Filed 8/8/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GREGORY GUZMAN, Defendant and Appellant.	H024003 (Santa Clara County Super. Ct. No. CC199361)

In this case we consider whether Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 (the Act), applies to a defendant who commits nonviolent drug possession offenses (NVDPOs) while on probation for a nonviolent, nonserious felony offense and a misdemeanor offense.[1] Although we conclude that the Act does not apply to such individuals, we hold that their exclusion violates equal protection because of the Act's applicability to similarly situated parolees. Accordingly, we will reverse.

FACTS AND PROCEDURAL BACKGROUND

In February 2001, defendant Gregory Guzman pleaded no contest to inflicting corporal injury on a cohabitant (Pen. Code, § 273.5) and committing a misdemeanor battery upon a peace officer engaged in his duties. (Pen. Code, §§ 242, 243, subd. (b).)[2]

---

[1] We use the term "nonviolent, nonserious felony offense" to refer to those offenses not included within subdivision (c) of Penal Code section 667.5 or section 1192.7. (See Pen. Code, § 1210.1, subd. (b)(1).)

[2] All further unspecified statutory references are to the Penal Code.

Defendant was placed on three years' probation. One probation condition required that defendant serve eight months in county jail.

On October 16, 2001, defendant pleaded guilty to possessing methamphetamine and being under the influence of a controlled substance. (Health & Saf. Code, §§ 11377; 11550.)

On October 18, 2001, defendant was arraigned on a petition to revoke his probation in the corporal injury/misdemeanor battery case. The petition was based upon defendant's conviction for possessing methamphetamine and being under the influence of a controlled substance. Both possessing methamphetamine and being under the influence of a controlled substance are NVDPOs. Defendant's probation was summarily revoked and defendant was remanded to custody on the probation violation.

On October 23, 2001, defendant was placed on probation for the NVDPO conviction pursuant to Proposition 36. He was placed on probation for 18 months, ordered to participate in a treatment plan, and released from custody in the NVDPO case.

On November 21, 2001, defendant's counsel filed a "Motion to Compel Drug Treatment Pursuant to Proposition 36" in the corporal injury/misdemeanor battery case. Defendant argued that he should be treated no worse than a parolee, who, under identical facts, would be eligible for probation under Proposition 36 pursuant to section 3063.1. Defendant stated that his equal protection rights were violated by the failure to treat him the same as a parolee would be treated in similar circumstances.

The trial court found that defendant had violated probation and denied his motion for drug treatment under Proposition 36. Defendant was sentenced to the two-year mitigated term with 393 days of credit against that term.

This appeal ensued.[3]

---

[3] Defendant sought expedited review by filing a petition for a writ of habeas corpus. In March 2002, we summarily denied the petition. Subsequently, defendant moved to augment the record on appeal to include the materials in his habeas petition.

DISCUSSION

I. *Whether The Act Applies To Defendant*

According to defendant, the Act applies when an individual on probation for a nonserious, nonviolent felony violates that probation by committing an NVDPO.[4] We disagree.

To decide if the Act applies, we turn to its language. Under section 1210.1, subdivision (a), it is stated: "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation."[5]

The Act does not apply to certain categories of defendants. For example, the Act does not apply to "(1) Any defendant who previously has been convicted of one or more *serious or violent felonies* in violation of subdivision (c) of Section 667.5 or Section 1192.7, unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in (A) a felony conviction other than a nonviolent drug possession offense, or (B) a misdemeanor conviction involving physical injury or threat of physical injury to another person." (§ 1210.1, subd. (b)(1), italics added.)

We treated the motion as a request for judicial notice, granted that request, and took judicial notice of the record in the habeas matter.

[4] The fact that defendant was also on probation for a misdemeanor offense does not change the analysis and therefore we will not refer to it further.

[5] An NVDPO is defined as "the unlawful possession, use, or transportation for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance." (§ 1210.)

Defendant's prior convictions for inflicting corporal injury on a cohabitant and committing a misdemeanor battery upon a peace officer engaged in his duties are not violent or serious felonies as those terms are defined under subdivision (c) of section 667.5 or section 1192.7, and therefore the exclusion within section 1210.1, subdivision (b)(1) does not apply to him. The Attorney General does not contend otherwise.

In fact, none of the descriptions of the categories of defendants excluded from the Act's operation mention defendant's circumstances: a defendant who commits an NVDPO while on probation for a nonviolent, nonserious felony.[6]

Section 1201.1, subdivision (e) describes the consequences of violating a grant of probation under section 1201.1, subdivision (a). It refers to "[n]on-drug-related probation violations" and "[d]rug-related probation violations."[7] (§ 1210.1, subd. (e)(2) & (3).)

---

[6] Section 1210.1, subdivision (a) also does not apply to a defendant who, in addition to being convicted of an NVDPO, "has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony." (§ 1210.1, subd. (b)(2).) Section 1210.1, subdivision (a) does not apply to a defendant who uses a firearm while unlawfully possessing certain controlled substances (§ 1210.1, subd. (b)(3)(A)) or a defendant who uses a firearm while unlawfully under the influence of certain controlled substances. (§ 1210.1, subd. (b)(3)(B).) A person who refuses drug treatment as a probation condition is not entitled to probation under section 1210.1, subdivision (a). (§ 1210.1, subd. (b)(4).) Finally, section 1210.1, subdivision (a) does not apply to defendants who have two separate convictions for an NVDPO, who have participated in two separate courses of drug treatment under subdivision (a), and who are found by the court, by clear and convincing evidence, "to be unamenable to any and all forms of available drug treatment." (§ 1210.1, subd. (b)(5).) Such defendants shall be sentenced to 30 days in jail. (*Ibid*.)

[7] Section 1210.1, subdivision (e)(2) provides, "If a defendant receives probation under subdivision (a), and violates that probation either by being arrested for an offense that is not a nonviolent drug possession offense, or by violating a non-drug-related condition of probation, and the state moves to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The court may modify or revoke probation if the alleged violation is proved." Subdivision (e)(3)(A) states: "If a defendant receives probation under subdivision (a), and violates that probation either by committing a nonviolent drug possession offense, or a misdemeanor for simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or

Subdivision (e)(3)(D), (E), and (F) addresses the situation where a defendant is "on probation at the effective date of this act for a nonviolent drug possession offense . . . ."

These provisions do not apply to defendant. Defendant was not on probation under section 1210.1, subdivision (a) when he committed the NVDPO. He was also not on probation at the effective date of the Act for an NVDPO. Instead, defendant was on probation for inflicting corporal injury on a cohabitant and committing misdemeanor battery. Section 1210.1 contains no provision addressing defendant's circumstances. Nor does any other part of the Act cover defendant's situation.

Defendant concedes that the Act does not refer to a defendant who commits an NVDPO while on probation for a nonserious, nonviolent felony. He argues that the Act should be interpreted to cover his circumstances because the Act applies to a parolee on parole for a nonviolent, nonserious felony. (§ 3063.1.) Defendant says it would be absurd to deny him the benefits of the Act while including the parolee.

Defendant correctly describes the Act's applicability to parolees. Section 3063.1, subdivision (a) states, in pertinent part, "(a) Notwithstanding any other provision of law, and except as provided in subdivision (b), parole may not be suspended or revoked for commission of a nonviolent drug possession offense or for violating any drug-related condition of parole. [¶] As an additional condition of parole for all such offenses or violations, the Parole Authority shall require participation in and completion of an appropriate drug treatment program. . . ."

---

failure to register as a drug offender, or any activity similar to those listed in paragraph (1) of subdivision (d) of Section 1210, or by violating a drug-related condition of probation, and the state moves to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves by a preponderance of the evidence that the defendant poses a danger to the safety of others. If the court does not revoke probation, it may intensify or alter the drug treatment plan."

Section 3063.1, subdivision (b) lists those defendants excluded from section 3063.1, subdivision (a). It states that section 3063.1, subdivision (a) does not apply to (1) parolees convicted of one or more serious or violent felonies under section 667.5, subdivision (c) or section 1192.7; (2) a parolee who, while on parole, commits an NVDPO and concurrently commits "a misdemeanor not related to the use of drugs or any felony" and (3) a parolee who refuses drug treatment as a condition of parole. (§ 3063.1, subd. (b)(1)-(3).)

Accordingly, if defendant had committed his NVDPO while on parole for inflicting corporal injury on a cohabitant, his parole could not have been suspended or revoked. Instead, he would have been required to participate in and complete an appropriate drug treatment program. Thus, had defendant been a parolee, rather than a probationer, he would have received probation under the Act.

Nonetheless, we decline to rewrite the statute to include probationers who commit an NVDPO while on probation for a nonviolent, nonserious felony. In interpreting a statute, our duty is "to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code. Civ. Proc., § 1858.) If a statute is unambiguous, then it must be applied according to its plain terms. Judicial interpretation is neither necessary nor allowed. (Code. Civ. Proc., § 1859; *People v. Wells* (1996) 12 Cal.4th 979, 985.)

In this case, the Act contains no language addressing defendant's circumstances. The Act simply does not cover the situation where a defendant is on probation for a nonviolent, nonserious felony and then commits an NVDPO. Since there is nothing in the language of the Act to indicate that it applies to individuals in defendant's circumstances, we conclude that the Act is inapplicable.

II. *Equal Protection*

We must now decide whether defendant's equal protection rights were violated because he is excluded from the Act. Defendant argues that it violates equal protection to include within the Act a parolee who commits an NVDPO while on parole for a nonviolent, nonserious felony but to exclude defendant simply because he is a probationer who commits an NVDPO while on probation for a nonserious, nonviolent felony. We agree.

SIMILARLY SITUATED

The Fourteenth Amendment of the United States Constitution guarantees the right to equal protection of the laws. Under the California Constitution, the right is set forth in article I, section 7.

To establish a meritorious equal protection claim, a defendant must first show that the state has adopted a classification that impacts two or more similarly situated groups in an unequal manner. (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) In this context, the term " 'similarly situated' " means only that " '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' [Citations.]" (*In re Roger S.* (1977) 19 Cal.3d 921, 934.)

In *People v. Nguyen* (1997) 54 Cal.App.4th 705, this court elaborated on the "similarly situated" requirement. "There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The 'similarly situated' prerequisite simply 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." (*Id*. at p. 714, italics added.)

People v. Nguyen shows that examining the purpose of the law is critical in deciding whether two groups are similarly situated. Here, the purpose of the Act is set forth in Section 2 and Section 3.

Section 2 of the Act states: "The People of the State of California hereby find and declare all of the following: [¶] (a) Substance abuse treatment is a proven public safety and health measure. Nonviolent, drug-dependent criminal offenders who receive drug treatment are much less likely to abuse drugs and commit future crimes, and are likelier to live healthier, more stable and more productive lives. [¶] (b) Community safety and health are promoted, and taxpayer dollars are saved, when nonviolent persons convicted of drug possession or drug use are provided appropriate community-based treatment instead of incarceration. [¶] (c) In 1996, Arizona voters by a 2-1 margin passed the Drug Medicalization, Prevention and Control Act, which diverted nonviolent drug offenders into drug treatment and education services rather than incarceration. According to a Report Card prepared by the Arizona Supreme Court, the Arizona Law: is 'resulting in safer communities and more substance abusing probationers in recovery,' has already saved state taxpayers millions of dollars, and is helping more than 75 percent of program participants to remain drug free." (Ballot Pamp., Gen. Elec. (Nov. 7, 2000) text of Prop. 36, § 2, p. 66.)[8]

Section 3 of the Act states that Proposition 36 was enacted: "(a) To divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses; [¶] (b) To halt the wasteful expenditure of hundreds of millions of dollars each

[8] We granted the People's request to take judicial notice of excerpts from the California Official Voter Pamphlet for the November 2000 general election that discuss Proposition 36.

year on the incarceration—and re-incarceration—of non-violent drug users who would be better served by community-based treatment; and [¶] (c) To enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective treatment strategies."

Sections 2 and 3 demonstrate that the Act is designed to save money by ending wasteful spending on incarcerating nonviolent drug offenders and to enhance public health and safety by diverting these offenders to drug treatment. In *In re DeLong* (2001) 93 Cal.App.4th 562, 569, the court reasoned that the Act is to have a "wide reach" and "far-ranging application."

Given the purpose and scope of the Act, we conclude that defendants who commit an NVDPO while on probation for a nonviolent, nonserious offense and defendants who commit an NVDPO while on parole for a nonviolent and nonserious offense are sufficiently similar to justify judicial scrutiny of the Act's distinction between them. There are several reasons for our conclusion.

First, both the parolee and probationer have committed the same type of offense—an NVDPO. Second, both the parolee and probationer are on probation or parole for the same type of offense—a nonviolent and nonserious felony. Third, diverting to drug treatment a defendant who commits an NVDPO while on probation for a nonviolent and nonserious felony would save as much money and enhance public health and safety just as much as diverting a defendant who commits an NVDPO while on parole for a nonviolent and nonserious felony. The public health, safety, and pocketbook would benefit if drug treatment were provided to probationers like defendant.

According to the Attorney General, parolees and probationers are not similarly situated because when parole is revoked, the revocation term is imposed for the offense that caused parole to be revoked, whereas when probation is revoked the sentence is imposed for the defendant's original offense. Since parolees and probationers who

violate their conditions are sentenced for different offenses, the Attorney General says that the two groups are not similarly situated.

There is no doubt that there are differences between probationers and parolees. But with respect to the purpose of the Act—to save money by ending wasteful spending on incarcerating defendants who commit an NVDPO and to enhance the public safety and health—we do not see the difference. The goal of saving money by ending wasteful spending on incarcerating nonviolent drug offenders would be furthered by applying the Act to a defendant who commits an NVDPO while on probation for a nonviolent, nonserious felony. In addition, nothing within sections 2 or 3 evince a purpose to exclude individuals such as defendant from the Act. Indeed, under Section 3, it is stated that the Act's purpose is to divert "nonviolent defendants, *probationers* and parolees charged with simple drug possession or drug use offenses; . . ." (Italics added.) This language suggests an intent to include defendant within the Act. Certainly defendant is a nonviolent probationer just as much as a parolee on parole for a nonviolent, nonserious felony is a nonviolent parolee.

In addition, probation and parole serve similar purposes. "The purpose of probation is rehabilitation. [Citations.]" (*People v. Hackler* (1993) 13 Cal.App.4th 1049, 1058; see also *People v. Cortez* (1962) 199 Cal.App.2d 839, 844 ["[p]robation is granted to the end that a defendant may rehabilitate himself, make a responsible citizen out of himself and be obedient to the law"]; § 1202.7.) The purpose of parole is also largely rehabilitative. (*People v. Britton* (1984) 156 Cal.App.3d 689, 696; see also § 3000, subd. (a)(1).)[9] Parole ensures that those who have completed their prison

[9] Section 3000, subdivision (a)(1) shows the rehabilitative purpose of parole. It provides: "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees, including the judicious use of revocation

sentences will be monitored and assisted as they make the transition from regimented prison life to free society. (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 477-478.) The fact that parole and probation serve similar purposes, a purpose that is consistent with the goal of the Act itself, supports the conclusion that parolees and probationers are similarly situated with respect to the purpose of the Act.

The Attorney General cites *People v. Blunt* (1986) 186 Cal.App.3d 1594. *Blunt* is distinguishable. It involved an issue of presentence custody credits and hinged upon interpreting section 2900.5's language that "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." *Blunt* stated that the parole revocation term "for some purposes" is not treated as part of the sentence term for the original offense. *Blunt* then concluded that "it is not unreasonable to view the [parole revocation] term as being imposed for the new offense *for purposes of determining credits.*" (*People v. Blunt, supra*, 186 Cal.App.3d at p. 1600, italics added.) Thus*, Blunt* dealt with the factually unique question of custody credits and the interpretation of a specific statute, section 2900.5, the language of which provided strong support for the court's result. Further, *Blunt* recognized that the parole revocation term was for some purposes not treated as part of the sentence term for the original offense. Consequently, *Blunt* can hardly be viewed as establishing that there is a legitimate justification for the Act's different treatment of parolees and probationers, or that parolees and probationers are not similarly situated for the purposes of the Act.

People v. Jones (1985) 176 Cal.App.3d 120 is also distinguishable. *Jones* applied a rational relationship test to hold that equal protection was not violated by a statute making former probationer felons ineligible for a certificate or rehabilitation because of

---

actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge."

subsequent incarceration even though former state prisoner felons were not rendered ineligible. *Jones* emphasized that the Legislature had established two different procedures for obtaining a certificate of rehabilitation depending upon the individual's status as a probationer or parolee. Under section 1203.4, if a probationer successfully completes probation, then the matter may be dismissed. The idea is that the probationer is rewarded for his or her successful rehabilitation or reformation. (*People v. Jones, supra*, 176 Cal.App.3d at pp. 128-129.) Consistent with that idea, section 4852.01, subdivision (c) authorizes a certificate of rehabilitation when a probationer has obtained a dismissal under section 1203.4 *so long as* the probationer has not been incarcerated since the dismissal and is not on probation for committing another felony. (*Id*. at p. 129.) Thus, according to *Jones*, the Legislature meant to ensure that the rehabilitative purpose of probation had continued to succeed before the former probationer was permitted to obtain a certificate of rehabilitation. (*Ibid*.) By contrast, former parolees had not benefited from having the charges against them dismissed after complying with a probation order tailored to their rehabilitative needs. Unlike probationers, they are not eligible for relief under section 1203.4. Instead, as former state prisoners, parolees have records of conviction and a history of confinement and "bear the full onus and stigma of ex-convicts that those former probationers who have previously obtained section 1203.4 relief do not share." (*Id.* at pp. 129-130.) *Jones* concluded that former probationers are not similarly situated with former state prisoners for purposes of applying section 4852.01. *Jones* also decided that there was a rational relationship between the statutory distinctions between these two classes of ex-felons and "the state's legitimate purpose of rehabilitating and restoring rights to ex-felons who are not similarly situated." (*Id.* at p. 131.)

Unlike *Jones*, in this case there are not two separate schemes to deal with these two classes. There exists only a scheme for dealing with parolees who commit an NVDPO while on parole for a nonviolent, nonserious felony offense. There is no

separate provision for dealing with probationers who commit an NVDPO while on probation for a nonviolent, nonserious offense. Rather, such probationers are simply not mentioned under the Act. Thus, unlike *Jones*, there is no broad legislative mandate indicating an intent to treat the two classes differently with respect to the purpose of the law in question.

Jones is also different because the statutes there reflected an intent to ensure adherence to the rehabilitative intent of probation, an intent that would have been undermined by accepting the position of the *Jones* defendant. By contrast, in this case, treating individuals like defendant the same as parolees on parole for a nonviolent, nonserious offense would not run counter to the rehabilitative goal of probation. This is so for two reasons. First, the purpose of the Act itself is largely rehabilitative. Second, the Act already permits probationers on probation for an NVDPO to receive the benefits of the Act. This fact demonstrates an absence of an intent to exclude from the Act individuals already on probation, thereby demonstrating a recognition that the rehabilitative goal of probation will not be undermined by making certain probationers subject to the Act. In this case, the rehabilitative needs of probationers and parolees would be promoted if the two groups were treated alike, and similar treatment would be consistent with the purpose of the Act itself. A grant of probation under the Act would help defendant with his drug problem and save the public money just as much as a grant of probation would help the parolee with a drug problem and save the public money.

Finally, *Jones* is distinguishable since it utilized the rational relationship test, whereas in this case, as discussed *post*, the strict scrutiny test applies.

In *People v. Vickers* (1972) 8 Cal.3d 451, the California Supreme Court stated, "The recognition that aside from an act of clemency a grant of parole is an integral part of the penological system intended to help those convicted of crime to integrate into society as constructive individuals as soon as possible and alleviate the cost of maintaining them in custodial facilities, is equally applicable in the case of a grant of probation. The

characterization of a grant of probation as a privilege rather than a right is also, as in the case of a grant of parole, no longer of significance. Certainly the nature of a probationer's interest in his liberty, not necessarily ever having been an inmate of a prison or jail, is at least as great as that of a parolee and is entitled to at least the same due process safeguards before it is terminated." (*Id*. at p. 458.)

In *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782, footnote 3, the United States Supreme Court held that there is no difference between parole revocation and probation revocation for purposes of due process. In a footnote, the Court stated, "Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole. [Citations.]"

We conclude that with respect to the purposes of the Act probationers and parolees are similarly situated so that further judicial scrutiny is warranted.

STRICT SCRUTINY

Defendant contends strict scrutiny review is required because the different treatment infringes upon his fundamental liberty interests. He says his liberty interest is infringed because his probation was revoked and he was sentenced to prison whereas the parolee would automatically receive the benefit of drug treatment under the Act. We agree.

When an equal protection case does not involve a suspect classification or fundamental interest, legislative distinctions between persons or classes are lawful if they have a rational relationship to a legitimate state purpose. However, if the distinction arises from a suspect classification or infringes on a fundamental interest, then the classification is subject to strict scrutiny. Strict scrutiny means that the classification will be upheld only if it is necessary to further a compelling state interest. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155-1156; *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42.)

People v. Olivas (1976) 17 Cal.3d 236 demonstrates that strict scrutiny should be applied here. In *Olivas*, there was an equal protection challenge to statutes that divided misdemeanor offenders into two groups based on their ages. The statutes reflected a sentencing scheme that singled out for substantially longer periods of incarceration offenders between ages 16 and 21 years. (*Id.* at pp. 239-242.) The defendant faced a three-year California Youth Authority commitment. By contrast, an adult would have faced only a six-month jail term. According to *Olivas*, incarceration was a deprivation of liberty and therefore the classification-by-age scheme affected the defendant's " 'personal liberty interest.' " (*Id*. at p. 245, fn. omitted.) The court found that liberty was a "fundamental" interest. (*Id*. at pp. 246-251.) Among other things, *Olivas* reasoned that our justice system is greatly concerned by procedures that restrict liberty as reflected by many of the specific guarantees of due process, which are, in essence, manifestations of our fundamental respect for personal liberty. (*Id*. at p. 249.) The court found that the California Constitution "manifests an even stronger concern for unwarranted deprivations of personal liberty by the state than can be found in the due process clause of the Fourteenth Amendment, itself a strong protection against unwarranted deprivations of liberty." (*Id*. at p. 250.) The court stated, "No reason has been suggested, nor can we conceive of any, why the concern for personal liberty implicit in both the California and federal Constitutions is any less compelling in [the] defendant's case. We believe that those charters are no less vigilant in protecting against continuing deprivations of liberty than are their due process clauses in protecting against the initial deprivation of that liberty. We conclude that personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*Id*. at pp. 250-251.) Thus, since the defendant challenged a statutory distinction that affected a fundamental interest, the court reviewed it under the strict scrutiny standard.

People v. Nguyen, supra, 54 Cal.App.4th 705 also shows that strict scrutiny should be applied in this case. In *Nguyen*, this court followed *Olivas* in addressing a challenge to

the "Three Strikes" law, which divides the class of recidivist offenders currently convicted of petty theft into two groups and treats them differently. Those with prior theft-related convictions are subject to significant prison terms, in some cases 25 years to life. This is because the prior conviction elevates the current petty theft offense from a misdemeanor to a felony and triggers sentencing under the Three Strikes law. Those without a prior theft-related offense are subject to a jail term of six months. This is because the current petty theft conviction remains a misdemeanor and does not trigger the Three Strikes law. (*People v. Nguyen, supra*, 54 Cal.App.4th at pp. 713-714.) Following *Olivas*, this court concluded that the classification scheme affected the defendant's fundamental interest in liberty. "The challenged distinction subjects some petty thieves to life sentences and others to no more than six months in jail. Like the two groups of offenders in *Olivas*, these two groups of offenders have committed the same offense. While it may be tempting to try to distinguish *Olivas* on the ground that it involved an age-based classification, the California Supreme Court explicitly stated that its decision that strict scrutiny applied was not based on the classification itself being suspect but solely on the fact that the classification affected a fundamental interest. That same interest is affected by the classification in question here. One group of offenders faces a significantly extended period of incarceration, a life sentence, while the other group faces no more than six months in jail. As in *Olivas*, the personal liberty interest of the individual offender facing an extended period of incarceration is significantly affected by this classification. We can find no substantial basis for distinguishing the interest at *issue* in *Olivas* from the interest at *issue* here." (*People v. Nguyen, supra*, 54 Cal.App.4th at p. 717, fn. omitted.) Consequently, this court reviewed the challenged classification scheme under the strict scrutiny standard. (But see *id*. at p. 720 (conc. opn. of Bamattre-Manoukian, J.) [questioning application of strict scrutiny standard of review].) After doing so, this court concluded that the state had a strong and compelling interest in

protecting its citizens from violent criminal conduct. *Nguyen* decided that the classification scheme was necessary to further that compelling interest. (*Id*. at p. 719.)

Like the classifications in *Olivas* and *Nguyen*, the classification here affects defendant's fundamental interest in liberty. In fact, the impact here is greater than the impact in *Olivas* and *Nguyen*. In *Olivas* and *Nguyen*, both groups suffered at least some period of incarceration but the classification singled out one group for substantially longer periods of confinement. By contrast, in this case, both groups do not face incarceration. Rather, the probationer faces possible incarceration while the parolee is guaranteed drug treatment.

We conclude that the classification affects defendant's fundamental liberty interest and therefore strict scrutiny is applicable. Thus, the state must show that the distinction serves a compelling interest and that the distinction is necessary to further that interest. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480; *People v. Olivas, supra*, 17 Cal.3d at p. 251.)

According to the Attorney General, the distinction between probationers and parolees is justified by a compelling state interest. Specifically, the Attorney General contends that "[i]ndividuals who engage in crimes of violence pose a substantially greater danger to the community than those who possess narcotics for personal use. Accordingly, the state has a compelling interest in providing drug treatment for drug addicts while punishing those who engage in crimes of violence."

This argument is without merit. First, it does not accurately identify the classifications. Defendant was not on probation for a violent or serious felony as defined by sections 667.5, subdivision (c) or section 1192.7. Thus, the Attorney General is incorrect in implying that defendant was on probation for a violent crime as that term is used within the Act. Second, the Attorney General does not explain the justification for classifying a probationer who commits an NVDPO while on probation for a nonviolent, nonserious offense as "violent" while classifying a parolee who commits an NVDPO

while on parole for a nonviolent, nonserious offense as a mere person who "possesses narcotics for personal use." The mere fact that the parole revocation term is imposed for the current offense, while the probation term is imposed for the prior offense, does not establish what compelling interest is served by the Act's distinction between these parolees and probationers or demonstrate that the distinction is necessary to further any compelling interest.

If the Act evinced a purpose to exclude individuals with prior nonviolent, nonserious felony convictions, then our analysis would be different. For example, the Act could exclude defendants with prior felony convictions for nonviolent or nonserious offenses. But under the Act as written, as long as the prior conviction is not serious and not violent, as defined under sections 667.5, subdivision (c) or section 1192.7, then it does not matter if a defendant has a prior felony conviction when the defendant commits the NVDPO. Since this is the case, then why should it matter if the defendant is on probation for the nonviolent, nonserious felony conviction, as opposed to being on parole for that conviction or simply having that conviction as part of his prior record? If defendant committed the very same NVDPO offense one day after his probation ended, then the Act would apply. If he committed the NVDPO while on parole for the nonserious, nonviolent felony, then the Act would apply. We see no reason to deny defendant drug treatment merely because he happened to commit the NVDPO while on probation.

The Act is designed to have a "wide reach" and a "far-ranging application." (*In re DeLong, supra*, 93 Cal.App.4th at p. 569.) Under section 1210.1, subdivision (a), it is stated that the Act's purpose is to divert to drug treatment defendants, probationers, and parolees charged with drug possession or drug use crimes, thereby improving public health by reducing drug abuse and dependence through the use of effective treatment strategies. The Act is also designed to reduce incarceration costs and preserve jails and prisons for serious and violent offenders. Including defendant within the Act would be

consistent with these mandates: he was on probation for nonserious, nonviolent crimes and then committed NVDPOs. He should be provided treatment under the Act.

In sum, we conclude that the Act's distinction between defendants who commit an NVDPO while on probation for a nonserious, nonviolent felony and defendants who commit an NVDPO while on parole for a nonviolent, nonserious felony is not justified by a compelling interest or necessary to further any compelling interest.

We recognize that courts should strive to preserve the constitutionality of statutes and try to avoid if possible interpretations that raise serious constitutional questions. (*People v. Garcia* (1999) 21 Cal.4th 1, 25; *People v. Birks* (1998) 19 Cal.4th 108, 135.) In this case, serious constitutional questions cannot be avoided.

"Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous." (*Hill v. Texas* (1942) 316 U.S. 400, 406.)

We hold that the Act's distinction between probationers and parolees violates equal protection. The Act is unconstitutional insofar as it excludes from the Act probationers who commit an NVDPO while on probation for a nonserious, nonviolent offense yet includes within the Act parolees who commit an NVDPO while on parole for a nonviolent, nonserious offense.[10]

" 'Where a statute is defective because of underinclusion,' . . . 'there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.' [Citation.]" (*Califano v. Westcott* (1979) 443 U.S. 76, 89, quoting conc. opn. of Harlan,

[10] Given our conclusion, we need not address defendant's due process challenge to the Act.

J., in *Welsh v. United States* (1970) 398 U.S. 333, 361; see also *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1026.)

Accordingly, to comply with equal protection requirements, we will construe the Act to include probationers, like defendant here, who commit an NVDPO while on probation for a nonserious, nonviolent offense. As so construed, we will reverse and remand for resentencing in accordance with the provisions of the Act.

DISPOSITION

The judgment is reversed and the matter is remanded for resentencing in accordance with the provisions of the Act.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
WUNDERLICH, J.

People v. Guzman
H024003

Trial Court:	Santa Clara County Superior Court Superior Court No.: CC199361
Trial Judge:	The Honorable Leon P. Fox
Attorney for Appellant: Gregory Guzman	Law Offices of the Public Defender Jose R. Villarreal, Public Defender Seth Flagsberg, Deputy Public Defender
Attorney for the Respondents: The People of the State of California	Bill Lockyer, Attorney General Robert R. Anderson. Chief Assistant Attorney General Ronald A. Bass, Senior Assistant Attorney General Catherine A. Rivlin, Supervising Deputy Attorney General William Kuimelis, Deputy Attorney General

People v. Guzman
H024003