



Two Ex-Navy Football Players to go on Trial in Rape Case Despite Judge's Recommendation

By Annys Shin
The superintendent of the U.S. Naval Academy set aside the recommendation of a military judge Thursday and ordered two former Navy football players to face court-martial in the alleged sexual assault of a female midshipman, attorneys for the accused men said. Joshua Tate, 21, of Nashville, will be tried on a charge of aggravated sexual assault, and Eric Graham, 21, of Eight Mile, Ala., will be tried on a charge of abusive sexual contact. Both are also charged with making false statements. A third ex-player, Tra'ves Bush, 22, of Johnston, S.C., who was charged with aggravated sexual assault, will not face court-martial. Bush was prevented from graduating in May while the case was pending. All charges against him have been dismissed, said his attorney, Andrew Weinstein. Attorneys for all three men said the military judge, Cmdr. Robert P. Monahan Jr., who presided over the preliminary Article 32 hearing and filed a 174-page report to Vice Adm. Michael Miller, the academy's superintendent, last week did not recommend that any of the midshipmen face court-martial. Lt. Cmdr. John Schofield, an academy spokesman, said he could not discuss details of the judge's report until the case was over. However, Schofield said Miller's decision was consistent with the judge's findings about what probably occurred at an April 2012 off-campus party, where the alleged sexual assault occurred. The victim, now a 21-year-old senior, testified that she was drinking heavily that night and could not remember much of what had happened. The Washington Post generally does not identify victims of sexual assault. Miller's decision, his spokesman said, "is not based on the probability of a successful prosecution. Rather, it is [Miller's] responsibility to independently evaluate evidence and determine if reasonable grounds exist that a crime has been committed by the accused." The superintendent's choice to proceed with a court-martial comes amid intense scrutiny of the military's handling of sexual-assault cases. The Department of Defense has estimated that as many as 26,000 service members were the targets of unwanted sexual contact last year, although only 3,374 incidents of sexual assault were reported. The release of those numbers was accompanied by several high-profile cases this year, including an Air Force general's decision to overturn the conviction of a fighter pilot on sexual assault charges and the arrest of the Air Force officer in charge of sexual assault prevention in the alleged groping of a woman outside a Crystal City bar. Sen. Kirsten Gillibrand (D-N.Y.) and other lawmakers have been pushing for such cases to be taken away from the military chain of command — so far, without success. Ronald "Chip" Harrington, an attorney for Graham, said Miller's decision to send the case to court-martial over the recommendation of an experienced military judge "is evidence of bowing to public pressure." "There is no evidence of a non-consensual criminal act by Eric Graham," he said. Jason Ehrenberg, an attorney for Tate, was also critical of the decision to ignore the judge's recommendation. "We are disappointed," he said. "But we are confident that if Midshipman Tate receives a fair trial, he will be found not guilty." In the weeks leading up to the decision, it was the accuser, not the accused, who was contending that Miller could not be trusted to be fair. On Monday, U.S. District Judge Ellen Hollander blocked an attempt by the alleged victim to force Miller to recuse himself from the case. Susan Burke, an attorney for the accuser, had argued in court that Miller was angry with her client for

embarrassing the school. Testimony at the Article 32 hearing provided an unflattering portrait of the Navy's elite, taxpayer-funded training ground for officers. A parade of midshipmen described a world of heavy drinking, casual sex and harassment via social media. Burke said Miller and the defense lawyers intentionally tried to exhaust and intimidate the young woman, who endured a brutal cross-examination at the Article 32 hearing that included questions about whether she wore underwear, how she danced and how she performed oral sex. But Hollander said she did not find grounds for a civilian court to interfere in the military investigation. Despite accusing Miller of bias, Burke said she welcomed his decision Thursday to go forward with a court-martial. "We are pleased that two of the men have been referred for court-martial," Burke said. "We continue to believe that the system needs to be fixed, as it is clear that the Article 32 process is broken." Experts said the case highlighted significant problems with the military justice system, including Miller's decision to overrule the military judge. "This is so scrambled by the political environment," said Eugene Fidell, visiting lecturer at Yale University Law School. "Because of how explosive the atmosphere is right now, it's hard to see how anyone could see straight." Greg T. Rinckey, a former attorney for the Army Judge Advocate General's Corps and now a managing partner with Tully Rinckey, agreed that the atmosphere on sexual assault cases has become highly politicized. "A lot of commanders are afraid if they don't let the process work itself out, their heads are on the line," said Rinckey, who called the decision "shocking" and said it could open up avenues for the defense to appeal even before a court-martial gets underway. The case against the midshipmen is likely to hinge on whether the woman was too intoxicated at the "toga and yoga" party to consent to sexual relations. A person familiar with the contents of the military judge's report said Monahan considered the accuser's credibility badly damaged by her inability to remember what happened. Prior to the party, the young woman had been friends with Tate and Graham and involved in an on-again, off-again sexual relationship with Bush. In the days after the party, she heard rumors and saw social media posts that suggested she had sex with multiple men. And three of the accused allegedly later admitted to her or Naval Criminal Investigative Service agents that they had engaged in sex acts with her that night. Attorneys for all three men argued that any sex that may have taken place was consensual. Under military law, the maximum penalty for aggravated sexual assault is life in prison without the possibility of parole and a dishonorable discharge, according to Lisa Windsor, a former judge advocate now in private practice. The two accused midshipmen could also be forced to repay the cost of their education. In 2006, a military jury acquitted former Navy football quarterback Lamar Owens on charges he allegedly raped a female midshipman. Owens was still expelled and required to repay the academy \$90,000.