S240153

# In the Supreme Court of the State of California

SUPREME COURT
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Deputy

In re

**ANTHONY COOK,**

**On Habeas Corpus**

Case No. S______

Fourth Appellate District Division Three, Case No. G050907
San Bernardino County Superior Court, Case No. WHCSS1400290
The Honorable Katrina West, Judge

## PETITION FOR REVIEW


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TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to rules 8.500(a)(1) and (b)(1) of the California Rules of Court, the People of the State of California respectfully petition this court to review the published decision of the California Court of Appeal, Fourth Appellate District, Division Three, granting habeas corpus relief to petitioner Anthony Maurice Cook, Jr. The Court of Appeal's opinion is attached.

## ISSUE PRESENTED

Whether the remedy of a limited trial court proceeding to preserve evidence for use at a future youth offender parole hearing, as ordered on direct appeal in *People v. Franklin* (2016) 63 Cal.4th 261, is available to a habeas corpus petitioner whose conviction is already final.

## STATEMENT OF THE CASE

In December 2003, when Cook was 17 years old, Cook and a companion shot at three men, killing two of them, in retaliation for the murder of Cook's brother. (Slip Opn. at pp. 2-3; *People v. Shaw and Cook* (2009) 2009 WL 1486716, pp. *1-2.) In 2007, a jury convicted Cook of two counts of first degree murder (Pen. Code, § 187, subd. (a))[1] and one count of attempted murder (§§ 187, subd. (a), 664). (Slip Opn. at p. 3.) The jury found true allegations that Cook personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and that he personally and intentionally discharged a firearm, proximately causing great bodily injury or death (§ 12022.53, subd. (d)). (Slip Opn. at p. 3.) The trial court sentenced Cook to prison for life with the possibility of parole on the

[1] All statutory references are to the Penal Code

attempted murder count and imposed five consecutive indeterminate terms of 25 years to life for the murder counts and firearm enhancements, for a total sentence of 125 years to life. (*Ibid.*)

The Court of Appeal affirmed the convictions and sentence in an unpublished opinion (case number G041439), and this Court denied review (case number S173497).

In 2014, Cook filed a petition for writ of habeas corpus in the Court of Appeal, Fourth Appellate District, Division Three (case number G050907). He alleged that his sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*), because he was a juvenile at the time of the offenses and was sentenced to a de facto term of life without the possibility of parole. (*In re Cook* (2016) 2016 WL 1384894, pp. *1-2.) The Court of Appeal appointed counsel for Cook, issued an order to show cause, and received formal briefing by the parties. (*Id.* at p. *2.) In an unpublished opinion filed on April 6, 2016, the Court of Appeal, relying on *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718] (*Montgomery*), held that *Miller* applied retroactively to cases on collateral review. (Slip Opn. at p. 2.) The Court of Appeal further concluded, however, that recently enacted legislation – sections 3051 and 4801 of the Penal Code – cured any constitutional infirmity in Cook's sentence. (*Ibid.*) The Court of Appeal thus denied relief. (*Ibid.*)

Cook petitioned for review (case number S234512), and this Court transferred the case back to the Court of Appeal to consider whether, in light of this Court's intervening decision in *Franklin, supra*, 63 Cal.4th at pp. 268-269, Cook "is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'" (Slip. Opn. at p. 2.)

After supplemental briefing by the parties, including a rehearing petition filed by the People, the Court of Appeal filed a published opinion granting relief. (Slip opn. at p. 7.) In doing so, the Court of Appeal

concluded that this court's order directing reconsideration of the case in light of *Franklin* "strongly suggests that the relief afforded by that opinion is available by habeas corpus." (Slip Opn. at p. 7.) "Otherwise," the Court of Appeal continued, "it seems, the Supreme Court would have denied [Cook's] petition for review." (*Ibid.*) Further, the Court of Appeal stated that habeas corpus relief is available "when changes in case law expanding a defendant's rights are given retroactive effect" and that "changes in case law are customarily retroactive." (Slip. Opn. at pp. 7-8.) Thus, the court held, "the deprivation of rights granted by *Franklin* is cognizable on habeas corpus." (Slip Opn. at p. 8.) The Court of Appeal also observed that a *Franklin* hearing would be appropriate in a habeas case because, while development of the record many years after the original sentencing proceedings took place is "far from ideal . . . it is better than [at] the 15th, 20th or 25th year of incarceration, which are the possible times for the youth offender parole hearing. [Citation.]" (Slip Opn. at p. 9.) The Court of Appeal remanded the matter to the trial court to conduct a hearing, within 90 days of finality of its opinion, "at which [Cook] has the opportunity to make a record of such mitigating evidence." (*Ibid.*)

## REASONS REVIEW SHOULD BE GRANTED

Review is necessary in this case to provide statewide guidance on the question whether the remedy ordered on direct appeal in *Franklin*, *supra*, 63 Cal.4th at p. 284 – a limited trial court proceeding to preserve evidence relevant to a future youth offender parole hearing – is available to habeas corpus petitioners whose convictions are already final. The question potentially affects a large number of inmates. Moreover, the Court of Appeal's analysis of the issue overlooked important principles governing the scope of habeas corpus review, and it is not clear that the result it reached was the correct one. The same question presented here is before the Court in *In re Wilson*, S235541, an original habeas proceeding in which

the People have filed an informal response. The present case would afford the Court an opportunity to address the issue in light of the Court of Appeal's reasoned decision.

**A. Legal Background**

In *Roper v. Simmons* (2005) 543 U.S. 551 the United States Supreme Court held that the Eighth Amendment forbids the execution of persons who were 18 or younger at the time of their crimes. (*Id.* at pp. 578-579.) And in *Graham v. Florida* (2010) 560 U.S. 48, the United States Supreme Court determined that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Id.* at pp. 74-75.) Central to the result in *Graham* was the Court's appreciation for the "fundamental differences between juvenile and adult minds" and its recognition that juveniles are "more capable of change than are adults . . . ." (*Id.* at p. 68.) In *Miller*, *supra*, 132 S.Ct. 2455, the Court extended the reasoning of *Graham* to hold that imposition of a mandatory sentence of life without parole on a juvenile convicted of murder also violates the Eighth Amendment. (*Id.* at pp. 2463-2464.) While a trial court may still impose an LWOP sentence on a juvenile offender convicted of homicide, before doing so the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*) *Miller* implied that courts should consider factors such as the juvenile offender's chronological age, his family and home environment, his inability to deal with law enforcement and assist his own attorneys, the circumstances of the homicide offense, and the possibility of rehabilitation. (*Id.* at p. 2649.)

In the wake of *Graham* and *Miller*, this Court in *People v. Caballero* (2012) 55 Cal.4th 252 considered the constitutionality of a 110-year prison sentence imposed on a juvenile convicted of a non-homicide offense. This Court concluded that since the sentence fell outside the defendant's natural

life expectancy, it constituted a de facto LWOP sentence and was therefore cruel and unusual punishment in violation of the Eighth Amendment. (*Id.* at pp. 265, 268-269.) This Court directed the trial court, on remand for resentencing, to "consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Id.* at pp. 268-269.)

In response to *Graham*, *Miller*, and *Caballero*, the Legislature enacted Senate Bill 260, codified at section 3051. The statute provides for a "youth offender parole hearing" that guarantees juvenile offenders a meaningful opportunity for release on parole after serving 25 years. Section 3051 provides, in pertinent part, "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b).)

Subsequently, in *Montgomery*, *supra*, 136 S.Ct. 718, the United States Supreme Court held that the rule announced in *Miller* is substantive and must therefore be applied retroactively. (*Id.* at pp. 732-736.) The *Montgomery* majority noted that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (*Id.* at p. 736.)

In *Franklin*, this Court held that section 3051, subdivision (b), section 3046, subdivision (c),[2] and section 4801, subdivision (c)[3] rendered moot the defendant's claim that his de facto LWOP sentence constituted cruel and unusual punishment. (*Franklin, supra*, 63 Cal.4th at pp. 277-278.) The Court found that these sections "superseded the statutorily mandated sentences of inmates who committed their controlling offense" as juveniles. (*Id.* at p. 278.) In light of the new statutes, the Court held, "Franklin is now serving a life sentence that includes a meaningful opportunity for parole" and therefore "no *Miller* claim arises here." (*Id.* at pp. 279-280.)

This Court observed, however, that because the defendant was sentenced before *Miller* and before the enactment of section 3051, the trial court might not have allowed him to make a complete record of information that might be relevant to the parole board at a subsequent parole hearing. The Court therefore remanded the matter to the trial court to determine whether the defendant had been given that opportunity and, if not, to permit the defendant to put on the record "any evidence that demonstrates the [defendant's] culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin, supra*, 63 Cal.4th at p. 284.)

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[2] Under section 3046, a parolee who is serving consecutive life sentences "shall not be paroled until he or she has served the [specified term] on each of the life sentences that are ordered to be run consecutively." (§ 3046, subd. (b).) An exception exists for youthful offenders found suitable for parole, however, under section 3051. Those offenders "shall be paroled regardless of the manner in which the [parole] board set release dates . . ." (§ 3046, subd. (c).)

[3] Section 4801 subdivision (c) provides that in reviewing the suitability for parole of a person who committed his or her controlling offense before reaching the age of 23, the parole board "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

This Court explained:

> The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors [citation] in determining whether the offender is 'fit to rejoin society despite having committed a serious crime 'while he was a child in the eyes of the law'."

(*Franklin*, *supra*, 63 Cal.4th at p. 284, quoting *Graham*, *supra*, 560 U.S. at p. 73.)

### B. Review is Necessary to Provide Guidance on an Important Question of Law

As the People have noted in *In re Wilson*, the availability of *Franklin* relief on habeas corpus – a question not addressed in *Franklin* itself – would potentially affect a large number of inmates. (*In re Wilson* (S235541), Informal Response at pp. 10-11 & Exh. 1.) In many of these cases, the offenders' appeals are final and have been final for many years. Some of those offenders will be far removed from "youth" and much closer to their section 3051 parole hearings.

The Court of Appeal's analysis of whether a *Franklin* hearing is available to these many inmates on habeas corpus rests on a faulty premise. Relying on *People v. Birks* (1998) 19 Cal.4th 108, 136 and *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207, the Court of Appeal held that "[c]hanges in case law customarily are fully retroactive" and therefore "the deprivation of rights granted by *Franklin* is cognizable on habeas corpus." (Slip. Opn. at p. 8.) But those cases dealt with the retroactivity of a new judicial ruling and a new statutory regime, respectively, to cases not yet final on direct review. Different rules of retroactivity apply on habeas corpus. (See e.g., *In re Moore* (2005) 133 Cal.App.4th 68, 75 ["Although new substantive rules generally apply retroactively, new rules of procedure

generally do not."].) And indeed, the issue in this case concerns not merely retroactivity but whether the relief sought is even of the type that may be addressed on collateral review. The Court of Appeal did not discuss the applicable body of law, which was highlighted in the People's briefing, addressing the proper scope of habeas relief that is available to inmates whose convictions are already final.[4]

Taking into account the relevant principles of law, it is not clear that the Court of Appeal reached the right result. On direct appeal, a reviewing court has broad powers to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." (§ 1260.) "[A] reviewing court has the power, when the trial court has made a mistake in sentencing, to remand with directions that do not inevitably require all of the procedural steps involved in arraignment for judgment and sentencing." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258.) A court's habeas power, however, is much more constrained. "[T]he writ of *habeas corpus* does not afford an all-inclusive remedy available at all times as a matter of right." (*People v. Villa* (2009) 45 Cal.4th 1063, 1069-1070 (*Villa*), quotation marks and citation omitted.)

Collateral attack by habeas corpus has been limited to providing a forum for challenges to a custodian's legal authority to hold the petitioner

[4] The Court of Appeal did say that "Respondent takes an overly narrow view of the scope of the writ of habeas corpus" and cited *In re Cortez* (1971) 6 Cal.3d 78, 82-83, *In re Terry* (1971) 4 Cal.3d 911, 916, and *In re Johnson* (1970) 3 Cal.3d 404, 407-410 for the proposition that habeas corpus relief is appropriate "when changes in case law expanding a defendant's rights are given retroactive effect." (Slip. Opn. at p. 7.) Those cases addressed the retroactivity of various new legal rules to cases on collateral review. But instead of grappling with the particulars of when and how a new rule is given effect on habeas corpus, the Court of Appeal, as noted, simply posited based on inapposite authority that all new judicial decisions are "customarily fully retroactive." (Slip. Opn. at p. 8.)

in custody or otherwise restrain his liberty, or to the manner in which he is confined. "Where one restrained pursuant to legal proceedings seeks release upon *habeas corpus*, the function of the writ is merely to determine the legality of the detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since the process was issued to render it invalid." (*Villa, supra*, at p. 1069, quotation marks and citation omitted.) "Unlike review on direct appeal, habeas corpus does not simply inquire into the correctness of the trial court's judgment." (*In re Harris* (1993) 5 Cal.4th 813, 828.) Rather, habeas corpus "will reach out to correct errors of a fundamental jurisdictional or constitutional type only." (*Ibid.*) The writ has not been used as a procedural mechanism for reopening or supplementing otherwise closed proceedings for any less fundamental purpose. (*In re Sands* (1977) 18 Cal.3d 851, 857.)

While this Court stated in *Franklin* that a juvenile should have the opportunity to make a record within the evidentiary confines of a sentencing hearing, it did not indicate whether its remand order was predicated on any underlying illegality in the initial sentencing proceeding or upon other fundamental prerequisites necessary to granting habeas corpus relief. Language in *Franklin* suggests the remand order was not based on any constitutional concern. (*Franklin, supra*, 63 Cal.4th at p. 268 ["section 3051 . . . moots Franklin's constitutional claim"].) The order appears to have been focused instead on advancing the purpose and interests of the youth offender parole hearing procedure under section 3051, and it presumably derived from the court's inherent supervisory authority over criminal trial procedure (see generally *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 & fn. 135), or fell within an appellate court's broad authority, on direct appeal, to remand a criminal case "for such further proceedings as may be just under the circumstances" (§ 1260; cf. *People v.*

*Moore* (2006) 39 Cal.4th 168, 176 [noting that this clause "evinces a 'legislative concern with unnecessary retrials where something less drastic will do'"]).

There is therefore no clear legal basis for ordering a *Franklin* hearing on collateral review. Nor, if there were a basis, is it clear that such a remedy would be called for in all habeas cases. When a *Franklin* hearing is sought through a habeas corpus petition, the case is likely to be substantially removed in time both from the underlying offense and from trial, where the resources of the parties and the courts were fully marshaled for the purpose of building and testing a factual record. The defendant is also further removed from being a juvenile. He or she, who is considered a juvenile for statutory purposes up to age 23, may be close to 48 years old, and may well be closer in time to a parole hearing than he or she is to the initial sentencing date. It may be that, even if *Franklin* hearings are permissible in habeas corpus cases, some threshold showing of practicability should be required on a case-by-case basis. Or it may be that the question of whether and how to implement *Franklin* on collateral review is better left to the Legislature. (See, e.g., § 1016.5 [creating collateral statutory mechanism to vacate judgment for failure to give mandatory advisement on immigration consequences, without any custody requirement]; § 1473.6 [authorizing motion to vacate for newly discovered evidence of fraud or false testimony by government agent without a custody requirement]; see generally *Villa*, *supra*, 45 Cal.4th at p. 1076 [noting Legislature's role in creating such remedies outside of habeas].) The Court of Appeal's decision, however, opens the door to *Franklin* remands in all habeas cases. This Court's guidance is therefore needed.

## CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated: February 17, 2017

Respectfully submitted,

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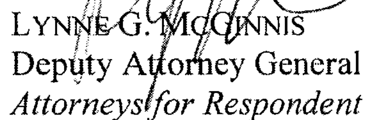

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains **2,952** words.

Dated: February 17, 2017

XAVIER BECERRA
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# ATTACHMENT

Court of Appeal, Fourth Appellate District, Division Three
Kevin J. Lane, Clerk/Administrator
Electronically FILED on 1/10/2017 by Dana Johnson, Deputy Clerk

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

| In re ANTHONY MAURICE COOK, JR. on Habeas Corpus. | G050907<br>(Super. Ct. No. WHCSS1400290)<br>O P I N I O N |
|---|---|

Original proceedings; petition for writ of habeas corpus after a judgment of the Superior Court of San Bernardino County, Katrina West, Judge. Petition granted.

Anthony Maurice Cook, Jr., in pro. per.; and Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Theodore Cropley, Parag Agrawal and Lynne G. McGinnis, Deputy Attorneys General, for Respondent.

*   *   *

## INTRODUCTION

In 2009, the convictions against petitioner Anthony Maurice Cook, Jr. (Petitioner), for two counts of murder, one count of attempted murder, and firearm enhancements were affirmed in *People v. Shaw and Cook* (May 28, 2009, G041439) (nonpub. opn.). By petition for writ of habeas corpus, Petitioner challenged his sentence of 125 years to life in prison. Petitioner, who was 17 years old when he committed the crimes, contended his sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*) and, as relief, asked to be resentenced.

In *In re Cook* (Apr. 6, 2016, G050907) (nonpub. opn.) (*Cook*), we denied Petitioner's petition for writ of habeas corpus. We concluded, based on *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], that *Miller* applied retroactively to cases on collateral review but that recently enacted Penal Code sections 3051 and 4801 had the effect of curing the unconstitutional sentence imposed on Petitioner. (*Cook*, *supra*, G050907.) In July 2016, the California Supreme Court granted Petitioner's petition for review of our opinion and transferred the matter to us with directions to vacate our decision and consider, in light of *People v. Franklin* (2016) 63 Cal.4th 261, 268-269, 283-284 (*Franklin*), "whether petitioner is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'"

The petition is granted insofar as the relief sought in the prayer of Petitioner's supplemental opening brief seeks a hearing to allow Petitioner to make a record of mitigating evidence tied to his youth at the time of the offense. The matter is remanded with directions to the trial court to grant Petitioner a hearing at which he can make a record of such mitigating evidence. In doing so, we hold that the relief afforded by *Franklin* is available by both direct review and petition for writ of habeas corpus.

## BACKGROUND

In December 2003, Petitioner and Rufus Raymond Shaw shot and killed Odrum Nader Brooks and his son, Demarcus T. Brooks, while the latter two sat in an

automobile. Petitioner was 17 years old at the time. In 2007, a jury convicted Petitioner of two counts of first degree murder (Pen. Code, § 187, subd. (a)) and one count of attempted murder (*id.*, §§ 664, 187, subd. (a)), and found true the allegations that Petitioner personally and intentionally discharged a firearm (*id.*, § 12022.53, subd. (c)) and personally and intentionally discharged a firearm proximately causing great bodily injury (*id.*, § 12022.53, subd. (d)).

The trial court sentenced Petitioner to an indeterminate term of life with the possibility of parole for the attempted murder, plus five consecutive indeterminate terms of 25 years to life for murder and discharging a firearm, for a total sentence of 125 years to life. The convictions and sentence were affirmed in *People v. Shaw and Cook*, *supra*, G041439.

In 2014, Petitioner filed a petition for writ of habeas corpus in the superior court in which he had been convicted. The superior court denied the petition without an evidentiary hearing in September 2014.

One month later, Petitioner, who was self-represented at the time, filed a petition for writ of habeas corpus in the Court of Appeal. He sought relief based on *Miller*, *supra*, 567 U.S. __ [132 S.Ct. 2455]. Counsel was appointed to represent Petitioner, and counsel filed a supplement to the petition for writ of habeas corpus and an appendix of exhibits. We issued an order to show cause, in response to which the Attorney General (Respondent) filed a return. Petitioner filed a traverse, thereby joining the issues for review. In April 2016, we issued our opinion in *Cook*, *supra*, G050907, denying the petition for writ of habeas corpus.

The California Supreme Court granted Petitioner's petition for review of our opinion and transferred the matter to us with directions. Following transfer, Petitioner filed a supplemental opening brief. Respondent did not file a supplemental brief. After we issued an opinion, we received a petition for rehearing from Respondent informing us that Respondent had never been served with Petitioner's supplemental

opening brief and requesting that we accept Respondent's supplemental brief. We granted Respondent's petition for rehearing and accepted Respondent's supplemental brief. Petitioner filed a supplemental responding brief. We have considered the supplemental briefs.

## DISCUSSION

### I.

### In Light of *Franklin*, Petitioner Is Entitled to a Hearing to Make a Record of Mitigating Evidence Tied to Youth.

We noted in *Cook*, *supra*, G050907, it was undisputed that Petitioner's sentence of 125 years to life was a de facto sentence of life without the possibility of parole and that, when sentencing Petitioner, the trial court did not consider his age, youthful attributes, and capacity for reform and rehabilitation. We concluded that *Miller* applies retroactively to matters on collateral review. (*Montgomery v. Louisiana*, *supra*, 577 U.S. __ [136 S.Ct. 718].) As a consequence, we concluded, Petitioner's sentence was unconstitutional under *Miller*, *supra*, 567 U.S. at page __ [132 S.Ct. at page 2460] and *People v. Caballero* (2012) 55 Cal.4th 262. (*Cook*, *supra*, G050907.) But we were compelled by *Montgomery v. Louisiana*, *supra*, 577 U.S. __ [136 S.Ct. 718], to conclude that Penal Code section 3051 cured the constitutional error in sentencing by giving Petitioner the right to a parole hearing after serving 25 years of his sentence. (*Cook*, *supra*, G050907.)

The California Supreme Court's order granting Petitioner's petition for review of our opinion transferred the matter to us with directions to vacate our decision and consider, in light of *Franklin*, *supra*, 63 Cal.4th 261, "whether [P]etitioner is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'" In *Franklin*, the defendant was 16 years old when he shot and killed the victim. (*Id.* at p. 269.) A jury convicted the defendant of first degree murder and found true a personal firearm-discharge enhancement. (*Id.* at p. 268.) The defendant was sentenced to two

25-year-to-life sentences, giving him a total sentence of life in state prison with the possibility of parole after 50 years. (*Ibid.*) The California Supreme Court concluded that Penal Code sections 3051 and 4801 mooted the defendant's claim that the sentence was unconstitutional because "those statutes provide [the defendant] with the possibility of release after 25 years of imprisonment (Pen. Code, § 3051, subd. (b)(3)) and require the Board of Parole Hearings (Board) to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (*id.*, § 4801, subd. (c))." (*Franklin*, *supra*, at p. 268.)

The California Supreme Court also concluded, however, that the defendant had raised "colorable concerns" over "whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth." (*Franklin*, *supra*, 63 Cal.4th at pp. 268-269.) The court explained: "The criteria for parole suitability set forth in Penal Code sections 3051 and 4801 contemplate that the Board's decisionmaking at [the defendant]'s eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense. Because [the defendant] was sentenced before the high court decided *Miller* and before our Legislature enacted [Penal Code sections 3051 and 4801], the trial court understandably saw no relevance to mitigation evidence at sentencing. In light of the changed legal landscape, we remand this case so that the trial court may determine whether [the defendant] was afforded sufficient opportunity to make such a record at sentencing. This remand is necessarily limited; as section 3051 contemplates, [the defendant]'s two consecutive 25-year-to-life sentences remain valid, even though the statute has made him eligible for parole during his 25th year of incarceration." (*Id.* at p. 269.)

The Supreme Court explained that if, after remand, the trial court were to determine the defendant did not have sufficient opportunity to make a record at sentencing, then "the court may receive submissions and, if appropriate, testimony

pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) "[The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors ([Pen. Code,] § 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Ibid.*)

In this case, Petitioner asserts, "the record of [his] characteristics and circumstances at the time of the offense is bare bones at best, with the probation officer's report consisting of less than a half page of 'personal history'; as opposed to ensuring a full and accurate record, the report noted that the information in that personal history section was 'not independently verified.'"

We agree with Petitioner. In *Franklin*, *supra*, 63 Cal.4th at page 284, it was "not clear" whether the defendant "had sufficient opportunity to put on the record the kinds of information that [Penal Code] sections 3051 and 4801 deem relevant at a youth offender parole hearing." Here, in contrast, it is clear that Petitioner was *not given* sufficient opportunity to make such a record. Petitioner's sentence was imposed before the decision in *Miller* and before enactment of Penal Code sections 3051 and 4801. We noted in *Cook* that the trial court, when sentencing Petitioner, did not consider his age, youthful attributes, and capacity for reform and rehabilitation. (*Cook*, *supra*, G050907.)

Thus, rather than direct the trial court to make the determination whether Petitioner had sufficient opportunity at sentencing to make a record of "information that will be relevant to the Board as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801" (*Franklin*, *supra*, 63 Cal.4th at pp. 286-287), we will direct the trial court to conduct a hearing at which Petitioner will have the opportunity to make such a record.

**II.**

**Relief Under *Franklin* Is Available on Habeas Corpus.**

Respondent asserts that relief by writ of habeas corpus is unavailable to Petitioner because he is not challenging the legality of his restraint. Respondent argues: "[H]abeas corpus has traditionally been limited to providing a forum for challenges to a custodian's legal authority to hold a petitioner in custody or otherwise restrain his liberty or to the manner in which the petitioner is confined. It has not been used as a procedural mechanism for reopening or supplementing otherwise closed proceedings for any less fundamental purpose." The relief offered by *Franklin* is, according to Respondent, available only by direct review.

The California Supreme Court's order directing us to reconsider the matter in light of *Franklin* strongly suggests the Supreme Court recognizes that the relief afforded by that opinion is available by habeas corpus. Otherwise, it seems, the Supreme Court would have denied the Petitioner's petition for review.

In any event, Respondent takes an overly narrow view of the scope of the writ of habeas corpus. A previously convicted defendant may obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect. (E.g., *In re Cortez* (1971) 6 Cal.3d 78, 82-83 [new California Supreme Court decision justifies habeas corpus relief]; *In re Terry* (1971) 4 Cal.3d 911, 916 [new United States Supreme Court decision justifies habeas corpus relief]; *In re Johnson* (1970) 3 Cal.3d 404, 407-408, 409-410 [same].)

In *Franklin*, *supra*, 63 Cal.4th at pages 286-287, the California Supreme Court in effect expanded the defendant's rights by remanding the matter to the Court of Appeal with instructions to remand to the trial court to determine whether the defendant was afforded an adequate opportunity to make a record of information relevant to a future determination under Penal Code sections 3051 and 4801. *Franklin* thus holds that a defendant has the right at the time of sentencing to present evidence and make a record of information that may be relevant at his or her eventual youth offender parole hearing.

Changes in case law customarily are fully retroactive. (*People v. Birks* (1998) 19 Cal.4th 108, 136; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207.) There is an exception to the rule of retroactivity when a judicial opinion changes a settled rule on which the parties had relied. (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378.) In that situation, """[c]onsiderations of fairness and public policy may require that a decision be given only prospective application.""" (*Ibid.*) *Franklin* did not change any settled rule on which the parties to this case relied in the trial court or on appeal. Nothing in *Franklin* suggests the California Supreme Court intended it to be excepted from the rule of full retroactivity.

As the deprivation of the rights granted by *Franklin* is cognizable on habeas corpus, we have inherent power to fashion the appropriate remedy (*In re Crow* (1971) 4 Cal.3d 613, 619-620, fn. 7) with consideration toward factors of justice and equity (*In re Harris* (1993) 5 Cal.4th 813, 851). The appropriate remedy, we have concluded, is to remand the matter to the trial court with directions to conduct a hearing at which Petitioner will have the opportunity to make such a record.

Respondent argues that Petitioner should not be afforded habeas corpus relief because, as a practical matter, a hearing conducted 13 years after the commission of the offenses and more than nine years after original sentencing would not be "an efficient or effective way of seeking to augment the existing sentencing record with any further evidence of [Petitioner]'s particular characteristics as a youthful offender in 2003."

According to Respondent, there is no guarantee the original sentencing judge will be available to conduct the hearing, and the parties likely will have to be represented by new defense counsel or prosecutors who might have no familiarity with the matter.

The issues identified by Respondent are inherent in the remedy afforded by *Franklin*, whether granted by direct appeal or collateral challenge. We take judicial notice of the Court of Appeal docket in *People v. Franklin*,[1] which shows that nearly four years elapsed from the date the notice of appeal was lodged (June 5, 2012) to the date on which the Supreme Court issued its opinion (May 26, 2016). Thus, when the court in *Franklin* remanded the matter for a determination whether the defendant had had the opportunity to make a record of youth-related factors, it did so with the knowledge and understanding that such determination and any evidentiary hearing would be conducted more than four years after the date of original sentencing.

As explained in *Franklin*, *supra*, 63 Cal.4th at page 269, the criteria for parole suitability in Penal Code sections 3051 and 4801 "contemplate that the Board's decisionmaking at [the defendant]'s eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." It would be most effective to make a record of those youth-related factors as near in time as possible to the date of original sentencing. Nine years after original sentencing is far from ideal, but it is better than the 15th, 20th, or 25th year of incarceration, which are the possible times for the youth offender parole hearing. (Pen. Code, § 3051, subd. (b)(1), (2) & (3).)

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[1] A print copy of the online Court of Appeal docket is attached to Petitioner's supplemental responding brief. We take judicial notice of the docket pursuant to Evidence Code section 452, subdivision (h) as "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

## DISPOSITION

The petition for writ of habeas corpus is granted insofar as it challenges Petitioner's sentence of 125 years to life without affording Petitioner the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed. The matter is remanded with directions to the trial court to conduct a hearing at which Petitioner has the opportunity to make a record of such mitigating evidence. The hearing must be conducted no later than 90 days from the date this opinion is final in this court.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.

## DECLARATION OF SERVICE BY OVERNIGHT COURIER AND INTERNAL MAIL

Case Name: **In re Anthony Cook, on Habeas Corpus**
Case No.: **S______/G050907**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On February 17, 2017, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with **FEDERAL EXPRESS**, addressed as follows:

**Supreme Court of California**
**350 McAllister Street, Room 1295**
**San Francisco, CA 94102-4797**

*(Original and 13 Copies For Filing)*

In addition, on February 17, 2017, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

**Michael Satris**
**Law Offices of Michael Satris**
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**The Honorable Katrina West**
**San Bernardino County Superior Court**
**247 W. Third Street**
**Department S20**
**San Bernardino, CA 92415-0240**

**Kevin J. Lane, Clerk of the Court**
**Court of Appeal of the State of California**
**Fourth Appellate District, Division Three**
**PO Box 22055**
**Santa Ana, CA 92702**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 17, 2017, at San Diego, California.

B. Romero
Declarant

B. Romero
Signature

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