

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

In re:)
HERBERT S. MONCIER) No. 1:08-mc-09
BPR NO. 1910)

MOTION FOR AN EMERGENCY ORDER FOR STAY

Herbert S. Moncier moves this Court to stay its Order of April 29, 2008, pending appeal, or at the very least to the extent necessary to allow Mr. Moncier to afford his client, Julia Newman, the assistance of counsel of her choice with regard to her pending and impending case in the Federal District Court.

Mr. Moncier has a trial in the case of *United States v. Newman*, EDTN 3:07-cr-89 on May 20, 2008.¹ Ms. Newman has requested a speedy trial. Mr. Moncier requests the emergency relief of a stay to protect Ms. Newman's Fifth and Sixth Amendment rights to the effective assistance of counsel of her

¹ Mr. Moncier provided the Magistrate-Judge cases that would be affected by imposing discipline on Mr. Moncier including *United States v. William Gallion* in the Eastern District of Covington, Kentucky. Trial in that case was to begin May 12, 2008. Upon reading this Court's April 29, 2008, opinion Mr. Gallion requested Mr. Moncier withdraw and that Mr. Gallion's lead counsel try his case. Mr. Moncier filed and was permitted to withdraw. See EDKY No. 2:07-cr-39, Doc. 383, 386.

choice at that trial.² See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 490 (2006)

Memorandum

1. Mr. Moncier has previously applied for a stay of the disciplinary proceedings by a motion in his pending appeal from his criminal contempt conviction in the Sixth Circuit. Upon receipt of this Court's April 29, 2008, Order, Mr. Moncier supplemented that prior motion for stay in his criminal contempt case in the Sixth Circuit. [Copies previously provided this Court]

2. On May 5, 2008, the Sixth Court denied consideration of this disciplinary hearing in Mr. Moncier's contempt appeal. The Sixth Circuit also denied Mr. Moncier's motion for a stay holding that Mr. Moncier should apply to this Court for any stay in this action. [Opinion Attached]

3. Mr. Moncier reported his pending obligations and the May 20, 2008,³ trial in the case of *United States v. Newman*, EDTN 3:07-cr-89 to Magistrate-Judge Lee as an exhibit to his testimony on March 6, 2008.

² The undersigned filed a motion for Mr. Moncier before the Magistrate-Judge in *Newman* for that Court to permit Mr. Moncier to complete his representation of Ms. Newman as her counsel of choice. [EDTN 3:07-cr-89, Doc. 78] The Magistrate-Judge held that he did not have "jurisdiction or authority to alter, amend, clarify, interpret, or stay" that order, but that any such motion should be filed in this court.

³ It was erroneously reported to Magistrate-Judge Lee that the trial was for May 25, 2008.

4. On May 6, 2008, the undersigned filed a motion with the Court in *United States v. Newman* for Mr. Moncier to be permitted to complete his representation of Ms. Newman in that case. [EDTN 3:07-cr-89, Doc. 78]

5. On May 6, 2008, the Magistrate-Judge in *Newman* declined to grant Mr. Moncier's motion holding that it did not have jurisdiction. The denial was without prejudice for Mr. Moncier to re-file that motion with this Court. [EDTN 3:07-cr-89, Doc. 79]

6. The May 6, 2008, Order of Magistrate-Judge Guyton in *Newman* has been appealed to the District Judge by a secondary attorney representing Ms. Newman, Brent Austin, pursuant to Fed.R.Crim.P. 59 and is pending a hearing for emergency relief. [EDTN 3:07-cr-89, Doc. 80]

7. Respectfully, for the reasons stated in the appeal to the District Judge in *United States v. Newman*, the decision whether to permit Mr. Moncier to continue to represent Ms. Newman should be made by the judge presiding in that case.

8. Ms. Newman has demanded a speedy trial. Mr. Moncier is Ms. Newman's trial counsel and has represented Ms. Newman since August 2006.

9. Two other attorneys are of record for Ms. Newman in EDTN 3:07-cr-89, Doc. 79.

10. One attorney of record is David Wigler. Mr. Wigler is an employee of Mr. Moncier. Mr. Wigler appeared for Ms. Newman at an early arraignment but has not taken part in any of the complex proceedings in Ms. Newman's case since August 2006. Under this Court's Order of April 29, 2008, there exists a

significant question concerning whether Mr. Wigler could proceed for Ms. Newman.

11. The other attorney is Brent Austin. Mr. Austin was not chosen by Ms. Newman to be Ms. Newman's trial counsel. Ms. Newman chose Mr. Moncier to be responsible for the motion practice; discovery; trial preparation and trial. Mr. Austin was retained by Ms. Newman to be available to communicate with Ms. Newman because of Mr. Moncier's heavy trial schedule; to advise Ms. Newman pertaining to various matters collateral to the trial of her case; and, generally, to assist Mr. Moncier when necessary. Only Mr. Moncier can provide Ms. Newman her constitutional right to the effective assistance as her counsel of choice at her May 20, 2008 trial. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 490 (2006).

12. It is asserted that denying Ms. Newman the services of Mr. Moncier to complete her case as counsel of her choice would be a structural constitutional defect in her ongoing criminal proceeding. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 490 (2006)

13. Mr. Moncier offered to the Magistrate-Judge a list of nine (9) judges before whom he has tried complex and often hotly contested trials after the events reflected in the transcript of November 17, 2006. In none of those matters did the actions addressed in this Court's findings in its Order of April 29, 2008, occur. [EDTN 1:08-mc-9, Doc. 9]

14. One of those proceedings was before District Judge Greer who had allowed Mr. Moncier to represent Mr. Vassar after the November 17, 2006,

hearing at a sentencing hearing on February 12, 2007. During that hearing, there was no reoccurrence of the types of activity addressed by this Court in its opinion.

15. There is no evidence to support a belief that the matters addressed by this Court in its April 29, 2008, opinion would re-occur if Mr. Moncier were permitted to provide Ms. Newman her constitutional right to her counsel of choice at her trial on May 20, 2008.

16. The Local Rules of this Court provide some guidance in the request being made by Mr. Moncier. EDTN LR 1.1(b) provides the local rules are to be construed by "the judge to whom the case is assigned" so as to not "work an injustice." EDTN LR 1.1(c) provides that the Local Rules, "shall be construed . . . to promote the just, efficient, and economical determination of every action and proceeding."

17. It is asserted that permitting Mr. Moncier to complete the representation of Ms. Newman is consistent with the construction of the local rules for a "just, efficient, and economical determination" of her case.

18. Ms. Newman hired Mr. Moncier prior to the events of November 17, 2006. In Ms. Newman's case, Mr. Moncier has not conducted himself in the manner addressed by this Court. There is no reason for this Court to believe that Mr. Moncier will not conduct himself consistent with the legal and ethical parameters reflected in this Court's April 29, 2008, Order during Ms. Newman's trial.

19. It is asserted that Ms. Newman's constitutional right to continued counsel of her choice at her trial should outweigh the other interests addressed by this Court in its Order of April 29, 2008.

Respectfully submitted this 8th day of May 2008.

s/Ralph E. Harwell

Ralph E. Harwell, B.P.R. #001501

RALPH E. HARWELL, P.C.

Attorney for Herbert S. Moncier

2131 First Tennessee Plaza

Knoxville, Tennessee 37929

Telephone: (865) 637-8900

Certificate

The undersigned hereby certifies on date, the foregoing Motion was filed electronically. Notice of this filing will be sent by operation of the Court's CM-ECF electronic system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

s/Ralph E. Harwell

Ralph E. Harwell