



June 21, 2005

Privacy Skirmish Clouds Military Rape Case

By Marie Tessier, WeNews Correspondent

A court martial opens tomorrow in a high-profile Air Force Academy rape case. In the backdrop is a legal skirmish over keeping counseling records private and a new Pentagon policy on confidentiality for rape victims that critics call too limited.



Jessica Brakey

(WOMENSENEWS) – Jessica Brakey was among the first Air Force Academy cadets to speak publicly about assault allegations to Colorado media and ABC News 20/20 in 2003.

She, along with dozens of other female cadets, said they were ignored or punished when they reported sexual assaults.

Three years later, after an avalanche of public and congressional indignation over the treatment of victims of sexual assault in the military, the Air Force is prosecuting Jessica Brakey's alleged assailant, First Lt. Joseph Harding, at a court-martial scheduled to begin tomorrow, June 22.

Members of Congress and victim advocates are watching closely to see if Harding will become the first – and perhaps only – person to be convicted of rape at the academy. One other defendant recently pleaded guilty to a lesser charge.

Beyond the issues of personal guilt or innocence, Brakey's case is also testing the extent to which civilian rape-counseling records can be called into evidence in military trials.

Civilian Counseling Sought

Two years after her alleged assault, Brakey sought counseling at the civilian rape crisis center TESSA in Colorado Springs in order to avoid an imbroglio at the academy.

Earlier this year, Air Force judge David Brash sparked an outcry among victims' rights advocates by ordering Brakey's counselors and physicians to turn over records for his review.

Brakey's civilian rape counselor, licensed social worker Jennifer Bier of Colorado Springs, refused to turn over the records without Brakey's permission. In response, Brash in late May issued a warrant for her arrest.

In early June, a civilian U.S. District Court Judge in Denver ratified the military judge's decision.

But a week later, the 10th Circuit Court of Appeals in Denver stayed the arrest warrant, and gave the Air Force until this week to file briefs explaining why the records should be part of the court-martial.

Symbol of Legal Insecurity

Sexual assault experts and victims' advocates say the subpoenas for Brakey's confidential records and the arrest warrant for her counselor symbolize the legal insecurities of victims of sexual assault in the military.

Under Military Rule of Evidence 513, a crime victim has the privilege to keep confidential the records of sessions with licensed counselors, as Jessica Brakey has chosen to do (although attorney Wendy Murphy says that some other physicians and counselors turned over records without her consent).

However, a defendant's Sixth Amendment right to confront his or her accuser provides some leverage to open otherwise closed records if counsel can persuade a judge to order it.

Such orders for privileged records must be based on a showing in court that specific records are vital to a defendant's right to a fair trial, says Diane Mazur, a University of Florida law professor with expertise in rules of evidence and the constitutional relationship between military and civilian society.

To that extent, military and civilian federal rules of evidence are much the same, she says.

"It is really, really unusual for a judge to order production of records like this in a criminal case," says Mazur. "Lawyers would find it absolutely bizarre if this request were made to them, but in the context of women, and in the context of sexual assault, people don't accept the strength or the breadth of the privilege."

Military rules of evidence grant a counselor-client privilege for licensed therapists such as Bier. State laws vary, but Colorado's rules are among the strongest for victims, advocates and legal scholars say.

Right to Privacy

Bier's lawyer, prominent victims rights advocate Wendy Murphy, argues that rape victims and others have a constitutionally protected right to privacy that blocks defendants from gaining access to confidential counseling and medical records, except in rare instances.

"If these records can be compelled in this case, you might as well slam the door and send the victims home, because there's no more privilege," says Murphy, an adjunct professor of law at the New England School of Law in Boston.

As proceedings in *U.S. vs. Harding* begin, Air Force and Pentagon officials are not commenting on the case, spokespeople said. Defense counsel Capt. Lynn Schmidt also declined to comment on the issues raised in court.

Advocates say that privilege for rape counselors is essential so that victims can have a fair shot at recovering from trauma.

Joan Zorza, a Washington, D.C., attorney who is editor of the newsletter “Sexual Assault Report,” says it is common for counseling records to reflect victims’ self-doubt and even self-blame when they’ve been raped.

“Bringing in counseling records really puts the focus on blaming the victim,” Zorza says. “In acquaintance rape, like most of the military cases, people have very complicated feelings and there’s a big element of disbelief because it’s difficult to say to yourself, ‘I’ve been raped.’”

New Pentagon Policy

Coincidentally, the court-martial opens just a week after the Pentagon on June 14 put into force a new policy offering some confidentiality for victims of sexual assault, issued by Deputy Secretary of Defense Paul Wolfowitz three months earlier.

The new policy – which has no direct bearing on the Bier matter because it pertains only to military records – differs from the old in that it allows a victim to seek services without necessarily triggering an official investigation and without being specifically identified to commanders.

Under the new policy, however, the records are not privileged, or protected from release, under a host of circumstances beyond the victim’s control.

A spokesperson for the Pentagon’s Joint Task Force for Sexual Assault Prevention and Response said people should not confuse a victim’s right to privately seek services with commanders’ and investigators’ ability to see records later.

“Privilege and confidentiality are two very different animals,” says Roger Kaplan, a spokesperson for the Pentagon task force.

Under the new rules, Kaplan and victim advocates say, officials can obtain records if information comes from a source other than the victim.

Protections for Healing

“We don’t even call it a confidentiality policy in our office, because it doesn’t provide meaningful confidentiality for victims who need to obtain services in order to heal,” says Christine Hansen, executive director of The Miles Foundation in Newtown, Conn., which provides services and advocacy for victims of sexual and domestic violence related to the military.

U.S. Rep. Carolyn Kilpatrick, D-Mich., and U.S. Rep. Louise Slaughter, D-N.Y., wrote to Secretary of Defense Donald Rumsfeld in April, expressing their concern that the policy does not provide sufficient confidentiality to support victims and advocates. “Some health care professionals are protected under the confidentiality protocol while others are not,” they wrote. “How can victims be expected to know which health care providers are covered?”

Zorza and advocates such as The Miles Foundation’s Hansen, say the Bier case and the limitations of the Pentagon’s sexual assault reporting rules are bound to have a chilling effect on victims.

“They’re really boxing in victims,” Zorza says, “so it’s so difficult to seek any kind of help.”

Meanwhile, Bier, the Colorado Springs counselor, vows to go to jail rather than turn over counseling records without her client’s approval.

“The reason victims from the Air Force Academy came to TESSA was because the academy was going after the victims,” Bier said in an interview June 8. “I’m horrified about what this means for my field.”

Marie Tessier is an independent journalist who writes frequently about violence against women.

For more information:

Deputy Secretary of Defense – Confidentiality Policy for Victims of Sexual Assault
[Adobe PDF format]:

<http://www.defenselink.mil/news/Mar2005/d20050318dsd.pdf>

Miles Foundation Inc.:

<http://hometown.aol.com/milesfdn/myhomepage/index.html>

National Sexual Assault Hotline: 1-800-656-HOPE

Copyright © 2005 Women’s eNews.