IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20110503
Specialist (E-4) **Matthew R. Adams, Jr.,** United States Army, Appellant	)	USCA Dkt. No. 14-0495/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Granted

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRECTION IN ADMITTING THE PORTION OF SPECIALIST ADAMS' 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 SPECIALIST ADAMS TOOK COCAINE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On June 14-16, 2011, a military judge sitting as a special court-martial convicted Specialist (SPC) Matthew R. Adams, Jr., contrary to his plea, of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921 (2008).[1] The military judge sentenced SPC Adams to reduction to the grade of E-1, confinement for 165 days, and a bad-conduct discharge. The military judge credited SPC Adams 104 days of confinement against his sentence to confinement. The convening authority approved the adjudged sentence and credited SPC Adams 104 days of confinement against the sentence to confinement.

On January 29, 2014, the Army Court affirmed the findings and sentence as approved by the convening authority. (JA 1). Specialist Adams received notice of the Army Court's decision and petitioned this Court for review on May 6, 2014. On September 11, 2014, this Court granted Specialist Adams' assignment of error and ordered him to file this final brief.

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[1] The military judge acquitted SPC Adams of the robbery offense in violation of Article 122, UCMJ, 10 U.S.C. § 922 (2008) but found him guilty of the lesser included offense of larceny in violation of Article 121, UCMJ. Consistent with SPC Adams' pleas, the military judge acquitted SPC Adams of conspiracy to commit robbery, failure to obey an order, and wrongful introduction.

Statement of Facts

The CID "source"

In March 2011 the U.S. Army Criminal Investigation Command (CID) at Fort Drum, New York, received word that SPC Daniel P. Tuberville alleged another Soldier in his unit "ha[d] a weapon in his house and controlled substances." (JA 39). That soldier is SPC Adams. Having recently returned from an absent without leave (AWOL) status and failing to report that morning, SPC Tuberville sought help from his command for his apparent troubles with drug addiction. (JA 78-79, 84-86, 116). In doing so, SPC Tuberville penned a sworn statement implicating SPC Adams in an alleged robbery of cocaine. (JA 116).

Specialist Tuberville's chain of command relayed this fact to Specialist Amy McKinney with CID who then conducted a source interview with SPC Tuberville. (JA 39, 78). Specialist Tuberville absented himself from his unit shortly thereafter and remained so three months later during SPC Adams' subsequent court-martial. (JA 80-83). Attempts by SPC Tuberville's command to contact him were to no avail. (JA 83).

The Investigation

Based on SPC Tuberville's story, SPC McKinney and Special Agent (SA) Villegas obtained a search authorization to search SPC Adams' residence. (JA 39-40). Specialist McKinney and SA Villegas believed they would find "controlled substances,

contraband, drug paraphernalia and [. . . .] the weapon." (JA 40). While the search yielded no evidence of cocaine, it discovered several bags of suspected synthetic marijuana, smoking devices, a syringe, a handgun and magazines. (JA 42, 47). Field tests confirmed the bags did not contain tetrahydrocannabinol (THC) leading CID to believe the bags contained synthetic cannaniboids. (JA 62). No other evidence confirmed the bags seized contained either THC or synthetic cannaniboids, let alone cocaine. (JA 62-67).

That same day authorities apprehended SPC Adams and delivered him to the CID office for questioning. (JA 49). During the course of the interrogation[2], SPC Adams confessed to conspiring with SPC Tuberville and Mr. Anderson to steal cocaine from an individual known to SPC Adams as "Ootz." (JA 97-100).

The pre-trial Article 39(a)

Defense moved to suppress SPC Adams' statement during a pre-trial motions hearing alleging CID obtained an involuntary statement from SPC Adams. (JA 17, 107). Special Agent McKinney, SA Charles Kohler III, and SA Villegas all testified for the government. Special Agent McKinney identified SPC Tuberville as the source who told her SPC Adams "had a weapon and committed armed robbery for narcotics." (JA 18, 31).

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[2] The military judge noted SA Villegas appeared angry and confrontational during SPC Adams' interrogation and SA Villegas accused SPC Adams of not caring about his children. (JA 38).

Special Agent Villegas testified SPC Adams "robbed by gun point Matthew Outz, a former Soldier, outside of the installation in Evans Mills for an eight ball of cocaine." (JA 35). The military judge denied the suppression motion. (JA 38).

The court-martial

During the merits trial, the government offered testimony from SA McKinney. She testified that a source visited her office with information about SPC Adams "having a weapon in his house and controlled substances." (JA 39). She did not name the source. Although SA McKinney did not identify the weapon as a Smith & Wesson .40 caliber handgun, she confirmed the firearm labled "PE 18" was the weapon discovered at SPC Adams' residence. (JA 44). She also testified Ouzts "was a previous soldier" believing his first name to be "Timothy." (JA 55). Government counsel then asked her to recall where SPC Adams told her the admitted offense occurred. (JA 56). Special Agent McKinney responded "I believe it started at the Walmart, and then it moved to another location I don't really recall." (JA 56). Special Agent McKinney believed SPC Adams meant "the Walmart right outside the north gate, sir, in Calcium". (JA 56). The military judge asked SA McKinney if she interviewed the informant and if so "was the informant Tuberville?" (JA 69). He also asked "You said something about he said he had used cocaine? Tell me about that." (JA 69). Special Agent

McKinney responded, "During the interview with Tuberville, he stated that he had used cocaine which himself and [SPC] Adams had robbed from Ouzts." (JA 69). The military judge then asked, "That is the cocaine he had used; that robbed from Ouzts?" (JA 69). She responded "Yes, sir." (JA 69).[3]

Special Agent Villegas testified next for the government. (JA 70). She testified that a registered source "had information concerning drug information" but defense objected to the contents of the source's statement on hearsay grounds. (JA 71). The military judge sustained the objection. (JA 71). Special Agent Villegas testified that she did not know an "Ouzts" prior to her working on this case but according to her, "Research running through cases that we have had at CID. . ." Matthew Ouzts "was a former Soldier, reported to be a drug dealer in the local area." (JA 72). When asked if she knew of a Walmart in the area near Fort Drum SA Villegas recalled a store in the town of Evans Mills. (JA 74). Government counsel then asked "is there a Walmart in Calcium to your knowledge?" to which SA Villegas responded "not to my knowledge, sir." (JA 74). She also testified she knew of a Microtel "next to the McDonalds across the street from the Walmart in Evans Mills." (JA 75).

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[3] This evidence derives from SPC Tuberville's statement which the military judge later found to be inadmissible and he did not consider it in his ruling.

The government called neither Ootz or Anderson to testify. Nor did they call SPC Tuberville as a witness, opting instead to offer into evidence his sworn statement under Military Rule of Evidence [Mil. R. Evid.] 804(b)(3). (JA 77). Defense objected to its admission and the military judge sustained the objection. (JA 87).

The government offered SA Adams' statement into evidence and the defense objected to the lack of corroboration under Mil. R. Evid. 304(g). (JA 57). The military judge asked "[w]hat evidence do we have of the cocaine, Counsel, beyond the accused's statement?" and "[s]o the gun corroborates also the conspiracy?" (JA 59). Arguing SPC Adams' admissions to both conspiring to and stealing cocaine were corroborated, trial counsel reasoned the gun corroborates "everything in the sworn statement." (JA 60). The military judge granted the motion, in part, finding that "the portions of the confession which involve Spice or the transport of cocaine onto Fort Drum to be insufficiently corroborated under Military Rule of Evidence 304(g) . . . ." (JA 91). The military judge however made the following three findings:

> Eight, in his confession, the accused admitted to pulling a gun and grabbing cocaine from an individual named Ouzts on 28 February 2011. He indicated that he met Ouzts at Walmart, and then proceeded to Microtel.

> Nine, on 4 March 2011, the CID drug suppression team arrived without warning to search the accused's residence, only four days after the events discussed in the accused's confession. The drug suppression team found Prosecution Exhibit 18, a Smith & Wesson .40 caliber hand gun and two loaded magazines, Prosecution Exhibits 19 and 20. The description of the handgun the accused admitted to "waiving around quick" is a "S&W .40 cal." This matches the description of Prosecution Exhibit 19.
>
> Ten, the 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 slight corroboration required by the rule and case law.

(JA 91-92).

The military judge admitted into evidence the following portions of Adams' statement:

I, Matthew ADAMS, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:
After my Friend beirl move me, Tuberville & Anderson where at my house and Tuberville was ~~[illegible]~~ trying to get drugs. He told me who the perpetrators who had ripped me off previously & gave me the idea to rob him. we met him at walmart and had him drive over to the microtel where we got in his car. Tuberville looked at the stuff began talking shit & I pulled my gun out and Tuberville grabbed the bible & we got out of dudes car & got in mine and returned to base.

Q: INV McKinney
A: SPC ADAMS
Q: What day did this take place?
A 28 Feb 2011

Q: What was deal agreed upon by Tuberville 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 vehicle?
A. Tuberville asked for the stuff and an arguement 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 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 40cal sigma
Q: Where did you get the gun?
A. Bought in PA / April 2018
Q: When did you bring the gun to FBNY?
A. Christmas leave 2018
Q: What happened after you, Tuberville 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

(JA 92-94, 97-101).

The Army Court of Criminal Appeals

On review the Army court found the independent evidence adequately corroborated SPC Adams' confession. (JA 1-5). At the outset, the Army court identified three corroborated essential

facts in SPC Adams' confession: "the identity of the victim of the larceny, the appellant's use of a Smith and Wesson .40 caliber pistol, and the location of a WalMart and Microtel as the situs of the crime." (JA 4). Corroborating those three essential facts according to the Army court was (1) the evidence considered by the trial judge-location of the retailers coupled with the firearm found in SPC Adams' home-and (2) the testimony about Ouzts. The Army court found on its own that "[Ouzts] went by that fairly uncommon and unique name." (JA 4). Based on that evidence, the Army court held "it is reasonable to infer the truth of the essential facts in appellant's confession to stealing cocaine." (JA 5). Additional facts necessary for resolution of the issue presented are included below.

Summary of Argument

The military judge abused his discretion in finding the essential facts admitted in SPC Adams' statement to CID were adequately corroborated by a Smith and Wesson .40 caliber handgun seized from SPC Adams' home coupled with testimony identifying a Walmart and Microtel in the local vicinity. No substantial independent evidence adduced at trial, either direct or circumstantial, implies the essential fact admitted-"Tuberville grabbed the coke and we got out of Ootz' car"-is true. The Army Court likewise erred in relying on unrealiable evidence not considered by the military judge-the victim's

identity as a drug dealer-and by inappropriately finding the victim's name to be uncommon and unique. From this fact, the court inferred the statement's truth, an inference the court substituted for independent evidence as required by Mil. R. Evid. 304(g).

Standard of Review

A military judge's finding that an admission is corroborated by sufficient evidence is reviewed for an abuse of discretion. *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004); *United States v. O'Rourke*, 57 M.J. 636, 642 (Army Ct. Crim. App. 2002). "'A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.'" *Seay*, 60 M.J. at 77 (quoting *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004)). The focus of this Court's analysis is the ruling of the military judge. When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, this Court "typically ha[s] pierced through that intermediate level" and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006)(quoting *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996).

Law

We begin with first principles. In the United States our concept of justice and history of judicial experience strongly distrusts prosecutions premised on "confessions of the accused not made by him at the trial of his case." *Opper v. United States*, 348 U.S. 84, 89 (1954). Although the statement may not be the product of torture or inquisition "aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." *Opper*, 348 U.S. at 90. Akin to hearsay, a confession elicited in a police interrogation room lacks reliability for the "words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." *Opper*, 348 U.S. at 90. To this end, the courts have noted "a number of false confessions voluntarily made." *Smith v. United States*, 348 U.S. 147, 153 (1954).

Prior to 1954 federal courts were split on their demands to corroborate a confession. Some required independent evidence establish each and every element of the confessed offense while others required it merely touch the *corpus delecti*. *See Manning v. United States*, 215 F.2d 945 (10th Cir. 1954). The 1951 version of the *Manual for Courts-Martial* incorporated the common law *corpus delecti* rule as a requirement for corroborating a confession. *Manual for Courts-Martial, United States* (1951 ed.), ch. iv, ¶140.a. In 1954, the Court in *Opper* held the

corroboration required was that which ensured the trustworthiness of the admission or confession rather than independent evidence that touched on the corpus delecti. *Opper*, 348 U.S. at 92. In that same year *Smith* extended the Court's trustworthiness doctrine to a crime presenting an intangible corpus delecti-tax evasion. *Smith*, 348 U.S. at 154 ("We choose to apply the [trustworthiness] rule, with its broader guarantee, to crimes in which there is no tangible corpus delecti, where the corroborative evidence must implicate the accused in order to show that a crime has been committed.").

After the decisions in *Opper* and *Smith*, Military Rule of Evidence [hereinafter Mil. R. Evid.] Para. 140(5) adopted the trustworthiness doctrine which remains in effect today. *Manual for Courts-Martial, United States* (1968 ed.), ch. xxvii, ¶140.a.5. It provides that "[a]n 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 . . . has been introduced that corroborates the *essential facts admitted* to justify sufficiently an inference of their truth." Mil. R. Evid. 304(g)(emphasis added).

Independent evidence of "each and every element of the confessed crime is not required as a matter of military law" however it is required for "the essential facts stated in the confession." *United States v. Rounds*, 30 M.J. 76, 80 (C.A.A.F.

1990)(citing *United States v. Melvin,* 26 M.J. 145, 147 (C.M.A. 1988); Mil. R. Evid. 304(g). And though the quantum of corroboration required is slight and the reliability of the essential facts admitted need not be established by a preponderance of the evidence, their reliability nonetheless "must be established" and "the *quality* of that evidence is a more critical focus to the confession's reliability and, thus, admissibility." *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997); *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988)(corroboration needed "very slight"); *Maio*, 34 M.J. at 223 (Wiss, J., concurring). Only "substantial independent evidence" may establish the trustworthiness of the statement. *Melvin*, 26 M.J. at 146 (citing *Opper*, 348 U.S. at 93).

Argument

The military judge erroneously found the essential facts admitted in SPC Adams' confession were sufficiently corroborated by a Smith and Wesson .40 caliber handgun seized from his home four days after the alleged larceny coupled with testimony identifying a Walmart and Microtel in the local vicinity. No evidence properly admitted during trial, either direct or circumstantial, tends to show the essential fact in SPC Adams' statement-"Tuberville grabbed the coke & we got out of Ootz car"-occured. For this the military judge abused his discretion.

1. The theft of the cocaine is an essential fact admitted in SPC Adams' admission

A fact is essential to a confession if the statement cannot be read without it. *See* Webster's Third New International Dictionary 777 (1981)(A fact is essential if it is "fundamental or central to the nature of something."). In *Yeoman*, this Court reviewed an accused's confession to stealing cassette tapes from a fellow marine. *United States v. Yeoman*, 25 M.J. 1 (C.M.A. 1987). In his statement, Yeoman admitted he had missed morning formation and arrived late to work where he happened on gear left unattended. *Yeoman*, 25 M.J. at 2. He then "took eight cassette tapes which were mostly rock music, and put the other sixteen tapes which were mostly new wave music, in a plastic bag and left them in a Dempsty Dumpster near the barracks." *Id.* This Court (citing to the Navy-Marine court) found Yeoman admitted to the following essential facts:

> First, that he missed morning formation and that during the course of the morning he discovered a brown cassette case amongst a set of personal gear staged outside a building;
>
> Second, he picked up the cassette case, took eight cassettes out and put the rest of the tapes in a plastic bag and threw them into a dumpster;
>
> Third, he disposed of the case and its remaining contents in a locker between barracks 1643 and 1644 at Twentynine Palms, California.

Id. at 5. Each of these facts is essential because Yeoman's statement cannot be read without them. Yet they all describe one criminal transaction.

A fact likewise omitted from a confession indicates it is not an essential fact. *United States v. Rounds*, 30 M.J. 76, 81 (C.M.A. 1990). What is and what is not an essential fact is subjective, viewed from the declarant's vantage. In *Rounds*, this Court rejected the argument that an admission that does not name a situs of a crime cannot be corroborated reasoning that its very omission from the confession, "Would indicate that it is not an essential fact admitted by appellant which requires corroboration." *Rounds*, 30 M.J. at 81.

Specialist Adams' statement similiarly cannot be read without the following essential fact: "Tuberville grabbed the coke & we got out of Ootz car." (JA 97). Indeed this fact is the essence of SPC Adams' confession.

2. Nothing in the record corroborates "Tuberville grabbed the coke & we got out of Ootz car"

Even had the military judge found the theft of the cocaine is an essential fact admitted he would have been unable to find independent evidence corroborating it. Mil. R. Evid. 304(g) accords the military judge discretion to consider any independent evidence-either direct or circumstantial-provided it implies the essential facts are true. Evidence is direct if it "speaks directly to the issue, requiring no support by other

evidence" while circumstantial evidence is a fact from which one "may infer other connected facts which reasonably follow, according to the common experience of mankind." Black's Law Dictionary 595 (8th ed. 2004).

In *Yeoman*, this Court compared the essential facts admitted in Yeoman's statement to the evidence adduced at trial. *Yeoman*, 25 M.J. at 5. Finding the evidence sufficient to justify an inference of truth in the confession this Court noted the direct and circumstantial evidence supporting each separate essential fact:

Essential fact admitted	**Evidence admitted during trial**
First, that he missed morning formation and that during the course of the morning he discovered a brown cassette case amongst a set of personal gear staged outside a building;	First, that appellant missed morning muster;
Second, he picked up the cassette case, took eight cassettes out and put the rest of the tapes in a plastic bag and threw them into a dumpster;	Second, that upon being asked where the cassette case was, appellant led his platoon leader to a locker between barracks 1643 and 1644, where a brown cassette case was found;
Third, he disposed of the case and its remaining contents in a locker between barracks 1643 and 1644 at Twentynine Palms, California.	Third, that appellant's fingerprint was on the cassette case; fourth, that a number of cassette tapes were found in appellant's barracks locker, confiscated by the platoon leader and given to PFC Fuentes.

Yeoman, 25 M.J. at 5. Based on these essential facts admitted and the circumstantial evidence, this Court found Yeoman's confession corroborated.

In *Rounds*, this Court reviewed an airman's confession to ingesting cocaine at a Thanksgiving party and again on New Year's Eve. *Rounds*, 30 M.J. 76, 78 (C.M.A. 1990). In his statement, Rounds admitted the following essential facts:

> "And cocaine I did the cocaine in Houston. A couple times. On [T]hanksgiving and on New Years.
> ...
> Just Eric and myself. He talked me into going on Thanksgiving Holiday. That's when I did the cocaine.

Rounds, 30 M.J. at 78. An eyewitness testified at trial he and Rounds attended parties on both occasions with friends all of whom the witness knew had "been involved in the use of drugs." *Rounds*, 30 M.J. at 79. He did not observe Rounds use cocaine at either party. *Rounds*, 30 M.J. at 76. While the witness did not actually see drugs at the Thanksgiving party, he did see drugs at the New Year's Eve fest "in visible abundance." *Rounds*, 30 M.J. 76. In fact, the witness requested a dollar bill from Rounds, consumed cocaine in front of him and returned the dollar bill to Rounds. He did this a second time. Standing next to the witness, Rounds had, "An unobstructed view of the cocaine. . ." each time. *Rounds*, 30 M.J. at 79.

Although the evidence did not directly show consumption, the Court reasoned the eyewitness testimony nonetheless revealed that on New Year's Eve Rounds "had both access and the opportunity to ingest the very drugs he admitted using in his confession," and it "establish[ed] appellant's presence at the scene of active drug use" and "dovetail[ed] with the time, place, and persons involved in the criminal acts admitted. . ." *Rounds*, 30 M.J. at 80. The Court noted however that inference "is distinctly lacking" for the admitted cocaine use at the Thanksgiving party. *Rounds*, 30 M.J. at 80. The witness corroborated the time and place of the admitted cocaine use and he placed Rounds in the company of known drug users. Nonetheless, the witness failed to corroborate the essential fact admitted for the evidence adduced at trial neither directly speaks to or would reasonably infer that Rounds consumed cocaine.

This Court revisited Mil. R. Evid. 304(g) seven years later in *United States v. Cottrill*. 45 M.J. 485 (C.A.A.F. 1997). There, an accused admitted he penetrated his daughter and he "got sexually excited. . .when [he had his] finger in her." *Cottrill*, 45 M.J. at 487. Finding evidence in the record corroborated the admitted offense the Court relied on ample inferences. First, the medical examiner testified the young victim said her "privates" hurt and "[m]y Daddy touches my

privates," as the reason why she hurt. *Cottrill*, 45 M.J. at 489. The examiner noted an unnatural opening in her hymen and, in his expert medical opinion, "it was caused by sexual abuse." *Id.* This evidence tended to show the victim suffered sexual injury at the hands of her father and therefore it corroborates the essential fact admitted.

This Court however reached a different conclusion in *Faciane*. There, the Court found insufficient corroboration to child abuse where independent evidence showed only that the accused parent had access and opportunity, noting "although the Government argues that appellant's exclusive custody of the child establishes that he had access and the opportunity to abuse her, we are unwilling to attach a criminal connotation to the mere fact of a parental visit." *United States v. Faciane*, 40 M.J. 399, 403 (C.M.A. 1994).

Here, no evidence adduced at trial, either direct or circumstantial, tends to show the theft of the cocaine is true. The military judge relied on two items of evidence in his oral ruling-the firearm and the Walmart and Microtell-together finding them "sufficient to meet the slight corroboration required by the rule and case law." (JA 91-92). Possessing a .40 caliber Smith & Wesson handgun in his home is not direct evidence that SPC Adams used it in an alleged larceny of cocaine in a Microtel parking lot. Nor would its use in a larceny of

cocaine reasonably follow the fact that CID seized a .40 caliber Smith & Wesson handgun from SPC Adams' home. No evidence indicated the possession was unlawful. To the contrary, the desire to bear arms in one's home is a fundamental right. U.S. Const. amend. II. This fact corroborates only that he owns a .40 caliber Smith & Wesson handgun. For the gun to corroborate the confession the military judge would necessarily need to make the following inferences from the gun: (1) Ootz is a known drug dealer; (2) Ootz had cocaine; (3) Ootz was at Walmart; (4) Ootz knew SPC Adams; (5) Ootz and SPC Adams rode in the same car; (6) Ootz was robbed; (7) SPC Adams robbed him; and (8) SPC Adams used a gun during the robbery. The military judge did not explain why owning a handgun in one's home reasonably implies SPC Adams' used it in a larceny and to that end this Court should afford the trial court less deference.

The testimony identifying a Walmart and Microtell proves similarly unremarkable. A general familiarity of the retailers' locations in the immediate vicinity of Fort Drum, New York is not direct evidence that "Tuberville grabbed the coke & we got out of Ootz car." (JA 97). Nor would it logically follow circumstantially. Disimilar to *Rounds*, the evidence does not place SPC Adams at the Walmart or Microtell at the time of the offense. It confirms only that the two locations indeed exist. The record moreover notes two Walmart locations. While SA

McKinney believed SPC Adams meant "the Walmart right outside the north gate, sir, in Calcium I believe" SA Villegas recalled a store in the town of Evans Mills. (JA 56, 74). Government counsel then asked "is there a Walmart in Calcium to your knowledge?" to which SA Villegas responded "not to my knowledge, sir." (JA 74). In his oral ruling, the military judge did not specify which Walmart location he believed corroborated SPC Adams' admission. To that end, this Court should afford him less deference.

In *Seay*, this Court rejected the notion that corroboration for a confessed larceny of a wallet would require the fact-finder to conclude the victim carried a wallet. *United States v. Seay*, 60 M.J. 73, 80 (C.A.A.F. 2004). In doing so, the Court pointed to the "very low standard" espoused in *Cottrill* and emphasized that "the rule simply requires a presence of facts that enable the members to infer the truth of the essential facts in the confession." *Seay*, 60 M.J. at 80. Finding the admission adequately corroborated, the Court reasoned,

> [w]hen a person confesses to participation in the larceny of a wallet, it is reasonable to infer the truth of the confession from the fact that the victim named in the confession knew the Appellant, died as a result of foul play, was found in a concealed place, and did not have a wallet at the time or thereafter.

Seay, 60 M.J. at 80.

In dissent, Judge Erdman cautioned against reliance on "inferences that arise from facts unessential to the offense of larceny. . ." as independent evidence. *Seay*, 60 M.J. at 82 (Erdmann, J. dissenting). No evidence suggested the victim ever possessed a wallet, "much less that he was carrying one at the time of his murder." *Id.* The majority, however, inferred that because no wallet was found on the victim, he must have possessed one before, and Seay thus absconded with it. That inference, Judge Erdman argued, "Stretches the corroboration requirement beyond the breaking point. The corroboration rule requires independent evidence upon which inferences can be drawn, not inferences which substitute for evidence." *Id.*

While the quantum of corroborating evidence required by this Court is "slight," Mil. R. Evid. 304(g) "still requires that it be sufficient to raise an inference of the truth of the essential facts admitted." *Seay*, 60 M.J. at 81 (Erdmann, J. dissenting). "Slight in this context does not mean the bearest wisp of possibility. An inference of truth is raised only when 'there is substantial independent evidence that the offense has been committed.'" *Id.* (citing *Melvin*, 26 M.J. 145, 146 (C.M.A. 1988)(quoting *Smith*, 348 U.S. at 156). Afterall, a statement is true only if it is "in accord with fact, with the actual state of things." Ballentine's Law Dictionary 1302 (2010). If substantial independent evidence must infer the essential facts

admitted are true then it necessarily must also infer the essential facts occurred-a comparison without distinction. Here, the handgun found in SPC Adams' home "coupled with" the existence of Walmart and Microtel do not imply "Tuberville grabbed the coke & we got out of Ootz car" is true. The military judge erred in finding otherwise. His misapplication of Mil. R. Evid. 304(g) is perhaps best articulated in his own analogous hypothetical posed to defense counsel:

> I confess to robbing a bank and using a gun. They introduce a gun in my trial. You are saying that is not enough in terms of corroboration[?]. The corroboration has to be specific[?]

(JA 61). The answer is yes. If the essential fact admitted is "I robbed a bank" then the gun offered at trial must imply "a bank was robbed," "I robbed a bank," and "I used a gun to rob a bank" are true to corroborate it. Corroboration requires a fact that is unique to both the accused and the alleged offense. To corroborate is "to strengthen or confirm; to make more certain." Black's Law Dictionary 396 (9th ed. 2009). Absent substantial independent evidence admitted at trial that strengthens the essential facts' trustworthiness or certainty, like *Faciane*, this Court would be unwilling to attach a criminal connotation to the mere fact of gun ownership.

3. The Army Court erred in relying on unreliable hearsay evidence and in finding facts and inferences not in the record of trial

In its memorandum opinion the Army Court rejected *de jure* that "Tuberville grabbed the coke & we got out of Ootz car" is an essential fact in SPC Adams' admission requiring independent corroboration. (JA 3). Instead, the Army Court enumerated what it viewed as *the* three essential facts adequately corroborated: (1) identity of the victim; (2) SPC Adams' possession of a .40 caliber Smith and Wesson handgun; and (3) the location of Walmart and Microtell as the situs of the crime. (JA 4). Based on these three essential facts the Army Court reasoned it can "infer the truth of the essential facts in [SPC Adams]' confession to stealing cocaine." A fact is essential if it is fundamental or central to the nature of something. Here the Army Court even characterized SPC Adams' admission is "to stealing cocaine." Yet that fact is apparently unessential.

The Army Court twice erred. It erred in finding the "Ouzts" testimony reliable and thus corroborated and in finding on its own "Ouzts" is a "farily uncommon and unique name." (JA 4). We address each in turn.

The Army Court determined "the identity of the victim of the larceny" to be one of three essential facts admitted and corroborated by independent evidence. (JA 4). Corroborating that fact is (1) SPC Adams' confession where he "stated

repeatedly that the person who he stole cocaine from was a drug dealer named Ouzts[;]" and two CID agents who testified "they were familiar with an individual who went by that faily uncommon and unique name." (JA 4). First, Mil. R. Evid. 304(g) requires evidence independent of the confession to corroborate the essential facts admitted-the frequency in which a fact appears in a statement is immaterial to that determination. SPC Adams' statement moreover mentions "Ootz" but *one* time in his narrative. (JA 111).

Second, the remaining independent evidence-testimony of the two CID agents-lacked foundation and the necessary indicia of reliability. The court relied on Special Agent McKinney's testimony that "the victim of the theft was a former Soldier." During trial SA McKinney never established why she knew "Ouzts" to be a former Soldier or how she came to know that fact. Only that he was "a previous Soldier." (JA 55). Special Agent McKinney also knew his first name to be "Timothy"-a different Ouzts than described by Special Agent Villegas (JA 55). Lacking proper foundation the Army Court however found SA McKinney "familiar" with him. (JA 4).

Special Agent Villegas testified she "was informed of this individual [Ouzts] on 4 March." (JA 72). According to her "research running through cases that we have had at CID" SA Villegas believed Ouzts "was a former Soldier, reported to be a

drug dealer in the local area" and his first name is Matthew. (JA 72). Defense then objected both to hearsay and her lack of personal knowledge of the facts and the military judge sustained the objection. (JA 73). Indeed, Special Agent Villegas' familiarity with Ouzts stems from hearsay within hearsay and it lacked proper foundation. Mil. R. Evid. 805. The government never actually confirmed "Oozts" exists because no witness with personal knowledge testified to that. Special Agent Villegas rather only testified one or more entries on a document associate the name "Ouzts" with drug dealing. Special Agent McKinney however recalled from her interview with SPC Adams that she believed the victim's first name was Timothy. (JA 55). Not surprisingly, the military judge's ruling neither cites to nor relies on the CID testimony to corroborate the confession. (JA 91-92). While the Army Court aptly noted its duty to establish "the reliability of the essential facts" (JA 3)(citing *Seay*, 60 M.J. at 79) it failed to do so in this case. In doing so the Army Court abused its discretion.

When the Army Court reviews a military judge's ruling, it has the "awesome, plenary, *de novo* power of review" to substitute its judgment for that of the military judge." *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). That awesome power to substitute its judgement however does not permit the Army Court to find facts that are "clearly erroneous or

unsupported by the record," or base its decision "on 'an erroneous view of the law.'" *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)(quoting *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).

In *Collier*, this Court reversed a military judge's decision to prohibit defense counsel from cross examining a government witness about a homosexual relationship under Mil. R. Evid. 403. *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009). The Navy-Marine Court of Criminal Appeals had upheld the decision finding that the evidence "would have been of a particularly inflammatory nature in a trial by court-martial." *Id.* In doing so, the court advanced an argument in support of the judge's decision "that the military judge himself did not articulate..." and it based its conclusions "on speculation about prejudicial impact unrelated to any specific findings of the military judge." *Id.* So is the case here.

Both during oral argument and in its decision the Army Court highlighted the CID testimony about the victim-a fact the military judge himself did not rely on in his ruling. The Army Court also found the victim had an "uncommon and unique name." The Army Court's finding did not derive from the record but is based rather on speculation about the frequency that a given surname appears in a specific locale without accounting for the

area's immigration patterns or the local demographics.[4] Indeed, the Army Court first created and then relied on this separate fact to infer the trustworthiness of SPC Adams' statement. Only evidence introduced into evidence during trial can corroborate a confession. *United States v. Duvall*, 47 M.J. 189, 192 (C.A.A.F. 1997). In doing so, the Army Court exceeded its plenary fact finding powers under Article 66, UCMJ, and the court's decision should be set aside. Relying on distinct but flawed rationales, both the military judge and the Army Court erred in finding substantial independent evidence adduced at trial, either direct or circumstantial, implied the essential fact admitted-"Tuberville grabbed the coke and we got out of Ootz' car"-is true.

[4] By way of example, the family name "Yoder" might appear uncommon and unique to a French creole in Louisiana but not so to the Amish and Mennonite communities in Western Pennslyvania, Northern Indiana and the Ohio Valley who descend from German-born immigrants who settled the area in the late nineteenth century. *See generally Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Conclusion

WHEREFORE, SPC Adams respectfully requests that this Honorable Court grant his petition for review.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 21(b) because this brief contains 6,298 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface (12-point, Courier New font) using Microsoft Word, Version 2007.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Adams*, Army Dkt. No. 20110503, USCA Dkt. No. 14-0495/AR, was electronically filed with both the Court and Government Appellate Division on October 14, 2014.

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