

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

**MOTION TO STRIKE PRIVATE COUNSEL'S MOTION FOR THE
PRODUCTION OF DOCUMENTS PURSUANT TO RULE 17(C)**

COME NOW Defendants Richard F. Scruggs and the Scruggs Law Firm (collectively "Scruggs") and hereby move to strike the Motion for the Production of Documents Pursuant to Rule 17(c) (Doc. 25), filed by the private counsel on January 16, 2008. Scruggs has contested the authority of these private counsel to take any action against them because:

- 1) Scruggs is innocent of contempt as a matter of law;
- 2) the private counsel lack jurisdiction to charge Scruggs with criminal contempt because Scruggs was not a party to the dispute and Judge Acker found that the actual parties (Cori & Kerri Rigsby) committed no criminal contempt, *see Young v. United States ex rel. Vuitton et Fils S.A.*, 487 U.S. 787 (1987); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930);
- 3) the private counsel lack the independence and neutrality required by *Young*, and *Morrison v. Olson*, 487 U.S. 654 (1988); and

- 4) the appointment of these private counsel, following the U.S. Attorney's refusal to prosecute, violates separation-of-powers principles and is unconstitutional.

(Doc. 8). Whether the private counsel's appointment is constitutionally valid, and whether the Allegations they filed against Scruggs must be dismissed as a matter of law, are already set for hearing on February 8, 2008, before this Court (Doc. 24). Until the threshold issue of the private counsel's authority is decided, discovery against Scruggs is premature and should not be permitted.

Should the Court decide that discovery served by these private counsel is appropriate, Scruggs will promptly move to quash the subpoena, as allowed by Rule 17(c)(2).¹ Scruggs should not be required to respond to the burdensome and irrelevant "fishing expedition" that the private counsel seek to conduct through the guise of a Rule 17 subpoena. *See United States v. Nixon*, 418 U.S. 683, 699-700 (1974).²

¹ Rule 17 is not the proper vehicle for obtaining discovery from a defendant in a criminal case; instead, party discovery falls within the ambit of Rule 16. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951) ("It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. . . . Rule 17(c) was not intended to provide an additional means of discovery."); *United States v. Walters*, 558 F. Supp. 726, 727-28 (D. Md. 1980) (chastising the government for "attempting to obtain under Rule 17(c) what it cannot obtain under Rule 16"). Having already brought criminal Allegations against Scruggs, the private counsel may not seek civil-style discovery against Scruggs in the hope of bolstering and expanding their case.

² The wide-ranging scope of the private counsel's proposed subpoena bears little relation whatsoever to the factual issues in this case. For example, while the private counsel's Allegations charged Scruggs with willfully violating an injunction in the *Renfroe v. Rigsby* case through the specific act of delivering documents to the office of a "third party" (namely, the Office of Attorney General Jim Hood) on or about December 12, 2006, private counsel demand discovery of correspondence between Scruggs and any other party (at any time) concerning the distribution, copying and return of the documents at issue (Doc. 25-2, ¶ 9); documents and correspondence dating back months, and, in some cases, years, before Judge Acker's injunction (*Id.* ¶¶ 1-4, 6-12); and even communications with ABC News (*Id.* ¶ 8)! Not only is this discovery irrelevant and unnecessary, but it also would be extremely burdensome and would implicate the attorney-client privilege, the attorney work product privilege, the joint prosecution privilege and Scruggs's Fifth Amendment privilege.

RESPECTFULLY SUBMITTED this the 23rd day of January, 2008.

/s/ John W. Keker

John W. Keker

/s/ Brook Dooley

Brook Dooley

/s/ Warren Braunig

Warren Braunig (* *Pro Hac Vice pending*)

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2008, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the following:

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