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## Judge: Therapist May be Jailed

By Miles Moffeit, Denver Post Staff Writer

A U.S. District Court judge refused Wednesday to block the Air Force from arresting a rape therapist who has refused to turn over a former cadet's treatment records, avoiding a showdown – for now – between civilian and military courts.

The decision in Denver, which shocked victims' rights organizations, came after testy exchanges between Judge Edward Nottingham and one of Jennifer Bier's lawyers. Wendy Murphy argued that, in most cases, no official, not even a judge, should examine a rape victim's private confessions in therapy.

Nottingham, in an about-face from his remarks two days earlier, sided with a Texas military judge who has ordered Bier, a Colorado Springs counselor, to provide him with records of sessions with Jessica Brakey. The order was issued at the request of attorneys for Lt. Joseph Harding, Brakey's alleged attacker who is facing a court-martial.

"Suppose she says (in the sessions), 'I made all of this up,'" Nottingham said during a debate with Murphy. Nottingham said the military judge should have access to her therapy records to determine whether evidence exists as part of the defendant's Sixth Amendment right to confront witnesses.

Nottingham also said that Randolph Air Force Base Judge David Brash's ruling is "extremely limited" and fair because it asks Bier to turn over records solely for review by the judge, who would then decide if Harding's defense could use any part of them in court.

Murphy, who said Bier will appeal immediately to the 10th U.S. Circuit Court of Appeals, countered that it is outrageous for even a judge to be able to invade the privacy of a woman seeking therapy for rape. She said civilian appellate courts have consistently ruled that such records are off limits for "government review" and that judges are government officials.

Murphy also argued that there is no guarantee that Brash would not turn Bier's records over to the defense. He already has turned over records held by other medical professionals, Murphy said, after they were improperly given to the judge without Brakey's permission.

"She (Bier) is a civilian who faces imminent danger to her liberty," Murphy said, adding that victims will also suffer because they can't be assured of the total confidentiality needed to heal the trauma from assaults. "This will be a big, chilling effect."

The exchange marked the first public airing of a case that had previously been conducted entirely in secret military court. It could define how far the military can reach into the files of civilian counselors.

Though civilian courts have generally ruled that discussions between therapists and their patients are shielded from scrutiny, military courts have not tested Pentagon rules on privilege. In 1999,

President Clinton issued a military executive order establishing privileged discussions between service members and their psychotherapists. But little, if any, appellate case law exists to test its strength.

The case landed in Nottingham's court because Brash ruled that Bier is a third party and did not have standard appeal rights within the military. So, Murphy said, she had no choice but to seek relief in federal civilian court.

Murphy said Bier will stand her ground, including going to jail if appeals grant her no relief. "Wherever the showdown, the bottom line is that she's not turning over her records," Murphy said.

Arguing the Air Force's case was Kurt Bohn, an assistant U.S. attorney, who repeatedly said that Brash did everything right in pursuing subpoenas for Brakey's records and an arrest for Bier.

"He (Brash) has done nothing so far, except say, 'Give me the records,'" Bohn said, adding that rules of military privilege establish clear-cut steps before counseling records are exposed to defense scrutiny. The trial begins June 22.

Military legal experts who are watching the case said it offers the best opportunity to define exactly what kind of confidential protections rape victims and their therapists have.

"This is just a delicious case," said retired Brig. Gen. Dave Brahms, the Marines' former top lawyer. "There absolutely needs to be spelled out in appellate courts what can happen here."

During a lengthy exchange about how broad a therapist's privilege is in both civilian and military courts, Nottingham acknowledged he was growing irritated at Murphy and repeatedly told her she was too broadly describing therapists' privilege. Judges review confidential materials all the time to see whether they are admissible, he told Murphy.

Murphy disagreed, saying the burden is on the defense to justify why the information is part of the evidence and that Harding's lawyers have not done that.

Cynthia Stone, spokeswoman for the Colorado Coalition Against Sexual Assault, said she was shocked by Nottingham's decision, especially given his remarks Monday that he was inclined to rule in Bier's favor.

"Victim advocates everywhere are behind her," Stone said. "We're all saying, 'Go, Jen, keep fighting.'"

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