IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

WALTER KENDALL MYERS, and
GWENDOLYN STEINGRABER MYERS,

Defendants.

Criminal Case Number:

09-150 (RBW/JMF)

MOTION FOR REVOCATION OR AMENDMENT OF THE MAGISTRATE'S DETENTION ORDER

Pursuant to 18 U.S.C. § 3145(b), Mr. and Mrs. Myers, through counsel, respectfully move this Court for release with conditions pending their trial in the above captioned case.

On June 4, 2009, the Federal Bureau of Investigation (FBI) arrested Mr. and Mrs. Myers at the Capital Hilton in Northwest, Washington, D.C. On June 5, 2009, the government orally moved the court for a pretrial detention order on the grounds that Mr. and Mrs. Myers presented a serious flight risk. On June 10, 2009, Magistrate Judge Facciola granted the government's motion and ordered the pretrial detention of Mr. and Mrs. Myers after concluding that no reasonable conditions would assure Mr. and Mr. Myers' appearance at trial.[1] Mr. and Mrs. Myers request that this Court reconsider this issue on the grounds that a combination of conditions can be set that will reasonably assure the Myers' appearance in this case.

This Court reviews the Magistrate's decision *de novo*. *United States v. Karni*, 298 F. Supp. 2d 129, 130 (D.D.C. 2004). The Court is free to consider any evidence presented and to rest its decision on a rationale different than that of the Magistrate's. *Id.*

[1] A copy of the Detention Memorandum is attached hereto as Exhibit A.

Under the Bail Reform Act, a defendant must be released prior to trial unless the court determines that no conditions or combination of conditions exist which will "reasonably assure the appearance of the person." 18 U.S.C. § 3142(c). Under the Act, a finding based on flight risk that no combination of conditions will reasonably ensure the defendant's appearance must be supported by a preponderance of the evidence. *Karni*, 298 F. Supp. 2d at 131 (citing *United States v. Simpkins*, 826 F.2d 94, 96 (D.C. Cir. 1987)). In each case, the question for the court is whether there is *any* condition or combination of conditions that will *reasonably* assure the appearance of the defendant. 18 U.S.C. § 3142(c) (emphasis added). The Bail Reform Act only "speaks of conditions that will 'reasonably' assure appearance, not guarantee it." *United States v. Xulam*, 84 F.3d 441, 444 (D.C. Cir. 1996) (per curiam).

In *Karni*, the court ordered the release of a defendant who allegedly acquired products capable of triggering nuclear weapons and exported them to Pakistan without obtaining an appropriate license. *Karni*, 298 F. Supp 2d at 129–30. The court ordered the defendant's release even though the weight of the evidence against the defendant was substantial, the defendant was an Israeli national who had no ties to the United States, and the defendant presented a risk of flight. *Id.* at 131–32. The defendant was released subject to several conditions including home detention and electronic monitoring, waiver of extradition rights, posting of $100,000 of his own funds, and release into a rabbi's custody. *Id.* at 133.

Karni demonstrates that even in serious cases, a combination of conditions may exist that can reasonably ensure a defendant's presence at trial. Just as the court did in *Karni*, this Court can fashion a combination of conditions that would reasonably assure Mr. and Mrs. Myers' appearance at trial. Counsel submits that an order from this Court containing the

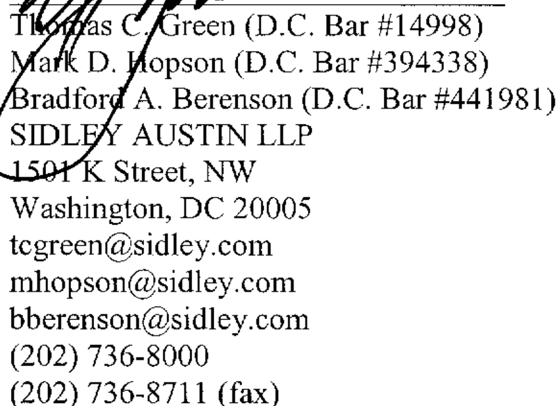
following conditions or any combination of them can reasonably assure Mr. and Mrs. Myers' appearance at trial:

1. An order to surrender all travel documents and to not apply for any travel documents.
2. An order to serve in-home detention subject to the electronic monitoring program. During the period of detention, Mr. and Mrs. Myers would be ordered to remain in the home except for meetings with attorneys, attendance at proceedings in this case, or other activities approved in advance by the Pretrial Services office. The cost of monitoring services would be paid by Mr. and Mrs. Myers.
3. An order requiring Mr. and Mrs. Myers to commit their own funds and certain property interests to post bond in an amount the court deems sufficient to discourage flight.
4. An order releasing Mr. and Mrs. Myers into the custody of Brad Trebilcock, Mrs. Myers' son, who will commit to have someone with Mr. and Mrs. Myers on a twenty-four hour basis, seven days a week.
5. An order to stay away from the Cuban Interests Section located in the Swiss Embassy in Northwest, Washington, D.C. In the alternative or in addition to the stay away order, an order requiring that Mr. and Mrs. Myers' house arrest be served at a location outside of Washington, D.C. or at least 20 miles from the Cuban Interests Section.
6. An order requiring Mr. and Mrs. Myers to stay at least 20 miles away from their sailboat located near Annapolis, Maryland and to surrender all maps or other navigational equipment relating to Cuba's navigable waters and/or that would enable the Myers' to travel to Cuba.

WHEREFORE, because a combination of conditions exists that will reasonably assure Mr. and Mrs. Myers' appearance at trial, counsel respectfully requests that the Court order Mr. and Mrs. Myers' release pursuant to the foregoing conditions or any others that the Court deems appropriate.

Dated: June 16, 2009

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	Criminal Case Number:
WALTER KENDALL MYERS, and GWENDOLYN STEINGRABER MYERS,	09-150 (RBW/JMF)
Defendants.	

PROPOSED ORDER

Upon consideration of Walter Kendall Myers and Gwendolyn Steingraber Myers' Motion to Release with Conditions, it is hereby

ORDERED that the Motion to Release with Conditions is GRANTED; it is

FURTHER ORDERED that Mr. and Mrs. Myers will surrender all travel documents and are not to apply for any new travel documents; it is

FURTHER ORDERED that Mr. and Mrs. Myers shall serve in-home detention subject to the electronic monitoring program and shall remain in the home except for meetings with attorneys, attendance at proceedings in this case, or other activities approved in advance by the Pretrial Services office; it is

FURTHER ORDERED that Mr. and Mrs. Myers shall pay the costs of electronic monitoring; it is

FURTHER ORDERED that Mr. and Mrs. Myers will post their apartment located at 3900 Cathedral Avenue, NW #610-A, their sailboat located near Annapolis, Maryland, and two hundred and fifty thousand dollars ($250,000) out of their own funds; it is

FURTHER ORDERED that Mr. and Mrs. Myers will be released into the custody of Brad Trebilcock, who will ensure that someone is with Mr. and Mrs. Myers on a twenty-four hour basis, seven days a week; it is

FURTHER ORDERED that Mr. and Mrs. Myers will stay away from the Cuban Interests Section located in the Swiss Embassy in Northwest, Washington, D.C.; and it is

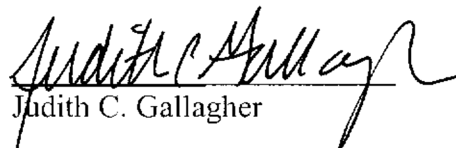
FURTHER ORDERED that Mr. and Mrs. Myers will stay at least 20 miles away from their sailboat located near Annapolis, Maryland and to surrender all maps or other navigational equipment relating to Cuba's navigable waters and/or that would enable the Myers' to travel to Cuba.

REGGIE B. WALTON
United States District Judge

CERTIFICATE OF SERVICE

I certify that on June 16, 2009, Defendant Walter Kendall Myers and Gwendolyn Steingraber Myers' Motion for Revocation or Amendment of the Magistrate's Detention Order was filed electronically with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

Gordon Michael Harvey (michael.harvey2@usdoj.gov)



Judith C. Gallagher

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v. **CR NO. 09-150 (RBW/JMF)**

WALTER KENDALL MYERS, and
GWENDOLYN STEINGRABER MYERS,

Defendants.

DETENTION MEMORANDUM

The government has moved for the defendants' detention on the grounds that they present such a significant risk of fleeing the jurisdiction that there are no reasonable conditions that can be set that reduce that risk to a tolerable level.

That such a risk of flight is grounds for detention under the Bail Reform Act, 18 U.S.C. §§ 3142(f)(2)(A); 3142(e)(1),[1] cannot be gainsaid. The Court must therefore detain the defendants if the government establishes by a preponderance of the evidence[2] that "no condition or combination of conditions will reasonably assure the presence of the person as required." 18 U.S.C. § 3142(e)(1). This memorandum is submitted to comply with the statutory obligation that "the judicial officer shall—include written findings of fact and a written statement of the reasons

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[1] All references to the United States Code are to the electronic versions in Westlaw or Lexis.

[2] United States v. Vortis, 785 F.2d 327, 328-29 (D.C. Cir. 1986).

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for the detention." 18 U.S.C. § 3142(i)(1).

FINDINGS OF FACT

The Government's evidence, if credited, would tend to establish the following:

1. Cuba is a communist country currently ruled by Raul Castro. From 1959 to 2007, it was ruled by Fidel Castro. The government of Cuba is an internationally recognized foreign government.

2. The United States does not have diplomatic relations with Cuba. The Cuban Interests Section in Washington, DC (under legal jurisdiction of the Swiss Embassy) is the official representative of the Cuban government to the United States. The Cuban Interests Section is located at 2630 16th Street NW, Washington, DC.

3. The "Cuban Intelligence Service" is a general term for Cuban intelligence and counterintelligence entities. The Cuban Intelligence Service maintains a program to recruit persons within the United States academic community to act as agents gathering intelligence and engaging in other types of clandestine activity at its direction.

4. The Cuban Intelligence Service additionally employs "handlers" in the United States to act as liaisons between the "agents" in the United States and the Cuban Intelligence Service in Cuba. The "handlers" maintain personal contacts with the agents and relay information from Cuba.

5. The Cuban Intelligence Service is known to have employed husband-and-wife teams as “paired” agents.

6. The Cuban Intelligence Service is known to provide false identification and documentation for its agents to facilitate clandestine travel and flight from the United States, in case of detection.

7. The Cuban Intelligence Service is known to communicate with its clandestine agents using shortwave radio.

8. Walter Kendall Myers (“Kendall Myers”) is a United States citizen and was born in Washington, DC in 1937. He served in the United States Army from 1959 to 1962. He taught full-time at Johns Hopkins University, School of Advanced International Studies (“SAIS”) from 1971-1977 and part-time since 1977. In June of 1972, he earned a Ph.D. from SAIS.

9. Gwendolyn Steingraber Myers is a United States citizen who was born in 1938. She moved to Washington, DC in 1980 with Kendall Myers and was employed by Riggs National Bank as an Administrative Analyst in the Management Information Systems soon thereafter.

10. Kendall Myers was employed as a contract instructor with the State Department’s Foreign Service Institute (“FSI”) from August 1977 through March 1979.

11. Kendall Myers traveled to Cuba in December 1978 for two weeks on "unofficial personal travel for academic purposes." This trip was predicated on an invitation from a Cuban government official who had given a presentation at the FSI. Kendall Myers kept a diary of the 1978 trip, in which he wrote of a strong affinity for Cuba and expressed a negative sentiment toward the United States and "American imperialism."

12. Kendall and Gwendolyn Myers lived in South Dakota from 1979 to 1980. During this time, they were visited and recruited by a representative of the Cuban government and agreed to become clandestine Cuban agents.

13. After living in South Dakota from 1979 to1980, Kendall and Gwendolyn Myers returned to Washington, DC.

14. Kendall and Gwendolyn Myers married in 1982. They currently reside at 3900 Cathedral Avenue NW, Apartment 610-A.

15. In 1982, Kendall Myers resumed his employment as a contract instructor with FSI and held the title of Chairperson for West European Studies.

16. Kendall Myers repeatedly made false representations to representatives of the State Department in his application for employment with the State Department and a security clearance, and during interviews for the maintenance of his security clearance.

    a. On May 9, 1983, he falsely stated that he had never been an agent or acted for a

foreign principal.

b. On November 21, 1989, he failed to list any personal or continuing contacts he had with any communist country.

c. On January 31, 1996, he falsely stated that he did not have any regular contact with foreign nationals.

d. On December 29, 2000, he falsely stated that he had no contact with any foreign governments, establishments, or representatives.

e. On February 13, 2001, he falsely stated that: no one in his immediate family was subject to foreign influence; his actions have always indicated a preference for the United States over foreign countries; he knew of no other information that could suggest a conflict of interest or embarrass him, the State Department, or the United States; his activities did not conflict with his security responsibilities or create an increased risk of unauthorized disclosure of classified information; and he did not know of any information omitted that could impact his suitability for employment or a security clearance.

f. On November 24, 2006, he falsely stated that he had no contact with any foreign governments, establishments, or representatives.

g. On January 9, 2007, he falsely stated that: he had no relatives who were ever

connected to a foreign government; he did not have any unauthorized association with a suspected collaborator of a foreign intelligence service; he had no suspicions of being a target of foreign intelligence services; he did not act, or attempt to act, to serve another government in preference to the United States; he did not deliberately omit, conceal, or falsify his responses to questions used to make employment, security clearance, or trustworthiness determinations; he did not provide misleading statements to the above questions; he did not act dishonestly or violate rules; he did not disclose sensitive or classified information; he did not perform any service with any foreign country; and he did not know of any information omitted that could impact his suitability for employment or a security clearance.

17. On March 27, 1985, he obtained a Top Secret ("TS") security clearance from the State Department for his employment beginning in April 1985. This clearance provided Kendall Myers with daily access to classified and sensitive United States Government information. On April 15, 1985, Kendall Myers was offered a two-year appointment as a Training Instructor and Chairperson for West European Studies at the FSI.

18. On June 12, 1985, Kendall Myers signed a Classified Information Nondisclosure Agreement. The document stated that Myers was forbidden from disclosing classified

information to other persons unless approved for access and from violating laws concerning the unauthorized disclosure of classified information.

19. On April 30, 1991, Kendall Myers signed a Classified Information Nondisclosure Agreement containing substantially the same language as the one above.

20. In January 1995, the defendants traveled to Cuba via Mexico to meet with Fidel Castro. No record of their travel exists, but the defendants indicated during an April 30, 2009 meeting with an undercover FBI agent that they used false names, “Jorge” and “Elizabeth,” when they traveled to Cuba in 1995. Kendall Myers did not disclose his travel to Cuba to the State Department, as its policy required.

21. The defendants possess a Cuban travel guide, which was published in the mid-to-late 1990s.

22. The FBI identified messages sent via shortwave radio from Cuban Intelligence Service to a “handler” of Kendall and Gwendolyn Myers in the United States. The messages make multiple references to Cuba as well as “passes,” visual signals, “dead drops,” clandestine communication techniques, coded messages, and code names referring to Kendall and Gwendolyn Myers.

23. The following messages were also intercepted by the FBI in 1996 and 1997:

    a. A November 1996 message in which a handler is instructed to take advantage of

an upcoming pass (of information) to study the new residence of agent "123." One of Gwendolyn Myers' code names is "123,"and she and Kendall Myers moved to a new residence one month after the message was sent

b. A February 1997 message, which involved a specific tasking by a Cuban intelligence officer nicknamed "GOD." Kendall Myers admitted to the FBI's undercover agent the existence of an intelligence officer referred to as "GOD."

c. A March 1997 message instructing "634" to be trained on the use of a data storage device. The FBI determined from a prior message that "634" and/or "E-634" refer to Gwendolyn Myers based on the physical description given in the message; specifically, the message referred to an agent with a tumor on her shoulder, and medical records indicate that Myers had a tumor removed from her shoulder in 1997.

d. An April 1997 message noting that agent "202" had informed the Cuban Intelligence Service that he was in the process of obtaining a security clearance. Kendall Myers told the FBI undercover agent that his code name was "202."

24. In October 1999, Kendall Myers became the Acting Director of the External Research Staff at the State Department's Bureau of Intelligence and Research ("INR"). During his tenure at INR, Myers specialized in intelligence analysis regarding European matters.

Prior to the start of this employment, his clearance was increased to a TS/SCI clearance in September 1999. He maintained this clearance until his retirement in 2007.

25. In January 2002, the defendants traveled to Port of Spain, Trinidad and Tobago on non-work related travel.

26. In December 2002, the defendants traveled to Kingston, Jamaica on non-work related travel.

27. In July 2003, the defendants traveled to Mexico City, Mexico on non-work related travel.

28. In December 2003, the defendants traveled to Rio de Janeiro, Brazil on non-work related travel.

29. In July 2004, the defendants traveled to Quito, Ecuador on non-work related travel.

30. In December 2004, the defendants traveled to Puerto Vallarta, Mexico on non-work related travel.

31. In July 2005, the defendants traveled to Buenos Aires and Iguazu, Argentina on non-work related travel.

32. In December 2005, the defendants traveled to Mexico City and Oaxaca, Mexico on non-work related travel.

33. From August 22, 2006 until October 31, 2007, Kendall Myers viewed over 200 intelligence reports regarding Cuba, most of whichy were classified as “secret” or “TS.”

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More than 75 of these reports were irrelevant to Kendall Myers' area of responsibility within his employment at INR.

34. Kendall Myers took information from his job by memorizing it or by taking notes on the information, which he stored in a safe in his home office.

35. In June and August 2008, the FBI executed two non-invasive court-authorized searches of the defendants' apartment, residential storage area in the basement of their apartment building, car, sailboat, and marine storage locker. The searches resulted in the recovery of the same brand of shortwave radio used by Cuban agent Ana Belen Montes, Kendall Myers' diary concerning his 1978 trip to Cuba, a sailing guide for Cuban waters, a travel guide to Cuba, and a book entitled <u>On Becoming Cuban</u>.

36. The same surreptitious searches resulted in the recovery of two e-mails from the defendants' home e-mail account between the defendants and a sender located in Mexico, whose cover name is "Peter Herrera."

   a. On December 22, 2008, "Peter" e-mailed the defendants, purporting to be an art dealer, and asked them to tell him when they will be "ready to pick [] up" some art pieces. Defendants responded to Peter on December 29, 2008, explaining that they were "[d]elighted to hear from [him] and to learn that [his] art gallery is still open" for them. They explained they had not made travel plans but would write

to him as soon as they had.

b. On March 16, 2009, "Peter" sent the defendants another e-mail, asking them to notify him when they were ready to "pick up" the art pieces. The defendants responded to "Peter" on March 27, 2009, writing that their schedules did not allow for a visit to Mexico at the time, but asking "Peter" to keep them informed of his future shows.

37. In April 2009, the FBI continued its covert investigation of the defendants, now using an undercover agent posing as a Cuban intelligence officer.

38. All meetings with the undercover agent were audio and video recorded as well as corroborated by information independently gathered by FBI..

39. On April 15, 2009, the undercover agent and the defendants had their first meeting, at a Washington, DC hotel. Kendall Myers agreed to provide information to the undercover agent regarding the views and opinions of various Executive Branch personnel with backgrounds in and responsibilities for Latin American policy.

40. During the April 15, 2009 meeting, Kendall and Gwendolyn Myers made several references to Cuba and their activities relating to Cuba, including:

a. References to the shortwave radio used to receive messages via Morse Code;

b. References to meetings taking place in third-party countries, including Mexico;

c. References to their plan to sail "home" to Cuba; and

d. References to a meeting with one "Sandy" at Chichen Itza in the Yucatan.

41. On April 16, 2009, the defendants again met with the undercover agent at the same Washington, DC hotel and responded to the April 15, 2009 request for information.

42. During the meeting, Kendall Myers agreed to provide the undercover agent with information regarding the Trinidad and Tobago Summit of the Americas.

43. During the meeting, Kendall Myers acknowledged that his code name for messages was "202," and Gwendolyn Myers acknowledged her code name as "123."

44. On April 30, 2009, the defendants and the undercover agent met again at a different Washington, DC hotel.

45. During the meeting, the defendants received from the undercover agent an encryption device and were trained in its use. The device was to be used for encrypting future e-mail communications between the defendants and the undercover agent.

46. During the meeting, Kendall Myers gave a message for the undercover agent to send regarding the fact that the defendants enjoy retirement but would like to be a "reserve army" to help as needed.

47. During the meeting, Kendall Myers acknowledged working with the Cuban Intelligence Service for 30 years.

48. The defendants confirmed traveling for meetings to Trinidad and Tobago, Argentina, Brazil, Ecuador, and Jamaica, and additionally confirmed having contacts in Italy, the Czech Republic, and France.

49. The defendants discussed different ways of transmitting information, including “dead drops,” “hand-to-hand” (the “most secure”), the “telephone system” (their least favorite), and a method involving an exchange of shopping carts at a grocery store.

50. Kendall Myers discussed Cuban spy Ana Montes and noted that he had supplied some of the same information as Montes.

51. They discussed the1995 visit to Cuba in which they had met Fidel Castro.

52. Kendall Myers acknowledged that they used false documentation to facilitate clandestine travel, including for the 1995 trip to Cuba.

53. The defendants discussed escaping from the United States, if necessary, and how they would either sail to Cuba (because no travel documents would be needed) or fly to Cuba via Canada or Mexico.

54. Kendall Myers told the undercover agent that their last meeting was in December 2005 in Guadalajara, Mexico.

55. The undercover agent and the defendants agreed to meet again for a final meeting on June 4, 2009.

REASONS FOR DETENTION

Federal courts have ordered the detention of defendants, like these, who are accused of espionage, finding that there no conditions that will assure their appearance. See, e.g., United States v. Kostadinov, 527 F. Supp. 1547, 1551 (S.D.N.Y. 1983) ("A spy would undoubtedly have access to many exit routes and to places which would afford him sanctuary as a hero and not as a criminal."); United States v. Cole, 715 F. Supp. 677, 680 (E.D. Pa. 1988) (following Kostadinov in holding that evidence of espionage bears on flight risk).

In determining whether to detain these defendants, the Court is obliged to consider the following factors: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the history and characteristics of the person; (4) whether on probation or parole or pre-trial release and (5) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g). Here the most pertinent considerations are the weight of the evidence and the nature of the crime.

I begin with the weight of the evidence.

Weight of the evidence. To put it bluntly, the government's case seems at this point insuperable. The investigation culminates in the remarkable meetings that took place in April 2009 in which the defendants, thinking that they were speaking to a Cuban intelligence

officer, spoke warmly and proudly of their history of spying for the Cuban government for most of their adult lives, complete with passwords, "drops," code names and the use of a shortwave radio. Moreover, the FBI has independently corroborated much of what the defendants told the undercover officers during those meetings by interceptions of transmittals of information by Cuban intelligence officers, surreptitious searches that found the same kind of shortwave radio used by another Cuban spy, Ana Montes, who was prosecuted in this Court, and e-mails exchanged with still another Cuban agent, using a clumsy code. Surely, the government's case at this point is very strong. The greater the possibility of conviction, the greater the motivation to flee.

Nature of the crime. The nature of the crime involved here has several different dimensions that warrant individual discussion.

A. The Potential Punishment. The defendants face significant penalties. Indeed, another Cuban spy, Ana Montes, prosecuted in this Court albeit for a more serious offense, is serving 25 years in prison. The offenses with which these defendants are charged carry maximum penalties of 35 years, and their recommended sentences under the guidelines fall in the 14-17 year range. These defendants have already retired and are each over 70 years old. If convicted, they face incarceration for what may very well be the rest of their lives. That fate provides a most compelling motivation to flee and avoid it at all costs. See United States v.

Townsend, 897 F.2d 989, 994 (9th Cir. 1990); United States v. Gentry, 455 F. Supp. 2d 1018, 1023-24 (D. Ariz. 2006) (noting the fact that defendant, because of his age and the seriousness of the offenses charged was facing an effective life sentence, and that it bore on his being a risk of flight).

B. The Policies of the Cuban Government. The United States does not have an extradition treaty with Cuba; indeed, the two countries do not have diplomatic relations and the relationship between them has been antagonistic for over 50 years. Hence, if the defendants succeed in fleeing to Cuba, a country they have described as their home, they will not be extradited to the United States.

Moreover, Cuba has a powerful motivation to assist them. It may wish to repay their loyalty over the many years the defendants have been in its service and to make sure that its other agents in the United States are encouraged to continue to work for Cuba knowing that Cuba will help them to escape if they, like the defendants, get caught. Speaking less altruistically, Cuba has an equally powerful motive to prevent defendants from ever being tempted to cooperate with the United States and expose other agents or how Cuba manages and supports them. See Kostadinov, 572 F. Supp. at 1551. There is not a single imaginable reason why Cuba would want the defendants to remain in the United States subject to prosecution.

C. Cuba's Ability to Facilitate Escape. The assistance that Cuba may afford the defendants in planning and executing an escape cannot be ignored. See id. at 1551 (Espionage is different; countries that "would not offer asylum to murderers or thieves very likely will open their doors to one who shares their political purpose."); see also United States v. Amirnazmi, No. 08-CR-429, 2008 WL 4925015, at *2 (E.D. Pa. Nov. 18, 2008) (defendant could exploit high level contacts in foreign government to secure passport and flee).

It must be remembered that the defendants live a short cab ride from the Cuban Interests Section, which is the functional equivalent of a Cuban Embassy. Once they enter that building, they will have effectively fled from the United States. I know of no principle of international law that would permit the United States to enter that building to apprehend persons within and, as a matter of common sense and international comity, it is fanciful to even suggest that the United States would invade the Cuban Interests Section to remove the defendants.

If all of this is dismissed as hyperbolic, I would note that history teaches that countries have made efforts to get their spies out of the country when they were discovered. For example, Kim Philby, the notorious British double agent, was in Beirut and supposed to attend a second interview with British intelligence when he disappeared and emerged in Moscow where he had been granted political asylum.[3] Embassies as potential safe havens for spies was also illustrated

[3] James Bamford, The View From the K.G.B., N.Y. Times, Jan. 29, 1995.

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by the case of Jonathan Pollard, who was arrested just as he tried to seek such safe haven in the Israeli embassy. Joe Pichirallo, FBI Seeking Pollard Contact Identity, Washington Post, Dec. 4, 1985, at A10.

D. The Attitude of the Defendants. The defendants' hostility to the United States and their admiration for Cuba is well documented. It is hard to imagine, with so much at stake, that they would feel any compunction to fleeing prosecution in a country to which they seem to feel such little loyalty.

On the other hand, they have traveled extensively beyond the United States to meet with Cuban agents and expressed a familiarity with how to accomplish this using assumed and false identities and documents. Most significantly, in their April 2009 conversations, they described the plans they had already made to escape if the government were to find them. Those plans specifically included ways in which to leave the United States and get to Cuba by going through Canada or by sailing to Cuba in their own boat. The government's searches proved that the Myerses own a 37 foot yacht located near Annapolis, possess charts for Cuban waters, have taken multiple long trips at sea in the past, and Kendall Myers' personal calendar indicates that he planned to sail to the Carribean this fall with no return date indicated. That defendants already had made plans to escape indicates how profound the risk of flight is.

E. Countervailing Considerations. Against this, defendants have to offer their roots in the community, their character, and their family ties. While those may be substantial, they are, in my view, overwhelmed by the extraordinary risk these defendants present. The question is after all a pragmatic one: what reasonable assurance do the conditions I could set, instead of detention, provide that the defendants will not get out of the country through one of the various methods I have described herein and escape prosecution?

I could subject them to electronic surveillance but I have no assurance that the device will signal the authorities in sufficient time to apprehend them before they take the 10 minute cab ride to the Cuban Interests Section. The only alternative would be to effectively turn their home into a prison by having either the FBI or the Marshals Service move into their home and subject them to 24 hour personal surveillance for as long as it takes to complete this case. While that is a condition, it surely cannot be described as reasonable. Its draconian nature and expense to the United States compels me to reject it as an alternative to the defendants' detention.

I have therefore concluded that there are no reasonable conditions that I could set that would assure that these defendant will appear and I order them detained pending trial.

SO ORDERED.

Date: June 10, 2009

/S/
JOHN M. FACCIOLA
U.S. MAGISTRATE JUDGE