wasn’t a heavier-set man?’ and I think I began to doubt myself.”

Another key factor in Nickerson’s conviction, a federal court later concluded, was questionable police work—sloppy at best, misconduct at worst. Indeed, police errors and ethical lapses seem to be a particular problem in California, occurring in 63 percent of false convictions in our analysis, versus 38 percent in a nationwide study by the Innocence Project. (The figure zooms when you include the scores of exonerations in the Kern County sex-abuse cases and the LAPD’s Ramparts scandal, in which a band of rogue cops did everything from plant drugs and guns on innocent people to beat up witnesses.) On TV, police investigators are dispassionate sleuths who examine the evidence and adjust their theories to fit it. In real life, cops often get invested in theories that, for various reasons—sympathy for the victim, pressure to wrap up a case, a gut feeling that the suspect is a bad person who should be off the streets—they are unwilling to abandon. “Where improprieties tend to happen most is when they really think the suspect is the culprit but they have a weak case, so they think they’re justified if they stretch,” says Janice Brickley, an attorney with the Innocence Project at Golden Gate University. In Nickerson’s case, the friends he’d been partying with on the night of the murders said the sheriff’s investigators threatened them in an attempt to shake his alibi (it didn’t work); the detectives had also

been caught hiding evidence. Later, in the death penalty trial of Nickerson’s codefendant Murray Lodge, the same cops were discovered to have lied on the witness stand (they claimed they hadn’t taped a confession; then the tape was found), leading the judge to declare they’d committed perjury.

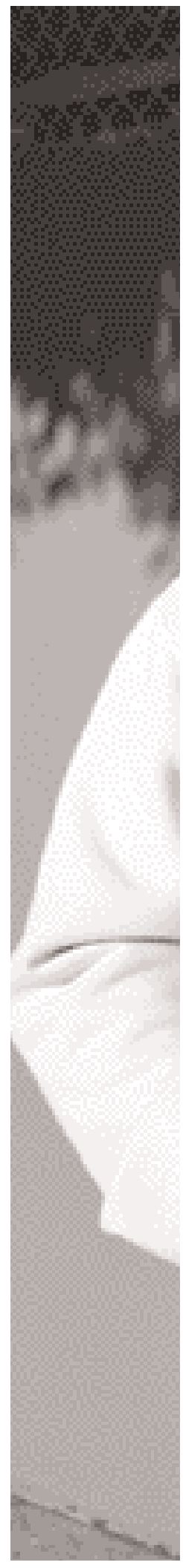
In fact, police have been accused of improprieties in 83 percent of the Bay Area wrongful conviction cases in our analysis. But Los Angeles County’s record of police mistakes and misconduct trumps all, often going hand in hand with the use of informants. For years a virtual snitch industry has existed in L.A. jails, with

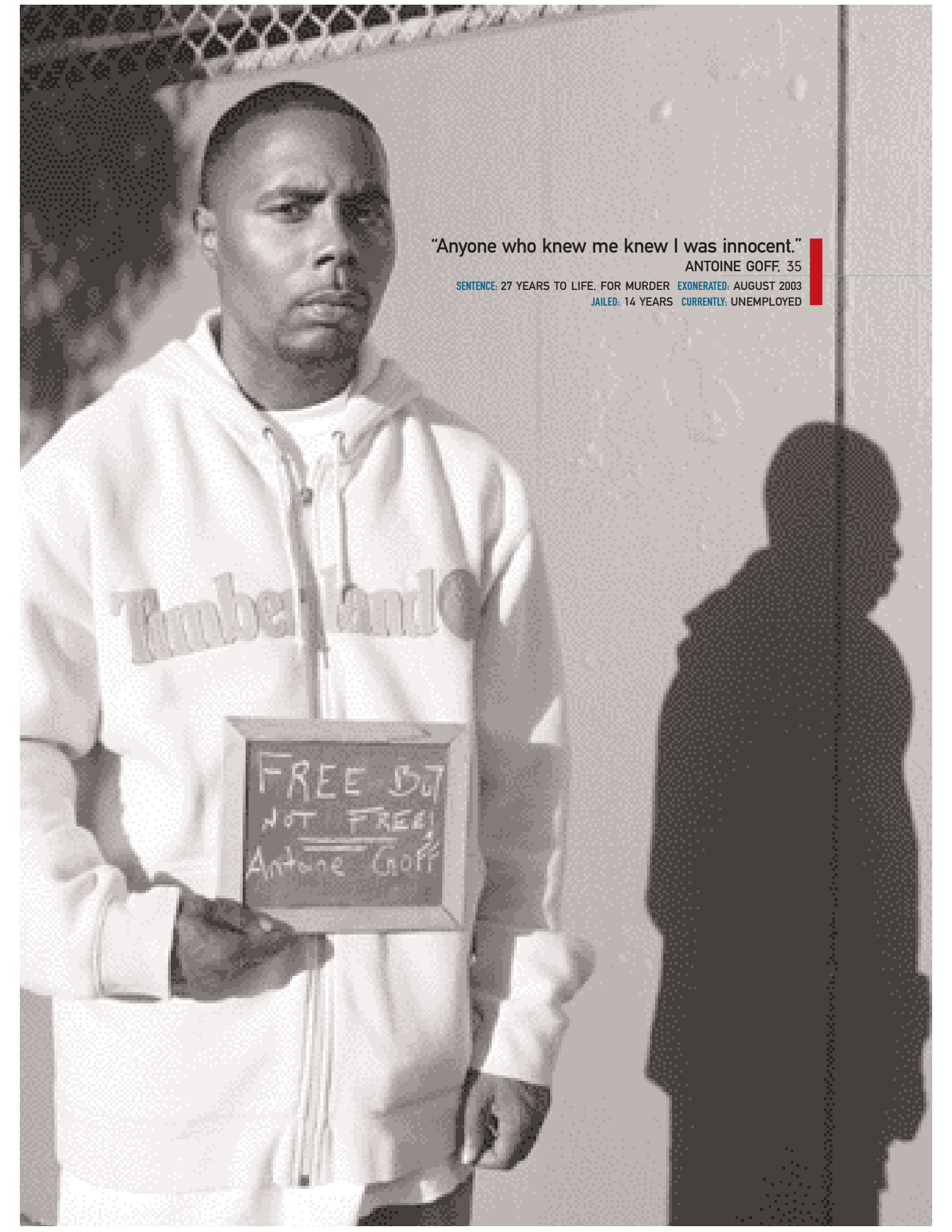
An innocent Californian convicted of murder is almost better off being sentenced to death than to life in prison.

inmates routinely making up incriminating stories about their cell mates in exchange for favorable treatment. The Long Beach murder case against Thomas Lee Goldstein hints at how it worked. Police had little evidence against the ex-marine until they found a heroin-addicted informant with the unlikely name of Edward F. Fink who claimed Goldstein had confessed to him; Fink made the same claim about ten other cell mates. Prosecutors also hid a leniency deal that might have helped discredit Fink. Goldstein served 24 years in prison until a series of courts ordered him freed this year.

Prosecutors can fall prey to the same emotions that lure a cop over the line. They sometimes get cynical and wrapped up in cases in ways that make it difficult to see new evidence and information in an objective light. They genuinely believe the suspect is guilty; they want to help victims find closure with a conviction. They succumb to the adversarial mind-set and the competitive pressure to win. Indeed, misconduct or serious errors in judgment by prosecutors have been an issue in 50 percent of the false convictions in our analysis (nationally, the average is 34 percent)—most commonly, concealing deals with snitches and codefendants, turning a blind eye when witnesses lie and cops cross the line, and making improper arguments to the jury.

Contributing to official misconduct is the unlikeliness of punishment. A *Los Angeles Times* investigation in 2000 found that the Los Angeles D.A.’s office declined to prosecute even when an officer had been caught in the act on tape or had confessed, or when the officer’s lie had led to an innocent person’s arrest. One L.A. cop involved in a wrongful conviction case was allowed to retire with a full pension after he’d been caught using police computers to spy on celebrities. The sheriff’s investigators in Nickerson’s case—whose misconduct led to two mistrials that cost Santa Clara County millions of dollars and convicted an innocent man—suffered no setbacks to their careers as a result of their actions; one went on to oversee all the department’s investigations, including homicides. Meanwhile, none of the D.A.s accused of





“Anyone who knew me knew I was innocent.”

ANTOINE GOFF, 35

SENTENCE: 27 YEARS TO LIFE, FOR MURDER EXONERATED: AUGUST 2003

JAILED: 14 YEARS CURRENTLY: UNEMPLOYED

improprieties in any of the false convictions in this analysis has been disciplined by the state bar, the agency that acts as a watchdog over the 195,100 lawyers licensed to practice here.

Bad defense lawyering is another big problem. Around the state, innocent people have been sent away for long prison terms at least in part because their attorneys were inexperienced, lazy, incompetent, or just plain conflicted about representing someone they believed to be guilty. Court-appointed lawyers, particularly public defenders, tend to be overworked and underfunded and hence are more likely to cut corners. One East Bay lawyer failed to order DNA testing that might have cleared her client of two rapes. Another, whose client was eventually convicted of attempted murder, didn't get a translation of a taped confession by another man. Sometimes the lawyer's biggest error is a naive belief that a jury will not convict because the evidence is so weak. In fact, many jurors expect defendants to *prove* they are innocent, not just poke holes in the prosecution's case. Even in a liberal place like the Bay Area, plenty of jurors assume that defendants wouldn't be on trial if they hadn't done *something* bad.

The simple truth: even the most dedicated lawyer may not be good enough to save an innocent person from prison when the rest of the system is intent on conviction. That's what happened in the late 1980s, when San Francisco was convulsed by a murderous gang war hauntingly similar to the one it faces today. Then, as now, many of the victims were young African American men; the police, like the police today, had little help from the community in bringing killers to justice. Antoine "Soda Pop" Goff, a 20-year-old vocational student "running with the wrong folks" at the time, sees his 1990 wrongful conviction for the murder of a young man named Roderick Shannon as part of the city's rush to crack down on the violence: "My opinion is that [police] had it out for me. I had a friend that was shot when I was in the car. They came around in their investigation and I never wanted to talk to them. So when they had an opportunity to link me to a case, they did."

The Shannon murder was one of the rare times when witnesses did come forward and a conviction seemed possible—which may be why police worked so hard to protect their case when it started falling apart. The two young girls who named Goff also fingered John Tennison, a 17-year-old from a close-knit family who knew Goff slightly. The girls' stories contradicted each other, the physical evidence, and other people who had seen the crime go down, but that didn't deter the investigating officers, Napoleon Hendrix and future police chief Earl Sanders. When one of the girls recanted, saying she didn't witness any murder, Hendrix and Sanders pressured her to go back to her original version of events, the girl later said in a sworn statement. When another witness came forward to say that Goff and Tennison hadn't been at the crime scene—and named the gangbanger who was the real killer—the cops didn't turn over her name or information to the defense. When the young man she implicated, Lovinsky Ricard, volunteered in a taped confession to other police officers after the trial that he was, indeed, the shooter, police still didn't turn the tape over to the defense for another several months. By then, it was too late.

"I know I'll never make up for that time," says Goff, who got 27 years to life. "I lost the best years of my life."

Tennison lost more than that. "My father passed away, my

grandfather passed away, my two uncles passed away, my brother was murdered. I didn't get to see my dad before he died. I wasn't released for any of the funerals." His only contact with any of these events was when one of his relatives called or visited. "It was always good to see one another," he says. "But when it was time to leave, the tears would not stop. It was terrible, really."



"THEY DON'T EVEN READ YOUR CASE, MAN. THEY'RE JUST LIKE, 'DENIED, DENIED, DENIED.'"

—RICK WALKER

THE APPEAL > Not many people get sent to prison to practice their chosen profession. Gloria Killian used to joke that she was one of the "lucky" ones. Convincing herself that she'd been dispatched to Frontera prison, aka the California Institution for Women, on a divine mission—

to use her legal training to fight for the rights of forgotten and neglected women—made what happened to her easier to bear. Not that she actually *understood* what had happened to her. "It was like being wrapped in fog," she says, still sounding dumbfounded 20-plus years later. "I couldn't get my hands around it. I kept pulling at it and pulling at it, but I couldn't figure it out. I literally did not know how I had gotten there."

What she did know had all the hallmarks of a paranoid delusion. Once upon a time, Killian had been the kind of feisty, confident woman who would just pick up and move to Alaska for the adventure of it, or talk her way into law school even though she had only one semester of college under her belt. But as she was approaching her mid-30s, her life came unglued. She got mixed up with a guy she describes as bad news, quit McGeorge School of Law in Sacramento, and supported herself with a variety of jobs, including doing freelance detective work for her landlord, the co-owner of a coin shop.

The real nightmare started in 1981. One day, an elderly coin collector was robbed, hog-tied, and shot to death in his home; his 76-year-old wife was gravely wounded. Someone called the Sacramento police and accused a law student named Gloria of being involved, so they picked her up. Killian couldn't believe it, and a judge didn't either; the charges against her were soon dropped. "But I had a really terrible, terrible feeling," Killian says. "I should have left town, but I didn't." Her premonitions came true a year later, when a repeat felon named Gary Masse was convicted of the shootings and sentenced to life without parole. Before going off to prison, he offered to help prosecutors nail his two accomplices. One, he said, was his cousin, a guy named Stephen DeSantis. The other, he claimed, was Gloria Killian—allegedly the brains behind the scheme. Masse had met Killian, though they weren't friends. She and her lawyers figured that he was trying to deflect police attention from his wife, who had helped him in a robbery attempt a few months before

and was a potential suspect in this case. This time, the accusation stuck. In 1986, Killian was convicted of conspiracy and murder and sentenced to 32 years to life. “All I could think was, this is insane, this is insane, this is insane.”

In prison, Killian’s main goal was to keep from going crazy herself. Her salvation turned out to be a job at the law library. Sometimes she helped 50 women a day—with appeals, child custody and medical issues, parole board hearings; over her entire prison career, her “cliente” numbered in the thousands. She took a special interest in battered women who had killed their abusive spouses, then been convicted of felony murder, writing

law review articles and thousands of letters to raise awareness about their plight. She even helped win clemency for one such battered woman—a California first. Yet when it came to her own case, Killian did almost nothing. Her court-appointed trial lawyer had been followed by a court-appointed appellate lawyer. After the state appeals court upheld her conviction, she didn’t have enough grounds—no new evidence, no convincing proof that her constitutional rights had been violated—to begin another round of appeals. Nearly a decade after her conviction, she hardly even talked about her case. “Who would care?” she says.

Killian—58 now, with a warm, disarmingly direct manner

Innocent?

THREE CASES TO WATCH

Patrick O. Dunn

CONVICTED OF the 1992 Bakersfield murder of his wife, allegedly committed to get her multimillion-dollar estate. Her body was discovered in the desert, mutilated and half-buried in a ritualistic pose.

SENTENCE Life without parole; he has served 11 years.

EVIDENCE OF INNOCENCE Extremely strong. Defense lawyers point out that on its face, the prosecution’s theory—that Dunn, 56 at the time, with no criminal record, would kill his wife to get her money when he stood to gain more financially if she lived—seems preposterous. No physical evidence linked the retired high school principal to the murder. Furthermore, the prosecution knew that its key witness, a heroin-addicted informant who lied about seeing Dunn put a body in his truck the night of the murder, gave false testimony. The snitch also got a leniency deal that was not disclosed to the defense.

CHANCE OF FREEDOM It’s up to the federal courts now. Dunn’s direct appeal and five state court habeas petitions have all been denied, including by the California Supreme Court in June.

Jerry Killedjian

CONVICTED OF the 1992 Los Angeles murder of black-marketer Jesse Khorrami, who’d just been sentenced in an illicit-fuel case and had been cooperating with the feds. The D.A. convinced a jury that Killedjian, who worked as a bagman for another black-marketer, and a cohort killed Khorrami for \$26,130 in his possession. The D.A. contended that the two men lured Khorrami to drive to the murder scene by lying that Killedjian’s car brakes were bad.



SENTENCE Life without parole. He has served 12 years.

EVIDENCE OF INNOCENCE Compelling. In 2003, another man convicted in the fuel scheme (whom Khorrami had apparently fingered) admitted to a jail mate that he’d arranged the killing. (*This snitch passed a polygraph test.*) What’s more, the new suspect had sued Khorrami, claiming he owed him money.

CHANCE OF FREEDOM Long shot. A federal appeals court has denied a habeas petition that claimed Killedjian’s trial lawyer dropped the ball by not testing the brakes (they were damaged) and not interviewing two alibi witnesses. Habeas counsel is working on a new petition based on the latest evidence but concedes that getting the courts to take another look will be very difficult.

Peter J. Rose

CONVICTED OF kidnapping and raping a 13-year-old girl in Lodi as she walked to school in 1994.

SENTENCE 27 years. He has served 9 years.

EVIDENCE OF INNOCENCE

Extremely strong. For three weeks, the victim maintained that she did not know who her assailant was; Rose was a neighbor and acquaintance. Then, police interview tapes show, she identified Rose after a three-hour interrogation in which police told her she was lying and threatened to dismiss the case if she didn’t identify her attacker; she was also pressured by family members who disliked Rose. Rose’s blood type didn’t match semen on the victim’s underwear, but the semen sample was deemed too small to conclusively rule him out.

CHANCE OF FREEDOM All but certain. As this issue was going to press, Innocence Project lawyers received great news: state-of-the-art DNA tests have excluded Rose as the rapist. If prosecutors agree, he could be out by the time you read this. ● SUSAN R. KELLEY

that belies her sad eyes—is not a particularly religious woman. But in the early nineties, a series of things happened that might convince the most cynical person that God exists. First she was befriended by an elderly Pasadena prison volunteer named Joyce Ride (the mother of Sally Ride, America’s first female astronaut). Next, Killian got a call from appellate lawyers representing her codefendant, DeSantis. Because he had been sentenced to death for his part in the robbery-murder, the lawyers had state funds and other resources that a lifer like Killian could only dream about. In the course of discovery, they had forced Sacramento prosecutors to turn over piles of documents, including several that pertained to her case. One was a secret letter, written by Masse to the prosecutor, in which he emphasized that

he had “lied [his] ass off on the stand” to help convict Killian; another was a letter from prosecutors supporting a sentence reduction for Masse because of his cooperation on the case. It was what Killian had been waiting for all these years—not just an explanation of what had happened to her, but rock-solid grounds for appeal. After paying a private detective to dig around in the case, Ride dipped into her savings again to hire a Santa Monica appellate specialist named William Genego to get Killian out of prison. Nearly \$100,000 later, Ride had run out of money, but Genego kept going.

It took the former USC law professor more than six years of battling with state and federal courts before he could convince one to throw out her conviction. Genego says he has run into

The Voters: Ready for Change?

AN EXCLUSIVE SAN FRANCISCO MAGAZINE/DAVID BINDER RESEARCH POLL

Californians have never met an anticrime measure they didn’t like. Even after two decades in which the state has elected four straight hard-line governors, built the largest jail system in the nation, and put 30,492 convicts in prison for life, 36 percent of those polled say the state is “too soft on crime.” But this poll of 676 California voters found that a passion for punishment doesn’t make us jaded about locking up innocent people for life. “Californians want to punish the guilty but also to believe in the system,” says Will Gudelunas of David Binder Research. “They want to be tough on crime but to be fair at the same time.”

69% believe lifers should have the same rights as people facing execution. California has a long history of inflammatory rhetoric about criminals getting off on technicalities and “frivolous” delays in executions. So it’s surprising that over two-thirds said that prisoners facing life in prison should have about the same access to free attorneys and multiple appeals as prisoners on death row. Twenty-two percent felt that lifers should have fewer rights, as they do now.

61% support adding safeguards to prevent wrongful life sentences. Nearly as many Californians would back the same protections to prevent an innocent person from getting a life term as to prevent an innocent person from getting executed (66 percent). Even among those who think California is “too soft on crime,” 57 percent would back more safeguards. On the other hand, nearly one-third—including 45 percent of self-identified conservatives—believe the state is careful enough.

78% favor firing police or prosecutors who break the rules to get a conviction. Most Californians have high levels of trust for both cops and prosecutors. But when one of them lies or suppresses evidence, more than three-fourths would want that person dismissed, and another 17 percent would favor suspension. Today, misconduct is rarely disciplined.

76% have bought the fanfare about DNA testing. TV shows and exoneration headlines have apparently convinced Californians that nearly every violent crime involves biological evidence; three in four said that widespread DNA testing would “mostly correct” the problem of false convictions. In fact, only 10 percent of cases involve any biological evidence.

59% of African Americans believe California is tougher on the innocent than other states. While only 13 percent of all respondents said California sends a higher proportion of innocent people to prison than other states, African Americans disagree. In fact, blacks express deep skepticism about the state’s entire criminal justice system. Half of African Americans distrust cops, while only 15 percent of other respondents do; 44 percent distrust prosecutors, versus 15 percent of others. African Americans are also three times more likely to say the state is “too tough” on crime, and half as likely to believe that DNA testing is a panacea or that the state has enough safeguards to protect innocent people.

42% say false convictions are more common than law enforcement wants to admit. That’s the percentage of voters who accept the claims of criminal justice organizations that the wrong person is convicted in California up to 5 percent of the time. But another 27 percent sided with prosecutors’ estimates (1 percent or fewer of convictions are false), while a third said they don’t know what to believe.

MARGIN OF ERROR +/- 3.8%. POLL CONDUCTED SEPTEMBER 18–24. FOR COMPLETE POLL RESULTS, GO TO WWW.SANFRANMAG.COM.

the same set of difficulties in every other case he's handled on behalf of innocent clients sent to prison for very long terms—not just mistakes and misdeeds that can take years to uncover, but a profound unwillingness on the part of appeals courts to correct miscarriages of justice that do come to light. “The institutional mind-set [of the appeals courts] is that they are going to secure a conviction that they already got,” Genego says. “Instead of admitting its mistakes, the system throws up roadblocks that make them harder to correct.” UC Irvine criminologist Ron Huff calls this phenomenon—which he, too, has seen repeatedly in 20 years of research into wrongful convictions—“ratification of error.” “The further a case progresses in the system,” he says, “the less chance there is that an error will be discovered and corrected.”

On the face of it, California's legal system should be well equipped to right its occasional wrongs. Not only are there two layers of appeals courts—state and federal—but there are two kinds of review: a “direct” appeal of the verdict itself, and a habeas corpus petition to raise issues that come up after the trial. California's appeals court system is thought to work pretty well compared with that of some other states: it's reasonably efficient, well funded and staffed, and (in general) intellectually respected. At the federal level, the Ninth Circuit, which governs California and nine other western states, is still the most liberal in the nation.

Yet this system of safeguards is swamped by all the factors that work against an innocent defendant. The most basic problem: judges in a direct appeal can consider only the record of a trial. But the things that are mostly likely to lead to a reversal—like the secret letters in Killian's case, or the taped confession by another man in the Tennon and Goff case, or the psychologist's report in John Stoll's case—aren't in the record. Appellate courts cannot retry cases or second-guess juries; they're only supposed to make sure that the trial was legally fair (free of procedural or constitutional errors big enough to have affected the jury's decision) and that the verdict was “reasonable” based on the evidence (a verdict doesn't have to be correct to be “reasonable”). Given the narrow scope, the chances of getting a conviction overturned on direct appeal are very low. In the 30 cases in our analysis, it happened just three times.

The inherent conservatism of the appeals process has been magnified by the political transformation of the state's courts since the 1980s. The California Supreme Court, once considered the most liberal and activist high court in the country, has swung to the opposite extreme on law-and-order issues. The state's six Courts of Appeal have followed suit, even in the Bay Area, largely reflecting the politics of recent governors. The appeals court based in San Jose has the highest proportion of Republican appointees in the state (71 percent); the San Francisco-based court is 65 percent GOP. Twenty years ago, the Court of Appeal threw out 9 percent of convictions; last year, the reversal rate was 5 percent.

The decrease in reversals reflects another big change over the past two decades—the courts' growing tolerance of constitutional and legal errors in criminal cases, everything from coerced confessions to squelched evidence. These kinds of problems used to get convictions automatically overturned; now they are apt to be dismissed as “harmless” if—in the view of the appeals court—the other evidence of guilt is overwhelming. Many appeals

judges used to be prosecutors, which makes them even more inclined to see defendants as guilty and errors as harmless, says Dennis Riordan, a respected San Francisco appellate lawyer. Riordan takes the provocative position that the current crop of appellate judges is actually toughest on defendants who might be innocent. “It is often in the cases where the error is most blatant and the evidence is weakest that judges work the hardest to avoid reversal,” he says, “because those cases are the most embarrassing to our judicial system and the ones in which it's going to be most difficult to ever get a conviction again.”



“IF YOU DON'T HAVE THE BEST AND THE BRIGHTEST FIGHTING FOR YOU, WITH LOTS OF MONEY AND SUPPORT, YOU'RE NOT GOING TO MAKE IT OUT. AND IF YOU'D HAD THAT KIND OF MONEY, YOU PROBABLY WOULDN'T BE IN PRISON IN THE FIRST PLACE.”

—GLORIA KILLIAN

THE HABEAS > Defendants whose direct appeals have been denied do have another recourse. Known as the “Great Writ of Liberty,” habeas corpus allows inmates like Killian to challenge their convictions by raising

new evidence of innocence or showing a violation of their constitutional rights. But once again, innocent prisoners face enormous hardships.

The biggest is lack of money. At this stage, only people on death row are entitled to court-appointed lawyers. While state appeals courts may OK some funds for habeas lawyers and investigators in noncapital cases, the amounts are a pittance compared to the true costs—often in the hundreds of thousands of dollars—of digging up new evidence and putting together a writ strong enough to convince a skeptical court inundated with such claims.

And California courts—where habeas petitions are first filed—can be skeptical indeed. Take the case of Harold Coleman Hall, who spent 19 years in prison for the 1985 murder of a Los Angeles woman named Nola Duncan. Hall, who had been picked up for another crime, had admitted killing Duncan, but he recanted, saying police had badgered him during a 17-hour interrogation. (Indeed, many of the facts of the murder flatly contradicted the confession.) But prosecutors had another damning piece of evidence: two pages of notes, in Hall's own writing, in which he had seemed to answer another inmate's questions about the case, in the process admitting his guilt. After Hall was sentenced to life without parole, his lawyers made a startling discovery: the written “confession” was a forgery. The snitch who had provided the notes to police admitted he had tricked Hall into answering innocuous questions, then erased them and substituted incriminating ones. The prosecution's own expert found signs of tampering; the exasperated trial judge said he had “no legal or moral choice” but to give Hall a new trial. But the Court of Appeal reversed that habeas ruling and upheld

Hall's conviction, saying the judge hadn't expressly called the faked confession "false."

Luckily for people like Hall (and Killian, and Tennison, whose habeas writs were also rejected by state courts), they have the right to pursue their claims in federal court. But here again, there's no money for lawyers or investigators, unless an inmate can convince a court that his claims have merit (talk about a Catch-22). By the time Killian reached this stage, she had Genego working for her pro bono—a very rare situation indeed. Hall, on the other hand, found himself in the same boat as the vast majority of California prisoners. His attorneys had to drop out, leaving him to fend for himself for the next ten years.

Inmates who attempt do-it-yourself ("pro se") habeas writs are hampered by all the disadvantages you would expect, plus a few more. Hall had to overcome both his lack of education (he was a tenth-grade dropout) and constant lockdowns at the gang-infested Lancaster State Prison in the Mojave Desert, which sometimes shut down the law library for months at a time. "You're constantly threatened with missing deadlines in your case," says Hall, who taught himself about the appeals process by reading legal newspapers and books. "I would have to type my papers three or four times because I couldn't xerox them in the library." Even when there wasn't a lockdown, Lancaster inmates were entitled to just two hours in the law library per week. The only way to get around these barriers, Hall eventually concluded, was to get a job in the law library. "That way, if I saw a lockdown coming, I could make sure I had copies of everything I needed in my cell." In prison, he adds, "they're always trying to defeat your purpose. If you're not strong enough to endure it, and figure out how to help yourself, eventually you give up."

The lack of legal help has become even more of a problem since a sweeping law, enacted in 1996, made it much more difficult get a habeas claim into federal court, period. Habeas "reform," a longtime goal of conservatives who complained that death row inmates were delaying their executions with frivolous appeals, was passed as part of an antiterrorism bill in the wake of the Oklahoma City bombing. Like so many statutes that try to speed up the execution process, it actually had a far greater impact on non-death penalty cases, with new deadlines, a higher burden of proof, and other daunting procedural hurdles. The law also requires federal courts to almost always defer to the state courts' previous ruling. Says Justice Alex Kozinski of the Ninth Circuit, "This essentially gives state courts the final say in most criminal habeas cases."

The 1996 law slams the door shut on all but a very few innocent prisoners. Killian's case shows how it can go in federal court even when you have a great lawyer and a strong case. After spending a couple of years jumping through procedural hoops, she and Genego scored a key victory: an evidentiary hearing before a federal magistrate. Besides the secret letters to and from the prosecutor, they had DeSantis's testimony that he had never heard of Killian—they even got Masse to admit on the stand that Killian *hadn't* planned the crime. The magistrate still ruled against them. Only after Genego appealed to the Ninth Circuit did Killian win her freedom—two years later.

Indeed, the Ninth Circuit is the last, and sometimes best, hope

of innocent prisoners in California. "It's like I used to tell the other inmates—'When you get to the Ninth Circuit, you'll get someone to pay attention,'" Hall says. That faith was borne out in his own case—after lower federal courts ignored him, the Ninth Circuit took a hard look, decided his claims had merit, and appointed Genego to take over the appeal. "It is absolutely

"One parole commissioner looked me in the face—I'll never forget this—and said, 'If you don't admit you did it, you'll never get out.'"

amazing that Harold was able to keep his case alive that far," Genego says. But he still needed one last stroke of luck—a panel of judges who would be receptive to his claims. Despite its liberal reputation, the Ninth Circuit has been transformed by the same revolution that's hit the state courts. While it continues to be relatively progressive, it's far more conservative than it used to be, not only in its politics but in how it views the role of judges. In the end, the court ruled 2 to 1 to overturn Hall's conviction. But the dissenting judge argued that he and his colleagues were bound to respect the state court's decision. "If one more judge who thought like that had been assigned to Harold's case," says Genego, "he spends the rest of his life in prison."



"THEY MASK IT BY CALLING IT 25 YEARS TO LIFE, BUT THEY'RE NOT LETTING THOSE PEOPLE OUT OF PRISON. THOSE ARE DEATH SENTENCES." —RICK WALKER

PAROLE > It used to be that innocent inmates in California who had exhausted all their appeals had one small comfort: even if they were never exonerated, they might well be paroled. That was one of the few rays of hope for Rick Walker

and his family after he was wrongfully convicted for the 1991 murder of his drug-addicted ex-girlfriend. Given the horror of the crime—the killers suffocated the victim by wrapping her head in duct tape like a mummy—he could easily have been sentenced to death or life without parole. Instead, he got 25 to life. In theory, this made him eligible for parole at the end of 2009. But once he was in prison, it didn't take long for the more experienced guys to set him straight. "There were guys that had 7 years to life and they were still in there after 32 years. In reality, I was doing life without."

Walker is 48 years old now, a big bear of a man with the charisma of a natural-born preacher and a voice both commanding and gentle. His story echoes those of many innocent people accused of heinous crimes: bad choices magnified by worse luck. One of four sons, he came from a solid family—his mother was an East Palo Alto school trustee and later mayor, his father a powerful, strong-willed truck driver with a passion

for old cars. He grew up in San Francisco, moved to the Peninsula with his family after graduating from high school, and found steady work as a car mechanic. But in his early 30s, he got caught up in the drug-and-violence epidemic that earned East Palo Alto the title of murder capital of the United States.

Another casualty was his ex-girlfriend, a Princeton grad turned junkie who owed money to a lot of people, including a drug dealer. One evening, the dealer and another man accompanied the woman to a Cupertino condo and killed her. Confronted with the evidence against him—his fingerprints were all over the duct tape—the dealer eventually claimed he had been put up to it by Walker, whose tempestuous relationship with the victim was well known. Unfortunately, Walker had a terrible alibi: he'd been shackled up in a motel for three or four days, smoking crack with a married lover who was afraid her husband would find out. Doubly unfortunate, his lawyer failed to do the obvious, like use room service records at the motel to confirm his story. The prosecutor, meanwhile, cut a testimony deal with Walker's codefendant that he hid from the judge and Walker's attorney, the codefendant's lawyer later admitted. The prosecutor also made a leniency agreement with another of Walker's ex-girlfriends, who testified—falsely—that Walker was a violent man (he kept this deal secret, too).

Other guys would have burned with rage at the injustice of it all. Walker's parents certainly did as they worked to free him, only to have every state and federal court reject his appeals. Walker was shocked when his father came to visit him, 50 pounds lighter and no longer the man he knew. "My mother told me that he would just lay there in his bed and cry," he says. "In essence, this killed my father. His son was in prison and he couldn't get him out." Shipped off to San Quentin and three other prisons, Walker was determined to use his conviction as an opportunity to turn his life around. He kicked his drug problem and became a lay preacher and counselor. He struggled to forgive. "There is nothing positive that can come out of me holding on to a grudge against a prosecutor or a judge," he says. "Anger just hurts me."

In other words, Walker was a model inmate—the ideal candidate for parole. The first step was a documentation hearing, at which a prisoner's activities and conduct are evaluated for possible credit for time served. But when he went to the hearing, he found that the warnings he'd heard were true. One parole commissioner put it bluntly: "It's unlikely that a person convicted of a capital crime like yours will ever get out of prison."

California's parole system started its hard right turn in the early 1980s, when a series of notorious criminals were released after serving stunningly short sentences for truly horrific crimes. First Governor George Deukmejian remade the Board of Prison Terms, replacing its bleeding heart with a skeptical core; the board—which reviews indeterminate sentences that carry a maximum of life—has recommended parole in just 2.5 percent of the cases that have come before it in the past six years. Then, in 1988, Deukmejian pushed through Proposition 89, giving the governor veto power over parole recommendations in homicide cases. By handing the ultimate authority to an elected official, voters ensured that very few convicted murderers would ever be freed. Again, an ax aimed at the worst criminals has fallen

hardest on innocent prisoners. Says Cliff Gardner, a San Francisco appellate lawyer, "Whereas a wrongful conviction in a murder case used to be a 10-year or 12-year mistake, now it's a 30- or 40-year mistake."

Parole vetoes peaked during Gray Davis's five-year term; he rejected 97 percent of his board's recommendations. Likewise,

"Whereas a wrongful conviction in a murder case used to be a 10-year mistake, now it's a 30- or 40-year mistake."

Arnold Schwarzenegger, who vowed to accept most of his board's decisions, has so far overruled 61 percent of them. One inmate Schwarzenegger agreed to parole was Adam Riojas, an Oceanside man who had served 13 years of a 15-to-life sentence for a 1989 drug slaying. After numerous witnesses came forward to say that Riojas's father had admitted shortly before his death that he was the actual killer, prosecutors told the parole board they believed Riojas might have been wrongfully convicted, and the board voted unanimously to release him. A year earlier, Davis—with exactly the same facts before him and the same recommendation for parole—had refused to set Riojas free.

In representing Riojas, Innocence Project lawyers from California Western School of Law in San Diego had to grapple with a dilemma so obvious and perverse that it was almost laughable. The board, by its nature, will always require inmates to take responsibility for their crimes and profess remorse. "They expect you to say what they want you to say, exactly the way they want to hear it, whether it happened that way or not," says Gloria Killian, who helped hundreds of women prepare for their hearings. "I was never going to say I was guilty, so they were never going to let me go."

A spokesman for the Board of Prison Terms denies this is the policy. But Walker heard the same thing. "One parole commissioner looked me in the face—I'll never forget this—and said, 'If you don't admit that you did this crime, you'll never get out.'" Walker felt the same way Killian did. He would never tell such a lie to win his freedom. He would have to find another way out.



"I BELIEVE GOD INTERVENED IN MY CASE."

—RICK WALKER

EXONERATION > In the end, the only thing that could get Walker out of prison—the only thing that ever frees an innocent prisoner locked up for life—was the efforts of some amazing people and a freakish alignment of the stars. Walker was more fortunate than most.

For one thing, he had a mother who never lost faith in him. Soon after his trial, Myrtle Walker asked a school board colleague of hers to ask her daughter—a law student named Alison Tucher,

who was at the top of her class at Stanford—to take a look at the case, including new evidence she and her husband had dug up. Tucher quickly concluded Walker was innocent. After a stint clerking at the U.S. Supreme Court, she returned to the Bay Area, taking a job at—of all places—the Santa Clara County D.A.’s office, the same office that had prosecuted Walker. (She tried to prod her colleagues to reexamine the case: “I didn’t get very far.”) She moved to Morrison & Foerster and became Walker’s pro bono lawyer in 1999, tracking down new witnesses while breast-feeding two babies, litigating complex commercial cases, and making partner in record time.

In early 2003, Tucher wrangled an appointment with Karyn Sinunu, then chief of the D.A.’s homicide unit. Tucher’s PowerPoint presentation raised red flags for Sinunu; during her years as a prosecutor she had run into many of the characters in the Walker case and knew in her gut that something was amiss. Her office spent the next four months doing its own investigation, eventually discovering that DNA on cigarette butts left at the crime scene belonged to someone Tucher had identified as the second killer. But in some ways, the clincher came when Sinunu’s investigators actually met Walker and discovered what so many people already knew. “My vision of someone who’s been wrongly convicted is a very bitter, angry person,” Sinunu says. “But Rick took probably the worst possible thing that can happen to a person, and he turned it positive. He just doesn’t have that blind, bitter rage. Once you meet him, you can see what a nonviolent person he is. He was not a killer.”

The outcome for Walker—tears from the D.A., a concession of innocence, quick compensation by the state—is society’s warm-and-fuzzy fantasy of how the system ought to respond to a miscarriage of justice. Two other Bay Area cases are more typical of the way things usually happen.

One of these involves Buddy Nickerson, the 430-pound biker mistaken for a 200-pound killer who was also prosecuted by Sinunu’s office. Sentenced to life without parole, Nickerson

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was no more the model prisoner than he had been the model citizen. For the most part, he refused to work. “My job was making sure the TV antenna worked so that I could watch my TV programs.” He figures he wasted a good 16 years on prison moonshine, brewed in a plastic bucket out of catsup, Kool-Aid, sugar, and rotten fruit. He got sick and nearly died, and shed 100 pounds. He made no effort to file a habeas writ—there didn’t seem to be any point. “My case was shut down. Basically, I was going to live my life in there. I took the outside world and put it up on a shelf, in a box.”

If it seems that most exonerated prisoners are resilient, remarkable people, it’s also probably true that the ones who will never be freed are more like Buddy Nickerson: beaten down and hopeless, the opposite of saintly, so angry and distrustful that they make it easy—for potential defense lawyers as well as prosecutors—not to care. Attorney M. Gerald Schwartzbach, who looks and sounds like Woody Allen channeling Perry Mason, was more empathetic than most, but even he was taken aback by Nickerson’s surliness when he showed up in Tehachapi one day in 1992 and offered—free of charge—to try to prove his innocence. Schwartzbach had an ulterior motive: he was representing Nickerson’s old nemesis Murray Lodge, who was facing the death penalty for the shootings. Schwartzbach figured that if he could cast doubt on

the reliability of the sole survivor, Mike Osario (who had named Lodge as the gunman), jurors might let his client live. What better way to do this than to prove Osario’s ID of Nickerson had been wrong? Nickerson had no idea how lucky he was—Schwartzbach was famous, with a string of landmark cases on his résumé, and he had state money to spend, since Lodge’s was a capital trial. Nor did he much care. Nickerson had a swastika

“What prosecutors did to keep Buddy in jail was outrageous,” his lawyer says. “They should be ashamed of themselves.”

tattooed on his arm; Schwartzbach was Jewish. “Buddy told me he didn’t want to talk to me,” Schwartzbach recalls. “So I told him that if I left, his last chance of ever getting out of there other than in a box was going with me. And then he started to think—‘Well, you know, maybe these Jews aren’t so bad!’”

Over the next decade, Schwartzbach and his team scored some notable victories (including keeping Lodge off death row). But getting Nickerson out of prison proved much tougher. In 2002, after considerable back and forth, a federal judge gave them their best shot: a hearing on Nickerson’s habeas claim. Schwartzbach and his team were feeling hopeful; in addition to the retraction of a key eyewitness and proof that the cops in his case were liars,

6 THINGS THAT NEED TO BE DONE NOW

Change police procedure

A 1999 National Institute of Justice report outlined a series of reforms to reduce eyewitness errors, including relatively simple changes in how police line-ups are conducted. Meanwhile, a blue-ribbon panel studying Illinois’s error-ridden capital system offered 19 proposals to improve investigations, including taping interviews with witnesses and suspects and periodic training on issues like false confessions and use of informants. **WHAT’S BEEN DONE** Just one county, Santa Clara, has adopted any of the NIJ reforms. On the Illinois recommendations, California is batting 0.

Fund legal help to prove innocence

Without lawyers and investigators to track down new evidence and overcome procedural obstacles in the courts, few wrongfully

convicted lifers can ever hope to get out. **WHAT’S BEEN DONE** The state’s DNA testing law provided funding for two years to help inmates find old blood or semen samples and put together habeas petitions. But the money (most of which went to Innocence Projects) ran out this year, and budget-minded politicians think there are more important priorities. The U.S. Justice Department, meanwhile, has just awarded the state more than \$11 million for DNA and forensic services to solve crimes and free the innocent. Los Angeles County stands to get around \$2.4 million; Bay Area counties will receive almost \$1.5 million. But most felonies don’t involve DNA evidence, and much more money is needed to help with non-DNA cases. **NEXT STEP** Innocence Projects around the state are looking for donations; if you want to help, go to www.sanfranmag.com.

Let the media in

A 1996 law made it much more difficult for the media, especially radio and TV, to get access to prisoners. SB 1164, passed by the Legislature this year, would have lifted some of the restrictions. **WHAT’S BEEN DONE** Despite his marriage to a TV journalist (and promises to make state government more open), Governor Schwarzenegger vetoed the bill in September. (Three earlier bills were also vetoed.)

Help exonerated reenter society

The wrongfully convicted get, at most, \$200 when they leave prison—and no mental health, housing, or other services to adjust to life outside. **WHAT’S BEEN DONE** Senator Don Perata (D-Oakland), the new state Senate leader, has promised to reintroduce a bill providing such services in 2005.

Compensate them for time lost

In 2001, California enacted the most generous compensation law in the country, allowing exonerated to claim \$100 for each day of false imprisonment. **WHAT’S BEEN DONE** The attorney general’s office has blocked payment in all but six cases.

Convene a blue-ribbon commission

Such a panel led to major reforms in Illinois, including stiffer punishment for cops and D.A.s whose misconduct leads to wrongful convictions. **WHAT’S BEEN DONE** As one of his last acts as Senate leader pro tem, John Burton of San Francisco pushed through a measure creating such a commission, with a report due by 2007. **NEXT STEP** Finding private funding to proceed—then coming up with meaningful reforms that powerful police and D.A. groups will support.

they had Lodge's testimony and exonerating statements from all his accomplices. They even had a statement from a respected Santa Clara D.A. who, before joining that office, had been Lodge's first lawyer, saying that *he* was sure Nickerson was innocent. Then came a bombshell: an informant had come forward, claiming that Nickerson had confessed to him back in 1984, while the two were in county jail.

No one could fault prosecutors for fighting to keep Nickerson in prison. It's their job to vigorously defend a verdict. "We believed [the informant] was credible," says Gregory Ott, of the attorney general's office, which takes over for the local D.A. after a trial, handling most state and federal appeals. "What he was telling us was consistent with what we knew. He knew things he could not have made up."

But like so many informants prosecutors have relied on in wrongful convictions in California, this one had a shady pedigree and a motive to lie, the defense soon discovered. In addition to being a convicted murderer who had tried to pin his crimes on his own sister, he was a member of the violent Nuestra Familia inmate gang with a drug habit, an abysmal prison record, and so many enemies (for ratting out his fellow gang members) that he needed to be moved frequently—something prosecutors could help arrange. He had already helped convict another Santa Clara County murder defendant in a mostly circumstantial case. (That guy insists he's innocent, too.) The judge didn't believe a word the snitch said and ordered the state to set Nickerson free. Prosecutors had the option of retrying him but decided enough was enough. Schwartzbach is still furious about the last-ditch effort to nail his client. "What the D.A.'s office and the A.G.'s office did to keep Buddy in jail was outrageous," he says. "They should be ashamed of themselves." But noting that Osorio still says Nickerson was involved and that Lodge and the others may have lied to free their accomplice, Sinunu is adamant: "The district attorney is not conceding innocence."

That's the way it often goes in California exoneration fights. In the 30 cases we looked at, local and state



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prosecutors have fought exoneration the majority of times, refusing to give in even after an appeals court has looked at new evidence of innocence and ruled the conviction was wrong. Prosecutors have kept innocent prisoners in jail well after the release date ordered by judges, threatened to retry them after every scrap of major evidence has been discredited, fought DNA testing that might strengthen appeals—even forced them to agree not to file suit before letting them go.

Then there's what's happened in the third Bay Area case, which some fear signals a new chapter in the state's battle with exonerees. Tennison and Goff finally won their release last year, thanks to the pro bono efforts of Kecker & Van Nest, one of the finest law firms in the country. (Tennison's brother used to work in the San Francisco lot where many of the firm's lawyers park their cars.) Those efforts didn't stop when a federal magistrate issued her ruling letting them go; the lawyers also put together declarations of factual innocence, which Terence Hallinan, then San Francisco's district attorney, went along with. The declarations—quickly OKed by a judge—were a critical step in winning compensation under a state law that allows \$100 for every day an innocent person is wrongfully imprisoned. This was the process Rick Walker went through to win speedy payment of \$421,000 last year. Together, Tennison and Goff were owed at least \$800,000.

State compensation exists in part because it's so difficult to get any money from the cities and counties whose actions led to wrongful conviction. "Our legal system has developed so many immunities and protections for law enforcement and prosecutors that there is no one held accountable for these great tragedies," says San Diego attorney Dwight Ritter, who sued local authorities on behalf of an innocent man named Frederick Daye who spent ten years in prison before a DNA test cleared him of rape. The court ruled that Daye was only entitled to damages for three days in jail; the jury gave him nothing, while the state awarded him almost \$400,000.

But if, after everything else that had

happened to Tennison and Goff, they expected the resolution of their story to be happy, they were sorely disappointed. Since the Legislature raised the compensation rate three years ago (before, California exonerees were entitled to a flat \$10,000 no matter how long they'd been jailed), 25 people have filed claims, and only six have been approved, mainly in cases with DNA evidence. The state is grappling with a budget crisis; just as important, it's grappling with the elusive and often unprovable concept of innocence itself. In language that has not changed in 60 years, the law requires not only that a claimant be innocent, but that "he did not, by any act or omission on his part, either intentionally or negligently contribute to the arrest or conviction." "It's a very tough standard," says Nathan Barankin, a spokesman for the A.G.'s office—which, despite its role fighting exonerations on appeal, acts as legal advisor to the board that decides exonerees' compensation, a relationship frustrated defense lawyers call a conflict of interest.

The A.G.'s office showed Tennison and Goff just how tough that standard may be. Deputy Attorney General Michael Farrell learned that the judge had spent "approximately" a minute glancing through the two men's documents before declaring them innocent. Hallinan's concession didn't carry much weight, either, since the actual prosecutor in the case still believes Goff and Tennison are guilty. Mainly, though, Farrell concluded that Tennison and Goff had failed to meet their burden of proof. The prosecution's key witness had never wavered in her claim that Tennison and Goff were the killers—never mind that the argument that had freed the two men was that this witness was a liar.

Farrell recommended that the claim be denied outright; instead, the board referred the case to an administrative law judge for a hearing. Late this summer, lawyers for Tennison and Goff faced off in Sacramento against Farrell—essentially a weeklong retrial of the murder case. The process was maddening and painful. "On the drive back, I would have tears in my eyes," Goff says. "It made me think about all

WHAT DNA CAN'T FIX

IN THE 15 YEARS SINCE RELIABLE DNA TESTING BECAME POSSIBLE, more than 150 prisoners around the country—at least 6 of them in California—have been scientifically proven to be innocent of the crimes of which they were convicted, and untold numbers of "cold cases" have been solved. That's led many people to see DNA as the criminal justice system's knight on a white horse (a notion promoted by Proposition 69, the DNA database initiative on the November ballot, which proclaims that "DNA identifies criminals and protects the innocent"). But the idea that preventing or correcting an erroneous conviction is as easy as drawing a vial of blood is a fallacy. For one thing, only about 10 percent of criminal cases have any biological evidence—blood, semen, skin—to test. And the state has no money to hire anyone to help inmates track down old evidence.

Even when biological evidence exists, not everything goes according to script. When Albert Johnson, a father of two young children with no record of sex crimes, was arrested in 1992 and charged with two Richmond-area rapes, he insisted he was innocent and demanded a DNA test, but none was ever done. He was convicted on the basis of eyewitness testimony and sentenced to 39 years. Johnson couldn't get anyone to pay attention to his case until 2001, when a state law granted prisoners the right to postconviction DNA testing if it would have led to an acquittal at trial. The semen from one of the rapes exonerated him of that assault, but the rape kit in the other case was gone, despite a new requirement that all biological evidence be saved. Johnson was freed anyway, but because he hasn't been cleared in one of the attacks, he remains a registered sex offender. "It's hard going to prison," he lamented in a recent documentary about his case. "Being accused and charged with rape when you got a little girl. I don't know how she's thinking and looking at me. People saying things to her—your daddy's a rapist."

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the things we've been through and all the suffering we still have to go through."

Yet the hearing did give Goff a chance to do something he had never done, something many murder defendants are prevented by their lawyers from ever doing—tell his story in court.

"I couldn't wait to give my side," says Goff. "I've been waiting 13 and a half years just to be able to give my side."

A decision is expected any day.



Buddy Nickerson, meanwhile, is like most exonerees; he's getting nothing. Without a finding of factual innocence, he has little chance of persuading the

state to pay him for 19 lost years. His lawyers are considering suing Santa Clara County, but they would face another fight against overwhelming odds. He could use the money. Unlike parolees, exonerees receive no state

services—no mental health counseling, no job training, no help finding work or a place to live. Parolees get 200 bucks on their way out of jail; exonerees aren't in the parole system, so they may not get even that paltry sum. Just the simple process of claiming disability benefits or obtaining a driver's license is enormously difficult: How do you explain where you've been all this time? Why should you have to?

The first few nights Nickerson spent at home, he found his bed too soft and his room too big for comfort, so he slept on the floor of his father's garage, between two cars. He's spent the last 18 months trying to get adjusted to life on the outside—staying sober, reconnecting with his family, riding the motorcycle his brother gave him, figuring out how to live on almost no money. In and out of hospitals for a variety of health conditions that went more or less untreated in prison, he's lost another 100-plus pounds and is now less than half the size he was when he was arrested.

He has struggled to control his rage, not just at what Santa Clara County did to him, but at the inability of most people to understand what he went through

THE "THREE-STRIKES" EFFECT

WITH THE NOVEMBER 2 VOTE ON PROPOSITION 66—which would drop non-violent crimes from the list of "third strikes" punishable by life in prison—Californians are being asked to reappraise the radical anticrime measure they passed ten years ago. Before voting, consider this: among its other effects, the law has pushed people to plead guilty to crimes they didn't commit.

Most people think only guilty defendants plead guilty. That just isn't true, writes conservative columnist Paul Craig Roberts, formerly of Stanford's Hoover Institution: "Many innocent people cop a plea just to end their ordeal." In the Central Park jogger rape case, five black defendants pleaded guilty to viciously assaulting a white woman to avoid the wrath of a jury, only to be exonerated 13 years later by DNA tests. Around the nation, at least 15 people have been exonerated after pleading guilty to murder, mainly to avoid the death penalty.

In California, where pleas account for 95 percent of felony convictions, the law has only added to a D.A.'s huge bargaining leverage. In exchange for a plea, D.A.s often drop a felony strike or ignore a prior conviction as a strike. Facing life in prison if a jury convicts, many people who have two strikes already but are innocent of the third charge have taken deals—including most of those busted by the Ramparts cops. In another case, Ronald Reno had three priors dating from the 1980s when he was picked up on gun and other charges. Though Reno was innocent, his lawyer got him to plead to a single three-strikes charge for 25 to life rather than the 50 to 100 he'd get if a jury found him guilty. He was exonerated 6 years later.

in prison and what he's going through now. His previous girlfriend was a little afraid of him. "She'd say, 'You're not in the prison yard any more. You don't need that look.' My buddy calls it the survival look—you're letting people know not to piss with you." Perhaps his greatest source of comfort is other ex-cons. "They are there for me. I can call them anytime, night or day." The woman he's currently dating is one, too. "She understands where my head is."

Two things Nickerson has been very clear about. The first is staying out of trouble. Life is precious now. He wants to experience as much of it as he can. He also doesn't want to give any police officer a pretext for arresting him. "I've had cops tell me—'Hey, Buddy, you'd be a big feather in somebody's cap if they busted you.'" This fear has made him a little paranoid sometimes: "If my car is out of my sight, OK, I search it. I put little markings on it that if somebody gets in my car, I know it."

His other primary mission is something a lot of people—the sheriffs who busted him, the prosecutors and jurors who convicted him, maybe even the man he used to be—wouldn't believe he was capable of achieving. He wants to be a good person.

One of his first priorities after his release was having that swastika erased from his arm, out of respect for Schwartzbach, a man he never would have believed he could have trusted, much less called a friend. The other racist tattoos are gone, too. He's not that guy anymore.

Some people might hear his story and think those 19 years weren't lost after all, if this is what he's learned and the person he's become. But that's just another delusion, something we tell ourselves to ease our guilt and make sense of a terrible injustice.

Here's the truth. It wasn't prison that changed Buddy Nickerson. It was getting out. ●

San Francisco's executive editor, Nina Martin, has covered California's criminal justice system for 16 years. Additional reporting by Susan R. Kelley, Susan Kostal, Justine Sharrock, Jaimal Yogis, and Michelle Kaylor.



Wayne Thiebaud *Four Sandwiches* 13 x 21 1/4" oil on paper, 1965

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