THE HONORABLE EDMUND G. BROWN, JR.
GOVERNOR OF CALIFORNIA

PETITION FOR EXECUTIVE CLEMENCY
PURSUANT TO ARTICLE V, SEC. 8(a) OF THE CALIFORNIA CONSTITUTION AND REQUEST FOR HEARING

By the undersigned, appearing as counsel for petitioner Kevin Cooper

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

I. INTRODUCTION

The Governor can and must intervene in Mr. Cooper's case to prevent the ultimate injustice: the execution of an innocent man. Many interrelated causes—including withholding and destruction of exculpatory evidence, prevention of forensic testing and a discriminatory criminal justice system—have brought Mr. Cooper to imminent execution for crimes he did not commit. These and numerous other injustices will be described in detail in this petition. Regardless of the genesis of these denials of his most fundamental constitutional and human rights, Mr. Cooper has exhausted all appeals and is without further judicial recourse. Now, after more than 30 years on death row, Mr. Cooper stands before Governor Brown with clemency as the only remaining avenue to save his life.

A wealth of evidence shows that persons other than Mr. Cooper committed the murders for which he was sentenced to death. Advanced forensic testing is now available that could show that Mr. Cooper is innocent of these crimes, but the State refuses to permit it. Given the fundamental questions that persist in this case—as recognized by the original jurors, at least twelve federal appellate judges, two former prosecutors and several law enforcement professionals—the Governor cannot in good conscience allow Mr. Cooper to be executed without initiating or permitting a search for the truth, including ensuring that the necessary forensic testing be completed.

> **"The State of California may be about to execute an innocent man."**[1]

So wrote federal Court of Appeals Judge William Fletcher in his 2009 dissent to the Ninth Circuit Court of Appeals' refusal to give Mr. Cooper a fair hearing to establish his

[1] *See* Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009) (Fletcher, dissenting)]. ****For the reader's convenience, each exhibit hereto has been hyperlinked and may be accessed by clicking on the citation. Mr. Cooper has also included a "Glossary of Individuals" herein as Appendix B to aid the reader in keeping track of the various individuals involved in Mr. Cooper case spanning nearly 33 years.**

innocence. In his lengthy opinion, Judge Fletcher outlined how and why he concluded that Mr. Cooper was likely innocent, including a discussion of how the prosecution framed Mr. Cooper for the brutal murders of the Ryen family and Christopher Hughes that occurred in June 1983. Four more federal appellate judges joined Judge Fletcher in his dissent.

In that same proceeding, Judge Kim Wardlaw expressed her concerns about the proceedings that led to Mr. Cooper's conviction and death sentence in this way:

> **"Public confidence in the proper administration of the death penalty depends on the integrity of the process followed by the state. … So far as due process is concerned, twenty-four years of flawed proceedings are as good as no proceedings at all."[2]**

Five more Ninth Circuit Judges, making a total of *eleven* appellate judges, also agreed that Mr. Cooper had not received the fair hearing on his innocence that he deserved.[3]

Another Ninth Circuit Court of Appeals judge, Margaret McKeown, put it this way in 2007:

> **"Significant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued, including, for example blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt discovered alongside the road near the crime scene. … Countless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the outcome."[4]**

But it is not just twelve federal appellate judges who have expressed grave concern about the fairness of Mr. Cooper's conviction and death sentence. After an exhaustive investigation into Mr. Cooper's case, Thomas R. Parker, retired Special Agent of the Federal Bureau of

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[2] *Id*. at 635.

[3] According to a separate dissent by Judge Stephen Reinhardt, at least one or two additional judges voted to give Mr. Cooper a hearing, although they did not sign onto any of the dissents. *Id*. at 581. That means either twelve or thirteen Ninth Circuit judges voted that Mr. Cooper deserved a fair hearing on his innocence. Mr. Cooper needed 14 votes (a majority of the active Ninth Circuit judges) to win a hearing.

[4] Ex. 2 [*Cooper v. Brown*, 510 F.3d 870, 1004 (9th Cir. 2007) (McKeown, concurring)].

Investigation and formerly Deputy Chief of the FBI's Los Angeles Regional office, stated in a 2013 report:

> **"I was totally overwhelmed by the degree and volume of evidence of police misfeasance and malfeasance I found in this case. … [T]he facts and circumstances in this case strongly suggest that members of law enforcement created and planted evidence intended to inculpate Mr. Cooper…"**[5]

As a result of his study of the case, Mr. Parker became **"convinced of Mr. Cooper's innocence."**[6]

Other experts in law enforcement have come to the same conclusion. After an investigation of whether evidence at the Ryen/Hughes crime scene supported the prosecution's theory that a lone assailant murdered the Ryens and Christopher Hughes, Gregg O. McCrary, retired FBI "profiler" concluded that:

> **"in all probability, multiple offenders murdered [the Ryens and Christopher Hughes]."**[7]

Others who have studied the Ryen/Hughes murders and Mr. Cooper's prosecution have come to the same conclusion. After spending three years studying the Ryen/Hughes murders, the investigation of them and the resulting prosecution of Mr. Cooper, J. Patrick O'Connor authored an award winning[8] book entitled Scapegoat: The Chino Hills Murders and the Framing of Kevin Cooper. Mr. O'Connor was left with one conclusion: Mr. Cooper is an innocent man who was framed.[9]

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[5] *See* Ex. 3 [Declaration of Thomas R. Parker dated October 17, 2013 ("Parker Decl. (Oct. 17, 2013)."), ¶¶ 3, 10].
[6] *See* Id. at ¶ 3].
[7] *See* Ex. 4 [McCrary Report IACHR Prehearing Submission 2013 ("McCrary Report"), p. 11].
[8] Independent Publisher's award, True Crime category, silver; ForeWord Reviews' award, True Crime category, bronze.
[9] A copy of Mr. O'Connor's book is included with this clemency petition at Ex. 5 [J. Patrick O'Connor, SCAPEGOAT: THE CHINO HILLS MURDERS AND THE FRAMING OF KEVIN COOPER (Strategic Medica, Inc. 2012) ("Scapegoat".] In addition, Mr. O'Connor has submitted a letter to the Governor professing his continued belief in Mr. Cooper's innocence and asking for clemency. See Ex. 6 [Letter of J. Patrick O'Connor dated Sept. 29, 2015]. In addition, based on his conclusion as to Mr. Cooper's innocence, Mr. O'Connor has submitted a letter to

Other tribunals have also concluded that what happened to Mr. Cooper was a travesty of justice. A distinguished international human rights commission[10] that looked into the Mr. Cooper case for four years found numerous due process violations and evidence of racial bias in his prosecution, trial and appeals, ultimately recommending that the State:

> **"grant Kevin Cooper effective relief, including the review of his trial and sentence in accordance with the guarantees of due process and a fair trial…"[11]**

It is not enough to say, as the prosecution undoubtedly will, that Mr. Cooper "had his day in court." Particularly where a person's life is on the line, a defendant's "day in court" must be meaningful. As discussed in this petition, Mr. Cooper's journey through the state and federal courts, although long, has been inadequate at every turn. Now, because of multiple failures of the criminal justice system, clemency is the only vehicle remaining to him. The reasons for this travesty of justice are detailed in this Clemency Petition. By granting Mr. Cooper a reprieve so that a full and adequate investigation can be undertaken, the Governor can prevent the execution of an innocent man. In so doing the Governor can also permit at last forensic testing that will prove once and for all that Mr. Cooper was framed, and perhaps uncover the identities of the "three white men" whom the sole surviving victim, Josh Ryen, identified as the Chino Hills murderers.[12]

A. <u>Evidence of Innocence</u>.

Put simply, and as discussed in detail below, there is significant evidence that exonerates Mr. Cooper and points toward other suspects:

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the Governor asking for clemency. That letter is included as Ex. 7 [Letter of J. Patrick O'Connor dated Oct. 5, 2015] to this clemency petition.

[10] Specifically, the Inter American Commission on Human Rights ("IACHR").

[11] Ex. 8 [Kevin Cooper, Report No. 78/15, Case No. 12.831, Merits ("Cooper IACHR Merits Report Oct. 28, 2015"), ¶¶ 5, 152, 157].

[12] See Ex. 9 [Declaration of Kathy Pezdek Ph.D. dated Sept. 25, 2013 ("Pezdek Decl.")].

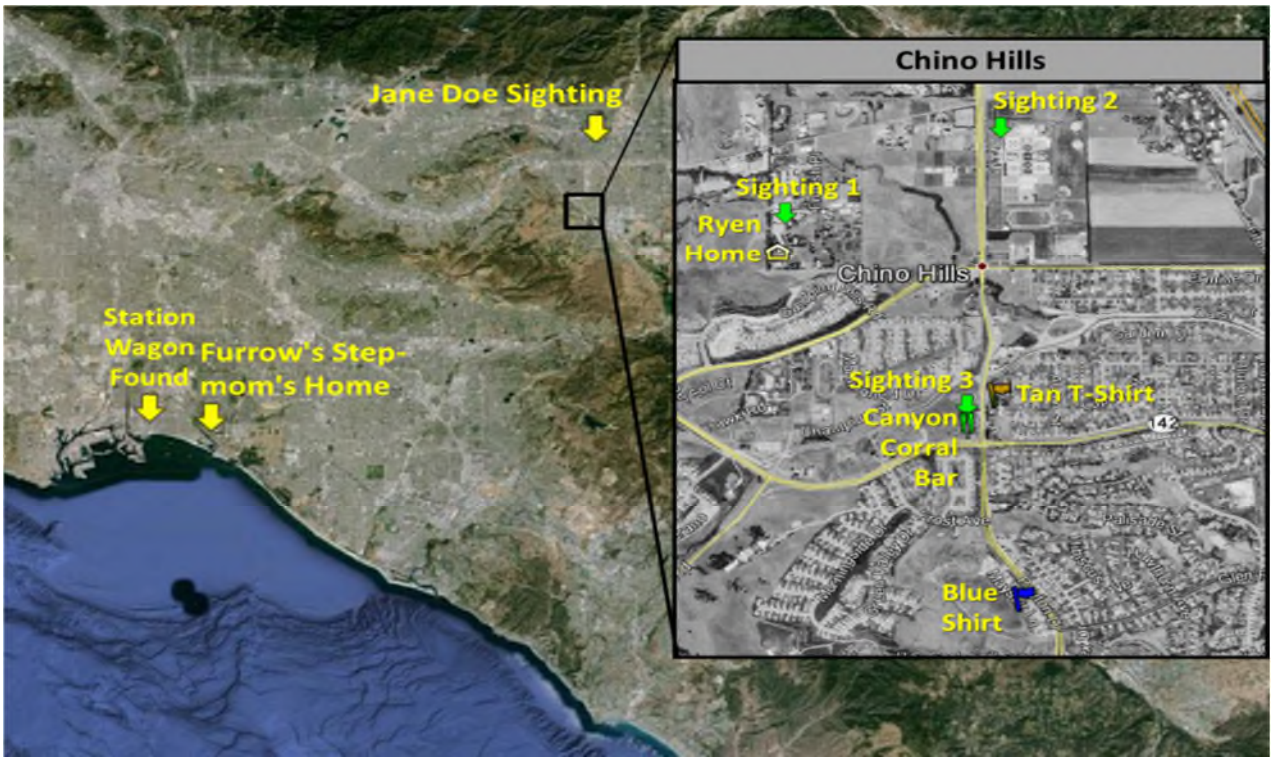
- The sole surviving victim of the murders, Josh Ryen, told police and hospital staff within hours of the murders that the killers were "three white men." Mr. Cooper is African-American. Josh Ryen repeated this identification of the attackers in the days following the crimes. When he saw Mr. Cooper's picture on television as the suspected attacker, Josh Ryen said "that's not the man who did it."[13]

- The coroner who investigated the Ryen/Hughes murders initially concluded that the murders took four minutes at most. He also determined that the murder weapons were a hatchet, a long knife, an ice pick and perhaps a second knife. Given the number of victims (5), the number of murder weapons (3 or 4), and the number of wounds (over 144), he logically concluded there must have been multiple attackers. Nevertheless, at trial the prosecution's theory was that Mr. Cooper was the sole attacker. But how could a single person, in four or fewer minutes, wield three or four weapons, and inflict over 144 wounds on five people, two of whom were adults, one a 180 pound ex-marine, **who had loaded weapons near their bedsides?**[14]

Ex. 10 [link to above photo (Guns and ammo)]; see also Ex. 11 [Shotgun].

[13] *See* infra at Section IV.B.1.
[14] *See* Ex. 4 [McCrary Report analyzing investigatory materials concluding murders were committed by multiple individuals].

- Two witnesses who were driving near the Ryens' home the night of the murders corroborated Josh Ryen's description of the killers. They reported seeing three white men in a station wagon matching the description of the Ryens' station wagon speeding away from the direction of the Ryens' home, which was at the end of a dead end road.



Ex. 12 [Link to above (Sighting Map)].

Recently, another witness came forward who saw the Ryens' station wagon on the afternoon after the murders with three white men in it who were acting strangely and nearly collided with her car.[15] Shortly after learning of the crimes, she reported this sighting to law enforcement by letter, but her letter was apparently ignored by authorities and was never turned over to the defense.[16] See Ex. 12 above.

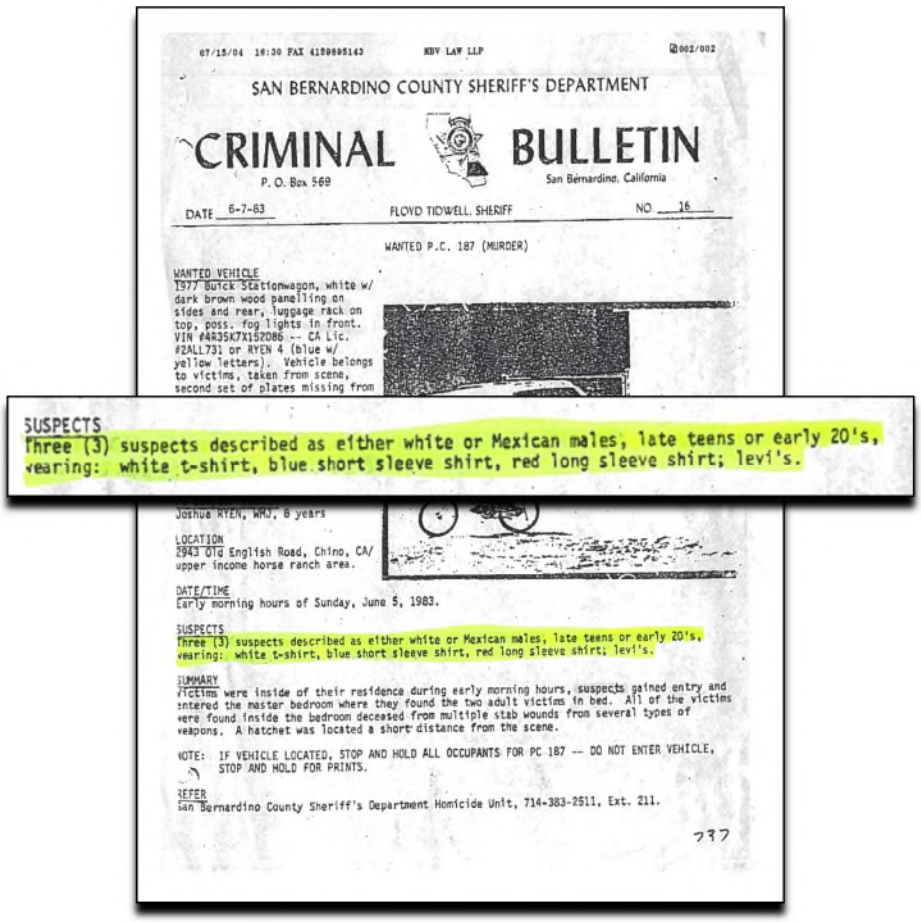
[15] Ex. 13 [Declaration of Jane Doe dated Aug. 18, 2015 ("J. Doe Decl.")]. The true identity of this witness is being withheld from this filing for her protection as she is afraid of retribution from the real killers.
[16] *Id*.

- Several employees and patrons of the Canyon Corral Bar, a bar within sight of the Ryens' home, corroborated these descriptions, saying that they saw three white men enter the bar around midnight the night of the murders, two of whom were covered in blood.[17]

- Shortly after the murders were discovered, a woman named Diana Roper alerted authorities that her boyfriend, a white man and convicted murderer named Lee Furrow, left blood-spattered coveralls at her home the night of the murders. Roper gave the bloody coveralls to the San Bernardino County Sheriff's Department ("SBSD"), but the SBSD *threw them away without testing them*. Roper also reported that Furrow had been wearing a t-shirt identical to the shirt with Doug Ryen's blood on it that the SBSD recovered near the bar where the three white men had been spotted. She further reported that Furrow owned a hatchet matching the one recovered near the scene of the crime, and that Furrow's hatchet was missing in the days following the murders. Finally, her sister saw Furrow and two other white men in a vehicle that could have been the Ryens' station wagon on the night of the murders.

Two days after the crimes were discovered and based on Josh Ryen's identification of the assailants, the Sheriff's Department issued a "Criminal Bulletin" stating the suspects were "three (3) . . . white or Mexican males," one wearing a "blue short-sleeve shirt."

[17] *See* Section IV.B.2, infra.



07/15/04 16:30 FAX 4159985143 KBV LAW LLP 002/002

SAN BERNARDINO COUNTY SHERIFF'S DEPARTMENT

CRIMINAL BULLETIN

P. O. Box 569 San Bernardino, California

DATE 6-7-83 FLOYD TIDWELL, SHERIFF NO 16

WANTED P.C. 187 (MURDER)

WANTED VEHICLE
1977 Buick Stationwagon, white w/ dark brown wood panelling on sides and rear, luggage rack on top, poss. fog lights in front. VIN #4R35K7X152086 -- CA Lic. #2ALL731 or RYEN 4 (blue w/ yellow letters). Vehicle belongs to victims, taken from scene, second set of plates missing from

SUSPECTS
Three (3) suspects described as either white or Mexican males, late teens or early 20's, wearing: white t-shirt, blue short sleeve shirt, red long sleeve shirt; levi's.

Joshua RYEN, WMO, 8 years

LOCATION
2943 Old English Road, Chino, CA/ upper income horse ranch area.

DATE/TIME
Early morning hours of Sunday, June 5, 1983.

SUSPECTS
Three (3) suspects described as either white or Mexican males, late teens or early 20's, wearing: white t-shirt, blue short sleeve shirt, red long sleeve shirt; levi's.

SUMMARY
Victims were inside of their residence during early morning hours, suspects gained entry and entered the master bedroom where they found the two adult victims in bed. All of the victims were found inside the bedroom deceased from multiple stab wounds from several types of weapons. A hatchet was located a short distance from the scene.

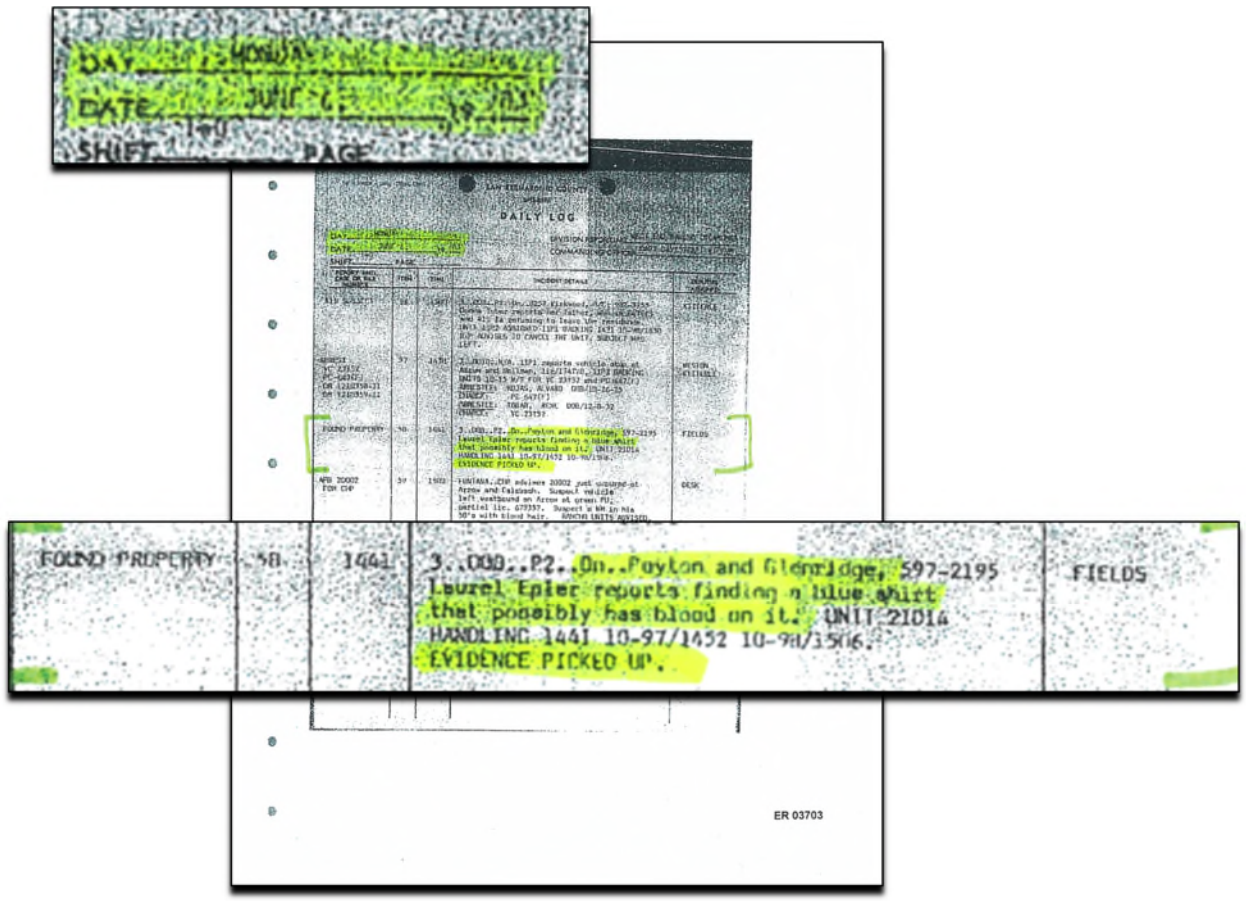
NOTE: IF VEHICLE LOCATED, STOP AND HOLD ALL OCCUPANTS FOR PC 187 -- DO NOT ENTER VEHICLE, STOP AND HOLD FOR PRINTS.

REFER
San Bernardino County Sheriff's Department Homicide Unit, 714-383-2511, Ext. 211.

737

In 2004, the defense uncovered a SBSD log showing that the day after the murders were discovered, an SBSD deputy recovered a blue shirt with blood on it beside a road near the Ryen home and Canyon Corral Bar.[18] The woman who found the shirt and turned it over to the SBSD confirmed its existence at a hearing in 2004.

[18] Ex. 67 [SBSD Log dated June 6, 1983 (ER 3703) aka Blue Shirt Log].



However, the prosecution never tested this blue shirt nor disclosed its existence to the defense, and thus the jury never heard about it. Therefore, the jury never heard that there were **two bloody shirts** found near the Canyon Corral Bar after the crimes, not just the one tan t-shirt entered into evidence at trial. *This blue shirt is now "missing."* But notwithstanding its own log and the testimony of the woman who found it, the SBSD claims the blue shirt never existed.[19]

B. <u>Discredited Evidence of Guilt</u>.

The jury in Mr. Cooper's trial deliberated for over six days before finding him guilty. One juror later said that if there had been one less piece of evidence, the jury would not have

[19] Ex. 14 [*Cooper v. Brown*, 2005 U.S. Dist. LEXIS 46232 *270 (S.D. Cal. 2005)]; August 26, 2004, HRT 140-48, 154-55, 161, 165, 187, 201-03]. "HRT" refers to the habeas corpus proceedings before Judge Huff in 2004 and 2005. Rather than produce voluminous exhibits from these hearings, reporter's transcripts of these proceedings are provided in searchable pdf by date.

voted to convict.[20] But in the ensuing 30 years, as fully discussed in later sections of this clemency petition, most of the evidence the prosecution presented to the jury at trial supposedly tying Mr. Cooper to the crime scene has been discredited. For example:

- Because Mr. Cooper had recently escaped from prison, the prosecution presented what now is known to be false evidence that the type of tennis shoes that supposedly left bloody shoeprints at the crime scene could only have been prison issued. It has since been established that the model of tennis shoe the prosecution claimed Mr. Cooper wore was not exclusively sold to prisons but, in fact was available to the public through both retailers and the company's catalogue, and that the prison warden told the prosecution as much before trial.[21] In addition, the jury never knew that William Baird, the SBSD criminalist who at trial tied the shoeprints to shoes allegedly worn by Mr. Cooper, was soon thereafter fired for stealing five pounds of heroin from the SBSD's property locker.[22]

- The prosecution produced no finger prints or hair evidence at the crime scene that matched Mr. Cooper. But through the testimony of an SBSD criminalist, it claimed a drop of blood found in the Ryens' hallway was consistent with Mr. Cooper's blood type. In 2009, five Ninth Circuit judges recognized, as demonstrated his own trial testimony, that the criminalist had falsified test results associated with this blood drop.[23]

- Lacking a motive to ascribe to Mr. Cooper for murdering a family and their houseguest, the prosecution claimed that Mr. Cooper, who had earlier walked away from custody at a minimum security prison, did it to steal the Ryens' car to escape to Mexico. But it was

[20] Ex. 5 [SCAPEGOAT, p. 231].
[21] June 2, 2004, HRT 239-40; Ex. 16 [Pro-Keds Catalog (Stride-Rite), Spring 1981].
[22] Ex. 1[*Cooper v. Brown*, 565 F.3d 581, 592 (2009) (Fletcher, dissenting)]; Ex. 2 [*Cooper v. Brown*, 510 F.3d 870 (2007) (McKeown, concurring)]; Ex. 17 [William Baird Investigative Report dated Jul. 1, 1997 (ER 1714-16)].
[23] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (2009) (Fletcher, dissenting)]; *see also* Ex. 2 [*Cooper v. Brown*, 510 F.3d 870 (2007) (McKeown, concurring)].

undisputed that the Ryens had left the keys in both their vehicles (which were parked in their driveway), so there was no need to kill them to steal a car. The prosecution also claimed that Mr. Cooper needed money, but money and credit cards were found untouched and in plain sight at the murder scene in the Ryens' house.

Ex. 18 [Link to above photo (cash and tobacco)]; *see also* Ex. 19 [wide pan photo showing $ and kitchen table], Ex. 20 [photo of coin collection].

To tie Mr. Cooper to the theft of the Ryens' car, the prosecution claimed at trial that SBSD deputies found cigarette butts consistent with prison issued tobacco in the Ryens' car when it was recovered some days later. But the SBSD report written when the car was first searched reported finding no evidence of these butts despite a thorough search; in a later search, those butts mysteriously appeared. In 2001, even though the prosecution had claimed that cigarette paper from one of these later discovered butts had been consumed in testing in 1984, the paper somehow "reappeared" in time for DNA testing. The "reappeared" paper had inexplicably changed color and grown in size from 4 millimeters to 7 millimeters.[24]

[24] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (2009) (Fletcher dissenting)]; Ex. 2 [*Cooper v. Brown*, 510 F.3d 870 (2007) (McKeown concurring)]; Ex. 21 [Letter of Janine Arvizu, Certified Quality Auditor dated Oct. 8, 2013 ("Arvizu Letter")].

C. **Evidence Destruction and Tampering**.

In 2009, six Ninth Circuit judges found that the prosecution and the SBSD destroyed, tampered with and hid from the defense significant exonerating evidence that the jury never had a chance to evaluate:

- As noted above, shortly after the murders were discovered, a woman turned over to the SBSD her boyfriend's blood-spattered coveralls left at her home the night of the murders. The prosecution either did not test these coveralls, or did test them and suppressed the exonerating results, and an SBSD deputy discarded them in a dumpster before the prosecution disclosed their existence to the defense.[25]

- The SBSD deputy who destroyed the bloody coveralls lied at trial when he testified that he acted on his own in destroying them. In 1998, over 13 years after the trial, the defense uncovered a signed SBSD "disposition report" that showed that the deputy's supervisor had in fact approved the destruction of the coveralls.[26] The disposition report was not turned over to the defense before trial, and the jury thus never knew that the deputy's testimony was false and the destruction of the coveralls was not a "rogue" accident. (*Id.*)

- The SBSD totally mishandled the crime scene investigation. In the first 24 hours after the Ryen/Hughes murders were discovered, over 70 people walked through the Ryen house and untold forensic evidence was lost, contaminated or destroyed. The trial judge later said in open court: "Counsel, as I sat there and listened to the evidence over a prolonged period of time,

[25] 102 R.T. 6550-6554.
[26] Ex. 128 [SBSD Disposition Report Regarding The Bloody Coveralls dated December 1, 1983]; See also, Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (2009) (Fletcher dissenting)]; Ex. 2 [*Cooper v. Brown*, 510 F.3d 870 (2007) (McKeown concurring)].

I thought ... [without] any criminalistics experience at all, I could have gone in there and done a better job, I think, than [the SBSD] did."[27]

- Shortly before Mr. Cooper's trial in 1984, the warden from the prison from which Mr. Cooper escaped called the SBSD to tell them that the tennis shoes that supposedly created the shoeprints at the crime scene were not specifically shoes made for institutions, but were instead available at retail. The prosecution never disclosed this fact to the defense or the jury, and argued repeatedly to the jury that the shoes that left the shoeprints could have come only from a prison.[28]

- In 2002, at Mr. Cooper's request, DNA tests were conducted on the tan t-shirt found near the Canyon Corral Bar and on the blood drop claimed to have been found in the Ryens' hallway. Although those tests found evidence of Mr. Cooper's DNA on the tan t-shirt and the blood drop, later testing done at the direction of the Ninth Circuit showed that the blood that was tested on the tan t-shirt contained heightened levels of EDTA, a chemical used to preserve blood taken from suspects like Mr. Cooper.[29] In 2009, five federal judges concluded that the SBSD likely planted Mr. Cooper's blood on the t-shirt before the 2002 DNA tests were run.[30] In 2015, the IACHR reached the same conclusion.[31]

- In 2004, further testing on what was supposed to be an exemplar of Mr. Cooper's blood taken when he was arrested in 1983 showed that the vial contained not only Mr. Cooper's DNA, but that of another person. This finding suggests that blood was added to the vial to replace blood used for planting, and throws into question all of the evidence the jury heard at Mr.

[27] 63 R.T. 5622.
[28] 106 R.T. 7749-52.
[29] Judge Huff refused to allow preservative testing of the blood drop, but we know that it was completely exhausted in the 1980s, but reappeared for DNA testing after being checked out by Gregonis for over 24-hours and kept within feet of Mr. Cooper's blood vial, which was not subject to evidentiary controls. *See infra* at Section IV.B.
[30] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (2009) (Fletcher dissenting)]. Mr. Cooper does not take a position on when this blood was planted, be it back in 1983 or thereafter.
[31] Ex. 8 [Cooper IACHR Merits Report Oct. 28, 2015].

Cooper's trial about the blood drop on the wall in the Ryen's house, as well as post-conviction DNA testing of the tan t-shirt.[32]

- In 2004, tests were done to determine whether the prosecution had tampered with the tan t-shirt by planting Mr. Cooper's blood on it before the 2002 DNA tests. The test results by the State's own expert pointed to tampering, showing heightened levels of a blood preservative used by law enforcement to preserve a sample of Mr. Cooper's blood taken in 1983. When he learned what his test results showed, the State's expert suddenly "withdrew" his results, claiming they were invalid because of contamination in his own laboratory. Despite countless requests, Mr. Cooper's defense team has been denied access to the expert's lab records that would show whether there actually was such contamination.[33]

- Lest anyone presume such law enforcement corruption is simply not believable, it is. In fact, SBSD corruption went right to the top. Sheriff Floyd Tidwell, who headed the SBSD's investigation of the Ryen/Hughes murders, pleaded guilty in May 2004 to four felony counts of stealing over 500 guns from county evidence rooms during his tenure as Sheriff from 1983 to 1991.[34]

D. Further Evidence and Conclusions Confirming Mr. Cooper's Innocence

Recently, a number of experts who have reviewed Mr. Cooper's case testified before the IACHR about further infirmities in Mr. Cooper's prosecution:

- In 2013 former FBI agent Thomas R. Parker testified before the IACHR that the SBSD's investigators suffered from "tunnel vision" in pursuing Mr. Cooper and were blinded by

[32] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581, 607, 615, 619 (2009) (Fletcher dissenting)]; 56 R.T. 4827-28.
[33] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581, 583 (2009) (Fletcher dissenting)].
[34] Ex. 5 [SCAPEGOAT AT P. 92].

what Parker describes as "abject racism." Parker testified that law enforcement ignored and/or destroyed exculpatory evidence that would have exonerated Mr. Cooper.[35]

- Janine Arvizu, a chemist and certified Quality Auditor of forensic testing, told the IACHR in 2013 that the forensic testing results the prosecution used to convict Mr. Cooper in 1984-85 were so lacking in integrity as to render those results invalid, and "[t]he observed facts are consistent with a concerted effort to tamper with evidence in a manner that would incriminate Kevin Cooper, and to hide evidence of the tampering."[36]

- Gregg O. McCrary, a 25-year veteran of the FBI and a criminal "profiler," told the IACHR that, based on his investigation, he believes multiple offenders committed the murders, and that it was "highly unlikely" that burglary, robbery and motor vehicle theft were motives for the crimes, as the prosecution claimed at trial.[37]

- Kathy Pezdek, Ph.D., a specialist on the reliability of eyewitness memory, testified that Josh Ryen's statements made shortly after the attacks that the perpetrators were three white men were much more reliable than his later memory accounts, which came after SBSD deputies, prosecutors and other adults told Josh Ryen that Mr. Cooper was the attacker.[38]

- Michael Adelson, an experienced capital defense lawyer, testified before the IACHR that the performance of Mr. Cooper's trial counsel in 1984-85 was constitutionally deficient, and had trial counsel been up to standard, Mr. Cooper likely would not have been found guilty and sentenced to death.[39]

Based on a thorough review of Mr. Cooper's case including this new evidence of Mr. Cooper's innocence, the IACHR ruled on September 12, 2015, in a Final Report signed by six

[35] Ex. 8 [Cooper IACHR Merits Report Oct. 28, 2015]; Ex. 3 [Parker Decl. (Oct. 17, 2013), ¶ 3].
[36] Ex. 21 [Arvizu Letter].
[37] Ex. 4 [McCrary Report].
[38] Ex. 9 [Pezdek Decl.].
[39] Ex. 22 [Declaration of Michael Adelson dated Oct. 16, 2013 ("Adelson Decl.").

Commissioners,[40] that Mr. Cooper's human rights were violated in multiple respects by the United States over the past 30 years (the "IACHR Report").[41] The IACHR Report followed the Commission's extensive review of evidence, full briefing by Mr. Cooper and the United States and an evidentiary hearing at which the United States appeared before four IACHR Commissioners in Washington D.C. in October 2013.

The IACHR Report found that Mr. Cooper's prosecution violated several provisions of the American Declaration on the Rights and Duties of Man.[42] This 32-page Report noted eight separate instances of the denial of Mr. Cooper's due process rights in his trial and subsequent appeals.[43] The IACHR also found ineffective assistance by Mr. Cooper's trial counsel, and that Mr. Cooper was likely the victim of racism during evidence gathering, in his prosecution and in the imposition of his death sentence.

The IACHR recommended that, to address these violations of Mr. Cooper's human rights, the United States do a fresh review of Mr. Cooper's prosecution, trial and death sentence in order to guarantee that Mr. Cooper's right to due process and a fair trial be protected as required by the American Declaration.[44]

E. <u>Important Forensic Testing Remains to Be Done</u>.

In order to ensure that the truth of Mr. Cooper's innocence has a chance to emerge – and perhaps to identify the true perpetrators of the Ryen/Hughes murders - there is important forensic testing that can and should be done.

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[40] This report was signed unanimously by every eligible IACHR Commissioners. The IACHR currently has seven commissioners. However, by rule, the Commissioner from the United States is not eligible to vote on matters regarding the United States.
[41] Ex. 23 [IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014 ("Cooper IACHR Merits Report Jul. 17, 2014")].
[42] *Id.* at 31.
[43] The IACHR's criticisms of limitations imposed by the Anti-terrorism and Effective Death Penalty Act of 1996 were echoed by Judge McKeown's 2007 concurrence. *See* Ex. 8 [Cooper IACHR Merits Report (Oct. 28, 2015), p. 18]; Ex. 2 [*Cooper v. Brown*, 510 F.3d 870 (2007)].
[44] A more detailed discussion of the IACHR Report is found in Section IX below.

As Judge Fletcher and other Ninth Circuit judges and the IACHR explained, forensic testing the Ninth Circuit ordered in 2004 has never been adequately completed.[45] And further testing can also be done on evidence that is in the control of the State to exonerate Mr. Cooper and identify the actual attackers. Mr. Cooper has requested such testing, but the State, which has custody of the evidence, has refused further testing and opposed it in court.

Before an innocent man is executed, shouldn't the most advanced science available be employed in a search for the truth? Why doesn't the State want to join in that search? Why shouldn't forensic testing that Mr. Cooper has requested – at his own expense – and which can be done quickly, be done before he is executed? At minimum, how can the State execute a man whose conviction is undermined by the gravely troubling evidence detailed in this Clemency Petiton, and whose sentence has been found by an international tribunal to violate his human rights, without at least completing the best available forensic evidence testing? An evolved society must refuse to let an innocent person be executed, and must take every possible step to prevent that from happening. The serious questions in Mr. Cooper's case require conclusive answers before the State can be permitted to end his life.

As Americans and Californians, we all value our criminal justice system and hope that it works well. But the fact is that any system of justice, including ours, can reach erroneous results. That is why no one should be surprised to learn that our criminal justice system tried, convicted and sentenced to death an innocent person such as Mr. Cooper. In the United States, since 1973, 156 people previously convicted and sentenced to death by our criminal justice system have been exonerated.[46] For at least seven innocent men sentenced to death, exoneration

[45] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009) (Fletcher, dissenting)].
[46] Ex. 24 [*Facts about the Death Penalty*, Death Penalty Information Center (Oct. 30, 2015), http://deathpenaltyinfo.org/documents/FactSheet.pdf].

came too late: that is, after they were executed.[47] For instance, in 2004, the State of Texas executed Cameron Todd Willingham for the arson deaths of his two daughters. We now know that Willingham was innocent, and that the prosecution obtained his conviction through false testimony from a jailhouse "snitch," and by using a purported arson expert whose opinions are now known to amount to unsupportable "junk science."[48]

Mr. Cooper deserves a chance to prove his innocence before he is executed. He should be pardoned or re-tried before an impartial jury in a trial that is free from constitutional and human rights errors. Our system of justice should not tolerate what former Supreme Court Justice Sandra Day O'Connor called the "constitutionally intolerable" event: the execution of an innocent man.[49]

[47] Ex. 25 [*Executed But Possibly Innocent*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/executed-possibly-innocent (last visited Nov. 9, 2015)].
[48] Junk science related to the "bloody shoeprint" also was involved in Mr. Cooper's conviction, as see below in Sections III.D and VI.A.3.
[49] *Herrera v. Collins*, 506 US 390, 419 (1993) (O'Connor concurring).

II. ROAD MAP TO THE CLEMENCY PETITION

Mr. Cooper provides this summary as a road map for the Governor in reviewing this Clemency Petition. Mr. Cooper's case is exceedingly complex, with a history spanning over 30 years. Accordingly, in Section III below, this Clemency Petition addresses the clemency process, including a discussion of how Mr. Cooper's case fits into California's clemency construct and why the clemency process is crucial in this case. [link]

Next, in Section IV, the Clemency Petition discusses the factual record that supports Mr. Cooper's innocence [link], including the evidence that shows three white men committed the Ryen/Hughes murders, how the SBSD botched the investigation and then manipulated and tampered with evidence. [link]

The Clemency Petition then addresses, in Section V, how Mr. Cooper was denied a fair trial in multiple ways in 1984-5. [link]

The Clemency Petition then shows, in Section VI, how the vast majority of evidence relied upon by the California Supreme Court on direct appeal has been undermined or called into question. [link]

Next, in Section VII, the Clemency Petition discusses the undeniable obstacles Mr. Cooper's appeals in federal court faced and in particular the unfair treatment he received from Judge Marilyn Huff, who predetermined the merits of Mr. Cooper's claims and denied him due process. [link]

Next, in Section VIII, the Clemency Petition discusses procedural impediments to proving innocence claims and discusses the testing that could be done to prove Mr. Cooper's innocence. [link]

Next, in Section IX, the Clemency Petition discusses the IACHR's consideration of Mr. Cooper's case and how it concluded Mr. Cooper's human rights have been repeatedly violated.

Next, in Section X, the Clemency Petition discusses statements by several of the jurors in Mr. Cooper's 1984-5 trial, who implore further inquiries and testing in Mr. Cooper's case. [link]

In section XI, the Clemency Petition shows how newspaper editorials have supported granting clemency in Mr. Cooper's case. [link]

Finally, as to relief, in Section XII, the Clemency Petition asks that, as the IACHR report recommends, the Governor undertake a full investigation of Mr. Cooper's case, including permitting evidence testing that Mr. Cooper has requested and the production and review of documents Mr. Cooper has not been permitted to inspect. Once that investigation is done, the Clemency Petition asks that the Governor pardon Mr. Cooper or, if there is any doubt about his innocence, the Governor conditionally pardon him unless the State agrees to retry him at a fair trial.

III. OVERVIEW OF CLEMENCY

A. The California Constitution Empowers the Governor to Intervene to Prevent the Execution of an Innocent Man.

The Governor's clemency power, found in Article V, section 8(a) of the California Constitution, provides:

> ***Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.***

According to Professors Mary-Beth Moylan and Linda Carter, who studied clemency in death penalty cases to give guidance to the California Commission on the Fair Administration of Justice,[50] clemency serves two dominant purposes: (1) it is the final fail-safe for correcting miscarriages of justice that occurred in the judicial process; and (2) it is a source of mercy based on facts or circumstances that are outside the parameters of the judicial process. An example of the first purpose is "granting clemency to an innocent person."[51] That is what Mr. Cooper seeks here.

Notwithstanding that Article V, section 8(a) gives the California Supreme Court in certain cases the opportunity to review a Governor's grant of a pardon or commutation,[52] clemency is not part of the criminal justice process. It is a purely executive function, and should be considered in that light. *See Herrera v. Collins*, 506 U.S. 390 (1993) (recognizing clemency's

[50] Ex. 26 [Mary-Beth Moylan and Linda E. Carter, *Clemency in California Capital Cases,* 14 Berkeley J. Crim. L. 37 (2009). Available at: http://scholarship.law.berkeley.edu/bjcl/vol14/iss1/2].
[51] *Id.*
[52] Significantly, sec. 8(a) does not give the California Supreme Court the power to review a reprieve, as that term is left off the last sentence of the provision. Thus, the Governor may unqualifiedly order a stay of any execution pending forensic testing of evidence that the State has refused to permit.

role as the "fail safe" for previously unsuccessful actual innocence claims). Where factual innocence is claimed, the criminal justice system may have failed at trial, likely because of prejudice, misdeeds by the prosecution and/or an incompetent defense. It also may have failed in post-conviction proceedings because of the administrative hurdles the system places in front of a wrongfully-convicted person. Thus, it is up to the Governor, as Chief Executive, to correct in whatever way he or she can what otherwise would be intolerable: the execution of an innocent man. In the context of a case raising a claim of actual innocence, the late Chief Justice William Rehnquist, no friend of convicted felons, recognized that "clemency...is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted."[53] Chief Justice Rehnquist went on to say: "Executive clemency has provided a 'fail-safe' in our criminal justice system. ... It is an unalterable fact that our judicial system, like human beings who administer it, is fallible."[54]

Clemency is the sole province of the Governor. As Governor George Ryan of Illinois noted in 2003**:**

> "Our Supreme Court has reminded inmates petitioning them that while errors and fairness questions may actually exist and cannot be recognized under judicial rules and procedural mandates, the last resort for relief is the Governor."[55]

As former Justice Janice Rogers Brown of the California Supreme Court wrote in 1992**:**

> "Mercy cannot be quantified or institutionalized. It is properly left to the conscience of the executive entitled to consider pleas and should not be bound by court decisions meant to do justice."[56]

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[53] *Herrera v. Collins*, 506 U.S. 390, 411-412 (1993).
[54] Id. at 415.
[55] Ex. 27 [Gov. George H. Ryan, Clemency Address, Northwestern University School of Law, Jan 11, 2003, quoted in Kathleen M. Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers Justice or Mercy?*, 24 CRIM. JUST. 26 (2009)].
[56] Ex. 28 [Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. Rev. 327].

Clemency often is sought based on claims that judicial proceedings were unfair including because of misconduct by the prosecution and/or ineffective assistance of defense counsel at the trial or appellate level. [57] Clemency is also appropriate where there is new evidence that has surfaced since the trial, and on grounds of factual innocence.[58] All of these grounds are applicable to Mr. Cooper's request.

In considering this petition, we urge the Governor to consider the record of Maryland's former Governor Robert Ehrlich, Jr., who during his term from 2003 to 2007, made clemency a priority, dedicating lawyers to screen requests and meeting monthly with senior aides to review applications.[59] As Governor Ehrlich said:

> "If you have this extraordinary power and fail to use it, the quality of justice in your jurisdiction suffers. [Sifting requests for clemency] is an art, not science. … This is not any easy thing. If it was easy, it would not be leadership. It would be politics." *Id*.

B. <u>Clemency Granted in Death Penalty Cases</u>

According to the Death Penalty Information Center, since the death penalty was re-instituted in 1976, Governors in the United States have granted clemency to 280 death row inmates.[60] Governors in 22 states have granted clemency for various reasons, including based on concerns about innocence.[61] In addition, President Clinton granted clemency in one death penalty case.[62]

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[57] Ex. 26 [Mary-Beth Moylan and Linda E. Carter, *Clemency in California Capital Cases,* 14 Berkeley J. Crim. L. 37 (2009)].
[58] *See* Section III.C below.
[59] *See*, Ex. 29 [Ken Armstrong, *The Politics of Mercy*, The Marshall Project (Jan. 23, 2015), https://www.themarshallproject.org/2015/01/23/the-politics-of-mercy].
[60] Ex. 30 [*Clemency*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/clemency (last visited November 2, 2015)].
[61] For instance, Gov. Ryan of Illinois pardoned four death row inmates on the basis of innocence. *(Id.);* Ex. 31 [LINDA E. CARTER, ET AL., UNDERSTANDING CAPITAL PUNISHMENT, p. 251 §15.05 (LexisNexis, 3rd ed. 2012)].
[62] In 2001 President Clinton granted clemency to David Ronald Chandler because Chandler's principal accuser changed his testimony, casting doubt on Chandler's guilt. *Id.*

Startlingly, in the 39 years since the death penalty was reinstituted in 1976, no California the largest death row population of any state. By contrast, Gov. John Kashich of Ohio granted clemency in five death penalty cases,[63] Gov. Ted Strickland of Ohio commuted five death penalty sentences to life without parole,[64] Gov. Richard Celeste of Ohio granted clemency to 8 death row inmates in 1991 citing a "disturbing racial pattern in death sentencing," and Gov. George Ryan of Illinois commuted the death sentences of 167 death row prisoners as he left office in 2003.[65]

The failure of California Governors to grant clemency in any capital case since 1976 stands in stark contrast to the record of California Governors before that time. Between 1943 (of 59 he considered) during his two terms in the 1960's. In his book on the subject, *Public Justice, Private Mercy*, Governor Brown stated that he wished he had granted more clemency petitions.[66]

C. Clemency in Death Penalty Cases Where Guilt Is in Doubt

According to the Death Penalty Information Center, of the 275 grants of clemency in death penalty cases since 1976, no fewer than 20 of these were based on a Governor's concern about the innocence of the defendant.[67] For instance, in 2011 Gov. John Kasich commuted the death sentence of Shawn Hawkins because doubts had arisen about the degree of Hawkins' involvement in a drug related murder.[68] Thus, it is not at all unusual for a Governor to grant clemency because the criminal justice system appears to have failed and because of hesitancy to of someone may be innocent. Florida Governor Bob Graham granted clemency in two cases

[63] Ex. 29 [Ken Armstrong, *The Politics of Mercy*, The Marshall Project (Jan. 23, 2015)].
[64] Ex. 32 [Alan Johnson, *Kasich rarely uses clemency to pardon, commute sentences*, The Columbus Dispatch (Mar. 16, 2015, 8:23 AM), http://www.dispatch.com/content/stories/local/2015/03/16/kasich-rarely-uses-clemency.html].
[65] Ex. 27 [Kathleen M. Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers Justice or Mercy?*, 24 CRIM. JUST. 26 (2009); *See also* Ex. 33 [Commutations in Capital Cases On Humanitarian Grounds, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/clemency].
[66] Ex. 34 [EDMUND G. (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW, p. xiii (Weidenfeld & Nicolson 1989)].
[67] Id.
[68] *Id.*; *See also* Ex. 35 [THE WASHINGTON POST, June 9, 2011].

because the condemned man might be innocent.[69] Texas Gov. George W. Bush granted clemency because of possible innocence in the case of Henry Lee Lucas.[70]

The reason Gov. George Ryan of Illinois commuted so many death sentences in 2003 was clearly based on a fear of executing someone who was innocent. In his clemency message, Gov. Ryan noted that Illinois had executed 12 people since the reinstitution of the death penalty in 1977, and during the same period, the state had released 13 people based on new evidence that demonstrated their innocence.[71]

D. Innocent People Have Been Regularly Convicted and Sentenced to Death in the United States.

No one should assume that Mr. Cooper is guilty of the Ryen/Hughes murders because a jury convicted him of those crimes and sentenced him to death in 1985. Nor should any comfort come from the fact that his conviction and sentence were upheld on appeal. As noted above, according to the Death Penalty Information Center, 156 defendants sentenced to death in the United States have been exonerated since 1973. As discussed below, three of them were wrongly convicted in California.

Undeniably, our criminal justice system regularly convicts innocent people and sentences them to death. Once condemned, innocent people usually are without resources to establish their innocence on appeal or by habeas corpus petition. To achieve these 156 death row exonerations, it took massive efforts by dedicated lawyers, investigators and scientists.

How many more innocent people continue to languish on death row? How many innocent men and women have not been so lucky as to have had someone devote resources to exonerate

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[69] Ex. 30 [*Clemency*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/clemency (last visited November 2, 2015)].
[70] Id.
[71] Ex. 27 [Kathleen M. Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers Justice or Mercy?*, 24 CRIM. JUST. 26 (2009)]; *See also*, Ex. 26 [Mary-Beth Moylan and Linda E. Carter, *Clemency in California Capital Cases*, 14 Berkeley J. Crim. L. 37, 95, 103 (2009)].

them? There is no way to tell. However, we know that the criminal justice system is not exonerating all of the innocents. There is strong evidence of innocence for at least eleven men who were executed in recent years. They include:

- **Cameron Todd Willingham.** Texas wrongly executed Willingham in 2004 for purportedly setting fire to his home, thereby killing his three daughters. After his execution a jailhouse "snitch" recanted his testimony about Willingham's confession, and the State's expert's testimony on arson was shown to be wrong, and based what has now been proven to be "junk science." Texas Governor Rick Perry was shown a report that showed that the expert's report was bogus, but allowed Willingham to be executed anyway.[72]

- **Carlos DeLuna.** Texas wrongly executed DeLuna in 1989 for allegedly murdering a gas station clerk. The execution of the wrong man is recounted in detail in the book entitled "The Wrong Carlos."[73]

- **Leo Jones.** Florida executed Jones in 1998 for the murder of a police officer. Some years later, a retired police officer testified that Jones had been beaten into the confession by another officer with a record of torture who bragged about beating Jones.[74]

- **Ruben Cantu.** Texas wrongly executed Cantu in 1993 for shooting two men, one of whom died. The survivor recanted his testimony, which was the only evidence against Cantu, twelve years after Cantu's execution.[75]

- **Troy Davis.** Georgia executed Davis in 2011 for the shooting death of an off-duty police officer. Seven of the nine eye-witnesses later recanted their trial testimony. The eighth had already told police he "wouldn't know [the shooter] if he saw him." Evidence now points to the ninth as the shooter.[76]

- **Claude Howard Jones.** Texas wrongly executed Jones in 2000 for murdering a liquor store owner.[77] Jones was convicted based on expert testimony using hair examination

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[72] Ex. 35.1 [DAVID GRANN, TRIAL BY FIRE DID TEXAS EXECUTE AN INNOCENT MAN (The New Yorker, Sept. 7, 2009 issue)].
[73] Ex. 36 [JAMES S. LIEBMAN, ET AL., THE WRONG CARLOS ANATOMY OF A WRONGFUL EXECUTION (Colum. U. Press 2014)].
[74] Ex. 37 [Steve Mills, *Questions of Innocence*, Chicago Tribune, Dec. 18, 2000].
[75] Ex. 38 [Lise Olsen, *Did Texas Execute an Innocent Man?* Houston Chronicle, Nov. 20, 2005, http://www.chron.com/news/houston-texas/article/Did-Texas-execute-an-innocent-man-1559704.php].
[76] Ex. 39 [NAACP, *Significant Doubts About Troy Davis' Guilt: A Case for Clemency*, http://www.naacp.org/pages/troy-davis-a-case-for-clemency (last visited Apr. 24, 2013)].
[77] Ex. 40 [*Hard to stomach: The last meals of death row inmates executed for crimes they were proved to be INNOCENT of years later*, MailOnline, Feb. 13, 2013, http://www.dailymail.co.uk/news/article-2278434/Can-stomach-Human-rights-group-launches-ad-campaign-featuring-meals-death-row-inmates-executed-crimes-did-commit.html].

now shown to be "junk science." DNA testing done after Jones' execution exonerated him.[78]

- **David Spence.** Texas wrongly executed Spence in 1997 for the murder of three teenagers. The "snitches" who testified at Spence's trial recanted their testimony and the bite mark testimony that the prosecution presented was later found to be "junk science."[79]

The National Registry of Exoneration currently lists 1,733 people wrongly convicted of crimes who have been exonerated since 1989.[80] This number of known exonerations of course is likely just the tip of the iceberg. To begin with, the number does not account for the innocent people in prison who have not yet, for various reasons, been able to establish their innocence. Impediments include lack of money to hire lawyers and investigators, laws that make proving innocence through post-conviction proceedings virtually impossible,[81] prosecutorial intransigence—particularly hiding or destroying exonerating evidence,[82] and a justice system that gives every benefit of the doubt to the prosecution in post-conviction proceedings, which is where issues of innocence and exonerating evidence often arise. *See generally* Ex. 44 ["CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG" by Prof. Brandon L. Garrett of the University of Virginia School of Law.] In his book, Prof. Garrett discusses cases of innocent people wrongly convicted based on several factors, all of which have been prevalent in Mr. Cooper's case, such as flawed forensics, junk science, prosecutorial misconduct, ineffective assistance of counsel and biased judges and juries.

Second, the number of exonerations may be far greater than reported due to the absence of a mandatory system for reporting exonerations and the lack of publicity about exonerations.

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[78] Ex. 41 [Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, Texas Observer, Nov. 11, 2010, http://www.texasobserver.org/texas-observer-exclusive-dna-tests-undermine-evidence-in-texas-execution/].
[79] Ex. 42 [Raymond Bonner and Sara Rimer, *A Closer Look At Five Cases That Resulted In Executions Of Texas Inmates*, N.Y. Times, May 14, 2000].
[80] *See* Ex. 43 [The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/pages/about.aspx].
[81] See Section VIII.A below.
[82] See Section VIII.D2 below.

In addition, the National Registry of Exonerations excludes at least 1,100 exonerations between 1995 and 2012 in which groups of convictions were dismissed after discovery of systematic and widespread police misconduct such as perjury and planting of evidence.

We have included with this petition letters to the Governor from two former prosecutors who obtained murder convictions and death sentences against defendants who were later exonerated: Sam D. Millsap, Jr. and A.W. "Marty" Stroud.[83] Both reviewed Mr. Cooper's case and both request that the Governor consider the evidence that points to Mr. Cooper's innocence and grant him clemency. We urge the Governor to read and weigh these letters heavily.[84]

E. <u>California Has Convicted and Sentenced Innocent People to Death</u>.

No one should assume that Mr. Cooper is guilty of the Chino Hills murders merely because he was convicted and sentenced to death and his appeals were denied *in California*. At least three innocent men sentenced to death in California were subsequently exonerated. In fact, the wrongful convictions of Troy Jones, Oscar Morris, and Ernest "Shujaa" Graham suffered from similar injustices and misconduct as those that led to Mr. Cooper's wrongful conviction and death sentence.

- **Troy Jones:** Jones was exonerated fourteen years after his 1982 conviction for first degree murder. When it examined Jones' case in 1996, the California Supreme Court found a multitude of deficiencies by Jones' trial counsel. *In re Jones*, 13 Cal. 4th 552, 559 (1996); *see also People v. Jones*, 13 Cal. 4th 535, 537-38 (1996). Not only did Jones' trial counsel fail to refute critical, yet flawed, evidence at trial, he did not even attempt to locate a key trial witness and provided no reason for his failure to do so. The court found that "defense trial counsel's performance was so deficient and prejudicial to deprive petitioner of effective assistance of counsel guaranteed under the state and federal constitution." *In re Jones*, 13 Cal. 4th at 562-63, 567.

- **Oscar Morris:** Morris was exonerated seventeen years after his conviction for first degree murder. Morris's case is particularly troubling because, despite the California

[83] Ex. 45 [Letter to Governor from Sam D. Millsap, Jr. dated Dec. 9, 2015]; Ex. 46 [Letter from A.M. "Marty" Stroud dated Nov. 17, 2015 ("Stroud Letter")].

[84] Mr. Millsap's letter is particularly pertinent, since the defendant he wrongly convicted and sentenced to death was Ruben Cantu, who was executed before he was exonerated.

Supreme Court's finding in 1988 that prosecutors failed to disclose that they provided their key witness special consideration and assistance in return for his testimony, Morris remained behind bars for a crime he didn't commit. *People v. Morris*, 756 P.2d 843, 858-59 (Cal. 1988). Although the Court found that the government's nondisclosure "constituted a clear denial of due process," it only remanded the case for resentencing. *Id.* at 864, 869. Almost ten years later, in 1997, that same key witness confessed on his death bed that he had fabricated the entire case against Morris in return for favorable treatment in at least two unrelated criminal cases.[85] Prosecutors declined to re-try Morris and he was freed in 2000.[86]

- **Ernest "Shujaa" Graham:** Years after his initial conviction and death sentence, Graham was exonerated by a jury of his peers. In December 1973, after a state correctional officer died from injuries from an on-duty assault, the State charged Eugene Allen and Ernest E. Graham with murder. The first trial ended in a mistrial. Prosecutorial misconduct plagued the second trial when the prosecutor systematically removed potential jurors of color. *People v. Allen*, 590 P.2d 30 (Cal. 1979). The white jury returned a guilty verdict, and the trial court sentenced each of the defendants to death. *Id.* Fortunately, the California Supreme Court reversed Graham's conviction based upon the blatant prosecutorial misconduct and remanded the case for a third trial, which ended in a mistrial. *Id.* at 35. Finally, in 1981, after a fourth trial, Graham was acquitted by a jury of his peers.

Like Jones, Morris and Graham – all of whom were given the opportunity to again face jurors after the discovery of governmental misconduct -- the problems associated with Mr. Cooper's prosecution, and the facts that have come to light through the appellate and post-appellate investigative processes, require that Mr. Cooper receive an equal opportunity to be judged, impartially and without prejudice, through a new trial, by a jury of his peers.

F. Studies Show That Racial Discrimination Plagues Capital Prosecutions and Sentencing, Including in California.

The victims in the Ryen/Hughes murders were white. Mr. Cooper is black. As noted by the IACHR in its Final Report, racial disparities within the application and administration of the

[85] Ex. 47 [CAL. ST. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, AB 1121 BILL ANALYSIS (Ca. 2006), http://leginfo.ca.gov/pub/05-06/bill/asm/ab_1101-1150/ab_1121_cfa_20060109_123813_asm_comm.html (citing the Los Angeles Daily Journal, Oct. 29, 2002)].

[86] Ex. 48 [*Oscar Morris*, The National Registry of Exonerations, (2012) http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3493].

death penalty in the United States have historically been scandalous, and continue to this day.[87] The national death row population is roughly 42% black, while blacks make up only 13.6% of the U.S. population according to the latest census.[88] In some states a defendant is nearly 22 times more likely to receive a death sentence if the defendant is black and the victim is white.[89] This disparity is not just in the deep South. On October 9, 2013, the Center for Constitutional Rights (CCR), in coordination with the International Federation for Human Rights (FIDH), released a report regarding the death penalty in California and Louisiana. Entitled "DISCRIMINATION, TORTURE, AND EXECUTION: A HUMAN RIGHTS ANALYSIS OF THE DEATH PENALTY IN CALIFORNIA AND LOUISIANA," this report found that "[s]tark racial disparities in charging, sentencing, and imposing death sentences persist" in both states.[90] Specifically, the report found that, in California, African Americans represented 36 percent of the people on death row, while comprising only 6.7 percent of the total population.[91] Because of prosecutorial discretion, stark discrepancies continue to exist in the proportion of death sentences imposed on blacks, as demonstrated by the concentration of death sentences within a small number of counties within California. *Id*.; *see also id*. at 22 (discussing the problems associated with the breadth of California's death penalty statute that allows the imposition of the death penalty even where there is no intent to kill). The CCH/FIDH report further noted that "illegitimate factors such as race play a part in whether a defendant is charged and sentenced with the death penalty, and that

[87] Ex. 8 [Cooper IACHR Merits Report (Oct. 28, 2015), pp. 27-29 (citing, *e.g.*, Ex. 49 [*The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II. Doc. 62, Dec. 5, 2011, ¶ 184)].
[88] Ex. 50 [Matt Ford, *Racism and the Execution Chamber*, The Atlantic, Jun. 23, 2014].
[89] Ex. 51 [Rachel Leland, *NYU Professor Speaks for Silenced Voices*, The Baylor Lariat, Mar. 3, 2015]. Bryan Stevenson, Executive Director of the Equal Justice Initiative, in a speech on March 2, 2015 at Baylor University. Ex. 52 [BRYAN STEVENSON, JUST MERCY A STORY OF JUSTICE AND REDEMPTION (Spiegal & Grau 2014)]. In his book, *Just Mercy,* 2014, Stevenson notes that one in every three black male babies born in this century is expected to be incarcerated. *Id.* at 15.
[90] Ex. 53 [CTR. FOR CONST. RTS. & INT'L FED'N FOR HUM. RTS., DISCRIMINATION, TORTURE, AND EXECUTION: A HUMAN RIGHTS ANALYSIS OF THE DEATH PENALTY IN CALIFORNIA AND LOUISIANA 4 (2013)].
[91] *Id.*

the death penalty is applied in an arbitrary manner." *Id*. at 23. One example of this is a study that found that "defendants found guilty of killing whites were 3.7 times more likely to be sentenced to death than those found guilty of killing Hispanics." *Id*. Clearly, the racial discrimination Mr. Cooper suffered in 1984-5 continues within California to this day.

G. Prior Clemency Proceedings in This Case Highlight the Growing Evidence of Mr. Cooper's Innocence.

In following sections of this Clemency Petition, we outline in detail how the prosecution that produced Mr. Cooper's death sentence was corrupt; how the prosecution not only ignored exculpatory evidence, but in some cases actually destroyed it; and how Mr. Cooper's conviction and death sentence is bound up in blatant racial discrimination in the criminal justice system. In addition we outline how testing of existing evidence, testing the State now steadfastly opposes, could not only exonerate Mr. Cooper but could identify the men who actually committed these brutal murders. But before going into that detail, it is important to first review the history of clemency in this case because Gov. Schwarzenegger's vastly different responses to Mr. Cooper's two prior clemency petitions underscore how the evidence of Mr. Cooper's innocence has continued to build.

After Mr. Cooper's state and federal appeals and habeas corpus petitions were exhausted in late 2003, the State scheduled his execution for midnight on February 10, 2004. In addition to court petitions seeking to stay his execution for forensic testing, Mr. Cooper filed a clemency petition with Gov. Schwarzenegger. On January 30, 2004 Gov. Schwarzenegger issued a written decision flatly denying clemency.[92] Gov. Schwarzenegger's decision cited, among other things, the California Supreme Court's 1991 opinion denying Cooper's direct appeal, stating that "California's highest court concluded that evidence established Mr. Cooper's guilt of these

[92] *See* Ex. 54 [2004 Clemency Decision].

horrible murders 'overwhelmingly...'" Gov. Schwarzenegger stated his conclusion "that this case does not present factual questions that warrant investigation or a hearing."[93]

Mr. Cooper's life was saved hours before his scheduled February 10, 2004 execution when the Ninth Circuit Court of Appeals issued a stay and ordered that he be permitted to file a new habeas corpus petition that would include a request for certain forensic testing.[94] As a result of those subsequent proceedings, significant new evidence emerged pointing to Mr. Cooper's innocence.

We show in detail in a later section how the California Supreme Court's 1991 decision has been completely undermined by new evidence of Mr. Cooper's innocence, much of which came to light after the Court considered Mr. Cooper's case in 1991. But the best evidence of how the landscape in Mr. Cooper's case has changed since 1991 is to review Gov. Schwarzenegger's response to Mr. Cooper's subsequent clemency petition filed in December 2010.

In August 2010, after the California Department of Corrections and Rehabilitation issued new regulations for lethal injection executions, Gov. Schwarzenegger's Legal Affairs Secretary notified counsel for the five California death row inmates whose appeals at that time had been exhausted, including Mr. Cooper, that if they wished to file a clemency petition before execution, they should do so in the coming months.

In response, in December 2010 Mr. Cooper filed a second clemency petition with Gov. Schwarzenegger. In it, Mr. Cooper highlighted the evidence of his innocence and of prosecutorial misconduct that had come to light *since January 2004*, and in particular the evidence that surfaced during proceedings related to his federal habeas corpus petition in 2004-5

[93] Id.
[94] *See* Ex. 54.1 [2010 Clemency Petition].

after the 9th Circuit stayed his execution. Prominent in that petition was a discussion of the evidence cited in the opinions of the eleven Ninth Circuit judges who dissented in 2009 from denial of Cooper's request for rehearing en banc and the "concurring" opinion of Ninth Circuit Judge Margaret McKeown in 2007 raising significant concerns about the integrity of the prosecution that led to Mr. Cooper's death sentence.

Clearly, Mr. Cooper's second petition changed Gov. Schwarzenegger's mind. In a letter to Mr. Cooper's attorneys dated the day he left office, January 2, 2011, Gov. Schwarzenegger stated:

> ***In this case, the clemency application raises many evidentiary concerns which deserve a thorough and careful review of voluminous records. Such an extraordinary request needs more than two weeks of attention.***

Ex. 55 [2010 Clemency Decision].

Thus from 2004 to 2010, Governor Schwarzenegger's analysis went from "this case does not present factual questions that warrant investigation or a hearing" to "the clemency application raises many evidentiary concerns which deserve a thorough and careful review."[95]

Even more evidence of Mr. Cooper's innocence and of the corruption of the prosecution that led to his conviction and death sentence has surfaced since 2010, notwithstanding the State's refusal to permit any testing of the evidence that could both prove Mr. Cooper's innocence and identify the real culprits. The sum of all the evidence now available mandates that Mr. Cooper be granted clemency in the form of a full and fair investigation of his case, including forensic testing that could prove his innocence.

[95] Ex. 54 [2004 Clemency Decision]; Ex. 55 [2010 Clemency Decision]; further setting of execution dates in California ceased pursuant to a de facto moratorium on executions arising from a court order in *Morales, et al v. Beard, et al.*, U.S. District Court, Northern District of California, Case No. 3:06-cv-00219-RS pending promulgation of new execution protocol regulations.

IV. THE FACTS NOW AVAILABLE SHOW THAT MR. COOPER DID NOT COMMIT THE RYEN/HUGHES MURDERS.

In his award winning book *Scapegoat: The Chino Hills Murders and the Framing of Kevin Cooper*[96] crime author J. Patrick O'Connor examined the entire history of the Ryen/Hughes' murders and Mr. Cooper's prosecution up to its publishing date in 2012. O'Connor concluded that Mr. Cooper is innocent and that he was framed by the San Bernardino County Sheriff's Department and the prosecution. O'Connor analyzed the crime scene and other evidence, which compelled him to conclude that a single person could not have attacked and subdued the Ryen family and Christopher Hughes, and that Mr. Cooper was framed by the SBSD.[97] What follows here is a shortened version of the facts with cites to the record, and includes new developments since *Scapegoat* was published that also point to Mr. Cooper's innocence.

A. More Than One Killer Committed The Murders/Attempted Murder of the Ryen Family and Their Houseguest Christopher Hughes.

On Saturday, June 4, 1983, Douglas and Peggy Ryen and the Ryens' children, Josh and Jessica, attended a barbecue at a friend's house near their home in Chino Hills, California. (88 R.T. 3180-81, 3179; 100 R.T. 6204.) Josh's friend, Chris Hughes, came to the barbecue with the Ryen family, and was given permission to spend the night at the Ryen home. (88 R.T. 3181, 3187-88.) The Ryens arrived at the barbeque around 6:30 or 7:00 p.m. and left to return to their home around 9:00 p.m. (88 R.T. 3181-82.)

[96] Independent Publisher's award, True Crime category, silver; ForeWord Reviews' award, True Crime category, bronze.

[97] As noted above, Peggy Ryen's sister, Lillian Shaffer, also does not believe that Mr. Cooper was the person who attacked the Ryens and Christopher Hughes. *See* Ex. 56 [Lillian Shaffer letter to Governor Schwarzenneger, Feb. 2, 2004 ("Shaffer Letter dated Feb. 2, 2004")]; Ex. 57 [Lillian Shaffer letter to Governor Edmund G. Brown Jr. dated Dec. 17, 2015 ("Shaffer Letter dated Dec. 17, 2015")]. She knew how strong Peggy and Doug Ryen were, and Peggy was skilled with the weapon she kept close to her bedside. 88 R.T. 3381-82; Ex. 5 [SCAPEGOAT, p. 41].

Around 9:00 a.m. on Sunday morning, June 5, Chris' mother, Mary Hughes, became concerned because Chris had not returned from his sleepover. (88 R.T. 3190.) By 11:30 a.m., she became quite upset, and her husband, William Hughes, drove over to the Ryen home to investigate. (88 R.T. 3191-92.)

Mr. Hughes found the front door locked, so he walked around the house looking in windows. (88 R.T. 3193-96.) When he looked through sliding glass doors that led to the master bedroom, he could see Douglas, Peggy, and Josh Ryen, and his son, Chris. (88 R.T. 3196-99.) Only Josh appeared to be alive. (88 R.T. 3198-99.) When Mr. Hughes entered the house, he saw Jessica lying dead on the floor. (88 R.T. 3204-05.)

Mr. Hughes attempted to use a portable phone to secure help, but it was not operative. (88 R.T. 3206-07.) He then drove to the home of a neighbor, phone authorities, and the two of them returned to the Ryen home. (88 R.T. 3207.) Shortly thereafter, SBSD Deputy Beltz, arrived at the scene (88 R.T. 3209, 3211-13), and within minutes the Chino Fire Department arrived to treat Josh. (88 R.T. 3263-65.) In all, eight individuals entered the Ryen bedroom to treat Josh. (88 R.T. 3264-65, 3309-10, 3313, 3318-20, 3328-29, 3333.)

Dr. Irving Root was the contract pathologist with the San Bernardino County Coroner's Office who responded to the crime scene before the bodies. (90 R.T. 3826-27; 90 R.T. 3833.) At trial he testified that Douglas Ryen was 6 foot 2-1/2 inches tall and weighed 176 pounds. (90 R.T. 3835.) Mr. Ryen appeared to be close to his ideal weight and, as a former Military Policeman, had an athletic physique. (91 R.T. 3988; Ex. 5 [SCAPEGOAT, p. 41].) His loaded shotgun was found in the closet nearby within feet of his body. (88 R.T. 3381-82; Ex. 5 [SCAPEGOAT, p. 41.]) Dr. Root described a number of chop wounds that had been inflicted to Doug Ryen's head, arms, and upper body areas. (90 R.T. 3837-46, 3850-52.) The five chop

wounds to the head (two of which had fractured the skull) could have been delivered in rapid succession, in the space of a second or two, while Doug was in the position in which he was found. (90 R.T. 3838-41.) However, it appeared from the blood spray that Doug had moved from one side of the bed to the other and then back again. (*See* Ex. 5 [SCAPEGOAT, p. 24].) Several wounds to Doug's fingers could have been caused by the same blows as the head wounds, if Doug had held his hands up to protect his head during the attack. (90 R.T. 3846-47.)

Doug also suffered a series of stab wounds (likely caused by a knife), some of which could not have been received in the position in which he was found. (90 R.T. 3850-57.) One of the stab wounds was to the left neck and completely cut the left carotid artery and incised into the trachea. (90 R.T. 3858.) This wound would have bled massively and would have cut off half of the supply of blood to the brain; Dr. Root believed this was among the first wounds Doug suffered. (90 R.T. 3858-59.) Dr. Root found no evidence inconsistent with the possibility that all of Doug's wounds were inflicted within a time span of as little as 15 to 30 seconds. (91 R.T. 4054.)

Peggy Ryen was 5 foot 8 inches tall and weighed about 140 pounds. (90 R.T. 3924.) She was an athletic, well-proportioned and exceptionally strong woman who regularly trained Arabian horses. (91 R.T. 3987; Ex. 5 [SCAPEGOAT, pp. 15-17, 41].) Her loaded gun was found within feet of where she slept in the nightstand. (88 R.T. 3381-82; Ex. 58 [SBSD Report by Detective Michael Hall dated Jun. 10, 1983, pg. 19]; Ex. 5 [SCAPEGOAT, p. 26].) She also knew how to handle weapons, as demonstrated by her having shot a snake in her bedroom in front of her half-sister a few years before the murder. (Ex. 5 [SCAPEGOAT, p. 41].)

Like her husband, Peggy Ryen also suffered numerous chop and stab wounds (90 R.T. 3871-95) and appeared to have been mobile for at least part of the attack, as demonstrated by the

statements of the surviving victim, Josh Ryen. (100 R.T. 6140-41, 6145-47; *see also* Ex. 5 [SCAPEGOAT, p. 24.) Blood and hair evidence suggested that, at one point during the attack, Peggy cradled Jessica, who was located in the hallway several feet away from her mother at the time of the discovery of the crimes. (Ex. 5 [SCAPEGOAT, p. 25].)

Like her parents, Jessica Ryen suffered a number of chop and stab wounds. (90 R.T. 3896-3923.) However, unlike the other victims, Jessica appeared to have escaped the Ryen house for part of the attack, picking up plant burrs and a nocturnal beetle outside before she was brought back into the house. (Ex. 5 [SCAPEGOAT, pp. 199-202]; Ex. 1 [*Cooper*, 565 F.3d at 593-94].) One of her stab wounds cut the right internal jugular vein; it would have caused massive bleeding, rapid unconsciousness and death within a few minutes. (90 R.T. 3903-04.) She also suffered a series of about 20 very shallow puncture wounds in the chest area caused by an instrument such as an ice pick. (90 R.T. 3910-11.) Dr. Root believed most of these wounds occurred after she was already dead. (90 R.T. 3911-12.)

Christopher Hughes was also subjected to a number of serious chop and stab wounds (26 in total). (90 R.T. 3924; 91 R.T. 3946; Ex.5 [SCAPEGOAT, p. 25].) One wound to his right wrist nearly severed the hand and could have been caused while the hand was upraised to protect the head. (90 R.T. 3925.) One of his stab wounds penetrated the lung, collapsing it, and struck both the main pulmonary artery and esophagus. (91 R.T. 3937.)

Notably, the victims were clutching hairs that were not from an African American person and may have been from the true killers. Jessica Ryen's autopsy report stated there were numerous hairs in her hands. A SBSD lab report further stated that hair was found in the hands of each victim. (Ex. 59 [Petition for Writ of Habeas Corpus dated Apr. 1, 2004, ¶178]; Ex. 60 [SBSD Report on Examination of Physical Evidence, June 14, 1983].) The hairs found in the

victims' hands were not a single, half-inch fragment, but instead were quite significant in amount and length, as if they had been ripped from someone's head by the victims. (Ex. 5 [SCAPEGOAT, p. 190].) There were particularly large amounts of hair found in Jessica Ryen's right hand, Doug Ryen's left hand and Chris Hughes' right hand. Further, in Jessica's hand at least, the hair was found tightly clutched in her fist, strongly suggesting that the hairs were a result of her encounter with her killer, and not merely "debris" from the house. (Ex. 59 [Petition for Writ of Habeas Corpus dated Apr. 1, 2004, ¶177]; Ex. 61 [photo of hair in Jessica's hand].)

Hospital personnel who treated Josh Ryen noted that he had a sharp cut on the top of his head, probably made with a sharp and heavy instrument; underneath the laceration he had a fractured skull that could have been caused by a blow from the hatchet. (102 R.T. 6632, 6639-40.) Josh also had a neck laceration. (100 R.T. 6230.)

All four deceased victims still had food in their stomachs, suggesting they had died within one to three hours of their last meal. (91 R.T. 3962.) The number of victims (five) and weapons that appeared to have been used (three or four) led Dr. Root to initially conclude that there was more than one killer. (91 R.T. 3974.) In 2000, Dr. John P. Ryan of the American Board of Pathology, studied the autopsy reports and reached the same conclusion, that "more than one person had to have inflicted these wounds. It would be virtually impossible for one person to have accomplished this entire trauma."[98] Dr. Root initially testified in pretrial proceedings that there had been at least three weapons utilized in the attacks (91 R.T. 4125-29); however, after coaching from the prosecution, he later altered that opinion at trial to say that besides the hatchet wounds, a single knife could have caused all the incision and stab wounds. (91 R.T. 3957.)

[98] Ex. 62 [Letter from Dr. John P. Ryan, M.D. dated Mar. 22, 2000].

Whoever attacked the Ryens and Christopher Hughes did not do it with robbery or car theft as a motive. Cash and credit cards were left untouched in plain sight at the crime scene.[99] Other items of value also untouched were the guns in the bedroom, a large coin collection, stereo equipment in the den estimated to be worth about a thousand dollars, as well as a television and video recorder in the living room. (89 R.T. 3441-42, 3457-59.)

[99] Exs. 18, 19 [Photos of cash and tobacco].

Ex. 20 [Link to above photo (Coin Collection)].

Outside the master bedroom, nothing in the house was visibly disturbed. (97 R.T. 5302.) Nor was vehicle theft an apparent motive for the killings. The Ryens routinely left their car keys in their vehicles, and the keys were in their truck in their driveway.[100]

B. The SBSD Knew About Potential White Suspects, Including Three Men in the Canyon Corral Bar.

1. Surviving Victim Josh Ryen Identified His Attackers as Three White or Hispanic Men Immediately After the Crimes.

Josh Ryen's initial statements to medical personnel on Sunday, June 5, 1983, were clear and consistent: the crimes were committed by three men who were white or Hispanic. Donald Gamundoy, a clinical social worker at the hospital emergency room, interviewed Josh shortly after he was brought in by medical helicopter on June 5. (99 R.T. 5918-20; 88 R.T. 3264-66) He quickly discovered Josh was unable to speak. He therefore wrote out all the letters of the alphabet and the numbers zero through nine and had Josh point at letters to spell words. (99 R.T. 5921-23.)

Using this system, Josh was able to accurately give his birth date and phone number. (99 R.T. 5925-27.) When Gamundoy asked how many people had attacked him, Josh pointed to the numbers "3" and "4."(99 R.T. 5928.) Through further questioning, Josh identified the attackers as white males. (99 R.T. 5928-29.) Josh also reported that he did not know the attackers, but had seen them before. (99 R.T. 5931-32.) At this point, SBSD Deputy Sharp entered the room and took over the questioning. (99 R.T. 5932-33, 5966-67, 5977-81.) Under Sharp's interrogation, Josh again identified the attacker as three white male adults. (99 R.T. 6010-12, 6016-17.) This information was the likely source of an entry in an SBSD log from June 5 that

[100] Ex. 5 [SCAPEGOAT, p. 26].

described the suspects as "three white males" driving the Ryens' station wagon.[101] (*See* Ex. 1 [*Cooper*, 565 F.3d at 585].)

Josh's interview was then interrupted for approximately an hour while he underwent surgery.[102] (99 R.T. 6018-29.) When the interview resumed, Josh was asked if there had been anybody around the house on Saturday who did not belong there, and he described in detail three Mexican males and an older model Chevy Impala. (99 R.T. 6022-29.) Josh said these men talked to his father, possibly about directions. (99 R.T. 6026, 6030.) When Deputy Sharp asked Josh if he thought the three Mexican men were the people in his house when things went crazy, Josh squeezed his hand, indicating a 'yes' response. (99 R.T. 6035-36.)

On Monday June 6, 1983, SBSD Detective O'Campo became the primary SBSD contact with Josh Ryen. (100 R.T. 6059-60.) O'Campo's assignment was to develop a rapport with Josh so that when Josh was ready for a formal interview he would feel comfortable with O'Campo. (100 R.T. 6186.) O'Campo did not recall ever being told about the information Deputy Sharp had acquired on June 5, although O'Campo had heard that Josh had described three white men as the suspects and then changed it to three Mexican men. (100 R.T. 6062, 6086.)

O'Campo visited Josh approximately 20 times from June 6 until June 14.[103] During these interviews, Josh continued to maintain that there were three attackers and that they may have been Hispanic. (100 R.T. 6205-08; 101 R.T. 6305-12.) Inexplicably and highly suspiciously,

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[101] Ex. 63 [SBSD Log dated June 5, 1983].

[102] During this time, SBSD Officer Sharp still did not bother to get his tape recorder. (99 R.T. 6020.)

[103] Significantly, O'Campo never taped any of these interviews and never mentioned these visits in any police reports. (100 R.T. 6077-82; see Ex. 1 [Cooper, 565 F.3d at 612].) Likewise, even though O'Campo later recalled differently (100 R.T. 6083-85), he conducted substantive questioning of Josh as early as Monday June 6, the day after the discovery of the murders.Josh's grandmother recalled being present sometime during the first few days in the hospital, before Josh was able to talk, when O'Campo asked about the Mexican suspects. Josh responded with signs and head shakes and at one point held up three fingers when O'Campo asked how many attackers there had been. (100 R.T. 6205-08.) Hospital nurse Linda Headley described seeing what was apparently these same events, and she believed they occurred on June 6; the only days she could have been with Josh were June 6 and 7. (101 R.T. 6305-12.)

O'Campo destroyed all notes of any interviews he conducted with Josh during this time. (*See* Ex. 1 [*Cooper*, 565 F.3d at 612].)

On June 14, SBSD decided that Josh was ready for a formal interview. (100 R.T. 6100.) Dr. Hoyle, a psychologist at the hospital, was present during the interview. (100 R.T. 6099-102.)[104] Josh gave O'Campo a detailed description of everything he had done on Saturday, June 4. (100 R.T. 6116-18.) O'Campo asked Josh who he thought had done it, and Josh told him about the three Mexican males who had come to his house as the family was leaving for the barbecue. (100 R.T. 6157-59.) Josh described their vehicle as a small light blue pickup with a white camper shell. (100 R.T. 6160.) Josh described each of the male Mexicans in detail. (100 R.T. 6163, 6176-77.) However, this information did not appear in O'Campo's report.[105] (*See* Ex. 1 [*Cooper*, 565 F.3d at 611-613].)

Further, Dr. Hoyle recalled Josh saying "*they* chased us around the house" and that Josh had "tried to fight *'em'* off." Josh referred to the assailants in the plural on multiple occasions. (101 R.T. 6358-61, 6364, 6368.) Dr. Hoyle also recalled that Josh said his dad did not like Mexicans; Josh felt the three Mexicans who had talked to Doug Ryen as the Ryen family was leaving for the barbecue had been angry because Doug Ryen had sent them away without work. (101 R.T. 6386.)[106]

[104] Although Josh was fully able to talk by this time and although the SBSD had recording equipment—which Detective O'Campo knew was useful when interviewing a child—O'Campo made no effort to record the interview via video or audio tape. (100 R.T. 6099-6103.) O'Campo and Sergeant Arthur subsequently decided it would be a good idea to redo the interview and videotape it, but this was never done. (100 R.T. 6178-79.)

[105] Further, O'Campo destroyed his notes after completion of his report of the June 14, 1983 interview. (*See* Ex. 1 [*Cooper*, 565 F.3d at 612].)

[106] Of paramount significance, and as discussed in greater detail below (at Section V.C1), Josh also saw a televised picture of Mr. Cooper on two separate occasions from his hospital bed. Each time he saw it, he told those in his room that Mr. Cooper was not one of the assailants

2. The Canyon Corral Bar and More Reports of Three White Men Seen the Night of the Murders.

In June 1983, a restaurant and bar called the Canyon Corral Bar was located at the intersection of Peyton and Carbon Canyon roads not far from the Ryens' home, which could be seen from the bar's parking lot. (97 R.T. 5261-62, 5276.) On Monday, June 6 Pam Smith, a regular bar patron, called the SBSD after hearing reports that the authorities were looking for three white men as the culprits in the Ryen/Hughes murders. (*See* Ex. 1 [Cooper, 565 F.3d at 585]; Ex. 64 [SBSD Recovered Evidence Report dated June 10, 1983]; June 28, 2004, HRT 187-88.) Smith reported that three strange men she had seen the night of the murders at the Canyon Corral Bar. (*Id*.)

Edward Lelko, the bartender at the Canyon Corral Bar, was familiar with most of the bar's regular clientele. Lelko recalled that on Saturday night, June 4, 1983, he had noticed three young men (not regular patrons) in the bar with short, military style haircuts. (102 R.T. 6525-28.) He first saw the three men when each one had a beer around 9 p.m. and then they left. (102 R.T. 6528-29.) All three were white and all were wearing t-shirts and Levis. (102 R.T. 6530.) They returned to the bar around 11:30 p.m., but one of them was so intoxicated that Lelko refused to serve them. (102 R.T. 6530-31, 6542-43.) One of them wore a yellow or beige t-shirt that was similar to the blood stained t-shirt recovered in the vicinity of the bar on June 7, 1983. (101 R.T. 6510-13; 102 R.T. 6531, 6533; 106 R.T. 7649.) Another wore a blue shirt. (Ex. 65 [Interview of Shirley Killian Mar. 31, 2004].

Bar manager Shirley Killian saw the intoxicated men, but did nothing until one attempted to leave the bar with an open bottle of beer after being cut off by the wait staff. (106 R.T. 7643-44.) Shortly thereafter, she looked outside to confirm that the men had left and saw one of them

getting into a larger light colored vehicle that could have been the Ryen station wagon. (106 R.T. 7650; June 29, 2004, HRT 108.)

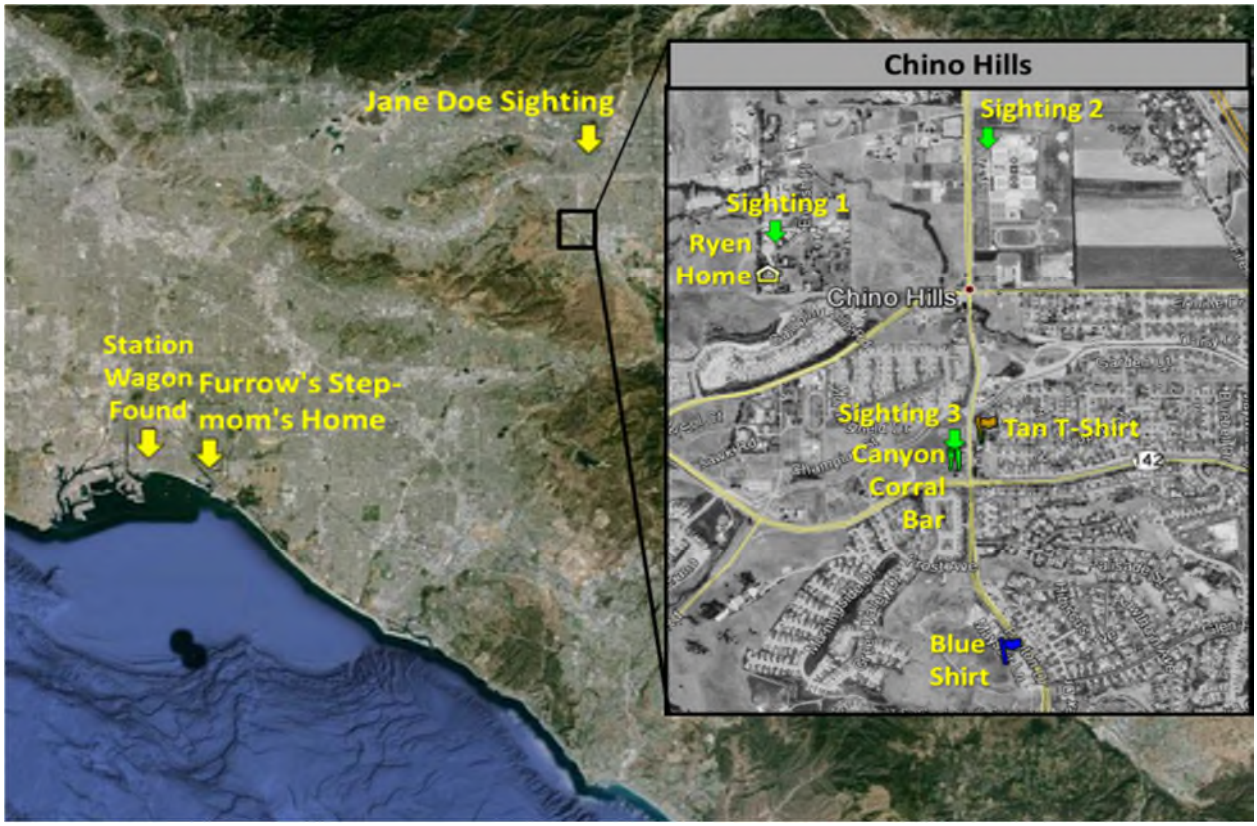
Had the SBSD contacted Lance Stark, a regular patron of the bar, it would have learned that two of the white men seen in the bar that night were being rude and abusive to three women. Stark testified for the first time in 2004, describing "a couple of young loud mouths" being rude to some women in the bar on the night of the murders. (July 23, 2004, HRT 20-21, 59.) He also commented that the third man in the group was very quiet and not noticeable. (*Id.* at 40.) He described the men as scruffy looking or dirty looking, and he observed that one of the men looked like he had grease or mud on him. (*Id.* at 22-24, 60, 62, 63.) He recalls one of the women telling that man that he had something on his clothes. (*Id.* at 108-09.)

One of the women mentioned by Stark was Christine Slonaker, who had worked as a phlebotomist—a person who draws blood. (June 28, 2004, HRT 7.) Slonaker alerted Mr. Cooper's attorneys in 2004 that she had been present at the Canyon Corral Bar the night of the murders. She then testified in federal district court that the more aggressive man she saw the night of the Ryen-Hughes murders had blood all over him, and when she told him he was covered in blood, he acted surprised and then his behavior changed. (June 28, 2004, HRT 25.)

Mary Mellon Wolfe also came forward in 2004. She testified at the same evidentiary hearing that she noticed that the man wearing a tan shirt had spots of blood on his shirt and a small bit of blood on his face. (June 28, 2004, HRT 123-24, 164-65.) She said at least one of the three men in the bar that night was wearing coveralls and that the louder man in the coveralls also had blood on him. (June 28, 2004, HRT 120-24.) Both Slonaker and Wolfe recalled that the men who accosted them were wearing tennis shoes. (June 28, 2004, HRT 22, 121, 122 [shown as 122 in source document].) According to Wolfe, the bartender refused to serve the

unruly men and the bouncer directed them to leave. (June 28, 2004, HRT 26-27.) As they exited, Wolfe noted a uniformed officer at the bar's door. (June 28, 2004, HRT 27.)

Significantly, on the night of the murders, there were several sightings of what could have been the Ryen station wagon near the Ryen home and the Canyon Corral Bar.



Ex.12 [Link to above photo (Sighting Map)].

Around 12:30 or 1:00 a.m. on Sunday morning, June 5, 1983, Douglas Leonard was driving in the area near the Canyon Corral Bar. (102 R.T. 6587-88.) While coming out of a driveway on a side street near the bar, he was forced to stop in order to avoid a station wagon going somewhat fast. (102 R.T. 6588-90, 6595.) The vehicle looked much like the Ryen's station wagon. (102 R.T. 6590-91, 6600-01.) The driver was wearing an unbuttoned shirt over a t-shirt that could have been tan. (102 R.T. 6593-94.)

Leonard testified at trial that he was unsure of the race of the driver, but when he talked to an officer soon after the incident, he described the driver as a young white male.[107] (102 R.T. 6592.) Leonard's wife, who was with him at the time, believed she saw the silhouettes of two people in the front seats of the station wagon and two in the rear. (102 R.T. 6603.)

Independent events corroborate the Leonards' testimony. Linda Edwards lived down the hill from the Ryens' house, and it was necessary to drive past her house to enter or leave the Ryen property. (103 R.T. 6800.) She recalled that the night of either Friday, June 3, or Saturday, June 4, immediately preceding the discovery of the murders, she saw the Ryen station wagon leaving at a somewhat faster than normal speed at about 12:30 a.m., which was an unusual hour for such activity. (103 R.T. 6801-03.) Further, the Ryen station wagon was spotted in Claremont, California on the afternoon of June 5, 1983 when it nearly collided with another car; notably, it was being driven erratically by a young white man with several other young white male occupants.[108]

3. A Hatchet and Two Bloody Shirts Discovered Near the Canyon Corral Bar.

On the afternoon of June 5, a neighbor of the Ryens discovered a hatchet (Ex. 66 [Photo of hatchet (P5250616.jpg)]) with what looked like dried blood on it in the weeds not far down the road from the Ryen home. (90 R.T. 3789-91.) He pointed out the hatchet to the SBSD. (90 R.T. 3793, 3795.) The SBSD examined a fence near the location of the hatchet and found an indentation in a pole that looked as if the pole had been struck by a sharp-edged instrument. (90 R.T. 3799.)

[107] Leonard acknowledged that his uncertainty at the time of trial as to whether the driver had been white or black could have been due to the fact that by then he had seen pictures of Mr. Cooper on television. (102 R.T. 6597-98.)
[108] Ex. 13 [J. Doe Decl.].

The next day, June 6, the SBSD received a call from a woman named Laurel Epler. Epler, who lived near the Canyon Corral Bar, reported that she had found a blue shirt beside Peyton Road that might contain blood. SBSD daily logs first made available to Mr. Cooper in 2004 reflect that a deputy was dispatched to recover the blue shirt that same day, and that the "[e]vidence [was] picked up." (Ex. 67 [SBSD Log June 6, 1983 (Blue Shirt Log)]; August, 26, 2004, HRT 133-34, 140.) Significantly, an SBSD's "Criminal Bulletin" dated June 7 identifies the suspects in the Ryen/Hughes murders as "three (3) . . . white or Mexican males," one wearing a "blue short-sleeve shirt." (Ex. 68 [SBSD Criminal Bulletin No. 16 dated June 7, 1983.] In addition, there is evidence that suggests that one of the three men seen in the Canyon Corral Bar the night of the murders was wearing a blue shirt. (Ex. 65 [Interview of Shirley Killian Mar. 31, 2004].)

Apparently because of the recovery of the blue shirt, the SBSD conducted a search on Tuesday June 7, 1983, of the area around the Canyon Corral Bar. The search resulted in the recovery of a bloodstained tan, medium-size, Fruit of the Loom t-shirt with a front pocket found beside Peyton Road, not far from the Ryen house and the Canyon Corral Bar and about a block from where the blue shirt had been found the day before. (Ex. 1 [*Cooper*, 565 F.3d at 584]; 31 R.T. 1790; Ex. 69 [ER 2780-81 (Testimony of Scott Field)]; Ex. 70 [SBSD Report re Recovery of tan shirt and towel dated Jun. 10, 1983]; Ex. 12 [Sighting Map].) A subsequent test found blood on the t-shirt consistent with Doug Ryen's blood type. (93 R.T. 4602-06; 94 R.T. 4663.) The test results on the tan t-shirt were consistent with it having been thrown on the road the night of the murders and remaining there, damp overnight, until it was found two days later. (93 R.T. 4605.)

4. Convicted Murderer Eugene Leland Furrow ("Lee Furrow") and the Bloody Coveralls.

On Thursday, June 9, a woman named Diana Roper contacted the SBSD regarding her then boyfriend, Lee Furrow. (Ex. 1 [*Cooper*, 565 F.3d at 587-88].) Roper suspected that Furrow was one of the three white men the SBSD had identified in its "Criminal Bulletin" within hours of the discovery of the crimes as suspects in the murders. (*Id*. at 586-87.) She based this belief on the fact that Furrow had returned to their home the night of the murders wearing bloody coveralls. (*Id*.) He arrived in a car matching the description of the Ryen vehicle. (*Id*. at 587; Ex. 71 [Declaration of Karee Kellison dated Nov. 15, 1998].) In addition, on the night of the murders, Furrow had been wearing a tan Fruit of the Loom t-shirt with a front pocket that matched the description of the bloody tan t-shirt recovered by the SBSD near the Canyon Corral Bar. (Ex. 1 [*Cooper*, 565 F.3d at 586].) Further, Furrow's hatchet was missing. (*Id*. at 587.) Roper had good reason to suspect Furrow. He was already a convicted killer and had only recently been recently from prison. He murdered Mary Sue Kitts in 1974 and dismembered her body and threw it into the Kern River. (*Id.* at 585.)

Roper's suspicions were later bolstered by the jail house confession of Kenneth Koon, which confirmed that Furrow had been involved in the murders and had left the bloody coveralls at Roper's house. (*Id*. at 588-89.) In late 1984, during Mr. Cooper's trial, Kenneth Koon—while incarcerated at California Medical Facility at Vacaville (CMF), a penal institution with the California Department of Corrections and Rehabilitation—confessed to a cellmate that he and two other individuals committed the Ryen/Hughes murders. (Ex. 73 [SBSD Detective Woods Report re Anthony Wisely Confession dated Dec. 21, 1984]; Ex. 1 [*Cooper*, 565 F.3d at 588-89].) Koon's cellmate, Anthony Wisely, reported this confession and confirmed it several times to the sheriff and investigators. (Ex. 1 [*Cooper*, 565 F.3d at 588-89].; Ex. 73 [SBSD Detective

Woods Report re Anthony Wisely Confession dated Dec. 21, 1984].) The confession was particularly significant because it contained details that were eerily similar to the facts reported by Diana Roper and other third party witnesses regarding the circumstances surrounding the murders. (*See id*.)

Mr. Cooper's guilt phase trial had begun on October 23, 1984. (84 R.T. 2277.) On December 17, 1984, SBSD Detective Woods was told that a prisoner named Anthony Wisely had reported he had a conversation with Kenneth Koon during which Koon said he went to the Ryen house with two others and killed the Ryen family. Ex. 73 [SBSD Detective Woods Report re Anthony Wisely Confession dated Dec. 21, 1984 at 923].

On December 19, Woods interviewed Wisely. Wisely reported that Koon, whom Wisely identified as affiliated with the Aryan Brotherhood, told Wisely that he and two other men committed the Ryen/Hughes murders to "collect a debt" for the Aryan Brotherhood. According to Koon, the two men entered the Ryen house with two axes or hatchets, and after they returned they told Koon the debt was paid. Koon told Wisely he thought they "hit the wrong house." (*Id*.)

Woods examined Koon's prison file, which showed that from October 11, 1982 to November 7, 1983, Koon was not in custody, and that Koon's emergency contacts included Diana Roper and Terry Kellison in Mentone. Woods then made the connection between Roper's contact with the Yucaipa substation regarding Furrow's hatchet and coveralls. (*Id*.)

Woods confirmed through Wisely that Koon identified Roper as his girlfriend. Ex. 73 [SBSD Detective Woods Report re Anthony Wisely Confession dated Dec. 21, 1984 at 926]. Woods then interviewed Koon, who acknowledged that Roper was his girlfriend. Koon said he remembered the incident in which Roper turned over bloody coveralls to the Yucaipa substation immediately after the Chino Hills murders. He believed they belonged to "Lee Farrel" [*sic*].

Koon said that law enforcement lost or destroyed the coveralls. Koon ended the interview once he was asked about the Aryan Brotherhood. (Ex. 72 [SBSD Detective Woods Report re Kenneth Koon Interview dated Dec. 21, 1984].

C. Kevin Cooper Escaped From Prison, Stayed Near the Ryen Home and Hitchhiked to Mexico.

Despite the evidence that three white men committed the Ryen/Hughes murders, random circumstances and SBSD's bias caused Mr. Cooper to become the sole focus of the SBSD's investigation.[109] On Thursday, June 2, 1983, two days before the Ryen/Hughes murders, Mr. Cooper escaped through a hole in a fence from the minimum security section of the California Department of Corrections California Institute for Men at Chino. (85 R.T. 2587-90, 2595-96, 2422-28, 2446-48.) He had served a little over one month of a 4 year sentence for a non-violent felony.[110] Mr. Cooper was wearing his prison issue denim pants, a white t-shirt, a brown jacket, used size 9 PF Flyers tennis shoes, and was wearing his hair in braids. (85 R.T. 2388, 2408; 97 R.T. 5340, 5357-58, 5362.) He had Kool cigarettes, as well as some prison-issued tobacco and rolling paper. (97 R.T. 5346, 5362-63.) From the prison, he made his way to an empty home owned by Larry Lease and Roger and Kermit Lang (hereinafter the "Lease" home), where he hid for two days. (86 R.T. 2721-22; 96 R.T. 5191; 97 R.T. 5327, 5378-84.) The Lease home was, coincidentally, the closest house to the Ryen home (126 yards away). (86 R.T. 2721-22; 96 R.T. 5191.) It was also only recently vacant.[111]

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[109] Ex. 3 [Parker Decl. ISO IACHR (Oct. 17, 2013)].

[110] Ex. 74 [FBI Report re Kevin Cooper].

[111] On May 27, 1983, Kathy Bilbia, who had lived in the Lease home in the bedroom nearest the garage (referred to as the "Bilbia bedroom"), moved out most of her belongings. (86 R.T. 2659-61, 2665, 2703, 2722.) She removed everything from the bedroom she had been using, except for a headboard that was built into the wall. (86 R.T. 2665-66.) On May 30, she returned, vacuumed the house, and cleaned the bathroom. Significantly, her clean-up included washing the shower and the shower doors with bleach. (86 R.T. 2666, 2706.) Bilbia left the front door unlocked, as she did not have a key for it. (86 R.T. 2686.) Roger Lang and his wife, Vicki, only occasionally stayed overnight in another portion of the home (referred to as the "Lang" bedroom). (86 R.T. 2660.)

Upon arrival, Mr. Cooper opened the cracked garage door where he found some old clothes, which he put on in place of his own wet and muddy clothes, and some beer. (97 R.T. 5384-87.) He eventually discovered that the front door was open and surmised through investigation that no one was home and that the house was vacant. He went inside, found more clothes and food, and listened to the news. (97 R.T. 5394-5403.) Later, he called his friend Yolanda Jackson. (97 R.T. 5404.) After he spoke to Yolanda, he fell asleep on the bed in the furnished Lang bedroom. (97 R.T. 5407-08.)

He woke up the next morning when it was light and called Diane Williams in Pennsylvania. (87 R.T. 2900-01, 88 R.T. 3174, 97 R.T. 5407-08.) He was somewhat alarmed that he had fallen asleep in a position where he would have been very vulnerable if anybody had come into the house, so he put some blankets and a pillow in the closet of the vacant Bilbia bedroom to more easily keep hidden when he would sleep again. (97 R.T. 5413-15.)

He remained in the house all day Friday, June 3, figuring that after 48 hours the officials from the prison would assume he had left the area and the search for him would be less intense. (97 R.T. 5419.) He kept busy by re-braiding his hair and monitoring the radio and TV for news of his escape. (97 R.T. 5422-23, 5425-26.) He slept in the Bilbia bedroom closet Friday night. (97 R.T. 5428.) Saturday morning he was preparing to take a shower in the Lang bathroom when he heard somebody pull up in a car; he stayed in the back part of the bathroom while Vicki Lang entered the house briefly to retrieve a sweater; she did not realize he was there. (97 R.T. 5429-31.)

Mr. Cooper no longer felt safe in the house, but decided not to leave in the daylight. (97 R.T. 5432.) Around 8:00 p.m. he called Diane Williams again; after their conversation ended around 8:30, he left on foot going downhill, retracing the route down the hill he had taken on

Thursday night. (97 R.T. 5435-36; 103 RT 6800; Ex. 75 [Report re Phone Records dated Jun. 9, 1983]) He never went close to the Ryen residence, which was at least 125 yards away from the Lease home and higher on the hill.[112] (97 R.T. 5437; 96 R.T. 5191; Ex. 77 [SBSD Report re Distance Between Ryen & Lease Homes dated May 24, 1984].)

Mr. Cooper made his way through the fields to a large intersection and then hitchhiked south to San Ysidro, near the Mexican border. (97 R.T. 5438-43, 98 R.T. 5450-55.) He had no money, so he snatched a purse containing over a hundred dollars, mostly in quarters, and then ran across the border. (98 R.T. 5455-59.) According to a hotel attendant, Mr. Cooper checked into a Tijuana hotel at 6:00 p.m. on June 5 and paid in quarters. (103 R.T. 6747-50, 6754.) He stayed in a hotel in Tijuana until Wednesday morning, June 8, using the name Angel Jackson. (98 R.T. 5459-63.) Mr. Cooper surveyed the news for word of his escape and on June 7, he learned of the Ryen/Hughes murders. (98 R.T. 5465-66.) Still monitoring the news, on June 8, Mr. Cooper read that he was suspected of committing the killings and decided to leave Tijuana. (98 R.T. 5466-67.)

Mr. Cooper then went to Ensenada where he found work on a private boat, which set sail on June 13. (95 R.T. 4838-41, 56.) From then until the end of July, the boat sailed north and made a number of stops for two to four days at a time at various ports along the coast of southern California. (95 R.T. 4842-45.) On July 30, 1983, while the boat was anchored near Santa Barbara, Mr. Cooper was apprehended. (95 R.T. 4845-46.)

[112] Ex. 57 [Shaffer Letter dated Dec. 17, 2015]. According to Peggy Ryen's sister, Lillian Shaffer, who had visited the Ryens' home and stayed in the Lease home, the Ryens' house was not visible from the Lease home, particularly in the summer with full foliage. This is evident also from a home movie Ms. Shaffer made during a visit with the Ryens in the early 1980's, which also shows how the Lease home and the Ryen house were physically separated and on different levels on a hill. *See* Ex. 76 [Lillian Shaffer Home Movie].

D. The Abhorrent Culture of Corruption Endemic to the San Bernardino Sheriff's Department Renders the Entire Investigation Suspect.

As an initial matter, it is important to understand the endemic culture of corruption contained within the SBSD, the law enforcement agency charged with investigating the Ryen/Hughes murders. For example, during the time of the investigation and prosecution of Mr. Cooper, the head of the SBSD crime lab, William Baird—who gave critical testimony at trial regarding the shoe prints at issue in this case—was stealing over 5 pounds of heroin for both his personal use and sale (*see* Ex. 1 [*Cooper*, 565 F.3d at 592] [noting Baird's dismissal for these activities shortly after Mr. Cooper's conviction]). San Bernardino County Sheriff Floyd Tidwell, was himself in the process of stealing guns from the evidence locker for his own personal collection and as gifts for friends, some of whom were law enforcement officers themselves (Ex. 5 [SCAPEGOAT, pp. 90-93].) In all, Sheriff Tidwell later admitted to stealing 523 guns (some of which would have been stolen during the time of the Ryen investigation and Cooper trial).

Such misdeeds by SBSD personnel were not isolated incidents. Rather, they were business as usual within the SBSD, the control of which had been passing from hand-picked Sheriff to hand-picked Sheriff since the 1950s, creating ample opportunity for corruption and mismanagement. (*See* Ex. 5 [SCAPEGOAT, p. 89].) Another example of SBSD corruption was a secret fund known as the "county bread," which consisted of money confiscated from drug busts that was distributed to members of law enforcement by Tidwell's predecessor in $100 to $200 increments as he saw fit. (*Id.*)

The investigation of the Ryen murders was headed by Sheriff Tidwell and performed by the members of the SBSD whose prior and subsequent actions and corrupt culture suggested they would bend and even break the rules as necessary to convict a black man, particularly one who had recently escaped from prison, for the murder of a white family. This is further borne out by

the SBSD's nonadherence to established procedure and policy. For example, SBSD Det. O'Campo (the officer assigned to be the point of contact with Josh Ryen and who was convinced of Mr. Cooper's guilt[113]) destroyed his notes of all interviews with Josh (Ex. 1 [*Cooper*, 565 F.3d at 612]) and failed to utilize recording equipment during these interviews in an effort to minimize evidence pointing away from Mr. Cooper. (*See* 100 R.T. 6099-6103.) O'Campo further failed to timely report Josh's statement that Mr. Cooper did not commit the crimes. (*See* 101 R.T. 6405-06.)

E. The Botched Investigation of the Ryen/Hughes Murders by the San Bernardino Sheriff's Department.

The SBSD's investigation into the Ryen/Hughes murders was also plagued by errors and negligence from the outset, which hampered their ability to find the real killers. It is clear that once Mr. Cooper became a suspect, SBSD made no attempt to find the white men whom Josh Ryen identified as his attackers and who were seen in the Canyon Corral bar the night of the murders. Nor did SBSD pursue Lee Furrow, who had left his bloody coveralls with Diana Roper that same night. Once SBSD locked in on Mr. Cooper, they abandoned and ignored all other leads, and manipulated the evidence to fit their case.

1. SBSD Mishandled the Crime Scene and Prematurely Demolished It, Preventing Investigation Into Who the Killers Were and How Many There Were.

A major reason why the SBSD focused all its efforts on finding evidence to convict Mr. Cooper, as opposed to the real killers, was its bungling of the crime scene investigation. The SBSD's processing of the Ryen home was disastrous. It effectively prevented both the SBSD and Mr. Cooper's defense from solving these crimes. Notably, Mr. Cooper's trial judge

[113] *See* 100 R.T. 6095-96.

remarked that he could have done a better job processing the crime scene than the SBSD. (63 R.T. 5622.)

In the first 24 hours, *the SBSD allowed over 70 people to walk through the crime scene.*[114] (90 R.T. 3715; Ex. 78 [SBSD Woods Report dated Sept. 22, 1983 (List of People at Scene)].)

When they first arrived, SBSD officers found Josh in a state of shock, but stable and breathing. (88 R.T. 3221.) After Josh was taken to the hospital, SBSD began processing the crime scene. (88 R.T. 3262-64, 68.) About 45 minutes later, the first homicide detective, arrived and went to the Ryen's master bedroom. (88 R.T. 3269.)[115] Later, Sergeant Arthur arrived and he and Sergeant Gilmore put crime scene tape around the residence.[116] (88 R.T. 3269, 3274.)

Sergeant Gilmore noticed the spa cover on the patio outside the Ryen master bedroom was lying flat. He did not recall ever seeing it in a position where one of the edges was lifted, as shown in the crime scene photographs. Significantly, he did not notice any footwear impressions on the spa cover. (88 R.T. 3298-99.)

Detective Duffy arrived shortly after 2 p.m. He took photos and checked for latent fingerprints inside and outside of the home. (88 R.T. 3357-59, 3363.) Duffy also photographed the inside of the Ryen refrigerator where there was a six-pack of beer with one can missing.

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[114] SBSD Sergeant Arthur acknowledged that a fundamental rule of crime scene investigation is to keep to a minimum the number of persons allowed in a scene while it is being processed; curious officers tromping through a crime scene is a recognized problem. (96 R.T. 5156.) Arthur admitted he had never previously been at a murder scene where there were as many officers inside the house as there were in this case. He also noted that no more than six officers were actually involved in processing the scene. (96 R.T. 5177.)

[115] Hall later wrote a 23 page report on his initial inspection of the crime scene. *See* Ex. 58 [SBSD Report By Detective Michael Hall dated June 10, 1983; 88 R.T. 3269]. The report is significant both because of what is reported and what is not reported. What it does not report finding, for instance, are the shoe print on the bloody sheet in the master bedroom or the shoe print on the spa cover. It also does not report finding bloodspot A-41.

[116] But Sergeant Gilmore, who was in charge, made no list of persons who went in or out of the house, and made no effort to document any changes to the physical scene that occurred as a result of the effort's to save Josh Ryen's life. (88 R.T. 3283.) After Sergeant Arthur took over from Gilmore, he likewise made no effort to keep track of the people who were at the scene; although after the preliminary hearing, he tried to construct a list by using photos and talking to people known to have been at the scene. (96 R.T. 5117.) By the time of the trial, however, Sergeant Arthur was still not certain how many people had been inside the Ryen house on Sunday, June 5. (96 R.T. 5128.)

Duffy noted a red substance consistent with blood on the inside of the refrigerator and on one of the beer cans. (88 R.T. 3374-75.) He believed he pointed out the stains in the refrigerator to one of the criminalists. (89 R.T. 3459.) However, no one collected any of this possible blood evidence for examination. (89 R.T. 3623.)

Criminalists David Stockwell and Pat Schechter arrived at the Ryen home about 2:45 p.m. on June 5. (89 R.T. 3501-02.) At that point, Schechter and Stockwell had only about 11 months of experience as criminalists. (89 R.T. 3572-74.) This crime scene was clearly more complicated than any Stockwell had worked before. (89 R.T. 3572-73.)

Stockwell and Schechter met with supervising SBSD criminalist William Baird upon their arrival. Baird pointed out a couple items of evidence that should be seized and suggested some procedures; however, despite Stockwell and Schechter's inexperience (104 R.T. 7068), Baird did not remain to supervise the evidence collection and failed to give the pair any detailed instructions. (89 R.T. 3502-03, 3574; 104 R.T. 7068.)

One item Stockwell seized was the sheet from the Ryen's bed. (89 R.T. 3504-06.) About a month later at the SBSD crime lab, Stockwell claimed to have discovered a rust-colored footwear impression on the sheet in two separate portions that came together when the sheet was folded in a certain manner. (89 R.T. 3506-07.) He was unable to recall the time he had collected the bed sheet, and his notes did not reflect the time of collection, although he acknowledged that the time of collection could be important in determining the likelihood that the foot impression he found came from one of the many people who had been in the bedroom that day, rather than from a suspect.[117] (90 R.T. 3680-81, 3687-88.)

[117] SBSD claimed that Detective Duffy found a bloody shoe impression on the master bedroom sheet. Although Duffy had not noticed any bloody shoe impressions anywhere in the master bedroom when he was first in that room, at trial he claimed that he found a shoe impression a couple hours after being there. He admitted that he did not

Among the blood stains allegedly seized by Stockwell was a single isolated drop of blood on the wall in the hallway immediately across from the hallway entrance to the master bedroom; this drop was given the laboratory identification number A-41. (89 R.T. 3511-12, 3639.)

Stockwell's processing of the scene was lackluster and insufficient to allow for crime scene reconstruction (89 R.T. 3625)[118] that could have provided critical information, such as the location of the various victims when attacked, how much the victims moved during the attack, and the handedness and number of the attackers. (*See, e.g.*, 90 R.T. 3705-6; 105 R.T. 7501-08.)

Significantly, notwithstanding the viciousness of the attacks and over 140 blows delivered to the victims, *not a single African American hair was discovered at the crime scene or anywhere in or near the Ryen home*.

Astoundingly, a mere 48 hours after the crimes were discovered, on Monday June 6, 1983, an SBSD officer removed everything from the Ryen master bedroom, including the carpeting and a large section of the west wall behind Douglas and Peggy Ryens' waterbed. (103 R.T. 6936-37, 6945-46, 6953.) Earlier that day, SBSD criminalists Gregonis and Ogino had begun to evaluate the patterns of blood on the floors and walls in order to analyze the velocity and angles at which blood hit the walls. (103 R.T. 6984-87; 104 R.T. 7052.) When the process of dismantling the bedroom began, Gregonis and Ogino requested more time to study the blood patterns. Their request was rejected by District Attorney Dennis Kottmeier. (103 R.T. 6988-89; 104 R.T. 7008-09.)

Gregonis later testified that a full crime reconstruction would have required a representative sample of each of the approximately 200 different blood stain patterns in the Ryen

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photograph it. (89 R.T. 3497.) This trial testimony is in contrast to Duffy's preliminary hearing testimony, where he stated that he had not seen any shoe impression in the master bedroom. (89 R.T. 3498.)

[118] For example, Stockwell failed to document the origin of samples (89 R.T. 3646-49; 90 R.T. 3653-64), mixed samples (90 R.T. 3659, 3668), and failed to account for scale or angles in photographs. (90 R.T. 3668.)

bedroom. (103 R.T. 7006-07.) He and Ogino requested the scene remain in place to allow for this additional work. They made their requests to: (1) Sergeant Swanlund, who was in charge of the dismantling process; (2) District Attorney Kottmeier, who had ordered the striking of the scene; and (3) the lead SBSD criminalist Baird. All their requests were denied.[119] (103 R.T. 6989-92.) During the crime scene dismantling, Gregonis noted that the carpet had not been handled in such a manner to avoid contamination of possible trace evidence. (103 R.T. 7001.)

At trial, the defense presented an expert witness, John Thornton, who testified regarding the inadequate forensic processing of the crime scene.[120] Thornton opined that the SBSD had allowed too many people access to the crime scene, including those who did not need access at all or did not need it until after the scene had been processed. (105 R.T. 7491.) Thornton also testified that the division of responsibility between the various teams from the SBSD was unsystematic and resulted in an emphasis on the mere collection of items without an adequate effort to relate the various aspects of evidence to one another. (105 R.T. 7491-92.)

Thornton's major criticisms included SBSD's failure to collect enough blood samples to do a full crime reconstruction and the failure to adequately document the exact locations of the samples that were collected. (105 R.T. 7501-06.) Thornton testified that over 100 blood samples should have been collected, and that if the job had been done correctly, it probably would have been possible to have a much clearer idea of the position of the victims when they were attacked, the number of assailants, the position of the assailants, the sequence of the

[119] District Attorney Kottmeier later claimed there would be some type of legal complication if the officers did not promptly return control of the house to its owners. (104 R.T. 7057-58.) He never explained what type of complication he feared, particularly since the owners of the house were deceased. Apparently, the District Attorney also feared that if the wall was not promptly removed, there was a danger that he would be criticized in a manner that had occurred in the Charles Manson case. (104 R.T. 7064-65.)

[120] Thornton was employed as a Professor of Forensic Science at the University of California at Berkeley. He was an occasional consultant in physical evidence matters. Prior to his teaching experience, he worked for nine years in the crime lab of the Contra Costa County Sheriff's Office. In Contra Costa, he had participated in over 300 homicide investigations, of which he was in charge of the scene at over 100. (105 R.T. 7469-71.)

wounds, and whether the assailants were left-handed or right-handed. (105 R.T. 7505-08.) Dr. Thornton also testified there were defects in supervision, photography,[121] documentation, collection and preservation of evidence, and in the failure to address the matter of crime scene reconstruction. (66 R.T. 5922.)

Tragically, not only had the SBSD failed to adequately process the crime scene, but it then stored what it had removed from the Ryen bedroom in an SBSD loft without air conditioning, causing the remaining "uncollected" serological evidence to be destroyed in short order. (36 R.T. 2387-90; 40 R.T. 2895-96; 66 R.T. 5927.) This made it impossible for Mr. Cooper's defense team, including Dr. Thornton, to attempt a reconstruction of the scene. (66 R.T. 5934-38; 67 R.T. 6168.)

2. When the SBSD Searched the Lease Home, It Learned That Mr. Cooper Had Stayed There.

On Sunday, June 5, the SBSD attempted to access the vacant Lease house as part of his canvass of the area, but was unable to do so because all the doors and windows were locked. (86 R.T. 2728-30, 2797-99; Ex. 79 [SBSD Report by Deputy Gaul dated Jun. 7, 1983].) A SBSD Deputy surveyed the windows and did not see anything of note in the house. *Id*. The following day, Monday June 6, Lease, homeowner Larry Lease, his employee, Jack Fletcher, and two SBSD Detectives Moran and Hall returned to the Lease house. (86 R.T. 2730-31, 2801-02.) Moran and Hall searched the interior of the Lease residence, finding no suspects and again noting no evidence. (86 R.T. 2804; Ex. 80 [SBSD Report Re Moran 6.6 Search dated Jun. 8, 1983].)

[121] Dr. Thornton testified that specific to photography, there was no logical sequence of photos (66 R.T. 5927); there were no close ups of bloodstains showing the distribution of blood and splatter patterns (66 R.T. 5927); close up photos were not taken with a scale in place to allow interpretation and reconstruction (66 R.T. 5927); critical areas, such as the ceiling over the bed were not photographed (66 R.T. 5927-28); and photos were not taken perpendicularly to the subject to allow splatter analysis (66 R.T. 5928).

While authorities claim not to have seen Mr. Cooper's sleeping nest or the tobacco evidence that was present throughout the house during their June 6, 1983 suspect sweep (*see* 86 R.T. 2807-09, 2824), such claims are simply not reasonable or credible. First, we know that Det. Moran entered the Bilbia bedroom on June 6, the only day he was in the Lease house. (87 R.T. 2927-28, 2938, 2965; 89 R.T. 3471-72; 97 R.T. 5428.) To try to explain how he could have missed the obvious evidence "found" in the Bilbia bedroom the next day, Det. Moran later claimed he was never in that bedroom. (86 R.T. 2807-08.) That improbable claim was conclusively disproven by the presence of his fingerprints in the very closet containing Mr. Cooper's sleeping nest and roll-rite tobacco. (87 R.T. 2927-28, 2938, 2965; 89 R.T. 3471-72; 97 R.T. 5428.) Second, authorities were aware that Mr. Cooper was at large and were looking for him as of June 2, 1983 when he escaped from CIM. The SBSD partially justified Mr. Cooper's arrest warrant by citing evidence of inmate smoking habits being present in the Lease home. Ex. 81 [Declaration in support of Arrest Warrant dated June 9, 1983]; Ex. 82 [SBSD Report re Smoking Habits of inmates Jun. 30, 1983]. Further, Mr. Cooper re-braided his lengthy afro while staying at the Lease house (97 R.T. 5422-26) and made no effort to conceal any lost hair, nor did he otherwise clean up after himself.[122] Thus, contrary to the SBSD's later claims, there is every reason to believe that as of June 6, 1983, the SBSD had identified Mr. Cooper as the occupant of the Lease house and begun to focus solely on him as the perpetrator of the Ryen/Hughes murders.

On Tuesday June 7, while in the Lease home, Richard Sibbitt noted that a hatchet was missing, but the sheath was on the floor of the Bilbia bedroom. (86 R.T. 2856-59.) Perry Burcham, who was with him, noticed some bedding inside the closet in the Bilbia bedroom. (86

[122] For example, Mr. Cooper left the bedding in the closet where he slept and did not make any effort to clean up the dishes in kitchen, etc. where the record is clear that Ms. Bilbia cleaned the home earlier that week upon vacating the property. (86 R.T. 2668; 99 R.T. 5835.)

R.T. 2861.) The men left everything undisturbed and contacted SBSD Deputy Phillips who accompanied them back into the house. Phillips saw the sheath and the bedding in plain view in the closet of the Bilbia bedroom. (86 R.T. 2861-63; 87 R.T. 2903-07.) He then notified Sergeant Swanlund (87 R.T. 2903-07; 86 R.T. 2861-63), who examined the closet and found several blankets and other items, including a bloodstained green button.[123] (86 R.T. 2841-44; 87 RT 2908; Ex. 1 [*Cooper*, 565 F.3d 581 at 593, 619].) Swanlund had no difficulty seeing the sheath or the items in the closet. (86 R.T. 2846.)

Just after midnight on Wednesday, June 8, SBSD lifted fingerprints from inside the closet door in the Bilbia bedroom where the bedding and hatchet sheath were found. The lifted fingerprints included three in a row that matched three fingers from the hand of Detective Moran, showing that he had, contrary to his later testimony, entered the Bilbia bedroom on June 6 and even inspected the closet, but had failed to note the evidence—including an empty hatchet sheath—allegedly appearing in plain view. (87 R.T. 2927-28, 2938, 2965; 89 R.T. 3471-72.)

Although Mr. Cooper smoked numerous rolled and manufactured cigarettes during his time at the Lease house (*see, e.g.*, 97 R.T. 5428, 98 R.T. 5503-07, 5657-58), the SBSD officially collected only one cigarette butt found in the headboard of the Bilbia bedroom, which Mr. Cooper did not smoke. (*See* Ex. 60 [Report on Examination of Physical Evidence dated Jun. 14, 1983], pp. 6-8; *see also*, Ex. 1 [*Cooper*, 565 F.3d at 618] [noting "[m]ost of the cigarette butts that Cooper left behind were never processed into evidence"]; 99 R.T. 5826.)

Criminalists from the SBSD subsequently sprayed luminol (a substance used to detect the presence of blood) in various areas of the Lease home. (87 R.T. 3079-81.) There was a positive reaction on the walls of the shower; it was an even glow confined to an area between two and

[123] Neither the sheath nor any of the items in the closet had been in those locations when Kathy Bilbia had last left the Lease home. (86 R.T. 2677-80.)

five feet above the bottom of the shower rather than around the drain. (87 R.T. 3080.) The criminalists performed some experiments that indicated that luminol would also react quite strongly to bleach; even after spraying water on the bleached areas for 20-to-30 minutes, there was a reaction, although somewhat spotty, and less intense than before water was sprayed. (88 R.T. 3169-70; 92 R.T. 4277-78, 4281-84.) It is undisputed that Kathy Bilbia used bleach in cleaning the shower several days before the officers performed the first luminol tests, mainly in the area between knee height and shoulder height. (86 R.T. 2707.) There were also luminol reactions on the floor of the hallway that could have been from a footprint. (87 R.T. 3081.) There was no indication that bloody clothing had been placed in the vicinity of the shower or anywhere else in the Lease home for that matter. Significantly, the SBSD failed to conduct a secondary test that would have established whether the luminol reactions they obtained were the result of bleach or blood. (Ex. 1 [*Cooper*, 565 F.3d at 594; *id.* at 631] [indicating the "likely basis for the positive test is the bleach used by Katherine Bilbia in cleaning the shower."].)

3. The SBSD Destroyed and/or Lost Exculpatory Evidence Critical to Mr. Cooper's Case.

The discovery of the gruesome murders of a prosperous, white family and their young houseguest sent waves of shock and fear through the affluent, rural horse country in San Bernardino County. Newly-appointed Sheriff Floyd Tidwell faced an election in the coming months; he needed to solve the Ryen/Hughes murders fast. Thus, when the SBSD learned that Mr. Cooper, a black escaped convict, had been hiding in a vacant house close to the crime scene, Sheriff Tidwell immediately announced to the world that Mr. Cooper was the prime and indeed only suspect. All law enforcement efforts were immediately directed toward one goal: collecting evidence to convict Mr. Cooper.

Based on SBSD reports, it is clear that, once the agency learned that Mr. Cooper had stayed at the Lease house, SBSD failed to follow up on other significant leads. Indeed, SBSD ignored, lost, or destroyed much of the evidence that could have led to the real killers. And, as will be discussed in the next section, the SBSD also resorted to manufacturing or tampering with other evidence in an attempt to bolster their weak case against Mr. Cooper.

Former FBI agent Thomas Parker, who has extensively studied the Ryen/Hughes crime scene, the SBSD's investigation and in particular the methods that the SBSD used in its pursuit of convicting Mr. Cooper, recently opined that the SBSD clearly had "tunnel vision" in its investigation.[124] What Parker saw, and what is startling, is that once the SBSD discovered that a black escaped prisoner had been in the vicinity of the Ryen home, its investigation became one designed to convict that man rather than to pursue all leads in the case to find the truth, no matter where it led.

a. <u>Law Enforcement Discarded Lee Furrow's Bloody Coveralls</u>.

As discussed above, on June 9, 1983, days after SBSD locked in on Mr. Cooper as a suspect, Diana Roper alerted SBSD Deputy Eckley to her suspicions about Lee Furrow's involvement in the Ryen/Hughes murders and gave Eckley Furrow's blood spattered coveralls. (102 R.T. 6546-48.) Roper relayed that Lee Furrow returned to their home late on June 5, 1983 wearing those coveralls. (Ex. 1 [*Cooper*, 565 F.3d 586].) Furrow quickly changed and left again. (*Id*.) Roper found Furrow's bloody coveralls in the closet a few days later and, after speaking with her father, called the SBSD. (*Id*. at 587.) Roper believed that Furrow was involved in the Ryen/Hughes murders and said she had more information to share, but wanted to relay that information directly to homicide detectives. (102 R.T. 6552.) After personally interviewing Roper, Eckley recovered and logged the overalls as evidence in the Ryen case.

[124] Ex. 3 [Parker Decl. (Oct.17, 2013)].

(102 R.T. 6546.) Fixated on Mr. Cooper, however, SBSD failed to follow up on Roper's information.

Remarkably, and inexplicably, *the SBSD never tested the coveralls to see whether they contained blood or other evidence connected to the Ryen/Hughes murders*. Eckley did not comply with SBSD procedures requiring that all bloodstained evidence be immediately submitted to the SBSD crime lab for testing. (Ex. 1 [*Cooper*, 565 F.3d at 625]; 102 R.T. 6550-6554.) Instead, he contacted the SBSD Career Criminal Division and sent a report of Roper's interview and collecting the coveralls to SBSD Sergeant Bill Arthur in the homicide division. (102 R.T. 6549-50.) Sergeant Arthur recalled receiving Eckley's June 9, 1983 report about the coveralls, but did nothing about them for almost a year, until May 1984, when Roper called the SBSD and Mr. Cooper's defense counsel inquiring about the coveralls' disposition.[125] (97 R.T. 5246-51.) Only then did the SBSD interview Furrow, and they did not make him submit to a polygraph. At trial, Sergeant Arthur testified that his failure to respond to Eckley's report and to send the coveralls to the crime lab for analysis was a matter of neglect. (97 R.T. 5261.)

Meanwhile, Eckley contacted homicide again a few times regarding the coveralls, but after receiving no response for six months, he threw them away in a dumpster. (102 R.T. 6550-51.) Coincidentally or not, Eckley destroyed the coveralls the first day of Mr. Cooper's preliminary hearing. (Ex. 1 [*Cooper*, 565 F.3d at 588].)

At trial in 1984, Eckley testified, falsely as we now know, that he acted alone in the decision to discard the coveralls. (102 R.T. 6550-6554.) As will be discussed in greater detail below, Mr. Cooper learned years later that Eckley's action was not done on his own, but rather

[125] Roper was haunted by her firmly held belief that Furrow committed the Ryen/Hughes murders and disgusted with the corruption within the SBSD and repeatedly expressed this to her friends until her death in 2003. *See, e.g.*, Ex. 83 [Declaration of Susan Dunn dated Sept. 10, 2015].

was approved by his superior officer, Deputy Ken Schreckengost. (Ex. 1 [*Cooper*, 565 F.3d at 625].)

That law enforcement literally threw away what was likely the "smoking gun" proving Mr. Cooper's innocence, standing along, should compel a review of Mr. Cooper's case to ensure an innocent man is not executed.

b. <u>The SBSD Also Recovered a Bloody Blue Shirt Found Near the Canyon Corral Bar, But That Shirt Is Now Missing</u>.

As discussed above, on June 6, 1983, the SBSD recovered a blue shirt with blood on it that Laurel Epler found near the Canyon Corral Bar. However, the blue shirt's existence was never disclosed to the defense either before or after trial. It was only because the SBSD produced its daily log during an evidentiary hearing in 2004 (21 years after the crime) that Mr. Cooper learned for the first time about the second bloody shirt found near the Canyon Corral. (Ex. 1 [*Cooper*, 565 F.3d at 627].) Even after being confronted with its own log reporting the existence of the blue shirt, and despite Ms. Epler's testimony in 2004 confirming its existence, SBSD and the prosecution denied the blue shirt's existence.[126] (Ex. 14 [*Cooper v. Brown*, 2005 U.S. Dist. LEXIS 46232 *270 (S.D. Cal. 2005)].) It is not clear whether the SBSD ever performed any tests on the blue shirt, which its procedures required, and Mr. Cooper of course was never permitted to do so.

[126] In fact, the State has gone so far as to suggest that the blue shirt and tan t-shirt are one in the same despite clear testimony and documentation that these shirts were recovered on different days in different locations and under different circumstances. *See* August 26, 2004, HRT 140-48, 154-55, 161, 165, 187, 201-03; Ex. 12 [Sighting Map]; Ex. 67 [SBSD Log dated Jun. 6, 1983 (Log re Blue Shirt)]; Ex. 70 [SBSD Report re Recovery Tan Shirt dated Jun. 10, 1983]. The existence of two bloody shirts destroys the prosecution's ["lone"] perpetrator theory, and the existence of a blue shirt is consistent with eye-witness accounts regarding the three white men. *See* Ex. 68 [SBSD Criminal Bulletin dated Jun. 7, 1983]; Ex. 65 [Interview of Shirley Killian dated Mar. 31, 2004].

c. The SBSD Did Not Investigate the Sighting of Three White Men at the Canyon Corral Bar.

The SBSD also did not adequately pursue the information about the three strangely-acting white men at the Canyon Corral Bar the night of the murders. SBSD Sergeant Arthur (the head of the investigation) ignored information from Detective Tim Wilson that three white men with blood on their clothing had been spotted at the Canyon Corral Bar.[127] Although the SBSD later interviewed the bar's manager, the bartender, two waitresses, the bouncer and two or three regular bar patrons, none of the SBSD deputies asked any of these people to help create a composite sketch of the three white men. Nor did the SBSD show any of the subjects interviewed any photo arrays for purposes of identification. And the SBSD made no attempt to find out who else was in the bar the night of the murders or further investigate the three white men. Thus, the SBSD never interviewed Lance Stark, Christine Slonaker or Mary Wolfe, and the jury never heard the facts that came to light years later (as described above at Section IV.B.2) from Stark, Slonaker and Wolfe, who noticed blood on the men's clothing.

F. The SBSD Manufactured and Tampered With Evidence.

Having predetermined Mr. Cooper's guilt as of June 6, 1983, the SBSD worked carefully and methodically to buttress its circumstantial case against Mr. Cooper.

1. The SBSD Falsified Its Test Results for Blood Drop A-41.

During the investigation, SBSD Deputy Stockwell claimed to have discovered a single drop of blood in the hallway outside the Ryen master bedroom. (89 R.T. 3511-12, 3639.) However, Stockwell inexplicably failed to recover the carpet directly below it, which might have had blood from the same source. (89 R.T. 3511-12). Once collected, the hallway paint chip containing this drop of blood was identified as "A-41." SBSD criminalist Daniel J. Gregonis

[127] *See* Ex. 1 [*Cooper*, 565 F.3d at 590-91].

conducted testing on A-41, and purportedly determined that this drop of blood had characteristics consistent with Mr. Cooper's genetic profile and inconsistent with any of the victims. (93 R.T. 4424.) Thus, A-41 became a central part of the prosecution's case against Mr. Cooper.

As Judge Fletcher of the Ninth Circuit recognized, Gregonis' testing on this drop of blood was performed under suspicious circumstances. First, Gregonis waited to conduct testing until he had at least a partial blood type profile on Mr. Cooper from the testing of semen found at the Lease house, as well as information received from Pennsylvania authorities. (93 R.T. 4488, 4550.) Second, Gregonis delayed conducting some of the most sensitive tests of A-41 until after Mr. Cooper had been arrested on July 31, 1983 and SBSD had taken a vial of his blood (vial VV-2). (56 R.T. 4852; 93 R.T. 4428-29.) Third, Gregonis did not conduct his testing of A-41 blind (as is standard forensic practice); rather, he had A-41 and VV-2 samples side-by-side on the same slide when he performed his tests on A-41. (93 R.T. 4488, 4526, 4550, 4557.) Fourth, although Gregonis originally found that both Mr. Cooper's blood sample and the blood in A-41 had an erythrocyte acid phosphatase ("EAP") enzyme of "B", Gregonis subsequently learned that Mr. Cooper's EAP was not "B" but in fact "rB." In order to tie his test results to Mr. Cooper, Gregonis altered his testing records to show that A-41 had an EAP result of rB so that A-41 would match Mr. Cooper's EAP type. (93 R.T. 4429-31, 4444.) Gregonis initially lied about these alternations under oath. (93 R.T. 4493-95.) Finally, Gregonis wasted portions of the already limited A-41 sample on duplicative testing (56 R.T. 4851-52), failed to take steps to accurately document the tests that he did perform so that they could be verified (56 R.T. 4819, 4841, 4847-48; 57 R.T. 4913-15), and ran tests that had a small likelihood of excluding Cooper as a suspect (56 R.T. 4856-58, 4863-65).

2. The SBSD Planted Cigarettes in the Ryen Station Wagon.

On Saturday, June 11, 1983, seven days after the discovery of the crimes, the Ryen station wagon was found in a church parking lot in Long Beach, 45 miles west of the Ryen house.[128] (103 R.T. 6786-98.)

The SBSD's initial search of the Ryen station wagon yielded an extensive list of items contained within the car: a paper flyer, a match box, ashes and cigarette butts in the ashtray, electric tape, a blue cord, a magazine, a Burger King cup, a Burger King French fry container, a Burger King wrapper, a Footlocker bag containing Nike shoes, and an empty 12 ounce can of Hansen's grapefruit soda. (Ex. 84 [SBSD Report by Detective Michael Hall, dated June 16, 1983].) Significantly, it also identified a substance appearing to be blood in both the front driver and passenger seats *and* the rear seat of the station wagon, consistent with Mr. Cooper's theory of multiple killers and multiple occupants. (*Id.*; Ex. 85 [Photos of Ryen Car]; Ex. 86 [SBSD Supplemental Report dated Jun. 15, 1983 (Report showing luminol testing of car)].)

However, this SBSD detailed inventory conflicts with what was found in a search later conducted later by SBSD Officers Craig Ogino and David Stockwell back in San Bernardino County (Ex. 84 [SBSD Report by Hall dated Jun. 16, 1983]; June 24, 2003, ERT 188 [Craig Ogino], ERT 227 [David Stockwell]). Ogino and Stockwell were the same SBSD criminalists who processed the Lease house, and as noted above, failed to submit into evidence numerous pieces of tobacco evidence that they found in the Lease house. (*See* Ex. 1 [*Cooper,* 565 F.3d at 618] [noting "Most of the cigarette butts that Cooper left behind were never processed into evidence"]; 97 R.T. 5428, 98 R.T. 5503-07, 5657-58; Ex. 60 [SBSD Report on Examination of Physical Evidence dated Jun. 14, 1983].) Stockwell and Ogino's subsequent list of items in the

[128] Mr. Cooper had arrived at a hotel in Tijuana, Mexico, 125 miles *southeast* of the Ryen house, at 6 p.m. seven days earlier.

station wagon they claimed to have been found in their search was undated and unsigned. But it included two cigarette butts labeled V-12 and V-17 that had not been inventoried during the first search. Stockwell and Ogino "discovered" V-12 in a crevice in the front passenger seat, whereas they found V-17 between the front passenger seat and the door. (92 R.T. 4234-35, 4287-89; 95 R.T. 4887-88.) Significantly, Stockwell and Ogino's list failed to note the cigarette evidence from the ashtray identified by Det. Hall during his original search. The cigarette evidence noted by Det. Hall was, as far as Mr. Cooper knows, not taken into evidence.

The defense did not do any testing of V-12 because it was told that the initial forensic testing in 1984 "consumed" V-12. (57 R.T. 4947-48.) However, inexplicably, V-12 somehow reappeared and was introduced during trial as trial exhibit 584. (93 R.T. 4471.) At that time, it was 4 mm long. (Ex. 1 [*Cooper*, 565 F.3d at 618].) Later in 2002, when the State sent V-12 off to a lab for DNA testing, it was significantly larger than what was tested in 1984; it had grown to 7 mm by 7 mm square and had refolded itself. (*Id.*; *see also* Ex. 87 [Handwritten notes re Cigarette Paper (ER 1670-72)].) Notably, much like the cigarettes that had disappeared from the Lease house and reappeared in the Ryen car, a similar cigarette butt (labeled QQ) which had been found in Mr. Cooper's own car after his arrest in 1983, inexplicably disappeared from evidence prior to the DNA testing implicating Mr. Cooper. (June 23, 2003, ERT 122-23[129]; Ex. 88 [Photo of QQ in car]; Ex. 89 [Photo of QQ-2.jpg].) Thus, it's clear to Mr. Cooper that the SBSD planted the cigarette butts in the Ryen car and used substitutes during later testing.

3. Evidence Suggests the SBSD Planted the Pro-Ked Shoe Prints at the Crime Scene.

SBSD investigators claim to have found certain shoe prints at the crime scene. These shoe prints were a major piece of evidence the prosecution relied upon at trial to convict

[129] "ERT" refers to the proceedings before Judge Kennedy in 2003. Rather than produce voluminous exhibits from these hearings, reporter's transcripts of these proceedings are provided in searchable pdf by date.

Mr. Cooper. SBSD criminalist William Baird, manager of the SBSD's crime lab, testified that he analyzed three shoe print impressions purportedly implicating Mr. Cooper in the murders:[130] (1) a faint shoe impression that had been found on a spa cover outside of the Ryen master bedroom (2) a bloody shoe impression on a fold of the sheet from the Ryen master bedroom, and (3) a tennis shoe impression from the Lease house. (94 R.T. 4755-56, 4760-63, 4767.) Baird claimed that the prints were likely made by a PRO-Ked tennis shoe. (94 R.T. 4767-82.).) As discussed in greater detail below at Section IV.A, the evidence allegedly tying these prints to Mr. Cooper has since been discredited. However, there is reason to believe that the prints themselves may have been planted.

The first shoe print was purportedly "discovered" on the spa cover outside the Ryen master bedroom on June 5, 1983. (94 R.T. 4763.) Three days later, SBSD Dep. Martha Smith was charged with sketching all shoe prints on the spa cover. (Ex. 1 [*Cooper*, 565 F.3d at 617].) She testified that she sketched all the shoe prints she saw, but that none of her sketches matched the shoe print of a PRO-Ked Dude shoe. (*Id*.) However, later that day, she was directed back to the spa cover where she purported to see a PRO-Ked Dude shoe print that she had not previously seen. (*Id*.; 103 R.T. 6869, 6871-73, 6878-79.) SBSD destroyed this shoe print during its processing, forever precluding further analysis by the defense of the print. (88 R.T. 3297-98, 89 R.T. 3447-48; *Cooper*, 565 F.3d at 617.)

As earlier discussed, SBSD Dep. Stockwell "discovered" the second shoeprint at the SBSD Crime Lab on the bed sheet collected from the Ryen master bedroom. (Ex. 1 [*Cooper*, 565 F.3d at 616-17].) The record shows that Stockwell did not discover it until sometime in early July, about a month after the crimes were discovered. Dep. Stockwell purportedly

[130] Additional shoe prints at the scene were discovered, but not investigated. For example, Dep. Gilmore noticed a bloody footprint on the concrete outside of the sliding glass door on the day of the murders, but ignored it because of a belief that it had been caused by fire personnel attending to Josh Ryen. (88 R.T. 3266-68.)

discovered it when he refolded the sheet in a particular manner. (89 R.T. 3506-07.) At trial, only one person, SBSD Deputy Duffy, testified that he had seen the bloody shoe print on that sheet while it was still in the master bedroom. (89 R.T. 3497.) However, as mentioned above at Section IV.E.1, Duffy's assertion contradicted his pretrial testimony that he had *not* seen the bloody shoe print on the sheet in the master bedroom. (89 R.T. 3498.)

The shoe print on the sheet was a focal point of the prosecution's case. But evidence has come to light that seriously undermines the credibility of its *bona fides*. Not only is the timing of the discovery of the print suspicious, having occurred a month after discovery of the murders themselves, but Baird himself admitted he had practiced with blood in the lab in order to "recreate" the shoe print "discovered" on the sheet. (94 R.T. 4777:1-20) Likewise, according to Patrick Whelchel, a reserve SBSD deputy recently interviewed by Thomas R. Parker, the SBSD obtained the shoes needed to make the print from the prison prior to its discovery. (*See* Ex. 90 [Parker Decl. re Whelchel (Oct. 8, 2015), ¶ 7]; *see also* 85 RT 2515:6-18, 2527:18:-2528:7 [testimony of jail snitch James Taylor re providing Pro Keds to SBSD].)[131]

Finally, there was ample opportunity to plant the third shoe print found in the Lease house. The day before the Lease house was searched, the front door was left unlocked. (Ex. 1 [*Cooper*, 565 F.3d at 617]; 105 R.T. 7312.) Further, at least 12 people walked through the Lease house before the shoe print was discovered. (Ex. 1 [*Cooper*, 565 F.3d at 617]; 103 R.T. 6956-58.)

4. <u>The Tan T-Shirt the SBSD Recovered Near the Canyon Corral Bar Matches the Description of the T-Shirt Worn by Lee Furrow</u>.

As mentioned above, the SBSD recovered a bloodstained tan, medium-size, Fruit of the Loom t-shirt with a front pocket beside Peyton Road, not far from the Ryen house and the

[131] Whelchel also told Parker that his superior at SBSD asked him to obtain a prison jacket from CIM. Ex. 90, [Parker Decl. re Whelchel (Oct. 8, 2015), ¶ 7].

Canyon Corral Bar. (Ex. 1 [*Cooper*, 565 F.3d at 628]; 31 R.T. 1790-91; Ex. 91 [Declaration of Diana Roper, dated November 21, 1998, ER 1575].)

Ex. 92 [Link to above photo (Tan Shirt)].

Prior to trial in 1984, law enforcement tested stains on two separate portions of the tan t-shirt for blood, but released only one test result. That test found blood consistent with Doug Ryen's blood type, but inconsistent with Mr. Cooper's serological profile.[132] (93 R.T. 4602-06; 94 R.T. 4663.) Having failed to tie Mr. Cooper to the tan t-shirt, SBSD halted testing of it and did not use it at trial. Indeed, the evidence at trial strongly confirmed that the t-shirt was not Cooper's. The tan t-shirt was not prison issued, and testimony established that the owners of the Lease house did not recognize the tan t-shirt (even though they did identify other clothes found in Mr. Cooper's possession after his arrest that belonged to the Lease house residents or guests); nor did any witness identify it was coming from the Ryen's home. (93 R.T. 4602-06, 4608; 101 R.T. 6508-11.) However, as discussed above at Section IV.F.4, the tan t-shirt matched the description of the t-shirt that Diana Roper reported Lee Furrow wore on the night of the murders.

[132] The fact that law enforcement tested two areas of the t-shirt was not revealed to trial counsel, and the results of a second, undisclosed test have never been released.

5. The SBSD Likely Planted the Hatchet Sheath and Green Button in the Lease House.

As described above, despite not "remembering doing so," Detective Moran entered the Bilbia bedroom in the Lease house on June 6, 1983 (leaving his fingerprints inside the closet), while conducting a sweep for suspects. (86 R.T. 2730-31, 2801-02; 87 R.T. 2927-28, 2938, 2965; 89 R.T. 3471-72.) He failed to note any evidence in the bedroom, including the hatchet sheath and green button discussed immediately below.[133] (86 R.T. 2809, 2824; Ex. 1 [*Cooper,* 565 F.3d at 619].)

However, on Tuesday June 7, 1983, in response to a call from Lease employees, SBSD deputies returned and "discovered" a hatchet sheath and a green bloodstained button in the Bilbia bedroom, in plain view on the floor near the closet.[134] (86 R.T. 2732-33; 86 R.T. 2838-46; 87 R.T. 2905-08; Ex. 93 [Photos of hatchet]; Ex. 94 [Photos of sheath]; Ex. 95 [Photos of button]).

[133] Moran never offered any explanation for his failure to notice the sheath on the otherwise empty floor, or the bedding in the closet, other than his clearly erroneous testimony that he had not been in the Bilbia bedroom during his search of the Lease home.

[134] Neither the sheath nor any of the items in the closet had been in those locations when Kathy Bilbia had last left the Lease home. (86 R.T. 2677-80.)

Ex. 96 [Link to above photo (sheath.jpg)].

Those deputies had no difficulty seeing the sheath or the items in the closet (including a full-sized blanket and tobacco), as the bedroom was virtually empty. (*See* 86 R.T. 2846; *see also* Ex. 1 [*Cooper*, 565 F.3d at 619].) The discovery of the sheath and button is highly suspicious. As a SBSD deputy told defense consultant Thomas Parker, he was instructed to obtain a prison jacket from CIM shortly after the discovery of the murders, which may have occurred before the green button was found. (*See* Ex. 90 [Parker Decl. re Whelchel (Oct. 8, 2015), ¶ 7].) Further, there was undisputed evidence at trial that the jacket Mr. Cooper was wearing when he escaped was tan or brown in color, not green, such that there is no explanation for how Mr. Cooper could have lost a "green" button from a brown prison jacket. (*See* 97 R.T. 5331, 5355-57; 98 R.T. 5567-68; 85 R.T. 2408.) This led Judge Fletcher, and four other Ninth Circuit judges, to conclude that the button and sheath were planted in an effort to tie Mr. Cooper's stay at the Lease house to the murders that occurred nearby. (Ex. 1 [*Cooper*, 565 F.3d at 619].)

V. KEVIN COOPER WAS DENIED A FAIR TRIAL IN MULTIPLE WAYS.

Mr. Cooper's conviction and sentence are premised on the evidence presented at trial. But it's clear that the trial was not fair and did not establish Mr. Cooper's guilt beyond a reasonable doubt, as recognized by the IACHR Report recommending his retrial. Knowing what we know now, there's no question that the trial included numerous constitutional errors, including violations of *Brady v. Maryland* (withholding exculpatory evidence), *Napue v. Illinois* (presentation of false evidence), and *Strickland v. Washington* (ineffective assistance of counsel) as discussed herein. This is even more compelling because the jurors themselves have said they were barely convinced enough to convict Mr. Cooper back in 1985. Therefore, it is inappropriate to rely now on that verdict as an indication of Mr. Cooper's guilt.

A. Mr. Cooper's Fair Trial Right Was Violated by Prejudicial Pretrial Publicity, Racial Animus, and an Ineffective Change of Venue.

Mr. Cooper's case is reminiscent of the case of Glenn Ford, who spent over 30 years on death row in Louisiana's infamous Angola Prison for a murder he did not commit. Ford was tried, convicted and sentenced to death by a white prosecutor, before and all-white jury with a white judge presiding. The prosecutor took advantage of Ford's incompetent lawyers during the trial, withholding exonerating evidence that pointed to the true killer. In 2013 an informant told prosecutors of a confession by the true killer, and in March 2014 Ford was finally freed. Sadly, during his years on death row, Ford developed lung cancer and he died barely a year after being released.

Glenn Ford's prosecutor, A.M. ("Marty") Stroud III, has recently expressed his extreme remorse for his role in Ford's wrongful conviction and sentence, calling his actions "arrogant" and "narcissistic." In a letter submitted to Gov. Brown that is attached to this Clemency Petition,

Mr. Stroud pleads that the Governor spare Mr. Cooper's life and undertake a full review of his case.[135]

The gruesome murders of a prosperous, white family and their young houseguest sent waves of shock and fear through the affluent, rural horse country in San Bernardino County. The Ryen/Hughes murders generated enormous media attention. (Ex. 97 [Defendant's Motion for Change of Venue; Declaration; Points and Authorities dated Feb. 26, 1985 (Case No. OCR 9319 Super. Ct. of Cal.)].)

The announcement that the suspect was a black man created a tidal wave of racial hatred in San Bernardino County, and indeed throughout all of Southern California.[136] Mr. Cooper became the target of the largest manhunt in California history.[137] The SBSD's and the media's focus on the black suspect's history was particularly prejudicial, as it repeatedly referred to Mr. Cooper's early juvenile record, his prior escapes from custody, and his commitment to and escape from a mental hospital. Unsubstantiated allegations that the black suspect had committed a rape, and unfounded rumors that he was a homosexual and/or a transvestite, further fueled the racial tension. (Ex. 97 [Defendant's Motion for Change of Venue; Declaration; Points and Authorities dated Feb. 26, 1985,1083-85].)

Pretrial events in San Bernardino County included a demonstration by a group in uniforms with Nazi emblems, carrying a pole with a monkey hanging from it with a sign stating "Hang the Nigger." (12 R.T. 241-44.)

[135] Ex. 46 [Stroud Letter].
[136] *Id.*
[137] *Id.*

Ex. 98 [Link to above photo (Monkey 1.jpeg)]; see also, Ex. 99 [Monkey 2.jpeg]; Ex. 100 [Monkey 3 (SBSD demonstrative photo)].

Mr. Cooper was the subject of racial animus even in jail.[138] (Ex. 101 [*Cooper Injured in Jail Fight*, San Bernardino Sun Telegram, Sept. 10, 1983, at p. B-26 noting incident where white inmate inexplicably gained access to and beat Mr. Cooper in his cell in high security section of jail].)

The extensive media attention about the Ryen/Hughes murders, and public animus that arose when the suspect was identified as a black man, made a fair trial impossible in San Bernardino County. Indeed, statewide publicity made finding any fair venue challenging. (*See* Ex. 102 [Points and Authorities and Argument in Opposition to Defendant's Motion for Change

[138] There is no denying that the pursuit and prosecution of Mr. Cooper was racially motivated as no other justification exists for ignoring the exonerating statements of the sole-surviving victim, destruction of the bloody coveralls and bloody blue shirt, and failure to follow-up on leads of the white men seen in the Canyon Corral Bar with bloody clothing.

of Venue, C.T. 5:1151] [prosecution arguing that no change of venue was necessary because it would not make a difference].) Although the court granted Mr. Cooper's change of venue motion, instead of moving the trial to a county with a more heterogeneous population, as the defense requested, the trial was moved to San Diego County, which amounted to no improvement at all given the extensive media coverage, proximity to the crime scene, and homogeneity of the population. (76 R.T. 1; Ex. 103 [Defendant's Statement Regarding Hearing to Choose County for Trial, dated February 26, 1985, C.T. 7:1496-97]; 13 R.T. 292 [noting post-capture media coverage dropped in Northern California, while remaining high in Southern California].) San Diego County historically has disproportionately sentenced black defendants to death. While blacks make up only about 5 percent of the population of San Diego County, they account for 34 percent of the death convictions.[139] According to a report on counties that originated the most current death row inmates, San Diego County ranks 10th in the United States of counties responsible for current death row inmates.[140] When Mr. Cooper renewed his motion for a transfer away from San Diego, it was denied (76 R.T. 24.)

The evidence was indisputable that publicity surrounding the Ryen/Hughes murders had been much greater in San Diego County than in Sacramento or Alameda Counties. (19 R.T. 942-8, 942-10.) No reasons against Sacramento or Alameda were ever presented, other than the cost and convenience factors. (21 R.T. 988-89) The judge expressly recognized that his decision turned on the balance of the cost/convenience and prejudicial publicity factors, but there is nothing whatsoever in his comments to show that he subordinated the former to the latter in any

[139] Ex. 104 [RICHARD C. DIETER, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTRIES PRODUCE MOST DEATH CASES AT ENORMOUS COST TO ALL* (Death Penalty Info. Ctr., Oct. 1998)].

[140] Id.

way. (21 R.T. 1008-10.) If he had done so, the only conclusion that could be supported was that either Sacramento or Alameda County was strongly preferable to San Diego County.

Even more troubling was the trial court's refusal to allow a change of venue to downtown Los Angeles. The prosecution *never* presented any reason whatsoever why downtown Los Angeles would interfere with any legitimate prosecution interest. (19 R.T. 942-4.) Since cost and convenience was the *only* factor that was ever offered to justify the choice of San Diego over another county, and since the defense was in favor of Los Angeles and strongly opposed to San Diego, there was simply no legitimate rationale for choosing San Diego rather than downtown Los Angeles.

Indeed, the record is clear that the only reason the court chose San Diego rather than Los Angeles was its insistence that Los Angeles would not be considered without a stipulation from *both* sides. (19 R.T. 942-4.) While it may have been reasonable for the trial judge to conclude that venue should not be moved to Los Angeles over a *defense* objection, the defense had no objection and there was no explanation whatsoever for allowing the prosecution to have an absolute veto over the Los Angeles option. This is particularly true given the presumption that the prosecution will get a fair trial in any county. Change of venue exists to protect the defendant, not the prosecution.

Moreover, allowing the prosecution to preclude Los Angeles as a forum is even more unfair because the trial court refused to extend a similar power of veto to the defense in regard to San Diego County, which also had substantial media coverage. Therefore, Mr. Cooper's fundamental rights were violated by the Court's refusal to change venue out of San Diego County due to a poisoning of the jury pool by extensive and hostile media coverage.

B. The Prosecution Withheld and Destroyed Potentially Exculpatory Evidence, Unfairly Precluding Mr. Cooper From Proving His Innocence.

The prosecution suppressed evidence favorable to Mr. Cooper in violation of his fair trial right as recognized by the Supreme Court of the United States in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny. The prosecution failed to disclose to the defense several strands of material exculpatory information that pointed to the three white men and Lee Furrow as the culprits. First, the prosecution failed to disclose to the defense that Tim Wilson, a former San Bernardino County Detective, learned shortly after the murders that three white men with blood on their clothing had been spotted at the Canyon Corral Bar on the night of the murders, not far from the scene of the crime. Second, the prosecution failed to disclose to the defense the existence and recovery of a blue shirt with blood on it nearby. This blue shirt is especially significant when viewed with the discovery of the tan t-shirt with Doug Ryen's blood on it. The existence of two bloody shirts discarded near the crime scene points to multiple killers, and therefore strongly supports Mr. Cooper's innocence. (*See* Ex. 1 [*Cooper*, 565 F.3d at 627-29].) Third, as discussed above, the prosecution failed to disclose the existence of the bloody coveralls provided to Deputy Eckley by Diana Roper. Indeed, the State's destruction of these coveralls also violated *Arizona v. Youngblood*, 488 U.S. 51, 56-58 (1998). It is hard to conceive of a more relevant and important piece of exonerating evidence than the bloody coveralls, which the State threw away without testing. Had Mr. Cooper's counsel been able to test these coveralls, he might have been able to prove that Lee Furrow was one of the three white men who committed the crimes.

Fourth, the prosecution failed to disclose before or during Mr. Cooper's trial information provided by Midge Carrol, the warden at the Chino prison in 1983, that the type of shoes the prosecution claimed left shoe prints at the crime scene were not special prison-issued shoes, as

asserted by the District Attorney throughout the trial, but rather were available to the public through catalog and retail sales. (*See* Ex. 1 [*Cooper*, 565 F.3d at 620-25].) Warden Carroll testified in 2004 that, during the murder investigation and before trial, she made multiple phone calls to the SBSD to advise them that the prison at Chino did not issue special tennis shoes, but instead issued common, ordinary shoes sold in retail stores. (June 2, 2004, HRT 102-09; Ex. 1 [*Cooper*, 565 F.3d 621].) In other words, she called the SBSD to alert them they were pursuing an incorrect theory, but the SBSD never returned her call. *Id.* Neither Warden Carroll's calls to the SBSD, nor the contents of them, was relayed to Mr. Cooper's defense team. This evidence was crucial to Mr. Cooper as the shoe prints, contrary to what the prosecution told the jury, very well could have been left by someone who did not receive them from prison.

Each of these evidentiary violations, individually, deprived Mr. Cooper of a fair trial. The cumulative effect of the withheld evidence was devastating to his defense and unquestionably led to his erroneous conviction. (*See Barker v. Fleming*, 423 F.3d 1085, 1096 (9th Cir. 2005) [requiring cumulative inquiry into whether defendant received "a fair trial that resulted in a verdict 'worthy of confidence.'"].

C. <u>The State Presented False Evidence Against Mr. Cooper</u>.

It is beyond cavil that fabricating incriminating evidence violates the right to a fair trial. (*See Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) ["implicit in any concept of ordered liberty," is that the State may not use false evidence to obtain a criminal conviction]; *see also Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935) [deliberate deception of a judge and jury is "inconsistent with the rudimentary demands of justice."].) Thus, a conviction through the knowing use of false evidence requires reversal. (*See Napue*, 360 U.S. at 269, 79 S. Ct. 1173 (citations omitted); *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) [quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975)].)

Moreover, the prosecution also has a duty to correct false evidence. (*See Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957).)

The prosecution presented multiple pieces of false evidence at Mr. Cooper's trial in 1984-85, as well as during post-conviction proceedings as discussed below. (*See* Ex. 1 [*Cooper*, 565 F.3d at 607-619].)

1. <u>The State Presented False Evidence About Josh Ryen's Statements</u>.

As described above at Section IV.B.1, in the days after the murders, Josh Ryen consistently identified his attackers as three white or Hispanic men. However, by the time of Mr. Cooper's trial, Josh Ryen's recollection of the night of the muders had dramatically morphed. Influenced by the many accounts he had heard from SBSD officers and the District Attorney regarding Mr. Cooper's guilt, he no longer remembered his assailants as three white or Hispanic men.

Josh Ryen did not testify at Mr. Cooper's trial. Rather, pursuant to stipulation the jury was shown a videotape recorded December 9, 1984 in which Josh was questioned by the prosecutor and defense counsel. (95 R.T. 4931, 4971.) Also pursuant to stipulation, the jury was permitted to hear an audio tape recording of a December 1, 1983 interview of Josh by Dr. Lorna Forbes, a psychiatrist who began treating Josh in October of 1983. (95 R.T. 4971.)

As presented by the prosecution, Josh's testimony was that he saw either a single man or a single shadow in the house during the murders. (*See supra*, section IV.D.2.; *see also* Ex. 1 [*Cooper*, 565 F.3d at 608, 619].) However, this testimony was flatly inconsistent with what Josh communicated immediately after the murders, where he repeatedly identified his attackers as three white or Hispanic males.[141]

[141] Expert analysis of Josh's statements shows that the earlier accounts of the attacks reflect Josh's true memory of the events and exonerate Mr. Cooper. *See* Ex. 9 [Pezdek Decl.].

Josh Ryen's dramatic change of recollection is particularly troubling given that, in the weeks following the attacks, after seeing a photograph of Mr. Cooper on TV, Josh remarked at least two times[142] that Mr. Cooper did not commit the murders. (*See* Ex. 1 [*Cooper v. Brown*, 565 F.3d at 584, 612].) When one takes into account the tunnel vision the SBSD utilized in its investigation of the crime and prosecution of Mr. Cooper, it is not surprising that the SBSD was able to manipulate Josh's recollection. (*See, e.g.*, 100 R.T. 6095-96 [Det. O'Campo acknowledging that he was certain Cooper was responsible for the crime and had a strong desire to see Mr. Cooper convicted].)[143] Even Josh's therapist, Lorna Forbes, did not believe that Josh had actually perceived the singular person with the "puff" of hair[144] that he described. (73 R.T. 6567-70).

SBSD Detective O'Campo, who was the primary detective from SBSD assigned to interview Josh (100 R.T. 6060), also presented false testimony about Josh's intial recollections about multiple attackers. Despite his sworn testimony otherwise, O'Campo visited Josh a total of 20 times from June 6 until June 14, but O'Campo never taped any of his interviews with Josh and these visits were never mentioned in any police reports. (100 R.T. 6077-82; Ex. 1 [Cooper, 565 F.3d at 612].) Likewise, even though O'Campo testified differently (100 R.T. 6083-85), he conducted substantive questioning of Josh as early as the day after the discovery of the murders. (100 R.T.6205-08 [testimony of Dr. Howell, the victim's grandmother]; 101 R.T. 6305-12 [testimony of Nurse Headley, who was with Josh on June 6 and 7].)

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[142] The first statement was to San Bernardino County Reserve Deputy Louis Simo, who informed Det. O'Campo that Josh spontaneously said that Mr. Cooper did not commit the attacks after viewing a picture of Mr. Cooper on the television. However, Det. O'Campo failed to do anything with the information. In fact, Det. O'Campo did not take a report on the incident until after Dep. Simo called him a second time several months later. (*See* Ex. 1 [*Cooper*, 565 F.3d at 612-13].) Josh made the second statement to his grandmother, indicating that he did not recognize Mr. Cooper's picture on the television. (Ex. 1 [*Cooper*, 565 F.3d at 613].)

[143] This confirms that the SBSD was guilty of "tunnel vision" in its investigation. *See* Ex. 3 [Parker Decl. (Oct. 17, 2013)].

[144] Even if Josh had seen a person with a "puff" of hair, it is undisputed that Mr. Cooper's hair was in braids at the time of the murders. (*See* Ex. 1 [*Cooper*, 565 F.3d at 612].)

The prosecution also misrepresented the consistency of Josh's statements during closing arguments. District Attorney Kottmeier argued to the jury:

> We have from Josh the same basic story to different people at different times that have been both tape recorded and videotaped.
>
> …During the entire time that Josh was with his grandmother, at time of protection and love, Josh told the same basic story that you ladies and gentlemen got a chance to hear, the story that shows there was just…one attacker: Kevin Cooper with a hatchet in one hand and a knife in the other.

(106 R.T. 7823-24.)

This is simply false. As noted above, from the moment he could communicate after the attack Josh Ryen consistently told different people, including SBSD and his grandmother, that there was more than one attacker and that that attacker was not African-American.[145] (*See, e.g.*, 99 R.T. 5928-32 [Social Worker Gamundoy]; 99 R.T. 6010-12, 6016-18, 6035-36 [Deputy Sharp]; 100 R.T. 6062, 6157-59, 6205-08, 6086 [Det. O'Campo]; 101 R.T. 6358-61, 6364, 6368 [Dr. Hoyle]; 101 R.T. 6400-03 [Reserve Deputy Simo]; 100 R.T. 6205-08 [Dr. Mary Howell]; 101 R.T. 6305-12 [Nurse Headley].) And before learning that Mr. Cooper had hidden in the Lease house nearby, the SBSD believed and relied on Josh's statements to issue its June 7, 1983 "Criminal Bulletin" alerting the public and law enforcement that the suspects were three white or Hispanic men. Ex 68 [SBSD Criminal Bulletin, No. 16 dated June 7, 1983].

Finally, it is clear that Josh's manipulated testimony was critical to Mr. Cooper's conviction. Obviously, the jury's judgment would be affected by the only surviving victim identifying his attackers as three white or Hispanic males when the accused is a single African-

[145] This is also furthered by Josh's inquiry to his uncle after his release from the hospital, wherein he stated "Are you sure they have the right guy?" (73 R.T. 6592-93.)

American man.[146] Indeed, one item of evidence the jury asked be read to them during deliberations was Josh's manipulated statement about his attackers. (106 R.T. 7863-A.)

2. Deputy Eckley Provided False Testimony About Destroying the Bloody Coveralls.

At trial, SBSD Deputy Fred Eckley testified that he acted alone in his decision to discard the bloody coveralls.[147] (*See* Ex. 1 [*Cooper*, 565 F.3d at 615]; 102 R.T. 6550-6554.) However, in 1998 Mr. Cooper's investigator discovered an SBSD "Disposition Report" dated December 1, 1983 that showed that Eckley's then supervisor, Deputy Ken Schreckengost, approved the destruction of the bloody coveralls. (*See* Ex. 1 [*Cooper*, 565 F.3d at 625]; Ex. 105 [Declaration of Joseph P. Soldis in Support of Petitioner's Further Motion for Preliminary Hearing dated February 22, 2005, ER 4786-91].) Under oath in 2005, Schreckengost confirmed his initials on the Disposition Report approving the destruction of the coveralls. (Ex. 1 [*Cooper*, 565 F.3d at 625].)

3. Criminologist Daniel J. Gregonis Presented Manipulated Evidence and False Testimony.

The prosecution also presented false evidence in the form of manipulated evidence and corresponding perjured testimony by SBSD criminalist Daniel J. Gregonis. Gregonis conducted the serological testing on blood drop A-41, which was the sole piece of direct evidence allegedly tying Mr. Cooper to the interior of the Ryen house. (93 R.T. 4424.) He also "verified" A-41's continued existence prior to DNA testing on that evidence in 2002. (June 23, 2003, ERT 107,

[146] This is true despite the 2002 DNA tests showing Mr. Cooper's DNA on the tan t-shirt, as that DNA was planted by the State as discussed more fully below. (*See also*, Ex. 1 [*Cooper*, 565 F.3d at 607-08].)

[147] The significance of the discarded coveralls cannot be overstated because it would explain the relative lack of blood on the tan t-shirt in comparison to the bloody crime scene in the Ryen's master bedroom and carnage contained therein.

112-113, 133.) However, Gregonis falsified his test results used at trial and manipulated A-41 prior to the DNA testing. (*See* Ex. 1 [*Cooper,* 565 F.3d at 615].)[148]

4. The State Used Falsified Cigarette Evidence Against Mr. Cooper.

The prosecution used falsified cigarette evidence against Mr. Cooper. (*See* Ex. 1 [*Cooper,* 565 F.3d at 592-93, 618].) As discussed herein in Sections IV.E.2 and IV.F.2, in all probability the SBSD planted the cigarettes taken from the Lease house (which had never been logged into evidence) in Ryen station wagon after it was towed back to San Bernardino.[149]

5. SBSD Planted the Hatchet Sheath and Green Button in Order to Frame Mr. Cooper.

As discussed above, the prosecution presented false evidence at trial when it introduced into evidence the planted hatchet sheath and green button. (*See* Ex. 1 [*Cooper,* 565 F.3d at 618-19].) There is simply no other explanation for Det. Moran's failure to note the hatchet sheath lying on an otherwise empty floor. (86 R.T. 2730-31, 2801-02; 87 R.T. 2927-28, 2938, 2965; 89 R.T. 3471-72; 86 R.T. 2732-33; 86 R.T. 2838-46, 87 R.T. 2905-08; 86 R.T. 2841-44; 87 RT 2908; *see also* Ex. 1 [*Cooper,* 565 F.3d at 593, 619].) Further, the green button doesn't even match the color of the jacket Mr. Cooper was wearing when he escaped from CIM. (*See* 85 R.T. 2408; 97 R.T. 5331, 5355-57; 98 R.T. 5567-68; *see also* Ex. 1 [*Cooper,* 565 F.3d at 619] [concluding the evidence was planted].)

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[148] As discussed further at Section VI.B and Appendix C, Gregonis waited to test A-41 until he obtained a partial serological profile of Mr. Cooper from various sources (*see* 93 R.T. 4488, 4550), tested A-41 on the same slide as Mr. Cooper's blood (56 R.T. 4852; 93 R.T. 4428-29, 4488, 4526, 4550, 4557), and altered his lab notes to conform his serological results for A-41 to Mr. Cooper's known profile. (93 R.T. 4429-31, 4444.) He lied about these alterations under oath. (93 R.T. 4493-95.) There are also strong indications that Gregonis planed Mr. Cooper's blood on A-41 in 1999 when he checked A-41 out of the SBSD evidence locker for over 24 hours, supposedly to simply "verify" A-41's continued existence and kept it within feet of Mr. Cooper's blood sample that was not subject to evidentiary controls. (*See, e.g.,* June 23, 2003, ERT 103, 106-07, 113, 118-19, 133-34.)

[149] The following evidence supports this inference: 93 R.T. 4475-77; Ex.84 [SBSD Report by Detective Michael Hall dated Jun. 16, 1983]; Ex. 86 [SBSD Supplemental Report by Detective Michael Hall dated Jun. 15, 1983; 92 R.T. 4234-35, 4287-89; 95 R.T. 4887-88; Ex. 106 [Handwritten List of Contents of Ryen Car (ER 836-37)]; June 24, 2003, ERT 188 [Ogino], ERT 227 [Stockwell]; see Ex.1 [Cooper, 565 F.3d at 618] [noting "Most of the cigarette butts that Cooper left behind were never processed into evidence."]; 97 R.T. 5428, 98 R.T. 5503-07, 5657-58; Ex. 60 [SBSD Report on Examination of Physical Evidence dated Jun. 14, 1983].

6. The State Used a "False" Positive Luminol Test Against Mr. Cooper at Trial.

As discussed above, the State offered false evidence of a positive reaction from a luminol test of the shower in the Lease house as proof that Mr. Cooper washed the blood off him after he committed the crimes. (*See* Ex. 1 [*Cooper*, 565 F.3d at 594].) However, the positive reaction was limited to the area on the walls of the shower previously cleaned by former resident Kathy Bilbia (not at the drain) and SBSD failed to perform the secondary test that could potentially rule out bleach as the cause of the positive result. (86 R.T. 2707; 87 R.T. 3079-81; Ex. 1 [*Cooper*, 565 F.3d at 594].)[150]

D. Trial Counsel's Ineffective Assistance Crippled Mr. Cooper's Defense.

Despite having the deck stacked against him by racial bias, a corrupt prosecution and an unfair venue, Mr. Cooper might still have been exonerated had he received adequate representation. But as attested to in the Declaration of Michael Adelson[151] and as found by the IACHR, [152]Mr. Cooper's trial counsel made numerous mistakes that crippled Mr. Cooper's defense.

There comes a point where counsel's representation of a client is so deficient that it becomes ineffective. This doctrine, known as "Ineffective Assistance of Counsel," recognizes that ineffective representation deprives a defendant of due process. (*See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984) [recognizing fundamental entitlement to fair trial and reliable result].) Counsel renders unconstitutionally ineffective assistance where "counsel's

[150] Further, the prosecution's contention that Mr. Cooper returned to the Lease house to clean up after committing the crimes conflicts with its theory of Mr. Cooper's motive for the murders: that is to steal the Ryens' station wagon to vacate the area as quickly as possible. (*See* Ex. 86 [SBSD Supp. Hall Report dated Jun. 15, 1983 (re processing station wagon)].

[151] Michael Adelson is an experienced capital defense lawyer who reviewed Mr. Cooper's case and the efforts of his trial counsel, David Negus, in 2013. Adelson submitted a declaration with his conclusions about the quality of Mr. Negus' representation to the IACHR. [Ex. 22 [Adelson Decl.].

[152] Ex. 8 [Cooper IACHR Merits Report (Oct. 28, 2015), ¶¶ 127-134].

representation falls below an objective standard of reasonableness," and there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).) Mr. Cooper's trial counsel rendered ineffective assistance to Mr. Cooper on numerous occasions leading up to and throughout his 1984-85 trial.

1. Trial Counsel Inexplicably Failed to Accept Additional Help.

Fundamentally, Mr. Cooper's trial counsel faced a difficult case that required a defense team to offset the prosecution's almost unlimited resources devoted to obtaining a conviction. But trial counsel, an employee of the San Bernardino County Public Defenders' Office, inexplicably refused to enlist additional attorneys and support staff for Mr. Cooper's defense.[153] For reasons that seem incomprehensible but that had a devastating effect on Mr. Cooper, trial counsel Negus chose to "go it alone." Astonishingly, the defense "team" aligned against the unlimited resources of the San Bernardino District Attorney's office and the SBSD consisted of Negus and one private investigator. Negus' decision not to enlist other attorneys and staff to help him defend Mr. Cooper undeniably led to crucial mistakes.

The need for second counsel is best illustrated by some of the comments that trial counsel Negus himself made. He often complained to the court during trial that he was working an unsustainable "60 to 80 hours a week" (*see, e.g.*, 72 R.T. 6513-8), and could not conduct more than four court days per week of trial. He had earlier come to a bitter dispute with the trial judge when he was ordered to conduct, at the very least, one five-day week of *voir dire*, to which trial counsel responded:

> ...I'm sorry, Judge, you can get all the mad at me that you want. I only have one life, and I'm not going to give it for this case, and – my – I have been told to cut down on the amount of work and the

[153] Id.

> amount of stress I do, and I'm going to, and that's, you know, what I'm going to do, and you know, you can throw me in jail. That's nice and restful, but I can't work any harder than I am, and I have to cut down on the amount of work that I'm doing. That's what my doctor says. That's what I'm going to do.

(*See* 72 R.T. 6513-1 through 72 R.T. 6513-5). Later in this same exchange, the Court advised trial counsel, "A wise man knows when to delegate, Dave.[154] You maybe ought to get some help." (72 R.T. 6513-8.) Trial counsel, however, continued in his irrational belief that obtaining help would be "a disservice to Mr. Cooper." (72 R.T. 6513-9; Ex. 107 [Declaration of David Negus dated Oct. 21, 1996 ("Negus Decl."].)

It is obvious that trial counsel was physically exhausted. (*See* 89 R.T. 3539; 10 R.T. 174, 58 R.T. 5107, 62 R.T. 5551, 72 R.T. 6513-2 to 13-9.) Unfortunately, this was not the time for weary trial counsel.

2. Trial Counsel Failed to Pursue and Present Evidence of the Three White Men Alternative.

Trial counsel rendered ineffective assistance during the guilt phase when he ignored evidence of other killers and failed to present that evidence to the jury to provide a plausible alternative to the prosecution's case.[155] Inexplicably, in his opening statement trial counsel only asserted that the jury would never know if Mr. Cooper committed the crime because of the poor investigation conducted by the SBSD. (*See, e.g.*, 84 R.T. 2296, 2321-22, 2337, 2340-41.) This failure to provide an alternative theory of the case fell below the objective standard of reasonableness and resulted in severe prejudice to Mr. Cooper.

[154] A.k.a. David Negus.
[155] *See* Ex. 22 [Adelson Decl., ¶ 8].

Not only did Negus fail to provide an alternative theory, he failed to seek a continuance when, during the guilt phase of the trial, he learned about Kenneth Koon's confession, which further implicated Lee Furrow and the bloody coveralls.[156] (Ex. 1 [*Cooper*, 565 F.3d at 588-89].)

As described above, Mr. Cooper's guilt phase trial began on October 23, 1984. (84 R.T. 2277.) On December 17, 1984, SBSD Detective Woods received a telephone call from Lieutenant Henson at CMF advising him that prisoner Anthony Wisely had told Henson that Koon had confessed to committing the Ryen/Hughes murders. (Ex. 73 [SBSD Detective Woods Report re Anthony Wisely Confession dated Dec. 21, 1984, pp. 923-24.)

Woods interviewed Wisely, who confirmed this confession and provided additional details consistent with Roper's account. *Id.* Negus received Woods' report several weeks later on January 2, 1985, the morning that Mr. Cooper was to begin his testimony at trial. But Negus inexplicably informed the Court that he did not want a continuance nor did he need more time to investigate. (97 R.T. 5322-5326.)

Had Negus sought a continuance and investigated, he would have uncovered significant additional facts to present to the jury that showed that other parties murdered the Ryens and Christopher Hughes. Information Mr. Cooper obtained in 2003-4, including testimony from Mary Mellon-Wolfe, Christine Slonaker, and Lance Stark, (as previously discussed at Sections IV.B.2, VI.A.2 and IV.G, *supra*) corroborates his claim that trial counsel was ineffective for

[156] Koon's statement that multiple people killed the Ryen family with axes or hatchets is supported by the nature and extent of the victims' wounds and the coroner's initial conclusion that the murders could not have been committed by one person alone. Koon's confession also corroborates (1) Josh Ryen's statements that three white or Hispanic men, none of whom was Mr. Cooper, committed the murders (101 R.T. 6402-03); (2) the testimony of witnesses who testified they saw three white men, covered in blood, in a bar near the crime scene on the night of the murders (Ex. 108 [Declaration of Christine M. Slonaker dated Feb. 7, 2004 ("Slonaker Decl.")] and Ex. 109 [Declaration of Mary Mellon Wolfe dated Feb. 9, 2004 ("Wolfe Decl.")]); (3) witnesses who testified they saw three of four white men speeding away from the scene of the crime (102 R.T. 6589-6592, 6600-6601.); (4) Roper's statement that Furrow, a convicted killer, left bloody coveralls at her house (Ex. 73 [Detective Woods Report on Anthony Wisely Confession dated Dec. 21, 1984]); and (5) the fact that Furrow's hatchet was missing from his tool belt after the murders (id.).

failure to fully investigate and present evidence concerning third party culpability, including Koon's third-party confession. *See* Ex. 22 [Adelson Decl., ¶ 13].

It is obvious that Negus' dismissal of evidence that pointed to other perpetrators fell below what a reasonable professional would have done, namely, to seek a continuance and to commence an investigation. Here, Negus conducted a cursory review of Koon's statement weeks after learning about it, but neither followed up, nor figured out the connection to Diana Roper. He also failed to present this compelling evidence at trial.

Negus further rendered ineffective assistance by failing to introduce evidence that the victims had hair clutched in their hands. Jessica Ryen, Doug Ryen, and Chris Hughes all had hair in the hands that did not come from an African-American. (Ex. 59 [Petition for Writ of Habeas Corpus dated April 1, 2004, ¶¶ 177-78; (Ex. 5 [SCAPEGOAT, p. 190.) A gross comparison easily shows that none of these hairs could have come from Mr. Cooper, who is African-American, and the SBSD lab so concluded. (Id. at ¶¶ 176-79.) Nevertheless, Negus did not introduce into evidence the photographs or other evidence of these hairs or the fact that they could not have come from Mr. Cooper. Nor did Negus seek to have the hairs tested to establish that they did not come from the victims.

Defense counsel needs only to raise a reasonable doubt as to a defendant's guilt. Had Negus introduced the evidence of these hairs, it would have provided the jury with reasonable doubt as to whether Mr. Cooper was the killer. It would have further refocused attention on the three white men from the Canyon Corral Bar and/or the men described by Josh Ryen. Reasonable doubt as to the source of the hair would have accrued to Mr. Cooper's benefit and the prosecution's detriment. This is particularly true in view of statements made by a juror after

trial that had there been one less piece of evidence, they would not have voted to convict. (Ex. 5 [SCAPEGOAT, p. 231].)

Finally, Negus' health problems – brought on by the stress and exhaustion of attempting to defend Mr. Cooper on his own – continued to plague him, precluding Negus from putting together a "comprehensive statement regarding the physical evidence" at the conclusion of the guilt phase of trial. (Ex. 107 [Negus Decl. ¶ 5].) This significantly and adversely impacted Negus' closing argument to the jury.

VI. THE VAST MAJORITY OF THE EVIDENCE THE CALIFORNIA SUPREME COURT CITED IN 1991 HAS BEEN CALLED INTO QUESTION OR COMPLETELY UNDERMINED.

In its denial of Mr. Cooper's direct appeal in 1991, the California Supreme Court stated that evidence of Mr. Cooper's guilt at trial was "overwhelming." Ex. 110 [*People v. Cooper*, 53 Cal. 3d 771, 837 (1991)]. The State and reviewing courts have cited the California Supreme Court's "overwhelming" comment numerous times since that 1991 ruling, but in so doing they failed to make a critical examination of all the evidence at trial that has since been undermined as well as all the additional evidence of Mr. Cooper's innocence that has emerged since then. The three judge panel of the Ninth Circuit that denied Mr. Cooper's first federal habeas appeal (Ex. 111 [*Cooper v. Calderon*, 255 F.3d 1104, 1109 (9th Cir. 2001)]) cited the Supreme Court's now-obsolete comment, as did the three judge panel that denied Mr. Cooper's successive federal habeas appeal (Ex. 2 [*Cooper v. Brown*, 510 F.3d 870, 875 (9th Cir. 2007)]). Finally, the comment was embraced by Judge Rymer's concurrence in the narrow denial of Mr. Cooper's 2009 Ninth Circuit en banc appeal (Ex. 1 [*Cooper v. Brown*, 565 F.3d 581, 637 (9th Cir. 2009) (Rymer, J., concurring)].

As Governor Schwarzenegger's response to Mr. Cooper's 2010 clemency petition shows,[157] continued reliance on the California Supreme Court's 1991 review of the facts in this case is a mistake. As discussed below, the vast majority of the evidence the Court cited has been called into question or completely undermined by evidence that has emerged since 1991.

A. New Evidence Seriously Undermines the State's Theory Regarding the PRO-Ked Dude Shoes.

Relying on evidence presented at trial, the California Supreme Court cited several pieces of evidence purportedly connecting athletic shoes that Mr. Cooper was allegedly wearing to

[157] Ex. 55 [2010 Clemency Decision].

shoeprints found in the Ryen home. Virtually every piece of evidence the Court cited on this issue has been seriously undermined since 1991.

1. PRO-Ked Dudes Were Widely Available at the Time.

The California Supreme Court relied on trial testimony from Stride Rite General Merchandise Manager Michael Newberry that the PRO-Ked Dude shoes that purportedly matched prints at the crime scene were "a tennis shoe that is manufactured only for institutions," and is "supplied strictly for prison use within the State of California." (86 R.T. 2624.) Based on this testimony the Court concluded that the PRO-Ked Dudes were "not sold retail, but only to states and the federal government." Ex. 110 [*People v. Cooper*, 53 Cal. 3d at 798]. Since 1991, this assertion has been definitively disproven.

Midge Carroll was the warden of California Institute for Men at the time of the murders. At a 2004 hearing before U.S. District Judge Marilyn Huff, Warden Carroll testified that, during the 1983-4 investigation of the Ryen/Hughes murders, when she heard that the SBSD was describing "a special shoe that had to come from a prison" she became concerned and looked into the claim. (June 2, 2004, HRT 102-09.) When she confirmed that "the shoes we had and that we issued were common ordinary shoes that were commonly manufactured and sold in retail stores" she made several calls to the SBSD and shared this information with two detectives. *Id.* Warden Carroll never heard back from the detectives, and Mr. Cooper's trial attorney was never made aware of her calls or their content.

Also testifying at the 2004 hearing was Stride Rite executive Don Luck, who managed the Keds shoe line during the time of the murders. Mr. Luck testified – contrary to the testimony presented at trial from a different Stride Rite employee and relied upon by the California Supreme Court – that PRO-Ked Dudes were sold in retail stores throughout the East Coast, possibly as far west as Chicago, and that smaller chains and individual stores on the West Coast

would have had access to PRO-Ked Dudes through the company's wholesale catalog. (June 2, 2004, HRT 239-40.) The catalog itself proves this point.[158]

In sum, in 1991, like the jury that convicted and sentenced Mr. Cooper to death, the California Supreme Court did not know that the PRO-Ked Dudes were widely available at retail and not limited to prisons; nor did it know that the warden of the very prison from which Mr. Cooper escaped had brought this to the attention of the SBSD and the prosecution prior to trial. By failing to pursue and disclose the truth about the availability the shoes, the State effectively misled both the jury and the California Supreme Court about this critical fact.

2. New Evidence Suggests Mr. Cooper Was Not Wearing PRO-Ked Dudes.

The Supreme Court also cited 1984 trial testimony by inmate James Taylor, who worked in the equipment room of CIM at the time of Mr. Cooper's incarceration. (Ex. 110 [*People v. Cooper*, 53 Cal. 3d at 797-98].) Taylor testified at trial that he had issued Mr. Cooper a pair of F.P. Flyer shoes, and then allowed Mr. Cooper to exchange those shoes for a pair PRO-Ked Dudes a few days before Mr. Cooper was transferred to minimum security. (85 R.T. 2547-48.) However, Taylor recanted this testimony in a January 2004 declaration.[159] Taylor stated that he had not told the truth at trial in 1984 and that, in fact, the only shoes he had ever provided to Mr. Cooper were the P.F. Flyers. (Ex. 112 [Taylor Decl.]. When called to testify at the 2004 evidentiary hearing after the SBSD had confronted him, Taylor's testimony was essentially "incoherent" and suggested, at best, that he could not tell the difference between Pro-Keds and P.F. Flyers and, at worst, that he was intentionally recanting his recantation to avoid perjury charges. Ex. 1 [*Cooper v. Brown*, 565 F.3d at 623 (Fletcher, J., dissenting)] (describing Mr. Taylor's testimony as "incoherent" and citing specific portions on his contradictory testimony).

[158] Ex. 16 [Pro-Keds (by Stride-Rite) Catalog, Spring 1981].
[159] Ex. 112 [Declaration of James Taylor dated Jan. 8, 2004 (ER 1678-79) ("Taylor Decl.")].

It is also relevant that, after trial in 1985, a CIM internal investigator recommended that Taylor's sentence be reduced because his "testimony implicated Mr. Cooper in the Chino Hills murders" (Ex. 113 [Midge Carroll Memo to Office of Investigative Services re Request for Taylor sentence reduction dated Mar. 7, 1985 (ER 376-377]), and District Attorney Kottmeier wrote a letter in support of Taylor to the California Department of Corrections stating that "Taylor's testimony . . . was of critical importance both at the preliminary hearing and at the jury trial." Ex. 114 [Letter from Dennis Kottmeier to Daniel McCarthy Mar. 11, 1985 (ER 378-379).]

Thus, not only was the State's contention that the PRO-Keds were available only at institutions completely invalidated, but its claim that Mr. Cooper was wearing PRO-Keds when he escaped from CIM has been substantially undermined. Moreover, neither the jury nor the California Supreme Court was aware that James Taylor's testimony at trial in 1984 was part of a *quid pro quo deal* with the prosecution.

3. The Shoe Print Identification Testimony Used at Trial Was "Junk Science" and the Prints Themselves Were Likely Planted.

The California Supreme Court also relied on trial testimony from SBSD Det. William Baird, the manager of the SBSD's crime laboratory during the investigation into the murders. Baird testified at trial in 1984 that he compared shoe print impressions purportedly found in the Ryen and Lease houses to the tread on PRO-Ked Dude shoes he just happened to have in his lab, and concluded that they were "consistent with one another, and ... could have been caused by the same shoe." Ex. 110 [*People v. Cooper*, 53 Cal. 3d at 797-98]. However, Mr. Baird's testimony must now be evaluated not only in the context of the new evidence discussed above, but what came to light after trial: that Baird was caught stealing heroin from the evidence locker at the San Bernardino County Crime Lab.[160]

[160] (Ex. 17 [William Baird Investigative Report dated Jul. 1, 1997 (ER 1714-16)].

The fact that Baird was using and selling heroin during the Ryen/Hughes murder investigation – a fact that was not available to the jury at the time of trial – puts Baird's already dubious shoe-print testimony into a stark new light. But more than that, and as thoroughly documented in Judge Fletcher's 2009 dissent, the two shoe prints allegedly found at the Ryen house that Baird claimed matched the treds of PRO-Ked Dudes were found under extremely suspicious circumstances. Ex. 1 [*Cooper v. Brown*, 565 F.3d at 616-17 (Fletcher, J., dissenting).] One shoe print, which was supposedly found on a crumpled sheet from the Ryen's master bedroom, was not noticed by investigators until some weeks later after the sheet was taken to Baird's lab. (89 R.T. 3506-07.) The other shoe print was supposedly found on the Ryen's spa cover. On the morning of June 8, 1983, three days after the murders, a deputy was ordered to sketch all of the shoe prints on the spa cover. When none of her sketches matched the print of a PRO-Ked Dude shoe, she was directed back to the spa cover. Only then did she "see" a print that purportedly matched the PRO-Ked Dudes tread. (103 R.T. 6869, 6871-73, 6878-79.)

At trial Baird admitted that he might have told Mr. Newberry (the Stride-Rite official who testified at trial) that the SBSD wanted information from him so they could "shut down certain defenses." (94 R.T. 4792.) It does not take a great leap of imagination to conclude that the prosecution created the entirety of the shoeprint evidence to place Mr. Cooper where he had literally never set foot – at the Ryen's house.

Nor did the California Supreme Court (or the jury) foresee in 1991 that Baird's "shoe print identification" would be unmasked in the last several years as "junk science." Like bite mark identification and microscopic hair analysis, identification of a particular shoeprint as coming from the tread of a particular shoe is no longer accepted as scientifically valid.[161] While

[161] Ex. 44 [Brandon L. Garrett, *Convicting the Innocent*: *Where Criminal Prosecutions Go Wrong*, pp. 105-106]; *See also*: Ex. 115 [National Academy of Sciences Report: Committee on Identifying the Needs of the Forensic

the information about Baird's drug use and crimes was known to the California Supreme Court in 1991, had that court known about the evidence discovered since then, and about how shoe print identification is now considered to be discredited "junk science," it likely would have been more skeptical of the State's claims and less likely to consider the evidence of Mr. Cooper's guilt "overwhelming."

B. A-41's Questionable Treatment Completely Undermines Any Confidence in Its Probative Value.

The treatment of blood drop A-41 by SBSD criminalist Daniel J. Gregonis completely undermines any confidence in its probative value. As the only piece of direct evidence allegedly linking Mr. Cooper to the crime scene, A-41 was most certainly used by the jury in deciding whether to convict Mr. Cooper. There can be no doubt that the manipulation of A-41 and Gregonis' perjured testimony regarding this crucial piece of evidence dramatically affected the result of the trial and the Supreme Court's 1991 review of the case. However, Gregonis falsified his test results used at trial and manipulated A-41 prior to the DNA testing as demonstrated below, undermining its probative value as explained herein. (*See* Ex. 1 [*Cooper*, 565 F.3d at 615).]

As to the falsified test results in 1983, as discussed above, Gregonis inexplicably waited to conduct testing on A-41 until he obtained a partial serological profile of Mr Cooper from various sources. (*See* 93 R.T. 4488, 4550.) Further, he delayed other tests for months in order to perform those tests on the A-41 sample side-by-side with Mr. Cooper's blood sample, despite standard forensic practice being to conduct such tests blind. (56 R.T. 4852; 93 R.T. 4428-29, 4488, 4526, 4550, 4557; 105 R.T. 7437.) After learning that his results for the serological identifier for EAP did not match Mr. Cooper's identifier, Gregonis altered his records so that his

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Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Aug. 2009, p. 7].

findings for both A-41 and Mr. Cooper's exemplar would match Mr. Cooper's known EAP type – changing his results on A-41 from B to rB. (93 R.T. 4429-31, 4444.) He lied about those alterations under oath. (93 R.T. 4493-95.) He also needlessly wasted portions of the limited A-41 sample so that his test results could not be confirmed or rebutted by the defense. (56 R.T. 4819, 4841, 4847-48; 57 R.T. 4913-15.)

Regarding A-41's later manipulation, there are strong indications that Gregonis planted Mr. Cooper's blood from vial VV-2 on A-41 in 1999 when he checked A-41 out of the SBSD evidence locker for over 24 hours, supposedly to simply "verify" A-41's continued existence.[162] Specifically, we know that Gregonis checked out A-41 from August 12 to August 13, 1999. (*See* June 23, 2003, ERT 107, 133.) During this time, Gregonis kept A-41 within feet of Mr. Cooper's blood vial VV-2. VV-2 was not subject to evidentiary controls. (*See, e.g.*, June 23, 2003, ERT 103, 106-07, 113, 118-19, 134.)

In May 2001, Mr. Cooper's attorneys reached a long-negotiated agreement with the State to conduct DNA testing on A-41. The testing, which occurred in 2002, revealed the presence of Mr. Cooper's DNA in the blood in A-41; however and notably, it also revealed the presence of another person's DNA that was not Mr. Cooper nor the victims. (Ex. 116 [Supplemental Physical Evidence Examination Report dated Sept. 24, 2002, p. 4 and p. 5; Ex. 117 [Physical Evidence Examination Report dated Jul. 7, 2002]. Alarmingly, the exemplar from the vial of Mr. Cooper's blood was also found in 2004 to have a mixture of DNA from two or more persons.[163]

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[162] It is important to note that around the time Gregonis checked out A-41, Mr. Cooper was in the midst of filing several state and federal habeas petitions, which he hoped would allow him to do testing of A-41 to prove his innocence. *See* Ex. 120 [*In re Cooper*, Case No. S077408, 1999 Cal. LEXIS 2197 (Apr. 14, 1999)]; Ex. 121 [*Cooper v. California*, 528 U.S. 897 (1999)]; Ex. 122 [*Cooper v. Calderon*, 2003 U.S. App. LEXIS 27035 (Feb. 2003)]. It also occurred just prior to the passage of California Penal Code § 1405, which allowed Mr. Cooper to seek post-conviction DNA testing.

[163] Notably, Judge Fletcher believes this additional DNA profile suggestive of tampering. *See* Ex. 1 [*Cooper v. Brown*, 565 F.3d 599-600] ("[t]he most logical explanation for the finding [of DNA other than Cooper's] is that someone added another person's blood to the vial.")

(Ex. 118 [2004 Mito DNA Report]; Ex. 119 [SBSD Supplemental Report on Examination of Physical Evidence Aug. 1, 1983 (ER 3187)].)

Gregonis denied tampering with A-41 in a 2003 evidentiary hearing before Judge Kennedy of the San Diego Superior Court. (June 23, 2003, ERT 11-17.) He also denied opening the glassine envelope that held A-41 (June 23, 2003, ERT 117), which is demonstrably false as indisputable photographic proof shoes Gregonis' initials on the glassine envelope seal, along with the date August 13, 1999, proving that Gregonis did indeed open the glassine envelope containing A-41. (Ex. 123 [Photos of glassine envelope].)

Ex. 124 [Link to above photo (A-41 Vial Tin with Gregonis Initials.jpg)].

Mr. Cooper believes that further DNA testing of A-41 and VV-2 may show that they share the same minor DNA contributor, thus proving Mr. Cooper's tampering theory. The unreliability of A-41 handling and attendant results were also identified by Mr. Cooper's Certified Quality Auditor, Janine S. Arvizu, who conducted an independent review of the forensic testing in Mr. Cooper's case and concluded that incriminating items of forensic evidence – including A-41 – "lacked integrity" and "present compelling evidence of deliberate tampering

on a disturbing scale." Ex. 21 [Arvizu Letter]. The State has denied Mr. Cooper's requests to do further DNA testing of this evidence at his own expense. In any event, A-41's questionable treatment and lingering questions undermine its probative value and support Mr. Cooper's requested relief here.

C. The State Used Falsified Cigarette Evidence Against Mr. Cooper

The prosecution used falsified cigarette evidence against Mr. Cooper. (*See* Ex. 1 [*Cooper,* 565 F.3d at 592-93, 618].) At trial, the State presented evidence that the Ryen station wagon contained two cigarettes (V-12 and V-17), which testing suggested Mr. Cooper could have smoked. (93 R.T. 4475-77.) Suspiciously, SBSD Detective Hall did not find these cigarettes in the original search of the Ryen station wagon, even though he noted other cigarettes in the ashtray of the Ryen vehicle. (Ex. 84 [SBSD Report by Detective Michael Hall dated Jun. 16, 1983]; Ex. 86 [SBSD Supplemental Report re Processing Station Wagon dated Jun. 15, 1983].) The other cigarettes Hall found were never taken into evidence. Hall also noted in his search report numerous items,[164] suggesting the thorough nature of his search. (*Id*.) V-12 and V-17 only appeared in the Ryen station wagon later, and when they did appear, their existence was documented in an undated, unsigned report generated after a purported search of the Ryen car by SBSD Officers Ogino and Stockwell. (92 R.T. 4234-35, 4287-89; 95 R.T. 4887-88; Ex. 84 [SBSD Report by Detective Michael Hall dated Jun. 16, 1983]; Ex. 106 [Handwritten List of Contents of Ryen Car (ER 836-37)]; June 24, 2003, ERT 188 [Ogino], ERT 227 [Stockwell].) Not coincidentally, Ogino and Stockwell are the same criminologists who processed the Lease house and failed to log into evidence numerous pieces of tobacco evidence found there. (*See*

[164]Including a paper flyer, match box, ashes and cigarette butts in the ashtray of the car, electric tape, blue cord, magazine, Burger King Cup, Burger King French fry container, Burger King wrapper, Footlocker bag containing Nike shoes, and a 12-ounce can of Hansen's grapefruit soda. Ex. 84 [SBSD Report by Detective Michael Hall dated Jun. 16, 1983].

Ex. 1 [*Cooper*, 565 F.3d at 618] [noting "Most of the cigarette butts that Cooper left behind were never processed into evidence."]; 97 R.T. 5428, 98 R.T. 5503-07, 5657-58; Ex. 60 [SBSD Report on Examination of Physical Evidence dated Jun. 14, 1983].) The logical explanation is that Stockwell and Ogino planted V-12 and V-17 in the Ryen station wagon (or falsified the report to claim they found the butts in the car) to frame Mr. Cooper. (*See* Ex. 1 [*Cooper*, 565 F.3d at 618].) This explanation is further supported by V-12's unexplained history of being consumed, reappearing, and later growing for the DNA testing conducted in 2002. (*Id*.)

D. SBSD Planted the Hatchet Sheath and Green Button in Order to Frame Mr. Cooper.

The prosecution presented false evidence at trial when it introduced into evidence the planted hatchet sheath and green button. (*See* Ex. 1 [*Cooper*, 565 F.3d at 618-19].) On June 6, 1983, SBSD Detective Moran searched the Lease home (including the Bilbia bedroom),[165] but failed to find this evidence. (86 R.T. 2730-31, 2801-02; 87 R.T. 2927-28, 2938, 2965; 89 R.T. 3471-72.) However, on June 7, 1983, SBSD deputies returned and claimed to have then discovered a bloodstained green button and hatchet sheath in the Bilbia bedroom in plain view on the virtually empty floor.

[165]Det. Moran could not explain his failure to note the evidence, except for his mistaken testimony that he had not entered the bedroom. However, fingerprint evidence on the Bilbia bedroom closet door proved that Moran did, indeed enter the Bilbia bedroom. (*See* Ex. 1 [*Cooper*, 565 F.3d at 618-19].)

Ex. 96 [Link to above photo (sheath.jpg)].

(*See* 86 R.T. 2732-33; 87 R.T. 2838-46, 2905-08; 86 R.T. 2841-44; 87 RT 2908; *see also* Ex. 1 [*Cooper*, 565 F.3d at 593, 619].) In addition to the fact that this evidence appeared on June 7 when it was not there on June 6, the green color of the button supposedly from a prison issue jacket shows the evidence was planted, as there was undisputed evidence at trial that Mr. Cooper was wearing a tan or brown prison jacket when he escaped. (*See* 85 R.T. 2408; 97 R.T. 5331, 5355-57; 98 R.T. 5567-68; *see also* Ex. 1 [*Cooper*, 565 F.3d at 619] [concluding the evidence was planted].)

E. <u>The State Used a "False" Positive Luminol Test Against Mr. Cooper at Trial</u>.

At trial the State offered false evidence of a positive reaction from a luminol test of the shower in the Lease house as proof that Mr. Cooper washed the blood off him after he committed the crimes. (*See* Ex. 1 [*Cooper*, 565 F.3d at 594].) Shortly after the discovery of the murders, SBSD criminalists conducted luminol testing on various surfaces of the Lease house. (87 R.T. 3079-81.) The prosecution used a positive reaction on the walls of the shower against Mr. Cooper at trial (87 R.T. 3080), but this supposed positive reaction was confined to an area between two and five feet above the bottom of the shower, not around the drain of the shower.

(*Id*.) Moreover, this testing was incomplete; SBSD failed to conduct the secondary test to determine whether the source of this reaction was bleach instead of blood. (Ex. 1 [*Cooper*, 565 F.3d at 594].) As discussed above, Kathy Bilbia (the former resident of the Lease house) testified that she cleaned this shower with bleach only days before Mr. Cooper's escape. (86 R.T. 2707.) Nor was there any indication or evidence of bloody clothing having been placed in the vicinity of the shower or anywhere else in the Lease house. (Ex. 1 [*Cooper*, 565 F.3d at 594].) Therefore, the only logical conclusion is that the SBSD's luminol test showed only Bilbia's bleach, not any alleged victim's blood. (*Id*.)

F. <u>New Evidence Further Undermines the State's Theory on Motive</u>.

Conjuring a motive for Mr. Cooper brutally murdering the Ryen family and Christopher Hughes has always been problematic for the State. In 1991, the California Supreme Court accepted the prosecution's theory that Mr. Cooper's motive was the "defendant's need for a vehicle and for time to drive out of the area." Ex. 110 [*People v. Cooper*, 53 Cal. 3d at 823]. Another implied motive was that Mr. Cooper needed money. *Id.* at 796 (discussing a call Mr. Cooper made to a friend asking for money).

The evidence at trial, however, was contrary to these alleged motives. As noted above, cash, credit cards and other valuables were left undisturbed in the Ryen house. Additionally, the prosecution asserted that Mr. Cooper stole the Ryen station wagon while acting alone. Yet there was blood on three seat locations in the Ryen station wagon, suggesting not only multiple occupants, but also that the killers entered the station wagon while covered in blood.[166] The prosecution also asserted that Mr. Cooper returned to the Lease house on foot after the murders to clean off the blood, thus leaving the beer can with blood in the field and depositing the residue

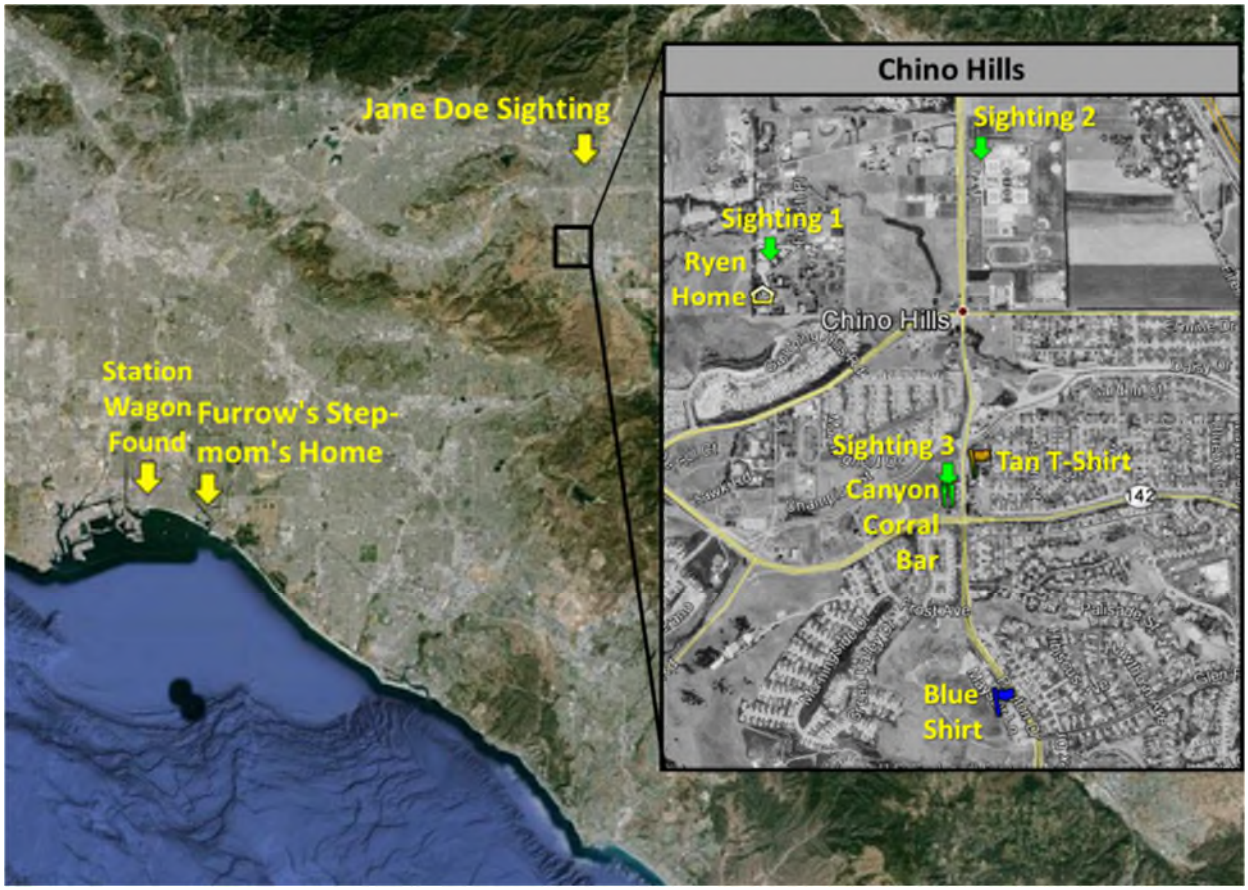
[166] Ex. 86 [SBSD Supplemental Report re Processing Station Wagon dated Jun. 15, 1983]; Ex. 85 [Photos of inside of station wagon].

of blood in the shower, causing the "positive" reaction to luminol. But if Mr. Cooper had returned to the Lease house to "clean up" before driving away in the Ryens' station wagon, how did he deposit blood on three seats? And the same question remains (how did three seats get blood on them?) even if one assumes, contrary to what the prosecution asserted, that Mr. Cooper somehow drove from the Ryen house to the Lease house to clean up.[167]

Unfortunately, the California Supreme Court ignored these inconsistencies. It also did not have the benefit of the objective criminal analysis and reconstruction conducted by Gregg McCrary, a 25-year FBI veteran. After reviewing the evidence in 2013, McCrary concluded that the Ryen/Hughes murders were likely committed by multiple assailants, and not for the purpose of obtaining a vehicle, money or valuables, but for some other, possibly "personal cause."[168]

Nor did the Court know about the recently-discovered fact that the church parking lot in Long Beach where the Ryens' station wagon was found after the murders was just a few miles from the home of Lee Furrow's step-mother.[169] Nor did it know about the sighting of the Ryen station wagon in Claremont the day after the murders.[170] These revelations further bolster the probability that three white men, perhaps including Lee Furrow, were involved in the murders and rode away in the Ryens' station wagon, depositing blood on three of its seats. As detailed below, this evidence undermines the State's already-tentative theory that Mr. Cooper had any motive to commit the murders.

[167] The Ryen house and the Lease house were at the end of two separate streets as depicted in the diagram at Ex. 125 [Map: Ryen and 2991].
[168] Ex. 4 [McCrary Report, p. 10].
[169] Ex. 3 [Parker Decl. (Oct. 17, 2013)].
[170] Ex. 13 [J. Doe Decl.].



Ex. 12 [Link to above photo (Sighting Map)].

1. <u>Veteran FBI Profiler Gregg McCrary's Analysis</u>.

In 2013, McCrary agreed to conduct an analysis and reconstruction of the Ryen/Hughes murders. McCrary spent 25 years as an FBI agent, including 17 years investigating violent crimes and 8 years as a Supervisory Special Agent at the National Center for the Analysis of Violent Crime in Quantico, Virginia. He trained and worked with law enforcement throughout the country and the world.

After a detailed review of the evidence in Mr. Cooper's case, McCrary concluded:

> Based on the totality of the forensic and behavioral crime scene evidence, it is my opinion that it is most likely that multiple offenders were involved in this crime for the following reasons: Over 140 wounds were inflicted on five victims by multiple weapons in ferocious blitz-style attack. Those weapons included a hatchet, one or more sharp edged instruments and other possible

> weapons such as an awl, an ice pick or a screwdriver. Dr. Root, the medical examiner, opined that death came to the four homicide victims within minutes. The presence of multiple weapons is noteworthy. Most lone offenders use a single weapon due to utility and time constraints and rarely switch weapons arbitrarily during an assault. If a single offender perpetrated these murders, he or she would had to have quickly alternated between two, three or perhaps more weapons, i.e. setting one down while picking up another, during this intensely violent, relatively short attack period when so many wounds were inflicted in such rapid succession. That scenario is most unlikely.

Ex. 4 [McCrary Report, p. 6.].

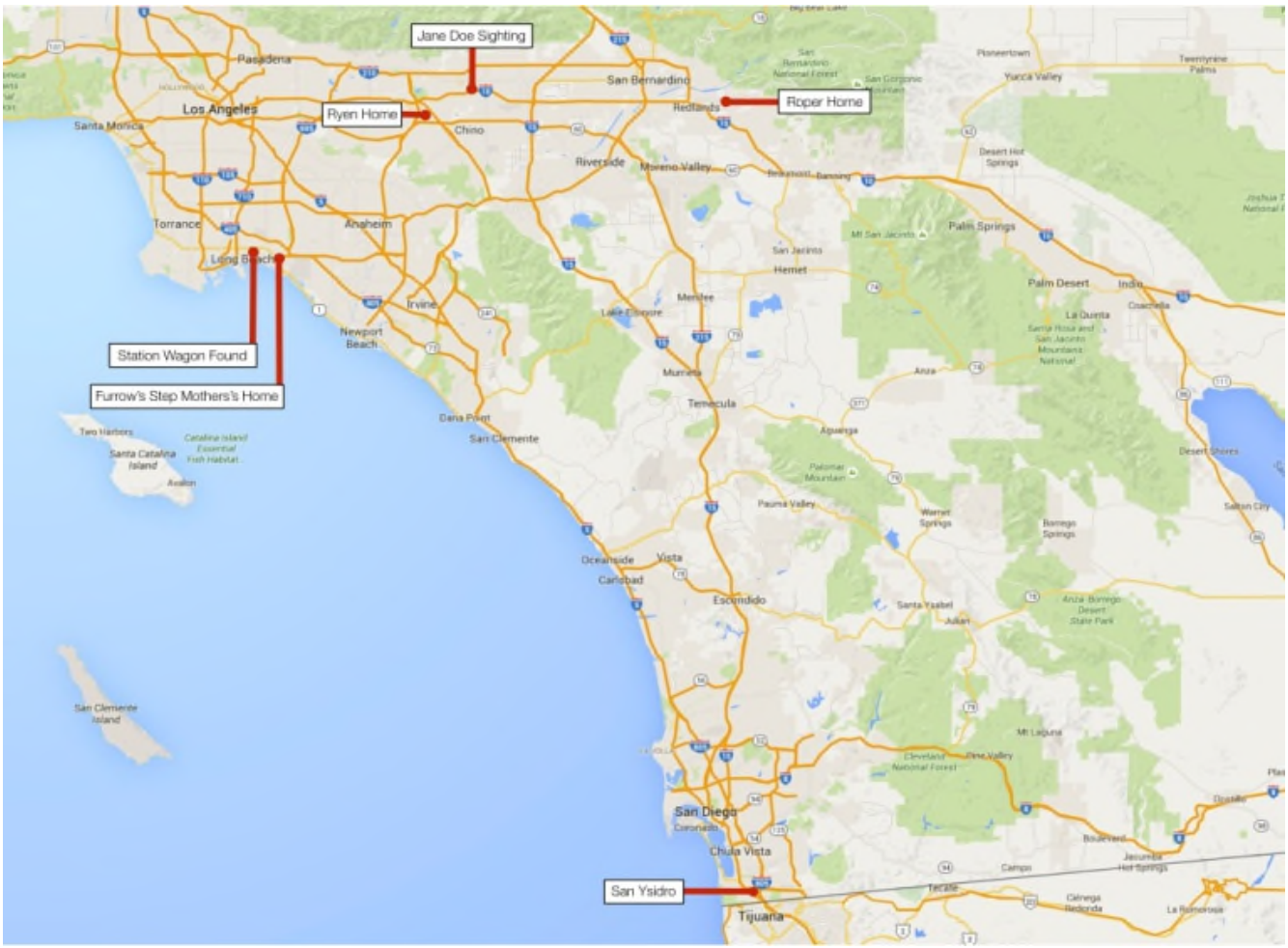
McCrary noted that it was unlikely that theft of the Ryens' station wagon was a motive for the murders, "as the keys were in the ignitions of both [Ryen] vehicles which were openly parked in the driveway, and therefore either vehicle could have been driven away easily without incident." *Id.* at 9. He also noted that the murders did "not appear to be a burglary 'gone bad,' as the offender(s) left behind credit cards, cash, a rifle, two handguns, jewelry, electronics and numerous other items of value." *Id.* Had the perpetrators indeed been looking for valuables to assist in an escape, Special Agent McCrary said he would have expected signs of ransacking in the home – there were no such signs. *Id.*

In addition to his analysis of evidence from the crime scene, McCrary cited several empirical studies to support his conclusions, including a study of over 18 million residential burglaries that found less than 1 percent involved homicides, and of that 1 percent, 65% of the offenders were known to the victims. *Id.*, citing Shannan Catalano, Ph.D., *Victimization During Household Burglary*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics; September 2010, NCJ 227379. (A copy of this report is included herein as Ex. 126.)

In short, this 25-year FBI veteran, who spent his career trying to bring criminals to justice and with no reason to slant his analysis in favor of Mr. Cooper, concluded that none of the purported motives the California Supreme Court ascribed to the attacks fit these murders.

2. <u>The Ryens' Station Wagon Was Found Near Lee Furrow's Stepmother's Home</u>.

Mr. Cooper testified at trial that he left the Lease house sometime after 8:30 p.m. on June 4 and registered at a hotel in Tijuana at 4:30 p.m. on June 5. District Attorney Kottmeier conducted a detailed and at times bullying cross examination trying to undercut Mr. Cooper's testimony that he left the Lease home early on the evening of June 4, made his way to Highway 71, which runs north and south, and hitchhiked to San Ysidro before crossing the border to Mexico. (99 R.T. 5847-5867.)



Ex. 127 [Link to above photo (Large Scale Cooper Map)].

The California Supreme Court accepted the State's theory that the Ryen station wagon was found "in the same direction defendant used on his way to Mexico." Ex. 110 [*People v. Cooper*, 53 Cal. 3d 771 at 837]. However, this analysis is refuted by a simple look at a map. Tijuana is 125 miles *southeast* of the Ryen home; the station wagon was discovered in a church parking lot in Long Beach, 45 miles *west* of the Ryen home. It is implausible that Mr. Cooper would have driven 45 miles west to an area with which he was not familiar, only to abandon the car and *then* hitchhike southeast to his intended destination, all within 16 or fewer hours. What makes this all the more implausible is that the Ryens' station wagon was not in Long Beach the morning after the murders; it didn't arrive there until days later at the earliest.[171] And witnesses and evidence confirm that Mr. Cooper was in Tijuana at 4:30 p.m. on June 5.

A newly-discovered piece of evidence makes the Supreme Court's implausible conclusion even less likely: the church parking lot where the Ryen's station wagon was found was just a few minutes drive down a surface street from the home of Lee Furrow's step-mother. Ex. 3 [Parker Decl. (Oct. 17, 2013), at ¶¶ 11 (fn.1), 13 (fn.3)].This discovery, of course, further strengthens the likelihood that Furrow and his partners committed the Ryen/Hughes murders and provides a more plausible explanation for the car's location than the one presented by the State and relied upon by the California Supreme Court.

G. <u>Additional Exculpatory Evidence Uncovered Since 1991</u>.

Numerous additional pieces of exculpatory evidence have come to light in recent years that were not available to the California Supreme Court in 1991, whether because the prosecution withheld or destroyed the evidence, or because Mr. Cooper's trial attorney failed to discover the evidence, or because new witnesses came forward with relevant information that

[171] 103 R.T. 6786-98.

could have been discovered before trial if leads had been fully investigated. This new evidence includes the following:

- **An SBSD Disposition Report Regarding The Bloody Coveralls.** This SBSD disposition report[172] was first discovered by Mr. Cooper's investigator in 1998.[173] It shows that, contrary to what SBSD Dep. Eckley testified in front of the jury at trial,[174] a senior SBSD deputy, Kenneth Schreckengost, approved Eckley's destruction of the bloody coveralls before they were tested or turned over to the defense.

- **New Witnesses From the Canyon Corral Bar.** The Canyon Corral Bar was located less than a mile from the Ryens' house, which at the time of the murders could be seen from the bar's parking lot. 97 R.T. 5261-62, 5276. The bloody tan t-shirt with Doug Ryen's blood on it was found near the bar on June 7, 1983.[175] Several bar employees testified at trial about three white men who were in the bar on the night of the murders and who were refused service because they appeared intoxicated and acting strangely. 102 R.T. 6530-31, 6542-43; 106 R.T. 7643-44. Shortly before Mr. Cooper's 2004 execution date, three bar patrons, never interviewed by the SBSD, came forward and provided further detail about these men that strongly suggested their involvement in the Ryen/Hughes murders. One of the new witnesses was Christine Slonaker, a phlebotomist (a person who draws blood), who said that at least one of the men had blood all over him. (June 28, 2004 HRT 7, 24-25.) Another witness, Mary Wolfe, also noticed that the man wearing a tan shirt had spots of blood on his shirt and a small bit of blood on his face. (June 28, 2004, HRT 123-24, 164-65.) Wolfe said at least one of the three men was wearing coveralls and both women recalled that the men wore tennis shoes. (June 28, 2004, HRT 22, 120-24.) Finally, a third witness, Lance Stark, a regular patron of the bar, corroborated Slonaker's and Wolfe's accounts. (July 23, 2004, HRT 20-21, 59-63.) Stark also testified that in early 2004 he was visited by someone he believed was associated with law enforcement who told him it would be in his best interest not to talk about the Kevin Cooper case. (July 23, 2004 HRT 20-21, 30-34.) The district court denied Mr. Cooper's efforts to show that the SBSD may have tried to intimidate Stark.[176]

- **SBSD Daily Logs.** During an evidentiary hearing in 2004, when the SBSD produced daily logs from the time period of the murders, Mr. Cooper's legal team became aware for the first time of the existence of a blue shirt possibly with blood on it found near the Canyon Corral Bar. The logs showed that at 2:41 p.m. on June 6, 1983, the day after the Ryen/Hughes' murders were discovered, Laurel Epler, a woman unconnected with the case, called the SBSD and reported that she had found a blue short sleeved shirt beside

[172] Ex. 128 [SBSD Disposition Report Regarding The Bloody Coveralls dated Dec. 1, 1983].
[173] *Id.*
[174] 102 R.T. 6550-6554.
[175] Ex. 64 [SBSD Recovered Evidence Report dated Jun. 10, 1983].
[176] Ex. 129 [Order 1) Denying Petitioner's Request for Modification of Scheduling Order Dated July 29, 2004 2) Denying Petitioner's Objections to Respondent's Witness Designations and 3) Denying Petitioner's Motion for Subpoenas/Subpoenas Duces Tecum dated Aug. 13, 2004 (ER4037-39)]; Ex. 130 [Order Denying Without Prejudice Petitioner's Motion for Leave to File an Amended Petition Dec. 8, 2004 (ER 4663-65)].

Peyton road.[177] Though Mr. Cooper's trial attorney became aware of the tan t-shirt discovered the next day, he was unaware of the discovery of a blue shirt. (31 R.T. 1790, 101 R.T. 6512-6513.) At the 2004 evidentiary hearing, the State asserted that the logs were given to Mr. Cooper's trial counsel before trial even though it was unable to produce a Bates stamped copy of the pertinent page. The district court refused to allow Mr. Cooper's trial attorney to testify to rebut the State's contention that it had given the logs to him, and Judge Huff accepted the State's explanation that the blue shirt was the same shirt as the tan t-shirt, despite their being found on different days, in different locations, under different circumstances. (31 R.T. 1790, 101 R.T. 6512-6513.)[178] It is not surprising the State has clung to the contention that the blue shirt did not exist. The State's theory has always been there was a single perpetrator. A **second** shirt discovered near the Canyon Corral Bar and only blocks from the tan t-shirt, and particularly one that was blue, would be nearly-indisputable evidence that there was a second killer.

- **Sheriff's Department June 7, 1983 "Criminal Bulletin."** The State's contention that the blue shirt did not exist is particularly disturbing considering another piece of evidence that Mr. Cooper's legal team became aware of in 2004: An SBSD Criminal Bulletin, dated June 7, 1983, that lists suspects for the murders as three "white or Mexican males, late teens or early 20's, wearing: white t-shirt, *blue short sleeve shirt*, red long sleeve shirt; Levi's." Ex. 68 [SBCSD Criminal Bulletin No. 16 dated Jun. 7, 1983], (emphasis added). The bulletin not only confirms that the original suspects were three males,[179] but further undermines the State's contention that there was no blue shirt.

- **Eye-witness Report of Three White Men Seen in Ryen Station Wagon.** Recently an eye-witness came forward to say that on Sunday, June 5, 1983, the afternoon after the murders, she saw three white men in a white station wagon with the Ryens' license plate in the vicinity of Chino and Pomona.[180] Notably, these men nearly collided with the witness, who later anonymously reported the incident to law enforcement. The description of the men and their placement in the station wagon is consistent with what Karee Kellison described at Diana Roper's early on the morning of June 5, 1983 and explains the blood found on three seats of the station wagon when it was recovered in Long Beach several days later.

- **Findings of Janine Arvizu After Her Review of SBSD Crime Lab Documents.** As part of his submission to the IACHR in Oct. 2013, Mr. Cooper submitted a letter from Janine Arvizu, a Certified Quality Auditor, who reviewed SBSD lab documents related to blood spot A-41, cigarette butts V-12 and V-17, blood vial VV-2 and the tan t-shirt (trial

[177] Ex. 67 [SBSD Log, Jun. 6, 1983 Blue Shirt Log (ER 3703)].
[178] Laurel Epler also testified in 2004 specifically that she recalled the shirt was blue and that she found it a different location from where the tan t-shirt was found on the following day. (August 26, 2004 HRT 140-48, 154-55, 161, 165, 187, 201-03.)
[179] The bulletin's description of the suspects as three men is also consistent with the initial statements of the surviving victim Joshua Ryen. These statements were analyzed in 2013 by Dr. Kathy Pezdek, a preeminent expert in eyewitness memory accuracy, who concluded that "the early eyewitness accounts of Josh Ryen exculpating Mr. Cooper were likely to be correct." *See* Ex. 9 [Pezdek Decl., ¶ 6].
[180] *See* Ex. 13 [J. Doe Decl.].

ex. 169).[181] In that letter, Ms. Arvizu found that the lab record the prosecution had produced was incomplete or contradictory in many respects. Evidence disappeared without a record of testing, and evidence was tested without a record of results. She also found the presence of an "unidentified contributor" with respect to an exemplar from blood vial VV-2 to be "alarming." She found a troubling pattern of serious gaps and omissions. She stated: "The observed facts are consistent with a concerted effort to tamper with evidence in a manner that would incriminate Kevin Cooper, and to hide evidence of tampering." She concluded that a "carefully designed protocol and a thorough review of all available files may be able to conclusively demonstrate that critical items of evidence … have been tampered with, and the incriminating forensic results that were introduced at trial were invalid."

- **Findings of Kathy Pezdek, Ph.D. Regarding Josh Ryen's Identification of the Assailants.** In a declaration dated Sep. 25, 2013, Dr. Kathy Pezdek, an expert in the reliability of eye-witness memory, stated her conclusion that Josh Ryen's early eye-witness memory accounts that three white or Hispanic men were the attackers were reliable and that circumstances after that cast "significant doubt about the reliability of his later memory accounts, such as in the interview that was later played at trial.[182]

- **Findings of Thomas Parker, Michael Adelson and Dr. Peter DeForest.** The California Supreme Court also did not have the benefit of the recent testimony of former FBI agent Thomas Parker, who concluded Mr. Cooper is innocent and that the SBSD was guilty of "tunnel vision" in pursuing Mr. Cooper, or of Michael Adelson, who concluded that Mr. Cooper's trial counsel rendered ineffective assistance, of Dr. Peter DeForest, who Judge Huff prevented from doing a proper scientific analysis in advance of testing the tan t-shirt and the hairs in the hands of the victims.[183]

[181] *See* Ex. 21[Arvizu letter].
[182] *See* Ex. 9 [Pezdek Decl., ¶ 31].
[183] *See* Ex. 3 [Parker Decl. (Oct. 17, 2013) and Ex. 22 [Adelson Decl.].

VII. MR. COOPER'S FAILED ATTEMPTS AT EXONERATION BEFORE U.S. DISTRICT JUDGE MARILYN HUFF

A. Judge Huff Improperly Handicapped Mr. Cooper's First Habeas Petitions.

After the California Supreme Court denied Mr. Cooper's direct appeal in 1991, he filed a federal habeas corpus petition in the United States District Court for the Southern District of California. His case was assigned to District Judge Marilyn Huff. In December 1992 Judge Huff appointed Charles D. Maurer, Jr. as Mr. Cooper's federal habeas corpus counsel. (Ex. 5 [SCAPEGOAT, p. 247].) Mr. Maurer was an appellate practitioner who had handled over 100 capital cases. (*Id.* at 247-48.) Maurer quickly deduced that a full-scale investigation of Mr. Cooper's case was necessary, and after spending over 100 hours on the most complicated capital case he had ever seen, he made his first request for fees from Judge Huff. (*Id*. at 248.) Judge Huff awarded only a third of the requested money, however, severely handicapping Mr. Maurer's ability to conduct an investigation. (*Id.* at 248-49.)

Shortly thereafter, Mr. Maurer suffered a severe change in circumstance, and was forced to resign from his law firm to establish a solo law practice that would afford him the flexibility required to cope with raising his children as a single parent. *Id.* No longer able to effectively represent Mr. Cooper, Mr. Maurer first asked to be relieved from the case in July of 1994. (*Id.*; Ex. 131 [Declaration of Jeannie Sternberg dated Apr. 27, 1995 ("Sternberg Decl."), ¶¶ 6-7 [outlining Maurer's inability to represent Mr. Cooper].) Judge Huff, however, repeatedly denied Maurer's requests to withdraw, despite the fact that Maurer was no longer conducting any legal work on Mr. Cooper's case. As a result, Maurer remained counsel of record as Mr. Cooper's first execution date of November 26, 1994 closed in. (Ex. 5 [SCAPEGOAT, p. 249].)

On July 7, 1994, Judge Huff issued an order informing Maurer that unless a habeas petition was filed, no stay of execution would be granted. (*Id*. at 249.) In response, Maurer

enlisted the help of Jeannie Sternberg, a staff attorney at the California Appellate Project (a non-profit that offers legal resources to attorneys representing death row inmates). (*Id.*; *see also* Ex. 131 [Sternberg Decl., ¶¶ 3, 7.]) Sternberg compiled a skeletal habeas petition filed on August 8, 1994, resulting in a temporary stay of execution. (Ex. 5 [SCAPEGOAT, p. 249]; Ex. 131 [Sternberg Decl., ¶¶ 5, 7; *see also* Ex. 132 [Declaration of Kevin Cooper dated Apr. 27, 1995] [indicating a lack of any work by Maurer on his behalf].) On June 2, 1995, nearly a year later, Judge Huff finally approved Maurer's replacement with William McGuigan and Robert Amidon. (Ex. 5 [SCAPEGOAT, pp. 249-50.) She failed, however, to grant more than a short continuance to allow for the preparation of an adequate petition containing Mr. Cooper's habeas claims. Ultimately Judge Huff denied Mr. Cooper's handicapped claims on August 25, 1997. (*Id.* at 250.) The Ninth Circuit Court of Appeals denied Mr. Cooper's appeal of the denial of his habeas petition. (Ex. 111 [*See Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001)].)

Undeterred, Mr. Cooper's habeas counsel filed another federal habeas petition on his behalf on April 30, 1998.[184] Unfortunately, Judge Huff was again assigned to the case and she summarily denied this petition on June 15, 1998[185], finding that the California Supreme Court had already denied the claim, that no new facts or law were presented, and that because Mr. Cooper had filed a notice of appeal of her denial of his first habeas petition, she was divested of jurisdiction and without authority to again address the merits of the petition.[186]

[184] Ex. 133 [*Cooper v. Calderon,* Case No. 98-CV-818, Petition for Writ of Habeas Corpus dated Apr. 30, 1998].
[185] Ex. 133.1 [*Cooper v. Calderon,* Case No. 98-CV-818, Order Denying Motion to Alter Judgment dated Jun. 30, 1998].
[186] Ex. 133.2 [*Cooper v. Calderon,* Case No. 98-CV-818, Notice of Appeal dated Jul. 29, 1998].

On November 4, 1999, Mr. Cooper's counsel again sought to file a successive petition, requesting the Ninth Circuit's permission pursuant to 28 U.S.C. Section 2244(b)(3)(A). The 9th Circuit denied this request in 2003.[187]

B. Judge Huff Failed to Comply With the Testing Ordered by the Ninth Circuit.

At the urging of the prosecution, the San Diego Superior Court set February 10, 2004, as the date for Mr. Cooper's execution. In spite of Judge Huff's denials of Mr. Cooper's prior habeas corpus claims, attorneys who believed in Mr. Cooper's innocence continued to fight on his behalf. New counsel filed a request with the Ninth Circuit for a stay of execution and for leave to file a successive habeas corpus petition that would include newly discovered exonerating evidence including the testimony of Christine Slonaker, Mary Wolfe, and Warden Midge Carroll. The request noted that several simple tests that had yet to be run might prove Mr. Cooper's innocence. Mr. Cooper requested permission to conduct this testing before he was executed. The tests included: (1) testing the tan t-shirt and A-41 for the preservative EDTA that would show SBSD tampering; (2) mitochondrial DNA testing of hairs found clutched in the hand of Jessica Ryen and other victims that might show who the true killers were.

On February 9, 2004, less than eight hours before Mr. Cooper was to be executed, the Ninth Circuit Court of Appeals issued a stay of execution and an order permitting the testing Mr. Cooper had requested. (*See* Ex. 134 [*Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc).]) Less than four hours before Mr. Cooper was to be executed, the Supreme Court of the United States declined to intervene.

Unfortunately, on remand to the district court Judge Huff was again assigned to the case, despite her prior denials of relief and clear bias against Mr. Cooper. She held hearings in 2004

[187] Ex. 122 [*Cooper v. Calderon*, 2003 U.S. App. LEXIS 27035 (9th Cir., Feb. 14, 2003)].

and 2005 on this successive petition, ultimately denying all relief. (*See* Ex. 14 [*Cooper v. Brown*, 2005 U.S. Dist. LEXIS 46232 (S.D. Cal. May 27, 2005)].)

As Judge Fletcher and ten other 9th Circuit judges later found, Judge Huff failed to abide by the Ninth Circuit directive. As stated by Judge Fletcher:

> There is no way to say this politely. The district court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests. . . . [T]he district court impeded and obstructed Cooper's attorneys at every turn as they sought to develop the record. The court imposed unreasonable conditions on the testing the en banc court directed; refused discovery that should have been available as a matter of course; limited testimony that should not have been limited; and found facts unreasonably, based upon a truncated and distorted record."

(Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009) (Judge Fletcher, dissenting)].)

Specific instances of Judge Huff's unfairness include: (1) her oral denial of Mr. Cooper's discovery requests prior to the actual filing of those requests. (Ex. 135 [Judge Huff Order Granting in Part and Denying in Part Petitioner's Motion for Testimony and Production of Documents re EDTA Testing dated Feb. 11, 2005 (ER 4751-54)]; June 29, 2004, HRT 99, 189); (2) her denying necessary testing and creation and use of a testing protocol recognized by the experts as flawed, resulting in the withdrawal of Mr. Cooper's expert (Ex. 136 [Letter from Peter De Forest to Judge Huff dated Sept. 3, 2004 (ER 4148-60)]; (3) her predetermining the result of mitochondrial DNA testing by only allowing the testing of hairs already examined in prior proceedings and determined not worthy of testing (June 4, 2004, HRT 34-35, 81-83); (4) her restricting the investigation and the presentation of evidence regarding the missing blue shirt with blood on it that was recovered the day after the murders (Ex. 137 [Petitioner's Memorandum of Points & Authorities in Support of Motion for Evidentiary Hearing dated Sept. 10, 2004 (ER 3886, 3887, 3901, 4185)]; August 13, 2004, HRT 182-83); and (5) denying

requests for documentation of purported contamination in the State's laboratory that was the basis for the State's expert's withdrawal of the lab's findings showing evidence tampering.

C. Judge Huff Ignored Attempted Intimidation of Post-Conviction Witness Lance Stark.

A criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor." (U.S. CONST. AMEND. VI.) The Supreme Court of the United States has also recognized:

> "[T]he right to offer the testimony of witnesses, and to compel their attendance ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts ... Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

(*Washington v. Texas*, 388 U.S. 14, 19 (1967).) Moreover, it is illegal under California law and United States law to attempt to intimidate a witness. (*See* Cal. Pen. Code § 136.1(a)(2); 18 U.S.C. § 1512(b).) However, despite these protections, state actors unlawfully attempted to intimidate Lance Stark away from participating in Mr. Cooper's post-conviction habeas proceedings before Judge Huff, and the judge prevented Mr. Cooper from demonstrating the unlawful conduct.

Specifically, during hearings before Judge Huff in 2004, the SBSD, acting through an unidentified individual, attempted to deprive Mr. Cooper of these rights by visiting Lance Stark (a witness Mr. Cooper intended to call) near his place of work in what unmistakably was an unmarked police car (a white crown Victoria with a computer extending from the dashboard). (*See* Ex. 1 [*Cooper*, 565 F.3d at 590-91].) This unknown government agent warned Stark against participating in the Cooper proceedings, noting "it would be in his best interests not to talk about the Kevin Cooper case" and then abruptly drove off. (*Id.*) This visit occurred shortly

after one of Mr. Cooper's investigators first interviewed Stark as a witness. (July 23, 2004, HRT 90-91.) This "warning" was obviously designed to discourage Mr. Stark from participating in Mr. Cooper's defense, as Stark noted in his next meeting with Mr. Cooper's attorney, "Well, I'm not sure if I should talk to you because I was told not to." (*Id*. at 101). Thankfully, Stark eventually agreed to participate and testified that he saw three white men at the Canyon Corral Bar on the night of the murder who may have had blood on them. (*Id*. at 60-63, 108-09.) However, the attempt to intimidate Mr. Stark demonstrates the prosecution's ongoing commitment to preventing, at any cost, the truth of Mr. Cooper's innocence to be established.

VIII. WHY MR. COOPER HAS THUS FAR BEEN UNABLE TO ESTABLISH HIS INNOCENCE.

A. The Criminal Justice System Impedes Actual Innocence Claims.

In the United States we treasure the constitutional concept of "innocent until proven guilty." We also rely heavily upon the notion that a crime must be proven "beyond a reasonable doubt." While admirable at the pre-trial and trial stage, these principles are reversed for anyone who has been wrongly convicted by a jury despite their innocence.

Mr. Cooper's inability to obtain habeas corpus relief in no way reflects the strength of the evidence that he is innocent and was framed. Rather, it largely is the result of a post-conviction system that poses nearly insurmountable barriers to prisoners seeking post-conviction relief through the courts.[188]

In the United States, and particularly in California, federal habeas corpus relief is no longer a viable option for most state prisoners.[189] The current federal habeas system has been described as "unworkable" and "perverse," and a petitioner's chance of obtaining relief as "microscopic."[190] The California system does not fare much better: a recent commission (which included then-Attorney General Edmund G. Brown, Jr.) described the state's death penalty and capital habeas system as "dysfunctional" and "broken."[191] Empirical research supports these conclusions: federal habeas relief is granted in less than 1% of non-capital cases[192], and the

[188] *See* Ex. 138 [Lara Bazelon, *Scalia's Embarrassing Question: Innocence Is Not Enough to Get You Out of Prison*, SLATE MAG., Mar. 11, 2015].
[189] Ex. 139 [Daniel S. Medwed, *California Dreaming: The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1444 (2007)] ("Federal habeas has effectively vanished as a viable post-conviction remedy for potentially innocent state prisoners over the past decade.").
[190] Ex. 140 [Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL L. REV. 1, 1 (2010)]; Ex. 141 [Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 89 (2012)].
[191] Ex. 142 [CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT, p. 116 (Gerald Uelmen & Chris Boscia eds., 2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf].
[192] EX. 143 [NANCY J. KING, ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 52 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf].

California Supreme Court denies 94% of the capital habeas cases brought before it.[193] Because habeas relief is so extraordinarily difficult to obtain – even for innocent petitioners – Mr. Cooper's unsuccessful habeas petitions do not in any way signify his guilt.

A brief overview of the state and federal habeas process illustrates the near impossibility of obtaining relief. A state prisoner cannot petition for federal habeas relief without first petitioning for post-conviction relief in state court. 28 U.S.C. § 2254(b). When a petitioner makes a claim in state court based on newly discovered evidence, he faces a particularly significant barrier if he is in California. While other states like Arizona or Florida grant relief when a prisoner provides new evidence that "probably" would have changed the verdict or sentence, *see* Ariz. R. Crim. P. 32.1(e); *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), California courts require that petitioners produce new evidence that "points unerringly to innocence." *In re Richards*, 55 Cal. 4th 948, 952 (2012) (internal quotation marks and alteration omitted). This standard is so severe that even innocent petitioners, such as Mr. Cooper, are unable to meet it.[194]

Only after a state court has denied a prisoner's claim for post-conviction relief may the prisoner file a habeas corpus petition in federal court. Federal habeas corpus, however, has its own exceptionally high standards that make it all but impossible for a prisoner to obtain relief. Under the so-called "relitigation bar" of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "if the state court denie[d] the [petitioner's] claim on the merits, the claim is

[193] This statistic is based upon publically available information that was compiled by the Habeas Corpus Resource Center, a state agency tasked with representing death row inmates in their habeas proceedings. It represents capital habeas cases denied since 1980 based upon a substantive denial, dismissal as moot, or dismissal due to the death of the petitioner. Only 4% of the identified 94% can be attributed to the "death of the petitioner."

[194] Ex. 144 [Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L.J. 1001, 1016 (2008)] (describing the standard as "quite strict and nearly impossible to meet"); Ex. 139 [Medwed, *supra* note 185, at 1470] (describing the standard as "remarkably severe").

barred in federal court unless one [of two] exceptions . . . applies." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The first extremely limited exception is that a federal court may grant relief if the state court proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under this standard, a federal court may not grant relief even if the state court was wrong; rather, it may grant relief only if the state court was *unreasonably* wrong. *Richter*, 562 U.S. at 101 ("an *unreasonable* application of federal law is different than an *incorrect* application of federal law" (internal quotation marks omitted)). So long as it is possible that "fair-minded jurists could disagree" on the application of federal law, the court cannot grant relief. *Id.* (internal quotation marks omitted). Moreover, the legal rule at issue must have been clearly established *by a decision of the Supreme Court of the United States*; it is not enough that the state court unreasonably applied clear precedent of the federal courts of appeals. *See Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam). And further, in determining whether the state court unreasonably applied a clear rule of the Supreme Court, a federal court is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). Consequently, all facts that come to light *after* the state court decision was rendered – including newly discovered evidence of innocence or of prosecutorial misconduct – cannot factor into the federal court's analysis. *See id*. at 1400 ("evidence introduced in federal court has no bearing on § 2254(d)(1) review"). The Supreme Court of the United States has acknowledged that even a petitioner with "a strong case for relief" likely cannot succeed under these extraordinarily difficult standards. *See Richter*, 562 U.S. at 102.

The second extremely limited exception is where the state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2). The federal court, however, is required to presume that any factual determinations made by the state court are correct, and the petitioner bears the burden of rebutting the presumption by presenting "clear and convincing evidence" to the contrary. § 2254(e)(1).

Finally, once a petitioner has filed an initial habeas corpus petition in federal court, AEDPA severely restricts his ability to present additional claims if new evidence subsequently comes to light.[195] A claim in a "second or successive petition" that was presented in a prior petition *must* be dismissed. § 2244(b)(1). At the same time, a claim that was not presented in a prior petition is waived and *must* also be dismissed, unless the petitioner shows that "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by *clear and convincing evidence* that, but for constitutional error, *no reasonable factfinder* would have found the applicant guilty." § 2244(b)(2)(B) (emphasis added).

This clear and convincing evidence standard under the AEDPA is exceptionally hard to satisfy and without question has contributed to Mr. Cooper's inability to obtain relief. In her 2007 concurring opinion in *Cooper v. Brown*, Judge McKeown voiced her concern with the manner in which AEDPA constrains federal review in cases like Mr. Cooper's where the integrity of the evidence has been called into question. Ex. 2 [*Cooper*, 510 F.3d 870, 1005, 1005 (9th Cir. 2007) (McKeown, J., concurring)] ("Despite the presence of serious questions as to the

[195] Ex. 31 [LINDA E. CARTER, ET AL., UNDERSTANDING CAPITAL PUNISHMENT, p. 251 §15.05 (LexisNexis, 3rd ed. 2012)].

integrity of the investigation and evidence supporting the conviction, we are constrained by the requirements of [AEDPA]. . . *In light of this demanding statutory barrier*, I agree that Cooper has failed to qualify for relief." (emphasis added)). Judge McKeown described the flaws in the current system under the AEDPA:

> "The habeas process does not account for lingering doubt or new evidence that cannot leap the clear and convincing hurdle of AEDPA. Instead, we are left with a situation in which confidence in the blood sample is murky at best, and lost, destroyed or tampered evidence cannot be factored into the final analysis of doubt. The result is wholly discomforting, but one that the law demands."

Id. at 1007. Moreover, in justifying the Ninth Circuit's decision not to rehear Mr. Cooper's habeas case *en banc* in 2009, Judge Rymer relied almost exclusively on AEDPA's interlocking web of impossibly difficult standards. *See*, Ex. 1 [*Cooper*, 565 F.3d 581, 637-39 (9th Cir. 2009) (Rymer, J., concurring) (citing § 2254(e)(1), § 2254(d), § 2244(b)(1), and § 2244(b)(2)(B)).] As Judge Fletcher commented elsewhere, "If you have been wondering why Kevin Cooper is still on death row, the answer is AEDPA."[196]

Thus, contrary to any suggestion that Mr. Cooper's failure to obtain habeas relief is a result of the strength of the evidence against him, his lack of success reflects a state and federal habeas system designed to deny him relief. *See Richter*, 131 S. Ct. at 786 ("If this standard [under AEDPA] is difficult to meet, it is because it was meant to be.").[197] The Supreme Court of the United States has justified the difficulty of obtaining habeas relief in cases like Mr. Cooper's because the "traditional remedy for claims of actual innocence based on new evidence . . . has been executive clemency," not habeas relief. *Herrera v. Collins*, 506 U.S. 390, 416-17 (1993).

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[196] Ex. 145 [William A. Fletcher, *Madison Lecture: Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805, 824 (2014)].
[197] The Inter-American Commission on Human Rights has concluded that AEDPA's limitations on meaningful habeas review violate a prisoner's human rights. *See* Ex. 146 [Ivan Teleguz, Report No. 53/13, Case No. 12.864, Merits, ¶¶ 112-113] ("Considering the irreversible nature of the death penalty, a federal post-conviction review limited by state court interpretations and by the state factual determination . . . does not comply with the inter-American standards, according to which the right to appeal is part of a body of procedural guarantees that ensures the due process of law.").

Accordingly, it would be entirely backward – if not a fundamental miscarriage of justice – for any determination about whether Mr. Cooper deserves executive clemency to rely on his inability to secure habeas corpus relief through the courts. That outcome would be a Catch-22 with, literally, fatal consequences.

B. The State Has Blocked Forensic Testing That Could Show Cooper Is Innocent.

No one can argue that the execution of an innocent man serves justice. Nor should the State object to a search for the truth before the ultimate penalty is imposed. Yet objecting to finding the truth is what the State has done and continues to do to Mr. Cooper.

Despite the significant evidence that has come to light that shows Mr. Cooper was framed and is innocent, the State has objected to, and state courts have denied, Mr. Cooper's attempts to obtain forensic testing on select pieces of evidence, even though this testing would be *at no expense to the government.* (Ex. 147 [Judge So's Order re Motion for Post-Conviction DNA Testing dated Jan. 14, 2011].) In 2010, Mr. Cooper's counsel learned of a new DNA testing technique called a "MiniFiler" test that is more sensitive than traditional DNA testing and may be utilized to determine DNA information from small and/or degraded DNA samples. (Ex. 148 [Revised Declaration of Norman C. Hile ISO Testing Request, dated September 3, 2010, ¶ 7]; Ex. 149 [Declaration of Dr. Vince Miller, In Support of Kevin Cooper's Motion for Performance of Post-Conviction DNA Testing dated Aug. 12, 2010, ¶¶ 5, 6, 8].) Accordingly, Mr. Cooper filed a motion seeking supplemental DNA testing of the tan t-shirt, A-41, and VV-2 in the hopes of identifying the secondary DNA donors who were previously found, but who were unable to be identified in the 2002 DNA testing. (Ex. 150 [Memorandum of Points and Authorities in Support of Performance of Post-Conviction DNA Testing dated Aug. 12, 2010]; Ex. 151 [Defendant Kevin Cooper's Reply ISO of Request for Further DNA Testing dated Oct. 4, 2010].)

Despite the fact that this testing could have been completed at no expense to the State and within a matter of weeks, the State refused to permit this testing.[198] It then vigorously opposed Mr. Cooper's motion to do it, and prevailed because the San Diego Superior Court relied on the California Supreme Court's 1991 ruling. (Ex. 147 [Judge So's Order re Motion for Post-Conviction DNA Testing dated Jan. 14, 2011].)

The recent exoneration of Anthony Ray Hinton after 30 years on death row in Alabama is a prime example of why it is so necessary to grant clemency in this case to permit forensic testing. On April 3, 2015 Hinton was released from jail after serving 30 years for a crime he did not commit.[199] Hinton had been charged with the murder of two fast-food managers in 1985. At Hinton's trial, the only evidence that suggested Hinton was the culprit was the testimony of the prosecution's purported "gun experts," who claimed the bullets that shot the two victims came from a gun Hinton's mother owned and which was found in the house Hinton shared with her. During post-conviction litigation, the Alabama Attorney General's Office refused for more than a decade to have the bullets and gun re-tested, even though defense experts had testified in 1994 and again in 2002 that they could not find any match between the bullets and the gun.

State prosecutors never questioned or disputed Hinton's defense experts' conclusions. The prosecutors just ignored this exonerating evidence, as well as Hinton's powerful alibi evidence: his co-workers confirmed he was at work with them at the time of the murders. With a conviction in hand, the prosecutors had no interest in pursuing justice or the truth, and in fact protected it at all costs.

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[198] The State continues to possess the glassine envelope that contains whatever is left of blood spot A-41, and it also possesses blood vial VV-2. At the time of Mr. Cooper's 2011 motion, the State also possessed the tan t-shirt. The tan t-shirt is now in the custody of the San Diego Superior Court.

[199] Ex. 152 [Abby Phillip, *Alabama Inmate Free After Three Decades on Death Row. How the Case Against Him Unraveled*, THE WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/03/how-the-case-against-anthony-hinton-on-death-row-for-30-years-unraveled/].

But in 2014 the Supreme Court of the United States granted Hinton a new trial because his trial attorney had been ineffective in failing to hire a better ballistics expert for his trial. *Hinton v. Alabama*, 134 S.Ct. 1081 (2014). The Court noted that Hinton's defense expert at trial was visually impaired and had no expertise in firearms identification. The same expert also admitted he could not operate the machinery necessary to examine the evidence.

When Hinton was given a new trial, Alabama authorities finally had no choice but to examine the forensic evidence that exonerated Hinton, since they would now have to respond to Hinton's experts' conclusions to keep their conviction. When the State's own experts retested the bullets and gun in an effort to counter Hinton's experts' findings from 1994 and 2002, three prosecution experts confirmed Hinton's defense experts' conclusions. As a result, the prosecution dropped all charges against Hinton. Hinton had spent 30 years in prison for a crime he did not commit, the last 20 years of which resulted directly from the prosecution's steadfast but unjustifiable refusal to reexamine evidence to ensure the truth came out.

The Hinton case is eerily reminiscent of Mr. Cooper's case. As in Hinton's case, here the prosecution simply refuses to permit testing that could exonerate the defendant, preferring to rest on an extremely questionable conviction rather than to permit a search for the truth. After a decision requiring a retrial, in Hinton's case the prosecution had no choice but to re-test the evidence. Mr. Cooper deserves the same chance to force the prosecution to submit evidence to testing that could prove he is innocent. And if the State is so confident Mr. Cooper is guilty of these murders, the State should be eager to conclusively confirm that with the testing Mr. Cooper requests.

C. Significant Testing Must Be Done to Establish Mr. Cooper's Innocence and to Potentially Identify the Ryens' Attackers.

In 2009, Judge Fletcher and several other 9th Circuit judges found that, in handling Cooper's 2004 federal habeas corpus petition, Judge Huff thwarted Mr. Cooper's efforts to do meaningful testing.[200] The IACHR concluded likewise.[201] The fact is that Mr. Cooper has never been able to accomplish in any meaningful way the testing that the 9th Circuit ordered in February of 2004: (1) of the tan t-shirt for heightened EDTA and (2) of the origin of the hairs clutched in Jessica Ryen's hands.[202] Ex. 134 [*Cooper v. Woodford*, 358 F.3d 1117, 1124 (9th Cir. 2004).]

Judge Huff also erroneously eliminated Cooper's expert, Dr. Peter DeForest, from participation in designing the testing protocol, and then created her own flawed testing protocol for examining the tan t-shirt for heightened EDTA. In so doing, she incorrectly chose the spot on the tan t-shirt to be tested. What she ignored was that the spot she ordered to be tested has never been determined to contain blood, much less Cooper's blood and DNA. Nevertheless, the State's own expert's test results were consistent with heightened EDTA in the spot that was tested.[203] This confirms Cooper's claim that the prior finding of his DNA on the shirt was the result of tampering in 1999.

As noted above, when the expert designated by the State learned that his test results showed heightened levels of EDTA, thus supporting Cooper's tampering claim, he suddenly

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[200] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 at 583]: "The district court so interfered with the design of the testing protocol that one of Cooper's scientific experts refused to participate in the testing. The district court allowed the state-designated representative to help choose the samples to be tested from the t-shirt. The court refused to allow Cooper's scientific experts to participate in the choice of samples. Indeed, the court refused to allow Cooper's experts even to *see* the t-shirt."

[201] Ex. 8 [Cooper IACHR Merits Report (Oct. 28, 2015), ¶ 115].

[202] During the proceedings before Judge Huff Mr. Cooper also requested and was denied the testing of A-41 for EDTA. Ex. 135 [Huff Order, Feb. 11, 2015].

[203] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 at 583]: "The state-designated lab obtained a test result showing an extremely high level of EDTA in the sample that was supposed to contain Cooper's blood."

withdrew his results, claiming that his laboratory had been the subject to "EDTA contamination."[204] When Mr. Cooper sought documentation of this supposed contamination, Judge Huff denied the request. The IACHR found this to be a due process violation.[205] Mr. Cooper has also recently obtained confirmation from a former employee of the lab that any such EDTA contamination was extremely unlikely.[206]

As to testing of hairs clutched in the victims' hands, while she ordered some hairs to be tested for mitochondrial DNA, Judge Huff designed the hair testing so that it would fail. Her designated expert, Edward Blake, conceded that he and the State's expert, Stephen Myers, had not examined many of the hairs that were recovered from the victims' hands. Nevertheless, Judge Huff only allowed testing of hairs already examined and thus already determined not to have anagen roots. Therefore, the mitochondrial DNA testing done by Dr. Terry Melton, based on Judge Huff's instructions, was doomed from the start. Significantly, however, during the DNA testing that she did, Dr. Melton discovered that the blood sample the State provided from blood vial VV-2 contained the DNA of not just Mr. Cooper, but of another unidentified person. This suggests, as Judge Fletcher concluded, that someone "topped off" the blood in VV-2 after Mr. Cooper's blood was planted on the tan t-shirt and blood drop A-41. (Ex. 1 [*Cooper v. Brown*, 565 F.3d 581].)

Given these gaping holes in the 2004 forensic testing as dictated by Judge Huff, and the possibility that new testing could prove SBSD tampering, as noted above, in 2010 Mr. Cooper filed motions under the California Penal Code to further test evidence. (Exs. 147-151, 155-162 [Penal Code § 1405 Briefing and Order]; Exs. 163-182 [Penal § 1054.9 Briefing and Order].)

[204] *See* Ex. 153 [Siuzdak Fax to Judge Huff withdrawing test results dated Oct. 27, 2014]; Ex. 154 [Parker Decl. (Jan. 13, 2016)].
[205] Ex. 8 [Cooper IACHR Merits Report (Oct. 28, 2015), ¶¶ 113-115].
[206] Ex. 154 [Parker Decl. (Jan. 13, 2016) re Scripps employee's statements doubting contamination].

The State opposed these requests (Ex. 160 [Opposition to 2010 DNA Testing Request dated Sept. 21, 2010] and, despite the plain language of Penal Code and Mr. Cooper's willingness to pay the cost of the testing, the San Diego Superior court denied his motions. (Ex. 147 [Judge So's Order re Motion for Post-Conviction DNA Testing dated Jan. 14, 2011]; Ex. 182 [Penal § 1054.9 Order].) Mr. Cooper thus has not been able to do meaningful testing of the tan t-shirt, A-41, blood vial VV-2 or the hairs clutched in the victims' hands.

Meanwhile as shown in Mr. Cooper's 2010 motion for testing[207] and in his submissions to the IACHR, DNA science has advanced significantly since the last DNA testing in 2002. As seen below, there is now a good chance to obtain "touch" DNA evidence from the tan t-shirt, orange towel[208], hatchet and hatchet sheath, and as well as to determine the identity of the as yet unidentified DNA contributors on A-41, the tan t-shirt, and blood vial VV-2.

Below is a short summary of testing that Mr. Cooper submits should be done, all supported by the submissions of experts Janine Arvizu and Selma and Richard Eikelenbloom. A more complete discussion of testing that should be done is found in Appendix C:

- tan t-shirt: habitual wearer testing should be performed to determine the DNA profile of the person who wore the shirt; further, the remaining stains should be tested to determine (1) if they are blood, (2) whose DNA is contained in the blood, (3) the identity of the unknown DNA contributor found during testing in 2002, and (4) whether there are heightened levels of EDTA in the blood spots that confirms tampering.

[207] Exs. 163-182 [Penal Code § 1054.9 Briefing and Order].
[208] This orange towel was recovered next to the tan t-shirt in the case and matches the towels the Ryen's had in their bathroom. Ex. 70 [SBSD Report re recovery of t-shirt and towel dated Jun. 10, 1983]; Ex. 183 [SBSD Report re Orange Towel –confirm's matching Ryen's dated Jun. 12, 1984].

- Orange Towel (found with the tan t-shirt and positively identified as having come from the Ryen House): touch DNA analysis should performed to determine (1) whether DNA is present and (2) the identity of any such DNA profile(s).
- Blood drop A-41: testing should be done to determine (1) the identity of the unknown contributor found during the 2002 testing, and (2) whether there are heightened levels of EDTA in the blood spot that confirms tampering.
- Blood vial VV-2: blood in this vial should be tested to determine: (1) the identity of the unknown contributor Dr. Melton found in 2004, and (2) what are the levels of EDTA present and whether they match the levels on the tan t-shirt and A-41. In addition, extracted DNA from DOJ Criminalist Myers' sample should be examined to replicate Dr. Melton's testing.
- Remaining hairs clutched in victims' hands: those hairs not already examined for anagen roots (1) should be examined, and (2) those found to have anagen roots should be tested for nuclear or mitochondrial DNA.
- Victims' Clothing (particularly Jessica's nightgown) should be examined for touch DNA that may have been deposited during the attack.
- Victims' fingernail scrapings should be examined for DNA as the victims displayed defensive wounds suggesting they may have had DNA of the perpetrators under their fingernails.
- The bloody hatchet: the handle should be analyzed, and the chemical layer that was applied years ago should be removed so that "touch" DNA testing can be done to see who handled the hatchet.

- The hatchet sheath: touch DNA testing should be done to determine who handled the sheath discovered under suspicious circumstances in the Lease House.
- Green Button: touch DNA should be done to determine who handled the green button that was discovered under suspicious circumstances in the Lease House.

Mr. Cooper also requests the Siuzdak/Scripps records related to 2004 EDTA testing; specifically, the Scripps laboratory test records should be produced to Cooper's defense team to enable it to determine whether there actually was "EDTA" contamination in the Scripps lab in 2004.

D. Deficiencies Within the U.S. Criminal Justice System Underscore the Need to Grant Mr. Cooper's Requested Relief.

As discussed previously, Mr. Cooper contends he was framed by law enforcement and that evidence has been destroyed, tampered with and planted. That may be hard for some people to accept. But reality is that no one should assume that the criminal justice system in California or elsewhere in the United States is perfect or even universally honest. There is considerable evidence that our criminal justice system produces wrongful convictions and human rights violations more frequently than anyone would like to admit. A brief survey of instances of flawed forensic evidence and pervasive prosecutorial misconduct underscores these deficiencies and highlights the need to undertake a careful review of Mr. Cooper's case.

1. Government Forensic Science Laboratories Continually Produce Flawed, False, and/or Misleading Results.

In an age where "CSI" and its many spin-offs are television's most popular TV shows, the public has been led to believe that scientific evidence prosecutors present in criminal cases predictably and accurately identifies the perpetrator of a crime.

Actual experience tells a very different story, as Mr. Cooper's case has shown. As discussed at length above, SBSD criminologist Daniel Gregonis falsified his test results on

bloodspot A-41, and evidence strongly suggests that he later planted Mr. Cooper's blood on the tan t-shirt and A-41 in 1999. In 2004, when the State's own expert, Dr. Gary Siuzdak, saw that the results from his EDTA testing on the tan t-shirt supported Mr. Cooper's claim of blood planting, he "withdrew" those results under highly suspicious circumstances.[209] Given this record, it is not reasonable to blindly trust the State's test results in this case to date.

Lest anyone need more proof that prosecution test results should be questioned, the record of government forensic science over the past 25 years tells a very frightening story. From "junk" science (that is testimony with no valid scientific underpinnings), to purported experts exaggerating the mathematical significance of test results, to outright fraud emanating from government-operated labs, the unreliability of government forensic testimony has been shown so frequently in recent years that no one should assume that the forensic evidence presented by law enforcement in this case can be trusted.

In 2009, a Committee of the National Academy of Sciences found that "with the exception of nuclear DNA analysis…no forensic method has been rigorously shown to have a capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[210] Since 1989, when an innocent person was first exonerated by post-conviction DNA testing, case after case has shown that innocent defendants had been convicted based, at least in part, on what can only be called faulty forensics. The National Innocence Project has found that unvalidated or improper forensic testimony played a role in nearly half of all cases where innocent persons were later exonerated through the use of

[209] This is discussed at length at Section VII.B herein.

[210] Ex. 115 [National Academy of Sciences Report: Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Aug. 2009, p. 7].

post-conviction DNA testing.[211] DNA exonerations are just a glimpse into the real problem – many, many innocent people are being convicted from CSI gone bad.

The problems with prosecution forensic testimony are numerous. First, much of the "science" that the government presents is not really science at all, nor is it subject to scientific evaluation, peer review, or validation. Over the years, law enforcement officials created many forensic "sciences" solely for the purpose of prosecuting people they thought had committed crimes. Examples of "junk" science that sent innocent people to prison and have now been debunked include microscopic hair identification, bite mark analysis, shoe print identification, and fiber comparisons. Based on testimony from purported government "experts," courts have permitted all of these rubrics to rise to the level of "science" even though they had little to no scientific underpinnings. Again, the National Academy of Sciences found that "…there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods."[212]

California's state and local law enforcement forensic labs suffer significant problems. In 1997, a team of consultants evaluated seven forensic laboratories operated by the California Department of Justice. They found that the laboratories were in deplorable condition, with serious concerns about evidence handling, cross-contamination and security. In 1998, the California Bureau of State Audits conducted an evaluation of 19 forensic laboratories. They found that many laboratories did not have essential elements of quality control system and

[211] Ex. 184 [Innocence Project, *DNA Exonerations Nationwide*, Oct. 26, 2015, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide].
[212] Ex. 115 [National Academy of Sciences Report: Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Aug. 2009, p. 8].

proficiency testing programs. They also found training was inadequate, and equipment was obsolete or malfunctioning.[213]

Examples of forensic testimony with little or no scientific underpinning that have been used to convict innocent people include:

- *Microscopic Hair Comparisons.* As described more fully below, the FBI admitted in April, 2015 that hair identification testimony from its forensic scientists was flawed in 95 percent of 268 cases over the past 20 years. The purported expert testimony involved statements regarding microscopic hair comparisons, a "science" that the FBI has since replaced with mitochondrial DNA hair analysis.[214]
- *Shoe Prints.* The 2009 National Academy of Sciences report concluded that there was no consensus concerning the number of characteristics required to make a positive identification when comparing shoe prints, and there have been no studies about the variability of class or individual characteristics or the validity or reliability of methods used to make such comparisons. "Without such population studies, it is impossible to assess the number of characteristics that must match in order to have any particular degree of confidence about the source of the impression." As to relying on the experience and judgment of an analyst in the absence of scientific studies, the

[213] Ex. 185[Janine Arvizu, *Forensic Labs: Shattering the Myth, National Association of Defense Lawyers journal*, May 2000].
[214] Ex. 186 [Associated Press, *DOJ, FBI Acknowledge Flawed Testimony From Unit*, The Washington Post, Apr. 18, 2015].

report notes that "it is difficult to avoid biases in experience-based judgments…."[215]

- *Bite-marks.* Bite-mark comparisons are equally suspect. The 2009 National Academy of Sciences report concluded that the committee had received "no evidence of an existing scientific basis for identifying an individual to the exclusion of all others" through bite-mark comparisons. In one case, the forensic odonatologist who testified in a 1982 murder case has testified that he no longer believes in bite-mark analysis.[216]

In presenting forensic testimony, analysts from government labs or independent "experts" hired by the prosecution either have exaggerated what the forensic evidence showed or simply offered invalid testimony. In one study involving 137 exonerated persons who were wrongly convicted, 60% of the forensic analysts called by the prosecution at their trials were found to have provided invalid testimony involving a total of 72 forensic analyses employed by 52 laboratories or medical practices in 25 states.[217]

While the lack of scientific foundation and the invalid testimony of government analysts and purported experts is deplorable, the outright fraud and incompetence that has been exposed involving government-run criminal laboratories should sound an alarm for anyone thinking about relying on prosecution forensics. In the past decade, scandals which, in the best light, call into question the veracity of any prosecution forensic evidence, include the following:

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[215] William Baird's "expert" testimony purporting to match the shoe print on the sheet would never pass muster in a court today.

[216] Ex. 115 [National Academy of Sciences Report: Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Aug. 2009, p. 176].

[217] Ex. 187 [C.Michael Bowers. 2006. Problem-based analysis of bite mark misidentifications: The role of DNA. *Forensic Science International* 159 Supplement 1:s104-s109].

- As noted above, in 2012, the Federal Bureau of Investigation commenced a review of nearly 2600 convictions involving hair and fiber identifications made by its examiners. After many delays in the review (including an initial review of 160 cases that detected substantial errors), the U.S. Department of Justice and the FBI announced in April, 2015 that in their initial review of 268 cases, FBI lab testimony was fundamentally flawed in 257 cases – **95%**.[218] Of those defendants convicted based on this flawed science, 32 received the death penalty, 14 of whom were executed or died in prison.[219] The review concluded that 26 of 28 FBI agent/analysts provided either testimony that included erroneous statements or submitted laboratory reports with erroneous statements. As a result of the review, a District of Columbia Superior Court judge overturned the conviction of a man who spent 26 years in prison after being convicted of a 1982 murder largely based on testimony of forensic experts linking the man to hair collected at the crime scene. Several others convicted of crimes have now been exonerated after DNA evidence contradicted testimony by FBI hair examiners.
- In May, 2014, the Santa Clara County, California, District Attorney's Office announced that its crime lab analysts had used the wrong chemical to conduct over 2,500 drug tests, resulting in false positive tests in at least seven cases.[220]
- In 2009, the San Francisco Police Department crime laboratory permanently closed its drug section after discovering that a technician had used cocaine

[218] Ex. 188 [*FBI Admits Flaws in Hair Analysis Over Decades,* Washington Post, Apr. 18, 2015]; Ex. 186 [Associated Press, *DOJ, FBI Acknowledge Flawed Testimony From Unit,* The Washington Post, Apr. 18, 2015].
[219] Id.
[220] Ex. 189 [Tracy Kaplan, *Crime lab uses wrong chemical in 2,500 methamphetamine tests,* San Jose Mercury News, May 5, 2014].

evidence for her personal use.[221] In 2010, the crime lab was accused of a mix-up of test tubes containing DNA. The lab denied the incident, but a report issued by the American Society of Crime Lab Directors later confirmed the sample switch.[222]

- The New York City medical examiner's office confirmed in January 2013 that it was reviewing more than 800 rape cases during a 10 year period that may have been mishandled by a lab technician who resigned in 2011 after an internal investigation uncovered problems with her work.[223] Among other things, the review uncovered 19 cases in which DNA evidence was commingled with DNA evidence from other cases.[224]
- In 2012, Massachusetts crime lab chemist Annie Dookhan was accused of falsifying drug sample tests results, forging paperwork, and mixing up samples affecting as many as 34,000 cases.[225] Dookhan resigned from the crime lab in March 2012, later confessing to "dry-labbing" substances (identifying drugs by look rather than applying a chemical test) and assembling drugs that looked similar, performing tests on a few of them, and labeling them all as positive. In November, 2013, Dookhan pleaded guilty to 27 charges, including 17 counts of obstruction of justice and eight counts of

[221] Ex. 190 [Peter Jamison, *SFPD crime lab's DNA evidence could be tainted by concealed mistakes*, SF Weekly News, December 15, 2010].
[222] Ex. 191 [Peter Jamison, *Exclusive: SFPD Concealed DNA Sample Switch at Crime Lab*, SF Weekly News, December 3, 2010].
[223] Ex. 192 [Mark Hansen, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results*, ABA Journal, September 1, 2013]; Ex. 193 [Joseph Goldstein, *Report Details the Extent of a Crime Lab Technician's Errors in Handling Evidence*, The New York Times, December 5, 2013].
[224] Ex. 192 [Hansen, Mark, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results*, ABA Journal, September 1, 2013].
[225] Ex. 194 [*Crime Lab and Forensic Scandals*, National Association of Criminal Defense Lawyers Website, October 29, 2015].

evidence tampering. [226] Over 500 convicted felons were released because their evidence had been examined by Dookhan and could not be reexamined. An inspector general's report concluded that the Massachusetts drug lab "lacked formal and uniform protocols with respect to many of its basic operations, including training, chain of custody, and testing methods."

- In February, 2014, two independent consultants hired to review the St. Paul, Minnesota, police crime lab found major errors in almost every area of the lab's work, including fingerprint and crime scene evidence processing.[227] The consultants concluded that more than 40 percent of the reviewed fingerprint cases involved "seriously deficient work" and that police crime lab employees appeared to lack the most basic understanding of how to inspect a fingerprint.
- In January, 2015, federal prosecutors stopped sending evidence for DNA testing to the District of Columbia crime lab, opting instead to use outside labs.[228] After a review of 116 cases, two independent consultants found what prosecutors conceded were critical errors. A subsequent audit concluded that the DNA analysts at the lab "were not competent and were using inadequate procedures." As a result, the U.S. Attorney's office ordered an outside review of 182 cases.

[226] Ex. 195 [Milton J. Valencia and John R. Ellement, *Dookhan, Former state chemist who mishandled drug evidence, sentenced to 3 to 5 years in prison*, Boston Globe, November 23, 2013]; Ex. 196 [Milton J. Valencia; *Pattern of neglect at state drug lab found*, Boston Globe, March 4, 2014].
[227] Ex. 192 [Mark Hansen, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results*, ABA Journal, September 1, 2013]; Ex. 197 [Madeleine Baran, *Troubled St. Paul crime lab problems even worse than first thought, probe reveals*, MPR News, February 14, 2013].
[228] Ex. 198 [*Under the microscope*, Washington Post, posted March 12, 2015]; Ex. 199 [Keith L. Alexander, *Crime lab in D.C. is told to halt DNA tests*, Washington Post, April 28, 2015]; Ex. 200 [Andrea Noble, *D.C. told to suspend in-house DNA testing*, Washington Times, April 28, 2015].

- In July, 2015, the Cuyahoga County, Ohio medical examiner announced that it was tightening reporting protocols after discovering at least 27 errors made by a former forensic chemist. The office is investigating thousands of cases the chemist had analyzed dating back to early 2013.[229]
- In 2014, an investigation of the Delaware state drug testing laboratory discovered more than 50 incidents of evidence tampering or theft between 2010 and early 2014. Other problems found at the lab included lax security and poor recordkeeping.[230]
- The Nassau County, New York crime lab was closed in February 2011. The state inspector general cited a litany of failures at the lab, including weak leadership, a dysfunctional quality management system, inconsistently trained and qualified analysts, and outdated and inconsistent testing procedures.[231]
- In 2003, a workplace investigation of the Laboratory Services Division of the Colorado Department of Public Health was conducted due to complaints by employees.[232] The Colorado Office of the Attorney General determined that the resulting report "contained information that could be considered mitigating evidence" in criminal cases in which the lab was involved and made the report available to the Colorado Public Defender's office and others. The report concluded that analysts were not adequately trained and that there was pressure from supervisors for lab analysts to make excess

[229] Ex. 201 [Cory Shaffer, *Cuyahoga medical examiner tightens protocols after botched tests,* The Times Reporter, July 16, 2015].
[230] Ex. 202 [Randall Chase, *Judge sets course for drug cases after lab scandal,* November 18, 2014].
[231] Ex. 192 [Mark Hansen, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results,* ABA Journal, September 1, 2013].
[232] Ex. 203 [Office of the Attorney General, *State of Colorado, Investigation Report,* March 18, 2013]; Ex. 204 [Susan Greene, *Colorado Forensic Lab Under Fire For Alleged Mismanagement, Lab Bias And "Cover Up,"* Huffington Post Denver; June 10, 2013].

accommodations for prosecutors and law enforcement agencies. The report also concluded that a supervisor made statements to analysts indicating bias against defendants in criminal trials.

- In 2010, an audit commissioned by the North Carolina Attorney General revealed that the North Carolina Bureau of Investigation withheld or distorted blood evidence in more than 200 cases, including death penalty cases.[233] Seven persons involved in the cases had been executed, others were on death row, and some had died in jail. The report found that agents improperly aided prosecutors for a 16-year period, including withholding test results favorable to defendants. The state Supreme Court had held in 1992 that lab notes are evidence that must be made available to the defense. The report concluded, however, "that did not happen for several reasons, including a mindset, led by a section chief, that the lab's main customer was law enforcement."
- Former FBI lab technician Jacqueline Blake admitted to failing to follow proper scientific procedure when preparing DNA evidence in 103 cases. (Ex. 205 [Office of the Inspector General, F.B.I, The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities (2004), pp 39-68,]) In particular, Ms. Blake had certified that she had performed the required control tests designed to ensure reliability of DNA analysis, when, in fact, she had not. (*Id.* at 41.)
- David Kofoed, chief crime scene investigator for the Douglas County, Nebraska Sheriff's Office, was convicted of tampering with DNA evidence in

[233] Ex. 206 [Mandy Locke, Joseph Neff, J. Andrew Curlis, *Scathing SBI audit says 230 cases tainted by shoddy investigations*, The News and Observer, Aug. 19, 2010]; Ex. 192 [Mark Hansen, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results*, ABA Journal, Sept. 1, 2013].

an investigation of a double murder. (*State v. Kofoed*, 283 Neb. 767, 801 (2012) (upholding conviction).) Kofoed planted a speck of the victim's blood in a car to bolster the case against the two suspects, who were later cleared of murder charges. (*Id.* at 794.)

- Investigation by the Office of the Attorney General in North Carolina identified 230 forensic lab cases from 1987 to 2003 in which the final report included positive preliminary results for the presence of blood, but did not include subsequent confirmatory tests reflecting negative or inconclusive results. *(See,* Exs. 192 and 206). These lab reports contributed to 190 convictions; four of those defendants are currently on death row and three have been executed. (*Id.*)
- In 1997, the internal review of an FBI laboratory found that (1) forensic analyst Michael Malone made false reports on numerous cases across the country and (2) he utilized *faulty* DNA analysis techniques in his work. (Ex. 207 [Keith L. Alexander, *DNA Sets Free D.C. Man Imprisoned in 1981 Student Slaying*, THE WASH. POST, Dec. 16, 2009].) After Malone's work was called into question, the Department of Justice ordered a review of all convictions in which he testified. (*Id.*) One of those cases was that of Donald Gates, who was convicted of rape and murder in large part due to testimony from Malone, who said that Gates' hairs were "microscopically indistinguishable" from hairs found on the victim's body. (Ex. 208 [*Donald Eugene Gates*, Innocence Project, http://www.innocenceproject.org/Content/Donald_Eugene_Gates.php (last

visited July 16, 2012)].) DNA testing conducted in 2007 proved that Gates did not commit the rape or murder; he was released after serving 27 years in prison. (*Id.*)

Given these widespread examples of misconduct by government-sanctioned labs and their employees, no one should be surprised that Mr. Cooper's case contains multiple instances of misconduct by SBSD forensic employees.

2. Just as in Mr. Cooper's Case, Prosecutorial Misconduct Is Undermining the Integrity of the Criminal Justice System, Requiring Severe Scrutiny of This Death Sentence.

> **"*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."** Ninth Circuit Court of Appeals Chief Judge Alex Kozinski, dissenting in *United States v. Olsen*, 737 F.3d 625, 631 (2013).

While many prosecutors operate with integrity, no one should assume that all prosecutors are honest and fair and only search for the truth. Most certainly are and do. But there are myriad examples recently that show that prosecutors can get caught up in the culture of winning at all costs and consequently ignore the truth. As a result, innocent men and women are convicted, imprisoned and sent to death row.[234]

Over eighty years ago, the United States Supreme Court established that every prosecutor has a "duty to refrain from improper methods calculated to produce wrongful conviction [and] to use every legitimate means to bring about a just one." (*Berger v. United States*, 295 U.S. 78, 88 (1935), reversing a conviction because of prosecutorial misconduct.) And, as Governor Brown himself recently recognized: "Prosecutorial misconduct should never be tolerated."[235]

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[234] A prime example is A.M. ("Marty") Stroud III, a prosecutor whose actions resulted in the wrongful conviction and sentencing to death of Glenn Ford. Mr. Stroud has expounded on what caused this and on the sad result in a letter which is Ex. 46 to this clemency petition.

[235] *See* Ex. 209 [California Governor Brown's veto message to the State Assembly regarding bill AB 885, dated Sept. 28, 2014, http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0851-0900/ab_885_vt_20140928.html].

Despite what the Constitution requires, however, no one should assume that prosecutorial misconduct didn't happen in Mr. Cooper's case. As here, acts of prosecutorial misconduct by over-zealous prosecutors are being discovered at ever increasing rates. As discussed above, the San Bernardino County District Attorney utilized numerous dishonest tactics to win a conviction and death sentence in Mr. Cooper's case. In the same manner, the following highlight the scourge of prosecutorial misconduct in the U.S. criminal justice system:

- A 2009 study by the New York State Bar Association found that, out of 53 exonerations in criminal cases, "more than half … were the result of 'government practices,' including prosecutorial misconduct."[236]
- A 2010 study done in California found that during a 12-year period there were 707 California cases in which "courts explicitly found that prosecutors committed misconduct." (Ex. 211 [Kathleen M. Ridolfi & Maurice Possley, Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009, p. 16 (N. Cal. Innocence Project, Santa Clara Univ. Sch. of L., 2010)].) Information favorable to the defense is more likely to be disclosed late or withheld entirely in death penalty cases. A study done by the National Association of Criminal Defense Lawyers (NACDL) in conjunction with University of Santa Clara School of Law recently found that information favorable to the defense was never disclosed or disclosed late by the

[236] Ex. 210 [Frances Robles, *Scrutiny of Prosecutors after Questions About Brooklyn Detective's Work*, NY TIMES (May 12, 2013), http://www.nytimes.com/2013/05/13/nyregion/scrutiny-on-prosecutors-after-questions-about-brooklyn-detectives-work.html?_r=0].

prosecution in 53% of decisions involving the death penalty, but in only 34% of all decisions studied.[237]

- In 2002, the Ninth Circuit Court of Appeals overturned a murder conviction because the deputy district attorney failed to disclose exculpatory evidence that proved the prosecution's key witness was lying. (*See Killian v. Poole*, 282 F.3d 1204, 1210 (9th Cir. 2002) [The court quoted from a letter written to the prosecutors by their key witness, which stated: "I even lied my ass off on the stand for you people."].) The jury relied on this witness to convict Killian of murder and robbery. (*Id.* at 1209.) It was only years later, after going through folders of government documents, that defense attorneys discovered the letter and obtained Killian's release – 18 years after her wrongful conviction. (*Id.* at 1210.)
- John Thompson came within a month of being executed because the prosecution deliberately withheld a police lab report showing his innocence.[238] The report showed blood found on the victim at the crime scene did not match Mr. Thompson's blood. (*Id.* at 13A.) This report led defense investigators to other discoveries that dismantled the case against Thompson, including uncovering inconsistent witness statements. (*Id.*) Inexplicably, the district attorney's office, which had all of this evidence when Thompson was on trial, failed to disclose it to the defense, as required by law. (*Id.*) After 18 years in prison, Mr. Thompson was retried and acquitted. (*Id.*)

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[237] Ex. 212 [KATHLEEN RIDOLFI, ET AL., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES, p. 43 (Nat'l Ass'n of Crim. Def. Law., Santa Clara Law, 2014), http://www.nacdl.org/discoveryreform/materialindifference].

[238] Ex. 213 [Brad Heath & Kevin McCoy, *Supreme Court Set to Hear a Case That Considers Whether Prosecutors' Employers Can Be Held Accountable For Not Preventing Misconduct*, USA TODAY, Oct. 6, 2010, at 13A].

- Likewise, CIA agent Edwin Wilson spent 20 years in prison because prosecutors knowingly produced falsified evidence to convict him of smuggling explosives to Libya. (*United States v. Wilson*, 289 F. Supp. 2d 801 (S.D. Tex. 2003).) At trial, Wilson testified that he smuggled the weapons for the CIA. (*Id.* at 807) The prosecutors presented evidence that Wilson had never worked with the CIA, even though they were aware of almost 40 occasions where Wilson furnished services to the CIA. (*Id.*) Twenty years after the conviction, the government finally admitted that the evidence used to convict Wilson was false, and that the prosecutors had knowledge of this during the trial. (*Id*. at 809) The government came clean only after Wilson discovered an internal document that proved the prosecutors and the CIA knew the evidence was inaccurate. (*Id.*) Due to this unconstitutional use of false evidence, Wilson's conviction was vacated. (*Id*. at 802.)
- Debra Milke spent 22 years on death row before being exonerated in December 2014.[239] In its order dismissing charges against her, the court leveled harsh criticism against the prosecution for its failure to turn over evidence showing a detective whose testimony was crucial to convicting Milke had a long history of misconduct and lying. The court called prosecutors' actions "a severe stain on the Arizona justice system." Even after Milke's exoneration however, local authorities declined to seek charges against the detective.[240]

[239] Ex. 214 [Paul Davenport, *Judge in Milke Murder Case Demands Explanation*, THE ASSOCIATED PRESS ST. & LOC. WIRE, Sept. 17, 2013]; *See also Milke v. Ryan*, 711 F3d 998 (2013).
[240] *See* Ex. 215 [Terry Tang, *Woman Who Spent 22 years on Death Row Has Murder Case Tossed*, ASSOCIATED PRESS ONLINE, Mar. 23, 2015].

- Juan Melendez spent 17 years on death row for a murder he did not commit. A post-conviction investigation revealed the real killer's confession that prosecutors had withheld. When an exculpatory witness also emerged, a judge ordered a new trial and prosecutors dismissed the case against Melendez.[241]
- In August 2013 a federal judge in Philadelphia overturned the 1992 conviction and death sentence against James Dennis because city police and prosecutors ignored, lost or "covered up" evidence that showed Dennis was not the killer.[242]
- In May 2014 the Delaware Supreme Court reversed the death sentence of Jermaine Wright after he had spent over 20 years on death row. The justices ruled that prosecutors withheld critical evidence and potentially exculpatory information including that a surprise witness who testified Wright had confessed had a history of cooperating with prosecutors in exchange for reduced charges.[243]
- In *United States v. Olsen*, cited above, after signaling the epidemic of prosecutorial misconduct, Chief Judge Kozinski cited 29 other federal and state cases in which *Brady* violations were proven.

The New York *Times* recently editorialized about the corruption in Orange County's district attorney's office. *See:* "Dishonest Prosecutors, Lots of Them in Southern California,"

[241] Ex. 216 [Mike Bush, *Life No Longer Taken for Granted; Wrongly Convicted and Sentenced to Death, Man seeks Repeal of Penalty*, ALBUQUERQUE J. (N.M.), Jan. 22, 2015].
[242] Ex. 217 [John P. Martin, *Citing 'Miscarriage of Justice,' Judge Overturns Murder Conviction*, THE PHILA. INQUIRER, Aug. 22, 2013].
[243] Ex. 218 [Laura Ly, *Delaware High Court Overturns 1992 Conviction and Death Sentence*, CNN.COM, May 20, 2014].

NY Times, Sep. 30, 2015.[244] The problem, as Judge Kozinski[245] and others who have studied prosecutorial misconduct have found, is that there is no effective deterrent to prosecutorial misconduct. Prosecutors and law enforcement personnel are not punished for their abuses that send innocent people to prison.[246] Meanwhile, victims of these practices have no remedies themselves against prosecutors who cause them years of wrongful imprisonment. [247] Shockingly, California's Attorney General's office has actively *defended* on appeal local prosecutors who have committed demonstrably outrageous *Brady* violations.[248]

Given these examples, it is not too much of a reach to conclude that the SBSD planted evidence in order to gain a conviction in Mr. Cooper's case. Acts of outright evidence planting have come to light in numerous other cases. For instance, in April 2014 two former LA Sheriff's Deputies were charged with planting evidence at a south L.A. marijuana dispensary. The charges included planting two handguns on top of a desk and withdrawing another from a drawer

[244] *See* Ex. 219 [The Editorial Board, *Dishonest Prosecutors, Lots of Them*, N.Y. TIMES, Sept. 30, 2015, http://www.nytimes.com/2015/09/30/opinion/dishonest-prosecutors-lots-of-them-in-southern-calif.html?_r=0].
[245] Judge Kozinski wrote the Foreward to Sidney Powell's book chronicling instances of recent corruption in the U.S. Dept. of Justice. This book, entitled: Licensed to Lie, details examples of *Brady* and other violations by federal prosecutors in a number of cases. The book is a chilling account of overzealous prosecutors who lie and cheat to win convictions. Brown Books Publishing Co. 2014.
[246] *See, e.g.* Ex. 220 [Martha Bellisle, *Despite misconduct, Prosecutors rarely Face Discipline*, ASSOCIATED PRESS ST. & LOC., Aug. 3, 2015].
[247] *See, Thompson v. Connick*, 563 U.S. 51 (2011).
[248] *See, e.g. People v. Efrain Velaxco-Pacisios*, 235 Cal. App. 4th 439 (2015). There, the Fifth Appellate District of the California Court of Appeal found state prosecutors had committed "outrageous government misconduct," that included falsifying a transcript to coerce a guilty plea. Notwithstanding these actions, the California Attorney General defended them on appeal, saying that a prosecutor's outrageous conduct should not be the basis for dismissal of a criminal case. *See also*, Ex. 221 [Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. TIMES, Jan. 31, 2015] reporting on how three federal appellate judges, including Judge Kozinski and Judges William Fletcher and Kim Wardlaw, in a case originating from Riverside County, expressed frustration and anger that California state judges are not cracking down on prosecutorial misconduct that included lies by a deputy district attorney. A Magistrate Judge's report had made a finding that Riverside County District Attorney's office had turned a blind eye to fundamental principles of justice to obtain a conviction. The California Attorney General's office defended the practices in federal court until called to account by the federal panel.

and placing it on a chair so that the deputies could arrest the proprietor. The charges also included filing a false report.[249]

This wave of prosecutorial misconduct underscores the need to redress the San Bernardino County District Attorney's and the SBSD's misconduct in Mr. Cooper's case. Their misconduct includes the failure to preserve and disclose multiple pieces of exculpatory evidence, including the bloody coveralls, the disposition report showing approval of their destruction, the blue shirt and the evidence documenting its existence, and Warden Midge Carroll's information that Pro-Keds were available at retail. It also includes failing to follow up on leads that led to the three white men who Josh Ryen identified as the attackers. And worse yet, it also includes planting evidence, including placing the missing the cigarette butts from the Lease house in the Ryens' station wagon, planting the hatchet sheath and button in the Lease house, and planting Mr. Cooper's blood from blood vial VV-2 on the tan t-shirt and A-41, all done for the purpose of convicting Mr. Cooper and then protecting that conviction at all costs.

3. California in General and San Bernardino County in Particular Have No "Innocence Commissions" Before Whom Mr. Cooper Can Present His Innocence Claims.

In light of the number of wrongful convictions and the prevalence of exonerations in recent years, and given the obstacles that courts, state legislatures and Congress have placed in the way of wrongfully convicted defendants proving innocence claims, some local and state jurisdictions have established bodies or commissions to investigate a case when a defendant asserts an innocence claim. North Carolina, for example, has an Innocence Commission that

[249] *See* Ex. 222 [Melissa Pamer, *Sheriff's Deputies Charged with Planting Evidence at South L.A. Pot Shop*, KTLA 5, Apr. 23, 2014, http://ktla.com/2014/04/23/sheriffs-deputies-charged-with-planting-evidence-at-l-a-pot-shop/].

regularly reviews innocence claims by prisoners in custody.[250] And, after a string of high-profile wrongful convictions came to light, the Los Angeles County District Attorney established a wrongful conviction unit to review innocence claims related to cases it prosecuted.[251]

Unfortunately, neither San Bernardino County nor the State of California has such a body or process that would enable a defendant to seek review of his or her case on innocence grounds. Thus innocent but wrongly-convicted prisoners like Mr. Cooper are burdened with the virtually insurmountable restrictions created by courts, the California legislature and Congress that, for all intents and purposes, make innocence irrelevant to post-conviction appeals.

This situation makes it all the more important for the Governor to exercise his clemency power under Article V, Section 8(a) in this case, where an innocent man's life is at stake.

[250] Ex. 223 [Marisa Gerber, *L.A. County D.A. Jackie Lacey to Unveil Details on Wrongful-Conviction Unit*, L.A. TIMES, June 29, 2015, http://www.latimes.com/local/lanow/la-me-ln-conviction-integrity-unit-20150629-story.html].
[251] (Id.)

IX. THE IACHR'S FINAL REPORT CONFIRMS THAT MR. COOPER'S RIGHTS HAVE BEEN VIOLATED IN NUMEROUS WAYS OVER THE PAST 30 YEARS AND THAT HIS CASE SHOULD BE REVIEWED.

A. The IACHR Found That Mr. Cooper's Human Rights Were Violated by his Prosecution, Sentencing, Appeals and Treatment on Death Row.

Judge Fletcher and the other Ninth Circuit judges who dissented from the denial of Mr. Cooper's petition for rehearing *en banc* in 2009 are not the only judges to find significant error in Mr. Cooper's prosecution and death sentence. As noted earlier in this petition, on September 12, 2015, the Inter-American Commission on Human Rights, an agency of the Organization of American States, issued a Final Report after studying a petition that Mr. Cooper filed in April 2011. After considering the extensive record before them, all six IACHR commissioners found that Mr. Cooper's human rights were violated during his prosecution, sentencing, and appeals. The IACHR Final Report states:

> **"[A]fter analyzing the position of [Cooper] and the State, and the available information, the Inter-American Commission concludes that the United States is responsible for violating Articles I [right to life, liberty and personal security], II [right to equality], XVIII [right to a fair trial] and XXVI [right to due process] of the American Declaration with respect to Kevin Cooper. Consequently, should the State carry out the execution of Mr. Cooper, it would also be committing a serious and irreparable violation of the basic right to life recognized in Article I of the American Declaration."**[252]

The IACHR made these significant and unequivocal findings after an extensive review of evidence, full briefing from Mr. Cooper as petitioner and the United States as respondent, and a hearing in Washington, D.C. before the Commissioners themselves. There can be no doubt that the IACHR acted with full deliberation, after giving the parties full opportunity to present their cases. Shouldn't a ruling such as this be sufficient grounds to give Mr. Cooper a chance to prove

[252] Ex. 224 [IACHR, Report No. 52/15, Case 12,831, Merits, Kevin Cooper, United States, Sept. 12, 2015 ("Cooper IACHR Merits Report (Sept. 12, 2015)]. The Organization of American States (OAS) General Assembly has "repeatedly recognized that the American Declaration is the source of international obligations for the member states of the OAS." Id. at 21.

his innocence? Does California want to be viewed internationally as a place where human rights violations are ignored?

B. The IACHR Found Numerous Denials of Mr. Cooper's Right to Due Process of Law.

With respect to violations of Mr. Cooper's right to a fair trial and to due process of law, the IACHR found eight separate due process violations:

(1) with respect to the 2004 testing of the tan t-shirt for evidence tampering, based on the heightened levels of EDTA that the State's own expert found during his testing, Mr. Cooper's blood appears to have been planted on the t-shirt during post-conviction DNA testing;[253]

(2) federal district court judge Marilyn Huff improperly denied Mr. Cooper's requests for discovery into the State's expert's "withdrawal" of his test results after the expert learned the high levels of EDTA he found suggested that blood had been planted;[254]

(3) Judge Huff improperly denied Mr. Cooper's expert from participating in designing and implementing the test protocol for heightened EDTA on the tan t-shirt;[255]

(4) Judge Huff improperly failed to allow Mr. Cooper to determine why the DNA of two persons, and not just Mr. Cooper, was found in blood vial VV-2, the blood sample taken from Mr. Cooper in 1983 and used for mitochondrial DNA testing in 2004;[256]

[253] Id. at 23.
[254] Id. at 23.
[255] Id. at 24.
[256] Id. at 24.

(5) the trial court improperly denied Mr. Cooper's 2011 request for DNA testing of the tan t-shirt and blood spot A-41 using more advanced and sensitive test methods;[257]

(6) the prosecution failed to divulge to Mr. Cooper's defense team: (a) the information Warden Midge Carroll provided to the SBSD that the Pro Keds shoes were in fact available at retail; (b) that the bloody coveralls Diana Roper turned over to the SBSD were never tested; and (c) that trial testimony from the SBSD deputy who destroyed them was false because he did not act on his own but rather with the approval of his supervisor;[258]

(7) the State acted improperly when it denied Mr. Cooper's defense team the opportunity to participate in the decisions of whether to test the bloody coveralls before they were destroyed;[259]

(8) the prosecution acted improperly when it failed to turn over to Mr. Cooper's defense team the blue short-sleeved shirt with blood on it found near the Canyon Corral bar the day after the murders were discovered. Contrary to what Judge Huff concluded, the IACHR found that the blue shirt indeed existed based on the record in the SBSD's own files showing that a citizen discovered the blue shirt and the SBSD retrieved it.[260]

[257] Id. at 24.
[258] Id. at 24.
[259] Id. at 24.
[260] Id. at 25.

Based on all these due process violations, the IACHR concluded that "30 years after Mr. Cooper's conviction and sentence, the question of his innocence has not been answered 'once and for all,' as requested by the Ninth Circuit."[261]

In making its findings that Mr. Cooper's due process rights were violated in so many ways, the IACHR criticized the limitations on post-conviction remedies created by the AEDPA, which prevents judges in the US courts from fully considering whether Mr. Cooper is factually innocent.[262]

C. The IACHR Found Mr. Cooper's Trial Counsel Provided Ineffective Assistance.

The IACHR also found that Mr. Cooper's court-appointed trial counsel provided "ineffective assistance," which is a further due process violation.[263] Relying on the American Bar Association's adopted Guidelines and related commentaries for death penalty defense, the IACHR found Mr. Cooper's trial counsel's efforts deficient in many respects.[264]

D. The IACHR Found That the SBSD's Investigation and the San Bernardino District Attorney's Prosecution of Mr. Cooper Violated His Right to Equality Before the Law.

Article II of the American Declaration states that:

> All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

In its Report, the IACHR recounted the myriad of indications that Mr. Cooper faced racism in his prosecution: from the SBSD's ignoring evidence implicating three white males as the perpetrators, to the District Attorney's refusal to allow the case to be transferred to a racially diverse forum, to the statistical evidence that, in the United States, a black person is more likely

[261] Id. at 25.
[262] Id at 25.
[263] Id. at 26.
[264] Ex. 224 [Cooper IACHR Merits Report (Sep. 12, 2015)] at p. 27.

to receive the death sentence than a white person.[265] In particular, the IACHR noted "the special seriousness of that fact that the [United States'] own studies demonstrate that the race of defendants and the race of victims of crime has an undeniable influence on conviction and sentencing patterns."[266] In addition, the IACHR cited a public hearing it held in October 2014 on reports of racism in the U.S. justice system.[267] The IACHR noted in particular that reports of racism were not new, but could be traced to US government reports as early as 1981.[268]

Acknowledging the race of the victims (white) and Mr. Cooper's race (African American), the IACHR said that the courts in the U.S. were "on notice" and had the obligation in Mr. Cooper's case to complete a full and fair inquiry into the possibility of law enforcement evidence tampering and failure to fully investigate other potential perpetrators, particularly in light of the significant amount of evidence pointing to the perpetrators as having been white.[269] The IACHR concluded that the U.S. justice system should investigate whether racial discrimination was at the heart of the due process violations that clearly occurred in Mr. Cooper's prosecution, and which were raised time and again at trial, on appeal and during post-conviction proceedings. This included in particular the failure of the SBSD and the prosecution to follow leads suggesting that three white men identified by the sole surviving victim and other witnesses near the crime scene and in the Canyon Corral Bar the night of the murders were the true killers.

E. The IACHR Concluded That the Imposition of the Death Penalty in Mr. Cooper's Case Would Constitute a Grave Violation of Article I of the American Declaration.

Article I of the American Declaration provides:

[265] Id. at 27.
[266] Id. at 28, citing Ex. 225 [General Accounting Office Report to the Senate and House Committees on the Judiciary titled: *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities*, Feb.1990].
[267] Id. at 28, citing
[268] Id. at 28, citing
[269] Id. at 29.

> "Every human being has the right to life, liberty and the security of his person."

Given its findings with respect to violations of Mr. Cooper's due process and fair trial rights and the ineffective assistance of his defense counsel at trial, the IACHR concluded that the imposition of the death penalty in such circumstances would constitute a grave violation of Article I of the American Declaration.[270]

F. The IACHR Recommended That Mr. Cooper Be Granted Relief in the Form of a Review of His Trial and Sentence in Accordance With the Guarantees Enshrined in Articles I, II, XVIII and XXVI of the American Declaration.

Given its findings of human rights violations, the IACHR recommended "a review of [Mr. Cooper's] trial and sentence in accordance with the guarantees of due process and a fair trial enshrined in Articles I, II, XVVIII and XXVI of the American Declaration."[271]

We submit that, given this recommendation after the IACHR's exhaustive investigation, the Governor should institute a complete investigation into Mr. Cooper's case to determine whether he is innocent. In the alternative, the Governor should take action to insure that Mr. Cooper has the opportunity to have a new, fair trial that includes the right to conduct forensic testing to finally and conclusively demonstrate that he is innocent.

[270] Id. at 30.
[271] Id. at 31.

X. SEVERAL JURORS BELIEVE MR. COOPER SHOULD RECEIVE CLEMENCY AND MORE TESTING SHOULD BE DONE.

As demonstrated above, the jury that heard the evidence the prosecution presented at trial in 1984-5 did not hear critical evidence that exonerates Mr. Cooper. For instance, the jury never knew that:

- a second shirt with blood on it, this one blue and short-sleeved, was found near the Canyon Corral Bar the day after the murders were discovered, that the SBSD recovered it, but it then disappeared;
- on the night of the murders, patrons in the Canyon Corral Bar saw three white men acting strangely, one with blood on his coveralls and another wearing a blue shirt;
- Three white men were seen driving the Ryens' station wagon the afternoon of the day of the discovery of the murders in Claremont, a city north of Chino Hills;
- Pro-Keds tennis shoes were not only available in 1983 at prisons, but in fact were sold at retail stores and through catalogues;
- The Warden at CIM, Midge Carroll, had alerted the SBSD that Pro-Keds tennis shoes were in fact available at retail stores and in catalogues, but the SBSD ignored this and the prosecution wrongly asserted at trial that the tennis shoes were only available at prisons;
- an exemplar of Mr. Cooper's blood taken from vial VV-2 also contains someone else's DNA;
- Lee Furrow's stepmother was living within 3 miles of where the Ryens' station wagon was found;

- the head of the SBSD crime lab and central forensic witness at trial, William Baird, had been caught stealing heroin from the SBSD evidence locker;
- SBSD laboratory examiner Daniel Gregonis not only falsified his test records in 1983-4 to find a match with Mr. Cooper's blood type, but Gregonis lied under oath in 2003 when he said that he never removed A-41 from the glassine envelope in 1999;
- an SBSD "disposition report" discovered in 1998 showed that SBSD Dep. Eckley had received permission from his supervisor to destroy the bloody coveralls instead of having them tested (Ex. 1 [*Cooper*, 565 F.3d at 625]);
- the State's expert for analyzing EDTA on the tan t-shirt in 2004, Gary Siuzdak, withdrew his findings when he found out they supported Mr. Cooper's assertion that his blood had been planted on the tan t-shirt;
- expert testimony has revealed that Josh Ryen's initial statements about three white men being the culprits most likely represent his true memory of the night of the murders;
- further expert testimony has revealed that the Ryen Hughes murders were most likely the result of a "statement" killing and not a result of a home invasion or car theft as the prosecution claimed.

Only a fraction of the above was actually presented to the jurors; nevertheless in January 2004, when Mr. Cooper was only weeks away from being executed, several of them expressed their wish that Gov. Schwarzenegger grant Mr. Cooper clemency based on their concern about what evidence they did not hear, and about evidence testing that had never been done. For example, one juror wrote:

> "Because the murders were so atrocious, and because of the devastating loss of life, at the time I let the police misconduct go

> and sentenced Mr. Cooper to death. I now regret that decision. Too much continues to bother me about this case. I am angered by the fact that jurors were not shown the photograph of Jessica Ryen grabbing onto hair, and the police report that states her hair is inconsistent with her own….I am angry that the hair has not been tested. I am angered to learn that the officer who testified about the footprints was caught stealing drugs from the evidence locker, and admitted to having in his office a size 9 shoe that would match the prison-issued shoe said to have been worn by Mr. Cooper. I am bothered to know that a convicted murderer who years before had dismembered his female victim was near the scene at the time, that his hatchet was missing, and that his girlfriend called police and turned in his bloody coveralls. … I have followed Mr. Cooper's case, and am aware that there is still testing that has not been done. The … hair was not tested, sweat on the t-shirt was not tested."

Another juror said:

> "There are so many unanswered questions that we may never know. Why did Josh not recognize Mr. Cooper? Why were there no finger prints found where the evidence showed there should have been. Why wasn't information about the station wagon followed up on? … Why did the prosecution cover up evidence? Why was the jury not shown the photograph of Jessica Ryen clutching hair? …Why wasn't the jury told about the convicted murderer's bloodied coveralls turned over to the police? Why did the police destroy those coveralls? Why wasn't the found beer can ever tested for saliva?"

A third juror said:

> "I had heard before that there was evidence not presented to the jury. And, in light of new technology, I do not see any reason not to have the DNA tests done. There were a lot of questions not answered. … I would hate to see an innocent man die for something he didn't do, and I would expect the state to explore every avenue to find the truth."[272]

There can be no question that the jury never saw much exonerating evidence that has now come to light, evidence that could have changed its verdict and death sentence. There can also be no question that much testing could be done now that could not have been done before trial.

[272] Ex. 15 [Juror Letters from 2004].

At the least, the jurors' plea to have testing done that may now reveal the truth should not fall on deaf ears before an innocent man is executed.

XI. NEWSPAPER EDITORIALS HAVE SUPPORTED CLEMENCY FOR MR. COOPER AND ARE CONCERNED ABOUT THE POTENTIAL EXECUTION OF AN INNOCENT MAN.

When Mr. Cooper faced possible execution in February 2010, many editorial writers decried the attempted execution of a man who was likely innocent. Nicholas Kristof of the New York *Times* wrote, in an op-ed piece entitled "Framed for Murder":

> "This case is a travesty. It underscores the central pitfall of capital punishment: no system is fail-safe. How can we be about to execute a man when even some of America's leading judges believe he was framed?" [273]

Alan Dershowitz and David Rivken wrote about Mr. Cooper's plight in the Los Angeles Times. In an op-ed piece entitled: "A Time For Clemency, They said:

> "A credible chance for clemency, particularly when there are serious problems with the investigation and prosecution of the underlying offense, is essential to maintain public confidence and support for a system of justice that includes the death penalty. It's a safety valve, precluding further polarization in our political and judicial battles about the death penalty."[274]

Both the San Francisco *Chronicle*[275] and the Los Angeles *Times*[276] ran editorials asking Gov. Schwarzenegger not to execute Mr. Cooper.

Since that time, with executions in California on hold because of legal challenges to the method of lethal injection, the tide of editorial comment on the death penalty has swung decidedly against the death penalty. Citing, among other things, the scores of exonerations of innocent people who have been on death row across the nation, the most influential newspapers in California have taken editorial stands against the death penalty in California. The Los

[273] Ex. 226 [Nicholas Kristof, *Framed for Murder*, N.Y. TIMES, Dec. 8, 2010, http://www.nytimes.com/2010/12/09/opinion/09kristof.html?_r=0].
[274] Ex. 227 [Alan M. Dershowitz & David B. Rivkin Jr., *A Time for Clemency*, L.A. TIMES, Dec. 1, 2010, http://articles.latimes.com/2010/dec/01/opinion/la-oe-rivkin-deathpenalty-20101201].
[275] Ex. 228 [*Reasonable Doubts About Executing Kevin Cooper*, San Francisco Chronicle, December 13, 2010].
[276] Ex. 229 [*Governor, Save Inmate's Life*, Los Angeles Times, December 23, 2010].

Angeles *Times*,[277] The San Francisco *Chronicle*,[278] the Sacramento *Bee*,[279] the Oakland *Tribune*,[280] The Contra Costa *Times*[281] and the San Jose *Mercury News*[282] have all published editorials supporting repeal of California's death penalty.

Recently, the New York Times published "Justice Gone Wrong in New Orleans," decrying a culture of "negligence and outright dishonesty that has pervaded [the New Orleans District attorney's office] for decades."[283] The editorial discussed dozens of instances where that office failed to turn over *Brady* material.

Suffice it to say, a decision by Governor Brown to prevent the execution of a man who is innocent, and who was likely framed, will not draw editorial fire from our state's most influential newspapers.

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[277] Ex. 230 [Ron Briggs, *Let's abandon a fatally flawed law; We believed the Briggs initiative -- the Death Penalty Measure we wrote in 1977 -- Would Bring Greater Justice. We were wrong*, Los Angeles Times, Feb. 12, 2012]; Ex. 231 [*Death by `Return to Sender'*, Los Angeles Times, October 7, 2011]; Ex. 232 [*Death Penalty Dishonesty*, Los Angeles Times, September 25, 2012].

[278] Ex. 233 [*Death Penalty's Fatal Flaws*, San Francisco Chronicle, July 18, 2014]. *See also*, Ex. 234 [Mugambi Jouet, *Why Does Kamala Harris Defend the Death Penalty?*, San Francisco Chronicle, Sep. 6, 2015].

[279] Ex. 235 [Stuart Leavenworth, *Why We Changed Stand on Death Penalty*, Sacramento Bee, Sep. 16, 2012]; Ex. 236 [*Time to End the Fiction of California's Death Penalty*, Sacramento Bee, Sep. 9, 2012].

[280] Ex. 237 [*Oakland Tribune endorsement: Proposition 34 -- California's death penalty has got to go*, The Oakland Tribune, Nov. 1, 2012]; Ex. 238 [Howard Mintz, *Defeat of Proposition 34: California's death penalty battle will continue*, The Oakland Tribune, Nov. 7, 2012]; Ex. 239 [Ronald Entwisle, *Guest Commentary: Spate of recent news articles makes strong case against capital punishment*, The Oakland Tribune, Apr. 18, 2015]; Ex. 240 [Howard Mintz, *California death penalty under court microscope*, The Oakland Tribune, Aug. 31, 2015]; Ex. 241 [Howard Mintz, *Poll: California death penalty is toss-up for voters*, The Oakland Tribune, Jan. 15, 2016].

[281] Ex. 242 [*Election recommendations of the Oakland Tribune editorial board for November 2012*, Contra Costa Times, Aug. 27, 2012]; Ex. 243 [Byron Williams, *Polling Shows State's Views Changing on Capital Punishment*, Contra Costa Times, October 1, 2011]; Ex. 244 [Paul Lind, *Death penalty serves no one, it should be replaced in California*, Contra Costa Times, February 23, 2012]; Ex. 245 [*Ruling Shows Need To Ditch Death Penalty In California*, Contra Costa Times, May 31, 2013].

[282] Ex. 246 [*President Should Lead the Charge to Abolish the Death Penalty*, San Jose Mercury News, May 8, 2014]; Ex. 247 [*California's Death Penalty Should Expire In 2016*, San Jose Mercury News, January 3, 2015]

[283] Ex. 248 [The Editorial Board, *Justice Gone Wrong in New Orleans*, N.Y. TIMES, Oct. 20, 2015, http://www.nytimes.com/2015/10/20/opinion/justice-gone-wrong-in-new-orleans.html].

XII. REQUEST FOR RELIEF

After more than thirty years on California's death row, after coming within three hours and 42 minutes of being executed in February 2004 for crimes he did not commit, after eleven appellate judges declared in 2009 that Mr. Cooper has never had a fair hearing to establish his innocence, after the Inter-American Commission on Human Rights found violations of Mr. Cooper's human rights including eight due process violations, ineffective assistance of trial counsel, an unfair appellate process and evidence of racial discrimination, it is time that Mr. Cooper be given the chance to conclusively prove his innocence. Accordingly, Mr. Cooper respectfully asks the Governor to exercise his power under Article V, Section 8(a) of the California Constitution:

(1) to grant Mr. Cooper a reprieve of his death sentence;

(2) to undertake a complete investigation into Mr. Cooper's case under the auspices of the Governor's office with the goal of determining whether Mr. Cooper is innocent and whether he should be released from prison;

(3) as part of that investigation to permit Mr. Cooper's defense team to do all the forensic testing that it determines should be done, including that which the State has refused to permit;

(4) to give Mr. Cooper access to documents that have been denied him, including from the San Bernardino County Sheriff and District Attorney's Office and the Scripps Institute laboratory, that may prove his innocence; and

(5) to pardon Mr. Cooper if, after said testing and review of documents is completed, the evidence shows that he is innocent or, should there remain any question as to his innocence, to instruct the San Bernardino District Attorney that if he does not retry Mr. Cooper within a reasonable time in a fair trial, the Governor will pardon him.

In order to present his case directly to the Governor, Mr. Cooper respectfully also requests a hearing before the Governor himself so that Mr. Cooper and his attorneys can plead directly with the Governor for an opportunity to prove his innocence and to gain his freedom at long last.

Dated: 2/17/14

NORMAN C. HILE

Orrick, Herrington & Sutcliffe LLP

Norman C. Hile

Attorneys for Defendant

Kevin Cooper

DAVID TODD ALEXANDER

David Todd Alexander

Appendix A

Exhibit List

EXHIBIT NO.	EVIDENCE DESCRIPTION
1	*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009) (Fletcher, dissenting)
2	*Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007) (McKeown, concurring)
3	Declaration of Thomas R. Parker, dated October 17, 2013 ("Parker Declaration re tunnel vision; IACHR")
4	McCrary Report IACHR Prehearing Submission 2013 ("McCrary Report")
5	J. Patrick O'Connor, SCAPEGOAT: THE CHINO HILLS MURDERS AND THE FRAMING OF KEVIN COOPER (Strategic Media, Inc., 2012)
6	J. Patrick O'Connor letter to Jerry Brown September 29, 2015
7	J. Patrick O'Connor letter to Jerry Brown October 5, 2015
8	Kevin Cooper, Report No. 78/15, Case No. 12.831, Report on Merits (Publication), October 28, 2015 ("Cooper IACHR Merits Report Oct. 28, 2015")
9	Declaration of Kathy Pezdek, Ph.D. dated September 25, 2013
10	PHOTO: Guns and ammo
11	PHOTO: Shotgun
12	MAP: Final Sighting Map ("Sighting Map")
13	Declaration of JANE DOE dated August 18, 2015
14	*Cooper v. Brown*, 2005 U.S. Dist. LEXIS 46232 (S.D. Cal. 2005)
15	Juror Letters from 2004 (Redacted)

EXHIBIT NO.	EVIDENCE DESCRIPTION
16	Pro-Keds (by Stride-Rite) Catalog, Spring 1981
17	William Baird Investigative Report dated July 1, 1997 (ER 1714-16)
18	PHOTO: Cash and tobacco on counter (zoom view)
19	PHOTO: Cash tobacco and cards (wide pan photo)
20	PHOTO: Coin collection
21	Letter of Janine Arvizu, Certified Quality Auditor dated October 8, 2013
22	Declaration of Michael Adelson dated October 16, 2013
23	Kevin Cooper, Report No. 44/14, Case No. 12.873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014 ("Cooper IACHR Merits Report Jul. 17, 2014")
24	*Facts about the Death Penalty*, Death Penalty Information Center (October 30, 2015), http://deathpenaltyinfo.org/documents/FactSheet
25	*Executed But Possibly Innocent*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/executed-possibly-innocent (last visited November 9, 2015)
26	Mary-Beth Moylan and Linda E. Carter, *Clemency in California Capital Cases*, 14 Berkeley J. Crim. L. 37 (2009)
27	Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers Justice or Mercy?*, 24 Crim. Just. 26 (2009)
28	Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. Rev. 327
29	Ken Armstrong, *The Politics of Mercy*, The Marshall Project (Jan. 23, 2015)
30	*Clemency*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/clemency (last visited November 2, 2015)

EXHIBIT NO.	EVIDENCE DESCRIPTION
31	Linda E. Carter, et al., UNDERSTANDING CAPITAL PUNISHMENT, p. 251 § 15.05 (LexisNexis, 3rd ed. 2012)
32	Alan Johnson, *Kasich rarely uses clemency to pardon, commute sentences*, The Columbus Dispatch (March 16, 2015, 8:23 AM)
33	Commutations in Capital Cases On Humanitarian Grounds, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/clemency
34	Edmund "Pat" Brown, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW, p.xiii (Weidenfeld & Nicolson 1989)
35	The Washington Post, June 9, 2011
35.1	David Grann, *Trial by Fire Did Texas Execute an Innocent Man*, (The New Yorker, September 7, 2009 issue)
36	James S. Liebman, et al., THE WRONG CARLOS, ANATOMY OF A WRONGFUL EXECUTION (Colum. U. Press 2014)
37	Steve Mills, *Questions of Innocence*, Chicago Tribune, December 18, 2000
38	Lise Olsen, *Did Texas Execute an Innocent Man?*, Houston Chronicle, November 20, 2005
39	NAACP, *Significant Doubts About Troy Davis' Guilt: A Case for Clemency*, http://www.naacp.org/pages/troy-davis-a-case-for-clemency (last visited April 24, 2013)
40	*Hard to stomach: The last meals of death row inmates executed for crimes they were proved to be INNOCENT of years later*, MailOnline, Feb. 13, 2013
41	Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, Texas Observer, November 11, 2010
42	Raymond Bonner and Sara Rimer, *A Closer Look At Five Cases That Resulted In Executions Of Texas Inmates*, N.Y. Times, May 14, 2000

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43	The National Registry of Exonerations (2012), http://www.law.umich.edu/special/exoneration/pages/about.aspx
44	Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG, Harvard University Press, April 2011
45	Letter from Sam Millsap to Edmund G Brown Jr dated December 9, 2015
46	A.M. Marty Stroud III Letter to Honorable Edmund Gerald Brown, Jr., November 17, 2015
47	Cal. St. Assembly Committee on Public Safety, AB 1121 Bill Analysis (Ca. 2006), http://leginfo.ca.gov/pub/05-06/bill/asm/ab_1101-1150/ab_1121_cfa_20060109_123813_asm_comm.html (citing the Los Angeles Daily Journal, October 29, 2002)
48	Oscar Morris, The National Registry of Exonerations (2012), http://www.law.umich.edu/special/exoneration/pages/about.aspx?caseid=3493
49	*The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II. Doc. 62, December 5, 2011
50	Matt Ford, *Racism and the Execution Chamber*, The Atlantic, June 23, 2014
51	Rachel Leland, *NYU Professor Speaks for Silenced Voices*, March 3, 2015
52	Bryan Stevenson, JUST MERCY A STORY OF JUSTICE AND REDEMPTION (Spiegal & Grau 2014)
53	Ctr. for Const. Rts. & Int'l Fed'n for Hum. Rts., *Discrimination, Torture, and Execution: A Human Rights Analysis of the Death Penalty in California and Louisiana* 4 (2013)
54	2004 Clemency Decision
54.1	2010 Clemency Petition and Exhibits

EXHIBIT NO.	EVIDENCE DESCRIPTION
55	2010 Clemency Decision
56	Lillian Shaffer letter to Governor Schwarzenneger dated February 2, 2004
57	Lillian Shaffer letter to Governor Edmund G. Brown Jr. dated December 17, 2015
58	SBSD Report by Detective Michael Hall dated June 10, 1983
59	Petition for Writ of Habeas Corpus dated April 1, 2004
60	SBSD Report on Examination of Physical Evidence June 14, 1983
61	PHOTO: Hair in Jessica's hand
62	Letter from Dr. John P. Ryan, M.D. dated March 22, 2000
63	SBSD Log dated June 5, 1983
64	SBSD Recovered Evidence Report dated June 10, 1983
65	Interview of Shirley Killian March 31, 2004
66	PHOTO: Hatchet (P5250616.jpg)
67	SBSD Log dated June 6, 1983 (ER 3703) aka Blue Shirt Log
68	SBSD Criminal Bulletin No. 16 dated June 7, 1983
69	Testimony of Scott Field (ER 2780-81)
70	SBSD Report re Recovery of tan shirt and orange towel June 10, 1983
71	Declaration of Karee Kellison November 15, 1998

EXHIBIT NO.	EVIDENCE DESCRIPTION
72	SBSD Detective Woods Report re Kenneth Koon Interview dated December 21, 1984
73	SBSD Detective Woods Report re Anthony Wisely Confession dated December 21, 1984
74	Kevin Cooper Rap Sheet (FBI Report)
75	SBSD Report re Phone Records at Lease House dated June 9, 1983
76	Lillian Schaffer's Home Movie
77	SBSD Report Re Distance Between Ryen & Lease Homes dated May 24, 1984
78	SBSD Woods Report (List of People at Scene) dated September 22, 1983
79	SBSD Report by Deputy Gaul Report re June 5, 1983 Lease House Check, dated June 7, 1983
80	SBSD Report re Moran 6.6 Search June 8, 1983
81	Declaration in support of Arrest Warrant dated June 9, 1983
82	SBSD Report re Smoking Habits of inmates June 30, 1983
83	Declaration of Susan Dunn dated September 10, 2015
84	SBSD Report by Detective Michael Hall dated June 16, 1983
85	PHOTOS: Ryen Car
86	SBSD Supplemental Report re Processing Station Wagon dated June 15, 1983
87	Handwritten notes re Cigarette paper (ER 1670-72)

EXHIBIT NO.	EVIDENCE DESCRIPTION
88	PHOTO: Cigarette butt labeled QQ (in car)
89	PHOTO: Cigarette butt labeled QQ-2.jpg
90	Declaration of Thomas R. Parker (re Whelchel) dated October 8, 2015 ("Parker Decl. re Whelchel")
91	Declaration of Diana Roper dated November 21, 1998
92	PHOTO: Tan Shirt
93	PHOTOS: Hatchet
94	PHOTOS: Sheath
95	PHOTO: Green button
96	PHOTO: Sheath (sheath.jpg)
97	Defendant's Motion for Change of Venue; Declaration; Points and Authorities dated February 26, 1985
98	PHOTO: Monkey 1.jpeg
99	PHOTO: Monkey 2.jpeg
100	PHOTO: Monkey 3 SBSD demonstrative photo
101	*Cooper Injured in Jail Fight*, San Bernardino Sun Telegram, September 10, 1983
102	Opposition to Motion for Change of Venue; C.T. 5:1151
103	Defendant's Statement Regarding Hearing to Choose County for Trial, C.T. 71496-97 dated February 26, 1985

EXHIBIT NO.	EVIDENCE DESCRIPTION
104	Richard C. Dieter, *The 2% Death Penaly: How a Minority of Countries Produce Most Death Cases at Enormous Cost to All* (Death Penalty Info. Ctr., Oct. 1998)
105	Declaration of Joseph P. Soldis ISO Petitioner's Motion for Prelim. Hearing dated February 22, 2005 (ER 4786-91)
106	Handwritten List of Contents of Ryen Car (ER 836-837)
107	Declaration of David Negus dated October 21, 1996
108	Declaration of Christine M. Slonaker dated February 7, 2004
109	Declaration of Mary Mellon Wolfe dated February 9, 2004
110	*People v. Cooper*, 53 Cal. 3d 771 (1991)
111	*Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001)
112	Declaration of James Taylor dated January 8, 2004 (ER1678-1679)
113	Midge Carroll Memo to Office of Investigative Services re Request for Taylor sentence reduction dated March 7, 1985 (ER 00376-377)
114	Letter from Dennis Kottmeier to Daniel McCarthy re shoes Mar. 11, 1985 (ER378-379)
115	National Academy of Sciences Report: Committee on Identifying the Needs of Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, August 2009
116	Supplemental Physical Evidence Examination Report September 24, 2002
117	Physical Evidence Examination Report July 7, 2002
118	2004 Mito DNA Report of Dr. Melton dated August 2, 2004

EXHIBIT NO.	EVIDENCE DESCRIPTION
119	SBSD Supplemental Report on Examination of Physical Evidence August 1, 1983 (ER 3183-3187)
120	*In re Cooper*, Case No. S077408, 1999 Cal. LEXIS 2197 (April 14, 1999)
121	*Cooper v. California*, 528 U.S. 897 (1999)
122	*Cooper v. Calderon*, 2003 U.S. App. LEXIS 27035 (9th Cir., Feb. 14, 2003)
123	PHOTO: Glassine envelope
124	PHOTO: A-41 Vial Tin with Gregonis Initials
125	MAP: Ryen and 2991
126	Shannan Catalano, Ph.D., *Victimization During Household Burglary*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, September 2010, NCJ 227379
127	MAP: Large Scale Cooper Map
128	SBSD Disposition Report Regarding The Bloody Coveralls dated December 1, 1983 (ER 3010, 4934)
129	Order 1) Denying Petitioner's Request for Modification of Scheduling Order Dated July 29, 2004 2) Denying Petitioner's Objections to Respondent's Witness Designations and 3) Denying Petitioner's Motion for Subpoenas/Subpoenas Duces Tecum dated August 13, 2004 (ER 4037-39)
130	Order Denying Without Prejudice Petitioner's Motion for Leave to File an Amended Petition December 8, 2004 (ER 4663-65)
131	Declaration of Jeannie Sternberg dated April 27, 1995
132	Declaration of Kevin Cooper dated April 27, 1995

EXHIBIT NO.	EVIDENCE DESCRIPTION
133	*Cooper v. Calderon*, Case No. 98-CV-818, Petition for Writ of Habeas Corpus dated April 30, 1998
133.1	*Cooper v. Calderon*, Case No. 98-CV-818, Order Denying Motion to Alter Judgment dated June 30, 1998
133.2	*Cooper v. Calderon*, Case No. 98-CV-818, Notice of Appeal dated July 29, 1998
134	*Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004)
135	Judge Huff Order Granting in Part and Denying in Part Petitioner's Motion for Testimony and Production of Documents Regarding EDTA Testing, February 11, 2015 (ER 4751-54)
136	Letter from Peter De Forest to Judge Huff dated September 3, 2004 (ER 4148-60)
137	Petitioner's Memo of Points & Authorities ISO Motion for Evidentiary Hearing dated September 10, 2004
138	Lara Bazelon, *Scalia's Embarrassing Question: Innocence Is Not Enough to Get You Out of Prison*, Slate Mag, March 11, 2015
139	Daniel S. Medwed, *California Dreaming: The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.S. David L. Rev. 1437 (2007)
140	Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 Cal. L. Rev. 1 (2010)
141	Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 Wash. & Lee L. Rev. 85 (2012)
142	*California Commission on the Fair Administration of Justice, Final Report* (Gerald Uelmen & Chris Boscia eds., 2008), available at http://www.ccfaj.org/documents/CCFAJFinalReport.pdf)

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143	Nancy J. King, et al., *Final Technical Report Habeas Litigation in U.S. District Courts 52* (2007), available at hrrp://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf)
144	Jessica D. Gabel & Margaret D. Wilkinson, *"Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 Hastings L.J. 1001, (2008)
145	William A. Fletcher, *Madison Lecture: Our Broken Death Penalty*, 89 N.Y.U.L. Rev. 805 (2014)
146	Ivan Teleguz, Report No. 53-13, Case No. 12.864, Merits
147	Penal Code § 1405 Judge So's Order re Motion for Post-Conviction DNA Testing January 14, 2011
148	Penal Code § 1405 Revised Declaration of Norman C. Hile ISO Testing Request dated September 3, 2010
149	Penal Code § 1405 Declaration of Dr. Vince Miller, In Support of Kevin Cooper's Motion for Performance of Post-Conviction DNA Testing dated August 12, 2010
150	Penal Code § 1405 Memorandum of Points and Authorities ISO Performance of Post-Conviction DNA Testing dated August 12, 2010
151	Penal Code § 1405 Defendant Kevin Cooper's Reply ISO of Request for Further DNA Testing dated October 4, 2010
152	Abby Phillip, *Alabama Inmate Free After Three Decades on Death Row. How the Case Against Him Unraveled*, The Washington Post, April 3, 2015
153	Siuzdak Fax to Judge Huff withdrawing test results dated October 27, 2014
154	Declaration of Thomas R. Parker, dated January 13, 2016 ("Parker Decl. re Scripps employee doubting contamination")

EXHIBIT NO.	EVIDENCE DESCRIPTION
155	Penal Code § 1405 1) Notice of Motion and Motion for Performance of Post-Conviction DNA Testing August 12, 2010
156	Penal Code § 1405 3) Declaration of Kevin Cooper in Support of Motion for Post-Conviction DNA Testing August 12, 2010
157	Penal Code § 1405 5) Declaration of Norman C. Hile in Support of Motion for Post-Conviction DNA Testing August 12, 2010
158	Penal Code § 1405 7) Supplemental Declaration of Dr. Vince Miller, Ph.D. in Support of Kevin Cooper's Motion for Performance of Post-Conviction DNA Testing October 4, 2010
159	Penal Code § 1405 8) Supplemental Declaration of Norman C. Hile in Support of Motion for Post-Conviction DNA Testing October 4, 2010
160	Penal Code § 1405 9) Opposition to Motion for Post-Conviction DNA Testing September 21, 2010
161	Penal Code § 1405 10) [Proposed] Findings & Order re Defendant Kevin Cooper's Motion for Further DNA Testing Pursuant to Penal Code § 1405 October 15, 2010
162	Penal Code § 1405 11) Proposed Order re Motion for Post-Conviction DNA Testing October 19, 2010
163	Penal Code § 1054.9 1) Defendant's Notice of Motion and Motion for Post-Conviction Discovery and For Examination of Physical Evidence Pursuant to Penal Code Section 1054.9
164	Penal Code § 1054.9 2) Defendant Kevin Cooper's Memorandum of Points and Authorities in Support of Motion for Post-Conviction Discovery and for Examination of Physical Evidence
165	Penal Code § 1054.9 3) Declaration of David T. Alexander in Support of Defendant's Motion for Post-Conviction Discovery and For Examination of Physical Evidence Pursuant to Penal Code Section 1054.9

EXHIBIT NO.	EVIDENCE DESCRIPTION
166	Penal Code § 1054.9 4) Opposition to Motion for Post-Conviction Discovery and Examination of Physical Evidence & Memorandum of Points and Authorities in Support Thereof
167	Penal Code § 1054.9 5) Defendant's Reply to Opposition for Post-Conviction Discovery and for Examination of Physical Evidence Pursuant to Penal Code Section 1054.9
168	Penal Code § 1054.9 6) Reply Declaration of David T. Alexander in Support of Defendant's Motion for Post-Conviction Discovery and For Examination of Physical Evidence Pursuant to Penal Code 1054.9
169	Penal Code § 1054.9 7) Supplemental Memorandum of Points and Authorities in Opposition to Cooper's Motion for Discovery Pursuant to Penal Code § 1054.9
170	Penal Code § 1054.9 8) Declaration of Norman C. Hile in Support of Defendant's Supplemental Briefing Pursuant to Court's Request
171	Penal Code § 1054.9 9) Supplemental Memorandum of Points and Authorities in Opposition to Cooper's Motion for Discovery Pursuant to Penal Code § 1054.9
172	Penal Code § 1054.9 10) Order Denying Request for Discovery Made Pursuant to Penal Code § 1054.9 May 16, 2005
173	Penal Code § 1054.9 11) Defendant's Supplemental Reply Memorandum in Support of Defendant's Motion for Post-Conviction Discovery Under Section § 1054.9 May 19, 2005
174	Penal Code § 1054.9 12) Notice of Lodgment re State-Court Post-Conviction Discovery Motion
175	Penal Code § 1054.9 13) Order Denying Successive Petition for Writ of Habea Corpus May 27, 2005
176	Penal Code § 1054.9 14) Petition for Writ of Mandate Ordering Post-Conviction Discovery Under Penal Code Section 1054.9; Memorandum of Points and Authorities; Verification and Declaration of Counsel

EXHIBIT NO.	EVIDENCE DESCRIPTION
177	Penal Code § 1054.9 15) Order Denying Request August 12, 2005
178	Penal Code § 1054.9 16) Notice of Errata to Petitioner's Writ of Mandate Ordering Post-Conviction Discovery Under Penal Code Section 1054.9
179	Penal Code § 1054.9 17) Petitioner's Reply to Opposition to Petition for Writ of Mandate Ordering Post-Conviction Discovery Under Penal Code Section 1054
180	Penal Code § 1054.9 18) Petitioner Kevin Cooper's Request for Oral Argument
181	Penal Code § 1054.9 19) Petitioner Kevin Cooper's Amended Request for Oral Argument September 13, 2005
182	Penal Code § 1054.9 20) Order Denying Motion for Post-Conviction Discovery of Evidence December 23, 2005
183	SBSD Report re Orange Towel June 12, 1984
184	Innocence Project, DNA Exonerations Nationwide, October 26, 2015, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide
185	Janine Arvizu, *Forensic Labs: Shattering the Myth*, National Association of Defense Lawyers journal May 2000
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187	C.Michael Bowers, *Problem-based analysis of bite mark misidentifications: The role of DNA*, Forensic Science International, 159 Supplement 1:s104-s109, 2006
188	*FBI Admits Flaws In Hair Analysis Over Decades*, Washington Post, April 18, 2015

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189	Tracy Kaplan, *Crime lab uses wrong chemical in 2,500 methamphetamine tests,* San Jose Mercury News, May 5, 2014
190	Peter Jamison, *SFPD crime lab's DNA evidence could be tainted by concealed mistakes*, SF Weekly News, December 15, 2010
191	Peter Jamison, *Exclusive: SFPD Concealed DNA Sample Switch at Crime Lab*, SF Weekly News, December 3, 2010
192	Mark Hansen, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results,* ABA Journal, September 1, 2013 (99 A.B.A. J. 44 2013)
193	Joseph Goldstein, *Report Details the Extent of a Crime Lab Technician's Errors in Handling Evidence*, The New York Times, December 5, 2013
194	*Crime Lab and Forensic Scandals,* National Association of Criminal Defense Lawyers Website, October 29, 2015
195	Milton J. Valencia and John R. Ellement, *Dookhan, Former state chemist who mishandled drug evidence, sentenced to 3 to 5 years in prison,* Boston Globe, November 23, 2013
196	Milton J. Valencia; *Pattern of neglect at state drug lab found*, Boston Globe, March 4, 2014
197	Madeleine Baran, *Troubled St. Paul crime lab problems even worse than first thought, probe reveals,* MPR News, February 14, 2013
198	*Under the microscope,* Washington Post, posted March 12, 2015
199	Keith L Alexander, *Crime lab in D.C. is told to halt DNA tests,* Washington Post, April 28, 2015
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201	Cory Shaffer, *Cuyahoga medical examiner tightens protocols after botched tests*, The Times Reporter, July 16, 2015
202	Randall Chase, *Judge sets course for drug cases after lab scandal*, November 18, 2014
203	Office of the Attorney General, *State of Colorado, Investigation Report*, March 18, 2013
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205	Office of the Inspector General, *F.B.I., The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities*, (2004)
206	Mandy Locke, Joseph Neff, J. Andrew Curlis, *Scathing SBI audit says 230 cases tainted by shoddy investigations*, The News and Observer, August 19, 2010
207	Keith L. Alexander, *DNA Sets Free D.C. Man Imprisoned in 1981 Student Slaying*, The Washington Post, December 16, 2009
208	Donald Eugene Gates, Innocence Project, http://www.innocenceproject.org/Content/Donald_Eugene_Gates.php
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210	Frances Robles, *Scrutiny of Prosecutors after Questions About Brooklyn Detective's Work*, NY Times, May 12, 2013
211	Kathleen M. Ridolfi & Maurice Possley, *Preventable Error A Report on Prosecutorial Misconduct in California*, 1997-2009 (N. Cal. Innocence Project, Santa Clara Univ. Sch. Of L., 2010)

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214	Paul Davenport, *Judge in Milke Murder Case Demands Explanation, The Associated Press St. & Loc. Wire*, September 17, 2013
215	Terry Tang, *Woman Who Spent 22 years on Death Row Has Murder Case Tossed*, Associated Press Online, March 23, 2015
216	Mike Bush, *Life No Longer Taken for Granted; Wrongly Convicted and Sentenced to Death, Man Seeks Repeal of Penalty*, Albuquerque J. (N.M.), January 22, 2015
217	John P. Martin, *`Miscarriage of Justice,' Judge Overturns Murder Conviction*, The Phila. Inquirer, August 22, 2013
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221	Maura Dolan, *U.S. Judges See `Epidemic' of Prosecutorial Misconduct in State*, Los Angeles Times, January 31, 2015
222	Melissa Pamer, *Sheriff's Deputies Charged with Planting Evidence at South L.A. Pot Shop*, KTLA 5, April 23, 2014
223	Marisa Gerber, *L.A. County D.A. Jackie Lacey to Unveil Details on Wrongful-Conviction Unit*, L.A. Times, June 29, 2015

EXHIBIT NO.	EVIDENCE DESCRIPTION
224	Kevin Cooper, IACHR, Report No. 52/15, Case 12,831, Final Merits Report, United States, September 21, 2015 ("Cooper IACHR Merits Report Sept. 12, 2015")
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226	Nicholas Kristof, *Framed for Murder*, N.Y. Times, December 8, 2010
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EXHIBIT NO.	EVIDENCE DESCRIPTION
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238	Howard Mintz, *Defeat of Proposition 34: California's death penalty battle will continue*, The Oakland Tribune, November 7, 2012
239	Ronald Entwisle, *Guest Commentary: Spate of recent news articles makes strong case against capital punishment*, The Oakland Tribune, April 18, 2015
240	Howard Mintz, *California death penalty under court microscope*, The Oakland Tribune, August 31, 2015
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244	Paul Lind, *Death penalty serves no one, it should be replaced in California*, Contra Costa Times, February 23, 2012
245	*Ruling Shows Need To Ditch Death Penalty In California*, Contra Costa Times, May 31, 2013
246	*President Should Lead the Charge to Abolish the Death Penalty*, San Jose Mercury News, May 8, 2014
247	*California's Death Penalty Should Expire In 2016*, San Jose Mercury News, January 3, 2015
248	The Editorial Board, *Justice Gone Wrong in New Orleans*, The New York Times, October 20, 2015
249	http://www.innocenceproject.org/cases-false-imprisonment/michael-mortontouch

EXHIBIT NO.	EVIDENCE DESCRIPTION
250	http://en.wikipedia.org/wiki/David_Camm
251	July 2002 DNA Report
252	Letter of S. Eikelenboom dated October 17, 2013
253	Letter of S. Eikelenboom dated October 23, 2015
254	PHOTO: Orange Towel on Shoulder of Road
255	Gregonis' Handwritten Test Results (re towel)
256	June 2002 DNA Report

Appendix B

Glossary of Individuals

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Michael Adelson, Esq.	Distinguished capital defense lawyer who has been practicing in California since 1966 and who has had extensive experience in the defense of capital cases. Adelson testified before the IACHR in 2013 that the performance of Mr. Cooper's trial counsel's performance in 1984-85 was constitutionally deficient, and that had trial counsel been up to standard, Mr. Cooper likely would not have been found guilty and sentenced to death
Robert Amidon, Esq.	Prior habeas corpus counsel for Mr. Cooper appointed on 6/2/95.
Sergeant Billy Arthur	SBSD Sergeant who headed the investigation and reported directly to Sheriff Floyd Tidwell. After learning information about three white men as the suspects, there is no indication he ordered anyone to follow-up about it. Under his watch, the Ryen/Hughes murder scene was dismantled before his deputies could process the evidence. The blood evidence was then stored in an un-air-conditioned storage unit, thus causing it all to be lost.
Janine Arvizu	Chemist and Certified Quality Auditor of forensic testing who concluded in 2013 that the forensic testing results the prosecution used to convict Mr. Cooper in 1984-85 were so lacking in integrity as to render those results invalid, and "[t]he observed facts are consistent with a concerted effort to tamper with evidence in a manner that would incriminate Mr. Cooper, and to hide evidence of the tampering."
William Baird	SBSD Supervising Criminologist who failed to supervise the work of SBSD deputies Stockwell and Schechter in processing the crime scene. He later testified at trial in 1984 regarding the procedure utilized to recreate the bloody footprints in his lab. Baird was caught stealing heroine from the SBSD evidence locker and was fired after Cooper's trial.
Ellis Bell	Citizen who discovered hatchet with blood on it down the road from the crime scene on June 5, 1983.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Deputy Paul Beltz	First SBSD officer to arrive at the crime scene on June 5, 1983.
Kathy Bilbia	Renter of Lease house who had moved out shortly before Mr. Cooper found the house. She cleaned the Lease house bathroom with bleach before she moved out.
Edward Blake	Expert witness originally hired by the defense for 2002 DNA testing but later Judge Huff retained him as her witness during 2004 evidentiary hearing. He testified in 2004 that he and Stephen Myers only examined some of the hairs attached to the victims.
Perry Burcham	Larry Lease's employee who noticed bedding inside the closet in the bedroom Kathy Bilbia slept in.
Warden Midge Carroll	Warden at California Institution for Men, Chino in 1983. Before the trial in 1984 she called SBSD to inform them that the prison did not issue special tennis shoes, but rather ordinary shoes sold in retail stores. Carroll testified at the evidentiary hearings in 2004.
Detective Phil Dana	SBSD detective who interviewed a waitress at La Vida Bar about the three white men who had been at the Canyon Corral Bar on the night of the murders. He failed to obtain any sketches of the men.
"Jane Doe"	Woman who in recent declaration described seeing the Ryen station wagon in Claremont, CA on the afternoon of June 5, 1983 with white men in it. She alerted the police at the time through an anonymous letter.
Juror Doxey	Juror at 1983-84 trial. She insisted that the trial judge should be notified of juror LaPage's comment and worried that the information regarding Mr. Cooper's alleged mental illness might affect the outcome of the trial.
Detective Gail Duffy	SBSD Detective who arrived at crime scene after 2 pm on Sunday, June 5 and took photos and checked for latent fingerprints.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Deputy Frederick Eckley	SBSD Deputy who retrieved the bloody coveralls from Diana Roper, destroyed them in Dec. 1983, and then falsely testified at trial that he acted without supervisory approval when he destroyed them. He noted that Roper had provided reliable information in the past.
Linda Edwards	Citizen who witnessed the Ryen car at about 12:30 a.m. on June 5, 1983 driving faster than normal.
Richard and Selma Eichelenboom	Specialists in "touch DNA" testing who have proposed tests on several pieces of evidence in Mr. Cooper's case including the tan t-shirt, the hatchet and the hatchet sheath.
Laurel Epler	Citizen who discovered and reported finding a blue short sleeved shirt with blood on it near the Canyon Corral Bar on June 6, 1983. Epler confirmed under oath that the blue shirt existed when she testified at an evidentiary hearing in 2004.
Deputy Fields	SBSD Deputy who retrieved the blue shirt reported by Laurel Epler on June 6, 1983 south of the Canyon Corral Bar and found the bloody tan t-shirt on June 7, 1983 near the Canyon Corral Bar.
Jack Fletcher	Employee of Larry Lease who entered the Lease house with Lease and SBSD Detectives Moran and Hall.
9th Circuit Judge William A. Fletcher	Judge of the U.S. 9th Circuit Court of Appeals who in May 2009 issued a 100+ page dissent documenting why he believes Mr. Cooper may be innocent and noting the many ways in which U.S. District Court Judge Marilyn Huff denied Cooper a fair hearing. *See* Ex. 1 [*Cooper v. Brown*, 565 F.3d at 581 (2009).]
Dr. Lorna Forbes	Josh Ryen's therapist, who treated Josh and later testified that she did not believe that Josh had actually perceived the single attacker with the "puff" of hair.
Ron Forbush	Trial Counsel David Negus' investigator who interviewed Diana Roper & Dep. Eckley about the bloody coveralls.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Leland (Lee) Eugene Furrow	Boyfriend of Diana Roper and convicted murderer of Mary Sue Kitts. Furrow arrived at Roper's home early in the morning on June 5, 1983 wearing bloody overalls. Furrow had been wearing a tan Fruit of the Loom t-shirt that day, and owned a missing hatchet matching the description of the hatchet recovered by authorities near the Ryen home.
Monsignor Gaulderon	Priest who reported that the Ryen station wagon was not in the Long Beach church parking lot on Friday, June 10.
Sergeant Gilmore	SBSD Sergeant who had initial charge of the crime scene on June 5, 1983, but who failed to document the people visiting the crime scene or any changes that occurred thereto. He observed the spa cover on June 5, 1983, but did not see any footprints on it.
Daniel Gregonis	SBSD Criminologist who delayed testing of blood spot A-41 until he had Mr. Cooper's serological information. He then ran tests on A-41 (some of which were duplicative) exhausting a substantial portion of the limited sample without defense input. He also ignored standard lab procedures when performing these tests and failed to properly document the results. Because of this, he prevented the defense from conducting meaningful testing on A-41 or verifying his test results. He later falsely testified at trial regarding his findings related to A-41. He also checked A-41 out of the SBSD evidence locker in 1999 and kept it for 24 hours, after which it was discovered in 2002 to have Cooper's DNA on it. He lied under oath in 2003 about opening the glassine envelop that contained A-41 in 1999.
Michael Hall	SBSD Homicide Detective who issued a report on the recovery of the Ryen station wagon that inventoried its contents, but did not include cigarette butts V-12 or V-17. That report did, however, include other cigarette evidence that was not taken into custody and noted blood on the seats in the front and back of the car.
Owen Handy	Hired Mr. Cooper to work on his boat in Ensenada, Mexico. He also took Mr. Cooper onto his boat with his wife and young daughter. The group sailed to California, where Cooper was later arrested.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Linda Headley	Hospital nurse who witnessed Josh's answers to questions about suspects during his first few days in the hospital. She witnesses Det. O'Campo taking notes during these interviews, notes that are now missing.
Lieutenant Henson	Correction officer at CMF who talked with Prisoner Anthony Wiseley regarding the Kenneth Koon confession.
Dr. Mary Howell	Peggy Ryen's mother and Josh Ryen's grandmother. Josh told her that he did not recognize Mr. Cooper's picture on the television while Josh was still recovering in the hospital. She hired Dr. Lorna Forbes to help her get custody of Josh.
Bob Howey	Neighbor of Doug and Peggy Ryen. William Hughes used Howey's phone to call for help after discovering the murders.
Dr. Jerry Hoyle	Psychologist who was assigned to sit in on the June 15, 1983, Det. O'Campo's interview of Josh Ryen. He observed numerous instances of Josh referring to his attackers in the plural, which O'Campo failed to record and later denied at trial.
Judge Marilyn Huff	U.S. District Court Judge who denied all of Mr. Cooper's habeas corpus petitions and was found to have abused her discretion by Judge Fletcher of the 9th Circuit Court of Appeals.
Christopher Hughes	Victim of the crimes who was a friend of Josh Ryen and had been spending the night at the Ryen home when the murders occurred.
Mary Hughes	Christopher Hughes' mother, who made multiple calls to the Ryen house and looked around the outside of the Ryen home on the morning of the murders.
Williams Hughes	Christopher Hughes' father, who discovered the murders and secured medical assistance for Josh Ryen by calling for help from a neighbor's house.
Angel Jackson	Alias that Mr. Cooper used while in Mexico in June 1983.
Yolanda Jackson	Friend of Mr. Cooper whom he called while hiding in Lease house.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Gordon James	Believed he had placed a flyer on the Ryen station wagon in the church parking lot in Long Beach on Sunday, June 5.
Sister Joseph Ann James	Reported that she thought she noticed the Ryen station wagon in the church parking lot in Long Beach on Tuesday, June 7.
Karee Kellison	Diana Roper's sister. In the early morning of June 5, 1983 she saw Lee Furrow wearing the bloody coveralls and exiting a station wagon that held 2 other occupants.
Shirley Killian	Bar Manager of Canyon Corral Bar who on the night of the murders saw the three men in the bar and reported that one of them may have been wearing a blue shirt.
Deputy District Attorney John Kochis	District Attorney Kottmeier's chief assistant at Mr. Cooper's trial. He also assisted the State in the 2004 habeas proceedings and in later proceedings seeking further DNA testing. Has asserted that the blue shirt discovered by Epler on June 6 did not exist and was actually the tan t-shirt recovered on June 7, 1983.
Kenneth Koon	Prisoner who, during Mr. Cooper's trial, confessed to a cellmate that he and 2 other individuals committed the Ryen/Hughes murders. Koon also dated Diana Roper. His jailhouse confession corroborated Diana Roper's account that the crimes were committed by the wearer of the coveralls.
District Attorney Dennis Kottmeier	San Bernardino County's District Attorney who ordered the striking of the Ryen/Hughes crime scene despite SBSD criminalist requests that further samples be taken in order to allow for a later reconstruction of the crime scene. He also prosecuted Mr. Cooper at trial with D.A. Kochis as his second chair.
Juror LaPage	Told fellow jurors during jury deliberations that she knew of her own knowledge that Cooper was an escaped mental patient.
Kermit Lang	Co-owner of the Lease house and brother of Roger Lang.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Roger Lang	Co-owner of the Lease house who occasionally spent the night there. Husband of Vicki Lang and brother of Kermit Lang.
Vicki Lang	Married to Roger Lang and occasionally stayed overnight in the Lease house. She entered the Lease house while Cooper was there, but did not encounter him and left without incident.
Larry Lease	Co-owner of the Lease house who asked SBSD officers to accompany him to his vacant house on June 5 and June 6, 1983 because of his reluctance to enter that house alone.
Edward Lelko	Bartender at Canyon Corral Bar. He recalled seeing 3 strange white men in bar on night of the murders.
Douglas Leonard	Testified that on the night of the murders he saw a car matching the description of the Ryen station wagon coming from the direction of the Ryen house with a white man driving.
Paula Leonard	Testified that on the night of the murders she saw a car like the Ryen station wagon coming from the direction of the murder scene with three or four white males in it.
Don Luck	Executive of the Stride Rite Company, manufacturer of Pro-Ked tennis shoes, who testified in 2004 that Pro-Ked shoes were widely available in retail stores in 1983 on the East Coast and would have been available to retail stores on the West Coast through the wholesale catalog.
Prison Guard Mason	Gave Mr. Cooper used PF Flyer tennis shoes that Cooper was wearing when he escaped.
Charles D. Maurer, Jr., Esq.	Mr. Cooper's first habeas corpus counsel, who withdrew for personal reasons in 1994.
Gregg O. McCrary	Retired FBI profiler with 40 years of experience (25 as a FBI Agent) who in 2013 reviewed the reports and other evidence associated with the crime scene, autopsies, etc. and concluded that the murders were committed by multiple individuals for reasons other than burglary, robbery or motor vehicle theft.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
William McGuigan, Esq.	Habeas corpus counsel for Mr. Cooper appointed on 6/2/95.
9th Circuit Judge Margaret McKeown	Judge McKeown authored a "concurrence" in 2007 to the denial of Mr. Cooper's appeal, recounting all the serious questions that the evidence destruction and tampering raised but saying that the AEDPA constrained her from ruling in Mr. Cooper's favor.
Terry Melton, Ph.D.	Founding Director and Scientific Adviser at Mitotyping Technologies. Dr. Melton tested 10 hairs attached to the victims in 2004 and discovered that the exemplar of Mr. Cooper's blood from vial VV-2 had the DNA of another person besides Mr. Cooper.
Sam D. Millsap, Jr.	Former Bexar County (TX) prosecutor who obtained a conviction and death sentence against Ruben Cantu in 1984. The State of Texas executed Cantu in 1993. Subsequently, Cantu was exonerated and Mr. Millsap has stated he is now opposed to the death penalty. Mr. Millsap has submitted a letter to the Governor asking for clemency for Mr. Cooper.
Detective Steve Moran	SBSD Detective who entered Lease home, but failed to note critical evidence later found therein, particularly in the Bilbia bedroom, where a hatchet sheath was later found in plain view lying on an otherwise empty floor. His fingerprints were found on the Bilbia bedroom closet door, placing him in that bedroom prior to the discovery of hatchet sheath, contrary to his testimony that he did not go into that room.
George Murdock	Reported finding the Ryen station wagon abandoned in church parking lot in Long Beach on June 11, 1983.
Stephen Myers	DOJ criminalist who was involved in 2002 DNA testing of the tan t-shirt and A-41 and who testified at the evidentiary hearings before Judge Huff in 2004. Myers was the one who chose the spot on the tan t-shirt to be tested in 2004, but then notified the court some days later that the spot no longer existed, leading Judge Huff to personally chose the spot to be tested.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
David Negus	Mr. Cooper's defense counsel from 1983 to 1985 for pre-trial proceedings through sentencing. He hired only one investigator and refused any further help despite the exceedingly complex nature of the case, causing numerous mistakes. In September 2015 the IACHR found that he provided ineffective assistance to Mr. Cooper both before and during Mr. Cooper's trial in 1984-85, and that this violated Mr. Cooper's human rights.
Michael Newberry	Stride Rite employee who falsely testified at trial in 1983 that Pro-Ked shoes were not available at retail, but were only sold to institutions.
Jury Foreman Nugent	Jury Foreman at 1984-5 trial who gave court 2-page note regarding mention by juror LaPage of something not part of evidence.
Detective Hector O'Campo	SBSD Detective who failed to report that Josh Ryan did not identify Cooper as attacker after viewing picture of Cooper on television. He later perjured himself by testifying that Josh did not refer to multiple assailants in hid formal interview on June 15, 1983; he also destroyed all notes of his interviews with Josh and failed to electronically record those interviews.
J. Patrick O'Connor	Crime author who spent three years researching an award-winning book entitled "Scapegoat: The Chino Hills Murders and the Framing of Kevin Cooper." O'Connor concluded that Mr. Cooper is innocent.
Deputy Craig Ogino	SBSD criminologist who attempted to process the Ryen/Hughes crime scene on June 6, 1983, but was ordered to stand aside as it was dismantled despite a request that further processing be allowed. Ogino also processed the Lease house and the Ryen station wagon and had the opportunity to plant cigarette evidence not taken into evidence from the Lease house in the Ryen station wagon.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Thomas R. Parker	Retired Special Agent of FBI, whose final post was Assistant Special Agent in Charge of FBI's Los Angeles Regional Office. Parker has reviewed the case over the past three years and concluded that investigators suffered from "tunnel vision" and "abject racism." He also concluded that "the facts and circumstance in this case strongly suggest that members of law enforcement not only ignored and/or destroyed exculpatory evidence… but also created and planted evidence intended to inculpate Mr. Cooper in the crimes."
Kathy Pezdek, Ph.D.	Professor in the Department of Psychology at Claremont Graduate University and expert in human memory. Dr. Pezkek reviewed the evidentiary record regarding the various statements of Josh Ryen and concluded that "the attackers were more likely 3-4 White or Hispanic mean, not a single Black man, specifically, not Kevin Cooper."
Deputy Bobby Phillips	SBSD Deputy contacted by Sibbitt and Burcham regarding the discovery of evidence in the Lease house.
Dr. Irving Root	Contract pathologist with San Bernardino County Coroner's Office who responded to the crime scene. He initially stated the crime had to have been committed by more than one person and that it involved three or four weapons. After coaching from the prosecution, he testified at trial the crime could have been committed by one person and that there might have been only 3 weapons.
Diana Roper (also referred to as Diane Furrow, Diane Loper, and Diane Kellison by Deputy Eckley)	Turned the bloody coveralls worn by her boyfriend, Lee Furrow, to the SBSD on June 9, 1983, just 4 days after the discovery of the murders. She reported that Furrow returned home on the night of the murders wearing the bloody coveralls. She also said he had been wearing a tan Fruit of the Loom t-shirt the night of the murders that was identical to the bloody t-shirt recovered from near the Canyon Corral Bar. Further, she reported that Furrow's hatchet (which looked like the one recovered by police) was missing and never reappeared after the murders.
Deputy Rick Roper	SBSD Deputy who recovered the hatchet from the side of the road not far from the Ryen house after it was discovered by Ellis Bell.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Dr. John P. Ryan	Expert enlisted by attorney Robert Amidon in 2000 to review the autopsy evidence. Ryan concluded that the crimes could not have been committed by one person, but rather by three or four people.
Douglas Ryen	Victim and father of Jessica and Josh Ryen; married to Peggy Ryen; chiropractor and former Military Policeman. He was mobile for at least part of the attacks and sustained defensive wounds. However, inexplicably, he did not utilize the loaded shotgun found feet from his body.
Jessica Ryen	11 year-old daughter of Doug and Peggy Ryen and victim found clutching hairs (that were not of African American origin) that did not appear to be hers. Evidence indicated that she had escaped from the house during the attack and also that she was cradled by her mother at some point during the attack.
Josh Ryen	Son of Doug and Peggy Ryen and only surviving victim of the attacks on June 5, 1983. Immediately after the crimes, he told authorities that the attack was committed by three white or Hispanic males and not Cooper. After seeing Cooper's mug shot on television he said that Cooper was not the one who "did" it. After manipulation by the SBSD and exposure to media attention, he later stated that he only saw a single shadow and puff of hair.
Peggy Ryen	Victim and mother of Jessica and Josh Ryen; married to Doug Ryen. She was a chiropractor and horse trainer. She was mobile for at least part of the attack, warned Josh to hide, and at some point cradled Jessica during the attack before she and Jessica expired. She did not utilize the loaded firearm recovered from her nightstand, despite her facility with the use of weapons.
Pat Schechter	Inexperienced SBSD criminologist who helped Dep. Stockwell process the crime scene on June 5 by taking pictures. Claimed at trial that he saw the bloody shoeprint on the Ryen sheet in the Ryen bedroom, but this contradicted his preliminary hearing testimony that he did not see that shoeprint. He failed to take any pictures of the bloody shoeprint at the scene.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Deputy Kenneth Schreckengost	SBSD Deputy whose initials were found on the Disposition Report approving Dep. Fred Eckley's destruction of Lee Furrow's bloody coveralls. When confronted with the report in 2004, Schreckengost admitted that he had approved their destruction in December 1983, also proving Dep. Eckley had lied at trial when he testified he threw away the coveralls on his own.
Lillian Shaffer	Sister of deceased victim Peggy Ryen. Shaffer, who had visited the Ryen family at their home before the murders, does not believe Mr. Cooper murdered her sister and her sister's family for multiple reasons that she has set forth in a letter to the Governor attached to the petition.
Deputy Dale Sharp	SBSD Deputy who questioned Josh Ryen in the hospital after Don Gamundoy on June 5, 1983 and reported that Josh communicated that the attackers were three white or Hispanic males.
Richard Sibbitt	Employee of Larry Lease who noted that the hatchet from the Lease house was missing, but the sheath was on the floor of the Bilbia bedroom
Deputy Louis Simo	San Bernardino County Reserve Deputy who, along with Det. O'Campo, witnessed Josh Ryen state that Cooper did not commit the attacks after viewing a picture of Cooper on television. He followed up with Det. O'Campo nearly a year later after O'Campo failed to file a report of the incident.
Gary Siuzdak, Ph.D.	Senior Director of the Center for Mass Spectrometry at the Scripps Research Institute. In 2004, the State hired Siuzdak to be its expert for measuring the amount of EDTA found on the tan t-shirt. After submitting his test results and finding out they supported Mr. Cooper's claim of evidence tampering on the t-shirt, Siuzdak suddenly "retracted" his report, claiming "contamination" in his laboratory.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Christine Slonaker	Witness to the three strange white men in the Canyon Corral Bar on June 4, 1983, the night of the murders. SBSD did not interview her in 1983. A phlebotomist, in 2003 she came forward with the information about being bothered by the white men in the bar the night of the murders and noticing that one was wearing coveralls that were covered in blood. She testified at the evidentiary hearings in 2004 before Judge Huff.
Deputy Martha Smith	SBSD Deputy who in 1983 was charged with sketching the shoeprint from the Ryen house spa cover and from the Lease house. She initially failed to see the shoeprint on the spa cover (which was destroyed during its processing). She also noted that she discovered the Lease house print on her own, contrary to Baird's testimony that it had been marked off.
Lance Stark	Witness to the three strange white men in the Canyon Corral Bar on June 4, 1983, the night of the murders. SBSD failed to interview him in 1983. He came forward in 2004 to corroborate Christine Slonaker and Mary Wolfe's account of the men "hitting" on the women. Shortly before he was to testify in 2004, he was warned against testifying by a man driving what was obviously an SBSD cruiser.
Jeannie Sternberg, Esq.	Staff Attorney at California Appellate Project who helped Charles Maurer file a skeletal version of Cooper's first habeas petition. She also lobbied Judge Huff to replace Maurer due to his inability to represent Cooper.
David Stockwell	SBSD criminalist who collected A-41 and the bloody bedsheet. He also processed the Lease house and Ryen car, giving him the opportunity to plant cigarette evidence in the Ryen station wagon that was found but not logged at the Lease house. He also allegedly discovered bloody shoe print on Ryen sheet once back at the SBSD crime lab, although the record does not contain when this discovery was made.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
A.W. "Marty" Stroud III	Louisiana former prosecutor who obtained a conviction and death sentence against Glenn Ford. Ford spent 30 years on death row for a crime he did not commit before being exonerated and freed in 2014. Mr. Stroud now regrets his prosecution and has submitted a letter to the Governor asking for clemency for Mr. Cooper.
Sergeant Karl Swanlund	SBSD officer in charge of dismantling the crime scene (after such dismantling was ordered by D.A. Kottmeier); he denied requests to keep scene in place for further processing; was notified of hatchet sheath and bedding in Bilbia bedroom of the Lease house.
James Taylor	CIM prison inmate who testified at trial in 1984 that he gave Pro-Ked shoes to Cooper. In return for this testimony, District Attorney Kottmeier later wrote to prison authorities on Mr. Taylor's behalf. In 2004 Taylor recanted his trial testimony, but at a 2004 evidentiary hearing he recanted his recantation and showed he couldn't distinguish between Pro-Keds and PF Flyers.
John Thornton, Ph.D.	Professor of Forensic Science, University of California at Berkeley, who was a defense expert and testified regarding numerous inadequacies in the forensic processing of crime scene and that opportunities to learn about the attacks were lost as a result (*e.g.*, the potential to determine the movements of the victims and handedness of the attackers).
Sherriff Floyd Tidwell	SBSD Sheriff in 1983. Recently appointed by the outgoing Sheriff, he was running for election in the fall of 1983 and needed to solve the Ryen murders fast. He later pleaded guilty to four felony counts for stealing 523 guns from the SBSD property room during his tenure.
Judge Kim Wardlaw	Judge of the United States Court of Appeals for the Ninth Circuit who signed on to Judge William Fletcher's dissent and wrote her own dissenting opinion to the same denial. *See* Ex. 1 [*Cooper v. Brown*, 565 F.3d at 581 (2009).]
Pat Whelchel	SBSD Reserve Deputy who, according to his statement to Tom Parker, responded to the Ryen/Hughes murders on June 5, 1983 and was soon thereafter tasked by SBSD with obtaining tennis shoes from CIM.

Case No: 12.831, Cooper Merits Brief: Glossary of Individuals	
Diane Williams	Former girlfriend of Mr. Cooper living in Pennsylvania whom Mr. Cooper called from the Lease house on June 3 and June 4 and also from Tijuana Mexico on June 5, 1983 to ask for money.
Deputy Tim Wilson	SBSD Detective who learned that shortly after the Ryen murders three white men with blood on their clothing were spotted in a bar close to the murders. He reported this information to Sgt. Billy Arthur.
Anthony Wisely	Prisoner Koon's cellmate who advised authorities of Koon's confession. He voluntarily spoke with Det. Woods, but by the time that Cooper's investigator (Ron Forbush) came to interview him several weeks later, he was uncooperative and believed that he had experienced retribution from guards at the prison for coming forward with information about the Ryen/Hughes murders.
Mary Mellon Wolfe	Witness to the three strange white men in the Canyon Corral Bar the night of the murders along with Christine Slonaker and Lance Stark. SBSD did not interview her in 1983. In 2003 she came forward with the information about being bothered by the white men in the bar the night of the murders and noticing that one was wearing coveralls that were covered in blood. She testified at the evidentiary hearings in 2004 before Judge Huff.
Detective Gary Woods	SBSD Detective who received telephone call from Lieutenant Henson at CMF about the Koon confession. He interviewed Anthony Wisely about the Koon confession.

Appendix C

Evidence That Should Be Tested

DNA testing has advanced by leaps and bounds from the time of the original testing in 2002 (profiler) to the testing available at Mr. Cooper's last formal request in 2010 (minifiler) to the highly sensitive testing available today (touch DNA and low copy number methodology). Unlike previous testing that required comparatively large amounts of DNA, touch DNA analysis requires only seven or eight cells from the outermost layer of human skin. This increased sensitivity has been successfully utilized in other cases to analyze old and degraded evidence. For example, Michael Morton was exonerated 2011 after DNA found on a bandana discarded near the crime scene revealed the DNA of his deceased wife and another man who committed a similar murder two years after the Morton murder. *See* Ex. 249 [http://www.innocenceproject.org/cases-false-imprisonment/michael-mortontouch.] [284]

Thus, where previous tests has failed, touch DNA has the potential to provide mountains of meaningful information, particularly here where previous testing was unable to identify the habitual wearer of the tan t-shirt and where unknown DNA contributors were identified on several key pieces of evidence, including the tan t-shirt, blood drop A-41 and Mr. Cooper's blood vial VV-2. What follows is a robust discussion of the evidence known to exist in Mr. Cooper's case that should be subject to forensic testing and further discovery.

Tan T-Shirt (Trial Ex. 169)

SBSD Dep. Fields recovered this Fruit of the Loom tan t-shirt with a left side pocket on the side of Peyton Road just north of the Canyon Corral Bar on June 7, 1983, two days after the discovery of the murders and a day after Laurel Epler discovered the now mysteriously missing blue shirt, possibly with blood on it, just over half a mile away.[285] The tan t-shirt is consistent (color, size, brand, style) with the Fruit of the Loom tan t-shirt with a left side pocket that Diana Roper said she purchased and laid out for her boyfriend Lee Furrow to wear on June 4, 1983, the day of the murders.[286] In 1983, SBSD tested the tan t-shirt and found that what appeared to be blood stains on the t-shirt were consistent with Doug Ryen's blood type, but not with Mr. Cooper's.[287] The defense, not the prosecution, introduced the tan t-shirt as Exhibit 169 at trial in 1984 as evidence of Cooper's innocence and to support evidence of other attackers.

In 2002, California DOJ Senior Criminologist Steven Myers conducted DNA testing on the tan t-shirt. Habitual wearer testing using then available technology yielded no results. Ex.

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[284] This exoneration was also supported by the previously undisclosed statements of Morton's son about the "monster" who attacked his mother, which was specifically identified as not being his father Michael Morton. *Id*. Similarly, DNA showing the DNA of another individual on several key pieces of evidence, including his wife's broken fingernail and panties aided in the acquittal of David Camm for his wife's murder at his third retrial. *See* Ex. 250 [https://en.wikipedia.org/wiki/David_Camm]. Camm had been previously convicted for that murder based upon testimony of the very man whose DNA was later found on the fingernail and panties. *Id*.

[285] *See* Ex. 70 [SBSD Report re Recovery of t-shirt and towel dated Jun. 10, 1983], Ex. 67 [SBSD Log dated Jun. 6, 1983 (Blue Shirt Log)], Ex. 1 [*Cooper v. Brown*, 565 F.3d 581, 628 (9th Cir. 2009)], 31 R.T. 1790-91 and Ex. 91 [Roper Decl., ¶¶ 5, 10].

[286] Ex. 91 [Roper Decl., ¶¶ 5, 10].

[287] 93 R.T. 4602-06, 94 R.T. 4663.

251 [June 2002 DNA Report]. Thus, there is no current DNA information establishing who might have worn the shirt. Tests of blood spatter on the tan t-shirt showed the DNA of Mr. Cooper, Doug Ryen, Chris Hughes, Jessica Ryen, and Peggy Ryen, as well as a possible match with the minor DNA contributor detected in testing of A-41 that did not match any of these individuals.

As the Ninth Circuit recognized in 2004 when it ordered further testing of the tan t-shirt, analysis of this item offers a critical opportunity to determine Mr. Cooper's innocence once and for all. Unfortunately, Judge Marilyn Huff (the district court judge who oversaw the last round of testing on the t-shirt in 2004) refused to permit Mr. Cooper's expert, Dr. Peter DeForest, to examine the tan t-shirt.[288] She herself chose the spot on the tan t-shirt to be tested for EDTA[289] and, despite her lack of scientific knowledge, authored the EDTA testing protocol. Despite these misguided actions, the EDTA testing that was done in 2004 showed heightened levels of EDTA, strongly suggesting that Mr. Cooper's blood was planted.[290]

Using proper analysis and modern scientific testing, defense experts could confirm previous findings of heightened levels of EDTA in any blood spots or spatter. They could also conduct state of the art "habitual wearer" testing through the use of "touch DNA." Ex. 252 [Letter of S. Eikelenboom dated Oct. 17, 2013] and Ex. 253 [Letter of S. Eikelenboom dated Oct. 23, 2015]. Results of such testing could yield a DNA profile of the person who wore the t-shirt, presumably during the attacks. Such testing might also identify the minor DNA contributor from areas previously tested in order to match that contributor with other minor DNA contributors found in other evidence such as VV-2 and A-41. Ideally, the defense experts could conduct detailed analysis utilizing highly specialized equipment available to these defense experts. Such testing may entail repeated cuttings until a DNA profile could be obtained.

[288] (Ex. 135 [Judge Huff Order Granting in Part and Denying in Part Petitioner's Motion for Testimony and Production of Documents re EDTA Testing, dated February 11, 2005, ER 04751-54].

[289] In choosing the spot to be tested, Judge Huff ignored that this spot had never been tested to determine whether it was in fact blood, and if it was, whether the blood belonged to Mr. Cooper or someone else. Before any spot or spatter on the t-shirt is tested for heighted levels of EDTA, testing must be done to determine: (1) whether the spot contains blood, and (2) whose DNA is in that blood. As a non-scientist who refused to listen to the defense experts, Judge Huff missed these critical steps.

[290] *See* Judge Fletcher's dissent at Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009)], analyzing the EDTA testing results of the State's expert Siuzdak and the defense's expert Ballard and concluding that the results showed heightened levels of EDTA. Therefore, more scientific testing for heightened levels of EDTA could more clearly determine whether Daniel Gregonis planted Cooper's blood on the tan t-shirt and A-41 when he had access to VV-2, A-41 and presumably the tan t-shirt in 1999.

In advance of such testing, the defense experts should be permitted to examine the tan t-shirt. In the past these experts have hosted law enforcement personnel at their facilities in Colorado, allowing for on-site examination and concurrent cutting and testing of DNA in the presence of law enforcement, while utilizing the most sensitive equipment available at that lab. A less desirable alternative would be to allow these experts to conduct an in person inspection of the t-shirt where it is currently located utilizing portable equipment. The experts would then have to take cuttings from the t-shirt – likely from the armpits and collar – and bring those cuttings back to their lab to test for DNA. These cuttings would need to be larger than cuttings taken on site in Colorado so that they would have the ability to run multiple tests in order to maximize the chance of their obtaining a usable "habitual wearer" DNA profile.

Ideally, defense experts would then compare the DNA profile of the habitual wearer with the DNA profile of Lee Furrow and others in the CODIS Database. The habitual wearer DNA profile, as well as any other identified, non-victim DNA, could also be compared with the minor DNA contributors that have been discovered throughout the years as well as the to the individuals who handled the various items of evidence (e.g. hatchet, hatchet sheath, button) to see if any of them match, thus further supporting Mr. Cooper's framing/planting theory

Orange Towel

At the same time the SBSD recovered the tan t-shirt, it also seized an orange hand towel that was laying on the shoulder off the side of the road. Ex. 70 [SBSD Report re recovery of tan t-shirt and orange towel dated Jun. 10, 1983]; Ex. 254 [Photo: Orange Towel on shoulder]. This towel matched the size, color, and brand of a hand towel recovered from the Ryen home. Ex. 183 [SBSD Orange Towel Report dated Jun. 12, 1984]. Testing of the towel (which had been given the label BB) in 1983 did not yield meaningful results (Ex. 255 [Gregonis' handwritten test results]) and, it does not appear that the orange towel was subject to any DNA testing in either 2002 or 2004. *See* Ex. 256 [June 2002 DNA Test Report] and Ex. 118 [2004 Mito DNA Report]. However, given that it was taken from the Ryen home and discarded with the bloody tan t-shirt there is a strong probability that it may have been used by the killer(s) to clean up and therefore may have previously undetected touch DNA which could exonerate Mr. Cooper.

The orange towel should be subjected to DNA testing to: (1) determine the donor(s) of any DNA present on it, (2) compare that DNA to the DNA on other evidence, particularly the habitual wearer of the tan t-shirt.

Blood Drop A-41

SBSD allegedly found Blood Drop A-41 in the Ryen house on the wall in the hallway immediately across from the entrance to the master bedroom. (89 R.T. 3511-12, 3639.) It consisted of a single isolated drop of blood, which SBSD Criminologist Daniel Gregonis' initial serological testing (without defense experts present) concluded was EAP type B. (93 R.T. 4430.) However, Gregonis then changed his lab results to Type rB, after learning that was Mr. Cooper's Type. (93 R.T. 4429-31, 4444.) Mr. Cooper also asserts that Gregonis perjured himself in 2003 when he testified before a San Diego Superior Court judge that he did not open the glassine envelope containing A-41 prior to DNA testing in 2002. Photographic evidence of the glassine envelope clearly shows Gregonis' initials and the date (8/19/99), proving that he opened the glassine envelope when he had it in his possession for 24 hours in August 1999. Ex. 124 [photo of A-41 vial tin.]

In 2001, when what was supposed to be the remains of A-41 was sent to the DOJ Crime Lab for testing, it consisted of a vial inside a metal tin. The vial's cap was loose. When the tin was opened, the vial was empty. Loose within the tin was a paint chip.[291] DNA testing of whatever was in the vial revealed that A-41 contained the DNA of two individuals, one of whom was Mr. Cooper. The identity of the second donor was unknown, but did not match a combination of any of the victims' DNA.

The 2001 DNA testing agreement between the State and Cooper stated that, if possible, a portion of the sample would be retained for potential further testing at the lab. This portion of the sample of A-41 should be tested to confirm the presence of two DNA donors and for the presence of EDTA, to determine whether the minor DNA contributors match, further supporting that Gregonis planted blood from VV-2 onto A-41 in 1999.

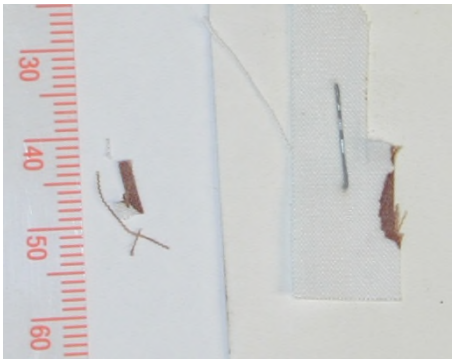
[291] The existence of this chip was surprising as prior testing notes and testimony indicated that all of the chip was consumed in prior testing.

Blood Vial VV-2

VV-2 is the vial of blood SBSD criminalist Stockwell took from Mr. Cooper shortly after he was arrested in Santa Barbara in July 1983. California DOJ employee Stephen Myers tested a swatch from this vial in 2002. Myers' testing apparently yielded a DNA profile, which has been used as Mr. Cooper's profile from that point forward. See Ex. 256 [June 2002 DNA Report] and Ex. 251 [July 2002 DNA Report]. However, when mitochondrial DNA expert Dr. Terry Melton tested the remaining portion of the swatch from VV-2 in 2004, she found it contained the DNA of two individuals: Mr. Cooper and another unknown person. Ex. 118 [2004 Mito DNA Report]. In Judge Fletcher's dissent, he speculates that the reason why two sources of DNA were found in the sample is because someone had first used blood from the vial to plant Mr. Cooper's DNA on other evidence (i.e., the tan t-shirt and A-41), and then added another person's blood to the vial to make it appear as full as it previously had been.[292]

As of 2003, vial VV-2 has been housed at the San Bernardino County Crime Laboratory, where it is not subject to evidentiary controls. Purportedly, it is held in a refrigerator that is accessible with a key available to all crime lab employees. Mr. Cooper believes Daniel Gregonis used this vial to put Mr. Cooper's DNA on A-41 in August 1999. The blood in VV-2 should be tested for the presence of two DNA donors and potentially to match the minor DNA contributors found on A-41 and/or the tan t-shirt to that second donor.

DNA Extracted from the VV-2 Swatch



In his October 26, 2010 Supplemental Declaration, California DOJ Senior Criminalist Myers noted that "Extracted DNA from the testing for my sampled portion of [the VV-2] stain is still being maintained at the California Department of Justice DNA Laboratory." Analysis should be done of that DNA profile to examine the raw data.[293] The goal of this testing would be to attempt to replicate the results of Dr. Melton's 2004 testing of the remaining portion of the VV-2 swatch, which appeared to contain DNA of two or more people.

[292] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009).]

[293] As of the time of the drafting of this memorandum, a disk containing the raw DNA data from 2002 has been burned and sent to Selma and Richard for their review.

Hairs Clutched in the Victims' Hands

Pursuant to the earlier stipulation for DNA testing between the prosecution and Mr. Cooper, in 2002 defense expert Edward Blake and DOJ's Stephen Myers examined *some* of the hairs found stuck to the victims' hands.[294]

In 2004, Ninth Circuit-ordered testing of hairs found clutched in the victims' hands was re-started. The object was to determine whether any of the hairs was from a person other than any of the victims. It was and always has been uncontested that none of the hairs belonged to Mr. Cooper.

Mr. Cooper's asserts, and in his 2009 dissent Judge Fletcher opined, that the district court unduly limited mitochondrial DNA testing of these hairs and prematurely foreclosed the opportunity for further testing.[295] As Judge Fletcher noted, Judge Huff did not permit any further examination of hairs that defense expert Edward Blake had testified had not previously been examined, and Judge Huff limited the mitochondrial DNA testing to hairs that had already been determined not to have root material.

The remaining hairs found attached to the victims should be reexamined for root material. If any hairs with the root intact are found, they should be subjected to mitochondrial DNA testing to determine whose hairs they are.

The hairs are currently at the San Diego County Courthouse and are easily accessible for examination.

[294] June 4, 2004 HRT 35.
[295] Ex. 1 [*Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009).]

Victims' Clothing (particularly Jessica's nightgown)

Scientific advances in DNA technology may afford the opportunity to locate touch DNA on the clothing of Jessica and Josh Ryen, as well as Christopher Hughes. In particular, because we know that Jessica Ryen's nightgown was lifted in order to perform post-mortem carving on her chest, there is a possibility that the person manipulating her nightgown left genetic material that may be detected through touch DNA. Further, genetic material may also have been deposited on Josh and Chris's clothes, especially when one considers that the murders occurred on a summer night and with extreme force in a short period of time, thus supporting a probability that the killer(s) may have perspired on these clothes during the attacks.

Victims' Fingernail Scrapings

Fingernail scrapings were taken from Doug, Peg, and Jessica Ryen, as well as Chris Hughes during their autopsies. *See* Ex. 60 [SBSD Report on Examination of Physical Evidence dated June 14, 1983]. These samples were not tested during the 2002 or 2004 DNA testing. *See* Ex. 256 [June 2002 DNA Report] and Ex. 118 [2004 Mito DNA Report]. However, given advancements in DNA technology, there is a possibility that if one of the victims acted to defend themselves, DNA identifying the killer(s) could be present. Notably, Doug, Peg, and Jessica Ryen, as well as Chris Hughes experienced defensive wounds during the attack. *See, e.g.*, 90 R.T. 3878-79; 91 R.T. 3931, 3933, 3994, 4004, 4007, 4012-14, and 4055. Therefore, Mr. Cooper requests DNA testing of the samples taken from these victims, which he believes will show the identity of the true killer(s) and may be matched to the habitual wearer of the tan t-shirt, user of the orange towel, etc.[296]

The Hatchet

On June 5, 1983, the day the bodies of the victims were discovered, a person visiting friends in the Ryen neighborhood discovered a hatchet lying in the weeds next to the road not far from the Ryen home (90 R.T. 3789-91). SBSD Detective Bell recovered the hatchet, which was located on the right side of the road for a vehicle traveling away from the Ryen residence, and thus on the passenger side of the car. Shortly thereafter, the SBSD tested the hatchet for fingerprints utilizing several different methodologies. Ultimately SBSD sent the hatchet to the FBI, which used a chemical process on the hatchet that permanently darkened its handle. [297]

The parties subjected the hatchet to DNA testing in 2002. This testing revealed DNA profiles from victims Doug and Peggy Ryen, daughter Jessica, and Christopher Hughes. However, to Mr. Cooper's knowledge, no attempt was made to recover DNA from the handle itself. Upon stipulation by Mr. Cooper and the State, the hatchet was recently transferred from the DNA laboratory to the San Diego County Courthouse.

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[296] These fingernail scraping samples were identified by crime lab personnel as follows: Peg Ryen; right hand (B-11); left hand (B-12); Jessica Ryen: right hand (C-4), left hand (C-5); Doug Ryen: right hand (D-13), left hand (D-14); Chris Hughes: right hand (E-5); left hand (E-6). *See* Ex. 60 [SBSD Report on Examination of Physical Evidence dated Jun. 14, 1983].

[297] In an odd twist, while this processing altered the color of the hatchet and may have made serological testing of the hatchet impossible in the 1980s, that chemical layer deposited in 1983 may have preserved touch DNA, which once the chemical layer is removed, could be tested and reveal the identity of the person(s) who handled the hatchet.

Testing of the hatchet could be instructive on several fronts. First, there is a possibility that this hatchet belonged to Lee Furrow, because Diana Roper identified it as being consistent with the hatchet missing from among Lee Furrow's tools shortly after the discovery of the murders.[298] Thus, even if Furrow used gloves during the commission of the crimes, he likely handled the hatchet prior to committing the murders. Second, there is also a possibility that DNA obtained from the handle could be used to disprove other prosecution theories (*e.g.*, that the hatchet came from the Lease house). Further, if DNA is present, but does not belong to Cooper, that is supportive (though not dispositive) of the theory that Cooper did not handle the hatchet.

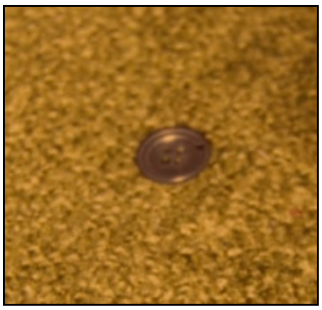
[298] Ex. 91 [Roper Decl., ¶ 9].

The Hatchet Sheath

Employees of Larry Lease (the owner of the hide-out house) discovered the hatchet sheath lying in open sight on the floor of the empty Bilbia bedroom on June 7, 1983.[299] This was one day after SBSD detectives Moran and Hall, who had not noted any evidence contained therein, searched this home. This sheath has not been the subject of DNA testing.

The sheath currently resides at the San Diego Courthouse. Although testing the leather sheath may be more difficult than other materials, it could be tested using "touch DNA" methods to identify any persons who handled it. Such testing could be instructive on several fronts. Assuming this hatchet sheath was planted by authorities but was not a pair with the hatchet that was one of the murder weapons, there may be DNA that would identify the individual who planted the item. Further, if this sheath was in fact paired with the murder weapon, there is a possibility that the killers deposited DNA on the sheath.

Green Button



SBSD investigators claimed to have recovered a green, blood-stained button in plain view on the floor of the hideout house near the Bilbia bedroom closet.[300] The blood on the button was a ABO Type-A, consistent with both Cooper and Doug Ryen. At trial, the prosecution's theory was that the button came from a prison jacket issued to Cooper.

In 2002 DNA testing on the "small amount of red/brown staining" on the green button was inconclusive. The button was recently transferred from the DNA Lab to the San Diego County Courthouse upon stipulation by Mr. Cooper and the State. The button still resides in a pill box at the DOJ Lab in Richmond and the DNA that was inconclusive is likely still suspended there. The button should be tested to determine whether Mr. Cooper's or Doug Ryen's DNA are on it, as well as whether there is DNA of anyone else who may have planted the button.

Siuzdak/Scripps Lab Records from 2004 EDTA Testing

The 2004 EDTA testing of a spot on the tan t-shirt that Judge Huff designed and ordered was done on a "blind"[301] basis. When Siuzdak/Scripps presented their results to the court, they didn't know what the results meant. Only after Siuzdak/Scripps' results were revealed by the district court and they showed heightened EDTA, did Siuzdak/Scripps claim EDTA

[299] 86 R.T. 2732-33, 86 R.T. 2838-46, 87 R.T. 2905-08.

[300] *Id*.

[301] "Blind" testing means that the laboratories tested a number of purported samples, some of which were actually taken from places where there was no stain and some of which were "controls" designed to test whether there was a difference from the actual stain. This meant that the testing laboratories did not know what their results meant because they did not know, which was the actual stain and which was a control. Only after Siuzdak/Scripps results were opened by the district court and showed heightened EDTA, did Siuzdak/Scripps claim contamination.

contamination in their lab. Not willing to accept the State's laboratory's explanation, the Cooper team asked Judge Huff for the lab's records. Judge Huff denied this request.[302]

Siuzdak/Scripps laboratory records should be produced to the Cooper team for inspection. Only then can the Cooper team evaluate whether there was in fact lab "contamination" and whether the "withdrawal" of the Suizdak/Scripps results was in good faith.[303]

[302] Ex. 135 [Judge Huff Order Granting in Part and Denying in Part Petitioner's Motion for Testimony and Production of Documents Regarding EDTA Testing, Feb. 11, 2015 (ER 4751-54).]

[303] A good list of some of the items that should be produced is attached at Appendix D [Appendix A to Defendant Kevin Cooper's Memorandum of Points and Authorities in Support of Motion for Post-Conviction Discovery and for Examination of Physical Evidence filed April 7, 2005.] This list is discovery that Mr. Cooper requested by motion under Cal. Penal Code section 1405 toward the end of the hearings before Judge Huff, when she had denied virtually every discovery request that Mr. Cooper's team made. The San Diego Superior Court inexplicably denied every request notwithstanding the clear language of section 1405.

Appendix D

Appendix A to Defendant Kevin Cooper's Memorandum of Points and Authorities in Support of Motion for Post-Conviction Discovery and For Examination of Physical Evidence Filed April 7, 2005

DISCOVERY REQUESTS[304]

1. Documents[305] reflecting or relating to Detective Derek Pacifico's investigation of any relevant files at SBSD relating to any contacts between persons at CIM Chino and SBSD, including the documents he reviewed pursuant to his investigation of the gym shoes.

The tennis shoes allegedly worn by Defendant the night of the murders were key evidence in the prosecution's case. The prosecution argued in both its opening and closing statements at trial that one of the shoeprints found at the Ryen and Lease houses was from a type of shoe sold only to prisons and not sold at retail stores. (84 RT 10/18/84 at 2280-81; 106 RT 12/5/95 at 7749.) One of Defendant's *Brady* claims is based on the prosecution's suppression at trial of material, exculpatory evidence regarding the availability of a particular type of tennis shoe. In her January 30, 2004 declaration, the warden of CIM Chino, Midge Carroll, stated that she told one of the lead SBSD detectives investigating the Ryen/Hughes murders that the shoeprint was created by a tennis shoe not available only to prisons but available in retail stores. (Declaration of Madge Carroll dated 1/30/04 ¶ 3.) Warden Carroll's declaration was corroborated by her June 2, 2004 testimony in the habeas proceeding (RT 6/2/04 at 102:11-106:1), the June 2, 2004 testimony of Stride Rite sales representative Don P. Luck (RT 6/2/04 at 236:19-23), and Exhibit 68 of the State's answer, a Pro Keds sales catalogue indicating that the

[304] The Requests are a listing of discovery that Defendant has determined to request at this time. There is additional information that Defendant believes has not been provided, and to which he is entitled. Therefore, Defendant's discovery request currently focuses on what Defendant believes are the most pressing areas of information, but Defendant reserves the right to request additional discovery at a later date.

[305] For the purposes of this request, "documents" includes all information, records, notes, reports, test data, diagrams, messages, transcriptions, statements or other oral, written, typed or visual information, whether or not acknowledged or signed by the person giving the information, and however recorded or preserved, including by way of photograph, digital recording, electronic computer files, videotape, audiotape, telephone answering machine message, wiretap, surveillance tape and/or security tape. "Documents" also include charts, printouts, analyses, graphs, diagrams, drawings, slides, transparencies, reprints, exemplars, tests, test materials and all other similar items. "Recordings" includes all film, videotape, and audiotape.

shoe that purportedly could have created the shoeprint in question was available for general retail in at least 1981.

In an attempt to rebut Carroll's declaration and testimony, at the June 3, 2004 evidentiary hearing, the State called SBSD Detective Derek Pacifico to testify that he had reviewed "all" files relating to contacts between (i) Midge Carroll, and (2) SBSD officials and representatives, relating to the shoe issue. Pacifico stated that, based upon his review of the file, he saw no writing to show that Carroll had ever called SBSD to relay this information. (RT 6/3/04 at 46-47].) Yet, despite his alleged thorough review of the SBSD files, Pacifico was only able to name two investigators who had worked on the Ryen/Hughes case in 1983. (*Id.* at 49.) Pacifico also conceded that he had not actual spoken in person, or on the telephone, with a single person actually involved in the investigation of the case in 1983-84. (*Id.* at 49-50.) In short, Pacifico's testimony was wholly unreliable.

Accordingly, Defendant requests production of the documents reviewed by Mr. Pacifico upon which he based his testimony and any other SBSD files relating to any contacts between CIM Chino and SBSD.

2. Documents reflecting or relating to William Baird's investigation of the Ryen/Hughes murders and the identity and source of the gym shoe in his office.

One of only two pieces of evidence purportedly linking Defendant to the Ryen house was a shoeprint found on a bed sheet, designated A-8, by William Baird, former criminalist at SBSD. Baird was in fact the only criminalist who analyzed the relevant shoeprint evidence during the investigation of the Ryen/Hughes murders. Notably, this shoeprint was never spotted on the sheet while at the crime scene, but was only detected by Mr. Baird after the sheet was packaged and shipped to his office. (46 RT 6/18/84 at 3703.) Baird also admits to having a tennis shoe in his office at the time he received the bed sheet that could have created the print in question. (94 RT 12/11/84 at 4793.)

Defendant requests production of any documents reflecting or relating to Baird's investigation of the Ryen/Hughes murders and the identity and source of the gym shoe in his office.

3. Documents reflecting or relating to (1) interviews that Detectives Pacifico and Mahoney, or any other SBSD representatives, conducted in connection with investigation of the make, model, sale, availability, distribution, or chain of custody of the tennis shoes purportedly worn by Defendant in the Ryen and Lease houses, and (2) any investigation, from June 4, 1983 to the present date, of the make, model, sale, availability, distribution, or chain of custody of the tennis shoe that purportedly were worn by defendant at the Ryen and Lease houses.

Since Defendant's stay of execution was granted, at least two SBSD detectives, Derek Pacifico and Don Mahoney, conducted interviews with individuals, including but not limited to former warden Midge Carroll, former Stride Rite sales representative Don P. Luck, Charles Kraus, Thomas Hornung, Robert Bales, and inmate James Taylor, in connection with investigation of the make, model, sale, availability, distribution, or chain of custody of the tennis shoes that purportedly were worn by Defendant at the Ryen and Lease houses. Defendant was not aware of the extent and nature of these contacts, and in some cases the very existence of any contacts between SBSD and these witnesses, until being served with a stack of 100 separate exhibits (thousands of pages) submitted in support of the State's answer filed with the federal court on May 3, 2004. This information is material to the proof of Defendant's habeas claims, including Defendant's actual innocence claim and Defendant's *Brady* claims.

Defendant therefore requests the production of any documents reflecting or relating to (1) the interviews conducted by Detectives Pacifico and Mahoney, or any other SBSD representatives, in connection with investigation of the make, model, sale, availability, distribution, or chain of custody of the tennis shoes that purportedly created the shoeprints purportedly found at the Ryen and Lease houses, and (2) any investigation, from June 4, 1983 to the present date, of the make, model, sale, availability, distribution, or chain of custody of these tennis shoes.

4. Examination of cigarette butts found, stored, or tested, including but not limited to V-12, V-17, and QQ.

Like other evidence in the case, law enforcement testified that the cigarette butt designated as V-12, that was allegedly found in the Ryen station wagon and later purportedly linked to Defendant in DNA testing conducted in 2002, was consumed during pretrial proceedings, only to reappear inexplicably during trial. (47 RT 7/12/84 at 4947, Testimony of Daniel Gregonis; 91 RT 11/28/84 at 4291, Testimony of David Stockwell.) V-12 was first tested by San Bernardino County criminalist Daniel Gregonis, and then sent to Mr. Wraxall, the State's expert, for further testing. (57 RT 7/12/84 at 4947, Gregonis Testimony.) Ed Blake, the defense's forensic expert, was also involved in the Wraxall examination (they share office space and frequently work together). (*Id.* at 5018.) Blake's notes showed that V-12 was approximately 4 millimeters long. (Handwritten Laboratory Notes dated 7/5/84.) Wraxall's notes showed that he was given a cigarette butt approximately 1 cm in length and 5 millimeters in height to test. Wraxall has explained that his measurement was derived from spreading out the cigarette paper and laying it flat, as the drawing and photograph in his notes appears to show. Mr. Wraxall's notes reflect, and his subsequent interview verifies, that he placed the entire amount in a saline solution for testing. (Grele Decl. ¶ 6.) At pretrial proceedings, Mr. Gregonis testified that V-12 had been entirely consumed by Mr. Wraxall's testing. (57 RT 7/12/84 at 4947, Gregonis Testimony.)

Inexplicably, at trial, SBSD criminalist David Stockwell opened the canister containing V-12 and identified tobacco and paper from the hand-rolled cigarettes. (91 RT 11/28/84 at 4291, Stockwell Testimony.) It was not explained how this paper could reappear. However, because the saliva testing on V-12 and V-17, another cigarette butt purportedly recovered from the Ryen station wagon, was inconclusive at the time of trial and in fact supported the defense (Mr. Wraxall found indications that would only be present by a secretor, which Mr. Cooper was not, but could not conclude it was a secretor because of the small sample

size), trial counsel had no reason to question how something that had been previously consumed could now be present. (93 RT 12/5/84 at 4501-02, Gregonis Testimony.)

Most troubling was the examination of V-12 in 2001. When the exhibit that was identified as the paper from the cigarette butt labeled V-12 was turned over to the California Department of Justice, it measured 7 mm long, a 75% increase, and appeared to have been refolded. (Handwritten DOJ Laboratory Notes dated 7/6/01.) Even more disturbing, QQ, the cigarette butt that was from Defendant's car and that is similar to what was tested as V-12 in 2001, is no longer in the evidence bag it was once in. (Inventory conducted by Officer Garcia pursuant to Court Order issued by Judge Kennedy.) To compound these facts, cigarette butts that were in the ashtray in the Lease house, where Defendant stayed for two days, turned up missing, as did cigarette butts originally described as being in the Ryen station wagon's ashtray. (97 RT 12/19/84 at 5403, Testimony of Kevin Cooper; Declaration in Support of Arrest Warrant dated 6/9/83; SBSD Reported dated 6/25/83 by Officer Swanland; SBSD Report of Ryen station wagon dated 6/16/83 by Detective Michael Hall.) A subject of Defendant's claims is that the cigarette butts from the Lease house were moved to the Ryens' car.

Whether V-12 and V-17 were ever in the Ryens' station wagon in the first place itself is highly doubtful. Michael Hall, the Sheriff's detective who did a thorough search of the Ryens' car at the site where it was originally found in Long Beach, found no cigarette butts where V-12 and V-17 were purportedly later found. (SBSD Report of Ryen station wagon dated 6/16/83 by Detective Michael Hall.) SBSD criminalists Stockwell and Ogino later purportedly found V-12 and V-17 in the Ryens' car, at locations where Hall had earlier found other small items, but not the cigarettes. (Handwritten list of contents of Ryen station wagon, undated; Evid. Hearing of David Stockwell 6/24/03 at 227.) Stockwell and Ogino's report did not show the times, dates and persons responsible for gathering this evidence. The only documentation of the results of Stockwell and Ogino's search is a handwritten, undated and unsigned note. (Handwritten list of contents of Rye station wagon, undated.)

Defendant therefore requests permission to examine the cigarette butts found, stored, or tested in connection with the Ryen/Hughes murders, including but not limited to V-12, V-17, and QQ. Defendant believes this physical evidence is currently in the possession of the SBSD Crime Lab or the California Department of Justice DNA Laboratory.

5. Documents reflecting or relating to the destruction of bloodstained coveralls.

On December 1, 1983, in the midst of the preliminary hearing, SBSD detective Frederick Eckley destroyed a pair of bloody coveralls found by Diana Roper that were linked to a third party suspect, including perhaps one of the men in the Canyon Corral Bar. The Disposition Report was not disclosed by the State. It was discovered by Petition in late November 1998. Before the Disposition Report was discovered, Deputy Eckley testified twice at trial that he alone made the decision to destroy the coveralls without consulting anyone. Eckley wrote on the Disposition Report that the coveralls were destroyed because they had "no value" and that the report that these items possibly belonged to the suspect was "unfounded." Contrary to Deputy Eckley's sworn testimony, the destruction of the coveralls was approved by a sheriff's deputy named Ken Schreckengost ("KS"). This report shows that Eckley did not destroy the coveralls on his own initiative, but that he did so after consultation with a deputy in the homicide division or with his supervisor.

Within the last several weeks, and after months of efforts, Defendant's counsel has finally located and interviewed "KS." (Declaration of Joseph P. Soldis dated February 22, 2005 ["Soldis Decl."] ¶ 3.) KS has stated that he would not have authorized destruction of any evidence with blood on it if it were not first tested. This was SBSD's strict policy and practice. (*Id.* ¶ 11.) KS also referred to a green form that would reflect what testing was done on the coveralls. (*Id.* ¶ 11.) Mr. Eckley, a retired sheriff's detective, has also been located. (*Id.* ¶ 16.) However, when questions were put to him, he declined to talk without an attorney. (*Id.* ¶¶ 18-20.)

In light of this recently obtained information, Defendant requests production of all documents reflecting or relating to the custody and alleged destruction of the bloodstained coveralls.

6. The custody and handling of the T-shirt during its storage at the SBSD Crime Laboratory, including but not limited to custody by SBSD criminalist Daniel Gregonis and former SBSD criminalist William Baird.

Both parties agree that the subject T-shirt has a varied substrate with an unknown history. An important part of the "unknown history" of the T-shirt is that its chain of custody both pre- and post-trial, has never been established. A "few release and receipt of evidence logs" show gaps in the custody of the T-shirt. Its whereabouts are unaccounted for during the period November 28, 1983 through April 15, 1984. Given the importance, yet uncertainties about the history of the T-shirt, its chain of custody must be determined.[306] In addition, pictures of the T-shirt taken by the SBSD after it was found have never been produced and should be.

Accordingly, Defendant requests the production of all documents reflecting custody of the T-shirt, including but not limited to documents created by San Bernardino criminalists, e.g., SBSD criminalist Daniel Gregonis and former SBSD criminalist William Baird, both of whom worked for the SBSD Crime Laboratory from June 1983, when the T-shirt was first discovered, through the completion of Defendant's trial.[307]

7. Documents reflecting or relating to the blue shirt found by Laurel Epler and taken by SBSD Detective Scott Field.

During Deputy Chief Rodney Ray Hoops' testimony before the district court on June 29, 2004, the State submitted Exhibit UUU-2, a Sheriff's Dispatch Log indicating that on June 6, 1983, "597-2195 Laurel Epler" reported finding "a blue shirt that possibly had blood on it" near Glenridge and Peyton about one quarter mile from the Canyon Corral Bar. The log

[306] The beige T-shirt also was found with an orange colored towel. The towel was entered into a sheriff's evidence log. The disposition of the towel also is unknown.

[307] Mr. Gregonis continues to work as an SBSD criminalist. Mr. Baird was forced to leave his position as an SBSD criminalist after being caught using and stealing heroin from the SBSD evidence locker.

shows that this evidence was picked up by Deputy Field. UUU-2 indicates that the assigned deputy was Scott Field. On August 13, 2004, John Kochis, one of two prosecuting attorneys in Defendant's criminal case in state court, testified that "I don't believe there ever was a blue shirt." (RT 8/13/04 at 198.) Kochis based this speculation on the fact that he had never heard anything about a blue shirt. (*Id.* at 199.)

However, on August 26, 2004, Laurel Epler, the woman who found and reported the blue shirt, testified before this Court regarding the incident. The State resisted Ms. Epler testifying and represented to the Court that Ms. Epler should not be called to testify in part because she had "no independent recollection of having reported the shirt" and "is not going to be able to provide any information that will inform this Court regarding the entry in the Sheriff's Dispatch Log regarding the 'blue' shirt." (State's *Ex Parte* Request *Re* Witness Epler dated August 20, 2004 at 2:1-4.) It now is clear why the State resisted hearing Ms. Epler's testimony. Ms. Epler testified that she found the blue shirt, notified the sheriffs office and that the blue shirt was picked up by Detective Scott Field.[308] Further, she described Detective Field with sufficient detail so that her identification of him can be verified. Her eyewitness testimony completely undermines the speculation of Mr. Kochis.

In light of this newly discovered information, Defendant requests production of all documents reflecting or relating to the custody and apparent destruction of the blue shirt found by Laurel Epler and recovered by SBSD Detective Scott Field.

8. Examination of A-41 — the blood drop discovered at the crime scene, and "UU" — the surrounding blood spots.

The State's sole evidence that Defendant was present in the victims' house was a single spot of blood located near the baseboard on a hallway wall in the Ryens' house, designated as Trial Exhibit A-41. (89 RT 11/19/84 at 3511-12, Stockwell Testimony.) More precisely, this drop was later described as a mixture of the blood of Defendant and one of the

[308] Mr. Field is deceased.

victims. (California Department of Justice, Physical Evidence Report 6/4/02.) However, the evidence that A-41 was subject to tampering prior to or during trial is substantial.

At trial, Gregonis testified falsely that he subjected A-41 to blind testing, and that at the time he first tested A-41, he was not aware of the theory that Defendant was suspected to be responsible for the crimes. (93 RT 12/6/84 at 4557, Gregonis Testimony.) Gregonis' statement that he was unaware that Defendant was the primary suspect at the time of his testing is belied by his own notes. (*Id.* at 4604-06, 4557, 4550.) His notes reflect that Gregonis only tested A-41 for enzymes that he knew matched Defendant. (*Id.)* He had this knowledge from testing of semen found on a blanket in the Lease house (10 RT 11/20/83 at 54-57), and from his communications with Pennsylvania authorities (93 RT 12/5/84 at 4488), well before Defendant was arrested and his blood obtained. When Gregonis conducted additional testing, he used an improper testing method by placing A-41 side-by-side with Defendant's sample. (*Id.* at 4557.) He lied about using this method until confronted by counsel during trial. (*Id.*)

When Gregonis initially read the results of testing on A-41, he found an enzyme that did not match Defendant (*id.*), so he altered Defendant's profile to reflect the presence of this enzyme. (11 RT 11/29/83 at 64-65.) He then reported that A-41 matched Defendant. (93 RT 12/5/84 at 4494-95.) Gregonis subsequently "reevaluated" his initial work when he learned that A-41 contained a different enzyme than he initially believed. (11 RT 11/29l83 at 64-65.) When confronted with this discrepancy, Gregonis *altered* his original laboratory notes in an attempt to hide his initial interpretation that exonerated Defendant. He then lied about altering his notes at trial until confronted with the truth. (*Id.*)

Gregonis testified at the preliminary hearing and at trial that he had consumed all of A-41 in testing, but twice later the sample was "found." (*Id.* at 4527-28.) Each time, without notifying the defense so as to prevent subsequent testing, Gregonis consumed more. (56 RT 7/11/84 at 4851-54.) He initially lied about this under oath, but had to change his testimony when confronted with the truth. (*Id.* at 4827-29.)

Gregonis failed to maintain adequate records of his testing that would have enabled his results to be verified. (93 RT 12/5/84 at 4492-96.) This was contrary to standard laboratory procedures. His photographs were intentionally **(?)** of poor quality, and he deliberately failed to adequately describe the tests in his notes. (*Id.*)

After trial, A-41 was stored in the same evidence bag as Defendant's blood sample and saliva sample. (RT 6/23/03 at 84-87, Evidentiary Hearing Testimony of Kelley Risheh; *id.* at 93-95, Evidentiary Hearing Testimony of Melody Moreno.)

When A-41 was tested for use at trial in 1985 and purportedly consumed, it consisted of loose chips in a metal tin (chips of plasterboard from the wall where State agents claim to have found and removed the blood drop later denominated as A-41). The white plaster chips extracted supposedly had been used up and discarded. However, when examined in 1998 by defense counsel, A-41 consisted of one capped vial with white chips, and a tin with a smaller vial inside containing a single paint chip. (SBSD Lab Report dated 8/1/83; Evidence Property Tracking System Log dated 9/19/00; photos of A-41.) Gregonis then examined A-41 in 1999, but never documented what he did with A-41 when he checked it out of the evidence locker for twenty-four hours. Gregonis also lied about opening the glassine envelope that contained A-41 in 1999. (RT 6/23/03 at RT 84-87, Risheh Testimony; *id.* at 93-95, Moreno Testimony; *id.* at 106-13, Gregonis Testimony; photos of sealed A-41 and wax-taped A-41.)

In 2001, when A-41 was sent to the Department of Justice lab in Berkeley, California, it consisted of a vial containing white flakes with a cap that was loosened, and a metal tin. When the tin was opened, there was an empty vial inside. Loose within the tin was a paint chip. The label on the glassine envelope containing A-41 indicated that Gregonis had opened the envelope in 1999. (Handwritten notes of S. Myers dated 7/6/01, 6/15/02; photos of A-41 tin.)

While A-41 is the only spot of non-victim blood found in the Ryen house, the prosecution possesses other information regarding blood samples in the vicinity of A-41 that has been withheld from the defense. Certain blood evidence close in proximity to A-41 was never

collected by sheriff's investigators. Other evidence, such as blood from the hallway, was collected and tested. These samples were small blood spots, given the designation "UU," found near A-41. These spots were not consistent with Defendant's blood. Defendant's counsel has obtained information that the prosecution instructed its expert Dr. Wraxall to cease testing UU after initial testing results were inconsistent with Defendant's blood. (Grele Decl. ¶ 7.) The defense was never given access to these spots to perform their own testing. Nor was Defendant ever provided with the State's complete tests results.

In light of the issues, Defendant requests permission to examine A-41 and the UU series, in order to determine whether A-41 may have been tampered with or contaminated, and whether UU was attributable to a person other than Defendant.

9. Documents reflecting or referring to any instruction on behalf of law enforcement, including but not limited to the SBSD, including its Crime Lab, or the San Bernardino District Attorney's office, not to pursue evidence that pointed to someone other than Defendant as the assailant in the Ryen/Hughes murders, including but not limited to instructions given to Brian Wraxall not to test the UU series of blood samples.

Small blood spots, given the designation "UU," were found within a one-foot radius of A-41, the only drop of blood allegedly from Defendant found in the victims' home. Defendant alleges that "UU" was checked out by SBSD Sergeant Billy Arthur for testing by one of the State's criminalist, Brian Wraxall. (Petition ¶ 77.) Mr. Wraxall's notes state that tests on some of the spots excluded Defendant because Defendant had a particular enzyme type that did not match the enzyme type in the spots Mr. Wraxall tested from the UU series. When it became evident that the UU series would exculpate Defendant, Mr. Wraxall was instructed immediately to stop the testing. Thus, the remaining blood spots, at least one of which was very close to A-41, have never been tested. If they were tested by someone other than Mr. Wraxall, those tests were never revealed to the defense. In his statement to John Grele, one of counsel for Defendant, Wraxall himself confirms that he was ordered to stop testing the UU series. (Declaration of John R Grele dated 2/22/05 in support of motion for further evidentiary hearing ["Grele Decl."] ¶ 7.)

Defendant requests the production of all documents reflecting or referring to any instruction by the SBSD, including its Crime Lab, or the San Bernardino District Attorney's office, not to pursue evidence that tended to point to someone other than Defendant as the assailant in the Ryen/Hughes murders. This information includes, but is not limited to, documents reflecting, referring to the instructions given to Brian Wraxall not to test the UU series of blood samples.

10. The daily logs and documents reflecting or relating to the daily logs from June 1, 1983 through July 31, 1983, including the underlying blue sheets, radio logs and dispatch recordings for that period.

The State's witnesses' testimony regarding the daily logs and the underlying primary documents (blue sheets, radio logs and radio recordings), from which the daily log is prepared, is incomplete and unclear. In Mr. Kochis' July 23, 2004 declaration he describes with great precision how all documents produced to Defendant had a handwritten number typically in the lower right-hand corner. (State's Notice of Lodgment of Declaration of John P. Kochis Re Trial Discovery Re Information from CIM Counselor Donnie Eddings with attached Kochis Declaration dated June 23, 2004 ["Kochis Decl."] ¶ 5(b).) In addition, Mr. Kochis described a system, apparently also implemented by Mr. Kottmeier, the co-prosecutor that reflects the date and numbers on the documents produced. (*Id.* at ¶¶ 5(c), 6.) The State included one such primitive and handwritten page that purportedly reflected this type of production log. (*Id.* ¶ 9, Ex. B.) The complete production log, which cannot be particularly long, has never been introduced. This is not just a matter of discovery, but the subject of evidence at trial.

Subsequent to Mr. Kochis' July 23, 2004 declaration, the State apparently recognized that his declaration contained a gaping hole. The daily logs did not bear any production number as they should according to Mr. Kochis' declaration. So, on August 13, 2004, Mr. Kochis was called to the stand to attempt to belatedly explain why the daily logs did not bear document production numbers. According to Mr. Kochis, they were produced by the sheriff's office pursuant to subpoena duces tecum. (Kochis RT 8/13/04 at 182-84.) Mr. Kochis

is not a competent witness to testify about the production of the daily logs unless, of course, he was involved in their production. There is no testimony that he had any role in their production. If the logs were produced by the sheriff's office and, according to Mr. Kochis, without any involvement by the district attorney, then the person(s) who gathered and produced the logs is the only one competent to testify.

In addition to the daily logs, SBSD dispatchers Nancy Simendich and Debra Holman described the primary documents underlying the daily logs, including the blue sheets (the primary paper used to record information telephoned to the dispatchers), radio logs, which contain more detailed information than the daily logs, and dispatch recordings. (Simendich RT 8/13/04 at 21-22, 40, 43, 47-58; Holman RT 8/13/04 at 82-83.) Defendant has not been provided with the actual blue sheets from which the daily logs are generated. All the State provided was a blank form of a blue sheet showing the type of information maintained on it. (Simendich RT 8/13/04 at 76, Ex. YYYY; Holman RT 8/13/04 at 92.)

The State relies on testimony from Defendant's trial attorney David Negus at a September 2, 1983 hearing on a motion to quash, as evidence that Mr. Negus received the daily logs. (State's Opposition to Motion for Evidentiary Hearing at 16 n.10.) But Mr. Negus cannot know if he received all daily logs. They contain no handwritten numbers as originally sworn to by Mr. Kochis. Like Mr. Kochis, Mr. Negus would testify that he never heard of a blue shirt being picked up and, like Mr. Kochis, he never saw a daily log entry to that effect.

In addition to the partial evidence regarding daily logs and related materials, Paul Ingels, a private investigator for the defense, was called by the State, with less than 24 hours notice to Defendant's counsel, to testify regarding documents he claims to have provided to prior counsel for Defendant. Mr. Ingels' involvement post-dates Defendant's only other federal *habeas* petition that was heard on the merits. With the recent transcription of Mr. Ingels' testimony, Defendant can now scrutinize exactly what Mr. Ingels claims to have known and related to Defendant's former counsel, Messrs. Robert Amidon and William McGuigan, and what documents he provided and when. According to Mr. Ingels, an unspecified number of

documents were first produced by him in fall 2003 or winter 2004 to Mr. Amidon for delivery to Defendant's new and current counsel. (Ingels RT 8/13/04 at 133-134, 163.) The daily logs and underlying documents and the "Ingels documents" relate to Defendant's constitutional rights under *Brady* and his claims of destruction of evidence and of actual innocence.

In light of this information, Defendant requests production of all documents reflecting or relating to the daily logs from June 1, 1983 through July 31, 1983, including the underlying blue sheets, radio log and dispatcher recordings for that period.

11. Documents reflecting or relating to discussions between SBSD officials, the District Attorney and Joshua Ryen.

From the outset of the investigation of this case, the likelihood of multiple perpetrators has never been satisfactorily negated. The sole eyewitness to the murders, Joshua Ryen, communicated to San Bernardino sheriffs shortly after the crime that there were several perpetrators. Don Gamundoy, a clinical social worker in the emergency room at Loma Linda University Medical Center, was the first person to communicate at the hospital with Joshua Ryen. (99 RT at 5918, 5921, Testimony of Donald Gamundoy.) Joshua Ryen told Gamundoy that (1) either three or four people were responsible for the attack; (2) they were male; (3) they were not black and did not look like Gamundoy, who was often mistaken for Hispanic; and (4) they were Caucasian. (*Id.* at 5928-29.) Calvin Fischer, a registered nurse assigned to the emergency room, took notes and confirmed Gamundoy's recollections that Joshua Ryen was alert and able to communicate and that he held up three fingers to indicate the number of attackers. (SBSD Interview of Calvin J. Fischer 1/9/84; R. Forbush interview of Calvin J. Fischer 10/12/83 at 2, 12; 100 RT at 6232, Testimony of Calvin Fischer.) Joshua Ryen's subsequent conversations with law enforcement confirmed this information. (R. Forbush interview of Mary Howell 10/27/83 at 2-3.)

Joshua Ryen later viewed photographs of Defendant on television while Joshua Ryen was still in the hospital and well before Defendant's arrest. Joshua Ryen also saw the television coverage of Defendant at the time of his arrest. Pictures of Defendant on each

occasion showed him with his hair combed out in an afro hairstyle. On June 14, 1983, while still in the hospital and the first time Joshua Ryen viewed Defendant's photograph on television, he spontaneously remarked to his grandmother, Dr. Mary Howell, that the man on television was not the person who committed the murders. (106 RT at 7703-04, Testimony of Mary Howell.)[309]

Joshua Ryen's subsequent descriptions of his attackers represented errant memory, influenced by the relationships formed with law enforcement, including preparation for his videotaped statements shown at trial, the repetitious questioning, his repeated viewing of Defendant on television, and the subsequent details of the capture of Defendant as well as discussions with relatives, law enforcement and therapists. Yet because Defendant has not been afforded full discovery, subpoena power and access to critical law enforcement records, confidential records of therapists and mental health professionals, or personnel who wrote these reports, Defendant is unable to provide further specificity regarding this claim.

Defendant requests the production of all documents reflecting or relating to all discussions between SBSD officials or the District Attorney's Office, on the one hand, and Joshua Ryen, on the other hand.

12. Documents prepared in connection with audits conducted in 1985 and 1986 of the San Bernardino County Sheriff's Department Crime Laboratory.

The trial judge was harshly critical of the investigation and forensic work in connection with the Ryen/Hughes murders for which Defendant was convicted. Indeed, he observed that, without any criminology experience all, he could have done a better job. (63 RT 7/25/85 at 5622:16-20.) Defendant is informed that in 1985 and 1986, inspections and audits were conducted of the practices of the San Bernardino County Sheriff's Department ("SBSD") Crime Laboratory. Such audits may corroborate and highlight the sloppy and unreliable practices of the SBSD laboratory that were exposed at trial and are at issue in claims in the

[309] Following the receipt of information from his uncle and police officers, Joshua Ryen's subsequent descriptions of his attackers changed dramatically. Because Defendant has not been afforded full discovery, subpoena power and access to either critical law enforcement records, confidential records of therapists and mental health professionals, or personnel who wrote these reports, Defendant is unable to provide further specificity.

current habeas proceeding. Defendant requests production of these audit reports and any documents created as part of the investigation and preparation of the reports.

13. Documents created in connection with (1) any SBSD contact since February 9, 2004, with any individuals in connection with any investigation of activities at the Canyon Corral Bar on the night of the Ryen/Hughes murders, (2) documents reflecting or relating to Detective Wilson's communications with other members of SBSD, including but not limited to Sergeant Arthur, relating to the events at the Canyon Corral Bar, and (3) documents created in connection with any investigation, from June 4, 1983 to the present date, of any activities at the Canyon Corral Bar on the night of the Ryen/Hughes murders.

On the evening of the Ryen/Hughes Murders, June 4, 1983, three suspicious men, who were not bar regulars, were seen in the Canyon Corral Bar, located less than one mile from the murder scene. Christine Slonaker and Mary Mellon Wolfe, two bar patrons that night, independently and without speaking to one another, came forward only days before Defendant's scheduled execution, and unequivocally told Defendant's counsel that these suspicious men not only acted bizarrely, but also had blood on their clothing. The men approached near where Slonaker, Wolfe and a third woman with them were sitting and attempted to engage them in conversation. Slonaker and Wolfe had the best opportunity to view the men in question, making their independent and mutually corroborating recollections that the men were covered in blood particularly credible. For her part, Slonaker previously had worked as a phlebotomist. This information is directly relevant to Defendant's actual innocence claim, as it strongly points to the culpability of third parties as the true perpetrators of the crimes for which Defendant was convicted.

Slonaker stated in her declaration that, shortly after the incident at the bar that night, a police officer was seen entering the bar. (Declaration of Christine Slonaker dated February 7, 2004 ¶ 11.) If it exists, no police report regarding the investigation that night has ever been turned over to Defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Since Defendant's stay of execution was granted, at least three SBSD law enforcement officials, Detectives Michael Gilliam and Derek Pacifico and Sergeant Patrick

Cavenaugh, have contacted at least nine witnesses in connection with investigation of activities at the Canyon Corral Bar on the night of the Ryen/Hughes murders: Edward Lelko, Shirley Killian, Virginia Mansfield, Kathleen Royals, Linda Paulk, Pamela Smith, Lester Land, Mary Wolfe, and Christine Slonaker,. Defendant was not aware of the substance of these contacts, and in some cases the very existence of any contacts between SBSD and these witnesses, until being served with a stack of 100 exhibits (thousands of pages) submitted in support of State's answer, filed within the federal court on May 3, 2004. However, this information is material to the development of Defendant's habeas claims, including Defendant's actual innocence claim, and Defendant's *Brady* claims.

On August 25, 2004, two additional witnesses testified as to events occurring at the Canyon Corral bar on the night of the Ryen/Hughes murders - Al Ward and Randy Mansfield. Al Ward was subpoenaed by the State, which thought he was a bartender at the Canyon Corral Bar identified in prior testimony by other bar employees and regular patrons. State's counsel provided Defendant's counsel with contact information that allowed Defendant's counsel to meet with Mr. Ward at the last minute - on the night immediately prior to Mr. Ward's scheduled testimony.

When Defendant's counsel interviewed Mr. Ward on the night of August 24, 2004, Defendant's counsel immediately determined that the individual who had been subpoenaed to testify was in fact not the former bartender at the Canyon Corral Bar. At the outset of the evidentiary hearing on August 25, 2004, Defendant's counsel notified the Court that the person who was subpoenaed to testify was not Al Ward, the bartender.[310] (RT 8/25/04 at 1:5-13.) Nonetheless, the Al Ward who was subpoenaed provided important information supporting Defendant's claims.

The other witness on August 25, 2004 was Randy Mansfield, who was a regular patron of the Canyon Corral Bar, the son of its manager Shirley Killian and then boyfriend of bar

[310] The State's representatives both subpoenaed Mr. Ward and spoke with him well prior to his testimony and were plainly aware that Al Ward was not the right person. Inexplicably, the State chose not to disclose that fact.

employee Virginia McNeil. When Defendant's counsel asked Mr. Mansfield what the race was of the "Al Ward" who bartended at the Canyon Corral Bar, Mr. Mansfield quickly responded that Mr. Ward was "white." The "Al Ward" the State subpoenaed to testify on August 25, 2004 was African-American.

On July 23, 2004, Lance Stark, a long time regular patron at the Canyon Corral Bar, corroborated the material facts testified to by Ms. Slonaker and Ms. Wolfe regarding the events at the bar on the night of the murders. Mr. Stark testified before the district court that he saw two men approach several ladies sitting at the bar on the evening of June 4, 1983. (Reporter's Transcript ["RT"] 7/23/04 at 20-21, 28.) Moreover, Mr. Stark testified that one of the men had light hair and was wearing a light T-shirt and coveralls. (*Id.* at 23-24.) Mr. Stark's testimony corroborated that of Ms. Slonaker and Ms. Wolfe in material respects and further establishes Defendant's claims that the three men at the bar, one of whom was wearing a light T-shirt, were likely the actual perpetrators of the Ryen/Hughes murders. At a minimum, these facts, if presented to the jury, would establish a reasonable doubt that Defendant was guilty.

At the August 26, 2004 hearing, Detective Tim Wilson of the SBSD testified that he was made aware, most likely within a week, perhaps two weeks, of the information that three male strangers with blood on them were seen at the bar late the night of the murders. (RT 8/26/04 at 77-78.) He also testified that he provided this information to Sergeant Arthur, who was in charge of the Ryen/Hughes murder investigation. (*Id.* at 70.) The prosecution's failure to disclose this information to the defense is a basis for Defendant's claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Accordingly, Defendant therefore requests the production of all documents created in connection with (1) any SBSD contact since February 9, 2004, with any individuals, including but not limited to those individuals discussed above, in connection with investigation of the activities at the Canyon Corral Bar on the night of the Ryen/Hughes murders, (2) documents reflecting or relating to Detective Wilson's communications with other members of SBSD, including but not limited to Sergeant Arthur, relating to the events at the Canyon Corral

Bar, and (3) documents created in connection with *any* investigation by or on behalf of law enforcement , from June 4, 1983 to the present date, of any activities at the Canyon Corral Bar on the night of the Ryen/Hughes murders.

14. Documents in the possession of the DEA, Riverside County Sheriff's Office, or SBSD, relating to Mr. Ruiz's connection to, or knowledge of the Ryen/Hughes murders, including the investigation of those murders.

On August 6, 2004, Albert Anthony Ruiz testified before the district court that he previously worked as a confidential informant for the Riverside Sheriff's Department, Drug Enforcement Agency ("DEA") or the federal DEA.[311] (RT 8/6/04 at 77, 108.) He also testified that he worked directly with police officers and was deputized by Riverside sheriffs. (*Id.* at 111, 133.) Ruiz's opinion that the Ryen/Hughes murders were a "hit" on the Ryen family was based directly on information that had been provided to him by someone he knew who worked in law enforcement. (*Id.* at 80.) Mr. Ruiz further testified that his life would be jeopardized if he answered counsel's question of whether the drug trafficking matters for which he served as an informant extended geographically beyond the boundaries of Riverside County. (*Id.* at 109-no.) He also warned that his life would be jeopardized if he answered counsel's question of whether the Ryen/Hughes murders were connected to drug trafficking. (*Id.* at 134.)

On August 13, 2004, former San Bernardino County radio dispatchers Nancy Simendich and Debra Holman both testified in district court that, in connection with the Cooper investigation, the SBSD sought assistance from law enforcement agencies across the state of California, as well as outside of California. Simendich testified that requests for information "would go anywhere any law enforcement agency in [California]", including Riverside County. (RT 8/13/04 at 51.) Both Simendich and Holman testified that requests also were sent to the Phoenix and Flagstaff, Arizona Sheriff's Offices. (*Id.* at 49-50, 121.) Holman testified that the SBSD worked cooperatively with Riverside County in their past investigations. (*Id.* at 127.)

[311] The federal district court severely restricted the examination of Mr. Ruiz, allowing him to testify only as to information received from law enforcement officials within San Bernardino County. (RT 8/6/04 at 139-143.)

Their testimony establishes that there was an ongoing exchange of information between multiple law enforcement agencies inside and outside California, both in connection with the Ryen/Hughes murders, and in connection with other criminal investigations. They were all part of a multi-jurisdictional law enforcement team. In addition, San Bernardino and Riverside counties were and are part of an Inland County Narcotics Enforcement Team ("IRNET") which is a coordinated multijurisdictional task force involving federal, state and local agencies.

If a federal or state law enforcement agency had information indicating that the Ryen/Hughes murders were a "hit" relating to drug trafficking, the prosecution was obligated under *Brady* to disclose this evidence to the defense.[312] Furthermore, there exists a direct nexus between (1) Mr. Ruiz's role as a confidential drug trafficking informant for the DEA and Riverside County, which neighbors San Bernardino County, (2) the strong likelihood that Mr. Ruiz was informing on drug trafficking activities beyond the borders of Riverside County, and (3) Mr. Ruiz's opinion, based on inside information he acquired as a drug trafficking informant, that the Ryen/Hughes murders were a drug "hit" on the wrong family. The nature and extent of Mr. Ruiz's work as a confidential informant for the Riverside County Sheriff's Office and/or DEA, and the source of his opinion that the Ryen/Hughes murders were a drug "hit" gone wrong, is unquestionably relevant to Defendant's claim that the prosecution failed to disclose potentially exculpatory evidence in this case.

Defendant requests production of any documents in the possession of the DEA, Riverside County Sheriff's Office, SBSD, or San Bernardino District Attorney's Office relating to Mr. Ruiz's connection to, or knowledge of, the Ryen/Hughes murders.

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[312] In *Brady v. Maryland*, 373 U.S. at 104, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The duty extends not only to information relevant to guilt, but also to evidence that would tend to impeach the prosecution's witnesses. See *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.*

15. Documents reflecting or relating to the investigation undertaken on behalf of law enforcement, including but not limited to the SBSD, including its Crime Lab, the San Bernardino District Attorney's Office, the California Attorney General's Office, the Riverside County Sheriff's Department, the Drug Enforcement Agency, and the California Department of Justice since February 9, 2004 regarding Defendant, the Ryen/Hughes murders, or the averments in the Petition.

Prior to February 9, 2004, the date the Ninth Circuit Court of Appeals granted Defendant's application to file a successor habeas petition, counsel for Defendant and persons working on their behalf were freely communicating with certain witnesses, including former California Institute for Men at Chino ("CIM") inmate James Taylor and former shoe company executive Michael Dewey Newberry, who possess information relevant to Defendant's claims for habeas relief. Investigators working on Defendant's behalf extensively interviewed Mr. Taylor, who freely shared information relating to his former testimony and recollection of certain events relevant to Defendant's habeas claims, and Mr. Newberry, who promptly responded to Defendant's investigator's attempt to contact him.

However, since approximately mid-March of 2004, Defendant's counsel began experiencing new and unusual difficulty speaking with several important witnesses. Mr. Taylor expressly refused to speak to Defendant's attorneys despite repeated attempts by Defendant's attorneys and investigators to contact Mr. Taylor. (Declaration of Norman C. Hile in Support of Defendant's Memorandum of Points and Authorities in Support of Motion for Discovery in Support of Petition for Writ of Habeas Corpus dated May 10, 2004 ["Hile Decl."] ¶ 12.) Defendant subsequently learned that in the intervening time, investigators working on behalf of the State had spoken at length with Mr. Taylor. (Hile Decl. ¶ 13.) Defendant's counsel does not know whether State investigators have contacted at least one other important witness, Michael Dewey Newberry. However, Defendant's counsel's attempts to contact Mr. Newberry have been completely unsuccessful, despite the fact that Mr. Newberry responded within one day to an earlier attempt to contact him on February 9, 2004. (Hile Decl. ¶ 14.)

During the course of the habeas proceedings, a newly discovered witness was told by someone driving an all white Crown Victoria Ford automobile with a computer screen extending on an arm from the dashboard, that it would be in his best interests not to talk to Defendant's attorneys in the habeas proceeding. (Declaration of Lance Stark dated June 2004 ¶ 11) Mr. Stark's testimony corroborated important claims in Defendant's petition regarding three men at the Canyon Corral Bar the night of the murders. Very recently, Ken Schreckengost, a former SBSD deputy who authorized destruction of coveralls with blood on them, refused to continue talking to Defendant's investigator after Mr. Schreckengost spoke with an attorney in the San Bernardino District Attorney's Office. (Supplemental Declaration of Joseph P. Soldis dated March 17, 2005 ¶ 4.)

The State's investigation has significantly hindered Defendant's ability to fully discover and explore all of the facts that relate too many of the issues raised in his habeas petition. Since the State and Respondent in the habeas proceeding initiated their investigations and made disclosed and undisclosed contacts with witnesses, the witnesses have refused to respond at all to Defendant's counsel's investigators' requests to speak, expressly stated their unwillingness to speak to Defendant's counsel or his investigators, or delayed responses to Defendant's counsel's requests to speak. Defendant has been prevented from preparing a full investigation and presentation of the facts in support of his habeas claim.

On May 3, 2004, the State submitted one hundred exhibits (thousands of pages) in support of its Answer to Defendant's Petition for Writ of Habeas Corpus. These exhibits included transcripts of interviews of numerous witnesses whom the State interviewed without Defendant's knowledge in connection with this Defendant or the Ryen/Hughes murders, including but not limited to Midge Carroll, former warden of CIM; James Taylor, former prisoner at CIM; Don Luck, a former shoe company executive who provided key corroborative testimony that the gym shoes were *not* issued only from state prisons regarding the shoe prints found at the crime scene; Christine Slonaker and Mary Mellon-Wolfe, witnesses at the Canyon

Corral Bar the night of the murders; and Lee Furrow, Kenneth Koon, and Michael Darnell, potential third-party perpetrators.

Defendant therefore requests the production of all documents reflecting or relating to any investigation on behalf of law enforcement, including but not limited to the SBSD, including its Crime Lab, the San Bernardino District Attorney's Office, the San Diego Attorney General's Office, the Riverside County Sheriff's Department, the Drug Enforcement Agency, and the California Department of Justice, since February 9, 2004 regarding Defendant, the Ryen/Hughes murders, or the averments in the Petition.

16. Examination of physical evidence, including but not limited to the T-shirt designated Exhibit 169, and documents reflecting or relating to all forensic testing ordered by the district court to date in connection with Defendant's habeas petition, including but not limited to physical evidence in the possession of Dr. Gary Siuzdak and/or Scripps Research Institute, Dr. Lewis Maddox and/or Orchid Cellmark, and Mr. Steven Myers and/or the California Department of Justice.

In connection with the issues discussed in request 13(a), (b), and (c), the Court should also allow Defendant's expert to examine all of the physical evidence in the possession of or generated by Dr. Gary Siuzdak and/or Scripps Research Institute, Dr. Lewis Maddox and/or Orchid Cellmark, and Mr. Steven Myers and/or the California Department of Justice. This includes examination of the T-shirt designated Trial Exhibit 169. The T-shirt is currently in the possession of the California Department of Justice.

17. Documents reflecting or relating to all forensic testing ordered by the district court to date in connection with Defendant's habeas petition, including but not limited to documents in the possession of Dr. Gary Siuzdak and/or Scripps Research Institute, Dr. Lewis Maddox and/or Orchid Cellmark, and Mr. Steven Myers and/or the California Department of Justice.

a. <u>Dr. Gary Siuzdak</u>

On October 5, 2004, Dr. Gary Siuzdak of Scripps Research Institute, located in La Jolla, California, reported EDTA testing results which supported Defendant's allegations of tampering. Pursuant to the federal court's Amended EDTA Testing Order filed September 7, 2004, Dr. Siuzdak's obligations were as follows:

> 7.1 Upon receipt of the coded vials, Dr. Siuzdak and Dr. Ballard, or their designees, shall each document, photograph, and log the evidence and perform EDTA testing as described below. Dr. Siuzdak and Dr. Ballard, or their designees, shall each document their testing procedure as they perform the EDTA tests.
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> . . . .
>
> 7.6 Dr. Siuzdak and Dr. Ballard shall maintain the remainder, if any, of the testing materials and the raw data in their possession until further order by the Court.

On October 27, 2004, approximately a month after reporting his results, Dr. Siuzdak wrote to the federal court and unilaterally withdrew the EDTA testing results that he obtained. (Letter from Gary Siuzdak to Judge Marilyn Huff dated 10/27/04.) Dr. Siuzdak belatedly, but without any explanation, claimed that the samples were somehow contaminated in his laboratory. (*Id.*)

In a February 11, 2005 order, the district court denied Defendant's request for discovery to take Dr. Siuzdak's deposition and for production of the materials he was to maintain. Instead, the Court ordered that Dr. Siuzdak's testing "protocol" be provided to Defendant's counsel to see if that might answer the mystery of the alleged contamination. But the purported protocol that was produced is no protocol at all and was of no assistance. As Defendant's expert, Dr. Kevin Ballard, stated, the Siuzdak "protocol" is not really a protocol and sheds no light on the possible cause of the alleged contamination. (Declaration of Dr. Kevin Ballard in Support of Defendant's Further Motion for Evidentiary Hearing dated March 23, 2005 ¶ 5.) Nothing in the record evidences the source of contamination, the extent of it or how it may have occurred. (*Id.* ¶ 6.)

In light of the issues and the failure of the "protocol" to be of assistance, Defendant requests production of all documents generated by Dr. Siuzdak and/or Scripps Research Institute in connection with his testing of the samples, including but not limited to test data, bench notes, correspondence and other documents reflecting or relating to the alleged contamination.

b. Dr. Lewis Maddox

In connection with the recent EDTA testing[313] conducted on the T-shirt, Defendant was not permitted to have an expert present during the examination of the T-shirt. The preparation and selection of T-shirt stains for EDTA testing is a critical phase of the testing process. This examination was done at Orchid Cellmark in Germantown, Maryland, under the supervision of Dr. Lewis Maddox and in the presence of the Attorney General's expert, Mr. Steven Myers.

Defendant requests production of all documents generated by Dr. Maddox and/or Orchid Cellmark in connection with the selection and preparation of the T-shirt samples.

c. Steven Myers

According to Steven Myers' bench notes in January 2002, the area immediately surrounding the T-shirt cut-out designated in 2002 as 6G was probably the best available subject stain for DNA and anticoagulant testing. (Declaration of David T. Alexander in Support of Defendant's Further Motion for Evidentiary Hearing dated February 22, 2005 ["Alexander 2/22/05 Decl. ¶ 2, Ex. A.) The initial protocol for EDTA testing called for the testing of the area denoted as 6G. After inspecting the T-shirt at Orchid Cellmark's facilities, Mr. Myers notified the Court that cut-out 6G had been completely consumed in prior testing.[314] He did not inform the Court that a stain immediately adjacent to 6G was a strong candidate for the testing ordered by the Court. As Mr. Myers' January 28, 2002 bench notes disclose, he did not, nor could he, actually perform a presumptive blood test on the cut-out 6G. According to his bench notes, cut-out 6G already had been completely consumed in the DNA testing. (Alexander 2/22/05 Decl. ¶ 2, Ex. A [Bench Notes of Steven Myers dated January 9, 2002].) Instead, Myers' bench notes show that the presumptive blood test for 6G was performed on "the stain, sampled at the top

[313] Defendant notes that EDTA testing is a separate and distinct process from DNA testing, and does not fall under the purview of California Penal Code Section 1405.

[314] On January 9, 2002, Mr. Myers sampled 6G for DNA testing. (Alexander 2/22/05 Decl. ¶ 2, Ex. A [Bench Notes of Steven Myers dated January 9, 2002].) On January 19, 2002 during that DNA testing, Mr. Myers consumed the cut-out designated 6G in DNA testing. (*Id.* 113, Ex. B.) On January 28, 2002, Mr. Myers wrote that he conducted a presumptive blood test on areas near the top edge of 6G. (*Id.* ¶4, Ex. C [Bench Notes of Steven Myers dated January 28, 2002].)

edge of where DOJ-6G was taken," and that section of the T-shirt tested positive for blood. (*Id.*, Ex. C.)

In short, Mr. Myers conducted a presumptive blood test on a section of the T-shirt just above 6G that was not DNA tested but was consumed in prior testing. Mr. Myers obtained a positive result on the stain, indicating the presence of blood on that section of the T-shirt. He then assumed that the cut-out 6G, the section of the T-shirt that was consumed in prior testing, also was blood, based on the positive presumptive blood test he obtained for the T-shirt stain above the 6G cut-out.

The district court previously determined that 6G should be tested for EDTA primarily because, according to Mr. Myers' prior test results, 6G may be the only stain that contained only Defendant's blood. Although cut-out 6G no longer exists, it is clear that the section of the T-shirt immediately above cut-out 6G remains intact and suitable for EDTA testing. A photograph of cut-out 6G was taken by the California Department of Justice on September 14, 2004. (Alexander 2/22/05 Decl. ¶ 5, Ex. D.) The 6G cut-out is the large cut-out at the top right of the photograph. (*Id.)* While, based on Mr. Myers' presumptive blood test conducted on January 19, 2002 the immediate area above 6G contains blood, this area of the T-shirt has never been tested for DNA. Defendant's experts have not been permitted to examine the actual T-shirt to verify this crucial information.

For these reasons, Defendant requests production of all documents maintained by Mr. Myers or the California Department of Justice Laboratory in connection with his examination of the T-shirt for the purpose of EDTA testing and DNA testing conducted in 2004.