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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICKY EUGENE HOLLIS, Defendant and Appellant.	F037882 (Super. Ct. No. SC81780A) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Larry L. Dixon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and Michael P. Farrell, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Dibiaso, Acting P.J., Vartabedian, J., and Buckley, J.

A jury convicted appellant Ricky Hollis of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), and in a separate proceeding appellant admitted an allegation that he had served a prison term for a prior felony conviction (Pen. Code, § 667.5, subd. (b)). The court imposed a prison term of four years, consisting of the three-year upper term on the substantive offense and one year on the prior prison term enhancement.

Appellant contends the court erred in denying his motion to suppress evidence (Pen. Code, § 1538.5). We will affirm.

FACTS[1]

At approximately 1:00 p.m. on November 22, 2000, City of Bakersfield Police Officer Steven Wilson and his partner, Officer Francisco, were on duty, sitting in their parked patrol car on the "1700 block, Lincoln[,]" an area "high in narcotics and criminal activity[,]" talking with Bakersfield Police Officers Talbot and Heredia who were parked nearby in another vehicle, when Officer Wilson saw appellant walk out from between two houses and begin walking in the direction of the officers.[2] Officer Wilson made eye contact with appellant, at which point appellant "immediately turned away from [the officers] and began walking in the opposite direction and placed his right hand into his right front pants pocket."

Officer Francisco, who was driving, "accelerated to make contact with" appellant, who was walking in the direction of an apartment complex. Appellant reached the

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1 Because appellant challenges the denial of his suppression motion and does not challenge the sufficiency of the evidence supporting his conviction, the factual statement is taken from the hearing on the suppression motion. (*People v. Fiscalini* (1991) 228 Cal.App.3d 1639, 1644, fn. 5 ["our review [of the denial of suppression motion] is limited to the evidence before the court at the suppression motion hearing"].)

2 Except as otherwise indicated, the factual statement is taken from Officer Wilson's testimony.

complex and "ran up short stairs to apartment 8." As he reached the doorway, the car driven by Officer Francisco reached the apartment. Officer Wilson, from inside the car, "yelled for [appellant] and said, 'Hey, come here.' " At that point, appellant entered the apartment and Officer Wilson "exited the patrol car and ran up the stairs to the doorway."

When Officer Wilson arrived at the open door of the apartment, he lost sight of appellant. The officer saw a woman, later identified as Alice King, appellant's grandmother, standing in the kitchen of the apartment. The officer called to her, saying, " 'Hey, which way did the guy go[?]' " At that point, appellant "emerged from the southwest corner of the kitchen with hands raised and fingers spread." Officer Wilson, believing that appellant possessed contraband and that if he (the officer) lost sight of appellant, appellant would either hide or destroy the contraband, stepped into the apartment, handcuffed appellant and took him back outside. At no point prior to entering the apartment did Officer Wilson knock or announce that he was a police officer.

At some point after taking appellant into custody, Officers Wilson and Talbot entered the apartment, and went into a bathroom located "off the southwest corner of the kitchen." In the shower stall in the bathroom Officer Talbot found what appeared to be, according to Officer Wilson's testimony, cocaine base.

Alice King testified to the following: she lives at "1714 Lincoln, Apartment 8 . . . ." Appellant comes to her apartment "[w]henever he wants to[,]" which is "[v]ery often." He does not have a key to the apartment, but she allows him to stay there when she is there. King "give[s] him the right" to "exclude people from the house[.]" Appellant lives with his mother. King testified, "how [appellant] treats his mama's house, he treats my house the same way. "

At the outset of the suppression motion hearing, the parties stipulated that on November 22, 2000, appellant was on parole, and subject to the condition that his "person, residence and immediate property [*sic*] under his control" were subject to

search, "day or night by parole officer or other peace officer without a warrant, with or without cause."[3]

DISCUSSION

Probation Search Condition

"The Fourth Amendment protects an individual's reasonable expectation of privacy against unreasonable intrusion on the part of the government. A warrant is required unless certain exceptions apply . . . ." (*People v. Jenkins* (2000) 22 Cal.4th 900, 971.) Appellant argues that the warrantless search of his grandmother's apartment infringed on his reasonable expectation of privacy and was not authorized under any of the recognized exceptions to the warrant requirement, and was therefore unreasonable under the Fourth Amendment.

There is no merit to this contention. We base our conclusion on *In re Tyrell J.* (1994) 8 Cal.4th 68 (*Tyrell J.*) and *People v. Reyes* (1998) 19 Cal.4th 743. In *Tyrell J.*, our Supreme Court held that the detention and patsearch of a juvenile probationer subject to a search condition "did not intrude on a reasonable expectation of privacy, that is, an expectation that society is willing to recognize as legitimate[,]" and "one must *first* have a reasonable expectation of privacy *before* there can be a Fourth Amendment violation." (*In re Tyrell J.*, *supra*, 8 Cal. 4th at p. 89; see *People v. Robles* (2000) 23 Cal.4th 789, 798 [juvenile probationer subject to a search condition has a "severely diminished expectation of privacy" over his or her "person or property"].) And in *Reyes* the court applied the rationale of *Tyrell J.* to adult parolees. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 752.) Therefore, appellant, as a parolee subject to a search condition, had no Fourth Amendment-protected reasonable expectation of privacy.

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[3] We refer herein to any condition of this sort, whether imposed on parolees or probationers, as a "search condition."

Appellant argues that the search condition cannot be used to validate the search in the instant case because the police were not aware of the condition until after conducting the search. We disagree. From our conclusion that appellant had no constitutionally protected reasonable expectation of privacy, it follows that a search condition can validate a warrantless search of the property of a defendant who was a probationer subject to a search condition, even if the police did not know of the condition at the time of the search. (*In re Tyrell J.*, *supra*, 8 Cal.4th at pp. 73-74.) Indeed, in *Tyrell J.*, the officer was not aware of the minor's search condition before detaining and searching the minor.

Appellant also argues that appellant's search condition cannot validate the search in the instant case because the place searched was the property of a third person, viz. Alice King, appellant's grandmother. Again, we disagree. From King's testimony, the court reasonably could have concluded that appellant and King had joint control over the apartment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362 [reviewing court must "defer to the trial court's factual findings, express or implied, where supported by substantial evidence"].) And under accepted Fourth Amendment jurisprudence, a consent search is not invalidated by the fact that the property may be under the joint dominion of the defendant and another person (see *People v. Woods* (1999) 21 Cal.4th 668, 675-676) and it is immaterial that the other person does not consent (*id*. at p. 676).

Appellant relies in large part on the recent case of *People v. Robles*, *supra*, 23 Cal.4th at page 789. The pertinent issue in that case, however, was whether "the probation search condition of [the] defendant's brother [can] be used to validate [a] warrantless search of [a home]" which turned up evidence incriminating the defendant, who was a co-resident of the property and who *was not* a probationer subject to a search condition, "where the police did not know of the condition at the time of the search." (*Id.* at p. 794, emphasis added.) The court ultimately answered the question in the negative. The issue here, on the other hand, is whether the probation search condition of defendant

can be used to validate a warrantless search of a home which turned up evidence incriminating defendant, who *was* a probationer subject to a search condition, where the police did not know of the condition at the time of the search. As indicated above, we conclude the answer to this question should be in the affirmative because the situation in the instant case is one covered by "the logic" (*id*. at p. 798) of *Tyrell J*. And as we discuss below, the instant case does not present the situation addressed in *Robles*.

We acknowledge there is text in *Robles* which tends to support the determination that it applies equally to searches sought to be validated by an unknown search condition imposed upon a joint resident of property who *is* the defendant because residential searches are different than personal searches, such that the lesser expectation of privacy held by a probationer who jointly controls the property with a nonprobationer is subordinate to the "principal purpose of the exclusionary rule," which is to " ' "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment." ' " (*People v. Robles*, *supra*, 23 Cal. 4th at p. 799.) Thus, *Robles* states in part as follows: "*residential searches present an altogether different situation" than the search of a person* because "residences frequently are occupied by several people living together. . . . 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. . . . Thus, while society generally has an interest in having all probative evidence before the court, *in circumstances such as these* a knowledge-first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures." (*Id*. at p. 800; emphasis added.)

But, on the other hand, some text in *Robles* appears to agree with our interpretation, for *Robles* states, in discussing and quoting from *Tyrell J.*, that a juvenile probationer subject to a search condition must expect that an authorized official " 'could at any time stop [the probationer] on the street, at school, or *even enter his home*, and ask that' " he or she submit to a warrantless search. (*People v. Robles, supra*, 23 Cal.4th at p. 798, emphasis added; see *In re Tyrell J., supra*, 8 Cal.4th at p. 86.)

Moreover, there is text in *Robles* which suggests it applies only to searches sought to be validated by an unknown search condition imposed upon a joint resident of the property who *is not* the defendant because probationers and nonprobationers harbor different expectations of privacy. For example, at one point the *Robles* court distinguished nonprobationers who reside with "a person subject to a search condition" and who therefore "enjoy measurably greater privacy expectations in the eyes of society" than a person subject to a search condition. (*People v. Robles*, *supra*, 23 Cal. 4th at p. 798.) At another, the *Robles* court noted that the "logic" of *Tyrell J.* did not extend to *Robles* because *Tyrell J.* "focused specifically on the reasonableness of a probationer's privacy expectations" (*id.* at p. 799) and the police conduct in issue in *Robles* transgressed the "reasonable expectations of privacy under the Fourth Amendment" of the nonprobationer (*id*. at p. 800). And at yet another, *Robles* expresses "no doubt that those who reside with [a probationer] enjoy measurably greater privacy expectations in the eyes of society [than the probationer]." (*Id*. at p. 798.)

As indicated above, appellant suggests that *Robles* teaches that *Tyrell J.* must be limited to nonresidential searches (except perhaps a residence under a probationer/parolee's *sole* control), such as a search of a probationer/parolee's person. But we do not believe that the Supreme Court meant to give *Robles* such a broad effect. *Robles* does not say that *Tyrell J.* is to be limited to nonresidential or single occupant residential searches; it says instead only that the "logic" of *Tyrell J.* does not apply to "vitiate the illegality of the police action" in *Robles*. (*People v. Robles, supra*, 23 Cal.4th

at p. 798.) The ratio decidendi of *Robles* is determined by comparing the language of the opinion with the facts giving rise to the case. (*People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1212; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157; see generally 9 Witkin, Cal. Procedure (4th ed. 1996) Appeal, § 945 et seq.; p. 986 et seq.) The "police action" in *Robles* was not a search that resulted in evidence incriminating a probationer, as it was in *Tyrell J.* and as it is in the instant case. The search in the instant case did not violate appellant's Fourth Amendment rights.

Knock-Notice

Appellant contends the police failed to comply with Penal Code section 844,[4] thereby rendering the subsequent entry and search unlawful. We disagree.

"[A]n entry effected in violation of the provisions of section 844 . . . renders any subsequent search and seizure 'unreasonable' within the meaning of the Fourth Amendment. [Citations.] As a consequence, an unexcused failure to fulfill the knock and notice requirements delineated by section 844 nullifies the subsequent search and requires exclusion of the evidence obtained." (*Duke* v. Superior Ct. (1969) 1 Cal.3d 314, 325; accord, *People v. Neer* (1986) 177 Cal.App.3d 991, 997 [above holding in *Duke* unaffected by enactment of art. I, § 28, subd. (d) of the Cal. Const., which provides relevant evidence may be excluded only if exclusion is required by the U.S. Constitution].)

Strict compliance with section 844 requires that a police officer, before making a nonconsensual entry into a home, must "have 'reasonable grounds' to believe that a suspect is inside a dwelling" (*People v. Wader* (1993) 5 Cal.4th 610, 632, fn. omitted),

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[4] Penal Code section 844 provides, in relevant part, "To make an arrest, . . . a peace officer[] may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired."

and must identify himself, announce his purpose and demand entry (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1072). However, " '[I]t is recognized that section 844 may be satisfied with substantial compliance.' " (*People v. Miller* (1999) 69 Cal.App.4th 190, 201.)

" ' "Substantial compliance means ' "*actual* compliance in respect to the substance essential to every reasonable objective of the statute," as distinguished from "mere technical imperfections of form." ' " [Citation.] The essential inquiry is whether under the circumstances the policies underlying the knock-notice requirements were served. [Citation.]' " (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1208.) And "[t]he purposes and policies supporting the 'knock-notice' rules are fourfold: (1) the protection of the privacy of the individual in his home; (2) the protection of innocent persons present on the premises; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice; and (4) the protection of police who might be injured by a startled and fearful householder." (*People v. Macioce* (1987) 197 Cal.App.3d 262, 271.)

Here, there is no evidence the officer demanded entry or announced his presence or purpose. However, by virtue of the search condition, appellant's right to privacy was already severely compromised. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 753 [probationer subject to search condition has "greatly reduced" expectation of privacy].) And Alice King's right to privacy was also severely compromised, by virtue of her allowing appellant to treat her apartment as his own. (*People v. Woods*, *supra*, 21 Cal.4th at p. 676 [probationer's consent to search extends to common areas of residence shared with nonprobationer].) Moreover, there is no dispute that prior to entry both appellant and King could see the officer through the open door and that both occupants of the apartment were therefore aware he was a police officer. Similarly, it is undisputed that given the officer's question to King as to which way appellant went, the occupants of the apartment were aware the officer was seeking appellant. Thus, the danger to police and

occupants sometimes associated with a police entry into a residence was greatly reduced. (*People v. Turner* (1976) 54 Cal.App.3d 500, 504 [purposes underlying knock-notice requirements include "to prevent the violence-prone confrontations that would often attend entry by an unknown intruder"].) On this record, we conclude both the security and privacy interests protected by knock-notice requirements were served, and therefore there was substantial compliance with those requirements.

CALJIC No. 17.41.1

The court instructed the jury with CALJIC No. 17.41.1 as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Appellant contends this instruction "improperly compromises the private and uninhibited character of jury deliberations" and "constitutes an impermissible anti-nullification instruction." However, even assuming the instruction should not have been given, reversal is not required in this case. Such an error is subject to harmless error analysis. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.) Here, there is no indication that CALJIC No. 17.41.1 had any prejudicial impact on the deliberative process. The jurors deliberated for a relatively short period of time; they began deliberations on February 22, 2001, at 9:13 a.m. and returned a verdict two hours later. The jury's only communications with the court were requests that the testimony of a witness be read back and that they be provided with jury instructions and exhibits admitted into evidence. There was absolutely no sign of deadlock or holdout jurors. Thus, appellant's assumptions that the instruction inhibited the jury or led to interference by the court in the jury's deliberations are based on nothing more than speculation. Consequently, applying the standard of review most favorable to appellant, viz., that announced in *Chapman v. California* (1967) 386 U.S. 18, we

conclude the error, if any, was harmless beyond a reasonable doubt. (Cf. *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1335-1336.)

DISPOSITION

The judgment is affirmed.

DISSENTING OPINION OF VARTABEDIAN, J.

I respectfully dissent.

The majority concludes appellant's parole search condition forecloses any claim the search in the instant case infringed an interest of appellant which the Fourth Amendment was designed to protect. Appellant's parole search condition authorized warrantless, suspicionless searches of appellant's person, residence and property under his immediate control. The majority relies, in large part, on *People v. Reyes* (1998) 19 Cal.4th 743. In that case, the defendant was on parole and subject to a parole search condition similar to the search condition in the instant case. The defendant's parole officer, after receiving an anonymous tip, contacted the Woodlake Police Department and asked the officers to evaluate the defendant to see if he was under the influence of drugs. The officers later saw the defendant coming out of a shed in his backyard. They searched the shed as property within his control and found a small amount of methamphetamine.

The defendant challenged the search of the shed on the ground that the police lacked a reasonable suspicion that the defendant had violated the law or his parole or was planning to do so. The Supreme Court rejected this contention, holding that an adult parolee subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole. The court reasoned, "Because of society's interest both in assuring the parolee corrects his behavior and in protecting its citizens against dangerous criminals, a search pursuant to a parole condition, without *reasonable* suspicion, *does not 'intrude on a reasonable expectation of privacy*, that is, an expectation that society is willing to recognize as legitimate.'" (*People v. Reyes*, *supra*, at p. 751, first emphasis in original, second emphasis added.)

I find the majority's reliance on *Reyes* misplaced. As explained below, *Reyes* is inapposite because (1) that case did not involve a residential search as does this case, and

(2) here, unlike in *Reyes*, the police were not aware of the search condition at the time of the search.

In *People v. Robles* (2000) 23 Cal.4th 789, the police searched a portion of the defendant's residence, viz., the garage, without a warrant. It was not until after the search that police discovered that the defendant's brother Armando, a cohabitant of the residence, was on probation and subject to a search condition. While acknowledging that consent is one of the recognized exceptions to the warrant requirement, and that a probationer may consent in advance to searches by accepting probation with a search condition, our Supreme Court held: "[T]he police conduct here transgressed constitutional limits. By entering [the] garage with no warrant and no awareness of Armando's advance consent to probation searches, the police violated defendant's reasonable expectations of privacy under the Fourth Amendment. Although the advance consent might have furnished a legitimate basis for the search and seizure had the officers known of it at the time they acted, the mere fact of its existence does not vitiate the unlawfulness of what happened here." (*Id.* at p. 800.)

The court based its holding, in part, on considerations related to the defendant's expectation of privacy. The court began with a discussion of *In re Tyrell J.* (1994) 8 Cal.4th 68, a case upon which the majority here place strong reliance: "In *Tyrell J.*, we considered a minor's efforts to suppress evidence of marijuana found on his person by a police officer who, unaware of the minor's probation search condition, detained and pat-searched the minor. Although the officer had acted without probable cause and without a warrant, we concluded, based on the circumstances surrounding the search, that the minor's expectation of privacy was 'not one society is prepared to recognize as reasonable and legitimate' for purposes of the Fourth Amendment." (*People v. Robles*, *supra*, 23 Cal.4th at pp. 797-798, fn. omitted.)

But, the Supreme Court held, "[t]he logic of *Tyrell J.* cannot be stretched to vitiate the illegality of the police action here." (*People v. Robles*, *supra*, 23 Cal.4th at p. 798.)

As indicated above, the defendant lived with a person who was subject to a search condition but the defendant himself was not subject to such a condition, and, the court reasoned, "[e]ven though a person subject to a search condition has a severely diminished expectation of privacy over his or her person and property, there is no doubt that those who reside with such a person enjoy measurably greater privacy expectations in the eyes of society." (*Ibid*.)

The majority asserts that this basis for the *Robles* holding does not aid appellant because appellant, unlike the defendant in *Robles*, was personally subject to a search condition. However, the court in *Robles* rested its holding on another rationale as well. The majority acknowledges that this second rationale stated in *Robles* "tends to support the determination that it [*Robles*] applies equally to searches sought to be validated by an unknown search condition imposed upon a joint resident of property who *is* the defendant because residential searches are different than personal searches, such that the lesser expectation of privacy held by a probationer who jointly controls the property with a nonprobationer is subordinate to the 'principal purpose of the exclusionary rule,' which is to '"'deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment.'"' (*People v. Robles, supra*, 23 Cal.4th at p. 799.)" (Maj. opn. at p. 6.)

This second rationale found in *Robles* focuses on the fact that the place searched was a portion of the defendant's residence: "Finally, we observe the principal purpose of the exclusionary rule '"is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."' [Citations.]" In *Tyrell J.*, we concluded that dispensing with a strict 'knowledge-first' rule would not encourage law enforcement officials to engage in warrantless searches of juveniles because they would be '[taking] the chance' that if the target of a search is not subject to a search condition, any contraband found will be inadmissible in court. (*Tyrell J., supra*, 8 Cal.4th at p. 89.) Although police officers therefore have sufficient incentive

to avoid an improper search of a person (*ibid*.), *residential searches present an altogether different situation*.

"Notably, residences frequently are occupied by several people living together, including immediate family members and perhaps other relatives or friends, as well as guests. 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. [Citation.] The potential for abuse, with its consequent impact on the citizenry, is especially heightened in high crime areas where police might suspect probationers to live. Thus, while society generally has an interest in having all probative evidence before the court, in circumstances such as these a knowledge-first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures." (*People v. Robles, supra,* 23 Cal.4th at pp. 799-800, emphasis added.)

The Supreme Court's rationale stated in *Robles* applies in the instant case. First, the challenged search here, as in *Robles* and unlike in *Reyes* and *Tyrell J.*, was a residential search. I recognize that appellant, unlike the defendant in *Robles*, did not live in the residence searched but, as demonstrated above, his connection to the apartment was sufficient to establish that he had a legitimate expectation of privacy therein. Second, the police were not aware that appellant was on parole and subject to a search condition. The second *Robles* rationale applies here because it would discourage warrantless, suspicionless searches of homes if officers know that any incriminating evidence cannot simply be pinned on a resident, or other person with some significant connection to the residence, later discovered to be subject to parole or probation search

conditions. Thus, notwithstanding appellant's search condition, the challenged search infringed on an interest of appellant the Fourth Amendment was designed to protect.

I turn now to the question of whether the warrantless search was constitutionally unreasonable. Under *Reyes*, a search conducted under the auspices of a parole search condition is nonetheless "'constitutionally "unreasonable" if [1] made too often, or [2] at an unreasonable hour, or [3] if unreasonably prolonged of for other reasons establishing arbitrary or oppressive conduct by the searching officer.'" (*People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754.) In explaining the third of these categories, the court cited with approval *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004, where the court held "a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 754.)

When the search in question is of a residence, I see no difference between the purpose of a person's probation (as was the case in *Robles*), and our present analysis of the purpose of parole. In that regard, *Robles* suggests that the search of a particular residence cannot be reasonably related to a proper parole purpose when the officers involved do not even know of a parolee who is sufficiently connected to the residence: "As our decisions indicate, searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation. [Citations.] Significantly, a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence. Moreover, if officers lack knowledge of a probationer's advance consent when they search the residence, their actions are 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.)

Thus, under *Robles*, the challenged search was not justified by appellant's search condition. And the People offer no other justification for the warrantless search. Therefore, the denial of appellant's suppression motion was error.

My conclusion also finds support in *In re Martinez* (1970) 1 Cal.3d 641. In that case, in holding that the search of the defendant parolee's home was constitutionally unreasonable, the court stated, "regular police officers undertook the search pursuant to their general law enforcement duties; the officers, at the time of the search, did not even know of defendant's parole status. The investigation involved suspected criminal activity, not parole violations. Under these circumstances the officers cannot undertake a search without probable cause and then later seek to justify their actions by relying on the defendant's parole status, a status of which they were unaware at the time of their search." (*Id*. at p. 646.)

It has been suggested that the holding of *Martinez* "has been undermined" by *Tyrell J.* and *Reyes* and "can no longer be regarded as controlling." (*People v. Lewis* (1999) 74 Cal.App.4th 662, 668.) However, *Martinez* has never been expressly overruled and therefore we are required to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) And *Martinez*, because it involves a residential search pursuant to a parole search condition, is factually indistinguishable from the instant case. Thus, under *Robles* and *Martinez*, the court erred in denying appellant's suppression motion. Without the evidence seized there was not substantial evidence to support the judgment.

I would therefore reverse the judgment.

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VARTABEDIAN, J.