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Court Seals Rape-Therapist Data: Air Force Bid Put on Hold

By Miles Moffeit, Denver Post Staff Writer

A federal appeals court has blocked the Air Force's attempt to get its hands on a cadet's rape-treatment records, staving off indefinitely a therapist's jail sentence.

The action late Friday indicates the growing importance of the unprecedented case that legal experts predict could wind its way all the way to the U.S. Supreme Court.

The 10th Circuit Court of Appeals, in a one-page order, put a temporary hold on an Air Force arrest warrant for civilian therapist Jennifer Bier. She provided treatment to Jessica Brakey, one of the first cadets to blow the whistle on how the Air Force handled rape cases.

The order gives Randolph Air Force Base in Texas until 5 p.m. Wednesday to file briefs explaining why records of the counseling sessions should become part of court-martial proceedings against Joseph Harding, whom Brakey has accused of rape.

The court's action brought relief to Bier after a jarring two-week legal ride that had a federal judge siding with her, then reversing his stance on whether she should be arrested. On Friday, her attorneys scrambled to the 10th Circuit, based in Denver.

"Today is a day for relaxing and celebrating," Bier said. "I've been on pins and needles. It's gratifying to have a court look at this and go, 'Wait a minute; we need to look at what's happening here.'"

Legal experts said the order reflects the growing importance of the case involving key constitutional questions of whether counseling sessions are as protected in military courts as they are in civilian law. Representatives for the court could not be reached for comment Saturday. Only one judge is needed to grant the order.

"Certainly this is good news for her (Bier)," said Marc Kaplan, a Denver-based appellate lawyer. "This is a glimmer of sunshine in her suit and signals that higher courts are willing to listen. They may believe this could go to the Supreme Court."

Legal experts have said that because the military's therapist-privilege rules, established in 1999, haven't been tested in appellate courts, Bier's case could be groundbreaking, helping determine whether the military can reach into the private files of a civilian therapist.

The federal judge who did an about-face in the case last week, U.S. District Judge Edward Nottingham, said Air Force guidelines spell out an exception to a therapist's privilege, recognizing a defendant's constitutional right to confront witnesses. He also ruled that Bier did not exhaust her appeal options within the military.

In their appeal Friday, Bier's attorneys said Nottingham erred because Harding does not have any constitutional right to discovery from private people and that the alleged victim's due process rights are being violated.

They also cited case law that allows civilians like Bier to appeal through federal court instead of military venues.

Bier's refusal to hand over her records has uncorked an array of questions.

Will Colorado's strong privilege law, which has been held to bar even a judge from looking at a therapy patient's records, factor into the case? Will military law trump civilian federal law? And how do you reconcile a defendant's Sixth Amendment right to confront witnesses with a victim's constitutionally based privilege?

Bier attorney Wendy Murphy hopes the federal courts will resolve these questions so that rape victims everywhere will not be afraid to confide in a counselor and so counselors such as Bier can stay out of prison.

"This is the first time since May 25 that Jennifer can literally go to sleep and not worry," Murphy said. "The military is a big opponent. But the law is on our side. To get this order, you have to prove that you have a likelihood of prevailing."

Bier is hoping for a definitive decision by the appellate court this week. She said she craves normalcy in her life again.

"I'm just amazed that it's come to this point," Bier said of the arrest warrant. "My son and I went out and celebrated over French fries. For the first time in a while, I could breathe calmly.

"But I feel I have to take these steps to protect therapists and other clients. I fear that if they aren't protected, my field of work will be reduced to going underground with our notes. How crazy is this?"

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