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March 11, 2021

By E-mail and Hand Delivery

Governor Gavin Newsom
1301 10th Street, Suite 1173
Sacramento, CA 95814

Re: *Letter in Support of Kevin Cooper's Request for Innocence Investigation*

Dear Governor Newsom:

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) respectfully submits this letter in support of Kevin Cooper’s request for an innocence investigation pursuant to Cal. Penal Code § 4812 and 5 CCR § 2816(b).

Mr. Cooper is a Black man who has served over 35 years on death row, notwithstanding serious concerns about the integrity of the State’s case and the risk that it was marred by racial discrimination. The grave doubts about Mr. Cooper’s guilt have only worsened over time, with a federal judge who reviewed his case in 2009 concluding that “he is probably innocent,” *Cooper v. Brown*, 565 F.3d 581, 634 (9th Cir. 2009) (Fletcher, J., dissenting)—and more recently, DNA testing on a towel connected to the crime pointing to another person. Additionally, multiple witnesses have come forward who aver that another man has confessed to the crime and implicated two accomplices.

As the Innocence Project and National Registry of Exonerations have found, exonerations are disproportionately likely to result in cases with Black defendants—especially in cases with white victims—and Mr. Cooper’s case appears to involve precisely the kinds of circumstances that result in the conviction of innocent people.¹

¹ See, e.g., Innocence Project, *Explore the Numbers: Innocence Project’s Impact*, <https://innocenceproject.org/exonerations-data/> (last visited Mar. 9, 2021); Nat’l Registry of Exonerations, *Exonerations by Race/Ethnicity and Crime*, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx> (last visited Mar. 9, 2021); Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States*, Nat’l Registry of Exonerations, 4–6 (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

No one should serve decades in prison, much less on death row, absent confidence in their conviction. Mr. Cooper's conviction does not meet that standard.

As the nation's oldest civil rights law organization, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black Americans from realizing their basic civil and human rights. LDF has long been concerned about the persistent and pernicious influence of race on the administration of criminal justice in general, and in the death penalty context in particular. Based on its examination of Mr. Cooper's case, LDF joins the numerous others—including federal appellate judges² and the Inter-American Commission on Human Rights³—who have voiced serious concerns about Mr. Cooper's prosecution, conviction, and death sentence.

The case against Mr. Cooper was doubtful from the beginning. Within days of the brutal killings of Doug, Peggy, and Jessica Ryen, and their family friend, Chris Hughes, San Bernardino law enforcement targeted Mr. Cooper as the sole suspect even though the evidence pointed to multiple assailants and even though the surviving victim, Josh Ryen, initially indicated that three white or Latino men committed the crime. Concerns about racism marred the trial as well: outside the courthouse, a group wearing Nazi insignia carried a pole with a monkey hanging from it, with a sign stating: "Hang the N*****."

Since Mr. Cooper's trial, disturbing facts have emerged that raise further concerns about the integrity of the investigation. As Ninth Circuit Judge M. Margaret McKeown observed, Mr. Cooper's case is rife with "examples of evidentiary gaps, mishandling of evidence and suspicious circumstances." *Cooper v. Brown*, 510 F.3d 870, 1005 (9th Cir. 2007) (McKeown, J., concurring). Judge McKeown cited, among other things, the facts that "[s]ignificant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued," "[o]ther evidence, such as the eye witness testimony, was wide-ranging and contradictory," and "[c]ountless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the evidence." *Id.* at 1004, 1005 n.1. "Despite the presence of serious questions as to the integrity of the investigation and evidence supporting the conviction," Judge McKeown concurred in

² See, e.g., *Cooper v. Brown*, 565 F.3d 581, 581 (9th Cir. 2009) (Fletcher, J., dissenting, joined by Pregerson, J., Reinhardt, J., Paez, J., and Rawlinson, J.); see also *id.* at 635 (Wardlaw, J., dissenting); *Cooper v. Brown*, 510 F.3d 870, 1005 (9th Cir. 2007) (McKeown, J., concurring).

³ See Inter-American Commission on Human Rights, Report No. 78/15, Case 12.831, Merits (Publication), Kevin Cooper, United States (Oct. 28, 2015), <https://www.oas.org/en/iachr/decisions/2015/USPU12831EN.docx>.

the Ninth Circuit’s denial of habeas relief to Mr. Cooper because of the “demanding statutory barrier” of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2244(b)(2)(B), in cases like his. *Id.* at 1005. Recent DNA testing from a towel connected to the crime revealed a full DNA profile that does not match Mr. Cooper or any victim, and multiple witnesses report that another man has confessed to the crime and identified two other accomplices.

Of course, AEDPA’s constraints do not apply to your exercise of executive discretion here—and as the Supreme Court has recognized, such discretion “provide[s] the ‘fail safe’ in our criminal justice system” when judicial avenues to innocence claims are foreclosed. *Herrera v. Collins*, 506 U.S. 390, 415 (1993). Even under AEDPA’s constraints in 2009, Ninth Circuit Judge William Fletcher issued a 100-page dissent (joined by four of his colleagues), in which he reviewed the record of Mr. Cooper’s case and concluded: “he is probably innocent” and “[t]he State of California may be about to execute an innocent man.” *Cooper*, 565 F.3d at 581, 634 (Fletcher, J., dissenting); *see also id.* at 635 (Wardlaw, J., dissenting) (“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 as at all.”). And as noted above and detailed in Mr. Cooper’s submissions, more recent evidence, including from new DNA testing and witnesses, further casts doubt on his conviction.

Moreover, data indicates that the types of concerns implicated by Mr. Cooper’s case are neither isolated nor inconsequential—and that such concerns disproportionately infect the sentences of Black defendants. The Innocence Project reports that from its cases alone, 63% of exonerations involved eyewitness misidentification, 52% involved misapplied forensic science, and 58% involved Black defendants.⁴ Similarly, data maintained by the National Registry of Exonerations indicates that at least half of all exonerees in the United States are Black.⁵

The risk of wrongful conviction is of course especially grave in capital cases, given the finality of the death sentence. A 2014 study conducted by the National Association of Criminal Defense Lawyers and the University of Santa Clara School of Law found that information favorable to the defense was disclosed late or withheld entirely in 53% of decisions involving the death penalty, compared with only 34% of all decisions studied.⁶ And according to the Death Penalty Information Center, of all

⁴ See Innocence Project, *supra* note 1.

⁵ See Nat’l Registry of Exonerations, *supra* note 1.

⁶ See Kathleen Ridolfi, et al., *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*, Nat’l Ass’n of Crim. Def. Law. & Santa Clara Law 43 fig. 20, 46 (2014),

death row exonerees in the United States since 1973, *54% have been Black*.⁷ There are also disparities in exonerations based on the race of victims, with cases involving white victims more likely to lead to innocent defendants sentenced to death. As a 2017 study by the National Registry of Exonerations concluded: “[t]he disparities we see in our data suggest that innocent defendants who are charged with killing white victims are more likely to be sentenced to death, and sometimes no doubt executed, than those charged with killing black victims.”⁸

Based on the record before you, further inquiry into Mr. Cooper’s case is both warranted and necessary. Mr. Cooper has spent over 35 years of his life on California’s death row. The judicial system has proven inadequate to review the serious and numerous concerns raised by his case, such that an innocence investigation may very well be his last recourse. For these reasons, LDF respectfully urges you to exercise your discretion to permit such investigation to be conducted.

Sincerely,

NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.

/s/ Samuel Spital

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⁷ See Death Penalty Information Center, “Innocence Database,” <https://deathpenaltyinfo.org/policy-issues/innocence-database> (last visited Mar. 9, 2021).

⁸ See Gross, et al., *supra* note 1, at 4.