# In the Supreme Court of the State of California

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| In re<br>**ANTHONY COOK,**<br>**On Habeas Corpus.** | Case No. S240153 |

Fourth Appellate District, Division Three, Case No. G050907
San Bernardino County Superior Court, Case No. WHCSS1400290
The Honorable Katrina West, Judge

## OPENING BRIEF ON THE MERITS



XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
*JEFFREY M. LAURENCE
Senior Assistant Attorney General
State Bar No. 183595
MICHAEL R. JOHNSEN
Deputy Solicitor General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5897
Fax: (415) 703-1234
Email: Jeff.Laurence@doj.ca.gov
*Attorneys for Respondent*

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## ISSUE PRESENTED

Whether the remedy of a limited trial court proceeding to preserve evidence for use at a future youth offender parole hearing, as ordered on direct appeal in *People v. Franklin* (2016) 63 Cal.4th 261, is available to a habeas corpus petitioner whose conviction is already final.

## INTRODUCTION

A court has broad authority to grant relief by way of a writ of habeas corpus. But that authority is not unbounded. Habeas corpus jurisdiction is constrained by a few essential prerequisites—habeas petitioners must be in actual or constructive custody, and central to this case, habeas petitioners have historically been required to demonstrate that their custody is in some way unlawful. Habeas petitioners seeking a remand pursuant to *People v. Franklin* (2016) 63 Cal.4th 261, however, are not subject to an unlawful restraint.

*Franklin* did not create its novel remand procedure to cure an underlying illegality. It crafted the procedure to help implement the new parole provisions in Penal Code section 3051 by reopening youthful offenders' sentencing hearings for the limited purpose of providing them an opportunity to build a more robust record of their characteristics and circumstances related to the offense, at a time not too far removed from the conviction, for later use at a parole hearing. Creating such a remand procedure on direct appeal is an appropriate use of the Court's supervisory authority over cases not yet final. However, absent any underlying unlawful restraint or illegal sentence, habeas corpus would not historically lie to reopen a sentencing hearing in a long final case in order to supplement a record. And this case provides no compelling basis for expanding the scope of habeas corpus to permit or require such hearings in

light of the practical difficulties and burdens on the court system that would ensue.

## STATEMENT

### A. Legal Background

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court held that the Eighth Amendment forbids the execution of persons who were 18 or younger at the time of their crimes. (*Id.* at pp. 578-579.) And in *Graham v. Florida* (2010) 560 U.S. 48, the Court determined that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Id.* at pp. 74-75.) Central to the result in *Graham* was the Court's appreciation for the "fundamental differences between juvenile and adult minds" and its recognition that juveniles are "more capable of change than are adults . . . ." (*Id.* at p. 68.) In *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455], the Court extended the reasoning of *Graham* to hold that imposition of a mandatory sentence of life without parole (LWOP) on a juvenile convicted of murder also violates the Eighth Amendment. (*Id.* at pp. 2463-2464.) While a trial court may still impose an LWOP sentence on a juvenile offender convicted of homicide, before doing so the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*) *Miller* implied that courts should consider factors such as the juvenile offender's chronological age, his family and home environment, his inability to deal with law enforcement and assist his own attorneys, the circumstances of the homicide offense, and the possibility of rehabilitation. (*Id.* at p. 2649.)

In the wake of *Graham* and *Miller*, this Court in *People v. Caballero* (2012) 55 Cal.4th 262 considered the constitutionality of a 110-year prison sentence imposed on a juvenile convicted of a non-homicide offense. The

Court concluded that since the sentence fell outside the defendant's natural life expectancy, it constituted a de facto life without parole sentence and was therefore cruel and unusual punishment in violation of the Eighth Amendment. (*Id.* at pp. 265, 268-269.) *Caballero* directed the trial court, on remand for resentencing, to "consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Id.* at pp. 268-269.)

In response to *Graham*, *Miller*, and *Caballero*, the Legislature enacted Senate Bill 260, codified at Penal Code section 3051.[1] The statute provides for a "youth offender parole hearing" that guarantees most juvenile offenders a meaningful opportunity for release on parole after serving no more than 25 years. 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 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." (§ 3051, subd. (b).)

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[1] Stats. 2013, ch. 312, § 4. Senate Bill 260 also amended sections 3041, 3046, and 4801. (Stats. 2013, ch. 312, §§ 2, 3 & 5.) In 2015, the Legislature amended Penal Code section 3051 to raise the age of eligible youthful offenders to 23. (Stats. 2015, ch. 471, § 1 (S.B. 261), effective Jan. 1, 2016.) All subsequent statutory references are to the Penal Code unless otherwise noted.

Subsequently, in *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], the United States Supreme Court held that the rule announced in *Miller* is substantive and must therefore be applied retroactively. (*Id.* at pp. 732-736.) *Montgomery* noted that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (*Id.* at p. 736.)

In *Franklin*, this Court held that section 3051, subdivision (b), section 3046, subdivision (c),[2] and section 4801, subdivision (c)[3] rendered moot the defendant's claims that his aggregate term was a de facto LWOP sentence and that it constituted cruel and unusual punishment. (*Franklin, supra*, 63 Cal.4th at pp. 277-278.) The Court found that these sections "superseded the statutorily mandated sentences of inmates who committed their controlling offense" as juveniles. (*Id.* at p. 278.) In light of the new statutes, the Court held, "Franklin is now serving a life sentence that includes a meaningful opportunity for parole" and therefore "no *Miller* claim arises here." (*Id.* at pp. 279-280.)

This Court observed, however, that because the defendant was sentenced before *Miller* and before the enactment of section 3051, the trial court might not have allowed him to make a complete record of information

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[2] Under section 3046, a parolee who is serving consecutive life sentences "shall not be paroled until he or she has served the [specified term] on each of the life sentences that are ordered to be run consecutively." (§ 3046, subd. (b).) An exception exists for youthful offenders found suitable for parole, however, under section 3051. Those offenders "shall be paroled regardless of the manner in which the [parole] board set release dates . . . ." (§ 3046, subd. (c).)

[3] Section 4801 subdivision (c) provides that in reviewing the suitability for parole of a person who committed his or her controlling offense before reaching the age of 23, the parole 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 of the prisoner in accordance with relevant case law."

that might be relevant to the parole board at a subsequent parole hearing. The Court therefore remanded the matter to the trial court to determine whether the defendant had been given that opportunity and, if not, to permit the defendant to put on the record "any evidence that demonstrates the [defendant's] culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

> 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 [citation] 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*, *supra*, 63 Cal.4th at p. 284, quoting *Graham*, *supra*, 560 U.S. at p. 73.)

### B. Factual and Procedural Background

In December 2003, when Cook was 17 years old, Cook and a confederate ambushed three men in retaliation for the murder of Cook's brother, killing two and wounding the third. (Typed opn. at pp. 2-3;[4] *People v. Shaw and Cook* (May 28, 2009, G041439) [nonpub. opn.].)[5] In 2007, a jury convicted Cook of two counts of first degree murder (§ 187, subd. (a)), and one count of attempted premeditated murder (§§ 187, subd. (a), 664). (Typed opn. at p. 3.) The jury found true three allegations that Cook personally and intentionally discharged a firearm, proximately causing great bodily injury or death (§ 12022.53, subds. (c), (d)). (Typed

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[4] Citations to the "Typed opn." refer to the unpublished opinion below from which the People sought review.

[5] In his supplemental habeas petition, Cook asked the appellate court to take judicial notice of the record of his underlying conviction in *People v. Shaw and Cook*, *supra*, G041439. (Supp. Petn. at pp. 2-3.)

opn. at p. 3.) The trial court sentenced Cook to prison for life with the possibility of parole on the attempted murder count and imposed five consecutive indeterminate terms of 25 years to life for the two murder counts and the three firearm enhancements, for a total sentence of 125 years to life. (*Ibid.*)

The Court of Appeal affirmed the conviction and sentence in an unpublished opinion (Typed opn. at p. 3; *People v. Shaw and Cook*, *supra*, G041439), and this Court denied review (case number S173497).

In 2014, Cook filed a petition for writ of habeas corpus alleging that his prison term of 125 years to life was unconstitutional. He argued that his lengthy prison term was a de facto sentence of life without the possibility parole which, because he was only 17 at the time he committed the murders, violated the Sixth Amendment prohibition against cruel or unusual punishment under *Miller v. Alabama*, *supra*, 132 S.Ct. 2455. (Petn. at p. 3; Supp. Petn. at pp. 4-5.)

After issuing an order to show cause, the Court of Appeal held that *Miller* applied retroactively to cases on collateral review. (Typed opn. at p. 2, relying on *Montgomery*, *supra*, 136 S.Ct. 718.) The court, however, found that petitioner was not entitled to relief because newly enacted section 3051 cured any constitutional infirmity in Cook's sentence by providing Cook with a meaningful opportunity for a parole hearing, notwithstanding his original sentence. (Typed opn. at p. 2.) The Court of Appeal thus denied the petition for writ of habeas corpus. (*Ibid.*)

Cook petitioned for review, and this Court transferred the case back to the Court of Appeal to consider whether, in light of this Court's intervening decision in *People v. Franklin*, *supra*, 63 Cal.4th at pages 268-269, Cook "is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'" (Typed opn. at p. 2; *In re Cook* (July 13, 2016, S234512) [nonpub. order].)

After receiving supplemental briefing by the parties, and reconsidering the matter on rehearing, the Court of Appeal, in a published opinion, issued a writ of habeas corpus directing the superior court to hold a hearing to allow petitioner "the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed." (Typed opn. at p. 10.)

In doing so, the Court of Appeal concluded that this Court's order directing reconsideration of the case in light of *Franklin* "strongly suggests that the relief afforded by that opinion is available by habeas corpus." (Typed. opn. at p. 7.) "Otherwise," the Court of Appeal continued, "it seems, the Supreme Court would have denied [Cook's] petition for review." (*Ibid.*) Further, the Court of Appeal stated that habeas corpus relief is available "when changes in case law expanding a defendant's rights are given retroactive effect" and that "changes in case law are customarily retroactive." (Typed opn. at pp. 7-8.) Thus, the court held, "the deprivation of rights granted by *Franklin* is cognizable on habeas corpus." (Typed opn. at p. 8.) The Court of Appeal also observed that a *Franklin* hearing would be appropriate in a habeas case because, while development of the record many years after the original sentencing proceedings took place is "far from ideal . . . it is better than [at] the 15th, 20th or 25th year of incarceration, which are the possible times for the youth offender parole hearing. [Citation.]" (Typed opn. at p. 9.) The Court of Appeal remanded the matter to the trial court to conduct a *Franklin* hearing to make a record of mitigating evidence tied to youth, within 90 days of finality of its opinion. (*Ibid.*) This Court granted review.

## ARGUMENT

### THERE IS NO APPARENT STATUTORY OR PRECEDENTIAL BASIS FOR USING HABEAS CORPUS TO PROVIDE A SUPERIOR COURT HEARING PURSUANT TO *FRANKLIN*, AND DOING SO WOULD RAISE SIGNIFICANT PRACTICAL CONCERNS

There is no clear legal basis for using a writ of habeas corpus to direct a superior court to hold a record-supplementing hearing of the sort described in *Franklin*. Although habeas corpus is a flexible remedy, this Court has long held that unlawful custody is a prerequisite to habeas relief. That prerequisite is absent in this case, and the Court of Appeal identified no other ground to justify the remedy it ordered. Moreover, there is no compelling basis for expanding the scope of habeas corpus in the present circumstances. Requiring *Franklin*-type hearings in cases already final on appeal would be unwarranted given the practical difficulties in holding such hearings, which will often be far removed from the trial proceedings, and the probable burdens that would be placed on the courts by the number of habeas petitioners who would qualify for them.

#### A. A Writ of Habeas Corpus Has Historically Been Reserved for Claims of Unlawful Restraint

While a court's authority to provide relief by way of a writ of habeas corpus is undoubtedly broad, that authority is generally circumscribed by the essential requirement that petitioners must demonstrate that they are subject to an unlawful restraint. Penal Code section 1473, subdivision (a), which sets forth the statutory requirements for challenging a conviction by way of a petition for writ of habeas corpus, provides: "Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint." (See *People v. Romero* (1994) 8 Cal.4th 728, 737 ["In exercising this original jurisdiction, the Courts of

Appeal 'must abide by the procedures set forth in Penal Code sections 1473 through 1508'"].)

Thus, this Court has explained that "[t]he key prerequisite to gaining relief on habeas corpus is a petitioner's custody." (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) A person who is in actual or constructive state custody may seek the writ to challenge the legal basis for the state restraint. (*Id.* at pp. 1069-1070.) Under some circumstances, a person in custody may also use habeas to bring "a challenge related not to the petitioner's underlying conviction but instead to [the conditions of] his or her actual confinement." (*Id.* at p. 1069.) In contrast, even potentially severe collateral consequences of a criminal conviction do not provide a sufficient basis for habeas jurisdiction. (*Id.* at p. 1070.)

The Court further observed in *Villa* that the purpose of the writ of habeas corpus is to challenge the lawfulness of the confinement. "'Where one restrained pursuant to legal proceedings seeks release upon *habeas corpus*, the function of the writ is merely to determine the legality of the detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since the process was issued to render it invalid.'" (*Villa*, *supra*, at p. 1069, quoting *In re Fortenbury* (1940) 38 Cal.App.2d 284, 289; accord, *People v. Romero*, *supra*, 8 Cal.4th at p. 737 ["The petition 'must allege unlawful restraint . . . , and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful'"].) The Court emphasized that "the writ of *habeas corpus* does not afford an all-inclusive remedy available at all times as a matter of right." (*Villa*, *supra*, at pp. 1069-1070.) And, so far as the People have been able to determine, this Court has never previously allowed a person in state custody to use a writ of habeas corpus to seek relief that involves no challenge to the basic legality either of the custody itself or of the conditions under which the petitioner is confined.

For example, to establish an unlawful restraint giving rise to habeas corpus jurisdiction, it is generally not sufficient for a petitioner to allege merely that some procedural flaw occurred at trial or sentencing. "Since it is a collateral attack on a judgment, habeas corpus does not lie unless the asserted defect in the proceedings constitutes a fundamental jurisdictional or constitutional error." (*In re Sands* (1977) 18 Cal.3d 851, 856.) *Sands* explained that the predicate requirement of a fundamental jurisdictional error "encompasses any error of sufficient magnitude that the trial court may be said to have acted in excess of jurisdiction." (*Id.* at p. 857.)

The Court emphasized that this requirement should be interpreted broadly "to preserve habeas corpus as a flexible remedy adaptable to the exceptional circumstances of individual cases." (*Sands*, *supra*, at p. 857.)

> Nevertheless, despite the expanded scope of the great writ in California, the principle endures that habeas corpus will not lie to correct procedural error which is not of fundamental jurisdictional character. [Citations.] Thus we must inquire in the present case whether [the asserted error] would constitute [a] "fundamental jurisdictional defect" [citation], entitling petitioner to release upon habeas corpus or would be a "mere error of procedure" [citation] which cannot be raised by collateral attack. [Citation.]

(*In re Sands*, *supra*, at p. 857; accord, *In re Harris* (1993) 5 Cal.4th 813, 828 ["Unlike review on direct appeal, habeas corpus does not simply inquire into the correctness of the trial court's judgment. The scope of habeas corpus is more limited. Although the writ of habeas corpus is directed against the custodian of one who is illegally confined, it will reach out to correct errors of a fundamental jurisdictional or constitutional type only"]; *In re Chessman* (1955) 44 Cal.2d 1, 5-6 ["The function of the writ of habeas corpus is solely to effect 'discharge' from unlawful restraint, though the illegality in respect to which the discharge from restraint is sought may not go to the fact of continued detention but may be simply as

to the circumstances under which the prisoner is held . . . ."]; *In re Porterfield* (1946) 28 Cal.2d 91, 99 [habeas corpus "may not be used as a device for the correction of mere errors or irregularities committed within the exercise of an admitted jurisdiction"]; *In re Fortenbury*, *supra*, 38 Cal.App.2d at pp. 289-290 [noting limitation on the availability of the writ].)[6]

Federal habeas corpus jurisprudence is in accord. In *Hill v. United States* (1962) 368 U.S. 424, 428, for example, the Supreme Court discussed the limited scope of habeas corpus jurisdiction in the context of a collateral challenge based on the denial of a defendant's statutory right to allocution at sentencing. *Hill* explained that the asserted error "is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" (*Ibid.*, citations omitted.)

Justice Ginsberg, writing for the plurality in *Reed v. Farley* (1994) 512 U.S. 339, 348, reaffirmed that the scope of a federal writ of habeas corpus, though broad, is limited—it reaches only substantial legal defects, as provided in *Hill*. (*Ibid.*, see also *id.* at pp. 355-356 (conc. opn. of Scalia, J.) [agreeing that *Hill* governs and arguing for an even narrower

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[6] Similarly, although the scope of state habeas corpus has been extended to encompass challenges to unlawful conditions of confinement, the courts have recognized that nonsubstantial prison rules violations do not warrant habeas review. (*In re Williams* (2015) 241 Cal.App.4th 738, 743-745; *In re Johnson* (2009) 176 Cal.App.4th 290, 299; see generally *Gomez v. Superior Court* (2012) 54 Cal.4th 293, 308-310 & fn. 10.)

interpretation of habeas corpus jurisdiction].)[7] "We have stated that habeas review is available to check violations of federal laws when the error qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.'" (*Id.* at p. 348 (plur. opn. of Ginsberg, J.).) *Reed*, relying on *Hill*, declined to extend habeas relief for mere procedural errors. (*Id.* at pp. 354-355; accord, *Medellin v. Dretke* (2005) 544 U.S. 660, 664 (per curiam) ["In *Reed* . . . , this Court recognized that a violation of federal statutory rights ranked among the 'nonconstitutional lapses we have held not cognizable in a postconviction proceeding' unless they meet the 'fundamental defect' test announced in [*Hill*]"]; *United States v. Timmreck* (1979) 441 U.S. 780, 784 [habeas corpus unavailable for procedural error because no claim can "reasonably be made that the error here resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure'"]; *United States v. Addonizio* (1979) 442 U.S. 178, 185 [observing regarding habeas corpus, "While the remedy is in this sense comprehensive, it does not encompass all claimed errors in conviction and sentencing"]; *Davis v. United States* (1974) 417 U.S. 333, 346 ["This is not to say, however, that every asserted error of law can be raised on a § 2255 motion"].)

Thus, both state and federal habeas corpus have traditionally been limited to providing a forum for addressing challenges to a custodian's legal authority to hold a petitioner in custody or otherwise restrain his liberty, or for reviewing the lawfulness of the manner in which the petitioner is confined. Habeas has not been used as a procedural

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[7] Justice Ginsberg's plurality opinion represents the holding of the Court because it was the narrowest ground agreed upon by a majority of justices. (See *Marks v. United States* (1977) 430 U.S. 188, 193.)

mechanism for reopening or supplementing otherwise closed proceedings for any less fundamental purpose. (*In re Sands*, *supra*, 18 Cal.3d at p. 857; *In re Williams* (2015) 241 Cal.App.4th 738, 743-744.)

### B. The Remand Remedy Adopted on Direct Appeal in *Franklin* Was Not Predicated on an Underlying Illegality or Unlawful Restraint

In *Franklin*, the court found no illegality in the defendant's sentence, concluding that the enactment of section 3051 rendered moot the defendant's Eighth Amendment challenge to his indeterminate sentence of 50 years to life. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 279-280.) "[T]he combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because Franklin is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*." (*Ibid.*) The Court therefore denied the defendant's request for resentencing and held that the defendant did not suffer an unconstitutional sentence or other unlawful restraint.

*Franklin* did, however, order further proceedings. Although the Court concluded that the defendant was not entitled to resentencing, it observed that the new parole statutes "also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Franklin*, *supra*, at p. 283.) The Court added that obtaining the relevant information would presumably be easier if undertaken as part of the sentencing hearing in superior court, and conducted in relative temporal proximity to the offense and the trial.

> Assembling such statements "about the individual before the crime" is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, section 3051, subdivision (f)(1) provides that any "psychological evaluations and risk assessment instruments" used by the Board in assessing growth and maturity "shall take into consideration ... any subsequent growth and increased maturity of the individual." Consideration of "subsequent growth and increased maturity" implies the availability of information about the offender when he was a juvenile.

(*Id.* at pp. 283-284.)

The Court noted that it was unclear from the record in *Franklin* whether the defendant had a full opportunity at his sentencing hearing to present all available mitigating material that could be of use at a subsequent parole hearing. It therefore ordered that the case be remanded to the superior court to determine if Franklin had such an opportunity, and if not, to allow him to provide such information within the evidentiary confines of a sentencing hearing. (*Franklin*, *supra*, at p. 284.)

Although the Court explained that the desirability of a hearing to preserve this material flowed from the assumption inherent in section 3051 that such material should be available at the parole hearing, the Court did not hold that its remand order was predicated on a finding of any illegality in the underlying sentencing proceeding. Rather, it remanded a case that was pending on direct appeal to the trial Court for potential supplementation of the existing record, to serve additional purposes that might arise in the future. The Court's opinion pointed to procedural mechanisms made available by statute for the compilation of a relevant record at the sentencing stage of an open criminal proceeding. (See *Franklin*, *supra*, at p. 284 [citing § 1204 and Cal. Rules of Court, rule 4.437].) And although the legal basis for the remand order allowing for