

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

* 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

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

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

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 sexsomnia'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 sexsomnia are: physical contact with another

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, sexsomnia's "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

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

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

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

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 judge 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

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

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

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

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

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 Report¹⁴⁶, in accordance with Department of Defense Instruction (DoDI) 6130.03. Department of Defense Instruction

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

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

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

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

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.