

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

UNITED STATES,
Appellee

v.

BRANDON M. HORNE,
Staff Sergeant (E-5)
United States Air Force,
Appellant

USCA Dkt. No. 21-0360/AF

Crim. App. No. ACM 39717

**PROTECT OUR DEFENDERS'
AMICUS CURIAE BRIEF**

Peter Coote
Pennoni Associates Inc.
1900 Market Street, Third Floor
Philadelphia, PA 19103
(215) 254-7857
pcoote@pennoni.com

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GRANTED ISSUE

WHETHER THE CONDUCT OF THE TRIAL COUNSEL AND SPECIAL VICTIMS' COUNSEL CREATED AN INTOLERABLE STRAIN ON THE PUBLIC'S PERCEPTION OF THE MILITARY JUSTICE SYSTEM.

ISSUE PRESENTED BY AMICUS CURIAE

WHETHER COUNSEL PERFORMING DUTIES IN ACCORDANCE WITH PROFESSIONAL ETHICAL OBLIGATIONS UNLAWFULLY INFLUENCE PROCEEDINGS.

INTEREST OF AMICUS CURIAE

Protect Our Defenders honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted, or harassed by fellow service members. Military victims of sexual assault are entitled to be represented by counsel who zealously and diligently advocate on their behalf to protect their rights. Protect Our Defenders is committed to protecting victims' right to counsel.

ARGUMENT

I. TRIAL COUNSEL AND SPECIAL VICTIMS' COUNSEL PERFORMED THEIR DUTIES IN ACCORDANCE WITH PROFESSIONAL ETHICAL OBLIGATIONS.

The Appellant alleges that trial counsel Captain AS ("TC AS") and special victims' counsel Captain JP ("SVC JP") unlawfully influenced the investigation because of their "pre-coordination" regarding the victim's sworn written statement and because they colluded to interfere with the Air Force Office of Special Investigation's ("OSI") interview of the victim's husband. Brief at 27.

Although the Appellee does not concede that TC AS's and SVC JP's actions constituted unlawful command influence, they nevertheless assert the counsel's actions were "unwise and inadvisable." Answer at 22.

TC AS's and SVC JP's actions in this case were not unlawful. Their actions were in accordance with the applicable rules of professional responsibility, and they exercised the professional judgment afforded to them by such rules. As the applicable professional rules are different for a victim's counsel and a prosecuting counsel, each will be analyzed separately below.

a. Trial Counsel Lawfully Performed Her Duties and Exercised Her Judgment in Accordance with Her Prosecutorial Ethical Obligations.

The American Bar Association's ("ABA") *Criminal Justice Standards for the Prosecution Function* ("*ABA Standard*"), Fourth Edition (2017)¹ sets forth the ABA's model ethical responsibilities for prosecutors and are used by jurisdictions throughout the country. The *ABA Standards* require prosecutors to consider the interests of victims. *ABA Standard* 3-1.2. The prosecutor's responsibility to diligently investigate criminal charges is guided by her consideration of fairness, accuracy, and the rights of the defendant, **victims, and witnesses**. *ABA Standard* 3-1.9. Prosecutors are obligated to know and follow the law and rules of the

¹https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

jurisdiction regarding victims. *ABA Standard 3-3.4*. Before making significant decisions, a prosecutor should provide victims the opportunity to consult with and provide information to the prosecutor. *Id.*

Prosecutors are given significant discretion and must exercise their judgment. Prosecutors should consider the views of and potential collateral impact on the victim. *ABA Standard 3-4.4(a)(vii) and (x)*. Air Force Instruction (“AFI”) 51-110, *Professional Responsibility Program*, December 11, 2018, *Air Force Standards for Criminal Justice*, The Function of the Prosecutor Standard (“*AFI Standard*”) does not conflict with the *ABA Standards*. While the *ABA Standards* for prosecutors is prescriptive, the *AFI Standard* is more proscriptive. The *AFI Standard* still recognizes that a prosecutor must exercise sound discretion. *AFI Standard 3-1.2(b)*.

The *AFI Standards* prohibit trial counsel from using illegal means to obtain evidence, and trial counsel may not discourage or obstruct communication between prospective witnesses and defense counsel. *AFI Standard 3-3.1(c) and (d)*. Trial counsel may not intentionally fail to disclose evidence to the defense or intentionally avoid pursuing evidence because she believes it will damage the prosecution’s case. *AFI Standard 3-3.11(a) and (c)*.

Applying the *ABA* and *AFI Standards* to her actions in this case, TC AS behaved ethically and exercised sound judgment balancing the interests of justice

and the rights of the Appellant and the victim. The Appellant alleges unlawful command influence based solely upon his arguments about intolerable strain on the public's perception of the military justice system. While he mentions the *ABA* and *AFI Standards*, he speaks only to their general duties to seek justice and not merely convictions. Brief at 17. He does not dive into the other *ABA* and *AFI Standards* that explain what it means to seek justice.

The facts alleged by the Appellant and Appellee do not constitute any violation of the *ABA* and *AFI Standards*, and the parties do not allege any specific violation of any prosecution standard. They simply argue “intolerable strain.”

When TC AS sent SVC JP an email explaining what she was looking for and identifying specific information described in slide 18, she was acting within her professional obligations. If she were communicating directly with the victim, she could explain to the victim the type of information she needed. TC AS was prohibited by professional ethical rules from contacting the victim directly because she knew the victim was represented by counsel. There is nothing illegal or unethical about telling a victim's counsel the same thing she would have told the victim.

When TC AS discussed the victim's fragility with SVC JP and subsequently asked OSI to delay interviewing the victim's husband, she was doing exactly what a prosecutor should be doing. She was complying with 10 U.S.C. § 806b (“Article

6b”) by balancing an immediate interview against her obligation to treat the victim fairly and with respect for her dignity and privacy. By listening to SVC JP, TCAS was providing the victim the opportunity to provide information (she was fragile from the assault, her pregnancy, and move and that she would not have cooperated further if her husband was interviewed immediately). She considered the interests of justice in keeping the investigation alive by accommodating the victim’s desire not to have her husband interviewed immediately without prejudicing the ability of the Appellant to defend himself.

TC AS did not destroy any evidence, did not discourage or obstruct communications between any witness and the Appellant’s counsel, did not fail to disclose evidence to Appellant’s counsel, and did not avoid pursuing evidence because it would damage the prosecution’s case. She simply asked the investigators to delay any interview of the victim’s husband. TC AS is squeaky clean with her professional ethics compliance. TC AS did not violate any *ABA* or *AFI Standard*. TC AS did not, by any unauthorized, unlawful or unethical means, influence the court-martial proceedings.

b. Special Victim Counsel Lawfully Performed His Duties and Exercised His Judgment in Accordance with His Prosecutorial Ethical Obligations.

AFI 51-110, *Air Force Rules of Professional Conduct* (“*AFI Rules*”) require attorneys to act with diligence and promptness in representing a client. *AFI Rules*

1.3. Although the comments to the ABA's *Model Rules of Professional Conduct* ("*ABA Rules*") have not been incorporated, the *AFI Rules* encourage counsel to consult the *ABA Rules*'s comments for guidance and assistance in placing the *AFI Rules* in context. *AFI Rules*, Introduction. The comment to *ABA Rule* 1.3 explains that a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *ABA Rule* 1.3 Comment.

A lawyer may not unlawfully obstruct another party's access to evidence, destroy or falsify evidence, or request any person other than a client to refrain from giving relevant information to another party unless the person is a relative of the client and the person's interests will not be adversely affected. *AFI Rule* 3.4(f). Attorneys must be truthful in statements to others. *AFI Rule* 4.1.

A special victims' counsel's duty to zealously represent the interest of his client is not diminished because he is practicing within the military justice system. A special victims' counsel represents victims relating to the reporting, investigation, and military prosecution of sex-related offenses, and the relationship between the special victims' counsel and a victim is the relationship between an attorney and client. 10 U.S.C. § 1044e(b)(6) and (c). The law's intent is to provide victims with real representation and advocacy. Anything less would violate the law and the special victims' counsel's professional obligation.

Applying the *AFI Rules* and the ABA comments to his actions in this case, SVC JP behaved ethically in all aspects of his representation of his client. Similar to his arguments about TC AS, Appellant focuses solely upon arguments about intolerable strain on the public's perception. He does not cite the *AFI Rules* or ABA comments. He cannot allege any facts that demonstrate SVC JP acted unlawfully or unethically.

The facts alleged by the Appellant and Appellee do not constitute any violation of the *AFI Rules*, and the Appellant does not identify a violation of any rule. The Appellant simply argues "intolerable strain."

SVC JP had the duty to advance his client's interests competently, diligently, and with zeal. He performed ably in all respects. His edits to his client's written statement demonstrated his competence. He did not ask his client to lie or provide a false or misleading written statement. SVC JP did not violate any law or professional obligation relating to his client's written statement.

SVC JP's representation of his client allows him to act on behalf of his client on matters that his client is lawfully able to do for herself. The victim had the right to confer with TC AS and communicate information to her. The victim had the right to tell TC AS that if her husband were interviewed by OSI at that time then she would no longer participate in the investigation and prosecution of the Appellant. The victim is not prohibited from asking investigators not to contact

her husband directly but to contact him only through her (although the OSI agent is not obligated to comply with such a request).

SVC JP's conversation with TC AS explaining his client's intent to cease cooperation was truthful and lawful. He was acting in his client's interest. Asking the OSI agents to contact him to schedule any interview with the victim's husband was not unlawful or unethical. SVC JP did not order the OSI agents to do so, he did not assert a right to have them contact him, and he did not assert that he was representing the husband. He only explained that he could be a conduit to schedule an interview. Acting as a conduit to, without any assertion of representation of, his client's husband was in the best interest of his client, and therefore within the scope of his representation.

There is no allegation that SVC JP asked his victim's husband to refrain from being interviewed by the OSI, trial counsel or Appellant's counsel. Even if SVC JP had, such a request is ethical and appropriate. *AFI Rule 3.4(f)*.

SVC JP complied with all *AFI Rules*, including his obligation to zealously represent his client.² SVC JP did not violate any law. SVC JP did not, by any

² If SVC JP violated any professional rule, he violated *AFI Rule 1.6*, Confidentiality of Information. Because counsel for amicus curiae Protect Our Defenders does not have access to the record of trial, he is unable to determine why or how the victim's email communication to SVC JP became part of the record. Appellee's Answer at 5, quoting J.A. at 215. There are no facts available to amicus curiae to determine whether the victim waived her privilege, whether

(continued...)

unauthorized, unlawful or unethical means, influence the court-martial proceedings.

II. ARTICLE 37 APPLIES TO PROCEEDINGS, NOT LAW ENFORCEMENT INVESTIGATIONS.

10 U.S.C. § 837, Unlawfully Influencing Action of Court (2018) (“Article 37”) prohibits coercion or unauthorized influence in court-martial proceedings. In applying Article 37, this Court has distinguished between the accusatorial process and the adjudicative stage of courts-martial. *United States v. Weasler*, 43 M.J. 15, 17 (C.A.A.F. 1995). This Court explained that the adjudicative stage consists of the proceedings occurring after referral, including interference with witnesses, judges, members, and counsel. *Id.* at 17-18.

This Court limited the accusatorial process to preferral, forwarding, and referral. *Id.* at 17. The earliest stage that Article 37 may apply is the preferral stage. Federal courts applying Article 37 agree. Until there is a court-martial, Article 37 does not apply. *Doolen v. Esper*, 2018 U.S. Dist. LEXIS 153994, *16-17 (S.D.N.Y. September 10, 2018).

The events complained by the Appellant (victim’s written statement and interview of her husband) occurred during the law enforcement investigation of the

SVC JP violated his duty of confidentiality, or whether the privileged information was otherwise disclosed. Regardless, a member of the public would perceive a violation of the attorney-client privilege to be unfair to the victim.

crime over a month before preferral. Appellee Answer at 21. A careful reading of the Appellant's Brief and Reply demonstrate Appellant uses the term "influence" repeatedly, but he always uses it as a legal conclusion as in "unlawful influence." Not once does he identify how TC AS and SVC JP influenced preferral or any subsequent stage of the court-martial. He simply assumes influence because this Court has defined unlawful influence as "an intolerable strain on the public's perception." See Granted Issue.

The Appellant has not identified any influence, lawful or unlawful, on his court-martial proceedings.

III. THE "INTOLERABLE STRAIN" STANDARD CONFLICTS WITH ARTICLE 37 AND HAS NO LIMITING PRINCIPLE.

The "intolerable strain on the public's perception of military justice system" standard is not workable because it conflicts with the plain language of Article 37 and has no limiting principle. There is no such thing as an "objective, disinterested observer, fully informed of all the facts and circumstances." The objective, disinterested observer is simply a cover for a military judge to rule in accordance with his own personal views on the fairness of a court-martial.

a. Article 37 Must Be Interpreted According to Its Plain Language.

This Court must interpret and apply the laws as enacted by Congress. When construing these laws, the Court applies accepted rules of statutory construction. *E.V. v. United States*, 75 M.J. 331, 333-334 (C.A.A.F. 2016). When a statute's

language is plain, the sole function of the courts is to enforce it according to its terms. *Id.*, quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); see also *United States v. Watson*, 71 M.J. 54, 57 (C.A.A.F. 2012); *United States v. Dickenson*, 6 C.M.A. 438, 20 C.M.R. 154, 165-66 (1955).

The applicable language of Article 37 is plain: “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal.” In this plain language there is no basis to interpret it to mean “intolerable strain on the public’s perception of military justice system” as viewed by an “objective, disinterested observer, fully informed of all the facts and circumstances.” An examination of how this “intolerable strain” interpretation became associated with Article 37 will explain how far it has strayed from the law.

The Court’s earliest use of “intolerable strain” was in *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). The issue was not unlawful command influence but was implied bias where a panel member had supervisory responsibility over six other panel members.

The Court applied “intolerable strain” to Article 37 a year later in *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002). In *Stoneman*, the Court applied the public’s perception of a fair trial standard it used in *Wiesen* to analyze “implied bias” to its analysis of unlawful command influence under Article 37.

Staneman, 57 M.J. at 42-43. Although it did not use the term “apparent,” the Court for the first time held that even if there was no actual unlawful command influence, there was still a question of “the **influence of command** placed an intolerable strain on the public perception of the military justice system.” *Id.* (emphasis added). This expansion of Article 37 beyond actual unlawful command influence required the “intolerable strain” to be caused by the influence of command. This influence of command requirement remained in the Court’s subsequent opinions. *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003); *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (outrageous conduct by staff judge advocate).

While reciting the “influence of command placed an intolerable strain” language in *United States v. Sayler*, 72 M.J. 415, 423 (C.A.A.F. 2013), the Court expanded the scope of the language to include outrageous actions by trial counsel.

The Appellant asks this Court to further expand “influence of command” to actions of trial counsel and other attorneys in the investigative phase prior to any accusatorial proceedings. This expansion violates the plain language of Article 37 because it eliminates the necessity of demonstrating command influence by a commander, or coercion or unauthorized influence by others subject to the code. It further eliminates precedent that Article 37 applies to court-martial proceedings (at least the preferral) and not any earlier.

b. The “Intolerable Strain” Language Cannot Be Limited.

In his Reply, the Appellant makes clear what this case is about, and it is not about unlawful command influence. Reply at 5. The Appellant seeks to turn any violation of the Rules for Court-Martial into a violation of Article 37, including discovery violations. He states, “In the context of apparent unlawful command influence, discovery violations would affect a member of the public’s confidence in the fairness of the proceeding.” *Id.*

Given the broad sweep of the “intolerable strain” standard, the Appellant recognizes that any violation of any rule would affect the public’s confidence and would require reversal. The “intolerable strain” standard would supersede the entire Uniform Code of Military Justice and Rules for Courts-Martial. The military justice system would be reduced to whether an objective, disinterested member of the public would feel fairness is intolerably strained. If the “intolerable strain” standard is not tethered to the plain language of Article 37, there is no limiting principle.

c. There Is No “Objective, Disinterested Observer.”

This Court has never defined who the objective, disinterested observer or member of the public is. *Lewis*, 63 M.J. at 415. This fictional observer is created in the mind of a military judge to help him decide the fairness of a court-martial. The military judge, who is a member of a specialized society, is asked to determine

how a member of the separate civilian society would perceive fairness. *Parker v. Levy*, 417 U.S. 733 (1974); *Weiss v. United States*, 510 U.S. 163, 174 (1994).

The fictional objective, disinterested observer raises many questions that cannot be answered by the wisest military judge or court in today's politically and socially divided society. Is the observer from a blue state or red state? Is he a democrat, republican, or independent? What race or gender is the observer?

The observer may feel that the crime of desertion unfairly creates an intolerable strain because in the civilian society no person be charged with quitting a job. The constitutionality of non-unanimous verdicts would never need to be decided because non-unanimous verdicts could be decided by a military judge applying what he thinks is the perception of the objective, disinterested observer.

The objective, disinterested observer is a fictional person who is not accountable to anyone, but this fiction relieves military courts from taking responsibility for their decisions. Rather, a military judge assigns responsibility to the fictional observer. It appears military judges believe the public or fictional observer is only concerned about fairness to defendants and would never be concerned about victims, discipline, or justice.

If the objective, disinterested observer can be distilled into anything, our Constitution distills it into "We the People." Under the Constitution, the people elect members of Congress and the President. Congress is the branch that most

closely reflects the will of the people and is most accountable to the people. The courts are the least accountable.

Congress created the military justice system, and its laws reflect what an objective, disinterested observer, or “We the People,” believe is fair. Courts, military or civilian, should not be usurping Congress’s constitutional powers and responsibilities. Congress has determined that victims of military sexual assault do not need to testify at a preliminary hearing. Congress has determined victims may not be deposed. Congress has given victims the right to refuse to be interviewed by defense counsel. Congress has determined that sexual assault victims shall have the right to counsel who will zealously represent them.

This Court is not accountable to the people. This Court cannot thwart the will of Congress and the people by using the fictional objective, disinterested observer. If the laws created by Congress create an intolerable strain on the public’s perception of the fairness of military court, the public will respond by electing members of Congress who create laws that reflect its perception of fairness. While not perfect, the laws passed by Congress are the best reflection of what the public perceives as fair.

IV. THIS COURT SHOULD AFFIRM THE PROPRIETY OF COUNSEL’S ACTIONS.

This Court could affirm the Appellant’s conviction on the basis of the Appellee’s arguments that there is no intolerable strain on the public’s perception

of fairness; however, such a ruling would create an intolerable strain on the military justice system itself. The military judge and Air Force Court of Criminal Appeals (“AFCCA”) have each ruled that the actions of TC AS and SVC JP were unlawful.

The military judge disqualified each from the case. The purported reason (attorney testifying in the case) is not real. There was no reason why either counsel would need to testify at the court-martial trial. The Appellee was denied representation by TC AS who was replaced. The victim was denied her right to counsel that Congress afforded her. The record does not indicate whether her counsel was replaced by another special victim counsel.

The findings by the military judge and AFCCA disparage the reputations of TC AS and SVC JP. Throughout the military justice system, trial counsel and special victim counsel have taken note of the courts’ treatment of TC AS and SVC JP. Counsel will be less likely to zealously advocate for their clients. Prosecutors will be less likely to exercise judgment to achieve justice. Their judgment will be reduced to what they think a military judge or court would think the fictional objective, disinterested observer would think about fairness. This is not workable.

This strain on trial counsel and special victims’ counsel is intolerable. Military courts, like civilian courts, are based upon the adversarial system in the belief that zealous representation by all counsel involved will lead to a just result.

Of course, all counsel must follow the law and professional ethical responsibilities, but the professional rules allow defense counsel greater leeway than other counsel.

To restore and protect the adversarial nature of the military justice system, the Court should acknowledge the propriety of counsel's actions and affirm the lower court because counsel performed their professional duties ethically, lawfully, and without any unauthorized means.

CONCLUSION

WHEREFORE, Protect Our Defenders respectfully requests this Honorable Court affirm the lower court's ruling.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter Coote', with a stylized flourish extending to the right.

Peter Coote, Esq.
Attorney for Protect Our Defenders
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19103
pcoote@pennoni.com
Phone: (215) 254-7857

CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief is less than 7,000 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

CERTIFICATE OF FILING AND SERVICE

I certify that on February 14, 2022 a copy of the foregoing was transmitted by electronic means to the following:

- (1) This Court: efiling@armfor.uscourts.gov
- (2) Counsel for Appellant: Capt. David L. Bosner, USAF
- (3) Counsel for Appellee: Mary Ellen Payne, Esq.

Respectfully submitted,



Peter Coote, Esq.
Attorney for Protect Our Defenders
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19103
pcoote@pennoni.com
Phone: (215) 254-7857