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September 29, 2010

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In re: U.S. v Sgt. Frank Wuterich, USMC

Dear Mr. Puckett:

I am a forensic scientist and an Emeritus Professor of Forensic Science at the University of California at Berkeley. I have conducted crime scene reconstructions for over 47 years. A curriculum vitae and a bibliography are attached in pdf format. Attached to the bibliography is a list of high visibility cases in which I have been involved. The Haditha incident is listed among them. The most recent of my publications relevant to crime scene reconstruction are two chapters in a work entitled Crime Reconstruction, ed. B. E. Turvey and W.J. Chisum, Academic Press, 2006. The two chapters are "The Ethics of Crime Reconstruction," and "Trace Evidence in Crime Reconstruction." A second edition of this work is now in preparation, and I have contributed updated chapters for this edition as well.

In June 2007 I was contacted, and later retained, by Lt. Col. Colby Volkey, counsel for Sgt. Wuterich, to review certain of the physical evidence aspects of the incident that took place in Haditha, Iraq, on 19 Nov 05. In October of that year I received voluminous reports concerning the incident, and was subsequently supplied with photographs, additional reports, transcripts of testimony, an Iraqi post-incident video recording of a portion of what has been referred to as "House 2," and a video reenactment of the incident. It would be senseless to list all of this material here, as the preponderance is not relevant to my review. It was represented to me by Lt. Col. Volkey that I was being supplied with the totality of the discovery material germane to physical evidence.

I was not tasked by Lt. Col. Volkey to conduct a *de novo* review of the entire incident, but rather the segments of the incident that in various reports are referred to as the "Roadside Incident" and "House 2." My review of the discovery material focused on those aspects of the overall incident.

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I reviewed the relevant physical evidence reports, photographs, transcripts, and videos. I met directly with Lt. Col. Volkey and Major Haytham Faraj at Camp Pendleton on 19 Dec 07. I was informed by you on 24 Jan 08 that you were now the lead attorney on the case, and I met directly with you and your associate, Mark Zaid, in Oceanside on 25 Feb 08.

My review of the Haditha incident, and the essence of my comments to follow, centers around the attempts at analysis and reconstruction of the Roadside Incident and House 2 conducted by NCIS Forensic Consultants Thomas Brady and Michael Maloney. The terms "analysis" and "reconstruction" are terms used by Brady and Maloney in their reports, and are terms that are well understood within the community of crime reconstructionists.

The term "reconstruction" as countenanced by crime scene reconstructions is something far afield of what has been advanced by Maloney and Brady. Reconstruction establishes the factual circumstances at the time a crime has been committed. Physical evidence is used to tell a story. For validity to be attached to a crime scene reconstruction, however, certain qualifiers must be present.

First, physical evidence must be present.

Second, it must be perceived and acknowledged as evidence to be utilized in the reconstruction.

Thirdly, and this is exceedingly important, it must be documented carefully. A requirement here is that the evidence may not be moved, removed, nor gratuitously added to.

Fourthly, it must be collected and, when appropriate, subjected to proper laboratory examination.

And lastly, it must be interpreted correctly by competent people possessing the requisite skills to accomplish this aspect.

In my view, in the Haditha matter it is only this last element that has been satisfied. I believe that Maloney and Brady did the best they could under conditions that were not just adverse, but fatal to any valid reconstruction. Maloney and Brady are skilled, experienced, and from the sense I derive from their reports, are principled as well. But I believe that their reconstructions are necessarily flawed as a result of the catastrophic and ruinous collapse of the second, third, and fourth requirements set forth above.

I do, however, take issue with certain of their conclusions, and will address these matters presently.

It is beyond cavil that whatever physical evidence existed at the conclusion of the incident was not collected, nor were photographs taken that would clarify what physical evidence was present. A palpably obvious example of this is the issue of whether any expended cartridge cases in House 2 were fired through Sgt. Wuterich's M-16. We have the benefit of neither recovered cartridge cases from House 2 nor test firings from Sgt. Wuterich's weapon.

Physical evidence necessary to a reconstruction was not acknowledged at the conclusion of the incident. This is certainly understandable given the nature of combat. But while it is *understandable*, it is not *excusable* if a reconstruction is to be attempted at some point in the future. The Haditha scene was not treated as a crime scene at a time when crime scene processing would have been of value. Maloney and Brady attempted to *turn* the scene into a crime scene, applying the techniques generally accepted for crime scene investigation. There are definite standards for crime scene processing, but they were not applicable to the Haditha incident.

At one point, Mr. Maloney was quite candid concerning the physical evidence. In the Discovery of 3 December (not dated, but presumably 2007), 005 Maloney Discovery Disk, A, PowerPoint Briefs, Haditha HQ Brief, Maloney is saying the following in a PowerPoint presentation:

In a typical investigation, we would process the scene for forensic evidence. This would provide a series of "snapshots" of what had happened at a static point in time.

In a typical investigation we would then use bloodstain pattern analysis, scene indicators, laboratory results and wound dynamics/mechanism of injury to place the "snapshots" in a logical sequence.

In this investigation thorough processing of a preserved death scene was not possible. Subsequently, the number of evidentiary "snapshots" to place in order was greatly reduced.

*Think of removing half of the puzzle pieces from a jigsaw puzzle.* (Italics added)

I consider Mr. Maloney's allusion to a jigsaw puzzle to be quite felicitous. I will add to it. In the Haditha incident, we don't really know what half of the puzzle we have and what half we do not have, if in fact we have half and not a quarter or yet another fraction, and which pieces tell us something worth knowing and which pieces do not. If the half of the puzzle that is available consists of the border and the sky, we have not advanced our knowledge of the character of the puzzle. I believe this is precisely the situation with any reconstruction of Haditha event.

In another venue, however, Mr. Maloney is considerably more sanguine concerning the credence of his reconstruction. In a 2009 presentation to the *Association for Crime Scene Reconstructions*, he concluded by saying, "The reconstructive effort was

sufficient to clearly support the veracity of a single version of events and actions that day when the Marines' and the Iraqi's accounts of the events differed so dramatically." I am not aware of what he is referring to in "the Marines' and Iraqi's accounts of the events," but I take issue that *the physical evidence is capable of supporting the veracity of a single version of events.*

In my own review of the matter, I don't believe that the physical evidence supports the veracity of a single version of events and actions. I don't think the physical evidence at Haditha supports much of any version upon which a reconstruction would rest. An example of this is the expended 9mm cartridge case in House 2 (Maloney report ROI 16 Nov 06, 0089) and the expended 7.62mm cartridge case found by SSgt Laughner in House 2 (Brady notes pg. 12, Discovery of 21 Jun 07). Clearly there must be an explanation, that is, another version, that doesn't involve Sgt. Wuterich, who was armed with an M16A1 only. Mr. Maloney's reconstruction of the activity in House 2 does not even acknowledge these expended cartridge cases of two other firearms. Good professional practice does not permit of ignoring evidence that does not conform to a proposed reconstruction. I am skeptical of any physical evidence noted at Haditha, but on this matter, taken in isolation, the evidence should speak for itself. I consider it unlikely that any experienced Marine would misjudge the caliber of a 9mm cartridge case or a 7.62mm cartridge case, or confuse them with 5.56mm casings.

Another example is with respect to Victim #14 in House 2. Mr. Maloney has her kneeling at the South side of the bed, between the bed and the South wall. There is a blood distribution on the wall. This distribution has two aspects, which are duly noted in the Maloney report. However, photographs of the wall show the higher distribution to be denser and with a very distinct upward directionality. This would be consistent with a shot to the head while the victim was erect. Severe damage to head was attributed to this victim by the Iraqi nurse and is repeated by the AFIP report of Dr. Elizabeth Rouse. So now we have two versions, not a single version.

As a person who has conducted crime scene reconstructions under less than ideal conditions myself, I can empathize with Mr. Maloney and Mr. Brady. I can certainly appreciate the frustration they must have felt when exigencies of the situation permitted only a seven minute view of House 2 when they conducted their field examination on 29 Mar 06. Under no circumstances, however, could that be considered an adequate processing of the scene. Mr. Maloney has consistently acknowledged the difficulties attendant to his efforts at reconstruction, given the constraints placed upon he and Mr. Brady. Mr. Brady also gives voice to uncertainty (cf Brady ROI 16 Nov 06 00051-00052). They nevertheless proceed to deliver reconstructions. Here are my concerns:

First, neither Brady and Maloney nor anyone else would be in a position to quantify the validity that could be placed on their reconstructions. Entirely valid? Somewhat valid? I see no feasible means of establishing the soundness, the extent of validity, that accompanies their reconstructions. Brady and Maloney are experienced, but projecting their reconstructions on their past experience strikes me as a weakness, given the fact that the Haditha incident is, and was, unique.

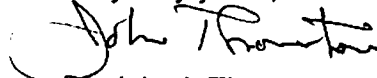
means 51% or 99% probable, or what the implications would be of embracing any particular level of confidence.

Secondly, crime scene reconstruction is supposedly a scientific endeavor, involving the scientific method. An obligatory aspect of the scientific method is the development of hypotheses and the testing of hypotheses. A trenchant hypothesis is the following: Sgt. Wuterich discharged his firearm in House 2, killing a number of Iraqi citizens. There's nothing wrong with a consideration of that hypothesis. But when we attempt to test it, we draw a blank. Under other circumstances, we could test it. We could compare recovered cartridge cases with test firings from Sgt. Wuterich's weapon. But this test is not available to us, nor are other tests of other relevant hypotheses.

Crime scene reconstruction is difficult enough, even treacherous in many instances, when the crime scene is "frozen" following the incident, when the evidence has not been disturbed, when the evidence is carefully documented, when the evidence is collected, and when the evidence is subsequently analyzed. In teaching crime scene reconstruction, I have emphasized this by suggesting that a person go into a neighbor's kitchen after breakfast and reconstruct has happened there in the preceding few hours. Scene reconstruction is difficult to do under the best of circumstances, and clearly the circumstances at Haditha were deplorable.

In summary, I do not believe the physical evidence associated with the Roadside Incident or House 2 is susceptible of being interpreted in a manner that establishes a reconstruction of these events.

Very truly yours,



Dr. John I. Thornton

Attch: (1) cv  
(2) bibliography