No. 07-6053

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)
	)
Appellee,	)
	)
vs.	)
	)
	)
HERBERT S. MONCIER	)
	)
Appellant.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Appellant makes the following disclosures pursuant to Sixth Circuit Rule 26.1:

1. Appellant is not subsidiary or affiliate of a publicly owned corporation.

2. There is no publically owned corporation, not a party to this appeal that has a financial interest in the outcome.

_____
Counsel for Appellant
Date:_____

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STATEMENT REGARDING ORAL ARGUMENT

Appellant suggest oral argument is necessary to understanding the issues in this case.

JURISDICTIONAL STATEMENT

1. Jurisdiction was in the United States District Court pursuant to 18 U.S.C. § 3231.

2. This appeal is of right pursuant to Fed. R. App. P. 4(a); Fed.R.Crim.P. 32(j)(B); and 28 U.S.C. § 1291.

3. Notice of Appeal was timely filed.

4. This appeal is from the final judgment that disposed of all parties' claims.

STATEMENT OF THE ISSUES

1. Can Attorney Herbert S. Moncier be convicted of committing a criminal offense where Moncier was reasonably attempting to perform an ethical duty to his client, Michael Vassar, required of Moncier by law?

2. Is the evidence sufficient to convict Moncier where Moncier's words were neither loud nor sarcastic but were a reasonable request to District Judge J. Ronnie Greer for Moncier to be allowed to perform his duty to confer and advise Moncier's client, Vassar?

3. Was Judge Greer's command to Moncier to not say another word "lawful" if that command included Moncier not requesting permission of Judge Greer to perform his duty to confer and advise Vassar or if that command prohibited Moncier from performing his duty to confer and advise Vassar?

4. Was Judge Greer disqualified from trying Moncier for contempt pursuant to Fed.R.Crim.P. 42(c); 28 U.S.C. § 455; Code of Conduct for United States Judges; or the constitution?

5. Was Moncier denied his constitutional right to a jury trial?

6. Was Moncier denied his constitutional right to cross-examine and confront personal knowledge and observations Judge Greer stated as "facts" in his May 30, 2007 order of conviction and did Judge Greer considering that "testimony" after Moncier's trial deny Moncier his constitutional right to present a complete defense?

7. Was the Greeneville division of the United States Attorney's office disqualified from prosecuting Moncier?

SUMMARY OF ARGUMENTS

1. Moncier had a duty imposed on him by law to confer and advise Vassar during Judge Greer's questioning Vassar in the presence of the prosecutors and FBI. *see* EDTN LR 83.6; Tennessee Supreme Court Rule 8, Rules of Professional Conduct Preface, RPC 1.1, 1.2(d), 1.3, 1.4, 1.14, 1.16, 2.1, 3.1, 3.3, 3.4, and 3.5 and Commentaries.

2. Moncier had a duty to object in order not to waive any rights of Vassar or any errors that may have been committed as District Judge Greer was questioning Vassar. *see United States v. Vonner,* 516 F.3d 382 (C.A.6 2008); *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Offutt v. United States,* 348 U.S. 11 (1954).

3. Moncier cannot be convicted of criminal contempt of court for performing a duty required of him by law. *Sacher v. United States*, 343 U.S. 1 (1952); *In re McConnell*, 370 U.S. 230 (1962); *In re Dillinge*r, 461 F 2d. 389 (7thCir.1972); *Brogan v. United States*, 522 U.S. 398 (1998); *see also Corpus Juris Secunum*, Crimlaw §56.

4. The Rule of Lenity requires any ambiguity of the language of 18 U.S.C. §401 that may be applied to restrict Moncier from reasonably attempting to perform his duties, as an advocate, must be resolved in favor of Moncier. *see United States v. Thomas*, 211 F.3d 316, 321-322 (2000).

5. Moncier's duty to confer and advise Vassar necessarily includes potential obstruction of Judge Greer questioning Vassar in the presence of the prosecutors and FBI when Judge Greer's questioning may effect substantial and serious Fifth Amendment rights of Vassar. *see Miranda v. Arizona*, 384 U.S. 426 (1966); *Maness v. Myers,* 419 U.S. 449, 461 (1975).

6. The evidence was insufficient to support a conviction of violating 18 U.S.C. § 401(a)(1) or (3) by Moncier's works "May I speak to my ... [Client]" where those words were not uttered in a disrespectful or sarcastic manner but were for the purpose of Moncier's attempting to perform his duty to confer and advise Vassar. *Sacher, id.; In re McConnell*, *id.; Offutt, id.; In re Dillinge*r, 461 F 2d. 389 (7thCir.1972)

7. The evidence was insufficient to establish the required element of actual obstruction or blocking of Judge Greer in administrating justice when Judge Greer could have responded by "no" and completed questioning of Vassar. *Sacher, id.; In re McConnell id.* 270 U.S. 236.

8. The evidence was insufficient to establish the required element of actual obstruction or blocking of Judge Greer in administrating justice when Judge Greer could have completed questioning of Vassar after placing Moncier in jail and no manifest necessity required Judge Greer to terminate the proceedings. *United States v. Wilson*, 421 U.S. 309, 319 (1975); *In re Smothers*, 322 F.3d 438 (6th.Cir.2003); *In re Dillinge*r, 461 F 2d. 389 (7thCir.1972)

9. The evidence was insufficient to establish actual obstruction or blocking of Judge Greer in administrating justice when manifest necessity did not require Judge Greer choose the most severe measure he viewed was necessary to administer justice. *United States v. Jorn*, 400 U.S. 470 (1971); *In re Smothers*, *id.*

10. The command of Judge Greer to Moncier that Moncier not perform a duty to Vassar, or not request permission to do so, constituted a completed constitutional structural defect in the proceedings and was insufficient to establish the "lawful" element of the command for there to be a violation of 18 U.S.C. §401(3). *see United States v. Gonzalez-Lopez*, 548 U.S. 140, (2006).

11. Negligence or mistake of Moncier in his believing he could request clarification of Judge Greer's command to confer and advise Vassar is insufficient to establish a violation of 18 U.S.C. §401. *In re Snyder*, 472 U.S. 634

(1985); *In re Chandler*, 906 F.2d 248, 250 (6th.Cir.1990) quoting from *TWM Mfg. Co. v. Dura Corp.,* 722 F.2d 1261, 1272 (6th.Cir.1983)

12. Judge Greer was disqualified to sit in judgment in this case as his "impartiality might reasonably be questioned"; he had become embroiled in a controversy with Moncier; he had made statements in other proceedings about opinions he had of Moncier; he had personal knowledge of facts pertaining to the alleged contempt; and he was a witness to facts necessary to constitute the contempt conviction. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Gray v. Mississippi*, 481 U.S. 648 (1987); *Offutt v. United States*, 348 U.S. 11, 17 (1954); *Ungar v. Sarafite*, 376 U.S. 575 (1964); *In re Murchison*, 349 U.S. 133, 136, (1955)Fed.R.Crim.P. 42(a)(3); 28 U.S.C. §455(a), 455(b)(1) and 45(b)(5)(iv); and Code of Conduct United States Judges.

13. Moncier was denied his constitutional right to confront and cross-examine Judge Greer on facts relied on by Judge Greer in his May 30, 2007 opinion convicting Moncier. *Davis v. Alaska,* 415 U.S. 308 (1974); *Crawford v. Washington,* 541 U.S. 36 (2004).

14. Moncier was denied his Fifth and Sixth Amendment Constitutional right to a jury to determine facts necessary for Judge Greer to sentence Moncier. *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New*

Jersey, 530 U.S. 466 (2000); *Blakely v. Washingto*n, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

15. Moncier was denied his constitutional right to present a complete defense by Judge Greer relying on "facts" in convicting Moncier that were not presented at Moncier's trial. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)

16. The Greeneville Division of the United States Attorney's office was disqualified from prosecuting Moncier where members of that office had a personal interest in Moncier being convicted. *Young v. United States*, 481 U.S. 787, 804, (1987); EDTN LR 83.6, RPC 1.7 and Commentary 17, 3.5; United States Attorney's Manual Sections 9-2.032 through 3-2.170.

STATEMENT OF THE CASE

Attorney Herbert S. Moncier had represented Michael Vassar since 10/4/05 in Vassar's defense of two indictments before District Judge J. Ronnie Greer. [S.R.77:Supp.1:Indictment,J.A.349;S.R.77:Supp.8:Indictment,J.A.349][1]

At a sentencing hearing on 11/17/06 the following occurred:

> **The Court**: Mr. Moncier, one more word and you're going to jail.
>
> **Mr. Moncier**: May I speak to my -- [Client][2]
>
> **The Court**: Officers, take him into custody. We'll be in recess.
>
> [12:47 p.m.]

[Exhibit3:Transcript11/17/96,p.107,J.A.646]

Moncier was placed in jail; disqualified from representing Vassar; and cited by Judge Greer for criminal contempt of court. [R.1:Notice, J.A.12]

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[1] Moncier filed a motion to supplement the record designated as Docket 77 in the docket sheet. On 9/24/08 this Court denied Moncier's motion but held "the motion to supplement . . . shall be referred to the merits panel for such consideration, if any, that panel deems necessary." Accordingly, Moncier will cite to the supplemental materials with the abbreviation "S.R.77" for the merits panel to consider where deemed necessary.

[2] The typed transcript does not contain [Client] after "--". Moncier added [Client] in brackets because that is what Moncier was attempting to say. The court reporter did not either hear Moncier say "Client" or Judge Greer spoke over Moncier. Judge Greer had already prohibited Moncier from speaking to the Court. Moncier's use of the possessive pronoun "my" could only relate to "Client."

On 4/27/07, over Moncier's objections, motions to dismiss and demands for a jury trial, the Greeneville Division of the United States Attorney's office prosecuted Moncier for criminal contempt before Judge Greer. [R.62:Transcript4/24/07,J.A.407-520]

On 5/30/07 Judge Greer found Moncier guilty of criminal contempt of court under 18 U.S.C. §401(1) and 401(3). [R.44:M&O,J.A.209]

On 8/27/07 Judge Greer sentenced Moncier to one-year probation; a fine of $5,000.00; 150 hours of community service; 3 extra hours of ethics CLE; and completion of an anger management course. [R.71:Judgment,J.A.16]

Moncier moved to stay the sentence. [R.72:MotiontoStay,J.A.336] Judge Greer denied a stay except to permit Moncier to deposit the $5,000.00 fine with the Clerk pending appeal. [R.75:Order,J.A.344]

Timely notice of appeal was filed to this Court. [R.68:NoticeofAppeal,J.A.15]

STATEMENT OF THE FACTS

*United States v. Michael Vassar**
EDTN 2:05-cr-70 and EDTN 2:05-cr-75

Vassar was indicted in two separate indictments for a total of six offenses and was subject to a minimum mandatory 20-years to life sentence if convicted of the lead offenses in each indictment. [S.R.77:Supp.1:Indictment,J.A.349;S.R.77:Supp.10:Indictment,J.A.350]

On 1/9/06 a severance of offenses in 2:05-cr-70 was ordered resulting in Vassar facing three jury trials. [S.R.77:Supp.2:Order,J.A.349] Vassar's jury trials were set beginning on 2/14/06; the Court would begin the second trial after a verdict in first trial, and the Court would begin the third trial after a verdict in the second. [S.R.77:Supp.3:Order,J.A.349]

Discovery violations by prosecutors delayed Vassar's first trial. Vassar moved to exclude untimely discovery pursuant to Fed.R.Crim.P. 16(d)(2)(C) and refused to consent to a continuance. The prosecution would not have been able to obtain a conviction had Vassar's motion been granted. Judge Greer blamed Moncier for putting Judge Greer in a "box" by refusing to consent to a continuance whereby the prosecutors would be able to get evidence admitted. Instead, Judge Greer "sanctioned" the Government by ordering Vassar released from detention and continued Vassar's trials. [S.R.77:Supp.4:Order,J.A.349]

Vassar's first trial began 2/14/06 and ended 2/16/06. The jury found Vassar not guilty. [S.R.77:Supp.5:JuryVerdict, J.A.349]

Prosecutors then dismissed the severed charges set for the second trial. [S.R.77:Supp.6:MotionDismiss,J.A.349]

Before Vassar's third trial, a federal investigation of Harold Grooms was leaked which led to massive news-coverage about Grooms' personal, political and financial ties to the Governor of Tennessee amid inferences that Grooms was about to be charged.

Grooms hired Moncier. Moncier first assured himself there were no conflicts with Moncier's other clients, including Vassar and a Michael Gunter. [S.R.77:Supp.9:MoncierAffidavit,J.A.350;S.R.77:Supp.9:AffidavitVassar,J.A.350]

On 3/9/06 in *United States v. Michael Gunter* EDTN No. 2:06-cr-05 Moncier notified the Court and the Greeneville United States Attorneys Office that Moncier represented Grooms. [S.R.77:Supp.7:Appeal,J.A.349]

The Court *sua sponte* set a hearing to inquire into conflicts even though Grooms had not been charged and none of Moncier's clients were jointly charged in one trial. [S.R.77:Supp8:Order,J.A.349]

On 3/16/06 AUSA M. Neil Smith filed a "memorandum" requesting the Court inquire into the source of Moncier's fees. AUSA Smith stated Moncier

was known to laundry money for payment of his fees. AUSA Smith also asserted Moncier had a conflict because Moncier still represented on appeal a Gary Musick.[3] [S.R.77:Supp.9,ResponseConflict,J.A.350]

At a hearing 3/16/06 Moncier demanded AUSA Smith be required to state the basis of his accusation. AUSA Smith cited a 1999 trial he prosecuted in which Moncier represented Tracy Fleenor who was the financial officer of Logan-Laws Corporation. *United States v. Tracy Fleenor* EDTN 2:96-cv-17. Logan-Laws Corporation advanced Fleenor's fees for her defense. Fleenor was acquitted of all charges. Judge Greer who had represented a co-defendant of Fleenor, found there was no basis for AUSA Smith to make the allegation, and held AUSA Smith's assertion of a conflict as to Musick was unfounded. Judge Greer took Moncier's motion for sanctions under advisement. To date, Judge Greer has not ruled on Moncier's motion for sanctions against AUSA Smith. [S.R.77:Supp.24:Transcript3/16/07,J.A.354]

Vassar's second trial began 6/12/06. Discovery violations by prosecutors again delayed that trail. On 6/21/06 Vassar was found not guilty of

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[3] *United States v. Gary Musick*, Sixth Circuit No. 05-5563 was decided 8/29/08 and a motion to rehear with a suggestion for *en banc* consideration is pending.

conspiracy to distribute over 5 kilograms of cocaine; not guilty of conspiracy to distribute over 500 grams of cocaine; but guilty of conspiracy to distribute less than 500 grams of cocaine and guilty of distribution of approximately 1.6 grams of cocaine to one Rick Fann. [S.R.77:Supp.11:JuryVerdict,J.A.350]

Vassar' defense was that he was addicted to cocaine and shared approximately 1.6 grams of cocaine with Fann who was also a cocaine addict. Fann, unfortunately for Vassar, was for that transaction a paid operative for officers and was also working to not be charged for crack cocaine and other narcotic offenses. Vassar acknowledged the transfer and defended on the basis that it was a casual exchange constituting only simple possession.

Judge Greer declined to charge "casual exchange" or "simple possession." The jury convicted Vassar of the minimum offense under the charge given. [S.R.77:Supp.11:JuryVerdict,J.A.350]

Vassar's USSGs sentence for the conviction was 12-16 months.

Post Conviction Proceedings
Leading Up to 11/17/06

After trial, Vassar's case became complex and contentious.

First, it appeared the jury convicted Vassar only of the Fann transfer. Fann was not a named member of the indictment conspiracy and because Fann was a government operative, Vassar could not be convicted of a conspiracy with Fann. [S.R.77:Supp.12:MotionNewTrial,J.A.350;S.R.77:Supp.13:ArrestJudgment,J.A.350]

AUSA Smith sought to increase Vassar's sentence under the conspiracy conviction. Contentious arguments began over whether the conspiracy verdict relating to less than 500 grams, was based on only the Fann transaction and therefore not a crime. *see* [S.R.77:Supp.21:SentencingMemorandum,J.A.350].

Vassar's wife received an anonymous letter from a juror. The juror stated she could not convince other jurors to find Vassar not guilty on all charges. The juror suggested the Fann transaction was the basis of the jury's verdict; that Vassar should appeal; and believed Vassar would be found not guilty before a different jury after appeal. [S.R.77:Supp.14:Motion/JurorLetter,J.A.350]

Moncier moved Judge Greer re-assemble the jury and inquire whether the conspiracy verdict was based on the Vassar-Fann transaction. If so, Moncier moved to set the conspiracy verdict aside because the Vassar-Fann

transaction could not be a crime of conspiracy. [S.R.77:Supp.14:Motion/JurorLetter,J.A.350]

AUSA Smith responded by stating the letter indicated "jury tampering" and requested that the FBI should investigate the letter. Ultimately, District Court Greer declined to conduct any inquiry of the jury and held the local rule prohibited Counsel from contacting jurors. [S.R.77:Supp.15:Response,J.A.350]

AUSA Smith relied upon trial testimony of cooperating witnesses, rejected by the jury, to urge the presentence officer recommend, and the Court to sentence, Vassar by a preponderance of evidence, to 27-years of the 30-year maximum sentence for the conspiracy conviction. [S.R.77:Supp.21:SentencingMemorandum,J.A.350]

AUSA Smith's request for a 27-year sentence made Vassar's jury verdicts meaningless and created extensive and complex sentencing issues that resulted in the equivalent of another trial before Judge Greer.

Between September and November 2007 Moncier filed a series of motions pertaining to issues that were on the cutting edge of federal sentencing practice under *Apprendi*, *Blakely* and *Booker* and have later been held material to Vassar's sentencing by *Gall* and *Kimbrough* that under this Court's *en banc*

opinion in *United States v. Vonner,* 516 F.3d 382, (C.A.6 2008) would have been waived had Moncier not plead and argued those issues. [S.R.77:Supp16:MotionPresentenceConference,J.A.350; S.R.77:Supp17:Motion SentencingDiscoveryProsecution,J.A.350; S.R.77:Supp18:MotionSentencing DiscloveryPesentenceOfficer,J.A.350;S.R.77:Supp.19:MotionDiscoveryCourt,J.A. 350;S.R.77:Supp.20:MotionOrderDisclosures,J.A.350; S.R.77:Supp.23:Motion Departures,J.A.350; S.R.77:Supp.24:Motion§3553(a),J.A.350]

Moncier filed motions to dismiss prior to sentencing asserting prosecutorial misconduct by prosecutors withholding favorable evidence during the trial and at sentencing [S.R.77:Supp.42:Dismiss,J.A.351]; a motion to dismiss for prosecutorial misconduct asserting a practice and custom in the Greeneville United States Attorney's office to provide unauthorized, undisclosed and unlawful benefits to cooperating witnesses outside the lawful provisions of USSG §5K1.1.[4] [S.R.77:Supp.41,ProsecutorialMisconductJ.A.351]. Moncier also filed motions for Judge Greer to disclose information Judge Greer had material to Vassar's disputed sentencing determinations that was unknown to Vassar but was before Judge Greer under seal from wire-tap applications; search warrant applications; co-conspirators

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[4] *See United States* v. Singleton*,* 144 F.3d 1343, 1355 (en banc, 10th CiR.1999)

separate cases; co-conspirator presentence reports; and materials submitted to Judge Greer *in camera* by the Government in Vassar and related cases.[5] [S.R.77:Supp.34:Disclosures,J.A.351][6]

Moncier filed motions seeking presentence reports of others who were similarly situated to Vassar for the Court to conduct a 18 U.S.C. §3553(a)(6) analysis to avoid unwarranted sentence disparity [S.R.77:Supp.46,J.A.351] and motions for Vassar's sentencing to be after sentencing of Vassar's co-conspirators similarly situated who were not asserting sentencing disparity to allow the Court to have the similarly situated co-conspirator's sentences for 28 U.S.C. §3553(a)(6) comparison with the 27-year sentence AUSA Smith was seeking for Vassar. [S.R.77:Supp.25:Continue,J.A.350; R.77:Supp.30:Continue, J.A.350;R.77:Supp.56:Continue,J.A.351]

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[5] Fed.R.Crim.P. 32; Code of Conduct for United State's Judges, Canon 1, 2 and 3.

[6] Judge Greer later criticized Moncier for filing these motions to disqualify as alleging "bias" and "prejudice" without a factual basis. [S.R.77:Transcript.11/15/06,J.A.352] In fact the basis for disqualification asserted was Judge Greer's knowledge of sentencing facts that were unknown to Vassar and his attorney.

Moncier's motions were not well received by Judge Greer leading up to Vassar's 11/17/06 sentencing hearing. [S.R.77:Supp.52:OrderStrikingMotions,J.A.351]

AUSA Smith's Alleged Vassar-Thornton-Grooms Communication Disclosed The Day Before Vassar's Sentencing Hearing

Part of Vassar's sentencing defense was that Judge Greer could rely on the creditability of trial witnesses to sentence Vassar to 27-years. Moncier had discovered evidence that AUSA Smith had made threats to witnesses to cause them to testify against Vassar to facts that were not true.[7] In support of that assertion, on November 13, 2006 Moncier filed a transcript of a statement by Mark Thornton that Thornton and his attorney had been promised a 10 to 15 year recommended sentence for Thornton's cooperation prior to Vassar's trial. According to Thornton, within days before Vassar's trial AUSA Smith visited Thornton in jail and threatened Thornton that unless Thornton testified to things about Vassar AUSA Smith would "pull" Thornton's 10-15 recommended sentence. Thornton stated he told AUSA Smith AUSA Smith that the testimony AUSA Smith wanted was not true and he would not testify to those facts. The day after Vassar's trial, AUSA

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[7] Vassar had repeatedly objected that AUSA Smith had required that Vassar provide information about things Vassar said were not true to obtain a 5K1.1.

Smith withdrew the prior recommendation promised Thornton and instead recommended Thornton receive a 27-year sentence and that was the sentence that Thornton received. [S.R.77:Supp.44:NoticeThorntonTranscripts,J.A.351]

AUSA Smith became aware Moncier intended to call Thornton after Moncier filed Thornton's recorded statement and obtained an Order for Thornton to be transported by the Marshalls to testify for Vassar at the 11/17/06 sentencing hearing. [S.R.77:Supp.37:MotionTransport,J.A.351]

Between 10/13/06 and 11/16/06 Moncier filed multiple motions for AUSA Smith to disclose favorable sentencing evidence. [S.R.77:Supp.19:MotionDiclosure,J.A.350;S.R.77:Supp.20:Motion,J.A.350; S.R.77: Supp.27:Compel,J.A.350;S.R.77:Supp.28:CompelSubpoenas,J.A.350; S.R.77:Supp.34: Compel,J.A.351; S.R.77:Supp.48:Compel,J.A.351]

Judge Greer repeatedly denied the motions and criticized Moncier noted that prosecutors had repeatedly represented to Moncier that all favorable evidence had been disclosed. AUSA Smith knew that was not true. [S.R.77:Supp.33:Order,J.A.351]

Moncier's filed the third motion on November 15, 2006, two days before Vassar's sentencing hearing. [S.R.77:Supp.48:Compel:J.A.351] Judge Greer again criticized Moncier for re-filing the motion when Moncier brought to

Judge Greer's attention that in one of Vassar's alleged co-conspirator's case on 11/13/06 Judge Greer had granted the same motion Moncier filed for Vassar. [S.R.77:Supp.66:Transcript11/15/06,J.A.352]

Judge Greer then, on 11/15/06 orally instructed AUSA Smith to review his files and make certain all favorable sentencing information had been disclosed to Vassar. [S.R.77:Supp.66:Transcript11/15/06,J.A.352]

On 11/16/06 AUSA Smith faxed a letter to Moncier in response to Judge Greer's directive. AUSA Smith denied the information contained in his letter was "favorable" to Vassar's sentencing but "out of an abundance of caution" AUSA Smith made disclosures of three matters. [Exhibit5,J.A.647]

First, AUSA Smith's 11/16/06 letter disclosed that the Government had given a trial witness, Dewey Phillips, a polygraph after Phillips testified against Vassar. AUSA Smith disclosed Phillips failed the polygraph and then Phillips admitted he had committed perjury during his testimony against Vassar at trial.[8] [Exhibit5,J.A.647]

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[8] According to AUSA Smith's 11/16/06 letter Phillips' admission of perjury was not favorable sentencing information although AUSA Smith was urging Judge Greer to believe Phillips' trial testimony to sentence Vassar to 27 years.

Second, AUSA Smith disclosed another cooperating witness, Chris Shults, provided the Government information for two years prior to the 2005 Fann transaction that Vassar was in bad shape and was heavily addicted to drugs being provided Vassar by others. Vassar's addiction to drugs, and the extent of that addiction, and his casual exchange of 1.6 grams to drug addict Fann, was a substantial sentencing mitigation fact relied on by Vassar at sentencing.[9] [Exhibit5,J.A.647]

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[9] AUSA Smith in his letter asserted Vassar's addiction was not favorable sentencing information knowing that the Government had sent another paid addict, Fann, to get 1.6 grams of cocaine from Vassar.

Third, for reasons AUSA Smith has never been required to explain,[10] in his 11/16/06 "favorable sentencing disclosure" letter, AUSA Smith included an alleged[11] statement of Mark Thornton that Vassar told Thornton while they were in jail in October 2005 that before Vassar was arrested, Harold Grooms had offered to help Vassar and had said if Vassar needed any drugs to contact Grooms. [Exhibit5,J.A.647]

AUSA Smith's alleged Vassar-Thornton-Grooms communication triggered Moncier's ethical duty pursuant to EDTN LR 83.6/Tenn. RPC 1.7 to resolve any potential of a conflict between Vassar and Grooms to assure Vassar had conflict-free counsel at his 11/17/06 sentencing hearing.

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[10] Despite multiple request and subpoenas AUSA Smith has never been required to explain why he did not disclose the alleged Vassar-Thornton-Grooms communication during the April 2006 inquiries of Vassar as to potential conflicts with Grooms; why he waited until the day before Vassar's sentencing to disclose the alleged Vassar-Thornton-Grooms communication; or why AUSA Smith choice to place the alleged Vassar-Thornton-Grooms communication in a favorable sentencing information disclosure letter.

[11] "Alleged" is used because both Vassar and Thornton later denied making the statement as reported by AUSA Smith. Despite repeated requests and subpoenas, AUSA Smith, to date, has not disclosed any document that was the basis for what he reported Vassar told Thornton.

AUSA Smith's Vassar-Thornton communication allegation also created a problem if Vassar continued with his plan to call Thornton to testify about threats made by AUSA Smith.

Significantly, Vassar had already testified twice under oath in March 2006 and April 2006 before Judge Greer that Vassar knew nothing about Grooms being involved in illegal activities. If the Vassar-Thornton-Grooms communication were true, Vassar could be charged with perjury; sentenced for obstruction of justice under the USSGs; or at a minimum, this information undercut one of Vassar's sentencing defenses, i.e., Vassar did not have the information AUSA Smith demanded in order to get a §5K1.1 departure.

On 11/17/06 Moncier attempted to resolve the potential conflict through a continuum of efforts, each being less protective of Vassar's interest.

First, Moncier hand-delivered a letter of his intentions to Vassar before the sentencing hearing began on 11/17/06.[12] [S.R.77:Supp.67:VassarLetter,J.A.352]

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[12] Vassar had been taken into custody after his June 2006 conviction and was detained in Jonesboro, Tennessee approximately two hours from Moncier. The telephones at Jonesboro are monitored. Moncier had no means to confidentially communicate with Vassar about the November 16th letter prior to the morning of 11/17/06.

Then, Moncier moved Judge Greer appoint Vassar an independent attorney to inquire about, investigate and advise Vassar. [Exhibit 3:Transcript11/17/06,J.A.542-646]

Failing to have an independent counsel appointed, and because Vassar's answers could impact Vassar's sentencing or be considered perjury, Moncier requested Judge Greer have a separate judge, who was of sentencing Vassar, inquire of Vassar *in camera* about AUSA Smith's alleged Vassar-Thornton-Grooms communication. [Exhibit 3:Transcript11/17/06,J.A.542-646]

Absent a separate non-sentencing judge making the inquiry, Moncier requested Judge Greer conduct an *in camera* inquiry of Vassar about AUSA Smith's alleged Vassar-Thornton-Grooms communication. [Exhibit 3:Transcript11/17/06,J.A.542-646]

All of Moncier's efforts were unsuccessful. Moncier then informed Judge Greer he would discuss the matter with Vassar during the lunch recess and be prepared to proceed to the sentencing hearing after the lunch break. [Exhibit 3:Transcript11/17/06,J.A.542-646]

Instead, Judge Greer directed Vassar and Moncier to come to the podium. Judge Greer began to question Vassar in the presence of prosecutors and

FBI agents. Judge Greer overruled Moncier's objections. [Exhibit 3:Transcript11/17/06,104-107,J.A.643-646]

Judge Greer's inquiry of Vassar at the podium was whether Judge Greer should remove Moncier and appoint Vassar a different attorney to represent Vassar at sentencing. The following then occurred:

> **The Court**: Mr. Vassar, here's the court's concern. When we have this sentencing hearing I want your lawyer to ask whatever questions are necessary to ask to adequately present your case to this court. I don't want you represented by a lawyer who is reluctant to ask questions for – out of concern about what the answers might be as they relate to Harold Grooms. I don't want your lawyer to be in a position to where he is reluctant to call a witness for fear that the government might ask about Harold Grooms and he doesn't know what the witness is going to say. You understand what I'm saying? [13]
>
> **Mr. Vassar**: Yes, sir.
>
> **The Court**: I want your lawyer's loyalty to be to you --
>
> **Mr. Vassar**: That's what I want.

---

[13] Moncier would not "be reluctant" to ask questions, or not call a witness, that may know something about Grooms. Moncier would not call a witness if their answers were not favorable to Vassar. If advantageous to Vassar, Moncier, or any attorney, would jump at the chance to get, at the same time, discovery for another client.

The Court: Now, you understand how those conflicts can arise in the context of this case with Mr. Moncier representing Harold Grooms and representing you at the same time?[14]

Mr. Vassar:I understand.

The Court: Okay. It's a very simple question then, understanding how those conflicts can arise, do you want Mr. Moncier to continue representing you in this case or do you want me to see if I can find somebody who has no connection with any other codefendant or potential codefendant in this case?[15]

Mr. Moncier: Once again, your honor --

The Court: Mr. Moncier --

Mr. Moncier: He makes -- [objection to being asked these questions by the Court without having the advice of counsel][16]

The Court: Moncier, you be quiet.

Mr. Moncier: May I approach the bench?

The Court: You may stand there and do what I told you to do until Vassar answers this question.

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[14] Apparently, Judge Greer believed AUSA Smith's 11/16/06 disclosure of what Thornton said Vassar said about Grooms was true. As it turned out later, both Thornton and Vassar denied the alleged statements as reported by AUSA Smith. [R.10:VassarAffidavit,J.A.46]

[15] Judge Greer's suggestion to Vassar that Grooms was a "codefendant or potential codefendant in this case" was incorrect where Vassar was to be sentenced and Vassar's case was over.

[16] Id. footnote 1. [objection to being asked these questions by the Court without advice of counsel] is not in the transcript but is placed in brackets because that is what Moncier intended to say had he not been cut-off.

Mr. Moncier: For the record, your honor, I object without him having -- [the advice of counsel][17]

The Court: Moncier, one more word and you're going to jail.

Mr. Moncier: May I speak to my -- [Client][18]

The Court: Officers, take him into custody. We'll be in recess.

(Recess at 12:47 p.m.)

Thereafter, Moncier was brought back to the Courtroom from the jail and through counsel apologized to the Court. [Exhibit 3:Transcript11/17/06,J.A.542-646]

> ROGERS: Before I go on, Your Honor, though I want to make it clear to you that Moncier has expressed to me in the brief time that I spent with him the fact that he was only trying to make an objection; that he intended no disrespect to the court at that time and that he is very sorry that by, by, by attempt1ng to utter his statement that he violated this Court's order when he felt he was compelled to do so.

[Exhibit 3:Transcript11/17/06,J.A.542-646]

The Court then orally cited Moncier for criminal contempt of court and set a hearing; disqualified Moncier from representing Vassar; and stated that

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[17] Ibid. footnote 1. [advice of counsel] is not in the transcript but is placed in brackets because that is what Moncier intended to say had he not been cut-off.

[18] Ibid. footnote 1.

the Court would appoint Vassar other counsel. [Exhibit 3:Transcript11/17/06,J.A.542-646]

On 11/17/06 Judge Greer appointed Vassar a new attorney. [Exhibit 3:Transcript11/17/06,J.A.542-646]

On 1/29/07 Judge Greer held a hearing with Vassar and his new appointed attorney. Moncier was not present. At Vassar's request Judge Greer reinstated Moncier as Vassar's attorney. [Exhibit3:Transcript11/17/06,J.A.542-646]

On 2/13/97 Judge Greer conducted a sentencing hearing and Moncier represented Vassar at that hearing. Judge Greer sentenced Vassar to 12 years based on acquitted conduct. [S.R.77:Supp.65:Transcript1/29/07,J.A.352]

Moncier's Contempt Trial

At a hearing on 4/24/07 Judge Greer clarified his notice of contempt to reflect Moncier's conduct for which he was charged as being "May I speak to my -- [Client]" after being told " Moncier, one more word and you’re going to jail." [R.62:Transcript,4/24/07,p.107,J.A.501-502]

On 4/18/07, Judge Greer entered a written Fed.R.Crim.P. 42 notice of charges to Moncier pursuant to Fed.R.Crim.P. 42(a). [R.1:Complaint,J.A.12]

On 4/18/07 Moncier filed a motion to disqualify Judge Greer from presiding over Moncier's contempt trial [R.8:MotionDisqualify,J.A.36]; a motion

to recuse the Greeneville United States Attorney's office from prosecuting Moncier [R.6:MotionRecuse,J.A.29]; a motion for clarification of the Show Cause Order [R.5:MotionClarification,J.A.27]; a motion to dismiss the charge because of former jeopardy [R.9:MotionDismissJ.A.49]; a motion to dismiss for failure to state an offense [R.10:MotionDismiss,J.A.42]; a motion to dismiss because of defenses established in the record [R.13:MotionDismissJ.A.69]; a motion for notice of 404(b) evidence [R.7:MotionPretrial,J.A.34]; and a motion for a jury trial. [R.28:MotionJuryTrial,J.A.124]

Moncier filed an affidavit on 4/8/07 again apologizing to the Court and explaining the circumstances and the reasons for his request to speak to Vassar. [R.10:MoncierAffidavit,J.A.50]

Vassar also filed a detailed affidavit on 4/18/07 of Vassar explaining that the statement reported by AUSA Smith about what Vassar allegedly said to Thornton was not true; Vassar had no knowledge of Grooms illegal activities; Vassar told Moncier, when Moncier was considering representing Grooms, that he had no knowledge of Grooms illegal activities; and that Vassar was attempting to speak to Moncier when Moncier was placed in jail. [R.10:VassarAffidavit,J.A.46]

The Greeneville United States Attorney's office declined to recuse themselves and AUSA M. Neil Smith's wife, AUSA Helen Smith, entered her

name as one of the prosecutors against Moncier. [R.41:MotionQuash,J.A.169;R.42:Memorandum,J.A.171]

The Tennessee Association of Criminal Defense Attorneys filed for leave to be allowed to file an amicus brief. [R.29:MotionToFile,J.A.124] Judge Greer granted TACDL's motion [R.31:Order,J.A.139]. TACDL filed an amicus brief on 4/23/07. [R.38:Brief,J.A.155]

On 4/23/07 Judge Greer entered Orders denying motions to disqualify himself [R.32:M&O,J.A.140]; denying motions to recuse the Greeneville office from prosecuting Moncier [R.30:Order,J.A.137]; denying Moncier's demand for a jury trial [R.33:Order,J.A.148]; denying Moncier's motions to dismiss [R.34,Order,J.A.150;R.35:Order,J.A.151;R.36:Order,J.A.152;R.40: Order, J.A.168]; and denying Moncier's motion for pretrial Fed.R.Evid. 404(b) notice [R.37:Order,J.A.154].

A bench trial before Judge Greer was held on 4/24/07. The prosecution offered the transcript of the 11/17/06 hearing and rested. Moncier made a Fed.R.Crim.P. Rule 29 motion for judgment of acquittal which the Court overruled. [R.62:Transcript4/24/07,J.A.407-520]

Moncier testified in his own defense. [R.62:Transcript4/24/07,J.A.407-520]

On 5/30/07 Judge Greer issued a Memorandum Opinion finding Moncier guilty of criminal contempt of court and set a sentencing hearing for 8/27/07. [R.44:M&O,J.A.209]

Moncier filed a motion to arrest the judgment [R.45: MotionArrest,J.A.237]; motion for new trial and renewed motion for the Court to disqualify itself [R.46:MotionNewTrial/Disqualify,J.A.240]; renewed motion to disqualify the prosecutors [R.48:MotionDisqualify,J.A.245]; motion to sentence without a presentence report [R.49:MotionSentence,J.A.248]; and motion for immediate sentencing in order to appeal. [R.47:MotionSentence, J.A.243].

On 6/20/07 the prosecutors filed responses opposing each of Moncier's post-judgment motions. [R.52:ResponseArrest,J.A.254;R.53:ResponseNewTrial,J.A.258;R.54:ResponseImmediateSentencing,J.A.261;R.55:ResponseDisqualifyProsecutor:,J.A.263;R.56:ResponseWaiveReport,J.A.268]

On 6/21/07 Judge Greer denied each of Moncier's post-judgment motions.

[R.57:Order,J.A.270;R.58:Order,J.A.272;R.59:Order,J.A.273;R.60:Order,J.A.275; R.61:Order,J.A.277]

A presentence report was prepared and Moncier filed objections. [PSR,J.A.653-663] [R.66:Objections,J.A.665]

On 8/22/07 Moncier filed a sentencing memorandum. [R.64:Memorandum,J.A.280;R.65:AffidavitVassar,J.A.301]

The prosecutors also filed a sentencing memorandum. [R.67:SentencingMemorandum,J.A.305]

A sentencing hearing was held on 8/27/07. [R.76:Transcript8/27/07,J.A.522-541] Judge Greer began his sentencing by stating:

> The Court: A simple statement, Judge, I made a mistake, I'm sorry, would have ended this matter a long time ago, but for some reason, Moncier, you're not able to say those words. You're not able to say, I made a mistake.

[R.76:Transcript8/27/07, pp.11-12,J.A.531-532]

ARGUMENT

I. Moncier's Performance Of His Ethical Duty Required By Court Rule Cannot Constitute A Crime Of Criminal Contempt Of Court.

Standard of Review

Whether Moncier's acted pursuant to an ethical duty or violated a command of Judge Greer is a question of law. A district court's conclusions of law are reviewed *de novo*. *United States v. Ward*, 506 F.3d 468, 474 (6th.Cir.2007).

Judge Greer made repeated findings that Moncier's testimony was not credible in his May 30th Opinion. [R.44:M&O,J.A.209]

These credibility determinations were not based on Moncier's demeanor, or balanced against other witnesses, but were made by Judge Greer comparing the record to Moncier's testimony. This Court is in the same position as Judge Greer to compare the record to Moncier's testimony.

Analysis

Problems Created By AUSA Smith's 1//16/06 Disclosure Of An Alleged 2005 Vassar-Thornton-Grooms Communication

(1) AUSA Smith's 11/16/06, 2006 disclosure of the alleged Vassar-Thornton communication in October 2005 was a surprise to Moncier.

(2) Moncier represented to Judge Greer in March and April 2006 that before agreeing to represent Grooms in February 2006, Moncier first conferred with Vassar and was assured by Vassar that he knew nothing about any illegal activities of Grooms. If AUSA Smith's Vassar-Thornton-Grooms communication were true, Moncier was placed in the position of telling the Court Vassar had not been truthful with Moncier prior to Moncier being hired by Grooms.

(3) Judge Greer had previously on March 17th and April 17th, 2006 questioned Vassar under oath about Vassar's knowledge about Grooms and Vassar testified he had no knowledge of illegal activity of Grooms. If AUSA Smith's Vassar-Thornton-Grooms communication were true, Vassar was potentially subject to a perjury indictment; obstruction of justice adjustments to his USSGs calculation; and, at a minimum, it could be used against Vassar by the Court in weighing Vassar's 18 U.S.C. §3553(a) sentencing factors.

(4) The alleged Vassar-Thornton-Grooms statement, if true, conflicted with Vassar's planned presentation at sentencing defense that Vassar did

not have knowledge about others which the prosecutors insisted Vassar testify against including Grooms.

(5) If Vassar called Thornton to testify against AUSA Smith about the threats reflected in Thornton's statement filed 11/13/06, during cross-examination AUSA Smith would offer the alleged 2005 Vassar-Thornton-Grooms communication. If Thornton admitted the alleged communication, Vassar would be subject to an increased sentence for obstruction of justice by reason of Vassar's March and April 2006 sworn testimony to Judge Greer.

(6) There had been no investigation of the truthfulness or accuracy of AUSA Smith's alleged October 2005 Vassar-Thornton-Grooms communication.

(7) Vassar had not had an opportunity to confer with, or have the advice of counsel, about AUSA Smith's alleged October 2005 Vassar-Thornton-Grooms communication.

(8) Vassar had not had advice of counsel pertaining to questions Judge Greer was propounding to Vassar.

(9) Vassar had not had advice of counsel as to actions Judge Greer could take based on Vassar's answers to the questions propounded.

(10) Vassar had not had advice of counsel as to potential waiver of Vassar's rights that could, and would, occur based on Vassar's answers to questions propounded by Judge Greer.

(11) Vassar had not been advised Vassar could request Judge Greer allow Vassar to confer with, and obtain the advice of Moncier, during questions propounded by Judge Greer.

(12) Vassar had attempted to confer with Moncier throughout the proceeding and was continuing to attempt to confer with Moncier. [R.10:AffidavitMoncier:J.A.50;R.10:Affidavit Vassar,J.A.46].

It was in the context of these serious and substantial issues and consequences to Vassar after the Court stated it intended to require Vassar to answer the Court's questions that Moncier asked "May I speak to my -- [Client]".

Applicable Authorities[19]

> "Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge - his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each

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[19] Citations are at the end of the quotations.

in his own time and within his allowed time, and with relevance and moderation."

. . .

"But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling."

Sacher v. United States, 343 U.S. 1, 9 and 14 (1952)

"The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long a the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."

"An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice . . . ."

In re McConnell, 370 U.S. 230 (1962).

"[Contempt is] a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage. The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law."

Offutt v. United States, 348 U.S. 11 (1954).

> "Substantial freedom of expression should be tolerated in the area of advocacy because '[J]udges are supposed to be men of fortitude, able to thrive in a hardy climate.'"

Craig v. Harvey, 331 U.S. 367 (1947).

> "'the least possible power adequate to the end proposed' should be used in contempt cases,' (quoting *Anderson v. Dunn,* 6 Wheat. 204, 231, 5 L.Ed. 232 (1821)"

United States v. Wilson, 421 U.S. 309, 319 (1975)

> "[A] court must keep in mind that the judicial contempt power is 'shielded from democratic controls' and hence should be exercised with restraint and discretion. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1989; *see also Gompers v. Buck's Stove & Range Co.,* 221, U.S. 418, 450-451, 21 S.Ct. 492, 55 L.Ed. 797 (1911)."
>
> . . .
>
> "'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.' [citing *Chambers v. NASCO,* 501 U.S. 32, 43 (1991); *Anderson v. Dunn*, 5 L.Ed. 242 (1821)] Hence, when confronted with actions that may not fall within the court's contempt power, this inherent power to maintain respect and decorum grants courts the flexibility to equitably tailor punishments that appropriately fit the conduct . . . without the powerful stigma of an order of criminal contempt."

In re M. Dianne Smothers, 322 F.3d 438, 442-443 (6th.Cir.2003)

> "It is often difficult for an attorney to strike an effective accommodation between his client's interest and his obligation to meet the demands of the judge before whom he must argue his case."

Wess v. Barr, 484 F.2d 873 (9thCir.1973).

> “A trial lawyer must be given substantial leeway in making objections and pressing contentions.”
>
> “Appellate courts must ensure that trial judges (or the jury on remand) are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts.”
>
> “[Appellate Courts] resolving doubts in favor of advocacy, an independent and unintimidated bar can be maintained while actual obstruction is dealt with appropriately.”
>
> “A trial lawyer must be given substantial leeway in making objections and pressing contentions.”
>
> "[M]ere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the "heat of courtroom debate" may prompt statements which are illconsidered and might later be regretted.”
>
> “Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf.”
>
> “An attorney possesses the requisite intent [for contempt] only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.”

*In re Dillinge*r, 461 F 2d. 389 (7thCir.1972).

EDTN Ethical Rules

Moncier asserted at his contempt trial, and asserts on appeal, that his duties under the RPC to confer and advise Vassar as Judge Greer was propounding questions to Vassar in the presence of the prosecutors and FBI was clear and unambiguous[20] and that Moncier's request to Judge Greer to perform that duty cannot be criminal contempt of court in violation of 18 U.S.C. §401.

Eastern District of Tennessee Local Rule 83.6 required Moncier perform duties prescribed by the Tennessee Supreme Court Rule 8, Rules of Professional Conduct, as Vassar's criminal defense attorney during this major serious litigation where prosecutors were seeking a 27 year penitentiary sentence, which, at Vassar's age of 56, was the equivalent of the life sentence Vassar was facing.

Moncier's duties pertaining to Vassar are set out in EDTN 83.6, RPC Preface, 1.1, 1.2(d), 1.3, 1.4, 1.14, 1.16, 2.1, 3.1, 3.3, 3.4, and 3.5. Copies of these rules are contained in the Appendix. Also contained in the Appendix is a truncated statement of the rules tailored to Vassar's case.

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[20] Other cases may not be as clear. The test where there is uncertainty between performing a duty or being in criminal contempt should be the same as liability of a judge or prosecutor, i.e., whether the conduct of the attorney was within or outside the outermost limits of the duty of the attorney.

Constitutional Duty

Moncier had a duty to object in order to preserve Vassar's constitutional rights, particularly in situations implicating Vassar's waiver of his right to conflict-free and effective counsel under U.S. Const. Amend. VI. See *Mickens v. Taylor*, 535 U.S. 162, 168 (2002)(finding defense counsel must timely object in order for any Sixth Amendment violation for conflict of interest based upon joint representation to be preserved (citing and discussing *Holloway v. Arkansas*, 435 U.S. 475 (1978)).[21]

Justification[22]

> Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. See, e.g., 2 P. Robinson, Criminal Law Defenses §142(a), p. 121 (1984) ("Every American jurisdiction recognizes some form of law enforcement authority justification")[23].

Brogan v. United States, 522 U.S. 398, 405, 118 S.Ct. 805. 139 L.Ed.2d 830 (1998); *see also Corpus Juris Secunum*, Crimlaw §56.

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[21] *see also United States v. Vonner,* 516 F.3d 382, (C.A.6 2008); Fed. R.Crim. P. 51(b), Fed. R.Evid. 103, and Fed. R.App. P. 36(a).

[22] Pled by Moncier on April 18, 2007 [R.13:MotionDismiss,J.A.69]

[23] This compliance with the law "justification" defense is different from the "justification" defense defined in Sixth Circuit Pattern Jury § 6.07.

Moncier was an officer of the Court. Moncier had the duties imposed on him by EDTN LR 83.6/RPC discussed *infra.* Criminal prohibitions of 18 U.S.C. §401, just as with a law enforcement officer, do not apply where Moncier's acts were reasonable compliance with the duties imposed on Moncier by EDTN LR 83.6/RPC.[24]

The Rule of Lenity

> If the statute remains ambiguous after consideration of its plain meaning, structure and legislative history, the rule of lenity is applied [to construe the statute] in favor of criminal defendants. See *United States v. Hill*, 55 F.3d 1197, 1206 (6th.Cir.1995).

United States v. Thomas, 211 F.3d 316, 321-322 (2000)(Concurring Opinion of Circuit Judge Clay)

Moncier's had a clear ethical duty to confer and advise Vassar when Vassar was being compelled by Judge Greer to answer questions had serious implications to Vassar. Moncier's ethical duties required by the rules of the Court create ambiguity in the language of 18 U.S.C. §401 as to whether Moncier's attempts to perform a duty to a client in this case violated the terms 18 U.S.C. §401. This ambiguity must, under the principles of Rule of Lenity, be resolved in Moncier's favor.

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[24] Defenses of "coercion" and "necessity" to protect Vassar may also apply.

Ethical Duties To Clients Are Often "Obstructive"

Compelled questions by Judge Greer had serious Fifth Amendment consequences.

Moncier was convicted of "obstructing justice" by asking to be allowed to perform a EDTN LR 83.6/RPC duty to confer and advise Vassar during Judge Greer's questioning.

The "obstruction" argument regarding attorneys was made, and rejected, in *Miranda v. Arizona*, 384 U.S. 436, 441 (1066) regarding attorneys advising clients during questioning by police.

> If the individual desires to exercise his privilege, [representation by counsel] he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath-to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

Conclusion

The United States Supreme Court promised in *United States v. Sacher*, 343 U.S. 1, 14 (1952) to "unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person."

It is upon this promise that Moncier requests this Court reverse his conviction and dismiss the charge of criminal contempt of court as that charge is based on Moncier's reasonable attempt to perform a duty to confer and advise Vassar as required of Moncier by law.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF 18 U.S.C. §401(1) OR 401(3)

Standard of Review

A challenge to the sufficiency of the evidence is reviewed by this Court *de novo*. *United States v. Tocco*, 200 F.3d 401, 424 (6th.Cir.2000).

Moncier's Convictions

Judge Greer found Moncier guilty of a violation of 18 U.S.C. §401(1) and also a violation of §401(3).

Sufficiency of the Evidence

Judge Greer described his statement to Moncier "Mr. Moncier one more word and you're going to jail" as "a direct, unequivocal command for silence." [R.44:M&O,J.A.209]

Judge Greer did not dispute Moncier was requesting to speak to Vassar when Moncier spoke the words "May I speak to my -- [Client]."

There is no suggestion that Moncier uttered the words in a loud tone or sarcastic manner. Moncier was convicted for uttering words, not for the content or manner the words were uttered.

Thus, the issue is whether Judge Greer's "command" and Moncier's spoken "word[s]" are sufficient to constitute the crimes described in 18 U.S.C. §401(1) or (3).

18 U.S.C. §401(1)

An element of 18 U.S.C. §401(1) is that Moncier's words "May I speak to my -- [Client]" must have been "misbehavior" . . . "that obstruct[ed] the administration of justice."

Seeking clarification of Judge Greer's directive by requesting "May I speak to my -- [Client]" is insufficient to constitute §401(1) "misbehavior" or "obstruction of the administration of justice."

No Obstruction Of Justice Occurred

Even if Moncier's words were "misbehavior", the evidence is insufficient that those words caused an "obstruction of the administration of justice" as required by 18 U.S.C. §401(1).

Judge Greer could have simply replied "no" to Moncier's request.

When Moncier uttered the words Judge Greer put Moncier in jail.

Judge Greer could have completed his questions to Vassar after Moncier was lead from the podium to jail. Had Judge Greer completed his question and obtained Vassar's answers, Judge Greer could have taken whatever action Judge Greer believed Vassar's answers warranted.

Moncier's words did cause an obstruction of the administration of justice.

18 U.S.C. §401(3)

The McConnell "actual obstruction" element

18 U.S.C §401(3), unlike $ 401(1) just discussed, does not contain an obstruction of justice statutory requirement.

The Supreme Court, however, recognizing attorney's duty to represent clients, has restricted contempt powers of courts against attorney to only those that "block the judge in the performance of his judicial duty." *see In re McConnell*, 370 U.S. 230, 236 (1962).

> "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long a the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."

> "An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice . . . ."

In re McConnell, 370 U.S. 230, 234 (1962).

Moncier's request for clarification of Judge Greer's "command" was made at a hearing without a jury present. As discussed, Judge Greer had options available that would not block what Judge Greer intended to do, i.e., have Vassar answer questions propounded by Judge Greer.

In the case of an advocate, *McConnell* requires the Court exercise "the least possible power adequate to prevent actual obstruction of justice." Id. 270 U.S. at 234. Judge Greer could have told Moncier "No, Mr. Moncier you may not speak with your client." In Judge Greer's view, Moncier had no function during Judge Greer questions to Vassar and his actions were not the "least possible power adequate to prevent actual obstruction of justice" Judge Greer had available.

Instead, Judge Greer chose the most drastic and unnecessary measure by disqualifying Moncier and terminating the proceeding. There was no "manifest necessity" for Judge Greer to terminate the proceeding or take from Vassar his structural constitutional right to counsel of his choice. *see United States v. Jorn*, 400 U.S. 470, (1971); *United States v. Gonzalez-Lopez*, 548 U.S. 140, (2006).

The evidence is insufficient to establish Moncier, by uttering the words "May I speak to my -- [Client]", "in some way create[d] an obstruction [that] block[ed] the judge in the performance of his judicial duty" or that Moncier "actually obstructed the administration of justice" as required *In re McConnell* to be convicted of violating 18 U.S.C. §401(3).

The "Lawful" element of the "command" under 18 U.S.C. §401(3)

Judge Greer's May 30th Order makes clear he intended his "command" to deny Vassar his right to have his Sixth Amendment right to the assistance of counsel, i.e., Moncier, during Judge Greer's question to Vassar.[25] Judge Greer in his verdict did not discuss the §401(3) that his "command" is required to be "lawful" to constitute for a violation the statute to be "criminal contempt of court."

Certainly, an attorney has a duty to obey an order even if that Order is erroneous. When considering the elements of a crime under 18 U.S.C. §401(3) this analysis misses the mark.

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[25] Compare Judge Greer's position to the requirement of *Miranda v. Arizona*, 384 U.S. 436, 473 (1966) that if Vassar agreed to answer questions he may at, any time during the questioning, stop and confer with counsel.

18 U.S.C. §401(3) has a statutory requirement that the command be "lawful" before a person can be convicted of the crime. If Judge Greer's command to Moncier was not "lawful", Moncier's spoken words asking "May I speak to my -- [client]" cannot be a crime.

Judge Greer cannot lawfully command Moncier to violate the law. The law required Moncier to confer and advise Vassar when Judge Greer was questioning Vassar. A command from Moncier to disregard the law is transparently unlawful.

Judge Greer's "command", as applied to Moncier's words "May I speak with my -- [Client]" denied Vassar's his Sixth Amendment right to counsel and his right to counsel of his choice. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Wheat v. United States,* 486 U.S. 153, 159 (1988; *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). If Judge's command was for Moncier to violate a constitutional right of Vassar that command was unlawful.

Judge Greer's "command", as applied, was not a constitutional "trial error" but was a constructional structural defect in the proceeding that was complete upon being imposed. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

> In Arizona v. Fulminante, 499 U.S. 279, (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." Id., at 307-308, 111 S.Ct. 1246 (internal quotation marks omitted). These include "most constitutional errors." Id., at 306, 111 S.Ct. 1246. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." Id., at 309-310, 111 S.Ct. 1246.FN4 See also Neder v. United States, 527 U.S. 1, 7-9, 119 S.Ct. 1827, 144 L.Ed. 35 (1999).

United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006)

> "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of counsel will affect whether and on what terms the defendant cooperates with the prosecution, pleas bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds or indeed whether it proceeds at all." [underlining added]

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)

The most minimal requirement of procedural due process require that Vassar be entitled to counsel at every critical stage of the criminal proceeding to the right to counsel. *Johnson v. United States*, 344 F.2d 401 (5th.Cir.,1965) This Fifth Amendment right applied to the compelled questioning of Vassar by Judge Greer on 11/17/06 in the presence of the prosecutors and FBI.

Further, Fed.R.Crim.P. 44(a) provided Vassar a right to counsel at "all stages of the proceedings" which would include Judge Greer's questioning and compelled answers of Vassar on 11/17/06.

Vassar's right to counsel of his choice, i.e. Moncier, was a structural right, and the "command" of Judge Greer denying Vassar his structural constitutional right to counsel was "completed" when District Court Judge Greer placed Moncier in jail for asking "May I speak to my -- [Client]. *id Gonzalez-Lopez*, 548 U.S. 140.

Judge Greer's "command", as applied to prohibit Moncier from conferring and advising Vassar during the compelled questioning of Vassar is insufficient to meet the element of 18 U.S.C. §401(3) as being lawful.

Accident, Inadvertence or Negligence

This Court in *In re Chandler*, 906 F.2d 248, 250 (6th.Cir.1990) quoting from *TWM Mfg. Co. v. Dura Corp.,* 722 F.2d 1261, 1272 (6th.Cir.1983) held that for disobedience of a command to constitute criminal contempt the disobedience must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation."

Regarding Moncier's position that Vassar had been trying to speak to Moncier, Judge Greer in his verdict stated:

> Such a request would likely have been granted and would not have violated the Court's command to Moncier for silence.

[R.40:Order,J.A.168]

Vassar's right to request to speak to Moncier and Moncier's duty to confer with and advise Vassar are both rights provided Vassar. One is not superior to the other.

Judge Greer recognized Vassar's right to request to speak to Moncier. Judge Greer did not recognize Moncier's duty to confer with and advise Vassar. Apparently Judge Greer believed Moncier's duty was only triggered upon Vassar's request. *cf.* Tenn. Sup. Ct. Rules, RPC 2.1(duty to advise the client if the client's course of action is related to the representation when doing so appears to be in the client's interest; Fed.R.Crim.P. 51(b) duty to object; Fed.R.App.P. 36(a) failure to object; *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Vonner*, 516 F.3d 382 (6th.Cir.2008).

Judge Greer in footnote 8 appears to hold that Vassar was not entitled to confer with or the advice of Moncier during Judge Greer's compelled questions of Vassar. Judge Greer's compelled questions impacted Vassar's Fifth Amendment right to remain silent and Vassar's answers could be used as a basis for an obstruction enhancement at sentencing or perjury. In *Maness v. Myers*, 419 U.S. 449, 460 (1975) regarding the Fifth Amendment privilege:

> This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73, 41 S.Ct. 26, 27, 65 L.Ed. 138 (1920).

Maness v. Myers, 419 U.S. 449, 461 (1975)

The Court in *Mannes* further held that an attorney cannot be held in criminal contempt of court for advising a witness to refuse to produce evidence pursuant to a subpoena where the lawyer, in good faith, believed the evidence may incriminate the client.

> The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present, as here, could be penalized for advising his client in good faith to assert it.

Maness v. Myers, 419 U.S. 449, 465-466 (1975)

Judge Greer began Moncier's sentencing hearing by stating "A simple statement, Judge, I made a mistake, I'm sorry, would have ended this matter." [R.76:Transcript8/27/07,pp.11-12,J.A.531-532]

Mistakes are insufficient to support a conviction of criminal contempt of court.

Likewise, an attorney's failure to apologize to a court is insufficient to constitute or form the basis of contemp. *In re Snyder*, 472 U.S. 634 (1985).

III. Judge Greer Was Disqualified.

Standard of Review

Mandamus is a proper appellate procedure to obtain appellate review of a Judges' refusal to disqualify itself. *In re Aetna Cas. & SuR.Co.*, 919 F.2d 1136, 1143 (6th.Cir.1990). 28 U.S.C. §1651 provides this court authority to grant mandamus in an original petition to this Court or by alternative writ or by *rule nisi*.

The Seventh Circuit discussed the appropriate standard and held review under either 28 U.S.C. §144 or §455 should be *de novo.* *United States v. Balistrieri*, 779 F.2d 1191, 1199, 1203 (7th.Cri.1985).

Proceedings Below

Moncier moved to disqualify Judge Greer from presiding over his case pursuant to Fed.R.Crim.P. 42(a)(3) and 28 U.S.C. §455(a), 455(b)(1) and 45(b)(5)(iv). [R.8:MotionDisqualify,J.A.36]

Moncier filed numerous statements made by Judge Greer after 11/17/06 and before Moncier's criminal contempt trial that established Judge Greer harbored a §455(b)(1) bias against Moncier or, at a minimum, statements that "might reasonably question his impartiality" under §455(a) [R.40:UnderSeal,J.A.168]

Judge Greer declined to disqualify himself. [R.32:Order,J.A.140]

By post-conviction motion Moncier renewed his motion to disqualify Judge Greer based on Judge Greer being a witness in violation of 28 U.S.C. §455(b)(5)(iv) as shown by his May 30th findings. [R.46:MotionNewTrial/Disqualify,J.A.240]

The Constitutional Structural Right To An Impartial Judge

Trial by a judge that is not impartial is a constitutional "structural defect" in the criminal proceeding:

> We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S., at 23, 87 S.Ct., at 827. The right to an impartial adjudicator, be it judge or jury, is such a right. Id., at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057, 95 L.Ed.2d 622 (1987)

Fed.R.Crim.P. 42(a)(3)

Fed.R.Crim.P. 42(a)(3) mandates that if the criminal contempt "involves disrespect toward or criticism of a judge" that judge is disqualified from presiding at the contempt trial unless the defendant consents. Moncier did not consent.

At a status conference on 3/23/06 the following occurred:

> MR.ROGERS:. . . but what I really was trying to ask you is, is it not the very core of, what occurred here in the court's mind, does that not involve disrespect to the orders and the inquiry that this court was

> making from your perspective? And the, and, you know, the only way I know how to get that answer is to ask you; that do you consider that that involved disrespect to your honor and as a, as a judge for interfering from your perspective with the proceedings?
>
> THE COURT: That's really two different questions, Mr. Rogers.
>
> MR. ROGERS: Ok. Well, I'm sorry. Well, I'm sorry.
>
> THE COURT: Was it disrespectful? Yes, it was. Is Moncier's disrespect to the court the basis of the show cause order? The answer to that is no. Moncier is chronically disrespectful to this court. The basis of the show cause was that Mr. Moncier's refusal to comply with my oral directive to him disrupted this court's conduct of the proceedings that were being undertaken at the time. And in fact brought them to a halt. [Underlining added]

[S.R.77:Supp.67:Transcript3/23/07,pp.11-12,J.A.350]

Judge Greer applied an incorrect standard for disqualification under Fed.R.Crim.P. 42(a)(3). Judge Greer declined to disqualify himself because Moncier's conduct on 11/17/06 was not the "basis" for the Show Cause Order. [S.R.77: Supp.67:Transcript3/23/07,pp.11-12,J.A.350]

Fed.R.Crim.P. Rule 42(a)(3) requires disqualification when the charged conduct "involved disrespect" not just where disrespect was the "basis" of the charge.

On 1/17/08 Judge Greer's supervising judge, Chief Judge Curtis L. Collier, reviewed the 11/17/06 transcript and determined from the transcript that Moncier's conduct was disrespectful. [R:77:Supp.68:ShowCauseOrder1/17/08,J.A.350] Likewise, on 4/8/09 Magistrate-

Judge Susan Lee found that Moncier's conduct on 11/17/06 involved disrespect to Judge Greer. [R:77:Supp.68:ShowCauseOrder1/17/08,J.A.350]

Judge Greer's 3/23/07 statement; Senior Judge Collier's 1/17/08 finding; and Magistrate-Judge Lee's 4/8/08 findings that Moncier's 11/17/06 conduct involved disrespect conclusively establish the Fed.R.Crim.P. 42(a)(3) disqualification of Judge Greer.

28 U.S.C. §455

28 U.S.C. §455(a) required disqualification when Judge Greer's "impartiality might reasonably be questioned."

28 U.S.C. §455(b)(1) required disqualification when Judge Greer had "personal knowledge" about disputed facts.

28 U.S.C. §455(b)(1) required disqualification when Judge Greer had a "bias" against Moncier.

28 U.S.C. §455(b)(3) required disqualification when Judge Greer had expressed opinions concerning Moncier.

28 U.S.C. §455(b)(1) and (3) required disqualification where Judge Greer had knowledge or opinions about Grooms, or Vassar's knowledge about Grooms.

28 U.S.C. §455(b)(5)(iv) required disqualification where Judge Greer was a witness to material facts.

28 U.S.C. §455(b) criteria do not include the provision that those criteria also require disqualification where they "might reasonably question [Judge Greer's] impartiality." The Code of Conduct for United States Judges, Canon 3, however, does require disqualification where a §455(b) criteria "might reasonably question [Judge Greer's] impartiality."

Constitutional Requirements For Disqualification

Due process requires recusal of a judge who has become personally embroiled in a controversy and cannot therefore adjudicate it fairly. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-466, (1971).

Likewise, a trial judge should not preside over a criminal contempt proceeding against an attorney where the trial judge has permitted himself to become "personally embroiled" with the defense attorney throughout trial. *Offutt v. United States*, 348 U.S. 11, 17, (1954). As stated in *Offutt* Judges should not sit:

> "[I]n judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feelings against the lawyer.. . .The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance."

Offutt v. United States, 348 U.S. 11, 17, (1954)

The inquiry is "not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" *Ungar v. Sarafite*, 376 U.S. 575 (1964). "Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136, (1955). The fact that an appearance of bias is sufficient to warrant disqualification underscores the elemental truth that in a judicial proceeding appearances do matter. *Offutt v. United States*, 348 U.S. 11, 14, (1954).

> "The disqualification calculus does not concern what is in the mind of the judge, nor does it prescribe some subjective test by which one might measure the probability of bias or prejudice. Instead, it says that a judge should be disqualified from a proceeding where the circumstances raise reasonable questions about his impartiality, regardless of his state of mind or ability to conduct a fair and impartial hearing."

United States v. Griffin, 84 F.3d 820 (7thCir.1996).

Moncier and Judge Greer had a difficult, strained relationship in Vassar's case. Judge Greer made statements in other cases about his unfavorable opinions of Moncier after 11/17/06 but before Judge Greer tried Moncier for criminal contempt without a jury. Moncier has filed statements made by Judge

Greer *in camera* and a copy is filed with this Court for its review *in camera*. [S.R.77:UnderSealFiling,J.A.350]

Moncier had tried five criminal jury trials before Judge Greer during his tenure from 2002 up until 2005. [R.44:Order,J.A.209] Moncier's clients were acquitted by juries in each of those cases except Vassar and Musick who were convicted of the least minimum offense they were charged with committing. [R.6:MotionRecusalProsecutors,J.A.29]

Judge Greer's description of Moncier as "chronically disrespectful" on March 23, 2008 demonstrated Judge Greer had a long-standing negative view of Moncier.

Judge Greer's opinions about Moncier "regardless of the Court's state of mind or ability to conduct a fair and impartial hearing" constitutionally required his disqualification because the fact that "appearance of bias is sufficient to warrant disqualification underscores the elemental truth that in a judicial proceeding appearances do matter. *Offutt v. United States*, 348 U.S. 11, 14, (1954)

Conclusion

Judge Greer was disqualified to preside over Moncier's trial pursuant to Moncier's constitutional right to an impartial judge; Fed.R.Crim.P. 42(c) and 28 U.S.C. §455; and the Code of Conduct for United States Judges.

In the event this Court does not dismiss the charges, Moncier requests this Court order a new trial and, on remand requests this Court by *rule nisi* order a judge outside the Eastern District of Tennessee to preside over Moncier's trial.

IV. Moncier Was Denied His Fifth and Sixth Amendment Right To A Jury Trial.

Standard of Review

Denial of a fundamental constitutional right is subject to strict scrutiny or rational basis review by this court. *United States v. Bandon*, 158 F.3d 947, 956 (6th.Cir.1998)

Proceedings Below

Moncier on April 18, 2007 demanded a jury. [R.28:DemandJuryTrial,J.A.119] On April 23, 2007 Judge Greer denied Moncier a jury. [R.33:Order,J.A.148]

Applicable Law

Supreme Court cases beginning with *Jones v. United States; Apprendi v. United States;* and *Blakely v. Washington* have redefined the Fifth and Sixth Amendment right to a jury trial. These cases now require a jury for finding of any

fact that is necessary to increase punishment beyond those facts required to be found by the jury's verdict.[26]

Judge Greer could not sentence Moncier without Judge Greer making factual findings necessary to convict Moncier. It is constitutionally illogical to provide a constitutional right to a jury trial for any factual determination that increases a sentence beyond which could be imposed without the factual finding, but deny a person a jury trial for a crime, the conviction of which is required for a judge to impose a sentence.

Jones, Apprendi and *Blakely* revised the standard for determining Moncier's right to a jury trial to be for any fact required to sentence Moncier to a greater sentence than he would be have been subjected to without the fact.

Former "petty offense" law

In *Bloom v. State of Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 1480 (1967), the Supreme Court held that:

> [S]erious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution. ... [id. 198] Our experience teaches that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, are

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[26] *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely V. Washingto*n, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

> indistinguishable from those obtained under ordinary criminal laws. If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases. [Id. 207-08]... deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury. [Id. at 210]... If the penalty authorized by the legislature is more than six months, the crime is a serious crime and the defendant is entitled to a jury trial (even though the judge may impose a sentence of less than six months. [Id. at 211]

At the time of *Bloom* a petty offense was defined by 18 U.S.C. §19 as an offense for which a sentence of less than six months can be imposed. *Taylor v. Hayes*, 418 U.S. 488 (1974) held a "petty offense" was not subject to jury trials.

18 U.S.C. §19, defining a petty offense, was later amended by Congress to remove from its definition offenses punishable by a jail sentence of up to sixth months and now include only Class B or C misdemeanors that are subject to a fine. Consequently, the early cases holding that petty offense did not provide for a jury trial are no longer applicable because a petty offense, as now defined by Congress, cannot include an offense that provides for a jail sentence.

In 18 U.S.C. §401 Congress did not prescribe a penalty for a contempt but simply provides the Court has the authority to punish contempt of its authority by fine or imprisonment, or both, at its discretion. Presumably, the Court has the discretion to impose any “reasonable” sentence. Since there is no statutory

maximum, the Court has the authority to impose a sentence of more than six months. Accordingly, Moncier was entitled to a jury trial.

Judge Greer, in an effort to deny Moncier a jury trial, held if Judge Greer determined the facts were sufficient to convict Moncier "any penalty imposed by this Curt will not exceed six months." This is the same thing that happened in *Apprendi v. New Jersey* wherein the judge made a determination that Apprendi was guilty of a "hate crime" that carried a new and separate five-year sentence.

Conclusion

If this Court does not dismiss the charges against Moncier, Moncier was denied his constitutional rights to a jury and a new trial, with a jury, should be ordered.

V. Judge Greer's Testimonial "Facts" As Contained In His Order After Moncier's Trial Violated Moncier's Sixth Amendment Right Of Confrontation and Cross-Examination And Constitutional Right to Present A Complete Defense

Standard of Review

Denial of a fundamental constitutional right is subject to strict scrutiny or rational basis review by this court. *United States v. Bandon*, 158 F.3d 947, 956 (6th.Cir.1998)

Proceedings Below

Moncier filed motions for Fed.R.Evid. 404(b) notice. [R.7:MotionPretrial,J.A.34] The prosecutor responded there was none. [R.25 RespMotionPretrial,J.A.112] Judge Greer based on the Government's representation that it did not intend to use 404(b) evidence "Denied as Moot."

Applicable Law

Moncier had a constitutional right to cross-examine witnesses against him. *Davis v. Alaska,* 415 U.S. 308 (1974). Moncier also had the right to confront witnesses against him. *Crawford v. Washington,* 541 U.S. 36 (2004).

Judge Greer did not testify subject to cross-examination and Moncier was not afforded the opportunity to confront Judge Greer. Instead, Judge Greer provided evidence against Moncier in his May 30, 2007 order of conviction.

Moncier moved to disqualify Judge Greer [R.8:MotionDisqualify,J.A.36]

Judge Greer denied the motion stating the 11/17/06 transcript was "wholly adequate to either prove or disprove such allegations." [R.32:Order,p.7,J.A.140]

Judge Greer was alerted to evidence that Moncier would offer in his defense by the filing of Moncier's affidavit and Vassar's affidavit on April 18, 2007. [R.10:AffidavitMoncier,J.A.50;R.10:AffidavitVassar, J.A.46]

In his May 30th Opinion convicting Moncier, however, Judge Greer Judge Greer then "testified" about matters to rebut Moncier's testimony he knew from Moncier and Vassar's affidavits to be in issue.

At page 16 Judge Greer testified:

> At no time during these proceedings did Vassar ever request time to consult with Moncier. During the entire proceeding at the podium, Vassar listened intently to the Court's questions and made direct eye contact with the Court. Vassar never exhibited confusion but rather affirmatively acknowledged the Court's inquiry and his understanding of the inquiry.[27]

[R.44:Order,p.16,J.A.224]

At page 18 Judge Greer testified about Moncier's intent from Judge Greer's observations of Moncier in five criminal trials before Judge Greer and Moncier's 38 years of practice of law. [R.44:Order,p.18,fn11,J.A.226]

On page 22 Judge Greer testified to his own experience and conduct in the private practice of law. [R.44:Order,p.22,J.A.230]

Moncier's Right To Present A Defense

Judge's Greer "testimony" in his Order after the trial caught Moncier by surprise and denied Moncier his constitutional right to notice and a meaningful

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[27] Whether Vassar was attempting to speak to Moncier was a critical issue. Judge Greer in footnote 8 stated had Vassar requested to speak to Moncier Judge Greer would have probably granted that request because Vassar was not knowledgeable of the law or Rule 44. [R.44:Order,p.16,fn8,J.A.224] Judge Greer's acknowledgment of the validity of Vassar's right to request to speak to Moncier negates any wrongful conduct by Moncier if Moncier made the request for Vassar because Vassar was attempting get Moncier to speak with him.

opportunity to be heard[28] and to present a complete defense and produce evidence.[29]

Conclusion

If this Court does not dismiss the charges against Moncier, Moncier request this Court order a new trial because Judge Greer's factual testimony in his May 30, 2007 Order violated Moncier's Sixth Amendment right to confront and cross-examine Judge Greer and Moncier's constitutional right present a complete defense.

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[28] "[C]ore requirements" of due process are "adequate notice ... and a genuine opportunity to explain"). The notice provided must be "reasonably certain to inform those affected," *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and the opportunity to be heard must be given "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

[29] *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra,* or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [Internal citations omitted], the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *see also Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503, (2006)

VI. The Greeneville Office of the United States Attorney Was Disqualified To Prosecute Moncier

Standard of Review

Disqualification of an attorney is a supervisory duty of the Courts and should be reviewed *de novo* by this Court.

Proceedings Below

On April 18, 2007 Moncier filed a motion that the Greeneville Division of the Untied State's Attorney's Office be disqualified from being appointed pursuant to Fed.R.Crim.P. 42(b) to prosecute Moncier. [R.6:DisqualifyProsecutor,J.A.29]

The Greeneville Division prosecutors opposed the motion. [R.19:ResponseDisqualify,J.A.97]

On April 21, 2007 Judge Greer denied the motion. [R.32:Order,J.A.140]

Applicable Rules

Moncier's prosecutors were required to act in accordance with the ordinary duties of a prosecutor in a criminal proceeding. *Young v. United States*, 481 U.S. 787, 804, 107 S.Ct. 2124, 2136 (1987). Eastern District of Tennessee Local Rule 83.6 makes the Tennessee Rules of Professional Conduct applicable to

Assistant United States Attorneys practicing in the Court's of the Greeneville Division.

Tenn. Sup. Ct. R. 8, RPC 1.7, Commentary 17, while advising caution to avoid harassment, provides that opposing counsel in litigation can move to disqualify an attorney where the conflict "is such as clearly to call in question the fair or efficient administration of justice."

Provisions of the United States Attorney's Manual prohibited the Greeneville division from prosecuting Moncier. *see* Section 9-2.032 through 3-2.170.

The following factors of the USAM were applicable.

(1) the level of his/her involvement in the litigation involving the attorney's current or former client. AUSA Smith and attorneys in the Greeneville Division was subsumed in cases in which Moncier defended clients going back to *United States v. Fleenor,* 1999.

(2) the level of his/her involvement in the prosecution of the attorney. The Greeneville division had only four attorneys. AUSA Smith's wife was one of those attorneys and was counsel of record in Moncier's prosecution. AUSA Helen Smith prepared and filed motions to quash subpoenas to her husband

for testimony and records in Moncier's prosecution and was present at counsel table during the trial.

(3) the amount of time, if any, that has passed between the litigation involving the attorney's current or former client and the criminal prosecution of the attorney. Moncier was in the middle of the high-profile defense of Vassar. Moncier was also representing Grooms about whom the Greeneville division had leaked high-profile information.

(4) the level of the attorney's involvement in the representation of the current or former client. Moncier had successfully defended a number of persons who were targeted by AUSA Smith and the Greeneville division.

(5) the potential that there will be a public perception of favoritism or animus toward the attorney. Moncier presented evidence going back to 2005 of animus toward Moncier by AUSA Smith and the Greeneville division.

The following additional circumstances created required the recusal of the United States Attorney's Office in Greeneville:

(6) AUSA Smith, who is employed by the United States Attorney's Office in Greeneville, was directly involved in the prosecution of Moncier's client, Michael Carl Vassar;

(7) Moncier's 3/17/06 motion for sanctions against AUSA Smith was pending before the same court in which AUSA Smith's office and wife were prosecuting Moncier;

(8) AUSA Smith was a material witness to the incident on 11/17/06 that is the subject of the contempt charge against Moncier and a CFR Request had been made for records and testimony from AUSA Smith for the trial on 4/24/07.

(9) Moncier currently represents Gary Musick on appeal from this Court's judgment and sentence where one of the issues on appeal is prosecutorial misconduct of the United States Attorney's Office in Greeneville in filing a pretextual notice of appeal in effort to gain a tactical advantage by continuing Musick's trial over his objections.

(10) Moncier had been subject to unfounded accusations by AUSA Smith.

(11) Moncier had moved for sanctions against the United States Attorney's office repeatedly for withholding discovery and favorable evidence.

(12) In *United States v. Vassar*, on 11/14/06 Moncier had filed a transcript of a recorded conversation that AUSA Smith threatened Mark Thornton to withdraw a recommended sentence if Thornton did not testify at Vassar's trial to matters that were not true.

(13) In *United States v. Vassar*, on 11/8/06 Moncier filed motions to dismiss for prosecutorial misconduct, supported by evidence, asserting AUSA Smith and the Greeneville division had a habit and practice of providing witnesses undisclosed and unlawful benefits outside the lawful provisions of USSG §5K1.1.

Conclusion

In the event this Court does not dismiss the charges, Judge Greer appointing, and the Greeneville division of the United State's Attorney's Office accepting, prosecution of Moncier was error requiring a new trial.

Moncier requests relief by this Court ordering an independent prosecutor from a district other than the Eastern District of Tennessee be appointed by the Department of Justice for at any new trial to perform the full duties of a prosecutor, including probable cause determinations.

CONCLUSION

For the reasons stated Moncier requests this Court reverse and dismiss the charges of criminal contempt of court.

In, the alternative, Moncier moves this Court for a new trial with the requested instructions to the Court on remand.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief, including footnotes, headings and quotations, does complies with the type-volume limitation set out in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that it contains 13,575 words including footnotes, as counted by Microsoft Word 2008, the word processing system used to prepare the brief.

_____
RALPH E. HARWELL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Brief has been served upon AUSA Robert Reeves by United States Mail this ___ of October 2008.

_____
RALPH E. HARWELL

DESIGNATION OF APPENDIX CONTENTS

Appellant designates the following items to be included in the contents of the Joint Appendix:

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Complaint/Order Notice of Charges	4/18/07	R.1
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Minute Entry	4/18/07	R.4
Motion for Clarification and/or Enlargement of Time to File Motions	4/18/07	R.5
Motion for Recusal of Prosecutors	4/18/07	R.6
Motion for Pretrial Notice of 404(b) Evidence	4/18/07	R.7
Motion to Disqualify Judge	4/18/07	R.8
Motion to Dismiss Former Jeopardy	4/18/07	R.9
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RALPH E. HARWELL