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December 9, 2015

The Honorable Edmund G. Brown, Jr.  
Governor of the State of California  
Suite 1173, State Capitol  
Sacramento, California 95814

RE: State of California v. Kevin Cooper  
Application for Clemency

Dear Governor Brown:

I proudly write in support of the request for clemency that has been filed on behalf of Kevin Cooper, a black man who has been on death row in California for thirty years and who is almost certainly innocent. Because the materials relating to the case that have been made available to you are exhaustive and have been analyzed and discussed very thoughtfully, I will not burden this letter with yet another detailed discussion of Kevin Cooper's nightmare.

As an adjunct professor of law who has taught an upper division seminar on the death penalty for several years, I am familiar with the tortured intricacies of the law in this area and join the many who are deeply troubled by the prospect that Kevin Cooper may one day be executed by the State of California.

It is safe to say that this case presents almost every component of what is wrong with the application of the death penalty in America today—frightening due process issues of every imaginable type, many of which concern very credible allegations of both police and prosecutor negligence and misconduct that have never been refuted adequately; woefully inadequate legal representation; the undeniable existence of the type of pernicious and deadly racism that still poisons our criminal justice system; and finally, the complete breakdown of the Byzantine review process that occurs all too often in cases of this type. In short and because the appellate process has run its course without a fair and thoughtful consideration of the practical effect of these fundamental problems, this case has landed on your desk and you are Kevin Cooper's last hope for the just result that, when it comes, will be long overdue.

There are tough cases and there are easy cases. Although I cannot say, based on my analysis of the extensive record in this matter, with absolute, moral certainty that

Kevin Cooper is innocent, it is nevertheless clear that very substantial questions concerning his guilt have continued to multiply over the past 30 years. That undeniable fact is why this is in fact an easy case—exactly the type of case for which the clemency process exists. Whether Mr. Cooper is actually innocent, as appears to me to be the case, is really beside the point; this case was botched so badly from the outset that it would be literally impossible at this time to untangle the knots and determine with certainty who actually committed the heinous crimes for which Mr. Cooper was convicted and sentenced to death. His very credible claim of innocence, coupled with undeniable due process issues of appalling magnitude and effect, are exactly what the clemency power is designed to address; clemency exists in death penalty cases as a safety net to prevent the irreversible from occurring when it should not. Legal scholars have delineated at least two purposes for clemency, each of which clearly applies in this case. The first and most fundamental is simply mercy; the second is to remedy an incorrect or unjust result. What is abundantly clear in this context is that this case cries out for clemency for the most simple of reasons: If Kevin Cooper's jury had known what we know today, its verdict would almost certainly have been "Not Guilty."

Because I have probably been entirely too professorial thus far, I should eliminate any concern that I am just another wild-eyed, ranting, pointy-headed social scientist type. I am not. I come to you from Texas, the execution capitol of the free world. I have been a strong supporter of the death penalty during most of my adult life. I was the elected District Attorney in San Antonio, Texas, in the 1980's and no one ever accused me of being soft on crime. When I was District Attorney, I prosecuted death penalty cases and compiled a perfect record; all of my death penalty prosecutions resulted in the conviction of the defendant; each of those defendants has been executed by the state of Texas. In addition, I was a member of the Board of Directors of the National District Attorneys Association and of the United States Justice Department's Executive Working Group, the most select group of prosecutors in America at the time. I have spent more than forty years trying cases in state and federal courts.

I'm not bragging. I say these things to make a point: I have done more than just "talk the talk" on this issue. I have also walked the walk.

I do not oppose the death penalty on moral grounds. I believe that some crimes are so monstrous that the only appropriate response is execution. I am an opponent of the death penalty today for entirely practical reasons. Based on my experience as an elected, major metropolitan prosecutor, I am persuaded that the American criminal justice system is simply not competent to decide who may live and who must die. This conclusion is supported by a Columbia University study, conducted by Professor James Liebman several years ago, of 5,000 capital murder cases from 1973-1995 which concluded that the death penalty machine in America is "collapsing under the weight of its own mistakes." The study found that convictions in 68% of those cases had been

reversed on appeal because of serious errors by incompetent defense attorneys or misconduct by police or prosecutors. I have seen no case in recent years that makes this point more convincingly than the Kevin Cooper case.

We should not be surprised. Although our states are very different in material respects, Texas and California are identical in those that matter most in this context. Although the vast majority of our police and prosecutors are dedicated and work hard to get it right, the people and courts of California and Texas are not infallible. Your courts function like ours; your juries determine guilt or innocence based on testimony from fact and expert witnesses who may or may not be telling the truth and who, even when they tell the truth as they know it, are sometimes simply wrong. As is the case in Texas, the criminal justice system in California, on its best day, is driven by decisions that are made by imperfect human beings. Try as we do to always get it right, we sometimes get it wrong. We have learned the hard way that eyewitness testimony is often mistaken. We have seen junk science debunked and the exposure of terrible results, too often intentional, by forensic laboratories. What we have seen over and over again are situations in which witnesses who have nothing but trouble to gain by recanting sworn trial testimony nevertheless do so and for good reasons. And finally, we have seen egregious misconduct and errors by key players in the system.

In 2005, the *Houston Chronicle* concluded that one of my capital murder prosecutions—the *Ruben Cantu* case—produced the execution of a man who was probably innocent. When I reviewed the case, I concluded that, whether Cantu was innocent or not, my decision to seek the death penalty in his case had been a mistake. Although it was very difficult at a personal level, I acknowledged my error publicly and assumed personal responsibility for his execution. I won't say more about the Cantu case because it has little in common with the Cooper case (other than the fact of probable innocence). If additional information is needed, the following link should be useful:

<http://www.cnn.com/2015/08/07/us/death-row-stories-ruben-cantu/index.html>.

If our words are to be matched by deeds, we must give renewed meaning to our proudly stated values—that our criminal justice system exists to produce justice, that our courts are fair and guarantee the protection of the innocent, that every criminal defendant is entitled to a fair trial and to fundamental due process, that it is better for 100 guilty men to go free than for 1 innocent person to be convicted, and that it is the legal duty of every prosecutor in America to see to it that justice is done, and not merely to convict. Fortunately, the community at large has been quicker than our courts to recognize that a gap exists between nice words and actual results. For the best of reasons, public support for the death penalty has plummeted in recent years and capital murder convictions and executions have declined dramatically. America is waking up to the fact that what happened to Kevin Cooper has happened more frequently than we care to admit—that 156 persons who were convicted have been

released from death rows across the country because of wrongful convictions.

I believe that a fair and thorough review of this matter will persuade you that its facts mandate clemency, that Kevin Cooper is a glaring example of the human wreckage, the living flotsam of a system that gets it wrong too often—the carnage that is produced by the very finest criminal justice system on earth, a system that on its best day—because it is driven by decisions that are made by human beings—produces mistakes that destroy the lives of too many innocent men and women and could in this case lead to the execution of a man who has been butchered by a system that undermined the promise that our courts are fair and guarantee the protection of the innocent.

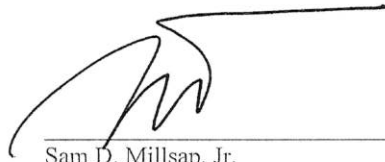
I will conclude with the general observation that what death penalty opponents seek today is not for the thousands of guilty men and women who are waiting to die on death rows throughout the country. It is for those who are innocent and, more important, the millions of people who follow the law every day and have not forgotten the promise we made to ourselves and each other when we agreed to give the government this awesome power so long ago—that our Courts will guarantee the protection of the innocent.

You can't abolish the death penalty in California, but you can and should prevent this execution and say, in the process, that the result to date in this case is beneath the people of the State of California. In that sense, this case is a test of sorts and the question is whether Californians should be satisfied with a criminal justice system that gets it right *most of the time* in death penalty cases, whether Californians should be satisfied with the conduct of its police and prosecutors in this case, whether California demands more than Kevin Cooper has received from its criminal justice system. Whether the State of California passes this test will say more about its real values than it does about Kevin Cooper or the miserable creatures who commit horrible crimes in its communities.

I know your record. I have admired your approach to policy questions since the 1970's. You have always thought outside the box; you have never been afraid to make tough decisions. And most important, you understand that we will be forever judged not by how we treat the rich, the powerful, and the well connected, but by how we deal with the weakest, the most vulnerable, and the most miserable among us—whether we keep our promises.

You have the power to insure that the judgment of history will be that, when it came to Kevin Cooper, the State of California passed the test. Justice in this case is long overdue and it's time to keep the promise that Kevin Cooper has been denied.

Respectfully submitted,



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Sam D. Millsap, Jr.