

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	}	
	}	
-vs-	}	2:07-cr-325-CRV
	}	
RICHARD F. SCRUGGS	}	
THE SCRUGGS LAW FIRM, P.A.	}	
	}	

**REPLY OF SPECIAL PROSECUTORS TO
SCRUGGS' REQUEST FOR AN EVIDENTIARY HEARING**

Come now the undersigned Special Prosecutors, and reply to the Motion filed by the Scruggs Defendants on February 1, 2008 in which Defendants request an Evidentiary Hearing with regard to the appointment of the Special Prosecutors. Once again, as previously pointed out, Scruggs' disrespect for the Court and Special Prosecutors is illustrated by refusing to properly refer to them as Special Prosecutors. A Special Prosecutor is a well defined term and authorized under Rule 42 Federal Rules of Criminal Procedure.

His use of the term "private counsel" in this case is an attempt to infer that they represent the Judge, not the Court. The undersigned are mindful of their professional obligations. We accepted appointment after determining that probable

cause for the charge of criminal contempt was present. The evidence we expect to present at trial is guilt beyond a reasonable doubt.

The issue of Scruggs' unfounded accusations against the Special Prosecutors was addressed in their Response to the Eleventh Circuit Court of Appeals Show Cause Order dated August 31, 2007. A copy of that Response is attached hereto as Exhibit A. A copy of Judge Acker's Response to the Eleventh Circuit is attached as Exhibit B. The Eleventh Circuit Court of Appeals denied Scruggs Petition for Prohibition and Mandamus which included his request that the Special Prosecutors be replaced. The Special Prosecutors reply to Show Cause Order also demonstrates Scruggs' request has no merit.

Once again, Scruggs has moved, without citing a case which actually supports his request, for an unwarranted examination of Judge Acker and the Special Prosecutors, seeking a laundry list of work product information, without any factual or legal showing. This harassment serves no value other than to distract attention from Scruggs' own contemptuous conduct, for which a factual showing has been presented.

Quite simply, Scruggs has presented no factual basis of any personal or financial interests of Special Prosecutors against Scruggs nor any personal, professional or financial connection or interest with Judge Acker. That is because

none exists. As the undersigned stated in their pleading to the Eleventh Circuit, the Special Prosecutors were not aware when studying the file and deciding to accept appointment, of any case which any firm client had with the Scruggs firm. The case referenced by Scruggs' Eleventh Circuit pleading, involving an anti-trust class action in New Jersey against BNSF railroad, or a homeowner's claim against Liberty Mutual in Mississippi, has nothing to do with any case being handled by Special Prosecutors.

Discussions which Special Prosecutors have had with any potential witness, or any source of information during their investigation, is work product. This includes conversations with Judge Acker, a possible witness. Scruggs cites no case which would allow a Defendant to cross-examine Special Prosecutors regarding information they studied, their investigation, and their thought processes concerning the decision to accept appointment, their continuing work product after such acceptance and their preparation and prosecution of charges. This includes discussions with Judge Acker, who recused himself from handling any criminal charges filed against the Defendants. This includes any information of their work concerning their bills submitted for payment by the office of court administration in Washington, D.C.

The Defendants may of course, request evidentiary disclosures under Rule 16, Federal Rules of Criminal Procedure.

Scruggs cites *McKenzie v. Risley*, 915 F.2d 1396 (9th Cir. 1990) in which the trial and sentencing judge and the prosecutor met ex parte and were acknowledged to have discussed the case. That circumstance is entirely different from Judge Acker's inquiries concerning the appointment of Special Prosecutors under Rule 42.

Judge Acker is not the Judge that is presiding over this trial nor deciding whether Scruggs is guilty or not guilty of the charges filed by the Special Prosecutors. That is the scenario contemplated by *McKenzie*, supra. Scruggs broadens or misinterprets the scope of that case just as he does the *Young v. United States ex rel. Vuitton et Fils, S. A.*, 481 U.S. 787, (1987).

As previously explained in our Response to the Eleventh Circuit (Exhibit A), Scruggs' remedy to any perceived violation of his purported rights, is to appeal a conviction should he be found guilty. See, *United States v. Gregory*, 656 F.2d 1132 (11th Cir. 1981), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *United States v. Reed*, 937 F.2d 575 (11th Cir. 1991), *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *United States v. Heldt*, 668 F.2d 1238 (D.C. 1981), *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), cert. denied, 442 US. 1032 (1980), which are discussed in the Eleventh Circuit brief.

Absent a showing that the Special Prosecutors have a pecuniary interest or other disqualifying conflict in the outcome of this prosecution and that such interest

or conflict is proven by clear and convincing evidence to have caused demonstrable actual prejudice to Scruggs, and that exceptional circumstances exist to contest the process now rather than after a conviction, Scruggs' motion for dismissal is due to be denied.

Scruggs has certainly offered no evidence of any disqualifying conflict nor proof of any actual prejudice in making his remote, unfounded, speculative assertions against the Special Prosecutors. Based upon the standards outlined in *Heldt* and *Birdman*, supra, there has been no showing whatsoever to support the draconian and intrusive relief sought by Scruggs. Scruggs' cites no legal authority to support the request, which should be summarily denied.

Respectfully submitted:

s/Charles E. Sharp, Sr.

Charles E. Sharp, Sr.
Special Prosecutor on behalf of the
United States of America
Sadler ♦Sullivan, P.C., Suite 2500
420 North 20th Street
Birmingham, Alabama 35203

s/Joel A. Williams

Joel A. Williams
Special Prosecutor on behalf of
United States of America
Sadler ♦Sullivan, P.C., Suite 2500
420 North 20th Street
Birmingham, Alabama 35203

s/Michael V. Rasmussen
Michael Vail Rasmussen
Special Prosecutor on behalf of the
United States of America
1122 22nd Street North
Birmingham, Alabama 35242

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 6th day of February, 2008, I have caused a copy of the above and foregoing **Response of United States of America to Defendants' Motion to Strike** to be delivered for service upon the following:

William M. Acker, Jr.
Senior United States District Judge
481 Hugo L. Black United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

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

Frank M. Bainbridge
Bruce F. Rogers
Bainbridge, Mims, Rogers & Smith, LLP
Post Office Box 530886
Birmingham, Alabama 35253

Robert J. McLean
Post Office Box 430024
Birmingham, AL 35243

s/Joel A. Williams
OF COUNSEL