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MILITARY LAW REVIEW

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"SO YOU'RE TELLING ME THERE'S A CHANCE"[1]: WHY CONGRESS SHOULD SEIZE THE OPPORTUNITY TO REFORM ARTICLE 37 (UCI) OF THE UCMJ

Colonel John Loran Kiel, Jr.[*]

In the past year and a half, the Court of Appeals for the Armed Forces (CAAF) has created a lot of tumult with respect to the way it adjudicates unlawful command influence (UCI) claims. In the Spring of 2017, CAAF decided *United States v. Boyce*[2], which abolished the longstanding requirement to find prejudice to the accused in claims involving the appearance of UCI.[3] Sixteen months later, the court held in *United States v. Barry*[4], that intent was no longer required to unlawfully influence, by unauthorized means, the action of a convening authority in claims

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[1] DUMB AND DUMBER (New Line Cinema 1994).

[*] Judge Advocate, U.S. Army. Presently assigned as the Kenneth J. Hodson Chair of the Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. LL.M., 2008, The Judge Advocate General's School, Charlottesville, Virginia; J.D., 1999, The Florida State University College of Law, Tallahassee, Florida; B.A., 1996, Brigham Young University, Provo, Utah. Previous assignments include Deputy Staff Judge Advocate, I Corps & Joint Base Lewis-McChord, Washington, 2015-2017; Chief, Policy Branch, Criminal Law Division, Office of The Judge Advocate General, Washington, D.C., 2013-2015; Deputy Staff Judge Advocate, 7th Army Joint Multinational Training Command, Grafenwoehr, Germany, 2011-2013; Brigade Judge Advocate, 1st and 3rd Brigade Combat Teams, 82nd Airborne Division, Fort Bragg, North Carolina, 2008-2010; Assistant Professor of Law, United States Military Academy, West Point, New York, 2005-2007; Trial Defense Counsel, U.S. Army Trial Defense Service, Vilseck, Germany, 2003-2005; Operational Law Attorney, Senior Trial Counsel, Trial Counsel, and Tort Claims Attorney, XVIII Airborne Corps, Fort Bragg, North Carolina, 1999-2003. Member of the Florida Bar.

[2] 76 M.J. 242 (C.A.A.F. 2017).

[3] *Id*.

[4] 78 M.J. 70 (C.A.A.F. 2018).

involving actual UCI.[5] The *Barry* decision also dismantled the mantle of command authority doctrine reinforced by nearly seven decades of precedent, relegating it instead as a factor lower courts may simply choose to consider in future cases.[6]

With all of the upheaval and uncertainty the court has created, is there any wonder why Congress has become increasingly interested in UCI cases? The *Barry* and *Boyce* decisions provide impetus to congressional curiosity, as both were sexual assault cases—one originating out of the Navy, the other out of the Air Force. In both cases, Barry and Boyce's victims testified at the court-martial and subjected themselves to cross-examination, both were found credible by their respective fact-finders, and both had to watch their attacker's convictions vanish due to allegations of UCI. In addition to these two cases, CAAF overturned another rape conviction earlier this year in *United States v. Riesbeck*[7], when it found that the convening authority attempted to stack a court-martial panel in order to obtain more favorable results in sexual assault cases.[8]

Setting *Riesbeck* aside for another day, this article will examine in depth the *Barry* and *Boyce* decisions to illustrate why Congress should amend Article 37 of the Uniform Code of Military Justice (UCMJ)[9]. First, the article will profile the court's decision in *Barry* and the case law contradictions it has created regarding intent in actual UCI claims. Next, the article will discuss the mantle of command authority and how this significant precept had been a major factor in UCI claims prior to the *Barry* decision. The article will then explore how *Boyce* generated even more confusion, this time regarding the requirement to show prejudice to the accused in apparent UCI claims. The article concludes with proposed revisions to Article 37 that specifically address these concerns and it proposes two statutory inclusions that would permit superior convening authorities to mentor subordinate convening authorities and if necessary, withhold the authority to dispose of certain offenses in individual cases without committing UCI. In sum, Congress should seize the opportunity to clarify what constitutes UCI and subdue a lot of the turmoil CAAF has created since it decided *Boyce* nearly a year and a half ago.

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[5] *Id*.
[6] *Id*. at 76.
[7] 77 M.J. 154 (C.A.A.F. 2018).
[8] *Id*.
[9] 10 U.S.C. 837 (2018).

I. United States v. Barry

For the sake of brevity, the author will not rehash the entire procedural history of this complex case but will refer the reader to his article titled "They Came in Like a Wrecking Ball: Recent Trends at CAAF in Dealing with Apparent UCI" published in the *Army Lawyer* in January 2018.[10] That article thoroughly analyzes the *Barry* case from the Navy Marine Corps Court of Appeals (NMCCA) opinion through the *DuBay* hearing ordered by CAAF.

To recap quickly, Senior Chief Special Warfare Operator Keith Barry was a Navy Seal who had been convicted at a general court-martial by a military judge sitting alone for forcing his girlfriend to engage in nonconsensual anal sex.[11] The military judge sentenced Barry to a dishonorable discharge and confinement for three years.[12] The general court-martial convening authority (GCMCA), Rear Admiral (RADM) Patrick J. Lorge, after having reviewed the record of trial and clemency matters submitted by Barry's defense counsel, felt that the trial judge had committed a number of erroneous rulings that prejudiced Barry's right to a fair trial.[13] Admiral Lorge was wrongly advised by his staff judge advocate (SJA) that his only option to remedy the judge's error was to approve the findings and the sentence.[14] Acknowledging this faulty advice, the NMCCA ordered a new final action and informed RADM Lorge that he could have disapproved the findings and sentence under Article 60, UCMJ.[15]

Frustrated, Lorge reached out to his good friend, RADM James Crawford III, the Deputy Judge Advocate General (DJAG) of the Navy.[16] The two admirals met at Lorge's headquarters in San Diego to discuss the merits of Barry's case and Lorge's clemency options.[17] The *DuBay* judge, Air Force Colonel Vance Spath, issued in his fact-finding report that during this particular meeting, RADM Crawford committed apparent UCI

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[10] John L. Kiel, Jr., *They Came in Like a Wrecking Ball: Recent Trends at CAAF in Dealing with Apparent UCI*, ARMY LAW., Jan. 2018, at 21-24.
[11] United States v. Barry, No. 201500064, 2016 CCA Lexis 634, at *2-3 (N-M. Ct. Crim. App. 2016).
[12] *Id*. at *1.
[13] 78 M.J. 70, 72 (C.A.A.F. 2018).
[14] *Id*. at 75.
[15] *Id*.
[16] *Id*.
[17] *Id*.

by warning Lorge about "putting a target on his back" and advising him to approve the findings and sentence.[18] Admiral Lorge clearly appreciated what Crawford meant about the target remark after recalling a conversation he had had earlier with Crawford's boss, Vice Admiral (VADM) Nanette DeRenzi, the Judge Advocate General (TJAG) of the Navy.[19] In a conversation unrelated to the Barry case, VADM DeRenzi had been lamenting to RADM Lorge about how much time she spent on Capitol Hill testifying to members of Congress about why commanders should keep their convening authority responsibility.[20] She explained that every few months, commanders were profiled in the newspapers doing something Congress didn't like and as a result, she spent a great deal of time defending their role in the military justice system.[21] Incidentally, the *DuBay* Judge found that VADM DeRenzi also committed apparent UCI on RADM Lorge during the conversation because she injected politics into his decision-making as the convening authority.[22]

After the meeting with RADM Crawford, Lorge consulted his SJA once more to consider his options. The SJA advised him yet again to approve the findings and sentence but added this time that Lorge may want to include a memorandum to the NMCCA articulating his concerns about unfairness in the case.[23] Admiral Lorge then disapproved the reduction in rank, approved the confinement, and took the highly unusual step of pleading with the NMCCA to either remand the case back to him for a rehearing or in the alternative, disapprove the dishonorable discharge to permit Barry to retire in the rank that he last honorably served.[24] Before firing off his missive to the appellate court though, Lorge made one last phone call to Crawford about his proposed course of action. Crawford told Lorge that the memorandum really was his only viable option and that if he disapproved the findings and sentence, his Navy career would be all but over.[25] The *DuBay* judge also found that this conversation was tantamount to legal advice which constituted apparent UCI.[26]

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[18] Findings of Fact & Conclusions, United States v. Barry, No. 17-0162/NA at 4 (C.A.A.F. Oct. 24, 2017).
[19] *Id*. at 2.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 8.
[23] *Id*. at 4.
[24] *Barry*, 78 M.J. at 73.
[25] Findings of Fact & Conclusions, *supra* note 11, at 4.
[26] *Id*. at 8.

After receiving Judge Spath's *DuBay* report, CAAF granted review of two issues to determine whether UCI had tainted the convening authority's approval of Barry's findings and sentence.[27] The first issue specifically examined whether the DJAG is capable of committing UCI on a convening authority.[28] The second investigated whether the most senior leaders of the Navy Judge Advocate General (JAG) Corps exerted actual UCI on the convening authority or created the appearance of exerting unlawful command influence on him.[29]

A. Can the DJAG commit UCI?

With break-neck speed, CAAF answered the first issue in less than four full paragraphs. A DJAG can commit UCI on a convening authority, the majority wrote, even though he is not a commander, a convening authority, or an SJA.[30] In reaching this conclusion, the court set aside nearly seven decades of its own precedent, which previously required that an individual accused of committing UCI must have acted with the "mantle of command authority."[31] Since the 1990s, legal advisors, commanders, and convening authorities had been taught that former leaders, subordinates, and peers generally could not commit UCI when discouraging someone from supporting an accused.[32] Friendship, peer pressure, and mentorship are not enough to commit UCI; rather, the offender must use their rank or status to improperly influence.[33]

In 1994, CAAF issued a decision in *United States v. Stombaugh*[34] that formally reaffirmed this concept of "mantle of command authority" in actual UCI cases.[35] Airman Apprentice Stombaugh was convicted of raping a female junior grade officer and was sentenced to ninety-three months confinement, a dishonorable discharge, and reduction to the lowest enlisted grade.[36] At trial, Stombaugh called more than 10 character

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[27] *Barry*, 78 M.J. at 73.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 76.
[31] *See* United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994).
[32] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, at 1-1 (1 Jan. 2019).
[33] *Id*. at 2-2.
[34] *Stombaugh*, 40 M.J. 208.
[35] *Id*. at 211.
[36] *Id*. at 209.

witnesses to testify on his behalf.[37] One of the character witnesses, a lieutenant, testified that he was told by fellow junior officers in the squadron not to testify on Stombaugh's behalf and against the victim.[38] A petty officer also testified that his division officer told him not to get involved in the case and complained that he had been verbally harassed by two other officers after they learned that he was going to testify on Stombaugh's behalf.[39]

CAAF examined the plain language of Article 37 and determined that:

> It goes without saying that a violation of Article 37 does not automatically amount to unlawful command influence. Likewise, discrepancy in rank between the party seeking to influence and the person whom he or she seeks to influence is not, in and of itself, the determinative factor in assessing whether the unlawful command influence was indeed unlawful command influence. While the influence may well be unlawful and its effect just as harmful, there is a distinction between influence that is private in nature and influence that carries with it the mantle of official command authority.[40]

Interestingly enough, CAAF then admitted that since the 1950s, every one of the UCI cases it had considered involved some degree of mantle of command authority in the alleged unlawful activity.[41] The court also noted that every one of the actors in those cases had been a commander, a convening authority, or an SJA.[42] With regard to the lieutenant witness in the Stombaugh case, CAAF held that even though other lieutenants discouraged him from testifying, none of them held the mantle of command authority and as such, they couldn't commit UCI.[43]

With regard to the petty officer witness, the court found that technically UCI had been exerted over him by officers who outranked him.[44] But because none of these officers were commanders or convening

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[37] *Id*. at 210.
[38] *Id*. at 212-13.
[39] *Id*. at 213.
[40] *Id*. at 211.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 213.
[44] *Id*.

authorities, it made no difference whether the interference was UCI or called something else like "unlawful interference with access to witnesses."[45]

One year later, CAAF decided *United States v. Ayala*[46], which involved interference with the appellant's right to provide character letters in his clemency petition.[47] Ayala was convicted of stealing explosives while he was deployed to Saudi Arabia and mailing them back to Colorado.[48] After the trial, Ayala approached several witnesses about providing written character references for inclusion into his clemency packet.[49] All but one of the witnesses refused.[50] Ayala claimed that his sergeant major committed UCI by providing his counseling packet to one potential witness who declined to provide a letter after reading it.[51] A former sergeant major refused to provide a letter unless the current sergeant major agreed to provide one, which he declined to do.[52] Ayala's current and former company commanders and current battalion commander all declined to provide letters because they didn't want to be at odds with the current chain of command.[53] The court found that Ayala failed to sufficiently allege UCI because he could not prove that anyone acting with the mantle of authority unlawfully influenced or coerced any of the potential witnesses approached by Ayala's friend to write letters on his behalf.[54]

Notwithstanding the decisions in *Stombaugh* and *Ayala*, and the decades of precedent leading to those decisions, in *Barry*, nearly a quarter century later, the same court considered the same statute but expounded a vastly different interpretation. The majority claimed that the mantle of command authority was never a requirement under the UCMJ despite acknowledging that all of its precedent required unlawful influence exerted by those in formal command.[55] The court ironically exclaimed that "the plain language of Article 37(a), UCMJ, does not require one to operate with the imprimatur of command, and we decline to read a

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[45] *Id*. at 214.
[46] 43 M.J. 296 (C.A.A.F. 1995).
[47] *Id*.
[48] *Id*. at 297.
[49] *Id*. at 299.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 300.
[55] *Barry*, 78 M.J. at 76.

supposedly implied condition into congressional silence."[56] The irony of course results from the fact that CAAF created the "supposedly implied condition" that it now shuns.[57]

Moreover, the majority seems to chide Congress into writing mantle of command authority into Article 37 declaring "we have faith that Congress knows how to change the law if it so desires."[58] After discussing the rest of *Barry* and reexamining the *Boyce* case, the author will urge Congress to take the majority up on its challenge to rewrite Article 37 immediately, before UCI jurisprudence gets any more confusing than it already is.

B. Did the DJAG commit UCI?

After finding that the DJAG could commit UCI, the second issue the court took up in *Barry* was whether or not any senior members of the Navy JAG Corps actually did commit UCI. Incidentally, if you're a fan of adverbial clauses and verb modifiers, this part of the opinion is what you've been waiting for your entire life. One particular clause in Article 37 sparked a colossal duel between Chief Judge Stucky and Judge Ryan over grammatical rules of interpretation. The clause in question states in part, that "no person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action … of any convening, approving, or reviewing authority with respect to his judicial acts."[59]

After reviewing the plain language of the statute, Chief Judge Stucky, writing for the majority, posited that the phrase "attempt to" only modifies the verb "coerce" and not the verb "influence."[60] In applying one of the cannons of statutory construction referred to as the "series qualifier canon", Stucky determined that a modifier can only modify a series of verbs only if there are no adverbs, prepositions, or articles that interrupt the sequence of verbs.[61] Because the phrase "by any unauthorized means"

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[56] *Id*.
[57] After concluding that mantle of command authority is not a statutory requirement, the court mentions in footnote 3 of the opinion that it "may be a relevant factor" in determining whether there has been a violation of Article 37, UCMJ. *Barry*, 78 M.J. at 77.
[58] *Id*. at 76.
[59] *Id*. at 78. (citing 10 U.S.C. 837 (2018)).
[60] *Id*.
[61] *Id*.

is an adverbial clause preceded by the coordinating conjunction "or", the modifier "attempt to" only applies when a person subject to the code tries to coerce the action of a convening, approving, or reviewing authority but nothing more, Stucky reasoned.[62] According to the Chief Judge then, a person subject to the code who attempts to coerce must do so with requisite intent, whereas the same person may influence an action via unauthorized means regardless of intent.[63] Judge Stucky found that even though the DJAG did not attempt or intend to influence RADM Lorge, he committed actual UCI nonetheless because Lorge felt like he had been susceptibly influenced by Crawford to make a decision he didn't want to make.[64]

Judge Ryan, who was joined by Judge Maggs, wrote a caustic rebuke to the majority opinion. First, she took umbrage with Judge Stucky's interpretation of the series qualifier cannon. According to *Blacks Law Dictionary*, there is a presumption that "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."[65] Under *Black's* interpretation then, the phrase "attempt to" would modify both "coerce" and "influence."[66] To reach any other conclusion, Ryan reasoned, would meet with truly absurd results.[67] To illustrate, why would Congress prohibit a person subject to the code from "attempting to coerce" the action of a convening authority but not prohibit that same person from "attempting to influence" the convening authority as long as the convening authority was not actually influenced?[68] It unquestionably makes no sense for Congress to hold such a view or to permit a UCI violation to hinge on whether the convening authority felt susceptible of feeling influenced, Ryan asserted.[69]

Ryan then noted that the court's recent decision in *Riesback* would have been wrong under the majority's new-found interpretation.[70] In *Riesbeck*, a unanimous court found that because the convening authority attempted to influence the action of a court-martial by stacking the panel with women, it found UCI and reversed the findings and sentence with

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[62] *Id*.
[63] *Id*.
[64] *Id*. at 79.
[65] *Id*. at 82.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 83.
[69] *Id*.
[70] *Id*.

prejudice.[71] But under the majority's logic in *Barry*, the *Riesbeck* court should have held that there was no UCI despite the convening authority's attempt to influence the court-martial, because there was no evidence that the panel-stacking actually succeeded in influencing the case's outcome.[72] Judge Ryan pointed out that "both the statute and our case law, including our recent decision in *Riesbeck*, require intentional action in cases of unlawful influence."[73]

> In one final point of emphasis, Ryan observed:
> our interpretation of the text is fully consistent with this Court's past jurisprudence, as the majority concedes. This Court has consistently held that *actual* unlawful influence requires an intentional manipulation of the military justice system that results in an improper handling or disposition of a case. In other words, where this Court has found *actual* unlawful influence, we have concluded that the actor exerting the unlawful influence did so with specific intent or motive to 'unlawfully coerce or influence' the proceedings.[74]

Another absurd result of the majority's interpretation, according to Ryan, is its illogical conclusion that RADM Crawford committed UCI while VADM DeRenzi did not.[75] The *DuBay* judge specifically found that RADM Lorge had been influenced by both TJAG and DJAG's discussions about politics.[76] Admiral Lorge was concerned about remarks they both made regarding the politics involved in sexual assault cases and how the Navy would be viewed by Congress and the President if he didn't approve the findings and sentence in Barry's case.[77] Despite the fact that neither TJAG nor DJAG intended to influence the action of the Barry court-martial, RADM Lorge felt susceptible to their influence nonetheless and as such, both should have been found to have committed actual UCI, Ryan reasoned.[78] Instead, the majority concluded that since TJAG's comments

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[71] *Riesbeck*, 77 M.J. at 159-60.
[72] *Barry*, 78 M.J. at 83.
[73] *Id*. at 85.
[74] *Id*. at 84.
[75] Judge Ryan also noted that the majority's interpretation directly contradicted both party's positions on appeal. Both the government and defense appellate counsel argued that the words "attempt to" modified the phrase "by any unlawful means, influence the action" in their appellate briefs and during oral argument. *Id*. at 83.
[76] *Id*. at 85.
[77] *Id*.
[78] *Id*.

took place earlier in time and because DJAG's remarks were construed by Lorge to be legal advice, only DJAG committed actual UCI.[79]

Judge Ryan surmised that the majority had simply adapted its holding on apparent UCI in *Boyce* to conclude that there had been actual UCI committed in *Barry*.[80] In *Boyce*, the court held that any "improper manipulation of the criminal justice process, *even if effectuated unintentionally*, will not be countenanced by this Court."[81] In reaching the same determination in *Barry*, Ryan observed, the court was without statutory or case law support and she warned that the majority's "bizarre misapplication of its own newly minted test for actual unlawful influence will leave both the field and lower courts floundering to determine how and when unintentional conduct rises to an 'unlawful' level or constitutes 'improper manipulation."[82]

II. United States v. Boyce

Sixteen months before CAAF issued its "newly-minted test" for actual UCI in *Barry*, it decided *United States v. Boyce*, which also upended longstanding precedent with regard to apparent UCI claims. To recap quickly, Airman Rodney Boyce was convicted by a court-martial panel of raping and assaulting his wife in violation of Articles 120 and 128 of the UCMJ.[83] He was sentenced to be confined for four years, reduced to the lowest enlisted grade, and to be dishonorably discharged.[84] The CAAF was asked to decide whether the GCMCA had been subjected to UCI by the Air Force Chief of Staff when he made the decision to refer Boyce's case to a general court-martial.[85]

The GCMCA in this case, was none other than Lieutenant General Craig A. Franklin who had gained notoriety for his decision to set aside the rape conviction of a popular Air Force pilot named Lieutenant Colonel James Wilkerson after Wilkerson had been convicted of sexually assaulting a houseguest who spent the night in his family quarters after

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[79] *Id*.
[80] *Id*. at 84.
[81] *Id*. (citing *Boyce*, 76 M.J. at 246).
[82] *Id*.
[83] United States v. Boyce, 2016 CCA Lexis *198 (A.F. Ct. Crim. App. Mar. 24, 2016).
[84] *Id*.
[85] *Boyce*, 76 M.J. at 244.

attending a USO concert.[86] Franklin's decision to exercise his Article 60 powers to set aside Wilkerson's rape conviction set off a firestorm of controversy in the media and triggered an historic hearing by the Personnel Subcommittee of the Senate Armed Services Committee (SASC).[87] The Personnel Subcommittee of the SASC ultimately decided to recommend eliminating the convening authority's ability to set aside the findings and sentence in sex assault cases and several other serious felony-level offenses, thus greatly curtailing the convening authority's nearly unfettered ability to grant clemency.[88]

Shortly after the Wilkerson debacle, Lt. Gen. Franklin, in keeping with his SJA's advice this time, declined to refer a subsequent rape case to general court-martial.[89] Three months later, a new Air Force Secretary had been appointed and shortly thereafter, General Franklin received a telephone call from the Air Force Chief of Staff who told him in effect, that the new Secretary had lost confidence in his ability to command.[90] The Chief proceeded to give Franklin two options: he could voluntarily retire from the Air Force at the lower grade of major general, or he could wait for the new Secretary to fire him.[91] Three hours after the phone call, General Franklin decided to retire.[92] But before he did, his SJA brought him the referral packet for *United States v. Boyce*. The SJA advised General Franklin to refer the case to a general court-martial, which Franklin promptly did.[93] Two days later, Franklin announced that he would step down as the Third Air Force Commander and two months after that, he officially retired.[94]

On appeal, the CAAF opinion written by Judge Ohlson quickly determined that there had been no actual UCI exerted on General Franklin

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[86] Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAGAZINE, Nov. 26, 2014, https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html.
[87] *Boyce*, 76 M.J. at 244-45.
[88] Press Release, U.S. Senate Committee on Armed Services, Chairman and Ranking Member on Armed Services Reach Agreement with House Counterparts Regarding the National Defense Authorization Act for Fiscal Year 2014 (Dec. 9, 2013), https://www.armed-services.senate.gov/imo/media/doc/Press%20release.pdf.
[89] *Boyce*, 76 M.J. at 245.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 246.
[94] *Id*.

in making his referral decision.[95] The court then focused on whether the Chief of Staff's conversation with General Franklin gave the appearance of UCI. Before issuing its holding though, the majority opinion provided a great overview of the development of apparent UCI jurisprudence at CAAF over the years. The first case where the court acknowledged the impropriety of apparent UCI took place in 1954 in *United States v. Knudson*.[96] The first time the court actually overturned the conviction of a service member because of an apparent UCI claim happened in 1964 in *United States v. Johnson*.[97] Thirty years later, in 1994, CAAF's current standard for assessing apparent UCI emerged in *United States v. Mitchell*.[98]

Then in 2006, in *United States v. Lewis*,[99] Chief Judge Erdmann sketched out a detailed roadmap of the burdens of proof for assessing UCI claims.[100] He laid out the accused's burden of proving an actual UCI claim which requires him to demonstrate: 1) facts, that if true, constitute UCI; 2) the court-martial proceedings were unfair to the accused (he was prejudiced); and 3) the UCI was the cause of the unfairness.[101] Chief Judge Erdmann remarked that even where the court couldn't find actual UCI, it must also look to determine whether apparent UCI placed "an intolerable strain on the public perception of the military justice system."[102] He announced that the test for apparent UCI is similar to the test the court applies in determining whether a court member has implied bias or whether a military judge has a conflict of interest:[103]

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[95] *Id*. at 250. The majority concluded that there had been no actual UCI committed because there was more than one corroborating witness, there was ample physical evidence, the Article 32 investigating officer recommended the charges all be referred to a general court-martial, and the SJA recommended that the charges all be referred to a general court-martial. Given that, there is no reasonable likelihood, according to the court, that a different convening authority standing in General Franklin's shoes would have made any different referral decision.

[96] *Id*. at 247 (citing United States v. Knudson, 4 C.M.A. 587, 598 (1954)).

[97] *Id*. (citing United States v. Johnson, 14 C.M.A. 548, 551 (1964)).

[98] *Id*. (citing United States v. Mitchell, 39 M.J. 131, 151 (C.M.A. 1994)). The court did an excellent job laying out the distinction between actual and apparent UCI in the context of these and other historic cases and laying out the development of the burdens and standards regarding claims involving he appearance of UCI.

[99] 63 M.J. 405 (C.A.A.F. 2006).

[100] *Id*.

[101] *Id*. at 413.

[102] *Id*. at 415.

[103] *Id*.

> We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.[104]

After reviewing Judge Erdmann's analysis in *Lewis*, Judge Ohlson concluded that unlike an actual UCI claim where prejudice to the accused is required, there is no requirement to demonstrate prejudice in order to prevail on an apparent UCI claim.[105] To the contrary, Ohlson observed, the prejudice involved in apparent UCI "is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused."[106] In footnote 5 of the opinion, Ohlson explained that while a determination that the accused was not personally prejudiced by the UCI or that it was later cured remains a "significant factor that must be given considerable weight" it is not dispositive of the underlying concern that the public taint of an appearance of UCI may still exist.[107]

After reviewing the history of General Franklin's handling of the three sexual assault cases, the majority concluded that members of the public would rightly question whether "the conduct of the Secretary of the Air Force and/or the Chief of Staff of the Air Force improperly inhibited Lt Gen Franklin from exercising his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process."[108] Despite the majority's new interpretation of how to assess apparent UCI claims, an examination of CAAF's UCI jurisprudence prior to *United States v. Boyce* reveals that the court has consistently assessed apparent UCI claims for prejudice in the past.

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[104] *Id*.
[105] *Boyce*, 76 M.J. at 248.
[106] *Id*. at 249.
[107] *Id*.
[108] *Id*. at 252.

III. Prejudice was Always Required in Apparent UCI Claims

In *United States v. Salyer*[109], decided in 2013, CAAF considered whether UCI resulted in the military judge's decision to recuse himself after repeated and invasive attempts by the government to have him removed.[110] Corporal Salyer was charged with possession and distribution of child pornography.[111] The military judge made a ruling that the definition of "child" meant anyone under the age of 16 and not the age of 18 as the government contended.[112] Government counsel met to discuss the ruling and during the meeting there was mention that the judge married his wife when she was just 17 years old.[113] Trial counsel pulled the judge's personnel file, confirmed the rumor, and then conducted voir dire of the judge using excerpts from his personnel record.[114] The judge admitted that his wife was only 17 when they married and the trial counsel immediately moved to disqualify him for actual and implied bias.[115] After deliberating on the matter overnight and later the next day, the military judge reluctantly recused himself.[116]

The majority reviewed the government's actions during the proceedings and concluded that the attempt to remove a military judge from a particular case depending on whether he was viewed as favorable or unfavorable to the prosecution's case placed an intolerable strain on the public's perception of the military justice system.[117] Having then found that apparent UCI affected this particular case, the majority matter-of-factly noted that it would "now test for prejudice."[118] The exact prejudice CAAF was looking for was whether a disinterested member of the public would believe that the accused "received a fair trial free from the effects of unlawful command influence."[119]

The CAAF decided a remarkably similar case in 2006. In *United States v. Lewis*[120], the government tried to convince a female military

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[109] 72 M.J. 415 (C.A.A.F. 2013).
[110] *Id*.
[111] *Id*. at 417.
[112] *Id*. at 418-20.
[113] *Id*. at 420.
[114] *Id*.
[115] *Id*.
[116] *Id*. at 421.
[117] *Id*. at 427.
[118] *Id*.
[119] *Id*. (citing *Lewis*, 63 M.J. at 415).
[120] 63 M.J. 405 (C.A.A.F. 2006).

judge to recuse herself because of a relationship she had with the female civilian defense counsel.[121] During trial counsel's voir dire, the judge explained that she occasionally saw civilian defense counsel at the barn where she rode horses and the defense counsel boarded hers.[122] After the judge refused to recuse herself, the government filed a written motion for reconsideration alleging among other things, that the judge had failed to disclose that she and the defense counsel had been seen leaving a play together in LaJolla, California.[123] In support of its motion, trial counsel called the SJA as a witness.[124] The SJA testified that there had been a rumor floating around that the two had been on a date while the *Lewis* case was pending[125] The SJA then pointed to civilian defense counsel's body movement in the courtroom and the way the judge let her "stroll around" like she was in charge as further evidence that the judge was clearly biased in her favor.[126] The following morning, the judge announced that she would recuse herself because of the government's crass and slanderous behavior in bringing up unsubstantiated allegations about an affair between her and the civilian defense counsel.[127]

On appeal to CAAF, Lewis's appellate counsel argued that the government's outrageous conduct created the appearance "that a command can de-select military judges and orchestrate the parties to a court-martial."[128] Appellate counsel argued that the government's actions were prejudicial to Lewis and not harmless beyond a reasonable doubt.[129] The government claimed in response that there had been no UCI and that even if there was, there was no "demonstrable prejudice" to the accused.[130] In conducting its analysis, CAAF once again examined whether the accused had been prejudiced by the government's actions. Specifically, the court found that "a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government's conduct with respect to MAJ CW."[131] It also held that the government had failed to convince the court that Lewis had received a trial "free from the

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[121] *Id*.
[122] *Id*. at 408.
[123] *Id*. at 410.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*. at 411.
[128] *Id*. at 412.
[129] *Id*.
[130] *Id*.
[131] *Id*. at 415.

effects" of unlawful command influence.[132] The court's use of the term "effects" of in this context, can only refer to "prejudice."

In light of both *Salyer* and *Lewis*, Judges Stucky and Ryan argued in separate dissenting opinions that the majority's new test for judging apparent UCI claims made little sense. They both argued that if, as the majority correctly concluded, neither the Air Force Chief of Staff nor Secretary committed actual unlawful command influence, it would be incredibly difficult to understand how an objective, disinterested, fully informed observer would doubt the fairness of the proceedings.[133] Judge Ryan then cited to the court's opinion in *Salyer* where it held:

> [A] correctible legal error of apparent unlawful command influence must be based upon more than the theoretical presence of influence on a particular convening authority. It must be based upon an objective observation of the 'facts and circumstances' of an individual case, and a finding of substantial prejudice to the rights of the accused.[134]

In addition to trampling on its own precedent, Judge Ryan argued that the court violated federal law every time it reverses the findings and sentence in cases involving apparent UCI claims where there was no evidence of prejudice to the accused.[135] Article 59(a) of the UCMJ states that a "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[136] Judge Ryan agreed with the majority's finding that there was not one iota of prejudice to Boyce, but complained that having found no evidence of prejudice, the majority still granted Boyce relief despite the restriction Article 59(a) placed on the court.[137] Ryan opined that "Congress had good reason to tether appellate relief to Article 59(a)'s requirement of prejudice to the accused, and thus [I] respectfully dissent from the majority's conclusion that this case was 'properly presented.'"[138]

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[132] *Id*.
[133] *Boyce*, 76 M.J. at 254.
[134] *Id*. at 256 (citing *Salyer*, 72 M.J. at 423).
[135] *Id*. at 254.
[136] *Id*. (citing 10 U.S.C. § 859(a)(2018)).
[137] *Id*.
[138] *Id*. at 256.

IV. Congress should amend Article 37

Assuming Judge Ryan is right, what can Congress do to tether the court back to case law precedent, ensure consistency in its future opinions, and prevent it from violating federal law in future UCI cases? The only real assurance is for Congress to revise Article 37 of the UCMJ. Fortunately, amending the statute is a relatively easy fix.

First, Congress should resolve the debate over adverbial clauses, dangling participles, and the statutory canons Judges Stucky and Ryan had so much fun arguing about in *Barry* by inserting the words "attempt" and "to" into the phrase "by any unauthorized means, influence the action of a court-martial". Article 37(a) of the statute would be amended to read:

> No person subject to this chapter may attempt to coerce, or by any unauthorized means, *attempt to* influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

This particular fix would address Judge Ryan's concern that the court's current interpretation wrongfully infers that Congress only wanted to prohibit persons subject to the UCMJ from attempting to coerce but not from attempting by unauthorized means to influence the action of a convening authority.[139] This simple inclusion would make clear that no one subject to the code may attempt/intend to do either.

The next revision addresses the judicially-created concept of the mantle of command authority. As we can see from the language of Article 37 and from every case ever adjudicated prohibiting UCI, Congress was primarily concerned about commanders wielding their power to unlawfully influence subordinate commanders and others involved in the court-martial process. Notwithstanding Congress's clear intent, CAAF found in *Barry*, after reading the plain language of the statute, that DJAG (who is not a commander), "just like any other military member, is capable of committing unlawful influence."[140] Government counsel had it right in *Barry* when he argued that the only way DJAG could commit UCI is if he

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[139] *Barry*, 78 M.J. at 83.
[140] *Id*. at 76.

had been acting with the mantle of command authority.[141] That position is clearly supported by the case law cited to in this article, all of which originated at the CAAF. The good news is, there is also an easy fix for this issue. Congress should insert the phrase "and acting with the mantle of command authority" after the phrase "No person subject to this chapter" such that it would read:

> No person subject to this chapter and *acting with the mantle of command authority*, may attempt to coerce or, by any unauthorized means, *attempt to* influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

This particular revision would bring the court back in line with more than seventy years of decisions recognizing this important concept in UCI jurisprudence.

This next revision will address the court's holding in *Boyce* that there need not be a showing of substantial prejudice to the accused when litigating apparent UCI claims. As discussed earlier in the article, apparent UCI is a doctrine of the court's creation. There is absolutely no reference to apparent UCI in Article 37, UCMJ. One way to ensure that CAAF honors its precedent and doesn't run afoul of Article 59(a), is to formally acknowledge the doctrine in Article 37, UCMJ and then forbid appellate courts from setting aside the findings or sentence of a court-martial unless the UCI substantially prejudiced the accused. At the end of Article 37 then, there should be a new paragraph (c) that reads:

> The finding or sentence of a court-martial may not be held incorrect on the ground of an error of law, including error involving actual unlawful command influence or the appearance of unlawful command influence, unless the error materially prejudices the substantial rights of the accused.[142]

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[141] *Id*.

[142] This language is taken word-for-word from Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2018).

In addition to making these three particular revisions, Congress should also add two additional paragraphs in Article 37 in order to formally recognize actions that superior convening authorities can take that do not constitute UCI. The statute already recognizes the ability to teach general or instructional courses in military justice so long as they "are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of the court-martial."[143] It also covers statements and instructions made by the military judge, counsel, or president of a special court-martial in open court.[144] There are two other areas that merit further consideration.

Colonels Jim Garrett and Max Maxwell, Lieutenant Colonel Matt Calaraco, and Major Frank Rosenblatt coauthored an excellent article in 2004 discussing the difference between lawful command emphasis and unlawful command influence.[145] In it, they argued that "Commanders may easily, and legally, influence the progression of a case or investigation without influencing a subordinate commander at all through the use of a withholding policy."[146] In support of their assertion, they cite to the April 20, 2012 withholding memo issued by the Secretary of Defense who mandated that all sexual assault cases be withheld for initial disposition to the first O-6 special court-martial convening authority in the chain of command.[147] The most notable aspect of the memo, they wrote, "is the lack of reference to how any commander should dispose of a case beyond the process."[148] Instead, the Secretary encourages subordinate commanders to engage the process, review the case file, conduct their own independent review as necessary, and to make recommendations.[149] Only then could the convening authority be able to determine an appropriate disposition.[150] Congress should include an additional paragraph in Article 37, UCMJ to formally recognize this familiar concept. The proposed addition could read:

> A superior convening authority may withhold the authority of a subordinate convening authority to dispose

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[143] 10 U.S.C. § 837 (2018).
[144] *Id*.
[145] James F. Garrett et al., *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, ARMY LAW., Aug. 2014.
[146] *Id*. at 15.
[147] *Id*.
[148] *Id*.
[149] *Id*.
[150] *Id*.

> of certain categories of offenses or offenses in an individual case. If the superior convening authority does not limit the independent discretion of the subordinate convening authority over an offense which they have authority to dispose of, there is no violation of this chapter.

Lastly, Congress should also add a paragraph to the statute recognizing the responsibility of superior convening authorities to mentor their subordinates on military justice matters. The CAAF addressed this particular idea in *United States v. Stirewalt*[151], decided in 2004.[152] Stirewalt had been convicted of raping several of his female shipmates.[153] The Coast Guard Court of Criminal Appeals (CGCCA) found that the military judge erred in his Military Rule of Evidence (MRE) 412 analysis so it set aside most of the sex-related charges and the sentence but authorized a sentence rehearing for the remaining findings of guilt.[154]

During his second appeal, Stirewalt argued that all of the charges referred for retrial should be set aside due to UCI.[155] He specifically alleged that the O-5 convening authority who ordered the Article 32 investigation had been unlawfully influenced to do so by one of the O-6s who happened to be the Eighth Coast Guard District Chief of Staff.[156] According to the military judge's findings of fact, Lieutenant Commander Crawley conducted two conference calls with his O-6 boss to discuss the Stirewalt investigation.[157] During both calls, there were two other O-6s on the line, one of whom was Captain Prokop, the Chief of Staff.[158] During one call, Captain Prokop "very clearly and forcefully" made his opinion known that the allegations "were too serious to go to a captain's mast and that they warranted an airing at an Article 32."[159] The judge also found that the other captain listening in on the conversations made it very clear both times to Lieutenant Commander Crawley that the disposition decision was his alone to make.[160]

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[151] 60 M.J. 297 (2004).
[152] *Id*.
[153] *Id*. at 298.
[154] *Id*. at 299.
[155] *Id*. at 300.
[156] *Id*.
[157] *Id*. at 300-01.
[158] *Id*.
[159] *Id*. at 301.
[160] *Id*.

The CAAF concluded that there had been no UCI committed by Captain Prokop on Lieutenant Commander Crawley.[161] The majority reasoned that "there is nothing inherently suspect about an officer in Lieutenant Commander Crawley's position electing to consult with his chain of command concerning the potential investigative and procedural options when faced with allegations of serious misconduct."[162] The court was also persuaded by the fact that both conversations weren't initiated by Captain Prokop, the superior, but rather by Lieutenant Commander Crawley, his subordinate.[163] Congress should likewise formally acknowledge a superior convening authority's obligation to mentor his or her subordinates by inserting an additional paragraph in Article 37 which could read:

> (i) A superior convening authority may discuss particular offenses and general military justice-related matters with a subordinate convening authority.
>
> (ii) A subordinate convening authority may seek advice from a superior convening authority with regard to a specific offense or offenses and on military justice matters in general.
>
> (iii) A superior convening authority may not interfere with the independent discretion of a subordinate convening authority by directing that an offense or offenses by disposed of in a certain way.

If Congress wanted to send a strong message about eliminating UCI, it could make UCI a punishable offense under the UCMJ. Right now, the only way to punish persons subject to the UCMJ who commit UCI is under Article 98. Article 98 deals with "noncompliance with procedural rules."[164] In theory, if the UCI delays the court-martial proceedings in any way or the person committing the UCI knowingly or intentionally fails to comply with any provision of the UCMJ regulating the court-martial proceedings at any stage, they can be charged under this particular punitive article.[165]

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[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] 10 U.S.C. § 898 (2018).
[165] *Id*.

Congress could create a completely separate punitive article or it could include UCI as an Article 134 general disorder which already has a prejudice requirement built into it. Short of that however, Congress should seize the opportunity to enact the proposals examined above. This would serve to realign CAAF with its previous precedent where intent had always been a requirement in actual UCI claims and where prejudice to the accused had always been required in apparent UCI claims. In enacting these measures, Congress could do much, as Judge Ryan astutely observed in the *Barry* case, to prevent the field and lower courts from "floundering" any further because of the court's bizarre interpretations of its own UCI jurisprudence.[166]

[166] *Barry*, 78 M.J. at 85.

CHALLENGING CHILDREN: A PRIMER ON CROSS-EXAMINING CHILD WITNESSES

MAJOR KATHERINE L. DEPAUL*

I. Introduction

You are a trial defense counsel who just received your next case. Suppose your client is accused of sexually abusing Vicky, his four-year-old daughter. As you begin to review the case file, several questions come to mind: Was Vicky's forensic interview conducted in accordance with best practices? If not, how can I use that to my client's advantage? What will happen if Vicky is too scared to testify? Assuming she does testify, should I cross-examine Vicky the same way I would an adult?

As the questions above illustrate, child witnesses raise unique legal issues. Accordingly, counsel's approach to confronting a child witness must be substantially different from that used to confront an adult. Successfully confronting a child witness requires counsel to examine the investigation for potential taint;[1] to analyze the forensic interview against best practices; and to assess the child's competency to testify. Additionally, counsel must be prepared to respond to motions for accommodations and, in order to deliver an effective cross-examination, be familiar with the language and mannerisms that are developmentally appropriate for that particular child.

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* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 18th Field Artillery Brigade. LL.M., 2018, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; J.D., 2008, Temple University Beasley School of Law; B.A., 2005, Seton Hall University. Previous assignments include Defense Appellate Attorney, Fort Belvoir, Virginia, 2015-2017; Chief, Administrative Law, 7th Infantry Division, Fort Lewis, Washington, 2014-2015; Administrative Law Attorney, 7th Infantry Division, Fort Lewis, Washington, 2013-2014; Trial Defense Counsel, Fort Bliss, Texas, 2011-2013; Trial Counsel, 1st Sustainment Brigade, Camp Arifjan, Kuwait, 2010-2011; Trial Counsel, 1st Sustainment Brigade, Fort Riley, Kansas, 2009-2010; Legal Assistance Attorney, 1st Infantry Division, Fort Riley, Kansas, 2009. Member of the bars of Pennsylvania and New Jersey.

[1] By "taint," the author is referring to questioning techniques that may influence a child's report. Research has shown "the skill of the interviewer directly influences whether a child relates a true memory, discusses a false belief, affirms details suggested by others, embellishes fantasies, or provides no information at all." Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 L. & CONTEMP. PROBS. 149, 150 (2002).

Using a hypothetical scenario involving Vicky throughout, this article provides a rubric that counsel can use to prepare to effectively cross-examine a child witness. Section II discusses the origins of the forensic interview, its importance in child abuse cases, and highlights forensic interviewing "best practices." Section III informs practitioners of ways to successfully challenge a child's competency to testify at trial. Finally, Section IV summarizes the law on remote testimony and provides guidance on how to conduct an effective, age-appropriate cross-examination.

With the ongoing emphasis placed on prosecuting allegations of physical and sexual abuse, cases involving children are only likely to increase. By following the guidance contained in this article, counsel will be able to develop an effective strategy for confronting their next child witness.

II. Identifying Potential Taint

By the time you are detailed to the case, a child witness has likely already spoken with numerous individuals about the alleged abuse including school counselors, pediatricians, family members, lawyers,[2] law enforcement officials, and forensic interviewers, among others.[3] As a

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[2] Any alleged victim of a "sex-related offense" under Articles 120, 120a, 120b, 120c, and 125, Uniform Code of Military Justice (UCMJ) or of an attempt to commit such an offense under Article 80, UCMJ, who is eligible to receive legal assistance services is entitled to representation by a Special Victim's Counsel (SVC). 10 U.S.C. § 1044e (2015). This includes children who are the accused's military dependents. *Id.*; 10 U.S.C. § 1040(a)(5) (2015). As the case proceeds, practitioners should be aware that for alleged victims who are under eighteen years of age, Article 6b(c), UCMJ, requires the military judge to designate a representative of the estate, a family member, or other "suitable individual" to serve as the child's guardian ad litem (GAL) and "assume the victim's rights." UCMJ art. 6b(c) (2016). Because the GAL must represent the child's best interests and the SVC represents the child's expressed interests (which may or may not be one and the same), the SVC will not serve as the child's GAL. U.S. ARMY SPECIAL VICTIMS' COUNSEL PROGRAM, SPECIAL VICTIMS' COUNSEL HANDBOOK 4TH EDITION para 7-1b (9 JUNE 2017). As will be discussed throughout this article, defense counsel must be aware of the varying parties exerting influence upon the child witness, as well as their roles in the process. The SVC and GAL are just two individuals in a potentially very large pool.

[3] While discussed more substantively later in the article, a forensic interview is a "legally sound" and developmentally appropriate method of obtaining factual information about abuse or violence through a neutral and trained professional. Chris Newlin, et. al., *Child Forensic Interviewing: Best Practices*, OFF. JUV. JUST. & DELINQ. PREVENTION JUV. JUST. BULL., Sept. 2015, https://www.ojjdp.gov/pubs/248749.pdf.

general matter, you should carefully note the following while you review the investigation: (1) how many individuals the child spoke with about the alleged abuse; (2) when each disclosure was made (perhaps two weeks, three weeks, or four months after the alleged abuse); (3) the nature of the individual's questioning (open-ended or highly suggestive);[4] (4) the substance of the child's report to each individual; and (5) whether the allegations changed after each subsequent disclosure and, if so, how? You should also determine whether any physical evidence corroborates the allegations and if an apparent motive to fabricate exists.[5]

While this checklist offers a good start to discovering the potential for taint (or outright fabrications), counsel must also have a structured approach to analyzing the child's forensic interview as it may be the only formal interview conducted.[6] Further, and more importantly, there are circumstances under which the child's forensic interview could be admitted into evidence under the residual hearsay exception.[7]

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[4] "There is a good deal of scholarly debate in the area of child suggestibility and its effect on the reliability of the testimony of a child victim; however, scholars agree that the danger of false testimony from a child is greater when the child is subjected to highly suggestive interviewing techniques such as 'closed' (yes/no) questions and 'multiple interviews with multiple interviewers.'" United States v. Cano, 61 M.J. 74, 78 (C.A.A.F. 2005) (citing Thomas D. Lyon, *New Wave of Child Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1070-72 (1999) and Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 86 (2000)).

[5] For example, a child could fabricate an allegation as a means of getting attention, to deflect attention away from his or her own misbehavior, or to express anger at a parent for ending the marital relationship.

[6] Civilians cannot be compelled to testify at preliminary hearings. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 405(h)(2)(B) Discussion (2019) [hereinafter MCM]. Further, while counsel may prevail on a motion for equal access under Article 46, UCMJ, such a remedy would likely come fairly late in the game, maybe even just prior to trial.

[7] Military Rules of Evidence (M.R.E.) 807 permits the introduction of hearsay testimony not otherwise covered by M.R.E. 803 or M.R.E. 804, where, given equivalent circumstantial guarantees of trustworthiness, the military judge determines: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (3) the general purpose of the rules and the interests of justice will best be served by admission of the statement into evidence. MCM, *supra* note 6, MIL. R. EVID. 807 (2019). The proponent must also give advance notice of its intent to offer any such statement into evidence. *Id.* For a case where the court admitted a child's forensic interview into evidence under the residual hearsay exception, *see* United States v. Barbary, 2017 CCA LEXIS 235, A.F. Ct. Crim. App. 2017 (finding the military judge did not abuse his discretion by admitting the child's forensic interview into evidence under M.R.E. 807 because such evidence was necessary due to the child's

Accordingly, counsel must be prepared to show why the child's statements given during the forensic interview are not reliable and, consequently, inadmissible. One way to demonstrate this unreliability is through cross-examining the forensic interviewer to show how the child's forensic interview deviated from the forensic interviewing best practices discussed below.[8]

A. Forensic Interviews

1. Background

During the 1980s and 1990s, problems associated with child witnesses rose to national prominence as a result of high-profile acquittals like the McMartin trial which involved allegations of sexual abuse at a preschool.[9] Despite the enormous amount of time and money prosecutors invested in the case, the highly suggestive questions asked during the interviews and the fantastic stories told by the children made it impossible to determine

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demonstrated lack of memory and reluctance to testify during trial). For a case where the military judge failed to make reasonable efforts to determine the necessity of hearsay evidence, *see* United States v. Czachorowski, 66 M.J. 432, 435 (C.A.A.F. 2008) (rejecting the trial counsel's proffer that the child had forgotten the alleged abuse as sufficient justification to admit the child's pretrial statements to her mother and grandparents under the residual hearsay exception). For a comprehensive analysis of rules of evidence and statutes governing the admissibility of out-of-court statements from children, *see* NAT'L DISTRICT ATTORNEYS ASS'N, RULES OF EVIDENCE OR STATUTES GOVERNING OUT OF COURT STATEMENTS OF CHILDREN (May 2014), https://ndaa.org/wp-content/uploads/Statutes-Governing-out-of-Court-Statements-of-Children.pdf?click=Rules%20of%20Evidence%20or%20Statutes%20Governing%20Out%20of%20Court%20Statements%20of%20Children%20(updated%20May%202014).

[8] In addition to the basic tools for analyzing a forensic interview provided in this article, counsel would be wise to request expert assistance in the field of forensic interviewing immediately upon preferral and, if denied, to file a motion with the court immediately upon referral. While the court will likely provide a pretrial order, nothing prohibits counsel from filing motions ahead of the predetermined schedule.

[9] CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds., 1993). In addition to the allegations of sexual abuse, some children claimed during interviews that they had been taken on plane rides, forced to drink blood, and had to watch animals being mutilated. David Shaw, *COLUMN ONE: NEWS ANALYSIS: Where was Skepticism in Media?: Pack Journalism and Hysteria Marked Early Coverage of the McMartin Case. Few Journalists Stopped to Question the Believability of the Prosecution's Charges.* L.A. TIMES (Jan. 19, 1990), http://articles.latimes.com/1990-01-19/news/mn-226_1_media-coverage.

whether the reports of sexual abuse were accurate.[10] In response to problems associated with the child interviewing techniques law enforcement used during the McMartin trial and other high-profile child sexual abuse cases, the need for a "forensic interview" conducted by trained professionals emerged.[11]

2. Defined

While there is no agreed upon definition of what constitutes a "forensic interview," the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP), offers the following definition in its bulletin on child forensic interviewing best practices: "A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process."[12]

Just as there is no single agreed upon definition for what constitutes a "forensic interview," there are no uniform training requirements for becoming a certified forensic interviewer; moreover, the training that is available is not limited to any particular professional field.[13] Accordingly, the field of forensic interviewers includes police officers, social workers, psychologists, and psychiatrists, among others.

3. Best Practices

There are many forensic interviewing courses administered at both the state and federal level that teach different interviewing techniques.[14] In 2015, representatives of major forensic interviewing programs gathered in

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[10] The trial of Peggy McMartin and her son, Ray Buckey, lasted six years and cost taxpayers approximately $15 million. Goodman & Bottoms, *supra* note 9 at 97. "Although the jury had mixed feelings about whether abuse had occurred, they agreed that the original interviews were so poorly conducted that conviction was not possible." *Id.*

[11] Victor I. Vieth, *The Forensic Interview at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony Concerning an Investigative Interview in a Case of Child Abuse*, 36 WM. MITCHELL L. REV. 186, 188 (2009).

[12] Newlin et al., *supra* note 3, at 3.

[13] *Id.*

[14] Vieth, *supra* note 11, at 195.

order to address the multitude of forensic interviewing techniques and the related training required.[15] Subsequently, the OJJDP disseminated a bulletin with contributions from these representatives setting forth best practices of those conducting forensic interviews of children in cases of alleged abuse or exposure to violence.[16]

Returning to our hypothetical scenario, you are now ready to watch Vicky's electronically recorded forensic interview.[17] Keep the following guidance in mind as you proceed:[18] a "forensic interview is an interview with children used to gather information, not conduct therapy."[19] As such, the overall tone of the interview should be oriented towards gathering facts, not "helping" Vicky. As the interview goes on and you learn more details, evaluate whether Vicky's interviewer adhered to the best practices.

a. Interview Setting

You hit play. Vicky is sitting alone in the room. The walls are pale-blue and decorated with paintings of what seem to be talking animals. Vicky is playing with toys as the interviewer enters and introduces himself.

Although interview rooms will naturally vary in size, shape, and color, in accordance with best practices, only non-fantasy artwork should be

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[15] *Id.*

[16] Newlin, et al., *supra* note 3, at 2.

[17] "Electronic recordings are the most complete and accurate way to document forensic interviews" and are used in "90 percent of Children's Advocacy Centers (CACs) nationally." Newlin, et al., *supra* note 3 at 6. If the video of the interview is not included in your case file, request a copy immediately. If the interview was not recorded at all, you must highlight the lack of the "most complete and accurate" documentation of the interview at every opportunity (for example, in opening statement, during cross-examination of the forensic interviewer and direct examination of your expert witness, if you have one, and while making closing argument). *Id.*

[18] Counsel should also keep the checklist, assembled earlier, available to use in assessing whether the potential "taint" from individuals Vicky spoke with before the official investigation began may have influenced her responses during the forensic interview. If so, did the forensic interviewer employ tools to identify and mitigate the impact of these external influences on her report?

[19] State v. Hilton, 746 So.2d 1027, 1033 (La. Ct. App. 2000). Further, "therapists may be interested in bringing to fruition intrapsychic conflicts that may or may not be reality-based." Walker, *supra* note 1 at 152.

displayed on the walls.[20] Further, "materials that encourage play or fantasy are uniformly discouraged."[21]

Comparing this best practice with Vicky's interview, look more closely at the setting where Vicky's interview took place. Are the animals depicted in the paintings "talking"? To the extent you cannot see the paintings clearly, you should ask the forensic interviewer for these details in a pretrial interview, through discovery, or during cross-examination. If the animals are "talking," the paintings would qualify as fantasy artwork and run afoul of this best practice. You also saw Vicky playing with toys immediately before the interviewer entered the room. This too is counter to best practices. The presence of fantasy artwork and toys may undermine the fact-finding purpose of the interview because it could cause Vicky to view the interview as play-time.[22]

b. Rapport Building and Preliminary Instructions

You press play again. After asking preliminary questions about what Vicky does for fun and her favorite foods and colors, the interviewer begins to ask questions about the alleged abuse.

All interview models acknowledge that building rapport is important for both the child and the interviewer."[23] While it is important for the child to trust the interviewer, the interviewer should provide the child with guidance for how the substantive interview is going to be conducted and not simply engage in friendly banter.[24] For example, the interviewer should instruct the child: (1) that the interviewer was not present during

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[20] Newlin, et al., *supra* note 3, at 6. The use of child-sized furniture and painting with "warm" colors is acceptable. *Id.* What about markers and paper? There is no uniform consensus with respect to making markers and paper available to the child. *Id.* If these supplies are provided, counsel need to know if the child used them and what he or she drew, information that may be obtained through pretrial interviews or requested in discovery. Do the drawings look like fantasy? If so, counsel must explore how that initial foray into make-believe may have affected the rest of the interview, particularly if the interviewer fails to instruct the child to only talk about things that really happened (another best practice discussed more substantively later).

[21] *Id.* Because the goal of the forensic interview is to gather facts, best practices discourage the use of materials that encourage play or fantasy as doing so could confuse the child.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 8.

the alleged abuse and does not know the answers to the questions he is asking; (2) that it is permissible for the child to respond "I don't know" or "I don't understand that question"; and (3) that the child should only talk about things that really happened.[25] Further, while there is a split in the practice about how to encourage children to tell the truth, research indicates that children "may be less likely to make false statements if they have promised to tell the truth before the substantive phase of the interview."[26]

In our hypothetical, Vicky's interviewer attempted to engage in rapport building by asking her about her favorite foods and colors. While there is nothing wrong with doing so, the interviewer failed to provide Vicky with any preliminary instructions set forth above, nor did he ask Vicky to promise to tell the truth during the interview. While failure to solicit such a promise from Vicky may not conflict with the best practices, Vicky's interviewer should, given the findings of the research, be able to explain why he did not have Vicky promise to tell the truth prior to beginning the substantive portion of the interview.[27]

c. Use of Open-Ended and Non-Suggestive Questions

After noting your observations, you continue to watch the interview. The interviewer asks Vicky to tell him what happened with your client. When Vicky says she does not know, the interviewer asks whether your client ever touched her in her "private areas."

Forensic interviewers should use open-ended questions that encourage the child to provide information.[28] Preferred construction of questions include: "What are you here to talk to me about today?" as an example of an appropriate non-leading question to ask after the rapport-building phase

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[25] Newlin, et al., *supra* note 3 at 8. This goes back to the protocol about interview settings. The conditions and settings under which the interview takes place will influence a child's understanding of the purpose of the interview, which naturally will shape how the child responds to questioning. Accordingly, in addition to not displaying fantasy artwork on the walls or providing toys for the child to play with, the interviewer should inform the child to only discuss events that actually occurred.

[26] *Id.* Some states require children to take a "developmentally appropriate oath" before the interview begins while others simply "encourage" truth telling in an effort to assess competency. *Id.*

[27] *Id.*

[28] *Id.* at 9.

of the interview.[29] If the child's response concerns the alleged abuse, the interviewer should perhaps ask this follow-up open-ended question: "Tell me everything and don't leave anything out."[30]

Here, the interviewer asked Vicky to tell him what happened with your client. As such, he, not Vicky, is the first person to introduce your client into the conversation. Another deviation from best practices is that it came through a leading question asked at the very beginning of the interview. While asking such a direct question may be appropriate later in the interview after Vicky has provided information about your client, specific questions should be reserved for either clarifying previous responses or expanding upon previous answers, rather than introducing wholly new topics or individuals.[31]

d. Concluding the Interview

After carefully documenting these discrepancies, you press play again. Vicky describes the alleged abuse in specific detail. At one point, the interviewer hands Vicky two unclothed dolls and asks her to use them to demonstrate the alleged abuse. While using the dolls, Vicky describes additional acts of abuse that she had not mentioned before. The interview goes on and after Vicky answers the last question, the interviewer tells Vicky she "did great" and leaves the room.

At the termination of a forensic interview, the interviewer should: (1) ask the child if there is anything else she needs the interviewer to know; (2) ask if there is anything else she wants to tell or ask the interviewer; and (3) thank the child for her "effort," not for the information provided.[32]

How does the interviewer's wrap-up compare with the above best practice? Here, the interviewer told Vicky she "did great." This is

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[29] *Id.*

[30] *Id.*, *supra* note 3, at 9.

[31] Goodman & Bottoms, *supra* note 9, at 108. Moreover, while there may be times outside of clarification or expansion where use of a prompt is appropriate such as with a child who is too scared or anxious to speak, the interviewer should "allow for silence or hesitation without moving to more focused prompts too quickly." Newlin, et al., *supra* note 3, at 9. Further, there is "broad consensus" that interviewers should be cautious about using externally derived information (that is, information that was gathered outside the interview or that the child has not provided). *Id.* at 10.

[32] Newlin, et al., *supra* note 3, at 10.

problematic because words of affirmation encourage consistency, not necessarily truth-telling.[33] Instead, the interviewer should have simply thanked Vicky for speaking with him. The interviewer also failed to give Vicky an opportunity to provide additional information. You note these discrepancies, along with the others, as potential areas to cross-examine the forensic interviewer should he testify.[34]

4. Interview Aids

One tool that is not included on the list of best practices are aids such as anatomically detailed drawings or dolls. "The goal of a forensic interview is to have the child verbally describe his or her experience."[35] To that extent, the use of interview aids remains controversial and the OJJDP concludes, "ongoing research is needed to shed further light on the influence of various types of media on children's verbal descriptions of remembered events."[36] Anatomical dolls in particular receive a lot of attention and are generally familiar to most practitioners. While the impact of use of anatomical dolls has on children's reports may need further research,[37] there are several potential problem areas of which defense counsel should be aware.

First, as noted above, the goal of a forensic interview is to have a child explain what happened in his or her own words. To the extent the use of any prop, anatomical doll or otherwise, is needed to spur the discussion, you already have an area that can be explored to your advantage during cross-examination of the forensic interviewer should he or she testify

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[33] Goodman & Bottoms, *supra* note 9, at 80. "It is a good idea to praise children for their effort . . . [i]t is not a good idea to praise them for the content of what they report, as this may cause them to 'report more of the same' whether they are certain about the information or not." *Id.*

[34] *See infra* Appendix A. Because the forensic interview could be offered into evidence under a variety of theories of admissibility (as residual hearsay or as a prior consistent statement, for example), it is critically important that counsel are prepared to attack the reliability of the interview. Appendix A provides a sample cross-examination of Vicky's forensic interviewer into several areas discussed in the hypothetical involving Vicky.

[35] Newlin, et al., *supra* note 3, at 7.

[36] *Id.* The frequency with which anatomical dolls are used in forensic interviews differs among jurisdictions as does the requirement to conduct a forensic interview at all. Accordingly, if presented with a case in which an anatomical doll is utilized, counsel should determine whether the usage was in accordance with the jurisdiction's practice. If not, this too is a ripe area to cross-examine the forensic interviewer should he or she testify.

[37] *Id.*

either at trial or during a motions hearing.[38] Second, if dolls were used, were they clothed? They should be—at least at the outset.[39]

Comparing Vicky's interview against this guidance, you first note that Vicky verbally described the alleged abuse in detail and, as such, the dolls were not needed to facilitate communication. Second, the dolls were unclothed and Vicky used them to simulate sexual acts she had not previously reported. Eliciting these two critical points on cross-examination will allow you to then argue in closing that the additional acts were simply the by-product of Vicky playing with the unclothed and unnecessary dolls, thus undermining her credibility.

III. Competency

After examining the pretrial investigation for potential taint and assessing the forensic interview against the best practices, counsel should next assess whether the child is competent to testify.[40] With the exception of the military judge and members, every person who has personal knowledge of a matter or is testifying as an expert witness and takes an oath promising to tell the truth is competent to testify.[41] Additionally, whether the witness understands the difference between truth and falsehood and the moral importance of telling the truth, goes to the weight

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[38] Several experts have opined that props should be used with "great caution" and "only as a last resort." Walker, *supra* note 1, at 11. When they are used, they should only be used to encourage the child to expand upon information that has already been provided. *Id.* Further, preschool-aged children are particularly susceptible to the misleading effects of not only leading questions generally, but also to the suggestive use of anatomical dolls. Goodman & Bottoms, *supra* note 9 at 98.

[39] Goodman & Bottoms, *supra* note 9, at 54. " [These dolls] seem to have no clothes so you can't play school with them, set them up for tea, or even undress them to take a bath. There is one main thing you can see on these dolls—their sex . . . there is just about one game to play with these dolls—sex." *Id.*

[40] Because assessing competency will require evaluating a child's ability to recall and communicate, counsel should request expert assistance in this area. Moreover, while counsel may be able to flag competency issues while comparing the interview against the best practices, counsel should keep the two inquires distinct (at least analytically) to avoid conflating the different standards that apply to each.

[41] MCM, *supra* note 6, MIL. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise."); *Id. at* MIL. R. EVID. 602 (describing the need for personal knowledge); *Id. at* MIL. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. . . . in a form designed to impress that duty on the witness' conscience."); *Id. at* MIL. R. EVID. 605 (military judge not competent to testify), *Id. at* MIL. R. EVID. 606 (members not competent to testify); *Id. at* MIL. R. EVID. 702 (expert testimony).

of the testimony and not its competency.[42] The latter principle is important to keep in mind as trial counsel often attempt to establish the child's ability to understand truth from falsehood by using demonstrative aids consisting of truth-telling tasks before the child testifies (and, consequently, prior to any attack by the defense suggesting otherwise). Since children are presumed competent to testify, counsel should consider objecting to these exercises as improper bolstering. Further, although the Court of Appeals for the Armed Forces has found that age, by itself, is not a sufficient basis for challenging a witness's competence, there are other ways it can be attacked.[43]

Let's watch the interview again. This time, ask yourself: Is Vicky able to answer the precise questions she is asked? Does she appear to be delivering rehearsed responses? Was anyone watching the interview outside the room? Does Vicky ever leave the room?[44]

After watching the video, you notice the majority of Vicky's answers appear rehearsed since they are not responsive to the precise questions the interviewer asked. Additionally, you overhear the interviewer mention that Vicky's mom was watching through a two-way mirror and notice that Vicky took several breaks during which time she left the room. At this point, you do not know whether Vicky's mom is telling Vicky what to say or is simply trying to help Vicky remember what Vicky previously had said occurred. However, based on the above, one theory you should explore with your expert is whether Vicky's testimony is not based on her own personal knowledge, but rather from what she has been told by her mother. If so, you may have a valid basis to challenge Vicky's competency to testify for lack of personal knowledge.[45] To the extent the

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[42] *Id. at* MIL. R. EVID. 601 analysis, at A22-53.

[43] United States v. Morgan, 31 M.J. 43, 47 (C.A.A.F. 1990) ("We have never suggested that children might be incompetent to testify based on some general inability to understand an oath or affirmation to tell the truth.").

[44] Charles H. Rose III, MASTERING TRIAL ADVOCACY 246 (2014) (discussing child competency generally and providing foundational questions to establish competency, if challenged); Walker, *supra* note 1, at 5 (noting that children have a difficult time distinguishing between information that is based on personal experience from information obtained from parents or other sources).

[45] MCM, *supra* note 6, MIL. R. EVID. 601; MIL. R. EVID. 602. If competency is challenged, the trial counsel will attempt to establish a foundation for the child's ability to testify. For an example of questions the trial counsel may use to rehabilitate the witness, *see* Rose, *supra* note 44, at 246. Moreover, if a valid basis to challenge competency exists, counsel should consider which makes better strategic sense: filing a pre-trial motion or challenging competency at trial. One risk in filing a pretrial motion is

interview also raises concerns about Vicky's general ability to understand and respond to questions, you should raise those issues as well. Having crafted a plan to keep Vicky from testifying, you should continue to prepare for her cross-examination in the event the court determines she is, in fact, competent.

IV. Confronting the Child Witness

A. Confrontation

1. Introduction

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[46] A primary interest secured by the Confrontation Clause is the right to cross-examine, which the Supreme Court has called, "[T]he principal means by which the believability of a witness and the truth of his testimony are tested."[47] Further, while the right to cross-examine is not absolute and the trial judge has the authority to preclude or restrict repetitive or harassing questions, cross-examination has historically included the right to challenge a witness's perceptions and memory and to impeach his credibility.[48] The Confrontation Clause, which applies to members of the armed forces during the trial,[49] has

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that, if successful, the government will have more time to prepare (and give notice of its intent) to introduce the statement as residual hearsay under M.R.E. 807 than had the motion been granted during trial.

[46] U.S. CONST. amend. VI.

[47] Davis v. Alaska, 410 U.S. 308, 316 (1974).

[48] *Id*. In a subsequent case, the Supreme Court identified several grounds upon which a trial judge could appropriately limit cross-examination, including concerns about harassment, prejudice, confusion of the issues, witness safety, or for interrogation that is repetitive or only marginally relevant. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); *see* MCM, supra note 6, MIL. R. EVID. 611 (granting the military judge the ability to limit cross-examination on similar grounds).

[49] Article 32, UCMJ, is not a "critical stage" of the trial and, thus, the accused enjoys only the right of cross-examination, not confrontation. United States v. Bramel, 29 M.J. 958, 964 (A.C.M.R. 1990). While Article 32, UCMJ, has undergone substantial revisions since *Bramel* was decided, there is no reason to think any of the changes would affect its rationale. Indeed, the recent changes limiting the scope of the hearing and affording alleged victims the option of testifying further indicates the Article 32 hearing is not a "critical stage" of the trial as the court in *Bramel* found.

unique applications when the witness is a child.[50]

2. Limits on Face-to-Face Confrontation (Remote and Screened Testimony)

Recognizing that it is more difficult to lie about a person while in his presence than "behind his back," the Supreme Court has acknowledged that witnesses are less likely to wrongfully implicate an innocent person during face-to-face confrontation.[51] Further, the Court noted that the symbolic importance of face-to-face confrontation between the accused and his accuser is so engrained in human nature that it is regarded as "essential to a fair trial."[52] Accordingly, there is a "preference" for face-to-face confrontation.[53] The right to face-to-face confrontation is not absolute, however, and must occasionally give way to considerations of public policy.[54] One such public policy consideration concerns the protection of minor victims of sex crimes from further trauma and embarrassment, an issue the Supreme Court addressed in *Maryland v. Craig*.

In *Maryland v. Craig*, the Supreme Court considered the issue of whether the Confrontation Clause "categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed-circuit television."[55] The case centered around a Maryland statute that permitted judges to receive, via one-way closed-circuit television[56] the testimony of child

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[50] United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A 1960) ("[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."); United States v. Easton, 71 M.J. 168, 174 (C.A.A.F. 2012) (citing United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004)) for the position that, "Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable.").

[51] Maryland v. Craig, 497 U.S. 836, 846 (1990).

[52] *Id.* at 847.

[53] *Id.* at 849.

[54] *Id.* at 850.

[55] *Id.* at 840.

[56] This procedure allowed the child witness, prosecutor, and defense counsel to move to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was then examined and cross-examined in the separate room, while a video monitor recorded and displayed the testimony in the courtroom. The child witness was unable to see the defendant, who was permitted to remain in electronic communication with defense counsel. *Id.* at 841.

witnesses who were alleged to be the victims of child abuse. As a prerequisite to hearing testimony in this manner, the statute required the trial judge to determine that testimony by the child victim in the courtroom would result in the child suffering "serious emotional distress such that the child cannot reasonably communicate."[57] Craig objected to this procedure as a violation of the Confrontation Clause.[58]

The Court upheld Maryland's statute, reasoning that the state's interest in the psychological well-being of child abuse victims "may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accuser's in court."[59] In doing so, the Court distinguished the statutory procedure in *Craig* from the one the Court invalidated just two years earlier in *Coy v. Iowa* that allowed the placement of a screen between child witnesses and the defendant based solely on a generalized presumption of trauma associated with children testifying in front of their alleged abuser.[60] In *Craig*, the state presented expert testimony that the victims would experience "serious emotional distress" from testifying in front of the defendant (as opposed to by the courtroom generally).[61]

Military Rule of Evidence (MRE) 611(d) is the service equivalent of Maryland's statutory scheme. It allows a child victim or witness to testify from outside the courtroom where the military judge makes the following three findings on the record:

> (1) that it is necessary to protect the welfare of the particular child witness;
> (2) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and
> (3) that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis.[62]

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[57] *Id.* (citing MD. CTS. & JUD. PROC. CODE. ANN. § 9-102(a)(1)(ii) (1989)).
[58] *Craig*, 497 U.S at 842.
[59] *Id.* at 853.
[60] Coy v. Iowa, 487 U.S. 1012, 1021 (1988).
[61] Additionally, the Court noted that despite the absence of face-to-face confrontation, the procedure, overall, satisfied the remaining elements of confrontation: oath, cross-examination, and observation of demeanor by the trier of fact. *Craig*, 497 U.S. at 857.
[62] MCM, *supra* note 6, MIL. R. EVID. 611(d)(3). Additionally, "de minimis" has been interpreted to mean more than "mere nervousness or excitement or some reluctance to testify." United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (citing *Craig*, 497 U.S. at 856). Further, while alleged victims may testify from places other than the courtroom, courts have overturned cases where the accused (as opposed to the witness)

Returning to our hypothetical scenario, imagine the trial counsel files a motion with the judge requesting a screen be placed between her and the accused based upon studies showing that children experience trauma when compelled to confront their abusers in person.

Your response to the motion should cite *Coy*, arguing that such generalized notions of trauma are insufficient to overcome your client's constitutional right to confront his accuser and that approving such a request would also violate the procedures set forth in MRE 611(d). Specifically, the government failed to demonstrate how the screen was needed to protect Vicky's welfare, how any harm Vicky might have experienced was caused by your client's presence (as opposed to from testifying generally), and that even if Vicky would have experienced harm caused by your client's presence, that any such harm was more than de minimus.

Assume you prevail on the motion, and the trial counsel files another motion attaching an affidavit from a psychologist who avers that Vicky has post-traumatic stress disorder from the alleged abuse that will cause her severe anxiety if compelled to testify in the intense courtroom setting of a court-martial. In order to trump your client's constitutional right to confront his accuser, both *Maryland v. Craig* and MRE 611(d) require the military judge to find that any trauma Vicky is expected to experience would be caused by the presence of your client, and not by the experience of testifying generally. In the above scenario, the expert's affidavit fails to establish this evidentiary burden and the military judge should deny the motion.[63]

Having prevailed on these motions, suppose you then receive notice that Vicky may not testify at all (or if she does, she may not be able to communicate due to fear or anxiety) in which case the trial counsel would offer Vicky's forensic interview into evidence under the residual hearsay exception. Upon receipt of any such notice, you should consider filing a motion in limine arguing the statements Vicky made during the forensic

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has been removed absent a finding he was disruptive. *See* United States v. Daulton, 45 M.J. 212 (C.A.A.F. 1996) (finding the accused's confrontation rights were violated where the military judge excluded him from the courtroom while his daughter testified even though the accused watched the testimony via close circuit television because he could not observe the alleged victim, nor could the members observe him, and he could not communicate with counsel except through the bailiff).

[63] For an application of the procedures set forth in MIL. R. EVID. 611(d), *see McCollum*, 58 M.J. at 331–34.

interview are unreliable and inadmissible under the Confrontation Clause, and outline the various instances in which the interviewer deviated from the forensic interviewing best practices in the multiple, significant ways you carefully noted during your review of the interview.[64]

The trial counsel is not yet finished with his pretrial motions. This time, counsel seeks the court's permission for Vicky to testify while holding her favorite doll. How should you handle this motion?

3. Unique Issues—Comfort Items

Remote testimony is just one of several accommodations for children testifying in the courtroom; other accommodations may include child-sized furniture, support persons, and comfort items. As a general matter, accommodations should not be given as a reward for providing testimony as that undermines the reliability of the witness's testimony.[65] Instead, they should be implemented on a case-by-case basis based upon the needs of the alleged victim as required by *Craig* and should not be used to garner sympathy from the finder of fact.[66]

In determining whether to allow an accommodation, courts typically balance the child's need for the accommodation against the prejudice to the accused.[67] Often courts will look to certain factors, including: "the age of the witness, the nature of the comfort item, whether the prosecutor encouraged or initiated the witness to hold a comfort item, the nature of the offense, the likely impact of testifying in court facing the defendant, and any cautionary instructions given to the jury."[68]

Returning to our scenario, you should first request the military judge make specific findings as to why Vicky needs the comfort item. Second,

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[64] Crawford v. Washington, 541 U.S. 36 (2004) (testimonial statements of witnesses absent from trial are admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the witness).

[65] Major Bradley M. Cowan, *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, ARMY LAW., Feb. 2013, at 1,7 (additionally, Major Cowan notes that a limiting instruction ordering the panel to disregard the comfort item may be appropriate).

[66] *Id.*

[67] Angela Nascondiglio, *The Cost of Comfort: Protecting a Criminal Defendant's Constitutional Rights When Child Witnesses Request Comfort Accommodations*, 61 N.Y.L. SCH. L. REV. 395, 400-01 (2016-2017).

[68] *Id.* at 401.

consider objecting on due process grounds, arguing the prejudice to your client's right to a fair trial by giving the alleged victim undue sympathy outweighs the expected benefit to Vicky. Further, if overruled, you should request a limiting instruction that advises the panel to disregard the presence of the comfort item. Having successfully handled all of the trial counsel's pretrial motions, you are now ready to develop the questions you will ask Vicky on cross-examination.

B. Execution—Crafting Developmentally Appropriate Questions

As the Supreme Court has noted, cross-examination is the "principal means" for determining the believability of a witness and testing the truth of his testimony.[69] It follows then that in cases where the testimony of the child may be the primary evidence against your client, a skillful cross-examination of the child witness is imperative and may even determine the outcome of the trial. Indeed, "[a]ll of the forensic interviewing models agree that considering the age and development of the child is essential."[70] In order to succeed, counsel must not only know the facts of the case, but also how to present questions to the child in an age and developmentally appropriate manner.

Additionally, cross-examination of a child should be done for a specific purpose[71] such as: to minimize the damage done on direct examination; to discredit the child's testimony due to bias, inconsistency or motive to fabricate; or to establish facts that support your theory of the case.[72] Taken together, counsel preparing to cross-examine a child witness must not only know what information they intend to elicit and

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[69] *Davis*, 410 U.S. at 316.

[70] As noted in the OJJDP's bulletin, while infants and toddlers can recall experiences, they do not associate those memories with verbal descriptions. Newlin, et al., *supra* note 3, at 4. As children age, their ability to verbally describe experiences improves. *Id.* Moreover, children's ability to recognize: (1) they understand a question; (2) possess stored information about it; and (3) can retrieve the relevant information (a process called "metacognition") also improves as children age. *Id.*

[71] Counsel must always evaluate the risks and benefits of conducting cross-examination of any witness. For child witnesses, this calculation is even more important. The benefit of cross-examining a child witness without a specific purpose for doing so is unlikely to outweigh the risk of having the child look sympathetic to the fact finder or, worse, credible.

[72] Steven Lubet, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 87-88 (3rd ed. 2004).

why, but also how to effectively elicit that information given the child's age and development.

1. Where to Begin

Counsel cannot assume the style and demeanor they employ when cross-examining an adult witness will be effective for cross-examining a child witness, although it could in certain cases. Instead, counsel's approach must be individually crafted based on the child and the case. How to begin the cross-examination will be driven in part by your natural courtroom demeanor, but also by whether you've had the opportunity to interview the child before and establish rapport.[73]

Counsel should also review the OJJDP's best practices for interviewing children and implement suggested techniques into their own examinations. For example, one way to begin the examination is to identify yourself and lay some ground rules such as explaining to the child that if she does not know the answer to a question or does not understand the question, she should say "I don't know" or "I don't understand the question."[74]

2. Transitioning to Substance

However you choose to begin, you will need to transition to the substance of the examination. To do so, one author suggests asking the child a series of questions the child could easily agree with before skillfully (and subtly) transitioning to asking substantive questions for which an affirmative response is also sought.[75]

While it is important to get the timing of the transition from introductory to substantive questions correct, it is, as mentioned above, critical that the questions be delivered in an age and developmentally appropriate manner. If you have secured an expert, he will serve as your primary advisor for developing appropriate questions. If you do not have the benefit of an expert, consider employing some of the strategies forensic

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[73] John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L. J. 801, 878-79 (1987).
[74] Newlin, et al., *supra* note 3, at 8.
[75] For a more in depth discussion about this technique, *see* Myers, *supra* note 73, at 880.

interviewers use to conduct developmentally and age-appropriate interviews of children such as: using the active voice; avoiding negatives and double negatives; asking one question at a time; using simple words; using the child's terms; and being mindful to signals the child does not understand your questions.[76] By using simple words and asking simple questions, you can greatly enhance your ability to craft an effective cross-examination.[77]

V. Conclusion

When confronting a child witness, counsel's approach must be substantially different from that used to confront an adult. Conducting an effective cross-examination of a child witness requires reviewing the pretrial investigation for potential taint; analyzing the forensic interview against best practices; assessing the child's competency to testify; responding appropriately to motions for accommodations; and using age and developmentally appropriate language during the examination itself. Employing the tools and strategies discussed in this article will provide any defense counsel with a rubric to zealously represent their client and successfully challenge a child witness.

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[76] Walker, *supra* note 1, at 9. Of course, counsel may, for strategic reasons, wish to deviate from this list.

[77] *See infra* Appendix B for a sample cross-examination of Vicky that utilizes some of these strategies.

Appendix A. Sample Cross-Examination of Vicky's Forensic Interviewer

Q. Agent Smith, you conducted the forensic interview of Vicky?

A. Yes.

Q. While waiting in the interview room, Vicky was playing with dolls?

A. Yes.

Q. The walls were decorated with pictures of unicorns and talking animals.

A. Yes.

Q. You are familiar with the forensic interviewing best practices?

A. Yes.

Q. Then you know play items and fantasy artwork are uniformly discouraged.

A. Yes, but Vicky knew the interview was not play time.

Q. You didn't tell her to only talk about things that really happened, did you?

A. No, not expressly.

Q. And you didn't make her promise to tell the truth before beginning the interview.

A. No, I didn't.

Appendix B. Sample Cross-Examination of Vicky

Q. Hi, Vicky. My name is Sam. Do you remember talking to me?

A. Yes.

Q. I am going to ask you a few questions. It's okay to say I don't know or I don't understand the question. Do you understand?

A. Yes.

Q. You've talked to a lot of grown-ups about what happened, right?

A. Yes.

Q. You don't always remember everything that happened, do you?

A. No.

Q. When you forget, sometimes the grown-ups will help you remember.

A. Yes.

Q. They'll tell you what you said before.

A. Yes.

Q. And that will help you remember?

A. Yes.

Q. The grown-ups like it when you remember, don't they?

A. Yes.

Q. When you remember, they'll tell you good job?

A. Yes.[78]

[78] *See* Myers, *supra* note 73, at 893-94 (using this line of cross-examination about remembering to show how adults can influence a child's testimony). Myers' article is a great tool for practitioners as it provides sample cross-examination questions into a variety of other areas as well.

AUTOMATISM: A COMPLETE YET IMPERFECT DEFENSE

CAPTAIN BRENDAN J. MCKENNA*

> *Like a prisoner who dreams that he is free, starts to suspect that it is merely a dream, and wants to go on dreaming rather than waking up, so I am content to slide back into my old opinions; I fear being shaken out of them because I am afraid that my peaceful sleep may be followed by hard labour when I wake, and that I shall have to struggle not in the light but in the imprisoning darkness of the problems I have raised.*[1]

I. Introduction

On 4 February 1961, Staff Sergeant (SSgt) Willis E. Boshears, U.S. Air Force, pleaded not guilty to the murder of Jean Constable.[2] Staff Sergeant Boshears testified before the Essex, England, court that he killed Ms. Constable by strangling her while he slept.[3] The pathologist testified that this account was "certainly within the bounds of improbability."[4] In his instructions to the jury, the judge provided that no medical evidence exists to support a man strangling a woman in his sleep.[5] However, the jury should acquit if they determine the murder occurred involuntarily, while the defendant slept.[6] The jury acquitted after one hour and fifty minutes of deliberation.[7]

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* Judge Advocate, United States Marine Corps. Presently assigned as Complex Trial Team Member for the National Capital Region. LL.M., 2018, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; J.D., Duquesne University School of Law; B.A., University of Pittsburgh. Previous assignments include Deputy Staff Judge Advocate, 2d Marine Logistics Group, Camp Lejeune, North Carolina, 2015-2017; and Trial Counsel, Legal Services Support Section East, Camp Lejeune, North Carolina, 2013-2015. This article was submitted in partial completion of the Master of Laws requirements of the 66th Judge Advocate Officer Graduate Course.

[1] René Descartes, *Meditations on First Philosophy*, Early Modern Texts, 3 (1641), http://www.earlymoderntexts.com/assets/pdfs/descartes1641.pdf (last updated April 2007).

[2] PAUL DONNELLEY, ESSEX MURDERS 137 (2007).

[3] *Id.* at 138. The Director of Public Prosecutions rejected the military's request to try Staff Sergeant Boshears before a court-martial. *Id.* at 137.

[4] *Id.* at 138.

[5] *Id.* at 139.

[6] *Id.*

[7] *Id.*

The automatism defense provided the means for SSgt Boshears' acquittal. Black's Law Dictionary defines "automatism" as "[a]ction or conduct occurring without will, purpose, or reasoned intention," "behavior carried out in a state of unconsciousness or mental dissociation without full awareness," and "[t]he physical and mental state of a person who, though capable of action, is not conscious of his or her actions."[8] In May 2015, the U.S. Court of Appeals for the Armed Forces (CAAF) recognized automatism as an affirmative defense.[9]

Although automatism provides a complete defense, employing the defense may expose an accused to additional criminal and administrative consequences. For example, disorders that form the basis for an automatism defense are a complete bar to military service.[10] An accused who relies upon a sleepwalking defense may conflict with Article 104a, Fraudulent Enlistment, Appointment, or Separation,[11] if they knew of their condition prior to joining the military and failed to disclose it.[12] Moreover, the same accused may still be convicted if the resulting harm was foreseeable or the felony murder rule applies.[13] Even if acquitted, an accused may face administrative separation for qualifying disorders under a basis of condition not a disability.[14]

As a relatively new type of military defense, this article provides criminal law practitioners a review of common automatism based

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[8] BLACK'S LAW DICTIONARY 160 (10th ed. 2014).
[9] United States v. Torres, 74 M.J. 154 (C.A.A.F. 2015).
[10] U.S. DEP'T OF DEF., INSTR. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES para. 1.b (6 May 2018) [hereinafter DoDI 6130.03].
[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 35 (2019) [hereinafter MCM].
[12] *See* U.S. Dep't of Def., DD Form 2807-2, Medical Prescreen of Medical History Report (Oct. 2003); UCMJ art. 104a (2018).
[13] Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191, 1201 n.36 (1990); *See* UCMJ art. 118c(5) (2018).
[14] U.S. MARINE CORPS, ORDER 1900.16F Ch2, MARINE CORPS SEPARATION AND RETIREMENT MANUAL para 6203.2 (26 Nov. 2013) [hereinafter MARCORSEPMAN]; U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 5-17 (19 Dec. 2016) [hereinafter AR 635-200]; U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL sec. 1910-120 (22 Aug. 2002) [hereinafter MILPERSMAN]; U.S. DEP'T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 5.11 (14 June 2018) [hereinafter AFI 36-3208]; U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1000.4, MILITARY SEPARATIONS art. 1.B.12 (Aug. 2018) [hereinafter COMDTINST M1000.4].

disorders, how military courts address the defense, and best practices for both employing and overcoming the defense.

II. Common Automatism Based Disorders

Unconscious violence generally occurs under the umbrella of one of three conditions: Epilepsy, Non-Rapid Eye Movement Sleep Arousal Disorders, and Rapid Eye Movement Sleep Behavior Disorders.[15]

A. Epilepsy

Epilepsy is caused by irregular brain activity.[16] Although some are born with the disorder, others develop it through head trauma, infection, or an ingestion of toxic substances.[17] A seizure is a symptom of epilepsy and is frequently associated with involuntary action, to include: "lip smacking, eye fluttering, purposeless movement, excessive swallowing, and unintelligible speech."[18] At the onset of a seizure, the individual may experience déjà vu or emit an epileptic cry.[19] Seizures typically end gradually with a period of drowsiness or confusion, known as the "postictal" state.[20]

Seizures are classified into specific types based upon whether there is a loss of consciousness, type of involuntary movement, and duration.[21] Descriptions of the seizure are the most important data used by medical professionals in diagnosing the individual.[22] Following an initial diagnosis, diagnostic testing is performed to verify the diagnosis, uncover

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[15] Francesca Siclari at al., *Are Sleepwalking Killers Conscious*, SCI. AM. MIND, July 2012, at 38, 40.
[16] Susan E. Norman & Thomas R. Browne, *Seizure Disorders*, 81 AM. J. NURSING 984, 984 (1981).
[17] *Id*.
[18] *Id*. at 985.
[19] *Id.*
[20] *Id.* In United States v. Torres, the government's expert, a neurologist, testified that postictal violence is rare among people who have epilepsy. *Torres*, 74 M.J. at 157-58. In those rare cases, violence occurs immediately upon entering the postictal state. *Id.* at 158.
[21] Norman & Browne, *supra* note 16, at 985.
[22] *Id*. at 986.

precipitating factors, and identify treatment.[23] Notable seizure triggers include trauma, lack of sleep, emotional stress, poor nutrition, and the use of alcohol or drugs.[24]

B. Non-Rapid Eye Movement Sleep Arousal Disorders

1. Somnambulism

Sleepwalking occurs during Non-Rapid Eye Movement (NREM) sleep, generally within the first third of the night.[25] A sleepwalking episode typically lasts between a few minutes and one half hour.[26] The defining characteristic of sleepwalking is repeated instances of complex motor behavior during sleep.[27] A sleepwalking episode may initially involve simply sitting up in bed, but progress to more complex behavior.[28] An individual may leave the room or building, use the bathroom, eat, unlock doors, and even drive a car.[29] While sleepwalking, the individual will exhibit a blank stare, remain mostly unresponsive to communication from others, and lack the ability to feel pain.[30] If awakened, the individual will possess limited recall of the sleepwalking event.[31]

Only one to seven percent of adults will experience a sleepwalking episode.[32] Sleepwalking is more prevalent in children, and episodes

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[23] *Id.* Medical professionals perform diagnostic testing by conducting a complete neurological exam, skull x-ray, computerized axial tomography (CAT) scan, and blood studies. *Id.*

[24] *Id.* at 991.

[25] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH EDITION 399-400 (2013) [hereinafter DSM-5].

[26] *Id.* at 400.

[27] *Id.*

[28] *Id.*

[29] *Id.* In 1987, a Canadian man was acquitted using the "sleepwalking defense" after driving fourteen miles to his in-laws residence, strangling his father in-law, striking his mother-in law with a tire iron, and stabbing each with a knife. Lindsay Lyon, *When Sleep Problems Become Legal Problems, Neuroscience Can Help*, U.S. NEWS (May 8, 2009, 10:22 AM), https://health.usnews.com/health-news/family-health/sleep/articles/2009/05/08/when-sleep-problems-become-legal-problems-neuroscience-can-help?PageNr=1. His confusion, inability to feel pain after severing tendons in both hands, and family history of parasomnia gave credibility to his defense. *Id.*

[30] DSM-5, *supra* note 25, at 400; Lyon, *supra* note 29.

[31] DSM-5, *supra* note 25, at 400.

[32] *Id.* at 401.

become less frequent with age.[33] If an adult without a childhood history reports a sleepwalking episode, medical professionals will analyze other potential causes for the episode, such as a nocturnal seizure or medication.[34] Eighty percent of those who sleepwalk have a family history of sleepwalking.[35] Sleepwalking triggers include sedatives, sleep deprivation, disruption in sleep schedule, fatigue, and both physical and emotional distress.[36]

2. Sexsomnia

Sexsomnia is one of two specialized forms of sleepwalking.[37] During a sexsomnia episode, an individual may participate in various sexual activity, to include masturbation, fondling, groping, making sexual noises, and sexual intercourse.[38] These activities all occur without an individual's awareness.[39] Some experts attribute a sexsomniac's unconscious fondling of a partner or child to the "local sleep theory."[40] This concept provides that some parts of the brain sleep while other parts remain active.[41]

Sexsomnia is most prevalent in adult males.[42] A 2007 study revealed that some things that trigger sexomnia are: physical contact with another

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[33] *Id.*

[34] *Id.* Alcohol induced blackouts are nearly indistinguishable from sleepwalking because individuals exhibit similar behavior. *Id.* at 403. Unlike sleepwalking, an alcohol-induced blackout does not involve loss of consciousness; rather, an isolated disruption of memory occurs. *Id.*

[35] *Id.* at 401.

[36] *Id.*

[37] *Id.* at 400. The other specialized form is sleep-eating. *Id.*

[38] *Id.* at 400-01; Noah Michelson et al., *This Is What Life With Sexsomnia Is Like (And Why It Can Be Dangerous)*, HUFFINGTON POST (Feb. 25, 2016, 5:28 PM, updated Apr. 14, 2017), https://www.huffingtonpost.com/entry/what-it-is sexsomnia_us_56cf31b0e4b03260bf75bf50.

[39] DSM-5, *supra* note 25, at 401.

[40] James Vlahos, *What Sleep Crime Tells Us About Consciousness*, SCI. AM., Sept. 2012, at 48, 50.

[41] *Id.* Brain-imaging studies show that during NREM sleep, the prefrontal cortex, which governs reason and moral judgment, is less active. *Id.* at 53. However, the area governing simple, primitive behavior in the midbrain remains active. *Id.* When the prefrontal cortex is unable to counter the midbrain, sexsomniacs "become more like wild animals, governed by instinctive urges and impulsive reactions." *Id.*

[42] DSM-5, *supra* note 25, at 401.

person in bed, stress, fatigue, alcohol use, drug abuse, and sleep deprivation.[43] Fever also increases the risk of a sexsomnia episode.[44]

C. Rapid Eye Movement Sleep Behavior Disorder (RBD)

Unlike sexsomnia, RBD is not triggered by alcohol or drug abuse, but occurs during Rapid Eye Movement (REM) sleep—a deeper state of sleep where most dreaming occurs.[45] In REM sleep, the body naturally enters a state of paralysis in order to prevent harming itself.[46] However, some people can escape the paralysis and act out the dream.[47] Depending on the dream, the consequences can be violent.[48]

In contrast to sleepwalking, a person exhibiting RBD may be awoken relatively easily and can recall detailed content from the dream without confusion.[49] Only 0.38% to 0.5% of the population have RBD.[50] It is most prevalent in males over fifty.[51]

III. Automatism in Military Courts

A. Negating Actus Reus

1. Adopting the Actus Reus Approach

U.S. Court of Appeals for the Armed Forces adopted the actus reus approach to the automatism defense in *United States v. Torres*.[52] In May 2008, Airman First Class (A1C) Torres and his spouse hosted a party, during which A1C Torres consumed approximately eight to ten shots of

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[43] Mark D. Griffiths, *Sleeping Thrills: A Brief Look at Sexsomnia*, PSYCHOL. TODAY (Oct. 9, 2014), https://www.psychologytoday.com/blog/in-excess/201410/sleeping-thrills.
[44] DSM-5, *supra* note 25, at 401.
[45] *Id.* at 407-08.
[46] Lyon, *supra* note 29.
[47] *Id.* For example, in April 2012, a U.S. Soldier savagely pistol-whipped his spouse while dreaming of fighting a Nazi spy using a knife. Vlahos, *supra* note 40, at 53.
[48] DSM-5, *supra* note 25, at 408. "Dream enacting behavior" describes motor responses to a dream, to include falling, jumping, running, punching, and kicking. *Id.*
[49] *Id.* at 403, 408.
[50] *Id.* at 408.
[51] *Id.*
[52] *Torres*, 74 M.J. at 158.

alcohol.[53] At approximately 0200, A1C Torres and his spouse went to bed while the party guests slept throughout the home.[54] Several hours later, the spouse awoke to find A1C Torres apparently asleep on the floor.[55] She unsuccessfully attempted to shake him awake to inform him that she intended to drive some guests home.[56] Upon returning a short time later, the spouse again attempted to wake A1C Torres by shaking him; then by lifting him to an upright position.[57] During the lifting motion, A1C Torres grabbed his spouse and threw her onto the bed.[58] He then squeezed her head, punched her, choked her, and hit her head against the bed's headboard.[59]

The spouse escaped by hitting A1C Torres in the head with a telephone base near the bedside.[60] Thereafter, A1C Torres walked into the living room and asked a guest what happened to his spouse.[61] The guest responded that A1C Torres severely beat his wife, and he returned to the bedroom.[62] Subsequently, military police arrived to find A1C Torres asleep.[63] Military police vigorously shook A1C Torres until he awoke, and he again asked about his spouse.[64]

At trial, defense counsel introduced evidence that the assault was due to an altered state of consciousness following an epileptic seizure.[65] Although the defense requested an instruction pertaining to the involuntary act, the military judge instructed the members in accordance with Rule for Courts-Martial (RCM) 916(k)(1), lack of mental responsibility.[66] In relevant part, the military judge instructed that the burden shifted to the defense to prove by clear and convincing evidence

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[53] *Id.* at 155.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 155-56.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 156.
[66] *Id.*

that the accused was unable to appreciate the nature or wrongfulness of his conduct.[67] The members convicted Torres of aggravated assault.[68]

The CAAF granted Torres' appeal to determine whether the military judge erred by denying the defense requested instruction.[69] The Court began its analysis by reasoning that "an accused cannot be held criminally liable in a case where the actus reus is absent because the accused did not act voluntarily, or where mens rea is absent because the accused did not possess the necessary state of mind when he committed the involuntary act."[70] The CAAF noted that no clear precedent existed within the UCMJ or previous military cases as to whether automatism negated mens rea or actus reus.[71] The Court specified that the last time it addressed automatism, evidence of unconsciousness suggested the mens rea approach, which was at odds with the actus reus approach adopted by both the common law and Model Penal Code.[72] The CAAF concluded that the state of the law pertaining to automatism was unclear at the time of Torres' trial.[73] However, the Court found instructional error as neither epilepsy nor automatism qualified as a severe mental disease or defect for purposes of the lack of mental responsibility defense.[74] The Court held that "[i]n cases where the issue of automatism has been reasonably raised by the evidence, a military judge should instruct the panel that automatism may serve to negate the actus reus of a criminal offense."[75]

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[67] *Id.*
[68] *Id.* at 155.
[69] *Id.* at 156.
[70] *Id.*
[71] *Id.*
[72] *Id.* (citing United States v. Berri, 33 M.J. 337, 341 n. 9 and 344 (C.M.A. 1991)). C.A.A.F. further provided that the Court of Military Appeals' dicta indicated the mens rea approach is more appropriate. *Id.* at 157 (citing United States v. Olvera, 4 C.M.A. 134, 140-41 (1954); United States v. Rooks, 29 M.J. 291, 292 (C.M.A. 1989)).
[73] *Torres*, 74 M.J. at 157.
[74] *Id.* The Court determined that the instructional error was harmless as both the government and defense expert agreed that Torres' claim of postictal violence was highly improbable, the sanity board determined Torres was not suffering from a postictal state at the time of the charged offense, and the military judge permitted defense counsel to present evidence of automatism at trial. *Id.*
[75] *Id.* at 158. Interestingly, at the conclusion of the Court's opinion, it specified that military judges "must" rather than "should" provide the instruction. *Id.*

2. The First Application of the Actus Reus Approach

Approximately two weeks following the publication of the *Torres* opinion, the newly recognized automatism defense was litigated on board Marine Corps Air Station Miramar.[76]

In February 2014, Sergeant (Sgt) Clugston and three other Marines consumed alcohol at a barracks smoke pit for several hours.[77] At approximately 2300, Sgt Clugston and "Cpl W" escorted the victim, a junior female Marine, to her room due to her level of intoxication.[78] Upon reaching the room, Sgt Clugston collapsed on the floor.[79] The victim provided that Sgt Clugston could stay the night after the Marines' attempt to wake him proved unsuccessful.[80] Thereafter, the victim fell asleep fully clothed in her rack wearing a sweatshirt, shirt, bra, skinny jeans, underwear, and boots.[81] In addition, Cpl W turned Sgt Clugston on his side in case he vomited.[82] Concerned over the Marines' degree of intoxication, Cpl W slept in an open rack.[83]

The victim awoke during the night to Sgt Clugston on top of her and pain in her vagina.[84] Subsequently, she pushed Sgt Clugston onto the floor with her screams for help awaking Cpl W.[85] Cpl W turned on a light to find the victim sitting in bed, wrapped in a blanket, and her clothes on the floor.[86] According to Cpl W, Sgt Clugston appeared disoriented and dressed himself prior to departing the room.[87] The victim reported the assault that night, and a sexual assault forensic examination revealed the presence of Sgt Clugston's DNA.[88]

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[76] Interview with Lieutenant Colonel Doug C. Hatch, United States Marine Corps, Instructor, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (Sept. 28, 2017). Lieutenant Colonel Hatch served as the trial counsel in United States v. Clugston. *Id.*
[77] United States v. Clugston, No. 201500326, 2017 WL 411118, at *1 (N-M. Ct. Crim. App. Jan. 31, 2017).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at *1-3.
[82] *Id.*
[83] *Id.* at *1.
[84] *Id.* at *2.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

At trial, defense counsel presented evidence that Sgt Clugston suffered from sexsomnia at the time of the charged sexual assault.[89] Evidence included both personal and family history of sleepwalking and expert testimony that Sgt Clugston's heavy drinking triggered a sexsomnia episode.[90] The military judged determined that the evidence reasonably raised the automatism defense and instructed the members that the government must prove every element of the offense beyond a reasonable doubt.[91] In relevant part, the government had to prove that Sgt Clugston was conscious at the time of the charged offense.[92] The members found Sgt Clugston guilty of violating Article 120(b)(2), committing a sexual act upon the victim while she was incapable of consent due to alcohol.[93]

Sergeant Clugston partly appealed his conviction asserting that the government failed to prove he was conscious when he committed the sexual act.[94] On appeal, the U.S. Navy-Marine Corps Court of Criminal Appeals (N-M. Ct. Crim. App.) primarily focused its analysis on the expert testimony presented at trial, finding "significant inconsistencies between [Sgt Clugston's] behavior and involuntary actions during sleep."[95] The government's expert testified that "virtually all" sexsomnia episodes occur at home, in bed, with the usual bed partner.[96] Moreover, those rare occasions involving a stranger usually occur when two people sleep next to each other.[97] Finally, removing tight-fitting clothing was far too complex a behavior for someone to achieve during a sexsomnia episode.[98] When questioned about how he was able to distinguish between Clugston's alleged parasomnia episode and an alcohol induced incident, the defense expert relied solely on perceived good military character.[99]

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[89] *Id.* at *8.
[90] *Id.* at *6.
[91] *Id.*
[92] *Id.* at *6.
[93] *Id.* at *4. The members also acquitted Clugston of committing a sexual act while the victim was asleep, unconscious, or otherwise unaware. *Id.* The appellate court determined that the findings were inconsistent; however, the finding of not guilty did not bind the court to set aside the conviction. *Id.* at *4. The appellate court reasoned that it may consider evidence that the victim was asleep in analyzing evidence related to the other specification. *Id.*
[94] *Id.* at *5.
[95] *Id.* at *5-6.
[96] *Id.* at *6.
[97] *Id.*
[98] *Id.* at *6. The defense expert testified that driving a car is an example of a complex behavior that a sleepwalker may perform. *Id.* However, driving is a routine and repetitive behavior, unlike the removal of another's tight-fitting clothing. *See id.*
[99] *Id.* at *7.

Ultimately, the N-M. Ct. Crim. App. found that the defense evidence supported sexsomnia as a hypothesis for Sgt Clugston's behavior, but he did not suffer from sexsomnia.[100]

The N-M. Ct. Crim. App. held that a military judge must instruct on the following two points if automatism is reasonably raised by the evidence: "(1) 'automatism may serve to negate the actus reus of a criminal offense[,]' and (2) the government has the burden to disprove automatism and prove conscious, voluntary conduct beyond a reasonable doubt."[101] In its analysis of *Torres*, the N-M. Ct. Crim. App. articulated that the second point is really "two sides of the same coin."[102] The government must either disprove involuntary action or prove voluntary action; one necessitates the other.[103] The Court reasoned that it did not need to determine whether the government proved consciousness beyond a reasonable doubt because Sgt Clugston did not suffer from sexsomnia.[104]

Sergeant Clugston also appealed his conviction arguing the trial judge committed instructional error.[105] Voluntary intoxication is generally not a defense; however, it is a trigger for epileptic seizures, sleepwalking, and RBD.[106] In *Clugston*, the trial judge borrowed California instructions after determining no military instruction existed addressing cases where the evidence raised both voluntary intoxication and automatism.[107] The judge rejected defense counsel's proposed instruction on voluntary intoxication serving as a "contributing factor" for parasomnia.[108] Rather, the judge instructed that voluntary intoxication and automatism provide "independent causes of unconsciousness."[109] On appeal, the N-M. Ct. Crim. App. found no instructional error.[110]

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[100] *Id*. at *7.
[101] *Id*.
[102] *Id*. at *6.
[103] *Id*.
[104] *Id*. at *7.
[105] *Id*. at *1.
[106] MCM, *supra* note 11, R.C.M. 916(k)(3)(C)(2); Norman & Browne, *supra* note 16, at 991; Griffiths, *supra* note 43; DSM-5, *supra* note 25, at 408.
[107] *Clugston*, 2017 WL 411118, at *9.
[108] *Id*.
[109] *Id*.
[110] *Id*.

B. Burden of Proof

A critical takeaway from the CAAF's adoption of the actus reus approach is that the burden of proof never shifts. This is a key distinction to draw between the affirmative defenses of automatism and lack of mental responsibility. Under a lack of mental responsibility defense, the burden shifts to the defense to show by clear and convincing evidence that the accused suffered from a severe mental disease or defect.[111] Under an automatism defense, the burden always rests with the government to prove each element of an offense beyond a reasonable doubt.[112]

C. Absence of Procedural Safeguards

As noted by the N-M. Ct. Crim. App., the CAAF recognized automatism as an affirmative defense even though it is not contained within RCM 916.[113] Consequently, automatism is void of the legal procedures that exist for lack of mental responsibility. Under a lack of mental responsibility defense, the members may find that the accused is not guilty only by reason of lack of mental responsibility.[114] If this finding is entered for an offense involving bodily harm, serious property damage, or substantial risk of injury, the military judge must conduct a post-trial hearing.[115] The purpose is to determine whether the accused, if released, poses "a substantial risk of bodily harm to another or serious damage to property of another."[116] If the accused is unable to prove that he does not pose a risk by clear and convincing evidence, the General Court-Martial Convening Authority may commit the accused to the custody of the Attorney General.[117]

Recognizing automatism as an affirmative defense without post-trial safeguards is potentially problematic. As discussed above, some disorders

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[111] MCM, *supra* note 11, R.C.M. 916(k).
[112] *Torres*, 74 M.J. at 157.
[113] *Clugston*, 2017 WL 411118, at *5.
[114] MCM, *supra* note 11, R.C.M. 921(c)(4). "If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results." *Id.*
[115] MCM, *supra* note 11, R.C.M. 1105.
[116] *Id.*
[117] *Id.* Under this scenario, the accused is hospitalized until the director of the facility determines that the accused no longer poses a risk and petitions the Attorney General for release. *See* 18 U.S.C. § 4241(e); UCMJ art. 76(a)(4)(A) (2018).

providing the automatism defense are both dangerous and treatable. Nevertheless, those employing the defense do not run the risk of a finding of guilt by reason of the underlying condition or mandated treatment.

IV. Best Practices

A. Inquiry into the Mental Capacity or Mental Responsibility of the Accused

Despite the lack of post-trial safeguards, authority exists to support an RCM 706 inquiry if the facts suggest that the accused exhibited automatism.[118] Per RCM 706(c)(2), a mental health order must "contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused or other reasons for requesting the examination."[119] In *Clugston*, the trial judge granted the government's request for the RCM 706 inquiry to include a sleep study that addressed the alleged sexsomnia.[120] Furthermore, the CAAF relied upon the sanity board results in *Torres* to reason that the lower court's instructional error was harmless.[121] The CAAF's reliance on the sanity board provides additional authority for an RCM 706 inquiry in automatism cases.

Commanders, trial counsel, defense counsel, military judges, preliminary hearing officers, and even courts-martial members share the responsibility to request an inquiry.[122] Requesting the inquiry is appropriate if "there is reason to believe that the accused lacked mental responsibility for any offense charged . . . ."[123] A proper defense request for employment of expert assistance will signal the need for an RCM 706 inquiry.[124]

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[118] *See e.g. Torres*, 74 M.J. at 158 (sanity board determined appellant suffered from an "alcohol-induced mood disorder and partner relationship problems," not a postictal state); United States v. Savage, 67 M.J. 656, 658 (Army Ct. Crim. App. 2009) (sanity board found appellant competent to stand trial and "reasonable probability" he suffered from a parasomnia at the time of the charged offense).
[119] MCM, *supra* note 11, R.C.M. 706(c)(2).
[120] Interview with Lieutenant Colonel Doug C. Hatch, United States Marine Corps, Instructor, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (Feb. 5, 2018).
[121] *Torres*, 74 M.J. at 158.
[122] MCM, *supra* note 11, R.C.M. 706(a).
[123] *Id.*
[124] MCM, *supra* note 11, R.C.M. 703(d).

An expert request must "include a complete statement of reasons why employment of the expert is necessary . . . ."[125] In addition, the accused must show "both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial."[126] Given this standard, an accused must provide some evidence indicating that they may have an automatism disorder. Failure to do so will result in the convening authority's denial of the expert request and a subsequent motion to the military judge in order to compel expert assistance.[127] The savvy trial counsel should hold the defense to its burden of showing necessity, resulting in production of some evidence of the accused's potential condition. Upon receipt, the trial counsel will have a non-frivolous, good faith basis to request an RCM 706 inquiry.[128]

Requesting an RCM 706 inquiry provides the trial counsel with several benefits. First, the military judge may prohibit the defense from introducing automatism if the accused refuses to comply with an RCM 706 order.[129] Second, if the defense offers expert testimony concerning the accused's automatism, the government must receive the full contents of the evaluation, absent statements made by the accused.[130] Third, the

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[125] *Id.* Military courts apply a three-part test to determine whether expert assistance is necessary. United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005). "The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Id.*

[126] *Id.*

[127] MCM, *supra* note 11, R.C.M. 703(d).

[128] "A request for a sanity board [is] to be granted 'if [the motion] is not frivolous and is made in good faith.'" United States v. Jancarek, 22 M.J. 600, 601 (C.M.A. 1986) (quoting United States v. Nix, 36 CMR 76, 79 (C.M.A. 1965).

[129] MCM, *supra* note 11, M.R.E. 302(d).

[130] MCM, *supra* note 11, M.R.E. 302(c). At the conclusion of the inquiry, the trial counsel only receives a "short form" of the board's findings. MCM, supra note 11, R.C.M. 706(c)(3)(A). The short form contains the board's ultimate conclusions concerning four questions:

> (1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
> (2) What is the clinical psychiatric diagnosis?
> (3) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
> (4) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the

judge may compel disclosure of the accused's statements if introduced into evidence by the defense.[131] Finally, assuming the board diagnoses automatism, trial counsel will possess the documents necessary to render a disposition recommendation to the convening authority.[132]

The RCM 706 inquiry is not merely a government tool. Defense counsel may desire the board's findings to determine whether a mental condition provides a viable defense. When the voluntariness of the accused's actions or his intent is in question, criminal trials typically evolve into the familiar "battle of the experts."[133] Armed with a complete evaluation, a defense expert consultant may properly advise defense counsel on the legitimacy of the board's findings. Alternatively, defense counsel may find the accused's interests are better served pursuing a non-automatism defense or pre-trial agreement.

If defense counsel introduce the automatism defense, they must carefully illicit expert testimony to avoid disclosing statements made by the accused to the sanity board. Military Rule of Evidence (MRE) 302(a) grants the accused a privilege to prevent disclosing statements made to the mental health board.[134] However, no privilege exists if the defense introduces the statements or derivative evidence.[135] An inadvertent disclosure or misunderstanding of the privilege may result in the accused's conviction.

For example, in United States v. Savage, Private (Pvt) Savage participated in a mental health evaluation to determine whether he understood the charges against him and could participate in his defense.[136]

> proceedings against the accused or to conduct or cooperate intelligently in the defense?

MCM, *supra* note 11, R.C.M. 706(c)(2).

[131] MCM, *supra* note 11, M.R.E. 302(c).

[132] The discussion following R.C.M. 706(b) provides, "Based on the report, further action in the case may be suspended, the charges may be dismissed [or] . . . administrative action taken to discharge the accused from the service . . ." MCM, *supra* note 11, R.C.M. 706(b).

[133] *See e.g. Clugston*, 2017 WL 411118, at *2 ("A battle of the experts ensued, as the counsel litigated parasomnia, sexsomnia, and the effect of alcohol on sleep.").

[134] MCM, *supra* note 11, M.R.E. 302(a). In United States v. Savage, the Army Court of Criminal Appeals determined that the privilege is not limited to cases where the defense uses a non-lack of mental responsibility defense. 67 M.J. at 661. The Court specifically found that "parasomnia" is a mental condition subject to M.R.E. 302. *Id.* at 662.

[135] MCM, *supra* note 11, M.R.E. 302(b)(1).

[136] *Savage*, 67 M.J. at 657.

The sanity board found Pvt Savage competent. "[T]here was a reasonable possibility" he suffered from parasomnia at the time of the attempted murder.[137] At trial, the defense argued Pvt Savage could not form the requisite intent because he suffered from parasomnia.[138] The defense expert testified "a history of sleep-walking was an important indicator of parasomnia."[139] However, the expert further testified "'Private Savage didn't have any recollection' of prior parasomniac events."[140] The military judge reasoned, and the Army Court of Criminal Appeals concurred, that the expert's testimony referenced a specific statement made by the accused to his sanity board.[141] Therefore, the government was entitled to the accused's statements pertaining to his sleep history.[142] Subsequently, trial counsel successfully crossed the defense expert using the statements, who admitted an inability to diagnose Pvt Savage as an actual sleepwalker.[143] A general court-martial convicted Pvt Savage, sentencing him to twenty-three years confinement.[144]

B. Fraudulent Enlistment

Defense counsel must carefully screen clients' contracting documents for a DD Form 2807-2 before submitting affidavits and medical history in support of requests and motions for expert assistance.[145] Prior to joining the military, individuals must complete DD Form 2807-2, Medical Prescreen of Medical History Report[146], in accordance with Department of Defense Instruction (DoDI) 6130.03. Department of Defense Instruction

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[137] *Id*. at 659.
[138] *Id*.
[139] *Id*.
[140] *Id*. at 662.
[141] *Id*. at 663.
[142] *Id*.
[143] *Id*. at 659-660.
[144] *Id*. at 657.
[145] In a case tried by the author, defense counsel submitted an affidavit from a former girlfriend swearing (1) the accused suffered from sexsomnia, (2) they openly discussed his condition during their relationship, and (3) the relationship took place years before his enlistment. As the accused failed to disclose the medical condition on his enlistment paperwork, defense counsel unwittingly exposed his client to an additional charge for violating Article 83, Fraudulent Enlistment. After explaining to the military judge that the government intended to withdraw the original charges in order to prefer the additional offense, defense counsel submitted a favorable pretrial agreement. This assertion is based on the author's recent professional experience as Trial Counsel for Legal Services Support Section East, Camp Lejeune, North Carolina, from 2013 to 2015.
[146] DD Form 2807-2, *supra* note 12.

6130.03 is to be used as guidance "for appointment, enlistment, or induction of personnel into the Military Services."[147] Department of Defense Instruction 6130.03 prohibits individuals from joining the military if they currently exhibit or have a history of parasomnias, including, but not limited to sleepwalking.[148] Also prohibited are individuals suffering seizures beyond six years of age, "unless the applicant has been free of seizures for a period of [five] years while taking no medication for seizure control."[149]

Department of Defense Form 2807-2 provides a conspicuous warning to applicants indicating that information "given constitutes an official statement . . . . If you are selected . . . based on a false statement, you can be tried by military courts-martial or meet an administrative board for discharge. . . ."[150] Thereafter, applicants must indicate current and past medical history pertaining to sleepwalking, epilepsy, seizures, or convulsions.[151] As the Department of Defense relies upon the standards set forth by DoDI 6130.03 in accepting able-bodied applicants, failure to report the above is punishable under Article 104a, Fraudulent Enlistment, Appointment, or Separation.[152]

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[147] DoDI 6130.03 para. 1.2(a).
[148] DoDI 6130.03 para. 5.27.
[149] DoDI 6130.03 para. 5.26(m).
[150] DD Form 2807-2, *supra* note 12.
[151] *Id*.
[152] UCMJ art. 104a (2018) requires that the government prove four elements:

> (1) That the accused was enlisted or appointed in an armed force;
> (2) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;
> (3) That the accused's enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and
> (4) That under this enlistment or appointment that accused received pay or allowances or both.

C. The Culpable, Unconscious Accused

1. Foreseeable Harm

The success of the automatism defense is contingent upon the foreseeability of harm.[153] In the CAAF's finding of instructional error in *Torres*, the court cited Government of the Virgin Islands v. Smith.[154] *Smith* provides an excellent example of how foreseeability of harm negates automatism as a defense.[155]

> It has been held that the operator of an automobile who is suddenly stricken by an illness which he had no reason to anticipate but which renders it impossible for him to control the car is not chargeable with negligence. On the other hand it has also been held that an operator of a motor vehicle, unconscious from illness at the time of the accident, may nonetheless be found guilty of criminal negligence in having undertaken to drive the vehicle if he knew at the time that he might black out or lose consciousness while doing so.[156]

Trial and defense counsel must recognize that in cases where experts agree the condition caused the charged offense, a conviction may still result.[157] One determining factor is foreseeability of harm. Once trial counsel learns the accused seeks to use the automatism defense, he must determine whether the accused knew of his condition prior to the charged offense. This is not just accomplished by evaluating contracting

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[153] Corrado, *supra* note 13, at 1201 n.36 ("The actor may . . . be responsible for the resulting harm, if he could have foreseen the appearance of the volition in question, even though he is not responsible for the volition itself."); *see e.g.* Government of the Virgin Islands v. Smith, 278 F.2d 169 (3d Cir.1960).

[154] *Torres*, 74 M.J. at 157 (citing *Smith*, 278 F.2d at 173 (finding error where defendant required to prove his unconsciousness resulted from an epileptic seizure)).

[155] In *Smith*, the District Court of the Virgin Islands convicted Smith of involuntary manslaughter for killing two people while operating his vehicle in a grossly negligent manner. 278 F.2d at 174-75. The defense appealed his conviction arguing that he suffered an epileptic seizure at the time of charged offense. *Id.* at 171.

[156] *Id.* at 175.

[157] As Yogi Berra would summarize, "It ain't over 'till it's over, no matter how it looks." Jason Foster, *Yogi Berra's "It Ain't Over 'Til It's Over" True in Baseball as in Life*, SPORTING NEWS (Sept. 23, 2015, updated Sept. 25, 2015), http://www.sportingnews.com/mlb/news/yogi-berra-dies-quotes-its-not-over-till-its-over-yankees-comebacks-mets-red-sox-braves-indians/13tyjao2mbhrf1jrgniroq2auz.

documents against matters submitted in support of expert assistance. Trial counsel must personally interview the accused's family and friends. Close family likely possess firsthand accounts of the accused's automatic behavior. Furthermore, the defense may seek to introduce such evidence through the family rather than place the accused on the stand.[158] Prior episodes are critical to experts in diagnosing parasomnia.[159] Such episodes are equally important to the trial counsel in explaining how the prior episodes render the charged offense and resulting harm foreseeable.

2. Felony-Murder

Trial counsel may successfully petition a military judge to exclude the automatism defense if the accused violated the felony-murder rule.[160] Congress codified the felony-murder rule in Article 118, Uniform Code of Military Justice.[161] An accused is guilty of murder if he kills another while "engaged in the perpetration . . . of burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson."[162] A conviction may follow absent intent to commit murder; "the only criminal intent necessary is the intent to commit the underlying offense."[163] Notably, if an accused commits a killing during the course of one of these offenses, "it is not a defense that the killing was unintended or accidental."[164] Although no military case law currently exists regarding whether automatism provides a defense to felony-murder, North Carolina addressed the issue.

In *State v. Boggess*, North Carolina charged Boggess with kidnapping, raping, and killing his girlfriend.[165] At trial, the defense introduced expert testimony that Boggess entered a dissociative state after the kidnapping, but before the killing.[166] Importantly, the defense expert, a forensic psychiatrist, equated the dissociative state to automatism or

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[158] *See e.g. Clugston*, 2017 WL 411118, at *7 (reasonably raising the automatism defense through the accused's father testifying to personal and family history of parasomnia).
[159] DSM-5, *supra* note 25, at 401.
[160] *See* UCMJ art. 118c(5) (2018); *see e.g.* State v. Boggess, 673 S.E.2d 791 (N.C.App. 2009).
[161] United States v. Jefferson, 22 M.J. 315, 319-320 (C.M.A. 1986).
[162] UCMJ art. 118(4) (2018).
[163] United States v. Hamer, 12 M.J. 898, 900 (A.C.M.R. 1982).
[164] UCMJ art. 118c(5) (2018).
[165] *Boggess*, 673 S.E.2d at 792.
[166] *Id.*

unconsciousness.[167] The court denied the defense requested automatism instruction, reasoning that the defense of automatism did not apply to felony-murder.[168] The Court of Appeals of North Carolina concurred, finding the automatism defense did not apply when the automatic state occurred after the underlying felony.[169] Trial counsel should advocate the *Boggess* court's reasoning in excluding automatism in felony-murder cases.

D. Administrative Separation

Even if an acquittal follows a successfully pled automatism defense, the government may pursue administrative separation.[170] Although the services use different nomenclature, the basis for separation is convenience of the government for a physical or mental condition that is not a disability.[171] Should the individual separate from service with less than an Honorable characterization of service, benefits accrued through Veteran Affairs may be lost.[172] Therefore, defense counsel must carefully advise and document their advice pertaining to the use of the automatism defense. For some clients, the automatism defense may present a Pyrrhic victory if losing their career or benefits is the end result.

V. Conclusion

Triggers for automatic episodes are conditions known to plague service members: alcohol use, lack of sleep, emotional trauma, head injuries, etc. At a quick glance, automatism provides the ideal affirmative defense. The burden rests with the government and the post-trial procedural safeguards present for lack of mental responsibility do not yet

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[167] *Id.*
[168] *Id.* at 793.
[169] *Id.* at 793-94. "Because all events leading to the killing constitute 'a single transaction,' no additional voluntary act was required to complete the felony murder." *Id.*
[170] MARCORSEPMAN, *supra* note 14, para 6203.2; AR 635-200, *supra* note 14, para. 5-17; MILPERSMAN, *supra* note 14, sec. 1910-120; AFI 36-3208, *supra* note 14, para. 5.11; COMDTINST M1000.4, *supra* note 14, art. 1.B.12.
[171] MARCORSEPMAN, *supra* note 14, para 6203.2; AR 635-200, *supra* note 14, para. 5-17; MILPERSMAN, *supra* note 14, sec. 1910-120; AFI 36-3208, *supra* note 14, para. 5.11; COMDTINST M1000.4, *supra* note 14, art. 1.B.12.
[172] Umar Moulta-Ali & Sidath Viranga Panangala, CONG. RESEARCH SERV., R43928 VETERANS' BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY, (2015).

exist. However, using the defense carries risk. When imperfectly employed, defense counsel may expose their client to an additional charge. Moreover, even if experts agree on a verified diagnosis, foreseeable harm and felony-murder render the defense moot. Finally, the government may process a service member administratively for the condition that provided the acquittal.

Automatism is a new, developing military defense. Accordingly, the current generation of trial and defense counsel possess the rare opportunity to shape how military justice applies it. They must do so, bearing in mind, the unique imperfections inherent in this defense.

MONEY TALKS AND WE KNOW WHAT WALKS: A PRIMER ON SUCCESSFULLY PROSECUTING ENTITLEMENT FRAUD CASES

MAJOR MITCHELL D. HERNIAK*

I. Introduction

You have been a trial counsel for sixteen months. You have a heavy caseload and ten contested panel cases. Although you have tried larceny cases, you have never prosecuted an entitlement fraud case. The Criminal Investigation Command (CID) contacts you about a suspected fraud case involving basic allowance for housing (BAH) and travel pay entitlements. The special agent briefs you that it appears the service member has stolen $30,000 over a twenty-four month period by claiming his wife lives with his two children in Baltimore, Maryland, while he is stationed in Japan. The special agent presents two large file folders. As you peruse the documentation, you notice leave and earnings statements, printouts from finance, and defense enrollment eligibility reporting system (DEERS) documentation, but no witness interviews. Although CID insists it is a clear case of fraud, you have no idea what you are reviewing, how the documents relate to one another, how to draft the appropriate charges, how to successfully prosecute the case, or whether a crime has been committed. Where do you start?

Entitlement fraud results in significant financial losses to the U.S. government;[1] however, there is a void in secondary sources to assist the

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* Judge Advocate, United States Army, presently assigned as Chief, Contract and Fiscal Law, United States Forces-Afghanistan. J.D., 2008, Indiana University School of Law–Indianapolis; B.S., 2004, Manchester College. Previous assignments include Student, 66th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, 2017–2018; Defense Counsel, United States Army Trial Defense Service, Pacific Rim Region, Yongsan, Republic of Korea, 2015–2017; Group Judge Advocate, 6th Military Police Group (CID), Joint Base Lewis–McChord, Washington, 2013–2015; Administrative and Contract and Fiscal Law Attorney, Headquarters, United States Army Training and Doctrine Command, Fort Eustis, Virginia, 2011–2013; Trial Counsel, 19th Expeditionary Sustainment Command, Daegu, Republic of Korea, May 2010–August 2011; Chief, Legal Assistance, 19th Expeditionary Sustainment Command, Daegu, Republic of Korea, August 2009–May 2010. Member of the bar of Indiana. This paper was submitted in partial completion of the Master of Laws requirements of the 66th Judge Advocate Officer Graduate Course.

[1] Telephone Interview with Mr. Michael L. Ashby, Financial Management Specialist,

inexperienced trial counsel in navigating an entitlement fraud case. This primer fills the void by providing trial counsel a process to investigate and prosecute entitlement fraud cases.

This primer addresses navigating an entitlement fraud case from investigation to prosecution. Though there are many entitlements, this primer focuses on BAH, family separation allowance (FSA), and permanent duty travel pay (PDTP). Part II addresses pre-preferral research and documentation collection. Part III addresses the decision to charge and the drafting of appropriate charges. Part IV addresses evidence presentation, and Part V provides recommended guidance for effective case presentation.[2]

II. Pre-preferral Research and Documentation Collection

A. Understanding the Entitlements at Issue

The first step to successfully prosecuting an entitlement fraud case is to identify the entitlements at issue and their legal framework. This section offers an analysis of the entitlement rules for BAH, PDTP, and FSA, as well as the Department of the Army and Department of Defense Forms used to process the entitlements.

1. The Joint Travel Regulations—BAH and PDTP

The most common entitlements at issue in an entitlement fraud case are BAH and PDTP. The Joint Travel Regulations (JTR)[3] govern BAH

U.S. Air Force (Dec. 12, 2017) [hereinafter Ashby Interview]. While serving as a Military Pay Systems Analyst with the Defense Finance and Accounting Service from May 2014–Jan. 2017, Mr. Ashby tracked almost $14 million in fraudulent basic allowance for housing (BAH) and Family Separation Allowance (FSA) entitlements. *Id.*

[2] Due to page limitations, this primer does not address other forms of entitlement fraud including fraud based on a fraudulent marriage and fraud involving do-it-yourself moves. While this primer specifically focuses on entitlement fraud cases within the U.S. Army, the principles may be applied within any service, and where appropriate, references are provided to service-specific forms.

[3] U.S. DEP'T OF DEF. TRAVEL MGMT. OFF., JOINT TRAVEL REGULATIONS at Intro 1 (1 Mar.. 2019) [hereinafter JTR] ("The JTR implements policy and laws establishing travel and transportation allowances of Uniformed Service members and Department of Defense civilian travelers . . . The JTR applies to Uniformed Service Active and Reserve

and PDTP. The JTR is updated monthly; therefore, trial counsel must ensure they examine the version in effect at the time of an alleged offense.[4]

a. Housing Allowances—BAH

To determine whether a case involving BAH merits prosecution, trial counsel must understand the following JTR rules: (1) general rules for a housing allowance; (2) definitions of dependents; and (3) assignment situations. Service members on active duty and entitled to basic pay are "authorized a housing allowance based on [their] grade, rank, location, and whether he or she has any dependents."[5] The BAH rate is based on the grade, dependency status, and location of the *service member* not dependents.[6] Unless a different rule applies, BAH will be paid for the service member's location.[7]

The first question is whether the service member has a qualifying dependent. The JTR contains definitions for dependents.[8] Absent exceptions, lawful spouses and legitimate, unmarried, minor children always qualify as dependents.[9] However, trial counsel must be aware there are other dependent scenarios including secondary dependents, dependent parents, adopted children, children born out of wedlock, and stepchildren.[10] Furthermore, different rules apply to dependents other than

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Component members and their dependents."). Like the Uniform Code of Military Justice, the JTR is a base document applicable to all service members.

[4] DEF. TRAVEL MGMT. OFF.: THE DOD CENTER FOR TRAVEL EXCELLENCE, http://www.defensetravel.dod.mil/site/travelreg.cfm (last visited Mar. 20, 2019). This website contains the most up-to-date version of the JTR as well as a link to archived copies that allows counsel to review the version in effect at the time of an offense. The JTR references cited herein are current as of March 2019.

[5] JTR, *supra* note 3, para. 1001.

[6] *Id.* para. 100902B ("Ordinarily a housing allowance is paid based on the member's PDS . . . . However, the Service may determine that a member's assignment to a PDS or the circumstances of that assignment requires the dependent to reside separately.").

[7] *Id.*

[8] *Id.* app. A, at A9-11 (listing eleven different dependent scenarios).

[9] *Id.* para. 100201A. Examples of exceptions include: "A minor child who is entitled to basic pay as a member on active duty in a Uniformed Service" and "A former spouse to whom the [service member] is paying alimony." *Id.* paras. 100201B2, 100201B7.

[10] JTR, *supra* note 3, paras. 100210A3, 100204, 100205. The JTR defines a secondary dependent as "[a]n incapacitated child over age 21, a ward of the court, or an unmarried child over age 21 and under age 23 (full time in college) . . . ." *Id.* para. 100210A3. Furthermore, in-fact dependency determinations in accordance with applicable service regulations are required for secondary dependents and dependent parents. *Id.* paras. 100201A3, 100204. Although dependency determinations are not required for adopted

lawful spouses and children born in wedlock. For example, a service member claiming BAH for a child born out of wedlock must provide proof of parentage.[11] For the entitlement to apply, trial counsel must understand what, if any, documentation is required and may be needed as evidence. Once trial counsel determine whether the service member has a lawful dependent, one must examine the assignment situation and location rules.

Assignment situation and location rules are found within chapter ten of the JTR.[12] Generally, a housing allowance is based on a "[service member's] PDS [primary duty station] or the home port for a member assigned to a ship or afloat unit."[13] However, as with dependency, variables affect the BAH location. In particular, trial counsel overseas must examine rules addressing unaccompanied or restricted tours.[14] The JTR contains rules specifying when BAH may be based on a dependent location as opposed to a service member's location, how to determine the location, and what is required to validate the location.[15] For example, a case may involve a situation where a service member's dependent no longer resides at a designated place, but the service member claims BAH for that location. If, prior to permanent change of station (PCS), the service member was authorized to move his dependents to a designated location a subsequent relocation at personal expense may not abrogate the service member's entitlement to BAH for the previous location.[16]

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children, children born out of wedlock, and stepchildren, proof of parentage is required. *Id*. para. 100205.

[11] *Id*. para. 100205 ("For a child born out of wedlock, a birth certificate with the Service member's name cited is required. If the Service member's name is not stated on the birth certificate or on a court-order, obtain a signed statement of parentage from the Service member . . . .").

[12] *Id*. paras. 100901-100915.

[13] *Id*. para. 100902.

[14] *Id*. para. 100904 ("Member with a Dependent Serves an Unaccompanied/Dependent Restricted Tour or 'Unusually Arduous Sea Duty Tour.'").

[15] *Id*.

> A Service member with a dependent who serves an unaccompanied or dependent restricted tour OCONUS or "unusually arduous sea duty" [OCONUS] is authorized a with-dependent housing allowance based on the dependent's location. The housing allowance may be based on the old PDS if the dependent remained in the residence shared with the Service member before the PCS, did not relocate, and is not in Government quarters.

Id.

[16] *Id*. para. 100904F ("If the dependent relocates at personal expense from a designated place in a BAH area to a different location in a BAH area that is not at or near the

To determine what location is claimed for BAH, trial counsel must obtain and review the service member's most recent Department of the Army Form 5960 (Form 5960).[17] Form 5960 is significant because it is an official form the service member completes listing marital and dependency status, current dependent address, and most importantly, certifies that all listed information is correct.[18] Also, Form 5960 contains a statement notifying the signatory of the penalties for making a false official statement[19] and will assist in proving the mens rea elements of larceny,[20] and false official statement.[21] Although the service member may have multiple dependents in multiple locations, the key is to examine which address is claimed for BAH, and whether the JTR dependency and location conditions are satisfied.[22] Therefore, trial counsel should focus on the address claimed for BAH and not the number of addresses.

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member's PDS, continue BAH based on the previously authorized location (either old PDS or dependent location before the move)."). Based on the author's professional experience, the correct BAH location under this provision is open to interpretation. Trial counsel need to work with Defense Finance and Accounting Services (DFAS) personnel and be prepared for the possibility of being provided different potentially conflicting interpretations.

[17] U.S. Dep't of Army, DA Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ), and/or Variable Housing Allowance (VHA) (Sept. 1990) [hereinafter Form 5960]; *See also* U.S. Marine Corps NAVMC 10922 (EF), Dependency Application (Apr. 2001); U.S. Dep't of Air Force, AF Form 594, Application and Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) or Dependency Determination (Nov. 1990); U.S. Dep't of Homeland Security, U.S. Coast Guard, CG-2025, BAH/Housing Worksheet (Sept. 2010).

[18] Form 5960, *supra* note 17, at Block 12 ("I certify ALL information regarding this authorization is correct. I will immediately notify the FAO/HRO of any changes in the information above, due to divorce, marriage, death, living in government quarters [sic] etc. which could affect by [sic] BAQ or VHA entitlement.").

[19] *Id.* ("IMPORTANT: Making a false statement or claim against the US Government is punishable by courts-martial. The penalty for willfully making a false claim or a false statement in connection with claims is a maximum fine of $10,000 or imprisonment for 5 years, or both.").

[20] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 64b(1)(d) (2019) [hereinafter MCM] ("That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property . . . .").

[21] MCM, *supra* note 20, pt. IV, ¶ 41b(1)(d) ("That the false document or statement was made with the intent to deceive.").

[22] Form 5960, *supra* note 17. For example, a service member's current spouse may be located in Baltimore. However, he may have a dependent child from a previous marriage living in New York City. If the service member is claiming BAH for New York City as opposed to Baltimore, then he must have an appropriate custody arrangement in order to properly claim BAH for that location.

b. Permanent Duty Travel Pay—PDTP

When a service member undergoes a PCS, PDTP entitlements are controlled by the JTR and the Department of Defense Financial Management Regulation (FMR).[23] Two commonly claimed entitlements are dependent per diem and dislocation allowance (DLA).[24] A service member is authorized per diem for dependents who travel under authorized PCS orders.[25] A DLA is paid to eligible service members to partially reimburse for the movement of a household.[26] Fraud arises when dependents are not entitled to PCS travel, and when although entitled, dependents do not travel or relocate.

Using the same analytical framework as for BAH, trial counsel must determine whether the service member has a qualifying dependent. If the service member has a qualifying dependent, trial counsel need to examine the PCS orders to determine whether dependent travel was authorized. If travel was authorized, the next step is to determine the claimed travel entitlements.

To determine the claimed travel entitlements, trial counsel must examine the service member's Department of Defense Form 1351-2 (Form 1351-2).[27] This is the travel voucher completed following PCS travel, generally when in-processing to a new unit. On Form 1351-2, the service member annotates dependent status, claims for DLA and per diem, the dependents' address on receipt of orders, and where and when dependents' travelled.[28] By examining this form and working with travel pay personnel, trial counsel can determine claimed entitlements and

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[23] JTR, *supra* note 3, paras. 050101–0534; U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 9 (June 2017) [hereinafter DOD FMR].
[24] JTR, *supra* note 3, paras. 050303, 050104, 050501–050509.
[25] *Id.* para. 050303.
[26] *Id.* para. 050104.
[27] U.S. Dep't of Def., DD Form 1351-2, Travel Voucher or Subvoucher (May 2011) [hereinafter Form 1351-2].
[28] *Id.*

amounts.[29] Finally, the instructions portion provides a warning[30] regarding the penalties for providing false claims, which assists in proving the mens rea elements of larceny[31] and false official statement.[32]

2. DoD Financial Management Regulation—FSA

The next entitlement likely to be at issue is FSA. FSA is primarily governed by the FMR.[33] Its purpose is to "provide compensation for added expenses due an enforced separation" of the service member from his family.[34] It applies to qualifying members inside and outside of the United States.[35] Unlike BAH, FSA is paid at a flat rate of $250 per month.[36] Assuming a service member meets all criteria for enforced separation, FSA applies regardless of BAH location. Therefore, irrespective of listing a fraudulent BAH location, a service member separated from a qualifying dependent is likely still entitled to FSA; therefore, in many cases a larceny specification for FSA is inappropriate.[37]

Fraudulent claims for FSA arise when service members claim they are not legally separated or divorced, when they do not have custody of a child for purposes of dependency that entitles them to FSA, or when separation is not incurred due to enforced family separation. Trial counsel should ask

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[29] Interview with Supervisory Financial Analyst, Defense Finance and Accounting Service (DFAS) (Jan. 23, 2018) [hereinafter DFAS Interview]. Travel pay transactions are completed and stored in the Integrated Automated Travel System (IATS). *Id*. For the Army, travel pay entitlements are processed at DFAS–Rome. *Id*. Although local finance personnel will likely not have access to IATS, they should have the capability to communicate directly with DFAS to obtain transaction records and documentation. *Id*.

[30] Form 1351-2, *supra* note 27 ("There are severe criminal and civil penalties for knowingly submitting a false, fictitious, or fraudulent claim (U.S. Code, Title 18, Sections 287 and 1001 and Title 31, Section 3729).").

[31] MCM, *supra* note 20.

[32] *Id*.

[33] DoD FMR, *supra* note 23, vol. 7A, ch. 27 (Nov. 2017). *See also* U.S. DEP'T OF ARMY REG. 55-46, TRAVEL OVERSEAS para. 2-4 (14 June 2017) [hereinafter AR 55-46] (providing Army-specific guidance on when service members are entitled to FSA).

[34] DoD FMR, *supra* note 23, para. 270101. The FMR provides for three types of enforced separation: "(1) Family Separation Allowance-Restricted (FSA-R)"; "(2) Family Separation Allowance-Ship (FSA-S)"; and "(Family Separation Allowance-Temporary (FSA-T)." *Id*. para. 270203A. As such, trial counsel must ensure they understand the basis for the FSA payment.

[35] *Id*.

[36] *Id*. para. 270203B.

[37] *See infra* App. B. This appendix provides an example and rationale for when charging larceny based on FSA is inappropriate.

two questions: (1) does the service member have a qualifying dependent; and (2) was the service member separated from the dependent due to enforced family separation? Like the JTR, the FMR contains a definition for dependents.[38] While the most common categories will be a spouse or an unmarried child under the age of twenty-one, the FMR lists eight dependent scenarios.[39] Additionally, the FMR provides the criteria for an unmarried child considered to be in the custody of the service member.[40] If there is a qualifying dependent, trial counsel must determine if there is an enforced separation. The FMR details enforced separations.[41] Trial counsel must be aware that FSA is generally not payable when separation is due to personal convenience.[42]

In determining whether a service member is entitled to FSA, trial counsel must examine the service member's Department of Defense Form 1561 (Form 1561).[43] Like Form 5960, this form is significant because it is completed by the service member. The form requires the service member to list the complete, current dependent addresses and certify the dependents do not fall into a category disallowing FSA.[44] By signing, the service member acknowledges the requirement to notify a commanding officer if dependency status changes or if there is no longer a separation.[45] Although not containing a warning about false claims or statements, the form assists in proving mens rea elements because the service member

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[38] DoD FMR, *supra* note 23, at DEF 10–11.
[39] *Id.*
[40] *Id.* para. 270202A1 (providing criteria for legal custody and the requirement that actual physical custody is "precluded due to an enforced family separation described under paragraph 270203.").
[41] *Id.* para. 270203.
[42] *Id.* paras. 270401A, 270401C (discussing situations that amount to personal convenience); *See also In re* Harda, 56 Comp. Gen. 805, 807 (1977) (finding that a service member stationed OCONUS was not entitled to FSA when his spouse failed to accompany him due to a legal separation.).
[43] U.S. Dep't of Def., DD Form 1561, Statement to Substantiate Payment of Family Separation Allowance (FSA) (Dec. 2017) [hereinafter Form 1561].
[44] *Id.*
[45] *Id.*

> I understand that I must notify my commanding officer immediately upon any change in dependency status and if my sole dependent or all of my dependents move to or near this station or if my dependent(s) visit at or near this station for more than 90 continuous days (more than 30 continuous days in the case of FSA-T (Temp) or FSA-S (Ship) while I am in receipt of FSA.

Id.

completes and signs the form. If, after examination of the form and other evidence, the service member was not separated from a qualifying dependent, a larceny charge is appropriate.

3. Army Regulation 55-46—Designated Place Moves

Along with the JTR, for Army specific cases, Army Regulation 55-46 (AR 55-46) controls "designated place" moves for service members serving unaccompanied tours overseas.[46] A designated place move is a relocation of dependents to a location other than that of the service member.[47] When service members are required or elect to serve an unaccompanied tour, they have the option of either leaving their family at the current location or moving their family to a designated place.[48] However, such moves require PCS orders to contain the following language, "Travel of your Family members to your overseas duty station at Government expense is not authorized during this tour. You are authorized to make a designated place move to (authorized place)."[49]

For cases involving unaccompanied tours overseas, AR 55-46 should be examined in conjunction with the JTR as well as the definition of "designated place" in the JTR.[50] A service member serving an

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[46] AR 55-46, *supra* note 33.

[47] The term "designated place move" is not defined in the JTR or AR 55-46. However, both regulations define "designated place" and list the process for dependent relocation to a designated place. *See* JTR, *supr*a note 3, para. 050814; AR 55-46, *supra* note 33, paras. 2-7–9.

[48] AR 55-46, *supra* note 33, para. 2-9. For example, a service member stationed at Fort Hood who receives orders for an unaccompanied tour in Korea may elect to leave his family at Fort Hood or move his family to New York City, i.e., the designated place.

[49] *Id*. para. 2-9c. In a real case, the parentheticals contain the designated place, e.g., New York, New York. This annotation makes it clear where the service member may move dependents and claim BAH.

[50] JTR, *supra* note 3, at A14–15:

> [A] place in CONUS/non-foreign OCONUS area . . . [T]he foreign OCONUS place to which dependents are specifically authorized to travel under pars. 050814, 050903 or 050907, when a member is ordered to an unaccompanied/dependent restricted tour. This is limited to the native country of a foreign born spouse for DoD Services and Coast Guard . . . [T]he OCONUS place at which a member is scheduled to serve an accompanied tour after completing an unaccompanied or dependent-restricted tour, and to which dependents specifically are authorized to travel under par. 050809, 050814, 050903, or par. 050907 . . . [T]he OCONUS place in the old

unaccompanied tour overseas will be paid BAH based either upon the former PDS or a designated location.[51] For BAH to be paid for a designated location, the service member must certify that "is the place at which the dependents intend to establish a bona fide residence until further dependent transportation is authorized at Government expense."[52] Chapter 2 of AR 55-46 provides a process by which the service member makes the requisite certification. If the language is absent from the PCS orders, it will assist in proving a larceny by showing the service member did not have authorization to move his dependents at government expense and claim BAH for a location other than the former PDS.

Once trial counsel have properly framed each entitlement and understand the analytical framework, it is essential to begin collecting documentation pre-preferral.

B. Pre-preferral Documentation Collection

After framing the entitlements, trial counsel should focus on pre-preferral documentation collection. Collecting documentation pre-preferral accomplishes four goals: (1) it assists in determining whether a crime has been committed; (2) it alleviates potential tolling of the speedy trial clock;[53] (3) it ensures counsel are prepared to prove their case; and (4) it can drive efficient case resolution, e.g., the defense may want to negotiate quickly.

A common focus will be proving a service member's dependents live at an address other than that claimed. In addition to Form 5960, useful

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> PDS vicinity at which dependents remain under par. 050809, while a member serves a dependent restricted/unaccompanied tour . . . [T]he CONUS, non-foreign OCONUS, or foreign OCONUS place to which dependent are specifically authorized to travel under par. 050804 or par. 050805, when early return of dependents is authorized. This is limited to the native country of a foreign born spouse for DoD Services and Coast Guard.

Id.

[51] *Id.* at para. 100904.

[52] *Id.* at A14-15 ("To receive allowances associated with a designated place move, the member must certify that the designated place is the place at which the dependents intend to establish a bona fide residence until further dependent transportation is authorized at Government expense.").

[53] MCM, *supra* note 20, R.C.M. 707.

documentation that can be obtained from the local military personnel division includes the service member's PCS orders, record of emergency data,[54] and service member's group life insurance forms.[55] These forms are generally completed during in-processing and are required to be updated annually.[56] Both forms require the service member to list addresses. Often, the primary dependent for BAH purposes will be an individual the service member lists as an emergency contact and as a beneficiary. Although these forms do not drive entitlements, if the listed addresses differ from the address or addresses listed on Form 5960, this will assist in proving mens rea elements.[57] Furthermore, the service member's Army Military Human Resource Record (AMHRR), should contain documentation of finance and personnel records reviews.[58] This documentation shows dates of reviews, whether the service member was present during the review, and any noted errors.[59]

Additional documentation to prove a dependent's address includes lease agreements, title or deed information, and school records. To obtain these records, trial counsel must be prepared to enlist the assistance of military law-enforcement or contact the source directly. Additionally, trial counsel should be prepared to utilize the government's subpoena power

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[54] U.S. Dep't of Def., DD Form 93, Record of Emergency Data (Jan. 2008) [hereinafter Form 93].

[55] Office of Servicemembers' [sic] Group Life Insurance, SGLV 8286, Servicemembers' [sic] Group Life Insurance Election and Certificate (Oct. 2017) [hereinafter Form 8286].

[56] U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCES RECORDS MANAGEMENT para. 3-7 (7 Apr. 2014); United States Army Human Resources Command, https://www.hrc.army.mil/site/assets/directorate/TAGD/Required%20Documents%20Posted%20(20180221).pdf (last visited Mar. 23, 2019) (providing a list of documentation required to be placed in a service members' Army Military Human Resource Record).

[57] Form 93, *supra* note 54; Form 8286, *supra* note 55. Trial counsel should pay close attention to the instructions accompanying these forms because it appears it is legally permissible to list an address other than a dependent's current address. For example, on a Form 8286, a service member may list his mother-in-law's address for his spouse because someone may always be reached at the address. Although his spouse does not live at the listed address, it may not qualify as a false statement due to a lack of intent to deceive. *But see* United States v. Suthanaviroj, No. 200000763, 2002 WL 1750802, at *4 (N-M Ct. Crim, App. July 22, 2002) (affirming conviction for false official statement for a Form 93 when service member admitted he believed listing accurate information on a Form 93 would change his housing allowance.).

[58] U.S. Dept. of Army, Finance Records Review (Sept. 2016) [hereinafter FRR]; U.S. Dept. of Army, Personnel Records Review (Jan. 2014) [hereinafter PRR].

[59] FRR, *supra* note 58; PRR, *supra* note 58. Both forms contain spaces for finance or personnel clerks to annotate whether the service member was present during annual reviews and whether any errors were noted. *Id.*

either at a preliminary hearing or after referral,[60] and if necessary, petition the military judge for a warrant of attachment.[61]

If marital status or child custody is at issue, trial counsel will need to obtain certified records. A non-exclusive list of potentially helpful certified records includes records of marriage, divorce, child custody agreements, and tax returns. These records assist in proving a lack of qualifying dependents for entitlements,[62] e.g., BAH at the with-dependent rate and FSA. These documents can often be researched online and certified copies can be ordered either by phone or by mail.[63] Trial counsel should be prepared to utilize the subpoena power provided in the Uniform Code of Military Justice (UCMJ).[64] Once the appropriate documentation is obtained, these records are admissible under hearsay exceptions[65] and are self-authenticating.[66]

Tax returns may assist in demonstrating the lack of a qualifying dependent in cases involving BAH and FSA. To obtain tax returns for use in a criminal investigation, an order from a federal district court judge or magistrate is required.[67] The order may only be obtained through an application from "The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under section 593 or title 28 . . . or any attorney in charge of a criminal division organized crime

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[60] MCM, *supra* note 20, R.C.M. 703(g)(3)(D) ("A subpoena may be issued by (i) the summary court-martial; (ii) the trial counsel of a general or special court-martial; (iii) the president of a court of inquiry; (iv) an officer detailed to take a deposition; or (v) in the case of a pre-referral investigative subpoena, a military judge or, when issuance of the subpoena is authorized by a general court-martial convening authority, the detailed trial counsel or counsel for the Government.").

[61] MCM, *supra* note 20, R.C.M. 703(g)(3)(H)(i) ("The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.").

[62] *See* JTR, *supra* note 3, paras. 100201A, 100210A3, 100204, 100205; FMR, *supra* note 23, at DEF 10–11..

[63] *See, e.g.*, The Official Website of the City of Indianapolis and Marion County: Marion County Clerk of the Court, http://www.indy.gov/eGov/County/Clerk/Pages/home.aspx (last visited Mar. 14, 2018) (providing online searches of marriage and divorce records and forms for ordering certified copies).

[64] *See* MCM, *supra* note 20, R.C.M. 703(g)(3)(D), R.C.M. 703(g)(3)(H)(i).

[65] MCM, *supra* note 20, MIL. R. EVID. 803(8).

[66] MCM, *supra* note 20, MIL. R. EVID. 902(2).

[67] I.R.C. § 6103(i)(1)(A) (2016).

strike force established pursuant to section 510 of title 28 . . . ."[68] Given this requirement, trial counsel should coordinate with their office's Special Assistant to the United States Attorney (SAUSA) to determine whether the local Assistant United States Attorney (AUSA) is willing and able to obtain a court order. Critically, trial counsel will need to consider analogous federal offenses to enable application before a federal judge.[69] Finally, trial counsel must consider the necessary lead-time in obtaining tax documents.[70]

When addressing claims of PDTP and movement of a household and dependents, trial counsel should obtain the service member's application for shipment of personal property,[71] bills of lading for household goods transportation, and the full travel voucher submission with all supporting

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[68] I.R.C. § 6103(i)(1)(B) (2016) (upon application, a federal judge or magistrate may issue an order if)

> (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed, (ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and (iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act . . . and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

[69] *Compare* Telephone Interview with Captain (Capt.) Kathleen O'Hara, Judge Advocate, United States Marine Corps (Jan. 22, 2018) [hereinafter, Capt. O'Hara Interview]. While serving as a SAUSA, Capt. O'Hara successfully worked with the AUSA to obtain a court order for tax return information in a case involving questionable FSA payments for a service member who had claimed FSA following a divorce. *Id.* In this situation, the application for the order was possible because of related federal fraud provisions as opposed to a purely military offense. *Id.* Additionally, the AUSA had venue because the offense occurred within San Diego County. *Id., with* Telephone Interview with Captain (CPT) Christopher Kim, Judge Advocate United States Army (Jan. 22, 2018). While serving as a SAUSA, a trial team was unable to successfully apply for a federal court order in a sexual misconduct-based case due to the lack of a sufficient analogous federal provision to provide appropriate jurisdiction. *Id.* Examples of analogous federal provisions include 18 U.S.C. § 641 (addressing stealing public money) and 18 U.S.C. 1001 (addressing false statements).

[70] Capt. O'Hara Interview, *supra* note 69. Following the issuance of the order, the order was served on the IRS, and the documents were not received until shortly before the start of trial. *Id.*

[71] U.S. Dep't of Def., DD Form 1299, Application for Shipment and/or Storage of Personal Property (Sept. 1998).

documentation.[72] These documents will either support or reject a service member's claim. For example, a service member may apply to ship a certain weight of household goods to a particular address. This should be compared to the bill of lading to determine what amount was delivered and to what address. The bill of lading can be obtained from the local transportation office while the travel documents will be obtained through the local finance office.[73]

In order to prove amounts paid, trial counsel should obtain the service member's leave and earnings statements and finance printouts for travel pay claims. Both may be obtained at the local finance office or the Defense Finance and Accounting Service (DFAS).[74]

While the aforementioned list contains the most common documentation for an entitlement fraud case, it is not exhaustive. Trial counsel should consider additional documentation such as in-processing sign-in sheets to prove attendance at a finance brief, briefing slides used by finance, and records of pay inquiries initiated by the service member.

III. The Charging Decision and Drafting of Appropriate Charges

After relevant pre-preferral research and documentation collection is complete, trial counsel must decide whether charging is appropriate, draft appropriate charges, and avoid the pitfalls of unreasonable multiplication of charges (UMC) and exact amount charging. When contemplating these decisions, trial counsel should consider three principles: (1) whether a crime was committed; (2) command and prosecutorial objectives; and (3) what can and should be charged.

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[72] Form 1351-2, *supra* note 27. Supporting documentation accompanying the travel voucher may include hotel receipts, rental car receipts, flight receipts, toll receipts, etc. *Id.* Also, a lack of this documentation may refute a service member's claim that his dependents actually travelled to a certain location.

[73] DFAS Interview, *supra* note 29. Individual finance offices normally retain hard copy documentation until it is uploaded into the Corporate Enterprise Document Management System; however, electronic copies will be archived with DFAS. *Id.* Most documents are retained for ten years. *Id.*

[74] Ashby Interview, *supra* note 1 ("Leave and earnings statements are stored in the Defense Joint Military Pay System or DJMS. Leave and earnings statements dating back to 1991 can be obtained.").

A. Determining Whether a Crime Was Committed

Trial counsel must first determine whether a crime was committed. Though seemingly obvious, this step is critical because one must consider whether erroneous entitlements were paid due to misunderstandings either in paperwork or entitlement rights. Equally, if not more important, trial counsel must determine whether an entitlement is lawfully being paid pursuant to JTR and FMR rules.[75]

The following steps are useful in determining whether a crime was committed. First, speak to finance personnel conducting briefs for in-coming service members and sit through a finance brief. This assists in understanding the clarity of the brief or lack thereof, and if needed, obtaining witnesses and documentation.[76] Second, determine whether the service member initiated a pay inquiry[77] to attempt to correct the entitlement. Third, prior to drafting charges, speak with finance, and if possible, DFAS personnel. This is recommended because trial counsel are likely not familiar with the JTR's more nuanced provisions.[78] This step also assists with witness identification pre-preferral. After these steps, trial counsel must consider command and prosecutorial objectives.

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[75] *See* JTR, *supra* note 3, para.100904. This is especially critical when deciding whether to prosecute service members serving unaccompanied overseas tours given dependents may have moved to a designated location entitling the service member to a higher BAH rate.

[76] Yongsan Finance Office, Finance (2015) (unpublished PowerPoint presentation) (on file with author). This PowerPoint presentation provides an example of how service members are instructed step-by-step to complete Form 5960, Form 1561, and Form 1351-2.

[77] *E.g.*, U.S. Dep't of Army, DA Form 2142, Pay Inquiry (Apr. 1982) (requiring the service member to list the nature of the pay inquiry and requiring the local finance office to provide a description of the cause and action taken). For the Army, local policies for submitting a pay inquiry vary. For example, to submit a pay inquiry, it is a common requirement for Soldiers in the rank of Specialist (SPC) and below to obtain the approval of a commander or first-line noncommissioned officer supervisor. If this is the case, trial counsel should also seek to interview the supervisor providing approval.

[78] JTR, *supra* note 3; DFAS Interview, *supra* note 29. For example, there are several portions of the JTR that discuss waivers through a "secretarial process." That process is not well defined within the JTR; however, it involves an approval process through each service component's personnel branch. DFAS Interview, *supra* note 29. Within the Army, requisite approvals are obtained at Army G-1 and communicated back to DFAS. *Id*.

B. Considering Command and Prosecutorial Objectives

When considering command and prosecutorial objectives, trial counsel need to manage the expectations of the command. Entitlement fraud cases tend to result in low confinement terms.[79] On the other hand, entitlement fraud cases frequently result in a punitive discharge.[80] Trial counsel should discuss potential outcomes versus the resources required to prosecute and determine whether more efficient and economic courses of action achieve a desired outcome, e.g., General Officer Memorandum of Reprimand and a separation action.[81] If prosecution remains the goal, trial counsel must determine what and how to charge.

C. Determining What Can and Should be Charged

Entitlement fraud cases most commonly involve charges of false official statement, false claims, and larceny.[82] In making the charging decision, trial counsel should begin by determining the theory of liability for larceny, i.e., whether the larceny is based on a wrongful taking or wrongful withholding.[83] This step is critical because while most entitlement fraud cases are based upon a wrongful taking by false

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[79] Review of 117 Entitlement Fraud Cases involving BAH between 1953 and 2017 (on-file with author). Of the 117 entitlement fraud cases reviewed, only 19 cases carried a term of confinement for more than one year regardless of amount and only 17 cases carried a term of confinement of one year regardless of amount.

[80] *Id.* Of the 117 cases reviewed, 108 cases included a punitive discharge.

[81] This assertion represents an example based on the author's recent professional experience as Defense Counsel, Trial Defense Service–Yongsan Field Office, from 29 March 2015–20 July 2017 [hereinafter Professional Experience]. During the aforementioned timeframe, the author represented six clients at courts-martial charged with entitlement fraud and observed two additional entitlement fraud cases. Of the eight cases, only one carried a sentence of a bad-conduct discharge and confinement for more than six months. Of the remaining cases, two ended in a full acquittal and five carried sentences of less than six months confinement and no punitive discharge. When balanced against the amount of resources required for prosecution, adverse administrative action may be more efficient while meeting the goals of the command.

[82] 10 U.S.C. §§ 907, 921, 924 (2018). Although these are the most common offenses charged, entitlement fraud cases may also involve the offenses of altering public records, forgery, and impersonation under 10 U.S.C. § 904, 10 U.S.C. § 905 and 10 U.S.C. § 906. Trial counsel should resist the urge to charge violations of Article 92, UCMJ, as neither the JTR, nor the FMR are punitive regulations.

[83] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-46-1, notes 2, 7 (10 Sept. 2014) [hereinafter BENCHBOOK].

pretense,[84] cases based upon wrongful withholding[85] may not be accompanied by false official statements or false claims.[86] Therefore, the theory of liability drives the charging decision.

For larceny by false pretense, UMC should be avoided.[87] At a finance in-brief, service members generally complete and submit Forms 5960 (or service equivalent), 1561, and 1351-2. All three may contain false statements regarding dependent status, dependent location, and dependent travel; however, whether each merits a separate specification may depend on the subject matter and timing.[88] For example, Forms 5960 and 1561 require certification of dependent status and location; therefore, the subject matter of the false representation is the same.[89] If both forms were completed and submitted on the same date, a recommended best practice

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[84] *Id*. para. 3-46-1d, note 2 ("A criminal 'false pretense' is any misrepresentation of fact by a person, who knows it to be untrue, which is intended to deceive, which does in fact deceive, and which is the means by which value is obtained from another without compensation.").

[85] *Id*. at note 7; United States v. Helms, 47 M.J. 1, 6-7 (C.A.A.F. 1997) ("We now hold that once a servicemember [sic] realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the servicemember [sic] has committed larceny.").

[86] For example, a service member with dependents may submit a correct Form 5960 listing a zip code for El Paso; however, finance inputs a zip code for San Antonio. When discovered, the service member intentionally fails to correct the error. Although the service member begins committing a larceny at the moment he forms the intent to steal, he never provided a false official statement or made a false claim.

[87] *See* United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) (listing the following factors for a UMC analysis "'Did the accused object at trial?'"; (2) "'Is each charge and specification aimed at distinctly separate criminal acts?'"; (3) "'Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?'"; (4) "'Does the number of charges and specifications unfairly increase the appellant's punitive exposure?'"; and (5) "'Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?'" *Id*. (quoting United States v. Quiroz, 53 M.J. 600, 607 (N-M Ct. Crim. App. 2000)).

[88] *See, e.g.* United States v. Wright, 44 M.J. 739 (A. Ct. Crim. App. 1996) (finding an unreasonable multiplication of charges for two false statements to law enforcement related to the same victim despite a fifteen to twenty minute time difference); United States v. Bartelle, No. 13-0420, 2015 WL 7170012, at*3 (A. Ct. Crim. App. Nov. 12, 2015) (finding an unreasonable multiplication of charges for three false statements made during one law enforcement interview about a relationship with another service member); *But see* United States v. Oliver, No. ACM 38858, 2017 CCA LEXIS 59, at *31-32 (A.F. Ct. Crim. App. Jan. 27, 2017) (finding no unreasonable multiplication of charges for specifications aimed at differing versions of events during the same interview of a homicide investigation).

[89] *See* Wright, 44 M.J. 739.

is to draft one specification.[90] Contrarily, the Form 1351-2 differs in subject matter because the service member is claiming dependent travel.[91] Consequently, a separate specification for falsehoods on Form 1351-2 is warranted. Given differing Service court interpretations of UMC, trial counsel should consider prior rulings by their respective military judge and appellate courts.[92]

A UMC situation may also arise when charging both a false official statement and a false claim. False official statement requires specific intent[93] and a false claim requires specific knowledge;[94] however, both are often based on the submission of a form. For false claims, trial counsel must consider the underlying basis of the false claim. For instance, if a false claim for BAH is based upon the submission of Form 5960 listing the service member's dependent as residing at a false location it is likely the two offenses are aimed at the same misconduct.[95] A charging strategy that chooses either the false claim or the false official statement avoids unnecessary motions practice for offenses carrying the same maximum

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[90] *See infra* Appendix A and Appendix B. These appendices provide examples of a recommended and not recommended charging scheme with accompanying rationales.
[91] Form 1351-2, *supra* note 27.
[92] *See infra* Appendix A and Appendix B.
[93] BENCHBOOK, *supra* note 83, para. 3-31-1c(4) ("That the false (document) (statement) was made with the intent to deceive.").
[94] *Id.* para. 3-58-2c(3) ("That the claim was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged)."). The offense of Presenting a False Claim is found at 10 U.S.C. § 924. The most current, official version of the Benchbook still cites 10 U.S.C. § 932.
[95] BENCHBOOK, *supra* note 83, para. 3-31-1d ("'Intent to deceive' means to purposely mislead, to cheat, to trick another, or to cause another to believe as true that which is false."); BENCHBOOK, *supra* note 83, para. 3-58-2d,

> ('False') ('Fraudulent') ('False and Fraudulent') mean intentionally deceitful. (It) (They) refer(s) to an untrue representation of a material fact, that is, an important fact, made with knowledge of its untruthfulness and with the intent to defraud another. The test of whether a fact is material is whether it was capable of influencing the approving authority to (pay) (approve) (approve and pay) the claim.

Given the similarity between the definitions of intent to deceive and false and fraudulent, the submission of a single form, e.g., Form 5960, for the purpose of fraudulently obtaining BAH, the purpose is one in the same, i.e., to deceive or defraud. The UMC situation is created because a false official statement charge and a charge for presenting a false claim are aimed at the same conduct.

punishment[96] and are likely to be UMC for findings or at least merged for sentencing purposes.[97]

It is also recommended that trial counsel avoid exact amount charging. When charging a larceny, whether the amount stolen is under or over $1,000 increases the maximum punishment.[98] Entitlement fraud cases often involve amounts over $1,000.[99] Although it can be enticing to view monthly LESs and add the total dollar amount stolen, this can create unnecessary problems, and it is recommended trial counsel draft specifications listing the amount as "more than $1,000."

First, exact amount charging may hinder plea negotiations or create problems during plea inquiries. For plea negotiations, a service member may be willing to admit a larceny, but insist the intent to steal did not begin until a later date than alleged thereby changing the charged amount.[100]

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[96] MCM, *supra* note 20, pt. IV, ¶¶ 41d(1), 71d(1) (providing a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years for both false official statement and false claims). This practice is recommended for cases where the completion and submission of a form are one in the same, e.g., the completion of the Form 5960 is also the submission of a claim for BAH.

[97] *E.g.*, United States v. Curtis, No. 20130289, 2015 CCA LEXIS 192, at *4 (A. Ct. Crim. App. Apr. 20, 2015) (finding UMC for false official statement and false claim addressing the same document and same lie.); United States v. Roosa, No. 20100879, 2013 CCA LEXIS 373, at *8 (A. Ct. Crim. App. Apr. 30, 2013) (finding UMC for false official statements and false claims based on the same document.); United States v. Perkins, No. 32547, 1997 CCA LEXIS 579, at *6-7 (A.F. Ct. Crim. App. Nov. 4, 1997) (addressing false official statements and false claims based on a Form 1351-2, it was stated, "[T]his Court cannot discern how one can present a false claim without also making a false official statement. The claim is an official statement and, if false, a false official statement."). *But see* Curtis, 2015 CCA LEXIS 192, at *4; United States v. Smith, No. 200600156, 2007 WL 3025072, at *2-3 (N-M Ct. Crim. App. Oct. 16, 2007); United States v. Suthanaviroj, No. 200000763, 2002 WL 1750802, at *8 (N-M Ct. Crim, App. July 22, 2002). These cases demonstrate that courts generally treat larceny as a criminal act distinct from false official statement or false claim. Therefore, UMC will likely not be an issue for larceny and false claims or false statements.

[98] MCM, *supra* note 20, pt. IV, ¶¶ 64d(1)(a), 64d(1)(b) (providing a maximum punishment of a bad-conduct discharge, total forfeiture, and confinement for one year for larceny of military property of $1,000 or less and a maximum of dishonorable discharge, total forfeiture, and confinement for ten years for larceny of military property over $1,000).

[99] Professional Experience, *supra* note 81. The author represented six clients at courts-martial charged with entitlement fraud. All six cases involved amounts over $10,000.

[100] *Id.* In negotiation of a plea deal for a BAH fraud case, trial counsel charged an exact amount where the beginning date for the intent to steal was in question. *Id.* Although ultimately resolved, the parties initially reached an impasse when the trial counsel refused

Therefore, the specification must be amended or a mutually agreeable deal may be lost. On the other hand, if a deal is reached, the amount charged can threaten a providence inquiry if counsel are not cognizant of how the amount was calculated. Even if counsel agree, during sentence deliberation, a military judge may attempt to confirm the total.[101] If the military judge arrives at a different total and cannot resolve the total with counsel, and most importantly the accused, a mutually beneficial agreement can fail.

Second, in panel cases, exact amount charging can affect trial counsel credibility.[102] If evidence of amount is incongruent with the charged amount, panel members may question case integrity. If an exact amount is charged, trial counsel should expect panel members to add totals. If the totals are off, this can unnecessarily affect trial counsel credibility.

Exact amount problems are avoided by drafting specifications using the language "over $1,000" or similar language to indicate an amount over $1,000.[103] Not only does this alleviate problems with amount, it allows presentation of damning evidence. Trial counsel may still admit LES statements or travel pay amounts as relevant evidence of larceny or as aggravating evidence during sentencing and avoid imprecise mathematical calculations.[104] Trial counsel retain credibility while amplifying the larceny.

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to amend the charge sheet to read "over $500" (using the 10 U.S.C. § 921 provision in effect in 2016) as opposed to a specific amount. *Id.*

[101] *Id.* Following deliberation on a sentence in an exact amount charging case, a military judge re-opened a providence inquiry after reaching a different amount than that on the charge sheet. *Id.* The military judge accepted the plea by excepting the charged amount and entering a lower amount still over $500. *Id.*

[102] MCM, *supra* note 20 ¶ 64b(1)(c) ("That the property was of a certain value, or of some value . . . .").

[103] *See* MCM, *supra* note 20, R.C.M. 307(c)(3) discussion (H)(iv) (2019) ("Exact value should be stated, if known. For ease of proof an allegation may be 'of a value not less than . . .' If only an approximate value is known, it may be alleged as 'of a value of about . . . .'").

[104] BENCHBOOK, *supra* note 83 para. 3-46-1c; MCM, *supra* note 21, R.C.M. 1001(b)(4) ("The trial counsel may present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty . . . [including] evidence of financial . . . impact on or cost to any person or entity who was the victim of an offense . . . .").

IV. Evidence Presentation

For evidence presentation, it is recommended trial counsel focus on judicial notice,[105] business records,[106] absence of business records,[107] public records,[108] and attestation certificates.[109] Furthermore, trial counsel must identify witnesses with the requisite knowledge of military pay systems and processes.

It is recommended trial counsel request judicial notice of pertinent JTR and FMR sections. Judicial notice educates panel members and allows trial counsel to refer to and request panel members review the relevant rules while deliberating. However, caution should be taken to not overload the panel. For example, chapter ten of the JTR, addressing housing allowances, is eighty-five pages.[110] If the intent is to allow and remind the panel members the service member claimed an entitlement for an improper dependent, judicial notice should be sought for only Part B.[111]

For the presentation of business records and accompanying attestation certificates, trial counsel must focus on the correct witness with knowledge of relevant finance systems. Different systems are used to maintain different pieces of pay and entitlement data.[112] For example, LES statements are obtained through the Defense Joint Military Pay System (DJMPS).[113] However, travel pay transactions are stored and retrieved through the Integrated Automated Travel System.[114] Defense counsel may attack the foundation for a business record by challenging witness

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[105] MCM, *supra* note 20, MIL. R. EVID. 202(a).
[106] MCM, *supra* note 20, MIL. R. EVID. 803(6).
[107] MCM, *supra* note 20, MIL. R. EVID. 803(7).
[108] MCM, *supra* note 20, MIL. R. EVID. 803(8).
[109] MCM, *supra* note 20, MIL. R. EVID. 902(11).
[110] JTR, *supra* note 3.
[111] *Id.* paras. 100201–100208.
[112] DFAS Interview, *supra* note 29. Different finance systems are used by the different Service components. *Id*. The Army, Navy, and Air Force use the Defense Joint Military Pay System (DJMS). *Id*. The Coast Guard uses the Integrated Personnel Pay System. *Id*. The Marine Corps uses the Marine Corps Total Force System. *Id*. Trial counsel need to identify the pay system being used and ensure to use witnesses with knowledge of the relevant system. For example, defense counsel may attack the witness's knowledge of how data is entered into a system or retrieved from a system.
[113] *Id.* DJMS warehouses all payroll data and transactions. *Id.* The data stored is data provided by the service member and entered by finance personnel. *Id*.
[114] *Id*.

knowledge of the system and the trustworthiness of the record.[115] These problems are avoided if trial counsel become educated on what systems are at issue and who can testify as to knowledge of the system as opposed to simply obtaining a document from finance.

V. Presenting a More Compelling Panel Case

While entitlement fraud cases may border on the mundane, trial counsel can tell a captivating story about the misconduct through evidentiary foundations. A recommended approach is to avoid filing a lengthy motion to pre-admit evidence. For example, when laying a business record foundation for a Form 5960, trial counsel may use the witness to discuss the steps to complete the form and the warnings the form provides for false information. This assists in creating a full picture of every step the accused took to commit the larceny, false statement, or false claim. In contrast, the pre-admission of evidence deprives the panel of the benefit of hearing the foundation. Thus, the panel may be deprived of details such as how the document was completed and what assistance was offered.

Second, pre-admitting most or all of the documentary evidence may raise cumulative presentation objections.[116] For instance, if trial counsel pre-admits a Form 5960, defense counsel may object if the trial counsel then attempts to elicit testimony regarding the foundation for the document. Once again, this may result in panel members being deprived of details of the foundation that enhance the description of the alleged misconduct. Preserving the opportunity to elicit foundational testimony allows trial counsel to have witness testimony tell the story of the service member's alleged misconduct. This, in turn, allows the trial counsel to construct and present a cohesive, comprehendible case.

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[115] MCM, *supra* note 20, MIL. R. EVID. 803(6), MIL. R. EVID. 803(7), MIL. R. EVID. 803(8).

[116] MCM, *supra* note 20, MIL. R. EVID. 403 ("The military judge may exclude relevant evidence if its probative value is substantially outweighed by . . . *undue delay, wasting time, or needlessly presenting cumulative evidence*.") (emphasis added). If this occurs, trial counsel also risk reducing credibility if several witnesses are called to testify and then quickly dismissed due to relevance objections.

VI. Conclusion

For a new trial counsel, prosecuting entitlement fraud cases can be daunting and confusing with little assistance offered through secondary material. By analyzing the proper legal framework, trial counsel will be in a position to tailor the investigation to ensure effective pre-preferral evidence collection, which allows for focused command and prosecutorial objectives. By following this process, if and when a decision is made to go to trial, trial counsel will be able to draft appropriate charges, in-line with command and prosecutorial objectives, and use the evidence to present a captivating and winning case.

Appendix A. Example of and Rationale for a Recommended Charging Scheme

This example is based upon the following fact pattern: On 1 January 2017, Staff Sergeant (E-6) service member undergoes a PCS from Fort Bliss, Texas, to South Korea. The service member is married, but is serving an unaccompanied, dependent restricted tour. Upon in-processing, the service member attends a finance brief and completes a Department of the Army (DA) 5960 for BAH, a Department of Defense (DD) 1561 for FSA, and a DD 1351-2 for PCS travel expenses. On both the DA 5960 and the DD 1561, the service member lists he is married and lists a current address for his spouse in Brooklyn, New York 11201. Furthermore, he lists his spouse moved from El Paso, Texas 79835; however, she never actually left El Paso. The difference in BAH at the with-dependent rate for El Paso and New York is $2,712 per month ($4,128 for Brooklyn - $1,416 for El Paso). The service member also claimed $3,000 in travel expenses for his spouse's alleged move to Brooklyn. At the time the suspected fraud is uncovered on 30 November 2017, the service member has been stationed in Korea for eleven months and has received $29,832 of BAH to which he is not entitled.

Trial counsel drafts the following charges:

CHARGE I – A violation of the UCMJ, Article 107

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign official records, to wit: Department of the Army Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), and Department of Defense Form 1561, Statement to Substantiate Payment of Family Separation Allowance, which records were false in that his spouse's current address was not Brooklyn, New York 11201, and was then known by the said Staff Sergeant (E-6) to be so false.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of Defense Form 1351-2, Travel Voucher or Subvoucher, which record was totally false in that his spouse did not relocate from El Paso, Texas, to Brooklyn, New York, and was then known by the said Staff Sergeant (E-6) to be so false.

CHARGE II – A violation of the UCMJ, Article 121

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about between 1 January 2017 and 30 November 2017, steal Basic Allowance for Housing, military property, of a value over $500, the property of the U.S. Army.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, steal travel pay entitlements, military property, of a value over $500, the property of the U.S. Army.

This type of charging scheme is recommended for the following reasons:

1. It avoids unnecessary UMC motions practice for false official statements.

2. It avoids unnecessary UMC motions practice for the false official statements and false claims.

3. It avoids specifications that will automatically result in an acquittal either by verdict or by operation of R.C.M. 917.

4. It eliminates problems associated with exact-amount charging.

5. It simplifies the government's case while carrying the same maximum punishment, i.e., dishonorable discharge, confinement for 30 years, and forfeiture of all pay and allowances, that is likely after successful defense motions practice discussed in Appendix B.

6. Although rulings may differ from case to case, there will generally not be a UMC issue for the larceny and false official statement charges because they are considered distinct criminal acts.

Appendix B. Example of and Rationale for a Charging Scheme NOT Recommended

This example is based upon the same fact pattern listed in Appendix A.

CHARGE I - A violation of the UCMJ, Article 107

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of the Army Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), which record was false in that his spouse's current address was not Brooklyn, New York 11201, and was then known by the said Staff Sergeant (E-6) to be so false.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of Defense Form 1561, Statement to Substantiate Payment of Family Separation Allowance, which record was false in that his spouse's current address was not Brooklyn, New York 11201, and was then known by the said Staff Sergeant (E-6) to be so false.

Specification 3: In that Staff Sergeant (E-6), U.S. Army, did at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of Defense Form 1351-2, Travel Voucher or Subvoucher, which record was totally false in that his spouse did not relocate from El Paso, Texas, to Brooklyn, New York, and was then known by the said Staff Sergeant (E-6) to be so false.

CHARGE II – A violation of the UCMJ, Article 121

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about between 1 January 2017 and 30 November 2017, steal Basic Allowance for Housing, military property, of a value of $29,832, the property of the U.S. Army.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about between 1 January 2017 and 30 November 2017, steal Family Separation Allowance, military property, of a value of $2,750, the property of the U.S. Army.

Specification 3: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, steal travel pay entitlements, military property, of a value of $3,000, the property of the U.S. Army.

CHARGE III – A violation of the UCMJ, Article 124

Specification 1: In that Staff Sergeant (E-6), did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, by preparing a DA Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), for presentation for payment, make a claim against the United States in the amount of $45,408 for Basic Allowance for Housing, which claim was false and fraudulent in the amount of $29,832 in that his spouse did not live in Brooklyn, New York 11201, and was then known by the said Staff Sergeant to be false and fraudulent.

Specification 2: In that Staff Sergeant (E-6), did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, by preparing a Department of Defense Form 1351-2, Travel Voucher or Subvoucher, for presentation for payment, make a claim against the United States in the amount of $3,000 for Travel Pay Entitlements, which claim was false and fraudulent in the amount of $2,750, in that his spouse did not travel from El Paso, Texas 79835 to Brooklyn, New York 11201, and was then known by the said Staff Sergeant to be false and fraudulent.

This type of charging scheme is not recommended for the following reasons:

1. Specifications 1 and 2 of Charge I allege false statements that were made at the same time and place and contained the same substance. Therefore, under a UMC analysis, it is highly likely these specifications will, at the very least, be merged for sentencing and possibly be merged into a single specification for findings. These two specifications lead to unnecessary motions practice, and a resulting merger will negate the prosecutorial benefit of arguing for a higher sentence.

2. The specifications of Charge II all allege exact amounts. This approach runs the risk of hindering plea negotiations and plea inquiries. Additionally, if any amount varies at a contested court-martial, trial counsel may lose credibility in front of a panel.

3. Specification 2 of Charge II will result in an acquittal either by verdict or operation of R.C.M. 917. FSA is paid at a flat rate of $250 per month regardless of dependent location. Although the service member may be convicted of a false official statement for listing an incorrect address, because he was separated from his spouse he is nonetheless entitled to FSA.

4. The Specifications of Charges I and II will likely be merged for sentencing. Under a UMC analysis, there is a high probability the defense can successfully argue that the charges and specifications are aimed at the same criminal act, misrepresent the service member's criminality, and unfairly increase his punitive exposure. This will lead to unnecessary motions practice and the resulting merger will negate the prosecutorial benefit of arguing for a higher sentence.

5. The Specifications of Charge III create the aforementioned exact amount charging problems. It is unnecessary for trial counsel to create this problem for the following reasons:

(1) the false official statements which form the basis of the false claims can easily be proved;

(2) the false claim specifications allow for the same maximum punishment as the false official statement specifications; and

(3) it will create unnecessary motions practice.

6. Specification 2 of Charge III will result in an acquittal either by verdict of operation of R.C.M. 917. FSA is paid at a flat rate of $250 per month regardless of dependent location. Although the service member may be convicted of a false official statement for listing an incorrect address, because he was separated from his spouse he is nonetheless entitled to FSA.