

No. _____

IN THE
Supreme Court of the United States

IN RE:

HERBERT S. MONCIER,

Petitioner.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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February 22, 2010

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QUESTIONS PRESENTED

1. Was Petitioner denied his structural constitutional right to an impartial judge by the Magistrate-Judge, District Judge and Sixth Circuit considering the findings of a disqualified judge to discipline Petitioner.

2. Is Petitioner protected from being disciplined for conduct Petitioner reasonably believed was required of him by his ethical and Constitutional duties as an attorney-advocate for his Client?

3. Was Petitioner denied Constitutional rights in his *quasi*-criminal disciplinary proceedings?

4. Was Petitioner denied *In re Snyder* appellate review and his Fed. R. App. P. 4 right to appeal non-frivolousness and constitutional claims?

5. Did the doctrines of primary jurisdiction, federal abstention, and choice of forum and remedies require Judge Collier permit the Tennessee Board of Professional Responsibility complete proceedings against Petitioner previously instituted against Petitioner by Judge Greer for the same conduct?

6. Was Petitioner's discipline arbitrary, unlawful, unnecessary and unreasonable?

7. Were Judge Collier and the Magistrate-Judge disqualified and/or required to respond to requests for information pertaining to their qualification?

PARTIES TO THE PROCEEDINGS

Disciplinary charges were filed against Petitioner by Eastern District of Tennessee District Judge Curtis L. Collier in his capacity as the rotating Chief Judge for the District. [Pet. Appx. 5-10]

The only party to the proceeding in the Court of Appeals for the Sixth Circuit was Petitioner, Herbert S. Moncier.

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The opinion of the same panel of the United States Court of Appeals for the Sixth Circuit, referenced in the Opinion in this appeal, is reported at *United States v. Moncier*, 571 F.3d 593 (6h Cir. 2009).

A Petitioner for Writ of Certiorari in the case during which Petitioner's conduct occurred has been filed in this Court on February 17, 2010 in *Michael Carl Vassar v. United States*, Application number 09A560.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution Section 9, Cause 3. Bill of attainder--Ex post facto laws.

No Bill of Attainder or *ex post facto* Law shall be passed.

Eastern District Tennessee Local Rule 83.6 Rules of Professional Conduct.

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

Eastern District Tennessee Local Rule 83.7 Disbarment.¹

(a) Conduct Subject to Discipline. The Court may impose discipline on any member of its bar who has violated the Rules of Professional Conduct as adopted by the Supreme Court of Tennessee, or has engaged in unethical conduct tending to bring the Court or the bar into disrepute. The Court may also discipline any member who has been suspended or disbarred from the practice of law by the state in which he or she is a member, or by any court of record. Discipline which may be imposed includes disbarment, suspension, reprimand, or such other further disciplinary action as the Court may deem appropriate and just. Nothing in this rule shall be construed as limiting in any way the exercise by

¹ This is the rule in effect at the time of Petitioner's disciplinary hearing in 2008. The rule was amended in 2009.

the Court of its inherent contempt power or its authority to impose other sanctions provided under federal law and the Federal Rules of Civil Procedure.

(b) Initiation of Disciplinary Proceedings.

Formal disciplinary proceedings shall be initiated by the issuance of an order to show cause signed by the Chief Judge. An order to show cause may be issued by the Chief Judge on his or her own initiative or upon a complaint filed by any counsel of record or party to an action in this Court. When such order is issued on the Court's initiative, no separate complaint need be filed. All complaints relating to disciplinary matters under this rule shall be filed under seal with the Clerk. All records pertaining to attorney disciplinary proceedings, except with respect to reinstatement proceedings, shall be confidential and kept under seal in the Clerk's Office unless otherwise ordered by the Court. (1) All complaints of attorney misconduct shall include: (i) The name, address, and telephone number of the complainant; (ii) The specific facts that require discipline, including the date, place and nature of the alleged misconduct, and the names of all persons and witnesses involved; (iii) Copies of all available documents or other evidence that support the factual allegations, including a copy of any rule or order of the Court that is alleged to have been violated; and (iv) At the end of the complaint, a statement signed by the complainant under penalty of perjury that the complainant has read the complaint and the factual allegations contained therein are correct to the best of the complainant's knowledge.

(c) Initial Action on the Complaint. Upon filing, the complaint shall be sent to the Chief Judge for initial review.

(1) If the Chief Judge determines that the complaint on its face or after investigation is without merit or does not warrant action by the Court, the complaint shall be dismissed by order of the Chief Judge.

(2) If following review it is determined that reasonable grounds exist for further investigation, the Chief Judge may order such investigation or may issue an order to show cause if the complaint appears to be meritorious. A copy of the order to show cause, the complaint, and accompanying documents shall be mailed to the member who is the subject of the complaint. The member shall also receive in the same mailing a copy of this rule and a written statement that the member shall have 20 days from the date of entry of the order to show cause in which to respond.

(3) Alternatively, the Chief Judge may refer the matter to a state disciplinary board for such action as it determines is appropriate.

(d) Response. A member against whom an order to show cause is issued shall have 20 days from the date of the entry of the order in which to file a response. The response shall be filed, under seal, with the Clerk, and shall contain the following:

(1) The name, address and telephone number of the respondent.

(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.

(3) All documents or other supporting evidence not previously filed with the complaint or order that are relevant to the charges of alleged misconduct.

(4) A specific request for a hearing or a statement specifically declining a hearing.

(5) A statement signed by the respondent under the penalty of perjury indicating that the respondent has read the response and that, to the best of respondent's knowledge, the facts alleged therein are correct.

(e) Summary Dismissal. If the response discloses that the complaint is without merit, it may be dismissed by the Chief Judge.

(f) Conformity with State Discipline. When the respondent has been disbarred or suspended from the practice of law by a state in which the member practices, and the respondent admits the action complained of, or does not respond to the order to show cause, the Chief Judge may enter a final order of the court imposing similar discipline similar discipline.

(g) Judicial Officer. Upon filing of the response, the Chief Judge may appoint a judge or other judicial officer from within the Eastern District of Tennessee to investigate the allegations of the complaint and the response. The judicial officer shall review all sealed documents related to the disciplinary charges, conduct hearings if necessary, and issue a written recommendation.

(h) Hearings on Disciplinary Charges. A disciplinary hearing shall be held only when the

member under investigation has requested such a hearing in a timely response and the judge or the judicial officer has determined that such a hearing is necessary for the proper disposition of the charges.

(1) **Hearing Procedures.** When it has been determined that a hearing is necessary, the judicial officer shall provide the member with written notice of the hearing a minimum of 20 days before its scheduled date. The notice shall contain the date and location of the hearing and a statement that the member is entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine adverse witnesses.

(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.

(3) **Rights of the Complainant and the Respondent.** During the hearing, the respondent shall be entitled to be represented by counsel, to present witnesses and other evidence, and to confront and cross-examine any adverse witnesses. The judicial officer may permit the complainant to participate in the proceedings through counsel.

(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.

(5) **Failure to Appear.** The failure of the respondent to appear at the hearing shall itself be grounds for discipline under Subsection (a) of this rule.

(i) **Recommendation.** The judicial officer shall prepare a written recommendation which shall include a proposed disposition of the disciplinary charges.

(1) **Filing of the Recommendation.** The recommendation shall be filed, under seal, in the Clerk's Office and copies distributed to the Court and the respondent.

(2) **Exceptions to the Recommendation.** The respondent shall have 10 days from the date of service of the recommendation in which to file with the Clerk a written response to the recommendation. The response shall not exceed 25 typewritten pages and shall state concisely any inaccuracies, errors or omissions which warrant a disposition other than that recommended.

(j) **Final Action on the Recommendation.** Within 30 days of the filing of any exceptions to

the recommendation, the Court shall enter a final order of disposition. Notice of the final order shall be sent to the respondent and the complainant.

JURISDICTION

The Court of Appeals issued its decision on July 8, 2009. (Pet. App. 1-2)

A petition to rehear was denied on September 24, 2009. (Pet. App. 3)

On December 15, 2009 Justice Stevens granted an extension of the time to file a petition for a writ of certiorari to February 21, 2010. (Pet. App. 4)

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

At a hearing on November 17, 2006 in *United States v. Michael Carl Vassar*² District Judge J. Ronnie Greer was questioning Petitioner's client. Petitioner was stating objections to the questions. Judge Greer denied Petitioner permission to approach the bench to argue the reasons for his objections to avoid being accused of "coaching" Vassar. Judge Greer then instructed Petitioner not to state objections to his questions while standing at the podium with Vassar. Petitioner then, in a non-sarcastic normal tone requested permission of Judge Greer "May I speak to my client?"

Petitioner was placed in jail, removed from representing Vassar and cited for contempt for making

² Petitioner has a Petition for Certiorari pending in this Court in *Herbert S Moncier v. United States*, __ Application Number 09A581.

the request “May I speak to my client?” Petitioner, over his demand for a jury, was tried for criminal contempt without a jury by Judge Greer and convicted on May 30, 2007. On August 21, 2007 Judge Greer sentenced Petitioner to 1 year probation, 150 hours community service; a \$5,000.00 fine; 3 hours extra CLE; and an anger management course. Petitioner was denied a stay and has served the sentence and paid the fine.

While pending sentencing, on June 14, 2007 Judge Greer filed a complaint against Petitioner with the Tennessee Board of Professional Responsibility for Petitioner’s conduct on November 17, 2006. Petitioner responded. The Tennessee BOPR decided to wait for the decision of the Sixth Circuit on Petitioner’s appeal of his contempt conviction prior to acting on Judge Greer’s complaint.

The Sixth Circuit reversed Petitioner’s conviction holding Judge Greer was disqualified and remanded for a new trial. *see United States v. Moncier*, 571 F.3d 593 (6th Cir. 2009) A Petition for Certiorari is pending in this Court from the Sixth Circuit Opinion sanctioning Petitioner being tried for conduct that could reasonably be believed to be necessary to protect Vassar’s Constitutional rights and to perform Petitioner’s ethical duties to Vassar; denying Petitioner a jury trial; and limiting Petitioner’s defenses at his new trial based on the record created before Judge Greer when he was disqualified.

On December 19, 2007 Petitioner was hired to represent Lee Almany. *Almany* was pending trial before Judge Greer. Almany had been unable to negotiate an acceptable plea agreement. Almany was to be tried on January 21, 2008. The same prosecutor trying *Vassar*

immediately moved that Judge Greer disqualify Petitioner from representing Almany because Petitioner also represented a Gary Musick on appeal. Musick, as had Almany, declined to cooperate and chose to proceed to trial. Prior to agreeing to represent Almany at trial, Petitioner conferred with Musick and assured himself there was not a conflict. Petitioner obtained written waivers and acknowledgments from Musick and Almany.

Almany was well known in the Greeneville Division. Almany previously had one charge dismissed and was acquitted by a jury on another charge. Fearing Petitioner's prior strained relationship with Judge Greer may result in Judge Greer disqualifying Petitioner, Almany requested Petitioner to file 28 U.S.C. § 144 affidavit and § 455 motion to disqualify the Magistrate-Judge and Judge Greer. Both disqualified themselves.

District Judge Curtis L. Collier, sitting in the Southern Division of the District in Chattanooga approximately 3 hours from Greeneville, was serving a rotation as the District's Chief Judge. Judge Greer disqualified himself by order on January 3, 2008. Judge Collier, on the same day, reassigned *Almany* to himself and set a hearing in Chattanooga on the prosecutor's motion to disqualify Petitioner for January 9, 2008.³

Almany was questioned at length by Judge Collier on January 9, 2008. Nothing Almany said indicated a lack of understanding or any conflict with Musick by Petitioner represent him. Written waivers

³ Knoxville is approximately 1/2 the distance from Greeneville to Chattanooga and had two District Judges and two Senior Judges who often interchange with Judge Greer were available.

and acknowledgements of Albany and Musick were filed. There was no Fed. R. Crim. P. 44(c) joint representation. There was no conflict.

Nevertheless Judge Collier disqualified Petitioner and declined to make any findings at that time. Judge Collier ordered Petitioner to have no further contact with Albany or his family. Judge Collier then appointed a local attorney from the Chattanooga area to represent Albany. Albany ultimately accepted the plea he had previously rejected when he hired Petitioner to try his case.

Eight days later, on January 17, 2008, Judge Collier, without mentioning *Albany*, entered a show cause order for Petitioner to establish that conclusions Judge Collier's made from reading the November 17, 2006 transcript in *Vassar* were "inaccurate." Judge Collier appointed a Magistrate-Judge he hired and supervised to act as Petitioner's "judicial officer" and limited the hearing before her to a demonstration by Petitioner that Judge Collier's charges were "inaccurate."

After issuing the Show Cause Order, Judge Collier transferred Albany's case back to Judge Greer. Petitioner filed a motion to determine whether Judge Collier had Petitioner's disciplinary proceeding before him at the time Judge Collier disqualified Petitioner from representing Albany. Petitioner cited the fact that Judge Collier sent Albany's case back to Judge Greer after removing Petitioner as a circumstance that might reasonably question Judge Collier's impartiality under 28 U.S.C. § 455 because Judge Greer's disqualification in *Albany* would apply in all of Petitioner's cases in the Greeneville division if Petitioner were permitted to

practice in the EDTN. After Petitioner's motion, Judge Collier reassigned *Almany* back to himself stating the reassignment back to Judge Greer was a "mistake."

After a two day hearing the Magistrate-Judge issued a 61-page opinion. [Pet. App. ****] The Magistrate-Judge pretermitted all of Petitioner's defenses and evidence by applying "issue preclusion" to the findings of Judge Greer in Petitioner's criminal contempt trial. Based exclusively on the findings of Judge Greer, the Magistrate-Judge recommended Petitioner be disciplined but "reserved" the nature and amount of discipline to Judge Collier.

Petitioner filed Local Rule "exceptions." Judge Collier in an 81-page opinion affirmed the Magistrate-Judge and also applied "issue preclusion" to Judge Greer's findings from the contempt proceedings. [Pet. Appx. pp. 11-74 at 56] Judge Collier denied Petitioner's request a hearing as to the nature or amount of discipline. Judge Collier disciplined Petitioner for each defense, motion and evidence Petitioner presented in his defense.

Judge Collier on April 28, 2008 suspended Petitioner *instanter* from the bar of the Eastern District for seven (7) years with five years being active suspension. Judge Collier imposed conditions that in language reminiscent of his order in *Almany* prohibiting Petitioner from speaking to any of Petitioner's existing clients directly or indirectly; conferring with any client on a matter that could involve a federal question; speaking to attorneys about federal matters who are members of the bar of the EDTN; being in the audience section of federal courtrooms; or speaking to federal court personnel. Judge Collier denied Petitioner a stay

of the suspension holding that Petitioner was a danger to society.

Petitioner had 23 pending federal cases with contract fees in excess of one (1) million dollars that Petitioner instantly was required to abandon based on Judge Collier's order. Four of those cases were serious criminal cases in varying stages. One of the criminal cases had national attention where a janitor was charged with stealing classified materials and was going to trial before a jury to resolve disputes as to his "offense of conviction" for sentencing guideline determinations.

At the time of Petitioner's suspension over 70% of Petitioner's practice was in federal courts. Petitioner's federal criminal practice had developed toward persons who could not resolve their cases by plea agreements and wished to hire Petitioner to try their cases before a jury. The balance of Petitioner's practice in state courts involved civil or constitutional rights that almost always had federal components. Petitioner's admission *pro hac vice* in other federal Districts was based on Petitioner's good standing in the Eastern District of Tennessee. The evidence Petitioner offered established that his April 28th *instanter* suspension and the additional conditions imposed were the functional equivalent of shutting down Petitioner's law practice.

Prior to the events of November 17, 2006 before Judge Greer, Petitioner had never been held in contempt of court or had a complaint to the Tennessee Board of Professional Responsibility.

Petitioner graduated from the University of Tennessee Law School in 1970 and received a master of law degree from George Washington National Law

Center in 1974. Petitioner served as a Captain in the Judge Advocate General Corps from 1971 to 1974; as a prosecutor in the Knox County Attorney General's office from 1974 to 1976; and in private practice in federal and state courts since 1976. Petitioner tried numerous high profile local, regional and national cases throughout the eastern part of the country and had appeared before the 1st, 4th, 5th, 6th, 9th and 11th Circuit Courts of Appeal. Petitioner has been a member of the bar of this Court since 1981.

At the time of his suspension Petitioner had been rated A-V by Martindale-Hubble for over 25 years; listed in "Best Lawyers in America" since 1994; listed in "Super Lawyers" since 2001; listed in Tennessee's Best 100 Lawyers since 2002; listed in local publications as a best criminal defense attorney; and had been recognized by the Tennessee Association of Criminal Defense Lawyers and National Association of Criminal Defense Lawyers.

Petitioner had served as the president of the Young Lawyers of the Knoxville Bar Association and Tennessee Association of Criminal Defense attorneys. Petitioner was a frequent speaker at professional seminars on criminal defense topics and taught criminal law at several institutions.

REASONS FOR GRANTING THE PETITION

I. Petitioner was denied his structural constitutional right to an impartial judge by the Magistrate-Judge; Judge Collier; and the Sixth Circuit considering the findings of Judge Greer who was disqualified.

Regardless of the length, or how well written the 61-page Magistrate-Judge recommendation or Judge Collier's 81-page opinion may be, unless those writings were based on constitutional procedures and afforded Petitioner his constitutional rights those opinions are defective.

The Magistrate-Judge hearing Petitioner's case exclusively applied "issue preclusion" to the findings of Judge Greer in Petitioner's contempt case to recommend Petitioner be disciplined and thereby pretermitted all of Petitioner's defenses and evidence. [Pet. Appx. pp. 56]

Judge Collier denied Petitioner's exceptions and held Petitioner was "certainly aware of those findings" [id. 480-491]; held Judge Greer "witnessed the conduct" and was in "the best position to assess the nature, demeanor, and atmosphere involved" [id. 491]; and Judge Greer's findings should be given "substantial deference" like appellate courts give to trial courts. [id. 491] Judge Collier held that "Judge Greer's factual findings in Respondent's criminal contempt conviction are clear and convincing evidence of Judge Greer's perceptions of what occurred at the hearing." Possibly the most surprising reason Judge Collier applied issue preclusion to Judge Greer's findings was his ruling that the "only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct."

The Sixth Circuit Opinion, after holding Judge Greer was disqualified, sanctioned the Magistrate-Judge and Judge Collier's reliance on the findings of Judge Greer. According to the Opinion, their consideration of Judge Greer's findings was "harmless error."

In *Herbert S. Moncier v. United States Supreme Court*, Application Number 09A581, Petitioner request this Court grant that Petition to determine whether Petitioner's defenses at his retrial for contempt can be limited by the Sixth Circuit based on the record created before Judge Greer who was disqualified. Petitioner adopts those arguments in this Petition.

Petitioner requests this Petition be granted to consider whether findings of Judge Greer, who was disqualified can, consistent with Petitioner's structural constitutional right to an impartial judge, be relied on exclusively by the Magistrate-Judge at Petitioner's hearing and Judge Collier to find "clear and convincing" evidence to discipline Petitioner.

II. Petitioner is protected from being disciplined for conduct he reasonably believed was necessary to provide Vassar his Constitutional right to counsel and for Petitioner to perform his ethical duties an attorney-advocate for Vassar.

In Petitioner's related Petition to this Court in *Moncier v. United States*, Petitioner requests this Court grant his Petitioner to consider whether Petitioner can be charged with criminal contempt for conduct he reasonably believed to be required by his ethical and Constitutional duties to Vassar. In this Petition, Petitioner requests this Court consider whether he can

be disciplined for conduct he reasonably believed to be required by his ethical and Constitutional duties to Vassar. Petitioner adopts the reasons for granting the Petition on this issue that are more fully developed in *Moncier v. United States*.

Petitioner asserts that Petitioner's discipline is in conflict with this Court's opinions in *Maness v. Meyers*, 419 U.S. 449, 457 (1975); *Sacher v. United States*, 343 U.S. 1, 14 (1952); *In re McConnell*, 370 U.S. 230, 239 (1962) and the Seventh Circuit standard in *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972) "an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth."

In *Sacher v. United States*, 343 U.S. 1, 14 (1952), this Court held

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

Petitioner requests this Court provide him the aide promised in *Sacher* by granting his Petition to consider whether he is protected from being disciplined for conduct that he reasonably believed was necessary to protect the constitutional rights of his client and perform his ethical duties an advocate.

III. Petitioner was denied Constitutional protections in his *quasi*-criminal disciplinary proceeding.

Disciplinary proceedings designed as a penalty on a lawyer are “adversary proceedings of a *quasi*-criminal nature.” *In re Ruffalo*, 390 U.S. 544, 550 (1968). In *Middlesex County Ethics Committee v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982) this Court held “noncriminal [disciplinary proceedings] bear close relationship to proceedings criminal in nature.” In *In re Gault*, 387 U.S. 1, 30 (1967) this Court held the *quasi*-criminal juvenile hearing need not comply with all of the requirements of a criminal trial but “the hearing must measure up to the essentials of due process and fair treatment.” This Court in *In re Snyder*, 472 U.S. 634, 646 (1985) held an attorney is entitled to appellate review of the sufficiency of discipline.^{4,5}

Judge Collier not only denied Petitioner’s Constitutional claims but he also disciplined Petitioner for presenting those claims.

⁴ *Snyder* was disciplined by a Circuit Court pursuant to Fed. R. App. P. 46 that provides for a different standard of conduct in federal appellate courts from that adopted in the EDTN by Local Rule 83.6.

⁵ Petitioner asserts EDTN Local Rule 83.7 defines Fifth Amendment due process disciplining attorneys in the EDTN. Many of the Constitutional protections Petitioner was denied are also contained in, or defined by Eastern District of Tennessee Local Rule 83.7, including Petitioner’s right to of notice of the rules he was changed with violating; the burden of proof being on the complainant; the requirement witnesses testify under oath; the right of cross-examination; and the present evidence.

The Sixth Circuit Opinion was 1 1/2 pages; failed to review any of Petitioner's Constitution claims on appeal; thereby sanctioning the denial of those claims.

In *quasi-criminal* juvenile delinquency proceedings this Court held the Due Process Clause of the Fourteenth Amendment requires the hearing must measure up to the essentials of due process and fair treatment, as a requirement which is part of. *In re Gault*, 381 U.S. 1, 30 (1967). This made applicable constitutional rights in *quasi-criminal* juvenile proceedings to "virtually coextensive with an adult's" and included "due process of law;" "notice, counsel, and confrontation of witnesses;" "the right against self-incrimination [and] protection against coerced confessions;" "guarantees against double jeopardy;" and "the presumption of innocence implemented by the government's burden to prove guilt beyond a reasonable doubt". see *W. v. California*, 449 U.S. 1043, 1047 (U.S. 1980)

A. Petitioner was denied Fifth Amendment protection from impermissible shifting of the burden of proof.

Judge Collier reviewed a transcript of a November 17th hearing in *United States v. Vassar* and concluded Petitioner had committed multiple acts of misconduct. Thereafter Judge Collier Ordered Petitioner's hearing "shall be limited to a demonstration by Petitioner that the allegations in the Show Cause Order are inaccurate."

Respectfully, this procedure was destined to be a self-fulfilling prophecy. Judge Collier formed opinions and then required Respondent establish his opinions

were inaccurate. As addressed *infra*, not only did this procedure impermissibly shift the burden of proof, Judge Collier prejudged Petitioner's conduct by forming and expressing opinions prior to Petitioner's hearing disqualifying both Judge Collier and the Magistrate-Judge pursuant to 28 U.S.C. § 455.

In *In re Winship*, 397 U.S. 358 (1970) this Court held the Fifth Amendment requires the burden of proof be on the Government to establish the crime beyond a reasonable doubt. This Court applied these Constitutional protections to *quasi-criminal* juvenile delinquency proceedings. *W. v. California*, 449 U.S. 1043, 1047 (U.S. 1980).

Sandstrom v. Montana, 442 U.S. 510 (1979) held the Fifth Amendment prohibits shifting the burden of proof to a defendant in a criminal proceeding. EDTN LR 83.7(h)(4) requires that prior to discipline being imposed, proof of a violation of the Code of Professional Conduct must be established by "clear and convincing evidence."

B. Petitioner was denied Fifth Amendment notice; Sixth Amendment information; and *ex post facto* protection by Judge Collier, after Petitioner's conduct and hearing, applying different, unconstitutionally vague and uncertain standards instead of the standards applicable to Petitioner pursuant to the Local Rules of the District.

Eastern District Tennessee Local Rule 83.6 provides that "The Rules of Professional Conduct adopted by the Supreme Court of Tennessee are hereby

adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this Court." Petitioner's defense was that he did not violate the Tennessee Rules of Professional Conduct. Petitioner affirmatively asserted his conduct was required by Tennessee's RPC.

The Magistrate-Judge preempted Petitioner's RPC defenses by applying "issue preclusion" to the findings of Judge Greer who previously held Petitioner in criminal contempt of court. Judge Greer was held to be disqualified in *United States v. Moncier, supra*. Petitioner filed EDTN LR 83.7 "exceptions" from the Magistrate Judge to Judge Collier and continued to assert his conduct did not violate a provision of the Tennessee RPC but was in fact required by those rules. Judge Collier rejected Petitioner's claims that EDTN LR 83.6 provided the standard of conduct that governed Petitioner's conduct was Tennessee's RPC. Instead the District Judge held:

[T]he federal courts have their own distinct requirements and standards for attorneys practicing before them. The federal courts also have their own requirements and standards which must be maintained for members to continue to practice in federal court. Thus, the requirements for admission and continued practice in federal and states courts are distinct. . . . Federal courts must establish their own standards of practice to create an effective, functional judicial system which involves attorneys practicing throughout the United States and its territories."

In footnote 6, Judge Collier cited a selected phrase from the TRPC, Scope (2) “It is important to keep in mind the Tennessee Rules of Professional Conduct expressly do not ‘exhaust the moral and ethical considerations that should inform a lawyer [*]’⁶ they “simply provide a framework for the ethical practice of law.” In an Order on 7/31/08 the Chief Judge described EDTN LR 83.6 as only “one of the standards to which attorneys admitted to the bar of this Court must meet.” In footnote 7 Judge Collier noted the phrase of EDTN LR 86.7(a), i.e., “engaged in unethical conduct tending to bring the court or the bar into disrepute” is not defined in the Tennessee RPC but held

Unethical conduct must be defined by case law; widely accepted standards of the profession such as standards adopted by the American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized standards of ethical and professional behavior in this district.^{7,8}

Judge Collier cited cases decided in 1812 and 1821, long before the adoption of EDTN LR 83.6 and the Tennessee RPC to hold “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their

⁶ [*] represents a RPC, Scope 2, explanation phrase Judge Collier left out “for no worthwhile human activity can be completely defined by legal rules”

⁷ Judge Collier did not cite specific provision of those standards that are different from the Tennessee RPC.

⁸ Judge Collier did not include the National Association of Criminal Defense Attorneys.

presence, and submission to their lawful mandates” and these powers provide federal courts power to “regulate and discipline attorneys.”

Congress provided authority for the Courts to establish various rules of practice and procedure in 28 U.S.C. § 2072. The Supreme Court adopted Fed. R. Civ. P. 83 and Fed. R. Crim. P. 57 that provide for District Court to adopt local rules of court. Fed. R. Civ. P. 83(a)(1) and Fed. R. Crim. P. 57(c) both provide "A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the juridical council of he circuit in which he district is located."

28 U.S.C. § 2072(b) prohibits a rule of court abridging, enlarging or modifying a substantive right. If Petitioner's conduct complied with Tennessee's RPC, or was required by those rules, Petitioner cannot be subjected to different “federal” standards of conduct first applied after Petitioner's conduct.⁹ EDTN LR 83.7(a), second clause relied on by Judge Collier, requires there must be an “unethical act” for that clause to establish different and distinct federal standards in the EDTN. None of the standards referred to by Disciplinary District Judge, however, define what is an “unethical act.” Tenn. Sup. Ct. R., Scope (1) provides for there to be an “unethical” act, there must be a violation of a mandatory, i.e. “shall”, provision of the Tennessee RPC. Tenn. Sup. Ct. R. RPC “ethical standards” define

⁹ Judge Collier may have misconstrued this Court's consideration of Fed. R. App. P. 46 in *In re Snyder*, 472 U.S. 634 (1985). Fed. R. App. P. 46 that applies to federal appellate courts is entirely different from EDTN LR 83.6 that applied to Petitioner in the district court.

conduct that is “unethical” and subject to discipline pursuant to LR 83.7(a).

Although “Federal standards” are discussed in a number of federal cases, however, Local Rule 83.6 adopts the Tennessee RPC in the Eastern District of Tennessee and the Tennessee Sup. Ct. R. 8, RPC define the “ethical standards” for attorneys in that District. Judge Collier simply chose not to apply the Local Rules in Petitioner's discipline and denied Petitioner his defenses predicated on the Tennessee RPC.

Petitioner requests this Court grant the Petition to determine whether Petitioner's right to Fifth Amendment notice; Sixth Amendment information; and protection from being subjected to *ex post facto* law was violated by Judge Collier disregarding Tennessee's RPC made applicable to Petitioner pursuant to EDTN LR 83.6 and applying what Judge Collier said were federal standards of conduct to Petitioner's conduct.

C. Petitioner was disciplined for Fifth Amendment impermissibly vague and overly broad standards.

Regardless of the worthiness of the standards applied by Judge Collier, the breath and vagueness of those standards subjected Petitioner to Judge Collier's predilections. For example, according to Judge Collier, the federal standard for discipline requires attorneys “to demean themselves as an attorney uprightly and according to the law” [and in a] “highly professional and civil manner, demonstrating respect for the court, opposing counsel, the judicial system, and the parties involved in the judicial action.”

Repeatedly, Judge Collier referred to Petitioner's actions as "unprofessional conduct." On other occasions, Judge Collier described Petitioner's conduct as being "unethical and unprofessional." "Unprofessional conduct" is not a term used either in EDTN LR 83.7 or the TRPC. It is unknown whether Judge Collier is of the opinion that "unprofessional conduct" equates to an "unethical" act that is subject to discipline under EDTN LR 83.7. Judge Collier concluded that Petitioner's conduct "has fallen below that required of members of the bar of the Eastern District of Tennessee" such that permitting Petitioner to continue as a member of the EDTN federal bar "poses an immediate danger to the public, the bar and this court." Judge Collier, held Petitioner failed to "demean [himself] as an attorney, proctor and solicitor of this Court, uprightly and according to law."

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

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

Petitioner had no way to know he was subject to discipline under rules of the "American Bar Association, the American College of Trial Lawyers, and other such organizations; or the generally recognized standards of

ethical and professional behavior in this district” to discipline Petitioner.” LR 83.7(b) requires that “(1) All complaints of attorney misconduct shall include . . . (ii) The . . . nature of the alleged misconduct, and . . . (iii) . . . a copy of any rule or order of the court that is alleged to have been violated. EDTN LR 1.1(c) provides the Local Rules “supersedes any judges rules.” EDTN LR 83.6 adopting the Tennessee RPC. Therefore, EDTN LR 83.6 superseded the rules Judge Collier applied *ex post facto* to Petitioner.

Presumably Judge Collier used the same “standards” to make the conclusions about Petitioner’s conduct stated in his Show Cause Order. Petitioner, however, only learned of these rules long after Petitioner’s ability to comply with those rules and after his ability to defend his actions as comporting with those rules.

Regardless of whether Judge Collier’s rules exist in some authority, and regardless of how well intended those rules may be, those standards are not found in the Tennessee RPC and those rules were neither cited in, nor attached to, the Show Cause Order as required by EDTN LR 83.7(b)(1)(iii). The non-specific standards applied permitted Judge Collier to apply his own predilections and standards to support his pre-determined decision to discipline Petitioner.

Petitioner request this Court grant the Petition to determine if Petitioner was denied Fifth Amendment notice and LR 83.7(b)(1)(iii) notice of the standards of conduct he was charged with violating.

D. Petitioner was denied his Sixth Amendment right of confrontation and

cross-examination of non-testifying judges.

The right of confrontation is applicable to *quasi-criminal* juvenile proceedings. *In re Gault*, 387 U.S. 1, 56 (1957) EDTN LR 83.7(h)(3) specifically provided Petitioner the right to “to confront and cross-examine any adverse witnesses.”

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

Judge Collier overruled Petitioner's exceptions to considering non-testifying findings of Judge Greer and held Petitioner was “certainly aware of those findings” [id. 480-491]; Judge Greer “witnessed the conduct” and was in “the best position to assess the nature, demeanor, and atmosphere involved” [id. 491]; and Judge Greer's findings should be given “substantial deference” like appellate courts give to trial courts. [id. 491] Judge Collier held that “Judge Greer's factual findings in Respondent's criminal contempt conviction are clear and convincing evidence of Judge Greer's perceptions of what occurred at the hearing.” Possibly the most surprising reason Judge Collier applied issue preclusion to Judge Greer's findings was his ruling that the “only use of Judge Greer's opinion is the factual findings as to Respondent's disrespectful and unprofessional conduct.”

Judge Collier made the observation that “It is unclear what alleged deprivation Respondent believes he suffered by not having Judge Greer as a witness.” Respectfully, Judge Collier overlooked, or chose not to

address, Petitioner's rights provided Petitioner by LR 83.7(H)(1) and the Fifth and Sixth Amendments

Judge Collier became an adverse witness when he Ordered the Magistrate Judge to conduct a hearing for Petitioner to demonstrate that Judge Collier's opinions and conclusions in his Show Cause Order were "inaccurate." Judge Collier ruled that he could not be cross-examined on his opinions and conclusions because his Show Cause Order "was institution of proceedings aimed at determining the appropriate conclusion and any information necessary was stated in the Show Cause Order."

Judge Collier failed to acknowledge the stated purpose of his referral to Magistrate-Judge was for Petitioner to "demonstrate" Judge Collier conclusions in his Show Cause Order were "inaccurate." Petitioner's EDTN LR 83.7(h)(1)/Sixth Amendment right to confront and cross-examine Judge Collier was the most effective method by which Petitioner could demonstrate that Judge Collier's opinions and conclusions were inaccurate.

Judge Collier's 1/17/08 Show Cause Order provided "This show cause order and its ultimate decision as to the appropriate action(s) to be taken in regards to Petitioner 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." Not predicating discipline on Petitioner "having been convicted of criminal contempt" but then predicating Petitioner's discipline on findings from the contempt conviction appear purely semantic.

Inexplicably, Judge Collier held Petitioner did not “offer any objection to any of Magistrate-Judge Lee’s findings or recommendations on the merits of the matter” that were based on issue preclusion from Judge Greer’s findings and attributed Petitioner’s failure to object to her findings as a “testament to the fine work performed by the Magistrate Judge” when in truth and fact the Magistrate-Judge’s findings were the findings of Judge Greer.

Judge Collier overruled Petitioner’s exceptions to Magistrate-Judge Lee applying issue preclusion because Petitioner did not factually or legally develop the argument that was “factually-barren” and “surprising” and it “defies credibility” that Petitioner would expect the Magistrate-Judge to ignore Judge Greer’s “clearly-detailed impressions of the events, and it would blindly accept [Petitioner] often evasive, revisionist, and self-serving account of his conduct.” Again, this finding was made even though Judge Greer did not testify, and has yet to be confronted or cross-examined as provided for by the EDTN rules and the Constitution.

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

Petitioner requests this Court grant the Petition to determine if the Fifth Amendment right of confrontation applies in *quasi*-criminal attorney discipline hearings and whether findings of a non-testifying judge can be relied on in a *quasi*-criminal disciplinary proceeding.

E. Petitioner was denied his federal Constitutional right to present a complete defense.

The Magistrate-Judge denied Petitioner's request for subpoenas for documents and for witnesses because the hearing would be limited to the November 17, 2006 transcript. As discussed, *supra*, the Magistrate-Judge then applied issue preclusion to all issues.

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

Judge Collier severely and unjustifiably criticized and denounced expert declarations of attorneys who examined the November 17th transcript and disagreed with Judge Collier's conclusions. Judge Collier described the declaration of Dr. Bethany Dumas, a lawyer and nationally known expert in linguistics, as "outlandish", "ludicrous", "incredible", "ignorance" and "devoid of belief." Judge Collier challenged the fact that she voiced her opinions "after reading" his Show Cause Order. Judge Collier then embarked on a parody of Dr. Dumas' opinions claiming the court is not "mocking" Dr. Dumas but her opinions were "utter absurdity" in light of unspecified "surrounding circumstances" the court presumed Dr. Dumas was not aware of.¹⁰ Judge Collier then blamed Petitioner for submitting the declarations

¹⁰ Compare Federal Code of Judicial Conduct Canon 1.

as “false or misleading” evidence and required as a condition of Petitioner being readmitted that Petitioner personally apologize to each witness for involving them in Petitioner’s defense.

Judge Collier apparently overlooked, or chose not to address, that his Show Cause Order was based exclusively on his review of the November 17th transcript; that he was not present at that hearing; but that he required Petitioner establish was inaccurate. The 23 attorneys Judge Collier rejected each reviewed the exact same transcript in forming their conclusions and opinions that Judge Collier’s conclusions were inaccurate.

Judge Collier essentially held that anyone who disagreed with his preconceived opinions and conclusions were wrong. It is not surprising the Magistrate-Judge he hired and supervised chose not to disagree with his opinions and conclusions.

In *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) this Court held

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984)

In *Holmes v. South Carolina*, 547 U.S. 319 (U.S. 2006) this Court held that a state evidentiary rule violated a defendant's federal constitutional right to present a complete defense.

Petitioner requests this Court grant the Petition to consider whether the constitutional right to present a complete defense applies to *quasi*-criminal attorney discipline cases and whether Judge Collier's rejection of Petitioner's evidence denied Petitioner his constitutional right to present a complete defense.

F. Petitioner was denied Fifth Amendment due process by Judge Collier "gauging" Petitioner's discipline on personal knowledge from an unknown case.

Judge Collier relied on an unnamed, uncited case to "gauge" the discipline he imposed on Petitioner. (Pet. Appx. 137) Petitioner filed a post-hearing motion for the name, citation or location of the case. Judge Collier declined to provide Petitioner the name, citation or place of the case in an opinion holding, for the first time, that the Federal Rules of Civil Procedure Petitioner cited for the post-hearing motion do not apply to LR 83.7 disciplinary proceedings.¹¹

"[C]ore requirements" of Fifth Amendment due process are "adequate notice ... and a genuine

¹¹ LR 1.1(d) provides: "(c) Scope of Rules; Construction. These rules supersede all previous rules promulgated by this court or any judge of this court and supplement the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and the Civil Justice Reform Act plan for the Eastern District of Tennessee . . ."

opportunity to explain". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, (1950) The opportunity to be heard must be given "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965).

Respectfully, irrespective of the requirements of due process or a meaningful opportunity to be heard, providing the name and citation of a case relied upon in determining an issue is basic 101 legal procedure.

What Judge Collier did is similar to the actions of a district judge in *United States v. Hayes*, 171 F.3d 389, 392 (6th Cir.,1999) by expressly relying on a previously undisclosed victim impact letter to sentence a defendant. The Court held the judge's conduct affected the defendant's "substantial rights" and reversed for plain error. In *United States v. Hamad*, 495 F.3d 241, 251 (6th Cir.,2007) the Court held "escalation of a sentence based on undisclosed evidence raises serious due process concerns."

Once again, in spite of their own cases, the Sixth Circuit Opinion declined to consider Petitioner's claim and sanctioned Judge Collier relying on his personal knowledge of undisclosed information to imposing harsh discipline on Petitioner.

Petitioner requests this Court grant the Petition to consider whether consistent with Fifth Amendment due process, Petitioner's discipline can be "gauged" by the personal knowledge of a judge from an unnamed, unknown case.

G. Petitioner was denied a hearing on the type or nature of discipline.

Petitioner requested and was denied a hearing before either the Magistrate-Judge or Judge Collier as to the type and amount of any discipline.

Tennessee Supreme Court Rule 9, § 8.4 requires that the applicable provisions of the American Bar Association *Standards for Imposing Lawyer Sanctions* be considered in disciplining an attorney for violation of the Tennessee RPC EDTN LR 83.6 made applicable to Petitioner.

EDTN LR 86.7(h)(2) provides “The hearing shall be conducted by the judicial officer, who shall have the authority to resolve all disputes on matters of procedure and evidence which arise during the course of the hearing.” EDTN LR 83.7(i)(1) provides “The judicial officer [conducting the hearing] shall prepare a written recommendation which shall include a proposed disposition of the disciplinary charges.” EDTN LR 83.7(i)(2) provides Petitioner 20 days to file “exceptions” to the recommendation. EDTN LR 83.7(j) provides “(j) Final Action on the Recommendation. Within thirty days of the filing of any exceptions to the recommendation, the court shall enter a final order of disposition. Notice of the final orders shall be sent to the respondent and the complainant.” EDTN LR 1.1(c) provided EDTN LR 83.7(i)(2) “be construed so as to [be consistent with the Fed. R. Crim. P.] and to promote the just, efficient, and economical determination of every action and proceeding.” Fed.R.Crim.P. 32 entitled Petitioner to a hearing as to punishment. Fed.R.Crim.P. 42(b) prohibits summary punishment without a hearing.

The Magistrate-Judge denied subpoenas or depositions of judges from other cases Petitioner had tried since November 17th, 2006 including Judge Greer, wherein Petitioner's alleged conduct did not reoccur. The Magistrate-Judge also denied Vassar being called to testify that he was attempting to get Petitioner's attention to speak to Petitioner as he was being questioned by Judge Greer. The Magistrate-Judge held these witnesses were "not relevant" to Petitioner's conduct in the November 17th transcript. These witnesses, however, were highly relevant to what, if any discipline, Petitioner should receive.

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

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

Petitioner request this Court grant the petition to consider whether Petitioner was entitled to a hearing as to the type and appropriate discipline and to further consider an important question as to whether federal judges are required to consider the American Bar Association's *Standards of Imposing Lawyer Sanctions* in imposing attorney discipline.

H. Petitioner was denied Fifth Amendment due process and a meaningful opportunity to be heard prior to being disciplined for presenting the foregoing Constitutional claims during his disciplinary hearing.

Beginning at page 38 and continuing through page 61 Judge Collier found each motion filed by Petitioner, and each declaration of witnesses filed by Petitioner in his defense, were filed “in bad faith and [are] frivolous” and were “not filed for any proper purpose or supported by any legal basis, but rather [were] filed for the purpose of causing unnecessary delay and prolonging these proceedings.” [Pet. Appx. 143]

Then Judge Collier, at Pet. Appx. 163-167 disciplined Petitioner for 19 separate acts occurring during Petitioner’s defense. Petitioner was disciplined for filing a “number of frivolous motions and other submissions that were devoid of legal or factual support and that were submitted for improper reasons” and cited particularly the filing of Dumas’ declaration that “contradicts undisputed facts in this case.”

EDTN LR 83.7 is clear as to the rights and procedures required to impose discipline on Petitioner. Petitioner was disciplined for his conduct and filings in an attempt to defend himself for which he had no notice as required by LR 83.7(b)(1); there was no opportunity for Petitioner to respond as required LR 83.7(c); and Petitioner has had no hearing concerning such filings or their content.

Petitioner request this Court grant the Petitioner to determine if it violates Fifth Amendment due process

notice and meaningful opportunity to be heard to discipline Petitioner for presenting defenses in his *quasi-criminal* disciplinary hearing.

I. Petitioner was denied Fifth Amendment protection from double jeopardy by being disciplined for the same conduct he had previously been punished for by criminal contempt.

Petitioner pled Fifth Amendment double jeopardy protection from his subsequent discipline for the same conduct he had been punished for by criminal contempt.

The Magistrate-Judge held disciplinary proceeding did not punish Petitioner “criminally.” Judge Collier adopted the Magistrate-Judge’s rulings and described Petitioner’s position “exasperating.” According to Judge Collier, if Petitioner’s position were correct, a court could not impose discipline on an attorney convicted of “fraud, murder, treason, or any other criminal offense.”

The Sixth Circuit Opinion failed to address Petitioner’s claim and thereby sanctioned imposition of double punishment.

Subsequent discipline cannot categorically be allowed as Judge Collier believed. “Fraud, murder, treason, or any other criminal offenses” are different from criminal contempt and discipline for the same conduct before the same court. Each case, or crime, must be examined under this Court’s “remedial or punitive” test in *United States v. Ursery*, 518 U.S. 267, 273 (1996) ; the “Functional Equivalent” Test in *Department of Revenue of Mont. v. Kurth Ranch*, 511

U.S. 767, 781-784 (1996) ; and the “Statutory Construction” and “comparative punishment test” in *Hudson v. United States.*, 522 U.S. 93, 99 (1997).

Judge Greer had authority to consider the factors listed in 18 U.S.C. § 3553(a) in sentencing Petitioner. One of the § 3553(a) factors was to “protect the public from further crimes of” Petitioner. “Protect[ing] the public from further crimes of” Petitioner was a specific reason the disciplining District Judge in his May 6, 2008 Order denied Petitioner a stay of his discipline. Judge Greer had authority pursuant to 18 U.S.C. § 3553(a) in sentencing Petitioner to provide Petitioner “needed...correctional treatment in the most effective way.” 18 U.S.C. § 3563(b) provided Judge Greer had authority to impose conditions of probation that included the same discipline imposed by Judge Collier including §3563(b)(5) suspending Petitioner from the practicing law in the Courts of the Eastern District of Tennessee or anywhere else; §3563(b)(6) that Petitioner not associating with other attorneys who practice in the federal courts; or §3563(b)(23) requiring Petitioner “satisfy such other conditions” as Judge Greer may impose.

Petitioner request this Court grant the Petitioner to consider whether the Fifth Amendment prohibition of double jeopardy bars attorney discipline proceedings for the same conduct that is charged as criminal contempt.

IV. Petitioner was denied *In re Snyder* and Fed. R. App. P. 4 right of appellate review of his discipline.

The Sixth Circuit Opinion was 1 1/2 pages long. Sixth Circuit Rule 36 provides authority for summary

disposition where “each judge of the panel believes that no jurisprudential purpose would be served by a written opinion.”

This Court has not previously addressed the authority of a Circuit Court to decline to address a non-frivolous claim on appeal. Fed. R. App. P. 4 provides Petitioner a right to appeal from errors committed by the district court. The Sixth Circuit’s denial of review of Petitioner’s non-frivolous claims makes hollow Petitioner’s Fed. R. App. P. 4 right to appeal. This Court in *In re Snyder*, 472 U.S. 634, 644 fn 4 (1985) held that an attorney is entitled to review of his discipline under Local Rules by an appellate court.

Petitioner requests this Court grant the Petition to consider the important federal question as to whether the Sixth Circuit was required to address Petitioner’s non-frivolous claims or acknowledge each claim and make a specific holding that each claim was frivolous or that no jurisprudential purpose would be served by addressing that claim.

V. The doctrines of primary jurisdiction, abstention and choice of law and forum required Judge Collier to permit the Tennessee Board of Professional Responsibility complete its disciplinary proceedings on a prior complaint made by Judge Greer against Petitioner with the TBOPR.

Petitioner asserted Judge Collier’s impartiality might reasonably be questioned pursuant to 28 U.S.C. § 455 where Judge Greer had to disqualify himself on January 3, 2008 in *United States v. Almany* and Judge Collier, the same day, reassigned *Almany* to himself;

then disqualified Petitioner from representing Albany on January 9th; eight (8) days later on January 17th brought disciplinary charges against Petitioner for conduct occurring 14 months earlier; then reassigned Albany back to Judge Greer; and then prohibited Petitioner from taking new federal cases that could result in Judge Greer being required to disqualify himself in the future. A person might reasonably question Judge Collier's actions being to get rid of Petitioner instead of Petitioner being allowed to continue to practice and Judge Greer would be required to disqualify himself. A person might also reasonably question Judge Collier's refusal to allow the Tennessee BOPR complete its action on Judge Greer's prior complaint to be an effort by Judge Collier to preempt the Tennessee BOPR to force that agency to take action against Petitioner. Finally, a person might also reasonable question whether Judge Collier's fast-track to remove Petitioner from practice in the federal courts was undertaken because Judge Collier knew Judge Greer was disqualified and Petitioner's conviction for contempt would be reversed.

The doctrine of primary jurisdiction applies to "cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency that administers the scheme." *see United States. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963). EDTN LR 83.6 adopted the Tennessee RPC and therefore made the Tennessee RPC primary.

Younger v. Harris, 401 U.S. 37 (1971) provided a federal court could not intervene in a state criminal prosecution prior to the completion of the state action. *Huffman v. Pursue, Ltd.*, 420 U.S. 582 (1975) expanded

the federal abstention doctrine to a state civil proceeding.

Federal abstention, or comity, has been applied to prevent federal courts from acting on matters before disciplinary proceedings before state disciplinary boards. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 439-432 (1982).

Burford v. Sun Oil Co., 319 U.S. 315 (1943) provides abstention is appropriate when there is an important local interest and a state-organized structure for resolving disputes relating to that interest. *see also Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, (1944); *Alabama Pub. Servo Comm'" v. Southern Ry. Co.*, 341 U.S. 341, 347-48 (1951); *Colorado River Water Conservation Dist v. United States*, 424 U.S. 800, 817-18 (1976)

Judge Collier denied Petitioner's motion to abstain holding "this court has not delegated and would never delegate its authority to determine for itself the fitness of attorneys practicing in the EDTN." and whether Petitioner's conduct brought the federal court into disrepute are "concerns of the utmost importance to *this Court*." Judge Collier then disciplined Petitioner for filing the motion.

Judge Greer filing the complaint with the Tennessee BOPR chose the federal remedy to discipline Petitioner to be under EDTN LR 83.7(a) and to be with the TBOPR. EDTN LR 83.6/TRPC 8.5(b)(1), regarding choice of law, provides that where the federal EDTN adopts the Tennessee RPC, the TRPC control.

Petitioner requests this Court grant the Petition to consider whether the doctrines of primary jurisdiction, abstention or choice of forum required Judge Collier to wait until after the Tennessee BOPR considered Judge Greer's prior complaint.

VI. The discipline imposed on petitioner was arbitrary, unlawful, unwarranted or unreasonable.

Tennessee Supreme Court Rule 9, § 19.2 provides a disbarred attorney can reapply for admission after a five-year suspension from the practice of law. Judge Collier, in effect, imposed the maximum allowable discipline on Petitioner under the Tennessee RPC made applicable to Petitioner by EDTN LR 83.6/TRPC. By its timing the discipline imposed was consecutive to contempt punishment of a \$5,000.00 fine; 150 hours community service, one year probation, an anger management course, and extra CLE courses.

The discipline imposed bears no relationship to discipline to be considered or imposed pursuant to EDTN LR 83.6/TRPC 9, § 8.4 or the *ABA Standards for Imposing Lawyer Sanctions*.

Petitioner's hourly rate is \$350.00 hour. Judge Greer's 150-hour community service at that rate had already constituted a loss to Petitioner of approximately \$52,000. Petitioner had over \$1,000,000 in potential fees contracted for in existing federal cases Petitioner lost as a result of the discipline and denial of a stay pending appeal.

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

Petitioner practiced *pro hoc vice* in other federal courts based on his good standing in the Eastern District of Tennessee. Petitioner's 37 year nationally recognized law practice was destroyed by the discipline imposed.

Judge Collier continued to enter orders further restricting Petitioner's rights as a licensed attorney in Tennessee pursuant to T.C.A. § 23-3-101 after Petitioner's notice of appeal. Petitioner was required by the Sixth Circuit to file a separate appeal from those orders which Petitioner did in *In re Moncier*, Sixth Circuit 09-5227.

Petitioner waived oral argument in that appeal so that the Sixth Circuit Panel considering Petitioner's appeals of his contempt conviction and his discipline could also consider the jurisdiction of the federal disciplining Judge to place restrictions on Petitioner's rights under his Tennessee license. To date the Sixth Circuit panel has declined to rule on Petitioner's appeal *In re Moncier*, Sixth Circuit 09-5227.

Little can be accomplished by attempting to compare Petitioner's discipline to other cases. Petitioner has found no other case in American jurisprudence where an attorney has been disciplined for attempting to resolve a potential of a conflict or requesting to confer and advise his client.

In *Theard v. United States*, 354 U.S. 276, 282-283 (1957) this Court recognized that disciplinary proceedings are "vary serious business." The Court applied "the principles of right and justice" to reverse a state disciplinary proceeding. In *In re Snyder*, 105 S.Ct. 2874, 2881 (1985) held an attorney's discipline is to be reviewed for sufficiency of the evidence.

TRPC 9, §8.4 provide that the *ABA Standards for Imposing Lawyer Sanctions* apply¹²; a continuum of sanctions is to be considered; discipline be imposed with a view to obtaining uniformity; obtaining appropriate punishment should be imposed under the circumstances of each case; and provides for review by a court for “excessiveness.”

Petitioner requests this Court grant the Petition to consider whether the American Bar Association *Standards for Imposing Lawyer Sanctions* is to be followed by federal judges in imposing discipline and whether Petitioner’s discipline was arbitrary, unlawful, unreasonable and unnecessary.

VII. The Magistrate-Judge and Judge Collier were disqualified and/or had a constitutional duty to disclose information requested pertaining to their qualification.

Structural Constitutional Right To An Impartial Judge

Trial by a partial judge is a constitutional "structural defect" in a criminal proceeding:

We have recognized that “some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.” [citation omitted] The right to an impartial adjudicator, be it judge or jury, is such a right. [citation omitted].

¹² www.abanet.org/cpr/regulation/standards_sanctions.pdf

Gray v. Mississippi, 481 U.S. 648, 668, (1987); *see also Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (U.S. 2009)

A. A reasonable question existed as to Judge Collier’s impartiality.

In Issue V., *supra*, Petitioner recited the circumstances surrounding Judge Collier’s removing Petitioner from federal practice after Judge Greer disqualified himself in *United States v. Almany* on January 3, 2008 that reasonably question Judge Collier’s impartiality and thereby required his disqualification under 28 U.S.C. § 455(a).

B. Ex Parte And/Or Personal Information.

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

1. Personal knowledge of an uncited, unnamed case he participated in to “guage” Petitioner’s discipline.

2. Information from an unnamed source in the Eastern District of Kentucky concerning alleged misconduct by Petitioner.

3. “[J]udges of the eastern district of Tennessee had decided not to follow *In re Mitchell*” in Petitioner’s case.

These statements established Judge Collier relied on improper *ex parte* communications and/or personal knowledge in Petitioner’s case and disqualified Judge Collier pursuant to 28 U.S.C. §455(b)(1).

C. The Magistrate-Judge Was Disqualified Because Of Her Employment Relationship To Judge Collier.

Petitioner filed motions to disqualify the Magistrate-Judge to serve as a judicial officer to determine whether the disciplinary Judge's Show Cause Order opinions and conclusions were "inaccurate".

Judge Collier held he was not the "complainant" and that resolved any problem that may otherwise exist because of his employment supervision relationship with the Magistrate-Judge. Judge Collier then held that Petitioner's 28 U.S.C. § 144 and 455(a) motion "mischaracterized the local rules and the proceedings"; was "recklessly uninformed"; was "purposefully disrespectful to the court and the proceedings"; and was "without legal basis or factual foundation, and not filed for any proper purpose" and disciplined Petitioner for filing the motion. Petitioner asserts the employment supervision relationship created an appearance of bias so as to warrant disqualification. *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11 (1954).

D. Failure to Make Disclosures

Petitioner filed motions to disclose communications and personal knowledge received about Petitioner. Judge Collier chastised, and later disciplined, Petitioner for filing the motions.

According to Judge Collier, Petitioner's motion for information for a 28 U.S.C. § 144 affidavit or § 455 motion to disqualify is "bizarre and largely incomprehensible" because there is no authority to seek "discovery" from a judicial officer. Judge Collier termed

Petitioner's request another "indication of the disrespect Respondent harbors for the institutional role of judge." Judge Collier cited Petitioner's examples of potential *ex parte* communications as "accusing district judges of talking about [Petitioner]" and "vague, unfounded attacks on the judiciary." Judge Collier, however, then held that if those communications occurred that were "entirely proper." Regarding Petitioner's requests to Magistrate-Judge for disclosures of *ex parte* communications to her, including those from Judge Collier, Judge Collier said there was no "legal" authority for why such an "extraordinary request would be seriously considered;" termed the request as seeking "discovery from the presiding judicial officer;" and held requested disclosures "would detract from and make impossible" for the judge to perform their institutional role."

Petitioner was a party and had a legal interest in making certain that the judges who were trying him were both impartial and did not have undisclosed extrajudicial information about him or the matter before them. Neither Judge Collier nor the Magistrate-Judge denied *ex parte* communications regarding Petitioner.

The Canon 3(A)(4) provides judges must provide interested persons the full right to be heard and prohibit *ex parte* communications except under limited circumstances. Canon 3(A)(4).; § 455(b)(1)

Petitioner request the Petition be granted to consider these issues.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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