

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
THE HON. JOLIE RUSSO, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
Government,)
)
v.) No. 6:16-mj-00056-JR-1
)
MICHAEL RAY EMRY,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EUGENE, OREGON
TUESDAY, MAY 24, 2016
PAGES 1 - 22

Kristi L. Anderson
Official Federal Reporter
United States Courthouse
405 East Eighth Avenue
Eugene, Oregon 97401
(541) 431-4112
Kristi_Anderson@ord.uscourts.gov

1 APPEARANCES OF COUNSEL:

2

3 FOR THE GOVERNMENT:

4 Nathan J. Lichvarcik
5 United States Attorney's Office
6 405 E. Eighth Avenue
7 Suite 2400
8 Eugene, OR 97401
9 541-465-6771
10 Email: nathan.j.lichvarcik@usdoj.gov

8

9 FOR THE DEFENDANT:

10 Marc Spence
11 Spence & Sabitt LLP
12 747 Willamette St
13 Eugene, OR 97401
14 541-343-9909
15 Fax: 541-343-0014
16 Email: mm2attys@aol.com

14

15

16

17

18

19

20

21

22

23

24

25

1 PROCEEDINGS

2 TUESDAY, MAY 24, 2016

3 THE COURT: Thank you. Please be seated.

4 THE CLERK: Now is the time set for Criminal
5 Case -- I'm sorry -- Magistrate Case 16-56, United States of
6 America versus Michael Ray Emry for detention hearing.

7 THE COURT: Thank you. Mr. Emry, the purpose of
8 this hearing is to determine whether the court should
9 release you from custody pretrial.

10 I have had the opportunity to review the seven
11 letters or declarations from various individuals, one from
12 Southern Oregon; three from Idaho; two from Grant County,
13 Oregon; and one from New Jersey submitted by your lawyers,
14 Mr. Sabitt and Mr. Spence.

15 Thank you very much for doing that. I appreciate
16 that.

17 MR. SPENCE: Thank you, Your Honor.

18 THE COURT: I have consulted, actually, twice with
19 the pretrial services officer assigned to your case. I will
20 note that she has worked tirelessly since May 9th, spending
21 literally hours interviewing a large number of individuals
22 as well as tracking down relevant information for the
23 court's examination, including recorded phone messages that
24 she has received.

25 I wanted to ask Ms. Brown, have you had an

1 opportunity to talk with ATF Agent Smith yet?

2 MS. BROWN: No, Your Honor.

3 THE COURT: Okay. Thank you.

4 I also consulted with Judge Coffin, utilizing his
5 30 years of judicial experience.

6 The pretrial services officer is recommending
7 detention on the grounds that defendant is a danger to the
8 community.

9 I am interested, government counsel, do you concur
10 with this recommendation?

11 MR. LICHVARCIK: I do, Judge. And frankly, I was
12 prepared to, in a long-winded kind of way, walk through some
13 of the detention factors for Your Honor, if you'd like me to
14 do that at this point or if you'd prefer that I wait until
15 another point in the hearing.

16 THE COURT: Why don't you -- you are talking about
17 18 U.S.C. 3142(e)?

18 MR. LICHVARCIK: (g).

19 THE COURT: (g). Excuse me.

20 Please, for the record. Thank you.

21 MR. LICHVARCIK: And the reason I am doing this,
22 Judge, is because this is somewhat of a unique case. I
23 mean, I guess -- you know, at first blush and I guess the
24 simple way to look at this case would be to say, well, it's
25 just a -- it's a gun case on a man who really has no

1 criminal convictions that are noteworthy. And if you were
2 to look at the case in that way, it would be easy to say,
3 well, why shouldn't he be released.

4 And the reason I wanted to walk through some of
5 the factors for Your Honor is because once you start to peel
6 away layers of this case, and, really, as you apply the
7 facts as we know them to the 3142(g) detention factors, you
8 start to realize this isn't just a simple, run-of-the-mill
9 case. And when you really apply the facts to the factors, I
10 think all of the factors point towards detention. I don't
11 think they all point as strongly as each other towards
12 detention, but I still think they all point in the same
13 direction.

14 And so that's going to be the structure of my
15 argument is just walking the court through those (g) factors
16 with a big-picture argument that we have a very, very
17 serious weapon capable of very serious consequences. We
18 also have a detonator for a bomb found with this .50 caliber
19 machine gun, and we have it on a guy who has a history with
20 a lot of machine guns and a bomb. And then we have some
21 serious witness safety concerns.

22 So generally, that's the structure of my argument,
23 and, you know, with the indulgence of the court, again, I am
24 going to be a little longer winded than I normally am, and I
25 might not be this long-winded again for another year or so,

1 but there are some aspects of this case that I think need to
2 be explained a little more.

3 THE COURT: Go ahead.

4 MR. LICHVARCIK: So starting with nature and
5 circumstance of the offense, it's a .50 caliber machine gun.
6 And I think in the context of guns, the .50 caliber machine
7 gun is the -- to me, it's the silverback gorilla of the gun
8 world. And to even call it a gun I think is not doing
9 service to it. It's, frankly, a -- it's a weapon of war.
10 There is a reason that it's been used by the U.S. military
11 mounted on vehicle and aircraft during wars, and that's
12 because it's a weapon designed and capable of taking down
13 small aircraft, disabling vehicles.

14 I have prosecuted just -- .50 caliber cases down
15 on the border involved in cartel trafficking, and so I know
16 I have had ATF experts testify that the .50 caliber, not
17 even in the machine gun form, that it's capable of killing a
18 person from over a mile away, taking out the engine block of
19 a vehicle, shooting through a brick wall.

20 So I think when you look at what kind of gun we
21 are talking about, this isn't just a run-of-the-mill person
22 with a .22 caliber gun and they are not supposed to have it.
23 This is a firearm, well, by defendant's own admission, that
24 could fire five to six hundred rounds per minute, and we are
25 talking about some pretty serious rounds of ammunition.

1 Not only is it one of the more serious types of
2 guns that can be possessed, there is some aggravating
3 factors around his possession of it that I think increase
4 the seriousness of the offense.

5 Number one, by his own admission, he stole it from
6 a gun dealer over in Idaho. And I can't say for sure that
7 that's the truth. You know, I know that he admitted that
8 and I know that the gun dealer in Idaho said the same thing.

9 I am not sure I completely believe that but, at
10 least by his own admission, he stole it from this Idaho gun
11 dealer.

12 He brought it over to our state in Oregon. And by
13 his own admission, he obliterated the serial number once it
14 was brought over here, thus creating what he described in a
15 recorded call as an untraceable, fully functioning .50 cal
16 machine gun.

17 And we also know that he was trying to sell it in
18 the Oregon marketplace. And that's, frankly, the reason we
19 needed to move so quickly and get the execute -- get the
20 search warrant executed is because I had and the agents had
21 a very real concern and we had information that he had a
22 ready and willing buyer for it. And so we needed to move
23 quickly because if a fully functioning .50 cal machine gun
24 with a ground-off serial number did make its way into the
25 illicit firearms world, I mean, I don't want to get into

1 hyperbole, but if it got into -- you can imagine a number of
2 circumstances where it got in the hands of someone who
3 shouldn't have it and who had bad intentions. And that's
4 the reason we moved so quickly.

5 In addition, we were told by the cooperating
6 witness in this case -- and the cooperating witness has a
7 load of baggage with him too. We set that out in the search
8 warrant affidavit. But that doesn't mean that I -- or we
9 can ignore what he told us because he also told us that
10 Mr. Emry had a machine gun, a .50 cal machine gun, and he
11 was right about that.

12 The three, I guess, most concerning things that we
13 learned from this cooperating witness, Judge, was, number
14 one, that Mr. Emry wanted to take the .50 caliber machine
15 gun onto the Malheur Refuge during the occupation but that
16 he couldn't because of the law enforcement presence.

17 Emry stated that he had a large arsenal of weapons
18 and access to grenades, and Mr. Emry spoke about shooting
19 police officers and how a bullet from the .50 cal would
20 penetrate the side of a police car and a Kevlar vest.
21 Again, I don't have any information apart from the
22 cooperating witness having told us that, but I can't ignore
23 it, especially in light of the other things we heard from
24 the cooperating witness ended up being true.

25 And sure enough, when we searched Mr. Emry's

1 trailer and the vehicles, we found the .50 cal machine gun
2 we heard about and were looking for, and we also found a
3 blasting cap, which is basically a detonator for a bomb.

4 And we also found the parts, and I don't think it
5 was all the parts, but we found some parts that, if he was
6 able to get the other parts, could create another machine
7 gun called a Sterling machine gun. That's on the nature and
8 circumstances of the offense.

9 And I think and I'd be -- well, I would be
10 surprised, I guess, if the defendant was somehow able to
11 argue that the offense was not dangerous.

12 I do know that during a confession, Mr. Emry
13 talked about that the gun might have something wrong with it
14 and that it might blow up if people tried to fire it. And I
15 don't know yet if that's true. But what I do know is that
16 when we were using an undercover officer to talk about the
17 gun, that never came up. It was purported by Mr. Emry
18 during the undercover phone call to be a fully functioning
19 .50 caliber machine gun.

20 Weight of the evidence, which I know Your Honor
21 knows is the least important but that doesn't mean we ignore
22 it either, the weight of the evidence is strong. We have a
23 recorded conversation of Mr. Emry stating that the machine
24 gun is fully automatic and untraceable. We seized the
25 machine gun from his trailer. And in subsequent interviews,

1 Mr. Emry confessed, I believe, not once, not twice, I think
2 a total of three times, and he confessed in detail.

3 We have also been in the process of listening to
4 his jail calls, which are voluminous, and I can't say that
5 we have listened to even a large percentage of them. But
6 he's made statements about having brought the gun over here
7 and having been the one to grind off the serial number in
8 those jail calls.

9 So strength of the evidence is there. Again, that
10 factor, although a weaker factor to consider, that also
11 points in the same direction as the seriousness of the
12 offense.

13 And I will just kind of put a little asterisks on
14 that because I know the court sometimes wants to know, well,
15 is this a probationary case, is this a case involving jail
16 time, if there's a -- you know, if the weight of the
17 evidence is strong, his guideline calculations, while there
18 might be some disputes over them, I can -- I think that I
19 can say at this point that his guideline calculations are,
20 at a minimum, four plus years and that we will be seeking
21 prison time on Mr. Emry.

22 So if all we knew -- and I am going to move on to
23 history and characteristics unless the court has any
24 questions on what I have covered so far.

25 THE COURT: Go ahead.

1 MR. LICHVARCIK: Moving on to history and
2 characteristics, if all I knew about Mr. Emry is what I have
3 said so far about him, I would be asking for detention. And
4 I would also be saying, then, in that scenario that it might
5 be a closer call.

6 But there's more to Mr. Emry than just what I have
7 said. Who is he? You know, I think we are still trying to
8 figure that out. And if you were to read the affidavits
9 that have been submitted by the defense, he sounds like he's
10 the salt of the earth. And I am not saying he's a horrible
11 guy or intrinsically bad or anything like that.

12 But what I do know is he has a bit of a darker
13 side and a bit of a dark -- and while he might not have
14 criminal convictions related to guns and bombs on his
15 criminal history sheet, what he does have, though -- well,
16 he's been described as the Picasso of machine guns. He was
17 caught having made, I think, and he admitted in his
18 testimony back in 2004, that he made approximately maybe
19 more than 66 machine guns for an individual in that
20 individual's bunker of firearms.

21 And he also was caught having made a bomb for an
22 individual who wanted to use that bomb to kill somebody.
23 Now, whether Mr. Emry knew or not exactly what this person
24 wanted to do with the bomb I believe is up for debate. Now,
25 I am not saying -- I don't know yet exactly what he knew.

1 But what I have done is I have reviewed his
2 testimony, and I have provided it both to the defense and to
3 pretrial, and, by his own testimony, he made a bomb out of
4 C-4 and a detonator. And he testified, I believe, that the
5 bomb was capable of blowing up an area I think three times
6 the size of the federal courtroom that he was testifying in.
7 And he acknowledged that the bomb could do a lot of harm and
8 was highly illegal.

9 So we have a man who also testified that he had
10 made a silencer and that the machine guns he had made for
11 the individual with the bunker, at one point Mr. Emry was
12 worried that he was going to go on a rampage, as he
13 testified.

14 So we have a man that might not have criminal
15 history convictions, but we still have a man who has been
16 caught now with a very dangerous machine gun and a detonator
17 for a bomb and the parts for another machine gun, who has a
18 history with bombs, silencers, and machine guns.

19 And, again, this is -- you know, what kind of
20 individual is caught with those things a while ago and then
21 goes ahead and continues to engage in that conduct?

22 And, Judge, my position is that's an individual
23 who says loudly and clearly that they can't be trusted to
24 abide by any court-ordered conditions of supervision.

25 Is Mr. Emry going to go do anything bad? Is he

1 going to go -- I don't know. I can't say for absolute
2 certainty. I don't think the court can say what he's going
3 to do with absolute certainty. I don't think the feds can
4 say. We don't have any kind of crystal ball that's going to
5 tell us. And I think the detention factors recognize that,
6 and that's why they have us walk through the various factors
7 to see which direction they point in.

8 So in terms of danger to a person or community if
9 released, again, I don't want to overstate this because it's
10 so hard to predict with the future. All I can do is flag
11 what I have flagged to the defense and pretrial services
12 about what our concerns are.

13 And, again, Mr. Emry's past, which I think is the
14 best predictor of his future behavior, is riddled with
15 dangerousness: Bombs, machine guns.

16 The cooperating witness in this case is very
17 scared. Since Emry's arrest, Emry has been talking to a lot
18 of people on the phone about who he believes the
19 confidential witness is, and he's gone so far as to say, "He
20 ain't going to escape this one." And I will repeat that
21 because I listened to that portion of the call and I just
22 provided it. I know the defense hasn't listened to that
23 yet. I just got it, and I am trying to give them
24 information as it's coming in.

25 But I listened to that, and there was no context

1 around that. There was no -- that I heard. There was no
2 mitigating kind of explanation. He said, "The CW ain't
3 going to escape this one."

4 That's concerning. You know, I have tried to
5 construe that in a number of different ways favorable to
6 Mr. Emry. I can't really think of a way that that can
7 honestly be construed that doesn't at least cause concern
8 for this confidential witness in this case.

9 And sure enough, it should come as no surprise
10 that the confidential witnesses in fact received a number of
11 phone calls since Mr. Emry was arrested. A number of them
12 were just hangups, but at least one of them said something
13 to the effect of, we know where you are.

14 And the confidential witness believes that Emry's
15 conduct since being arrested is putting his or her life in
16 danger.

17 So, again, looking at the totality of the
18 circumstances, knowing that we can't predict exactly what
19 Mr. Emry is going to do, and knowing that Mr. Emry is not --
20 I am not saying he's the worst person in the world or he's
21 inherently bad or inherently dangerous. But when you walk
22 through in a calculated way and stack the evidence up to the
23 detention factors, we look at the dangerousness of the
24 offense, we look at his history with machine guns, bombs,
25 silencers, and we look at the witness safety concern. And I

1 think that anything short of detention in this case is just
2 a roll of the dice that some people are not deserving of.

3 THE COURT: Thank you very much.

4 Mr. Spence.

5 MR. SPENCE: Thank you, Your Honor. Marc Spence
6 with or on behalf, for today, of Mr. Sabitt on behalf of
7 Mr. Emry.

8 So from our perspective, there is a lot of noise
9 and collateral distractions about this case that have to do
10 with unfortunate developments in this state over the last
11 several months that ought to not be part of this case,
12 frankly, and that seem to bring into focus things that don't
13 belong in this case. I mean, from our perspective, boiling
14 this detention or release question down to its fundamental
15 facts are these:

16 That Mr. Emry is 54 years old. The court is well
17 familiar with criminality rates and recidivism rates and
18 likely to engage in reckless conduct as highly tied to age.
19 And here is someone who is 54 years old who sits before the
20 court today.

21 Secondly, in terms of criminal history, he has a
22 *de minimis* record. It looks like there is some sort of
23 check offense from 1992. That seems to be the only thing
24 that's out there.

25 And reliability, he's never had an FTA.

1 So the three things that we think are the most
2 important and relevant factors for the court to consider
3 here today are 54 years old, *de minimis*, almost nonexistent
4 involvement in the system, criminal justice system, as a
5 defendant, and never had an FTA.

6 He's got good community support here today. Just
7 to support him, I guess sort of a sampling, are his partner,
8 slash, spouse Becky Hudson; Vicky Davis is a stronger
9 supporter who came all the way from Twin Falls, Idaho; two
10 other women who came from long distances to provide support.

11 And my understanding -- well, I will get to the
12 tape or the recordings in a second.

13 Let me just talk about Mr. Emry's number one goal
14 for being not in detention or not detained is that his
15 number one goal is to have the opportunity to help out his
16 wife to get settled, to make arrangements, recognizing that
17 he does have a fair amount of exposure in this case. And so
18 it's just a common, understandable human desire to want to
19 be able to take care of and settle into a long-term living
20 situation the person that he cares about. That's his
21 primary goal.

22 And that obviously ties in with one of the
23 questions, which is is he a flight risk. He's absolutely
24 not a flight risk.

25 In terms of the arguments having to do with the

1 confidential source in this case, we just ask the court to
2 completely discount that and ask -- and rely instead on the
3 objective facts here. The confidential source has -- it is
4 no secret is not a reliable -- has been unreliable in the
5 past, can't be relied on, and appears to be engaged in sort
6 of self-serving hyperbole with respect to this case. He is
7 not making -- he or she is not making a secret of their own
8 identity, not making a secret of their own involvement in a
9 shared community, and so -- and, in fact, continues to
10 insert themselves into conversations that have to do with
11 shared populations of acquaintances. So not acting in any
12 way like somebody who is fearful and not acting in any way
13 like somebody who doesn't want to be noticed but, in fact,
14 continues to be sort of actively engaging in conversation
15 and communication with shared acquaintances.

16 In terms of the -- what has now been provided to
17 us today, a CD, my understanding is that it is -- and again,
18 we just received it, so I am just relying on fragments of
19 information, but my understanding is that it's taped calls
20 from the jail that Mr. Emry clearly knew he was being taped;
21 that these conversations primarily are with some women that
22 he is acquainted with through his reporting endeavors and
23 his political endeavors. These are 50- and 60-year-old
24 women, one of whom I know from my partner was a 25-year
25 employee of the federal government; not a population that's

1 likely to be engaging in unlawful retribution-type behavior.

2 My understanding of the conversation was they
3 could easily be viewed in the context of the person that is
4 identified as the informant who is out and openly engaging
5 in interactions with other members of the community, from
6 that population's perspective, faces legal or political
7 consequences that this language can easily be interpreted
8 that way versus the worst-case interpretation that appears
9 to be at least suggested to the court at this point.

10 With respect to the weapon, certainly there are
11 concerning circumstances around the weapon. Again, it's
12 noted there was no ammunition. Again, it's -- that there is
13 some question about whether it's even functional. And
14 really, from our perspective, if you take away kind of the
15 environment or the collateral excitement of what has
16 happened in Oregon over the last several months, this case
17 could easily be viewed as a simple theft case of a valuable,
18 collectible weapon that has a high level of marketplace
19 value unrelated to the violent circumstances that have been
20 considered also at that time.

21 We understand that there continue to be a number
22 of unknowns. We certainly appreciate the work that
23 Ms. Brown has put into this. But I understand there are
24 other things -- other people, including Agent Smith, that
25 she -- that ultimately could be contacted or connected with.

1 And just today there is new information that has come to us
2 in terms of the CD with what I understand is a partial list
3 of the conversations that were recorded at the jail.

4 So our perspective is that the objective facts
5 support release, and at this point I would say that there
6 are really no conditions that he would not agree to. And
7 certainly you could fashion a set of conditions, a set of
8 circumstances and rules that would govern behavior that
9 would lead to his safe release into the community. And that
10 would include, obviously, no weapons; obviously, no contact,
11 third-party contact with the person who is alleged to be the
12 informant; certainly, given the kind of complicated number
13 of relationships that are out there, no contact with any
14 number of people; and, in fact, house arrest he
15 would certainly -- would agree would be reasonable.

16 So there are certainly a set of circumstances that
17 could be fashioned by the court that could ensure the safety
18 of the community, get him home to his spouse, and allow him
19 to make plans with her for the future, acknowledging the
20 seriousness of the offense and the possibility of a
21 significant consequence.

22 In the alternative, if that's not where the court
23 is willing to go today, we would ask that any ruling be
24 without prejudice so that Mr. Sabitt could revisit it in the
25 near future.

1 THE COURT: Thank you very much, Mr. Spence. I
2 appreciate your argument and time.

3 Mr. Lichvarcik, anything further that you'd like
4 to add?

5 MR. LICHVARCIK: No, Your Honor.

6 THE COURT: Okay. I have thought a great deal
7 about this case as well as looked very carefully at
8 § 3142(g).

9 As I mentioned, I consulted with Judge Coffin. I
10 have consulted with Ms. Brown, who I know consulted with her
11 supervisor. There have been a lot of people looking at this
12 and thinking about this. I really -- Ms. Brown, in terms of
13 the information, she certainly has compiled a tremendous
14 amount of information that she has presented to me to assist
15 with my decision here today, and I do appreciate that.

16 I realize that pretrial detention is serious, and
17 I certainly don't make this decision lightly. Based on the
18 statutory grounds outlined in 18 U.S.C. § 3142(g), including
19 as outlined by the government, the nature and circumstance
20 of the charged offense, which is illegally possessing a .50
21 caliber machine gun with an obliterated serial number; the
22 weight of the evidence, I actually had the opportunity to
23 review several pages of transcribed recorded phone calls
24 that Mr. Emry placed from the jail, weight the evidence;
25 history and characteristics of the defendant; and finally,

1 the nature and seriousness of the danger to any person or
2 the community if Mr. Emry is released.

3 I will therefore enter an order continuing
4 defendant's pretrial detention on the ground that there are
5 no conditions that will reasonably assure the safety of the
6 community due to the factors discussed on the record and the
7 factors set forth in the pretrial services report.

8 And I make that ruling without prejudice,
9 Mr. Spence, as you requested.

10 MR. SPENCE: Thank you, Your Honor.

11 THE COURT: Anything further today?

12 MR. LICHVARCIK: Not from the government.

13 MR. SPENCE: No, Your Honor. Thank you.

14 THE COURT: Thank you.

15 THE CLERK: This court's adjourned.

16 *(The proceedings were concluded this*
17 *24th day of May, 2016.)*

18

19

20

21

22

23

24

25

1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 26th day of May, 2016.

5

6 /s/Kristi L. Anderson

7 _____
8 Kristi L. Anderson, Certified Realtime Reporter

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25