

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee

v.

KEITH E. BARRY

Senior Chief Special Warfare

Operator (E-8)

U. S. Navy

Appellant

MOTION TO FILE AN AMICUS
CURIAE BRIEF, AND RELIEF
FROM RULE 26(D)

Crim. App. No. 201500064

USCA Dkt. No. 17-0162/NA

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

A. Motion to file a brief in amicus curiae.

1. Counsel for amicus, Lieutenant Commander Jonathan E. Dowling, Judge Advocate General's Corps, United States Navy, moves under Rule 30, of this Court's Rules of Practice & Procedure (2017), for leave to file an amicus curiae brief in accordance with Rule 26(a)(3) to address an issue that is important to staff judge advocates service-wide.

2. A brief is filed contemporaneously but separate from this motion, in accordance with Rule 30(d).

3. Counsel asks this Court for an exception to Rule 26(d) to allow this motion and filing. The issue that the brief raises did not become apparent until this Court heard oral argument in Appellant's case on March 22, 2018 and were not obvious from the prior filings in this case. During oral argument, questions were

asked of the parties which amicus seeks to address. The questions related to whether a staff judge advocate and deputy staff judge advocate can violate Article 37(a), Uniform Code of Military Justice (UCMJ), 10 U. S. C. §837.

4. Amicus' believes this Court should address the following additional issue.

A STAFF JUDGE ADVOCATE HAS A DUTY TO GIVE LEGAL ADVICE WHEN A CONVENING AUTHORITY (CA) IS DECIDING IF A COURT-MARTIAL FINDINGS AND SENTENCE SHOULD BE APPROVED? WHEN EXECUTING THIS DUTY, CAN THE STAFF JUDGE ADVOCATE VIOLATE ARTICLE 37, UCMJ, WHEN GIVING THAT ADVICE? AND IF SO, DOES THE RECORD HERE SHOW THE STAFF JUDGE ADVOCATES HERE VIOLATED ARTICLE 37, UCMJ?

5. Counsel has consulted with the parties and Appellee consents but not Appellant.

B. Amicus has two interests here.

1. Unresolved issue.

a. Can a staff judge advocate or acting staff judge advocate violate Article 37, UCMJ, when advising the convening authority on that officer's post-trial responsibilities? The issue appears to be one of first impression before this Court which should be addressed now.

b. This Court should decide that the principles in *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987) remain valid, and that they should be applied to

staff judge advocates exercising their legal duty to properly advise a convening authority.

2. Interest of Amicus.

a. Amicus served as the Acting Staff Judge Advocate and the Deputy Staff Judge Advocate for the post-trial processing in Appellant's case.

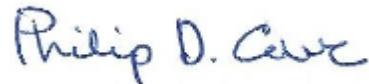
b. On March 31, 2017, LCDR Dowling recognized a potential post-trial error that may have prejudiced the Appellant. On April 21, 2017, LCDR Dowling raised this potential post-trial error to appellate government counsel who characterized the issue as "unlawful command influence" under Article 37, UCMJ. LCDR Dowling's action in coming forward with this information led to the current proceedings before this Court.

c. On March 22, 2018, during oral argument, the Court asked if a staff judge advocate can violate Article 37, UCMJ, and in particular can the Staff Judge Advocate (SJA) or Deputy Staff Judge Advocate (DSJA) unlawfully influence a convening authority under Article 37, and "What are we to do counsel in a situation like this where we have, basically, a collusion between the SJA and the Deputy SJA to keep their boss from doing what he wants to do and then on top of that, a sort of imprimatur added by the TJAG saying the same thing for all the same reasons, it is going to make the Navy look bad, it is going to cause an issue, it

is going to cause a problem, even going as far to give incorrect advice? (Audio Recording, 23:38). This last question appears to overlook facts in the record.

d. Amicus argues that a staff judge advocate can violate Article 37, UCMJ, 10 U.S.C. §837; yet disagrees with the premise of the question that the facts demonstrate a violation here. The briefs of the parties do not adequately address the questions raised by the Court during oral argument. Amicus can assist this Court by insuring a more complete understanding of the record to address the questions presented by the court. *See generally, Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (citations omitted).

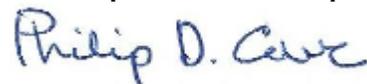
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the forgoing was electronically submitted to this Court, and that a copy electronically delivered to counsel for the parties, on 6 April 2018.



Philip D. Cave