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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TOM LOVE VINSON, Defendant and Appellant.	B257225 (Los Angeles County Super. Ct. No. NA083837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed and remanded with directions.

Fay Arfa for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Tom Love Vinson appeals from a judgment entered following a resentencing hearing. Defendant was convicted by a jury of one count of first degree murder (Pen. Code, § 187, subd. (a); count 1), two counts of attempted willful, deliberate and premeditated murder (*id.*, §§ 187, subd. (a), 664; counts 2 and 3), and one count of attempted voluntary manslaughter (*id.*, §§ 192, subd. (a), 664; count 4). In addition, the jury found true the allegations defendant personally and intentionally discharged a firearm, causing great bodily injury on the victims in counts 1 through 3 (*id.*, § 12022.53, subds. (b), (c) & (d)), the crimes were committed for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)), and in the commission of the voluntary manslaughter, defendant personally used a firearm (*id.*, § 12022.5, subd. (a)). The trial court sentenced defendant to 130 years to life plus a determinate term of 25 years and six months.

Defendant appealed, and on March 13, 2013, we filed our opinion in the case, affirming the judgment of conviction but remanding the case for resentencing consistent with the views expressed by the United States Supreme Court in *Miller v. Alabama* (2012) 576 U.S. ___ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*) regarding imposition of life sentences for juveniles. (*People v. Vinson* (Mar. 13, 2013, B238043) [nonpub. opn.].)

On April 24, 2013, defendant filed a petition for review in the Supreme Court, challenging our affirmance of his conviction. (No. S210211.) The Supreme Court denied the petition without comment on June 12, 2013. We issued our remittitur on June 26, 2013, certifying that our decision had become final.

On remand, the trial court again sentenced defendant to 130 years to life plus a determinate term of 25 years and six months. Defendant again appealed, contending the trial court failed to consider the *Miller* factors when resentencing him, and the case must again be remanded for resentencing.

While this appeal was pending, Proposition 57, The Public Safety and Rehabilitation Act of 2016, was passed by the voters on November 8, 2016. This act affects the filing of cases against juveniles in criminal courts. Also while the appeal was pending, *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) was decided, explaining the effect of recently enacted Penal Code section 3051 on the sentencing of juveniles post-*Miller*. In light of these developments, we invited the parties to brief the impact of *Franklin*, and "the effect, if any, of Proposition 57's amendments to Welfare and Institutions Code sections 602 and 707 on a case in the somewhat unusual posture of the pending proceeding: the conviction of a defendant, 16 years old at the time of the crime, that was affirmed on appeal but not yet final as of November 9, 2016 because of a remand for resentencing."

We affirm the conviction and the sentence, but remand to afford defendant the ability to make a record of mitigating evidence related to his youth at the time the offense was committed.

TRIAL AND INITIAL SENTENCE[1]

On the evening of October 30, 2009, at a homecoming football game at Wilson High School in Long Beach, defendant

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1 We take the facts from our prior opinion.

exchanged words with rival gang members and then fired a handgun four times into the crowd, killing student Melody Ross and wounding two rival gang members, Marcus Moore and Brad Van.

Defendant was 16 years old at the time of the shooting. He testified he had been a member of the Rolling Twenties Crips street gang before switching to the Baby Insane gang. A person can be killed for switching gangs, and a friend of his had been killed at age 15 for switching to Baby Insane. Defendant testified he carried a gun because he was always in fear for his life and that he had been shot at 20 times and beaten up for switching gangs. He claimed he shot his gun only after seeing Van point a gun in his direction. Moore admitted that he had made threatening gang gestures at Vinson in the past and had brought a concealed and loaded handgun to the game. Defendant did not aim at Ross or intend to kill her.

Defendant was convicted of the murder of Ross, attempted murder of Van and Moore, and attempted voluntary manslaughter of Tori R., another student who had been sitting next to Ross when the shots were fired. He was sentenced to 130 years to life plus a determinate sentence of 25 years and six months. (*People v. Vinson*, *supra*, B238043.)

PRIOR APPEAL

In the prior appeal, defendant contended "that imposition of the 'functional equivalent' of a term of life without the possibility of parole [citation] for a crime committed when he was 16 years old constitutes cruel and unusual punishment." (*People v. Vinson*, *supra*, B238043.) We remanded for resentencing in

light of *Miller*, which held that mandatory sentence of life imprisonment without the possibility of parole for a juvenile convicted of murder violates the Eighth Amendment. (*Miller*, *supra*, 576 U.S. at p. ___, [132 S.Ct. at pp. 2467-2468].) We directed "the trial court [to] consider the mitigating factors discussed in *Miller*, namely the differences between juveniles and adults, 'and how those differences counsel against irrevocably sentencing [a juvenile] to a lifetime in prison.' ([*Id.*] at p. ___ [132 S.Ct. at p. 2469] . . . .)" (*People v. Vinson*, *supra*, B238043.)

REMAND AND RESENTENCING

After remand but before the resentencing hearing, the Legislature enacted Penal Code section 3051, which provided in pertinent part that "[a] person who was convicted of a controlling offense that was committed before the person had attained 18[2] 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." (*Id.*, subd. (b)(3); Stats. 2013, ch. 312, § 4.)

At the resentencing hearing on November 22, 2013, the trial court noted the new statute but expressed its belief that "the court has to address the issue that was raised by the Court of Appeal, that is whether . . . the court should consider the defendant's age and the difference between a juvenile and an

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2 This statute was amended in 2015 to change "18 years of age" to "23 years of age." (Stats. 2015, ch. 471, § 1.)

adult and whether the sentence is appropriate in light of those factors." The court indicated it had received a probation report and resentencing memoranda from both parties and asked whether they had anything to add.[3]

Defense counsel argued that "Penal Code section 3051 has rendered the Court of Appeal's opinion moot in that it is the view of the Legislature that all juveniles in my client's situation deserve a youthful offender review hearing in 25 years . . . ." The resentencing report presented by defendant contained only this argument and no additional information. At the hearing, defense counsel stated that "[a]t the time of this incident, [defendant] was the product of a single parent home." His father was absent, his brother had been in trouble with the law, and his mother worked long hours to support the family and was unable to adequately supervise him. No evidence was presented about defendant's home life other than counsel's statement on the record. Counsel also advised the court that while defendant was in custody, he had earned his GED, enrolled in community college, and grown taller.

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[3] Defendant's resentencing memorandum did not contain any information about defendant's childhood, psychological development, level of maturity, possibility of rehabilitation, or other factors under *Miller*. The memo focused exclusively on the right to a youth offender review hearing pursuant to Penal Code section 3051. The probation officer's report which had been prepared in December 2011, prior to the first sentencing hearing, indicated, among other information, that defendant had completed his GED while in juvenile hall after his arrest, that he had been a "self-admitted member of the 'Insane Crips' criminal street gang since the 9th grade," and that he "considers his mental and physical health [to be] in good condition."

The prosecutor agreed defendant was entitled to a youth offender parole hearing and otherwise submitted based on the prosecution's resentencing memorandum.

The trial court acknowledged that it "must consider individualized factors of the defendant in question in deciding what is the appropriate sentence based on the defendant's age[, h]e being a minor.

"His case is distinguishable from other cases which did not consider that a life sentence is appropriate [in] that, number one, the defendant is the actual killer. The defendant was found to have killed a person and that the killing was deliberate and premeditated.

"Two, the jury found that this was a gang case. The fact of this case was, that there were two individuals who were rival gang members [and it] took place near a high school, Wilson High after a football game. The defendant, a member of Baby Insane Crips, he is the one that initiated the confrontation by actually approaching those two Rollin' 20 members back then . . . . Gang exchanges are made. The defendant pulled out a gun, shoots multiple rounds, and the record should indicate that the area in which he fired multiple rounds at random [was] filled with people who were coming out of a football game and three people were hit. He is lucky only . . . three [of the] people were hit[, w]hen you consider that the area in which he took a shot at there were [a] multiple number of people."

Citing *People v. Em* (2009) 171 Cal.App.4th 964, the court found "it is not unreasonable . . . to conclude that the defendant has proven himself to be completely resistant to the rules and structures of civilized society and the criminal justice system. The danger he presents to society is significant. The defendant

didn't commit this crime because he was at the wrong place at the wrong time. This crime was committed because it was a gang situation and he knew what the consequences of the acts would be and considered it[, b]ut he did it anyway.

"The aggravating factor doesn't end there. The defendant actually had previous brushes with the law. He had a sustained petition for receiving stolen property when he was 13 and then picked up two additional petitions for burglary. He was placed on probation. In fact, when this crime was committed, he was on juvenile probation.

"It is also important to note at the time this shooting took place resulting in the death and two injuries to two separate victims, the defendant was 16.

"Based on those individualized factors," the court resentenced defendant to 130 years to life plus a determinate term of 25 years, six months. The court added, "[h]owever, based on the new statute that was enacted by the State Legislature Senate Bill [No.] 260 that came into effect September 16th, 2013, the defendant is entitled to a youthful parole consideration date and that date will be set for November 4, 2034, to comply with the newly signed Penal Code section 3051."

DISCUSSION

A. *The Effect, If Any, of Proposition 57*

1. *Proposition 57's Changes to the Manner in Which Criminal Cases Against Juveniles Are Prosecuted*

At the time of the crimes, Welfare and Institutions Code former section 602, subdivision (b), provided that "[a]ny person who is alleged, when he or she was 14 years of age or older, to

have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction." These offenses included murder, where it was alleged "that the minor personally killed the victim." (*Id.*, former subd. (b)(1).)

Welfare and Institutions Code former section 707, subdivision (d), specified when the prosecutor could file an accusatory pleading in a court of criminal jurisdiction against a minor. Again, criminal charges could be filed against a minor who was 16 years old and committed murder. (*Id.*, former subds. (b)(1), (d)(1).)

Proposition 57 was enacted by the California voters on November 8, 2016 to: "1. Protect and enhance public safety. [¶] 2. Save money by reducing wasteful spending on prisons. [¶] 3. Prevent federal courts from indiscriminately releasing prisoners. [¶] 4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles. [¶] 5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (*Id.*, § 2.)

Proposition 57 amended Welfare and Institutions Code section 602 to provide: "Except as provided in Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." (Prop. 57, § 4.1.)

Proposition 57 also amended section 707 of the Welfare and Institutions Code. (Prop. 57, § 4.2.) Subdivision (a)(1) of section 707 of the Welfare and Institutions Code now provides in pertinent part that "[i]n any case in which a minor is alleged to

be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute . . . , the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. . . ." Subdivision (a)(2) sets forth the criteria the juvenile court must consider in ruling on the motion. (*Id*., subd. (a)(2).)

2. *Whether Proposition 57 May Be Applied Retroactively to This Case*

As a general rule, amendments to the Penal Code are presumed to operate prospectively. (See Pen. Code, § 3; *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1195.) "'[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.' [Citation.]" (*In re E.J.* (2010) 47 Cal.4th 1258, 1272; accord, *Vinson*, at p. 1195.)[4] An exception to this general rule, however, is that when a statute is amended to mitigate the *punishment* for a crime, it applies retrospectively to cases in which the judgment is not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745; *Vinson*, at pp. 1195-1196.)

Defendant takes the position that Proposition 57 is a statute which mitigates punishment for a crime, and his case is not yet final, therefore Proposition 57 applies retroactively to him. Since this case was filed directly in the criminal court, in contradiction with the newly-amended versions of Welfare and

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[4] Proposition 57 does not contain an express retroactivity provision.

Institutions Code sections 602 and 707, defendant contends the case must be remanded to the juvenile court and we have no jurisdiction to consider his appeal.

The People take the position, first, that because defendant's judgment of conviction was final years before the passage of Proposition 57, it cannot apply to him. Second, they claim that, in any event, Proposition 57 applies prospectively only.

Assuming *arguendo* that Proposition 57 mitigates punishment for individuals who commit crimes when they are juveniles by requiring initial filing in delinquency court where sentences are strictly limited, its provisions are entitled to retrospective application only if the judgment of conviction entered against defendant is not yet final. (*In re Estrada*, *supra*, 63 Cal.2d at pp. 744-745; *People v. Vinson*, *supra*, 193 Cal.App.4th at pp. 1195-1196.)

A judgment becomes final when the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046.) Defendant did not file a petition for writ of certiorari following the California Supreme Court's denial of his petition for review challenging our original affirmance of his judgment of conviction. Therefore, the People argue, his "judgment of *conviction* became final on September 11, 2013, for purposes of retroactive application of *new state statute law changes*" such as Proposition 57. (Italics added.)

The California Supreme Court addressed this issue in *People v. Ketchel* (1966) 63 Cal.2d 859 (*Ketchel*). There, the defendants were convicted of murder and given the death penalty. On appeal, the court affirmed the judgments of conviction but reversed as to the death penalty. Following

retrial, the defendants were again given the death penalty. On renewed appeal, the defendants not only challenged the second death penalty but also sought to have their convictions overturned on the ground their confessions were inadmissible under the then-recent decisions in *Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977] and *People v. Dorado* (1965) 62 Cal.2d 338, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, footnote 17. (*Ketchel*, at pp. 861-862.)

The court previously had determined that *Escobedo* and *Dorado* applied prospectively only, meaning they did not apply "'to cases which have become final prior to the date that the United States Supreme Court rendered the *Escobedo* decision.' [Citations.]" (*Ketchel*, *supra*, 63 Cal.2d at p. 863.) In this context, a case becomes final, *Ketchel* held, """where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . ."" (*Id.* at p. 864, citing *Linkletter v. Walker* (1965) 381 U.S. 618, 622, fn. 5 [85 S.Ct. 1731, 14 L.Ed.2d 601].) That is, the courts have "'in substance defined finality as denoting that point at which the courts can no longer provide a remedy to a defendant on direct review.'" (*Ketchel*, at p. 864.)

In the case before the court, "[u]nder the *Linkletter* test of finality, the judgments as to [the defendants'] guilt were not final unless 'the time for petition for certiorari had elapsed' before *Escobedo*" was decided. (*Ketchel*, *supra*, 63 Cal.2d at p. 864.) The court noted that following its original affirmance of the judgments of conviction, the defendants could have petitioned the United States Supreme Court for a writ of certiorari. (*Ibid.*) It found no authority, "however, establishing that [the defendants]

could not await affirmance of the judgments as to penalty before filing a petition for certiorari in which they raise federal questions relating to their trial on guilt." (*Ibid.*) "To the contrary, language in several cases gives support to the view that certiorari may still be available here with respect to matters relating to the trial on guilt. *Corey v. United States*[(1963)] 375 U.S. 169, 175 [84 S.Ct. 298, 11 L.Ed.2d 229], which involved a federal statute pursuant to which the defendant was sentenced twice for a crime, held that the defendant had the option of appealing within the prescribed time after either the first or the second sentence. The court stated that 'Long-accepted and conventional principles of federal appellate procedure require recognition of the defendant's right to await the imposition of final sentence before seeking review of the conviction. That is the general rule.' It was recognized that as a practical matter the severity of the sentence imposed might be a major factor in determining whether to seek review. Similarly in a case such as the present one whether death or life imprisonment were imposed might be a major factor in the defendant's determination whether to seek certiorari." (*Id.* at pp. 864-865.)

Based on the foregoing, the court concluded the defendants' judgments of conviction were not final even though the time to petition for certiorari from their convictions had expired. (*Ketchel*, *supra*, 63 Cal.2d at p. 865.) The court noted as well that "[i]t would be an unnecessary expenditure of time and money were we to reverse solely as to penalty and federal habeas corpus relief were later granted on the ground that at the guilt trial evidence was admitted that was inadmissible under *Escobedo*." (*Id.* at pp. 865-866.) Additionally, the defendants' "attack on the judgments of guilt on this appeal from the judgments as to

penalty is comparable to a collateral attack, and this court normally affords collateral relief on constitutional grounds if the petitioner had no opportunity to raise the constitutional issue at trial and on appeal [citation]. There was no such opportunity when, as in this case, the new constitutional right had not been declared at those times." (*Id*. at p. 866.) Under those circumstances, the court held the newly articulated constitutional requirements with respect to confessions set forth in *Escobedo* and *Dorado* could be invoked by the defendants to challenge their underlying convictions.

The People argue *Ketchel* is distinguishable, in that it involved constitutional grounds as opposed to statutory amendments. Conceding as they must that a defendant can wait to file a petition for certiorari until both his conviction and sentence have been affirmed in state court, the People point out that such defendant would be limited to raising federal questions in that petition. Because Proposition 57 is purely a change in state procedural rules and not a new federal constitutional principle, *Ketchel*'s rules regarding finality do not apply. This position has merit.

People v. Vaughn (1973) 9 Cal.3d 321, similar to *Ketchel*, involved the court's affirmance of a judgment of conviction but reversal of the death penalty. On retrial, the defendant was again given the death penalty. (*Vaughan*, at pp. 323-324.) On the second appeal, the defendant attempted to challenge the trial court's acceptance of his guilty plea without the presence of counsel, in violation of Penal Code section 1018. (*Id*. at p. 326.) The court found "considerable question whether [the] defendant may raise this issue for the first time at the present stage," noting its "prior affirmance of the judgment of guilt constitutes a

final judgment as to guilt, *at least with respect to questions of state law*." (*Id*. at p. 326, fn. 3, italics added [citing *Ketchel* among other cases]; accord, *People v. Kemp* (1974) 10 Cal.3d 611, 613; but see *People v. Stanworth* (1974) 11 Cal.3d 588, 596, fn. 7.)

Proposition 57 involves the amendment of state statutes as to state procedural matters only. It does not implicate federal questions relating to defendant's trial on guilt which could be raised in a petition for writ of certiorari following affirmance of the judgment as to the sentence. (*Ketchel*, *supra*, 63 Cal.2d at p. 864.) It follows that, for purposes of the retroactivity of Proposition 57, "our prior affirmance of the judgment of guilt constitutes a final judgment as to guilt, at least with respect to questions of state law" (*People v. Vaughn*, *supra*, 9 Cal.3d at p. 326, fn. 3), following the denial of review by the state Supreme Court and the expiration of the time in which to file a petition for writ of certiorari to review that affirmance (*Ketchel*, at pp. 863-864).

Our decision is reinforced by *People v. Murtishaw* (1989) 48 Cal.3d 1001, which declined to apply a change in state criminal procedure retrospectively. In that case, as here, the defendant had been convicted and his conviction affirmed on appeal, but the court had reversed the penalty judgment. After a penalty retrial, the jury had imposed the same penalty again and the defendant had pursued a second appeal. In his second appeal, the defendant sought a new trial on the guilt phase (as well as challenging the penalty), on the basis of intervening law which he contended should be given retrospective affect. The Supreme Court disagreed. The court pointed out that the defendant's conviction "may well have been 'final'" by the time the new decision was announced, as the conviction had already been

affirmed and the petition for certiorari denied. (*Id*. at p. 1013.) Further, the court held that the rule requiring retrospective application "applies only to rules based on the federal Constitution, or upon the federal judicial supervisory power." (*Ibid*.) The court declined to extend the retrospective application principle announced by federal case law to changes in "rules of criminal procedure derived solely from state law." (*Ibid*.) Because the rule the defendant sought to have applied was purely one of California law, the court held that the defendant was not entitled to retrospective application of the law or retrial on the underlying convictions. (*Ibid*.)

In light of these principles, we hold that defendant's judgment of conviction was "final" for purposes of retrospective application of the changes in state criminal procedures embodied in Proposition 57 when the time for petition for certiorari expired as to his original appeal challenging his conviction. Thus, the new procedure with respect to filing in juvenile court does not apply to him. (*In re Estrada*, *supra*, 63 Cal.2d at pp. 744-745; *People v. Vinson*, *supra*, 193 Cal.App.4th at pp. 1195-1196.) We therefore need not consider whether the voters intended Proposition 57 to be given retrospective application generally, or how the new procedures would impact other proceedings which had not yet become final as defined herein.

B. *Defendant's Constitutional Challenge to his Sentence Is Moot*

Defendant contends the case must again be remanded for resentencing, in that the trial court "failed to adequately consider [his] youth and social history" and whether his sentence constituted cruel and unusual punishment. We disagree.

Defendant's claim that his new sentence after remand violates the Eighth Amendment because it is the functional equivalent of life without parole and the trial court did not properly consider the *Miller* factors has been rendered moot. In response to *Miller*, the Legislature enacted Penal Code section 3051, effective January 1, 2014. Section 3051 states that "any prisoner who was under 23 years of age at the time of his or her controlling offense" shall be provided "[a] youth offender parole hearing . . . for the purpose of reviewing the [prisoner's] parole suitability . . . ." (Pen. Code, § 3051, subd. (a)(1).) "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . ." (*Id.*, subd. (b)(3).) Penal Code section 4801 provides that 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." (*Id.*, subd. (c).)

In *Franklin*, *supra*, 63 Cal.4th 261, the California Supreme Court held that "Penal Code sections 3051 and 4801[,] . . . enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*[*v. Florida* (2010) 560 U.S. 48 (130 S.Ct. 2011, 176 L.Ed.2d 824)], and [*People v.*] *Caballero* [(2012) 55 Cal.4th 262]," mooted a juvenile's claim that a sentence of 50 years to life was the functional equivalent of life without parole and thus unconstitutional. (*Id.* at p. 268.) The Supreme Court explained that, "[c]onsistent with constitutional dictates, those statutes provide [the juvenile] with the possibility

of release after 25 years of imprisonment [citation] and require the [parole 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.' [Citation.]" (*Ibid.*) Because Penal Code section 3051 now ensures that a juvenile serving a life sentence will have "a meaningful opportunity for release during his 25th year of incarceration," his "sentence is neither [life without parole] nor its functional equivalent" and "no *Miller* claim arises . . . ." (*Franklin*, at pp. 279-280.)

Like the juvenile offender in *Franklin*, defendant is now entitled to a youth offender parole hearing with a meaningful opportunity for release after 25 years of incarceration. (Pen. Code, § 3051, subd. (b)(3).) Therefore, under *Franklin*, defendant's sentence of 155 years to life in state prison is not the functional equivalent of life without parole, and his constitutional challenge to the sentence is moot.

C. *A Limited Remand Under* Franklin *Is Proper*

In *Franklin*, the Supreme Court held that the juvenile offender "need not be resentenced," but it remanded "the matter to the trial court for a determination of whether [the juvenile] 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.) The Supreme Court described the procedure to be followed on remand: "If the trial court determines that [the juvenile] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of

Court, and subject to the rules of evidence. [The juvenile] 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. 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' [citation]." (*Ibid*.)

"Changes in case law customarily are fully retroactive." (*In re Cook* (Jan. 10, 2017, G050907) ___ Cal.App.4th ___ [2017 Cal.App. Lexis 13, *10].) "Nothing in *Franklin* suggests the California Supreme Court intended it to be excepted from the rule of full retroactivity." (*Id.* at p. ___ [2017 Cal.App. Lexis at p. *11.) As this case was not final as to sentencing, *Franklin* clearly applies.

Defendant was resentenced after the enactment of Penal Code sections 3051 and 4801, but prior to the decision in *Franklin*. Neither counsel nor the trial court could foresee the instructions which would be issued as part of that opinion with respect to the content of the evidentiary record to be developed for the juvenile offender. At the sentencing hearing in this case, defense counsel presented only very limited information about defendant's level of maturity, noting his age, and that he had

been raised by a single working mother. Defense counsel presented no information about defendant's cognitive abilities, his psychological development, or the impact of his home life on his emotional development. Counsel called no witnesses and presented no reports other than a two-paragraph resentencing memorandum, which contained only legal argument. The probation report, on which the court relied, had been prepared in 2011, long before *Miller, Franklin* and the passage of Penal Code section 3051; that report focused on conduct occurring after defendant's arrest, including that he had grown several inches and had completed school while in prison. Defense counsel submitted on this bare bones record, apparently relying on the fact that under Penal Code section 3051, defendant was entitled to a parole hearing during his 25th year of incarceration.

The People nevertheless argue that a remand is unnecessary because defendant "had sufficient opportunity to, and did, make a record of information relevant to his eventual youth offender parole hearing." It is true, as the People assert, that the parties both submitted new sentencing memoranda prior to the resentencing hearing and that the matter was continued at least two times to allow defense counsel to gather mitigation evidence. The parties had the opportunity to argue and the court considered the application of the *Miller* factors prior to resentencing defendant. Defense counsel's argument at the hearing and the probation report provided some minimal details about defendant's life prior to his arrest. However, neither party nor the court contemplated the type of evidentiary record that is envisioned by *Franklin* to prepare for defendant's eventual youth offender parole hearing under Penal Code sections 3051 and 4801. (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Indeed, at the

resentencing hearing, counsel argued primarily that Penal Code section 3051 rendered resentencing moot in light of the review hearing in 25 years. Counsel relied on a few sentences in a probation report about post-arrest efforts at improvement by defendant, and counsel's own argument, without supporting evidence, as to defendant's absent father and overworked mother. Counsel presented no evidence to evaluate how these and other factors actually affected defendant. Counsel presented no information about any other environmental, social, or psychological factors impacting defendant prior to or at the time of the shooting.

As we explained recently in *People v. Jones* (Jan. 19, 2017, B263800) ___ Cal.App.4th ___ [2017 Cal.App. Lexis 36]: "Prior to *Franklin*, . . . there was no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the juvenile with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801.'" (*Id*. at p. ___ [2017 Cal.App. Lexis 36 at p. *60], citing *Franklin*, *supra*, 63 Cal.4th at p. 287.)

As in *Jones,* with this pre-*Franklin* hearing, "we cannot assume that [defendant] and his counsel anticipated the extent to which evidence of youth-related factors was a critical component of the sentencing hearing. We do not suggest that every juvenile offender sentenced prior to *Franklin* and eligible for a parole hearing under [Penal Code] section 3051 is entitled to a remand to present evidence regarding his or her youth-related

characteristics and circumstances at the time of the offense. Rather, we conclude that, in this case, it is unclear whether [defendant] understood both the need and the opportunity to develop the type of record contemplated by *Franklin*." (*People v. Jones*, *supra*, ___ Cal.App.4th at p. ___ [2017 Cal.App. Lexis 36 at p. *61]; accord, *In re Cook*, *supra*, ___ Cal.App.4th at p. ___ [2017 Cal.App. Lexis 13 at pp. *8-*9 [directing the trial court to conduct a hearing at which the defendant would have an opportunity to make full record under *Franklin* because the defendant's counsel had presented only "bare bones" information at the sentencing hearing, consisting of a probation report with less than a half page of personal history.)

Accordingly, we remand the matter so that the trial court can follow the procedures outlined in *Franklin* to ensure that such opportunity is afforded to defendant. In addition, we note that the abstract of judgment erroneously lists count 4 as attempted murder (Pen. Code, §§ 187, subd. (a), 664) rather than attempted voluntary manslaughter (*id.*, §§ 192, subd. (a), 664). This error must be corrected.

DISPOSITION

The judgment is affirmed but remanded for a further evidentiary hearing. The trial court also is directed to correct the abstract of judgment to reflect a conviction of attempted voluntary manslaughter on count 4, and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.