

Rodriguez, the Massachusetts Supreme Judicial Court clarified that information gathered during forensic evaluations cannot be admitted to prove the truth of that information; rather, the information can be admitted for the sole purpose of explaining how the expert reached an opinion. In making its decision, the court emphasized that forensic interviews are inherently less reliable than clinical interviews, as defendants may be motivated by secondary gain in their legal case. Forensic interviews, however, are often more thorough than clinical interviews and often involve testing for malingering and a particularly heavy reliance on collateral information to inform the final opinion. Despite these practices designed to assess for potential deception in forensic interviews, the court ruled that information gathered during forensic interviews cannot be used to prove the truth of that information. The court's ruling serves as an important reminder that the potential for secondary gain by defendants may limit the admissibility of the information gathered in forensic interviews, no matter the safeguards put in place to assess for malingering.

Mr. Frahs's case. This conditionally reversed his conviction and sentence and remanded his case to the trial court for an eligibility hearing for pretrial diversion.

Facts of the Case

In March 2016, Eric Jason Frahs was asked to leave a market by the storeowner, who recognized him from a previous attempt to steal cigarettes. Mr. Frahs left the store and began throwing rocks at passing cars, striking and shattering a windshield. Mr. Frahs reentered the store and "grabbed a can of beer and an energy drink" (*Frahs*, p 846). When the storeowner and his son attempted to block his exit, Mr. Frahs "punched the owner in the head" (*Frahs*, p 846) and ran into the parking lot, where the owner and son detained him until police arrived. Mr. Frahs was "charged with two counts of second degree robbery and one felony count of throwing a substance at a motor vehicle with intent to cause injury" (*Frahs*, p 846).

Mr. Frahs testified about his mental health at his trial that same year. He described experiencing hallucinations and delusions since his early twenties, endorsed multiple psychiatric hospitalizations, and identified several months during which he required an appointed conservator. Mr. Frahs explained that, at the time of his arrest, he had not taken his psychiatric medications for four days and was experiencing severe hallucinations and delusions. He described specifically "he thought an angel flew by on a horse and talked to him just before he entered the market" (*Frahs*, p 846).

A clinical forensic psychologist who evaluated Mr. Frahs testified at the trial. He asserted that Mr. Frahs had a diagnosis of schizoaffective disorder, "was very ill and unstable" (*Frahs*, p 846), and was experiencing a psychotic episode that resulted in a disconnect from reality in the days preceding the incident. The psychologist testified that Mr. Frahs's behavior at the market was a result of a psychotic episode.

The jury found Mr. Frahs "guilty of two counts of second-degree robbery and [a] misdemeanor offense of throwing a substance at a motor vehicle without intent to cause injury" (*Frahs*, p 847). During a subsequent bench trial prior to sentencing, the court found Mr. Frahs had previously been convicted of a "strike" felony (under Cal. Penal Code § 667 (2012), a defendant convicted of a felony after a previous serious felony conviction is imposed a sentence double that for the provided crime) and thus imposed a nine-year sentence.

Retroactive Application of Diversion Statute

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Retroactive Application of Diversion Eligibility Is Acceptable When Applied to a Class of Persons and for Ameliorative Benefit

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In *People v. Frahs*, 466 P.3d 844 (Cal. 2020), the Supreme Court of California upheld the decision of the California Court of Appeal to retroactively apply Cal. Penal Codes § 1001.35 and § 1001.36 (2018) to

Mr. Frahs appealed; in 2018, while his appeal was pending, the legislature passed a bill that became effective immediately, Cal. Penal Code § 1001.36 (2018), which “gives trial courts the discretion to grant pretrial diversion for individuals suffering from certain mental health disorders” (*Frahs*, p 847).

The court of appeal determined that “§ 1001.36 applies retroactively to all nonfinal judgments” (*Frahs*, p 847) and that Mr. Frahs is “entitled to a limited remand because his case was not yet final on appeal and his record demonstrates that he appears to satisfy at least one of the statute’s threshold eligibility requirements, a diagnosed and qualifying mental disorder” (*Frahs*, p 847). The court conditionally reversed Mr. Frahs’s conviction and sentence and remanded the case to the trial court to conduct a mental health diversion eligibility hearing under § 1001.36.

Ruling and Reasoning

The Supreme Court of California affirmed the opinion of the court of appeal and upheld the decision to reverse conditionally the conviction and sentencing of Mr. Frahs to remand his case to the trial court for a diversion eligibility hearing under § 1001.36.

The court referenced *In re Estrada*, 408 P.2d 948 (Cal. 1965), in which it held that “an amendatory statute lessening punishment for a crime was presumptively retroactive and applied to all persons whose judgments were not yet final at the time that statute took effect” (*Frahs*, p 846). The court further referenced two additional cases in which the *Estrada* holding was applied. In *People v. Superior Court (Lara)*, 410 P.3d 22 (Cal. 2018), the court “applied the *Estrada* rule to legislation that mitigated the possible punishment for a class of persons” (*Frahs*, p 846). The court reasoned that § 1001.36 provides possible ameliorating benefit for a class of persons “by offering an opportunity for diversion and ultimately the dismissal of charges” (*Frahs*, p 846) for persons with a mental illness. The court also referenced *People v. Francis*, 450 P.2d 591 (Cal. 1969), in which the court inferred legislative intent of an amendment to apply retroactively in sentencing discretion and held that, although the statute in question did not guarantee a lighter sentence, it granted the trial court discretion to impose lighter sentences, and thus § 1001.36 met the ameliorative benefit standard of the *Estrada* rule.

The court further reasoned that, without the legislature’s explicit statements that § 1001.36 would

apply solely prospectively or that the *Estrada* rule would not apply to this diversion program, the court can reasonably assume that the “legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply” (*Frahs*, p 848). The court also reasoned that the legislature was aware of existing laws and judicial decisions, and only months prior to the passage of § 1001.36 the *Lara* decision was made in which the court determined “that a statute that reduced the possible punishment for a class of persons applied retroactively” (*Frahs*, p 853). The court ruled that the cited case law clarified that if the legislature intended to rebut the *Estrada* rule for ameliorative statutes, it must do so with “sufficient clarity.”

Upholding the court of appeal grant of a limited remand of Mr. Frahs’s case for a mental health diversion eligibility hearing, the court held that Mr. Frahs met at least one eligibility criterion, a qualifying mental disorder and that some evidence indicated that mental illness contributed to the offense. The court, however, did not rule on whether Mr. Frahs will be able to demonstrate full eligibility or whether the trial court should grant diversion if it determines that Mr. Frahs meets eligibility.

Discussion

The court’s decision in *People v. Frahs* signals its understanding of the importance and necessity of mental health treatment for defendants who have a mental disorder. It also recognizes the potentially ameliorative benefit of mental health diversion, both for treatment of mental illness and reduction of recidivism. One point for consideration is understanding where the responsibility for evaluation and treatment lies and what resources are required to assure defendants the best chance to “perform satisfactorily in diversion” (*Frahs*, p 848), a necessity for successful diversion and dismissal of charges.

Through clinical experience, psychiatrists are aware that engaging a client in treatment can be a challenge to successful treatment. The eligibility requirements as written in § 1001.36 address some of these concerns by specifying that defendants must consent to diversion and agree to comply with treatment. We also know from clinical practice that consent to treatment is not the only barrier to engagement and successful treatment. This statute and the diversion programming do not take into

account the other factors that may affect a client's ability to connect with treatment, such as transportation, housing, substance use, social supports, case management, and the like. A defendant who may be unable to address all of these other factors may struggle to participate fully in the court diversion program. The salient point then becomes understanding how those factors influence "successful" completion of diversion programming and allow for eligibility of dismissal of charges. The diversion bill does not mandate explicitly the provisions for programming needed to adequately address factors that may contribute to or exacerbate mental illness or pose barriers to treatment. These provisions are necessary to ensure that all defendants are given equal opportunities to be successful.

The most concerning dilemma for providers is understanding the burden of responsibility for "satisfactory" completion of treatment. A defendant may lack the resources to resolve treatment barriers adequately and these resources may not be addressed through the court diversion program (which they often are not). Such cases present the question of whether the defendant is responsible for an unsatisfactory treatment program or the system is responsible for failing to provide necessary resources to ensure success. An ethics dilemma emerges in which the clinician responsible for reporting to the court must either determine success by factoring in individual barriers or must use the same standard of successful treatment for all defendants, regardless of circumstance. In this case, the court highlights the cost-savings of providing treatment to defendants versus incarcerating them, but the statute lacks language that guarantees adequate resources to address all components of a defendant's mental illness. It merely specifies that treatment can be court funded or privately funded.

Sex Discrimination in the Workplace

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An Employer Who Fires an Individual Merely for Being Gay or Transgender Violates Title VII of the Civil Rights Act of 1964

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In three consolidated cases, under *Bostock v. Clayton County, Board of Commissioners*, 140 S. Ct. 1731 (2020), the U.S. Supreme Court considered the question of sex discrimination in the workplace and held that an employer who fires an individual for being homosexual or transgender effectively violates Title VII of the Civil Rights Act of 1964.

Facts of the Cases

In the first case, *Gerald Lynn Bostock v. Clayton County, Georgia*, Gerald Bostock, who had worked as a child welfare advocate for Clayton County, Georgia for a decade and was recognized as a model employee, was fired by the county for conduct "unbecoming a county employee" (*Bostock*, p 1738) soon after joining a gay recreational softball league. In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), Donald Zarda, a skydiver instructor with Altitude Express in New York, was fired within days of mentioning that he was gay to a female tandem skydiving client, after she complained about his homosexual status. In *Equal Employment Opportunity Commission (EEOC) v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E. D. Mich. 2016), Aimee Stephens, who was hired and had worked for years as a man, was fired after six years of employment at the company when she notified them she planned to transition to "live and work full-time as a woman" (*Bostock*, p 1738).

Though each employee brought suit under Title VII alleging "unlawful discrimination on the basis of sex" (*Bostock*, p 1738), each case had a different outcome in the lower courts. In *Bostock*, the U.S. District Court for the Northern District of Georgia dismissed the suit, siding with the county that Title VII does not apply to discrimination on the basis of sexual orientation, and the Eleventh Circuit Court of Appeals upheld the decision. In *Zarda*, the U.S.