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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Earl B. Stratton,

Defendant.

) CR 00 - 0431 PHX SMM
) CR 01 - 0152 PHX SMM

ORDER

Counsel for the Government and defense counsel make strong arguments, respectively, for the continued detention or release of the Defendant. The Government argues, among other things, that, if released, the Defendant, now diagnosed with a terminal disease, “has nothing to lose by settling any old grudges, or if medical treatment becomes too painful or difficult that he would prefer to exit this world by use of a firearm at his own hand or engage in ‘suicide by cop.’”¹ The prosecutor argues that, given his history of illegal possession of firearms, until such time as a medical professional indicates that the Defendant’s medical condition is such that he is physically incapable of handling a firearm, he should remain

¹ See, page 9, Government’s Memorandum of Law Regarding Detention, filed April 16, 2001.

1 detained as a danger to the community and Deputy Sheriff Glass.² The Government has also
2 sought the detention of the Defendant on the grounds that he is a serious flight risk.

3 Defense counsel, on the other hand, argues that the Defendant's sister, Margo
4 Bowman, now willing to care for him and act as third party custodian, has found a place for the
5 Defendant to live out his shortened life expectancy. She has secured an apartment right across
6 the street from her residence which would permit her to provide for his meals and other living
7 needs, to provide him transportation for medical and other legitimate purposes, and to
8 supervise him to ensure compliance with his conditions of release. Counsel argues that his
9 client is a dying man and should be given the normal opportunity to make amends with his
10 family and die in peace rather than in a federal detention facility when he is harmless and a
11 danger to no one.

12 After considering all the evidence, the arguments of counsel, the controlling
13 and persuasive authorities on the issues sub judice and all the factors set forth in 18
14 U.S.C. §3142(g), the Court **FINDS** the following to be true by a preponderance of the
15 evidence:

16 1. Since the Defendant was initially indicted in CR00 - 0431 PHX SMM on
17 May 2, 2000 and the first detention hearing held before the undersigned on July 13, 2000, the
18 Defendant has been charged by Superseding Indictment³ with, among others, three counts of
19 Possession of a Firearm by a Convicted Felon [18 U.S.C. §922(g)(1)]. A single count
20 Indictment of Possession of an Unregistered Firearm, to wit: a sawed-off shotgun [26
21 U.S.C. §5861(d)] was also returned against the Defendant on February 22, 2001 in CR 01-
22 0152 PHX SMM. All of these charges are felonies.

25 ² The Court notes in passing that the Government has not argued that a basis exists to
26 detain the Defendant due to his courtroom threat and/or intimidation of Deputy Sheriff Glass
27 who may be a prospective witness. See, 18 U.S.C. §(f)(2)(B)

28 ³ The initial Indictment was returned on two Counts of Possession of a Firearm by a
Convicted Felon [18 U.S.C. §922(g)(1)].

1 2. That the Government agrees, and this Court concurs, that there has been a
2 material change in circumstances since Defendant’s detention hearing on July 13, 2000 to
3 warrant reconsideration of detention⁴ in CR00 - 0431 PHX SMM which hearing the Court has
4 combined with Defendant’s detention hearing on the more recent Indictment. Specifically,
5 Defendant has been diagnosed with terminal cancer⁵ for which he underwent surgical resection
6 of a mass in the left temporal area. He is actively undergoing medical treatment at the Tucson
7 Medical Center in Tucson, Arizona while in custody. This disease was not known to the
8 Defendant at the time of the first detention hearing herein and has a material bearing on the
9 issue of release.

10 3. Although not specifically addressed by the Ninth Circuit to date, the language
11 of the Bail Reform Act,⁶ and persuasive authority from the 5th Circuit,⁷ do not permit the
12 Government to seek detention on the sole basis that a defendant is a danger to the safety of any
13 other person or the community unless the crime charged is a “crime of violence” as technically
14 defined in the Bail Reform Act. See, 18 U.S.C. §3142(f).

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16 ⁴ Title 18 U.S.C. §3142(f) provides in part: “The [detention] hearing may be reopened
17 . . . at any time before trial if the judicial officer finds that information exists that
18 was not known to the movant at the time of the hearing and that has a material bearing on the
19 issue whether there are conditions of release that will reasonably assure the appearance of the
20 person as required and the safety of any other person and the community.”

21 ⁵ Per the medical oncology consultation report by Don W. Hill, dated March 23, 2001,
22 Defendant has “a high grade malignant fibrous histiocytoma, which is an aggressive sarcoma.”
23 Dr. Hill also indicates in his report that Defendant “has a lethal disease. He will relapse and die
24 from systemic disease, probably in the very near future.”

25 ⁶ Title 18 U.S.C. §3142(f) provides:

26 “Detention hearing - The judicial officer shall hold a hearing to determine
27 whether any condition . . . will reasonably assure the appearance of the person as
28 required and the safety of any other person and the community-

 (1) upon motion of the attorney for the Government, **in a case that involves-**
 (A) a crime of violence;” (Emphasis added).

⁷ See, United States v. Byrd, 969 F.2d 106 (1992).

1 4. A “crime of violence” is defined in 18 U.S.C. §3156(a)(4) for purposes of
2 the Bail Reform Act as follows:

3 (a) As used in sections 3141 - 3150 of this chapter-

4 * * * * *
5 “(4) the term crime of violence means-

6 (A) an offense that has an element of the offense the use, attempted use, or threatened
7 use of physical force against the person or property of another;

8 **(B) any other offense that is a felony and that, by its nature, involves a
9 substantial risk that physical force against the person or property of another may
10 be used in the course of committing the offense;**

11 (C) any other felony under chapter 109A [18 U.S.C.A §2241 et seq.] 110 [18
12 U.S.C.A §2251 et seq.], or 117 [18 U.S.C.A. §2421 et seq.]” (Emphasis added).
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14 5. The Ninth Circuit Court of Appeals has consistently held that the crime of
15 Unlawful Possession of a Firearm by a Felon is not a “crime of violence” for purposes of
16 sentencing. See, United States v. Sahakian, 965 F.2d 740 (9th Cir. 1992); United States v.
17 Canon, 993 F.2d 1439 (9th Cir. 1993); United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993);
18 United States v. Stephens, 237 F.3d 1031 (9th Cir. 2001).⁸

19 6. The Ninth Circuit Court of Appeals has yet to establish or consider whether
20 the crimes of Unlawful Possession of a Firearm by a Felon and/or Possession of an
21 Unregistered Firearm, to wit: a sawed-off shotgun, are “crimes of violence” for purposes of
22 release or detention pursuant to the Bail Reform Act (18 U.S.C. §3142).

23 7. At least one District Court in the Ninth Circuit has held that for purposes of
24 the Bail Reform Act, the crime of possession of an unregistered firearm is, by its very nature,
25 so inherently dangerous as to qualify as a “crime of violence.” See, United States v. Spires, 755
26 F. Supp. 890 (D.C. Cal. 1991).
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29 ⁸ Defense counsel did not cite any of these 9th Circuit cases to the Court at the prior
30 hearing. In fact, he erroneously advised the Court that the 9th Circuit “has not ruled on the
31 issue.” See, page 6, line 11, transcript of 6/22/00. He did, however, direct the Court to an
32 unpublished 6th Circuit opinion, United States v. Hardon, 149 F.3d 1185 (6th Cir.
33 1998)(Possession of a firearm and ammunition by a felon in violation of 18 U.S.C.
34 §922(g)(1), by their nature, do not involve a substantial risk; therefore, it is not a crime of
35 violence).

1 8. The Ninth Circuit has held that possession of an unregistered sawed-off
2 shotgun is a “crime of violence” for purposes of sentencing. In United States v. Hayes, 7 F.3d
3 144, 145 (9th Cir. 1993), the Court stated:

4 “. . . Because the statutory definition of Hayes' unregistered shotgun
5 conviction does not involve the use, attempted use or threatened use of physical
6 force against another, we focus solely on whether the charged conduct
7 presented a serious potential risk of physical injury to another. See [United
8 States v.]Young, 990 F.2d [469, 471, 9th Cir. 1993].

9 We conclude that in Hayes' case it does. As we said in United States v.
10 Dunn, 946 F.2d 615, 621 (9th Cir.), cert. denied, 502 U.S. 950, 112 S.Ct.
11 401, 116 L.Ed.2d 350 (1991), and United States v. Huffhines, 967 F.2d 314,
12 321 (9th Cir.1992); **sawed-off shotguns are inherently dangerous, lack
13 usefulness except for violent and criminal purposes and their possession
14 involves the substantial risk of improper physical force.** These attributes
15 led Congress to require registration of these weapons. Huffhines, 967 F.2d at
16 321.

17 We hold that the conduct charged in the unregistered shotgun count of
18 Hayes' indictment "presents a serious potential risk of physical injury to
19 another." The district court found correctly that Hayes was convicted of a crime
20 of violence for career offender purposes." (Emphasis added).

21 9. This Court adopts, as if fully set forth herein, the rational as the better-
22 reasoned decision and slim majority rule⁹ that the crime of Possession of a Firearm by a
23 Convicted Felon for purposes of the Bail Reform Act is a “crime of violence” as held and
24 discussed in United States v. Dillard, 214 F.3d 88 (2nd Cir. 2000). The Court hereby expressly
25 rejects the minority view¹⁰ found in United States v. Singleton, 182 F.3d 7 (D.C. Cir. 1999) and
26 other cases outside the Ninth Circuit.

27 ⁹ See, United States v. Spry, 76 F.Supp.2d 719, 720-722(S.D. W.Va.1999); United
28 States v. Kirkland, 1999 WL 329702, at 2-3 (E.D. La. 1999); United States v. Chappelle, 51
F.Supp.2d 703, 704-05 (E.D.Va.1999); United States v. Butler, 165 F.R.D. 68, 71-72
(N.D.Ohio 1996); United States v. Trammel, 922 F.Supp. 527, 530-31 (N.D.Okla.1995);
United States v. Sloan, 820 F.Supp. 1133, 1138-41(S.D. Ind.1993); United States v. Aiken, 775
F.Supp. 855, 856-57 (D.Md.1991); United States v. Phillips, 732 F.Supp. 255, 262-63
(D.Mass.1990); United States v. Johnson, 704 F.Supp. 1398, 1399-1401 (E.D.Mich.1988).

¹⁰ See, United States v. Shano, 955 F.2d 291, 295 (5th Cir. 1992); United States v.
Johnson, 953 F.2d 110 (4th Cir. 1992); United States v. Hardon, 6 F.Supp.2d 673, 676
(W.D.Mich.), rev'd, 149 F.3d 1185 (6th Cir.1998) (unpublished).

1 In addition to the other reasons outlined in Dillard, supra, which will not be repeated
2 herein, the term “crime of violence” should have a broader scope for public policy purposes
3 in the pretrial detention context than it does with respect to sentencing issues because 1) there
4 may be a greater risk to the community at the detention or beginning stage of the criminal
5 process than at the sentencing stage as less is usually known about a defendant at this time, and
6 2) the Government is precluded by the language of 18 U.S.C. §3142 from seeking detention
7 on the basis that a defendant is a danger unless the charged crime is a “crime of violence” as
8 defined in 18 U.S.C. §3156(a)(4). In other words, absent this broader meaning of “crime of
9 violence” or another reason existing to detain a defendant, i.e. a serious flight risk, the crime
10 charged carries a maximum sentence of life imprisonment or death, the defendant has been
11 convicted of two or more crimes of violence, or that the defendant will obstruct justice or
12 threaten, injure or intimidate a prospective witness or juror, a defendant must be released no
13 matter how dangerous that defendant is or may be. If a broader scope is permitted, the Court
14 can then proceed with a detention hearing, requiring the Government to prove on a case-by-
15 case basis by a clear and convincing standard whether the particular person before it is a danger
16 to the community or a particular individual.

17 10. The Court concludes that the crime of Possession of an Unregistered
18 Firearm, to wit: a sawed-off shotgun, is also a “crime of violence” for purposes of the Bail
19 Reform Act. See, United States v. Hayes, 7 F.3d 144, 145 (9th Cir. 1993).

20 11. That the Defendant is 64 years old, a resident of Arizona since 1964, has
21 resided at one address (1026 S. 29th Ave, Phoenix) for approximately 20 years, is hearing
22 impaired, is receiving Social Security Disability payments, has significant family ties to the
23 Phoenix community and is dying of cancer.

24 12. That the Defendant is not likely physically able to flee and become a
25 fugitive from justice but he does currently have the strength and mental capacity to physically
26 possess and discharge a firearm.

27 13. That there is no evidence presented that the Defendant voluntarily failed
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1 to appear for any of his prior criminal court proceedings except for some failures to appear
2 on traffic matters over thirty (30) years ago.

3 14. That prior to his arrest on the subject charges on June 19, 2000 and
4 subsequent detention, Defendant had a significant illicit drug addiction as he “consumes
5 methamphetamine daily or whenever it can be obtained”¹¹ which makes the Defendant likely
6 more unreliable and more untrustworthy. Defendant does not appear to be an abuser of alcohol.

7 15. That the Defendant was convicted in 1990 after a jury trial in state court
8 of Aggravated Assault,¹² a Class 3 Felony and dangerous offense,¹³ and served a prison term in
9 the Arizona Department of Corrections.

10 16. That Defendant was involved in a confrontation on April 13, 1999 in his
11 mobile home in Phoenix that led to the fatal shooting of Pete Rocha by the Defendant, who was
12 obviously in possession of a firearm at the time. The decedent, who was shot five times by the
13 Defendant, was in possession of a .30-.30 cal. rifle and allegedly raised it to his shoulder and
14 pointed the rifle at the Defendant when the Defendant commenced firing.¹⁴ The Maricopa
15 County Attorney’s Office declined to prosecute the Defendant for this incident for the likely
16 reason of justification (self-defense) for the use of deadly force by the Defendant.

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18 ¹¹ See, U.S. Pretrial Services’ Supplemental Report, dated June 21, 2000.

19 ¹² According to the state’s presentence report (Exhibit 1), “[o]n January 4, 1990, at
20 approximately 12:35 p.m., Officer Kohl of the Phoenix Police Department responded to an
21 emergency call of a man with a gun at 6400 W. Van Buren. There he was contacted by witness
22 Larry Dees and suspect Earl Stratton. Stratton was upset because his daughter, Crystal, was
23 missing. Stratton was accusing Dees and victim Adam Brady of hiding her. Brady and Dees
24 were riding their bikes while Stratton started chasing them on his motorcycle. The boys sought
25 refuge on private property off of Van Buren and Stratton followed. Stratton told Dees to call
26 the police, but Dees said there was no phone there. Dees said that Stratton reached down and
27 took a pistol out of his waistband. Stratton pointed the pistol at Brady and said, ‘If you take one
28 more step, I’m going to kill you.’ Stratton also said, ‘I’m going to kill you if you don’t tell me
where by (sic) daughter is.’ Dees went to the phone at a nearby Circle K where the police came
and arrested suspect Stratton.”

¹³ This crime is a “crime of violence” under federal law.

¹⁴ See, Government’s proffer at June 22, 2000 hearing.

1 17. That Defendant was acquitted by jury trial of the crimes of Attempted
2 Homicide and Aggravated Assault in the Maricopa County Superior Court, State of Arizona,
3 for the May 19, 1999, .22 cal. rifle shooting of Jerry Glass, a deputy sheriff with the Maricopa
4 County Sheriff's Office. Deputy Glass was shot in the jaw and seriously injured while he and
5 another deputy sheriff were conducting surveillance of the Defendant and others who were
6 living in the desert north of Phoenix.¹⁵ Obviously, Defendant illegally possessed a firearm at
7 the time of this shooting.

8 18. Although acquitted of the state crimes charged, the Defendant's behavior
9 of using deadly force by shooting into the dark, towards the sounds of voices without the
10 apparent use or threatened use of immediate deadly force against himself or others, shows, at
11 a minimum, a reckless disregard for the health and safety of others.

12 19. That at the detention hearing before the undersigned on April 19, 2001,
13 Deputy Sheriff Glass testified that when the Defendant first appeared for his initial appearance
14 in the U.S. District Court in Phoenix on June 19, 2000, the Defendant mouthed these words
15 directly to Deputy Glass, who was sitting near the front of the courtroom's spectator section
16 with his wife: "I'll get you" and "You're next." The Defendant also used derogatory, vulgar
17 language towards Deputy Glass at a chance encounter while in the hallway of the courthouse
18 and to his wife when they were in the courtroom. None of these alleged statements were heard
19 by the Court nor contradicted by Defendant.

20 20. That although he has a motive to ensure that the Defendant is not released,
21 the Court finds the testimony of Deputy Sheriff Glass is credible and reliable.

22 21. That the Court personally observed the Defendant and his demeanor during
23 the testimony of Deputy Sheriff Glass on April 19, 2001. Although usually quiet and sedate
24 during court proceedings, the Defendant became emotional and animated in his
25 communications with his lawyer and showed outward signs of anger toward Deputy Sheriff
26 Glass when Deputy Sheriff Glass took the witness stand. The Court wishes to make clear,

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28 ¹⁵ Id., at page 14.

1 however, that the Defendant did not do or say anything out loud during the hearing that was
2 inappropriate or disrespectful to the witness or the Court.

3 22. That despite his serious medical condition, the Defendant likely still harbors
4 strong emotional feelings of ill will toward, and feelings of persecution by, Deputy Sheriff
5 Glass for which the Defendant likely needs anger control counseling.

6 23. That although justification may be a defense to a felon's possession of a
7 firearm,¹⁶ Defendant has demonstrated a history of disregarding the law, a history of illegally
8 possessing firearms, and has shown little reluctance in using deadly force with or without
9 justification.

10 24. That there is no evidence that Defendant has ever had, or has now, any
11 suicidal ideations.

12 25. That all of the Defendant's reasonable, necessary and specialized medical
13 needs are being timely met at the present time by CCA, his current detention facility in
14 Florence, Arizona, and the U.S. Marshal Service.¹⁷

15
16 Based upon all of the foregoing and the evidence presented at the subject
17 detention hearings,

18 The Court **FINDS** that the Government has failed to sustain its burden of proof that the
19 Defendant is a serious flight risk.

20 The Court **FURTHER FINDS** that the Government has sustained its burden of proof
21 by clear and convincing evidence that the Defendant is, and remains, a danger to Deputy Sheriff
22 Jerry Glass and that no condition or combination of conditions would reasonably assure the
23 safety of Deputy Sheriff Jerry Glass were the Defendant to be released.

24 Accordingly,

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27 ¹⁶ See, United States v. Gomez, 92 F.3d 770 (9th Cir. 1996).

28 ¹⁷ See, testimony taken at OSC hearing before the undersigned on April 9, 2001.

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IT IS ORDERED that the Defendant shall remain detained in both CR 01 - 152 PHX SMM and CR00 - 431 PHX SMM until further order of the Court.

DATED this 24th day of April, 2001.

Lawrence O. Anderson
United States Magistrate Judge