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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JODY CHATMAN,

Defendant and Appellant.

Case No. S237374

First Appellate District, Division One, Case No. A144196
Alameda County Superior Court, Case No. C140542
The Honorable Paul Delucchi, Judge

OPENING BRIEF ON THE MERITS

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CONSTITUTIONAL PROVISIONS

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QUESTION FOR REVIEW

Whether Penal Code section 4852.01, subdivision (b), violates the right to equal protection of former felony probationers ineligible to seek a certificate of rehabilitation due to their incarceration after the granting of a dismissal and release from disabilities under Penal Code section 1203.4.

STATEMENT

A. The Civil Disabilities Attending Felony Conviction and the Pathways to Limiting Those Disabilities

To place the issue in this case in context, we provide an overview of the civil disabilities resulting from felony conviction and the various opportunities to limit or remove those disabilities.

1. Disabilities Attending Felony Conviction

A prior felony conviction may be used to enhance a new sentence, trigger the use of an alternative recidivist sentencing scheme, or reduce eligibility for probation or diversion in a subsequent case. (See Pen. Code, §§ 667, 1170.12, 1203, subd. (e), 1210.1.)[1] These are the penal consequences of the prior conviction. Convictions for certain gang-related crimes, narcotics offenses, or sex offenses may trigger a duty to register, which is a civil, regulatory consequence of the conviction. (*People v. Castellanos* (1999) 21 Cal.4th 785, 798-799; Health & Saf. Code, § 11590; Pen. Code, §§ 290, 186.30.) The remaining post-sentence disabilities, statutorily imposed on convicted felons, are also civil in nature. They range from disqualification from jury service, to licensing restrictions and disciplinary proceedings, to witness impeachment at trial, to eligibility for in rem civil forfeiture proceedings, to restrictions on gun and ammunition possession. (*People v. Ansell* (2001) 25 Cal.4th 868, 888-889 [recognizing

[1] Further statutory references are to the Penal Code, unless otherwise noted.

that these statutes serve "vital public interests, avoid criminal punishment, and otherwise raise no ex post facto concerns"]; see also *United States v. Ursery* (1966) 518 U.S. 267, 270, 116 S.Ct. 2135, 135 L.Ed.2d 549 [no double jeopardy violation in civil property forfeiture, a remedial civil sanction, after criminal conviction]; *People v. Culbert* (2013) 218 Cal.App.4th 184, 194 [addressing §§ 29800 and 30350 and their antecedents]; *United States v. Marks* (2004) 379 F.3d 1114, 1119-1120 [federal law precludes firearm and ammunition possession by felons].) In the case of violent sex offenders, the conviction is one of several prerequisites for civil commitment as a sexually violent predator under the Sexually Violent Predators Act. (Welf. & Inst. Code, § 6600 et seq.; *People v. McKee* (2010) 47 Cal.4th 1172, 1202-1203; *People v. Allen* (2008) 44 Cal.4th 843, 860 [SVP proceedings are civil, not criminal, in nature].) A convicted felon who is not presently imprisoned or on parole is now eligible to vote (Cal. Const., art. II, § 4; Elec. Code, §§ 2150, subd. (a)(9), 2201, subd. (c)), but the other disabilities described above remain. (*People v. Ansell, supra*, 25 Cal.4th at pp. 872-873.)

2. Executive Clemency

The Governor's power to grant executive clemency dates to California's first Constitution. The California Constitution of 1849, article V, section 13, provided, "The Governor shall have the power to grant reprieves and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." A pardon both exempts the individual from punishment which the law inflicts for the crime committed and removes some or most of the consequent disqualifications or disabilities. (*People v. Biggs* (1937) 9 Cal.2d 508, 510.) Present article V, section 8 of the California Constitution requires four

justices of this Court to concur with a pardon or commutation to a person who has been convicted of two or more felonies, but otherwise similarly provides that "Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment."

Section 4800 et seq. provides the procedures for direct application to the Governor for clemency.

3. Successful Completion of Probation

In addition, the Legislature has established probation as a rehabilitative pathway. "The primary purpose of granting probation instead of the imposition of sentence to an incarcerating institution is to help the defendant rehabilitate himself" under the close guidance and supervision of the probation officer, with periodic "profitable and instructive sessions" at which the probationer must "reveal his activities and seek the assistance of the probation officer." (*People v. Matranga* (1969) 275 Cal.App.2d 328, 332.) Probation is neither painless for the probationer nor inexpensive for the supervising county. (*Ibid.*) Probation is both an act of clemency and grace, and a substantial investment in the probationer's long-lasting reform. Those who successfully complete probation and satisfy certain conditions may seek removal of civil disabilities under section 1203.4 as of right. (*In re Griffin* (1967) 67 Cal.2d 343, 347, fn. 3 ["On application of a defendant who meets the requirements of section 1203.4 the court not only can but must proceed in accord with that statute. [Citations.]"].)

Section 1203.4, initially enacted as Section 1203, section 4, in 1872, provides, in relevant part:

> (a)(1) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation . . . the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the

commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted. . . . However, 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. . . . The probationer shall be informed in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon.

(2) Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [certain firearm laws].

(3) Dismissal of an accusation or information underlying a conviction pursuant to this section does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

"The expunging of the record of conviction [under section 1203.4] is in essence a form of legislatively authorized certificate of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation." (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788-789.) "A grant of relief under section 1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequence of his [or her] conviction and, with a few exceptions, to restore him [or her] to his [or her] former status in society to the extent the Legislature has power to do so." (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 581; *People v. Field* (1995) 31 Cal.App.4th 1778, 1787, internal quotations omitted.)

Dismissal and release under section 1203.4 thus provides a palpable benefit, but not a complete expungement of the criminal conviction. (*People v. Frawley* (2000) 82 Cal.App.4th 784, 791.) The benefits conferred by grant of relief under section 1203.4 include the right to "truthfully represent to friends, acquaintances and private sector employers that he [or she] has no conviction" (*People v. Acuna* (2000) 77 Cal.App.4th 1056, 1060); the right not to volunteer information about the prior conviction unless directly asked when applying for certain public offices or licenses, or contracting with the state lottery; the right to apply for certain employment otherwise unavailable to convicted felons; and it confers eligibility to apply for a certificate of rehabilitation and release at the earliest possible time. (*People v. Arata* (2007) 151 Cal.App.4th 778, 788; §§ 4852.01, subd. (b), 4852.03, subd. (a)(3).) The statute lists, and judicial opinions have clarified, exceptions to the penalties and disabilities from which the defendant is released: he remains subject to impeachment as a felon; may not possess firearms or ammunition; and may not hold any license or public office that is specifically precluded by the conviction, such as becoming licensed as an attorney, physician, seller of alcoholic beverages, or becoming a peace officer. (§ 1203.4, subd. (a); *People v. Guillen* (2013) 218 Cal.App.4th 975, 996-997; *Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095; *Krain v. Medical Board* (1999) 71 Cal.App.4th 1416, 1419-1420.) Section 290.007 precludes release from sexual offender registration.

Accepting the privilege of probation and exercising the right to dismissal upon successful completion of probation comes with a risk. If the successful probationer is later confined in a jail or prison, that is, if the lasting rehabilitation fails, he or she becomes ineligible to later apply for the certificate of rehabilitation described below. Probationers are made aware of that risk when placed on probation. (§ 1203.4, subd. (a)(1) ["The

probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon."]; see also § 4852.21.)

4. Certificate of Rehabilitation

Felons who were placed on probation and had their charging documents dismissed per section 1203.4, and succeeded in avoiding subsequent incarceration, as well as those felons who were incarcerated and therefore never had an opportunity to establish their reformation, may apply for a certificate of rehabilitation and pardon under section 4852.01.[2] That provision was enacted in 1943 to streamline the process for California ex-felons to apply for a pardon to be eligible to serve in the military and work in defense industries:

> During World War II the Governor's office was inundated with pardon applications received from ex-felons who were otherwise barred from serving in the military and working in defense industries. (See Requirement for Rehabilitation Certificate, supra, 65 Ops.Cal.Atty.Gen. 232, 233-234; Mosk, Certificates of Rehabilitation and the New Pardon Procedure (1943) 18 State Bar J. 172, 173-175.) Enacted as an urgency measure in 1943, the certificate of rehabilitation scheme eased the administrative burden on the executive branch by allowing the superior court to investigate and recommend pardon applicants. (Stats.1943, ch. 400, § 1, p. 1922, eff. May 13, 1943.)

(*Id.* at pp. 874-875.) A certificate of rehabilitation provides an "additional, but not exclusive procedure for restoration of rights and application for pardon." (§ 4852.19.) The certificate procedure does not replace the direct application to the Governor for clemency. It engages the superior court, the

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[2] After appellant's petition in the superior court for a certificate was denied, the Legislature amended the statutes relating to the procedure for restoration of rights, in ways not relevant to the issue presented. (See Stats. 2015, ch. 378, eff. Jan. 1, 2016.) Like the Court of Appeal, we cite the current version of the statutes. (See Typed Opn. at p. 5, fn. 2.)

investigative agencies, and the rehabilitative agencies, such as the probation department, in an expedited, yet detailed and thorough, vetting for clemency applications, involving documentary evidence and often live testimony; the issuance of a certificate itself restores some of the civil disabilities attendant to felony conviction. (§§ 4852.04, 4852.07, 4852.1, 4852.12, 4852.15, 4852.17.)

Section 4852.01, subdivision (b), makes former felony probationers certificate-eligible when "the accusatory pleading [on their original offense] has been dismissed pursuant to Section 1203.4 . . . if the petitioner has not been incarcerated in a prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading, is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years' residence in this state prior to the filing of the petition." The preclusion of subsequently incarcerated felony probationers has been a part of the statute since it was enacted in 1943. (Stats. 1943, c. 400, p. 1922, § 1, eff. May 13, 1943.)

If a felon meets those criteria, he or she must further demonstrate to the superior court a sustained period of rehabilitation. A certificate is available only to convicted felons who have successfully completed their sentence, supervision, probation, or parole, and who have undergone an additional and sustained period of rehabilitation, generally seven to ten years, in California during which the person must display good moral character and behave in an honest, industrious and law-abiding manner. (*People v. Ansell, supra*, 25 Cal.4th at p. 875; see §§ 4852.01, subds. (a)-(c), 4852.03, subd. (a) [five year base period to which two to five additional years are added, depending on the underlying offense], 4852.05 ["the person shall live an honest and upright life, shall conduct himself or herself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land"] , 4852.06 [petitioner must meet

the standards of section 4852.05 for the seven- to ten-year period, including five years in California immediately preceding the application].) Any violation of law, satisfactorily proved, permits denial of the certificate and may start the clock over again on a new period of rehabilitation. (§ 4852.11.) "To enter an order known as a certificate of rehabilitation, the superior court must find that the petitioner is both rehabilitated and fit to exercise the rights and privileges lost by reason of his conviction." (*Id.* at pp. 875-876; § 4852.13, subd. (a).)

A section 4852.01 certificate of rehabilitation, when granted by the superior court, renders the former offender eligible to apply for certain additional licenses (see Bus. & Prof. Code, § 480; Educ. Code, §§ 4408, 8708; Lab. Code, § 26) and also serves as a judicially approved, thoroughly vetted, expedited application to the Governor for pardon.[3]

B. Trial Court Proceedings

In 2001, appellant was convicted of robbery (§ 211) and placed on felony probation with a 180-day term in jail. (CT 147.) Almost two years later, he was convicted of alcohol-related reckless driving in violation of Vehicle Code section 23103. (CT 179.) The court eventually granted him release from penalties and disabilities pursuant to section 1203.4, with the reckless driving conviction dismissed in 2006, and the robbery conviction dismissed in 2007. (CT 170, 179.) Later, in 2008, appellant pleaded guilty to driving under the influence in violation of Vehicle Code section 23152, subdivision (b) and was granted three years' probation with a 10-day jail term. (CT 179.) The latter conviction was never dismissed.

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[3] There are additional pathways to reduction of the impact of prior convictions not at issue here. (See, e.g., §§ 17, 1170.18 [pathways for reducing felonies to misdemeanors].)

In 2014, appellant filed a petition for a certificate of rehabilitation under section 4852.01, acknowledging that he was not eligible under the terms of the statute, but seeking relief on equal protection grounds. The Court of Appeal characterized the petition as appellant's attempt to avail himself of a statutory exemption from ineligibility in order to work as an administrator of a group home for foster and delinquent youth. (Typed Opn. at p. 2; see Health & Saf. Code, § 1522, subds. (a), (d), (g)(1)(A)(ii).) In 2015, the superior court denied the petition, relying primarily on *People v. Jones* (1985) 176 Cal.App.3d 120 [former felony probationers ineligible for a certificate of rehabilitation due to subsequent incarceration are not similarly situated with former state prisoners, who had not previously benefitted from dismissal of charges, a probation order tailored to their rehabilitative needs and a period of supervised compliance; and a rational basis exists for any distinction in treatment between the two classes].) (Typed Opn. at pp. 1-2.)

C. The Court of Appeal's Ruling

In the Court of Appeal, appellant argued that section 4852.01 violates equal protection by excluding subsequently incarcerated probationers but not subsequently incarcerated prisoners. The Court of Appeal agreed and reversed, remanding with directions to consider the merits of appellant's petition. (Typed Opn. at p. 12.) Observing that section 4852.01, subdivision (b) "grants certificate eligibility to felons who have completed a prison sentence (former felony prisoners) and are subsequently incarcerated," and that "it might make sense to deny certificate eligibility to all subsequently incarcerated former felons," it could discern "no rationale to deny certificate eligibility only to those who have served sentences of probation." (*Id.* at p. 1.) "[F]ormer felony prisoners may petition for a certificate of rehabilitation, with no requirement that they remain free from

incarceration after the completion of their state-prison sentence (or sentence to county jail under section 1170, subdivision (h))." (*Id.* at p. 5.)

Indicating its analysis would be the same under either the federal or the state equal protection clauses (Typed Opn. at p. 5, fn. 3), the court found unpersuasive the conclusion of the court in *Jones*, *supra*, 176 Cal.App.3d 120, "'that former probationers do not have the same status and, therefore, are not similarly situated with former state prisoners (and those discharged from parole) *for purposes of applying section 1203.4*." (Typed Opn. at p. 7, quoting *Jones*, at p. 128, italics in *Chatman*.) While criticizing the *Jones* opinion for finding former felony probationers and former felony prisoners dissimilarly situated, the court below also characterized *Jones* as failing to articulate a rational basis for the differing treatment of the two groups, and as circularly examining "'the purpose of section 1203.4 and its relation with section 4852.01.'" (Typed Opn. at pp. 7-9, quoting *Jones*, at p. 128.).

In contrast with *Jones*, the Court of Appeal reasoned that "[b]oth groups are convicted felons seeking certificates of rehabilitation to reduce the disabilities that resulted from their prior convictions" and, hence, are similarly situated for purposes of section 4852.01. (Typed Opn. at p. 9.) Invoking by analogy *Newland v. Board of Governors* (1977) 19 Cal.3d 705, where this court found no rational basis to permit felons, but not misdemeanants, to seek a certificate of rehabilitation under section 4852.01, the Court of Appeal concluded the legislative classification between former felony probationers and former felony prisoners leads to the "same perverse effects . . . at play here." (Typed Opn. at p. 11.) The court explained: "A subsequently incarcerated felon is eligible for a certificate of rehabilitation if he or she originally served a sentence of imprisonment and meets other requirements. (§ 4852.01, subd. (a).) But a subsequently incarcerated felon is ineligible for a such a certificate if he or she was originally sentenced to

probation, successfully completed it, and obtained a dismissal under section 1203.4. (§ 4852.01, subd. (b).) We discern no rational justification for this different treatment." (*Ibid.*)

This Court granted the People's petition for review.

SUMMARY OF THE ARGUMENT

Since 1943, the Legislature has distinguished between felony probationers and felony prisoners for purposes of eligibility for certificates of rehabilitation. Appellant's equal protection challenge to that longstanding statutory framework fails. This Court has previously held that a threshold question in evaluating an equal protection claim is whether groups receiving different treatment under the law are similarly situated with respect to the purposes of the statute being challenged. Here, subsequently incarcerated felons who successfully completed probation and obtained dismissal and release from disabilities under section 1203.4 are not similarly situated with subsequently incarcerated felons who served a sentence of imprisonment. Those who were reincarcerated after a dismissal and release have taken advantage of the resource-intensive probation-related pathway to rehabilitation, with its legislatively-endowed incentives to rehabilitate once and for all, and yet they have failed to rehabilitate. Former felony prisoners have not had the same rehabilitative resources provided toward their reformation, have not applied for and obtained a judicial finding of their rehabilitation, and have not then proven that rehabilitative effort was wasted on them. The former prisoners have never had the opportunity to promise and prove they can reform. The groups accordingly are differently situated with respect to the Legislature's purpose to establish the expedited judicial vetting that leads to a certificate of rehabilitation for those felons who have had no prior opportunity to establish their reform, and particularly who have not wasted a prior expedited judicial review of their reform.

Moreover, the legislative distinction between felony probationers and felony prisoners makes sense in light of the structure and purpose of the statutes. Because the statutes at issue here implicate no suspect class or fundamental right, appellant must establish that the law lacks any rational basis for distinguishing between the two groups. Treating felony probationers differently from felony prisoners for the purposes of certificate eligibility gives felony probationers a strong incentive to take advantage of the opportunity they have received to rehabilitate on probation and thereafter pursue a law-abiding life. The legislative distinction also saves resources by denying eligibility to those—probationers who have demonstrated that they are not able to successfully rehabilitate—who are unlikely to successfully obtain a certificate of rehabilitation. The judgment of the Court of Appeal should be reversed.

ARGUMENT

THE LEGISLATIVE DISTINCTION BETWEEN FORMER FELONY PROBATIONERS AND FORMER FELONY PRISONERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

For almost three quarters of a century, felony probationers have known, as the superior court ruled below, that under what is now section 4852.01, subdivision (b), a former felony probationer who is granted a dismissal and release from penalties and disabilities, and who is later incarcerated, does not qualify for a certificate of rehabilitation. Appellant acknowledged his lack of eligibility in his petition for a certificate of rehabilitation. He relies solely on the Equal Protection Clause for eligibility, arguing that he is similarly situated with formerly incarcerated felons who are reincarcerated, yet retain eligibility to apply for a certificate following their release, and that no rational basis exists to preclude him from applying for a certificate after completion of the sentence for his third offense, just because there was a third offense after his successful

application for dismissal of his first two offenses. (AOB in case A144196, 17-18.)

This Court has established the scope of the inquiry when a statute is challenged as unconstitutional. That inquiry involves several separate principles, generally discussed together. Legislative acts are accorded a presumption of constitutionality, and all doubts are resolved in favor of a finding of validity. Unless the act clearly, positively, and unquestionably conflicts with a provision of the state or federal Constitution the act must be upheld. Moreover, the reviewing court must interpret a statute so as to harmonize it with the Constitution whenever possible. (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594; *People v. Hansel* (1992) 1 Cal.4th 1211, 1219.) The equal protection question, as relevant here, addresses whether a statute treats classes similarly situated for the purposes of the statute in an unequal manner, without a rational basis for doing so. (*People v. Jones, supra*, 176 Cal.App.3d at p. 124.)

Felony probationers who have obtained dismissal and release, then been reincarcerated, are not similarly situated with felony prisoners who are facing the possibility of establishing their rehabilitation for the first time. Even if they are, a rational basis supports distinct treatment. Equal protection will not reopen the pathway to a certificate of rehabilitation the former probationers closed off by promising rehabilitation and falling short.

A. Reincarcerated Former Probationers Are Not Similarly Situated with Reincarcerated Former Prisoners for the Purposes of the Law Challenged

"The Equal Protection Clause of the Fourteenth Amendment, section one, commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10.) For purposes of the present case, the state and federal equal protection analyses are the same. (*Johnson v. Department of Justice*

(2015) 60 Cal.4th 871, 881; see U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Cooley v. Superior Court* (2003) 29 Cal.4th 228, 253, internal quotation marks omitted.) Accordingly, this Court has held that a meritorious equal protection claim requires "a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*Ibid.*, internal quotation marks omitted, italics in original; see also *People v. Guzman* (2005) 35 Cal.4th 577, 591-592.) This inquiry concerns "not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley*, *supra*, at p. 253.)

The similarly situated requirement serves a gate-keeping function. As this Court has observed, equal protection of the laws "does not mean that things different in fact or opinion must be treated in law as though they were the same." (*Guzman*, *supra*, 35 Cal.4th at p. 591, internal quotation marks, ellipses, and alterations omitted [neither federal nor state Constitution "'precludes classification by the Legislature or requires uniform operation of the law with respect to persons who are different'"].) The requirement to show that the differentially treated groups are similarly situated "means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Moreno* (2014) 231 Cal.App.4th 934, 941-942 [holding that felons eligible for rehabilitation and ex-felons whose convictions have been reduced to misdemeanors and dismissed are not similarly situated groups for the purposes of the law governing certificates

of rehabilitation].) Thus, in *People v. Guzman*, 35 Cal.4th 577, this Court rejected an equal protection challenge to a statute that made persons on probation for offenses that could not be described as non-violent drug possession offenses, who then committed non-violent drug possession offenses, ineligible for mandatory probation and community-based treatment for which those on parole for the same offenses when they committed non-violent drug possession offenses were statutorily eligible. (*Guzman, supra*, at pp. 592-593 [the two groups are similarly situated for purposes of determining initial eligibility, but not for purposes of ending their eligibility].) The Court held that the two groups—parolees and probationers—were not similarly situated for the purposes of the statute, because parolees, unlike probationers, had served their time for the non-drug offense, while probationers were given the opportunity to avoid serving time in prison and had not completed the period of conditional release. (*Id.* at p. 593.) Likewise, in *Cooley*, the Court turned back an equal protection attack on procedures applicable to committees under the Sexually Violent Predators Act on the ground that SVPA committees are not similarly situated to those committed under the Lanterman-Petris-Short Act in light of the different procedures provided in each of those Acts. (*Supra*, 29 Cal.4th at pp. 252-254.)

These principles apply here because former probationers who reoffend are not similarly situated with former prisoners who reoffend for purposes of section 4852.01. Former felony probationers, unlike former felony prisoners, have received an opportunity, through the close guidance and resource-intensive supervision and support of the probation officer, applying conditions tailored to the probationer's particular needs (*People v. Matranga, supra*, 275 Cal.App.2d at p. 332), to work hard at reform. The probationers have already had an expedited judicial vetting of their reform efforts by the superior court, have promised to maintain reform, and been

given a fresh start, with the warning that all the benefits will be undone if they fail to maintain that reform. (§ 1203.4.) Then they failed, establishing that they do not respond in a lasting way to targeted reform efforts. By contrast, former prisoners, are, for the first time, being given a resource-intensive avenue to establish, in an extensive but expedited judicial process supported by state and county investigative and rehabilitative agencies, for which the state and counties pay, that they have reformed. (§§ 4852.01-4852.22.)

Penal Code section 1203.4 "places a defendant who has had a conviction dismissed . . . on a different footing from other convicted persons." (*People v. Guillen*, *supra*, 218 Cal.App.4th at p. 998.) Section 1203.4 applies only to those admitted to probation, with all the attendant resources[4] directed toward their rehabilitation, and not those committed to any state institution. Further it only applies to those probationers who succeed, either by completing probation without violating any of its conditions, by obtaining a favorable early discharge, or by obtaining discretionary relief from the sentencing court in the best interests of justice. (*Ibid.*) The intent of section 1203.4 is not just to rehabilitate, but to rehabilitate permanently, and as befits one eligible for probation:

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[4] Pursuant to section 1203.1b, each county calculates the average cost of certain probation services and creates a schedule approved by the presiding judge of the superior court. (See *People v. Hall* (2002) 103 Cal.App.4th 889, 892 [order to pay all or a portion of probation costs may not be made a condition of probation].) It does not include the cost of programs, testing, or the day to day costs of following up with a probationer concerning compliance with terms of probation, but does support that every contact and investigation has a cost. A current example, consisting of Chapter 4D of the Colusa County Code may be found at: http://www.codepublishing.com/CA/ColusaCounty/html/ColusaCounty04D.html

> " 'A grant of relief under section 1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of his conviction and, with a few exceptions, to restore him to his former status in society to the extent the Legislature has power to do so [citations].' [Citation.]" [Citation.] "The purpose and hope [of granting probation] are, of course, that through this act of clemency, the probationer may become reinstated as a law-abiding member of society. Removal of the blemish of a criminal record is the reward held out through the provisions of Penal Code, section 1203.4, as an additional inducement. The obvious purpose is to secure law compliance through an attempt at helpful cooperation rather than by coercion or punishment." [Citation.]

(*People v. Guillen*, *supra*, 218 Cal.App.4th at p. 998.)

Thus, when former probationers obtain relief under section 1203.4, then engage in behavior that subjects them to incarceration, they have not only rejected the inducement provided by the probation laws and refused to cooperate, they have accepted the benefit of programs and services tailored to their needs and a close judicial monitoring of their progress, without actually reforming in any lasting way.

Former felony prisoners, by contrast, have not had a similar opportunity to prove their reform efforts will have a lasting effect. Their application under section 4852.01 triggers for the first time the kind of close vetting and application of state and county resources from which the failed probationers have already benefitted. To prove the conduct elements, living an honest and upright life of sobriety and industry for the entire period of reform without a single failure to obey the law or demonstrate moral character, the formerly incarcerated felon must gather considerable evidence and put it in the petition. (§ 4852.05.) Evaluation of that petition for certificate of rehabilitation is a substantial investment of the court's time and resources, the investigators' efforts in each county in which the felon has been convicted, the rehabilitative agencies' record checking and support in the form of a parole officer to assist with the hearing or other

form of detailed record review, and the district attorney's investigation and report to the court. (§§ 4852.06-4852.12.) A single lapse, and the petition may be denied and the time clock may be started again for the period of rehabilitation. (§4852.11.)

These fundamental differences between the former felony probationers and former felony prisoners make them differently situated for the purpose of section 4852.01. The "purpose of section 4852.01 is to afford an avenue for felons who have proved their rehabilitation to reacquire lost civil and political rights of citizenship." (*People v. Moreno*, *supra*, 231 Cal.App.4th at p. 943, citing *People v. Lockwood* (1998) 66 Cal.App.4th 222, 230.) But former felony probationers who are reincarcerated are no longer in a position to prove their rehabilitation. They have, in fact disproved rehabilitation along the avenue provided by section 1203.4.

A former felony probationer who reoffends therefore cannot make the threshold showing for equal protection analysis, being similarly situated for the purposes of the act. (See *People v. Guzman*, *supra*, 35 Cal.4th at p. 592 [the act's broadly stated purposes apply to those offenders specifically included in the statute].) Both section 1203.4 and section 4852.01 aim broadly at rehabilitation, but section 1203.4 aims at rehabilitating probationers through the resource-intensive process of probation supervision, while section 4852.01 aims to rehabilitate those who have not had a supported chance to prove they have reformed and, in particular, have not disproved their ability to reform despite a considerable investment by the government toward that end. As this Court noted in *Guzman*, the two groups were similarly situated with respect to their initial eligibility to apply for a certificate of rehabilitation, but they were not similarly situated with respect to the way their eligibility ended. (*Guzman*, *supra*, 35 Cal.4th at p. 593.)

B. Even if Reincarcerated Former Probationers Are Similarly Situated with Reincarcerated Former Prisoners, the Legislature's Carrot-and-Stick Approach to Reformation Provides a Rational Basis for the Distinction

The Legislature's decision to deny certificate eligibility to former felony probationers, and not to former felony prisoners, who reoffend also serves legitimate governmental purposes and thus easily satisfies rational-basis review. Classifications based on race or national origin or which affect fundamental rights are reviewed under strict scrutiny, while classifications based on gender or illegitimacy are given intermediate scrutiny. (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." (*Nordlinger v. Hahn*, *supra*, 505 U.S. at p. 10.) Prisoners, probationers, and criminal defendants are not suspect classes as no person encountering the criminal justice system has a vested interest "in a specific term of imprisonment or in the designation a particular crime receives." (*People v. Wilkinson* (2012) 33 Cal.4th 821, 838; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 178.) Accordingly, the Legislature's decision to deny certificate eligibility to former felony probationers who reoffend (and not to former felony prisoners who reoffend) violates equal protection only if there is "no rational relationship between the disparity of treatment and some legitimate governmental purpose." (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 881, internal quotation marks omitted.) As this Court has explained, "[t]his standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically

substantiated." (*Ibid.*, internal quotation marks omitted.) A court may engage in "rational speculation" regarding the justification for the Legislature's decision; the "speculation [need not have] a foundation in the record." (*Ibid.*, internal quotation marks omitted.) To prevail, appellant must "negative every conceivable basis" for the statutory distinction. (*Ibid.*, internal quotation marks omitted.)

Here, the distinction in section 4852.01, subdivision (b), advances substantial governmental purposes. The statute promotes rehabilitation for probationers, by encouraging them to reform once and for all while they are being supported by probation services, and conserves judicial resources by reserving certificate of eligibility proceedings to only those former felons who are likely to be able to demonstrate rehabilitation.

"The clear intent of the probation sections of the Penal Code, and especially of section 1203.4 is to effect the complete rehabilitation of those convicted of crime. [Citation.]" (*People v. Johnson* (2012) 211 Cal.App.4th 252, 261.) That such a purpose of complete probation-related reform is shared by both the statute creating the probation reform avenue and that creating the certificate of rehabilitation avenue is evident in the mutual cross-referencing between sections 1203.4 and 4852.01. Section 1203.4 requires notice at the outset of probation that the offender's acceptance of the "right and privilege" of a release from disabilities following successful completion of probation, will either enhance or preclude the opportunity to obtain a certificate—depending on whether the offender embraces the opportunity of rehabilitation as contemplated by the Legislature. If the probationer is successful, he or she achieves a release from disabilities as of right, and is potentially eligible to further apply for a certificate, subject to meeting the additional requirements of section 4852.01.

Probationers are also expressly made aware of the importance of their chance at reform. Section 1203.4, subdivision (a) admonishes "however, 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." This shows the importance ascribed by the Legislature to the offender maintaining the exemplary behavior that resulted in successful completion of probation *in order to maintain the benefits of the dismissal and release from liabilities*. (See *People v. Frawley* (2000) 82 Cal.App.4th 784, 791 [section 1203.4 contains a "sweeping limitation" on the relief it offers].) Both the "carrot," the opportunity for probation and ultimately dismissal and release from liabilities, and the "stick," the use of the formerly dismissed conviction for enhancement and the use of subsequent incarceration for certificate ineligibility, are integral parts of the Legislature's incentive plan to encourage complete, lifelong rehabilitation via the probation system.

Prisoners have been subject to no comparable carrot or stick and therefore have not demonstrated an inability to respond to similar reformative efforts. With respect to certificate ineligibility, the "stick" is the rational basis for the legislative difference between former felons who complete probation and break their promise to the court as compared to former prisoners who did not make that promise. It is also the rational basis for appellant's ineligibility for a certificate. Appellant had a robbery and a "wet reckless" driving conviction expunged by applications per section 1203.4, only to be reincarcerated, albeit for only 10 days, when he drove under the influence two years later. His promise of lasting rehabilitation was something he could not abide beyond the courtroom doors. The distinction embodied in section 4852.01, subdivision (b) rationally acts as a certificate ineligibility exception in cases of former

felony probationers like appellant. The Legislature's thoughtful decision to limit the avenue provided to formerly incarcerated felons by section 4852.01 to those who have not yet revved up the judicial and administrative engines to vet their claims reflects a commonsense direction of resources toward giving a group which has not yet benefitted from such an outpouring of resources a chance for such a benefit to make a lasting difference in their lives.

The Court of Appeal relied on *Newland*, *supra*, 19 Cal.3d 705, to support its conclusion that no rational basis exists for the legislative scheme that denies reincarcerated former probationers eligibility to apply for a certificate of eligibility, but that case is inapposite. (Typed Opn. at pp. 10-11.) In *Newland*, this Court did not find the certificate of rehabilitation statute unconstitutional, but rather addressed former Education Code section 13220.16 and determined that no rational basis existed to deny otherwise qualified misdemeanants the opportunity to obtain community college credentials by requiring a certificate of rehabilitation available only to felons. The two classes in *Newland* were on an equal footing with respect to the Education Code provision at issue, but for the fact that one of the hoops through which all had to jump was not open to misdemeanants.

In the present case, certificates of rehabilitation and pardon are available to all felons from the start, but those who accept probation, succeed, apply for the automatic clean slate of dismissal and release from disabilities, then engage in behavior which results in new writing upon the slate, become ineligible to invoke the resources of the courts in an attempt to erase it again.[5] Former probationers take themselves out of the running

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[5] Nothing prevents appellant from pursuing clemency outside the certificate of rehabilitation scheme per the alternative procedure of direct

(continued...)

for a certificate of rehabilitation by demonstrating a failure to reform despite engaging in a process in which the superior courts and county probation agencies have invested considerably. In appellant's case, nothing about achieving dismissal and release prevented him from progressing from a wet reckless to driving under the influence of alcohol. The Legislature is permitted to limit the burdens placed upon the courts and the Governor's Office by precluding those likely to seek a certificate, but unlikely to obtain one, from filing an application. (See *People v. Ansell, supra*, 25 Cal.4th at p. 890 [in precluding certain sex offenders from pursuing certificates of rehabilitation, the Legislature affected "those individuals who are least likely to obtain certificates of rehabilitation in the superior court, and who are most likely to waste public resources attempting to obtain such relief"].) In short, why should another expedited resource-intensive vetting of the former felon by the superior court be offered to one who has invoked a similar procedure and failed to reform?

The *Jones* case on which the superior court relied is more applicable to this case. The *Jones* court recognized the need to make the investment in probation services count. "[T]he Legislature has sought to insure that the reformative or rehabilitative purpose of probation has continued to succeed before a former probationer is deemed eligible to seek a certificate of rehabilitation and pardon by requiring the petitioner for the additional relief provided under section 4852.01 to meet substantially the same criteria of law abidance that the petitioner had to meet to obtain dismissal of the accusatory pleading and the other relief provided by section 1203.4." (*Jones, supra*, 176 Cal.App.3d at p. 129; see also *People v. Lockwood*

(...continued)
application to the Governor. (§ 4800 et seq.) He simply cannot invoke the resources of the superior court again.

(1998) 66 Cal.App.4th 222, 230 [the "overall goal of the [section 4852.01] [is] to restore civil and political rights of citizenship to ex-felons who have proved their rehabilitation"].) The Legislature presumably understood that providing yet another expedited opportunity to make the promise of lifelong rehabilitation to those who have already made and broken that very promise, undermines incentives for probationers to reform.

"It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard." (*People v. Turnage*, *supra*, 55 Cal.4th at p. 74.) The standard that "any reasonably conceivable state of facts that could provide a rational basis for the classification" will save legislation from an equal protection challenge, "does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated." (*People v. Turnage*, *supra*, 55 Cal.4th at p. 75, quoting *Heller v. Doe*, *supra*, 509 U.S. at p. 320.) So even if the carrot-and-stick approach and the concern for court resources amounted to no more than "rational speculations," about why the Legislature acted as it did, they would still justify the legislative choice. (*Heller v. Doe*, *supra*, 509 U.S. at p. 321.)

CONCLUSION

For the reasons set forth above, respondent requests that the opinion of the Court of Appeal be reversed and that the judgment be affirmed.

Dated: January 31, 2017

Respectfully submitted,

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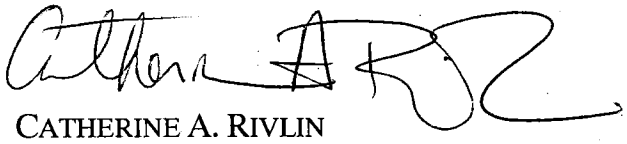

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Opening Brief on the Merits uses a 13 point Times New Roman font and contains 7,252 words.

Dated: January 31, 2017

XAVIER BECERRA
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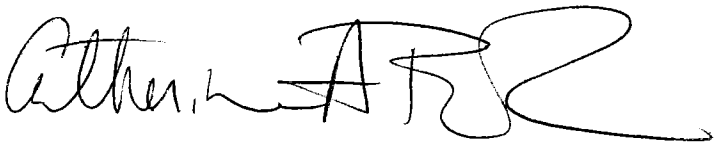

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Chatman***

No.: **S237374**

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 collection and processing of correspondence for mailing with the United States Postal Service. 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.

On January 31, 2017, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, 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 January 31, 2017, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature

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