Filed 8/16/17 In re Villalobos CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JOHNNY VILLALOBOS, on Habeas Corpus.	B279545 (Los Angeles County Super. Ct. No. MA040107)

ORIGINAL PROCEEDINGS. Petition for writ of habeas corpus after a judgment of the Superior Court Los Angeles County, Kathleen Blanchard, Judge. Petition granted.

Laura S. Kelly, for Petitioner and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General and Rene Judkiewicz, Deputy Attorney General, for Respondent.

In 2010, a jury convicted petitioner Johnny Villalobos of first degree murder, and found true a special allegation asserting that he had personally and intentionally discharged a firearm, causing great bodily injury and death. Villalobos was sentenced to an aggregate term of 50 years to life in prison.

In October of 2016, Villalobos filed a petition for writ of habeas corpus requesting a hearing under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) to make a record of information relevant to his eventual youth offender parole hearing. (See Pen. Code, §§ 3051, 4086.) The trial court denied the petition, concluding it lacked jurisdiction to issue a writ of habeas corpus because Villalobos had not challenged the legality of his incarceration.

Villalobos then filed a petition for writ of habeas corpus in this court seeking an order requiring the trial court to hold a hearing pursuant to *Franklin*. We issued an order to show cause, and now grant the petition.

FACTUAL BACKGROUND

A. Villalobos's Conviction and Sentencing

In 2007, petitioner Johnny Villalobos, then 18 years old, shot and killed Juan Valdez during an altercation at a party. On June 25, 2008, the Los Angeles District Attorney filed an information charging Villalobos with a single count of murder (Pen. Code, § 187, subd. (a).)[1] The information also included special allegations asserting he had personally and intentionally discharged a firearm during the offense, causing great bodily

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[1] Unless otherwise noted, all further statutory citations are to the Penal Code.

injury and death (§ 12022.53, subd. (d)), and that the offense had been committed for the benefit of a street gang. (§ 186.22, subd. (b).) The jury convicted Villalobos of first degree murder, and found both special allegations to be true.

At sentencing, Villalobos did not present any evidence related to his age at the time of the offense. The court sentenced Villalobos to an aggregate term of 60 years to life in prison, which consisted of: (1) a term of 25 years to life in prison for first degree murder; (2) a consecutive term of 25 years to life in prison for the firearm enhancement (see § 12022.53, subd. (d)); and (3) an additional consecutive term of ten years in prison for the gang enhancement (see § 186.22, subd. (b)(1)(C)).

In 2013, we reversed the gang enhancement for lack of sufficient evidence, and affirmed the judgment in all other respects. (*People v. Villalobos* (Aug. 14, 2013, No. B239739) [nonpub. opn.].) At his resentencing, which occurred in December of 2013, the prosecution informed the trial court that it did not intend to retry the gang allegation. No evidence was presented at the hearing, and the court sentenced Villalobos to an aggregate term of 50 years to life in prison, which consisted of a term of 25 years to life in prison for first degree murder, and a consecutive term of 25 years to life in prison for the firearm enhancement (§ 12022.53, subd. (d).) Villalobos filed a second appeal, and we affirmed the judgment. (*People v. Villalobos* (Oct. 27, 2014, No. B254393) [nonpub. opn.].)

B. Villalobos's Petition for Writ of Habeas Corpus

On October 28, 2016, Villalobos filed a petition for writ of habeas corpus requesting a "hearing under *People v. Franklin* (2016) 63 Cal.4th 261 . . . to 'make a record of "mitigating

evidence tied to his youth"" for use at his eventual youth offender parole hearing. (See §§ 3051, 4086.) Villalobos argued that because he was not eligible for a youth offender parole hearing at the time he was sentenced, he "did not have sufficient incentive or opportunity to present mitigating evidence related to his youth." Villalobos also requested that the court appoint counsel to represent him in the proceedings.

The trial court denied the petition, concluding that it lacked authority to issue a writ of habeas corpus because Villalobos had not challenged the legality of his incarceration. The court did, however, invite Villalobos to "submit whatever documents he feels will be relevant at his eventual youth offender parole hearing. . . . [¶] . . . . If petitioner feels that procedure is insufficient, he may request a further hearing, detailing why testimony is necessary under the circumstances."

Villalobos then filed a petition for writ of habeas corpus in this court requesting that we issue an order compelling the trial court to: (1) hold "a hearing at which he will be permitted to make a record of mitigating evidence" tied to his youth; and (2) appoint counsel to represent him in the proceedings. We issued an order to show cause.

DISCUSSION

A. Recent Legal Developments Regarding Life Sentences for Juvenile and Youth Offenders

1. The Eighth Amendment's prohibition against mandatory life sentences for juvenile offenders

Shortly after Villalobos's original sentencing in this matter, the United States Supreme Court held in *Graham v. Florida*

(2010) 560 U.S. 48, 74 (*Graham*) that the Eighth Amendment prohibits states from sentencing a juvenile convicted of nonhomicide offenses to life imprisonment without the possibility of parole. The Court mandated that juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id*. at p. 75.) "*Graham's* holding was based on the following [four factors]: (1) scientific studies showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows that his crimes are less likely the result of an inalterably depraved character; (3) the notion that it is morally misguided to equate a minor's failings with those of an adult; and (4) the fact that even though nonhomicide crimes may have devastating effects, they cannot be compared to murder in terms of severity and irrevocability." (*People v. Murray* (2012) 203 Cal.App.4th 277, 282-283 [citing *Graham*, *supra*, 560 U.S. at pp. 67-70 [disapproved of on other grounds by *People v. Gutierrez* (2014) 58 Cal.4th 1354].)

Two years later, in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), the Court held that the Eighth Amendment also precludes states from imposing mandatory sentences of life without the possibility of parole for homicide offenses on juveniles. "The *Miller* court explained that a mandatory life sentence 'precludes consideration of [the juvenile's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' [Citation.] Although the *Miller* court did not prohibit sentencing juvenile offenders convicted of murder to life imprisonment without the possibility of parole, it held that sentencing courts must 'take into account how children are different, and how those

differences counsel against irrevocably sentencing them to a lifetime in prison.' [Citation.]" (*People v. Jones* (2017) 7 Cal.App.5th 787, 817 (*Jones*).)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court applied *Graham* and *Miller* to a juvenile offender who had been sentenced to 110 years to life in prison for nonhomicide offenses. The Court concluded that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.) The Court explained that "[a]lthough proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Ibid.*)

In a footnote, the Court "urge[d]" the Legislature to address the issue by "establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." (*Caballero*, *supra*, 55 Cal.4th at p. 269, fn. 5.)

2. The Legislature's adoption of youth offender parole hearing procedures

In response to *Caballero*, "the Legislature passed Senate Bill No. 260, which became effective January 1, 2014, and added sections 3051, 3046, subdivision (c), and 4801, subdivision (c) to

the Penal Code." (*Franklin*, *supra*, 63 Cal.4th at pp. 276-277 ["the Legislature passed Senate Bill No. 260 explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*"].) The purpose of the act was to "'establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity.' [Citation]." (*Franklin*, *supra*, 63 Cal.4th at p. 277.) When adopted in 2013, the statute and the associated Penal Code provisions applied only to persons who were under 18 years of age at the time of their offense. In 2015, however, the Legislature amended each of the Penal Code provisions to make them applicable to persons who were under 23 years of age at the time of their offense. (*Ibid.* [citing Stats. 2015, ch. 471].)

Section 3051, which our Supreme Court has characterized as "the heart of Senate Bill No. 260," requires the Board of Parole Hearings (the Board) to "conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. [Citation.]. . . . A juvenile offender whose controlling offense carries a term of 25 years to life or greater is 'eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (*Franklin*, *supra*, 63 Cal.4th at p. 277.)

Section 3051, subdivision (f) describes various types of evidence the Board may consider at a youth offender parole hearing. Subdivision (f)(1) provides, in relevant part:

"In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, . . . shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." Subdivision (f)(2) further provides that "Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board."

Section 4081 further provides that when reviewing the parole suitability of a prisoner who was under 23 years of age at the time of the offense, the Board must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

3. People v. Franklin

In *Franklin*, *supra*, 63 Cal.4th 26, a juvenile offender who had been convicted of shooting and killing another teenager argued that his sentence of 50 years to life in prison (comprised of two mandatory terms of 25 years to life) qualified as a de facto life sentence in violation of the Eighth Amendment. The Court held that the defendant's constitutional challenge to his sentence had been mooted by the Legislature's enactment of sections 3051 and 4086, explaining: "[S]ection 3051 has superseded [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. Crucially, the Legislature's recent enactment also requires the Board not just to consider but to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' [Citation.] For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Id.* at p. 277.)

The Court further held, however, that although the defendant "need not be resentenced," it was unclear "whether [he] had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) The Court explained that "the statutes . . . contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. . . . Assembling such [information] . . . 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 Court further explained that because the defendant had been sentenced before Senate Bill 260 was enacted, "the trial court understandably saw no relevance to . . . evidence [of youth-related factors] at sentencing." (*Franklin*, *supra*, 63 Cal.4th at p. 269.) In light of the "changed legal landscape," the Court

concluded the case should be remanded "so that the trial court may determine whether [the defendant] was afforded sufficient opportunity to make such a record at sentencing." (*Ibid.*) The Court further directed that if the "the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony . . . . [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. 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 (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [Citation.]" (*Id.* at p. 284.)

Following *Franklin*, the Supreme Court transferred several pending habeas cases raising sentencing claims under *Miller* and *Caballero* to the Courts of Appeal with directions to issue orders to show cause "why petitioner is not entitled to make a record of 'mitigating evidence tied to his youth.' [Citation.]" (*In re Bonilla* (Aug. 17, 2016, S214960) 2016 Cal. Lexis 6823; see also in *In re Wilson* (Aug. 18, 2016, S235541) [nonpub. order]; *In re Alatriste* (Aug. 17, 2016, S214652) [nonpub. order]; *In re Heard* (Aug. 17, 2016, S216772) [nonpub. order]; *In re Gonzalez* (Aug. 17, 2016,

S226480) [nonpub. order]; *In re Aguilar*, (Aug. 17, 2016, S226995) [nonpub. order]).

B. Villalobos Is Entitled to a Franklin Hearing

Petitioner Villalobos argues that under the Supreme Court's holding in *Franklin*, he is entitled to a hearing to make a record of his juvenile characteristics and circumstances at the time of his offense. He also argues he has the right to have counsel represent him at those proceedings. The Attorney General argues we should deny the petition because: (1) a writ of habeas corpus petition is not a proper legal mechanism to obtain a *Franklin* hearing; and (2) the trial court provided Villalobos an adequate opportunity to make a record of his youth-related characteristics.

1. A writ of habeas corpus is an appropriate mechanism to obtain a Franklin hearing

The Attorney General argues that the form of relief Villalobos seeks in this case, an opportunity to make a record of information relevant at his eventual youth offender parole hearing, is not available through a petition for writ of habeas corpus. The Attorney General contends "habeas corpus is limited" to cases in which the petitioner is challenging either the "custodian's legal authority to hold [him]," or the conditions of his confinement. According to the Attorney General, because the remedy Villalobos is seeking here does not fall into either category, he cannot proceed by way of habeas corpus.

The Attorney General raised this same argument in *In re Cook* (2017) 7 Cal.App.5th 393 (*Cook*), which is now under review in the Supreme Court (review granted April 12, 2017, No.

S240153.) The petitioner in *Cook* initially argued that under *Miller*, his sentence of 125 years to life in prison violated the Eighth Amendment. After the appellate court denied the petition, the Supreme Court granted review, and held the case pending its decision in *Franklin*. Following *Franklin*, the Court transferred the case back to the appellate court "with directions to vacate [the] decision and consider . . . 'whether petitioner is entitled to make a record before the superior court of "mitigating evidence tied to his youth."'" (*Cook, supra*, 7 Cal.App.5th at p. 397.) On remand, the petitioner filed supplemental briefing requesting a *Franklin* hearing. The Attorney General opposed, arguing that "relief by writ of habeas corpus [wa]s unavailable to [p]etitioner because he [wa]s not challenging the legality of his restraint." (*Id.* at p. 399.)

The appellate court rejected the argument, explaining that the fact the Supreme Court had transferred the matter with directions to reconsider the case "in light of *Franklin* strongly suggest[ed that] the . . . Court recognize[d] that the relief afforded by that opinion is available by habeas corpus." (*Cook*, *supra*, 7 Cal.App.5th at p. 399.) The court further explained that, "[i]n any event," the Attorney General's "view of the scope of the writ of habeas corpus" was "overly narrow. . . . A previously convicted defendant may obtain relief by habeas corpus when changes in case law expand[] a defendant's rights . . . . [Citations.] [¶] In *Franklin*, . . . the California Supreme Court in effect expanded the defendant's rights by remanding the matter to the Court of Appeal with instructions to remand to the trial court to determine whether the defendant was afforded an adequate opportunity to make a record of information relevant to a future determination under Penal Code sections 3051 and 4801.

Franklin thus holds that a defendant has the right at the time of sentencing to present evidence and make a record of information that may be relevant at his or her eventual youth offender parole hearing. [¶] . . . [¶] . . . [T]he deprivation of the rights granted by *Franklin* is cognizable on habeas corpus." (*Id*. at pp. 399-400)

Although the Supreme Court has now granted review in *Cook*, we agree with its conclusion that habeas corpus is a proper mechanism to obtain the rights afforded in *Franklin*.[2] Contrary to the Attorney General's assertions, prior holdings of the Supreme Court demonstrate that habeas review is not limited to cases in which the petitioner is directly seeking his release from confinement, or challenging the conditions of his confinement. For example, in *People v. Tenorio* (1970) 3 Cal.3d 89 (*Tenorio*) and *In re Cortez* (1971) 6 Cal.3d 78 (*Cortez*), the Supreme Court concluded that habeas relief was available to obtain a hearing on whether the trial court should exercise its discretion to strike a prior conviction allegation. In *Tenorio*, the defendant challenged a statute that prohibited the trial court "from dismissing prior convictions without the previous approval of the prosecutor" in certain categories of narcotics cases. (*Cortez*, *supra*, 6 Cal.3d at p. 82.) The Court concluded the statute violated the California Constitution's separation of powers provisions, and further held that "any prisoner" whose sentence had been augmented by

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[2] The California Supreme Court's unofficial statement of pending issues describes the question presented in *Cook* as follows: "Does habeas corpus jurisdiction exist for a petitioner seeking a post-sentencing hearing to make a record of 'mitigating evidence tied to his youth' [citation] after the conviction is final?" (Available at http://www.courts.ca.gov/documents/JUN0217crimpend.pdf> (as of June 9, 2017).)

virtue of a prior conviction while the statute was in effect could "file a habeas corpus petition with the superior court inviting the exercise of discretion to dismiss the prior conviction. . . . Upon receipt of such a petition, the sentencing court should follow normal sentencing procedures and grant appropriate relief whenever deemed warranted in its discretion." (*Ibid.*)

In *Cortez*, the petitioner filed a petition for writ of habeas corpus seeking a hearing under *Tenorio*. Without holding a hearing or appointing counsel, the trial court issued an order denying the petition. Although the court acknowledged it had discretion to strike the prior conviction, it concluded that the record showed the prior "convictions should not be stricken." (*Cortez*, *supra*, 6 Cal.3d at p. 89.*)* Petitioner thereafter filed a habeas petition in the Supreme Court "claiming that the sentencing court had denied him his constitutional rights in not granting him a hearing at which he could be present and be represented by counsel." (*Id.* at p. 83.) The Court agreed, explaining that "[t]he trial judge's decision as to whether or not he should strike a prior narcotics conviction . . . substantially affects the rights of the defendant, since the proven or admitted prior . . . increases the period in prison during which release on parole is forbidden, and greatly lengthens the overall sentence. Thus, an opportunity to persuade a sentencing judge to exercise his discretion to strike a prior conviction in the interests of justice is extremely important to such defendants." (*Id.* at pp. 83-84.) The Court further explained that to effectuate the rights set forth in *Tenorio*, any prisoner "who desires an opportunity to invoke the discretion of the court to dismiss the prior convictions, may file a petition for writ of habeas corpus with the superior court. . . ." (*Cortez*, *supra*, 6 Cal.3d at p. 88.)

The form of habeas relief at issue in *Cortez* (and *Tenorio*) did not involve a challenge to the legality of the petitioner's confinement or the conditions of that confinement. Rather, the Court found habeas relief was available to secure a hearing to present evidence and argument as to why the trial court should exercise its discretionary authority to strike a prior conviction, thereby shortening the petitioner's period of incarceration. Villalobos seeks similar relief here, requesting a hearing to present evidence and argument the Board will later consider when determining whether to exercise its authority to release him at his eventual youth offender parole hearing, thereby shortening his period of incarceration. (See *Franklin*, *supra*, 63 Cal.4th at p. 284 ["goal" of a *Franklin* hearing is to allow parties to make record of youth-related factors that will allow the Board to properly perform its duties under §§ 3051 and 4801].) We agree with *Cook's* conclusion that a writ of habeas corpus is a proper mechanism to effectuate the hearing rights established in *Franklin*.[3]

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[3] The Attorney General also argues that a *Franklin* hearing should not be available "by way of a writ of habeas corpus" because "[s]uch cases are likely to be substantially removed in time both from the underlying offense and from the trial stage at which the resources of the parties and courts were fully marshaled for the purpose of building and testing a factual record." The Attorney General posits that holding a hearing several years after the defendant's sentencing would not be an "efficient or effective way of . . . augment[ing] the existing record with any further evidence of [the] petitioner's particular characteristics as a youthful offender. . . ." The same argument was raised and rejected in *Cook*, where the petitioner filed his habeas petition nine years after his original sentencing. The court explained that such "issues . . . [were] inherent in the

2. Villalobos is entitled to a Franklin hearing

Having concluded that a *Franklin* hearing may be obtained through a habeas petition, we must next determine whether Villalobos has established that he is entitled to such relief.

The record shows Villalobos did not have a sufficient opportunity to place on the record the kinds of information sections 3051 and 4801 deem relevant at a youth offender parole hearing. At the time of Villalobos's final sentencing hearing, those statutes did not apply to him, and the Supreme Court had not decided *Franklin*. (See *Jones, supra*, 7 Cal.App.5th at p. 819. ["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"].) The transcripts of Villalobos's sentencing hearings also show his counsel did not present any evidence or argument regarding the defendant's age, cognitive ability or any other youth-related factors during either

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remedy afforded by *Franklin*, whether granted by direct appeal or collateral challenge," and that "it would be most effective to make a record of those youth-related factors as near in time as possible to the date of original sentencing." (*Cook*, *supra*, 7 Cal.App.5th at p. 401.) We agree with *Cook's* analysis. While holding a *Franklin* hearing more than six years after Villalobos was initially sentenced is certainly not ideal, it is better than waiting until Villalobos's 25th year of incarceration. (See *Jones*, *supra*, 7 Cal.App.5th at p. 819 ["such a record is better made close in time to the 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'"] [citing and quoting *Franklin*, *supra*, 63 Cal.4th at p. 284].)

of his sentencing hearings. Villalobos's probation report likewise contains no discussion of any youth-related factors, and states that the probation officer had identified no "circumstances in mitigation."

The Attorney General nonetheless contends there are two reasons a *Franklin* hearing is not warranted. First, the Attorney General argues such a hearing is unnecessary because "the record contains some evidence of youth-related mitigating factors." In support, the Attorney General cites trial testimony in which Villalobos stated, among other things, that: (1) he had a "rough childhood"; (2) he had joined a gang because he had no one in his life to care for him; (3) "gang life" involved a substantial amount of "party[ing]," including "drinking, doing drugs [and] smoking"; and (4) he had been drunk at the time he committed his offense.

This argument is without merit. The criteria relevant to a parole determination under sections 5031 and 4086 include a wide array of "youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." (*Franklin*, *supra*, 63 Cal.4th at p. 269.) In *Franklin*, the Court explained that a 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 that 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." (*Id.* at p. 284.) Villalobos, who was not eligible for a youth offender parole hearing at the time of his trial and sentencing, could not have reasonably anticipated the importance such evidence would play at a future parole hearing.

The fact that Villalobos made brief references to his childhood during his trial testimony does not preclude him from "develop[ing] the type of record contemplated by *Franklin*." (*Jones*, *supra*, 7 Cal.App.5th at p. 819.)

The Attorney General also argues "a *Franklin* hearing is not warranted" because the superior court "invited [Villalobos] 'to submit whatever documents he feels will be relevant at his eventual youth offender parole hearing.' [Citation.]" Merely allowing an incarcerated defendant to submit documentation he or she believes might be relevant at a future youth offender parole hearing is far short of the remedy contemplated under *Franklin*. Perhaps most notably, the trial court's proposed "remedy" does not afford Villalobos the assistance of counsel in gathering and presenting evidence of his youth-related mitigating factors.[4] The right to counsel "'applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake' [citations]," and it is well-settled that "a sentencing hearing is one such stage." (*People v. Bauer* (2012) 212 Cal.App.4th 150, 155; *People v. Hall* (1990) 218 Cal.App.3d 1102, 1105 ["It is fundamental that the right to counsel applies at all stages in a criminal proceeding where substantial rights of an accused may be affected"] [citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134].) As discussed above, the purpose of the *Franklin* hearing is to allow youth offenders to make an "accurate record" of youth-related mitigating factors so that "the Board, years later, may properly discharge its obligation to 'give great weight to' [such] factors [citation] in determining whether the offender is fit" for parole. (See *Franklin*, *supra*, 63 Cal.4th at p. 284.) Given

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[4] In his habeas petition, Villalobos specifically requested the appointment of counsel. The trial court denied the request.

the critical role a *Franklin* hearing plays in determining parole eligibility at a subsequent youth offender parole hearing, we think it clear that the hearing qualifies as a "critical stage" to which the right to counsel attaches.[5] (Cf. *Cortez*, *supra*, 6 Cal.3d. at p. 87 ["an effective presentation of the merits of the petition [to strike a prior conviction] depends . . . upon his having the assistance of counsel to fashion facts and arguments into a persuasive appeal to the court . . ."].)

In sum, the record shows Villalobos was not provided a sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. We therefore direct the trial court to conduct a hearing to allow Villalobos to make such a record.[6]

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[5] The Attorney General appears to agree with this conclusion, conceding in its return a *Franklin* hearing "will . . . likely require the appointment of counsel."

[6] In *Franklin*, the Court held that when "it is not clear" (*Franklin*, *supra*, 63 Cal.4th at p. 284) whether the petitioner had a sufficient opportunity to put on the record the kinds of information contemplated under sections 3501 and 4806, the proper remedy is to remand to the trial court with directions to: (1) make a determination whether the petitioner had such an opportunity, and (2) if the trial court determines the petitioner had no such opportunity, it shall then hold an evidentiary hearing. In this case, however, it is clear that Villalobos did not have any such opportunity. "Thus, rather than direct the trial court to make the determination whether Petitioner had sufficient opportunity at sentencing to make a record of 'information that will be relevant to the Board as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801' [citation], we will direct the trial court to conduct a hearing at

DISPOSITION

The petition for writ of habeas corpus is granted. The trial court is directed to conduct a hearing at which petitioner will be given the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed. Petitioner shall be appointed counsel to represent him in such proceedings.

ZELON, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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which Petitioner will have the opportunity to make such a record." (*Cook*, *supra*, 7 Cal.App.5th at pp. 398-399.)

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