

December 14, 2023

The Honorable Gavin Newsom
Governor of the State of California
State Capitol
Sacramento, CA 95814

Dear Governor Newsom:

I write on behalf of the American Bar Association (ABA) to express our ongoing concerns regarding the case of death-row inmate Kevin Cooper, whose case we previously wrote about to former governor Jerry Brown in 2016.¹ In that letter, the ABA encouraged conducting “a full and transparent investigation of Mr. Cooper’s guilt.” I understand that on May 28, 2021, you ordered an independent investigation of Mr. Cooper’s application for clemency and claims of innocence and assigned Special Counsel. On January 13, 2023, Special Counsel published a report concluding that Mr. Cooper is guilty of the capital offense. Most recently, on October 26, 2023, Mr. Cooper’s pro bono counsel published a “Rebuttal Report” that responded to Special Counsel’s investigation and disputed Special Counsel’s findings.

Without taking any position on the factual issues in dispute or passing judgment on the quality of Special Counsel’s investigation, I write to underscore concerns that all law enforcement files were not disclosed to Special Counsel during their investigation. I urge you to take action to ensure that the State discloses all relevant evidence and that any such evidence is evaluated before acting on Mr. Cooper’s petition for executive clemency.

The ABA does not take a position for or against the death penalty per se, but it has long been concerned with due process and accuracy in criminal cases and particularly in capital cases due to the irrevocable nature of the penalty. “To reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty,” the ABA recommends adopting certain principles which ensure that law enforcement understand their disclosure obligations and that material evidence is preserved.² Consistent with these principles, and in the interests of “promot[ing] a fair, accurate, and expeditious disposition” of cases, the ABA’s Criminal Justice Standards for the Discovery Function (2020) recommend that prosecutors permit the “inspection, copying, testing, and photographing of disclosed documents or tangible objects” including “[a]ll law enforcement records created in the case” and “any material or information that tends to

¹ American Bar Association, Letter from Paulette Brown to Gov. Jerry Brown, Mar. 14, 2016, available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/ab-a-letter-kevin-cooper.pdf.

² American Bar Association, Principles and Standards for Prosecutors to Reduce the Risk of Wrongly Convicting the Innocent, 2004 AM 111F.

negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence."³

In their Rebuttal Report, Mr. Cooper's counsel objected to the State's failure to provide Special Counsel "all documents in their possession relating to Mr. Cooper's conviction."⁴ Mr. Cooper's counsel previously identified several categories of records that they claimed had never been disclosed, including records related to multiple physical pieces of evidence from the crime scene, the surviving victims' initial description of his attackers, and police files regarding alternate suspects.⁵ They characterized these documents as "directly probative of the integrity of Mr. Cooper's conviction and his claims of innocence..."⁶ It is my understanding that Special Counsel requested these specific records from the State, but prosecutors turned over only previously disclosed information.⁷ As a result, it appears that these requested records were never viewed by Special Counsel and are not included in any conclusions drawn in Special Counsel's report.

Concerns about this missing information are not new. For nearly 40 years, Mr. Cooper's attorneys have sought this same information from the State,⁸ and courts reviewing his case have shared similar unease. In her concurring opinion denying relief on procedural grounds, Judge McKeown wrote that she was "troubled" because "[s]ignificant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued..."⁹ Noting "serious questions as to the integrity of the investigation and evidence supporting the conviction," Judge McKeown blamed the State, emphasizing that while investigations will often not be perfect, the expectation is "full disclosure, competency in the investigation, and confidence in the evidence."¹⁰ Given the numerous errors that have occurred throughout the history of the investigation and prosecution of this case—including major pieces of physical evidence that the State concedes were destroyed rather than preserved and tested—it is particularly important that there be "full disclosure" of the remaining records. Without transparency about law enforcement's original investigation of the

³ American Bar Association Standards for Criminal Justice: Discovery, (4th ed. 2020), Standard 11-1.2 (Objectives of these Standards), Standard 11-2.1 (Prosecutorial disclosure).

⁴ Rebuttal Report at 6.

⁵ *Id.* at 7, Exhibit 4.

⁶ *Id.* at 8.

⁷ *Id.* at 7 ("In fact, Special Counsel informed Mr. Cooper that he received only 'discovery materials that were [already] produced to the Cooper defense team in connection with Mr. Cooper's 1984 trial.'").

⁸ Such efforts are consistent with longstanding norms of capital defense practice, as detailed in the ABA Guidelines for the Appointment & Performance of Death Penalty Cases. 31 Hofstra L. Rev. 913 (2003). The commentary to Guideline 10.7 (Investigation), instructs that "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery." *Id.* at 1020. The Guidelines recognize that this information is necessary because "faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, flawed or false forensic evidence, and the special vulnerability of juvenile suspects—have contributed to wrongful convictions in both capital and non-capital cases." *Id.* at 1017.

⁹ *Cooper v. Brown*, 510 F.3d 870, 1004 (9th Cir. 2007) (McKeown, J., concurring).

¹⁰ *Id.*

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case, confidence is undermined in any conclusions drawn—whether by judge, jury, or special counsel—a result that is “wholly discomfoting.”¹¹

In 2016, the ABA wrote that an investigation into Mr. Cooper’s claims of innocence was necessary to “maintain public confidence in the integrity of California’s capital punishment system.” This concern remains as important and relevant today as it was 7 years ago. I thank you for the careful approach you have taken with consideration of this matter up to this point and urge you to order additional investigation, specifically as it relates to law enforcement records, before reaching a decision about whether to grant Mr. Cooper’s request for executive clemency.

Sincerely,

Mary Smith

Mary Smith

¹¹ *Id.* at 1007.