565 F.3d 581

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United States Court of Appeals,
Ninth Circuit.

**Kevin COOPER, Petitioner-Appellant,**
**v.**
**Jill BROWN, California State, Prison at San Quentin, Respondent-Appellee.**

**No. 05-99004.**
May 11, 2009.

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Holly D. Wilkens, Esquire, Deputy Attorney General, Agca-Office of the California Attorney General, San Diego, CA, for Respondent-Appellee.

D.C. No. CV-04-00656-H, Southern District of California, San Diego.

Before: PAMELA ANN RYMER, M. MARGARET McKEOWN, and RONALD M. GOULD, Circuit Judges.

Dissent by Judge WILLIAM A. FLETCHER; Dissent by Judge WARDLAW; Dissent by Judge FISHER; Dissent by Judge REINHARDT; Concurrence by Judge RYMER.

**ORDER**

The panel has voted to deny the Petition for Rehearing and Petition for Rehearing En Banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to hear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

WILLIAM A. FLETCHER, Circuit Judge, dissenting from denial of rehearing en banc, joined by PREGERSON, REINHARDT, PAEZ, and RAWLINSON, Circuit Judges:

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

From the time of his initial arrest until today, Kevin Cooper has consistently maintained his innocence of the murders for which he has been convicted. Cooper was convicted of capital murder and sentenced to death by a California court in 1985. The California Supreme Court affirmed Cooper's conviction and sentence in 1991. *People v. Cooper*, 53 Cal.3d 771, 281 Cal.Rptr. 90, 809 P.2d 865 (1991). The California Supreme Court denied Cooper's state petition for habeas corpus in 1996. A three-judge panel of the Ninth Circuit affirmed the denial of Cooper's first federal application for habeas corpus in 2001. *Cooper v. Calderon*, 255 F.3d 1104 (9th *582 Cir.2001) To view preceding link please click here . That decision was called en banc, but the call failed.

In 2004, on the eve of his scheduled execution, Cooper sought permission from the three-judge Ninth Circuit panel to file a second or successive application for federal habeas corpus under 28 U.S.C. § 2244(b)(3)(A). Among other things, Cooper claimed that he had new and previously unavailable evidence that the State had violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* requires the State to turn over exculpatory information to a criminal defendant. Based on the claimed *Brady* violation, Cooper claimed actual innocence under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), and § 2244(b)(2)(B)(ii). The three-judge panel denied permission, but an en banc panel of the Ninth Circuit reversed. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir.2004) (en banc). We stayed Cooper's then-pending execution until his new federal habeas application could be addressed.

Two days before the murders, Cooper had escaped from the minimum security section of a nearby California state prison by walking across an open field. Shortly before Cooper's scheduled execution date, Midge Carroll, the now-retired warden of the prison, provided a sworn declaration in which she stated that she had learned from her staff that shoes issued to prisoners "were not prison manufactured or specially designed prison-issue shoes," but, rather, were "common tennis shoes available to the general public through Sears and Roebuck and other such retail stores." Carroll stated that she had learned this information during the investigation and conveyed it

that, as intended by the protocol, all of the pieces of the new sample sent for EDTA testing had Cooper's blood. But it was also possible that one or more of the pieces had none of his blood. This second possibility was greatly enhanced for the new sample, as compared to the old one from *599 Area 6G. The new sample was adjacent to Area 6G, and therefore Dr. Maddox and Mr. Myers assumed that it contained Cooper's blood. But it was unclear how far into the new sample Cooper's blood extended (if indeed his blood extended into the new sample at all). Further, the new sample was both larger and more irregularly shaped than the old sample, making it even more likely that any blood on the sample was not evenly distributed throughout the entire sample.

As I discuss below, these characteristics of the new sample may well account for the radical difference obtained by the two labs in testing their pieces of the sample. The State-designated lab found an extremely high level of EDTA in its piece. The Cooper-designated lab found an elevated but lower level of EDTA in its piece. This disparity could well have happened because the state-designated lab tested a piece that contained Cooper's blood, and the Cooper-designated lab tested a piece that did not contain his blood, or contained considerably less of it. If the district court had permitted testing of the new sample for blood--and, specifically, Cooper's blood--we would know the answer.

### iii. Refusal to Permit Inquiry into Why Vial VV-2, Which Should Have Contained Only Cooper's Blood, Contained the DNA of Two or More People

On August 1, 1983, two days after Cooper's arrest, two SBCSD criminalists drew Cooper's blood. They put that blood into a vial labeled VV-2. The vial contained the preservative EDTA. In 2004, during the court-ordered testing of the hairs Jessica clutched in her hand, (FN3) the State made a mistake. It inadvertently sent a card containing blood from vial VV-2 to Dr. Terry Melton, the expert charged with testing the hairs. ER 3187. This was the first time since 1983 that any non-State personnel had been permitted to see or test blood from vial VV-2.

Dr. Melton tested the blood from VV-2, unaware of the fact that the State had not intended to send it to her. Dr. Melton found that the blood from VV-2 contained the DNA of two or more people. This was a truly startling finding. On August 2, 2004, Dr. Melton informed the court of her finding. ER 5645.

Vial VV-2 originally contained only Cooper's blood, and should have continued to contain only Cooper's blood. The most logical explanation for the finding is that someone added another person's blood to the vial. Why might that have been done? One explanation is that someone took some of Cooper's blood out of the vial for some purpose (planting it on the t-shirt?), and wanted the vial to appear as full as it previously had been. In order to accomplish that, he or she had to add someone else's blood to the vial to bring it back up to the proper level.

On August 4, Cooper's lawyer raised Dr. Melton's discovery with the district court. Perhaps the court thought Cooper's lawyer was speaking of DNA from the hairs. The court stated, "[W]e never expected that it was going to be Cooper." 8/6/04 RT 138. Counsel replied, "[I]t is not the hairs that were sent that we're talking about. It is the known sample that was sent, and that's been contaminated. And there is a very serious issue about that." *Id.* at 139.

*600 On September 10, Cooper moved for an evidentiary hearing, inter alia, "to determine the cause for the appearance of a 'mixture' of DNA in Petitioner's blood sample also submitted to Dr. Melton." He wrote:

> VV-2 is the blood sample collected from Petitioner at the time of his arrest [.] ... [The][b]lood sample should only have contained Petitioner's DNA [.] ... Dr. Melton's report reveals that a mixture of DNA sources was detected in VV-2.... In light of prior evidence presented by Petitioner regarding tampering or contamination of biological evidence in this case, Dr. Melton's findings regarding VV-2 are extremely alarming and mandate further inquiry.

ER 4168. On February 3, 2005, the district court denied Cooper's motion. It did not mention vial VV-2 in its order.

On April 22, 2005, in final oral argument to the district court, Cooper's counsel returned to the subject of the blood in vial VV-2. He said, "[W]ith regard to VV-2, I just want to be--make this clear. There seems to be a possible misunderstanding. VV-2, which is the sample that Doctor Melton tested and found a mixture in, it's Petitioner's blood sample. It is not a hair sample. I wasn't sure if the Court was clear on that." 4/22/05 RT 153. The court immediately interrupted, "And it's consumed." *Id.* Cooper's counsel agreed that Dr. Melton had consumed the

sample on the card she had been sent, but stated, "[T]hat doesn't necessarily mean that there isn't more VV-2 in San Bernardino or at the DOJ that could be tested." *Id.* The State's counsel then responded, "I can represent to the Court that VV-2 was completely consumed by Doctor Melton. Doctor Melton was shipped the remainder of this particular blood sample, and she consumed it, and it's reflected in her report. So we don't have any more of that particular reference sample." *Id.* at 156.

The State's counsel seems to have meant to say (or at least to have meant the court to understand) that there was no blood remaining in vial VV-2. If that is what counsel meant to say, it was a startling statement. The State had never before said or even suggested such a thing. For example, when Cooper moved in September 2004 for an evidentiary hearing on how the DNA of two people came to be in vial VV-2, the State did not say or even suggest that vial VV-2 was empty. Nor had the State ever presented evidence to support such a statement. Nor had the district court relied on the fact that vial VV-2 was empty in denying Cooper's motion for an evidentiary hearing.

Cooper's counsel told the district court that Dr. Melton's finding that the DNA of two or more people was in the blood that came from vial VV-2 was "extremely alarming and mandate[d] further inquiry." The district court refused to allow any investigation into the issue, even though the presence of additional DNA in vial VV-2 clearly pointed to evidence tampering by the State.

iv. Refusal to Allow Access to the State-Designated Lab's Raw Data and Notes Concerning Asserted Contamination

Dr. Maddox of the Orchid Cellmark laboratory sent a total of ten samples to each of the two designated testing labs. Dr. Siuzdak was the tester designated by the State. Dr. Ballard was the tester designated by Cooper.

Sample 1 was a piece of the t-shirt that had been chosen by Dr. Maddox and Mr. Myers as likely to contain Cooper's blood. Samples 2-6 were taken from other parts of the t-shirt and were intended to serve as controls. Samples 7-10 were not taken ***601** from the t-shirt; they were also intended to serve as controls.

As I will explain below, the EDTA results obtained by Dr. Siuzdak and Dr. Ballard are remarkably consistent for all of the samples except Sample 1 and Sample 8. Dr. Siuzdak found that his piece of Sample 1 (the sample supposedly containing Cooper's blood) contained an extremely high level of EDTA, more than twice as high as any other sample. If Dr. Siuzdak's piece of Sample 1 contained Cooper's blood, and if his EDTA result is valid, this indicates that Cooper's blood was planted on the t-shirt. By contrast, Dr. Ballard found that his piece of Sample 1 contained a somewhat elevated, but fairly low, level of EDTA.

Dr. Siuzdak submitted his report, containing the high EDTA reading for Sample 1, to the district court on October 5, 2004. On October 27, without prior warning, Dr. Siuzdak withdrew his report. His fax to the court stated in its entirety:

> On Monday, October 5th I submitted a report on the Cooper samples tested for the presence of EDTA. I now believe that the samples tested were contaminated with EDTA in my laboratory and therefore must retract the report submitted. I deeply apologize for the inconvenience and confusion this report may have caused.

ER 4464.

Cooper moved to be allowed access to Dr. Siuzdak's raw data and bench notes relevant to his testing of all the samples. ER 4465-82. The district court denied this access. ER 4751. Cooper has never been permitted to see Dr. Siuzdak's raw data and bench notes, and has never been permitted to investigate the nature and possible significance of the purported contamination. Dr. Siuzdak has never been asked to provide an explanation for his conclusion that there was contamination in his lab.

v. District Court Reliance on Faulty Controls

As discussed in greater detail below, five supposed "control" samples were taken from the tan t-shirt. When the two laboratories tested these samples, everyone assumed that they contained no human material (and therefore no human DNA) and that they contained only a background level of EDTA. However, at least three of the five purported control samples taken from the t-shirt (Samples 2, 3, and 4) actually contained human DNA. ER 4659, 4669. The amount of DNA in these samples corresponds closely with an elevated level of EDTA in these same samples. The combined presence of DNA and elevated levels of EDTA strongly suggest that these

second habeas application. Josh testified on April 22, 2005:

> The first time I met Kevin Cooper, I was eight years old and he slit my throat. He hit me with a hatchet and put a hole in my skull. He stabbed me twice, which broke my ribs and collapsed one lung.
>
> ....
>
> Every time Kevin Cooper opens his mouth, everyone wants to know what I think, what I have to say, how I'm feeling, and the whole nightmare floods all over me again. The barbecue, me begging to let Chris spend the night, me in my bed, Chris on the floor beside me. My mother screams, Chris gone, dark house, hallway, *bushy hair*, everything black, mom cut to pieces, saturated in blood, the nauseating smell of blood.
>
> .... Helicopters give me flashbacks of the life flight and my Incredible Hulks being cut off by paramedics. *Bushy hair* reminds me of the killer. Silence reminds me of the quiet before the screams. Cooper is everywhere. There is no escaping him.

4/22/05 RT 129-133 (emphases added).

The district court denied Cooper's counsel's repeated requests to allow discovery concerning Josh's memory and his testimony at trial. The court also denied Cooper's counsel's request to cross examine Josh at the habeas hearing. Immediately after Josh's statement at the hearing, the district court required Cooper's attorneys to make their closing arguments.

The district court denied Cooper's habeas application from the bench the same day Josh testified. The court stated:

> I do recognize that the victims who came today are technically under the federal law--it's not mandated or it's analogous they're not required to speak. But I did think *for completion of the record*, it is helpful for any reviewing court to at least hear their statements about their views of the matter. And so the Court recognizes your objections, but believes that because it's a case of major importance, that it's appropriate to give the victims a say. And it was not a significant period of time, but it does *complete the record* for the reviewing court.

4/22/05 RT 182 (emphases added). Given the district court's refusal to permit discovery and cross examination, Josh's unsworn testimony at the end of the habeas hearing hardly "completed the record."

Instead, Josh's testimony at the 2004-2005 hearing raised new questions. In its order denying Cooper's habeas petition, the district court wrote that the videotape and audiotape interviews benefitted Cooper because "[t]he defense also avoided the drama and sympathy that would have undoubtedly occurred had the defense called ***615** victim Josh Ryen to the stand in the trial *and heard his firsthand recollection about a man with bushy hair.*" Dist. Ct., 510 F.3d at 1000 (citing 4/22/05 RT 133) (emphasis added). Josh's testimony in 2005 was the first time Josh made an in-court statement that he had seen someone with "bushy hair" during the attack. If Cooper's attorneys had been permitted to question Josh in the 2005 hearing, they could have asked him about his recollection of the attacker's "bushy hair" (or "puff of hair"), and could have pointed out that it was extremely unlikely that the man with "bushy hair" on the night of June 4--if, indeed, there was such a man--was Cooper.

### ii. Drop of Blood A-41

A drop of blood was found by Deputy Baird on the wall in the hall across from the master bedroom in the Ryen house. Chips of paint with the blood on them were taken from the wall and labeled "A-41." The State introduced evidence at trial through SBCSD Criminologist Daniel Gregonis that his testing of A-41 showed that its blood characteristics matched those of Cooper. During deliberations the jury requested that Gregonis's testimony about A-41 be read back. 2/11/85 RT 7864-65. This was the second of only two read-backs requested by the jury. (The other was Josh's audiotaped interview with Dr. Forbes.)

There is a strong likelihood that the results of the blood tests performed on A-41, presented at trial, were false evidence. There is also a strong likelihood that state actors tampered with A-41 to ensure that it would generate inculpatory results when Cooper's post-conviction DNA testing was conducted in 2002.

Gregonis delayed most of his testing of A-41 until he had information about Cooper's genetic profile--that is, until he knew what he had to match. He then delayed doing the most sensitive and discriminating tests of A-41 until after Cooper had been arrested and had the vial of Cooper's blood (vial VV-2) in his lab. Without contacting Cooper's counsel, Gregonis re-ran

tests that consumed more of the limited sample that constituted A-41. Gregonis then tested a known sample of Cooper's blood side by side on the same testing plate with A-41, but initially denied doing so and represented under oath that he had tested the samples blind. ER 761.

When the results of Gregonis's tests on A-41 were initially inconsistent with Cooper's expert's results for a known sample of Cooper's blood, Gregonis altered his lab notes and claimed that he had misinterpreted his results. ER 747. Here is some of Gregonis's trial testimony:

Q [by Cooper's attorney]: Did you change your mind about A-41 after you learned that if your original call was accurate, A-41 couldn't have come from Mr. Cooper?

A [by Gregonis]: Not immediately, no. But it was after. Yes.

Q: Prior to your learning that if your original call about A-41 was correct, then it couldn't have come from Mr. Cooper, how many times did you testify on the witness stand, under oath, that A-41 was a B and nothing else but a B?

A: It is probably about three times.

Q: And your explanation was that it was a technical fault on your part, you made a mistake?

A: Essentially, yes.

ER 746.

The blood sample in A-41 has had a disturbing pattern of being entirely "consumed" in the testing, and then reappearing in a form that could be subjected to further testing. Gregonis had initially ***616** used so much of the limited sample (or so he said) that when the parties finally did joint testing, they were forced to place the remaining tiny flakes of white paint in a liquid solvent to dissolve any remaining blood. The sample was so small that their results were largely inconclusive. All of the chips that had had any traces of blood on them were discarded. ER 722-23; 12/6/84 RT 4543-47; 1/30/85 RT 7380-87. Then, in early July 1984, "just out of curiousity [sic] sake, [Gregonis] ... open[ed] the[A-41] pillbox and saw a very small quantity of blood remaining." ER 722-24; 12/6/84 RT 4548. The parties tested those remaining small specks of blood in October 1984, and again the results were inconclusive. 12/5/84 RT 4442-45.

In August 1999, Gregonis checked A-41 out of the evidence storage room for one day. ER 1629, 2650-54. When Cooper's post-conviction DNA testing took place in 2002, a "bloodstained paint chip" and "blood dust" had inexplicably, and conveniently, appeared in the A-41 canister. ER 790. The blood on that chip was tested, and Cooper's DNA was found. The appearance of a blood-stained chip in 2002 is, to say the least, surprising, given that Gregonis had testified at trial that in the October 1984 testing of A-41 they had processed and discarded all of the paint chips with blood on them. ER 722-23.

In the 2004-2005 habeas proceeding, Cooper requested EDTA testing of A-41. Without taking evidence on the feasibility of testing any remaining A-41 for the presence of EDTA, the district court rejected Cooper's request. Dist. Ct., 510 F.3d at 948-50; ER 3467; 6/29/04 RT 209.

iii. Pro-Ked Shoeprints

Three matching shoeprints made by a Pro-Ked Dude shoe were critical evidence against Cooper at trial. According to testimony at trial, one was a bloody print found on a crumpled sheet in the master bedroom of the Ryen house. Another print was found on a spa cover at the Ryen house outside the master bedroom. The third print was found in dust on the floor inside the Lease house near a pool table.

I discuss below difficulties with the evidence about whether Cooper was, or could have been, wearing Pro-Ked Dude shoes. For the moment, I am concerned only with the suspicious circumstances under which the shoeprints were purportedly found.

The most suspicious of the shoeprints are the two found at the Ryen house. The most incriminating was the bloody print purportedly found on the crumpled sheet in the master bedroom. At trial, only one person testified that he saw the bloody print while the sheet was still in the bedroom. That person was SBCSD Deputy Duffy. No one else claimed to have seen the bloody print while the sheet was still in the bedroom. However, Deputy Duffy had testified under oath at Cooper's preliminary hearing that he had *not* seen the print in the master bedroom. ER 706, 1557. If Deputy Duffy was telling the truth at the preliminary hearing, no one saw the bloody print on the sheet while it was in the bedroom. If Deputy Duffy was telling the truth at the preliminary hearing, he lied at trial.