at the evidentiary hearing -- shows, *see* Order at 15811-24, rumors that Wilson picked up from [*887] word on the streets could not have been exculpatory, impeaching or material.

VII

[25] The district court noted that the jury heard two taped statements of Joshua Ryen, pursuant to stipulation, that benefitted the defense because he did not [**42] identify his assailant, had earlier indicated that three Hispanic workers had been at the ranch, and was not on the stand to garner sympathy. The court deferred to denial of Cooper's constitutional claim on the merits by the California Supreme Court pursuant to 28 U.S.C. § 2254(d), and found that Cooper had not demonstrated that, but for constitutional error, no reasonable juror would have found him guilty if Josh Ryen had been subjected to testifying at trial. Order at 15878-80. We agree.

VIII

Cooper's initial briefing posits that he is entitled to relief on his claim that SBSD unlawfully destroyed the bloody coveralls, and on his claims that trial counsel rendered ineffective assistance in failing to present evidence of another person's confession to the murders, failing to connect the bloody coveralls to Lee Furrow, and failing to introduce evidence that victims were clutching hair in their hands. He pursues none of these claims in reply. Each has been adjudicated previously in one forum or another. And we are in accord with the district court's treatment of all these claims. *See* Order at 15846-53.

IX

[26] Our conclusion that Cooper prevails on none of his claims moots his last submission, [**43] that his conviction and sentence were infected by multiple constitutional errors without which the jury would have returned a not guilty or non-capital verdict. As the district court, and all state courts, have repeatedly found, evidence of Cooper's guilt was overwhelming. The tests that he asked for to show his innocence "once and for all" show nothing of the sort.

AFFIRMED.

APPENDIX A

Order Denying Successive Petition for Writ of Habeas Corpus (May 27, 2005)

United States District Court

Southern District of California

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: 2005 U.S. Dist. LEXIS 46232.]

[EDITOR'S NOTE: The pagination for 510 F.3d pgs. 888-1003 will not be reported within this document at this time.]

CONCUR BY: McKEOWN

CONCUR

[*1004] McKEOWN, Circuit Judge, concurring:

I.

I concur in the opinion but am troubled that we cannot, in Kevin Cooper's words, resolve the question of his guilt "once and for all." I do not fault the careful and extensive review by the district court or the multiple levels of appeal carried out under statutory and Supreme Court standards. Rather, the state bears considerable responsibility in making such resolution unavailable. I separately concur to underscore the critical link between confidence in our justice system and integrity of the evidence.

Significant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued, including, for example, blood-covered [**44] coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish Cooper's guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the evidence. As the Supreme Court observed in *Kyles v. Whitley*, "[w]hen, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." 514 U.S. 419, 446 n.15, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

The legitimacy of our criminal justice system depends on the "special role played by the American prosecutor in the search for truth in criminal trials." *Banks v. Dretke*, 540 U.S. 668, 696, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). The same principle extends to the police and their investigatory work in supporting the [**45] prosecution. Of course we don't demand or expect perfection. But we expect full disclosure, competency in the investigation, and confidence in the evidence. To be sure, sometimes the prosecution is hampered by sloppy police work. And sometimes inept investigation and disclosure by the police colors the prosecution. But, the obligation of the

prosecutor to disclose evidence favorable to the defense serves to "justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at [*1005] 439 (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

Despite the presence of serious questions as to the integrity of the investigation and evidence supporting the conviction, we are constrained by the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b)(2)(B). The only exception potentially applicable in Cooper's case requires Cooper to present facts that "could not have been discovered previously through the exercise of due diligence," and that, if proven, and "viewed in light of the evidence as a whole, would [**46] be sufficient to establish by *clear and convincing evidence* that, but for constitutional error, *no reasonable factfinder* would have found [Cooper] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B) (emphases added).

In light of this demanding statutory barrier, I agree that Cooper has failed to qualify for relief. Nonetheless, I write separately to draw attention to the illustrative troubling circumstances involving the alleged state mishandling of evidence. The forensic evidence in this case is critical and yet was compromised. [1] These facts are all the more troubling because Cooper's life is at stake.

> 1 Other evidence, such as the eye witness testimony, was wide-ranging and contradictory. For example, following the murders, Josh initially signaled that three men were his attackers. He also signaled that they were not black or dark-skinned. Later, he saw Cooper on television and said that Cooper was not the attacker and that he had never seen Cooper, an observation he also shared with his grandmother. A year and a half later, Josh testified that Cooper had done the killing.

II.

Following [**47] are illustrative examples of evidentiary gaps, mishandling of evidence and suspicious circumstances.

DESTRUCTION OF BLOODY COVERALLS

During the pre-trial investigation, a woman named Diana Roper phoned police to report a pair of bloody coveralls left at her house by her then-boyfriend, Lee Furrow. Roper told police that Furrow may have been involved in the Ryen-Hughes murders. Furrow's hatchet was missing from his tool belt after the murders, and Roper also reported erratic behavior and remarks that aroused her suspicion.

According to Roper and her sister, on the day after the murders, Furrow showed up in a car that matched the description of the Ryens' station wagon. Roper also explained that Furrow bragged about his three rules "to follow anytime you do a crime:" "wear gloves, never wear your own shoes and never leave a witness alive."

In the face of this potential link between Furrow and the murders, and despite being a convicted murderer, Furrow was never pursued as a suspect. *See, e.g., Allen v. Woodford*, 395 F.3d 979, 986 (9th Cir. 2005) ("When Furrow and Kitts were finally left alone, Furrow began to strangle Kitts, only to be interrupted by a phone call . . . . Furrow then strangled [**48] Kitts to death . . . tie[d] stones to Kitt's wrapped-up body and . . . [threw] it into a canal.").

The coveralls were turned over to a detective, but case investigators did not follow up. The homicide division did not return phone calls. Then, before completion of the preliminary hearing, the detective threw the coveralls away in a dumpster. Although the destruction of the coveralls was known at trial and was pursued during Cooper's first federal habeas petition, the destruction of evidence was claimed to be the misguided act of a single officer. Only later, long after the trial, did the defense discover previously [*1006] undisclosed documentary evidence to the contrary--a police department memorandum confirming destruction of the coveralls, signed by a higher ranking supervisory officer. Destruction of bloody coveralls from a potential suspect is not an inconsequential forensic gaffe.

THE MISSING SHIRT

Although two suspicious and potentially bloodied t-shirts were apparently turned over to the police and logged in as evidence during the murder investigation, only one of these--a yellow tshirt--was disclosed to the defense. However, the police logged in a second, possibly blood-covered shirt [**49] and recorded it as a *blue* shirt. The blue shirt was not produced to the defense and reference to the shirt was only found when, post-conviction, defense counsel was combing through later discovered police logs.

In yet another investigative contradiction, the state now claims that the blue t-shirt was actually the yellow t-shirt that was properly disclosed. However, the woman who found the shirt on the side of the road not far from the crime scene and who reported the blue t-shirt remembers it as blue. The written log clearly reflects a blue t-shirt, and separately notes a yellow t-shirt.

The district court concluded that the log reflecting the blue t-shirt was produced to the defense earlier, and hence the blue t-shirt did not constitute new evidence. Cooper claims the page in question is not stamped in the same format as the other police log pages produced in pre-trial discovery. No explanation is provided for this discrepancy. Even had the page been produced, the t-shirt itself was undeniably never produced. Has the t-shirt gone the way of the destroyed coveralls? Is the blue t-shirt really the yellow t-shirt? How could a shirt described as blue become yellow? Once again, bungled records [**50] and bungled investigative work obscure the truth.

BLOOD DROP A-41

Blood drop A-41 is the most controversial and crucial aspect of the state's case, yet it was handled carelessly from the time it was first acquired. To begin, no one actually remembers finding A-41; everyone claims that someone else pointed it out.

When originally tested, Cooper's blood type was identified as Type B, and subsequently A-41 was identified as Type B. Soon after, it came to light that Cooper's blood type was actually RB, and then A-41 was determined to be RB as well. One criminologist changed his testimony regarding the depletion of the sample. The criminologist originally thought he ran low on the blood stored inside a small pill box, but later more "appeared" to him that he claimed not to have seen initially. In 1991, the Supreme Court of California determined that after the final pre-trial tests on A-41, the sample was "completely consumed." *People v. Cooper*, 53 Cal. 3d 771, 281 Cal. Rptr. 90, 809 P.2d 865, 878 (Cal. 1991).

Criminologist Daniel Gregonis, who tested Cooper's blood, saliva and semen, is alleged to have repeatedly mishandled the biological evidence both pre- and post-trial. Evidence points to the fact that Gregonis broke the [**51] seal on A-41 in 1999, potentially contaminating it, and conducted testing of unknown source evidence specimens by placing them alongside the samples drawn from Cooper. In state court, Gregonis testified that he did not open the glassine envelope containing A-41 during the time it was in his unsupervised custody. However, photographic evidence reveals that A-41 was opened and resealed with the initials DJG (Daniel John Gregonis) and the date "8/13/99," which was during the period that the sample was checked out to Gregonis. After trial, Gregonis [*1007] also allegedly checked out and mislaid a sample of Cooper's saliva. On several other occasions, Gregonis altered his laboratory notes and changed his testimony about laboratory testing. The chain of custody of the blood sample is also in question due to mishandling by Gregonis.

To make matters worse, the manager of the San Bernadino Sheriff's Crime Laboratory was a heroin addict during the time period in question and was later dismissed from his employment for allegedly stealing heroin from the police evidence cache. As in *House v. Bell*, "the evidentiary disarray" and the "limited rebuttal of it in the present record, would prevent reasonable [**52] jurors from placing significant reliance on the blood evidence." 547 U.S. 518, 126 S. Ct. 2064, 2083, 165 L. Ed. 2d 1 (2006). 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 the evidence.

THE WIDE AVAILABILITY OF KEDS SHOES

The Keds tennis shoes are perhaps the most damning evidence against Cooper. As the prosecution stated in its opening statement, the shoes "were supplied strictly for prison use within the state of California and unavailable through retail stores in California." However, we now know that the Keds shoes believed at trial to be issued only to prison inmates were actually provided by various government entities, including the Forest Service, Navy, and state hospitals, and were available through retail catalogs.

In district court, Cooper produced a catalog, not before the jury in 1985, that demonstrated that the shoes were available for retail sale. According to Cooper, the widespread availability of the shoes *was known to the prosecution at the time of trial*, as it had been reported by the warden of the minimum security prison from which Cooper escaped. But the prosecution failed [**53] to disclose this evidence. Before trial, the warden reported to a lead investigator that the notion that the shoes were prison-issue only was inaccurate and that the shoes were commercially available to the public through Sears Roebuck and other retail outlets. Cooper's trial attorney confirmed that at the time of trial he was "not aware the Pro Keds Dude tennis shoes were listed for sale in a retail catalogue" and that had he known this information he "would have featured that fact prominently in the defense at trial."

The habeas process does not account for lingering doubt or new evidence that cannot leap the clear and convincing hurdle of AEDPA. Instead, we are left with a situation in which confidence in the blood sample is murky at best, and lost, destroyed or tampered evidence cannot be factored into the final analysis of doubt. The result is wholly discomforting, but one that the law demands.