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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EARNEST LEE PRESCOTT,

Defendant and Appellant.

A135991

(Alameda County  
Super. Ct. No. C165685A)

**INTRODUCTION**

Defendant Earnest Lee Prescott appeals from his conviction of murder. He maintains the court erred in admitting “gang evidence” and in excluding evidence attacking the credibility of a witness. He also claims because he was 16 years old at the time of his crime his sentence of two consecutive 25-years-to-life terms violates the proscriptions against cruel and unusual punishment in the United States and California Constitutions.

In our original opinion, we concluded the trial court did not err in its evidentiary rulings. We further concluded defendant’s sentence was in effect the functional equivalent of life imprisonment without possibility of parole and deprived him of a meaningful opportunity for parole in violation of the Eighth Amendment. We therefore reversed the judgment and remanded for resentencing.

The Supreme Court granted the Attorney General’s petition for review and held the case pending its decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). The high court concluded in *Franklin* that the combined operation of Penal Code sections

3051, 3046, subdivision (c), and 4801, mooted the juvenile's Eighth Amendment challenge to an effective life sentence without possibility of parole because the new statutory scheme insures that juvenile offenders will have a meaningful opportunity for release no more than 25 years into their incarceration. (*Id.* at pp. 279–280.) In light of its opinion, the Supreme Court vacated our prior opinion with directions to reconsider the case.

*Franklin* is squarely on point, and defendant acknowledges it forecloses his constitutional challenge to his sentence. Both defendant and the Attorney General also agree a limited remand is appropriate in order to afford defendant an adequate opportunity “to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801.” (*Franklin, supra*, 63 Cal.4th at p. 287.) We therefore affirm the judgment, and remand for the limited record purpose set forth in *Franklin*.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On June 6, 2010, James Johnson was shot and killed as he walked from his home to the store. He lived in the Acorn housing complex in west Oakland, an area which was the territory of the “Acorn” gang.

On the day of the shooting, defendant, then 16 years old, was in a car heading over to Sycamore Street in west Oakland, part of the turf of the “Ghost Town” gang. Armond Turner was driving, and defendant was in the front seat with Laquisha Williams. Williams was a crack dealer who at one time headed the “Q Team,” which was allied with the “P Team.” Both “teams” were subsets of the Ghost Town gang. Jason Jones, known as “2-9” and an individual called “Duder,” both of whom were affiliated with P Team, as well as “three or four girls” were also in the car, which belonged to Williams’s sister. Defendant was also affiliated with P Team.

Williams wanted to buy some marijuana, so the group headed toward an Oakland neighborhood known as “Lower Bottoms,” driving though the territory of the rival Acorn gang. While in Acorn territory, Jones saw a man he thought was Dionte Houff, or

“Birdman,” an Acorn gang member who had knocked out Jones’s tooth in prison. Jones and defendant convinced Turner, the driver, to turn the car around anyway.

Turner made a U-turn, drove back and parked in a lot by a housing unit known as “Mohr 1.” Defendant and Jones got out of the car and entered the housing complex. They did not see Houff, but saw Johnson, who was walking from his home at the Acorn housing unit toward Green Valley Foods. Defendant fired multiple shots at Johnson, who fell to the ground. Johnson died from massive hemorrhaging due to multiple gunshot wounds.

After defendant and Jones left the car but before the shooting, Williams sent Duder to find out why the two were taking so much time in rival gang territory. She testified if an individual is from Ghost Town, it would be dangerous to be in Acorn. Williams then heard seven or eight shots fired, and defendant, Duder and Jones came running back to the car. Williams told police that when defendant got in the car, he had a silver and black gun, but at trial she testified she did not remember seeing a gun. Williams told police defendant told her Jones “wanted to shoot” but defendant “ran up on the dude.” At trial, Williams testified what she told police was “[n]ot really” true.

At the time of the shooting, Mignon Perry was at her mother’s home in the Mohr 1 unit, directly across from Johnson’s home. Perry supported “Gas Team,” a subset of the Acorn gang. She knew Johnson well, and thought of him as a relative. From her kitchen window, she saw Johnson headed toward the Green Valley store, which she knew was his “everyday routine.” She had just opened the front door to ask him to pick something up for her when she heard multiple gunshots and Johnson shouting he had been shot.

Perry’s mother slammed the front door shut, and through the window, Perry saw the shooter with a semiautomatic gun in his hand. The shooter pointed his gun at Johnson, moved closer, and aimed. After the shooting stopped, she opened the door and stepped outside, where she saw Johnson on the ground and the shooter running away. The shooter turned around when Perry swore at him, giving her the opportunity to see “the front of him,” and make eye contact with him. Perry saw no one else around. Perry stayed with Johnson, who was still alive but could not speak, until police arrived.

Perry described the shooter to police as an African-American male between the ages of 16 and 18 years old, 6 feet and 1 inch tall, wearing a white T-shirt and blue jeans and carrying a silver handgun. She would not provide a written statement at the time because the crowd that had gathered told her not to say anything to police. She later learned from “[p]eople from the neighborhood” that Williams, Turner and defendant may have been involved in the shooting. Perry was acquainted with Williams and Turner. She logged on to Williams’s MySpace page, where she saw a photograph of Williams with Turner and defendant, and recognized defendant as the shooter.

In an interview with police, Perry identified defendant in the MySpace photo as the shooter. Police also showed her still photos from surveillance videos taken at Mohr 1, in which she was able to identify defendant, Williams, and Williams’s car. The surveillance videos show a man identified as defendant leaving Williams’s car first and heading into the housing complex, followed by a second man. About two minutes later, a youth got out of Williams’s car and ran in the direction defendant and Jones had gone. Within 30 seconds, all three of them returned to the car, got in, and drove away.

The day before the shooting, Williams hosted a memorial barbecue for Anthony Dailey, known as “Active,” a Ghost Town gang member killed in 2007. She had T-shirts made with Dailey’s picture on them for the event. Defendant, Jones and Dailey were close, and defendant was wearing one of the memorial T-shirts on the day of the shooting.

Two days after the shooting, police arrested defendant and Williams for the murder. Ultimately, defendant and Jones were charged with murder.<sup>1</sup> (Pen. Code, § 187, subd. (a).) The amended information further alleged defendant personally and intentionally discharged a firearm causing great bodily injury and death. (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subds. (b) & (d), 12022.7, subd. (a).)

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<sup>1</sup> Defendant and Jones were tried together, but Jones was acquitted.

Police found the gun used to kill Johnson a few weeks later, in the course of investigating another shooting. Police discovered defendant was a contact in the cell phone of the individual from whom the gun was recovered.

A few months after his arrest, defendant escaped from the juvenile facility where he was being held for trial. In his cell, law enforcement found two handwritten letters addressed to “Dear Lord” in which he admitted “taking a human being life,” and asked for forgiveness and a not guilty verdict.

A jury found defendant guilty of murder and discharging a firearm causing death. The court sentenced defendant to an aggregate term of 50 years to life, consisting of two consecutive terms of 25 years to life, one for the murder and one for the firearm enhancement.

## **DISCUSSION**

### **Admission of Gang Evidence**

Defendant maintains the court erred in admitting the testimony of Oakland Police Officer Steve Valle as an expert on the structure and activities of West Oakland gangs. Valle testified regarding West Oakland gangs, the rivalry between Acorn and Ghost Town gangs, common forms of gang retaliation, and identified the gangs with which defendant and other involved individuals were affiliated. Defendant claims the evidence was not relevant because the prosecution “fail[ed] to prove that [defendant] was a member of the P-Team gang or had committed any past violent criminal acts in affiliation with or for the benefit of that gang . . . .” He also asserts the court erred in denying his motion to exclude the evidence under Evidence Code section 352.<sup>2</sup> We review the court’s rulings “regarding relevancy and . . . section 352 . . . under an abuse of discretion standard.” (*People v. Lee* (2011) 51 Cal.4th 620, 643 (*Lee*).

“Evidence of the defendant’s gang membership, when not directly relevant to prove an element of the offense or an enhancement . . . is, like evidence of prior crimes, subject to both Evidence Code section 1101, subdivision (b) and 352.” (Simons, Cal.

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<sup>2</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

Evidence Manual, § 1:31.) Section 1101 prohibits admission of evidence of a “person’s character . . . whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct . . . when offered to prove his or her conduct on a specified occasion.” (§ 1101, subd. (a).) “In general, ‘[t]he People are entitled to “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” [Citation.]’ [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.) Thus, gang evidence may be admissible “if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect.” (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Defendant maintains that in cases such as this, in which there is no substantive gang charge or street gang enhancement, gang evidence is only admissible when the defendant has “proven gang ties that made the evidence relevant to a material issue.” He relies on three cases: *Lee, supra*, 51 Cal.4th 620; *People v. Jordan* (2003) 108 Cal.App.4th 349 (*Jordan*); and *People v. Ruiz* (1998) 62 Cal.App.4th 234 (*Ruiz*), none of which support his claims.

In *Lee*, the defendant was convicted of first degree murder after shooting the victim “with seven shots to her face at close range,” with the special circumstance of attempted rape. (*Lee, supra*, 51 Cal.4th at pp. 623, 643.) The prosecutor conceded there was no evidence the murder was gang-related, and agreed not to present evidence of the defendant’s gang membership. (*Id.* at p. 642.) The prosecutor instead sought to introduce evidence of the defendant’s nickname, “Point Blank,” to show identity and intent. (*Ibid.*) The evidence showed defendant introduced himself as “Point Blank,” and after the murder was asked “ ‘[I]s that why they call you Point Blank?’ ” to which he did not respond. (*Ibid.*) On appeal, the court held evidence of the nickname was relevant to identity but cumulative of other evidence, and thus had minimal probative value in that regard. (*Id.* at p. 643.) The nickname, however, was relevant and “extremely probative with regard to the intent,” and thus admissible. (*Ibid.*)

In *Jordan*, the defendant was charged with possession for sale of cocaine base, which was found in a stairwell where he had been sitting. (*Jordan, supra*,

108 Cal.App.4th at pp. 353–354.) The trial court initially excluded evidence of his gang membership, but allowed it on rebuttal after the defense presented evidence “indicating gang members sold drugs in the area of the apartment complex” where the defendant was apprehended. (*Id.* at pp. 365–366.) The court held “[t]he prosecutor was entitled to rebut the inference, created by [the] defense, that the drugs found in the stairwell belonged to one of the gang members, not [defendant].” (*Ibid.*)

In *Ruiz*, the defendant was convicted of the sale of rock cocaine. (*Ruiz, supra*, 62 Cal.App.4th at p. 236.) His defense was alibi. In addition to several family members testifying he was at his mother’s house at the time of the drug sale to an undercover officer, a man who shared a cell with the defendant but claimed not to know him stated he was the dealer who had sold drugs to the undercover officer. (*Id.* at p. 237.) In rebuttal, the prosecutor presented expert gang testimony that the man and defendant were both members of the same small gang, and thus “it was impossible for [them] not to know each other.” (*Id.* at p. 238.)

Contrary to defendant’s claim, the California Supreme Court has explained that neither a substantive gang charge nor a street gang enhancement is a prerequisite for admission of gang affiliation to show motive or intent. “In cases not involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] *But evidence of gang membership is often relevant* to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, original italics omitted, italics added.)

The court admitted the testimony of Officer Valle as an expert on “gangs, their structure and activities, particularly as related to West Oakland.” Valle identified the neighborhood where the shooting took place as the turf of the Acorn gang, a rival of the Ghost Town gang. He explained those two gangs were involved in an “extremely violent

and bloody feud.” Officer Valle testified defendant, Williams and Jones were affiliated with the P Team subset of the Ghost Town gang, and Duder<sup>3</sup> was affiliated with Ghost Town. He identified Dionte Houff, also known as “Birdman,” as an Acorn gang member.

Officer Valle also testified it was not important to the gangs whether innocent bystanders were killed during their feud. Shootings of innocent people, in his opinion, benefited the shooting gang because they create “a violent reputation for the gang, sending a message to the rivals that they are not to use force, or means of violence to attack them, and to send a message that . . . they are willing to shoot anybody within their turf to send a message. And at times, that sends that shock value to the gangs that are being attacked . . . .”<sup>4</sup> Officer Valle testified it was common for gang members or people living in gang territory to be uncooperative with police, often for fear of retaliation.

Defendant does not specify the precise evidence he claims was irrelevant, but asserts “[g]ang evidence was irrelevant in light of the prosecution’s failure to prove that [he] was a member of the P-Team gang or had committed any past violent criminal acts in affiliation with or for the benefit of that gang, or any other circumstance to rationally support the conclusion that [he] explicitly or impliedly knew the conduct was motivated by a retaliatory purpose on the part of P-Team.” Defendant mistakes the prosecution’s burden in this regard; because this case involved neither a substantive gang charge nor a street gang enhancement, the prosecution was not required to prove defendant’s gang membership beyond a reasonable doubt. Nevertheless, there was sufficient evidence of defendant’s gang affiliation to render the “gang testimony” relevant. Officer Valle testified defendant was affiliated with P Team, and Williams told police defendant was affiliated with P Team. Defendant does not dispute the evidence showed Williams,

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<sup>3</sup> Duder, sometimes spelled “Dooder” in the transcript, was 13 years old at the time of the shooting.

<sup>4</sup> Williams’s assessment of the situation, in her interview with police, was similar: “When people funk it’s just like they gonna get on whoever they think that that’s gonna be out there that’s you know with it. Cuz it’s like a lot of people in Ghost Town had died that didn’t have nothing to do with nothin’ they just standing in a crowd. And like you know like how you be goin’ to get somebody but then you get the wrong person . . . .”

Jones, and Duder, who were in the car driven to the shooting, were affiliated with the P-Team/Ghost Town gang.

At oral argument, defendant's counsel maintained the gang evidence was not relevant to motive, relying on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*). In *Albarran*, the defendant was convicted of attempted murder, shooting at an inhabited dwelling, and attempted kidnapping for carjacking, as well as gang enhancements pursuant to Penal Code section 186.22. (*Albarran*, at p. 217.) A large amount of gang evidence, "including [defendant's] gang affiliation, tattoos, gang behavior, activities [and] crimes," was admitted as relevant to motive and intent. (*Id.* at pp. 217, 219–220.) A sheriff's deputy gang expert testified to his "numerous" prior contacts with the defendant, who was a member of the "13 Kings" gang. (*Id.* at p. 220.) He "testified at length about the identities of other 13 Kings members, the wide variety of crimes they had committed and the numerous contacts between the various gang members (other than [the defendant]) and the police. He described a specific threat 13 Kings had made in their graffiti to kill police officers. The jury heard references to the Mexican Mafia both during the prosecutor's opening argument and in [the expert's] testimony." (*Id.* at pp. 227–228, fn. omitted.) The expert further testified "how gang members gain respect by committing crimes and intimidating people." (*Id.* at p. 221.)

The shooting occurred at a private birthday party, with "no evidence the shooters announced their presence or purpose—before, during or after the shooting." (*Albarran, supra*, 149 Cal.App.4th at pp. 220, 227.) The gang expert testified "he was told there were members of another gang" at the home where the shooting occurred, and opined the offenses were gang-related because "there were two shooters involved, and the crime would intimidate people." (*Id.* at pp. 227–228.) The Court of Appeal held the gang evidence was improperly admitted to show motive, concluding "[t]here is nothing inherent in the facts of the shooting to suggest any specific gang motive . . . the only evidence to support . . . motive is the fact of [the defendant's] gang affiliation." (*Id.* at p. 227, fn. omitted.)

In contrast, the circumstances of the crime in this case did suggest a gang motive. Defendant, an affiliate of Ghost Town, while wearing a memorial T-shirt commemorating a slain gang member, was driving through rival gang territory with other affiliates of the Ghost Town gang. His codefendant Jones saw a man he thought to be a member of a rival gang, Dionte Houff, with whom he had a previous conflict. That man, however, turned out to be Johnson.

Officer Valles's testimony was thus highly relevant because it provided evidence of motive for the otherwise unexplainable killing. And, his testimony was relevant to provide background and context, explaining the structure, activities, territories and rivalries of gangs in Oakland at the time of the killing.

Defendant also maintains the evidence should have been excluded under section 352, claiming even if the "gang evidence" was relevant, its relevance was "heavily outweighed by the extreme emotional bias [it] evoked against defendant." Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." " " "Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citation.]' [Citation.]" (*People v. McKinnon, supra*, 52 Cal.4th at p. 655.)

"It is important to keep in mind what the concept of 'undue prejudice' means in the context of section 352. " "Prejudice" as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . " "The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous

with “damaging.” ’ [Citation.]” [Citation.] [¶] ‘The prejudice that section 352 “ ‘is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations]. ‘Rather, the statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’ ” (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

The court undertook a careful weighing before admitting the gang testimony. After conducting a section 402 hearing at which Officer Valle testified, the court stated: “I do find that there is some prejudice as to admission of the gang evidence, in that, . . . the jury could take from that gang membership, such that the membership in a violent street gang might, to a jury, show that the defendants are bad guys, and by that reason alone, are more likely to have committed the crime. [¶] So those are factors weighing towards prejudice and confusion, pursuant to 352. [¶] However, I feel that the evidence is highly relevant to show motive, to provide the ‘why’ the killing of James Johnson occurred; that is, that it was a retaliation type of killing, shown by the fact that the group would not have been in the Acorn area at [personal] peril unless to conduct a violent act. [¶] Also, the evidence is highly relevant, in and of itself, to corroborate the expected testimony of Laquisha Williams. [¶] So I’m balancing all of the evidence, taking into consideration the written authorities and the testimony of Officer Valle that I heard today. [¶] I feel that the relevance of the evidence substantially outweighs prejudice. [¶] I do believe a curative instruction, if desired by the defense, can be fashioned, to the effect that membership in a gang, in and of itself, does not prove the crime charged.” We cannot say this ruling was an abuse of discretion.

Even assuming it was error to admit the gang evidence, it was harmless.<sup>5</sup> Defendant acknowledged “taking a human life” in his “Dear Lord” letters, and prayed for acquittal. Perry witnessed the shooting and identified defendant as the shooter. Williams told police defendant got out of her car at Mohr 1 on the day of the shooting, and returned carrying a gun after she heard shots. Williams also identified defendant in still photos from the surveillance video. Moreover, the gang evidence was also used to attack the credibility of the prosecution witnesses Perry and Williams, who were affiliated with rival gangs. In sum, there was no reasonable probability that there would have been a result more favorable to defendant in the absence of Officer Valle’s testimony.

### **Exclusion of Evidence Regarding Williams’s Credibility**

Defendant maintains the court erred in excluding evidence Williams “fabricated evidence to incriminate her husband” in statements to police about an unrelated murder with which her husband was charged. The court excluded the evidence under section 352.

Counsel for codefendant Jones filed a motion seeking to question Williams about her testimony in the trial of her husband for the murder of her brother, which was proceeding at the same time. She allegedly “testified as to hiding a murder weapon [and] suggesting that [her husband,] the defendant take a photo of himself in Reno, and change the date, manufacturing evidence.” Williams also told police her husband was not the shooter. Defense counsel asserted “she’s now saying that she told the police that story, because she was upset with her husband for having another woman, and for shooting her brother, so she was trying to fabricate evidence to incriminate him. [¶] At the trial she says: But I just made that up. Now I’m telling the truth: I did not suggest he fabricate it.”

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<sup>5</sup> Defendant claims admission of this evidence denied him his due process rights, necessitating review under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18.) “[T]he admission of evidence results in a due process violation only if it renders the trial fundamentally unfair,” a claim defendant has not made. (*People v. Cowan* (2010) 50 Cal.4th 401, 463–464.) The Attorney General asserts there was no prejudice under either the *Chapman* or *People v. Watson* (1956) 46 Cal.2d 818 standards.

The court acknowledged the evidence was relevant to her credibility, but held “in order for the jury to make any sense whatsoever of that evidence, in the face of her denial that she lied during her testimony at those trials, [it] certainly will involve undue time and confusion, which I think does substantially outweigh its probative value.”

The probative value of her inconsistent testimony in connection with a different trial was limited because Williams’s credibility was already severely undermined in a variety of ways. Her testimony at this trial contradicted important aspects of the statement she made to police after the incident. At trial, she claimed to have “fabricated a little bit” in her statement to police. She was also impeached with three felony convictions. Additionally, she testified she used drugs and alcohol, and when she was under the influence had a difficult time remembering because she also had “other personal issues, on top of the drugs.” She also readily acknowledged her lack of truthfulness. At trial, she was asked “[D]o you think it’s fair to say that this statement is true: That you are willing to lie often to get what you want.” Williams responded “Yes.”

Given the cumulative evidence Williams was untruthful and willing to lie to get what she wanted, the confusion likely to result from the proffered evidence of her further untruthfulness in an unrelated proceeding, and the undue time presenting this evidence would take, the trial court did not abuse its discretion in excluding the evidence.<sup>6</sup>

### **Constitutionality of Defendant’s Sentence**

Given the Supreme Court’s decision in *Franklin*, we need not address at length defendant’s original assertion that his total sentence of 50 years to life was a de facto life sentence without possibility of parole (LWOP) which violated his Eighth Amendment rights because “it was imposed with no consideration of [his] youth and attendant

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<sup>6</sup> Defendant asserts exclusion of the evidence to impeach Williams’s credibility violated his constitutional rights to due process and to present a defense. “ “As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.” ’ [Citation.]” (*People v. Lucas* (2014) 60 Cal.4th 153, 270–271, disapproved on other grounds by *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.) He also maintains the cumulative effect of the claimed evidentiary errors resulted in reversible error. Because we find no error in the evidentiary rulings, these claims fail.

factors” set forth in *Miller v. Alabama* (2012) \_\_\_ U.S. \_\_\_ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*).<sup>7</sup>

Even assuming defendant’s sentence was the functional equivalent of a LWOP sentence, our Supreme Court held in *Franklin* that the Legislature’s enactment of Penal Code sections 3051, 3046, subdivision (c), and 4801, subdivision (c)—which entitle juveniles like *Franklin* and like defendant, here, to a parole hearing in their 25th year of incarceration—renders “moot any infirmity in [their] sentence under *Miller*.”<sup>8</sup> (*Franklin, supra*, 63 Cal.4th at p. 276.) The Supreme Court explained its holding in depth, and we need not, and do not, repeat it here. (*Id.* at pp. 276–287.) Suffice it to say that “[b]y operation of law” (that is, upon the enactment of §§ 3051, 3046, subd. (c), and 4801, subd. (c)), defendant is not subject to a de facto LWOP sentence and therefore he has no constitutional claim under *Miller*. (*Franklin*, at p. 286.)

Defendant is, however, as the Attorney General agrees, entitled to make a record pertaining to the juvenile sentencing factors identified in *Miller*. (See §§ 3501, 4801; *Franklin, supra*, 63 Cal.4th at pp. 283–284, 286–287.)

#### DISPOSITION

The judgment is affirmed and the case is remanded to the trial court for the limited purpose of allowing defendant to make a record of information that will be relevant to the

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<sup>7</sup> The *Miller* opinion sets forth a list of factors related to the age of a juvenile offender that the trial court must consider before imposing an LWOP sentence, including “immaturity, impetuosity, and failure to appreciate risks and consequences”; whether “the family and home environment that surrounds” the juvenile is “brutal or dysfunctional”; “the way familial and peer pressures may have affected” the juvenile; and “the possibility of rehabilitation.” (*Miller, supra*, \_\_\_ U.S. \_\_\_ at p. \_\_\_ [132 S.Ct. at p. 2468].)

<sup>8</sup> Penal Code section 3051 provides in pertinent part: “A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . .” (Pen. Code, § 3051, subd. (b)(3).)

California Board of Parole Hearings as it fulfills its statutory obligations under Penal Code sections 3051 and 4810.<sup>9</sup>

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<sup>9</sup> Defendant has also filed a petition for writ of habeas corpus in case No. A141777 which we have denied by separate order filed this date. The deferred request for judicial notice filed in case No. A141777 is hereby granted.

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Banke, J.

We concur:

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Humes, P. J.

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Dondero, J.