MILITARY LAW REVIEW

Volume 178 Winter 2003

WRESTLING WITH MRE 304(G): THE STRUGGLE TO APPLY THE CORROBORATION RULE

MAJ RUSSELL L. MILLER[1]

Therefore confess thee freely of thy sin; For to deny each article with oath Cannot remove nor choke the strong conception that I do groan withal. Thou art to die.[2]

I. Introduction

Confessions are powerful. The admission of an accused's confession in a criminal trial carries heavy weight. Likewise, the suppression of such a confession may cause a prosecutor's case to fall apart. Given its importance, our jurisprudence affords the accused several privileges against self-

1. Judge Advocate, U.S. Army. Presently assigned as an Advanced Operational Law Studies Officer with the Center for Law and Military Operations. LL.M, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia; J.D. 1995 (*magna cum laude*), Salmon P. Chase College of Law, Northern Kentucky University; B.A. 1988 (*summa cum laude*) Southwestern Oklahoma State University. Prior assignments include: Deputy Legal Advisor, Joint Task Force Six, Ft. Bliss, Texas, 2000-2002; Deputy District Attorney, 8th Judicial District, Clayton, New Mexico, 1998-2000; Brigade Judge Advocate, 505th Parachute Infantry Regiment, 82d Airborne Division, Fort Bragg, North Carolina, 1997-1998; Chief, Legal Assistance, 82d Airborne Division, Fort Bragg, North Carolina, 1997; Operational Law Attorney, 82d Airborne Division, Fort Bragg, North Carolina, 1996; Legal Assistance Attorney, 82d Airborne Division, Fort Bragg, North Carolina, 1996; 138th Judge Advocate Officer Basic Course, The Judge Advocate General's School, 1995; Assistant Intelligence Officer, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1991-1992; Assistant Personnel Officer, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1991; Mortar Platoon Leader, 5th Battalion, 15th Infantry Regiment, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1989-1990; Rifle Platoon Leader, 5th Battalion, 15th Infantry Regiment, 1st Brigade, 3d Infantry Division, Schweinfurt, Germany, 1989; Bradley Commander's Course, Infantry Mortar Platoon Officer Course and Infantry Officer Basic Course, Fort Benning, Georgia, 1988-1989. Before his commissioning in 1988, Major Miller served as an enlisted infantry soldier and drill sergeant. This article was submitted in partial completion of the Master of Laws requirements of the 51st Judge Advocate Officer Graduate Course.

2. WILLIAM SHAKESPEARE, OTHELLO THE MOOR OF VENICE act 5, sc. 2.

incrimination. One of these important privileges is the notion that a confession or admission of a defendant or accused cannot subsequently be used against them as evidence of guilt in a criminal trial unless there is independent evidence which sufficiently corroborates the confession. This rule is commonly referred to as the corroboration rule. Its common law roots trace back to the courts of England in the mid seventeenth century.[3] The rule was adopted throughout courts in the United States at the state and federal levels.[4] In military practice, the corroboration rule is codified at Military Rule of Evidence (MRE) 304(g).[5] Although it seems fairly simple and straightforward, military courts-martial have, at times, struggled to apply it consistently. Simple mechanical implementation of the rule can be challenging. This article urges a fair and faithful application of this important rule and privilege by identifying recent inconsistent treatments, exploring its rational and historical underpinnings, and making a recommendation to clarify its requirements.

Specifically, this article proposes amendments to MRE 304(g).[6] These proposed amendments require some degree of admissible evidence against the accused in determining whether the accused's confession or admission has been sufficiently corroborated. The purpose of the proposed amendments is to focus the analysis of the rule's application on the quality of the corroborative evidence with the aim of preventing the erosion of an accused's rights and privileges.

II. Background

A. The Distrust of Confessions

A criminal defendant in our system of justice receives the benefit of several forms of privilege against self-incrimination. The privileges against self-incrimination derive, in part, from distrust in American criminal jurisprudence of the confession.[7] A reflection of this mistrust is found in a quote by Justice Goldberg: "a system of criminal law enforce-

---

3. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press 1979).

4. *See* Opper v. United States, 348 U.S. 84, 93 (1954) (adopting corroboration rule for federal courts); *see generally* 3 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987).

5. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(g) (2002) [hereinafter MCM].

6. *Id.*

ment which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[8] There are two components to this mistrust.

The first component is a concern for a potential abuse of authority that may arise during interrogation of a suspect, which may be of an oppressive nature.[9] To address police misconduct during interrogations, the privilege against self-incrimination has several aspects. These include suppression of coerced confessions[10] and the requirement to advise suspects of their Fifth and Sixth amendment constitutional rights before custodial interrogation.[11] These aspects of the privilege against self incrimination "purport to regulate interrogation in a way that reduces the incidence of false con-

---

7. Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wis. L. Rev. 1121, 1122 (1984).

8. Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (Goldberg, J., concurring).

9. Ayling, *supra* note 7, at 1123.

10. Payne v. Arkansas, 356 U.S. 560 (1958). In *Payne*, a mentally dull nineteen-year-old African American with a fifth-grade education, was convicted in a state court of first degree murder and sentenced to death.

> At his trial, there was admitted in evidence, over his objection, a confession shown by undisputed evidence to have been obtained in the following circumstances: He was arrested without a warrant and never taken before a magistrate or advised of his right to remain silent or to have counsel, as required by state law. After being held for three days without counsel, advisor or friend, and with very little food, he confessed after being told by the Chief of Police that "there would be 30 or 40 people there in a few minutes that wanted to get him" and that, if he would tell the truth, the Chief of Police probably would keep them from coming in.

Id. The Supreme Court reversed the conviction finding from the totality of the circumstances that the confession was coerced and did not constitute an expression of free choice. *Id.* at 568. Even though there may have been sufficient evidence to support his conviction apart from the coerced confession, the judgment was voided because it violated the Due Process Clause of the Fourteenth Amendment. *Id.*

11. Miranda v. Arizona, 384 U.S. 436 (1966). The Court held:

> Prosecution may not use statements from custodial interrogation of a defendant unless it shows procedural safeguards secured the privilege against self-incrimination. Defendant must be warned that he has the right to remain silent and anything he says may be used against him. He must be clearly informed he has the right to consult with a lawyer and to have the lawyer with him during interrogation.

Id.

fessions, reliability concerns are collateral to the main purpose of each: to suppress all confessions, whether reliable or not, that result from the abuse of power."[12]

The second component of the mistrust of confessions is the concern regarding the reliability of the confession. "The primary doctrinal remedy for the problem of physically uncoerced false confessions, on the other hand, has been the corroboration rule."[13] There are several species of the corroboration rule in American jurisprudence, and all require evidence in addition to the confession as a test of reliability.[14] Military Rule of Evidence 304(g) sets forth the means for corroborating a confession or admission of an accused in courts-martial.[15] An examination of the historical development of the corroboration rule will facilitate a more complete analysis of MRE 304(g).

B. Historical Underpinnings of the Corroboration Rule

1. The Corpus Delecti Rule

a. Origins of the Corpus Delecti Rule

The corroboration rule traces its historical underpinnings back to the development of the corpus delecti rule, which is still followed in most states today.[16] Legal historians identify the origins of the corpus delecti rule in a 1661 English murder prosecution entitled *Perry's Case*.[17] *Perry's Case* was a murder trial in which the victim's body was never found. The "victim" was waylaid, kidnapped, and held as a slave in Turkey. The defendant, his servant, was implicated by his failure to return home after being sent to find his brother and mother. The three were convicted and executed on the basis of the victim's disappearance, a bloodied hat, and a confession by one of the co-defendants.[18] The victim later showed up

---

12. Ayling, *supra* note 7, at 1124.

13. *Id.*

14. Other forms of the corroboration rule will be discussed *infra* as we examine its origin and development. For a more comprehensive listing of jurisdictions and the form of the corroboration rule they follow, *see generally* E. H. Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R. 2d 1316 (1956).

15. MCM, *supra* note 5, MIL. R. EVID. 304(g).

16. Bruce A. Decker, People v. McMahan: *Corpus Delecti Rule or Trustworthiness Doctrine?*, 1997 DET. C.L. REV. 191 (1997).

17. 14 HOW. ST. TR. 1312 (1660).

alive and well after the executions of the defendants.[19] Under English law at the time, a criminal defendant could be convicted solely on the basis of an uncorroborated confession.[20]

In the United States, a similar case arose in which an alleged murder victim surfaced just in time to prevent the execution of the person convicted of the murder.[21] Thereafter, courts throughout the United States began formulating forms of the corpus delecti rule. In fact, during the eighteenth century, all U.S. jurisdictions had adopted a form of the corpus delecti rule with the exception of Massachusetts.[22] Moreover, while English courts applied the rule only to murder cases, U.S. courts began to apply the rule to all kinds of criminal cases.[23]

b. What Is the Corpus Delecti Rule?

While there are different versions of the rule, one can discern its general aspects in defining it. The term "corpus delecti" means "the body of the crime." It is a common law doctrine that requires the prosecutor to prove that a crime was committed before allowing a defendant's extrajudicial confession to be admitted into evidence.[24] "Corpus delecti does not mean dead body, as often assumed by laymen, but the body or substance of the crime. Every offense has its corpus delecti, and independent proof thereof is needed for homicide and non-homicide offenses such as arson, bribery, burglary, conspiracy, false pretenses, incest or larceny."[25] Under the corpus delecti rule, a defendant's extrajudicial confession was admissible only when there was independent evidence that a death had occurred,

---

18. *Id.*; Note, *Construed in Proof of the Corpus Delecti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638, 639 (1955).

19. Tom Barber, *Young Lawyers Division: The Anatomy of Florida's Corpus Delecti Doctrine*, 74 FLA. B.J. 80 (2000).

20. Ayling, *supra* note 7, at 1126.

21. Rollin M. Perkins, *The Corpus Delecti of Murder*, 48 VA. L. REV. 173, 175 (1962) (construing *The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. 73 (1819)).

22. Ayling, *supra* note 7, at 1126. In declining to adopt the corpus delecti rule, the Massachusetts Supreme Court reasoned the jury was competent to evaluate the probative value of an uncorroborated confession and the "trend of modern decisions is in the direction of eliminating quantitative tests of the sufficiency of evidence." Commonwealth v. Kimball, 73 N.E.2d 468, 470 (1947) (quoting Commonwealth v. Gale, 57 N.E.2d 918, 920 (1944)).

23. Barber, *supra* note 19, at 81.

24. *Id.* at 80.

25. *Id.* (citing Perkins, *supra* note 21, at 179).

and that it resulted from an act of criminal agency.[26] The corpus delecti rule was viewed as both a rule of evidence and a substantive rule. It was an evidentiary rule in that it prohibited the admission of a confession without other proof. It was substantive because it prohibited a criminal conviction if the prosecution had not proven that a crime had been committed.[27]

c. The Purposes of the Corpus Delecti Rule

Formulation of the corpus delecti rule was created to preclude a person from being convicted of a crime that had not been committed and to avoid an undue reliance on confessions. Thus, it served to further three main purposes: (1) it served to protect the mentally unstable from being convicted as a result of an untrue conviction; (2) it helped to ensure people were not convicted as a result of an involuntary, coerced confession; and (3) it helped to promote more thorough law enforcement work by requiring authorities to find evidence beyond the confession.[28] In requiring more thorough investigation by law enforcement and demanding the production of independent evidence of the crime, the confession is more reliable. Additionally, this requirement helps prevent the criminal justice system from becoming inquisitorial.[29]

A custodial interrogation is an inherently coercive environment. In his article, Corey Ayling describes the interrogation environment. "The interrogator and the defendant interact in a certain social environment. That social environment consists of a physical place—an interrogation room—and an institutional setting—imprisonment. Both coerce."[30] The conditions under which interrogations often occur can set the conditions for involuntary and unreliable confessions.[31] The shock and self-mortification of arrest and imprisonment cause the defendant to enter the interrogation room in a badly debilitated state. The physical environment of the interrogation room intensifies the anxiety of the defendant and maximizes

26. Decker, *supra* note 16.

27. Barber, *supra* note 19, at 80.

28. Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delecti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 408 (1993).

29. Ayling, *supra* note 7, at 1128-29.

compliance. The interrogation environment enables the interrogator to confront a defeated, depressed, and compliant individual.[32]

The coercive environment impacts the interaction between investigators and an accused. In discussing the social interaction between an investigator and an accused, Ayling refers to another study which postulates that persons being interrogated tend to respond to external stimuli.[33] When internal cues are unambiguous, the individual does not look to external cues. An accused may well resist self-persuasion because they have direct access to some very strong, unambiguous internal cues, such as the knowledge of their own innocence or fear of self-incrimination. The suspect's internal cues will be more ambiguous notwithstanding his innocence. He may suffer from guilt feelings arising from unrelated acts, the investigator may induce guilt feelings, he may be traumatized by the shock of arrest and imprisonment, or he may feel a need for approval. By manipulating these external stimuli, the investigator may induce the accused in confessing falsely.[34]

A related issue is the sociological aspect of the confession. The confession can be viewed as a ritual of social inclusion through which society

---

30. *Id*. at 1162. In his analysis, Ayling references research at the University of Stanford in which twenty-four male students were divided into two groups. Half were assigned as "guards" and the other half as "prisoners." The prisoners were assigned to "cells" within the psychology building. Other than issuance of appropriate garb and a prohibition on physical force, they were given little guidance. In a very short period of time,

> [t]he guards quickly began to relish their power and increasingly subjected the prisoners to verbal abuse and harassing rules and rituals. Five of the ten prisoners had to be released early because of extreme depression, crying, rage, and acute anxiety; the pattern of symptoms began as early as the second day of imprisonment. On the whole, the prisoners behaved with increasing passivity and complied, after a brief rebellion, with the guards' orders. The prisoners also began to internalize the guard's negative attitudes towards themselves.

Id.

31. *See generally* Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (citing Miranda v. Arizona, 384 U.S. 436 (1966)) (collecting social psychological literature and concluding that *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation).

32. Ayling, *supra* note 7.

33. *Id.* at 1174-75 (citing Daryl Bem, *When Saying Is Believing*, 1 PSYCHOLOGY TODAY 21 (June 1967)).

34. *Id.*

reinforces its norms by first defining deviants and then restoring them to the graces of society.[35] The individual comes to realize his deviance from societal norms and confesses it to others. The confession dramatizes and reinforces the importance of the individual's conscience, which in turn mirrors societal norms.[36] Western culture affirms the importance of the individual, yet manages to achieve social control over the individual by causing him to internalize societal norms in the form of an interior conscience. The social purpose of the confession then, is to restore deviants to their former social status. By doing this, the confession legitimates the correctness of the social order, shows deviance and evil to be caused by individuals—not society—and reaffirms the value of individual conscience, which in turn mirrors societal norms.[37] The suspect in an interrogation room has been defined as a deviant and excluded from society by the degradation rituals of arrest and incarceration. The social compulsion to talk is overwhelming: the individual must reaffirm his former social and individual status by either denying guilt or accepting it through confession. In extreme cases, the desire for immediate redemption through confession may outweigh the longer term consequences of a false confession and may induce the suspect to make false inculpatory statements.[38]

There are several reasons that may cause an accused to succumb during custodial interrogation. The confession may be obtained as a result of a coercive environment in which a psychologically defeated suspect is manipulated by a trained and clever investigator or it may be based on sociological reactions derived from being deemed a deviant. Either way, the reliability as well as the voluntariness of the confession is called into question. As the Supreme Court stated in *United States v. Smith*,[39] "[T]hough a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past."[40] The consequence is a powerful

---

35. *Id.* at 1177-79 (citing MIKE HEPWORTH, CONFESSION: STUDIES IN DEVIANCE AND RELIGION 175 (Routledge, Kegan and Paul ed., 1982)).

36. *Id*.

37. *Id.*

38. *Id.*

39. 348 U.S. 147 (1954). Along with *United States v. Opper*, 348 U.S. 84 (1954), *Smith* was one of two cases that established the so-called trustworthiness doctrine, the current federal standard for corroboration of confessions. *Smith*, 348 U.S. at 147. Both cases are discussed in more detail *infra.*

40. *Smith*, 348 U.S. at 153.

piece of evidence for which stringent safeguards have been erected and must be maintained.

The corroboration rule is one of these safeguards, regardless of which variety of rule a particular jurisdiction follows. As the corpus delecti rule evolved, its primary purpose can be contrasted with the purposes of other privileges against self incrimination. Rather than testing the voluntary nature of the confession or the abuse of authority in procuring the confession, the corroboration rule tests the reliability of the confession itself.[41] It thereby protects from "errors in conviction based upon untrue confessions alone."[42]

As the corpus delecti rule developed, different jurisdictions adopted the rule in varying forms.[43] Most jurisdictions continue to apply the traditional corpus delecti rule.[44] Other jurisdictions have fashioned hybrid forms of rules for corroborating a confession.[45] This includes the Wisconsin rule,[46] the New Jersey rule,[47] the Iowa rule,[48] and the federal rule.[49] The states following the federal rule include Texas, New Mexico, Hawaii,

---

41. Ayling, *supra* note 7, at 1127.

42. *Id.* (citing Warszower v. United States, 312 U.S. 342, 347 (1941)). In *Warszower*, a Russian immigrant gave false statements to obtain a passport in the United States. The Supreme Court held, "the rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist." Thus, admissions made by the defendant before the crime did not need to be corroborated. *Warszower*, 312 U.S. at 347.

43. *See* E. H. Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R. 2d 1316 (1956) (providing a somewhat exhaustive listing of the rule followed all states, with the exception of Massachusetts, which has not adopted any form of the corroboration rule).

44. Ayling, *supra* note 7, at 1145. The corpus delecti jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.*

45. *Id.* at 1148-51.

46. The Wisconsin rule provides that a confession may be corroborated by "any significant fact in order to produce a confidence in the truth of the confession." Holt v. State, 17 Wis. 2d 468, 480 (1962). This rule is similar to the federal rule.

47. The New Jersey Supreme Court rule requires: (1) proof of loss or harm associated with the crime; and (2) other proof "tending to establish that when the defendant confessed he was telling the truth." State v. Lucas, 30 N.J. 37, 58 (1959).

and the District of Columbia.[50] The federal rule is also known as the "trustworthiness doctrine."[51]

2. The Trustworthiness Doctrine

a. Two Corroboration Rules in Federal Court

The development of the corpus delecti rule in federal courts led to a split in the circuit courts. In essence, the federal courts were applying two different corroboration rules.[52] The two lines of cases following the corpus delecti rule are set forth in *Daeche v. United States*[53] and *Forte v. United States.*[54]

In *Daeche,* a Russian immigrant was convicted for his involvement in a conspiracy to injure insurance underwriters and a conspiracy to blow up ships.[55] The court found ample evidence to corroborate the defendant's confession from the existence of an agreement to attack ships.[56] In an opinion authored by Judge Learned Hand,

> Proof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession. There is no necessity that such proof touch the corpus delecti at all, though, of course, the facts of the admission plus the corroborating evidence must establish all elements of the crime.[57]

---

48. The Iowa rule is the most strict. It requires independent proof of both the corpus delecti and the defendant's link to the crime. State v. White, 319 N.W.2d 213, 214 (Iowa 1982).

49. The federal rule was the product of two Supreme Court cases decided in 1954. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

50. Ayling, *supra* note 7, at 1149.

51. *See generally* Decker, *supra* note 16, at 191; Schopler, *supra* note 43.

52. *Opper*, 348 U.S. at 92-3; *see* Lieutenant Colonel R. Wade Curtis, *Trial Judiciary Note: Military Rule of Evidence 304(g)—The Corroboration Rule*, ARMY LAW., July 1987, at 35.

53. 250 F. 566 (2d Cir. 1918).

54. 94 F.2d 236 (D.C. Cir. 1937).

55. *Daeche*, 250 F. at 569.

56. *Id.*

57. *Id*. at 571.

The rule in *Forte* was much different.[58] It was much stricter and demanded more independent corroborative evidence. In *Forte*, the defendant was convicted of transporting a motor vehicle in interstate commerce. The defendant claimed there was insufficient substantial proof of the corpus delecti because there was no evidence, independent of his confession, that he knew that the car was stolen.[59] The court cited, a number of forms of misconduct sometimes occurring during the conduct of custodial interrogation. This included physical brutality, protracted questioning, threats and illegal detention. Due to their resultant distrust of the confession, the court reversed the conviction. They held there could be no conviction upon an uncorroborated confession and the corroboration had to embrace substantial evidence of the corpus delecti.[60]

> There can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delecti and the whole thereof.[61]

In order to reconcile the split among the circuits regarding the application of the corroboration rule, the Supreme Court set forth a new federal rule which is referred to as the "trustworthiness doctrine."[62]

b. Opper v. United States

Opper was a procurement fraud case.[63] Opper was tried and convicted on charges he had conspired with and induced a federal employee to accept outside compensation for services in a matter before a federal agency in which the United States had an interest.[64] Opper was not a fed-

---

58. *Forte*, 94 F.2d at 236.
59. *Id.*
60. *Id.* at 241.
61. *Id.* at 240.
62. United States v. Opper, 348 U.S. 84, 86 (1954) (stating "Certiorari was granted because of asserted variance or conflict between the legal conclusion reached in this case—that an extrajudicial, exculpatory statement of an accused, subsequent to the alleged crime, needs no corroboration—and other cases to the contrary.").
63. *Id.*
64. *Id.* at 85.

eral employee but was charged with inducing a federal employee through a conspiracy, to accept compensation for such services.[65] Opper was a subcontractor who supplied goggles to the Air Force as part of a contract for survival kits.[66] The goggles tendered by Opper failed to comply with specifications in the contract. Opper thereafter met with Hollifield, the government contracting officer, and convinced Hollifield to recommend acceptance of the non-conforming goggles in exchange for a payment of cash.[67] During the investigation conducted by the FBI, Opper admitted, in oral and written statements, he had given Hollifield the money but insisted the money was given as a loan.[68]

Opper's statements did not constitute a confession, but were admissions of material facts used to convict him. The Supreme Court held corroboration was required for admissions to the same extent as confessions.[69] The Court then addressed the divergence within the circuit courts with respect to which corroboration rule to apply; the *Daeche* rule or *Forte* rule.[70] The Court held the corroboration required was that which ensured the trustworthiness of the admission or confession, rather than independent evidence that simply touched on the corpus delecti:

> [W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delecti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[71]

---

65. *Id.*
66. *Id.* at 87.
67. *Id.*
68. *Id.* at 88.
69. *Id*. at 91 (acknowledging that admissions differ from confessions in that "confessions are only one species of admissions" but the Court concluded that the admissions "call for corroboration to the same extent as other statements").
70. *Id.* at 92.
71. *Id.*

In affirming the conviction, the Court found independent evidence in the record to support Opper's statements which was sufficient corroboration as to one element of the crime charged; the payment of money.[72] The government was required to prove by independent evidence the other element—the rendering of services—which was not established by Opper's statements.[73] While *Opper* was a case involving a crime with a tangible corpus delecti, the Court ruled on the application of the corroboration rule involving cases without a tangible corpus delecti in *United States v. Smith.*[74]

c. United States v. Smith

The Supreme Court applied its newly announced trustworthiness doctrine to a crime in which there is no tangible corpus delecti in *United States v. Smith.*[75] In *Smith*, the appellant submitted a five-page document to investigators from the Internal Revenue Service (IRS) that represented his claimed net worth for a five year period.[76] Believing he had understated his net worth for the period, the IRS prosecuted Smith for understating his income to avoid taxation.[77] The appellant asserted, *inter alia*, there was insufficient evidence to corroborate the document he submitted to the IRS as evidence against him.[78]

In addressing the appellant's claims regarding the insufficiency of corroboration, the Court first examined whether the corroboration requirement applied to crimes in which there is no tangible corpus delecti—such as tax fraud.[79] The Court observed the corroboration requirement was formulated to prevent conviction for serious crimes of violence, such as mur-

---

72. *Id.* at 94.

73. The Court found the corroborative evidence which established the truthfulness of Opper's admissions did not establish a corpus delecti for the entire crime. "Rather it tends to establish only one element of the offense—payment of money. The Government therefore had to prove the other element of the *corpus delecti*—rendering of services by the government employee—entirely by independent evidence." *Id.*

74. 348 U.S. 147 (1954).

75. To say a case has no tangible corpus delecti does not mean there is corpus delecti or body of the crime. It simply means there is no direct tangible victim, such as in a murder case. A case with no tangible corpus delecti can be thought of as a so-called victimless crime, such as tax fraud or drug usage.

76. *Smith*, 348 U.S. at 149.

77. *Id.*

78. *Id.* at 151.

79. *Id.* at 153.

der, unless there was "independent proof . . . *someone* had indeed inflicted the violence, the so-called *corpus delecti*."[80] Once the corpus delecti—the body of the crime—had been established, the confession of the accused could be used to convict him.[81] "But in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delecti*."[82] The Court was faced with a choice. It could either apply the corroboration rule, which would provide the accused with greater protection than in a homicide,[83] or the Court could find the rule wholly inapplicable because of the nature of the offense, which would strip the accused of this guarantee altogether.[84] They chose to apply the rule, which provides greater legal protection to an accused.[85] The Court chose to apply the rule to a case in which there is no corpus delecti apparently out of a concern for the inquisitional nature of a law enforcement investigation.[86]

Regarding the sufficiency or quantum of corroboration required, the Court addressed two questions: "(1) whether corroboration is necessary for all elements of the offense established by admissions alone . . . [and] (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged."[87] The Court said yes to both questions, noting that "[a]ll of the elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[88] From this analysis it can be said that "[t]he 'quantum of corroboration' refers to both the government's burden to corroborate the confession, as well as the government's ultimate burden regarding guilt and innocence."[89]

---

80. *Id.* at 153-4.
81. *Id.*
82. *Id.* at 154.
83. *Id*. (citing Evans v. United States, 122 F.2d 461 (10th Cir. 1941); Murray v. United States, 288 F. 1008 (D.C. Cir. 1923)).
84. *Id.*
85. *Id.*
86. *Id*. (stating, "We hold the rule applicable to such statements, at least where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case.").
87. *Id.* at 156.
88. *Id.*
89. Curtis, *supra* note 52, at 38.

The Supreme Court's decisions in *Smith* and *Opper* authored the standard for determining the legal sufficiency of corroborating a confession or admission in federal courts and courts-martial.[90] Consequently, the next logical step in determining whether amendments to MRE 304(g) are needed is by analyzing how the military developed and incorporated the *Smith-Opper* standard in conducting courts-martial.[91] This article examines military case law to gauge judicial faithfulness to the *Smith-Opper* standard. This analysis demonstrates how recent military case law has eroded some of the protections the Supreme Court intended to erect and maintain.

III. Analysis

A. The Corroboration Rule in Military Criminal Practice

Military Rule of Evidence 304(g) is the codification of the corroboration rule in military criminal practice.[92] It is modeled after the corroboration rule that applies in federal courts following the Court's decisions in *Opper* and *Smith.*[93] Military Rule of Evidence 304(g) is both a rule of evidence and of substantive law. It is an evidentiary rule from the standpoint of ensuring admissibility of the confession. Substantively, it is designed to ensure the accused is not convicted solely on his confession alone.[94] The rule requires independent evidence that corroborates the essential facts admitted to justify sufficiently an inference of their truth. This is a long-standing provision in our jurisprudence that is continued in the codification of MRE 304(g), which seems to assume that corroboration has or will be independently introduced into evidence in determining the admissibility of a confession or admission.[95] "[T]he independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth."[96]

The rule appears fairly simple and straightforward. A review of case law, however, reveals the difficulty with which military courts struggle to make its application uniform.[97] The issues tending to arise often surround the weight and sufficiency of the corroborating evidence and whether the

---

90. *Smith*, 348 U.S. at 147; United States v. Opper, 348 U.S. 84, 86 (1954).
91. MCM, *supra* note 5, MIL. R. EVID. 304(g).

corroborating evidence must be admitted into evidence. The rule does not specifically address whether the corroborating evidence must be admitted into evidence. As a result, the Court of Appeals for the Armed Forces (CAAF) has recently rendered several inconsistent decisions in applying MRE 304(g).[98] Tracing the genesis and development of MRE 304(g) will assist in grasping an understanding of these inconsistencies. It will also

---

92. *Id.* The text of MRE 304(g) is as follows:

> (g) *Corroboration*. 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 introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. 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. 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.
>
> (1) *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.
>
> (2) *Procedure*. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

Id.

93. *Smith*, 348 U.S. at 147; *Opper*, 348 U.S. at 84.

94. STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 189 (4th ed. 1997).

95. *Id.*

96. *Opper*, 348 U.S at 109.

97. SALTZBURG, SCHINASI & SCHLUETER, *supra* note 94.

prove useful in determining whether amendments are required to preserve its protections.

B. The Historical Development of MRE 304(g)

Before the Supreme Court decisions in *Smith* and *Opper*, the 1951 version of the *Manual for Courts-Martial* incorporated the common law corpus delecti rule as a requirement for corroborating a confession.[99] It required that evidence be admissible as a precondition for sufficient corroboration:

> An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is *in the record* other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone . . . . Usually the corroborative evidence is introduced before evidence of the confession or admission; but the court may in its discretion admit the confession or admission in evidence upon the condition that it will be stricken and disregarded in the event that the above requirement as to corroboration is not eventually met.[100]

After the decisions in *Smith* and *Opper*, paragraph 140(a)(5) of the rules of evidence was amended to embrace the trustworthiness doctrine. The drafters' analysis for the *1968 Manual for Courts Martial* states this quite clearly.[101] Their adoption of the trustworthiness doctrine stressed the above stated concern for reliability of the confession or admission: "The main purpose should be to corroborate the confession or admission so that one will be reasonably assured that it is not false."[102] Under the 1984 revision of the *Manual for Courts Martial*, there was another change. The initial determination as to whether a confession was sufficiently corroborated for purposes of admissibility was transferred from the panel members to the military judge, consistent with treatment of other preliminary questions concerning admissibility of confessions.[103] Other than transferring the preliminary question of admissibility to the military

---

98. *See supra* notes 106-30, and accompanying text; *see also* MCM, *supra* note 5, MIL. R. EVID. 304(g).

99. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. iv, ¶ 140(a) (1951) [hereinafter 1951 MCM] (emphasis added).

100. *Id.*

judge, the rule of corroboration in the military was not changed but restated.[104]

C. Applying the *Smith-Opper* Rule, not Corpus Delecti, in Courts Martial

In reviewing military cases involving the application of the corroboration rule, it appears that military courts have, at times, been reluctant to depart from a traditional application of the corpus delecti rule. This is surprising due to the rather clear pronouncement from the drafters of the rules of evidence that military courts will follow the trustworthiness doctrine instead of the older corpus delecti rule.[105] *United States v. Loewen* illustrates this issue.[106]

Loewen involved a soldier convicted of forging a number of prescriptions and the larceny of the drugs prescribed.[107] The prescriptions were

---

101. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. xxvii, ¶ 140(a)(5) (1968) [hereinafter 1968 MCM] (analysis of contents). It provided:

> *Corroboration of confessions and admissions*. This subparagraph contains the new rule pertaining to corroboration of confessions and admissions adopted by the Supreme Court in Opper v. United States, 348 U.S. 84 (1954), and Smith v. United States, 348 U.S. 147 (1954). The *Opper* case is authority for the proposition that the corroborating evidence need only raise a "jury inference" of the truth of the essential facts admitted, and the *Smith* case is authority for the principle that if the prosecution desires to use the accused's statement as evidence to establish a particular essential fact, the essential fact must be corroborated by independent evidence. Although both cases involved offences in which there was no tangible corpus delecti, the Court did not, in announcing its new rule, state that the rule applied only to this type of offense–that is, it did not indicate that the old "corpus delecti" rule would continue to be applied to offenses in which there was a "tangible" corpus delecti, if there is, in fact, any distinction to be drawn. The new rule is entirely different from the corpus delecti rule found in the former Manual. Under the *Opper* and *Smith* rule, all that is required is that there be independent evidence raising a "jury inference" of the truth of the matters stated in the confession or admission, in other words, actual corroboration of the statement; whereas, under the so-called "corpus delecti" rule the confession or admission is completely disregarded until such time as it is shown independently that the offense in question has "probably been committed by someone."

Id.

102. *Id.*

written for the soldier's wife. A special agent of The Army's Criminal Investigations Division (CID), subjected the soldier to custodial interrogation. During the interrogation, the soldier-appellant told the CID agent he had forged the prescriptions and that his wife was not involved in the forgery. His statement was used as evidence against him at trial. The soldier appealed on the basis that his inculpatory statement was not sufficiently corroborated by substantial independent evidence under MRE 304(g).[108] The Army Court of Military Review agreed and reversed his conviction, but their analysis reveals some confusion in applying the rule.[109]

Initially, the court recognized the 1984 version of MRE 304(g) was substantially the same as its predecessor rule[110] and made reference to the *Smith-Opper* standard in the drafters' analysis of the earlier rule.[111] Yet,

---

103. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(g) (1984) (drafter's analysis) [hereinafter 1984 MCM]. The drafter's analysis reveals the change requiring the military judge, rather than the members, to decide the initial determination as to whether a confession was sufficiently corroborated for purposes of admissibility was a result of *United States v. Seigle*, 47 C.M.R. 340 (1973). The drafter's analysis provides:

> Rule 304(g) restates the present law of corroboration with one major procedural change. At present, no instruction on the requirement of corroboration is required unless the evidence is substantially conflicting, self contradictory, uncertain, or improbable and there is a defense request for such an instruction. United States v. Seigle, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973). The holding in *Seigle* is consistent with the present Manual's view that the admissibility may be decided by the members, but it is inconsistent with the position taken in Rule 304(d) that admissibility is the sole responsibility of the military judge. Inasmuch as the Rule requires corroborating evidence as a condition precedent to admission of the statement, submission of the issue to the members would seem to be both unnecessary and confusing. Consequently, the Rule does not follow *Seigle* insofar as the case allows the issue to be submitted to the members. The members must still weigh the evidence when determining the guilt or innocence of the accused, and the nature of any corroborating evidence is an appropriate matter for the members to consider when weighing the statement before them.

1984 MCM, at A22-12. The analysis quoted above is identical to the current *Manual* at page A22-13. MCM, *supra* note 5, at A22-13.

104. 1984 MCM, *supra* note 103.

105. 1968 MCM, *supra* note 101, analysis of contents.

106. 14 M.J. 784 (1982).

107. *Id*. at 785.

108. *Id.* at 785-6.

109. *Id.*

110. 1968 MCM, *supra* note 101, ¶ 140(a)(5).

rather than simply applying the trustworthiness doctrine to the larceny and forgery charges, the court reasoned that "[t]he Supreme Court did not discard the corpus delecti rule in *Smith* and *Opper*, but instead provided an alternate method of corroboration which could be used in cases where there is no tangible corpus delecti."[112] Larceny and forgery are cases in which there is a tangible corpus delecti. They reasoned the trustworthiness doctrine applied only to cases without a corpus delecti. Rather than applying the *Smith-Opper* rule, they applied the old corpus delecti rule to these facts. Additionally, they held that *Smith* "extends the corroboration requirement to include the identity of the accused as the perpetrator, an element not required to be corroborated under the old corpus delecti rule."[113]

United States v. Yates provides a thorough analysis of the corroboration rule in military practice.[114] The analysis in *Yates* assists in resolving some of the confusion left by *Loewen*.[115] Yates was a sailor charged with the rape and sodomy of his infant step-daughter.[116] He admitted to several instances of sexual contact with the step-daughter during custodial interrogation by the Naval Investigative Service (NIS). He also admitted that while in the Philippines he had sex with an unnamed girl he met in a bar.[117] At trial, he recanted his confession. The government sought to introduce his confession into evidence.[118] The corroborative evidence of his confession consisted of a labial tear on the child's vulva, the child's positive test result for gonorrhea, expert testimony concerning transmission of the disease, and medical evidence that the accused may have had gonorrhea as well.[119]

The Navy-Marine Court of Military Review examined the same cases and drafters' analysis as the *Loewen* court. They reached a conclusion similar to that of the *Loewen* with respect to the corpus delecti rule: "[W]e conclude the Supreme Court has not abandoned the corpus delecti rule, but

---

111. *Id.*
112. *Loewen*, 14 M.J. at 784.
113. *Id.*
114. 23 M.J. 575 (N.M.C.M.R. 1986).
115. *Id*; *see Loewen*, 14 M.J. at 787; Curtis, *supra* note 52.
116. *Yates*, 23 M.J. at 575.
117. *Id.* at 575-76.
118. *Id.* at 575.
119. *Id.* at 576.

has provided a second approach where the corpus delecti could not be proven independently . . . ."[120]

The crimes charged in *Yates* had a tangible corpus delecti, but unlike the *Loewen* court, the *Yates* court did not apply the corpus delecti rule. Instead, they embraced the more flexible trustworthiness doctrine:

> We believe a persuasive argument can be made that Mil.R.Evid. 304(g) recognized that *Opper-Smith* was designed to give the federal sector more, not less, flexibility in establishing a two-pronged test, and that the revised military rule is broad enough and was designed to emulate the more flexible federal rule, subject to the caveat that under either prong the linchpin consideration is whether the independent evidence corroborates the essential facts admitted sufficiently to justify an inference of their truth.[121]

Misunderstanding of the corroboration rule persisted, however, as evidenced in *United States v. Baldwin*.[122] In *Baldwin*, the trial judge suppressed the confession by applying the corpus delecti rule rather than the trustworthiness doctrine.[123] Air Force Staff Sergeant Baldwin was charged with committing indecent acts on his seven year old stepdaughter. The accused confessed during a custodial interrogation by Air Force investigators.[124] The evidence supplied by the government to corroborate the confession consisted of non-testimonial acts of the accused. These non-testimonial acts consisted of leaving the marital home and moving into on-post quarters, his emotional state of distress, and going to see the chaplain and a counselor.[125] A review of the record from the suppression motion reveals the military judge applied the old corpus delecti rule in his decision to suppress the confession.[126] In ordering the suppression of the confession, the military judge determined the lack of evidence of a corpus delecti was a factor "in determining if the government has presented evidence that establishes an inference of truth as to the 'essential facts admitted' in the confession."[127] The Air Force Court of Criminal Appeals

120. *Id.* at 578.
121. *Id.* at 579.
122. 54 M.J. 551 (A.F. Ct. Crim. App. 2000).
123. *Id.*
124. *Id.* at 552.
125. *Id.* at 553.

(AFCCA) found the military judge had abused his discretion by applying the wrong legal standard and reversed the suppression of the confession.[128]

Military appellate courts have embraced the transformation of applying the trustworthiness doctrine, rather than the corpus delecti rule.[129]

---

126. *Id*. The dialog on the suppression motion went as follows:

> MJ: Okay. Let me ask you this, back in law school the common law rule concerning this was that before an admission or confession is admissible the prosecution has to prove *corpus delecti.* That is, that there was a crime committed. That is, a person can't confess to something where there's no evidence that there was a crime committed. Okay.
> For instance, defendant one goes into the police and confesses that he killed somebody last year on the side of the road. There's no other evidence indicating that anybody's missing, anybody's dead, you know, anything to indicate that what he's saying is correct. Now, of course there are people that can testify that from time to time there are people on the side of the road, but that's all.
>
> My question is, can the prosecution prosecute defendant one for murder where there's no indication whatsoever of *corpus delecti?* Part B of that is, what evidence do we have in this case that there is any *corpus delecti* and, Part C is, what case do you have to support your legal position where there was no evidence presented by the prosecution of a *corpus delecti?*

Id. at 553.

127. *Id.*

128. The AFCCA rebuked the military judge's employment of the wrong legal standard:

> The existence of a corpus delecti is not required by the rule. Despite his acknowledgement that this was the law, the military judge's ruling was based upon the absence of any evidence that the accused was seen committing the acts or that the child-victim exhibited physical or mental injury. So, while eschewing the requirement, he virtually demanded that trial counsel present evidence of the body of the crime, the corpus delecti.

Id. at 555.

129. *See* United States v. Maio, 34 M.J. 215 (C.M.A. 1992) (finding sufficient independent evidence corroborated appellant's voluntary confession, which was shown to be sufficiently trustworthy for admission at his court-martial. In confirming the trustworthiness doctrine as the appropriate legal standard the court announced that "it can be realistically said in the Federal sector that the 'corpus delecti' corroboration rule no longer exists.").

Baldwin, however, shows the corpus delecti rule may still linger in courts-martial.

Having established the trustworthiness doctrine of *Smith-Opper* as the appropriate legal standard, a review of recent applications on the issue of the weight and sufficiency of the corroborating evidence reveals its current interpretation.[130] This will prove useful in determining the need, if any, for amendments to ensure faithfulness to its intended protections.

D. Recent Applications of the Corroboration Rule in Courts Martial

1. United States v. Grant[131]

This is the most recent case analyzing the quality and admissibility of evidence proffered to corroborate a confession. *Grant* was an Air Force case where an Air Force Staff Sergeant (SSG) Grant was found unconscious at the club complex on Incirlik Air Force Base in Turkey.[132] He was taken to the base hospital where Captain (Capt.) Poindexter, the physician on duty, treated SSG Grant.[133] As part of his treatment, Capt. Poindexter ordered a drug screen in accordance with "the customary medical protocol for diagnosis and treatment."[134] Based on the results of other tests, the appellant was treated for acute alcohol poisoning and released.[135]

Despite his release, the hospital continued to process the drug screen.[136] Several weeks later, the physician was notified by email that the accused tested positive for cannabinoids.[137] The hospital notified the Air Force Office of Special Investigations (AFOSI) of the test results, and interrogated the appellant.[138] The appellant initially denied having used illegal drugs but when confronted with the results of the drug screen, the accused confessed in writing.[139] The drug screen results were hearsay

130. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).
131. 56 M.J. 410 (2002).
132. *Id.* at 412.
133. *Id.*
134. *Id.*
135. *Id*.
136. *Id*.
137. *Id.*
138. *Id.*
139. *Id.*

under MRE 801.[140] The government, however, offered the drug screen results under MRE 803(6)[141] as a "business record" exception to the hearsay rule. The drug screen results were not offered as substantive evidence against the appellant, but only for the limited purpose of corroborating the confession.[142]

The court found that, "The Government called no witnesses from either Incirlik [Air Force Base] or Armstrong [Laboratory] to testify about the chain of custody regarding appellant's urine sample. Nor did it call any witnesses to testify about the testing procedures used at Armstrong Laboratory."[143] The government also did not adduce testimony from witnesses regarding the testing procedures used at Armstrong Laboratory.[144] Instead, the government simply called Capt. Poindexter and another hospital employee to demonstrate the hospital's reliance on the record and to establish that the record was procured and incorporated in the hospital's records in the normal course of business.[145] The trial judge, over defense

---

140. MCM, *supra* note 5, MIL. R. EVID. 801.

141. *Id.* MIL. R. EVID. 803(6), which provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

Id.

142. *Grant*, 56 M.J. at 413.

143. *Id.*

144. *Id.*

objection, found the confession sufficiently corroborated and admitted the confession into evidence.[146] The sum of the evidence before the members was the confession and the foundational testimony for the drug screen results as a business record for the "limited purpose" of corroborating the confession.[147] The AFCCA affirmed the conviction.[148]

The CAAF also affirmed the conviction.[149] The appellant asserted the government was required to introduce scientific testimony to interpret the drug screening results and substantiate testing procedures.[150] The CAAF rejected this claim by reasoning the drug screen results were proffered not as substantive evidence, but only for the limited purpose of corroborating the confession. Thus, the foundational testimony which would otherwise be required was not necessary.[151]

The appellant also argued there was insufficient evidence to corroborate the confession.[152] The CAAF also rejected this argument, citing *United States v. Melvin*,[153] for the proposition that the quantum of evidence required to corroborate a confession "may be very slight."[154] Unlike the

145. *Id.*

146. *Id.*

147. *Id.*

148. United States v. Grant, 2001 C.C.A. LEXIS 22 (A.F. Ct. Crim. App. Jan. 18, 2001).

149. *Grant*, 56 M.J. at 410.

150. *Id.* at 416. The appellant cited *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987). *Murphy* was part of a trilogy of cases that set forth a three-part test for the admissibility of drug screen results proffered by the government in a court martial. As will be discussed *infra*, the three elements are: (1) the seizure of the urine sample must be a lawful seizure; (2) the laboratory results must be admissible, requiring proof of a chain of custody of the sample, that is, proof that proper procedures were utilized; and (3) there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful. *Id.* The other two cases are *United States v. Harper*, 22 M.J. 157 (1986) and *United States v. Ford*, 23 M.J. 331 (1987). The three cases are summarized into a three-part test in *United States v. Graham*, 50 M.J. 56 (1999).

151. *Grant*, 56 M.J. at 416.

152. *Id.*

153. *Id.* (citing 26 M.J. 145 (C.M.A. 1988) (finding sufficient independent evidence had been introduced to support the confession of the accused)).

154. *Id.*

situation in *Grant*, the appellant's confession in *Melvin* was corroborated by numerous items of other independently admissible evidence.[155] The *Grant* court chose not to address this distinction.

In *Grant*, the record reflected an adequate foundation for the admission of a business record under MRE 803(6).[156] In affirming the foundational prerequisites, the CAAF examined how other federal courts of appeals applied the business record exception when "a document prepared by a third party is properly admitted as part of a second business entity's records if the second business integrated the document into its records and relied upon it in the ordinary course of its business."[157] The difficulty in this analysis lies in the nature of the record itself. Drug screen results of biochemical testing are scientific evidence. None of the cases cited by the *Grant* court dealt with the admissibility of scientific results of biochemical testing or drug screening.[158] The drug screen was a business record prepared by a third party, not by a testifying witness. The majority in *Grant* cited federal courts of appeal cases involving repair estimates and firearm sales invoices as business records prepared by a third party.[159] There is a qualitative difference between routine transactions that constitute normal business records, such as invoices and receipts, and drug screen results.

---

155. *Id.* In *Melvin*, the COMA listed a variety of independently admissible evidence in the record to corroborate the appellant's confession. We will examine this case in greater detail *infra*. The following describes the quantum of corroboration in *Melvin*:

> In the instant case, independent evidence in the record shows that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.

United States v. Melvin, 26 M.J. 145, 147 (C.M.A. 1986). *See Grant*, 56 M.J. at 416.

156. *Grant*, 56 M.J. at 416; *see* MCM, *supra* note 5, MIL. R. EVID. 803(6).

157. *Grant*, 56 M.J. at 414.

158. *Id.* (citing Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999); MRT Constr., Inc. v. Hardrives, 158 F.3d 478 (9th Cir. 1998); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978); United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977)).

159. *Grant*, 56 M.J. at 414.

Drug screen results are scientific reports that demand expert testimony as a precondition to admissibility under the rules of evidence.

In the prosecution of a typical urinalysis case, the positive test results of a drug screen are admitted into evidence in one of three ways—through stipulation, judicial notice, or through the testimony of an expert witness.[160] Under MRE 702,[161] an expert witness may be called to explain drug screen testing procedures for proving an accused's usage of an illegal substance. This testimony can be rather involved and complicated.[162] The chain of custody of the urine sample and procedures for its handling at the lab are also admissibility requirements.[163]

Before *United States v. Murphy*,[164] the government proved use of illegal substances by introducing the testimony of the unit alcohol and drug coordinator and the assigned urinalysis observer. The observer linked the accused to a particular urine sample, and then introduced the positive urinalysis results as a business record. The government was able to convict the accused without the testimony of an expert witness.[165] This practice ended with *United States v. Murphy.*[166] In *Murphy,* a sailor was convicted for the wrongful use of illegal drugs. The government presented no scientific or expert testimony, but relied on testimony "from various witnesses from the command concerning the command procedures for taking the specimen from appellant, mailing it to the laboratory, its return to command, and its presence in the courtroom."[167] The Court of Military Appeals (COMA) rejected this approach and required expert testimony to prove illegal use of drugs. "We are not persuaded that the scientific prin-

---

160. Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 7.

161. MCM, *supra* note 5, MIL. R. EVID. 702.

162. Captain Fitzkee's article describes the scientific testimony required of the expert:

> After establishing the witness as an expert, the trial counsel should use the expert's testimony to: explain how the laboratory receives, processes, and tests urine samples; explain the scientific principles behind the radioimmunoassay (RIA) test and the gas chromatography/mass spectrometry (GC/MS) test that the laboratory uses; explain the results of the tests of the accused's sample; explain the meaning of the results; explain the internal and external quality control procedures that guarantee that the result is accurate; and introduce into evidence the accused's urine bottle and the laboratory reports pertaining to that sample.

Fitzkee, *supra* note 160, at 13.

ciples of urinalysis are matters of 'common sense' or of 'knowledge of human nature'. . . the determination of the identity of narcotics certainly is not generally within the knowledge of men of common education and experience."[168]

The foundational testimony for admitting the drug screen results in *Murphy* are nearly identical to those in *Grant*.[169] In *Grant*, the drug screen results were admitted as a business record based on the testimony of workers at the hospital to demonstrate the hospital's reliance on the record and to establish that the record was procured and incorporated in the

---

163. Captain Fitzkee's article also describes the procedural aspects of the drug screen:

> Urine samples typically arrive by registered mail in the laboratory's mail room. The unopened boxes are thereafter transferred to the receiving and processing section. A technician inspects each sealed box, which contains up to twelve urine samples, to ensure that the box is sealed with tape. If the box is not sealed, or there are other signs of tampering, the samples in that box are rejected, and not tested. If everything is in order, the processing technician opens the box and compares the social security number and specimen number on each bottle with the numbers on the DA Form 5180-R that accompanied the box. Each number must exactly correspond. The technician assigns each accepted sample a laboratory accession number, by which the sample is tracked throughout the laboratory. The technician places this number on the urine bottle and on the DA Form 5180-R. The samples are then configured into batches for testing, and are put into temporary storage in a secure, limited-access area. Other technicians later conduct tests by removing aliquots from the bottles kept in temporary storage. All tests are documented to establish a proper chain of custody. The bottles remain in temporary storage until the sample is determined to be negative and is discarded, or until it is determined to be positive and is transferred to long-term storage. The laboratory determines that a sample is negative when the sample contains no drug or drug metabolites or contains drug or drug metabolites at threshold levels below those established by Department of Defense ("DOD"). The laboratory determines that a sample is positive when two separate tests by RIA and GC/MS confirm that it contains drugs or drug metabolites at levels exceeding the DOD thresholds.

Id.

164. 23 M.J. 310 (C.M.A. 1987).
165. Fitzkee, *supra* note 160, at 12.
166. *Murphy*, 23 M.J. at 310.
167. *Id*. at 311.
168. *Id*.
169. *Compare id*., *and* United States v. Grant, 56 M.J. 410 (2002).

hospital's records in the normal course of business.[170] As a result of *Grant,* the government will no longer have a need to call for scientific testimony, at least when the accused confesses to use.

In their deletion of the requirement to proffer scientific testimony or testimony regarding the chain of custody as a condition precedent to the admission of drug screen results, the CAAF set the legal standard lower than the Supreme Court mandated in *Smith* and *Opper.*[171] An unwanted byproduct may be lower standards in conducting the urinalysis program. Since the government now needs only an email as a business record for the purpose of corroboration of a confession, units may not be as vigilant with chain of custody procedures. The laboratories may lower their level of oversight with handling and testing procedures. Not only does *Grant* erode the protections of the corroboration rule, it causes harm to the integrity of the urinalysis program of the Department of Defense. In effect, *Grant* is a practical reversal of *Murphy.*

Murphy was one of three cases which set forth a three part test for the admission of drug screen results.[172] *United States v. Graham* articulated the three part test.[173] Judge Sullivan authored a concurring opinion in *Grant* in which he recognized the majority's opinion "erodes the holding of this Court in [*United States v.*] *Graham* and I join it."[174] In *Graham*, the appellant was charged with the unlawful use of marijuana when a drug screen analysis of the appellant's urine tested positive with the presence of THC metabolites.[175] Four years earlier (1991), the appellant had another positive urinalysis and was court-martialed for that alleged use.

The court acquitted the appellant at the previous court-martial after he asserted an innocent ingestion defense.[176] At trial for the alleged subsequent use, the military judge allowed the government to cross examine the accused regarding the 1991 positive urinalysis. On cross examination, the evidence of the earlier urinalysis was not offered to prove the accused

170. *Grant*, 56 M.J. at 413.

171. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

172. *See* United States v. Ford, 23 M.J. 331 (1987); United States v. Murphy, 23 M.J. 310 (1987); United States v. Harper, 22 M.J. 157 (1986).

173. 50 M.J. 56 (1999).

174. *Grant*, 56 M.J. at 418. Judge Sullivan also authored the dissent in *United States v. Graham*, 50 M.J. 56, 59-64 (1999).

175. *Graham*, 50 M.J. at 57.

176. *Id.*

knowingly used illegal drugs in 1991. It was offered to rebut the appellant's trial testimony that "there is no way I would knowingly use marijuana" and that, after he was notified about the 1995 urinalysis, he was "shocked, upset, and flabbergasted."[177] The CAAF held the trial judge abused his discretion by allowing the government to admit evidence of a positive drug screen for the limited purpose of rebuttal.

The majority relied on the three part test which established the "rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrongfully used the substance."[178] To satisfy the three part test: (1) the seizure of the urine sample must be a lawful seizure; (2) "the laboratory results must be admissible, requiring proof of a chain of custody of the sample, i.e., proof that proper procedures were utilized;" and (3) "last, but importantly, there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful."[179]

The court found none of these rules had been observed by the military judge in admitting the evidence for the limited purpose of rebuttal and the military judge had abused his discretion admitting it to the material prejudice of the appellant.[180] The court concluded as follows:

> Our dissenting colleagues seem to forget, once again, that our service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.[181]

Judge Sullivan observed the holding in *Grant* eroded the finding in *Graham*.[182] In both, evidence of a positive urinalysis was not offered to prove substantively the appellant used illegal drugs. In *Grant* it was

177. *Id.*
178. *Id*. at 58.
179. *Id.* at 58-9.
180. *Id.* at 59.
181. *Id.* at 60.
182. *Graham*, 50 M.J. at 56 (citing United States v. Grant, 56 M.J. 410 (2002)).

offered under the business record exception to the hearsay rule for the limited purpose of corroborating the confession of the accused.[183] In *Graham* it was offered for the limited purpose of rebuttal on cross-examination.[184] In neither case was evidence adduced regarding the chain of custody nor the compliance with proper procedures in the handling of the specimen. Neither case included scientific or expert testimony to validate the results. *Grant* did not follow any of the three "rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrongfully used the substance."[185]

Grant appears to be the only military case in which the CAAF upheld a conviction based solely on a confession that is corroborated on evidence admitted strictly for the limited purpose of corroborating the appellant's confession.[186] The drug screen results in *Grant* admitted under the business record exception to the hearsay rule to corroborate the confession, fell short of the legal standards of *Graham* and *Murphy*.[187] As such, the results should have been considered inadmissible hearsay.[188] As inadmissible hearsay, this information was not evidence at all. This information constituted neither direct nor circumstantial evidence for showing the accused was guilty of the crime charged. Military Rule of Evidence 304(g) requires that "[a]n admission or confession of the accused may be considered as evidence against the accused only if independent evidence, *either direct or circumstantial*, has been introduced that corroborates the essential facts admitted sufficiently to justify sufficiently an inference of their truth."[189] Direct evidence is defined as "[e]vidence in the form of testimony from a witness who actually saw or touched the subject of questioning."[190] Circumstantial evidence is "[t]estimony not based on personal actual knowledge or observation of the facts in controversy, but

---

183. MCM, *supra* note 5, MIL. R. EVID. 803(6); *Grant*, 56 M.J. at 413.

184. *Graham*, 50 M.J. at 57.

185. *Id.* at 58.

186. *Grant*, 56 M.J. at 414-15.

187. *Id.* at 417; *see* United States v. Murphy, 23 M.J. 310 (1987).

188. "Hearsay is not admissible except as provided by these rules or by any act of Congress applicable in trials by court-martial." MCM, *supra* note 5, MIL. R. EVID. 802.

189. *Id.* MIL. R. EVID. 304(g) (emphasis added).

190. BLACK'S LAW DICTIONARY 576 (7th ed. 1999).

other facts from which deductions are drawn, showing indirectly the facts sought to be proved."[191]

The evidence admitted for the limited purpose of corroborating the appellant's confession in *Grant* meets neither of these definitions. As Judge Sullivan points out in his concurrence,

> [E]vidence of a prior positive test result (in the form of a business record entry) was admitted for a purpose other than to directly show the charged offense. It was admitted to corroborate appellant's confession to all the charged misconduct by proving some of the more recently charged drug misconduct included in that confession.[192]

United States v. Grant is troubling. The CAAF essentially allowed the military judge to forge a single piece of admissible evidence from among several forms of inadmissible hearsay.[193] The accused's confession was not admissible as evidence against him unless corroborated. The drug screen results were not admissible against the accused as a matter of direct evidence under *Graham* and *Murphy*.[194] Yet, the court allowed the judge to bootstrap one onto the other to create a single piece of admissible evidence and convict the accused on that basis. According to Black's Law Dictionary, inadmissible material is not evidence at all. It defines evidence as "[t]hat probative material, *legally received*, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue."[195] The facts of *Grant*[196] are analogous to those in *United States v. Duvall*,[197] in which the opposite result was found.

2. United States v. Duvall

In *Duvall*, the CAAF reversed the conviction of an Air Force appellant who was convicted solely on the basis of his confession.[198] Airman

---

191. *Id.* at 243.
192. *Grant*, 56 M.J. at 418.
193. *Id.* at 410-17.
194. *See id.*; United Stated v. Graham, 50 M.J. 56 (1999); United States v. Murphy, 23 M.J. 310 (C.M.A. 1987).
195. BLACK'S LAW DICTIONARY, *supra* note 190, at 555 (emphasis added).
196. 56 M.J. at 410-18.
197. 47 M.J. 189 (1997).
198. *Id.*

Duvall, the appellant, was charged with the unlawful use of marijuana. He had allegedly used the marijuana with a buddy, Airman First Class (A1C) McKague. Airman First Class McKague confessed to smoking marijuana with the appellant to Senior Airman (SrA) Brents.[199] Information regarding the use of illegal drugs came to the attention of Air Force investigators, who took the appellant into custody and questioned him.[200] The appellant confessed in a written statement.[201] Before trial, the court held an Article 39(a)[202] session at which A1C McKague invoked his privilege against self-incrimination and stated he would not testify as to the merits of the allegations against appellant. The unavailability of McKague's testimony left the government only with the testimony of SrA Brents.[203] Brents' testimony consisted only that McKague had told him the appellant had used illegal drugs with him (McKague).[204] The military judge ruled that, while Brents' testimony was inadmissible hearsay, [205] he could nevertheless consider Brents' testimony on the issue of corroboration. At the close of the government's case, the only evidence against the accused was the confession.[206] "The 'net' result of the military judge's ruling was Brents' corroborative testimony was not introduced during trial on the merits."[207]

In *Duvall*, the CAAF determined there was a requirement that corroborative evidence of a confession be admissible: "[t]he text of the Rule continues the longstanding requirement that a confession cannot be considered on the issue of guilt or innocence unless corroborating evidence 'has been introduced.'"[208] The CAAF reversed the conviction noting that MRE 304(g) has two parts: (1) a determination that the confession is admissible based on sufficient corroboration, and (2) a determination by the trier of fact that the confession *plus* the corroborating evidence establish guilt beyond a reasonable doubt.[209] The CAAF held the AFCCA ignored the second part of this analysis and reversed the conviction.[210] The CAAF

199. *Id.* at 190.
200. *Id.*
201. *Id.*
202. UCMJ art. 39(a) (2002).
203. *Duvall*, 47 M.J. at 190.
204. *Id.*
205. MCM, *supra* note 5, MIL. R. EVID. 802.
206. *Duvall*, 47 M.J. at 190.
207. *Id.* at 191.
208. *Id.* at 192.
209. *Id.* (emphasis added).
210. *See* Major Martin H. Sitler, *Widening the Door: Recent Developments in Self Incrimination Law*, ARMY LAW., Apr. 1998, at 93.

reasoned that "[t]he role of the members in deciding what weight to give a confession would be undermined if the corroborating evidence were produced only at an out-of-court session under Article 39(a) but not introduced before the members during their consideration of guilt or innocence."[211]

3. United States v. Faciane[212]

Unlike *Grant* and *Duvall*, *Faciane* was not an Air Force drug case but the facts lend themselves to a similar legal analysis.[213] Airman First Class Faciane was convicted of committing indecent acts on his three-year old daughter.[214] After the appellant divorced the child's mother in February 1991, he was granted visitation rights. Several months later, the mother observed the child's aberrant behavior after returning from visitation with the appellant.[215]

By October, the child's behavior worsened.[216] The child's day care provider also observed and testified to the child's worsening behavior.[217] The mother took the child to the hospital. Before going to the hospital, she told the child that she was "going to see a doctor and there would be a lady there for her to talk to."[218] The "lady" who interviewed the child was Mrs. Cheryl Thornton, a member of the Child Protective Committee at Children's Memorial Hospital in Oklahoma City.[219] As a result of the inter-

---

211. *Duvall*, 47 M.J. at 192.

212. 40 M.J. 399 (C.M.A. 1994).

213. *Compare id.*, *with* United States v. Grant, 56 M.J. 410 (2002), *and* United States v. Duvall, 47 M.J. 189 (1997).

214. *Faciane*, 40 M.J. at 399.

215. *Id.* at 400. The facts of the case provide the mother "noticed that her daughter would wet the bed, have nightmares, would not eat, and would be withdrawn after visiting appellant." *Id.*

216. The mother described her daughter's behavior as "extremely withdrawn and extremely angry. She could not relax. She was running around the house and throwing her toys. When I put her to bed, she would not relax enough to go to sleep. She was hiding under her bed and crying." The mother testified having observed the child inserting a toothbrush inside her vagina. *Id.*

217. *Id.* "Ms. Fancher testified that in October the child's behavior became 'three times worse.' She would throw toys, hit younger children, refuse to use the bathroom, and refuse to eat." *Id.*

218. *Id.*

219. *Id.*

view, Mrs. Thornton reported the matter to the Del City, Oklahoma, police department, who referred the matter to the AFOSI.[220]

Special Agent (SA) Gardner of AFOSI conducted a custodial interrogation of the appellant. Appellant waived his rights and provided a written statement. In his written statement appellant admitted touching his daughter's vaginal area on three occasions.[221] His written statements revealed the appellant's motive for touching the child's vaginal area was "sexual arousal."[222]

At trial, appellant moved to suppress his statement as uncorroborated. He also moved to suppress Mrs. Thornton's testimony as inadmissible hearsay. The government's response was that Mrs. Thornton's testimony was admissible as a statement for the purpose of obtaining medical diagnosis in accordance with MRE 803(4)[223] and her testimony was corroborative of the appellant's confession.[224] The military judge ruled that the child's statements to Mrs. Thornton were admissible under MRE 803(4) and were sufficient to satisfy the corroboration requirement of MRE 304(g).[225] The Air Force Court of Military Review affirmed the conviction, but the COMA overturned it.[226]

The COMA noted the following two-pronged test to satisfy the requirements of MRE 803(4): "first, the statements must be made for the purposes of 'medical diagnosis or treatment;' and second, the patient must make the statement 'with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought.'"[227] The court

---

220. *Id.* at 402.
221. *Id.*
222. *Id.*
223. MCM, *supra* note 5, MIL. R. EVID. 803(4). It provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id.

224. *Faciane*, 40 M.J. at 402.
225. *Id.*
226. *Id*.
227. *Id*. at 403.

held the testimony failed to satisfy the second prong of the test: "[t]here is no evidence indicating that the child knew that her conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. Mrs. Thornton testified that she did not present herself as a doctor or do anything medical."[228] Having found Mrs. Thornton's testimony to be inadmissible hearsay, the court further held that it was insufficient to corroborate the appellant's confession.[229] There was independent evidence that the appellant had exclusive custody of the child and, that the accused had, an opportunity to commit the offense. The court, however, found this insufficient to corroborate the confession: "we are unwilling to attach a criminal connotation to the mere fact of a parental visit."[230]

4. Reconciling Grant with Duvall and Faciane

All three of these cases involved a confession which was the result of custodial interrogation. In *Duvall* and *Faciane*, the courts held the evidence proffered to corroborate the confession was inadmissible hearsay, and therefore, insufficient as corroborative evidence.[231] Indeed, after *Duvall*, the issue as to whether inadmissible hearsay could be the basis for corroborating a custodial confession seemed to be settled.

> *Duvall* affirms the traditional protection afforded to an accused under the corroboration rule. The court mandates that the prosecution present admissible corroborating evidence to the trier of fact when introducing the accused's confession. The Air Force court's significant departure from the traditional application of the corroboration rule required the CAAF to resolve the issue to ensure the rule's uniform application. The message is now clear: to convict using an out-of-court statement from the accused, the fact-finder must base its decision on a corroborated confession—that is, a confession plus corroborative evidence.

228. *Id.*

229. *Id.*

230. *Id. Duvall* cites *Faciane* as authoritative on the sufficiency of evidence required to corroborate the appellant's confession. *Id.* "Because the military judge's ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant's confession, the findings that are based solely on the confession must be set aside." United States v. Duvall, 47 M.J. 189, 192 (1997).

231. *See* United States v. Duvall, 47 M.J. 189 (1997); United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).

> To satisfy this requirement, the government must introduce *admissible* corroborative evidence.[232]

In *Grant*, the evidence used to corroborate the confession was an emailed drug screen result,[233] which under *Murphy* and *Graham*, constituted inadmissible hearsay.[234] The CAAF upheld its admission "for the limited purpose of corroborating the appellant's confession"[235] and affirmed the conviction solely on the basis of the confession. Bearing in mind the historical distrust of confessions and the concerns involving abuse of power, reliability, and the aspiration for skillful and thorough law enforcement investigation, it cuts against the rights of the accused and endangers the urinalysis program. It is the quality of the corroborative evidence which ensures the protection of the accused's rights. Yet, the quality of the corroboration also helps to preserve the integrity of the urinalysis program. Military Rule of Evidence 304(g) must demand only evidence of a sufficient quality to serve these ends be operative to corroborate a confession.

E. The Quality of Corroborative Evidence

Appellate issues surrounding the corroboration rule frequently involve the weight and sufficiency of the corroborative evidence. Often, the debate is a determination of whether there exists a sufficient quantum of evidence to ensure the reliability of the confession. As the Supreme Court stated in *Smith:*

> There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty.[236]

---

232. Sitler, *supra* note 210, at 103 (emphasis in original).
233. United States v. Grant, 56 M.J. 410, 412 (2002).
234. *See* United Stated v. Graham, 50 M.J. 56 (1999); United States v. Murphy, 23 M.J. 310 (1987).
235. *Grant*, 56 M.J. at 411.
236. United States v. Smith, 348 U.S. 147, 156 (1954).

This article postulates the quality of the corroborative evidence is of equal, if not greater, importance to the reliability of the confession than the quantum of corroboration. In *Grant*,[237] the CAAF relied on *United States v. Melvin*[238] in noting the quantum of evidence needed to corroborate "may be very slight."[239] A closer review of *Melvin*, however, shows that the assertion of *Melvin* as a means to minimize the sufficiency of corroboration may be misplaced.

In *Melvin*, an Army sergeant and his wife were stopped by German police who found cigarettes in the car containing a white powdery substance and three drinking straws with white adhesions on them later identified them as heroin.[240] As a result of subsequent custodial interrogation, the appellant confessed to the use of heroin and provided information about his supplier.[241] At trial, the appellant redacted his confession. He claimed his wife had used the drugs. His wife corroborated his testimony. There was chemical analysis showing he had not used heroin.[242]

The COMA granted review on the following issue: "Whether appellant's conviction for the offense of wrongful use of heroin can stand solely upon appellant's uncorroborated confession."[243] Having certified this issue for review, it is revealing that the court decided the issue on other grounds. "We hold that appellant's confession was adequately corroborated by other evidence presented in this case and conclude that his conviction was proper."[244] The court did not affirm the conviction based on the legal issue as to whether the conviction could stand solely on the basis of an uncorroborated confession. Instead, they determined there existed sufficient independent admissible evidence sufficient to corroborate his confession. Specifically, the court noted the fact that:

> [I]ndependent evidence in the record shows that at the time of his arrest, appellant was in possession of heroin, the very drug he confessed to using earlier. Moreover, the heroin was contained in cigarettes, the very method of consumption he admitted to employing on the earlier dates. Also, the straws found in his car

237. 56 M.J. at 416.
238. 26 M.J. 145, 146 (C.M.A. 1988).
239. *Grant*, 56 M.J. at 416 (citing *Melvin*, 26 M.J. at 146).
240. *Melvin*, 26 M.J. at 146.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

clearly suggest a familiarity with the drug culture consistent with the number of acts he admitted. Finally, evidence of his friendship with Dudu, a known drug dealer, and his leaving Dudu's apartment at the time of his arrest dovetails with his description of the situs and circumstances of his earlier acts.[245]

The record revealed numerable items of evidence, independent of the confession, directly admissible against the accused. The court commented in dicta the evidence "may be very slight," but was referring to the drafter's analysis in making this conclusion.[246] As regards the quantum of evidence, the drafter's analysis provides, "The corroboration rule requires only that evidence be admitted which would support an inference that the essential facts admitted in the statement are true."[247] The drafter's analysis can be read to mandate the admissibility of the corroboration.

Another case often cited for the proposition that the quantity of corroboration is "slight" is *United States v. Yeoman*.[248] In *Yeoman*, a young Marine was charged with larceny for stealing a brown case that contained a number of audio cassettes. Private (Pvt.) Yeoman found the cassette case among some personal items left in a common area. After taking the case, he secreted himself to examine its contents. Inside were twenty-four cassettes, several personal letters and an airline ticket. Yeoman threw sixteen of the cassettes in a dumpster and secured the case in a locker.[249] Once the larceny was reported, Yeoman was taken to the provost marshal's office for interrogation. In the course of custodial interrogation, Yeoman confessed to the larceny in writing.[250]

On appeal, defense counsel argued the confession had not been sufficiently corroborated for its admission into evidence. The COMA, citing the *Military Rules of Evidence Manual*,[251] stated, "the quantum of evidence" needed to raise such an inference is "slight."[252] The corroborative evidence consisted of testimony that Yeoman had missed morning formation,[253] recovery of eight cassette tapes from his locker, recovery of the

---

245. *Id.* at 147.
246. *Id.* at 146.
247. 1984 MCM, *supra* note 103, MIL. R. EVID. 304 (g), A22-13.
248. 25 M.J. 1 (C.M.A. 1987).
249. *Id*. at 3.
250. *Id.* at 2-3.
251. SALTZBURG, SCHINASI & SCHLUETER, *supra* note 94.
252. *Yeoman*, 25 M.J. at 4.

cassette case, and his fingerprint on the cassette case. The court found this to be sufficient corroboration.[254]

In *Yeoman*, the corroborative evidence consisted of several items of physical evidence that were independently admissible against the accused. Both the quantity and the quality of the corroborative evidence were substantial. This is precisely the type of corroborative evidence contemplated in *Smith* and *Opper*.[255] Given the relative quality of the corroborative evidence, it is ironic that *Yeoman* is cited most often for the simple proposition, in dicta, that the quantum of corroboration need only be "slight."[256]

United States v. Harjak[257] presents an analysis of the corroboration rule which illuminates the role of hearsay testimony as corroboration. In *Harjak*, the appellant faced charges of sodomy and indecent acts upon his ten year-old daughter.[258] The appellant had divorced the victim's mother when the child was three years old. The mother re-married. Several years later, the State of Iowa took the child-victim out of the mother's custody and granted custody to the appellant when it determined the child-victim's stepfather had sexually molested her.[259] Four months after the child-victim had moved into the appellant's home, she was again removed. She was placed in foster care when allegations surfaced to the Naval Investigative Service (NIS) that the appellant had sodomized her and engaged in indecent acts with her.[260]

An NIS agent interviewed the child-victim at the foster home. The agent recorded the interview. The interview was later transcribed and

---

253. Private Yeoman was also charged with unauthorized absence from his appointed place of duty. *Id.*

254. *Id*. at 5.

255. *See* United States v. Smith, 348 U.S. 147 (1954); United States v. Opper, 348 U.S. 84 (1954).

256. *Yeoman*, 25 M.J. at 4.

257. 33 M.J. 577 (N.M.C.M.R. 1991).

258. *Id.* at 580.

259. *Id*.

260. *Id.*

sworn to by the child-victim. After this interview, another NIS agent interviewed the appellant, who confessed in writing twice.[261]

At trial, the government moved *in limine* to get a ruling on the admissibility of the confessions.[262] The proffered corroborating evidence was the interview between the NIS agent and the child-victim. The child-victim did not testify. The government sought admission of the interview for the purpose of corroborating the confessions. As a basis for admissibility, the government cited the unavailability of the child-victim and the residual hearsay exception, MRE 804(b)(5)[263] and 803(24).[264] Determining the child-victim to be unavailable and the interview to possess sufficient particularized guarantees of trustworthiness, the military judge admitted the transcript over defense objeciton, as corroboration of the appellant's two confessions.[265] The defense contended that the appellant's Sixth Amendment right to confrontation of witnesses had been violated and that there was insufficient corroborating evidence.[266]

On appeal, the government conceded to the appellant's assertion the military judge improperly found the victim unavailable to testify at trial. The *Harjak* court then examined the interview for particularized guaran-

---

261. *Id.* at 581.

262. *Id.*

263. MCM, *supra* note 5, MIL. R. EVID. 804(b)(5).

264. *Id.* MIL. R. EVID. 803(24). Both MRE 804(b)(5) and MRE 803(24) are currently codified under MCM, *supra* note 5, MIL. R. EVID. 807. It provides as follows:

> Residual Exception. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

265. United States v. Harjak, 33 M.J. 577, 581 (1991).

266. U.S. CONST. amend. VI; Maryland v. Craig, 497 U.S. 836 (1990) (upholding a state-court procedure that permitted a child-victim to testify by one way closed circuit television as satisfying the Confrontation Clause of the Sixth Amendment).

tees of trustworthiness to determine its admissibility under MRE 803(24). Citing *Idaho v. Wright*,[267] the court noted the trustworthiness of hearsay statements under MRE 803(24),

> can only be determined by examining of the totality of the circumstances surrounding the making of the statement. These circumstances must eliminate the possibility of fabrication, coaching, or confabulation and, by revealing the declarant to be particularly worthy of belief, render adversarial testing of those statements superfluous.[268]

The *Harjak* court examined the findings of the military judge and found them insufficient to guarantee the trustworthiness of the statements. The statements in the interview lacked the reliability of admissible evidence, and therefore, "should not have been considered as corroborating evidence of appellant's confessions to sodomizing and committing indecent acts with his daughter."[269] Thus, it was not the quantity but the quality of the corroborative evidence that was lacking.

Harjak stands for the proposition that to satisfy the constitutional requirements, the evidence furnished to corroborate a confession must show "particularized guarantees of trustworthiness" or fall within a firmly rooted hearsay exception. In other words, evidence proffered to corroborate a confession must be as reliable as evidence admitted under any other hearsay exception.

Another case that is illuminating on the issue of the quality of the corroborating evidence is *United States v. Rounds*.[270] Senior Airman Rounds was charged with illegally using marijuana and cocaine during the Thanksgiving and New Year's holidays. A female civilian reported his drug use to the AFOSI. The AFOSI interrogated SrA Rounds. After submitting

---

267. 497 U.S. 805 (1990). The Court held that incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. *Id.* The reliability requirement can be met when the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." *Id.* The residual hearsay exception is not a firmly rooted hearsay exception for Confrontation Clause purposes. *Id.*

268. *Harjak*, 33 M.J. at 582.

269. *Id*.

270. 30 M.J. 76 (C.M.A. 1990).

two written statements which were exculpatory, SrA Rounds prepared a third handwritten statement in which he confessed.[271] On appeal, the appellant asserted "this independent evidence was insufficient corroboration because it did not directly show that he consumed, ingested, or otherwise used drugs as he confessed."[272] The court found sufficient independent corroborative evidence of confession pertinent to the drug use at the New Year's Eve party, but insufficient corroboration as to his drug use during Thanksgiving. The testimony of two witnesses "dovetail[ed] with the time, place, and persons involved in the criminal acts admitted by appellant in his confession. More importantly, their testimony concerning these two incidents clearly shows that the appellant had both access and the opportunity to ingest the very drugs he admitted using in his confession."[273] Testimony from the only government witness as to the Thanksgiving incident was able to ascertain the appellant's presence at the place and time charged but he saw no drugs. The court found this insufficient to corroborate the confession.[274]

In *Melvin* and *Rounds*, circumstantial evidence placing the appellant at the place and time of the events charged, combined with the presence of illegal drugs, was held to be sufficient corroboration.[275] The circumstantial testimonial evidence in both cases was independently admissible showing "indirectly the facts sought to be proved."[276] This differs from *Faciane*, in which the government sought to supply corroborative testimony under MRE 803(4) as a statement for the purpose of obtaining medical diagnosis or treatment.[277] There was independent evidence that Faciane had exclusive custody of the child and, thus, an opportunity to commit the offense. But the court found this insufficient to corroborate the confession, deciding, "we are unwilling to attach a criminal connotation to the mere fact of a parental visit."[278] In all three cases, the government provided circumstantial evidence to supply the required

---

271. *Id.* at 78.
272. *Id.* at 80.
273. *Id.* (citing United States v. Melvin, 26 M.J. 145 (C.M.A. 1988)).
274. *Id.*
275. *See* United States v. Rounds, 497 U.S. 805 (1990); *Melvin*, 26 M.J. at 145.
276. BLACK'S LAW DICTIONARY, *supra* note 190.
277. United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).
278. *Id.* at 403.

corroboration. Reconciliation lies in the quality of the corroborative evidence, rather than in the quantum of the corroboration.

The differing roles of the military judge and the panel members is another important factor in the corroboration-rule analysis. The *Duvall* court, in citing *Faciane* as authoritative on the sufficiency of evidence required to corroborate the appellant's confession, states "[b]ecause the military judge's ruling in this case precluded the members from considering any corroborating evidence in deciding what weight to give appellant's confession, the findings that are based solely on the confession must be set aside."[279]

F. The Role of the Judge and the Role of the Members

Military Rule of Evidence 304(g) assigns to the military judge the role of determining whether there is adequate corroboration of the confession. "The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration."[280] The drafters legislated this assignment directly in response to *United States v. Seigle*,[281] which gave the panel members the decision regarding the admissibility of the confession.[282] This change made the determination of corroboration consistent with the military judge's role in determining the voluntariness of confession under MRE 304(d).[283] The rules generally call upon the military judge to decide preliminary questions on issues as to the admissibility of evidence.[284] Hearings on the admissibility of state-

---

279. United States v. Duvall, 47 M.J. 189 (1997).
280. MCM, *supra* note 5, Mil. R. Evid. 304(g).
281. 47 M.J. 340 (C.M.R. 1973).
282. For a discussion of this issue *see supra* note 92.
283. MCM, *supra* note 5, Mil. R. Evid. 304(d).
284. *Id.* Mil. R. Evid. 104(a):

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

Id.

ments of the accused are required to be outside the hearing of the members when the case is being tried before a panel.[285]

A determination as to the adequacy of the corroborative evidence speaks to the sufficiency of the evidence as a whole, in addition to admissibility of the confession. This reflects the rule's dual role as a rule of admissibility of evidence and a rule of substantive law. It is because of this duality there can be a blur with the respective roles of the military judge and the panel members as it involves determinations of fact as well as determinations of law.

> A finding of corroboration is a finding of law because it governs the admissibility of evidence—the confession. Yet in two respects the finding is also a finding of fact. First, in order to decide whether a confession is corroborated one must make a judgment about facts. Second, this preliminary finding corresponds with the ultimate issue in the case: whether the confession is believable.[286]

An amendment to MRE 304(g) requiring admissible evidence to serve as corroboration of a confession or admission would aid in clearing up these blurred roles. This was precisely the situation the court faced in *Duvall*.[287] In *Duvall*, the government sought to admit the testimony of SrA Brents. Brents' testimony consisted only that McKague had told him that appellant had used illegal drugs with him (McKague).[288] The military judge found Brents' testimony was inadmissible hearsay. The military judge, however, allowed Brents to testify during the Article 39(a) session outside the presence of members to corroborate the confession, but he would not permit the government to present Brents' testimony to the members during the trial on the merits.[289] Based on Brents' testimony at the

---

285. *Id.* MIL. R. EVID. 104(c):

> (c) *Hearing of members.* Except in cases tried before a special court-martial without a military judge, hearings on the admissibility of statements of an accused under Mil. R. Evid. 301–306 shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

Id.

286. Ayling, *supra* note 7, at 1137.
287. 47 M.J. 189, 191 (2002).
288. *Id.*

Article 39(a) session, the military judge found the confession adequately corroborated and admitted it into evidence.[290]

Out of the hearing of the members, the military judge made a qualitative finding of fact that the confession was sufficiently reliable. While it is true that MRE 104(a) assigns to the judge the task of determining preliminary issues of the admissibility of evidence, the ultimate issue was the reliability of the confession. This provides an explanation for the necessity of having evidence admitted independently of the confession. This was the Supreme Court's intent in formulating the trustworthiness doctrine, as stated in *Opper*:

> Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[291]

In *Grant*, the situation before the court was similar, but there was a procedural difference that changed the result. There, the government offered the report of the positive drug screen as a business record exception to the hearsay rule. It was offered for the limited purpose of corroborating appellant's confession.[292] The real issue, however, was the reliability and admissibility of the accused's confession.

Military Rule of Evidence 104(c) mandates that "the admissibility of statements of an accused under Mil. R. Evid. 301-306 shall in all cases be conducted out of the hearing of the members."[293] The admissibility of the confession in *Grant* was debated in open court despite the clear language of MRE 104(c) requiring consideration of admissibility of the confession in an Article 39(a) session.[294] The quality of evidence in each case was similar. This begs the question as to whether the CAAF would have decided *Duvall* differently if the military judge would have allowed SrA

289. *Id.*
290. *Id*. at 191.
291. United States v. Opper, 348 U.S. 84 (1954).
292. United States v. Grant, 56 M.J. 410 (2002).
293. MCM, *supra* note 5, MIL. R. EVID. 104(c).
294. *Id.*; *Grant*, 56 M.J. at 410.

Brents' hearsay for the limited purpose of corroborating the confession in open court rather than only in an Article 39(a) session.[295]

An amendment to MRE 304(g) requiring that corroborative evidence of a confession be independently admissible, would enable us to square *Grant* with *Duvall*. It would also clarify the requirements of the corroboration rule for military judges and counsel in its implementation. Most importantly, such an amendment would ensure the preservation of this aspect of the privilege against self-incrimination and faithfulness to the rationale for the creation of the rule.

IV. Conclusion

Military Rule of Evidence 304(g), the military version of the corroboration rule, may seem simple. Our review of its interpretive case law, reminds us that while the rule seems straightforward, its application to a particular set of facts in a case may be difficult. In its current form, it has led to some inconsistent results. The rule's most recent application in *Grant* endangers its role as a privilege against self-incrimination and could harm the integrity of our urinalysis program.

Military Rule of Evidence 304(g) should be amended to clarify its requirements in order to facilitate its fair and consistent application without eroding the protections it was formulated to provide. Accordingly, the rule should be amended to read as follows (proposed amendments emphasized):

> (g) Corroboration. 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 introduced *into evidence* that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. *Independent evidence employed to supply corroboration of the admission must include evidence that is admissible against the accused. Statements of facts constituting otherwise inadmissible hearsay cannot be the sole basis for a finding of*

295. *Duvall*, 47 M.J. at 189.

> *sufficient corroboration of the confession or admission.* 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. 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.
>
> (1) 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 *quality* 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.
> (2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. *In determining the admissibility of the confession or admission, the military judge must ensure there is some evidence admissible against the accused apart from the confession.* Corroborating evidence usually is to be introduced *into evidence* before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

These proposed amendments are consistent with the historical distrust of confessions and the rationale of the Supreme Court in *Smith* and *Opper*. As Senior Judge Pearson wrote in his dissent in *Duvall* before the AFCCA, "I conclude the trier of fact may use a confession as evidence to support a conviction only when the evidence used for corroboration is otherwise

admissible in evidence before it . . . The majority gives no meaning to words of those great justices who created the corroboration rule."[296]

The proposed amendment simplifies the requirements of the rule and provides clarification. It is consistent with the interpretation given in the majority of military cases. The proposed amendment precludes the erosion of the rule's purpose by preventing the military judge from synthesizing items of inadmissible hearsay in the creation of a single piece of evidence to supply as corroboration, as was the case in *Grant.* The proposed amendment would preserve the precedental value of case law, such as that in *Graham* and *Murphy*, protecting the integrity of our urinalysis program. Most importantly, these proposals strengthen and preserve the corroboration rule as a critical component in self-incrimination jurisprudence.

---

296. United States v. Duvall, 44 M.J. 501, 506-507 (A.F. Ct. Crim. App. 1996) (Pearson, J., dissenting) (citing United States v. Faciane, 40 M.J. 399 (C.M.A. 1994)).