S240153

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPLICATION OF THE POST-CONVICTION JUSTICE PROJECT AND PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ANTHONY MAURICE COOK, JR.; BRIEF OF AMICUS CURIAE

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF ANTHONY MAURICE COOK, JR.

The Post-Conviction Justice Project (PCJP) respectfully applies for leave to file the attached amicus curiae brief in support of Petitioner Anthony Maurice Cook, Jr., pursuant to California Rules of Court, rule 8.520(f). PCJP is familiar with the content of Respondent's opening and reply briefs on the merits submitted by Attorney General Xavier Becerra and Petitioner's answer brief on the merits.

PCJP, a clinical program at the University of Southern California Gould School of Law, provides supervised student representation on post-conviction matters to California prisoners serving indeterminate life terms. Since 1994, PCJP has represented several hundred California prisoners at parole hearings and on habeas corpus challenging the arbitrary denial of parole. PCJP successfully litigated *In re Lawrence* (2008) 44 Cal.4th 1181, which clarified the "some evidence" standard of judicial review over parole decisions by the Board of Parole Hearings and the Governor.

More recently, PCJP has advocated for legal reforms to address excessive sentences for youth offenders. PCJP was heavily involved in the passage of Senate Bill 9, codified as California Penal Code § 1170, subdivision (d)(2) (providing some prisoners sentenced as juveniles to life without parole (LWOP) an opportunity to petition for review and resentencing after 15 years of incarceration) and Senate Bill 394, codified as California Penal Code § 3051, subdivision (b)(4) (providing prisoners sentenced as juveniles to LWOP a youth offender parole hearing in the 25th year of incarceration). PCJP has represented 18 individuals sentenced to juvenile LWOP on habeas, resentencing, and appeal.

PCJP co-sponsored Senate Bill 260 (SB 260), which added § 3051 and amended §§ 3041, 3046, and 4801 of the California Penal Code to create the Youth Offender Parole Process. Since the effective date of SB

260, PCJP has represented clients at more than 30 youth offender parole hearings, sponsored an empirical study of 427 California youth offender parole transcripts, participated in numerous youth offender workshops for prisoners, trained the Board of Parole Hearings on the Youth Offender Parole Process, and offered input and public feedback on the draft youth offender parole regulations. PCJP as amicus curiae participated in *People v. Franklin* (2016) 63 Cal.4th 261, 284-287, arguing that the current application of the Youth Offender Parole Process does not provide youth offenders with a meaningful opportunity for release.

PCJP is uniquely situated to provide the Court with experience, evidence, and expertise into the practical functioning of the Youth Offender Parole Process and the necessity of a *Franklin* hearing so the Board is able to meet its requirement to give great weight to the mitigating factors of youth under Penal Code § 4801.

The Pacific Juvenile Defender Center (PJDC) is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center. PJDC works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. PJDC provides support to more than 500 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers to ensure quality representation for children throughout California and around the country. Collectively, PJDC members represent thousands of youth in juvenile court delinquency cases and youth being tried as adults in California. PJDC is also involved in policy work and appellate cases aimed at assuring fairness and appropriate treatment of young people in the justice system. In this regard, PJDC has long been concerned about the handling of youth in the adult criminal justice system.

This year PJDC amicus curiae participated in the pending case of *People v. Contreras et al.*, S224564, which will decide whether a total

sentence of 50 years to life or 58 years to life is the functional equivalent of life without the possibility of parole for juvenile offenders. Last year, PJDC participated with other amici curiae in the cases of *People v. Franklin* (2016) 63 Cal.4th 261, *In re Alatriste*, S214652, and *In re Bonilla*, S214960, filing an amicus brief in *Bonilla* regarding whether a total term of imprisonment of 50 years to life for murder committed by a 16-year-old offender is the functional equivalent of life without the possibility of parole by denying the offender a meaningful opportunity for release on parole. PJDC also participated with other amici curiae in *People v. Gutierrez* (2014) 58 Cal. 4th 1354, in which this Court held that the Eighth Amendment forbids a presumption in favor of life without parole at sentencing hearings under Penal Code section 190.5. PJDC also participated in *People v. Caballero* (2012) 55 Cal.4th 262, in which this Court struck down the imposition of "de facto" life sentences on juveniles tried as adults. PJDC is knowledgeable about the relevant law, and the impact of age and immaturity on behavior, adjudicative competence, and capacity for rehabilitation.

Dated: December 13, 2017

Respectfully submitted,

By: _____

Ian C. Graves
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Richard L. Braucher

On behalf of Amici Curiae: Post-Conviction Justice Project & Pacific Juvenile Defender Center

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I. INTRODUCTION

The California Legislature created the Youth Offender Parole Process to fulfill the Eighth Amendment's promise of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juveniles. (*Graham v. Florida* (2010) 560 U.S. 48, 75 (*Graham*); *Miller v. Alabama* (2012) 567 U.S. 460, 479-480 (*Miller*); Stats. 2013, ch. 312; *People v. Franklin* (2016) 63 Cal.4th 261, 277 (*Franklin*).) Critical to the Youth Offender Parole Process's guarantee of a meaningful opportunity for release is the requirement that the Board "give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity . . . ." (*Franklin*, *supra*, 63 Cal.4th at p. 277.) For the Board of Parole Hearings (Board) to properly discharge this obligation, there must be a "sufficient opportunity" to make a record "of the juvenile offender's characteristics and circumstances at the time of the offense." (*Id.* at p. 284, quoting Pen. Code, § 4801, subd. (c).)

A court hearing is the only adequate remedy for post-conviction youth offenders to make such a record. In almost every case, the record for the youth offender parole hearing will not contain adequate, if any, information relevant to the Board's consideration of the youth factors. Historically, attorneys did not have reason or opportunity to gather or introduce mitigating youth factors at sentencing. Board-appointed parole attorneys do not have the resources to develop such information or any opportunity to include it in the prison record, and incarcerated youth offenders cannot be expected to do it themselves. The unavailability of this evidence impacts the Board conducted psychological evaluations and almost certainly the outcome of the hearings.

II. THE GREAT WEIGHT STANDARD, A CRITICAL COMPONENT OF PROVIDING A MEANINGFUL OPPORTUNITY FOR RELEASE, REQUIRES THE OPPORTUNITY TO MAKE AN ADEQUATE RECORD OF YOUTH FACTORS.

The Eighth Amendment prohibition on cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." (*Roper v. Simmons* (2004) 543 U.S. 551, 560 (*Roper*).) "This prohibition encompasses the 'foundational principle' that the 'imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Franklin*, *supra*, 63 Cal.4th at p. 273, quoting *Miller, supra,* 567 U.S. at p. 474.) In all but the "rare" case in which a court determines a juvenile offender who committed homicide is irreparably corrupt, the Eighth Amendment guarantees every juvenile offender a "meaningful opportunity to obtain release." (*Graham, supra,* 560 U.S. at p. 75; *Miller*, *supra*, 567 U.S. at p. 479.) Following *Graham*, this Court held that the promise of a meaningful opportunity for release includes non-homicide juvenile offenders serving de facto life without parole sentences. (*People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*).) Last year, this Court held that for juvenile offenders who commit homicide, a sentence that is the functional equivalent of LWOP is similarly subject to the strictures of *Miller*. (*Franklin*, *supra*, 63 Cal.4th at p. 276.)

In response to this Court's decision in *Caballero*, the Legislature created the Youth Offender Parole Process to provide most juveniles, and later youth offenders and juveniles sentenced to LWOP, with the constitutionally required meaningful opportunity for release. [1] (Stats. 2013,

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[1] The Youth Offender Parole Process initially applied to offenders less than 18 years old at the time of the controlling offense. (Stats. 2013, ch. 312, § 4.) The Legislature has since extended the process to apply to youth

ch. 312; Stats. 2015, ch. 471; Assem. Bill No. 1308 (2017-2018 Reg. Sess.); Sen. Bill No. 394 (2017-2018 Reg. Sess.) ("The youth offender parole hearing . . . shall provide for a meaningful opportunity to obtain release.").) Qualified youth offenders become eligible for release through the Youth Offender Parole Process in their 15th, 20th, or 25th year of incarceration, depending on their controlling offense.[2] (Cal. Penal Code § 3051(b).) In determining a youth offender's suitability for parole, the Board is required to give great weight to mitigating circumstances and characteristics of youth (youth factors), specifically "[(1)] the diminished culpability of juveniles as compared to adults, [(2)] the hallmark features of youth, and [(3)] any subsequent growth and increased maturity." (Pen. Code, § 4801, subd. (c).) The Youth Offender Parole Process also requires consideration of the "diminished culpability of juveniles" in psychological evaluations and the opportunity for those with knowledge of the individual as a youth to provide statements to the Board. (Pen. Code, § 3051, subd. (f)(1)-(2).) Finally, the Legislature mandated that the Board "review and, as necessary, revise existing regulations and adopt new regulations . . . in order to provide [the] meaningful opportunity for release." (Pen. Code, § 3051, subd. (e).)

The Legislature explicitly intended to provide the constitutionally required meaningful opportunity for release through the Youth Offender Parole Process. (Stats. 2013, ch. 312, § 1; *Franklin, supra*, 63 Cal.4th at p. 277 (recognizing "that the Legislature passed Senate Bill No. 260 explicitly

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(Stats. 2015, ch. 471; Assem. Bill No. 1308 (2017-2018 Reg. Sess.); Sen. Bill No. 394 (2017-2018 Reg. Sess.).)

[2] The controlling offense is defined as the offense or enhancement for which any sentencing court imposed the longest term of imprisonment. (Pen. Code, § 3051, subd. (a)(2)(B).)

to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*.").)

> The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in People v. Caballero (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in Graham v. Florida (2010) 560 U.S. 48, and Miller v. Alabama (2012) 183 L.Ed.2d 407.

Ibid., emphasis supplied. In fact, this Court held that Franklin's challenge to the constitutionality of a de facto LWOP sentence was mooted by the passage of Senate Bill No. 260 (SB 260) because Franklin was "serving a life sentence that include[d] a meaningful opportunity for release." (*Franklin*, *supra*, 63 Cal.4th at pp. 279-280.)

To fulfill the Youth Offender Parole Process's promise of a constitutionally meaningful opportunity for release, the Legislature imposed the requirement that the Board give great weight to the mitigating factors of youth recognized by the Supreme Court in *Miller* and its progeny.

> Crucially, the Legislature's recent enactment [] requires the Board not just to consider but 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 in accordance with relevant case law." (§ 4801, subd. (c).) For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration.

(*Id.* at p. 277, emphasis supplied.) In response to Franklin's argument that the Youth Offender Parole Process did not provide adequate procedures to provide a meaningful opportunity for release, this Court recognized that the great weight requirement was a necessary component of the process. (*Id.* at

p. 283 ("in order to provide such a meaningful opportunity, the 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'").)

At the risk of stating the obvious, information regarding an offender's characteristics and circumstances at the time of the offense must be available to the Board in order for the Board to give the requisite great weight consideration to the mitigating youth factors. (*Franklin*, *supra*, 63 Cal.4th at p. 283.)

> In directing the Board to "give great weight" to the [mitigating youth factors], 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.

(*Ibid.*, emphasis supplied.) Section 3051, subdivisions (f)(1)-(2) give examples of the types of information relevant to youth factors that may be considered at a youth offender parole hearing. (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.) "[F]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime" have the opportunity to submit statements. (*Id.* at p. 283, quoting Pen. Code, § 3051, subd. (f)(2).) "[P]sychological evaluations and risk assessment instruments . . . shall take into consideration . . . any subsequent growth and increased maturity of the individual." (*Id.* at p. 284, quoting Pen. Code, § 3051, subd. (f)(1).) *Franklin* noted, "Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile." (*Ibid.*, quoting Pen. Code, § 3051, subd. (f)(1).)

Recognizing that pre-*Miller* and SB 260 there was little reason or opportunity to make a record of this information at the time of sentencing,

this Court remanded to the trial court to determine whether Franklin had an adequate opportunity to create a record of youth factors. (*Franklin*, supra, 63 Cal.4th at p. 284.) In the case he did not, this Court provided the remedy of a hearing to develop the record. (*Ibid.*) For the hearing, Franklin could "place on the record any documents, evaluations, or testimony . . . that may be relevant at his eventual youth offender parole hearing." (*Ibid.*) This Court described the purpose of such a hearing as:

> provid[ing] 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 (§ 4801, subd. (c)) in determining whether the offender is "fit to rejoin society" despite having committed a serious crime "while he was a child in the eyes of the law" (*Graham*, *supra*, 560 U.S. at p. 79).

(*Franklin*, *supra*, 63 Cal.4th at p. 284, emphasis supplied.)

Franklin conditioned its holding that the Youth Offender Parole Process cured the constitutional defect of a de facto LWOP sentence on the opportunity to make such a record.

> So long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

(*Ibid.*, emphasis supplied.) Absent an adequate opportunity to create a record of the individual's characteristics and circumstances at the time of the crime so that the Board can give great weight to youth-related factors, the Youth Offender Parole Process cannot provide the constitutionally required meaningful opportunity for release. This is as true for defendants on direct appeal as for those who are post-conviction. (*Id.* at p. 278

("[Y]outh offender parole hearings apply retrospectively . . . to all eligible youth offenders regardless of the date of conviction.").)

III. EXISTING PAROLE HEARING RECORDS DO NOT INCLUDE AN ADEQUATE RECORD OF YOUTH FACTORS.

As this Court acknowledged in *Franklin*, prior to *Miller* and SB 260, defense counsel had little or no incentive to develop or present evidence of youth factors. In many cases, mandatory sentencing laws render mitigation evidence essentially meaningless to the outcome of the sentencing proceeding. As a result, most youth offenders sentenced before *Franklin* did not have an adequate opportunity to create such a record. (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Even in cases in which such mitigation may have been developed, that information is unlikely to be available to the Board at the time of the youth offender parole hearing. The record for a parole hearing is limited to the prison record, called a Central-File (C-File), and "any other information" submitted to the Board by the parole attorney. (Cal. Code Regs., tit. 15, § 2281, subd. (b).) The C-File typically includes a Probation Officer Report and a copy of the Court of Appeal decision in cases that went to trial. Occasionally, a C-File may include police investigation materials or a sentencing transcript. There is no mechanism for an inmate or parole attorney to add documents to the C-File. Moreover, as discussed below, Board-appointed attorneys do not have the resources to gather information relevant to the youth factors, much less to develop such information. The unavailability of such information precludes the Board from giving great weight to the youth factors, especially the youth offender's growth and maturity, and affects the outcome of these hearings.

A. The Absence of Evidence of Youth Factors at Youth Offender Parole Hearings Affects the Outcome.

A study of transcripts of youth offender parole hearings held from January 2014 to June 2014 found that youth factors mostly did not

influence the suitability decision.[3] (Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California's Youth Offender Parole Hearings* (2016) 40 N.Y.U. Rev. L. & Soc. Change 245, 279-280 (hereafter *Creating Meaningful Opportunities for Release*).) Although the study did not record the quantity or quality of evidence of youth factors, one obvious explanation for the Board's failure to properly consider such information is the absence of the information in the record. The article recognizes that "the fact that [the variable tracking youth factors] does not appear to be having a statistically significant outcome on suitability determinations indicates [the Youth Offender Parole Process] may not be functioning as intended." (*Ibid.*) In order for the Board to give "great weight" to youth factors as required, youth offenders must have an adequate opportunity to create a record for the Board's consideration. (Pen. Code, § 4801, subd. (c).)

A comparison of the rate at which the Board grants parole to youth offenders and non-youth offenders is telling. Notwithstanding the great weight requirement, the Board actually grants parole to youth offenders at a lower rate than it does generally. Of the over 3,700 youth offender parole hearings held from 2014 through 2016, only 26.2 percent of youth offenders were found suitable and granted parole; 60.9 percent were denied parole; and 12.9 percent stipulated to unsuitability. (*Plata v. Brown*, Case Nos. 2:90-cv-00520 KJM-DB & C01-1351 JST, Three-Judge Court, Defendants' November 2017 Status Report in Response to February 10, 2014 Order, Exhibit B, p. 4.)[4] From 2014-2016, the Board conducted 9,558

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[3] The study coded 107 transcripts of the first 109 youth offender parole hearings conducted into variables, including whether the crime was committed with others; any history of physical, sexual, or emotional abuse of the prisoner; and the risk assessment rating. (*Id.* at pp. 245, 268, 275.)

[4] Available at http://www.cdcr.ca.gov/News/docs/3JP-Nov-2017.pdf.

parole hearings[5] for youth and non-youth offenders. In those hearings, the Board granted parole to 27.4 percent of all offenders; 61.7 percent were denied parole; and 10.6 percent stipulated to unsuitability.[6] (California Department of Corrections and Rehabilitation, Board of Parole Hearings Workload Summaries for Calendar Years 2014, 2015, and 2016.)[7] A lower grant rate for youth offenders strongly suggests that the Board is failing to give great weight to youth factors. One likely explanation is the unavailability of individualized information relevant to those factors at the hearings.

B. Due to the Absence of Evidence of a Youth Offender's Circumstances and Characteristics at the Time of the Crime, the Comprehensive Risk Assessment Cannot Adequately Consider the Youth Factors as Required by § 3051(f)(1).

Prior to the initial parole hearing, a psychologist employed by the Board performs a Comprehensive Risk Assessment (CRA). (Cal. Code Regs., tit. 15, § 2240., subd. (a).) The CRA "will provide the clinician's opinion . . . of the inmate's potential for future violence," resulting in a rating of a low, moderate, or high risk of violent recidivism. (*Id.*, subd. (b).) The CRA "may assist a hearing panel . . . in determining whether the inmate is suitable for parole." (*Ibid.*) In practice, the CRA's conclusion about the youth offender's potential for violence is statistically predictive of whether the youth offender will be found suitable. (*Creating Meaningful Opportunities for Release* at pp. 275-276, 279, 299-300.) For example, the study of the first six months of youth offender parole hearings found zero

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[5] Waivers, postponements, cancellations, and continuances are excluded as hearings were not actually conducted in those cases.
[6] An additional 0.2 percent were split or tie decisions.
[7] Available at
http://www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2014.pdf;
http://www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2015.pdf; and
http://www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2016.pdf

youth offenders rated high risk were found suitable. (*Id.* at p. 279.) Recognizing the critical importance of the CRA to the outcome of a parole hearing, the Legislature imposed a requirement that psychological evaluations used by the Board in youth offender hearings consider "the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (Pen. Code § 3051(f)(1).)

The Board psychologists cannot meet the statutory obligation to consider youth factors if the relevant information is not available. Under current practice, the CRA is limited to the evaluator's review of the C-File and one meeting with the prisoner. The C-File is a "master file maintained by the [California Department of Corrections and Rehabilitation] containing records regarding each person committed." (Cal. Code Regs., tit. 15, § 2000, subd. (b)(17).) The C-File mostly consists of records related to activity in prison, including classification and movement, housing assignments, work and education, educational testing, disciplinary violations and appeals, and programming. Little or no information relevant to youth factors is contained in the C-File.[8]

By way of example, a PCJP client who was sentenced to life without parole as a juvenile for felony murder and was later resentenced pursuant to Penal Code § 1170, subdivision (d)(2) became eligible for the Youth Offender Parole Process. Aside from the original Probation Officer Report and minute orders, no records from the original sentencing or resentencing hearing were included in the C-File. As a result, the BPH psychologist did not consider information critical to the youth factors contained in those

[8] Although a C-File should include sentencing transcripts, often they do not and, in any event, information relevant to youth factors was not typically presented at sentencing before *Franklin*.

documents (fitness report, court-ordered psychological assessment, subsequent psychological evaluation from the resentencing) including borderline cognitive functioning, chaotic and dysfunctional childhood circumstances, historically pro-social orientation, and lack of criminal sophistication. In fact, the psychologist concluded that the youth factors did not apply because the individual later sold and used cell phones in prison. As a result of the CRA's diagnosis of Anti-Social Personality Disorder and conclusion that he posed a high risk for violent recidivism, the client waived his right to a parole hearing until a new CRA could be conducted. Even then, despite counsel providing the Board with the documentation of the youth factors along with objections to the original CRA, his subsequent CRA did not consider any of those documents, presumably because they were not included in his C-File. Absent critical information about the youth factors, the Youth Offender Parole Process fails to provide a meaningful opportunity for release.

Information about a youth offender's characteristics and circumstances at the time of the crime is especially critical to the CRA's prediction of risk. BPH psychologists use risk assessment tools, including the Historical Clinical Risk Management-20 (HCR-20) and Level of Service/Case Management Inventory (LS/CMI),[9] to predict a youth offender's risk. (California Department of Corrections and Rehabilitation, Board of Parole Hearings Revised Final Statement of Reasons, Cal. Code Regs., tit. 15, §2240.)[10] Both tools count certain youth factors as

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[9] These tools were, respectively, created to measure the risk of violence and plan supervision for probationers and parolees. Both tools use negative static factors from a person's history to aggravate the person's risk assessment, without taking into account the person's youthful characteristics or inability to escape the childhood environment.

[10] Available at http://www.cdcr.ca.gov/boph/docs/revised_final_statement_reasons_original.pdf.

aggravating, rather than mitigating, future risk. For example, the HCR-20 uses the presence of variables such as relationship instability, employment problems, substance abuse problems, and early maladjustment -- all typical mitigating youth factors -- to elevate the prediction of violent recidivism. (*Ibid.*) Similarly, the LS/CMI relies on variables such as poor employment history, poor family relationships, and a history of substance abuse to aggravate prediction of risk. (*Ibid.*) Information about the youth offender's characteristics and circumstances at the time of the offense is critical to provide context to factors that otherwise, in a vacuum, will be used against the youth offender in contravention of the purposes and intent of the Youth Offender Parole Process.

IV. IN MOST CASES, A *FRANKLIN* HEARING IS THE ONLY MECHANISM TO GATHER INFORMATION RELEVANT TO THE YOUTH FACTORS AND FULFILL THE PROMISE OF A MEANINGFUL OPPORTUNITY FOR RELEASE.

As described below, Board-appointed parole attorneys and prisoners themselves are unable to create records of youth factors. In addition, a wide range of information may be relevant to youth factors, and time is of the essence in its collection.

A. Board-Appointed Parole Attorneys Do Not Have Adequate Resources to Investigate or Gather Information Relevant to the Youth Factors.

Developing a record of youth factors is an involved, often long-term process. Typically, it requires substantial time with the client and others to develop a relationship of trust. (Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court* (2012) 64 Me. L. Rev. 391, 416-417.) Quite simply, "the attorney must invest time in getting to know the client." (*Id.* at p. 418.) In addition to time spent with the client and family members, the attorney should gather documents that contain information relevant to youth factors such as Dependency and Delinquency Court records, school records and testing,

statements from those who knew the client as a young person, counseling evaluations and records, and expert opinions. (*Id.* at pp. 415-417.)

Board-appointed parole attorneys do not have the resources to adequately develop a record of youth factors. The majority (73.8%) of prisoners are represented in parole hearings by Board-appointed attorneys, paid by the state, [12] and 6.8 percent appear pro se. (Friedman & Robinson, *Rebutting the Presumption: An Empirical Analysis of Parole Deferrals Under Marsy's Law* (2014) 66 Stan. L. Rev. 173, 197.) Fewer than 20% are able to retain private counsel. (*Ibid.*) Putting aside the inherent conflict of interest in a system in which the Board hires, assigns, and reimburses the attorneys who litigate against it, the Board appoints attorneys shortly prior to a scheduled parole hearing and pays a maximum of $400 for each case. (Attorney Invoice, BPH Form 1076.[13]) Board attorneys receive $25 for appointment, $50 for review of the information packet compiled by the Board, $75 for review of the Central-File (many hundreds, sometimes thousands of pages, containing every record produced by the Department of Corrections and Rehabilitation about the client), $75 to travel and conduct one client interview prior to the hearing, and $175 to travel and represent the client at the parole hearing. (*Ibid.*) The Board does not provide compensation or reimbursement to travel to the prison or to conduct more than a single meeting with the client, much less to investigate and develop

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[12] If a prisoner is entitled to be represented at a hearing, an attorney will "be provided at state expense if the prisoner . . . cannot afford to retain private counsel." (Cal. Code Regs., tit. 15, § 2256, subd. (c).) A prisoner is "presumed able to afford an attorney" if the prisoner has $1,500 or more in "any combination of cash and accounts," (*ibid.*) despite the fact that most private attorneys charge much more for representation at a parole hearing. In such a case, the prisoner must show an inability to obtain an attorney for that amount before an attorney is appointed at state expense. (*Ibid.*)

[13] Available at http://www.cdcr.ca.gov/BOPH/docs/Invoicing/BPH-1076_Attorney_Invoice-fillable.pdf.

relevant information regarding the youth factors. The Board's pending youth offender regulations, voted on more than a year ago but not yet submitted to California Office of Administrative Law, do not contain any provision for Board-appointed counsel to develop mitigation evidence.[14]

Board-appointed parole attorneys do not have the resources to adequately develop a record of youth factors for the Board's consideration at a youth offender parole hearing. There is no compensation for finding or speaking to persons who might know the "juvenile offender's characteristics and circumstances at the time of the offense," securing past psychological evaluations to establish "subsequent growth and increased maturity," drafting declarations, or procuring any other information relevant to the factors. (*Franklin*, *supra*, 63 Cal.4th at p. 283; Pen. Code, § 3051, subd. (f)(1).) Neither does a parole attorney have any opportunity to include such information in the C-File prior to the BPH psychologist's preparation of the CRA, a critical component of the suitability decision. Reliance on Board-appointed parole attorneys to develop a record of youth factors at the time of the hearing falls short of the promise of a meaningful opportunity for release.

B. Prisoners Cannot Be Expected to Develop a Record of Youth Factors.

The suggestion that the burden of presenting evidence of youth factors should fall to an incarcerated youth offender misunderstands what is required to develop such evidence. Many youth offenders may not recall certain critical factors from their childhood such as early childhood trauma, mental health diagnosis, and testing for cognitive disabilities and learning

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[14] Available at http://www.cdcr.ca.gov/BOPH/docs/reg_revisions/BPHRN-XX-XX_15CCR_2440-2446_YouthOffender_SubmitforBoardVote_Nov2016.pdf; http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

differences. In most cases, the evidence of youth factors comes primarily from documents and interviews, not initially from the client.

Even in those cases where a youth offender does recall and understand all the evidence of the youth factors, it is unrealistic to expect that individual to understand the relevance of the information to the youth factors or the question of parole suitability. A disproportionate number of incarcerated individuals present with low executive function (the set of cognitive processes enabling the attainment of goals) (Meijers, et al., *Prison brain? Executive dysfunction in prisoners* (2015) Frontiers Psychology, Vol. 6, p. 43), learning disabilities (Grigorenko, et al., *Academic Achievement Among Juvenile Detainees* (2016) J. Learning Disabilities, Vol. 48, Issue 4, pp. 359-368), and mental health challenges (Prins, *Prevalance of Mental Illnesses in U.S. State Prisons: A Systematic Review* (2015) Psychiatric Services, Vol. 65, Issue 7, pp. 862-872). Most youth offenders enter prison with a subpar or incomplete education and limited life experience. Many have not had the "opportunity to participate in [social institutions such as employment and education] before incarceration purely because of young age." (Annitto, *Graham's Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of Graham and Miller* (2014) 80 Brook. L. Rev. 119, 163.)

And there are significant practical obstacles for incarcerated youth offenders to develop a record of youth factors. They have limited access and resources. They are not able to use the internet or social media to locate or communicate with individuals who may have relevant information. They are unable to make phone calls to any person or institution not willing to accept charges and registered with the CDCR contractor that provides phone service. Thus, they may not be able to locate, much less contact, individuals who have information about their characteristics or circumstances in their youth. They have limited or no

access to institutions, such as schools and courts, which may have relevant records. For documents that require a court order, incarcerated youth offenders face additional obstacles such as obtaining the correct forms, making copies, effecting proper service, and so on.

For all these reasons, incarcerated youth offenders cannot be expected to create a record of youth factors, and they require the assistance of an attorney through a court process.

C. A *Franklin* Hearing Is Needed Because the Power and Procedure of the Court Is Necessary to Gather Evidence Relevant to Youth Factors and Make It Subsequently Available at a Parole Hearing.

A wide range of information may be relevant to the youth factors. This Court's remand in *Franklin* to determine whether the defendant had "sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing," created a broad category of potential information. (*Franklin*, *supra*, 63 Cal.4th at p. 284, emphasis supplied.) The record to be developed could include "any documents, evaluations, or testimony . . . that may be relevant to his eventual youth offender hearing." (*Ibid.*) Additionally, *Franklin* noted the importance of a "sufficient opportunity" to obtain any information needed to consider "subsequent growth and increased maturity." (*Ibid.*, quoting Pen. Code, § 3051, subd. (f)(1).)

The range of information could include statements from any person who knew the offender's "characteristics and circumstances" as a youth, including childhood trauma, childhood abuse, chaos, exposure to violence, negative family and peer influence, mental health diagnoses, and cognitive and learning issues. (*Franklin*, *supra*, 63 Cal.4th at p. 283.) Similarly, a prior psychological evaluation or other assessment could contain information relevant to evaluating subsequent growth and maturity. (Pen. Code, § 3501, subd. (f)(1).) School records often contain information about

learning challenges, bullying, academic potential or failure, and personality traits (impulsivity, susceptibility to peer influence, social deficits). Likewise, dependency court records and juvenile court records often shed light on the youth factors.

Through the court process of a *Franklin* hearing, attorneys for youth offenders can file information collected with the Department of Corrections and Rehabilitation (CDCR) to be placed in the offender's C-File. (Pen. Code, § 1203.01.) "The attorney for the defendant . . . may . . . file with the clerk of the court statements" the clerk will subsequently mail to CDCR for inclusion in the C-File. (*Id.*, subd. (a).) This information would then be available to the Board, including the Board psychologists who conduct the CRAs, so that the Board can meet its obligation to give great weight to youth factors. (*Franklin*, *supra*, 63 Cal.4th at p. 284.) The ability to place information in the C-File, where it will be available to the Board, is one key difference between a court hearing and attempts to gather information outside of a court process.

D. A *Franklin* Hearing is Needed Because, In Gathering Information Relevant to Youth Factors, Time Is of the Essence.

The opportunity to develop the record of youth factors cannot be put off until the time of the initial youth offender parole consideration. As this Court recognized in *Franklin*, assembling such information "is typically a task more easily done at or near the time of the juvenile's offense . . . ." (*Franklin*, *supra*, 63 Cal.4th at p. 283.) With the passage of time, "memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Ibid.*) In addition, psychological evaluations require a point of comparison to consider "subsequent growth." (*Ibid.*, quoting Pen. Code, § 3051, subd. (f)(1).) Waiting for unforeseeable events such as additional resource

allocation to Board-appointed attorneys does not afford an "adequate opportunity to make a record of . . . youth-related factors." (*Id.* at p. 286.)

The right to an adequate opportunity to develop a record of youth factors does not disappear when substantial time has passed since conviction. Although the passage of time may make creating a record more difficult, it does not vitiate the need for the record or the right to make the record. (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.) The Attorney General's suggestion for a requirement of specific allegations that evidence can be marshaled as a prerequisite to a hearing where significant time has passed since the original sentencing misses the point. The Attorney General fails to recognize that the *Franklin* hearing court process is the mechanism to determine if relevant evidence exists and can be marshaled. In providing "sufficient opportunity" to Franklin to create a record, the court did not find important to mention whether Franklin actually had information to produce. (*Id.* at p. 284.) The Attorney General is correct the availability of relevant information may decrease with the passage of time, but the decreased likelihood of the availability of all the relevant information makes the court process that much more critical.

In one breath, the Attorney General argues against providing a *Franklin* hearing because the information may have been lost in the past 14 years. In the next breath, the Attorney General suggests that the passage of time in inconsequential, suggesting that the quality of the record may be comparable if created "in preparation for the parole hearing itself." Certain records may remain available even 25 years after the proceedings -- fitness hearing proceedings and amenability reports; delinquency court records, which often include psychological evaluations or reports from social workers; and dependency court records. Many will not, including school records, medical and mental health records, and statements from individuals who knew the youth offender prior to the crime.

Similarly, the Attorney General claims, "[I]t is not at all clear . . . a psychological evaluation conducted 14 years after the offense would be sufficiently more informative than the . . . evaluation conducted 25 years after the offense for the parole hearing." Put simply, the difference is 11 years, the difference of 25 and 14 years, during which the offender may show "subsequent growth and increased maturity." (Pen. Code, § 3501, subd. (f)(1).) In addition, as stated previously, a psychological evaluation immediately before the parole hearing would still contain information relevant to youth factors not contained in the Comprehensive Risk Assessment.

V. *FRANKLIN* HEARINGS WILL NOT POSE AN UNDUE BURDEN ON THE COURTS GIVEN THE COURTS' DISCRETION IN HOW TO CONDUCT THEM.

Franklin left discretion to courts in determining what form the adequate opportunity to create a record of youth factors should take. (*Franklin, supra*, 63 Cal.4th at p. 284.) The opportunity is important, rather than the form of the process. (See *Id.* at pp. 284-286.) Franklin stated, "The court may receive submissions and, if appropriate, testimony pursuant to procedures . . . and subject to the rules of evidence." (*Id.* at p. 284, emphasis supplied.) Apart from testimony, "Franklin may place on the record" documents or evaluations "that may be relevant." (*Ibid.*) Additionally, the prosecution "may put on the record any evidence [bearing on] youth-related factors." (*Ibid.*) Both parties' opportunity may be satisfied by the filing of written materials rather than testimony, which is only included as "appropriate." (*Ibid.*) Therefore, the adequate opportunity to create a record may be satisfied by hearings consisting of written materials rather than in-court testimony.

VI. CONCLUSION

A court process where the youth offender has the effective assistance of counsel to develop a record of the most relevant information to the

Board's consideration in the Youth Offender Parole Process fulfills the intent of the Legislature in creating the Youth Offender Parole Process and is critical to ensuring that process guarantees youth offenders a meaningful opportunity for release. For the reasons set forth above, amicus curiae urges this Court to affirm the judgment of the Court of Appeal.

Dated: December 13, 2017

Respectfully submitted,

By: _____

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On behalf of Amici Curiae: Post-Conviction Justice Project & Pacific Juvenile Defender Center

CERTIFICATE OF COMPLIANCE

This brief is set using 13-pt Times New Roman font. According to Microsoft Word, the computer program used to prepare this brief, this brief contains **6,198** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies this brief complies with the requirements set by California Rules of Court, rules 8.204, 8.520(b) and 8.520(f).

Dated: December 13, 2017

By: _____
Ian C. Graves

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

I, Ian Graves, declare that: I am over the age of 18 years and not a party to this case. My business address is Post-Conviction Justice Project, University of Southern California Gould School of Law, 699 Exposition Blvd., Los Angeles, California 90089-0071.

On December 13, 2017, I served the foregoing document, **APPLICATION TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ANTHONY MAURICE COOK, JR.; BRIEF OF AMICUS CURIAE** 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:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Los Angeles, California, on December 13, 2017.

Ian Graves