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IN THIS ISSUE

**Interviewing Represented Military Suspects:
U.S. v. Finch (CAAF 2006) and the Sixth Amendment Right to
Counsel**

Click [HERE](#)

Supreme Court Preview

A new 4th Amendment case to be decided this year.

Click [HERE](#)

**Circuit Courts of Appeals
Case Summaries**

Click [HERE](#)

Interviewing Represented Military Suspects: *U.S. v. Finch* (CAAF 2006) and the Sixth Amendment Right to Counsel

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Introduction

On 29 September 2006, the Court of Appeals for the Armed Forces (CAAF) published its decision in *United States v. Finch*³, effectively overturning its prior decision in *United States v. McOmber*.⁴ The overturning of *McOmber* had been widely predicted since MRE 305(e)(2) was changed in 1994 to more accurately reflect the present state of the law as governed by Supreme Court decisions on the Sixth Amendment right to counsel.⁵ Both *Finch* and *McOmber* address the United States' duty to honor the attorney client relationship during a criminal investigation. In *McOmber*, the Court of Military Appeals⁶ ruled that as soon as an investigator is on notice that a military suspect is represented by counsel in a military criminal investigation, further questioning of the suspect, without affording counsel notice and a reasonable opportunity to be present, renders a statement involuntary and inadmissible. However, suspects who themselves initiated the contact could be questioned without notice to and the presence of counsel. The *Finch* decision dramatically changed the legal landscape and brought military practice in line with federal, civilian criminal practice. What practical effect will the *Finch* decision have on criminal investigations in the military? What are the potential pitfalls for military prosecutors when advising government agents to contact⁷ a military member who is represented by counsel?

The Sixth Amendment Right to Counsel and MRE 305(e)

The Sixth Amendment right to effective assistance of counsel is triggered by the initiation of "adversarial judicial proceedings," and is guaranteed at any critical stage of a prosecution.⁸ In the federal, civilian criminal justice system, the Sixth Amendment right to counsel is triggered by

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³ *United States v. Finch*, 64 M.J. 118 (2006).

⁴ *United States v. McOmber*, 1 M.J. 380 (1976).

⁵ MANUAL FOR COURTS-MARTIAL, App. 22, M.R.E. 305(e).

⁶ In 1994, Congress renamed the Court of Military Appeals the Court of Appeals for the Armed Forces.

⁷ The words contact and re-interview are used interchangeably throughout this article. Understand that in both instances an interrogation would occur so that investigators would be required to advise the military member of their Article 31(b) and potentially Miranda/Tempia rights. The word interrogation is deliberately not used to avoid a discussion about Art. 31(b) and the 5th Amendment, as that analysis is outside the scope of this article.

⁸ *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Maine v. Moulton*, 474 U.S. 159, 171 (1985).

way of a formal charge (indictment or information) or the initial appearance, whichever occurs first.⁹ Once formal proceedings begin, police may not deliberately elicit statements from a defendant without notice to and approval of counsel or defendant's express waiver of the right to counsel. This is true even in a non-custodial setting and even when the person being questioned does not know the questioner is the police.¹⁰ In the military, criminal justice system, an accused's Sixth Amendment right to counsel is triggered when charges are preferred.¹¹ After charges are preferred the accused may not be questioned about the charged offense(s) unless counsel is present or unless the accused initiates the contact.¹² In accordance with *McOmber*, statements taken, even before prefferal of charges, by investigators with knowledge that the suspect is represented by counsel are involuntary and inadmissible. CAAF, in overturning *McOmber*, has effectively removed an extra, procedural protection for military members subject to the military justice process. The following examples illustrate just how far the *Finch* decision has withdrawn the protection of counsel to service members.

EXAMPLE 1: On 13 Oct 06, the Air Force Office of Special Investigations (AFOSI) receives a letter from the Area Defense Counsel (ADC) stating that the ADC represents SSgt Snuffy, and not to talk to SSgt Snuffy without consulting the ADC. SSgt Snuffy is not currently under investigation. Two hours later, OSI receives an allegation that SSgt Snuffy is a suspect in an aggravated assault. Since charges have not been preferred, OSI may contact SSgt Snuffy directly to talk to him about the allegation even though OSI knows that SSgt Snuffy is represented by the ADC. It is up to SSgt Snuffy to request an attorney or assert his right to remain silent (under Art. 31(b) and/or *Miranda/Tempia*).

EXAMPLE 2: On 1 Nov 06, charges are preferred against A1C Doe for use of cocaine. Agents cannot contact A1C Doe about the charged use of cocaine without first calling her ADC. However, agents could directly contact A1C Doe to talk to her about an unrelated charge of assault. Agents must comply with Art. 31(b), as usual, but it is up to A1C Doe to decide whether or not she wants to speak to OSI about the assault charge or talk to her lawyer.

EXAMPLE 3: On 3 Dec 06, 1st Lt Berry is placed in pretrial confinement. When advised under Art. 31(b) and *Miranda/Tempia*, he asks for a lawyer. While he is in pretrial confinement, OSI receives an allegation that 1st Lt Berry has also committed larceny. Government agents are barred from going to confinement and interviewing 1st Lt Berry about either the larceny or rape charge without his attorney being present. On 10 Dec 06 1st Lt Berry is released from pretrial confinement. Charges have not been preferred. OSI may interview him (under rights advisement) for the larceny, the rape, or any other offense, without first going through 1st Lt Berry's lawyer.

The examples illustrate how dramatically the *Finch* decision has changed the way government investigators can conduct criminal investigations. Prior to the decision in *Finch*, investigators would generally only get one bite at the apple when interviewing a suspect because it was

⁹ *Fellers v. U.S.*, 124 S. Ct. 1019 (2004).

¹⁰ *Michigan v. Jackson*, 475 U.S. 625 (1986).

¹¹ MANUAL FOR COURT-MARTIAL, MIL. R. EVID. 305(d)(1)(b).

¹² *United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993); *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985).

common for the suspect to seek assistance from the Area Defense Counsel shortly after an interview had occurred. The Area Defense Counsel in turn would place the government on notice that the suspect was represented by counsel using the commonly issued notice of representation letter. Now, after *Finch*, investigators are not bound by the notice of representation and may re-interview a suspect who is represented by counsel, provided charges have not been preferred.

Contacting Represented Parties and the Air Force Rules of Professional Conduct Rule 4.2¹³

Even though *Finch* has changed the rules of engagement for contact by investigators, judge advocates who advise government agents still need to be sensitive to the pre-preferred attorney-client relationship and when approaching the apple on the second bite. Criminal investigators must understand that there are ethical constraints on military attorneys that can impact the advice they give regarding interviewing represented suspects. The Air Force Rules of Professional Conduct contain a “no contact” provision. Specifically, Rule 4.2 prevents a lawyer from communicating with a person who the lawyer knows to be represented by another lawyer in the same matter.¹⁴ The purpose of Rule 4.2 is to protect the integrity of the attorney-client relationship. Federal circuits have made clear that when a government agent acts as the alter-ego of the lawyer, the “no contact” rule can reach the conduct of the agent and therefore the lawyer.¹⁵ In other words, a lawyer cannot get someone else to do what the lawyer cannot ethically do. For example, the judge advocate, who advises the local OSI detachment to conduct a re-interview of a represented accused, may have crossed the ethical line between “mere knowledge” and “active encouragement”.¹⁶ The ethical inquiry is highly fact specific and will hinge on the level of involvement between the judge advocates and the investigators. The greater the involvement the more likely the investigator becomes an agent of the judge advocate. Thus, judge advocates often counsel cautiously when an accused is represented by counsel.

Lawyers can be disbarred for ethical violations. Federal courts, at least in criminal cases, have been reluctant to suppress statements or exclude evidence because of an ethical violation, provided all other evidentiary and Constitutional requirements have been satisfied.¹⁷ That said, however, there is no guarantee that future courts will be so kind. A false step that is particularly egregious may warrant suppression, undoing a successful prosecution of a case. Where re-interviews with a member represented by counsel are of concern, judge advocates may restrict their input to avoid any ethical entanglement on the second bite.

¹³ In the federal criminal justice system the prohibition against using agents to contact represented parties can be found at 28 USC 530B (McDade Act). The Attorney Generals guidelines regarding contacting represented parties, state ethics rules and local district rules.

¹⁴ AIR FORCE RULES OF PROFESSIONAL CONDUCT Rule 4.2 (2005).

¹⁵ *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983).

¹⁶ *Miano v. AC&R Adver.*, 148 F.R.D. 68, 83 (S.D. N.Y. 1993). See also, *Holdren v. GMC*, 13 F. Supp. 2d 1192, 1195 (D.Kan. 1998).

¹⁷ *United States v. Guerrerio*, 675 F. Supp. 1430, 1433 (S.D.N.Y. 1987).

Conclusion

With one fell stroke of the pen (or keyboard), CAAF overturned *McOmber* and changed almost thirty years of standard military justice practice. By negating the protections of the notice of representation letter for an accused in the early stages of a criminal investigation, CAAF has opened new opportunities for suspect interviews and more closely aligned military practice with long standing civilian practice.

SUPREME COURT PREVIEW

A new Law Enforcement case to be decided in the October 2006 Term.

TRAFFIC STOP – 4TH AMENDMENT “SEIZURE” OF A PASSENGER

On January 19, 2007, the Supreme Court took the case of *Brendlin v. California*, 136 P.3d 845, decided by the California Supreme Court on June 29, 2006.

When police stop a car for a traffic offense, is a passenger in the car “seized” under the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop on a motion to suppress evidence seized from the vehicle?

Click [HERE](#) for the California Supreme Court’s Opinion.

CIRCUIT COURTS OF APPEALS CASE SUMMARIES

5th CIRCUIT

U.S. v. Finley, 2007 U.S. App. LEXIS 1806, January 26, 2007

The permissible scope of a search incident to lawful arrest includes looking for and seizing evidence of the arrestee’s crime on his person to preserve it for trial, and this extends to containers found on the arrestee’s person. Specifically, searching the cell phone logs and both the out-going and in-coming text messages was lawfully done as part of a search incident to arrest.

Click [HERE](#) for the court’s opinion.

6th CIRCUIT

U.S. v. Williams, 2007 U.S. App. LEXIS 905, January 9, 2007

The public safety exception to *Miranda* applies when officers have a reasonable belief based on articulable facts that they are in danger. An officer must, at minimum, have reason to believe (1) that the defendant might have, or recently has had, a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it.

There can be no other context-specific evidence that rebuts that reasonable belief. Indications that the officers may have acted pretextually might rebut the presumption that the public safety exception should apply.

Click [HERE](#) for the court's opinion.

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7th CIRCUIT

U.S. v. Wilburn, 2007 U.S. App. LEXIS 513, January 11, 2007

Police may not remove a potentially objecting tenant in order to avoid a refusal when obtaining valid consent to search the apartment from a co-tenant. Absent other, additional evidence, legitimately arresting the defendant and placing him in the patrol vehicle is not purposefully removing him to avoid a refusal.

Click [HERE](#) for the court's opinion.

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8th CIRCUIT

U.S. v. Herrera-Gonzalez, 2007 U.S. App. LEXIS 1737, January 26, 2007

A traffic stop is reasonable under the Fourth Amendment if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. Even if the officer was mistaken in concluding that a traffic violation occurred, the stop does not violate the Fourth Amendment if the mistake was an “objectively reasonable” one.

Even if a traffic stop is determined to be invalid, subsequent voluntary consent to a search may purge the taint of the illegal stop if it was given in circumstances that render it an independent, lawful cause of the officer's discovery. To determine whether sufficient attenuation between the unlawful stop and the consent exists, consider the following factors: (1) the amount of time between the illegal stop and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

Click [HERE](#) for the court's opinion.

9th CIRCUIT

U.S. v. Crapser, 472 F.3d 1141, January 10, 2007

Looking at this issue for the first time, the Court decides:

When a suspect voluntarily opens the door of his residence in response to a non-coercive “knock and talk” request, the police may temporarily seize the suspect outside the home (or at the threshold) provided that they have reasonable suspicion of criminal activity. However, *Terry* does not apply *inside* a home.

Click [HERE](#) for the court’s opinion.

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U.S. v. Ressam, 2007 U.S. App. LEXIS 867, January 16, 2007

Looking at this issue for the first time, the Court decides:

18 U.S.C. § 844(h)(2) makes it a crime to carry an explosive “during the commission of any felony.” The government must demonstrate that the explosives “facilitated or played a role in the crime” and, therefore, “aided the commission of the underlying felony in some way.”

The 3rd and 5th Circuits disagree, saying that the government need only prove that explosives were carried during a felony offense. (cites omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Ramirez, 2007 U.S. App. LEXIS 869, January 16, 2007

The “collective knowledge doctrine” applies so that when an officer (or team of officers), with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest, that other officer may do so without violating the Fourth Amendment. When one officer directs another to take some action, there is necessarily a “communication” between those officers, and they are necessarily functioning as a team. The “collective knowledge doctrine” includes no requirement regarding the *content* of the communication that one officer must make to another.

The 3rd, 5th, and 7th Circuits agree. (cites omitted).

Click [HERE](#) for the court’s opinion.

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Fisher v. City of San Jose, 2007 U.S. App. LEXIS 860, January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

Click [HERE](#) for the court's opinion.

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U.S. v. Hector, 2007 U.S. App. LEXIS 1641, January 25, 2007

Overruling its prior decisions, the court decides:

The purpose (under F.R.Cr.P. 41(d)) of handing the occupant the warrant, like that of the “knock and announce” rule, is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate.

Failure to serve a copy of the warrant, even if a violation of the Fourth Amendment, does not trigger the exclusionary rule. Given that a valid search warrant entitles the officers to retrieve evidence in the residence, resort to the massive remedy of suppressing evidence of guilt is unjustified.

Click [HERE](#) for the court's opinion.

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10th CIRCUIT

U.S. v. Guerrero, 472 F.3d 784, January 2, 2007

If officers merely examine an individual's driver's license, a detention has not taken place. When officers retain a driver's license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants' papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver's documentation may not end the detention if there is evidence of a coercive show of authority, such as the

presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled.

A defendant's consent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

Click [HERE](#) for the court's opinion.

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U.S. v. Shaffer, 472 F.3d 1219, January 3, 2007

18 U.S.C. § 2252A(a)(2) makes it a crime to distribute child pornography. The statute fails to define the term "distribute." Placing child porn images in a "shared folder," freely allowing others access to the images through a peer-to-peer file sharing program, and openly inviting them to take or download the items is "distribution" under the statute. The statute does not require that a defendant actively transfer the images to others.

Click [HERE](#) for the court's opinion.