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3 Attorney for Defendant  
4 EDWARD PARK

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7  
8 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
9 SAN FRANCISCO DIVISION  
10

11 UNITED STATES OF AMERICA,

CR 05-00375 SI

12 Plaintiff,

NOTICE OF MOTION AND MOTION  
TO SUPPRESS EVIDENCE RE  
13 UNLAWFUL CELL PHONE SEARCH

14 v.

[Excludable Time: 18 U.S.C.  
§ 3161(h)(1)(F) & (J)  
through disposition]

15 EDWARD PARK,

16 Defendant.

Date: October 27, 2006  
Time: 11:00 a.m.  
17 Dept: Judge Illston

18 \_\_\_\_\_/  
TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED  
STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

19 PLEASE TAKE NOTICE that on the date and at the time  
20 indicated above, or as soon thereafter as the matter may be  
21 heard, defendant Edward Park, by and through counsel, will and  
22 hereby does move the Court to suppress evidence in this matter.  
23 Defendant Edward Park also respectfully requests an evidentiary  
24 hearing to resolve contested issues of material facts.

25 Pursuant to Rules 12 and 47 of the Federal Rules of  
26 Criminal Procedure, defendant moves to suppress any and all  
27 evidence seized, along with the fruits thereof, as a result of  
28 the warrantless search of his cellular phone on or about

1 December 1, 2004.

2 This motion is made on the ground that the warrantless  
3 search of Mr. Park's cellular phone was conducted in violation  
4 of his rights to be free from unreasonable searches and seizures  
5 as guaranteed by the Fourth Amendment of the United States  
6 Constitution.

7 This motion is based on this notice, the points and  
8 authorities filed herewith, on such supplemental points and  
9 authorities as may be hereafter filed with this Court or orally  
10 presented, on the records and files in this action, and on such  
11 oral and documentary evidence as may be presented at the  
12 hearing.

13 Dated: September 11, 2006

14 /s/ ANNA LING  
15 ANNA LING  
16 Attorney for Defendant  
17 EDWARD PARK  
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8 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
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11 UNITED STATES OF AMERICA,

CR 05-00375 SI

12 Plaintiff,

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
13 MOTION TO SUPPRESS EVIDENCE  
RE UNLAWFUL CELL PHONE  
14 SEARCH

13 v.

14 EDWARD PARK,

Date: October 27, 2006  
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15 Defendant. Dept: Judge Illston  
16

17 STATEMENT OF FACTS

18 On or about December 21, 2004, officers from the San  
19 Francisco Police Department (SFPD) executed a California state  
20 search warrant on a residence located at 922 Capitol Avenue, San  
21 Francisco. See Exhibit A, Search Warrant, Affidavit, and  
22 Return<sup>1</sup>. The search warrant authorized the search of the  
23 premises of 922 Capitol, and the person of Asa Lee Barnla, a  
24 former co-defendant in this matter who has since plead and is  
25 awaiting sentencing. The warrant specifically listed the  
26

27  
28 <sup>1</sup> The probable cause portion of the affidavit in support  
of search warrant was initially sealed and has yet to be  
provided in discovery in the present matter before this court.

1 following to be searched: "marijuana, marijuana cultivation  
2 equipment including high density lights, ballasts, transformers,  
3 timers, water pumps, and fertilizers. Also items of personal  
4 property tending to establish the identity of persons in control  
5 of the premises being searched including rent receipts, utility  
6 company receipts, addressed mail and keys." See Exhibit A.  
7 Noteworthy, the search warrant did not authorize the seizure or  
8 search of cellular phones.

9 At the time of the execution of the search warrant, Mr.  
10 Park was arrested at or near the scene. Mr. Park was in  
11 possession of a cellular phone, which was "seized and  
12 surreptitiously searched incident to the arrests, and were then  
13 returned to the owners." See Affidavit of Christopher Fay in  
14 Support of Wiretap, p. 48, lines 4-5, previously filed with the  
15 court as Exhibit A to Declaration of Andrew M. Scoble Re Motion  
16 to Dismiss Indictment for Selective Prosecution, 2/3/06.  
17 Specifically, the cellular phone's memory of the names and  
18 numbers were retrieved.

19 Mr. Park now files the instant motion to suppress evidence  
20 based upon the unlawful and warrantless search of the cellular  
21 phone.

22 ARGUMENT

23 I

24 EDWARD PARK HAS STANDING TO CHALLENGE  
THE LEGALITY OF THE WARRANTLESS SEARCH

25 As a threshold matter, "the capacity to claim protection of  
26 the Fourth Amendment depends upon whether the person who claims  
27 the protection ... has a legitimate expectation of privacy in  
28 the place invaded." Katz v. United States, 389 U.S. 347 (1967);

1 Rakas v. Illinois, 439 U.S. 128, 143 (1978).

2 In determining whether an individual's Fourth Amendment  
3 rights have been violated, property ownership is a factor to be  
4 considered, but it is not determinative. United States v.  
5 Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 2553 (1980). The  
6 relevant inquiry is two-fold: (1) whether the individual has  
7 exhibited an actual (subjective) expectation of privacy; (2)  
8 whether the expectation is one which society recognizes as  
9 "reasonable." Katz v. United States, 389 U.S. 347, 88 S.Ct. 5-  
10 7, 511 (1967).

11 Mr. Park clearly has a legitimate expectation of privacy in  
12 his own property and under his control sufficient to assert that  
13 the warrantless and unlawful search invaded his own Fourth  
14 Amendment rights.

15 II  
16 THE GOVERNMENT BEARS THE HEAVY BURDEN OF  
17 JUSTIFYING THE WARRANTLESS SEARCH

18 A search conducted without a warrant is "per se  
19 unreasonable ...subject only to a few specifically established  
20 and well-delineated exceptions." Schneckloth v. Bustamonte, 412  
21 U.S. 218, 219 (1973) (citations omitted).

22 The government bears the burden of establishing that a  
23 warrantless search was reasonable and did not violate the Fourth  
24 Amendment. United State v. Carbajal, 956 F.2d 924, 930 (9th  
25 Cir. 1992), *cert. denied*, 510 U.S. 900 (1993) (citations  
26 omitted).

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27 ///

28 ///

1 III

2 CHIMEL DOES NOT SPEAK TO THE VALIDITY OF THE  
3 SEARCH AND SEIZURE OF THE CELL PHONE THAT  
4 THE GOVERNMENT PLANS TO INTRODUCE AT TRIAL

5 Based upon the affidavit of DEA Agent Fay, it appears as if  
6 the government contends that the "surreptitious" search was  
7 lawful as a search incident to arrest. Noteworthy, the search  
8 warrant did not authorize seizure or search of cellular phones,  
9 and said phone was returned to Mr. Park.

10 The United States Supreme Court elucidated the rationale of  
11 a "search incident to arrest" in Chimel v. California, 395 U.S.  
12 752 (1969), as follows:

13 When an arrest is made, it is reasonable for  
14 the arresting officer to search the person  
15 arrested in order to remove any weapons that  
16 the latter might seek to use in order to  
17 resist arrest or effect his escape.  
18 Otherwise, the officer's safety might well  
19 be endangered, and the arrest itself  
20 frustrated. In addition, it is entirely  
21 reasonable for the arresting officer to  
22 search for and seize any evidence on the  
23 arrestee's person in order to prevent its  
24 concealment or destruction.  
25 *Id.* at 762-763.

26 Unequivocally, at the time of the search of Mr. Park's  
27 person, the cell phone was neither a weapon nor contraband  
28 evidence of any sort, and therefore falls outside the scope of  
the Chimel doctrine. See also Sibron v. New York, 392 U.S. 40,  
67 (1967) (Search upheld as incident to a proper arrest where  
"reasonably limited" by the need to seize weapons and prevent  
destruction of evidence, and officer did not "engage in an  
unrestrained and thoroughgoing examination" of defendant and his  
personal effects.) *Id.* Moreover, any concerns of officer  
safety or destruction of evidence had virtually dissipated when

1 no weapons or contraband were discovered on Mr. Park subsequent  
2 to the search of his person. Accordingly, the seizure of the  
3 cell phone cannot be predicated upon the government's theory of  
4 a search incident to a lawful arrest.

5 Even assuming *arguendo* that the cell phone was lawfully  
6 seized from Mr. Park's person at the time of his arrest, the  
7 warrantless search of the phone's content (i.e. memory) "cannot  
8 be justified as incident to that arrest either if the 'search is  
9 remote in time or place from the arrest,' or no exigency  
10 exists." See United States v. Chadwick, 433 U.S. 1, 15 (1977),  
11 *abrogated on other grounds*, California v. Acevedo, 500 U.S. 565  
12 (1991) [internal citation omitted].

13 Chadwick involved a search of a footlocker subsequent to  
14 the arrest of the defendants. *Id.* at 4. In affirming the  
15 suppression of the footlocker's contents, the Court explained  
16 that absent exigency, the concerns regarding officer safety and  
17 preservation of evidence did not justify subsequent, warrantless  
18 searches of items safely in the possession of law enforcement.  
19 *Id.* at 15.

20 In reaching this holding, the Court reiterated the  
21 rationales of officer safety and evidence preservation  
22 underlying the decisions in Chimel v. California, 395 U.S. 752  
23 (1969) and United States v. Robinson, 414 U.S. 218 (1973). See  
24 *id.* at 14-15.

25 As applied to the case at bar, under Chadwick the search of  
26 Mr. Park's cell phone was unlawful because a warrantless search  
27 cannot be justified as incident to arrest **either** if the search  
28 is remote in time or place to the arrest **or** if there is no

1 exigent circumstance. *Id.* at 15. Here, the government does not  
2 contend exigency to dispense with the requirement of a search  
3 warrant for the search, seizure and utilization of the phone's  
4 memory.

5 Therefore, any evidence stemming from the unlawful search  
6 and seizure of Mr. Park's cell phone must be suppressed.

7 IV

8 ALL EVIDENCE OBTAINED AS A RESULT OF AN  
9 UNLAWFUL WARRANTLESS SEARCH IS "FRUIT OF THE  
10 POISONOUS TREE" AND MUST BE SUPPRESSED

11 The exclusionary rule prevents the use of evidence obtained  
12 as the indirect product of unlawful conduct in the same manner  
13 that it precludes the use of evidence directly obtained by  
14 improper conduct. *Segura v. United States*, 468 U.S. 796, 804  
15 (1984). This principal has become established as the "fruit of  
16 the poisonous tree" doctrine. *Wong Sun v. United States*, 371  
17 U.S. 471 (1963). Therefore, any and all tangible and intangible  
18 evidence is fruit of the unlawful search, and must be  
19 suppressed.

20 V

21 AN EVIDENTIARY HEARING IS REQUIRED TO  
22 RESOLVE DISPUTED ISSUES OF FACT

23 The appropriateness of an evidentiary hearing rests within  
24 the sound discretion of the district court, and may be held even  
25 if no facts are in dispute. *United States v. Batiste*, 868 F.2d  
26 1089, 1092 (9th Cir. 1989)<sup>2</sup>. However, an evidentiary hearing on

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27 <sup>2</sup> In *Batiste*, the court found it appropriate to hold an  
28 evidentiary hearing on the basis that "a defendant often does  
not have complete information regarding his or her arrest at the  
time a motion to suppress is filed and additionally officer's  
testimony at a hearing often differs materially from the  
statements in the police reports." 868 F.2d at 1092.

1 a motion to suppress is required if the court concludes from the  
2 moving papers that there are contested issues of fact going to  
3 the validity of the search are in issue. United States v.  
4 Walczak, 783 F.2d 852, 857 (9th Cir. 1986) (citation omitted).  
5 Furthermore, when there are contested issues of fact requiring  
6 an evidentiary hearing, it is an abuse of discretion for the  
7 court to deny such a request. United States v. Dicesare, 765  
8 F.2d 890, 895 (9th Cir. 1985).

9 The numerous issues discussed herein turn primarily on  
10 factual determinations. Where factual issues are involved, Rule  
11 12(e) of the Federal Rules of Criminal Procedure requires the  
12 court to state essential findings on the record. In order to  
13 make these factual determinations an evidentiary hearing is  
14 required.

15 CONCLUSION

16 Based upon the foregoing, the defense prays that all the  
17 evidence seized as a result of the unlawful search be suppressed  
18 as violative of Mr. Park's Fourth Amendment rights as guaranteed  
19 by the United States Constitution.

20 Dated: September 11, 2006

21 Respectfully Submitted,

22 /S/ANNA LING

23 ANNA LING

24 Attorney for EDWARD PARK