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## IN RE AVALOS

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*In re VINCENT JOHNNY AVALOS On Habeas Corpus.*

Court of Appeals of California, Fourth District, Division Two.

Filed January 10, 2019.

### ***Attorney(s) appearing for the Case***

*Vincent Johnny Avalos, in pro. per.; [Matthew A. Siroka](#), under appointment by the Court of Appeal, for Petitioner.*

*[Xavier Becerra](#), Attorney General, [Christine Levingston Bergman](#), Deputy Attorney General, for Respondent.*

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## **OPINION**

**RAMIREZ, P. J.**

Defendant and petitioner Vincent Johnny Avalos was convicted in 2007 of attempted premeditated and deliberate murder and other related crimes he committed at 24 years old. He was sentenced to life with the possibility of parole plus 20 years. Avalos filed a petition for a writ of habeas corpus, claiming entitlement to an evidentiary hearing to create a record of youth-related factors existent at the time of the offenses. He also contends that his abstract of judgment contains an erroneous order requiring him to submit to HIV and AIDS blood testing while in prison. We issued an order to show cause why relief should not be granted. We now grant the petition.

## FACTUAL AND PROCEDURAL BACKGROUND <sup>1</sup>

### *A. Avalos's Conviction and Sentencing*

In 2006, Avalos, then 24 years old, was ordered to vacate his rented house after failing to pay rent. Subsequent to the court proceedings, Avalos confronted both the property owner and manager outside of the courthouse and threatened them with retribution. Later that day, the property manager drove by the house to check on the property and made eye contact with Avalos, who was exiting his vehicle. The property manager did not stop his car and instead drove away from the property. Avalos got into his car, followed the property manager for approximately 20 to 25 minutes, and then sped up to pull alongside his car. After hearing five to six gunshots coming from the direction of Avalos's car, the property manager slammed on the brakes of his car and called 911. Bullets shattered some of the windows in the property manager's car but did not strike him. His hand was injured from broken glass, though.

A jury convicted Avalos of attempted premeditated and deliberate murder (Pen. Code, §§ 664, 187, subd. (a) <sup>2</sup>), assault with a firearm (§ 245, subd. (a) (2)), and discharge of a firearm with gross negligence (§ 246.3). Firearm enhancement allegations were found true for each count.

After trial, Avalos asked to represent himself at sentencing. The request was granted, and he was given a two-week continuance to prepare even though the sentence imposed was mandatory. On the day of sentencing, he requested an additional continuance of 16 weeks to investigate potential ineffective assistance of counsel claims to support him in moving for a new trial. The request was denied. Immediately thereafter, Avalos asked to have counsel appointed. That request was denied too. The trial court commenced with pronouncing judgment. Avalos interrupted the judge, indicating that he did not wish to proceed with sentencing because he felt his concerns were not being heard. The judge admonished him to not speak, and Avalos continued to interrupt at which point he was warned that he would be removed from the courtroom if he interrupted again. Avalos did not heed the warning and was removed. Sentencing resumed without Avalos present. He was sentenced to prison for life with the possibility of parole plus 20 years. We affirmed the judgment in all respects in *People v. Avalos, supra*, E043700.

### *B. The Abstract of Judgment*

The abstract of judgment was filed on July 20, 2007, and includes the following handwritten order on the second page: "Prior to CDC release, submit to HIV/AIDS test pursuant to 1202.1 PC/1202.6 PC to be conducted by med staff w/[illegible] results to be forwarded to clerk of court for distribution." <sup>3</sup> Over 10 years later, in a letter dated August 29, 2017, and filed with the trial court, a correctional case records manager from the California Department of Corrections and Rehabilitation (Department of Corrections) inquired about the testing requirement. The Department of Corrections noted the order appeared to be in error since Avalos had not been convicted of one of the enumerated offenses listed in section 1202.1, and asked "the court to review its records to determine whether the blood test was ordered in error or whether the court intended [the Department of Corrections] to perform the blood test pursuant to a different statute."

In a hearing without Avalos or a representative present, the court granted the "motion/petition" and concluded no further action was necessary because the blood test results had been sent to the court previously, citing to a November 12, 2015 letter from the Department of Corrections. The November 2015 letter is marked as confidential in the trial court docket and not included in the record.

### *C. Habeas Corpus Petition*

In December 2017, Avalos filed a petition for writ of habeas corpus in the trial court, alleging, among other things, that: (1) he is entitled to a hearing under *People v. Franklin* (2016) [63 Cal.4th 261](#) (*Franklin*) to create a record of information relevant to his future youthful offender parole hearing (§§ 3051, 4801); and (2) his abstract of judgment should be amended to exclude the order for HIV/AIDS testing. The trial court denied the petition, concluding that it failed to state a prima facie factual case supporting Avalos's release from prison and that it impermissibly raised issues raised and rejected in his direct appeal and an earlier habeas petition.

Avalos then filed a petition for writ of habeas corpus in this court raising the same two issues, along with others. At our invitation, the Attorney General filed an informal response addressing the claims about the *Franklin* hearing and modification of the abstract of judgment only. We issued an order to show cause on these issues and appointed counsel for Avalos. <sup>4</sup> The Attorney General elected to stand on the informal response previously filed.

## II

## DISCUSSION

### *A. Franklin Hearing*

Petitioner contends that he is entitled to an evidentiary hearing now to create a record of mitigating factors of youthfulness that existed at the time of his offense for his eventual youthful offender parole hearing. We agree.

#### *1. The Evolution of Sentencing Law Applicable to Juvenile and Youthful Offenders.*

There has been a dramatic shift in the sentencing landscape for juvenile and youthful offenders in the past decade. Several years after Avalos was

sentenced, the United States Supreme Court held that the Eighth Amendment of the federal constitution categorically prohibits a sentence of life without the possibility of parole (LWOP) for juvenile offenders under 18 years old who have not committed homicide. (*Graham v. Florida* (2010) [560 U.S. 48](#), 74 (*Graham*)). While a juvenile nonhomicide offender need not be guaranteed eventual release, the court concluded that he or she must be provided "some realistic opportunity to obtain release before the end of th[eir] term." (*Id.* at p. 82.) Two years later in *Miller v. Alabama* (2012) 567 U.S. 460, 479, the United States Supreme Court extended the reasoning in *Graham* to conclude that the Eighth Amendment prohibition against LWOP sentences for juvenile offenders includes those who have committed homicide. Although an LWOP sentence is not outright forbidden for such an offender, *Graham* instructs that prior to sentencing "a judge or jury must have the opportunity to consider mitigating circumstances," including the defendant's age, age-related characteristics, and the nature of their crimes. (*Miller*, at p. 489.) The court also must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 480.) *Miller* announced a substantive rule of constitutional law, and its holding applies retroactively. (*Montgomery v. Louisiana* (2016) 577 U.S., \_\_\_\_, \_\_\_\_, [[136 S.Ct. 718](#), 736, 193 L.Ed.2d 599].) Applying *Graham* and *Miller*, the California Supreme Court concluded in *People v. Caballero* (2012) [55 Cal.4th 262](#), 268 (*Caballero*) that the constitutional prohibition against LWOP sentences for all juvenile nonhomicide offenders applies to sentences that are the functional equivalent of LWOP, including the challenged term of 110 years.

In response to *Graham*, *Miller*, and *Caballero*, the Legislature passed Senate Bill 260, which became effective January 1, 2014, and added sections 3046, subdivision (c), 3051, and 4801, subdivision (c), to the Penal Code.<sup>5</sup> (*Franklin, supra*, 63 Cal.4th at p. 276.) Youthful offenders are entitled to early parole consideration at 15, 20, or 25 years postincarceration depending on the controlling offense (i.e., that for which the longest period of incarceration was imposed).<sup>6</sup> (§ 3051, subds. (a)(2)(B), (b).) Through recent amendment, the covered age has been increased to include offenders who were 25 years or younger at the time of the controlling offense. (§ 3051, subd. (a)(1); Stats. 2017, ch. 684, §§ 1, 2.) Youthful offender parole hearings are available to all eligible youthful offenders regardless of the date of conviction. (See § 3051, subd. (b); *Franklin, supra*, 63 Cal.4th at p. 278.)

The purpose of the youthful offender parole hearing is to provide youthful offenders with "a meaningful opportunity to obtain release." (§ 3051, subd. (e).) The Board of Parole Hearings (BPH) is directed 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."<sup>7</sup> (§ 4801, subd. (c).) Psychological evaluations and risk assessments prepared by a licensed psychologist to assist the BPH in making its determination must take into account these factors. (§ 3051, subd. (f) (1).)

Subsequent to this enactment, our Supreme Court in *Franklin, supra*, [63 Cal.4th 261](#), concluded that sections 3051 and 4801 rendered a juvenile offender's constitutional challenge to a 50-year-to-life sentence moot because the defendant had a meaningful opportunity for release after 25 years of imprisonment. (*Id.* at pp. 268, 276-277.) Though the defendant did not need to be resentenced, the case was remanded to the trial court to determine whether the defendant was given a sufficient opportunity to make a record of youth-related factors. (*Id.* at p. 284.) In the event a sufficient opportunity had not been provided, the trial court was directed to hold an evidentiary hearing at which the defendant could "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 [could] 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." (*Ibid.*)

## **2. Avalos Is Entitled to a Franklin Hearing.**

Against this backdrop, we turn to petitioner's claim of entitlement to a *Franklin* hearing. To start, we note that Avalos was a young adult, not a juvenile, when the controlling offense was committed since he was older than 18 years old. (See *Roper v. Simmons* (2005) [543 U.S. 551](#), 569.) Our directive that Avalos receive an evidentiary hearing on remand renders moot the issue of whether the constitutional prohibition against a sentence of LWOP or its equivalent for a juvenile offender extends to him. (*People v. Rodriguez* (2018) 4 Cal.5th 1123, 1132 (*Rodriguez*)). Regardless of the constitutionality, the Legislature chose to afford the opportunity to obtain early release through parole to a much broader category of offenders than juveniles. Sections 3051 and 4801, therefore, place Avalos, and other young adult offenders, on equal statutory footing with juvenile offenders. All are entitled to a youthful parole hearing and thus a *Franklin* hearing beforehand to prepare.

The Attorney General contends that a *Franklin* hearing is not an available remedy through habeas corpus because Avalos is not challenging the legality of his sentence or a condition of confinement. The same argument was raised and rejected in *In re Cook* (2017) 7 Cal.App.5th 393 (*Cook*), which is currently under review in the Supreme Court, review granted April 12, 2017, S240153. There, the juvenile offender challenged the constitutionality of his sentence to 125 years to life in prison via a petition for writ of habeas corpus. Our colleagues in Division Three of this District denied the petition, concluding that recently enacted sections 3051 and 4801 cured the unconstitutionality of the sentence. (*Id.* at p. 395.) The Supreme Court granted review and transferred the matter back to the appellate court with directions to vacate the decision and consider in light of *Franklin* "whether petitioner is entitled to make a record before the superior court of "mitigating evidence tied to his youth." (*Ibid.*) On remand, the Attorney General argued, like they do here, that a *Franklin* hearing should not be available to the defendant via habeas corpus because the petitioner was "not challenging the legality of his restraint." (*Cook*, at p. 399.) The court rejected this argument, noting that the Supreme Court's remand with directions to consider the case in light of *Franklin* strongly suggested that the relief afforded by it was available by habeas corpus. (*Ibid.*) Furthermore, the court reasoned that the Attorney General took "an overly narrow view of the scope of the writ of habeas corpus," which allows a "previously convicted defendant [to] obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect." (*Id.* at p. 399.) While the entitlement to a youthful offender parole hearing is a statutorily created right, *Franklin* created a judicial right to an evidentiary hearing to create a record of youthful offender factors.

We agree with the analysis in *Cook* and hold that habeas corpus is the appropriate avenue to be granted the relief afforded by *Franklin*. Habeas corpus relief is not limited to cases in which a petitioner is seeking immediate release from confinement or challenging the conditions of his confinement. For instance, in *In re Cortez* (1971) [6 Cal.3d 78](#) (*Cortez*), the Supreme Court granted the petitioner habeas corpus and directed the trial court to hold a hearing to determine whether to strike a prior narcotics conviction in light of *People v. Tenorio* (1970) [3 Cal.3d 89](#) (*Tenorio*), which found unconstitutional a statute prohibiting the court from striking prior convictions without approval by the prosecutor. The trial court had applied *Tenorio* and upheld the prior conviction without holding a hearing. (*Cortez*, at p. 83.) Although the petitioner would not be entitled to immediate release if the prior was stricken, the petitioner's sentence could be potentially reduced. Because of this, the Supreme Court concluded that the trial judge's decision of whether or not to strike the prior "substantially affect[ed] the rights of the defendant" and thus required the court to hold a hearing on the matter with the petitioner represented. (*Id.* at pp. 83-84.) The court explained that a habeas petitioner "who has established a prima facie case for *Tenorio* relief is

clothed with the same congeries of rights as any other offender entitled to *tenorio* relief. (*Cortez*, at p. 89.)

*Cortez* did not involve either a challenge to the legality of the petitioner's confinement or the conditions of that confinement. Rather, the court granted habeas corpus relief to allow the petitioner access to a hearing to present argument and evidence as to why the trial court should exercise its discretion to strike a prior conviction and potentially shorten the petitioner's sentence. Avalos seeks the same relief as that afforded the petitioner in *Cortez*—access to an evidentiary hearing to allow him to create a proper record for his eventual parole hearing at which the BPH may exercise its discretion to release him early, resulting in a shortened sentence. Thus, while access to the evidentiary hearing will not result in immediate release, it may assist Avalos in obtaining early release from prison. Due to Senate Bill 260, Avalos's present restraint comes with the future promise of an early parole hearing. The *Franklin* hearing is designed to fully and meaningfully effectuate that statutory right. We see no reason to deny this judicially created right to offenders who are entitled to early parole consideration but whose judgments were final prior to the enactment of Senate Bill 260. Any other result would undermine the youthful offender's ability to obtain early release.

Moreover, immediate release is not the sole remedial option available through habeas corpus. Our power to fashion a remedy in habeas corpus is not so limited. (*In re Crow* (1971) [4 Cal.3d 613](#), 619; see § 1473, subd. (d).) We instead have the authority to dispose of the petition "as the justice of the case may require." (§ 1484; see *Crow*, at p. 619.) A just and appropriate remedy for Avalos is to allow him access to an evidentiary hearing to create a record of youth-related mitigating factors.

Our analysis is not affected by whether the Legislature contemplated youthful offenders utilizing habeas corpus as a vehicle to avail themselves of the benefit of Senate Bill 260 by creating a record of youthful offender related factors years prior to their hearing. The Legislature did not express what provisions should be made for any offender—with a final judgment at the time of enactment or not—to prepare for the eventual parole hearing. We thus find unpersuasive the Attorney General's contention that the Senate Committee on Appropriations analysis that the legislation might result in decreased petitions for habeas corpus "by which inmates challenge convictions and/or sentences" has any bearing on this matter. (Assem. Com. on Appropriations, Rep. on Sen. Bill No. 260 (2013-1014 Reg. Sess.) as amended Aug. 12, 2013.)<sup>8</sup> Had the Legislature intended to restrict access to habeas corpus relief to youthful offenders whose judgments were already final, it clearly knew how to do so. (See *DiCampli-Mintz v. County of Santa Clara* (2012) [55 Cal.4th 983](#), 992 [courts "'must assume that the Legislature knew how to create an exception if it wished to do so'"].) In any event, as we previously stated, the entitlement to a *Franklin* hearing is a judicial creation to render the statutory entitlement meaningful. Youthful offenders whose judgments were final prior to the enactment should not be burdened with a less meaningful parole hearing. Here, there is no factual dispute that Avalos was not provided a sufficient opportunity at sentencing to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youthful offender parole hearing. Avalos was removed from his sentencing hearing for being disruptive and presented no evidence or argument at the hearing. The probation report likewise does not contain any discussion of relevant youth-related factors. In fact, Avalos refused to participate in the interview by the probation officer and provided no information about his family history. Because Avalos was sentenced prior to the addition of sections 3051 and 4801 and *Franklin*, any evidence he did submit would not be adequate in any event. Prior to the enactment, he would "not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process." (*Rodriguez, supra*, 4 Cal.5th at p. 1131.) "Without such notice, *any opportunity* to introduce evidence of youth-related factors is not adequate in light of the purpose of Senate Bill No. 260." (*Ibid.*, italics added.)

The Attorney General nevertheless contends that an evidentiary hearing is not warranted, arguing that "ordering a hearing in the superior court, to be conducted over 12 years after the commission of the offense and almost 11 years after the original sentencing, would not be an efficient or effective way of seeking to augment the existing sentencing record with any further evidence of petitioner's particular characteristics as a youthful offender in 2006." We could not agree more. Yet we see no better alternative. Time is a ruthless menace to all forms of evidence—witnesses age, lose touch, and pass away; memories fade; and documentary evidence and its ilk get lost or destroyed. (*In re Grunau* (2008) [169 Cal.App.4th 997](#), 1005.) Common law and statutory rules of procedure and evidence have long recognized and codified this commonsense notion. (See, e.g., *Order of Railroad Telegraphers v. Railway Express Agency* (1944) [321 U.S. 342](#), 348-349 ["Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."].) Following this logic, it stands to reason that the more time passes the staler evidence and memories become. An evidentiary hearing held 12 years after the fact will be more effective than one held 25 years later. While holding a hearing now after so much time has lapsed undoubtedly presents difficulties, no better solution presents itself at this time. Absent a mandatory presumption—statutory or otherwise—of the presence of factors of diminished culpability due to the offender's age, creation of a record of relevant factors as close in time as possible to the original sentencing hearing is the best way to fulfill the statutory objective of making the eventual parole hearing meaningful.

In sum, we conclude that the record demonstrates that Avalos was not provided a sufficient opportunity to place on the record the kinds of information sections 3051 and 4801 deem relevant at a youthful offender parole hearing. We therefore direct the trial court to conduct an evidentiary hearing as outlined in *Franklin* to allow Avalos the opportunity to make such a record.

## ***B. The Abstract of Judgment Must Be Amended.***

Petitioner contends that the abstract of judgment erroneously requires him to submit to an HIV and AIDS test.<sup>9</sup> The Attorney General concedes this point, and we agree. The trial court did not have authority to require Avalos to submit to HIV testing while in prison, so the abstract must be corrected. (See *People v. Mitchell* (2001) [26 Cal.4th 181](#), 185 (*Mitchell*)).

There is a general statutory proscription against involuntary HIV testing. (Health & Saf. Code, § 120990, subs. (a) & (c); *People v. Butler* (2003) [31 Cal.4th 1119](#), 1125.) Such testing may be ordered either when a defendant is convicted of certain sexual offenses (Pen. Code, § 1202.1, subd. (e)) or previously, at the time of Avalos's conviction, when convicted for the first time of prostitution<sup>10</sup> (Pen. Code, former § 1202.6, subd. (a)). Both statutory provisions are referenced in the abstract of judgment. But Avalos was not convicted of any of the enumerated offenses in either section. The trial court therefore did not have authority to order him to submit to HIV testing. (See *People v. Green* (1996) [50 Cal.App.4th 1076](#), 1091.)

In that vein, the oral pronouncement of judgment did not include any requirement that Avalos submit to HIV testing. An abstract of judgment "may not add to or modify the judgment it purports to digest or summarize." (*Mitchell, supra*, 26 Cal.4th at p. 185.) Where, as here, there is a conflict between the oral pronouncement of judgment and the abstract of judgment, the oral ruling controls. (*Ibid.*) We have "the inherent power to correct clerical errors in [the court's] records so as to make these records reflect the true facts" (*In re Candelario* (1970) [3 Cal.3d 702](#), 705) whenever the error comes to our attention (*In re Ricky H.* (1981) [30 Cal.3d 176](#), 191, superseded by statute on other grounds as stated in *In re Michael D.* (1987) [188 Cal.App.3d 1392](#), 1396).

The matter was not rendered moot by the Department of Corrections' compliance with the order in 2015. As ordered, the blood test must be taken prior to Avalos's release from prison, which has not yet occurred. Nothing in the order indicates that the requirement is satisfied once one blood test was taken nor is that how it has been construed by the Department of Corrections. For instance, in March 2017, Avalos was forced to submit to another blood test based on this order. And, the record on this point is far from complete, so he may have been required to endure additional procedures.<sup>11</sup>

A clerical error in an abstract of judgment should not be allowed to stand under any circumstance—let alone one with such a profound impact. (See *Mitchell, supra*, 26 Cal.4th at p. 185 ["It is, of course, important that courts correct errors and omissions in abstracts of judgment."].) We therefore conclude that the abstract of judgment must be modified to remove the erroneous order requiring Avalos to submit to HIV testing.

### III

## DISPOSITION

The petition for writ of habeas corpus is granted with respect to the two issues for which we ordered cause. The superior court is directed to: (1) modify the abstract of judgment to delete the order requiring petitioner to submit to HIV/AIDS testing under Penal Code sections 1202.1 and 1202.6; (2) forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation; and (3) conduct a hearing at which petitioner has the opportunity to make a record of mitigating evidence tied to his youth at the time the controlling offense was committed. Petitioner shall be appointed counsel to represent him in such proceedings.

SLOUGH, J. and FIELDS, J., concurs.

## FootNotes

1. These facts are taken from our unpublished opinion in the direct appeal of which we take judicial notice on our own motion. (See *People v. Avalos* (Oct. 16, 2008, E043700) [nonpub. opn.]; Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

2. All further statutory references are to the Penal Code unless otherwise indicated.

3. An amended abstract of judgment was filed on February 28, 2008, to add the discharging of a firearm count. The record does not include the second page of the amended abstract. However, the parties do not dispute that it contains the same order as the original.

4. We note that the remaining claims were summarily denied for being procedurally barred and for failing to state a prima facie case for relief. (See *In re Lugo* (2008) [164 Cal.App.4th 1522](#), 1541 ["[W]hen an order to show cause issues, the claims are limited to those alleged in the petition that form the basis of the court's order to show cause."].)

5. Section 3051 has been amended twice since 2014. (See Stats. 2015, ch. 471, § 1, Sen. Bill No. 261, eff. Jan. 1, 2016; Stats. 2017, ch. 675, Assem. Bill No. 1308, § 1, eff. Jan. 1, 2018 and Stats. 2017, ch. 684, Sen. Bill No. 394, § 1.5, eff. Jan. 1, 2018.) For ease of reference, however, we at times refer to the totality of the statutory scheme providing for youthful offender parole hearings as "Senate Bill 260."

6. As pertinent to Avalos, section 3051 provides: "A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(3).)

7. Though directed to issue implementing regulations (§ 3051, subd. (e)), the BPH has not yet done so.

8. We grant the Attorney General's unopposed request to take judicial notice of the legislative history of section 3051. (Evid. Code, § 452, subs. (a), (c).)

9. Although the statutes refer to the testing requirement both as HIV testing and as AIDS testing (§ 1202.1, former § 1202.6, subd. (a)), we will refer to the requirement as HIV testing only for ease of reference.

10. Effective January 1, 2018, section 1202.6 no longer authorizes HIV testing for individuals convicted of prostitution. (Stats. 2017, ch. 537, § 17, eff. Jan. 1, 2018.)

11. An evidentiary hearing is not necessary to discover the extent of the effect the order has had over the years since the entitlement to relief does not hinge on resolution of a factual dispute. (*People v. Romero* (1994) [8 Cal.4th 728](#), 739-740, 744.)

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