

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

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March 16, 2016

The Honorable Edmund G. Brown, Jr.  
Governor of the State of California  
State Capitol, Suite 1173  
Sacramento, CA 95814

Please respond to: Robert M. Sanger Sanger Swysen & Dunkle 125 E. De La Guerra Street, Suite 102 Santa Barbara, CA 93101
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Re: Application for Clemency for Kevin Cooper

Dear Governor Brown:

The California Attorneys for Criminal Justice (CACJ) urges you to grant clemency or a reprieve pending further investigation to Kevin Cooper. This request is unusual in several regards, however, for the reasons stated, we respectfully assert that it is time for this Administration to take this first, important step. The grant of clemency or a reprieve pending further investigation is not only critical to Mr. Cooper but critical for all others for whom the imposition of the death penalty would be the ultimate and irreversible injustice.

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV, CACJ By Laws). CACJ's membership consists of approximately 1,700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 35 years, CACJ has appeared before the courts as an amicus curiae on matters of importance to the administration of justice, and to its membership.

This letter is submitted on behalf of CACJ with the approval of the CACJ Amicus Committee and John Phillipsborn, Committee Chair. The undersigned is Past President of CACJ, former Chair of the CACJ Death Penalty Committee, a criminal defense lawyer with over 40 years experience and a Certified Criminal Law Specialist<sup>1</sup> for the last 34 years. The undersigned has consulted with Mr. Cooper's defense team and has met with Mr. Cooper at San Quentin. In

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<sup>1</sup>Certified by the State Bar of California Board of Legal Specialization.

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addition, as a representative of CACJ,<sup>2</sup> the undersigned had the opportunity, on February 6, 2016, to interview Justice John Paul Stevens, Associate Justice of the United States Supreme Court, retired.

Justice Stevens, in this remarkable interview, specifically recognized that the Governor of California is in a particularly strong position to take a firm step to bring attention to the impropriety of the death penalty.<sup>3</sup> He stated forcefully that the death penalty, in practice, is severely flawed. He spoke to the issues – all of which are present in Kevin Cooper’s case – that death cannot be reversed in the case of mistake, that many people have been convicted only to find that they were not guilty, that the cost and dangers of the death penalty cannot justify any marginal benefit of its use (if there is any benefit), and that the length of time that transpires from the original trial to execution, if any, further diminishes that potential or imaginary benefit.

Justice Stevens had taken this position on the merits of the death penalty while on the bench, first in *Lackey v. Texas*<sup>4</sup> regarding the effects of delay and then in *Baze v. Rees*<sup>5</sup> where he set forth in detail his position as to why the death penalty itself, in his opinion, violates the Eight

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<sup>2</sup>This was for the purposes of the annual Capital Case Defense Seminar which is jointly sponsored by CACJ and the California Public Defenders Association.

<sup>3</sup>The interview was conducted at Ft. Lauderdale, Florida, by the undersigned and was presented to the Capital Case Defense Seminar in San Diego, California on February 13, 2016. It can be seen in its entirety at:  
<http://www.cacj.org/Resources/Educational-Video-Archive/Interview-with-Justice-Stevens.aspx>.

<sup>4</sup> *Lackey v. Texas* (1995) 514 U.S. 1045. Justice Stevens’ opinion in *Lackey* was filed as a Memorandum to the denial of certiorari in that case. Justice Breyer agreed that the matter would warrant further consideration.

<sup>5</sup> *Baze v. Rees* (2008) 553 U.S. 35. Justice Stevens filed a concurrence in this case, ultimately agreeing that the issue before the court, i.e., the mode of execution by lethal injection, did not warrant reversal. However, he stated his reasons for believing that the death penalty was unconstitutional in great detail, covering the same issues addressed in his interview of February 6, 2016.

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Amendment to the Constitution. In 2014, he published a book, Six Amendments,<sup>6</sup> in which he urged a Constitutional Amendment abolishing the death penalty. In each instance -- the two opinions, his book and his February 6, 2016 interview -- he made it clear that the United States Supreme Court could abolish the death penalty but, as a practical matter, that would only occur if the Court as a whole were to find it to violate the Eight Amendment.

Rather than waiting for the Court, Justice Stevens made it emphatically clear in his interview that he believed that political action should be taken now to end the death penalty. He supported legislators and voters in bringing an end to it state by state. However, he also acknowledged that the Governor of California, the state having the largest death row in the country, was in a particularly good position to make a clear statement about the inappropriateness of the death penalty. He said,

“The number of people on death row is another remedy that is available in most states. And I assume that the Governor of California would have the power to commute those sentences as the Governor of Illinois did some years ago. He commuted all the sentences of the people who were then on death row which preceded a decision later on to abolish the death penalty in Illinois. And it would seem to me that you have a very enlightened Governor in your state and conceivably he might consider that action as a possible remedy.”<sup>7</sup>

Justice Stevens makes a very solid point. We can look to the United States Supreme Court to consider abolition as a matter of Eighth Amendment law but we should not anticipate that such a remedy will come soon. After all, in July of 2015, Justice Breyer, joined by Justice Ginsburg, filed a dissent to a denial of certiorari in *Glossip v. Gross*,<sup>8</sup> inviting full briefing on the constitutionality of capital punishment under the Eighth Amendment. Earlier this year, in *Walter*

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<sup>6</sup>John Paul Stevens, Six Amendments, Little Brown and Company, New York (2014)

<sup>7</sup>Interview, February 6, 2016.

<sup>8</sup> *Glossip v. Gross* (2015) 135 S. Ct. 2726.

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*v. Pennsylvania*,<sup>9</sup> specifically in response to the opinion in *Glossip*,<sup>10</sup> a petition for certiorari was filed asking the Court to do just that. It was denied without dissent.<sup>11</sup> Therefore, as Justice Stevens made absolutely clear when he said, “It is time to end it,”<sup>12</sup> he also recognized that the history of formal challenges before the Supreme Court has not ended it and does not seem likely to anytime soon. Injustices will continue to occur and the Courts may not – and in Kevin Cooper’s case have not – remedied these injustices.

Therefore, CACJ comes before you to urge that you take the first small but critical step in bringing capital punishment to task in California. That step is not only critical as a matter of policy but is critical to the very life of Mr. Cooper who appears to be the victim of alarming police practices, confirmation bias, corrupted evidence, and racial prejudice.<sup>13</sup> We respectfully submit that your action is critical in the discharge of the duties of Governor of the State of California.

This is an unusual request. Mr. Cooper is seeking relief based on innocence and on the failure of law enforcement, the trial courts and appellate courts to remedy an injustice. This is not the typical petition involving remorse, rehabilitation and a request for clemency. It is a request for a clemency and a reprieve to do a proper investigation. Yet, it is still a request for mercy. Not mercy for the life of someone who committed a horrible crime – although there is a place for that – but mercy for the life of a man who appears to be innocent and for whom the system has failed spectacularly. Due to these failures, this is something that only the Governor of the State of California can now address.

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<sup>9</sup> *Walter v. Pennsylvania* (2016) 136 S. Ct. 981.

<sup>10</sup>It should be noted that the Eight Amendment arguments on the constitutionality of capital punishment itself have been submitted to the United States Supreme Court routinely, predating *Furman v. Georgia* (1972) 408 U.S. 238, continuing on after *Gregg v. Georgia* (1976) 428 U.S. 153 and to the present, e.g., see, *People v. Turner* (2004) 34 Cal.4th 406, filed by the undersigned in 2002.

<sup>11</sup> *Walter v. Pennsylvania* (2016) 136 S. Ct. 981.

<sup>12</sup> Interview, February 6, 2016.

<sup>13</sup> See the dissent of Judge Fletcher to the denial of *en banc* review in *Cooper v. Brown* (9<sup>th</sup> Cir. 2009) 565 F.3d 581.

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CACJ, as an organization, is opposed to the death penalty for all the reasons that Justice Stevens has articulated. Capital punishment simply has no place in our system of government. It is anachronistic and it is wrong on many levels. In this particular case – the case involving the life of Kevin Cooper – it would be strikingly wrong for the Governor not to intercede. Judicial passivity has allowed injustice to continue by inertia to move toward the death of Mr. Cooper at the hands of government executioners. Looking at the record, this passivity the only rational conclusion is that the courts should not have been passive and should have interceded. That judicial passivity is morally unforgivable. We respectfully submit that, given the fact that no other remedy is available, it would be as morally unforgivable for the Governor to passively permit that same inertia to lead to the final lethal injection of Mr. Cooper.

But CACJ also sees this as an opportunity for the Governor to take the enlightened step, as Justice Stevens suggested, of saying that this administration will not allow this state to proceed with a flawed system that places in jeopardy the lives of not only Mr. Cooper but others who may have been failed by the system. Mr. Cooper’s petition asks that the Governor order a further investigation into this case. That investigation is critical, not only for Mr. Cooper, but also for others facing death for a crime they did not commit. Since the courts have failed in this case and there is no “innocence commission” or other remedy, the governor’s office is the last chance to take this important step.

In 1972, in a remarkable opinion that should be re-read, Chief Justice Wright, writing for the California Supreme Court, held that the death penalty was unconstitutional under state law in *Anderson*.<sup>14</sup> The *Furman* case<sup>15</sup> followed in the United States Supreme Court the same year only see the re-institution of capital punishment in the death states soon thereafter, including California in 1977. In 2004, the California Commission for the Fair Administration of Justice reviewed how this anachronistic experiment had done over the last 30 years. The Commission was Chaired by the Honorable former Attorney General John K. Van de Kamp. The Commission issued a Report in 2008, finding, among other things, that the death penalty system in California was profoundly flawed.<sup>16</sup> The then Chief Justice, Ronald George, pronounced the system

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<sup>14</sup> *People v. Anderson* (1972) 6 Cal.3d 628.

<sup>15</sup> *Furman v. Georgia, supra*, 408 U.S. 238.

<sup>16</sup> “California Commission on the Fair Administration of Justice: Official Recommendations on the Fair Administration of the Death Penalty in California,” June 30, 2008.

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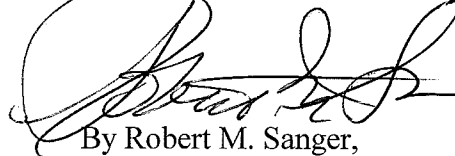
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“dysfunctional.”<sup>17</sup> The current Chief Justice, Tani Cantil-Sakauye, has pronounced the system as “not working.”<sup>18</sup>

Justice Stevens has joined other members of the United States Supreme Court, including Justices William Brennan, Thurgood Marshall<sup>19</sup> and Harry Blackmun,<sup>20</sup> in stating that the death penalty violates the Constitution. But, despite the entreaty of Justices Stephen Breyer and Ruth Bader Ginsburg in *Gossip*, Justice Stevens and we have to acknowledge that Eight Amendment law is not likely to remedy the problem before further injustice is done. Justice Stevens called upon the Governor of California – and CACJ calls upon you as well – to do justice. It can start with doing justice in the case of Kevin Cooper. But that critical step in the case of Kevin Cooper will also be a critical step forward to re-evaluate capital punishment as an institution in this state and around the country.

Respectfully submitted,

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE



By Robert M. Sanger,  
Past President of CACJ,  
Former Chair of the CACJ Death Penalty Committee  
on behalf of CACJ and the CACJ Amicus Committee  
as Amicus Praefectae to the Application for Clemency  
of Kevin Cooper

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<sup>17</sup> Ronald M. George, Reform Death Penalty Appeals, L.A. Times, Jan. 7, 2008 (“The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing.”) (cited in Commission Report at 164–65 n. 3)

<sup>18</sup> Tani Cantil-Sakauye, California Chief Justice Urges Reevaluating Death Penalty, L.A. Times, December 24, 2011.

<sup>19</sup> *Gregg v. Georgia* (1976) 428 U.S. 227.

<sup>20</sup> *Collins v. Collins* (1994) 510 U.S. 1141.