No. 07-6053

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
HERBERT S. MONCIER,	)
	)
Defendant.	)
	)

BRIEF OF AMICUS CURIAE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS URGING REVERSAL

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Rules of this Court, TACDL states that there is no corporation or other entity which owns a financial interest in TACDL, and TACDL has no financial interest, directly or indirectly, in the outcome of this proceeding. Although not required under Rule 26.1, TACDL informs the Court that Mr. Moncier was President of the Association in 1986-1987.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Cases:

Page No.

Page No.

Other Authorities:

Statutes and Constitutional Provisions

Rules

Other

INTEREST OF AMICUS

TACDL is a non-profit corporation chartered in Tennessee in 1973. It has over 800 members statewide, mostly lawyers actively representing criminal defendants. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. Among TACDL's objectives are to facilitate the exchange of information within the membership including information about the defense of criminal cases, educational programs, membership meetings, special committees, and publications. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes education, training, and support to such lawyers, as well as advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee. TACDL has long had an Amicus Curiae committee that follows cases that could significantly impact the administration of justice. When TACDL has a unique perspective that can assist the courts in evaluating issues, members of the committee volunteer to research and file amicus curiae briefs.

In this case, the Tennessee Association of Criminal Defense Lawyers brings special expertise and insight to the question of the important role of

the criminal defense attorney and the protection of the Sixth Amendment right to the effective assistance of counsel.

ARGUMENT

I. THE CONVICTION WAS IMPERMISSIBLY BASED ON FACTS OUTSIDE THE SCOPE OF THE NOTICE

According to the Fed. R. Crim. Proc. 42(a)(1) specification of the charge filed by the district court [Notice, Doc. 1; Apx. ___], Herbert S. Moncier, a criminal defense attorney, was charged with criminal contempt for requesting permission to speak with his client Michael Vassar, a criminal defendant, during a proceeding in which his client was being questioned by the district judge in the presence of the prosecution about a potential conflict of interest and waiver of any such conflict.[1] The specification indicates that Mr. Moncier had been ordered not to speak further.

The court below issued a written decision finding Mr. Moncier guilty of contempt after prosecution on notice pursuant to Fed. R. Crim. Proc. 42(a). [Memorandum and Order, Doc. 44; Apx. ___]. A review of the decision reveals that the basis for the court's decision extended far beyond the scope of the specification of the charge. The court below stated:

> It is unlikely that this Court, and most other courts, would have taken the extraordinary step of citing Moncier for contempt if the incident of November 17 had been an isolated one. It was not, however. The transcript of the November 17 hearing establishes that Moncier had interrupted the Court no

[1] The transcript indicates that Mr. Moncier stated, "may I speak to my . . . ." *Amicus* concludes from the context that Mr. Moncier was asking to speak to his client.

> fewer than 14 times during the November 17 proceedings before the Court's order to Moncier to say not one more word. In addition, this case must also be considered in the context of Moncier's long experience in the defense of criminal cases in the federal courts. Moncier has practiced law for 38 years and his actions of November 17, 2006, cannot be viewed as the innocent mistake of a young, inexperienced lawyer or as anaberrant act. Although Moncier's actions on November 17 were decided in a "split second", his decisions were made in the context of a long career of trying cases and dealing with judges and courts under circumstances where decisions and judgments often must be made immediately and without the luxury of extensive forethought.

[Id., pgs. 9-10; Apx. ___].

The court below also specifically acknowledged that the basis for its ruling was outside the scope of the notice provided:

> First of all, the TACDL [amicus] brief mistakenly states that Moncier was charged with criminal contempt for requesting permission to speak with his client. That simply is not the case. Secondly, the TACDL motion acknowledges that its brief was based solely on the notice of charges filed by the Court and that TACDL did not view Moncier's conduct in the context of the entire hearing of November 17, 2006.

[Id., pg. 20, n.15; Apx. ___]. It is correct that the brief of amicus curiae below was based on the facts stated in the notice of charges. TACDL believes that it is critical in any criminal case that the defendant be given notice and that the proof and any potential criminal conviction be based solely upon the charges noticed. Such procedural safeguards are required by

the relevant constitutional provisions and are reflected in the rules of criminal procedure.

Fed. R. Crim. Proc. 42(a) provides the following:

> **Rule 42. Criminal Contempt**
>
> (a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.
>
> (1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:
>
> (A) state the time and place of the trial;
> (B) allow the defendant a reasonable time to prepare a defense; and
> (C) state the essential facts constituting the charged criminal contempt and describe it as such.

Rule 42 codifies the constitutional principles that apply, in particular the due process right of notice, to all criminal allegations. The United States Court of Appeals for the Seventh Circuit recently found:

> It is worth underscoring, in this regard, that criminal contempt is a crime, like all other crimes. See Bloom v. Illinois, 391 U.S. 194, 201, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968). It is for that reason that the Supreme Court has held that a person accused of criminal contempt enjoys the normal range of procedural rights. See Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-27, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (referring to In re Bradley, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943) (double jeopardy); Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925) (*rights to notice of charges*, assistance of counsel, summary process, and to present a defense); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444, 31 S.Ct. 492, 55 L.Ed.

797 (1911) (privilege against self-incrimination and right to proof beyond a reasonable doubt); and, for contempts that involve imprisonment beyond six months, right to trial by jury, Taylor v. Hayes, 418 U.S. 488, 495, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974)).

Rule 42 of the Federal Rules of Criminal Procedure implements these principles.

In re Troutt, 460 F.3d 887, 893 (7th Cir. 2006) (emphasis added) (reversing attorney's conviction for criminal contempt on the basis of district court's failure to comply with procedural requirements of Rule 42).

The necessity for the notice of the charges to "state the essential facts constituting the charged criminal contempt and describe it as such", Fed. R. Crim. Proc. 42(a)(1)(C), is more than a procedural prerequisite; it is a practical necessity with respect to allegations of contempt and in particular lawyer contempt. Even the district court below acknowledged the amorphous nature of the charge. "Almost any inappropriate act or comment by a lawyer in legal proceedings could be deemed 'misbehavior' and the appellate courts have never precisely defined what constitutes sufficiently egregious misconduct...." [Memorandum and Order, Doc. 44, pg. 11; Apx. ___].

In dealing with this difficulty, the Georgia Supreme Court recently recognized that the traditional standard for attorney contempt was so vague as to be essentially meaningless. See In re Jefferson, 657 S.E.2d 830, 831-

833 (Ga. 2008) (reversing conviction for attorney contempt and remanding). "Presently, the standards governing both the limits of acceptable advocacy and the scope of the contempt power are haphazard and imprecise. Although numerous appellate decisions purport to specify standards for applying the contempt power, their open-ended and ill-defined criteria make it impossible to predict, except in the most obvious instances, whether an attorney's conduct is punishable." Id. at pg. 832, n. 2 (quoting Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power-Part One: The Conflict Between Advocacy and Contempt*, 65 Wash. L.Rev. 477, 482-483 (July 1990)).

In the present case, the Rule 42(a) specification of the charge provided essentially that Mr. Moncier's client, Mr. Vassar, was in the process of being questioned by the district court about a potential conflict of interest, and the district court questioned Mr. Vassar over whether he was willing to waive that conflict of interest. During the waiver portion of the inquiry, Mr. Moncier attempted to ask the court's permission to speak with, presumably, his client. [Notice, Doc. 1, pgs. 1-2; Apx. ___]. The district court's written findings concerning contempt, as detailed above, are outside of the specification of the charge and rather are based upon other conduct during the same hearing and other appearances before the court. Ascertaining

whether the charged conduct is contemptuous must be, under the plain language of the rule and the constitutional principles it implements, limited to the specification of the charge.

II. MR. MONCIER HAD A CONSTITUTIONAL DUTY TO OBJECT AND REQUEST CONSULTATION WITH HIS CLIENT IN ORDER TO PREVENT WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

According to the proceedings as reproduced in the specification of the charge, the court below was questioning Mr. Vassar in order to ascertain: (1) whether Mr. Vassar understood that there was, in the Court's opinion, a potential conflict of interest as a result of Mr. Moncier's representation of Mr. Vassar and an uncharged third person [Notice, Doc. 1, pgs. 1-2; Apx. ___]; and (2) if Mr. Vassar was aware of such conflict, whether Mr. Vassar was willing to waive the conflict and allow Mr. Moncier to continue in his representation of Mr. Vassar. [Notice, Doc. 1, pgs. 2-3; Apx. ___].

Mr. Moncier was put in the untenable position of having to object and request to speak to his client during the Court's questioning of his client in open court in the presence of the prosecution in order to prevent his client from waiving the right to effective and conflict-free representation of counsel pursuant to U.S. Const. Amend. VI. Gillard v. Mitchell, 445 F.3d 883, 890 (6th Cir. 2006) (finding criminal defendant entitled to conflict-free effective representation pursuant to U.S. Const. Amend. VI) (citing Smith v. Anderson, 689 F.2d 59, 62-63 (6th Cir.1982)). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely

consequences." United States v. Dixon, 479 F.3d 431, 434 (6th Cir. 2007) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

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

Mr. Moncier did not object when the court below informed Mr. Vassar of any potential conflict of interest. [Notice, Doc. 1, pgs. 1-2; Apx. ___]. Mr. Moncier voiced an objection at the point when the district court asked Mr. Vassar to waive any conflict of interest, real or potential, that could exist with Mr. Moncier's representation of Mr. Vassar and an uncharged third person, and after voicing the objection requested to speak with Mr. Vassar immediately after the district court instructed Mr. Moncier to not speak or he was "going to jail." [Notice, Doc. 1, pg. 3; Apx. ___].

Accordingly, the notice on its face reveals that Mr. Moncier was attempting to satisfy the requirements of U.S. Const. Amend. VI in objecting

to any waiver by his client, Mr. Vassar, of any conflict of interest, real or perceived, that would deprive his client of constitutional effective representation, at least without adequate consultation and understanding. In re Jefferson, 657 S.E.2d 830, 833-834 (Ga. 2008) ("[I]n light of the important constitutional rights involved, we are of the opinion that, in adjudicating a case of possible contempt, 'doubts should be resolved in favor of vigorous advocacy.'") (citing and quoting United States ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir.1972)). This is the epitome of the constitutional and ethical mandates of a criminal defense lawyer in our adversarial system of justice. See Tenn. Sup. Ct. R. 8, RPC 3.1, Comment; U.S. Const. Amend. VI; Mickens v. Taylor, 535 U.S. 162, 168 (2002); Holloway v. Arkansas, 435 U.S. 475 (1978).

III. MR. MONCIER'S CONDUCT DID NOT CONSTITUTE CONTEMPT

As noted previously, Mr. Moncier had a constitutional and ethical responsibility to object and request consultation with his client when the court's inquiry reached the point where the court was asking Mr. Vassar whether or not he wished to waive any potential conflict of interest with his attorney. It is respectfully submitted that such action by Mr. Moncier did not constitute criminal contempt. If such action can be construed as criminal contempt, then the court will set a precedent that has a chilling effect on

advocacy by the criminal defense bar in general, and in turn weakens not only the rights to a fair trial of those accused of criminal conduct, but also the integrity and reliability of our system of justice as a whole. Wheat v. United States, 486 U.S. 153 (1988) (right to effective and zealous defense counsel ensures fairness and integrity of trial); United States v. Gonzales-Lopez, 126 S.Ct. 2557, 2562 and n.3 (2006) (same); Sacher v. United States, 343 U.S. 1, 9 (1952) ("[I]t is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts."); In re Dillinger, 461 F.2d 389 (7th Cir. 1972) (stating court must not "manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts"; "where the judge is arbitrary or affords counsel inadequate opportunity to argue his position, counsel must be given substantial leeway in pressing his contention, for it is through such colloquy that the judge may recognize his mistake and prevent error from infecting the record. It is, after all, the full intellectual exchange of ideas and positions that best facilitates the resolution of disputes."); see also Cooper v. Superior Court, 55 Cal.2d 291, 10 Cal.Rptr. 842, 359 P.2d 274 (Ca. 1961) ("The power to silence an

attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been afforded.").

For example, in United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965), a case originating out of the Eastern District of Tennessee, this Court grappled with whether or not the following conduct constituted criminal contempt:

> The statements of Schiffer, found contemptuous by the Court, were his repeated charges that the Court was conducting a 'drum head court martial', and 'a star chamber proceeding'. He stated that the Court's rulings 'smacked of Stalinism, Hitlerism, Mussoliniism, and all these isms'. These offensive and derogatory statements were made to the Court seven times during the course of the trial. On one occasion Schiffer accused the Court of 'being used as a tool by the Government' to deprive the defendant of putting on his defense.
>
> Schiffer further accused the Court of '* * * being used as an adjunct to the prosecutor to hide evidence * * *' and stated: 'This is chicanery, not law.'
>
> He insinuated that the case was only 'a trial technically begun.' He stated that the prosecutor 'runs to the aid of an affiliate, the Court'.
>
> He further accused the Judge of concealing evidence known by him to be perjured, and of keeping Schiffer's mouth closed so that he could not attack it.
>
> He asked the Court to permit him to withdraw from the case and for the Court to defend his client because he was being prevented from defending him.

United States v. Schiffer, 351 F.2d 91, 93 (6th Cir. 1965). In reviewing this conduct, this Court held:

> We realize that in contempt cases against lawyers the evidence must be carefully scrutinized in order that there be no undue interference with their right to properly represent their clients. In the present case the evidence must be viewed in the background of a bitterly contested trial charged with emotions, where things are sometimes said that should have remained unsaid. Here, however, we do not have an isolated outburst in the heat of a trial, but rather deliberate, continuous and repeated acts, extending throughout the trial, which were wholly unwarranted.

Id. at 94. The Schiffer court further defined which remarks by counsel will constitute criminal contempt:

> They were calculated to provoke and to bring undue pressure upon the Court in the making of various rulings during the course of the trial. They delayed the trial, obstructed the administration of justice and interfered with the Court in the performance of his judicial duties.

Id. In interpreting Schiffer and the requirements for contempt, the Sixth Circuit has later held that "[t]he use of the word 'calculated' [in Schiffer] implies a requirement that the act be done with a purpose to obstruct." Vaughn v. City of Flint, 752 F.2d 1160, 1168 (6th Cir. 1985). "This requirement was made explicit in TWM Manufacturing Co., Inc. v. Dura Corp., 722 F.2d 1261, 1272 (6th Cir.1983), where we wrote '[i]n criminal contempt, willful disobedience must be proved beyond a reasonable doubt.' Willfulness, for this purpose, implies a deliberate or intended violation, as

distinguished from an accidental, inadvertent or negligent violation." Vaughn v. City of Flint, 752 F.2d at 1168 (6th Cir. 1985) (internal quotations and citations omitted); see also United States v. Seale, 461 F.2d 345, 367-368 (7th Cir. 1972) (finding contempt to be a volitional act done by one who knows or should reasonably be aware *that his or her conduct is wrongful*).

In balancing the allegations in the specification of the charge in Mr. Moncier's case to those in Schiffer, there really is no comparison. Here, it is not alleged that Mr. Moncier made deliberate and repeated derogatory comments about the court. Rather, it is alleged that Mr. Moncier objected and attempted to obtain the court's permission to speak to his client when the court reached the stage of the inquiry with Mr. Vassar to where the court asked Mr. Vassar if he would waive any conflict, real or potential, with his counsel. Such action by Mr. Moncier was not "wholly unwarranted", Schiffer, 351 F.2d at 94, but rather was constitutionally required, Mickens v. Taylor, 535 U.S. 162, 168 (2002), discussed supra. Nor was the purpose of the comments to obstruct, Vaughn v. City of Flint, 752 F.2d 1160, 1168 (6th Cir. 1985); rather, the purpose was to preserve and protect the constitutional right to counsel of Mr. Vassar, a defendant in a criminal proceeding who was in the process of having to decide on the spot, in an un-counseled

fashion, and under the direct scrutiny of the Court, whether or not to waive his right to conflict-free counsel under U.S. Const. Amend. VI.

Accordingly, it is clear that the conduct alleged was not contemptuous, but rather constituted a good faith attempt by Mr. Moncier to preserve the right to counsel of his client under U.S. Const. Amend. VI. See State v. Maddux, 571 S.W.2d 819, 821 (Tenn. 1978) (reversing defense attorney's conviction for contempt on the basis of attorney's repeated failure to accept appointment to a case by the Court and repeated attempts to withdraw on the basis that the attorney felt he was unqualified; "While we may not agree with his contention, we have no cause to believe that it was not pressed in good faith.").

CONCLUSION

For the reasons stated above, this Court should reverse the district court's finding of contempt.

Respectfully submitted,

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RULE 32 CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the Rules of Appellate Procedure and of this Court, counsel certifies that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,185 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14 point, Times New Roman type style.

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The undersigned certifies copies of the foregoing were sent by first-class mail to the following persons:

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This 23rd day of April, 2008.

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