

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA**

**FILED UNDER SEAL**

In re:  
HERBERT S. MONCIER  
BPR NO. 1910

**Respondent's EDTN Local Rule 83.7(d) Response  
To The Show Cause Order**

For Response to the Show Cause Order and pursuant to EDTN Local Rule 83.7(d) Respondent says:

1. Pursuant to ECTN LR 83.7(d)(1) Respondent's name, address and telephone number of respondent is:

Herbert S. Moncier  
Suite 775 Bank of America Center  
550 Main Street  
Knoxville, Tennessee 37902  
(865) 546-7746

2. Pursuant to ECTN LR 83.7(d)(4) Respondent specifically request a hearing.

3. Pursuant to ECTN LR 83.7(d)(2) Respondent submits the following specific admission or denial of each of the factual allegations contained in the complaint and order to show cause and, in addition, a specific statement of any facts on which respondent relies, including all other material dates, places, persons and conduct relevant to the allegations of the order.<sup>1</sup>

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<sup>1</sup> Counsel has separated the Allegations by numbers so as to specifically respond.

## **Foreword**

1. Respondent avers and will present evidence at a hearing that Respondent deeply regrets that District Judge J. Ronnie Greer construed Respondents actions as being anything other than Respondent's effort to represent Michael Vassar's interest under difficult and adverse circumstances.

2. Respondent avers and will present evidence at a hearing that Respondent's actions were within the permissible limits of ethical conduct under the Tennessee Code of Professional Responsibility, however, by doing so, Respondent is mindful that his ultimate goal as an attorney is to effectively represent his clients and, if in the context of the circumstances presented on November 17, 2006, there is a more effective way to communicate his client's cause, Respondent has learned from that experience.

3. Respondent avers and will present evidence at a hearing that Respondent has made a concerted effort since the unfortunate events of November 17, 2006 to communicate more effectively while representing the interest of his clients.

4. Respondent, having averred this background to what has occurred over the past fifteen (15) months since the November 17, 2006 hearing, for specific response to the Show Cause allegations has separated the allegations by numbers so as to more specifically respond.

**ALLEGATION I:**

"As counsel in a proceeding before United States District Judge 1. Ronnie Greer. Herbert S. Moncier ("Respondent") conducted himself in a manner constituting a violation of an order of a court, disrespect for the court, contemptuous behavior directed at the court, interference and needless prolongation of the proceeding before the court, and obstructive behavior."<sup>2</sup>

**RESPONSE 1:**

1. Respondent admits he appeared in a proceeding before United States District Judge J. Ronnie Greer.

2. Respondent admits District Judge Greer found that Respondent violated an Order of the Court.

3. Respondent admits District Judge Greer found that Respondent's actions were contemptuous toward the Court.

4. Respondent avers that the findings of District Judge Greer are on appeal to the Sixth Circuit Court of Appeals and this Court should abstain from ruling in this case because of the potential effect that appeal will have on res judicata; collateral estoppel; or double jeopardy pertaining to Judge Greer's findings.

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<sup>2</sup> Respondent is unclear as to the meaning of the following sentence in footnote 1 of the Show Cause Order: "The show cause order and its ultimate decision as to the appropriate action(s) to be taken in regards to Respondent 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. Respondent asserts res judicata; collateral estoppel; and double jeopardy apply to Judge Greer's findings."

5. Respondent denies<sup>3</sup>, and demands evidence by clear and convincing evidence<sup>4</sup> at a hearing<sup>5</sup> that Respondent intentionally violated a court Order not to say another word by asking District Judge Greer for clarification as to whether Respondent could speak to his client.

6. Respondent denies and demands evidence by clear and convincing evidence at a hearing that he intended any disrespect for the Court.

7. Respondent denies and demands evidence by clear and convincing evidence at a hearing that his conduct in representing his client constituted disrespect for the court.

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<sup>3</sup> EDTN Local Rule 83.7(d) provides:

**(d) Response.** A member against whom an order to show cause is issued shall . . . file a response. The response . . . shall contain the following:

. . .

(2) A specific admission or denial of each of the factual allegations contained in the complaint and order to show cause and, in addition, a specific statement of any facts on which respondent relies, including all other material dates, places, persons and conduct relevant to the allegations of the order. [underlining added; this footnote will not be repeated because this rule is cited throughout this Response *passim*]

<sup>4</sup> EDTN Local Rule 83.7(h)(4) provides:

. . .

(4) **Burden of Proof.** The respondent's violation of the Rules of Professional Conduct or rule or orders of the court shall be proven by clear and convincing evidence. A certified copy of a final order of disbarment or judgment of conviction for a criminal offense, entered in any state or federal court, shall be considered clear and convincing evidence. [underlining added; this footnote will not be repeated because this rule is cited throughout this Response *passim*]

<sup>5</sup> EDTN Local Rule 83.7(h)(2) provides:

. . .

(2) Conduct of the Hearing. 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. All witnesses shall testify under penalty of perjury. Such hearings, at the discretion of the judicial officer, shall be confidential and shall be recorded. The record of the hearing shall be kept on file in the clerk's office, under seal.

8. Respondent avers and evidence will be presented at a hearing that Counsel's conduct did not involve disrespect for the Court.

9. Respondent avers and evidence will be presented at a hearing that District Judge Greer did not consider Respondent's conduct involved disrespect to the Court because, if it did, District Judge Greer would have disqualified himself as requested by Respondent pursuant to the provisions of Fed. R. Crim. P. 42(a)(1)(c)<sup>6</sup>.

10. Respondent avers and evidence will be presented at a hearing that circumstances and events leading up to the events of November 17th are relevant to establish the background to the November 17th transcript; to place into context of the ongoing proceedings Respondent's conduct of November 17th; to establish the nature of the relationship between the parties and the Court as of November 17th; to determine whether Respondent was making a good faith effort to represent his client on November 17th; justification for Respondents' actions; whether there is clear and convincing evidence of a violation of the code of professional conduct; to justify Respondents statements made about the prosecutor charged in the Show Cause Order; to mitigate against a need for discipline; to establish Respondent's fitness to practice before the Court; and to establish Respondent is fit to continue to be a member of this bar.

11. Respondent avers and evidence will be presented at a hearing that Respondent's client, Michael Vassar, beginning in August 2005 was required to defend himself at multiple trials structured by indictments prepared by AUSA Neil Smith after Vassar in 2002 refused to participate in an FBI sting operation and thereafter declined offers to become a government informant

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<sup>6</sup> Fed. R. Crim. P. 42(a)(1)(c) provides:

**(3) Trial and Disposition.** A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment. [underlining added]

in return for not being charged.

12. Respondent avers and evidence will be presented at a hearing that Vassar was found not guilty by a jury in February 2008 of an offense, that if he was convicted, would have subjected Vassar to a sentence of 20 years to life.

13. Respondent avers and evidence will be presented at a hearing that AUSA Smith prepared a second indictment that charged Vassar as being a member of a cocaine conspiracy that could include the conduct for which had been dismissed and that indictment was set for a trial in June 2006.

14. Respondent avers and evidence will be presented at a hearing that Vassar was found not guilty of the conspiracy drafted by AUAS Smith with a person by the name of Dewey Phillips for over 5 kilograms of cocaine (20 years to life), but instead Vassar was found guilty of a conspiracy that Vassar admitted to a transfer of less than 1/4 ounce of cocaine he provided, while addicted to cocaine to another drug addict, Rick Fann for less than Vassar paid for it. Fann, however, unknown to Vassar was acting an informant.<sup>7</sup>

15. Respondent avers and evidence will be presented at a hearing that after his first acquittal Vassar was again pressured to cooperate by AUSA Smith and AUSA Smith's case agent FBI Agent Farrow before his second trial, however Vassar declined to do so because, in part, Vassar could not truthfully testify to what AUSA Smith was demanding him to testify to and, in part, because AUSA Smith was requiring Vassar to plea guilty to a crime that Vassar insisted he did not commit, and for which Vassar was ultimately acquitted.

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<sup>7</sup> These facts are disputed by the Government, however, the jury verdict found Vassar not guilty of a conspiracy for over 5 kilograms; not guilty of a conspiracy for over 500 grams to 5 kilograms; but guilty of a conspiracy of less than 500 grams of cocaine.

16. Respondent avers and evidence will be presented at a hearing that after his first acquittal, Vassar presented a plea agreement to AUSA Smith to plead guilty to what Vassar had done, however, AUSA Smith refused that offer and continued to insist that Vassar plead guilty to offenses Vassar denied committing.

17. Respondent avers and evidence will be presented at a hearing that in late February 2006 after Vassar's first acquittal, Respondent was approached to represent a person, Harold Grooms, who had been the subject of intense news coverage from leaks from federal investigations.

18. Respondent avers and evidence will be presented at a hearing that before agreeing to meet with Harold Grooms, Respondent first discussed with Vassar whether there was any potential conflict and then, thereafter, Counsel assured himself that there was no potential conflict representing Grooms.

19. Respondent avers and evidence will be presented at a hearing that AUSA Smith and others in the Greeneville Division of the United States Attorney's office and FBI in the Greeneville Division harbored a bias against the manner Respondent represented his clients in that division.<sup>8</sup>

20. Respondent avers and evidence will be presented at a hearing that after Respondent preformed his ethical due diligence conflicts inquiry with Vassar and thereafter with Grooms, and other of Respondent's clients, including a Michael Gunter, Respondent filed with the Court a notice that Respondent represented Harold Grooms, although Harold Grooms had not been charged.<sup>9</sup>

21. Respondent avers and evidence will be presented at a hearing that after Respondent filed notice he represented Harold Grooms the Court *sua sponte* set a hearing, presumptively pursuant to Fed. R. Crim. P. 44 although Respondent did not represent two clients in a joint trial.

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<sup>8</sup> The origin of this bias is discussed infra in this Response pertaining to the Show Cause Order as to those accusations being also made on November 17, 2006.

<sup>9</sup> As of today, 2 years later, Harold Grooms has still not been charged.

22. Respondent avers and evidence will be presented that AUSA Smith, consistent with his prior bias against Respondent, wrote in a pleading on March 16, 2006, the evening before the conflicts hearing, that the Court should inquire into Respondent's fees because Respondent:

"is known to have engaged in a practice in which he effectively 'launders' funds for his fee which are known to have come from co-conspirators by requiring the co-conspirator to pay the funds first to the putative client, who then pays Moncier."

23. Respondent avers and evidence will be presented at a hearing that on March 17, 2006 Respondent demanded and District Judge Greer required AUSA Smith to state the basis of AUSA Smith's allegation. AUSA Smith cited *United States v. Fleenor*, a 1999 case that AUSA Smith prosecuted and Respondent defended wherein Ms. Fleenor was found not guilty of all charges after an extended; hotly contested and high profile trial. District Judge Greer represented a co-conspirator charged with Ms. Fleenor and was familiar with what had transpired. District Judge Greer found that AUSA Smith's accusation was unfounded and took under advisement sanctions against AUSA Smith for his statements about Respondent in the pleading.<sup>10</sup>

24. Respondent avers and evidence will be presented that at a hearing that District Judge Greer conducted a hearing on March 17, 2006 at which time he questioned Vassar about potential conflicts and determined that Respondent did not have a conflict representing Vassar and also representing Grooms.<sup>11</sup>

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<sup>10</sup> Despite Respondent bringing to District Judge Greer's attention on multiple occasions that he has not ruled on sanctions against AUSA Smith taken under advisement on March 17, 2006, to date, to Respondent's knowledge, Judge Greer has never ruled on sanctions and the matter remains under advisement.

<sup>11</sup> District Judge Greer did determine that Respondent could not represent a Michael Gunter in a separate case wherein it was not alleged that Vassar was involved because Michel Gunter was alleged to be a co-conspirator with Vassar in Vassar's second indictment although Gunter was represented in that case by two independent attorneys and Respondent did not represent Gunter in the joint trial with Vassar. As it turned out Gunter was found not guilty of being a member of the conspiracy of less than 500 grams that Vassar was found guilty by the jury. Respondent

25. Respondent avers and evidence will be presented that Vassar's June trial was marked with evidence that AUSA Smith, and the members of the prosecution team,<sup>12</sup> had provided undisclosed benefits to witnesses to testify against Vassar.

26. Respondent avers and evidence will be presented that after Vassar's trial a juror wrote an anonymous letter<sup>13</sup> to Vassar's wife that resulted in protracted litigation as to whether Vassar was allowed to have contact with that juror.

27. Respondent avers and evidence will be presented that after Vassar's trial a juror wrote an anonymous letter<sup>14</sup> to Vassar's wife that resulted in protracted litigation as to whether Vassar was allowed to have contact with that juror.

28. Respondent avers and evidence will be presented that AUSA Smith filed false statements without any foundation that Respondent had acted improperly in obtaining the letter from the juror.

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respectfully disagreed with Judge Greer's reasons for disqualification of Counsel representing Gunter in a unrelated separate case, however, Counsel refunded the full fee paid so that Gunter and referred Gunter to qualified counsel.

<sup>12</sup> United States Attorney Manuel 9-5-001(b)(2) defines the prosecution team as:

"2. The prosecution team. It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant."

<sup>13</sup> It was clear from the content of the letter which juror wrote the letter.

<sup>14</sup> It was clear from the content of the letter which juror wrote the letter.

29. Respondent avers and evidence will be presented that there were also protracted and hotly contested post-verdict motions charging misconduct against AUSA Smith and the prosecution team in the prosecution of Vassar, including threatening witnesses and withholding from the defense benefits provided to witnesses.

30. Respondent avers and evidence will be presented that although Vassar had been acquitted at two trials of crimes that would carry a 20 year to life sentence and the prosecution team had originally offered not to charge Vassar if he would participate in a sting operation, AUSA Smith filed a memorandum with the Court urging the Court to impose a 27 year maximum guideline sentence on Vassar for Vassar's conviction of less than 500 grams of cocaine that carried a guidelines sentence of 12 - 15 month sentence Vassar had almost already served.

31. Respondent avers and evidence will be presented that AUSA Smith was relying on the testimony of Government Cooperative Dewey Phillips given at trial, although rejected by the jury, for the Court to accredit to sentence Vassar to the maximum sentence provided by the guidelines.

32. Respondent avers and evidence will be presented at a hearing that Respondent discovered and developed evidence that AUSA Smith, and the United States Attorney's Office for the Eastern District of Tennessee at Greeneville, have a custom and practice of providing undisclosed benefits given to cooperating witnesses pre-charge and pre-5K1.1, that are not disclosed to the presentence officers, the Courts, and most importantly pursuant to *Brady* to Defendants in cases where those witnesses testify.

33. Respondent avers and evidence will be presented at a hearing that Respondent filed evidence of the allegations in paragraph 32 and moved to dismiss for prosecutorial misconduct and/or for a new trial.

34. Respondent avers and evidence will be presented at a hearing that these motions and the filing of the evidence brought about further bias against Respondent in the Greenville division.

35. Respondent avers and evidence will be presented at a hearing that beginning with the filing of the presentence report in Vassar's case in October 2006, Respondent filed a series of three motions for exculpatory sentencing information for Vassar's sentencing hearing; AUSA Smith allowed Judge Greer to believe AUSA Smith had provided all exculpatory sentencing materials to Vassar; and it was not until Vassar's third motion was heard on November 15, 2006, after Judge Greer had on Monday of that week granted the same motion in a different case, that District Judge Greer instructed AUSA Smith to again review his files and provide Vassar any favorable sentencing information prior to the sentencing hearing on November 17, 2006.

36. Respondent avers and evidence will be presented at a hearing that pursuant to Judge Greer's November 15, 2006 directive, on November 16, 2006 AUSA Smith faxed Respondent a letter of potential "favorable sentencing information disclosures".<sup>15</sup>

37. Respondent avers and evidence will be presented at a hearing that among the listed favorable sentencing information AUSA Smith included a non-favorable disclosure that Phillips had been provided a polygraph on July 6, 2006, within two weeks after Vassar's trial, about testimony Phillips gave during Vassar's trial and failed the polygraph. Phillips then admitted he committed perjury during Vassar's trial.

38. Respondent avers and evidence will be presented at a hearing that AUSA Smith did not disclose the October 2005 information that Thornton said Vassar said something about what Grooms said to Respondent or the Court in March 2006 when that issue was before the Court or at any other time prior to November 16th, the day before Vassar's sentencing hearing.

39. Respondent avers and evidence will be presented at a hearing that AUSA Smith's untimely disclosures created a potential conflict of Respondent going forward representing Vassar that in turn reciprocated and goaded Respondent's actions on November 17, 2006.

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<sup>15</sup> The November 16, 2006 "favorable sentencing information letter" is provided as "Exhibit 1" under the EDTN LR 83.7(h)(4) documents section of this Response.

40. Respondent avers and evidence will be presented at a hearing Vassar learned for the first time in the "favorable sentencing information" letter of AUSA Smith provided on November 16, 2006 that the government gave Phillips a polygraph examination in July 2007 after Phillips testimony in Vassar's trial as to parts of Phillips' testimony; Phillips failed the polygraph; and thereafter Phillips admitted to the Government that Phillips committed perjury during Vassar's trial.

41. Respondent avers and evidence will be presented at a hearing that it was only after Vassar's third motion for production of favorable sentencing materials and Judge Greer's directive of November 15 that AUSA Smith included in his November 16 letter that the witness Phillips was relying on to have Vassar sentenced to 27 years had, five months earlier, admitted committing perjury during Vassar's trial.

42. Respondent avers and evidence will be presented at a hearing that the fact that Phillips had admitted to committing perjury during Vassar's trial had not previously been disclosed to Vassar's presentence officer or to the Court nor, upon information and belief, had that information been disclosed to the presentence officer; the Court in Phillips case; or to the United States Grand Jury.

43. Respondent avers and evidence will be presented at a hearing that Vassar's defense at trial was that he had become addicted to cocaine; that he has what was left of 1/2 ounce of cocaine for his personal use; and that Vassar had provide the less than 1/4 ounce of cocaine to another drug addict, Rick Fann, for Fann's personal use for less than Vassar paid for it as a favor to Fann.

44. Respondent avers and evidence will be presented at a hearing that it was only after Vassar's third motion for production of favorable sentencing materials and Judge Greer's directive of November 15 that AUSA Smith included in his November 16 letter information know to the Government since 2002 from another Government informant, Chris Shultz, that long before Vassar's charges Vassar had a bad drug habit and needed help, something that was favorable to Vassar's defense at trial and at sentencing.

45. Respondent avers and evidence will be presented at a hearing that during the week of November 13, 2006 the defense filed copies of transcripts of recordings of James Mark Thornton wherein Thornton accused AUSA Smith of threatening

Thornton to withdraw a recommended sentence that had been promised to Thornton for his prior cooperation unless Thornton testified against Vassar at Vassar's June 2006 trial about matters Thornton told AUSA Smith were not true.

46. Respondent avers and evidence will be presented at a hearing that on November 16, 2006 AUSA Neil Smith, the day before the sentencing hearing, intentionally placed in the favorable sentencing information disclosure letter Ordered by Judge Greer on November 15, information allegedly known to AUSA Smith since October 2005, over a year before, that Respondent's client, Michael Vassar, allegedly made a statement to Mark Thornton in October 2005 that Vassar had information about Respondent's other client, Harold Grooms.

47. Respondent avers and evidence will be presented at a hearing that AUSA Neil Smith knew his untimely disclosure of the alleged statement of Vassar to Thornton about Grooms would create ethical duties on Respondent to Vassar that would impact, and potentially delay, the sentencing hearing set the following morning.

48. Respondent avers and evidence will be presented at a hearing that AUSA Smith knew that Respondent intended to call Thornton to testify at Vassar's sentencing hearing and the untimely disclosure of the alleged statements of Vassar to Thornton about Grooms would impact a decision as to whether or not to call Thornton as a witness to testify about the treats made to Thornton by AUSA Smith.

49. Respondent avers and evidence will be presented at a hearing that AUSA Smith knew Judge Greer was displeased with Respondent representing charged clients at the same time Respondent represented Harold Grooms who had not been charged.

50. Respondent avers and evidence will be presented at a hearing that there exist a reasonable basis to infer that AUSA Smith intended his untimely disclosure of the allegations that Thornton provided information Vassar had information about Grooms would distract from, or prevent Vassar from offering Thornton's testimony that AUSA Smith's threatened Thornton for refusing to testify to matters about Vassar that were not true.

51. Respondent avers and evidence will be presented at a hearing that there is a reasonable basis to infer that AUSA Smith's untimely disclosure of the allegations that Thornton had provided information Vassar had information about Grooms was

designed to distract from AUSA Smith's acknowledgment on November 16th AUSA Smith violated USAM § 9-5-001(d)(1) by withholding information for almost six months that the witness AUSA Smith was relying on for a sentence for Vassar of 27 years had admitted committing perjury during Vassar's trial.<sup>16</sup>

52. Respondent avers and evidence will be presented at a hearing that AUSA Smith's untimely disclosure of the allegations that Thornton had provided information Vassar said about Grooms was designed to incite Judge Greer against Vassar and Respondent and to distract from Respondents allegations against AUSA Smith for prosecutorial misconduct.

53. Respondent avers and evidence will be presented at a hearing that AUSA Smith's disclosures of November 16th pertaining to the alleged statement of Vassar to Thornton about Grooms were untrue; Thornton did not make that statement during his cooperation with the Government; and Vassar did not make that statement to Thornton.

54. Respondent avers and evidence will be presented at a hearing that Respondent, after failing to obtain independent counsel for Vassar, agreed to speak with Vassar during the lunch break about the allegations contained in AUSA Smith's letter.

55. Respondent avers and evidence will be presented at a hearing that Respondent, after failing to obtain independent counsel for Vassar to advise Vassar on AUSA Smith's untimely disclosure, was prepared to go forward with Vassar's sentencing hearing.

56. Respondent avers and evidence will be presented at a hearing that there was no basis for District Judge Greer to call Vassar and Counsel to the podium to question Vassar under oath in the presence of the Prosecutor and FBI.<sup>17</sup>

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<sup>16</sup> See United States Attorney Manuel § 9-5-001(d)(1) provides: "1. Exculpatory information. Exculpatory information must be disclosed reasonably promptly after it is discovered. . . ."

<sup>17</sup> Absent a compelling reason, Vassar had a Fifth Amendment right not to be questioned and his answers were potentially devastating to him under the "obstruction of justice" complex sentencing guideline or 18 U.S.C. § 3663 sentencing factors.

57. Respondent avers and evidence will be presented at a hearing that Respondent had an ethical obligation to object to District Judge Greer attempting to obtain a waiver from Vassar of his right to effective assistance of conflict-free counsel where Vassar, under current law, would have waived his right to conflict free counsel had Counsel not objected.

58. Respondent avers and evidence will be presented at a hearing that Respondent had an ethical obligation to object to questions to Vassar by the Court that Vassar, under current law, Vassar would have waived any error in that questioning.

59. Respondent avers and evidence will be presented at a hearing that Respondent had an ethical obligation to confer and advise Vassar as to questions asked of Vassar under oath by the Court in the presence of the prosecutor and FBI.

60. Respondent avers and evidence will be presented at a hearing that Vassar wanted to confer with Respondent as Judge Greer was questioning him.

61. Respondent avers and evidence will be presented at a hearing that Respondent had District Judge Greer permitted to complete Respondent to complete his sentence to Judge Greer without being cut off Counsel was asking "May I speak to my client?"

62. Respondent avers and evidence will be presented at a hearing that Respondent had an ethical obligation to object that Respondent requesting permission of Judge Greer to speak to Vassar is permitted conduct of counsel in the performance of his ethical obligations in representing Vassar.

63. Respondent avers and evidence will be presented at a hearing that Respondent's request to the Court to be permitted to speak with Vassar did not constitute an actual obstruction of justice where the Court could have responded by either "yes" or "no".

64. Respondent avers and evidence will be presented at a hearing that if Respondent could not object; could not approach the bench; and could not speak to Vassar, there was no purpose for Respondent to be in the Courtroom.

65. Respondent avers and evidence will be presented at a hearing that Judge Greer, after Respondent asked if he could speak to his client, could have either ordered Respondent, out of the Courtroom or ordered counsel placed in jail, and then completed his questioning of Vassar and thereafter conducted the sentencing hearing so that there was no actual obstruction of justice;

66. Respondent avers and evidence will be presented at a hearing that Respondent's actions were within the proper limits of an attorney in a criminal proceeding pursuant to the Tennessee Code of Professional Responsibility.

67. Respondent avers and evidence will be presented at a hearing there does not exist EDTN LR 83.7 clear and convincing evidence of Respondent committing a violation of the Rules of Professional Conduct.

**ALLEGATION II:**

"Such conduct by a member of the bar of this court raises questions about Respondent's fitness to practice before this court and remain a member of the bar of this court."

**RESPONSE II:**

1. Respondent adopts his responses in Allegation I.
2. Respondent denies and demands proof by clear and convincing evidence at a hearing that he is unfit to practice before this court.
3. Respondent denies and demands proof by clear and convincing evidence at a hearing that he is unfit to remain a member of the bar of this court.
4. Respondent avers and evidence will be presented at a hearing that Respondent's conduct took place in the context of ethical issues created by AUSA Smith's untimely disclosure of an alleged potential conflict Respondent had between two clients that required Respondent to take immediate action to protect Vassar's right to conflict free counsel.
5. Respondent avers and evidence will be presented at a hearing that Respondent attempted in good faith to fulfill his ethical duties to Vassar under adverse circumstances created by AUSA Smith's untimely disclosure.

6. Respondent avers and evidence will be presented at a hearing that Respondent was prepared to proceed forward with Vassar's sentencing hearing after Respondent attempted to comply with Counsel's ethical duties to Vassar.

7. Respondent avers and evidence will be presented at a hearing that Respondents has tried approximately 13 complex contested hearings and/or trials since November 2006 before 11 different judges without re-occurrence of the events cited in the Show Cause order.

8. Respondent avers and evidence will be presented at a hearing that Respondent is fit to practice before this court.

9. Respondent avers and evidence will be presented at a hearing that Respondent is fit remain a member of the bar of this court.

**ALLEGATION III:**

"On November 17,2006, Herbert S. Moncier ("Respondent") represented Michael Vassar at his sentencing hearing before Judge J. Ronnie Greer (Case No. 2:05-CR-7S-3, Court File No. 683). Throughout the hearing, Respondent conducted himself in an unprofessional manner. Respondent repeatedly interrupted or spoke over the presiding judge (see. e.g., Case No. 2:0S-CR-75-3, Court File No. 683, pp. 9, 29, 46, 53, 65, 70, 71, 95, 98)."

**RESPONSE III:**

1. Respondent adopts his responses in Allegation I and Allegation II.

2. Respondent admits he represented Michael Vassar at his sentencing hearing before District Judge Greer.

3. Respondent denies and demands clear and convincing evidence at a hearing that throughout the hearing Respondent conducted himself in an unprofessional manner.

4. Respondent admits that the transcript reflect uncompleted sentences by both the District Judge and Respondent.

5. Respondent avers and evidence will be presented at a hearing that the tape recording of the hearing is the best

evidence of the intonation, cadence and impact of exchanges between the Court and Respondent.

6. Respondent avers request that he be allowed to respond further after listening to the tape recording of the proceedings.

7. Respondent avers and evidence will be presented at a hearing that Respondent has tried approximately 13 complex hearings or trials since November 2006 before 11 different judges without re-occurrence of the events cited in the Show Cause order.

8. Respondent avers and evidence will be presented at a hearing that the Respondents actions do not establish clear and convincing evidence of an ethical violation that establishes Respondent is unfit to practice before this Court.

#### **ACCUSATION IV:**

"Respondent also accused the prosecution of engaging in a conspiracy to prevent him from trying cases due to his success in past trials (see *id.*, pp. 39-40,49-50,87-88,91 ,96)."

#### **RESPONSE IV:**

1. Respondent adopts his responses in Allegation I, Allegation II, and Allegation III.

2. Respondent denies and demands clear and convincing evidence that the cited statements violated the Code of Professional Responsibility.

3. Respondent denies and demands clear and convincing evidence that the cited statements establish Respondent is unfit to practice before this court.

4. Respondent denies and demands clear and convincing evidence that the cited statements establish Respondent is unfit to remain a member of this Court.

5. Respondent avers and will offer evidence at a hearing that Respondent had a reasonable basis to make the statements cited in the Show Cause Order pertaining to AUSA Smith and the prosecution team in Greeneville Division of this Court.

6. Respondent avers and will offer evidence at a hearing that Respondent made CFR request for and subpoenaed AUSA Smith and members of the prosecution team to obtain records and testify to matters that pertain to these allegations both to the November 17th hearing and subsequent contempt hearings against Respondent.

7. Respondent avers and will offer evidence at a hearing that to date Respondent has not been allowed access to information and documents necessary to litigate the bias that has developed against Respondent in the Greenville Division of this Court.

8. Respondent avers and will offer evidence of respondent's trials in the Greenville division of the Eastern District as reflected in the summary document filed with this Response as Exhibit 4.

9. Respondent avers and will offer evidence at a hearing that Respondent has received reports of members of the prosecuting team in the Greenville division telling arrestees that arrestees should not to hire Respondent because Respondent will insist that the arrestee go to trial and the arrestee will get a longer sentence than they would if they didn't go to trial cooperated.

10. Respondent avers and will offer evidence at a hearing that on March 16, 2006 AUSA Smith falsely charged Respondent with money laundering in effort to have Respondent disqualified from representing Michael Gunter; AUSA Smith falsely charge Respondent with obstruction of justice pertaining to the July 2006 letter received from a juror; and AUSA Smith in January 2008 falsely stated he intended to call another of Respondent's clients, Gary Musick, to testify against a Lee Albany to cause District Judge Collier to disqualify Respondent from representing one Lee Albany.

**ALLEGATION V:**

"At one point during the hearing, Respondent threatened to "sit there and remain moot," i.e. not provide a defense for his client, due to a potential conflict Respondent perceived in his representation of Mr. Vassar *iid.*, pp. 41-42).."

**RESPONSE V:**

1. Respondent adopts his responses in Allegation I, Allegation II, Allegation III, Allegation IV; Allegation V.

2. Respondent admits making the cited statement.

3. Respondent denies and demands clear and convincing evidence that the cited statement violated the Code of Professional Responsibility.

4. Respondent denies and demands clear and convincing evidence that the cited statement establish Respondent is unfit to practice before this court.

5. Respondent denies and demands clear and convincing evidence that the cited statements establish Respondent is unfit to remain a member of this Court.

6. Respondent avers and will offer evidence at a hearing that Respondent's concern, after Respondent failed to obtain an independent counsel to advise Vassar on the alleged Thornton statement, was that if Vassar went forward with the sentencing hearing as prepared and presented Thornton and Vassar's prepared statement and then AUSA Smith presented the alleged Thornton statement, Vassar sentencing defense would be discredited and would be subject to a greater sentence for obstruction of justice.<sup>18</sup>

7. Respondent avers and will offer evidence at a hearing that the statement was made in the context of Respondent being compelled to go forward to a sentencing hearing prepared prior to having knowledge of the alleged conflict and prior to Vassar having the benefit of counsel as to the alleged conflict that would potentially create a greater sentence to Vassar if the sentencing hearing went forward under the complex laws of obstruction of justice and 18 U.S.C. § 3663 sentencing factors.

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<sup>18</sup> Once again, as it turned out, both Vassar and Thornton deny what was reported by AUSA Smith in the November 16th letter.

8. Respondent avers and will offer evidence at a hearing that during continuing legal education programs it has been suggested that ethical obligations may require an attorney to stand moot and that was a that potential course of action was considered, but not implicated, by Respondent in this case.

9. Respondent avers and will offer evidence at a hearing that consideration of standing moot was a good faith effort by Respondent to deal with a difficult ethical created by AUSA Smith's untimely, and false, November 16th disclosure of the alleged statement of Thornton of what Vassar allegedly said about Grooms.

**ALLEGATION VI:**

"Respondent represented to the court Mr. Vassar could not speak candidly or fully with him because of his representation of an uncharged co-conspirator." (*id.*, p. 43).

**RESPONSE VI:**

1. Respondent adopts his responses in Allegation I, Allegation II, Allegation III, Allegation IV; Allegation V.

2. Respondent admits making the cited statement.

3. Respondent denies and demands clear and convincing evidence that the cited statement violated the Code of Professional Responsibility.

4. Respondent denies and demands clear and convincing evidence that the cited statement establish Respondent is unfit to practice before this court.

5. Respondent denies and demands clear and convincing evidence that the cited statements establish Respondent is unfit to remain a member of this Court.

6. Respectfully, the Show Cause Order does not accurately reflect what Respondent said; the context in which the statement was made; or Respondents explanation of the statement.

7. Respondent avers and will produce evidence at a hearing that in February 2006 Counsel, prior to speaking to Grooms, questioned Vassar carefully about any knowledge Vassar may have about Grooms and Respondent was told by Vassar that

Vassar had no knowledge of illegal drugs or activities of Grooms.

8. Respondent avers and will produce evidence at a hearing that District Judge Greer at a hearing in March 2006 questioned Vassar under oath about his knowledge of Grooms.

9. What the transcript reflects Respondent said is "He isn't going to tell me if Harold Grooms said that because he know I represent Harold Grooms."

10. Respondent avers and will produce evidence at a hearing that Respondents statement could have been more stated as "I would not expect that Vassar would tell me if Harold Grooms said that because Vassar knows I represent Harold Grooms and Vassar doesn't understand my ethical obligations to not disclose Vassar's statement to Harold Grooms and my ethical obligation to withdraw from representing Harold Grooms in the event Vassar agreed to cooperate against Harold Grooms."

11. Respondent avers and will produce evidence at a hearing that the proper course of action of a criminal defense attorney where a potential conflict arises is obtain the client independent counsel to investigate the conflict and advise the client.

12. Respondent avers and will produce evidence at a hearing that Respondent was suggesting to the Court that because of what taken place prior to Counsel agreeing to represent Harold Grooms, Vassar should have an independent attorney advise him as to the untimely alleged Thornton disclosure so that Vassar would not be placed in the position of having to tell Respondent Vassar was previously not truthful with Respondent and run the risk of Respondent telling Grooms that Vassar had changed his story.

**ALLEGATION VII:**

"Despite these representations of a conflict, later in the hearing, Respondent represented to the court he had "absolutely" no reason to believe he had a conflict of interest in representing Mr. Vassar (*id.*, p. 88)."

**RESPONSE VII:**

1. Respondent adopts his responses in Allegation I, Allegation II, Allegation III, Allegation IV; Allegation V; and Allegation VI.

2. Respondent denies and demands clear and convincing proof that Counsel admitted having a conflict as charged in the Show Cause Order.

3. Respectfully, the Show Cause Order does not accurately reflect what Respondent said; the context in which the statement was made; or Respondents explanation of the statement.

4. Respectfully, Respondent avers and will produce evidence at a hearing that Counsel represented that Counsel had a potential conflict based on the untimely, and ultimately determined to be false, November 16th disclosure of AUSA Smith.

5. Respondent denies and demands clear and convincing evidence that Respondent's representation of a potential conflict violated the Code of Professional Responsibility.

6. Respondent denies and demands clear and convincing evidence that Respondent's representation of a potential conflict establishes Respondent is unfit to practice before this court.

7. Respondent denies and demands clear and convincing evidence Respondent's representation of a potential conflict establishes Respondent is unfit to remain a member of this Court.

**ALLEGATION VIII:**

"The court, spanning over three pages in the record, explained, admonished, and instructed Respondent as to the appropriateness of his conduct and demeanor (*id.*, pp. 90-93). Respondent responded by contradicting the court's admonishment (*id.*, pp. 94-96).

**RESPONSE VIII:**

1. Respondent adopts his responses in Allegation I, Allegation II, Allegation III, Allegation IV; Allegation V; Allegation VI; and Allegation VII.

2. Respondent admits the transcript of November 17, 2006 and the pages cited in the Show Cause Order.

3. Respondent avers that the transcript of November 17, 2006 speaks for itself.

4. Respondent denies and demands clear and convincing evidence that Counsel "responded by contradicting the court's admonishment."

5. Respondent denies and demands clear and convincing evidence that Respondent's response violated the Code of Professional Responsibility.

6. Respondent denies and demands clear and convincing evidence that Respondent's response establishes Respondent is unfit to practice before this court.

7. Respondent denies and demands clear and convincing evidence Respondent's response establishes Respondent is unfit to remain a member of this Court.

**ALLEGATION IX:**

"Ultimately , the court, in exploring the conflict issue, spoke directly to Mr. Vassar, who expressed concern as to a potential conflict (*id.*, pp. 101-102). After Mr. Vassar expressed this concern, Respondent interrupted (*id.*, pp. 103-105). The court listened to Respondent's concern; then proceeded to question Mr. Vassar (*id.*, pp. 106). Respondent again interrupted the court and, despite being told to stop interrupting continued to do so as follows: [quotation from transcript omitted]

**RESPONSE IX:**

1. Respondent adopts his responses in Allegation I, Allegation II, Allegation III, Allegation IV; Allegation V; Allegation VI; and Allegation VII.

2. Respondent admits the transcript of November 17, 2006 and the pages cited in the Show Cause Order.

3. Respondent avers that the transcript of November 17, 2006 speaks for itself.

4. Respondent denies and demands clear and convincing evidence that Counsel requesting to speak to his client constitutes a violation of the Code of Professional Responsibility.

5. Respondent denies and demands clear and convincing evidence that Respondent's requesting to speak to his client establishes Respondent is unfit to practice before this court.

6. Respondent denies and demands clear and convincing evidence Respondent's requesting to speak to his client establishes Respondent is unfit to remain a member of this Court.

**AFFIRMATIVE RESPONSES:**

1. Respondent affirmatively asserts that this Court should abstain from hearing or ruling on the Show Cause Order until the competition of the appeal for the findings of District Judge Greer for the same conduct that is the subject of this Show Cause Order.

2. Respondent affirmatively asserts that the Show Cause Order proceeding as to why Respondent should not be disciplined for his conduct on November 17, 2006 is barred by the prior jeopardy clause of the Fifth Amendment to the United States Constitution by the contempt of court discipline imposed by District Judge Greer for the same November 17th conduct.

3. Respondent affirmatively asserts that the doctrines of res judicata and collateral estoppel apply to the Show Cause Order proceeding where District Judge Greer had the authority to discipline Respondent for the same November 17th conduct.

3. Respondent affirmatively asserts that his conduct on November 17th was goaded by wrongful conduct of the prosecution team in Greeneville Tennessee.

4. Respondent pursuant to ECTN LR 83.7(a)(3) attaches documents or other supporting evidence not previously filed with the complaintor order that are relevant to the charges of alleged misconduct are as follows:

Exhibit 1: Letter of AUSA Neil Smith November 16, 2006;

Exhibit 2: Transcripts of statements of Thornton about AUSA Neil Smith filed during the week of November 13, 2006;

Exhibit 3: Juror Note

Exhibit 4: Summary of cases tried by Respondent in the Greeneville Division of the Eastern District of Tennessee.

5. ECTN LR 83.7(d)(5) by this statement signed by Respondent under the penalty of perjury, Respondent states that he has read this response and that, to the best of respondent's knowledge, the facts alleged therein are correct.

This 23rd day of February 2008.

\_\_\_\_\_  
Herbert S. Moncier  
Respondent

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BPR # 1910

**Certificate**

The undersigned certifies that on February 23, 2008, pursuant to the Court's directive, the foregoing has been served only upon Geneva Ashby, Division Manager, 209 Joel. W. Solomon Federal Building and United States Courthouse, 900 Georgia Avenue, Chattanooga, TN 37402, by United States Mail, with proper postage thereon, to e filed under seal.

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Herbert S. Moncier  
Respondent