In the Supreme Court of the State of California

THE 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
County Superior Court, Case No. 140542
The Honorable Paul DeLucchi, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In his answer brief, appellant asserts that former felony probationers who obtained dismissal and release, then were incarcerated, are necessarily similarly situated with former felony prisoners, because both groups of felons seek the restoration of civil rights. (ABM 5.[1]) However, pure desire for relief neither defines a group's situation in terms of the legitimate purposes of the statute, nor establishes their eligibility to apply for a certificate of rehabilitation under Penal Code section 4852.01.

A certificate of rehabilitation is an expedited judicial process toward the restoration of civil rights and, in appellant's case, to possible exemption from the requirement of a spotless record needed to apply for a Community Care License. The Legislature did not make the expedited process available to former felony probationers whose subsequent incarceration demonstrates that the court's decision to expunge their convictions has not resulted in rehabilitation. Appellant too easily dismisses the basic fact that former felony prisoners who serve out their sentences and whose convictions are not expunged 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. (ABM 11.) Appellant subverted a prior judicial finding of rehabilitation under Penal Code section 1203.4, but former felony prisoners to whom he compares himself have not.

Appellant remains eligible for alternative, if slower, pathways to clear his record. He may seek a pardon. He may request a district attorney's recommendation for exemption from the clean-record requirement for an application for a Community Care License. The Legislature rationally

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[1] We use OBM for the opening brief and ABM for the answer brief on the merits.

decided to reserve the expedited pathway of a certificate of rehabilitation for those who were not incarcerated for a crime after having their records expunged.

ARGUMENT

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

A. Former Felony Probationers and Former Felony Prisoners Are Not Similarly Situated for the Purposes of Restoring Civil Rights by Certificates of Rehabilitation and Pardon

Penal Code section 4852.01[2] describes who is eligible to seek certificates of rehabilitation that expedite applications for pardons. Appellant narrowly focuses on this one pathway to claim that the desire for restoration of rights via a certificate makes former felony probationers and prisoners similarly situated. (ABM 5, 10.) His motives argument is wholly misplaced. The inquiry in equal protection analysis "is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Appellant asserts the purpose of the law challenged is to provide a pathway for all felons who have proved their rehabilitation to obtain relief from the disabilities associated with a felony record. However, the statement on which he relies is less expansive. "[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, citing *People v. Lockwood* (1998) 66 Cal.App.4th 222, 230.) The

[2] Further unspecified references to statute are to this code.

chapter in which section 4852.01 resides does provide *an* avenue, but as recognized by the Legislature, not an exclusive avenue toward this reacquisition of rights. (§ 4852.19 ["This chapter shall be construed as providing an additional, but not an exclusive procedure for the restoration of rights and application for pardon."] Where alternative pathways exist, equal protection is not implicated merely because different pathways are open to different groups. (See *People v. Moreno*, *supra*, 231 Cal.App.4th at p. 943 [where two groups do not receive significantly different treatment under alternative pathways toward the same end, equal protection analysis neither recognizes a violation nor provides a remedy].)

Both these groups have been afforded the opportunities for the restoration of rights that are appropriate to their differing situations. The certificate is rarely an end in itself; rather, it is instead one means to an end. (§§ 4800, 4852.17, 4853.) A certificate is an application for a pardon that the governor may grant without further investigation, since the applicant has already been vetted by the superior court. (See §§ 4800, 4852.01, 4852.16; Cal. Const., art. V, § 8.) While a certificate by no means guarantees a pardon, ineligibility for a certificate also does not preclude a pardon. (§ 4800 et seq.)

Far from overlooking distinctions in the obedience to the law of formerly convicted persons, the Legislature meant to ease "the administrative burden on the executive branch by allowing the superior court to investigate and recommend pardon applicants" reflecting the needs of ex-felons who otherwise were barred from military service or work in defense industries in World War II. (See *People v. Ansell* (2001) 25 Cal.4th 868, 874-875.) Neither persons sentenced to death or subject to lifetime parole, nor certain forcible sex offenders, nor those, like appellant, who availed themselves of record clearance under section 1203.4, then were incarcerated, are eligible to apply for a certificate. However, any of

them can apply for a pardon. (§§ 4800, et seq., 4852.01, subd. (c); see *Ansell, supra*, 25 Cal.4th at p. 878, fn. 18.) All other former felons, whether probationers or prisoners, who have demonstrated their reformation in the ways prescribed by section 4852.05, for the number of years required by section 4852.03, are eligible to apply for a certificate of rehabilitation (§§ 1203.4, 4852.01).

The ineligible groups are not similarly situated with the eligible groups. Certain sex offenders were made ineligible to apply for a certificate on a legislative finding that they would be the group least likely to seek or obtain a certificate, yet likely to burden the courts with repeated applications. (*Ansell, supra*, 25 Cal.4th at pp. 787, fn. 18, and *id.* at p. 882.) Unlike the other groups of former probationers and prisoners, appellant's group consists of persons who were previously provided an expedited pathway to record clearance and who by committing an additional criminal act resulting in incarceration showed their claims of reformation to be unfounded. Appellant's group is not similarly situated to the eligible groups. Appellant's group seeks a finding of rehabilitation a second time, not a first time, after breaking an earlier promise of lasting reform made to the superior court. That group though, like other groups, retains another pathway to a gubernatorial pardon. The Legislature simply denied appellant's group the right to demand that the courts vet them in still another resource-intensive and expedited judicial process, and consigned that group to the executive branch's administrative process, to assess if their latest promises of reformation are real.

Appellant questions whether former probationers really have "promised" to reform and whether they really have been vetted by the court. The offer of probation is accepted by a convicted felon with an express promise to abide by its conditions. Valid conditions foster rehabilitation by directly prohibiting criminal conduct or by requiring or forbidding

noncriminal conduct reasonably related to the present offense or to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486.) The failure to abide by the agreed upon conditions, the broken promise to practice a reformed life, has consequences, including revocation of probation, modification of its terms, and a prison sentence. Section 1203.4 dismissal does not start when probation concludes, it reflects years of successful promise-keeping in the form of compliance with probation conditions. During those years the probation officer, an officer of the court, supervises the probationer, and the court itself becomes involved in supervision when needed. Probation itself is the resource-intensive, court-supervised vetting process for dismissal and release of disabilities under section 1203.4.

B. Because the Statutory Scheme Affords Appellant Alternate Pathways to Again Demonstrate His Rehabilitation, He is Not Being Treated in a Significantly Different Manner from Certificate-Eligible Felons

Appellant is claiming that he must be treated identically to former prisoners who have not yet had an opportunity to prove rehabilitation. "Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment." (*People v. Green* (2000) 79 Cal.App.4th 921, 924, citing *People v. Romo* (1975) 14 Cal.3d 189, 196.) Appellant fails to establish any disparate treatment with respect to the legitimate purpose of the statute providing for the certificate of rehabilitation pathway to a pardon or other relief from disabilities. As noted, each group eligible or ineligible to apply for a certificate of rehabilitation has open to it the pathways to restoration of civil rights appropriate to its situation. The certificate procedure is "an additional, but not an exclusive, procedure for the restoration of rights and application for pardon." (§ 4852.19.)

Appellant incorrectly states that "a person with a robbery conviction—like appellant—can obtain a community care license only by first receiving a certificate of rehabilitation." (RBM 3.) Appellant can apply directly for a pardon, which, if successful, would provide him a clean criminal record report. (§ 4800.) Health and Safety Code section 1522, subdivision (g) also provides for a discretionary grant of exemption by the Director of the State Department of Social Services from the requirement that a clean criminal record accompany any application for a Community Care License. The Director can consider an application from someone with a certificate of rehabilitation, but also may consider someone who has otherwise been of good conduct in accord with section 4852.05 for at least 10 years and has obtained the recommendation of the district attorney representing his county of residence. (*Doe v. Saenz* (2006) 140 Cal.App.4th 960; Health & Saf. Code, §§ 1522, subd. (a)(1), (g)(1).)

C. Since the Legislature and the Electorate Are Empowered to Experiment with Punishments and Reformation Without Violation of Equal Protection, Section 1203.41 Does Not Establish Unequal Treatment

Appellant, for the first time in this case, asserts that section 1203.41, enacted and effective well before he moved for a certificate of rehabilitation on equal protection grounds in superior court,[3] establishes another instance of unequal treatment. The answer brief on the merits is not a proper vehicle for raising a new claim. (*People v. Brown* (2012) 54 Cal.4th 314, 322 fn. 11.) This claim should be disregarded. We address it only out of caution.

Appellant incorrectly imagines legislative experimentation in the area of rehabilitation of convicted persons is choked off by the equal protection

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[3] Section 1203.41 was enacted in 2013, effective January 1, 2014. (Stats. 2013, ch. 787 (AB 651) §1.) Appellant's motion was filed on October 16, 2014. (CT 176.)

clause. He makes much of the fact that recent section 1203.41 provides a new pathway for post-realignment felons who successfully complete their terms under section 1170, subdivision (h)(5), to apply to have their convictions expunged following the punishment-free passage of a specified number of years, without limiting their later ability to seek a certificate of rehabilitation, even if they are reincarcerated after a successful application.

Equal protection does not preclude legislative experimentation with different approaches or recognition of degrees of evildoing or rehabilitation, nor does it require that "things which are different in fact or opinion be treated in law as though they were the same." (*People v. Descano* (2016) 245 Cal.App.4th 175, 183-185; see *Skinner v. Oklahoma* (1942) 316 U.S. 535, 540; *Tigner v. Texas* (1940) 310 U.S. 141, 147.) "The Legislature may experiment individually with various therapeutic programs related to criminal charges or convictions. [Citation.] The equal protection issue is whether actual distinctions in the statutory classes realistically justify disparities in treatment under the appropriate standard of review. [Citation.]" (*People v. Lynch* (2012) 209 Cal.App.4th 353, 361.) "The Realignment Act is, if nothing else, a significant experiment by the Legislature." (*Ibid.*)

The Legislature has rationally chosen to experiment with different pathways to expungement and clemency for different types of offenders. It gives (1) former felony probationers the opportunity to reform early and thoroughly through record clearance, followed by the option to apply for a certificate of rehabilitation if there is no further incarceration; (2) former felony jail inmates under realignment the opportunity to seek record clearance and a certificate of rehabilitation once they satisfy the period of rehabilitation; and (3) former state prisoners the opportunity to seek a certificate of rehabilitation following satisfaction of the period of rehabilitation. (§§ 1203.4, 1203.41, 4852.01.) All three groups retain

access to the existing non-certificate pardon pathway of Penal Code section 4800 et seq. Any distinctions made in the course of the realignment experiment are explained and justified by the different circumstances of the offenders and do not implicate equal protection.

Appellant also incorrectly views this scheme as irrationally disadvantaging him in comparison to someone "who is incarcerated numerous times for serious crimes and for extended periods of time post-release," yet may still apply for a certificate of rehabilitation. (RBM 9.) He misses a fundamental point of the Legislature's choices, however. The concept of pardon and clemency under review is geared almost entirely toward recognizing the rehabilitative efforts of offenders who have stepped off the path of legal behavior by committing a single felony. For example, those who have twice (or more) been convicted of felonies must apply directly to the Governor for clemency or pardon (§ 4802) if seeking a gubernatorial pardon and must, in either the direct application or the certificate of rehabilitation case, obtain the recommendation of a majority of the Justices of this Court to obtain relief (§§ 4852, 4852.14, 4852.16).[4] Appellant's hardened criminal straw man or woman appears to be in line far behind appellant for pardon or for restoration of rights.

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[4] The most recent Court Statistics Report of the Judicial Council of California indicates that this Court generally rules on no more than one executive clemency application per year. (2014 Court Statistics Report, at pp. 12-13, available at http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf.)

D. A Rational Basis Exists for Treating Former Felony Probationers Who Have Certified Their Reform, Then Been Incarcerated, Differently from Former Felony Prisoners Who Have Never Been Court-vetted for Reform

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if any reasonably conceivable state of facts could provide a rational basis for the classification." (*Federal Communications Commission v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.) A party challenging a classification has the burden of negating "'every conceivable basis which might support it.' [Citations.]" (*Id.* at p. 315.) Appellant cannot meet this burden. Respondent's opening brief provided at least two conceivable bases for upholding the alternate pathways scheme: (1) the courts have already invested considerable resources in the reform of probationers by supervising probation and considering the petition for dismissal and release from disabilities, only to have a promise of reform dashed; and (2) providing only one *expedited* pathway to reform encourages focus and dedication to success at that early point, where the Legislature has focused its resources, and reduces lapses, incarcerations, and other costs of failure to reform.

Appellant asserts that no rational basis exists for what he terms the "disparate treatment" of former felony probationers and former felony prisoners, but his analysis considers the two groups at different points in time. He compares probationers who have been incarcerated after dismissal of their felony charging documents on promise of reform, with former felony prisoners who have not been offered an opportunity to establish before a court that they have reformed and satisfied the lengthy minimum rehabilitation period.

Based on that anomalous comparison, appellant asserts that the loss of certificate eligibility takes away the incentive to reform. That assertion is incorrect when viewed in the more appropriate context of the incentive of the offender to take probation seriously and to commit during the period after dismissal and release from disabilities to a new, crime-free life. In that context, the incentives are quite strong to succeed because the only expedited pathway to release from any remaining disabilities depends on continued success. Nevertheless, when there is a subsequent lapse, as occurred to appellant, there remain strong incentives to succeed and even alternative pathways to the result he seeks. Reformation, of course, is its own reward in community standing, employability, and self-esteem. Beyond that, section 4800 et seq. and Health and Safety Code section 1522, subdivision (g)(A)(i), provide alternative, if slower, pathways to restoration of rights. Of course, all that depends on appellant's ability to prove a second time that he can lead and honest and upright life.

To require the courts to provide yet another expedited means of clearing the criminal records of those who have already availed themselves of probation and court-ordered dismissal and release--the Legislature's primary means of providing a fresh start--undermines the incentive that encourages probationers to succeed the first time around. Lapsed former probationers are also not eligible because, having completed probation, applied for and obtained expungement from the court, then reoffended at the level of a jail or prison commitment, they represent an elevated rehabilitative risk, or so the Legislature could find.

It is rational to conclude that someone who has been through the rigors of probation and obtained dismissal and release, yet committed another offense which results in incarceration, is unable to fully learn from his or her mistakes and is likely to lapse again. Petitioner, whose second and third offenses were both for alcohol-related driving, is a case in point.

However good his intentions, it is a twice-proved fact that knowing his freedom is on the line is not enough to keep him from driving impaired. The judicial fast lane, after all the opportunities he has been given,[5] may simply be viewed as an expedited route to a "no" answer. That benefits and opportunities have already been offered, and promises of reform extracted, along the way from probation to discharge and release, is the norm. The Legislature can rationally assume that, separately vetted by the governor, rather than being vetted again by the court that oversaw his probation and granted the discharge and release, a certificate applicant can make his case for reform without the full burden of having undertaken in court to follow through on reform and having returned to court, not having followed through.

It is rational to reserve available judicial resources to expedite the pardon process through the evaluation of certificate applications by those deemed to be lesser risks. It is likewise rational to view as such lesser risks those offenders who remain law abiding after their record was expunged and those who have not yet had the opportunity to prove the ability to

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[5] The court placing appellant on probation realized it was going out on a limb for appellant: "[T]here are a lot of people who would agree with exactly what the District Attorney just said, that six months isn't enough for robbing somebody at the point of a bee-bee gun. . . . Hopefully, I'm not going to see you back here. If you come back on a probation violation, . . . the sentence for this is two years, three years, or five years in prison. You are a young guy. I want you to follow through, if you can, back in that Cisco employment program. It's a good program. . . . Take advantage of it, okay? Good luck. And by the way, the reason I didn't give you a year in jail for this robbery is because of what you've been trying to accomplish. So I tried to find a balance in there. I tried to give you something that's going to make you think about it, but hopefully not ruin your chances at that program. Good luck." (CT 151-152 .) A probation violation and reinstatement, a wet reckless conviction, two expungements, then a DUI conviction followed.

remain law abiding for a sustained period. Accordingly, appellant was not denied the equal protection of the laws.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: May 19, 2017

Respectfully submitted,

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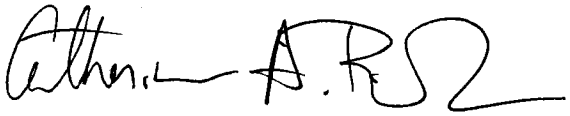

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contain 3,329 words.

Dated: May 19, 2017

XAVIER BECERRA
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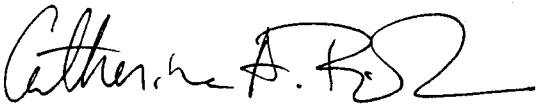

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DECLARATION OF SERVICE BY U.S. MAIL

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 May 19, 2017, I served the attached **REPLY 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 May 19, 2017, at San Francisco, California.

A. Bermudez
Declarant

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Signature

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