No. A107293

In the Court of Appeal

Of the State of California

First Appellate District

Division 5

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LANECIA MICHELLE MONDO

Defendant and Appellant.

APPELLANT S OPENING BRIEF

Appeal from
Contra Costa County Superior Court Case No. 5-030411-3
The Honorable Douglas R. Cunningham

FIRST DISTRICT APPELLATE PROJECT
In association with

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STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment including sentencing of the defendant and is appealable pursuant to Penal Code section 1538, subdivision (m).

STATEMENT OF THE CASE

In an Information filed on March 25, 2003, the Contra Costa County District Attorney charged appellant Lanecia Michelle Mondo with possession of a controlled substance (cocaine base) in violation of Health and Safety Code[1] section 11350, subdivision (a). (Clerk s Transcript on Appeal (CT) 25.)

Ms. Mondo filed a motion to unseal and quash a search warrant affidavit and suppress evidence pursuant to Penal Code section 1138.5, which the District Attorney vigorously opposed. (CT 31-95.) After holding an *in camera* hearing and a hearing in open court on July 29-30, 2003, the trial court denied the motion in its entirety. (CT 98-99; July 30, 2003 Reporter s Transcript (7/30/03 RT) 16-18, 57-58.)

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[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

On June 24, 2004, Ms. Mondo pled no contest to two counts of violating section 11350, one of which was pending in another case, with the understanding that she was reserving the right to appeal from the denial of the Penal Code section 1538.5 motion. (CT 120-24; 6/24/04 RT 2-4.) The trial court sentenced her to probation pursuant to Proposition 36. (CT 120-24; 6/24/04 RT 2-4; 7/8/04 RT 3.)

Ms. Mondo then filed a timely notice of appeal, limited to the denial of her motion to suppress. (CT 129-30.)

STATEMENT OF FACTS

On July 30, 2002, Contra Costa County Sheriff s Office Detective Marty Ryan applied for a search warrant for 123 Marys Avenue in Bay Point, and for the persons of Debra and Lanecia Mondo. (3/30/03 RT 19-21; CT 82-85 (People s Exhibit 1).) There was no request that the search include a strip search or visual body cavity search. (CT 82-85.)

Detective Ryan stated that in 2001 he had served a search warrant at the same location and for the same

people, resulting in the arrest of Debra Mondo. (CT 84.) Within the last 11 days, a confidential reliable informant had advised Detective Ryan that Debra Mondo was in possession of methamphetamine, and Lanecia Mondo in possession of cocaine, at the same address. (CT 84.) Detective Ryan asked that the identity of the informant be kept confidential. (CT 84.) A magistrate issued Search Warrant No. M02-649, allowing the search of the premises and the persons of Debra and Lanecia Mondo. (3/30/03 RT 20-21; CT 80-81.)

Along with 7 other deputies, Detective Ryan executed the search warrant at 3:06 in the afternoon of July 30, 2002. (3/30/03 RT 21.) As he approached the front door, Detective Ryan observed that a security screen door was shut, the front door was open, and there were at least two people inside. (3/30/03 RT 21-22, 25.) The security screen was:

> not your standard flimsy screen door that you can pull over or pull open I should say. It s a security door. It s usually made of steel or a thick mesh, metal mesh and it s used for home protection, you know, provide security like a regular hard front door.

(3/30/03 RT 22-23.)

Because of the mesh of the security screen,

Detective Ryan could not see the people s hands or see anything definite. (3/30/03 RT 27.) He could not identify the people inside and did not see Lanecia Mondo until he was in the house, when he realized she was sitting closest to the front door. (3/30/03 RT 25, 27.)

Lanecia Mondo, her sister, Danielle Hueners, and Ms. Hueners boyfriend, Michael Daniels, were in the living room at the time watching television and conversing. (3/30/03 RT 43, 46, 56.) Ms. Mondo was within 2 feet of the front door, while Ms. Hueners was on a couch approximately the same distance away, on the other side of the door. (3/30/03 RT 27, 45, 51.)

Detective Ryan testified that as he approached the security screen he said, Sheriff s Office, search warrant, and continued to the front door. (3/30/03 RT 23, 25, 28.)[2] Neither Ms. Mondo nor Ms. Hueners heard any announcement before the deputies entered the living room. (3/30/03 RT 29, 43-44, 50-51, 55.)

Immediately after the announcement, and without

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[2] Detective Ryan later testified that he also said, Demand entry, but he did not mention that phrase in his initial testimony or in his police report. (3/30/03 RT 28-30.)

giving anybody an opportunity to come and open the door, another deputy passed Detective Ryan and checked the security screen; finding it unlocked, he opened the door and the officers walked into the house. (3/30/03 RT 23, 28-29.)[3]

After entering the house, the officers detained the people there by having them lie on the floor and handcuffing them. (3/30/03 RT 25, 44.) The deputies approached Ms. Mondo with a 9 millimeter gun and told her to lie on her face. (3/30/03 RT 50.) According to Ms. Mondo, it was only then that they identified themselves. (3/30/03 RT 51.)

A female deputy, Kathleen Parker, conducted a strip-search of Ms. Mondo in a room outside of Detective Ryan s presence. (3/30/03 RT 26-27, 32.) Lieutenant Parker first removed Ms. Mondo s handcuffs and, after Ms. Mondo handed over all of her clothing in response to an order, checked her mouth, ears, and under her arms.

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[3] Detective Ryan estimated this took 5 seconds, give or take a second or 2. (3/30/03 RT 29.) He also indicated that they checked security screen doors to see if they are locked, because many of them are and they are in a dangerous position while standing at the door. (3/30/30 RT 24.)

(3/30/03 RT 32-34, 37-38, 52.)

Ms Mondo was cooperative until she was asked to bend over at the waist, when she asked to see the search warrant. (3/30/03 RT 33.) Lieutenant Parker refused to show her the warrant until after the search had concluded and, when Ms. Mondo said she did not want to comply, advised her that the strip search could either occur there or at jail. (3/30/03 RT 33.)

After a little more argument, Ms. Mondo did bend over in response to an order to bend over and spread her cheeks. (3/30/03 RT 33-34, 38.) Lieutenant Parker, who gave the order so she could visually inspect Ms. Mondo s body cavities, (3/30/03 RT 38), observed a piece of a plastic bag in the vaginal anal area, her lower extremities. (3/30/03 RT 34.)

Ms. Mondo then put herself upright, turned around, and retrieved a plastic bag from between her legs. (3/30/03 RT 34, 36.) Lieutenant Parker grabbed Ms. Mondo s right wrist and, while attempting to gain control of her, observed suspected narcotics in the bag. (3/30/03 RT 36, 38.) She repeatedly told Ms. Mondo to drop the bag, but Ms. Mondo refused. (3/30/03 RT 36.)

Despite training in how to control people, Lieutenant Parker struggled unsuccessfully with Ms. Mondo for 10-15 seconds. (3/30/03 RT 38-39.) Ms. Mondo did not punch or push her during that time, but did try to get her hands loose. (3/30/03 RT 39-41.) Lieutenant Parker did not try to put the handcuffs back on Ms. Mondo, but wanted to get her handcuffed. (3/30/03 RT 38, 41.)

Although Lieutenant Parker had hold of Ms. Mondo s arms, she did not feel she had complete control of Ms. Mondo and called for assistance, whereupon three male detectives entered the room to gain control of Ms. Mondo. (3/30/03 RT 37, 39, 41.) Ms. Mondo was completely naked at the time. (3/30/03 RT 39.) The male detectives grabbed Ms. Mondo s hands, put the handcuffs back on her, and retrieved the bag from underneath her foot, where she had dropped it after they arrived. (3/30/03 RT 40, 42.)

ARGUMENT

I. THE FOURTH AMENDMENT REQUIRES THE EXCLUSION OF EVIDENCE DISCOVERED DURING AN UNREASONABLE SEARCH

The Fourth Amendment guarantees [t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. (*Wilson v. Arkansas* (1995) 514 U.S. 927, 931.) Courts must suppress evidence obtained in violation of the Fourth Amendment, (*People v. Williams* (1999) 20 Cal.4th 119, 125), and California courts apply federal constitutional standards in deciding motions to suppress evidence seized during police searches. (*People v. Robles* (2000) 23 Cal.4th 789, 794.)

In reviewing the denial of a motion to suppress, this court should defer to the trial court s factual findings, if supported by substantial evidence, but must independently determine as a matter of law whether the search was reasonable. (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1207.)

II. WHEN OFFICERS OPEN A SECURITY SCREEN DOOR AND ENTER A HOME SIMULTANEOUSLY WITH THEIR ANNOUNCEMENT OF THEIR PRESENCE, THE FAILURE TO COMPLY WITH COMMON LAW, STATUTORY AND CONSTITUTIONAL KNOCK AND ANNOUNCE REQUIREMENTS RENDERS ANY SUBSEQUENT SEARCH UNREASONABLE UNDER THE FOURTH AMENDMENT

In denying Ms. Mondo s motion to suppress the evidence found during the search, the trial court did not reach any factual findings regarding the officers compliance with knock and announce requirements, but did conclude that:

> [I]n the case of an open of a screen type door that the officers entered within the limits of the law with their search warrant so I don t find that to have violated anybody s rights.

(3/30/03 RT 57.)

The court s legal conclusion was error. The officers failure to comply with common law, statutory and constitutional knock and announce requirements resulted in a violation of Ms. Mondo s Fourth Amendment rights, and the court should have suppressed the evidence.

The United States Supreme Court has held that the common-law knock and announce principle forms a part of the reasonableness inquiry under the Fourth

Amendment, (*Wilson v. Arkansas* (1995) 514 U.S. 927, 929), and even prior to *Wilson* the California Supreme Court applied Fourth Amendment standards in resolving knock and announce issues. (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1203.)

A. A Search Conducted Without Giving Occupants Any Opportunity to Respond Was Unreasonable Under United State Supreme Court Precedent

Since at least the beginning of the 17th century, the common law provided that authorities who desired to break into a person s home could do so only after announcing their presence and requesting admittance. (*Wilson*, 514 U.S. at 931-34.) Early American legislatures and courts embraced the common-law knock and announce principle, which became embedded in Anglo-American law. (*Wilson*, 514 U.S. at 933-34.)

Writing for a unanimous court, Justice Thomas concluded:

> Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search and seizure.

> Contrary to the decision below, we hold that in some circumstances an officer s unannounced entry into a home might be unreasonable under the Fourth Amendment.

(*Wilson*, 514 U.S. at 934.)

In *Wilson*, police officers executing a search warrant identified themselves [w]hile opening an unlocked screen door and entering the residence. (*Wilson*, 514 U.S. at 929.) The prosecution argued before the Supreme Court that the officers were concerned about safety and the destruction of evidence. While recognizing that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence, or where there was reason to believe evidence would be destroyed, the Supreme Court reversed and remanded for further proceedings because the lower courts had not addressed the sufficiency of the showing of reasonableness. (*Wilson*, 514 U.S. at 936-37.)

Since *Wilson*, the Supreme Court has addressed the knock and announce principle in *Richards v. Wisconsin* (1997) 520 U.S. 385, and in *United States v. Banks* (2003) 540 U.S. 31. *Richards* reversed the Wisconsin

Supreme Court s decision that officers could ignore the knock and announce principle whenever they were serving search warrants in felony drug investigations. While such investigations might involve danger or easily destroyed evidence, the Fourth Amendment requires courts to review the facts of each case to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement. (*Richards*, 520 U.S. at 394.)

> If a *per se* exception were allowed for each category of criminal investigation that included a considerable albeit hypothetical risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment s reasonableness requirement would be meaningless.

(*Richards*, 520 U.S. at 387-88, 394.)

In order to justify a no-knock entry, the officers must demonstrate a reasonable suspicion of exigency or futility. (*Banks*, 540 U.S. at 37, citing *Richards*, 520 U.S. at 394-95.) While acknowledging that they have consistently eschewed bright-line rules in deciding whether a particular search was unreasonable, (*Banks*, 540 U.S. at 35-36), the Court in *Banks* determined that officers investigating cocaine sales acted reasonably in

entering a small apartment after waiting 15-20 seconds. (*Banks*, 540 U.S. at 33, 38.)

The officers had no reasonable suspicion of facts justifying a no-knock entry when they arrived at the front door, but the Court found that an exigency developed after the officers knocked loudly on the front door, announced they had a police search warrant, and received no response. (*Banks*, 540 U.S. at 39-40.) The Court agreed that this call is a close one, (*Banks*, 540 U.S. at 38), but concluded that after 15-20 seconds, police could fairly suspect that cocaine would be gone if they were reticent any longer. (*Banks*, 540 U.S. at 38.)[4]

Under these controlling Supreme Court precedents, the officers in this case acted unreasonably and in violation of the Fourth Amendment. The prosecution has never attempted to suggest either exigency or futility as an excuse for failure to comply with the knock and

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[4] The California Supreme Court is currently considering the *Banks* holding in a case involving failure to comply with knock and announce requirements during a probation search conducted as part of a drug investigation. (*People v. Murphy*, review granted June 16, 2004, S125572.)

announce principle, much less show there was any reasonable suspicion to support either exception.

In excusing a failure to obtain a refusal by officers who had knocked and announced loudly and received no response for 15 seconds, the Supreme Court considered the matter a close call. (*Banks*, 540 U.S. at 38.) The call is not a close one in this case, where the officers made an announcement that people seated within a few feet of the door did not hear, and admittedly gave those people no opportunity to respond before entering with guns drawn after 3-7 seconds. (3/30/03 RT 21-29, 43-46, 50-55.)

Under controlling Supreme Court precedent, the prosecution failed to establish any basis for excusing compliance with traditional and constitutional knock and announce principles. This court should reverse the order denying Ms. Mondo s motion.

B. The Officers Unexcused Failure To Substantially Comply With Penal Code section 1531 By Breaking Into the Home Was Also Unreasonable Under Controlling California Precedent

In California, Penal Code section 1531 provides that an officer executing a warrant may break open any outer or inner door ... if, after notice of his authority and purpose, he is refused admittance. Entry through an unlocked door, even a screen door, constitutes breaking under section 1531. *People v. Peterson* (1973) 9 Cal.3d 717, 722; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 965-66.)

Long before *Wilson v. Arkansas*, (1995) 514 U.S. 927, 931, the California Supreme Court applied Fourth Amendment principles in determining the effect of section 1531 violations. *Duke v. Superior Court* (1969) 1 Cal.3d 314, held that, in the absence of an excuse for failure to comply:

> an entry effected in violation of the provisions of section 844 [governing arrest warrants] or its companion section 1531 renders any subsequent search and seizure unreasonable within the meaning of the Fourth Amendment.

(*Duke*, 1 Cal.3d at 325.)

The excuses recognized as valid in *Duke* were almost identical to the concerns later discussed in *Wilson* safety of the officers and the potential for destruction of evidence. (*Duke*, 1 Cal.3d at 323-24, see *Wilson*, 514 U.S. at 936-37.) *Duke* s identification of the purposes underlying the knock and announce statutes is also consistent with *Wilson* the protection of individual privacy in the home, the protection of innocent guests and police, and the prevention of potentially violent confrontations. (*Duke*, 1 Cal.3d at 321.)

Since the adoption of article I, section 28, subdivision (d) of the California Constitution in 1982 (Proposition 8), the Courts of Appeal have quarreled over its effect on *Duke*, which the California Supreme Court followed in *People v. Jacobs* (1987) 43 Cal.3d

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472, 480, 484, and has never abrogated.[5]

Jacobs did clarify that a mere technical violation of a knock and announce statute would not be unreasonable under the Fourth Amendment, but that the officers must at least be in substantial compliance with the statute s provisions, which means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. (*Jacobs*, 43 Cal.3d at 482-83 (emphasis in original).

There is no need for this Court to resolve the dispute among the districts because, as discussed above, the holding in *Duke* is fully consistent with *Wilson*, and under either line of precedent the search here was unreasonable. The majority in *Hoag*, for instance,

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[5] *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1220 (Sims, Acting P.J., dissenting.) The Third District issued three separate opinions on this issue in *Hoag*, 83 Cal.App.4th at 1208-09, 1209 n.7 (following *Jacobs* and ignoring *Duke*), 1212-1215 (Morrison, J., concurring and dissenting), and 1219-29 (Sims, Acting P.J., dissenting)(*Duke* controls, though applies substantial compliance). The Fourth District split sharply in *People v. Neer* (1986) 177 Cal.App.3d 991, 994-1001 (*Duke* controls), 1002-06 (Crosby, J., dissenting)(*Duke* does not compel exclusion), and the Sixth District in *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1409-22, sided with the *Neer* dissent. As mentioned above, the California Supreme Court is currently considering *People v. Murphy*, review granted June 16, 2004, S125572, which may resolve this issue.

determined that there was substantial compliance and a search was reasonable, where the officers twice knocked on the door and announced that they were demanding entry pursuant to a warrant, then turned a handle on an unlocked door and opened it slightly before entering, with a total elapsed time of fifteen seconds. (*Hoag*, 83 Cal.App.4th at 1202, 1211-12.)[6]

The search here was unreasonable under *Hoag* because there was no substantial compliance with section 1531, and the officers made no real attempt to meet the objectives of the statute. The announcement was made as they approached the house. Although Ms. Mondo and her sister were close to the front door, neither heard the announcement, and both first discovered the officers after they entered the house with guns drawn. The officers entered the house immediately after determining that the security screen was unlocked, and admittedly before anyone could respond. (3/30/03 RT 21-29, 43-46,

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[6] The dissent believed that the officers had not waited a reasonable time before entering, and that the lead opinion stretches the substantial compliance doctrine to unprecedented lengths by ignoring the danger posed to officers and residents by recklessly entering the house. (*Hoag*, 83 Cal.App.4th at 1222-26 (Sims, Acting P.J., dissenting.)

50-55.)

The search was clearly unreasonable under *Neer*. In that case, there was no evidence of the actual amount of time that elapsed between an announcement in the front yard and a second announcement at a closed screen door, after which the officer immediately opened the screen door and went in the house. The court held that the evidence had to be excluded, because the officer had no basis for safety or destruction of evidence concerns beyond the fact that the search was part of a narcotics investigation, which was insufficient. (*Neer*, 177 Cal.App.3d at 995-1001.)

The search here was also unreasonable under *Jeter v. Superior Court* (1983) 138 Cal.App.3d 934, 938, where officers had knocked and announced twice before turning the door handle and entering the residence after 15 seconds had elapsed; the court rejected the prosecution s claim that there was an implied refusal, and issued a peremptory writ ordering the trial court to set aside the information. (*Jeter*, 138 Cal.App.3d at 938.)

This is not a case like *People v. Peterson* (1973) 9

Cal.3d 717, 720-21, where the officers could plainly see occupants of a house through a normal screen doors, knocked several times without getting a response and, after a full minute, opened the screen door, stood at the threshold, announced the warrant and entered. The Court found that the officer s failure to announce until he had opened the screen door did not frustrate any objectives of the statute. (*Peterson*, 9 Cal.3d at 723-24.)

In this case, since the officers could not clearly see the occupants, and the occupants could not clearly see the officers (even assuming they had heard the announcement), the officers undermined the objective of the statute and created a much greater risk of violence by entering the house with guns drawn without giving the occupants a chance to open the door. (3/30/03 RT 21-29, 43-46, 50-55.)

Under both federal and state authority, the trial court erred in denying the motion to suppress, and this court should reverse.

III. THE OFFICERS VIOLATED MS. MONDO S FOURTH

AMENDMENT RIGHTS WHEN THEY CONDUCTED A WARRANTLESS STRIP SEARCH AND VISUAL BODY CAVITY SEARCH OF HER

In denying Ms. Mondo s motion to suppress the evidence found during the search, the trial court also did not reach any factual findings regarding the strip search and visual bodily cavity search of Ms. Mondo, but upheld the search because:

> The search warrant itself specifically names the defendant as a person to be searched.... Once that is given, then I do not believe that the strip search and particularly when it was conducted in a private room with a female officer I think it s within reasonable bounds. Otherwise what does a search and warrant specify.

(3/30/03 RT 57.)

The trial court reached this conclusion despite the prosecution s failure to point to any authority for the proposition that a standard search warrant automatically authorizes the type of intrusive search conducted in this case. (CT 75-76.) Under the circumstances, the search was unreasonable under the Fourth Amendment, and the court erred in not suppressing the results of that search.

The only authority put forward by the prosecution

in support of the search conducted of Ms. Mondo was *People v. Wade* (1989) 208 Cal.App.3d 304, 307-08, which involved a search incident to arrest rather than a search conducted pursuant to a search warrant. Relying in part on Penal Code section 4030 governing searches following arrests for misdemeanors, the court found that no warrant was necessary prior to a post-arrest visual body cavity search. (*Wade*, 208 Cal.App.3d at 307-08.)

But not only is a greater showing of probable cause [] required to justify an arrest without a warrant than to justify a search pursuant to a warrant, (*People v. Madden* (1970) 2 Cal.3d 1017, 1023), but federal law is clear that even an arrest does not provide blanket justification for such searches.

While a search incident to arrest reasonably includes a full search of the person, (*United States v. Robinson* (1973) 414 U.S. 218, 235), the full search is limited to a pat-down and does not extend to a strip search or bodily intrusion. (*Giles v. Ackerman* (9th Cir. 1984) 746 F.2d 614, 616.)

In determining whether a particular search violates the Fourth Amendment s prohibition on unreasonable

searches, the courts must balance, the need to search ... against the invasion which the search ... entails. *People v. Scott* (1978) 21 Cal.3d 284, 292-93, quoting *Terry v. Ohio* (1968) 392 U.S. 1, 21.)

While intrusive strip and body cavity searches are not considered unreasonable *per se* under the Fourth Amendment, (*Scott*, 21 Cal.3d at 292-93), a strip search, even if conducted with all due courtesy, invades a suspect s privacy in a frightening and humiliating manner. (*Giles*, 746 F.2d at 617.) Regarding a visual body cavity search:

> The intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual exploration of body cavities is dehumanizing and humiliating.

(*Kennedy v. L.A.P.D.* (9th Cir. 1989) 901 F.2d 702, 711.)

Even in the institutional setting, therefore, strip searches are permissible only on reasonable suspicion that the person being searched is carrying or concealing contraband. (*Act Up!/Portland v. Bagley* (9th Cir. 1992) 0971 F,2d 298, 301-02; *Giles*, 746 F.2d at 617-18.)

Visual body cavity searches are normally allowable only on a showing of more than probable cause and,

typically, pursuant to a warrant. (*People v. Bracamonte* (1975) 15 Cal.3d 394, 400-01; *Scott*, 21 Cal.3d at 293; *Fuller v. M.G. Jewelry* (9th Cir. 1991) 950 F.2d 1437, 1446-50.)

Contrary to the trial court s holding here, a warrant authorizing a search of the defendant s person does not authorize more intrusive searches:

> It is quite clear, and the People admit, that the warrant was not intended to authorize intrusions beyond the surfaces of their bodies. Assuming arguendo that the magistrate intended the warrant to justify such further intrusions, we find that the warrant did not so specify. (U.S. Const., Amend IV; Cal. Const., art. I, § 13)

(*Bracamonte*, 15 Cal.3d at 401.)

In this case, there was apparently no attempt to obtain authorization from the magistrate for a strip or visual body cavity search, and the warrant certainly contained no such authorization. (CT 80-86.) The officers did not articulate any reasonable suspicion that Ms. Mondo had contraband concealed on her person, and refused to show her a warrant authorizing any intrusive searches. (3/30/03 RT 33.) Despite the absence of even reasonable suspicion, they conducted a

strip and visual body cavity search that included the removal of all of her clothes, an inspection of her mouth, ears, and under her arms, and repeated commands that she bend over and spread her cheeks. (3/30/03 RT 33-34, 38.)

The Fourth Amendment prohibits such dehumanizing and humiliating searches in the absence of a warrant, or even reasonable suspicion, and the trial court should have suppressed the evidence.

IV. COURT SHOULD REVIEW SEALED PORTIONS OF RECORD TO DETERMINE WHETHER THE TRIAL COURT SHOULD HAVE TRAVERSED OR QUASHED THE WARRANT

After conducting an *in camera* review of the sealed portion of the affidavit filed in support of the search warrant, (3/29/03 RT 18-19 and sealed portion; 3/20/03 RT 11-15), the trial court refused to turn over any portion of the sealed affidavit, found that there was probable cause for issuance of the search warrant, and denied Ms. Mondo s motion to traverse or quash the warrant. (3/30/03 RT 16-18.)

Ms. Mondo s appellate counsel, like her trial counsel, has no access to the sealed portion of the

affidavit, but asks the court to review the trial court s denial of the motions under the standards established in *People v. Hobbs* (1994) 7 Cal.4th 948, 971-77.

In order to accommodate the prosecution s right to protect the identity of confidential informant under Evidence Code sections 915 and 1042, and the defendant s right to discovery, *Hobbs* and recognizing that the sealing of the affidavit makes it impossible for the defendant to make an informed preliminary showing, *Hobbs* required trial court to conduct an *in camera* hearing to determine:

> whether sufficient grounds exist for maintaining the confidentiality of the informant s identity. It should then be determined whether the entirety of the affidavit or any major portion thereof is properly sealed; *i.e.*, whether the extent of the sealing is necessary to avoid revealing the informant s identity.

(*Hobbs*, 7 Cal.4th at 972.)

If a redaction would allow part of the affidavit to be revealed, the court should order it. (*Hobbs*, 7 Cal.4th at 972 n.7.) Since the defense does not know what the affidavit contains, it is up to the court,

aided by written questions from the defense, to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause. (*Hobbs*, 7 Cal.4th at 973.) The court must first determine whether the affidavit is properly sealed and, if so, whether there is evidence of misrepresentations or omissions. (*Hobbs*, 7 Cal.4th at 973-74.)

> If ... the court determines there is a reasonable probability that defendant would prevail on the motion to traverse *i.e.*, a reasonable probability, based on the court s *in camera* examination of all the relevant materials, that the affidavit includes a false statement or statements made knowingly and intentionally, or with reckless disregard for the truth, which is material to the finding of probable cause,... the district attorney must be afforded the option of consenting to disclosure ....

(*Hobbs*, 7 Cal.4th at 974.)

Similarly, in ruling on the motion to quash, if the court determines the affidavit was properly sealed, it must determine whether there was a fair probability under the totality of the circumstances that contraband would be found. (*Hobbs*, 7 Cal.4th at 975.) If there is a reasonable probability defendant could prevail on the

motion to quash because the affidavits fails to establish probable cause for issuance of the search warrant, the district attorney must again be given the option of disclosure or loss of the motion. (*Hobbs*, 7 Cal.4th at 975.)

Ms. Mondo asks the court to review the entire record, including the sealed portions of the affidavit and the sealed portion of the Reporter s Transcript, in determining whether the trial court properly denied her motions to traverse and quash the search warrant.

CONCLUSION

For all the above reasons, this court should reverse the judgment.

DATED: March 22, 2007 LAW OFFICES OF PAUL KLEVEN

By:_____
PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Appellant s Opening Brief contains 4900 words, as calculated by my WordPerfect 11 word processing program.

_____
PAUL KLEVEN