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UMER HAYAT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No.: CR. NO. S-05-240 GEB
)	
Plaintiff,)	DEFENDANT’S OPPOSITION TO
)	GOVERNMENT’S APPEAL FROM
vs.)	MAGISTRATE JUDGE’S ORDER
)	GRANTING RELEASE ON BAIL
UMER HAYAT,)	
)	Date: October 17, 2005
Defendant.)	Time: 10:00 a.m.
)	Court: Hon. Garland E. Burrell, Jr.
_____)	

I. INTRODUCTION

Defendant UMER HAYAT respectfully requests that the Court affirm the order of Magistrate Judge Gregory G. Hollows, releasing Defendant under specific terms and conditions. The government’s appeal fails in light of Ninth Circuit precedent that Defendant cannot be detained based on a perceived danger to the community, (*United States v. Twine*, 344 F.3d 987 (9th Cir. 2003)), and the government ultimately fails to demonstrate that the Magistrate Judge’s conditions of release would not reasonably assure Defendant’s appearance at future court proceedings.

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1 **II. STANDARD OF REVIEW**

2 The court in *Koenig* explained that a de novo standard of review applies to a magistrate’s
3 order regarding detention:

4 As the district court points out, a classical application of the de novo concept would mean
5 that the whole process before the district court would start from scratch, as if the
6 proceedings before the magistrate had never occurred. As the district court recognizes,
7 that is often not what appellate courts mean when they talk of de novo review. *E.g.*,
8 *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir.) (en banc) (court of appeals
9 reviews de novo question of exigent circumstances justifying officers' entry of building),
10 *cert. denied*, 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct. 101 (1984). It may be too late to
11 restore the original precision to the term "de novo," but we can at least state what we
12 conceive it to mean in the context of a district court's review of a magistrate's detention
13 order. Clearly, the district court is not required to start over in every case, and proceed as
14 if the magistrate's decision and findings did not exist. The district court erred, however, in
15 ruling that it could review the magistrate's findings under a "clearly erroneous" standard
16 of deference. It should review the evidence before the magistrate and make its own
17 independent determination whether the magistrate's findings are correct, with no
18 deference. If the performance of that function makes it necessary or desirable for the
19 district judge to hold additional evidentiary hearings, it may do so, and its power to do so
20 is not limited to occasions when evidence is offered that was not presented to the
21 magistrate. *Delker*, 757 F. 2d at 1394-95. The point is that the district court is to make
22 its own "de novo" determination of facts, whether different from or an adoption of the
23 findings of the magistrate. It also follows, as the *Harris* opinion agrees, that the ultimate
24 determination of the propriety of detention is also to be decided without deference to the
25 magistrate's ultimate conclusion. *See Harris*, 732 F. Supp. at 1032-33; *Motamedi*, 767
F.2d at 1406. The district court in this case erred, therefore, in concluding that it should
not set aside the magistrates' factual determinations unless they were clearly erroneous.
However, the district court also stated that the magistrates' findings were the same ones
that the district court would have made on the evidence presented to the magistrate. We
conclude that this determination renders harmless the district court's error in the standard
of review. Even under the proper "de novo" requirement, the district court, while
empowered to do so, is not required to hold an evidentiary hearing when no evidence is
offered that was not before the magistrate.

21 *United States v. Koenig*, 912 F.2d 1190, 1192-1193 (9th Cir. 1990).

22 **III. SUMMARY OF FACTS**

23 Defendant Umer Hayat was arrested on or about June 5, 2005 on suspicion of making a
24 false statement and of providing material support to terrorists and designated terrorist
25 organizations. At an initial court appearance on June 7, 2005, Defendant appeared before The

1 Honorable Magistrate Judge Peter Nowinski. The defendant's request for setting of bail was
2 rejected based on the government's allegations that (1) defendant had a home in Pakistan to
3 which he could flee, and (2) that defendant presented a danger to the public because of
4 allegations that he contributed financial assistance to his son and to an al-Qaida-sponsored
5 terrorist organization to help them train to kill Americans. A federal affidavit in support of a
6 search warrant for defendant's home alleged that defendant provided material support to
7 terrorists and designated terrorist organizations, in violation of 18 U.S.C. §2339A and §2339B.
8 In addition, a federal affidavit supporting the initial complaint against defendant alleged that the
9 training was conducted specifically to kill Americans in the United States.

10 Despite these sensational allegations, the Grand Jury returned an indictment that charged
11 defendant with only one count of making a false statement in violation of 18 U.S.C. §1001.
12 Defendant is not charged with providing material support to terrorists and designated terrorist
13 organizations.

14 On August 15, 2005, Defendant filed a motion for reconsideration of Judge Nowinski's
15 order on the basis that new facts emerged justifying reconsideration, namely that the indictment
16 returned against Defendant was only for false statement. At the hearing on the motion for
17 reconsideration, heard on August 22nd and 23rd, Magistrate Judge Drozd denied Defendant's
18 motion, but expressed doubt that Defendant's detention could be based on danger to the
19 community since there was no crime of violence charged.

20 On September 12, 2005, Defendant filed his second motion for reconsideration on the
21 basis that he was then prepared to post in excess of \$1.2 million dollars worth of real property as
22 security on a release bond.

23 On September 22, 2005, the grand jury convened again in this matter and returned a First
24 Superseding Indictment adding a new charge against Defendant Hamid Hayat for providing
25 material support to terrorists in violation of 18 U.S.C. §2339A. Otherwise, the First Superseding

1 Indictment contains the same charges as the indictment originally obtained against Defendants.
2 Thus, Defendant Umer Hayat is charged with the same count of making a false statement in
3 violation of 18 U.S.C. §1001.

4 After a June 7, 2005 hearing on Defendant's second motion for reconsideration,
5 Magistrate Judge Hollows found that a substantial security bond in the amount of \$1.2 million
6 dollars, combined with conditions akin to home detention and electronic monitoring, would
7 reasonably assure Defendant's appearance at future court appearances, and ordered release on
8 such conditions. This appeal by the government followed.

9 As of October 17, 2005, Defendant will have been in custody for 135 days. It is important
10 to note that the next status conference in this matter is scheduled for January 6, 2006. There is
11 currently no trial date set.

12 **IV.**
13 **THE BAIL REFORM ACT DOES NOT GRANT THE COURT THE**
14 **AUTHORITY TO DETAIN DEFENDANT ON THE GROUNDS OF DANGER TO**
15 **COMMUNITY BECAUSE HE IS NOT CHARGED WITH A CRIME OF**
16 **VIOLENCE.**

17 The government contends that the court may detain Defendant based on a perceived
18 danger to the community. This argument, however, was squarely rejected in *United States v.*
19 *Twine*, 344 F.3d 987 (9th Cir. 2003). In *Twine*, the defendant was charged with being a felon in
20 possession of a firearm. *United States v. Twine*, The district court ordered the defendant detained
21 on the sole basis of finding him a danger to the community. *Id.* In the alternative, the district
22 court also held that felon in possession of a firearm is a crime of violence, triggering the Bail
23 Reform Act's authority to detain the defendant without bail pending trial. *Id.*

24 On appeal, the Ninth Circuit addressed two distinct questions: (1) whether a defendant,
25 regardless of the charge, may be detained without bail based solely on a finding that they would
be a danger to the community, and (2) whether felon in possession of a firearm is a crime of

1 violence. *Twine*, 344 F.3d at 987-988. The Ninth Circuit answered the first question in short
2 form:

3 We are not persuaded that the Bail Reform Act authorizes pretrial detention without bail
4 based solely on a finding of dangerousness. This interpretation of the Act would render
5 meaningless 18 U.S.C. § 3142(f)(1) and (2). Our interpretation is in accord with our sister
6 circuits who have ruled on this issue. *See United States v. Byrd*, 969 F.2d 106 (5th Cir.
1992); *United States v. Ploof*, 851 F.2d 7 (1st Cir. 1988); *United States v. Himler*, 797
F.2d 156 (3d Cir. 1986).

7 *Id.* at 987. The court also concluded that felon in possession of a firearm is not a crime of
8 violence. *Id.* at 988.

9 To understand the Court’s holding, one must examine both the posture of the case before
10 the Ninth Circuit and the holdings in *Byrd*, *Ploof*, and *Himler*. The district court in *Twine* made
11 two independent rulings: (1) the defendant was ordered detained on the sole basis of finding him
12 a danger to the community; and, in the alternative, (2) felon in possession of a firearm is a crime
13 of violence, allowing the court to detain the defendant without bail pending trial. In other words,
14 and in light of its specific holding in the alternative, the district court held that even if *Twine* was
15 not charged with a crime of violence, he posed a danger to the community and should be
16 detained. The Ninth Circuit reversed the district court’s conclusion as a matter of law. The Ninth
17 Circuit held that a court may not order a defendant detained based on dangerousness unless he is
18 charged with a crime of violence. This holding is illustrated by and consistent with the analyses
19 in *Byrd*, *Ploof*, and *Himler*.

20 In *United States v. Himler*, the Third Circuit considered whether “under the Bail Reform
21 Act of 1984, an accused taken into custody may be detained prior to trial based on danger to the
22 community where the detention hearing was justified only by an alleged serious risk of flight
23 pursuant to 18 U.S.C. § 3142(f)(2)(A).” *United States v. Himler*, 797 F.2d 156, 157 (3d Cir.
24 1986).

25 The court also stated that the record supported a finding that there existed a danger that the
defendant would commit further crimes involving the use of false identification. *Id.* at 159.

1 The government in the instant case is making the identical argument proffered in *Himler*:
2 “The government further asserts that once a hearing is authorized any evidence of danger to the
3 community from recidivism may be relied upon to justify pretrial detention.” *Id.* at 160. The
4 Third Circuit disagreed:

5 If Congress had intended to authorize pretrial detention in all cases where recidivism
6 appears likely it could easily have done so. The legislative history of the Bail Reform Act
7 of 1984 makes clear that to minimize the possibility of a constitutional challenge, the
8 drafters aimed toward a narrowly-drafted statute with the pretrial detention provision
9 addressed to the danger from “a small but identifiable group of particularly dangerous
10 defendants. S.Rep. No. 225, 98th Cong., 1st Sess. 6-7 (1083, U.S.Code Cong. &
11 Admin.News 1984, pp. 3182, 3189. ¶ ...Therefore, as stated in the legislative history,
12 “the requisite circumstances for invoking a detention hearing in effect serve to limit the
13 types of cases in which detention may be ordered prior to trial.” S.Rep. No. 225, *supra*, at
14 20, U.S.Code Cong. & Admin.News 1984, at 3203. Pretrial detention may not be
15 considered except under carefully specified circumstances.

16 *Id.*

17 In *United States v. Ploof*, the First Circuit adopted the holding in *Himler*. *United States v.*
18 *Ploof*, 851 F.2d 7 (1st Cir. 1988). The First Circuit stated:

19 We believe, however, the structure of the statute and its legislative history make it clear
20 that Congress did not intend to authorize preventive detention unless the judicial officer
21 first finds that one of the § 3142(f) conditions for holding a detention hearing exists. To
22 conclude otherwise would be to ignore the statement in the legislative history that the
23 “circumstances for invoking a detention hearing in effect serve to limit the types of cases
24 in which detention may be ordered prior to trial,” *see* S.Rep. No. 225, 98th Cong., 2d
25 Sess. 20, *reprinted in* 1984 U.S. Code & Admin.News 3182, 3202; *see also United States*
v. Salerno, ___ U.S. ___, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) “The Bail
Reform Act carefully limits the circumstances under which [preventive] detention may be
sought to the most serious of crimes”), and to authorize detention in a broad range of
circumstances that we do not believe Congress envisioned.

26 *Ploof*, 851 F.2d at 11.

27 The Fifth Circuit, in *United States v. Byrd*, agreed with *Ploof* and *Himler*. *United States v.*
28 *Byrd*, 969 F.2d 106, 108 (5th Cir. 1992). The court held that, “detention can be ordered only in
29 certain designated and limited circumstances, irrespective of whether the defendant’s release
30 may jeopardize public safety.” *Id.* at 110. Because the court determined that defendant was

1 neither charged with a crime of violence nor a crime involving violence, the defendant could not
2 be detained based on dangerousness. *Id.*

3 The government is mistaken in its reading of *Twine*. It suggests that *Twine* held that, “if
4 none of the (f)(1) or (f)(2) factors are present, a detention hearing is not authorized, period, even
5 if a defendant is a danger. Were it otherwise, subsection (f), which sets forth the detention
6 hearing triggering factors, would be superfluous.” (Government’s Appeal at 9:17-21.) To the
7 contrary, *Twine* stands for the proposition that even if a detention hearing is triggered based on
8 flight or obstruction of justice, the defendant cannot be detained as a potential danger to the
9 community because it would undermine the purpose of the Act.¹ Defendant urges the court to
10 follow the well-reasoned approach used by the Ninth Circuit in *Twine*.

12 The government also argues that the court may detain Defendant as a danger because his
13 case involves an offense listed in section 2332(g)(b), a federal terrorism case. The government
14 relies on the Fifth Circuit’s language in *Byrd*: “it is not necessary that the charged offense be a
15 crime of violence; only that the case involve a crime of violence or any one or more of the
16 § 3142(f) factors.” *Byrd*, 969 F.2d at 110. The government’s position is untenable, however,
17 because the holding in *Twine* leaves no room for such an interpretation. Assumedly, the Ninth
18 Circuit in *Twine* specifically considered the “nexus” or “involvement requirement” in *Byrd*
19 because it relied on *Byrd*. Had the Ninth Circuit wanted to create a “nexus” rule, it certainly
20 would have done so in *Twine* because the charge was felon in possession of a firearm, a charge
21

22
23 ¹ The government urges the Court to reach the opposite conclusion and side with the reasoning in *United States v.*
24 *Singleton*, 182 F.3d 7 (D.C. Cir. 1999), and *United States v. Friedman*, 837 F.2d 48 (2d Cir. 1988). This Court,
25 however, is bound by *Twine*. See *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (“If a court must decide an
issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result,
even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a
body competent to do so.”)

1 with a potential nexus to a crime of violence. Defendant urges this Court to decline to conduct a
2 “nexus analysis” and affirm the Magistrate’s Order.

3 **V.**

4 **DEFENDANT SHOULD NOT BE DETAINED BECAUSE THERE ARE**
5 **CONDITIONS OF RELEASE THAT WILL REASONABLY ASSURE HIS**
6 **APPEARANCE AT TRIAL AND THE SAFETY OF THE COMMUNITY.**

7 The Bail Reform Act of 1984 mandates the release of a person facing trial unless
8 no condition, or combination of conditions, will "reasonably assure" the appearance of the
9 person as required and the safety of the community. Only in rare circumstances should release be
10 denied, and doubts regarding the propriety of release should be resolved in favor of release.

11 United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985).

12 Moreover, the government has the burden of showing, by a preponderance of the
13 evidence, that there is no condition of release, or combination of conditions, that will reasonably
14 assure a defendant's appearance at future proceedings if he is released on bond. *United States vs.*
15 *Chen*, 820 F. Supp. 1205, (N.D. Cal. 1992). Opportunity to flee is not enough to justify
16 detention. The Bail Reform Act does not seek ironclad guarantees, and the requirement that the
17 conditions of release “reasonably assure” a defendant’s appearance cannot be read to require
18 guarantees against flight. Even where the issue is the safety of the community, Congress did not
19 require guarantees in enacting the Bail Reform Act. Id.

20 In determining whether there are conditions of release that will reasonably assure the
21 appearance of the Defendant at trial and the safety of the community, the court must take into
22 account the available information concerning four factors. These factors include (1) the nature
23 and circumstances of the offense charged, including whether the offense is a crime of violence,
24 (2) the weight of the evidence against the person, (3) the history and characteristics of the person,
25 and (4) the nature and seriousness of the danger to the community. 18 U.S.C. §3142(g). As set
forth in detail below, an examination of these factors as applied to the Defendant Umer Hayat

1 confirms that there are indeed conditions to reasonably assure his appearance at trial and safety
2 to the community.

3 **A. The Nature and the Circumstances of the Offense Charged**
4 **Weigh in Favor of Defendant’s Release (18 U.S.C. § 3142(g)(1))**

5 The government contends that the nature and circumstances of the crime alleged against
6 Umer Hayat “suggest” that he poses a significant risk of flight and danger to the community.

7 The government attempts to support this contention by arguing that the nature and circumstances
8 of the charges pending against Defendant Hamid Hayat, namely a violation of 18 U.S.C. §
9 2339A, suggest that Defendant Umer Hayat is a flight risk and danger. This contention and
10 argument ignores the fact that (1) the *only* charge against Defendant Umer Hayat is one count of
11 making a false statement in violation of 18 U.S.C. § 1001; (2) the false statement charge under
12 18 U.S.C. §1001 is not a crime of violence; and (3) the maximum period of incarceration is only
13 eight years. In short, Defendant Umer Hayat is charged with nothing more than *lying* to the FBI
14 about his alleged knowledge concerning training camps and his son’s alleged attendance at
15 training camps.

16
17 **1. The Charged Offense**

18 Though the government submits alarming allegations concerning Defendant Hamid
19 Hayat ties to terrorist activity, it has not and cannot translate those allegations into criminal
20 terrorist charges against Defendant Umer Hayat. Four months ago Defendant Umer Hayat was
21 charged with one count of making a false statement. Since then the government has repeatedly
22 stated that an ongoing investigation may lead to additional charges. However, the government’s
23 further investigation has not resulted in any additional charges against Defendant Umer Hayat.
24 Great weight must be given to the fact that on two separate occasions the government presented
25 this matter before the grand jury and, on each occasion regarding Defendant Umer Hayat, the

1 grand jury returned a single charge of making a false statement. Hence, the nature and
2 circumstances of the charge against Defendant Umer Hayat is simply lying to the FBI and, as
3 correctly and succinctly concluded by Magistrate Judge Hollows, “the charged crime in this case
4 does not indicate flight.” Order at 12:7-8.

5 **2. Defendant is Not Charged With a Crime of Violence**

6 Regarding a “crime of violence,” the government shows true desperation when it argues
7 that a false statement charge is a crime of violence. Though Defendant Umer Hayat is not
8 charged with a crime of violence or a crime of terror under 18 U.S.C. §2332b(g)(5), the
9 government is urging this Court to treat him as if he has be so charged. As noted by Magistrate
10 Judge Hollows, “despite the encouragement of the AUSA’s arguing the case, the court will not
11 find in a detention proceeding what the U.S. Attorney is unwilling or unable to sustain.” Order at
12 6:22-23. Likewise, this Court should not find what the government can not or will not charge,
13 namely a crime of violence.²

15 **B. The Weight of the Evidence Against Defendant (18 U.S.C. § 3142(g)(2))**

16 Of all the factors in section 3142(g), “the weight of the evidence against the defendant is
17 the least important, and the statute neither requires nor permits a pretrial determination of guilt.”
18 *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). Although the weight of the
19 evidence is the “least important of the various factors,” this is only true if the weight of the
20 evidence is used to buttress a decision to detain the defendant. If the evidence against a
21 defendant is weak, that becomes an important factor favoring release.

23 In setting forth its “evidence” against Defendant Umer Hayat, the government submits
24 approximately eight pages of alleged facts that focus primarily on the alleged conduct of

25 ² The government further contends that that the false statement charge against Defendant is one that “involves a crime of violence.” As discussed above, however, the holding in *Twine* bars this argument.

1 Defendant Hamid Hayat. Government’s Brief at 24-31. A careful reading of this “evidence”
2 unquestionably demonstrate that other than Defendant Umer Hayat’s alleged statements to the
3 FBI, the government has no evidence that Umer Hayat *actually* toured a training camp or knew
4 that his son *actually* attended such training camps. The only arguable evidence against
5 Defendant Umer Hayat consists of statements the FBI allege he made during stressful,
6 protracted, and confusing interview sessions with agents. The highly coercive environment under
7 which the alleged statements were made, coupled with the fact that Defendant Umer Hayat was
8 not afforded an interpreter to aid in understanding the questioning, renders the statements highly
9 unreliable and potentially inadmissible.

10
11 Accordingly, this Court should find that the weight of the evidence weighs in favor of
12 Defendant Umer Hayat.

13 **C. Character of Defendant Umer Hayat (18 U.S.C. § 3142(g)(3) “Character of**
14 **Defendant”)**

15 Regarding the character of Defendant Umer Hayat, the government attempts to paint the
16 picture of a man so untrustworthy that he presents an unacceptable risk of flight. In painting this
17 picture, the government contends that Defendant Umer Hayat (1) failed to disclose his ownership
18 of a second home in Pakistan during his pretrial interview; and (2) failed to disclose the true
19 source of money to Custom’s agents during his 2003 interview. The government, simply put, is
20 incorrect in these contentions.

21 **1. Defendant Never Made a False Statement to Pretrial Services.**

22 During his interview with Pretrial Services, Defendant told the Pretrial Services Officer
23 that he owned one house in Pakistan. Defendant was truthful and forthright during his Pretrial
24 Services interview. Subsequent to this interview, the government interviewed Defendant Umer
25 Hayat’s son, Arsalan Hayat, regarding the home in Pakistan. Based exclusively on that interview,

1 the government contends that Defendant owns a second home and Defendant omitted this
2 information in his Pretrial Services Interview.³ This is simply not the case.

3 In 2003, Defendant's wife, Salma Hayat, fell ill. After conventional medicine failed to
4 improve her condition, Defendant and his family traveled to Pakistan so his wife could receive
5 alternative medicine treatments.⁴ (*See* Declaration of Salma Hayat, attached hereto as "Exhibit
6 A.") The family expected that Defendant's wife's recovery would be lengthy. Before they left for
7 Pakistan, Defendant's father gave Defendant an old and poorly maintained house, located in the
8 village of Behboodi, in the District of Attock in Pakistan. When the family arrived in Pakistan,
9 they resided with Defendant's in-laws. While living with his in-laws, Defendant worked to
10 renovate the house to make it inhabitable. Since September of this year, Defendant's house in
11 Behboodi has been listed for sale with the Pakistani real estate company Meer Enterprises. (*See*
12 real estate listing, attached as "Exhibit B.") According to Defendant's wife, Defendant has only
13 owned this home in Behboodi. (*See* Exhibit A.) Accordingly, Defendant made no false statement
14 to Pretrial Services.

15 **D. Defendant and His Family Were Honest When Making Statements to Customs**
16 **Officials (18 U.S.C. § 3142(g)(3) "Character of Defendant")**

17 The government contends that Defendant was untruthful during his 2003 interview with
18 Customs' agents regarding the source of money in his family possession. Despite defense
19 discovery requests, the government still has not provided discovery of the actual statements
20 made by Defendant during this interview with Customs' authorities.

21 Notwithstanding the government's refusal to provide this discovery, the defense has
22 confirmed that Defendant Umer Hayat advised Customs' agents that the source of the money
23 was credit card cash withdrawals, proceeds from the sale of a used car, cash savings, and money

24 ³ The government has not provided the defense with a copy of the interview between Arsalan Hayat and the agents.
25 However, at the September 23rd hearing before the Magistrate Judge, the defense produced Arsalan Hayat (and his
attorney) as a witness to counter the government's allegations regarding a second home in Pakistan. The government
did not question Arsalan Hayat on the record, but continues to maintain that there is a second home.

⁴ The facts surrounding Defendant and his family's trip to Pakistan was not proffered to the Magistrate Court.

1 from family and friends who wanted the money delivered to their respective families in Pakistan.
2 To prove the truthfulness of these statements, Defendant Umer Hayat provided the government
3 with evidence of *all* of these sources of money. Specifically, he provided the government with
4 financial records and notarized affidavits from all of the family and friends who gave money to
5 be delivered in Pakistan. The government ultimately returned the money to Defendant. Attached
6 hereto as “Exhibit C” are signed Declarations of many of the family and friends who in 2003
7 provided money for delivery to their respective families in Pakistan.⁵

8 Accordingly, concerning the character of Defendant Umer Hayat, this Court should find
9 this factor weighs in his favor.⁶

10 **E. The Government Exaggerates Defendant’s Potential Criminal Exposure**
11 **(18 U.S.C. § 3142(g)(1) “Nature and Circumstances of Offense”)**

12 The government contends that Defendant Umer Hayat’s potential criminal exposure gives
13 him great incentive to flee. A close examination of this contention, however, undermines the
14 government’s position. The defendant, the government, and the magistrate court all agree that
15 the sentencing guideline applicable generally to a 18 U.S.C. §1001 false statement charge is
16 U.S.S.G. §2B1.1. The government, however, contends that the terrorism enhancement in
17 U.S.S.G. §3A1.4 applies because that guideline controls.⁷

19 ⁵ Because the government has not provided the defense with any of this information, the defense has gone to great
20 lengths to obtain these signed declarations.

21 ⁶ The government attempts to further disparage Defendant Umer Hayat’s character by linking him to a “jihadist
22 network.” The government is really stretching itself thin with such efforts. It has no credible evidence
23 substantiating allegations that Defendant Umer Hayat’s father-in-law and brother-in-law have any ties to terrorist
24 related activities; and that Defendant Umer Hayat supports any such ties if they were to exist. Moreover, the
25 Supreme Court has held that “for liability to be imposed by reason of association alone, it is necessary to establish
that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal
aims.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (emphasis added).

⁷ U.S.S.G. §2B1.1, subd. (c)(3) states that if the count of conviction establishes an offense covered by another
guideline, that guideline controls. U.S.S.G. §3A1.4 states: “(a) If the offense is a felony that involved, or was
intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than
level 32, increase to level 32; (b) In each such case, the defendant’s criminal history category from Chapter Four
(Criminal History and Criminal Livelihood) shall be Category VI.... Application Notes: 1. ‘Federal Crime of
Terrorism’ Defined.—For purposes of this guideline, ‘federal crime of terrorism’ has the meaning given that term in
18 U.S.C. § 2332b(g)(5).

1 As the magistrate court indicated, whether §3A1.4 applies depends on whether the
2 charged conduct constitutes a federal crime of terrorism. Section 2332b(g)(5) defines a federal
3 crime of terrorism as conduct that (1) is calculated to influence or affect the conduct of
4 government by intimidation or coercion, or to retaliate against government conduct; and (2) is a
5 violation of at least one of the specifically enumerated criminal statutes. Alleged false statement
6 to the FBI, by itself, has no element of intimidation, coercion, or retaliation whatsoever.
7 Furthermore, §1001 is not specifically enumerated in §2332b(g)(5). Congress did enumerate
8 dozens of other statutes that fit the definition of a federal crime of terrorism, but it decided to
9 omit §1001. That omission completely negates the government’s argument that Defendant’s
10 false statement charge is a federal crime of terrorism. Thus, the government is mistaken in its
11 argument that U.S.S.G. §3A1.4 applies in this case. It does not.

12 The government thereby overstates Umer Hayat’s potential criminal exposure. Based on
13 the foregoing, it cannot be said that the potential criminal exposure gives Umer Hayat such an
14 incentive to flee as to weigh against his request for pretrial release. Because the government
15 fails to advance an argument on this issue that would justify disturbing the magistrate’s findings,
16 this factor (nature and circumstances of the crime) should continue to weigh in Umer Hayat’s
17 favor.

18 Further, the nature of the charge against Defendant Umer Hayat does not suggest flight
19 risk because the false statement charge only carries a maximum sentence of eight years
20 imprisonment.⁸ As Judge Hollows noted, “it takes no extensive exercise in logic to realize that
21 the more potential time one can be locked away in prison, the more tendency there may be to
22 flee.” Order at 12:1-3. Likewise, the less potential time one can be locked away in prison the
23

24 ⁸Magistrate Judge Hollows noted that “the government’s position appears to be not well taken vis-à-vis Umer,”
25 because an enhancement in this case is “definitionally unavailable... [and] there is even the possibility on the
present charge that Umer will have served all of his time even if found guilty on the 1001 offense.” Order at 12 and
13. While the government disagrees with these statements concerning the potential guideline ranges, there can be no
dispute that the maximum period of incarceration Defendant Umer Hayat faces if convicted is only eight years.

1 more tendencies there may be not to flee. Defendant Umer Hayat, if convicted, is not facing a
2 substantial period of incarceration and therefore has less of a tendency to flee.

3 Accordingly, concerning the nature and circumstances of the crime, this Court should
4 find this factor weighs in favor of Defendant Umer Hayat.

5 **F. Defendant Has Significant Ties to the United States and Lodi, Those Ties are**
6 **Far Stronger Than His Ties to Pakistan, and His ties to Lodi Minimize Any**
7 **Flight Risk (18 U.S.C. § 3142(g)(3) “Family and Community Ties of Defendant”)**

8 In its report, Pretrial Services confirmed that Defendant Umer Hayat has significant ties
9 to the United States. Magistrate Judge Hollows agreed and concluded that Defendant “has
10 substantial family ties in the United States.” Order at 13:20-21. The government concedes, as it
11 must, that Defendant Umer Hayat has been a resident of the United States for over thirty years
12 and has lived in the same home in Lodi, CA with his family for the past twenty years. He, his
13 wife, and his four children are all American citizens, and they intend to continue making Lodi
14 their home. In fact, most of Defendant’s immediate family lives in Lodi. Both of his parents, his
15 brother, and his two sisters also live in Lodi with their respective families. Defendant Umer
16 Hayat also has many distant relatives living in Lodi that include, cousins, aunts, uncles and in-
17 laws. Defendant attended the Lodi mosque frequently and participated in community events.
18 Defendant and his family also participated in cross-cultural community events in Lodi, CA. For
19 example, eight days after the 9-11 tragedy, the city of Lodi held a peace service to promote peace
20 among all cultures in Lodi. Defendant and his family attended this service of more than 300
21 people and, in fact, a family member opened the service with a prayer. Defendant is a proud
22 citizen of Lodi where he is surrounded by all of his immediate family and many more distant
23 family and friends. Such strong familial and community ties strongly suggest no risk of flight.

24 The government argues that Defendant has strong ties to Pakistan and therefore poses a
25 flight risk. It places great weight on the fact that Defendant was born and raised in Pakistan

1 before immigrating to the United States. Further, it engages in detailed calculations of how many
2 months Defendant stayed in Pakistan during his visits from the United States.

3 The fact of the matter is that Defendant is no different from many other immigrants living
4 in the United States. All immigrants were born in another country and most were raised there.
5 Most immigrants have some family ties in their native land and most immigrants try to visit their
6 native land when they can. The government fails to note that Defendant immigrated to the United
7 States as soon as he reached adulthood, has lived here *most of his life* and is a United States
8 citizen.

9 Defendant has visited Pakistan a few times over the past 27 years, and his employment as
10 an ice cream truck driver permitted somewhat lengthy visits. Defendant and his family most
11 recently visited Pakistan between 2003-2005. Defendant's family made this trip out of necessity,
12 because Defendant's wife was extremely ill and after conventional medicine failed her, the
13 family decided to seek alternative medical treatment for her illness in Pakistan. The Magistrate
14 Court correctly observed the reality of Defendant's situation when it stated:

15 He [Defendant] does have substantial family ties in the United States, and would
16 certainly be an official Pakistan. The government's belief that Umer could "just set up
17 shop" in Pakistan in a notorious fashion is unrealistic. His supposed homes in Pakistan
18 would be the first place government officials would look for the fugitive. Traveling
19 outside of the United States would be difficult, for as defense counsel indicated, Umer
20 would be on every "no-fly" list in existence. Finally, the court has a difficult time
21 believing that Umer would simply fly off leaving his son to fend for himself – all to avoid
22 a relatively modest (as far as federal sentences go) prison sentence.

23 (Order at 13:21-14:2.)

24 For all of the reasons stated above, Defendant's strong ties to Lodi far outweigh the
25 significance of any ties to Pakistan and, therefore, he poses no risk of flight.

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1 **G. The Support from Defendant’s Friends and Family in Lodi and the Sacramento**
2 **Valley Demonstrate the Strength of His Ties to the Region. (18 U.S.C. §**
3 **3142(g)(3) “Employment and Financial Resources of Defendant”)**

4 The government contends that Defendant Umer Hayat’s modest employment history
5 evidences his insignificant ties to the United States, and suggests that Defendant could flee with
6 little consequence to his occupational prospects. The government also contends that Defendant’s
7 modest employment should amplify suspicion about Defendant’s spending beyond his means
8 and his alleged access to secret funds and/or financial support that will enable him to flee.

9 Defendant’s employment as an ice cream truck driver, while modest, along with income
10 earned from rental property, has enabled him to support and raise his family. Furthermore,
11 contrary to the government’s contention, Defendant has not made “significant expenditures
12 inconsistent with his self-reported occupation and income.” His most significant recent expenses
13 include airline travel to, and renovation of a house in, Pakistan. Defendant paid for these
14 expenses primarily from credit card cash advances, totaling more than \$15,000, and from the sale
15 of his used car. There is nothing inconsistent or sinister about Defendant’s use of credit cards or
16 the sale of his car.

17 Furthermore, the support that the government characterizes as secret is simply
18 community support that the Defendant enjoys. Over the past 30 years of his adult life in the
19 United States, Defendant and his immediate family have been able to maintain and draw
20 emotional and financial support from relatives who live in the Sacramento Valley area, including
21 Lodi. Furthermore, Defendant has developed and maintained close-knit friendships with people
22 from the Lodi community. None of this community support, however, extends to encouraging or
23 enabling Defendant to flee, contrary to what the government suggests. Defendant’s community
24 support simply does not have the negative connotations that the government attempts to portray.
25

1 Instead, this community support demonstrates the strength and substance of his relationships and
2 ties to the Sacramento Valley region. Defendant urges the court to take this community support
3 in its proper light, reject the unfounded negative connotations that the government offers, and
4 find that Defendant's strong community ties weigh in favor of his release.

5 **H. Defendant's Minimal Criminal History (18 U.S.C. § 3142(g)(3))**

6 Defendant has one misdemeanor conviction for battery. This occurred in 2001 and
7 involved an incident concerning his ice cream truck. He was placed on probation, which he
8 successfully completed. He was *not* on probation at the time of this alleged offense.

9 Additionally, Defendant has no history of missed court appearances and no history of alcohol or
10 substance abuse. The government's position that such a history suggests any risk of flight or
11 danger to the community is wholly unreasonable. Accordingly, Defendant Umer Hayat's minor
12 criminal history weighs in his favor.

13 **I. Defendant's Proposed Collateral of \$1,213,000 is More Than Sufficient to**
14 **Reasonably Assure His Appearance at Future Court Proceedings (18 U.S.C. §**
15 **3142(g)(3))**

16 Defendant is prepared to post approximately \$1,213,000 of real property to secure a bond
17 for his release. There can be no dispute that Defendant and his family are of modest means, and
18 the government concedes, as it must, that this proffered bail is "substantial."⁹ Defendant's
19 potential loss of his homestead and family's property is a harsh penalty that will assure
20 Defendant's appearance. *See United States v. Townsend*, 897 F.2d 989, 996 (9th Cir. 1990) ("The
21 purpose of bail is not served unless losing the sum would be a deeply-felt hurt to the defendant
22 and his family; the hurt must be so severe that defendant will return for trial rather than flee.").

23
24 ⁹ In its Order, Magistrate Judge Hollows stated: "This sum of money is substantial, is far in excess of what monies
25 Umer has demonstrated access to, and would impose hardship, if forfeited, on numerous other persons aside from
defendants. It is one thing to leave your own possessions and flee to a foreign country; it is quite another to
knowingly permit others to be left 'holding the bag.' The court cannot say on the *present* charge against Umer, that
there are no conditions or combination of conditions to be imposed that would *reasonably* assure the appearances of
Umer Hayat." (Order, 14:7-12.)

1 Contrary to the government’s unfounded assertion, Defendant’s relatives are very important to
2 him and the loss of their properties would be a severe blow to him personally.¹⁰ The proposed
3 collateral is sufficient to mitigate the risk of Defendant’s flight because it is such a substantial
4 amount and its forfeiture would cause a severe loss to Defendant and his family.

5 **J. Danger to the Community (18 U.S.C. § 3142(g)(4))**

6 Notwithstanding the government’s argument to the contrary, the fact remains that
7 Defendant Umer Hayat is not charged with a crime of violence and, therefore, dangerousness to
8 the community cannot be considered in factoring conditions of pretrial release or detention.¹¹

9 **K. The Magistrate Court’s Specified Terms and Conditions of Release Assure that**
10 **Defendant Will Appear at Future Court Proceedings.**

11 The government contends that the magistrate court’s terms and conditions of release fail
12 to provide barriers that would render Defendant’s flight impossible. Simply put, this is not the
13 law. The magistrate court’s specified terms and conditions provides reasonable assurance that
14 Defendant Umer Hayat will appear at all court proceedings. Defendant will not flee because he
15 is committed to litigating his case and he considers the United States, not Pakistan, to be his and
16 his family’s home. In addition, under the magistrate court’s terms and conditions of release,
17 Defendant feels compelled and bound by honor to protect the \$1.2 million dollars of real
18 property that his family is prepared to post as substantial security for his release bond. Further,

19
20 ¹⁰ In its appeal, the government again raises its “concerns” about the sureties and whether they are truly willing to
21 post their property for Defendant’s release. The government raised these same concerns in its Opposition to
22 Defendant’s Second Motion for Reconsideration. In response to the government’s concerns, the sureties were
23 present at the September 23, 2005 hearing. During the hearing, defense counsel stated that the sureties were present
24 and prepared to testify regarding their willingness to post their property. The government claims that during the
25 hearing it expressly requested that the Magistrate Court allow the government to examine their suitability as sureties.
(Government’s Appeal, page 49, fn 43.) Defendant disputes the government’s recollection of the hearing.

¹¹ The magistrate court did not consider safety to the community in setting conditions of pretrial release because the
charged offense against Defendant Umer Hayat is not a crime of violence. Instead, the magistrate court specifically
only considered the (g)(1), (g)(2), (g)(3) factors. The magistrate court necessarily concluded that danger to the
community is not a factor warranting consideration in setting conditions of pretrial release. This Court should take
the same approach.

1 Defendant will be subject to constant surveillance and monitoring, thereby deterring any attempt
2 to flee.

3 The cases cited by the government regarding electronic monitoring and home detention
4 do not apply in this case because these cases focus on danger to the community. In *Orena*, the
5 Second Circuit expressed doubt that home detention and electronic surveillance would alleviate
6 the danger to the community presented by a pretrial detainee charged in his capacity as “boss”
7 and “captain” of a criminal enterprise under RICO, with predicate acts of conspiracy and murder.
8 *United States v. Orena*, 986 F. 2d 628, 632 (2d Cir. 1993). In *Goba*, the Western District Court
9 of New York discussed the defendants’ risk of flight and danger to the community, but expressed
10 its dissatisfaction with electronic monitoring and home detention as it related to preventing
11 danger to the community. *United States v. Goba*, 240 F. Supp. 2d 242 (W.D. N.Y. 2003); citing
12 *Orena, supra*, 986 F. 2d at 632-33.

13 As stated above, Defendant Umer Hayat cannot be detained based on danger to the
14 community because the charged offense is not a crime of violence. Any discussion regarding
15 release conditions must be directed to address risk of flight. Thus, citations to cases like *Orena*
16 *Goba* is inappropriate. It bears emphasizing, however, that Defendant is not a danger to the
17 community. Every allegation by the government that Defendant is a danger is simply
18 unsubstantiated conjecture. Defendant is charged with making a false statement, not with
19 providing material support to terrorists.

20 The government also cites *Minns* to support its contention that Defendant’s flight cannot
21 be mitigated against by electronic surveillance and home detention, but this citation lends no
22 support to the government position because of its extreme facts. In *Minns*, the defendant was
23 charged with making false statements in passport applications. The Northern District Court of
24 Texas rejected the defendant’s request for release on electronic monitoring and home detention
25 with armed guards because of defendant’s risk of flight. *United States v. Minns*, 863 F. Supp.

1 360 (N.D. Tex. 1994). The defendant in *Minns* had lived outside the United States for 14 years
2 prior to his prosecution, renounced his U.S. citizenship and became a citizen of Ireland and also
3 of Israel, held seven passports from four different countries under five different names, used
4 thirteen different aliases in the past 14 years, faced a money judgment and tax levy in the United
5 States in excess of \$32 million dollars, and had access to huge financial assets abroad in an
6 amount estimated to be from \$1 million dollars to \$6 million dollars. *Id.* at 363-364. Based on
7 these extreme facts, the court found that no conditions of release would reasonably assure
8 defendant's appearance, including electronic monitoring and home detention. *Id.*

9 Defendant Umer Hayat stands in stark contrast to the defendant in *Minns*. Umer Hayat is
10 an American citizen, embraces his American citizenship, has lived in the United States for most
11 of his adult life, does not use aliases, has been issued passports from the United States and
12 Pakistan in his real name, and is of modest means. He does not present the extreme danger of
13 flight presented by the defendant in *Minns*. These facts should weigh heavily in favor of finding
14 that the terms and conditions of release announced by the magistrate court will reasonably assure
15 Defendant's appearance.

16 Lastly, the government expresses concern regarding the magistrate court's order
17 regarding "monitored home detention centers" (Government's Appeal; pg. 52, line 20, citing
18 *Orena*, supra, 986 F. 2d at 632) and search authority (Government's Appeal; pg. 53, line 8).

19 As discussed above, the *Orena* court discussed extensive staffing and maintenance of
20 home detention centers as it related to safeguarding the community against a defendant reputed
21 to be a boss of a criminal enterprise involved in conspiracy and murder. These concerns simply
22 are not present in Defendant Umer Hayat's case. Additionally, the magistrate court's terms and
23 conditions do not require the government to provide personnel and maintain a home detention
24 center for Defendant. Instead, the terms and conditions call for the kind of monitoring and
25 surveillance that can easily be provided and will reasonably assure Defendant's appearance.

1 With respect to the government's reluctance to exercise its search powers authorized by the
2 magistrate's court order, Defendant is prepared to waive his rights under *United States v. Scott*, --
3 - F.3d ---, 2005 WL 2174413 (9th Cir. (Nev.) 2005).
4

5 **VI. CONCLUSION**

6 For the reasons stated above, Defendant respectfully requests that the Court affirm the
7 Magistrate Court's order releasing Defendant on bail under the specified terms and conditions of
8 release.
9

10 Respectfully submitted,

11 Dated: October 12, 2005

12
13 /s/ Johnny L. Griffin, III
14 Johnny L. Griffin, III
15 Attorney for Defendant UMER HAYAT
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