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, Plaintiff and Respondent, v. JAIME P., Appellant and Petitioner.	)	(Solano County Superior Court No. J32334)

APPELLANT'S REPLY BRIEF ON THE MERITS

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By appointment of the California Supreme Court

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INTRODUCTION

In *People v. Sanders* (2003) 31 Cal.4th 318, this court held the government could not retroactively justify an illegal search of a parolee based on the subsequent discovery that the individual was subject to a parole search condition. Petitioner asserts this rule should be extended to individuals on juvenile probation who are subject to search conditions. Respondent concedes that the reasonableness of a search must be determined in light of the investigating officer's knowledge at the time of the search and does not argue that a search may be justified

by facts and information unknown to the searching officer. (RAB[1] 5, 9.) Respondent, however, argues that the prosecution's intrusion into petitioner's vehicle was not a "search" within the meaning of the Fourth Amendment because a juvenile probationer subject to a search condition has "no reasonable expectation of privacy in his person or effects." (RAB 4.) According to respondent, juvenile probationers subject to search conditions are like prisoners who are exempted from the Fourth Amendment's prohibition against illegal searches and seizures of items in their prison cells. (See *Hudson v. Palmer* (1984) 468 U.S. 517.)

Respondent's argument that petitioner had absolutely no reasonable expectation of privacy in his property so as to preclude him from even raising a Fourth Amendment claim is devoid of legal authority, contravenes the privacy and liberty interests of juveniles as well as others who may be impacted by the exercise of such broad authority, would encourage police misconduct, and would deny minors equal protection under the law. Respondent's argument was previously rejected by this court in *Tyrell J.* when it refused the prosecution's invitation to hold that the minor lacked standing to assert the Fourth Amendment claim therein,[2] and it is

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1. Respondent's Answer Brief on the Merits filed November 14, 2005.
2. *In re Tyrell J.* (1994) 8 Cal.4th 68, 86, fn. 5.

inconsistent with this court's decision in *Sanders* as well as with United States Supreme Court precedent construing the Fourth Amendment.

The issue before this court is not whether there was a search within the meaning of the Fourth Amendment. The issue before this court is whether the rationale behind *Tyrell J.*'s holding that an illegal search of a juvenile may be justified after the fact remains viable in light of this court's holding in *Sanders* and respondent's concession that the reasonableness of a search must be determined based on what the officer knows at the time of the search.

ARGUMENT

I

A JUVENILE PROBATIONER SUBJECT TO A SEARCH CONDITION RETAINS THE RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT

Respondent argues for the first time that no search occurred because a juvenile probationer, like a convicted felon committed to prison, has no reasonable expectation of privacy.[3] Relying almost entirely on *Tyrell J.*,

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3. Respondent's argument before the Court of Appeal was essentially that while this court "largely rejected the rationale of *Tyrell J.*, . . . this court did not overrule *Tyrell J.* as it applied to searches of juvenile probations [sic]." (RB 7-8.) Respondent further argued that "[t]he justification announced in *Tyrell J.* for declining to adopt a 'knowledge first' requirement for juvenile probation search conditions still holds true," i.e., that the possibility that a juvenile probationer may be searched at any time

respondent argues that petitioner was not "searched" because he did not have a reasonable expectation of privacy. (RAB 19.) *Tyrell J*. does not so hold. On the contrary, *Tyrell J*. expressly holds that a juvenile on probation retains an expectation of privacy despite being subject to a search condition authorizing police officers to search him without a warrant or probable cause. (*Tyrell J.*, *supra*, 8 Cal.4th at p. 86, fn. 5.) His expectation of privacy, while diminished, nonetheless permits him to challenge probation searches which are conducted arbitrarily or for purposes of harassment. (*Ibid*.) A search conducted without knowledge that the person searched is subject to a search condition violates the Fourth Amendment because it is arbitrary and undertaken without any perceived limits to police authority. (*People v. Robles* (2000) 23 Cal.4th 789, 800.)

If juvenile probationers subject to search conditions could not be searched within the meaning of the Fourth Amendment, they would have no way to challenge arbitrary or harassing searches. If juvenile probationers could not challenge arbitrary and harassing searches, they would stand in the same shoes, for Fourth Amendment purposes, as prisoners confined to penal institutions. Hence, unless this court is disposed to adopt the novel

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"provides a powerful deterrent effect" and promotes the rehabilitative component of the juvenile law. (Respondent's Brief filed February 16, 2005 (hereafter "RB") at p. 8.)

and untenable position which respondent suggests, i.e., that a juvenile probationer subject to a search condition should be treated as harshly as a convicted felon who is serving his time at a penal institution, a minor does not lose his right to be free of unreasonable searches and seizures simply because he is subject to a search clause as a condition of juvenile probation.

A. This Court's Fourth Amendment Cases Hold That a Juvenile Probationer has a Right to Present a Fourth Amendment Claim

Fourth Amendment jurisprudence traditionally referred to an individual's right to present a Fourth Amendment claim as "standing." "[S]ince *Rakas v. Illinois* (1978) 439 U.S. 128 [], the United States Supreme Court has largely abandoned use of the word 'standing' in its Fourth Amendment analyses" and has replaced it with an inquiry into whether the individual has a reasonable expectation of privacy in the place searched or the item seized. (*People v. Ayala* (2002) 23 Cal.4th 225, 254, fn. 3, citing *Minnesota v. Carter* (1998) 525 U.S. 83, 97.) This court has likewise adopted the use of the reasonable expectation of privacy terminology when analyzing Fourth Amendment claims. (*Ayala,* at p. 255.)

Nonetheless, in 1994 when *Tyrell J.* was decided, this court referred to both of the terms in its analysis as follows:

> Because a juvenile probationer retains the ability to challenge execution of a search condition on the ground that a search was arbitrary or for purposes of harassment,

> it cannot be said that such a probationer lacks *standing* to assert a Fourth Amendment claim. Indeed, we hold today that a juvenile probationer subject to a search condition simply has a greatly reduced *expectation of privacy*, not that he or she has no legally recognizable privacy rights at all. [Citations omitted.] Accordingly, we reject the claim that the minor in this case lacked *standing*.

(*In re Tyrell J., supra*, 8 Cal.4th at p. 86, fn. 5, italics added.) Juveniles generally have the same Fourth Amendment rights as adults. (*Id*. at pp. 75-76.) Hence, notwithstanding the perfunctory use of the words "no reasonable expectation of privacy" in its initial summary of the case, this court made it abundantly clear that it did not intend to strip juveniles subject to search conditions of their right to present a Fourth Amendment claim when a search was conducted unreasonably, arbitrarily or for purposes of harassment. (*Id* at p. 74.)

Interestingly, when this court held in *Tyrell J*. that the police were not required to possess advance knowledge of a juvenile's probation search condition in order to subsequently have a search upheld on that basis, the case upon which this court relied was a juvenile case holding that juveniles and adults have the same "capacity or standing to claim the protection of the Fourth Amendment. . . ." (*In re Marcellus L*. (1991) 229 Cal.App.3d 134, 145.) In *Marcellus L*., Division Four of the First District Court of Appeal specifically stated as follows on the issue of standing: "[n]eedless to say, the constitutional principle of standing does not depend on the age of

a criminal defendant; it has applicability to all claimants whether tried as juveniles or adults." (*Id*. at p. 146.)

In the *Reyes* case, this court noted that adult parolees and juvenile probationers have the same diminished expectation of privacy. (*People v. Reyes* (1998) 19 Cal.4th 743, 750-753.) Moreover, this court recently explained in *In re Randy G*. (2001) 26 Cal.4th 556, 564, that *Tyrell J*. "rejected the notion that a juvenile probationer has no legally cognizable privacy rights at all and permits a juvenile probationer to challenge a search as arbitrary, capricious, or undertaken for harassment." Juvenile probationers retain the same expectation of privacy as do adult parolees who may likewise challenge only those searches which are arbitrary, capricious, or undertaken for harassment. (*Ibid*., citing *Reyes, supra*, at pp. 753-754.)

Respondent's argument that a juvenile probationer subject to a search condition can not be searched within the meaning of the Fourth Amendment, i.e. that such juveniles have absolutely no legally cognizable privacy rights at all, is therefore unsupported by this court's jurisprudence. (RAB 10, fn. 1.) What has changed since *Tyrell J.* was decided is this court's determination of whether an illegal search can be justified, after the fact, by subsequently acquired knowledge that the probationer or parolee was subject to a search condition. In *Robles*, this court first implied that

the actions of officers who search a probationer subject to a search condition without knowledge of the search condition may not be acceptable, calling their actions "wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority." (*People v. Robles, supra*, 23 Cal.4th at p. 797.) In *Sanders*, this court made it very clear that because the reasonableness of a search must be determined by the facts known to the searching officer at the time of the search, the illegal search of an individual could not be justified by subsequently acquired knowledge that the individual was a parolee subject to a search condition. (*People v. Sanders, supra*, 31 Cal.4th at p. 335.)

Because a search is illegal at its inception if not supported by facts known to the officer which might justify the search, it makes no difference whether the person searched is a juvenile on probation or an adult probationer or parolee. They are each subject to the same diminished expectation of privacy and both may seek to exclude only that evidence which was obtained pursuant to a search conducted arbitrarily, for purposes of harassment, or without prior knowledge of a search condition.

B. Federal Fourth Amendment Cases Fail to Support Respondent's Argument that Juvenile Probationers Subject to a Search Condition Have No Expectation of Privacy

United States Supreme Court Fourth Amendment jurisprudence also fails to support respondent's argument that there was no search within the meaning of the Fourth Amendment because a juvenile probationer subject to a search condition has no reasonable expectation of privacy. Only one case holds that a particularly situated individual lacks a reasonable expectation of privacy and can not challenge even an arbitrary or capricious search. In *Hudson v. Palmer, supra*, 468 U.S. at page 526, the United States Supreme Court held that a prisoner is precluded from presenting a Fourth Amendment claim that his cell was illegally searched because he has absolutely no expectation of privacy in his cell.[4] If a prisoner's cell is searched unreasonably, arbitrarily, or for purposes of harassment, his remedy is limited to filing an administrative grievance. (*Id*. at p. 528.) The Court reasoned that unlike a home or automobile, the right to privacy in a

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4. While the *Hudson* case held a prisoner has no expectation of privacy to assert a Fourth Amendment claim based on an unreasonable search of his cell, a prisoner does appear to have retained a limited expectation of privacy in his person. A prisoner, for instance, may raise a Fourth Amendment claim if a body cavity search or bodily fluid seizure is conducted unreasonably. (See *Peckham v. Wisconsin Dept. Of Corrections* (7th Cir. 1998) 141 F.3d 694, 697; *Covino v. Patrissi* (2d Cir. 1992) 967 F.2d 73, 78; and *Dunn v. White* (10th Cir. 1989) 880 F.2d 1188, 1191; see also *People v. West* (1985) 170 Cal.App.3d 326, 332-333.)

prison cell is fundamentally incompatible with the close and continual surveillance of inmates required to ensure institutional security and internal order. (*Id*. at pp. 527-528.)

Minors on probation subject to search conditions are not prisoners and should not be equated with prisoners. Instead of leading highly compartmentalized and rigorously structured lives, minors on probation live at home, go to school, participate in sports, walk on public streets, drive cars on the roadway, and carry on their affairs in virtually the same manner as minors who are not on probation. While the United States Supreme Court has held that parolees and probationers subject to search conditions have diminished expectations of privacy, they clearly have greater Fourth Amendment protection than prisoners in their cells. (See *United States v. Knights* (2001) 534 U.S. 112, 118-119; and *Pa. Bd. of Prob. and Parole v. Scott* (1998) 524 U.S. 357, 369.) In the parole context, the Court has long observed that "[t]hough the State properly subjects [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 482.)

None of the remaining federal cases cited by respondent even discuss a juvenile probationer's expectation of privacy, much less hold that they have no privacy expectation, like adult prisoners, and are not protected by the

Fourth Amendment's prohibition against unreasonable searches. In *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646, for instance, the Court simply held that minors who try out for school sports have even less of an expectation of privacy than do other students, not that they do not have any expectation of privacy. (*Id*. at p. 657.) Analogizing minors wishing to participate in sports to adults who work in industries closely regulated by the government, the court held that a school policy requiring drug tests of its athletes was reasonable within the meaning of the Fourth Amendment. (*Id*. at pp. 664-665.)

Moreover, in another case cited by respondent which was authored by Justice Kozinski, the Ninth Circuit Court of Appeals considered the issue of whether a defendant who agrees to random drug testing and to having his home searched for drugs without a warrant, as a condition of his pre-trial release, has a reasonable expectation of privacy. (*United States v. Scott* (2005) 424 F.3d 888, 891-893.) The court analogized the defendant's expectation of privacy to those of government employees and held that one who has agreed to a search condition in order to be released on pre-trial bail does not lose his right to be free of unreasonable searches. (*Id.* at p. 893.) The court specifically rejected the notion that a defendant awaiting trial outside of a detention facility had privacy interests no greater than the prisoner in *Hudson v. Palmer, supra*, 468 U.S. at page 529. (*Id*. at p. 898,

fn. 11.)

This same argument was made and rejected when the United States Supreme Court ruled that the Fourth Amendment's prohibition against unreasonable searches and seizures applied to searches of students conducted by public school officials. (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 333.) The Court rejected the prosecution's argument that due to "the pervasive supervision to which children in schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into a school." (*Id*. at p. 338.) The Court specifically refused to hold that schools and prisons should be equated for Fourth Amendment purposes, noting that "'[the] prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.'" (*Id.* at pp. 338-339.)

While holding that strict adherence to the probable cause requirement was unnecessary, the Court nonetheless held that such searches must be justified at their inception and must be reasonably related in scope to the circumstances which justified the intrusion. Where there are reasonable grounds for suspecting that a search will turn up evidence that the student has broken a school rule or violated the law, and the search is not excessively intrusive in light of the infraction, the search was held not to violate the Fourth Amendment. (*New Jersey v. T.L.O., supra,* 469 U.S. at

pp. 341-342.) Similarly, juvenile probationers subject to search conditions should not be equated with prisoners for Fourth Amendment purposes.

Under federal law, adult probationers and parolees subject to search conditions have expectations of privacy which enable them to bring Fourth Amendment claims. (See *United States v. Knights, supra,* 534 U.S. at pp. 118-119; *Pa. Bd. of Prob. and Parole v. Scott, supra,* 524 U.S. at p. 369.) While both a probationer and a parolee have a greatly diminished expectation of privacy, they may nonetheless seek to have illegally seized evidence suppressed in a criminal trial. (*Ibid*.) Respondent initially distinguished the *Knights* case below before Division Four of the First Appellate District by arguing that the opinion addressed the constitutionality of a search of an adult probationer's home and did not involve a juvenile probationer. (RB 9.) Respondent now argues that *Knights* is distinguishable because the United States Supreme Court assumed that the police intrusion constituted a search. Stated another way, respondent argues that the court assumed that the adult probationer's expectation of privacy was sufficient to assert a Fourth Amendment claim. (RAB 17.) Contrary to this assertion, the United States Supreme Court specifically ruled on this issue and held that "[t]he probation condition thus significantly diminished Knights' reasonable expectation of privacy" but did not eliminate it. (*Id.* at pp. 119-120.)

Hence, federal Fourth Amendment jurisprudence does not support respondent's claim that juvenile probationers subject to a search condition have no reasonable expectation of privacy in their persons or effects.

C. There Is No Factual Nor Theoretical Basis for Treating Juvenile Probationers Subject to Search Conditions like Prisoners for Fourth Amendment Purposes

In deciding Fourth Amendment issues, this court necessarily considers what consequences will flow from a particular holding, not just upon those who break the law, but upon law abiding citizens. In *Robles*, for instance, this court warned about the damage to the privacy interests of non-probationers if the police were encouraged to engage in facially invalid searches on the off-chance that a person living or visiting the house might turn out to be on probation. (*People v. Robles, supra*, 23 Cal.4th at p. 800.) This court also noted that allowing a search to be justified after the fact by a search condition which was unknown to the searching officers "would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification." (*Ibid*.)

Similarly, this court in *Sanders* noted that an additional reason for adopting a knowledge-first requirement for parole searches was to protect the rights of the parolee's cohabitants and guests. "Permitting evidence that has been suppressed as to a cohabitant to be used against the parolee would

encourage searches that violate the rights of cohabitants and guests by rewarding police for conducting an unlawful search of a residence." (*People v. Sanders, supra*, 31 Cal.4th at p. 335.) In addition, this court warned that failure to require prior knowledge of a search condition would discourage law abiding citizens from opening their homes to probationers and possibly result in higher recidivism rates. (*Ibid*.) By requiring prior knowledge of a search condition, however, the primary purpose of the exclusionary rule – deterrence of police misconduct – would be furthered by removing the incentive to disregard it. (*Id*. at p. 332, 334.)

Ruling that a juvenile probationer subject to a probation search condition can not be "searched" within the meaning of the Fourth Amendment would give the police a license to conduct unreasonable, arbitrary and capricious searches of juvenile probationers even without knowledge of the juvenile's status as a probationer subject to a search condition. Such a rule would severely threaten not just the rights of juvenile probationers, but the rights of all minors and those who live with them, drive with them, or associate with them. There are many types of searches which are subject to the Fourth Amendment's reasonableness requirement. These searches range from pat down searches for weapons to body cavity searches for contraband. If a juvenile probationer subject to a search condition can not contest any search, no matter how arbitrary,

intrusive, or unreasonably conducted, the police would be encouraged to conduct blatantly illegal searches of juveniles, and those who look like juveniles, in the hopes of getting lucky and subsequently discovering that their subject is on juvenile probation with a search condition. This is particularly true in high crime neighborhoods where many juvenile probationers reside and will accordingly have a disproportionate impact on racial minorities. (See *People v. Sanders, supra*, 31 Cal.4th at pp. 335-336; and *People v. Robles, supra*, 23 Cal.4th at p. 800.)

While the circumstances of prison may necessitate "severe deprivation of [F]ourth [A]mendment rights" because, absent frequent suspicionless searches, "the possibility of riots or attempts to escape might be substantially increased," juvenile probationers obviously do not present the same threat to society. (White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L.Rev. 167, 180.) Moreover, there is no knowledge issue with respect to searches of a prisoner's cell. Because prison guards know who their prisoners are and control where the prisoners go, the rights of non-prisoners are not implicated by the rule that prisoners have no expectation of privacy within their cells.

Petitioner submits that we as a society may be prepared to permit arbitrary and harassing searches to be conducted in the cell of an adult criminal who has been sentenced to state prison and is confined in a penal

institution with offenders who have committed serious and violent crimes. We are not, however, prepared to allow unreasonable body cavity, personal, vehicle, or residential searches to be conducted on our children who have transgressed the law by committing petty crimes and have been placed on juvenile probation subject to a search condition. Because those juveniles that commit serious crimes are often certified to be tried as adults or sentenced to the California Youth Authority, it is the juveniles who have committed less serious crimes that end up on probation. It makes absolutely no sense to provide those juveniles who have committed more serious offenses more protection under the Fourth Amendment, once they are released into society on either adult probation or youth authority parole, than those minors who have committed lesser crimes.

Subjecting juvenile probationers to the kind of treatment this court has held is unacceptable with respect to adults on probation or parole may also engender resentment and disrespect for the law. Police officers who conduct unreasonable searches of juvenile probationers and the system which sanctions such searches may logically be viewed by both juvenile probationers and law abiding citizens as unreasonable and unworthy of respect. Increased resentment and disrespect for the law would in turn undermine the rehabilitative purpose of the juvenile probation system and negatively impact the recidivism rate. "The effectiveness of a city's police

department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias." (*Pappas v. Giuliani* (2d Cir. 2002) 290 F.3d 143, 146, citing Tome R. Tyler, *Why People Obey the Law* 22-23, 67 (1990) (demonstrating how belief in the legitimacy of legal authority and trust in law enforcement leads to greater compliance with law).)

A rule which allows law enforcement to conduct unreasonable searches of juvenile probationers will therefore pose an even greater threat to the privacy interests of non-probationers and may serve to negatively impact the government's interests in engendering respect for the law and reducing the recidivism rate among juveniles.

II

THE RATIONALE BEHIND *TYRELL J.*'S HOLDING THAT AN ILLEGAL SEARCH OF A JUVENILE MAY BE JUSTIFIED AFTER THE FACT IS NO LONGER VIABLE IN LIGHT OF THIS COURT'S HOLDING IN *SANDERS*

Having established that there is no legal authority or policy reasons to treat juveniles like prisoners and strip them of all Fourth Amendment protection, the issue becomes whether – given a juvenile probationer's diminished expectation of privacy – a facially illegal search of a juvenile can be justified after the fact by a search condition of which the officer was unaware. Respondent, on the one hand, concedes that a knowledge-first

requirement is necessary to render a search reasonable. (RAB 5, 9.) On the other hand, respondent cites to *Tyrell J.*'s language rejecting the knowledge-first requirement for juvenile probationers as unnecessary to deter police misconduct. (RAB 15-16.) Respondent additionally cites to *Pa. Bd. of Prob. and Parole v. Scott, supra*, 524 U.S. 357 to support this argument. (RAB 16.)

As discussed by petitioner in his opening brief on the merits, this court specifically rejected this argument in the *Sanders* case. (See PBOM 18-20.) In *Sanders*, this court acknowledged that a knowledge-first requirement is absolutely necessary to deter police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches. (*People v. Sanders, supra*, 31 Cal.4th at pp. 334-336; *People v. Robles, supra*, 23 Cal.4th at p. 800; see also PBOM 7-9.) The need to deter police misconduct is not eliminated merely because the subject of the police search is a juvenile. Moreover, the United States Supreme Court's opinion in *Pa. Bd. of Prob. and Parole v. Scott, supra*, 524 U.S. 357, does not support a contrary conclusion.

The only issue before the Court in the *Pa. Bd. of Prob. and Parole* case was whether the Fourth Amendment's exclusionary rule applied at parole revocation hearings. (*Pa. Bd. of Prob. and Parole v. Scott, supra*, 524 U.S. at p. 359.) The Court held that while illegally seized evidence would be

precluded at the parolee's criminal trial, the exclusionary rule was not applicable at the parolee's parole revocation hearing. (*Id*. at p. 360, 364.) While Scott was on parole for murder, his parole officer obtained an arrest warrant based on evidence that Scott had violated several terms on his parole. (*Id*. at p. 360.) Scott was arrested at a local diner, but he gave his parole officer the keys to his residence. A parole search of his residence resulted in the recovery of firearms and other weapons. (*Ibid*.) At his parole violation hearing, Scott objected to the introduction of the weapons on the ground that the officers lacked reasonable suspicion to believe he had weapons at his residence. (*Id*. at p. 361.) The Commonwealth Court of Pennsylvania agreed with Scott and found that the residential search violated the Fourth Amendment because it was not supported by reasonable suspicion. (*Ibid*.)

The parole officers in the case clearly knew that Scott was on parole subject to a search condition. However, in response to Scott's argument that exclusion of the illegally seized evidence at the parole hearing was necessary to deter police misconduct by hypothetical police officers who might conduct a search without knowing of the parole search condition, the court simply noted that the exclusion of illegal evidence at trial was sufficient to deter misconduct by such officers. (*Pa. Bd. of Prob. and Parole v. Scott, supra*, 524 U.S. at p. 367.) Because an officer who knows

that his subject is a parolee "will be deterred from violating his Fourth Amendment rights by the application of the exclusionary rule to criminal trials," the Court did not believe that the additional deterrence provided by the exclusion of the illegally obtained evidence at a parole revocation hearing was sufficient to warrant excluding such evidence at a parole revocation hearing. (*Id*. at p. 368.)

Contrary to respondent's assertion, this case actually supports this court's ruling in *Sanders* that a knowledge-first rule is necessary to deter police misconduct. By acknowledging that an officer who knows an individual is subject to a search condition will be deterred from committing police misconduct due to fear that the evidence will be excluded at the individual's criminal trial, the Court implied that the opposite was not the case. That is, absent a rule excluding illegally seized evidence at trial, a police officer will be undeterred from engaging in an unreasonable search. Because the reasonableness of a search must be determined by the facts known to the officer at the time of the search, a search conducted without knowledge of a search condition is unreasonable and any evidence seized pursuant to such a search must be excluded from the individual's criminal trial to deter police misconduct. Absent a knowledge-first requirement, police are encouraged to search juveniles first and ask questions later. Law-abiding juveniles who are illegally searched but have no contraband would

be unfairly affected by police officers unfettered by the imposition of a knowledge-first rule.

Hence, the rationale behind *Tyrell J.*'s holding that contraband recovered as a result of a search of a juvenile without cause would not be suppressed if the officer subsequently discovered the juvenile was on probation subject to a search condition, is no longer viable. The *Tyrell J.* court reasoned that a knowledge-first rule was unnecessary to deter police misconduct. This reasoning, however, is void of legal support and is contrary to this court's finding in *Sanders* that a knowledge-first rule is necessary to deter police misconduct.

III

MINORS ON JUVENILE PROBATION SUBJECT TO A SEARCH CONDITION AND ADULTS ON PAROLE SUBJECT TO A SEARCH CONDITION ARE SIMILARLY SITUATED FOR PURPOSES OF THE FOURTH AMENDMENT

In a brief response to petitioner's equal protection argument, respondent argues only that juvenile probationers are not similarly situated to adult parolees. (RAB 19.) Quoting from *People v. Guzman* (2005) 35 Cal.4th 577, respondent first notes that the initial inquiry in an equal protection argument is whether persons "'are similarly situated for purposes of the law challenged.'" (*Id*. at pp. 591-592, citations omitted.) Respondent then, without any analysis or citation to authority, dismisses

petitioner's equal protection argument by simply declaring that petitioner, like the juvenile probationer in *Tyrell J*., is not similarly situated to the adult parolee in the *Sanders* case because petitioner has no expectation of privacy whereas the parolee in *Sanders* had a diminished expectation of privacy. (RAB 19.)

Petitioner agrees that the initial inquiry is whether juvenile probationers and adult parolees subject to search conditions are similarly situated for purposes of the Fourth Amendment. (See PBOM 38-40.) It is clear, however, that probationers and parolees subject to search conditions are similarly situated for purposes of the Fourth Amendment regardless of their age. "'Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.'" (*In re William G.* (1985) 40 Cal.3d 550, 556-557, quoting *Planned Parenthood of Missouri v. Danforth* (1976) 428 U.S. 52, 74.)

In *People v. Olivas* (1976) 17 Cal.3d 236, a 19-year-old defendant challenged the court's ability to sentence him to the youth authority for a term longer than the maximum jail term which could be imposed on an individual who committed the same crime but was 21 years of age or older. A state statute permitted individuals between 16 and 21 years of age who were tried in adult court to be committed to the youth authority on a misdemeanor for two years or until the individual reached his 23rd birthday,

whichever occurred later. (*Id*. at pp. 239-241.) In contrast, individuals 21 years of age and older who committed the same misdemeanor offense could only be sentenced to the maximum possible jail term of six months. (*Id.* at pp. 241-242.) This court first held that persons between the age of 16 and 21 and those persons 21 years of age and older convicted of the same public offense were similarly situated for purposes of their fundamental right to personal liberty. (*Id*. at p. 248.) This court then went on to hold that the statute violated the Equal Protection Clause of the Fourteenth Amendment because the state's interest in rehabilitating youthful offenders was insufficient to justify sentencing them to longer terms. (*Id*. at pp. 248, 255-257.)

Likewise, any person, including a minor, possesses fundamental rights that must be respected by this state. (*In re William G*., *supra*, 40 Cal.3d at p. 557.) "Among these rights is the guarantee of freedom from unreasonable searches and seizures contained in the Fourth Amendment . . . ." (*Ibid*.) A minor is therefore similarly situated as an adult with respect to the fundamental right to be free from arbitrary searches and seizures guaranteed by the Fourth Amendment. Respondent's suggestion that juveniles and adults should be treated differently with respect to this fundamental right is what requires respondent to put forth a compelling state interest to justify the discrimination and to prove that it is necessary to

discriminate against juveniles in order to achieve a compelling state interest.

Indeed, this court has held that juvenile probationers and adult parolees have the same diminished expectation of privacy with respect to Fourth Amendment claims. (*People v. Reyes, supra*, 19 Cal.4th at pp. 743, 753-754; see also *In re Randy G., supra*, 26 Cal.4th at p. 564.) In *Sanders*, this court acknowledged that giving the police license to conduct arbitrary "get lucky" searches of adult parolees without knowledge that the person was on parole subject to a search condition would create an unacceptable risk of abuse. (*People v. Sanders, supra*, 31 Cal.4th at p. 335.)

The issue at stake with respect to the equal protection argument is therefore whether the government has a compelling interest in subjecting all juveniles, as a class, to such danger of abuse while protecting all adults from such arbitrary conduct. It is respectfully submitted that there can be no justification whatsoever, much less a "compelling" justification, for such discrimination. Notwithstanding its burden, respondent does not put forth any claim of compelling interest when addressing the equal protection argument. In arguing that juvenile probationers have no expectation of privacy, however, respondent mentions in passing that "the reduction of a juvenile's expectation of privacy reflects society's customs and traditions and is necessary to serve its compelling interest in the control and

rehabilitation of its minor offenders." (RAB 9.) Even assuming arguendo that the government's interest of rehabilitating juvenile probationers is "compelling" within the meaning of the Equal Protection Clause, respondent did not meet its burden of establishing that a rule encouraging arbitrary searches of all juveniles is necessary to rehabilitate juvenile offenders.

This court has held that a search conducted of an adult without advance knowledge that the adult is subject to a search condition is arbitrary and therefore unreasonable under the Fourth Amendment. There would seem little reason to believe that arbitrary searches are necessary with respect to juveniles. More importantly, respondent offers no argument as to why it is necessary to subject all juveniles as a class to arbitrary searches in order to deter the misbehavior of those juveniles who are on probation with search conditions. Such unbridled discretion is over-inclusive.[5]

This court should not take away, by judicial interpretation, the constitutional right of a particularly vulnerable and powerless group within society. Having ruled that the Fourth Amendment requires adults to have

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5. Over-inclusiveness is generally deemed fatal under a strict scrutiny analysis. This is because an over-inclusive provision is, by definition, not narrowly tailored to the state's interest and is thus not necessary to achieve that interest. (See *City of Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469, 506-508.)

the protection of a knowledge-first rule, it is respectfully submitted that this court must likewise hold that juveniles are entitled to the same protection of this time honored principle that a search must be justified by the objective facts and circumstances known to the officer at the time of the intrusion.

CONCLUSION

Based on the arguments and authorities set forth above and in appellant's opening brief on the merits, petitioner urges this court to hold that in order for the warrantless and suspicionless search of a juvenile probationer to be reasonable within the meaning of the Fourth Amendment, searching officers must know that the juvenile is subject to a search condition at the time of the search.

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 REPLY 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 5th day of January 2006, in Newport Beach, California.

_____
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 6049.

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Diana M. Teran