

Kevin Cooper  
Legal Update  
May 2009

**“The State of California may be about to execute an innocent man.”**

– Cooper V. Brown, Case: 05-99004 Filed May 11, 2009, Ninth Circuit Court of Appeals. W. FLETCHER, Circuit Judge.

The Ninth Circuit Court of Appeals denied Kevin Cooper en banc review on May 11, 2009. Eleven Judges dissented from the ruling. The main dissent was written by W. FLETCHER, Circuit Judge, joined by PREGERSON, REINHARDT, PAEZ, RAWLINSON, WARDLAW, and FISHER, Circuit Judges. The following are excerpts from that dissent (emphasis added.)

**- INNOCENCE -**

**“Given the weakness of the evidence against Cooper, if the state had given Cooper’s attorneys this exculpatory evidence it is highly unlikely that Cooper would have been convicted.** Thus, based on the State’s *Brady* violations, Cooper would be able to make a showing of **actual innocence** under either the standard of Schlup or of 28 U.S.C. 2244(b)(2)(B)(ii).”

“Once SBCSD [San Bernardino County Sheriff’s Department ] investigators drew that conclusion, [that Kevin Cooper was the murderer] they **manipulated and planted evidence** in order to convict Cooper. In the course of their investigation, they discounted, disregarded, and discarded evidence pointing to other killers. Their decision to close their eyes early in the investigation to the possibility that someone other than Kevin Cooper might be guilty has led us to the situation in which we find ourselves today. Unfortunately, the district court made things worse. After our en banc panel granted Cooper permission to file a second habeas application, the district court obstructed and impeded Cooper and his lawyers in almost every way imaginable.”

“Kevin Cooper has now been on death row for nearly half his life. **In my opinion, he is probably innocent of the crimes for which the State of California is about to execute him.** If he is innocent, the real killers have escaped. They may kill again. They may already have done so. We owe it to the victims of this horrible crime, to Kevin Cooper, and to ourselves to get this one right. We should have taken this case en banc and ordered the district judge to give Cooper the fair hearing he has never had.”

**- EVIDENCE -**

“The en banc court directed the district court to test Cooper’s blood on the t-shirt for EDTA. The district court flouted that direction. **If the EDTA testing had been properly performed, there would likely be important new evidence of evidence tampering by state actors.** Even based on the EDTA testing that has so far been performed, there is strong evidence that Cooper’s blood was planted.”

“Further, new evidence of evidence tampering appeared during the district court hearing when it was discovered that vial VV-2, which was supposed to contain only Cooper’s blood, contained blood with the DNA of two or more people. The district court refused to acknowledge the significance of this new

evidence, and refused to allow any investigation into the circumstances that might have led to the blood of a second person being placed in vial VV-2.”

“Evidence available from the EDTA testing that has been done so far, and new evidence of evidence tampering connected with vial VV-2, substantially increases the likelihood that the State presented false evidence at trial in violation of *Mooney* and *Napue*. Evidence that would be available if further EDTA testing were performed may well increase that likelihood still further.”

“The false evidence at trial includes Josh’s two recorded statements, the State’s analysis of the blood contained in A-41, the Pro Ked Dude shoeprints purportedly found in the Ryen and Lease houses, the cigarettes and tobacco purportedly found in the Ryens’ station wagon, and the hatchet sheath and button purportedly found in the Bilbia bedroom in the Lease house.”

### - **BRADY VIOLATIONS** -

“Cooper’s *Brady* claims based on new evidence are the failure to reveal Warden Carroll’s information that the prison issued no shoes to prisoners that were available only in prisons; the failure to turn over the Disposition Report showing that Senior Deputy Schreckengost approved Deputy Eckley’s discarding of Lee Furrow’s bloody coveralls; and the failure to turn over daily logs showing the SBCSD took into custody a blue shirt that possibly had blood on it, and that there had been a report to the SBCSD shortly after midnight on the night of the murders of a white station wagon with wood sides, carrying three young males.”

“The new evidence showing the second and third *Brady* violations casts new light on what had previously been known — that Deputy Eckley had discarded the bloody coveralls without testing them and without alerting Cooper’s attorneys, and that the SBCSD contended that a bloody blue shirt was never taken into custody. Based on the new evidence, we now know that the failure to make available to Cooper the bloody coveralls and blue shirt were also *Brady* violations.”

“If either of the above claims is valid, Cooper has a newly available claim of innocence under *Schlup* or 28 U.S.C. § 2244(b)(2)(B).”

(All quotations taken from Cooper V. Brown, Case: 05-99004. Filed May 11, 2009.)

#### **BACKGROUND ON DEVELOPMENTS IN THE COOPER CASE – 2004-Present**

In 2004, an en banc panel of the Ninth Circuit granted permission to file a second or successive application for habeas corpus based on a ‘prima facie’ showing that the state violated ‘Brady’ in not providing Cooper with Warden Midge Carroll’s information about the tennis shoes issued by the prison. (Brady violations are constitutional violations - when the prosecution withholds exculpatory evidence from the defense, from the U.S. Supreme Court ruling *Brady v. Maryland*.)

Now, after the 2004-2005 Federal District Court hearings, we know that there were numerous Brady violations. First, the state violated *Brady* by failing to provide Warden Carroll’s information to Cooper. Second, the state violated *Brady* by failing to provide a copy of the Disposition Report with the Deputy’s initials on it, and by failing to preserve and make available Lee Furrow’s bloody coveralls. Third, the state violated *Brady* by failing to provide a copy of the San Bernardino County Sheriff’s Department daily logs showing the call reporting the finding of the blue shirt and by failing to preserve and make available the shirt.

**For more information or to read the full text of the May 11, 2009 ruling, visit [www.savekevincooper.org](http://www.savekevincooper.org)**