## SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

CR 72787

KEVIN COOPER,

Supreme Court No.

92101

Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HONORABLE DAVID C. MERRIAM, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

FRIDAY, AUGUST 12, 1983

Vol. 3

**APPEARANCES:** 

For Plaintiff-Respondent:

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IN PROPRIA PERSONA

COPY

NOEMI LUCCHESI, C.S.R. Official Reporter, C-3136

IN THE SAN BERNARDINO COUNTY MUNICIPAL COURT DISTRICT 1 WEST VALLEY DIVISION, COUNTY OF SAN BERNARDINO 2 3 STATE OF CALIFORNIA, THE PEOPLE OF THE STATE OF CALIFORNIA, 5 Plaintiff, 6 OCR-9319 vs. 7 FWV-13949 and FWV-13950 KEVIN COOPER, 8 Defendant. 9 10 HEARING ON A DEMURRER AND MOTION TO QUASH SUBPOENA DUCES TECUM 11 BEFORE HONORABLE DAVID C. MERRIAM, JUDGE, DEPARTMENT A 12 13 · FRIDAY, AUGUST 12, 1983 14 15 APPEARANCES: 16 DENNIS KOTTMEIER For the People: 17 District Attorney DENNIS KOTTMEIER 18 District Attorney 19 By: JOHN P. KOCHIS Deputy District Attorney 20 CHARLES E. WARD For the Defendant: 21 Public Defender By: DAVID W. NEGUS 22 Deputy Public Defender 23 24 NOEMI LUCCHESI, CSR #3136 Reported by: 25 Official Reporter 26

(The following proceedings were held in chambers:)

THE COURT: The record may reflect that we're present in chambers in regards to the case of the People of the State of California versus Kevin Cooper. We're in chambers out of the public courtroom at the request of Mr. Negus who is the attorney for Mr. Cooper for him to make certain requests or motions to the court. Mr. Negus is present; the record may reflect that also counsel for the People are present as well.

Let me, before we proceed further, clarify a couple of things:

One, it should be clear on the record that Mr. Negus is the properly appointed, duly appointed counsel for Mr. Cooper in both Case No. FWV-13949 and in also Case No. FWV-13950, the latter case alleging a single count of escape from State Prison.

I'm not absolutely sure, Mr. Negus, whether or not there was an arraignment on the second case.

MR. NEGUS: There has not been an arraignment on the

THE COURT: On the single escape case.

MR. NEGUS: 2465? No.

THE COURT: Have you received a copy of that Complaint?

MR. NEGUS: No, I don't -- I haven't.

THE COURT: Okay. Let me hand you that at this time. And you at this time waive arraignment, reading of the Complaint?

MR. NEGUS: Yes, I do. Enter a plea of not guilty.

THE COURT: Okay. We'll defer setting a preliminary
hearing date on that matter till we've considered the other
case.

Now, Mr. Negus, did you wish to be heard?
MR. NEGUS: Yes, Your Honor.

At this point in time I would like to enter my formal objection to the extended coverage and ask that you refuse extended coverage in this particular case. The reasons for that are that I believe that such a ruling is necessary in order to preserve a fair trial. The -- this particular proceeding is solely of interest, I would say, to lawyers in terms of the content of it. Most of the people that have been talking to us about it don't even understand the concepts involved in a demurrer and certainly probably don't have any idea what a Motion to Quash a Subpoena is. Therefore, the only possible reason for covering would be to obtain pictures of Mr. Cooper or the various and sundry parties.

Last time, when we had a similar situation, the taking

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of pictures without any content to go with them generated all kinds of -- of coverage of issues which were not -- which were not very important and some of which were rather inflammatory to Mr. Cooper. We're put in somewhat of a bind in this situation when photographs are taken, because photographs have a capacity to excite a lot more comment than just news stories do.

For example, last time, in order to comply with People v. Duran, People v. Burnett, the court ordered that Mr. Cooper appear in civilian clothes without manacles which I think is certainly better than having him appear in jail clothes with manacles.

On the other hand, there were articles in the paper, phone calls to my office, protesting guite strongly that Mr. Cooper should be allowed to appear in civilian clothes, alleging that he had had a haircut, which wasn't true, and worrying about who was paying for the haircut. And just the appearance of the photographs seemed to generate all kinds of unfavorable publicity.

It's going to be hard enough to try to find a jury which can be fair in this particular case, given that this case has had more publicity than any case in San Bernardino County since I've been here for nine years, I believe, and I think that by allowing extended coverage of essentially proceedings which will have no intrinsic interest to the press, we are just asking to generate more unfavorable

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publicity.

THE COURT: Thank you, Counsel.

Mr. Kottmeier, or Mr. Kochis, do you wish to be

MR. KOTTMEIER: Only, Your Honor, in the area that should the court decide to have all of the proceedings in chambers, I would think it would be appropriate to at least advise the media that that is your intention and give them a chance to have whatever say they want to have. I think they're under the impression that the decision has already been made that these arraignment proceedings, entry of plea and so on, will be out in the courtroom, and I don't know if they have anything to add, but I'm certainly not here to represent media interest.

THE COURT: Well, okay. The record may reflect that I had indicated to counsel previous to today that it was my probable intention to allow extended media coverage. Yesterday I did receive written requests for extended media coverage, and I did indicate to the requesting television stations my intention at that time, and they indicated a pooling station. I did designate two still-camera newspapers, that they would have permission to be present, and one audio request from a radio station in Riverside to be present, indicating at that time that all of it was subject to any request or motion by any of the parties of this case to deny it. And that's the sole reason for this hearing at this time.

heard?

I'm convinced that given the present state of the law and the present state of the situation of this case, that extended media coverage for this hearing will not prevent Mr. Cooper from having a fair trial ultimately, if that is what happens in this case. So the request for the denial of the extended media coverage will be denied.

MR. NEGUS: I have one other request with respect to in-camera proceedings.

On the Motion to Quash the Subpoena, I don't know how far we'll have to get, but if we have to get into the facts of the case in arguing whether or not the material requested is necessary and material, I would request that any argument about the facts of this particular case take place in-camera in order not to jeopardize a future motion under Penal Code 868 to close the courtroom, which I'm not prepared to make now, but which I intend to present evidence on at an appropriate time.

THE COURT: Mr. Kochis?

MR. KOCHIS: Your Honor, in regard to the Motion to Quash, Mr. Negus has served upon me additional papers, an amended attachment and a declaration setting forth his theory under which he believes the material is relevant to the proceedings. And at first blush reading them, he may have, to my satisfaction, limited the material that he requested and provided a sufficient basis to comply with pitchess and other court cases.

If I could just review it further, I may be withdrawing my Motion to Quash the Subpoena and simply asking
for a further date, a compliance date, because the information
he does request is going to take us perhaps two to three
weeks to gather.

THE COURT: I would think that would probably be reasonable.

As I was reviewing the motion, it struck me that there were certain modifications that could be made.

MR. NEGUS: I have the amended papers.

THE COURT: Thank you.

MR. NEGUS: I don't believe I signed the latter declaration.

THE COURT: You'd probably best do that.

MR. NEGUS: Yes. I have no objection to setting a compliance date.

THE COURT: Well, then what we will do is I'll address the Motion to Quash in open court, and then we'll --you can make your representations, and we'll arrive at a date that will have some bearing to any other date we might set for preliminary hearing.

Do we have any other questions to raise?

Okay. We'll go out, and if all parties would like to position themselves in the courtroom.

The bailiff will open the courtroom without a formal opening so everyone may remain seated when I come out.

Thank you, gentlemen.

MR. KOCHIS: Your Honor, I wonder, there is a gentleman here from the sheriff's office who has appeared pursuant to the subpoena. May he be released?

MR. NEGUS: If we're not going to have any problem with it, then that's fine.

MR. KOCHIS: Whether we have a problem or not, I don't think he's going to be able to shed any light on the situation one way or another. If you feel more comfortable if he remain until the proceeding is over, that's fine.

MR. NEGUS: The only reason I wanted to have somebody here is in case we have to have any dispute as to what daily logs are, daily records and those other documents.

MR. KOCHIS: Fine.

Then perhaps, Detective, you should remain.

THE COURT: I don't think we'll be very long. We shouldn't be.

Okay, gentlemen. Thank you.

MR. NEGUS: Your Honor, we have another problem.

THE COURT: Okay. Come back in.

Yes, Mr. Negus?

MR. NEGUS: Mr. Cooper has -- I guess they're called foot manacles on, and I would request that they be removed before he go into -- into open court. I know from having heard the requests of the press yesterday that apparently the entrance of Mr. Cooper is something which the press

considers very important and intends to photograph Mr. Cooper on, and I suspect that's the kind of shot that's going to be shown on television, and I think it would be prejudicial to him under People v. Burnett for potential jurors to see him manacled.

I note the presence of at least -- many, many, many, many, many, many officers in uniform and out, and I don't think that there's any danger of Mr. Cooper running.

THE COURT: Counsel?

MR. KOTTMEIER: Assuming that the marshal's office and sheriff's office have adequate time to get set up in the courtroom, I think we have sufficient personnel to assure his presence.

THE COURT: All right. That's agreeable. Let's make sure everyone gets set up. The leg manacles may be removed. Thank you.

(The following proceedings were held in open court:)

THE COURT: Morning, ladies and gentlemen, Counsel.

This is the time and place set for a hearing in the case of the People of the State of California versus Kevin

Cooper, Case No. 13949 and also Case No. 13950.

In the first case, this is the time and place set for a hearing on a demurrer filed by the defense, and it's the

court's intention to let counsel be heard on that matter, have that matter argued, and for the court to attempt to decide that issue at this hearing.

The record may reflect that Mr. Cooper is present with his duly appointed counsel, and the District Attorney's Office is represented.

Mr. Negus, do you wish to be heard?
MR. NEGUS: Yes.

There's two -- there's essentially two grounds to the demurrer; one, that there should only be one special circumstances of multiple murder, and the second one, that the way that this particular Complaint reads is a -- is not a legally sufficient way to charge that.

With respect to the first one, the cases cited by

Mr. Kochis in his brief all deal with the situation in which
you have allegations of different types, for example,
allegation of a multiple murder and a robbery, allegation of
a multiple murder and a kidnap. They don't deal with a
situation where there is a multiple allegation of essentially
one set of crimes.

For that particular reason, I think that the authorities cited are not good proposition that you can sort of bootstrap a one allegation into four separate allegations for the purposes of making the Complaint read more seriously.

With respect to the second allegation, the authority cited by the prosecution, the Jackson and Harris

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cases never ruled on the validity of this particular -- of this particular part of Penal Code Section 190.2. What they did do was to uphold the constitutionality of the 1977 death penalty statute against a general constitutional attack.

As I indicated in the first part of the brief, there's no general constitutional attack intended by this particular -- by this particular document. The logical problems with the statute that the prosecution are proceeding on I think are exemplified by the allegation that in this proceeding which -- in which a plea has not yet even been entered, Mr. Cooper has already been convicted of multiple murders. Obviously he hasn't, and the Complaint must set out what the prosecution intends to prove at the preliminary hearing. Obviously they won't be able to prove what they've stated in their Complaint. Therefore I would suggest that the statute as it is stated does not state a cause of action.

The legislative history of the statute is of no help in this particular matter. The prosecution talks about a legislative intent. This particular language was formed in the 1977 statute which was drafted by the then-Senator Deukmejian and passed through the legislature. There is nothing in the legislative history of that particular statute which would give us any light on what they would -- what the legislature had in mind.

The particular statute in which Mr. Cooper is being

charged was passed by popular initiative in 1988 -- 1978. was drafted by Mr. Nicholson who was working with Mr. Briggs. and they just took the language from Mr. Deukmejian's statute and put it into the -- into the initiative. They did it again without any comment in the legislative analysis of the -- of the statute, and in the arguments that are submitted in favor of the initiative in the 1978 ballot book. there is no mention of this particular -- of this particular part of the statute nor what it would intend. Therefore, the -- Mr. Kochis in his brief has syggested that what they're really talking about is will they just want you to prove that more than one murder occurred. He hasn't alleged that. If he were to try and allege that, I think there would be additional problems with that. But as it reads, he's alleged something that is impossible for him to prove, and therefore I don't think he's alleged a cause of action.

THE COURT: Okay. Thank you, Counsel.

Counsel?

MR. KOTTMEIER: Your Honor, in regard to both of
the suggestions made by defense counsel, I think that defense
counsel really misses the point. The issue, as far as the
presentation of the special allegations in the initial
Complaint, is to put the defense on notice that we are
seeking the death penalty as to any combination of murder
charges that should be found true and a jury convict upon
those charges. It is not an effort at this particular stage

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of the proceedings to in effect have a judicial finding necessarily as to the truth or falsity of the allegation, because, of course, that would necessarily follow once there had been a decision as to the initial murder charges. Therefore, we're not so much concerned with the semantic argument that has been presented nor with even a validity argument. The sole purpose of our presentation of those facts in this Complaint is to put the defense on notice that if we have more than one murder charge found true in these proceedings as a result of a jury verdict, that we will seek the death penalty.

THE COURT: Thank you, Counsel.

Anything further, Mr. Negus?

MR. NEGUS: The problem is that they have to do that -- they have to do that at the preliminary hearing, because the cases indicate that they must present evidence at a preliminary hearing which would cause a reasonable suspicion that the special circumstance is true. I would submit that it's impossible for them to do that, to submit evidence that they will get convictions on more than one murder count, and the legislature just didn't think about this problem very carefully, and therefore -- as Justice Mosk indicated in the case of People v. Frierson, the legislature, if they're going to have a death penalty, has to give some thought to the procedures by which they impose it and try to make those procedures rational and logical,

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and I submit that they haven't.

THE COURT: Thank you, Counsel.

There may be some less-than-perfect craftsmanship in the writing of this code section and the necessary allegations that need to go with it, but I am in accordance with Mr. Kottmeier that the principal purpose at this stage of alleging the initial allegations is one of notice, and it is important that the defense be given notice of the seriousness and the nature of those special allegations.

So based on that very general principal, although appreciating the -- some of the logical inconsistencies that you've brought out, Mr. Negus, the court is going to over-rule the demurrer.

We're at this point now, at the position to receive an entry of a plea from Mr. Cooper in Case No. 13949 which alleges escape. The murder charge is the attempted murder charges -- charge.

MR. NEGUS: At this point in time we would enter a plea of not guilty to all six counts, and we would also deny all five special allegations.

THE COURT: Okay. And make sure there is a second case, which is probably a duplicate filing, but nonetheless it's still an existing finding, and that's Case 13950, alleging escape from State Prison.

And you previously indicated in chambers that you wish to enter not guilty on that; is that correct?

MR. NEGUS: That's correct.

THE COURT: The clerk will make note of those entries of pleas.

Next we should set a preliminary hearing date.

Counsel wish to be heard?

MR. NEGUS: I would suggest that that may be premature in this particular case. The -- perhaps if we could handle the Motion to Quash the Subpoena on the part of the prosecution first --

THE COURT: I think that would be a good idea.

There has been a motion filed by the prosecution in this case to quash a subpoena duces tecum which has been served upon the sheriff of this county.

Mr. Kottmeier, Mr. Kochis, do you wish to be heard on that?

MR. KOCHIS: Your Honor, Mr. Negus served upon me moments ago additional moving papers on that issue, and after reviewing those, I'm confident that he's complied with the Pitchess cases, that he's further limited the type of information that he's requesting, and he's provided, at least to me, a theory in which he's justified in receiving that information. However, based upon the type of information that he's requesting and the volume of that information, I'd request we set a compliance date, approximately three weeks from today, to enable the sheriff to gather the material Mr. Negus requests, and I'd ask that we take the Motion to

Quash at this point off calendar.

THE COURT: Okay.

Does that seem agreeable to you, Mr. Negus?

MR. NEGUS: Yes, Your Honor.

In addition, I would request that at that compliance date we attempt to deal with other matters of obtaining information which I think will be necessary before we can proceed in the case. There is a large bulk of information in this particular case which is in the hands -- not in the hands of law enforcement, therefore, is not reachable by way of a discovery motion and will be needed to be subpoenaed in. Therefore what I would request is that we pick the date of the 2nd of September for a compliance motion on the subpoena duces tecum, for additional discovery matters, and at that point in time, when we see what sort of -- what sort of problems in investigation and discovery we have, we set a preliminary hearing date.

THE COURT: I'm rather inclined to set a preliminary hearing date at this time with some reasonable expectation that we might be able to meet it, realizing that if we run into discovery problems or other pre-preliminary motions, it may have to be reset. I feel more comfortable by having a specific date set. How long --

MR. NEGUS: I would --

THE COURT: Excuse me.

How long after the September 2nd date,

assuming all went well and we had everything in hand by September the 2nd -- how long after that would you want the preliminary hearing?

MR. NEGUS: I would request sometime at the end of October. I believe that that is the first time that I could reasonably expect to be prepared in this particular case, be reasonably expected to run down the -- all the information which I've been provided with which, frankly, I haven't had even a chance to read all of it yet. I could read the more important parts, but I haven't had a chance to read anywhere near in detail the 1600 pages that have been provided to me, and I am aware that there are additional documents which have not yet even been provided by way of police reports and that sort of thing. We are hoping to have those things all in hand I hope by Monday, but there are numerous police reports, arrest reports and crime lab reports that haven't been provided to me. I can't do anything on those, of course, until I get them.

THE COURT: Counsel?

MR. KOTTMEIER: Your Honor, the People would oppose the setting of a date two and a half months from now for preliminary hearing. We reasonably expect that the crime lab reports will be in the defense hands Monday or Tuesday, and as the court could note in reading between the lines of what Mr. Negus said, many of the procedures that they are seeking to carry out -- excuse me -- are defense procedures

as opposed to discovery procedures associated with the District Attorney's Office. And I would suggest that two and a half months is much too long.

MR. NEGUS: If I could just be heard on that -THE COURT: You may.

MR. NEGUS: -- just by analogy.

One of the statutes that's involved in this particular case is Penal Code Section 859 which indicates that all police and arrest reports should be in the defense hands no later than two days after the first appearance of counsel.

Well, that was August 1st. If we get them all by Monday, that will be approximately seven times the length of time allowed to the prosecution.

Can't fault them for that, really, because it's a very complex case. However, I think that perhaps that's also a reliable estimate of the amount of time, extra time necessary for the defense to try and prepare for the preliminary hearing, and that's -- approximately 70 days from now would be October the 24th.

MR. KOTTMEIER: Your Honor, 859 refers to only reports in existence, and those reports, 1632 pages, were delivered to defense at the first appearance on August the 1st. We will give him all the additional reports that we have as we receive them and not hold them longer than 48 hours.

THE COURT: Thank you, Counsel.

It's the court's intention to set a preliminary hearing

date on September the 19th at 8:30 in this department. I realize that we all know that all preliminary hearing dates are not set in concrete, and certainly I'll be prepared to hear from both counsel on September the 2nd as to the actual feasibility or reasonable timing of that preliminary hearing date.

(Discussion off the record.)

THE COURT: My clerk does point out a problem. Let's change that to September the 20th. Thank you.

MR. NEGUS: 20th?

THE COURT: September the 20th, Tuesday, right.

Mr. Cooper, you do have the right to have your preliminary hearing in both of these matters, these two files, within 10 court days of the date of your arraignment. You have previously waived and given up that right when you your counsel filed the demurrer and asked that the matter be set over until this date. Do you at this time again waive and give up your right to have your preliminary hearing within 10 court days of the date of your arraignment and agree that the matter be set at this time for September the 20th?

THE DEFENDANT: Yes.

THE COURT: Do you concur, Counsel?

MR. NEGUS: Yes.

THE COURT: Okay. The court will set the matter down for a preliminary hearing on September the 20th, and

that will be at the hour of 8:30 in the morning in this department, unless we indicate otherwise before that. The court will set the matter down for September the 2nd at the hour of 8:30 in this department for further discussions on the subpoena duces tecum.

MR. KOTTMEIER: Your Honor, could you inquire of defense as to the necessity of having Mr. Cooper here on the September 2nd hearing?

MR. NEGUS: I would like to have Mr. Cooper present for all the proceedings.

THE COURT: Okay. Thank you.

Counsel, do we have any other matters?

MR. KOCHIS: No.

THE COURT: Thank you very much. Court will be in recess.

(Whereupon the proceedings were concluded.)

## CERTIFICATE REPORTER'S

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STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

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I, NOEMI LUCCHESI, Official Reporter of the aboveentitled court, do hereby certify:

That I am a Certified Shorthand Reporter of the State of California, duly licensed to practice; that I did report in stenotype the oral proceedings had upon hearing of the aforementioned cause at the time and place hereinbefore set forth; that the foregoing pages numbered 1 through 19, inclusive, constitutes to the best of my knowledge and belief a full, true and correct transcription from my said stenotype notes so taken.

DATED This 21st day of June, 1985, at Ontario, California.

Official Reporter

C.S.R. No. 3136