

disease or defect and its interaction with voluntary intoxication. The court noted that there was no dispute that Mr. Dunphe was not under the influence of cannabis at the time of the offense. The Commonwealth expert opined, however, that the symptoms were a result of a drug-induced psychosis and the prosecutor's statements emphasized the impact of voluntary, long-term cannabis use on the defendant's brain. These inferences, combined with the instruction that a defendant is not entitled to a criminal responsibility defense if voluntary intoxication is the cause of a lack of substantial capacity, may have led a reasonable jury to conclude erroneously that a mental disease or defect caused by chronic cannabis use (i.e., settled psychosis) is not recognized as a mental disease or defect under the law. Further, the court decided that, because Mr. Dunphe was not intoxicated at the time of the offense, the third scenario ("knew or had reason to know" that voluntary intoxication could worsen psychiatric symptoms) did not apply in this case. Ultimately, the court ruled the jury instructions for mental state trials should be amended to reflect the intention of the court and the case law of the Commonwealth. Mr. Dunphe's convictions were vacated, and his case was remanded back to the superior court for a new trial.

#### Discussion

In *Dunphe*, the court provided a review of the relevant case law in the Commonwealth that serves as a basis for insanity defenses. It also dissected the jury instructions related to the defense. The court concluded that the instruction pertaining to the origin of mental disease or defect, as written, could have been misinterpreted by a reasonable jury. To that end, the court amended jury instructions to reflect more accurately the intent that the origin of a defendant's mental disease or defect need not be considered when deciding criminal responsibility.

Case law in Massachusetts establishes numerous avenues whereby a defendant can be considered not criminally responsible. A defendant can be found not guilty by reason of insanity as a result of cognitive or volitional impairments. In addition, in the stated spirit of not criminalizing mental illness or addiction, the court used *Dunphe* to clarify the meaning of the Commonwealth's case law around this matter. It made clear that cases of fixed or settled insanity secondary to substance use qualify for an insanity defense. The ruling further codified the intent of the

court by amending provisionally the model jury instructions to ensure jurors understand substance use that induces settled insanity is indeed a reasonable affirmative defense. This ruling did not expand the standard, but rather clarified case law in the Commonwealth under which a defendant can be considered not guilty by reason of insanity.

## Mental Health Pretrial Diversion

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### A Retroactive Application of a Mental Health Pretrial Diversion Program Is Allowed

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In *People v. Frahs*, 466 P.3d 844 (Cal. 2020), the Supreme Court of California considered whether a statute creating a mental health pretrial diversion program could be applied retroactively. The court ruled the statute can be applied retroactively because it could have an ameliorative effect, there was no "savings clause" (exemption from the statute's operation), the California legislature did not signify an intent for the statute to be prospective only, and the judgment in the case was not final at the time the statute was enacted. The court ruled a conditional remand was appropriate to determine eligibility for the diversion program.

#### Facts of the Case

In March 2016, Eric Frahs was throwing rocks at vehicles in front of a store he later entered, where he attempted to steal beverages and then punched the store owner. He was subsequently charged with two counts of second-degree robbery and one count of throwing a substance at a motor vehicle with intent to cause injury.

At trial, Mr. Frahs introduced testimony regarding his mental health; he testified that he experienced hallucinations and delusions for years and had been hospitalized several times. He testified that he thought he saw an angel fly by on a horse and talk to him prior to his entering the store. A forensic psychologist testified that Mr. Frahs had a diagnosis of schizoaffective disorder and opined that his behavior at the time of the offense was related to his mental illness. Despite this, Mr. Frahs was convicted on the two charges of second-degree robbery and throwing a substance at a vehicle without intent to cause injury, and he was sentenced to nine years of incarceration.

While Mr. Frahs' appeal was pending, California enacted Penal Code § 1001.36 (2018), a statute that allows for pretrial diversion of individuals with certain mental illnesses. The California Court of Appeal (*People v. Frahs*, 238 Cal. Rptr. 3d 483 (Cal. Ct. App. 2018)) ruled that the statute applied retroactively to cases that fit the criteria, if the judgments were not final. The court ordered a conditional remand for Mr. Frahs.

#### Ruling and Reasoning

The Supreme Court of California affirmed the judgment of the lower court, ruling the statute could be applied retroactively and Mr. Frahs was entitled to an eligibility hearing to determine whether such diversion was appropriate. The court noted the purposes of the statute included diverting individuals with mental disorders to treatment to reduce their involvement in the criminal justice system; to allow local courts discretion and flexibility in diversion; and to provide treatment and support for individuals with mental illness. The statute allows for trial courts to use their discretion in granting pretrial diversion if the following are met:

- (1) the defendant suffers from a qualifying mental disorder; (2) the disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to mental health treatment; (4) the defendant consents to diversion and waives his or her speedy trial right; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community (*Frahs*, p 847).

The court relied on its prior decision in *In re Estrada*, 408 P.2d. 948 (Cal. 1965), which held that amendatory statutes (e.g., statutes that reduce punishment) are intended to apply retroactively. The

court interpreted the legislative intent in enacting such statutes was for the reduced penalty to apply to every case "to which it constitutionally could apply" (*Frahs*, p 848, citing *Estrada*, p 951), including cases in which judgments were not final. More recently, the court ruled in *People v. Superior Court (Lara)*, 410 P.3d. 22 (Cal. 2018) that the *Estrada* rule applied to an amendatory statute that "ameliorated the punishment for a class of persons" (*Frahs*, p 849, citing *Lara*, p 27; emphasis in original). In *Lara*, the court ruled a statute prohibiting prosecutors from charging juveniles in adult court and giving juvenile courts the discretion to transfer juveniles to adult courts could be applied retroactively because it could potentially reduce punishment.

Relying upon both *Estrada* and *Lara*, the court reasoned that the new statute could offer a "potentially ameliorative benefit for a class of individuals—namely, criminal defendants who suffer from a qualifying mental disorder" (*Frahs*, p 850). The diversion program would allow for individuals with mental illness to receive treatment and, if completed successfully, have their criminal charges dismissed instead of serving a sentence in prison. Accordingly, the court ruled the statute was ameliorative in nature. Further, they concluded that the California legislature did not include any language indicating it intended the statute to be applied only proactively. Although the statute contained language indicating the diversion could be applied "at any point in the judicial process . . . until adjudication" (Cal. Penal Code § 1001.36 (c) (2018)) and referencing the program as "pretrial," the court reasoned this language only conveyed how the legislature intended the statute to be enacted during the ordinary trial process. The court rejected the arguments raised by the state that the legislature's intent was for it to be applied only prospectively.

The court then considered the remedy for Mr. Frahs in particular. In *Lara*, the court endorsed a limited remand procedure in which appellate courts could conditionally reverse a conviction and sentence and order the trial court to conduct a new hearing, which, in *Lara*, was a juvenile transfer hearing. In *Frahs*, the California Court of Appeal followed such a procedure, conditionally reversing Mr. Frahs' conviction and sentence and instructing the trial court to determine whether Mr. Frahs met eligibility for the diversion program, noting the record indicated Mr. Frahs appeared to have a mental disorder and a psychologist had testified that his actions at the time of

the offense were related to symptoms of his mental disorder. Accordingly, the court affirmed the judgment of the appeals court and conditionally reversed Mr. Frahs' conviction and sentence. The court remanded the case to the appeals court with instructions to remand it to the trial court to conduct an eligibility hearing considering the relevant factors named by statute.

#### Discussion

Across the country, many jurisdictions utilize pretrial diversion programs for a variety of individuals, including those with mental illness, substance use, or first-time offenders (National Association of Pretrial Services (NAPSA): Pretrial diversion in the 21st century: a national survey of pretrial diversion programs and practices. *NAPSA Monograph*, 2009, available at: <https://netforumpro.com/public/temp/ClientImages/NAPSA/18262ec2-a77b-410c-ad9b-c6e8f74ddd5b.pdf>). Pretrial diversion programs aim to serve several important goals, including reduce recidivism, provide specialized treatment rather than punishment to those who need it, and reduce court costs (Hiday VA, Ray B, Wales H: Longer-term impacts of mental health courts: recidivism two years after exit. *Psychiatric Services* 67:378–83, 2016; Edwards ER, Sissoko DRG, Abrams D, *et al*: Connecting mental health court participants with services: Process, challenges, and recommendations. *Psychol Pub Pol'y & L* 26:463–75, 2020). In the United States, individuals with mental illness are overrepresented in prisons and jails, indicating a high prevalence of mental illness within our penal system. Pretrial diversion programs, such as the one discussed in *People v.*

*Frahs*, are a potential avenue to reduce the criminalization of mental illness, reduce the prevalence of mental illness in our correctional environments, and provide mental health treatment to individuals in need.

In *Frahs*, the Supreme Court of California recognized the potential value of a mental health pretrial diversion program, and, through its analysis, enabled a program to be applied broadly to capture as many individuals as could benefit by allowing its application at any point during the legal process prior to final judgment. The court makes reference at several points to the beneficial nature of such a program, discussing how the purpose of the program is to reduce the involvement of individuals with mental illness with the criminal justice system, provide specialized mental health treatment to individuals in need of it, and prevent individuals with mental illness from unjustly accruing criminal convictions and sentences. The court further recognized the financial benefit a mental health pretrial diversion program may have for the state, citing that community mental health treatment costs significantly less than jailing someone (*Frahs*, p 853). The court's ruling in this case underscores the potential benefit of mental health pretrial diversion programs and, importantly, allows such a program to apply in the broadest sense possible, capturing many individuals with mental illness who have been involved in the criminal justice system secondary to their psychiatric symptoms. In doing so, the Supreme Court of California recognized the dire need for improved treatment of persons with mental illness within the criminal justice system.