



County of San Bernardino

Office of the District Attorney

MICHAEL A. RAMOS, District Attorney

November 27, 2018

DEPUBLICATION REQUEST
California Rules of Court, rule 8.1125(a)(1)

Honorable Tani Cantil-Sakauye
Chief Justice
Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

RE: *People v. Frahs* (2018), 27 Cal.App.5th 784
Supreme Court Case No. S252220
Fourth District Court of Appeal, Division Three, No. G054674

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On September 28, 2018, Division Three of the Fourth Appellate District published *People v. Frahs* (2018) 27 Cal.App.5th 784¹ (*Frahs*), in which the court ruled the application of the newly created Mental Disorder Diversion (MDD) mandated reversal of the defendant's preexisting conviction so that he might have an opportunity to seek the benefits of MDD under new Penal Code section 1001.35, subdivision (b). In so ruling, the court disregarded the plain language of the statute, in which the Legislature specifically characterized MDD as a proceeding that could only occur prior to a criminal case's adjudication. Not only did the court effectively write key words out of the new statute, it did so in a way that could lead to absurd results and extensive judicial inefficiency. For these reasons, the San Bernardino District Attorney's Office (SBCDA) respectfully requests this Court order depublication of *Frahs* pursuant to California Rules of Court, rule 8.1125(c)(1).

Interest of SBCDA

SBCDA is the agency responsible for almost all felony and misdemeanor criminal cases with the County of San Bernardino. Our office reviews more than

¹ Although the official citation for *Frahs* is now available, complete pagination is not. Therefore all pinpoint cites will be to the pagination of the slip opinion.

60,000 criminal cases per year. If the *Frah's* case is permitted to remain published authority, the impact on our office and our courts could be significant, as every defendant on appeal could concoct a means to claim that MDD should be applied retroactively to him or her. Further, claims that MDD should also be available to those whose convictions are final via writ of habeas corpus are certain to materialize. In addition to the jeopardy into which *Frahs* places our convictions, SBCDA's interest is coupled with the resource allocation necessary to address the large number of cases that may return to the superior court in the wake of *Frahs*. Moreover, as SBCDA handles all petitions for writ of habeas corpus in the superior court, we would further be tasked with allocating staff to accommodate informal responses, returns, and evidentiary hearings that may result.

Mental Disorder Diversion

On June 27, 2018, California adopted Assembly Bill 1810, a budget bill addressing many health and sanitation issues. (Stats. 2018, ch. 34, § 24.) The bill affected a wide variety of statutes, but also created MDD with the enactment of Penal Code section 1001.35.² Under the new mechanism, a defendant might be eligible for diversion under MDD if (1) the defendant has been diagnosed by a "qualified mental health expert" with a condition identified within the most recent version of the Diagnostic and Statistical Manual of Mental Disorders (DSM), (Pen. Code, § 1001.35, subd. (b)(1))³; (2) the trial court believes that the disorder in question "played a significant role in the commission of the charged offense," (§ 1001.35, subd. (b)(2)); (3) a "qualified mental health expert" opines that the defendant's diagnosed condition would respond to treatment, (§ 1001.35, subd. (b)(3)); and the defendant consents to, and complies with, treatment with the inclusion of a waiver of his right to a speedy trial, (§ 1001.35, subd. (b)(4) & (b)(5)).

The statute provides for two disqualifying factors from MDD. The first is a threshold issue in that the initial mental health condition as diagnosed can not be that of antisocial personality disorder, borderline personality disorder, or pedophilia.⁴ The second results from a factual determination by the trial court if

² The bill also modified Penal Code sections 1370, 1370.1 and 1372 to merge the application of MDD into the existing statutory scheme addressing a criminal defendant's competence to stand trial. *Ibid.*

³ All further statutory references are to the Penal Code.

⁴ The statute does not address whether the presence of any of these three disorders is a complete disqualifier, or if a defendant with one of these conditions

the defendant is eligible on the face of the issue. The defendant may be excluded from participation if he or she is found by the trial court to pose an “unreasonable risk of danger to public safety.” (§ 1001.35, subd. (b)(6).) The definition of this term is based upon that found in section 1170.18. (§ 1001.35, subd. (b)(6).)⁵

The new statute does not provide a well-defined time period in which the defense may assert a mental disorder in an effort to seek MDD. It does, however, refer to MDD as “[p]retrial diversion.” (§ 1001.35, subd. (b).) Further, it also defines “pretrial diversion” as meaning “the postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication” (§ 1001.35, subd. (c).)

The *Frahs* Ruling

In *Frahs*, the defendant had been convicted at trial of two counts of second degree robbery and an accompanying misdemeanor. (*Frahs, supra*, at p. 3.) He testified in his own defense and claimed that he had been suffering from hallucinations and delusions since his early twenties. (*Ibid.*) He also called a psychologist to testify that he had been diagnosed with a combination of schizophrenia and bipolar disorder. (*Ibid.*)⁶ Following a true finding to the allegation that the defendant had a prior “strike” conviction, he was sentenced to an aggregate term of nine years in prison. (*Id.* at pp. 3 – 4.)

The District Court of Appeal (DCA) recognized that a presumption exists that new statutes only apply prospectively. (*Frahs, supra*, at p. 6, citing § 3.) The DCA concluded, however, that the introduction of MDD to the California criminal process does not mitigate the punishment for crime, but does provide an “ameliorating benefit” by providing for a possible dismissal of the case under section 1001.36.

could still qualify if the defendant is diagnosed with another, different disorder that played a causal role in the commission of the charged offense.

⁵ A subsequent amendment to § 1001.36 in Senate Bill 215 also would preclude eligibility based on the charging of certain enumerated offenses not implicated in this case. (Stats. 2018, ch. 1005, § 1.) As this legislation contained no clause indicating that it was urgency legislation, it does not go into effect until January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c)(1).)

⁶ It is unclear from the opinion what role this evidence played in the proceeding. There is no indication of a Not Guilty by Reason of Insanity Plea under § 1016. Given the abolishment of diminished capacity, § 25, subd. (a), the evidence was presumably admitted in an attempt to negate specific intent. (§ 28, subd. (a).)

This amelioration, as reasoned in *Frahs*, meant that this Court's rule from *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), as interpreted by *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*), compelled a conditional reversal of the defendant's conviction so that the trial court might consider whether the defendant could enjoy the new benefits of MDD. (*Frahs, supra*, at pp. 7 – 9.)

In *Frahs*, the Attorney General argued that the Legislature's limitation of the application of MDD to those cases in which a defendant's case had not yet been adjudicated conveyed an intention to not broadly extend the benefits of MDD. (*Frahs, supra*, at p. 8.) The DCA dismissed this argument. "Here, although *Frahs'* [*sic*] case has technically been 'adjudicated' in the trial court, his case is not yet final on appeal." (*Ibid.*) This one sentence, without analysis, effectively rendered §1001.35, subd. (c) ineffective surplusage.

Retroactivity and Nullification of Statutory Language

In *Lara*, this Court reviewed the general consideration for the retroactivity of a criminal statute under the teachings of *Estrada*. As noted above, there is a presumption against the retroactivity of new laws. (*Lara, supra*, 4 Cal.5th at p. 307, citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1224.) *Estrada*, however, set out the precept that when the Legislature acts to lessen punishment, there is an inference that the benefit should extend to "every case to which it constitutionally could apply." (*Estrada, supra*, 63 Cal.3d at p. 745.) As this Court summed up the *Estrada* rule, it "rests on an inference that, *in the absence of contrary indications*, a legislative body ordinarily intends for ameliorative changes to criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*), emphasis added.)

Proposition 57 removed the prosecution's ability to directly file criminal cases in adult court. (*Lara, supra*, 4 Cal.5th at p. 303.) This Court concluded that its effect would therefore be retroactive under *Estrada*, as the language of the proposition was silent on retroactive effect. (*Id.* at p. 312 – 313.) By contrast, where the Legislature or Electorate includes specific language limiting retroactivity, such as that which was found in the reformation of "Three Strikes," the enacting body is acting within its power to "modify, limit, or entirely forbid" retroactive application. (*Conley, supra*, 63 Cal.4th at p. 656 – 657.)

With the case of MDD here, the Legislature *has* included such limiting language by indicating that is available "at any point in the judicial process from the point at which the accused is charged until adjudication . . ." (§ 1001.35, subd.

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(c.) If the Legislature had intended for the application of MDD to be available until a case is final on appeal, this statutory language would not have been included without further modifiers.

Frahs simply cast aside the plain language of the statute by saying that the defendant's case had been "technically" adjudicated. (*Frahs, supra*, at p. 8.) With no analysis, and without a mention of this Court's ruling in *Conley*, the DCA rewrote the MDD statute. If such post-conviction application of MDD is indeed to be reached, focused analysis should at least be applied to avoid construction that renders any part of the statute surplusage. (*Reno v. Baird* (1998) 18 Cal.4th 640, 658.) As it stands now, *Frahs's* dismissal of a "technical" adjudication could imply that a defendant could take his or her chances at trial, *then* seek MDD if he or she did not like the outcome.

Conclusion

This Court's teachings in *Estrada*, *Conley*, and *Lara* show that the issue of retroactivity contains complexity that cannot be resolved with a cavalier shrug. When the effect of reading retroactivity into a new statute, and an entire subdivision out of one, could potentially undo hundreds of convictions, the potential cost to society deserves more attention than that which *Frahs* provided.

For the reasons set forth above, SBCDA joins with the San Diego District Attorney's Office in requesting that this Court issue an order depublishing *Frahs*.

Sincerely yours,



Robert P. Brown
Chief Deputy District Attorney
Specialized Prosecutions Division

**SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY
PROOF OF SERVICE BY UNITED STATES MAIL**

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

Robert P. Brown says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is

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I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on November 27, 2018.



Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S252220**
Lower Court Case Number: **G054674**

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/s/Robert Brown

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Last Name, First Name (PNum)

San Bernardino District Attorney

Law Firm

