No. 18-2457

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REGINALD LATSON
Plaintiff-Appellant,

v.

HAROLD W. CLARKE, et al.,
Defendants-Appellees

On Appeal from the United States District Court for the Western District of Virginia, No. 1:16cv00039-JPJ-PMS and from the Eastern District of Virginia:1:16cv00447-GBL-MSN

RESPONSE IN OPPOSITION TO MOTION OF THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, ET AL. IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Defendants-appellees, Harold W. Clarke, Dara Robichaux, Larry Jarvis, and Virginia Department of Corrections, by counsel, hereby oppose the Motion of the American Civil Liberties Union of Maryland, et al. in Support of Plaintiff-Appellant and Reversal. The motion should be denied because Amici cannot satisfy the requirements of Federal Rule of Appellate Procedure 29.

I. STANDARD OF REVIEW

Under Rule 29(a), other than the United States or its officer or agency or a state, an amicus curiae may file a brief only by leave of court or with the consent of all parties. When a party objects to filing by a private amicus curiae and leave of court is sought, the Rule provides that a motion for leave to file must be accompanied by the proposed brief and state:

> (A) the movant's interest; and
> (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

F.R.C.P. 29(a)(3).

"Although the Rule does not say expressly that a motion for leave to file should be denied if the movant does not meet the requirements of (a) an adequate interest, (b) desirability, and (c) relevance, this is implicit." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3rd Cir. 2002).

II. ARGUMENT

This Court should deny Amici's Motion because they cannot satisfy the requirements of F.R.A.P. 29.

In *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir.1997), Judge Posner stated:

> An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Id. (internal citations omitted).

The term "amicus curiae" means friend of the court, not friend of a party. *Id.* Judge Posner noted further that the court is "not helped by an amicus curiae's expression of a 'strongly held view' about the weight of the evidence, … but "by being pointed to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to our attention." *Ryan*, 125 F.3d at 1064. *See New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n. 3 (1st Cir. 1979) (noting "an amicus is, namely, one who, 'not as parties, … but, just as any stranger might,' … 'for the assistance of the court gives information of some matter in law in regard to which the court is

doubtful or mistaken,' … rather than one who gives a highly partisan … account of the facts.") (Internal citations omitted)). Here, the content of Amici's proposed brief adds nothing of benefit to this Court beyond the help provided by the parties' counsel.

Two discrete issues are presented on this appeal: (1) whether the district court properly granted qualified immunity to appellees on appellant's Eighth Amendment conditions-of-confinement claim; and (2) whether the district court properly determined that there was insufficient evidence to establish that Virginia Dept. of Corrections' Director Harold Clarke had knowledge of the conditions of appellant's incarceration at the Rappahannock Regional Jail prior to his transfer to the Marion Correctional Treatment Center ("MCTC"). Appellant is represented competently by attorneys who have thoroughly briefed the two issues.

As the undisputed facts demonstrated, this case involves an autistic inmate who (1) had a history of assaulting law enforcement officers; (2) was housed for a period of months in a specialized correctional facility for males that focuses on mental health treatment[1]; (3) was assessed with a high risk of aggression; (4) was

[1] MCTC "is accredited by the Joint Commission on Accreditation of Health Care Organizations (JCAHO) as a Behavioral Health Care Facility, and Licensed for Acute Care, Outpatient, and Residential Unit mental health services by the Virginia Department of Behavioral Health and Developmental Services (DBHDS). MCTC houses adult male offenders classified to multiple levels of security." https://vadoc.virginia.gov/facilities/western/marion/.

assigned a multi-disciplinary mental health treatment team composed of a psychiatrist, psychologist, clinical social worker, psychology associate, recreational therapist, psychiatrist nurse, and corrections counselor; (5) participated in a therapeutic program using a Segregation Release Plan ("SRP") designed by his team, individually tailored to his needs, continuously reassessed, and devised with the goal to safely transition him and integrate him into the general population; and (6) had face-to-face interactions and/or out of cell time with others in some form almost every day, as well as abundant telephone access, hygiene items, reading materials, commissary access, and opportunities for recreation and time spent acclimating to the general population, limited only for short periods by MCTC's disciplinary policy.

Appellant was at MCTC for less than eight months. By modifying and executing appellant's SRP and carefully and steadily increasing his time with other inmates, appellant's mental health treatment team accomplished its goal. Appellant was safely transitioned into the general population twice, interrupted only by two disciplinary actions resulting from incidents of aggression involving jail officers. In fact, appellant spent the entirety of his final six weeks at MCTC in the general population, save for four days following his conditional pardon when appellees moved him out of the general population for his own safety to prepare an empty

wing for his exclusive use as a general population inmate for the remainder of his stay.

The legal issue before this Court on which Amici seek input is whether it was clearly established that the conditions of confinement generally outlined above violated the Eighth Amendment in 2014 and 2015. Amici's proposed brief offers legal research on solitary confinement which they argue put appellees on notice that their conduct had long violated the Eighth Amendment. The brief does not assist the Court.

First, Amici disingenuously parse, paraphrase, and manipulate the undisputed facts as found by the district court in a manner to suggest that this is a case of prolonged solitary confinement with evidence of horrific conditions of isolation. Appellant was not "subjected to solitary confinement for nearly eight months," his daily existence was not defined by social isolation, and he was not "cut off from humanity." (Doc. 20-1, p.p. 6-7). An amicus curiae's "expression of a 'strongly held view' about the weight of the evidence," does not help the court. *Ryan*, 125 F.3d at 1064 (quoting *New England Patriots Football Club*, 592 F.2d at 1198 n. 3)).

Second, Amici's proposed brief retreads purportedly pertinent Supreme Court, Fourth Circuit, and other case law, much of which has already been brought to the Court's attention and addressed at length by appellant's able counsel.

Amici's inability to lend further assistance to this Court is reflected in boldly their claiming: "That Mr. Latson could not be subjected to prolonged solitary confinement without violating the Eighth Amendment was also crystal clear in this Circuit by 2014-2015." (Doc. 20-1, p. 25). Yet Amici's proposed brief fails even to mention, let alone discuss, the two cases in this Circuit where inmates challenged the conditions of long term segregation specifically because of their affect on mental health and the Court upheld summary judgment for prison officials, *William v. Branker*, 462 F. App'x 348, 353 (4th Cir. 2012), and *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 472 (4th Cir. 1999). In *Williams*, the inmate spent ten years in segregation, was allowed out for one hour, five days a week, had no outdoor recreation for years, and only minimal contact with other inmates. On these facts, the Court affirmed summary judgment for prison officials just two years before Latson's incarceration, holding, "[t]he fact that the conditions to which Williams was subjected aggravated his mental illness is an unfortunate but inevitable result of his incarceration. This is particularly so given the twin responsibilities of prison officials to limit the opportunities for Williams to harm both himself and others." 462 F. App'x at 354.

As the district court aptly stated after addressing these cases, "[u]nfortunately for Latson, the qualified immunity inquiry looks not to evolving

standards of decency but to clearly established law. Given the state of the law, the defendants cannot be said to have violated clearly established law in 2014 and 2015 by placing Latson in restrictive housing and subjecting him to the conditions described above." JA 1092.

In sum, the proposed amicus brief does not provide unique information or a perspective that will assist this Court beyond the help that the parties are able to provide. Given these circumstances, the Court would not benefit from accepting the brief and Amici's Motion for Leave should be denied.

III. CONCLUSION

For these reasons, Defendants-Appellees, Harold W. Clarke, Dara Robichaux, Larry Jarvis, and Virginia Department of Corrections, respectfully request this Court to deny the Motion in Support of Plaintiff-Appellant and Reversal.

DATED: February 19, 2019

Respectfully Submitted,

/s/

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R. App. P. 27 (d), I certify that:

This opposition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this opposition contains 1,701 words, excluding the parts of the opposition exempted by Fed. R. App. P. 32(f).

This opposition 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 this opposition has been prepared in Times New Roman 14-point font using Microsoft Word 2016.

Date: February 19, 2019

/s/
Jeff W. Rosen

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: February 19, 2019

/s/
Jeff W. Rosen