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A Jurisdictional Analysis of *Franklin* Proceedings: A Preliminary Study

A thesis submitted in partial fulfillment
of the requirements for the degree of Master of Arts in
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Abstract

A recent trilogy of United States Supreme Court cases held that sentencing juveniles to life in prison violates the Eighth Amendment in all but the most extreme cases. California responded to this line of cases with the passage of Senate Bill 260 and Penal Code § 4801(c). Senate Bill 260 and Penal Code § 4801(c) mandate that the youthful offender parole board "give great weight to the diminished culpability of youth as compared to adults." Senate Bill 260 also requires that the parole board meet with juvenile offenders before their parole eligibility date and offer individualized recommendations to promote rehabilitation. In 2016, the California Supreme Court directed trial courts to start conducting *Franklin* Hearings for the purpose of allowing sentenced youthful offenders to make a record of youth-related factors relevant to their eventual parole determination. This preliminary study looks at how different jurisdictions in California are responding to *People v. Franklin*. This paper examines whether there are procedural differences between urban versus rural jurisdictions and public defenders versus independent contractors in how *Franklin* Hearings are conducted. This preliminary study concludes by proposing additional research into the *Franklin* Hearing process and whether it is allowing youthful offenders to present an accurate and complete record of youth related mitigation.

Keywords : Franklin Hearing, juvenile offenders, evidence of youthfulness, defense representation, Senate Bill 260, Eighth Amendment

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Introduction

In 2016, the California Supreme Court directed trial courts to start conducting *Franklin* hearings for the purpose of allowing sentenced youthful offenders to make a record of youth-related factors relevant to their eventual parole determination (*People v. Franklin*, 2016). *Franklin* hearings are the product of recent ideological and empirical shifts in how the crimes of youth should be punished. Courts and the legislature affirmed the capacity of youthful offenders to change and the impermanence of their character. This paper will briefly discuss the processing of youthful offenders in the criminal justice system. This background will provide context for the trilogy of Supreme Court cases that addressed Eighth Amendment challenges to juvenile sentences. These cases all contain the fundamental principle that children and young adults are different and should be allowed the opportunity for rehabilitation. This paper will then examine California's response to the *Roper, Graham* and *Miller* decisions, specifically focusing on *Franklin* hearings. This paper will conduct a preliminary examination of how criminal defense practitioners are preparing for and conducting *Franklin* hearings in different jurisdictions in California.

While many contend that California is acting in the spirit of the Supreme Court's decisions, there is limited information as to whether *Franklin* hearings are actually providing youth with a "meaningful opportunity for release" (Mehta, 2016; Eckholm, 2014; Senate Bill No. 260, 2013). *Franklin* (2016) hearings necessitate that the offender has an opportunity to make a record of information that will be relevant to the Parole Board. There is limited material available as to how jurisdictions across California are handling *Franklin* hearings. By conducting surveys of criminal defense attorneys, this paper seeks to determine if there are differences in the quality of the hearings and the variables presented to the trial court. Ultimately, it would be important to analyze what weight these variables are given by the parole board. California gives

the parole board considerable discretion in determining whether youthful offenders will have the opportunity to live a meaningful life outside of prison. If trial courts are not providing a meaningful opportunity for evidence of youth to be presented and if the parole board is not giving this evidence the appropriate weight, California is not complying with the spirit of the United State Supreme Court.

Background

The first juvenile court in the United States was developed in 1899 with the goal of rehabilitating youth (Feld, 1998). The juvenile court "sought to turn juvenile delinquents into productive citizens" (National Research Council and Institute of Medicine, 2001, p. 24). The court contained special legal procedures, services and laws to address behaviors specific to juvenile offenders (Feld, 1998). Judges were tasked with investigating the background and character of delinquent youth (Steinberg, 2008). The juvenile court judge was seen as more of a "father figure than a legal jurist" and was expected to be familiar with the social and psychological aspects of family conflict and complexities of children's problems (National Research Council and Institute of Medicine, 2001, p. 25; Guttman, 1995). In moving children from the adult system to one focused on rehabilitation, juvenile courts rejected the traditional criminological goal of punishment (Feld, 1998). These courts acted as *parens patriae* and intervened to protect children.

The common law doctrine of *parens patriae* assumes the state has both the right and the duty to help and protect those that cannot protect themselves (Coleman & Soloman, 1976). Although Courts have long recognized the constitutional right to family privacy and the notion that "family integrity is best protected when the family is shielded from state intervention, even when that interference is beneficent," *parens patriae* requires the state ensure the safety and well-being of children (Kindred, 1996, p. 521). *Parens patriae* allows the state to intervene in

family matters to prevent criminal conduct or to protect children from harm from their parents (Kindred, 1996). Under the doctrine of *parens patriae*, juvenile courts emerged intending to emphasize treatment over punishment (Feld, 1998). The goals were to minimize the punitive process, increase confidentiality and provide individualized treatment to delinquent youth (Feld, 1998).

The first juvenile courts operated on the premise that adolescents are developmentally different from adults (Steinberg, 2008). There was a significant reconstruction of childhood premised on a belief that it contains distinctive stages "each with characteristic emotions, capacities and needs" (Ainsworth, 1991, p. 1094). The demarcations of childhood were extended to include adolescence (Ainsworth, 1991). Children were seen as "vulnerable, malleable, and in need of adult guidance, training, and control before they could graduate to full personhood, adolescents now became targets of paternal adult attention" (Ainsworth, 1991, p. 1095).

> By categorizing the adolescent as a sub-class of the child rather than as a type of adult, the Progressives fashioned a discrete juvenile justice system premised upon the belief that, like other children, adolescents are not morally accountable for their behavior. (Ainsworth, 1991, p. 1097).

The misbehavior of juveniles was viewed as a manifestation of a social pathology capable of being treated with the "proper diagnosis and treatment" (Ainsworth, 1991, p. 1097).

By 1915, nearly every state had juvenile courts (Liles & Moak, 2015). However, it did not take long before many began to criticize juvenile courts, suggesting that they were too lenient and lacked due process (Feld, 1998). The juvenile justice system confronted a difficult paradox with vastly different ideologies: humanitarians condemned the brutality of the official system, and conservatives claimed the system coddled young criminals (Sutton, 1988). Many became disillusioned with rehabilitative penology and wanted strict accountability for the crimes of

juveniles (Ainsworth, 1991). Other critics of early juvenile courts condemned the lack of procedural safeguards given to children charged with crimes (Mennel, 1972). Some argued depriving juveniles of procedural due process made the treatment worse than the punishment (Guttman, 1995). The philosophy of juvenile courts again started to shift towards accountability viewing "any rehabilitative services or programs provided during incarceration" as "incidental to the punishment meted out" (Ainsworth, 1991, p. 1105). A "just desserts" sentencing model emerged basing the length of incarceration on the punishment rather than the time needed to rehabilitate the offender (Ainsworth, 1991). Juvenile courts started to move away from the benevolent practice of *parens patriae* towards an emphasis on justice and punishment (Ainsworth, 1991).

In the 1960s and 1970s, the United States Supreme Court delivered several rulings making juvenile courts look more like adult courts. These decisions were a "systematic reexamination of the procedural manifestation of the *parens patriae* juvenile court" (Ainsworth, 1991, pp. 1112-3). In *In re Gault* (1967), the Supreme Court mandated attorneys for youth charged with crimes and required procedural due process. *In re Winship* (1970) required proof beyond a reasonable doubt to establish a juvenile adjudication. Although these decisions increased procedural safeguards for youth, they also shifted the focus away from rehabilitation and toward punishment (Reese, 2013).

The 1980s and 1990s experienced a conservative movement to get tough on crime and implement more punitive policies (Liles & Moak, 2015, Steinberg, 2008). The political climate demanded harsh punishments for criminal offenders. In a speech addressing the causes of crime, President Reagan attributed the rise in crime and "growth of a hardened criminal class," to "misplaced Government priorities and a misguided social philosophy" (Reagan, 1982). President Reagan spoke of:

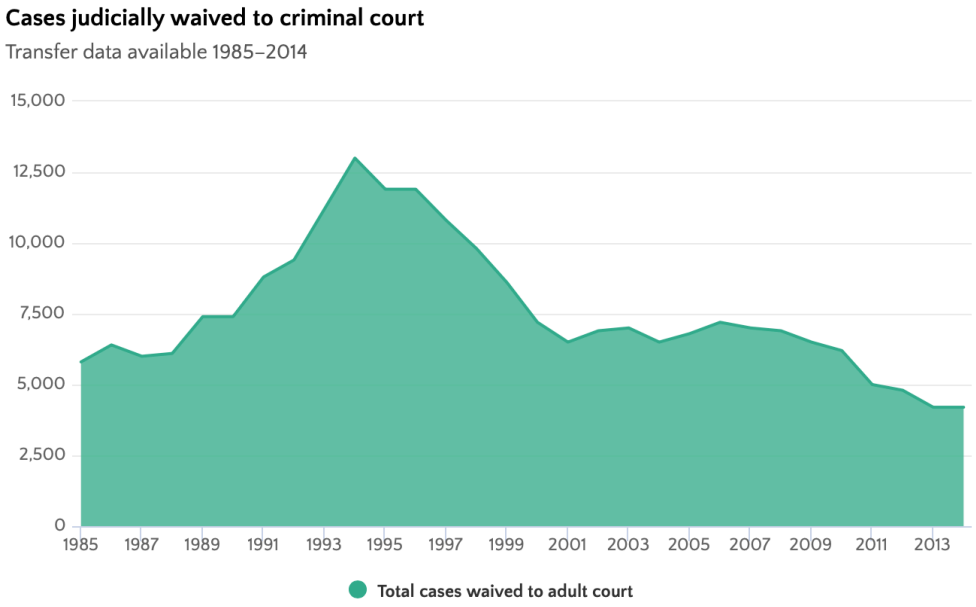
> enduring truths: The belief that right and wrong do matter, that individuals are responsible for their actions, that evil is frequently a conscious choice and that retribution must be swift and sure for those who decide to make a career of preying on the innocent. (Reagan, 1982)

Academics predicted "a wave of ruthless, violent young offenders" (Boghani, 2017). John Dilulio (1995) coined the term "super-predator" as he described children with "remorseless eyes," "vacant stares" and "impulsive violence" that committed crimes in "wolf packs." Dilulio (1995) contended that these juvenile super-predators are "capable of committing the most heinous acts of physical violence for the most trivial reasons." Dilulio's (1995) solution proposed "get-tough law-enforcement strategies" and incarceration. Tragedies such as the Columbine High School massacre in 1999 reinforced many of these viewpoints. Policy changes shifted the focus away from the rehabilitation of juvenile offenders to punishment. The targeting of juveniles for "societal retribution" was predicated on perceptions that juvenile crime and violence reached "catastrophic levels" (Guttman, 1995, p. 508).

During this "get-tough" era, many states expanded the number of juveniles who could be transferred to adult court (Feld, 2018). "Adult crime, adult time" reflected the societal view that youth's culpability is equated with that of adults (Feld, 2018). Legislation lowered the age for transfer to adult court, expanded the number of offenses that required transfer to adult court and strengthened the ability of the prosecution to make charging decisions that determined whether a youth will be treated as an adult (Feld, 2018). The number of juveniles transferred to adult court dramatically increased and many youths started receiving adult court penalties. During this period, juveniles were transferred to adult court for a variety of offenses including drug law violations and property offenses (Guttman, 1995). According to Juvenile Justice Geography, Policy, Practice & Statistics, in 1994, approximately 13,000 children were judicially transferred

to adult court. Table 1 represents the number of cases transferred to adult court between 1985 and 2014. These numbers do not include the number of children prosecuted in adult court through direct file mechanisms.

Table 1.



Note. Reprinted from Juvenile Justice Geography, Policy, Practice & Statistics. Retrieved July 2, 2019 from http://www.jjgps.org/jurisdictional-boundaries#transfer-trends?&state=52.

The criminal justice system was less concerned with the rehabilitation of youthful offenders and sought to suppress crime through punishment, deterrence and incapacitation (Feld, 2018).

Recent Changes

In the last 15 years, the climate of the criminal justice system again shifted in favor of young offenders. This change partially represented the transformation of public sentiment away from viewing juvenile offenders as violent "super-predators" and toward the understanding that juveniles merit "unique consideration under the law – and that punishment should perhaps be tailored to development and reform" (Scialabba, 2016). In a series of United States Supreme Court cases, the vulnerability of youth and the presumption of diminished capacity were

emphasized as justifications for treating juvenile offenders differently from adults. The Court relied on the emerging research on neurobiological, cognitive and psychosocial maturation through the end of adolescence (Steinberg, 2009; Steinberg & Scott, 2003).

Previously, most studies compared adolescents with children; however, research evolved to demonstrate that adolescence is a unique stage in development that produces risky behaviors and suboptimal decision making (Steinberg, 2008; Casey, Getz & Galvan, 2008).

> Adolescence is a time when sex, drugs, *very* loud music, and other high-stimulation experiences take on great appeal. It is a development period when an appetite for adventure, a predilection for risks, and a desire for novelty and thrills seem to reach naturally high levels. (Dahl, 2004, pp. 7-8)

Risk taking behavior is caused by the interaction between two separate neurobiological systems: the socioemotional system and the cognitive control system (Steinberg, 2008). Some adolescents are more prone to take risks than others based on individual differences in neural responses to reward (Casey et al., 2008). Even at 18-years of age, adolescents are immature in their emotional and psychosocial development (Steinberg, 2008). Youth are more susceptible to peer influences, disproportionately concerned about short term goals and consequences, over-reactive to impulses, and prone to emotional responses (Steinberg, 2008).

Sommerville and Casey (2010) examined several studies that discussed the developmental neurobiology of adolescence. The traditional view contended that adolescent risky behavior was the result of immature cognitive development; however, emerging research showed that adolescents have a less mature cognitive control system that creates an imbalance in the ability to learn rewarding cues in their environment (Sommerville and Casey, 2010). According to Cohen & Casey (2014), recent scientific studies propose that changes in the refinement of competing brain activity cause adolescents to be more reactive in emotionally

charged situations. The research on the diminished cognitive capacity of young adults in negative emotional situations suggests that sentencing and punishment should be informed by developmental considerations and should be used as a mitigating factor (Cohen, Bonnie, Taylor-Thompson & Casey, 2016).

Not only are adolescent offenders unique in their brain development; but they are also more vulnerable to outside influences and likely to have encountered distinct traumatic life experiences. The immaturity of adolescents makes them more susceptible to coercive circumstances such as "provocation, duress, or threat" (Steinberg & Scott, 2003, p. 1011) Negative influences are more transitory for adolescents as they are still forming their personal identity (Steinberg & Scott, 2003). Juveniles involved in the criminal justice system are also more likely to have experienced traumatic life experiences. In 2012, The Sentencing Project conducted a survey of people sentenced to life for crimes they committed as juveniles (Nellis, 2012). The results of the survey showed that 79% of these individuals witnessed violence in their homes on a regular basis (Nellis, 2012). Thirty-two percent grew up in public housing and 62.8% perceived their neighborhood to be unsafe (Nellis, 2012). Less than half of the youth were attending school at the time of their offense and 40% were enrolled in special education classes at some point (Nellis, 2012). Rates of abuse were high with almost half of the youth being physically abused (Nellis, 2012). The rates of abuse were even higher among girls, with 80% reporting physical abuse and 77% reporting sexual abuse (Nellis, 2012). Table 2 depicts the rates of childhood violence exposure reported by juvenile lifers.

Table 2.

Childhood Violence Exposure Reported Among Juvenile Lifers

	Number	Percent "Yes"
Physical Abuse	730	46.9
Among Girls	35	79.5
Sexual Abuse	316	20.5
Among Girls	34	77.3
Witnessed Violence at Home	1,239	79.0
Among Girls	37	84.1

Note. Reprinted from Nellis, A. (March, 2012) The Lives of Juvenile Lifers: Findings from a National Survey, The Sentencing Project. Retrieved June 28, 2019 from https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf.

"Although it does not excuse their crimes, most people sent to prison for life as youth were failed by systems that are intended to protect children" (Nellis, 2012, p. 2).

Recognizing the research on the uniqueness of adolescent development and juvenile offenders' distinct life experiences, a series of United States Supreme Court cases addressed the sentences of juveniles under the Eight Amendment's prohibition of cruel and unusual punishment (*Roper v. Simmons*, 2005; *Graham v. Florida*, 2010; *Miller v. Alabama*, 2012). These cases all recognized that children are different from adults and have greater potential for rehabilitation. Previous cases cited juveniles' potential for rehabilitation as a justification for limiting the procedural safeguards established by *Gault* (1967) and *Winship* (1970). For example, in *McKeiver v. Pennsylvania* (1971) the court held juveniles are not entitled to a jury trial as it would equate the adjudicative phase of the juvenile proceeding with a criminal trial and ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention" contemplated by the juvenile court system (p. 550). In *Schall v. Martin* (1984), the United States Supreme Court

used paternalism and its role as *parens patriae*, to allow preventive detention of juveniles for a crime that would not warrant detention for adults. Justice Rehnquist reasoned:

> Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity -- both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child. (*Schall v. Martin*, 1984, p. 266)

Rather than using the vulnerability of children to limit access to constitutional protections, *Simmons* (2005), *Graham* (2010) and *Miller* (2012) took an important step in achieving a balance of due process and paternalism. These cases recognized the unique life experiences of juvenile offenders and their greater need for protection.

In 2005 the United States Supreme Court held in *Roper v. Simmons*, that it was both cruel and unusual punishment to impose the death penalty for crimes that were committed when the defendant was under the age of 18. The Court cited the social and neurological research that described juveniles' lack of maturity and underdeveloped sense of responsibility, the vulnerability of juveniles to negative influences and outside pressures and juveniles' lack of a fully developed character (*Roper v. Simmons*, 2005). The Court noted that there is a greater possibility that a minor's character deficiencies will be reformed and that most adolescents stop engaging in risky activities as they enter adulthood (*Roper v. Simmons*, 2005).

Five years later, in *Graham v. Florida* (2010) the Supreme Court extended the ruling in *Roper v. Simmons* (2005) by prohibiting life without parole sentences for juveniles who commit non-homicide offenses. The Court held that the characteristics of the youth and nature of the offense must be considered. None of the four recognized penological goals of retribution, deterrence, incapacitation or rehabilitation provide adequate justification for a life without parole

sentence for a nonhomicide juvenile offender (*Graham v. Florida*, 2010). The Court noted that a juvenile offender sentenced to life without parole will serve more years and a greater percentage of his or her life in prison than an adult offender (*Graham v. Florida*, 2010). *Graham v. Florida* (2010) did not mandate that states guarantee eventual freedom to a juvenile convicted of a nonhomicide crime; however, it did require that youth have a meaningful opportunity to obtain release based on established maturity and rehabilitation. The court noted, "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation" (*Graham v. Florida*, 2010, p. 28). In some ways the Supreme Court's reasoning in *Graham* is not that much different from the beliefs of the founders of the first juvenile court in 1899 (Henning, 2012). Progressive reformers intuitively understood that children were "physically, mentally, and morally different from adults and society should respond differently to their behavior" (Henning, 2012, p. 19). *Graham* applied current developmental research to establish a balance of due process and paternalism in resolving the treatment of children in the courts (Henning, 2012).

In 2012, the United States Supreme Court held in *Miller v. Alabama* that mandatory life without the possibility of parole sentences for juvenile homicide offenders violated the Eighth Amendment's ban on cruel and unusual punishments. In *Miller v. Alabama* (2012), the defendant, Evan Miller, was 14 years old when he and a 16-year old boy got in a fight with a neighbor. The two boys beat the neighbor and set his trailer on fire (*Miller v. Alabama*, 2012). The neighbor died of smoke inhalation (*Miller v. Alabama*, 2012). At sentencing, Evan Miller was prevented from presenting mitigating evidence and was sentenced to the mandatory sentence of life without the possibility of parole (*Miller v. Alabama*, 2012). Justice Kagan delivered the opinion of the court and stated that children are a specific group of offenders who are

constitutionally different from adults, particularly for sentencing (*Miller v. Alabama*, 2012). Justice Kagan discussed four significant differences between juveniles and adults: lack of maturity and responsibility, vulnerability to negative influences, lack of control over their environment, and the impermanent nature of a juvenile's character (*Miller v. Alabama*, 2012). *Miller* (2012) referred to mandated sentencing practices for homicide offenders and how they failed to take into account how children are different. The failure to acknowledge age and other mitigating factors prevents consideration of proportionality, so the state is prevented from proceeding as though they were not children (*Miller v. Alabama*, 2012). Life without parole is essentially a death sentence; therefore, *Miller* requires that trial courts conduct an individualized sentencing that accounts for the factors that potentially influenced the youth (Liles & Moak, 2015).

Following the decision in *Miller v. Alabama* (2012), life without parole may only be imposed on a juvenile convicted of homicide, after considering youth-related mitigating factors, including the juvenile's age, immaturity, vulnerability to negative influences, and capacity to change. The sentencing court must make a finding that a juvenile is "irreparably corrupt" before life without the possibility of parole be imposed. In *Montgomery v. Louisiana* (2016), the United States Supreme Court made the requirements outlined in *Miller* retroactive to those sentenced prior to 2012.

This series of Eighth Amendment cases all affirmed the diminished culpability of juvenile offenders. However, these cases provided minimal guidance to state courts as to how to handle youth who commit serious offenses (Annitto, 2014, Caldwell, 2016, Lerner, 2012). In *Graham* (2010), the Supreme Court intentionally left the term "meaningful opportunity to obtain release" vague, reasoning, that it should be left up to the States "to explore the means and

mechanisms for compliance" (*Graham v. Florida*, 2010, p. 75; Caldwell, 2016). Justice Thomas predicted in his dissent that the decision's ambiguity "will no doubt embroil the Court for years" as the majority failed to specify what a "meaningful opportunity" entails (*Graham v. Florida*, 2010, p. 123; Caldwell, 2016). Lerner (2012) outlines the various questions *Miller v. Alabama* left open and argues the Court's decision was "riddled with uncertainties that will spawn more litigation" (p. 27). *Miller* failed to establish how courts were to consider the developmental and neurological difference of juveniles when dispensing long sentences (Levick & Schwartz, 2013). The Supreme Court's demand for proportionality "left the States to wrestle with substantive questions about concepts as nebulous as diminished culpability, mitigation, and amenability to rehabilitation, and as technical as retroactivity" (p. 968). This resulted in "an assortment of practical problems to be resolved by legislatures, practitioners, and correctional administrators" (Levick & Schwartz, 2012, p. 369).

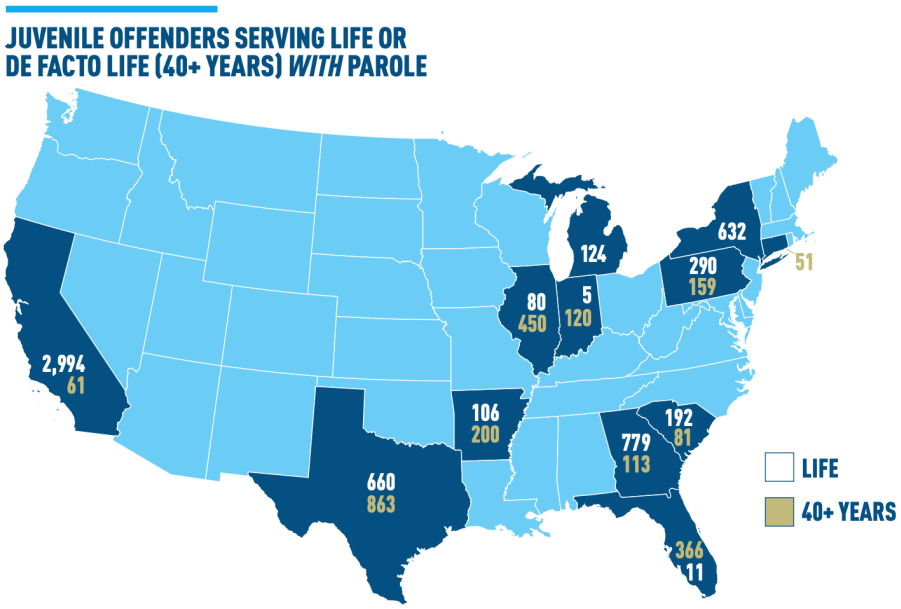
States experimented with ways to comply with the Supreme Court's mandates; legislative and legal reactions varied drastically (Martinson, 2012; Kinell, 2013). The proportionality jurisprudence of *Roper*, *Graham* and *Miller* resulted in states employing uneven and, in some cases, obstructionist responses (Moriearty, 2017). Reactions essentially fell into two categories: a willingness to embrace the concept that children are fundamentally less culpable than adults, or a desire to circumvent the requirements of *Miller* and exploit the Court's vagueness (Martinson, 2012). Some states responded by changing their laws and parole processes for juvenile offenders, recognizing youthful offenders are fundamentally different from adult offenders and should be afforded the opportunity to demonstrate their rehabilitation. For example, according to the Sentencing Project, 21 states and the District of Columbia completely banned life without the possibility of parole sentences for juveniles (Rovner, 2018). Other states determined compliance with *Graham* and *Miller* can be satisfied through the existing parole process (Annitto, 2014).

"This raises critical questions about whether parole boards, judges or appointed commissions are best equipped make release decisions" and whether youth are actually being afforded a "meaningful opportunity for release" (Moriearty, 2017, p. 1010).

California

As of 2015, in 12 states, approximately 8,300 people were serving a life or de facto life (40 or more years) sentence for offenses they committed as juveniles (Mehta, 2016). Over 3,000 of those people were incarcerated in California (Mehta, 2016). An additional 15,605 California prisoners were serving life sentences for offenses committed when they were between the ages of 18 and 25 years old (Mehta, 2016).

Table 3.



Note. Reprinted from Mehta, S. (2016) False Hope: How Parole Systems Fail Youth Serving Extreme Sentence, American Civil Liberties Union. Retrieved June 30, 2019 from https://www.aclu.org/report/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences. p. 35

Some have described California as a leader in juvenile lifer parole reform and one of the few states acting in the "spirit of the Supreme Court rules" (Mehta, 2016; Eckholm, 2014).

According to the American Civil liberties Union's National Survey, California has done the most to give juvenile lifers a meaningful opportunity for release (Mehta, 2016). Several states, including West Virginia, Massachusetts and Connecticut, have followed California's example and adopted similar practices. Given California's large number of young offenders sentenced to lengthy periods of incarceration, and its image as the "forefront of a legislative trend" a critical examination of the state's response to the trilogy of Eighth Amendment decisions is warranted to determine whether California's efforts conform with intent behind *Roper, Graham* and *Miller* (Caldwell, 2016, p. 6).

California's response to *Roper, Graham* and *Miller* has relied largely on the parole board to determine whether juvenile offenders serving lengthy sentences will have the opportunity for release (Bell, 2018). In 2013, California passed Senate Bill 260[1] which initiated juvenile offender release reform and has been described as more expansive than the requirements of *Graham* or *Miller* (Annitto, 2014). Senate Bill 260[2] and Penal Code § 4801(c) mandate that the youthful offender parole board "give great weight to the diminished culpability of youth 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." Senate Bill 260 also requires that the parole board meet with juvenile offenders before their parole eligibility date and offer individualized recommendations to promote rehabilitation. Senate Bill 260 has created more realistic opportunities for juvenile offenders to be released (Caldwell, 2016). California Penal Code § 3051 allows for release during the offender's fifteenth year of incarceration if the youth was sentenced to a determinate term. If the youthful offender received a life term of less than 25

[1] Pursuant to Penal Code § 3051, Youthful offender parole suitability procedures do not apply to life without parole sentences for a controlling offense that was committed after the person was 18 years old, sentences under "three strikes" (§ 1170.12) and "one strike" life terms for certain sex offenses (§ 667.61) (Penal Code 3051(h).
[2] Senate Bill 260 addresses Youthful Parole Hearings and amended California Penal Code §§ 2041, 3046 and 4801 and enacted § 3051.

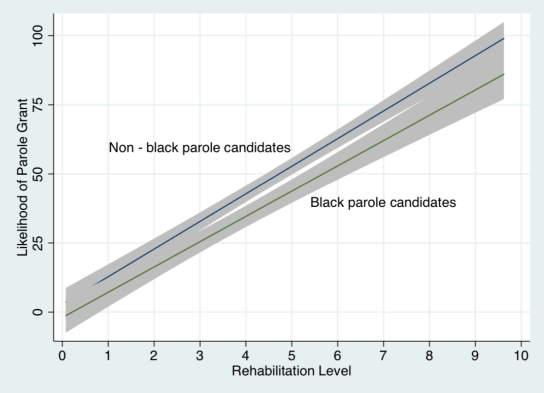
years to life, the offender could be released during the 20th year of incarceration (Penal Code § 3051). If a term of 25 years to life or longer is imposed, the youth is eligible for release during the 25th year of incarceration (Penal Code § 3051). During the first year of youthful parole hearings, the parole grant rate was eleven percent higher than for non-youth offenders, suggesting that the Board may be moving in a direction that gives youthful offenders an opportunity for a "meaningful life after prison" (Caldwell, 2016, p. 8). California explicitly treats youth as a mitigating factor in the decision of whether to grant parole; this is different than other states that treat being under 18-years old as an aggravating factor that increases the risk assessment score (Mehta, 2016). The California Department of Corrections and Rehabilitation continues to use a classification system that weighs an "offender's young age and a lengthy sentence" as factors that warrant a higher security classification (Caldwell, 2016, p. 288). Rehabilitative options are more limited for those with a higher security classification; therefore, young offenders often have less access to rehabilitative programing (Caldwell, 2016). Youthful offenders must show the parole board that they participated in rehabilitative programing in order to qualify for release (Caldwell, 2016).

Bell (2018) addressed whether allowing the California Parole Board to determine whether a youthful offender will live or die in prison is acting in the spirit of Supreme Court's trilogy of cases or whether their decision-making is "arbitrary and capricious" (p. 6). Bell (2018) conducted an empirical study of 426 juvenile lifer parole decisions in California. Descriptive statistics and a multivariate regression were used to examine transcripts from all juvenile lifer parole hearings during an eighteen-month period in 2014 and 2015 (Bell, 2018). Of the 426 juvenile lifers, 176 candidates were granted parole and 250 candidates were denied parole (Bell, 2018). Two variables were selected: outcome measures and factors predicted to influence whether parole was granted (Bell, 2018). Outcome measures included whether parole was

denied, if so, the number of years until the next parole hearing and the Board's justification for the decision (Bell, 2018). Predicted factors included considerations determined by law, factors attorneys hypothesize may influence parole decisions and factors identified as significant to parole based on prior studies (Bell, 2018). Results show significant differences in the parole grant rate between racial groups (Bell, 2018). Specifically, African Americans were granted parole at lower rates than other racial groups. Results also showed that variables that measured rehabilitation do have a significant impact on the decision to grant parole, providing evidence that parole decisions are responsive to efforts of offender rehabilitation (Bell, 2018). Despite rehabilitative efforts designed to make the granting of parole more likely, rates were still lower for African American candidates with the same rehabilitative score as non-African American candidates (Bell, 2018). Table 4 demonstrates this difference. Retaining a private attorney also tended to improve the chances of parole (Bell, 2018). Notably, despite the statutory mandate that the parole board shall give "great weight to the diminished culpability of youth," none of the variables that related to the candidate's youth had a statistically significant impact on the risk assessment score or decision to grant parole (Senate Bill 260; Bell, 2018). Bell (2018) concluded that the parole board has more control over the time an individual spends in prison than the legislature and the court, "[t]he back-end release mechanism is in this sense more significant than the initial sentence determination" (p. 69). The parole board's decisions may focus too much on illegitimate variables and not be sufficiently responsive to legitimate variables (Bell, 2018).

Table 4.

Influence of Race on Likelihood of Parole by Rehabilitation Level
(linear trend lines with 95% confidence interval)



Note. Reprinted from Bell, K. (2018). A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions. *Forthcoming in Harvard Civil Rights-Civil Liberties Law Review*.

Reese (2013) examined Senate Bill No. 9 to determine whether the recent legislation will have any practical impact on juvenile offenders sentenced to life without the possibility of parole. Senate Bill No. 9 allowed juveniles to petition the court for a resentencing after serving 15 actual years of their sentence (Reese, 2013). If successful, a life without parole sentence could be reduced to a sentence allowing for the possibility of parole (Reese, 2013). Reese (2013) contended that Senate Bill No. 9 places "substantial procedural hurdles before prisoners can seek even a mere possibility of a parole" (p. 929). Because the California parole system essentially determines when individuals will be released from prison, the recent statutory reforms may not have the desired impact (Reese, 2013). Reese's conclusion echoes the concerns expressed by Bell (2018), that the power of the parole system may diminish the intended developments of the recent statutory changes.

In determining whether the parole process in California is providing juvenile offenders with a constitutional sentence under the Eighth Amendment, they must have a "meaningful opportunity for release" (*People v. Franklin*, 2016, p. 286). This paper endeavors to examine the

recent California Supreme Court decision, *People v. Franklin* (2016) and determine whether *Franklin* hearings are allowing youthful offenders to present evidence that will promote "a meaningful opportunity for release." Following *Miller* and the implementation of Senate Bill No. 260, the California Supreme Court decided *People v. Franklin* (2016). *People v. Franklin* (2016) involved a challenge to a life sentence arguing that it violated *Miller* as it constituted violation of the Eighth Amendment ban on cruel and unusual punishment. In *Franklin*, the defendant was sentenced to 50 years to life for a murder he committed when he was 16 years old. On appeal Franklin contended that the youthful parole hearing system is not in compliance with *Miller's* requirement that a judge factor in the relevance of his youth for sentencing (*People v. Franklin*, 2016). The California Supreme Court did not agree and held that because there was the prospect of early parole consideration under California Penal Code §§ 3051 and 4801(c), the defendant's right to have this information presented does not require a resentencing hearing under *Montgomery v. California* (2012). However, the Court held that "youthful offenders"[3] must be afforded an adequate opportunity to present a record of mitigating evidence tied to their youth (*People v. Franklin*, 2016). This mitigation should include cognitive ability, character, and social and family background. Such information may include psychological evaluations, social histories and witness testimony. The prosecution may also present evidence that demonstrates the offender's maturity or culpability (*People v. Franklin*, 2016). The purpose of the information is to allow the assembly of evidence of the juvenile offender's characteristics and circumstances at or near the time of the offense (*People v. Franklin*, 2016). The right to have a record of this information applies to current cases, as well as those previously adjudicated (*People v. Perez*,

[3] Assembly Bill 1308 went into effect January 1, 2018 and expanded the age for parole eligibility in Penal Code §§ 3051 and 4801 to include anyone 25 or under at the time of the offense. Youthful offenders now include those sentenced to a long determinate or indeterminate term for a crime committed before they turned 26-years-old (*People v. Perez*, 2016).

2016). Under the authority of California Penal Code § 1203.01, *In re Cook* (2019) extended the remand procedures outlined in *Franklin* to sentenced prisoners whose convictions were final. The "evidence preservation process should apply to all youthful offenders now eligible for such a parole hearing" (*In re Cook*, 2019).

People v. Franklin upheld the constitutionality of a juvenile receiving a life sentence provided that the parole hearing affords a "meaningful opportunity for release." The parole board decides whether youthful offenders will die behind bars or will at some point be able to rejoin society (Bell, 2018). California Penal Code §§ 3051 and 4801 outline the procedure for youthful parole hearings thereby establishing the mechanism for juveniles to have a meaningful opportunity to obtain release upon a showing of maturation and rehabilitation (*People v. Franklin*, 2016).

Given the requirements of Penal Code §§ 3051 and 4801 and the remand procedures outlined in *Franklin,* counties across California are determining how to approach compiling evidence of youthful mitigation for future consideration by the youthful offender parole board. According to the Prison Law Office (2018), procedures for *Franklin* hearings differ greatly across California. Some counties are conducting actual hearings, others are submitting documents to the original sentencing court for submission to the parole board (Prison Law Office, 2018). In order to understand the variability in *Franklin* remand procedures across counties, it is important to understand the differences in indigent defense representation in California.

Indigent Defense Representation

There are significant disparities in how indigent defense representation is provided to defendants (Benner, 2010). Many large urban jurisdictions have government-funded public

defender offices; whereas, other jurisdictions contract with members of the local bar association to represent defendants on a case-by-case basis (Harley, Miller & Spohn, 2010). Some jurisdictions use a combination of the two approaches. There has been a growing movement towards the privatization of indigent criminal representation that some believe "threatens the very existence of competent and efficient institutional Public Defender offices" (Benner, 2010, p. 175). According to the Constitution Project formed by the National Right to Counsel Committee (2009) there are several barriers to providing quality indigent defense representation including: inadequate funding of public defenders, inconsistent standards, incompetent or inexperienced counsel, late appointment of counsel, disparity in between urban and rural representation, excessive caseloads, lack of resources and understaffing.

As of 2008, 33 of California's 58 counties had a public defender's office. In 24 counties defense services are provided by contractual members of the local bar (Benner, 2010). Most of these counties have a population of less than 100,000 people. Benner (2010) discusses the obvious disparity between counties in their ability and sometimes willingness to fund indigent defense representation. In an effort to keep costs low, competitive bidding can result in an inadequate number of attorneys and insufficient training, supervision and support (Benner, 2010). Benner (2010) notes the quality of representation between flat fee contract attorneys and public defenders can also vary greatly. Spending on indigent defense is often skewed towards those counties with more local resources (Carroll, 2010). Some jurisdictions use an assembly-line approach to representation and pass the client off to another attorney for the next stage in the case (Carroll, 2010). This approach inhibits the attorney-client relationship, discourages accountability in representation and increases the likelihood of oversights; nevertheless, many counties argue they have no choice but to employ this method given their limited infrastructure and the costs of indigent representation (Carroll, 2010).

Funding for defense representation at parole hearings is even more limited. Parole attorneys in California receive $400 total per hearing regardless of the length of the hearing or complexity of the case (Bell, 2018). Parole attorneys do not receive additional compensation for meeting with the client, collecting documents or supplementing the record with mitigating documents or expert opinions (Bell, 2018). Given the limited resources and the mandates of *Franklin* and *Miller*, it is largely in the hands of trial counsel to collect and prepare evidence of youthfulness.

Franklin **Hearings**

Franklin hearings are based on the premise that trial counsel will investigate and present mitigation for youthful offenders to be considered at a future youthful parole hearing (*People v. Franklin*, 2016). Defense attorneys are being asked to have an understanding of the neuro-developmental foundation of adolescence and understand the relevance of trauma in childhood development. Defense representation must be provided with adequate training and receive sufficient resources to accomplish these goals.

The purpose of this paper is to present some initial data on how indigent defense representation in California is responding to *Franklin* and whether there is disparity across jurisdictions in how evidence of youthfulness is presented to the trial court. This research represents a first step in examining the uniformity of *Franklin* procedures across California and in determining the effectiveness of the *Franklin* hearing process. Ultimately it will be important to determine what weight the parole board gives the material provided at *Franklin* proceedings. The Parole Board could elect to use evidence of childhood trauma as a reason to deny or grant parole (Bell, 2018). For example, Bell found in her study that one commissioner cited a candidate's "unstable and tumultuous social history" and parental abuse as a basis to deny parole

(Bell, 2018, p. 77). In another case, the same commissioner cited the candidate's childhood instability, stating that the individual had "limited control" over their environment, as a basis to grant parole (Bell, 2018, p. 77). California gives the Parole Board considerable power in determining whether a youthful offender will have the possibility of reentering society (Bell, 2018; Reese, 2016). The *Franklin* (2016) decision upheld the constitutionality of the Board's power.

> So long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. (*People v. Franklin*, 2016, p. 27)

Thus, the *Franklin* (2016) decision relies on trial courts to receive "an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense" and on the Board's ability to give this evidence the appropriate weight (p. 27).

Research Questions

Based on the California Supreme Court's decision in *People v. Franklin* (2016), many youthful offenders are eligible for a *Franklin* hearing. Counties have responded by compiling a record of mitigating evidence tied to the youthfulness of the offender. The current study conducts a preliminary examination of the *Franklin* procedures employed by indigent defense representation by addressing several questions. First, this preliminary study examines whether there is a difference in how urban and rural jurisdictions in California prepare for and conduct *Franklin* proceedings.

Hypothesis I:

H_0: There is no difference between rural and urban jurisdictions in the procedures for handling *Franklin* proceedings.

H_1: Urban jurisdictions in California will have more procedures in place for handling *Franklin* proceedings relative to rural jurisdictions.

Second, this preliminary investigation examines whether public defender agencies, when compared to contract panel attorneys, are more likely to have formal procedures in place for handling *Franklin* proceedings.

Hypothesis 2:

H_0: The is no difference between public defender organizations and independent contract attorneys in the procedures for handling *Franklin* proceedings.

H_1: Public defender organizations are more likely to have formal procedures in place for handling *Franklin* proceedings relative to independent contract attorneys.

Methods

The target population for the present research was criminal defense attorneys in California that conduct *Franklin* proceedings. An internet search was conducted to determine who provided indigent defense representation in each of the 58 counties in California. While many counties had a public defender agency, smaller counties typically utilized independent contractors. Telephonic contact was attempted with at least one person from each county to determine who handled the *Franklin* proceedings for that county. Efforts were made to recruit

participants from small and large counties in order to best measure the differences between urban and rural settings.

The Survey

The survey consisted of 72 questions. There were 16 questions designed to obtain demographic or background information about the respondent, followed by 12 questions involving general information about the number of *Franklin* hearings conducted within the office, and the number conducted by the respondent. Questions were then presented which queried the respondent about the format and nature of the *Franklin* proceedings within their respective offices. These questions included what documents were reviewed, whether experts were hired, and the type of expert utilized, and the respondent's objectives for the *Franklin* hearing.

After obtaining the approval of the University of Nevada – Reno Institutional Review Board, the survey was placed in Qualtrics. An email was sent to the identified contacts inviting them to participate in the research. In hopes of obtaining a larger sample, the email also allowed respondents to forward the survey link to other defense attorneys. Initial survey questions provided participants with an informed consent advising them participation was voluntary. The survey was active February 25, 2020 through March 25, 2020.

Variables

The study examined the impact of the population size of the county and type of defense agency on procedures related to the *Franklin* hearing process. The population of counties was coded at the ordinal level. Population was measured using the following categories: "Less than 50,000," "50,000-199,999," "200,000-499,999," "500,000-799,999," "800,000-1,499,999," "1,500,000-1,999,999" and "2,000,000 or more." The type of agency was divided into groups using the following two categories: local (e.g. county or city) public defender office or agency,

and firm or nonprofit organization under contract with a state, local, or tribal jurisdiction to provide counsel for indigent defendants.

The following four variables were used in the multivariate analysis: existence of a formal office procedure for handling *Franklin* hearings; how eligible clients are identified; the nature of the preparation for *Franklin* hearings and the format of the *Franklin* proceeding within the trial court.

Results

Fifty-seven attorneys were emailed the survey; 11 participated in the study, yielding a response rate of approximately 20%. Respondents were nearly evenly split according on gender line with five respondents reporting to be male and six reporting to be female. The mean age was 45.7, with a range of 34 to 69 years of age. Respondents came from counties of various sizes. Eighteen percent (2) of respondents came from counties with a population between 50,000-199,999 an additional two came from counties with a population between 500,000-799,999. Additionally, eighteen percent (2) respondents came from counties with a population between 800,000-1,499,999, nine percent (1) came from counties with a population between 1,500,000-1,999,999, and the remaining 36% (4) of the respondents came from counties with a population of 2,000,000 or more. While the response rate was less than ideal, the range of county size allows this research to statistically compare the differences between large and small counties.

Table 5.

Population of Jurisdictions

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	50,000-199,999	2	18.2	18.2	18.2
	500,000-799,999	2	18.2	18.2	36.4
	800,000-1,499,999	2	18.2	18.2	54.5
	1,500,000-1,999,999	1	9.1	9.1	63.6
	2,000,000 or more	4	36.4	36.4	100.0

Total	11	100.0	100.0	

Eight respondents worked for state or county public defender agencies, while three respondents worked for firms or nonprofit organizations under contract to provide counsel to indigent defendants. The size of the offices varied. One respondent worked in an office with two attorneys, in contrast, one respondent from a larger jurisdiction worked in an office with up to 250 attorneys. This broad distribution yielded a mean of 117 attorneys, with a standard deviation of 108. Respondents reported working in their current position between five and thirty-one years with the mean being 12.5 years. Seven respondents reported having previous legal experience before their current position. The average annual salary was between $100,000-$200,000. Reported caseloads varied greatly, with the lowest reporting seven cases and the highest reporting 400. The mean was 83 cases with a standard deviation of 121.3.

Existence of an Office procedure

Open ended questions were included in the survey to ascertain more operational details about the offices being studied; these findings were qualitative and thus were not included in the statistical analyses. One of the contract attorney respondents from a relatively small county (50,000-199,999) indicated that they are notified of all new appointments by the court and they did not know what *Franklin* proceedings were. The Chief Public Defender in a county with a population less than 50,000 indicated that there have not been any *Franklin* Hearings in that county. A firm contracting to provide public defenses services to a county with a population between 200,000-499,999 reported no one in the office handles *Franklin* proceedings. Another firm that contracts to provide defense services to a county with a population between 200,000-499,999 reported they had never heard of *Franklin* proceedings.

The existence of an office procedure for how to handle Franklin proceedings was measured as a dichotomous variable (1 = yes, 2 = no). Survey results reported six respondents

had an office procedure in place for how to handle *Franklin* Hearings, and four respondents reported that there was no such procedure within their office. One respondent did not answer this question. A linear regression was performed to determine the impact of population of on the likelihood of having an office procedure for how to handle *Franklin* Hearings. The R^2 for how much office procedure can be explained by population was 64.8%. The p value was .003.

Table 6.

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.829[a]	.688	.648	1.016

a. Predictors: (Constant), Franklin Procedure

Table 7.

ANOVA[a]

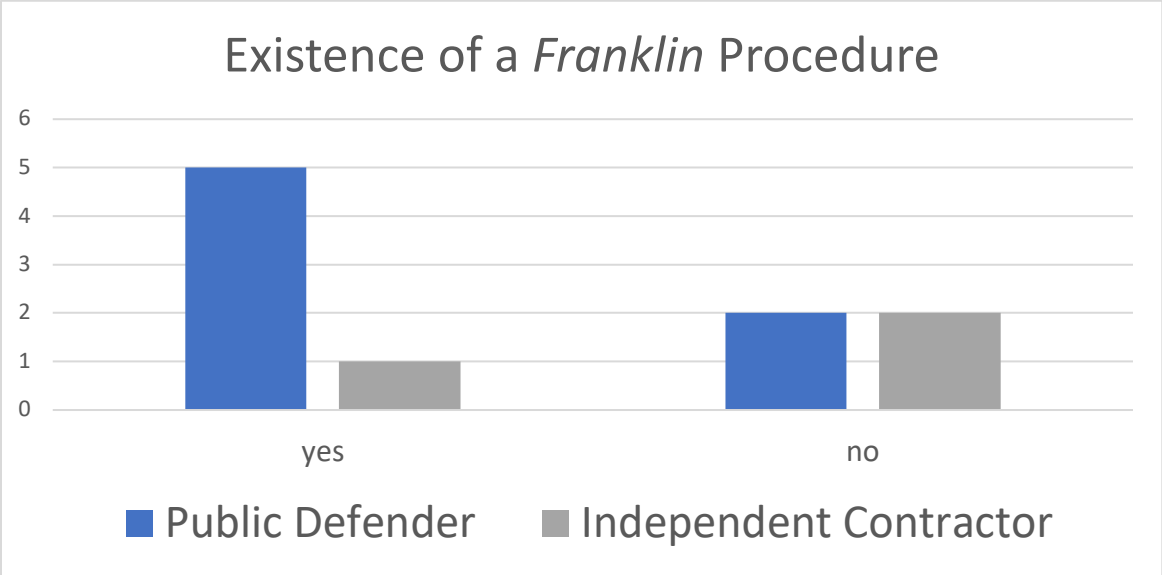
Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	18.150	1	18.150	17.600	.003[b]
	Residual	8.250	8	1.031		
	Total	26.400	9			

a. Dependent Variable: Population

b. Predictors: (Constant), Franklin Procedure

A cross-tabulation was preformed to determine whether there was a relationship between the type of office and whether the office had a *Franklin* hearing procedure in place. The results indicated that five of the seven public defenders had an office *Franklin* procedure while only one of the three independent contractors reported having an office procedure for addressing *Franklin* proceedings. These preliminary results suggest that it is more likely that public defender agencies will have formal procedures in place for how to handle *Franklin* hearings.

Table 8.



Identification of Eligible Clients

A public defender from a county with a population between 50,000-199,999 indicated that eligible clients are identified by "wait[ing] for the sentenced clients to contact us or be court appointed following the client filing something with the court." Another public defender from a county with a population of 2,000,000 or more indicated eligible clients are identified "Via list from CDCR, combined with our internal case management system to identify those who are Youthful Offenders and received more than 18 years determinate or a life sentence." An independent contractor from a county with a population between 500,000-799,999 who had personally handled *Franklin* hearings reported the process of identifying eligible clients as follows: "My understanding is that they are youthful offenders facing life. I may conduct one if there is a life sentence imposed however regardless of age." Given the range of these responses, it appears that significant disparity exists in how eligible clients are identified.

Preparation

Respondents reported considerable variation in preparation time for *Franklin* hearings. One public defender from a county with a population of 2,000,000 or more reported it took three months from assignment until the hearing. That attorney reported spending 75 hours preparing for the typical *Franklin* hearing. An independent contractor from a county with a population between 500,000-799,999 reported the number of months from case assignment to completion varied depending on the case, but they typically spent 4-5 hours preparing for the hearing. A public defender from a county with a population between 500,000-799,999 reported it taking four months or more from assignment to completion and spending 60 hours or more preparing for the hearings.

The majority of respondents reported personally meeting with the client 1 or 2 times prior to the hearing. Two respondents indicated they did not personally meet with clients. Most attorneys reported having the assistance of support staff to assist with the preparation process. Support staff consisted of paralegals and investigators. Four respondents indicated support staff were utilized for client meetings. The number of meetings between the client and support staff ranged from one to six or more.

Respondents were asked what three types of records they find the most helpful when preparing for a *Franklin* hearing. Responses included: psychological records, adult criminal history, juvenile delinquency records, other juvenile records, education, medical records, mental health records, prison behavior/discipline and probation reports; Child Protective Services records, Health and Human Services records, Juvenile delinquency; court file/probation reports, comprehensive Risk Assessments and questionnaires. A Pearson Correlation showed population size was correlated to the decision to review jail records. There was no statistical significance between population size and the review of other types of records. There was also no statistical

significance between years of experience and the types of records reviewed. However, the lack of significance should be interpreted cautiously given the small sample size.

All respondents reported consulting with experts to assist with the preparation process. Results varied when asked what experts attorneys found to be the most helpful. Several respondents reported mitigation specialists and psychologists as being the most helpful. Others reported experienced attorneys, social workers and investigators to be the most helpful. Population size had a negative correlation with the decision to consult with a psychologist. The number of years the attorney had been in their current position had a negative correlation with the decision to consult with psychologists and gang experts. There was a strong correlation between attorneys who consulted with social workers and prison experts, with a significance of .002.

All respondents reported experiencing difficulty reconstructing evidence of youthfulness given the passage of time. Specific concerns were noted with records being destroyed, family and friends passing away and memories fading.

Format of the Hearing

The format of *Franklin* hearings also varied throughout jurisdictions. One independent contractor from a county with a population between 800,000-1,499,999 reported the format of the hearing as follows:

> Documents are submitted on behalf of the client that will be sent to CDCR to be reviewed at the client's youthful offender parole board hearing. If the prosecution wishes to cross-examine the person who has made statements in the submitted documents an actual hearing is set. If the prosecution submits and does not seek to cross-exam any statements then the matter is submitted, and the documents are sent to CDCR without any further hearing.

Two public defenders from counties with a population of 2,000,000 or more reported the hearing was limited to the submitting of documents without testimony. One public defender from a county with a population between 50,000-199,999 indicated documents and expert reports would be supplemented with "live character witnesses." An independent contractor from a county with a population between 500,000-799,999 described the hearing as "adversarial" and lasting approximately 60 minutes. Regarding witnesses, two respondents indicated that the court did not permit witness testimony during the hearing, and three respondents indicated that witness testimony was permitted; one respondent was unsure whether the testimony was permitted.

The question which concerned whether clients would be produced for the hearing produced similar inconsistent results. Three respondents reported clients are never produced for *Franklin* hearings, while two respondents reported clients are always produced for the hearings. One respondent reported that clients are produced "most of the time." A Pearson Correlation showed that as population increased, clients were less likely to be produced for court. Results of a cross-tabulation suggest that there is little relationship between public defenders and independent contractors and the client being produced for court.

Table 9.

		How Often is the Client Produced for Court			
		never	most of the time	always	Total
Type of Office	Public Defender	2	1	1	4
	Independent Contractor	1	0	1	2
Total		3	1	2	6

When asked about whether the prosecution is likely to file a response during the proceedings, three respondents indicated that the prosecution never files a response during the proceeding, two respondents indicated the prosecution always files a response and one attorney

indicated the prosecution sometimes files a response. The likelihood of the prosecutor filing a response did not appear to be impacted by the population size of the county. Results of a cross-tabulation suggest that there is little relationship between public defenders and independent contractors and the likelihood of the prosecution filing a response.

Table 10.

		Does the DA File a Response			
		never	sometimes	always	Total
Type of Office	Public Defender	2	1	1	4
	Independent Contractor	1	0	1	2
Total		3	1	2	6

When asked about the judge and the making of findings following the hearing, all but one attorney reported that the court never makes findings at the conclusion of the hearing. One public defender from a county with a population between 500,000-799,999 reported that the court makes finding "most of the time" at the conclusion of the hearing. The likelihood of the court making finding during a *Franklin* Hearing did not appear to be impacted by the population size of the county.

Table 11.

		Does the Judge Make Findings		
		never	most of the time	Total
Type of Office	Public Defender	3	1	4
	Independent Contractor	2	0	2
Total		5	1	6

In an effort to ascertain the effectiveness of the *Franklin* hearing process, the survey asked respondents if the *Franklin* Hearing process is accurately capturing evidence of youthfulness. Twenty-five percent of respondents reported that the *Franklin* hearing process is probably accurately capturing evidence of youthfulness. Approximately 62% of respondents

expressed ambivalence about whether the process is accurately capturing evidence of youthfulness. Approximately twelve percent reported the process is probably not accurately capturing evidence of youthfulness.

Table 12.

Is Evidence of Youthfulness Accurately Captured

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	probably yes	2	18.2	25.0	25.0
	might or might not	5	45.5	62.5	87.5
	probably not	1	9.1	12.5	100.0
	Total	8	72.7	100.0	
Missing	System	3	27.3		
Total		11	100.0		

The average respondent was unsure if the *Franklin* Hearing process is achieving the goals outlined in *Franklin* (2016) and *Miller* (2012).

Discussion

The California Supreme Court's decision in *Franklin* (2016) is premised on a recognition that offenders under the age of 26 have less than fully developed mental capacities and do not exercise sound decision making. In discussing the passage of Senate Bill 260 and its establishment of a parole eligibility mechanism for youthful offenders, the California Supreme Court noted the Legislature intended "to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established" (*People v. Franklin*, 2016). The defendant in *Franklin* (2016) argued that he was not afforded adequate procedures to ensure a "meaningful opportunity for release." In remanding the case back to the trial court, the *Franklin* decision established a process by which youthful offenders can make a record of information of youthfulness for eventual consideration by the parole board. Although the Court emphasized the need for process and procedure, the *Franklin* decision failed to

establish guidelines for what constitutes effective gathering and presentation of evidence of youthfulness.

This preliminary study reveals significant disparity in how jurisdictions are approaching the *Franklin* hearing process. Some jurisdictions reported no formal procedure for how to identify eligible clients and gather evidence of youthfulness. Other jurisdictions identified a set process for how clients are identified and how hearings are handled. The failure to have a universal standard or procedure for the processing of *Franklin* hearings may result in many youthful offenders receiving an inadequate opportunity to gather and present evidence of youthfulness. This lack of evidence may ultimately impact the parole board's decision to grant or deny these youth an opportunity for release.

Many youthful offenders were not old enough to drink, join the military or vote. They broke the law and were sentenced to prison terms longer than they had been alive. By failing to establish uniform procedures and guidelines for the compiling of age-related mitigation, youthful offenders are being denied the ability to surpass the crimes of their adolescence. The failure to create minimal standards of representation for youthful offenders ignores the extensive research regarding the fundamental difference between children and adults. "Youth is more than a chronological fact" (Eddings v. Oklahoma, 1982, p. 115). Evidence of youthfulness must capture the transitory qualities of youth and distinguishing characteristics of youthful offenders. The procedures needed to gather this information are diverse and time consuming. Counsel must consult with a variety of different kinds of experts and review numerous records to capture the unique experiences of each youth. This preliminary study shows that there is significant variation among defense counsel in what experts they consult with and what records they review the *Franklin* hearing process.

Senate Bill 260 gave hope to youthful offenders waiting to meet with parole boards. It offered an incentive for these youth to show evidence of their capacity for redemption and rehabilitation. Senate Bill 260 offered youth serving lengthy sentences an opportunity for a life outside of concrete walls, steel doors and strip searches. If defense counsel fails to accurately and completely gather evidence of youthfulness, the hope to have a meaningful life outside of prison will be nothing more than a quixotic illusion.

Limitations

The purpose of this research was to conduct a preliminary examination of how different jurisdictions conduct *Franklin* Hearings. Contact was attempted with attorneys who are conducting *Franklin* proceedings. Given the limited number of indigent defense counsel who conduct *Franklin* Hearings in California, the sample size was small. The limited sample size made it challenging to have a large number of respondents willing to participate in the study. During the time the survey was active, COVID-19 created a public health emergency in the United States. California Governor Newsom ordered all residents to stay at home. Additionally, the California suspended all jury trials. This may have impacted the number of participants in the research.

Future Research

This preliminary research suggests there is considerable variation in the procedural aspects of *Franklin* hearings across California. As noted by one respondent, the process could be improved by providing guidance to courts on how these hearings should be handled procedurally. Future research should incorporate a mixed-methods approach and add qualitative interviews and records from court files. Qualitative interviews will allow participants to elaborate on details of the *Franklin* hearing process. Interviews will elicit additional information about procedural differences and barriers to reconstructing evidence of youthfulness. A content

analysis of court dockets, motions, and exhibits ultimately submitted to trial courts during *Franklin* hearings will determine what materials are actually received for eventual consideration by parole boards. Review of these records should focus on whether the youthful offenders were produced for hearings, if the prosecution filed a response, the types of records submitted to the court and if the trial court made any findings.

Ultimately, this research should be expanded to determine what weight the parole board gives the information presented. When asked how the *Franklin* Hearing process could be improved, one respondent indicated:

> Between me, my experts, my client's family & my client, We spend hundreds of hours gathering records, conducting interviews/testing, writing reports and persuasive briefs, & calling witnesses, then a youthful offender parole board may or may not actually give great weight to the evidence of youthfulness, rehabilitation & mitigation we submit through the Franklin hearing process.

Future research should track a sample of youthful offenders from the preparation and filing of the *Franklin* hearing documents through the ultimate Youthful Offender Parole Board hearing. Tracking several cases through the parole process would allow for a comparison between those you have a substantial amount of evidence of youthfulness submitted through the *Franklin* hearing process with those that do not. It is important to determine what weight the parole board gives to the evidence of youthfulness and how the effectiveness of the representation impacts the eventual decision to grant parole.

By conducting additional research with a larger sample size, adding qualitative interviews and conducting a content analysis of materials from court files there is potential to increase procedural uniformity and effectiveness of representation for youthful offenders eligible for *Franklin* proceedings. This will help determine if the current *Franklin* hearing process is living

up to the Supreme Court's mandates by allowing youthful offenders to present an accurate record of their characteristics and circumstances at the time of the underlying offense.

Conclusion

The findings of this preliminary study suggest there are significant procedural differences across California in how *Franklin* proceedings are identified, prepared for and conducted within the courts. These findings have implications for youthful offenders hoping to have an accurate record of youthfulness submitted before parole boards. If the proportionality jurisprudence of *Roper, Graham* and *Miller* is to effectively implement constraints on punishment, "it must be willing to incorporate a minimum threshold of procedural prescription" (Moriearty, 2017, p. 971). Research must continue to examine procedural differences in order to fulfill the mandates of *Roper*, *Graham* and *Miller*. This research will ensure youthful offenders are afforded an opportunity to "transcend their adolescence" before the criminal justice system buries them alive (Kinell, 2013, p. 171).

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