Supreme Court No. S135263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re JAIME P., a Person Coming Under the Juvenile Court Law	)	Court of Appeal Case No. A107686
PEOPLE OF THE STATE OF CALIFORNIA,	)	(Solano County Superior Court
Plaintiff and Respondent,	)	No. J32334)
v.	)	
JAIME P.,	)	
Appellant and Petitioner.	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAIME P., Appellant and Petitioner.	) (Court of Appeal) Case No. A107686;) Solano County) Superior Court) No. J32334))) APPELLANT'S) OPENING BRIEF) ON THE MERITS)

ISSUE PRESENTED

Does the rule of *In re Tyrell J*. (1994) 8 Cal.4th 68, that the search of a juvenile may be justified by a probation search condition unknown to the officer conducting the search, remain viable in light of the reasoning and holding of this court's subsequent decision in *People v. Sanders* (2003) 31 Cal.4th 318?

STATEMENT OF THE CASE

On April 28, 2004, a two count petition was filed, pursuant to Welfare and Institutions Code section 602, alleging that appellant had concealed a firearm in a vehicle and had driven a vehicle without a

license. (CT 93-95) Amended supplemental petitions were filed adding a count of driving without a license on an earlier date and carrying a loaded and unregistered firearm with a gang enhancement. (RT 98-100, 120-124.)

Appellant filed a motion to suppress evidence alleging that the stop and subsequent search of his vehicle violated his Fourth Amendment rights. (CT 111-117, 144-149, 151-155.) During the hearing on the motion to suppress, appellant argued that the initial detention was illegal because the failure to signal was not a Vehicle Code violation justifying a traffic stop unless another vehicle could have been affected by the movement. Furthermore, the ensuing search of appellant's car was the tainted fruit of this illegal detention. (RT 28, citing *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1366, fn. 6.) The prosecution conceded that the officer was wrong to detain the vehicle for a traffic violation. However, relying on the majority's opinion in *In re Tyrell J., supra,* 8 Cal.4th 68, the prosecution argued that the search of appellant and his vehicle was reasonable, despite the lack of justification for the detention, because appellant was subject to a probation search condition; and it did not matter that the officer was unaware of the search condition at the time of the detention and search. (CT 133-134, 163-164; RT 29, 26-38.)

The juvenile court denied the motion to suppress evidence relying on appellant's probation search condition to justify the officer's action. (RT 36-38.) The juvenile court thereafter found true one of the counts of driving without a license, the count alleging appellant was carrying an unregistered loaded firearm, and the gang enhancement. (CT 164; RT 113-114.) Appellant was continued as a ward of the juvenile court in the care and custody of probation for placement at Fouts Springs Boys Ranch. (CT 165-167; RT 1221.)

On appeal, appellant argued that the trial court erred in denying the motion to suppress because the searching officer was not aware of appellant's probation search condition at the time of the search. (AOB 7-23.) In an unpublished opinion filed on May 25, 2005, Division Four of the First Appellate District affirmed the trial court's decision because it believed it was bound by *Tyrell J.*'s holding that prior knowledge of a probation search condition was not necessary for juvenile probationers. (*In re Jaime P.*, 1st Crim. No. A10785, at pp. 4-5, hereafter "opinion.")

On July 5, 2005, appellant filed a petition for review. This court granted his petition on August 31, 2005, on the issue of whether the rule in *Tyrell J.* remains viable in light of the reasoning and holding of this court's subsequent decision in *People v. Sanders, supra,* 31 Cal.4th 318.

STATEMENT OF FACTS RELEVANT TO MOTION TO SUPPRESS

It was stipulated that there was no search or arrest warrant. The juvenile court took judicial notice that appellant was on juvenile probation subject to a search and seizure condition. (RT 3-4.)

At 11:25 p.m., Officer Darren Moody was in a marked patrol car following Officer Thomas back to the police station when he heard Officer Thomas run the license plate on a Chevy Caprice that had pulled out in front of them. (RT 4-6.) They both passed the Chevy but when the radio dispatcher advised that the license plate came back registered to a Toyota, Officer Moody made a U-turn and tried to catch up to the Chevy to confirm the license plate. (RT 6.) After reading the Chevy's license plate back to dispatch, Officer Moody was able to confirm that the license plate did belong to a Chevy and not a Toyota as earlier reported. (RT 6, 16.)

Officer Moody nonetheless continued to follow the Chevy, and he observed that the driver failed to signal when making a right turn and then again when pulling over and coming to a stop on the east curb line of Nottingham Avenue. (RT 6, 8, 19.) Moody pulled up behind the stopped Chevy in order to contact appellant, the driver, for not using his turn signal. (RT 7-8, 21.) The patrol car's headlights and spotlights emitted light into the Chevy. (RT 7, 10.) There were initially four

individuals in the Chevy including appellant when Officer Moody first observed the vehicle. Two of the passengers, however, had exited the Chevy by the time Officer Moody pulled up behind it. (RT 8.) Before contacting appellant, Moody called out to the two passengers that had exited the vehicle. He wanted to speak to them because he had earlier responded to a call involving gang graffiti and violence four or five houses away from their location. (RT 10.)

After contacting the passengers who had exited the vehicle, Officer Moody waited for a cover officer to arrive before contacting appellant. (RT 8, 10.) While waiting for backup to arrive, Officer Moody saw appellant turn around and face him. (RT 11.) The remaining passenger who was seated in the back seat, bent over into the floorboard area and "fiddled" with something. (RT 11.) The officer yelled at everyone to keep their hands where he could see them. (RT 11.) When backup officers arrived, Officer Moody ordered the remaining passenger out of the car and approached appellant to ask for his driver's license. (RT 11-12, 26.) Appellant was unable to provide the officer with a driver's license. (RT 12.)

Officer Moody then noticed a box of ammunition on the front passenger floorboard of the vehicle. He ordered appellant and the remaining passenger out of the vehicle and conducted a pat search for

weapons. (RT 12-13.) The officer removed a padlock attached to a bandana from one of the passenger's front pocket and then called for a tow truck because none of the passengers had a license to drive. (RT 14.) During an inventory search of the vehicle, Officer Moody found a handgun under the seat where the rear passenger had been sitting. (RT 15, 39.) Appellant admitted to knowing the firearm was in his vehicle. (RT 51.)

ARGUMENT

I

THE RULE OF *TYRELL J.* IS NO LONGER VIABLE IN LIGHT OF THE REASONING AND HOLDING OF THIS COURT'S SUBSEQUENT DECISION IN *PEOPLE V. SANDERS*

A. Introduction

In 1994, this court held in *In re Tyrell J., supra*, 8 Cal.4th 68, that an otherwise illegal search of a juvenile may be justified if he or she was subject to a probation search condition, even though the officer conducting the search was unaware of the juvenile's probationary status and search condition at the time of the intrusion. This decision focused on the probationer's diminished expectation of privacy. (*Id*. at pp. 83-86.) The decision additionally noted, however, that requiring prior knowledge of the probation search condition, at the time of the search, was unnecessary to

deter police misconduct, and "inconsistent with the special needs of the juvenile probation scheme." (*Id*. at pp. 86-87, 89.)

The holding in *Tyrell J*. was a substantial departure from this court's precedent as well as from established principles of Fourth Amendment jurisprudence set forth by the United States Supreme Court. In 1970, this court had held that the warrantless search of a residence could not be justified as a parole search if the police did not know of the suspect's parole status at the time of the search. (*In re Martinez* (1970) 1 Cal.3d 641, 646.) When deciding *Tyrell J.*, however, this court declined to follow the reasoning of *Martinez* and instead focused on the juvenile probationer's diminished expectation of privacy. (*In re Tyrell J., supra*, 8 Cal.4th at pp. 83-89.)

As this court is aware, *Tyrell J*.'s departure from *Martinez* has been criticized by many legal observers since its publication. The first critics of the *Tyrell J.* ruling were the Supreme Court justices who dissented from the majority's opinion. In a dissent joined by Justice Mosk, Justice Kennard stated that the majority opinion was a "startling departure from settled principles underlying the Fourth Amendment." (*In re Tyrell J., supra*, 8 Cal. 4th at pp. 90, 92-94 [dis. opn. of Kennard, J.].) This court in *Sanders* candidly recognized the widespread criticism as follows: "Our holding, in *Tyrell J.* that police could justify a search based upon a condition of which

they were unaware, received a chilly reception." (*People v. Sanders, supra,* 31 Cal.4th at p. 328.) This court then quoted legal commentators who referred to the decision in *Tyrell J.* as "insupportable in fact and law," "strange," "unsettling," and based on "bizarre reasoning." (*Id.* at pp. 328-329.)

In 2003, this court reaffirmed *Martinez* and held that the "police cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition." (*People v. Sanders, supra,* 31 Cal.4th at p. 332.) This court offered two rationales for its holding. First, it is well-established that the reasonableness of a search must be based on the circumstances known to the officer when the search is conducted. (*Ibid.*) Second, contrary to the reasoning in *Tyrell J.*, this court held that the imposition of a knowledge-first requirement was consistent with the primary purpose of the exclusionary rule – to deter police misconduct. (*Id.* at pp. 330, 332.) Failure to require prior knowledge of the search condition "would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification." (*Id.* at p. 330.)

In *Sanders*, this court refused to extend *Tyrell J.* to adult parolees and expressly declined the government's invitation to reaffirm the *Tyrell J.* rule

for juvenile probationers: "Because this case does not involve a juvenile, we need not, and do not, decide this issue." (*People v. Sanders, supra*, 31 Cal.4th at p. 335, fn. 5.) Although this court did not explicitly overrule *Tyrell J.*, it firmly repudiated its reasoning, "dismantled the foundation and cornerstones" of *Tyrell J.*, and made clear that *Tyrell J.* was no longer good law. (*In re Joshua J.* (2005) 129 Cal.App.4th 359, 363, review den. Aug. 17, 2005; and *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1191-1192, review den. Oct. 13, 2004; see also *People v. Bowers* (2004) 117 Cal.App.4th 1261, 1269.)

This case presents the court with the opportunity to expressly rule on the issue of whether *Tyrell J.*'s holding with respect to juvenile probationers remains viable. Appellant urges this court to rule that it does not. This court's ruling in *Sanders* effectively undermined the rule in *Tyrell J.* by rejecting its focus on a juvenile probationer's diminished expectation of privacy. In addition, neither the "special needs" of the juvenile system nor United States Supreme Court precedent justify departing from well-established principles of the Fourth Amendment. Lastly upholding *Tyrell J.* in light of this court's rationale and holding in *Sanders* will trigger a violation of appellant's right to equal protection under the law.

B. <u>Standard of Review</u>

On review of a superior court's ruling on a motion to suppress

evidence, all presumptions are drawn in favor of the express or implied findings of the superior court if they are supported by substantial evidence. The reviewing court must then independently review the superior court's determination that the search did not violate the Fourth Amendment. (*People v. Memro* (1995) 11 Cal.4th 786, 846; *People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Loewen* (1983) 35 Cal.3d 117, 123; *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1236; and *In re William V.* (2003) 111 Cal.App.4th 1464, 1468.) If the search or seizure falls short of the articulated standard, as represented by the Fourth Amendment of the United States Constitution, then evidence seized as a result of that search must be excluded. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655; *People v. Ayala* (2000) 23 Cal.4th 225, 254-255; *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.)

A search conducted without a warrant is per se unreasonable, unless the prosecution can justify the search by showing that the search falls within one of the recognized exceptions to the warrant requirement. (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181; *Griffin v. Wisconsin* (1987) 483 U.S. 868, 870-871; *In re Arturo D.* (2002) 27 Cal.4th 60, 100.) Due to the importance of the state's interest in public safety through probation and parole supervision, one such exception is a search conducted by an officer pursuant to a search and seizure condition of probation or parole. (*United States v. Knights* (2001) 534 U.S. 112, 117-118; *Griffin v. Wisconsin,* at p.

875; *People v. Bravo* (1987) 43 Cal.3d 600, 607-608; *People v. Reyes* (1998) 19 Cal.4th 743, 753-754.) The prosecution bears the burden of establishing that the challenged search was conducted pursuant to a probation or parole search condition.

C. This Court, in *Sanders*, Effectively Undermined *Tyrell J.*

The holding in *Sanders* that the officer must know he is acting pursuant to the government interest permitting dispensation of traditional Fourth Amendment requirements when he conducts a search without a warrant or individualized suspicion effectively rejected and undermined the reasoning of *Tyrell J*. First, in *Sanders* this court employed a traditional Fourth Amendment analysis which assesses the reasonableness of a search based on the circumstances known to the officer beforehand and considers whether the search furthered a legitimate government interest or intruded on the individual's reasonable expectation of privacy. (*People v. Sanders*, *supra*, 31 Cal.4th at pp. 333-334.) This analysis repudiates *Tyrell J*.'s exclusive focus on the juvenile probationer's diminished expectation of privacy. Second, in *Sanders* this court reversed the position previously taken in *Tyrell J*. by holding that a knowledge-first requirement effectuates the primary purpose of the exclusionary rule by deterring police misconduct. (*Id*. at p. 330.) Third, all published cases considering the issue have recognized this court's rejection of *Tyrell J*. and have applied the rule

and reasoning of *Sanders* beyond its facts to personal searches and to adult and juvenile probation searches.

1. In Sanders, this Court Rejected Tyrell J.'s Exclusive Focus on the Juvenile Probationer's Diminished Expectation of Privacy, and Properly Assessed the Reasonableness of the Search on the Facts Known to the Officer at the Time of the Search and Whether the Search Furthered a Legitimate Government Interest

In *Sanders*, this court reviewed the reasoning underlying *Tyrell J.*'s refusal to impose a knowledge-first requirement. This court then soundly rejected the reasoning underlying *Tyrell J.* because it focused exclusively on the probationer's diminished expectation of privacy, and failed to consider whether the officer conducting the search was knowingly advancing the government interest which permits warrantless and suspicionless searches of persons on probation. (See *People v. Hoeninghaus, supra,* 120 Cal.App.4th at p. 1191; *In re Tyrell J., supra,* 8 Cal.4th at pp. 83-86; and *People v. Sanders, supra,* 31 Cal.4th at pp. 327, 329, 333.)

In *Tyrell J.,* the juvenile was at a high school football game with two friends when he was searched by an officer who retrieved a bag of marijuana from one of his pockets. (*In re Tyrell J., supra,* 8 Cal.4th at pp. 74-75.) The juvenile was on probation subject to a search condition but the officer was unaware of the condition at the time of the search. (*Ibid*.) The

issue before the court was whether the search condition validated an otherwise improper search despite the fact that the officer was unaware of the search condition at the time he conducted the search. (*Id*. at p. 75.)

The *Tyrell J*. court first looked at federal law for guidance but determined that existing federal case law did not control the situation because the only United States Supreme Court case which had discussed the constitutionality of a probation search condition involved a search by a probation officer who knew about the condition and had reasonable grounds to search. (*In re Tyrell J., supra,* 8 Cal.4th at pp. 76-79.) Not having found any high court decisions directly on point, the *Tyrell J*. court proceeded to discuss state cases involving searches based on adult probation conditions. (*Id.* at pp. 79-81.) This court had previously justified adult probation searches on the theory that the probationer had consented in advance to warrantless searches by agreeing to the probation search condition. (See *People v. Bravo, supra,* 43 Cal.3d at p. 608.) However, a juvenile has no choice but to accept a condition of probation that subjects him to warrantless searches. Thus, *Tyrell J*. could not justify the search in that case on an advance consent theory. (*Tyrell J.*, at pp. 79-81.)

The *Tyrell J*. majority then went on to focus exclusively on whether the juvenile had a reasonable expectation of privacy in the bag of marijuana

hidden in his pants. (*In re Tyrell J, supra*, 8 Cal.4th at pp. 83-86.) Because the juvenile probationer was subject to a search condition, the majority in *Tyrell J*. ruled his expectation of privacy was severely diminished and he could reasonably expect to be searched by any officer, including those unaware of the search clause. (*Id.* at pp. 86-87.) The court declined to apply the *Martinez* knowledge-first rule to juvenile probationers noting that at the time *Martinez* was decided, parolees were not subject to automatic conditions which permitted searches by police or parole officers. (*Id.* at pp. 88-89.)

Anticipating criticism of this departure from precedent, the *Tyrell J*. court reasoned that their ruling permitting retroactive justification of illegal searches would *not* encourage blatant disregard for the Fourth Amendment. According to the *Tyrell J*. court, police officers would not be induced to search a juvenile, without reasonable cause, in the hope that they would get lucky and later learn the individual was on juvenile probation with a search clause. (*In re Tyrell J., supra*, 8 Cal.4th at p. 89.)

This court first distanced itself from *Tyrell J*.'s "expectation of privacy" analysis and limited its holding in *People v. Robles* (2000) 23 Cal.4th 789. The police in *Robles* conducted an unlawful search of the defendant's garage and discovered a stolen vehicle. The next day, they discovered that the defendant's brother who shared his residence was on

probation subject to a search condition. The police sought to thereafter justify the search on that basis. (*Id*. at p. 800.) This court recognized that the defendant's expectation of privacy "hinged, in part, on the searching officer's knowledge of the search condition and declined to extend the logic of *Tyrell J*. to allow retroactive validation of the illegal search of the co-habitant's property. (*Id*. at p. 798.) Nevertheless, this court did not expressly overrule *Tyrell J*.

In *Sanders*, however, this court completed the process begun in *Robles*. In place of focusing entirely on a parolee's diminished expectation of privacy, this court employed a traditional Fourth Amendment analysis which considers both the individual's privacy expectation and the government interest justifying the search. "[T]he reasonableness of a search is determined by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." *(People v. Sanders, supra*, 31 Cal.4th at p. 333.; *United States v. Knights, supra,* 534 U.S. at pp. 118-119.) Most significantly, *Sanders* acknowledged the cardinal Fourth Amendment principle that the reasonableness of a search must be assessed based on the factual circumstances known to the officer before the search begins. (*Sanders,* at p. 334, citing *Scott v. United States* (1978) 436 U.S. 128,

137; and *Ornelas v. United States* (1996) 517 U.S. 690, 696.)

These principles must be applied when the government seeks to justify a search based on an exception to traditional Fourth Amendment requirements. A probation search condition is such an exception; it permits law enforcement officers to search probationers, without a warrant in order to promote the state's legitimate interest in monitoring probationers' compliance with the law and preventing recidivism. (*People v. Sanders, supra*, 31 Cal.4th at pp. 333-334; *United States v. Knights, supra*, 534 U.S. at pp. 120-121.) "As with any exception, the reasonableness of a search predicated on [a probation search condition] must be measured in relation to the rationale for excusing compliance with Fourth Amendment strictures." (*People v. Robles, supra*, 23 Cal. 4th at p. 805 [conc. opn. of Brown, J.].)

Thus, for a probation search to be reasonable, the officer must know that he is acting pursuant to a legitimate government interest in supervising probationers; he must know beforehand that the suspect is subject to a probation search condition authorizing a warrantless and suspicionless intrusion. The problem with the *Tyrell J.* approach is that it permitted officers to conduct suspicionless searches without knowing they had authority to do so. As *Sanders* recognized, this approach encourages police misconduct because an officer who searches without knowing he has authority to do so, conducts a blatantly illegal search without perceived

objective justification. (*People v. Sanders, supra,* 31 Cal. 4th at pp. 333, 335-336.)

This court's focus, in *Sanders,* on the circumstances known to the officer prior to the search marked a clear departure from *Tyrell J.*'s narrow focus on the probationer's privacy expectations. *Tyrell J.*'s focus on the juvenile's expectation of privacy has therefore been abandoned and replaced with a traditional Fourth Amendment analysis – an analysis which considers the government interest in permitting a warrantless suspicionless search and requires that the reasonableness of the search be determined based on the facts known to the officer at the time of the search.

2. Contrary to Tyrell J., Sanders Held that an Advance Knowledge Requirement is Necessary to Deter Police Misconduct

This court's ruling in *Sanders* further undermined the rationale in *Tyrell J.* by reversing its prior view that an advance knowledge requirement was not necessary to deter police misconduct. (*In re Tyrell J., supra,* 8 Cal.4th at pp. 86-87.) "Where *Tyrell J.* considered such a requirement to be unnecessary, *Robles* and *Sanders* found the [advance knowledge] requirement to be vitally important because without it police would be encouraged to conduct unlawful searches." (*People v. Hoeninghaus, supra,* 120 Cal.App.3d at pp. 1191-1192.)

This court offered the following rationale in *Sanders* for invalidating a parole search conducted without prior knowledge of the search condition: "[T]his result flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule – to deter police misconduct." (*People v. Sanders, supra*, 31 Cal.4th at p. 332.) Because the officer must know beforehand that a search condition authorizes a warrantless suspicionless search, he is discouraged from searching without any perceived justification for his actions.

Previously, in *People v. Robles, supra*, 23 Cal.4th at page 800, this court held as follows:

> Allowing the People to validate a warrantless residential search, after the fact, by means of showing a sufficient connection between the residence and any one of a number of occupants who happens to be subject to a search clause, would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later. It also would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification.

(*Ibid*.) The *Robles* court went on to conclude that "a knowledge-first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable

searches and seizures." (*Ibid.*, citation omitted.)

The exclusionary rule compels respect for the Fourth Amendment "by removing the incentive to disregard it." (*People v. Sanders, supra.*, 31 Cal.4th at p. 334, citing *Mapp v. Ohio*, *supra*, 367 U.S. at p. 656.) If police were permitted to enter a home without perceived justification, the potential for abuse would be greatest in high crime areas where numerous parolees and probationers reside. (*People v. Sanders*, at pp. 334-336; *People v. Robles, supra*, 23 Cal. 4th at pp. 799-800.) This same rationale supports a knowledge-first rule for personal searches of juvenile probationers. (See *People v. Bowers*, *supra*, 117 Cal. App. 4th at p. 1270.) The Fourth Amendment guarantees individuals' rights to be secure in their persons, as well as in their houses, from unreasonable searches and seizures. (*Bowers*, at p. 1270 [citing *United States v. Calandra* (1974) 414 U.S. 338, 347].) Juveniles are not excluded from that constitutional protection. (*In re Tyrell J., supra*, 8 Cal. 4th at p. 75.)

Hence, this court's recognition in *Sanders* that a knowledge-first requirement actually deters police misconduct further undercuts the rationale in *Tyrell J.* As Justice Kennard astutely noted in her dissenting opinion in *Tyrell J.*, it would be difficult to imagine a policy more at odds with the purpose underlying the Fourth Amendment than one which encourages police to "'search first and ask questions later.'" (*In*

re Tyrell J., supra, 8 Cal.4th at p. 98 (dis. opn. of Kennard, J.].)

3. Since Sanders, All Published California Appellate Court Opinions Have Imposed an Advance Knowledge Requirement to Uphold Searches Based on Probation and Parole Search Conditions

Since *Sanders* was decided, several appellate courts have entertained the issue of whether or not a search can be retroactively justified by a probation or parole search condition of which the officer was unaware. These cases have uniformly held that *Sanders* compels the conclusion that a search cannot be justified based on a search condition unknown to the officers at the time of the search. (See e.g., *People v. Lazalde* (2004) 120 Cal.App.4th 858, review den. Oct. 13, 2004 (S127330) [search of motel room cannot be justified pursuant to a probation search condition unknown to the searching officer]; *People v. Hoeninghaus, supra,* 120 Cal.App.4th at p. 1195 [warrantless search of a probationer and his car cannot be upheld based on probation search unknown to searching officers]; *People v. Jordan* (2004) 121 Cal.App.4th 544 [parole search condition unknown to officer did not validate search of person]; *Myers v. Superior Court* (2004) 124 Cal.App.4th 1247 [search of pedestrian without knowing he was on probation and subject to a search condition is unreasonable]; *People v. Hester* (2004) 119 Cal.App.4th 376, review den. Sept. 22, 2004 [search of vehicle cannot be upheld based on unknown

juvenile probation search condition]; *In re Joshua J., supra,* 129 Cal.App.4th 359 [warrantless personal search of juvenile cannot be upheld based on probation search condition unknown to officer].)

Sanders has specifically been interpreted as abandoning the analysis of *Tyrell J.* As summarized by the Sixth Appellate District in the *Hoeninghaus* case:

> Our chronological summary [of California Supreme Court cases] reveals that the court has changed the analysis it uses to determine the propriety of a warrantless search in cases involving a search condition. In *Tyrell J.*, the court focused on the scope of a probationer's reasonable expectation of privacy. In *Robles*, the court distanced itself from *Tyrell J.*'s analysis, implying that knowledge of a search condition is essential to a valid probation search. In *Sanders*, the court abandoned *Tyrell J.*'s analysis, implicitly adopted Justice Kennard's dissenting view in *Tyrell J*., and held when the state seeks to justify a warrantless search under a search condition, the propriety of the search depends on whether police knew about the condition at the time of the search.
>
> Our summary further reveals that the court has reversed its view of the role played by an advance knowledge requirement in deterring unlawful police conduct.

(*People v. Hoeninghaus, supra,* 120 Cal.App.4th at p. 1191.)

The core reasoning behind the ruling in *Sanders* – that the Fourth Amendment is best protected by "removing the incentive to disregard it" – applies equally to personal and residential searches. (*People v.*

Bowers, supra, 117 Cal.App.4th at p. 1270, citing *United States v. Calandra, supra*, 414 U.S. at p. 347.) It also applies to both parolees, juvenile and adult probationers. (*Bowers*, at p. 1270; *People v. Hester*, *supra*, 119 Cal.App.4th at pp. 404-405; and *In re Joshua J., supra*, 129 Cal.App.4th at p. 364.)

In *Hester*, the Fifth Appellate District addressed the issue of whether the stop and search of a lawfully operated vehicle can be retroactively justified when unbeknownst to the officers who stopped the vehicle, a passenger in the vehicle was on juvenile probation. (*People v. Hester*, *supra*, 119 Cal.App.4th at p. 398.) As in this case, the defendant in the *Hester* case was on *juvenile* probation subject to a search condition. (*Id*. at p. 388.) Two out of three of the other occupants in the vehicle, one adult and one juvenile, were also subject to probation or parole search conditions. (*Id*. at p. 387.) The vehicle was stopped because one of the occupants was believed to be a member of a gang which was suspected of being involved in a shooting. The officers believed that all members of that gang would be armed in order to protect themselves from retaliation. (*Id*. at p. 384.) After stopping the vehicle, one of the officers observed a passenger with a handgun and subsequently located a loaded firearm under the front seat. (*Id*. at p. 382.)

After holding that the stop of the vehicle was not supported by reasonable or probable cause, the *Hester* court ruled that this court's decision in *Sanders* compelled the conclusion that the stop could not be justified by a passenger's unknown probation search condition. (*People v. Hester, supra,*119 Cal.App.4th at pp. 398, 405.) The *Hester* court discussed the California Supreme Court cases on parole and probation searches and noted that "[w]ith one exception [*Tyrell J.*], this court has not held that a probation waiver may justify a search where the officer did not know that the person or residence was subject to such a waiver." (*Id.* at p. 388.) The court further noted that the prosecution had failed to identify any special consideration of the juvenile justice system that would justify departure from the *Sanders* analysis and limited *Tyrell J.* to its facts. (*Id.* at p. 404.) The court concluded by stating that to do otherwise would encourage police misconduct, particularly in high crime neighborhoods, "would contravene the purpose of the exclusionary rule and ignore the basic premise of Fourth Amendment analysis – what did the officer know at the time he acted?" (*Id.* at pp. 404-405.)

Most recently, in the *Joshua J.* case, the Fifth Appellate District refused to apply the majority's holding in *Tyrell J.* to the personal search of a juvenile subject to a probation search condition unknown to the officer. The *Joshua J.* court held that *Tyrell J.* was impliedly overruled by this court

in *Sanders* because the holding and rationale in *Sanders* "dismantled the foundation and cornerstones of *Tyrell J*." (*In re Joshua J., supra*, 129 Cal.App.4th at p. 363.) The *Joshua J.* court refused to apply the rule of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, noting that "the vitality of *Tyrell J*. remains an unanswered question." (*Joshua J.*, at p. 363.)

Notwithstanding the uniformity of opinion among appellate courts that have entertained the issue since *Sanders* was decided, Division Four of the First Appellate District in this case felt bound by the majority opinion in *Tyrell J*. because it was not expressly overruled by this court in *Sanders*. (Opinion at p. 5.) Appellant acknowledges that *Sanders* did not expressly overrule *Tyrell J.* However, *Sanders* declined to expressly affirm the *Tyrell J*. rule for juvenile probationers. By acknowledging the pervasive criticism of *Tyrell J*. by legal commentators, by repudiating *Tyrell J*.'s reasoning, and by employing traditional Fourth Amendment principles which focus on the known circumstances justifying a warrantless and suspicionless search, the *Sanders* decision implicitly overruled the earlier holding of *Tyrell J.* An illegal search cannot be retroactively justified based on a search condition which was unknown to the officers at the time of the search, whether it be a condition of parole or juvenile probation.

D. The Special Needs of the Juvenile System do not Justify Departing from Fourth Amendment Jurisprudence

There is no rational basis in Fourth Amendment jurisprudence, which requires application of the knowledge-first rule to searches of adult probationers and parolees with search conditions, but to deny this fundamental constitutional protection to juvenile probationers.

> Can a court countenance a system where, as here, an adult may suppress evidence with the usual effect of having the charges dropped for lack of proof, and on the other hand, a juvenile can be institutionalized – lose the most sacred possession a human being has, his freedom – for "rehabilitative" purposes because the Fourth Amendment right is unavailable to him?

(Note, *People v. Sanders: Towards a Unified Policy Protecting the Rights of Juveniles*, 41 Cal.W.L.Rev. 459, 468, citing Juvenile Justice Standards § 3.2, cmt. introduction; *State v. Lowry* (1967) 230 A.2d 907, 911.) The short answer is no, for a number of reasons.

First, the reasoning of *Sanders* applies beyond its facts. As noted above, *Sanders* offered two reasons for requiring prior knowledge of the parole search condition: (1) *any* circumstance justifying a search must be known to the officer before the search commences -- this rule applies whether the justifying circumstance is individualized suspicion or a search condition; and (2) a knowledge-first requirement effectuates the primary purpose of the exclusionary rule by deterring police misconduct. (*People v.*

Sanders, *supra*, at pp. 332, 334.) Both rationales support a knowledge-first rule for the search of a juvenile probationer.

It is particularly important that this court apply a knowledge-first requirement in this case to discourage the police from abusing their power by detaining any vehicle that appears to have a juvenile as a driver or passenger. If this court approves the search in the present case – conducted without reasonable suspicion and without knowledge of appellant's probation search condition – this court would be sanctioning a blatantly illegal search and endangering the Fourth Amendment rights of all young citizens. The *Hester* court in fact observed that it could "envision no conduct more unreasonable than stopping a vehicle and then hoping the stop later can be justified if one of the occupants in the vehicle happens to be on probation or parole." (*People v. Hester*, *supra*, 119 Cal.App.4th at p. 398.)

Without an advance knowledge requirement, the police would be encouraged to ignore Fourth Amendment requirements in neighborhoods where many juvenile probationers live or congregate. The police could stop and search young pedestrians, drivers, or vehicle passengers in these areas, without individualized suspicion, in the hope that they would later discover that some detainees had probation search clauses. The potential for abuse would be particularly high as juveniles are easily intimidated by the police

and often lack knowledge of their legal rights. To deter such police misconduct and protect the Fourth Amendment rights of all juveniles, including those not on probation, prior knowledge of a search condition must be required.

Second, requiring the police to know about a juvenile probation search condition before justifying a search on that basis is consistent with nationally recognized juvenile justice standards published by the Joint Commission on Juvenile Justice Standards of the Institute of Judicial Administration and the American Bar Association. These standards conclude that all aspects of the Fourth Amendment should apply equally to juveniles and adults. Standard 3.2 specifically recommends as follows:

> Police investigation into criminal matters should be similar whether the suspect is an adult or a juvenile. Juveniles, therefore, should receive at least the same safeguards available to adults in the criminal justice system. This should apply to: [¶] A. preliminary investigations (e.g., stop and frisk); [¶] B. the arrest process; [¶] C. search and seizure; [¶] D. questioning; [¶] E. pretrial identification; and [¶] F. prehearing detention and release.

(ABA, Juvenile Justice Standards, § 3.2 (1990).)

Although the Juvenile Justice Standards are not binding on this court, they are both relevant and instructive in determining whether juveniles are entitled to at least the same protection as adults under the Fourth Amendment. (*See United States v. Juvenile* (9th Cir. 2003) 347 F.3d 778,

787-788 [looking to Juvenile Justice Standards to determine whether court abused its discretion regarding confinement of juvenile]; and *Foster v. Johnson* (5th Dist. 2002) 293 F.3d 766 [looking to Juvenile Justice Standards to determine whether transfer from adult court to juvenile court was appropriate.].)

Third, the Attorney General can be expected to argue that the *Tyrell J.* rule should apply to juveniles due to the special needs of the juvenile probation scheme which emanates from the Doctrine of *Parens Patriae.* No special consideration of the juvenile probation system, however, justifies departure from this court's analysis in *Sanders* "to sanction police conduct that otherwise violates the Fourth Amendment" for juvenile probationers. (*People v. Hester, supra,* 119 Cal.App.4th at p. 404.) The Doctrine of *Parens Patriae* is generally invoked in order to preserve and promote the welfare of children. (See *Santosky v. Kramer* (1983) 455 U.S. 745, 766.) Denying juveniles basic Fourth Amendment protection does not serve to either preserve or promote the welfare of children.

The juvenile probation system has special rehabilitative needs that are arguably stronger than in the adult context. (*In re Tyrell J., supra,* 8 Cal.4th at p. 87.) These special rehabilitative needs may justify imposing probation search conditions in circumstances where such conditions would not be

warranted for adults. (*Id*. at pp. 81, 87; *In re Todd L.* (1980) 113 Cal.App.3d 14, 18-21; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1499-1503.) The imposition of additional conditions for juvenile probationers permits greater supervision and regular monitoring of juveniles than would otherwise be permitted of adults. However, once a search condition has been imposed on a juvenile probationer, the special needs of the juvenile probation system do not justify dispensing with the knowledge-first requirement because an officer cannot be acting pursuant to those "special needs" if he does not know about the search condition. (*People v. Sanders, supra*, 31 Cal.4th at p. 333; *People v. Hoeninghaus, supra*, 120 Cal.App.4th at p. 1190.)

As recognized by this court in *Reyes*, juvenile probationers and adults stand in the same shoes. Both groups have search terms involuntarily imposed upon them as a condition of their release into society so that the state can supervise their behavior. Both groups receive notice that their activities will be routinely monitored by law enforcement and both have the same diminished expectations of privacy. (*People v. Reyes, supra,* 19 Cal. 4th at pp. 750-53.) Because both groups shared identically diminished expectations of privacy, this court in *Reyes* held that adult parolees – like juvenile probationers – could be searched without reasonable suspicion.

"The logic of *Tyrell J.* applies equally, if not more so, to parolees." (*Reyes*, at p. 751.)

In *Sanders*, this court acknowledged that a parolee, subject to an imposed search condition, has a diminished expectation of privacy. (*People v. Sanders, supra*, 31 Cal.4th at pp. 332-333.) However, the government cannot rely exclusively on that reduced expectation to justify an illegal search if the officer is unaware of the individual's parole search clause, and thus his authority to search, at the time of the intrusion. "Despite the parolee's diminished expectation of privacy, such a search cannot be justified as a parole search, because the officer is not acting pursuant to the conditions of parole." (*Id.* at p. 333.) An officer who lacks knowledge of the parole search clause is not furthering the legitimate governmental interest which permits warrantless searches and causes the diminished privacy expectation in the first place. (*Ibid*.) This same reasoning applies to juvenile probationers.

The main purpose of a probation search condition is to provide law enforcement with the means to monitor a juvenile probationer and assure that he is not breaking the law. The potential of random searches deters the minor from recidivism. (See *In re Tyrell J, supra.*, 8 Cal. 4th at p. 87; *People v. Reyes, supra*, 19 Cal. 4th at p. 753.) It is the juvenile's

knowledge of the imposed condition which creates this deterrent effect because the juvenile is aware that he can be searched without a warrant or reasonable cause by both probation and police officers. A knowledge-first requirement does not lessen this deterrent effect, but it does serve other important purposes. It assures that the officer knows he is furthering the "special needs" of the juvenile probation scheme before he searches a minor without particularized suspicion. The knowledge-first requirement also discourages police officers from searching juveniles without perceived justification, in the hope that he will later learn the juvenile searched is on probation with a search clause.

Fourth, aside from the single appellate court case in Virginia noted by this court in *Sanders*, no other jurisdictions, state or federal, have adopted the rule from *Tyrell J*. (*People v. Sanders*, *supra*, 31 Cal.4th at p. 329, fn. 3.) In her dissent in *Tyrell J*., Justice Kennard remarked, "My research has not disclosed, nor has the majority cited, any decision, whether from a federal or a sister-state court, that has relied on a search condition to uphold a search by an officer who did not know of the condition's existence." (*In re Tyrell J., supra*, 8 Cal.4th at p. 92 (dis. opn. of Kennard, J.) Twelve years later, California remains the only state to allow this treatment of juvenile probationers. Appellant was unable to find any cases, federal or

state, which hold that a subsequently discovered juvenile probation search condition can be used retroactively to render an otherwise illegal search lawful. The dearth of support from other jurisdictions for *Tyrell J.*'s holding provides further evidence that a change is appropriate.

E. In *United States v. Knights*, the United States Supreme Court Implied that Advance Knowledge of the Search Condition was Required for a Valid Probation Search

Finally, as acknowledged by this court in *Sanders*, a knowledge-first requirement is consistent with United States Supreme Court precedent on probation searches. (*People v. Sanders*, *supra*, 31 Cal.4th at pp. 325-326, 333-335.) United States Supreme Court precedent requires courts to assess the reasonableness of *any* search, including a probation or parole search, by engaging in traditional Fourth Amendment analysis. (*Id*. at pp. 323, 333; *United States v. Knights* , *supra*, 534 U.S. at pp. 118-122.)

In *United States v. Knights*, the court considered whether officers could conduct a warrantless search of a residence for "investigatory" rather than "probationary" purposes. The officers knew Knights was on probation with a search condition and they had reasonable suspicion to believe that he had engaged in a crime. (*United States v. Knights*, *supra*, 534 U.S. at pp. 114-116, 120, fn. 6.) In upholding the probation search, the Supreme Court applied the traditional Fourth Amendment approach of examining the

totality of circumstances *known* to the searching officer, "with the probation condition being a salient circumstance." (*Id.* at p. 118.) After weighing the probationer's reduced expectation of privacy against the legitimate government interest in assuring that he did not re-offend, the court concluded that "no more than reasonable suspicion" was required to conduct a lawful probation search. The officer did not need a warrant or probable cause. (*Id.* at pp. 118-121.)

Because the search of Knights' residence was supported by reasonable suspicion, the court did not decide whether law enforcement officers could search a probationer's person or property without any individualized suspicion whatsoever.[1] (*United States v. Knights, supra*, 534 U.S. at p. 120, fn. 6.) However, as *Sanders* recognized, the Supreme Court implied that the officer's prior knowledge of the individual's probation search condition was a prerequisite to a lawful probation search. (*People v. Sanders, supra*, 31 Cal.4th at p. 335.) It is this knowledge that allows the officer to presume the probationer might be violating the law and to search with less than probable cause. (*United States v. Knights, supra*, at pp. 120-121; *Sanders,*

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1. The issue of whether reasonable suspicion is a constitutional prerequisite to a valid parole search is pending before the United States Supreme Court in *People v. Samson* (2005) ___ Cal.4th ___ cert. granted Sept. 27, 2005, No. 04-9728, *sub nom. Samson v. California* (2005) ___ U.S. ___ [2005 U.S. Lexis 5424, 74 U.S.L.W. 3199].

at p. 333.) The officer's knowledge was essential to weighing the reasonableness of a warrantless search under the state's special needs exception developed in *Griffin v. Wisconsin*, *supra*, 483 U.S. 868.

Knights confirmed that the government has a legitimate interest in monitoring a probationer's compliance with the law in order to protect society and assure the probationer's rehabilitation. Government officials can fairly assume that a probationer is more likely than the average citizen to violate the law. Because a certain degree of suspicion flows from the individual's status as a probationer, the officer can search with less than probable cause. The known recidivist tendencies of probationers, as a class, combine with the reasonable suspicion of criminal activity on the part of the particular probationer to render the search reasonable. (*United States v. Knights, supra*, 534 U.S. at pp. 120-121.) However, this analysis only applies if the officer *knows* the individual is on probation *before* conducting the search: "[I]f an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts." (*People v. Sanders, supra*, 31 Cal.4th at p. 333.)

Federal courts have likewise interpreted *Knights* as requiring the

searching officers to know beforehand about the circumstance that renders a search reasonable. In *Moreno v. Baca* (2005) 400 F.3d 1152, for example, the Ninth Circuit Court of Appeal confronted "the question of whether a search or seizure can be considered 'reasonable' if the fact that rendered the search 'reasonable' . . . was unknown to the officer at the time of the intrusion." (*Id*. at p. 1157.) The prosecution argued that either an outstanding bench warrant or parole search condition retroactively rendered the arrest and search reasonable. Both circumstances were unknown to the officers at the time of the search. The court concluded that the existence of the outstanding bench warrant could not be used retroactively to justify the search because the officers did not know about it at the time of the search.[2] (*Ibid*.; see also *United States v. Hector* (C.D. Cal. 2005) 368 F.Supp.2d 1060, 1069 [holding Fourth Amendment requires officers know and give notice of legal basis for their authority to search pursuant to probation search condition].)

Lacking knowledge of the probation search condition in this case, the officer's unlawful search of appellant cannot be retroactively justified under

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2. The court did not reach the issue of whether the search could have been retroactively justified due to the existence of a parole search condition because it held that even if the officers had known of the condition the search would not have been justified because it was not supported by reasonable suspicion. (*Moreno v. Baca*, *supra,* 400 F.3d at p. 1157, fn. 9.)

federal law.

F. The Failure to Overturn *Tyrell J.* In View of *Sanders* Would Violate the Equal Protection Clause Because the Discrimination Against Juveniles With Respect to the Fourth Amendment Cannot be Justified as Necessary to Serve a Compelling State Interest

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires states to provide equal protection of the laws to all persons within their jurisdiction. (U.S. Const., 14th Amend., § 1.) Most equal protection arguments involve government actions which distinguish among people based on specific characteristics such as age, race, gender, or disability. (Chemerinsky, E., *Constitutional Law: Principles and Policies* 645, 648 (2d ed. 2002). However, we deal here with another form of Equal Protection violation**.** If a law that treats similarly situated groups differently impinges on the exercise of a fundamental interest or right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. (*People v. Olivas* (1976) 17 Cal.3d 236, 243.)

> Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government purpose. The government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative. The government has the burden of proof under strict scrutiny, and the law will be upheld only if the government persuades the court that it is necessary to achieve a

> compelling purpose. *Strict scrutiny is virtually always fatal to the challenged law*.

(Chemerinsky, E., *Constitutional Law: Principles and Policies, supra,* at p. 645, emphasis added.)

1. Strict Scrutiny Applies Because a Failure to Extend the Holding and Reasoning of Sanders to Juvenile Probationers Infringes Upon Fundamental Interests and Rights

This case involves the disparate treatment between two classes, adults and juveniles, with respect to their fundamental rights to liberty and privacy. The Attorney General's position below was that because *Sanders* and *Knights* both involved adults, juvenile probationers are exempt from their holdings and are instead governed by the ruling in *Tyrell J*. *Tyrell J*. permitted illegal searches of juveniles to be retroactively justified if it was later determined the juvenile was on probation subject to a search condition. (RB 8.) The government's interpretation of the current state of the law, divides one class of individuals -- those probationers and parolees subject to a search condition who are searched by the police without a warrant, without individualized suspicion and without knowledge of the search condition -- into two or more groups for purposes of how they are treated under the Fourth Amendment..

One group would consist of juveniles and adults still on juvenile

probation with a search condition. The other groups would consist of juveniles certified to be tried as adults and placed on criminal probation, adults on probation or parole, and CYA parolees with search conditions. Those individuals on juvenile probation would not be entitled to have evidence suppressed pursuant to the Fourth Amendment if the officer conducting the illegal search was unaware that the individual was on juvenile probation subject to a search condition. The other groups would be entitled to suppression of the evidence under the same circumstances. This disparate treatment of juvenile probationers similarly situated to other persons on criminal probation or parole, triggers an equal protection violation with respect to Fourth Amendment protection.[3]

It is well settled that our Fourth Amendment right to be free of unreasonable searches and seizures is a fundamental right guaranteed by both our state and federal constitutions. (*Weeks v. United States* (1914) 232 U.S. 383, 392; *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 149; *People*

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3. Juveniles and adults subject to search conditions are so similar that they will often overlap. Juvenile offenders, for instance, are now routinely tried as adults and are subject to being placed on adult probation. (See Pen. Code, § 1170.17.) Because a term of probation generally lasts from three to five years, many juveniles will become adults during the term of their probation but remain subject to a juvenile probation search condition. The question of whether juveniles tried as adults and/or juveniles who turn 18 during their probationary or CYA parole period should receive the same protection under the Fourth Amendment as adult probationers and parolees would need to be decided by this court if *Tyrell J.* is affirmed.

v. Magana (1979) 95 Cal.App.3d 453, 460.) Hence, the question of whether failing to extend the holding and reasoning of *Sanders* violates appellant's right to equal protection under the law is subject to a strict scrutiny analysis.

2. The Prosecution Cannot Meet its Burden of Establishing a Compelling Interest Which Justifies Denying Juvenile Probationers the Same Protection under the Fourth Amendment as that Provided to Other Similarly Situated Individuals

In order to survive an Equal Protection challenge, the prosecution bears the burden of establishing a compelling state interest which would justify denying juvenile probationers the same protections under the Fourth Amendment as are afforded to those individuals on adult probation or parole subject to search conditions.

> [O]nce it is determined that the classification scheme affects a fundamental interest or right the burden shifts; thereafter *the state* must first establish that it has a *compelling* interest which justifies the law and then demonstrate that the distinctions drawn by the law are *necessary* to further that purpose.

(*People v. Olivas, supra,* 17 Cal.3d at p. 251 [emphasis provided].) The prosecution cannot prove that any compelling state interest is served by allowing the police to search persons on juvenile probation without a warrant, without individualized suspicion, and without knowledge of a

search condition. The rehabilitative needs of the juvenile justice system do not provide a compelling state interest that justifies depriving juvenile probationers of the full extent of their Fourth Amendment rights.

The rehabilitative needs of the juvenile justice system, in fact, failed to establish a compelling interest to justify a term potentially longer than the maximum jail term which might be imposed on a 16 to 21-year-old for the same offense if committed by a person over 21. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 239; *People v. Hester*, *supra*, 119 Cal.App.4th at p. 404 [noting in dicta that there were no compelling reasons to treat individuals subject to the juvenile law differently than adults].) Similarly, the special needs of the juvenile justice system articulated by the majority in *Tyrell J.* are insufficient to require this court to sanction police misconduct that otherwise violates the Fourth Amendment.

Moreover, the prosecution will be unable to show that it cannot achieve its rehabilitation objective through any less discriminatory alternative. As discussed in subsection D above, the state's interest in more closely monitoring juvenile probationers than adults may be lawfully accomplished by imposing search conditions and permitting monitoring under circumstances where such conditions would not be reasonable for adults.

Insofar as the prosecution will not be able to justify the disparate

treatment of juvenile probationers subject to search conditions, the holding and reasoning in *Sanders* must be extended to juvenile probationers in order to afford them equal protection under the law.

CONCLUSION

Based on the foregoing arguments and authorities, petitioner urges this court to expressly overrule its holding in *Tyrell J.*, and instead mandate that the *Sanders* rule applies to juvenile probationers. In order for a court to admit the fruits of a warrantless and suspicionless search of a juvenile probationer, there must be evidence that the searching officer was aware of the individual's probation search condition, and that the officer relied on that condition in conducting the search. By so ruling, this court will acknowledge that probationers and parolees retain a reasonable, albeit diminished, expectation of privacy within the meaning of the Fourth Amendment, and that probation and parole searches must be conducted pursuant to the legitimate government interest in permitting dispensation of a traditional Fourth Amendment requirement. This ruling would also be consistent the principles of the Fourth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the rehabilitative and reformative goals of the probation system.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age and not a party to the within cause. My business address is 1048 Irvine Avenue, PMB 613, Newport Beach, California. On the date below, I served copies of PETITIONER'S BRIEF ON THE MERITS in *In re Jaime P*. (Superior Court No. J32334, Court of Appeal No. B107686) by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in Orange County, California, addressed as follows:

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Executed on this 17th day of October 2005, in Newport Beach, California.

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Diana M. Teran

BRIEF LENGTH CERTIFICATION

I, Diana M. Teran, certify pursuant to Rule 29.1 of the California Rules of Court, that the attached Petitioner's Brief on the Merits was produced on a computer using WordPerfect 11 and the computer generated word count on this document is 9,275.

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Diana M. Teran