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Therapist Opts to Skip High Court – For Now

By Miles Moffeit, Denver Post Staff Writer

With their legal arguments failing to persuade civilian trial and appellate federal judges, attorneys for a Colorado Springs therapist are hoping public opinion will help protect their client.

Attorneys for Jennifer Bier on Sunday postponed plans to file an appeal with the U.S. Supreme Court and instead chose to wait and see whether the Air Force and federal prosecutors would follow through on an arrest warrant issued after Bier refused to let a military judge review her notes of conversations with an alleged rape victim.

“They can’t keep bullying her, and our position is that, after reviewing the military law over the weekend, they absolutely have no power to arrest her,” said attorney Wendy Murphy, adding that she recognizes the U.S. attorney’s office can pursue prosecution and that such an action might then force an appeal to the Supreme Court. “But we hope that day never comes.”

Murphy said she is relying on a 2000 decision from the military’s court of appeals that said civilian courts should govern civilians, rather than military courts. But rather than pursue that appeal through legal channels, Murphy and Bier have decided to wait and see whether military officials would actually jail Bier.

Officials at Randolph Air Force Base near San Antonio, where the court-martial is to be held, have refused to comment on Bier’s challenge to the warrant. Jeff Dorschner, spokesman for the U.S. attorney’s office in Colorado, which has argued the case on behalf of the Air Force in Denver federal courts, had no comment on Murphy’s remarks.

“We don’t comment on whether that (prosecution of Bier) could be likely,” he said.

Air Force Judge David Brash issued the arrest warrant after Bier refused to let him review notes from therapy sessions she held with a former Air Force cadet who says she was raped by former cadet Joseph Harding. Brash wanted to see whether there was any evidence in those notes that would be beneficial to Harding’s defense.

Harding, now a lieutenant on active duty, faces court-martial proceedings beginning Wednesday on two charges of sexual assault involving Bier’s client and a second woman. But unless Bier changes her mind and decides to provide her notes for a review by the judge, Brash may be faced with a choice between Harding’s constitutional right to a fair trial and Bier’s pledge to keep client records confidential.

After a U.S. District Court judge had ruled the arrest warrant valid, the 10th U.S. Circuit Court of Appeals on Thursday also declined to block the arrest warrant, saying it was reluctant to interfere in a military proceeding and pointed to a 1975 Supreme Court case in support of its move.

Instead of ruling on the constitutionality and privilege-protection questions, the court said Bier's appeal should be exhausted first in the military's own justice system, relying on a case cited by the Air Force. Murphy, however, has declined to appeal in the military system.

Murphy said a 2000 decision in the case *U.S. vs. Quintanilla*, from the Court of Appeals for the Armed Forces, reads in part: "In contrast to federal civilian judges, military judges do not have the power to treat noncompliance with a subpoena as a contempt of court.... In a court-martial, if a civilian refuses to comply, the matter is referred to the appropriate U.S. attorney for prosecution in the federal civilian courts."

David Ware, a Pueblo attorney and former Army lawyer, said last week that he believed the jurisdictional issue could be the most crucial point in the case, instead of the clash between civilian and military therapist-patient privilege protections, questioning "whether the military can legally subpoena a civilian" with enforceability.

If the U.S. attorney's office decides to prosecute, Murphy said, she will have an even stronger case in federal courts that Bier's liberty is being violated: "There's a better chance we'll prevail."

Bier said she agrees and that she's willing to go to jail to protect her clients.

Staff writer Miles Moffeit can be reached at 303 820-1415 or mmoffeit@denverpost.com.

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