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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,) CR. NO. S-05-240 GEB
12)
Plaintiff,) GOVERNMENT'S REPLY IN SUPPORT OF
13) APPEAL FROM MAGISTRATE JUDGE'S
v.) ORDER 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 submits this reply in support of its
21 appeal of the order of the Magistrate Court filed on September 26,
22 2005, setting conditions of release for defendant Umer Hayat. For
23 the reasons set forth below, as well as in the opening brief,
24 defendant Umer Hayat should be detained as both an extreme flight
25 risk and danger to the community.
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II.
ARGUMENT

A. Detention Is Authorized In This Case Because Defendant Poses a Serious Risk of Flight and There Are No Conditions That Will Reasonably Assure the Appearance of Defendant as Required And/Or the Safety of the Community

Defendant raises a series of arguments in an effort to convince this Court, as a matter of law, that it cannot consider defendant's dangerousness. These arguments should be rejected.

First, citing United States v. Twine, 344 F.3d 987 (9th Cir. 2003), defendant argues that "a court may not order a defendant detained based on dangerousness unless he is charged with a crime of violence." Defense Opposition at 5. According to defendant, "Twine stands for the proposition that even if a detention hearing is triggered based on flight or obstruction of justice, the defendant cannot be detained as a potential danger to the community because it would undermine the purposes of the Act." Id. at 7. Not so.

The Twine court resolved two issues and two issues only. First, the district court, in the context of a felon-in-possession case, held that pretrial detention was appropriate "on the sole basis of a finding of dangerousness to the community." Twine, 344 F.3d at 987. In other words, the district court found that, even in the absence of any (f)(1) or (f)(2) factor under 18 U.S.C. § 3142, it had the authority to detain a defendant based on dangerousness alone. The Ninth Circuit, like all other Circuits, held that "the Bail Reform Act [does not] authorize[] detention without bail based solely on a finding of dangerousness." Id. The key word is "solely." If none of the (f)(1) or (f)(2) factors are present, a

1 detention hearing is not authorized, period, even if a defendant is
2 a danger.

3 Second, the district court held that a felon-in-possession
4 charge was a crime of violence and that, as such, detention was
5 permissible because there was a crime of violence and established
6 dangerousness. Id. The Ninth Circuit disagreed, concluding that a
7 felon-in-possession charge was "not a crime of violence for the
8 purposes of the Bail Reform Act." Id.

9 The Ninth Circuit did not broadly hold, as defendant suggests,
10 that detention premised on dangerousness is only available for
11 crimes of violence.¹ It simply held that detention cannot be
12 premised on dangerousness alone, that is, detention is not
13 authorized in the absence of a (f)(1) or (f)(2) factor, even if
14 dangerousness is established.
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16 In addition, contrary to defendant's claim, Twine does not
17 "stand for the proposition" that "even if a detention hearing is
18 triggered based on flight or obstruction of justice, the defendant
19 cannot be detained as a potential danger to the community." Defense
20 Opposition at 7. Twine did not address that issue. The trial
21 court premised detention on dangerousness alone, or alternatively, a
22 crime of violence coupled with dangerousness. Neither the trial
23 court nor the Ninth Circuit addressed the issue of whether and how
24 to consider dangerousness when a detention hearing is premised on a
25 defendant's serious risk of flight.
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28 ¹Indeed, the defense interpretation would eviscerate all the
other factors listed in 18 U.S.C. § 3142(f), an obviously absurd
result.

1 Finally, as noted before, this prosecution stands on entirely
2 different footing than Twine. Unlike Twine, the government here has
3 established that there are two triggering factors for a detention
4 hearing: the case involves a serious risk of flight or,
5 alternatively, a federal crime of terrorism. The government does
6 not seek defendant's detention premised on dangerousness alone in
7 the absence of any (f)(1) or (f)(2) factor.

8 Defendant also cites to United States v. Ploof, 851 F.2d 7
9 (1st Cir. 1988), United States v. Himler, 797 F.2d 156 (3d Cir.
10 1986), and United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992),
11 to support his general argument that dangerousness cannot be
12 considered in this case. Opposition at 6-7. The government
13 acknowledged the holdings of Himler and Ploof in its opening brief
14 and does so here: these courts have held that dangerousness can
15 serve as a basis for detention only if a (f)(1) factor, or factor
16 (f)(2)(B) is present. These decisions, of course, are not binding.
17 Moreover, they should not be viewed as even good persuasive
18 authority because they are plainly at odds with the language of the
19 statute. The better rule of law is set forth by United States v.
20 Friedman, 837 F.2d 48 (2d Cir. 1988), Byrd, and United States v.
21 Singleton, 182 F.3d 7 (D.C. Cir. 1999): dangerousness or flight can
22 serve as a basis for detention once any one of the (f)(1) or (f)(2)
23 factors is triggered. The Court is urged to follow this latter line
24 of authority. ²

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27 ²Defendant indicates that Byrd agreed with Ploof and Himler.
28 This is true to a limited extent only. Byrd agreed with Ploof and
Himler that detention cannot be premised on dangerousness alone.
Unlike Ploof and Himler, Byrd found that once a hearing is triggered
by any of the six factors, both flight and/or danger can serve as a

1 B. In The Alternative, Detention Is Authorized Because This Case
2 Involves An Offense Listed in 18 U.S.C. § 2332b(g) (5) (B) and
3 There Are No Conditions That Will Reasonably Assure the
4 Appearance of Defendant as Required And/Or the Safety of the
5 Community

6 The government contends that detention of defendant under the
7 Bail Reform Act is also appropriate because this case involves an
8 offense listed in 18 U.S.C. § 2332b(g) (5) (B). See 18 U.S.C. §
9 3142(f) (1) (A); see also Byrd, 969 F.2d at 107. Defendant argues
10 that "the holding in Twine leaves no room for such an
11 interpretation." Opposition at 7. "Assumedly," the defense
12 asserts, "the Ninth Circuit in Twine specifically considered the
13 `nexus' or `involvement requirement' in Byrd." Id. "Had the Ninth
14 Circuit wanted to create a `nexus' rule," the defense concludes "it
15 certainly would have done so in Twine." Id.

16 The defense assumes too much. The question of how to interpret
17 the phrase "a case that involves a crime of violence" neither arose
18 nor was litigated in the Twine case. Twine does not answer this
19 question; Byrd does. Byrd squarely held that, for the purposes of
20 18 U.S.C. § 3142(f), "it is not necessary that the *charged offense*
21 be a crime of violence; only that the *case involve* a crime of
22 violence or any one or more of the §3142(f) factors." Id. It stated
23 that "the proof of a nexus between the non-violent offense charged
24 and one or more of the six § 3142(f) factors is crucial." Id. Such
25 is the case with the instant prosecution. It is not necessary that
26 the *charged offense* be a federal crime of terrorism; only that the
27 *case involve* a federal crime of terrorism.

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basis for detention. Compare Ploof, 851 F.2d at 10; Himler, 797 F.2d
at 160, with Byrd, 969 F.2d at 107, 109-10.

1 And, in this case, there is proof of a nexus between the
2 offense charged against Umer Hayat and the federal crime of
3 terrorism charged against Hamid Hayat. Umer Hayat purchased an
4 airline ticket for his son, knowing that his son intended to go to a
5 jihadist camp. Moreover, after Hamid Hayat attended a jihadist camp
6 and had returned to the United States, Umer Hayat, like his son,
7 knowingly concealed his son's conduct from the FBI. As such, this
8 case involves an offense listed in 18 U.S.C. § 2332b(g)(5)(B), a
9 hearing can be predicated on this ground, and detention of Umer
10 Hayat can be predicated on either flight and/or danger grounds.

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

16 According to defendant, because he is not charged with a crime
17 of violence, dangerousness cannot be considered in factoring either
18 conditions of pretrial release or detention. Opposition at 19. The
19 plain language of the Bail Reform Act indicates otherwise.

20 States the Act, when "determining whether there are conditions
21 of release that will reasonably assure the appearance of the person
22 as required and the safety of any other person and the community," a
23 court must consider, among other things, "the nature and seriousness
24 of the danger to any person or the community that would be posed by
25 the person's release." 18 U.S.C. § 3142(g). Moreover, the Ninth
26 Circuit has reached the same conclusion. See United States v.
27 Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991).
28

1 D. The Nature and Circumstances of the Offense Charged Weigh
2 Against Defendant's Release

3 Defendant argues that he is charged with "nothing more" than
4 lying to the FBI and, as such, this factor weighs in favor of
5 release. Opposition at 9. This is a gross oversimplification.

6 This court must consider both the nature of the charges and the
7 "case-specific facts" or "manner in which the defendant committed
8 it". See Singleton, 182 F.3d at 11. The nature and circumstances
9 of the crime alleged against Umer Hayat suggest that defendant poses
10 a significant risk of flight and danger to the community. Defendant
11 Umer Hayat allegedly paid for his son's airline ticket to Pakistan
12 with knowledge that his son wished to train at a jihadist camp,
13 traveled to Pakistan, toured jihadist camps, was aware that his son
14 attended a jihadist camp, returned to the United States, and then
15 lied to the FBI not only about his conduct, but also about his son's
16 conduct. This factor weighs heavily against release.³

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20 ³Defendant states that, "Great weight must be given to the fact
21 that on two separate occasions the government presented this matter
22 before the grand jury and, on each occasion regarding Defendant Umer
23 Hayat, the grand jury returned a single charge of making a false
24 statement." Opposition at 10. Defense counsel has made similar
25 remarks to the press. See The Sacramento Bee at A. 12 (Sept. 23,
26 2005) (According to counsel for Umer Hayat, "The grand jury has twice
27 considered the evidence against Umer and twice it has voted 'No' to
28 charging him with giving material support to terrorists.").

This speculation assumes that material support charges were, in
fact, presented to the grand jury. The fact is that defendant has
been charged by the grand jury with making false statements in a
matter related to international terrorism. The nature of the
charges and the case-specific facts suggest that defendant actively
attempted to conceal his knowledge regarding his son's jihadist
activities and that of others. The charges and case specific facts
indicate that defendant poses a significant risk of flight and
danger to the community.

1 E. There Is Substantial Evidence Against Umer Hayat Establishing
2 His Guilt

3 Defendant contends that there is not substantial evidence of
4 his guilt. Opposition at 10. The record suggests otherwise.

5 FBI agents will testify that they interviewed Umer Hayat and
6 that he emphatically stated that he had no first hand knowledge of
7 terrorist training camps in Pakistan that would prepare people to
8 fight for Jihad, and that his son, Hamid Hayat, did not attend any
9 terrorist or jihadist training camps. Later, during a detailed and
10 wholly voluntary videotaped interview, Umer Hayat admitted, among
11 other things, that, in fact: Hamid Hayat attended a terrorist
12 training camp in Pakistan in 2003-04; he paid for Hamid's flight,
13 knowing that Hamid's intention was to attend a jihadist training
14 camp; and that he visited more than four operational training camps
15 in Pakistan. Certain evidence that is already a matter of public
16 record will corroborate Umer Hayat's statements. For example, at
17 least one jihadist magazine and book were found in Hamid Hayat's
18 room among a variety of correspondence addressed to, among others,
19 both Umer and Hamid Hayat. Other evidence will be adduced at trial
20 to corroborate these admissions. In short, there is compelling
21 evidence of defendant Umer Hayat's guilt.⁴
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25 ⁴Of course, Umer Hayat's admissions are also independently
26 corroborated by much of the evidence associated with Hamid Hayat:
27 Hamid Hayat made a series of similar incriminating statements during
28 his videotaped interview with the FBI; Hamid Hayat made a series of
jihadist magazines and books were located in the Hayat home
(including the laundry room and Hamid Hayat's bedroom); and a note
was found in Hamid Hayat's wallet stating, "Lord let us be at their
throats, and we ask you to give us refuge from their evil."

1 F. Umer Hayat Potentially Made False Statements to Pretrial
2 Services in June, 2005 Regarding His Assets

3 It is undisputed that Umer Hayat told Pretrial Services that he
4 owned one home in Pakistan. The record is somewhat unsettled as to
5 whether the Hayats own a second home in Pakistan and whether Umer
6 Hayat failed to disclose this fact to Pretrial Services.

7 Some evidence suggests that the Hayats own two homes. As noted
8 before, during an interview on June 7, 2005, Arsalan Hayat (son to
9 Umer Hayat and brother to Hamid Hayat) informed agents, among other
10 things, that he lived in Pakistan during 2003 to 2005; that during
11 this time frame his family lived in an old residence that his father
12 Umer owned; and that during this time frame his father was having a
13 new house built.⁵

14 Other evidence suggests that the Hayats might own only one
15 home. First, in an interview on July 28, 2005, Arsalan Hayat
16 indicated that, when the Hayat family arrived in Behboodi, Pakistan,
17 the family rebuilt their home while living at the home of Hayat's
18 Aunt, Asthma. Second, defendant's wife, Oma Salma Hayat, has
19 indicated in a declaration submitted by the defense that the Hayat
20 family only owns one home in Pakistan.

21 At present, thus, the record suggests that the Hayats might own
22 a second home in Pakistan; the record is not conclusive, however.
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28 ⁵Contrary to the defendant's claim, the government produced
this interview report to the defense as part of discovery.

1 G. Umer Hayat and Other Family Members Made A Series of False
2 Statements to Customs Officials In April, 2003⁶

3 In April, 2003, the defendant and his family attempted to hand
4 carry over \$28,000 in cash out of the United States without
5 declaring it. When stopped by U.S. Customs ("Customs"), the
6 defendant and co-defendant Hamid Hayat, gave a series of
7 inconsistent statements to officials at the Washington-Dulles
8 Airport that were fully chronicled in the government's opening
9 brief. See Government's Appeal from Magistrate Judge's Order
10 Granting Release on Bail at 32-34.

11 In his Opposition, the defendant does not attempt to explain
12 why several different stories were told to the inspectors. Instead,
13 the defendant suggests that he "honestly" advised Customs that "the
14 source of the money was credit card cash withdrawals, proceeds from
15 the sale of a used car, cash savings, and money from family and
16 friends who wanted the money delivered" to Pakistan. Opposition at
17 12-13.

18 In support of this assertion, the defendant attached to his
19 opposition a series of declarations from people claiming to have
20 given him money to be delivered to Pakistan in April 2003.
21 Opposition, Exhibit C. The problem with this latest assertion is
22 that the declarations are inconsistent with two prior written
23 statements the defendant provided to Customs when he was trying to
24 get his money back, not to mention inconsistent with his prior
25 statements to inspectors at Washington-Dulles Airport.
26

27
28 ⁶Contrary to the defendant's claim, the government produced the
interview report associated with the April, 2003 Customs stop to the
defense as part of discovery.

1 The first written submission to Customs, a letter dated May 2,
2 2003, on stationary with Umer Hayat's name and signed by "Umer
3 Hayat," described the sources of the money that was seized.⁷ See
4 Letter from Umer Hayat to U.S. Customs dated May 2, 2003, Attachment
5 1. In this version of the story, the defendant claimed that \$9,200
6 of the money was from him and his family: \$3,400 (tax return),
7 \$1,800 (sale of car), and \$4,000 (money saved from disability
8 payments). Id. He further claimed that certain people gave him the
9 following amounts:

10	Muhammad Hakik Khan to repay a loan	\$3,000
11	Saffdar for mother	\$500
	Hazrat Bilal for father	\$650
12	Jahan Zaib for father	\$350
	Muhammad Altaf Khan for brother	\$2,000
13	Nazima Khan for sister	\$200
	Umar Khitab for sister	\$300
14	Rukhsana Zaib	\$100
	Kahlid Khan for father-in-law	\$500
15	Baber Nisar for father	\$500
	Muhammad Waseen for father	\$5,000
16	Nasir Khan for son-in-law	\$100
	Ajmal Khan for daughter	\$100
17	Said Ur-Rahman for mother	\$200
	Naseem Khan loan	\$493
18	Jahan Zaib Khan for mother	\$2,000
19	Mohammad Waheed Khan for father	\$3,000

20 Id. The total amount of money accounted for in this letter is
21 \$28,193 (\$100 over the amount of cash the defendant actually had
22 when stopped).

23 Approximately three months later, after the defendant
24 apparently did not get the release of the money he wanted, he sent
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27 ⁷Customs seized a total of \$28,093 and returned \$1,093 for
28 humanitarian purposes before the Hayat family left the airport. The
apparent purpose of both the first and second letters to Customs was
to convince Customs to release the additional \$27,000 to the
defendant.

1 another letter to Customs. This second written submission, dated
2 August 1, 2003, was notarized.⁸ See Notarized Statement from Umer
3 Hayat dated August 1, 2003, Attachment 2. In this second letter,
4 the defendant claimed that \$21,000 of the seized money actually
5 belonged to him and his family: \$9,900 (credit card advance); \$520
6 (credit card advance); \$2,500 (credit card advance); \$2,080
7 (insurance check); \$3,400 (tax return); \$2,000 (rental income); \$600
8 (wife's income from her job). Id. This is remarkable especially
9 because, in the first letter, defendant claimed that only \$9,200 of
10 the seized money belonged to him and his family. Defendant did not
11 attempt to explain in his second letter why, all of a sudden, he was
12 claiming that a larger portion of the seized funds actually belonged
13 to the Hayats.⁹

14 The second letter also included notarized statements from
15 several individuals who purportedly provided cash as follows:

16	Jahan Zeb for father	\$450
17	Bayyaz Shakoof for father	\$200
18	Hazrat Bilal for mother	\$650
19	Safdar Afzal for mother	\$500
20	Babar Nisar for mother	\$1,000
	Khursid Khan for aunt	\$200
	Mohammad Hakik for Shabbir Ahmed	\$3,000

21 Id. The total amount of cash accounted for in this second letter

22
23 ⁸After receiving the August 1, 2003 letter, Customs levied a
24 \$2,500 fine and returned the remainder of the money and monetary
25 instruments to the defendant. After receiving the lump sum in his
26 account, the defendant proceeded to send three installments of money
in the course of a week (9/22/03-\$9,900, 9/23/03-\$9,900; 9/30-03-
\$8,000) to his brother-in-law Attiq Ur Rehman.

27 ⁹There were other unexplained differences between the second
28 and first letter. There was no discussion of the sale of a used car
in the second letter and there was no explanation as to why the
amount of money attributable to his wife dropped from \$4,000 to \$600
in the second letter.

1 was \$27,000. Significantly, defendant offered no explanation as to
2 why his first letter indicated that defendant had received
3 approximately \$14,000 from Muhammad Altaf Khan, Nazima Khan, Umar
4 Khitab, Rukhsana Zaib, Kalid Khan, Muhammad Waseen Nasir Khan, Ajmal
5 Khan, Said Ur-Rahman, Naseem Khan, and Mohammad Waheed Khan, and why
6 his second letter made no reference to these individuals.¹⁰

7 The declarations attached to the opposition and submitted to
8 this Court are yet another example of the reality that the
9 defendant's word cannot be trusted. The declarations are
10 incomplete, accounting for only \$5,800 of the money. More
11 importantly, the documents represent yet another shuffle of names
12 associated with the money. Five people the defendant referenced in
13 his first letter (as giving him money), but omitted in the second,
14 are once again identified in the recently filed declarations as
15 giving him money (Ajmal Khan, Nasir Khan, Umar Khitab, Said Ur-
16 Rahman, and Rokhsana Zeb). Still two more individuals (Mohammad
17 Fiaz and Mohammad Taj Khan) did not appear on either previous
18 submission by the defendant.
19

20 The bottom line is that the statements the defendant made to
21 inspectors at Washington-Dulles airport and the subsequent written
22 correspondence submitted to Customs are inconsistent with one
23 another. The declarations submitted to this Court with the
24 Opposition just raise more questions about the defendant's ability
25

26 ¹⁰There was also no explanation in the second letter for the
27 following: (1) why the second letter accounted for only \$27,000
28 instead of the \$28,093 actually seized; (2) why the money from
Hazrat Bilal was now for a mother instead of a father; (3) why the
amount for Jahan Zaib was now \$450, instead of the original \$350;
(4) why Babar Nisar's money was now for a mother, not a father.

1 to be truthful. Given that the defendant cannot even tell the
2 government the same story twice, his promises that he wishes to
3 remain in the United States and that he will abide by bail
4 conditions are highly suspect.

5 H. Defendant Umer Hayat Faces A Significant Custodial Sentence
6 Upon Conviction

7 Defendant concedes that his statutory maximum sentence is 8
8 years. He contends, however, that the sentencing enhancement that
9 would subject him to an 8 year sentence, U.S.S.G. § 3A1.4, does not
10 apply in a case such as this one. Opposition at 14. Defendant is
11 incorrect.

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 defendant's offense level is 32
15 and criminal history is VI.¹¹ The government contends that Umer
16 Hayat's false statement, in fact, involved or was intended to
17 promote a federal crime of terrorism, i.e., material support to
18 terrorists by his son Hamid Hayat.

19 The Courts have recognized that, the phrase "intended to
20 promote" means that if one purpose or goal of a defendant's
21 substantive count of conviction (or his relevant conduct) is to
22 bring or help bring into being a federal terrorism crime listed in
23 18 U.S.C. § 2332b(g)(5)(B) (such as material support), the terrorism
24 enhancement applies. See United States v. Mandhai, 375 F.3d 1243,
25 1248 (11th Cir. 2004); United States v. Graham, 275 F.3d 490, 516
26

27
28 ¹¹Hence, the post-trial advisory guideline range for Umer Hayat
would be 210-262 months, with a statutory maximum of 8 years.

1 (6th Cir. 2001). The terrorism enhancement does not hinge upon a
2 defendant's ability to carry out specific terrorist crimes or the
3 degree of separation from their actual implementation. Rather, it
4 is the defendant's purpose that is relevant, and if that purpose is
5 to promote a terrorism crime, the enhancement is triggered. See
6 Mandhai, 375 F.3d at 1248.

7 Here, Hamid Hayat is charged with providing material support
8 and concealing the same from the FBI (an offense enumerated in 18
9 U.S.C. § 2332b(g)(5)). Defendant Umer Hayat is likewise charged
10 with lying to the FBI about his son's attendance at a terrorist
11 camp. In the government's view, such a lie, to conceal his son's
12 activities, was intended to promote his son's federal terrorism
13 crime, hence triggering application of the guideline.

14
15 As noted before, the ultimate determination as to whether
16 § 3A1.4 applies (or any other guidelines) is one that this Court
17 will make after the issue has been examined by the Probation Office
18 and the parties, and in the context of all the facts presented at
19 trial and at sentencing. The relevant point for purposes of this
20 bail proceeding is that defendant faces very real exposure of up to
21 eight years incarceration. That amount of potential incarceration
22 serves as a significant incentive for flight.

23 I. Even Though Defendant Has Some Ties to the United States, He
24 Has Significant Established Ties to Pakistan

25 Defendant claims that his strong ties to Lodi far outweigh his
26 ties to Pakistan. Opposition at 15. The government cannot agree.

27 While defendant has some ties to the Lodi community and the
28 United States, he also has very significant and developed ties to

1 Pakistan which makes him a high risk for flight.

2 To recap: Defendant Umer Hayat has spent approximately twenty-
3 two and one-half years, nearly one-half of his life, living abroad
4 in Pakistan. Most recently, defendant resided in Pakistan during
5 most of 2003 and 2004.

6 Defendant Umer Hayat's other immediate family, i.e., Umer's
7 wife and his four other children, have also spent a significant
8 amount of time living in Pakistan. For example, Hamid Hayat and
9 presumably Oma Salma Hayat (defendant's wife) have lived there half
10 their lives in Pakistan.

11 Umer Hayat has many close relatives who reside in Pakistan
12 and/or frequently travel to Pakistan including defendant's two
13 sisters (residents), his parents as well as his brother (recent
14 visitors), Umer Hayat's in-laws (residents), his brother-in-law
15 (likely resident), his daughter-in-law and son-in-law (residents).
16 Presumably, given the number of years defendant and his family have
17 resided in Pakistan, they have various friends and/or acquaintances
18 there as well.

19 Of additional importance, there are indications that Attiq
20 Rehman (brother-in-law to Umer Hayat and uncle to Hamid Hayat) has
21 sometimes resided in England.

22 Finally, and of great significance, defendant owns one, and
23 possibly a second, residence in Pakistan.

24 In short, even though defendant Umer Hayat has some ties to the
25 Lodi area, he has very significant and current residential ties to
26 Pakistan.
27
28

1 J. Even Though Defendant Has Some Ties to the United States, He
2 Apparently Has Ties to A Network of Jihadists Located in
3 Pakistan and Potentially the United Kingdom

4 Defendant asserts that there is no credible evidence
5 substantiating allegations that Umer Hayat's father-in-law and
6 brother-in-law have any ties to terrorist related activities and
7 that defendant supports any such ties. Opposition at 13. Not so.

8 Both defendant Umer Hayat and Hamid Hayat made a variety of
9 statements to the FBI about Attiq Rehman's (Umer Hayat's brother-in-
10 law) and Saeed Ur Rehman's (Umer Hayat's father-in-law) affiliations
11 with jihadist groups in Pakistan and the United Kingdom. Hamid
12 Hayat made similar remarks to the CW. Hamid Hayat admitted that he
13 participated in jihadist training (with numerous other
14 participants). Hamid Hayat admitted that he returned to the United
15 States to await orders for jihad (presumably from contacts in the
16 United States). Umer Hayat toured jihadi camps in Pakistan, was
17 aware that his son attended a jihadist camp and supported the same.
18 The fair inference, based on all of this evidence, is that Umer
19 Hayat and his son Hamid Hayat are all likely tied to a broad network
20 of other jihadists in Pakistan, potentially the United Kingdom, and
21 potentially here in the United States. The existence of these ties
22 make Umer Hayat a significant flight risk and danger.

23 K. Defendant Has a Modest Record of Gainful Employment in the
24 United States

25 The government contends that Umer Hayat has, at best, minimal
26 occupational ties to the United States. He is a seasonal ice cream
27 salesman, and landlord, earning (on average) \$10,000 per year.
28 This is hardly the type of compelling occupational tie that would

1 mitigate the risk of flight. The defense seemingly does not contest
2 this point.

3 The defense does argue, however, that defendant enjoys
4 unspecified emotional and financial "community support" and that
5 this support somehow mitigates defendant's risk of flight.

6 Opposition at 17. This is hardly persuasive. The defense has made
7 no showing of who these supporters are, and more importantly, what
8 the nature of their support is and how their support is ultimately
9 germane to this bail determination.

10 L. Defendant's Proposed Collateral Is Insufficient to
11 Reasonably Assure His Appearance At Future Proceedings
12 and to Safeguard the Community

13 Defendant argues that the proposed \$1.2 in property to be
14 posted by sureties Sadfar Afzal, Sher Afzal and Umer Khatab
15 mitigates the risks of flight/danger in this case. He claims that
16 his "relatives are very important to him and that the loss of their
17 properties would be a severe blow to him personally." Opposition at
18 19. The government disagrees again.

19 The government continues to have genuine concerns about the
20 proposed sureties, the true nature of their relationship to
21 defendant Umer Hayat, and whether potential financial losses to the
22 proposed sureties will reasonably assure defendant's appearances and
23 protect the community. The defense has proffered nothing to address
24 these questions, see Opposition at 19, and the government's concerns
25 remain the same.

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

3 Finally, the defense argues that the other conditions set by
4 the Magistrate Judge will reasonably address the risks of
5 flight/danger in this case. Opposition at 19. A few points must be
6 made in response.

7 First, contrary to defendant's argument, the government does
8 not believe that conditions of release must "guarantee" a
9 defendant's appearances or protection of the community. The Bail
10 Reform Act indicates that the conditions must reasonably assure
11 defendant's appearances and reasonably protect the community. See
12 18 U.S.C. § 3142(g). The Magistrate Court's proposed conditions do
13 not reasonably mitigate the risks at hand.

14 Second, defendant suggests that the courts that have questioned
15 the efficacy of home detention and electronic surveillance have only
16 done so in the context of mitigating a defendant's danger.

17 Defendant is incorrect. Many courts have expressed this skepticism
18 in the context of both risks of danger and flight. See, e.g.,
19 United States v. Mercedes, 254 F.3d 433, 437 (2nd Cir. 2001) (both
20 risks); United States v. Millan, 4 F.3d 1038, 1048, 49 (2nd Cir.
21 1993) (both risks), cert. denied, 511 U.S. 1006 (1994), United States
22 v. Goba, 240 F.Supp.2d 242 (W.D.N.Y. 2003) (both risks); United
23 States v. Minns, 863 F.Supp. 360, 364 (N.D. Tex. 1994) (flight risk).

24 Third, defendant suggests that the conditions set by the
25 Magistrate Court do not require the government to provide personnel
26 to maintain a home detention center for defendant. Opposition at
27 21. This argument is nonsense. Pretrial services and the
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1 government would be the entities responsible for providing the
2 personnel and equipment necessary to set up and oversee the proposed
3 electronic monitoring, operate the proposed pen register/trap and
4 trace device, and conduct searches as necessary. And, as noted
5 before, a court does not have authority under the Bail Reform Act to
6 effectively order the government to set up monitored home detention
7 centers. See United States v. Orena, 986 F.2d 628, 632 (2d Cir.
8 1993).

9 Finally, defendant suggests that he will waive his Fourth
10 Amendment rights under United States v. Scott, __ F.3d __ , 2005
11 W.L. 2174413 (9th Cir. Sept. 9, 2005). Opposition at 22. That is
12 all well and good. Defendant's proposed waiver (which is likely
13 ineffective as a matter of law) does not resolve the substantial
14 constitutional issue posed by this proposed search condition.
15

16 **III.**
17 **CONCLUSION**

18 In sum, defendant Umer Hayat poses a significant flight risk
19 and danger to the community and there are no conditions which will
20 reasonably mitigate these risks. Defendant should be detained
21 pending trial as a flight risk and danger to the community. In the
22 alternative, defendant should be detained as a flight risk alone.

23 DATED: October 14, 2005

Respectfully submitted,

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