

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

07-13591-J

---

IN RE:

RICHARD F. SCRUGGS, and  
THE SCRUGGS LAW FIRM, P.A.,

-----  
On Petition for Writ of Mandamus and  
Prohibition to the United States  
District Court for the  
Northern District of Alabama  
-----

RESPONSE OF WILLIAM M. ACKER, JR. TO  
ORDER ENTERED ON AUGUST 31, 2007

William M. Acker, Jr.  
Senior United States District Judge  
481 Hugo L. Black United States  
Courthouse  
1729 5<sup>th</sup> Avenue North  
Birmingham, Alabama 35203  
(205) 278-1880

RESPONSE OF WILLIAM M. ACKER, JR.  
TO ORDER ENTERED ON AUGUST 31, 2007

On August 3, 2007, Richard F. Scruggs and The Scruggs Law Firm, P.A. ("Scruggs"), filed in the Court of Appeals their "Petition for Writs of Prohibition and Mandamus" in which they sought "writs of prohibition and mandamus directing Judge Acker (or his successor, if the case has been reassigned)", to dismiss all contempt proceedings, or, alternatively, "to void the prior appointment of private attorneys and to appoint new attorneys with instructions that they must adhere to all Department of Justice guidelines and other ethical rules that would apply to the U.S. Attorney if she had undertaken the same prosecution, and that they may decline to prosecute after reviewing the case." After Scruggs's petition had been filed in this Court, the anticipated criminal contempt complaint was actually filed by the special prosecutors I had appointed. The contempt case, CR-07-CO-0325-S, was then randomly assigned to another judge, Honorable L. Scott Coogler. I am not involved in that case, but confess to having an interest in its outcome.

On August 31, 2007, this Court entered its order that "invites the District Judge to respond". Because it was I who appointed the special prosecutors, I am proceeding on the assumption that I am the district judge invited to respond. If I am incorrect, Judge Coogler is being notified by copy of this response.

As I understand the order of August 31, 2007, the Court is asking me to respond only to that aspect of the petition that seeks the replacement of the three special prosecutors. This is the only unruled-upon aspect of the petition.

In the memorandum opinion I entered on June 15, 2007, I found cause to believe that Scruggs is guilty of criminal contempt, and said the following unequivocal things about it:

(1) "The court will refer Scruggs to the United States Attorney for the Northern District of Alabama for prosecution for criminal contempt." p.1.

(2) "The court finds that there exists sufficient evidence to meet the burden of proving that Scruggs willfully violated the court's December 8, 2006 preliminary injunction, and that referral to a prosecutor is the appropriate course to take to vindicate the court's authority." p.19.

(3) "In accordance with Rule 42(a), Fed.R.Crim.P., the court will formally request that an attorney for the government prosecute Scruggs's contempt. If the government declines this request, the court will appoint another attorney to prosecute the contempt." p.25.

Rule 42(a)(2) does not say that the trial court "**may**" appoint a special prosecutor if the United States Attorney declines the invitation to prosecute a contempt. It says that the court "**MUST**" under that circumstance appoint another prosecutor. There is no other option provided.

Between June 15, 2007, when I entered my order, and August 3, 2007, when Scruggs filed the mandamus petition that was denied on August 31, 2007, no objection or other challenge to the Rule 42(a) procedure was presented by Scruggs to me. Only an

intelligent guess could suggest what I would have done if I had been given the opportunity to react to the various objections now raised by Scruggs. Instead of complaining to me, Scruggs filed with the United States Attorney, to whom I had by then referred the matter, an elaborate brief protesting his innocence and interposing jurisdictional defenses. These are the same arguments made by Scruggs in the petition filed with this Court. No suggestion was ever made to me that any one of the attorneys I had appointed was in any way disqualified. I did exactly what I said I would do, and what Rule 42(a)(2) required, and I was never presented a request for reconsideration.

Never before in my twenty-five years on the bench have I found it necessary to employ Rule 42, a procedure that is rarely invoked by any judge. After taking the unusual step of appointing the special prosecutors, I depended upon them to prepare and to file the charging document, and I stepped aside. Because I had acted in a capacity similar to that of a grand jury, I ordered the criminal case assigned to another judge.

The three lawyers I appointed did not need to be instructed that they must adhere to the Department of Justice guidelines and to all other ethical rules that would apply to the United States Attorney. One, who now is in private criminal practice, had a long and distinguished career as a federal prosecutor. I had many opportunities to observe his quality performances as a prosecutor. The other two are conscientious, experienced and

highly competent trial lawyers for whom I have the highest regard, and who have unimpeachable integrity. I applied no pressure to any of them. I gave them ample time within which to examine the entire court file and to evaluate the case against Scruggs. They could easily have declined appointment if they had thought the prosecution unwarranted. And, of course, they still have the broad discretion possessed by all federal prosecutors, including the right to request a dismissal of the criminal charges if they later find dismissal warranted. If these three lawyers are disqualified, it will be difficult to find a qualified lawyer who is not disqualified under petitioners' criterion, which seems to be that I appointed them. The unambiguous mandate of Rule 42(a)(2) would, as a practical matter, become meaningless if these fine lawyers are removed.

Respectfully submitted,

---

William M. Acker, Jr.  
Senior United States District Judge  
481 Hugo L. Black Courthouse  
1729 5<sup>th</sup> Avenue North  
Birmingham, Alabama 35203  
(205) 278-1880

CERTIFICATE OF SERVICE

I hereby certify that I have mailed by United States Mail postage prepaid or otherwise delivered a copy of the above response to the following interested parties and attorneys-of-record:

John W. Keker, Esq.  
Steven A. Hirsch, Esq.  
Brook Dooly, Esq.  
Keker & Van Nest, LLP  
710 Sansome Street  
San Francisco, California 94111

Frank Bainbridge, Esq.  
Bruce Rogers, Esq.  
Bainbridge, Mims, Rogers and Smith, LLP  
P.O. Box 530886  
Birmingham, Alabama 35253

Jack E. Held, Esq.  
J. Rushton McClees, Esq.  
Sirote & Permutt, P.C.  
P.O. Box 55727  
Birmingham, Alabama 35255-5727

Barbara Ellis Stanley, Esq.  
Helms & Greene, LLC  
One City Center  
Suite 1290  
1021 Main Street  
Houston, Texas 77002

Michael R. Smith, Esq.  
William W. Taylor, III, Esq.  
Zuckerman & Spaeder, LLP  
1800 M Street, NW  
Suite 1000  
Washington, DC 20036

Charles A. Sharp, Esq.  
Joel A. Williams, Esq.  
Sadler-Sullivan, P.C.  
Wachovia Tower  
Suite 2500  
420 North 20<sup>th</sup> Street  
Birmingham, Alabama 35203

Michael V. Rasmussen, Esq.  
130 Inverness Plaza, #175  
Birmingham, Alabama 35242

Honorable L. Scott Coogler  
United States District Judge  
786 Hugo L. Black Courthouse  
1729 5<sup>th</sup> Avenue North  
Birmingham, Alabama 35203

Honorable Harwell Davis  
United States Magistrate Judge  
101 Holmes Avenue  
Huntsville, Alabama 35801

Dated this 11th day of September, 2007.

---

William M. Acker, Jr.