Randall Garteiser (Cal Bar # 231821)
SINGER & GARTEISER LLP
1766 Union Street
San Francisco, CA 94123
Telephone: (415) 568-0553
Facsimile: (415) 568-0560
Email: randall@sftrialattorneys.com

Jennifer Granick, Esq. (Cal Bar # 168423)
Marcia Hofmann, Esq. (Cal Bar # 250087)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
Email: jennifer@eff.org
marcia@eff.org

Attorneys for Defendant: Christian Taylor

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRISTIAN TAYLOR, Defendant.	Case No.: SC070057 (NF388922A) DA Case No: INFO0405593 (felony) **NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE AND TO TRAVERSE AND TO QUASH SEARCH WARRANT** DATE: February 18, 2009 TIME: 10:00 a.m. PLACE: 2A **[Submitted Concurrently With: Proposed Order; Supporting Declarations Of Randall Garteiser And Christian Taylor]**

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on February 18, 2010, at 10:00 a.m., or as soon thereafter as the matter may be heard in the courtroom cited in the above-entitled court, Defendant Christian Taylor will move TO SUPPRESS EVIDENCE AND TO TRAVERSE AND TO QUASH SEARCH WARRANT.

Defendant moves to suppress (1) all evidence seized from the Defendant's car; (2)

all evidence seized from the defendant's iPhone is suppressed; (3) all evidence obtained pursuant to the warrant; and (4) all fruits thereof.

The motion will be made on the concurrently filed memorandum of points and authorities, the supporting declarations of Randall Garteiser and Christian Taylor, and any additional briefing or oral argument the Court may allow.

DATED: February 3, 2010

By _____
Randall Garteiser, Esq. (Cal Bar # 231821)
SINGER & GARTEISER LLP

Jennifer Granick, Esq. (Cal Bar # 168423)
Marcia Hofmann, Esq. (Cal Bar # 250087)
ELECTRONIC FRONTIER FOUNDATION

Attorneys for Defendant
CHRISTIAN TAYLOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND TO TRAVERSE AND TO QUASH SEARCH WARRANT

I. INTRODUCTION

Mr. Taylor is charged with two counts of identity theft, commercial burglary, and attempted grand theft.

This suppression motion relates to the improper search of Defendant Taylor's car and iPhone,[1] and the improper issuance of a warrant purporting to authorize more extensive analysis of the iPhone based on the initial illegal searches.

On November 3, 2009, Mr. Taylor attempted to purchase Blackberry phones from a Sprint PCS ("Sprint") store for his company, Hype Univercity Online ("Hype Univercity"). He is the founder of Hype Univercity. His company assists with issuing prepaid Visa credit cards with artists and celebrities on the cover of the cards. (Taylor Decl., ¶ 3, Ex. 1.)[2] Mr. Taylor wanted to purchase 30 phones to provide them to his independent contractors working for Hype Univercity to get in contact with celebrities to promote his business idea. (*Id.* at ¶¶ 4, 7.) For example, Hype Univercity worked with the Jackson family to put pictures of the late Michael Jackson on one of its credit cards. (*Id.* at ¶ 3.)

To avoid customers opening up accounts with incorrect Tax ID numbers and defaulting on accounts, Sprint has a fraud avoidance checklist. (Garteiser Decl., Ex. A.)[3] On November 3, 2009, the sales clerk at the Sprint store informed Mr. Taylor that although he had a valid driver's license indicating his name as Christian Taylor, he was lacking additional required documentation for his company – its Articles of Incorporation and tax ID information. (Taylor Decl., ¶ 4.)

---

[1] An iPhone is a smartphone sold by Apple. It integrates cell phone technology, iPod, camera, text messaging, email, and Web browsing. Data and applications can be sent to this device via a wireless signal or Apple's iTunes software, which is used to organize music, videos, photos, and applications. (*See* PC MAGAZINE, Encyclopedia, available at http://www.pcmag.com/ encyclopedia_term /0, 254 2,t=iPhone&i=45393,00.asp, as visited on February 3, 2010.)

[2] An example of a Hype Univercity marketed credit card is attached to the supporting declaration of Christian Taylor as Exhibit 1 (hereinafter, "Taylor Decl.").

[3] Attached as Exhibit A to the supporting declaration of Attorney Randall Garteiser (hereinafter, "Garteiser Decl.").

Mr. Taylor informed the clerk he would return the next day and did so. As soon as Mr. Taylor arrived at the Sprint store, a Sprint employee called the police. Daly City Police Officers Palaby, Green, and Keyes were dispatched to the Sprint Store. Officer Palaby immediately arrested Mr. Taylor without providing him the opportunity to present his valid documentation, including Articles of Incorporation for Hype Univercity, a facsimile from the I.R.S. directed to Mr. Taylor as President of Hype Univercity and providing the company's tax ID number, and his valid Arizona driver's license indicating his name as Christian Taylor – documents that proved he was not committing fraud. (Taylor Decl., Ex. 2.)

Officer Green handcuffed Mr. Taylor and asked where his car was parked. Mr. Taylor told Officer Green that his car was parked in front of the store. Officer Green asked Mr. Taylor if they could search the car. Mr. Taylor refused to consent to the search. (Garteiser Decl., ¶ 7.) Mr. Taylor allegedly claimed that he had money in his car and wanted to retrieve it. Officer Palaby obtained the car keys, entered the car, searched the entire car from top to bottom, including the passenger compartment and the trunk, and seized a small luggage bag containing a notebook and money, as well as an old empty plastic shopping bag that had a few documents inside of it at the bottom. The latter was located in the trunk of the car. (Garteiser Decl., ¶ 7.) Officer Keyes then informed Mr. Taylor that his car would be impounded incident to arrest.

Mr. Taylor was transported to the prisoner processing center. Detective Bocci met the officers at the processing center. Officer Green gave Detective Bocci the iPhone that the officers obtained from Mr. Taylor when he was arrested. Mr. Taylor's iPhone was password protected. (Taylor Decl., ¶ 8.) Rather than placing the phone in inventory, as is appropriate when an item is seized incident to arrest, Officer Bocci bypassed the password on the phone and searched its contents. (Taylor Decl., ¶ 11; Garteiser Decl. ¶ 11.)

More than two hours later after his arrest, the officers interviewed Mr. Taylor. Detective Bocci told Mr. Taylor that he knew how to access iPhone information because he used to own one. The officers then questioned Mr. Taylor about information they found during the search of the

iPhone, including questions about why his girlfriend needed a nice new outfit to wear on Friday. Mr. Taylor responded to these questions. (Taylor Decl., ¶ 11; Garteiser Decl. ¶ 11.)

The information officers found stored on the iPhone, or by accessing Mr. Taylor's email accounts via his iPhone includes, but is not limited to, the number 510-378-**** displayed on the phone, the number Defendant provided on the booking sheet, a large amount of information, including phone book contacts, called phone numbers, emails, text messages, Internet search history, and photos. Officer Bocci proceeded to write down the information, but found it was too extensive. He then placed the iPhone into evidence with the intention of seeking a warrant. The information the officer retrieved from the search was incorporated into the search warrant, which he did not apply for and which did not issue until November 12, 2009. (Garteiser Decl., ¶¶ 12; 13.)

II. THERE WAS NO PROBABLE CAUSE TO ARREST MR. TAYLOR

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement personnel. (U.S. Const., 4th Amend.; *People v. Thompson* (2006) 38 Cal.4th 811, 817; *People v. Camacho* (2000) 23 Cal.4th 824, 829-830; *People v. Williams* (2006) 145 Cal.App.4th 756, 761.) A warrantless search or seizure is presumed to be illegal (*People v. Williams*, *supra*, at 761; *Miranda v. City of Cornelius* (9th Cir.2005) 429 F.3d 858, 862), and the prosecution has the burden of showing the officers' actions were justified by an exception to the warrant requirement. (*People v. Strider* (2009) 177 Cal.App.4th 1393, 1400.) Here, as explained below, search incident to arrest and inventory search are not applicable exceptions to the warrant requirement.

A prerequisite to an inventory search or search incident to arrest is that probable cause existed to make the arrest in the first place. Here, probable cause did not exist. On November 3, 2009, Mr. Taylor went to a Sprint store to purchase 30 phones for his business Hype Univercity. In response, the clerk informed him that as part of Sprint's fraud protection plan Mr. Taylor would have to send an email to the store, provide a copy of his company's tax ID number, his company's articles of incorporation, a photo identification card issued by a state or the U.S. government, and

send an email to the Sprint store from his business account. (Taylor Decl., ¶ 4; Garteiser Decl., Ex. A.)

Mr. Taylor complied and sent an email to the store. (Taylor Decl., ¶ 4.) He informed the clerk that he would return the next day with the requested information. When he did so, the clerk stalled Mr. Taylor until the police came. The police arrested Mr. Taylor without any investigative questioning whatsoever, and stated as a basis for probable cause that he was "providing false financial statements." (Garteiser Decl., Ex. B - Arrest Probable Cause Determination.) Mr. Taylor had in his hands when he was arrested actual (not fraudulent) financial statements for Hype Univercity, including a copy of the Articles of Incorporation for Hype Univercity and the tax ID number issued to Hype Univercity. (Taylor Decl., ¶¶ 4,5, Ex. 2.)

The sole basis for probable cause is the allegation that Mr. Taylor allegedly provided the Sprint PCS sales clerk an incorrect address. (Garteiser Decl., Ex. B.) Although the Sprint PCS sales clerk wrote the proper name "Hype Univercity" at the top of the fraud protection checklist used by Sprint, he appears to have conducted one of the last steps in the fraud detection analysis, the reverse look-up test, on the wrong company, "Hype Agency." The sales clerk then called the owner of Hype Agency, Ms. Kate Bright, who said she did not know who Mr. Taylor was and did not recognize the tax ID number was for his company but could say with confidence that it wasn't the tax ID for her company. However, the Internal Revenue Service fax Mr. Taylor had in his hands when he was arrested provided to Sprint the proper address of Hype Univercity as 1018 N 63rd St., Omaha, NE 68132. (*See* Taylor Decl., Ex. 2 at 4.)

Accordingly, probable cause did not exist to arrest Mr. Taylor, and the later searches of his iPhone and car were unconstitutional under the Fourth Amendment.

III. UNCONSTITUTIONAL WARRANTLESS INVESTIGATORY SEARCH OF THE CAR

Mr. Taylor has standing to challenge the search of his car. A person driving another's vehicle with the owner's full permission and knowledge has a legitimate expectation of privacy. (*See*, *e.g.*, *U.S. v. Cooper* (11th Cir. 1998) 133 F.3d 1394, 1398; *U.S. v. Portillo* (9th Cir. 1980) 633

F.2d 1313, 1317 [defendant, who had both permission to use friend's automobile and the keys to the ignition and trunk, and could exclude all others except the owner, had a legitimate expectation of privacy necessary to challenge the propriety of a search of the vehicle].)

An inventory search is constitutionally unreasonable when used as a ruse to conduct an investigatory search. (*Colorado v. Bertine* (1986) 479 U.S. 367, 371-372; *People v. Steeley* (1989) 210 Cal.App.3d 887, 891-892.) In South *Dakota v. Opperman* (1976) 428 U.S. 364, the United States Supreme Court held that police may constitutionally impound vehicles that jeopardize public safety or the efficient movement of traffic, as part of their "'community caretaking functions.'" (*Id.* 428 U.S. at 368-369.) Whether impoundment is warranted under the community caretaking doctrine "'depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.'" (*People v. Williams*, *supra*, 145 Cal.App.4th at 761.)

"If officers are warranted in impounding a vehicle, a warrantless inventory search of the vehicle pursuant to a standardized procedure is constitutionally reasonable." (*People v. Williams*, *supra*, 145 Cal.App.4th at 761; *see also People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053.) Police officers may exercise discretion in conducting an inventory search, "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." (*Colorado v. Bertine*, *supra*, 479 U.S. at 375; *Florida v. Wells* (1990) 495 U.S. 1, 3-4.)

However, "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." (*Florida v. Wells*, *supra*, 495 U.S. at 4; *People v. Needham* (2000) 79 Cal.App.4th 260, 266.) Where there is no standardized criteria or established routine whatsoever, an inventory search is "not sufficiently regulated to satisfy the Fourth Amendment." (*Florida v. Wells*, *supra*, 495 U.S. at 4; *People v. Williams* (1999) 20 Cal.4th 119, 126.)

When an officer impounds a vehicle, her actions must be reasonable in light of the justification for the impound and inventory exception to the warrant requirement. (*People v.*

Williams, *supra*, at 145 Cal.App.4th at 761.) In *People v. Williams*, *supra*, 145 Cal.App.4th 756, the court concluded that an impound of a legally parked vehicle was unreasonable because it did not serve a community caretaking function. A police officer observed the defendant driving without a seat belt and made a traffic stop. A computer check revealed an outstanding arrest warrant for the defendant, and the officer placed him under arrest. The officer decided to impound the vehicle "because 'the driver in control of that vehicle was being arrested.'" (*Id.* at 759-760.) The court suppressed the evidence because the car could have been locked and lawfully left where the defendant had parked it, but the officer did not give the defendant the opportunity to do so. (*Id.*)

Here, Mr. Taylor's car was legally parked in a mall parking lot space. There is no evidence that the car needed to be towed to serve a community caretaking function. The car did not impede the flow of traffic. There is no evidence that there was any concern that the car may be stolen or vandalized. Mr. Taylor could have simply locked and left the car where it was. Also, another individual, such as the owner of the automobile (his girlfriend), could have come to get the vehicle. In fact, his girlfriend did go and pick up the car from impound that day. An officer called and told her where to retrieve it from as he transported Mr. Taylor from the Sprint store to the prisoner processing center. (Taylor Decl., ¶ 10.)

The search was non-consensual, investigatory, and warrantless. Officer Green obtained Mr. Taylor's car keys from his pocket while he was in handcuffs. The officer rummaged through Mr. Taylor's car searching the glove compartment, underneath the seats and even inside closed containers, including a small luggage bag that was in the back seat of the car and plastic bags in the trunk. Inside the luggage bag was cash and a notepad. The plastic bag contained documents. (Garteiser Decl., ¶ 8.)

The "inventory search" was simply a pretext for investigatory exploration, and any information found in the car must be suppressed. The vehicle report does not indicate a single other piece of property that was located in the car. (Garteiser Decl., Ex. E – Completed CHP 180 Form, signed by Officer Palaby.) No officer completed a list of the actual contents of the vehicle. This is

because the search was investigatory, and not allowed under the inventory search exception. (*Id.*)

Further support that Officer Green's "inventory search" was a ruse is that he did not have the car towed to the police impound yard. The car was available for pick up from the tow truck lot as soon as it got there. It was never delivered to any police impound facility for safekeeping. (Garteiser Decl., Ex. E; Taylor Decl., ¶ 10.)

To preserve any evidence of a crime that might have been in the Defendant's car, Officer Green could have impounded the car and held it until he obtained a warrant. Instead, Officer Green "impounded" the car incident to arrest as a ruse to conduct an improper investigatory search in a private strip mall parking lot.

Furthermore, Officer Green should have obtained, but did not, a warrant to open the containers inside the car, including the small luggage bag and the plastic bag located inside the trunk containing receipts from a Sprint store. (*People v. Needham*, *supra*, 79 Cal.App.4th at 267.) Police may exercise discretion in opening containers during inventory searches provided that discretion is exercised according to "standardized criteria" or "established routine" based on some standard other than suspected criminal activity. (*Id.* at 266.) There is no indication that the search of Mr. Taylor's car occurred pursuant to policy. Nor did the search conform with the rationale for allowing warrantless inventory searches. Officers did not need to read any documents in the car in order to protect Mr. Taylor's property or safeguard the police from danger. Accordingly, the search of the car without a warrant was unconstitutional and evidence obtained pursuant to that search must be suppressed. (*Murray v. U.S.* (1988) 487 U.S 533; *Wong v. U.S.* (1963) 371 U.S 471, 485-486.)

IV. UNCONSTITUTIONAL SEARCH OF MR. TAYLOR'S IPHONE

The search incident to arrest doctrine likewise does not justify Detective Bocci's warrantless search of Mr. Taylor's iPhone at the police station hours after his arrest.

Search incident to arrest is an exception to the general constitutional requirement that law enforcement officers must obtain a warrant to perform a search. (*U.S. v. Hudson* (9th Cir. 1996)

100 F.3d 1409, 1419.) The purpose underlying this exception is the "need of law enforcement officers to seize weapons or other things which might be used to assault an officer or effect as escape, as well as the need to prevent the loss or destruction of evidence." (*U.S. v. Park* (N.D. Cal. May 23, 2007) 2007 WL 1521573 (unpublished) at *6, citing *Hudson,* 100 F.3d at 1419.) The Supreme Court has found that "property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists." (*U.S. v. Chadwick* (1977) 433 U.S. 1, 15, abrogated on other grounds, *Cal. v. Acevedo* (1982) 500 U.S. 565.)

The search incident to arrest exception does not give police free rein to search an arrestee's private information for investigatory purposes. The exception is intended to provide safety to law enforcement and bystanders and to prevent the destruction and concealment of evidence. (*See Chimel v. Cal.* (1969) 395 U.S 752.) Law enforcement may also collect an arrestee's property to ensure that it is not stolen. (*Illinois v. Lafayette* (1983) 462 U.S 640, 646.) But such searches "must not be a ruse for a general rummaging in order to discover incriminating evidence." (*U.S. v. Feldman* (9th Cir. 1986) 788 F.2d 544, 553.)

This case is similar to *Park*, in which law enforcement officers used the search incident to arrest doctrine to search several suspects' cell phones for telephone numbers during the booking process, approximately an hour and a half after the suspects' arrests. (2007 WL 1521573, *supra*, at *5.) Judge Illston held that the government did not meet its burden to establish that an exception to the warrant requirement applied to justify the searches. (*Id.*) Specifically, she found that cell phones should be considered "possessions within an arrestee's immediate control" -- which receive full Fourth Amendment protection at the police station -- rather than part of "the person," an area in which there is a reduced expectation of privacy after arrest. (*Park*, 2007 WL 1521573 at * 8, citing *Chadwick*, *supra*, 433 U.S. at 16 n.10.) Critical to her decision was the fact that "[i]ndividuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages." (*Id.*)

Furthermore, the court noted that the searches went "far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence." (*Id.* at *8.)

Like the defendants in *Park*, Mr. Taylor was at the prisoner processing center when Detective Bocci searched his password-protected iPhone "that evening" — hours after Mr. Taylor's arrest at 3:45 p.m. (Garteiser Decl., ¶ 11.) At the time of the search, Mr. Taylor was in custody and posed no danger to any member of law enforcement, nor any threat of destroying evidence. (Taylor Decl., ¶ 8.) Detective Bocci bypassed the iPhone's password to access the device and find further leads into the investigation, including text messaging, contact phone numbers, photographs and emails which were too extensive to copy down. (Garteiser Decl., ¶¶ 11-13.)[4] Like the search in *Park*, Detective Bocci's warrantless search of Mr. Taylor's iPhone is not justified by the search incident to arrest doctrine. For this reason, all evidence obtained from the iPhone should be suppressed.

V. STORED COMMUNICATIONS ACT

Detective Bocci may have illegally accessed email stored on the iPhone in violation of the Stored Communications Act. The iPhone was configured to pull email off of a remote third-party server. (Taylor Decl., ¶ 9.) Detective Bocci was not authorized to access this remote server, especially because both the email account and the iPhone were password-protected. (Taylor Decl., ¶ 8.) By circumventing the passwords, Detective Bocci unlawfully accessed Mr. Taylor's email messages in violation of 18 U.S.C. § 2701(a), which prohibits anyone from "intentionally access[ing] without authorization a facility through which an electronic communication service is provided" and "thereby obtain[ing] . . . access to a wire or electronic communication while it is in electronic storage in such system." (18 U.S.C. § 2701(a).) That illegal act is another reason why the evidence should be suppressed as a matter of due process.

[4] A password may demonstrate that an individual had a reasonable expectation of privacy. (*U.S. v. Heckenkamp* (9th Cir. 2007) 482 F.3d 1142, 1147; *U.S. v. Buckner* (4th Cir. 2007) 473 F.3d 551, 554 n.2.) The fact that Mr. Taylor password-protected his phone confirms that the contents of the device were private.

VI. INSUFFICIENCY OF THE WARRANT

A reviewing court assesses the totality of the circumstances under which a warrant is issued and invalidates the warrant when those circumstances fail to establish probable cause. (*Illinois v. Gates* (1983) 462 U.S. 213; *Massachusetts v. Upton* (1984) 466 U.S. 727.) Mere suspicion, common rumor, or even strong reason to suspect are not enough to establish probable cause. (*Henry v. United States* (1959) 361 U.S. 98, 101.) "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." (*Illinois v. Gates*, *supra*, 462 U.S. at 239.) Additionally, there must be a sufficient likelihood that seizable property "will be found in a particular place." (*Id.* at 238.)

"If lawfully obtained information in a search warrant affidavit supports probable cause for issuance of a warrant, the warrant will be upheld even if additional, illegally obtained, information is also contained in the warrant affidavit." (*People v. Angulo* (1988) 199 Cal.App.3d 370, 375; *People v. Luttenberger* (1990) 50 Cal.3d 1, 10; *People v. Torres* (1992) 6 Cal.App.4th 1324, 1334 [Per Smith, J., "the observations [in the affidavit] gained [from illegally obtained evidence] must be stricken and the affidavit retested for probable cause."].) It is the prosecution's burden to "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." (*Nix v. Williams* (1984) 467 U.S. 431, 444.)

Here, the allegations in the search warrant affidavit on Page 4, lines 10 through 13 must be stricken because they refer to information found during the illegal car search. Additionally, Page 6, lines 1 through 15 must be stricken. The first sentence describes information found in the illegal search of Mr. Taylor's car. The remaining sentences describe information found in the illegal search of the database of Mr. Taylor's iPhone.

Without these sentences, there is no factual support for the claim on Page 9, lines 1-3 that evidence of criminal activity could be found in the voicemail messages and "stored electronic data within" Mr. Taylor's iPhone. No legally obtained information provides a nexus between the contents of the iPhone and any of Mr. Taylor's efforts to buy phones at the Sprint Store with a false

address. The store clerk did not observe Mr. Taylor using his phone during the transaction, nor was there any reason to believe that Mr. Taylor had used the device to communicate with third parties about the attempted purchase. The only reason to believe that anything relevant to the case might be on the phone derived from the officer's search of the device after Taylor was already arrested and transported to jail.

Moreover, there is no reason to believe, absent the unlawful search of the iPhone, that officers would have decided to obtain a warrant to search the device in the first place. The inevitable discovery exception requires the court "to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." (*People v. Hughston* (2008) 168 Cal.App.4th 1062,1072.) In *Hughston*, the defendant was selling illegal drugs from inside a vehicle parked in a tent structure he'd built in the parking lot at a Mendocino County music festival. An undercover officer observed the defendant make two hand-to-hand sales of what he suspected, based on his training and experience, were narcotics. The officer arrested the defendant, and then located the vehicle covered by a tarp structure. The officer entered the tarp structure and then the vehicle, where he found narcotics. The court suppressed the evidence as an illegal search of the tarp structure and vehicle. It was not enough that there was probable cause to search the vehicle. Instead, to justify application of the inevitable discovery exception, law enforcement must demonstrate by a preponderance of the evidence that, due to "a separate line of investigation, application of routine police procedures, or some other circumstance," the evidence would have been discovered by lawful means. *Id.* The showing must be based not on speculation but on "demonstrated historical facts capable of ready verification or impeachment." (*Hughston, supra,* 168 Cal.App.4th at 1072, citing *Nix*, *supra*, 467 U.S. at 444-445, fn. 5.) The inevitable discovery exception requires the court "'to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.'" (*Hughston, supra,* 168 Cal.App.4th at 1072, citing *U.S. v. Cabassa* (2d Cir.1995) 62 F.3d 470, 473.) The government provided no evidence that the defendant's companions would not

have gained access to the interior of the vehicle and removed or destroyed the drugs. (*Hughston, supra,* 168 Cal.App.4th at 1073, (citing a number of courts for the proposition that if someone would have removed or destroyed the evidence at issue, the independent source exception does not apply)).

Here, there is no indication that the Daly City Police would have retained and sought a warrant to search Mr. Taylor's phone if not for the initial illegal review of its contents. There was no independent line of investigation, routine police procedure, or other circumstance that would have led them to the phone. Rather, Mr. Taylor would have been released from jail and given back his property, including the iPhone. At that point, he would have been free to continue to use the device, or erase its contents. The officers would never have searched it. Therefore, the warrant must be traversed and any evidence or information obtained also suppressed.

//

//

VII. CONCLUSION

There was no probable cause to arrest Mr. Taylor. Neither the search of his vehicle nor the search of his iPhone was justified by any exception to the warrant requirement. And because any probable cause in support of the warrant that did eventually issue relied on evidence obtained in these illegal searches, it must be traversed and quashed, and any evidence obtained pursuant to it suppressed.

DATED: February 3, 2010

By _____
Randall Garteiser, Esq. (Cal Bar # 231821)
SINGER & GARTEISER LLP

Jennifer Granick, Esq. (Cal Bar # 168423)
Marcia Hofmann, Esq. (Cal Bar # 250087)
ELECTRONIC FRONTIER FOUNDATION

Attorneys for Defendant
CHRISTIAN TAYLOR