THE CONSTITUTION PROJECT
Safeguarding Liberty, Justice & the Rule of Law

Governor Jerry Brown
c/o State Capitol, Suite 1173
Sacramento, CA 95814

September 6, 2016

Dear Governor Brown,

As a former Governor, I am intimately familiar with the difficult decision before you when asked to spare the life of a death-sentenced prisoner. In fact, as Governor of Texas, I supported the death penalty and was responsible for the execution of 19 men while in office.

I have reviewed many capital cases in my official capacity and since my formal departure from political life. One thing I have learned over the last several decades is that in capital cases, our justice system has many routes to finality. It has far fewer paths to fairness and truth-seeking. Perhaps there is no better illustration of this fatal paradigm than Kevin Cooper's case.

Yes, Cooper has had over two decades of appeals. But, to quote Judge Kim Wardlaw in her dissent in Cooper's case, "as far as due process is concerned, twenty-four years of flawed proceedings are as good as no proceedings at all." Although Cooper has had his last day in court, far more questions than answers remain about his guilt.

As you make this difficult decision, you undoubtedly will keep in mind the memory of the victims. There can be no accounting for the senseless brutality of the crimes in this case. I know that in an ideal world, a jury would have been presented with all relevant incriminating and exonerating evidence in the case. If it found the accused guilty of murder, it would have then carefully and fairly determined whether he should be sentenced to death. Appeals courts would have reviewed any new claims on the merits. In such a case, the only question before you would be one of mercy.

It is my view, however, that the case of Kevin Cooper is far from that ideal. The facts as we now know them – and as thoughtfully set out in 2009 by 11 judges on the United States Court of Appeals for the Ninth Circuit – indicate a far murkier picture. The history of Cooper's case is rife with serious, credible, and deeply troubling claims of evidence tampering and destruction, false testimony, the failure to turn over exculpatory evidence to the defense, and poor lawyering on behalf of the accused.

My chief concern, however, is that the judicial system has only compounded rather than corrected these grave errors. As a result of the court system's inability to be a neutral and rigorous arbiter, I am compelled to petition you for relief on behalf of Cooper. I draw your attention to the federal district court's hindrance of a fair resolution to Cooper's claims of misconduct and error in 2004 and 2005.

In 2004, the Ninth Circuit ordered new testing in Cooper's case to bring to an end the question of his guilt. At the time of Cooper's trial, a tan t-shirt found near the murder scene was tested and

found to contain only the blood of the one of the victims - it was "not consistent" with Cooper. However, DNA testing under dubious circumstances in 2002 allegedly tied the t-shirt to Cooper. Then, in 2004, after finding that the prosecution failed to turn over exculpatory evidence—and after hearing Cooper's claims of alleged evidence tampering—the Ninth Circuit stayed Cooper's imminent execution and ordered the federal district court to conduct further testing on the t-shirt to determine whether Cooper's blood was planted on it prior to the 2002 testing.

The Ninth Circuit ordered the t-shirt be re-tested for the presence of an additive called "EDTA." EDTA is the preservative that was added to the sample of Cooper's blood taken from him not long after he was initially arrested in 1983. If the t-shirt tested positive for EDTA, it would strongly indicate that Cooper's blood was planted on the t-shirt in advance of the 2002 DNA testing. This testing would, to quote the Ninth Circuit's 2004 order, show that Cooper was "either guilty as sin or he was framed by the police. There is no middle ground."

Following the Ninth Circuit's order, EDTA testing by the State's own expert revealed that the sample contained an "extremely high level of EDTA." The defense's expert found the presence of EDTA as well, although at a lower level. When confronted with this finding, however, the district court obstructed the fairness of the proceedings. After learning about the results of the EDTA testing, which suggested evidence tampering, the district court permitted the State to withdraw its test results for the purported reason that the very presence of EDTA indicated that *the lab* was contaminated, and thus the testing was unreliable. The court then refused Cooper's requests for an inquiry into the alleged contamination. The district court also did not allow Cooper's experts to assist in selecting and determining how the sample to be tested would be processed, when, as a matter of due process, a court must permit both sides to participate when such serious decisions are made.

Further, when a sample of Cooper's blood was mistakenly sent to an independent lab charged with testing hair strands in the case, an expert from that lab tested the sample and found that it now contained the DNA of *two* people – Cooper and an unknown second person. Even though the vial had been in State custody since 1983, the district court refused inquiry as to why a sample of blood from this vial also appeared to have been tampered with, as it now contained the blood of two individuals.

After Cooper appealed the district court's opinion denying him relief, a three-judge appellate panel affirmed, but one of the affirming judges, Margaret McKeown, stated that she felt compelled by the standard found in the Anti-Terrorism and Effective Death Penalty Act of 1996 from ruling in Cooper's favor, expressing that this result, in light of all the questions raised by lost, destroyed or tampered evidence, was "wholly discomforting." And she added: "Resting Cooper's conviction on the DNA evidence, which was not before the jury, is particularly problematic because of the extensive evidence documenting the mishandling of evidence."

In 2009, the Ninth Circuit denied Cooper a rehearing en banc even though *eleven* judges dissented. Commenting on the district court's performance, Judge William Fletcher said: "There is no way to say this politely. The district court failed to provide Cooper a fair hearing and flouted our direction to perform two tests." One of the judges added that the vote was "closer than the list of dissenters would suggest."

The final decision to do justice in this case now lies with you. I ask only that you be certain that California is not about to execute an innocent man and **appoint a commission to independently examine the facts in this case.**

Without your intervention, great doubt not only surrounds the reliability of the conviction and death sentence in this case, but also casts into doubt the very integrity of the justice system that came to that result.

Sincerely,

Mark White
Governor of Texas, 1983-1987