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Therapist Spared Arrest in Air Force Rape Case

By Marie Tessier, WeNews Correspondent

Three years after dozens of sex-assault allegations engulfed the Air Force Academy the only case to proceed to a court-martial could be poised for dismissal after U.S. marshals refused to arrest the accuser's civilian therapist.



Wendy Murphy
Credit: Tessier, Wilson

(WOMENSENEWS) – An attorney for the only woman to see her allegations about sex assault at the Air Force Academy brought to the point of a trial says the U.S. Marshals Service has given her side of the contentious, high-profile case good news.

On June 30, the marshals service notified the Air Force that it would not carry out an order to arrest or seize the records of Jennifer Bier, a civilian therapist in Colorado Springs, Colo., where the Air Force Academy is located.

Bier counseled former cadet Jessica Brakey, who alleges that she was sexually assaulted by Capt. Joseph Harding.

Bier has cited Colorado law and her professional obligation to maintain her client's confidentiality for not turning over her records to the court martial proceedings in Randolph Air Force Base near San Antonio, Texas.

“The message from the marshals service is that no victim, no therapist can be bullied in a court-martial proceeding,” says Wendy Murphy, a lawyer for both Bier and Brakey. “We want victims to understand that the only way to insulate their care from disclosure is to seek civilian help.”

Air Force judge Col. David Brash in 2005 ordered that Bier be arrested for not turning the records over for his review.

On July 14, Brash ruled that the prosecution has until late September to produce the counseling records, or defendant Harding's Sixth Amendment right to a speedy trial will have been violated.

In declining to arrest Bier, the U.S. Marshals Service letter cites advice from the Department of Justice and counsel's offices at the Department of Defense and the marshals service. A copy of the letter was obtained by Women's eNews. The marshals' letter has also been reported on by the Denver Post, which has intensively covered the scandal that engulfed the academy in 2003 when Brakey and other female cadets spoke publicly about being ignored or punished after they reported sexual assaults. Defense attorney David Sheldon of Washington, D.C., who represents Harding, says it is "mind-boggling" that the Department of Justice and the Department of Defense would advise U.S. marshals not to carry out the judge's order.

"I'm fully aware of the sensitivity of these kinds of records and I don't believe they should be disclosed in a cavalier fashion," Sheldon told Women's eNews. "But the law allows for in camera review, and the judge's order is consistent with federal law." In camera review means in judge's chambers, out of view of the jury.

Court Could Drop the Case

Defense attorney Sheldon says he will file a motion in September to dismiss the charges, and hopes to have a hearing date in October.

Victim rights advocate Wendy Murphy, a frequent guest on Fox News and other television programs, has been representing former cadet Brakey and therapist Bier in numerous hearings on appeal in federal courts where she has defended Bier's right to keep the records confidential. The courts have not ruled on the legal issue of whether Brash abused his authority in ordering the counseling records for possible use by the defense.

Though a client-therapist privilege is clearly spelled out in both Colorado and federal law, judges have discretion to order the production of counseling records if a defendant provides facts about specific items that may aid in a legal defense. However, it is rare for a judge to allow that access, many attorneys say.

"There was no factual basis presented for the judge that would justify trumping the therapist-client privilege," says Diane Mazur, a professor of military law at the University of Florida College of Law in Gainesville. "If defendants had a right to those records without specific facts, you could invade that privacy in every prosecution." Court records indicate that Brakey reported to academy officials in 2002 that she was assaulted during mandatory training at the academy in 2000. Academy officials did not prosecute. When Brakey and other cadets went public in 2003, the Air Force reopened the case and ultimately charged Harding more than a year later, in 2004. The case has been bogged down for the past year over the counseling records issue.

Judge Says Defendant's Career at Standstill

In his July 14 ruling that turned down – for now – the defense motion to dismiss the case, Brash called the government's failure to arrest the therapist "egregious."

The judge also described in detail Harding's career standstill, since he has had only menial duties such as repairing furniture and making photocopies since being put on "administrative hold" when the Air Force reopened the case in 2003. Though Harding has been promoted to captain since last year, that promotion is merely automatic, Mazur says.

Under Brash's ruling, Brakey must waive the privacy of her counseling records, or risk losing her day in court.

"What's really ironic in this case is that the victim is forced to decide," says Mazur. "What do I want more, my privacy protected or the crime prosecuted? It's the victim's insistence on maintaining her privacy that may lead to the charges being dismissed."

Three Scenarios

If Brash dismisses the case in September, lawyers say three things could happen. No 1: Air Force prosecutors could appeal the case and challenge Harding's right to have the judge's review of the counseling records. No. 2: The Air Force could turn over the prosecution file to the El Paso County, Colo., district attorney's office for possible prosecution. No. 3: the case could be closed.

Military lawyers are not commenting.

El Paso County Chief Deputy District Attorney Lisa Kirkman told Women's eNews her office will review the case for possible prosecution if the Air Force, the local police or the accuser present the case to them.

Murphy, Brakey's attorney, says she has not yet brought the case to Kirkman's office because Brakey's written request for the records has not yet been processed by the military.

In the meantime, rape-crisis specialists and members of Congress have been lobbying the district attorney's office to investigate and prosecute all allegations of sexual assault at the academy.

Civilian authorities in Colorado Springs share jurisdiction over incidents at the Air Force Academy and routinely discuss which jurisdiction is the best avenue to prosecute a particular case, Kirkman said.

In the Brakey-Harding case, Kirkman says that without reviewing the evidence it's not clear whether civilian authorities could prosecute at this date. Colorado's complex statute of limitations varies from three to 10 years for sexual assault and Brakey alleges the crime occurred in 2000.

Brakey, who did not respond to a request for an interview for this story, left the Air Force, and has said in television interviews that she wants to get the court-martial behind her and move on with her life.

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

For More Information

The Miles Foundation – http://members.aol.com/ht_a/milesfdn/myhomepage/

“Privacy Skirmish Clouds Military Rape Case” –
<http://www.womensenews.org/article.cfm/dyn/aid/2344/context/archive>

“Sexual Assault Pervasive in Military, Experts Say” –
<http://www.womensenews.org/article.cfm/dyn/aid/1273/context/archive>

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