IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S240153

In re ANTHONY MAURICE COOK, JR.,
on Habeas Corpus.

Court of Appeal of California
Fourth District, Division Three
G050907

Superior Court of California
San Bernardino County
WHCSS1400290
Hon. Katrina West

Answer Brief on the Merits

Michael Satris (SBN # 67413)
Law Office of Michael Satris
PO Box 337
Bolinas, CA 94924
(415) 868-9209
fax: (415) 868-2658
satris.eservice@gmail.com

Attorney for Petitioner

By appointment of the Supreme Court under the Appellate Defenders, Inc.'s independent case system

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Constitutions:

Other:

COOK'S ANSWER BRIEF ON THE MERITS

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.

ARGUMENT

I. THE COURT OF APPEAL APPROPRIATELY GRANTED COOK HABEAS CORPUS RELIEF TO SECURE THE RIGHT TO MAKE A RECORD IN THE TRIAL COURT OF MITIGATING EVIDENCE TIED TO HIS YOUTH FOR USE AT A FUTURE YOUTH OFFENDER PAROLE HEARING THAT THIS COURT ANNOUNCED ON DIRECT APPEAL IN *PEOPLE V. FRANKLIN* (2016) 63 CAL.4TH 261.

A. This Court's Announcement in *Franklin* of the Right of Juvenile Offenders to Make a Record in the Trial Court of Mitigating Evidence Tied to Their Youth Controls Disposition of Cook's Case.

Cook here stands in the shoes of the defendant in *Franklin* in all critical respects:

- Both were juveniles at the time of their crime.
- Both suffered minimum mandatory sentences that imposed de facto punishment of life imprisonment without parole (LWOP) that made any youth-related mitigation evidence irrelevant at the time of sentencing.
- Both were subject to the same "changed legal landscape" (*People v. Franklin*, *supra*, 63 Cal.4th at p. 269) that through enactment of Senate Bill 260 now not only gave them the possibility of parole in their lifetime, but also made youth-related mitigation particularly relevant to the parole determination.

As this Court in *Franklin* explained the "changed legal landscape" effected most pertinently here by the recent passage of legislation concerning the consideration of parole for youth offenders:

> 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*[1] and before our

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[1] The Court of Appeal explained *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407] as follows: "in *Miller*, the Supreme Court declared, 'just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his or her culpability." (Typ. opn. 4, filed April 6, 2016, quoting *Miller*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2467], inside quotation marks and brackets deleted.)

> Legislature enacted Senate Bill 260, the trial court understandably saw no relevance to mitigation evidence at sentencing.

(*People v. Franklin, supra*, 63 Cal.4th at p. 269.)

Indeed, this Court's statement that the Penal Code now contemplates that the Board's decision "will be informed by youth-related factors ... at the time of the offense" understates the relevance of the evidence to the parole determination, for the youth offender statutes this Court cited provide that "the Board, in reviewing [the applicant's] suitability for parole, '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.' (§ 4801, subd. (c).)." (*In re Perez* (2016) 7 Cal.App.5th 65, 92, italics added.)

"In directing the 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 of the prisoner' (§ 4801, subd. (c)), the 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." (*People v. Franklin, supra*, 63 Cal.4th at p. 283.) Recognizing that "the availability of information about the offender when he was a juvenile" that is essential to the Board's consideration of a youth offender for parole would be accomplished in the future through the sentencing process, but that a youth offender like the defendant in *Franklin* already sentenced to a mandatory term that excluded any practical

opportunity for parole during his lifetime typically would not have produced that evidence in the trial court (*id.* at p. 284), the Court held that such post-hoc youth offenders were entitled to a post-judgment opportunity to produce that evidence in the trial court. The Court accordingly affirmed the judgment of conviction and sentence in its entirety, but remanded the case to the trial court to ensure that "Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801." (*People v. Franklin*, *supra*, at pp. 286–287.) As the Court stated: "The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction." (*Id.* at p. 278.)

The same considerations that caused the Court to find that Franklin must be afforded an adequate opportunity to make a record of information relevant to the Board when it fulfills its statutory obligations under sections 3051 and 4801 compel a finding that Cook, too, must be afforded an adequate opportunity in the trial court to make a record of information that will be relevant to the Board when it fulfills its statutory obligations under those youth offender statutes. The State claims otherwise only because the issue arose in his case in the posture of habeas corpus rather than direct appeal. Cook will demonstrate below that such a difference in the form of the issue's presentation is not material, for the issue in substance is the same: Cook's claim to a right to an adequate opportunity to make a record in the trial court of information that will be relevant to the Board as it fulfills its statutory obligations under the youth offender statutes

in its consideration of him for parole stands on the exact same constitutional and statutory footing as Franklin's claim to that right. Just as this Court appropriately vindicated that right on direct appeal in *Franklin*, the Court of Appeal appropriately vindicated Cook's equivalent right on habeas corpus.

B. Habeas Corpus Was the Proper Vehicle to Vindicate Cook's Entitlement to Make a Record in the Trial Court of Information Relevant to the Board's Consideration of Him for Parole as a Youth Offender.

1. Cook's Claim of a Right to Develop Information in the Trial Court Related to the Board's Consideration of Him for Parole Fits Comfortably Within the Habeas Umbrella of Unlawful Custodial Restraint.

The State argues that the "prerequisite" or "essential requirement" of "unlawful custody" or "unlawful restraint" that marks habeas corpus is lacking in this case. (OBM 15.) Tell that to Cook, whose body –"corpus" – the State will keep locked in a cage behind walls and barbed wire until the day he dies, unless and until the Board grants him parole as a youth offender. Plainly, Cook's claim of deprivation of and entitlement to an opportunity to make a record in the trial court of his youthful attributes at the time of the offense for the purposes of securing parole as a youth offender is a claim of unlawful custodial restraint cognizable on habeas corpus.

To support its assertion otherwise, the State quotes this Court's decision in *People v. Villa* (2009) 45 Cal.4th 1063, 1069:

"The key prerequisite to gaining relief on habeas corpus is a petitioner's custody." (OBM 16, brackets in quote deleted and capitalization restored.) But comparison with that case only reinforces the reach of habeas corpus to Cook's case: the petitioner there was not "in California custody" at all, "but [was] instead in federal custody" facing deportation for a conviction that California many years earlier had relieved him from imprisonment by paroling him and then relieved him from all custodial restraint by discharging him from parole. (*Id.* at p. 1065.) In short, California did not restrain the petitioner's person or his liberty in the least at that point.

In fact, the power of a habeas court to redress wrongful restraint is at its greatest where imprisonment is at issue, for relief from the grave and irreparable injury of wrongful imprisonment is the animating force of the writ of habeas corpus:

> [The] Great Writ['s] ... function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

(*Fay v. Noia* (1963) 372 U.S. 391, 401–402 [83 S.Ct. 822]; see also *Hamdi v. Rumsfield* (2004) 542 U.S. 507, 529 (plurality opinion) ["most elemental" of liberties protected by the Due Process Clause is "the interest in being free from physical detention by

one's own government"]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80 ["Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"].)

Moreover, habeas corpus has never been an all-or-nothing affair, where the petitioner must show his immediate entitlement to release from prison for a challenge to the restraint imposed upon him to be cognizable on habeas corpus. Rather, just as the State quotes *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." (OBM 17, ellipsis deleted.) Again, as the State quoted this Court: "habeas corpus [is] a flexible remedy adaptable to the exceptional circumstances of individual cases." (OBM 17, quoting *In re Sands* (1977) 18 Cal.3d 851, 856; see also OBM 15 ["habeas corpus is a flexible remedy"].)

The exceptional circumstances in Cook's case are the changes in the legal landscape after imposition of judgment in his case – first, by making manifest the unconstitutionality of his de facto LWOP sentence that made consideration of the factors of his youth irrelevant, and, second, the establishment of parole for youth offenders that not only made consideration of those factors essential, but put them front and center with the requirement that the Board give them great weight. To quote the Court of Appeal here:

> 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.

(Typ. opn. 7.)

The State asserts that "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." (OBM 16.) If by this the State means that this Court has never allowed a prisoner to seek habeas corpus relief from incidents of their consideration for parole, the State is sadly mistaken. To be sure, this Court regularly has utilized the writ of habeas corpus to oversee the operation of the parole system and ensure its fairness and lawfulness from the very inception of the indeterminate sentencing law [ISL] a century ago. (See, e.g., *In re Application of Lee* (1918) 177 Cal. 690 [parole law imposed ex post facto punishment upon petitioner]; *In re Schoengarth* (1967) 66 Cal.2d 295, 298 ["By this application for habeas corpus petitioner challenges the power of the Adult Authority to condition its offer of parole on his agreeing to be released to the custody of Colorado representatives for trial on charges pending against him in that state, and the authority's power to redetermine his sentence upon his refusal to sign such an agreement."]; *In re Sandel* (1966) 64 Cal.2d 412, 413 ["By this proceeding in habeas corpus we adjudicate the power of the Adult Authority to 'correct' an erroneous sentence imposed by a trial court."]; *In re Prewitt* (1972) 8 Cal.3d 470, 473 [setting forth "specific procedural processes" the Board must use before it

rescinds a parole grant]; *In re Sturm* (1974) 11 Cal.3d 258 [Board must give prisoner a written statement of the reason for denial of parole].)

The State acknowledges that this Court's holding in *Franklin* that a youth offender is entitled to the opportunity to develop a record of his youthful attributes in the trial court and "preserve this material flowed from the assumption inherent in section 3051 that such material should be available at the parole hearing." (OBM 21.) The State nevertheless construes the Court's remand order in *Franklin* as merely a matter of judicial grace "presumably derived from the Court's inherent supervisory authority over criminal trial procedure ... 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....'" (OBM 22, quoting § 1260.) But a habeas court has equally broad authority to fashion such relief as may be just under the circumstances. (See § 1484 [authorizing a habeas court "to dispose of such party as the justice of the case may require"].) "The Penal Code thus contemplates that a court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy." (*In re Harris* (1993) 5 Cal.4th 813, 850; see also *In re Crow* (1971) 4 Cal.3d 613, 619–20 ["Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy"].)

Moreover, the Court has inherent supervisory power over the whole of our State's administration of justice, including the parole process. Indeed, this Court has long recognized its special responsibility to ensure a fair process that honors the statutory

and constitutional rights that consideration of parole may implicate, and specifically has utilized the writ of habeas corpus to do so. For example, decades ago this Court granted habeas relief on a petition that mounted a broad attack on the practices of the parole board implementing those "provisions of the California Penal Code commonly known as the Indeterminate Sentence Law." (*In re Minnis* (1972) 7 Cal.3d 639, 642.) While the Court there "reject[ed] petitioner's contentions based upon claims of constitutional infirmities," it held that the "Authority did abuse its discretion" (*ibid.*) in applying a policy that "does *not* satisfy the [ISL] requirements of individualized treatment and 'due consideration.'" (*Id.* at p. 647.)

Notably, in the course of considering the petitioner's challenges to the parole process in that case, the Court endorsed section 1203.1, which permits the parties and trial court at the time of pronouncement of judgment to file written statements with the court that are then forwarded to the Department of Corrections. As the Court stated in this regard:

> Section 1203.01 establishes a channel by which [the parties and court] can convey ... information to the Authority.... [S]ection 1203.01 enables the Authority to secure information which is relevant, and in fact essential, to effective administration of the indeterminate sentence and parole laws without incurring the unnecessary burden of a second fact-finding process. Adequate safeguards are built into the statute, and we can detect no unfairness in the procedure adopted therein.

(*In re Minnis*, *supra*, 7 Cal.3d at p. 650.)

Given Cook's de facto LWOP sentence, of course, neither he nor any other party had any interest in utilizing the available sentencing processes to develop or transmit to the Board any of the "relevant, and in fact essential information, to effective administration of the indeterminate sentence and parole laws." It is the opportunity to invoke a "fact-finding process" to develop information essential to fair consideration for parole as a youth offender that Cook seeks here by writ of habeas corpus – the same opportunity that this Court secured for the defendant in *Franklin* by its remand to the trial court.

Indeed, this Court's inherent authority to supervise the administration of justice both by the trial court and by the parole board conjoin here to give it full power to provide habeas relief that affords Cook the opportunity to utilize the trial court process to channel information to the parole board. As this Court has observed: "We have recognized that this court's obligation to oversee the execution of the penal laws of California extends not only to judicial proceedings, but also to the administration of the Indeterminate Sentence Law." (*In re Rodriguez* (1975) 14 Cal.3d 639, 648.) Thus, it is well within a court's habeas function to order relief that affords a youth offender like Cook an opportunity to utilize the processes in the trial court that the Legislature already has established to develop and convey to the Board information essential to its effective administration of the ISL and parole laws, but which he did not have the opportunity to utilize at the time of his judgment because it preceded enactment of the youth offender statutes that gave him a chance for parole.

To be sure, in recent years this Court has been particularly active in overseeing the administration of the parole process to

ensure its fundamental fairness. (See, e.g., *In re Shaputis* (*Shaputis II*) (2011) 53 Cal.4th 192 [clarifying earlier decision on application of the some-evidence standard]; *In re Prather* (2010) 50 Cal.4th 238 [setting forth remedy for arbitrary denial of parole]; *In re Lawrence* (2008) 44 Cal.4th 1181 [requiring some evidence of current dangerousness to deny parole]; *In re Rosenkrantz* (2002) 29 Cal.4th 616 [making gubernatorial reversal of parole grant subject to judicial review].) This centennial year of the indeterminate sentence is no time for the Court to break with the conscientious supervision of the parole system that it has maintained over the decades.

C. Cook's Entitlement to the *Franklin* Relief the Court of Appeal Granted Has a Statutory and Constitutional Basis.

"[I]t 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." (Typ. opn. 4.) Thereafter, the law evolved to make manifest that Cook's sentence accordingly imposed cruel and unusual punishment upon him. (See, e.g., *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 734–736 [Constitution prohibits imposition of LWOP sentence in a murder case on a youth offender unless the court, after the youth has had an opportunity to present the mitigating evidence relevant to his youth and capacity for reform, determines the youth is irreparably corrupt].).

As this Court recounted in *Franklin*:

> After Franklin was sentenced, the United States Supreme Court held that the Eighth Amendment to the federal Constitution prohibits a mandatory life without parole (LWOP) sentence for a juvenile offender who commits homicide. (*Miller v. Alabama* (2012) 567 U.S. 460, 465 [183 L. Ed. 2d 407, 132 S. Ct. 2455, 2460] (*Miller*).) Shortly thereafter, we held in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) that the prohibition on life without parole sentences for all juvenile nonhomicide offenders established in *Graham v. Florida* (2010) 560 U.S. 48 [176 L. Ed. 2d 825, 130 S. Ct. 2011] (*Graham*) applied to sentences that were the "functional equivalent of a life without parole sentence," including Caballero's term of 110 years to life. (*Caballero*, at p. 268.)

(*People v. Franklin*, *supra*, 63 Cal.4th at p. 268.)

In *Franklin*, the Court explicitly held that "a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 276.) The Court of Appeal's decision in its pre-*Franklin* opinion here also presaged this Court's holding on the constitutional question, for the court there "concluded, Petitioner's sentence was unconstitutional." (See typ. opn. 2.)

The Court of Appeal in that first opinion also presaged this Court's opinion in *Franklin* that passage of Senate Bill 260, which had "recently enacted Penal Code section 3951," cured the unconstitutionality of Cook's sentence, so that it could be left intact. (Typ. opn. 2, filed April 6, 2016; see also typ. opn. 4 ["we conclude[d] 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"].) The Court of

Appeal "further note[d] that that the California Supreme Court has granted review in cases on the issue whether section 3051 cures the unconstitutional sentence imposed on a juvenile" (*id.* at p. 10), and that it "heard argument in *People v. Franklin* on March 1, 2016, and the cause has been submitted." (Typ. opn. filed April 6, 2016 at p. 11, fn. 1.)

This Court began its analysis in *Franklin* "with the recognition that the Legislature passed Senate Bill No. 260 explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 277.) And central to that analysis was the fact that parole consideration under the youth offender statutes was designed to ensure that the *Miller* factors were taken into account to give the youth offender the kind of "meaningful opportunity for release" that both the Constitution and the new youth law required. (*Ibid.*) As the Court there stated:

> In sum, the 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*.

(*People v. Franklin*, *supra*, 63 Cal.4th at pp. 279–280.)

On that basis, the Court concluded that such meaningful consideration for release required that the youth offender have

the opportunity "to make a record of information relevant to his eventual youth offender parole hearing" (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284) – an opportunity all youth offenders sentenced after enactment of 3051 would have. Thus, to effectively cure the unconstitutionality of Cook's sentence and carry out the salutary aims of the youth offender law in his case, the Court of Appeal appropriately granted him relief in the form of an opportunity to make a record in the trial court of information relevant to his eventual youth offender parole hearing – just as this Court did for the youth offender in *Franklin*. This relief will make meaningful Cooke's consideration for parole and opportunity for release as a youth offender, which was the legislative fix to his unconstitutional sentence.

D. Practical Considerations Favor, Rather than Disfavor, Extension of the *Franklin* Right to Defendants Whose Judgments Already Are Final.

The State asserts that "[a]s a practical matter, the potential benefits and costs of" ensuring an opportunity to develop information in the trial court for a youth offender's eventual consideration for parole "are very different" for habeas petitioners than for the criminal appellant because the "time lapses between the original sentencing and the remand order" presumably will be longer in habeas cases. (OBM 28–29.) But that presumed additional time lapse is only one of degree, which does not affect the legal bases establishing entitlement to return to the trial court, however informed by a cost/benefit analysis the inquiry may be.

As the Court of Appeal pointed out, in *Franklin* itself a number of years had gone by since the judgment, and that had no effect on this Court's determination of entitlement to remand to the trial court to ensure the opportunity to make a record for purposes of his eventual consideration for parole as a youth offender. (Typ. opn. 9.) Just as the Court of Appeal reasoned:

> 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.

(Typ. opn. 9.) In addition, the opportunity to make a record of youth-related factors as near as possible to the date of original sentencing will enhance the likelihood of the availability of the original sentencing judge, counsel for each side, and the record – all of which the State says is important to effective and efficient production of a record of the youth-related factors. (See OBM 30–31.)

The State points to the potential number of youth offenders who were deprived of the opportunity to make a record in the trial court for purposes of their eventual parole hearing as a "practical consideration" weighing against a grant of habeas relief (OBM 29), pointing out that "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." (OBM 30.) Putting aside the conjectural terms of that argument, it only highlights the breadth of the unfairness

that this Court addressed in *Franklin* by providing for remand in these circumstances. That many other youth offenders similarly have been deprived of an opportunity to make a record of essential matter for eventual parole consideration is an argument for providing relief on habeas, not denying relief.

The State nevertheless argues that provision of habeas relief here "could also impose significant burdens on the trial courts." (OBM 29.) The State, however, fails to show a substantial likelihood that its conjecture will ripen into actuality. As already noted, section 1203.01, subdivision (a) provides a ready-made mechanism in the trial court for the efficient development and preservation of information relevant and essential to the parole determination. It not only comes equipped with "adequate safeguards" to ensure "no unfairness," but also "enables the Authority to secure information which is relevant, and in fact essential, to effective administration of the indeterminate sentence and parole laws without incurring the unnecessary burden of a second fact-finding process." (*In re Minnis, supra*, 7 Cal.3d at p. 650.) Although this statute contemplates that such information will be filed "immediately after judgment has been pronounced," that only emphasizes the importance of developing that information as close to the time of judgment as possible.

Moreover, any burden on the trial courts in providing this essential information facilitating the parole of youth offenders presumably will be more than offset by the prison system's considerable financial savings and improved ability to manage its population that their parole will effect. Passage of such sentencing reform measures as Propositions 36, 47, and 57 attests to the fact that concern for the burdens of mass

imprisonment on both public safety and the public fisc -- not to mention the human costs of continued imprisonment of youth offenders – is a matter that is uppermost in the minds of the public at present. (See also *Brown v. Plata* (2011) 563 U.S. __ [131 S.Ct. 1910] [California's prisons are so overcrowded that they impose cruel and unusual punishment upon their population, so that the Eighth Amendment requires California to reduce its prison population].) Assuming a "cost/benefit" analysis may properly inform the determination of legal rights, any such analysis must take these benefits into consideration as well.

The State asserts that "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." (OBM 31.) On the contrary, it is very clear that remand to the trial court at the earliest point possible for professional investigation and presentation of the factors of youth is an infinitely more effective and efficient way to assure the requisite meaningful consideration of a youth offender for parole than any other possible alternative. The Board certainly has not undertaken the "burden of a second fact-finding process" to do so, but rather has fashioned itself merely as the passive recipient of any information that the youth offender or other interested party may provide at the far end of incarceration when it considers the youth offender for parole. (See, e.g., OBM 32, fn. 15, referencing the Board's proposed regulations for parole consideration of youth offenders.) The State sees no problem with abandoning a youth offender to his own devices to develop and present this information, asserting that "[t]he youthful offender is likely the most knowledgeable resource" for this information and simply

"can create a written record of those facts and circumstances for use at a subsequent parole hearing" -- and can always "enlist family or friends to compile additional potentially relevant information for later use at a parole hearing." (OBM 32.) But the very attributes and incompetencies of youth that contributed to the youth offender's crime, if not also other attributes of youth, compromise the offender's ability to be his own best advocate in the development and presentation of information concerning his youth. (See, e.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1377 [recognizing that the attributes of youth can impair the offender's ability to effectively function in the criminal justice process].)

Indeed, the most pertinent mitigating information for consideration of parole may revolve around events that the youth offender was "too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate." (O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008) 36 Hofstra L. Rev. 693; see also *id.* at p.738 [noting the tendency not only of an offender, but also his "family and friends to minimize, normalize or deny mental illness"]; *id.* at 739 [explaining "a few of the forces that impede discovery of important mitigating evidence" concerning the defendant's childhood].) And the impediments to the extraction of evidence of the attributes of youth that mitigate the crime and demonstrate the amenability to reform and rehabilitation discussed in this article concern professional efforts made at the time of trial and judgment; those impediments become infinitely greater to the point of insurmountability when the offender is left to develop that evidence himself after an intervening 25 years of

imprisonment. Those circumstances would create an intolerable risk in Cook's case that "the Legislature's mandate that youth offender parole hearings must provide for a meaningful opportunity to obtain release is unachievable in practice," throwing the constitutionality of his de facto LWOP judgment into question and undermining the laudable purpose of the youth offender enactments. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 286.)

The State also points to the fact that for the youth offender's parole consideration hearing 25 years down the road, the Board will furnish counsel pursuant to its statutory obligation to do so for all parole applicants. (OBM 33, citing § 3041.7.) Conspicuously absent from the State's argument is any suggestion that the Board imposes a duty on counsel or provides counsel with the resources to investigate and present evidence about the youthful attributes of the offender that now is so important to parole consideration. Certainly, there is nothing in the Board's proposed regulations that impose either that duty on counsel or provide counsel with the resources to do so. (See OBM 32, fn. 14.) Rather, the Board, including the counsel it appoints to represent parole applicants, relies on the trial court processes the Legislature has established for development and transmittal to the Board of information relevant to its determination of parole. (See, e.g., *Roberts v. Duffy* (1914) 167 Cal. 629, 635–636 ["the legislature ... did not contemplate that the board should take the initiative and investigate the case of each prisoner, and the board so understood this"].)

E. The State's Recommendation that Habeas Petitioners Should Be Required to Make a Greater Showing of Need for *Franklin* Relief Than the Court Required in *Franklin* Is Not Well Taken.

The State proffers a menu of options from which this Court might choose to establish a special showing of need for *Franklin* relief beyond the need this Court identified in *Franklin* that justified its grant of relief there. (OBM 31–32.) The State, however, cites no authority to support its recommendation of such a higher showing of need to grant relief here. Such artificially-enhanced requirements for pleading a claim for *Franklin* relief would needlessly complicate the administration of the writ on this issue and be counter-productive to efficient use of the trial court's resources. Their creation at this point in the litigation also would only needlessly delay any grant of *Franklin* relief to Cook – relief that both parties agree, if given at all, is better given sooner rather than later.

Finally, the State also recommends that the Court consider leaving it "to the Legislature to determine if and when *Franklin*-type hearings are necessary in cases final on appeal." (OBM 33.) But those determinations are judicial functions first and foremost, particularly in the absence of legislative action. The cases cited by the State to support its recommendation have no application. As the State notes, they all involved establishment of collateral proceedings concerning judgment where the State no longer held the defendant in custody pursuant to the judgment. As already discussed, this collateral proceeding concerns a judgment for which the State decidedly is maintaining

custody of the defendant – indeed, custody for life unless paroled as a youth offender. There simply is no basis to defer to the Legislature in a habeas proceeding specifically established by the Legislature pursuant to constitutional guarantee (§ 1473 et seq.); where the question is whether the petitioner is entitled to an opportunity to use procedures established by the Legislature for the development and transmittal of information to the Board (§ 1203.1 and related sentencing provisions); for consideration at a special type of parole hearing that the Legislature has established (§ 3051). The Legislature has done its job, and the State's recommendation that this Court shirk its job is misguided.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of the Court of Appeal.

Law Office of Michael Satris

Respectfully submitted,

Dated: September 7, 2017 By: 

Michael Satris

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

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Law Office of Michael Satris

Dated: September 7, 2017 By: _____

Michael Satris

Attorney for Petitioner

Case Name: ***In re Cook***
No.: S250143

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50.)

I, Duncan Hopkins, declare that: I am over the age of 18 years and not a party to the case; I am employed in the County of Marin, California, where the mailing occurs; and my business address is Post Office Box 337, Bolinas, California 94924.

On September 7, 2017, I caused to be served the within **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties at their mailing addresses as follows:

Mr. Anthony M. Cook
CDCR# F80581, E-4-203
P.O. Box 5242
Corcoran CA 93212
(Petitioner)

Clerk, Superior Court
San Bernardino County
247 West Third St., Second Floor
San Bernardino, CA 92415-0063

PROOF OF SERVICE BY ELECTRONIC SUBMISSION
(Cal. Rules of Court, rule 8.70.)

Additionally, I, Duncan Hopkins, declare that on September 7, 2017, I electronically served a true pdf copy of the within **ANSWER BRIEF ON THE MERITS** using the TrueFiling service to:

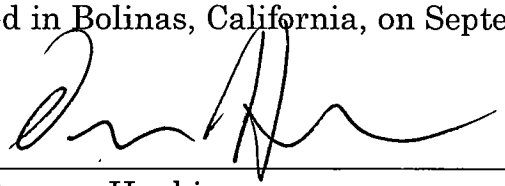
Court of Appeal, Third Appellate District, Division 3

Attorney General, State of California (Respondent)

Appellate Defenders, Inc.

District Attorney, San Bernardino County

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on September 7, 2017.



Duncan Hopkins