IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	CRIMINAL CASE NO. 03-296-A
	)	The Honorable Leonie M. Brinkema
	)	
v.	)	**Hearing Date: July 2, 2003, 4:00 p.m.**
	)	
MASOUD AHMAD KHAN, ET AL	)	
	)	
Defendant.	)	

GOVERNMENT'S MOTION TO STAY AND REVOKE RELEASE ORDER

The United States of America, by and through its undersigned counsel, hereby moves this Honorable Court pursuant to 18 U.S.C. § 3145(a)(1) to stay and revoke the order of release imposed by this Court (Magistrate Judge Thomas Rawles Jones, Jr.) on June 30, 2003, for the reasons set forth below.

I. BACKGROUND

The defendant is one of 11 individuals charged in a 41-count Indictment pending before the Court. Arraignment of the defendant and his co-defendants is scheduled for Thursday, July 3, 2003, before this Court.

The defendant is charged in 11 of the 41 counts of the Indictment:

* Count 1 charges the defendant with conspiracy to commit numerous offenses, including the undertaking of a military expedition from the United States against a foreign nation with whom the United States is at peace, in violation of 18 U.S.C. § 960. As set forth in the Indictment, the defendant and others sought to carry out this expedition by joining

Lashkar-e-Taiba and becoming *mujahideen* fighting in support of violent Islamic *jihad*. *Lashkar-e-Taiba* is an Islamic organization in Pakistan that has been designated as a Foreign Terrorist Organization by the United States Government pursuant to Section 219 of the Immigration and Nationality Act.

* Count 3 charges the defendant with aiding and abetting co-defendant Ibrahim Ahmed al-Hamdi to commit a violation of 18 U.S.C. § 960.

* Count 5 charges the defendant himself with a violation of 18 U.S.C. § 960.

* Count 16 charges the defendant with conspiracy to use, carry, possess, and discharge firearms during, in relation to, and in furtherance of crimes of violence, in violation of 18 U.S.C. § 924(o) and (c).

* Counts 25, 33, 34, 35, 36, and 41 charge the defendant with knowingly using, carrying, possessing, and discharging firearms in relation to, and in furtherance of, crimes of violence, in violation of 18 U.S.C. § 924(c) and 2(a).

A detention hearing was held on June 30, 2003, before United States Magistrate Judge Thomas Rawles Jones, Jr. Although the § 924(c) charges in the Indictment require a presumption, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community, and the government put on additional evidence in support of detention, Judge Jones denied the government's request for detention and ordered the defendant's release subject to the following conditions: (1) the defendant must report on a regular basis to Pretrial Services; (2) the defendant is placed in the custody of his mother; (3) the defendant is required to reside at his current

address; (4) the defendant cannot leave the Washington, D.C. area without prior approval; (5) the defendant will be subject to electronic monitoring using a global positioning satellite system; (6) the defendant cannot possess any travel documents; (7) the defendant must refrain from possessing a firearm, desturctive device, or other dangerous weapons; and (8) the defendant cannot have any contact with any co-defendants except through counsel.

II. STANDARD OF REVIEW

Title 18, United States Code, Section 3145(a)(1) vests this Court with the authority to stay the release order and to order defendant's detention pending indictment and trial in this district. The statute states that "[i]f a person is ordered released by a magistrate . . . the attorney for the government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order . . . ." Id. See United States v. Velasco, 879 F. Supp. 377, 378 (S.D.N.Y. 1995); United States v. Chagra, 850 F. Supp. 354, 355-356 (W.D. Pa. 1994).

The District Court's review of Judge Jones's release order is de novo. See United States v. Clark, 865 F.2d 1433, 1435 (4th Cir. 1989); United States v. Williams, 753 F.2d 329, 333 (4th Cir. 1985). The District Court is not limited to the evidence presented below. It has a responsibility to reconsider the conditions of release as "if the district court were considering whether to amend its own action. It is not constrained to look for abuse of discretion or to defer to the judgment of the prior judicial officer. These latter considerations would be pertinent when . . . the district court's action is called before the court of appeals." United States v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985) (construing the court of appeals." United States v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985) (construing prior review statute as similar to § 3145).

The standard of proof for detention regarding danger to the community is clear and convincing evidence. See United States v. Clark, 865 F.2d 1433, 1435 (4th Cir. 1989).

The circuit courts that have directly considered the standard of proof for detention based on risk of flight have all concluded that the appropriate standard is preponderance of the evidence. See, e.g., United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996); United States v. Jackson, 845 F.2d 1262, 1264 n.3 (5th Cir. 1988); United States v. Himler, 797 F.2d 156, 160 (3rd Cir. 1986); United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985). The Fourth Circuit has been less clear about the appropriate standard. Several published cases refer in passing to a clear and convincing standard. See, e.g., United States v. Clark, 865 F.2d 1433, 1435 (4th Cir. 1989); United States v. Williams, 753 F2d 329, 332 (4th Cir. 1985). In a recent unpublished decision, however, the Court specifically held that the appropriate standard is a preponderance of the evidence standard. United States v. Stewart, 2001 WL 1020779 (4th Cir. (N.C.)) (citing decisions in the 6th and 11th Circuits). We believe the appropriate standard is a preponderance of the evidence standard.

III. REBUTTABLE PRESUMPTION AGAINST PRETRIAL RELEASE

Title 18 of the United States Code, section § 3142(e), requires a court to order the detention of a person pending trial where no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of other persons in the community. The statute also provides that, subject to rebuttal by the person, "it *shall be presumed* that *no condition or combination of conditions* will reasonably assure the appearance of

the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense under section 924(c) of . . . title 18 of the United States Code." (Emphasis added.) Section 924(c) makes it illegal for a person who, during and in relation to any crime of violence, for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.

The crime of violence at issue, as charged by the grand jury, is 18 U.S.C. § 960, which makes it unlawful for an individual to unlawfully and knowingly begin, provide for, prepare a means for, or take part in a military expedition and enterprise to be carried on from the United States against the territory and dominion of a foreign state with whom the United States is at peace – in this case, India. The grand jury found probable cause to believe that the defendant violated § 924(c) not just once, but *6 times*. Moreover, two of the § 924(c) acts for which the grand jury found probable cause to indict involved the defendant's use and discharge of a machine gun and a rocket-propelled grenade at a *jihad* training camp in Pakistan operated by *Lashkar-e-Taiba*. (Indictment, Counts 35-36.) The grand jury also found probable cause that the defendant used and discharged an AR-15-style rifle in the United States, aided and abetted other defendants in the use and discharge of AR-15-style and AK-47-style rifles in the United States, aided and abetted a co-defendant in the use and discharge of a 12 mm antiaircraft gun in Pakistan, and possessed an AK-47-style rifle in the United States as recently as May 8, 2003, all in violation of § 924(c).

In sum, there is abundant probable cause to believe that the defendant committed multiple

offenses under § 924(c) for purposes of 18 U.S.C. § 3142(e).

IV. DANGER TO THE COMMUNITY

In addition to the grounds for pretrial detention arising from the defendant's multiple alleged violations of § 924(c), the defendant should be detained pending trial because he presents a substantial danger to the community.

The grand jury's indictment is based on numerous overt acts set forth in furtherance of the alleged conspiracy charged in Count 1, and realleged and incorporated by reference within other counts of the Indictment. Those overt acts were supplemented by testimony given at the detention hearing on June 30 by Federal Bureau of Investigation Special Agent Wade Ammerman as follows:

* In 2000, the defendant engaged in live-fire training in Pennsylvania with semi-automatic weapons in preparation for undertaking violent Islamic *jihad.* (Indictment at 10, 12, paras. 3 and 15).

* Four days after the terrorist attacks of September 11, 2001, the defendant agreed with co-defendants Yong Kwon, Khwaja Mahmood Hasan, and Mohammed Aatique to go overseas and join *Lashkar-e-Taiba*. (Indictment at 17, para. 55) Special Agent Wade Ammerman gave unrebutted testimony at the detention hearing on June 30 that only two days after this agreement (i.e., September 17, 2001), the defendant applied for a U.S. passport. As stated in the Indictment, the defendant subsequently departed the United States for Pakistan the following day (i.e., September 18, 2001) in order to go to a camp operated by *Lashkar-e-Taiba*. (Indictment at 19-20, paras. 70, 76-77)

* By early October 2001, the defendant had arraived at the *Lashkar-e-Taiba* camp to receive *jihad* training. (Indictment at 20, para. 77) At the camp, he received military training and fired a machine gun, a rocket-propelled grenade, an AK-47 rifle, and a 12 mm. antiaircraft gun. (Indictment at 20-21, paras. 80, 83, 87, 91)

* In December 2002, the defendant purchased an auto-pilot module for a radio-controlled model aircraft. (Indictment at 23, para. 103)

* A search of the defendant's residence on May 8, 2003, resulted in the discovery of several items exacerbating concerns about the danger to the community presented by the defendant. Of particular concern were the discovery of an AK-47-style rifle; a document entitled "The Terrorist's Handbook," which contained instructions regarding how to manufacture and use explosives and chemicals as weapons; and a photograph of the FBI Headquarters building that had been downloaded from the Internet. (Indictment at 24, paras. 110-112) According to unrebutted testimony by Special Agent Wade Ammerman, the search also resulted in the discovery of a SKS rifle, a 12 gauge shotgun, and a H&K .45 caliber handgun.

V. **RISK OF FLIGHT**

There is also a serious risk of flight if the defendant is released pending trial. First, the defendant has a strong incentive to flee: on the § 924(c) charges alone, the defendant faces minimum sentences if convicted totaling *at least 85 years*.[1] Moreover, he faces *life sentences* if he

[1] The defendant would receive 10 years for using and discharging an AR-15-style rifle; at least 50 years for aiding and abetting a co-defendant to use and discharge an AK-47-style rifle and 12 mm antiaircraft gun; and 25 years for possession of an AK-47 style rifle. *See* 18 U.S.C. §

receives second or subsequent convictions under § 924(c) for using and discharging a machine gun and a rocket-propelled grenade. *See* 18 U.S.C. § 924(c)(1)(C).

Second, the defendant already has demonstrated a willingness and ability to leave the United States quickly. As discussed above, he left the United States within days after the attacks of September 11. Although the goverment is now in possession of the defendant's passport, and Judge Jones ordered as a condition of release that the defendant not possess any travel documents, there is no way to prevent the defendant from summarily dispensing with his electronic monitoring and fleeing the United States.

The record also reflects the defendant's recent intention to leave the United States. As Special Agent Ammerman testified at the June 30 detention hearing, the search of the defendant's residence on May 8, 2003, resulted in the discovery of a completed application in the name of the defendant for a visa to travel to Saudi Arabia, dated April 17, 2003, and apparently signed by the defendant. According to Special Agent Ammerman's testimony, the defendant's mother advised law enforcement agents in an interview that the defendant has a brother and sister currently living in Saudi Arabia.

VI. GOVERNMENT'S RESPONSE TO DEFENSE ARGUMENTS

In response to the grounds for detention advanced by the government, counsel for the defense maintained at the June 30 detention hearing that the defendant is a "family man"; that he lacks financial resources; that the nature of the offense (disparaged as only a violation of the Neutrality Act, rather than a crime of violence, without mention of corresponding firearms

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924(c)(1).

charges under 18 U.S.C. § 924) is too insignificant to warrant pretrial detention; that the government is simply trying to "trump up" charges against the defendant; that the multiple firearms the defendant possessed were not illegal; and that the defendant does not have a criminal history; and that the defendant heretofore has not attempted to flee the United States.

These arguments are insufficient to rebut the presumption against pretrial release set forth in 18 U.S.C. § 3142(e). Moreover, the factors set forth in 18 U.S.C. § 3142(g), to be considered by a court in assessing whether to order pretrial release, militate strongly in favor of the defendant's continued detention pending trial. First, as noted above, a violation of 18 U.S.C. § 960 is a crime of violence for purposes of 18 U.S.C. § 924, as, "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). Second, the weight of the evidence against the defendant tilts strongly in favor of continued detention. Third, the defendant's character and past conduct raise *alarm bells*: this is an individual, it must be emphasized, who was in possession and control of a weapons stockpile and who responded to the singlemost devastating assault on the American homeland by leaving his country to commit violent Islamic *jihad* overseas with an organization that has been designated by the United States Government as a terrorist organization.

Further, the fact that the government is in possession of the defendant's passport provides little protection against the defendant's flight from this jurisdiction and from the United States. A passport, for example, is not needed to cross the land border between the United States and Canada.

VII. CONCLUSION

The defendant has failed to rebut the presumption that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community. Further, the United States has established by clear and convincing evidence that no condition or combination of conditions would reasonably assure the safety of community, and has established by a preponderance of the evidence that no condition or combination of conditions would reasonably assure the appearance of the defendant as required. For these reasons and the other reasons set forth above, the Court should stay and revoke the June 30 order of release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 1, 2003, copy of the attached Motion to Stay and Revoke Order of Release was sent by facsimile to defense counsel as follows:

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