IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, VS. JODY CHATMAN, Defendant and Appellant.	No. S237374 First Appellate District, Division One, No. A144196 Alameda County Superior Court, No. 140542 The Honorable Judge Paul DeLucchi

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

QUESTION PRESENTED

Does it violate the equal protection clause to bar eligibility for a certificate of rehabilitation and pardon to former felony probationers who are incarcerated subsequent to obtaining a Penal Code section 1203.4 dismissal of their felony conviction, but not former felony prisoners who are incarcerated following release from prison?

STATEMENT OF THE CASE AND FACTS

In 2001, when appellant was 18 years old, he was convicted of robbery in the Alameda County Superior Court. (C.T.[1] p. 145.) The court imposed a five-year term of probation, with the condition that appellant

[1] Abbreviation key:
C.T. = Clerk's Transcript
R.T. = Reporter's Transcript
O.B.M. = Opening Brief on the Merits

serve 180 days in the county jail. (C.T. p. 147.) Several years later, in 2003, appellant was convicted of reckless driving involving alcohol and sentenced to serve one day in jail, credit for time served. (C.T. pp. 179, 218.) Appellant subsequently succeeded in getting both convictions dismissed under Penal Code[2] section 1203.4; the reckless driving conviction was dismissed in 2006, and his robbery conviction was dismissed in 2007. (C.T. pp. 170, 174, 179.) The documents in the robbery dismissal proceeding – the petition and signed order – contained no advisement on the availability of a certificate of rehabilitation. (C.T. pp. 170, 174.)

In 2008, appellant was convicted of driving under the influence of alcohol and placed on three years of probation with a 10-day jail term. (C.T. p. 179.) This brief incarceration triggered appellant's lifetime bar to a certificate of rehabilitation. (C.T. p. 182; § 4852.01, subd. (b).)

After his 2008 conviction, appellant worked towards becoming a productive citizen; he graduated from a technical school and began working. (C.T. p. 197.) In 2009, he started volunteering at a community garden. (C.T. p. 197.) Subsequently, appellant volunteered at a non-profit that provided low-income housing in a sober living environment. (C.T. pp. 197-198, 201.) At this organization, he participated in Narcotics

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[2] Hereafter all references are to the Penal Code unless otherwise stated.

Anonymous meetings with residents, helped manage a transitional housing program, and provided research for a project funded by the San Francisco Juvenile Probation Department. (C.T. pp. 197-198, 201.) Appellant aspired to become a group home administrator for foster children because of his experiences helping youth at the sober living program and because he himself grew up in foster care. (C.T. p. 198.)

In 2014, a colleague appellant met through his volunteer work offered him a job as a group home administrator for foster youth. (C.T. p. 201.) The job required appellant to acquire a community care license. (C.T. p. 198; see also Health & Saf. Code, § 1522.) A person with a robbery conviction – like appellant – can obtain a community care license only by first receiving a certificate of rehabilitation. (C.T. p. 198; Health & Saf. Code, § 1522, subd. (g)(1)(a)(ii); *Doe v. Saenz* (2006) 140 Cal.App.4th 960.) Accordingly, appellant filed a petition for a certificate of rehabilitation and pardon in the trial court, wherein he acknowledged his ineligibility but argued that section 4852.01 violated his equal protection rights because of the statute's disparate treatment of former felony probationers and former felony prisoners. (C.T. pp. 176-190.)

The trial court denied appellant's petition. (R.T. p. 8.) While addressing the equal protection claim, the court acknowledged the disparate treatment of the statute was "incongruous." (R.T. p. 8.) Nonetheless, the

trial court found that *People v. Jones* (1985) 176 Cal.App.3d 120 (*Jones*), in which the court rejected a similar claim, was indistinguishable from appellant's case. (R.T. pp. 8-9.) The trial court denied the petition on ineligibility without reaching the merits. (R.T. p. 9.)

The Court of Appeal reversed. (*People v. Chatman* (2016) 2 Cal.App.5th 561, 574 (*Chatman*).) Analyzing the relationship between felons sentenced to probation and felons sentenced to prison, the court determined that the two groups were similarly situated. (*Id.* at p. 571.) The Court of Appeal acknowledged that the *Jones* court had reached a different result, but found that in reaching that result, the *Jones* court erroneously considered whether the two groups were similarly situated for all purposes rather than the purpose of the law challenged. (*Id.* at pp. 569-70, citing *Jones*, *supra*, 176 Cal.App.3d at pp. 127-28). The Court of Appeal concluded that "[b]oth groups are convicted felons seeking certificates of rehabilitation to reduce the disabilities that resulted from their prior convictions," and thus, similarly situated. (*Chatman*, at pp. 570-71.)

The Court of Appeal then found no rational basis for the unequal treatment, observing that "while *Jones* pointed out that the Legislature has established different eligibility prerequisites for these two classes, it failed to articulate a rationale for the different treatment." (*Chatman*, *supra*, 2 Cal.App.5th 561 at pp. 571-72.) The Court of Appeal further found that

respondent failed to furnish any rational basis – apart from the rejected rationale offered in *Jones* – to justify the different treatment. (*Id.* at p. 571.) The Court of Appeal cited to *Newland v. Board of Governors* (1977) 19 Cal.3d 705, where the statutes at issue barred a misdemeanant from obtaining a teaching credential but not a felon, and concluded that "[t]he same perverse effects are at play here." (*Id.* at p. 573.) The judgment of the trial court was reversed, and the case was remanded for determination of the merits of appellant's petition for a certificate of rehabilitation. (*Ibid.*) Respondent petitioned for review, and this proceeding follows.

ARGUMENT

I. Summary of Similarly Situated Argument

Former Felony Probationers and Former Felony Prisoners, Seeking Restoration of Their Civil Rights, Are Similarly Situated

All felons are subject to substantial disabilities as a result of their convictions. A felon can ordinarily obtain relief from a number of these disabilities by obtaining a certificate of rehabilitation under section 4852.01 (the only avenue for such relief in the judicial system). However, former felony probationers who are incarcerated subsequent to obtaining a dismissal of their felony conviction under section 1203.4 are barred from obtaining a certificate of rehabilitation. This prohibition does not apply to former felony prisoners who are incarcerated after being released from

prison. Appellant argues that, in light of the purpose of section 4852.01 – to afford felons who can prove their rehabilitation an avenue to restore lost civil and political rights – former felony probationers and former felony prisoners are similarly situated. In other words, both groups are in the same position with respect to the loss of rights and the restoration thereof.

In respondent's view, these groups are not similarly situated because, unlike former felony prisoners, former felony probationers have: 1) had the benefit of the resource-intensive rehabilitation path that probation provides, and 2) broken a promise of lasting rehabilitation and rejected substantial resources dedicated to their rehabilitation by being incarcerated subsequent to section 1203.4 dismissal. Respondent contends, probationers "have, in fact disproved rehabilitation." Respondent's arguments are erroneous.

The main flaw with the first part of respondent's argument is that it overstates the difference between former probationers and former prisoners with respect to the state's investment of rehabilitation resources. While it is true that one of the goals for probation is rehabilitation, and the state invests resources to that end, the same is true of prison and parole. So regardless of whether a felon goes through the prison-parole or probation path, the state provides an opportunity and resources for rehabilitation.

The second part of respondent's argument misconstrues and attaches too much significance to a dismissal under Penal Code section 1203.4. Dismissal is a summary proceeding – typically, a reward for successful completion of probation – and is neither a "close vetting" with a substantial expenditure of court resources nor a promise of lasting reform. Moreover, incarceration does not "disprove" rehabilitation for a former probationer any more than it does for a former prisoner.

Finally, respondent's analysis fails because felons sentenced to county prison under realignment can obtain the functional equivalent of a dismissal under section 1203.4 (§1203.41), be subsequently incarcerated, and still remain eligible for a certificate of rehabilitation. Thus, former felony probationers are similarly situated to former felony county prisoners – and treated differently by section 4851.01 – even if this Court accepts respondent's position that a section 1203.4 dismissal sets former probationers apart from former state prisoners.

II. Summary of Rational Basis Argument

No Rational Basis Exists to Bar Former Felony Probationers from Obtaining a Certificate of Rehabilitation When in Like Circumstances Former Felony Prisoners are not Barred

Respondent claims there is a rational basis for treating former felony prisoners and former felony probationers who have obtained dismissal differently because the disparate treatment: 1) promotes rehabilitation for

probationers who have obtained dismissal by incentivizing them to reform once and for all, and 2) conserves judicial resources by reserving certificate of rehabilitation eligibility proceedings only for those former felons who are likely to be able to demonstrate rehabilitation. These arguments should be rejected.

Respondent's first contention, that the eligibility bar promotes lasting rehabilitation, provides a possible, albeit unreasonable, explanation for imposing such a condition. However, this explanation, even if credited as reasonable, does little to justify subjecting former felony probationers but not former felony prisoners to this restriction. The only justification offered by respondent rests on the false premise that in having a section 1203.4 petition granted, the probationer has promised lasting reform. As explained above, the granting of a section 1203.4 petition implies no such promise.

Moreover, the eligibility bar does not conserve judicial resources. First, the argument incorrectly assumes that the state has invested substantial resources toward rehabilitating probationers but has not done so with prisoner-parolees. As previously noted, rehabilitation is a goal of both the probation and prison-parole systems; and the costs of state prison are vastly more than those for probation. Second, there is no reason to believe that former felony probationers who were incarcerated subsequent to

section 1203.4 dismissal are any less likely to have a certificate of rehabilitation granted than former felony probationers who were incarcerated prior to a section 1203.4 dismissal or former felony prisoners who were incarcerated after release from prison. There are endless scenarios that show the irrationality of such a theory. For example, a former felony prisoner who is incarcerated numerous times for serious crimes and for extended periods of time post-release remains eligible for a certificate of rehabilitation, whereas a former felony probationer who is incarcerated for one day post-dismissal, who subsequently lives 20 years with exemplarily conduct, is barred for life.

The eligibility bar's disparate treatment of former felony probationers and former felony prisoners is irrational, arbitrary, and incongruous. Consequently, the disparate treatment violates the equal protection clause.

III. Former Felony Probationers and Former Felony Prisoners Are Similarly Situated for Purposes of Obtaining a Certificate of Rehabilitation Because They Both Seek Restoration of Their Lost Civil Rights

"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." (*In re Gary W.* (1971) 5 Cal.3d 296, 303.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a

classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, original italics.) "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*), citing *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1438.) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.)

"[T]he 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* (2014) 231 Cal.App.4th 934, 943 (*Moreno*).) Thus, the question in this case is whether subsequently incarcerated former felony probationers and subsequently incarcerated former felony prisoners are similarly situated for the legislative purpose of providing a path for felons who have proved their rehabilitation to obtain relief from disabilities resulting from the felony conviction.

Respondent's position that these two groups are not similarly situated is based on two main arguments. First, respondent asserts former

probationers, unlike former prisoner-parolees, had the benefit of "resource-intensive supervision and support of the probation officer," with "conditions tailored to the probationer's particular needs." (O.B.M. pp. 11, 15.) Second, respondent argues that former probationers who are incarcerated subsequent to obtaining a dismissal under section 1203.4 have broken a promise of lasting rehabilitation, and in doing so, have "disproved rehabilitation." (O.B.M. pp. 15-16, 18.) According to respondent, former felony prisoners are not similarly situation because, up until the point when they petition for a certificate of rehabilitation, they have not received the kind of "close vetting" that comes with a petition for dismissal under section 1203.4. (O.B.M. pp. 17-18.) This Court should reject respondent's arguments.

A. The Purported Differences Between Probation and Prison-Parole do not Establish that Former Felony Probationers are not Similarly Situated to Former Felony Prisoners

Respondent argues that a resource-intensive tailored probation sentence differentiates probationers from prisoners-parolees. (O.B.M. pp. 15, 17-18.) The argument is erroneous for several reasons.

First, although probation does involve a state investment of resources aimed at rehabilitation of the probationer, (*People v. Matranga* (1969) 275 Cal.App.2d 328, 332) this investment does not differentiate probationers from prisoner-parolees in a meaningful way. As is true of

probation, one of the purposes of the state prison and parole systems is to rehabilitate offenders. (§§ 1170, subd. (a), 3000, subd. (a), 3450, subd. (b); see also *People v. Reyes* (1998) 19 Cal.4th 743, 764.) The guiding parole statute demonstrates this purpose:

> It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family, and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.

(§ 3000, subd. (a)(1).) Moreover, like probation conditions, parole conditions can be tailored to the individual needs of the parolee. (§ 3053, subd. (a); Code Regs. tit. 15, § 2513.) And the financial investment of the state for a prisoner-parolee is substantially greater than it is for a probationer. (Couzens, Bigelow, and Prickett, The Problem, Sentencing Cal. Crimes (The Rutter Group 2016) § 5:1 ["Adult probation services average $1,250 a year per person; state prison costs $49,000 per year per person"].) Consequently, former prisoners who are incarcerated after parole have also, in respondent's words, "rejected" the resources dedicated by the state to their rehabilitation. (O.B.M. p. 17.)

Second, even if the investment in probation rehabilitation resources did differentiate former probationers from former prisoner-parolees, the difference is not meaningful with respect to the purpose of section 4852.01 – to provide a pathway for rehabilitated felons to obtain relief from

disabilities resulting from the conviction. (*Moreno, supra,* 231 Cal.App.4th at p. 943; *Cooley, supra,* 29 Cal.4th at p. 253.) A tailored probation sentence neither restores nor limits the lost civil rights shared by all felons, (see *People v. Ansell* (2001) 25 Cal.4th 868, 872) and disparate treatment of former felony probationers would only hamper the goal of rehabilitation. (See *Ayala v. Superior Court* (1983) 146 Cal.App.3d 938, 944.)

Finally, another problem with respondent's argument – that the probation investment differentiates probationers from parolees with respect to the challenged statute – is clear based on how section 4852.01 treats former probationers who are incarcerated prior to obtaining a section 1203.4 dismissal. Under section 4852.01, subdivision (b), individuals incarcerated after their release from probation but before dismissal are *not* barred from obtaining a certificate of rehabilitation. A dismissal application can be made at any time. (§ 1203.4 [no time limit].) If obtaining reform services through probation were a crucial factor in the analysis, as respondent argues, one would expect *all* incarcerations after probation to render a person ineligible, not just incarceration post-dismissal.

B. Respondent Mischaracterizes the Dismissal Statute and Related Proceedings and Overlooks the Limited Effect of Dismissal

The premise of respondent's argument is that incarceration after dismissal disproves rehabilitation, rendering felony probationers

incarcerated after dismissal not similarly situated to former prisoners incarcerated after release. (O.B.M. p. 18.) According to respondent, a dismissal under Penal Code section 1203.4 is a "close vetting." (O.B.M. p. 17.) One that, along with a "resource-intensive supervision" was a substantial "application of state and county resources." (O.B.M. pp. 15, 17.) Upon obtaining dismissal, former probationers, "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." (O.B.M. pp. 15-16.) With incarceration after dismissal, former probationers have rejected the resources they were provided, and "are no longer in a position to prove their rehabilitation. They have, in fact disproved rehabilitation along the avenue provided by section 1203.4." (O.B.M. p. 18.) But with former prisoners who apply for a certificate of rehabilitation, respondent asserts that they are for the first time, "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." (O.B.M. p. 16.)

To reach this conclusion, respondent misconstrues the dismissal statute and overlooks the limited effect of dismissal. First, a dismissal does nothing to minimize the loss of civil rights shared by convicted felons. Second, respondent attaches too much significance to a dismissal, which is

merely a summary proceeding that rewards successful completion of probation; dismissal proceedings do not involve a "close vetting" or substantial investment of government resources. (O.B.M. p 17.) Third, a petition to dismiss contains no lifelong promise of reform. Fourth, the logical flaw of respondent's argument is apparent when considering that incarceration for one day post-dismissal *disproves* rehabilitation, but not post-release incarceration for hundreds of days for a former prisoner.

1. Dismissal Does Not Minimize the Substantial Loss of Civil Rights Shared by Convicted Felons

The benefit of a dismissal is that it enables a "defendant to 'truthfully represent to friends, acquaintances and private sector employers that he has no conviction.' " (*People v. Arata* (2007) 151 Cal.App.4th 778, 788, citing *People v. Acuna* (2000) 77 Cal.App.4th 1056, 1060.) The limitations on relief provided by section 1203.4 are "numerous and substantial." (*People v. Frawley* (2000) 82 Cal.App.4th 784, 791; see e.g. § 1203.4, subd. (a) [no restoration of eligibility for a professional license], § 290.007 [no relief from sex offender registration], Evid. Code, § 788, subd. (c) [no relief from impeachment with prior conviction at subsequent criminal trial], Code Civ. Proc., § 203, subd. (a)(5) [persons ineligible for jury service include those "who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored."].) Because dismissal does not restore the civil rights lost as a result of a felony

conviction, persons with dismissed convictions stand in the same position as former prisoners with respect to the purpose of the law challenged.

Respondent cites to *Moreno, supra,* 231 Cal.App.4th at p. 934 as an example of where the court found two groups applying for a certificate of rehabilitation dissimilar. (O.B.M. pp. 14-15.) However, this decision does not support respondent's position. In *Moreno,* the applicant's felony conviction had been reduced to a misdemeanor under section 17, subdivision (b), for "all purposes." (*Id.* at p. 940.) The trial court denied the petition for a certificate of rehabilitation because the applicant was no longer a felon, and therefore, statutorily ineligible. (*Id.* at pp. 941-42.) The Court of Appeal affirmed the denial, turning away an equal protection challenge. (*Ibid.*) The Court of Appeal determined that the reduction to a misdemeanor made the petitioner dissimilar from other felons because, as a misdemeanant, he was no longer subject to the statutorily imposed disabilities. (*Ibid.*) A section 17 reduction is an example of a procedure that actually eliminates the shared burdens, and thus made the two groups dissimilar. Here, section 1203.4 does not have the same effect as section 17, subdivision (b), so the same analysis does not apply.

2. Dismissal is Neither a Close Vetting nor a Substantial Expenditure of Resources

Respondent contends dismissal is a "close vetting and application of state and county resources," and that those incarcerated post-dismissal have

rejected these resources. (O.B.M. p. 17.) In comparison, respondent asserts that former felony prisoners who apply for a certificate of rehabilitation are given, for the first time, a "resource intensive avenue to establish . . . that they have reformed." (O.B.M. p 17.) Thus, respondent claims that a dismissal hearing is a substantial expenditure of judicial resources, and equates a dismissal hearing to a certificate of rehabilitation hearing. On both these points, respondent errs.

First, dismissal is a summary proceeding, not a "close vetting." (O.B.M. p. 17.) In deciding a petition to dismiss, the court considers merely whether a petitioner has fulfilled the conditions of probation for the entire period – checking off a list more or less – and if so, for the majority of offenses, the court is required to grant the petition. (§ 1203.4, subd. (a); *People v. Chandler* (1988) 203 Cal.App.3d 782, 788 [defendant is entitled as a matter of right to the dismissal of the charge].) In contrast, the certificate of rehabilitation standard requires a much higher standard of conduct from the petitioner:

> 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.

(§4852.05.) Residency in the state is required for a certificate of rehabilitation, and there is a waiting period of five to ten years after release from custody for most offenses. (§ 4852.03.) The certificate process allows

the court to appoint the district attorney to investigate the petitioner's residency, the petitioner's conduct during rehabilitation, and the petitioner's representations in the petition. (§ 4852.12.) None of these substantial vetting procedures – or strict requirements – are present in a dismissal proceeding. (See § 1203.4.)

The proceedings in this case evidence the summary nature of dismissal. The dismissal hearing was not reported and defendant and district attorney were not present. (C.T. p. 172.) No support letters or declarations were attached to the petition. (C.T. p. 169.) Indeed, counties handle hundreds, if not thousands, of dismissal hearings a month. Respondent's claim that a dismissal proceeding is a "close vetting" akin to a certificate of rehabilitation proceeding is inaccurate. (O.B.M. p. 17.)

What is more, a petition to dismiss is not a substantial expenditure of resources – at least not an expenditure comparable to that on a certificate. Section 1203.4 contains no provision for the appointment of counsel, assistance of the adult probation office, or assistance of the Department of Corrections and Rehabilitation (§§ 4852.04, 4852.08, 4852.09); no requirement for the production, at no expense to the petitioner, of all written reports from the probation department, police department, and place of incarceration (§ 4852.11); and no provisions for the court's appointment of the district attorney to investigate the petitioner and provide a report. (§

4852.12.) In dismissal proceedings, counties may require the applicant to pay a $150 fee to reimburse the county for the expenses of the hearing, but in a certificate proceeding "[n]o filing fee nor court fees of any kind shall be required of a petitioner." (§ 1203.4, subd. (d); § 4852.09.) Respondent's claim that dismissal is a substantial investment of resources, the rejection of which renders a person dissimilar, is incongruent with the reality of how dismissal proceedings are conducted. (O.B.M. p. 16.)

Respondent's argument also ignores the substantial resources dedicated to re-incarcerating former prisoners, who nonetheless remain eligible to apply for a certificate of rehabilitation. As previously explained, the costs dedicated to state a state prisoner-parolee far exceed those for a probationer. As such, through numerous instances of incarceration post-release, former prisoners have rejected the substantial resources provided in their subsequent proceedings, likely including probation and even possibly dismissal. The conclusion of respondent's analysis is that persons incarcerated for one day post-dismissal are dissimilar because they have rejected court resources put towards their reform, but this does not hold sway where it is former prisoners who have rejected substantially more court resources directed towards their reform.

Finally, even if respondent's argument that former prisoners who apply for a certification of rehabilitation are for the first time being afforded

close vetting and government resources sets them apart from former probationers, the argument only holds true for a former prisoner who applies for a certificate once. Section 4852.01 allows a former prisoner who petitions for but is denied a certificate of rehabilitation to apply again; the court can set a new rehabilitation period in certain circumstances, but there is no limit to how many times the former prisoner can reapply. (See §§ 4852.01, 4852.03, 4852.05, 4852.11, 4852.13.)

3. Dismissal Is Primarily a Reward for Successful Completion of Probation, Not a Lasting Promise of Reform

Respondent next argues that a petition to dismiss under section 1203.4 is a lasting promise of reform, the breaking of which, petitioners have been warned, "disproves rehabilitation." (O.B.M. pp. 15-16.) This argument should be rejected because there is no authority that dismissal is a lasting promise of reform, and there is no warning to probationers that subsequent incarceration will result in permanent deprivation of a certificate.

According to respondent, after dismissal probationers "have been given a fresh start, with the warning that all the benefits will be undone if they fail to maintain that reform." (O.B.M. pp. 15-16.) Dismissal is hardly a "fresh start." (See *People v. Frawley* (2000) 82 Cal.App.4th 784, 791 [limitations on relief "are numerous and substantial"].) What is more,

petitioners are not warned that the benefits will be undone if they fail to maintain reform. While it is true that section 4852.21 requires the clerk to inform defendants in writing, prior to dismissal, of the availability and procedure for a certificate of rehabilitation, this information does not contain a warning of ineligibility for a certificate with subsequent incarceration. (See also § 1203.4, subd. (a)(1).) Here, the record of the dismissal proceeding shows that appellant was *not* notified of the availability of a certificate, much less the dangers of subsequent incarceration. (C.T. pp. 169-174.) Notably, the current Judicial Council forms (CR-180, CR-181 [Rev. January 1, 2017]), which are the only documents filed in court for most dismissal proceedings, do *not* provide notice of the availability of a certificate of rehabilitation, and, likewise, any repercussions from subsequent incarceration.

Respondent also contends that dismissal is a lasting promise of reform. (O.B.M. pp. 15-16.) While lasting reform is certainly desirable, section 1203.4 is primarily a backwards-looking statute that rewards successful completion of probation. The petition forms (CR-180, CR-181 [Rev. January 1, 2017]) require no promise of lasting reform, and make no such announcements upon dismissal being granted. As noted previously, in the majority of cases dismissal must be granted as of right if the petitioner completed the terms of probation and is not serving a sentence or facing

new charges. (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788; § 1203.4, subd. (a).) This means that even if a person is re-incarcerated after successful completion of probation, they are entitled to dismissal once released from probation on the new case.

What is more, all the benefits of a dismissal are not "undone," as respondent asserts, with subsequent incarceration. (O.B.M. p. 16.) Under the statute, the limited release from disabilities that the dismissal statute grants are valid for life, even if the person is incarcerated after dismissal. (§1203.4.) For instance, if a person obtains a dismissal and is thereafter convicted of a new crime, the person must disclose the new conviction on a private employment application, but not the old, dismissed crime. (See generally §1203.4; *People v. Acuna* (2000) 77 Cal.App.4th 1056, 1060.) Finally, even if a person is incarcerated after dismissal, there is nothing stopping them from obtaining dismissal of the subsequent conviction, or any prior convictions that had not been previously dismissed. (§1203.4.)

Considering the above-noted aspects of the statute, the flaw in respondent's argument is evident. Dismissal is not a strict and lasting promise of reform because the statute neither invalidates the dismissal with subsequent incarceration nor limits the ability to obtain dismissal for other convictions if the person is incarcerated after a dismissal. Rather, dismissal

is primarily a reward for completing the terms of probation, or, sometimes, an exercise of discretion in the interests of justice. (§1203.4, subd. (a)(1).)

4. The Premise of Respondent's Argument is Irrational

The ultimate premise of respondent's argument is that former felony probationers who are incarcerated after dismissal have, "in fact . . . disproved rehabilitation," but former felony prisoners who are incarcerated after release from prison have not. (O.B.M. p. 16.) To a certain degree, respondent veers into rational basis territory; nonetheless, the argument fails in the similarly situated context. There are undoubtedly endless permutations of circumstances that discredit respondent's theory. But one clear example would be a former prisoner who is incarcerated for serious crimes numerous times after his release compared to a former felony probationer who is incarcerated once for a few days on a minor offense subsequent to a section 1203.4 dismissal. In this instance, the former felony prisoner has disproved rehabilitation to a much greater degree than the former probationer, yet the former prisoner is eligible for a certificate of rehabilitation while the former probationer is not. This Court should reject respondent's argument.

C. Felons Sentenced to County Prison Are Able to Obtain the Functional Equivalent of a Dismissal Under Section 1203.4, be Subsequently Incarcerated, Yet Remain Eligible For a Certificate of Rehabilitation

Respondent's similarly situated argument fails when confronted with the recently amended provisions of section 4852.01 applicable to felons who serve a term of imprisonment in the county jail under realignment. Like felony probationers, these realignment felons can obtain dismissal after supervised release. But unlike probationers, they remain eligible for a certificate of rehabilitation even with post-dismissal incarceration. The provisions in section 4852.01 addressing county prisoners (which are the same provisions as those applicable to former prisoners) were not addressed in the Court of Appeal because the amendment was not effective until 2016. (§ 4852.01, subd. (a), as amended by Stats. 2015, ch. 378 § 6 (AB 1156).)

Under realignment, persons convicted of felonies, the punishment for which is an unspecified term of imprisonment, shall be imprisoned in the county jail for a term of 16 months, 2 years, or 3 years (with certain exceptions for more serious offenses). (§ 1170, subds. (h)(1), (h)(3).) After the term of incarceration is completed, the court is generally required to order a term of mandatory supervision. (§ 1170, subds. (h)(5)(A)-(B).) While on mandatory supervision, the defendant is supervised by county probation "in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." (§ 1170, subds. (h)(5)(A)-(B).) Once one year or two years have passed since completion of

the sentence – depending on the sentence imposed – the offender can apply for a dismissal. (§1203.41, subd. (a)(2).) Section 1203.41 provides virtually the same procedure as §1203.4: withdrawal of the guilty plea, dismissal of the accusation or information, and release from disabilities. (§ 1203.41, subd. (a)(1).) Relief is granted in the interests of justice within the court's discretion. (§ 1203.41, subd. (a).) Like the eligibility provisions to a certificate of rehabilitation for former prisoners, incarceration does not result in a lifetime bar, regardless of whether or how many times the person is incarcerated following the dismissal. (§ 4852.01, subd. (a).)

The unlimited eligibility of felons who are imprisoned in the county jail is fatal to respondent's similarly situated argument. Former county prisoners have all the characteristics that respondent claims set former felony probationers apart from former felony prisoners: felony probationers and felons sentenced to county jail under realignment both 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" and utilized nearly identical dismissal procedures. (O.B.M. p. 15.) As such, respondent's argument about how a tailored probation sentence and dismissal differentiates former probationers from former prisoners cannot provide a basis for finding the two groups are not similarly situated.

However, if this Court does accept respondent's argument and finds that former felony probationers and former felony prisoners are not similarly situated, appellant asserts in the alternative that he is similarly situated to former felony offenders who were sentenced to county jail under realignment and that the disparate treatment by section 4852.01 (with regard to post-dismissal incarceration ineligibility) denies him equal protection under the state and federal constitutions. (Cal. Const., art. I, § 7; U.S. Const., 14th Amend; see also Cal. Rules of Court, rule 8.516.)

IV. No Rational Basis Exists for Section 4852.01's Disparate Treatment of Former Felony Probationers and Former Felony Prisoners

Felons sentenced to prison can serve an indefinite amount of time incarcerated and still be eligible for a certificate of rehabilitation, whereas one day of incarceration post-dismissal renders a former probationer ineligible for life. Respondent contends that this disparate treatment is rational because it promotes rehabilitation for former probationers who have obtained dismissal, encouraging them to reform once and for all. (O.B.M. p. 20.) Respondent also argues that the eligibility bar conserves judicial resources by reserving eligibility proceedings only for those felons who are likely to be able to demonstrate rehabilitation. (O.B.M. p. 20.) These arguments lack a rational basis, and should be rejected.

First, if the goal of the statute is to encourage lifetime reform, it is irrational to *remove* the primary motivation for lifetime reform (the granting of a certificate of rehabilitation) because of only one day of incarceration. What is more, there is no rational basis to encourage *only* felony probationers – those convicted of less serious offenses – to reform once and for all, but not former prisoners who pose a greater risk of danger to society.

Second, the eligibility bar does not conserve judicial resources. Respondent's argument is essentially that the eligibility bar acts to filter out unworthy certificate of rehabilitation candidates. As explained above, there are countless scenarios that disprove respondent's argument. In short, the rule allows former felony prisoners who repeatedly commit serious offenses following release from prison to remain eligible for a certificate of rehabilitation while barring former felony probationers with only one minor offense subsequent to a section 1203.4 dismissal. No such rule can rationally be characterized as a mechanism to conserve judicial resources.

A. Section 4852.01's Eligibility Bar is not a Reasonable Way to Motivate Lifelong Rehabilitation, nor is it Reasonable to Impose the Eligibility Bar as a Means of Motivating Former Probationers but not Former Prisoners to Rehabilitate

Respondent argues that probation, dismissal, and the eligibility bar "[a]re integral parts of the Legislature's incentive plan to encourage

complete, lifelong rehabilitation via the probation system." (O.B.M. p. 28.) Respondent's argument has two main flaws. First, the eligibility bar is more likely to discourage lifetime reform than encourage it – the bar removes the primary motivation for lifetime reform. Second, accepting that applying the bar is a reasonable motivation tool, its application is not rational because it encourages *only* former probationers to rehabilitate for life, not former prisoners who are equally, if not more, in need of motivation for reform.

Respondent assumes that the "stick" – permanently depriving former probationers of the opportunity to apply for a certificate of rehabilitation – is a rational way to encourage lifetime reform. (O.B.M. p. 28.) It is correct that the judicial restoration of lost civil rights and the automatic recommendation to the Governor for a pardon make a certificate of rehabilitation one of the primary motivators for reform. But the eligibility bar, which takes away the opportunity for relief after just one brief relapse, is not a rational way of encouraging rehabilitation because it removes the motivation for lifetime reform. The principle that reform should be encouraged for life, despite problematic interludes along the way, is readily demonstrated by the certificate statute and related rehabilitative laws.

Apart from the eligibility bar, section 4852.01 accepts that at some point the petitioner's behavior was lacking and allows an avenue for relief. If the court receives satisfactory proof that the petitioner has violated any

laws during the rehabilitation period, the court "may" deny the petition and determine a new period of rehabilitation, "not to exceed the original period of rehabilitation for the same crime." (§ 4852.11.) In *People v. Zeigler* (2012) 211 Cal.App.4th 638, 666, the court explained,

> [T]he permissive language in section 4852.11 gave the court the discretion to determine the effect of defendant's new offense on the petition: it could deny the petition and determine a new period of rehabilitation or grant the petition in spite of the new offense.

Moreover, for persons not required to register under section 290, the court can shorten the period of rehabilitation in the interests of justice. (§ 4852.22.) Thus, apart from the eligibility bar in section 4852.01, subdivision (b), new criminal conduct is not fatal to a petition on the merits; rather, correctly so, it is one of the factors to consider in the total picture of a petitioner's rehabilitation.

The principle that reform should be encouraged for life is readily shown in the laws of rehabilitative petitions and related motions. For example, in sections 1203.4 and 17, subdivision (b), the court retains discretion to determine eligibility despite intervening criminal convictions. (*People v. Feyrer* (2010) 48 Cal.4th 426, 439-440; *Meyer v. Superior Court of Sacramento County* (1966) 247 Cal.App.2d 133, 140.) Moreover, rehabilitative motions should rarely, if ever, be denied with prejudice. In *People v. Lockwood* (1998) 66 Cal.App.4th 222, 230 (*Lockwood*), the court

reversed a decision to deny a certificate of rehabilitation with prejudice, observing: "By definition, rehabilitation may take years to achieve . . . . Those who so endeavor should be encouraged; denying a petition for a certificate of rehabilitation with prejudice works in the opposite direction."

The *Newland* court also reflected on the lifetime aspect of reform. After respondent argued that the plaintiff's conduct did not warrant a fitness hearing, the court wrote:

> The case at bar is the counterexample; it cannot reasonably be maintained that because plaintiff masturbated in a closed toilet stall at a bus station in 1967 that now, 10 years later, he is necessarily unfit to teach community college students, and will forever be unfit. Even if plaintiff's 1967 conduct suggests a lack of judgment or discretion, these are not immutable traits, but defects which may disappear with greater maturity and experience.

(Newland, supra 19 Cal.3d 705, fn. 11.) Like the plaintiff in *Newland,* appellant was a young man when he was involved in the criminal justice system; he subsequently matured and became a productive, law-abiding citizen. (C.T. pp. 197-198.) Leaving open the possibility of obtaining a certification of rehabilitation encourages people like appellant to maintain upstanding lives; the eligibility bar is counterproductive to this purpose.

What is more, even if respondent is correct that the eligibility bar is a rational "stick," it is not rational to encourage *only* probationers who have obtained dismissal to reform for life. Respondent's argument fails to explain why former prisoners are not equally in need of a lifetime

encouragement to reform; after all, offenders who are given prison sentences rather than probation have in most instances committed more serious crimes. Encouraging lifetime rehabilitation only for the least serious offenders is not a rational basis for treating former probationers and former prisoners differently. Respondent attempts justify the disparate treatment by asserting that the "stick" is rational for former probationers but not former prisoners because probationers have "[broken] their promise to the court as compared to former prisoners who did not make that promise." (O.B.M. p. 21.) The justification fails because, as previously explained, having a section 1203.4 petition granted does not equate to a promise of lasting reform.

B. Imposing a Lifetime Ban on Probationers Cannot be Reasonably Characterized as a Means of Conserving Judicial Resources

Respondent argues that it is a waste of judicial resources to consider the eligibility of those who have been incarcerated after dismissal. (O.B.M. p. 20.) Respondent claims:

> 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 commonsense direction of resources toward giving a group which has not yet been benefitted from such an outpouring of resources a chance for such a benefit to make a lasting difference in their lives.

(O.B.M. p. 22.) In sum, respondent contends that the eligibility bar limits "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." (O.B.M. p. 23.) As a preliminary matter, the argument wrongfully assumes that, prior to the point when a felon would apply for a certificate of rehabilitation, the state has made a substantial investment in rehabilitation for former probationers but has not done so for former prisoners (see above). Additionally, for this argument to succeed, there must be a rational basis to conclude that a former probationer incarcerated after dismissal is "unlikely to obtain" a certificate, but a former prisoner incarcerated a substantial amount of time after their release is more likely to obtain one. Because there is no rational basis for such a conclusion, the argument should be rejected.

The disparate treatment of probationers who obtain dismissal is not a rational way to conserve judicial resources when viewed in light of the likelihood for relief. (O.B.M. p. 23 ["precluding those likely to seek a certificate, but unlikely to obtain one"].) Former prisoners were presumably convicted of more serious crimes, or at least their conduct or level of culpability in the crime was more serious, than those sentenced to probation. (*D.M. v. Department of Justice* (2012) 209 Cal.App.4th 1439, 1451-1452.) And section 4852.01 allows former prisoners who are unable

to maintain reform outside of prison and are incarcerated numerous times to remain eligible for a certificate of rehabilitation. By any reasonable measure, a former felony prisoner with a serious post-release criminal history is less likely to meet the standard of "an honest and upright life," and conduct with "sobriety and industry" than a probationer incarcerated for a short time post-dismissal with twenty years of exemplarily conduct. In short, perhaps a rational way to conserve judicial resources would be to impose an eligibility bar on former prisoners incarcerated after their release, or an eligibility bar on both former prisoners and former probationers who are incarcerated after their release, but not an eligibility bar *only* on felons who were convicted of the least serious crimes, successfully completed probation, and had a better overall post-conviction record.

CONCLUSION

The issue at stake in this case for appellant, and society, is of great significance. Hundreds of former probationers likely find themselves in appellant's position; they merely seek a chance for the court to consider their efforts at bettering themselves and their community. The question presented is whether an arbitrary technical bar should permanently deprive an individual of the ability to prove rehabilitation. Rehabilitation is a fundamental value in our justice system. As the *Lockwood* court observed, "rehabilitation may take years to achieve . . . . Those who so endeavor

should be encouraged; denying a petition for a certificate of rehabilitation with prejudice works in the opposite direction." (*Lockwood*, *supra*, 66 Cal.App.4th at p. 230.) Consequently, the judgment of the Court of Appeal should be affirmed, and the case should be remanded for a hearing on appellant's fitness for a certificate of rehabilitation and pardon.

Dated: March 29, 2017

David Reagan
Attorney for Appellant
Jody Chatman

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to California Rules of Court, rule 8.520(c), that the attached brief contains 7,274 words based upon a word count produced by Microsoft Word.

Dated: March 29, 2017

David Reagan
Attorney for Appellant
Jody Chatman

PROOF OF SERVICE

I, the undersigned, depose and state: I reside or do business within the County of Alameda. I am over eighteen years of age and not a party to this action. My business address is 725 Washington Street, Suite 200, Oakland, CA 94607

On March 30, 2017, I served the following documents:

ANSWER BRIEF ON THE MERITS, *PEOPLE V. CHATMAN*

I served the following persons by first class U.S. mail:

Catherine A. Rivlin Office of the Attorney General 455 Golden Gate, Suite 11000 San Francisco, CA 94102-7004	Honorable Judge Paul DeLucchi Alameda County Superior Court 1225 Fallon St. Oakland, CA 94612
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I declare under penalty of perjury that this is true. Executed in Oakland, California, on March 30, 2017.

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