

1 DENNIS K. BURKE
United States Attorney
District of Arizona

2 REID C. PIXLER
3 Assistant United States Attorney
Arizona State Bar No. 12850
4 Two Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004
5 Telephone: (602) 514-7500
reid.pixlerc@usdoj.gov

6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 United States of America,
10 Plaintiff,
11 v.
12 Gerald James Brown,
13 Defendant.

CR-07-0111-PCT-DGC

**STIPULATION RE FIREARMS
HELD AS EVIDENCE**

14
15 The United States of America, by its undersigned counsel, Defendant, GERALD JAMES
16 BROWN, by Daniel Drake, respectfully submits this stipulation and proposed Order in the
17 above-entitled case for the reasons set forth below. A proposed order is submitted with this
18 motion. This stipulation will also address the difficult legal issues regarding the disposition
19 of firearms after conviction of the owner of the firearms.

20 1. On May 15, 2008, GERALD JAMES BROWN was convicted of Count 5 of
21 the Indictment, knowingly possessing a silencer, a firearm as defined in Title 26, United
22 States Code, Section 5845(a)(7), that is a 7 inch long, 1 and 1/4 inch wide, black metal
23 cylinder, threaded at one end, which firearm was not registered to GERALD JAMES
24 BROWN in the National Firearms Registration and Transfer Record as required by Title 26,
25 United States Code, Section 5841, knowing the weapon was a silencer as defined in Title 18,
26 United States Code, Section 921(a)(24). This was in violation of Title 26, United States
27 Code, Sections 5861(d) and 5871. That conviction is on appeal to the Ninth Circuit Court of
28

1 Appeals and is stayed pending the resolution of the conviction related to a Street Sweeper
2 shotgun, displaying Serial Number 12117.

3 2. The 123 weapons listed in Exhibit A were seized from GERALD JAMES
4 BROWN early in the investigation and prior to his conviction for the possession of the
5 silencer. However, he is now a convicted felon and may not possess these firearms.

6 3. The Eighth Circuit considered a very similar factual situation in *United States*
7 *v. Felici*, 208 F.3d 667 (8th Cir. 2000). In that case, Felici had been convicted for drug
8 related offenses. *Felici*, 208 F.3d at 669. Nevertheless, Felici filed a Motion For Return of
9 Seized Property pursuant to Fed.R.Crim.P. 41(e)¹⁷ for the return of firearms and
10 paraphernalia which had allegedly been used in his drug activity, leading to his conviction.
11 *Felici*, 208 F.3d at 669. The drug paraphernalia were dual use items, such as scales and
12 containers with false bottoms. *Felici*, 208 F.3d at 669. The district court denied the motion
13 without an evidentiary hearing on the basis that,

14 ‘returning firearms to a felon and drug-related materials to an individual convicted
15 of distribution of methamphetamine would amount to a mockery of the law.’ (Dist
Ct. Order at 3) (internal quotations omitted).

16 *Felici*, 208 F.3d at 669.

17 3. On appeal, Felici argued Rule 41(e) required the district court to conduct an
18 evidentiary hearing to allow him the opportunity to prove he was entitled to possess the
19 firearms prior to denying his motion. *Felici*, 208 F.3d at 670. The Appellate Court rejected
20 that argument.

21 As a threshold matter, however, Rule 41(e) contemplates the existence of a factual
22 dispute as to whether the petitioner lawfully is entitled to possess the challenged
23 property. When it is apparent that the person seeking a return of the property is not
24 lawfully entitled to own or possess the property, the district court need not hold an
25 evidentiary hearing. *See Bagley*, 899 F.2d at 708.

26 ¹⁷ This rule is now numbered 41(g). For cases arising prior to August 23, 2000, a motion
27 filed pursuant to this rule was the recognized procedure to set aside an administrative forfeiture
28 order. As the result of CAFRA, 18 U.S.C. § 983 (e), is now the exclusive remedy to contest a
completed administrative forfeiture matter.

1 Federal law prohibits convicted felons from possessing guns. *See* 18 U.S.C. §
2 922(G)(1994). Based upon Felici's status as a convicted felon, the district court
3 could properly conclude without receiving evidence that Felici is not entitled to a
4 return of the firearms, Felici is also not entitled to have the firearms held in trust for
5 him by a third party. Such a request suggests constructive possession. Any firearm
6 possession, actual or constructive, by a convicted felon is prohibited by law. *See*
7 *United States v. Sample*, 136 F.3d 562, 564 (8th Cir. 1998). Hence, based upon the
8 facts and the law, the district court could properly deny Felici's motion for the return
9 of his firearms without receiving any additional evidence.

6 *Felici*, 208 F.3d at 670.

7 4. *Felici* appears to be the leading Circuit authority on the issue of whether a
8 convicted felon retains any interest, economic or otherwise, in weapons the felon owns and
9 possesses at the time of conviction. *Felici* also addresses whether the convicted felon has the
10 legal ability or authority to store the weapons, conceal the weapons, or dispose of his interest
11 in the weapons through a constructive ownership which allows the felon to designate to a
12 third party any interest in the weapons. The Ninth Circuit cited *Felici* with approval in
13 *United States v. Kaczynski*, 551 F.3d 1120 (9th Cir. 2009), for the proposition that the
14 "Unabomber" had no legal ability to direct his bomb making materials be delivered to a
15 designee selected by Kaczynski. *Kaczynski*, 551 F.3d. at 1129-30. After evaluating the
16 claims the bomb making material was not contraband "per se" but merely "derivative"
17 contraband which can be lawfully possessed and only becomes unlawful due to the use or
18 intended use of the items, pursuant to the holdings of *United States v. Dean*, 100 F.3d 19,
19 20-21 (5th Cir. 1996) and *United States v. Lussier*, 128 F.3d 1312, 1314-15 (9th Cir. 1997), the
20 panel held:

21 Although Kaczynski emphasizes that many listed items are not "per se" contraband,
22 this argument does not get him as far as he hopes, because the court is entitled to
23 prohibit him from possessing derivative contraband as well. A motion such as
24 Kaczynski's for the return of his property is a motion in equity, and "the owner of
25 the property must have clean hands." *United States v. Howell*, 425 F.3d 971, 974
26 (11th Cir. 2005); *see also United States v. Felici*, 208 F.3d 667, 670-71 (8th Cir.
27 2000)... .

25 For these reasons, the district court acted well within its discretion by ordering the
26 materials not be returned to Kaczynski or his designee.

27 *Kaczynski*, 551 F.3d. at 1129-30.

1 5. In *Kaczynski*, the Ninth Circuit also cited with favor *Howell*, which in turn
2 relied heavily upon *Felici*:

3 The facts in the instant case are almost identical to *Felici*. In both, convicted felons
4 filed a 41(g) motion asking for the return of firearms that were seized during their
5 arrest. We agree with the conclusion that to do so would be a clear violation of 18
6 U.S.C. § 922(g).

7 Alternatively, the defendant argues that he may lawfully possess the three seized
8 firearms constructively. Although not actual possession, the defendant asks this
9 court to either place the firearms in the possession of a relative in trust or sell the
10 firearms and distribute the proceeds to him. Even though the defendant's rationale is
11 interesting, it is beyond the scope of Rule 41(g). We agree with the Eight Circuit in
12 concluding that any firearm possession, actual or constructive, by a convicted felon
13 is prohibited by law.

14 “Federal law prohibits convicted felons from possessing guns ... [The defendant] is
15 also not entitled to have the firearms held in trust for him by a third party. Such a
16 request suggests constructive possession. Any firearm possession, actual or
17 constructive, by a convicted felon is prohibited by law.” *Felici*, 208 F. 3d at 670.

18 The fact that the defendant was in lawful possession and was not a convicted felon
19 when he acquired the three firearms is irrelevant. 18 U.S.C. § 922(g) was
20 specifically designed to serve public policy and prevent convicted felons from
21 having either constructive or actual possession of firearms. This statute was
22 designed to work retroactively, and once an individual becomes a felon, he will be in
23 violation of 18 U.S.C. § 922 if found to be in possession of a firearm. Obviously,
24 the courts cannot participate in a criminal offense by returning firearms to a
25 convicted felon.

26 *Howell*, 425 F.3d at 976-77.

27 6. Both of the above cases involved the effort by a convicted defendant to rely
28 upon a motion to return property that is contraband. While the above analysis is necessary to
properly advise this Honorable Court of the complexities involved, no Rule 41(g) motion has
been filed in this action. The Government holds the weapons as evidence but with no
authority to destroy or dispose of the weapons. GERALD JAMES BROWN cannot have
possession or control over the weapons, but he has no other assets from which to pay the
expenses associated with this case, including any contribution to the payment of the Criminal
Justice Act Attorney appointed to represent him. But for the liquidation of these weapons,
this Court will have no asset from which to collect the expenses and fees associated with this
case. The parties have attempted to craft a resolution which address the unique factual
situation presented in this case in a manner similar to the holding in *United States v.*

1 *Approximately 627 Firearms*, 589 F.Supp. 2d 1129 (S.D. Iowa 2008). In this case the district
2 court followed both *Felici* and *Howell* in finding a few specific non forfeitable weapons
3 could neither be returned to the convicted felon nor conveyed to his designee, but ordered
4 them sold.

5 7. In this case, there are two weapons which are defined as firearms and which
6 GERALD JAMES BROWN simply cannot ever possess. As to GERALD JAMES BROWN
7 these items are directive contraband and he can have no control over this items under any
8 circumstance, as set out in *Felici* and *Howell*. The two items are a silencer, a firearm as
9 defined in Title 26, United States Code, Section 5845(a)(7), that is a 7 inch long, 1 and 1/4
10 inch wide, black metal cylinder, threaded at one end, and a Street Sweeper shotgun,
11 displaying Serial Number 12117. Neither of these firearms were registered to GERALD
12 JAMES BROWN in the National Firearms Registration and Transfer Record as required by
13 Title 26, United States Code, Section 5841. As a convicted felon, GERALD JAMES
14 BROWN cannot receive these weapons and can have no control over them. GERALD
15 JAMES BROWN stipulates and agrees that the Final Order of Forfeiture in this action is a
16 Final Order and these two items can be disposed of according to law by the United States.
17 The silencer will continue to be retained as evidence in the criminal case. GERALD JAMES
18 BROWN makes no further claim to either of these weapons.

19 8. The parties further stipulate and agree that the 123 items appearing on Exhibit
20 A are not contraband per se and were seized from GERALD JAMES BROWN at a time
21 when he was not a convicted felon. As in the *627 Firearms* case, these items are not subject
22 to forfeiture but they also cannot be returned to the convicted felon nor conveyed to his
23 designee. Based upon the equities of this case, as well as the terms and conditions contained
24 in this stipulation, the parties have agreed to urge this Court to Order that the weapons be
25 sold according to the terms and condition contained herein.

26 A. The parties have considered a number of Federal Firearms License holders (FFL) and
27 agreed to select David and Patricia Jones, Old World Guns, 567 S Main St., Camp
28 Verde, AZ. The object is to retain a reputable FFL who all parties trust not to engage

1 self dealing, dedicate time and resources to the sale of the items, avoid scams, and not
2 assist or conspire with GERALD JAMES BROWN to regain control over the
3 weapons.

4 B. Agents from BATF and the Government reserve the right to permanently retain
5 and or otherwise dispose of any of the firearms in question that are determined
6 to belong legally to another party or that the release and sale of said firearm(s)
7 would be in violation of any local, state, or federal law. ATF will remove from
8 the inventory of the 123 items any items which have been found, through the tracing
9 of the serial numbers, any weapons which have been reported as stolen. These items
10 will be returned to the owners or to another who has obtained an ownership interest in
11 them, such as an insurance company, but may not be resold. Because these items
12 were stolen, GERALD JAMES BROWN never acquired an ownership interest.

13 C. Agents from BATF retain the right to inspect the inventory of these items and the
14 books or logs related to the sales of any of these items and confirm the identity of the
15 purchaser of firearm, to insure that the sales are arm's length sales to real purchasers
16 and not individuals acting for or on behalf of GERALD JAMES BROWN.

17 D. The expenses of the sale will be deducted from the sales price and the net sales
18 proceeds will be distributed to the Registry of the Court on a monthly basis.
19 The funds will be held by the Registry for at least 90 days to allow BATF to
20 complete any investigation regarding the identity of the purchaser to insure that
21 the sales are not to straw parties acting for or on behalf of GERALD JAMES
22 BROWN.

23 D. Prior to any distribution from the Registry the Court may order, in its sole
24 discretion, a portion of the funds applied to pay any fees associated with Court
25 appointed counsel; other Court Costs; fees or fines. The United States will not
26 urge the Court to apply any particular amount or percentage. Rather, this
27 procedure is designed to give the Court an accounting for the liquidation value
28 of these items and provide for a reasonable delay of the distribution of the

1 funds. In the event any of the purchasers are found to be acting for GERALD
2 JAMES BROWN the United States may object to the distribution of the funds
3 and ask the Court for an alternative disposition. For purposes of the funds
4 contained in the Registry of the Court on behalf of GERALD JAMES
5 BROWN, the funds shall be considered fungible within the definition of 18
6 U.S.C. § 984. Funds will be conveyed from the Registry of the Court only
7 upon order by the Court.

8 E. The Court, at its sole discretion, may delegate the duty to evaluate the
9 liquidation value, distribution percentage, and ability to direct distributions to
10 another officer of the Court such as a Probation/Parole Officer. If such
11 delegation occurs, the Court should provide direction and instruction to this
12 person but need not provide that information to the parties.

13 F. The parties agree that the professional FFL selling the guns must be free to
14 determine what the market will bear. However, there must be a time limit on
15 the sale of the items. The shorter the time limit, the more aggressive the price
16 point must be. The longer the period, the more flexibility the seller has to
17 obtain the greatest price. The parties agree that this agreement must end sixty
18 days after the Ninth Circuit renders an opinion in the above captioned case or
19 the appeal is dismissed, whichever occurs first. Any of the items not disposed
20 of by that date shall be taken into the custody of BATF and disposed of as if
21 the items were contraband and had been ordered forfeited.

22 9. GERALD JAMES BROWN agrees to the liquidation of the weapons in this
23 manner, including the determination of the price for which the items will be sold by the FFL
24 which he has selected and which has been approved by BATF. The disposition of the items
25 described herein is final. GERALD JAMES BROWN may not subsequently claim that any
26 of this property should have been sold for a higher price.

27 10. GERALD JAMES BROWN agrees to hold and save the United States
28 Department of Justice; BATF; all State and Local law enforcement officers participating in

1 this investigation; and their respective officers, agents, task force agents, servants and
2 employees, their heirs, successors or assigns, harmless from any claims by GERALD JAMES
3 BROWN or any other potential claimant which has not been disclosed, regarding the seizure,
4 storage, transportation, liquidation, or other disposition of any of the items mentioned in this
5 agreement, as noted herein, including costs and expenses for or on account of any and all
6 lawsuits or claims of any character whatsoever in connection with the liquidation of the items
7 appearing in Exhibit A.

8 WHEREFORE, the parties respectfully request that this Court enter the Proposed Order
9 directing the liquidation of the items in Exhibit A.

10 Respectfully submitted this ____ day of March, 2011.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DENNIS K. BURKE
United States Attorney
District of Arizona

/S/ Reid C. Pixler

DANIEL DRAKE
Counsel for Defendant

REID C. PIXLER
Assistant United States Attorney

GERALD JAMES BROWN
Defendant

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
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on March ____, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant: