

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

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

**REPLY OF SPECIAL PROSECUTORS TO
DEFENDANTS' RESPONSE TO SHOW CAUSE ORDER AND
REQUEST FOR ARRAIGNMENT**

Come now the United States, by and through its Special Prosecutors, and replies to Defendants' Response to Order to Show Cause (document 7), and further requests this Honorable Court to set an arraignment in order that the Defendants can enter their pleas and the case be set for trial within the time specified by the Speedy Trial Act.

BACKGROUND

On September 1, 2006, E. A. Renfroe & Company ("Renfroe") filed a suit in the United States District Court for the Northern District of Alabama against two of their former employees (the "Rigsbys") seeking, among other things, the return of documents the Rigsbys had purloined from the State Farm. *E. A. Renfroe &*

Company, Inc. v. Moran and Rigsby, CV-06-WMA-1752. The case was assigned to United States District Court Judge William Acker. The evidence will show that the Rigsbys and Richard Scruggs and his law firm (Scruggs), used the documents in furtherance of multiple lawsuits including their own qui tam action and to get new lawsuits.

On December 8, 2006, following motions and hearings, Judge Acker found that the documents had been purloined, and entered a preliminary injunction ordering the Rigsbys and their “agents, servants, employees, attorneys, and other persons in active concert or participation with them,” to deliver the documents to Renfroe’s attorneys. Renfroe’s attorneys were further order to not disclose the documents to anyone else, including their clients.

Although Scruggs did not formally appear as counsel of record for the Rigsbys in *Renfroe* suit, the evidence will prove that his attorney-client relationship extended to all legal matters in any way concerning the documents; and Scruggs was in fact agents, servants, employees, and attorneys of the Rigsbys, and were otherwise in active participation and legally identified with them at all material times within the meaning of the injunction.

The evidence will also prove that Scruggs believed that the documents were of value to him, that Scruggs thought Judge Acker wrong to issue the injunction, and

that Scruggs did not trust Renfroe's attorneys to obey the Protective Order because he had "no doubt" they would not keep the documents secret to themselves as required by Judge Acker. The evidence will prove that Scruggs believed that compliance with the injunction would be contrary to his economic interests. The evidence will prove that, in substituting his own judgement for that of Judge Acker's, Scruggs deliberately set out to defy the injunction. The evidence will prove that his plan was to pretend to misinterpret the injunction so as to permit him to ship the documents to a friendly third party. The evidence will prove that Scruggs' interpretation and actions were a sham to frustrate the Order and further his interests.

In his response to the order to show cause, Scruggs asks that the allegations of criminal contempt be dismissed, or in the alternative, that other special prosecutors be appointed. He argues first that he is innocent as a matter of law. He argues second that he was not subject to the injunction. He argues third and fourth that the appointment of the special prosecutors violated separation of powers principles and principles of disinterest.

In so far as his arguments are based on the law, they are wrong. In so far as they are based on the facts as he perceives them, he is both wrong and premature.

I.

The *Allegations of Criminal Contempt of Court* filed in this case charge that the Defendants willfully disobeyed an injunction by delivering materials that were subject to the injunction to a third party. The Defendants argue that the injunction permitted such a delivery. They assert that the Eleventh Circuit has already agreed that such a delivery was permitted. They are wrong.

Whether the injunction permitted the Defendant's actions will be determined by the judge or jury at the trial of this case. That determination will be based not only on the words of the injunction but also on the circumstances which give those words meaning. The evidence will demonstrate that the Scruggs not only violated the injunction, but intended to violate it, and why.

The injunction was plain. It ordered the Defendants to "**MANDATORILY**" "*deliver*" to counsel for Renfroe "*forthwith*" the purloined documents, and any copies thereof. The meaning of "mandatorily" "deliver" and "forthwith" in the first, conclusive paragraph is plain. It meant that the documents were to be immediately and physically delivered as order. The "law enforcement" exception in this first operative paragraph is inapplicable to Scruggs. The government authorities were not being ordered to return their copies.

The second paragraph of the injunction *then* proscribed the Rigsbys subsequent conduct. It ordered that the Rigsbys and their “agents, servants, employees, attorneys, and other persons in active concert or participation with them,” not “*further*” “*use*” or “*disclose*” such material except to law enforcement officials at their request. The Rigsbys were also barred from any future misappropriation. The meaning of “further” is plain. It means that *after* the documents were “MANDATORILY delivered” to plaintiffs’ counsel, the Rigsbys *et al* could not take advantage of their knowledge of documents for their own purposes. They were only allowed to “use” or “disclose” the documents to law enforcement. They were not authorized to “deliver” anything to law enforcement nor to disgorge possession of the documents to anyone but Renfroe’s counsel. The “exception” in the second paragraph concerned the copy of the documents already in possession of “law enforcement” from which it could elicit testimony from the Rigsbys.

Together, the terms of the injunction meant only that they could cooperate with law enforcement by discussing with law enforcement what they knew about the documents. This becomes clear with additional facts known to Judge Acker: That in June and July 2006, the Rigsbys gave their only copies of the documents to their attorney Scruggs and to law enforcement (i.e., Mississippi Attorney General’s office); and that the Rigsbys were subpoenaed to testify before a grand jury investigating

State Farm. These and other facts outlined in the Appendix hereto, and further evidence at trial will prove that the aforesaid interpretation and intent is plain and obvious.

Only one with no knowledge of the factual background leading up to the injunction, or one intent on defying its clear order to immediately return the documents in question, could construe the Order as Scruggs contends. As found by Judge Acker, any ambiguity created by Scruggs' twisted construction is so strained and so contrary to the express order, as to lack any credibility whatsoever. The evidence will prove that the Scruggs put self-interest above compliance with the court, and deliberately set out to disobey and circumvent the injunction by shipping the documents to a third party.¹

In *United States v. Fidanian*, 465 F.2d 755 (5th Cir. 1972), cert. denied, 409 U.S. 1054 (1972), Judge Roney, writing for the court in its affirmance of an 18 U.S.C. 401(3) criminal contempt conviction for disobeying an injunction, cited multiple cases for the well established rule of law: "To sustain a finding of willfulness, the government need not prove evil motive on the part of the defendant. It is sufficient

¹ The Defendants complain that the *Allegations of Criminal Contempt of Court* used the term "third party" instead of identifying the recipient as a law enforcement official. That is because, as explained next, the transaction was a sham.

if the defendant's actions were deliberate, voluntary, or intentional, as opposed to accidental, inadvertent or negligent." *Id.* at 760.

Another 18 U.S.C. 401(3) case is *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974) in which retired U. S. Supreme Court Justice Clark was on the panel, affirming a conviction despite defendants' contention that the order was vague, uncertain or ambiguous and hence its actions were not criminally willful. The court stated the law as follows:

Willfulness, for the purpose of criminal contempt, does not exist where there is a "good faith pursuit of a plausible though mistaken alternative." *In re Brown*, supra at 1007. To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible. The defendant may not avoid criminal contempt by "twisted interpretations" or "tortured constructions" of the provisions of the order. *United States v. Gamewell*, 95 F. Supp. 9, 13 (D. Mass. 1951). *See also, United States v. Christie Indus., Inc.*, supra at 1007. As Chief Judge Robson noted, a defendant, if he has doubts as to his obligations under an order, may petition the court for a clarification or construction of that order. 363 F. Supp. at 534. *See, McComb v. Jacksonville Paper Co.*, 336 U. S. 187 (1949). **While a defendant is, of course, not required to seek such a clarification, a failure to do so when combined with actions based upon a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the decree.** *Federal Trade Comm'n v. Gladstone*, 450 F. 2d 915 (5th Cir. 1971); *United States v. Tijerina*, 412 F.2d 661, 667 (10th Cir. 1969), cert. denied, 396 U. S. 990. (emphasis added)

The very issuance of the order puts the party on notice that his past acts have been wrongful. "No concept of basic fairness is violated by requiring a person in this position to be more than normally careful in

his future conduct.” *United States v. Custer Channel Wing Corp.*, 247 F. Supp. 481, 496 (D. Md. 1965), *aff’d*, 376 F. 2d 675 (4th Cir. 1967), *cert. denied*, 389 U.S. 850.

Scruggs did not seek a clarification or permission from the court. The evidence will show that he was advised to do so by the Attorney General’s office. This constitutes willful ignorance and conscious assumption of the risk, which is further grounds for criminal liability.²

Even if the injunction could be misinterpreted generally to permit the shipment of the documents to a law enforcement official instead of to Renfroe’s counsel, the Defendants are still criminally liable because their purported “compliance” with the injunction was a sham. It is well settled that a transaction that is legal in form but is in fact a sham does not shield a perpetrator against civil or criminal liability. *Braxton v. United States*, 858 F.2d 650 (11th Cir. 1988) (transfer of property to avoid forfeiture a sham); *United States v. Carroll*, 252 F.3d 1193 (11th Cir. 2001) (same); *United States v. Smith*, 572 F.2d 1089 (5th Cir. 1978) (transfer of store from disqualified food stamp participant to qualified spouse a sham); *United States v. Maduno*, 40 F.3d 1212 (11th Cir. 1994) (marriage to obtain citizenship a sham); *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996) (loan agreement a sham); *United States v.*

² The advice to seek clarification and permission of the Court may even have arisen to the level of a precondition. See footnote 5.

Sheer, 168 F.3d 445 (11th Cir. 1999) (borrowers a sham); *United States v. Cunningham*, 194 F.3d 1186 (11th Cir. 1999) (purchase of chemicals a sham); *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001) (processing of medical patients a sham); *United States v. Wilson*, 175 F.3d 294 (11th Cir. 2006) (straw purchase of firearms a sham); *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003) (same); *United States v. Williamson*, 339 F.3d 1295(11th Cir. 2003) (business set up as a sham); *United States v. Day*, 405 F.3d 1293 (11th Cir. 2005) (not for profit organizations were shams); *United States v. Corliss*, ___ F.3d ___ (11th Cir. Oct. 31, 2006) (same); *United States v. McLean*, 227 Fed. Appx. 844 (11th Cir. 2007) (trust a sham) See also *Miller & Lux Incorporated v. East Side Canal and Irrigation Company*, 211 U.S. 293 (1908) (acquisition of business in another state to acquire diversity to avoid state court a sham), and *In Re BellSouth Corporation*, 334 F.3d 941 (11th Cir. 2003) (associating an attorney to disqualify judge a sham).

In such cases, the issue is not what the defendants did, but what they intended.

Intent is usually proved by circumstantial evidence, including evidence of motive.

There will be a significant amount of such evidence offered at the trial of this case.³

³ Among other things, the evidence will show that the documents were shipped not for law enforcement purposes – the recipient law enforcement official already had a copy of the same documents – but to assist the Defendants in their commercial business endeavors, and lawsuits. This evidence will include evidence of the relationship between the Defendants, the Rigbys, the Scruggs Katrina Group, and other persons and entities. It will include evidence of the words and actions of the Defendants’ agents and associates in various litigations. Much of this evidence is not part of the

If the Defendants' delivery of documents to a purported law enforcement official was a sham, their reliance on the words of the Eleventh Circuit is of no help. Their reliance is of no help anyway, sham or no sham. The Defendants take the Eleventh Circuit's words out of the context of the issues on appeal as demonstrated by reading the Rigsbys' brief and the appellate opinion. The Eleventh Circuit did not address Scruggs' actions nor did it have the evidence that Scruggs decided that Renfroe's attorneys could not be trusted, hence substituting his judgment for Judge Acker's. The Eleventh Circuit did not address the violation of the injunction which ordered the Defendants to deliver the purloined documents to Renfroe's counsel forthwith.⁴

record in the Renfroe case, which illustrates why the Defendants' motion to dismiss is premature. There is evidence in the Renfroe case that supports the proposition that the Defendants created a sham. For example, when the Rigsbys were sued for the return of the documents, they did not assert as a defense that they no longer possessed them, and thus could not return them. Only after the injunction became final did they suddenly disclaim possession or control of the documents and claim that Scruggs had sole possession and control of the documents. Scruggs then asserted that because he was not nominally a party or attorney of record in the *Renfroe* case, he was not subject to the injunction, and thus free to do whatever he liked with the documents. We will argue that these machinations were a sham designed to avoid compliance with the injunction while protecting Scruggs and the Rigsbys from liability for contempt of court. No doubt the Defendants will demur; the trier of fact will have to make its own credibility choices and inferences from this evidence. This further illustrates that the Defendants motion to dismiss is premature. See also footnote 5.

⁴ Indeed, what the Eleventh Circuit did do in a separate action filed by Scruggs, was deny Scruggs' Petition for Writ of Mandamus seeking dismissal of the charges on the basis of Scruggs' arguments which presumably are the purported defenses.

The Eleventh Circuit addressed only the Rigsbys' wrongful conduct and their contentions that the Injunction was contrary to public policy and exposed them to criminal prosecution by the Mississippi Attorney General. The Rigsbys spuriously argued that by returning the documents to Renfroe's counsel as ordered, which were a copy of the same documents they had already turned over to the Attorney General's office and which were being used as evidence, they would somehow be in violation of grand jury secrecy rules.⁵ They also contended that testifying at the grand jury

⁵ This argument was based on assertions made by a special assistant attorney general for Mississippi at the injunction hearing in the district court. We intend to produce evidence at trial of the remarkably close relationship between Scruggs and the Mississippi Attorney General. On July 16, 2007 the Attorney General, Jim Hood, wrote a letter to Alice Martin, U.S. Attorney for the Northern District of Alabama, stating that Scruggs was a "confidential informant" and urged the U.S. Attorney not to prosecute Scruggs for this contempt. Scruggs' listings in Martindale-Hubbell boast a close relationship with the Mississippi Attorney General related to civil litigation. Scruggs was hired by the predecessor of Jim Hood, Michael Moore, in connection with the class action lawsuit against the tobacco industry, which resulted in a \$248 billion settlement agreement in 1998 and a reported \$1 billion fee to Scruggs. According to the Mississippi Secretary of State's office, Scruggs has donated \$44,000 to Hood's campaign in direct cash payments. This does not include any contributions to any PACS which may provide support for Hood's campaign. The Attorney General, along with Scruggs, urged acceptance of a settlement of at least one Katrina class action lawsuit which would have paid Scruggs millions in fees; that settlement was rejected because the judge determined that it was not in the best interest of the clients and that Scruggs had not earned such fees. The shipment of the documents to the Attorney General in disobedience of the injunction in this case took place after a conversation between Scruggs and Hood wherein Scruggs justified the shipment because he "did not trust" Renfroe's attorneys to keep the documents secret as required by the injunction. This is not grounds for disobeying an injunction. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery," *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911), as cited in *United States v. United Mine Workers of America*, 330 U.S. 258 (1949). There is evidence that Scruggs was advised to specifically obtain the court's permission before shipping the documents to the Attorney General's office, and that he indicated that he would. He did not. All this evidence constitutes further proof that the "law enforcement" excuse was a sham. Scruggs even subsequently requested the documents back, as Ms. Schloemer's letter acknowledged

would put them in violation of the injunction. The Rigsbys' "fall back arguments" had "no merit either" according to the Eleventh Circuit.

The Rigsbys' argument before the Eleventh Circuit makes their post-injunction declaration that they could not comply with the injunction anyway because they did not possess the documents and had not possessed them for many months, all the more astonishing. In their answer in *Renfro*, this defense was not presented. Indeed, it was Scruggs who tried to benefit from the meritless appeal. It was Scruggs who selected and pays for Rigsbys lawyers and attorneys fee. (See footnote 2). The Eleventh Circuit was not privy to this declaration or the other evidence that will be presented to this court at trial. Its opinion, like Judge Acker's Order, simply recognized that the June 2006 delivery of the documents to law enforcement was not an issue in *Renfro*.

II.

Similarly, the decision of whether the Defendants' were subject to the jurisdiction of the court must await the submission of the evidence at trial and reasonable inferences and credibility choices arising from the evidence. The *Allegations of Criminal Contempt of Court* allege that the defendants were

that the Attorney General's office could do.

agents, servants, employees, and/or attorneys of Cori Rigsby Moran and Kerri Rigsby and were otherwise in active concert or participation with them within the meaning of the *Memorandum Opinion and Preliminary Injunction*. . . . [and] were otherwise legally identified with Cori Rigsby Moran and Kerri Rigsby so as to be subject to penalty for criminal contempt should they willfully violate and disobey, or willfully cause, aid, or abet a violation and disobedience of, the aforesaid order.

The evidence, which will, again, include more than the record in the *Renfroe* case, will show that Scruggs' defense that he was not subject to the Injunction is wrong and he knew it was wrong when he made his urgent Friday night call to discuss strategy to avoid compliance with the Order he received that day.

On page 2 of Scruggs' brief, the Defendants' cite *Young*, supra. However, Scruggs' brief fails to disclose that (1) the quoted cite was dicta rather than the majority holding of the case and (2) that *Young* did not even concern the issue of jurisdiction over the parties to that case. The majority holding in *Young* actually supports the actions of Judge Acker.

Rule 65(d) Federal Rules of Civil Procedure states, as follows:

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

In *Waffenschmidt, et al, v. McKay, et al*, 763 F.2d 711 (5th Cir. 1985), the Court stated the rule as follows:

An injunction binds not only the parties subject thereto, but also nonparties who act with the enjoined party. *Ex Parte Lennon*, 166 U.S. 548, 555, 17 S. Ct. 658, 660-61, 41 L. Ed. 1110 (1897); *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 344 (9th Cir. 1966); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930); Fed.R.Civ.P. 65(d). Rule 65(d):

is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in “privity” with them, represented by them or subject to their control. In essence. . . defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 14, 65 S. Ct. 478, 481, 89 L. Ed. 661 (1945). *See also, Ex parte Lennon*, 166 U.S. at 554, 17 S. Ct. at 660; *Reich v. United States*, 239 F.2d 134, 137 (1st Cir. 1956), cert. denied, 352 U.S. 1004, 77 S. Ct. 563, 1 L. Ed. 2d 549 (1957); *Alemite*, supra at 832.

This principle could easily be thwarted if a court could only enforce its injunction over nonparty aiders and abettors who resided within the court’s territory for service of process. The nationwide scope of an injunction carries with it the concomitant power of the court to reach out to nonparties who knowingly violate its order. *See Ex parte Lennon*, 166 U.S. at 555, 17 S. Ct. at 660-61; *Alemite*, 42 F.2d at 832. Cf. *Wilgus v. Paterson*, 335 F. Supp. 1385, 1389-90 (D. De. 1972).

In *Waffenschmidt*, two persons who were not parties to the pending case, contested the court’s determination that it had personal jurisdiction over them so as

to properly hold these persons in contempt of its injunction. These two persons, like Scruggs, testified before the court and while denying that they were subject to the injunction, also denied conduct which violated the order. The court found no error in the trial court's determination that the respondents stories were a mere pretense and that the witnesses' motives and demeanor justified a finding of their guilt in aiding or abetting those parties with whom they had an identity of interest.⁶

The seminal pronouncement and the rule regarding the binding of non-parties to an injunction were established even before Rule 65(d); "The respondent (Scruggs) must abet the defendant (Rigsbys) or be legally identified with him (them)." See, *Alemite; Regal Knitwear*, supra. The facts that will be proved in this case could not be more on point – Scruggs could not be more legally identified with the Rigsbys than if Renfroe had made Scruggs a named party defendant. Scruggs was the one holding the documents purloined by the Rigsbys. Scruggs used those documents on the

⁶ *Waffenschmidt* states: Courts possess the inherent authority to enforce their own injunctive decrees. *United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1972) ("Rule 65(d) as a codification rather than a limitation of the courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment."); *Berry v. Midtown Service Corp.*, 104 F.2d 107, 110 (2d Cir. 1939). *Berry* stated:

Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender. Federal courts, equally with those of the state, are possessed of ample power to protect the administration of justice from being thus hampered or interfered with. Nor is the power in any wise limited by the predecessor to 18 U.S.C. § 401, 104 F.2d at 110-11.

Rigsbys' behalf; Scruggs continuously represented the Rigsbys in legal issues and matters related to the very documents in question; Scruggs represented the Rigsbys in a sealed plaintiff case seeking millions in fees for his firm and his clients; Scruggs was authorized by the Rigsbys to use the documents to nationally advertise on ABC 20/20 on August 25, 2006, and they appear on Scruggs' website in the context of a campaign soliciting clients; Rigsby appeared on television soliciting clients without disclosing she was an employee of Scruggs and being paid \$150,000 a year; Scruggs filed pleadings in support of the Rigsbys unmeritorious appeal because his interests were identical with his clients; Scruggs employed the Rigsbys, paying them each \$150,000 annually, selected their trial counsel in *Renfro*, paid their legal fees, monitored the *Renfro* case closely, and received the very order in question on the day it was entered. Indeed, the evidence shows Scruggs knew about it before the Rigsbys themselves and having been entrusted with the documents, decided what would be done with them without first advising his clients and in defiance of his clients' subsequent *pro forma* requests.

Further, one does not have to be a party or attorney in a case to be guilty of aiding and abetting a contempt of court. As stated in *USA Ex rel v. Vuitton Et Fils, et al*, 602 F. Supp. 1052 (So. Dist. N.Y. 1985):

. . . "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or **procures its commission, is punishable as a principal**". The elements necessary to prove aiding and abetting are "the commission of the underlying offense by someone, a voluntary act or omission, and a specific intent that such act or omission promote the success of the underlying criminal offense." *United States v. Perry*, 643 F.2d 38, 46 (2d Cir.), cert. denied, 454 U.S. 835, 102 S. Ct. 138, 70 L. Ed. 2d 115 (1981).

The standard of proof as articulated by Judge Learned Hand, *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), and currently applied in this Circuit, *United States v. Clemente*, 640 F.2d 1069, 1079 (2d Cir. 1981), demands that a defendant must "in some sort associate himself with the venture . . . participate in it as something that he wishes to bring about, and seek by his action to make it succeed."

The evidence will demonstrate that Scruggs and his actions fit these elements.

The evidence will show Scruggs procured the commission of the contempt offense and is punishable as a principal.⁷

III. & IV.

The Defendants reliance on *Young v. United States ex rel Vuitton et Fils*, 481 US 787 (1987) and their attack on Judge Acker and the Special Prosecutors is unfounded as outlined in the previously filed *Response of Special Prosecutors* to the Order of the Eleventh Circuit. That *Response* and the *Response of William M. Acker*,

⁷ It is not necessary to specifically allege in a charging instrument that a defendant aided and abetted the commission of an offense. *United States v. Griffin*, 705 F.2d 434 (11th Cir. 1983), citing *United States v. Munoz*, 681 F.2d 1372 (11th Cir.), modified on other grounds, 692 F.2d 116 (11th Cir. 1982).

Jr. have been submitted to the court for its consideration. Judge Acker followed the steps outlined in *Young* and the procedures established by Federal Rules of Criminal Procedure 42(a)(2). Scruggs' reliance on the dissent in *Young* is not persuasive and is no basis for Defendants' requested relief.

Contrary to the allegations of the Defendants, Judge Acker does not have any "power" to require the Special Prosecutors to do or not do anything. There is no evidence that the Court is somehow controlling the Prosecutors. While he had the power to appoint prosecutors, they have the power to refuse such appointments, and once appointed, have the power, without restraint, to proceed, or not proceed, as they deem best. Judge Acker's power ended with raising the allegations of contempt, and nothing indicates the contrary.

At this stage, Judge Acker is merely a witness and his court's authority the victim. The Defendants have asked that the Special Prosecutors, whoever they are, comply with Department of Justice guidelines. Section 3-7.320 of the *United States Attorney's Manual* specifically requires prosecutors to consult with and give consideration to victims and witnesses. The same is required by law. See 18 U.S.C. § 3771. Discussions with Judge Acker have been, and will be had by the prosecutors in the same light and given the same weight as those of victims and witnesses.

Scruggs' brief cites *Morrison v. Olson*, 487 U.S. 654 (1988), which actually states, "We have recognized that courts may appoint private attorneys to act as prosecutors for judicial contempt judgments. *See, Young*," (supra.) *Morrison*, held that the statute authorizing appointment of Special Prosecutors (now referred to as independent counsel) was constitutional. It has nothing to do with the Scruggs' case. 28 U.S.C. 49 provides that independent counsel are appointed by a three judge panel, and those judges may not sit as judges in a case being prosecuted by the independent counsel. The esoteric "separation of powers" contentions in Scruggs' brief are quite different from the lengthy discussions concerning Article III of the Constitution and the issue of control by the three judge panel over an independent counsel in *Morrison*.

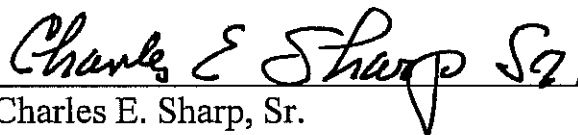
Judge Acker did the only reasonable thing he could do when Alice Martin declined the referral. He appointed disinterested attorneys to consider the case. According to Scruggs, Judge Acker should have simply accepted the defiance of his Order. The Special Prosecutors agreed that probable cause existed to file charges.

Further, there is no merit to Scruggs' criticism of Judge Acker for issuing an Amended Order concerning the Rigsbys, after properly considering newly discovered evidence of the Rigsbys' qui tam suit and its December 8, 2006 disclosure of evidence in that civil case which is prohibited by the Injunction. Scruggs' brief ignores this new evidence and instead makes more unfounded accusations.

Jurisdiction over Scruggs did not need shoring up. Scruggs knew he was subject to the Injunction. That is why Scruggs called his colleague on Friday night to discuss strategy to avoid compliance.

CONCLUSION

There is no legal or factual basis for Scruggs' motion to dismiss or his request for an evidentiary hearing. *See United States v. Heldt*, 668 F. 2d 1238 (D.C. Cir. 1981), discussed in "Response by Special Prosecutors," and ignored by Scruggs. The only hearing which needs to be scheduled is the trial of the case, from which Scruggs can appeal if convicted as any criminal defendant has the right to do.



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



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

for 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 *12th* day of *October*, 2007, I have caused of the above and foregoing **Reply of Special Prosecutors to Defendants' Response to Show Cause Order and Request for Arraignment** 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

J. Vail Rasmussen

OF COUNSEL