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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,) CR. NO. S-05-240 GEB
12)
Plaintiff,) GOVERNMENT'S APPEAL FROM
13) MAGISTRATE JUDGE'S ORDER
v.) GRANTING RELEASE ON BAIL
14)
Date: October 17, 2005
15 UMER HAYAT,) Time: 10:00 a.m.
16) Court: Hon. Garland E. Burrell,
Defendant.) Jr.
17)
_____)

18 I.
19 INTRODUCTION

20 The government hereby appeals the order of the Magistrate Court
21 (the Honorable Gregory G. Hollows, Chief Magistrate Judge) filed on
22 September 26, 2005, setting conditions of release for defendant Umer
23 Hayat. For the reasons set forth below, defendant Umer Hayat should
24 be detained as both an extreme flight risk and danger to the
25 community.
26

27 II.
PROCEDURAL HISTORY

28 A complaint was filed June 7, 2005, charging defendants Hamid

1 Hayat and Umer Hayat with making false statements in violation of 18
2 U.S.C. § 1001. The same date, following defendants' arraignment,
3 the Honorable Magistrate Judge Peter A. Nowinski ordered that
4 defendant Umer Hayat be detained as both a flight risk and danger to
5 the community. After a detention hearing conducted on June 10,
6 2005, defendant Hamid Hayat was likewise ordered detained as both a
7 flight risk and danger to the community.

8 On June 16, 2005, a Grand Jury returned an indictment against
9 both defendants, charging defendant Hamid Hayat with two separate
10 counts of making false statements, and defendant Umer Hayat with one
11 count of making false statements.

12 On August 15, 2005, defendants filed their first motion for
13 reconsideration of the detention orders before the Honorable
14 Magistrate Judge Dale A. Drozd. Following a hearing on August 22
15 and 23, 2005, the Magistrate Judge denied the motion finding that
16 defendants had failed to establish an adequate basis for
17 reconsideration of the detention orders.

18 On September 12, 2005, defendants filed a second motion for
19 reconsideration of the detention orders before Magistrate Judge
20 Hollows.

21 On September 22, 2005, the Grand Jury returned a First
22 Superseding Indictment. The Superseding Indictment charges
23 defendant Hamid Hayat with providing material support to terrorists
24 in violation of 18 U.S.C. § 2339A (Count 1, a new charge), and two
25 counts of making false statements in violation of 18 U.S.C. § 1001
26 (Counts 2 and 3, the same charges alleged in the original
27 Indictment, but renumbered). The Superseding Indictment also
28

1 charges defendant Umer Hayat with one count of making a false
2 statement (Count 4, the same charge alleged in the original
3 Indictment, but renumbered).

4 On September 23, 2005, defendants' motion for reconsideration
5 of bail was heard by Magistrate Judge Hollows. Defendant Hamid
6 Hayat withdrew his motion; the motion as to Umer Hayat was argued
7 and submitted.

8 On September 26, 2005, the Magistrate Court, in a written
9 decision, ordered that defendant Umer Hayat be released on bail.
10 The Court opined that, as a matter of law, it could not consider
11 dangerousness as a ground for detention. Order at 7-11. The Court
12 then conducted a flight analysis weighing the nature of the offense,
13 the strength of the evidence and the characteristics of the
14 defendant; it did not, however, consider danger to the community
15 posed by the defendant. Thereafter, the Court concluded, by a
16 preponderance of the evidence, that defendant was a flight risk, but
17 that conditions would reasonably mitigate this risk. The main
18 conditions of release included: a \$1.2 Million secured bond, home
19 confinement with electronic monitoring, monitoring of defendant's
20 phones by a trap and trace device/pen register; search of
21 defendant's premises based on reasonable suspicion of wrongdoing,
22 and disclosure to Pretrial Services "within two days" of all
23 individuals (other than counsel and family) who visit defendant. Id.
24 at 14.¹

25
26
27 ¹The Court ordered released subject to the following terms and
28 conditions:
a. A bond in the amount of \$1,200,000 must be posted. The bond
may be secured with the property proffered by the defendant
unless the United States objects to the value of the subject

1 As set forth below, the Magistrate Court clearly erred. First,
2 this Court has the authority to conduct a detention hearing because
3 the case involves a serious risk of flight, or alternatively, a
4 federal crime of terrorism. Contrary to the conclusion of the
5 Magistrate Court, the Court is then authorized to detain defendant
6 Umer Hayat as either a flight risk, a danger to the community, or
7 both. Second, the record clearly indicates, as a factual matter,
8 that defendant Umer Hayat should be detained as both a flight risk
9 and danger to the community, and that there are no conditions which
10 reasonably mitigate these risks. Third, even assuming, arguendo,
11 that this Court believes that detention in this case is authorized
12 solely on the ground of flight risk, the Bail Reform Act indicates
13

14 property proffered

15 b. Umer Hayat shall reside at 302 E. Acacia # A, Lodi Ca.
16 95240, and, absent a medical emergency, not leave that
17 residence without the prior approval of the pretrial services
18 officer; Umer Hayat shall be subject to electronic monitoring,
19 and shall pay the costs attendant to such electronic
20 monitoring;

18 c. Umer Hayat shall permit all phones, including cellular
19 phones, to be monitored via trap and trace and pen register;
20 Umer Hayat shall submit a list of all phones which are
21 presently in the premises, and no other phones shall be
22 permitted in the residence;

21 d. The court finds that search of the Umer Hayat premises on
22 reasonable suspicion is a necessary condition to deter flight
23 without which the court would not order pretrial release on
24 conditions; no release order will be signed without a waiver of
25 any rights Umer Hayat may have under United States v. Scott,
26 __F.3d__, 2005 WL 2174413 (9th Cir. 2005).

24 e. Umer Hayat shall divest himself of any firearms or other
25 dangerous weapons, and shall submit proof of divestment to the
26 pretrial service officer;

26 f. Umer Hayat shall disclose to pretrial services the
27 identities of any persons, outside of those living with him and
28 his attorney or persons working with the attorney,
coming to visit him while he is under house arrest within two
days of their visit;

28 g. Umer Hayat shall not possess or attempt access to any
documents authorizing international travel.

1 that a court must consider danger as part of this flight analysis.
2 Finally, the record clearly indicates that detention on the basis of
3 flight risk alone is wholly appropriate.

4 **III.**

5 **THIS COURT HAS THE AUTHORITY TO DETAIN DEFENDANT BOTH**
6 **ON THE GROUNDS OF FLIGHT RISK AND/OR DANGER TO THE COMMUNITY**

7 A. Detention Is Authorized In A Case That Involves a Serious Risk
8 of Flight and When There Are No Conditions That Will Reasonably
9 Assure the Appearance of the Person as Required And/Or the
10 Safety of the Community

11 Detention of a defendant under the Bail Reform Act is
12 appropriate when, in a case such as this one, a judicial officer
13 finds: first, that the case involves a serious risk of flight; and
14 second, that no condition or combination of conditions will
15 reasonably assure the appearance of the person as required and/or
16 the safety of any other person and the community.

17 1. The Bail Reform Act

18 The structure and plain language of the Bail Reform Act, 18
19 U.S.C. § 3142, makes this principle quite evident. The Bail Act
20 sets forth a two-step process for determinations of detention. The
21 first step is found in subsection (f), which provides that the Court
22 can consider detention only when one of six enumerated threshold
23 factors are present, including a serious risk of flight. The second
24 step is found in subsection (g), which provides that, if a threshold
25 factor is present, the Court must hold a hearing at which all the
26 factors in subsection (g) shall be considered in determining if any
27 combination of conditions will reasonably assure the appearance of
28 the person and the safety of any other person and the community.

Section 3142 (f) provides, in relevant part:

1 (f) Detention hearing. - The judicial officer shall hold
2 a hearing to determine whether any condition or
3 combination of conditions set forth in subsection (C) of
4 this section will reasonably assure the appearance of such
5 person as required and the safety of any other person and
6 the community--

- 7 (1) upon motion of the attorney for the Government, in a
8 case that involves -
9 (A) a crime of violence;
10 (B) an offense for which the maximum sentence is
11 life imprisonment or death;
12 (C) an offense for which a maximum term of
13 imprisonment of ten years or more is prescribed
14 in the Controlled Substances Act (21 U.S.C.
15 § 801 et seq.), the Controlled Substances Import
16 and Export Act (21 U.S.C. § 951 et seq.), or the
17 Maritime Drug Law Enforcement Act (46 U.S.C.
18 App. § 1901 et seq.); or
19 (D) any felony if such person has been convicted of
20 two or more offenses described in subparagraphs
21 (A) through (C) of this paragraph, or two or
22 more State or local offenses that would have
23 been offenses described in subparagraphs (A)
24 through (C) of this paragraph if a circumstance
25 giving rise to Federal jurisdiction had existed,
26 or a combination of such offenses; or
27 (2) [u]pon motion of the attorney for the Government or
28 upon the judicial officer's own motion, in a case
that involves -
(A) a serious risk that such person will flee; or
(B) a serious risk that such person will obstruct or
attempt to obstruct justice, or threaten, injure, or
intimidate, or attempt to threaten, injure, or
intimidate, a prospective witness or juror.

18 U.S.C. § 3142(f) (emphasis added).

21 Read in a straightforward fashion, the statute indicates that,
22 in order to conduct a detention hearing, the Court must look at the
23 overall case and find that at least one of these six enumerated
24 factors is present (including serious risk of flight). If any one
25 of the six factors is present, the court "shall" conduct a detention
26 hearing "to determine whether any condition or combination of
27 conditions . . . will reasonably assure the appearance of such
28 person as required and the safety of any other person and the

1 community." Id.

2 The detention hearing itself is governed by subsection (g).
3 Here again, this section expressly states that, at a detention
4 hearing, the court "shall" consider the factors outlined in
5 subsection (g), including danger to the community.

6 Subsection (g) states:

7 (g) Factors to be considered. - The judicial officer
8 shall, in determining whether there are conditions of
9 release that will reasonably assure the appearance of the
10 person as required and the safety of any other person and
11 the community, take into account the available information
12 concerning--

11 (1) The nature and circumstances of the offense
12 charged, including whether the offense is a
13 crime of violence or involves a narcotic
14 drug;

13 (2) the weight of the evidence against the person;
14 (3) the history and characteristics of the person,
15 including--

14 (A) the person's character, physical and
15 mental condition, family ties, employment,
16 financial resources, length of residence in
17 the community, community ties, past
18 conduct, history relating to drug or
19 alcohol abuse, criminal history, and record
20 concerning appearance at court proceedings;
21 and

19 (B) whether, at the time of the current
20 offense or arrest, the person was on
21 probation, on parole, or on other release
22 pending trial, sentencing, appeal, or
23 completion of sentence for an offense under
24 Federal, State, or local law; and

21 (4) the nature and seriousness of the danger to
22 any person or the community that would be
23 posed by the person's release.

24 18 U.S.C. § 3142 (g) (emphasis added).²

25 Once the factors outlined in subsection (g) have been

26 ²The government must show either that the defendant is a flight
27 risk (by a preponderance of the evidence) or that defendant poses a
28 danger to the community (by clear and convincing evidence). See
United States v. Aitken, 898 F.2d 104, 107 (9th Cir. 1990); United
States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985); 18 U.S.C. §
3142(e), (f).

1 considered, the court is required to make the findings outlined in
2 subsection (e), i.e., whether conditions will reasonably assure the
3 appearance of the person as required and the safety of any other
4 person and the community. 18 U.S.C. § 3142 (e).

5 2. A Detention Hearing Is Authorized Only When One of The Six
6 Subsection (f) Factors Is Present

7 Turning to case law, the circuit courts have uniformly held
8 that a detention hearing is authorized only when one of the six
9 "triggering" circumstances listed in section 3142(f)(1) and (2) is
10 present, including a serious risk of flight. United States v. Byrd,
11 969 F.2d 106, 109 (5th Cir. 1992) ("§ 3142(f) does not authorize a
12 detention hearing whenever the government thinks detention would be
13 desirable, but rather limits such hearings to the [six circumstances
14 listed in (f)(1)(A), (f)(1)(B), (f)(1)(C), (f)(1)(D), (f)(2)(A) and
15 (f)(2)(B)]." "A hearing can be held only if one of the six
16 circumstances listed in (f)(1) and (2) is present"); United States
17 v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) ("[A] judicial officer
18 must find one of six circumstances triggering a detention hearing.
19 Absent one of these circumstances, detention is not an
20 option.") (citation omitted); United States v. Ploof, 851 F.2d 7, 9
21 (1st Cir. 1988) (same); United States v. Himler, 797 F.2d 156, 159
22 (3d Cir. 1986) (same).

23
24 As a logical extension of this principle, the courts, including
25 the Ninth Circuit, have held that the Bail Reform Act does not
26 authorize pretrial detention based "solely" on a finding of
27 dangerousness. E.g., United States v. Twine, 344 F.3d 987 (9th Cir.
28 2003) (noting that "Our interpretation is in accord with our sister

1 circuits who have ruled on this issue," citing United States v.
2 Byrd, 969 F.2d 106 (5th Cir. 1992); United States v. Ploof, 851 F.2d
3 7 (1st Cir. 1988); United States v. Himler, 797 F.2d 156 (3d Cir.
4 1986)), reh'g denied, 362 F.3d 1163 (9th Cir. 2004).

5 In Twine, a felon-in-possession case, the district court held
6 that pretrial detention was appropriate "on the sole basis of a
7 finding of dangerousness to the community." Twine, 344 F.3d at 987
8 In the alternative, the district court held that the charge was a
9 crime of violence, and then made a finding of dangerousness to the
10 community. Id.

11 Focusing on the first basis for detention, the Ninth Circuit
12 held that:

13 We are not persuaded that the Bail Reform Act authorizes
14 detention without bail based solely on a finding of
15 dangerousness. This interpretation of the Act would render
16 meaningless 18 U.S.C. § 3142(f)(1) and (2).

17 Id. (emphasis added).

18 In other words, if none of the (f)(1) or (f)(2) factors are
19 present, a detention hearing is not authorized, period, even if a
20 defendant is a danger. Were it otherwise, subsection (f), which
21 sets forth the detention hearing triggering factors, would be
22 superfluous.

23 After reaching this conclusion, the Ninth Circuit then went on
24 to examine whether the charged case was a crime of violence that
25 would serve as a triggering factor for a detention hearing and
26 detention on the basis of dangerousness. It concluded that a felon-
27 in-possession charge was "not a crime of violence for the purposes
28 of the Bail Reform Act." Id.

1 Thereafter, the Court concluded that conditions of release had
2 to be set. (Again, the rationale for this rule of law follows from
3 the language of subsection (f) itself. If, in fact, a case does not
4 involve one of the six triggering factors, a detention hearing is
5 not authorized *under any circumstances*, and detention cannot be
6 ordered).

7 The case at bar is distinguishable from Twine. Unlike Twine,
8 the government contends, infra, that there are two separate (f)
9 triggering factors in this case which authorize a detention hearing
10 and ultimately, consideration of dangerousness, namely this case
11 involves a serious risk of flight, or alternatively, a federal crime
12 of terrorism.

13
14 3. Many Courts Have Held That A Detention Hearing Is
15 Triggered If A Case Involves A Serious Risk of Flight and
16 that the Detention Analysis Thereafter Must Consider Both
17 Danger and Flight

18 Significantly, the Second, Fifth, and D.C. Circuits have held
19 that detention ultimately can be ordered in a case that involves *any*
20 one of the six triggering factors (including serious risk of
21 flight), if the judicial officer ultimately concludes that no
22 condition or combination of conditions will reasonably assure the
23 appearance of the person as required and the safety of any other
24 person and the community. For example, in United States v.
25 Friedman, 837 F.2d 48, 49 (2d Cir. 1988), a child pornography
prosecution, the Second Circuit held:

26 After a motion for detention has been filed, the district court
27 must undertake a two-step inquiry. It must first determine by a
28 preponderance of the evidence, that the defendant either has
been charged with one of the crimes enumerated in Section
3142(f)(1) or that the defendant presents a risk of flight or
obstruction of justice. Once this determination has been made,

1 the court turns to whether any condition or combinations of
2 conditions of release will protect the safety of the community
3 and reasonably assure the defendant's appearance at trial.

4 Id. at 49 (emphasis added).

5 In Friedman, the government sought defendant's detention on
6 the basis of serious risk of flight only; it conceded that defendant
7 was not charged with a crime of violence or any of the other crimes
8 enumerated in Section 3142(f)(1). Id. The district court's
9 detention order contained "only implicit findings relating to risk
10 of flight but conclude[d] that 'no release conditions will
11 reasonably assure the safety of any other person or the community if
12 defendant is not detained.'" Id. On appeal, the government
13 "relie[d] on the district court's 'findings' that Friedman should be
14 detained as a serious risk of flight." Id.

15 The Second Circuit expressly held that detention on the basis
16 of danger alone is authorized if, as a preliminary matter, the
17 government establishes a serious risk of flight. It stated: "[T]he
18 Bail Reform Act does not permit detention on the basis of
19 dangerousness in the absence of risk of flight, obstruction of
20 justice or an indictment for the offenses enumerated above." Id.
21 (The converse, thus, is equally true: that is, the Bail Reform Act
22 would permit detention on the basis of dangerousness if, as a
23 preliminary matter, there was a demonstrated risk of flight, etc.).
24 The Circuit then went on to hold that "the district court's finding
25 with regard to Friedman's risk of flight was clearly erroneous," and
26 remanded so that the district court could set conditions and/or hear
27 additional information related to flight and/or potential
28 obstruction. Id. at 50.

1 Other Circuits have reached the same conclusion. In Byrd,
2 another child pornography prosecution, the Fifth Circuit held that:

3 [D]etention can be ordered . . . only 'in a case that involves'
4 one of the six circumstances listed in (f), and in which the
5 judicial officer finds, after a hearing, that no condition or
6 combination of conditions will reasonably assure the appearance
of the person as required and the safety of any other person
and the community.

7 Byrd, 969 F.2d at 107, 109-10 (government stipulated to no risk of
8 flight; detention ultimately denied because "[t]he government has
9 not shown . . . that any one of the six listed circumstances that
10 warrants pre-trial detention is present in this case.").

11 The D.C. Circuit similarly held that once a hearing is
12 triggered by any of the six factors, both flight and/or danger can
13 serve as a basis for detention:

14 [A] judicial officer must find one of six circumstances
15 triggering a detention hearing. . . . [A]ssuming a hearing is
16 appropriate, the judicial officer must consider several
17 enumerated factors to determine whether conditions short of
18 detention will 'reasonably assure the appearance of the person
as required and the safety of any other person and the
community.' The judicial officer may order detention if these
factors weigh against release.

19 Singleton, 182 F.3d at 8, 9 (citation omitted) (further holding that
20 the only triggering factor at issue, crime of violence, had not been
21 established).

22 Various districts courts are also in accord. Observes the
23 Court in United States v. Butler, 165 F.R.D. 68, 71 (N.D. Ohio
24 1996):

25 [I]t is reasonable to interpret the statute as authorizing
26 detention only upon proof of a likelihood of flight, a
27 threatened obstruction of justice or a danger of recidivism in
28 one or more of the crimes actually specified by the bail
statute. Once a judicial officer determines that a detention
hearing is warranted, the concept of danger to the community
resurfaces. Section 3142(g) sets forth the factors to be

1 considered by the court in deciding the propriety of detention.
2 One of those factors is "the nature and seriousness of the
3 danger to any person or the community that would be posed by
4 the person's release." 18 U.S.C. § 3142(g)(4). While at first
5 blush this appears to create the classic giveth/taketh away
6 situation, such is not the case. The factors set forth in §
7 3142(g) come into play only after the government has met the
8 initial burden of satisfying the requirements of § 3142(f)(1)
9 or (f)(2). It is certainly reasonable that a judicial officer
10 consider danger to the community in evaluating whether there
11 are appropriate conditions of release.

12 Id. (citations and quotations omitted, emphasis added) (further
13 noting that flight risk was not present, but authorizing detention
14 hearing based on crime of violence); see also United States v.
15 Riccardi, 2002 WL 1402232, *2 (D.Kan. June 26, 2002) ("As is evident
16 from the face of the statute, dangerousness alone . . . in the
17 absence of serious risk of flight, serious danger of obstruction of
18 justice or intimidation of witnesses, or charges involving one of
19 the specifically enumerated offenses, does not provide a basis for
20 detention and thus the government is not entitled to a detention
21 hearing under such circumstances.")

22 4. Some Courts Have Seemingly Held To The Contrary

23 Despite the seemingly clear language of the statute, the First
24 and Third Circuits, as well as some district courts, have held that
25 dangerousness can be considered as a ground for detention only in a
26 case that involves: a crime of violence, 18 U.S.C. § 3142(f)(1)(A);
27 narcotics with a ten year mandatory minimum sentence, 18 U.S.C.
28 § 3142(f)(1)(B); a crime with a maximum penalty of life imprisonment
or death, 18 U.S.C. § 3142(f)(1)(C); a recidivist defendant whose
criminal history involves two or more qualifying prior convictions,
18 U.S.C. § 3142(f)(1)(D); or obstruction, 18 U.S.C. § 3142
(f)(2)(B). The decisions, as written, suggest that dangerousness

1 cannot be considered as a ground for detention even if a case
2 involves a serious risk of flight under subsection (f)(2)(A). See
3 Ploof, 851 F.2d at 10 ("where detention is based on dangerousness
4 grounds, it can be ordered only in cases involving one of the
5 circumstances set forth in § 3142(f)(1);" remanded for
6 consideration of "whether or not there is a serious risk defendant
7 will engage or attempt to engage in the conduct set forth in §
8 3142(f)(2)(B) and that no condition or combination of conditions . .
9 . will reasonably assure the safety of any other person and the
10 community"); Himler, 797 F.2d at 160 (because defendant's case "does
11 not involve any of the offenses specified in subsection (f)(1), nor
12 has there been any claim that he would attempt to obstruct justice
13 or intimidate a witness or juror . . . we hold that the statute does
14 not authorize the detention of the defendant based on danger to the
15 community. . . . Any danger which he may present to the community
16 may be considered only in setting conditions of release. He may be
17 detained only if the record supports a finding that he presents a
18 serious flight risk."); United States v. Giordano, 370 F.Supp. 2d
19 1256 (S.D. Fla. 2005); United States v. DeBeir, 16 F.Supp. 2d 592
20 (D. Md. 1998).³

23 ³In its Order, the Magistrate Court states that "every court to
24 squarely rule on the subject has determined that a defendant may not
25 be detained as a danger to the community unless one of the
26 'triggers' in subsection (f)(1) is present. All of the cited cases
27 stand for the proposition that an (f)(1) circumstance is necessary
28 in order to make a danger finding." Order at 8 (citations omitted);
see also Order at 10. Later, the Court, citing Byrd, states that
"Byrd clearly held that an (f)(1) trigger was necessary." This is
not an accurate statement of the law. As noted supra, there is a
split of authority on this point. Friedman, Byrd, and Singleton
indicate that dangerousness (or flight) can serve as a basis for
detention once any one of the (f)(1) or (f)(2) factors is triggered.
Other Circuits, namely Ploof and Himler, indicate that dangerousness

1 5. This Court Should Follow Friedman, Byrd and Singleton

2 As between these two lines of authority, the government urges
3 the Court to follow the reasoning of Friedman, Byrd, and Singleton,
4 which are consistent with a plain reading of the Bail Act. The Bail
5 Act clearly indicates that a detention hearing is authorized if the
6 case involves any of the six triggering circumstances, including a
7 serious risk of flight; thereafter, the Act authorizes detention if
8 conditions cannot reasonably be set to mitigate both the risk of
9 flight and danger. If Congress had intended to limit the discretion
10 of courts to order detention premised on dangerousness to five
11 triggering circumstances (as suggested by the Himler and Ploof
12 decisions), it could have done so. Congress simply could have
13 indicated that, in cases involving a serious risk of flight, a court
14 may order detention only if there are no reasonable conditions to
15 assure defendant's appearance at future proceedings. Congress did
16 not limit courts' discretion in this fashion, and with good reason.
17 Congress has declared that, in certain circumscribed cases,
18 including those involving a serious risk of flight, the courts must
19 consider not only the risk of flight posed by the accused but also
20 the danger to the community posed by the accused.⁴ Such is the case

21 _____
22
23 can serve as a basis for detention only if a (f)(1) factor, or
24 factor (f)(2)(B) is present.

25 ⁴In addition, it should be noted that many of the courts that
26 have reached the contrary legal view on this issue, in fact, have
27 been fairly imprecise with respect to their analysis and citation to
28 authority. Take, for example, the decision in Giordano, which the
Magistrate Court cited as authority for his legal conclusion that he
lacked authority to consider dangerousness. See Order at 8. The
court in Giordano states that, "Circuit Court opinions considering
this issue under section 3142(f) have all ruled that the
'dangerousness' prong for pretrial detention under section 3142(e)
only applies to cases that arise under section 3142(f)(1)," (citing,

1 with respect to defendant Umer Hayat. In sum, because this case
2 involves a serious risk of flight, this Court has authority to
3 consider risk of flight and dangerousness with respect to defendant,
4 and to predicate his detention on either or both factors.

5 B. In The Alternative, Detention Is Authorized In A Case That
6 Involves An Offense Listed in 18 U.S.C. § 2332b(g) (5) (B) and
7 When There Are No Conditions That Will Reasonably Assure the
8 Appearance of the Person as Required And/Or the Safety of the
9 Community

10 Detention of a defendant under the Bail Reform Act is also
11 appropriate when, in a case such as this one, a judicial officer
12 finds: first, that the case involves an offense listed in 18 U.S.C.
13 § 2332b(g) (5) (B) (a "federal terrorism case"); and second, that no
14 condition or combination of conditions will reasonably assure the
15 appearance of the person as required and/or the safety of any other
16 person and the community.

17 A detention hearing is authorized for "a case that involves . .
18 . an offense listed in section 2332b(g) (5) (B) for which a maximum
19 term of imprisonment of 10 years or more is prescribed." 18 U.S.C.
20 § 3142(f) (1) (A) (emphasis added).

21 At bar, Hamid Hayat has been charged with providing and
22 concealing material support to terrorists in violation of 18 U.S.C.
23 § 2339A. Providing/concealing material support to terrorists, 18

24 Himler, 797 F.2d at 160 and Byrd, 969 F.2d at 109). Giordano, 370
25 F.Supp. 2d at 1261, 62. Later in the opinion, the Giordano court
26 cites to Friedman, 837 F.2d at 49, for the same proposition.
27 Giordano, 370 F.Supp. 2d at 1262, n. 4. This is wholly inaccurate.
28 Byrd and Friedman recognized that detention premised on
dangerousness is permissible in a case involving any (f) (1) or
(f) (2) factor. Himler, by contrast, indicated that detention is
permissible if the case involved any (f) (1) factor or factor
(f) (2) (B).

1 U.S.C. § 2339A, is listed under 18 U.S.C. 2332b(g)(5)(B); and the
2 maximum authorized sentence for material support is 15 years. See
3 18 U.S.C. §§ 2339A, 2332b(g)(5)(B).

4 The relevant question with respect to Umer Hayat, though, is
5 whether the case against Umer Hayat also "involves" an offense
6 listed in section 2332b(g)(5)(B). The government contends that it
7 does.

8 It is important to note that the Bail Reform Act states that a
9 detention hearing is authorized "in a case that *involves* . . . an
10 offense listed in section 2332(g)(5)(B). . . ." 18 U.S.C. § 3142
11 (f)(1)(A) (emphasis added). The Act does not state that detention is
12 authorized only if the *charged offense* against the defendant is a
13 federal terrorism offense; the case against the defendant must
14 "involve" a federal terrorism offense. This is a critical
15 distinction, and one that has been recognized by the courts.

16 Byrd is again on point. Byrd was charged with receiving a
17 videotape depicting minors engaged in sexually explicit conduct.
18 969 F.2d at 107. The Fifth Circuit considered, among other things,
19 the question of whether a detention hearing for Byrd was authorized
20 where the offense charged (receipt of child pornography) was not a
21 crime of violence, but the case potentially involved some other
22 uncharged crime of violence. Id. at 110. The Fifth Circuit noted
23 that, for the purposes of 18 U.S.C. § 3142(f), "it is not necessary
24 that the *charged offense* be a crime of violence; only that the case
25 *involve* a crime of violence or any one or more of the §3142(f)
26 factors." Id. It stated that "the proof of a nexus between the non-
27 violent offense charged and one or more of the six § 3142(f) factors
28

1 is crucial." Id. It noted, by way of example, that the government
2 could have established that Byrd's case was "a case that involves a
3 crime of violence," if it "demonstrat[ed] child molestation-an act
4 of violence-by Dr. Byrd, and that such specific act or acts are
5 reasonably connected to the offense with which he [was] charged."
6 Id. The court concluded that the government ultimately failed to
7 prove that the charged child pornography case was reasonably
8 connected to some crime of violence, and accordingly, that a
9 detention hearing was not warranted in the absence of a (f)(1)
10 circumstance. Id.⁵

11 In the case against Umer Hayat, thus, it is not necessary that
12 Umer Hayat be charged with a federal terrorism offense. It only
13

14
15 ⁵In its Order, the Magistrate Court opined that the phrase
16 "case that involves ... a crime of violence," means that the charged
17 offense must be a crime of violence. Order at 9. "'Case' is
18 synonomous with charged offense," stated the Court. Id. The
19 Magistrate Court later opined that "the *charged* offense [must be] a
20 crime of violence or federal crime of terror in order to trigger the
21 danger basis for detention." Order at 11.

22 The government respectfully disagrees. First of all, the Fifth
23 Circuit expressly rejected this conclusion. Byrd, 969 F.2d at 110.
24 Second, this interpretation is plainly at odds with a plain reading
25 of the statute. The Act specifically used the language "case that
26 involved" a crime of violence or "case that involved" a federal
27 terrorism crime. If Congress had intended to limit the (f)(1)
28 triggers solely to charged crimes of violence, it would have said
29 so. It did not. That fact speaks volumes. Congress knew how to
30 pick and choose its words in the Bail Reform Act. Indeed, in other
31 sections of the Bail Reform Act, namely subsection (g), Congress
32 specifically referred to charged crimes. See 18 U.S.C. § 3142(g)
33 (directing the court to consider the "nature and circumstances of
34 the offense charged.")(emphasis added).

35 In its Order, the Magistrate Court further suggested that
36 Singleton, 183 F.3d at 12, 14, somehow rejected the Byrd holding,
37 i.e., that a "case that involves . . . a crime of violence" can
38 trigger a detention hearing and that this category is distinct from
39 and broader than a charged crime of violence. Not so. Singleton did
40 not address the question of how to address the phrase "case that
41 involves." Singleton addressed the more narrow question of whether
42 a felon-in-possession charge was a crime of violence.

1 must be shown that his case involves an offense listed in section
2 2332b(g) (5) (B). See *id.* at 110.

3 The charged case against Umer Hayat, namely, making a false
4 statement in a matter related to international and domestic
5 terrorism, by its nature and as alleged, does involve a section
6 2332b(g) (5) (B) offense, namely provision of and concealment of
7 material support by Hamid Hayat. Recall that Umer Hayat purchased
8 an airline ticket for his son, knowing that his son intended to go
9 to a jihadist camp. Moreover, after Hamid Hayat attended a jihadist
10 camp and had returned to the United States, Umer Hayat, like his
11 son, knowingly concealed his son's conduct from the FBI. (Indeed he
12 was charged specifically with a violation of 18 U.S.C. § 1001 based
13 on this lie.) These two facts, particularly the latter, is
14 sufficient, for the purposes of bail proceedings, to establish that
15 Umer Hayat's case "involves" a section 2332b(g) (5) (B) offense. Umer
16 Hayat's conduct, including his charged lie, directly relate to his
17 son's charged federal terrorism offense. As such, defendant Umer
18 Hayat's case is one "that involves ... an offense listed in section
19 2332b(g) (5) (B)," a detention hearing for Umer Hayat can be
20 predicated on this ground, and detention of Umer Hayat can be
21 predicated on either flight and/or danger grounds.⁶

23
24 ⁶In *Byrd* the court held that even if the charged crime is non-
25 violent, the case could "involve a crime of violence" if the
26 government had demonstrated an act of violence by the defendant that
27 was reasonably connected to the charged crime. The situation at bar
28 is distinct in that the government contends that there is a nexus
between the charged crime of Umer Hayat and the separate charged
crime of defendant Hamid Hayat, a different defendant. This
distinction, in the context of this case, is not determinative.
There must, of course, be a nexus, as the *Byrd* court indicated,
between defendant Umer Hayat's charged crime, false statements, and
the overall conduct which indicates that the case is one that

1 C. Even If The Court Were to Conclude That It Does Not Have
2 Authority to Detain on the Basis of Dangerousness, The Court
3 Must Still Consider Defendant's Dangerousness In Assessing
4 Whether There Are Conditions Which Will Reasonably Assure
5 Defendant's Appearance At Trial

6 When "determining whether there are conditions of release that
7 will reasonably assure the appearance of the person as required and
8 the safety of any other person and the community," a Court is
9 directed to "take into account the available information
10 concerning," four separate factors, including "the nature and
11 seriousness of the danger to any person or the community that would
12 be posed by the person's release." 18 U.S.C. § 3142(g).

13 Subsection (g) indicates that all of these factors are to be
14 considered once a detention hearing is triggered under subsection
15 (f). United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir.
16 1991) ("Section 3142(g) specifies the various factors that must be
17 considered in determining whether there are conditions of release
18 that will reasonably assure the appearance of the person and the
19 safety of the community. These factors [include, among others] (4)
20 the nature and seriousness of the danger to any person or the
21 community that would be posed by the defendant's release") (emphasis
22 added; citation omitted); see also, United States v. Townsend, 897
23 F.2d 989, 993 (9th Cir. 1990). Subsection (g) does not indicate,
24 for example, that one set of subsection (g) considerations apply to
25 a case involving a crime of violence, and a different set of
26 subsection (g) factors apply to a case involving a serious risk of
27 _____
28 "involves a federal terrorism crime." Otherwise, there would be no
reasonable limit on the number of cases which could be considered to
fall within this category of cases for which a detention hearing is
authorized. Here, however, the required nexus is present.

1 flight. All factors are to be considered once a detention hearing
2 is authorized.

3 That being the case, even if the Court concludes that it does
4 not ultimately have the authority to detain on the basis of
5 dangerousness, it must still consider that factor in relation to its
6 flight risk analysis.⁷

7 IV.

8 DEFENDANT SHOULD BE DETAINED AS A SEVERE FLIGHT
9 RISK AND DANGER TO THE COMMUNITY

10 In the case at bar, an examination of all the relevant bail
11 factors demonstrates that defendant Umer Hayat is a severe flight
12 risk, that defendant poses a severe danger to the community, and
13 that there are no conditions that will reasonably assure his
14 appearance at further proceedings and mitigate the danger to the
15 community.⁸

16
17
18
19 ⁷In its Order, the Magistrate Court only considered the factors
20 set forth at 18 U.S.C. § 3142(g)(1)-(3) (related to the nature of the
21 offense, weight of the evidence, and characteristics of the
22 defendant), but not factor (g)(4) (related to danger). This was
23 erroneous.

24 ⁸In its Order, the Magistrate Court suggested that the
25 government somehow opposed defendant's motion to reopen the bail
26 hearing. Stated the Magistrate Court, "The undersigned does not
27 accept the government's protestations that in a fairly
28 straightforward 'false statement' case on its face, the government's
twice-made request to vacate the trial date on the basis of volume
of evidence and complexity, and the subsequent granting of that
request, did not significantly alter the calculus of this case for
the defendants." Order at 6. This is wholly incorrect. The
government did not advance this argument at all in connection with
defendant's second motion for reconsideration, either in its briefs
or at the hearing. Indeed, the government specifically informed the
Magistrate Court during oral argument that it was not contesting the
reopening of the hearing. 9/23/05 R.T. 3:11-14.

1 A. The Nature and Circumstances of the Offense Charged
2 (18 U.S.C. § 3142(g)(1))

3 Defendant Hamid Hayat is charged with providing material
4 support to terrorists in violation of 18 U.S.C. § 2339A.⁹ In a
5 nutshell, it is alleged that:

6 -During a period of months sometime between Fall, 2003 and
7 Fall, 2004, defendant Hamid Hayat attended a jihadist training
8 camp in Pakistan and, among other things, received training in
9 physical fitness, firearms, and means to wage jihad ("holy
10 war"). Superseding Indictment, Count 1, ¶ 7.

11 -On or about May 27, 2005, defendant Hamid Hayat departed
12 Pakistan. At this time, defendant Hamid Hayat intended to
13 return to the United States and intended, upon receipt of
14 orders from other individuals, to wage jihad in the United
15 States against persons within the United States and against
16 real and personal property within the United States. Id. ¶ 8.

17 -On or about May 30, June 3, and June 4, 2005, when questioned
18 by the Federal Bureau of Investigation ("FBI"), defendant Hamid
19 Hayat concealed the fact that he had received jihadist
20 training, and that he was returning to the United States for
21 the purpose of waging jihad. Id. ¶¶ 9, 11, and 12.¹⁰

23 ⁹Certain information related to defendant Hamid Hayat is
24 equally germane to bail issues with respect to Umer Hayat, and
25 hence, was proffered to the Magistrate Court and is proffered to
this Court as well.

26 ¹⁰Defendant Hamid Hayat is also charged with two separate
27 counts of making false statements. In Count Two, he is charged with
28 falsely stating on June 3, 2005: "that he was not involved in any
way with any type of terrorist organization, that he never attended
any type of terrorist training camp, that he never attended a
jihadist training camp, that he never attended a terrorist training
camp in Pakistan, and that he would never be involved in anything

1 Defendant Umer Hayat is charged, in Count 4, with falsely
2 stating on June 4, 2005: "that he had no first hand knowledge of
3 terrorist training camps in Pakistan that would prepare people to
4 fight for Jihad, and that his son, Hamid Hayat, did not attend any
5 terrorist or jihadist training camps, when, in truth and in fact as
6 he then well knew, he had visited various terrorist training camps
7 in Pakistan, and Hamid Hayat had attended one or more jihadist
8 terrorist training camps in Pakistan." Superseding Indictment, Count
9 4 (emphasis added).

10 The nature and circumstances of the crime alleged against Umer
11 Hayat suggest that defendant poses a significant risk of flight and
12 danger to the community.¹¹ See Singleton, 182 F.3d at 11 (noting
13 that a court must consider both the nature of the charges and the
14 "case-specific facts" or "manner in which the defendant committed
15 it"). Defendant Hamid Hayat, the grand jury charges, traveled to
16 Pakistan, participated in jihadi training, returned to the United
17 States with the intent to wage jihad, and then lied about his
18 conduct to the FBI. In interrelated conduct, his father, Umer
19 Hayat, allegedly traveled to Pakistan, toured jihadi camps, was
20

21 _____
22 related to terrorism, when, in truth and in fact as he then well
23 knew, he had attended one or more jihadist terrorist training camps
24 in Pakistan." Superseding Indictment, Count 2.

25 In Count Three, Hamid Hayat is charged with falsely stating on
26 June 4, 2005: "that he never attended a terrorist camp, that he
27 never received any training directed toward a Jihad against the
28 United States, and that he never received any weapons training at a
jihadist camp, when, in truth and in fact as he then well knew, he
had attended one or more jihadist terrorist training camps, which
included weapons training, in Pakistan." Superseding Indictment,
Count 3.

¹¹The Magistrate Court found that the nature and circumstances
of the crime weighed in favor of defendant Umer Hayat. For the
reasons noted herein, the government disagrees.

1 aware that his son attended a jihadist camp, returned to the United
2 States, and then lied to the FBI not only about his conduct, but
3 also about his son's conduct. This is not some garden variety false
4 statement on a loan application or benefits' application. Defendant
5 Umer Hayat is charged with concealing his knowledge about terrorist
6 training aimed at the conducting of jihad against the United States.
7 Umer Hayat's concealment of his son's jihadist training and intent,
8 and Umer Hayat's concealment of his own activities, reasonably give
9 rise to inferences that: Umer Hayat has a propensity to engage in
10 obstructive conduct; that, as an ultimate obstructive act or evasive
11 act, Umer Hayat might flee; and that Umer Hayat poses a danger.
12 Defendant's charged conduct, on its face, demonstrates that
13 defendant poses both a tremendous flight risk and danger.

14
15 B. There Is Substantial Evidence Against Umer Hayat Establishing
16 His Guilt and Substantial Evidence Against Hamid Hayat That Is
17 Relevant to the Bail Determination of Umer Hayat (18 U.S.C. §
18 3142 (g)(2))

19 The weight of the evidence against defendants Hamid and Umer
20 Hayat is substantial and compelling.¹² The evidence includes, among
21 other things:

- 22 1. Defendant Hamid Hayat had a series of recorded
23 conversations with a cooperating witness ("CW") between
24 March, 2003 and mid-April, 2003.¹³ During these

25 ¹²The Magistrate Court (correctly) found that the strength of
26 the evidence weighed in favor of the government. Order at 13. Of
27 course, of all the detention factors, "the weight of the evidence is
28 the least important." Gebro, 948 F.2d at 1121; see United States v.
Winsor, 785 F.2d 755, 757 (9th Cir. 1986).

¹³This proffer related to conversations between the CW and
Hamid Hayat, as well as all other such conversations proffered
herein, are based on preliminary summary translations of the

1 conversations with the CW, defendant Hamid Hayat, among
2 other things, revealed that he understood the nature and
3 structure of various known Pakistani terrorist groups and
4 that he had detailed knowledge regarding the mechanics of
5 attending a jihadist camp. He also indicated, during the
6 course of various conversations, that his relatives had
7 various connections to jihadist groups.¹⁴

8 2. Defendants Umer Hayat, Hamid Hayat, and their family
9 traveled from the United States to Pakistan on or about
10 April 19-21, 2003.

11 3. Defendant Hamid Hayat had a series of recorded
12 conversations with the CW after he arrived in Pakistan.
13 Among other things, he advised the CW that he genuinely
14 desired to attend a camp and strongly indicated in his
15 final conversation with the CW that he had been accepted
16 to "training" and was going to attend the same after
17 Ramadan in 2003.

18 4. Defendant Umer Hayat returned to the United States on or
19
20

21 recorded conversations. (These summaries, together with copies of
22 the actual recordings, have been provided to the defense). The
23 government is presently preparing full translations and transcripts
of these conversations.

24 ¹⁴For example, Hamid Hayat indicated that: a) his Uncle Attiq
25 [Rehman] was affiliated with a branch of JUI [Jamiat Ulema-I-Islam,
26 a major party in Pakistan] in the United Kingdom that covertly is
27 enthusiastic about jihad; b) his uncle Attiq [Rehman] could help
28 someone with the process of getting into a jihadist camp in
Pakistan; c) he believed, but was not sure, that Mullah [Mohammad]
Omar [the Taliban Supreme Leader] once called his grandfather [Saaed
Ur Rehman] in 1999 asking his grandfather to seek volunteers for
jihad [in Afghanistan]; in response to this request, 60 people from
"our" [Hamid's] madrassah volunteered, as well as 70-80 individuals
from Islamabad.

1 about February 27, 2005. His son, Hamid Hayat, returned
2 to the United States on or about May 30, 2005.

3 5. During his initial interviews with the FBI on May 30, 2005
4 (in the airport in Tokyo), on June 3, 2005 (at defendants'
5 home), and on June 4, 2005 (at the FBI¹⁵), defendant Hamid
6 Hayat repeatedly denied that he had participated in any
7 sort of jihadist or terrorist training in Pakistan.

8 6. On June 4, 2005, after advisement and waiver of his
9 rights, defendant Hamid Hayat submitted to and failed a
10 polygraph examination. Thereafter, defendant Hamid Hayat
11 stated and admitted, among other things, as follows during
12 a videotaped interview:

13 -He attended a jihadist training camp in Pakistan for
14 approximately 3-6 months in 2003-2004, and another
15 camp for a 3-day period in 2000.¹⁶

16 -He described, with fair detail, the location of the
17 second camp and layout of the same.

18 -The purpose of both camps was to train for jihad and
19 to teach people to kill those who work against
20 Muslims.

21 -The camp provided apparent paramilitary training,
22 including weapons training, explosives training, hand
23 to hand combat training, and exercise.
24

25
26 ¹⁵Defendants Umer Hayat and Hamid Hayat voluntarily came to the
27 Sacramento Division of the FBI, driving to the office in their own
28 car.

¹⁶Hamid Hayat had informed his father that he attended camp in
2000. This statement is proffered to this Court. It was not
proffered to the court below.

1 -He was being trained to and intended to commit jihad
2 in the United States.

3 -He did not have any orders to fight at present;
4 however, he was awaiting such orders.

5 7. During his interview with the FBI on June 4, 2005 (at the
6 FBI), defendant Umer Hayat denied that he had any
7 firsthand knowledge of training camps in Pakistan,
8 indicating that he would swear on the Quran that this were
9 true. Defendant Umer Hayat also denied any knowledge of
10 his son's attendance in terrorist or jihadi training.

11 8. Later that day, defendant Umer Hayat was confronted with a
12 small portion of his son's videotaped interview.
13 Thereafter, defendant Umer Hayat stated and admitted,
14 among other things, as follows during a videotaped
15 interview:

16 -Hamid Hayat attended a terrorist training camp in
17 Pakistan in 2003-04.

18 -Umer Hayat paid for Hamid's flight, knowing that
19 Hamid's intention was to attend a jihadist training
20 camp.
21

22 -Hamid Hayat first became interested in attending a
23 jihadist training camp during his early teenage
24 years, after being influenced by a classmate at the
25 madrassah (religious school) Hamid attended in
26 Rawalpindi, Pakistan. Hamid was also influenced by
27 his uncle [believed to be Attiq Rehman], who fought
28 with the mujahedeen in Afghanistan.

1 -The madrassah Hamid Hayat attended was operated by
2 Hamid Hayat's grandfather [Saaed Ur Rehman] (the
3 father-in-law to Umer Hayat). The father-in-law-
4 sends the students from this madrassah to jihadist
5 training camps in Pakistan.

6 -After completing his education at the madrassah,
7 Hamid Hayat went to a training camp near Rawalpindi,
8 Pakistan. Hamid was at the training camp for 6
9 months, but had been able to leave for home on the
10 weekends.

11 -Because of his family connections, he was invited to
12 observe more than four operational training camps.
13 He was assigned a driver [his father in law's
14 driver]¹⁷ who drove him from camp to camp. While
15 visiting these training camps, he observed weapons
16 and urban warfare training (including target practice
17 utilizing pictures of President Bush and Secretary of
18 Defense Rumsfeld), physical training, and classroom
19 education.
20

- 21 9. An agent searched defendant Hamid Hayat at the time of his
22 arrest on June 5, 2005. Defendant's wallet contained
23 various identification documents, as well as a scrap of
24 paper which included a brief statement in Arabic.
25 Translated, the phrase states, "Lord let us be at their
26 throats, and we ask you to give us refuge from their
27

28 ¹⁷The relationship of the driver is proffered to this Court; it
was not proffered to the court below.

1 evil." At trial, the government will be prepared to offer
2 expert testimony explaining the origin and usage of this
3 phrase.

4 10. Agents searched the Hayat residence on or about June 7,
5 2005. Agents recovered a book in the room occupied by
6 Hamid Hayat¹⁸ titled Virtues of Jihad, by Mohammad Masood
7 Azhar, founder and leader of the known Pakistani extremist
8 group Jaish-i-Muhammed. A preliminary translation of the
9 book has been prepared. Among other things, the book
10 conveys the message that jihad is considered as important
11 as the five pillars of Islam and invites every Muslim to
12 join jihad. The author elaborates about the virtues of
13 the fighter in the battlefield, the virtues of being
14 wounded during war, and the afterlife rewards for
15 performing jihad. At trial, the government will be
16 prepared to offer expert testimony explaining the nature,
17 organization, and purpose of Jaish-i-Muhammed.

18
19 11. During the same search, agents recovered a Jaish-i-
20 Muhammed newspaper by Masood Azhar in the room occupied by
21 Hamid Hayat.¹⁹ A preliminary translation of the magazine
22 has been prepared. Among other things, the magazine
23 declares that jihad is as important as one of the five
24

25 ¹⁸The book was found among a variety of correspondence
26 addressed to, among others, both Umer and Hamid Hayat. (This fact
is proffered to this Court, but was not proffered to the Magistrate
Court.)

27 ¹⁹The newspaper was found among a variety of correspondence
28 addressed to, among others, both Umer and Hamid Hayat. (This fact
is proffered to this Court, but was not proffered to the Magistrate
Court.)

1 pillars of Islam and invites all Muslims to renounce their
2 wealth and life in the path of Allah.

3 12. During the same search, agents recovered a book titled
4 Ventilator From the Jail by Masood Azhar in the laundry
5 room of the Hayats' house. A preliminary translation of
6 the book has been prepared. The book, written by Azhar
7 while imprisoned, invites Muslims to join the fight
8 against Indians and other "infidels," including Americans.
9 Among other things, the author states that jihad is our
10 duty and that jihad on the Pakistani Muslims is a definite
11 duty due to India's intrusion into the Kashmir. He tells
12 his readers to hate America with passion and to prepare
13 themselves for jihad because war has been declared. He
14 invites young men to jihad, declaring that a death in
15 jihad is the most prestigious one of all.

16
17 This is but a preview, if you will, of some of the government's
18 anticipated trial evidence. This information alone, however,
19 demonstrates that there is substantial evidence of defendant Umer
20 Hayat's guilt, and substantial reason to believe that defendant is a
21 serious flight risk and danger. Umer Hayat actively participated in
22 and concealed his knowledge about individuals, including his son,
23 who were engaging in training intended for jihad in the United
24 States and elsewhere. Umer Hayat knew that his son attended a camp
25 in 2000 and knew that his son wished to attend a camp again in 2003.
26 Umer Hayat bought an airline ticket for Hamid to go to Pakistan,
27 knowing of Hamid's jihadist plans. Once in Pakistan, Umer Hayat
28 knew that his son attended a camp. Umer Hayat, himself, toured

1 camps. With all this knowledge, after both Umer and Hamid Hayat
2 returned to the United States, Umer Hayat then lied to the FBI to
3 cover up his conduct and his son's conduct. This is not a bare
4 bones case where defendant Umer Hayat has a genuine chance of
5 prevailing or where pretrial detention could somehow work an
6 injustice against an arguably innocent accused. Likewise, this is
7 not a case where a father told a minor lie to cover up relatively
8 inconsequential misdeeds by his son. Defendant Umer Hayat
9 undoubtedly knows this, and this reality, in the circumstances of
10 his situation, will serve as a very strong incentive for defendant
11 to flee.

12 C. Umer Hayat Made False Statements to Pretrial Services in June,
13 2005 Regarding His Assets (18 U.S.C. § 3142(g)(3) ("Character of
14 Defendant"))

15 Umer Hayat indicated during his Pretrial Services interview
16 that he and his family spent 2003 and 2004 in Pakistan building a
17 house, a fact conceded by the defense.²⁰

18 Of significance, the government also has reason to believe that
19 the Hayats own a second home in Pakistan as well. During an
20 interview on June 7, 2005, Arsalan Hayat (son to Umer Hayat and
21 brother to Hamid Hayat) informed agents, among other things, that he
22 lived in Pakistan during 2003 to 2005; that during this time frame
23 his family lived in an old residence that his father Umer owned, and
24 that during this time frame his father was having a new house
25

26
27 ²⁰In its Order, the Magistrate Court indicated that the
28 government has "averred" that Umer maintains a house in Pakistan.
Order at 3. This is an understatement of the evidence. Pretrial
Services reported and the defense conceded that the Hayats owned a
home in Pakistan.

1 built.²¹

2 This omission is quite significant. It suggests that defendant
3 Umer Hayat has attempted to mislead the Court regarding a key issue:
4 the availability of assets abroad that could be used to assist
5 defendant's flight from this jurisdiction.

6 D. Umer Hayat and Other Family Members Made A Series of False
7 Statements to Customs Officials In April, 2003 (18 U.S.C. §
8 3142(g)(3) ("Character of Defendant"))

9 On April 19, 2003, Hamid Hayat, Umer Hayat and other Hayat
10 family members were stopped by U.S. Customs authorities as they were
11 on a jetway preparing to board a plane at Washington-Dulles
12 International Airport, while in route to Pakistan. Defendant Umer
13 Hayat was asked if he had any cash to declare and was reminded that
14 individuals carrying more than \$10,000 cash out of the United States
15 are required to declare that fact. Umer Hayat indicated that he had
16 \$10,000 and produced the cash. Umer Hayat, upon inquiry, stated
17 that the money was for his whole family. He was then asked, two
18 times, if there was any more money to declare. He replied no both
19 times. The family was then advised that they and their bags would
20 be searched. When Hamid Hayat was approached by inspectors, he
21 removed two envelopes from his pocket containing an aggregate amount
22 of \$10,000. Inspectors then asked the three female members of the
23

24
25 ²¹In its Order, the Magistrate Court stated that "the
26 government has intimated (without proof) that Umer may have a
27 connection with a second house in Pakistan." Order at 3. The
28 record indicates otherwise. The government proffered the statement
of Arsalan Hayat made to the FBI. The defense suggested that
Arsalan Hayat, if called to testify at present, would testify that
it was his grandfather's house. 9/23/05 R.T. 30:19-31:6. At best,
there is a dispute in the proffered evidence with respect to this
issue.

1 party if they had money. Umer Hayat's wife, Oma Hayat, stated that
2 she did, and after some initial resistance, handed over \$8,000 in
3 currency.

4 When subsequently questioned, Umer Hayat and Hamid Hayat made a
5 series of inconsistent statements about the origin of the money.
6 Umer Hayat first stated that the \$10,000 was money that he had
7 earned from his business as an ice cream salesman. He also
8 indicated that his wife worked and that the money on her person was
9 her own. Hamid Hayat then stated that he worked for a church and
10 that the money in his possession was his earnings from teaching.
11 Shortly thereafter, Umer Hayat offered a different explanation,
12 stating that much of the money represented wedding gifts from his
13 friends for the upcoming weddings for his daughter Najia and his son
14 Hamid. Questioning continued, in a separate location. Umer Hayat
15 offered a third and different explanation for the money: he stated
16 that he took a cash advance before his flight and that a large
17 portion of money was to be given to families in Pakistan from some
18 of his friends in the United States. Hamid Hayat then seemingly
19 changed his explanation as well, stating that he received \$1,800
20 from the sale of his Ford Escort the day prior to their departure.
21 Hamid Hayat also indicated that his mother, in fact, was not
22 employed.²²

24 This evidence, like the evidence associated with the charged
25 crimes, suggests that defendant Umer Hayat is an exceedingly poor

27 ²²U.S. Customs seized approximately \$27,000 in cash (and other
28 financial instruments) from the Hayats after these events.
Subsequently, the Hayats and a series of third parties filed claims
to the seized money. Customs ultimately assessed a penalty of
\$2,500 and returned the remaining cash (and financial instruments).

1 risk for the purposes of admission to bail. Defendant's propensity
2 to lie whenever it is convenient, whether to the FBI, to Customs
3 authorities, or to Pretrial Services, indicates that he cannot be
4 trusted.

5 E. Defendant Umer Hayat Faces A Significant Custodial Sentence
6 Upon Conviction (18 U.S.C. § 3142(g)(1))

7 Defendant Umer Hayat's criminal exposure is potentially severe
8 and obviously would give defendant a substantial incentive to flee.
9 According to the government's preliminary guidelines calculations,
10 if defendant Umer Hayat were convicted at trial, his advisory
11 guideline range would be 8 years of incarceration.

12 U.S.S.G. § 3A1.4 provides, in relevant part, that if the
13 offense is a felony that involved or was intended to promote a
14 federal crime of terrorism, then the offense level is 32 and
15 criminal history is VI.²³ Under this guideline, the post-trial
16 advisory guideline range for Umer Hayat would be 210-262
17 months with a statutory maximum of 8 years.²⁴

19
20 ²³The Magistrate Court suggests that defendant Umer Hayat's
21 sentencing range will be 0-3 years and, without citation to
22 authority, asserts that §3A1.4 is "definitionally unavailable."
Order at 12. Suffice it to say that, for the reasons set forth
herein, the government strongly disagrees.

23 ²⁴False statements are generally governed by U.S.S.G. § 2B1.1,
24 which would yield an offense level of 6. However, U.S.S.G.
25 § 2B1.1(c)(3) indicates that if the count of conviction establishes
26 an offense covered by another guideline, that guideline controls.
27 The government contends that Umer Hayat's false statement, in fact,
28 involved or was intended to promote a federal crime of terrorism,
i.e., material support to terrorists by his son Hamid Hayat. See
U.S.S.G. § 3A1.4. Here, Hamid Hayat is charged with providing
material support and concealing the same from the FBI. Defendant
Umer Hayat is likewise charged with lying to the FBI about his son's
attendance at a terrorist camp. In the government's view, such a
lie, to conceal his son's activities, was intended to promote his
son's federal terrorism crime, hence triggering application of the

1 F. Even Though Defendant Has Some Ties to the United States, He
2 Has Significant Established Ties to Pakistan (18 U.S.C. § 3142
3 (g) (3) ("Family and Community Ties of Defendant"))

4 Although defendant Umer Hayat has some ties to the Lodi
5 community and the United States, he also has significant and
6 developed ties to Pakistan which makes him a high risk for flight.²⁵

7 Defendant Umer Hayat was born January 5, 1958 in Pakistan, and
8 is currently age 47²⁶. He moved to the United States in 1976,
9 became a naturalized citizen in 1993, and has apparently maintained
10 some form of residence in Lodi for approximately 30 years. Umer
11 Hayat PTS Report at 1, 2. Defendant Umer Hayat lives with his wife
12 of 25 years and has two daughters and two sons: Hamid Hayat (age
13 23), Nija Hayat (17), Arslan Hayat (16), Rehalla Hayat (10), all of
14 whom normally reside at home. Id. They have had a residence at 302
15 E. Acacia # A, Lodi, for approximately 20 years. Id.

16 Of significance, defendant Umer Hayat has spent approximately
17 *twenty-two and one-half years, nearly one-half of his life*, living
18 abroad in Pakistan. Umer Hayat apparently resided in Pakistan from
19 his birth until he immigrated to the United States in 1976, a period
20

21 guideline. The ultimate determination as to whether § 3A1.4 applies
22 is one that this Court will make after the issue has been examined
23 by the Probation Office and the parties, and in the context of all
24 the facts presented at trial and at sentencing. The relevant point
25 for purposes of this bail proceeding is that defendant faces very
26 real exposure of up to eight years incarceration. That amount of
27 potential incarceration serves as a significant incentive for
28 flight.

25²⁵The Magistrate Court (correctly) found that "[t]he factors
[related to the history and characteristics of the defendant]
posited by the government indicate a potential for flight risk," and
ultimately concluded that these factors weigh in favor of the
government. Order at 13, 14.

26²⁶His passports so indicate.

1 of eighteen years. Umer Hayat's Immigration file indicates that he
2 traveled to Pakistan on three occasions between 1978 and 1990 and
3 remained in Pakistan for 23 months during that time period.²⁷

4 During his Pretrial Services interview, defendant indicated that he
5 spent 2003 and 2004 in Pakistan. Umer Hayat PTS Report at 1.

6 Indeed, a review of defendant's American passports indicates that
7 defendant traveled to Pakistan four times between late 1999 and the
8 present, and remained in Pakistan for 30 months during that time
9 frame²⁸. These time periods, in the aggregate, indicate that
10 defendant Umer Hayat has resided in Pakistan for 22 and ½ years.

11 Defendant Umer Hayat's other immediate family, i.e., Umer's
12 wife and the four other children, have also spent a significant
13 amount of time living in Pakistan. For example, even though
14 defendant Hamid Hayat, age 23, was born in the United States and is
15 a citizen here, he has lived *more than half of his life* in Pakistan.
16 According to Hamid Hayat, he traveled to Pakistan at least five to
17 seven times since he was born. Hamid Hayat Supplemental PTS Report
18 at 2. On one occasion, defendant stated, he lived with his maternal
19 grandparents, i.e., Saed Ur Rehman and his spouse (believed to be
20 Shaheen Begum) for ten years from 1990 to 2000 (approximately ages
21 nine through eighteen). Id. Most recently, Hamid Hayat resided in
22

24 ²⁷Umer Hayat's Immigration file indicates that he traveled to
25 Pakistan on the following dates: 9/78-6/23/79 (approximately 10
26 months); 9/28/83-7/20/84 (approximately 10 months); 10/17/89-1/26/90
(over 3 months).

27 ²⁸Various U.S. passports for Umer Hayat located by the
28 government indicate that, at the very least, he resided in or
visited Pakistan on the following dates: 10/19/03 to 2/28/05 (over
16 months), 4/23/03 to 6/12/03 (about 1.5 months), 11/12/99 to
5/23/00 (over 6 months), and 11/1/98 to 4/17/99 (6.5 months).

1 Pakistan for two years between 2003 and 2004. Id. Indeed, during a
2 conversation with the CW in 2003, defendant stated, that this
3 country [referring to the U.S.] is just a name and that his heart
4 belongs to Pakistan. This remark is telling.

5 The same can be said about Umer Hayat's other immediate family.
6 Oma Hayat was born in Pakistan and, at some point later in her life,
7 she immigrated to the United States. It is also known that Oma
8 Hayat and the other three Hayat children, like Umer and Hamid, all
9 lived in Pakistan in 2003 and 2004.²⁹

10 Of importance, defendant Umer Hayat has many close relatives
11 who reside in Pakistan and/or frequently travel to Pakistan.
12 Defendant's two sisters currently reside in Pakistan.³⁰ Umer
13 Hayat's parents as well as his brother recently visited Pakistan
14 between April, 2005 and July, 2005. Umer Hayat's in-laws reside in
15 Pakistan including his father-in-law, Saaed Ur Rehman (grandfather
16 to Hamid), his mother-in-law (believed to be Shaheen Begum), and
17 possibly his brother-in-law, Attiq Rehman (uncle to Hamid).³¹ In
18 addition, defendant Umer Hayat's daughter-in-law (wife to Hamid
19 Hayat) currently resides in Pakistan. Hamid Hayat Supplemental PTS
20

21
22 ²⁹Defendant Umer Hayat has one sister living in Lodi near his
23 home.

24 ³⁰According to Umer Hayat, his father (believed to be Suleman
25 Suleman), two sisters, and one brother (believed to be Umer Khatab)
26 went to Pakistan in approximately April, 2005. Umer Hayat PTS
27 Report at 1. The defense reported at the July bail review hearing
28 that Umer Hayat's father and brother had returned to the United
States; apparently, however, the sisters remain in Pakistan.

³¹Recall that Hamid Hayat indicated during his confession that
the camp he attended was run by his Uncle Attiq Rehman. For that
reason, it is fair to assume that Attiq Rehman has resided in
Pakistan in the past and may potentially reside there at present.

1 Report at 2.³²

2 Of additional importance, there are indications that Attiq
3 Rehman (brother-in-law to Umer Hayat and uncle to Hamid Hayat) has
4 sometimes resided in England. Hamid Hayat told the CW in 2003 that
5 his uncle apparently had a visa to reside in the United Kingdom and
6 intended to renew the same.³³

7 Finally, and of great significance, defendant owns one, and
8 possibly a second, residence in Pakistan. It is undisputed that
9 defendant Umer Hayat owns at least one home in Pakistan. Umer Hayat
10 indicated during his Pretrial Services interview that he and his
11 family spent 2003 and 2004 in Pakistan building a house. Umer Hayat
12 PTS Report at 1. (During his videotaped confession, Umer Hayat
13 suggested that the new house was being built for Hamid Hayat because
14 he was getting married). As noted before, the government also has
15 reason to believe that the Hayats own a second home in Pakistan
16 based on the statements made by Arsalan Hayat.³⁴

17
18 In short, even though defendant Umer Hayat has some ties to the
19 Lodi area, he has very significant and current residential ties to
20

21 ³²In addition, according to a recent letter from defense
22 counsel for defendant Hamid Hayat, Umer Hayat's son-in-law (husband
23 to his daughter Nija) also currently resides in Pakistan. This fact
is proffered to this Court, but was not proffered to the Magistrate
Court.

24 ³³During a March 11, 2003 tape recorded conversation, Hamid
25 Hayat told the CW that his uncle (his mother's brother) was heading
back from Islamabad to England because his visa was expiring.

26 ³⁴In addition, Umer Hayat has historically utilized his credit
27 cards to make major purchases, including the purchase of airline
tickets for travel to Pakistan. An analysis of the credit cards
28 Umer Hayat is known to possess suggests that he has combined
available credit in excess of \$8,000, an amount easily sufficient to
fund travel abroad.

1 Pakistan. Umer Hayat has not just traveled frequently to Pakistan,
2 he has lived there for more than two decades. Hayat has established
3 Pakistani familial connections, one, possibly two, Pakistani homes,
4 and undoubtedly countless friends and associates made through his
5 and his family's years of residency, all of which could easily be
6 utilized to facilitate a flight from justice in the United States.
7 See, e.g., United States v. Koenig, 912 F.2d 1190, 1193 (9th Cir.
8 1990) (defendant detained based on absence of substantial ties to
9 his community, his foreign contacts, and his employment history).

10 A few comments are in order regarding some of the findings made
11 by the Magistrate Court on this issue. First, the Magistrate Court
12 opined that it would be difficult for defendant to travel outside of
13 the United States because defendant would be placed on no-fly lists.
14 Order at 13. This, of course, assumes that defendant Umer Hayat
15 would travel in a notorious manner and would utilize air travel from
16 a location with vigilant security checks. Suffice it to say that
17 there are a myriad of ways that fugitives flee from the United
18 States without departing from a United States airport with vigilant
19 security systems.
20

21 The Magistrate Court further opined that Umer Hayat would be an
22 "an official pariah in Pakistan," and that it would be difficult for
23 Umer Hayat to flee to Pakistan and reside notoriously there. The
24 Court further suggested that defendant's home(s) would be the first
25 place where Pakistani government officials would look for defendant.
26 Order at 13. There is no information in the record, one way or the
27 other, to support these assumptions about how defendant would be
28 treated were he to flee to Pakistan or about what actions the

1 Pakistani government would take were defendant to flee to Pakistan.

2 Finally, the Magistrate Judge indicated that he has a hard time
3 believing that Umer Hayat would simply fly off leaving his son to
4 fend for himself. Order at 14. Perhaps; but the government
5 believes otherwise. Defendant Umer Hayat has a tremendous incentive
6 to flee. His son faces likely conviction and incarceration for a
7 period of decades.³⁵ He too faces likely conviction and
8 incarceration for a number of years (during which their family will
9 undoubtedly face tremendous financial hardship). Moreover, Umer
10 Hayat (and his family) now face a lifetime of infamy here in the
11 United States based on his misdeeds and that of his son. Given this
12 probable future, why would Umer Hayat have any reason to remain in
13 the United States? A person in defendant's circumstances could
14 easily believe that his son's situation was a "lost cause," and
15 that, to protect the rest of the family, it would be better to
16 simply leave the son behind and start anew elsewhere.
17

18 G. Even Though Defendant Has Some Ties to the United States, He
19 Apparently Has Ties to A Network of Jihadists Located in
20 Pakistan and Potentially the United Kingdom (18 U.S.C. § 3142
21 (g) (3) ("Family and Community Ties of Defendant")

22 Of great importance, the evidence, in its totality, indicates
23 that both Umer Hayat and Hamid Hayat have significant ties to known
24 and unknown individuals involved in or sympathetic to jihad. This

25 ³⁵It is worth emphasizing that defendant Umer Hayat supported
26 his son's efforts to train for jihad, which, by its nature, includes
27 a willingness by the jihadist to sacrifice his life for the cause of
28 Holy War. If Umer Hayat was willing to allow his son to leave his
family for jihad and possible death, why would Umer Hayat be
unwilling to leave his son behind to face the consequences of this
prosecution? Umer Hayat has indicated where he stands with respect
to his son.

1 makes Umer Hayat an extreme flight risk and danger.

2 Attiq Rehman, Umer Hayat's brother-in-law is known to be
3 affiliated with jihadist groups.³⁶ Similarly, Saeed Ur Rehman, Umer
4 Hayat's father-in-law also is known to be affiliated with jihadist
5 groups.³⁷ In addition, Hamid Hayat admittedly attended a jihadist
6 camp where, by his estimate, there were up to 200 students. It is
7 fair to infer, thus, that Umer Hayat, Hamid Hayat, Umer Hayat's
8 father-in-law as well as his brother-in-law, are all tied to a broad
9 network of other jihadists in Pakistan (and, in the case of Attiq
10 Rehman, perhaps the United Kingdom).

11 In addition, it is known that Hamid Hayat returned home with
12 the intent to commit jihad in the United States upon receipt of
13 orders. Thus, the fair inference is that the Hayats have jihadist
14 associates, known or even unknown, here in the United States.

15 Defendant Umer Hayat's ties to an apparent jihadist network are
16 highly significant. This network could easily give Umer Hayat
17

18 ³⁶Among other things: 1. Hamid Hayat told the cooperating
19 witness that his uncle Attiq [Rehman] was affiliated with a branch
20 of JUI [Jamiat Ulema-i-Islam, a major party in Pakistan] in the
21 United Kingdom that covertly is enthusiastic about jihad. 2. Hamid
22 Hayat told the cooperating witness that his uncle Attiq [Rehman]
23 could help someone with the process of getting into a jihadist camp
24 in Pakistan. 3. Umer Hayat told the FBI that Hamid Hayat's uncle
25 [believed to be Attiq Rehman] fought with the mujahedeen in
26 Afghanistan. 4. Umer Hayat also told the FBI that Hamid was
27 influenced by his uncle [believed to be Attiq Rehman] to attend a
28 jihadi camp.

24 ³⁷Among other things: 1. Hamid Hayat claimed that his
25 grandfather had ties to Mullah Omar, the Taliban Supreme leader.
26 2. Umer Hayat told the FBI that the madrassah Hamid Hayat attended
27 was operated by Saeed ur Rehman (Umer Hayat's father-in-law) and
28 that Saeed ur Rehman sends the students from this madrassah to
jihadi training camps in Pakistan. 3. Umer Hayat told the FBI that
because of his family connections, he was invited to observe more
than four operational training camps. His father-in-law's driver,
drove him from camp to camp.

1 support, both financial and otherwise, to abscond from this
2 jurisdiction. See United States v. El-Hage, 213 F.3d 74, 80 (2d
3 Cir. 2000) (finding risk of flight despite defendant having American
4 citizenship, wife, and seven small children, because defendant had
5 access to false documents, extensive history of travel and residence
6 in other countries, and alleged ties to extensive and well-organized
7 terrorist group), cert. denied, 531 U.S. 881 (2000).

8 H. Defendant Umer Hayat Has a Modest Record of Gainful Employment
9 in the United States And Spending Habits Well Beyond His Means
10 (18 U.S.C. § 3142(g)(3) ("Employment and Financial Resources of
11 Defendant"))

12 Umer Hayat has a modest record of lawful employment during his
13 residence in the United States. According to pretrial services,
14 defendant Umer Hayat has "seasonal" employment: he has owned and
15 operated an ice cream truck during the summer months for the past 15
16 years earning \$1500 per month. Umer Hayat PTS Report at 2.
17 Otherwise, defendant reports that he collects approximately \$1,000
18 in rental income each month from renters at the Acacia property.
19 Id. at 1. Indeed, tax returns suggest that defendant Umer Hayat has
20 declared income ranging from as little as \$3,616 to a maximum amount
21 of \$13,907 for the tax years between approximately 1988 and 2003.
22 Most years, defendant's reported income was approximately \$10,000 or
23 below; during the last five years, defendant's income ranged from
24 about \$10,000 to \$12,000.³⁸ It does not appear that defendant Umer
25

26 ³⁸The government proffers specific tax return information for
27 Umer Hayat to this Court. The jointly filed returns for Umer Hayat
28 and his wife (found at his residence during execution of a search
warrant) indicate that defendant reported the following adjusted
gross incomes for the following years: 1988-\$7,812; 1990-\$4,376;
1992-\$3,616; 1993-\$3,648; 1994-\$13,907; 1995-\$10,621; 1996-\$8,526;
1999-\$10,356; 2000-\$11,042; 2001-\$10,577; 2002-\$12,123; 2003-

1 Hayat has any sort of full-time occupation or career. In addition,
2 according to Umer Hayat, his spouse, Oma, does not work, due to a
3 reported illness. Id. at 2. Finally, it could not be said, based
4 on the above facts, that Umer Hayat would have tremendous employment
5 prospects in the United States if released on bail. In short, it
6 does not appear that Umer Hayat has any sort of occupation that
7 naturally ties him here to the United States or that he would be
8 loath to give up. His occupational ties to the United States are
9 minimal at best.

10 On a related note, defendant Umer Hayat appears to be making
11 significant expenditures that are inconsistent with his self-
12 reported occupation and income.³⁹ Umer Hayat is the sole wage
13 earner for a family of six. His income for years has been about
14 \$10,000 per year. This notwithstanding, defendant appears to have
15 enough money to build a new house in Pakistan, perhaps maintain a
16 second house in Pakistan, and regularly travel to Pakistan. This
17 unexplained variance suggests that defendant potentially had and has
18 assets unknown to the government or outside financial support
19 unknown to the government. Under either scenario, the potential
20 existence of unaccounted for assets or financial support heightens
21

22
23
24
25 _____
26 \$10,526. The government proffered approximate tax return
27 information to the Magistrate Court, namely that defendant was
reporting yearly income of about \$10,000 for a number of years.
9/23/05 R.T. 33:14-18.

28 ³⁹Indeed, the Magistrate Court found that "Umer [Hayat]
seemingly has access to more money than his station in life would
ordinarily indicate." Order at 13.

1 the risk of flight.⁴⁰

2 I. Defendant Umer Hayat's Criminal History (18 U.S.C.
3 § 3142(g)(3))

4 Defendant Umer Hayat has one known criminal conviction for a
5 misdemeanor crime of violence. Defendant was arrested on August 27,
6 2001, for kidnaping and willful cruelty to a child. On November 11,
7 2001, he was convicted of misdemeanor battery upon a child, and
8 sentenced to 3 years probation and 3 days jail. Umer Hayat PTS
9 Report at 2.⁴¹

10 It should be noted that defendant apparently purchased an
11 airline ticket for his son, knowing that his son intended to attend
12 a jihadist camp, in 2003, at the time he was still on criminal
13 probation. (Defendant's probation lapsed approximately six months
14 before the charged crime). Defendant's propensity to engage in
15 misconduct during the course of his probation is yet another reason
16 that he constitutes a poor risk for admission to bail.

17
18 J. Defendant Poses a Significant Danger to the Community (18
19 U.S.C. § 3142(g)(4))

20 Defendant poses a significant danger to the community. The
21 charges filed and evidence proffered indicate that defendant Hamid
22 Hayat attended a terrorist training camp with the intention of

23 ⁴⁰In this regard, it should be noted that defendant Umer Hayat,
24 a seasonal ice cream truck operator, and Hamid Hayat, who had all of
25 a few days of work experience as a laborer, have somehow managed to
26 retain private counsel. That is, of course, their right. It does
27 suggest, however, that defendants are presently receiving third
party support for payment of their defense. The government has no
verified information regarding the identity of the party or parties
who apparently are providing this support.

28 ⁴¹Defendant denies use of illicit substances. He also does not
report any sort of significant ailments which would be germane to a
bail determination. Umer Hayat PTS Report at 2.

1 committing jihad here in the United States. The charges filed and
2 evidence proffered indicate that Umer Hayat provided support to his
3 son to attend a jihadi camp, observed camps himself, and lied to
4 cover up both his conduct and that of his son. In addition, the
5 nature of the charges and the evidence proffered suggests that
6 defendants are not isolated and independent criminal actors. To the
7 contrary, the charges and evidence indicate that defendants are
8 connected to an apparent network of jihadi associates that includes
9 relatives (such as Umer Hayat's father-in-law and brother-in-law)
10 and third-parties alike (including associates of Hamid Hayat from
11 the camp he attended and potential associates of Umer Hayat and
12 Hamid Hayat here in the United States). Given the nature of
13 defendant Umer Hayat's conduct, by itself, and as part of a larger
14 criminal network, detention is manifestly necessary. Detention is
15 imperative to safeguard the community against any possibility that
16 defendant will take steps, either himself, or through others known
17 and unknown, to bring harm to American citizens or property.

18
19 K. Defendant's Proposed Collateral Is Insufficient to
20 Reasonably Assure His Appearance At Future Proceedings
21 and to Safeguard the Community (18 U.S.C. § 3142(g)(3)
22 ("Financial Resources of Defendant"))

23 The Magistrate Court indicated that as a condition of bail,
24 defendant Umer Hayat is to post approximately \$1.2 million of real
25 property belonging to a combination of his relatives as collateral.
26 This bail, while substantial, is still insufficient given the flight
27 risk associated with this defendant and the danger to the community
28 posed by this defendant.

First of all, the government has genuine concerns about the

1 proposed sureties (including their property), the true nature of
2 their relationship to defendant Umer Hayat, and whether potential
3 financial losses to the proposed sureties will reasonably assure
4 defendant's appearances and protect the community.

5 One property proffered by the defense is 118 West Oak, Lodi.
6 Surety Safdar Afzal, defendant Umer Hayat's cousin, owns this
7 property. A second property proffered by the defense is 1011 Priebe
8 Street, Lodi. Surety Sher Afzal, defendant Umer Hayat's uncle, and
9 father to Safdar Afzal, owns this property.

10 Safdar Afzal was interviewed by the government. He explained
11 that while he and his father are related to the Hayats, they are not
12 particularly close to them. He further indicated that both he and
13 his father were reluctant to offer the properties, but Umer Hayat
14 made multiple, persistent calls from jail to convince Sher Afzal to
15 put up his property. Although Sher Afzal did not want to do it, he
16 ultimately acquiesced. Sher Afzal than asked his son Safdar Afzal
17 to do the same. Out of respect for his father's request, Safdar
18 Afzal reluctantly agreed to post the property.

19 The government also interviewed proposed surety Sher Afzal.
20 Sher Afzal appears to be an 81 year old man who recently suffered a
21 stroke and does not speak English. It was difficult to speak with
22 Sher Afzal because of the language barriers and the government,
23 based on the totality of the circumstances, is uncertain whether he
24 genuinely understands and appreciates the nature of the charges
25 against the defendant and the risk that he is taking.

26 Separate and apart from these issues, it should be noted that
27 neither Sher Afzal nor Safdar Afzal appear to reside at the
28

1 properties in question. According to interviewing agents and the
2 appraisal paperwork submitted by the defense, Safdar Afzal resides
3 at 230 Vine and his father similarly appears to reside at that
4 address. Potentially, thus, these are rental or investment
5 properties; the government does not know for certain. And, as the
6 court is aware, a primary residence is far better security than an
7 investment property since, in theory, a defendant would be less
8 inclined to violate a condition of release if it meant depriving a
9 surety of his or her homestead.

10 Given all this, there are serious doubts as to whether the
11 Afzals are truly willing and capable sureties who voluntarily have
12 agreed to their surety undertakings. Moreover, the government is
13 hardly confident that the posting of the Afzal properties will
14 mitigate the risks of flight and danger by defendant in this case.
15 Umer Hayat, at best, has a lukewarm familial connection to these
16 sureties. Indeed Sadfar Afzal candidly indicated that neither he
17 nor his father are close to Umer (or Hamid) Hayat. That being the
18 case, there is good reason to believe that loss of these properties
19 would mean little to Umer Hayat and would not serve as a significant
20 disincentive for flight or dangerous conduct on his part. See
21 Koenig, 912 F.2d at 1193 (rejecting use of defendant's parents as
22 surety: "His parents have offered to put up a bond, but there is
23 reason to believe that his relationship with his parents is not a
24 close one and that the bond would not assure his appearance.");
25 Townsend, 897 F.2d at 995 (rejecting \$1 million bail offered by a
26 Swiss friend of defendant; "The purpose of bail is not served unless
27 losing the sum would be a deeply-felt hurt to the defendant and his
28

1 family; the hurt must be so severe that defendant will return for
2 trial rather than flee.").

3 The defense has also proffered 333 Acacia and 302 Acacia in
4 Lodi. Umer Khatab is the owner of 333 Acacia and part owner of 302
5 Acacia. According to the defense, Khatab is Umer Hayat's brother
6 and Hamid Hayat's uncle.

7 Umer Khatab refused to be interviewed by the FBI. According to
8 Safdar Afzal, however, Umer Khatab and his family left the United
9 States earlier this year with the intention of never coming back.
10 Apparently, the Khatabs were planning on building a house and living
11 in Pakistan. According to Mr. Afzal, the Khatabs solely returned to
12 assist in connection with the Hayat matter. In addition, we know
13 from the defense that at least one of the two dwellings on 302
14 Acacia is utilized as the primary residence for the Hayats, while
15 the other is a rental property.

16 Given all this, it is clear that neither 333 Acacia or 302
17 Acacia is the primary residence for the Khatabs; the property they
18 intend to post is investment property. Moreover, the nature of the
19 property to be posted and the Khatabs' apparent intent to move
20 permanently to Pakistan, leads the government to question whether
21 the loss of these properties would constitute such a hardship to the
22 Khatabs that it would serve as a substantial disincentive against
23 flight or dangerous conduct by defendant. These properties, in the
24 government's view, would have minimal deterrent value.

25
26 Next, it should be noted that Umer Hayat proposes to post his
27 son's half-interest in 302 Acacia. While it is true that the Hayats
28 reside in one of the dwellings located on this property, this

1 security, ultimately, is of little value for the purposes of bail.
2 Hamid Hayat is facing a potential thirty year prison sentence. In
3 addition, the Hayats own one, if not two properties in Pakistan.⁴²
4 As such, the potential loss of Hamid Hayat's half interest in this
5 property would hardly be a significant disincentive for defendant
6 Umer Hayat's flight or potential dangerous acts.⁴³

7 Finally, and significantly, Umer Hayat appears to be tied to a
8 substantial jihadist network. This network, thus, would presumably
9 have the means to compensate any sureties who suffered financial
10 losses were their properties to be forfeited, undermining what
11 little deterrent value, if any, these properties might have.

12 In sum, the government believes that the proposed sureties and
13 properties are simply inadequate to mitigate the risks at issue.
14

16
17 ⁴²Defendant informed the Magistrate Court that one of the homes
18 has apparently been placed on the market. At present, the
19 government has received no verification of the location of this
20 property, verification that it has been sold and on what terms, much
21 less verification that the proceeds thereof have been placed outside
22 the control of the defendant to avoid their potential use for flight
23 from this jurisdiction. As for the second property, defendant has
24 not even acknowledged its existence, an alarming fact by itself.
25 Presumably, this property is not for sale and remains available for
26 immediate use by the Hayat family.

27 ⁴³The government advised the Magistrate Court, both in its its
28 Opposition to the Second Motion for Reconsideration of Release on
29 Bail as well as at the hearing, that it had serious concerns about
30 these sureties and their properties, i.e., how significant the loss
31 of the properties would be for these sureties, how significant the
32 loss of these properties would be to Umer Hayat and his willingness
33 to flee or commit dangerous acts, and whether the proposed sureties
34 fully understand the risks associated with their posting of property
35 in this case. Government's Opposition, at 33-36; 9/23/05 R.T. 44:7-
36 45:15. The government expressly requested that the Magistrate Court
37 place the sureties under oath and that examination be allowed to
38 determine their suitability as sureties. Id. at 36, n. 26. Even
39 though the sureties apparently were present at the hearing, the
40 government's request, inexplicably, was not granted.

1 L. The Other Conditions of Release Are Insufficient To Adequately
2 Mitigate The Risks of Flight and Danger

3 The Magistrate Court set a series of conditions effectively
4 placing defendant Umer Hayat on monitored home confinement. These
5 conditions, in the governments's judgment, are problematic for a
6 host of reasons and ultimately provide few significant barriers to
7 flight by defendant or the dangers posed by defendant.

8 First of all, the government seriously questions whether the
9 conditions imposed will serve as a meaningful deterrent against
10 flight or danger under the circumstances of this case.
11 Home detention and electronic surveillance, "at best elaborately
12 replicate a detention facility without the confidence of security
13 such a facility instills." United States v. Millan, 4 F.3d 1038,
14 1048, 49 (2nd Cir. 1993) (quotations and citations omitted), cert.
15 denied, 511 U.S. 1006 (1994), United States v. Orena, 986 F.2d 628,
16 632 (2d Cir. 1993); United States v. Gotti, 776 F.Supp. 666, 672
17 (E.D.N.Y. 1991). Numerous courts, in fact, have noted that
18 electronic monitoring systems and other technological devices easily
19 can be circumvented and rendered inoperative. Millan, 4 F.3d at
20 1049; Orena, 986 F.2d at 632; Gotti, 776 F.Supp. at 672. Moreover,
21 courts have candidly noted that "the wearing of an electronic device
22 [does not] offer assurance against flight occurring before measures
23 can be taken to prevent a detected departure from the jurisdiction."
24 Townsend, 897 F.2d at 994-95; United States v. Benatar, 2002 WL
25 31410262, at *3 (E.D.N.Y. Oct. 10, 2002) ("home detention with
26 electronic monitoring does not prevent flight; at best, it limits a
27 fleeing defendant's head start").
28

Secondly, the other conditions suggested by the Magistrate

1 Court also have little practical value for the purposes of deterring
2 flight or danger on a *real time basis*. How will a visitor's list
3 (presented to Pretrial Services "within two days"⁴⁴ of such visits),
4 access to historic phone data, or even a search condition,
5 realistically allow Pretrial Services or the government to monitor
6 defendant's contacts and activities and reasonably prevent imminent
7 flight or danger? They will not.

8 Not surprisingly, numerous courts have found that, in cases
9 such as this one, where there is a significant risk of flight and/or
10 danger, conditions designed to establish a "home confinement center"
11 are simply insufficient. For example, in United States v. Goba,
12 240 F.Supp.2d 242 (W.D.N.Y. 2003), "each defendant [charged with
13 providing material support to terrorists] share[d] the common
14 factors of being a United States citizen, having long-standing ties
15 to Lackawanna, NY, having family and friends living in and around
16 Western New York, and having no significant criminal history." Id.
17 This notwithstanding, the district court found that "each individual
18 defendant's background [was] significantly outweighed by the risk of
19 flight and danger to the community that each pose[d] as a result of
20 his demonstrated ability to live abroad for an extended period of
21 time and by his attendance and training at al-Qaeda's al-Farooq
22 terrorist training camp." Id. In reaching this conclusion, the
23

24
25 ⁴⁴It is unclear whether the Magistrate intended to order
26 defendant to present such visitor's lists before visitors arrived or
27 after. Even assuming that the Magistrate Court intended defendant
28 to submit these lists in advance, such a list, which depends on
self-reporting by defendant, has little practical value for the
purposes of preventing flight or danger. Without actual
surveillance of the premises by Pretrial Services and the
government, there would be no reliable means to know who was coming
or going at the Hayat home.

1 court specifically rejected the argument that monitored home
2 detention sufficiently mitigated the risks:

3 In this Court's view, the electronic surveillance suggested by
4 defense counsel is simply insufficient. Here, defending
5 against the danger that each of these four men present would
6 require institution of four replica detention facilities, a
7 measure not required by the caselaw.

8 Id.; see United States v. Mercedes, 254 F.3d 433, 437 (2nd Cir.
9 2001) (in a prosecution for conspiracy to commit armed robbery of a
10 drug-dealer, "electronic monitoring, home detention and assurances
11 by Roman's fiancée that he will comply with the requirements of
12 pretrial release are insufficient in the face of strong evidence
13 that Roman presents both a danger to the community and a flight
14 risk"); United States v. Minns, 863 F.Supp. 360, 364 (N.D. Tex.
15 1994) (prosecution for false statements in passport applications and
16 illegal procurement of citizenship; court rejected defendant's
17 release subject to: a \$750,000 cash bond; electronic, video and
18 telephone monitoring; third-party custody with his mother-in-law;
19 house arrest; 24-hour security provided by armed guards; and
20 supervision by pre-trial services).

21 Thirdly, and not insignificantly, a court does not have
22 authority under the Bail Reform Act to effectively order the
23 government to set up monitored home detention centers. In Orena,
24 the Magistrate Court ordered defendants' confinement to residences,
25 imposed restrictions on visitors and phone calls, authorized a
26 wiretap of defendants and use of electronic bracelets, ordered
27 defendants to call pretrial services, and authorized the government
28 to search defendants' homes at any time. Orena, 986 F.2d at 632.
The Second Circuit reversed. Among other things, the Circuit noted

1 that, "[s]afety of the community will be assured only if the
2 government provides trustworthy, trained staff to carry out the
3 extensive monitoring of homes, telephones, and travel that would be
4 necessary to ensure compliance with the conditions of bail" and that
5 the Court could "find nothing in the Bail Reform Act that requires
6 the government to staff home detention centers" Id. at 632-
7 33.

8 Finally, the government seriously questions whether the
9 Magistrate Court's search condition comports with the Fourth
10 Amendment. Recall that the Magistrate Court held that defendant
11 could be released only if he submitted to a search of his premises
12 on reasonable suspicion, and waived any rights he has under United
13 States v. Scott, __ F.3d __, 2005 W.L. 2174413 (9th Cir. Sept. 9,
14 2005). In Scott, a pretrial detainee (like defendant) consented as
15 a condition of his release to random drug testing and to have his
16 home searched for drugs anytime without a warrant. This
17 notwithstanding, the Ninth Circuit found that: any search of Scott,
18 in the absence of probable cause, would be unreasonable under the
19 Fourth Amendment, his consent to such a search would be invalid, and
20 that searches predicated thereon violated the Fourth Amendment.
21 Under this precedent, thus, a search of a pretrial detainee premised
22 on less than probable cause, as seemingly directed by the Magistrate
23 Court, appears to violate the Fourth Amendment, even if the
24 defendant consented to the same. The Magistrate Court's proposed
25 condition is constitutionally problematic. As such, the government
26 would be quite reluctant to utilize the search powers authorized by
27 the Magistrate Court.
28

1 In short, the conditions posed by the Magistrate Court are
2 simply not adequate to reasonably assure defendant's future
3 appearances and to protect the community.

4
5 **V.**
CONCLUSION

6 In sum, defendant Umer Hayat poses a significant flight risk
7 and danger to the community. There are no conditions which will
8 reasonably mitigate these risks. As such, defendant should be
9 detained pending trial as a flight risk and danger to the community.
10 In the alternative, if the Court believes that detention premised on
11 dangerousness is not allowed as a matter of law, defendant should be
12 detained as a flight risk alone.

13 DATED: October 7, 2005

Respectfully submitted,

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