



UNITED STATES DEPARTMENT OF STATE

Response of the Government of the United States to the  
Inter-American Commission on Human Rights Regarding  
Kevin Cooper, Case No. 12.831

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Case No. 12.831

12/2/2013

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## **I. Introduction**

The Government of the United States provides the following response to the Inter-American Commission on Human Rights (“Commission”) in its consideration of Petition P-593-11 (Case No. 12.831) filed by Kevin Cooper (“Mr. Cooper” or “Petitioner”),<sup>1</sup> who asserts violations of his human rights by the United States and its agents. In the Commission’s decision on admissibility of October 19, 2011, it found that Mr. Cooper’s allegations, if proven, could characterize violations of Articles I, II, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man (“American Declaration”).<sup>2</sup> The four rights recognized in the American Declaration that Mr. Cooper alleges have been violated are as follows: (1) the right to life, liberty, and personal security (Article I); (2) the right to equality before the law (Article II); (3) the right to a fair trial (Article XVIII); and (4) the right to due process of law (Article XXVI).<sup>3</sup>

Mr. Cooper alleges that the San Bernardino County Sheriff’s Department (“SBSD”) prosecuted Mr. Cooper solely on the basis of his race for the gruesome murders of four people on the night of June 4 or early morning of June 5, 1983; ignored evidence that implicated other killers, such as “three white men” allegedly seen at the Canyon Coral Bar; and repeatedly manipulated or manufactured evidence to implicate Mr. Cooper in the murders both at his trial and in post-conviction proceedings. Mr. Cooper asks the Commission to declare that the United

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<sup>1</sup> The United States acknowledges that the Commission refers to “the petitioners” as Norman C. Hile and Katie C. De Witt of Orrick, Herrington & Sutcliffe LLP in its report on the admissibility of Mr. Cooper’s petition. *See Kevin Cooper v. United States*, Case 12.831, Inter-Am. Comm’n H.R., Report No. 131/11, OEA/Ser.L/V/II.143, doc. 15 ¶ 1 (2011). However, the United States does not view Mr. Hile, Ms. De Witt, or the Orrick law firm as petitioners on behalf of Mr. Cooper, but rather the legal representatives of Mr. Cooper, who is the petitioner in this case. *See* Rules of Procedure of the Inter-American Commission on Human Rights art. 23, entered into force Aug. 1, 2013 (“The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in a separate document.”).

<sup>2</sup> *Id.* at ¶ 26.

<sup>3</sup> *See* Merits Brief of Petitioner at 2–16, *Kevin Cooper v. United States*, Case 12.831, Inter-Am. Comm’n H.R. (Aug. 30, 2012) [hereinafter Merits Brief of Petitioner].

States of America is responsible for the alleged violations of his rights recognized in the American Declaration of Human Rights, and to recommend remedial measures to address these violations. The Government of the United States respectfully submits that all of Mr. Cooper's claims have been extensively considered by the courts of the state of California and the United States, his conviction and sentence have been repeatedly upheld, and Mr. Cooper has presented no information to the Commission that would suggest they should be reconsidered.

Mr. Cooper was convicted and sentenced to death for the brutal slayings of Doug Ryen, Peggy Ryen, Jessica Ryen, and Chris Hughes, and the attempted murder of Josh Ryen, after a jury trial that lasted forty-eight days.<sup>4</sup> The jury found Mr. Cooper guilty based on evidence that established his guilt beyond a reasonable doubt.

Mr. Cooper's conviction was confirmed by the Supreme Court of California on appeal,<sup>5</sup> and has been continuously upheld in nearly thirty years of post-conviction litigation by Mr. Cooper, including three federal habeas corpus petitions filed in U.S. district court, seven state habeas corpus petitions filed in the California Supreme Court, two petitions for the writ of habeas corpus and six petitions for the writ of certiorari filed in the U.S. Supreme Court, and two applications for clemency with the Governor of California.<sup>6</sup> In his various post-conviction petitions, Mr. Cooper pursued his rights in state and federal courts to raise the same issues that he raises before the Commission, including alleged violations of his rights to a fair trial, equal protection, and due process of law.

Overwhelming physical evidence connecting Mr. Cooper to the murders was presented at trial, including physical and serological evidence left by Mr. Cooper both in the Ryen home and in the Ryen station wagon that he was found to have stolen. Moreover, the murder weapons

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<sup>4</sup> See *infra* Part IV.A.

<sup>5</sup> *People v. Cooper*, 809 P.2d 865 (Cal. 1991). Attached as Annex A.

<sup>6</sup> See *infra* Part II.

came from the next-door house where Mr. Cooper admitted to having hidden out after his escape from prison through the time of the murders.<sup>7</sup> At Mr. Cooper's request, post-conviction DNA tests were conducted, and they only served to further inculcate Mr. Cooper in the murders.

His allegations of police misconduct, including his claim that evidence regarding three white male perpetrators was ignored by police officers, are not supported by credible evidence. Rather, they are repeated to the Commission through distortions of that record. The police interviewed several persons known to have been present at the Canyon Corral Bar on the night of the murders, one of whom testified at trial, and none of them claimed to have seen three white men with bloody shirts.<sup>8</sup> This finding was affirmed by the U.S. District Court for the Southern District of California and the U.S. Court of Appeals for the Ninth Circuit in federal habeas proceedings.<sup>9</sup>

Mr. Cooper's assertion that the destruction by the prosecution of a pair of "bloody coveralls" severely compromised his defense is equally groundless. Diana Roper, who claimed her boyfriend Lee Furrow had left a pair of bloody coveralls in her closet and was involved in the murders at the Ryen residence based on a "vision" she had, was abusing methamphetamine at the time and had a motive for disparaging Mr. Furrow, who had begun a sexual relationship with one of her childhood friends.<sup>10</sup> There was no evidence linking Mr. Furrow to the scene of the crime, and Mr. Furrow was seen at a concert in Glen Helen Park on the night of the murders.<sup>11</sup> Furthermore, Mr. Cooper's defense team was informed about the coveralls and did not choose to investigate them further. Finally, the destruction of the Roper coveralls was known to the jury at trial. Even if the destruction had been improper – and there is no evidence that it was – it could

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<sup>7</sup> See *infra* Part III.D.

<sup>8</sup> See *Cooper v. Brown*, 510 F.3d 887, 961–71 (S.D. Cal. 2005). Attached as Annex B.

<sup>9</sup> See *id.*; see also *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007). Attached as Annex C.

<sup>10</sup> *Id.* at 981, 986–87.

<sup>11</sup> *Id.* at 981.

not have undermined the vast amount of evidence connecting Mr. Cooper to the crime.<sup>12</sup> These findings were confirmed in evidentiary hearings before a U.S. district court in federal habeas proceedings and affirmed by the Ninth Circuit.<sup>13</sup>

Mr. Cooper also asserts that eight year-old Josh Ryen, the sole survivor of the attack, described “three white males” or “three Mexicans” as the assailants, repeating a claim Petitioner made at trial and in numerous appeals. This assertion is not supported by any evidence, as Josh Ryen testified he could not recall seeing any assailants. He referred to “three Mexicans” who had inquired with his father about finding work earlier in the evening before the Ryen family and Chris Hughes left the house to attend a barbeque.<sup>14</sup> Moreover, Mr. Cooper’s allegation that Josh Ryen described the presence of multiple assailants and that police investigators manipulated his testimony was heard by the jury at trial and rejected—it is not the product of newly discovered information.<sup>15</sup> Lastly, this argument too was considered by the U.S. District Court for the Southern District of California and the Ninth Circuit Court of Appeals, and rejected.<sup>16</sup>

The claims in the brief filed with the Commission by Petitioner on August 30, 2012, contain additional, similar distortions of the record and statements that are completely without any factual basis. Many of the claims, including Petitioner’s theory of multiple assailants, a botched police investigation, and that he walked to Mexico the night of the murders, were considered by the members of the jury and disbelieved. In addition, the allegations of governmental misconduct and procedural deficiencies have been considered and rejected by multiple state and federal judges and the Governor of California over the course of the nearly three decades of post-conviction proceedings granted to Mr. Cooper.

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<sup>12</sup> *Id.* at 986–87.

<sup>13</sup> *Cooper v. Brown*, 510 F.3d 887 (S.D. Cal. 2005), *aff’d* by *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007).

<sup>14</sup> *Id.* at 980–81.

<sup>15</sup> *See infra* Part III.C.

<sup>16</sup> *Cooper v. Brown*, 510 F.3d 887 (S.D. Cal. 2005), *aff’d* by *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007).



In light of the extensive trial and post-trial proceedings that have been granted to Mr. Cooper, which considered and rejected the same issues that he brings to the Commission in the present case, the Government of the United States requests the Commission to reject the petition. It is not the role of the Commission to intervene and substitute its judgment for the consistent and collective judgments of the jury and a myriad of state and federal judges since the original trial in 1984.

## **II. Procedural History**

Mr. Cooper pled guilty to the charge of escaping from prison and a jury found Mr. Cooper guilty of all the remaining charges against him and returned a verdict of four counts of first-degree murder and one count of attempted murder.<sup>17</sup> Following an additional hearing, the jury decided on the death penalty for Mr. Cooper. Mr. Cooper's motion to modify the verdict was denied and the trial judge sentenced him to death.<sup>18</sup> The California Supreme Court affirmed the judgment; in its opinion, it noted that "the sheer volume and consistency of the evidence is overwhelming."<sup>19</sup> The United States Supreme Court denied certiorari review.<sup>20</sup> On March 26, 1992, the U.S. District Court for the Southern District of California issued the first in a series of stays of execution in order to consider Mr. Cooper's additional legal challenges to his conviction and sentence.<sup>21</sup>

In 1997, Mr. Cooper's first federal habeas petition was denied by the district court after allowing the petition to be amended and supplemented, and after conducting an evidentiary hearing.<sup>22</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's denial of

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<sup>17</sup> Opposition to Motion for Postconviction DNA Testing, *People v. Cooper*, No. CR-72787 at 9 (Cal. Super. Ct. Oct. 6, 2010). Attached as Annex D.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing *People v. Cooper*, 809 P.2d 865, 904 (Cal. 1991)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Mr. Cooper's first federal habeas petition, and subsequently denied rehearing and rehearing en banc. On April 30, 1998, Mr. Cooper filed a second federal habeas petition in the district court.<sup>23</sup> The district court dismissed the petition for lack of jurisdiction and as an impermissible successive petition for repeating the same claims.<sup>24</sup> On December 21, 2001, the Ninth Circuit denied Mr. Cooper's appeal. Rehearing and rehearing en banc were denied by the Ninth Circuit on October 18, 2002, and the United States Supreme Court denied certiorari.<sup>25</sup>

During his second federal habeas petition proceedings, Mr. Cooper filed a motion in the Superior Court of the State of California to seek DNA testing of blood found at the crime scene, in anticipation of the enactment of a new California law. Before the Superior Court made a ruling, the state of California entered into an agreement with Mr. Cooper on May 10, 2001, to conduct joint nuclear DNA forensic testing.<sup>26</sup> The results of the agreed-upon nuclear DNA testing only served to further inculcate Mr. Cooper and confirm the overwhelming evidence of his guilt that had been presented at trial.<sup>27</sup>

On October 22, 2002, Mr. Cooper filed a supplemental motion for additional, mitochondrial DNA testing of the approximately 1,000 hairs recovered from the hands of the victims, seeking to show that some of these hairs had come from other potential assailants, and requested an evidentiary hearing based on a claim that the evidence from the 2002 nuclear DNA test had been tampered with.<sup>28</sup> On June 16, 2003, Mr. Cooper also filed a postconviction discovery request in order to gain access to a tan blood-stained T-shirt that was found on the side of the road within two miles of the Ryen home to test it for the presence of preservatives in an effort to demonstrate his contention that the police had planted blood on it obtained from a vial

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 9–10.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.* at 12.

of Petitioner's blood that included a preservative<sup>29</sup> After an evidentiary hearing, the California Superior Court denied Mr. Cooper's request for further testing and found no merit to Mr. Cooper's allegations of evidence tampering.<sup>30</sup>

Mr. Cooper then sought leave again from the Ninth Circuit to file a second habeas petition involving the use of DNA testing and allegations of evidence tampering. This request was denied because Mr. Cooper could allege no new facts establishing his innocence or supporting his claim of DNA testing deficiencies or evidence tampering.<sup>31</sup> The United States Supreme Court denied certiorari for the fifth time.<sup>32</sup> Mr. Cooper subsequently filed two petitions for the writ of habeas corpus in the United States Supreme Court, one on February 11, 2003 and a second on May 15, 2003, which were denied.<sup>33</sup> On January 20, 2004, Mr. Cooper filed a sixth petition for the writ of certiorari in the United States Supreme Court, which was denied on February 9, 2004.<sup>34</sup> Mr. Cooper also filed a sixth petition for the writ of habeas corpus in the California Supreme Court on February 2, 2004, which was denied on the merits on February 5, 2004.<sup>35</sup> A seventh habeas petition was denied by the California Supreme Court on the merits February 9, 2004, which Mr. Cooper had filed on February 5.<sup>36</sup>

On February 9, 2004, a majority of the Ninth Circuit sitting en banc issued a stay of execution and granted Mr. Cooper's request for leave to file a new federal habeas petition (his third).<sup>37</sup> After extensive hearings held by the district court and a number of scientific tests of

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 14.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 15. Cooper based his emergency request on a claim that his conviction had been prejudiced by the prosecution's contention that the Pro Keds shoes issued by the California Institute for Men—the prison he had escaped days before the murders at the Ryen home—and that had left footprints at the scene of the crime, were only sold to prisons. *See id.* at 15, n. 8. Mr. Cooper's claim was found by the district court to have no merit. *Id.*

evidence presented at trial, in 2005 the district court issued a comprehensive 159-page decision rejecting each of Mr. Cooper's nine habeas claims.<sup>40</sup> In 2007, a three-judge panel of the Ninth Circuit affirmed the district court's denial of Mr. Cooper's third federal habeas petition, and his motions for rehearing and rehearing en banc were denied.<sup>41</sup>

California Governor Arnold Schwarzenegger denied Mr. Cooper's first clemency request in 2004, stating "I have carefully weighed the claims presented in Mr. Cooper's plea for clemency. The state and federal courts have reviewed this case for more than eighteen years. Evidence establishing guilt is overwhelming, and his conversion to faith and his mentoring of others, while commendable, do not diminish the cruelty and destruction he has inflicted on so many. His is not a case for clemency."<sup>42</sup> In 2010, Governor Schwarzenegger received a second clemency application from Mr. Cooper on December 17.<sup>43</sup> The state of California filed a response on December 24, 2010, and Mr. Cooper filed a reply on December 27, 2010.<sup>44</sup> Governor Schwarzenegger did not act on Mr. Cooper's second clemency application before he left office on January 3, 2011, stating that there was insufficient time from the time on which Cooper's request was received until the end of Governor Schwarzenegger's term to fully review the extensive materials filed and reach a decision.<sup>45</sup> We are not aware whether or not Mr. Cooper has filed a new clemency request with current California Governor Jerry Brown.

It is against this lengthy procedural backdrop that Mr. Cooper filed this present petition in the Commission.

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<sup>40</sup> *Id.* at 17; *see Cooper v. Brown*, 510 F.3d 887 (S.D. Cal. 2005).

<sup>41</sup> *Id.* at 17.

<sup>42</sup> *Governor Schwarzenegger Denies Clemency to Convicted Murderer Kevin Cooper*, CALIFORNIA OFFICE OF GOVERNOR, <http://gov.ca.gov/news.php?id=3248> (last accessed Nov. 19, 2013).

<sup>43</sup> Andrea Lynn Hoch, *Kevin Cooper Clemency Petition Deferral*, CALIFORNIA OFFICE OF THE GOVERNOR MEMO (Jan. 2, 2011). Attached as Annex E.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

### **III. Statement of Facts**

#### **A. Mr. Cooper's Escape from Prison and Arrival at the Lease Home**

The facts surrounding the murder of Doug Ryen and Peggy Ryen, Jessica Ryen (their 10-year-old daughter), and Chris Hughes (their 11-year-old houseguest), and the attempted murder of Josh Ryen (their 8-year-old son), have been repeated on numerous occasions in the nearly thirty years of Mr. Cooper's extensive criminal and post-conviction court proceedings.<sup>46</sup> On June 2, 1983, Mr. Cooper escaped from the California Institute for Men (CIM), where he had been sentenced for two counts of residential burglary in Los Angeles County under the false name of David Trautman.<sup>47</sup> Mr. Cooper assumed the false identity of David Trautman because he had recently escaped from custody in Pennsylvania, where he had kidnapped, raped, and assaulted a teenage girl who had interrupted him during a residential burglary.<sup>48</sup>

On the same day Mr. Cooper escaped from CIM, he broke into a vacant house owned by Larry Lease and brothers Roger and Kermit Lang ("the Lease home").<sup>49</sup> At trial, Mr. Cooper's presence in the Lease home was confirmed by his own testimony and a wide array of physical evidence, including his fingerprints and a semen stain he left on a blanket.<sup>50</sup> The Lease home was the closest neighbor to the Ryen house, about 126 yards (~115 meters) away. The Ryen home could be seen from the window near the Lease home's fireplace.<sup>51</sup>

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<sup>46</sup> See, e.g., Opposition to Motion for Postconviction DNA Testing at 5–18, *People v. Cooper*, No. CR-72787 (Cal. Super. Ct. Oct. 6, 2010); Brief for Respondent at 1–15, *Cooper v. Wong*, No. 09-363 (U.S. Oct. 27, 2009) [Attached as Annex F]; *Cooper v. Brown*, 510 F.3d 887, 892–917 (S.D. Cal. 2005); *Cooper v. Calderon*, 255 F.3d 1104, 1107–08 (9th Cir. 2001) [Attached as Annex G]; *People v. Cooper*, 809 P.2d 865, 875–80 (Cal. 1991).

<sup>47</sup> *Cooper v. Brown*, 510 F.3d at 893–94 (S.D. Cal. 2005).

<sup>48</sup> *Id.* at 894–95.

<sup>49</sup> *Id.* at 893.

<sup>50</sup> *Id.* at 895; *Cooper v. Brown*, 510 F.3d 870, 874–75 (9th Cir. 2007).

<sup>51</sup> *People v. Cooper*, 809 P.2d at 876.

## **B. The Murders at the Ryen Home**

On Saturday, June 4, 1983, the Ryens and Chris Hughes attended a barbeque at the home of George Blade in Los Serranos, a few miles from their home in Chino, California.<sup>52</sup> Chris had received permission to attend the barbeque and spend the night with the Ryens, and together they left the Blade residence between 9 and 9:30 p.m. for the Ryen home.<sup>53</sup> The next morning, June 5, Mary Hughes (Chris's mother) became concerned when Chris failed to return home and she could not reach the Ryen residence by telephone.<sup>54</sup> Around 9 a.m., Mary visited the Ryen home and noticed that the Ryen family station wagon was missing; no one answered the door.<sup>55</sup> William Hughes (Chris's father) went to the Ryen home around 11:30 a.m. and attempted to enter the kitchen door, but it was locked.<sup>56</sup> Mr. Hughes then proceeded to the sliding glass door leading into the Ryen master bedroom, and when he looked inside he saw the body of his son, Chris, the unclothed bodies of Douglas and Peggy Ryen, and Josh Ryen lying on the floor between his mother and Chris; only Josh appeared to be alive.<sup>57</sup>

When he was unable to open the sliding glass door, Mr. Hughes ran to the kitchen door and kicked it in.<sup>58</sup> He found the body of Jessica Ryen in the hallway as he approached the master bedroom.<sup>59</sup> Mr. Hughes entered the master bedroom and touched the body of his son; it was cold and stiff.<sup>60</sup> He asked Josh who had carried out the attack, but Josh was severely wounded and unable to speak.<sup>61</sup> The telephone in the Ryen home did not work, so Mr. Hughes drove to a

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<sup>52</sup> *Id.* at 875.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 875.

<sup>55</sup> *Cooper v. Brown*, 510 F.3d at 903 (S.D. Cal. 2005).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 904.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

neighbor's house to seek help.<sup>62</sup> When the police arrived, they discovered Doug, Peggy, Chris, and Jessica were dead.<sup>63</sup> They found the first three bodies in the master bedroom and Jessica's body on the floor in the hallway just outside the master bedroom.<sup>64</sup> Josh was alive but in shock, and was taken by helicopter to Loma Linda University Medical Center.<sup>65</sup>

The victims were killed by numerous chopping and stabbing wounds.<sup>66</sup> Doug Ryen suffered from at least thirty-seven separate wounds, including multiple chops to his skull that were delivered in rapid succession within one or two seconds of each other.<sup>67</sup> Peggy Ryen had been inflicted with thirty-two separate wounds to her head, chest, stomach, and neck areas.<sup>68</sup> Jessica Ryen suffered from forty-six separate wounds all over her body, including twenty separate carving injuries to her chest.<sup>69</sup> Chris Hughes suffered twenty-five separate wounds, including injuries consistent with an effort to raise his right hand in an effort to protect his head.<sup>70</sup> Josh Ryen, the sole survivor, suffered multiple injuries to his head and neck.<sup>71</sup> Dr. Root, who performed the autopsies, believed the injuries could have been inflicted quickly and within one minute for each of the victims, and that each victim would have died within minutes of having been attacked.<sup>72</sup> All of the victims had a moderate amount of food in their stomachs, indicating they had probably died within one to three hours after they had last eaten.<sup>73</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 900.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 900–01.

<sup>70</sup> *Id.* at 902–03.

<sup>71</sup> *Id.* at 903.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

**C. Accounts of the Night of the Murders Made By Josh Ryen, the Sole-Surviving Eye-Witness to the Attack**

At trial, Josh Ryen testified that “[t]hree Mexicans” came to the Ryen home and spoke to Doug Ryen about looking for work shortly before the Ryen family and Chris Hughes left for the barbeque around 6:30 p.m.<sup>74</sup> Josh testified that they took the Ryen’s truck to the barbeque and that the keys to the Ryen station wagon were usually kept in the master bedroom.<sup>75</sup> Upon returning home from the barbeque, Josh believed his father had stayed up a little later than everyone else watching television in the living room.<sup>76</sup> Chris and Josh slept on the floor of Josh’s bedroom,<sup>77</sup> and Josh remembers waking up once and falling back asleep before being woken up a second time by a scream.<sup>78</sup>

Josh testified that he awoke Chris, and they began walking down the dark hallway towards the laundry room and then the master bedroom.<sup>79</sup> According to Josh, they could see Jessica’s body lying in the hallway.<sup>80</sup> Josh remembered little else before waking up injured in the master bedroom with Mr. Hughes asking if he could open the sliding glass door.<sup>81</sup> He testified that he could not remember being hit or seeing Chris injured,<sup>82</sup> and that all he saw in the house that did not belong that night was “one” shadow near the bathroom where Jessica’s body was lying.<sup>83</sup>

Mr. Cooper has asserted that Josh Ryen indicated to SBSD Detective Hector L. O’Campo and others that the attackers were “three white men” or “three Mexicans” while recovering at

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<sup>74</sup> Reporters’ Transcript at vol. 95, 4947–48, *People v. Cooper*, No. OCR-9319 (Cal. Super. Ct. Dec. 13, 1984) [hereinafter “RT”].

<sup>75</sup> *Id.* at 4950–51.

<sup>76</sup> *Id.* at 4951–54.

<sup>77</sup> *Id.* at 4952–53.

<sup>78</sup> *Id.* at 4955–56.

<sup>79</sup> *Id.* at 4957.

<sup>80</sup> *Id.* at 4958.

<sup>81</sup> *Id.* at 4962.

<sup>82</sup> *Id.* at 4960–61.

<sup>83</sup> *Id.* at 4968–69.



Loma Linda University Medical Center. Specifically, Mr. Cooper repeats an assertion that he made at trial and in his post-conviction proceedings that Detective O'Campo deliberately destroyed evidence that shows Josh Ryen told him that his attackers were three white men. Mr. Cooper claims Detective O'Campo learned of Josh Ryen's alleged accusation of multiple attackers during questioning prior to his June 14, 1983 interview with Josh. According to Petitioner's claim, Detective O'Campo destroyed his notes in an attempt to hide the alleged fact that Josh had described three white men or three Mexicans as the assailants, and began to manipulate Josh's account of the attack in order to shift the blame to Mr. Cooper.<sup>84</sup> Mr. Cooper's assertions have been repeatedly found not to be credible, including by the jury and by judges, in the nearly thirty years of trial, appellate and habeas corpus proceedings.

At trial Detective O'Campo testified that during his initial interaction with Josh in his hospital room on June 6, 1983, he only spoke to Josh for "two or three minutes," did not ask about what had happened on night of the murders, and that there was no conversation about three Mexicans.<sup>86</sup> His main purpose during that interaction was to "develop a rapport with the youngster."<sup>87</sup> He testified that Josh was not in a condition to talk about suspects when he visited on June 6.<sup>89</sup> Dr. Mary Howell, Josh's grandmother, similarly testified that Josh was sedated and in no condition for questioning on June 6.<sup>90</sup>

Petitioner also claims that Josh spoke of multiple attackers during the June 14, 1983 interview conducted by Detective O'Campo.<sup>91</sup> However, the record of that interview does not contain any such statement, and is consistent with the testimony Josh offered at trial, especially

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<sup>84</sup> Merits Brief of Petitioner at 75–77.

<sup>86</sup> *Id.* at 6084–85.

<sup>87</sup> *Id.* at 6080.

<sup>89</sup> *Id.* at 6087. Josh Ryen was unable to verbalize on June 6, 1983 due to a tube going into his trachea. *See* RT at vol. 100, 6082.

<sup>90</sup> *Id.* at 6214–15.

<sup>91</sup> Merits Brief of Petitioner at 75–76.

regarding one key point: he could not remember who committed the murders.<sup>92</sup> When Detective O'Campo asked Josh who he "thought had done it," Josh speculated that the three Mexicans who had stopped by his home earlier that evening before the barbeque might have done it.<sup>93</sup>

According to Detective O'Campo's trial testimony, this was the first occasion that Josh Ryen had told him about the three Mexicans who had visited the Ryen family home earlier that evening,<sup>94</sup> although he had heard various tips, including about three white men, three Hispanics, and other persons of interest to the investigation at the scene of the crime after the murders had been discovered.<sup>95</sup> This information from Josh about the encounter with "three Mexicans" at the house, including his speculation that they could possibly be the perpetrators, is hardly the same as a description that he saw three men carry out the murders (whether white or Hispanic).<sup>96</sup>

The testimony of Josh Ryen and Detective O'Campo was supported at trial by other witnesses. Dr. Mary Howell, Josh's grandmother, testified that the first day Detective O'Campo visited Josh at Loma Linda University Medical Center (June 6) he was there to more or less make an acquaintance with Josh.<sup>97</sup> Dr. Howell, who was often with Josh during his recovery in the hospital, also testified that Josh never stated he had ever seen more than one attacker in his house.<sup>98</sup> Linda Headley, a nurse at Loma Linda University Medical Center, also testified that the interaction between Detective O'Campo and Josh Ryen on June 6, 1983 was "[m]aybe one or two minutes," and that O'Campo was just trying to develop a relationship with Josh at that time.<sup>99</sup>

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<sup>92</sup> RT at vol. 100, 6159.

<sup>93</sup> *Id.* at 6157.

<sup>94</sup> *Id.* at 6155.

<sup>95</sup> *Id.* at 6155, 6185. Detective O'Campo testified that neighbors were providing potential leads that covered a number of nationalities. *Id.* at 6185.

<sup>96</sup> *See id.* at 6155.

<sup>97</sup> *Id.* at 6206.

<sup>98</sup> *Id.* at 6217-18.

<sup>99</sup> *Id.* at vol. 101, 6306.

As for Mr. Cooper's claim that Detective O'Campo destroyed his notes, O'Campo testified at trial that he did not take notes on his brief encounter with Josh on June 6,<sup>100</sup> and stated that it was only "[a]fter I dictated my report and reviewed the typewritten report against my handwritten notes I destroyed the handwritten notes" during the interview of June 14, 1983.<sup>101</sup>

**D. Evidence of Petitioner's Guilt**

There were a number of details and items offered as evidence of Mr. Cooper's connection with the massacre at the Ryen family home on June 4, 1983. Mr. Cooper admitted to staying in the vacant Lease home next door to the Ryen's residence on Thursday night (June 2), Friday and Friday night (June 3), and hiding in the bathroom when one of the owners stopped by on Saturday morning (June 4).<sup>102</sup> Mr. Cooper slept in the closet of the bedroom that Kathleen Bilbia—an employee of Larry Lease—had rented and recently vacated (the Bilbia bedroom).<sup>103</sup> Mr. Cooper also admitted to making telephone calls to Yolanda Jackson and Diane Williams from the Lease home and asking for their help.<sup>104</sup> Telephone records showed that two telephone calls had been placed from the Lease home to Yolanda Jackson, one on June 3 at 12:17 a.m., and the second at 2:26 a.m. later that morning.<sup>105</sup> Ms. Jackson confirmed these two calls were made by Mr. Cooper at his trial.<sup>106</sup> Telephone records also showed that two telephone calls were made from the Lease home to Diane Williams, one on June 3 at 11:46 a.m., and the second beginning at 7:53 p.m. on June 4 and lasting thirty-four minutes.<sup>107</sup> Mr. Cooper's second call to Diane Williams, which was admitted to by Petitioner, occurred roughly one hour before the Ryens and

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<sup>100</sup> *Id.* at vol. 100, 6080.

<sup>101</sup> *Id.* Detective O'Campo further reiterated "After I reviewed my report and compared them against the typewritten report, if the typewritten report satisfactorily reflects the information I received, then, yes, I tear those – that portion of my handwritten notes and throw them away." *Id.*

<sup>102</sup> *Cooper v. Calderon*, 255 F.3d 1104, 1107 (9th Cir. 2001).

<sup>103</sup> *Cooper v. Brown*, 510 F.3d 870, 904 (S.D. Cal. 2005).

<sup>104</sup> *Id.* at 905.

<sup>105</sup> *Id.* at 905–06.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 906.

Chris Hughes left the barbeque for the Ryen home on the night of the murders.<sup>108</sup> Petitioner admitted that he asked both women for their help, but they declined.<sup>109</sup>

Other physical evidence connecting Mr. Cooper to the Lease home included Mr. Cooper's fingerprint recovered from a Coffee Mate jar in the kitchen, his footprint found on the shower sill of the bathroom in the Bilbia bedroom, a semen stain consistent with Mr. Cooper's genetic profile on a blanket in the Bilbia bedroom's closet, and saliva on a cigarette butt which was consistent with a non-secretor such as Mr. Cooper (less than twenty percent of the U.S. population are non-secretors).<sup>110</sup>

One of the murder weapons, a hatchet covered with dried blood and human hair, came from the Lease home where Mr. Cooper hid.<sup>111</sup> The hatchet was discovered on June 5, 1983 by a local resident on the side of English Road, which was the only paved road leading from the Ryen home out of the area.<sup>112</sup> Some of the hairs found on the hatchet were consistent with those of Doug and Josh Ryen, and post-conviction DNA testing confirmed that the dried blood came from the murder victims.<sup>113</sup> Roger Lang, part-owner of the Lease home, identified the hatchet as the one missing from the Lease home after the killing,<sup>114</sup> and he testified that the hatchet had been kept in a sheath by the fireplace in the Lease home.<sup>115</sup> Kathleen Bilbia, who had lived in the Lease home during the month of May 1983, recalled seeing the hatchet in its sheath by the fireplace when she was cleaning the house on June 1, 1983.<sup>116</sup> On June 7, 1983, two employees

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 905–06.

<sup>110</sup> *Id.* at 906. A non-secretor is a person who does not secrete his blood type antigen into his saliva and other body secretions.

<sup>111</sup> *Id.* at 895–96.

<sup>112</sup> *Id.* at 897.

<sup>113</sup> *Id.* at 897–98.

<sup>114</sup> *Id.* at 895; RT at vol. 87, 3004.

<sup>115</sup> *Cooper v. Brown*, 510 F.3d at 897; RT at vol. 87, 3004–05.

<sup>116</sup> *Cooper v. Brown*, 510 F.3d at 897; RT at vol. 86, 2685–86.

of Roger and Kermit Lang, part-owners of the Lease home, discovered the sheath to the hatchet lying on the floor in the Bilbia bedroom where Mr. Cooper slept.<sup>117</sup>

Buck knives, an eleven-inch hunting knife, and an ice pick were also missing from the Lease home.<sup>118</sup> The hunting knife could have caused the incision and stab wounds of the victims.<sup>119</sup> A strap to one of the missing buck knives was found on the floor near the closet in the Bilbia bedroom,<sup>120</sup> as was a blood-stained khaki green button identical to the buttons on field jackets issued at the prison from which Cooper escaped.<sup>121</sup> A coiled, blood-stained rope was found in the Bilbia bedroom closet.<sup>122</sup> Bloodstains on the rope were tested and found to be consistent with a mixture of blood from Jessica and Doug Ryen, or Peggy and Doug Ryen.<sup>123</sup> A criminalist from the San Bernadino County sheriff's crime laboratory sprayed various areas of the Lease home with luminol, a substance used to detect the potential presence of blood not visible to the naked eye.<sup>124</sup> A positive reaction occurred on the shower walls of the Bilbia bathroom; in the sink of the Bilbia bathroom; on the rug in the hallway leading to the Bilbia bedroom that appeared to be four foot impressions; and inside the Bilbia bedroom closet.<sup>125</sup>

A drop of blood (A-41) found on the opposite wall of the Ryen master bedroom was found to have belonged to an African-American male, such as Mr. Cooper, through various blood tests.<sup>126</sup> Post-conviction DNA testing confirmed Petitioner to be the source of the A-41 (one in 310 billion chance that he was not).<sup>127</sup> Hair was recovered from the Bilbia bathroom sink

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<sup>117</sup> *Cooper v. Brown*, 510 F.3d at 898; RT at vol. 86, 2859–60.

<sup>118</sup> *Cooper v. Brown*, 510 F.3d at 899; RT at vol. 87, 3002–04.

<sup>119</sup> *Cooper v. Brown*, 510 F.3d at 899; RT at vol. 91, 3957.

<sup>120</sup> *Cooper v. Brown*, 510 F.3d at 899–900.

<sup>121</sup> *Cooper v. Calderon*, 255 F.3d at 1107; RT at vol. 87, 3072–73.

<sup>122</sup> *Cooper v. Brown*, 510 F.3d at 906; RT at vol. 86, 2842.

<sup>123</sup> *Cooper v. Brown*, 510 F.3d at 909.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 908–09.

<sup>127</sup> *Id.* at 909.

trap in the Lease home, some of which was matted and appeared to have been there for a long time. Other hair was not matted and was found to have characteristics similar to Jessica Ryen's head hair upon microscope examination.<sup>128</sup> A hair removed from the Bilbia bathroom shower had characteristics similar to Doug Ryen's head hair.<sup>129</sup> Plant burrs found inside Jessica's nightgown were similar to burrs found on the blanket inside the closet where Mr. Cooper slept, burrs from plants between the Ryen home and Lease home, and burrs found in the Ryen station wagon.<sup>130</sup>

Police investigators found three significant shoe-print impressions, two on the Ryen premises, and one in the Lease home.<sup>131</sup> At the Ryen home, a partial sole impression was made on a spa cover outside the Ryen master bedroom and a partial bloody shoe print was made on a sheet on the Ryen waterbed.<sup>132</sup> A nearly complete shoe-print impression was found in the game room of the Lease home.<sup>133</sup> The three shoe-prints were all consistent with Mr. Cooper's shoe size and the pattern of the Pro-Keds Dude tennis shoes issued to inmates at CIM, the prison from Mr. Cooper escaped, including Mr. Cooper.<sup>134</sup> The Stride Rite Corporation sold Pro-Keds Dude tennis shoes to state and federal government institutions such as CIM, and the diamond sole pattern of the shoes was not found on any other type of shoe the company manufactured nor, to the best of the general merchandise manager for Stride Rite's knowledge, any other shoe.<sup>135</sup> Mr. Cooper admitted to drinking beer in the Lease home.<sup>136</sup> A six-pack of Olympia Gold beer with

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 901.

<sup>131</sup> *Id.* at 908.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 911.

one can missing was found in the refrigerator of the Ryen home.<sup>137</sup> One of the cans in the six-pack was blood-stained.<sup>138</sup> A nearly empty can of Olympia Gold was found in a plowed horse-training area about midway between the Ryen home and Lease home.<sup>139</sup>

The Ryen station wagon was missing when the murders were discovered but was later found in Long Beach, California.<sup>140</sup> Some loose “Role-Rite” tobacco—provided free to CIM inmates and not available for retail—was found on the floorboard just to the right of the front passenger seat.<sup>141</sup> Role-Rite tobacco had also been found in the Bilbia bedroom of the Lease home.<sup>142</sup> A hand-rolled cigarette containing Role-Rite tobacco was found in the crevice formed by the vertical and horizontal portions of the front passenger seat of the Ryen station wagon.<sup>143</sup> A manufactured cigarette butt was also found in the front passenger seat area, and saliva tests on both cigarettes showed they had been smoked by a non-secretor such as Mr. Cooper.<sup>144</sup> Post-conviction DNA tests confirmed that the cigarettes were Mr. Cooper’s (matched to a potential error rate of one in 19 billion and one in 110 million).<sup>145</sup> Several hairs discovered in the car were consistent with Mr. Cooper’s pubic hair.<sup>146</sup> Plant burrs found in the Ryen station wagon were “virtually identical” to those found in Jessica’s dress, in the area between the Ryen home and Lease home, and in the bedding in the Bilbia bedroom closet.<sup>147</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 909.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 909–10.

<sup>144</sup> *Id.* at 910.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

#### **E. Petitioner's Flight and Arrest**

Mr. Cooper escaped to Tijuana, Mexico (two hours by car from the San Bernardino area) and checked into a hotel at around 4:00 p.m. on Sunday, June 5, 1983.<sup>148</sup> He made his way to Ensenada, Mexico and met Owen and Angelica Handy there on June 9, 1983.<sup>149</sup> Mr. Cooper secured work on the Handys' boat, and they set sail for San Francisco.<sup>150</sup> The Handys saw Mr. Cooper in possession of some items from the Lease home, including sweat pants and a pair of Mrs. Lang's gloves.<sup>151</sup> Mr. Cooper did not go ashore when they stopped at various places along the way, but rather stayed aboard the Handys' vessel.<sup>152</sup>

On July 30, 1983, officers from the Santa Barbara County Sheriff's Department responded to a call for assistance of an attempted rape on a boat docked next to the Handys' boat in Pelican Cove.<sup>153</sup> The twenty-six-year-old female victim reported Mr. Cooper attempted to rape her at knife point.<sup>154</sup> When the authorities arrived, Mr. Cooper tried to flee, throwing an object into the water before diving off the Handy's boat.<sup>155</sup> A knife was recovered from the water where Mr. Cooper failed to make his escape.<sup>156</sup>

#### **IV. Argument**

##### **A. Position of Petitioner**

Petitioner alleges violations of several of the rights recognized in the following articles of the American Declaration: Article I (right to life, liberty and personal security) on the basis that he was wrongfully convicted, incarcerated since 1985, and sentenced to death; Article II (right to

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<sup>148</sup> *Id.* at 912.

<sup>149</sup> *Id.* at 913.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* At his murder trial, Petitioner's arrest was presented as evidence, but not the report of attempted rape or the knife recovered from the water. *See id.* at note 4.



equality before law) for the allegedly racially motivated prosecution and alleged failure to protect Mr. Cooper from the atmosphere of racial discrimination at his trial; Article XVIII (right to a fair trial) for the alleged introduction of false evidence and failure to disclose exculpatory evidence; and Article XXVI (right to due process of law) for *inter alia* alleged ineffective assistance of counsel.<sup>157</sup>

Petitioner argues that the Commission should review the allegations in the present case with a heightened level of scrutiny because this is a case involving capital punishment, consistent with a “well-established doctrine” of the Commission.<sup>158</sup> The Government of the United States notes that the fact that Mr. Cooper has been sentenced to death, a penalty which is not prohibited by the American Declaration, and is lawful in some jurisdictions in the United States, is not an independent basis for review by the Commission in criminal cases where the underlying claims have been repeatedly raised and extensively litigated over the course of decades. Victims of crime and their close families also have a right to the repose that comes with the finality of a judgment after so many years.

In the present case, many of the issues that Petitioner raises are factual contentions (e.g., Mr. Cooper could not have committed the crime because there is evidence that “three white guys” were the perpetrators, and that San Bernardino detectives manipulated testimony and evidence to prove Mr. Cooper’s guilt) that were all presented to and decided upon by a jury after hearing **forty-eight days** of trial arguments and testimony.<sup>159</sup> That jury had the opportunity to evaluate directly the credibility of witnesses and examine the entire record of evidence presented

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<sup>157</sup> *Kevin Cooper v. United States*, Case 12.831, Inter-Am. Comm’n H.R., Report No. 131/11, OEA/Ser.L/V/II.143, doc. 15 ¶ 9 (2011).

<sup>158</sup> See Merits Brief of Petitioner at 71(citing the *Landrigan* case, *Graham* case, and *Thomas* case).

<sup>159</sup> The trial transcripts provided to the Commission by Petitioner show the jury trial began in late October 1984 and ended in early February 1985; this does not include the numerous pre-trial motions, the penalty phase following the jury’s finding that Mr. Cooper was guilty, or Mr. Cooper’s post-conviction relief efforts. See Trial Transcripts Guide, *People v. Cooper*, No. OCR-9319 (Cal. Super. Ct. 1983–85).

in the trial, not simply the selection of evidence and unsubstantiated allegations that Petitioner puts forward.

Mr. Cooper's request for the Commission somehow to take it upon itself to re-weigh evidence or conduct further investigation into claims that have been deemed to be unsubstantiated by jury members, scientific experts, and a number of judges is unwarranted. Nowhere does Mr. Cooper establish that the courts of California and the United States, in numerous proceedings conducted over thirty years, were incapable of thoroughly considering his various petitions or deciding them in a fair and just fashion. The Commission cannot and should not accept Petitioner's efforts seeking to have the Commission insert itself and impose its own assessment of the evidence in the case.

**B. Mr. Cooper's Rights Recognized in Article I of the American Declaration (Life, Liberty, and Personal Security) Were Not Violated Because He Was Convicted and Sentenced to Death by a Jury of His Peers Pursuant to the Laws and Regular Criminal Procedure of the State of California for the Murders of Doug, Peggy, and Jessica Ryen and Chris Hughes, and the Attempted Murder of Josh Ryen**

Petitioner asserts that he has been deprived of his life and liberty by virtue of a wrongful conviction and incarceration for a crime he did not commit, in violation of Article I of the American Declaration of the Rights and Duties of Man.<sup>161</sup> However, Mr. Cooper was found guilty of murdering Doug, Peggy, and Jessica Ryen and Chris Hughes, and attempting to murder Josh Ryen, only after a lengthy jury trial and full representation by counsel. Petitioner does not dispute that he has been incarcerated and sentenced to death following a jury trial, but rather asserts the trial proceedings were flawed due to governmental misconduct.<sup>162</sup> There is no claim of an independent violation of Mr. Cooper's Article I rights; therefore, Mr. Cooper's Article I rights are only implicated upon the finding the other rights he asserts under Articles II (right to

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<sup>161</sup> Merits Brief of Petitioner at 71.

<sup>162</sup> See *id.* at 71–72.

equality before the law), XVIII (right to a fair trial), and XXVI (right to due process of law) have been violated.

Petitioner makes out no violation of Mr. Cooper's Article I rights to life, liberty, and personal security because he cannot show that he was denied due process, including equality before the law and a fair trial.

**C. Mr. Cooper's Right to Equality Before Law Recognized in Article II of the American Declaration Was Not Violated Because California Took Measures to Protect Mr. Cooper from Racial Hostility and Nothing in the Record Suggests Mr. Cooper Was Found Guilty or Sentenced to Death Because of His Race**

Petitioner alleges his right to equal protection before the law, as reflected in Article II of the American Declaration, was violated because governmental entities including the Superior Court of San Diego County and the San Bernardino County Sheriff's Department (SBSD) prosecuted him on the basis of his race and failed to protect him against the racially charged atmosphere surrounding his trial, and because of some statistics cited by Petitioner regarding race and the imposition of the death penalty.<sup>163</sup>

**1. The State of California Took Measures to Protect Mr. Cooper from Racial Prejudice and Ensure He Received a Fair Trial**

**a. Mr. Cooper Was Granted a Change of Venue and San Diego Was a Proper Venue for the Case to Be Heard**

In order to protect Mr. Cooper against potential biases and prejudices, Judge Garner granted Mr. Cooper's request to move the case out of San Bernardino County, where the murders were committed and the coverage of them and the pre-trial proceedings was significant.<sup>164</sup> Judge Garner selected San Diego County after several hearings were held on venue,<sup>165</sup> and his decision was based on numerous factors, including the convenience, hardship, costs, time, and money

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<sup>163</sup> *Id.* at 108–10.

<sup>164</sup> *See generally* RT at vols. 11, 12, 19, & 21.

<sup>165</sup> *See id.*

necessary to hold a lengthy, complicated trial with over one-hundred witnesses, as well as the publicity given to the relevant events around the state.<sup>166</sup> In his ruling, Judge Garner found the trial required significant logistical considerations even without a change of venue, and these problems would be unreasonably exacerbated by moving the trial into the north of the state.<sup>167</sup>

It was noted in the multiple hearings on venue that the murders and case had received publicity throughout the state, but Judge Garner found much of the recent publicity surrounding the pre-trial phase was neutral and not decidedly prejudicial to Mr. Cooper.<sup>168</sup> Finally, Judge Garner reiterated that the defense would have a full opportunity to examine potential jurors and exclude those who demonstrated they might be predisposed against Mr. Cooper.<sup>169</sup>

**b. Mr. Cooper Participated in the Selection of an Impartial Jury**

In addition to agreeing to a change of venue, Mr. Cooper and his defense actively participated in the selection of an impartial jury to protect him against possible prejudices, including those based on race.<sup>170</sup> During jury selection for Mr. Cooper's trial, the basic nature of the case was described to the potential jurors, who were asked questions by defense counsel specifically tailored to reveal any biases.<sup>171</sup> Moreover, Mr. Cooper's attorney not only had the ability to bring an unlimited number of challenges to a potential juror for cause, but also used several peremptory challenges, whereby a juror may be excluded without any reason given at all.<sup>172</sup> As can be seen from the reporters' transcript of Mr. Cooper's trial, a jury acceptable to the defense and prosecution was chosen with "ease," and Mr. Negus (defense counsel for Mr. Cooper) noted that knowledge of the order in which potential jurors would be called upon

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<sup>166</sup> RT at vol. 21, 1011.

<sup>167</sup> See, e.g., *id.* at 1009.

<sup>168</sup> *Id.* at 1006.

<sup>169</sup> *Id.* at 1004.

<sup>170</sup> See, e.g., *id.* at vol. 84, 2204.

<sup>171</sup> See *id.* at vol. 76, 35.

<sup>172</sup> See "Peremptory Challenge," LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/peremptory\\_challenge](http://www.law.cornell.edu/wex/peremptory_challenge) (last accessed Nov. 8, 2013).

allowed him to effectively employ his peremptory challenges.<sup>173</sup> Therefore, the allegation that Mr. Cooper was not protected by the state of California during his trial from the atmosphere of racial hostility has no basis in the record.

**2. The Statistics Cited By Petitioner Do Not Show That Race Was a Consideration in Mr. Cooper's Prosecution, Conviction, and Sentencing**

Mr. Cooper's effort to cite various statistics to support his allegation that his right to equality before the law under Article II of the American Declaration was violated fails for three reasons. First, Mr. Cooper has presented no evidence that any direct or indirect act of racial discrimination occurred at any time in his case. Second, relying on statistical evidence alone – without some concrete evidence of discriminatory acts – is not sufficient to call into question and criminal conviction and sentencing that has been the subject of such extensive trial and post-trial proceedings. Third, even if it could stand on its own, the statistical evidence cited by Mr. Cooper has inherent flaws, is susceptible to different interpretations, and the conclusions he draws from it are the subject of significant contention, not general acceptance.

**a. Petitioner Provides No Evidence That Race Was a Consideration in Mr. Cooper's Prosecution, Conviction, and Sentencing**

Mr. Cooper asserts that he was the victim of unchecked racial hostility that resulted in his wrongful conviction and sentencing, but cites no evidence specific to his case.<sup>174</sup> Nor does Mr. Cooper point to any facts supporting his contention that police investigators acted out of racial prejudice in investigating and arresting him for the murder of the Ryen family.<sup>175</sup> Instead, Petitioner merely notes the difference between his race and that of his victims, downplays the fact he was granted a change of venue to protect against racial bias in the nearby community, and completely ignores his counsel's role in choosing an impartial jury. The petition simply asserts

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<sup>173</sup> See RT at vol. 84, 2204.

<sup>174</sup> See Merits Brief of Petitioner at 108–09.

<sup>175</sup> See *id.*

the conclusion it wishes the Commission to draw: “[u]ltimately, Mr. Cooper was treated differently than he would have had he been white; he was railroaded into conviction and sentenced to die for crimes he did not commit.”<sup>176</sup>

This conclusion—that Mr. Cooper was “railroaded into conviction”—further ignores the extensive pre-trial motions and hearings that began on August 11, 1983 and continued until September 1984; the jury selection process that occurred over the period of mid-September through mid-October 1984; forty-eight days of trial testimony beginning October 23, 1984 and ending on February 7, 1985; jury deliberations that lasted until February 19, 1985 that resulted in a verdict of guilty; following which there was a penalty phase and additional jury deliberations before the penalty of death was imposed.<sup>177</sup> These extensive pre-trial and trial proceedings, in addition to the lengthy jury deliberations, show a dispassionate and careful judicial process completely at odds with Mr. Cooper’s characterization of a quick, heated, and racially animated proceeding that “railroaded” him into his conviction.

**b. Statistical Evidence Alone Is Not Sufficient Proof That Mr. Cooper’s Conviction and Sentencing Was the Result of Racial Discrimination**

Rather than presenting specific evidence that his conviction and sentencing was the result of racial discrimination, Mr. Cooper relies on statistical studies to support an allegation that he was statistically more likely to be sentenced to death because of his race, but this approach has previously been rejected by the Commission.<sup>178</sup> In *Willie Celestine v. United States*,<sup>179</sup> the petitioner also cited statistical studies about the implementation of the death penalty in the United States to challenge his conviction and death sentence, but the Commission found that

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<sup>176</sup> *Id.* at 108–09.

<sup>177</sup> See Trial Transcripts Guide, *People v. Cooper*, No. OCR-9319 (Cal. Super. Ct. 1983–85).

<sup>178</sup> See Merits Brief of the Petitioner at 108–10.

<sup>179</sup> *Willie Celestine v. United States*, Case 10.031, Inter-Am. Comm’n H.R., Resolution No. 23/89, OEA/Ser.L/V/II.77 rev.1, doc. 7 (1989). Attached as Annex H.

“[a]n entire criminal justice system cannot be proved invalid by mere citations to statistical studies without more.”<sup>180</sup> The Commission cited to the seminal U.S. Supreme Court case on the issue, *McCleskey v. Kemp*,<sup>181</sup> for finding the following propositions: each jury is unique;<sup>182</sup> capital sentencing rests on innumerable factors in each case;<sup>183</sup> there is a threshold below which the death penalty may not be imposed;<sup>184</sup> the jury is allowed to consider relevant circumstances that might cause it to decline to impose the death penalty;<sup>185</sup> the jury as a whole assures the defendant a “diffused impartiality”;<sup>186</sup> a jury may decline to convict or convict of a lesser crime;<sup>187</sup> and that the jury is actually an aid to the defendant because it can decline to impose the death penalty, decline to convict, or convict of a lesser crime.<sup>188</sup> Accordingly, the Commission in *Celestine* determined that “the petitioner has not provided sufficient evidence that the statistical studies presented make a prima facie case to prove the allegations of racial discrimination and partiality in the imposition of the death penalty such as to shift the burden of proof to the United States Government.”<sup>189</sup>

The Commission further noted that statistical information raising questions about the general tendencies of juries in death penalty cases is not enough to call into question convictions for particularly severe murders. The Commission stated that the facts of *Celestine* provided a “poor case” to recommend the reversal of a case based on a perceived tendency in favor of the death penalty because the rape and murder of an elderly woman “was a particularly heinous

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<sup>180</sup> *Id.* at ¶ 45.

<sup>181</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987). Attached as Annex I.

<sup>182</sup> *Celestine*, *supra* note 179, at ¶ 30.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at ¶ 31.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at ¶ 33.

<sup>189</sup> *Id.* at ¶ 45.

crime” that was punishable by death in the state of Louisiana.<sup>191</sup> In the instant case, the vicious murders of two parents, their young daughter, a young boy who was a guest in their home, and the attempted murder of their young son are also clearly “particularly heinous” crimes that may result in the imposition of the death penalty according to the law of the state of California.

**c. The Value and Accuracy of Statistical Evidence in the Race and the Death Penalty Debate is Contested**

Petitioner argues that “a black person convicted of a capital crime is significantly more likely to receive the death penalty than a white person convicted of the same kind of offense,” and that “the race of the victim is determinative in whether a defendant receives the death penalty.”<sup>192</sup> Mr. Cooper cites several websites and legal publications in support of this contention,<sup>193</sup> and several of the figures (including the statistic that black perpetrators are “4.3 times as likely” to receive the death penalty when their victim is white rather than black) are rooted in the study done by David Baldus (“Baldus Study”) that was at issue in *McCleskey* and considered by the Commission in *Celestine*.<sup>194</sup> However, the causes of these discrepancies as well as their actual meaning have been disputed, including by a 2001 report issued by the U.S. Department of Justice.<sup>195</sup> With respect to the causes of these discrepancies, Kent Scheidegger highlights the problem of determining which factor is actually responsible for an outcome when correlations among independent variables are otherwise strong, a problem known as “multicollinearity.” This factor was at issue in how the trial court in *McCleskey* handled its consideration of the Baldus Study.<sup>196</sup>

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<sup>191</sup> *Id.* at ¶ 45.

<sup>192</sup> Merits Brief of Petitioner at 109.

<sup>193</sup> *Id.*

<sup>194</sup> *See id.*

<sup>195</sup> *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm> (June 6, 2001).

<sup>196</sup> Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 153 (2012). Attached as Annex J.



Another problem, difficult for nonexperts to understand, is the problem of multicollinearity. Suffice it to say that when two variables in the equation are related to each other, the regression technique is not very good at separating out the effect of one versus the effect of the other. Katz's [the prosecution's expert before the district court] analysis of the Georgia data show[s] that victim race is strongly correlated with legitimate sentencing variables and offender-victim race combinations are even more so. Killings during armed robberies [which is a variable that correlates with imposition of the death penalty] were 33.3% of the white-victim cases and only 7.4% of the black-victim cases. The killer was a stranger to the victim in 35.8% of white-victim cases but only 18.8% of black-victim cases. Looking at black-perpetrator, white-victim cases, robberies are a staggering 67.1% and stranger-murders are 70.6%. Crimes of predation, where the victim is chosen simply because he has something the perpetrator wants, strike particular fear into people's hearts. 'That could have been me.' This is an entirely legitimate factor, strongly correlated with race, and multicollinearity limits the ability of regression analysis to account for it.<sup>197</sup>

In other words, legitimate sentencing variables—such as crimes of predation in the Baldus Study data—that may actually be the most accurate explanation for the decisions that are reached by juries, may also be strongly correlated with racial factors. Scheidegger points out that the district court in *McCleskey* had found “no evidence of discrimination” against the black defendants in that case from the Baldus Study, even accepting the study on its own terms, a result Scheidegger maintains has been replicated in subsequent studies.<sup>198</sup>

As for the actual meaning of these discrepancies, the phrasing that accompanies the numbers is often changed to convey a severely distorted picture to those not trained in statistics. For instance, the figure cited by Mr. Cooper that the alleged perpetrator is “4.3 times as likely” to receive the death penalty when the victim is white and the alleged perpetrator is black,<sup>199</sup> phrasing that was used by the defendant's lawyers in *McCleskey*, is described by Scheidegger as

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<sup>197</sup> *Id.* at 153–54.

<sup>198</sup> *Id.* at 154–55. The Supreme Court later found the failure of *McCleskey* to show discrimination in his individual case dispositive, and did not do the same in-depth analysis of the Baldus Study as the district court. *See id.* at 155.

<sup>199</sup> This assertion is in the Merits Brief of the Petitioner at 109.

“literally a textbook example of how to lie with statistics” to those “unschooled in statistics.”<sup>200</sup>

The phrasing “4.3 times as likely” also figured prominently in an article written by MIT Professor Arnold Barnett as an example of how statistics are misused in arguments. Barnett asserted that the Supreme Court, media, and ultimately the public misunderstood the conclusions of the Baldus Study *by viewing odds and probabilities as interchangeable*.<sup>201</sup>

As discussed by Professor Barnett, the “four times as likely” phrasing was a “serious distortion” of the actual findings of the Baldus Study, which only found that the *odds* of receiving the death sentence was 4.3 times greater for those whose victims were white than for those whose victims were black.<sup>202</sup> Barnett explained that the “four times as likely” phrasing used by the defense in *McCleskey*—and by Petitioner here—gave the impression that when defendants were convicted of a crime against a white victim so serious that the probability of the death sentence being imposed was 99%, the probability of the death sentence being imposed against defendants for the same crime when the victim was black was only 23%.<sup>203</sup> However, Barnett clarified that the Baldus Study actually showed that when the probability of the death sentence being imposed for a serious crime was 99% for defendants whose victims were white, the probability of the death penalty being imposed was still 96% for defendants facing the same crime whose victims were black.<sup>204</sup>

In summary, Mr. Cooper cannot show based on his statistical arguments alone that his right to equality before the law under Article II of the American Declaration was violated. First, the state of California took precautions to protect him from racial discrimination by granting him a change of venue for his trial and a role in choosing an impartial jury. Second, Petitioner has

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<sup>200</sup> Scheidegger, *supra* note 196, at 156–57.

<sup>201</sup> See *id.* at 157; see Arnold Barnett, *How Numbers Can Trick You*, TECH. REV. at 38 *et seq.* (Oct. 1994). Attached as Annex K.

<sup>202</sup> See Barnett, *supra* note 201, at 38 *et seq.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

failed to allege any facts that support his contention that his race played any role in his conviction and sentencing. Third, the statistical evidence Petitioner cites is not sufficient by itself to cast doubt on his conviction and sentencing, and the meaning of the statistics themselves are a matter of contentious debate.

**D. Mr. Cooper's Right to a Fair Trial Recognized in Article XVIII of the American Declaration Was Not Violated Because the Prosecution Did Not Manufacture False Evidence Prejudicial to Mr. Cooper, the Prosecution Did Not Hide Potentially Exculpatory Evidence, There Was No Juror Misconduct, and San Diego Was a Proper Venue**

Petitioner maintains Mr. Cooper's right to a fair trial, recognized in Article XVIII of the American Declaration, was violated because allegedly false evidence was presented against Mr. Cooper at trial, potentially exculpatory evidence was destroyed or not disclosed to Mr. Cooper, the jury allegedly considered information outside the trial record, and the trial was held in San Diego.<sup>205</sup> Each of these contentions is without merit.

**1. The State of California Did Not Present False Evidence Against Mr. Cooper at His Trial**

**a. The Testimony of Josh Ryen Was Not Manipulated and the Jury Heard About Josh's Description of "Three Mexicans"**

Since his first interview on June 14, 1983 with Detective O'Campo until his video testimony presented at trial, Josh Ryen's testimony was generally consistent: he did not remember much from the events and could not recall seeing an attacker before being rendered unconscious.<sup>206</sup> Petitioner's assertion that "Josh Ryen consistently told different people, including his grandmother, that there was more than one attacker and that that attacker was not African-American" is simply not true. Dr. Mary Howell, Josh's grandmother, who arrived at Loma Linda University Medical Center the night after the murders and was with Josh while he

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<sup>205</sup> Merits Brief of Petitioner at 72–92.

<sup>206</sup> See *supra* Part III.C.

made his recovery,<sup>207</sup> clearly and unequivocally testified at trial that Josh had never stated he could remember seeing more than one attacker in the home the night of the murders when asked if Josh had ever made such representations.<sup>208</sup>

Mr. Cooper has continuously attempted to distort Josh Ryen's account of three Mexicans speaking with his father before the family left for the barbeque and Josh's speculation maybe they carried out the attack to mean Josh said he saw more than one attacker in the Ryen home.<sup>209</sup> The jury heard testimony from Josh and a number of witnesses, and none of this testimony shows that Josh ever said that he saw three attackers in his home on the night of the murders. This claim that Josh described three attackers was also rejected by a U.S. district judge in habeas corpus proceedings as recently as 2005:

Petitioner next contends that Josh Ryen gave a description of the assailants that exonerates him, (Pet. at 23), but this evidence was already admitted at trial. (95 RT 4932–70; 4971–73.) The jury already rejected Petitioner's claim of innocence based on the speculation of an eight-year-old child, made shortly after he was brutally attacked, that the three Hispanic males who came to his home looking for work before the family left for the barbeque were responsible for the murders in his home later that night. (95 RT 4932–70; 4971–73.) The post-conviction testing of the physical evidence at the crime confirms Petitioner's guilt. Evidence exhibit A–41, the blood from the crime scene discovered shortly after the discovery of the victims, is consistent with blood from an African American and inconsistent with a Hispanic or White individual. (93 RT 4424.) Moreover, the post-conviction DNA testing confirms that A–41 is Petitioner's blood. (*See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Continued exploitation of the speculation of [a] victim who had been through a horrific experience is not a reliable basis for a finding of actual innocence.<sup>210</sup>

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<sup>207</sup> RT at vol. 100, 6204–05.

<sup>208</sup> *Id.* at 6217–18.

<sup>209</sup> This is evidenced by Petitioner's citations to the trial transcript on page seventy-five of his Merits Brief.

<sup>210</sup> *Cooper v. Brown*, 510 F.3d 887, 980–81 (S.D. Cal. 2005)

Accordingly, the testimony of Josh Ryen was not manipulated or misrepresented to secure a conviction of Mr. Cooper.

**b. Detective O'Campo Did Not Present False Testimony**

Petitioner charges that Detective O'Campo presented false testimony at trial by lying about Josh's references to multiple attackers during the June 14, 1983 interview.<sup>211</sup> However, it has already been shown that Petitioner has conflated the speculation of eight-year-old Josh Ryen about who may have perpetrated the attack with an identification of the perpetrators.<sup>212</sup> Likewise, Petitioner misrepresents the testimony Detective O'Campo gave at trial, and Petitioner's assertion that Detective O'Campo conducted substantive questioning of Josh as early as the day after the discovery of the murders—when Josh was sedated and unable to speak<sup>213</sup>—is unsupported by evidence in the record and completely contradicts the accounts given by multiple witnesses at trial. Thus, the allegations Detective O'Campo acted maliciously to deny Mr. Cooper a fair trial are without merit.

**c. Deputy Eckley Did Not Present False Testimony**

Petitioner next asserts that the SBSB intentionally destroyed the Roper coveralls, which allegedly would have undermined their case against Mr. Cooper. Petitioner also asserts that Deputy Eckley provided false testimony at trial that he disposed of the coveralls on his own initiative. According to Petitioner, the fact that Eckley's disposition report was initialed "KS" demonstrated that Eckley's supervisor Ken Schreckengost ordered him to destroy the

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<sup>211</sup> Merits Brief of Petitioner at 75.

<sup>212</sup> See *supra* Part III.C; see also *supra* Part IV.D.1.a.

<sup>213</sup> Both Josh's grandmother, Dr. Mary Howell, RT at vol. 100, 6217–18, and Nurse Headley, RT at vol. 101, 6306, testified that the day after the murders were discovered, Detective O'Campo only introduced himself to Josh for a couple of minutes and was simply trying to develop a rapport with the young boy.

coveralls.<sup>215</sup> These allegations and theories were previously raised by Mr. Cooper in U.S. courts, including in his 2005 federal habeas corpus proceedings, and found to have no merit.

During pretrial evidentiary hearings, Deputy Eckley testified that shortly after the discovery of the murders he was dispatched to the home of Diana Roper in Mentone, California, approximately forty miles from the Ryen family home.<sup>216</sup> Ms. Roper claimed she had found “bloody coveralls” hanging in a closet in her home that belonged to her former boyfriend Lee Furrow, which she believed were linked to the Ryen/Hughes murders based on a “vision” she obtained after she and some “witches” went into a trance.<sup>217</sup>

Deputy Eckley testified he found the coveralls had some stains below the knee that were dry and reddish in color, which was distinct from the brownish color of dried bloodstains he had seen in the past.<sup>218</sup> Deputy Eckley also testified that the coveralls had hair, sweat, dirt, and manure on them.<sup>219</sup> Deputy Eckley testified that he took the coveralls to the Yucaipa substation and tagged them, contacted the San Bernardino homicide department, spoke with defense investigator Forbush about them, and only disposed of the coveralls months later in December of 1983 when neither the homicide department nor the defense expressed any interest in them and Deputy Eckley did not see their relevance to the case.<sup>220</sup> Deputy Eckley testified similarly at trial.<sup>221</sup>

On April 1, 2004, the U.S. District Court for the Southern District of California held an evidentiary hearing to consider testimony from former Deputy Sheriff Ken Schreckengost and

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<sup>215</sup> Merits Brief of Petitioner at 77–78.

<sup>216</sup> *Cooper v. Brown*, 510 F.3d 887, 986 (S.D. Cal. 2005).

<sup>217</sup> *Id.* at 986–87. Ms. Roper was abusing methamphetamine at the time and suffering from hallucinations; she also had a motive to blame Lee Furrow for the murders. *See id.* at 981.

<sup>218</sup> *Id.* at 986.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 987.

former Deputy Eckley.<sup>222</sup> The testimony elicited that Eckley had made the decision to destroy the coveralls on his own, as he claimed in his pre-trial and trial testimony, and that most of the “disposition reports” that Schreckengost initialed were reports left in his inbox that he checked to make sure were filled out properly before initialing.<sup>223</sup> The U.S. Court of Appeals for the Ninth Circuit accepted this finding.<sup>224</sup> The issue had also previously been litigated between 1992 and 1997 in a separate habeas corpus petition that Mr. Cooper had brought.<sup>225</sup> Thus, Petitioner’s claim that Deputy Eckley gave false testimony was extensively reviewed by U.S. courts and found to be without merit.

**d. Criminologist Daniel J. Gregonis Did Not Manipulate Evidence or Give False Testimony**

Petitioner raised a number of issues regarding the manner in which criminalist Daniel J. Gregonis conducted serological testing of blood sample source A-41, which was discovered on a wall of the Ryen home after the murders and removed on a paint chip from the wall for evidence,<sup>226</sup> including the misidentification of a blood enzyme called EAP. Mr. Cooper has already raised this and similar claims at least twice, in the California Supreme Court on automatic appeal,<sup>227</sup> and in U.S. federal court during habeas corpus proceedings, where in both cases it was found to be without merit.<sup>228</sup> The California Supreme Court noted that Gregonis testified that the defense expert, Dr. Blake, was present during some of the testing of the drop of blood (A-41), where it was found not to have come from any of the victims.<sup>229</sup> In fact, Gregonis testified that some of the testing was “kind of a joint effort,” and that he followed Dr. Blake’s

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Cooper v. Brown*, 510 F.3d 870, 886 (9th Cir. 2007).

<sup>225</sup> *Cooper v. Brown*, 510 F.3d 887, 988–89 (S.D. Cal. 2005).

<sup>226</sup> Merits Brief of Petitioner at 78–80.

<sup>227</sup> *People v. Cooper*, 809 P.2d 865 (Cal. 1991).

<sup>228</sup> *Cooper v. Brown*, 510 F.3d 887, 988–89 (S.D. Cal. 2005).

<sup>229</sup> *People v. Cooper*, 809 P.2d 865, 895 (Cal. 1991).

suggestions in some retests of the blood sample.<sup>230</sup> Dr. Blake testified in cross-examination that he had previously worked with Gregonis, and that the two had generally obtained the same results in testing the blood sample.<sup>231</sup>

Regarding the EAP testing, the California Supreme Court found:

One of the enzymes tested is commonly called “EAP.” Gregonis initially believed the EAP of the drop of blood was type B. When he later typed defendant’s own blood, Gregonis also believed it was EAP type B. Gregonis subsequently learned that defendant’s type was RB, a rare type. Gregonis had never before seen an RB type. He reexamined the photograph of the original testing of the drop of blood, but it was inconclusive as to whether it was EAP type B or RB. Gregonis testified, however, that when he tested the drop of blood, it appeared to have the same EAP type as defendant’s blood. Brian Wraxall, another expert, described the difference between types B and RB as “fairly subtle.”<sup>232</sup>

The photographs of the original testing of the drop of blood were inconclusive on the issue of whether it was EAP type B or RB because the photograph did not extend high enough on the bands to show the subtle distinction between a type B and RB.<sup>233</sup>

All of the serological testing of A-41 performed by Dr. Blake, defendant’s own expert, including a transferrin test, peptidase test, and haptoglobin test, showed that defendant was possibly the source of A-41 based on his African-American ancestry, while the tests excluded A-41 as having come from a Caucasian or Hispanic individual.<sup>234</sup> The findings of the California Supreme Court, as well as the jury that heard the testimony and cross-examination of witnesses from both the prosecution and defense, show that Gregonis did not fabricate the serological results that implicated Mr. Cooper in the murders of Doug, Peggy, and Jessica Ryen and Chris Hughes, and the attempted murder of Josh Ryen.

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 878.

<sup>233</sup> RT at vol. 93, 4429–32.

<sup>234</sup> Order *Re* Motion for Post-Conviction DNA Testing, *People v. Cooper*, No. CR-72787 at 9–10 (Cal. Super Ct. Jan 14, 2011); RT at vol. 105, 7404–32.



Regarding the Petitioner's claim that Gregonis tampered with A-41 in 1999 by planting Mr. Cooper's blood from vial VV-2 on the paint chip, the U.S. District Court for the Southern District of California determined:

[Mr. Cooper's] unsupported assertion ignores the consistent DNA test results which were obtained from the hand-rolled cigarette butt found in the Ryen vehicle after its recovery in Long Beach and from blood smears/spatters on the T-shirt found near the roadway linking the Ryen home to the nearest freeway. The DNA profiles obtained from these items match the corresponding portion of the full DNA profile obtained from A-41—major donor and [Mr. Cooper's] DNA profile. All these items were in the custody of the San Diego Superior Court Exhibit Clerk from 1984 until 2001, when they were shipped directly to the DOJ Berkeley DNA Laboratory for analysis. Gregonis has had no contact since the time of trial with either the hand-rolled cigarette butt or the portion of the T-shirt on which the blood smears matching Petitioner's DNA profile were obtained. Consistent DNA test results confirming Petitioner's guilt have been obtained from evidence Gregonis had no contact with in 1999, and as to which he has had no contact since the time of Petitioner's trial. The items, which have remained in the custody of the San Diego Superior Court Evidence Clerk, operate as an independent control on the DNA results obtained from the items that were in the custody of the Sheriff's Department.

Criminalist Gregonis and others testified at the post-conviction evidentiary hearing held before Judge Kennedy of the California Superior Court on June 23, 2003. Judge Kennedy found at the conclusion of the hearing that Petitioner "has not made any showing that law enforcement personnel tampered with or contaminated any evidence in this case."<sup>235</sup>

Accordingly, Petitioners' allegation that criminalist Daniel Gregonis manipulated and tampered with evidence was extensively reviewed and rejected by U.S. courts. They found that the allegation was unsupported and was contradicted by the serological and DNA test results of evidence that was either not handled by Gregonis or was also verified by Mr. Cooper's own expert witness.

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<sup>235</sup> *Cooper v. Brown*, 510 F.3d 887, 952–53 (S.D. Cal. 2005) (citations omitted).

**e. California Did Not Use Falsified Cigarette Evidence Against Mr. Cooper**

Petitioner alleges the prosecution used falsified cigarette evidence against Mr. Cooper, contending two cigarettes from the cigarettes left behind by Mr. Cooper at the Lease home were planted in the Ryen family station wagon that was discovered in Long Beach, California by San Bernardino officers Craig Ogino and David Stockwell.<sup>236</sup> In 2007, after examining the information and arguments presented by Mr. Cooper, the U.S. Court of Appeals for the Ninth Circuit rejected his contention that the cigarette butts had been planted by the prosecution to frame him.<sup>237</sup> Mr. Cooper insists that the fact that the size of one of the cigarettes (V-12) changed by 3 millimeters after having been unrolled for testing demonstrates tampering, but the court of appeals noted the first measurement was of a “butt,” whereas the second measurement made after testing was of unrolled paper, and ruled that the fact that “the dimensions would be different is self-evident.”<sup>238</sup> Petitioner presents no new facts that would justify the Commission calling into question the considered findings of the California and federal courts on this question.

**f. There Is No Evidence San Bernardino Police Planted the Hatchet Sheath and Green Button and the State of California Did Not Use a “False” Positive Luminol Test Against Mr. Cooper**

Petitioner also asserts that Mr. Cooper was denied a fair trial when the prosecution presented false evidence in the form of a “planted” hatchet sheath and green jacket button and a “false” positive luminol test.<sup>239</sup> Mr. Cooper has previously litigated his theory that SBSD officers planted various items to implicate him in the murders at the Ryen home.<sup>240</sup> Here, Petitioner alleges Detective Stephen Moran did not find any evidence when he searched the

<sup>236</sup> Merits Brief of Petitioner at 80–81.

<sup>237</sup> *Cooper v. Brown*, 510 F.3d 870, 882 (9th Cir. 2007).

<sup>238</sup> *Id.* at 882–83.

<sup>239</sup> Merits Brief of Petitioner at 82–83.

<sup>240</sup> *See, e.g., Cooper v. Brown*, 510 F.3d 870, 882 (9th Cir. 2007).

Lease home on June 6, 1983, but then found the bloodstained green button and hatchet sheath in view in the Bilbia bedroom when deputies searched the Lease home on June 7, 1983.<sup>241</sup>

According to Petitioner, this is evidence that the hatchet sheath and button had been planted by the police.<sup>242</sup>

Yet at trial, Detective Moran testified that he had entered the Lease home on June 6 at the request of Mr. Lease only in order to “determine if there was anybody hiding in the residence.”<sup>243</sup> When Detective Moran, Detective Hall, and Mr. Lease entered the Lease home, the two detectives with guns drawn, they were not looking for evidence in the homicide, but simply for an individual who may have been in the Lease home.<sup>244</sup> Moreover, it was admitted at trial that the hatchet used in the murders had been discovered along the side of English Road on June 5, 1983 by a local resident,<sup>245</sup> which was the same day the murders were discovered and before the police could have had knowledge that Mr. Cooper had taken refuge in the Lease home or that the hatchet was taken from that house. Detective Moran, Detective Hall, and Mr. Lease each gave testimony and faced cross-examination at trial on their June 6 search of the Lease home, and the jury was able to consider it in reaching a guilty verdict.

As for the luminol tests performed at the Lease home, there was nothing “false” about the test: it was testified at trial that the test only reveals the “potential” presence of blood.<sup>247</sup>

Moreover, the Petitioner only focusses on the luminol test conducted in the shower area, and raises various points about it, but ignores other positive reactions in the Bilbia bathroom sink; inside the Bilbia bedroom closet; and from four foot-shaped impressions on the rug leading into

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<sup>241</sup> Merits Brief of Petitioner at 82.

<sup>242</sup> *Id.*

<sup>243</sup> RT at vol. 86, 2802–03.

<sup>244</sup> *Id.* at 2803, 2808–09.

<sup>245</sup> *Cooper v. Brown*, 510 F.3d 887, 897 (S.D. Cal. 2005).

<sup>247</sup> *Id.* at 909.

the Bilbia bedroom.<sup>248</sup> These issues were heard by the jury at trial and by judges in subsequent post-conviction proceedings. There is no reason to call into question the determinations of the California and U.S. federal courts that the SBSB did not plant evidence to secure a conviction of Mr. Cooper.

**2. The State of California Did Not Destroy Potentially Exculpatory Information Affecting Mr. Cooper**

Petitioner claims that Mr. Cooper did not receive a fair trial because California wrongfully destroyed the coveralls discovered by Diana Roper in her closet and misprocessed the crime scene.<sup>249</sup> The destruction of the Roper coveralls was known to the jury at trial and has been the subject of subsequent post-conviction litigation.<sup>250</sup> As noted by the U.S. District Court for the Southern District of California in 2005, “It is hardly surprising that defense counsel did not present the testimony of Diana Roper. Her credibility issues are readily apparent.”<sup>251</sup> The court added:

The stories about Mr. Furrow and coveralls, T-shirts, and hatchet originate with Diana Roper. Diana Roper, now deceased, was abusing drugs and had a motive for disparaging Furrow since he left her the night of the murders, and had begun a sexual relationship with her childhood friend, Debbie Glasgow. Significantly, Furrow had an alibi for the night of the murders. He was seen at a concert that night in Glen Helen Park with Debbie Glasgow. It would have been a poor strategy to claim that they traveled from the concert in Glen Helen to Chino Hills, murdered the Ryens and Chris Hughes, and returned home to Mentone [over 75 miles or 120 kilometers].<sup>252</sup>

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<sup>248</sup> *See id.*

<sup>249</sup> Merits Brief of Petitioner at 84.

<sup>250</sup> *See Cooper v. Brown*, 510 F.3d 887, 981 (S.D. Cal. 2005).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* (citations omitted). The trip from Glen Helen Park to Chino Hills to Mentone is in excess of seventy miles.

Accordingly, the court denied Mr. Cooper's claim that potentially exculpatory evidence had been destroyed, especially in light of the overwhelming evidence that had led to Mr. Cooper's guilty verdict.<sup>253</sup>

The processing of the crime scene was the subject of a number of pre-trial hearings occurring between May and August of 1984 that involved the testimony of a number of investigators and witnesses.<sup>254</sup> On automatic appeal to the California Supreme Court, the court found that the trial judge (Judge Garner), "although critical of aspects of the investigation, found that all law enforcement authorities acted in good faith, and that there was no destruction of material evidence."<sup>255</sup> Judge Garner did not impose sanctions on the prosecution, but the defense was free to attack the manner the police handled the investigation of the crime scene before the jury.<sup>256</sup> Given that the serological evidence actually collected (and later confirmed by post-conviction DNA testing) inculpated Mr. Cooper in the murders, petitioner cannot establish how additional serological evidence would have demonstrated his innocence.<sup>257</sup>

In summary, U.S. courts have found that the state of California did not intentionally destroy potentially exculpatory evidence from the Ryen murders, and petitioner presents no basis to second guess those findings.

### **3. The Prosecution Did Not Fail to Disclose Material Exculpatory Evidence to Mr. Cooper**

Petitioner cites four instances in which the prosecution allegedly failed to disclose material exculpatory evidence: 1) the alleged presence of three white men with blood on their clothing at the Canyon Corral Bar on the night of the murders; 2) the existence of a bloody blue

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<sup>253</sup> See *id.* 981–99.

<sup>254</sup> Trial Transcripts Guide, *People v. Cooper*, No. OCR-9319 (Cal. Super. Ct. 1983–85).

<sup>255</sup> *People v. Cooper*, 809 P.2d 865, 885 (Cal. 1991).

<sup>256</sup> *Id.* at 886.

<sup>257</sup> See *id.*

shirt; 3) the allegedly “bloody” coveralls in Diana Roper’s house; and 4) whether the type of shoes at the crime scene were available to the public and not “special prison shoes.”<sup>258</sup> The third issue, regarding the Roper coveralls, has previously been shown not to have been prejudicial and was in fact *known* to Mr. Cooper and the jury at the time of trial;<sup>259</sup> therefore, it will not be addressed again here.

a. **The Alleged Presence of Three White Men Covered in Blood at the Canyon Corral Bar Is Unsubstantiated and Was In Any Case Known to Mr. Cooper at the Time of His Trial**

The U.S. District Court for the Southern District of California extensively reviewed Mr. Cooper’s claim as part of his habeas corpus petition that three white men with blood on their clothing had been spotted at the Canyon Corral Bar (CCB) on the night of the murders.<sup>260</sup> First, the district court noted that the claim did not relate to newly discovered evidence. CCB bartender Ed Lelko testified at trial about three men who had entered the bar and later left without incident after being refused service for being too intoxicated.<sup>261</sup> Mr. Lelko, along with other witnesses present in the bar that night, had also been interviewed by the police after the murders, and none of them reported noticing blood on the three young men.<sup>262</sup>

Second, the district court held an evidentiary hearing for Mr. Cooper’s habeas corpus petition where Mr. Lelko and others known to have been at the bar that night testified.<sup>263</sup> Each of these persons had previously given police interviews and/or had testified at trial.<sup>264</sup> Several witnesses offered by Mr. Cooper also testified, including Alfred Eugene Ward, Sr., who testified he was at CCB the night *before* the murders (Friday, June 3) and saw three young white males

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<sup>258</sup> Merits Brief of Petitioner at 85–87.

<sup>259</sup> See *supra* notes 250–253.

<sup>260</sup> See *Cooper v. Brown*, 510 F.3d 887, 961–71.

<sup>261</sup> *Id.* at 961–62.

<sup>262</sup> *Id.* at 962.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

wearing extremely bloody T-shirts. The district court found that if Mr. Ward was credible, his testimony actually refuted Mr. Cooper's theory, and was consistent with Randy Mansfield's testimony "that it was not unusual for patrons to come into the bar with blood on their clothes from the slaughterhouses in the area."<sup>265</sup>

Following the hearing, the district court concluded the witnesses who had been interviewed in the aftermath of the murders and/or had given trial testimony were the most credible and had not seen three white males covered in blood on the night of the murders.<sup>266</sup> Furthermore, the district court found that Lance Stark, one of Mr. Cooper's witnesses, had been known to the defense at the time of trial.<sup>267</sup> Thus, the prosecution had not failed to disclose material exculpatory evidence to Mr. Cooper.

**b. The Prosecution Did Not Fail to Disclose the Existence of a Bloody Blue Shirt to Mr. Cooper**

The U.S. District Court for the Southern District of California has previously heard Petitioner's claim that the prosecution failed to disclose the existence and recovery of a bloody blue shirt allegedly allegedly recovered by Deputy Fields.<sup>268</sup> The district court found that the defense counsel was in fact on notice because the dispatch log with the entry report of a "blue shirt" was disclosed to the defense before Mr. Cooper's trial.<sup>269</sup> However, the district court found there was evidence the "blue shirt" had never existed and was in fact the "tan shirt" admitted at trial.<sup>270</sup> First, none of the documents logging the evidence at the San Bernardino

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 963.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 994–99.

<sup>269</sup> *Id.* at 994–95. The district court speculated that defense counsel—Mr. Negus—may have strategically decided not to focus on the blue shirt because Mr. Cooper testified at trial he had a blue prison shirt in a bag he was carrying when he fled to Mexico the night of the murders. *See id.* at 995, n. 50.

<sup>270</sup> *See id.* at 995–97.

crime lab mention a “blue shirt.”<sup>271</sup> Instead, apart from the single mention in the dispatch log (which did not mention the tan shirt), the documents show only the tan T-shirt that was ultimately introduced at trial by the defense, and testimony by Mr. Kochis indicated that the only shirt that had been recovered by Deputy Fields was the shirt involved in the trial.<sup>272</sup>

Second, the tan T-shirt was picked up near the side of the road on Peyton Drive, which is the same location the dispatch logs show the “blue shirt” being picked up after being reported by Laurel Epler.<sup>273</sup> The court elaborated:

Petitioner argues that the ‘tan shirt’ was picked up by Detective Fields on June 7, 1983, the day after the ‘blue shirt’ was picked. The daily log of June 7, 1983 has no entry regarding a ‘tan shirt.’ Although Detective Fields’ report, dated June 10, 1983, states he picked up the ‘tan shirt’ on June 7, 1983, he may have meant June 6, 1983. In any event, the ‘tan shirt’ that was picked up by Detective Fields and photographed was collected and tagged with Property Tag No. A-58046 and stored in the Sheriff’s evidence locker. At trial, Detective Fields identified the ‘tan shirt’ as the T-shirt he recovered on the side of the road. Therefore, the ‘blue shirt’ reported on June 6, 1983 is most likely the tan T-shirt at issue in this case as testified by Mr. Kochis.<sup>274</sup>

The mysterious “blue shirt” did not exist. It was likely the “tan shirt” that was recovered by law enforcement and introduced by Mr. Cooper himself at trial. In any case, the reference to a “blue shirt” was known to the defense before the commencement of trial. Thus, the prosecution did not fail to disclose material exculpatory evidence to Mr. Cooper.

**c. The Prosecution Did Not Fail to Disclose Potentially Exculpatory Information Regarding the Pro-Keds Dude Shoes**

Mr. Cooper further alleges that the prosecution misled the jury by presenting evidence that indicated the Pro-Keds Dude Shoes he was wearing when he escaped prison and that had left

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<sup>271</sup> *Id.* at 996.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* (citations omitted).



footprints at the Ryen home were only sold to prison authorities for their use.<sup>275</sup> This claim has been fully litigated by Mr. Cooper in U.S. federal court. The Court of Appeals for the Ninth Circuit held that Mr. Cooper's arguments were entirely without merit as "the prosecution's theory was not that Pro-Keds Dude shoes were limited to prison inmates (the Stride Rite records introduced at trial showed distribution to other government institutions), but that there was a link between the imprints found at and near the Ryen house and in the Lease house to Cooper, who never denied having a pair of Pro-Keds Dude shoes."<sup>276</sup> As noted in the court of appeals opinion, the documents submitted at trial showed that other government institutions apart from prisons purchased the Pro-Keds Dude shoes, and the prosecution's theory was only that there was a "link" between the imprints found at and near the Ryen home and the Lease home to Cooper, who never denied having a pair of Pro-Keds Dude shoes.

In conclusion, the prosecution did not fail to disclose material exculpatory evidence to Mr. Cooper, and Mr. Cooper has had the opportunity to litigate claims to the contrary in state and federal courts to no avail.

#### **4. The Jury Did Not Commit Misconduct In Considering a Document That Was Admitted Into Evidence**

Petitioner asserts the jury committed misconduct by considering a document that was inadvertently admitted into evidence,<sup>277</sup> a claim that was reviewed on automatic appeal by the California Supreme Court.<sup>278</sup> The California Supreme Court noted that when a jury considers evidence that it was inadvertently given, this is not misconduct by the jury, but constitutes a trial error.<sup>279</sup> When considering the effect of the error of inadvertently admitting an item into

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<sup>275</sup> Merits Brief of Petitioner at 53–57.

<sup>276</sup> *Cooper v. Brown*, 510 F.3d 870, 877–78 (9th Cir. 2007).

<sup>277</sup> Merits Brief of Petitioner at 88.

<sup>278</sup> *People v. Cooper*, 809 P.2d 865, 901–05 (Cal. 1991).

<sup>279</sup> *Id.* at 903.

evidence at trial, under California law the court may only vacate a guilty verdict if it determines that it is reasonably probable that an outcome more favorable to the defendant would have been reached in the absence of the error.<sup>280</sup> In Mr. Cooper's case, the California Supreme Court found that the effect of the exhibit's admission into evidence was relatively minor, since the jury simply learned Mr. Cooper had once complained of headaches and said he had hallucinations.<sup>281</sup> The minor effect was further reduced when Judge Garner withdrew the exhibit and admonished the jury to disregard it or any statements made pertaining to it. In addition, this minor effect was weighed against the overwhelming evidence of Petitioner's guilt.<sup>282</sup> Furthermore, the trial court questioned each juror individually to assure itself each juror could and would follow the admonition and decide the case solely on the evidence properly before it.<sup>283</sup> As decided by the California Supreme Court, there was neither jury misconduct nor prejudicial error related to the improperly submitted evidence.

**5. Mr. Cooper Was Not Denied a Fair Trial by When San Diego Was Selected as the Venue**

Petitioner claims Mr. Cooper was denied a fair trial because San Diego was not a proper venue.<sup>284</sup> For the same reasons given above in Part IV.C.1.a, the United States submits that Mr. Cooper was not denied a fair trial when his request for a change of venue out of San Bernardino County was granted and San Diego was selected as the new venue.<sup>285</sup>

**E. Mr. Cooper Received His Right to Due Process of Law Reflected in Article XXVI of the American Declaration**

Mr. Cooper alleges he did not receive his right to due process of law recognized in Article XXVI of the American Declaration because (1) he had ineffective assistance of counsel;

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 903–04.

<sup>283</sup> *Id.* at 905.

<sup>284</sup> Merits Brief of the Petitioner at 90.

<sup>285</sup> See *supra* Part IV.C.1.a.

(2) the SBSB planted evidence against him; and (3) federal courts failed to conduct meaningful post-conviction proceedings and he was confronted with an inappropriate procedural bar to relief for fair trial violations.<sup>286</sup> Much of the second contention regarding the planting of evidence has been treated in Part IV.D.1.d, but the additional allegation that blood was planted on the tan T-shirt during post-conviction DNA testing will be examined here.

#### **1. Trial Counsel Rendered Effective Assistance at Mr. Cooper's Trial**

As noted by Petitioner, U.S. law requires that a counsel's representation must not fall below an objective standard of reasonableness in order to guarantee a defendant due process of law.<sup>287</sup> The standard is known as the "Strickland test" after the U.S. Supreme Court decision that announced it<sup>288</sup>. Mr. Cooper has litigated on multiple previous occasions various claims regarding the alleged failure of his trial counsel to provide him with effective assistance, including his trial counsel's alleged failure to pursue leads on the Roper coveralls, to enter hair evidence found in the hands of the victims at trial, and regarding trial counsel's advice on whether to seek a second-degree murder verdict.<sup>289</sup> California and U.S. federal courts have rejected each claim as being without merit.

Several of the instances of alleged ineffective assistance of counsel revolve around trial counsel's "failures" regarding the fantastical story of Diana Roper, the destruction of the alleged "bloody" coveralls, and included an alleged "confession" made by Kenneth Koon, a friend of Ms. Roper, which was a matter of second-hand hearsay related by mental patient Anthony

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<sup>286</sup> Merits Brief of Petitioner at 92–107.

<sup>287</sup> *Id.* at 92 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

<sup>288</sup> *See Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>289</sup> *See Cooper v. Brown*, 510 F.3d 887, 925 (S.D. Cal. 2005) ("In this third federal habeas petition, Petitioner repeats several issues and arguments raised in his trial, along with challenges already made on direct appeal and in prior post-conviction challenges.").

Wisely.<sup>290</sup> As the U.S. District Court for the Southern District of California determined, none of these factors were grounds for a new trial. The district court explained:

Defense trial counsel cannot be faulted for a strategic decision not to call Roper at trial. During the time of the murders, Roper was using methamphetamine on a daily basis and in the midst of breaking up with Furrow knowing he was having sexual relations with one of her childhood friends, Debbie Glasgow.

What Koon knew about Furrow was hearsay from Roper. Such strategic decisions at trial to avoid having Roper, her friends, or Furrow's relatives testify concerning the coveralls, tennis shoes or Roper's relationship with Koon and Furrow are not grounds for a *Strickland* claim under these circumstances.<sup>291</sup>

Any assertion that trial counsel was objectively unreasonable for not pursuing this line of evidence is unfounded.

Petitioner also asserts that trial counsel rendered ineffective assistance by failing to introduce evidence that the victims were clutching hair in their hands.<sup>292</sup> This matter was also heard by the U.S. District Court for the Southern District of California during habeas proceedings concluded in 2005.<sup>293</sup> In 2001, an examination by Dr. Blake and Dr. Myers had revealed no pulled hairs, let alone clumps of pulled hairs, were found in the hands of the victims.<sup>294</sup> Nevertheless, the district court ordered mitochondrial DNA testing of the hair evidence, which showed that Jessica, Peggy, and Josh Ryen and their maternal relatives could not be excluded as the donors of the tested hairs, including the hairs found in Jessica's hands.<sup>295</sup> Some of the hairs also included animal hairs from domestic dogs, which the Ryens kept.<sup>296</sup>

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<sup>290</sup> *Id.* at 983–84. Petitioner spends several pages on this tale. See Merits Brief of Petitioner at 96–101.

<sup>291</sup> *Id.* at 984.

<sup>292</sup> Merits Brief of Petitioner at 101.

<sup>293</sup> *Cooper v. Brown*, 510 F.3d 887, 930–31 (S.D. Cal. 1991).

<sup>294</sup> *Id.* at 930.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 929; Opposition to Motion for Postconviction DNA Testing, *People v. Cooper*, No. CR-72787 at 17 (Cal. Super. Ct. Oct. 6, 2010).

As the district court remarked, this result was unsurprising:

The hairs adhered to the victims' bodies, including their hands, because there was a large amount of blood on the victims and a large amount of hair on the debris-ridden carpet. Also, the victims each sustained hatchet wounds to the head, causing clumps of cut hair to fall to the ground. Both animal and human hair were recovered from the hands of the victims. Just as with the animal hairs, the cut and shed human hairs adhered to the bloodied victims' hands because the victims came in contact with the carpet when they were dying on the floor.<sup>297</sup>

The district court continued by asserting “[a]s both the California Supreme Court and this Court have already expressly found, [Mr. Cooper] ‘received an extraordinarily vigorous and able defense’” from trial counsel, whose extensive educational background and prior litigation experience were developed in an evidentiary hearing before the trial court in 1997.<sup>298</sup>

Mr. Cooper’s further allegations regarding trial counsel’s advice regarding whether to seek a second-degree murder verdict were also found to be without merit by the California Supreme Court.<sup>299</sup> The California Supreme Court first found that there was no conclusive proof that trial counsel Mr. Negus misunderstood the law regarding the “penalty phase” of first degree and second degree murder convictions.<sup>300</sup> The court then found that trial counsel made a deliberate, tactical choice not to seek a second-degree murder instruction, and in any case there was no prejudicial error to Mr. Cooper:

The record makes clear that counsel, who was best able to evaluate the situation, believed it was hopeless to seek second degree murder verdicts. This belief was quite reasonable in light of the evidence. If the jury found that defendant was the killer, it necessarily would find he took the murder weapons, the hatchet and knife, with him from the Lease house. This showed planning prior to the killing. He had an obvious motive both for stealing the

<sup>297</sup> *Cooper v. Brown*, 510 F.3d 887, 930 (S.D. Cal. 1991).

<sup>298</sup> *Id.* at 930–31.

<sup>299</sup> *People v. Cooper*, 809 P.2d 865, 896–901 (Cal. 1991).

<sup>300</sup> *Id.* at 897–98 (noting defense counsel Negus never agreed with the prosecution’s interpretation of the law that multiple counts of second-degree murder would result in a penalty phase that could expose Mr. Cooper to the death penalty).

Ryen car—to get transportation away from the area—and for killing the family—to facilitate the theft and gain time to perfect his escape. To have argued for second degree murder verdicts might merely have undercut the credibility of the defense—which was that the investigation had been so badly botched the prosecution simply had the wrong person.

In addition, the evidence suggests that the two children were killed after the parents. Even if somehow the jury could have found second degree murder as to the parents (perhaps as the compromise that counsel feared), it surely would have found the murders of the children to have been in the first degree. This would have subjected defendant to the death penalty. Any tactic of asking the jury to convict of *four* second degree murders (the only verdict of guilty that could have avoided a penalty phase) “pales in comparison” with the tactic actually selected by defense counsel.<sup>301</sup>

Accordingly, Mr. Cooper was not deprived of effective assistance of counsel at his trial, but rather had “an extraordinarily vigorous and able defense”<sup>302</sup> that protected his right to due process of law.

**2. The San Bernardino County Sheriff's Department Did Not Plant Mr. Cooper's Blood on the Tan T-Shirt in Violation of His Right to Due Process**

Petitioner asserts Mr. Cooper's right to due process of law was violated by the San Bernardino County Sheriff's Department when it allegedly planted Mr. Cooper's blood on the tan T-shirt—recovered from the side of a road nearby the Ryen home shortly after the murders—before the 2002 DNA testing that determined that Mr. Cooper's blood was present on the T-shirt.<sup>303</sup> But, even if Petitioner could show this had happened—which he could not—as Petitioner himself admits, the tan T-shirt “was not used against Mr. Cooper at trial,”<sup>304</sup> and was not one of the many pieces of evidence that the jury considered in finding Mr. Cooper guilty.

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<sup>301</sup> *Id.* at 900.

<sup>302</sup> *Cooper v. Brown*, 510 F.3d 887, 930–31 (S.D. Cal. 1991).

<sup>303</sup> Merits Brief of Petitioner at 103.

<sup>304</sup> *Id.*

Mr. Cooper has previously litigated his theory regarding the tampering of the tan T-shirt in the U.S. District Court for the Southern District of California and on appeal in the U.S. Court of Appeals for the Ninth Circuit.<sup>305</sup> Petitioner's theory is that blood that had been drawn from Mr. Cooper after his arrest and stored in a "purple-topped tube" containing the preservative EDTA had been planted on his shirt by the San Bernardino County Sheriff's Department.<sup>306</sup> In a 2004 hearing before the district court, the expert witness for Mr. Cooper, Dr. Kevin Ballard, and for the government, Dr. Eva Steinberger, both testified that the known concentration of EDTA in one micro-liter of blood from a purple-topped tube was 1300 nanograms.<sup>307</sup> Based on the recommendation of the parties, the district court adopted a "control method" of testing in which the amount of EDTA detected in a stain would be compared to the amounts of EDTA found in non-stained swatches of the tan T-Shirt.<sup>308</sup>

On September 7, 2004, the parties agreed to the district court's recommendation of Dr. Lewis Maddox of Cellmark to do the extraction of samples from the tan T-Shirt. Then, Dr. Ballard (Mr. Cooper's expert) and Dr. Suizdak (the government's expert) conducted a double-blind EDTA testing.<sup>309</sup> In addition to one blood-stained extract from the tan T-shirt and five control areas that did not appear to be stained, extracts were prepared on a Control T-shirt using a human blood stain containing EDTA, a human blood stain without EDTA, an area not stained with human blood, and a PBS buffer reagent (which should test at zero for EDTA).<sup>310</sup> At the hearing before the Commission on October 28, 2013, counsel for Petitioner spoke at length about how the EDTA test results from the government's expert, Dr. Suizdak, were withdrawn and not

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<sup>305</sup> *Cooper v. Brown*, 510 F.3d 887, 931 *et seq.* (S.D. Cal. 2005), *aff'd* 510 F.3d 870 (9th Cir. 2007).

<sup>306</sup> *Id.* at 933.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 936.

<sup>310</sup> *Id.* at 937.

considered by the district judge; however, Petitioner's counsel ignored the fact that Dr. Ballard submitted his results to the district court, which are as follows:<sup>311</sup>

Specimen No.	Specimen Contents Prepared from:	Approximate Amount of EDTA (in nanograms) on the Original Cloth Cutting <sup>22</sup>
F041568 01.2	Stained area of T-shirt	110
F041568 02.2	Control 1 of T-shirt	220
F041568 03.2	Control 2 of T-shirt	360
F041568 04.2	Control 3 of T-shirt	160
F041568 05.2	Control 4 of T-shirt	110
F041568 06.2	Control 5 of T-shirt	16
F041568 07.2	Stain made from unpreserved blood on the Control T-shirt	7
F041568 08.2	Stain made from blood preserved in a purple-topped tube on the Control T-shirt <sup>23</sup>	1100
F041568 09.2	Unstained area from the Control T-shirt	6
F041568 10.2	PBS Buffer Reagent Blank Control	None detected

The test results submitted by Petitioner's own expert, Dr. Ballard, are inconsistent with Petitioner's theory of tampering. If Petitioner's theory was correct, there would be spiked levels of EDTA in the subject stain (F041568 01.2) relative to EDTA levels in the background material of the shirt (Controls 1–5 of the T-shirt).<sup>312</sup> Instead, Dr. Ballard's test showed that the subject stain contained a level of EDTA lower than most of the controls on the tan T-shirt, and a level that was far lower than the level of EDTA expected in a tampering that involved blood from a purple-topped tube (e.g. F041568 08.2).<sup>313</sup> According to Dr. Ballard's testing, about 110 nanograms of EDTA were present in the subject blood stain, which was the second lowest amount for all of the samples taken from the tan T-shirt and lower than the average amount of

<sup>311</sup> *Id.* at 938.

<sup>312</sup> *Id.* at 939.

<sup>313</sup> *Id.*



EDTA (173 nanograms) found in the controls.<sup>314</sup> The “planted” blood from a purple-topped tube containing EDTA as a preservative on the Control T-shirt was found to contain 1100 nanograms, an EDTA level “*ten times as great*” as the level of the EDTA in the subject stain.<sup>315</sup>

Dr. Suizdak withdrew his separate test results because he had found significant levels—313 nanograms—of EDTA in the PBS buffer reagent blank control sample where zero EDTA was the known control (PBS buffer reagent contains no EDTA).<sup>316</sup> Dr. Suizdak had never before done EDTA testing and was without the benefit of Dr. Ballard’s methodology.<sup>317</sup> Both Dr. Suizdak and Dr. Lee conclude that Dr. Suizdak’s samples had likely been contaminated and were not reliable specimens.<sup>318</sup>

In addition to noting that the test results submitted by Dr. Ballard showed Petitioner’s theory was not supported, the district court also found the expert testimony regarding EDTA testing was not reliable under the standards set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).<sup>319</sup> First, the district court found that EDTA testing had only been admitted once before by a U.S. court, and in that case the reliability of EDTA testing had not been challenged.<sup>320</sup> Moreover, in the only case that Dr. Ballard had previously offered test results, the New Jersey Superior Court rejected the credibility of Dr. Ballard and the reliability of EDTA testing for a number of reasons, all cited by the district court.<sup>321</sup>

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<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 939–40 (emphasis in original).

<sup>316</sup> *Id.* at 938–39.

<sup>317</sup> *Id.* at 938 n. 24 (stating this type of testing is rare in the scientific community).

<sup>318</sup> *Id.* at 938–39.

<sup>319</sup> *Id.* at 942–48.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 943.

Second, the district court found that EDTA testing has not been subjected to meaningful peer review and publications.<sup>322</sup> In fact, the district court found it particularly disturbing that Mr. Cooper could not find “any qualified expert or lab that would perform EDTA testing other than Dr. Ballard” despite having numerous opportunities to do so.<sup>323</sup> These factors greatly undermined the reliability of EDTA testing. Third, the district court found that EDTA is a simple chemical compound that is common in the environment, being present in food products, cleaning agents (laundry and dish detergent; bathroom and kitchen cleaners), and personal care products like soap and shampoo.<sup>324</sup> Its common presence thus prevented “the establishment of known, standard levels of EDTA against which a test measurement could reliably be compared.”<sup>325</sup>

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the ruling of the district court.<sup>326</sup> Accordingly, there is no evidence that the San Bernardino Sheriff’s Department tampered with the tan T-shirt in violation of Mr. Cooper’s right to due process of law, and Mr. Cooper has failed on the merits during his litigation of that theory in U.S. courts.

**3. The Federal Courts of the United States Conducted Meaningful Post-Conviction Review and Mr. Cooper Has Failed to Show He Was the Victim of an Inappropriate Procedural Bar to Relief**

Petitioner alleges that Mr. Cooper was denied due process of law because the federal courts failed to conduct meaningful post-conviction review, and accuses Judge Huff of “crippling Mr. Cooper’s appellate efforts since the early 1990s.”<sup>327</sup> There is no evidence to support this conclusion. Few convicted prisoners have had the number of opportunities to challenge their conviction as Mr. Cooper. The number of jurists, both at the state and federal

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<sup>322</sup> *Id.* at 946.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Cooper v. Brown*, 510 F.3d 870, 879 –82 (9th Cir. 2007).

<sup>327</sup> Merits Brief of Petitioner at 104.

level, who have reviewed his claims is both a comparatively and absolutely large number. For instance, a different judge presided over his trial than his post-conviction efforts before the California Superior Court of San Diego. Two different Superior Court judges have reviewed and rejected his post-conviction challenges and requests, as Judge Kennedy retired from the bench after conducting an evidentiary hearing on Mr. Cooper's tampering allegations, resulting in Judge So being assigned to hear Mr. Cooper's more recent post-conviction testing motion. This is in addition to the numerous appeals to the 7-member California Supreme Court (whose composition has changed over the past thirty years), and the numerous federal jurists who have reviewed his claims.

Mr. Cooper has filed three successive federal habeas petitions.<sup>328</sup> Each federal habeas petition was denied by the district court, and each denial was affirmed by the U.S. Court of Appeals for the Ninth Circuit.<sup>329</sup> In the third federal habeas petition, the district judge considered nine separate claims raised by Mr. Cooper and issued a comprehensive 159-page opinion dispensing with each of the claims.<sup>330</sup> Again, this comprehensive opinion was affirmed by the court of appeals.<sup>331</sup>

Mr. Cooper also has sought certiorari in the United States Supreme Court at least six times and filed at least two petitions for the writ of habeas corpus in the Supreme Court; filed seven petitions for habeas corpus in the California Supreme Court; and sought clemency from the Governor of California twice.<sup>332</sup> Mr. Cooper's inability to overturn his conviction has not been the result of a failure of state and federal courts to conduct meaningful review over the past three decades, but rather because the evidence of Mr. Cooper's guilt is overwhelming.

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<sup>328</sup> See *supra* Part II.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*; see *Cooper v. Brown*, 510 F.3d 887 (S.D. Cal. 2005).

<sup>331</sup> See *supra* Part II; see also *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007).

<sup>332</sup> See *supra* Part II.

The allegation that Mr. Cooper suffered from an improper procedural bar to relief must likewise fail.<sup>333</sup> As previously noted above, Mr. Cooper was granted a third successive federal habeas petition by the Ninth Circuit sitting en banc in 2004, meaning that he was permitted to proceed with his entire application in the district court irrespective of the provisions regarding successive applications found in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>334</sup> In 2005, the district court exhaustively examined nine separate claims raised by Mr. Cooper in a 159-page opinion that was affirmed by the Ninth Circuit.<sup>335</sup> Accordingly, Mr. Cooper has not been denied his right to due process by an “inappropriate procedural bar” or by any failures of state or federal courts to conduct meaningful post-conviction review.

## **V. Conclusion**

In light of the nearly thirty years of criminal and post-conviction proceedings granted to Mr. Cooper that have considered and rejected his claims that he has been wrongfully convicted and sentenced to death after having been denied due process of law, including his right to equality before the law and his right to a fair trial, and the fact that Mr. Cooper introduces no new facts or evidence in support of his present petition, the Government of the United States requests that the Commission rejects Mr. Cooper’s petition on the merits.

In support of this Response, the Government submits a number of documents, as Annexes, from the extensive litigation associated with this case, including prior state and federal court decisions and briefs of the California District Attorney’s Office. The United States has also made reference to the evidentiary exhibits submitted by Mr. Cooper in his merits brief of August 30, 2012, in particular the Reporters’ Transcript at trial.

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<sup>333</sup> See Merits Brief of Petitioner at 107.

<sup>334</sup> *Cooper v. Woodford*, 358 F.3d 1117, 1123 (9th Cir. 2004). Attached as Annex L.

<sup>335</sup> See *supra* Part II.