In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ERIC J. FRAHS,

Defendant and Appellant.

Case No. S252220

Fourth Appellate District Division Three, Case No. G054674
Orange County Superior Court, Case No. 16CF0837
The Honorable Glenn R. Salter, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Since briefing was completed in this case, a number of appellate decisions have weighed in on the question of whether the new mental health diversion law was intended to be retroactive. Some cases have agreed with the Court of Appeal in the present case and conditionally reversed judgments and remanded to trial courts to hold mental health diversion hearings (see, e.g., *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted October 9, 2019); other decisions have ruled to the contrary that the mental health diversion statute was not intended to apply retroactively to cases that had been adjudicated (see, e.g., *People v. Khan* (2019) 41 Cal.App.5th 460, review granted January 29, 2020). Two decisions in particular deserve in-depth consideration. In *People v. Torres* (2019) 39 Cal.App.5th 849, Division Six of the Second District Court of Appeal reasoned that applying the mental health diversion statute retroactively would "do violence to the language of the statute and potentially violate double jeopardy principles." (*Id*. at p. 852.) In *People v. Craine* (2019) 35 Cal.App.5th 744, review granted September 11, 2019, the Fifth District Court of Appeal likewise concluded that the Legislature did not intend pretrial diversion under Penal Code section 1001.36 to apply retroactively to those defendants whose cases have already progressed beyond the stages of trial, adjudication of guilt, and sentencing. In reaching this holding, the *Craine* court concluded that both "the text of section 1001.36 and its legislative history contraindicate a retroactive intent" with regard to defendants who have already been found guilty of the crimes for which they were charged. (*Id.* at p. 749.) Many of the reasons given by the court, particularly the language of Penal Code section 1001.36 and its focus on the postponement of prosecution until adjudication, have already been addressed by the parties in the briefing to date. However, the *Craine* court also examined four additional points that have not been expressly

considered. Respondent addresses below the additional points raised by the *Torres* and *Craine* decisions.

ARGUMENT

THE LEGISLATURE DID NOT INTEND MENTAL HEALTH DIVERSION TO APPLY RETROACTIVELY

Five additional reasons support the People's contention that the Legislature did not intend for the new mental health diversion law to apply retroactively.

A. The Legislature's Presumed Intent to Avoid Double Jeopardy Violations Reveals Penal Code Section 1001.36 Should Not Be Applied Retroactively

The lynchpin of the *Frahs* decision is that the "until adjudication" language in Penal Code section 1001.36, subdivision (c), does not establish a limitation on availability of diversion; instead, the court concluded that "[t]he fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791.) The *Torres* decision underscores one of the problems with this conclusion. Namely, if in a given case a defendant were given diversion after a jury was sworn, double jeopardy would likely prevent that defendant from being retried in the event that he or she later failed out of diversion. As the *Torres* court pointed out, this would "eviscerate the statute's enforcement mechanism." (*Torres, supra*, 39 Cal.App.5th at p. 855.) Further, in order to allow a defendant to receive mental health diversion after guilt is adjudicated, it would be necessary to add either a jeopardy waiver provision to Penal Code section 1001.36, or else conclude that such a defendant impliedly consents to waive his or her rights not to be placed twice in jeopardy. Neither of these alternatives would be effective. Adding a waiver provision would "violate the cardinal

rule of statutory construction that courts may not add words to a statute"; alternatively, implying consent would require an expansion of existing law in which consent is implied only where there was something wrong with the trial (e.g., an error requiring a mistrial). (*Id*. at pp. 855-856.) After concluding that the "until adjudication" language created a real, temporal bar, the *Torres* court rejected the argument that the statute was intended to apply retroactively after sentencing. (*Id*. at p. 856.)

The *Frahs* court might perhaps rejoin that its disposition of a conditional remand was designed to avoid the double jeopardy difficulty by holding the original judgment in abeyance. This response, however, is inadequate for at least two reasons. First, as respondent previously addressed in its briefing, suspending sentence is foreclosed in cases such as the present where the defendant has a prior strike (Pen. Code, § 667, subd. (c)) and was on probation at the time of the offense (Pen. Code, § 1203, subd. (k)). (OBM 33-34.) Second, and more fundamentally, even if it were otherwise possible to hold a judgment in abeyance in some cases, this would not detract from the *Torres* court's point that the Legislature must have intended not to permit diversion where jeopardy has attached but there is no judgment to stay.

B. The Primary Legislative Goals Cannot Be Achieved Once the Defendant Has Been Tried

The *Craine* court determined that "[t]he primary legislative goal of diverting mentally ill defendants from the criminal justice system through preadjudicative intervention programs cannot be achieved once the defendant has been tried, adjudged guilty, and sentenced." (*Craine, supra*, 35 Cal.App.5th at pp. 749-750.) The court reached this conclusion by examining the availability of mental health diversion from a real-world perspective. As the court reasoned, by the time most defendants could have their appeals decided, they would already be eligible for parole and thus

also be eligible for mental health treatment: "because mental health diversion is generally only available for less serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings." (*Id*. at p. 759.) Given the average length of a criminal appeal, and the Legislature's desire to have mental health diversion cases resolved in an expedient manner, the *Craine* court reasoned there is "little chance" the Legislature expected diversion proceedings to begin several years after the date of adjudication. (*Ibid*.)

C. The Secondary Goals of Judicial Economy and Fiscal Savings Would Be Thwarted by Attempting to Apply the Law Retroactively to Defendants Who Have Begun Serving Their Sentences

The *Craine* court further concluded that secondary goals of mental health diversion, including judicial economy and fiscal savings, would "actually be thwarted by attempting to apply the statute to defendants who have begun serving their sentences." (*Craine*, *supra*, 35 Cal.App.5th at p. 750.) Examining the legislative history behind both Assembly Bill 1810 and the amendment to the statute three months later in Senate Bill 215, the *Craine* court noted that the Legislature intended to reduce the number of incompetent-to-stand-trial referrals to the Department of State Hospitals, and also reduce recidivism, and avoid costs of trial and incarceration, by diverting those suffering from mental illness at an early stage of the proceedings. (*Id*. at pp. 758-759, citing Assem. Floor, Bill Analysis of Assembly Bill 1810 as amended June 12, 2018 (June 18, 2018, item 17, p. 7, and Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 as amended Aug. 23, 2018, p. 2.) Retroactive application of the statute, according to the *Craine* court, would be "antithetical" to the Legislature's goals. (*Id*. at p. 759.) This is because "[e]arly intervention cannot be achieved after a defendant is tried,

convicted, and sentenced," and the "costs of trial and incarceration have already been incurred." (*Ibid*.)

D. Penal Code Section 1001.36 Does Not Provide for Expungement of a Record of Conviction

Penal Code section 1001.36 contains a provision enabling a defendant who completes diversion to have charges dismissed and the record of arrest expunged. (Pen. Code, § 1001.36, subd. (e) ["Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (g) and (h)"].) There is no mention in this provision regarding the record of conviction; instead the Legislature used preadjudicative language to describe these benefits. (*Craine, supra,* 35 Cal.App.5th at p. 757.) This lacuna further suggests the Legislature did not anticipate the law would be applied to persons who had proceeded through trial and been found guilty. (*Id*. at p. 750.)

E. Retroactive Relief for Adjudicated Defendants Would Be Inconsistent with Limitations Placed on Relief for Probationers Under Penal Code Section 1203.4

As the *Craine* court observed, "retroactive application of the dismissal and expungement provisions of section 1001.36 would closely resemble a grant of felony probation under section 1203.4." (*Craine, supra,* 35 Cal.App.5th at p. 757.) In the probationary context, when a defendant is adjudicated guilty, placed on probation, and successfully completes that probation, the defendant may seek to be released from all penalties and disabilities resulting from the offense. (Pen. Code, § 1203.4, subd. (a)(1).) Notably, however, there are "'numerous and substantial'" limitations on this rule and "'section 1203.4 is ineffectual to avoid specified consequences of a prior conviction.'" (*Craine, supra,* 35 Cal.App.5th at pp. 757-758,

quoting *People v. Frawley* (2000) 82 Cal.Ap.4th 784, 791.) For example, a dismissal and expungement under Penal Code section 1203.4 does not affect restrictions on felons and certain other persons from owning firearms. (*Id*. at p. 758; Pen. Code, § 1203.4, subd. (a)(2).) Expungement under Penal Code section 1203.4 also does not prevent the prior conviction from being revived if the defendant subsequently commits a new crime. (Pen. Code, § 1203.4, subd. (a)(1) ["in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed"].)

In contrast, mental health diversion under Penal Code section 1001.36 does not contain similar limitations. (See Pen. Code section 1001.36, subdivision (f) ["A record pertaining to an arrest resulting in successful completion of diversion, or any record generated as a result of the defendant's application for or participation in diversion, shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate"].) This omission perhaps makes sense for cases in which there has been no determination of guilt. But as applied to persons who have had their guilt adjudicated, retroactive application would create a "troubling loophole." (*Craine, supra*, 35 Cal.App.5th at p. 758.) By way of examples, the *Craine* court pointed out that a person convicted of violating Penal Code section 314 (indecent exposure) could obtain greater expungement benefits through diversion than someone who was placed on probation; also, all persons who completed mental health diversion would be able to own and possess firearms. (*Ibid*.) It makes little sense to treat these probationers and mental health divertees differently. Once there has been a determination of guilt, a mentally ill defendant should not be able to possess a gun, even if the defendant has successfully completed a two-year diversion program. The

existence of this loophole provides further evidence that the Legislature did not intend the statute to apply retroactively to defendants who had already been found guilty.

CONCLUSION

The grounds relied upon in the *Craine* and *Torres* decisions provide additional reasons for this Court to conclude that the Legislature did not intend Penal Code section 1001.36 to operate retroactively to cases that had been already adjudicated.

Dated: March 25, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 1,910 words.

Dated: March 25, 2020

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/s/ Steve Oetting

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Frahs**
No.: **S252220**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 25, 2020, I electronically served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 25, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 25,2020, at San Diego, California.

E. Blanco-Wilkins	/s/ E. Blanco-Wilkins
Declarant	Signature

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