

1 McGREGOR W. SCOTT
United States Attorney
2 R. STEVEN LAPHAM
S. ROBERT TICE-RASKIN
3 Assistant U.S. Attorneys
501 I Street, Suite 10-100
4 Sacramento, California 95814
Telephone: (916) 554-2700
5
6
7

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

10 UNITED STATES OF AMERICA,)	CR. NO. S-05-240 GEB
)	
11 Plaintiff,)	GOVERNMENT'S REPLY IN
)	SUPPORT OF MOTION FOR ORDER
12 v.)	OF EXCLUDABLE TIME UNDER THE
)	SPEEDY TRIAL ACT
13 HAMID HAYAT, and)	
14 UMER HAYAT,)	Hearing Date: 15 July 2005
)	Hearing Time: 10:00 a.m.
15 Defendants.)	Court: Hon. G.E. Burrell, Jr.

16 The United States of America, by and through its undersigned
17 counsel, respectfully files this reply in support of its motion to
18 enter an order excluding time under the Speedy Trial Act, from July
19 1, 2005 through August 19, 2005, and its motion to vacate the trial

20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 date currently set for August 23, 2005.

2 DATED: July 13, 2005

Respectfully submitted,

3 MCGREGOR W. SCOTT
4 United States Attorney

5 /s/ R. STEVEN LAPHAM
6 R. STEVEN LAPHAM
Assistant United States Attorney

7 /s/ TICE-RASKIN
8 S. ROBERT TICE-RASKIN
Assistant United States Attorney

9 Attorneys for Plaintiff
10 UNITED STATES OF AMERICA

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 2001), amended, 262 F.3d 1033 (9th Cir. 2001) cert. denied, 534 U.S.
2 1013 (2001).

3 A review of the relevant factors in this case demonstrates that
4 the proposed exclusion of time does not violate the Sixth Amendment.

5 A. The Length of the Delay Is Minimal And Is Not Presumptively
6 Prejudicial

7 The first Barker factor, the length of the delay, weighs
8 heavily against defendants' Sixth Amendment claim. Length of delay
9 associated with a delay is a threshold issue in the Barker analysis.
10 Gregory, 322 F.3d at 1161. "Simply to trigger a speedy trial
11 analysis, an accused must allege that the interval between
12 accusation and trial has crossed the threshold dividing ordinary
13 from 'presumptively prejudicial' delay, since, by definition, he
14 cannot complain that the government has denied him a 'speedy' trial
15 if it has, in fact, prosecuted his case with customary
16 promptness." Doggett v. United States, 505 U.S. 647, 651-52
17 (1992) (citations omitted). "If the accused makes this showing, the
18 court must then consider, as one factor among several, the extent to
19 which the delay stretches beyond the bare minimum needed to trigger
20 judicial examination of the claim." Id. at 652.

21 Although there is no bright-line rule, courts generally have
22 found that delays approaching one year are presumptively
23 prejudicial. Gregory, 322 F.3d at 1161-62. The Ninth Circuit has
24 found that a sixth-month delay is a "borderline case" and has
25 further observed that there is a general consensus among the courts
26 of appeals that eight months constitutes the threshold minimum. Id.
27 at 1162, n.3. In addition, "because of the imprecision of the right
28 to speedy trial, the length of delay that will provoke such an

1 inquiry is necessarily dependent upon the peculiar circumstances of
2 the case." Barker, 407 U.S. at 530-31. "To take but one example,
3 the delay that can be tolerated for an ordinary street crime is
4 considerably less than for a serious, complex conspiracy charge."
5 Id.

6 At bar, defendants have utterly failed to establish presumptive
7 prejudice. The excludable time delay requested by the government is
8 from July 1, 2005 through August 19, 2005 (inclusive), a period of
9 50 days. Were the Court to exclude that time, the new Speedy Trial
10 Act trial deadline would be Saturday, October 15, 2005. Thus, the
11 theoretical time between the date of indictment, June 16, 2005, and
12 the latest available trial date, Friday, October 14, 2005, would be
13 120 days (about four months), far less than the six to eight month
14 period ordinarily required to trigger judicial examination of all
15 the Barker factors.

16 Moreover, this is not an ordinary street crime. As described
17 in the government's motion, this case is plainly complex given the
18 nature of the prosecution, the legal and factual issues related to
19 discovery of information from a large number of governmental
20 agencies, potential discovery of classified information and
21 application of CIPA, as well as the difficult factual issues related
22 to the government's review of voluminous seized materials currently
23 in foreign languages. Given this level of complexity, the length of
24 delay at issue most certainly is *not* presumptively prejudicial. For
25 this reason alone, defendants have failed to establish a cognizable
26 Sixth Amendment violation and further judicial examination of the
27 remaining Barker factors is not legally required.

28 In their opposition, defendants assert that the government has

1 not requested a continuance specifically limited in time. Defense
2 Opposition at 6. That is simply not the case. The government, at
3 present, has requested excludable time through August 19, 2005, and
4 has stated the reasons which justify such an exclusion. The
5 government has not asked the Court to grant an open-ended
6 continuance.

7 B. The Proposed Delay is Justified

8 Assuming, arguendo, the Court believes that there was
9 presumptive prejudice, a consideration of the remaining Barker
10 factors definitively demonstrates that defendants' Sixth Amendment
11 rights will not be violated by the proposed 50 day exclusion of
12 time.

13 The reason behind the proposed delay weighs heavily against
14 defendants. "Different weights should be assigned to different
15 reasons [for a speedy trial delay]." Barker, 407 U.S. at 531. "A
16 deliberate attempt to delay the trial in order to hamper the defense
17 should be weighted heavily against the government." Id. "A more
18 neutral reason such as negligence or overcrowded courts should be
19 weighted less heavily but nevertheless should be considered since
20 the ultimate responsibility for such circumstances must rest with
21 the government rather than with the defendant." Id. "Finally, a
22 valid reason, such as a missing witness, should serve to justify
23 appropriate delay." Id.

24 At bar, there are plainly valid reasons for the delay at issue.
25 As described previously, the delay is necessitated by two reasons:
26 First, the government needs to search for discovery requested by the
27 defense and potentially germane to this case. Defendants, of
28 course, have a right to and an interest in receiving information

1 that may be helpful to their case; the government has a right to and
2 an interest in safeguarding classified information potentially
3 subject to discovery. The government, thus, needs adequate time to
4 appropriately accomplish its discovery tasks. Indeed, a failure to
5 grant the government's request for excludable time could ultimately
6 work to the disadvantage of the defense, to the extent that it
7 hampers the government's ability to conduct a complete and thorough
8 search for potentially germane discovery. The government fully
9 intends to discharge its discovery obligations. It needs a
10 reasonable amount of time to do so.

11 Second, the government needs sufficient time to complete
12 necessary investigation related to the seized materials, many of
13 which are in foreign languages.

14 In their opposition, defendants assert that the case is neither
15 unusual nor complex. Defense Opposition at 7-8. The government
16 begs to differ. This is not your ordinary false statement case. Of
17 course, as defendants note, the government must establish that
18 defendants willfully made a material false statement within the
19 jurisdiction of a government agency. Of significance, the
20 government must also prove that the matter related to international
21 and domestic terrorism. Moreover, as noted previously, the case has
22 raised complex factual and legal issues related to discovery as well
23 as the review of seized evidence.

24 Defendants further claim that the government has shown a "lack
25 of diligence" in processing the seized evidence from defendants'
26 home. Defense Opposition at 8. The record belies this argument.
27 As noted previously, this is an extremely fast moving and evolving
28 investigation and prosecution. Defendant Hamid Hayat was first

1 interviewed by the F.B.I. on or about May 30, 2005. Defendants
2 Hamid Hayat and/or Umer Hayat were then interviewed at various times
3 between June 3rd and 5th in the Eastern District. Defendants' home
4 was searched on June 7th. And, defendants were indicted on June
5 16th.

6 At present, the FBI has completed its review of approximately
7 400 forms of loose media (which were in a variety of languages)
8 seized from defendants' home. The FBI is in the process of
9 reviewing the nearly 2000 pages of other documents (most of which
10 are in foreign languages), as well as other seized materials, and
11 estimates that it can complete these tasks in three to four weeks¹.
12 Given this, it is wholly unreasonable for the defense to suggest
13 that the government somehow has not acted diligently with respect to
14 its review of the seized evidence.

15 Defendants next assert that application of CIPA to this case
16 does not make the case unusual or complex. They further assert that
17 it is unknown what specific legal and factual issues will arise in
18 connection with potentially discoverable classified information.
19 Defense Opposition at 8, 9. The government disagrees on this score
20 as well. The government outlined, at great length, in this motion
21 (as well as its July 6, 2005 Motion In Support of Invocation of
22 Classified Information Procedures Act and Pretrial Hearing Regarding
23 the Same), that: it must follow a multi-stepped process to retrieve
24 and review discovery requested by defendants from a host of federal
25

26 ¹At the time of the original motion, the government indicated
27 that it would be able to estimate the time necessary for the review
28 of the cell phone and facsimile machine by July 7 or July 8, 2005.
The government estimates that it will need two more weeks from today
to complete that review.

1 agencies (including our intelligence agencies); the government is
2 presently aware of at least one classified document that is
3 potentially discoverable; and the government, in all likelihood,
4 will need to submit this document to the Court for ex parte and in
5 camera CIPA proceedings related to discoverability. This discovery
6 process is neither ordinary or simple by any stretch of the
7 imagination. A limited exclusion of time to conduct this complex
8 discovery process is wholly reasonable.

9 C. Defendants' Assertion of Their Speedy Trial Rights Is A Neutral
10 Or, At Best, A Minimal Factor

11 Defendants have promptly asserted their Speedy Trial rights.
12 This factor, however, is either a neutral factor which weighs
13 neither against nor for defendants; or, at the most, weighs slightly
14 in favor of the defendants. A recent panel of the Ninth Circuit has
15 expressly indicated that a defendant's prompt assertion of his
16 speedy trial right weighs neither for or against a defendant.
17 Gregory, 322 F.3d at 1162. It noted, however, that other Ninth
18 Circuit panels have concluded that a prompt assertion of speedy
19 trial rights weighs, at least slightly, in a defendant's favor. Id.
20 at 1162, n. 4 (citing cases).

21 D. Defendants Have Not Established Significant Actual Prejudice

22 In this case, defendants cannot, as they are required,
23 establish actual prejudice. The amount of prejudice that a
24 defendant must show depends on the reasons for the delay. When the
25 government has used reasonable diligence in pursuing a prosecution,
26 the defendant must show that the delay caused actual prejudice to
27 his defense. Doggett, 505 U.S. at 656; United States v. Aguirre, 994
28 F.2d 1454, 1457 (9th Cir.), cert. denied, 510 U.S. 1029 (1993).

1 Notes the Supreme Court:

2 Our speedy trial standards recognize that pretrial delay is
3 often both inevitable and wholly justifiable. The government
4 may need time to collect witnesses against the accused, oppose
5 his pretrial motions, or, if he goes into hiding, track him
6 down. We attach great weight to such considerations when
balancing them against the costs of going forward with a trial
whose probative accuracy the passage of time has begun by
degrees to throw into question.
Doggett, 505 U.S. at 656.

7 Even if the government has been negligent (and the delay does
8 not far exceed the minimum time required to trigger the full Barker
9 inquiry), the court still must consider the amount of delay in
10 relation to "particularized prejudice." Gregory, 322 F.3d at 1163
11 (even a 22-month delay is insufficient to relieve a defendant of the
12 burden of establishing actual prejudice).

13 No showing of prejudice is required by the defendant if, and
14 only if, the delay is lengthy and the delay is attributable to
15 either the negligence of the government, or bad faith conduct by the
16 government. Doggett, 505 U.S. at 656, 657; United States v. Shell,
17 974 F.2d 1035, 1036 (9th Cir. 1992).

18 Actual prejudice is typically demonstrated in three ways:
19 "oppressive pretrial incarceration, anxiety and concern of the
20 accused, and the possibility that the [accused's] defense will be
21 impaired." Gregory, 322 F.3d at 1163.

22 "Prejudice, of course, should be assessed in the light of the
23 interests of defendants which the speedy trial right was designed to
24 protect." Barker, 407 U.S. at 532. "The most important interest
25 which the speedy trial right assures is to limit the possibility
26 that the accused's defense will be impaired. This interest is of
27 fundamental importance 'because the inability of a defendant
28 adequately to prepare his case skews the fairness of the entire

1 system.'" United States v. Graham, 538 F.2d 261, 265 (9th Cir.
2 1976) (citing Barker, 407 U.S. at 532).

3 A defendant must set forth facts that demonstrate actual
4 prejudice; mere conclusory statements will not suffice. E.g.,
5 Graham, 538 F.2d at 263 ("Graham argues in conclusory terms only
6 that the delay caused memories to fade, deprived him of his ability
7 to gather evidence, and hindered his efforts to contact witnesses.
8 He points to no facts which support this contention, nor do we on
9 examining the record find any such support.")

10 Moreover, the prejudice of concern is prejudice caused by the
11 delay that triggered the Barker inquiry, not simply any prejudice
12 that may occur before the trial date but unrelated to the fact of
13 the delay itself. See Barker, 407 U.S. at 534 ("But there is no
14 claim that any of Barker's witnesses died or otherwise became
15 unavailable owing to the delay."); United States v. Guerrero, 756
16 F.2d 1342, 1350 (9th Cir. 1984) (Sixth Amendment claim failed where
17 the defendant "has not sufficiently shown any causal relationship
18 between the delay and the unavailability of two witnesses who [the
19 defendant] claims would have testified to being with him on the day
20 of the robbery").

21 At bar, defendants argue that their defense will be impaired
22 because the jury pool "will be" tainted because of media attention.
23 Defendants also assert that there is a "likelihood" that more
24 sensitive information will leak into the public, or that there "may
25 be" other acts of terrorism that the public "may associate with
26 defendants' case." Defense Opposition at 11. Defendants fail to
27 offer any proof that these prejudicial issues have or will arise,
28 much less any proof that the purported prejudice will be caused by

1 the delay at issue. As noted in Barker, Guerrero and Graham, this
2 type of conclusory speculation is insufficient to establish actual
3 prejudice.

4 Defendants further assert that they are suffering from anxiety
5 and concern as a result of the pending charges, and also suffering
6 from oppressive pretrial incarceration. Defense Opposition at 10-
7 11. This, at best, "constitute[s] a showing of minimal prejudice of
8 a type normally attending criminal prosecution." See Graham, 538
9 F.2d at 263 ("Graham further argues that he has suffered anxiety and
10 strain which have been unduly exacerbated by the delay. Upon
11 examining the record, however, we find nothing which differentiates
12 the emotional strain experienced by Graham from other criminal
13 defendants. Such conclusory allegations of general anxiety and
14 strain could be made in connection with almost every criminal
15 prosecution."); Barker, 407 U.S. at 534 (prejudice "minimal" where
16 defendant spent 10 months in jail awaiting trial, but made no claim
17 that witnesses died or otherwise became unavailable).

18 III.

19 CONCLUSION

20 In conclusion, the requested exclusion of time will not, in any
21 way, violate defendants' Sixth Amendment speedy trial rights. For
22 the reasons stated herein and in the government's motion, the Court
23 should enter an order excluding time from July 1, 2005 through
24 August 19, 2005 based on the pendency of the government's motion to
25 exclude time, and based on case complexity. In addition, this Court
26 should vacate the August 23, 2005 trial date.