IN A GENERAL COURT-MARTIAL
SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA

UNITED STATES	)	Defense Response to Government
	)	Motion *in Limine* (Admissibility of
v.	)	Accused's Interview)
	)	
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	19 June 2017

RELIEF SOUGHT

The defense objects to the admission of uncorroborated essential facts from SGT Bergdahl's statement to LTG Dahl.

Oral argument is requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The government's motion correctly states the burdens. In addition, when the defense has made an appropriate motion or objection under MRE 304, the prosecution has the burden of establishing the admissibility of the evidence. MRE 304(f)(6).

FACTS

On 6-7 August 2014, SGT Bergdahl cooperated with the Army's AR 15-6 investigator, waived his rights, and answered every question. He was under no obligation to do so. Neither SGT Bergdahl nor his counsel knew then that SGT Bergdahl's GCMCA from 2009 had already signed and approved but not yet delivered a grant of immunity for SGT Bergdahl to answer questions in exchange for that information to not be used against him.

SGT Bergdahl's ongoing trial phase began upon arraignment on 22 December 2015.

On 20 May 2016, President Obama signed EO 13730 which made significant revisions to military evidentiary rules including MRE 304(c) concerning corroboration of confessions and admissions.

EVIDENCE AND WITNESSES

No defense evidence or witnesses are required for this motion.

LAW

Article 36(a), UCMJ
National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015)
EO 13730, 20 May 2016, 81 Fed. Reg. 33331 (2016)
“Old” MRE 304(c)(1) (2015, pre-EO 13730)
“New” MRE 304(c)(1) (2016, post-EO 13730)
MRE 304(f)(6)
MRE 304(h)
United States v. Nichols, 6 C.M.R. 27 (C.M.A. 1952)
Opper v. United States, 348 U.S. 84 (1954)
United States v. Melvin, 26 M.J. 145 (C.M.A. 1988)
United States v. Rounds, 30 M.J. 76 (C.M.A. 1990)
United States v. Baldwin, 54 M.J. 464 (C.A.A.F. 2001)
United States v. Adams, 74 M.J. 137 (C.A.A.F. 2015)
United States v. Thomas, 2016 CCA LEXIS 551 (A. Ct. Crim. App. 9 Sep 2016)

ARGUMENT

I. The 2016 Version of MRE 304(c) is Inapplicable to This Case

Section 545 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726, 820 (2015), directed that:

> To the extent the President considers practicable, the President shall modify Rule 304(c) of the Military Rule of Evidence to conform to the rules governing the admissibility of the corroboration of admissions and confessions in the trial of criminal cases in the United States district courts.

This discretionary language mirrors authority the President already possessed by law:

> Pre-trial, trial, and post-trial procedures. . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . .

Article 36(a), UCMJ.

Pursuant to his authority under Article 36(a), President Obama signed Executive Order (EO) 13730 on 20 May 2016. 81 Fed. Reg. 33331 (2016). The order significantly revised MRE 304(c), the rule requiring the government to corroborate confessions and admissions. This new MRE 304(c) is the version cited in the government’s motion.

EO 13730 went into effect immediately when it was signed on 20 May 2016. *See* § 2. However, the EO also provided that the amendments were inapplicable to cases brought under the old rules. Section 2(b) of the EO states:

> Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Id. at § 2(b). This provision prohibiting midtrial changes in court-martial rules is based on settled military law:

> . . . [I]f a trial has reached the point of arraignment, it shall be completed under the old procedure without interference by the new. . . In a sense, the President set a cut-off date and he declared that acts accomplished or steps taken prior to that time were validated. He further declared that after the cut-off date the new procedure was to be controlling on those steps which had not been commenced prior to that date. . . . The result of these provisions, we believe, is to separate the court-martial process . . . into successive phases or principal steps, and to permit the completion with the old system's finality of any phase initially undertaken prior to the effective date of the Act on which the new procedure is based. However, as to stages not begun by this date, the provisions of the new scheme are to apply. . .

United States v. Nichols, 6 C.M.R. 27, 32 (C.M.A. 1952).

Last year, the Army Court of Criminal Appeals decided *United States v. Thomas,* 2016 CCA LEXIS 551 (A. Ct. Crim. App. 9 Sep 2016). Like this case, *Thomas* involved a rule change that arose from EO 13730. The court cited approvingly to the *Nichols* rule stated above in holding that newly adopted rules become effective only once there is a new phase in the case. In *Thomas*, the case reached a new phase after the trial phase once it was docketed for appeal.

II. The Case is Governed by the Previous Version of MRE 304(c) and *United States v. Adams*

Prior to the 2016 amendments, the corroboration requirement of MRE 304(c) said, in substantial part:

> An admission or a confession of the accused may be considered as evidence against the accused . . . only if independent evidence . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises

> an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

The corroboration requirement of "old" MRE 304(c) was interpreted by the Court of Appeals in *United States v. Adams*, 74 MJ 137 (C.A.A.F. 2015). *Adams* addressed the standards for corroboration of "essential facts":

> What constitutes an essential fact of an admission or confession necessarily varies by case. Essential facts we have previously considered include the time, place, persons involved, access, opportunity, method, and motive of the crime. *See, e.g., United States v. Baldwin*, 54 M.J. 464, 465-66 (C.A.A.F. 2001); *Rounds*, 30 M.J. at 77-78; *United States v. Melvin*, 26 M.J. 145, 147 (C.M.A. 1988).
>
> When independent evidence which is sufficient to corroborate an essential fact is provided, that essential fact is admissible. M.R.E. 304(c). If sufficient corroborating evidence of an essential fact is not provided, then the uncorroborated fact is not admissible and the military judge must excise it from the confession. *See id.* The essential facts which are corroborated may be used against the accused alongside any other properly admitted evidence. *See, e.g.*, *Opper*, 348 U.S. at 93 ("Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.").
>
> There is no "tipping point" of corroboration which would allow admission of the entire confession if a certain percentage of essential facts are found to be corroborated. For instance, if four of five essential facts were corroborated, the entire confession is not admissible. Only the four corroborated facts are admissible and the military judge is required to excise the uncorroborated essential fact. M.R.E. 304(c). This analysis is completed by the military judge examining the potential corroboration for each essential fact the government wishes to admit. Id.

Id. at 140-141.

Because *Adams* and the previous version of MRE 304(c) that it interpreted were the corroboration rules when SGT Bergdahl's trial phase began, they remain so for the entire trial phase.

III. The Government Has Not Met Its Burden to Corroborate Each Essential Fact

The government's motion indicates several reasons why it seeks to introduce the accused's statement to LTG Dahl. The defense objects to the introduction of this statement unless the government first meets its obligation under the former MRE 304(c) and *Adams* to corroborate each essential fact it seeks to use with appropriate independent evidence. If it cannot, those portions of the statement must be excluded from evidence against the accused even if evidence of other essential facts is admitted.

Procedurally, the government's motion inappropriately seeks a ruling "on spec" – in effect, an advisory opinion. By promising to satisfy the corroboration requirement in the future in order to secure an assurance of admissibility now, the prosecution fails to meet the requirements of either the old or new versions of MRE 304(c). Admissibility rulings are not given "on credit."

The government motion claims to seek a decision on the admissibility for SGT Bergdahl's entire 371-page sworn statement but only nine cherry-picked pages are attached to the motion. The reason for this discrepancy is unclear but it foreshadows a completeness issue under MRE 304(h) of statements not being considered in context.

CONCLUSION

The government's motion should be denied. The defense objects to the admission of uncorroborated essential facts from SGT Bergdahl's statement to LTG Dahl.

// s //
LTC FRANKLIN D. ROSENBLATT
Defense Counsel

With the defense team

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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Defense Response to Government Motion *in Limine* (Admissibility of Accused's Interview) to the Court and Trial Counsel on 19 June 2017.

// s //
LTC FRANKLIN D. ROSENBLATT

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Federal Register
Vol. 78, No. 98
Tuesday, May 21, 2013

Presidential Documents

Title 3—

The President

Executive Order 13643 of May 15, 2013

2013 Amendments to the Manual for Courts-Martial, United States

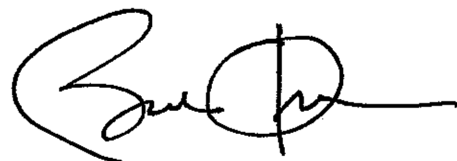
By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473, as amended, it is hereby ordered as follows:

Section 1. Parts III and IV of the Manual for Courts-Martial, United States, are amended as described in the Annex attached and made a part of this order.

Sec. 2. These amendments shall take effect as of the date of this order, subject to the following:

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.



THE WHITE HOUSE,
May 15, 2013.

Billing code 3295–F3–P

(2) If the court-martial has allowed the defense to present expert testimony as to the mental condition of the accused, an expert witness for the prosecution may testify as to the reasons for his or her conclusions, but such testimony may not extend to statements of the accused except as provided in subdivision (b)(1).

(c) *Release of Evidence from an R.C.M. 706 Examination.* If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, must order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge, upon motion, may order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) *Noncompliance by the Accused.* The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) *Procedure.* The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress.

Rule 303. Degrading Questions

Statements and evidence are inadmissible if they are not material to the issue and may tend to degrade the person testifying.

Rule 304. Confessions and Admissions

(a) *General Rule.* If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e).

(1) *Definitions.* As used in this rule:

(A) "Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

(B) "Confession" means an acknowledgment of guilt.

(C) "Admission" means a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

(2) Failure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was under investigation or was in confinement, arrest, or custody for the alleged wrongdoing.

(b) *Evidence Derived from a Statement of the Accused.* When the defense has made an appropriate and timely motion or objection under this rule, evidence allegedly derived from a statement of the accused may not be admitted unless the military judge finds by a preponderance of the evidence that:

(1) the statement was made voluntarily,

(2) the evidence was not obtained by use of the accused's statement, or

(3) the evidence would have been obtained even if the statement had not been made.

(c) *Corroboration of a Confession or Admission.*

(1) An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

(3) Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(4) *Quantum of Evidence Needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type

of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(5) *Procedure.* The military judge alone is to determine when adequate evidence of corroboration has been received. Corroborating evidence must be introduced before the admission or confession is introduced unless the military judge allows submission of such evidence subject to later corroboration.

(d) *Disclosure of Statements by the Accused and Derivative Evidence.* Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused.

(e) *Limited Use of an Involuntary Statement.* A statement obtained in violation of Article 31 or Mil. R. Evid. 305(b)-(c) may be used only:

(1) to impeach by contradiction the in-court testimony of the accused; or

(2) in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(f) *Motions and Objections.*

(1) Motions to suppress or objections under this rule, or Mil. R. Evid. 302 or 305, to any statement or derivative evidence that has been disclosed must be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(2) If the prosecution seeks to offer a statement made by the accused or derivative evidence that was not disclosed before arraignment, the prosecution must provide timely notice to the military judge and defense counsel. The defense may object at that time and the military judge may make such orders as are required in the interests of justice.

(3) The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily.

(A) Prior to the introduction of such testimony by the accused, the defense must inform the military judge that the testimony is offered under subdivision (f)(3).

(B) When the accused testifies under subdivision (f)(3), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(4) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

(5) *Rulings.* The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.

(6) *Burden of Proof.* When the defense has made an appropriate motion or objection under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When the military judge has required a specific motion or objection under subdivision (f)(4), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(7) *Standard of Proof.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such objection is made, it will be resolved pursuant to R.C.M. 801(e)(3)(C).

(8) *Effect of Guilty Plea.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

(g) *Weight of the Evidence.* If a statement is admitted into evidence, the military judge must permit the defense to present relevant evidence with respect to the voluntariness of the statement and must instruct the members to give such weight to the statement as it deserves under all the circumstances.
(h) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.
(i) *Evidence of an Oral Statement.* A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.
(j) *Refusal to Obey an Order to Submit a Body Substance.* If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine or other body substance, evidence of such refusal may be admitted into evidence on:

(1) a charge of violating an order to submit such a sample; or

(2) any other charge on which the results of the chemical analysis would have been admissible.

Rule 305. Warnings about Rights

(a) *General Rule.* A statement obtained in violation of this rule is involuntary and will be treated under Mil. R. Evid. 304.
(b) *Definitions.* As used in this rule:

(1) "Person subject to the code" means a person subject to the Uniform Code of Military Justice as contained in Chapter 47 of Title 10, United States Code. This term includes, for purposes of subdivision (c) of this rule, a knowing agent of any such person or of a military unit.

(2) "Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(3) "Custodial interrogation" means questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.

(c) *Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements.*

(1) *Article 31 Rights Warnings.* A statement obtained from the accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused except as provided in subdivision (d). Pursuant to Article 31, a person subject to the code may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(A) informing the accused or suspect of the nature of the accusation;

(B) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(C) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(2) *Fifth Amendment Right to Counsel.* If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible against the accused unless counsel was present for the interrogation.

(3) *Sixth Amendment Right to Counsel.* If an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges by anyone acting in a law enforcement capacity, or the agent of such a person, and the accused requests counsel, or if the accused has appointed or retained counsel, any statement made in the interrogation, or evidence derived from the interrogation, is inadmissible unless counsel was present for the interrogation.

(4) *Exercise of Rights.* If a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately. If a person who is subjected to interrogation under the circumstances described in subdivisions (c)(2) or (c)(3) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present.

(d) *Presence of Counsel.* When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) will be provided by the United States at no expense to the person and without regard to the person's indigency and must be present before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

Caution
As of: June 19, 2017 3:16 PM Z

United States v. Adams

United States Court of Appeals for the Armed Forces

January 14, 2015, Argued; April 27, 2015, Decided

No. 14-0495

Reporter
74 M.J. 137 *; 2015 CAAF LEXIS 344 **

UNITED STATES, Appellee v. Matthew R. ADAMS Jr., Specialist, U.S. Army, Appellant

Subsequent History: Reconsideration denied by *United States v. Adams, 2015 CAAF LEXIS 531 (C.A.A.F., June 4, 2015)*

Prior History: [1]** Crim. App. No. 20110503. Military Judge: Andrew J. Glass.

United States v. Adams, 2014 CCA LEXIS 61 (A.C.C.A., Jan. 29, 2014)

Core Terms

confession, corroborated, essential facts, military, independent evidence, trustworthiness, gun, cocaine, drug dealer, handgun, admissible, larceny, grabbed, uncorroborated, admitting, happened

Case Summary

Overview
HOLDINGS: [1]-There was no evidence which corroborated appellant's opportunity or motive to commit the crime, his access, his intent, the accomplices involved, the subject of the larceny, the time of the crime, or the act of the larceny itself; [2]-Even if the appellate court were to assume that the evidence relied upon below properly corroborated the location of the larceny and the identity of the victims, those facts, combined with the ownership of the handgun, were legally insufficient to support the larceny conviction absent any additional direct evidence of a crime.

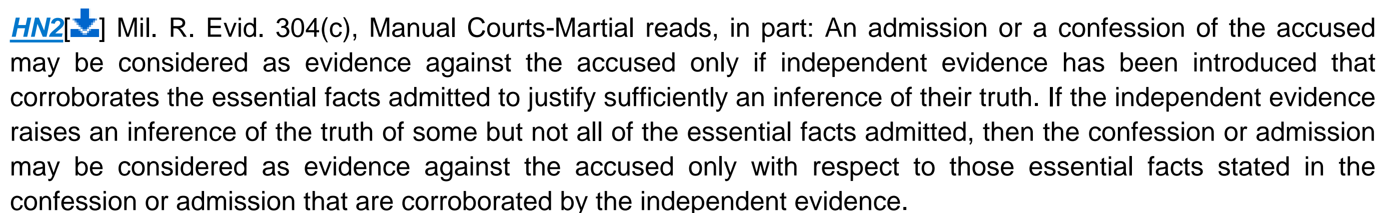
Outcome
Judgment reversed.

LexisNexis® Headnotes

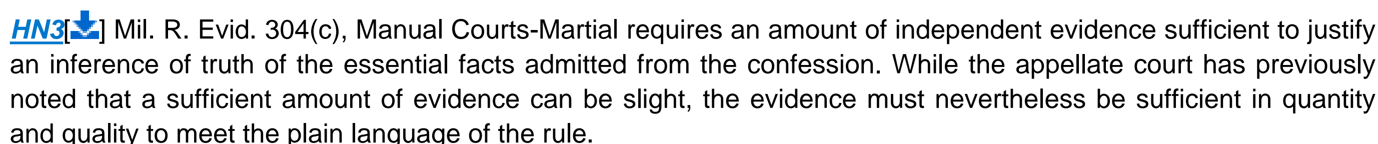
Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] The appellate court reviews a military judge's admission of evidence for an abuse of discretion.

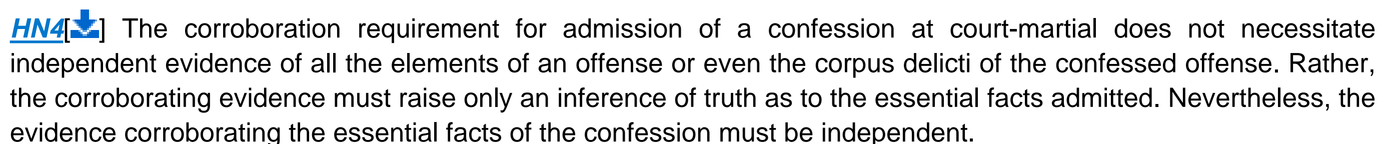
Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions


HN2[] Mil. R. Evid. 304(c), Manual Courts-Martial reads, in part: An admission or a confession of the accused may be considered as evidence against the accused only if independent evidence has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

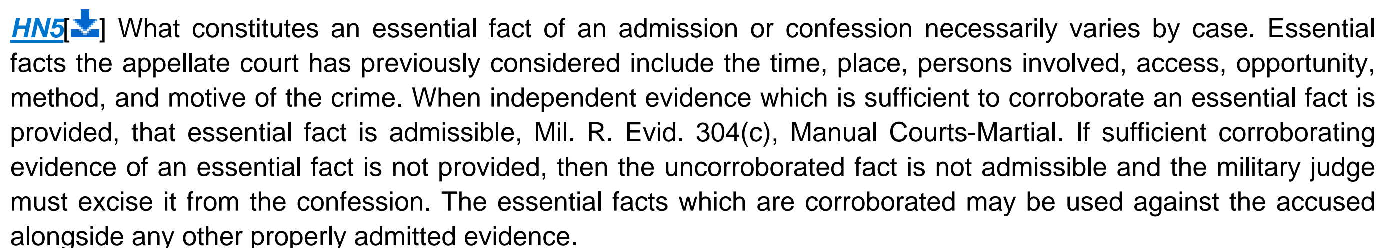
Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions


HN3[] Mil. R. Evid. 304(c), Manual Courts-Martial requires an amount of independent evidence sufficient to justify an inference of truth of the essential facts admitted from the confession. While the appellate court has previously noted that a sufficient amount of evidence can be slight, the evidence must nevertheless be sufficient in quantity and quality to meet the plain language of the rule.

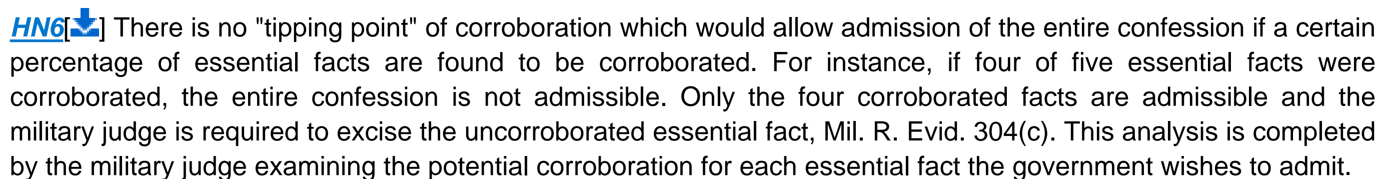
Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions


HN4[] The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the corpus delicti of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. Nevertheless, the evidence corroborating the essential facts of the confession must be independent.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions


HN5[] What constitutes an essential fact of an admission or confession necessarily varies by case. Essential facts the appellate court has previously considered include the time, place, persons involved, access, opportunity, method, and motive of the crime. When independent evidence which is sufficient to corroborate an essential fact is provided, that essential fact is admissible, Mil. R. Evid. 304(c), Manual Courts-Martial. If sufficient corroborating evidence of an essential fact is not provided, then the uncorroborated fact is not admissible and the military judge must excise it from the confession. The essential facts which are corroborated may be used against the accused alongside any other properly admitted evidence.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions


HN6[] There is no "tipping point" of corroboration which would allow admission of the entire confession if a certain percentage of essential facts are found to be corroborated. For instance, if four of five essential facts were corroborated, the entire confession is not admissible. Only the four corroborated facts are admissible and the military judge is required to excise the uncorroborated essential fact, Mil. R. Evid. 304(c). This analysis is completed by the military judge examining the potential corroboration for each essential fact the government wishes to admit.

Counsel: For Appellant: Captain Nicholas J. Larson (argued); Lieutenant Colonel Jonathan F. Potter (on brief); Colonel Kevin Boyle, Lieutenant Colonel Peter Kageleiry Jr., Major Aaron R. Inkenbrandt, Major Vincent T. Shuler, and Captain Brian D. Andes.

For Appellee: Captain Jaclyn E. Shea (argued); Colonel John P. Carrell, Major John Choike, Major Daniel D. Derner, and Captain Timothy C. Erickson (on brief).

Judges: ERDMANN, J., delivered the opinion of the court, in which STUCKY and OHLSON, JJ., joined. BAKER, C.J., filed a separate dissenting opinion, in which RYAN, J., joined.

Opinion by: ERDMANN

Opinion

[*137] Judge ERDMANN delivered the opinion of the court.

Specialist (SPC) Matthew R. Adams Jr. was charged with numerous offenses, including robbery, in violation of Article 122, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 921 (2006)*. **[*138]** Consistent with his plea, Adams was acquitted of all charges but was found guilty of larceny, as a lesser included offense of robbery, in violation of Article 121, UCMJ, *10 U.S.C. § 921 (2006)*. This Court granted review to determine whether the confession admitted by the military judge was properly corroborated.[1] Finding insufficient corroboration for a number **[**2]** of essential facts admitted in the confession, we hold the military judge abused his discretion and therefore reverse the decision of the United States Army Court of Criminal Appeals (CCA).

Background

SPC DT implicated himself and Adams in a robbery of cocaine from a local drug dealer and also alleged that Adams had a weapon and cocaine in his house. Based on this information, Special Agents (SA) McKinney and Villegas of the Army's Criminal Investigation Division (CID) obtained a search authorization for Adams' house. While searching the house, the agents found a Smith & Wesson "Sigma" .40 caliber handgun. No cocaine was found.

After the search, Adams was brought in for questioning. Adams provided a sworn statement in which he confessed to stealing cocaine from a drug dealer named Ootz[2] with DT and another co-conspirator. In his statement, **[**3]** Adams provided his motive for the larceny, the general location of the offense, admitted that he brandished a .40 caliber Smith & Wesson "Sigma" handgun, and that his co-conspirator grabbed the cocaine from Ootz.

At trial, the government did not call Ootz or the two accomplices, but relied on Adams' confession and corroboration testimony from the two CID agents. SA McKinney testified that she knew of a "Timothy" Ootz and that he was "a previous soldier." She did not testify how or when she learned of Ootz or that she knew him to be a drug dealer. SA McKinney testified that, during her interview of Adams, he told her that the larceny "started at the Walmart, and then it moved to another location," but she did not remember where. SA McKinney testified there was a Walmart located in Calcium, New York, "right outside the north gate," but did not testify about a Microtel at all. SA McKinney also confirmed that CID did not find any cocaine at Adams' house.

Special Agent Villegas testified that she was not aware of **[**4]** Ootz until March 4, the day CID interviewed both DT and Adams. She further testified that Ootz "was a former [s]oldier, reported to be a drug dealer in the local area." Villegas indicated that she had obtained this information from her "research running through cases that we have had at CID." Villegas testified there was a Walmart in Evans Mills, New York, but did not believe there was one in Calcium, as stated by McKinney. Villegas also testified that the Walmart in Evans Mills was located near a Microtel.

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[1] We granted review of the following issue:

> Whether the Army Court of Criminal Appeals erred in finding that the military judge did not abuse his discretion in admitting the portion of Appellant's sworn statement regarding the [theft] of cocaine because the government failed to corroborate, in accordance with Military Rule of Evidence 304(g), the essential fact that Appellant took cocaine.

[2] There was no consensus at trial as to either Ootz' first name or the spelling of his last name. SA McKinney identified him as Timothy while SA Villegas identified him as Matthew.

During McKinney's testimony, the government sought to admit Adams' written statement. The defense objected to the admission on the grounds it lacked corroboration. Following additional testimony and arguments, the military judge granted the defense motion in part and denied it in part. After excising a portion of the confession for lack of corroboration, the military judge admitted the following portions:[3]

> [Adams:] . . . [DT] told me who the person was Ootz [sic], who had ripped me off previously & gave me the idea to rob him. We met him [Ootz] at Walmart and had him drive over to the Microtel where we got in his car. [DT] looked at the stuff began talking shit & I pulled my gun out **[*139]** and [DT] **[**5]** grabbed the coke & we got out of Ootz [sic] car & got in mine and returned to base.
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> . . . .
>
> Q: What day did this take place?
>
> A: 28 Feb 2011[.]
>
> . . . .
>
> Q: What was [the] deal agreed upon by [DT] and Ootz?
>
> A: A ball for $220[.]
>
> Q: Did you have the $220 on you?
>
> A: No only $80 cause we were gonna rob him[.]
>
> . . . .
>
> Q: What happened after you all got in Ootz [sic] vehicle?
>
> A: [DT] asked for the stuff and an argument began and I pulled out my gun[.]
>
> Q: Did you say anything to Ootz?
>
> A: I told him not to do that shit again & then we got out[.]
>
> Q: What did you mean by that?
>
> A: About ripping [me] off[.]
>
> Q: Did Ootz say anything?
>
> A: No[.]
>
> Q: Did Ootz see the gun in your hand?
>
> A: Yes I waived [sic] it around quick[.]
>
> Q: What kind of gun did you have?
>
> A: S&W 40 cal sigma[.]
>
> Q: Where did you get the gun?
>
> A: Bought in PA/ April 2010[.]
>
> Q: When did you bring the gun to FDNY?[4]
>
> A: Christmas leave 2010[.]
>
> Q: What happened after you, [DT] and [the other co-conspirator] got back in your vehicle?
>
> A: Nothing we drove back to post[.]
>
> Q: Where was the gun when you were driving back on post?
>
> A: On me in my pants[.]

The military judge held **[**6]** that the evidence which corroborated these essential facts in Adams' confession consisted of:

> The description of the handgun the accused admitted to "waiving [sic] around quick" is a "S&W .40 cal." This matches the description of [the weapon found in the search]. . . . [T]he Court finds that these items found in the accused's home four days after the alleged crimes coupled with the testimony regarding the location of a Walmart and Microtel in Evans Mills, New York to be sufficient to meet the standard of the slight corroboration required by the rule and case law.

On appeal, the CCA affirmed Adams' conviction. *United States v. Adams, No. ARMY 20110503, 2014 CCA LEXIS 61, at *9, 2014 WL 448415, at *3 (A. Ct. Crim. App. Jan. 29, 2014)*. The CCA held the military judge did not abuse

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[3] Following a short narrative, the statement continued in question and answer format.

[4] Fort Drum, New York.

his discretion in admitting the confession, agreeing that it was corroborated by the handgun and the testimony as to the proximity of a Walmart and a Microtel. *2014 CCA LEXIS 61, at *6-9, 2014 WL 448415, at *2-3*. The CCA went on to hold that the confession was also corroborated by SA Villegas' testimony of a known drug dealer in the local area named Ootz.

Discussion

HN1[] We review a military judge's admission of evidence for an abuse of discretion. *United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003)*.

HN2[] Military Rule of Evidence (M.R.E.) 304(c) reads, in pertinent part:[5]

> An admission or a confession of the accused may be considered as evidence against the accused . . . only if independent evidence . . . has been **[**7]** introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

Emphasis added. The current iteration of M.R.E. 304(c)[6] was established in the Manual **[*140]** for Courts-Martial, United States (MCM) in 1969 and was based on the Supreme Court's decisions in *Opper v. United States, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101 (1954)*, and *Smith v. United States, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192, 1954-2 C.B. 225 (1954)*. See Dep't of the Army Pam. 27-2, Analysis of Contents Manual for Courts-Marital, United States 1969 Rev. Ed. ch. 27, para. 140a(5) (July 1970); see also Article 36, UCMJ, *10 U.S.C. § 836 (2012)*; Exec. Order No. 11430, 33 Fed. Reg. 13,502 (Sept. 11, 1968). While in Opper the Supreme Court held that it "is necessary . . . to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement," *348 U.S. at 93*, the "substantial" corroboration language was not incorporated into M.R.E. 304(c). Instead, ***HN3***[] M.R.E. 304(c) requires an amount of independent evidence sufficient to justify an inference of truth of the essential **[**8]** facts admitted from the confession.[7] While we have previously noted that a sufficient amount of evidence can be slight, the evidence must nevertheless be sufficient in quantity and quality to meet the plain language of the rule. *United States v. McClain, 71 M.J. 80, 82 (C.A.A.F. 2012)*; *United States v. Grant, 56 M.J. 410, 416 (C.A.A.F. 2002)*; *United States v. Rounds, 30 M.J. 76, 83 (C.M.A. 1990)* (Everett, C.J., concurring in part and dissenting in part).

In *United States v. Cottrill, 45 M.J. 485 (C.A.A.F. 1997)*, we explained:

> ***HN4***[] The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the corpus **[**9]** delicti of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted.

Id. at 489 (citation omitted). Nevertheless, the evidence corroborating the essential facts of the confession must be independent. *Grant, 56 M.J. at 416*.

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[5] At the time of Adams' trial, M.R.E. 304(c) was M.R.E. 304(g).

[6] Originally para. 140a, then M.R.E. 304(g), now M.R.E. 304(c). While there have been changes in word order, M.R.E. 304(c) remains substantively the same as the original para. 140a. ***MCM, ch. XXVII, para. 140a, at 27-15*** (1969 rev. ed.).

[7] The dissent would change the standard in M.R.E. 304(c) to a "trustworthiness" standard, where, if one part of the confession is found to be "trustworthy," that "trustworthiness" can be extrapolated to those portions of the confession which are not supported by independent evidence, thereby allowing the entire confession to be admitted into evidence. However, M.R.E. 304(c) expressly rejects the concept of extrapolating "trustworthiness" by requiring independent evidence of each essential fact to be corroborated.

HN5[] What constitutes an essential fact of an admission or confession necessarily varies by case. Essential facts we have previously considered include the time, place, persons involved, access, opportunity, method, and motive of the crime. See, e.g., *United States v. Baldwin, 54 M.J. 464, 465-66 (C.A.A.F. 2001)*; *Rounds, 30 M.J. at 77-78*; *United States v. Melvin, 26 M.J. 145, 147 (C.M.A. 1988)*.

When independent evidence which is sufficient to corroborate an essential fact is provided, that essential fact is admissible. M.R.E. 304(c). If sufficient corroborating evidence of an essential fact is not provided, then the uncorroborated fact is not admissible and the military judge must excise it from the confession. See id. The essential facts which are corroborated may be used against the accused alongside any other properly admitted evidence. See, e.g., *Opper, 348 U.S. at 93* ("Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.").

HN6[] There is no "tipping point" of corroboration which would allow admission of the entire confession **[**10]** if a certain percentage of essential facts are found to be corroborated. For instance, if four of five essential facts were corroborated, the entire confession is not admissible. Only the four corroborated facts are admissible and the military judge is required to excise the uncorroborated essential fact. M.R.E. 304(c). This analysis is completed by the military judge examining **[*141]** the potential corroboration for each essential fact the government wishes to admit. Id.[8]

In the present case, three facts were found to have corroborated Adams' confession: the possession of a handgun; testimony concerning the existence of a drug dealer named Ootz; and testimony regarding the location of a Walmart and a Microtel. The portion of Adams' **[**11]** confession admitting that he possessed a handgun was sufficiently corroborated by the matching handgun found by CID during the search of his house. While questions arise as to whether the location evidence sufficiently corroborated the place of the crime and whether the identification of Ootz was sufficiently reliable and independent of Adams' confession, we need not decide those issues.

In a case where the only direct evidence of the crime was the confession, it is important to determine what was not corroborated. Here, there is no evidence which corroborates Adams' opportunity or motive to commit the crime, his access, his intent, the accomplices involved, the subject of the larceny (i.e., cocaine), the time of the crime, or the act of the larceny itself (waving the handgun while [DT] grabbed the cocaine). In short, virtually none of the facts we have previously articulated as essential were corroborated. Even if we were to assume that the evidence relied upon below properly corroborated the location of the larceny and the identity of the victim, those facts, combined with the ownership of the handgun, are legally insufficient to support the larceny conviction absent any additional **[**12]** direct evidence of a crime. We therefore conclude that the military judge abused his discretion when he admitted numerous uncorroborated essential facts from Adams' confession. Because the confession was "the government's key piece of evidence" *Adams, 2014 CCA LEXIS 61, at *3, 2014 WL 448415 at *1*; the admission of the uncorroborated essential facts was prejudicial to Adams.

Decision

The decision of the United States Army Court of Criminal Appeals is reversed and the findings and sentence are set aside. The record is returned to the Judge Advocate General of the Army. A rehearing may be authorized.

Dissent by: BAKER

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[8] In *United States v. Seay, 60 M.J. 73, 80 (C.A.A.F. 2004)*, while interpreting the corroboration requirements under M.R.E. 304(g), the court stated: "The issue is whether the facts justify the inference as to the truth of the confession." While that statement could be interpreted to mean that the proper analysis is whether an appellant's confession is admissible in its entirety, it must be read in conjunction with the Seay court's earlier reference to the plain language of the rule referencing the need for corroboration of the essential facts. *Id. at 79*.

Dissent

BAKER, Chief Judge, with whom RYAN, Judge, joins (dissenting):

This Court is riding a pendulum back and forth when it comes to the law on corroborating confessions. In eleven years, we have moved from one extreme in *United States v. Seay, 60 M.J. 73 (C.A.A.F. 2004)*, to the other extreme in *United States v. Adams, 74 M.J. 137, 2015 CAAF LEXIS 344 (C.A.A.F. 2015)*. In Seay, the Court found the appellant's confession to stealing a wallet was corroborated by the fact -- or more precisely the absence of the fact -- that no wallet was found on the victim's body. *60 M.J. at 80*. From the absence of this fact, the Court made an inference that because no wallet was found on the victim, the appellant must have taken it. Id. Thus, his confession to stealing the wallet was corroborated. **[**13]** Id.

Today, the Court swings the law back to the opposite extreme. In the view of the majority, "[w]hen independent evidence which is sufficient to corroborate an essential fact is provided, that essential fact is admissible." *Adams, M.J. at , 2015 CAAF LEXIS 344* (9). However, they go on to say, "if sufficient corroborating evidence of an essential fact is not provided, then the uncorroborated fact is not admissible and the military judge must excise it from the confession." Id. The majority thus requires that every essential fact identified in a confession must be individually corroborated on a one-for-one basis.

The majority's approach precludes the drawing of appropriate inferences from an otherwise trustworthy statement. Moreover, because the only essential fact in Appellant's statement that is not demonstrated by independent **[*142]** evidence is the actual theft of the cocaine, the Court's decision effectively returns the law to a corpus delecti test.

The majority is trying to have it both ways. It purports to adhere to *United States v. Cottrill, 45 M.J. 485 (C.A.A.F. 1997)*, disavowing the corpus delecti test or a requirement to prove all the elements of the offense, but then rejects Appellant's statement for lack of independent evidence, where the only independent evidence of an essential **[**14]** fact that is lacking is of the crime itself: "[DT] grabbed the coke." It is difficult to imagine, however, that a drug dealer would ever report the theft of cocaine to the police. All the other facts in Appellant's statement are corroborated: the weapon used, the place of the crime, Appellant's participation in drug culture, and most importantly, the unique name of the "victim." The last point is particularly noteworthy because of the unlikelihood that Appellant could make up the name "Ootz," which then also happened to be the name of a known drug dealer in the area.

I did not join Seay and I do not join the Court today. I believe the law is and should be in a different place between the extremes presented in Seay and in Adams.

I would start with two principles. The purpose of the law as stated in *Smith v. United States, 348 U.S. 147, 153, 75 S. Ct. 194, 99 L. Ed. 192, 1954-2 C.B. 225 (1954)* (citing *Warszower v. United States, 312 U.S. 342, 345, 61 S. Ct. 603, 85 L. Ed. 876 (1941)*), is to protect against false confessions. More specifically, Military Rule of Evidence (M.R.E.) 304(g) and case law seek to protect against three possibilities: the risk that interrogation might produce a false confession; the risk that for psychological reasons or attention gathering purposes a person might choose to falsely confess; and, in the military context, there is the additional risk that grade and command differentials **[**15]** might result in false confessions. See *United States v. Yeoman, 25 M.J. 1, 4 (C.M.A. 1987)* (stating that the purpose of the corroboration rule is to prevent "errors in convictions based upon untrue confessions alone" or confessions "based upon words which might reflect the strain and confusion caused by the pressure of a police investigation") (citation and internal quotation marks omitted). To this end, the law requires "the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." *Opper v. United States, 348 U.S. 84, 93, 75 S. Ct. 158, 99 L. Ed. 101 (1954)*.

The first principle, therefore, is that the purpose of the law is to establish the trustworthiness of the statement. In other words, not every element or fact contained in the confession must be independently proved. The goal is trustworthiness. Thus, if substantial independent evidence indicates the statement is trustworthy, then appropriate inferences may be drawn from the statement beyond those for which there is independent evidence including the fact that a crime has been committed.

The second principle is that where a conviction is based exclusively on a confession, a court's inquiry should, as always, be rigorous and searching. But the test is one of corroboration. The purpose is **[**16]** to establish the trustworthiness of the statement, not to have a mini-trial to establish the elements of the confession and thus the crime, so that one can then introduce the confession in order to prove the crime.

If the government were required to have independent evidence of every essential fact in the confession as the majority now concludes, then the confession is no longer independent evidence, it is a redundant supplement to the government's other evidence. Moreover, the government would be barred from using the confession to fill in essential facts that might not otherwise be known to the government. As Cottrill recognized, the "quantum" of evidence required to corroborate need only be slight. *45 M.J. at 489*. That is why, consistent with our approach to Article 31, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 831 (2012)*, this Court has not adopted a literal reading of M.R.E. 304(g), because the result would be unworkable in practice. Rather, this Court has recognized that M.R.E. 304(g) was intended to implement Opper. See Manual for Courts-Martial, United States ch. xxvii, para. 140.a.(5) (1968 ed.) **[*143]** (MCM) (the corroboration rule was updated in the 1968 MCM to say, in part, "the independent evidence need only raise an **[**17]** inference of the truth of the essential facts admitted," thus reflecting the Supreme Court's holding in Opper); *United States v. Rounds, 30 M.J. 76, 80-82 (C.A.A.F. 1990)*. Thus, the Court has heretofore applied a purpose-based reading of the rule that tests for trustworthiness through independent evidence of those essential facts necessary to validate the trustworthiness of the confession. *United States v. Maio, 34 M.J. 215, 218 (C.M.A. 1992)*; *Cottrill, 45 M.J. at 489*; *Seay, 60 M.J. at 79-80*.

In this case, the military judge admitted Appellant's statement that:

> After my friend Beirl move [sic] me, [DT] & Anderson where [sic] at my house and [DT] was trying to get drugs. He told me who the person was Ootz [sic], who had ripped me off previously & gave me the idea to rob him. We met him at a Walmart and had him drive over to the Microtel where we got in his car. [DT] looked at the stuff began talking shit & I pulled my gun out and [DT] grabbed the coke & we got out of Ootz car & got in mine and returned to base.
>
> Q: What day did this take place?
>
> A: 28 Feb 2011[.]
>
> . . . .
>
> Q: What was deal agreed upon by [DT] and Ootz?
>
> A: A ball for $220[.]
>
> Q: Did you have the $220 on you?
>
> A: No only $80 cause we were gonna rob him[.]
>
> . . . .
>
> Q: What happened after you all got in Ootz [sic] vehicle?
>
> A: [DT] asked for the stuff and an argument began and I pulled out my **[**18]** gun[.]
>
> Q: Did you say anything to Ootz?
>
> A: I told him not to do that shit again & then we got out[.]
>
> Q: What did you mean by that?
>
> A: About ripping [people] off[.]
>
> Q: Did Ootz say anything?
>
> A: No[.]
>
> Q: Did Ootz see the gun in your hand?
>
> A: Yes I waived it around quick[.]
>
> Q: What kind of gun did you have?
>
> A: S&W 40 cal sigma[.]
>
> Q: Where did you get the gun?
>
> A: Bought in PA/ April 2010[.]
>
> Q: When did you bring the gun to FDNY?
>
> A: Christmas leave 2010[.]
>
> Q: What happened after you, [DT] and Anderson got back in your vehicle?
>
> A: Nothing we drove back to post[.]

Q: Where was the gun when you were driving back on post?
A: On me in my pants[.]

The military judge and CCA concluded this statement was corroborated. I agree and concur in the lower court's assessment of the corroborating facts. The evidence of corroboration is strong. First, Ootz was a former soldier and known drug dealer, with an uncommon if not unique last name that matched the name of the drug dealer Appellant confessed to robbing. CID knew this based on its independent search of its files. Second, the same type of weapon -- a .40 mm Smith & Wesson -- Appellant stated he used in the crime was found in his residence four days later. Third, bags **[**19]** of synthetic marijuana, smoking devices, and a syringe were also found in Appellant's house. While cocaine is a perishable item, this evidence demonstrated Appellant's knowledge and connection to drug culture. Less important is the fact that the locations where Appellant stated the events took place, in fact, exist in the actual area of the base. What is missing is independent evidence of the robbery itself, i.e., that "[DT] grabbed the coke." But requiring evidence of this fact leaves us with the corpus delecti test. What we have instead is corroboration of the means, the place, the drug connection, and the unique name of the "victim" all of which indicate the statement is trustworthy. Therefore, I would affirm the military judge, the CCA, and the conviction, and respectfully dissent.

End of Document

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Federal Register
Vol. 81, No. 102
Thursday, May 26, 2016

Presidential Documents

Title 3—

The President

Executive Order 13730 of May 20, 2016

2016 Amendments to the Manual for Courts-Martial, United States

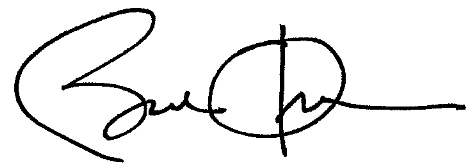
By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, and Part IV of the Manual for Courts-Martial, United States, are amended as described in the Annex attached and made a part of this order.

Sec. 2. These amendments shall take effect as of the date of this order, subject to the following:

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.



THE WHITE HOUSE,
May 20, 2016.

Billing code 3295–F6–P

Sec. 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

(a) Mil. R. Evid. 304(c) is amended to read as follows:

"(c) *Corroboration of a Confession or Admission.*

(1) An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession.

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of the admission or confession, then it may be considered as evidence against the accused. Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.

(3) Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(4) *Quantum of Evidence Needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the admission or confession. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(5) *Procedure*. The military judge alone is to determine when adequate evidence of corroboration has been received. Corroborating evidence must be introduced before the admission or confession is introduced unless the military judge allows submission of such evidence subject to later corroboration."

(b) Mil. R. Evid. 311(a) is amended to read as follows:

"(a) *General rule*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

(2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system."

(c) A new Mil. R. Evid. 311(c)(4) is inserted immediately after Mil. R. Evid. 311(c)(3)(C) and reads as follows:

"(4) *Reliance on Statute*. Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acts in objectively reasonable reliance on a statute later held violative of the Fourth Amendment."

(d) Mil. R. Evid. 311(d)(5)(A) is amended to read as follows: