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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) NO. CR S 06-00035 MCE
11)
Plaintiff,) **OPPOSITION TO DEFENDANT**
12) **McDAVID'S APPEAL OF**
v.) **MAGISTRATE JUDGE'S BAIL RULING**
13)
ERIC McDAVID, ZACHARY JENSON,)
14 and LAUREN WEINER,) Date: March 7, 2006
Time: 8:30 a.m.
15) Defendants.) Hon. Morrison C. England, Jr.
16)

17 I. Introduction

18 This matter is before the Court on the motion of Defendant
19 Eric McDavid for bail pending trial. His motion should be denied
20 for the reasons set forth below.

21 II. Standard of Review

22 A magistrate judge's bail ruling is subject to *de novo*
23 review. United States v. Koeniq, 912 F.2d 1190, 1191 (9th Cir.
24 1990). This does not mean that the district court is required to
25 start over and proceed as if the magistrate judge's decision and
26 findings did not exist. Id. at 1193. Rather, the court "should
27 review the evidence before the magistrate and make its own
28 independent determination whether the magistrate's findings are

1 correct, with no deference." Id.

2 III. Argument

3 The Magistrate Judge in this case concluded that the
4 conspiracy to commit arson was a presumptive offense such that in
5 the absence of rebuttal evidence, the court should presume "that
6 no condition or combination of conditions will reasonably assure
7 the appearance of the person as required and the safety of the
8 community." 18 U.S.C. § 3142(e). See 18 U.S.C. § 3142(f)(1)(A),
9 18 U.S.C. § 2332b(g)(5)(B), and 18 U.S.C. §§ 844 (f)(1) and (i).
10 Order at pp. 6, 11, 16-26. And although conspiracy punishable
11 under 18 U.S.C. § 844(n) is not specifically listed as a federal
12 crime of terrorism under Section 2332b(g)(5)(B), the objects of
13 the conspiracy (§ 844(f)(1) - arson of federal property, and §
14 844(i) - arson of a facility in interstate commerce) are. As the
15 Magistrate Judge correctly pointed out, not to treat a conspiracy
16 to commit a presumptive detention offense the same as the
17 presumptive detention offense itself would be illogical and lead
18 to an absurd result. Order at 6 n.1. Someone who conspired to
19 commit the act and made an overt act to complete it, but was
20 caught before he could carry it out, would be considered less
21 dangerous than one who was not caught in time. Id. The
22 absurdity of such a result is especially so here where the
23 defendant and his cohorts had taken substantial steps to carry
24 out their plans.

25 Second, irrespective of whether Defendant McDavid's offense
26 is treated as a presumptive one, a sufficient showing has been
27 made to justify his detention. McDavid is both a flight risk and
28 a danger to the community; a non-exhaustive list follows:

1 Factors indicating Defendant McDavid's risk of flight

- 2 • McDavid is unemployed;
- 3 • McDavid travels frequently and train-hops and hitchhikes as
4 means of transportation. Defendant McDavid spent Summer 2005
5 traveling in this manner to anarchist convergences/protests
6 with Defendant Jenson. In the last year, McDavid traveled
7 with Jenson to Washington, Oregon, California, Nevada, Texas,
8 Oklahoma, Florida, West Virginia, Indiana, Tennessee,
9 Pennsylvania, Missouri, and Colorado;
- 10 • In November 2005, McDavid stated that he left Northern
11 California in or about March 2005 on the advice of his lawyer.
12 (Lawyer was not identified.) In late February 2005, McDavid's
13 close friend, Ryan Lewis, was indicted in this District on
14 arson and conspiracy to commit arson charges, Case Number CR.
15 S. 05-00083 EJJ;
- 16 • During reconnaissance of the United States Forest Service
17 Institute of Forest Genetics in furtherance of the conspiracy,
18 McDavid used the alias, Sean Douglas, when signing the
19 facility's registration book;
- 20 • McDavid used the alias, Sal Vasquez, to subscribe to an email
21 address used in connection with the conspiracy;
- 22 • McDavid authored an "e-zine" (electronic magazine) article
23 instructing individuals on how to interact with law
24 enforcement so that investigative goals are thwarted; and
- 25 • When interviewed by the FBI on February 24, 2005, Defendant
26 McDavid's mother, Eileen, told agents that she did not know
27 where her son was, knew that he was hitchhiking, and said that
28 she had no way to contact him. Mrs. McDavid said that Eric

1 McDavid no longer lived at her residence and that he did not
2 have any possessions stored at her home. When the FBI agents
3 asked Mrs. McDavid for her phone number, she said they could
4 look it up.

5 Factors indicating Defendant McDavid's dangerousness

- 6 • In July 2005, after an anarchist conference in Bloomington,
7 Indiana, McDavid threatened to kill the Confidential Source if
8 she were law enforcement;
- 9 • After the January 10, 2006 reconnaissance of the Forest
10 Service facility, McDavid stated that human casualties as a
11 result of the group's attacks were acceptable. McDavid's
12 statements to this effect were recorded;
- 13 • In June 2005 at a protest in Philadelphia, McDavid offered
14 training on the construction and use of Molotov cocktails. At
15 the same protest, McDavid expressed his desire to kill a
16 police officer and his regret that he had not been involved in
17 the physical altercation between protesters and police that
18 ultimately resulted in an officer's death; and
- 19 • During the course of the conspiracy, McDavid repeatedly
20 expressed his views on potential targets and the use of
21 improvised explosive devices (using a recipe from an anarchist
22 cookbook) and improvised incendiary devices (gasoline and
23 diesel fuel device).

24
25 Third, as to Defendant McDavid's complaint about the type of
26 evidence received, the law specifically provides for the
27 admissibility of hearsay at a detention hearing. Title 18,
28 United States Code, Section 3142(f)(2) states that "[t]he rules

1 concerning admissibility of evidence in criminal trials do not
2 apply to the presentation and consideration of information at the
3 hearing." Moreover, the search warrant affiant, FBI Special
4 Agent Nasson Walker, testified at the bail hearing for McDavid
5 and was cross-examined by both Zachary Jenson's lawyer and Mr.
6 McDavid's counsel.

7 Finally, as to Defendant McDavid's complaint about his diet,
8 it appears that providing him with peanut butter and jelly
9 sandwiches, protein bars, and protein shakes should take care of
10 his needs since he is already being provided with fruit and
11 vegetables.¹ It is certainly no reason to release him.

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26 ¹ Oddly, during the November 2005 planning meeting attended
27 by the three defendants and the confidential source in
28 furtherance of the conspiracy, the group ate, among other things,
shrimp stir fry, pizza, and chocolate chip pancakes, none of
which is part of a vegan diet.

1 IV. Conclusion

2 The government respectfully requests that this Court affirm
3 the Magistrate Judge's denial of Defendant McDavid's bail. The
4 government notes that Defendant filed his 26-page motion
5 yesterday, on March 1, and seeks argument on March 7. Given that
6 the government had no notice of the motion, it submits for the
7 Court's consideration this short memorandum in opposition. If
8 the Court believes more substantial briefing of the issues is
9 necessary, the government asks that a schedule be set on March 7.

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11 Dated: March 2, 2006

12 Respectfully submitted,

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