

**Outline 10/28/13 IACHR Hearing Argument**

**11:30 A.M., October 28, 2013**

**Building of the Organization of American States, Washington D.C.**

Brief Introduction by Commission President Tracy Robinson

**Norm:**

Honorable Members of the Commission. Thank you for granting this hearing. My name is Norman Hile. I am an attorney from California. With me, is Katie Dewitt who has been working with me on this case. For the Commission's information, we have this case pro bono, we are not being paid. I would like to begin with a statement from the petitioner, recorded last Wednesday at San Quentin prison. The state would not permit Mr. Cooper to speak to you live via Skype or to appear by video recording. The State would only allow him to make an audio recording and therefore we will now play that recording that was made last Wednesday.

**Picture of Kevin (Power Point page 2)**

**Below is the transcript of the recording taken of Kevin Cooper at San Quentin on 10/23/2013**

**Kevin:**

Dear Honorable Members of the Commission:

I, Kevin Cooper, am speaking to you from death row at San Quentin Prison.

For the past 30 years, I have been a victim of repeated violations of my human rights. This nightmare began in June 1983 when I learned that I was being sought for multiple murders that I did not commit.

As the surviving victim told numerous people in the days and weeks following the crimes, the attackers were three white men. But once the Sheriff and the District Attorney's office learned that I, a black man and an escaped convict, had been hiding at a ranch near the crime scene, they immediately stopped trying to locate the three white men. Instead, they pursued one racist goal: convicting a black man - that black man being me. A monkey hanged in effigy outside the courthouse said it all: it bore the sign "hang the nigger."

My attorneys have explained to me that it is not your job to determine my innocence or to second guess how the U.S. Courts have acted in my case. I understand that you are to decide whether my international human rights have been violated. Please read my papers and look closely at the evidence presented. If you do, I'm sure you will see that . . .

I, Kevin Cooper, have been prosecuted because of my race,

That I, Kevin Cooper, have been denied a fair trial,

That I, Kevin Cooper, have been denied due process and the right to an effective defense,

That I, Kevin Cooper, have been denied my freedom,

Worst of all, in February 2004, I, Kevin Cooper, came within 3 hours and 42 minutes of being denied my right to life until an emergency stay granted me a temporary reprieve.

The State of California almost killed me then. The State of California still wants to kill me now. But you can save my life. You have the power to tell the United States that my conviction and death sentence violated international law. You can tell the Governor of California that I should not be executed. You can tell Governor Jerry Brown that I need a new trial, a fair trial, a trial free of human rights violations and a trial free from governmental interference.

I respectfully ask you to help me get that trial so that I may finally prove my innocence, freeing myself from 30 years of bondage at the hands of the State.

Sincerely and Respectfully,

This is Kevin Cooper

**End of recording**

**Hearing Presentation continues below:**

**Death is Different**

**Picture of California Execution Chamber (Power Point page 3)**

Brief Intro- Norm Hile representing Kevin Cooper along with Katie DeWitt, etc.

**Norm:** As the members of the Commission have recognized on numerous occasions, “Death is Different.” As the Commission found in Sankofa: “The irrevocable and irreversible nature of the death penalty warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.” I’m quoting from previous Commission decisions Sankofa and Teleguz. [Sankofa ¶ 27; Teleguz ¶75.]

Given these precedents, we ask that, the Commission apply a heightened level of scrutiny to Mr. Cooper’s claims of violations of his international human rights. Significantly, the courts in

the United States have not considered whether Mr. Cooper's human rights under the American Declaration have been violated. Therefore, this Commission is not constrained by decisions or findings of the Courts of the United States. You may decide whether Mr. Cooper's human rights under the American Declaration have been violated. [Sankofa ¶28.; Teleguz] I will return to the Right to Life under Article I of the American Declaration later in our presentation.

### **The first violation we want to discuss is Article 2 - Racial Discrimination**

**Norm** As the Commission has recognized in its Andrews decision, a reasonable appearance of racial bias by state decision makers implicates the protections of Article 2. As we have shown in our petition, and in our Merits brief, and as Mr. Cooper just told you, the San Bernardino Sheriff Department and District Attorney violated Mr. Cooper's right to equality before the law targeting him, a black man, for prosecution while ignoring the multitude of evidence pointing to three white men as the ones who attacked and killed the Ryen family and Christopher Hughes, the victims of the crimes for which he was convicted and sentenced to death. Worse, these State actors, in the Sheriff's department and the District Attorney's Office, destroyed and hid exculpatory evidence and actually manufactured evidence to frame Mr. Cooper. We will list the destruction and planting of evidence in a minute.

From the beginning, all of the evidence in this case pointed to three white men as the perpetrators of these heinous crimes:

#### **Crime Bulletin (Power Point page 4)**

- On multiple occasions within hours of the attacks, the sole Surviving Victim, 8 year old Josh Ryen, identified three white men as his attackers. This led the sheriff to issue a crime bulletin seen on the screen before you, which says that the crime suspects were 3 either white or Hispanic males, late teens to early 20's, described as wearing a white t-shirt and another a blue short-sleeve shirt. This is what they thought when they started. But as soon as they found out that Kevin Cooper had been in vicinity of the crime they adopted tunnel vision and stopped searching for those 3 white men. Let's look at what the evidence showed in addition to what Josh Ryen said. (Later, Josh Ryen explicitly stated, when shown a picture of Mr. Cooper, that Mr. Cooper did not commit the crimes;)
- **Justin's Map (Power Point page 5)** Before you is a map that shows the vicinity of the crimes, the Ryen house. And there were 3 sightings of the 3 white men involved in these crimes, shown on this map. The first sighting is at the Ryen house, the 2<sup>nd</sup> sighting location is where witnesses saw 3 white men driving the Ryen's car and the 3<sup>rd</sup> sighting was at the Canyon Corral Bar within 1 ½ mile of the Ryen home.
- 3 Eyewitnesses told the Sheriff that they saw multiple white males driving the Ryen Station wagon around the time of the murders in the location on the map displayed on the screen;
- Other eyewitnesses from the Canyon Corral Bar, also shown on the screen as Sighting 3, placed three white men with blood on their clothing in that bar around midnight the night of the murders;

- Eyewitnesses said that those white men were wearing bloody clothing described as matching the bloody clothing later recovered within a few hundred meters of the bar by the Sheriff;
- An eyewitness at the bar reported that when two of the men left the bar they got into a vehicle that fit the description of the Ryens' station wagon; which was stolen by whoever murdered the Ryens.
- Within days after the murders were discovered, a concerned citizen named Diana Roper turned over to the Sheriff bloody coveralls, stating that they were worn home on the night of the murders by her white boyfriend, a convicted murderer named Lee Furrow;
- Diana Roper also stated that on the evening of the murders her boyfriend Lee Furrow wore a shirt identical to the bloody tan t-shirt that was found near the Canyon Corral Bar with one of the victim's blood on it. She also reported that Lee Furrow's hatchet was identical to the hatchet the Sheriff recovered near the crime scene, and she could not find Furrow's hatchet after the murders were discovered .
- Diana Roper's sister said that she saw convicted murderer Lee Furrow exiting a car matching the description of the Ryen's station wagon on the night of the murders.

Despite all this compelling evidence that the crimes were committed by three white men including Lee Furrow, the San Bernardino Sheriff's Department and District Attorney predetermined Mr. Cooper's guilt based upon the color of his skin. They completely disregarded all this evidence pointing to white killers. And as we'll talk about now, they destroyed, withheld, and created evidence in order to frame Mr. Cooper for the murders.

Just as significant, as discussed in Thomas Parker's Declaration, which is in your materials, Hearing Exhibit 4, when the Sheriff's office announced to the public that the only suspect in the Ryen Hughes murder investigation was Mr. Cooper, a black man, it caused rampant racial animus throughout San Bernardino County and Southern California.

#### Monkey Hanging in Effigy (Nigger)(Power Point page 6)

As Mr. Cooper has told you, this extreme public and private racist hatred is embodied in the hanging of a monkey in effigy outside of the courthouse where Mr. Cooper was to be tried. The sign stated "hang the nigger."

It should come as no surprise that the State persecuted and prosecuted Mr. Cooper on the basis of his race. For many years, the death penalty has been unfairly applied in the United States to racial minorities, and in particular when blacks are accused of killing whites. As a result, black Americans make up a disturbing proportion of the individuals sentenced to die in the United States. Specifically blacks accused of killing white victims are 4.3 times more likely to get the death penalty [than blacks killing other races]. Such disparities reflect the immense discretion given to local prosecutors to decide whether the death penalty should be sought in a particular case in the United States.

I submit, therefore, Mr. Cooper's Article 2 rights under the American Declaration have been violated by the acts of the United States. We respectfully ask the Commission to so find in accordance with this Commission's prior findings in the Andrews case.

### **Due Process/Fair Trial-IAC**

We will now discuss Articles 18 and 26 of the American Declaration.

Judge Fletcher's Opinion "The State of California may be about to execute an innocent man."

(Power Point page 7)

(Katie) As recognized by Judge Fletcher and 10 of his fellow judges in an unprecedented dissenting opinion coming out of the Ninth Circuit Court of Appeals, an overview of the evidence in Mr. Cooper's case undermines the soundness of Mr. Cooper's conviction and raises significant doubt as to whether he actually committed the crimes at issue.

However, as the 11 judges found, Mr. Cooper has yet to receive a fair hearing before an impartial tribunal that would allow him to fully present this evidence. As recognized by Judge Wardlaw's concurring opinion, which you see on the screen before you, so far as due process is concerned 24 years of flawed proceedings are as good as no proceedings at all. (Power Point page 8)

Wardlaw 1 (Power Point page 8)

Because of this, the Commission is empowered to review Mr. Cooper's claims of violations of his right to a fair trial and to due process while utilizing strict scrutiny in order to determine whether articles 18 and 26 of the American Declaration have been violated. As to these violations, I will now discuss the inadequacies of Mr. Cooper's defense and governmental misconduct claims. Mr. Hile will then discuss the problems associated with the appellate system in the United States.

Katie:

Mr. Cooper's trial counsel indisputably and unforgivably failed to provide Mr. Cooper an effective defense.

Despite the extremely complicated nature of Mr. Cooper case, as demonstrated by the sheer volume of the material originally produced, Mr. Cooper's trial counsel failed to enlist the help of any other attorneys to aid in the organization and/or review of that material which consisted of at least:

- 2,000 pages of documents from the District Attorney;
- 2,000 pages of documents from the Sheriff's Department;
- 1,000 photographs; and
- And 100,000 pieces of physical evidence.

Rather, Mr. Cooper's defense team consisted of one attorney who worked for the California Public Defender's Office (a state entity), and one investigator. This acute understaffing left them irreparably handicapped. As a result, they committed several material mistakes that robbed Mr. Cooper of his right to an effective defense.

- For example, Mr. Cooper's trial attorney failed to discover the existence of the bloody coveralls and the statements made by Diana Roper about Lee Furrow, before the state destroyed those coveralls, even though they were contained within the pages of discovery produced to him.

#### Blue Shirt Log (Power Point page 9)

- Mr. Cooper's trial attorney also failed to discover the existence of the bloody blue shirt, which was referenced in the police call log you see before you. The defense learned of this shirt 21 years after the crimes occurred.
- Because of these errors, and likely because trial counsel was overwhelmed, overworked, and suffering health issues (as referenced in the merits petition), Mr. Cooper's trial attorney failed to make the connections that these crimes were really committed by the three white men as detailed in the declarations of Thomas Parker and Michael Adelson as well as Mr. Cooper's merits petition.
- These deficiencies, which the State has been aware of, but failed to correct, irreparably prejudiced Mr. Cooper's right to an effective defense, thus violating his right to a fair trial and due process, resulting in the need to grant Mr. Cooper a new trial as recognized by the Commission's reasoning in Sankofa.

### **Due Process/Fair Trial Government Misconduct and Procedural Bars to Review**

#### Katie

Further, as recognized by the Commission's decision in Teleguz, the United States has an enhanced obligation in a death penalty case not to withhold evidence. However, in Mr. Cooper's case not only did the United States withhold evidence, it also destroyed and planted evidence in order to frame him.

Due to the sheer number of the prosecution's misdeeds and the limited time we have here today, we will only highlight a few instances of government misconduct. However, for the Commission's convenience we have created the next 3 slides to document those acts as detailed in Mr. Cooper's merits brief.

#### Evidence Withheld by the State (Power Point page 10)

- First, the prosecution failed to notify Mr. Cooper's counsel of Midge Carroll's statements to investigators. Warden Carroll (the warden at Mr. Cooper's former prison) told the Sheriff that the shoes that Mr. Cooper was accused of wearing were actually available to the public and were not "prison issued" as repeatedly argued by the District Attorney at trial.

### Evidence Destroyed by the State. (Power Point page 11)

- Second, Mr. Cooper also wishes to highlight the systematic elimination of evidence pointing to other perpetrators. Contrary to proper law enforcement practices, investigators failed to videotape the interview of the only surviving victim, Josh Ryen and then destroyed all notes surrounding that interview allowing the investigating officer to eliminate all plural references to attackers in his formal report; however, we know from the supervising psychiatrist, that Josh Ryen made multiple references to his attackers in the plural during that interview.

### Evidence Fabricated by the State. (Power Point page 12)

- Finally, the Prosecution planted Mr. Cooper's blood on the tan t-shirt recovered near the Canyon Corral Bar two days after the discovery of the murders, as proved by blind testing conducted by the State's expert in 2004. However, when that expert learned of the true meaning of his results, he was allowed to withdraw that report under a claim of contamination, which Mr. Cooper's attorneys were never allowed to investigate.

### Judge Fletcher's Opinion—"There is no way to say this politely. . . ." (Power Point page 13)

#### **Norm:**

We have put up on the screen a portion of Judge Fletcher's opinion and it talks about how Mr. Cooper was treated in the appellate process in 2004. And it begins, "There is no way to say this politely, the District Court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests." The two tests were the tests that could have proven that Kevin Cooper is innocent.

- The problems associated with Mr. Cooper's prosecution have only been compounded by the passage of time and by an appellate process in the United States that fails to deal with innocence claims based on evidence found after trial. The U.S. legal system systematically discriminates against exonerating evidence found later within the appellate process. In effect, the prosecution is rewarded the longer they can hide the evidence from the defense. This commission recognized these flaws in the U. S. appellate system in its merits decision in the Teleguz case ([¶114](#)). These unfair rules, such as found in the AEDPA, have prevented Mr. Cooper from presenting the entirety of the exculpatory evidence and from having a court give full weight to them. He is required by this act, to prove that by clear and convincing evidence that no reasonable fact finder would have found him guilty, which changes the balance completely, from innocent until proven guilty beyond a reasonable doubt, to the defendant having to prove from clear and convincing evidence that he is innocent.
- Not only has Mr. Cooper suffered from the draconian restrictions imposed by the AEDPA that require him to show that no reasonable fact finder would have found him guilty, he was a victim of a judge ruling on his most recent habeas corpus petition who, as Judge Fletcher said, abused her discretion and refused to give Mr. Cooper a fair hearing where he could present his claims.

- **Wardlaw 2 (Power Point page 15)**
- On the screen is another portion of Judge Wardlaw's dissent from the decision of not allowing Mr. Cooper to have a fair hearing. And in it he talks about the failure to do what the court had wanted to do as far as testing is concerned. We'll talk about that in a minute.
- Therefore, it is imperative that this Commission recognize Mr. Cooper's need for a new trial where he would be able to do the testing which could show that he is innocent and where he could present the entirety of the evidence of his innocence and of the State's framing him to an impartial fact finder. After all, it took Mr. Cooper many years to learn many of these facts, not through any fault of his own, but because the State successfully concealed them from him.
- It cannot be that Mr. Cooper's fundamental rights under the American Declaration expire because the State manages to conceal its violations until long into the appellate process. Mr. Cooper's human rights under the American Declaration do not expire with time

## **Right to Life**

### **Kevin's Picture (Power Point page 2)**

#### **Norm:**

As this commission has found in its Teleguz case, if the U.S. executes Mr. Cooper despite these blatant human rights violations that we have outlined, it will be committing another violation by taking his life after he has been denied his rights under the American Declaration to no discrimination, to a fair trial and to due process.

## **Relief Request and Exigency of Issuing a Timely Decision**

#### **Norm:**

The exigencies surrounding Mr. Cooper's case could not be greater. He is likely to die sometime in 2014 at the hands of the State that already tried to kill him in 2004. It is therefore imperative that the Commission act as soon as possible to issue its merits determination. This will allow us, as his Attorney's to use the Commission's decision in efforts to save Mr. Cooper's life in a clemency petition to the California governor. Governor Brown, through his appointments during his past terms and through statements he has made, we think, is sympathetic to Mr. Cooper and other people on death row. We hope that Governor Brown will pay heed to a decision from this Commission, that his human rights have been violated. And we suspect that a decision from this Commission would help to give Governor Brown a basis to order what Mr. Cooper is entitled to which is a new trial.

Meanwhile, with all due respect to the United States, we submit that because the United States has for nearly two and a half years completely ignored Mr. Cooper's petition and this Commission's notices about it, the United States has waived its right to contest Mr. Cooper's

allegations. Indeed, through its silence, the United States has admitted its guilt in permitting these human rights violations, according to Commission rules.

Accordingly, we request that the Commission make the following findings on Mr. Cooper's behalf:

(1) That Mr. Cooper's rights under articles 1 [life liberty security of person], 2 [equality], 18 [fair trial], and 26 [due process] of the American Declaration have been violated by the conduct of the United States.

(2) That the only way to rectify those violations is to grant Mr. Cooper a new trial or release him from custody.

(3) That intervention by the Governor of California in securing a new trial or release of Mr. Cooper is a necessary and appropriate step in remedying these international human rights violations.

Thank you for hearing Mr. Cooper's petition and we stand ready to answer any questions the Commission may have.

**Power Point page 18 – List of Innocent But Executed by the United States**

END OF FORMAL PRESENTATION BY PETITIONER

United States Representatives:

Lawrence Gambino (Speaker), Rachel Owen, Margaret Pickering and Andrew Stevenson

The United States provided a statement that they has no response at present and promises to follow up within the next 30 days in writing regarding these matters.

Commissioners Present and their brief statements:

President: Tracy Robinson

Rose-Marie Antoine – Commissioner responsible of persons of Afro descent and racial discrimination

Felipe Gonzalez – Commissioner

Rodrigo Escobar Gil- Commissioner responsible for deprivation of liberty issues

Elizabeth Abi Merched – Deputy Executive Secretary

**President:** Remarked that the state has had 2 years to respond to these allegations made by the Petitioner and is very disappointed that the state has no response at this time.

**Commissioner Antoine:** Also very disappointed that the state has no response and has no excuse for not providing a response. "This is a sad situation." There are 3 issues of great importance,

being the death penalty issue, right to a fair hearing and the racial discrimination issue. This Commission has a history of being against the death penalty especially when there is a strong suspicion of a violation of due process. It is alarming to listen to the evidence; there is a large nexus between race and the death penalty involving racial discrimination; very concerned about these issues.

**Felipe Gonzalez:** We need to assess if Mr. Cooper's human rights have been affected especially since the life of a person is at stake. The state can't execute Mr. Cooper as long as precautionary measures have not been completely followed. This is a very important concern.

**Rodrigo Escobar Gil:** I agree with the President and Rose-Marie regarding the concerns that the state has no response given that they have had ample time to review this matter and considering that the life of an individual is at stake. My concerns are: was the presumption of innocence violated?; was Mr. Cooper provided with an effective defense?; and was his conviction based on racial reasons? In regards to the state, what consideration has the state given regarding precautionary measures as to the life of Kevin Cooper? Some additional questions that I have are: What is the status of death row in other states and the status of the death row moratorium in California?

**Elizabeth Abi-Merched:** When will the California death penalty resume with executions?

**Norm**(summarized): it could happen any day but most likely sometime in 2014. There are no guarantees.

Question: What are the 2 tests the 9<sup>th</sup> circuit court ordered in 2004?

**Norm** (summarized): First, to see if the DNA on a tan t-shirt was planted. A blind test was done by the state and found that the blood was planted. But after the tester was told what the test was for he recanted his results saying that his lab was contaminated and the Judge affirmed his statement of contamination.

The second test is on the hair that was found clutched in a victims' hand at the scene. None of the hair was African American and the results of the hair testing couldn't determine whose hair it was, but in doing this test the expert used a blood sample of Kevin Cooper's from when he was arrested. She found that there was someone else's DNA mixed in with Kevin's blood. The state refused to retest this tube to see where the blood came from, even though we had offered to pay all the costs of this testing. The state spent more money in fighting this testing than the test would have cost us to perform it. That is why a new trial would allow us to do new testing. Another example is that the hatchet handle has been preserved and in testing it, it may show DNA of who handled it.

Question: Is this the 1<sup>st</sup> request for clemency?

**Norm** (summarized): No there have been 2 previously, one to Governor Davis and then to Governor Schwarzenegger. The original one to Governor Schwarzenegger he reviewed and determined he was guilty, to execute him. But more recently in 2010, after being presented all of

our evidence he determined that it should be investigated more thoroughly and passed it on to Governor Brown, who was coming into office.

The hearing came to an end at approximately 12:30 P.M.