## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Case No.	09-mj-01169-0	CBS

UNITED STATES OF AMERICA

Plaintiff,

v.

NAJIBULLAH ZAZI

Defendant.

## ORDER OF DETENTION

THIS MATTER came before the Court for a detention hearing on September 25, 2009. Present were the following: Tim Neff, Assistant United States Attorney, Arthur Folsom, counsel for the defendant, and the defendant. The Court carefully considered the Pretrial Services Report and the entire court file, as well as the proffers and arguments presented by counsel.

The Court has concluded, by a preponderance of the evidence, that no condition or combination of conditions of release will reasonably assure the appearance of the defendant and, by clear and convincing evidence, that no condition or combination of conditions will reasonably assure the safety of the community, based upon the attached findings.

IT IS HEREBY ORDERED that the defendant is committed to the custody of the Attorney General or their designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; and

IT IS FURTHER ORDERED that the defendant is to be afforded a reasonable opportunity to consult confidentially with defense counsel; and

IT IS FURTHER ORDERED that upon order of this Court or on request of an attorney for the United States of America, the person in charge of the corrections facility shall deliver defendant to the United States Marshal for the purpose of an appearance in connection with this proceeding.

DATED and ENTERED this 25<sup>th</sup> day of September, 2009.

By the Court:

s/Craig B. Shaffer
Craig B. Shaffer United States Magistrate Judge United States v. Najibullah Zazi
Case Number 09-mj-01169-CBS

## FINDINGS OF FACT, CONCLUSIONS OF LAW and REASONS FOR ORDER OF DETENTION

Rule 5(c)(3) of the Federal Rules of Criminal Procedure provides that if an initial appearance occurs in a district other than where the offense was allegedly committed, the defendant must be transferred to the district where the offense was allegedly committed if, *inter alia*,, the magistrate judge finds that the defendant is the same person named in the indictment, information or warrant issued in the district where the offense was allegedly committed. Rule 5(d)(3) further states that the magistrate judge in the arresting jurisdiction must detain or release the defendant "as provided by statute or by these rules." *See United States v. Havens*, 487 F. Supp. 2d 335, 339 (W.D.N.Y. 2007) (holding that a magistrate judge in the district of arrest has the authority to conduct a detention hearing prior to the defendant's removal to the district of prosecution, subject to the defendant's right of immediate appeal to the district of prosecution pursuant to 18 U.S.C. § 3145).

The defendant appeared before this court on an warrant for arrest issued by the United States District Court for the Eastern District of New York. At a hearing on September 25, 2009, the defendant knowingly and voluntarily waived his right to an identity hearing under Rule 5(c)3). In light of that waiver, this court issued an Order of Commitment directing that the defendant be transferred to the Eastern District of New York for further proceedings. The government also moved for detention, which the defendant opposed.

In order to sustain a motion for detention, the government must establish that (a) there is no condition or combination of conditions which could be imposed in connection with pretrial release that would reasonably insure the defendant's presence for court proceedings; or (b) there is no condition or combination of conditions which could be imposed in connection with pretrial release that would reasonably insure the safety of any other person or the community. The former element must be established by a preponderance of the evidence, while the latter requires proof by clear and convincing evidence.

If there is probable cause to believe that the defendant committed an offense which is listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community.

The Bail Reform Act, 18, U.S.C, § 3142(g), directs the court to consider the following factors in determining whether there are conditions of release that will reasonably assure the appearance of the defendant as required and the safety of any other person and the community:

(1) [t]he nature and circumstances of the offense charged, including whether the

offense is a crime of violence or involves a narcotic drug;

- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including
  - (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
  - (B) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

In making my findings of fact, I have taken judicial notice of the information set forth in the Pretrial Services Report and entire court file. I have also carefully considered the proffers and arguments presented by counsel during the detention hearing on September 25, 2009. Weighing the statutory factors set forth in the Bail Reform Act, I find the following:

First the defendant has been named in an indictment filed in the Eastern District of New York and charging a violation of 18 U.S.C. § 2332a (knowingly and intentionally conspiring to use one or more weapons of mass destruction against persons and property within the United States). While defense counsel challenges the weight of the government's evidence, the grand jury has found probable cause to believe that the alleged offense was committed by this defendant. I further find that the government has proffered substantial evidence against the defendant, consisting of the defendant's own statements, electronic surveillance, physical evidence, photographs, witness interviews and information obtained through a lawful search of the defendant's own laptop computer. The charged offense is one of the crimes enumerated in 18 U.S.C. § 2332b(g)5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed. The court specifically finds that the defendant has not rebutted the statutory presumption that no release condition or combination of release conditions would reasonably assure his appearance as required or the safety of the community.

Second, I note the defendant's history and personal characteristics. To his credit, the defendant has several family members living the Denver metropolitan area. However, defendant's ties and his family's ties to the District of Colorado are tenuous at best. The defendant moved to Colorado as recently as January 2009. The defendant was recently terminated by his employer and appears to have few prospects for further employment. Defendant indicates that he was self-employed for a number of years as a cart vendor in New York City. The only member of the defendant's family who is employed is a younger brother.

The defendant does not own any real property in Colorado and his family was recently told that their apartment lease would not be renewed. The family's living arrangements are less-than-settled at present. The defendant has negligible financial assets. Pretrial Services indicates that the defendant's wife resides in Pakistan. It further appears that the defendant has traveled outside the United States on several occasions, with multiple trips to Pakistan and Canada. The defendant traveled to Pakistan as recently as late 2008. The defendant is a legal permanent resident of the United States, however, he would eligible for deportation if convicted of an aggravated felony or of criminal conduct that endangers public safety of national security. *See* 8 U.S.C. § 1127(a)(2). The defendant also could be deported if he was found to have engaged in terrorist activities. *See* 8 U.S.C. § 1127(a)(4). I find that these circumstances, individually and in the aggregate, significantly increase the risk of flight in this case.

Third, the court has been advised that the defendant has no history of prior arrests or convictions.

Finally, the court finds, from the proffers tendered by the government, that the defendant's release, even on conditions, would pose a serious and substantial danger to the community. In making that finding, the court specifically notes the proffered information concerning the nature of the explosive allegedly involved in this case. The court has been advised that the components for such an explosive are readily available on the market. The government has proffered information indicating that the defendant himself purchased some of these components in recent weeks. The court also notes that data found on the defendant's computer provided instructions for fabricating these components into an explosive device. The government's proffer indicates that the resulting explosive is easily concealed and difficult to detect. Defendant's knowledge and his ready access to necessary components establishes a substantial danger to the community that would not be ameliorated through conditions of release.

After considering all of the factors set forth in the Bail Reform Act, as well as the statutory presumption applicable in this case, and the information proffered during the detention hearing, I find, by clear and convincing evidence, that no condition or combination of conditions of release will reasonably assure the safety of the community. I further find, by a preponderance of the evidence, that no condition or combination of conditions of release will reasonably assure the appearance of the defendant.