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July 31, 2006

Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
of the California Supreme Court
Marathon Plaza - South Tower
350 McAllister Street, 8th Floor
San Francisco, CA 94102-1317

Re: *In re Jaime P.*, Supreme Court Case No. S135263,

REPLY TO RESPONDENT'S SUPPLEMENTAL LETTER BRIEF

To the Honorable Ronald M. George, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

I. Introduction

In its supplemental letter brief, respondent withdraws its previous argument that a juvenile probationer has no reasonable expectation of privacy and can not therefore be searched within the meaning of the Fourth Amendment. (Respondent's Supplemental Letter Brief (RSB) 2, fn. 1.) Respondent then discusses two issues relating to *Samson v. California* 2006) 547 US ___ [126 S.Ct. 2193]: (1) whether *Samson*'s approval of this court's prior-knowledge requirement in *People v. Sanders* (2003) 31 Cal.4th 318 undermines *In re Tyrell J*. (1994) 8 Cal.4th 68; and (2) whether the suspicionless search of a juvenile without knowledge that he is subject to a search condition is reasonable under the totality of the circumstances test utilized in *Samson*. In addition, respondent makes a new argument under the "special needs doctrine," and reiterates its position that the prior-knowledge requirement should only be applied to non-residential searches.

Appellant replies to each of these issues below.[1]

II. **The *Samson* Case Undermines the Validity of *Tyrell J*. By Explicitly Approving this Court's Ruling in *Sanders* that the Search of an Individual Without Knowing he is Subject to a Search Condition is Arbitrary, Harassing or Capricious**

Respondent argues *Samson* does not affect the validity of *Tyrell J*.'s holding that the "Fourth Amendment is not offended by the search of the juvenile probationer by an officer unaware of the minor's probationary status." (RSB 2.) Respondent further asserts that because the state's interest in supervising and rehabilitating juvenile probationers is not affected by the searching officer's ignorance of the juvenile's probationary status, a prior-knowledge requirement is not necessary to render suspicionless searches of juvenile probationers reasonable. (*Ibid*.) Appellant concedes the state has an interest in supervising and rehabilitating juvenile probationers irrespective of an officer's knowledge of a particular search condition. An officer's knowledge of a search condition, however, is directly relevant to the issue of whether a particular search is arbitrary, harassing or capricious. The officer's knowledge is also relevant to the main purpose of the Fourth

[1]The issue of whether or not *Sanders* should be extended to non-residential searches was previously briefed by both parties. (See ABOM 21-25; RBOM 16.) Appellant merely adds that the following language from *People v. Bowers* (2004) 117 Cal.App.4th 1261, 1270, is directly on point and further supports his argument that this court's disapproval in *Sanders* of retroactive justification for a warrantless search of a parolee's residence due to a suspect's search condition, applies equally to a similarly unlawful stop and search of a person's vehicle: "The Fourth Amendment applies as much to the protection of 'persons' against unreasonable search and seizure as it does to residences. *Sanders'* concern is with preventing officers from executing searches without having contemporaneous knowledge of the circumstances justifying such a search. That concern applies equally to both personal and residential searches. (See *United States v. Calandra* (1974) 414 U.S. 338, 347."

Amendment – deterrence of police misconduct.[2]

It is well settled that arbitrary, harassing or capricious searches are unreasonable under the Fourth Amendment. (*People v. Reyes* (1989) 19 Cal.4th 743, 750, 752-754.) In *Sanders* this court recognized that permitting officers to conduct suspicionless searches without knowing they have authority to do so, encourages blatantly illegal searches without perceived boundaries, limitations, or objective justification. (*Sanders, supra*, 31 Cal.4th at p. 330.) A prior-knowledge requirement was held necessary to prevent arbitrary searches and render the search reasonable under the Fourth Amendment. (*Id.* at pp. 334-336.) The United States Supreme Court in *Samson* likewise recognized that the prohibition against searches conducted without knowledge that a person is subject to a search condition provides a safeguard against arbitrary, capricious or harassing searches. (*Samson, supra*, 126 S.Ct. at p. 2202, fn. 5.)

Respondent refuses to acknowledge the significance of this language in the *Samson* opinion by arguing that recognition is not synonymous with approval. (RSB 6.) This argument, however, ignores the reason why the *Samson* court was discussing *Sanders*' prior-knowledge requirement in the first place. The *Samson* court cited to this court's opinion in *Sanders* with approval in order to address the dissent's concern that suspicionless searches of parolees might be conducted at the unchecked "whim" of law enforcement, i.e. in an arbitrary manner. (*Samson, supra*, 126 S.Ct. at p. 2202.) The majority in *Samson* specifically responded to this concern by stating that it was adequately addressed by this court's ruling in *Sanders* that suspicionless searches were unreasonable without prior-knowledge that

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[2]In section D of Respondent's Supplemental Letter Brief, respondent argues suppression would not serve the deterrent purpose of the exclusionary rule. Citing *Tyrell J.*, respondent specifically argues the deterrent purpose of the exclusionary rule is served without a knowledge-first requirement. (RSB 5.) Appellant disagrees for the reasons previously set forth in his opening brief on the merits. (See ABOM 18-20.) As appellant argued therein, this court in *Sanders* clearly reversed its position in *Tyrell J.* and held a knowledge-first requirement was necessary to deter police misconduct. (*Sanders, supra*, 31 Cal.4th at p. 332.)

the person stopped is a parolee. (*Ibid*.)

The significance of the *Samson* court's recognition that the knowledge-first requirement in *Sanders* will prevent officers from conducting arbitrary searches can not be disregarded. Absent the police officer's prior knowledge that *Samson* was on parole, it is clear that the *Samson* court would have found suspicionless searches of parolees were not reasonable under the Fourth Amendment out of concern that officers would have "unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society." (*Id*. at p. 2202.)

III. The Suspicionless Search of Appellant Without Knowledge That He Was Subject to a Search Condition Was Unreasonable under the Totality of the Circumstances Test Because Neither his Reduced Expectation of Privacy nor the States' Interest in Rehabilitating Juveniles Justify Departing from *Sanders'* Prior-Knowledge Requirement

Both parties agree *Samson* held the reasonableness of the search conducted pursuant to a search condition must be analyzed under the totality of the circumstances known to the officer at the time of the search. (RSB 1; RBOM 5, 9; ASB 4-5.) "Whether a search is reasonable '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 which it is needed for the promotion of legitimate governmental interests." (*Samson, supra*, 126 S.Ct. at p. 2197.) Respondent argues *Samson* actually supports the methodology applied by the majority in *Tyrell J*. because it *essentially* applied the totality of circumstances test by discussing both the state's interest in the supervision of juvenile probationers and a juvenile probationer's diminished expectation of privacy. (ASB 5; RSB 2.)

According to respondent, the totality of the circumstances include consideration of appellant's diminished expectation of privacy as a juvenile probationer, the state's interest in rehabilitating juveniles and deterring them from committing additional crimes, and the existence of substantial evidence supporting the trial court's implied finding that the officer did not intend to harass appellant. Consideration of these factors, however, leads to the conclusion that the search in this case was unreasonable because a probationer's expectation of privacy is greater than that of a parolee, the state's interest in reducing recidivism among parolee's is greater than its interest in rehabilitating minors, and the officer's actual intent is not relevant to the determination of reasonableness.

First, while the *Samson* case ruled a parolee has a significantly diminished expectation of privacy, it also noted "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." (*Samson, supra*, 126 S.Ct. at pp. 2198-2199.) This language conflicts with the language in *People v. Reyes* (1998) 19 Cal.4th 743, 752, that adult parolees had the same diminished expectation of privacy as juvenile probationers. The Attorney General in *Reyes* had in fact argued that there was no constitutionally significant difference between adult parolees and juvenile probationers. (*Id*. at p. 746.) Given *Samson*'s position on a parolee's expectation of privacy relative to a probationer, the fact that appellant is a juvenile probationer supports a finding that the suspicionless search herein by an officer who did not know he was subject to a search condition is even less reasonable than a similar search of a parolee.

Second, in discussing the state's interests, the *Samson* court relied heavily upon the presentation of empirical evidence that California's parolee population has a 68-70 percent recidivism rate. (*Samson, supra*, 126 S.Ct. at pp. 2200-2201.) This evidence led to the court's conclusion that suspicionless searches of adult parolees were reasonable in light of California's concerns respecting recidivism, public safety, and reintegration of parolees. (*Id*. at p. 2202.). California's interest in rehabilitating juvenile probationers and reducing recidivism rates among juvenile probationers is lower in the continuum of state interests. (See ASB 6.) Juvenile probationers are among the least dangerous individuals committing crimes in California. Juveniles can be placed on probation for conduct which is not even criminal but for the fact that they are under age, such as possession of alcohol or bullets. (See Bus. & Prof. Code § 25662 and Pen. Code § 12101, respectively.) Serious juvenile offenders are sentenced to the California Youth Authority or are tried as adults in criminal court. The state's interest in rehabilitating juveniles and reducing recidivism among them is therefore far less than the state's interest in reducing recidivism rates and reintegrating adult parolees into society.

In support of its argument that the state's interests in rehabilitating minors is "arguably stronger than in an adult context" respondent relies on the majority's language to this effect in *Tyrell J.* (RSB 3, citing *Tyrell J., supra*, 8 Cal.4th at p. 87.) The only support provided for this statement in *Tyrell J.*, however, was a comparison between the language in Welfare and Institutions Code section 202, subdivision (b) indicating the juvenile system had "rehabilitative objectives" and the language in Penal Code section 1170 indicating the primary purpose of imprisonment was punishment. (*Tyrell J., supra*, at p. 87.) A comparison of the objectives of the juvenile justice system and the adult imprisonment scheme, however, do not provide support for the proposition that the state has a greater interest in supervising juvenile probationers than adult parolees. Such a conclusion makes no sense in light of the contrast between the seriousness of crimes committed by juveniles placed on probation versus the seriousness of crimes committed by adults sent to prison. California's interest in supervising juvenile probationers is therefore clearly subordinate to its interest in supervising adults who have committed crimes serious enough to warrant a state prison sentence.

Third, respondent argues the search was reasonable because the searching officer did not intend to harass appellant. Because the trial court ruled the probation search rationale justified denial of the suppression motion, respondent argues the ruling constituted an implied finding that the search was not arbitrary, capricious, or intended to harass and should be upheld so long as supported by substantial evidence. (RSB 3-4.) This last contention is erroneous on a couple of grounds. To begin with, as the *Samson* court reiterated, "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." (*Samson, supra*, 126 S.Ct. 2201, fn. 4.) "The validity of a search does not turn on 'the actual motivations of individual officers.' [Citation.] But whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted." (*Sanders, supra*, 31 Cal.4th at p. 334.) Here, the officer did not know about the search condition when he searched appellant's vehicle. Whether he conducted the search in order to harass appellant or simply out of boredom is irrelevant to the inquiry of whether it was reasonable to stop and search appellant without cause and subsequently seek to uphold the search based on information which the officer did not have at the time of the search.

Next, while the trial court's factual findings are upheld on appeal if supported by substantial evidence, the trial court's legal conclusion that the search was reasonable under the Fourth Amendment is not. It is well established that a reviewing court must independently review the superior court's determination that the search was reasonable. (See ABOM 10.) The trial court and the appellate court relied on the majority's opinion in *Tyrell J*. to find the suspicionless search of appellant was reasonable despite the officer's lack of knowledge that he was on probation subject to a search condition. (RT 26-39; *In re Jaime P*., 1st Crim. No. A107686, at pp. 4-5.) The legal issue before this court is whether *Tyrell J*. remains viable after this court's decision in *Sanders* holding prior-knowledge of a search condition is necessary to render a search on that bases reasonable under the Fourth Amendment.

Hence, under the totality of the circumstances test which include the fact that appellant has a greater expectation of privacy than the adult parolee in *Sanders*, the fact that the state's interest in supervising adult parolees is greater than the state's interest in supervising juvenile probationers, and the fact that at the time the officer searched appellant he did not know appellant was on juvenile probation subject to a search condition, the search in this case was even more unreasonable than the search which was held to violate the Fourth Amendment in *Sanders*.

IV. The Special Needs Doctrine Discussed in the *Griffin* Case Does Not Justify Making an Exception to the Prior-Knowledge Requirement Established in *Sanders* for Juvenile Probationers

Respondent argues the special needs case, *Griffin v. Wisconsin* (1987) 483 U.S. 868, is squarely on point. (RSB 4.) The *Griffin* court held "special needs, beyond the normal need for law enforcement," such as the operation of a state's probation system, may justify departing from the usual warrant and probable cause requirement. (*Griffin*, *supra*, at p. 873.) The *Griffin* case, however, is distinguishable and does not control the situation herein. First, as the majority in *Tyrell J*. pointed out, *Griffin* is not controlling for numerous reasons including the fact that in *Griffin* a probation officer was required to give his approval of the search before the search was conducted. The most important distinction noted in *Tyrell J.*, however, was the fact that "*Griffin* involved a situation in which the probation officer was clearly aware of the presence of a search condition. By contrast, Officer Villemin [the searching officer in *Tyrell J.*] did not know the minor was subject to such a condition. Consequently, *Griffin* does not control the question whether a police officer can execute a valid search without being aware of the existence of a probation search condition, which is the question that confronts us here." (*Tyrell J., supra*, 8 Cal.4th at p. 79.)

Second, the special needs doctrine applies only when there is a special need beyond the normal need for law enforcement which makes the warrant and probable cause requirement impracticable and the government acts in furtherance of that need. (See Appellant's Answer to Amicus Curiae 10-11.) In *Griffin*, "[t]he court emphasized that the goal of the probation officer was not to detect crime, but to provide guidance and counseling to his 'client.'" (*Tyrell J., supra*, at p. 78, citing *Griffin, supra*, at p. 876.) A police officer patrolling the neighborhood, such as the officer in this case, is not out there to provide guidance and counseling to juveniles. He is out on the street patrolling neighborhoods in order to detect crime. As Justice Stevens, with whom Justices Souter and Breyer joined, stated in his dissent:

> Even if the supervisory relationship between a probation officer and her charge may properly be characterized as one giving rise to needs "divorced from the State's general interest in law enforcement," [citations omitted] the relationship between an ordinary law enforcement officer and a probationer unknown to him may not. "None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives." [Citation omitted.]

(*Samson, supra*, 126 S.Ct. at p. 2204 [dissenting opinion of J. Stevens.)

An officer who rounds up juveniles without cause and without knowledge that any of them are subject to a search condition in order to enforce the laws of this state does not act in furtherance of the special needs of the juvenile probation system. Hence, the special needs doctrine does not justify departing from the prior-knowledge requirement in *Sanders* for juvenile probationers.

V. Conclusion

For the foregoing reasons and those discussed in appellant's supplemental letter brief, the United State's Supreme Court ruling in *Samson* is consistent with this court's prior ruling and rational in *Sanders* and further undermines the continued vitality of *Tyrell J*.

Respectfully submitted,

Diana M. Teran
Attorney for Appellant

BRIEF LENGTH CERTIFICATION

I, Diana M. Teran, certify pursuant to Rule 29.1 of the California Rules of Court, that the attached REPLY TO RESPONDENT'S SUPPLEMENTAL LETTER BRIEF dated July 31, 2006 was produced on a computer using Word Perfect 12 and the computer generated word count on this document was 2,760, less than the maximum of 2800 imposed by subdivision (d)(2) of rule 29.1.

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Diana M. Teran

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 the attached REPLY TO RESPONDENT'S SUPPLEMENTAL LETTER BRIEF dated July 31, 2006, in *In re Jaime P.* (Supreme Court Case No. S135263) 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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