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The Honorable Edmund “Jerry” Brown
Governor of the State of California
State Capitol, Suite 1173
Sacramento, CA 95814

Dear Governor Brown:

I write on behalf of the American Bar Association (ABA) to express our concerns regarding the case of California death-row inmate Kevin Cooper, whose petition for executive clemency has recently come before your Office. Mr. Cooper’s arrest, prosecution, and conviction are marred by evidence of racial bias, police misconduct, evidence tampering, suppression of exculpatory information, lack of quality defense counsel, and a hamstrung court system. We therefore believe that justice requires that Mr. Cooper be granted an executive reprieve until the investigation necessary to fully evaluate his guilt or innocence is completed.

This case has captured national and international attention, including a ruling by the Inter-American Commission on Human Rights that Mr. Cooper’s conviction and sentence violated his human rights, as it is a particularly unique example of a criminal justice system falling short at every stage.¹

Mr. Cooper’s claims have come to the ABA’s attention because they implicate a variety of our policies designed to ensure that, in cases where the government seeks to impose the ultimate punishment of death, we first have confidence that the process has been fair and all compelling claims have been subject to meaningful review. Specifically, the ABA is greatly concerned that, although Mr. Cooper has exhausted all of his legal appeals, evidence has emerged in the more than 30 years since his arrest that continues to cast doubt on his conviction and that has never been comprehensively examined by any court.²

¹ In addition to significant media coverage, the case also inspired Ninth Circuit Court of Appeals Judge William Fletcher to pen a more than 100-page dissent from the Ninth Circuit’s refusal to rehear the case *en banc*. Judge Fletcher’s dissent began: “The State of California may be about to execute an innocent man” *Cooper v. Brown*, 565 F.3d 581, 581 (9th Cir. 2009) (W. Fletcher, dissenting). *See also* Kevin Cooper v. United States, Case 12,813, Inter-Am. Comm’n H.R., Report No. 78/15, OEA/Ser.L/V/II.156, doc. 31 (2015).

² The procedural history of Mr. Cooper’s case is voluminous and complex, and reflects a bitterly divided Ninth Circuit regarding the merits of Mr. Cooper’s claims. Mr. Cooper faced execution twice, ultimately receiving last minute stays in both instances to further explore his claims of innocence. While Mr. Cooper lost his successive federal habeas appeal in 2007, it bears remembering that the information that was then

Thus, I write with awareness of the broad clemency power available to you as Governor to ensure that no person is put to death without meaningful review of his or her guilt. Indeed, the ABA has a great interest in ensuring that clemency—determined by the Supreme Court to be “the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion”³—continues to function as the “fail-safe” within the capital punishment system.

The ABA’s 2010 *Protocols on the Administration of Capital Punishment* recommend the following:

(1) The clemency decision-making process **should not assume that the courts have reached the merits** on all issues bearing on the death sentence in a given case; decisions should be based upon an **independent consideration of facts and circumstances** (4) Clemency decision-makers should consider as factors in their deliberations . . . **any evidence relating to a lingering doubt about the inmate’s guilt** (8) Clemency proceedings should be formally **conducted in public and presided over by the Governor** or other officials involved in making the clemency determination; (9) Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the **limitations on the judicial system’s ability to grant relief** under circumstances that might warrant grants of clemency.⁴

While executive clemency is an extra-judicial process, taking place outside the province of the courts, it is no less significant a stage of review when the government intends to take a life. For a variety of reasons, the use of clemency in capital cases has declined in recent years. Nevertheless, the ABA has long recognized that the clemency power should be taken especially seriously in states that impose the death penalty. The responsibility to undertake a thorough and robust final review of a death sentence is particularly significant in cases such as this where the State has intentionally disposed of potentially exculpatory evidence, leaving many questions unanswered.

We understand that the California clemency power grants your Office broad authority in reviewing petitions for executive clemency, including the authority to direct the Board of

considered was severely limited by the fact that significant evidence was lost or destroyed over the course of the investigation into this case by law enforcement, and by the well-known constraints of the Anti-terrorism and Effective Death Penalty Act (AEDPA). What is clear, however, is that significant doubts regarding Mr. Cooper’s guilt continue to remain and trouble jurists, including both the IACHR and the five judges who joined Judge Fletcher’s 2007 dissent.

³ *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

⁴ AM. BAR ASS’N, *Protocols on the Administration of Capital Punishment* (2010) (emphasis added), available at

www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf.

Parole Hearings to open a full investigation into a case.⁵ We encourage the Board to conduct this robust review and investigation in light of significant evidence that was never satisfactorily reviewed by the courts. Such additional investigation into the legitimacy of Mr. Cooper's conviction is warranted here, given the State's admitted mishandling and destruction of forensic evidence essential to the accurate resolution of this case.⁶ Thus, we ask you to consider carefully these issues as you review Mr. Cooper's petition for executive clemency, and we encourage you to exercise your statutory authority to undertake the investigation needed to ensure that California does not commit the ultimate injustice: the execution of an innocent man.

While the ABA takes no position on the death penalty *per se*, we have a strong interest in ensuring a fair and accurate justice system. In 1997, the ABA passed a Resolution urging jurisdictions which impose capital punishment "not to carry out the death penalty until the jurisdiction implements policies and procedures . . . intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed."⁷ In addition, the 1997 Resolution was concerned that the "longstanding patterns of racial discrimination [that] remain in courts across the country" significantly undermine the potential for fair resolution of capital cases, particularly in situations such as this where the accused is a person of color and the victims are white.

Mr. Cooper's case is emblematic of the broader issues that the ABA has identified that undermine fairness in the administration of the death penalty. Moreover, the facts of Mr. Cooper's case cast considerable doubt on the process he received and the fairness and accuracy of his conviction for the 1983 murders of Doug, Peggy and Jessica Ryen, and Christopher Hughes. In particular, it is difficult to ignore the following evidentiary issues identified by Mr. Cooper's current counsel that he claims have not had a judicial hearing or been resolved:

- Mr. Cooper, an African-American man, was pursued by police as the only suspect in this case, despite considerable evidence pointing to multiple white or Hispanic perpetrators. The sole surviving victim of the attacks

⁵ CAL. PENAL CODE § 4812 (West, Westlaw through Ch. 2 of 2016 Reg. Sess. and Ch. 1 of 2015-2016 2nd Ex. Sess.).

⁶ Judge McKeown, part of the three-judge panel who denied Mr. Cooper's petition for federal habeas relief in 2007, wrote in a special concurrence, "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 . . . 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 . . . 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) . . . In light of this demanding statutory barrier, I agree that Cooper has failed to qualify for relief." *Cooper v. Brown*, 510 F.3d 870, 1004 (9th Cir. 2007).

⁷ ABA Recommendation No. 107, *available at*

http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.

initially identified “three white or Hispanic men” as the perpetrators. In addition, several eyewitnesses submitted signed statements declaring that they saw three white men enter a bar near the victims’ home the night of the attack, acting erratically and covered in blood.

- A woman approached the police in the days following the crime with information that her boyfriend, a convicted murderer, came home the night of the attacks in blood-spattered coveralls. She gave these coveralls to the authorities, but the San Bernardino Police Department (SBPD) now admits to having thrown them away without ever conducting forensic testing to determine whether the blood matched any of the victims. At Mr. Cooper’s trial, a deputy testified that the destruction of the coveralls was his lone decision, but post-conviction investigation found a signed report indicating that the Sheriff affirmatively approved the destruction of that evidence.
- Additionally, police phone logs note that a blue shirt “possibly having blood on it” was found and picked up near the victims’ home following the attack, but the existence of this shirt was never disclosed to the defense, despite the fact that its existence would have provided significant support to the defense claim at trial that multiple perpetrators were involved in this crime. The SBPD now denies that this shirt ever existed and claims that it is actually a tan t-shirt recovered on a different day, in a different location and under different circumstances, despite police records indicating otherwise.
- In 2002, DNA tests indicated the presence of Mr. Cooper’s blood on one of the few pieces of physical evidence not lost or destroyed in this case: a tan t-shirt collected close to the victims’ home. In 2004, however, subsequent testing was ordered by the court to determine whether EDTA (a blood preservative) was also present on the t-shirt. A finding of EDTA on the shirt could indicate that the blood was planted. Blind samples of the shirt were sent both to a defense expert and to the State’s expert. The defense expert’s test results showed some increased EDTA, while the State’s expert showed much higher levels of EDTA. The State then “withdrew” these results, claiming laboratory contamination. After the court allowed these results to be withdrawn, it subsequently denied re-testing of these samples, finding that the science itself was not reliable. In reviewing Mr. Cooper’s petition for habeas corpus, the Ninth Circuit therefore was unable to consider any of the evidence suggesting that the DNA match in 2002 may have been indicative of planting. To date, the defense team has not been given the lab reports that would confirm or deny contamination as the reason for the State’s finding of heightened levels of EDTA on the t-shirt, nor has further testing been authorized.

- Additionally, forensic testing in Mr. Cooper's case has shown unknown minor DNA contributors not matching any of the victims or Mr. Cooper on the tan t-shirt, as well as on other pieces of forensic evidence germane to this case. To date, Mr. Cooper's requests to conduct further DNA testing on these items have been denied.

These issues represent only a fraction of the questions that remain unanswered in Mr. Cooper's case. Given the diverse evidence casting doubt on Mr. Cooper's guilt and the inability of any court to meaningfully review this information in light of strict procedural bars, we encourage you to use your clemency authority to ensure that a full and transparent investigation of Mr. Cooper's guilt is conducted before any execution date is set. We believe such a course of action is necessary to maintain public confidence in the integrity of California's capital punishment system, especially as California in recent years has been plagued with investigations into the practices of its police departments and District Attorneys' offices, and as the state now intends to resume executions.

For these reasons, we believe that justice requires that Mr. Cooper be granted an executive reprieve so that there can be an investigation to fully evaluate his guilt or innocence. We recommend that this investigation include testing the forensic evidence still available to be analyzed—as described in Mr. Cooper's clemency petition—to put to rest the questions that continue to plague his death sentence. This is the only course of action that can ensure that Mr. Cooper receives due process and the protection of his rights under the Constitution.

The likelihood of injustice in this case is too considerable to allow Mr. Cooper's execution to proceed without additional and careful review in the clemency process. We request that you grant this reprieve and order a meaningful investigation into Mr. Cooper's case to prevent the possibility of a miscarriage of justice—one that can never be undone.

Sincerely,

A handwritten signature in black ink, appearing to read "Paulette Brown", with a long, sweeping horizontal line extending to the right.

Paulette Brown