SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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October 29, 2018

The Honorable Tani G. Cantil-Sakauye
Chief Justice
Supreme Court of the State of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: Request for Depublication (Cal. Rules of Court, rule 8.1125)
***People v. Eric Jason Frahs* (2018) 27 Cal.App.5th 784**
Fourth District Court of Appeal, Division 3, No. G054674
Orange County Superior Court, Case No. 16CF0837

Dear Chief Justice Cantil-Sakauye:

The District Attorney of San Diego County respectfully requests depublication of *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*) pursuant to California Rules of Court, rule 8.1125.

The San Diego County District Attorney's Office is the chief prosecution agency within the County of San Diego and, as such, regularly prosecutes any and all violations of state law which are properly commenced within its jurisdiction.

The Orange County District Attorney's Office prosecuted the underlying case in case number 16CF0837.[1]

> Defendant Eric Jason Frahs tried to steal a can of beer and an energy drink from a small store. As he was leaving, Frahs got into a physical confrontation with the store owner and his son. At a jury trial on two robbery charges, Frahs put on evidence that he suffers from a form of schizophrenia. The jury found defendant guilty. In a subsequent bench trial, the court found that Frahs had suffered a prior "strike" conviction (an assault with a deadly weapon) and imposed a nine-year prison sentence.
>
> Frahs testified in his own defense. Frahs said that in his early twenties he began hallucinating and experiencing delusions (he was 30 years old at the time of the trial). Frahs said that he thought his computer hard drive and birds were talking to him. Frahs testified that he has been hospitalized about eight times. Frahs said that he had been homeless for about two years, and every time he has been in trouble with the law it was due to his

[1] The three paragraphs of facts are taken from the *Frahs* opinion.

mental health issues. Frahs testified that just before entering the market, he thought an angel had flown by on a horse and talked to him.

Dr. Richard Lettieri, a clinical and forensic psychologist, testified that he had reviewed a report from a hospital where Frahs had been confined. Lettieri said that most psychiatric patients are temporarily confined for only three to 14 days to stabilize them on medication; however, Frahs had been confined for about four months, which indicates that Frahs had been very ill and very unstable. Lettieri testified that Frahs had been diagnosed with schizoaffective disorder, which is "a combination of schizophrenia and bipolar disorder." Lettieri said that Frahs had been prescribed various medications over the years to include "antidepressants, mood stabilizers, and antipsychotics."

While Frahs' case was pending appeal, the Legislature enacted Penal Code[2] section 1001.36, which created a pretrial diversion program for defendants with mental disorders. Frahs argued that the mental health diversion program should apply retroactively. That diversion program was described in *Frahs* as follows:

> "On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion . . . if the defendant meets all of the requirements . . ." (§ 1001.36, subd. (b).) There are six requirements. First, the court must be "satisfied that the defendant suffers from a mental disorder" listed in the statute. (§ 1001.36, subd. (b)(1).) Second, the court must also be "satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense." (§ 1001.36, subd. (b)(2).) Third, "a qualified mental health expert" must opine that "the defendant's symptoms motivating the criminal behavior would respond to mental health treatment." (§ 1001.36, subd. (b)(3).) Fourth, subject to certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial. (§ 1001.36, subd. (b)(4).) Fifth, the defendant must agree "to comply with the treatment as a condition of diversion." (§ 1001.36, subd. (b)(5).) And finally, the court must be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subd. (b)(6).)

The *Frahs* court acknowledged that in general, statutes are presumed to apply prospectively unless they state otherwise. The presumption against retroactivity does not apply when the Legislature reduces the punishment for criminal conduct. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) When a statute reduces or ameliorates the punishment, it is presumed that the Legislature has determined the offense no longer merits the greater punishment. (*Id.* at pp. 744-745.)

The *Frahs* court applied the holding in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*), which held that Proposition 57 was retroactive to all cases not final

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[2] All future references are to the Penal Code unless otherwise specified.

on appeal. *Lara* held that, because Proposition 57 eliminated a District Attorney's ability to direct file cases to adult court, it conferred potential benefits to *juveniles* accused of crimes. Thus, *Lara* held that the legislature intended Proposition 57 to apply to all cases *involving juveniles* whose judgment was not final at the time it was enacted. (*Lara*, at p. 304, italics added.)

The *Frahs* court adopted *Lara*'s reasoning to section 1001.36. However, the court also held: "Further, Frahs' case is not yet final on appeal and the record affirmatively discloses that he appears to meet *at least one* of the threshold requirements (a diagnosed mental disorder)." (*Frahs*, at p. 488, italics added.)

Thus, the question remains, does *Frahs* apply to all criminal cases whose appeals are not yet final? Or, on the other hand, does *Frahs* only apply to those cases where the record merely demonstrates that a defendant meets at least one of the threshold requirements such as suffering from a mental disorder? The former expansive interpretation could implicate thousands of cases pending appeal. Any and all convicted defendants could potentially be granted a conditional remand to a trial court that would be forced to conduct a section 1001.36 hearing in virtually all cases pending appeal. That disastrous result would surely deprive trial courts of already precious resources leading to thousands of mental health diversion hearings. The latter, narrower interpretation, however, is still problematic because it stands in contrast to cases that have interpreted the rule in *Estrada* and it does not accurately encompass the exact class of defendant invoked by section 1001.36.

A rule of limited retroactivity was declared in *Estrada*. *Estrada* held that when a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment, the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the legislature. (*Estrada*, at p. 750.) The *Estrada* rule has been successfully invoked in cases where juveniles were charged as adults pursuant to *Lara*, as well as to cases where a statute was amended, before final judgment, to impose a less severe penalty. (*In re Kirk* (1965) 63 Cal.2d 761, 762 [amendment to Pen. Code, § 476a (writing or passing bad checks) changing minimum from $50 to $100, in order to make crime felony rather than misdemeanor]; *People v. Francis* (1969) 71 Cal.2d 66, 75 [amendment to statute authorizing alternative county jail sentence for marijuana possession applied to defendant whose case was on appeal]; *People v. Chapman* (1978) 21 Cal.3d 124, 126 [statutory reduction of certain marijuana possession offenses from felonies to misdemeanors applied to defendant whose conviction was not final when amendment became effective]; *People v. Cloud* (1969) 1 Cal.App.3d 591, 600 [amendment to battery statute while appeal was pending gave defendant benefit of misdemeanor rather than felony sentence]; *People v. Podesto* (1976) 62 Cal.App.3d 708, 725 [amendment to Health & Saf. Code, § 11357, reducing marijuana possession from felony to misdemeanor, applied to defendant whose conviction was not final]; *People v. Benefield* (1977) 67 Cal.App.3d 51, 56 [juvenile defendant, tried as adult, received benefit of judgment-mitigating amendment to Welf. & Inst. Code, § 707.2, governing remand to juvenile facility]; *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1194 [amendment to Pen. Code, § 666 (petty theft with prior conviction) increasing number of prior convictions required for sentence to prison

mitigated punishment and applied retroactively to defendant whose conviction was not yet final].)

As the above cases demonstrate, the concept of retroactivity has always been applied to a specific demonstrable class of people who might receive an ameliorative benefit under a new law. While we do not agree with the retroactivity analysis of *Frahs*, that court, at the very least, should only have authorized a conditional remand of that case to the specific class of convicted defendant described in section 1001.36. That class of defendant is not just anyone suffering from a "mental disorder" as the case arguably suggests. The class of defendant affected by this new mental health diversion law would be those defendants whose appellate records demonstrate that they are (1) defendants who suffer from a mental and disorder; (2) that played a significant role in the commission of the charged offense and (3) where a qualified mental health expert has opined that the defendant's symptoms motivating the criminal behavior would respond to mental health treatment.

The first three section 1001.36 prongs accurately describe a defendant who might receive an ameliorative benefit under that law. Unless and until an appellate record demonstrates that a convicted defendant can meet these three threshold requirements, which *Frahs* did not, no adjudicated case should be remanded to a trial court for a labor-intensive and time-consuming conditional remand procedure described in section 1001.36.

For all the reasons listed above, the San Diego District Attorney's Office respectfully requests that this Court order the lower court's opinion in *Frahs* depublished.

Dated: October 29, 2018

Respectfully Submitted,

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SUPREME COURT OF CALIFORNIA
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

	For Court Use Only
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v.	
ERIC JASON FRAHS, Defendant and Appellant.	Supreme Court No.: TEMP-YDVXNMZL Court of Appeal No.: G054674 Trial Court No.: 16CF0837

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On October 29, 2018, a member of our office served a copy of the within **REQUEST FOR DEPUBLICATION (CAL. RULES OF CRT., RULE 8.1125)** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, in the FedEx dropbox, addressed as follows:

Clerk of the Court
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4797

I also electronically served the same referenced above document to the following entities via www.truefiling.com:

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STEVE OETTING, DEPUTY AG: steve.oetting@doj.ca.gov
ATTORNEY SUSAN L. FERGUSON: Susan.L.Ferguson@gmail.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 29, 2018 at 330 West Broadway, San Diego, CA 92101.

Jerri D. Carter

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 10/30/2018 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Frahs**
Case Number: **TEMP-YDVXNMZL**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/29/2018
Date

/s/Brooke Tafreshi
Signature

Tafreshi, Brooke (242935)

Last Name, First Name (PNum)

San Diego County District Attorney

Law Firm