

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v.

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

Case No. 2:07-CR-325-RV

**REQUEST FOR AN EVIDENTIARY HEARING ON THE
UNCONSTITUTIONAL APPOINTMENT OF PRIVATE COUNSEL**

COME NOW Defendants Richard F. Scruggs and The Scruggs Law Firm, P.A. (collectively “Scruggs”) and file this pleading styled REQUEST FOR AN EVIDENTIARY HEARING ON THE UNCONSTITUTIONAL APPOINTMENT OF PRIVATE COUNSEL and request an evidentiary hearing on the unconstitutional appointment of private counsel who have brought the Allegations against Scruggs resulting in a defect in instituting the prosecution pursuant to Fed. R. Crim. P. 12(b)(3)(A) (2002).

On February 8, 2008, this Court has set for hearing Scruggs’s Response to the Court’s Order to Show Cause, along with other matters. Doc. 24. Scruggs has asked the Court to dismiss the Allegations as a matter of law because the Injunction at issue contained an express law-enforcement exception, as confirmed by the Eleventh Circuit’s opinion in *E.A. Renfroe v. Moran*, 2007 WL 2404719(11th Cir. Aug. 24, 2007); because the district court lacked jurisdiction to hold him in contempt, as a nonparty to the proceedings involving Renfroe and Cori & Kerri Rigsby; because Judge Acker’s continued involvement in the proceedings has fatally tainted the Allegations; and because Rule 42’s provision allowing a

court to appoint private counsel to prosecute a criminal contempt is unconstitutional.

If the Court agrees, these Allegations will be dismissed. However, should the Court decide that the Allegations themselves may stand, Scruggs request an evidentiary hearing on the unconstitutional appointment of private counsel who have brought the Allegations against Scruggs resulting in a defect in instituting the prosecution pursuant to Fed. R. Crim. P. 12(b)(3)(A) (2002). It is critical, when private attorneys are appointed to prosecute a criminal contempt, that they be “as disinterested as a public prosecutor who undertakes such a prosecution.” *Young v. United States ex rel. Louis Vuitton et Fils, S.A.*, 481 U.S. 787, 804, 814 (1987) (establishing “a categorical rule against the appointment of an interested prosecutor”). As such, the Court must determine whether the appointed private counsel have “a personal interest, financial or otherwise,” in the conviction of Scruggs. *Id.* at 808 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980)). Likewise, should the Court decide that Judge Acker has “participated in” the private counsel’s investigation, “supervise[d]” their exercise of authority, or “review[ed]” any of their actions, that would render their appointment unconstitutional. *See Morrision v. Olson*, 487 U.S. 654, 677, 681, 683 (1988).

An evidentiary hearing is an appropriate vehicle to test the independence of specially-appointed prosecutors or investigators. *See McKenzie v. Risley*, 915 F.2d 1396, 1397 (9th Cir. 1990) (conducting evidentiary hearing where it was discovered that special prosecutor for capital case had conferred ex parte with judge between conviction and sentencing). For example, in the context of Special Litigation Committees appointed to investigate wrongdoing by corporate board members, courts have enabled shareholder plaintiffs to conduct discovery into the

independence of SLC members. *See, e.g., In re Oracle Corp. Derivative Litigation*, 824 A.2d 917, 928 (Del. Ch. 2003).

Therefore, Scruggs should be entitled to an evidentiary hearing to enable Scruggs and this Court to evaluate private counsel's purported independence. Scruggs anticipates the need for an evidentiary hearing into the following areas:

- Written and oral communications between private counsel and Judge Acker about the criminal-contempt prosecution of Scruggs, including Judge Acker's solicitation or recruiting of private counsel to participate in the prosecution of Scruggs; the preparation and drafting of the Allegations against Scruggs; the responses of private counsel and Judge Acker to the Eleventh Circuit's August 31, 2007 Order concerning the Scruggs's petition for writ of mandamus; Judge Acker's handling of the underlying *Renfro* case; the applicability of Department of Justice rules and regulations to private counsel's conduct; and any other ex parte communications between Judge Acker and the private counsel.
- The manner in which private counsel are paid by the Government, and any oversight Judge Acker has into that process
- All past and present litigation matters in which private counsel are adverse to Scruggs.
- Any professional, social or personal relationships between Judge Acker and private counsel, including but not limited to litigation in which private counsel have appeared before Judge Acker, and membership in professional organizations or committees, or fraternal or social organizations.

- Any cooperation or communication between any civil litigant adverse to Scruggs and the private prosecutors and / or Judge Acker
- Any contact that the private prosecutors have had with the Department of Justice, the Federal Bureau of Investigation or any other federal or state law enforcement agency or with any United States Attorney's Office.

Scruggs believes that a proper vetting of the private counsel's independence will require an evidentiary hearing preceded by document production at which private counsel and Judge Acker are available to testify as to these issues.

Scruggs will be prepared to discuss the logistics of such an evidentiary hearing at the scheduled hearing on February 8.

RESPECTFULLY SUBMITTED, this the 1st day of February, 2008.

/s/ John W. Keker
John W. Keker

/s/ Brook Dooley
Brook Dooley

/s/ Travis LeBlanc
Travis LeBlanc

/s/ Warren Braunig
Warren Braunig

KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, California 94111
(415) 391-5400

/s/ Frank M. Bainbridge
Frank M. Bainbridge

/s/ Bruce F. Rogers
Bruce F. Rogers

BAINBRIDGE, MIMS, ROGERS & SMITH, LLP
Post Office Box 530886
Birmingham, Alabama 35253
(205) 879-1100

/s/ Robert J. McLean
Robert J. McLean

ROBERT J. MCLEAN, ATTORNEY AT LAW
1330 21st Way South, Suite 200
P.O. Box 430024
Birmingham, Alabama 35243

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2008, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the following:

Charles E. Sharp, Sr., Esquire
Joel A. Williams, Esquire
Sadler ■ Sullivan, P.C.
Wachovia Tower, Suite 2500
420 North 20th Street
Birmingham, Alabama 35203

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

/s/ Robert J. McLean
Of Counsel