UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

02-CR-214-S

YAHYA GOBA,
SHAFAL MOSED,
YASEIN TAHER,
FAYSAL GALAB,
MUKHTAR AL-BAKRI, and
SAHIM ALWAN,

Defendants.

JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO REVOKE MAGISTRATE JUDGE SCHROEDER'S DETENTION ORDER

Defendants, Yahya Goba, Shafal Mosed, Yasein Taher, Faysal Galab, and Muktar Al-Bakri, by and through their attorneys, hereby submit this Memorandum of Law in support of their motion to revoke Magistrate Judge H. Kenneth Schroeder, Jr.'s Detention Order.[1]

Background

It is well-recognized that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103 (1987). Thus, bail should be denied only in the "rare case of extreme and unusual circumstances." *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978). The Senate, in fact, has stated that the legislative intent in enacting the Bail Reform Act is that detention apply only to a "limited group of offenders." *See*, Senate Report No. 225, 98th Congress, 2d

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1 Each defendant has separately filed papers addressing the individualized errors in Magistrate Judge Schroeder's Decision and Order.

Session, 7. The concept of detention, then, is contrary to the American tradition of criminal justice and as such must not be ordered unless rigorous due process requirements have been met.

The defendants in this case have been charged in a two count Indictment with violating 18 U.S.C. § 2339B by knowingly providing, attempting or conspiring to provide, material support or resources to a foreign terrorist organization. At the initial appearance, the Government moved for detention of each defendant pending trial. A hearing was held pursuant to 18 U.S.C. § 3142(f) over four separate days on September 18, 19, 20 and October 3, 2002. By Decision and Order dated October 8, 2002, Magistrate Judge Schroeder ordered the detention of defendants Goba, Mosed, Taher, Galab and Al-Bakri.[2]

Defendants Goba, Mosed, Taher, Galab and Al-Bakri subsequently appealed this decision by way of a motion to revoke Magistrate Judge Schroeder's detention Order. When the decision of a magistrate judge is appealed to the district court under section 3145(a), the district judge must conduct a *de novo* review. *See United States v. Leon,* 766 F.2d 77, 80 (2d Cir.1985).

POINT I
MAGISTRATE JUDGE SCHROEDER FAILED TO HOLD THE GOVERNMENT TO ITS STATUTORY BURDENS OF PROOF

18 U.S.C. § 3142(f) provides two distinct bases upon which a motion may be made to detain an individual while he is awaiting trial. The first basis focuses on the seriousness of the charged offense and the prior criminal record of the defendant. 18 U.S.C. § 3142(f)(1). The second basis focuses on the defendant's risk of flight and risk to the administration of justice. 18 U.S.C. § 3142(f)(2). If the Court determines that either basis is applicable, it must conduct a hearing to determine whether there are appropriate conditions which would reasonably assure the appearance of the defendant and the safety of the community. 18 U.S.C.§ 3142(f).

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2 Defendant Alwan was released on bail subject to various terms and conditions. He is not a party to this appeal.

The Government specifically predicated its motion for detention of all defendants on 18 U.S.C. § 3142(f)(1)(A), that the charged offense is a "crime of violence," and thus, the defendants may be detained if they represent a danger to the community, and on 18 U.S.C. § 3142(f)(2)(A), that there is a serious risk that the defendants will flee. The Government retains the burden of proof as to each of these bases.

The only presumption applicable at this hearing was the presumption of release. The Bail Reform Act creates a rebuttable presumption of release:

> The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

18 U.S.C. § 3142(b) (emphasis added). Magistrate Judge Schroeder failed to accord the presumption any weight in favor of an illegal balancing approach.

At numerous times throughout the detention hearing Magistrate Judge Schroeder suggested that the issue he was presented with involved the "balancing" of the interests of the accused against larger societal or public interests:

> I am attempting to balance, and that's my job, my obligation, to balance all of the rights, the rights of the people in the community to be safe, but also the rights of the defendants, who are presumed innocent, at all stages of these proceedings, as to their right to bail. And it's a balancing act.

September 18, 2002, Hearing Transcript, p. 44.

> The interests to be balanced are the legal interests of the defendants under the Bail Reform Act, as well as the Constitution, and the legal interests of the Government under the Bail Reform Act of the issue

> of whether the defendants would constitute a danger to the community, if released.

September 19, 2002, Hearing Transcript, p. 164.

> But I have to balance rights. Not the rights of the nation as perhaps when I did not articulate to the fullest, in that I'm not the military protector, I'm not the legislative protector, I'm not the executive branch protector of this nation, but I am the protector of probably our most valuable asset of all, and that's the Constitution of the United States. And in doing that, I have to defend and protect and make sure that the individual rights of each one of these defendants is protected, but I also have to make sure that the safety of the community is not put at risk in carrying out that protection. And that's the balancing that I continue to struggle with.

September 20, 2002, Hearing Transcript, p. 357.

However, the statutory scheme which permits detention does not involve nor does it permit such a "balancing" process. There is no balancing involved. The questions posed by the statute are clear, *i.e.* whether the government has sustained its burden of proof. And the issue is not whether there is some risk of flight, or risk to the safety of the community or even the nation, but whether it has been proven that there are no conditions or combination of conditions which can provide reasonable assurance that the accused will appear when required and not endanger the community while released. In this regard, Magistrate Judge Schroeder erred by not giving the appropriate presumption of release to these defendants.

A. A Defendant's Danger to the Community Must be Established by Clear and Convincing Evidence

Facts used to support a finding that a defendant represents a danger to another person or the community must be supported by clear and convincing evidence. *United States v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985). The Second Circuit in *Chimurenga* set the following guidelines for the "clear and convincing" standard:

> The "clear and convincing evidence" with respect to a defendant's danger to the community required by Section 3142(f)(2)(B) means something more than "preponderance of the evidence" and something less than "beyond a reasonable doubt". To find danger to the community under this standard of proof requires that the evidence support a conclusion with a high degree of certainty.

(Emphasis added).[3]

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3 The legislative history of the Bail Reform Act also provides some guidance as to what Congress's intent was in setting this heightened burden of proof:

> In facing the problem of how to change current bail laws to provide appropriate authority to deal with dangerous defendants seeking release, the committee concluded that while such measures as permitting consideration of community safety in setting release conditions and providing for revocation of release upon the commission of a crime during the pretrial period may serve to reduce the rate of pretrial recidivism, and that these measures therefore should be incorporated in this chapter, there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.
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> * * *
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> A finding that no form of conditional release is adequate reasonably to assure the safety of any other person and the community, must be supported by clear and convincing evidence. This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented. (The committee does not intend, however, that the pretrial detention hearing be used as a vehicle to reexamine the validity of past convictions). Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.

Contrary to Magistrate Judge Schroeder's blanket assessment that the defendants represent a danger to the community, no evidence was presented which established any such danger existed, let alone a danger by clear and convincing evidence. Importantly, the Government offered no evidence that any of these defendants are members of al-Qaida, let alone valuable in operations for al-Qaida or involved in planning operations for al-Qaida. In fact, the defendants denied ever being members of al-Qaida, or of ever having intentions of being members of al-Qaida. *See* September 20, 2002, Hearing Transcript, p. 339, and Magistrate Judge Schroeder acknowledged that the Government was not prepared to affirmatively state that the defendants are members of al-Qaida. *See* September 20, 2002, Hearing Transcript, p. 382. Furthermore, no evidence was offered that al-Qaida manuals, code books, explosive devices or the like were found in any of the defendants' homes. The proof just is not here that any of these defendants represent, by clear and convincing evidence, a danger to the safety of any other person or the community.

Moreover, the Government all but admitted that it failed to present clear and convincing evidence that these defendants represent a danger to the community. On the third day of the detention hearing, when pressed by Magistrate Judge Schroeder as to what the Government claimed the defendants were planning that would constitute a danger to the community, AUSA Hochul responded:

> [W]e are asking the Court to conclude that the defendants are a danger to the community...And we submit to the Court that when you knowingly support an al-Qaida terrorist organization, which is illegal, should be no ifs, ands or buts about it, and it's as dangerous as that group is, and according to the face of the charge here the defendants

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S. Rep. No. 225, 98TH Cong., 1ST Sess. 1983, 1983 WL 25404 (Leg.Hist.), P.L. 98-473, Continuing Appropriations, 1985 -- Comprehensive Crime Control Act of 1984.

> knowingly, intentionally, willfully supported this group, that this absence of clear evidence or clear indications is somewhat ominous.

Detention Hearing Transcript, Volume 3, p. 401-02. By the Government's own admission, there was an absence of clear evidence that these defendants represented a current danger to the community. Magistrate Judge Schroeder pressed the government for further proof of current dangerousness:

> Now we have gotten probably to that very very crucial point. What is it that these defendants were planning? Is the Government asking me to speculate some sort of potential act of violence or danger? That's not the way I read the Act. The Act says if the Government is moving on the basis that the defendants constitute a danger to the community, they must establish that potential danger by clear and convincing evidence, not have the Court speculate what it might be.
>
> * * *
>
> But as I had indicated, the Act says the Government has the obligation of establishing by clear and convincing evidence that the defendants constitute a danger to the community.
>
> Now, if I assume for the sake of argument everything about what went on in Afghanistan and the training camp and the speeches, and the conspiracy of silence, aren't you still asking me, the Court, to now make a leap to a conclusion that because of that, these defendants are dangerous and may commit acts of violence or may -- may do something that constitutes a danger to the community. And I guess it's that leap that I'm concerned about.

September 20, 2002, Hearing Transcript, p. 411-12.

Ultimately, Magistrate Judge Schroeder made that leap and failed to hold the government to its burden of proving dangerousness by clear and convincing evidence and instead detained these defendants on speculation. Decision and Order, p. 26. Mere possibility cannot rise to the level of "clear and convincing" – under the Second Circuit's definition speculation does not support a conclusion of dangerousness to a high degree of certainty.

B. The Government Failed to Satisfy its Burden of Proving by Clear and Convincing Evidence that No Condition or Combination of Conditions Exist Which Would "Reasonably Assure" the Safety of Any Other Person and the Community.

Likewise, any finding that there are no conditions or combination of conditions which will reasonably assure the safety of any person and the community must be supported by clear and convincing evidence. 18 U.S.C. § 3142(f)(2). The Court need not guarantee safety, only a reasonable assurance of safety. *See United States v. Orta*, 760 F.2d 887 (8th Cir. 1985). In *Orta*, the Eighth Circuit found that the district court imposed too strict a standard:

> [i]n this case, the district court erred in interpreting the "reasonably assure" standard set forth in the statute as a requirement that release conditions "guarantee" community safety and the defendant's appearance. Such an interpretation contradicts both the framework and the intent of the pretrial release and detention provision of the 1984 Act. Congress envisioned the pretrial detention of only a fraction of accused individuals awaiting trial. The district court's interpretation, however, virtually mandates the detention of almost every pretrial defendant: no other safeguard can "guarantee" the avoidance of the statutory concerns. Further, the burden on the government in most cases to show a defendant's dangerousness and flight propensity would be lessened considerably if the government need only show by clear and convincing evidence that no

> release condition could "guarantee" the community's safety and by a preponderance of the evidence that no condition could "guarantee" a defendant's appearance. The structure of the statute mandates every form of release be considered before detention may be imposed. That structure cannot be altered by building a "guarantee" requirement atop the legal criterion erected to evaluate release conditions in individual cases.

760 F.2d at 891-92 (emphasis added); *see also United States v. Fortna*, 769 F.2d 243 (5th Cir. 1985). Magistrate Judge Schroeder similarly imposed too strict a standard on these defendants. Given that Magistrate Judge Schroeder saw fit to impose conditions of bail for co-defendant Alwan, it is inexplicable that he found no equally available conditions for the remaining defendants. *See* Decision and Order pp. 26-27.

The Government failed to sustain its burden, and Magistrate Judge Schroeder failed to hold the government to its burden, of establishing by clear and convincing evidence that there are no conditions or combination of conditions which would reasonably assure the safety of the community. Accordingly, Magistrate Judge Schroeder's detention Order must be vacated on this basis.

C. A Defendant's Serious Risk of Flight Must be Established by a Preponderance of the Evidence

The Government moved for detention pursuant to 18 U.S.C. § 3142(f)(2)(A) by attempting to proffer that the offense involves a serious risk that these defendants will flee. In the first instance, under 3142(f)(2) the Government has the burden of showing that the defendant represents a "serious risk" of flight. This burden must be satisfied by a preponderance of the evidence. That burden was not met in this case as to any of the defendants. Magistrate Judge Schroeder made no specific findings, analysis or discussion as to any of the defendants with respect to their individual risk of flight.

D. The Government Failed to Satisfy its Burden of Proving by a Preponderance of the Evidence that No Condition or Combination of Conditions Exist Which Would "Reasonably Assure" the Appearance of Each Defendant.

The Bail Reform Act of 1984 provides that a court can order a defendant's detention pending trial if "no conditions or combination of conditions will reasonably assure the appearance of the person as required." 18 U.S.C. § 3142(e). Before preventive detention may be ordered under § 3142(e), however, the court is obliged to determine both whether the defendant is likely to flee the jurisdiction if released, and whether any conditions of release will be reasonably certain to guard against this propensity to flee. *See also* 18 U.S.C. § 3142(c) (listing possible conditions of release). *See United States v. Berrios-Berrios*, 791 F.2d 246 (2d Cir. 1986). The Government must meet this burden by a preponderance of the evidence. *United Stated v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987); *United States v. Awadallah*, 173 F.Supp.2d 186, 192 (S.D.N.Y. 2001). Again, the statute does not require a finding of "absolute certainty" that the defendant will appear in the future. *United States v. Awadallah*, 173 F.Supp.2d at 190, n.13.

When the Government fails to meet its burden, the Court must order a defendant's release subject to the condition, among others, that the defendant not violate the law. In addition, the defendant's release should be ordered subject to the "least restrictive further condition or combination of conditions" which will reasonably assure the defendant's future appearance. 18 U.S.C. § 3142(c)(1)(A)(B).

Here, the Government failed to establish by a preponderance of the evidence that there are no conditions or combination of conditions which would reasonably assure the future appearance of these defendants. While Magistrate Judge Schroeder attempted to distinguish co-defendant Alwan from the others, the distinctions related solely to the question of dangerousness. He offered no explanation or amplification on the risk of flight these defendants posed over Mr. Alwan. Indeed, there is no distinction to be made. Accordingly, all defendants should be

released on bail subject to the least restrictive condition or combination of conditions which will reasonably assure their future appearance.

POINT II

MAGISTRATE JUDGE SCHROEDER ERRED IN PERMITTING THE GOVERNMENT TO PROCEED BY PROFFER, IN LIEU OF LIVE TESTIMONY, WHERE THE ACCURACY OF THE GOVERNMENT'S ALLEGATIONS REGARDING DANGER TO THE COMMUNITY AND RISK OF FLIGHT WERE CHALLENGED BY EACH OF THE DEFENDANTS

The detention statute, 18 U.S.C. § 3142, provides for a high degree of substantive due process prior to the detention of an accused person. That is, that statute requires that a hearing be held to determine whether any condition or combination of conditions will reasonably assure the appearance of the accused person as required and the safety of the community. With respect to the hearing,

> [the accused] person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, and to present information by proffer or otherwise. The rules concerning the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.

18 U.S.C. § 3142(f). Of course, these statutory protections are meaningless unless they are actually provided to a defendant.

While detention hearings should not become "mini-trials," *United States v. Martir*, 782 F.2d 1141, 1144-45 (2d Cir. 1986), the United States Supreme Court has held that an accused must be afforded a "full-blown adversary hearing." *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103 (1987). The statute, therefore, clearly contemplates, and has been interpreted by the courts as requiring, the traditional elements of procedural due process— notice, the opportunity to be heard, and the right of confrontation.

Magistrate Judge Schroeder relied upon two Second Circuit cases, *United States v. LaFontaine*, 210 F.3d 125, 130 (2d Cir. 2000) and *United States v. Davis*, 845 F.2d 412 (2nd Cir. 1988), in permitting the Government to proceed by proffer alone. However, neither case supports permitting the government to proceed totally by proffer when the defense offers real evidence to the contrary.

In *United States v. Davis*, 845 F.2d 412 (2nd Cir. 1988), the Court, while reversing a detention decision where no hearing was conducted, suggested that it might not be "an abuse of discretion for the district court to permit the government to proceed by proffer alone." But this is far from a ringing or authoritative endorsement of unsworn "proffers" as the sole basis upon which to deprive an accused of liberty pending trial. It actually provides more strength to the proposition that factual disputes in detention matters must be fully explored through an evidentiary proceeding.

In *United States v. LaFontaine*, 210 F.3d 125, 130 (2d Cir. 2000), the Second Circuit cautioned against informality:

> Nevertheless, this court has also recognized that while the informality of bail hearings serves the demands of speed, the magistrate or district judge must also ensure the reliability of the evidence, "by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question."

210 F.3d at 131 (quoting *United States v. Martir*, 782 F.2d 1141, 1147). What makes the critical difference is where the accuracy of the facts proffered by the government is challenged by the defense. In *Martir* there had been no such challenge.

> In the interest of preserving the necessary informality of bail application proceedings, only where the defendant challenges the accuracy of the specific [proffered] evidence so as to reasonably give the district court a basis to doubt the overall reliability of the

> proffer need the district court require the actual production of the evidence.

United States v. Vondette, et al., 5 Fed. Appx. 73, 2001 WL 253109 (2nd Cir. 2001), citing *United states v. LaFontaine, supra.* In other words, the district court not only can direct that evidence be produced, in default of which the government's motion cannot be granted, where the accuracy of the "proffer" is questionable, the court needs to require that the government's evidence be exposed to cross-examination.

Here, the accuracy of the allegations regarding danger to the community and likelihood of flight was questioned by each of the accused. In the face of contrary proffers, the Government should have been required to produce live witnesses. In the face of contrary evidence, mere proffer cannot carry the burdens of providing (1) "clear and convincing evidence" that no conditions of release could provide reasonable assurance that the accused would not be a danger to the community if released, and/or (2) by a preponderance of the evidence that the defendants present a serious risk of flight and that there are no conditions which would reasonably assure their future appearance.

POINT III

MAGISTRATE JUDGE SCHROEDER IMPROPERLY AND UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF FROM THE GOVERNMENT TO THE DEFENDANTS, AS EVIDENCED BY HIS RECITATION OF SEVERAL PURPORTEDLY UNANSWERED QUESTIONS

In addition to not holding the Government to its requisite burdens of proof, Magistrate Judge Schroeder actually shifted the burden to the defendants:

> The finding that all of the defendants traveled to Pakistan and thereafter attended a training camp known as al-Farooq in Afghanistan at which Usama bin Laden spoke espousing anti-American sentiment and received training in the use of weapons and lectures on suicide as a means of causing harm to the enemy, causes the following questions to be asked:
>
> (1) How did it come to be that six young men, all in their twenties and all being from Lackawanna, New York traveled in two groups between April 28, 2001 and May 12, 2001 to Pakistan?
>
> (2) Were they recruited by someone to make this trip, and if so, by whom, and on what basis were they selected, and for what purpose?
>
> (3) How is it that six young men from Lackawanna, New York were allowed entry into Afghanistan since their passports did not indicate that appropriate visas for such entry were issued?
>
> (4) How is it that six young men from Lackawanna, New York were allowed to enter a secret training camp known as al-Farooq in Afghanistan and attend a speech given by Usama bin Laden?
>
> (5) What was the objective in attending said training camp and to what use or purpose was such training to be put?
>
> (6) Why did the defendants Goba, Mosed, Taher, Galab and Al-Bakri remain at the camp for the full training period?

See Decision and Order, pp. 21-22. Magistrate Judge Schroeder placed the burden on the defendants to come forward with the answers to these questions. Decision and Order, p. 23.

The statute provides for the defendant to have the burden in only limited circumstances where a presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community. *See* 18 U.S.C. § 3142(e). None of those presumptions apply in this case. Furthermore, even in those limited circumstances where the presumption may apply, it may be rebutted by the accused merely by the proffer or presentation of "some evidence" that the presumed facts are not true. This is a slight burden of coming forward, which in many cases can be satisfied merely by the general standing of the person in the community or the availability of sureties. *E.g. United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986):

> Any evidence favorable to a defendant that comes within a category listed in § 3142(g) can affect the operation of one or both of the presumptions, including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3).

This is not a burden of disproving the presumed facts. Once the defendant comes forward with some evidence, the burden of persuasion remains on the government. *See, e.g., United States v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *United States v. Martir*, 782 F.2d 1141, 1144 (2d Cir. 1986). The accused can satisfy that burden by coming forward with "some evidence" tending to rebut the presumption. As the Eleventh Circuit noted, citing the First Circuit,

> [o]nce the government establishes probable cause it becomes the task of the defendant to come forward with some quantum of evidence contrary to the fact presumed by the statute. Having done so, the defendant has met his obligation. The ultimate burden of persuading . . . still rests with the government.

United States v. Hurtado, 779 F.2d 1467, 1471 (fn.4)(11th Cir. 1985) (citing *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985)). Only if the accused comes forward with no evidence can the government rest on the presumption *qua* presumption.

Magistrate Judge Schroeder inappropriately shifted the burden to the defendants to answer questions which the Government left unanswered. Since no presumption of detention ever arose, it was wholly inappropriate to require the defendants to come forward with answers.

POINT IV

MAGISTRATE JUDGE SCHROEDER ERRONEOUSLY CONCLUDED THAT 18 U.S.C. § 2339B IS NOT UNCONSTITUTIONAL

With all due respect to this Court's request that the defendants delay briefing on the issue of the constitutionality of 18 U.S.C. § 2339B until such time as a motion to dismiss the indictment is filed, such an approach would be illogical given the consideration to be given to the weight of the evidence and the nature of the charges against the defendants in any bail determination. *See* 18 U.S.C. § 3142(g)(1) and (2). Perhaps it goes without saying, but if the statute under which these defendants are charged is unconstitutional, detention is necessarily inappropriate. Magistrate Judge Schroeder recognized that it would be putting the cart before the horse to delay consideration of the constitutionality of the statute until some later time, in the face of a legitimately filed challenge:

> THE COURT: It's the strength of the Government's case under the law. Because if I were to conclude -- and I emphasize the word if -- if I were to conclude the statute was unconstitutional, doesn't that then, if I'm going to be intellectually honest, cause me to conclude that I can't say these defendants constitute a danger, because they can't be held on an unconstitutional charge.
>
> MR. HOCHUL: Well, I don't know that the Court can decide the constitutional question. This is a bail question. This is whether or not, given that the defendants are already charged with a crime as signed off on by --

> THE COURT: But it can't be a crime if it's an unconstitutional statute. That's my point. The mere fact you say they're charged with a crime, doesn't automatically cause that to be the fact, if the statute which allegedly charges the crime is found to be unconstitutional.
>
> * * *
>
> Well, the constitutional issue is at the forefront immediately, as I understand the Constitution of the United States of America, starting with the Fifth Amendment, and that is, the defendant is entitled to due process. And due process involves and includes determining whether a law is, in fact, a valid law with which to charge a person. And the Eighth Amendment to the United States Constitution provides that there shall not be excessive bail imposed for a charge.
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> So it appears to me it brings it right up front that I have to take into account at least the validity of the statute charged in this case, when I have two diametrically opposed court decisions, one saying it's unconstitutional, one saying it is, in the context of the weight to be given to the Government's case, and then we'll get to the Government's evidence, if I determine that that statute is constitutional, not from a jurisdictional point of view as to my limitations of ruling a statute passed by Congress as being unconstitutional, but in the context of the weight of the Government's case, as to whether detention against these defendants should be granted.

October 3, 2002, Hearing Transcript, p. 602-06.

Defendants therefore incorporate all prior filings on this issue as if set forth fully herein and respectfully request that the court give due consideration to this issue now in the context of 18 U.S.C. § 3142(g).

POINT V

MAGISTRATE JUDGE SCHROEDER ERRONEOUSLY CONCLUDED THAT 18 U.S.C. § 2339B IS A CRIME OF VIOLENCE FOR PURPOSES OF THE BAIL REFORM ACT

Magistrate Judge Schroeder erroneously concluded that 18 U.S.C. § 2339B is a crime of violence for purposes of the Bail Reform Act. *See* Decision and Order, pp. 8-11. The Bail Reform Act defines a "crime of violence" as:

> (A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
>
> (C) any felony under chapter 109A [18 U.S.C.A. § 2241 et seq.], 110 [18 U.S.C.A. § 2251 et seq.] , or 117 [18 U.S.C.A. § 2421 et seq.]

18 U.S.C. § 3156(a)(4).

The offense in question in this case is 18 U.S.C. § 2339B. Section 2339B provides, "[w]hoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined . . . or imprisoned . . ." 18 U.S.C. § 2339B(a)(1).

Subsection (A) of § 3156(a)(4) addresses offenses in which an "element actually involves the use or threat of force." *United States v. Dillard*, 214 F.3d 88, 92 (2d Cir. 2000). In making this determination, the Court must look at the plain language of the statute. *United States v. Singleton*, 182 F.3d 7, 11 (D.C. Cir. 1999). Physical force, its use or attempted use, is not an element of the offense with which the defendants are charged.

Examples of offenses that involve the use or threat of force, for purposes of § 3156(a)(4)(A), include, arson, assault, and murder for hire. *See, e.g., United States v. Mitchell*, 23 F.3d 1, 2 n.3 (1st Cir. 1994); *United States v. Cruickshank*, 150 F.Supp.2d 1112, 1116 (D.Colo. 2001) (assault is a crime of violence); *United States v. Barnett*, 986 F.Supp.385, 395 (W.D.La. 1997) (murder for hire is crime of violence). Although not an exhaustive list, the language of these offenses illustrates the use, attempted use, or threatened use of physical force as an element. The element for arson is the willful and malicious setting of fire, 18 U.S.C. § 81; for assault it is physical force, 18 U.S.C. §§ 111, 113; and for murder, obviously, it is the physical killing. 18 U.S.C. § 1111.

18 U.S.C. § 2339B has five elements. First, a person must be "within the United States or subject to its jurisdiction." This element is simply a jurisdictional requirement for prosecution. Second, a person must "knowingly" act. The "knowingly" element sets forth the mental state required. The third element, is the active verb, "provides." Provides, along with attempting to provide or conspiring to provide, sets forth the type of act that is prohibited. To provide is to make available or to supply. *See* RANDOM HOUSE UNABRIDGED DICT. 1556 (2d ed. 1993).

Fourth, what is provided must be "material support or resources." "Material support or resources" is the object, that which is being made available or supplied. "Material support or resources" is defined as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b); *see also* § 2339B(g)(4) ("the term 'material support or resources' has the same meaning as in section 2339A"). The definition is simply a list of items that may not be provided. The fifth element is that the materials or resources are provided to a designated "foreign terrorist organization." A terrorist organization is the defined recipient of the resources or support. 18 U.S.C. § 2339(B)(g).

18 U.S.C. § 2339B does not contain an element of physical force, its use, attempted or threatened. As such, it is not a crime a violence as defined by subsection (A) of 18 U.S.C. § 3156(a)(4). Nor is it a crime of violence pursuant to subsection (C) 18 U.S.C. § 3156(a)(4). Each of the specified acts in subsection (C) involves crimes of sexual activity that are not relevant in this case.

The remaining question is whether § 2339B is a crime of violence pursuant to 18 U.S.C. § 3156(a)(4)(B). Subsection (B) of § 3156(a)(4) addresses offenses in which there is a substantial risk that force will result from the nature of the offense, and the potential for the use of force will result "in the course of committing the offense." *Dillard*, 214 F.3d at 92 (quoting § 3156(a)(4)(B)). This means that:

> some aspect of the charged offense must create the risk of violence in order to itself qualify as a crime of violence. Absent a direct relationship between the offense and a risk of violence, the possibility of violence is not a basis for pretrial detention on a charge that on its face does not involve violence as an element.

Singleton, 182 F.3d at 14.

The courts have used a categorical approach in order to determine whether an offense is a crime of violence under subsection (B). *Id.* at 11; *Dillard,* 214 F.3d at 92; *United States v. Carter*, 996 F.Supp. 260, 262 (W.D.N.Y. 1998). The categorical approach requires the court to "look[ ] only to the intrinsic nature of the offense itself as it is defined by statute, and . . . not [to] consider any of the specific facts surrounding the alleged offense." *United States v. Campbell*, 28 F.Supp.2d 805, 807 (W.D.N.Y. 1998); *accord Carter*, 996 F.Supp. at 261-62.[4]

Categorically, providing "material support or resources" does not involve a substantial risk that physical force will be used against the person or a property of another in the course of committing the offense. There must be a direct relationship between the charged offense and the

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4 This can be compared to the case by case approach, which examines the specific factual circumstances that caused the defendants to be charged. *See Campbell*, 28 F.Supp.2d at 807; *Carter*, 996 F.Supp. at 261-62.

risk of violence. *Singleton*, 182 F.3d at 14. That is, the risk of violence must arise "in the course of" providing the material support or resources. Any risk is attenuated by how the material support or resources may be used at some later date, not within the commission of the offense. *See Dillard*, 214 F.3d at 105 (Meskill, J., dissenting) (discussing the "in the course of" language of § 3156(a)(4)(B)).

By comparison, the crime of burglary serves as an example of an offense where there is a substantial risk that force will be used during the commission of the offense. *See Singleton*, 182 F.3d at 14; *United States v. Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985). "In the course of committing a burglary, there is . . . the violence against the property and the additional risk that one who may surprise the burglar will be harmed." *Chimurenga*, 760 F.2d at 404. This type of risk is not present in § 2339B.

No case law squarely addresses whether § 2339B is a crime of violence pursuant to § 3156(a)(4)(B). Magistrate Judge Schroeder relied on *United States v. Lindh*, 212 F.Supp.2d 541 (E.D.VA. 2002), in support of his decision that § 2339B is a crime of violence. *See* Decision and Order, p. 10-11. The relevant issue in *Lindh,* however, was whether § 2339B was a crime of violence for purposes of application of 18 U.S.C. § 924(c). Lindh argued that the charge of 924(c) against him should be dismissed because the underlying offense, § 2339B, is not a crime of violence.

According to Judge Ellis, the statute required him to "assess[ ] . . . the risks that may result from providing support or resources to terrorists in a manner that Section 2339B forbids." *Id.* at 579-80. However, this is the wrong approach in that it does not meet the nexus requirements of § 3156(a)(4)(B). *See Singleton*, 182 F.3d at 14; *Dillard*, 214 F.3d at 105 (Meskill, J., dissenting). Judge Ellis, and likewise Magistrate Judge Schroeder, focused not on the nature of the offense itself and the risk for violence during the commission of the offense, but rather on the nature of a terrorist organization, surmising all kinds of potential risks of violence even well after the offense has been committed.

Judge Ellis further examined the facts set forth in the indictment in order to "shed light" on the violent nature of the crimes alleged. *Lindh*, 212 F.Supp.2d at 581-82. In using this approach, Judge Ellis ignored the limiting language of § 3156(a)(4)(B) that requires that physical force be used "in the course of committing the offense." *Cf. Dillard*, 214 F.3d at 105 (Meskill, J., dissenting) (noting that the majority attempted to avoid the limiting language of § 3156(a)(4)(B) before determining that a felon in possession will, at some future point during the continued possession, engage in physical force). Instead, Judge Ellis considered the risk of all future harm occurring because of the commission of the crime when he defined § 2339B as a crime of violence.

The dangerousness of this analysis is illustrated by an example. Pursuant to the statute, providing $10.00 to a terrorist organization is a violation. Once that money is actually given, the crime is committed and completed. Under Judge Ellis's analysis there is a substantial risk of violence because of the potential future violence that may be engaged in not by the defendant but by another entity. The statutory definition of a crime of violence requires that the risk occur during the commission of the offense. Here, the only risk of violence occurs after the offense is completed.

Defining § 2339B as a crime of violence based on a risk of future harm rejects the plain meaning of the Bail Reform Act. An analysis based on the risk of future harm will lead to illogical results, as courts will have to conclude that offenses such as drunk driving, the unlawful transporting of hazardous chemicals, and other risk-creating offenses also constitute crimes of violence. *See United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.).

Accordingly, § 2339B is not a crime of violence for purposes of the Bail Reform Act. "[I]f the arrest offense is not within the statutory definition of a 'crime of violence,' no detention hearing will be held . . . and the defendant must be released, . . ." *Dillard*, 214 F.3d at 91. Because the charged offense is not a crime of violence as defined, detention may not be had on the basis of dangerousness. Magistrate Judge Schroeder's detention Order must therefore be vacated in this regard.

CONCLUSION

Wherefore, it is respectfully requested that the defendants' Motion for Revocation of Magistrate Judge Schroeder's detention Decision and Order be granted in all respects.

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