

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

UNITED STATES	)	Defense Motion to Exclude
	)	Motive Evidence Lacking
v.	)	Corroboration
	)	
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	23 August 2017

Based on their Adams Matrices (Government Appellate Exhibits 85 for the statement to MG Dahl and 91 for *Serial*), it appears that the government is able to offer corroborating evidence of the “who, what, when, where, and how” of the charged offenses but not the “why” – in other words, motive. There is not a scintilla of independent evidence that the defense is aware of, much less admitted, to corroborate that SGT Bergdahl's motive was to cause a DUSTWUN or cause search and recovery operations. As a result, the defense moves for motive statements to MG Dahl and *Serial* to be excluded.

Motive is not a required element of Article 85 or 99. In this case, the government's ambition is to use motive evidence as both an extra layer of proof and an aggravating factor. Motive can be an “essential fact” that triggers the corroboration requirements of MRE 304 and *US v. Adams*, 74 MJ 137 (CAAF 2015). Corroboration requirements for this case were briefed in Defense Appellate Exhibit 76.

“How much is enough” is the main question for independent corroboration. The two foundational Supreme Court cases, *Smith v. United States*, 348 US 84 (1954) and *Opper v. United States*, 348 US 147 (1954), both use “substantial” in describing the level of evidence needed for corroboration. “It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.” *Opper* at 93. Although military courts have interpreted “substantial” as meaning “slight” (*United States v. Yeoman*, 25 MJ 1, 4 (CMA 1987)) or “very slight” (*United States v. Melvin*, 26 MJ 145, 146 (CMA 1988)), this apparent diminution was explained as a distinction between quantity and quality: “While the *quantity* of the independent evidence need only be ‘slight’, the *quality* of that evidence is the more critical focus as to the confession’s reliability and, thus, admissibility.” *United States v. Maio*, 34 MJ 215, 223 (CMA 1992) (Wiss, J., concurring) (emphasis in original). The Military Judge’s Benchbook defines “corroborate” as “to strengthen, make more certain, to add weight.”

The government's proffered evidence to corroborate motive falls short of the legal requirement for reliable independent evidence. The fact that the accused was missing from COP Mest certainly corroborates the “what” but not the “why.” Similarly, testimony

that the unit did a DUSTWUN scenario at NTC, or that the accused knew what DUSTWUN was, do not prove that the accused had a motive of leaving in order to cause a DUSTWUN or cause search and recovery operations. As an analogy, a pickpocket cannot be said to have a motive to target a certain person by proof that many people own wallets, or that the accused knew what a wallet was. Proof of motive requires some proof of "why."

The inferences the government would like to make about the accused's motive are made no more reliable by their Adams Matrix proffers than any number of alternative inferences about alternative motives. Indeed, it weakens the government's position from a zero to a negative that the Adams Matrices list other possible motives for which the government *actually does have* direct independent corroborating evidence. The government, of course, has their prerogative to assert a motive that it considers to be the most aggravating, but it must choose one for which reliable and independent corroboration exists.

The government cannot meet its burden to corroborate that the accused acted with a motive of intending to cause DUSTWUN or intending to cause search and recovery operations. This motive evidence should thus be excluded.



FRANKLIN D. ROSENBLATT  
LTC, JA  
Defense Counsel

*For*

EUGENE R. FIDELL  
MAJ OREN GLEICH  
MAJ JASON D. THOMAS  
CPT JENNIFER D. NORVELL  
CPT NINA S. BANKS

P. SABIN WILLETT  
CAITLIN M. SNYDACKER  
CHRISTOPHER L. MELENDEZ

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 23 August 2017.

A handwritten signature in black ink, appearing to read "F. D. Rosenblatt". The signature is written in a cursive, somewhat stylized font.

FRANKLIN D. ROSENBLATT  
LTC, JA  
Defense Counsel