

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,)	UNITED STATES' ANSWER TO
<i>Appellee,</i>)	MOTION OF USAF APPELLATE
)	DEFENSE DIVISION FOR LEAVE
v.)	TO FILE AN AMICUS CURIAE
)	BRIEF
Airman Basic (E-1))	USCA Dkt. No. 15-0413/AF
SEBASTIAN P. LABELLA,)	Crim. App. No. 37679
USAF,)	
<i>Appellant.</i>)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to Rules 30(b) and 34(a) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully opposes the United States Air Force Appellate Defense Division's ("the Division"¹) Motion for Leave to File an Amicus Brief under Rule 26(a)(3). With all due respect, Amicus has failed to establish good cause to grant its motion for leave to file an amicus curiae brief in Appellant's case. The factual predicate for Amicus' proposed brief and Amicus' stated interest in Appellant's case is irrelevant to the actual facts and resolution of Appellant's case. Amicus seeks to litigate facts not present in this case, and the Court should not issue the advisory opinion Amicus seeks. Amicus should seek legislative, rather than judicial, relief to pursue its stated interest.

¹ The United States respectfully notes that footnote 3 on page 8 of the proposed Amicus brief appears to be at odds with paragraph 2 of the memorandum signed by The Judge Advocate General of the Air Force and submitted to this Court by Appellant. (JA at 24.)

Advisory Opinion. Amicus' stated interest in Appellant's case is "the Division's" ability to represent what is referred to as the "tardy client" when filing a petition for review before this Court. (Amicus Mot. at 2.) Amicus seeks equitable relief from the statutory requirement to file a petition for review within 60 days and the requirement for an appellant to personally authorize the filing of such petition. (Id.) Of course, it has been established in this record that Appellant was not personally tardy; his appellate counsel was tardy. (JA 24-26, 46; App. Br. at 3-6.) Appellant requested that his counsel file a petition, but that request was not fulfilled. (Id.) The fact that Amicus seeks to "offer greater assistance to tardy clients" (Proposed Am. Br. at 2) has nothing to do with the facts of Appellant's case. In effect, Amicus seeks an advisory opinion, which this Court should decline.

As this Court stated in United States v. Chisholm, 59 M.J. 151, 152 (C.A.A.F. 2003):

An advisory opinion is an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties. . . .Courts established under Article III of the Constitution may not issue advisory opinions. . . .Courts established under Article I of the Constitution, such as this Court, generally adhere to the prohibition on advisory opinions as a prudential matter.

(Internal citations omitted.)

Appellant presented facts to both the Air Force Court of Criminal Appeals, which accepted his factual averment, and this Court demonstrating that his former counsel failed to file a timely petition for review with this Court contrary to Appellant's request. The United States has not presented and does not possess evidence that challenges this factual predicate. Therefore, the matter presently before this Court does not involve a justiciable case or controversy between the adverse parties involving a "tardy client," and Amicus' proposed brief is irrelevant to resolution of the specified issue. If Amicus desires to make this argument, it should do so in a case where those facts are actually present. As such, the Court should deny the motion for leave to file the irrelevant amicus curiae brief.

Amicus Has Options. Assuming Amicus concerns are a proper matter for this Court to consider in Appellant's unrelated case, Amicus is not without options to address its concern. "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." (Amicus Mot. at 2.) In fact, Amicus has plenty of options to address its stated but irrelevant concern about the "tardy client."

First, as Amicus concedes, they can file a petition for extraordinary relief. In fact, that was precisely the stated

remedy identified by this Court in the companion case to Appellant's case, United States v. Thomas, No. 15-0288/AF (C.A.A.F. 27 February 2015) (this Court issued an order denying the appellant's untimely motion to file a petition out of time without prejudice to filing a writ of error coram nobis at the Air Force Court of Criminal Appeals, *citing* United States v. Rodriguez, 67 M.J. 110 (C.A.A.F. 2009), cert. denied, 558 U.S. 969 (2009)).

Second, as Amicus seeks to amend the statutory deadline contained in Article 67(b), UCMJ, Amicus should be pleading with Congress, not this Court. This Court found in Rodriguez "a clear picture of intent" when Congress amended Article 67 in 1981 to extend the period for filing a petition from 30 days to 60 days and provided for a method of constructive service of the court of criminal appeals decisions. Rodriguez, 67 M.J. at 115. This Court found the purpose of the 1981 amendments was "to provide a means of ensuring finality to cases." Id. Congress found under the old statute that cases could be held in legal limbo for up to five years with no finality in sight. Id. This Court also noted that both the Senate and House reports focused "on the fact that an appellant is in sole control of the decision to appeal and in large measure in control of the effectiveness of service of process." Id. at 116. While Amicus might prefer a return to the paternalistic, equity-based, and

slow construct of the past that provided no reasonable finality to an appellate system already considered by some as lacking celerity, Amicus should instead seek a legislative resolution to its concerns.²

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court deny the motion to for leave to file an amicus curiae brief.



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² In the interest of judicial economy and since this Court has not yet been able to rule on Amicus' motion for leave to file an amicus brief, the United States has not addressed the analysis contained in the proposed brief.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court, to the Air Force Appellate Defense Division, and to Appellant's counsel, Major Ja Rai A. Williams, on 2 July 2015.

A handwritten signature in black ink, appearing to read 'G.R. Bruce', with a long horizontal flourish extending to the right.

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