November 5, 2020

Via E-Mail and Hand Delivery

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Governor Gavin Newsom
1303 10th Street, Suite 1173
Sacramento, CA 95814

Re: Kevin Cooper: Request for Innocence Investigation

Dear Governor Newsom:

Mr. Cooper submits this letter in response to the San Bernardino County District Attorney's ("SBCDA") August 27, 2020 letter opposing Mr. Cooper's request for an innocence investigation. This letter corrects the SBCDA's mischaracterizations, misrepresentations, inaccuracies, and omissions. With those corrections, it is abundantly clear that an innocence investigation is necessary and warranted.

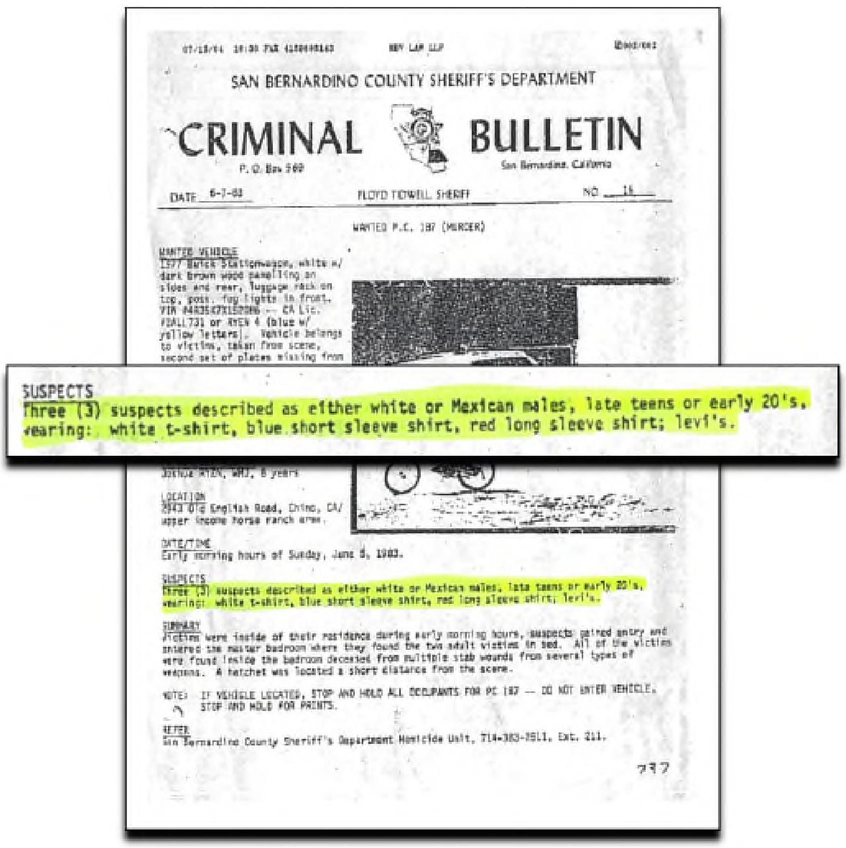
SBCDA attempts to justify Mr. Cooper's 1985 conviction and death sentence solely on the basis of its pre-trial investigation of and evidence presented at Mr. Cooper's trial that occurred between 1983 and 1985. However, such a narrow view ignores the substantial evidence that has come to light in the intervening 35 years that establishes Mr. Cooper's innocence. Mr. Cooper's request for an innocence investigation should be evaluated based on the facts as they are now, in light of the totality of the evidence. That includes the most recent DNA test results, the overwhelming proof of *Brady* violations and other official misconduct that permeated Mr. Cooper's trial, the questionable handling and preservation of physical evidence, and that the SBCDA's factual narrative is illogical and not plausible. Most important, the SBCDA's arguments should be considered against the history prosecution's lack of credibility that permeates all aspects of this case—from the pretrial investigation, to trial, to post-conviction hearings, to its present objections to an innocence investigation.

Mr. Cooper is an innocent man who has spent close to four decades on death row for crimes he did not commit. At best, a review of the facts demonstrates an utterly suspect conviction that demands an investigation. At worst, it demonstrates that an innocent man was sentenced to death. Either outcome warrants an innocence investigation.

I. The Blue Short-Sleeve Shirt Alone Requires an Innocence Investigation.

In violation of the prosecution's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), the SBCDA failed to provide to the defense the blue short-sleeve shirt collected by the San Bernardino

Sheriff's Department ("SBSD") just hours after the murders were discovered and hid it from the defense for nearly two decades. This clear *Brady* violation alone warrants an innocence investigation. Mr. Cooper first learned of the existence of the blue short-sleeve shirt 20 years after his trial at a 2004 evidentiary hearing before federal district Judge Marilyn Huff, when the SBCDA produced an SBSD log that verified that a citizen named Laurel Epler found the shirt near the crime scene, alerted the SBSD, and that the SBSD took the shirt into custody. This discovery was significant for a number of reasons. First, it matched the original description of the three suspects, one of whom was reported wearing a blue short-sleeve shirt[1], as detailed in the in the All-Points Bulletin (APB) released by the SBSD on June 7, 1983.



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 [illegible] -- CA Lic. #1ALL731 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, WMJ, 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

Second, it was found close to the Canyon Corral Bar and to where the orange towel and tan t-shirt were found the following day.

Thus, the blue short-sleeve shirt directly corroborated the description of the assailants Josh Ryen and several eyewitnesses gave; it also undermines the state's "one killer" theory. Yet, when

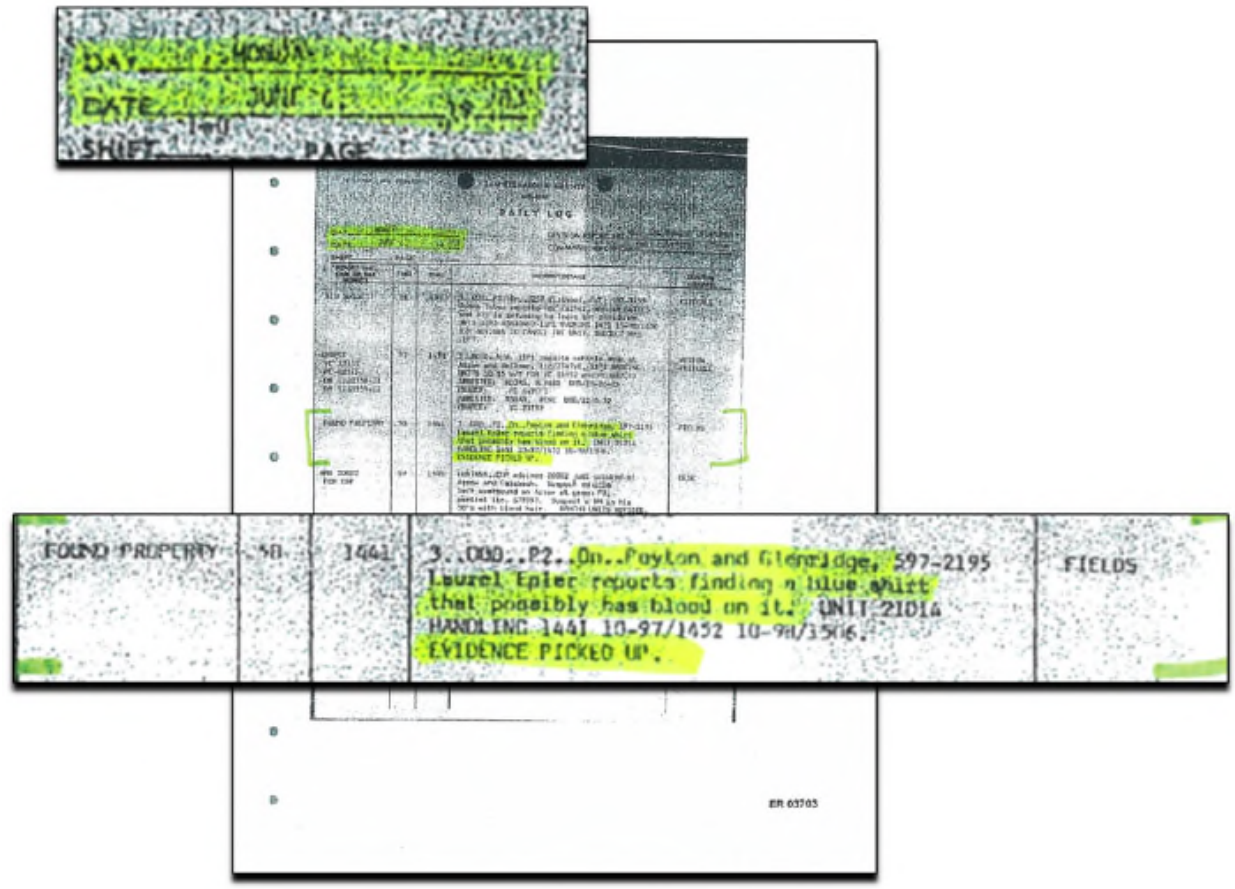
[1] Josh Ryen, in his June 6, 1983 interview with Detective Hector O'Campo, identified the third suspect as a Mexican wearing a red shirt. **Ex. B** [Excerpts of Trial Testimony, 34 R.T. 2150 (Trial Testimony of Linda Headley)].

Mr. Cooper learned of the blue shirt's existence in 2004, requested it be produced, and pointed to the clear *Brady* violation by the prosecution in withholding the shirt, the SBCDA obfuscated and ultimately lied about the blue shirt's existence.

The prosecution has argued there was no *Brady* violation because, as SBCDA John Kochis claimed, the defense had received the police logs in pre-trial discovery that Mr. Kochis claims *referenced* the shirt. The prosecution argued this was sufficient to satisfy the SBCDA's obligation under *Brady*, to *produce* the shirt. This argument is absurd. *Brady* protects the due process rights of the accused to mount a meaningful defense and therefore includes the ability to observe and test physical evidence material to the case. Producing evidence that something exists is not equivalent to the production of the actual evidence for the defense's own review.

When Mr. Cooper's team reviewed the files of his trial counsel, there was no record of any document being produced that referenced a blue short-sleeve shirt. When challenged, the prosecution produced a copy of the log; however, it was not from the prosecution's discovery file as shown by the fact it was not marked with a production number. Judge Huff denied Mr. Cooper's request that the State produce a copy of the police log from their discovery files. Judge Huff then requested testimony from the prosecutor, John Kochis, describing the document collection and production procedures of the sheriff's department in an attempt to explain the contradictions in the logs.[2] Finally, in the same hearing, Mr. Kochis testified: "I don't believe there was ever a blue shirt. . . . There was no blue shirt picked up." **Ex. A** [Excerpt from Aug. 13, 2004 Evidentiary Hearing, R.T. 198-99]. Mr. Kochis' "belief" was not competent evidence. Moreover, the log clearly states "EVIDENCE PICKED UP" by Deputy Scott Field, the same SBSD deputy who retrieved the tan t-shirt and orange towel the following day.

[2] Mr. Cooper contends that the prosecution impermissibly removed the log referencing the blue short-sleeve shirt from the discovery provided to the defense team in 1984 because it pointed to multiple attackers.



In his trial testimony, Field refers to his "report" (trial Ex. 169) of the tan t-shirt's retrieval and said of the t-shirt: "I took . . . photographs, marked it with my initials, the date, collected it, tagged it with a sheriff's evidence tag and placed in in evidence at the West End Substation." **Ex. B** [Excerpts of Trial Testimony, 101 R.T. 6511]. It is reasonable to expect Deputy Field utilized similar documentation procedure during his retrieval of the blue short-sleeve shirt the previous day.

In her final ruling, Judge Huff accepted Mr. Kochis' testimony that the blue shirt did not exist and disregarded Ms. Epler's testimony and the description of the shirt in SBSD log.

The blue short-sleeve shirt's significance is two-fold. First, it is evidence that there were multiple attackers in addition to the other evidence, which includes the number of wounds and weapons used in the killings, the coroner's initial report that there were multiple attackers, and Josh Ryen's description and that of other eyewitnesses. Second, the prosecution's attempt to say that the blue short-sleeve shirt is actually the tan t-shirt (that was found in a different location and on a different day) is evidence of the prosecution's intentional distortion of the facts. In her 2007

opinion, 9th Circuit Judge Margaret McKeown criticized the handling of the blue short-sleeve shirt as follows: "[n]o explanation is provided for this discrepancy. Even had the page been produced, the t-shirt itself was undeniably never produced. Has the t-shirt gone the way of the destroyed coveralls? Is the blue t-shirt really the yellow t-shirt? How could a shirt described as blue become yellow? Once again, bungled records and bungled investigative work obscure the truth." *Cooper v. Brown*, 510 F.3d 870, 1006 (9th Cir. 2007) (McKeown, J., concurring).[3]

II. The Results of the DNA Testing Confirm the Need for an Innocence Investigation

A. The SBCDA Mischaracterizes the Recent DNA Test Results.

1. The Recent DNA Test Results Must Be Reviewed Within the Context of Prior Mishandling and Tampering Claims.

The prosecution attempts to use the recent DNA results to undermine the need for an innocence investigation. However, the recent DNA tests on A-41reveal nothing new. They merely confirm prior results that were obtained by tampering with and manufacturing of evidence as described by Judge Fletcher and presented in Mr. Cooper's 2016 clemency petition. The prosecution also neglects to mention that the new testing performed by Bode Technologies ("Bode") produced no DNA evidence from Mr. Cooper, and then finds fault with the process it helped structure.

2. The Recent Testing of A-41 Provides No New Evidence.

The prosecution continues to argue that the partial DNA profile developed from A-41 that matches Mr. Cooper shows that he is guilty. However, as is well documented, there is substantial evidence showing previous mishandling of A-41, questionable testing procedures, and evidence tampering:

- SBSD Criminalist Daniel Gregonis waited to conduct testing on A-41 until *after* he had acquired Mr. Cooper's partial blood type from the testing of semen found at the Lease home.
- Gregonis conducted some of the most sensitive forensic testing of A-41 *after* Mr. Cooper's arrest on July 31, 1983 and after the SBSD had collected two vials of Mr. Cooper's blood. Thus, SBCDA's argument regarding the collection of A-41 is inconsequential.
- In violation of standard forensic practice, Gregonis did not conduct "blind" testing of A-41. Instead, he placed the samples A-41 and VV-2 (Mr. Cooper's blood) side-

[3] Judge McKeown incorrectly refers to the blue shirt as a "t-shirt." All records and accounts establish that the blue shirt was a short-sleeve shirt.

by-side on the same slide when he performed his tests. **Ex. B** [Excerpts of Trial Testimony, 93 R.T. 4488, 4526, 4550, 4557]anna. This violated standard practice and made it easier for contamination to occur, whether intentional or negligent.

- Once Gregonis learned that Mr. Cooper's erythrocyte acid phosphatase ("EAP") enzyme was "rB" and not "B" as he initially thought, he altered his testing records to change the "B" to "rB" so it would match Mr. Cooper's EAP type. Gregonis then perjured himself when he testified that he did not alter the test results. **Ex. B** [Excerpts of Trial Testimony 93 R.T. 4429-31, 4444, 4493-95].
- Gregonis also committed perjury when he denied having opened sample A-41 when he took it out of the evidence locker for 24 hours in 1999. Although he admitted removing the sample for 24 hours and placing it on the same lab table as W-2, the vial of Mr. Cooper's blood, he denied opening the glassine envelope. However photographs of the envelope clearly show Gregonis' initials and the date (8/19/99), demonstrating that he opened the envelope. This proves that he had the opportunity and the means to plant Cooper's DNA on A-41 prior to the testing in 2002. *See* **Ex. C** [photo of A-41 vial tin].
- Bode's testing **confirmed a second DNA profile within A-41**. This result either confirms that Mr. Cooper's blood was planted or, at minimum, that there was negligent or intentional mishandling of crucial forensic evidence.

The history of questionable testing and the presence of a second partial DNA profile in A-41 shows that the test results from A-41 cannot be trusted and SBCDA's reliance on it is misplaced.

3. <u>DNA Testing Performed on the Tan T-Shirt Supports an Innocence Investigation.</u>

The prosecution claims that Mr. Cooper's team did not request retesting of the blood stains on the tan t-shirt. This is misleading; it was Bode's recommendation not to retest the t-shirt because those areas would not generate anything detectable. **Ex. D** [Tr. from Call with Special Master Judge Pratt, September 12, 2019, p. 2]. Mr. Cooper's team accepted Bode's professional assessment that there was no scientific value for further DNA testing on the tan t-shirt. However, the need for an innocence investigation remains, especially where there is significant support for Mr. Cooper's claim that his blood was planted on the t-shirt.

The fact that the tan t-shirt was in possession of the Superior Court *after* trial does not change the fact that it was mishandled and/or tampered with by the SBSD *before trial*. The tan t-shirt was collected and tested by SBSD crime lab personnel who were involved in other instances of evidence tampering or mishandling (*see* discussion of Gregonis, *supra* at II.A.2) and was stored in

unsecured evidence/property locker (*see* discussion of Baird and Tidwell, *infra* at VI). Testing done at the direction of the Ninth Circuit in 2004 demonstrated that the tan t-shirt had heightened levels of EDTA, a chemical used to preserve the blood vial samples. In 2009, five federal judges concluded that the SBSD likely planted Mr. Cooper's blood on the t-shirt before the 2002 DNA testing using blood that was taken when he was in custody. *Cooper v. Brown*, 565 F.3d 581 (2009) (Fletcher, J., dissenting). The tan t-shirt and Mr. Cooper's claims of tampering and mishandling must be resolved through an innocence investigation.

4. SBCDA's Statements Regarding VV-2 are Incomplete and Misleading.

Following Mr. Cooper's arrest, two vials of blood were withdrawn from Mr. Cooper (VV-2). Bode's confirmation that the blood in the vial matches Mr. Cooper is thus unremarkable. However, it is significant, that despite numerous requests from the defense, the prosecution has never produced the second vial of Mr. Cooper's blood or explained where it is or what happened to it. The SBCDA recently confirmed the existence of the second vial in a phone call with Special Master Judge Pratt on September 12, 2019. **Ex. E** [Tr. from Call with Special Master Judge Pratt, September 12, 2019, p. 11-12]. At a minimum, this unexplained disappearance undermines the integrity and security of evidence handling at the SBSD. Either the vial is missing because of lax procedures handling the evidence or because of deliberate and intentional mishandling. The disappearance is particularly egregious in light of Mr. Cooper's claims that his blood was planted by the SBSD on the tan t-shirt. Under either possibility, an innocence investigation is necessary.

5. Hair Taken from Doug Ryen's Hands Importantly Excludes Mr. Cooper.

Testing of a hair sample found in Doug Ryen's hands matched the DNA profile of Doug Ryen and excludes Mr. Cooper. The SBCDA notes only that the result excludes Lee Furrow, a key suspect. For purposes of this case and Mr. Cooper's innocence, the relevant conclusion is that the DNA profile *excludes Mr. Cooper*. Although determining who actually committed the crime is very important, it is not Mr. Cooper's burden. His exclusion from the hair samples undermines the government's claim that he was at the crime scene.

B. SBCDA's Objections to a Process in Which it Fully Participated Lacks Merit.

The SBCDA's complaints about recent testing procedures are a red herring that should be ignored. From the outset, the SBCDA has had input in the testing procedure, a process that included both legal teams and was approved by Judge Pratt. To object now, close to the conclusion of testing, is disingenuous.

The prosecution falsely claims that Mr. Cooper's team "objected" to testing of the orange towel. Mr. Cooper's team in fact requested that the orange towel be tested, and the results not only exclude Mr. Cooper but confirm that another person was involved in the killings. Upon testing by

Bode, a *second* DNA profile was discovered that does not match Mr. Cooper or of any of the victims.[4] The additional profile is significant because this towel matched towels from the Ryen home and this towel was found near the tan t-shirt and blue short-sleeve shirt. It is highly likely that the suspects used and discarded the orange towel, along with the bloody tan t-shirt and blue short-sleeve shirt following the murders. This unidentified profile confirms that multiple attackers killed the Ryens and Christopher Hughes.

C. SBCDA's Claim that DNA Exclusion of Lee Furrow Establishes Mr. Cooper's Guilt is Erroneous.

The SBCDA claims that because the recent DNA testing did not return a match for Mr. Furrow, that Mr. Cooper is necessarily guilty. This argument is not logical. As described in this letter and in Mr. Cooper's previous submissions, there is extensive evidence of his innocence and support for an innocence investigation without DNA evidence from Mr. Furrow. The degraded condition of the evidence is the direct result of the prosecution's failure to properly store and preserve the evidence and is the direct cause of Bode's inability to derive DNA profiles from the tan t-shirt. The is ample evidence of Lee Furrow's involvement in the Ryen/Hughes murders, including Furrow's confession to three witnesses.

III. The Other Evidentiary Issues Raised by SBCDA Support Mr. Cooper's Request for an Innocence Investigation.

As discussed in Section IV, *supra*, the SBCDA ignores key issues that undermine the credibility of the SBCDA, its arguments, the evidence presented, and ultimately the original investigation and conviction. The evidence that the prosecution raises is either misleading, irrelevant, or supports Mr. Cooper's request for an innocence investigation. Taken together, the evidence as presented by the SBCDA would not support a conviction if Mr. Cooper were retried today, with the facts that are now known. Thus, these facts support Mr. Cooper's request for an innocence investigation.

A. The Factual Narrative of the Crime Supports Mr. Cooper's Innocence.

First, SBCDA now presents the unrealistic motive for the Ryen/Hughes murders: stealing the Ryen car. Notably, the prosecution never provided a motive at trial. In fact, lead trial prosecutor Dennis Kottmeier stated in a 2015 TV interview: "We were trying to come up with a motive for these killings and couldn't come up with anything. Nothing made sense."[5] The fact that Mr. Cooper had stolen cars in the past actually supports his innocence. Mr. Cooper would have had

[4] Unfortunately, CODIS was unable to return a match to the second profile found on the orange towel.
[5] *See* "Murder on the Mountain," *Death Row Stories*, Season 2, Episode 3 (July 26, 2015) [Interview with Dennis Kottmeier].

no problem stealing the Ryens' unoccupied car at night from outside their house. Indeed, the keys to the station wagon were *inside the Ryen car*, so Mr. Cooper could easily have stolen the car without ever stepping foot into their residence. Moreover, as a recent prison escapee, Mr. Cooper was motivated to avoid any action that would bring attention to him. It is for this reason that he hid out for two nights at the unoccupied Lease house. The motive, as currently put forth by the SBCDA, does not hold water.

Second, the medical examiner concluded that three or four weapons were used. The number of weapons used, the number of stab wounds (144 wounds inflicted on five individuals), duration of the attack (lasting fewer than four minutes), the fact that Mr. and Mrs. Ryen had easy access to loaded firearms in the room, and the physical fitness of Mr. and Mrs. Ryen makes it virtually impossible that one person could have committed the murders. Yet, in direct contradiction to the evidence, the SBCDA continues to espouse a single killer theory.

B. Reliance on the Pro-Ked Dude Shoes is Misplaced.

The only evidence that links Mr. Cooper to Pro Ked Dude shoes is non-credible testimony from a jailhouse "snitch", CIM inmate James Taylor. As the SBCDA concedes, "Taylor signed an eleventh-hour declaration" (SBCDA Aug. 27, 2020 Letter p. 6) in which he recanted his testimony about giving Cooper Pro Ked shoes. Given that Mr. Taylor was incentivized, via a promise of a transfer to a lower security prison, to testify that he had provided the Pro Ked shoes to Mr. Cooper, it is likely Taylor falsified his testimony and that Mr. Cooper never had such shoes in his possession. Testimony from jail snitches, especially when offered a deal by the prosecution, are frequently found to be problematic.[6] It was Mr. Taylor's testimony that was the lone evidence "establishing" the type of shoe worn by Mr. Cooper.

Moreover, the evidence related to the Pro Ked Dudes was subject to a *Brady* violation caused by the SBCDA's failure to disclose the exculpatory evidence that Warden Carroll had notified the prosecution that these shoes were available for purchase by the public and were not solely a prison-issued item, as the prosecution contended.[7]

C. SBCDA Attempts to Rely Upon Clearly Planted Evidence Must Fail.

SBCDA relies on several pieces of clearly planted evidence to argue against an innocence investigation. Despite not "remembering doing so," Detective Moran undeniably entered the

[6] "Jailhouse informant testimony is one of the leading contributing factors of wrongful convictions nationally, playing a role in nearly one in five of the 367 DNA-based exoneration cases." The Innocence Project, *Informing injustice: The disturbing use of jailhouse informants*, https://www.innocenceproject.org/informing-injustice/ (Last accessed September 30, 2020)

[7] In addition to Warden Carrol's statements to the SBSD, during the 2004 Evidentiary Hearing, Mr. Cooper entered a Stride Rite catalog from Sprig 1981 into evidence. The catalog shows that the Pro Ked shoes were available for public purchase, negating SBCDA's position. *See* **Ex. E** [Pro Keds Catalog (Stride-Rite), Spring 1981].

bedroom in the Lease house on June 6, 1983 while conducting a sweep for suspects as shown by his fingerprints being found inside the closet. Meanwhile, he did not note seeing any evidence in the bedroom. **Ex. B** [Excerpts of Trial Testimony, 86 R.T. 2809, 2824]; *Cooper*, 565 F.3d at 619. However, on Tuesday June 7, 1983, in response to a call from an employee of the Leases, SBSD deputies returned to the house and "discovered" a hatchet sheath and a green, bloodstained button in the bedroom, on the floor near the closet in plain view. This led Judge Fletcher, and four other Ninth Circuit judges, to conclude that the SBSD had planted the button and sheath in an attempt to tie Mr. Cooper's stay at the Lease house to the murders that occurred nearby. *Cooper*, 565 F.3d at 619.

Additionally, the green button does not match any of the clothing Mr. Cooper was seen wearing on the day he escaped CIM. An internal CIM prison report, written *the day* Mr. Cooper walked away from CIM states that Mr. Cooper was wearing "prison blue pants, a T-shirt and a light brown foul-weather coat[.]" The report did not mention a green jacket.

D. SBCDA's Discussion of the Plant Burrs Found at the Ryen Residence is Meaningless.

SBCDA's discussion of plant burrs found outside the Lease and Ryen house as well as inside of both homes is meaningless. If plants with such burrs were growing between and around the two properties, they could have been brought into the houses by latching onto clothing under regular, everyday circumstances. However, there is evidence that on the night of the attack Jessica Ryen escaped into the Ryens' backyard and was brought back inside by the attackers. This is likely how the burrs came to be on her nightgown.

IV. The Issues that SBCDA Notably Fails to Discuss Undermine the Credibility of the SBCDA, the Arguments Made in its Letters, and the Evidence it Presents.

SBCDA's failure to address key issues raised in Mr. Cooper's letter is telling. The SBCDA ignores the missing vial of blood taken from Mr. Cooper, the second DNA profile found within A-41, and the allegations of misconduct of the SBCDA committed during the investigation, trial, and post-conviction proceedings. These problems are exacerbated by Mr. Kochis' continued involvement in the case. The reason that SBCDA ignores these issues is that it cannot refute the serious credibility questions raised by Mr. Cooper. Any of these issues alone are grounds for an innocence investigation.

A. SBCDA Entirely Ignores the Missing Vial of VV-2.

Not only does the SBCDA not explain how the second vial of Mr. Cooper's blood mysteriously vanished, it pretends that the second vial never existed in order to avoid dealing with the fact it was not securely preserved in a case in which there are credible claims of evidence

planting and tampering. This is similar to SBCDA's stance regarding the missing blue short-sleeve shirt.

B. SBCDA Refuses to Address the Second DNA Profile Found in A-41.

The SBCDA's failure to address the second DNA profile found in A-41 confirms its significance. The DNA testing of A-41 produced a secondary profile which does not match Mr. Cooper or the victims. This secondary profile either confirms persons other than Mr. Cooper committed the murders (which is corroborated by eyewitness testimony, physical evidence, and the initial statements by Josh Ryen) or that A-41 was contaminated. There is no other reasonable explanation for the secondary profile, and either conclusion points unerringly towards granting an innocence investigation.

C. SBCDA Fails to Account for Its Misconduct.

The SBCDA fails to account for their misconduct during the investigation, prosecution, and post-conviction review of Mr. Cooper—any incidence of which warrants an innocence investigation or new trial. For example, the SBCDA ignores the *Brady* violation it committed when it did not produce the content of the Warden Carroll's phone call informing the SBSD that Pro-Ked Dude shoes were sold to the public. This *Brady* violation was one of the specific instances of prosecutorial misconduct that led to an *en banc* 9-2 decision by the Ninth Circuit to stay Mr. Cooper's execution.

Moreover, SBCDA ignores that not only is Mr. Kochis' continued representation of SBCDA is problematic because he was directly involved in examining witnesses whose trial testimony has been undermined, and that SBCDA continues to rely on this false evidence. Mr. Kochis conducted the trial examination of witnesses whose testimony was either heavily influenced by promises of favorable consideration of an inmate's felony record,[8] contradicted by evidence that SBCDA failed to disclose in violation of their *Brady* obligations,[9] or contradicted by the witnesses' own prior

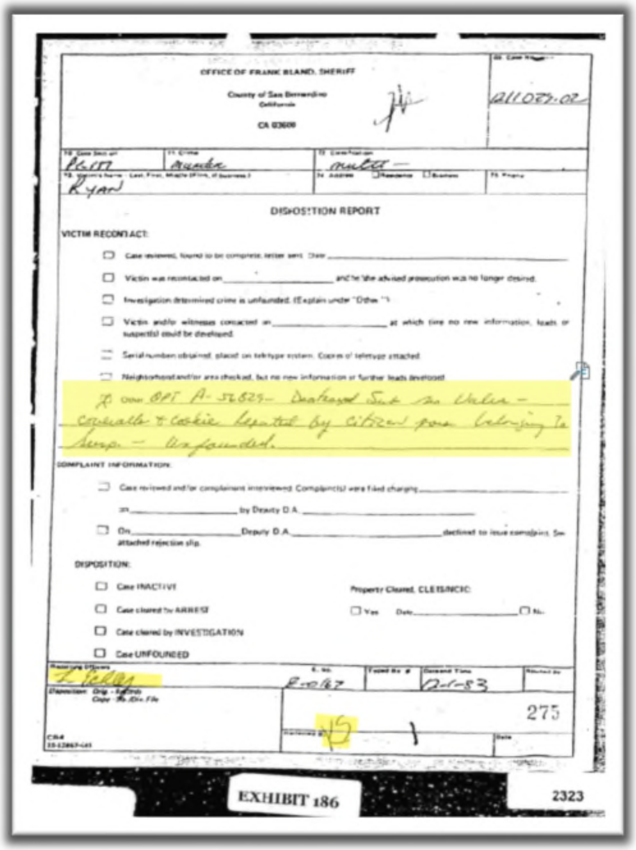
[8] Mr. Taylor's testimony was used to establish the link between Mr. Cooper and the Pro Ked Dudes shoes; as a four-time felon, he was rewarded for this testimony by being transferred to a minimum-security facility and was granted other privileges (such as allowing Mr. Taylor to keep his prison job despite acquiring a subsequent felony while incarcerated).
[9] Mr. Arjo's testimony regarding the availability of Pro-Ked Dudes was the basis of the prosecution's entire case tying Mr. Cooper to the crime scene. Yet it is unclear how the Supervisor of Recreation would have the firsthand knowledge to even testify about the availability of the Pro-Ked Dudes beyond prisons. When the SBCDA received credible, contradictory evidence from Warden Midge Carroll, the SBCDA concealed this evidence, and Mr. Kochis selectively presented the testimony of Mr. Arjo. Other examples include Criminalists Ogino and Stockwell's testimony regarding the contents of the Ryen car which is directly refuted Detective Hall's 23-page inventory report. Moreover, the Detective O'Campo's testimony regarding Josh Ryen's "identification" of Mr. Cooper and testimony that his first interview with Josh Ryen occurred on June 15 is undermined by the trial testimony of doctors and nurses who observed O'Campo interviewing Josh Ryen approximately 20 times between June 6 and June 14 and who witnesses Josh Ryen identifying the attackers in the plural.

inconsistent statements.[10] Not only does the SBCDA fail to address the credibility issues resulting from this false testimony, the SBCDA continues to rely on this very evidence in arguing that Mr. Cooper is guilty.

Finally, the SBCDA glosses over the missing blue short-sleeve shirt and the fact that the shirt was never produced. The SBCDA avoids addressing this critical piece of evidence because it does not fit with SBCDA's narrative that a lone killer was responsible for the murders. As with the destroyed coveralls, the blue short-sleeve shirt was likely discarded by one of the true killers. It is well established that Diana Roper turned over coveralls that appeared to be covered in blood to the SBSD. The prosecution never tested these coveralls, but rather permitted Deputy Eckley to discard them before any testing could be performed. As seen by the "disposition report" that Mr. Cooper uncovered in 1998, Eckley lied under oath at trial when he testified that he acted on his own in destroying the coveralls. The disposition report, reproduced below, shows that Eckley's destruction of the bloody coveralls was in fact authorized by his supervisor, Ken Schreckengost.[11]

[10] The trial testimony of Detective Duffy and Criminalist Gregonis directly contradicted their pre-trial testimony. There is no doubt that their change in testimony regarding the bloody footprint and A-41 was heavily influenced by the SBCDA.

[11] The SBCDA also fails to address the *Brady* violations with respect to Deputy Eckley's perjured testimony or the destruction of the coveralls. The SBCDA only acknowledges that Mr. Cooper has raised the destruction of the coveralls before.



OFFICE OF FRANK BLAND, SHERIFF

County of San Bernardino
California

CA 03600

DISPOSITION REPORT

VICTIM RECONTACT:

COMPLAINT INFORMATION:

DISPOSITION:

Case INACTIVE

Case cleared by ARREST

Case cleared by INVESTIGATION

Case UNFOUNDED

Property Cleared, CLETS/NCIC

275

EXHIBIT 186

2323

In total, 13 federal appellate Judges have agreed that the SBCDA violated *Brady* numerous times in their prosecution of Mr. Cooper: Judge Browning, Judge McKeown, Judge Fletcher, Judge Wardlaw, Judge Fisher, Judge Reinhardt, Judge Pregerson, Judge Paez, Judge Rawlinson, Judge Graber, Judge Berzon, Judge Thomas, and Judge Kozinski. Accordingly, an innocence investigation is needed to untangle the layers of misconduct that have prevented Mr. Cooper from obtaining a fair evaluation of his innocence for over three decades.

V. SBCDA's Remaining "Policy" Arguments Do Not Hold Water.

SBCDA offers several remaining "policy" arguments in opposition to Mr. Cooper's request for an innocence investigation. None of them are persuasive.

First, the SBCDA argues Mr. Cooper's 37 years in custody is reason to deny an innocence investigation. That argument is absurd. "Justice delayed is justice denied." Mr. Cooper has been denied justice for 37 years. The length of false imprisonment for wrongful conviction has no bearing on one's innocence and completely ignores the merits of an innocence investigation. In fact, it is common for individuals to be exonerated after decades of claiming their innocence. The recent

exonerations of Craig Coley (exonerated after 38 years) or Jack Sagin (exonerated after 34 years) demonstrate that time in prison is not a basis for denying an innocence investigation.

Second, the SBCDA relies on Mr. Cooper's unproven alleged "prior criminal history" in an unrelated matter from a different state, as reason to deny an innocence investigation. This is also absurd. This unproven and unrelated conduct from Pennsylvania bears no connection to Mr. Cooper's conviction in California and, accordingly, has no bearing as to the need for an innocence investigation.

Third, the SBCDA's blanket statement that racism was not an issue during the investigation and Mr. Cooper's trial ignores the reality. The victims were white, while Mr. Cooper is Black. It is undisputed that protesters, some in brown shirts and with Nazi insignia, gathered around the courthouse during Mr. Cooper's trial, shouting racist profanities and displaying a gorilla hanged in effigy. Moreover, the racial disparity is more significant given the SBCDA and SBSD misconduct that occurred in the investigation, prosecution, and conviction of Mr. Cooper.

A recently published report, *Government Misconduct and Convicting the Innocent: The Role Of Prosecutors, Police and Other Law Enforcement*[12] by the National Registry of Exonerations, provides data on racism in the criminal justice system that undoubtedly influenced Mr. Cooper's case. The report found that of the 2,400 exonerations reviewed, official misconduct contributed to the wrongful conviction in 54% of cases. *Id.* at 11. The occurrence of official misconduct increases for a Black exoneree compared to a white exoneree (57% as compared to 52%). *Id.* at 28. When focusing on exonerations for a murder conviction with a death sentence, the racial disparity is even more egregious (87% of Black exonerees experienced official misconduct that contributed to their wrongful conviction compared to 68% of white exonerees). *Id.* Race clearly resulted in greater instances of misconduct during the investigation[13] and prosecution of Mr. Cooper's case and remains a significant cause of his wrongful conviction.

Fourth, the prosecution objects to an innocence investigation on the basis that such process would "constitute an end run around both state and federal procedure" and that such investigation

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[12] Samuel R. Gross, Maurice J. Possley, Kaitlin Jackson Roll, Klara Huber Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, NATIONAL REGISTRY OF EXONERATIONS, UNIVERSITY OF MICHIGAN LAW SCHOOL (Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (hereinafter cited as "*Government Misconduct*").

[13] Mr. Cooper was the victim of official misconduct in the form of concealing exculpatory evidence (e.g., the information from Warden Carroll, the blue short-sleeve shirt, and destruction of the coveralls), misconduct at trial (e.g., the perjured testimony of officers regarding when the bloody footprint was "discovered" and Mr. Kochis' sanctioning of false testimony), witness tampering (i.e. inducing the testimony of Taylor through the grant of privileges), and fabrication of evidence (including Ogino and Stockwell's "discovery" of items inside the Ryen car that were not uncovered during the initial inventory or listed in the 23-page inventory report).

would occur without "foundations of admissibility." (SBCDA Aug. 27, 2020 Letter p. 4). However, it is well within the governor's power to define the contours of such process. There are plenty of sources from which to draw, including the recently created Innocence Commission formed by the San Francisco District Attorney's Officer in September 2020. The members of the Commission are a law professor, a retired judge, a medical expert, an attorney from the District Attorney's Office, a public defender from the San Francisco Public Defender's Officer, and the Executive Director of the Northern California Innocence Project. The Innocence Commission will review cases referred by the San Francisco DA's Post-Conviction Unit, make findings regarding innocence claims by majority vote, and prepare findings of fact and conclusions of law which it will be presented to District Attorney Chesa Boudin.

VI. SBSD Continues to Withhold Documents Critical to Examining the Security of Evidence and Evidence Preservation Practices.

Finally, the SBCDA simply claims that the SBSD personnel records that Mr. Cooper is requesting are of little import. However, the personnel records of Sheriff Tidwell, Deputy Baird, and Criminologist Gregonis are directly relevant to the mishandling of evidence in this case. Gregonis was directly involved in evidence mishandling[14], which has been addressed in Mr. Cooper's previous letters. Gregonis' actions have been criticized by numerous appellate judges. Thus, Gregonis' personnel records, which may have documented instances of misconduct, are of critical importance. Records for Tidwell and Baird speak to the issue of evidence handling at the SBSD. During the time that Deputy Baird was head of the SBSD crime lab, he stole 5 pounds of heroin with a value of $150,000 that was stored in the supposedly secured evidence/property room; he took it for personal use and to sell back to drug dealers for which he was fired. Given that Deputy Baird was directly involved in Mr. Cooper's case, his records are integral to analyzing the mishandling of evidence. . Similarly, during his tenure as sheriff, Tidwell stole more than 500 firearms (again, from a "secured" property/evidence room) for his own personal use and to give them to family and friends. Records related to Tidwell and his subsequent conviction[15] are relevant to assessing the credibility of whether the evidence in Mr. Cooper's case was similarly "secured" and "controlled."

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[14] This is not the first instance where Gregonis has been directly involved in evidence mishandling. In 2016, William Richards was exonerated after spending 23 years in prison for murder of his wife, a crime he did not commit. Similarly to Mr. Cooper's case, the San Bernardino Sheriff's Department's investigator believed that Richards was guilty and therefore failed to collect key evidence. Additionally, Gregonis fabricated evidence; he was responsible for "discovering" blue fibers under the victims fingernail which matched fibers from Mr. Richards's shirt. Review of autopsy photos taken of the victim's hand demonstrated that prior to Gregonis' "discovery," there were no blue fibers present under the victim's fingernails. Thus, Gregonis was responsible for planting the fibers in an effort to tie Mr. Richard's to the crime.

[15] Tidwell pled guilty to four felonies, that we later reduced to misdemeanors. Neither he nor Baird, who was not criminally charged, served any time in jail or prison.

VII. Conclusion

When Mr. Cooper's case is examined in light of the new evidence, the SBCDA's regurgitation of false and misleading statements, the myriad *Brady* violations, and common sense, what is left is a conviction that is suspect at best, and at worst, criminal. Mr. Cooper is innocent. Now is the time to rectify these mistakes and order an innocence investigation to provide Kevin Cooper with the fair evaluation of the evidence and facts of his case that he has been denied for 37 years.

Respectfully submitted,

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/s/ Norman C. Hile

Norman C. Hile
Senior Counsel

Attachments: Exhibits A-F