# "I Really Didn't Say Everything I Said":[1] Recent Developments in Self-Incrimination Law

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## Introduction

Unlike 2004, a year in which the Supreme Court decided five cases in the area of self-incrimination law,[2] 2005 was relatively uneventful. Although the Supreme Court originally set expectations high when it granted certiorari in *Maryland v. Blake*,[3] the Court dashed those hopes following oral argument by simply dismissing the writ of certiorari as "improvidently granted."[4]

Military appellate courts likewise saw little need to address the area self-incrimination law last year. Although the military courts established no new legal precedent, this article reviews two relevant cases in which the military courts applied the basic principles of self-incrimination law: *United States v. Bresnahan*,[5] in which the Court of Appeals for the Armed Forces (CAAF) applied the voluntariness doctrine,[6] and *United States v. Rittenhouse*,[7] in which the Army Court of Criminal Appeals (ACCA) determined the effect of an ambiguous invocation of the right to remain silent. Finally, the article discusses *United States v. Finch*,[8] a case in which the Court of Appeals for the Armed Forces (CAAF) granted review[9] of an issue of utmost importance to the military practitioner—whether there is a notification to counsel requirement for all military interrogations.

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[1] Yogi Berra, YOGI-isms & Casey Stengel, http://www.dennisweb.com/steve/quotyogi.htm (last visited Apr. 3, 2006).

[2] *See* Major Christopher T. Fredrikson, *What's Done is Done: Recent Developments in Self-Incrimination Law*, ARMY LAW., May 2005, at 19 (providing a general overview of these five cases).

[3] 125 S. Ct. 1823 (2005). The facts of the case are as follows: At 0500, 25 October 2002, police arrested the respondent (a seventeen-year-old male) at his home and transported him to the police station. At 0511, the lead investigator, Detective William Johns, advised the respondent of his *Miranda* rights. *See* Blake v. Maryland, 849 A.2d 410, 412 (Md. 2004). The respondent invoked his right to counsel and was placed in a holding cell, wearing only boxer shorts and a t-shirt. At 0600, in accordance with a state rule requiring service of a copy of a warrant and charging document promptly after arrest, Detective Johns, accompanied by uniformed Officer Curtis Reese, went to the respondent's cell and served him with a copy of the arrest warrant and a computer printout listing the charges. The statement of charges included a charge of first degree murder with the misstated penalty of "DEATH" written in all capital letters. (Death is not a legal punishment for a minor in Maryland.) *Id.* at 413. As Detective Johns turned to leave the cell, Officer Reese said "I bet you want to talk now, huh!" in a loud and confrontational voice. *Id.* Surprised by this unexpected outburst and concerned about violating the respondent's right to counsel, Detective Johns ushered Officer Reese out of the cell, saying very loudly within the respondent's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." *Id.* At 0628, Detective Johns returned to the respondent's cell to give him clothing that another police officer had brought to the station. As Detective Johns handed the respondent his clothes, the respondent asked, "I can still talk to you?" *Id.* Detective Johns responded, "Are you saying that you want to talk to me now?" *Id.* The respondent replied "yes." *Id.* Detective Johns took the respondent back to the intake room and re-advised him of his *Miranda* rights. The respondent waived his rights and provided a statement. After making a statement to Detective Johns, the respondent agreed to take a polygraph test. At 0915, a polygraph test was administered after the respondent was again advised of his *Miranda* rights. The respondent made additional statements. The trial court suppressed the respondent's statements because they resulted from an unlawful police-initiated interrogation in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that once a suspect invokes his right to counsel, the government cannot interrogate the suspect further unless counsel is present or the suspect initiates further communication with police. The state filed an interlocutory appeal and the Court of Special Appeals (Maryland) reversed the trial court's suppression order. *Id.* at 412. The respondent appealed to the Court of Appeals of Maryland, which agreed with the trial court, holding that the respondent did not initiate further conversation with the police; rather, his question "I can still talk to you?" was in direct response to Officer Reese's unlawful interrogation. *Id.* at 422. The United States Supreme Court granted certiorari on the following issue: When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police? Supreme Court of the United States, Granted & Noted List, October Term 2005, http://www.supremecourtus.gov/orders/05grantednotedlist.html (last visited Apr. 3, 2006)

[4] Maryland v. Blake, 126 S. Ct. 602 (2005). The Supreme Court gave no rationale for its decision. The Court simply stated: "The writ of certiorari is dismissed as improvidently granted." *Id.*

[5] 62 M.J. 137 (2005).

[6] *See infra* note 10.

[7] 62 M.J. 509 (Army Ct. Crim. App. 2005).

[8] No. 200000056, 2005 CCA LEXIS 77 (N-M. Ct. Crim. App. Mar. 10, 2005) (unpublished), *review granted*, 2005 CAAF LEXIS 1345 (Nov. 14, 2005).

[9] *See* United States v. Finch, 2005 CAAF LEXIS 1345 (2005).

## The Voluntariness Doctrine: *United States v. Bresnahan*

The concept of voluntariness includes elements of the common law voluntariness doctrine, due process, and Article 31, Uniform Code of Military Justice (UCMJ).[10] Even if *Miranda*[11] or Article 31(b)[12] are *not* at issue, to be valid and admissible, a confession must be voluntary—the product of an essentially free and unconstrained choice by its maker.[13] In other words, a coerced confession must be suppressed even though the accused received proper rights warnings and executed a rights waiver.[14] When examining the voluntariness of a confession, it is necessary to look at the totality of the circumstances to determine whether an accused's will was overborne.[15] In assessing the totality of the circumstances, the CAAF will look to factors such as: "the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[16] Last year, the CAAF applied this totality of the circumstances analysis in *United States v. Bresnahan*,[17] holding that the statements made by the appellant in that case were voluntary.[18]

In *Bresnahan*, the appellant, Specialist (SPC) Bresnahan, and his wife, Kristen, were awakened at approximately 0430 by the crying of their three-month-old infant son, Austin.[19] "Kristen got Austin from his crib and brought him back to their bed to feed him."[20] After she finished feeding Austin, she burped him, and handed him to SPC Bresnahan.[21] When SPC Bresnahan returned Austin to his crib, he again began crying, so SPC Bresnahan tried to "soothe him" by bouncing and shaking him.[22] Shortly thereafter, SPC Bresnahan "said he laid Austin down, heard some gurgling sounds, and saw Austin vomit and then become gray."[23] Specialist Bresnahan told Kristin to call 911 and then administered cardiopulmonary resuscitation to Austin until the paramedics arrived.[24] The paramedics arrived at approximately 0515 and rushed Austin to the local civilian hospital.[25]

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[10] UCMJ art. 31(d) (2005). Article 31 (d) specifically addresses the voluntariness of statements::

> No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

*Id.*

The Analysis to Military Rule of Evidence (MRE) 304(c)(2) lists examples of involuntary statements as those resulting from the following acts of coercion, unlawful influence, and unlawful inducement: infliction of bodily harm, which includes "questioning accompanied by deprivation of food, sleep, or adequate clothing;" threats of bodily harm; confinement or deprivation of privileges or necessities because a statement was not made; promises of immunity or clemency; and promises of reward or benefit, or threats of disadvantage. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c)(2) analysis, at A22-10 to A22-11 [hereinafter MCM]. For a detailed historic account of the voluntariness doctrine, see Captain Frederic I. Lederer, *The Law of Confessions: The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976).

[11] Miranda v. Arizona, 384 U.S. 436 (1966). The Court held that in a custodial environment, police interrogations are inherently coercive; therefore police must give a suspect certain warnings concerning self-incrimination. *Id.*

[12] UCMJ art. 31(b). Article 31 (b) states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense or which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

*Id.*

[13] United States v. Bubonics, 45 M.J. 93 (1996).

[14] *Id*.

[15] *Id.* at 95.

[16] United States v. Ellis, 57 M.J. 375, 379 (2002).

[17] United States v. Bresnahan, 62 M.J. 137 (2005).

[18] *Id.*

[19] United States v. Bresnahan, No. ARMY 20010304, slip op. at *5 (Army Ct. Crim. App. June 4, 2004) (unpublished), *aff'd* 62 M.J. 137 (2005).

[20] *Bresnahan*, 62 M.J. at 139.

[21] *Bresnahan*, No. ARMY 20010304, at *6.

[22] *Id*.

[23] *Bresnahan*, 62 M.J. at 140.

[24] *Id.* at 139.

[25] *Bresnahan*, No. 20010304, at *5.

At the hospital, a computed tomography (CT) scan revealed injuries to Austin's brain, which the treating physician believed to have been caused by someone shaking the infant.[26] Hospital officials promptly notified the local police department that Austin suffered from nonaccidental head trauma and, before any physicians talked to SPC Bresnahan about his son's condition, a detective arrived at the hospital.[27] In a quiet room outside the intensive care unit, without giving any *Miranda* warnings,[28] the detective questioned SPC Bresnahan about Austin's injuries.[29]

Specialist Bresnahan told the detective that he had simply laid Austin down and Austin began choking on his formula.[30] Responding with incredulity, the detective informed SPC Bresnahan that Austin suffered from very serious brain injuries that were so severe that he might not survive.[31] She insisted that "Austin was either shaken or struck on his head"[32] and pressed for further information by telling SPC Bresnahan that the doctor needed to know what had happened in order to help his son.[33] Specialist Bresnahan then admitted that he may have shaken his son a couple of times.[34] Following this admission, the detective "demonstrated what she believed to be the classic shaken-baby syndrome maneuver,"[35] and SPC Bresnahan conceded he may have shaken Austin a couple times in the same manner.[36]

Upon the detective's request, SPC Bresnahan voluntarily left the hospital and accompanied the detective to the police station for further questioning.[37] At the police station, a "virtual tug-of-war ensued"[38] with the detective trying to get SPC Bresnahan to admit to shaking the baby and SPC Bresnahan trying to maintain that he, at most, bounced his son in an attempt to stop his crying.[39] At one point, SPC Bresnahan advised the detective that "he may have killed his son."[40] Later, SPC Bresnahan again admitted that "he may have shaken Austin."[41] After approximately forty-five minutes of questioning, the detective took SPC Bresnahan back to the hospital. At the hospital, SPC Bresnahan told a doctor that he may have shaken his son "some, a little harder than he should"[42] and that "when he put Austin down, he heard some gurgling sounds, and saw Austin vomit and become gray."[43]

Specialist Bresnahan was subsequently convicted at a general court-martial of involuntary manslaughter and sentenced to six years confinement and a dishonorable discharge.[44] Among other things, the CAAF granted review to determine whether SPC Bresnahan's admissions were voluntary.[45]

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[26] *Bresnahan*, 62 M.J. at 139.

[27] *Bresnahan*, No. 20010304, at *5.

[28] Article 31(b) warnings were not required because this was strictly a civilian investigation. *See* UCMJ art. 31(b) (2005). Also note that *Miranda* warnings were never given because SPC Bresnahan was never subjected to a custodial interrogation. *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also supra* note 11.

[29] *Bresnahan*, 62 M.J. at 139-140.

[30] *Bresnahan*, No. 20010304, at *6.

[31] *Bresnahan*, 62 M.J. at 140.

[32] *Bresnahan*, No. 20010304, at *6.

[33] *Bresnahan*, 62 M.J. at 140.

[34] *Id*.

[35] *Bresnahan*, No. 20010304, at *6.

[36] *Id*.

[37] *Bresnahan*, 62 M.J. at 140. Although SPC Bresnahan was questioned at the police station, the interrogation did not amount to a "custodial interrogation." Therefore, *Miranda* warnings were not required. *See supra* note 11.

[38] *Bresnahan*, 62 M.J. at 140.

[39] *Id*.

[40] *Id.*

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Bresnahan*, No. 20010304, at *6.

[45] *Bresnahan*, 62 M.J. at 139. The CAAF also granted review to determine the following: whether the military judge erred by denying a defense request for expert assistance; whether the military judge's erroneous admission of alleged prior uncharged misconduct was harmless; and whether the military judge erred by admitting "profile" evidence. *Id*.

In examining the voluntariness of SPC Bresnahan's admissions, the CAAF conducted a *de novo* review and looked to the "totality of the circumstances to determine whether the confession [was] the product of an essentially free and unconstrained choice by its maker."[46] The CAAF acknowledged that SPC Bresnahan "found himself in a stressful situation on the morning of his son's death"[47]—his son was in a critical condition and a police detective was pressuring him to confess by emphasizing that the doctor needed to know what had happened in order to save his son's life.[48] Nevertheless, the CAAF found under the totality of the circumstances that SPC Bresnahan's statements were voluntary.[49]

The CAAF first looked at the mental condition of SPC Bresnahan, noting that SPC Bresnahan, a twenty-two-year-old Army specialist with over five years in the service, demonstrated no mental deficiency or low intelligence.[50] The court then turned to the character of detention, finding that SPC Bresnahan was never in custody, cooperated freely during the questioning, and voluntarily went to the police station.[51] Finally, the court considered the manner of the interrogation, including whether the detective used "threats, promises, or deceptions."[52] The detective, who was neither confrontational nor intimidating, did not threaten, injure, detain, or question SPC Bresnahan for a prolonged amount of time.[53] The court acknowledged that the detective may have exploited SPC Bresnahan's "emotional ties" to Austin by emphasizing that the doctors needed to know what happened in order to save Austin's life.[54] Since these statements painted an "accurate picture of what was happening to Austin,"[55] however, the CAAF found that the mere existence of a causal connection between such exploitation and the making of the statement did not transform SPC Bresnahan's otherwise voluntary confession into an involuntary one.[56]

Therefore, based on the totality of the circumstances, the CAAF held that SPC Bresnahan's confession was voluntary.[57]

### The Effect of an Ambiguous Invocation of the Right to Remain Silent: *United States v. Rittenhouse*[58]

If a suspect invokes his rights under Article 31(b) or *Miranda*, the interrogation must stop immediately.[59] If the suspect invokes his right to remain silent, the suspect is only entitled to a "temporary respite" from questioning, which the government must scrupulously honor.[60] If the suspect invokes his right to counsel in response to a *Miranda* warning, the government cannot interrogate the suspect further "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[61]

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[46] *Id.* at 141 (quoting United States v. Bubonics, 45 M.J. 93, 95 (1996)).

[47] *Id*.

[48] *Id*.

[49] *Id*. at 142.

[50] *Id*. at 141.

[51] *Id*.

[52] *Id*. at 142.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] 62 M.J. 509 (Army Ct Crim. App. 2005).

[59] MCM, *supra* note 10, MIL. R. EVID. 305(f)(1).

[60] Michigan v. Mosely, 423 U.S. 96 (1975). *Mosely* is considered the seminal case in this area of criminal law. In *Mosley*, the defendant exercised his right to remain silent after a police officer advised the defendant of his *Miranda* rights. *Id.* at 97. "The police officer immediately ceased the interrogation . . . and the defendant was then taken to a cell." *Id.* at 96. Several hours later, another police officer took the defendant to a different part of the building and, after advising him of his *Miranda* rights, questioned him concerning an unrelated offense. The defendant made an incriminating statement. The Court found that admission in evidence of defendant's incriminating statement did not violate *Miranda* principles. *Id.* at 97. *See also* United States v. Watkins, 34 M.J. 344 (C.M.A. 1992). In *Watkins*, the suspect invoked his right to remain silent, but did not request a lawyer. The questioning ceased and the suspect was allowed to leave the investigator's office. Later that evening, the investigator went to the suspect's military quarters to re-interview the suspect. *Id.* at 345. The investigator reminded Watkins of the earlier rights warning. The court found the investigator to have "scrupulously honored" the suspect's assertion of his right to remain silent. *Id.* at 346-47.

[61] Edwards v. Arizona, 451 U.S. 477 (1981); *see also* United States v. Harris, 19 M.J. 331 (C.M.A. 1985) (applying *Edwards* to military interrogations).

The law is quite clear that once a suspect initially waives his Article 31(b) or *Miranda* rights, only an unambiguous request for counsel will constitute an "invocation" and interrogators are not required to stop questioning to clarify an ambiguous request for counsel.[62] The legal effect of a suspect's ambiguous request to remain silent, however, evidently needed further clarification. The ACCA provided that clarification in *United States v. Rittenhouse*—holding that interrogators need not stop questioning a suspect upon an ambiguous invocation of the right to remain silent.[63]

Sergeant (SGT) Rittenhouse was charged with three violations of Article 134, UCMJ, including two specifications alleging conduct in violation of the Child Pornography Prevention Act[64] and one specification alleging conduct prejudicial to good order and discipline or service discrediting by possessing "visual depictions of minors engaging in sexually explicit conduct."[65] The government appealed "the military judge's decision to suppress evidence seized from SGT Rittenhouse's (appellee's) barracks room and to suppress oral statements and a portion of the written statement made by appellee to law enforcement officials."[66]

After receiving a report that another Soldier had seen sexually explicit pictures of children on SGT Rittenhouse's computer, the U.S. Army Criminal Investigation Command (CID) contacted SGT Rittenhouse's unit to have him report to the local CID office.[67] At the CID office, Special Agent (SA) Kristie Cathers informed SGT Rittenhouse, who the government concedes was in custody, that he was suspected of possessing child pornography. Agent Cathers also read SGT Rittenhouse his rights under Article 31, UCMJ, and *Miranda*.[68] Sergeant Rittenhouse waived his rights and agreed to make a statement without the presence of a lawyer.[69] He also signed a consent to search form, which allowed investigators to search his barracks room.[70] While other CID agents searched SGT Rittenhouse's room, SA Cathers continued interviewing SGT Rittenhouse.[71] Approximately an hour and a half into the interview, SA Cathers provided SGT Rittenhouse with a blank sworn statement form and asked him to write down what they had discussed and not to "close out" the statement since they would continue with a question-and-answer session following his written narrative.[72] Agent Cathers then left the room. When she returned, SA Cathers read SGT Rittenhouse's statement and noticed "he had written 'End of Statement' at the end of his narrative."[73] Assuming that SGT Rittenhouse "was a squared away-away NCO," who automatically wrote "End of Statement" at the end of all sworn statements, SA Cathers did not seek clarification.[74] Instead, SA Cathers lined through the words "End of Statement," directed SGT Rittenhouse to initial next to the crossed out language, and continued the interview by recording her questions and SGT Rittenhouse's answers on the remainder of the form.[75]

In addition to other motions to suppress, the defense moved to suppress all statements SGT Rittenhouse made after he allegedly invoked his right to silence by writing "End of Statement" at the end of his narrative.[76] "The military judge held that so much of [SGT Rittenhouse's] statement that preceded the words 'End of Statement' was admissible. However, she further held "that writing 'End of Statement' was an ambiguous or equivocal invocation of the right to remain silent."[77] The military judge found that SA Cathers was required to stop questioning or clarify what SGT Rittenhouse meant by writing

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[62] Davis v. United States, 512 U.S. 452 (1994).

[63] *Rittenhouse*, 62 M.J. at 512.

[64] 18 U.S.C.S. § 2252A (LEXIS 2006).

[65] *Rittenhouse*, 62 M.J. at 509-10.

[66] *Id.* at 509.

[67] *Id*. at 510.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] *Id*. at 510-11.

[76] *Id*. at 510.

[77] *Id*. at 511.

"End of Statement"[78] before continuing the interrogation. The military judge held that any statements (oral or written) following the words "End of Statement" were inadmissible.[79]

The government appealed the military judge's decision under Article 62, UCMJ,[80] and ACCA vacated the military judge's rulings.[81] The ACCA agreed with the military judge's findings that writing "End of Statement" amounted to an ambiguous or equivocal invocation of the right to remain silent.[82] Nevertheless, the court disagreed with the military judge on the legal effect of SGT Rittenhouse's equivocal invocation.[83] The court noted that in *Davis v. United States*,[84] the Supreme Court held that following a knowing and voluntary waiver, the requirement for law enforcement to cease interrogating a suspect (i.e., the *Edwards* Bar[85]) is not triggered until and unless the suspect *clearly* requests an attorney.[86] Therefore, law enforcement need not clarify ambiguous requests for counsel.[87] Acknowledging that *Davis* involved an ambiguous invocation of the right to counsel, rather than the right to remain silent, ACCA noted that CAAF has also held that "[o]nce a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence."[88] Following these decisions, the ACCA held "that, after a suspect has waived his right to remain silent, if he subsequently makes an ambiguous or equivocal invocation of his right to remain silent, law enforcement agents have no duty to clarify the suspect's intent and may continue with questioning."[89] Accordingly, the ACCA found that SA Cathers had no duty to clarify what SGT Rittenhouse meant when he wrote "End of Statement" and, thus, vacated the military judge's ruling to suppress SGT Rittenhouse's statements.[90]

## Will the *McOmber*[91] Rule Stand?

Thirty years ago, in *United States v. McOmber*, the United States Court of Military Appeals announced a notification to counsel rule requiring an investigator to afford a suspect's counsel reasonable opportunity to be present during any questioning of the suspect.[92] The court held that a statement taken in violation of this prophylactic rule is involuntary under Article 31(b), UCMJ.[93] In 1980, the President of the United States adopted the *McOmber* Rule when he promulgated Military Rule of Evidence (MRE) 305, Notice to Counsel.[94] However, in response to Supreme Court cases distinguishing the right to counsel rules under the Fifth and Sixth Amendments, the President eliminated the notification requirement from MRE 305 in 1994.[95] Nevertheless, over a decade later, the viability of the *McOmber* Rule remains uncertain, because the CAAF has never specifically overruled its holding.

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[78] *Id*.

[79] *Id*.

[80] UCMJ art. 62 (2005).

[81] *Rittenhouse*, 62 M.J. at 512.

[82] *Id*. at 511.

[83] *Id*. at 512.

[84] 512 U.S. 452, 462 (1994).

[85] Edwards v. Arizona, 451 U.S. 477 (1981) (holding that if the suspect invokes his right to counsel in response to a *Miranda* warning, the government cannot interrogate the suspect further "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

[86] 62 M.J. at 512. (citing *Davis*, 512 U.S. at 462).

[87] *Id*.

[88] *Id*. (quoting United States v. Lincoln, 42 M.J. 315, 320 (1995)).

[89] *Id*.

[90] *Id*.

[91] United States v. McOmber, 1 M.J. 380 (C.M.A. 1976).

[92] *Id*.

[93] *Id*.

[94] *See* MCM, *supra* note 10, MIL. R. EVID. 305(e) analysis, at A22-15 (stating that rule 305(e) "is taken from United States v. McOmber, 1 M.J. 380 (C.M.A. 1976)").

[95] *See id.*

> *1994 Amendment:* Subdivision (e) [of Mil R. Evid. 305] was amended to conform military practice with the Supreme Court's decisions in Minnick v. Mississippi, 498 U.S. 146 (1990), and McNeil v. Wisconsin, 501 U.S. 171 (1991). Subdivision (e) was

Does *McOmber* still stand or has it been broken? This term, the CAAF should issue a final determination in *United States v. Finch*,[96] a case the court granted review to determine, among other things, the continued validity of the prophylactic notification to counsel rule it set forth almost thirty years ago.[97]

Staff Sergeant (SSgt) James Finch, a recruiter in the United States Marine Corps, was under orders to have no further contact with Jennifer Keely, a recruit awaiting entry on active duty under the Delayed Entry Program.[98] Against orders, SSgt Finch met with the recruit.[99] After socializing and drinking alcohol for approximately three hours, SSgt Finch and Ms. Keely drove to a nearby lake where they drank more alcohol.[100] Although it is unclear who was driving the car when they left the lake, Keely's car hit a tree and she was killed instantly. Staff Sergeant Finch was tried by a general court-martial and convicted of "conspiracy, failure to obey a general order, failure to obey a lawful order, making a false official statement, and being drunk on duty, in violation of Articles 81, 92, 107, and 112, Uniform Code Of Military Justice, §§ 881, 892, 907, and 912. [Staff Sergeant Finch] was acquitted of involuntary manslaughter."[101]

Staff Sergeant Finch appealed his conviction to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). In one of SSgt Finch's eight assignments of error, "he contends that the military judge erred in failing to suppress involuntary statements made by [SSgt Finch] in violation of his right to counsel."[102]

As part of the military investigation,[103] which was separate from a local police investigation, SSgt Finch was ordered to meet with an investigating officer from the regional recruiting station.[104] The investigating officer properly advised SSgt Finch of his rights under both Article 31(b) and *Miranda* and obtained a valid waiver of those rights.[105] The investigating officer, however, never notified SSgt Finch's civilian defense counsel of the interview.[106]

Although SSgt Finch never told the investigating officer that he had retained counsel, prior to the interview, a police detective informed the investigating officer that SSgt Finch "had retained a 'hot shot lawyer.'"[107] The defense asserted that the investigating officer's "failure to notify his civilian defense counsel renders his statements involuntary by the rule set forth in *United States v. McOmber*."[108] The military judge denied the suppression motion, finding that although the investigating officer knew SSgt Finch was represented by civilian defense counsel, he had "voluntarily waived his right to have his attorney present."[109] The military judge also found that SSgt Finch was not in custody during the interview; therefore, the *Miranda* right to counsel had not been triggered.[110]

In a cursory portion of an unpublished opinion, the NMCCA affirmed the military judge's findings on the suppression motion.[111] The NMCCA acknowledged the conflict between the current MRE 305(e) and the notification to counsel

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> divided into two subparagraphs to distinguish between the right to counsel rules under the Fifth and Sixth Amendments and to make reference to the new waiver provisions. . . .

*Id.*

[96] United States v. Finch, No. 200000056, 2005 CCA LEXIS 77 (N-M Ct. Crim. App. Mar. 10, 2005) (unpublished), *review granted*, 2005 CAAF LEXIS 1345 (Nov. 14, 2005).

[97] *See Finch*, 2005 CAAF LEXIS 1345.

[98] *Finch*, 2005 CCA LEXIS 77, at *2.

[99] *Id.* at *2-3.

[100] *Id*. at *4.

[101] *Id.* at *1.

[102] *Id*. at *24.

[103] The command conducted a JAGMAN Investigation. *See* U.S. DEP'T OF NAVY, JAG INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (15 Mar. 2004).

[104] *Finch*, 2005 CCA LEXIS 77, at *24.

[105] *Id.* at *29.

[106] *Id.* at *25.

[107] *Id.* at *24.

[108] *Id.* at *24 (citing United States v. McOmber, 1 M.J. 380 (C.M.A. 1976)).

[109] *Id.* at *26.

[110] *Id.* at *27.

[111] *See id.* at *29.

requirement set forth in *McOmber*.[112] Then, without any further analysis on *McOmber*, albeit citing numerous cases,[113] the NMCCA sidestepped the *McOmber* issue and found that "[e]ven assuming the continuing validity of *McOmber*, . . . the military judge could have properly concluded that [SSgt Finch] knowingly and voluntarily waived his right to have counsel present."[114] To determine the overall voluntariness of the statements, the NMCCA assessed the totality of the circumstances surrounding SSgt Finch's statement, rather than analyze the statements under *McOmber* and its progeny.[115] The court found that the statements were voluntarily made and that "[t]he absence of custody dictates that [SSgt Finch's] right to counsel under MRE 305(e)(1) was not violated."[116]

Is an investigator required to notify a suspect's counsel before interviewing that suspect? Congress, through Article 31, imposes no such requirement. The President, through the MRE, imposes no such requirement. The Supreme Court, through caselaw, even frowns on such a requirement.[117] Will the CAAF continue to impose such a requirement? In *Finch*, the court will have the opportunity to finally rule on this issue.[118]

## Conclusion

The 2005 term for the military courts was an uneventful year in the area of self-incrimination. The *Bresnahan* court simply applied the well-established totality of the circumstances test to determine that statements were voluntarily made. The *Rittenhouse* court took well-established law regarding the legal effect of an ambiguous invocation of the right to counsel and applied it to an ambiguous invocation of the right to remain silent. Although military practitioners won't glean anything new from these cases, they should look forward to the CAAF's ruling in *United States v. Finch* in which the CAAF should finally settle the issue of whether an investigator is required to notify a suspect's counsel before interviewing a suspect who has waived his right to the presence of that counsel.

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[112] *See id.* at *25 (stating that "We note that 'there is some question as to whether *McOmber* continues to properly state the law owing to subsequent case law developments and changes to Mil. R. Evid. 305(e).'") (quoting United States v. Allen, 54 M.J. 854, 857 (A.F. Ct. Crim. App. 2001))).

[113] *See id.* at *27 (citing United States v. Payne, 47 M.J. 37, 44 (1997); United States v. LeMasters, 39 M.J. 490, 492 (C.M.A. 1994); United States v. Courney, 11 M.J. 594, 596 (A.F.C.M.R. 1981)).

[114] *Id.* at *27.

[115] *Id.* at *28.

[116] *Id.* at *29.

[117] *See* McNeil v. Wisconsin, 501 U.S. 171, 180-182 (1991).

[118] *See* United States v. Finch, 2005 CAAF LEXIS 1345 (2005) (granting review on the issue of "[w]hether the military judge erred to the substantial prejudice of the appellant when he failed to suppress appellant's statement in accordance with this court's ruling in *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), and the Fifth Amendment to the United States Constitution").