No. 07-6053

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

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

APPELLANT'S REPLY BRIEF

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1. Reply To Government's Response that the Court "had a duty to question Vassar regarding Joint Representation." [Gov. Respn. 39]

The Government confuses "joint representation" with "potential of a conflict."

> Fed. R. Crim. P. 44(c)(1) defines joint representation.
>
> (1) Joint Representation. Joint representation occurs when:
>
> (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and
>
> (B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

There was no joint representation by Moncier in this case. Moncier's other client, Grooms, had not been charged in any case, and certainly had not been jointly charged in the case with Moncier's client Vassar.[1] The Court had previously conducted two hearings, 3/17/06 and 4/17/06, wherein Vassar was questioned. Vassar testified he had no knowledge of alleged criminal activity of Grooms. The Court found there to

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[1] Mr. Grooms has yet to be charged with any offense.

be no conflict. [R. 24: Transcript 3/17/06, pp. 101-102, JA 386-388[2]; R;64: Transcript pp. 1-114, JA 407-420]]

Tenn. Sup. Ct. Rule 8, RPC 1.7 places the duty on the attorney to resolve any potential of conflict of interest. Moncier had complied with those duties prior to agreeing to represent Grooms. Moncier further notified the Government he represented Grooms to provide the Government an opportunity to present any information that Moncier, Vassar, or Grooms might not have known. [Motion filed in *U.S. v. Gunter*, 2:06-cr-05 was "stricken."]

It was not until AUSA Smith's "favorable sentencing disclosure" letter faxed to Moncier on 11/16/06 that the "potential of a conflict" was ever presented to Moncier. [Exhibit 5, JA 647] Moncier's actions on 11/17/06 were efforts to perform Moncier's ethical duties to resolve the potential of a conflict untimely created by AUSA Smith's 11/16/06 letter. *see* Tenn. Sup. Ct. Rule 8, RPC 1.7, Commentary 1 and 7.

After AUSA Smith rejected cooperation from Vassar during the hearing, Moncier's concerns on 11/17/06 turned to Vassar's planned defense at sentencing related to calling Thornton to testify to discredit testimony on

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[2] Full transcript remains under seal and District Court denied inclusion in the record on appeal.

which AUSA Smith was relying in an attempt to hold Vassar accountable for 45 kilograms of cocaine instead of 1.6 grams of cocaine as found by the jury. [Exhibit 3, pgs 14-15,J.A.553-554]

Pursuant to Tenn. Sup. Ct. Rule 8, RPC 1.7, Commentary 11, if Judge Greer were to question Vassar, the questioning should have been, as suggested by Moncier, *ex parte* and limited to whether there was an actual conflict and/or a potential conflict created by AUSA Smith's 11/16/06 letter.

The Government at page 39 incorrectly argues, "Before the court could sentence Vassar, it had to determine that Vassar knowingly and intelligently chose to go forward with defendant's representation despite the potential conflict created by [Moncier's] representation of Grooms." AUSA Smith had already declared the Government would not accept any testimony of Vassar against Grooms [Exhibit 3, pgs14-17, J.A.553-556]; and Moncier had stated he would be ready to proceed at the sentencing hearing after the lunch break. [Exhibit 3,pgs.45-46,J.A.584-585] There was no remaining duty of Judge Greer to question Vassar about anything. It remains unclear exactly why Judge Greer chose to question Vassar as he did.

The Government's reliance on *U.S. v. Brock*, 501 F.3d 762 (C.A.6,2007) is misplaced. *Brock* was a joint representation case controlled

by Fed. R. Crim. P. 44. Again, there was no joint representation in Vassar's case.

At page 41 the Government asserts, "The district court had a duty to advise Vassar of the nature of the potential conflict and to determine that he knowingly and intelligently waived his right to a conflict-free representation."

If this were the case, Moncier had a duty to object. *See Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *Holloway v. Arkansas*, 435 U.S. 475 (1978). Vassar cannot be required to waive a conflict that does not exist. Only in the event of joint representation is there a duty to advise as to the potential of conflicts and obtain waivers. In other cases of potential conflict, the duty lies with the attorney to resolve the conflict, or for an *ex parte* hearing in which the Court could assist the attorney in so doing.

As it turned out, AUSA Smith's statement in his 11/16/06, letter that created the potential for a conflict was incorrect. Once independent counsel was appointed, he immediately determined that Vassar denied making the statements.

To date, AUSA Smith has not been required to explain why he placed the information in the 11/16/06 letter; or why he did not bring that information to the attention of Judge Greer at either of the two hearings

regarding Moncier's representation of Grooms in March and April 2006. Nor has AUSA Smith been required to produce any report, statement, or evidence of Thornton's alleged October 2005 statement that supposedly was the basis for AUSA Smith's 11/16/06 letter.

Had Judge Greer appointed independent counsel the morning of January 17th as requested; or allowed a telephone conference with a judge or magistrate-judge in Knoxville to inquire into the alleged Thornton statement as requested; or conducted an *ex parte* inquiry himself into the alleged Thornton statement as requested; or even allowed a short continuance for Moncier to resolve the potential of a conflict, the matter could have been cleared up expeditiously.

2. **Reply To Government's Argument that "Defendant never told the district court that Vassar allegedly wished to speak with defendant; he did not say, for example, 'your Honor, Mr. Vassar is indicating that he wishes to consult with me before he responds.'" [Gov. Respn. 39]**

Respectfully, this is a remarkable argument.

The Government asserts it was not Mr. Moncier's speech that violated the district court's order, it was the content of Mr. Moncier's speech that constituted contempt after Judge Greer said, "Moncier, one more word and you're going to jail." According to this argument, had Moncier first

spoken the words suggested by the Government Moncier would not have violated Judge Greer's directive and none of the resulting consequences, including this appeal, would have been occasioned.

The Government's argument appears to support what Moncier has contended since the beginning, i.e., that Moncier had a duty to confer and advise Vassar during Judge Greer's questions to Vassar and that Judge Greer's directive should not be interpreted to mean that Moncier could not perform this duty. *See* Tenn. Sup. Ct. Rule 8, RCP 2.1.

A transcript of the hearing conducted on January 29, 2007, in Moncier's absence demonstrates that it was expected Counsel could confer and advise Vassar as he was being questioned by Judge Greer. At the January 29, 2007, hearing, the court began his questioning by stating:

> The Court: Mr. Vassar, I need to ask you a question. I'm going to place you under oath before I ask it. You may want to confer with Mr. Corker before you answer my question.
> . . .
> Mr. Corker is standing right there beside of you, so you may consult with him to the extent you need to do so before you answer my question.[3]

[Transcript 1/29/07, pp. 8-9][4]

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[3] Although Judge Greer said he had one question, the questions of Judge Greer lasted 17 pages. [Transcript 1/29/07]

Judge Greer did not begin his questioning on 11/17/06 with instructions to Vassar that he could confer with Moncier at any time. Thus, it was appropriate for Moncier to ask for clarification whether he had permission to perform his ethical duty to confer and advise Vassar just as Judge Greer recognized on January 29, 2007.

As stated in Moncier's opening brief, the duty to confer and advise, is not only limited to instances where the client asks for advice. Pursuant to Tenn. Sup. Ct. Rule 8, RCP 2.1, Commentary [5] the duty to confer and advise also extends to the lawyer initiating advice that appears to the lawyer to be in the client's best interest.

Finally, the ambiguity acknowledged by the Government in its argument that Moncier should have been permitted to speak certain words to Judge Greer (that Vassar wanted to speak to Moncier), invokes the rule of lenity. Any ambiguity in the directive of Judge Greer, just as ambiguity in a statute, must be resolved in Moncier's favor. *See Liparota v. U.S.*, 471 U.S. 419, 427 (1985)(pertaining to statutes).

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[4] This transcript was inadvertently omitted from the Record on Appeal. A motion to include this transcript has been submitted.

3. Reply To Government's Argument That Moncier's Conduct "a fortiori . . .obstructed the district judge in the performance of judicial duty." [Gov. Respn. p. 48]

Cases holding attorneys in criminal contempt for disobeying an order of a court while representing a client almost always involve an attorney's conduct during a jury trial where the conduct before the jury cannot easily be remedied. Rarely, if ever, are attorney's arguments while representing a client before the Court itself the subject of contempt except where the arguments are sarcastic, loud, or disrespectful. In the absence of a jury, the trial judge would always appear to have a lesser remedy than criminal contempt to allow it to perform its duty. *See Anderson v. Dunn*, 19 U.S. 204, 230 (1821); *In re McConnell,* 370 U.S. 230 (1962); *U.S. v. Wilson*, 421 U.S. 309, 319 (1975)(Courts must impose the least restrictive sanction in disciplining an attorney who is attempting to represent a client.)

Judge Greer could have ordered Moncier removed from the courtroom and finished his questioning of Vassar; could have finished his questioning of Vassar after he had Moncier placed in jail; could have finished his questioning of Vassar after the luncheon break when Vassar and Moncier were returned to the Courtroom from jail; or Judge Greer could

have proceeded to the sentencing hearing after the lunch break without questioning Vassar.

Most importantly, Judge Greer could have answered Moncier's question "May I speak to my [Client]" with a "yes" or "no" and then proceeded accordingly.

The Government at page 48 argues that the record establishes Judge Greer's answer would not have stopped Moncier's interruptions. To the contrary, when Judge Greer told Moncier he could not approach the bench, Moncier did not attempt to do so. When Judge Greer told Moncier not to make any further objections to the Court, Moncier did not do so.

4. Reply To The Government's Argument That There Was "No Irreparable Harm" To Letting Vassar Answer Judge Greer's Questions. [Gov. Respn. pp. 49-50]

The Government argues Moncier was only prohibited from speaking "until Mr. Vassar answers this question" and no "irreparable harm" would have occurred by permitting Vassar to respond and after Vassar's response, Moncier could appeal. [Gov. Respn. P. 49]

It is submitted that every time a defendant speaks on the record in a criminal proceeding, a slippery Fifth Amendment slope is created and there is the risk of irreparable harm.

An attorney cannot be held in contempt of court for advising a client to decline to comply with a Court's order that may violate a constitutional right. *Maness v. Meyers,* 419 U.S. 449 (1975) It follows that Moncier should not be held in contempt of court for attempting to exercise Vassar's Sixth Amendment right to advice of counsel while he is being compelled to answer questions propounded by the Court.

In the colloquy between Judge Greer and Vassar, Judge Greer's questions involved unfounded scenarios, were speculative, appeared to be confusing to Vassar, and assumed facts that were not correct. A reasonable construction of Judge Greer's questions suggests that Judge Greer was either attempting to obtain a waiver from Vassar of unknown conflicts for which Vassar had not received the advice of counsel; or cause Vassar to request a new attorney, (ultimately to be chosen by Judge Greer), by creating in Vassar the unfounded belief that Moncier was not representing Vassar's interest.

5. Reply To The Government's Argument it is "immaterial that defendant disagreed with the

district court's questioning of Vassar." [Gov. Respn. pp. 50-51]

Moncier has agreed from the outset that he is not be permitted to disobey Judge Greer's, or any other judge's, directive because he disagreed with the directive or because the directive may have been erroneous.

Moncier, however, disagrees that it is "immaterial that [Moncier] disagreed with" Judge Greer's questioning of Vassar. If Moncier disagreed with Judge Greer's questioning of Vassar, Moncier had a duty to object to preserve the issue for appeal. *See* Fed. R. App. 36; *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); Holloway v. Arkansas, 435 U.S. 475 (1978)

Further, because some of the objections pertained to the form and/or content of Judge Greer's questions, Moncier had a duty to contemporaneously object to that form or content. Because a jury was not present, speaking objections, including argument, were permissible.

Irreparable harm was imminent, because once Vassar spoke, whether the district court had erred or not, the content of his answers could be used against him for perjury; USSG § 3C1.1 obstruction of justice to enhance his sentence; or as an adverse § 3553(a) factor finding. *see Maness v. Meyers,* 419 U.S. 449 (1975)

6. Reply To Government's Response That The Evidence Supports A Violation of 18 U.S.C. § 401(3) For "Willfully violate[d] a specific, clear, and unequivocal court order." [Gov. Respn. 52]

18 U.S.C. § 401(3) has different elements from those in the above statement by the Government.

18. U.S.C. § 401(3) prohibits "disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

EDTN LR 83.6 required Moncier to comply with Tennessee Rules of Professional Conduct in representing Vassar. One of Moncier's duties is to confer and advise with Vassar. Tenn. Sup. Ct. Rule 8, RCP 1.4(b); 2.1. This duty becomes particularly important in a criminal proceeding in which the judge is questioning a defendant in the presence of prosecutors, FBI agents and presentence officers, as was the case on 11/17/06. *see Maness v. Meyers,* 419 U.S. 449 (1975).

Judge Greer imposed an injunction on Moncier by directing "Moncier, one more word and you're going to jail." Whether it was lawful to prohibit Moncier from conferring with and advising Vassar in his criminal proceeding under these circumstances is an issue of first impression.

A mandate which is beyond the power and jurisdiction of the issuing court is void and the court may not punish for its violation. *U.S. v. Thompson*, 319 F.2d 665 (C.A.2, 1963). It is not "contempt" to disobey a void mandate or decree, or one issued by a court without jurisdiction of parties and of subject matter. *Western Fruit Growers v. Gotfried*, 136 F.2d 98 (C.A.9, 1943).

Orders made by a court having no jurisdiction to make them may be disregarded, without liability to process for contempt. *Ex parte Rowland*, 104 U.S. 604 (1881). See, also, *U.S. v. Shipp*, 203 U.S. 563 (1906); *In re Sawyer*, 124 U.S. 200 (1888); *Ex parte Fisk*, 113 U.S. 713 (1885).

In *Maness v. Meyers*, 419 U.S. 449 (1975) the Supreme Court held that a lawyer is not subject to the penalty of contempt for advising his client, during the trial of a civil case, to refuse on grounds of the Fifth Amendment to produce material demanded by a subpoena *duces tecum* when the lawyer believes in good faith that the material may tend to

incriminate the client. According to *Maness v. Meyers,* to hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation, since when the witness is so advised the advice becomes an integral part of the protection accorded the witness by the Fifth Amendment.

It is illogical that the Supreme Court in *Maness v. Meyers* would protect a lawyer who advises a client to exercise a constitutional right to refuse to comply with an order of a court while Moncier, who in trying to advise Vassar while he was being questioned by Judge Greer, is held in contempt for asking to be permitted to give such advice to his client.

The *Maness v. Meyers* rule applies to irreparable injury that may occur when there is no remedy prior to appeal such as would be the case here. Vassar's answering Judge Greer's questions could result in a waiver of conflict free counsel and the *Maness* rule justified Moncier advising (or attempting to advise) Vassar not to waive anything. More importantly, Moncier did not know how Vassar would respond to questions and if Vassar made statements regarding Grooms or Thornton or the veracity of the information reported in the 11/16/06 letter, Vassar could subject himself to perjury charges; obstruction of justice at sentencing; or an increased sentence.

A federal judge has no authority or jurisdiction to order an attorney in a criminal case not to confer with, or advise, his client especially as the federal judge is asking the Client to answer questions in court, on the record and in the presence of the prosecutor, FBI, and presentence officer.

Counsel has been unable to find any case, and the Government has not cited a case, in which an attorney has been held in contempt of court for asking, in a normal non-sarcastic tone, a court for clarification of its Order or for permission to perform any ethical duty he has with regard to a client.

To be certain, Moncier's primary defense is not that the Order was unlawful or void. Even if the order were found to be lawful, it has been Moncier's position from the beginning that Moncier did not disobey Judge Greer's directive by asking for clarification by the words "May I speak to my [client]?" Moncier's question was intended to clarify a directive that an attorney could not confer with or advise his client, which at best would be characterized as unusual and at worst an unlawful directive.

To be contemptuous, Moncier's request for clarification must have been intentional conduct which at least constituted reckless disregard for the orders of court. Negligent, accidental, or inadvertent violations are not sufficient. *U.S. v. KS & W Offshore Engineering, Inc.*, 932 F.2d 906

(C.A.11 1991). Contempt will not be found where there is a fair ground of doubt as to violation of the court's order. *Heikkila v. Barber*, 164 F.Supp. 587 (N.D.Cal.1958).

At Moncier's sentencing on August 27, 2006, Judge Greer began by stating:

> I frankly never thought that this matter would come to the point of a sentencing hearing. I frankly thought on the day that this incident occurred that you'd go downstairs with the marshals for a few minutes, you'd cool down, you'd come back up here and you'd tell me that you got caught up in the heat of the moment, that you did something you regretted doing and that it wouldn't happen again. I didn't hear that. . . . 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.

[R. 76: Transcript, JA 531-532A[5]]

A mistake by Moncier is insufficient to sustain a contempt conviction. *U.S. v. KS & W Offshore Engineering, Inc.*, 932 F.2d 906 (C.A.11 1991)

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[5] Page 11 of the Sentencing Transcript was inadvertently omitted from the Joint Appendix Moncier requested this Court accept. A copy of that page is attached in the appendix to this reply.

Admittedly, Moncier's arguments and attempts to deal with the situation created by AUSA Smith's 11/16/06 letter were extensive. Judge Greer, however, had engaged Moncier in the arguments. Judge Greer, once he began to question Vassar, changed the nature and content of his questions which were believed to require new objections by Moncier.

A certain amount of leeway must be allowed when the court issues a directive to an Attorney to desist from arguing, to sit down, or to remain quiet. The directive must be clear and the judge's insistence on obedience cannot by undercut by his further rejoinder. If the party directed understands what is being asked of him, he must obey. As stated in *In re Dillinger*, 461 F.2d 389, 397-402, (C.A.7, 1972), however, "the record discloses that the trial judge, when ordering counsel to terminate their arguments or sit down, frequently added a rejoinder or coupled that order with a statement which called for a response by the attorney. In such situation, it is our view that an invited, additional response cannot subsequently be viewed as a contemptuous violation of the order." *See also In re Dellinger*, N.D.Ill.1973, 370 F. Supp. 1304, affirmed 502 F.2d 813, certiorari denied 95 S.Ct. 1425, 420 U.S. 990, 43 L.Ed.2d 671. Counsel's request for clarification in this case should lead to the same result.

Where an order is not specific in its terms there can be no contempt. *Downey v. Clauder*, 30 F.3d 681 (C.A.6, 1994); *McFarland v. U.S.* 295 F. 648 (C.A.7, 1923). The terms of an order must be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed. *In re Brown*, 454 F.2d 999 (C.A.D.C., 1971). Contempt will not lie for violation of an order of court unless the order is clear and decisive and contains no doubt about what it requires to be done. *NLRB v. Deena Artware, Inc*, 261 F.2d 503 (C.A.6 1958) certiorari granted 359 U.S. 983, reversed on other grounds, 361 U.S. 398(A person acting in good faith and with due respect to the court is not guilty of contempt if placed in a dilemma by an ambiguous order of the court).

"[I]f a contempt consists of acts done or statements which are ambiguous in character, and which are capable of two constructions, one of which would amount to a contempt, and the other not, so that the intent of the party himself becomes the material question of inquiry, then a denial on oath by such a party of information of an ignored order and of any intent to show disrespect to the court is entitled to much weight." *In re Rice*, 181 F. 217 (C.C.M.D.Ala., 1910).

Counsel has been unable to locate any case in which a District Court instructed an attorney not to confer with or advise a client in a criminal case.

From his 38 years of practice, Moncier had a reasonable expectation that Judge Greer's directive "Moncier one more word and you're going to jail" did not include ordering Moncier not to confer with or advise Vassar as Vassar was being questioned by Judge Greer. The fact that Moncier asked for clarification from Judge Greer "May I speak to my [client]?" rather than turn to Vassar and speak to him directly would appear to be immaterial, assuming that it was taken to fulfill the ethical duty of Moncier to assist Vassar in exercising his a Sixth Amendment Constitutional right.

For Judge Greer to make his directive "clear and decisive" as required by the foregoing authorities, Judge Greer was required to respond to Moncier's reasonable request for clarification. Had Judge Greer responded, "No, you may not" then the sole issue would be the lawfulness of that directive. Rather, Judge Greer chose not to give the requested clarification but rather to impose the harshest sanction available to him, i.e., jailing Moncier for criminal contempt.

The Government describes Moncier's conduct as "seriatim peppering the district court with any and every objection that came to mind in an effort to stop Vassar from answering." Moncier rather describes his conduct as a continuum of efforts to perform his ethical duty to his client, to state objections, and to confer with and advise Vassar, under very unusual circumstances the origin of which was not of his own making.

7. Reply To Government's Response That Judge Greer Was Not Disqualified [Gov. Respn. pp. 53-55]

Moncier has filed a Fed. R. App. P. 28 motion asking this panel to supplement the record in this appeal with the record in *In re Moncier*.

Specifically, Moncier requests this Court consider the 1/17/08, show cause order and the opinions of Magistrate-Judge Susan Lee and Chief District Judge Curtis L. Collier in which it was determined that Moncier's conduct on 11/17/06, constituted acts "disrespectful" toward District Judge Greer.

Fed. R. Crim. P. 42(a)(3) provides Judge Greer should be disqualified to sit in judgment at a trial for contempt when the "criminal contempt involves disrespect toward or criticism of a judge." The findings of the proceedings in *In re Moncier* therefore would appear to conclusively

judicially establish Fed. R. Crim. P. 42(a)(3) disqualification of Judge Greer to sit and decide the charge of contempt against Moncier.

The Government's argument at page 54 that disqualification is reviewed for an abuse of discretion would not appear to apply to mandatory disqualification pursuant to 28 U.S.C. § 455(b) and Fed. R. Crim. P. 42(a)(3).

The entirety of the Government's response to Fed. R. Crim. P. 42(a)(3) mandatory disqualification is "Defendant's misconduct involved the direct disobedience of an order, not disrespect or criticism of the court ... recusal was not required." [Gov. Respn. 54]

Surprisingly, the Government relies on *Fisher v. Pace*, 336 U.S. 155 (1949) for the proposition that the trial court has discretion whether to disqualify itself. [Gov. Respn. p. 54]

Counsel disagrees. *Fisher* was a state court summary contempt for the conduct of an attorney in the presence of a jury. The issue was whether the state procedure complied with Fourteenth Amendment Due Process.

The Government's *Fisher* argument that Judge Greer should hear the case because he was in the best position to see "facial expression, demeanor, or tone and volume of spoken words" is immaterial. There is no

suggestion or finding that Moncier had a contemptuous "facial expression, demeanor, or tone and volume of spoken words" in asking "May I speak to my [client]?"

Fed. R. Crim. P. 42(a)(3); 28 U.S.C. § 455(a), (b)(1), (b)(3) and (b)(5)(iv); and the Code of Judicial Conduct for United States Judges, Canon 3(C)(1)(a) and (d)(iv) were not applicable in *Fisher*. Pursuant to these rules and statutes, if "elements such as the defendant's facial expression, demeanor, and the tone and volume of spoken words, both positive and negative" were relevant to the charge against Moncier, then Judge Greer is disqualified as having § 455(b)(1) personal knowledge of those facts; under 28 U.S.C. § 455(b)(3) as having served in government employment as a material witness; and 28 U.S.C. § 455(b)(5)(iv) of being a material witness.

The Government argues Moncier "did not establish, nor could he," that Judge Greer held "a deep-seated favoritism or antagonism that would make fair judgment impossible," and attempts thereby to avoid addressing the mandatory provisions of the above cited rules and statutes. [Gov. Respn. p. 55]

Further, the test for discretionary disqualification is not the test under 28 U.S.C. § 455(a) which makes mandatory disqualification, but

subject to waiver, where a judge's disqualification "might reasonably be questioned."

Finally, *In re Dillinger* 461 F.2d at 294 (relying on *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971)) requires disqualification where the District Judge has "become embroiled in a controversy." For example, at sentencing Judge Greer reflected that he believed Moncier's contempt may be his "legacy as a federal judge" with a number of people. [R.76:Transcript,8/27/07,p. 15, JA 535]

8. Reply To Government's Argument That Moncier Was Not Entitled To A Jury Trial

§ 401 Criminal Contempt Is, After 1984, Not A Petty Offense

At page 56 the Government states a petty offense is defined by 18 U.S.C. § 1(3) as "any misdemeanor that the maximum imprisonment does not exceed 6 months or a fine in excess of $5,000.00." 18 U.S.C. § 1(3) cited by the Government was repealed by the 1984 Omnibus Crime Act, Public Law 98-472, Title II, § 218(a)(1) October 12, 1984, and was replaced by 18 U.S.C. § 19 and 18 U.S.C. § 3559 Classification of Offenses. The petty offense exception to the right to a jury of *Taylor v. Hayes*, 418 U.S. 488 (1974) and *Bloom v. Illinois*, 391 U.S. 94 (1968) relied on by the Government was repealed as to criminal contempt by congress as part of the 1984 Omnibus Crime Act.

After 1984, 18 U.S.C. § 19 defines a "petty offense" as a Class B or Class C misdemeanor or infraction that is punishable by a fine not greater than the amount set forth in 18 U.S.C. § 3571(b)(6) or (7), i.e. $5,000.00. 18 U.S.C. § 3559(a)(7) defines a Class B or Class C misdemeanor as one for which the authorized sentence is "(7) six months or less but more than thirty days."

18 U.S.C. § 401 Criminal contempt has no maximum term of imprisonment or fine. *Brown v. U. S.,* 359 U.S. 41, (1959), rehearing denied 359 U.S. 976. Sentences for criminal contempt of over one year and up to ten years have been upheld as "reasonable." *See U.S. v. DiPaolo,* 804 F.2d 225 (C.A.2, 1986)(10 years); *U. S. v. Green*, S.D.N.Y.1956, 140 F.Supp. 117, affirmed 241 F.2d 631, certiorari granted 77 S.Ct. 1057, 353 U.S. 972, 1 L.Ed.2d 1135, affirmed 78 S.Ct. 632, 356 U.S. 165, 2 L.Ed.2d 672(3 years)(three years); *U.S. v. Papadakis*, 802 F.2d 618 (C.A.2, 1986)(5 years); *U. S. v. Green*, 630 F.2d 566, (C.A.8 1980) certiorari denied 449 U.S. 904(2 years); *Nilva v. U.S.*, 227 F.2d 74, (C.A.8, 1955)(1 year and a day)

In *Lewis v. U. S.*, 518 U.S. 322, 326 (1996) the Supreme Court held "[T]o determine whether an offense is petty, we consider the maximum

penalty attached to the offense."[6] 18 U.S.C. § 401 is not a "petty offense", as defined by 18 U.S.C. § 19, because 18 U.S.C. § 401 does not limit the fine to a maximum of $5,000.00 as required by 18 U.S.C. § 19 and § 3571(b)(6) and (7); 18 U.S.C. § 401 does not define the offense as a Class B or C misdemeanor; and 18 U.S.C. § 401 does not limit the maximum punishment under § 3559(a)(7) to six months or less.

Moncier acknowledges *Lewis* discussed the pre-1984 case of *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) that permitted the actual sentence imposed to control a jury trial when the legislature has not specified a maximum penalty. The *Lewis* Court specifically did not reach or decide that issue. Respectfully, the *Lewis* Court also did not consider Congress' judgment reflected in the 1984 amendments for the definition of a petty offense under 18 U.S.C. § 19; the definition of a felony under § 3559; or USSG § 2J1.2 subjecting obstruction of justice to 24-30 month sentence.

§ 401 Criminal Contempt Is A Felony Pursuant To The USSGs

The 1984 Ominous Crime Act also established the Sentencing Guidelines. The Sentencing Commission determined, in Application Note 1

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[6] The maximum sentence for the offense in *Lewis* was six months making it a Class B misdemeanor. The Court held that even though there were more than one count, the potential of a consecutive sentence did not change the nature of the crime.

to § 2J1.1, that "Because misconduct constituting contempt varies significantly ... the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply." In *U.S. v. Voss*, 82 F.3d 1521 (C.A.10, 1996) the Court held that USSG § 2J1.2(b)(2) "obstruction of justice" was to be applied to criminal contempt of court with its Guideline level of 17 and resulting sentence of 24-30 months.

An essential element of 18 U.S.C. § 401 was that Moncier obstructed the administration of justice. USSG § 2J.1.2(b)(2) "Obstruction of Justice" has a specific offense characteristic that "If the offense resulted in substantial interference with the administration of justice, increase by 3 levels."

Thus, pursuant to 18 U.S.C. § 3559 (even pre-*Booker*), Congress provided that violations of 18 U.S.C. § 401 were felonies punishable by more that one year with a mandatory guideline sentence of 24-30 months. Clearly Moncier had a Sixth Amendment right to a jury trial for a felony with a guideline sentence of 24-30 months.

Post-*Booker* the question is whether sentencing is "reasonable" when Judge Greer rules pre-trial that he will vary 75% below the minimum guideline sentence to a maximum of six months for the purpose of denying

Moncier a jury trial: No 18 U.S.C. § 3553(a) factor permits Judge Greer to make such variance below the 24-30 "heartland" guideline sentence before trial. There is no procedure in *U.S. v. Booker,* 543 U.S. 220 (2005) or its progeny for a District Judge to determine prior to trial that a reasonable sentence is six months or less in place of the guideline sentence of 24-30 months.

Hybrid orders, finding an attorney in criminal contempt and suspending him from practicing law in the district court for five years, are permitted. *In re Troutt,* 460 F.3d 887 (C.A.7, 2006) As this Court knows, Judge Greer's Order finding Moncier guilty of criminal contempt ultimately was afforded "issue preclusion" by Magistrate-Judge Lee and Chief District Collier in reaching their decision to suspend Moncier from practice for five (5) year; take from Moncier over 21 pending proceedings that had over 1 million dollars of contract fees; and to prohibit Moncier from practicing law under his Tennessee license pertaining to any matter that in any manner relates to federal law.

Apprendi-Blakely Require A Jury Trial

Before Moncier could be sentenced, Judge Greer was required to find facts that proved Moncier was guilty of violating 18 U.S.C. § 401. In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the defendant was subject to a

maximum sentence of 10 years for the crime the jury found him guilty of committing. A judge then found *Apprendi* guilty of a "hate crime" which was not part of the jury's verdict which subjected him to greater punishment. It was the finding of the additional element of the crime by the judge that the Court in *Apprendi* found to be unconstitutional. *See also Jones v. U.S.*, 526 U.S. 227 (1999) and *Blakely v. Washington*, 542 U.S. 296 (2004).

Blakely reiterated the holding that any fact required for a Judge to increase the sentence over the maximum provided without that fact violates the Sixth Amendment. Neither *Apprendi* or *Blakely* made an exception for judges to make factual findings that would only increase sentences to six months or less.

9. Reply To Government's Argument That Moncier's Sixth Amendment Right Of Confrontation Was Not Violated By Judge Greer Making Findings Of Fact Based On His Personal Knowledge. [Gov. Respn. ¶ 4, pp. 58 - 60]

Counsel is unaware of any exception to the rules of evidence, or the Sixth Amendment Confrontation Clause, that permits a declarant to provide information to impeach a defendant in a criminal case without being subject to cross-examination and confrontation.

The Government's position is that "the denial of any such alleged right was harmless beyond a reasonable doubt." [Gov. Respn. p. 58]. The Government does not address *Crawford v. Washington,* 541 U.S. 36 (2004).

Judge Greer was advised he was a material witness prior to the trial in Moncier's motions to disqualify Judge Greer pursuant to 28 U.S.C. § 455(b)(1) and (b)(5)(iv). Judge Greer's response pretrial was that the transcript would be the only evidence. [S.R.750:Transcript 3/23/07] During trial, after Moncier testified, Judge Greer did not proffer his testimony or provide Moncier any opportunity to be heard concerning that testimony. Moncier learned of Judge Greer's reliance upon his observations without

testimony only when Moncier received Judge Greer's order convicting Moncier.

Judge Greer further denied Moncier a subpoena for AUSA Smith who was also in the Courtroom at the time of the alleged violation. [R:62:4/24/07Transcript,pgs.5-13,J.A.411-419] Judge Greer also denied Moncier's motion for Vassar to be brought from prison to testify. [R:62:4/24/07Transcript,pgs.5-13,J.A.411-419]

Finally, Moncier had an affidavit from Vassar reflecting that Vassar was attempting to get Moncier's attention, however, Moncier chose not to introduce the affidavit because there had been no evidence to contradict Moncier's testimony and because Judge Greer had ruled that if Moncier did offer the affidavit Judge Greer was going to admit intercepted telephone calls of hearsay conversations between Vassar and his family.

There is no accepted judicial rule or procedure that permits a judge in a criminal case to make findings of fact based on the judge's personal knowledge or observations by the judge that were not offered or testified to during a trial and were not subjected to cross-examination and confrontation. *See Code of Judicial Conduct for United States Judges*, Canon 3; 28 U.S.C. § 455; and *Crawford v. Washington.*

Finally, it is not persuasive that the judge's perception without confrontation was relevant "only to impeach (Moncier's) testimony." The Government asserts Judge Greer's findings were harmless because "Vassar's attentiveness was one of several findings that led the court to conclude that [Moncier's] testimony lacked credibility and it is the single finding that is not otherwise apparent for the transcript. Vassar's attentive demeanor was relevant only to impeach [Moncier's] testimony that Vassar simultaneously was communicating that he desired to speak with [Moncier]." [Gov. Respn. p. 59]

Moncier's intent and credibility went to the very core of Judge Greer's ultimate findings. It is submitted that if the trier of fact had properly accredited Moncier's testimony, there could be no finding of contempt.

10. Reply To The Government's Response To Disqualification Of The United State's Attorneys Office. [Gov. Respn. ¶ 5, pp. 61 - 62]

In Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800-801 (1987) the Supreme Court recognized a court's power to appoint a private attorney to prosecute a criminal contempt. In *Young*, the Court further examined the role of United State's Attorneys prosecuting criminal cases.

> Because of this unique responsibility, federal prosecutors are prohibited from representing the Government in any matter in which they, their family, or their business associates have any interest. 18 U.S.C. § 208(a). Furthermore, the Justice Department has applied to its attorneys the ABA Model Code of Professional Responsibility, 28 CFR § 45.735-1(b) (1986), which contains numerous provisions relating to conflicts of interest.

As this Court has said in disapproving the appointment of an interested contempt prosecutor in *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 705 (1985), cert. pending, No. 85-455, overzealousness in such cases, "does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction."

The Supreme Court in *Young* at page 810 further held "We have held that some errors 'are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.' *Delaware v. Van Arsdall*, 475 U.S. 673, 681, (1986). We find that the appointment of an interested prosecutor is such an error."

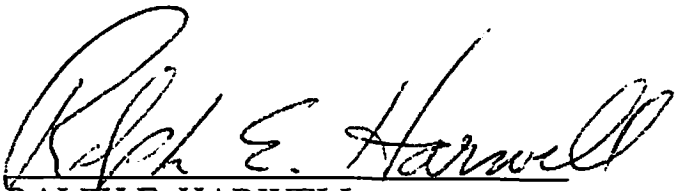
It is against this background that the relationship of Moncier and the Greeneville Division of the United State's Attorney's office is important. AUSA Smith had on two prior occasions attempted to disqualify Moncier from representing Vassar. AUSA Smith falsely accused Moncier of money-laundering fees which Judge Greer found unfounded and on 2/8/06 took under advisement sanctions against AUSA Smith. Sanctions remained pending against AUSA Smith at the time his office agreed to prosecute Moncier for criminal contempt.

Moncier has filed motions containing serious charges against AUSA Smith of prosecutorial misconduct [S.R.77:Supp.41,Prosecutorial Misconduct]. In the Vassar case, AUSA Smith had denied he had favorable evidence to Vassar's sentencing on three occasions. Only after Moncier's third motion resulted in Judge Greer ordering AUSA Smith to review his files to make certain he had made all required disclosures did AUSA Smith in his 11/16/06 letter disclose (1) that the Government's star witness against Vassar failed a polygraph and admitted committing perjury at Vassar's trial and, (2) another Government informant had been telling AUSA Smith for three years prior to Vassar's arrest that Vassar was seriously, dangerously addicted to drugs others were providing to Vassar, which supported Vassar's defense at trial.

Finally, Moncier had filed on November 14th a recorded statement of Thornton stating that AUSA Smith and an FBI agent, shortly prior to Vassar's trial, had threatened Thornton that if he did not testify against Vassar about matters which Thornton maintained were untrue, AUSA Smith would pull his recommended sentence. Thornton was called at Vassar's trial by AUSA Smith; Thornton did not testify to that which Smith wanted, and the next day, AUSA Smith withdrew a 10 to 15 year recommendation and instead recommended a 27 year sentence, which was the sentence Thornton received.

Not only did another member of AUSA Smith's office agree to prosecute Moncier; AUSA Smith's wife, who normally handles civil cases in the Greeneville office, entered her name as co-prosecutor of Moncier and filed the motion to quash a subpoena served on her husband, AUSA Neil Smith.

The relationship between the United States Attorney's office in Greeneville, Tennessee, and Moncier impacted the ability of the attorneys in that office to fulfill the unique responsibility and independent role necessary for them to appropriately prosecute Moncier.



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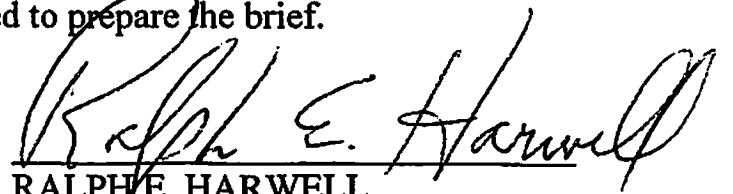
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief, including footnotes, headings and quotations, complies with the type-volume limitation set out in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that it contains 6,857 words including footnotes, as counted by Microsoft Word 2008, the word processing system used to prepare the brief.



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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2009, a copy of the foregoing was served by United States Mail to Robert M. Reeves, United States Attorney's Office, 220 W. Depot Street, Suite, 423, Greeneville, Tennessee 37743.

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