In the Supreme Court of the State of California

In re **ANTHONY COOK,** **On Habeas Corpus.**	Case No. S240153

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

OPENING BRIEF ON THE MERITS

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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.

INTRODUCTION

A court has broad authority to grant relief by way of a writ of habeas corpus. But that authority is not unbounded. Habeas corpus jurisdiction is constrained by a few essential prerequisites—habeas petitioners must be in actual or constructive custody, and central to this case, habeas petitioners have historically been required to demonstrate that their custody is in some way unlawful. Habeas petitioners seeking a remand pursuant to *People v. Franklin* (2016) 63 Cal.4th 261, however, are not subject to an unlawful restraint.

Franklin did not create its novel remand procedure to cure an underlying illegality. It crafted the procedure to help implement the new parole provisions in Penal Code section 3051 by reopening youthful offenders' sentencing hearings for the limited purpose of providing them an opportunity to build a more robust record of their characteristics and circumstances related to the offense, at a time not too far removed from the conviction, for later use at a parole hearing. Creating such a remand procedure on direct appeal is an appropriate use of the Court's supervisory authority over cases not yet final. However, absent any underlying unlawful restraint or illegal sentence, habeas corpus would not historically lie to reopen a sentencing hearing in a long final case in order to supplement a record. And this case provides no compelling basis for expanding the scope of habeas corpus to permit or require such hearings in

light of the practical difficulties and burdens on the court system that would ensue.

STATEMENT

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 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 v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455], the Court extended the reasoning of *Graham* to hold that imposition of a mandatory sentence of life without parole (LWOP) 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 262 considered the constitutionality of a 110-year prison sentence imposed on a juvenile convicted of a non-homicide offense. The

Court concluded that since the sentence fell outside the defendant's natural life expectancy, it constituted a de facto life without parole sentence and was therefore cruel and unusual punishment in violation of the Eighth Amendment. (*Id.* at pp. 265, 268-269.) *Caballero* 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 Penal Code section 3051.[1] The statute provides for a "youth offender parole hearing" that guarantees most juvenile offenders a meaningful opportunity for release on parole after serving no more than 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).)

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[1] Stats. 2013, ch. 312, § 4. Senate Bill 260 also amended sections 3041, 3046, and 4801. (Stats. 2013, ch. 312, §§ 2, 3 & 5.) In 2015, the Legislature amended Penal Code section 3051 to raise the age of eligible youthful offenders to 23. (Stats. 2015, ch. 471, § 1 (S.B. 261), effective Jan. 1, 2016.) All subsequent statutory references are to the Penal Code unless otherwise noted.

Subsequently, in *Montgomery v. Louisiana* (2016) 577 U.S. __ [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.) *Montgomery* 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 claims that his aggregate term was a de facto LWOP sentence and that it 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

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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."

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.)

> 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. Factual and Procedural Background

In December 2003, when Cook was 17 years old, Cook and a confederate ambushed three men in retaliation for the murder of Cook's brother, killing two and wounding the third. (Typed opn. at pp. 2-3;[4] *People v. Shaw and Cook* (May 28, 2009, G041439) [nonpub. opn.].)[5] In 2007, a jury convicted Cook of two counts of first degree murder (§ 187, subd. (a)), and one count of attempted premeditated murder (§§ 187, subd. (a), 664). (Typed opn. at p. 3.) The jury found true three allegations that Cook personally and intentionally discharged a firearm, proximately causing great bodily injury or death (§ 12022.53, subds. (c), (d)). (Typed

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[4] Citations to the "Typed opn." refer to the unpublished opinion below from which the People sought review.

[5] In his supplemental habeas petition, Cook asked the appellate court to take judicial notice of the record of his underlying conviction in *People v. Shaw and Cook*, *supra*, G041439. (Supp. Petn. at pp. 2-3.)

opn. at p. 3.) The trial court sentenced Cook to prison for life with the possibility of parole on the attempted murder count and imposed five consecutive indeterminate terms of 25 years to life for the two murder counts and the three firearm enhancements, for a total sentence of 125 years to life. (*Ibid.*)

The Court of Appeal affirmed the conviction and sentence in an unpublished opinion (Typed opn. at p. 3; *People v. Shaw and Cook*, *supra*, G041439), and this Court denied review (case number S173497).

In 2014, Cook filed a petition for writ of habeas corpus alleging that his prison term of 125 years to life was unconstitutional. He argued that his lengthy prison term was a de facto sentence of life without the possibility parole which, because he was only 17 at the time he committed the murders, violated the Sixth Amendment prohibition against cruel or unusual punishment under *Miller v. Alabama*, *supra*, 132 S.Ct. 2455. (Petn. at p. 3; Supp. Petn. at pp. 4-5.)

After issuing an order to show cause, the Court of Appeal held that *Miller* applied retroactively to cases on collateral review. (Typed opn. at p. 2, relying on *Montgomery*, *supra*, 136 S.Ct. 718.) The court, however, found that petitioner was not entitled to relief because newly enacted section 3051 cured any constitutional infirmity in Cook's sentence by providing Cook with a meaningful opportunity for a parole hearing, notwithstanding his original sentence. (Typed opn. at p. 2.) The Court of Appeal thus denied the petition for writ of habeas corpus. (*Ibid.*)

Cook petitioned for review, and this Court transferred the case back to the Court of Appeal to consider whether, in light of this Court's intervening decision in *People v. Franklin*, *supra*, 63 Cal.4th at pages 268-269, Cook "is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'" (Typed opn. at p. 2; *In re Cook* (July 13, 2016, S234512) [nonpub. order].)

After receiving supplemental briefing by the parties, and reconsidering the matter on rehearing, the Court of Appeal, in a published opinion, issued a writ of habeas corpus directing the superior court to hold a hearing to allow petitioner "the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed." (Typed opn. at p. 10.)

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." (Typed. 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." (Typed opn. at pp. 7-8.) Thus, the court held, "the deprivation of rights granted by *Franklin* is cognizable on habeas corpus." (Typed 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.]" (Typed opn. at p. 9.) The Court of Appeal remanded the matter to the trial court to conduct a *Franklin* hearing to make a record of mitigating evidence tied to youth, within 90 days of finality of its opinion. (*Ibid.*) This Court granted review.

ARGUMENT

THERE IS NO APPARENT STATUTORY OR PRECEDENTIAL BASIS FOR USING HABEAS CORPUS TO PROVIDE A SUPERIOR COURT HEARING PURSUANT TO *FRANKLIN*, AND DOING SO WOULD RAISE SIGNIFICANT PRACTICAL CONCERNS

There is no clear legal basis for using a writ of habeas corpus to direct a superior court to hold a record-supplementing hearing of the sort described in *Franklin*. Although habeas corpus is a flexible remedy, this Court has long held that unlawful custody is a prerequisite to habeas relief. That prerequisite is absent in this case, and the Court of Appeal identified no other ground to justify the remedy it ordered. Moreover, there is no compelling basis for expanding the scope of habeas corpus in the present circumstances. Requiring *Franklin*-type hearings in cases already final on appeal would be unwarranted given the practical difficulties in holding such hearings, which will often be far removed from the trial proceedings, and the probable burdens that would be placed on the courts by the number of habeas petitioners who would qualify for them.

A. A Writ of Habeas Corpus Has Historically Been Reserved for Claims of Unlawful Restraint

While a court's authority to provide relief by way of a writ of habeas corpus is undoubtedly broad, that authority is generally circumscribed by the essential requirement that petitioners must demonstrate that they are subject to an unlawful restraint. Penal Code section 1473, subdivision (a), which sets forth the statutory requirements for challenging a conviction by way of a petition for writ of habeas corpus, provides: "Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint." (See *People v. Romero* (1994) 8 Cal.4th 728, 737 ["In exercising this original jurisdiction, the Courts of

Appeal 'must abide by the procedures set forth in Penal Code sections 1473 through 1508'"].)

Thus, this Court has explained that "[t]he key prerequisite to gaining relief on habeas corpus is a petitioner's custody." (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) A person who is in actual or constructive state custody may seek the writ to challenge the legal basis for the state restraint. (*Id.* at pp. 1069-1070.) Under some circumstances, a person in custody may also use habeas to bring "a challenge related not to the petitioner's underlying conviction but instead to [the conditions of] his or her actual confinement." (*Id.* at p. 1069.) In contrast, even potentially severe collateral consequences of a criminal conviction do not provide a sufficient basis for habeas jurisdiction. (*Id.* at p. 1070.)

The Court further observed in *Villa* that the purpose of the writ of habeas corpus is to challenge the lawfulness of the confinement. "'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, quoting *In re Fortenbury* (1940) 38 Cal.App.2d 284, 289; accord, *People v. Romero*, *supra*, 8 Cal.4th at p. 737 ["The petition 'must allege unlawful restraint . . . , and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful'"].) The Court emphasized that "the writ of *habeas corpus* does not afford an all-inclusive remedy available at all times as a matter of right." (*Villa*, *supra*, at pp. 1069-1070.) And, so far as the People have been able to determine, this Court has never previously allowed a person in state custody to use a writ of habeas corpus to seek relief that involves no challenge to the basic legality either of the custody itself or of the conditions under which the petitioner is confined.

For example, to establish an unlawful restraint giving rise to habeas corpus jurisdiction, it is generally not sufficient for a petitioner to allege merely that some procedural flaw occurred at trial or sentencing. "Since it is a collateral attack on a judgment, habeas corpus does not lie unless the asserted defect in the proceedings constitutes a fundamental jurisdictional or constitutional error." (*In re Sands* (1977) 18 Cal.3d 851, 856.) *Sands* explained that the predicate requirement of a fundamental jurisdictional error "encompasses any error of sufficient magnitude that the trial court may be said to have acted in excess of jurisdiction." (*Id.* at p. 857.)

The Court emphasized that this requirement should be interpreted broadly "to preserve habeas corpus as a flexible remedy adaptable to the exceptional circumstances of individual cases." (*Sands*, *supra*, at p. 857.)

> Nevertheless, despite the expanded scope of the great writ in California, the principle endures that habeas corpus will not lie to correct procedural error which is not of fundamental jurisdictional character. [Citations.] Thus we must inquire in the present case whether [the asserted error] would constitute [a] "fundamental jurisdictional defect" [citation], entitling petitioner to release upon habeas corpus or would be a "mere error of procedure" [citation] which cannot be raised by collateral attack. [Citation.]

(*In re Sands*, *supra*, at p. 857; accord, *In re Harris* (1993) 5 Cal.4th 813, 828 ["Unlike review on direct appeal, habeas corpus does not simply inquire into the correctness of the trial court's judgment. The scope of habeas corpus is more limited. Although the writ of habeas corpus is directed against the custodian of one who is illegally confined, it will reach out to correct errors of a fundamental jurisdictional or constitutional type only"]; *In re Chessman* (1955) 44 Cal.2d 1, 5-6 ["The function of the writ of habeas corpus is solely to effect 'discharge' from unlawful restraint, though the illegality in respect to which the discharge from restraint is sought may not go to the fact of continued detention but may be simply as

to the circumstances under which the prisoner is held . . . ."]; *In re Porterfield* (1946) 28 Cal.2d 91, 99 [habeas corpus "may not be used as a device for the correction of mere errors or irregularities committed within the exercise of an admitted jurisdiction"]; *In re Fortenbury*, *supra*, 38 Cal.App.2d at pp. 289-290 [noting limitation on the availability of the writ].)[6]

Federal habeas corpus jurisprudence is in accord. In *Hill v. United States* (1962) 368 U.S. 424, 428, for example, the Supreme Court discussed the limited scope of habeas corpus jurisdiction in the context of a collateral challenge based on the denial of a defendant's statutory right to allocution at sentencing. *Hill* explained that the asserted error "is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" (*Ibid.*, citations omitted.)

Justice Ginsberg, writing for the plurality in *Reed v. Farley* (1994) 512 U.S. 339, 348, reaffirmed that the scope of a federal writ of habeas corpus, though broad, is limited—it reaches only substantial legal defects, as provided in *Hill*. (*Ibid.*, see also *id.* at pp. 355-356 (conc. opn. of Scalia, J.) [agreeing that *Hill* governs and arguing for an even narrower

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[6] Similarly, although the scope of state habeas corpus has been extended to encompass challenges to unlawful conditions of confinement, the courts have recognized that nonsubstantial prison rules violations do not warrant habeas review. (*In re Williams* (2015) 241 Cal.App.4th 738, 743-745; *In re Johnson* (2009) 176 Cal.App.4th 290, 299; see generally *Gomez v. Superior Court* (2012) 54 Cal.4th 293, 308-310 & fn. 10.)

interpretation of habeas corpus jurisdiction].)[7] "We have stated that habeas review is available to check violations of federal laws when the error qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.'" (*Id.* at p. 348 (plur. opn. of Ginsberg, J.).) *Reed*, relying on *Hill*, declined to extend habeas relief for mere procedural errors. (*Id.* at pp. 354-355; accord, *Medellin v. Dretke* (2005) 544 U.S. 660, 664 (per curiam) ["In *Reed* . . . , this Court recognized that a violation of federal statutory rights ranked among the 'nonconstitutional lapses we have held not cognizable in a postconviction proceeding' unless they meet the 'fundamental defect' test announced in [*Hill*]"]; *United States v. Timmreck* (1979) 441 U.S. 780, 784 [habeas corpus unavailable for procedural error because no claim can "reasonably be made that the error here resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure'"]; *United States v. Addonizio* (1979) 442 U.S. 178, 185 [observing regarding habeas corpus, "While the remedy is in this sense comprehensive, it does not encompass all claimed errors in conviction and sentencing"]; *Davis v. United States* (1974) 417 U.S. 333, 346 ["This is not to say, however, that every asserted error of law can be raised on a § 2255 motion"].)

Thus, both state and federal habeas corpus have traditionally been limited to providing a forum for addressing challenges to a custodian's legal authority to hold a petitioner in custody or otherwise restrain his liberty, or for reviewing the lawfulness of the manner in which the petitioner is confined. Habeas has not been used as a procedural

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[7] Justice Ginsberg's plurality opinion represents the holding of the Court because it was the narrowest ground agreed upon by a majority of justices. (See *Marks v. United States* (1977) 430 U.S. 188, 193.)

mechanism for reopening or supplementing otherwise closed proceedings for any less fundamental purpose. (*In re Sands*, *supra*, 18 Cal.3d at p. 857; *In re Williams* (2015) 241 Cal.App.4th 738, 743-744.)

B. The Remand Remedy Adopted on Direct Appeal in *Franklin* Was Not Predicated on an Underlying Illegality or Unlawful Restraint

In *Franklin*, the court found no illegality in the defendant's sentence, concluding that the enactment of section 3051 rendered moot the defendant's Eighth Amendment challenge to his indeterminate sentence of 50 years to life. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 279-280.) "[T]he combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because Franklin is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*." (*Ibid.*) The Court therefore denied the defendant's request for resentencing and held that the defendant did not suffer an unconstitutional sentence or other unlawful restraint.

Franklin did, however, order further proceedings. Although the Court concluded that the defendant was not entitled to resentencing, it observed that the new parole statutes "also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Franklin*, *supra*, at p. 283.) The Court added that obtaining the relevant information would presumably be easier if undertaken as part of the sentencing hearing in superior court, and conducted in relative temporal proximity to the offense and the trial.

> Assembling such statements "about the individual before the crime" is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, section 3051, subdivision (f)(1) provides that any "psychological evaluations and risk assessment instruments" used by the Board in assessing growth and maturity "shall take into consideration ... any subsequent growth and increased maturity of the individual." Consideration of "subsequent growth and increased maturity" implies the availability of information about the offender when he was a juvenile.

(*Id.* at pp. 283-284.)

The Court noted that it was unclear from the record in *Franklin* whether the defendant had a full opportunity at his sentencing hearing to present all available mitigating material that could be of use at a subsequent parole hearing. It therefore ordered that the case be remanded to the superior court to determine if Franklin had such an opportunity, and if not, to allow him to provide such information within the evidentiary confines of a sentencing hearing. (*Franklin*, *supra*, at p. 284.)

Although the Court explained that the desirability of a hearing to preserve this material flowed from the assumption inherent in section 3051 that such material should be available at the parole hearing, the Court did not hold that its remand order was predicated on a finding of any illegality in the underlying sentencing proceeding. Rather, it remanded a case that was pending on direct appeal to the trial Court for potential supplementation of the existing record, to serve additional purposes that might arise in the future. The Court's opinion pointed to procedural mechanisms made available by statute for the compilation of a relevant record at the sentencing stage of an open criminal proceeding. (See *Franklin*, *supra*, at p. 284 [citing § 1204 and Cal. Rules of Court, rule 4.437].) And although the legal basis for the remand order allowing for

supplementation of the existing sentencing record was not stated expressly, the order 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'"]). Habeas corpus does not provide any equivalent supervisory authority.[8]

C. The Court of Appeal Did Not Identify a Valid Basis for Finding Habeas Jurisdiction

The Court of Appeal below disagreed with the People's submission that habeas jurisdiction does not extend to *Franklin* hearings. (Typed opn. at p. 7 ["Respondent takes an overly narrow view of the scope of the writ of habeas corpus"].) However, the Court of Appeal's broader view of habeas jurisdiction was not supported by the authority it cited.[9]

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[8] Moreover, nothing suggests that the Legislature intended to create a new habeas mechanism for supplementing the record in superior court as part of section 3051. (See Arg. II(D)(i), *infra.*, at pp. 27-28.)

[9] In addition to case authority, the Court of Appeal also pointed to this Court's remand order—which directed the appellate court to reconsider the matter in light of *Franklin*, instead of denying the review petition outright—as "strongly suggest[ing] the Supreme Court recognizes that the relief afforded by that opinion is available by habeas corpus." (Typed opn. at p. 7.) The lower court's interpretation of this Court's order was understandable, particularly given that shortly after deciding *Franklin*, the Court transferred several pending habeas cases with claims based on *Miller v. Alabama*, *supra*, 132 S.Ct. 2455, to the Courts of Appeal with directions to issue orders to show cause in the superior court that require the respondent to show why the petitioner is not entitled to a *Franklin* hearing. (See, e.g., *In re Bonilla* (Aug. 17, 2016, S214960) 2016 WL 4432799 at *1 [nonpub. order]; *In re Alatriste* (Aug. 17, 2016, S214652) [nonpub. order];
(continued...)

The Court of Appeal cited to two legal propositions as supporting habeas jurisdiction. The court observed first that habeas corpus is available when "changes in case law expanding a defendant's rights are given retroactive effect" (Typed opn. at p. 7), and second that courts have the inherent authority under habeas corpus jurisprudence to fashion equitable remedies (*id.* at p. 8). The court's description of these principles was generally accurate, but its reliance on them was misplaced. Neither principle applies in this context.

The court's observation that changes in case law are often given retroactive effect is inapposite because the remand procedure identified in *Franklin* was not predicated on a change in case law.[10] As this Court noted, "Franklin's sentence was *statutorily* mandated at the time it was imposed." (*Franklin*, *supra*, 63 Cal.4th at p. 272, italics added.) Because the trial court lacked discretion under the existing statutory scheme, evidence of juvenile mitigation had no relevance at the sentencing hearing. (*Id.* at pp.

(...continued)
In re Heard (Aug. 17, 2016, S216772) [nonpub. order]; *In re Gonzalez* (Aug. 17, 2016, S226480) [nonpub. order]; *In re Aguilar*, S226995) [nonpub. order].) However, such unpublished orders, which were issued without the benefit of any briefing on this point, do not have precedential or persuasive value. (See *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 225-226.)

[10] A detailed discussion of when changes in case law should be given retroactive effect on collateral review is set out in *In re Gomez* (2009) 45 Cal.4th 650, 654-655, discussing *Teague v. Lane* (1989) 489 U.S. 288, 301. (See also *In re Joe R.* (1980) 27 Cal.3d 496, 511 ["Decisions have generally been made fully retroactive only where the right vindicated is one which is essential to the integrity of the fact-finding process. On the other hand, retroactivity is not customarily required when the interest to be vindicated is one which is merely collateral to a fair determination of guilt or innocence"]; *In re Moore* (2005) 133 Cal.App.4th 68, 75 ["Although new substantive rules generally apply retroactively, new rules of procedure generally do not"].)

269, 282-283.) The enactment of a new statutory provision, section 3051, rendered juvenile mitigation evidence meaningful at a subsequent parole hearing and thus newly relevant at sentencing for that future purpose. In other words, a statutory change, not a change in case law, altered the relevant considerations for sentencing hearings, which in turn precipitated the *Franklin* remand proceeding.

Unlike changes in case law, statutory changes are prospective, unless the Legislature expressly declares otherwise. (§ 3; *People v. Brown* (2012) 54 Cal.4th 314, 319.) Even when the Legislature amends a statute to reduce the punishment for a particular criminal offense, the presumption in the face of legislative silence is that the amended statute applies only to defendants whose judgments are not yet final. (*Brown*, *supra*, at p. 323; *In re Estrada* (1965) 63 Cal.2d 740, 742-748.)

As noted above, the enactment of section 3051 did not purport to alter or invalidate earlier sentencing hearings. (*Franklin*, *supra*, at pp. 278-279 ["But section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required"].) Rather it addressed eligibility for and timing of future parole hearings. The new parole statute also had the effect of making mitigation evidence newly relevant for the future parole hearings. Consequently, this Court elected in *Franklin* to order a remand to the sentencing court to allow for the presentation of mitigation evidence for possible use at a subsequent parole hearing as a complement to section 3051. Contrary to the appellate court's suggestion, the remand component of *Franklin* was not a retroactive change in case law that would directly trigger habeas jurisdiction.

The Court of Appeal's reliance on equitable principles is equally unavailing. The court cited footnote 7 of *In re Crow* (1971) 4 Cal.3d 613, 619-620, which provides, "Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy for the deprivation of any fundamental right which is cognizable in habeas corpus." Of course, the *Crow* footnote recognizes that habeas jurisdiction must exist as a predicate to exercising this equitable power. And *Villa* explains that the jurisdictional prerequisites for issuance of a writ of habeas corpus cannot be set aside for the sake of achieving an equitable end. (*Villa*, *supra*, 45 Cal.4th at pp. 1075-1076.) Consequently, the authority cited by the Court of Appeal does not support a finding of habeas jurisdiction.

D. While *Franklin*'s Record-Supplementing Hearing Procedure is Appropriate for Cases on Direct Appeal, It Raises Significant Legal and Practical Concerns in the Habeas Context

The *Franklin* remand procedure presents both legal and practical challenges in habeas cases that are not implicated on direct appeal. Appellate review courts have supervisory authority over trial courts, which provides authorization for remand orders even in the absence of any continuing legal error. There is no comparable statutory or precedential authority under California's habeas corpus jurisprudence for a record-supplementing *Franklin* hearing. Extending habeas corpus to include *Franklin* remands in cases long final also presents practical concerns not present on direct appeal—both in the number of cases potentially implicated and in the challenges in offering a meaningful hearing long after conviction. Given these legal and practical concerns, if the Court finds habeas corpus should lie for ordering a *Franklin* hearing, the Court should give careful consideration to whether reasonable limitations on the availability of any record-supplementing procedure on habeas would be appropriate.

1. There is no clear legal foundation for *Franklin* hearings on habeas corpus

Because *Franklin* did not rely on any finding of constitutional or sentencing error, and given the special nature of the remand order in that case, there is no clear legal basis for using a writ of habeas corpus to direct a superior court to hold a similar supplemental evidentiary hearing. *Franklin* did not hold that section 3051 creates a new statutory right to a hearing in superior court. Nor does the Court's opinion suggest that section 3051 renders unlawful any indeterminate life sentence imposed without an expanded sentencing hearing on an individual now covered by section 3051 but whose conviction was already final prior to the statute's enactment. Rather, *Franklin* concluded that, in a case not yet final on direct appeal, remand for a possible renewed evidentiary proceeding, likely before the original sentencing judge, provided an appropriate way to afford the defendant an opportunity to build a record that might prove useful for an ultimate parole determination under the new provisions of section 3051.

This approach makes sense for cases on direct appeal. In such cases there is not yet a fully final judgment, and existing sentencing procedures can be used to supplement the original sentencing record at a point still reasonably close in time to the trial proceedings and, presumably, the underlying events. The defendant will likely still be represented by trial counsel familiar with the investigation done for purposes of trial and sentencing, and fully acquainted with the defendant's particular circumstances, and the court will still be in immediate possession of the trial record. It is, however, far from clear whether the same is true, either legally or practically, for final judgments challenged by way of a petition for writ of habeas corpus.

As a jurisdictional matter, *Franklin* identified no illegality in the defendant's sentence of the type that would normally be necessary to

establish a basis for asserting habeas jurisdiction over cases that, unlike *Franklin*, are already final on appeal. (See *In re Sands*, *supra*, 18 Cal.3d at p. 857.) It also identified no existing legal mechanism, comparable to evidentiary proceedings in connection with sentencing under section 1204, that could ordinarily be invoked through a habeas challenge to a final judgment of conviction. (See *Franklin*, *supra*, 63 Cal.4th at p. 284.) Normally, the discretionary authority of courts to order special evidentiary proceedings, absent an underlying illegality, is far more limited in the habeas context than on direct appeal. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 ["As we have noted, habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment. It is not a device for investigating possible claims, but a means for vindicating actual claims"].)

Likewise, the legislative history of both the 2013 enactment and the 2015 expansion of section 3051 suggest the Legislature did not contemplate that habeas would serve as a vehicle for supplementing the record in superior court as part of implementing section 3051.[11] The appropriation committees' analyses of S.B. 260 and S.B. 261 expressly identified potential cost savings from a reduction in habeas corpus petitions raising challenges related to the youthful offenders' sentences as a result of section 3051. (See Assem. Com. on Appropriations, Rep. on S.B. 260 (2013- 2014 Reg. Sess.) as amended Aug. 12, 2013, p. 2 ["The above costs [of implementing § 3051] would be offset to an unknown degree by state trial court [general fund] savings as a result of an accompanying reduction in

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[11] The People have separately requested that the Court take judicial notice of the legislative history of section 3051. (Stats. 2013, ch. 312 (S.B. 260) [enacting § 3051], Stats. 2015, ch. 471 (S.B. 261) [expanding § 3051]; see Evid. Code, §§ 452, subd. (c) & 459, subd. (a); *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45 & fn. 9.)

writs of Habeas Corpus, by which inmates challenge convictions and/or sentences"]; see also Sen. Com. on Appropriations, Rep. on S.B. 261 (2015- 2016 Reg. Sess.) as amended Mar. 24, 2015, p. 1 [same].)[12]

2. Authorizing *Franklin* hearings on habeas corpus raises significant practical concerns

As a practical matter, the potential benefits and costs of ordering new evidentiary proceedings relating only to a possible future parole determination are very different in cases in which the original judgment has already become fully final. Such cases are likely to be substantially removed in time both from the underlying offense and from the trial stage at which the resources of the parties and the courts were marshaled for the purpose of building and testing a factual record. In this case, petitioner committed his offense in December 2003 and was sentenced in 2007. (Typed opn. at p. 3.) The People question whether ordering a hearing in the superior court, to be conducted more than 14 years after the commission of the offense and 10 years after the original sentencing, would 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. It is not at all clear that the quality of a record concerning the juvenile offender's youthful characteristics and circumstances created through some sort of special evidentiary proceeding at this late stage would

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[12] This anticipated reduction in habeas petitions was repeated in the bill analysis for S.B. 260 submitted to the full Senate and Assembly before passage. (See <http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_260&sess=PREV&house=B&author=hancock_%3Chancock%3E> [legislative history of S.B. 260].) The same is true for S.B. 261. (See < http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_261&sess=CUR&house=B&author=hancock_%3Chancock%3E> [legislative history of S.B. 261].)

be markedly better than a record developed and preserved through other means or in preparation for the parole hearing itself.

The Court of Appeal countered by observing that cases on appeal remanded for *Franklin* hearings may also reflect significant time lapses between the original sentencing and the remand order. It pointed out that in *Franklin*, nearly four years had elapsed from the date the notice of appeal was lodged and this Court's opinion ordering remand. (Typed opn. at p. 9.) The People recognize that a *Franklin* hearing following remand after appeal may occur anywhere from one to four years after the original sentencing. But such delays on appeal are not comparable to the potential delays associated with a *Franklin* hearing made available by way of habeas corpus. Since prisoners would resort to habeas corpus only after finality, the timeline for possible *Franklin* hearings on habeas will necessarily begin only after the one- to four-year period needed for direct review, and could occur as much as twenty years or more after trial.

Such an expansion of habeas corpus jurisdiction could also impose significant burdens on the trial courts. According to the Executive Officer of the California Board of Parole Hearings (CBPH)[13], as of September 1, 2016, there were 14,532 prisoners who were under the age of 23 when they committed their offenses, received sentences longer than the relevant threshold periods under section 3051, and therefore fall within the new parole procedures established by section 3051. (Request for Judicial Notice, Exh. A [Decl. of Jennifer Shaffer, Executive Officer, CBPH, from

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[13] The People have separately requested that the Court take judicial notice of its own record in *In re Wilson*, S235541, which includes the October 7, 2016, declaration of Jennifer Schaffer, Executive Officer of the CBPH, as an exhibit to the People's response to the pending habeas petition addressing this same issue. (Evid. Code, §§ 452, subd. (d) & 459, subd. (a).) The People previously invited this Court to consider the declaration from the *Wilson* case in our petition for review in this case.

In re Wilson, S235541] (hereafter Schaffer Decl.); see also *id.* at pp. 3-4 [requesting judicial notice of the legislative history of § 3051].)[14] Thus, while *Franklin* hearings are likely to be both more difficult and less valuable when substantial time has passed since an offense, the population of offenders who might seek to avail themselves of such hearings if they are made generally available through habeas corpus is not inconsiderable.

Moreover, compared with a remand on direct appeal, there is much less likelihood that the original sentencing judge would still be available to consider a habeas petition or that original record would be readily accessible. Such hearings would also likely require appointment of counsel (see *People v. Barton* (1978) 21 Cal.3d 513, 519 fn.3 [indicating counsel

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[14] According to CBPH, as of September 1, 2016, the number of offenders who committed their offense while under the age of 18 and are currently incarcerated was 3,867, and the number of offenders who were between the age of 18 and 23 at the time of their offense and are currently incarcerated was 10,648. (See Shaffer Decl.) CBPH provided a further breakdown of these numbers as follows.

For those inmates who were under 18 at the time of the offense: 696 have been incarcerated less than 5 years; 1,000 have been incarcerated between 5 and 10 years; 627 have been incarcerated between 10 and 15 years; 693 have been incarcerated between 15 and 20 years; and 851 have been incarcerated more than 20 years. (*Ibid.*)

For those between the ages of 18 and 23 at the time of their offense: 2,141 have been incarcerated less than 5 years; 2,618 have been incarcerated between 5 and 10 years; 1,701 have been incarcerated between 10 and 15 years; 1,300 have been incarcerated between 15 and 20 years; and 2,905 have been incarcerated more than 20 years. (*Ibid.*)

The legislative analysis for S.B. 260, enacting § 3051, estimated that as of May 2013, as many as 5,700 prisoners were under 18 when committing their offenses and would therefore be eligible for the new parole proceedings. (Assem. Com. on Appropriations, Rep. on S.B. 260, *supra*, at p. 3.) The legislative analysis for S.B. 261, expanding § 3051 eligibility up to age 23, noted in 2015 that as many as 5,600 additional inmates would be newly eligible for parole hearings in just the next few years under the expanded definition. (Sen. Com. on Appropriations, Rep. on S.B. 261, *supra*, at p. 1.)

must be appointed upon issuance of an order to show cause]; *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 862)—quite possibly new counsel who have no familiarity with the underlying record or the petitioner's original circumstances. Prosecutors, who may or may not be individually familiar with prior proceedings, would likewise presumably have to prepare for the proceeding, including potentially contesting expert testimony or other evidence that the petitioner seeks to submit. Accordingly, a blanket extension of *Franklin*-style remand proceedings to habeas could require a significant investment of time and resources by courts and counsel unfamiliar with the underlying facts or the petitioner's circumstances as a juvenile, even in cases where it is unclear whether such hearings would provide any incremental benefit for the ultimate parole hearing, as compared to other ways that the offender might build or preserve a record.

3. Given the legal and practical considerations, the Court should consider whether to impose reasonable limitations on the availability of any record-supplementing procedure on habeas

If the Court concludes that *Franklin*-type hearings should be available to some habeas petitioners, it bears consideration what showing a petitioner should be required to make to justify such a hearing. Courts considering habeas petitions might, for example, require specific allegations concerning why relevant evidence can still realistically be marshaled despite the passage of time. At the same time, they might require a showing that it is important the evidence be put on the record now through judicial proceedings, rather than being compiled and preserved in some other way

and awaiting presentation at the time of the parole proceedings for which the Legislature has now made specific provision under section 3051.[15]

The youthful offender is likely the most knowledgeable resource regarding any personal circumstances that may provide additional context to his or her life at the time of the offense, or about additional facts related to commission of the offense not reflected in the trial record, and he or she can create a written record of those facts and circumstances for use at a subsequent parole hearing. The defendant may also enlist family or friends to compile additional potentially relevant information for later use at a parole hearing. A record-supplementing hearing in superior court typically would not be essential for the recordation and preservation of such information for future use.[16] Thus, a particularized demonstration of need

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[15] The CBPH has now drafted proposed regulations to meet the specific requirements of section 3051 for evaluating youthful offenders. (See <http://www.cdcr.ca.gov/BOPH/2016_Board_Meetings/docs/16-11_Board_Mtg_docs/Discussion-Item.pdf> [as of June 5, 2017].) Proposed section 2446, subdivision (c) of title 15 of the California Code of Regulations provides: "The panel shall review and consider any written submissions that provide information about the youth offender at the time of his or her controlling offense, or the youth offender's growth and maturity while incarcerated, from a youth offender's family members, friends, school personnel, faith leaders, or representatives from community-based organizations." (*Ibid.*; see also *id.*, proposed § 2444 [listing 19 nonexclusive youth offender parole mitigating factors based on § 3051]; *id.*, proposed § 2445 [requiring that psychologist's comprehensive risk assessment shall consider all factors listed in proposed § 2444].)

[16] The parole board, in making its parole determination, must accept and consider all relevant material compiled and presented by the offender. (See Cal. Code Regs., tit. 15, § 2281(b) [providing in relevant part: "All relevant, reliable information available to the panel shall be considered in determining suitability for parole"]; see also *id.*, § 2402 [same]; *id.*, § 2249 [inmate's right to present evidence]; Pen. Code, § 3041.5, subd. (a)(2).) And such material offered at the parole hearing would not be subject to the ordinary rules of evidence. (Cf. Cal. Code Regs., tit. 15, § 2030, subd.

(continued...)

for a record-supplementing hearing on habeas might require a threshold showing of the existence of significant relevant information not otherwise in the possession of the offender or readily available to him or her, as well as a showing that any deficiency could not be addressed at the time of the parole hearing with the assistance of counsel. (See § 3041.7 [right to counsel at parole hearing]; cf. Cal. Code Regs., tit. 15, § 2251.)

Such an inquiry might also require a threshold showing that holding a *Franklin*-style hearing years after finality would result in substantially better record than the one that could be produced at the parole hearing itself. For example, it is not at all clear, absent a particularized showing, that a psychological evaluation conducted 14 years after the offense would be sufficiently more informative than the psychological evaluation conducted 25 years after the offense for the parole hearing (see Cal. Code Regs., tit. 15, § 2240), as to warrant a *Franklin* hearing.

The Court should also consider whether, given the practical challenges, it is best left to the Legislature to determine if and when *Franklin*-type hearings are necessary in cases final on appeal and to craft appropriate procedures outside the habeas context to achieve the desired goals. (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 *People v. Villa*, *supra*, 45 Cal.4th at p. 1076 [noting Legislature's role in creating such remedies outside of habeas].) In sum, unique legal and practical

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(...continued)
(d)(1) [only regulatory basis for exclusion of proffered testimony is if the testimony is "unnecessary, irrelevant or cumulative"].)

considerations arise in the habeas context that are absent from cases on direct review, and which militate against creating a broad extension of habeas corpus in this context.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: June 12, 2017

Respectfully submitted,

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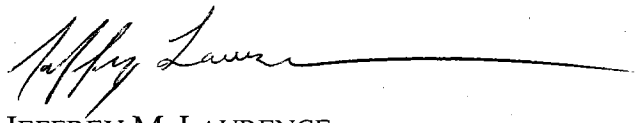

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,399 words.

Dated: June 12, 2017

XAVIER BECERRA
Attorney General of California

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DECLARATION OF SERVICE

Case Name: **In re Anthony Cook, on Habeas Corpus** No.: **S240153**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 12, 2017, I served the attached **OPENING BRIEF ON THE MERITS** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 June 12, 2017, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature