

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SEBASTIAN P. LABELLA,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 15-0413/AF

Crim. App. Dkt. No. 37679

**MOTION OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, <i>Appellee,</i> v. SEBASTIAN P. LABELLA, Senior Airman (E-4), United States Air Force, <i>Appellant.</i>) MOTION OF THE UNITED STATES AIR) FORCE APPELLATE DEFENSE DIVISION) FOR LEAVE TO FILE AN <i>AMICUS</i>) <i>CURIAE</i> BRIEF IN SUPPORT OF) APPELLANT)) USCA Dkt. No. 15-0413/AF)) Crim. App. Dkt. No. 37679
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TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW, the United States Air Force Appellate Defense Division ("the Division"), by and through undersigned counsel, under Rule 26(a)(3) of this Honorable Court's Rules of Practice and Procedure, and moves for leave to file an *amicus curiae* brief in support of Appellant, Airman First Class Sebastian LaBella.

Interest of the Division as *Amicus Curiae*

The Division is charged with the duty of routinely representing military personnel before this Court on appeal under Article 67, UCMJ. The Division's future operations will therefore be directly impacted by this Court's decision concerning whether Article 67(b) is a jurisdictional bar as was found in *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009), or merely a *Kwai Fun Wong* "claim-processing rule . . . which seek[s] to promote the orderly progress of litigation, but [does] not deprive a court of authority to hear a case." See *United States v. Kwai Fun Wong*, 135 S. CT. 1625, 1632 (2015).

A client who waits more than 60 days has passed from notice

or constructive notice of a Court of Criminal Appeals (CCA) to alert his or her Division lawyer of their desire to petition this Court currently has almost no recourse. The Division lawyer detailed to assist such a client is presently severely limited in the assistance which can be offered due to the interrelation of *Rodriguez* (finding Article 67(b)'s 60-day deadline was jurisdictional) and *United States v. Moss*, 73 M.J. 64 (C.A.A.F. 2013) (finding that a Division lawyer may not petition this Court for review on behalf of their client, even within the 60-day deadline set by Article 67(b), without the client's personal authorization). Short of petitioning this Court for relief under the All Writs Act, there is little which a Division lawyer can do for such a tardy client. If this Court reconsiders the *Rodriguez* holding and finds that the time limitation in Article 67(b) can be equitably tolled, then Division lawyers would be able to offer greater assistance to tardy clients - at least in that a motion to equitably toll Article 67(b)'s deadline could be filed.

Why a brief as *Amicus Curiae* from the Division is Desirable

The Division's proposed *amicus curiae* brief shares some commonality with Appellant's brief in that it argues *Rodriguez* must be reconsidered given *Kwai Fun Wong* and other Supreme Court cases. But, *amicus curiae's* proposed brief goes beyond Appellant's brief to also argue that legislative history undercuts any argument that Congress intended Article 67(b) to be jurisdictional. *Amicus curiae's* proposed brief also differs from

Appellant's brief in that it includes discussion of the "drastic" consequences that come with assigning the label "jurisdictional" to a statutory deadline; consequences which the Supreme Court has said weigh against assigning such a label unless there is no choice but to do so. See *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012). These additional arguments are important for this Honorable Court to consider in evaluating this issue.

WHEREFORE, this Honorable Court should grant this motion and accept the Division's contemporaneously-filed *amicus curiae* brief.

Very Respectfully Submitted,



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¹ Pursuant to Disciplinary Rule (DR) 7-106(B) (2) of the ABA Model Code of Professional Responsibility, Major Kennen avers as follows: He prepared this brief. He does not and has never represented Appellant. Further, he was deployed from 21 April 2014 until 1 October 2014 to NATO/ISAF Kandahar Airfield Command Headquarters, Afghanistan, and, as such, was not part of the Appellate Defense Division at the time the filing in this case was missed. Accordingly, he is untainted by any potential conflict of interest. This filing is the conflict-free independent position of the Air Force Appellate Defense Division.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court, to Counsel for Appellant, and to the Air Force Government Trial and Appellate Counsel Division, on 25 June 2015.

Very Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Isaac Kennen", written over a light gray rectangular background.

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