
No. 08-5645

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

In re:)
))
HERBERT S. MONCIER)
))
 Appellant.)

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

APPELLANT'S 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.

s/Ralph E. Harwell
Counsel for Appellant
Date: November 18, 2008

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STATEMENT REGARDING ORAL ARGUMENT

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

JURISDICTIONAL STATEMENT

1. Jurisdiction was pursuant to Eastern District of Tennessee Local Rule 83.7 before District Judge Curtis L. Collier in his position as Chief Judge in the Eastern District of Tennessee.

2. This appeal is of right pursuant to Fed. R. App. P. 4(a).

3. Notices of Appeals were timely filed.

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

STATEMENT OF THE ISSUES

I. Is the evidence sufficient to discipline Moncier for Moncier's conduct while performing duties required of him as an advocate for Vassar?

II. Does the double jeopardy clause of the Fifth Amendment prohibit Moncier being disciplined after Moncier was punished for the same conduct by contempt?

III. Does a 1-year statute of limitations or laches bar Judge Collier instituting disciplinary proceedings 14 months after Moncier's conduct?

IV. Was Moncier denied notice of the rules he was charged with violating or was Moncier disciplined under unconstitutionally vague and overly-broad rules.

V. Was Judge Collier required to abstain from exercising federal jurisdiction until after the TBOPR concluded its proceedings against Moncier for the same conduct that had been instituted earlier by Judge Greer?

VI. Was Moncier denied his right to confront and cross-examine Judge Greer by the application of issue preclusion to admit as evidence the findings of Judge Greer in Moncier's contempt case?

VII. Was Moncier denied his right to 20-day notice of a hearing; his right to present evidence; his right to confront and cross-examine witnesses; and his right have the burden of proof of clear and convincing evidence?

VIII. Was Moncier erroneously denied a hearing as to the type or amount of his discipline?

IX. Did Judge Collier correctly disregard the testimony of 23 witnesses that disagreed with Judge Collier's opinions and conclusions stated in his Show Cause Order?

X. Was it improper for Judge Collier to use his personal knowledge of an unnamed case to gauge Moncier's discipline?

XI. Was Moncier improperly disciplined for motions and witnesses Moncier presented in his defense to Judge Collier's Show Cause Order?

XII. Was Moncier's discipline unauthorized, excessive and/or unreasonable?

XIII. Is Moncier entitled to a jury trial?

XIV. Were Magistrate-Judge Lee and Judge Collier disqualified?

SUMMARY OF ARGUMENTS

Issue I: Insufficiency of the evidence.

1. Moncier's conduct did not violate any Tennessee Rule of Professional Conduct (TRPC) and did not constitute a violation of Judge Greer's directive because Moncier had an ethical duty to take steps to resolve a potential of a conflict created by AUSA Smith's letter and thereafter, as Judge Greer was questioning Vassar, to confer with and advise Vassar.

2. Moncier's conduct did not obstruct the administration of justice.

3. Moncier acted in good faith to perform what he believed were his ethical duties to Vassar.

4. Mistakes or misunderstandings as to Moncier's duties and/or obligations is insufficient to support discipline.

Issue II: Double jeopardy barred Judge Collier punishing Moncier.

1. Judge Collier failed to consider or apply the *Urserly, Ranch* or Hudson double jeopardy tests to determine if Judge Collier's discipline constituted double jeopardy in violation of the Fifth Amendment.

Issue III: 1-year statute of limitation and latches.

1. A statute of limitations and/or laches is required to protect Moncier and other attorneys from stale discipline or judges secretly “keeping book” on attorneys.

2. There is a reasonable basis to believe Judge Collier charged Moncier on 1/17/08 to get rid of Moncier because of recent events in *U.S. v. Almany* where Judge Greer disqualify himself because Moncier represented *Almany*.

3. The 1-year statute of limitations for contempt and legal malpractice is the most applicable statute.

4. Judge Collier was guilty of laches by waiting 14 months to discipline Moncier after Moncier, his clients and opposing parties had relied on Moncier’s ability to represent them in federal court.

Issue IV: Moncier was denied notice of the rules he was disciplined for violating and disciplined on unconstitutionally vague and overly broad standards.

1. The rules Moncier was charged with violating were not attached to the Show Cause Order as required by EDTNLR 83.7(b)(1)(iii).

2. The Show Cause Order did not give Moncier Fifth Amendment notice of the rules Moncier was charge with violating.

3. Judge Collier applied rules to discipline Moncier that were not part of the TRPC adopted in the EDTN by EDTNLR 83.6.

4. Discipline proceedings are *quasi-criminal* and require Fifth Amendment due process notice and fairness.

5. Rules applied to Moncier by Judge Collier were unconstitutionally vague and overly-broad.

Issue V: Abstention to the TBOPR.

1. Judge Collier should have abstained from invoking federal authority until a prior complaint by Judge Greer for the same conduct against Moncier to the TBOPR was resolved.

2. Judge Greer's complaint to the TBOPR about Moncier's 11/17/06 conduct constituted an election of remedies under EDTNLR 83.7(a).

3. Under the doctrine of "primary jurisdiction" EDTNLR 83.6 placed primary jurisdiction with the TBOPR.

4. Federal abstention required Judge Collier allow the TBOPR complete its proceedings.

Issue VI. Issue Preclusion

1. Relying on Judge Greer's contempt findings violated Moncier's right of confrontation and cross-examination pursuant to EDTNLR 84.7(h)(3).
2. Relying on Judge Greer's contempt findings violated Moncier's Sixth Amendment Confrontation-Cross Examination rights.
3. Relying on Judge Greer's contempt findings was a material variance from the Show Cause Order.

Issue VII: Hearing And Constitutional Violations

1. Moncier was denied his EDTNLR 83.7(h)(1)(i) right to twenty days notice prior to a hearing and his Fifth and Sixth Amendment right to present a complete defense.
2. Moncier was denied his EDTNLR 83.7(h)(1)(ii) right to present witnesses and his Sixth Amendment Compulsory process.
3. Moncier was denied his EDTNLR 83.7(h)(1)(ii) and his Fifth Amendment Due Process rights to have Judge Greer and Judge Collier testify "under penalty of perjury".
4. Moncier was denied his EDTNLR 83.7(h)(iii) and Sixth Amendment rights to "confront and cross-examine" Judge Greer and Judge Collier.

5. Judge Collier violated EDTNLR 83.7(h)(1)(iv) burden of proof of “clear and convincing” and the Fifth Amendment by shifting the burden of proof to Moncier to “demonstrate that [the Show Cause Order] was inaccurate.”

Issue VIII: Denial of a Hearing On Type And Amount Of Discipline.

1. Moncier was denied to a hearing before either the Magistrate-Judge or Judge Collier as to the type and amount of discipline in violation of EDTNLR 86.7(h)(2) and Fifth Amendment Due Process.

Issue IX: Disregarded Witnesses

1. Judge Collier erroneously disregarded witnesses who reviewed the 11/17/06 transcript and offered opinions that Judge Collier’s charges were “inaccurate” and incorrect.

Issue X: The unnamed “guage” case

1. Judge Collier erroneously relied on personal knowledge from an unnamed case to discipline Moncier.

Issue XI: Discipline For Presenting Motions And Evidence.

1. Without any compliance with EDTNLR 83.7 or Fifth Amendment due process or notice Judge Collier disciplined Moncier for motions Moncier filed in his defense of the disciplinary charges.

2. Without any compliance with EDTNLR 83.7 or Fifth Amendment due process or notice Judge Collier disciplined Moncier for presenting witnesses in his defense that Judge Collier's opinions and conclusions in his Show Cause Order were "inaccurate" and incorrect.

Issue XII: Jury Trial

1. Moncier was denied a jury trial in violation of the Sixth Amendment if his proceedings were criminal.

2. Moncier was denied a jury trial in violation of the Seventh Amendment if he was tried for common law misconduct.

Issue XIII: Moncier's discipline was unlawful, unauthorized, excessive and unreasonable

1. Moncier's discipline was unlawful where Judge Collier gauged his discipline for Moncier on personal knowledge of an unknown case.

2. Moncier's discipline was unlawful where Judge Collier considered *ex parte* communications from the Eastern District of Kentucky to discipline Moncier.

3. Moncier's discipline was unlawful where Judge Collier considered secret proceedings by judges in the EDTN to discipline Moncier.

4. The discipline imposed by Judge Collier exceeded his authority to suspend Moncier where his authority was limited to suspending Moncier from signing pleadings or making appearances before judges of the EDTN.

5. There is no reported similar case that imposed discipline against an attorney for attempting to perform duties as a lawyer in a serious criminal case.

6. Judge Collier failed to apply the ABA Standards for Attorney Sanctions adopted by the Tennessee Supreme Court in Rule 9, § 3.4.

7. Assuming Moncier's conduct was unethical or violated a TRPC, there is no case imposing the severity of the discipline imposed by Judge Collier on Moncier.

8. Assuming Moncier's conduct was unethical or violated a TRPC, Judge Collier's discipline was excessive and unreasonable.

Issue IV. Magistrate-Judge Lee and Judge Collier were disqualified pursuant to the Code of Judicial Conduct For United States Judges "COJCFUSJ" and 28 U.S.C. §144 and §455.

1. Judge Collier and Magistrate-Judge Lee had a duty and failed to disclose *ex parte* communications or personal knowledge pertaining to Moncier.

2. Magistrate-Judge Lee was disqualified to sit as a Judicial Officer to determine if Judge Collier's Show Cause Order was "inaccurate" because the employment supervisory relationship between them might raise a reasonable question as to Magistrate-Judge Lee's impartiality.

3. Judge Collier considered *ex parte* and personal knowledge in his rulings.

STATEMENT OF THE CASE

Moncier was convicted by District Court Judge J. Ronnie Greer for criminal contempt for Moncier's conduct in defending Michael Vassar in *U.S. v. Vassar* which is the same conduct for which Moncier has been disciplined in this case. Moncier's conviction is on appeal to this Court in *U.S. v. Moncier*, Sixth Circuit #07-6053. Oral arguments have not been scheduled.

Moncier's brief in his contempt proceeding is attached as an appendix to this brief. [Attachment 1]

U.S. v. Vassar is also on appeal to this Court in case #07-5299.

In June 2007 Judge Greer filed a complaint against Moncier for his 11/17/06 conduct in *Vassar* to the Tennessee Board of Professional Reasonability.

Judge Greer's complaint against Moncier was pending before the TBOPR on 01/17/08 EDTN when Chief Judge Curtis L. Collier,¹ issued a Show Cause Order for Moncier to establish why Moncier should not be disciplined for his conduct during the 1/17/06 hearing; ordered proceedings against Moncier be under seal and confidential; and ordered Moncier file a EDTNLR 83.7 response and a request for a hearing within 20 days. [R.1:ShowCause,ROA,pp.7-14].

¹ www.uscourts.gov describes the Chief Judge of a district to normally be the judge who has served on the court the longest; serves for a maximum of seven (7) years; and has administrative responsibilities relating to the operation of the Court.

On 2/11/08 Judge Collier appointed Chattanooga Magistrate-Judge Susan Lee to serve as a “Judicial Officer” pursuant to EDTNLR 83.7(g) to investigate the allegations of the Show Cause Order and the response, pursuant to E.D.TN. LR 83.7(g). Judge Collier Ordered that

“the hearing shall be limited to a demonstration by Moncier that the allegations in the Show Cause Order are inaccurate, or if accurate, that disciplinary action is not warranted.” [R.7:Order,pp.43]

On 2/23/08 Moncier submitted a detailed sworn response, with supporting documents. [R.13:Response,ROA,pp.71-122]

Moncier also filed an alternate response if a hearing was limited to whether Judge Collier’s allegations were “inaccurate” as specified in the 2/11/08 and 2/13/08 Orders. [R.22:AlternateResponse,ROA,pp.145-150]

On 2/27/08 Magistrate-Judge Lee filed an Order (received by Moncier on Friday afternoon, 2/29/08) holding:

In the interest of providing Moncier every opportunity to address the referred matters, a hearing limited to a demonstration by Moncier that the allegations in the Show Cause Order are either inaccurate, or, if accurate, do not warrant disciplinary action will be held on 3/5/08 at 10:00 a.m. in the chambers of the undersigned as previously scheduled.

[R.29:M&O,ROA,155]

Moncier timely submitted 28 U.S.C. § 636(b) objections and appeals to Judge Collier from pre-hearing orders of Magistrate-Judge Lee. [R.34:Objection,ROA,207] Judge Collier never ruled on Moncier's objections and appeals as provided for by 28 U.S.C. § 636(b).

Hearings were held by Magistrate-Judge Lee on 3/5/08 and 3/6/08. [R.66:Hearing,pgs.1-20;R.67:Hearing,pgs.1-76]

Moncier made a motion for directed verdict because "the other side hasn't carried their burden of proof" and continued to object that the Orders were "inverting" the burden of proof. [R.66:Hearing,pgs.26-27]

Magistrate-Judge Lee overruled Moncier's motion. [R.66:Hearing,p.27]

Moncier filed the declarations of 23 witnesses who, after reading the 11/17/06 transcript, disagreed with Judge Collier's opinions and conclusions. [R.36:NoticeDumas,ROA,221;R.37:NoticeShort,ROA,229;R.38:NoticeDavies,ROA,244;R.39:NoticeMartin,ROA,246;R.40:NoticeAlpert,ROA,249;R.41:NoticeDawson,ROA,252;R.42:NoticeReagan,ROA,255;R.43:NoticeMassey,ROA,259;R.44:NoticeStephens,ROA,262;R.45:NoticeOwen,ROA,267;R.46:NoticeAuer,ROA,272;R.47:NoticeEvans,ROA,275;R.48:NoticeHalstead,ROA,279;R.49:NoticeMoore,ROA,282;R.50:NoticeSkidmore,ROA,286;R.52:NoticeWhalen,ROA,290;R.52:NoticeWigler,ROA,294;R.53:NoticeBailey,ROA,300;R.54:NoticeBurroughs,ROA,302;

R.55:NoticeGibson,ROA,304;R.62:AffidavitIsaacs,ROA,363;R.63:AffidavitJohnson,ROA366;R.64;AffidavitDawson,ROA,378]

On 4/7/08 Magistrate-Judge Lee filed a 61-page recommendation; applied “preclusive effect” to the statements, findings and orders of Judge Greer in *U.S. v. Moncier*; recommended Moncier be disciplined; but left the decision as to what the discipline would be to Judge Collier. [R.65:Recommendation,pg.61,ROA,441]

On 4/18/08 Moncier timely filed exceptions to Magistrate-Judge Lee’s recommendations. [R.68:Objection,ROA,442]

In Moncier’s exceptions, Moncier requested a hearing before Judge Collier concerning discipline in the event Moncier’s objections to the recommendation were denied. [R.68:Objection,p.22,ROA,461]

On 4/29/08 Judge Collier issued an 80-page Memorandum and Order disciplining Moncier for Moncier’s actions on 11/17/06; Moncier’s disrespect toward prosecutors; Moncier’s motions filed in his defense of the Show Cause Order; and Moncier’s submission of witnesses in his defense. [R.69:MemoOrder,ROA,467-546]

The Memorandum overruled all of Moncier's objections; applied "preclusive effect" to Judge Greer's findings; denied Moncier a hearing on discipline; and discussed an unnamed case as a "gauge" for discipline that suggested Moncier may not be able to work with any attorney on any present or future federal cases. [R.69:MemoOrder,ROA,467-546]

Judge Collier suspended Moncier from the bar of the EDTN for seven (7) years with five years being active suspension and two years thereafter being on probation and established conditions for Moncier to seek reinstatement. [R.69:M&O,ROA, 467-546]

On 5/8/08 Moncier filed a motion for stay with Judge Collier. [R.70:MotionStay,ROA,547]

On 5/16/08 Judge Collier entered a Memorandum and Order denying Moncier's Motion for stay, relied in part on new communications he received from unnamed sources in the Eastern District of Kentucky; placed additional restrictions on Moncier; and held Moncier "was a danger to the public." [R.71:M&O,p.1,ROA,557]

On 7/30/08 Judge Collier ruled *inter alia* the Federal Rules of Civil Procedure did not apply to Moncier's EDTNLR 83.7 disciplinary proceedings. [R.80:Memorandum,p.1.ROA,696]

Although he held he did not have continuing jurisdiction after Moncier's notice of appeal, Judge Collier on 6/29/08 placed additional severe restrictions on Moncier. [R.80:M&O,pp.12-18,ROA,707-713] Included among Judge Collier's new restrictions were prohibitions for Moncier's:

presence in the courtroom during proceedings for former clients, accompanying admitted attorneys to federal court, appearing with admitted attorneys in federal court, sitting with admitted attorneys in federal court, and conversing with admitted attorneys in federal court in connection with any matter or potential matter, or case or potential case in federal court in the Eastern District of Tennessee, either directly or indirectly, either individually or in concert with one or more admitted attorneys.

[R.80:M&O,pp.15-16,ROA,709-711]

On 8/22/08 Judge Collier entered another Order that placed additional restrictions on Moncier's ability to continue his law business.

[R.81:Memorandum,p.18,ROA,73]

Judge Collier refused to rule on Moncier's 5/19/08 motion for Moncier to be permitted to be heard on uncharged and incorrect *ex parte* information relied on by Judge Collier in his 5/16/08 Memorandum Opinion.

[R.81:Memornadum,p.2,ROA,715]

Judge Collier also refused to rule on Moncier's 5/19/08 motion for the name, citation or location of the case used by Judge Collier in his 4/29/08 Memorandum Order as a "gauge" for discipline on Moncier.
[R.81:Memorandum,p.2,ROA,715]

On 8/28/08 Moncier filed a supplemental Notice of Appeal from the Orders of Judge Collier entered after the 5/28/08 Notice of Appeal.
[R.83:SuppNotice,ROA,734]

STATEMENT OF FACTS

Moncier's sworn responses to the Show Cause and the 11/17/06 transcript in *Vassar* were marked as Exhibit 1 at the 3/5/08 hearing. [Exhibit 1]

Moncier agreed that the transcript reflected what the Court Reporter heard and typed. Moncier reserved the right to explain omissions; the use of the symbol "--" in the transcript; tone; inflection; intent; and discerned impact. [R.66:Hearing ,pp.15-17]

Moncier's Background

Moncier testified he received his juris doctorate from UT Law School in 1970. In 1974 Moncier received a LLM, Masters of Law, from George Washington National Law Center in Washington, D.C. [R.66:Hearing,pp.38-44]

Moncier's wife died in 1981 when their two sons were 3 1/2 years and 5 months old. The younger son was born with cerebral palsy. Moncier did not remarry and alone raised his sons who are now 26 and 28. The younger son lives with Moncier. The older son was completing law school. [R.66:Hearing,3/5/08,p.37,74-75]

Moncier has been active with Knoxville's largest Methodist Church and has served on almost every committee of the Church including its Trustees. [R.67:Hearing,3/6/08,p.220]

Moncier does not drink, smoke, or use drugs.

[R.67:Hearing,3/6/08,p.221]

Moncier was drafted in 1970 and accepted a direct commission as a Captain in the Army Judge Advocate Generals Corps. [R.66:Hearing,3/5/08,p.41]

Upon graduation from the military law college at the University of Virginia Law School at Charlottesville, Virginia Moncier was assigned to Fort Meade, Maryland to prosecute major crimes in General Court-Martials and then as a criminal defense attorney. [R.66:Hearing,3/5/08,p.41-64]

Upon Moncier's discharge Moncier returned to Knoxville and accepted a position in the Knox County District Attorney General's Office as a trial court prosecutor for two years. [R.66:Hearing,3/5/08,p.64]

Moncier began his private practice in 1976 in the garage of his home. [R.66:Hearing,3/5/08,p.64]

Although Moncier was not certain as to which of his admissions were still active, Moncier has appeared before the First, Fourth, Sixth, Ninth and Eleventh Circuit Courts of appeal. Moncier is admitted to the United States Supreme Court and United States Military Court of Appeals. Moncier had appeared *pro hac vice* in numerous federal district courts based on his certificate of good standing from the Eastern District of Tennessee. [R.66:Hearing,3/5/08,p.77]

According to a Westlaw search, Moncier has appeared in the Sixth Circuit Court of Appeals in 42 cases. [R.67:Hearing,3/6/08,p.266]

Moncier became active in the Tennessee Association of Criminal Defense Attorneys; the National Association of Criminal Defense Attorneys; was elected president of the Knoxville Bar Association Barristers; and was involved with the activities of the Knoxville Bar Association and Tennessee Bar Association. [R.66:Hearing,3/5/08,pp.65-66]

Moncier supported the Tennessee Supreme Court adopting mandatory continuing legal education for attorneys in Tennessee; developed TACDL's continuing legal education program in 1982; and took TACDL's CLE programs to smaller areas of Tennessee for local attorneys. [R.66:Hearing,3/5/08,p.66-68]

Moncier was a member of the Board of Directors of TACDL and served as its President. [R.66:Hearing,3/5/08,p.66-68]

Moncier taught criminal law and procedure at three area colleges and regularly makes presentations at various seminars including TACDL, NACDL and UT Law School. [R.66:Hearing,3/5/08,p.70]

Moncier has received a number of accolades during his practice including the highest (A-V) rating from Martindale-Hubble since 1981; since 1997 Moncier has been listed in the “Best Lawyers in America”, initially “Best 500 Lawyers in America”; and listed in “Super Lawyers” of the Southeast. [R.66:Hearing,3/5/08,p.76]

In 2005 Moncier was named one of the 101 “Best Attorneys In Tennessee” by the Tennessee Business Journal. [R.67:Hearing,3/6/08,p.216]

In the 1990s Moncier was one of the first three attorneys in Tennessee to be certified by the National Board of Trial Advocacy as a criminal trial specialist. Moncier has allowed that certification to lapse because of the events pertaining to the 11/17/06 hearing. [R.66:Hearing,3/5/08,p.78]

Moncier’s Relationship To Judge Greer

Moncier successfully represented defendants in the Greeneville Division of the EDTN prior to Judge Greer’s being appointed to that bench in 2001. [R.66:Hearing,3/5/08,p.84].

Moncier tried one of the first criminal cases before Judge Greer, *United States v. Huff*, in February 2003. [R.66:Hearing,3/5/08,p.85;R.67:Hearing,3/6/08,p.224]

Contrary to the stated opinion of Judge Greer, prior to Moncier's moving to disqualify Judge Greer in *US v. Michael Snipes*, Moncier had never filed a motion to disqualify a federal judge. [R.66:Hearing,3/5/08,pp.86-88]

Moncier testified that after filing a motion to disqualify Judge Greer in *U.S. v. Snipes* in July 2004 Moncier began to be treated differently in the federal courts. [R.66:Hearing,3/5/08, p.88; [R.67:Hearing,3/6/08,p.224]

Moncier explained that after *Booker/Fanfan* was decided in June 2004, Moncier represented Snipes on a motion to set aside Snipes' guilty plea that had been entered before Judge Greer before *Booker/Fanfan* to offenses carrying a mandatory life sentence. Without a hearing, Judge Greer denied Snipes' motion to withdraw his plea. Moncier then learned Judge Greer had represented the prosecution's star witnesses against Snipes. That witness was receiving benefits on her sentence for Snipes' conviction under her plea agreement that had been negotiated for her by Judge Greer prior to Judge Greer taking the bench. Moncier filed Snipes' 28 U.S.C. § 144 declaration and a 28 U.S.C. § 455(a) motion for Judge Greer to disqualify himself. [R.66:Hearing,3/5/08,p.88-99,105-106]

Judge Greer disqualified himself but did not set aside his prior order denying Snipes' motion to withdraw his plea. *Snipes* was transferred to District Judge Leon Jordan in Knoxville. Judge Jordan characterized Moncier's motions as being critical of Judge Greer. [R.66:Hearing,3/5/08,pp.101-103,106-107]

After *Snipes*, Moncier's relationship with Judge Greer in Greenville was not good and Moncier's relationships with other federal judges in the EDTN were not the same as before. [R.66:Hearing,3/5/08,p.99,101-102,107,126]

Moncier represented Gary Musick in Judge Greer's court in September 2004. Moncier testified that prior favorable rulings Moncier had obtained from Judge Greer in *Huff* changed after Moncier litigated the disqualification motion in *Snipes*. [R.66:Hearing,3/5/08,pp.100-102,109,112;R.67:Hearing,3/6/08,p.224]

Moncier testified that Judge Jordan on 7/25/05, shortly after *Snipes*, filed a Order in an appeal Moncier filed asserting abuse of discretion by unfairness from an Order of a Magistrate-Judge in *Stidham v. Knox County*, No. 3:04-cv-139. In that Order Judge Jordan stated he would hold Moncier in contempt if he heard of Moncier being disrespectful to another judge in this district. That Order was published on the front page of the local newspaper. Pursuant to EDTN 83.7, Moncier presented an explanation and requested a hearing from Chief Judge Collier in August 2005. Moncier provided his explanation and response to each

judge in the district, including Judge Greer and Chief Judge Collier. Moncier never received a hearing. [R.66:Hearing,3/5/08,p.123-125;R.67:Hearing,3/6/08,pp.225-226,228-220]

U.S. v. Vassar

Moncier had represented Michael Vassar since 10/4/05 in Vassar's defense of two indictments, and three scheduled jury trials, before District Judge J. Ronnie Greer in Greeneville, Tennessee. [Appendix:MoncierContemptBrief]

Vassar was facing 20 years to life. Vassar was found not guilty in the first trial; the government dismissed the charge in the second trial; and at the third trial Vassar was found not guilty of an over 5-kilo cocaine conspiracy but convicted of a less than 500-gram cocaine conspiracy. [R.66:Hearing,3/5/08,p.118]

On 11/16/06, the day before Vassar was to be sentenced, AUSA M. Neil Smith faxed Moncier a letter purportedly containing favorable sentencing materials that had been requested by Moncier. [Exhibit 6]

Inexplicably, sandwiched between favorable information, was a sentence informing Moncier that a witness, Mark Thornton, who Moncier anticipated calling at Vassar's hearing the next day, had in October 2005 (some 12 months earlier) allegedly given a statement to authorities that Vassar had told

Thornton that another client of Moncier, Harold Grooms, had offered to secure drugs for Vassar. [Exhibit 6]

Thornton's statement, if true, potentially created a conflict of interest between Moncier and one, or both, of these clients; was destructive to Vassar's plans for the sentencing hearing the next day; potentially exposed Vassar to perjury and/or sentencing obstruction of justice for Vassar's prior sworn statements to the contrary; and if submitted, would accomplish something AUSA Smith had been attempting to do for some time, i.e. disqualify Moncier. [Appendix:MoncierContemptBrief]

At Vassar's sentencing hearing on November 17, 2006, Moncier made motions and suggestions to resolve the potential of a conflict created by AUSA Smith's letter, including asking for Judge Greer to appoint independent counsel to confer and advise with Vassar; asking Judge Greer to have a non-sentencing judge take up the matter *in camera* with Vassar; and even ultimately asking Judge Greer, himself, to question Vassar *in camera* about the alleged statement.

After Moncier's motions were overruled, Moncier communicated to Judge Greer that Vassar wanted to proceed with his sentencing and that Moncier would work with Vassar during the lunch break and be prepared to proceed after lunch. [Appendix:MoncierContemptBrief]

Judge Greer called Vassar to the podium and began to question Vassar openly in the presence of the prosecutors, FBI and PSR officer. Instead of asking questions to determine if there was in fact a potential of a conflict, Judge Greer posed hypothetical and speculative scenarios that assumed what AUSA Smith stated in the letter was in fact true. Moncier's objections and request to approach the bench were denied. [Appendix:MoncierContemptBrief]

When Moncier continued to state objections, the following discourse occurred:

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

Moncier: May I speak to my -- [Client]²

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

[12:47 p.m.]

[Exhibit 3,p.107]

² The typed transcript does not contain [Client] after "--". [Client] is added because that is what Moncier was attempting to say. Either the court reporter did not hear Moncier say [Client] or Judge Greer spoke over Moncier. Moncier's use of the possessive pronoun "my" could only relate to Moncier's "Client," Vassar, who was standing beside Moncier at the podium and being questioned by Judge Greer at the time this exchange occurred.

Moncier was placed in jail. Thereafter, Judge Greer disqualified Moncier from representing Vassar; cited Moncier for criminal contempt; and on a later date, tried and convicted Moncier without a jury. Judge Greer sentenced Moncier to a \$5,000 fine, one-year probation, 150 hours community service, an anger management class, and 3 extra hours of ethics CLE. [Appendix:MoncierContemptBrief]

Strained Relationship In Vassar

Moncier was hired by Vassar in September 2005 and proceedings commenced in October 2005. [R.67:Hearing,3/6/08,pp.116,227]

Extensive hearings on issues first addressed in *Huff* and later in *Musick* began in *Vassar* in January 2006. [R.66:Hearing,3/5/08,p.120]

Subpoenas authorized for Vassar by a Magistrate-Judge were later quashed *instanter*, without a hearing, based on *ex parte* information the Magistrate-Judge obtained. Moncier filed an emergency appeal to Judge Greer, dictated from his car and filed electronically from his office while traveling to Greeneville, asserting the Magistrate-Judge had relied on “institutional gossip”. [R.66:Hearing,3/5/08,p.120]

Judge Greer admonished Moncier for using the term “institutional gossip.” Moncier apologized and attempted to replace the pleading to remove that term. Judge Greer took under advisement “sanctions” against Moncier for using the term “institutional gossip” in the pleading. [R.66:Hearing,3/5/08,pp.119-121]

Magistrate-Judge Lee questioned Moncier whether it was his position that the strained relationship with Judge Greer prior to 11/17/06 was the cause of Moncier’s conduct on 11/17/06. Moncier responded that the cause of his conduct was his ethical duties to Vassar. Moncier stated it was his opinion that the prior strained relationship with Judge Greer caused Judge Greer to view Moncier’s actions on 11/17/06 differently and that Judge Greer would not have treated a different attorney with an amicable relationship with Judge Greer the same; that, under normal circumstances, Judge Greer should have wanted Moncier to resolve the potential of a conflict before continuing to represent Vassar and he believed Judge Greer misperceived his ethical obligations. [R.66:Hearing,3/5/08,p.127,130-131]

Moncier testified he perceived at the end of the 11/17/06 hearing Judge Greer was attempting to obtain a waiver from Vassar for a potential conflict about which Vassar had not been advised. [R.66:Hearing,3/5/08,p.132]

Independent Counsel Was Appointed And Resolved The Potential Of A Conflict

After Moncier was returned from being placed in jail, Judge Greer informed Vassar he was going to appoint an independent attorney to represent Vassar. Moncier testified this is the very relief Moncier had requested at the beginning of the hearing. [R.67:Hearing,3/6/08,p.259]

Moncier was first disqualified from representing Vassar but then reinstated. On 2/14/07 Moncier represented Vassar at the sentencing hearing that went late into the night. [R.67:Hearing,3/6/08,p.264]

By permission of Magistrate-Judge Lee, Moncier filed 23 declarations from the following witnesses who reviewed the 11/17/06 transcript and who were of the opinion that Moncier did not violate a rule of professional conduct and Judge Collier's opinions in the Show Cause Order were "inaccurate."

Magistrate-Judge Lee found that Moncier had conducted himself in an acceptable manner during the hearing. [R.65:Recommendation,ROA,439-440]

Moncier's Responses To Judge Collier's Charges

Charge I:³ "Violation of an order of a court, abuse of the court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior" [R.1:Order,p.1,ROA*]

Moncier filed a sworn response to these allegations.

[R.13:Response,ROA.95-96]

Moncier testified that at page 107 of the 11/17/06 transcript when Judge Greer cut him off, Moncier was attempting to ask Judge Greer "May I speak to my Client?" [R.66:Hearing,3/5/08,pp.132,138]

Moncier testified his request to speak to Vassar was not loud, sassy, angry, sarcastic, defiant or in a mocking tone; was not intended to be disruptive; there was nothing unusual about the request; and the request was made for true purpose of clarification whether, in light of Judge Greer's directive, Moncier could confer with Vassar. [R.66:Hearing,3/5/08,p.152-153;R.67:Hearing,3/6/08,p.248]

Moncier cited statements in the record beginning at page 98, line 14, where Judge Greer was suggesting hypothetical situations to Vassar that were not correct or did not have a factual basis for which he was required to object. [R.67:Hearing,3/6/08,p.248-250] Moncier testified he had requested to approach

³ Counsel has assigned the numbers to the Judge Collier's 11/17/06 charges for reference.

the bench because, if Moncier said things at the podium, Judge Greer would believe Moncier was attempting to coach Vassar. [R.66:Hearing,3/5/08,p.136]

Moncier said that he spoke the words, "May I speak to my---" because Vassar was standing beside Moncier trying to get Moncier's attention and Moncier did not believe that Judge Greer had directed that he could not confer with Vassar or give him advice as to what was taking place. [R.67:Hearing,3/6/08,pp.135,253-254]

Moncier said, under the tensions that had developed, it was both courteous and advisable to seek clarification concerning whether Moncier would be permitted to do what he had a duty to Vassar to do, i.e., confer and advise Vassar. [R.67:Hearing,3/6/08,p.254]

Moncier was permitted to introduce the affidavit of Michael Vassar. Vassar swore that what AUSA Smith had written about Thornton-Grooms was not true; Vassar had no knowledge of Grooms' criminal activities; Vassar wanted Moncier to go forward with his sentencing; that Vassar was trying to get Moncier's attention at the podium to speak to Moncier; and as soon as he was appointed independent Counsel Vassar explained these things to that attorney. [R.67:Hearing,3/6/08,p.254;Exhibit7]

In his years of practice Moncier testified no judge had ever told him that he could not confer with his client or respond to a client's request to speak to the client. [R.66:Hearing,3/5/08,p.137]

Moncier testified he had acted in good faith after the potential of a conflict was sprung on him the day before. [R.66:Hearing,3/5/08,pp.31,129]

Moncier testified that by asking permission of Judge Greer to speak to Vassar, Moncier did not violate any Rule of Professional Conduct or conduct himself in a manner to "otherwise bring the court or bar into disrepute" nor did Moncier intend any "disrespect." [R.66:Hearing,3/5/08,p.144-145]

Moncier testified he did not believe at the time, and does not believe now, that asking for permission to speak to Vassar violated Judge Greer's directive; Moncier did not intend to do so; Moncier was not being disrespectful by making the request; and Moncier's request was not contemptuous behavior directed at the Court. [R.66:Hearing,3/5/08,p.160-161]

Moncier testified his action did not prejudice the Administration of Justice, that he had had witnesses present and was ready to proceed with the sentencing hearing. [R.66:Hearing,3/5/08,p.163]

Charge II: Moncier's Unfitness To Practice.

Moncier filed his sworn response to these charges.

[R.13:Response,ROA,71-121]

Moncier produced an *amicus brief* of the Tennessee Association of Criminal Defense attorneys filed before Judge Greer arguing that his conduct was required by existing case law to prevent waiver by Vassar.

[R.66:Hearing,3/5/08,pp.179,182,Exh.5]

Moncier was asked whether he considered himself fit to practice in Judge Greer's court or any other court in the Eastern District of Tennessee.

Moncier stated that he was; he had done so for 37 years; and he has done so since 11/17/06. [R.67:Hearing,3/6/08,p.265]

Moncier identified pending contractual obligations he had to a great number of people with regard to federal cases and went through each case that was coming up in sequence. [R.67:Hearing,3/6/08,pp.267-271]

Moncier filed a summary of 21 cases that he had successfully tried in the EDTN, Greeneville division. [Exhibit 8]

Moncier submitted the names of 10 trials he had participated in after 11/17/06 and the successful results of those trials. [R.9:Motion,ROA.48]

Moncier late filed affidavits of 23 attorneys as to his fitness to practice in federal courts.

Charge III: Moncier's Interruptions. [R.1:Order,p.2,ROA.8]

Moncier prepared a summary of the use of "--" that was entered as Exhibit 4. [Exhibit 4]

Moncier testified the transcript reflected that "--" was used 11 times when Judge Greer was speaking and Moncier spoke next; 20 times when Moncier was speaking and Judge Greer spoke next; twice when Vassar was speaking and Judge Greer spoke next; once when Judge Greer was speaking and Vassar spoke next; and once when another attorney spoke and Judge Greer spoke next. [R.66:Hearing,3/5/08,p.166]

Moncier testified that Moncier was told the court reporter used an audio recording that would reflect what happened at the 11/17/06 hearing and that the audio-tape would be preserved. Moncier learned that Magistrate-Judge Lee had been told there is no tape recording now available. [R.66:Hearing,3/5/08,pp.166-168]

Moncier denied the Court Reporter's use of "--" represented disrespectful interruptions by Moncier of Judge Greer or by Judge Greer of Moncier. Moncier explained that four of Moncier's "--" were at the end of Judge Greer's statements and may reflect that the Court Reporter simply did not hear Judge Greer's last word or words. Moncier explained that five of Moncier's "--"

could be attributed to Moncier not hearing in the new large federal courtrooms such as Judge Greer's. Moncier noted the 11/17/06 transcript reflected that Moncier told Judge Greer on one occasions that Moncier did not hear what Judge Greer said. Moncier also noted Judge Greer never admonished Moncier for any of the "--" and at one point, Moncier realizing he had spoken before Judge Greer finished, apologized and Judge Greer told Moncier to go on with what Moncier was saying. Moncier suggested that the rapidity of the discussions may have accounted for the Court Reporter's use of "--". [R.66:Hearing,3/5/08,pp.169-171]

Moncier pointed out for example, the 3/5/08 and 3/6/08 hearing transcripts would establish that repeatedly throughout those hearings Moncier's attorney and Magistrate-Judge Lee interrupted, or spoke over each other, represented in by "--" while neither intended disrespect. [R.66:Hearing,3/5/08,p.147]

Charge IV: Moncier accused "the prosecution of engaging in a conspiracy to prevent [Moncier] from trying cases due to his success in past trials." [R.1:Order,p.2,ROA.8]

Moncier filed a sworn response explaining Moncier's statement. [R.13:Response,pp.18-19,ROA.88-89]

Moncier described his reasons for not trusting the prosecutors in Judge Greer's court. [R.67:Hearing,3/6/08,p.231]

Moncier testified information provided by AUSA Smith in his 11/16/06 letter about the Vassar-Thornton-Grooms statement later turned out to be false. [R.66:Hearing,3/5/08,p.130]

Moncier filed a list of the seven (7) cases Moncier had defended against the Greeneville office. [R.66:Hearing,3/5/08,p.185]

Moncier stated it was perceived by the Greeneville office that they had lost those cases. Moncier testified that the Greeneville office and its investigators tell persons arrested they should not hire Moncier because he'll just take a lot of money and get them into worse trouble. Moncier testified that since the difficult proceedings in Snipes, Musick and Vassar, Moncier has not been hired by another person in Greeneville except Lee Almany and in that case the prosecution successfully disqualified Moncier.

Moncier further explained that prosecutors dislike the way Moncier defends cases. Moncier explained the dialog in the transcript with Judge Greer on 11/17/06, cited by Judge Collier, in so far as it pertained to the prosecutors, was a continuation of complaints by Moncier about the prosecutor's treatment of Moncier and his clients that had been going on for over two years in the Greeneville Division. [R.66:Hearing,3/5/08,pp.186-189]

Moncier testified that AUSA Smith's had made prior unfounded accusations charging Moncier with money-laundering and had been cited for sanctions. [R.66:Hearing,3/5/08,pp.190-194]

Charge V: Moncier "Threatened to 'sit there and remain moot,' i.e. "not provide a defense for his client."

Moncier filed a sworn response to this charge.
[R.13:Response,ROA.pp.90-91]

Actually what the transcript reflects to have transpired is:

MR. MONCIER: WELL, IF, IF WHAT HAS TO BE DONE HAS TO BE DONE, YOU KNOW, THAT'S FINE. I SIMPLY CANNOT -- I'M NOT GOING TO WALK INTO THIS TRAP. I'M NOT GOING TO DO IT. I'M NOT GOING TO PUT THE -- I HAD A --

THE COURT: YOU [Sic] TELLING ME YOU'RE JUST GOING TO WALKOUT OF HERE THIS MORNING WHETHER I LET YOU WITHDRAW OR NOT?

MR. MONCIER: OF COURSE NOT.

THE COURT: WHAT DO YOU MEAN, I'M NOT WALKING INTO THIS TRAP?

MR. MONCIER: I MEAN IF I HAVE TO SIT THERE AND REMAIN MOOT, I WILL SIT THERE AND REMAIN MOOT.

THE COURT: IN OTHER WORDS, YOU WOULDN'T PROVIDE HIM A DEFENSE?

MR. MONCIER: I CAN'T PROVIDE HIM A DEFENSE. IT WOULD BE AN INEFFECTIVE

ASSISTANCE OF COUNSEL TO DO SO.
EVERYBODY IS WALKING INTO A 2255 IN THIS
SITUATION.

THE COURT: IT APPEARS TO ME THAT YOU'RE
SETTING THAT UP.

MR. MONCIER: I'M NOT SETTING THIS UP.

[Exhibit 3]

Moncier testified he had previously filed PSR objections; affidavits; sentencing memorandums; and charts of co-defendants sentences. The only issue remaining was whether Vassar would call Thornton to establish threats made by AUSA Smith against Thornton to attempt to cause Thornton to testify falsely against Vassar at his trial.

Moncier testified that in his opinion there may be certain ethical circumstances in which it may be that it would be proper for an attorney to stand moot.

Moncier testified the “stand moot” thought was made in a span of seconds. After conferring with Vassar, however, Moncier informed Judge Greer they were ready to proceed to sentencing. Moncier denied that he would have refused to follow the instructions from Vassar or the Court.

[R.66:Hearing,3/5/08,pp.199-202]

Charge VI: Moncier represented that “Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator.” [R.1:Order,p.2,ROA.8]

Moncier filed a sworn response explaining Moncier’s statement.

[R.13:Response,pp.21-22,ROA.91-92]

Moncier explained he would not expect Vassar, on the date of Vassar’s sentencing hearing, after everything that had occurred, to admit to Moncier that what Vassar had previously told Moncier, and had testified under oath to Judge Greer, was not true. [R.66:Hearing,3/5/08,pp.190-194]

Moncier explained that he had no reason to believe there was a conflict with Grooms before or after AUSA Smith’s 11/16/06 letter. However, Moncier, after receipt of the letter, wanted to provide Vassar every opportunity to change his prior statements and testimony and Moncier was not the proper person to do that. [R.66:Hearing,3/5/08,pp.196-198]

Charge VII: Moncier represented “he had ‘absolutely’ no reason to believe he had a conflict” representing Vassar. [R.1:Order,p.2,ROA.8]

Moncier filed a sworn response explaining Moncier’s statement.

[R.13:Response,pp.23-24,ROA.93-94]

Moncier testified the statement is true.

Moncier testified that Judge Greer at page 98 also determined there was no conflict. [R.67:Hearing,3/6/08,p.251]

Moncier recited that on 3/16/06 there was a prior hearing with regard to Vassar and Grooms and Judge Greer had made a determination that Moncier did not have a conflict. [R.67:Hearing,3/6/08,p.251]

Moncier testified he believed that Vassar never thought there was any conflict, that he wanted to go forward with the hearing, and that the hypothetical issues the Judge was presenting to him were confusing him. [R.67:Hearing,3/6/08,p.253]

Charge VIII: The Court spanning three pages “explained, admonished, and instructed [Moncier] to the appropriateness of his conduct and demeanor” and “Moncier responded by contradicting the court’s admonishment.” [R.1:Order,p.2,ROA.8]

Moncier filed a sworn response explaining the dialog between Moncier and Judge Greer. [R.13:Response,pp.24-25,ROA.94-95]

Moncier explained the statements of Judge Greer at pages 90 to 101 as indicative of statements made by Judge Greer previously about how Moncier defends his clients. [R.66:Hearing,3/5/08,p.230]

Moncier denied he used the terms “disqualification” or “prosecutorial misconduct” in a disrespectful, uncivil, challenging or demeaning manner. Instead, Moncier testified, where there was a reasonable basis to articulate facts supporting these legal positions, Moncier had a duty to his client to do so. [R.67:Hearing,3/6/08,p.223]

Moncier testified that from his experience dating back to the military, Attorneys who file motions to disqualify or motions for relief from prosecutorial misconduct are not viewed as “civil friends” of the prosecutors. [R.67:Hearing,3/6/08,p.234]

Moncier testified it was not his duty to have a warm, fuzzy relationship with the courts but it is his duty to represent his client. [R.67:Hearing,3/6/08,p.236]

Moncier defended his use of the term “concoct”, “torture” and “extort” cited by Judge Greer as being accurate terms used to describe evidence of what AUSA Smith had done and that Moncier did not use those terms to describe any action of Judge Greer. [R.67:Hearing,3/6/08,p.244]

Moncier testified that there was ample reasons to believe the 11/16/06 letter of AUSA Smith was “concocted” [R.67:Hearing,3/6/08,p.240].

Moncier testified that AUSA Smith threatening Thornton with up to life in prison unless Thornton testified to untrue facts is properly described as “torture” and “extortion.” [R.67:Hearing,3/6/08,p.240]

Moncier acknowledged the words are strong but he believed them to be accurate and he had presented evidence to support the accusations. [R.67:Hearing,3/6/08,pp.241-243]

Moncier testified Judge Greer had previously stated his opinions that Moncier hates the government; Moncier hates §5K1.1; and Moncier will not permit his clients to cooperate. [R.67:Hearing,3/6/08,p.244]

Magistrate-Judge Lee asked if Judge Greer's opinions were correct. Moncier said "absolutely not" and then explained Moncier's true beliefs as a criminal defense attorney representing clients. [R.67:Hearing,3/6/08,pp.242-247]

Moncier characterized the dialog as not being disrespectful but a disagreement between himself and Judge Greer concerning how Moncier should ethically proceed after Moncier's receipt of AUSA Smith's 11/16/06 letter. [R.67:Hearing,3/6/08,p.249]

Moncier testified that contrary to Judge Collier's opinion and conclusions in the Show Cause Order, in the page referred to in the transcript, Judge Greer was not giving Moncier directive as to how to proceed; instead Judge Greer was criticizing Moncier; Moncier responded to Judge Greer's criticism; Moncier and Judge Greer disagreed; and Moncier did not view their disagreements to be disrespectful. [R.67:Hearing,3/6/08,pp.248-249].

ARGUMENT

I. The Evidence Is Insufficient To Impose Discipline.^{4,5}

Standard of Review

Appellate courts determine whether the evidence is sufficient to discipline an attorney. *In Re Snyder*, 472 U.S. 634, 646 (1985).

“This Court reviews the district court's factual findings under a clearly erroneous standard,” and “[t]he district court's determination of whether the facts constitute an obstruction of justice is a mixed question of law and fact which this Court reviews de novo” *U.S. v. Mise*, 240 F.3d 527, 530-31 (C.A.6,2001).

Moncier's Motion For Judgment

Moncier's motions to have Judge Greer and Judge Collier testify at Moncier's hearing were denied. The only evidence offered against Moncier at the hearing was the 11/17/06 transcript.

Magistrate-Judge Lee declined Moncier's motion to dismiss the charges prior to Moncier's offering a defense. At that time the only evidence was the 11/17/06 transcript.

Moncier asserts that the 11/17/06 transcript, standing alone, is insufficient to establish by EDTNLR 83.7(h)(4) “clear and convincing” evidence

⁴ For a summary of the arguments for this issue go to page 4.

⁵ For Moncier's responses to Judge Collier's charges go to pages 31-43.

Moncier committed an unethical act or violated a directive of Judge Greer and the motion to dismiss at the end of the opening proof was erroneously denied.

It is impossible to determine whether Moncier's conduct violated rules of professional conduct, or Judge Greer's directive, without understanding the reasons for Moncier's conduct on 11/17/06.

Moncier's Proof

Moncier testified and offered declarations of 23 witnesses that the charges were "inaccurate", incorrect and Moncier had not committed an unethical act.

Judge Collier's charges were not "proof." There was no rebuttal proof.

Again, at the conclusion of all the evidence, the evidence was insufficient to establish by EDTNLR 83.7(h)(4) "clear and convincing" evidence Moncier committed an unethical act or violated a directive of Judge Greer and the motion to dismiss at the end of the opening proof was erroneously denied.

Findings From Contempt Hearing

Moncier addresses in Issue IV that Magistrate-Judge Lee and Judge Collier erroneously accepted Judge Greer's findings in the criminal contempt as "facts" although Moncier was not permitted his EDTNLR 83.7(h)(2) right or Sixth Amendment right to confront and cross-examine Judge Greer. Moncier argues that he had no Fed.R.Evid. 201 notice of the taking of judicial knowledge and Judge Greer's findings were not properly offered into evidence.

Excluding Judge Greer's findings in the contempt hearing, there is no evidence contrary to Moncier's testimony and that of his 23 witnesses that he did not violate an ethical duty or directive of Judge Greer on 11/17/06.

Dangers Of Disciplining Attorneys On Cold Records

Disciplining attorneys for conduct while representing clients, without considering their intent or reasons for their conduct, is fraught with danger and is akin to second-guessing any decision without knowing the facts which the attorney knew and upon which the attorney made the decision.

Moncier's Intent And Reasons For His Conduct

Magistrate-Judge Lee and Judge Collier limited their analysis to the cold 11/17/06 transcript and viewed Moncier's reasons for his conduct to be immaterial.

Moncier's conduct is insufficient as a matter of law for Judge Collier to discipline Moncier because Moncier's conduct was shown to be justified as it was done pursuant ethical duties Moncier had to Vassar.

AUSA Smith's untimely disclosure of a potential of a conflict triggered Moncier's TRPC ethical duties and created the serious legal problems for Vassar. It is within the context of Moncier's perceived duties and the existing legal problems that Moncier acted.

(1) If AUSA Smith's Vassar-Thornton-Grooms communication was true, Vassar had testified to the contrary falsely on 3/16/06 and 4/16/06 before Judge Greer and was subject to a perjury indictment; obstruction of justice adjustments to his USSGs calculation; or, at a minimum, his untruthfulness could be used against Vassar by Judge Greer in weighing Vassar's § 3553(a) sentencing factors.

(2) If AUSA Smith's Vassar-Thornton-Grooms communication was true, Moncier was placed in a position of telling Judge Greer that Vassar had not been truthful with Moncier prior to Moncier being hired by Grooms.

(3) The alleged Vassar-Thornton-Grooms statement, if true, conflicted with Vassar's theory of sentencing defense, i.e., Vassar did not have knowledge about others prosecutors wanted, including Grooms, and Vassar could not provide USSG § 5K1.1 cooperation to get a sentence below the 5 kilo charge prosecutors demanded he plea to.

(4) If Vassar followed through on his plan to call Thornton to testify against AUSA Smith about threats made by AUSA Smith reflected in Thornton's statement filed on 11/13/06,⁶ during cross-examination, AUSA Smith would ask about the alleged 2005 Vassar-Thornton-Grooms communication.

(5) If Thornton admitted the alleged communication, Vassar would be subject to perjury and/or an increased sentence for obstruction of justice by Vassar's March and April 2006 sworn testimony to Judge Greer

(6) Vassar had no advice of counsel:

(a) regarding AUSA Smith's alleged October 2005 Vassar-Thornton-Grooms communication;

(b) regarding the nature and purpose of the questions Judge Greer was propounding to Vassar;

⁶ R.13-3:Thornton,11/13/06,Ex2,ROA.101-116.

(c) regarding the actions Judge Greer could take based on Vassar's answers to the questions being propounded;

(d) regarding a potential waiver of Vassar's rights that could, and would, occur based on Vassar's answers to questions propounded by Judge Greer;

(e) regarding what use could be made of, and the risk, answering Judge Greer's questions;

(f) that Vassar could request Judge Greer allow Vassar to confer with and obtain the advice of Moncier during questions propounded by Judge Greer.

Ethical Rules

If Moncier was attempting to comply with an ethical rule then that evidence is clearly insufficient to discipline Moncier.

“The phrase ‘conduct unbecoming a member of the bar’ must be read in light of the ‘complex code of behavior’ to which attorneys are subject....

In Re Snyder, 472 U.S. 634, 644-645 (1985)

Strict Construction

Regarding determining whether an ethical rule was the basis for Moncier's conduct, attorney suspension cases are considered *quasi-criminal*

requiring disciplinary rules to be read strictly, resolving any ambiguity in favor of the attorney. *Matter of Thalheim*, 853 F.2d 383 (C.A.5,1988).

The Rule of Lenity

Moncier's ethical duties created ambiguity, at least in Judge Greer's view, as to whether Moncier requesting to speak to Vassar was being unethical.⁷ This ambiguity must, under the principles of Rule of Lenity, be resolved in Moncier's favor. *see U.S. v. Hill*, 55 F.3d 1197, 1206 (C.A.6,1995); *U.S. v. Thomas*, 211 F.3d 316, 321-322 (C.A.6,2000)(Concurring Opinion of Circuit Judge Clay)

EDTNLR 83.6/TRPC Rules

Moncier was placed on notice by the EDTN Local Rules that his conduct representing Vassar in federal court was to conform with the Tennessee Rules of Professional Conduct.

LR 83.6 Rules of Professional Conduct

The Rules of Professional Conduct adopted by the Supreme Court of Tennessee are hereby adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this court.

⁷ Judge Collier on 1/9/08 when questioning another of Moncier's clients, Lee Almany, as to conflicts, advised Almany prior to his questions that Almany could confer with Moncier at any time during the questioning.

TRPC Construction

The Tennessee RPC recognize that matters during advocacy, such as Vassar, change and Moncier cannot be disciplined for using his best judgment under the “facts and circumstances” in existence at the time as they appeared to Moncier.

EDTNLR 83.6/TRPC 3.1 Commentary [1] states:

"the law is not always clear and is never static. Accordingly, in determining the proper scope of [Moncier's] advocacy, account must be taken of the law's ambiguities and potential for change."

EDTNLR 83.6/TRPC “Scope” (5) cautions the RPC:

"presuppose that disciplinary assessment of [Moncier's] conduct will be made on the basis of the facts and circumstances as they existed at the time of [Moncier's] conduct in question and in recognition of the fact that [Moncier had] to act upon uncertain or incomplete evidence of the situation.

TRPC Rules Relied On By Moncier

Moncier in justifying the conduct in the 11/17/06 transcript and making that evidence insufficient for him to be disciplined relies on Tenn.Sup.Ct.R. 8, TRPC “Preamble” (5); TRPC “Preamble” (9); TRPC “Scope” (5); TRPC 1.2; TRPC 1.4; TRPC 1.7(b); TRPC 1.7(b)(2); TRPC 1.7(c)(2); TRPC 1.7, Commentary [2]; TRPC 1.7, Commentary [5]; TRPC 1.7, Commentary [11]; TRPC 1.9; TRPC 2.1; TRPC 2.1, Commentary [1]; TRPC 2.1, Commentary [5]; and TRPC 3.1 Commentary [1].

The text of each of these rules, tailored with Moncier and Vassar’s names, is contained in Appendix II.

Constitutional Duty

Mickens v. Taylor, 535 U.S. 162, 168 (2002) required Moncier to timely object in order for any Sixth Amendment violation for conflict of interest

based upon joint representation to be preserved. *Holloway v. Arkansas*, 435 U.S. 475 (1978).⁸

⁸ *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).

Contempt Authorities

Moncier attaches in Appendix I to this brief his argument in *U.S. v. Moncier*, CA 6 #07-6053 that the evidence is insufficient to support his criminal conviction. It is submitted that the cases cited and arguments made in that cause also apply to the same sufficiency issue in this appeal.

Moncier Tracked EDTNLR 83.6/TRPC 1.7, Commentaries, To Resolve The Potential Of A Conflict

The evidence is insufficient because Moncier tracked his ethical duties to first move for Vassar to have the advice of a “disinterested lawyer”, TRPC 1.7, Commentary[5]; then sought an *ex parte* hearing before a judge that was not sentencing Vassar, TRPC 1.7, Commentary[11]; then sought an *ex parte* hearing before Judge Greer, TRCP1.7, Commentary [11]; and, then, after none of the these procedures were afforded Vassar, Moncier sought the luncheon hour to confer and advise Vassar to comply with RPC 1.7(b),(c) and Commentary [5-7].

Moncier's Complied With TRPC 2.1 And The Fifth And Sixth Amendment To Request To Speak With Vassar

The evidence is insufficient because Moncier's request to speak to Vassar was required by Moncier's TRPC 2.1 ethical duty and the Fifth and Sixth Amendments to confer and advise Vassar while being questioned by Judge Greer.

Although Moncier's duty may have seemed obstructive to what Judge Greer was attempting to do, that obstruction, if any, does not subject Moncier to discipline as being "adverse to the administration of justice" because Moncier had duty to protect Vassar from risk Vassar was being subjected to by the questioning and Moncier's effective advice to Vassar was necessary for "the administration of justice."

The "obstruction" argument was made and rejected in *Miranda v. Arizona*, 384 U.S. 436, 441 (1966); *Maness v. Myers*, 419 U.S. 449, 465-466 (1975)(attorney can not 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).

No In Re McConnell Obstruction

The Supreme Court restricted courts punishing attorneys for only those acts that "block the judge in the performance of his judicial duty." *see In re McConnell*, 370 U.S. 230, 236 (1962). In the case of an advocate, *McConnell*

requires "the least possible power adequate to prevent actual obstruction of justice." *Id. McConnell*, 370 U.S. at 236.

There was no jury present during the 11/17/06 proceedings before Judge Greer.

Judge Greer could have answered Moncier's request to speak to Vassar "no" and then finishing his questions.

There was no "manifest necessity" for Judge Greer to terminate the proceeding or deny Vassar his structural constitutional right to counsel of his choice. see *U.S. v. Jorn*, 400 U.S. 470, (1971); *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2561, (2006).

*Justification*⁹

Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law... 'Every American jurisdiction recognizes some form of law enforcement authority justification'¹⁰.

Brogan v. U.S., 522 U.S. 398, 405 (1998); see also *CJS, Crimlaw* §56.

Moncier's conduct was justified when undertaken pursuant to his ethical duties to Vassar.

⁹ Justification was pled by Moncier on 4/18/07. [R.13 2:07-cr-40,J.A.*]

¹⁰ Compliance with the law "justification" is different from the "justification" defense defined in Sixth Circuit Pattern Jury § 6.07.

Accident, Inadvertence or Negligence

This Court in *In re Chandler*, 906 F.2d 248, 250 (C.A.6,1990) quoting from *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1272 (C.A.6,1983) 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."

At Moncier's sentencing on August 27, 2006 Judge Greer began 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, Mr. Moncier, you're not able to say those words. You're not able to say, I made a mistake.

[AppendixI:MoncierComtemptBrief]

A mistake is not only an insufficient basis for a contempt finding but also is insufficient to support Moncier's discipline. If Moncier's admitting he made a "mistake" would have absolved Moncier, then *ipso facto* that mistake cannot be sufficient to constitute discipline.

Relief Requested

The United States Supreme Court in *U.S. v. Sacher*, 343 U.S. 1, 14 (1952) assured the Court would "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 assurance that Moncier requests this Court hold the evidence presented, if viewed in light of his ethical duties to his client and the facts presented in this case, is insufficient to support his discipline and dismiss the Show Cause Order.

II. Fifth Amendment Double Jeopardy Barred Judge Collier's Subsequent Discipline.

Standard of Review

This Court reviews *de novo* the denial of a motion to dismiss on the ground of double jeopardy. *In re Ford*, 987 F.2d 334, 339 (C.A.6,1992)

Applicable Law

A disciplinary proceeding designed as a punishment or penalty imposed on the lawyer is an “adversary proceedings of a quasi-criminal nature.” *In re Ruffalo*, 390 U.S. 544, 550 (1968)(citing *In re Gault*, 387 U.S. 1 (1967).

In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) the Court held “noncriminal [disciplinary proceedings] bear close relationship to proceedings criminal in nature.”

In *In re Gault*, 387 U.S. 1, 30 (1967) the Court held the *quasi*-criminal juvenile hearing need not conform with all of the requirements of a criminal trial but “the hearing must measure up to the essentials of due process and fair treatment.”

Double Jeopardy Applies In Quasi-Criminal Juvenile Proceedings

The Fifth Amendment protection against double jeopardy applies to adversarial quasi-criminal juvenile proceedings. *Breed v. Jones*, 421 U.S. 519 (1975).

Ursery “Remedial” or “Punitive” Sanction Test

In *U.S. v. Ursery*, 518 U.S. 267, 273 (1996) the Supreme Court held:

The [double jeopardy] Clause serves the function of preventing both “successive punishments and...successive prosecutions.” [citations omitted]. The protection against multiple punishments prohibits the Government from “punishing twice, or attempting a second time to punish criminally for the same offense.”

The *Ursery* Court adopted a test of whether the subsequent proceeding was a "remedial civil sanction" or "punitive". *Id. Ursery*, 518 at 278-279; *see also, U.S. v. Bajakajian*, 524 U.S. 321 (1999).

Kurth Ranch “Functional Equivalent” Test

The Supreme Court in *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781-784 (1996) held the Fifth Amendment Jeopardy Clause

applies where a civil proceeding following a criminal prosecution is the “functional equivalent” of the prior criminal proceeding.

The application of “issue preclusion”, discussed *infra*, appears to establish the contempt was the “functional equivalent” of the disciplinary proceeding.

Hudson “Statutory Construction” Test

In *Hudson v. U.S.*, 522 U.S. 93, 99 (1997) the Court repudiated a prior test in *U.S. v. Halper*, 490 U.S. 435 (1989) but instead looked to whether similar penalties in the subsequent proceeding and concluded the issue was one of statutory construction.

Regarding Hudson statutory construction EDTNLR 83.7(a) provides:

Conduct Subject to Discipline. The court may impose discipline on any member of its bar. ...

Hudson “Comparative Punishment” Test

Regarding whether the subsequent civil action was punitive, in *Hudson*, the Court looked to the 7-point test from *Kennedy v. Medoza-Martinez*, 372 U.S. 144, 168-169 (1963). Each of those 7 points supports a determination that the subsequent discipline action against Moncier was punitive.

Judge Greer, when he imposed probation, had authority to consider the factors listed in 18 U.S.C. § 3553(a) in sentencing Moncier. One of the § 3553(a) factors is to “protect the public from further crimes of” Moncier.

“Protect the public from further crimes of” Moncier was a specific reason Judge Collier in his 5/16/08 Order denied Moncier a stay of his discipline. [R.71:M&O,p.1,ROA.557]

Judge Greer had authority pursuant to 18 U.S.C. § 3553(a) in sentencing Moncier to provide Moncier “needed...correctional treatment in the most effective way.”

18 U.S.C. § 3563(b) provided Judge Greer had authority to impose conditions of probation that included the same discipline imposed by Judge Collier including §3563(b)(5) suspending Moncier from the practicing law in the Courts of the Eastern District of Tennessee or anywhere else; §3563(b)(6) that Moncier not associating with other attorneys who practice in the federal courts; or §3563(b)(23) requiring Moncier “satisfy such other conditions” as Judge Greer may impose.

Judge Collier at pages 68-69 of his 4/29/08 Memorandum Opinion discusses a case used to “guage” Moncier’s punishment that Judge Collier approved as Chief Judge a decision in which an unnamed federal judge suspended an unnamed attorney from practicing in an unnamed federal court in an uncited, unreported case Judge Collier. It appears from Judge Collier’s discussion of the unnamed case, Judge Collier permits judges in the district, including Judge Greer, to suspend an attorney from practicing in the federal courts. [R.69:M&O, pp.68-69,ROA,534-535]

EDTNLR 83.7(a)

The *Ursery*, *Kurth Ranch* and *Hudson* test by implication modified the provision of EDTNLR 83.7(a) that permits attorney discipline after contempt proceedings.

Proceedings Below

Moncier pled affirmative defenses to the disciplinary proceedings of double jeopardy, res judicata, and collateral estoppels. [R.20:AffirmativeBars,JOA,pp.139-140]

Magistrate-Judge Lee overruled Moncier's assertion of double jeopardy holding the disciplinary proceeding did not punish Moncier "criminally, for the same offense." [R.65:Recommendation,ROA425,fn18]

Respectfully, Magistrate-Judge Lee failed to acknowledge the disciplinary proceeding were "*quais-criminal*" pursuant to *In re Ruffalo* and *Middlesex*. Nor did Magistrate-Judge Lee consider the *Ursery*, *Kurth Ranch* and *Hudson* test that specifically apply to civil cases brought after a criminal case.

Judge Collier adopted the Magistrate-Judge's rulings and described Moncier's position "exasperating." According to Judge Collier, if the position were correct, a court could not impose discipline on an attorney convicted of "fraud, murder, treason, or any other criminal offense." [R.69:MemoOrder,ROA.489]

Subsequent discipline cannot categorically be allowed as Judge Collier suggest. Each case must be examined under the *Usury, Ranch* and *Hudson* test.

Moncier's contempt and discipline, when analyzed under each *Ursery, Ranch* and *Hudson* test, are unlike the crimes listed by Judge Collier, and constitute impermissible Fifth Amendment subsequent punishment.

Relief Requested

Moncier request this Court dismiss the Show Cause Order because the Fifth Amendment Jeopardy Clause barred discipline of Moncier by Judge Collier.

III. A One-Year Statute of Limitations And/Or Laches Barred Judge Collier's Show Cause Order Filed 14 Months After Moncier's Conduct.

Review Standard

This Courts conducts a *de novo* review of a district court's determination that a complaint was filed outside the applicable statute of limitations. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

Proceedings Below

Moncier's conduct was fully known on 11/17/06 and arguably subjected Moncier to both contempt and to discipline under EDTNLR 83.7. Judge Greer chose both, first preceding by contempt and then filing a complaint with the TBOPR in June 2007. Moncier was then subjected to a third proceeding by Judge Collier's Show Cause Order filed 14 months after the conduct.

Moncier plead defenses of statute of limitations and laches to Judge Collier's action. [R.20:AffirmativeBars,JOA,pp.139-140]

Statute of Limitations

EDTNLR 83.7 and TRPC do not contain a statute of limitations for attorney discipline.

Federal courts must look to the most analogous state statute of limitations. *See Johnson v. Railway Express*, 421 U.S. 454, (1975). In determining the most appropriate state statute of limitations, federal Courts must consider the nature of the federal claim and the federal policies involved. *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56, 60-61, (1981)

The federal statute of limitations for Moncier's conduct if charged as contempt is one-year. *see* 18 U.S.C. §3285.

The Tennessee statute of limitations for Moncier's conduct if charged as legal malpractice is one year. *see Swift v. Binkley*, 104 S.W.3d 64 (Tenn.App.2002).

Because EDTNLR 83.7 makes the Tennessee Supreme Court Rules of Professional Responsibility apply, opinions of the Tennessee courts are instructive. *compare Mazur v. Young*, 507 F.3d 1013 (C.A.6,2007)

Tennessee Courts are to determine the appropriate statute of limitations “according to the gravamen of the complaint.” *Keller v. Colgems-EMI Music, Inc.*, 924 S.W.2d 357 (Tenn.Ct.App.1996).

Moncier urges this Court to adopt a 1-year limitation or apply the equitable doctrine of laches to protect him, and practicing attorneys, from stale discipline and/or judges secretly “keeping book” on attorneys over extended periods of time.

Laches

During the 14 months delay in Judge Collier’s show cause order, Moncier continued to work on his existing cases and undertook numerous new cases potentially involving millions of dollars of fees. Moncier tried 11 additional cases prior to Judge Collier’s decision to charge Moncier.

Judge Collier asserted his disciplinary proceedings were necessary “to protect the public” from Moncier because of Moncier’s acts on 11/17/06 and 14 months later, took from Moncier, his clients, opposing parties and other federal judges the due administration of justice in Moncier’s cases.

Judge Collier was guilty of laches in pursuing his untimely action “to protect the public” from Moncier.

This Court reviews Judge Collier’s exercise of disciplinary authority under the doctrine of “laches” pursuant to an abuse of discretion standard. *see In re United Producers, Inc*, 526 F.3d 942, 952 (C.A.6,2008).

For an abuse of discretion analysis, it is necessary to determine what caused Judge Collier to act after 14 months and whether his actions might have been for an improper purpose.

Reasons Judge Collier May Have Acted

The record does not explicitly reflect what prompted Judge Collier to issue his 1/17/08 Show Cause Order. Moncier testified that he believed Judge Collier acted because of events that occurred before Judge Collier eight days before in the case of *U.S. v. Almany*, EDTN #2:07-cr-88 and #1:08-cr-1.

Moncier testified he appeared in Greeneville on behalf of Lee Almany on 12/19/07 for a trial scheduled for 1/26/08 before Judge Greer. [R.67:Hearing,3/6/08,p.271]

AUSA Smith, the same day, filed a motion to disqualify Moncier because Moncier represented a Gary Musick whose case was on appeal.¹¹

Almany was a substantial case. Because AUSA Smith was attempting to disqualify Moncier before Judge Greer, Almany directed Moncier file a motion to disqualify Magistrate-Judge Inman and Judge Greer. Both Judge Inman and Judge Greer disqualified themselves. [R.67:Hearing,3/6/08,p.272]

On the same day Judge Greer disqualified himself, 1/3/07, Judge Collier assigned *U.S. v. Almany* to himself and set AUSA Smith's motion to disqualify Moncier for 1/9/08 in Chattanooga.

Moncier filed briefs, a declaration of Gary Musick who was in prison in Kentucky and a declaration of Almany who was in jail in Jonesborough establishing there was no conflict. [R.67:Hearing,3/6/08,pp.270-273]

Moncier on 1/9/08 advised Judge Collier Moncier had complied with the TRPC as to AUSA Smith's suggestions Moncier had a conflict representing Almany and was satisfied there was no conflict. [R.67:Hearing,3/6/08,p.273]

¹¹ AUSA Smith filed a similar motion in Vassar on in January 2006. Judge Greer, after a hearing, held Moncier did not have a conflict because Moncier represented Musick on appeal and Vassar in the District Court.

Judge Collier questioned Almany at length.¹² Almany made it clear he wanted Moncier to represent him and waived each hypothetical scenario presented by Judge Collier that could arise regarding Moncier's representation of Musick on appeal. [R.67:Hearing,3/6/08,p.273]

Judge Collier rejected Moncier's representations; the declaration of Musick; and the declaration and testimony of Almany to rule Moncier had an actual conflict of interest; disqualified Moncier; and orally directed Moncier that:

Judge Collier: Moncier, you are ordered not to have any further contact with this defendant regarding this case in your capacity as an attorney. This prohibition also applies to anyone in your law firm, any employees or any agents of you or your law firm. Moncier, you may remain in the audience but you may not remain on the side of the bar.¹³

[United States v. Almany, EDTN 1-08-cr-1,1/9/08]

[R.67:Hearing,3/6/08,p.273]

Eight days later, on 1/17/08, Judge Collier, without mentioning *Almany*, issued the Show Cause Order against Moncier.

[R.67:Hearing,3/6/08,p.275]

¹² Notably, at the beginning of Judge Collier's questioning Almany, Judge Collier advised Almany he could confer with Moncier at any time during the questioning.

¹³ Judge Collier's restrictions on Moncier in *Almany* are similar to those he placed on Moncier under his suspension. [R.*****]

Moncier, in this case requested Judge Collier disclose whether or not Moncier's disciplinary proceeding was before Judge Collier at the time Judge Collier disqualified Moncier from representing *Almany*. [R.4:MotionDisclosure,ROA,22, R.67:Hearing,3/6/08,p.275]

Moncier testified that had he known his conduct of 11/17/06 was before Judge Collier for judicial action at the time Judge Collier assigned *Almany* to himself, Moncier would have raised issues under 28 U.S.C. § 144 and 28 U.S.C. § 455 on behalf of *Almany*. [R.67:Hearing,3/6/08,pp.275-276]

After disqualifying Moncier, Judge Collier *sua sponte* reassigned *Almany* back to Judge Collier. [R.4:MotionDisclosure,ROA,22]

Moncier filed a motion in this case on 2/4/08 suggesting that the occurrences in *Almany*, including reassigning the case back to Judge Greer, raised a reasonable question as to Judge Collier's impartiality. Thereafter, Judge Collier *sua sponte* reassigned *U.S. v. Almany* back to himself with the explanation that reassigning the case back to Judge Greer was a "mistake." [R.4:MotionDisclosure,ROA,22]

Judge Collier's refusal to await the TBOPR to resolve Judge Greer's complaint and the timing, speed, unprecedented imposition of a seven (7) year suspension, denial of a stay, disruption of 21 of Moncier's pending federal cases, and broad restrictions on Moncier's law practice support the notion that Judge

Collier intended to put Moncier out of the law business of representing clients in federal courts.

Under the “might” standard of 28 U.S.C. §455(a), a reasonable question is created whether Judge Collier filed his Show Cause Order after *Almany* to prevent Moncier from being hired on federal cases in Greeneville wherein Judge Greer would be disqualified and other judges would be required to travel to Greeneville to handle Moncier’s cases.

Relief Requested

Moncier requests this court reverse his discipline and dismiss the Show Cause Order for either laches or the imposition of a one-year statute of limitations.

IV. Moncier Was Denied EDTNLR 83.7(b)(1)(iii) And Fifth Amendment Notice Of The Rules Moncier Was Charged With Violating And Was Disciplined On Incorrect And Unconstitutionally Vague and Overly Broad Standards.

Standard of Review

This court reviews a district court's interpretation of statutes and rules *de novo*, because such a construction is a question of law. *U.S. v. Breitzkreutz*, 977 F.2d 214, 221 (C.A.6,1992).¹⁴

¹⁴ This Court has not addressed a standard of review for a Local Rule. The First and Seventh Circuit have determined a district court’s local decisions about local rules is to be given special deference and is reviewed under an abuse of

Proceedings Below

Moncier filed a motion to dismiss the Show Cause Order for failure to comply with EDTNLR 83.7(b) and appealed Magistrate-Judge Lee's denial of that motion. However, Judge Collier never ruled on Moncier's appeal. [R.24:MotionDismiss,ROA,161;R.34:Objection,ROA,207]

discretion standard. *Crowley v. L.L. Bean, Inc.*, 361 F.3d 22 (C.A.1,2004); *Cuevas v. U.S.*, 317 F.3d 751 (C.A.7 (Ill.2003)). Because the local rules are being relied on for discipline and LR 83.7(b)(1)(iii) requires notice of the specific rule violated Moncier asserts Judge Collier's post-hearing construction of the rules must be reviewed *de novo*.

Judge Collier's Construction of LR 83.7(a)

Judge Collier held:

“[T]he federal courts have their own distinct requirements and standards for attorneys practicing before them. The federal courts also have their own requirements and standards which must be maintained for members to continue to practice in federal court. Thus, the requirements for admission and continued practice in federal and states courts are distinct. . . . The federal requirements and standards are not necessarily higher or lower than those of a state bar, but rather reflect the different nature and circumstances of the federal and state courts. . . . Federal courts must establish their own standards of practice to create an effective, functional judicial system which involves attorneys practicing throughout the United States and its territories.”

[R.69:MemoOrder,ROA.467-468]

In footnote 6, Judge Collier cited a selected phrase from the TRPC, Scope (2) “It is important to keep in mind the Tennessee Rules of Professional Conduct expressly do not ‘exhaust the moral and ethical considerations that should inform a lawyer [*]’¹⁵ they “simply provide a framework for the ethical practice of law.” [R.69:MemoOrder,fn6,ROA,474-475]

¹⁵ [*] represents a RPC, Scope 2, explanation phrase Judge Collier left out “for no worthwhile human activity can be completely defined by legal rules”

In footnote 7 Judge Collier noted the phrase of EDTNLR 86.7(a), i.e., “engaged in unethical conduct tending to bring the court or the bar into disrepute” is not defined in the Tennessee RPC but:

Unethical conduct must be defined by case law; widely accepted standards of the profession such as standards adopted by the American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized stands of ethical and professional behavior in this district.¹⁶

[R.69:MemoOrder,fn7,ROA.475]

Judge Collier relied on cases decided in 1812 and 1821, long before the adoption of EDTNLR 83.6 and the TRPC, to hold “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” and these powers provide federal courts power to “regulate and discipline attorneys.” [R.69:MemoOrder,ROA.473]

Later, on 7/31/08 Judge Collier described EDTNLR 83.6 as only “one of the standards to which attorneys admitted to the bar of this Court must meet.” [R.80,Order,ROA.7]

¹⁶ Judge Collier did not cite to any specific provision of those standards that are different from the Tennessee RPC.

Judge Collier's Standards

EDTNLR 83.7(a), second clause relied on by Judge Collier, requires there must be an “unethical act” for that clause to establish different and distinct federal standards in the EDTN. None of the standards referred to by Judge Collier, however, define what is an “unethical act.”

EDTNLR 83.6/TRPC 8 provides:

The ethical standards relating to the practice of law and the administration of law in the courts of this State shall be as hereinafter set out.

TRPC, Scope (1) provides for there to be an “unethical” act, there must be a violation of a mandatory, i.e. “shall”, provision of the Tennessee RPC.

Tennessee RPC “ethical standards” define conduct that is “unethical” and subject to discipline pursuant to LR 83.7(a).

“Federal standards” are discussed in a number of federal cases, however, in the EDTN Local Rule 83.6 adopts the Tennessee RPC and the TRPC define the “ethical standards” for attorneys in the EDTN.

Unconstitutionally Vague And Overly Broad Standards

Regardless of the worthiness of the standards expressed by Judge Collier, their breath and vagueness, subjected Moncier to Judge Collier's predilections.

For example, according to Judge Collier, the federal standard for discipline requires attorneys

“to demean themselves as an attorney uprightly and according to the law” [and in a] “highly professional and civil manner, demonstrating respect for the court, opposing counsel, the judicial system, and the parties involved in the judicial action.”
[R.69:MemoOrder,ROA469]

Repeatedly, Judge Collier referred to Moncier’s actions as “unprofessional conduct.” On other occasions, Judge Collier described Moncier’s conduct as being “unethical and unprofessional.”

[R.69:MemoOrder,ROA.469,470,471(fn5),472,482,484(2),485(4),486(2),487(2),492,494(3),497(2),498(2),502(2),503,505,508,510(2),519,520,522(3),523,524,525,526,530(2),531,532,533(2),534,535,536(3),537,538(4),539,540(3),541,542,544(5)]

“Unprofessional conduct” is not a term used either in EDTNLR 83.7 or the TRPC. It is unknown whether Judge Collier is of the opinion that “unprofessional conduct” equates to an “unethical” act.

Judge Collier concluded that Moncier’s conduct “has fallen below that required of members of the bar of the Eastern District of Tennessee” such that permitting Moncier to continue as a member of the EDTN federal bar “poses an immediate danger to the public, the bar and this court.”

[R.69:MemoOrder,ROA.543]

In making this finding and conclusion, Judge Collier does not relate in any way to EDTNLR 83.6/TRPC as the standards “required of members of the bar of the Eastern District of Tennessee” but apparently is applying some other standard.

Unconstitutional Standards

According to Judge Collier, Moncier failed to “demean [himself] as an attorney, proctor and solicitor of this Court, uprightly and according to law.” [R.69:MemoOrder,ROA.469]

In *U.S. v. Wunsch*, 84 F.3d 1110, 1117-1119 (C.A.9,1999) the Court held a California Rule that “It is the duty of an attorney . . . [to] abstain from all offensive personality[.]” was unconstitutionally vague and overly broad citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

The Magistrate-Judge cited a District Court opinion *In Matter of Searer*, 950 F. Supp. 811, 183 (W.D.Mich,1996) that referred to the need of Court’s to be vigilant to safeguard public trust in the judicial system from “deterioration in civility”.¹⁷ [R.65:Recommendation,JOA.420] Requiring attorneys act with “civility” is not dissimilar from requiring attorneys to “abstain from offensive personality” that was held to be unconstitutional in *Wunsch*.

¹⁷ It is unknown whether the Michigan District had adopted the Michigan Rules of Professional Conduct.

There is also scant difference between the vagueness and over-breadth of the California rule requiring an attorney abstain from “offensive personality” and Judge Collier’s rule that Moncier was required to “demean [himself] as an attorney, proctor and solicitor of this Court, uprightly and according to law.”

Insufficient Constitutional Due Process Notice

Disciplinary proceedings designed as a penalty imposed on a lawyer are “adversary proceedings of a quasi-criminal nature” and the absence of adequate notice denies procedural due process.¹⁸ *In re Ruffalo*, 390 U.S. 544, 550 (1968).

In Moncier’s case, notice of the rules he was charged with violating equate to notice of a statute or crime charged. Fifth Amendment notice, at its core, requires the nature of the offense be charged.

EDTMLR 83.6/TRPC placed Moncier on notice he was required to comply with the TRPC. Instead, Judge Collier admitted that he applied unspecified rules of the “American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized standards of ethical and professional behavior in this district” to discipline Moncier. [R.69:M&O,p.9,ROA,475]

¹⁸ Procedural due process was applicable in *Ruffalo* to Ohio disciplinary proceeding through the Fourteenth Amendment. In Moncier’s case, the Fifth Amendment due process clause would apply.

Insufficient LR 83.7(b) Notice

Assuming, Moncier had been provided Fifth Amendment due process notice of Judge Collier's standards, Moncier was still denied notice of the content of those rules as required by EDTNLR 83.7(b)(1)(iii).

LR 83.7(b) requires that:

(1) All complaints of attorney misconduct shall include:

...

(ii) The specific facts that require discipline, including the date, place and nature of the alleged misconduct, and the names of all persons and witnesses involved;

(iii) Copies of all available documents or other evidence that support the factual allegations, including a copy of any rule or order of the court that is alleged to have been violated;

...

Judge Collier's rules are nowhere found in Judge Collier's charges.

Judge Collier's rules are not attached to the complaint as required.

[R.1:ShowCause,ROA.1;R.69:MemoOrder,ROA.475]

Of course, Moncier did not know that rules, other than EDTNLR83.6/TRPC, would be applied by Judge Collier prior to or during his hearing and particularly before his pleadings and exceptions. It was only after Judge Collier disciplined Moncier under rules other than LR83.6/TRPC that the Fifth Amendment and LR 83.7(b)(1)(iii) deficiency became apparent. This was long after Moncier's ability to comply with those rules had past, and just as

importantly for Fifth Amendment purposes, was long after his ability to defend his actions as comporting with those rules.

LR 83.6 Superseded Judge Collier's Rules

Not once did Judge Collier cite a mandatory Tennessee RPC that that would support disciplining Moncier for an act as being “unethical” under the TRPC.

EDTNLR 1.1(c) provides the Local Rules “supersedes any judges rules.” EDTNLR 83.6 adopting the Tennessee RPC. EDLR 83.6 superseded the rules Judge Collier applied to Moncier.

Regardless of whether Judge Collier's rules exist in some authority, and regardless of how well intended Judge Collier's rules may be, those standards are not found in the Tennessee RPC, and those rules were neither cited in, nor attached to, the Show Cause Order as required by EDTNLR 83.7(b)(1)(iii).

Relief Requested

Moncier request the Show Cause Order be dismissed for Fifth Amendment insufficient and LR 83.7(b)(1)(iii) notice.

V. Judge Collier Should Have Abstained And Allowed The TBOPR To Complete Its Action On Judge Greer's Prior Complaint.

Standard of Review

This Court reviews *de novo* a district court's decision as whether to abstain to state court proceedings under *Younger* or *Burford*. *Traugher v. Beauchane*, 760 F.2d 673, 676 (C.A.6,1985).

Proceedings Below

Moncier on 2/21/08 moved Judge Collier allow the TBOPR finish a prior pending complaint filed by Judge Greer in July 2007 against Moncier for Moncier's actions on 11/17/06.¹⁹ [R.5:Motion,ROA,28-34]

Analysis

Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction applies to “cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency that administers the scheme.” *see U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

EDTNLR 83.6 adopts and therefore makes the TRPC primary. Judge Greer, on behalf of himself and the federal judiciary, placed before the TBOPR the issues of whether Moncier violated the TRPC on 11/17/06. The doctrine of primary jurisdiction would allow the TBOPR the first opportunity to enforce its regulatory scheme.

Federal Abstention

Younger v. Harris, 401 U.S. 37 (1971) provided a federal court could not intervene in a state criminal prosecution prior to the completion of the state

¹⁹ Moncier had also previously self-reported the events of 11/17/06 on 11/21/06.

action. *Huffman v. Pursue, Ltd.*, 420 U.S. 582 (1975) expanded the federal abstention doctrine to a state civil proceeding.

The federal abstention doctrine applies to attorney disciplinary proceedings before state disciplinary boards. *Middesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 439-432 (1982). According to *Middesex*, comity includes “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”

Burford v. Sun Oil Co., 319 U.S. 315 (1943) provides abstention is appropriate when there is an important local interest and a state-organized structure for resolving disputes relating to that interest. For further discussion of the abstention doctrine see *Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, (1944); *Alabama Pub. Servo Comm'" v. Southern Ry. Co.*, 341 U.S. 341, 347-48 (1951); *Bath Mem'l Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1012 (1st Cir. 1988); *Martin v. Creasy*, 360 U.S. 219, 224 (1959); *Colorado River Water Conservation Dist v. United States*, 424 U.S. 800, 817-18 (1976); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983); *Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.*, 120 F.2d 891, 903

(C.A.6,1983); and *Detroit Edison Co. v. East China Twp. Sch. Dist. No.3*, 378 F.2d 225, 229-30 (C.A.6,1967).

Regardless of the reason, federal abstention and the doctrine of prior case pending required Judge Collier abstain from invoking federal jurisdiction until the TBOPR reviewed Moncier's conduct under EDTNLR 83.6/TRPC. Judge Collier in his haste to proceed against Moncier after *Almany* failed to discuss, or apply, federal abstention or prior case pending to allow the TBOPR carry out its function, policies and rules adopted by the EDTN in LR 83.6.²⁰

Judge Collier denied Moncier's motion holding "this court has not delegated and would never delegate its authority to determine for itself the fitness of attorneys practicing in the EDTN." [R.69:M&O,pgs.42-43,ROA,508-509] Judge Collier asserted that Moncier could be disciplined for "both" a violation of the Tennessee RPC and federally for "unethical conduct tending to bring the court or the bar into disrepute."

²⁰ It is unknown whether Judge Collier knew the TBOPR had decided to wait for this Court's opinion in Moncier's appeal of his criminal contempt before proceeding on Judge Greer's complaint. Because there had been no decision as to whether to bring charges, that information was confidential at the time Judge Collier instituted his Show Cause Order and presumably unknown to Judge Collier. Consequently the TBOPR decision to await the review of the contempt conviction could not have been the basis for Judge Collier to not apply federal abstention.

Without addressing the interest of the TBOPR in enforcing its disciplinary rules, Judge Collier denied abstention because whether Moncier's conduct brought the federal court into disrepute are "concerns of the utmost importance to *this* Court." [R.6:MemoOrder,ROA.35-36]

Respectfully, Judge Collier's federal autonomy in regulating attorney's conduct is not contained in, and is contrary to, the Local Rules of the EDTN.

Choice of Remedy

Judge Greer chose the federal remedy to discipline Moncier under EDTNLR 83.7(a) to be with the TBOPR.

EDTNLR 83.6/TRPC 8.5(b)(1), regarding choice of law, provides that where the federal EDTN adopts the Tennessee RPC, the TRPC control.

The issue is not whether EDTNLR 83.6 delegated the discipline of attorneys to the TBOPR. The issue is whether the federal abstention doctrine, in conjunction with EDTNLR 83.6, required Judge Collier abstain because Judge Greer had instituted proceedings against Moncier before the TBOPR and those proceedings had not been completed.

Requested Relief

Moncier requests this Court Order that the EDTN federal courts abstain from proceeding against Moncier until after the TBOPR completes its action against Moncier.

VI. Application Of Issue Preclusion To Findings of Judge Greer In The Contempt Denied Moncier’s EDTNLR 83.7(h)(3) and Sixth Amendment Confrontation/Cross-Examination Rights.

Standard of Review

This Court reviews *de novo* the district court's application of the doctrines of *res judicata* and collateral estoppel. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 371 (C.A.6,1998)

Applicable Law

Disciplinary proceedings are *quasi-criminal* in nature. *In re Ruffalo*, 390 U.S. 544, 550 (1968).

The right of confrontation is applicable to *quasi-criminal* juvenile proceedings. *In re Gault*, 387 U.S. 1, 56 (1957)

EDTNLR 83.7(h)(3) specifically provided Moncier the right to “to confront and cross-examine any adverse witnesses.”

EDTNLR 83.7(h)(4) required the conduct justifying discipline “be proven by clear and convincing evidence.”

Proceedings

Magistrate-Judge Lee denied Moncier's request for subpoenas for documents and for witnesses relating to the 11/17/06 hearing by holding that matters outside the transcript of 11/17/06 are "not an issue which will be decided during the 3/5/08 hearing, if deemed necessary." [R.12:Order,ROA,p.67]

On 4/7/08, Magistrate-Judge Lee rendered her decision on the issues in Moncier's disciplinary hearing by applying issue preclusion to Judge Greer's findings in Moncier's contempt proceedings. [R.65:MemoOrder,ROA.436-451]

Magistrate-Judge Lee repeatedly cited from the findings of Judge Greer in the contempt proceedings to conclude that Judge Collier's conclusions and opinions in the Show Cause Order were not "inaccurate." [R.65,MemoOrder,ROA.434-436]

Moncier's exceptions to Magistrate-Judge Lee were overruled by Judge Collier. [R.69:MemoOrder,ROA.489-492] Judge Collier held issue preclusion was applicable because Moncier was "certainly aware of those [Judge Greer's] findings" [id. 480-491]; Judge Greer "witnessed the conduct" and was in "the best position to assess the nature, demeanor, and atmosphere involved" [id. 491]; and Judge Greer's findings should be given "substantial deference" like appellate courts give to trial courts. [id. 491]

Possibly the most surprising reason Judge Collier applied issue preclusion was that Judge Collier's "only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct." Judge Greer, however, did not testify and Moncier was denied both Sixth Amendment right of confrontation and cross-examination and EDTNLR 83.7(i)(2) right to cross-examine Judge Greer. [R.69:MemoOrder,ROA.492]

Judge Greer found Moncier's conduct did not "involve disrespect" so as to not be disqualified pursuant to Fed.R.Crim.P. 42(c) from trying Moncier for contempt. Judge Collier, however, did not apply "issue preclusion" to this finding of Judge Greer, but instead found Moncier's conduct did involve disrespect. Judge Collier's finding that Moncier's conduct involved disrespect establishes Judge Greer was disqualified pursuant to Fed. R. Crim. P. 42(c) because Moncier's conduct "involved disrespect."

Judge Collier, however, repeatedly relied on Judge Greer's findings to defeat Moncier's responses and defenses to impose discipline on Moncier. [R.69:MemoOrder,ROA.472(2),489)2),490(2),491,492(3),496,500,507,510,59(2),524,525(3),528,529,530,542]

Issue Preclusion Was In Variance With The Show Cause Order.

The 1/17/08 Show Cause Order provided:

This show cause order and its ultimate decision as to the appropriate action(s) to be taken in regards to Moncier are based upon his conduct during the November 17, 2006 hearing, and are in no way predicated on him having been convicted of criminal contempt.

[R.1:ShowCauseOrder,p.3,fn1,ROA,9]

Not predicating discipline on Moncier "having been convicted of criminal contempt" but then predicating discipline on facts relied upon for the contempt conviction is purely semantic.

Moncier's response, Moncier's entire defense, and the first 47 pages of the Magistrate-Judge Lees Recommendation, became immaterial after Magistrate-Judge Lee, between pages 47-50 applied "issue preclusion" to Moncier's disciplinary proceedings.

Between pages 54 through 56 Magistrate-Judge Lee exclusively relied on Judge Greer's findings in the criminal contempt proceedings to reject Moncier's explanations and evidence. [R.65:Recommendation,ROA.54-56]

Magistrate-Judge Lee's application of issue preclusion to accept facts found by Judge Greer as evidence against Moncier denied Moncier his right under EDTNLR 83.7(b)(2) to notice of all witnesses against Moncier in the Show Cause Order; his right under LR 83.7(i)(2) that "All witnesses shall testify under penalty of perjury"; and his right under LR 83.7(i)(3) right to "confront and cross-examine adverse witnesses."

Inexplicably, Judge Collier held that Moncier did not "offer any objection to any of Magistrate-Judge Lee's findings or recommendations on the merits of the matter" and took Moncier's failure to object to her findings as a "testament to the fine work performed by Magistrate Judge Lee." [R.69:MemoOrder,ROA.486,487]

Judge Collier overlooked that Magistrate-Judge Lee based her "findings and recommendations on the merits of the matter" not on the evidence, or even her own decision making, but on the findings of Judge Greer in the criminal contempt action by issue preclusion.

Judge Collier overruled Moncier's exceptions to Magistrate-Judge Lee applying issue preclusion because Moncier did not factually or legally develop the argument which was "factually-barren" and "surprising" and it "defies credibility" that Moncier would expect the Magistrate-Judge to ignore Judge Greer's "clearly-detailed impressions of the events, and it would blindly accept

[Moncier] often evasive, revisionist, and self-serving account of his conduct.”
[R.69:MemoOpinion,ROA,491] This finding was made even though Judge Greer did not testify, and has yet to be confronted or cross-examined as provided for by the EDTN rules and the Constitution.

Sixth Amendment Right Of Confrontation And Cross-Examination

In *Crawford v. Washington*, 541 U.S. 36 (2004) the Court held that the right of confrontation prohibited the introduction of testimonial hearsay.

Moncier Was Denied Fed. R. Evid. 201 Notice Or An Opportunity To Object To The Taking Judicial Notice Of Judge Greer's Findings.

Fed. R. Evid. 201(b) and (c) provided Magistrate-Judge Lee authority to take judicial notice to admit evidence.

Judge Greer's findings in the criminal contempt conviction were not properly introduced as evidence at the disciplinary hearing. Magistrate-Judge Lee did not state that the criminal contempt findings of Judge Greer would be judicially noticed before or during the hearing.

Assuming, Magistrate-Judge Lee intended to take Fed.R.Evid. 201 judicial notice, Fed.R.Evid 201(d) required notice to Moncier and an opportunity for Moncier to be heard as to the propriety to taking judicial notice and the tenor of the matter noticed.

Fed.R.Evid. 210(e) provides for an after-the-fact request be heard as to the propriety of the Magistrate-Judge Lee taking judicial notice and the tenor of the matter noticed.

Moncier excepted to Magistrate-Judge Lee taking judicial knowledge of Judge Greer's findings and requested an opportunity to be heard as to the propriety of the Magistrate-Judge Lee taking judicial notice of the findings of Judge Greer because none of the four reasons stated in *Smith v. SEC*, 129 F.3d. 356, 362 (C.A.6,1997) apply. Judge Collier did not address Moncier's exception and request.

Denial of Fifth Amendment and EDTNLR 83.7(b)(iii) Notice

The Show Cause Order itself did not plead, or place Moncier on notice, that Magistrate-Judge Lee would apply issue preclusion; collateral estoppel or *res judicata* to Judge Greer's criminal contempt proceedings. Instead, Footnote 1 of the Show Cause Order would tend to cause Moncier to believe that the findings of the criminal contempt proceedings would not be considered.

The Show Cause Order did not list Judge Greer as a witness as required by EDTNLR 86.7(b)(2).

Issue preclusion; collateral estoppel or *res judicata* deference to Judge Greer's findings in the criminal contempt proceedings were never considered or discussed during Moncier's hearing.

Moncier was blindsided by Magistrate-Judge Lee's recommendation applying preclusive effect, after the fact, to the findings of Judge Greer in the criminal contempt proceedings.

Moncier, if provided notice and an opportunity to be heard, would have opposed issue preclusion and would have offered evidence, arguments and authorities that the findings of Judge Greer were a product of procedural and constitutional trial errors and constitutional structural defects that denied Moncier a full and fair hearing making issue preclusion inapplicable.

If issue preclusion were to be applied, then Moncier's motion to stay the disciplinary proceedings until after this Court considers Moncier's appeal should have been granted, particularly in this instance where the disciplinary proceedings are based on conduct that had occurred 14 months before the initial of these proceedings that is the exact conduct and events presently being considered in that action. Issue preclusion would appear to be contrary to this Court's ruling in Moncier's contempt appeal denying Moncier a stay of the proceedings.
[AppendixI:MoncierContemptBrief]

Relief Requested

Excluding Judge Greer's findings there was no evidence contrary to Moncier's testimony and his witness declarations and Moncier's discipline should be dismissed. (See Issue I herein).

In the alternative, Moncier should be granted a new hearing where the findings of Judge Greer are not admitted as evidence.

VII. Multiple Denials Of Moncier's EDTNLR 83.7(h) Hearing And Constitutional Rights Require A New Hearing.

Standard of Review

This Court reviews *de novo* the question of whether a defendant has been denied a constitutional right” *U.S. v. Brown*, 169 F.3d 344, 348 (C.A.6,1999).

EDTNLR 83.7(h)(1) Minimum Twenty-day notice of hearing

Moncier immediately after receipt of Magistrate-Judge Lee's notice that a hearing was necessary, moved for minimum twenty (20) days provided for by EDTN 83.7(h)(1) to prepare for the hearing.

[R.27:Motion20Days,ROA,pp.179-182]

LR 83.7(h)(1) provides:

(1) Hearing Procedures. When it has been determined that a hearing is necessary, the judicial officer shall provide the member with written notice of the hearing a minimum of twenty days before its scheduled date.

It was not until her Order of 2/22/08 received by Moncier on Friday afternoon, 2/29/08, that Magistrate-Judge Lee determined a hearing was necessary.

[R.2:M&O,ROA,65]

Magistrate-Judge Lee denied Moncier's motion for his LR 83.7(h)(1) right to twenty-days after the hearing was determined necessary. [R.29:Order,ROA,186]

Judge Collier approved her having truncated the twenty-day period by having set a date for a hearing before it was determined a hearing was necessary. According to Judge Collier, Moncier's request for twenty days was "just another indication of the efforts of Respondent to delay and prolong this disciplinary matter." [R.69:MemoOrder,ROA.493,514]

The clear words of the rule and the purpose of the rule permit an attorney, once it is determined a hearing will be held, 20 days to prepare for the hearing.

Moncier's right to twenty-days to prepare for the hearing under the facts his case was critical.

On Monday, 3/3/08 Magistrate-Judge Lee entered an order on Moncier's motion to open the proceeding, however, Moncier had not received that Order prior to appearing for the hearing on 3/5/08.

Under Chief Judge Collier's 1/17/08 Order, Moncier could not discuss the case with or subpoena witnesses until Magistrate-Judge Lee made the proceedings public.

Even if Magistrate-Judge Lee's Order had been received on 3/3/08, and assuming Moncier had gotten a waiver prepared and filed in Chattanooga, Moncier would have had only one day to prepare for the 3/5/08 hearing.

EDTNLR 83.7(h)(1)&(2) Testimony under oath; confrontation; and Cross-examination

EDTNLR 83.7(h)(2) provides that "All witnesses shall testify under penalty of perjury."

Magistrate-Judge Lee stated in her initial order that if a hearing were held, Moncier had the right "confront and cross-examine witnesses, if any."

[R.8:Order,ROA,pp.44-45]

Moncier filed a motion *in limine* to exclude transcripts of Judge Greer's statements without Judge Greer's testifying or being subject to cross-examination. [R.24:Motion,ROA,pp.161-169]

EDTN LR 83.7(h)(3) provides Moncier the right to "confront and cross-examine adverse witnesses."

In *Davis v. Alaska*, 415 U.S. 308, 316, (1974) the Court held the right to cross-examine is included in the Sixth Amendment right of confrontation. In *U.S. v. Abel*, 469 U.S. 45, 50, (1984) the Court held the right of cross-examination "includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable."

In *Crawford v. Washington*, 541 U.S. 36 (2004) the Court held that the right of confrontation prohibited the introduction of testimonial hearsay.

Magistrate-Judge Lee denied Moncier's pretrial motion to have Judge Greer present to testify or cross-examine.

Magistrate-Judge Lee denied Moncier's pretrial motion to have Judge Collier present to cross-examine by holding Moncier could testify to the matters he might cross-examine Judge Collier on. [R.12:M&O,ROA,66]

Magistrate-Judge Lee, relying on her earlier Order, denied Moncier's motions during the hearing to be permitted to confront and cross-examine Judge Greer or Judge Collier. [R.66:Hearing,3/5/08,pgs.21-25]

Possibly the most surprising reason Judge Collier gave for applying issue preclusion was that Judge Collier's "only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct." [R.69:MemoOrder,ROA.492]

Judge Greer

Judge Collier held that "Judge Greer's factual findings in Respondent's criminal contempt conviction are clear and convincing evidence of Judge Greer's perceptions of what occurred at the hearing." [R69:MemoOrder,ROA.496]

Respectfully, Judge Collier overlooked, or chose not to address, Moncier's rights provided Moncier by LR 83.7(H)(1) and the Fifth and Sixth Amendments by the surprising observation that "It is unclear what alleged deprivation Respondent believes he suffered by not having Judge Greer as a witness." [R.69:MemoOrder,ROA.492]

Judge Greer became an adverse witness when Magistrate-Judge Lee applied issue preclusion to accept Judge Greer's findings in Moncier's contempt proceedings and Judge Collier relied on Judge Greer's factual findings to discipline Moncier.

Judge Collier

Judge Collier became an adverse witness when he Ordered Magistrate-Judge Lee to conduct a hearing for Moncier to demonstrate that Judge Collier's opinions and conclusions in his Show Cause Order were "inaccurate." [R.7:Order,ROA.43]

Judge Collier ruled that he could not be cross-examined on his opinions and conclusions because his Show Cause Order "was institution of proceedings aimed at determining the appropriate conclusion and any information necessary was stated in the Show Cause Order." [R.69:MemoOrder,ROA.493]

Not only does this beg the question, but it failed entirely to acknowledge the stated purpose of his referral to Magistrate-Judge Lee to be for

Moncier to “demonstrate” that what Judge Collier stated in the Show Cause Order was “inaccurate,” except for Moncier’s testimony, which was totally disregarded under the concept of “issue preclusion.”

Moncier’s EDTNLR 83.7(h)(1)/Sixth Amendment right confront and cross-examine Judge Collier was the most constitutionally accepted method by which Moncier could demonstrate that Judge Collier’s opinions and conclusions were “inaccurate.”

EDTNLR 83.7(h)(4) Improper Shifting Burden of Proof

Judge Collier’s Burden Of Proof

Judge Collier directed Moncier’s disciplinary hearing:

“shall be limited to a demonstration by Moncier that the allegations in the Show Cause Order are inaccurate.”

[R.7:Order,ROA.43;R.8,Order,ROA.44]

Moncier objected to Judge Collier’s Order erroneously shifting the EDTNLR 83.7(h)(4) burden of proof that allegations for discipline be established by “clear and convincing evidence” to requiring Moncier establish Judge Collier’s Show Cause Order opinions and conclusions were “inaccurate” or, if accurate, “not subject to disciplinary action.” [R.17:Objections&Revisions,ROA,pp.132-134]

EDTNLR 83.7(h)(4) provides the required burden of proof of a violation of the TRPC, order or rule is “clear and convincing evidence.”

Sandstrom v. Montana, 442 U.S. 510 (1979) held that the Fifth Amendment prohibits shifting the burden of proof to a defendant.

Relief Requested

Because of the violations of Moncier's rights under the EDTNLR and Fifth and Sixth Amendment Moncier request his discipline be reversed and that he be granted a new hearing wherein he is afforded these rights and protections.

VIII. Moncier Was Denied A EDTNLR 83.7(h) And Fifth Amendment Due Process Hearing On The Type Or Amount Of Discipline.

Review Standard

In re Gault provided that a *quasi*-criminal "hearing must measure up to the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30 (1967)

Summary of Argument

EDTNLR 86.7(h)(2) provides "The hearing shall be conducted by the judicial officer, who shall have the authority to resolve all disputes on matters of procedure and evidence which arise during the course of the hearing."

EDTNLR 86.7(h)(2) and Fifth Amendment Due Process entitled Moncier to a hearing before either the Magistrate-Judge and Judge Collier as to the type and amount of discipline.

EDTNLR 83.7(i)(1) provides “The judicial officer [conducting the hearing] shall prepare a written recommendation which shall include a proposed disposition of the disciplinary charges.”

EDTNLR 83.7(i)(2) provides Moncier 20 days to file “exceptions” to the recommendation.

EDTNLR 83.7(j) provides “(j) Final Action on the Recommendation. Within thirty days of the filing of any exceptions to the recommendation, the court shall enter a final order of disposition. Notice of the final orders shall be sent to the respondent and the complainant.”

EDTNLR 1.1(c) provided EDTNLR 83.7(i)(2) “be construed so as to [be consistent with the Fed. R. Crim. P.] and to promote the just, efficient, and economical determination of every action and proceeding.” Fed.R.Crim.P. 32 entitled Moncier to a hearing as to punishment. Fed.R.Crim.P. 42(b) prohibits summary punishment without a hearing.

Magistrate-Judge Lee denied subpoenas or depositions of judges from other cases Moncier had tried since 11/17/06, including Judge Greer, wherein Moncier’s alleged conduct did not reoccur, holding that those witnesses were “not relevant” to Moncier’s conduct in the 11/17/06 transcript. [R.12:Order,ROA,pp.68-69] These witnesses, however, were highly relevant to what, if any discipline, Moncier should receive.

Judge Collier, without stating any authority, construed EDTNLR 83.7(i) “disposition of the disciplinary charges” to mean only whether his charges were “accurate” and not to include a hearing on the type or appropriate discipline. *Cf.* Tenn. Sup. Ct. Rule 9, §8.4.

Judge Collier’s construction of EDTNLR 83.7(i) to deny Moncier a hearing as to the type or amount of discipline is not “just” construction of the rule under an EDTNLR 1.1(c); is inconsistent with Fed.R.Crim.P. 32 and 42; and fails to meet the *Gualt* test that the hearing “measure up to the essentials of due process and fair treatment.

Relief Requested

Moncier requests his discipline be reversed and he be granted a new hearing wherein he is permitted to be heard as to the discipline to be imposed, if any.

IX. Judge Collier Erroneously Disregarded Witnesses Who Reviewed The 11/17/06 Transcript And Offered Opinions That Judge Collier’s Charges Were “Inaccurate” And Incorrect.

Review Standard

Appellate review of the application of a right provided attorneys in discipline proceedings should be *U.S. v. Ward*, 506 F.3d 468, 474 (C.A.6,2007).

The Right To Present Evidence

EDTNLR 83.7(h)(1) provided Moncier the right to present evidence.

Magistrate-Judge Lee in her initial order provided that if a hearing were held, Moncier had the right to “present witnesses and other evidence.” [R.8:Order,ROA,pp.44-45]

Moncier’s motions for subpoenas and procedures to get witnesses before the hearing that were denied. [R.9:MotionHearing,ROA,pp.48-55;R.10,11:MotionsWrit,ROA,pp.56-64;R.12:Order,pp.65-69,ROA,65].

In re Gault, 387 U.S. 1, 30 (1967) provided a *quasi*-criminal “hearing must measure up to the essentials of due process and fair treatment.” The right to present a defense is a fundamental constitutional right. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683, 690, (1986); *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Judge Collier ruled Moncier was not denied the right to offer witnesses because the Magistrate-Judge permitted Moncier to file the declarations. [R.69:MemoOrder,ROA.496-497]

Judge Collier then ruled:

Respondent was permitted to submit evidence after the hearing, and filed nearly two dozen declarations from other witnesses. These witnesses possess no personal knowledge of the November 2006 hearing, as none of the witnesses are claimed to have been present, and are thus not material to that issue.

[R.69:MemoOrder,ROA.497]

Later, Judge Collier severely and unjustifiably criticized and denounced expert declarations of Ann Short Bowers and Bethany Dumas.

Judge Collier described the declaration of Dr. Dumas, a lawyer and nationally known expert in linguistics, as “outlandish”, “ludicrous”, “incredible”, “ignorance” and “devoid of belief.” Judge Collier challenges the fact that she voiced her opinions “after reading” Judge Collier’s Show Cause Order. Judge Collier then embarks on a parody of Dr. Dumas’ opinions claiming the court is not “mocking” Dr. Dumas but her opinions were “utter absurdity” in light of unspecified “surrounding circumstances” the court presumed Dr. Dumas was not aware of.²¹ [R.69:MemoOrder,ROA.515-519]

Judge Collier then blamed Moncier for submitting the declarations as “false or misleading” evidence to the Court.

Judge Collier apparently overlooked, or chose not to address, his Order that Moncier was required to demonstrate Judge Collier’s conclusions and opinions, based exclusively on the 11/17/06 transcript, were inaccurate. Judge Collier failed to acknowledge that Ms. Short, Dr. Dumas and the 22 other attorneys reviewed the exact same transcript in forming their conclusions and opinions.

²¹ Compare Federal Code of Judicial Conduct Canon 1.

Respectfully, Judge Collier's ruling in effect was that anyone who disagreed with his opinions and conclusions stated in his Show Cause Order were wrong and "Thus not material to the issue." It is perhaps then not surprising that Magistrate-Judge Lee chose not to disagree with his opinions and conclusions.

Relief Requested

Moncier requests this Court reverse his discipline and grant him a new hearing wherein the testimony of others can properly be presented and considered in their opinions and conclusions even if they disagree with Chief Judge Collier.

X. Judge Collier Erroneously Relied On Personal Knowledge From An Unnamed Case To Discipline Moncier.

Review Standard

This Court reviews the conduct of a judge that may involve disqualification *de novo*.

The Right To Due Process

In re Gault, 387 U.S. 1, 30 (1967) provided a *quasi*-criminal "hearing must measure up to the essentials of due process and fair treatment."

"[C]ore requirements" of due process are "adequate notice ... and a genuine opportunity to explain". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, (1950) 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, (1965).

The Unknown “Gauge” Case

At pages 68-69 Judge Collier relied on an unnamed, uncited case to “gauge” discipline for Moncier. [R.69:MemoOrder,ROA.534-536,540]

Moncier filed a motion on 5/19/08 for the name, citation or location of the case. [R.73:MotionAddFindings,ROA,582]

On 8/13/08 Judge Collier declined to provide Moncier the name, citation or place of the case in an opinion in which Judge Collier held, for the first time, the Federal Rules of Civil Procedure do not apply to LR 83.7 proceedings.²², [R.73:Motion,ROA.582]

Providing the name and citation of a case relied upon in determining an issue is basic legal procedure 101. Due process requires notice and a meaningful opportunity to be heard.

²² LR 1.1(d) provides: “**(c) Scope of Rules; Construction.** These rules supersede all previous rules promulgated by this court or any judge of this court and supplement the *Federal Rules of Civil Procedure* and the *Federal Rules of Criminal Procedure* and the Civil Justice Reform Act plan for the Eastern District of Tennessee . . .”

What Judge Collier did is similar to the actions of a district judge in *U.S. v. Hayes*, 171 F.3d 389, 392 (C.A.6,1999) by expressly relying on a previously undisclosed victim impact letter to sentence a defendant. This Court held the judge's conduct affected the defendant's "substantial rights" and reversed for plain error.

In *U.S. v. Hamad*, 495 F.3d 241, 251 (C.A.6,2007) this Court held "escalation of a sentence based on undisclosed evidence raises serious due process concerns."

28 U.S.C. § 455(b)(1) provides a judge with "personal knowledge of a disputed evidentiary fact concerning the proceeding" is disqualified.

Relief Requested

Moncier requests this Court reverse his discipline; disqualify Judge Collier; and remand his case to a new designated judge to determine whether or not disciplinary proceedings against Moncier are to be instituted pursuant to EDTNLR 83.7.

XI. Moncier Was Disciplined By Judge Collier For Conduct Without Judge Collier Complying With The Provisions Of LR 83.7.

Judge Collier's Findings

Beginning at page 38 and continuing through page 61 Judge Collier found each motion filed by Moncier, and each declaration of witnesses filed by Moncier in his defense, were filed "in bad faith and [are] frivolous" and were "not

filed for any proper purpose or supported by any legal basis, but rather [were] filed for the purpose of causing unnecessary delay and prolonging these proceedings.” [R.69:MemoOrder,ROA.503-527]

Then Judge Collier at pages 70 through 73 disciplined Moncier for 19 separate acts occurring during Moncier’s defense. Moncier was disciplined for filing a “number of frivolous motions and other submissions that were devoid of legal or factual support and that were submitted for improper reasons” and cited particularly the filing of Dumas’ declaration that “contradicts undisputed facts in this case.” In an apparent attempt to excuse Moncier having no notice, nor an opportunity to respond or a hearing, Judge Collier termed these other acts as “aggravating factors.” [R.69:MemoOrder,pp.70-73,ROA.538-539]

EDTNLR 83.7 is clear as to the rights and procedures for Judge Collier to impose discipline on Moncier.

Regardless of how described by Judge Collier, Moncier was disciplined for his conduct and filings in an attempt to defend himself for which he had no notice as required by LR 83.7(b)(1); there was no opportunity for Moncier to respond as required LR 83.7(c); and Moncier has had no hearing concerning such filings or their content. It is submitted this is violative of both Fifth Amendment notice or due process of law.

Request For Relief

Moncier request his discipline be reversed and he be granted a new hearing.

XII. Moncier Was Denied His Sixth and/Or Seventh 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. *U.S. v. Bandon*, 158 F.3d 947, 956 (C.A.6,1998)

Applicable Law

The Seventh Amendment provides Moncier a right to a jury for suits at common law where “the value in controversy” exceeds twenty dollars.

Proceedings Below

Moncier moved for a jury trial under the Seventh Amendment. [R.16:MotionJury,JOA,pp.128-130]

Moncier had over \$1,000,000.00 of contracted attorney fees in controversy. [R.67:Hearing,3/6/08,pgs.267-277]

As discussed *supra*, Judge Collier held that EDTNLR 83.6 did not limit him to the TRPC. Judge Collier held that federal common law established different standards on which he relied to discipline Moncier.

Therefore, Judge Collier applied federal “common law” and as the amount in controversy in this case exceeded the value of \$20.00 Moncier was entitled to a jury trial.

Relief Requested

Moncier requests his discipline by Judge Collier on federal common law be reversed for the denial of a jury trial and unless the charges against him are restricted to the provisions of the Tennessee RPC, that at a new hearing he be granted a jury.

XIII. The Discipline Imposed On Moncier Was Unlawful, Unwarranted And Unreasonable.

Review Standard

The Court in *In re Snyder*, 105 S.Ct. 2874, 2881 (1985) held an attorney’s discipline is reviewed for sufficiency of the evidence.

In *Theard v. U.S.*, 354 U.S. 276, 282-283 (1957) the Court held that disciplinary proceedings are “various serious business.” The Court applied “the principles of right and justice” to reverse a state disciplinary proceeding.

TRPC 9, §8.4 provide that the *ABA Standards for Imposing Lawyer Sanctions* apply²³; a continuum of sanctions is to be considered; discipline be imposed with a view to obtaining uniformity; obtaining appropriate punishment

²³ www.abanet.org/cpr/regulation/standards_sanctions.pdf

should be imposed under the circumstances of each case; and provides for review by a court for “excessiveness.”

Discipline Imposed

Pursuant to Tennessee law a disbarred attorney can reapply for admission after a five years suspension from the practice of law. TRPC 9, §19.2.

Judge Collier, in effect, imposed the maximum allowable punishment under EDTNLR 83.6/TRPC.

Judge Collier’s punishment by its timing was imposed consecutive to Judge Greer’s imposition of a \$5,000.00 fine; 150 hours community service; anger management course and extra CLE.

Judge Collier’s discipline bears no resemblance to discipline to be considered or imposed pursuant to EDTNLR 83.6/TRPC 9,§8.4 or the *ABA Standards for Imposing Lawyer Sanctions*.

Moncier’s hourly rate is \$350.00 hour. Judge Greer’s 150-hour community service at that rate had already constituted a loss to Moncier of approximately \$52,000.

Moncier had over \$1,000,000 in potential fees contracted for in existing federal cases that Moncier lost as a result of Judge Collier’s Order and denial of a stay pending appeal or allowing Moncier to complete existing cases.

70% of Moncier's entire practice was federal and was immediately lost to him by Judge Collier's Order.

Judge Collier, in language reminiscent of his order in *U.S. v. Almany*, beginning at pages 68-69 of his 4/29/08 order and continuing in his 5/16/08; 7/30/08, 8/13/08 and 8/19/08 orders prohibited Moncier from speaking to any of Moncier's existing clients directly or indirectly; conferring with any client on a matter that could involve a federal question; speaking to attorneys about federal matters who are members of the bar of the EDTN; being in the audience section of federal courtrooms; or speaking to federal court personnel.

Admission to the bar of the EDTN provides an attorney authority to sign pleadings and make appearances for clients before the judges of the EDTN. Nothing prohibits a Tennessee licensed attorney who is not a member of the EDTN bar from advising clients in the EDTN on federal questions or working for a member of the EDTN bar in a support or advisory role. T.C.A. § 23-3-101 clearly provides Moncier authority to do so.

First Amendment infringements aside, Judge Collier had no jurisdiction or authority to limit Moncier's right to practice law as defined by T.C.A. 23-3-101 pursuant to his Tennessee Law License, as defined in T.C.A. § 23-3-101, beyond prohibiting Moncier from signing pleadings or making appearances before the Courts in the EDTN.

Moncier therefore requests all restrictions of Judge Collier beyond suspension of Moncier from signing pleadings or making appearances be reversed.

Unlawful Discipline Hearing

Judge Collier relied on an unnamed, uncited case to “guage” Moncier’s punishment. Apparently in that case a lawyer violated an Order of suspension and was suspended for two additional years.

[R.69:Memorandum,pgs.68-69,ROA,534-535]

Judge Collier at some point relied on secret discussions with “the other judges in the Eastern District” to place additional restrictions on Moncier’s practice of law under his State license. [R.69:Memorandum,p.74,ROA,540]

Judge Collier later relied on information he received from an unnamed source in the Eastern District of Kentucky to deny Moncier a stay of his punishment or the right to complete Moncier’s pending cases which resulted in additional losses to Moncier. [R.71:M&O,pgs.7-9,ROA,563-565]

Moncier was denied his request to even appear before Judge Collier to address discipline as Judge Collier destroyed 70% of Moncier’s law practice; caused Moncier significant financial losses; denied Moncier’s clients’ their contractual rights to his services; denied Moncier’s client’s constitutional rights to counsel of their choice; and interfered with the rights of other litigants, attorneys and judges to the administration of justice in Moncier’s cases.

Little can be accomplished by attempting to compare Moncier's discipline to other cases. Counsel has found no other case in American jurisprudence where an attorney has been disciplined for attempting to resolve a potential of a conflict or requesting to confer and advise his client. Obviously Moncier cannot respond to Judge Collier's rulings that were based on *ex parte* information and statements for which there was no notice given Moncier.

Simply stated in the words of *In re Gault*, Moncier was denied a "fair hearing."

Relief Requested

If this Court does not reverse and dismiss Moncier's discipline, Moncier request this Court order a new hearing wherein Moncier is permitted to appear before the Court considering discipline with notice and a meaningful opportunity to be heard on all matters the Court may consider in imposing discipline.

XIV. Magistrate-Judge Lee And Judge Collier Were Disqualified.

Review Standard

In *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (C.A.6,1990) this court held "Under § 455(a) a recusal is required when a reasonable person would harbor doubts about the judge's impartiality."

The Seventh Circuit held review under either 28 U.S.C. §144 or §455 should be *de novo*. *U.S. v. Balistrieri*, 779 F.2d 1191, 1199, 123 (C.A.7, 1985).

Structural Constitutional Right To An Impartial Judge

Trial by a judge that is not impartial is a constitutional "structural defect" in a 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.” [citation omitted] The right to an impartial adjudicator, be it judge or jury, is such a right. [citation omitted].

Gray v. Mississippi, 481 U.S. 648, 668, (1987)

In *U.S. v. Christman*, 509 F.3d 299 (C.A.6,2007) this Court reversed a District Court *ex parte* communications with probation officers that were not disclosed to a defendant.

On 11/14/08 the Supreme Court granted certiorari to review when a judge is required to disqualify themselves. *See Caperton v. Massey*, ____ S.Ct.____, 2008 WL 2714888 (11/14/08)

Proceedings Below

Moncier moved Judge Collier disclose communications and personal knowledge he had received about Moncier. [R.4:MotionDisclosures,ROA,22] Moncier later filed a motion for notice of communications with Magistrate-Judge Lee by Judge Collier. Both motions were denied.

[R.19:Objections§Motion,ROA,pp.137-138;R.6:Order,ROA,35;R.69:M&O,pp.4042,ROA,506-508]

Failure to Make Disclosures

Something, after 14 months, caused Judge Collier to issue the Show Cause Order on 1/17/08. Canon 3(A)(4); §455(b)(1) and Fifth Amendment due process required Judge Collier disclose information and communications he received that caused him to exercise judicial authority over Moncier.

The Code of Conduct for United States Judges “COCFUSJ” Canon 3(A)(4) provides judges must provide interested persons the full right to be heard and prohibit *ex parte* communications except under limited circumstances.

COCFUSJ 3(C)(1)(a) and 28 U.S.C. § 455(a) required Judge Collier disqualify himself where he had “personal knowledge.” Personal knowledge would include undisclosed *ex parte* communications or information from others, including Judge Greer, about Moncier’s conduct.

COCFUSJ 2(a) required Judge Collier to “respect and comply with the law and should at all times promote public confidence in the integrity and impartiality of the judiciary.” Moncier asserts this requirement includes disclosure of Canon 3(A)(4) *ex parte* communications or extrajudicial 28 U.S.C. 455(b)(1) personal knowledge.

"[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).

Judge Collier's Position

Judge Collier chastised, and later disciplined, Moncier for filing a motion for Judge Collier, and later Magistrate-Judge Lee, to disclose *ex parte* communications or personal knowledge relating to Moncier. [R.69:M&O,pgs.40-42,ROA,506-508]

According to Judge Collier, Moncier's motion is "bizarre and largely incomprehensible" because there is no authority to seek "discovery" from a judicial officer. Judge Collier termed Moncier's request another "indication of the disrespect Respondent harbors for the institutional role of judge."

Judge Collier cited Moncier's examples of potential *ex parte* communications as "accusing district judges of talking about [Moncier]" and "vague, unfounded attacks on the judiciary." Judge Collier, however, then held that if those communications occurred that was entirely proper. [R.69:MemoOrder,ROA.507-508]

Regarding request to Magistrate-Judge Lee for disclosures of *ex parte* communications to her, including those from Judge Collier, Judge Collier said there was no “legal” authority for why such an “extraordinary request would be seriously considered;” termed the request as seeking “discovery from the presiding judicial officer; and held requested disclosures “would detract from and make impossible” for the judge to perform their institutional role.” [R.69:MemoOrder,ROA.513]

Judge Collier and Magistrate-Judge Lee had an independent duty to disclose the requested information. and it was entirely proper for Moncier to request Judge Collier and Magistrate-Judge Lee disclose *ex parte* communications or personal knowledge they had regarding the pending or impending disciplinary proceedings. Judge Collier’s findings of misconduct by Moncier in doing so was unfounded.

Moncier was a party and had a legal interest in making certain that the judges who were trying him were both impartial and did not have undisclosed extrajudicial information about him and the matter before them.

Judge Collier apparently relied on the “except as authorized by law” Canon 3(A)(4) exception, to hold that it was entirely proper for Judges to be talking among themselves about Moncier. [R.69:Memo507-508]. There is no authority for Judge Collier to participate in *ex parte* communications pertaining to

proceedings against Moncier over which he was designated to make important and far-reaching decisions concerning Moncier and his career.

Neither Judge Collier or Magistrate-Judge denied *ex parte* communications regarding Moncier.

Respectfully, it speaks volumes that Judge Collier, instead of simply disclosing or denying *ex parte* communications, instead severely chastised Moncier for making the request; accused Moncier of making unfounded attacks on judges; disciplined Moncier for making the request; and then held *ex parte* communications were entirely proper.

Magistrate-Judge Lee Was Disqualified Because Of Her Employment Relationship To Judge Collier

Moncier filed motions to disqualify Magistrate-Judge Lee to serve as a judicial officer to determine whether Judge Collier's Show Cause Order opinions and conclusions were "inaccurate" because she was a subordinate and worked under the direct supervision of Judge Collier.

[R.21:Motion&DeclarationDisqualify,ROA,pp.141-144;

R.25:MotionAdditionalFindings,ROA,pp.170-175]

Magistrate-Judge Lee held her employment relationship to Judge Collier was insufficient pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a) to disqualify her. [R.23:Order,pgs.3-5,ROA,153-155]

Judge Collier held that the fact that he was not the “complainant” resolved any problem that may otherwise exist because of his employment supervision relationship with Magistrate-Judge Lee. Judge Collier then held that Moncier’s 28 U.S.C. § 144 and 455(a) motion “mischaracterized the local rules and the proceedings”; was “recklessly uninformed”; was “purposefully disrespectful to the court and the proceedings”; and was “without legal basis or factual foundation, and not filed for any proper purpose” and disciplined Moncier for filing the motion. [R.69:M&O,pgs.20-28,ROA,486-494]

Moncier asserts the employment supervision relationship created an appearance of bias so as to warrant disqualification. *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13-14 (1954).

Judge Collier never addressed the issue under the correct 28 U.S.C. § 144 and 455(a) standard as whether his employment supervision relationship to Magistrate-Judge Lee “might create a reasonable basis to question” whether Magistrate-Judge Lee was impartial to make determinations whether Judge Collier’s statements and opinions were “inaccurate.”

Ex Parte And/Or Personal Information

Judge Collier relied on the following known *ex parte* and/or personal knowledge in violation of “COCFUSJ” Canon 3(A)(4) and 28 U.S.C. §455(b)(1).

1. Judge Collier in his 4/29/08 Order at pages 68-69 relied on his personal knowledge of an uncited, unnamed case he participated in to “guage” Moncier’s discipline. [R.69:Memorandum,pgs.68-69,ROA,534-535]

2. Judge Collier in his 5/16/08 Order stated that he had received information from an unnamed source in the Eastern District of Kentucky concerning alleged misconduct by Moncier. [R.71:M&O,pgs.7-9,ROA,536-565]

3. Judge Collier in his 7/30/08 Order stated the “judges of the eastern district of Tennessee had decided not to follow *In re Mitchell*” in Moncier’s case.

These statements constitute evidence of Judge Collier relying on improper *ex parte* communications and/or personal knowledge, in Moncier’s case disqualify Judge Collier pursuant to 28 U.S.C. §455(b)(1).

Relief Requested

Moncier request his discipline be reversed and he be granted a new hearing before a judge designated from outside the Eastern District of Tennessee.

CONCLUSION

Moncier respectfully requests this Court reverse his discipline and grant him the appropriate relief requested for each issue presented.

s/Ralph E. Harwell

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief, including footnotes, headings and quotations, does not comply with the type-volume limitation set out in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that it contains 20,257 words including footnotes, as counted by Microsoft Word 2008, the word processing system used to prepare the brief.

A motion to combine the principal brief and reply brief words has been filed.

s/Ralph E. Harwell

The undersigned hereby certifies that there is no opposing counsel that requires service of process.

s/Ralph E. Harwell