

# CRIMINAL INJUSTICE



A COST ANALYSIS OF  
WRONGFUL CONVICTIONS,  
ERRORS, AND FAILED  
PROSECUTIONS IN CALIFORNIA'S  
CRIMINAL JUSTICE SYSTEM



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# Introduction

*Criminal (In)justice* examines 692 adult felony criminal cases where California missed the mark in public safety by failing to prosecute the right person or by pursuing a flawed or unsustainable conviction. The individuals subjected to these faulty proceedings endured hundreds of trials, mistrials, appeals, and habeas petitions and **served more than two thousand years in prison and jail, at a total cost to California taxpayers of more than \$282 million.**<sup>1</sup>

The scope of *Criminal (In)justice* is, to our knowledge, unprecedented. We began by following the well-trodden path analyzing wrongful convictions and exonerations. As we started to explore the cases, however, we realized that criminal justice errors affect not only those who were convicted and later declared innocent, but also those whose convictions were overturned without a declaration of innocence. We could not ignore the many defendants subjected to years of detention, trials, retrials and incarceration only to have their cases eventually dismissed without a formal finding of innocence, nor could we ignore the victims left unserved when convictions against alleged perpetrators were dismissed due to error. We were also working in California which, unlike many other states, imposes a particularly burdensome process on individuals seeking a judicial declaration of innocence. As a result, innocent individuals in California may rationally choose not to pursue judicial declarations of innocence after their convictions are dismissed, especially if those individuals are indigent. For all of these reasons, we did not have confidence that using “innocence” as a criterion for inclusion would provide a complete picture of those who were not served by our criminal justice system.

In the end, we included every case we could find where

- the defendant was convicted of a felony,
- the conviction was reversed between 1989 and 2012,<sup>2</sup> and
- the charges were subsequently dismissed or the defendant acquitted on retrial.

We evaluated cases regardless of the reason for reversal, using a methodology specifically designed to avoid the subjective and often unknowable guilt or innocence of the defendant. Our cases came from court records, the National Registry of Exonerations, and other public records. Regardless of source, we relied on court records and we base our conclusions on those actual documents, not on extrapolations and assumptions. As a result, we include over 160 wrongfully convicted individuals from the National Registry, as well as others who may, or may not, be exonerated or “wrongfully convicted” as that term has come to be commonly understood. What cannot be disputed is that each of them was convicted of one or more felonies, that those convictions could not be sustained, and that the errors examined here imposed a substantial cost on both the individuals subjected to them and all California taxpayers.

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## FOOTNOTES

<sup>1</sup> All dollar figures are adjusted to 2013 dollars.

<sup>2</sup> The year 1989 was chosen because it was the first year that a defendant was exonerated due to DNA evidence.

## INTRODUCTION

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An ideal criminal justice system should arrest only the individual who actually committed a crime, deploy taxpayer resources responsibly, eliminate error, and impose consequences that are fair and just. Each mistake in the criminal justice process can have serious and lifelong consequences on the affected individual, and we should strive to eliminate all error. We nonetheless expect that some will note that the system theoretically worked in these cases, because its established checks and balances ultimately uncovered these wrongs and the convictions were eventually dismissed. We do not concede that this is a successful result. A perfect system may never be realized, but it must always be pursued.

We also expect that some will point to the fact that California prosecutes and convicts over 200,000 people every year,<sup>3</sup> and argue that the 692 faulty convictions described in this report reflects an acceptable rate of error. We reject the proposition that an acceptable rate of error can apply to proceedings that impact people's lives in the way that criminal prosecution can. The cases described in this report are actual events that impacted real people, with real families and real jobs, prosecuted in real California courts. There is perhaps no greater interference government can make in a person's life than to deny that person his or her liberty, and for that reason alone turning a critical eye on our criminal justice system is a valid and vital endeavor no matter what the rate of error. Just as with airline safety and medical mistakes, the acceptable rate of error is zero and that should be the goal.

Moreover, there are undoubtedly more than 692 Californians who have suffered injustices in our state and federal criminal justice system. California does not systematically collect information about reversed convictions, and the cases in this report thus represent only those that could be found through various public sources. We did not include juvenile cases, misdemeanor convictions, or cases in which an individual was detained and prosecuted but never convicted. The 692 cases and \$282 million in taxpayers costs catalogued here are thus most certainly the tip of the proverbial iceberg.

Mistakes happen, and human error persists. But our criminal justice system serves not only those who are facing criminal charges, but also anyone who may face the power of criminal prosecution in the future and anyone who may become a victim of crime. This is all of us. Everyone involved, whether legislators, prosecutors, defense attorneys, or judges must "strive to enhance and maintain confidence in our legal system....to ensure the confidence of the public."<sup>4</sup> We ignore flaws within the system at our own peril.

—June 2015

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### FOOTNOTES

- 3** Office of the California Attorney General, "Crime in California 2013," <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf?>
- 4** California Code of Judicial Ethics, Preamble (amended effective January 15, 2015), [http://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf).

## Executive Summary

*Criminal (In)justice* examines 692 individuals who were prosecuted and convicted in California state or federal courts, only to have their convictions dismissed because the government prosecuted the wrong person, because the evidence was lacking, or because the police, defense, prosecutors, or court erred to such a degree that the conviction could not be sustained. The 692 individuals subjected to these failed prosecutions spent a total of 2,346 years in custody, and their prosecutions, appeals, incarceration, and lawsuits cost California taxpayers an estimated \$282 million when adjusted for inflation.<sup>5</sup> Eighty-five of these cases arose from a large group exoneration—the Rampart police corruption scandal—and are discussed separately in a later section of this report.

The remaining 607 convictions, all of which were reversed between 1989 and 2012, illuminate a dark corner in California’s criminal justice system. These **607 individuals** spent a total of **2,186 years in custody**. They burdened the system with **483 jury trials, 26 mistrials, 16 hung juries, 168 plea bargains, and over 700 appeals and habeas petitions**. Many of the individuals subjected to these flawed prosecutions filed lawsuits and received settlements as a result of the error, adding to the taxpayer cost. Altogether, we estimate that these 607 faulty convictions **cost taxpayers \$221 million** for prosecution, incarceration and settlement, adjusted for inflation. This estimate is only a window onto the landscape of possible costs, as it does not include the often unknowable costs suffered by those subjected to these prosecutions.

The sections below provide a review of these 607 cases and offer some recommendations for change.

The first section, **Characteristics of Injustice**, paints a collective picture of the cases in our sample. Compared to California’s average, the individuals subjected to these errors were disproportionately prosecuted for violent crimes, especially homicide. This may be because prosecutions for violent crime are more likely to generate error than prosecutions for other crimes, though that question was beyond the scope of our research. Whatever the reason, failed prosecutions for violent crime account for a greater percentage of the wasted \$221 million than failed prosecutions for other crimes. Indeed, flawed homicide convictions alone account for 52% of the \$221 million, in part because these homicide cases took an average of 11 years to resolve and generated more lawsuits and civil settlements.

The second section, **Causes of Injustice**, catalogs the multitude of errors, dividing them into eight categories: eyewitness identification errors, prosecutorial misconduct, ineffective defense counsel, judicial mistake during trial, Fourth Amendment search and seizure violations, inadequate police practices before trial, unreliable or untruthful official testimony (officer or informant), and failure of prosecutorial discretion.

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### FOOTNOTES

<sup>5</sup> All costs in this Report are adjusted for inflation to 2013.



Prosecutorial misconduct and eyewitness identification were the most common errors in the flawed homicide prosecutions. When broken down by type of error, prosecutorial misconduct accounted for more of the cost in our sample than any other type of error. By contrast, the most common errors in our sample were Fourth Amendment search and seizure errors, and judicial mistake. These errors were resolved relatively quickly, however, and resulted in relatively little cost.

The third section, **Costs of Injustice**, walks through the cost analysis. It documents the many hurdles raised by the California Victims Compensation and Government Claims Board. This section also identifies many of the additional costs not captured by our methodology, including costs arising from wrongful misdemeanor convictions, flawed juvenile convictions, and cases that resolved prior to conviction, among others. These unaccounted costs highlight the fact that this report documents only a portion of the vast unknown waste in California’s criminal justice system—but it is at least a beginning.

*Criminal (In)justice* ends with a section on **Next Steps and Recommendations**. The problems presented in this report are undoubtedly complex, and each of them individually could be subject to its own investigation. This report does not attempt to comprehensively define the universe of best practices that will solve all of the issues raised. Instead, it identifies promising avenues for reform and highlights practices and jurisdictions that are leading the way. In particular, in 2006 the California Commission on the Fair Administration of Justice issued a report containing detailed recommendations regarding eyewitness identification, false confessions, informant testimony, problems with scientific evidence, and accountability for prosecutors and defense attorneys. The recommendations represent the unanimous views of a diverse group of prosecutors, defense attorneys, judges, law enforcement, and other stakeholders. To date, however, many of the substantive reforms have not been adopted, compromising public safety and leaving our criminal justice system at risk of endlessly repeating the errors catalogued here. (The report can be found at [www.ccfaj.org](http://www.ccfaj.org).)

# Overview, Definitions, and Methodology

*Criminal (In)justice* examines 692 flawed convictions, 607 of which are discussed in the body of this report.<sup>7</sup> Cases were included if:

- The defendant was convicted of a felony,
- The conviction was reversed in full, and
- The case was subsequently dismissed, or the defendant was acquitted on retrial.<sup>8</sup>

The term “error” as used in this report means any mistake, misconduct, or illegal or incompetent act that caused the reversal of the conviction, whether such act was

- factual (e.g., the individual did not commit the crime; the evidence was inaccurate or untruthful),
- procedural (e.g., the police, prosecution, defense or court committed error ranging from inadvertent mistake to intentional misconduct), or
- legal (e.g., the defendant’s rights were violated; the defendant’s acts did not violate the law).

We did not include any case for which a court record could not be located confirming both the reversal of the conviction and its ultimate dismissal or acquittal. We have captured only facts and legal findings reflected in official records. No errors, facts, or theories of law have been inferred or presupposed. Each error catalogued in this report has been verified by the court of record, and our coding has been limited to causes of action specifically found by the court on the record of the case. If a defendant made a particular legal argument, it was coded and captured. If the defendant did not make a particular argument, even if we believed that it might have been legally available (based, for example, on newspaper articles), it was not included. If the court rejected the defendant’s argument or did not reach a decision on a particular legal allegation, it was not included.

Notably, cases were not included or excluded on grounds of innocence, and our analysis was not confined to those defendants who had been declared innocent by the court. Under our country’s Constitution, a verdict of “not guilty” or the dismissal of a conviction means only that the government could not prove that the person committed the crime. That person may have been innocent, or not.<sup>9</sup> In addition, unlike some other states, California does not have an automatic or simple process by which

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### FOOTNOTES

<sup>7</sup> The remaining 85 cases arose from a group exoneration and are discussed separately in a later section of the report.

<sup>8</sup> We also include a small number of cases where the defendant’s most serious conviction or convictions were reversed, but the defendant remained convicted of a less serious crime. These cases were included only when we could irrefutably establish that the individual was imprisoned for at least a year longer than he would have been, if he had been convicted of only the lesser crime from the beginning.

<sup>9</sup> “Under the American system of justice, the high degree of certainty required in a criminal case, proof beyond a reasonable doubt, can sometimes result in the guilty going free. While this allows the presumption of innocence to prevail, it does not mean that the trier of fact has concluded the defendant is factually innocent. It does mean that guilt has not been proved by the standard required...Thus, under our system of justice, the guilty can go free in order to ensure as much as possible that the innocent are not convicted. This is an accepted consequence of a system of justice that places a high price on freedom—a system of justice for which this country has fought on numerous fronts and offered up innumerable lives to preserve and defend.”  
In re Sodersten, 146 Cal. App. 4th 1163, 1170 (2007).

## OVERVIEW, DEFINITIONS, AND METHODOLOGY

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an individual can seek a declaration of innocence. The best option is a Petition for Finding of Factual Innocence filed under California Penal Code Section 851.8, but these petitions are cumbersome and rare, rendering these petitions a poor arbiter of innocence.<sup>10</sup> Moreover, but for those few individuals who endure the arduous process of seeking a judicial declaration of innocence, an individual's innocence may continue to be the subject of police, prosecution, or media speculation even after the defendant has returned home and the conviction has been fully dismissed.

In 1992, 15-year old Francisco Carrillo<sup>11</sup> was convicted of murder in Los Angeles County; the conviction was based on eyewitness testimony of six eyewitnesses, all of whom knew each other. After the conviction, a witness was located who said that Mr. Carrillo was not at the scene, and all of the eyewitnesses subsequently recanted their testimony. One eyewitness later testified that the police had pointed Mr. Carrillo out during the identification process, and another eyewitness admitted that he could not have seen the shooter from where he had been standing. In 2011, after twenty years in custody, Mr. Carrillo was released. On the issue of innocence, Mr. Carrillo stated, "There are some people I'm sure I will never convince of my innocence, but I'm OK with it...There's something that kind of takes you over when you know it wasn't you."<sup>12</sup>

Our own sample demonstrates the limitations inherent in using innocence as a criterion for inclusion. In our sample of 607 people, 131 (22%) argued to the court at some point in their proceedings that they were factually innocent but only 28 (5%) subsequently obtained a Penal Code Section 851.8 declaration of innocence. We include five cases where the state awarded compensation as a result of the wrongful conviction, but there was never an 851.8<sup>13</sup> declaration of innocence. And, we include four cases where state compensation was denied despite the prior finding of innocence under 851.8. In our cases where DNA helped clear the individual, only 64% (9 out of 14) had successful 851.8 petitions.

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### FOOTNOTES

- 10** In an 851.8 petition, the individual must demonstrate that no reasonable cause exists to believe that he or she committed the alleged crime. The "no reasonable cause" standard that must be met by the petitioner is much higher than the "beyond a reasonable doubt" standard used to assess a person's guilt at trial, and the burden of proof is on the individual seeking the declaration, not on the government. There is no right to court-appointed counsel for this type of petition, so the individual seeking the declaration of innocence must pay the often considerable costs of an attorney to litigate on his or her behalf. The prosecution can contest the petition, meaning that a prosecutor could concede that a conviction should be dismissed, then argue that the defendant should not receive a declaration of innocence. The entire process can take years.
- 11** In this report, we use a person's full name if they are included in the National Registry of Exonerations or another public innocence website such as the Northern California Innocence Project, or if the person's situation has been subject to press coverage that continues to be publicly available. If we became aware of the person solely from court records or there is no indication that the person agreed to publicize their story, we use first name and last initial.
- 12** "Francisco Carrillo, quoted in Jack Leonard, "Man goes free after murder conviction is overturned," *Los Angeles Times*, March 17, 2011, <http://articles.latimes.com/2011/mar/17/local/la-me-carrillo-20110317>.
- 13** The law regulating the California's compensation board was amended in 2013 to prohibit the board from denying compensation if another court has declared the petitioner innocent.

## OVERVIEW, DEFINITIONS, AND METHODOLOGY

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These cases demonstrate that judicial declarations under 851.8 are poor arbiters of innocence. For this reason, and because without such a petition an individual's claim of innocence could be subject to dispute, we have not attempted subjective determinations about who was "innocent enough" to be included in our analysis. Rather, we eliminated innocence entirely as a criterion for inclusion, focusing instead on felony convictions that were reversed and ultimately dismissed. Of course, many individuals in our sample were innocent, including those who appear in the National Registry of Exonerations. We take our investigation further than the National Registry, however, and include both innocent people who were tried, convicted, and imprisoned as well as those who may or may not have committed the crime for which they were prosecuted. These other cases represent a different but equally valuable point of discussion, since releasing a guilty person can be just as problematic as convicting an innocent one. By discussing all of these cases in terms of systemic error and costs, rather than in terms of unknowable guilt or innocence, we hope to inspire a more thorough and thoughtful review of potential improvements to our administration of criminal justice.

## METHODOLOGY

California has no systematic way to effectively and comprehensively locate failed prosecutions such as those examined here, which makes a true audit impossible. The cases studied in this report represent only a subset of the unknown number of actual cases, and we have surely missed a number of potential cases and costs. We have nonetheless attempted to be as accurate as possible with as many cases as possible, if only to provide a window into the issues that should be subjected to further review and study.

Case selection for this report began with the California appellate courts, which provided records reflecting all appellate court reversals between 2002 and 2012. This review generated a list of over 10,000 cases that potentially fit our criteria.<sup>14</sup> Each case was then reviewed to ensure that (a) the appeal was of the conviction, not of the sentence or any other action in the case, and (b) the appeal was of the entire conviction, not just some of the counts on which the defendant had been convicted. If either criterion could not be met, the case was excluded from further review. These factors reduced our list to 980 cases.

To rely only on those appellate court records would have meant excluding hundreds of convictions that were reversed by the appellate courts prior to 2002, or that were reversed in the California trial courts, the California Supreme Court, or a federal court.<sup>15</sup> Therefore, we used the National Registry

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### FOOTNOTES

- 14** Appellate court reversals from 2002 to 2012 were obtained from two sources: case lists maintained by five out of the six appellate defense panels in California, and case numbers provided by the Administrative Office of the Courts (AOC) in response to our request. The AOC records the case numbers for petitions filed in the California appellate courts by criminal defendants, and records when the appellate petition is granted in full. We requested the list of case numbers for successful appeals filed by the defendant and the AOC graciously provided the list.
- 15** In certain circumstances a California state conviction can be reversed by a federal court. We counted these as California state cases, because the original conviction came from a California court and the case was ultimately resolved in that same state court even if the reversal was ordered by a federal court. In addition, about 3% of the cases in our sample originated in a California-based federal court. These cases were included only if the federal court was sited in California.

of Exonerations,<sup>16</sup> newspapers, attorney outreach, and other online sources to locate an additional 454 potential cases. Cases were included if the reversal stretched back to 1989, the year that the first individual in the United States was exonerated through DNA testing. The resulting list of 1,434 cases was our starting point.

Public records from each case were collected on-site and by hand in their respective county courthouses to determine the ultimate result in the case, as many defendants are re-convicted after a reversal and we were including cases only if the convictions were ultimately dismissed.<sup>17</sup> If the ultimate result was dismissal or acquittal, the records were scanned and coded into a database. In a few counties this quest could be done online, but in most counties the courthouse had to be visited in person, the paper files had to be pulled by the court clerk, and the file in its entirety had to be reviewed by hand. This cumbersome process, which took hundreds of hours and miles of travel, varied from county to county (the difficulties encountered in obtaining these files including lost files and missing records are more fully described in Appendix D); the counties of Napa and Riverside should be commended for being more accessible, responsive and organized than most.

Almost half (692) of the 1,434 potential cases were included in our sample because the ultimate result was dismissal or acquittal on retrial, including the eighty-five group exoneration cases that are discussed separately in this report. Ninety-seven case files could not be located or the file was so incomplete that a resolution could not be determined. The remainder (645) were not appropriate for our sample because the defendant ultimately pleaded guilty or was reconvicted in a later court proceeding. In the end, not including the eighty-five group exoneration cases, 376 (62%) of the 607 cases profiled in the main body of this report were gathered through our systematic review of the appellate records, and 231 (38%) came from other sources. All have been verified through court records.

Our cost methodology is fully described in the “Costs of Injustice” section as well as in Appendices B and C. We coded each error based on the legal ground for reversal as stated by the court; the complete list of all errors for which we coded is in Appendices E and F. Some of the calculations in this report break down cost by type of error. For those individuals with more than one ground for reversal (i.e., more than one validated error), we divided the total cost by the number of grounds. So if a particular individual accounted for \$100,000 in our sample, for example, and that individual’s conviction was reversed because the prosecutor failed to disclose exculpatory evidence (a *Brady* violation) and because the judge erroneously admitted evidence that should have been excluded, we assigned \$50,000 to the *Brady* category and \$50,000 to the erroneous admission of evidence category.

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### FOOTNOTES

**16** The National Registry of Exonerations, based at the University of Michigan Law School, was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989, defined as cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

**17** We also include a small number of cases where the defendant’s most serious conviction or convictions were reversed, but the defendant remained convicted of a less serious crime. These cases were included only when we could irrefutably establish that the individual was imprisoned for at least a year longer than he would have been, if he had been convicted of only the lesser crime from the beginning.

## OVERVIEW, DEFINITIONS, AND METHODOLOGY

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We recognize the limitations of our case collection methodology in particular, as there is no way to determine whether the cases we examine are a representative sample from which generalization would be appropriate. We are certain, however, that we have not found all the cases that would have fit our criteria, and at the very least we are therefore undercounting both the numbers and the cost of errors within the California criminal justice system. We are equally certain that the failed prosecutions profiled in this report utilized significant taxpayer resources and severely affected the lives of hundreds of individuals, and that we must diligently work towards reducing these errors in the future.

SECTION 1:

# THE CHARACTERISTICS OF INJUSTICE

*This section provides a collective overview of all 607 cases, including the types of crimes for which these individuals were prosecuted, how long they were in custody, and how long the cases took to resolve.<sup>18</sup>*

## Disproportionately More Errors Found in Convictions for Violent Crime as Compared to Property and Drug Crimes

Although the faulty convictions highlighted in this report range from simple drug possession to murder, they are notable in that they do not follow the pattern set in the rest of the state. Indeed, 30% of the individuals in our sample were improperly convicted of violent crimes, including homicide, rape, assault, and robbery, while only 18% of California’s felony convictions were for violent crime in 2013.<sup>19</sup> The inverse was true for property crimes: 26% of California’s 2013 convictions were for property crimes, including burglary, theft, and embezzlement,<sup>20</sup> but only 12% of the faulty convictions in this report were for property crimes. The proportion of drug crimes in our sample mirrors that of convictions in California in 2013—31% in our sample and 30% in California (see *Figure 1*).



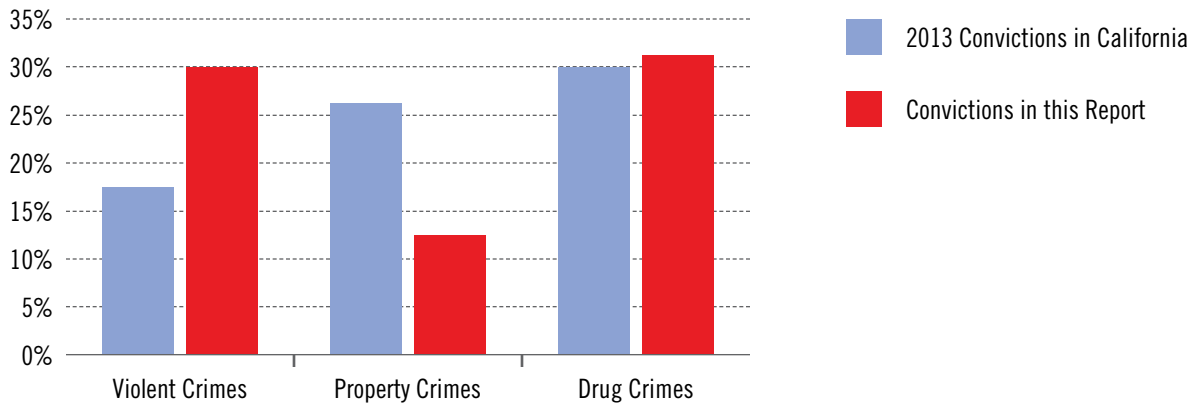
The faulty convictions in our sample were disproportionately convictions for violent crime.

### FOOTNOTES

- 18** This section does not include an analysis of the race of the individuals subjected to these failed prosecutions, because accurate information is unavailable. Race is not generally recorded in public documents and, even if it were available in a court record, it is not always clear whether the notation is one that has been confirmed by the defendant, or one that was inferred by court or police staff.
- 19** Office of the California Attorney General, “Crime in California 2013,” Table 40, <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf?>; Office of the California Attorney General, “Crime in California 2011,” Table 40 (2006 through 2011), <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd11/cd11.pdf?> Office of the Attorney General, “Crime in California 1996,” Table 41 (1991 through 1996) <http://ag.ca.gov/cjsc/publications/candd/cd96/cd96obts.pdf>. In 2013, from a total of 213,390 crimes, violent crimes were 38,034; drug offenses were 64,249; and property offenses were 55,342. The remaining crimes were categorized as “all other offenses.” The comparisons above are not exactly alike, as the convictions in this report stretch over more than twenty years and the Attorney General’s Report covers convictions in one calendar year. The distribution of convictions, however, has not changed substantially over time. Violent crime has fallen slightly over time (from 20% in 1991, to 24% in 1996, 17% in 2006, 19% in 2011, and 18% in 2013). Property crimes have also dropped (from 35% in 1991, to 30% in 1996, 27% in 2006, 26% in 2011, and 25% in 2013). Drug crimes have remained fairly consistent (27% in 1991, 30% in 1996, 28% in 2006, 28% in 2011, and 30% in 2013). The proportion of “other crimes” has risen from 17% in 1991 to 27% in 2011. This report uses the Attorney General’s definitions of “violent”, “property”, and “drug” convictions, which in turn are derived from the California Penal Code.
- 20** In collecting data, California follows the federal FBI guidelines for Uniform Crime Report (the UCR). The UCR does not include fraud and embezzlement in its definition of “property crime” therefore fraud and embezzlement cases are not included in the state percentages. In our sample we grouped fraud and embezzlement with theft. However, most of the cases were theft cases.

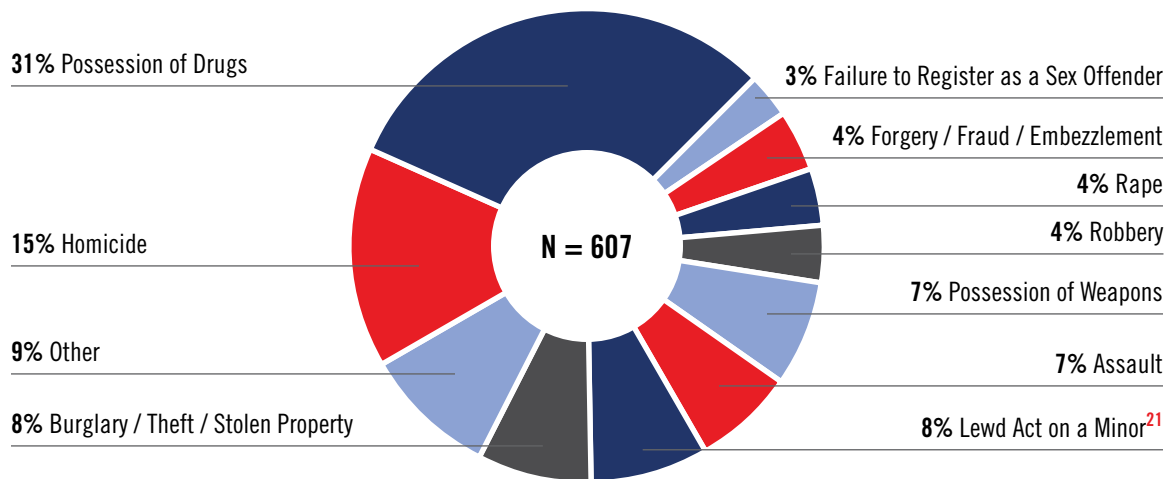


**Figure 1: All 2013 California Convictions v. Unjust Convictions in This Report**



The precise reasons for this disparity are unknown. We speculate that the higher frequency of error in prosecutions for violent crime could be a reflection of increased emotion at play in those cases, or increased public pressure to achieve a conviction, or perhaps a result of the increased complexity often seen in prosecutions for violent crime. This topic is deserving of further research, as failed prosecutions for violent crime have the greatest potential impact on victims and defendants alike (see Figure 2 for a breakdown of all reversed cases in this report, by type of crime).

**Figure 2: All Reversed Convictions in Report, Type of Crime**



**FOOTNOTES**

<sup>21</sup> Lewd Act on a Minor is the name given to California Penal Code Section 288(a), defined as an act upon a person under 14, on skin or through clothes, with the intent of sexual gratification for the perpetrator. It is a lesser crime than rape or other sexual assault crimes on minors, which are regulated by other penal code sections.

## Taxpayers Paid for 2,186 Needless Years in Custody

The 607 individuals in our sample spent 797,794 days—2,186 years—in prison and jail, all of which was paid for by Californians. None of this time and cost resulted in sustained convictions.<sup>22</sup> The vast majority these wasted years (78%) were in state prison, with the remainder in county jail and less than one percent in federal facilities.



The individuals subjected to the flawed prosecutions in this report were collectively incarcerated for 2,186 years, which was paid for by California taxpayers.

The taxpayer cost counts only a portion of the damage done by the errors catalogued here, as it cannot quantify the effect on those who were wrongfully or illegally incarcerated and their families. The individuals in this report were often incarcerated in the prime of their lives, in the time when they could have been getting an education, starting a career, and building a family.<sup>23</sup> More than half were 35 or younger at the time of their conviction, and 21% were between 15 and 24.<sup>24</sup> Their prosecutions are typically a matter of public record, leaving these future job seekers vulnerable to employer Internet searches that disclose the prosecution but not the dismissal. Their incomes are likely to decline after release from custody.<sup>25</sup> They lost their right to vote while incarcerated in prison.<sup>26</sup> Their children are stigmatized and more likely to suffer long-term emotional and behavioral challenges.<sup>27</sup> Indeed, a parent's incarceration alone increases the risk that his or her children will live in poverty or suffer household instability.<sup>28</sup>

### FOOTNOTES

- 22** The database includes 46 cases in which the serious crimes were dismissed but one or more lesser crimes remained. These cases were included only when it could be established that the individual was incarcerated for at least one full year longer than he or she would have been, had the erroneous conviction for the more serious crime never occurred. A small percentage of the 797,794 days may have been attributed to the lesser or minor conviction that was not reversed.
- 23** “While he was in prison, Carrillo missed out on a lot. His son was born. His father died. He says it hurts him to think that his father did not live to see him free. Carrillo lost 20 years—good years, the years when most people go to college and find love and build careers,” Mary Harris and Colleen Williams, “Freed after 20 years wrongly imprisoned, Franky Carrillo hits the books,” NBC News, March 16, 2012, [http://usnews.nbcnews.com/\\_news/2012/03/16/10722742-freed-after-20-years-wrongly-imprisoned-franky-carrillo-hits-the-books?lite](http://usnews.nbcnews.com/_news/2012/03/16/10722742-freed-after-20-years-wrongly-imprisoned-franky-carrillo-hits-the-books?lite).
- 24** Date of birth and date of conviction is known for 81% of the individuals in the database.
- 25** The National Longitudinal Youth Survey indicates that male wage earnings decrease up to 30% after incarceration. Men who were previously incarcerated contributed on average \$1,400 less to their families with small children. See Christopher Wildeman, and Bruce Western, “Incarceration in Fragile Families,” *The Future of Children* 20.2 (2010): 157-177; see also Steven Raphael and Michael A. Stoll, *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom*, (New York: Russell Sage Foundation, 2009). Family income declines by an average of \$8,726 several years following a father's release (1997 dollars); see also Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006). Earnings drop after incarceration (2004 dollars).
- 26** People convicted of felony offenses do regain their right to vote in California once they have completed the terms of their sentence including parole. <http://www.sfgov2.org/index.aspx?page=880>. Federally, in March 2015, Senators Cardin and Conyers introduced the Democracy Restoration Act which seeks to restore the voting rights in federal elections to all Americans who have been released from prison, ensure that probationers never lose their right to vote in federal elections, and notify people of their right to vote upon leaving prison. As of May 2015 the Democracy Restoration Act had not been signed into law. [https://www.aclu.org/sites/default/files/field\\_document/dra\\_-\\_fact\\_sheet\\_114th\\_congress\\_3\\_2015\\_v2.pdf](https://www.aclu.org/sites/default/files/field_document/dra_-_fact_sheet_114th_congress_3_2015_v2.pdf).
- 27** Nancy G. LaVigne, Elizabeth Davies, and Diana Brazzell, “Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents,” Urban Institute, 2008, [http://www.urban.org/UploadedPDF/411616\\_incarcerated\\_parents.pdf](http://www.urban.org/UploadedPDF/411616_incarcerated_parents.pdf).
- 28** Susan D. Phillips et al., “Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks,” *Criminology and Public Policy* 5 (2006): 677–702, <http://devepi.duhs.duke.edu/library/pdf/20970.pdf>.

Such long-lasting effects may not always be quantifiable,<sup>29</sup> but they are nonetheless a rallying cry for reform.



More than half of the individuals convicted and imprisoned in these dismissed cases were 35 or younger when they were convicted; 21% were younger than 25.

## Most of the Individuals Subjected to these Flawed Prosecutions Did Not Plea Bargain

As in most jurisdictions, California overwhelmingly resolves criminal prosecutions through plea-bargaining: in 2013 only two percent (2%) of criminal cases in California were resolved through a trial.<sup>30</sup> In our sample, by contrast, seventy-four percent (74%) of the individuals did not plead guilty and were instead convicted after a trial. This may be a result of the fact that these cases were problematic to begin with: many of these cases had limited or unreliable evidence against the defendant, and in that situation a defendant might rationally choose trial instead of a guilty plea.<sup>31</sup> It is also a result of the near impossibility of discovering error in a case that has been resolved by guilty plea. Additionally, many of the errors discussed in this report are errors that occurred during trial. Such errors, of course, do not occur in cases that do not go to trial.

Not only did the majority of these cases go to trial, but many of them went through multiple mistrials, hung juries, and retrials. These defendants' multiple trips through the system wasted 5,244 confirmed days of jury time.<sup>32</sup> Put differently, they required the equivalent of a full courtroom, with attorneys, judges, juries and court staff, for over twenty continuous years.



The reversed and dismissed cases in this report used 5,244 days of jury time, equating to the dedication of a full courtroom with attorneys, judges, juries, and staff for over twenty continuous years.

### FOOTNOTES

<sup>29</sup> Although wrongful incarceration may not always be quantifiable, in at least one case in Massachusetts the government was ordered to pay over \$100 million in damages to six defendants and their families for the defendants' wrongful conviction and incarceration. In making the order Judge Nancy Gertner said, "Now is the time to say and say without equivocation: this 'cost' to the liberty of four men, to our system of justice—is not remotely acceptable." Nancy Gertner, quoted in Robert Barnes and Paul Lewis, "FBI Must Pay \$102 Million in Mob Case," *The Washington Post*, July 27, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/27/AR2007072700282.html>. One of the defendants in the case commented, "All the money in the world wouldn't bring back my 33 years." Peter Limone, quoted in Scott Malone, "Judge awards 100 mln for unjust convictions," *Reuters*, July 26, 2007, <http://www.reuters.com/article/2007/07/26/us-usa-fbi-murder-idUSN2643274020070726>.

<sup>30</sup> Judicial Council of California, "2014 Court Statistics Report: Statewide Caseload Trends 2003-2004 through 2012-2013", 2014, Figure 35, 72, <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>.

<sup>31</sup> The vast majority of the 26% of cases in our database that were resolved by guilty plea follow the same pattern: The defendant is charged with a felony. He files a motion alleging either that the evidence against him was obtained in violation of the Fourth Amendment, or that the charges against him were filed too late and therefore violate the statute of limitations. The trial court denies the defendant's motion, so the defendant pleads guilty. The defendant then files an appeal, alleging that the trial court should have granted the motion. The appellate court agrees with the defendant, and orders that the evidence should have been suppressed or that the charges were brought too late. The government then dismisses the case.

<sup>32</sup> These 5244 trial days were utilized by the 447 cases in which there were one or more trials, mistrials or hung juries.

On March 18, 1993, Juan Carlos C. was an 18-year-old high school student on a school bus in San Joaquin County. There were 10 to 15 other students, some of whom were opening the emergency window on the bus. The driver pulled the bus over and called her supervisor. The supervisor responded in his work van, boarded the bus, and ordered the students off the bus. When one of the students mentioned that the supervisor had left his keys in the van, Mr. C. got in the van and began driving. The supervisor ran after the van and grabbed onto the door as it was moving. He leaned in the open window and struggled for control of the van. The car veered left and was struck by an 18-wheeler truck. The supervisor was killed.

In 1994 Mr. C., who had no criminal history, was charged and convicted of felony murder, robbery and vehicle theft. He filed an appeal and in 1995, the court reversed the murder and robbery conviction for insufficient evidence. In 1996, the prosecutor brought Mr. C. to trial a second time. This time the charge was second-degree murder. Mr. C. was found guilty and sentenced to 15 years to life. He appealed and in 1999 the court reversed the conviction for failure to instruct the jury on the lesser-included crime of vehicular manslaughter. The prosecution was given the option of accepting a verdict on vehicular manslaughter or retrying the case; the prosecution elected to retry the case. The prosecution tried to bring Mr. C. to trial again in 2000, but the court dismissed the charges because they had not been brought within the required time period. In 2001, the prosecution brought Mr. C. to trial for the third time, this time for murder and hit and run. The jury could not reach a verdict and the court declared a mistrial. In 2002, almost 10 years after the incident, the prosecution brought Mr. C. to trial for a fourth time. He was convicted of second-degree murder and sentenced to 15 years to life.

In 2004, the court of appeals held that the prosecutor did not have any legal authority to proceed against Mr. C. after the verdict in the first trial was reversed for insufficient evidence. Four trials, three appeals, and over ten years later, Mr. C. was released from prison.

The fact that most of the unjust and illegal convictions in our sample came about after trial should not be used to suggest that innocent people never plead guilty to crimes they did not commit, or that errors do not occur in cases that resolve by plea bargain. Indeed, one comprehensive review of two large group exonerations—the police scandals in Tulia, Texas and in the Rampart division of the Los Angeles Police Department—documents the fact that the defendants in these scandals only rarely went to trial.<sup>33</sup> Instead, the vast majority of the Tulia and Rampart defendants entered into plea bargains before they were exonerated. The fact that these defendants had not actually committed the crimes to which they pled guilty would never have been known if the police wrongdoing had not later become public knowledge.

#### FOOTNOTES

**33** Russell Covey. “Police Misconduct as a Cause of Wrongful Convictions” *Washington University Law Review* 90.4 (2013): 1133-1189. [http://openscholarship.wustl.edu/law\\_lawreview/vol90/iss4/2/](http://openscholarship.wustl.edu/law_lawreview/vol90/iss4/2/)

Other than the subsequently-discovered police wrongdoing, the hundreds of individuals in Tulia and Los Angeles who pled guilty look no different than the thousands of individuals who plead guilty every day in our nation's courthouses. For all of them, it is next to impossible to establish a wrongful conviction after a plea without new evidence or a fortuitous change in circumstances. The guilty plea of Henry Samueli, for example, was dismissed only after his alleged co-conspirator went to trial, a rare event in a state where only about 2% of cases proceed to trial. Mr. Samueli had agreed to a deal that required him to plead guilty to making a false statement, and required that he testify against his alleged co-conspirator, in order to avoid extensive prison time. During the alleged co-conspirator's trial, after hearing Mr. Samueli's testimony, the trial judge dismissed Mr. Samueli's guilty plea and stated that the prosecutor had intimidated and improperly influenced Mr. Samueli.<sup>34</sup> "Needless to say, the government's treatment of Mr. Samueli was shameful and contrary to American values of decency and justice," the judge said.<sup>35</sup> "I have looked at the plea agreement. I have listened to your testimony and you didn't make a false material statement."<sup>36</sup>

We do not know how many Californians plead guilty due to administrative convenience, the desire to end incarceration, rational risk-balancing given the risk of a loss at trial, a need to work and support their families, or a lack of faith in the system's ability to accurately determine factual innocence. The question of how many people plead guilty even when they were innocent is still very much at issue.<sup>37</sup>

A robbery and carjacking took place in the early morning hours of May 23, 2005, near James Ochoa's home in Buena Park, California (Los Angeles County). The victims gave a description to police. One officer thought that 19-year-old Mr. Ochoa matched the description and showed Mr. Ochoa's picture to the victims, who said that Mr. Ochoa looked like the perpetrator.<sup>38</sup> Two hours later a bloodhound was brought to the scene and given a swab from a baseball cap found in the car. The dog followed the scent to Mr. Ochoa's front door. Despite several family members stating that Mr. Ochoa had been home all night, he was arrested and charged with armed robbery, carjacking, and street terrorism. Prior to trial, DNA tests were done on the interior of the car and on objects found in the car. The DNA did not match Mr. Ochoa's, but the district attorney continued pursuing him. Mr. Ochoa was presented with a plea offer but rejected it.

## FOOTNOTES

<sup>34</sup> U.S. v. Ruehle, Reporter's Transcript December 15, 2009, Case No. SACR 08-00139-CJC <http://clients.oakbridgeins.com/clients/blog/ruehletranscript.pdf>

<sup>35</sup> <http://www.nbclosangeles.com/news/Judge-Throws-Out-Chargess-Against-Broadcom-Founder-Nicholas-79357367.html>

<sup>36</sup> <http://www.ocregister.com/articles/samueli-223282-options-guilty.html>

<sup>37</sup> "Courts work hard to equalize the incoming and outgoing cases—to resolve today's crimes and infractions to make way for tomorrow's... Courts use plea bargains to help equalize inboxes and outboxes. And experts say the use of enticements to wheedle admissions of guilt out of the accused makes the plea bargain process a lodestone for wrongful convictions." David J. Krajceck, "America's Guilty Mill," *The Crime Report*, February 9, 2015, <http://www.thecrimereport.org/news/inside-criminal-justice/2015-02-americas-guilt-mill>.

<sup>38</sup> Mr. Ochoa's age is taken from the National Registry of Exonerations and was not independently verified with court records.

After he rejected the plea, the judge indicated that Mr. Ochoa would be given the maximum life sentence if he were found guilty. Mr. Ochoa's attorney felt that the judge was pressuring him to get Mr. Ochoa to take a plea offer.<sup>39</sup> Mr. Ochoa's jury trial began on December 7, 2005, but after three days he decided, against the advice of his attorney, to plead guilty to second degree armed robbery for a guaranteed sentence of two years state prison. Mr. Ochoa told the judge that he was innocent but that he was scared at the possibility of facing a sentence of 25 years to life in prison, especially because he had a two-year-old son. A year later, in October of 2006, another man confessed to the robbery and carjacking. This man proved to be a DNA match to the DNA found on the items in the car. The district attorney filed a petition for habeas corpus, which was granted. Mr. Ochoa was released the next day. A month later, on November 22, 2006, the court granted Mr. Ochoa's petition for a finding of factual innocence. Mr. Ochoa subsequently settled a civil lawsuit for \$550,000. The lawsuit was based in part on improper police practices used to obtain the eyewitness ID, as well as improper reliance on the dog as evidence. Mr. Ochoa also received state compensation of \$31,700 in 2008, although the state compensation board initially refused to grant him compensation because of the guilty plea.

## The Original Sentences Imposed in these Flawed Cases Were Disproportionately Severe

Had the errors described in this report not been uncovered and the cases dismissed, the 607 individuals in our sample would have spent an enormous additional amount of time in custody. Nineteen percent (19%) of the unjustly convicted individuals in this report were originally sentenced to imprisonment for life or life without parole, and an additional 11% were originally sentenced to more than 10 years or more than 20 years in prison (*see Figure 3*).<sup>40</sup> All of these sentences were reversed and the convictions dismissed—but if they had remained hidden, California taxpayers could have paid millions of dollars to house these individuals for the remainder of their lives, including end of life medical costs that can run into the millions of dollars.

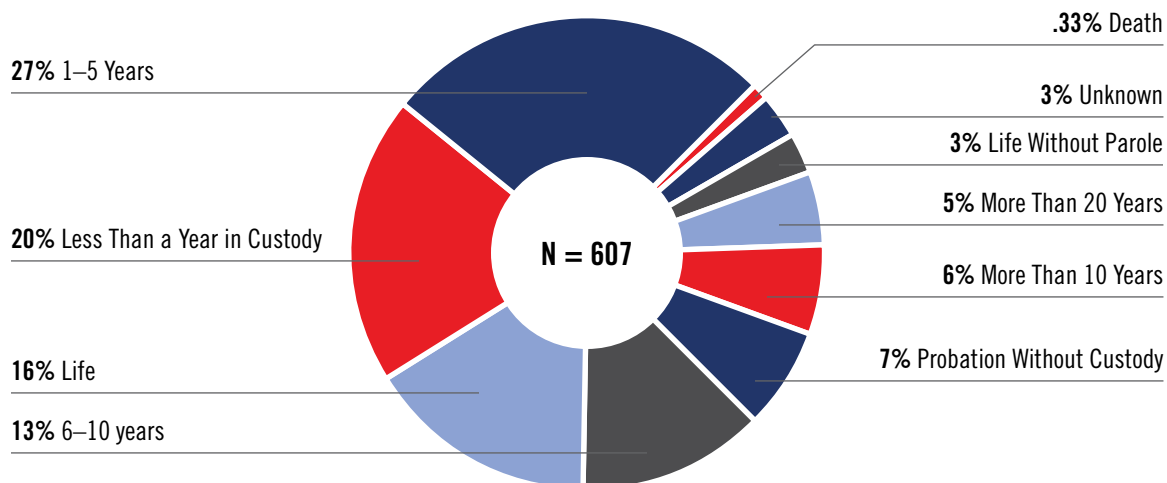


19% of the individuals subjected to these faulty prosecutions were originally sentenced to life or life without parole.

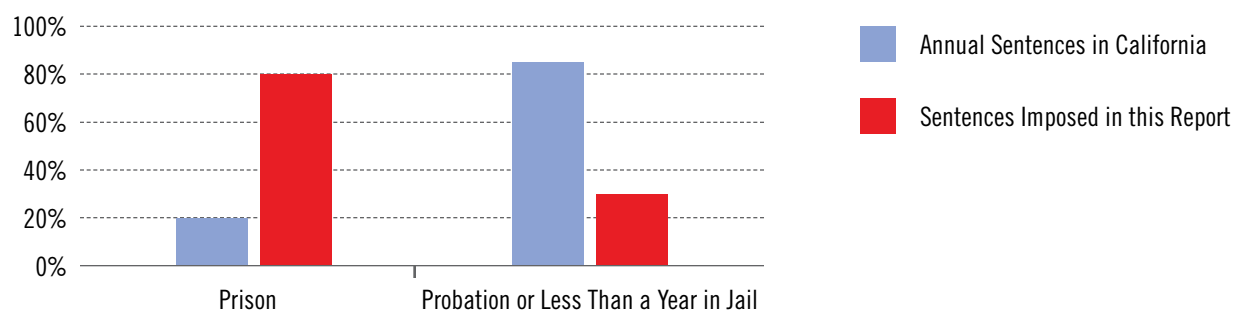
### FOOTNOTES

<sup>39</sup> Victims Compensation Government Claims Board Report, "In the Matter of the Claim of James Ochoa, Claim No. 565437", February 5, 2008, 64, <http://www.vcgcb.ca.gov/docs/pc4900/PC-4900-Approved-Ochoa.pdf>.

<sup>40</sup> Those who served the longest include Kash Register (33 years, Los Angeles County), James Shortt (27 years, Los Angeles County), Frank O'Connell (27 years, Los Angeles County), Adam Miranda (27 years, Los Angeles County), Elmer Pratt (25 years, Los Angeles County), Thomas Goldstein (24 years, Los Angeles County), Bruce Lisker (24 years, Los Angeles County), Willie Green (23 years, Los Angeles County), Kenneth Marsh (20 years, San Diego County), Mark Sodersten (20 years, Tulare County), Maurice Caldwell (20 years, San Francisco County), Timothy Atkins (19 years, Los Angeles County), John Stoll (19 years, Kern County), Francisco Carrillo (18 years, Los Angeles County), and Norma Croy (17 years, Siskyou County).

**Figure 3: Original Sentence Imposed, Cases in this Report**

Moreover, the individuals in our sample were penalized more severely than those in the system at large, which is likely a logical outcome of the fact that our sample contained more prosecutions for violent crime than the system as a whole. More than two thirds of the cases (68%) in our sample resulted in the defendant being sentenced to a term in prison, as compared to an annual California rate of about 20% prison sentences imposed for felony convictions. Similarly, only 28% of the individuals in our sample were sentenced to probation and/or less than a year in jail, while annually about 80% of all felony convictions in California receive such sentences (*see Figure 4*).<sup>41</sup>

**Figure 4: Sentences Imposed for Felony Convictions, Annual California Proportion v. Proportion in this Report****FOOTNOTES**

<sup>41</sup> Office of the California Attorney General, “Crime in California 2011,” Table 40, <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd11/cd11.pdf?> and Office of the California Attorney General “Crime in California 1996,” Table 41 (1991 through 1996). <http://ag.ca.gov/cjsc/publications/candd/cd96/cd96obts.pdf>. The year 2011 is used because Public Safety Realignment changed the ways in which defendants were sentenced to prison and jail starting in October 2011. Prior to Realignment, the ratio between prison and non-prison sentences imposed in felony cases did not change significantly for over 20 years; from 1996 to 2011 about 20% of sentences imposed annually in felony cases were prison sentences. In 2011, the exact numbers were: 195,821 total felony convictions and 37,972 prison sentences (19.4%). In 1996 the exact numbers were: 197,309 felony convictions and 43,691 prison sentences (22.1%). In 1991, the exact numbers were: 195,727 felony conviction and 38763 prison sentences (19.8%). As with Figure 1, the comparison is not exact because our dataset stretches over 25 years, while the Attorney General figures cover one calendar year.

## These Faulty Convictions Were Not Resolved Quickly

Our criminal justice system does not acknowledge or repair its errors quickly, particularly in California.<sup>42</sup> On average, the people in our sample fought for four and a half years before their cases were ultimately dismissed.<sup>43</sup> Fifty-eight of the individuals in the sample were imprisoned for more than ten years, and eleven were in prison for more than twenty years, before their cases were ultimately reversed and dismissed. Roughly one-quarter of the cases (24%) took more than five years from initial appearance to final resolution, and one defendant, Kash Delano Register, fought for 34 years.

In April of 1979, an 18-year-old African-American teenager named Kash Register was arrested for the murder of an elderly white man in Los Angeles County. At trial, Mr. Register presented five alibi witnesses including family members, his girlfriend, and a job coach. The fingerprints found on the scene did not match Mr. Register's and no evidence specifically linking him to the crime was found in his home or on his person. The case was based primarily on the eyewitness accounts of two people. One testified before trial that she could not see the suspect very well and that she was not sure of her identification. At trial, however, she said that she had no doubt that the suspect was Kash Register. The other eyewitness had an elaborate story about chasing down the perpetrator but later stated that he did not remember any of the events on the day in question. Following a nine-day trial before an all-white jury, Mr. Register was found guilty of murder and sentenced to life in prison without the possibility of parole. The sentence was later reduced to 27 years to life in prison. Mr. Register appeared before the parole board eleven times and professed his innocence. His requests for parole were denied.

In 2012, Mr. Register filed a habeas petition alleging that the prosecution withheld evidence (including the fact that one of the eyewitnesses was on probation at the time she testified), that eyewitnesses had lied about what they saw, and that there were two additional eyewitnesses, one of whom could not identify the shooter and the other of whom would have testified that Mr. Register was not the shooter. The court held that the prosecutor had improperly withheld this exculpatory evidence. In light of the new evidence, the court also found that the main witness against Mr. Register was not credible. The case was dismissed in December 2013 and Mr. Register was released after serving 34 years in prison.<sup>44</sup>

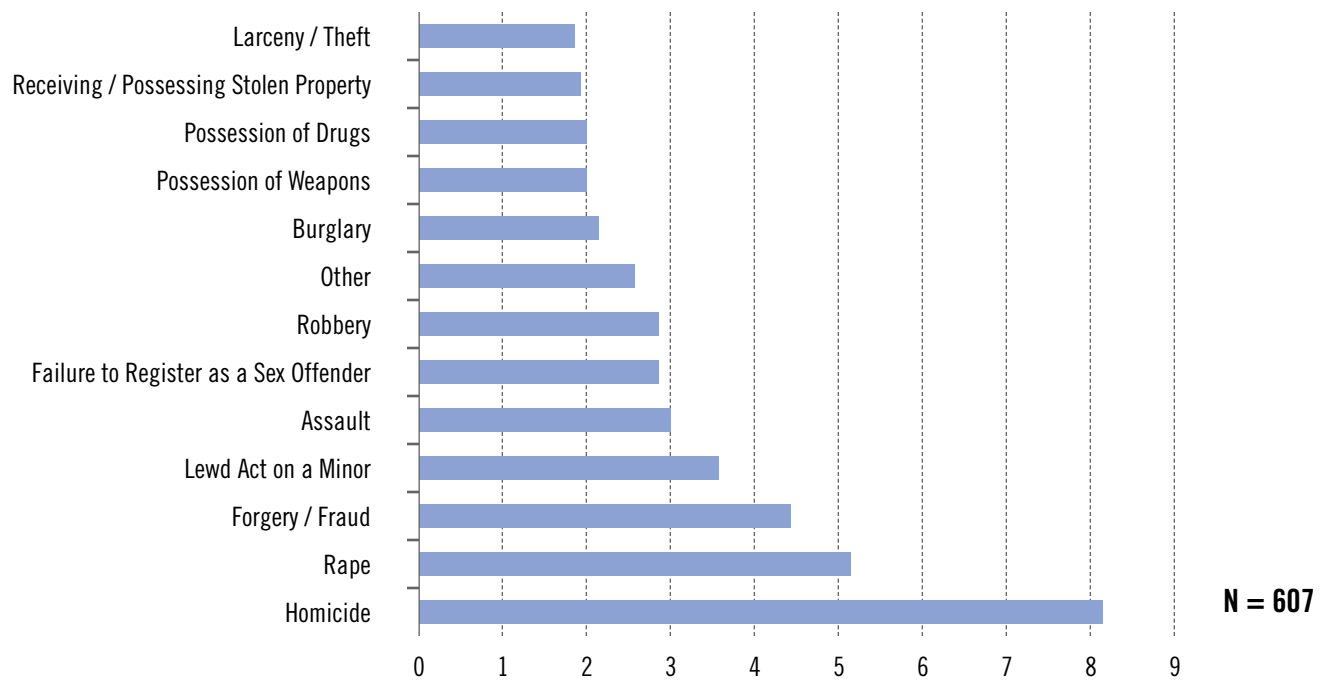
Within these averages are large variances based on the type of prosecution: the median time from initial arrest to reversal and release in flawed homicide prosecutions was almost nine years, while the median in theft and drug cases was just about two years (*see Figure 5*).

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### FOOTNOTES

- <sup>42</sup> Particularly when it comes to payment of compensation, other states have made resolution a priority in a way that California has not. New York, Ohio and Texas have all worked to speed the process by which wrongfully convicted individuals are compensated.
- <sup>43</sup> Date ranges in this section are from the date of arrest or first appearance in court, to the date of final dismissal. The average was 4.5 years and the median was 2.7 years.
- <sup>44</sup> Mr. Register's claim for compensation had not been resolved as of the date of this report.



**Figure 5: Median Case Resolution Length (Years), By Conviction Type**

## Flawed Homicide Convictions Were the Most Expensive

Costs associated with the 607 cases in our sample were not distributed equally among the various types of convictions. Faulty convictions with more serious charges, and particularly wrongful homicide prosecutions, were the most expensive. Indeed, the average cost of the flawed homicide prosecutions in our sample was more than twice the average cost of any other type of crime. Moreover, these failed homicide prosecutions constituted more than half (52%) of the total cost calculated for all cases in the sample. (See *Figure 6*)

The high cost for unjust homicide convictions is due in part to the fact that the individuals subjected to these prosecutions spent longer terms in prison than others in the sample. In addition, they filed more lawsuits and received more settlements than individuals prosecuted for other types of crime, all of which contributed to the total cost.

Figure 6: Cost By Type of Crime

Crime	Sum of Total Cost	% of Total Cost	# of Cases	Average Cost Per Case
Homicide	\$115,837,375	52%	92	\$1,259,102
Lewd Act on a Minor	\$27,387,054	12%	47	\$582,703
Possession of Drugs	\$19,987,150	9%	187	\$106,883
Rape	\$12,362,329	6%	21	\$588,682
Assault	\$11,213,758	5%	40	\$280,344
Robbery	\$9,242,437	4%	26	\$355,478
Burglary / Theft / Stolen Property	\$8,219,649	4%	74	\$458,681
Other	\$7,994,023	4%	57	\$140,246
Possession of Weapons	\$5,760,472	3%	43	\$133,964
Failure to Register as Sex Offender	\$3,597,483	2%	20	\$179,874
<b>Grand Total</b>	<b>\$221,601,730</b>	<b>100%</b>	<b>607</b>	<b>\$365,077</b>



More than half of the cost associated with the reversed cases in this sample came from flawed homicide prosecutions.

SECTION 2:

# THE CAUSES OF INJUSTICE

*This section examines the errors that caused the reversal of the convictions in our sample.*

Four hundred and eighty three (483) jury trials, 26 mistrials, 16 hung juries, and 168 plea bargains were required to resolve the 607 cases profiled in this report. Something went wrong in each of these proceedings. They all contained at least one instance of misconduct, incompetence, or mistake that invalidated the conviction.



**The 607 defendants in this report burdened the California criminal justice system with 483 jury trials, 26 mistrials, 16 hung juries, and 168 plea bargains before their cases were eventually dismissed.**

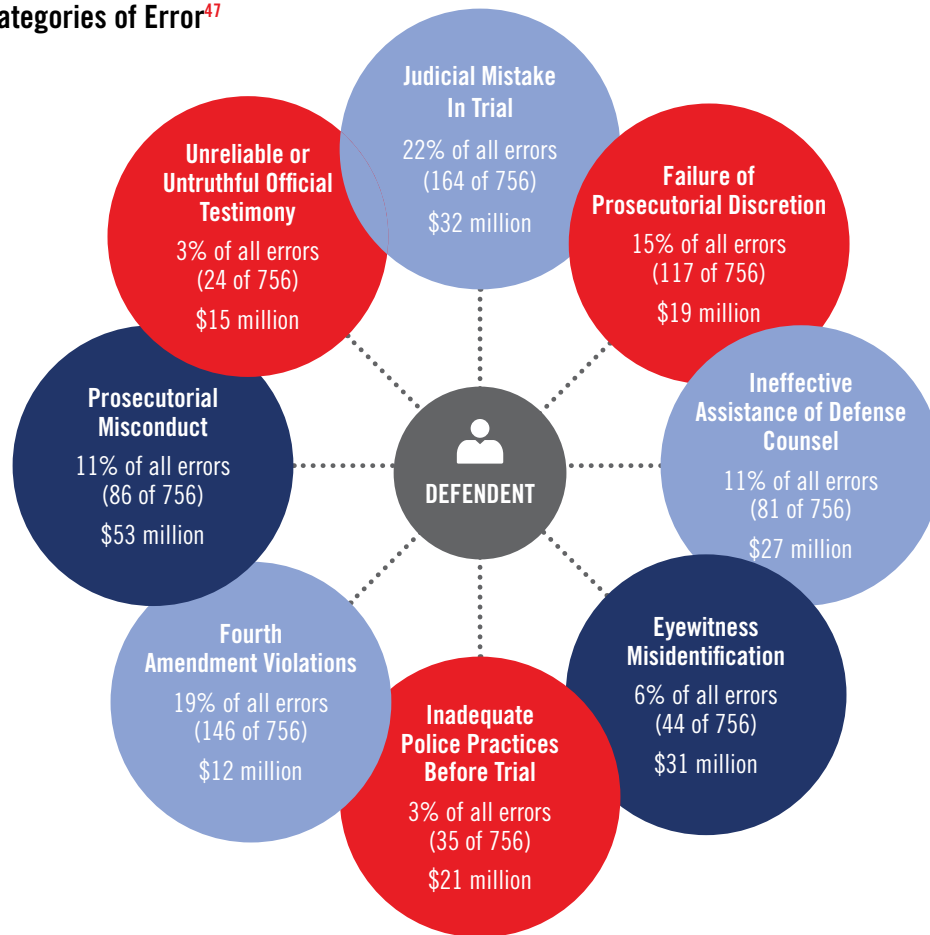
In total, this report catalogues 756 confirmed errors,<sup>45</sup> each representing a finding by a California court that the particular act of misconduct, incompetence or mistake justified reversal of the conviction. We divided the errors into eight different categories; each category is discussed separately in this section (see *Figure 7*).<sup>46</sup> The eight categories are addressed in descending order of cost, from highest total cost to lowest.

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## FOOTNOTES

- 45** There were 693 reversed trials, mistrials, hung juries and plea bargains, but we coded 756 errors. The number of errors is larger than the number of cases or the number of defendants because courts sometimes reverse a conviction for more than one reason. If the court specified that it was reversing a conviction on two separate grounds, each ground justifying reversal was counted as a separate error.
- 46** We did not assign a source to the types of error, because most errors have multiple sources. A Fourth Amendment search and seizure error, for example, requires a mistake by the police regarding the applicable law, a mistake by the prosecution in determining that the evidence should be used, a potential mistake by the defense in not adequately objecting, and a mistake by the judge in allowing the evidence to be used for the initial conviction.
- 47** Fifty-nine miscellaneous errors make up the final 8%. Miscellaneous errors include retroactive change in the law subsequent to conviction and unknown. The full list of coding categories for all errors can be found in Appendix F.



Figure 7: Eight Categories of Error<sup>47</sup>




Category	Definition
Judicial Mistake In Trial	Jury instructions, erroneous admission/ exclusion of evidence, Sixth Amendment (confrontation, impartial jury), jury misconduct, sentencing error
Failure of Prosecutorial Discretion	Insufficient evidence, defendant’s conduct doesn’t meet the legal definition of the crime, statute of limitations, double jeopardy
Ineffective Assistance of Defense Counsel	Failure to investigate, failure to adequately represent
Eyewitness Misidentification	Eyewitness recanted, eyewitness unreliable or lying, mistaken eyewitness, police eyewitness practices inadequate
Inadequate Police Practices Before Trial	New evidence found after trial, invalid confession or statement, Fifth Amendment violation, inadequate police practices
Fourth Amendment Violations	Improper search and seizure
Prosecutorial Misconduct	Prosecutorial misconduct, <i>Brady</i> violations
Unreliable or Untruthful Official Testimony	Unreliable/untruthful police officer testimony, confidential informant unreliable or lying

Although all these errors appear throughout the sample, certain errors were responsible for a disproportionate share of the overall cost. Prosecutorial misconduct, for example, accounted for 11% of the errors but 24% of the cost, while Fourth Amendment (search and seizure) violations accounted for 19% of the errors but only 5% of the cost (see Figure 8).

**Figure 8: Cost By Type of Crime**


	Type of Error	% of Error	% of Cost	Average Cost Per Error
 <b>PROPORTIONATELY MORE COST</b>	Prosecutorial Misconduct	11%	24%	\$617,513
	Eyewitness Identification	6%	14%	\$714,172
	Ineffective Assistance	11%	12%	\$327,870
	Official Testimony	3%	7%	\$615,873
	Police Practices	3%	10%	\$620,832
<b>PROPORTIONATELY LESS COST</b> 	Judicial Mistake	22%	14%	\$194,962
	Prosecutorial Discretion	15%	9%	\$165,503
	Fourth Amendment	19%	5%	\$78,377

 Prosecutorial misconduct, inadequate eyewitness identification, unreliable official testimony, and improper pre-trial police practices appear to be more costly errors per incident than other types of errors.

Moreover, errors were not distributed evenly across the different types of prosecution (see Figure 9).

**Figure 9: Most Common Error for Each Type of Prosecution**

Type of Prosecution	% of Prosecutions	Most Common Error
Possession of Drugs	31%	Fourth Amendment Violations
Homicide	15%	Prosecutorial Misconduct
Other	9%	Failure of Prosecutorial Discretion
Burglary / Theft / Stolen Property	8%	Failure of Prosecutorial Discretion / Judicial Mistake During Trial
Lewd Act on a Minor <sup>48</sup>	8%	Judicial Mistake During Trial
Assault	7%	Judicial Mistake During Trial
Possession of Weapons	7%	Fourth Amendment Violation
Forgery / Fraud / Embezzlement	4%	Judicial Mistake During Trial
Rape	4%	Inadequate Police Practices Before Trial / Problems With Eyewitness Testimony
Robbery	4%	IAC
Failure to Register as Sex Offender	3%	Failure of Prosecutorial Discretion

 Prosecutorial misconduct was the most common error in flawed homicide prosecutions in this sample.

## Prosecutorial Misconduct

\$53 million overall (24% of the total)

\$617,513 average cost per error

11% of the errors

- Prosecutorial misconduct includes **Brady<sup>49</sup> violations** (failure to meet the constitutional obligation to turn potentially exculpatory information over to the defense) and other **misconduct** (e.g., overzealous closing argument, improper admission of evidence, violation of judicial order, knowing admission of false testimony).
- Of the 86 errors in the prosecutorial misconduct category, 45 (52%) are *Brady* violations. These violations of the prosecutorial obligation to share exculpatory information account for \$44 million of the total cost.
- The largest share of the prosecutorial misconduct (44%) occurred in homicide cases, followed by prosecutions for lewd act on a minor (13%).
- Prosecutorial misconduct accounted for 11% of the errors but 24% of the total cost.
- Total sample cost associated with all prosecutorial misconduct was \$53 million.

### PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct includes any act or failure to act by a prosecutor that violates a professional code of ethics. Under Federal law, a prosecutor’s behavior violates the U.S. Constitution “if it is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”<sup>50</sup> Under California state law, a prosecutor’s actions constitute prosecutorial misconduct if they involve the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.<sup>51</sup> Not every act of misconduct will result in the reversal of a conviction, however, because the defendant must also show that he was prejudiced or actually harmed by the misconduct.<sup>52</sup>

Misconduct might consist of inappropriate remarks in the courtroom, presenting false or misleading evidence, tampering with evidence, or soliciting perjury or false evidence. It also might include the failure to disclose exculpatory evidence (i.e., *Brady* violations); we address these cases separately below. At the same time, misconduct can occur without any intent to create an unjust result. The federal Professional

#### FOOTNOTES

<sup>48</sup> Lewd Act on a Minor is the name given to California Penal Code Section 288(a), defined as an act upon a person under 14, on skin or through clothes, with the intent of sexual gratification for the perpetrator. It is a lesser crime than rape or other sexual assault crimes on minors, which are regulated by other penal code sections.

<sup>49</sup> *Brady v. Maryland*, 373 U.S. 83 (1963)

<sup>50</sup> *People v. Harris*, 47 Cal.3d 1047, 1084 (1989), citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974).

<sup>51</sup> *People v. Hill*, 17 Cal. 4th 800, 819 (1998); *People v. Pitts*, 223 Cal. App.3d 606,691 (1990); *People v. Strickland*, 11 Cal.3d 946, 955 (1974).

<sup>52</sup> *Chapman v. California*, 386 U.S. 18, 22-23 (1967); see also *People v. Crew*, 21 Cal.4th 822, 839 (2003).

Misconduct Review Unit (PMRU), for example, investigates allegations of misconduct by Department of Justice attorneys and divides misconduct into four categories: 1) intentional professional misconduct; 2) reckless professional misconduct; 3) poor judgment; and 4) excusable mistake.<sup>53</sup>

In July of 2004 in Los Angeles County, police arrested Jaime A. after a 16-year-old boy alleged that 27 year old Mr. A. stole the boy's bicycle. The main evidence against Mr. A. was the identification by the victim. Despite a lack of physical evidence linking Mr. A. to the crime, he was found guilty by a jury after a three-day trial. Because he had two prior strikes he was sentenced to 35 years to life in state prison. Two years later, the court reversed the conviction based on prosecutorial misconduct because the prosecutor had improperly vouched for the integrity of her office and stated her own personal belief that Mr. A. was guilty in closing argument. Mr. A. was retried, and in his second trial the jury deadlocked. The prosecutor sought to try him a third time, and this time the court declared a mistrial. The prosecutor sought permission to try him a fourth time, but the court found that the evidence was so weak that no reasonable jury could find Mr. A. guilty. The court finally dismissed the case over the prosecutor's objection. Mr. A. was in prison for over three years before his release.

Although our criminal justice system is an adversarial system, prosecutors are entrusted not with the burden to win their case but rather with the burden to do justice. A failure to uphold this obligation is all the more damaging given their unique role: "Prosecutorial misconduct fundamentally perverts the course of justice and costs taxpayers millions of dollars in protracted litigation. It undermines our trust in the reliability of the justice system and subverts the notion that we are a fair society."<sup>54</sup>

Although the cases in this report stretch from 1989 to 2012, prosecutorial misconduct continues to make headlines.<sup>55</sup>

In February 2015 in Riverside County, Johnny Baca was ordered to stand trial for a third time after both a jailhouse informant and the district attorney who prosecuted Mr. Baca were found to have lied under oath.<sup>56</sup> Mr. Baca was accused of killing a friend's father and the father's partner.

## FOOTNOTES

- <sup>53</sup> U.S. Attorney General Eric Holder, Memorandum for Heads of Departments (January 14, 2011), <http://www.documentcloud.org/documents/26309-memo-on-professional-misconduct-review-unit.html>. The Professional Misconduct Review Unit will review only findings of intentional or reckless professional misconduct, but "findings of poor judgment and excusable mistake will continue to be referred to the relevant U.S. Attorneys for appropriate action. "Attorney General Creates Professional Misconduct Review Unit, Appoints Kevin Ohlson Chief" U.S. Department of Justice, press release, January 18, 2011, <http://www.justice.gov/opa/pr/attorney-general-creates-professional-misconduct-review-unit-appoints-kevin-ohlson-chief>.
- <sup>54</sup> Kathleen M. Ridolfi and Maurice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009," Northern California Innocence Project, Santa Clara School of Law, October 2010, 4. <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.
- <sup>55</sup> This is particularly true in Orange County, which is embroiled in a misconduct scandal involving a "massive cover-up by both law enforcement and prosecutors." <https://www.washingtonpost.com/news/the-watch/wp/2015/07/13/the-jaw-dropping-policeprosecutor-scandal-in-orange-county-calif/>.
- <sup>56</sup> Unless noted otherwise, case summaries in this report are based on court records. Mr. Baca's summary is based on newspaper accounts instead of court records and he is not included in our sample because his case was not final as of May 2015. See, Sarah Burge, "Riverside County: Prosecutor accused of lying in murder trial," The Press Enterprise, February 23, 2015, <http://www.pe.com/articles/baca-760956-attorney-case.html?page=1>. See also Maura Dolan, "U.S. judges see 'epidemic' of prosecutorial misconduct in state," Los Angeles Times, January 31, 2015, <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html#page=1>.



His original 1995 conviction was based in part on testimony from the jailhouse informant, who claimed that the then-twenty-four-year-old Mr. Baca had confessed to him. The informant stated under oath that he received no deal from the prosecution in return for his favorable testimony. The first conviction was reversed for ineffective assistance of defense counsel. In Mr. Baca's second trial, the district attorney took the stand and testified under oath that the informant had received no deal in return for his testimony. In fact, the informant had received a lower sentence in exchange for his testimony against Mr. Baca. Mr. Baca appealed to the state appellate court and although the state court found that the informant and the district attorney had both lied on the stand, the conviction was affirmed. Mr. Baca then filed a federal Petition for Habeas Corpus, which was ultimately heard by the Ninth Circuit Court of Appeals. The Ninth Circuit oral arguments took place on January 8, 2015. During oral argument, the judges demanded to know why the informant and prosecutor had not been charged with perjury, and expressed frustration about the fact that the prosecutor had never been referred to the State Bar for investigation. One of the judges asked if Attorney General Kamala Harris was aware of the misconduct and called on the district attorney to make the Attorney General aware of the prosecutor's lying in the next 48 hours.

The Attorney General then withdrew its opposition to Mr. Baca's habeas petition, and on January 30th, 2015, the 9th Circuit granted the petition, vacating the conviction. The District Attorney's Office, however, decided shortly thereafter to proceed with a third trial against Mr. Baca. Mr. Baca was still awaiting his third trial as of June 2015.

## BRADY VIOLATIONS

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court articulated the prosecutor's Constitutional duty to turn over to the defense any material evidence that is favorable to the defendant. The prosecutor's duty extends to evidence that is held by law enforcement.

"A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence. Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice. In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. Professional discipline is rare, and violations seldom give rise to liability for money damages."<sup>57</sup>

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### FOOTNOTES

<sup>57</sup> U.S. v. Olsen, Case No. 10-36063, 11 (9th Cir. 2013) (Kozinski dissenting), <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/12/10/10-36063%20web.pdf>. In that same opinion, Justice Kozinski stated "There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it." US v. Olsen at 2.

On November 2, 1984, a mother was found beaten, burned and dead in her apartment in Tulare County. Her two children were covered in soot but otherwise unharmed. The three-year-old girl stated that “Mark did it,” identified Mark Dare in a lineup, and indicated that Mark Dare was her little brother’s father. Mark Dare, who was her brother’s father, had an alibi. The little girl later changed her story and said that there was a good Mark and a bad Mark and that the bad Mark was Mark Sodersten. Police later found a fingerprint at the scene that belonged to the victim’s neighbor, Lester Williams. Mr. Williams denied any knowledge of the murder in two interviews, but in his third interview he said he had been there and that Mark Sodersten had fought with the victim and murdered her. Two other witnesses placed Mark Sodersten with the victim, but there was no physical evidence that linked Mr. Sodersten to the crime. At trial, the little girl’s father testified that he thought the government investigator switched around the photos of Mark Dare and Mark Sodersten so many times that the girl got confused. Both he and the victim’s mother testified that they had seen the victim fighting with Mark Dare, not Mark Sodersten, days prior to the murder. In May of 1986, Mr. Sodersten, at age 28, was convicted by jury of murder and sentenced to life without the possibility of parole. He unsuccessfully appealed. Mr. Sodersten later learned that the prosecutors and the police had withheld a series of exculpatory tapes. The tapes included recordings of interviews with the little girl, demonstrating her confusion between the two Marks. Also on the tapes, Lester Williams repeatedly told police that he was high and did not remember the night in question, until police threatened to charge him with murder and seek the death penalty, after which he changed his story. Another tape revealed a conversation between Mr. Williams and Mr. Sodersten, in which Mr. Williams told Mr. Sodersten that he lied to police when he implicated Mr. Sodersten because he thought that Mr. Sodersten had implicated him in the murder. Mark Sodersten challenged his conviction in light of these newly discovered tapes, but he died in prison at age 48 before the case was resolved. Despite Mark Sodersten’s death, the court held that the prosecutor had committed a serious *Brady* violation and that it was reasonably probable that Mr. Sodersten would not have been convicted had the prosecutor complied with his Constitutional obligations.

**California is the only state in the nation that has failed to adopt some version of American Bar Association Model Rule 3.8,<sup>58</sup>** which is broader than the Federal *Brady* standard because it requires that prosecutors “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.”<sup>59</sup> Unlike *Brady*, Rule 3.8 does not require prosecutors to make a determination as to the credibility of the evidence and therefore leaves less discretion in the hands of prosecutors. Outside of the standard oath that all attorneys

## FOOTNOTES

<sup>58</sup> Laurie Levenson and Barry Scheck, “California is overdue in adopting rule on exculpatory evidence,” *Los Angeles Times*, December 15, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-1216-levenson-prosecutorial-misconduct-20141216-story.html>.

<sup>59</sup> American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2014), Model Rule 3.8(d), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html). See American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed., 1993, [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/prosecution\\_defense\\_function.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf), (outlining the special standards and duties for prosecutors).

practicing in California are required to take to uphold the U.S. and California State Constitutions,<sup>60</sup> the California Bar Association provides very little guidance on the specific ethical duties of prosecutors.<sup>61</sup> Although the vast majority of prosecutors comply with their *Brady* obligations, the failure to vigorously and fully enforce *Brady* obligations has enormous ramifications: “When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public’s trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.”<sup>62</sup>

Two cases, 35 years apart, demonstrate how the same *Brady* violations that were taking place over forty years ago continue today.

On July 28, 1972, 21-year-old, Elmer “Geronimo” Pratt was convicted of murder, robbery, and assault with intent to commit murder in Los Angeles. He was sentenced to life in prison. Mr. Pratt was a member of the Black Panther Party (BPP). He did not become a suspect until a letter indicating that he had confessed to the murders was delivered to the police. Thereafter, two eyewitnesses in a photo lineup identified Mr. Pratt and the police connected him to the gun and the getaway car. The defense presented evidence that Mr. Pratt was at a BPP meeting in Oakland at the time of the murders, that the car at the crime scene was often used by other BPP members, and that the gun was found inside a residence where it was available to numerous people. Mr. Pratt was convicted after a thirty-one day jury trial.

The letter that incriminated Mr. Pratt was given to police by a man named Julius Butler, a former Los Angeles Sheriff’s Deputy turned Black Panther. After the trial, it was discovered that Mr. Butler had been an FBI informant. Information regarding Mr. Butler being an informant had been withheld from the defense at trial. On the stand during trial, Mr. Butler had denied that he was an informant for the FBI.

Mr. Pratt filed an unsuccessful direct appeal and several unsuccessful habeas petitions. In 1997, after Mr. Pratt had been incarcerated for 27 years, the conviction was finally overturned because the government had violated its *Brady* obligation by failing to turn over evidence to the defense. Among other things, the court found that Mr. Butler had been an FBI informant for at least three years prior to the trial, that Mr. Butler had provided information to the FBI on at least 30 occasions, and that Mr. Butler had also been an informant for the Los Angeles Police Department.

## FOOTNOTES

- <sup>60</sup> California Business and Professions Code Section 6068, “Duties of Attorneys,” [https://www.calbarxap.com/applications/CalBar/PDFs/code\\_section\\_6068.pdf](https://www.calbarxap.com/applications/CalBar/PDFs/code_section_6068.pdf). See also California Rules of Court, Rule 9.4, [http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9\\_4](http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_4). “In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: ‘As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.’” Judges also take a similar oath to support and defend the Constitution of the United States and the Constitution of California. California Constitution, *See* Article 20, Sec. 3
- <sup>61</sup> The California Bar Association has drafted some proposed rules using the relevant language from Model Rules 3.8, but they have yet to go before the California Supreme Court. Supreme Court approval is required before the rules become binding. *See* The California Bar Association, Proposed Rules of Professional Conduct, 2010, <http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Proposed%20Rules%20of%20Professional%20Conduct%20v.24%20%287-21-14%29.pdf>.
- <sup>62</sup> *U.S. v. Olsen*, (Judge Kozinski dissenting) at 15.

Mr. Pratt also presented evidence that the FBI knew that he was not in the LA area at the time of the crime and was in fact at the BPP meeting in Oakland. The evidence included a declaration by a 25-year FBI veteran who had heard another agent state that Mr. Pratt had been in Oakland at the time of the murders. Evidence later surfaced that wiretaps installed in both the LA and Oakland Black Panther hangouts confirmed Mr. Pratt's presence in Oakland. The police had originally claimed that the information from the wiretaps had been destroyed.<sup>63</sup> None of this information had been turned over to the defense prior to trial.

Ten years after Mr. Pratt's release, in Sacramento County, another man was wrongfully convicted due to the withholding of *Brady* information connected to an FBI informant.<sup>64</sup> Eric McDavid had been arrested on charges that he and two others conspired to build bombs to destroy the Sacramento Nimbus Dam, a U.S. Forest Services Lab, and cellphone towers. No attacks took place. In 2007, at age 29, he was convicted and sentenced to 20 years in prison.<sup>65</sup>

In November 2014, in response to a Freedom of Information Act request filed by Mr. McDavid, the government provided a series of emails to Mr. McDavid's defense attorneys. The emails related to communications between Mr. McDavid and a key witness in the government's case who had been an FBI informant. In the emails, the informant promised a romantic relationship with Mr. McDavid once a series of attacks against government targets were carried out. She urged Mr. McDavid to attack the targets with promises of a sexual relationship. She also provided money, food, and shelter over an 18-month period while she was influencing Mr. McDavid to plan the attacks. The emails had been found in files in the FBI's Sacramento Office and the prosecutors claimed that they knew nothing of the letters at the time of the trial.

Mr. McDavid's conviction was reversed due to the *Brady* violation. He subsequently agreed to plead guilty to a lesser charge of conspiring to attack a government facility in exchange for a five year prison sentence. He also promised not to appeal or sue the government. He was released in January of 2015 because he had already served nine years.

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## FOOTNOTES

<sup>63</sup> Kate Coleman, "Elmer 'Geronimo' Pratt: The Untold Story of the Black Panther Leader, Dead at 63," *The New Republic*, June 27, 2011, <http://www.newrepublic.com/article/politics/90735/black-panther-geronimo-pratt-murder-conviction-prison-huey-newton>.

<sup>64</sup> Mr. McDavid is not in our database, and the errors and costs in his case are not reflected in our totals, because his exoneration came after we had stopped collecting cases. Summary of the proceedings against Mr. McDavid are based on newspaper accounts and online sources. See Danny Walsh and Sam Stanton, "Convicted 'eco-terrorist' freed amidst claims FBI hid evidence," *The Sacramento Bee*, January 8, 2015, <http://www.sacbee.com/news/local/crime/article5641188.html>; "Convicted 'eco-terrorist' freed amid evidence dispute," *USA Today*, January 9, 2015, <http://www.usatoday.com/story/news/nation/2015/01/09/eco-terrorist-freed/21528535/>; Wikipedia, accessed March 26, 2015, [http://en.wikipedia.org/wiki/Eric\\_McDavid](http://en.wikipedia.org/wiki/Eric_McDavid).

<sup>65</sup> Age calculated from <http://www.sacbee.com/news/local/crime/article5641188.html>.

The topic of prosecutorial immunity from liability is closely connected with *Brady* and prosecutorial misconduct. Prosecutors are absolutely immune from civil lawsuits, meaning that they cannot be held liable for their conduct as prosecutors even if they act knowingly and intentionally, and even if their intentional acts result in the deliberate conviction of an innocent person. We are not aware of any other profession—including police officers—that receives such immunity from intentional wrongdoing that gravely injures another.

While prosecutors have strongly advocated to keep their immunity, the existence of absolute immunity raises many concerns and the lack of accountability seems likely to contribute to the prevalence of prosecutorial misconduct. It has been argued that “[t]he main problem with absolute immunity for prosecutors is the incentives it creates. The problems with shielding a public servant in whom we grant the enormous powers granted to prosecutors should be pretty self-evident. Now consider that nearly every professional incentive (reelection, promotions, election to higher office, high-paying jobs at white-shoe law firms) points prosecutors toward procuring as many convictions as possible, and that courts and bar organizations are notoriously lax at sanctioning misconduct. You get a system that not only fails to sanction bad behavior, but also often rewards it.”<sup>66</sup>

In 2014, the California legislature introduced California State Assembly Bill 885 (AB 885). The bill addressed only prosecutorial misconduct that was (a) revealed during trial (a substantial minority of all known *Brady* violations) and (b) determined by a judge to be intentional. Its remedy was measured: the judge was permitted, but not required, to inform the jury of the prosecutor’s intentional misconduct, and further could inform the jury that it was free to consider that fact in its assessment of the defendant’s innocence or guilt. AB 885 passed both houses of the California legislature but was vetoed by Governor Brown because “judges have an array of remedies at their disposal if a discovery violation comes to light during trial.”<sup>67</sup> The veto has been sharply criticized.<sup>68</sup> While the need for prosecutors to have the freedom to pursue their cases in good faith without fear of civil liability is plain, it is troubling that such a modest and carefully tailored remedy for intentional acts of misconduct is not the law in California.<sup>69</sup>

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## FOOTNOTES

<sup>66</sup> Radley Balko, “7th Circuit Pokes a Hole In Prosecutorial Immunity,” *The Washington Post*, January 30, 2014, <http://www.washingtonpost.com/news/opinions/wp/2014/01/30/7th-circuit-pokes-a-hole-in-prosecutorial-immunity/>.

<sup>67</sup> Text of the veto message can be found at: [http://gov.ca.gov/docs/AB\\_885\\_Veto\\_Message.pdf](http://gov.ca.gov/docs/AB_885_Veto_Message.pdf).

<sup>68</sup> Radley Balko, “Jerry Brown Vetoes Bill Aimed At Holding Prosecutors More Accountable,” *The Washington Post*, October 1, 2014, <http://www.washingtonpost.com/news/the-watch/wp/2014/10/01/jerry-brown-vetoes-bill-aimed-at-holding-prosecutors-more-accountable/>.

<sup>69</sup> Texas is the first state in the nation that has sent a prosecutor to jail for his part in a wrongful conviction. See Mark Godsey, “For the First Time Ever a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man,” *The Huffington Post*, November 8, 2013, [http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a\\_b\\_4221000.html](http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html).

## Judicial Mistake During Trial

\$32 million overall (14% of the total cost)

\$194,962 average cost per error

22% of the errors

- Judicial mistakes during trial include **jury misconduct, improper jury instructions, erroneous admission or exclusion of evidence, and Sixth Amendment violations such as witness confrontations, failure to seat an impartial jury, and denial of the right to self-representation.**
- Judicial mistakes were distributed evenly across types of crimes, with 16% in drug cases, 13% in prosecutions for lewd act on a minor, 12% in homicide cases, and 11% in assault causes.
- Judicial mistakes accounted for 22% of the errors but only 14% of the total cost.
- The total cost associated with judicial mistakes was \$32 million.

### JURY MISCONDUCT

Jury misconduct includes any improper act by a juror, including the failure to be forthcoming during jury selection or discussing the case with non-jury members during deliberations. Jury misconduct is one of many errors that can hide other types of error, mistake and misconduct.<sup>70</sup>

On January 9, 1997, a man was killed at a party in Marin County. Police suspected that the victim was shot in retaliation for an earlier altercation between the victim and another man about drugs. The police questioned Darrell Hunter because he had been associated with the other man involved in the altercation, but Mr. Hunter denied being at the party. Despite his denials, 23-year-old Mr. Hunter was charged with murder, burglary, false imprisonment, assault with a deadly weapon, and possession of a firearm. During the trial several witnesses identified Mr. Hunter as being at the party. He testified that he was with the man involved in the earlier altercation on the night of the party, but that he did not enter the party and remained outside. On February 2, 2000, Mr. Hunter was convicted of murder and sentenced to life in prison without the possibility of parole. Shortly thereafter, Mr. Hunter's attorney learned that one of the jurors did not answer truthfully and withheld information when questioned during jury selection. The court agreed that there had been juror misconduct and reversed the conviction.

### FOOTNOTES

<sup>70</sup> Judicial error, and the case of Mr. Hunter, illustrates why some of the numbers in this report may differ from the National Registry of Exonerations. Although the actual ground for reversal of Mr. Hunter's conviction was the juror misconduct, the NRE categorizes Mr. Hunter's exoneration as eyewitness mistake. Although there was eyewitness error, we have categorized the error as juror misconduct because that is the basis on which the court reversed the conviction.

Mr. Hunter was retried in January of 2008. He had a different attorney who presented some new evidence, including the fact that witnesses said the shooter held the gun in his right hand but that Mr. Hunter was left handed, and the fact that the gun found at the scene had someone else's palm print on it. In addition, counsel argued that police lineup procedures were improper because Mr. Hunter was in prison clothes when others in the lineup were not. The jury returned a verdict of not guilty, and Mr. Hunter was released on April 30, 2008, after 10 years in prison.

## FAULTY JURY INSTRUCTIONS

Jury instruction errors vary, but examples include misstating the applicable law, failing to provide information about lesser-included offenses, and instructing the jury in a manner that improperly sways the jury's opinion or decision-making process.

Lisa Pineda and her co-defendant were involved in an intimate abusive relationship in Los Angeles County. In 2004, the co-defendant shot and killed someone in a gang-related shooting. A few days earlier, the co-defendant had beaten Ms. Pineda because she had asked him to move out, and during that altercation he had told her that he had a gun. On the day of the shooting, he made Ms. Pineda drive him to the store even though she told him that she was not feeling well. He then insisted that she drive him to a particular house. Fearing more abuse, she agreed. While in the car, he suddenly shot the victim, who was outside the house. Ms. Pineda testified that she did not know he had a gun in the car and did not know that he was planning to shoot anyone. The government later charged Ms. Pineda, age 26 and the co-defendant with murder, and both were convicted.<sup>71</sup> Ms. Pineda received a sentence of forty years to life. The appeals court reversed her conviction because the trial judge had given incorrect jury instructions, failing to instruct the jury on the lesser-included offense of involuntary manslaughter.

Ms. Pineda was retried. On retrial, after hearing evidence of the abuse that had not been presented in the first trial, she was found not guilty of murder and the jury was unable to reach a decision on involuntary manslaughter. A mistrial was declared on the involuntary manslaughter charge and the government dismissed the case.

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### FOOTNOTES

<sup>71</sup> Ms. Pineda's age was obtained from the National Registry of Exonerations.

## EXCLUSION OR INCLUSION OF EVIDENCE

Juries in criminal trials can consider evidence only if it has been admitted by the court; the prosecution and the defense must present their proposed evidence to the judge before trial so that the judge can decide what will be admitted and what will be excluded. When the judge excludes or admits evidence improperly, the result can be an unfair trial and an unjust conviction. A judge might, for example, improperly refuse to admit evidence that impeaches a witness' credibility. Or the judge might improperly admit unsubstantiated scientific evidence (such as lie detector results or testimony derived from hypnosis) or permit an expert witness to overstate the certainty of conclusions drawn from scientific evidence. Although we have called this judicial error because the judge makes the ultimate decision about what evidence is permitted, these errors can often also be attributed to inadequate representation on the part of the defense attorney, or inadequate training and experience on the part of the prosecutor. The judge, however, remains the final arbiter.

In 1997, a 14-year old girl told her drug counselor that her boyfriend had raped her nine months earlier while at a resort with her family in Lake County. When the counselor informed her that they had to report the rape to authorities, the girl changed her story and said that Brendan Loftus and his friend had raped her. She described being tied to a bedpost by the friend and cut with a knife. Both Mr. Loftus, age 23, and his friend were arrested and charged with rape.<sup>72</sup> Mr. Loftus testified that he had been at the resort and had seen his friend with the girl, but that he had been at the pool during the alleged attack. Two witnesses testified that they saw him at the pool, and 15 character witnesses testified on Mr. Loftus' behalf. Other evidence included the facts that there were no bedposts on the bed, that the victim had given several conflicting reports, and that Mr. Loftus weighed 140 pounds and would not have been able to restrain the 200-pound victim.

The victim's diary was made available to the defense. After reporting the rape, the victim had ripped the pages from her diary that corresponded to the time of the alleged attack. She said she did so because she was angry that her counselor had read them, but the counselor stated that she never read the diary. In addition, eight months after the alleged rape, the victim had written a diary entry about having sex for the first time with another man. The defense sought to have the diary introduced into evidence, but the judge refused. Mr. Loftus was convicted of rape in 1997 and sentenced to five years in state prison.

After Mr. Loftus filed an appeal, the court held a hearing and heard testimony from the man referred to in the diary entry. The man testified about his belief that the victim had been a virgin when he had sex with her, eight months after the alleged rape. In 2000, the California Court of Appeal vacated Mr. Loftus' conviction. The court held that, given the inconsistent testimony of the victim, the introduction of the diary into evidence could have raised a reasonable doubt as to Mr. Loftus' guilt or innocence. Mr. Loftus' case was finally dismissed in 2000.

### FOOTNOTES

<sup>72</sup> Mr. Loftus' age was obtained from the National Registry of Exonerations.



## Problems with Eyewitness Testimony

\$31 million overall (14% of the total cost)

\$714,172 average cost per error

6% of the errors

- Problems with eyewitness testimony include **eyewitnesses who retract their testimony, eyewitnesses who are found to be unreliable or lying, eyewitnesses who are mistaken in their identifications, and police eyewitness identification practices that are improper or inadequate and result in mistaken or false identifications.**
- Eyewitness identification problems occurred most often when the individual was erroneously convicted of homicide (41%), followed by cases in which the individual was erroneously convicted of lewd act on a minor (25%) and rape (16%).
- Eyewitness identification accounted for 6% of the errors, but 14% of the cost.
- Total cost associated with eyewitness identification was \$31 million.

Mistaken eyewitness identifications plague our criminal justice system, and yet eyewitness testimony continues to be heavily relied upon by courts, prosecutors, and juries. In several of the cases we reviewed, eyewitness testimony was the only evidence linking the individual to the crime.

Misidentifications are one of the most common types of error found in convictions of the innocent,<sup>73</sup> and a growing body of research continues to document concerns and flaws.<sup>74</sup>

In 1979, Kevin Lee Green was a 21-year old corporal in the United States Marine Corps, living in Orange County with his 20-year old pregnant wife. On the morning of September 30, 1979, Mr. Green drove to Jack in the Box. When he arrived home he found his wife unconscious in their bedroom. She had been raped, strangled, and hit in the head. Mr. Green called the police and an ambulance. His wife eventually woke up but she had no memory of the event, had forgotten how to speak, and needed constant care. The baby was stillborn. The police focused on Mr. Green as a suspect. Mr. Green and his wife had had a tumultuous marriage and the police had been called to their home on several occasions. Although Mr. Green reported to police that he had seen another man loitering in the apartment complex when he left to get food that day, their attention remained on Mr. Green. In 1980 he was arrested and tried for murder. At trial, despite her memory loss, his wife testified that the couple had quarreled about having sex and that Mr. Green had beaten and raped her. The cashier at the Jack in the Box provided an alibi for Mr. Green and the police report confirmed that the hamburgers were still warm when the first responders arrived on the scene. Mr. Green was sentenced to 15 years to life for the murder of their unborn

### FOOTNOTES

<sup>73</sup> “Eyewitness Misidentification,” The Innocence Project, accessed December 19, 2014, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

<sup>74</sup> The National Academy of Science, “Identifying the Culprit: Assessing Eyewitness Identification,” (Washington D.C.: National Academies Press, 2014).

child, assault with a deadly weapon, and the attempted murder of his wife. The only evidence against him was his wife's testimony. Mr. Green maintained his innocence throughout his entire time in prison. He petitioned the California Supreme Court but the trial court decision was affirmed in 1982.

After the California DNA database was established, it was discovered that the DNA found at the scene matched that of a serial killer. In 1996, the true perpetrator confessed to the wife's attack as well as to five other murders. The district attorney brought a petition for habeas corpus in the trial court based on the newly discovered DNA evidence. Mr. Green was released after serving 16 years in prison. He was awarded \$620,000 by the State of California for his wrongful conviction in 1999.

In 2014, the National Academy of Science released a seminal report on eyewitness identification in which the authors noted that “[T]he law enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. These efforts, however, have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continuing presence of actions and statements at the crime scene and elsewhere that may intentionally or unintentionally influence eyewitness’ identifications.”<sup>75</sup> The report identified a number of promising and research-based practices that have been found to reduce inaccurate or erroneous identifications, often referred to as “false positive” identifications, including:

- The use of blind procedures in lineups (i.e., administration of the photographs by an officer who does not know who the suspect is, or whether the suspect is in the lineup);
- Ensuring that other people in the lineup resemble the suspect so that the suspect does not stand out for any particular reason;
- Instructing the witness that the suspect may or may not be in the lineup and that the witness should not look to the administrator for guidance;
- Telling the witness that the investigation will continue regardless of whether an identification is made;
- Having the witness write a statement indicating the level of confidence in their identification immediately following the lineup; and
- Recording the lineup to ensure that best practices are followed.<sup>76</sup>

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## FOOTNOTES

<sup>75</sup> The National Academy of Science, “Identifying the Culprit: Assessing Eyewitness Identification,” at 2. (Washington D.C.: National Academies Press, 2014).

<sup>76</sup> The National Academy of Science, “Identifying the Culprit”. See also “Eyewitness Identification,” The Innocence Project, accessed December 19, 2014, <http://www.innocenceproject.org/fix/Eyewitness-Identification.php>.

Some counties in Northern California, such as Santa Clara County, are embracing these best practices, as are cities of Los Gatos and El Cerrito.<sup>77</sup> San Francisco County adopted the use of sequential lineups and photo spreads,<sup>78</sup> and Alameda County has been working to implement eyewitness best practices.<sup>78</sup>

In January of 1995, a man saw someone breaking into his truck in Santa Clara County. He shouted, and the perpetrator left the truck and got into a nearby Trans Am. The victim said that the woman driving the Trans Am had pointed a gun at him, and had then driven away in the Trans Am with the perpetrator. The police were able to trace the license plate on the Trans Am. Later that day, Kenneth Foley's wife borrowed the Trans Am from the registered owner, and let Mr. Foley drive the car. Twenty-six-year-old Mr. Foley was pulled over while driving the Trans Am. The witness identified Mr. Foley and the owner of the Trans Am as the perpetrators in photo lineups.

Mr. Foley was tried and convicted by jury for his alleged involvement in the unsuccessful theft of a car stereo. Two witnesses at Mr. Foley's trial testified that they were, in fact, the actual perpetrators of the crime and denied that Mr. Foley had any involvement. He was nonetheless convicted based almost exclusively on the testimony of the single eyewitness. Throughout this time Mr. Foley maintained his innocence.

Mr. Foley was sentenced to a "three strikes" sentence of 25-to-life in state prison. His appeals were denied. In 2006, the District Attorney's office re-opened its investigation and determined that there had been no gun, and that there was strong possibility that Mr. Foley did not commit the crime. Mr. Foley's conviction was finally vacated in 2007, after the district attorney joined in a habeas petition brought by the Northern California Innocence Project. By then Mr. Foley had been in prison for more than 11 years. His claim for compensation from the state Victim Compensation and Government Claims Board was subsequently denied because the Board found that he did not prove his innocence and did not prove that he did not intentionally contribute to his arrest or conviction.

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## FOOTNOTES

- <sup>77</sup> Police Chief's Association of Santa Clara County, "Line-up Protocol for Law Enforcement, accessed March 26, 2014, <http://www.ccfaj.org/documents/reports/eyewitness/expert/Santa%20Clara%20County%20Eyewitness%20Identification%20Protocols.pdf>. Also to be commended are Police Chief Greg Suhr from San Francisco, Chief Scott Seaman from Los Gatos (an Executive Fellow and Past President of the California Police Chiefs' Association) and Chief Sylvia Moir from El Cerrito.
- <sup>78</sup> Ari Burack, "New Police Protocols in San Francisco could help witnesses ID criminals," *The San Francisco Examiner*, November 23, 2011, <http://www.sfoxaminer.com/sanfrancisco/new-police-protocols-in-san-francisco-could-help-witnesses-id-criminals/Content?oid=2186742>.
- <sup>78</sup> Mistaken eyewitness identification played a role in 56 of the National Registry of Exoneration's 154 California state cases; almost half of those 56 came from Los Angeles County.

## Ineffective Assistance of Counsel (IAC)

\$27 million overall (12% of the total cost)

\$327,870 average cost per error

11% of the errors

- IAC includes **failure to adequately represent, failure to investigate, and failure to act competently on the part of defense counsel.**
- The largest share of the IAC was concentrated in homicide cases (27%), with another 19% in drug cases.
- IAC accounted for 11% of the errors and 12% of the total cost.
- Total cost associated with IAC was \$27 million.

An individual's right to effective counsel is guaranteed by the Sixth Amendment of the Constitution.<sup>80</sup> Situations in which a defendant does not receive such effective representation are referred to as Ineffective Assistance of Counsel (IAC). Just as prosecutorial misconduct includes a variety of errors attributed to prosecutors, IAC includes a variety of errors attributed to defense counsel. In order to demonstrate IAC, the defendant must show that his or her attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.<sup>81</sup>

In this report we have grouped all types of ineffective assistance together and have categorized them all as error on the part of defense counsel. IAC can arise at almost any stage of an attorney's representation, and may include failing to adequately investigate a case before trial, not calling the appropriate witnesses or experts to the stand during trial, or failing to object to the introduction of improper evidence during trial, among other things.

Because claims of ineffective assistance can encompass almost anything that occurs during or before trial, our classification has the impact of attributing certain errors to defense counsel when in reality they may have been committed by more than one actor or part of the criminal justice system. For example, some of the IAC cases in this sample were caused because the defense attorney did not pursue a motion regarding a Fourth Amendment violation committed by the police. The initial mistake was made by the police, who failed to comply with the Fourth Amendment. As a matter of the judicial record, however, the proximate error justifying reversal was the ineffectiveness of defense counsel in failing to object to the erroneous search, and therefore we have classified it as ineffective assistance of counsel.

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### FOOTNOTES

<sup>80</sup> Gideon v. Wainwright, 372, U.S. 335 (1963); Strickland v. Washington, 466 U.S. 668 (1984).

<sup>81</sup> Strickland v. Washington, at 669.

On July 8, 2002, in Los Angeles County, an African-American man opened fire on two men in South Los Angeles, wounding one and killing the other. Two witnesses at a nearby liquor store identified twenty-year-old DeAndre Maurice Howard from a photographic lineup administered by the police. One of the eyewitnesses later recanted her identification. Mr. Howard pleaded not guilty and went to trial in 2003. He was found guilty of murder after a six-day trial, and sentenced to 75 years to life in state prison. Two years later, the surviving victim of the shooting gave a sworn statement that Mr. Howard was not the shooter, and stated further that had he been called at trial he would have testified that Mr. Howard was not the shooter. Mr. Howard filed numerous appeals and habeas petitions, all of which were denied until 2011, when the court held that Mr. Howard was entitled to an evidentiary hearing on his claim that his trial attorney was ineffective because he failed to interview or call the surviving victim as a witness. After listening to testimony at the hearing, the court reversed Mr. Howard's conviction and set the case for a new trial. In 2013, after a nine-day jury trial, Mr. Howard was found not guilty on all charges and released the same day. He spent 11 years in custody.

In 1990, twenty-eight-year-old Kelvin Wiley was arrested and charged with burglary and assault of his former girlfriend in San Diego County. The former girlfriend testified that Mr. Wiley entered her apartment in a rage, hit her repeatedly with a wrench and strangled her with a belt until she lost consciousness. She also said that he attacked her because she tried to break off their relationship. Mr. Wiley testified that he had been at his apartment at the time of the crime. His landlord testified that he saw Mr. Wiley's truck in front of his home and did not see Mr. Wiley enter or exit his apartment on the day in question. Mr. Wiley testified that it was he who had broken off the relationship and since that time she had been following him and harassing him. On the night before the attack he had declined a dinner invitation from her and accidentally ran into her at a restaurant while he was having dinner with a friend. He returned home to find an obscene note on his door. Based almost solely on the ex-girlfriend's testimony, Mr. Wiley was convicted of battery with serious bodily injury and sentenced to four years in prison. He subsequently alleged ineffective assistance of counsel because his attorney failed to interview several key witnesses, including neighbors who saw the ex-girlfriend leave her home in the morning and who saw another man banging on her door shouting to be let in. The court found that Mr. Wiley's counsel had been ineffective, and the case was dismissed.

Yvonne Eldridge was an experienced foster parent in Contra Costa County who was selected to participate in a fragile infant care program for babies born with grave medical problems. When two young infant girls under her care had multiple medical ailments requiring major medical interventions, she was referred to Child Protective Services and eventually was prosecuted for child abuse.

Her trial took place in May of 1996. The babies at issue included one who was born seven weeks premature to a drug-abusing mother, and a baby with a birth weight of only 1½ pounds. Both had problems feeding and breathing, and issues with their bowel movements. Both had tubes placed into their stomachs for feeding. One of the girls had 24 hospitalizations, 13 ER visits, and 200 outpatient visits. Both of the babies ended up being removed from Ms. Eldridge's care and their conditions improved over time. The prosecution argued that Ms. Eldridge had Munchausen-by-proxy syndrome whereby she would lie about the ailments of children in her care in order to get attention from doctors and medical personnel. The defense was able to exclude mention of Munchausen-by-proxy but the prosecution was still able to argue that Ms. Eldridge had manufactured her foster children's illnesses and as a result the babies endured unnecessary medical procedures. In 1996, at age 43, Ms. Eldridge was found guilty of child abuse and was sentenced to three years in state prison.

Ms. Eldridge filed a motion for a new trial, arguing that her attorney had been ineffective. Her trial attorney had failed to call witnesses who could have confirmed that the babies were genuinely ill, and had failed to call a medical expert on Ms. Eldridge's behalf although the prosecution had called two medical experts. The defense attorney had consulted with a doctor on the case, but had given the doctor only a limited portion of the medical records that had been prepared by the prosecution. The doctor was never hired as an expert witness and was not provided adequate or complete medical records to form a solid medical opinion. The doctor stated that after reviewing the complete medical files, he would have testified that there were likely medical explanations other than abuse and that the symptoms described were consistent with the medical histories of the two children. He further stated that the issues suffered by the two girls were possibly the result of side effects of medications given by the doctors and that there were several instances of medical mistake. Finally, Ms. Eldridge provided evidence that one of the prosecution's medical experts had a history of accusing women of Munchausen-by-proxy, that he had made a pass at Ms. Eldridge but had been rejected, and that he had a history of making sexual advances to patients and hospital staff. Ms. Eldridge's motion was granted in 2002 and in January 2003 the district attorney chose to dismiss the case rather than proceed with a new trial.

## Failure of Prosecutorial Discretion

\$19 million overall (9% of the total cost)

\$165,503 average cost per error

15% of the errors

- Failures of prosecutorial discretion include **court rulings that there was insufficient evidence to support the conviction**, a finding that **the conviction could not be upheld because the defendant’s conduct did not meet the definition of the crime, or a dismissal because the prosecution violated the statute of limitations or double jeopardy**.
- These errors were distributed across all types of convictions, with the largest concentrations in drug cases (16%), prosecutions for failing to register as a sex offender (11%), fraud, forgery or embezzlement (9%), and homicide (9%).
- These errors accounted for 15% of the errors but only 9% of the cost.
- Total cost associated with failures of discretion was \$19 million.

From time to time, convictions are overturned because the conduct that has been proved does not fit the definition of the crime charged or is determined by a court not to be criminal conduct. In addition, convictions can be overturned when it is determined that the prosecution proceeded in violation of the double jeopardy clause in the Constitution or brought the case after the end of the statute of limitations. We have grouped these errors as “failures of prosecutorial discretion.” They have been combined with cases in which a trial judge or an appellate court has ruled that, given the evidence presented at trial, no reasonable trier of fact could have convicted the defendant beyond a reasonable doubt.<sup>82</sup>

We group these errors and use the term “failure of discretion” because all of these errors reflect a prosecutor’s decision to proceed with a case when the evidence, facts, or law do not support the prosecution. There is an obvious complexity that accompanies this sort of retrospective assessment of error, as there may well be instances where the good faith pursuit of a criminal case that ends up being unsuccessful is a reasoned and appropriate decision. At the same time, not only is it the obligation of the prosecutor to review all the evidence and proceed only when the evidence warrants it, but it is an obligation given specifically to the prosecutor in his or her sole discretion, and one with tremendous negative downstream implications for those charged whether or not the individual is ultimately exonerated.

In addition, the selection of which charges to bring for conduct that a prosecutor believes in good faith to be criminal can be a substantial and complex undertaking, and the decision regarding what to charge may be based upon information known to the prosecutor or believed to be true that is either excluded from evidence or subsequently found to be false. In such instances, the error would not be the levying of the

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### FOOTNOTES

<sup>82</sup> The United States Supreme Court has stated that “[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The California state standard is articulated in *People v. Johnson*, 26 Cal. 3d 557, 578 (1980). “[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence, that is evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”

initial charges, but the decision to proceed to trial with unavailable or compromised evidence. Likewise, a court finding of insufficient evidence may indicate that the prosecutor misjudged or overestimated the value and strength of the evidence against the defendant to an unreasonable extent, as subsequently determined by an objective observer (the court). These errors as a whole reflect misjudgment or overzealousness by the prosecution and are therefore grouped as “failure of discretion.”

In 1980 a Los Angeles man was found dead in the basement of his fix-it shop. Next to his body were three different size posts that were part of a turnstile unit typically found in grocery or retail stores. It was believed that the murder weapon was the three-foot post. In 1985, five years after the murder, the police matched some fingerprints on the alleged murder weapon to 25-year-old Melvin Mikes. Although no other prints were found in the shop and there was no evidence that placed Mr. Mikes at the shop on the day of the crime, Mr. Mikes was charged with first-degree murder and robbery. He pleaded not guilty and went to trial.

The fingerprints found on the post were the only piece of evidence linking Mr. Mikes to the crime. There were a total of 46 prints on the post, of which only sixteen were identifiable. Of those sixteen, six belonged to Mr. Mikes. None of Mr. Mikes’ prints were found anywhere else in the fix-it shop, including the area where jewelry boxes were found strewn about. There was an alibi witness who would have testified that Mr. Mikes was elsewhere at the time of the murder, but the defense never called her to the stand.

Mr. Mikes was convicted of first-degree murder and sentenced to 25 years to life. Six years later, in 1991, the court found that there was insufficient evidence to convict Mr. Mikes of murder since the prints could have been made prior to the crime and there was no other evidence connecting him to the murder. Mr. Mikes was released in 1992, after seven years of incarceration.

Prabhat Goyal, the Chief Financial Officer of Network Associates Inc., (NAI) formerly MacAfee, was charged in federal court with one count of securities fraud, six counts of making material false statements to auditors, and six counts of making false filings with the Securities and Exchange Commission. The prosecution challenged the accounting method used by NAI under Mr. Goyal’s supervision, and alleged that NAI was overstating its revenue.

Mr. Goyal was convicted at trial in 2007. On appeal, the court found no evidence that a crime had been committed, and held that the government did not prove that any technical accounting violations materially affected the revenue reported by the company. Further, the government did not prove that Mr. Goyal knowingly made false statements. The case was overturned in 2010. Judge Kozinski, in a concurring opinion, wrote, “This is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds.”<sup>83</sup>

## FOOTNOTES

<sup>83</sup> U.S. v. Goyal, 629 F.3d 912 (2010), (Kozinski concurring)



## Unreliable or Untruthful Official Testimony

\$15 million overall (7% of the total cost)

\$615,873 average cost per error

3% of the errors

- Unreliable or untruthful official testimony includes **testimony from police officers, confidential informants, and jailhouse informants.**
- Official testimony problems occurred most often in homicide cases (50%), followed by drug cases (46%).
- Unreliable or untruthful official testimony accounted for 3% of the errors, but 7% of the cost.
- Total cost associated with official testimony was \$15 million.

Unreliable or untruthful testimony, whether by police officers or by government-sponsored confidential informants, reflects a problem with the investigative arm of the prosecution. Although the sources of error are different (officer testimony or informant testimony), the structural reasons behind the errors are similar in that each may be the result of institutional pressure to obtain a conviction against a particular defendant.<sup>84</sup> Such errors are often multi-stakeholder errors—law enforcement has generated the error during its investigation; the prosecutor has failed to identify the unreliability or lack of truthfulness in his or her assessment of how to bring the case to trial; and the defense counsel, judge, and jury are unaware of the lack of truthfulness or credibility and are thus unable to serve in their intended “check and balance” roles.

In 1978, a man was shot and killed at a bathhouse in Los Angeles County. Several months after the murder, a man contacted police and implicated Oscar Lee Morris in the murder. The man had known Mr. Morris since childhood but they had recently had a falling out. The case was mistakenly closed in 1979 but in 1982, after being arrested for auto theft, the man again told police that Mr. Morris had committed the murder. Mr. Morris was serving an unrelated eight-year prison sentence at the time. At trial the witness testified that he drove Mr. Morris to the bathhouse and gave him the murder weapon. The witness stated that Mr. Morris had told him that he had to kill a homosexual. The witness also testified that he had received nothing in return for his testimony. After a five-day jury trial, thirty-seven-year-old Mr. Morris was found guilty of both the murder and robbery. He was sentenced to death in 1983.

It was later discovered that the witness had received considerable leniency for testifying: His auto theft charge had been reduced, his sentence for a parole violation had been terminated, and the prosecutor had written two letters on his behalf asking a fellow prosecutor and the parole board to grant him leniency

### FOOTNOTES

<sup>84</sup> In August of 2011, California Governor Jerry Brown signed SB 687, which requires that informant testimony be corroborated by other evidence. With the passage of SB 687 defendants can no longer be convicted solely on the basis of informant testimony. See, “Unreliable Witness,” Editorial, *Los Angeles Times*, August 11, 2011, <http://articles.latimes.com/2011/aug/11/opinion/la-ed-informants-20110811>.

in reward for his testimony against Mr. Morris. None of this information was made available to the defense. Mr. Morris appealed his conviction and sentence on multiple grounds, including the withheld information about the informant. The robbery conviction and death sentence were reversed, but the murder conviction remained. The court acknowledged that the prosecutor violated Mr. Morris' Constitutional rights when he withheld information regarding the leniency given to the witness, but decided that the violation was harmless. The case was remanded for resentencing and Mr. Morris was resentenced to life plus two years.

In 1997, the witness against Mr. Morris recanted his testimony and stated that he had fabricated the entire story. Mr. Morris then filed a habeas petition and his conviction was reversed based on the false testimony. The district attorney chose not to retry Mr. Morris and he was released in 2000 after spending sixteen years in prison, six of them on death row.

In 1979 a man was killed in Long Beach, Los Angeles County. One of the witnesses was shown a picture of Thomas Lee Goldstein and identified him as the potential shooter but noted that he was not certain. Mr. Goldstein did not match the witness's description of the perpetrator. Despite the lack of evidence, 29 year-old Mr. Goldstein was arrested and placed with a jailhouse informant named Eddy Fink, who later told police that Mr. Goldstein had confessed. There was no physical evidence that tied Mr. Goldstein to the crime. Mr. Goldstein went to trial. The informant testified against Mr. Goldstein, and testified that he (the informant) received no benefit for his testimony and that he had never received benefits from cooperating with the police. In 1980 a jury found Mr. Goldstein guilty of the murder and he was sentenced to 27 years to life in state prison. Mr. Goldstein filed numerous unsuccessful appeals.

In 1990 a Grand Jury investigation found that the Los Angeles District Attorney's Office had regularly presented false testimony by jailhouse informants from 1979 to 1990. In 1998 Mr. Goldstein filed a federal habeas petition claiming that the prosecution withheld *Brady* evidence by failing to reveal that the jailhouse informant received benefits in exchange for his testimony. Mr. Goldstein also argued that there was *Brady* evidence related to the eyewitness identification of Mr. Goldstein, because the police had coached the witness by pointing out Mr. Goldstein in the photo spread during the identification. Mr. Goldstein also alleged that his attorney had been ineffective.

In 2000, the eyewitness recanted his testimony. He stated that he did not initially recognize anyone in the lineup but police coached him into pointing out Mr. Goldstein. In 2002 the court agreed with Mr. Goldstein and ordered him released or retried. The district attorney initially filed new charges and Mr. Goldstein remained in custody, but the district attorney eventually decided to dismiss the charges. Mr. Goldstein was released after serving 24 years in prison.

Mr. Goldstein filed a civil suit against the city and county, the police department, the district attorney and his chief deputy. The California Supreme Court ruled that the district attorney and his chief deputy had absolute immunity and could not be sued, but Mr. Goldstein settled with the city of Long Beach for almost \$8 million.

## Fourth Amendment Violations

\$12 million overall (5% of the total cost)

\$78,377 average cost per error

19% of the errors

- Fourth Amendment violations occur when the police violate the defendant’s Constitutional right to be free from unreasonable **search or seizure**, such as when the police search without a warrant.
- Fourth Amendment violations occurred overwhelmingly in drug cases (73%), with a smaller number in weapons cases (16%).
- Fourth Amendment violations accounted for 19% of the errors in our sample, but only 5% of the total cost.
- The total cost associated with Fourth Amendment violations was \$12 million.

The Fourth Amendment of the United States Constitution protects individuals against unreasonable searches and seizures. When the police violate a person’s Fourth Amendment rights, the court prohibits the government from using the illegally obtained evidence against that person even if the person committed the crime. This often results in dismissal of the case. Dismissals due to Fourth Amendment violations have been called “technicalities,”<sup>85</sup> but framing the debate in this manner focuses on the costs of the remedy (the exclusion of illegally obtained evidence) as opposed to its benefits (the protection of each American’s right of privacy).<sup>86</sup> Moreover, “if a rule is even subconsciously viewed as merely a technicality, the courts will far more easily let it bend to countervailing concerns and will defer to other legal actors’ judgments about whether the rule has been met or requires an exception. To avoid that result in the area of search and seizure law, a substantive vision of the Fourth Amendment’s value to our republic must replace the near-sighted view of mere technicalities.”<sup>87</sup>

Whether one values Constitutional enforcement or bemoans the suppression of evidence in these situations, a more productive conversation centers on error prevention. The question is not how we should or should not enforce Constitutional rights, but rather how we can ensure that police are properly trained and supervised so that future violations do not occur. Doing so will actually aid the purposes of law enforcement and ensure that individuals in possession of illegal materials are appropriately held accountable for their acts, and that valuable police and prosecutorial resources are not spent on cases tainted from the outset.

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### FOOTNOTES

<sup>85</sup> Andrew E. Taslitz, “Respect and the Fourth Amendment,” *94 Journal of Criminal. Law. & Criminology* 15 (Fall 2003): 28-29.

<sup>86</sup> Andrew E. Taslitz, “Respect and the Fourth Amendment,” *94 Journal of Criminal. Law. & Criminology* 15 (Fall 2003): 23-24.

<sup>87</sup> Andrew E. Taslitz, “Respect and the Fourth Amendment,” *94 Journal of Criminal. Law. & Criminology* 15 (Fall 2003): 29.

Heriberto F. was stopped by police in Los Angeles County during the day on May 3rd, 2006, when officers saw him riding his bicycle on the sidewalk and in the street against the flow of traffic. The officers asked him to get off his bicycle and began a pat down search, a permissible activity only if there is reasonable suspicion to believe that an individual is armed, dangerous, or committing a crime. After the pat down, the officers asked Mr. F. if he had any weapons or needles; 29 year-old Mr. F. volunteered that he had a knife in his jacket pocket that was draped over the handlebars of the bike. The officers arrested Mr. F., then performed a full search which uncovered several small baggies of methamphetamine and drug related paraphernalia. Mr. F. told the officers that he carried the knife for protection and that he sold some of the drugs to his friend. Mr. F. was charged with possession of methamphetamine for sale. He pleaded no contest and was sentenced to 180 days in jail and three years' probation.

Mr. F. appealed and the court reversed his conviction. The court found that the officers violated Mr. F.'s Fourth Amendment rights because they lacked reasonable suspicion to conduct the initial pat down search. There was nothing about Mr. F.'s actions or behavior that gave rise to a reasonable suspicion that he was armed or dangerous, and he should not have been searched simply for riding his bicycle on the sidewalk. On June 18, 2007, the trial court dismissed the case after the prosecution announced that it was unable to proceed because the evidence was suppressed.

## Ruse Reports

Ruse reports are fake reports—that is, false reports generated by law enforcement—that are sometimes used in police investigations to obtain confessions from suspects. In this legally sanctioned procedure, police will create a report demonstrating that the person being questioned has been implicated in the crime, then show the report to the suspect in an attempt to trick the suspect into confessing his or her participation in the crime. Ruse reports might state that fingerprints were found, that DNA was a match, or that other scientific findings point to the suspect. Although ruse reports are permissible, their ability to increase the potential for error, mistake, and false confessions is obvious.

In the case of fifty-four year old Michael Kerkeles in Santa Clara County, a ruse report caused serious harm when the investigator gave a ruse report to the prosecuting attorney along with the rest of a case file. A 22-year-old developmentally delayed woman had accused Mr. Kerkeles of rape. The woman stated that the assault took place on a pink and peach colored blanket but investigators were unable to obtain a coherent timeline from her. Her mother indicated that she was mentally only seven years old. Prior to trial, the prosecution held a preliminary hearing where the judge was called upon to determine whether there was sufficient evidence to proceed against Mr. Kerkeles. The prosecution lost two preliminary hearings because the court found that there was insufficient evidence to hold Mr. Kerkeles for trial.

At the third preliminary hearing, the district attorney introduced the ruse report into evidence. The ruse report indicated that there was semen on the blanket where the alleged assault took place. In fact there was no semen on the blanket, only some blood. After the third preliminary hearing, the defense attorney noticed that he had two different crime lab reports and learned that the analyst whose name was on one of the reports did not in fact exist. Faced with the falsified report, the district attorney initially sought to enter into a plea deal with Mr. Kerkeles. Mr. Kerkeles refused and the case was eventually dismissed prior to trial. Mr. Kerkeles filed a civil law suit and, in 2013, he won a settlement of \$150,000 plus legal fees. Mr. Kerkeles filed a petition of factual innocence but the District Attorney opposed the petition and the petition was denied.<sup>88</sup>

### FOOTNOTES

- <sup>88</sup> Information on this case was gathered from the following sources: Kerkeles v. City of San Jose, 199 Cal. App. 4th 1001 (2011); Leslie Griffy, “Sex case hinged on phony lab report,” *The San Jose Mercury News*, December 16, 2007, [http://www.mercurynews.com/politics/ci\\_7736235?nclick\\_check=1](http://www.mercurynews.com/politics/ci_7736235?nclick_check=1).

## Inadequate Police Practices Before Trial

\$21 million overall (10% of the total cost)

\$620,832 average cost per error

3% of the errors

- Inadequate police practices before trial include **obtaining confessions or statements in violation of the Fifth Amendment, cases in which new evidence was discovered after trial, and other inadequate or improper police practices.**
- Pretrial inadequate police practices accounted for 3% of the errors, but 10% of the cost.
- Total cost associated with inadequate police practices was \$21 million.

### FIFTH AMENDMENT VIOLATIONS

The Fifth Amendment to the United States Constitution protects defendants from self-incrimination, among other things. A violation of the Fifth Amendment is often referred to as a *Miranda* violation from the Supreme Court case, *Miranda v. Arizona* 384 U.S. 436 (1966), which held that statements made by a defendant in custody can be used against the defendant only if the police have previously warned the defendant that he or she has a right to remain silent, that anything he or she says might be used against him or her in court, and that he or she has a right to an attorney. Fifth Amendment violations include the failure to give timely *Miranda* warnings, as well as the improper use of coercive interrogation tactics to obtain a confession.

On December 25, 2007, in Los Angeles County, a security guard saw two people rummaging in debris inside the perimeter of a fence near a partially demolished building. The security guard called the police. An officer arrived and saw, but then lost sight of, Arturo M. Officers later found Mr. M. in a nearby pool hall, handcuffed him, and told him that he was not under arrest. They then asked him what he had been doing at the building. After further questioning, Mr. M. stated that he went into the building to get some wire.

Mr. M., age 40, was found guilty by a jury of burglary and sentenced to 16 months in state prison. On appeal, Mr. M. argued that the trial court erred in admitting his statements at trial because his questioning constituted a custodial interrogation and therefore he should not have been questioned without being advised of his Fifth Amendment *Miranda* rights. The court found that a reasonable person in Mr. M.'s position would have concluded that he was not free to leave after being placed in handcuffs. The appellate court reversed the conviction based on the erroneous admission of Mr. M.'s statements in violation of his *Miranda* rights. On July 31, 2009, the trial court dismissed the case.

Convictions based upon a false confession are often reversed not because of a Fifth Amendment violation, but rather because of other fortuitous errors that bring the false confession to light. Without other evidence demonstrating that the confession is false or the conviction is illegal, a defendant's contention that his confession was false will generally not be sufficient to reverse his conviction. As with plea bargains, therefore, it is impossible to know how often defendants confess to crimes they did not commit. This is troubling given the fact that juries continue to give great weight to confessions, despite a growing awareness that false confessions happen across a wide variety of cases.

In 1992, police in Los Angeles County found the dead bodies of four women believed to be prostitutes. In January of 1993, police interviewed David Allen Jones about the murders. Mr. Jones, a thirty-two-year-old developmentally disabled man with an IQ of 62, confessed to the murders under police questioning and was charged with four murders and a rape. There were no eyewitnesses, and Mr. Jones' blood type did not match the biological material found at the scene. Nonetheless, in 1995 a jury convicted him of one count of murder, one count of rape and two counts of the lesser-included offense of voluntary manslaughter (he was acquitted on one of the murder counts). He was sentenced to 36 years to life in prison. After his conviction, more murders of women occurred in a similar area of Los Angeles. DNA testing was done on two of the four rape kits in Mr. Jones' case and the DNA matched another man who was a serial murderer already in prison.

In 2004, the district attorney filed a habeas petition on Mr. Jones' behalf, on innocence grounds. The court granted the habeas petition with respect to the murder and voluntary manslaughter charges, but could not set aside the rape charge through a habeas petition because Mr. Jones had fully served his sentence. The court later vacated the rape conviction based on a *Brady* violation because the prosecution had failed to disclose the rape victim's rap sheet. In 2005, the trial court finally dismissed the case entirely, freeing Mr. Jones after 19 years in prison. In 2006, the City of Los Angeles settled with Mr. Jones for \$720,000. The state Victims Compensation Government Claims Board granted Mr. Jones' claim and awarded him an additional \$74,600.

## IMPROPER AND INADEQUATE POLICE PRACTICES

Improper and inadequate police practices cover a variety of investigative errors, including failing to find evidence, ignoring evidence, or failing to follow leads for other suspects.

On March 10, 1983, in Los Angeles County, Bruce Elliot Lisker went to his parents' home, looked through a window, and saw his mother lying on the floor, injured. He broke into the house and called 911. She was transported to the hospital and died there from the injuries. A police detective suspected Mr. Lisker of the crime and arrested him at the scene. Although Mr. Lisker was 17, he was tried as an adult. His first trial began in November 1984. In the middle of trial he pleaded guilty to murder as part of deal to receive a juvenile disposition, which would have had him released from custody when he turned 26. The court refused to accept the deal, and Mr. Lisker was tried as an adult in a second trial in October 1985. The evidence at trial included a bloody footprint that allegedly matched blood on Mr. Lisker's clothing, the fact that Mr. Lisker had a tumultuous relationship with his parents, and the allegation that Mr. Lisker would not have been able to see in the house through the window. The detective did not obtain an expert to examine shoe prints, did not test for fingerprints, did not obtain the telephone bill to verify phone calls, and did not preserve the bloody entry rug. The prosecution alleged the motive to be a robbery because Mr. Lisker's father had given his wife \$120 in cash the night before in their son's presence, and this cash was said to be missing from her wallet. In addition, a jailhouse informant testified that Mr. Lisker had confessed to the murder.

During the investigation, Mr. Lisker's father had mentioned to the detective that one of Mr. Lisker's friends had unexpectedly come by their home the day before the murder looking to earn some money by doing some chores. The friend had been in and out of foster homes, mental institutions, and juvenile hall. The detective looked into him but abandoned him as a suspect, and the court refused to allow the defense to admit any evidence about the friend at trial.

Mr. Lisker was found guilty of second degree murder and sentenced to 16 years to life. He filed an appeal and two state court habeas petitions, all of which were denied. In 2004, Mr. Lisker filed a federal habeas petition, and in 2005 the court held an evidentiary hearing. The lack of proper investigation was critical to the hearing. After a crime scene reconstruction, it was clear that Mr. Lisker could have seen inside the window and could have seen the body, contrary to the detective's trial testimony. A comparison of bloody footprints from the crime scene with the shoes Mr. Lisker wore that day demonstrated that the footprints were not Mr. Lisker's. The court also found that the blood on Mr. Lisker was as consistent with innocence as it was with guilt. In addition, the court heard from two officers who had responded to the scene. One stated that he probably stepped in blood and left a footprint. The other stated that it was possible that he had stepped in blood and left a footprint. Also at issue in the hearing was the fact that the detective dismissed the friend as a suspect even though the friend had lied about where he was at the time of the murder. The detective also did not discover that the friend had a significant criminal record. The court also found that the allegedly missing money had been in Mr. Lisker's mother's wallet and had never been missing. Finally, the court found that the informant was unreliable.



The court reversed the conviction due to ineffective assistance of defense counsel, a due process violation from the use of false evidence produced by the detective, and cumulative error giving rise to a due process violation. Mr. Lisker was released after spending 26 years in prison and the court dismissed the case in September 2009.

## DNA

DNA testing has been a valuable tool in exonerating the wrongfully convicted,<sup>89</sup> although common expectations about both its availability and applicability are sometimes exaggerated. Indeed, in our report DNA appears as a factor in only 14 of the 607 cases.<sup>90</sup> Of those fourteen, eleven of the defendants alleged that they were innocent, and nine of the fourteen were declared innocent by the court. Only eight of the fourteen received a civil settlement, and only five of those eight were also awarded compensation from the state Victim Compensation Government Claims Board (VCGCB). Two people received compensation from the VCGCB but no civil settlement.

DNA is not itself a cause of the wrongful conviction, because the DNA is not usually in evidence at the trial that originally results in conviction. (In fact, had the DNA evidence been introduced, the likelihood of an acquittal in these cases was presumably substantial.) Rather, the errors causing the wrongful conviction often include mistaken eyewitness identification, a failure by defense counsel to adequately represent his or her client, a failure by the police to investigate, a judicial mistake in excluding evidence, or the improper withholding of evidence by the prosecution. Subsequent to the conviction, the DNA provides objective information that assists the courts in recognizing that an error occurred.

In the DNA cases in our sample, the DNA was either unavailable or untested at the time of the original trial. In most of our cases the actual error that caused the unjust conviction was an eyewitness misidentification. This is consistent with Innocence Project data, which has found that eyewitness misidentification played a role in 72% of the convictions that were subsequently overturned as a result of DNA testing.<sup>91</sup>

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### FOOTNOTES

**89** There have been 321 DNA exonerations in the United States. “DNA Exonerates Case Profiles,” Innocence Project, accessed December 19, 2014, <http://www.innocenceproject.org/know/>.

**90** The Innocence Project does not include three people who are included in our Report.

**91** “Eyewitness Misidentification,” The Innocence Project, accessed December 19, 2014, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

On January 10, 1991, a woman was discovered murdered in the guest bedroom of her home in Santa Clara County. She had been bound and stabbed, and duct tape had been placed across her mouth. Investigators were able to obtain fingerprints from the crime scene and matched latent fingerprints from the duct tape to a drug dealer. The drug dealer was arrested on March 7, 2001. He initially denied involvement in the murder and then confessed and implicated thirty-year-old Quedillis Ricardo Walker as his co-participant. The dealer claimed that he and Mr. Walker had accompanied the victim to her house, where two armed white men jumped out of a closet and assisted Mr. Walker in the killing. The dealer claimed that he assisted Mr. Walker in the crime because Mr. Walker had threatened to kill him. During a polygraph test, the dealer changed his story about the two white men being involved and said it was just he and Mr. Walker. Mr. Walker denied any involvement and stated that he was with another woman at a motel on the night of the crime. That woman denied being with Mr. Walker that night.

Mr. Walker and the dealer began trial together in August of 1991. Three weeks into the trial the dealer struck a plea deal by testifying against Mr. Walker. Another witness testified that Mr. Walker was a violent person and that he had previously threatened her with a knife and a gun. The woman from the motel testified that she was with Mr. Walker for a three-day period including the day of the crime, but that she had earlier lied because she was married and was afraid her husband would find out that she had been with Mr. Walker. The only evidence linking Mr. Walker to the crime was his co-defendant's testimony.

The jury convicted Mr. Walker of first-degree murder and on April 3, 1992, he was sentenced to 26 years to life in prison. Mr. Walker filed several petitions for habeas corpus alleging a *Brady* violation due to the prosecutor's failure to disclose the plea agreement with his co-defendant, and ineffective assistance of counsel. All were denied. Mr. Walker and his attorneys subsequently learned that, after the trial, five people had come forward to say that another man, not Mr. Walker, had accompanied his co-defendant to the victim's home the night of the murder. They also learned that the woman who testified against Mr. Walker had made a deal with the prosecutor to reduce her drug charges in an unrelated matter in exchange for her testimony against Mr. Walker, but the prosecutor had not provided that information to Mr. Walker's attorneys at the time. And, new DNA evidence from a cigarette butt at the scene linked the cigarette butt to a different person. In June 2003, Mr. Walker filed a new petition for habeas corpus based on newly discovered evidence pointing to factual innocence. On June 16, 2003, the district attorney conceded that Mr. Walker was factually innocent, that the prosecution's key witnesses at trial had provided perjured testimony, and that the prosecution failed to inform the defense that the prosecution had promised a benefit to the witness in exchange for her testimony. The court granted the habeas corpus petition and made a judicial finding of factual innocence. Mr. Walker was released from prison after serving 12 years. He was awarded \$409,500 from the California Victim Compensation and Government Claims Board and received a \$2,058,356 civil settlement.

## Forensic Errors

Although not categorized as a separate error in this report, forensic and laboratory errors can seriously compromise the integrity of a conviction. Sometimes these errors become known when science changes over time, as in the cases of George Souliotes and Cameron Todd Willingham. Mr. Souliotes was convicted of first-degree murder and arson, and subsequently sentenced to life without parole, after a 1997 apartment fire in a building he owned in California. Sixteen years later, in 2013, he was released when new evidence called into doubt the science used to argue that the fires were in fact arson. Mr. Willingham was similarly convicted of arson and murder after the deaths of his children in a house fire in 1991, in Texas. As with Mr. Souliotes, Mr. Willingham's conviction was based on scientific methodology and expert testimony that has now been largely discredited. Unlike Mr. Souliotes, Mr. Willingham was not able to fully refute the evidence in court, and he was executed in 2004. Many now believe that the State of Texas executed an innocent man.<sup>92</sup>

Forensic errors can also arise through faulty lab analysis or bad actors, as in the recent scandals involving the FBI's microscopic hair comparison unit and the San Francisco drug lab. In San Francisco, a crime lab technician admitted to stealing cocaine from the lab, causing the dismissal of hundreds of cases.<sup>93</sup> With the FBI, it was recently disclosed that the unit overstated forensic matches in favor of the prosecution in over 95% of 268 trials examined. Thirty-two of those defendants were sentenced to death, and 14 of the 32 died in prison or have already been executed. The analysis included five California cases, three of which were death penalty cases. More cases are being investigated.<sup>94</sup>

*The next section discusses the types of costs that gave rise to the cost calculations discussed earlier: incarceration, trials and attorneys and courts, claims against the state, and lawsuits and settlements.*

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### FOOTNOTES

<sup>92</sup> "A conviction up in smoke," Mora Dolan, *Los Angeles Times*, May 31, 2010, <http://articles.latimes.com/2010/may/31/local/la-me-arson-20100531>; *Trial by Fire*, *The New Yorker*, Sept. 7, 2009, <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire>; *Report of the Texas Forensic Science Commission*, Willingham/Willis Investigation, April 15, 2011, <http://www.fsc.state.tx.us/documents/FINAL.pdf>.

<sup>93</sup> "Former SF Lab Technician Sentenced for Cocaine Possession," CBS SF Bay Area, July 19, 2013, <http://sanfrancisco.cbslocal.com/2013/07/19/former-sf-crime-lab-technician-sentenced-for-cocaine-possession/>.

<sup>94</sup> "FBI admits flaws in hair analysis over decades," Spencer S. Hsu, *The Washington Post*, April 18, 2015, [http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcabc310\\_story.html](http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcabc310_story.html).

SECTION 3:

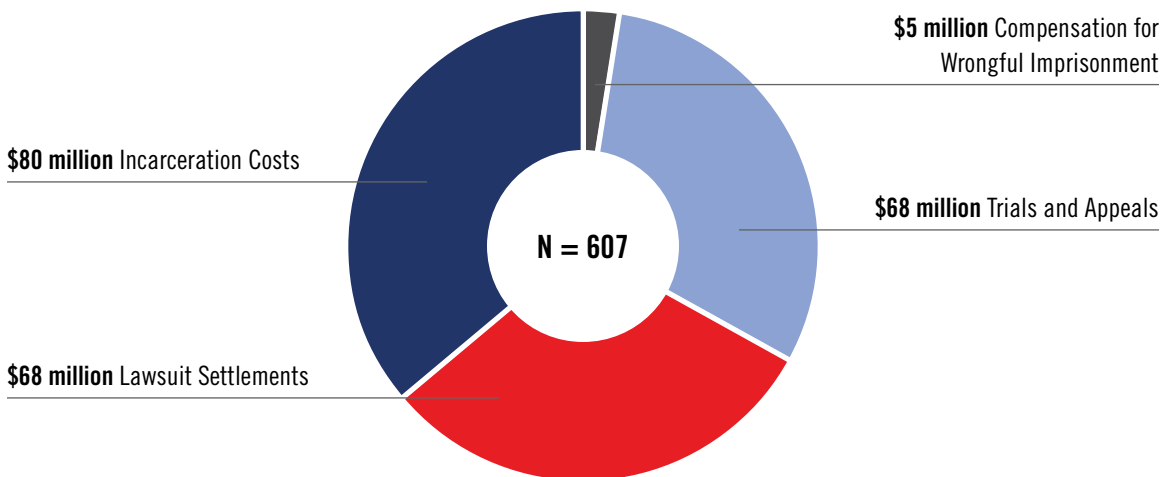
# **THE COSTS OF INJUSTICE**

*This section explains the bases for the cost calculations in this report, separating them into costs of incarceration, costs for court proceedings, costs for state compensation, and costs for lawsuits and settlements. It ends with an analysis of the potentially substantial costs that we did not include in our calculations.*

For the 607 failed prosecutions profiled in this report, taxpayers paid over \$220 million.<sup>94</sup> This money—which represents only the direct costs we can definitively show—reflects the prosecution, defense, incarceration and compensation of the 607 people in our sample, including:

- \$80 million in incarceration costs for time spent in jail and prison;
- \$68 million for trials and appeals, including prosecutors, defense attorneys, judges, trial courts and appellate courts;
- \$5 million awarded by the California Victims Compensation and Government Claims Board (VCGCB) as compensation for wrongful imprisonment; and
- \$68 million to settle lawsuits brought by these individuals against California counties and cities.

**Figure 10: Failed Prosecutions Profiled in this Report**



#### FOOTNOTES

<sup>94</sup> \$221,601,730, adjusted for inflation to 2013 dollars.

At its most basic level, this equates to over \$360,000 for each of the 607 people in our sample, although the actual estimated costs arising from each faulty conviction range from \$4,000 to over \$10 million per person.

For perspective, if California and its cities and counties had \$220 million today, the funds could purchase:

- A year of K-12 instruction for almost 40,000 children;<sup>96</sup>
- 117 million school lunches;<sup>97</sup>
- Testing of 214,000 rape kits;<sup>98</sup>
- 2,467 additional California Highway Patrol Officers;<sup>99</sup>
- 2,300 additional police officers; or
- 1,836 additional firefighters.<sup>100</sup>

The cost numbers in this report reflect only those costs we could locate and confirm; they are undoubtedly an incomplete picture. Moreover, we have not calculated additional costs such as lost wages, which would require both the knowledge of each individual's employment prior to their conviction and a model to calculate the negative impact on future earnings of the conviction. We have also not attempted to calculate the less quantifiable costs imposed on these individuals, including the impact on their families and the impact on their mental health. Although perhaps less quantifiable, these costs are substantial and ongoing, and should not be ignored.

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#### FOOTNOTES

**96** Average current spending for instruction per pupil in California by Elementary and Secondary School Systems is \$5,595.78 (adjusted for 2013). Mark Dixon, "Public Education Finances 2012," United States Census Bureau, 22 May 2014, Table 8, <http://www2.census.gov/govs/school/12f33pub.pdf>.

**97** Average cost per school lunch is \$1.89. California Department of Education, "Food Programs," March 2014, School Nutrition Program (SNP) 2012-2013 County Profile, Table Lunch 12-13, <http://www.cde.ca.gov/ds/sh/sn/#annual>.

**98** Average cost for processing a rape kit is \$1,035.65 (adjusted for 2013). Susan Price, "Rape Kits Testing, Backlogs, and Model Statutes," Office of Legislative Research, September 1, 2011, <http://www.cga.ct.gov/2011/rpt/2011-R-0260.htm>.

**99** California Highway Patrol employee's average wage was \$89,825 in 2013. California State Controller's Office, "Government Compensation in California: Highway Patrol 2013," July 14, 2014, <http://www.publicpay.ca.gov/Reports/State/StateEntity.aspx?fiscalyear=2013&entityid=3743>.

**100** California police officers made, on average, \$96,400, including overtime, incentive pay and retirement payouts during 2012, according to a *Sacramento Bee* analysis of new data from the state controller's office. Firefighters and engineers earned, on average, \$120,700. Average pay for police captains across the state was \$164,800; for fire captains, it was \$148,200. Phillip Reese, "See What California Cities Pay Police, Firefighter," *The Sacramento Bee*, October 20, 2014. <http://www.sacbee.com/site-services/databases/article2573210.html>.

## Incarceration, Trials, and Appeals: \$148 million

The 607 individuals in our sample spent 797,794 days (2,186 years) in prison and jail, at a cost of \$80 million dollars.<sup>101</sup> In addition, we estimate an additional \$68 million for the cost of prosecution, defense, trials, and appeals. These costs are incomplete and they are at best estimates—but when estimates rise to \$148 million, policymakers and advocates should take action.<sup>102</sup>

The \$80 million attributed to incarceration reflects the actual days in custody for each individual, calculated using court records. The number of days per year was multiplied by the cost per day, as reflected in county and state budget documents for the year in which the person was incarcerated.<sup>103</sup> Totals were then adjusted for inflation to 2013.

The \$68 million attributed to prosecution, defense, trials and appeals reflects court resources such as the judge, clerks, bailiffs, and other judicial personnel, a prosecutor and, usually, a public defender or county-paid attorney for the defense. Our methodology for these costs is fully set out in Appendix C. In brief:

- For court costs associated with trials, mistrials, hung juries and plea bargains, we used the California Administrative Office of the Courts' 2002 Judicial Workload Assessment<sup>104</sup> to ascertain the average number of court minutes by type of case (homicide, property, drug, and other) in the trial courts, both for cases that went to trial and for cases that resolved by plea prior to trial. We used the same study to determine the average cost of a court day and a court minute. The number of minutes multiplied by the cost per minute formed our estimate for trial court costs, differentiated by type of crime and whether the case went to trial or plead guilty. For cost purposes, trials, mistrials and hung juries were all considered to be trial cases despite the fact that the jury does not reach a verdict in mistrials and hung juries.

### FOOTNOTES

**101** In many of our cases the exact date on which the person entered custody and the exact date on which they left custody were unknown. To be conservative, if the dates were unknown we used as a starting date the first court date where the defendant appeared in custody (although it is almost certain that he or she was in custody for at least a day prior to the court appearance and potentially much longer). For an ending date, we used the last entry in the court file where the defendant was in custody; this was often the date on which the court ordered dismissal of the charges (although it is almost certain that the defendant was in custody for some number of days after the court issued its order). On rare occasions we did not have a release date, and we knew that the release date occurred prior to the final court date. This was the only situation in which we would fill in the missing data. In those rare situations, we calculated the number of days left to serve after the date on which the sentence was imposed. This may over-count the actual time in custody for these defendants, as some of them will have been released prior to the calculated date due to good time credits.

**102** If these 797,794 days in prison and jail had all been imposed in 2013, the custody time alone would have cost taxpayers \$120 million. The estimate of \$120 million is based on 173,065 county jail days times \$114, plus 619,240 state prison days times \$161.14. The prison calculation is based on CDCR's average cost per person per day in 2013, as determined by CDCR in its budget. The \$114 a day estimate for County Jail is taken from the Public Policy Institute of California, "Just the Facts: California's County Jails," (June 2013), [http://www.ppic.org/content/pubs/jtf/JTF\\_CountyJailsJTF.pdf](http://www.ppic.org/content/pubs/jtf/JTF_CountyJailsJTF.pdf).

**103** For state prison cost, we used the average annual cost per inmate published by the California Department of Corrections and Rehabilitation (CDCR). CDCR calculates this cost by dividing total annual cost by number of inmates. Some have argued that marginal cost of an additional inmate is lower than CDCR's estimate because so many incarceration costs are set and those costs may not change with the addition or subtraction of one person. We adopt the methodology and calculations used by CDCR. The methodology by which we determined daily County Jail cost is set out in Appendix B.

**104** Brian Ostrom et al "California Judicial Workload Assessment," National Center for State Courts, May 2002, <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1503>.



- For attorney costs associated with trials, mistrials, hung juries and plea bargains, we used state budget documents to calculate the cost of a fully loaded public defender hour and the cost of a fully loaded district attorney hour. We then used a 2003 study by the San Francisco Office of the Controller to ascertain the number of out-of-court minutes spent by public defenders on the different types of cases, and assumed the same number of out-of-court minutes for district attorneys. Finally, we multiplied the number of out-of-court minutes by the hourly cost to estimate an average cost for the out-of-court work of the public defender and the district attorney, by type of crime.
- For attorney costs associated with appeals, we used a three-year per-case average cost for court-appointed appellate counsel in California, obtained from the California Administrative Office of the Courts. We assumed that same cost to estimate the prosecution side.
- We were unable to develop a methodology by which to estimate the appellate court costs for appeals and post-conviction challenges, so those costs are unaccounted for.
- All costs were adjusted for inflation to 2013 dollars.

Developing a full methodology to ascertain these costs was beyond the scope of this report, particularly because these types of estimations have not been attempted previously. As with any pioneer effort, they will undoubtedly improve over time and with scrutiny. That said, we have attempted to keep our estimates conservative at every level and we believe that we are substantially underestimating actual costs. For example, we based our estimate for the cost of appellate counsel on three years of court data demonstrating the amounts paid to court-appointed appellate counsel between 2010 and 2013. Over those three years, court-appointed appellate counsel handled over 15,000 appeals in California; the statewide average attorney cost per case was \$9,171.19 and we applied that average to every case in our sample. Court records make clear, however, that actual numbers are often far greater. In one of our cases, for example, the true cost of defense counsel alone was over one million dollars.<sup>105</sup> Due to limitations in the data accessible on these cases, no reliable case-specific calculation exists for appellate counsel and we have thus used the more conservative average per-case estimate across the board, despite the virtual certainty of a substantial underestimation of the actual costs. We have also excluded the often substantial costs of expert witnesses, as no data was available from which the costs could be estimated.<sup>106</sup>

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#### FOOTNOTES

<sup>105</sup> Mr. Atkins' counsel was not court-appointed, but he sought attorneys' fees in the lawsuit that followed his wrongful conviction, and the court ordered that the county pay Mr. Atkins' attorneys \$1,368,834 in fees and costs. *Atkins v. Miller*, Order Granting Plaintiff's Motion For Attorneys' Fees and Costs, No. CV 01-01574 DDP, C.D. Cal., August 27, 2007.

<sup>106</sup> In one recent case from Idaho, the expert witness charged \$6500 a day.  
<http://www.kboi2.com/news/local/Murder-trial-costs-tallied-after-baby-sitters-acquittal-306982321.html?mobile=y>

## California Victims Compensation and Government Claims Board (VCGCB): \$5 million

Fifty-eight of the 607 individuals in our sample filed claims for compensation with the California Victims Compensation and Government Claims Board (VCGCB).<sup>107</sup> Of the 58, only fourteen (24%) were granted compensation despite the fact that many of those who sought compensation were unquestionably wrongfully convicted. Eight of the 58 claims were still pending as of February 2015, and the remaining 36 claims (62%) were denied. The money awarded to compensate those fourteen people for their wrongful convictions and incarcerations totaled over just \$5 million.

Although only 14 people in our sample received compensation from the state entity charged with providing compensation for the wrongfully convicted, 56 people in our sample successfully filed lawsuits against the counties and cities that led the wrongful prosecutions. (These lawsuits and settlement are discussed in the next section.) The remarkably low compensation rate is likely due to the substantial procedural hurdles raised by the VCGCB prior to 2013. Prior to 2013 these hurdles, combined with the discretionary power of the VCGCB hearing officers, often resulted in the denial of compensation even in cases with judicial rulings of factual innocence and clear wrongful incarceration.<sup>108</sup> For example, in four out of the 36 cases that were denied compensation in our sample, a different court had earlier ruled that the applicants were factually innocent, only to have the VCGCB reach a different result. In another nine of the denied cases, the VCGCB refused compensation because the hearing officer found that the applicant had somehow contributed to his arrest or conviction, despite the fact that the conviction had been overturned and invalidated by the court in the criminal proceedings.

California law allows anyone erroneously convicted of a felony to file a claim for government compensation if he or she was incarcerated in a state prison as a result of that erroneous conviction.<sup>109</sup> The VCGCB, originally created in 1965, handles those claims. To apply for compensation, a person must submit an application and provide information about his or her conviction and dates of imprisonment.<sup>110</sup> He or she must provide facts that show that the crime charged was either not committed at all or was not committed by the applicant. Each applicant must also provide a pecuniary injury statement that demonstrates financial loss as a result of the erroneous conviction and imprisonment.<sup>111</sup>

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### FOOTNOTES

<sup>107</sup> VCGCB compensation is only available for an individual incarcerated in a state prison, not for exonerated individuals who were prosecuted and incarcerated by the federal government.

<sup>108</sup> Although difficulties in compensation are not unique to California, the state's compensation system falls behind states like Texas, that have sought to improve both the speed and the quality of their compensation programs.  
<http://www.latimes.com/nation/la-na-exoneree-national-20141220-story.html#page=3>; <http://spreadsheets.latimes.com/texas-compensation-payments/>.

<sup>109</sup> California Penal Code Section 4900 *et seq.*

<sup>110</sup> "Erroneously Convicted Person Claim Form," California Victims Compensation and Government Claims Board, accessed December 19, 2014, <http://www.vcgcb.ca.gov/docs/forms/claims/PC4900ClaimForm.pdf>.

<sup>111</sup> Erroneously Convicted Person Claim Form.

California Penal Code Section 4900 originally capped the amount of any claim at \$10,000 per person. As a practical matter, this acted as a substantial disincentive to file a claim since the maximum reward was less than the likely legal costs needed to pursue the claim. In 2000, Governor Gray Davis signed a bill amending the compensation scheme to allow compensation of \$100 per day for incarceration in state prison. Even after the 2000 amendment, however, substantial hurdles remained. Claimants were subject to a two-year statute of limitations after release to file a claim for wrongful incarceration, and the law limited compensation to only time spent in state prison, leaving aside the often substantial time spent in county jail awaiting the resolution of the case. For example, if a wrongfully convicted person spent two years in county jail awaiting the resolution of his case, and two years in state prison before the wrongful conviction was overturned, he could be compensated only for the two years in state prison. The VCGCB also had complete discretion to decide whether someone was eligible for compensation, regardless of any earlier court ruling. This meant that VCGCB hearing officers were permitted to ignore the original triers of fact (court and jury), disregard court findings of factual innocence, and make their own credibility determinations. The law also allowed the VCGCB to deny compensation if it found that the claimant had contributed to his or her arrest or conviction in any way.<sup>112</sup>

On July 26, 1978, nineteen-year-old Longino Acero was convicted in Santa Clara County of committing a lewd act in public with an adult woman, a violation of California penal code section 647(a). A clerical error was then made in his file and his crime was listed as penal code 647a (child molestation) instead of 647(a) (lewd act in public). The crime for which Mr. Acero was convicted does not require sex offender registration, but the crime that was incorrectly recorded does. In 1978, Mr. Acero was incorrectly told that he was required to register as a sex offender. He registered in 1978, but in 1994, 2001, 2002, and 2003 he did not register and, as a result, he was charged with the crime of failing to register and imprisoned for 465 days. He was repeatedly told by his public defenders and by government officials that he was required to register, and on that basis he pled no contest to the felony of failing to register. Finally, in 2005, he received a letter from the Santa Clara Police Department informing him that he was not required to register as a sex offender. On March 28, 2006, with the support of the district attorney, the court made a finding of factual innocence regarding the crime of failure to register. Mr. Acero filed a claim before the VCGCB to receive compensation for the 465 days he spent in prison. The VCGCB denied compensation because it found that Mr. Acero had contributed to his incarceration by pleading no contest to the crime. Mr. Acero argued that he believed he had to register because his attorneys and the court told him so, and therefore he had pleaded no contest. The Board denied him any compensation and stated that it did not find his testimony credible, despite the fact that the Police Department and the district attorney acknowledged telling him that he had to register, and despite the fact that the court subsequently found him factually innocent of the crime.

#### FOOTNOTES

<sup>112</sup> The VCGCB generally used this provision to exclude anyone who had pled guilty, even if the guilty plea had been vacated and the conviction overturned. A plea of guilty was considered a way in which the defendant contributed to his conviction and incarceration.

On October 13, 2013, Governor Jerry Brown signed California Senate Bill 618, which attempted to address many of these concerns.<sup>113</sup> Under the new law, applicants can be compensated for time spent wrongfully incarcerated in county jail as well as time in state prison. Factual findings and credibility determinations made by a different court are now binding on the VCGCB, and a finding that new evidence points unerringly towards innocence will likewise be binding on the VCGCB. In such cases the VCGCB will be required to recommend compensation without holding its own separate hearing. The new law also removes the requirement that applicants prove that they did not intentionally contribute to their arrest or conviction.<sup>114</sup> This means that people who pled guilty at some point in their case are not disqualified from receiving compensation. The new law also places some parameters on the Board to ensure that decisions are made in a reasonable time frame. Governor Brown continued on the path toward reform in 2015, when he signed SB 635 and raised the compensation rate for the wrongfully convicted to \$140 a day.

The cases in our sample were all decided under the old law, although eight individuals from our sample had pending claims before the VCGCB at the time of this report's writing. The impact of the new law remains unclear, though its passing sends a hopeful signal that fair compensation will be provided to those individuals that the State of California has wrongfully convicted and incarcerated.

## Settlements: \$68 million

Cities and counties in California spent an additional \$68 million (adjusted for inflation) to settle lawsuits brought by the individuals in our sample as a result of their unjust and illegal convictions, and many of the individuals in our sample have unresolved lawsuits that are expected to settle for many millions of dollars.

Jeffrey Deskovic, who was awarded over \$13 million after 16 years in prison in New York for a rape and murder that he did not commit, said "I would be willing to not only give the money back, I'd be willing to go into debt for that amount of money, maybe even double it, to have had my years back and had a normal life."<sup>115</sup> This sentiment was mirrored by Obie Anthony, who was wrongfully convicted of murder in Los Angeles County and who received an \$8.3 million settlement. "The money will never make up for it," said Anthony, who was only 19 when he was convicted.<sup>116</sup>

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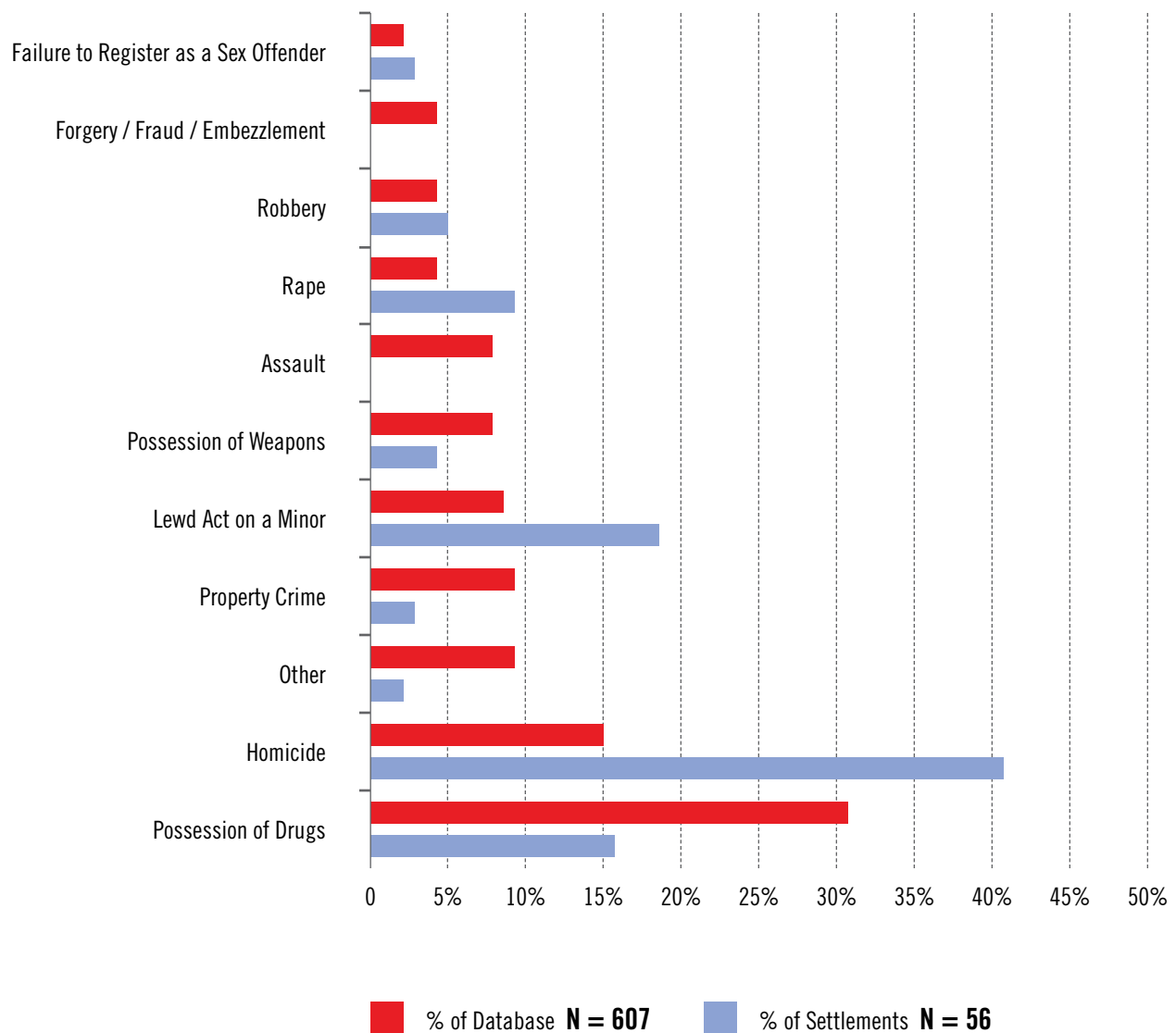
### FOOTNOTES

- 113** California State Senate Bill 618. Approved by Governor, October 13, 2013.  
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB618](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB618).
- 114** As of June 2015, however, the application forms available on the VCGCB website continue to require the applicant to affirm that he or she did not contribute to his arrest or conviction. "Erroneously Convicted Person Claim Form,"  
<http://www.vcgcb.ca.gov/docs/forms/claims/PC4900ClaimForm.pdf>.
- 115** Jeffrey Deskovic, quoted in Saski De Melker, "Four wrongfully convicted men, four very different outcomes," PBS NewsHour, November 9, 2014,  
<http://www.pbs.org/newshour/updates/life-exoneration/>.
- 116** [http://abc7.com/news/la-to-pay-\\$83-million-settlement-to-wrongly-convicted-man/656569/](http://abc7.com/news/la-to-pay-$83-million-settlement-to-wrongly-convicted-man/656569/)

Of the 607 cases examined, 56 led to lawsuits and settlements. Certain types of convictions were more likely to lead to lawsuits and settlements. Faulty homicide convictions, for example, represent only 15% of the cases in our sample but account for 41% of the settlements. In contrast, drug cases represent 30% of our sample, but only 16% of the settlements went to those individuals (see Figure 11).<sup>117</sup>

The reasons for this disproportionality are unknown, but may be related to the types of error seen in the faulty homicide convictions. It may also be because the true perpetrator can sometimes be found after a faulty homicide conviction, thus eliminating doubt about whether the conviction was wrongful and strengthening the claim of the falsely convicted individual.

**Figure 11: Distribution of Settlements**



#### FOOTNOTES

<sup>117</sup> These numbers could change if, for example, a large number of defendants had their convictions overturned due to a lab scandal.

## Costs and Cases Not Captured in this Report

Our methodology excluded an unknown—and potentially enormous—number of errors and resulting costs because we included only felonies, and then only those felonies in which (a) the defendant was convicted of the felony, (b) the conviction was reversed, and (c) the case was ultimately dismissed or the defendant was acquitted on retrial.<sup>118</sup> This section identifies some of the areas that were beyond the scope of this report, including:

- Cases that never reached conviction;
- Errors and reversals that were followed by a guilty plea;
- Errors that were found to be legally harmless;
- Misdemeanors; and
- Juveniles.

Each of these areas represents an additional potential well of injustice, with costs for taxpayers, victims, and the individuals caught up in the failures of our criminal justice system.<sup>119</sup>

### CASES THAT NEVER REACHED CONVICTION

Each year, tens of thousands of people are arrested and prosecuted, but released before trial or acquitted at trial. Californians pay millions of dollars to incarcerate these individuals, none of whom are ever convicted of a crime.

Almost 15% of California’s annual felony prosecutions are dismissed before trial or result in acquittal. Put differently, roughly 37,000 Californians each year are caught up in the criminal justice system but

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#### FOOTNOTES

**118** As noted earlier, we included a small number of cases in which the defendant took a plea deal on remand, but only if the defendant had already been in custody for at least a year longer than the amount of time negotiated in the deal and only if the plea was to a lesser crime. For example, one defendant in our database was in custody for almost ten years for serious felony convictions relating to a shooting, and after those convictions were dismissed he took a deal for a one-year misdemeanor sentence. There are 46 such cases.

**119** This report does not specifically focus on the death penalty, but the presence of so many different errors highlights the problematic nature of having a system that imposes death sentences. University of Michigan Law Professor Samuel Gross believes that over four percent of people sentenced to death in the United States are probably innocent, while nationwide 117 people have been exonerated after being sentenced to death. (Michael McLaughlin, “Shocking Numbers of People Sentenced to Death Study Finds,” *The Huffington Post*, April 28, 2014, [http://www.huffingtonpost.com/2014/04/28/innocent-death-penalty-study\\_n\\_5228854.html](http://www.huffingtonpost.com/2014/04/28/innocent-death-penalty-study_n_5228854.html).) Governor Wolf of Pennsylvania cited these numbers when announcing a moratorium on the death penalty in February 2015. (“Governor Tom Wolf Announces a Moratorium on the Death Penalty in Pennsylvania,” Pennsylvania Office of the Governor, press release, February 13, 2015, <http://www.prnewswire.com/news-releases/governor-tom-wolf-announces-a-moratorium-on-the-death-penalty-in-pennsylvania-300035913.html>.) A 2011 report found that the death penalty cost California over \$4 billion dollars since 1978 and had resulted in only thirteen individuals being executed, suggesting a substantial cost for little to no potential deterrent effect. (Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of Voters? A Roadmap to Mend or End the California Legislature’s Multi-Billion Dollar Death Penalty Debacle*, *Loyola of Los Angeles Law Review* 44 (2011): S41-S224, <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1030&context=llr>.) A follow up study found that maintaining the death penalty in California through 2050 will cost taxpayers \$5.4 to \$7.7 billion more than it would cost to impose life without parole. (Arthur L. Alarcon & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform in November?*, *Loyola of Los Angeles Law Review* 46 (2012): S1-S34, <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2803&context=llr>.)

never convicted of anything.<sup>120</sup> It is not known how much time each of these individuals spent in custody prior to the dismissal or acquittal, but even if each of them spent only five days in custody—a number that seems quite low—these individuals would cost the state over \$20 million dollars annually for incarceration alone. It is more likely that many of them spent far more than five days in jail before their cases were dismissed or they were acquitted, since between 2006 and 2012 the average length of stay in a California jail for individuals who were not sentenced was about 17 days.<sup>121</sup> If each of these 37,000 individuals is spending 17 days in custody each year, the total cost to California taxpayers for their incarceration is over *\$70 million a year*.<sup>122</sup>



Each year, approximately 37,000 Californians are arrested and prosecuted, but released before any conviction. If each of them is spending only 17 days in custody, Californians are paying \$70 million a year for their incarceration.

In 2005, twenty-four-year-old Edmond Ovasapyan was arrested for murder in Los Angeles County. The mother of the victim said that Mr. Ovasapyan was not one of the perpetrators but that he did look like one of them. After Mr. Ovasapyan had been in jail for 8 months, detectives collected DNA evidence that led to another suspect and Mr. Ovasapyan was released. In 2008, Mr. Ovasapyan filed a civil rights lawsuit against the city. The jury found that the officers unlawfully arrested and caused the malicious prosecution of Mr. Ovasapyan. It also found that the officers lacked probable cause to arrest, misled the district attorney, and withheld exculpatory information. In 2009 the jury awarded Mr. Ovasapyan \$1.31 million dollars.<sup>123</sup>

In August 2005, Michael Walker was arrested for robbery of a Los Angeles County convenience store. He was detained for 27 months because two police detectives withheld evidence of Mr. Walker's innocence. The charges were dismissed when the deception came to light, and a judge later found Mr. Walker to be innocent. A jury subsequently awarded him \$106,000 and the award was upheld by the United States Supreme Court in May 2015.<sup>124</sup>

#### FOOTNOTES

- 120** California Attorney General, "Crime in California 2013," Tables 38 A and 38B. The six-year average of dismissal and acquittals from 2008 through 2013 was 36,657 a year. An average of \$114 a day is used for jail costs. Public Policy Institute of California, "Just the Facts: California's County Jails," June 2013, [http://www.ppic.org/main/publication\\_show.asp?i=1061](http://www.ppic.org/main/publication_show.asp?i=1061).
- 121** Board of State and Community Corrections, Jail Dashboard Average Length of Stay, <https://public.tableausoftware.com/profile/kstevens#!/vizhome/ACJROctober2013/About>.
- 122** Calculated based on PPIC's 2013 average cost of \$114 a day for county jail in California. [http://www.ppic.org/main/publication\\_show.asp?i=1061](http://www.ppic.org/main/publication_show.asp?i=1061).
- 123** Melanie Hicken, "Glendale Will Pay Man Who Was Wrongly Detained In Murder Probe," *Los Angeles Times*, January 18, 2011, <http://articles.latimes.com/2011/jan/18/local/la-me-glendale-settlement-20110118>; [http://justicedenied.org/issue/issue\\_42/1.3\\_Million\\_jd42.pdf](http://justicedenied.org/issue/issue_42/1.3_Million_jd42.pdf)
- 124** "Supreme Court permits LAPD to be sued for concealing evidence," David G. Savage, *Los Angeles Times*, May 18, 2015, <http://www.latimes.com/nation/la-na-supreme-court-lapd-suit-20150518-story.html>.

In an attempt to gather further information about systemic criminal justice costs for cases that do not include conviction and reversal, we submitted requests under the California Public Records Act to each of the 58 counties in California and to the thirteen largest cities in the state, seeking information on all payments made to any individual who alleged wrongful arrest, prosecution, or conviction based on events occurring between January 1, 1989 and 2013.<sup>125</sup> We received information on 1,916 settlement or payments, the vast majority of which were made between 2000 and 2012.<sup>126</sup> Of the 1,916 settlements disclosed as a result of our Public Records Act request, ninety-six were already in our sample set. However, 1,820 of them were cases that we had not identified, potentially because those 1,820 cases never reached conviction. According to the documents provided by the counties and cities, these 1,820 cases cost taxpayers an additional \$135 million for civil settlement and legal fees paid to settle claims of wrongful arrest, incarceration or prosecution.<sup>127</sup> (Responses to the PRA request are more fully detailed in Appendix G.)

## GUILTY PLEAS ON REMAND

Of the over 1400 cases that we examined for potential inclusion, 645 were excluded because the defendant pled guilty on remand and stayed in custody as part of the plea deal. In 177 of those cases, we were able to locate information about the original sentence and the sentence imposed as part of the plea bargain after reversal. The facts of these 177 cases indicate potential injustices worthy of further study.<sup>128</sup>

In 68 of the 177 cases that we excluded because the defendant pled guilty on remand, the defendant had originally been sentenced to life in prison. In 40 of those 68 (60%), after the conviction was reversed and the defendant entered into a plea bargain, the defendant no longer had a life sentence. This includes seven cases where the original sentence was life without the possibility of parole. In one example, the original sentence of life without possibility of parole was reduced to just eleven years after the reversal. In another, a sentence of 88 years to life was reduced to 20 years, and in another a sentence of 100 years to life was reduced to six years.

In 82 of the 177 cases that were excluded because the defendant pled guilty on remand, the defendant was originally sentenced to prison or jail for a term less than life. The average reduction in those 82 cases

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## FOOTNOTES

**125** The methodology by which the responses were reviewed and our estimate reached is described in Appendix G. The PRA request sought: “(1) All documents that indicate or authorize payment by [respondent] to any individual who alleged wrongful arrest, wrongful prosecution, and/or wrongful conviction based on events occurring any time between January 1, 1989 and the present day. This request includes document in the possession of [respondent] that reflect the full name(s) of each person receiving such compensation; the alleged factual basis for the claim; the identifying court case number and jurisdiction, if a court case was associated with the request for compensation; copies of any court order(s) requiring that the County provide compensation; and minutes of any meeting at which one or more employees, agents or representatives of the County approved payment of the financial compensation referenced above. (2) All documents that reflect payment by [respondent] to outside legal counsel or for other professional services engaged to defend [respondent] against claims raised in paragraph (1); and/or (3) All documents that display payment of monetary compensation to any individual between January 1, 1989 and the present, in response to the individual’s allegation of wrongful arrest, imprisonment, or prosecution or related police misconduct.”

**126** As with our unjust conviction review, our inquiry into wrongful arrests and prosecutions sought information dating back to 1989. As a practical matter, we received almost no information on settlements paid prior to 2000, and in most cases the response was even more limited due to the record retention and analysis capabilities of the responding counties and cities.

**127** The total for all 1,916 was \$217 million.

**128** There are undoubtedly far more than 177 cases in which a conviction was overturned and the defendant plead guilty on remand, but this data was not easily accessible without accessing each file and reviewing it by hand, which would have been cost prohibitive. The examples presented here are merely a sample of the potential injustices that a more complete study would likely uncover.



was just under five years per case, but the total sum of years reduced in those 82 cases was 3,925 years. In one example, the defendant was originally sentenced to 36 years and the sentence was reduced to six years. In another, an 18-year sentence was reduced to four years.

In 2006 in Riverside County, a woman told officers that her bicycle had been taken; officers found the bicycle sitting on the lawn of a nearby house where two men were sitting in a car. Carl Lee Mallet was one of the men in the car. The woman identified him as the bicycle thief from at least 60 feet away with a flashlight shining on him. Later, she was shown a picture of Mr. Mallet and said he did not look like the thief. Then, she denied that he was the thief. At trial she testified that she had wrongly identified Mr. Mallet because the lighting was poor and she was far away; she also stated that it was her ex-boyfriend who had stolen the bike and that she was afraid of him because he had threatened to kill her. The jury was unable to reach a decision, but returned to deliberations after the judge said “[Y]ou’ve got to understand that it would be a real shame for the County of Riverside and you to pay for another trial just because you did not put in enough effort.”<sup>129</sup> When the jurors returned they indicated that they would like more time, but because of scheduling difficulties the Judge excused two jurors and inserted two alternates. Only fifteen minutes after the two alternates were sworn, the jury found Mr. Mallett guilty of second degree burglary. The court sentenced him to 12 years in state prison. In 2009, the appellate court reversed the conviction because of judicial misconduct, and in 2010 Mr. Mallett was released from custody. The district attorney decided to refile the charges but offered Mr. Mallett a sentence of four years, which meant he would not have to return to custody if he plead guilty. Mr. Mallett took the deal.

On September 24, 1997 in Los Angeles County, seven-year-old Eric O. was abducted from his elementary school and molested. He told police that the perpetrator was an African-American man wearing a red, white, and blue shirt. He described the home where he had been taken as an empty red and white house, and his brother also said the man had been African-American. The police went to a red and white house where they found Myron Howard, a forty-two year old man who said he was homeless and that he had arrived at the house a few minutes earlier. Eric identified Mr. Howard, but his brother did not. Mr. Howard’s defense attorney said that neither of the boys could identify anyone from the lineup, and that it was only after some words were exchanged in Spanish between the detective and the boys that eventually Eric said that one person looked familiar. After a nine-day jury trial, the jury found Mr. Howard guilty and in 1999 the court sentenced him to 85 years to life. Six years later, in 2003, DNA testing excluded Mr. Howard as a source of the DNA. The judge vacated Mr. Howard’s conviction, but ordered that Mr. Howard remain in custody so that he could be tried again on the same charges despite the DNA evidence. In November of 2004, after spending more than seven years in prison, Mr. Howard accepted an offer by the prosecutor for a sentence of six years in prison and immediate release to his family. Mr. Howard says that he pleaded guilty because he was told he could get out of prison if he did so.

#### FOOTNOTES

<sup>129</sup> *People v. Mallett*, 2009 WL 1879251, 2 (Cal. App. 4 Dist.) (unpublished). Mr. Mallett’s age at the time of arrest or conviction could not be determined.

It is worth questioning a system where the same case can be worth life in prison without the possibility of parole at the original sentencing, only to be decreased to 11 years in a plea deal after the original conviction is overturned.<sup>130</sup> The “black-box” of plea-bargaining, however, makes analyzing this issue and constructing a thoughtful policy response a nearly impossible task.<sup>131</sup>

## HARMLESS ERROR

The legal doctrine of “harmless error” allows appellate courts to reject a defendant’s appeal even when error is present, on the basis that the error would not have changed the outcome of the case.<sup>132</sup> To some degree our system needs the harmless error doctrine because “[i]f every error was ‘reversible error,’ an extraordinary percentage of trial judgments would be reversed” and the system could not function.<sup>133</sup> At the same time, however, the harmless error doctrine allows error and misconduct to fester unnoticed. Judges “send a message through our criminal justice system each time we reverse or remand a conviction on the grounds that the police or prosecutors have violated a defendant’s individual rights. Upon receiving such a message, the criminal justice process corrects itself accordingly. Thus, when we shrink from our duty to overturn convictions in individual cases, we accomplish nothing less than a subversion of the rules that we have devised to protect our shared values.”<sup>134</sup>

Criminal defendants in California file about 5,000 appeals a year, and approximately 95% of those appeals are denied.<sup>135</sup> Some of those denials are because the defendant did not demonstrate that an error occurred. Others, however, are denied despite an acknowledgement that the error occurred, because the error was deemed to be harmless. And while that error may be legally “harmless,” it still has an economic

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### FOOTNOTES

**130** Concerns about the great discretion of prosecutors, particularly as it relates to plea bargains, are not new. See *The Economist*, “The Kings of the Courtroom.” Oct. 4, 2014, <http://www.economist.com/news/united-states/21621799-how-prosecutors-came-dominate-criminal-justice-system-kings-courtroom>; Bibas, Stephanos, “Plea Bargaining Outside the Shadow of Trial” (2004). Faculty Scholarship. Paper 924, [http://scholarship.law.upenn.edu/faculty\\_scholarship/924](http://scholarship.law.upenn.edu/faculty_scholarship/924).

**131** The case of Weldon Angelos from Utah exemplifies some of the potential problems in our plea bargaining system: “The ability to procure a sentence that’s far longer than necessary is a well-used item in some prosecutors’ tool kits. A case in point is the 55-year sentence a judge was forced to impose on a man named Weldon Angelos, charged with marijuana trafficking and weapon possession. The government had offered him a 16-year sentence if he pleaded guilty. When he refused, the prosecutor charged him in such a way that had he been convicted of every charge, he would have been sentenced to 105 years in prison. [ . . . ] Clearly, the government believed that the goals of punishment would have been fulfilled by a 16-year sentence. The additional 89 years it sought? Punishment for going to trial, plain and simple.” Mary Price “Wanting A Trial By Jury Is Not A Crime. So Why Do We Treat It Like One?,” *Forbes Magazine*, September 24, 2014, <http://www.forbes.com/sites/realspin/2014/09/24/wanting-a-trial-by-jury-is-not-a-crime-so-why-do-we-treat-it-like-one/>.

**132** *People v. Watson*, 46 Cal. 2d 818 (1956), *Chapman v. California*, 386 U.S. 18 (1967). In California, a conviction can be upheld notwithstanding a substantive or procedural error if a judge determines that “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” *People v. Watson*, at 836. This is a much broader standard than that required in federal cases, where a judge can reverse the conviction only if he or she determines that the error was harmless beyond a reasonable doubt. *Chapman v. California* at 24. The impact of both of these doctrines is the same, however: many defendants who have been subjected to illegal proceedings are not able to reverse their convictions because the error is found to be legally “harmless.”

**133** Harry T. Edwards, *A Conversation with Judge Harry T. Edwards*, *Washington University Journal of Law & Policy* 16 (2004): 61, 71

**134** Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, *N.Y.U. L. Rev.* 70 (1995): 1167, 1198-99.

**135** Judicial Council of California, “2013 Court Statistics Report: Statewide Caseload Trends 2003-2004 through 2011-2012,,” 69, <http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf>.

cost in time and money since, had the mistake or misconduct not existed, there would have been no grounds for appeal, saving appellate court and attorney resources for more substantive matters.

There is no way to determine how many wrongful and faulty convictions are upheld under the harmless error doctrine. One potential proxy is “Preventable Error: Prosecutorial Misconduct in California, 1997-2009” published in 2010 by the Veritas Initiative at Santa Clara University School of Law. The report examined 707 substantiated findings of prosecutorial misconduct in California. In 548 (77%) of those cases, the court determined that the misconduct was “harmless.” Only 159 of the 707 were deemed to have overcome the harmless error standard.<sup>136</sup> In other words, almost 80% of the cases of misconduct were hidden by the harmless error doctrine. It is unknown whether this rate applies to other types of error, but the matter remains nonetheless worthy of further study.

## MISDEMEANORS

In general, about 80% of all criminal filings are misdemeanors, while only about 20% are felonies.<sup>137</sup> The maximum sentence for a misdemeanor is one year in jail, and many misdemeanors are relatively minor crimes which are resolved by probation or other non-custodial alternative sentences. Given the potentially enormous pool of misdemeanors, and the difficulties in locating cases that are reversed and dismissed after conviction, we could not include misdemeanors in our methodology. Yet, a faulty misdemeanor conviction can often impact an individual’s life and clog our courts just as much as a faulty felony conviction. The potential universe of injustice within misdemeanor convictions is worth examining.

## JUVENILES

By law, juvenile court files are not available to the public, preventing their inclusion in our analysis. There is no reason to believe, however, that the errors discussed in this report do not apply to juvenile prosecutions in all the same ways that they apply to those of adults. If anything, inflicting these injustices on juveniles should give rise to a louder call for reform. These failed prosecutions and faulty convictions have the potential for an even greater negative impact on the defendant’s life, since these individuals are torn from their families and communities even before they have reached adulthood.

A small window into these potential cases exists when juveniles are prosecuted as adults, because the files then become public. Eight of the defendants in our sample were arrested and incarcerated as juveniles, but tried as adults.

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### FOOTNOTES

<sup>136</sup> Kathleen M. Ridolfi and Maurice Possley, “Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009,” Northern California Innocence Project, Santa Clara School of Law, October 2010, 3, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.

<sup>137</sup> These totals do not include infractions, which are far greater than either misdemeanors or felonies but which do not implicate potential jail or prison time. Judicial Council of California, “2013 Court Statistics Report.” <http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf>.

In July of 2002 in Los Angeles County, Brian Banks was accused of raping his classmate. Mr. Banks was a 16-year-old rising football star; he and the girl had had a consensual sexual encounter not involving intercourse before she accused him of rape. In 2003, at the age of 17, he was charged as an adult. The only evidence against him was the preliminary hearing testimony of the girl. Her testimony was inconsistent with her prior report to police, no sperm was found on her body and no male DNA was detected on her clothing. Faced with the prospect of a harsh sentence of 41 years to life in prison, in 2003 Mr. Banks decided to plead no contest in return for a 6 year sentence and the requirement that he register as a sex offender for the rest of his life.

In 2006, Mr. Banks filed a writ of habeas corpus alleging inadequate legal counsel and alleging that there was no evidence of rape. The court denied his petition, and Mr. Banks was released on parole after serving five years in state prison. In 2011, the girl contacted Mr. Banks and recanted her story, acknowledging that she lied because she did not want her mother to find out that she was sexually active. She had been reticent to come forward sooner because she had sued the Long Beach Unified School District alleging inadequate security and received a \$1.5 million settlement. Armed with her recantation, Mr. Banks filed another habeas corpus petition. The case was dismissed in May of 2012 without any objection from the district attorney.

In 2015, Mr. Banks received \$142,200 from the VCGCB. He had not yet settled his lawsuit as of the time of this report.

SECTION 4:

# **A NOTE ON GROUP EXONERATIONS**

The 607 unjust convictions profiled in this report thus far reflect individual, unrelated instances of errors in the criminal justice system. There are other situations in which multiple individuals are arrested, charged, or convicted through a systematic and related set of facts; 85 cases fitting that criteria are included in our database. We refer to these interconnected injustices as “group exonerations.”

We are aware of several group exonerations that have occurred in California, involving allegations of systematic police corruption and crimes against a substantial number of people whose arrests and convictions were ultimately dismissed. The most prominent of these was the 2002 Rampart police scandal in Los Angeles, in which a group of Los Angeles police officers admitted to falsely arresting or accusing hundreds of mostly Latino residents. Two hundred and twenty-eight individuals received civil settlements for the corrupt misconduct of the Rampart officers, while a report released by the City of Los Angeles pointed to 156 felony convictions and 15 misdemeanor convictions overturned.<sup>138</sup> Los Angeles paid more than \$78 million in verdicts and settlements related to the scandal, and total costs related to the scandal and its review have ranged from \$125 million<sup>139</sup> to upwards of \$1 billion dollars.<sup>140</sup> The scandal caused the Los Angeles Public Defender to review upwards of 8000 cases for error, a herculean task required above and beyond their regular caseload.<sup>141</sup> And, in an ironic twist, the settlement costs included three \$5 million payouts to officers of the LAPD who were wrongly enmeshed in the scandal and lost their jobs, showing that substantial errors can occur even in the investigation of other errors.

Only slightly less prominent was the Riders scandal in Oakland, which led the City of Oakland to settle over 119 cases of police misconduct for \$10.9 million. While Rampart and Riders received the most publicity, other group exonerations have happened in California amidst lesser fanfare. For example, the District Attorney in Sacramento was forced to dismiss 79 criminal cases in 2010, most of them DUI convictions, after it was discovered that the arresting officer had falsified his reports, offered perjured testimony, and committed other errors.<sup>142</sup> And in 2010, the San Francisco Police Department was forced to temporarily close its crime lab after it was revealed that a technician had been taking drugs captured by police and supplied to the lab for evidentiary testing. As a result, the San Francisco District Attorney was forced to review over one thousand drug convictions, ultimately dismissing 701 cases.<sup>143</sup>

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## FOOTNOTES

<sup>138</sup> “Rampart Reconsidered: The Search for Real Reform Seven Years Later,” Appendix C, Rampart CRASH Scandal Scorecard, p. 1

<sup>139</sup> Young, Rick, “Frontline: The Outcome of the Rampart Scandal Investigations,” available online at <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/late/outcome.html>.

<sup>140</sup> Kaplan, Paul J., “Looking Through the Gaps: A Critical Approach to the LAPD’s Rampart Scandal,” *Social Justice*, Vol. 36, No. 1 (115), at 61 (citing Pomerantz, Dorothy, “Final Cost of Rampart: \$1 Billion,” *Los Angeles Business Journal*, February 28, 2000.

<sup>141</sup> Young, Rick, above at n. 138.

<sup>142</sup> “Sacramento County DA Cites Cop Misconduct in Dismissing 79 Cases,” Kim Minugh, *Sacramento Bee*, available at <http://blogs.sacbee.com/crime/archives/2010/09/sacramento-coun-34.html>; “Sacramento Police Officer Brandon Mullock charged with 34 Counts of Perjury, Falsifying Police Reports,” Kim Minugh, *Sacramento Bee*, republished at <http://exceptionalcrimes.com/2011/05/19/officer-brandon-mullock/>, accessed April 2, 2015.

<sup>143</sup> “Mistrial Declared for Woman At Center of SFPD Crime Lab Scandal,” ABC7 News, October 3, 2012, available online at <http://exceptionalcrimes.com/2011/05/19/officer-brandon-mullock/>; Marina Neil, “Judge Asks DA to Drop Hundreds of Drug Cases, Says Gov’t Didn’t Check for Witness Issues,” *ABA Journal*, April 16, 2010, available at <http://exceptionalcrimes.com/2011/05/19/officer-brandon-mullock/>, accessed April 2, 2015; communication with the San Francisco Office of the Public Defender October 1, 2015.

Although we collected group exoneration cases as we were building our database, we have not included information on these individuals in the calculations made up to this point in the report.<sup>144</sup> This is in keeping with other observers of unjust outcomes in criminal cases. Moreover, including a large number of similarly-situated police misconduct errors in our data and analysis would likely skew the remaining data, as the characteristics of group exonerations, including Rampart, Riders, and the Tulia police scandal in Texas, tend to be different than those of the 607 individual exonerations.<sup>145</sup> For example:

**Figure 12: Comparison of 85 Rampart Cases with 607 Cases in Report**

	85 Rampart Cases	607 Individual Cases
Average time from initial appearance to dismissal	3 years	4.5 years
% of violent crimes	7	30
% of drug crimes	67	31
% of cases with paid civil settlement	75	9
Settlement as % of total cost	89	33

In addition, with the Rampart scandal in particular it proved impossible to obtain accurate data. While it has been published that as many as 228 people have received civil settlements from Los Angeles in compensation for the violation of their rights related to the Rampart scandal, and there were additional convictions overturned for individuals who did not sue the City of Los Angeles, we were ultimately able to identify and confirm only 85 reversed convictions that met our criteria for inclusion in this report. In attempting to get a precise count, we reviewed: (1) Russell Covey’s law review article, which provided a list of Rampart exonerations and settlement payments based on the author’s primary review of Rampart documents provided by the Los Angeles District Attorney’s Office;<sup>146</sup> (2) a series of articles published in *The Los Angeles Times* by Matt Lait and others, who observed court proceedings related to Rampart and published roughly contemporaneous lists of individuals whose arrests or convictions were set aside; and (3) information provided in response to a Public Records Request Act in which we sought amounts paid in settlement of claims related to wrongful arrest, prosecution or conviction. There was variation across all sources both in the names of those receiving payments and in the amount of payments that they received. Across all sources of data, we identified 228 names and settlements totaling \$79.8 million. Once we went to the courts, however, we could locate only 85 court files corresponding to the names and cases, with civil settlements totaling \$54 million. The reasons for this are unknown. Deficient record-keeping by the Los Angeles Courts played a role, as the County was unable to locate other requested case

#### FOOTNOTES

<sup>144</sup> We have included in our group of 607 several individuals whose convictions in Kern County on charges stemming from a supposed child sex abuse scandal were ultimately reversed as individual convictions, rather than as a mass exoneration. For a detailed assessment of child sex cases in Kern County and its effects, see Edward Hume, “Mean Justice: A Town’s Terror, A Prosecutor’s Power, A Betrayal of Innocence,” Simon & Schuster, 2012.

<sup>145</sup> Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, Georgia State Law Review, 26 (2013).

<sup>146</sup> Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, Georgia State Law Review, 26 (2013).

files in addition to the Rampart cases. In addition, some of the 228 settlements were paid to juveniles, and those files are not available to the public. Other settlements were paid to people who were harmed by the Rampart unit but never convicted of a crime due to the unit's malfeasance, so they would not have had a file in the criminal courts.

Ultimately, it is not the precise dollar amount paid or the number of cases confirmed, but rather the inability to identify the costs and cases that is the problem. It is clear that the costs of the police misconduct involved are huge, and that even a small number of corrupt police can have a massive direct and indirect economic impact on the criminal justice system. It is equally clear, and perhaps equally troubling, that after multiple internal and external investigations, we cannot quantify those costs with any certainty. Without information systems that can link criminal court records to civil settlements and records from specific compensation funds, it is impossible to accurately measure the costs of one of the largest police scandals in the history of American law enforcement. Without such measurements, it is difficult to prioritize thoughtful reforms that will prevent the next Rampart scandal. And if a scandal of the magnitude of Rampart does not inspire such capabilities, it is difficult to envision what scandal will be required to spur change.



SECTION 5:

# **CONCLUSION – NEXT STEPS AND RECOMMENDATIONS**

This report covers a number of errors and flaws in California’s criminal justice system, each of which could give rise to its own set of recommendations. We do not attempt to comprehensively evaluate all possible reforms here. Instead, we call upon legislators, advocates, academics, and policy makers to look to existing recommendations, knowing that no single reform will by itself solve everything but that positive change can be generated with each individual reform. In particular, we look to the 2006 report issued by the California Commission on the Fair Administration of Justice.<sup>147</sup> The Commission, which was formed of prosecutors, law enforcement, defense attorneys, judges, and policymakers, targeted six different topics associated with wrongful convictions:

- Mistaken eyewitness identification;
- False confessions;
- Perjured informant testimony;
- Inaccurate scientific evidence;
- Prosecutorial and defense lawyer misconduct; and
- Inadequate funding for defense services.<sup>148</sup>

The Commission issued a series of unanimous recommendations in each area, some of which are highlighted below. California embarked upon follow-up outreach and meetings in 2007,<sup>149</sup> but substantive practical reform has been stymied. To date, many of the recommended reforms have not been implemented statewide.

The Commission’s report provides California a rare opportunity to build upon existing consensus. Reaching agreement in any single area of criminal justice is an unusual occurrence—reaching agreement in multiple areas, and coming to the point of specific, unanimous recommendations, is virtually unheard of. We should not waste this past investment: California should not squander the opportunity to build upon the work done by the Commission.

In this final section, we focus on four potential areas of reform. Prosecutorial misconduct is highlighted because it was the most common error in flawed homicide prosecutions, which were the most expensive errors in our sample. Mistaken eyewitness identification and judicial mistake were also sources of high cost. Lastly, search and seizure (Fourth Amendment) errors affected the largest number of people, although costs were lower. These areas are addressed below.

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## FOOTNOTES

<sup>147</sup> California Commission on the Fair Administration of Justice, *California Commission on the Fair Administration of Justice Final Report*, 2006, <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

<sup>148</sup> California Commission on the Fair Administration of Justice, at 6.

<sup>149</sup> California Commission on the Fair Administration of Justice, Minutes of Public Hearing, July 11, 2007, <http://www.ccfaj.org/documents/reports/prosecutorial/expert/Public%20Hearing%20Meeting%20Minutes.pdf>.

## PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct, and more specifically the failure of prosecutors to disclose potentially exculpatory material as required under *Brady v. Maryland*, has become a substantial focus of reform. Ample avenues for change—some minor, some expansive—have been suggested. These include:

- Creating statewide, standard practices for open file discovery, so that defense counsel have access to the prosecutor’s full file while appropriately protecting information that could endanger a potential witness, based on the theory that truth is best served and *Brady* violations best avoided by sharing information;<sup>150</sup>
- Allowing civil litigation against district attorney offices that engage in misconduct, potentially by allowing lawsuits against offices that have multiple intentional or reckless *Brady* violations within an agreed-upon period of time;<sup>151</sup>
- Reducing absolute prosecutorial immunity, to provide accountability for prosecutors who intentionally manipulate or withhold evidence in order to secure a conviction they know may be false;<sup>152</sup>
- Increasing investigation and disciplinary activity from the State Bar, including mandatory reporting of certain types of prosecutorial misconduct to the Bar for potential disciplinary proceedings;<sup>153</sup>
- Creating a Commission on Prosecutorial Misconduct;<sup>154</sup>

### FOOTNOTES

**150** In 2014 Texas adopted an open file policy in the Michael Morton Act, named after a man who was wrongfully convicted in the murder of his wife and spent 25 years in prison. Prior to the law, individual prosecutors made their own decisions about whether a particular document in the file should be considered exculpatory. See Terry Langford, “Costs and Questions as TX Implements New Discovery Law, The Texas Tribune, May 29, 2014, <http://www.texastribune.org/2014/05/29/michael-morton-act-driving-evidence-costs-das/>.

**151** The Hyde Amendment (Pub.L. 105-119, § 617, Nov. 26, 1997, 111 Stat. 2519, codified as a note following 18 U.S.C. § 3006A) allows individuals prosecuted in federal court to recover their attorneys’ fees and costs if the federal prosecutors’ position was “vexatious, frivolous, or in bad faith.” The Hyde Amendment does not apply to prosecutions that originated in state court, and it helps only those defendants who paid for their own counsel. In addressing a way to avoid future cases of prosecutorial misconduct, retired Associate Justice of the Supreme Court of the United States John Paul Stevens recommends borrowing from tort law and the rule of *respondeat superior*. There, employers are required to pay damages for torts committed by their employees during the normal course of business. Justice Stevens suggests a similar model for prosecutors. See John Paul Stevens, Letter to the Editor, *The New York Times*, February 18, 2015, [http://mobile.nytimes.com/2015/02/18/opinion/prosecutors-misconduct.html?referrer=&\\_r=0](http://mobile.nytimes.com/2015/02/18/opinion/prosecutors-misconduct.html?referrer=&_r=0).

**152** Edwin Chemerinsky, “Head In the Sand Over Prosecutorial Misconduct,” *The National Law Journal*, April 25, 2011, available online at Lexis/Nexis.

**153** Kathleen M. Ridolfi and Maurice Possley, “Preventable Error: A Report on Prosecutorial Misconduct 1997-2009, Northern California Innocence Project, Santa Clara School of Law, October 2010, at 4. <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>. See also Commission on the Fair Administration of Justice, at 79-80.

**154** Law Professor H Mitchell Caldwell advocates creating a Commission on prosecutorial misconduct fashioned on the existing California Judicial Conduct Commission. The Commission would have the authority to investigate, conduct hearings, and issue sanctions for violations. See Douglas Kmiec, “Prosecutorial Misconduct and ISSI Recruiting: The Hidden Linkage,” *The Huffington Post*, February 20, 2015, [http://www.huffingtonpost.com/douglas-kmiec/prosecutorial-misconduct-\\_1\\_b\\_6704524.html](http://www.huffingtonpost.com/douglas-kmiec/prosecutorial-misconduct-_1_b_6704524.html). Many in New York have also been advocating for such a commission. <http://observer.com/2015/06/supporters-rally-for-state-commission-on-prosecutorial-conduct-bill/>.

- Requiring district attorney offices to formulate and disseminate written policies governing *Brady* compliance, providing for systematic collection, tracking and disclosure of the materials as soon as relevance is known and prior to any guilty plea,<sup>155</sup> and
- Address overzealous prosecutions by requiring counties to pay for every inmate they incarcerate in state prison.<sup>156</sup>

These suggestions are not particularly new, and most of them are not particularly radical. California took a significant step in the right direction when Governor Brown signed AB 1328 in October, 2015. The new law will require judges to report certain deliberate and intentional *Brady* violations to the State Bar, and in rare instances will allow judges to disqualify entire offices if there is a systemic pattern and practice of violations. It is an encouraging first step, and one that should be watched as the law is implemented.

Many of these suggestions also allow for systems change that goes beyond blaming an individual prosecutor or office. Although appropriate accountability for intentional acts is important, it is only a partial solution. We must recognize the impact of high caseloads, insufficient resources for proper investigation and prosecution, poorly trained and compensated defense attorneys, an investigator culture that may not value evidentiary disclosure, and implicit bias that can negatively affective outcomes.<sup>157</sup> By addressing all of these pressures, along with individual repercussions for intentional bad acts, we can reduce misconduct and build towards a better system.

## EYEWITNESS IDENTIFICATION

As with prosecutorial misconduct, there has been a great deal of research, evaluation, and discussion around reducing inaccurate eyewitness identifications. As a result, there is a considerable body of existing recommendations surrounding erroneous eyewitness identifications. Moreover, eyewitness identification is another area that can be viewed systematically:

*Yes, the eyewitness does have to choose the wrong man from the photo array, but before that, law enforcement officers have to decide to put him into the array, design the format of the array and choreograph its display. Forensic evidence at the crime scene could have been overlooked or—even if properly collected and then tested in the lab—distorted during the courtroom presentation. Cell phone, mass transit card data, or other alibi information could have been ignored. Tunnel vision—augmented by clearance rate and caseload pressures from above—may have overwhelmed the investigators and the prosecutors. Poorly funded*

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### FOOTNOTES

<sup>155</sup> Commission on the Fair Administration of Justice, 90-91.

<sup>156</sup> W. David Ball, “Defunding State Prisons,” *Criminal Law Digital Commons, Bulletin* 50.5 (2014): 1060-1090, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1606&context=facpubs>. Ball proposes that one way to curb overzealous prosecution is to make counties pay for the men and women whom they send to state prison. Currently, the costs of state prison incarceration are borne by the state, so counties face no financial repercussions from sending larger numbers of individuals to prison rather than county jail. Ball argues that changing the funding structure to force counties to pay the costs of sending an individual to prison would improve accountability and transparency.

<sup>157</sup> James M. Doyle, “Learning From Error in the Criminal Justice System: Sentinel Event Reviews,” 8-9, in U.S. Department of Justice, National Institute of Justice, “Mending Justice: Sentinel Event Reviews,” September 2014, <https://ncjrs.gov/pdffiles1/nij/247141.pdf>.

*or untrained defense counsel may have failed to investigate alternative explanations or to execute effective cross-examination. The witness erred; the police erred; the technicians erred; the prosecutors erred; the defense erred; the judge and the jury erred; and the appellate court erred, too.*<sup>158</sup>

The National Academy of Sciences recently evaluated the research on eyewitness identification and recommended a series of focused and specific practices. Some of these recommendations target the actual moment of (mis)identification, while others seek to reduce error by viewing the identification as one moment within the larger frame of potential error. These best practices include:<sup>159</sup>

- Train all law enforcement officers on scientifically established practices that reduce the likelihood of “false positive” eyewitness identifications;
- Implement double-blind and photo array procedures;
- Use standard witness instructions;
- Document levels of witness confidence;
- Videotape the identification process;
- Conduct pretrial judicial inquiry;
- Make juries aware of prior identifications;
- Use scientific framework expert testimony; and
- Use jury instructions as an alternate means to convey information.

Other states have already begun to focus reform on eyewitness identification—Massachusetts, for example, recently created a standing committee on eyewitness identification.<sup>160</sup> New Jersey has set new standards for how judges instruct juries in the credibility of eyewitness identifications,<sup>161</sup> and Oregon has done similarly.<sup>162</sup> Although a few jurisdictions in California (e.g., Santa Clara County, Placer County, the city of El Cerrito) have been leading the way, for the most part California has not been implementing these best practices despite the fact that the 2006 Commission Report recommended similar reforms. Given the enormous potential for error, and given the clear and well-researched recommendations set out by the Commission and the National Academy of Sciences, it is time for California to act.

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#### FOOTNOTES

<sup>158</sup> James M. Doyle, *Learning From Error in the Criminal Justice System*, 4.

<sup>159</sup> National Research Council, *The National Academy of Sciences* (2014), “Identifying the Culprit: Assessing Eyewitness Identification” <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

<sup>160</sup> In 2015, Massachusetts created a Standing Committee on Eyewitness Identification which provides guidance to courts on the evolving law and science of eyewitness ID and designs seminars and training sessions on new eyewitness ID evidence procedures and protocols. See “Supreme Judicial Court Announces New Standing Committee on Eyewitness Identification,” Massachusetts Court System, press release, January 12, 2015, <http://www.mass.gov/courts/news-pubs/sjc/sjc-announces-new-standing-committee-on-eyewitness-identification.html>.

<sup>161</sup> [http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html?\\_r=1](http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html?_r=1)

<sup>162</sup> [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/11/oregon\\_supreme\\_court\\_ruling\\_de.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/11/oregon_supreme_court_ruling_de.html)

## JUDICIAL MISTAKE

Judicial mistakes during trial account for almost one quarter of the errors in this report, particularly improper jury instructions and erroneous admission or exclusion of evidence. Additional training for judges is a partial solution. But, as with misconduct and eyewitness identification, what is termed “judicial mistake” in this report is more accurately viewed as a systemic problem. In our adversarial system, we depend on competent and well-trained public defenders and district attorneys, both of whom should be granted sufficient time to understand the issues and adequately brief the court. Our system relies on each side speaking up to ensure that the judge has adequate information and that a fair trial is had. A judge may act inappropriately, or even commit misconduct, but he or she is aided by a prosecutor who missed or silently endorsed the mistake, as well as a defense attorney who did not or could not respond adequately.<sup>163</sup>

Rather than address the specific jury instructions and evidentiary mistakes made by judges, this report recommends the adoption of holistic checks and balances that reduce error more systematically. Those checks and balances should ensure well-trained prosecutors and defense attorneys, with caseloads that allow for proper representation, and resources that allow for adequate investigation and representation on both sides of the aisle. The 2006 Commission Report, for example, makes explicit recommendations regarding qualifications and compensation for court-appointed defense counsel who are retained by contract with the court.<sup>164</sup> It also calls for increased funding and oversight for defender services.<sup>165</sup> On the government side, it is critical that the system encourage and implement a culture of doing justice, rather than a culture of victory.

## FOURTH AMENDMENT VIOLATIONS

Officer violations of the Constitution’s Fourth Amendment protections against search and seizure were the largest category of individual error in our sample, although they were resolved relatively quickly and at relatively low monetary cost. But these errors nonetheless impact the lives of those who are subject to the illegal searches and seizures, as well as victims of crime who may not receive closure when the case against the defendant is dismissed as a result of the Constitutional violation.

Additional training is again a useful recommendation; officers who know and understand the Fourth Amendment and its application by the courts in specific circumstances are less likely to violate the law when they search or arrest a defendant. Here again, however, viewing the issues systemically provides a helpful framework. The search and seizure errors in our sample belong not only to the officer who conducted the search, but to his or her supervisor, to the prosecutor in the case who failed to detect the improper search during the investigation phase, and to the defense counsel who failed to adequately identify and object to the violation prior to or during trial. Moreover, many jurisdictions lack an

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### FOOTNOTES

<sup>163</sup> Judicial misconduct and error raise the issue of whether judges should be elected, since the electorate often has little way to accurately assess the qualifications of a particular candidate. [www.mercurynews.com/opinion/ci\\_27778493/mercury-news-editorial-another-flawed-judge-begs-question](http://www.mercurynews.com/opinion/ci_27778493/mercury-news-editorial-another-flawed-judge-begs-question).

<sup>164</sup> Commission on the Fair Administration of Justice, 91 – 100.

<sup>165</sup> Commission on the Fair Administration of Justice, 91 – 100.

automatic feedback mechanism, meaning that officers do not always know the repercussions of their errors and therefore cannot correct them:

“The police operate a ‘production stage,’ during which they make the cases, often with the participation of the prosecutors. Then the prosecutors, together with defense lawyers and judges, conduct an “inspection stage” that culminates in an adversary trial, at which the law enforcement team is required to account for the work it has produced. It is axiomatic in all industries that end-of-process inspection schemes, although they are necessary components of quality-control systems, are poor routes to achieving overall system quality.”<sup>166</sup>

Achieving system quality in this context means reducing search and seizure errors. Although those errors were caught in the cases studied here, they were not caught until the end of the process, after the defendant had been convicted. A more efficient and effective system should strive to reduce or eliminate error before it happens, rather than catching the errors after the fact. Requiring that individual officers be informed of the court’s ruling on a search or seizure in which they participated, and requiring that the court’s ruling be disseminated to the rest of the office, is a first step.

## CONVICTIONS INTEGRITY UNITS

Several prosecutors’ offices across the United States are establishing Convictions Integrity Units to investigate possible wrongful convictions and work toward error prevention.<sup>167</sup> Although the Dallas unit has been operating continuously since 2007,<sup>168</sup> in fact one of the first units in the country started in Santa Clara in 2002.<sup>169</sup> In addition to Dallas, the trend has been adopted in Houston, Manhattan, Denver, Baltimore, Philadelphia, Brooklyn, New York, Cleveland, New Orleans, and Portland, among others.<sup>170</sup> In September of 2014, the United States Attorney’s Office in Washington D.C. established the first federal Convictions Integrity Unit.<sup>170</sup> Outside of district attorney offices, North Carolina established an Innocence Commission in 2006, tasked with providing an independent truth-seeking forum for post-conviction claims of innocence.<sup>172</sup> Most recently, in 2015, the District Attorney for Los Angeles, the County responsible for the largest share of convictions in California, announced the formation of a Convictions Integrity Unit.<sup>173</sup>

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### FOOTNOTES

<sup>166</sup> James M. Doyle, “Learning From Error in the Criminal Justice System,” 8.

<sup>167</sup> Center for Prosecutor Integrity, “Conviction Integrity Units: Vanguard of Criminal Justice Reform,” 2014, <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf>.

<sup>168</sup> Molly Hennessy-Fiske. “Dallas County district attorney a hero to the wrongfully convicted,” *The Los Angeles Times*, May 8, 2012, <http://articles.latimes.com/2012/may/08/nation/la-na-dallas-district-attorney-20120509>.

<sup>169</sup> The Santa Clara unit operated from 2002 to 2007, then was relatively inactive from 2007 to 2010. It was revitalized and formally identified as a Convictions Integrity Unit in 2010 by District Attorney Jeff Rosen.

<sup>170</sup> <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf>

<sup>171</sup> Spencer S. Hsu, “D.C. prosecutors create unit to find wrongful convictions,” *The Washington Post*, September 11, 2014, [http://www.washingtonpost.com/local/crime/dc-prosecutors-create-unit-to-find-wrongful-convictions/2014/09/11/91a3722c-39da-11e4-bdfb-de4104544a37\\_story.html](http://www.washingtonpost.com/local/crime/dc-prosecutors-create-unit-to-find-wrongful-convictions/2014/09/11/91a3722c-39da-11e4-bdfb-de4104544a37_story.html).

<sup>172</sup> The North Carolina Innocence Commission, accessed March 4, 2014, <http://www.innocencecommission-nc.gov/>.

<sup>173</sup> <http://www.latimes.com/local/lanow/la-me-ln-conviction-review-unit-20150422-story.html>

Recommendations for Convictions Integrity Units tend to cover many of the subjects already addressed in this section, including *Brady* disclosures, prosecutorial misconduct, and police practices. As in other areas, best practices for these units often include rewarding prosecutors for their commitment to justice instead of their number of convictions, establishing open file discovery, working in partnership with police officers and investigators, and using best practices in eyewitness identification.<sup>174</sup> The fact that these recommendations overlap with many of the recommendations made in other contexts, including the 2006 Commission Report, highlights the need for reform.

## CONCLUSION

This report focuses a spotlight on 607 wrongful and invalid convictions that burdened Californians with 483 jury trials, 26 mistrials, 16 hung juries, 168 plea bargains, over 700 appeals and habeas petitions, more than 50 lawsuits and settlements and 2,186 years in prison and jail, for a taxpayer cost of \$221 million. California can do better.

The urgency of our call to action is grounded not only in the costs documented here, but also in the unknown costs omitted by our methodology. We have surely not captured all of the flawed felony convictions that could have been included in this report, nor have we quantified the often immense emotional harm done to those subjected to these flawed proceedings and their families. We have not included the untold costs that result from wrongful juvenile convictions, wrongful misdemeanor convictions, and prosecutions that do not result in conviction, among other things. The costs documented in this report are thus only a window onto the myriad ways in which our system fails citizens, victims and defendants.

At most, examining 607 cases as we have done here is the start of a conversation, and the suggested next steps and recommendations in this concluding section are only the first step. There are still many unanswered questions: how many more people are not being served by our criminal justice system? What are the true costs? Why does California seem to fall behind other states? Who will take the lead on solving these problems?

The answer to at least the final question is that it will take all of us. All Californians should care about our criminal justice system, and we all must make it a priority. The professionals who administer California's criminal justice system surely share our goal of a system without unjust arrests, and with convictions that are fair and free from error, mistake and misconduct. Our communities, our legislators, our citizens, and our criminal justice professionals themselves—police, prosecutors, defense counsel, judges, and juries—overwhelmingly believe in and seek to serve in a fair and just criminal justice system. Achieving this standard requires both an understanding about how and where we are not succeeding and the willingness to openly discuss areas for improvement. These discussions should include all participants across agency and adversarial lines, so that we can prioritize and promote improvements to the system. The real cases highlighted in this report can be the starting point for those conversations.

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### FOOTNOTES

<sup>174</sup> *Establishing Convictions Integrity Units in Prosecutors' Offices*, A Report of the Center on the Administration of Criminal Law's Conviction Integrity Project, 9, accessed March 30, 2015, [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Establishing\\_Conviction\\_Integrity\\_Programs\\_FinalReport\\_ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf).



SECTION 6:  
**APPENDICES**

## APPENDIX A – County Comparisons

It is not possible to generalize about individual counties based on the cases in this report. While there are variances among the reversals and wrongful convictions from county to county, limitations on data availability preclude any certainty regarding whether one county is “better” or “worse” than another in this regard. One county may appear to have more wrongful convictions than another, but that may be because, for example, an investigative journalist in that county published information about the reversed and dismissed cases, or because there is a local Innocence Project. Likewise, a particular county’s lack of sample cases in this report may simply be a result of poor record-keeping and barriers to access. That said, the comparison below between the number of cases in our sample, and the number of felony jury trials in each county, may provide a starting point for a conversation about the need for additional data and review. This information is not intended to be a report card for any county, but rather to demonstrate the need for additional data collection and transparency.<sup>175</sup> (See Figure 13)

**Figure 13: Felony Jury Trials and Sample Cases, by County**

County	Total Number of Felony Jury Trials 2002–2012 <sup>176</sup>	Average # of Felony Jury Trials Per Year 2002–2012 <sup>177</sup>	Total Cases in Sample 1989–2012 <sup>178</sup>	Total Cases in Sample 2002–2012 <sup>179</sup>	Sample cases as % of Felony Jury Trials 2002–2012 <sup>180</sup>
Amador	20	1.8	3	3	15.0%
Alameda	1,113	101.2	7	4	0.4%
Alpine	3	0.3	0	0	0.0%
Butte	301	27.4	6	5	1.7%
Calaveras	40	3.6	0	0	0.0%
Colusa	38	3.5	0	0	0.0%

### FOOTNOTES

<sup>175</sup> The ten counties with the highest number of felony convictions in 2013 include: Los Angeles, 43,545; Riverside, 12,734; Orange, 11,529; San Diego, 11,828; San Bernardino, 15,021; Sacramento, 6,509; Kern, 6,380; Fresno, 5,922; Santa Clara, 5,743; and San Joaquin, 4,216. Judicial Council of California, “2014 Court Statistics Report,” Table 8b, <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>.

<sup>176</sup> Judicial Council of California Administrative Office of the Courts, Court Statistics Reports, Table 8a. Data maintained by fiscal year 2002-03 through 2012-13. <http://www.courts.ca.gov/12941.htm#id7495>.

<sup>177</sup> Based on an eleven year average, 2002-03 through 2012-13, inclusive.

<sup>178</sup> These totals do not include 20 cases in the database from the California-based federal courts. Numbers in each column are based on the calendar year of the date of reversal.

<sup>179</sup> These totals do not include 20 cases in the database from the California-based federal courts. Numbers in each column are based on the calendar year of the date of reversal.

<sup>180</sup> Database cases from 2002-2012, inclusive, as a percentage of each county’s total jury trials 2002-2012, inclusive. Note that our sample includes cases where the defendant was initially convicted by guilty plea, as well as cases where the defendant was initially convicted after trial. All cases in the database are felony cases.

<b>Contra Costa</b>	1,349	122.6	18	15	1.1%
<b>Del Norte</b>	78	7.1	2	2	2.6%
<b>El Dorado</b>	335	30.5	0	0	0.0%
<b>Fresno</b>	1,122	102	3	2	0.2%
<b>Glenn</b>	66	6	0	0	0.0%
<b>Humboldt</b>	299	27.2	6	5	1.7%
<b>Imperial</b>	125	11.4	6	6	4.8%
<b>Inyo</b>	77	7	1	1	1.3%
<b>Kern</b>	2,017	183.4	65	40	2.0%
<b>Kings</b>	371	33.7	3	3	0.8%
<b>Lake</b>	228	20.7	5	1	0.4%
<b>Lassen</b>	87	7.9	0	0	0.0%
<b>Los Angeles</b>	22,391	2035.5	165	122	0.5%
<b>Madera</b>	270	24.5	3	3	1.1%
<b>Marin</b>	230	20.9	3	2	0.9%
<b>Mariposa</b>	12	1.1	0	0	0.0%
<b>Mendocino</b>	190	17.3	2	2	1.1%
<b>Merced</b>	301	27.4	2	1	0.3%
<b>Modoc</b>	23	2.1	0	0	0.0%
<b>Mono</b>	5	0.5	0	0	0.0%
<b>Monterey</b>	426	38.7	4	4	0.9%
<b>Napa</b>	168	15.3	3	2	1.2%
<b>Nevada</b>	59	5.4	1	1	1.7%
<b>Orange</b>	1,975	179.5	46	39	2.0%
<b>Placer</b>	256	23.3	1	1	0.4%
<b>Plumas</b>	15	1.4	1	1	6.7%
<b>Riverside</b>	5,552	504.7	14	13	0.2%
<b>Sacramento</b>	4,122	374.7	17	15	0.4%

<b>San Benito</b>	50	4.5	2	2	4.0%
<b>San Bernardino</b>	2,521	229.2	16	13	0.5%
<b>San Diego</b>	2,991	271.9	38	26	0.9%
<b>San Francisco</b>	2,447	222.5	11	10	0.4%
<b>San Joaquin</b>	818	74.4	8	7	0.9%
<b>San Luis Obispo</b>	142	12.9	0	0	0.0%
<b>San Mateo</b>	569	51.7	19	16	2.8%
<b>Santa Barbara</b>	311	28.3	2	1	0.3%
<b>Santa Clara</b>	1,684	153.1	42	36	2.1%
<b>Santa Cruz</b>	186	16.9	4	3	1.6%
<b>Shasta</b>	844	76.7	8	8	0.9%
<b>Sierra</b>	11	1.1	0	0	0.0%
<b>Siskiyou</b>	77	7	4	3	3.9%
<b>Solano</b>	966	87.8	14	9	0.9%
<b>Sonoma</b>	486	44.2	11	10	2.1%
<b>Stanislaus</b>	942	85.6	4	3	0.3%
<b>Sutter</b>	180	16.4	1	1	0.6%
<b>Tehama</b>	96	8.7	5	5	5.2%
<b>Trinity</b>	18	1.6	0	0	0.0%
<b>Tulare</b>	728	66.2	5	5	0.7%
<b>Tuolumne</b>	195	17.7	2	2	1.0%
<b>Ventura</b>	948	86.2	0	0	0.0%
<b>Yolo</b>	912	82.9	3	3	0.3%
<b>Yuba</b>	137	12.5	1	1	0.7%

## APPENDIX B – Methodology for Cost of County Jail

This appendix details the methodology and data sources employed to calculate the cost of detention in California’s county facilities.<sup>181</sup> Using data from the State Controller’s Office and the Board of State and Community Corrections, we estimated per day, per capita detention costs for 58 counties in California for each year from 1996 to 2011.

### METHODOLOGY FOR ESTIMATING PER CAPITA DETENTION COSTS

To estimate the per capita cost of detaining an individual, we obtained annual detention expenditures for each county and annual average daily detention population data. Using these data, we calculated an average cost per inmate figure using the following formula:

$$\text{Average Annual Cost Per Inmate} = \frac{\text{Total Annual Spending on Detention (\$)}}{\text{Annual Average Daily Population (ADP)}}$$

To calculate a daily per inmate cost, the annual per capita cost figure above is divided by 365 days:

$$\text{Average Daily Cost Per Inmate} = \frac{\text{Average Annual Cost Per Inmate (\$)}}{365 \text{ days}}$$

This calculation yielded an average cost per day, per inmate for each county in California, by year.

### DATA SOURCES

#### County Detention Expenditures Data

The most comprehensive resource on county-by-county detention expenditures is the Counties Annual Report published each year by the California State Controller’s Office (SCO). This publication reports all county revenues and expenditures each year, including spending on adult detention. Data from 1991 to 2011 were obtained from the SCO. To calculate per capita daily detention costs, only operating expenditures were included. County spending on juvenile detention has been excluded from these calculations.

#### FOOTNOTES

**181** The cost of detaining an inmate in a county detention facility may be broken down into two broad categories—operating costs and capital costs. Only operating costs are included in our calculations.

- **Operating costs** include the cost of personnel, services, and facility maintenance. These costs are the most relevant cost for estimating a per capita cost figure, as they can vary based on the number of inmates in detention.

- **Capital costs** include land purchases and construction costs. These may vary dramatically year-to-year and are not necessarily directly related to the expense of detaining each additional (or, marginal) inmate.

Within the operational cost category, there is a further distinction between fixed costs and variable costs. By and large, facility maintenance costs are mostly fixed, as are personnel costs. These fixed costs are a stepped-function: the addition of one additional inmate is unlikely to alter personnel and maintenance costs. However, an increase of 300 inmates may require the hiring of additional custody staff and the expansion of a unit. Ordinary variable costs—expenses that can change in the short run—include costs of food, supplies, clothing and medical care. Again, these are the costs likely to change with the addition of one inmate (and are most relevant to an estimate of per capita costs). A full analysis of fixed and variable costs is beyond the scope of this project.

## Limitations

The SCO county detention data are high-level, aggregating all adult detention costs including jail, residential rehabilitation centers, honor farms, as well as other non-secure, non-jail facilities, such as halfway houses, temporary holding facilities, and work release centers. There is no way to isolate jail costs from these data. As such, the per day costs calculated here may overstate the actual costs of detaining an inmate only in a county jail facility.

## Inflation Adjustment

Expenditure data from 1991 to 2011 were adjusted to 2013 dollars using the Bureau of Labor Statistic's Consumer Price Index for All Urban Consumers. The formula for adjusting for inflation used is as follows:

$$\text{Cost in 2013\$} = (\text{Nominal Value}) \times \left( \frac{\text{2013 CPI Index Value}}{\text{Original Year CPI Index Value}} \right)$$

## County Jail Population Data

The denominator of the per capita cost calculation is the average daily population (ADP) of a facility or county. In California, the Board of State and Community Corrections (BSCC) collects and maintains ADP figures for each facility in each county across the State through the Jail Profile Survey (JPS). The JPS, which has been conducted on both a monthly and quarterly basis since late 1995, covers Type II, III and IV facilities, and excludes temporary holding facilities and juvenile detention facilities (including juvenile halls and camps).

*Facility types covered by the JPS:*

- **“Type II facility”** means a local detention facility used for the detention of persons pending arraignment, during trial, and upon a sentence of commitment.
- **“Type III facility”** means a local detention facility used only for the detention of convicted and sentenced persons.
- **“Type IV facility”** means a local detention facility or portion thereof designated for the housing of inmates eligible under Penal Code Section 1208 for work/education furlough and/or other programs involving inmate access into the community.

## Annual Average Daily Population Calculations

In order to estimate a yearly average daily population (ADP), monthly ADP figures were obtained from the JPS survey data for all 58 counties for the years 1996-2012. An average annual ADP was calculated for each county by summing each monthly ADP figure within a given year and dividing by 12 months. When these numbers were calculated, the 2012 JPS data were available from January-June only, so the 2012 figures reflected a 6-month average, rather than an annual average.

**Notes about the JPS data**

For the majority of counties, detention facilities are included under the jurisdiction of the Sheriff or County Corrections Department. However, the JPS data also include detention data for several jurisdictions which were excluded from the calculations:

- Oakland Police Department (2000-2005) – Oakland City Jail, closed in 2005. Inmates were transferred to Glenn E. Dyer or Santa Rita facilities.
- San Diego Probation Department (1996-2001) – Includes Barrett Honor Camp/Barrett Juvenile (which also housed juveniles, beginning in 1997) and Camp West Fork (minimum security honor camp, closed in 2001).
- San Diego Work Furlough (all years) – Work Furlough residential facility, operated by Correctional Alternatives, Inc.
- Santa Clara Probation Department (1996-2007) – Mountain View Work Furlough program; residential facility, operated by the Probation Department.
- Scapular House (1996-2002) – Los Angeles County’s Work Furlough Program, developed as part of Community Based Alternatives to Custody Program, managed by the Probation Department.
- Ventura Work Furlough (all years) – Minimum security residential facility, operated by the Ventura Probation Department.

## APPENDIX C – Methodology for Trial, Appeal, and Attorney Costs<sup>182</sup>

This Appendix describes the data sources and methods used to calculate court cost estimates for felony cases defined by broad offense category, including whether the case involves a trial. We draw data from several sources, including a judicial work load assessment, court costs from drug court cost evaluations, and estimates of the hourly costs of public defenders and district attorney accounting for all supporting personnel. For the purposes of comparison, we present alongside our estimates for California, court-cost estimates produced by the Washington State Institute of Public Policy (WSIPP) for the state of Washington. The WSIPP estimates are used in their benefit-cost analysis of policy interventions that impact crime rates, and in turn, resources consumed in processing criminal cases.

Our estimates are based on time use and costs per hour figures for courts, district attorneys, and public defenders. We first discuss our time input estimates. We then discuss our estimates of hourly costs. Finally, we pull these estimates together to generate total costs per case type.

### TIME INPUT ESTIMATES

We begin by presenting estimates of the court time for criminal cases from the 2002 California Judicial Workload Assessment conducted by the National Center for State Courts. Table 1 presents estimates of the proportion of cases involving pre-trial proceedings, trials, and post-trial proceedings and with estimates of average time in minutes of each stage in the case processing flow. The table also presents estimates of average time taking into account the event occurrence rates for pre-trial proceedings, trials, and post-trial proceedings, as well as average time with and without trials. For our cost estimates we focus on the figures in the five columns pertaining to felony crimes. We use these estimates for several purposes. First, in estimating district court costs, we use the time estimates in conjunction with an hourly court cost estimate (to be discussed shortly) to estimate court time costs. In addition, we use the court time disparity by whether a case involves a trial in conjunction with time use estimates for public defenders to arrive at time use figures for public defenders and district attorneys.

Table 2 presents data from the San Francisco Public Defender’s Office Caseload/Workload analysis on average time in hours for public defenders by type of felony offense. We use these data along with the data in Table 1 to estimate time for case by whether the case involves a trial. We assume that differences in prep time for cases involving trials and cases with no trials is proportional to the differences in court time list in Table 1. To be specific, let  $R$  be the ratio of court time for a case involving a trial to a comparable case (in terms of offense) not involving trial. Let  $X$  be the prep time for the public defender when there is no trial. Let  $p$  be the proportion of cases of this type that go to trial, and let  $A$  be the average amount of prep time for these cases. The average prep time can be expressed as  $A = pRX + (1-p)X$ . Solving for  $X$  gives  $X = A / (pR + 1 - p)$ . With a solution for  $X$  (prep time for cases not involving a trial)

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### FOOTNOTES

<sup>182</sup> The authors of this report are grateful to Steven Raphael, Ph.D. Professor of Public Policy at the Goldman School of Public Policy, University of California Berkeley, for developing the methodology set out in this section. A complete peer-reviewed methodology for trial, attorney and court costs was beyond the scope of this report. We have attempted here only to roughly estimate these costs, using available information. Professor Raphael’s gracious contribution to this report is deeply appreciated.



prep time for cases involving a trial require multiplication by the ratio  $R$ . We use the figures in the first row of Table 2 for the parameter  $A$ , we use data on trial incidence from Table 1 to estimate  $p$  and  $1-p$ , and estimate  $R$  from the data in Table 1 by taking the ratio of average court time with trial to average court without trial. The implied solutions for average time per case with and without a trial are presented in the second and third rows of Table 2.

We do not have separate estimates of time use per case type for district attorneys. Hence, we assume that prep time for district attorneys and public defenders are the same.

## HOURLY COST ESTIMATES

We estimate the average cost of court time using estimates from the California Drug Court study. The Phase 1 evaluation of the Administrative Office of the Court includes estimates of hourly costs for the Superior Court, district attorney, and public defender from three separate county drug courts. These figures are presented in Table 3. While there is general agreement for Courts 1 and 2, average hourly costs are much lower for Court 3. We believe that Court 3 is an outlier and thus base our estimate of an hour of court time on the average of the values for Courts 1 and 2.

In our cost estimates, we use the Superior Court figures from Table 3 only. To estimate hourly costs figures for prosecutors and public defenders, we rely on more conservative calculations based on total annual operating expenditures in the state for public defenders and district attorneys and total attorney staffing levels. Table 4 presents these tabulations using data for fiscal year 2010-2011 and inflating the ultimate dollar figure per hour to 2013 dollars. Note, the tabulations in table 4 amortize all operating expenditures (inclusive of non-attorney staff) to attorney hours. The hourly figures in Table 4 are considerably lower than the hourly costs estimates from the drug courts study in Table 3. We use these lower hourly costs estimates in our ultimate cost tabulations.

## GENERATING THE FINAL COST ESTIMATES

Table 5 multiplies to time use figures and the hourly costs figures to estimate average court costs, public defense costs, and prosecution costs by broad offense type. The table presents separate cost totals for cases involving trials and cases not involving trials. Not surprisingly, costs are considerably higher when a trial is involved.

There are few extant comparable estimates of court processing costs for felony convictions. The Washington State Institute of Public Policy (WSIPP) has produced comparable estimates for the state of Washington, though using a decidedly different methodological approach and for somewhat different offense categories.<sup>183</sup> Moreover, WSIPP does not produce separate estimates for cases distinguished by whether they involve a trial. These differences aside, we present these estimate in Figure 1 to assess whether we are in the same ballpark. The figures are generally consistent with our estimates.

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### FOOTNOTES

**183** WSIPP estimates a time series regression of total criminal justice expenditures against changes in the number of convictions by type. The coefficients on the changes in convictions serve as estimates of the marginal cost of a criminal conviction. Table 1 comes from the coefficients in the regression model presented in Washington State Institute of Public Policy, *Benefit Cost Technical Manual*, Page 35 exhibit 13. The complete report can be found on the WSIPP webpage location, visited August 8, 2014, <http://www.wsipp.wa.gov/TechnicalManual/WsippBenefitCostTechnicalManual.pdf>.

**Table 1: Estimates of Court Time for Criminal Cases from the 2002 California Judicial Workload Assessment<sup>184</sup>**

	Homicide	Felony against person	Property	Drug	Other felony	Class A & C	Class B & D	Infractions
<b>EVENT OCCURRENCE RATE</b>								
Pre-trial	100%	100%	100%	100%	100%	100%	81%	27%
Trial	50%	6%	3%	2%	3%	3%	0.5%	4%
Post-trial	20%	20%	20%	50%	20%	10%	10%	0.5%
<b>TIME IN MINUTES</b>								
Pre-trial	713	159	74	82	153	18	3	2
Trial	3,000	1,829	684	902	1,440	720	360	13
Post-trial	186	70	45	76	97	30	3	0.52
<b>AVERAGE TIME WITH GIVEN OCCURRENCE RATES</b>								
Total	2,250	283	104	138	216	43	5	1
<b>AVERAGE TIME FOR CASES WITHOUT TRIAL</b>								
Total	713	159	74	82	153	18	2.43	1
<b>AVERAGE TIME FOR CASES THAT GO TO TRIAL</b>								
Total	3,899	2,058	803	1,060	1,690	768	366	15.5

**FOOTNOTES**

<sup>184</sup> Data come from Table 6-15 (page 110) from National Center for State Courts (2002), *California Judicial Workload Assessment Final Report*.

**Table 2: Times Per Case for Public Defender and (by Assumption) District Attorney**

	Homicide	Felony against person	Property	Drug	Other
<b>Average</b>	250	40	10	10	10
<b>No Trial</b>	93.68	27.34	8.53	8.95	8.53
<b>Trial</b>	406.31	243.01	57.56	60.21	57.63

Average hours taken from the San Francisco Public Defender’s Office Caseload/Workload Analysis (2013), Page 4, which in turn cites a report by the San Francisco Controller entitled: Public Defender Project: Final Felony and Misdemeanor Caseload Standards (Controller’s Office, May 21, 2003) for the hours estimates used above. Using the trial incidence from Table 1, we assume that differences in prep time for cases involving trials and cases with no trials for public defenders and district attorneys is proportional to the differences in court time list in Table 1. To be specific, let R be the ratio of court time for a case involving a trial to a comparable case (in terms of offense) not involving trial. Let X be the prep time for the public defender when there is no trial. Let p be the proportion of cases of this type that go to trial, and let A be the average amount of prep time for these cases. The average prep time can be expressed as  $A = pRX + (1-p)X$ . Solving for X gives  $X = A/(pR + 1 - p)$ . With a solution for X (prep time for cases not involving a trial) prep time for cases involving a trial require multiplication by the ratio R.

**Table 3: Estimated Costs Per Session Hour in Drug Courts for Three Courts Evaluated in Phase 1 of the California Drug Court Cost Assessment (2001 Dollars)<sup>185</sup>**

	Court 1	Court 2	Court 3
<b>Superior Court</b>	\$1,043.64	\$1,048.80	\$146.02
<b>District Attorney</b>	\$355.14	\$199.40	\$227.70
<b>Public Defender</b>	\$315	\$631.07	\$110.95

**FOOTNOTES**

<sup>185</sup> Figures come from Appendix F of Administrative Office of the Courts Judicial Council of California (2003), *California Drug Courts: A Methodology for Determining Costs and Avoided Costs, Phase 1: Building the Methodology*.

**Table 4: Tabulating Per Hour Expenditures for District Attorneys and Public Defenders from Operating Expenditures<sup>186</sup>**

	Attorney Total 2010	Operating Expenditures, FY10-11	Expenditures per hour assuming 2000 hours per year	Expenditures inflated to 2013.
<b>Public Defenders</b>	3,990	1,352,982,518	169	176
<b>District Attorneys</b>	2,496	730,869,200	146	152

**Table 5: Estimates of Court, Prosecution, and Public Defense Costs for Criminal Trials Based on Time Use Estimates and Cost Estimates Presented in Tables 1 through 3 (costs expressed in 2013 dollars)<sup>187</sup>**

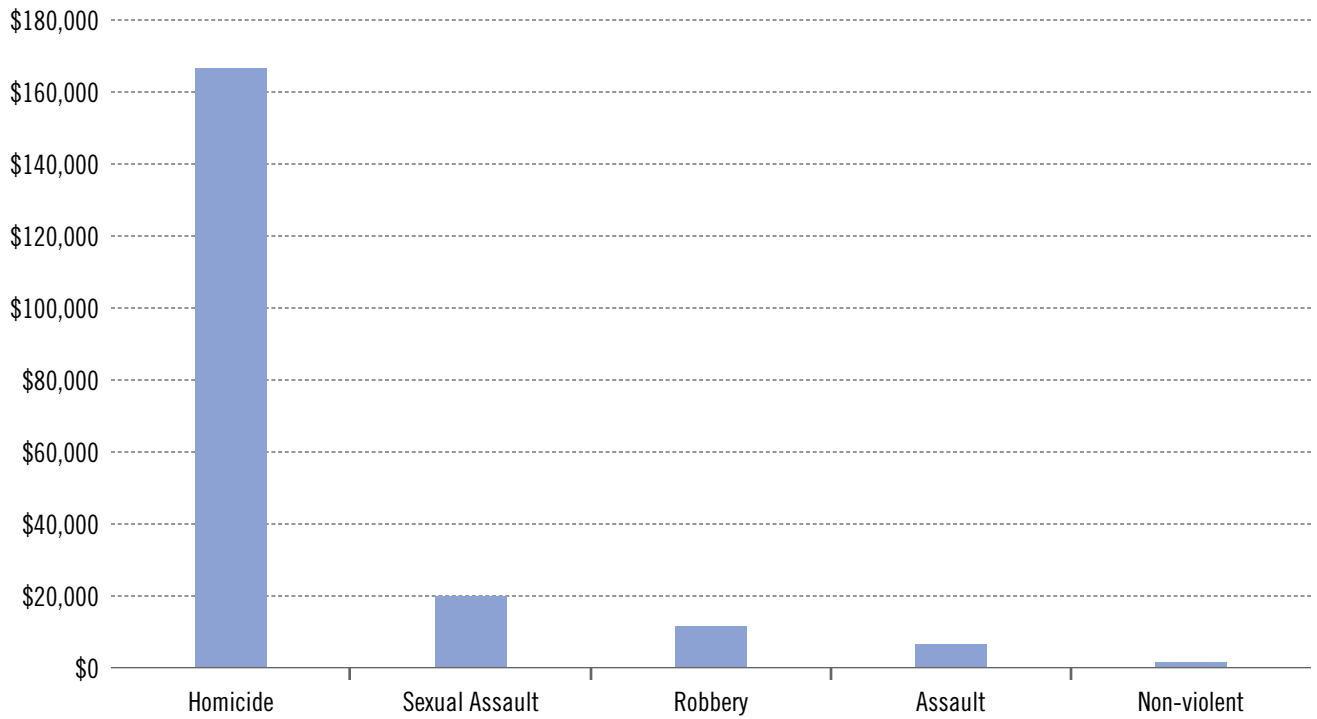
	Homicide	Felony against person	Property	Drug	Other
<b>AVERAGE COSTS</b>					
<b>Court</b>	\$51,644	\$6,489	\$2,376	\$3,168	\$4,948
<b>Public Def.</b>	\$38,000	\$6,080	\$1,520	\$1,520	\$1,520
<b>Prosecution</b>	\$44,000	\$7,040	\$1,760	\$1,760	\$1,760
<b>Total</b>	<b>\$133,644</b>	<b>\$19,609</b>	<b>\$5,656</b>	<b>\$6,448</b>	<b>\$8,228</b>
<b>WITHOUT TRIAL</b>					
<b>Court</b>	\$16,364	\$3,649	\$1,698	\$1,882	\$3,511
<b>Public Def.</b>	\$14,240	\$4,110	\$1,296	\$1,364	\$1,296
<b>Prosecution</b>	\$16,489	\$4,759	\$1,501	\$1,580	\$1,501
<b>Total</b>	<b>\$47,093</b>	<b>\$12,519</b>	<b>\$4,496</b>	<b>\$4,826</b>	<b>\$6,308</b>
<b>WITH TRIAL</b>					
<b>Court</b>	\$89,485	\$47,233	\$18,430	\$24,328	\$38,787
<b>Public Def.</b>	\$61,760	\$36,939	\$8,748	\$9,152	\$8,761
<b>Prosecution</b>	\$71,511	\$42,771	\$10,130	\$10,598	\$1,501
<b>Total</b>	<b>\$222,757</b>	<b>\$126,943</b>	<b>\$37,307</b>	<b>\$44,078</b>	<b>\$57,693</b>

**FOOTNOTES**

<sup>186</sup> Personnel totals come from the California Office of the Attorney General "Table 9: Criminal Justice Full Time Personnel by Type of Agency and Full Time Classification," <http://oag.ca.gov/crime/cjsc-stats/2010/table9> accessed on June 13, 2014. Total expenditures come from the State Controller's Office Division of Accounting and Reporting Local Government Reporting System. Totals in the table represent the sums for each variable across all 58 counties.

<sup>187</sup> Hourly rates and time per case for public defenders and prosecutors come from the figures in Tables 2 and 4. Hourly court expenditures are based on the average hourly figures for courts 1 and 2 presented in Table 3 from the Drug Court Evaluation study. All hourly figures are converted into 2013 dollars.

**Figure 1: Estimated Marginal Court and Prosecution Costs Per Conviction for Washington State in 2013 Dollars from the Washington State Institute of Public Policy**



## APPENDIX D – Lack of Access to County Court Records in California

Data collection for this report was severely hampered by a lack of access to public court records in California, as well as inconsistency between counties regarding what could be provided.

Only a few counties in California have online records systems that can be accessed by the public. At the time of this report's case collection process, for example, only Riverside and Napa Counties had complete online records systems that were searchable and that contained pdfs of court documents. Orange County maintained an online database detailing basic case information only, and San Bernardino County was the only Southern California county to provide free access to their online dockets, although not all dockets were available online. Yolo County has begun digitizing its more recent case files and other counties have made some progress at using technology to make records more available to the public.<sup>188</sup> Five of the counties visited, two in northern California (Napa and Yolo), and three in southern California (Los Angeles, San Diego and Orange), had files available through an imaged database that could be accessed through onsite kiosks.

In virtually every other county, accessing the public files required an in-person visit to the courthouse and an in-person written request for the file, followed by a delay before the file could be located. In Southern California counties the delay was generally a few days to a week or two, but in many Northern California counties, particularly the smaller ones, the delay was up to three weeks. Moreover, six out of the thirty-five Northern California counties that were visited required a fee from \$10-15 to produce each case file or volume; the others did not charge a fee.

San Joaquin County has an online form that can be used to request court files, which avoids multiple visits to the courthouse.<sup>189</sup> San Diego is also building to an electronic court file system. Although not all courthouses have implemented the system, collecting records from the downtown San Diego Courthouse was a seamless experience. Physical files and records were delivered within minutes of the request, imaged files could be printed on site at a kiosk, and files generally were complete and in order.

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### FOOTNOTES

<sup>188</sup> Other counties that leveraged technology to their advantage by making (somewhat) detailed dockets available via internet or other electronic court record system included San Bernardino, San Diego, Fresno, Solano, Kern, Butte, Shasta, Humboldt, Marin, San Mateo, Sonoma and Sacramento. Although Los Angeles provided access to imaged case files from computer terminals in the County Hall of Records, a substantial number of the imaged case files were missing or could not be located, and those that were available often had missing documents. Out of the 550 requested case files in Northern California, only 12 were missing.

<sup>189</sup> In Los Angeles County, out of the thirteen different courthouses, only one permitted a file request over the phone. The others either required an in-person request or did not answer the phone. Only two of the courthouses had a separate records counter. At the other courthouses, requests had to be made to clerks who also handle general matters.

Counties had inconsistent policies regarding which documents were inappropriate for public view. One court clerk prohibited the viewing of the Abstract of Judgment on the ground that it was confidential; all others made the Abstract available. Many courthouses also initially prohibited the use of a handheld scanner, including courthouses in Los Angeles County where the presiding judge has expressly permitted such scanners. One court supervisor in a Southern California county stated that using a scanner was akin to “stealing” the \$.50 per page copying fee from the court, and refused to allow it. A small minority of Northern California counties prohibited the scanner.

More troubling inconsistencies arose regarding confidentiality. In some counties, court clerks took steps to omit or blot out the names of witnesses before making the public file available. In others, however, case files were inappropriately released with un-redacted juror names, photos of child victims, and witness information.

## APPENDIX E – Coding: All Errors Identified in Cases Reviewed for this Report

**Note:** For most of the analysis in the main body of this report, we consolidated our 41 specific reversal ground types into 8 broader categories. The categories and their component ground types are as follows:

Error Definition	Number of Confirmed Errors	Number of Alleged Errors the Court Declined to Decide	Number of Alleged Errors the Court Rejected
<b>Grand Total</b>	<b>756</b>	<b>119</b>	<b>107</b>
<b>4th Amendment Violations</b>	<b>146</b>	<b>2</b>	<b>0</b>
4th Amendment search/seizure	146	2	1
<b>Failure of Prosecutorial Discretion</b>	<b>117</b>	<b>6</b>	<b>0</b>
Defendant's conduct doesn't meet legal definition of the crime	16	1	1
Double Jeopardy	8	1	1
Insufficient evidence	82	4	12
Statute of limitation	11	0	0
<b>IAC</b>	<b>81</b>	<b>18</b>	<b>0</b>
4th Amendment search/seizure	5	0	0
5th Amendment confession/Miranda violation	2	0	0
Defendant's conduct doesn't meet legal definition of the crime	2	0	0
DNA	1	0	0
Erroneous admission or exclusion of evidence	8	3	1
Eyewitness recanted his/her testimony	2	0	0
Eyewitness was unreliable or was lying	1	0	0
Failure to adequately represent	39	11	8
Improper jury instructions	3	2	0
Insufficient evidence	4	0	0
Lab error/individual or group mishandling of physical evidence	1	0	0
Mistaken eyewitness ID (honest mistake)	3	0	0
Other grounds	5	1	1
Police eyewitness ID practices were inadequate	2	0	0
Prosecutorial Misconduct	2	1	0
Ineffective defense counsel	1	0	0



<b>Inadequate Police Practices Before Trial</b>	<b>35</b>	<b>4</b>	<b>0</b>
5th Amendment confession/Miranda violation	8	1	5
New Evidence	24	2	0
Other police practices were inadequate	3	1	0
<b>Judicial Mistake During Trial</b>	<b>164</b>	<b>45</b>	<b>0</b>
6th Amendment	21	3	7
Erroneous admission or exclusion of evidence	50	13	13
Improper jury instructions	76	20	11
Juror Misconduct	16	2	5
Sentencing Error	1	7	2
<b>Other</b>	<b>59</b>	<b>28</b>	<b>0</b>
Unspecified error <sup>190</sup>	2	5	0
Other	37	23	27
Retroactive change or clarification in the law subsequent to conviction	16	0	0
Unknown	4	0	0
<b>Problems With Eyewitness Identification</b>	<b>44</b>	<b>3</b>	<b>0</b>
Eyewitness recanted his/her testimony	18	0	0
Eyewitness was unreliable or was lying	16	2	1
Mistaken eyewitness ID (honest mistake)	5	0	0
Police eyewitness ID practices were inadequate	5	1	0
<b>Prosecutorial Misconduct</b>	<b>86</b>	<b>13</b>	<b>0</b>
Brady violation	45	5	5
Prosecutorial Misconduct	41	8	5
<b>Unreliable or Untruthful Official Testimony</b>	<b>24</b>	<b>0</b>	<b>0</b>
Officer testimony was unreliable or untruthful	17	0	0
Snitch/confidential informant was unreliable or was lying	7	0	1

## FOOTNOTES

<sup>190</sup> In the final stages of quality control, it was discovered that the grounds for reversal (i.e., the type of error) in two cases had been entered with incorrect or unclear coding. The total database cost attributed to these two individuals for incarceration, trials, appeals, prosecution, defense, and settlement is reflected in this report. However, for those calculations which are broken down by type of error, the cost of these two individuals has not been included.

## APPENDIX F – Total Cost By Type of Error, All Errors

This report calculates the cost of the catalogued errors, according to the eight error categories used throughout the report. This appendix assigns cost to all of the errors coded for in the sample, without combining them into the eight categories.

Error Type	Sum of Total Cost <sup>191</sup>
<b>Grand Total</b>	<b>\$221,601,730.19</b>
Brady violation	\$44,221,687.04
New Evidence	\$19,132,785.76
Eyewitness was unreliable or was lying	\$17,294,773.28
IAC – Failure to adequately represent	\$15,401,844.95
Improper jury instructions	\$12,568,521.16
Fourth Amendment search/seizure	\$11,969,856.66
Insufficient evidence	\$11,911,741.43
Erroneous admission or exclusion of evidence	\$11,354,014.66
Officer testimony was unreliable or untruthful	\$9,361,344.13
Prosecutorial Misconduct	\$8,884,509.41
Eyewitness recanted his/her testimony	\$8,597,709.29
Snitch/confidential informant was unreliable or was lying	\$5,419,612.85
IAC – Mistaken eyewitness ID (honest mistake)	\$5,323,264.65
Juror Misconduct	\$4,410,436.79
Double Jeopardy	\$3,709,087.82
Police eyewitness ID practices were inadequate	\$3,707,046.08
Sixth Amendment	\$3,617,975.30
Retroactive change or clarification in the law subsequent to conviction	\$2,656,725.16
Statute of limitations	\$1,905,946.97
Defendant's conduct doesn't meet legal definition of the crime	\$1,837,075.92
Mistaken eyewitness ID (honest mistake)	\$1,824,067.00
Other police practices were inadequate	\$1,379,813.41
Fifth Amendment confession/Miranda violation	\$1,216,520.69
IAC – Erroneous admission or exclusion of evidence	\$1,130,789.12

### FOOTNOTES

<sup>191</sup> The associated cost is the total calculated cost of incarceration, attorneys, trial courts, VCGCB payments, and settlements, adjusted for inflation to 2013 dollars.

Unknown	\$1,083,230.63
IAC – Eyewitness was unreliable or was lying	\$791,511.67
IAC – Fourth Amendment search/seizure	\$650,064.50
IAC – Failure to adequately represent	\$15,401,844.95
IAC – Lab error/individual or group mishandling of physical evidence	\$592,318.66
IAC – Other grounds	\$563,613.61
Ineffective defense counsel	\$412,384.56
IAC – Police eyewitness ID practices were inadequate	\$356,203.40
IAC – Fifth Amendment confession/Miranda violation	\$255,058.30
IAC – Eyewitness recanted his/her testimony	\$248,701.10
IAC – DNA	\$225,466.23
IAC – Improper jury instructions	\$219,905.10
IAC – Prosecutorial Misconduct	\$171,924.44
IAC – Defendant's conduct doesn't meet legal definition of the crime	\$119,843.35
Unspecified error <sup>192</sup>	\$113,740.95
IAC – Insufficient evidence	\$ 94,581.85
Sixth Amendment	\$3,617,975.30
Sentencing Error	\$22,837.38

#### FOOTNOTES

**192** In the final stages of quality control, it was discovered that the grounds for reversal (i.e., the type of error) in two cases had been entered with incorrect or unclear coding. The total database cost attributed to these two individuals for incarceration, trials, appeals, prosecution, defense, and settlement is reflected in this report. However, for those calculations which are broken down by type of error, the cost of these two individuals has not been included.

## APPENDIX G – Public Records Act Request for Settlements

In April, 2013, we sent a request under the California Public Records Act, codified as California Government Code §§ 6250 et seq., seeking information about payments made by each county and 13 large cities in California related to claims of malicious or inappropriate arrest, charging, or prosecution. The request was intended to include payments made to settle one or more claims, as well as payments ordered at the conclusion of litigation. Although many and perhaps most such settlements include language expressly denying liability or inappropriate activity on the part of the county or city, the fact of payment on a claim, even where liability is strictly disclaimed in writing, suggests a potential for inappropriate action by law enforcement or the prosecution that should be subject to examination.

A limitation of our dataset is that it is dependent on the coding and recordkeeping of either the cities or counties that responded to our Public Records Act request, or their third party risk management providers. For example, many of the respondents to our request had a definition of “wrongful arrest” that did not differentiate between cases of inaccurate arrest (i.e., “I was arrested for a crime I did not commit”) and cases involving the use of excessive force during an arrest (i.e., “I am not contesting the validity of my arrest, but I should not have been arrested in the manner that I was arrested.”) Our request sought information related to settlements based on claims of inaccurate arrest, prosecution, or conviction, but not based on excessive force, assault and battery, or other similar “manner of arrest” cases. In some instances we were able to exclude “manner of arrest” claims based on other information provided by the respondent, but in practice, this was as much an art as a science, in part based on the complexities of specific cases and in part based on the lack of data and lack of standardization of formats and supporting information among the counties and cities. Thus, our numbers are not a precisely accurate accounting of costs arising from inaccurate arrests or prosecutions, but rather reflect a general estimate.

The costs of these wrongful arrests and prosecutions were further divided, where possible, into the costs of direct settlement and the costs arising from outside counsel or others outside the county or city paid to help defend against the lawsuit. Many counties did not provide amounts paid to outside legal counsel, either because they did not use outside counsel in the disputes or because data management limitations prevented them from tracking or reporting such external costs.

Location	Population	Number of Cases	\$\$ Paid Out	\$\$ in Settlements	\$\$ in Outside Legal Fees	Notes
Alameda County	1,510,000	17	\$2,409,000	\$1,405,000	\$1,004,000	
Alpine County	1,200	1	\$0	\$0	\$0	
Amador County	38,100	0	\$0	\$0	\$0	No documents responsive to request
City of Anaheim	336,000	11	\$99,000	\$99,000	\$0	
City of Bakersfield	347,000	11	\$43,000	\$43,000	\$0	
Butte County	220,000	4	\$25,000	\$25,000	\$0	
Calaveras County	45,600	2	\$31,000	\$31,000	\$0	
City of Chula Vista	244,000	8	\$85,000	\$20,000	\$65,000	
Colusa County	21,400	0	\$0	\$0	\$0	No documents responsive to request
Contra Costa County	1,050,000	20	\$176,000	\$176,000	\$0	
Del Norte County	28,600	0	\$0	\$0	\$0	No documents responsive to request
El Dorado County	182,000	21	\$570,000	\$352,000	\$218,000	
Fresno City	509,000	0	\$0	\$0	\$0	“Does not keep records in a format that would enable [it] to to provide the documents requested without locating and examining every individual claim and lawsuit filed since January 1, 1989.”
Fresno County	930,000	22	\$3,380,000	\$2,339,000	\$1,041,000	
Glen County	28,000	0	\$0	\$0	\$0	“Does not possess and does not retain documents requested and therefore cannot provide the documents.”
Humboldt County	135,000	9	\$152,000	\$73,000	\$79,000	
Imperial County	175,000	0	\$0	\$0	\$0	Failed to respond to Public Records Request
Inyo County	19,000	0	\$0	\$0	\$0	No documents responsive to request
Kern County	840,000	75	\$12,855,000	\$12,120,000	\$735,000	
Kings County	153,000	0	\$0	\$0	\$0	
Lake County	65,000	2	\$277,000	\$174,000	\$103,000	
Lassen County	35,000	0	\$0	\$0	\$0	“Does not maintain the files in a manner which would allow electronic access to the documents requested.”

<b>City of Long Beach</b>	462,000	21	\$8,472,000	\$8,472,000	\$0	
<b>Los Angeles City</b>	3,793,000	370	\$93,264,000	\$93,264,000	\$0	Includes Rampart Scandal – 200 people, \$78,192,000
<b>Los Angeles County</b>	10,018,000	99	\$29,477,000	\$23,372,000	\$6,105,000	
<b>Madera County</b>	151,000	3	\$580,000	\$81,000	\$499,000	
<b>Marin County</b>	252,000	3	\$1,066,000	\$886,000	\$180,000	
<b>Mariposa County</b>	18,000	0	\$0	\$0	\$0	No documents responsive to request
<b>Mendocino County</b>	88,000	4	\$65,000	\$62,000	\$3,000	
<b>Merced County</b>	256,000	23	\$445,000	\$383,000	\$62,000	
<b>Modoc County</b>	10,000	0	\$0	\$0	\$0	Failed to respond to Public Records Request
<b>Mono County</b>	14,000	20	\$0	\$0	\$0	No documents responsive to request
<b>Monterey County</b>	416,000	6	\$8,000	\$8,000	\$0	No documents responsive to request
<b>Napa County</b>	136,000	9	\$367,000	\$289,000	\$78,000	
<b>Nevada County</b>	99,000	3	\$2,000	\$2,000	\$0	
<b>City of Oakland</b>	391,000	364	\$49,466,000	\$49,466,000	\$0	Includes Rider Scandal – 119 people, \$10,900,000
<b>Orange County</b>	3,010,000	49	\$2,163,000	\$1,546,000	\$617,000	
<b>Placer County</b>	348,000	14	\$357,000	\$189,000	\$168,000	
<b>Plumas County</b>	20,000	0	\$0	\$0	\$0	No documents responsive to request
<b>City of Riverside</b>	304,000	0	\$0	\$0	\$0	Failed to respond to Public Records Request
<b>Riverside County</b>	2,190,000	67	\$5,328,000	\$5,328,000	\$0	
<b>Sacramento City</b>	2,527	39	\$482,000	\$482,000	\$0	
<b>Sacramento County</b>	1,419,000	193	\$7,747,000	\$4,441,000	\$3,306,000	
<b>San Benito County</b>	55,000	12	\$667,000	\$502,000	\$165,000	
<b>City of San Bernardino</b>	210,000	15	\$3,079,000	\$2,376,000	\$703,000	
<b>San Bernardino County</b>	2,035,000	126	\$5,325,000	\$5,325,000	\$0	
<b>San Diego City</b>	1,323,000	51	\$3,386,000	\$3,386,000	\$0	
<b>San Diego County</b>	3,095,000	83	\$7,004,000	\$7,004,000	\$0	
<b>City and County of San Francisco</b>	805,000	97	\$12,643,000	\$12,643,000	\$0	

<b>San Joaquin County</b>	685,000	8	\$477,000	\$375,000	\$102,000	
<b>City of San Jose</b>	946,000	58	\$1,454,000	\$1,454,000	\$0	
<b>San Luis Obispo County</b>	270,000	23	\$925,000	\$549,000	\$376,000	
<b>San Mateo County</b>	718,000	22	\$838,000	\$838,000	\$0	
<b>Santa Barbara County</b>	424,000	29	\$1,421,000	\$1,405,000	\$16,000	
<b>Santa Clara County</b>	1,782,000	102	\$6,262,000	\$4,440,000	\$1,822,000	
<b>Santa Cruz County</b>	262,000	2	\$65,000	\$65,000	\$0	
<b>Shasta County</b>	177,000	23	\$0	\$0	\$0	No documents responsive to request
<b>Sierra County</b>	3,000	0	\$0	\$0	\$0	No documents responsive to request
<b>Siskiyou County</b>	45,000	20	\$0	\$0	\$0	Failed to respond to Public Records Request
<b>Solano County</b>	413,000	19	\$843,000	\$530,000	\$313,000	
<b>Sonoma County</b>	484,000	17	\$80,000	\$80,000	\$0	
<b>Stanislaus County</b>	514,000	1	\$7,000	\$7,000	\$0	
<b>City of Stockton</b>	292,000	45	\$1,500,000	\$1,500,000	\$0	Includes Rider Scandal – 119 people, \$10,900,000
<b>Sutter County</b>	95,000	1	\$118,000	\$11,000	\$107,000	
<b>Tehama County</b>	63,000	13	\$704,000	\$324,000	\$380,000	
<b>Trinity County</b>	14,000	1	\$3,000	\$2,000	\$1,000	
<b>Tulare County</b>	442,000	7	\$110,000	\$103,000	\$7,000	
<b>Tuolumne County</b>	55,000	3	\$134,000	\$134,000	\$0	
<b>Ventura County</b>	823,000	146	\$1,595,000	\$420,000	\$1,175,000	
<b>Yolo County</b>	201,000	0	\$0	\$0	\$0	Failed to respond to Public Records Request
<b>Yuba County</b>	72,000	12	\$0	\$0	\$0	No documents responsive to request
<b>Total</b>	--	<b>2,351</b>	<b>\$268,031,000</b>	<b>\$248,601,000</b>	<b>\$19,430,000</b>	

**NOTES**

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