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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 UNITED STATES OF AMERICA,)
15 Plaintiff,)
16 v.)
17 EDWARD PARK, BRIAN LY, and)
DAVID LEE,)
18 Defendants.)

NO.: CR 05-0375 SI
UNITED STATES' SUPPLEMENTAL
BRIEF IN SUPPORT OF OPPOSITION
TO DEFENDANTS' MOTIONS TO
SUPPRESS EVIDENCE RE: CELL
PHONE SEARCHES

Hearing: February 2, 2007
Time: 11:00 a.m.
Courtroom: Ten (19th Floor)

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I. INTRODUCTION

1 Defendant Edward Park originally moved to suppress the fruits of a warrantless search of
2 the cell phone seized from him following his arrest on December 1, 2004. The government filed
3 an opposition to that motion, and the parties argued the motion on October 27, 2006.
4 Subsequently, defendant David Lee filed a joinder (without further argument or factual
5 discussion), and defendant Brian Ly filed a joinder (with supplemental argument).¹ The Court
6 subsequently granted the government's request, followed by a similar request from the
7 defendants, to file supplemental briefing.
8

9 The government submits this Supplemental Brief in support of its argument that the
10 warrantless search of cell phones seized from the defendants' persons incident to their arrests
11 was lawful as both a delayed search incident to arrest (analogous to the lawful delayed search of
12 a wallet or address book), and a lawful booking search. In order to place before the Court the
13 facts which bear on this latter argument, the government submits herewith Declarations of Martin
14 Halloran, David Martinovich, Ted Mullin, and Gary Watts (hereafter "Halloran 12/22/06 Decl.,"
15 "Martinovich 12/22/06 Decl.," "Mullin 12/22/06 Decl.," and "Watts 12/22/06 Decl.").
16

II. STATEMENT OF FACTS

17 On December 1, 2004, officers of the SFPD Narcotics Division, led by Inspector John
18 Keane, executed a state search warrant at 922 Capitol Street, San Francisco. Declaration of John
19 Keane, filed 10/06/06 (hereafter "Keane Decl.") at ¶ 2 & Exh. 1 [Narrative of Police Incident
20 Report 041367992, Bates Nos. 09073-09075]. The search warrant team for 922 Capitol Street
21 included SFPD Inspectors John Keane, Martin Halloran and Ted Mullin, as well as Officer Gary
22 Watts. Keane Decl. Exh. 1 at 09073, 09074; Declaration of Gary Watts, filed October 6, 2006
23 (hereafter "Watts 10/06/06 Decl.") ¶ 2.
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26 ¹ Defendant Darrick Hom filed a purported joinder in the motion. However, as he
27 was not present at 922 Capitol Street, San Francisco on December 1, 2004; was not arrested that
28 day; and did not have a cell phone searched by police that day, he is not properly part of this
motion.

1 Prior to executing the search warrant, the officers kept 922 Capitol Street under
2 surveillance. Keane Decl. Exh. 1, at 09073. Enrique Chan was seen arriving and then leaving
3 the premises with a large bag and box; he was detained after driving away. Id. Meanwhile,
4 Edward Park and Brian Ly arrived together; went inside. Next, Chi Hac arrived and parked in
5 front of the premises, but almost immediately drove away. Id. As he did so, David Lee was seen
6 coming out of 922 Capitol Street; Lee was detained. Id. at 09074. Chi Hac then returned and
7 parked nearby, at which point he, too, was detained. Id. Park and Ly now came out of the
8 premises, returned to their vehicle, and were detained. Id.

9 The officers then executed the search warrant. Keane Decl. Exh. 1, 09074. Asa Barnla
10 answered the door and was arrested. Id. The searching officers found evidence of an indoor
11 marijuana cultivation operation. Id. They seized marijuana, growth medium, and equipment of
12 the type used to grow marijuana. Id.

13 After the search warrant was executed Enrique Chan, Edward Park, Brian Ly, David Lee,
14 and Asa Barnla were arrested. Keane Decl. ¶ 6. Chi Hac was released pursuant to California
15 Penal Code Section 849(b), for lack of evidence to arrest. Id. & Exh. 1, at 09075. All five
16 arrested persons were transported to the Taraval Police Station for booking. Halloran 12/22/06
17 Decl. ¶ 6; Martinovich 12/22/06 Decl. ¶ 2. Although all five were found, ultimately, to be in
18 possession of cell phones, no cell phone was seized or searched prior to the arrestees' booking.
19 Halloran 12/22/06 Decl. ¶¶ 5, 7, 10; Martinovich 12/22/06 Decl. ¶¶ 4, 6; Watts 12/22/06 Decl. ¶¶
20 4, 6; Mullin 12/22/06 ¶¶ 4, 9.

21 At the Taraval Station, all five were taken to the booking area and processed for booking.
22 Martinovich 12/22/06 Decl. at ¶ 2. The entire process from arrest to booking of all five
23 individuals took approximately three and one-half hours. See Field Arrest Cards attached as
24 Exh. 1 to Mullin 12/22/06 Decl.; see also Edward Park's Booking Form, attached as Exh. 1 to
25 Halloran 10/06/06 Declaration; Asa Barnla's & Brian Ly's Booking Forms, attached as Exhs. 1
26 & 2 to Watts 12/22/06 Decl.; David Lee & Enrique Chan's Booking Forms, attached as Exhs. 2
27 & 3 to Mullin 12/22/06 Decl.

28 All five arrestees were processed one at a time. Watts 12/22/06 Decl. at ¶ 7. Pursuant to

1 standard SFPD booking procedure, all personal property on the person and in the possession of
2 each arrested person was removed and placed on the booking counter, for searching and
3 inventorying. Watts 10/06/06 Decl. ¶ 7; Mullin 12/22/06 Decl. ¶ 7. This included the cell
4 phones which are the subject of defendants' motion to suppress. Watts 10/06/06 Decl. ¶¶ 6(c), 7,
5 10-11; Watts 12/22/06 Decl. ¶ 6; Mullin 12/22/06 Decl. ¶¶ 6-7, 9.

6 It is standard SFPD procedure to obtain from each arrested person all personal property
7 on his person and his possession and to have these items placed on the booking counter so that
8 they can be inspected and inventoried. Martinovich 12/22/06 Decl. ¶ 5; see also Watts 10/06/06
9 Decl. ¶ 6(a)-(e). Moreover, it is standard SFPD booking procedure to inspect any and all
10 containers found on the person or in the possession of the arrested person. Id. This procedure
11 avoids risk of theft by police employees as well as false claims of theft by police employees, and
12 allows searching officers to locate and seize any contraband or dangerous items. Id. It is not
13 unusual for the arresting officers to assist, during the booking process, in removing and searching
14 items from the arrested person, and noting them for inventorying. This can include wallets,
15 address books and cell phones, back packs, and purses. Id.

16 In this case, Inspector Martinovich requested that the cellular telephones of Ly, Park, Lee,
17 Barnla, and Chan be searched for two reasons. First, he knew that standard SFPD booking
18 procedure requires the inventorying of all personal property and the inspection of all containers
19 in order to deter theft of arrestees' property and false claims of theft by arrestees, and to identify
20 contraband and other dangerous items. Martinovich 12/22/06 Decl. ¶ 6. Second, Inspector
21 Martinovich believed that evidence of marijuana trafficking and/or cultivation might be found in
22 each of the telephones, especially since he had been investigating the marijuana trafficking and
23 cultivation activities of Chan, Park, Lee and Barnla prior to December 1, 2004. Id.

24 During the booking process for Park, Ly and Lee, officers removed or requested that these
25 defendants remove all of their personal property, which including cellular telephones. Watts
26 10/06/06 Decl. ¶ 10; Watts 12/22/06 Decl. ¶ 6; Mullin 12/22/06 Decl. ¶ 9. In each case, the cell
27 phone was placed on the booking counter. Watts 10/06/06 Decl. ¶ 11; Watts 12/22/06 Decl. ¶ 6;
28 Mullin 12/22/06 Decl. ¶ 9. In each case, an officer took the cell phone and searched it. Halloran

1 10/06/06 Decl. ¶ 6; Halloran 12/22/06 Decl. ¶ 10; Martinovich 12/22/06 Decl. ¶ 3.

2 In the case of Park's cell phone, Inspector Halloran searched only the cellular telephone's
3 address book and recorded on a piece of paper names and telephone numbers of individuals
4 whose information appeared in Park's telephone. Halloran 10/06/06 Decl. ¶ 7 & Exh. 1;
5 Halloran 12/22/06 Decl. ¶ 9.

6 Inspector Halloran also conducted the search of Brian Ly's telephone. Halloran 12/22/06
7 Decl. ¶ 10. Inspector Halloran searched only the address book of the cellular telephone and
8 recorded on two pieces of paper the names and telephone numbers that he retrieved from the
9 cellular telephone. Id. & Exh. 1.

10 In the case of David Lee's cell phone, Inspector Martinovich searched the telephone's
11 address book and recorded the names and telephone numbers of individuals whose information
12 appeared in the telephone. Martinovich 12/22/06 Decl. ¶¶ 7-8.

13 None of these cell phones had been seized or searched out in the field. Each cell phone
14 was first seized and searched during the booking process at Taraval Station. Martinovich
15 12/22/06 Decl. ¶ 4; Watts 12/22/06 Decl. ¶¶ 4, 6; Halloran 12/22/06 Decl. ¶¶ 5-7; Mullin
16 12/22/06 Decl. ¶¶ 4, 9.

17 18 **III. ARGUMENT**

19 **A. The Seizure of Cell Phones at the Police Station and Accessing** 20 **of Stored Telephone Numbers, Was a Valid Search Incident to Arrest**

21 The search, incident to a lawful arrest, of items seized from the person of an arrestee or
22 immediately associated with his person may be delayed until the booking process or even later.
23 United States v. Edwards, 415 U.S. 800, 802-03 (1974) (search of clothing ten hours later, at
24 jail). See also Curd v. City Court of Judsonia, Arkansas, 141 F.3d 839, 843 (8th Cir. 1998)
25 (“Searches of the person and those articles ‘immediately associated’ with the person may be
26 made either at the time of arrest or when the accused arrives at the place of detention. Edwards,
27 415 U.S. at 803, 94 S.Ct. at 1237.”). As the Supreme Court found in Edwards, “the courts of
28 appeals have long since concluded that once the accused is lawfully arrested and is in custody,

1 the effects in his possession at the place of detention that were subject to search at the time and
2 place of his arrest may lawfully be searched and seized without a warrant even though a
3 substantial period of time has elapsed between the arrest and subsequent administrative
4 processing, on the one hand, and the taking of the property for use as evidence, on the other.”
5 415 U.S. at 807.

6 This rule of delayed search incident to arrest is not applied, however, to items such as
7 luggage. Thus, in United States v. Chadwick, 433 U.S. 1, 15 (1977), the Supreme Court
8 invalidated the search of a 200-pound, double-locked footlocker which was seized from the open
9 trunk of a car, which remained in exclusive law enforcement custody thereafter, and which was
10 then transported to the law enforcement office and searched without a warrant some 90 minutes
11 later. Chadwick, 433 U.S. at 4-5, 15; see also United States v. Monclavo-Cruz, 662 F.2d 1285,
12 1290 (9th Cir. 1981) (purse seized incident to arrest is more like luggage or briefcase than like
13 clothing; warrantless search at law enforcement office invalid).

14 The Ninth Circuit has applied this rule consistently to wallets seized incident to arrest,
15 even when they are not searched until after transportation to the police station for booking. See,
16 e.g., United States v. Ziller, 623 F.2d 562, 563 (9th Cir. 1980) (upholding warrantless search of
17 wallet after defendant arrested outside airport and transported to federal building); United States
18 v. Abel, 707 F.2d 1013, 1014-15 (9th Cir. 1983) (search of arrestee’s pockets and wallet at police
19 substation, and removal of currency and bait bill, held to be valid search of person incident to
20 arrest). Similarly, in United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980), the Ninth
21 Circuit upheld the search of a wallet, and explained: “Unlike a double-locked footlocker, which
22 is clearly separate from the person of the arrestee, the wallet found in the pocket of Mr. Passaro
23 was an element of his clothing, his person, which is, for a reasonable time following a legal
24 arrest, taken out of the realm of protection from police interest. Robinson and Edwards, supra.”

25 Courts have extended this rule to include address books. See United States v. Rodriguez,
26 995 F.2d 776, 778 (7th Cir. 1993) (seizure of address book found inside wallet, and copying of
27 its contents, after transportation to sheriff’s department held valid under United States v.
28 Edwards, 415 U.S. 800 (1974)); see also United States v. Lynch, 908 F.Supp. 284, 288 (D.V.I.

1 1995) (collecting cases).

2 Thus, the search of the wallet or address book need not take place contemporaneously
3 with the defendant's arrest, and it is immaterial that the item is no longer accessible by the
4 arrestee. Passaro, 624 F.2d at 944 (citing and quoting United States v. Edwards, 415 U.S. 800,
5 808-09(1974)). See also United States v. Vaneenwyk, 206 F.Supp.2d 423, 426 (W.D.N.Y. 2002)
6 (day planner lawfully searched incident to arrest; justification for such searches "is not that a
7 person does not have an expectation of privacy in such personal effects such as a wallet or
8 address book, but that once an arrest has been made, the privacy interests of the arrestee no
9 longer take precedence over police interest in finding a weapon or obtaining evidence").

10 While the government has not found a Ninth Circuit case extending this rationale to cell
11 phones or pagers, various courts have found the electronic address book in a pager or cell phone
12 to be essentially similar to a physical address book. See, e.g., United States v. Chan, 830 F.Supp.
13 531, 534 (N.D. Cal. 1993) (expectation of privacy in an "electronic repository for personal data"
14 analogous to that in personal address book or similar repository); see also United States v. Diaz,
15 2006 WL 3193370 *5 (N.D. Cal. Nov. 2, 2006) ("An electronic address book, such as the one
16 contained in defendant Fort's cellular phone, is in essence the same as a physical address book.").

17 In United States v. Lynch, 908 F.Supp. 284 (D.V.I. 1995), for example, the district court
18 upheld the seizure of a pager from the defendant's person at his arrest, and the search of the
19 pager and recording of numbers stored in it. Finding the case closer to Robinson and its progeny
20 than to Chadwick, the district court held: "Just as police can lawfully search the contents of an
21 arrestee's wallet or address book incident to an arrest, we hold that the agents here could lawfully
22 search the contents of Thomas' pager incident to his arrest." 908 F.Supp. at 288. In United
23 States v. Brookes, 2005 WL 1940124 (D.V.I. June 16, 2006), the district court extended that
24 reasoning to uphold the seizure of a cell phone and pager from the defendant's person at his
25 arrest, and to the later search of phone numbers stored in the defendant's cell phone. Id. * 3.

26 Moreover, in United States v. Cote, 2005 WL 1323343 (N.D. Ill. May 26, 2005), the
27 district court upheld a station house search of a cell's call log, phone book, and wireless web
28 inbox. The court found that the cell phone was similar to items such as wallets and address

1 books, which can be searched incident to arrest. The district court reasoned:

2 the fact that the contents of the phone may not have been searched at the scene of
 3 the arrest does not make it improper. It appears, from the FBI's 302 report, the
 4 phone was searched two and a half hours after the arrest was made and Cote was
 5 taken to a Cook County police station. This short lapse in time "is not sufficient
 6 to invalidate the search . . . because 'searches and seizures that could be made on
 7 the spot at the time of arrest may legally be conducted later when the accused
 8 arrives at the place of detention.'" Rodriguez, 995 F.2d at 778 (quoting United
States v. Edwards, 415 U.S. 800, 803 . . . (1974)). Since Cote's phone was
 9 searched soon after he arrived at the police station, the search of the phone was
 10 permissible as a search incident to arrest.

11 2005 WL 1323343 *6.²

12 Here, the station house search of defendants' cell phones no more than three and one-half
 13 hours after their arrests was valid under United States v. Edwards and its progeny. The cell
 14 phones were, like wallets or address books, seized from the persons of the defendants. See
 15 Passaro, 624 F.2d at 944; Lynch, 908 F.Supp. at 288. The cell phones were first seized at the
 16 station house; none of them was taken into exclusive law enforcement control at the time of the
 17 arrests at or near 922 Capitol Street. In all these respects, the searches were dissimilar to those
 18 invalidated in Chadwick and Monclavo-Cruz. In short, the defendants were lawfully arrested,
 19 and the cell phones were seized from their persons and searched within three and one-half hours.
 20 See Edwards, 415 U.S. at 802-03 (lapse of ten hours); cf. Cote, 2005 WL 1323343 at *6 (search
 21 two and one-half hours after arrest deemed "short lapse in time" under Edwards rule).³

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23 ² Cote, of course, is an unpublished district court opinion from another jurisdiction.
 24 The government cites the case, and quotes it here, so that the Court may consider not just the
 25 result but the underlying reasoning in that opinion, and may determine for itself what weight (if
 26 any) to accord that district court's ruling.

27 ³ Defendants urge that the rationale of these cases should not apply to a cell phone,
 28 because it is "more analogous to a computer" and may contain functions and data beyond the
 storing of names and telephone numbers. See Defendant Ly's 12/12/06 Joinder at 5-6. The Court
 need not reach this issue, because in this case the record reveals that the officers did not search
 "personal photographs and video, internet capacity, emails, text messages [or] personal
 calendars." Id. at 6. Here, the officers accessed those portions of the cell phones that operated
 like standard, paper-based address books. This case falls under the rule of Edwards and its
 progeny, including Holzman, 871 F.2d at 1504-05; Rodriguez, 995 F.2d at 778; and Passaro, 624
 F.2d at 944; Lynch, 908 F.Supp. at 288; see also Curd, 141 F.3d at 843.

1 **B. The Search of Each Defendant's Cell Phone**
2 **Also Constituted a Lawful Booking Search**

3 A related but distinct warrant exception is the booking search. See Illinois v. Lafayette,
4 439 U.S. 640, 643-44 (1983). In Illinois v. Lafayette the Supreme Court upheld the warrantless
5 search of a purse-type shoulder bag at the police station following the defendant's arrest. The
6 Court explained that this "well-defined exception to the warrant requirement," id. at 643 (citing
7 South Dakota v. Opperman, 428 U.S. 364 (1976)) is a form of inventory search which "is not an
8 independent legal concept but rather an incidental administrative step following arrest and
9 preceding incarceration." Id. at 644. The legitimate governmental interests served by the
10 warrantless booking search, the Court found, include deterrence of theft by police employees and
11 of false claims against such employees, protection of officers and arrestees from concealed
12 weapons, and verification of the arrestee's identity through inspection of his possessions. Id. at
13 646; see also Colorado v. Bertine, 479 U.S. 367, 372-73 (1987) (upholding inventory search of
14 van of arrestee, and noting underlying rationales).

15 Recognizing the need for a "single familiar standard" like that set forth in New York v.
16 Belton, 453 U.S. 454, 458-60 (1981) (bright-line rule allowing search of entire passenger
17 compartment and all containers in it, whether open or closed), the Court concluded: "It is
18 evident that a station house search of every item carried on or by a person who has lawfully been
19 taken into custody by the police will amply serve the important and legitimate governmental
20 interests involved." 462 U.S. at 648; see also Colorado v. Bertine, 479 U.S. at 743 (a "single
21 familiar standard is essential to guide police officers"). It thus held that:

22 it is not "unreasonable" for police, as part of the routine procedure incident to
23 incarcerating an arrested person, to search any container or article in his
possession, in accordance with established inventory procedures.

24 462 U.S. at 648 (footnoted omitted).

25 A valid "inventory search" cannot be undertaken "in bad faith" or for "the sole purpose of
26 investigation." Colorado v. Bertine, 479 U.S. at 372. However, a booking search that serves the
27 dual purposes of inventorying the arrestee's items and investigating suspected criminal activity is
28 valid. United States v. Bowhay, 992 F.2d 229, 231 (9th Cir. 1993).

1 The Court may find useful the written Order of United States District Judge William A.
 2 Alsup, finding that a cell phone can be searched without a warrant as part of a “booking search”
 3 at the police station. In United States v. Diaz, CR 05-0167 WHA, [2006 WL 3193370] (N.D.
 4 Cal. Nov. 2, 2006), District Judge Alsup upheld the booking search of a cellular telephone taken
 5 from an arrestee after he was transported to the police station for booking.

6 Judge Alsup found that the cell phone was lawfully searched incident to defendant Fort’s
 7 arrest during the booking process:

8 Collecting defendant Fort’s belongings at the station during the booking
 9 process did not violate defendant Fort’s Fourth Amendment rights. Searches
 10 during the booking process are “incidental administrative steps” and do not
 11 violate the Fourth Amendment’s preclusion against warrantless searches and
 12 seizures. Illinois v. Lafayette, 462 U.S. 640, 644 (1983). This Fourth
 13 Amendment exception “permits warrantless searches incident to custodial arrests,
 14 and has traditionally been justified by the reasonableness of searching for
 15 weapons, instruments of escape, and evidence of crime when a person is taken
 16 into official custody and lawfully detained.” United States v. Edwards, 415 U.S.
 17 800, 802-02 (1974) (citing United States v. Robinson, 414 U.S. 218 (1973),
 18 Chimel v. California, 395 U.S. 752, 755 (1969); Weeks v. United States, 232 U.S.
 19 383, 392 (1914)).

20 2006 WL 3193770 *4. Alternatively, the district court found, the search was a valid probation
 21 search.⁴

22 Important to District Judge Alsup’s ruling was his finding that cell phones are analgous,
 23 for Fourth Amendment purposes, to physical address books. He reasoned:

24 An electronic address book, such as the one contained in defendant Fort’s cellular
 25 phone, is in essence the same as a physical address book. The search of address
 26 books has been accepted by the Ninth Circuit as valid incident to arrest. [United
 27 States v. Holzman, 871 F.2d1496, 1501 (9th Cir. 1989)]. While this case does not
 28 involved a search incident to arrest, both searches incident to booking and
 searches incident to probationary search conditions are well-recognized
 exceptions to the Fourth Amendment.

Id. *5.

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4 District Judge Alsup also noted that the arrestee was on probation, with a search
 condition, and found that the discovery, during the booking process, of small amounts of
 marijuana and crack cocaine concealed in his clothing gave the officers reasonable suspicion to
 search the cell phone. Accordingly, the court found, “[w]hether incident to booking, or under the
 probationary search condition, the search of the cell phone was lawful.” Id. *5.

1 The searches challenged here were valid booking searches. The cell phones were first
2 seized during the booking process at Taraval Station and were searched shortly thereafter, before
3 the property envelopes were taken by the Booking Officer for safekeeping. Pursuant to standard
4 SFPD policy (see Martinovich 12/22/06 Decl. ¶ 5; Watts 10/06/06 Decl. ¶ 6(a)-(e)), the cell
5 phones were removed from the defendants, placed on the booking counter, and inventoried along
6 with other items of personal property such as wallets, keys, and jewelry. It is immaterial that
7 Inspector Martinovich had an investigatory purpose in mind in requesting that the cell phones be
8 searched (Martinovich 12/22/06 Decl. ¶ 6); this investigation was not the sole purpose for the
9 search, and there was no bad faith involved. Bowhay, 992 F.2d at 231; Colorado v. Bertine, 479
10 U.S. at 372.

11 **IV. CONCLUSION**

12 The warrantless search of the three cell phones was a lawful “delayed” search of items
13 closely associated with the person of the defendants, undertaken incident to the defendants’
14 arrests no more than three and one-half hours earlier. It was also a lawful booking search
15 undertaken at the police station in the course of defendants’ booking following their arrests.
16 Because these were reasonable searches under the Fourth Amendment, defendants’ joint motion
17 should be denied.
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21 DATED: December 22, 2006

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