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## In re Cook and the Franklin Proceeding: New Door, Same Dilapidated House

Christopher Hawthorne  
*Loyola Law School, Los Angeles*

Marisa Sacks  
*Loyola Law School, Los Angeles*

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# ***IN RE COOK AND THE FRANKLIN PROCEEDING: NEW DOOR, SAME DILAPIDATED HOUSE***

*Christopher Hawthorne\* & Marisa Sacks\*\**

*The California Supreme Court's decision in In re Cook was supposed to bring about a sea change in the way trial courts conduct Franklin mitigation hearings for youthful offenders. In fact, while Cook changed the procedure for initiating a post-conviction Franklin proceeding, little else has changed, including the lack of agreement among attorneys concerning best practices in these proceedings, and a less than less-than-enthusiastic response from the criminal defense bar. Absent any guidance from higher courts, the Franklin proceeding is limited by the personal and institutional energies and preferences of judges, prosecutors, public defenders and private defense counsel. The authors of this Article, who run a law school clinic dedicated to juvenile post-conviction mitigation, believe that the implementation of Franklin and Cook has not been as robust as needed, and that a more assertive, nuanced, and in-depth set of practices are necessary. This Article explores the underpinnings of the Franklin proceeding, the inadequacies of the institutional response so far, the need and purpose for a more robust set of practices related to Franklin, and recommendations for the practices themselves.*

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\* Christopher Hawthorne, Clinical Professor of Law and Director, Juvenile Innocence & Fair Sentencing Clinic, Loyola Law School, Los Angeles.

\*\* Marisa Sacks, Staff Attorney, Juvenile Innocence & Fair Sentencing Clinic, Loyola Law School, Los Angeles. The authors would like to extend a special thanks to Kayla Burchuk for suggesting this Article, and an equally special thanks to the students of the Juvenile Innocence & Fair Sentencing Clinic, who fight every day to tell their clients' mitigation stories in California courts and prisons.

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The California Supreme Court's June 3, 2019, decision in *In re Cook*<sup>1</sup> was much anticipated by both the criminal defense and prosecutorial bars.<sup>2</sup> At issue was the fate of nearly 20,000 youthful offenders serving long sentences in California prisons.<sup>3</sup> Their convictions had been final for some time. Could they use the writ of habeas corpus to present mitigation evidence relevant to their long-final convictions—evidence that should have been presented at their original sentencing hearings, as much as thirty years earlier?<sup>4</sup>

These difficult questions derived from the nature of the *Franklin* remedy itself, which at first glance is an odd, seemingly toothless transmutation of a traditional sentencing hearing. When done

1. 441 P.3d 912 (Cal. 2019).

2. Anthony Maurice Cook was tried in the Superior Court of San Bernardino County for a December 1, 2003, drive-by shooting. He was convicted of two counts of murder and one count of attempted murder, with firearm enhancements and was sentenced to 125 years to life, despite having been seventeen years old at the time of the crimes. Cook petitioned for a writ of habeas corpus in San Bernardino superior court, challenging his functional life without parole sentence under *Miller v. Alabama*, 567 U.S. 460 (2012). After a summary denial, Cook refiled his petition in the Fourth District Court of Appeal, Division Three. The court of appeal denied Cook's petition, holding that California Penal Code section 3051, following *Montgomery v. Louisiana*, 469 U.S. 916 (1984), cured the Eighth Amendment violation in his sentence, and that, therefore, he was not entitled to habeas relief. *In re Cook*, No. G050907, 2016 WL 1384894 (Cal. Super. Ct. Apr. 6, 2016). Cook sought review in the California Supreme Court. The California Supreme Court granted Cook's petition for review and transferred the matter back to the court of appeal on July 13, 2016, "with directions to vacate its decision and consider whether petitioner is entitled to make a record before the superior court of "mitigating evidence tied to his youth" in light of *People v. Franklin*." Docket for Cal. Supreme Court Case S234512, available at [https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=2141326&doc\\_no=S234512&request\\_token=NiIwLSEmXkw8WzBRSyNNWENIIFQ0UDxTICNeUztTUCAGcG%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2141326&doc_no=S234512&request_token=NiIwLSEmXkw8WzBRSyNNWENIIFQ0UDxTICNeUztTUCAGcG%3D%3D). On remand, the court of appeal determined that: (1) Cook was entitled to trial court proceeding for making record of mitigating evidence tied to his youth; and (2) the proper vehicle for seeking such a remedy was a petition for writ of habeas corpus. *In re Cook*, 212 Cal. Rptr. 3d 646 (Ct. App. 2017). The attorney general petitioned for review, which was granted on April 12, 2017. *In re Cook*, 441 P.3d at 912, 914. From April 12, 2017 until June 3, 2019, the question of whether habeas corpus was the proper remedy for a *Franklin* proceeding lingered in California courts, with some courts granting petitions (for example, in Los Angeles County), others denying them, and still others staying the petitions.

3. The numbers are in dispute, but a December 2017 comprehensive spreadsheet of California youthful offender parole hearing (YOPH) eligible inmates listed 19,290 individual names. The actual number may be much higher. Of these nearly 20,000 inmates, approximately 6,500 were convicted for crimes committed while they were minors. See Excel Document, Cal. Bd. of Parole Hearings, Eligible Youthful Offenders with YPED's [Youth Parole Eligibility Dates], Monday, December 18, 2017 (on file with authors); see also Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California's Youthful Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 265–66 (2016) ("Whereas there are approximately 2,623 juvenile offenders serving life sentences in California, an estimated 6,500 California people in California prisons qualify for YOPHs under S.B. 260," speaking of youthful offenders under the age of 18).

4. *In re Cook*, 441 P.3d at 914–15.

properly, a *Franklin* proceeding looks like a death penalty mitigation hearing: a detailed report by a mitigation expert, an equally detailed report by a psychological professional, an extensive memorandum in mitigation, followed by a live hearing with witnesses and cross-examination, with the People also presenting evidence. The difference—and it is quite a difference—is that the *Franklin* hearing, in contrast to *Miller* hearings, California Penal Code section 1170(d)(2) hearings, or even juvenile court transfer hearings, has no judicial resolution: no change in sentence; no on-the-record findings; no grant or denial of relief; not even a stray judicial remark concerning the defendant’s character, rehabilitation, or prospects. By taking *Cook* up on review, the California Supreme Court had the opportunity to further classify to which phylum this judicial mutant belonged.<sup>5</sup> The result would affect every institutional actor in the state criminal justice system.

If the court affirmed the survival of a post-conviction remedy under *People v. Franklin*,<sup>6</sup> prosecutors predicted a flood of mitigation hearings, overwhelming trial courts with social and psychological evidence that would not change the defendant’s sentence or parole eligibility date by one day. Defense attorneys, on the other hand, were concerned that inmates who were sentenced pre-*Franklin* and therefore deprived of a mitigation hearing would be at a stark disadvantage, compared to defendants sentenced after *Franklin*.<sup>7</sup>

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5. The authors are aware that they are mixing metaphors by classifying *Franklin* as both a house and a creature. On the other hand, there are creatures who are *also* houses, such as the hermit crab (genus Paguroidea), which uses another creature’s shell as a house, as well as a part of its person. In fact, *Franklin* has a very hermit crab-like existence, since it repurposes the disused shell of a sentencing hearing to guarantee its own survival.

6. 370 P.3d 1053 (Cal. 2016).

7. Of course, ideally a youthful offender should exercise the right to present mitigation evidence when it has a substantive effect on the offender’s sentence: either in a transfer hearing from juvenile court (where applicable), pursuant to California Welfare & Institutions Code section 707 (a), or in a sentencing hearing in adult court, post-trial.

On the other hand, some intermediate appellate courts appear to consider youthful offenders sentenced post-*Franklin* in exactly the same position as youthful offenders sentenced pre-*Franklin*. In *People v. Medrano*, 253 Cal. Rptr. 3d 653 (Ct. App. 2019), the Fourth District Court of Appeal, Division Two, declared that the defendant, Michael Medrano—sentenced eighteen months after *Franklin* was decided—had forfeited his right to present “mitigating youth-related evidence” at his sentencing hearing, “whether by choice or inadvertence.” *Id.* at 658. All was not lost, however: Medrano still had the right to “fil[e] a motion ‘for a *Franklin* proceeding under the authority of section 1203.01.’” *Id.* To Medrano, on the other hand, a lot had been lost: specifically, the right to have the trial court consider mitigating youth-related evidence *and then resentence him*. The reasoning in *Medrano* was apparently so compelling that the First District Court of Appeal reversed itself. *People v. Carranza*, No. A152211, 2019 WL 5867435 (Cal. Ct. App. Nov. 6, 2019),

Ultimately, *Cook* resolved none of those issues, except one: youthful offenders with final judgments—that is, youthful offenders who have no more direct appeal rights—can still seek relief under *Franklin*. The presentation of mitigation evidence will not change the offenders’ sentences, but it will provide information relevant to their future parole hearings. The filing to start the process will no longer be a petition; it will now be a motion pursuant to California Penal Code section 1203.01, connected to a theoretical case that will assume corporeal form once the motion is filed and accepted by the court.<sup>8</sup> Finally, the process will no longer be called a *Franklin* hearing; it will be a *Franklin* “proceeding,” reflecting the fact that the judge makes no ruling at the end of the process.<sup>9</sup> The court—perhaps reflecting the

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*vacating* 252 Cal. Rptr. 3d 919 (Ct. App. 2019). Like Medrano, Daniel Carranza (or rather, his attorney) had failed to introduce youth-related mitigating evidence at his sentencing hearing, even though he was sentenced after *Franklin* was decided. On appeal, Carranza argued that he was “entitled to a limited remand to ‘make a record of information relevant to his eventual youth offender parole hearing.’” *Id.* at 924 (citing *Franklin*, 370 P.3d at 1065).

The court agreed, stating that, “normally, a defendant prejudiced by counsel’s inaction in the trial court may rely on the ineffective assistance of counsel (IAC) framework to vindicate his or her rights.” *Id.* at 926. However, because the *Cook* court had imposed “[r]estrictions on the use of that doctrine in the *Franklin* context,” in part by declaring that the writ of habeas corpus was no longer the appropriate vehicle for *Franklin*, “it [was] questionable whether an IAC claim remains a viable method by which an offender can obtain access to a *Franklin* proceeding where his or her counsel failed to request a *Franklin* proceeding.” *Id.* at 927. Accordingly, the court held that Carranza had *not* forfeited his right to a *Franklin* proceeding; it was too important a right. *Id.* at 929.

Barely a month later, however, the First District Court of Appeal vacated its published decision in *Carranza*, and issued an unpublished decision, agreeing with *Medrano*. The court, adopting reasoning that was diametrically opposed to its earlier reasoning, declared that Carranza *had* forfeited his right to a *Franklin* proceeding during sentencing—but he could still “seek such a proceeding under section 1203.01.” *Carranza*, 2019 WL 5867435, at \*7. Apparently, the *Franklin* remedy was not an important enough right to survive the forfeiture analysis under *People v. Scott*, 885 P.2d 1040, 1042 (Cal. 1994), but the right survived anyway, only under section 1203.01. Moreover, it does not appear that Carranza would have been resentenced, even if his case had been remanded.

Therefore, while *Medrano* does not necessarily bestow an undying right to a *Franklin* proceeding pursuant to section 1203.01, it does suggest that the remedy is fairly durable, even for those defendants who should have sought to present youth-related mitigation evidence at their original, post-*Franklin* sentencing hearings.

8. *In re Cook*, 441 P.3d at 922 (“[T]he proper avenue is to file a motion in superior court under the original caption and case number, citing the authority of [California Penal Code] section 1203.01 and today’s decision.”).

9. *Id.* at 916 n.3 (“*Franklin* processes are more properly called ‘proceedings’ rather than ‘hearings.’ A hearing generally involves definitive issues of law or fact to be determined with a decision rendered based on that determination. A proceeding is a broader term describing the form or manner of conducting judicial business before a court. While a judicial officer presides over a *Franklin* proceeding and regulates its conduct, the officer is not called upon to make findings of

practice in San Bernardino County, where *Cook* originated—declared that documentary submissions, not hearings, may be acceptable.<sup>10</sup> Otherwise, very little has changed. To poach on the metaphor in the title, the doorway to the house has been remodeled by a contractor somewhat more concerned with cost than architectural integrity. Once inside the house, the buyer—the inmate seeking *Franklin* relief, who must live with the results—will find the interior unchanged but will still find plenty to criticize in the details.

Specifically, the California Supreme Court’s opinion admits that post-conviction *Franklin* still exists, but it does not say whether the remedy is *essential*. In fact, it leaves that deeper question conspicuously unanswered. This is not surprising; after all, the California Supreme Court created the *Franklin* hearing in a few paragraphs at the tail end of a largely negative opinion, one that spent most of its length explaining why the defendant, Tyris Lamar Franklin, could not get a resentencing hearing pursuant to *Miller*. Could 20,000 mitigation hearings hang on such a slender thread?

Through its light-handed treatment of *Franklin* trial procedure, was the California Supreme Court signaling that it really didn’t care about this remedy? Or was the court, through its gnomic remarks about judicial discretion, actually telling courts that the remedy—still in its infancy—requires deeper and more detailed examination, not by the California Supreme Court, but by the lower courts and attorneys tasked with carrying it out?<sup>11</sup>

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fact or render any final determination at the proceeding’s conclusion. Parole determination are left to the Board.” (citations omitted)).

10. *Id.* at 916.

11. It is also possible that the court had been reading John F. Pfaff’s groundbreaking book, *Locked In*. See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017). Pfaff, a Professor at Fordham Law School, makes a number of innovative and useful points about mass incarceration, which contrast with what he calls “The Standard Story.” *Id.* at 21–123 (arguing that “The Standard Story,” particularly as constructed by Michelle Alexander, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012), focuses mistakenly on low-level drug offenses and the federal criminal justice system as the drivers of mass incarceration). One point Pfaff makes repeatedly is that felony prosecutions that result in prison sentences represent a massive transfer of fiscal liability from the county (which pays for judges, prosecutors and trials) to the state (which pays for prisons and parole hearings). PFAFF, *supra*, at 142–143. He goes on to suggest one motivation for California’s Public Safety Realignment Act of 2011, which mandated that counties, not the state, shoulder the responsibility for incarcerating low-level offenders. *Id.* at 150–151.

“Lifers,” (those serving life sentences) however, were still the financial responsibility of state prisons, not county jails. However, in *People v. Caballero*, 282 P.3d 291 (Cal. 2012), and *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014), the California Supreme Court crafted a judicial remedy for juveniles who had committed violent offenses, putting the financial and political burden

One stubborn fact remains: The court did create the *Franklin* proceeding, when it could have simply denied relief. Moreover, the court did not simply call upon the legislature to enact more robust mitigation investigation during the parole process; it ordered *trial courts* to hold hearings, appoint attorneys and experts, and submit the resultant evidence package to the Board of Parole Hearings. Then, three years later, the court reaffirmed the existence of the remedy, whether we call it a “*Franklin* hearing” or an “evidence preservation proceeding.”

If mitigation evidence is to be presented at such a proceeding, that evidence must have value, at least to the Board of Parole Hearings. But the selection of venue is also significant. If the evidence has no value to the trial court, why present it there? This strongly suggests that the *Franklin* proceeding is not about parole; it’s about sentencing. Specifically, the proceeding exists to change the conversation about the oversentencing of youth, one case and one defendant at a time. Through repetition, context, and the repetition of context, the *Franklin* hearing is aimed squarely at the institutional actors who committed thousands of youthful offenders to California prisons. The fact that *Franklin* is a soft revolution does not make it less of a revolution. Therefore, defense attorneys and willing clients need to keep demanding investigation, expert appointments, and hearings, so that they can continue to create the mitigation context for future sentencing hearings.

This Article will trace the contours of the court’s ostensible holdings in *Franklin* and *Cook*, while also attempting to answer the deeper question about the future of the remedy. First, this Article will

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of remedying mass incarceration on county courts and prosecutors. In response, the legislature—partly under pressure from the California District Attorneys Association—created the Youthful Offender Parole Hearing, returning the burden to state prisons and parole boards to decide which youthful offenders needed to be released. *Franklin* returned *some* of that burden to counties, by requiring attorneys and courts to develop mitigation evidence that would eventually be used by the state Board of Parole Hearings. As argued below, *Cook* appears to attenuate the *Franklin* remedy, and its language suggests that part of the motivation for that attenuation is to ease the burden on county courts, allowing them to simply accept submissions of documents, in lieu of actual hearings. *See in re Cook*, 441 P.3d 912, 922 (Cal. 2019) (citing *Franklin*, 370 P.3d at 1065) (“[In managing a *Franklin* proceeding, t]he court may, for example, require an offer of proof regarding the evidence the offender seeks to present, so that it can determine whether such evidence is relevant to youth-related factors and meaningfully adds to the already available record. It may also determine whether testimony is ‘appropriate’, or if other types of evidentiary submissions will suffice.” (citation omitted)). As discussed in more detail below, in the opinion of these authors, evidentiary submissions rarely suffice.



trace California's journey to the holding in *Cook*. Specifically, it will analyze how the triangulation of watershed California Supreme Court precedent, the state's rapidly changing legislative landscape, and revelatory legal attitudes toward both the justice system and prison overcrowding led to the *Franklin* and *Cook* decisions. Next, this Article will address the seemingly shared attitudes of many defense attorneys and prosecutors that the *Franklin* remedy is basically administrative and has very little (if any) bearing on legal (or even moral) outcomes. In doing so, the authors also hope to explain the historical policies and practices that gave rise to these persistent attitudes, and why they need to change. Last, this Article will detail what the authors believe to be best practices for litigating the *Franklin* remedy from beginning to end.

#### THE JOURNEY TO *COOK*

At issue in *Cook* was a basic question: does a youthful offender have a post-conviction right to a *Franklin* proceeding? And along with it, a more procedural question: was the writ of habeas corpus the proper vehicle to pursue such a right? To understand why these questions are being asked at all, it is necessary to examine two seminal cases: *Miller v. Alabama*<sup>12</sup> and *Brown v. Plata*.<sup>13</sup>

#### *MILLER V. ALABAMA*

*Miller v. Alabama*, decided by the United States Supreme Court in 2012, was both a culmination of years of advocacy and the foundation for every juvenile justice reform that came after it. While *Miller* now seems like a treasure house of policy, rules, and helpful quotations, the opinion itself was narrow, elliptical, and politically astute. Justice Elena Kagan, less than two years into her tenure as a Justice, wrote the opinion, which steered a careful middle course between two extremes: on one hand, banning juvenile life without the possibility of parole (LWOP) outright, or on the other, declaring juvenile LWOP constitutional and leaving any further reforms to the states.

Instead, Justice Kagan declared only that *mandatory* LWOP for juveniles was unconstitutional. The holding left judges free to

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12. 567 U.S. 460 (2012).

13. 563 U.S. 493 (2011).

sentence juveniles to LWOP, but abrogated state statutes that mandated LWOP as the only penalty for a juvenile convicted of serious crimes. Certain states—“mandatory” states, such as Michigan, Pennsylvania, Louisiana and Alabama—would have to amend their juvenile LWOP statutes.<sup>14</sup> In a 5-4 decision, Justice Kagan was joined in the majority by Justices Breyer, Kennedy, Ginsburg, and Sotomayor. Justice Breyer filed a concurrence, in which Justice Sotomayor joined. Justices Alito, Roberts, Scalia, and Thomas filed various dissenting opinions.

In arriving at its conclusion, the Court relied on two lines of precedent. First, it reaffirmed its long-standing commitment to considering the status of children when construing their rights under the Constitution, asserting that “children are constitutionally different from adults for purposes of sentencing” and thus “less deserving of the most severe punishments.”<sup>15</sup>

The second line of precedent was grounded in the growing scientific consensus that, regardless of their crimes, children are less culpable and have greater prospects for reform because of their “hallmark features.”<sup>16</sup> Specifically, children are less mature and thus prone to “recklessness, impulsivity and heedless risk-taking.”<sup>17</sup> Children “are more vulnerable to . . . negative influences and outside pressures.”<sup>18</sup> And finally, children are “less fixed” in their character and consequently more capable of change than adults.<sup>19</sup> These “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders.”<sup>20</sup> Therefore, “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”<sup>21</sup>

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14. See *Miller*, 567 U.S. 460, 482, 486 & nn.13–15 (noting that twenty-nine jurisdictions had mandatory LWOP statutes for juveniles, including: Alabama, Arizona, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington, and the federal government).

15. *Id.* at 471 (citing *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

16. *Id.* at 471, 477.

17. *Id.* at 461 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2004)).

18. *Id.* at 471 (quoting *Roper*, 543 U.S. at 569); see also *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569).

19. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570); see also *Graham*, 560 U.S. at 89 (quoting *Roper*, 543 U.S. at 570).

20. *Miller*, 567 U.S. at 472.

21. *Id.* at 479; see generally Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support

As is often the case, the good stuff was in the details. Justice Kagan did not simply make a broad statutory declaration; she made a test—albeit a test couched in negative, precatory language—that would require skilled advocacy to achieve any real meaning. In discussing why mandatory juvenile LWOP violated the individualized sentencing requirement of *Roper v. Simmons*<sup>22</sup> and *Graham v. Florida*,<sup>23</sup> she noted that, with a *mandatory* LWOP sentence, all children would be treated the same: as irredeemable.<sup>24</sup> To avoid this unconstitutional result, she suggested that a court could consider certain factors that would allow it to sort out juveniles who were “irreparably corrupt” from those who only appeared to be corrupt, because of their transient, adolescent qualities.<sup>25</sup> This apparent corruption in youth manifests for a variety of reasons: because of childhood trauma, mental illness, peer threats, and most importantly, the immaturity that makes so many children appear to be callous, inappropriate, and even monstrous.<sup>26</sup>

But this list of subject areas—which has since become reified into “the *Miller* factors”—was not the most important policy statement in a case full of policy statements. Most important for juvenile justice reform was a cautionary phrase at the end of the opinion: “[G]iven all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*.”<sup>27</sup>

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of Petitioners at 4, *Miller v. Alabama*, 567 U.S. 460 (2012) (noting that “[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance”); *Graham*, 560 U.S. at 82 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”); *Roper*, 543 U.S. at 578 (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

22. 543 U.S. 551 (2004).

23. 560 U.S. 48 (2010).

24. *Miller*, 567 U.S. at 478.

25. *See id.* at 477.

26. *See id.*

27. *Id.* at 479 (emphasis added). This phrase—declaring that juvenile LWOP should be “uncommon”—is straight out of death penalty jurisprudence, as is much of the reasoning in *Roper*, *Graham*, and *Miller*. These similarities are outside the scope of this Article, but the idea that extreme sentences ought to be “rare” or “uncommon”—and that the determination of who receives these “rare” penalties starts with Justice Byron White’s concurrence in *Furman v. Georgia*, decided not long after the reinstatement of the death penalty, following a nationwide moratorium. Justice White, understandably, was concerned that the death penalty was being imposed arbitrarily on defendants, without consideration for the comparative gravity of the crime involved, or the

The call for juvenile LWOP to be “uncommon” changed *Miller* from a mere technical opinion to a call to arms. Changing juvenile LWOP from mandatory to discretionary was an order that could be fulfilled in a single legislative session, making sure it was *rare* would require years of litigation, client by client, case by case. It would need an army of lawyers, all pushing in the same direction.

#### CALIFORNIA’S RESPONSE TO *MILLER*

Many of those lawyers would be in California. A 2010 study by the National Conference of State Legislatures found that, in raw numbers, California had the fifth highest juvenile LWOP prison population in the United States, with 250 juveniles serving the sentence.<sup>28</sup> Other studies placed the number over 300.<sup>29</sup> Although this high number is to some degree a function of California’s large population, other big states did not find it necessary to lock up children for the rest of their lives. Texas, despite its enthusiasm for the adult death penalty, did not have a similar zest for juvenile LWOP. The study noted above found that, in 2010, Texas had only five juvenile offenders serving life without the possibility of parole.<sup>30</sup>

California, however, did not confine itself to sentencing juveniles to “actual LWOP.” Because of California’s peculiar constellation of sentencing laws, the state had an even bigger problem than juvenile LWOP: “functional juvenile LWOP.” A “functional LWOP” sentence is one where the offender theoretically is eligible for parole, but where the offender’s minimum eligible parole date occurs outside of the

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individual characteristics of the offender. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”). Those themes—that the death penalty be imposed with “great infrequency” and the necessity of “distinguishing [those] few cases” from far more common non-death cases are echoed in the *Miller* Court’s clear directives to lower courts: “[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [i.e., LWOP] will be uncommon,” and “[W]e require [the sentencing court] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 567 U.S. at 479–80.

28. NAT’L CONFERENCE OF STATE LEGISLATURES, JUVENILE LIFE WITHOUT PAROLE (JLWOP) 1–17 (2010), <https://www.ncsl.org/documents/cj/jlwopchart.pdf>. The other states with large juvenile LWOP populations are Florida (266), Illinois (103), Louisiana (335), Michigan (346), Missouri (116), and Pennsylvania (444). *Id.* at 4–9, 12.

29. See HUMAN RIGHTS WATCH, WHEN I DIE . . . THEY’LL SEND ME HOME 1 (2012), <https://www.hrw.org/sites/default/files/reports/crd0112webcover.pdf> (citing 301 juvenile offenders serving LWOP in California prisons as of 2012).

30. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 28, at 14.

offender's expected natural lifespan.<sup>31</sup> The California Supreme Court has never defined what the minimum age of parole eligibility must be for a juvenile to have functional LWOP, but in *People v. Contreras*,<sup>32</sup> the court emphatically stated that fifty years to life is functional LWOP, though shorter sentences may also qualify.<sup>33</sup>

It is beyond the scope of this Article to discuss all the reasons that California sentences so many juveniles to very long sentences. However, a relatively cursory review of California sentencing laws from the 1990s to the present day should give a sense of how harsh sentencing laws (often passed by initiative) and the hallmark qualities of youth combine to put many children in prison for the rest of their lives.

First, starting in the late 1970s, California passed a series of crime bills, usually with pithy names: "The Death Penalty Act" (1978); "The Victim's Bill of Rights" (1982); "The STEP [Street Terrorism Enforcement and Prevention] Act" (1988); "The Crime Victims Justice Reform Act" (1990); "Three Strikes and You're Out" (1994); the "Juvenile Crime Initiative" (2000); and "Marsy's Law" (2008). While the intent of *each* of these bills or initiatives was to strengthen the hand of law enforcement and prosecutors, lengthen sentences for individual crimes or activities, enhance the rights of crime victims and their families, and trim away the rights of criminal defendants, the *combined* effect of each law was magnified by the others.<sup>34</sup>

So, it may seem reasonable that an offender who attempts to murder another human being should receive a sentence of life in prison, with a minimum sentence of seven, ten, or even fifteen years. It may also be reasonable that an offender who uses a firearm should receive an enhanced sentence. It is arguable that persons who discharge weapons from or into motor vehicles, who shoot at groups of people, or who participate in a violent crime that results in the death

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31. In *People v. Caballero*, the California Supreme Court found that Rodrigo Caballero's sentence of 110 years to life was the "functional equivalent of a life without parole sentence," and that, therefore, he "would have no opportunity to 'demonstrate growth and maturity' to try to secure his release." *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012). The court did not, however, declare what was the bottom limit of "functional LWOP." *Id.*

32. 411 P.3d 445 (Cal. 2018).

33. *Id.* at 455.

34. CAL. CONST. art. I, § 28; see also CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 1994, GENERAL ELECTION 32-37 (1994), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2090&context=ca\\_ballot\\_props](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2090&context=ca_ballot_props).

of the victim of that crime should also be punished more severely.<sup>35</sup> It may also deter youths from joining street gangs if they know that, when they commit a crime along with fellow gang members, they may all receive an enhanced sentence.<sup>36</sup>

What is far less reasonable is that *none* of these harsher sentencing provisions were ever harmonized with the others. Many sentences and enhancements were “mandatory consecutive” sentences, meaning that, although a defendant might fire a single bullet at a group of people and hit no one, every person in that group was a potential victim, and every victim required the defendant to serve a separate sentence, one after the other, usually until the offender was old, dying, or dead.<sup>37</sup>

Old, dying, or dead, even if he was seventeen years old at the time of the crime. Because, make no mistake, juvenile offenders were the

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35. These situations are reflected in California Penal Code section 190.2, as “special circumstances,” which justify the imposition of the death penalty for adults, or the use of LWOP for juveniles. *See generally* CAL. PENAL CODE § 190.2 (listing “special circumstances” that apply to homicides committed by shooting from a motor vehicle (section 190.2(a)(21)), involving multiple victims (section 190.2(a)(2)), or while engaged in certain enumerated felonies (section 190.2(a)(17))).

36. *See id.* § 190.2(a)(22) (allowing imposition of the death penalty or LWOP, if a homicide is “carried out to further the activities of [a] criminal street gang”). Discouraging gang membership was an essential part of the STEP Act, as the legislative findings indicate: “It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.” CAL. PENAL CODE § 186.20; 1988 Cal. Legis. Serv. 1256 (West) (“This chapter shall be known and may be cited as the ‘California Street Terrorism Enforcement and Prevention Act.’”).

37. Offenders in California who are convicted of violent offenses often serve consecutive sentences for crimes involving multiple victims, and the court does not need to explain on the record why consecutive sentences are being imposed. *See, e.g.,* *People v. Arviso*, 247 Cal. Rptr. 559, 560–61 (Ct. App. 1988). Moreover, weapon enhancements—as long as twenty-five years to life—until 2018, had to be imposed consecutively and could not be struck by the trial judge. *See* CAL. PENAL CODE §§ 12022.5, 12022.53 (West 2019); *see also, People v. Robbins*, 228 Cal. Rptr. 3d 468, 482 (Ct. App. 2018) (acknowledging that, following the passage of California Senate Bill 620, judges have the discretion to strike weapon enhancements under Penal Code section 1385). These long sentences are a tremendous burden on both inmates and facilities. Thanks to excessively long sentences, the United States has more prisoners fifty-five years of age and older than ever before. *See* HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 6 (2012), [https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf) (“[T]he number of sentenced federal and state prisoners who are age 65 or older grew an astonishing 94 times faster than the total sentenced prisoner population between 2007 and 2010. The older prison population increased by 63 percent, while the total prison population grew by 0.7 percent during the same period.”). Inevitably, life sentences, especially life without parole sentences, make the problem worse; life sentences contemplate—if not guarantee—the likelihood that an offender will die of old age in prison. *See id.* at 33–36.

effective targets of these laws.<sup>38</sup> Youth are far more likely to participate in street gangs, more likely to commit a crime in a group of youths and commit a crime against another group of youths, more likely to fire into or out of a motor vehicle, and more likely to be in a group in which one member is engaged in those activities. Youth are also more likely to have undiagnosed mental illness, autism spectrum disorder, ADHD, or PTSD, which might lead them to commit these acts.<sup>39</sup>

An example of this tendency is the case of sixteen-year-old Rodrigo Caballero, who, by committing a crime, gave his name to the case, *People v. Caballero*.<sup>40</sup> Caballero, also known by his moniker, “Dreamer,” was a member of the Vario Lancas street gang; his intended victims were members of the rival Val Verde Park street gang. On June 6, 2007, Caballero jumped out of a car on a street corner in Palmdale, California, and shouted “Lancas” at a group of five youths.<sup>41</sup> One of the youths, Carlos Vargas, responded by shouting “Val Verde.”<sup>42</sup> Caballero fired a gun at the group, hitting one of the youths, Adrian Bautista, in the back and shoulder.<sup>43</sup>

Caballero admitted to an investigating officer that he had committed the shooting. At trial, he testified that he was “straight trying to kill somebody,” but then also said that he had fired at the group only to scare them.<sup>44</sup> Caballero, who was diagnosed by two mental health professionals as suffering from “schizophrenia, paranoid type,” was found to be too delusional to assist his attorney.<sup>45</sup> After approximately six months of antipsychotic medication, Caballero was found competent to stand trial and was convicted of “three counts of willful, deliberate, and premeditated attempted murder, with findings that he personally and intentionally discharged

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38. See, e.g., Sarah A. Kellogg, Note, *Just Grow up Already: The Diminished Culpability of Juvenile Gang Members After Miller v. Alabama*, 55 B.C. L. REV. 265, 281–82 (2014) (noting that California’s STEP Act disproportionately penalized juvenile offenders, and arguing that such an approach is categorically banned under *Miller*).

39. See generally Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT’L J. ENVTL. RES. PUB. HEALTH 228 (2016).

40. 282 P.3d 291 (Cal. 2012).

41. *Id.* at 293.

42. *Id.*

43. *People v. Caballero*, 119 Cal. Rptr. 3d 920, 922 (Ct. App. 2011), *rev’d*, 282 P.3d 291 (Cal. 2012).

44. *Id.* at 924.

45. *Id.* at 921.

a firearm, inflicted great bodily injury upon one victim, and committed the crimes for the benefit of a criminal street gang.”<sup>46</sup>

Caballero was sentenced as follows: fifteen years to life for each of three potential victims, including Adrian Bautista, to run consecutively.<sup>47</sup> For each of the victims, he received a firearm enhancement: twenty-five years to life for possessing and personally discharging a firearm and causing great bodily injury to one of the victims.<sup>48</sup> His aggregate sentence was 110 years to life, making him eligible for parole no earlier than his 126th birthday.<sup>49</sup>

It is notable, in passing, that Caballero was in many ways a classic youthful offender. He was in a street gang.<sup>50</sup> He was traveling with a group of other youths in a car.<sup>51</sup> He jumped out of that car to shoot into another group of youths, who obliged him by identifying themselves as rival gang members.<sup>52</sup> Finally, Caballero was floridly schizophrenic, unmedicated, and initially unable to help his attorney, yet he was found competent to stand trial, and his mental health had no effect on his sentence.<sup>53</sup> The court of appeal affirmed his sentence, declaring that it was “not unconstitutional.”<sup>54</sup>

The California Supreme Court, fresh on the heels of the United States Supreme Court’s decision in *Miller v. Alabama*, instead turned to an earlier Supreme Court decision, *People v. Graham*, which categorically banned LWOP sentences for juveniles who committed “non-homicide crimes.”<sup>55</sup> While *Graham* never said that *functional* LWOP was covered by its holding, the California Supreme Court, using language from *Graham*, declared that “a state must provide a juvenile offender ‘with some realistic opportunity to obtain release’ from prison during his or her expected lifetime.”<sup>56</sup> Because Caballero

46. *Id.* at 920 (first citing CAL. PENAL CODE §§ 186.22(b)(1)(C), 187(a) (West 2014); then citing CAL. PENAL CODE § 664(a) (West 2010); and then citing CAL. PENAL CODE § 12022.53(b)–(d) (West 2012)).

47. *Caballero*, 282 P.3d at 293.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *People v. Caballero*, 119 Cal. Rptr. 3d 920 (Ct. App. 2011), *rev’d*, 282 P.3d 291 (Cal. 2012).

54. *Id.* at 924–27.

55. *Caballero*, 282 P.3d at 293.

56. *Id.* at 295 (quoting *Graham v. Florida*, 560 U.S. 48, 82 (2010)).



did not receive this opportunity, the court's remedy was that he, as well as all

[d]efendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed[,] may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings.<sup>57</sup>

Although *Caballero's* holding was relatively narrow—it only applied to the perhaps 3,000 juvenile offenders who were serving functional LWOP—the effect of the decision was stark: every juvenile offender who met these criteria would be entitled to a resentencing hearing in a trial court.<sup>58</sup>

Whether this development was a good thing depends on whom you asked. Defense attorneys immediately filed petitions for their clients and began to prepare for mitigation hearings. Judges and prosecutors may not have been so sanguine. Suddenly, instead of facing hearings for fewer than 300 juveniles serving LWOP, they were looking at hearings possibly stretching on for decades.

Faced with the prospect of a re-reckoning with thousands of excessive juvenile sentences, the Los Angeles County District Attorney's Office immediately sponsored a bill (Assembly Bill 1276) that would have offered all juvenile non-homicide offenders a parole hearing at twenty-five years of incarceration, regardless of the seriousness of the crime, mitigation evidence, or length of sentence—a “parole fix.”<sup>59</sup> Juvenile justice advocates, on the other hand, proposed an alternative bill (Senate Bill 260) that would have given every juvenile offender serving an adult prison sentence a *resentencing hearing*, excluding certain offenders, such as juveniles serving LWOP (already covered by Penal Code section 1170(d)(2) and *Miller*), or juveniles who were convicted of first degree murder with special circumstances.<sup>60</sup>

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57. *Id.* at 295–96.

58. *See id.*

59. *See* ASSEMB. COMM. ON PUB. SAFETY, ANALYSIS OF ASSEMBLY BILL NO. 1276, 2013–2014 Reg. Sess., at 5 (Cal. 2013–2014).

60. S. COMM. ON PUB. SAFETY, ANALYSIS OF SENATE BILL NO. 260, 2013–2014 Reg. Sess., at 4 (Cal. 2013–2014).

How the legislature combined the two above bills to create the bill that ultimately became law—an amended version of Senate Bill 260 that created the Youthful Offender Parole Hearing—is beyond the scope of this Article.<sup>61</sup> But it *is* within the scope of this Article to observe that, from the very beginning, when faced with dealing with excessive juvenile sentences in county superior courts, prosecutors chose to hand the responsibility for these sentences back to the Board of Parole Hearings, and the state took on that responsibility.<sup>62</sup> This handoff occurred because of the confluence of two forces, described below.

#### DEFINING ACCOUNTABILITY UPWARD

The first of these two forces is more accurately described as a tendency: the tendency of institutional actors to transfer difficult responsibilities to other institutional actors. By quite a wide margin, Los Angeles County has sentenced more juveniles to long sentences in adult prisons than any other county in California.<sup>63</sup> If anyone was going to feel the pain of resentencing hearings for juvenile offenders, it would be Los Angeles County. John Pfaff, in his excellent book, *Locked In*, identifies a similar widespread tendency for counties to shift the burden of incarceration to states.<sup>64</sup> Naturally, having already shifted that burden, Los Angeles County had no desire to take it up once again, in the form of resentencing hearings. Much better to let the state-controlled, state-funded Board of Parole Hearings wrestle with the problem.

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61. S.B. No. 260, 2013–2014 Reg. Sess. (Cal. 2013–2014).

62. As noted in several places in this Article, the California Supreme Court’s *Franklin* decision, like “Realignment,” may have been part of an effort by the state to shift responsibility back to the counties.

63. Data released by the California Department of Corrections in October 2016 calculated the number of incarcerated offenders eligible for Youthful Offender Parole Hearings. By this time, these hearings covered offenders up to the age of twenty-five. But the contrast is still startling. Los Angeles County had 11,808 eligible youthful offenders. The next largest population was from Riverside County, with 1,989 eligible youthful offenders. See Excel Document, Cal. Bd. of Parole Hearings, *supra* note 3.

64. See JOHN F. PFAFF, *supra* note 11. Pfaff notes that one of the causes of oversentencing, and the seeking of excessive sentences by prosecutors, is that the county, which imposes the excessive prison term, is relieved from the difficulty of paying for that prison term, because prisons are administered and funded by the state. *Id.* at 143.

*BROWN V. PLATA*

And the state of California was already dealing with this very formidable problem, in the form of prison overcrowding.<sup>65</sup> As the original Committee Report for Senate Bill 260 noted,

For the last several years, severe overcrowding in California's prisons has been the focus of evolving and expensive litigation relating to conditions of confinement. On May 23, 2011, the United States Supreme Court ordered California to reduce its prison population to 137.5 percent of design capacity within two years from the date of its ruling, subject to the right of the state to seek modifications in appropriate circumstances.<sup>66</sup>

These anodyne, technical-sounding numbers in fact described a massive human rights crisis in California prisons. In 2011, California had a "design capacity" of 80,000 beds, with a prison population of 156,000.<sup>67</sup> Two lawsuits by California prisoners, demanding better medical and mental health care,<sup>68</sup> morphed into the monumental prison rights case, *Brown v. Plata*.<sup>69</sup> On May 23, 2011, the United States Supreme Court, in a 5-4 decision along partisan lines, ordered California to reduce the prison population to about 110,000 inmates: still very crowded and unhealthy, but less blatantly hellish.<sup>70</sup> The deadline for this reduction was June 27, 2013, and at the time of Senate Bill 260's introduction, Governor Brown was far behind schedule.<sup>71</sup>

This, then, is the second force that created the Youthful Offender Parole Hearing—state-level political control. Resentencing hearings were time-consuming and costly and could not efficiently release even a fraction of the more than 20,000 youthful offenders in the California prison system. Seeing an opportunity to do justice and keep his prisons

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65. *Brown v. Plata*, 563 U.S. 493, 502 (2011).

66. S. COMM. ON PUB. SAFETY, ANALYSIS OF SENATE BILL NO. 260, 2013–2014 Reg. Sess., at 4 (Cal. 2013–2014).

67. *Plata*, 563 U.S. at 501–02.

68. The original lawsuits were *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (filed in 1990, alleging inadequate mental health treatment for California prisoners), and *Plata v. Davis*, 329 F.3d 1101 (9th Cir. 2003) (filed in 2001, alleging inadequate medical treatment for California prisoners). The findings and orders of the three-judge panel at issue in *Brown v. Plata* applied to both lawsuits. *Plata*, 563 U.S. at 500.

69. *Id.* at 493.

70. *Id.* at 541–45.

71. S. COMM. ON PUB. SAFETY, ANALYSIS OF SENATE BILL NO. 260, 2013–2014 Reg. Sess., at 5 (Cal. 2013–2014).

away from federal control, Governor Brown signed Senate Bill 260, Senate Bill 261 and finally, Assembly Bill 1308, which made those inmates eligible for Youthful Offender Parole Hearings.<sup>72</sup>

Senate Bill 260 renders juvenile offenders serving non-LWOP sentences eligible for a youthful offender parole hearing at their fifteenth, twentieth, or twenty-fifth year of incarceration, depending on the length of their controlling offense.<sup>73</sup> Significantly, per California Penal Code section 4801(c), the legislature requires the Board of Parole Hearings 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 [offender].”<sup>74</sup> Senate Bill 260 was intended to ensure eligible juvenile offenders will “have a meaningful opportunity to obtain release” when that offender has gained sufficient maturity.<sup>75</sup>

#### PEOPLE V. FRANKLIN

Following the passage of Senate Bill 260, the California Supreme Court handed down a two-part decision in *People v. Franklin*.<sup>76</sup> First, the court held that the procedures created by Senate Bill 260, specifically the provisions that entitle an inmate to a youthful offender parole hearing, cured the constitutional error in sentencing by giving the petitioner the right to a parole hearing after serving twenty-five years of his sentence.<sup>77</sup> Second, the court held that remand was

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72. Senate Bill 260, approved by the governor on September 16, 2013, provides early parole hearings for juvenile offenders whose commitment offenses occurred when they were under the age of 18. *See* S.B. No. 260, 2013–2014 Reg. Sess. (Cal. 2013–2014). Senate Bill 261, approved by the governor on October 3, 2015, extends those hearings to youthful offenders whose commitment offenses occurred when they were under the age of 23. *See* S.B. No. 261, 2015–2016 Reg. Sess. (Cal. 2015–2016). Finally, Assembly Bill 1308, approved by the governor on October 11, 2017, extended the above protections to youthful offenders “who committed those specified crimes when they were 25 years of age or younger.” *See* A.B. No. 1308, 2017–2018 Reg. Sess. (Cal. 2017–2018).

73. S.B. No. 260, 2013–2014 Reg. Sess. (Cal. 2013–2014). Controlling offense means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment. A “controlling offense” does not refer to an offense, per se, but instead to a term of years, with or without a life term. Therefore, the longest component of an inmate’s sentence may be, and often is, a gang or weapon enhancement.

74. CAL. PENAL CODE § 4801(c) (West Supp. 2019).

75. *People v. Franklin*, 370 P.3d 1053, 1060 (Cal. 2016).

76. *Id.* at 1053.

77. *Id.* at 1062; *In re Cook*, 441 P.3d 912, 913–14 (Cal. 2019). It is still not clear whether Franklin’s sentence was constitutional *because* he would have the opportunity to put mitigation evidence into the record, or whether his sentence was constitutional because of his future parole hearing, and the opportunity to put evidence into the record flowed solely from that statutory right.

required to determine whether the trial court afforded the youthful offender sufficient opportunity, pursuant to *Miller* and its progeny, to develop a record of mitigating evidence relevant to his eventual youthful offender parole hearing.<sup>78</sup> Later, in *People v. Rodriguez*,<sup>79</sup> the court clarified that, essentially, *any* sentencing hearing conducted before the passage of Senate Bill 260 was “not adequate in light of the purpose of [the youthful offender parole hearing law].”<sup>80</sup> In other words, every youthful offender sentenced pre-2016 had to receive the benefits of *Franklin*. The question was, how?

#### *IN RE COOK* AND THE REALITIES OF JUVENILE POST-CONVICTION LAW

Initially, relief under *Franklin* was cognizable under the post-conviction vehicle used by nearly every prisoner seeking freedom: by a petition for a writ of habeas corpus. However, as the state argued in *Cook*, *Franklin* was not intended to provide a remedy for an unconstitutional or illegal sentence, and therefore, habeas corpus was not the proper means to initiate a *Franklin* proceeding.<sup>81</sup> Instead, it argued, *Franklin* was merely an “evidence-gathering procedure” meant only to aid the Board of Parole Hearings in deciding about a juvenile offender’s suitability for parole.<sup>82</sup> Such a purpose did not deserve the majesty of “The Great Writ.”<sup>83</sup>

That, coincidentally, is also the argument of the numerous defense attorneys who argue for the simplified, administrative version of “bundling.” “Bundling” (a neologism created by these authors) describes a common practice in *Franklin* “litigation.” The defense attorney chooses not to provide expert reports, social histories, and written pleadings to the court; decides not to present the experts and their findings in live testimony; and makes no oral argument on the

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The California Supreme Court has repeatedly acknowledged that this issue is unresolved. *Cook*, 441 P.3d at 922 (citing *People v. Rodriguez*, 417 P.3d 185, 190 (Cal. 2018)) (“Finally, as we have before, we express no view on whether a *Franklin* proceeding is constitutionally required.”)

78. *Franklin*, 370 P.3d at 1064–65.

79. 417 P.3d 185 (Cal. 2018).

80. *Id.* at 190; *see also* *People v. Tran*, 20 Cal. App. 5th 561, 570 (2018) (holding that a defendant sentenced before *Franklin* was decided was presumed to have received an inadequate opportunity to present mitigation evidence).

81. *Cook* argued, reasonably, that since an effective parole hearing was all that stood between him and freedom, the lack of a *Franklin* hearing affected the conditions of his confinement and was therefore a perfect subject for a habeas petition. *See* Answer Brief on the Merits at 10–11, *In re Cook*, 441 P.3d 912 (Cal. 2019) (No. S240153), 2017 WL 4001660.

82. *See id.* at 8–9.

83. *See id.* at 11–12.

client's behalf. Instead, the "bundling" defense attorney gathers an undifferentiated mass of pre-trial records—probation reports, juvenile delinquency records, DCFS records, and letters of support—and submits them to the court with a brief motion, asking the court to submit the documents to the Board of Parole Hearings. It's fast, it's inexpensive, and it avoids any confrontation with the prosecution over the moral character of the client.<sup>84</sup>

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84. The Second District Court of Appeal recently sanctioned this approach in a published opinion, *People v. Sepulveda*, No. B289160, 2020 WL 1545789 (Cal. Ct. App. Apr. 1, 2020). Travis Sepulveda, a defendant sentenced for three attempted murders he committed at age eighteen, and a murder he committed at age twenty-one, claimed that he had a constitutional right to a live *Franklin* hearing, rather than the detailed and comprehensive mitigation memorandum his attorney submitted to the trial court, out of the presence of both Sepulveda and the prosecutor. *Id.* at \*1. The court held that: (1) the defendant had no right to a live hearing at sentencing; and (2) there is no constitutional due process right to a *Franklin* proceeding; all rights flow from the statutory right created by the legislature. *Id.* However, nothing this Article says about live hearings as a best practice is affected by the ruling in *Sepulveda*. For example, one benefit of a live hearing would have been that the judge would have had to state on the record why or why not Sepulveda's mitigation evidence affected his sentencing decision. However, the *Sepulveda* court categorically dismissed this imputed purpose, stating instead that "[t]he purpose of providing an opportunity to present youth-related factors mitigating culpability is not to influence the trial court's discretionary sentencing decisions but to preserve information relevant to the defendant's eventual youth offender parole hearing." *Id.* at \*5.

This statement is frankly misplaced, applying the post-conviction holdings of *Cook* and *Rodriguez* to the issue of mitigation evidence at sentencing. Taking the court's reasoning to its logical conclusion, trial courts are still free to oversentence youth offenders, just as they did thirty years ago, secure in the knowledge that *Franklin* evidence—introduced only *after* sentencing—will influence the parole board, but not trouble the sentencing court itself. This is a troubling conclusion. Nothing in the *Franklin* opinion suggested that its holding was confined to post-conviction litigation. In fact, the issue in *Cook* was whether *Franklin* applied at all in post-conviction. *Cook*, 441 P.3d at 917. It seems strange that the California Supreme Court would create a special proceeding, designed to remedy the lack of mitigation evidence at a juvenile offender's original sentencing, and then also hold that this new, remedial hearing, going forward, would have no effect on a judge's sentencing decisions.

Sepulveda was convicted of three counts of attempted murder, and one count of first-degree murder he committed when he was eighteen and twenty-one years old, respectively. *Id.* at \*1. He was sentenced to an aggregate indeterminate prison term of ninety years to life. *Id.* During sentencing proceedings, Sepulveda's attorney stipulated to a written *Franklin* mitigation evidence submission and declined to present any live testimony. *Id.* at \*1–2. The *Franklin* evidence, a mitigation report authored by an appointed capital mitigation investigation expert, psychological and educational assessments, school records, and interviews with Sepulveda's family, would be submitted to the court "about three weeks or a month" after Sepulveda's sentencing. *Id.* at \*2–3. The court proceeded with Sepulveda's sentencing without consideration of any *Franklin* evidence. *See id.* at \*3.

Sepulveda appealed, seeking remand for a *Franklin* hearing. *Id.* at \*1. He argued, "*Franklin* is, in essence, an aspect of the sentencing hearing and, as such, directly implicates a defendant's fundamental due process rights, including to be present at the hearing, to present a defense and to cross-examine witnesses—rights that cannot be waived by counsel without the client's consent." *Id.* at \*5. The Second District held the opposite—that the rights *Franklin* affords defendants are statutory in nature and do not implicate a defendant's constitutional rights, at all. *Id.*

Many defense attorneys and public defender offices favor this method of presenting mitigation evidence.<sup>85</sup> There's no point in doing more, they argue. Doing a full-blown hearing is ruinously expensive for already cash-strapped public defender offices—it takes valuable time away from zealously representing defendants at the trial level, and it annoys judges. Finally, what if the People finally notice what's going on and start cross-examining our experts or presenting their own reports? Our psychologists' opinions about causative factors are just speculation, paper-thin supposition that will never withstand the brilliance of line deputies and their rapier-like trial skills. Better to quietly submit the documents and bypass the hearing process. Why do more?

None of these vital issues of attorney competence and diligence are discussed in *Cook*, and nor should they be. The California Supreme Court is not the place to define what an advocate ought to do in a trial-level court. On the other hand, trial-level attorneys also have no business arguing that the California Supreme Court *took away* rights from a defendant seeking *Franklin* relief. Yet pleadings have already been filed in California courts by prosecution offices, arguing that the California Supreme Court has severely curtailed the rights of *Franklin* movants, despite the fact that none of that prosecution-friendly language finds support in the *Cook* opinion.

On the other hand, *Cook* does not provide much support for diligent defense attorneys, either. True to its practice, the court seems content to leave much of the detail work to the superior court. Attorneys on both sides will have to thrash out those details, and much

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The court further held that the trial court properly exercised its discretion in accepting defense counsel's stipulation to a written *Franklin* submission. *Id.*

The California Supreme Court has not ruled on whether the lack of a *Franklin* proceeding violates due process. Moreover, *Sepulveda* does not vacate *Medrano* or *Carranza*, where other appellate courts declared that an insufficient *Franklin* hearing at sentencing could be cured by a 1203.01 motion post-conviction. *See* *People v. Medrano*, 253 Cal. Rptr. 3d 653 (Ct. App. 2019); *People v. Carranza*, No. A152211, 2019 WL 5867435 (Cal. Ct. App. Nov. 6, 2019).

The court also ruled that, if *Sepulveda* wanted to argue ineffective assistance of counsel by his attorney for failing to demand a live hearing, he could file a petition for writ of habeas corpus (though the court helpfully suggested several strategic reasons why the attorney wouldn't want a live hearing). *Id.* at \*6.

85. In San Bernardino County, where *In re Cook* originated, live hearings are discouraged. The process is designed to be streamlined, with as much documentation as possible submitted with the original motion. *See* Directive, Superior Court of Cal., Cty. of San Bernardino, Procedures for *Franklin* Proceedings (June 5, 2019) (on file with authors).

of that thrashing will take place at a local level, where custom and judicial habit are almost as important as black letter law.

But let's for a moment take the side of the bundlers, and ask the obvious question: "who cares?" Is it necessary to employ experts, solicit reports, and engage with the court and the prosecutor? Does the client need it? Does the Board of Parole Hearings need it? Does the court need it? Why all this pointless theater?

The answer is this: there's more at stake in a *Franklin* hearing than the proper transmission of mitigation evidence to the Board of Parole Hearings. Those stakes are not immediately apparent from the *Franklin* opinion, and they are certainly not mentioned in *Cook*, but the remedy in *Franklin* implicitly addresses them. These stakes can be summarized as a triad of institutional realities that will be familiar to any attorney who practices in California.

First, there is the fact that California trial court judges have historically heard very little mitigation evidence during the sentencing phase of a trial. Why would they? Judges had very little discretion under the sentencing laws of the 1990s, though they had more discretion than many judges were willing to admit.<sup>86</sup> After a conviction on a serious or violent felony, a judge's only option in many cases was to stack gang and gun enhancements, along with determinate sentences, on top of an already long sentence or series of sentences. As noted above, functional life without parole—that is, a sentence of fifty years to life or longer—was all too common, even as crime rates plummeted. Most of the judges sitting on superior court benches were ex-prosecutors themselves, and they knew how much power was in the hands of felony trial deputies.

Second, trial defense attorneys have historically agreed with those judges. For judges to hear mitigation evidence, defense attorneys must gather and present it. As sentencing laws became more and more draconian, and prosecutors acquired almost unlimited plea-bargaining power, defense attorneys began to despair. Many behaved as if their jobs were finished when the verdict was announced. They were

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86. See Jon'a Meyer & Paul Jesilow, *The Formation of Judicial Bias in Sentencing: Preliminary Findings on "Doing Justice"*, 22 W. ST. U. L. REV. 271, 279 (1995) (noting that after the 1976 implementation of determinate sentencing laws in California, judicial discretion at sentencing was so limited that California judges admitted to using "a variety of methods to expand their discretion, including refusing plea bargains, assignment of offenders to probation and community service, creative interpretation of statutes, and recommendations to the probation department to allow alternative placements for mandatory sentences").



supported in this belief by the other institutional actors. These authors have read too many appellate records where the only sentencing papers were filed by the prosecution, and the defense had almost nothing to say on the defendant's behalf.

Finally, *Franklin* addresses another reality of youthful offender parole hearings: it is highly unlikely that appointed parole counsel will gather mitigation evidence. They are incapable of it, both institutionally and financially. Social histories, psychological reports, prison adjustment reports, and institutional evidence in the form of educational records, DCFS records, and foster care reports are beyond the scope of the appointment, and the state is not offering any help, financial or otherwise.

In more detail, the next Part covers these three institutional limitations, and how the *Franklin* proceeding can ameliorate them.

#### ATTITUDES TOWARD *FRANKLIN*

Perhaps it would help to return to our original question: do post-conviction *Franklin* hearings matter at all? The word "hearings" is used advisedly, because the question is really two questions: does *Franklin* matter, and do *hearings* matter?

An easy answer to the first question is: if the *Franklin* proceeding didn't matter, the California Supreme Court would not have created it, and would not have chosen trial courts as the venue for these mitigation hearings. *Franklin* clearly states that its antecedents are not the regulations or decisions of the California Department of Corrections, but the California legislature and the courts of review, including the United States Supreme Court.<sup>87</sup> The California Supreme Court did not direct parole attorneys to gather evidence and present it to the Board of Parole Hearings; it directed trial attorneys to present evidence to trial courts.<sup>88</sup> That makes sense: mitigation evidence is generally presented in the trial court; mitigation evidence should have been presented in the trial court. So, by creating the *Franklin* proceeding, the California Supreme Court is, in effect, saying: you broke it, you fix it, and the Board of Parole Hearings can reap the benefits of the additional evidence.

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87. *People v. Franklin*, 370 P.3d 1053, 1060 (Cal. 2016).

88. *See In re Cook*, 441 P.3d 912, 922 (Cal. 2019).

It is therefore understandable that prosecutors would bridle at the thought of being forced to dig up old transcripts, justify earlier sentencing decisions, and generally endure the wholesale humanization of juvenile offenders who had previously been sentenced as if they were monsters. It is also understandable that judges, their dockets already strained by court consolidation, would not want to waste precious time on a hearing where they don't even get to make a ruling.

What is less understandable was the defense bar's lack of passion for rethinking or rearguing juvenile justice. A *Franklin* proceeding, properly litigated, is a way to explore the connection between social forces, psychological factors, and juvenile culpability, and to do it in full view of the institutional actors who make decisions based on juvenile culpability: judges, prosecutors, commissioners, probation officers, and defense attorneys. The hearings, though they will not change a single sentence, might shed some light on the legal and cultural forces behind the thirty-year effort to lock up thousands of youths in California prisons.

But a large part of the defense bar, perhaps beaten down by years of powerlessness in the face of absolute prosecutorial discretion, seems to have little appetite for restarting the conversation about juvenile sentencing. These authors have heard it frequently in Los Angeles trial courts: "*Franklin?* That useless remedy?" said one parole attorney. "Much ado about nothing," scoffed a defense attorney in a branch court, who was, in fact, handling several *Franklin* proceedings. "I can present any facts I want to at a parole hearing, without worrying about the Rules of Evidence. What do I need a court proceeding for?" asked another post-conviction attorney.

But if recent history has taught us anything, it is that democratic norms matter, and that much of what we call "the law" is in fact a cluster of entrenched customs that change, not only as the result of legislation or appellate law, but also in response to repetitive practice at the local level. This repetitive practice is often defined as "judicial discretion" or "prosecutorial discretion," with that term's aroma of well-deserved power. But really, repetitive practice is less a matter of absolute power than a cluster of unspoken beliefs, held in common by institutional actors. In other words, the decisions that prosecutors, judges, and defense attorneys make in day-to-day practice, and the

reasons for those decisions, matter as much as the laws that give them the latitude to make those decisions in the first place.<sup>89</sup>

This, in fact, ought to be the promise of *Franklin*: that it can change the assumptions that provide the foundation for repetitive decision-making in court practice. This promise is partly the necessary result of having no recourse to any other promises. *Franklin* changes no sentences, releases no inmates from prison, requires no explanations from prosecutors, and requires no judge to justify an earlier sentencing decision. If none of these more concrete goals are available, then the *Franklin* proceeding must take refuge in the less tangible goals of changing the conversation about juvenile offender culpability. On the other hand, it is also arguable that, without a change in this conversation, all the statutes, regulations, and appellate opinions will be insubstantial, impermanent gestures. Not only will there be little change in the criminal courts, the little change that does occur will fade away with the first uptick in the crime rate. So, the answer to both questions is yes. *Franklin* matters, because it changes the conversation about youth crime, and hearings matter, because it's not a conversation if one institutional actor submits documents and the other actors silently accept them.

Others would argue that *Franklin*'s promise is, in fact, not intangible but concrete. Specifically, the proceeding is concretely aimed at the Board of Parole Hearings because *Franklin* promises a proceeding to supplement the record that exists solely for the its use. In fact, *Franklin* states this clearly:

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 . . . in determining whether the offender is "fit

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89. Professor John F. Pfaff argues that the discretion of a single institutional actor—the county prosecutor—is primarily responsible for oversentencing, so perhaps some customs are more entrenched than others. *See, e.g.*, PFAFF, *supra* note 11, at 70 ("What we call the criminal justice system is, in practice, a mishmash of independent, often competitive bureaucracies, all attentive to different constituencies . . . . In fact, when we break the criminal justice 'system' into its constituent parts, a striking fact stands out . . . prosecutors have been the ones who are most responsible for overall prison growth.").

to rejoin society” despite having committed a serious crime “while he was a child in the eyes of the law.”<sup>90</sup>

Going with this view of *Franklin*, it makes sense not to simply “bundle” documents but also to avoid live hearings, since the intended target of *Franklin* is not courts, but the Board of Parole Hearings. It is true, the Board of Parole Hearings is the ultimate destination for *Franklin* evidence, and the most tangible result—namely, parole—will be felt there.

The authors of this Article come down squarely on one side of this debate: we believe that, to be effective, a *Franklin* proceeding must include three components: first, mitigation evidence that is summarized and curated, preferably in expert reports that analyze the client’s history, commitment offense, and potential for rehabilitation; second, a comprehensive mitigation memorandum that distills the mitigation evidence in an analytical structure based on the five factors enumerated in *Miller*; and third, a live hearing, where the experts can explain their opinions, deal with cross-examination, and answer any questions the court may have. Anything less will offer incomplete *Franklin* relief. To buttress this argument, here, in more detail, are the three institutional realities that make *Franklin* hearings necessary.

#### JUDICIAL CONTEXTUALIZATION

In *Franklin*, at issue are not only the rights of youthful offenders facing parole hearings, but also the rights of the youthful offenders of the future, sitting in the courtrooms of judges who sentenced their fathers, older brothers, and uncles to long sentences. Many of the judges who sentenced juvenile offenders to long sentences are still on the bench, and the judges who came after them are often former felony prosecutors who argued for those original sentences. Over the last thirty years, these judges and prosecutors have been the most important institutional actors in the overincarceration of youth. In thousands of cases, prosecutors have argued that children who commit crimes are irredeemable. They have pointed at juvenile defendants and described them as “monsters,” “dead inside,” “completely without moral understanding,” and “deserving of the death penalty.” Judges have echoed those arguments in their pronouncement of sentences,

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90. *Franklin*, 370 P.3d at 1065 (citations omitted) (quoting *Graham v. Florida*, 560 U.S. 48, 79 (2010)).

often invoking “the will of the people” or the fact that “the legislature has spoken.” Although judges and prosecutors must acknowledge changes in the law, it takes years—sometimes decades—to change judicial and prosecutorial habits. The only way to change those habits is to counter thirty years of repetitive oversentencing with an equal number of years of repetitive evidence of the humanity and redeemability of juvenile offenders.

Thirty years of mitigation hearings: that sounds crazy. But, as we gradually awaken from California’s nightmare of mass incarceration, it is helpful to remember that the nightmare did not happen overnight. Rather, it was the result of the repeated condemnation of youth in the news, in politics, in schools, on television, and in the courts.<sup>91</sup> After thirty years of that barrage, how can any judge believe—really believe, with her own senses—that youthful offenders are redeemable, without repeatedly seeing the evidence of that in their courtrooms? In the opinion of these authors, judges need to see the redeemability of juvenile offenders in the flesh. And not just once, but dozens, even hundreds of times. Otherwise, what judge would believe that the “irreparably corrupt” juvenile offender was, in the words of *Miller*, “rare”?<sup>92</sup> Why would she not believe that the true rarity was the juvenile offender whose crime reflected “transient immaturity”? Why would the judge not believe that the few rehabilitated offenders she saw in her courtroom were just exceptions, and that overall, she had made the right decision in 99 percent of her cases?

Based on their past decisions, statements, and asides to court counsel, trial judges are not going to see redemption in the sullen, angry, seventeen-year-old defendant, sitting through a long felony trial, twiddling his thumbs and staring at the ceiling. In order to do that, those judges would have to extend their understanding of the juvenile offender, into the past and into the future. They would have to see the totality of this distracted, affectless creature. What did his home life look like? How much violence did he experience daily? Did he have any cognitive limitations or mental illness, not enough to

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91. See, e.g., *The Super-Predator Scare*, N.Y. TIMES (Apr. 6, 2014), <https://nyti.ms/1h505w1> (detailing the misguided statistical analysis and moral panic that gave rise to the “super-predator” scare of the 1990s). Some experts argue that the super-predator myth is making a comeback, with constitutionally suspect gang suppression initiatives. Alex Vitale, *The New ‘Superpredator’ Myth*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/opinion/superpredator-myth.html>.

92. *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012).

render him incompetent, but enough to damage his choosing mechanism? What was this youthful defendant like when he wasn't experiencing the daily chaos of the streets? And finally, what might happen to this person in twenty years? Would the defendant mature, calm down, and become thoughtful, insightful, and self-aware? Or would he still be acting like an adolescent: impetuous, angry, and immature? Did he have a future, and could the court help guarantee that future by validating his humanity and his worth?

### THE LIMITED HORIZON OF PAROLE HEARINGS

There is also a practical dimension to a *Franklin* hearing, and it bears on the realities of the parole process in California prisons—realities that the *Franklin* court seemed to implicitly acknowledge.

First, parole attorneys—particularly those who are paid by the state—have no time, money, or energy to conduct independent mitigation investigation. They have their hands full just dealing with their client's prison records and the upcoming hearing. They also have little time to read a thick sheaf of pre-trial documents without even an executive summary to give them guidance. Finally, they are shockingly underpaid: rarely more than \$400 per client, regardless of the complexity of the case.<sup>93</sup> Most juvenile offenders seeking parole will be represented by appointed parole attorneys.

Second, the realities faced by appointed parole attorneys apply doubly to parole commissioners. Parole hearing officers—both commissioners and the deputy commissioners who work with them—conduct up to twenty hearings a week, followed by parole consultations, all at the same prison. Their days begin early in the morning, and frequently end well after nightfall. Lifer parole hearings take anywhere from one to five hours, depending on their complexity. For each hearing, a parole commissioner must read thousands of pages of prison records, as well as a Comprehensive Risk Assessment, any submissions by the potential parolee, and the transcripts from every prior parole hearing. The last thing a parole commissioner needs is a

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93. See CAL. DEP'T OF CORR. & REHAB., *Attorney Invoicing*, <https://www.cdcr.ca.gov/bph/attorney-overview/invoicing/> (last visited Jan. 16, 2020) (detailing a "menu" of attorney tasks, with assigned dollar amounts). In 2020, for the first time, California parole panel attorneys will get a raise, to a flat rate of \$750 per client, irrespective of case complexity—enough to do a competent job at a hearing, but not remotely enough to do independent mitigation investigation. See CAL. DEP'T OF CORR. & REHAB., *Application Process for New Attorneys*, <https://www.cdcr.ca.gov/bph/attorney-overview/application/> (last visited Jan. 16, 2020).

mass of undigested documents, many of which may be duplicated in the existing file. And yet, that appears to be the strategy employed by many public defender offices.

The bottom line is, the *Franklin* proceeding bears a heavy historic burden. With no other remedy on the horizon, it is perilous to act like we can short-change this one. And yet—with that blithe amnesia so characteristic of California—that’s exactly what we are doing.

It doesn’t have to be that way. Defense counsel have the energy, and the courts have the resources, to do *Franklin* proceedings in a way that meaningfully honors the rights of juvenile offenders. Here’s how:

#### HOW TO DO A *FRANKLIN* HEARING

The best practices for representing a youthful offender in a *Franklin* proceeding are not particularly complex, nor should they be unfamiliar. They are the same best practices that a competent attorney would employ for a juvenile sentenced to life without the possibility of parole, pursuant to *Miller*. After all, what Tyris Lamar Franklin was seeking was not a *Franklin* hearing, but a *Miller* hearing. The difference—the *only* difference—is that a *Franklin* hearing lacks a judicial ruling. Attorneys argue; objections are made, overruled, and sustained; witnesses testify under oath; and pleadings are exchanged. That the judge is essentially a disinterested referee should not cause a great deal of consternation. Judges are often required to be institutionally passive.

The first thing an attorney must do to initiate a *Franklin* proceeding is file a motion<sup>94</sup> under the original caption and case number, in the original sentencing court.<sup>95</sup> The motion should set forth the eligibility requirements for a *Franklin* proceeding: (1) that the client was under twenty-six at the time of the commitment offense; (2) that the client is entitled to a Youthful Offender Parole Hearing under California Penal Code sections 3051 and 4801 and an indication when that hearing is scheduled to take place; and (3) that the trial court did not consider youth-related mitigation evidence at the sentencing hearing.<sup>96</sup> Although the proper vehicle for a *Franklin* proceeding after

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94. Following *Cook*, this document is termed a “motion” pursuant to California Penal Code section 1203.01, but it contains the same allegations and arguments as a *Franklin* petition.

95. *In re Cook*, 441 P.3d 912, 922 (Cal. 2019).

96. CAL. PENAL CODE § 4801(c) (West Supp. 2019). Following *Rodriguez* and *Tran*, any sentencing hearing that took place before *Franklin* was decided on May 26, 2016, is presumptively inadequate. *Supra* note 80.

*Cook* is a motion instead of a petition, the procedure after filing the motion remains the same. Just as in pre-*Cook* and pre-*Franklin* proceedings, the district attorney may oppose the motion if it believes the client has already had an opportunity to make a record of youth-related mitigating evidence at the time of sentencing, and the court may exercise its discretion in how it wants to conduct the proceeding. However, if the client meets the eligibility criteria listed above, he is entitled to this proceeding,<sup>97</sup> and any objections or challenges to the client's right to a *Franklin* proceeding should be relatively easy to overcome.

Preparation for the *Franklin* proceeding begins with thorough record collection. Attorneys should collect documentation from the client's youth and post-conviction.<sup>98</sup> In order to eventually synthesize youth-related mitigation evidence into a cohesive narrative, an attorney needs a clear picture of the circumstances surrounding his or her client throughout the client's entire life. The records sought should comprise, but are not limited to the following: the full record on appeal, including reporter's and clerk's transcripts from the original trial and any appellate or habeas corpus filings; the original probation report; education records, particularly special education records; dependency and delinquency records, which may include records from the Department of Child and Family Services (DCFS); medical

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97. *In re Cook*, 441 P.3d at 917.

98. Some district attorneys argue that the goal of the *Franklin* remedy is to create a "time capsule," and the proceeding should only allow presentation of evidence from the time that the client committed his crime. They argue that any post-conviction evidence is irrelevant to the proceeding.

It is true that, following *Cook*, the court in a *Franklin* hearing may "exercise its discretion to conduct [the proceeding] efficiently, ensuring that the information introduced is relevant, noncumulative, and otherwise in accord with the governing rules, statutes, and regulations." *In re Cook*, 441 P.3d at 922 (quoting *People v. Rodriguez*, 417 P.3d 185, 190 (Cal. 2018)). However, the fact that a court has the discretion to not consider certain evidence is not an adequate reason not to present the evidence in the first place.

The only difference between the *Miller* remedy Tyris Lamar Franklin sought and the remedy the court created in the *Franklin* proceeding is that there is no judicial sentencing decision. The *Franklin* proceeding contemplates the same five *Miller* factors, including the fifth factor—which allows the client to present all relevant evidence bearing on the distinctive attributes of youth, including post-conviction efforts at rehabilitation. Moreover, under *Franklin*, the client must be given an opportunity to make a record of evidence relevant to the Board of Parole Hearings at his eventual youthful offender parole hearing. *People v. Franklin*, 370 P.3d 1053, 1064 (Cal. 2016) ("[I]n 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."). Thus, post-conviction evidence of rehabilitation is not only relevant, but is essential to the mitigation presentation at a *Franklin* proceeding.



records; and finally, the client's Central file ("C-File") from the institution at which she is currently housed.

Depending on the client's age, some of these records may have been lost, destroyed, or be difficult to locate. However, it is imperative that the attorney seek out as many records as possible because they will ultimately inform the attorney's decisions about what kinds of experts are the best equipped to evaluate and testify on behalf of the client. For example, an attorney who finds through medical records that his cognitively impaired client sustained a severe head injury as a child might seek out an expert who specializes in traumatic brain injury to best evaluate that client. Or, for a client who has had no apparent cognitive impairment or mental health concerns, but who endured severe childhood trauma, an attorney may seek out a licensed clinical social worker or social historian to best evaluate the client. The attorney should carefully read the records she is able to obtain, and glean from them significant themes, patterns, or events in the client's life.

The foundation for a fruitful *Franklin* proceeding is a comprehensive psycho-social life history, often referred to as a "social history." The social history can be written by a social worker, attorney, investigator, anthropologist, psychologist, academic, or law student, and should present an in-depth study of the client's life. To generate a high-quality social history, the author must do an exhaustive review of the available records, interview the client in person, and interview the client's family and friends, again in person.<sup>99</sup> The social history should ultimately contain information that is relevant to the factors present during the client's childhood and the client's subsequent growth and maturity.<sup>100</sup> It can be organized topically or chronologically, can include images or visual representations of data, and should highlight significant events in the client's life. Depending on who is best suited to write the social history, an attorney may seek

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99. The authors have heard anecdotal reports of social historians substituting questionnaires for in-person interviews with clients or family members. Needless to say, this deprives the social historian of valuable information—demeanor and affect, not to mention effective follow-up questions—that she would gather during an in-person interview.

100. The social history, like many of the components of a *Franklin* proceeding, grows out of death penalty litigation. See *Wiggins v. Smith*, 539 U.S. 510, 533–36 (2003) (counsel's failure to investigate and complete a competent social history for a defendant facing the death penalty was ineffective assistance of counsel).

appointment through the court, hire an independent social historian, or use an in-house specialist.

After the social history is complete, based on its content, the attorney may choose to seek appointment of an additional expert. There are various reasons the attorney may choose this path. First, and most commonly, the person generally appointed to write the social history is not credentialed to make diagnoses—there are some diagnoses only medical doctors can make. For example, if there are indications that the client has struggled with mental illness or cognitive impairment, it may be beneficial for a doctor to do a targeted clinical evaluation of the client and make a diagnosis. There are other types of experts that may be advantageous in a *Franklin* proceeding, like gang experts and prison adjustment experts. However, attorneys should be strategic and thoughtful about the court’s stated or apparent willingness to appoint multiple experts.

Once all reports and evaluations are complete, the attorney should meet with her expert to discuss the report’s findings and conclusions and prepare for in-court testimony. The court may allow multiple experts to testify, but in the case that it will only provide funds for one expert to appear in court, attorneys should choose the expert whose testimony will be most advantageous to the client at his youthful offender parole hearing.<sup>101</sup>

After meeting with the expert and reviewing all the finalized reports, the attorney should file a statement in mitigation in advance of the actual *Franklin* proceeding. Like a sentencing memorandum in a *Miller* hearing, the statement in mitigation should contextualize the evidence in terms of the five *Miller* factors.<sup>102</sup> Although there is no sentencing decision in a *Franklin* proceeding, the goal is to clarify for the court and, eventually, the Board of Parole Hearings, how the client’s youth affected his participation in the crime and how he has grown and rehabilitated since his conviction. The statement in

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101. In some cases, the court may deny the request to appoint an expert entirely. This denial is erroneous and would result in a constitutionally defective *Franklin* hearing and a Fourteenth Amendment due process violation. As the court held in *Doe v. Superior Court*, indigent defendants have a constitutional right to retain a competent psychiatrist who will conduct an appropriate examination and assist in the “evaluation, preparation, and presentation” of the defense. 45 Cal. Rptr. 2d 888, 892 (Ct. App. 1995). An attorney should be ready to litigate this matter but should also be cognizant of her client’s appetite for lengthy appellate litigation.

102. Some attorneys prefer to use the three factors listed in California Penal Code sections 3051 and 4801, but because *Franklin* is a judicial remedy, there is something to be said for the five judicial factors developed in *Miller* and *Gutierrez*.

mitigation should attach as exhibits the social history, the expert report, and any underlying documentation used to support it. This filing should be submitted to the district attorney and the court at least two weeks before the hearing to give the district attorney a chance to respond, if he or she is inclined to do so. It will also give the court time to digest the information contained in the reports.

The next strategic decision the attorney and client must make is to determine whether the client wishes to be present at the *Franklin* proceeding, or whether he chooses to waive his appearance. This decision can be quite difficult for clients who have invested a great deal of time and energy in creating a routine in state prison. Transportation to the county jail for court might result in the client losing his place in a specific self-help class or vocation. It may mean he will spend weeks in a crowded, more chaotic environment, surrounded by strangers, and potentially in danger.

There are, however, potential benefits for the client if he chooses to appear in court. First, the court is likely to allow the client to allocute, or to make a statement of remorse, from the defense table. If a client can make a record of remorse at his or her *Franklin* proceeding, the Board of Parole Hearings will be able to see early evidence of remorse and insight.<sup>103</sup> Additionally, because of the remote location of many of California's state prisons, it is likely that the county jail facility is closer to family and friends and would allow the client to see his loved ones more often.

Most significantly, a client who is present for his *Franklin* proceeding can see and hear, for the first time, the complete narrative that should have been developed at the time of his sentencing. At the time the client was sentenced, the only narrative presented in the courtroom was the story of the crime. Trial courts relied heavily on probation reports as evidence of criminal sophistication, gang membership, and antisocial behavior, and heard testimony from law enforcement, witnesses, and victims. Clients received exceptionally long sentences and were never given an opportunity to contextualize their involvement in the crime. Being present at the hearing can boost the client's self-esteem, impart a sense of dignity, and encourage the client to continue on a rehabilitative path until his parole hearing.

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103. In addition to the youth factors that the Board of Parole Hearings must consider, two of the primary measures of future dangerousness are whether the client possesses insight into the crime and remorse for his or her actions. *In re Shaputis*, 190 P.3d 573, 585 n.18 (Cal. 2008).

At the *Franklin* proceeding, an attorney may request that the court allow her to make a brief opening statement to frame the proceeding. The court will then hear the live witness testimony, and the district attorney may cross-examine the witness or witnesses. The attorney may request that she be able to make a brief closing argument and then she should request that the court transmit the transcript from the proceeding and the written submissions to the California Department of Corrections and Rehabilitation. The *Franklin* materials should be placed in the client's C-file, so the Board of Parole Hearings has access to it at the time of the client's youthful offender parole hearing. The court should also order that the client be removed back to state prison as quickly as possible.

#### CONCLUSION

After *In re Cook*, very little has changed legally. Defendants still have the right to conduct an "evidence preservation procedure," and although habeas corpus is no longer the entry point for that procedure, the nature of the evidence "preserved" is the same.<sup>104</sup> The court liberally quoted its earlier decisions in *Franklin* and *Rodriguez*, and still permits the possibility of actual hearings.<sup>105</sup> Whatever any interested party may have hoped or feared, the demise of the House of *Franklin* has been greatly exaggerated. Aside from a new door and some new signage, the interior is basically unchanged.

Or perhaps the right word is "unrenovated." Because, despite having opportunities to do so, the court did nothing to strengthen the effectiveness of *Franklin* hearings or better define what procedures and documents would satisfy the dictates of *Miller* and its progeny. Reports? Testimony? A personal statement from the defendant? An on-the-record finding that the client is or is not permanently incorrigible? The court did note that a defendant who found the process inadequate could file a petition for writ of habeas corpus but gave no guidance as to what might be adequate.<sup>106</sup> The court gave the power to judges to "conduct this process efficiently" and to exclude evidence if it does not "meaningfully add[] to the already available record."<sup>107</sup> Judges may also decide "whether testimony is

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104. See generally *In re Cook*, 441 P.3d 912 (Cal. 2019).

105. *Id.*

106. *Id.* at 914.

107. *Id.* at 922.

‘appropriate’ or if other types of evidentiary submissions will suffice.”<sup>108</sup>

What this means is that the House of *Franklin* is a real do-it-yourself project. The renovation skills of each defense attorney will come into play, and there will be no waiting for the legislature or the California Supreme Court to come in with a wrecking ball. If defense counsel doesn’t like the popcorn ceiling of “documents only” submissions, that ceiling can and should be demolished. For the diligent attorney, the reward will be a well worth it: a hitherto concealed, spacious, and ornate second story of genuine mitigation evidence. All the successful *Franklin* attorney needs are commitment, training, and elbow grease.

Without those three things, however, the *Franklin* attorney will soon find out that the house—so promising at the entrance—is cramped, inadequate, and shabby with a nice, low ceiling, but no floor to slow down the headlong race to the basement.