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**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

No. 05-1268

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JENNIFER BIER,

Plaintiff-Appellant,

vs.

EDWARD ZAHREN, in his official capacity as United States Marshal for the District of Colorado, LIEUTENANT GENERAL STEVEN R. POLK, in his capacity as Inspector General of the Air Force, and COLONEL DAVID BRASH, USAF Trial Judiciary,

Defendants-Appellees.

Appeal From The United States District Court  
For The District Of Colorado, Case No. 05-N-1020,

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**BRIEF FOR**

**NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
COLORADO PSYCHOLOGICAL ASSOCIATION,  
COLORADO PSYCHIATRIC SOCIETY,  
COLORADO SOCIETY FOR CLINICAL SOCIAL WORK,  
COLORADO ORGANIZATION FOR VICTIM ASSISTANCE,  
COLORADO COALITION AGAINST SEXUAL ASSAULT**

**AS AMICI CURIAE  
IN SUPPORT OF PLAINTIFF-APPELLANT'S  
EMERGENCY MOTION FOR STAY PENDING APPEAL**

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## INTERESTS OF AMICI CURIAE

The *Amici* in this case include the National Association of Social Workers and its Colorado Chapter, the Colorado Psychological Association, the Colorado Psychiatric Society, the Colorado Society for Clinical Social Work, the Colorado Organization for Victim Assistance, and the Colorado Coalition Against Sexual Assault. *Amici* collectively represent, among others, over 3,000 providers of mental health and therapeutic treatment in the state of Colorado.<sup>1</sup>

*Amici* are a group of national and Colorado-based sexual assault, domestic violence, mental health care, and victims' assistance advocacy and support organizations that, collectively, work on behalf of thousands of sexual assault, domestic abuse, child abuse victims, among others. *Amici's* constituents provide direct sexual assault, domestic violence, and child abuse victim services. *Amici's* constituents also engage in public policy development, community organizing, professional education, and task forces to promote coordinated community responses to sexual assault, domestic violence, and child abuse.

The role confidentiality and the psychotherapist-patient privilege plays in the effective treatment of *Amici's* patient population cannot be overstated. But for assurances of confidentiality, many existing psychotherapeutic relationships would be impaired or would cease altogether, and fear of disclosure may prevent those in need from seeking help in the first place.

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<sup>1</sup> Pursuant to Fed. R. App. P. 26.1(a), *Amici* state that they have no parent corporations and that *Amici* have no publicly traded stock.

This matter has received widespread public attention. *Amici* file this brief to prevent the irreparable and substantial harm psychotherapeutic relationships and psychotherapy patients may suffer if Plaintiff-Appellant is jailed or forced to disclose her patient's confidences under threat of imprisonment.

Pursuant to Fed. R. App. P. 29(c)(3), *Amici* state that they have filed a motion for leave to file this brief because Defendants have refused to consent to its filing.

## SUMMARY OF ARGUMENT

In her Emergency Motion, Plaintiff-Appellant, Jennifer Bier, seeks an emergency stay of the Warrant of Attachment issued by the military court pending a decision on the issues raised by the appeal. In the appeal, this Court will decide whether a military court can force a civilian social worker to either face imprisonment or disclose the confidential therapeutic post-assault counseling records of a sex-assault victim. *Amici* believe that the military court does not have such authority and that any such action would contravene Colorado, federal, and military law on the protection of the psychotherapist-patient privilege.

At issue in the Emergency Motion is whether this Court should enter a stay pending its decision on the merits of these questions. Refusal to enter the requested stay likely will result in Ms. Bier being arrested by U.S. Marshals and forced to disclose for *in camera* review the confidential therapeutic counseling records of her patient, the alleged victim of sexual assault. *See* Rules for Courts-Martial (“RCM”) 703(e)(2)(G)(i)-(iv) (“A witness attached under this rule shall be brought before the court-martial or proceeding without delay . . . .”); *see also* Department of Defense Form 454 Warrant of Attachment). Denial of the stay and forcing Ms. Bier into the Hobson’s choice of jail or disclosure would jeopardize the current and future mental health treatment of patients and victims of sexual assault across Colorado and elsewhere. The bedrock requirements of therapeutic treatment are trust and confidentiality. Granting a stay pending the outcome of this appeal will simply preserve the status quo and allow this Court to decide the important privacy issues presented.

In an effort to avoid a stay, Defendants may complain that the underlying sexual assault criminal trial is imminent in the military court and now requires the immediate arrest of Ms. Bier or seizure of her counseling records. Any such imminence would be a problem of Defendants’

own creation (as Defendant Brash is the presiding military trial court judge); notably, Defendants did not raise this argument in their briefs below and have never suggested that speedy trial or any other considerations require immediate action in the sexual assault trial.<sup>2</sup> Denial of the stay will cause the very harm to *Amici*'s patients, clients, and constituents that the psychotherapist-patient privilege was designed to prevent.

### ARGUMENT

#### **I. Refusing To Enter A Stay Could Jeopardize The Mental Health Treatment Of Thousands Of Patients.**

The *Amici* in this case include the National Association of Social Workers and its Colorado chapter, the Colorado Psychological Association, the Colorado Psychiatric Society, the Colorado Society for Clinical Social Work, the Colorado Organization for Victim Assistance, and the Colorado Coalition Against Sexual Assault. *Amici* collectively represent, among others, over 3,000 providers of mental health and therapeutic treatment in the state of Colorado, as well as thousands of victims of sexual assault and other violent crimes. Approximately 300,000 thousand people in Colorado receive mental health services each year. *See The Status of Mental Health Care in Colorado* (TriWest Group 2003), Mental Health Funders Collaborative: Denver, CO, at 3. Over 250,000 people in Colorado each year meet criteria established by the state office of Mental Health Services for severe need of mental health treatment. *Id.* Many of those are victims of sexual assault. Approximately 24 percent of Colorado women and 6 percent of Colorado men have experienced a completed or attempted sexual assault in their lifetime. *See Sexual Assault in Colorado: Results of a 1998 Statewide Survey*, Colorado Dep't of Public

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<sup>2</sup> Moreover, as Plaintiff-Appellant establishes in her Motion, the post-assault psychotherapy records of the alleged victim are statutorily and constitutionally protected, and will not, in any event, affect the underlying accused's right to a fair trial.

Health & Environment and Colorado Coalition Against Sexual Assault (1998). This equates to over 11,000 people each year experiencing a sexual assault in Colorado. *Id.*

The Supreme Court has recognized that the provision of psychotherapy “is a public good of transcendent importance.” *Jaffee v. Redmond*, 116 S.Ct. 1923, 1929 (1996). This is particularly true with respect to victims of sexual assault and domestic violence, who have been traumatized by violence that can cause deep-seated emotional difficulties.<sup>3</sup> “There is a strong public policy interest in encouraging victims of sexual assault to obtain meaningful psychotherapy.” *People v. District Court*, 719 P.2d 722, 727 (Colo. 1986). “The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.” *Jaffee*, 116 S.Ct. at 1929. Moreover, “the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust.” *Id.* at 1928 (internal quotation omitted).

Here, absent the requested stay, *Amici’s* current patients and constituents, including sexual assault and domestic violence victims, will suffer actual harm because the right of privacy and confidentiality is the cornerstone of the therapeutic relationship. *See People v. District Court*, 719 P.2d at 726-27 (“[I]t is of paramount importance to assure a victim of a sexual assault that all records of any treatment will remain confidential unless otherwise directed by the victim.”). Forcing a therapist to reveal such records violates the trust and privacy of the therapeutic relationship and would discourage victims from both coming forward to report the

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<sup>3</sup> In *Jaffee*, the Supreme Court noted the importance of providing confidential counseling to police officers who “not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger.” 116 S.Ct. at 1929 n.10. Victims of sexual assault have not only suffered actual physical harm, but have experienced feelings of powerlessness that often give rise anxiety, depression, fear and anger.

crimes and seeking the critical therapeutic assistance to recover their mental and emotional well-being. See U.S. Dep't of Justice, Report to Congress, *The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors: Findings and Model Legislation* (1975) (recognizing that without assurances that communications made by the victim of domestic violence and sexual assault will be kept confidential, victims will be even more reluctant to seek counseling or to explore legal and social remedies) (cited in *People v. Turner*, 109 P.3d 639, 643 (Colo. 2005)) “The knowledge that the alleged assailant would be entitled to discover these otherwise privileged documents could hamper a victim’s treatment progress because of her unwillingness to be completely frank and open with the psychotherapist.” *People v. District Court*, 719 P.2d at 727.

This case has received widespread publicity and is being monitored closely by the general public, the mental health care community, and *Amici’s* constituents and patients. If Ms. Bier is jailed or forced to divulge her patient’s most private and painful thoughts under threat of imprisonment, crime victims and patients everywhere will think twice about continuing or seeking the therapy they need and in which our society places substantial value. Some of those who need it most – rape victims, domestic violence victims, child abuse victims – will retreat from therapy, having lost their confidence and their trust. “If victims fear that their abuser may have access to victim impact statements, pre-sentence reports, and compensation files, they are less likely to seek assistance.” *Turner*, 109 P.3d at 644 (citing U.S. Dep’t of Justice, Office of Justice Programs, *Privacy of Victims’ Counseling Communications: Legal Series #8*, 1 (2002)).

In *Jaffee*, the Supreme Court considered this very issue – the effect that the mere possibility of disclosure would have on successful therapeutic treatment. “Effective psychotherapy . . .,” the Court wrote, “depends upon an atmosphere of confidence and trust in

which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears.” *Jaffe*, 116 S.Ct. at 1928 (citation omitted). “There is wide agreement that confidentiality is the *sine qua non* for successful psychiatric treatment.” *Id.* (quoting Advisory Committee’s Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)).

The District Court in this case distinguished disclosure to the defense from disclosure to the military court, and suggested that the latter does not invade the privacy and public policy interests protected by the privilege. Tr. at 50 (“All that will happen is that the military judge will have his hands on the documents concerning her treatment. That’s an intrusion, but it’s a minimal intrusion, and it’s certainly not the type of intrusion that would occur with full disclosure at trial.”). The District Court, however, failed to consider the role confidentiality plays in the psychotherapist-patient relationship.

The Supreme Court in *Jaffe* carefully considered the consequences of *possible* disclosure, and rejected the same type of balancing test advocated by the District Court here. See Tr. 10-11; *cf.* 116 S.Ct. at 1932 (rejecting balancing test). The Supreme Court found that the possible disclosure of psychotherapist-patient communications would have a detrimental effect on those in need of such care, recognizing that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.* at 1928. The Colorado Supreme Court has reached the same conclusion: “The mere threat of disclosure destroys the sanctity of the psychologist-patient relationship.” *People v. Sisneros*, 55 P.3d 797, 802 (Colo. 2002). Now, for thousands of patients, therapists, and victims here in Colorado and across the nation, the possibility of disclosure – as a constitutional imperative, under the District Court’s analysis – is a direct threat to their ongoing therapy. This Court should enter the requested stay pending its decision on the merits of this appeal.

**II. The District Court's Ruling Could Have Broad Application To The Provision Of Mental Health And Therapeutic Services.**

Although the underlying criminal case against the alleged assailant is in military court under the Military Rules of Evidence ("MRE"), the outcome of this appeal could affect the provision of mental health treatment and the scope of the psychotherapist privilege across Colorado and the country. There is no dispute that the MRE include the psychotherapist-patient privilege. Military Rule of Evidence 513 provides that a patient or therapist "has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." MRE 513(a). The Military Rules of Evidence establish exceptions to this rule, only one of which has been raised by the defendants and the court below and that is "when admission or disclosure of a communication is constitutionally required." MRE 513(d)(8).

This exception formed the basis of the District Court's ruling, which noted that "the question here is whether the materials at issue will need to be turned over to the accused in the military proceeding in order to protect the accused person's rights under the Confrontation Clause to the United States Constitution." *See* Tr. at 47-48; *see also* Tr. at 48 ("The exception in the military rules of evidence that is arguably applicable here is when admission or disclosure of the communication is constitutionally required."). The District Court concluded that the "constitutionally required" exception applied to the psychotherapist privilege because the Confrontation Clause of the Constitution mandated the disclosure of the victim's *post-assault* psychotherapy counseling records for *in camera* review by the military court and possible disclosure to the accused.

Thus, on the merits of the appeal, this Court will be asked to decide whether the Constitution affirmatively *requires* a licensed mental health professional to disclose post-assault counseling records in pre-trial discovery with no showing of how the victim's post-assault mental state is in issue. Such a ruling would not necessarily be limited to the Military Rules of Evidence, but could apply to both Colorado's own psychotherapist-patient privilege and the federal privilege recognized in *Jaffee*. While the Court resolves this important constitutional question, Ms. Bier should not be placed in jail or forced to violate her client's privacy rights.

In addition, although the District Court concluded that the Confrontation Clause required *in camera* disclosure of the victim's post-assault psychotherapy records,<sup>4</sup> prior cases demonstrate that the Constitution contains no such requirement. Several courts have directly addressed the question of whether the confrontation clause requires disclosure of the post-assault therapeutic counseling records of a crime victim. The Colorado Supreme Court explained that "[t]he defendant's constitutional right to confrontation is not so pervasive as to place sexual assault victims in the untenable position of requiring them to choose whether to testify against an assailant or retain the statutory right of confidentiality in post-assault psychotherapy records." *People v. District Court*, 719 P.2d 722, 727 (Colo. 1986); *see also United States v. Doyle*, 1 F.Supp.2d 1187, 1190 (D. Or. 1998) (rejecting defendant's argument that his Sixth Amendment right to compulsory process trumps the victims right to confidentiality of psychotherapist's records); *Newton v. Kemna*, 354 F.3d 776, 785 (8<sup>th</sup> Cir. 2004) (rejecting on habeas petition

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<sup>4</sup> The District Court held that "the premise of this Court's ruling today is that this [psychotherapist-patient privilege] is not an absolute right and that under proper circumstances, it will give way to the defendant's rights under the Confrontation Clause to the United States Constitution. Somebody somewhere has to do that process. Nobody is in a better position to do it than the trial judge in the case. And at this – and in order to perform that job, the trial judge has to at least be able to order *in camera* production." Tr. at 49-50.

defendant's argument that he had a constitutional right to discovery of psychiatric records or an *in camera* examination and noting defendant's "failure to identify even a single federal appellate court adopting this position").

Moreover, the Supreme Court has rejected the argument that resolution of the psychotherapist privilege should be contingent on the trial judge's later evaluation:

Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.

*Jaffee*, 116 S.Ct. at 1932. The Supreme Court further explained that "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Id.* (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981); see also *Doyle*, 1 F.Supp.2d at 1191 (rejecting defendant's request that court review psychotherapist records *in camera* and concluding that "[t]he court's review of the files would itself be a breach of the privilege"); *People v. District Court*, 719 P.2d at 727 (holding that defendant was not entitled to have the trial court review psychotherapy records *in camera* even on the theory that "the records might possibly reveal statements of fact that differ from the anticipated testimony of the victim at trial"). Thus, the fact that the military judge has, at this point, only ordered *in camera* disclosure does not cure the underlying harm and violation of the victim's privacy rights.

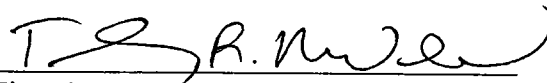
CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court enter the requested stay pending its final decision on the merits of this important question for the people of Colorado

DATED this 15th day of June, 2005.

Respectfully submitted,

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