



OFFICE OF THE GOVERNOR

July 3, 2018

Via U.S. Mail & E-mail

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Re: Inmate Kevin Cooper's Clemency Request

Dear Mr. Hile,

I am writing regarding the petition for executive clemency you have filed on behalf of inmate Kevin Cooper. As you know, the parties present two drastically different versions of the record in this matter. The People contend that this case has been extensively litigated at every level of the state and federal courts, including the San Diego Superior Court, Fourth District Court of Appeal, California Supreme Court, U.S. District Court for the Southern District of California, Ninth Circuit Court of Appeals, and U.S. Supreme Court. Two unsuccessful clemency petitions also were made to Governor Schwarzenegger. The People contend that every court that has reviewed the case has found overwhelming evidence that Mr. Cooper committed the murders at issue here.

More specifically, the People assert that the courts have found that DNA testing directly links Mr. Cooper to the murders and that the evidence clearly demonstrates Mr. Cooper's guilt, including via his blood found at the crime scene, his blood on a t-shirt that also contained the genetic material of the victims, and his saliva found on prison-issued cigarette butts in the victims' car. The People also argue that Mr. Cooper was tied to the crime by footprints at the crime scene, a blood-stained button found at the nearby home in which he was sleeping (the "hideout house"), a blood-stained rope found in the hideout house, a hatchet used in the murders that was missing from the hideout house,

hairs in the hideout house consistent with some of the victims' hairs, luminol testing in the sink and shower of the hideout house consistent with the presence of blood, and a sheath found in the hideout house matching one of the murder weapons.

The People also claim that the crimes at issue here were consistent with Mr. Cooper's violent criminal history, which includes two arrests for rape—one prior to the murders in which he escaped from a mental institution in Pennsylvania, broke into a nearby home and was discovered by a teenage girl who was visiting a friend, abducted her, drove her to a secluded park, threatened to kill her, raped her, and fled in her car; another just before his arrest in which he allegedly violently raped a second victim on a boat and was charged with forced oral copulation, rape by threat, sexual penetration by a foreign object with force, and sodomy.¹

The People further contend that each time additional forensic testing has been performed in this case, including testing in 2002 and again in 2004, the test results only further established Mr. Cooper's guilt—most notably, the re-testing confirmed that it was Mr. Cooper's blood on the tan t-shirt (that also contained the DNA of several of the victims), confirmed that blood found at the crime scene matched Mr. Cooper's DNA, and confirmed that the cigarette butts found in the victims' car contained Mr. Cooper's saliva.

On behalf of Mr. Cooper, you contend that the evidence against your client was planted by law enforcement. You point to prior tests showing heightened levels of the preservative EDTA (which you assert suggests evidence tampering), multiple incidents in which key evidence “mysteriously appeared” only after successive searches by law enforcement, DNA tests revealing genetic material of unknown origin on key pieces of evidence, and a test of Mr. Cooper's blood sample (VV-2) containing both Mr. Cooper's blood along with blood of unknown origin. You also cite the purported destruction of evidence by law enforcement, including a blue t-shirt and bloody overalls that you allege are linked to the actual killer or killers in this case. You point to witness accounts claiming that, shortly after the murders took place, they saw three men in a car matching the description of the Ryen's station wagon, and other witness accounts claiming they saw three potential suspects in a bar near the crime scene and that the suspects had blood on their clothes. You cite a purported confession to the crime by someone other than Mr. Cooper and you contend that the lone survivor in this case, Joshua Ryen, originally identified three men (not one), either Caucasian or Hispanic, as the attackers.

You now ask Governor Brown to order further forensic testing—testing that multiple courts have expressly rejected as unnecessary and unjustified. Attorneys in this

¹ This second arrest for rape occurred while there was a nationwide manhunt for Mr. Cooper in connection with the Ryen murders. After escaping prison and being on the run for many weeks, Mr. Cooper was arrested for the rape and, while in custody, the rape victim identified Mr. Cooper from a wanted poster.

office have evaluated your submissions, as well as filings made by other interested parties, including the District Attorney's Office and the victims' families and friends. We have thoroughly reviewed the record, the lengthy litigation and procedural history of the case, Mr. Cooper's record of arrests and convictions, and the entirety of his central file. We have taken the time to better understand the state of the evidence and the additional forensic tests you have requested. We have carefully considered your arguments, and attorneys in the Governor's Office have met in person or by telephone with you, your investigators, as well as attorneys from the California Attorney General's Office. Your allegations clearly deserve the serious consideration they have received and we now request more information in order to complete our evaluation of your requests for additional testing.

We respectfully request that you respond to the questions below no later than August 17, 2018. These questions are not intended to limit the scope of information that may be considered for purposes of clemency, but instead to clarify some of the details of your client's clemency application.

- 1) With respect to every piece of evidence you want tested in this case, describe with particularity:
 - i. the current location of the evidence;
 - ii. what kind of testing you want performed;
 - iii. how you want the test performed (*e.g.*, for the tan t-shirt, describe what portion of the t-shirt would be tested, the manner in which the test would be performed, etc.); and
 - iv. what information you believe new DNA testing would yield that was not already provided by previous testing.
- 2) Please rank in order of importance every piece of evidence you want tested in this case (starting with the evidence that you think is the most important).
- 3) If re-testing were to occur in this case, how should it be transported and maintained such that any potential chain-of-custody, tampering, and contamination concerns are addressed?
- 4) Do you have a forensic laboratory that you would propose to retain for further testing? Describe their qualifications and experience, and in particular their experience with the latest forms of DNA gathering and testing.
- 5) You propose that novel methods of DNA testing, including "touch DNA," be utilized. Please be as specific as possible in describing exactly what kind of testing you are referencing. Describe the scientific validity of these proposed forensic methods, including the use of these methods in other criminal cases, any published literature describing or validating these

methods, and any opinions expressed by the relevant scientific and forensic community about the proposed methods.

- 6) Describe what safeguards you would propose to prevent the exhaustion or destruction of any evidence.
- 7) If additional testing is ordered, should the parties enter into a DNA testing agreement similar to the agreement reached in 2001? Is there a forensic testing process that the parties can agree would be beyond reproach? Can the parties agree on which portions of the evidence to analyze if testing is to proceed?
- 8) To the extent not addressed above, you argue that “there is a good chance to obtain ‘touch’ DNA evidence” that will enable you to determine the “as yet unidentified DNA contributors on A-41, the tan t-shirt, and blood vial VV-2.” Why would touch DNA make it more likely that the unidentified DNA contributors can be identified? What will it provide that previous testing could not?
- 9) You have previously asserted that an individual named Lee Furrow was involved in the murders at issue here. Does a DNA sample from Lee Furrow already exist and/or do you (or anyone else) possess material from Mr. Furrow that might yield a DNA sample?
- 10) You have previously asserted that an individual named Kenneth Koon was involved in the murders at issue here. Does a DNA sample from Kenneth Koon already exist and/or do you (or anyone else) possess material from Mr. Koon that might yield a DNA sample?
- 11) Given that the evidence your client seeks to have retested has been handled by multiple parties, including law enforcement and laboratory technicians, and given that much of the handling of these materials occurred before any form of DNA testing even existed (and therefore no protocols for the proper handling of these materials would have been in place), do you think it’s possible that any additional testing is likely to uncover multiple DNA contributors of unknown origin?
- 12) If further DNA testing is ordered and it shows only the presence of additional DNA material of unknown origin (meaning the DNA could have come from anyone who handled the materials or through inadvertent transfers of genetic material), how would such a result aid in the determination of Mr. Cooper’s guilt or innocence?
- 13) Identify every item of forensic evidence that you maintain was planted or tampered with and identify with as much specificity as possible who you contend planted or tampered with the evidence.

- i. To the extent not addressed above, please describe in greater detail your allegation regarding the planting or tampering of evidence with respect to cigarette butt evidence related to the Ryen car. Are you claiming that the San Bernardino Sheriff's Department planted or tampered with this evidence in 1983 or in 2002, or both? Are you alleging that others (including but not limited to the California Department of Justice crime lab and/or law enforcement in San Diego) were also involved, and if so, when?
 - ii. To the extent not addressed above, when are you claiming that Mr. Cooper's blood was planted on the tan t-shirt, and by whom?
 - iii. To the extent not addressed above, are you asserting that items in the possession of the San Diego Superior Court clerk from 1984 to 2001 were tampered with during that time period and, if so, by whom? More specifically, you appear to contend that law enforcement officials in San Bernardino withdrew Mr. Cooper's blood from the vial marked VV-2 in 1999 and planted the blood on the tan t-shirt. The People claim that the tan t-shirt has been in continuous possession of the San Diego Superior Court since Mr. Cooper's trial. Do you dispute that point, or do you claim that officials in San Diego cooperated with San Bernardino law enforcement (approximately 16 years after the trial) to tamper with evidence and place Mr. Cooper's blood on the tan t-shirt?
- 14) You highlight in your client's clemency petition the fact that the police issued an all-points-bulletin for three white or Hispanic suspects. At or about the same time, you appear to also argue that the police were planting evidence to frame Mr. Cooper. If this is your contention, how do you explain this apparently inconsistent behavior by the police?
- 15) If you claim that law enforcement planted Mr. Cooper's blood prior to the advent of DNA testing, why in your view would they plant such evidence?
- 16) Do you acknowledge that the presence of EDTA in any piece of forensic evidence may not be the result of tampering but may instead be the result of lab contamination, or the result of a lab intentionally using EDTA to preserve a blood sample? If so, if subsequent testing were to reveal the presence of EDTA in any piece of forensic evidence, what significance should be ascribed to that fact?
- 17) Previous court orders have stated that Mr. Cooper escaped from a mental hospital in Pennsylvania in 1982 while awaiting trial on a number of charges and that while on the run, he kidnapped, raped, and then stole the car of a teenage girl who had interrupted him while he was burglarizing a home.

Should this prior arrest have any bearing on your client's clemency application? Why or why not?

- 18) Records show that, at the time of his arrest for the murders at issue here, Mr. Cooper was also arrested for raping a woman on a boat near the time of his capture. Should the circumstances leading to his arrest for forced oral copulation, rape by threat, sexual penetration by a foreign object with force, and sodomy, or the fact that the Santa Barbara District Attorney's Office apparently did not pursue these charges in light of the murder convictions, have any bearing on your client's clemency application? Why or why not?
- 19) You claim to have recently discovered new evidence related to the case. Please describe this recently discovered evidence and detail whether it could form the basis of a federal or state habeas corpus petition.

We look forward to receiving your answers to these questions no later than August 17, 2018. The People will be afforded an opportunity to respond to your submission. If further briefing is required beyond that, we will let you know.

Sincerely,



Peter A. Krause
Legal Affairs Secretary

cc: California Department of Justice, Office of the Attorney General
San Bernardino District Attorney's Office