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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARNELL JONES et al., Defendants and Appellants.	B254370 (Los Angeles County Super. Ct. No. TA119584)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed with directions.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Darnell Jones.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Luis Torres.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, Steven E. Mercer, and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found gang members Darnell Jones and Luis Torres guilty of first degree murder. The jury also found true the firearm and gang enhancement allegations. Jones, a minor at the time of the murder, was sentenced to 50 years to life. Torres, an adult, was sentenced to 75 years to life.

On July 31, 2015, we filed an opinion in which we affirmed the judgment as to Torres, affirmed Jones's conviction of murder, and reversed Jones's sentence with directions to resentence him after considering factors pertaining to juvenile offenders as discussed in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*).

On November 10, 2015, the California Supreme Court granted the People's petition for review and deferred further action pending its decision in *People v. Franklin*, S217699.

On May 26, 2016, the Supreme Court issued its opinion in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). The Court thereafter transferred this case to us with directions to vacate our decision and reconsider the cause in light of *Franklin*.[1] We have done so and now affirm the judgments as to Torres and Jones. In light of *Franklin*, we direct the trial court to provide a hearing for Jones where he can make a record of evidence relevant to a youth offender parole hearing pursuant to Penal Code sections 3051 and 4801, subdivision (c).

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[1] We have received and considered supplemental briefs from Jones and the Attorney General pursuant to rule 8.200(b)(1) of the California Rules of Court.

FACTS AND PROCEEDINGS BELOW

Michael Owens, not a gang member, lived in the gang territory of the West Side Piru Bloods who were feuding with the Carver Park Crips. As Owens walked home from school one afternoon, two cars started following him down the street. Two men jumped out of the first car and ran up to Owens. Each man fired his gun at Owens. Four of the shots struck Owens in his back and front shoulder. The shooters got back in the car and both cars drove away.

An autopsy showed that two .22 caliber bullets struck Owens's body and lodged there. One of these bullets pierced Owens's left lung and spine and caused his death. Owens suffered nonfatal gunshot wounds from the other .22 caliber bullet and from two "small caliber" bullets that were not recovered.

A forensic examination of the .22 caliber bullets recovered from Owens's body showed that they were fired from the same gun. The police recovered seven .22 caliber cartridge cases from the scene. A forensic examination could not determine whether any of the cartridges came from the bullets that struck Owens. No cartridges from a .38 revolver were found but a forensic expert testified that cartridges from a revolver would not normally be found unless the shooter opens up the cylinder and removes the empty casings.

A. *Testimony Of Witnesses To The Murder*

There were numerous witnesses to the shooting. The witnesses gave fairly consistent descriptions of the two cars as a Monte Carlo and a Buick. All but one witness agreed that the shooters exited and returned to the Buick. (One witness testified a shooter got out of the Monte Carlo.) None of the witnesses identified Jones or Torres as one of the shooters in photo lineups

or at trial. One witness testified that he told police the picture of Torres in a photographic lineup "kinda, kinda, kinda favors [Torres]." Another witness testified, however, that Torres is "way shorter" than the shooter he saw.

B. *Testimony Of Accomplice Ronald Armstrong*

The prosecution's chief witness was Ronald Armstrong, the driver of the Monte Carlo. In a plea bargain, Armstrong pleaded guilty to voluntary manslaughter, assault with great bodily injury and a gun use enhancement and received a determinate sentence of 15 years in exchange for his testimony against Jones and Torres.

Armstrong gave the following account of the murder.

He, Jones and Torres were members of the Crips, but belonged to different "sets." On the afternoon of the murder, Armstrong drove his Monte Carlo to Torres's home. He was armed with a .22 caliber pistol. Jones and another Crip, Phillip Clark, were already there. A short time later, another member of the gang, Toryian Green (referred to as Turk) arrived driving a Buick. Turk was armed with a .38 revolver. The previous day members of the Bloods had shot and wounded Jones and murdered another Carver Crips member. The five men decided to retaliate. Turk told Armstrong they were going to use his car. When Armstrong objected Turk told him he needed to be "putting in work in the hood" and "'[y]ou either going to do this or get put off the hood.'" Asked what it meant to get "'put off the hood,'" Armstrong answered it could mean getting beat up by members of the gang and then "kicked out of the gang, or it could lead to . . . something more harmful." Turk gave his .38 revolver to Jones and handed the .22 pistol to Torres.

The group headed out to Piru territory. Clark drove Jones and Torres in the Buick and Turk and Armstrong followed in the

Monte Carlo. On 132nd Street in Piru territory the gang members saw Owens walking on the sidewalk listening to his IPod. Both cars stopped and Jones and Torres jumped out of the Buick.

Jones ran up behind Owens and shot him once with Turk's .38 revolver. Owens fell to the ground. Jones fired his gun three or four times more "but the shots were missing." As Owens lay on the ground, Torres fired seven or eight shots at him with the .22 caliber pistol. While the shooting was going on, Turk and Armstrong remained in the Monte Carlo. After the shooting Jones and Torres got back into the Buick and the group drove back to Torres's home where they dispersed.

A year and a half after Owens's murder the police recorded a telephone conversation between Armstrong and another member of the Carver Park set in which Armstrong stated that "Louie" felt "[n]o remorse for what he did my nigga like." Later, in a recorded jailhouse conversation, Armstrong admitted to Jones that he told the police "some shit like [Torres] had no remorse for what he did." The CD recordings and transcripts of these conversations were admitted into evidence without objection.

Armstrong testified that when he agreed to talk to the police about the Owens murder he believed he would be charged with the murder and would be facing a sentence of life without possibility of parole.

C. *Corroborating Evidence*

Two years after Owens's murder the police recorded a telephone conversation between Jones and a friend, Lond Bass. Only snatches of the conversation were recorded but it appears from Bass's testimony and the transcript that Bass was searching for information about the Owens murder on the internet and

checking it with Jones. In the conversation, Jones told Bass: "But that's not. . . . He didn't look like that Cuz. . . . [¶] . . . [¶] Nigga didn't have no glasses on and motha fucka didn't notice nothing." When Bass said the Buick was a Regal, Jones corrected him saying: "Ay, and it wasn't that either." Near the end of the conversation Jones told Bass, "Ay, I'm innocent man." The CD recording and transcript of this conversation were admitted into evidence without objection.

The People also introduced a CD recording and transcript of a conversation between Christopher Hicks, a detective investigating the murder, and David Johnson, a Crip member serving time in prison for an unrelated crime. To stimulate the conversation, Hicks falsely told Johnson that Jones had confessed to killing Owens. When the prosecution sought to introduce the recording of Hicks's and Johnson's conversation, Jones objected to the portion in which Hicks told Johnson that Jones had confessed to the murder. In response to that objection, the parties and the court agreed that the prosecution could play Hicks's statement about Jones's confession after the court admonished the jury that Hicks's statement was a ruse to get Johnson talking about the crime and the jury could not consider Hicks's statement as evidence of Jones's guilt.

In their conversation, Johnson told Hicks that Jones admitted to him his involvement in Owens's murder. Hicks asked Johnson what Jones said he "actually did." Johnson responded: "Um, like, he ran up on the dude and shot him." Johnson also told Hicks that Jones said "after he got out and shot the dude, another dude came and shot the dude." Asked the name of the other dude, Johnson answered: "The Louie guy." The People introduced this portion of the conversation without objection from the defense.

On cross-examination, Johnson testified that Hicks told him that if he "helped" his investigation of the Owens murder, Hicks would help Johnson get a reduced sentence on the unrelated crime. Seeing an opportunity to get out of prison earlier, Johnson lied to Hicks. Specifically, Johnson testified that he lied when he said Jones told him that he ran up on Owens and shot him.

D. *Verdicts, Sentences and Appeals*

The jury convicted Jones and Torres of first degree murder and found true the firearm and gang enhancements. The court sentenced Jones, age 17 at the time of the murder, to a prison term of 50 years to life, consisting of 25 years to life for the murder and a consecutive sentence of 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1).[2] Torres was sentenced to a term of 75 years to life consisting of 25 years to life for the murder, doubled under the Three Strikes law, plus a consecutive term of 25 years to life under the same firearm enhancement statute.

Defendants filed timely appeals, each joining in the other's arguments so far as beneficial.

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[2] Statutory references are to the Penal Code.

DISCUSSION

I. *Armstrong's Testimony Was Sufficiently Corroborated.*

Jones and Torres argue that the testimony of Armstrong, an accomplice, and Johnson, a snitch seeking a reduced sentence, "is so lacking in credibility that it cannot be relied upon as evidence of guilt beyond a reasonable doubt." We disagree.

Defendants point out that Armstrong had a motive to lie because he received only a 15-year sentence for his part in the crime in return for his testimony against them. Armstrong's testimony, however, was corroborated by Johnson who told Detective Hicks that Jones admitted he "ran up on the dude and shot him" and by Jones's statements to Bass in which he corrected the Internet descriptions of the murder in a way that suggested he was present at the scene instead of home in bed as his mother testified.

Johnson was not an accomplice and his testimony did not require corroboration. The jury heard evidence that Johnson expected to be rewarded for his cooperation with a reduced sentence on an unrelated crime. It was up to the jurors to decide whether, in light of that expectation, Johnson's testimony was credible.

II. *The Court's Admonition To The Jury Cured Any Prejudice To Jones From Detective Hicks's False Claim That Jones Confessed To The Murder.*

As we noted above, Detective Hicks falsely told Johnson that Jones had confessed to the murder and Jones's counsel objected to the introduction of that portion of the conversation only. In response to that objection, the prosecutor and Jones's counsel stipulated that Hicks's statement was a ruse designed to induce Johnson to tell what he knew about the crime. Following

the parties' stipulation the court admonished the jury: "Ladies and Gentlemen, sometimes during interviews or whatnot, sometimes officers throw out things that aren't based on fact. And in this case, as counsel have just stipulated, the statement was made that apparently Mr. Jones had confessed to the officer about the crime. That was not the case. So you cannot use that as evidence, thinking, 'Oh, well, we heard detective Hicks say that he confessed,' but that is not the situation here. You just have to take it as—into consideration in conjunction of the effect on the listener, meaning Mr. Johnson in that regard. So when you're back there, deliberating, that is not a piece of evidence that you can consider."

We need not decide whether Hicks's statement was relevant and admissible for the nonhearsay purpose of showing its effect on Johnson. (Cf. *People v. Jablonski* (2006) 37 Cal.4th 774, 820.) The trial court's admonition to the jury was prompt, unambiguous and left no doubt in the minds of the jurors that they could not consider Jones's "confession" as evidence of his guilt.

III. *The Court Did Not Err In Excluding Evidence Of Third Party Culpability.*

Defendants maintain that the court erred in excluding evidence that Robert Thomas and Phillip Clark were the two men who shot Owens.[3] The record does not support this claim.

Prior to trial, Jones filed an "Offer of Proof of Third-Party Culpability" in which his attorney declared that Thomas's fingerprints were found inside the Buick, that Thomas matches the description of one of the shooters and that the day after the

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[3] An amended information charged Thomas with the murder. Prior to trial, the People dismissed the case against Thomas. No charges were filed against Clark.

murder a witness heard Thomas bragging "that he killed someone."

The court did not expressly rule whether third-party culpability evidence could be admitted at the trial but defendants argue that the court impliedly excluded such evidence "because it repeatedly sustained objections to questions designed to raise the defense."

Defendants cite no instance in which they attempted to introduce evidence that Thomas or Clark was one of the shooters. The only evidence that the court excluded that was even remotely relevant to third-party culpability was Jones's attempt to show that neither Green nor Clark had been arrested in connection with the murder. The court properly excluded this evidence as irrelevant.

IV. *The Failure To Subpoena Clark To Testify At Trial Was Harmless Error And Locating Him Later Did Not Entitle Defendants To A New Trial.*

Torres and Jones moved for a new trial based on allegedly newly discovered evidence from Phillip Clark who, they asserted, would impeach Armstrong's testimony that Clark drove defendants to the location where Owens was killed.

The court correctly denied the defendants' motion. It was not Clark's evidence that was newly discovered, just his whereabouts; the impeachment would have only affected some collateral issues, not the critical issue of who fired the shot that killed Owens; and the defendants did not submit an affidavit from Clark with their motion.

In support of the new trial motion, Torres's attorney filed his own declaration stating that he learned from *Brady*[4]

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[4] See *Brady v. Maryland* (1963) 373 U.S. 83.

material that Clark told police Armstrong was lying when he accused Clark of being involved in the murder. In March 2013, two months before the start of trial, Torres's attorney and his investigator interviewed Clark at the California Rehabilitation Center in Corona. Clark told the investigator, "'If Armstrong stated that I was driving a green Buick Skylark or if I was at the scene of a murder, he is lying and I will go to court and testify to that.'"

Torres's attorney did not subpoena Clark to testify at the trial and Clark did not keep his promise to come to court on his own. After being released from prison, Clark disappeared and Torres's investigator could not find him before the trial ended in June 2013. In July 2013, the investigator learned that Clark was again in custody in a California prison. The investigator obtained a written statement from Clark in which he said that if there was a new trial, "I will testify to statements of Ronald Armstrong and the fact that he is lying about the murder in this case." Torres included Clark's statement in the motion for a new trial.

Section 1181, subdivision 8, states that a new trial may be granted: "When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable."

The impeachment evidence that Torres expected Clark to provide was not new. Torres was aware two months prior to trial that Clark denied he was the driver of the Buick and denied that he was at the scene of the murder. Furthermore, it is highly doubtful that Clark's testimony impeaching Armstrong's assertion about who was driving the Buick would lead to the defendants' acquittal of the murder charges. Clark could not impeach Armstrong's testimony that Jones and Torres shot Owens because Clark claimed he wasn't there. Finally, Clark's written statement submitted in support of the motion was not in the form of an affidavit (or declaration) as required by section 1181, subdivision 8.

Torres argues in the alternative that his counsel provided ineffective assistance because he failed to subpoena Clark in March 2013 when he had the chance. Torres's counsel admitted at the new trial hearing that he made a mistake. "I should have put a subpoena on him," he said.

We conclude, however, that counsel's mistake was harmless. As the trial court observed, "Mr. Clark had some serious Fifth Amendment issues [and] I would be greatly surprised if he had [testified]." Moreover, as we explained above, it is not reasonably probable that Clark's impeaching testimony would have gained Torres a more favorable result.

V. *The People Pleaded And Proved 25 Years to Life Gun Enhancements As To Torres And Jones.*

Defendants argue that the court erred in imposing gun use enhancements of 25 years to life under section 12022.53, subdivisions (d) and (e)(1) because the People did not satisfy the pleading and proof requirements of section 12022.53, subdivisions (e)(1) and (j). We disagree.

A. *Statutory Background*

Section 12022.53 imposes progressive sentence enhancements for gun use in the commission of serious felonies including murder (subdivision (a)(1)).

A person who uses a firearm in the commission of a felony listed in subdivision (a) "shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years." (§ 12022.53, subd. (b).) A person who personally and intentionally discharges a firearm in the commission of a felony listed in subdivision (a) "shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years." (§ 12022.53, subd. (c).) And, a person who personally and intentionally discharges a firearm in the commission of a felony listed in subdivision (a) and "proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d).)

Subdivision (e)(1) of section 12022.53 is a gang-related firearm provision. It applies to any person who is a principal in a crime listed in subdivision (a) if it is "pled and proved" that the person committed the crime for the benefit of a gang under section 186.22, subdivision (b) and that "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d) [of section 12022.53]." Accordingly, the enhancement applies to a person who is the direct perpetrator of the crime as well as one who aids and abets another in the commission of the crime. (*People v. Yang* (2010) 189 Cal.App.4th 148, 154.)

Finally, subdivision (j) of the statute states: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the

accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

B. *Procedural Background*

The information originally alleged a gang enhancement as to both defendants and a gun enhancement under section 12022.53, subdivision (d) as to Torres only. The first paragraph of the gun enhancement allegation read: "It is further alleged that said defendant(s) Luis Torres personally and intentionally discharged a firearm, a handgun, which caused great bodily injury and death to Michael Owens within the meaning of . . . [s]ection 12022.53(d)." The second paragraph read: "It is further alleged that a principal personally and intentionally discharged a firearm, a handgun, which proximately caused great bodily injury and death to Michael Owens within the meaning of . . . section 12022.53(d) and (e)(1)." The fifth paragraph alleged that the murder "was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members."

Prior to the commencement of trial the prosecutor announced that the People would be proceeding under section 12022.53, subdivision (e)(1), the gang-related gun enhancement, "as to both defendants and will not be proceeding under [section] 12022.53(d) as to Mr. Torres." Accordingly, the trial court amended the information by striking the allegation in the second paragraph that Torres "personally and intentionally" discharged a firearm causing death within the meaning of subdivision (d) of section 12022.53. As amended, the allegation read in relevant part: "It is further alleged that said defendant(s) ~~Luis Torres's personally and intentionally~~ principal discharged a firearm, a handgun, which caused great bodily injury and death

to Michael Owens within the meaning of . . . [s]ection 12022.53~~(d)~~ (e)(1)." (Indicated deletions in original and block capitals omitted.) The court struck the second paragraph of the gun enhancement allegation entirely. The gang enhancement allegation under section 186.22, subdivision (b) remained in the information as originally pleaded.

The court instructed the jury that in order to prove the defendants guilty of murder "the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; and [¶] 2. When the defendant acted, he had a state of mind called malice aforethought." (Capitalization omitted.) It also instructed that a person may be guilty of a crime either by directly committing it or aiding and abetting the perpetrator. In addition, the court instructed the jury on the elements of a gang enhancement under section 186.22, subdivision (b). As to the firearm enhancement, the court instructed the jury: "If you find the defendant guilty of the crime charged and you find that the defendant committed that crime for the benefit of [a criminal street gang] you must then decide whether the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death. [¶] To prove this allegation, the People must prove that: [¶] 1. Someone who was a principal in the crime personally discharged a firearm during the commission of the crime; [¶] 2. That person intended to discharge the firearm; and [¶] 3. That person's act caused the death of another person. [¶] A person is a principal in a crime if he directly commits the crime or if he aids and abets someone else who commits the crime." (Capitalization omitted.)

The jury found each defendant guilty of first degree murder. It also found true the allegation that "a principal discharged a firearm, a handgun, which caused death to Michael

Owens" and that this crime "was committed for the benefit of . . . a criminal street gang." (Block capitals omitted.)

C. *The Evidence Is Sufficient To Support A Gun Enhancement Under Section 12022.53, Subdivision (e)(1) As To Both Defendants.*

The People's evidence established that Owens's murder was committed for the benefit of the Carver Park Crips. The defendants do not challenge that finding. The evidence was also sufficient to establish that Torres personally and intentionally discharged a firearm proximately causing the death of Owens and that Jones was an aider and abettor in that murder. The defendants do not dispute the sufficiency of that evidence either. Thus, the People proved the two elements of a gun enhancement under section 12022.53, subdivisions (d) and (e)(1): Jones and Torres committed the murder for the benefit of their gang under subdivision (b) of section 186.22 and a principal, Torres, personally and intentionally discharged a firearm proximately causing death as provided in section 12022.53, subdivision (d).

Defendants contend, however, that the gun use enhancement should be reversed because, regardless of the proof, the amended information failed to *plead* that the offense was committed for the benefit of a criminal street gang (subdivision (e)(1)(A)) and that a "principal in the offense committed [an] act specified in subdivision (b), (c), or (d)" (subdivision (e)(1)(B)). They maintain that where, as here, a statute requires that an enhancement be pleaded it must be specifically pleaded in the information or the enhancement cannot be imposed even though the evidence supports it. Reversal, they argue, is automatic citing *People v. Mancebo* (2002) 27 Cal.4th 735, 743; *People v. Botello* (2010)

183 Cal.App.4th 1014, 1028-1029; and *People v. Arias* (2010) 182 Cal.App.4th 1009, 1016.)[5]

The circumstances in this case are significantly different from the circumstances faced by the defendants in the cases cited above. In each of the cited cases the enhancements were sprung on the defendants after their trials were over and the verdicts were in. (*People v. Mancebo*, *supra,* 27 Cal.4th at p. 743 [at sentencing]; *People v. Botello*, *supra,* 183 Cal.App.4th at p. 1022 [on appeal]; *People v. Arias*, *supra,* 182 Cal.App.4th at p. 1017 [at sentencing].) Thus, the defendants in those cases had no opportunity to prepare a defense to the enhancement or engage in an informed plea bargain. (*People v. Mancebo*, *supra,* 27 Cal.4th at pp. 750, 752.)

In contrast, this case did not involve a post-conviction attempt to apply an unpleaded sentence enhancement. Defendants were on notice prior to trial that the prosecution was seeking a 25-years-to-life gun enhancement under section 12022.53, subdivisions (d) and (e)(1). The amended information alleged in one paragraph that Torres and Jones murdered Owens, alleged in another paragraph that the defendants committed the offense for the benefit of a criminal street gang, and alleged in a third paragraph that a principal discharged a firearm causing the death of Michael Owens

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[5] The court in *People v. Mancebo*, *supra*, did not hold that reversal is automatic in every case in which the prosecution fails to meet the precise statutory pleading requirements for an enhancement. The court limited its holding to the situation in which the People seek to impose the enhancement for the first time at sentencing. (27 Cal.4th at p. 745 & fn. 5.) In any event, we need not decide the standard of prejudice in this case because, as we explain, the court did not err in imposing the enhancements.

"within the meaning of . . . section 12022.53(e)(1)." It is true that the gun enhancement allegation did not repeat the language of the separate gang allegation nor did it specifically refer to subdivision (d) or allege that a principal "personally and intentionally" discharged the firearm that caused Owens's death. Nevertheless, defendants could easily connect the dots and understand that if the People proved the separately pleaded gang enhancement and proved that either Torres or Jones used a gun in murdering Owens (implying personal and intentional use) they would be liable for the 25-years-to-life gun enhancement under section 12022.53, subdivisions (d) and (e)(1).

Defendants further maintain that the enhancements must be reversed because the verdict form does not contain the findings necessary under section 12022.53, subdivision (d) and (e)(1). It does not contain a finding that the crime was committed for the benefit of a criminal street gang and it does not contain a finding that a principal "personally and intentionally" discharged a firearm which "proximately" caused Owens's death.

These shortcomings did not deprive defendants of a fair trial, however. In its instructions the court informed the jury that if it found the defendants guilty of murder and if it found the murder was for the benefit of a criminal street gang then it had to decide "whether the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death." The court further instructed that the prosecution had to prove "(1) Someone who was a principal in the crime personally discharged a firearm during the commission of the crime; [¶] (2) That person intended to discharge the firearm; and [¶] (3) That person's act caused the death of another person." (Capitalization omitted.) There is no evidence in the record suggesting that the jury was confused by any perceived

discrepancy between the instructions and the verdict form and we assume that the jury understood the instructions and followed them. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 31.)

VI. *Jones Is Entitled To An Evidentiary Hearing Pursuant to Franklin*.

Jones, who at most was guilty of murder as an aider and abettor, was sentenced to a term of 50 years to life for a crime he committed when he was 17 years old. Under the sentence imposed, Jones would be 71 years old before becoming eligible for parole. On appeal, Jones initially argued that his sentence constitutes cruel or unusual punishment or both in violation of the California and United States constitutions. As we explain below, in light of our state Supreme Court's decision in *Franklin*, *supra*, 63 Cal.4th 261, Jones's constitutional argument has been rendered moot by the Legislature's enactment of sections 3051 and 4801, subdivision (c). Jones now argues that this case must be remanded to the Superior Court for a hearing at which he can make a record of his "characteristics and circumstances at the time of the offense" that would be relevant to a youth offender parole hearing to be held pursuant to section 3051. We agree.

In *Miller*, *supra*, 132 S.Ct. 2455, the Supreme Court held that the proscription against cruel and unusual punishment under the Eighth Amendment to the United States prohibited sentencing a juvenile homicide offender to life without the possibility of parole (LWOP) without considering "the 'mitigating qualities of youth.' " (*Id.* at p. 2467.) In particular, the high court identified the following factors that the sentencing court must consider before imposing an LWOP sentence: (1) a juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) any evidence or other information in the

record regarding "the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional;" (3) any evidence or other information in the record regarding "the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him;" (4) any evidence or other information in the record as to whether the offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth;" and (5) any evidence or other information in the record bearing on "the possibility of rehabilitation." (*Id.* at p. 2468.)

In response to *Miller* and other decisions of the United States and California Supreme Courts concerning LWOP and de facto LWOP sentences imposed on youthful offenders,[6] the California Legislature enacted Senate Bill No. 260 (2013-2014 Reg. Sess.), adding section 3051 and section 4801, subdivision (c). These statutes created a mechanism that allows minors sentenced to lengthy determinate terms or an indeterminate life term to secure their release on parole after serving a prescribed term of confinement if they can demonstrate "growth and maturity." (Stats. 2013, ch. 312, § 1.) As relevant to Jones, 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 parole by the [Board of Parole Hearings (Board)] during his or her 25th

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[6] See *Graham v. Florida* (2010) 560 U.S. 48; *Miller*, *supra*, 132 S.Ct. 2455; *People v. Caballero* (2012) 55 Cal.4th 262 (Caballero).

year of incarceration at a youth offender parole hearing." [7] (§ 3051, subd. (b)(3).)

In *Franklin*, the trial court sentenced the defendant, who was 16 years old when he committed murder, to a mandatory term of 50 years to life. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) The defendant argued that his sentence was the functional equivalent of LWOP and, as such, violated the Eighth Amendment's prohibition against cruel and unusual punishment under *Miller*. The *Franklin* court did not reach that question, however, because it held that the enactment of section 3051 effectively "superseded [the defendant's] sentence so that notwithstanding his original term of 50 years to life, he is eligible for a 'youth offender parole hearing' during the 25th year of his sentence." (*Id.* at p. 277.) Because inmates who were juveniles when they committed their controlling offense are now "entitled to a parole hearing and possible release after 25 years of incarceration," they are "not serving an LWOP sentence or its functional equivalent." (*Id.* at pp. 281-282.) The defendant's constitutional challenge to his sentence was therefore moot. (*Id.* at pp. 268, 276-277.)

Franklin is controlling here. By operation of section 3051, Jones, like the defendant in *Franklin*, "is now serving a life sentence that includes a meaningful opportunity for release

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[7] A "[c]ontrolling offense" is defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).)

Section 3051 originally applied to persons who committed a controlling offense before the person was 18 years old. (Former section 3051; Stats. 2013, ch. 312, § 4.) The Legislature amended the statute in 2015 to include persons under 23 years of age. (Stats. 2015, ch. 471, § 1.)

during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent." (*Franklin*, *supra*, 63 Cal.4th at pp. 279-280.) Because Jones's sentence is not a de facto LWOP, his Eighth Amendment challenge to his sentence is similarly moot.

In his post-*Franklin* supplemental brief, Jones does not attempt to distinguish *Franklin* or argue that it does not control the outcome here. Indeed, he relies on *Franklin* to request that we remand the matter "for a hearing at which [his] characteristics and circumstances at the time of the offense may be adequately explored with a view to their significance at a subsequent youth offender parole hearing." We agree.

In *Franklin*, the court observed that section 3051 requires the youth offender parole hearing to " 'provide for a meaningful opportunity to obtain release' " and section 4801 provides that, "in order to provide such a meaningful opportunity, the Board 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' " (*Franklin*, *supra*, 63 Cal.4th at p. 283.) The *Franklin* Court then explained that these 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. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board.' " (*Franklin*, *supra*, 63 Cal.4th at p. 283.) Assembling that information, the Court observed, "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." (*Id*. at pp. 283-284.)

The *Franklin* court stated it could not determine whether the defendant had a sufficient opportunity to put such information on the record. (*Franklin*, *supra*, 63 Cal.4th at p. 284) The Court then remanded the matter for the limited purpose of determining "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid*.) If the trial court determined that the defendant "did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [The defendant] may 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." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Justice Werdegar, in a concurring and dissenting opinion, used the phrase, "baseline hearing" to describe this proceeding. (*Id.* at p. 287 (conc. & dis. opn. of Werdegar, J.).)

Here, there is nothing in our record to suggest that Jones had sufficient opportunity to put on the record the kinds of information described by *Franklin*. Defendant was convicted of first degree murder and the jury found true an enhancement allegation that he personally discharged a firearm. (§§ 187, subd. (a); 12022.53, subd. (d).) Consecutive terms of 25 years to life for the crime and the enhancement were mandatory. (See *Franklin*, *supra*, 63 Cal.4th at p. 271.) Prior to *Franklin*,

the question of whether such a sentence was subject to the requirements of *Miller* was unsettled, and the Supreme Court had not yet announced that persons entitled to a youth offender parole hearing had a present right to place on the record evidence relevant to such a hearing. It is not surprising, therefore, that Jones did not submit a sentencing memorandum or offer any such evidence at his sentencing hearing. Indeed, given the mandatory nature of the sentence, such evidence would have been irrelevant to any issue at the sentencing hearing under the law at that time. Jones now insists that he will be able to place such evidence on the record. Under *Franklin*, he is entitled to that opportunity.

The Attorney General contends that although Jones declined to present evidence of the kind described in *Franklin* at his sentencing hearing, he had the *opportunity* to do so. According to the Attorney General, this opportunity occurred when, after the prosecutor made a brief statement, the court turned to Jones's counsel, Dale Atherton, and said, "All righty. Mr. Atherton?" Mr. Atherton then responded, "I'll submit it, your Honor."

The Attorney General argues that this exchange shows that Jones had the opportunity to present evidence relevant to his youth offender parole hearing, but failed to "fully *capitalize* on the opportunity." We do not believe that either the court or counsel understood that the court's inquiry to Mr. Atherton thereby opened the door for the type of evidence contemplated in *Franklin*, especially when *Franklin* had not even been decided. Indeed, it would be patently unfair to hold that Jones missed his opportunity for a *Franklin* baseline hearing before the Supreme Court even created the right to such a hearing.

The Attorney General relies on a recent case from the Third District, *People v. Cornejo* (2016) 3 Cal.App.5th 36. In that case, two juvenile defendants were convicted of one count of murder, four counts of attempted murder, and one count of shooting at an inhabited dwelling. (*Id.* at p. 42.) Unlike here, the sentencing for the crimes in *Cornejo* involved discretionary determinations and consideration of aggravating and mitigating factors. Accordingly, one defendant offered 23 character reference letters, and the other pointed to evidence in the record showing that he had severe mental disabilities, lacked parental support as a child, was sexually abused, and had been homeless for many years. The Court of Appeal stated that such information "will be available at a youth offender parole hearing to facilitate the [Board]'s consideration as to whether or not to grant them release." (*Id.* at pp. 69-70.) Therefore, the court concluded, remanding for a further hearing was unnecessary.

Cornejo is easily distinguished because the defendants in that case had an incentive and the right to submit the character references and other evidence at the time of sentencing to support mitigating factors that could affect the court's sentencing decision. Here, by contrast, the court had no occasion to consider mitigating factors because Jones's sentence was statutorily fixed. (See §§ 190, subd. (a), 12022.53, subd. (d).) Thus, Jones, unlike the defendants in *Cornejo*, had no incentive or right to introduce such evidence.

The Attorney General's arguments and its reliance on *Cornejo* are unpersuasive. Because the record indicates that Jones did not have a sufficient opportunity to place evidence on the record relevant to his eventual youth offender parole hearing, he should have the opportunity to do so upon remand.

DISPOSITION

Our opinion filed July 31, 2015 is vacated.

The judgments are affirmed.

Upon remand, the court shall hold a hearing, pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 and this opinion, to allow Jones and the People 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.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.