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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMONTE EMARI COOK,

Defendant and Appellant.

A144563

(Contra Costa County
Super. Ct. No. 05-121583-9)

Appellant Timonte Emari Cook was convicted of first degree murder for a 2007 shooting that occurred when he was 17 years old and of second degree murder for a 2010 shooting. Appellant was sentenced to a prison term of 50 years to life for the 2007 murder and 40 years to life for the 2010 murder, to be served consecutively. We reject appellant’s claim the trial court erred in its handling of a juror who expressed concern about his family’s safety. We do not reach appellant’s claim the sentence imposed for the 2007 murder is cruel and unusual punishment. Instead, in accordance with the California Supreme Court’s recent decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), we remand for a determination of whether appellant had “sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing” (*id.* at p. 284) and, if not, for provision of such an opportunity to appellant.

PROCEDURAL BACKGROUND

In September 2012, the Contra Costa County District Attorney filed an information charging appellant, born March 1990, with the 2010 murder of Rueben

Cannon, Jr. (count one; Pen. Code, § 187)¹ and the 2007 murder of Nicholas Martin (count three; § 187). Appellant was also charged in count two with shooting at an occupied motor vehicle (§ 246), and as to all counts the information alleged appellant used a firearm causing death in the commission of the offenses (§ 12022.53, subd. (d)).

Following trial, the jury convicted appellant on all counts and found true the firearm use enhancement allegations. The jury found the 2010 murder of Cannon was in the second degree, and the 2007 murder of Martin was in the first degree.

In February 2015, the trial court sentenced appellant to a total term of 90 years to life, including 15 years to life on count one, plus 25 years to life on the firearm enhancement, and a consecutive term on count three of 25 years to life, plus 25 years to life on the firearm enhancement. The sentence on count two and its enhancement were stayed under section 654.

This appeal followed.

FACTUAL BACKGROUND²

The 2007 Shooting

Jerry Lindsey testified that on the morning of October 28, 2007, he was near the intersection of South 20th Street and Maine in Richmond. He saw a car pull up to the intersection and saw three young men get out of the car.³ All three started firing at a man who turned out to be the victim in count three, Nicholas Martin.⁴ Martin returned fire. Many shots were fired and Martin got hit in the chest and fell to the ground. A forensic pathologist testified there were five gunshot wounds on Martin's body, including a fatal wound to his chest.

¹ All undesignated section references are to the Penal Code.

² Because a thorough summary of all the evidence at trial is unnecessary to resolve the issues in the present appeal, this factual summary is brief and does not attempt to summarize all of the evidence implicating appellant in the murders.

³ In 2007, Lindsey told a Richmond police sergeant there were two shooters.

⁴ Lindsey did not know Martin, although he knew Martin was the boyfriend of Mynita Moore, who he knew as Baby.

Lindsey also testified that, prior to the shooting, he observed the three young men and Martin engaged in an altercation nearby. Lindsey identified appellant as one of the shooters in a photographic lineup in 2007 and again in court. A Richmond police sergeant testified Lindsey told him in a 2012 interview that appellant had said something to the effect of “get ‘em, kill ‘em, get ‘em, kill ‘em.” Lindsey asked to remain anonymous when he spoke to the police in 2007 out of concern for the safety of his family and, although he agreed to testify, he still had those concerns.

Mynita Moore, Martin’s girlfriend in October 2007, testified that on the morning of the shooting she physically fought with appellant’s aunt. Martin was shot two or three hours later. She was inside her grandmother’s house; she heard gunshots and screaming, ran outside, and saw Martin on the ground. She testified she did not see the shooting or the shooters, and denied telling a police detective she knew who the shooters were. A Richmond police detective testified that Moore told him she saw the shooting and that she identified appellant as one of the shooters. She also identified appellant as one of the shooters in a recorded interview that was played for the jury.

The 2010 Shooting

In the evening on November 12, 2010, Demisha Millard and her boyfriend Rueben Cannon stopped in San Pablo to visit Millard’s grandmother. There was a large crowd gathered outside, and a fight broke out between Millard’s sister and a woman known as Tootie. Millard heard someone yell “he’s got a gun,” and then there were gunshots. Cannon was shot and killed as he sat in the front seat of his car. A forensic pathologist testified Cannon’s body had 14 gunshot wounds.

When she testified, Millard said she did not see anyone with a gun and could not identify the shooter. She did not remember telling the police she had seen the man with the gun and describing his appearance. She did not remember what she said to the police but she remembered she was not truthful with them. She denied being afraid for her family’s safety after the shooting.

A San Pablo police detective testified that Millard said she had seen the shooter and that she had described the shooter. Further, two days after the shooting, Millard

identified a Facebook photograph of appellant as the man with the gun. Millard said she saw him pointing the gun at the crowd and forcing them to back up. She and Cannon ran towards his car; she ran past the car and hid behind a truck; she saw the shooter pointing the gun at Cannon's car; and she heard gunshots. She ran to Cannon's car and saw he had been shot. Millard told the detective her sisters had told her not to cooperate with the police due to safety concerns, and she was concerned about the safety of her grandmother and other family living in the Richmond area.

A cousin of appellant's testified appellant was next to her at the time of the shooting. A San Pablo police detective testified the cousin was adamant appellant was not present at the fight when he first interviewed her. The second time he interviewed her, she admitted appellant was present but did not say he was next to her at the time of the shooting. She said appellant became enraged when someone told them Tootie had been pepper sprayed.

The cousin texted appellant the next day to let him know people were saying he had killed someone the night before. He responded, "Soo wat?"

DISCUSSION

I. *The Trial Court Did Not Err With Respect to Juror No. 7*

A. *Background*

At the start of the proceedings on December 16, 2014, nearly at the close of the prosecution's case,⁵ the trial court addressed a note from a juror, in the presence of the juror and counsel but outside the presence of the rest of the jury. The note from Juror No. 7 read, "Should the jurors have concerns about their safety or that of their families?" The trial court acknowledged there had been "some intimations by some witnesses about concerns" and assured the juror that, among other things, the court would "seal all personal identifying information [about the jurors] at the close of the trial."

⁵ After the exchange with Juror No. 7, there were no additional live witnesses. Several exhibits were admitted into evidence and a video of Moore's police interview was played for the jury. Then the People rested and the defense rested without putting on any evidence.

The trial court told Juror No. 7 it did not want the juror's concerns to impact his deliberations and the juror responded, "I understand." The court continued that it did not want the juror to "hold it against anybody, particularly against [appellant], in this process because this is merely what witnesses had to say." The court confirmed the juror had not spoken with any other jurors about his concern and asked the juror not to do so, "because I want this trial to be as fair as possible for [appellant]." Juror No. 7 told the court that it had answered his question and that he was "just, you know, concerned." He also told the court, "I have isolated my family, and I'm -- I'm fine with that." The court responded, "If there is any [intimidation] -- for example, if you ever got approached outside the courtroom walking to your car or have any concerns, we can provide a deputy escort. If anything comes up, please alert one of our deputies." The juror responded "Oh, I will" and then exited the courtroom.

Defense counsel expressed concern that, if Juror No. 7 had isolated his family, he might have already concluded appellant was guilty. The court asked counsel, "What more would you like the Court to do? I did make inquiry and admonished him not to have that enter into his deliberations in any way. I also made inquiry as to whether or not he had discussed his concerns with other jurors because I wanted to isolate other concerns and also assuage his concerns in that he would feel comfortable that there isn't such a threat." The court also stated, "And nothing has been done that I can determine that has been an attempt to dissuade or affect the jurors in any way. I haven't been informed of it."

Defense counsel expressed concern Juror No. 7 had determined there was validity to the fears expressed by witnesses and suggested the court inquire further as to the steps the juror had taken to "isolate" his family. The prosecutor suggested further inquiry could heighten the juror's concern and argued the juror had not indicated he had made up his mind about appellant's guilt. Defense counsel pointed out that the juror had taken steps to isolate his family, stating "whatever his thought process is, it has triggered action on his part." The trial court declined to further question Juror No. 7 because "what steps he's taken to isolate his family would not further illuminate whether or not he would be a

fair juror or whether or not he's made up his mind." The court also commented, "here we have two murders that occurred with a lot of people around, and . . . there is a sense of almost astonishment that that many people would be afraid to speak up to point out who the individual was with the gun in both of these circumstances. . . . [¶] And so for that to provoke a concern by a juror, I think it's natural and it doesn't necessarily taint them as a juror."

Appellant moved for a new trial on the basis of Juror No. 7's note and comments. The trial court denied the motion. At the hearing on the motion, the trial court stated it wanted "to protect the record a bit" and commented that Juror No. 7's "body language demonstrated to me that he was absolutely with me with regard to being fair." In particular, the juror nodded his head while the trial court was talking to him.⁶

B. *Standard of Review*

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is 'capable and willing to decide the case solely on the evidence before it.' " (In re Hamilton (1999) 20 Cal.4th 273, 293–294; accord *People v. Hensley* (2014) 59 Cal.4th 788, 824.) "If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (Hensley, at p. 824.)

Although the obligation to discharge a juror who is actually biased is clear, "[t]he decision whether to investigate the possibility of juror bias, incompetence, or misconduct . . . rests within the sound discretion of the trial court." (*People v. Ray* (1996) 13 Cal.4th

⁶ Appellant also describes a verbal altercation between members of the families of Cannon (one of the victims) and Millard (Cannon's girlfriend at the time of the shooting) that occurred in a courthouse hallway in the presence of the jurors. After the incident, the trial court admonished the jurors to ignore the incident. Appellant has not shown that exposure to the incident, which did not directly involve appellant or the jurors, has any tendency to show Juror No. 7 was biased against appellant.

313, 343.) “The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his duties and would justify his removal from the case.” (*Ibid.*; accord *People v. Manibusan* (2013) 58 Cal.4th 40, 53 (*Manibusan*)). And “[b]ias in a juror may not be presumed.” (*People v. Williams* (1997) 16 Cal.4th 153, 232.)

Appellant argues a more rigorous standard of review applies to the trial court’s failure to investigate further, focusing on language in *People v. Lomax* (2010) 49 Cal.4th 530, stating, “Although decisions to investigate juror misconduct and to discharge a juror are matters within the trial court’s discretion [citation.], we have concluded ‘a somewhat stronger showing’ than is typical for abuse of discretion review must be made to support such decisions on appeal. (*People v. Wilson* (2008) 44 Cal.4th 758, 821[.]” (*Lomax*, at p. 589.) Appellant fails to appreciate that the “ ‘stronger showing’ ” language relates to a decision to discharge a juror. (*Wilson*, at p. 821 [“Although we have previously indicated that a trial court’s decision to remove a juror . . . is reviewed on appeal for abuse of discretion [citation], we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required.”].) The “demonstrable reality” test specifies the standard of review for such a discharge decision and mandates a strong showing before a juror can be discharged. (*Lomax*, at p. 589.) But *Lomax* does not articulate a test more rigorous than abuse of discretion for review of a trial court’s decision how to investigate an allegation of bias or misconduct. Indeed, the year after *Lomax* was decided, the Supreme Court stated flatly, “Whether and how to investigate an allegation of juror misconduct falls within the court’s discretion.” (*People v. Allen* (2011) 53 Cal.4th 60, 69.)⁷

⁷ At oral argument, appellant relied on several California Supreme Court decisions not cited in his briefs to argue that we review the trial court’s decision not to conduct additional investigation into Juror No. 7’s possible bias under a more stringent test than abuse of discretion. (See *People v. Beeler* (1995) 9 Cal.4th 953; *People v. Ashmus*

C. *The Trial Court Did Not Err*

Appellant has not shown a likelihood Juror No. 7 was actually biased and the trial court did not abuse its discretion in failing to conduct additional investigation.

The California Supreme Court's decision in *People v. Navarette* (2003) 30 Cal.4th 458, is directly on point. There, the defendant argued a juror "developed a bias against defendant because the evidence at trial made him fear defendant." (*Id.* at p. 499.) The juror had sent a note to the trial court during the presentation of the People's case asking, "Has [defendant] seen or have access to the questionnaires? [¶] My concern is for property and family." (*Id.* at pp. 499–500.) The trial court "assured the jury that no one other than the court, the clerk, and counsel had seen the questionnaires, that they would be placed under seal, and that the identities of specific jurors would not be public information. The court also encouraged the jurors that, if any of them felt unable to be 'fair' and 'unbiased,' to let the court know in writing." (*Id.* at p. 500.)

As in the present case, the defendant in *Navarette* "assume[d] that, because the juror had concerns about his family's safety and the safety of his property, he was therefore biased against defendant, requiring his removal." (*Navarette, supra*, 30 Cal.4th at p. 500.) But the Supreme Court concluded the record did not support that assumption because the trial court "specifically asked the jurors to report if they could no longer be fair and unbiased, and [the juror in question] did not pursue the matter further, apparently

(1991) 54 Cal.3d 932; *In re Mendes* (1979) 23 Cal.3d 847.) We reject appellant's reading of those cases. In both *Ashmus* and *Mendes* the Supreme Court held the trial court did not abuse its discretion in discharging a juror because the record showed good cause for the discharge; in *Beeler* the Supreme Court held the trial court did not abuse its discretion in declining to discharge a juror because "[n]othing in the record shows a 'demonstrable reality' that [the juror] was unable to discharge his duties" (*Beeler*, at p. 989–990; *Ashmus*, at p. 987; *Mendes*, at p. 852.) *Beeler* specifically states, "The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*Beeler*, at p. 989; see also *Mendes*, at p. 852 [trial court did not abuse its discretion in failing to conduct hearing].)

satisfied by the court's assurances." (*Ibid.*) The Supreme Court held the trial court did not abuse its discretion in declining to remove the juror. (*Ibid.*)

In *Manibusan, supra*, 58 Cal.4th 40, the Supreme Court cited *Navarette* in stating it is "faulty" to reason that "a juror's fear of a defendant establishes bias." (*Id.* at p. 56.) In that case, a juror informed the trial court she was fearful because she saw someone she knew in the courtroom and subsequently discovered the person was a " 'close friend' " of the defendant and his family. (*Id.* at p. 51.) The trial court denied the defendant's request to replace the juror based on her assurance that she was able to be impartial. (*Id.* at p. 52; see also *People v. Brown* (2003) 31 Cal.4th 518, 582 [jurors' fear of retaliation by the defendant's gang did not require hearing into possibility of misconduct where foreperson said fear did not affect their deliberations].)

Appellant argues *Navarette* and *Manibusan* are distinguishable because in those cases the trial court "specifically inquired whether the jurors could still be fair and impartial." In fact, in *Navarette* the opinion reflects that the trial court asked the jurors to *report* to the court if they felt they could not be fair, not that the court elicited responses from the jurors that they could be fair. (*Navarette, supra*, 30 Cal.4th at p. 500.) In *Manibusan* the juror did specifically state she could be impartial, although it is not clear whether she volunteered that or if it was in response to a question from the court. (*Manibusan, supra*, 58 Cal.4th at p. 52.) In any event, that the trial court in the present case did not directly ask Juror No. 7 to confirm he could be impartial is not determinative. The court told the juror it did not want his concerns to impact his deliberations and the juror responded, "I understand." The court continued that it did not want the juror to hold any fear against appellant or to speak to the other jurors about it in order to ensure a fair trial for appellant. The juror did not express any confusion or disagreement on those points. The trial court emphasized in denying appellant's new trial motion that the juror's body language indicated his agreement and understanding. Those assurances are equivalent to those in *Navarette* and *Manibusan*.

Appellant also emphasizes that "Juror No. 7 took actions to isolate his family based on his fears." We do not believe that changes the calculus. The fact that the juror

took steps to protect his family due to his fear does not show the juror was biased and unable to decide the case based on the facts. It simply demonstrates that, based on what he had heard during the trial, his fear was real. That was an understandable reaction to the testimony, and it does not show the juror was unable to deliberate based on the totality of the evidence. Notably, the juror delivered his note to the court at essentially the close of evidence; that a juror might have formed an impression of the facts after hearing almost all the evidence in the case is not unusual or indicative of bias or an inability to deliberate. Furthermore, the trial court could reasonably have concluded that probing the juror about the specific actions taken to protect his family might have heightened the juror's anxiety without providing much additional insight regarding the juror's ability to deliberate fairly.

The record does not demonstrate a "substantial likelihood" Juror No. 7 was "actually biased." (*Hensley, supra*, 59 Cal.4th at p. 824.) Further, because the information before the court did not "constitute 'good cause' to doubt [Juror No. 7's] ability to perform his duties," no further hearing to investigate the possibility of juror bias was required. (*Manibusan, supra*, 58 Cal.4th at p. 53.) The trial court did not err.

II. *Appellant's Challenge to the Constitutionality of His Sentence is Moot, But Remand is Required*

Appellant, who was 17 years old when he committed the murder charged in count three, contends the trial court's imposition of a sentence of 50 years to life on that count without considering the youth-related factors articulated by the United States Supreme Court in *Miller v. Alabama* (2012) 132 S.Ct. 2455 (*Miller*), renders the sentence unconstitutionally cruel and unusual punishment. The California Supreme Court recently held in *Franklin, supra*, 63 Cal.4th 261, that the Legislature's enactment, as described below, of section 3051 in response to *Miller* and other cases moots claims such as appellant's by providing a parole hearing during the 25th year of incarceration. Nevertheless, remand is necessary to ensure that appellant received or will receive "sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, at p. 284.*)

A. *Recent Case Law on Juvenile Sentencing*

The Eighth Amendment to the United States Constitution provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” This constitutional provision “guarantees individuals the right not to be subjected to excessive sanctions.” (*Roper v. Simmons* (2005) 543 U.S. 551, 560 (*Roper*)). This right “flows from the basic ‘precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.’” (*Ibid.*) Article I, section 17 of the California Constitution similarly proscribes “[c]ruel or unusual punishment.”

In *Roper*, the United States Supreme Court held it is cruel and unusual punishment to impose the death penalty on a defendant for a crime committed when under the age of 18. (*Roper, supra*, 543 U.S. at p. 568.) The court relied on “general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” (*Id.* at p. 569.) In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), the United States Supreme Court extended *Roper*’s rationale by holding it is cruel and unusual punishment to impose a sentence of life without the possibility of parole (LWOP)—“the second most severe penalty permitted by law” (*id.* at p. 69)—on a defendant who committed a nonhomicide offense while under the age of 18. (*Id.* at p. 74.) The court clarified, however, that “a [s]tate is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide offense”; it need only “give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Id.* at p. 75.)

In *Miller, supra*, 132 S.Ct. 2455, the United States Supreme Court held it is cruel and unusual punishment to impose *mandatory* LWOP on a juvenile *homicide* offender. (*Id.* at p. 2460.) This is so, the Supreme Court explained, because mandatory LWOP “precludes consideration of [a juvenile offender’s] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how

brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” (*Id.* at p. 2468.) The court did not “foreclose” the possibility of imposing a LWOP sentence on a juvenile offender, but it required that the sentencer “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Id.* at p. 2469.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court applied the principles announced in *Roper*, *Graham*, and *Miller* and “conclude[d] that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy”—the functional equivalent of an LWOP—“constitutes cruel and unusual punishment in violation of the Eighth Amendment.” (*Id.* at p. 268.)

Recently, in *Montgomery v. Louisiana* (2016) 136 S.Ct. 718 (*Montgomery*), the United States Supreme Court held that *Miller* announced a substantive rule of constitutional law that applies retroactively. (*Id.* at p. 736.) The decision pointed out that giving *Miller* retroactive effect would not be too onerous because states could simply give affected prisoners parole hearings, explaining, “Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” (*Montgomery*, at p. 736.)

B. *Penal Code Section 3051*

In response to the developing case law on juvenile sentencing, but well before issuance of the *Montgomery* decision, the California Legislature passed Senate Bill No. 260 (2013–2014 Reg. Sess.). Section 1 states in relevant part: “The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller*[, *supra*, 132 S.Ct. 2455], ‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior,’ and that ‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,’ including ‘parts of the brain involved in behavior control.’ The Legislature recognizes that youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in []*Caballero*[, *supra*,] 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham*[, *supra*,] 560 U.S. 48 . . . , and *Miller*[, *supra*, 132 S.Ct. 2455]. . . .” (Sen. Bill No. 260 (2013–2014 Reg. Sess.) § 1, pp. 2–3.)

Among other things, Senate Bill No. 260 enacted new section 3051, effective January 2014. (Stats. 2013, ch. 312, § 4.) Section 3051 provides an opportunity for a juvenile offender to be released on parole irrespective of the sentence imposed by the trial court by requiring the Board of Parole Hearings (Board) to conduct “youth offender parole hearing[s]” on a set schedule depending on the length of the prisoner’s sentence. As relevant here, for a sentence of 25 years to life, the hearing will be held during the 25th year of incarceration. (§ 3051, subd. (b)(3).)⁸ If parole is not granted during the

⁸ Section 3051, subdivision (b)(3) provides, “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

initial hearing, the Board will set a subsequent hearing in accordance with a statutory schedule. (See § 3051, subd. (g).)

The youth offender parole hearing “shall provide for a meaningful opportunity to obtain release.” (§ 3051, subd. (e).) In conducting youth offender parole hearings under section 3051, the Board is required to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (§ 4801, subd. (c).)

As originally enacted, section 3051, subdivision (h) (added by Stats. 2013, ch. 312, § 4) excluded from the benefits of the statute juvenile offenders “who, subsequent to attaining 18 years of age, commit[] an additional crime for which malice aforethought is a necessary element of the crime.” However, section 3051, subdivision (h) presently provides, “This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 23 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.” (*Ibid.*, as amended by Stats. 2015, ch. 471, § 1.) Because appellant was under 23 years old when he committed the 2010 murder, he is eligible for the parole hearing provided for in section 3051.

C. *People v. Franklin*

In *Franklin*, *supra*, 63 Cal.4th 261, the California Supreme Court considered a constitutional claim similar to appellant’s claim. There, the defendant was 16 years old

parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.” In the present case, the total sentence on count three is 50 years to life, including 25 years to life for the murder plus 25 years to life for the firearm enhancement. The parties agree appellant will be eligible for a youth offender parole hearing in the 25th year of incarceration. (See *Franklin*, *supra*, 63 Cal.4th at p. 277 [applying section 3051, subdivision (b)(3) to sentence of 50 years to life and stating that the provision provides a parole hearing in the 25th year of incarceration for “[a] juvenile offender whose controlling offense carries a term of 25 years to life or greater”].)

when he shot and killed another teenager. (*Id.* at p. 268.) He was convicted of first degree murder and, like appellant, sentenced to life in prison with the possibility of parole after 50 years for the murder with a firearm enhancement. (*Ibid.*)

Franklin held the enactment of section 3051 and related provisions “moot[ed]” the defendant’s claim. (*Franklin, supra*, 63 Cal.4th at pp. 279–280.) The statutes provided the defendant “the possibility of release after 25 years of imprisonment ([§ 3051, subd. (b)(3)) and require[d] the [Board] to ‘give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity’ (*id.*, § 4801, subd. (c)).” (*Franklin*, at p. 268.) *Franklin* concluded that, in light of the statutes, the defendant was “now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because [the defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature’s enactment of Senate Bill No. 260 has rendered moot [the defendant’s] challenge to his original sentence under *Miller*.” (*Franklin*, at pp. 279–280.)

Although *Franklin* only cites *Montgomery* in passing (*Franklin, supra*, 63 Cal.4th at p. 283), *Franklin*’s analysis is consistent with *Montgomery*’s guidance that “A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” (*Montgomery, supra*, 136 S.Ct. at p. 736.) In making that observation, *Montgomery* cited a Wyoming statute enacted after *Miller* that makes any person who committed an offense before reaching the age of eighteen “eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration. . . .” (Wyo.Stat. Ann. § 6–10–301(c); *Montgomery*, at p. 736.) Section 3051 provides an analogous opportunity for parole hearings in California. (Cf. *People v. Berg* (2016) 247 Cal.App.4th 418, 424 [distinguishing section 1170, subdivision (d)(2) and Wyoming statute because the former only authorizes a petition for recall of sentence], review granted July 27, 2016, S235277; see also *Franklin*, at p. 281 [distinguishing section 3051 and section 1170, subdivision (d)(2)].)

Under *Franklin* and *Montgomery*, assuming the sentence imposed on appellant on count three is the functional equivalent of an LWOP sentence (see *Caballero, supra*, 55 Cal.4th at p. 268), and assuming the trial court erred in failing to consider the *Miller* factors when sentencing appellant, any *Miller* violation is rendered moot by section 3051.⁹ Nevertheless, *Franklin* cautioned that, if the youth offender parole hearing is to “provide for a meaningful opportunity to obtain release” (§ 3051, subd. (e)), the record must contain the information necessary to enable the Board to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity” (§ 4801, subd. (c)). (*Franklin, supra*, 63 Cal.4th at p. 283.) Thus, “the statutes . . . contemplate that information regarding the juvenile offender’s characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board’s consideration.” (*Ibid.*)

In order to effectuate that legislative intent, *Franklin* deemed it necessary to remand to the trial court for a determination of whether the defendant “was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (*Franklin, supra*, 63 Cal.4th at p. 284.) If not, the defendant could on remand “place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender’s culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. 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

⁹ We also reject appellant’s contention that defense counsel rendered ineffective assistance of counsel in failing to argue the *Miller* factors as a basis for concurrent sentencing. Given the circumstances of the 2007 murder and the fact that appellant committed a second brazen murder in 2010, there is no “reasonable probability” (*Strickland v. Washington* (1984) 466 U.S. 668, 694) the trial court would have imposed a lesser sentence had defense counsel argued the *Miller* factors as mitigating circumstances. The facts in the record that appellant cites as a basis for an argument for concurrent sentencing are not so persuasive as to show a probability of a different result.

circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth-related factors (§ 4801, subd. (c)) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he was a child in the eyes of the law.’ ” (*Franklin*, at p. 284.) The same remand is appropriate in the present case.¹⁰ (See *People v. Windfield* (2016) 3 Cal.App.5th 739, 769.)

DISPOSITION

The trial court’s judgment is affirmed, but the matter is remanded for the purpose of determining whether appellant was afforded an adequate opportunity to make a record of information relevant to his eventual youth offender parole hearing and, if not, for provision of such an opportunity to appellant.

¹⁰ We received supplemental briefing from the parties regarding the *Franklin* decision. The parties agree a remand similar to that in *Franklin* is appropriate, and appellant suggests he did not previously have a sufficient opportunity to make the record *Franklin* describes. Like *Franklin*, we leave that determination to the trial court.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

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