

After the Court's ruling, Dr. MacDonell spoke with Defense Counsel about the result. He requested copies of the relevant documents. He was sent the briefs submitted by both sides, the Court's ruling, and a transcript of his testimony on the motion for mistrial.

On 21 April 2009, after the trial, the Defense Counsel received the attached affidavit from Dr. MacDonell, making it clear that just prior to his departure on Thursday, he did in fact inform the Trial Counsel of his opinion that the forensic evidence supported the demonstration he had performed for them the day before that the deceased was shot first in the chest, while standing, and second in the head, while dropping to the ground. Dr. MacDonell swears that he told the Trial Counsel this between the time he told Dr. Berg, and the time of his brief conversation with Defense Counsel as he left for the airport.

LAW

United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008).

WITNESSES / EVIDENCE

The attached sworn affidavit of Dr. Herbert Leon MacDonell. The Defense moves that the affidavit be admitted as evidence on this motion.


ARGUMENT

This Court has jurisdiction and the authority to grant a new trial. United States v. Webb, 66 M.J. at 92. Failure to disclose evidence which could be used to assist the Defense in the preparation of its case, to include formulating strategy, or to impeach a government witness, is a violation of due process. Id.


The Government knew of Dr. MacDonell's favorable opinion before the Defense rested, and before it argued to the members that 1LT Behenna's version of the shooting was impossible. 1LT Behenna did not receive a fair trial. Id. at 92.

CONCLUSION

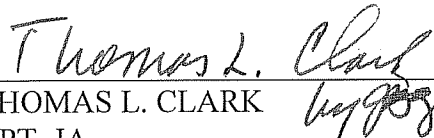
The Court should grant a new trial.



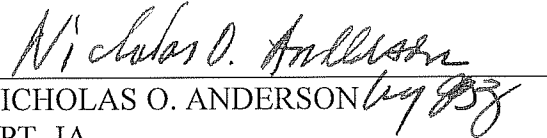
JACK B. ZIMMERMANN
Lead Civilian Defense Counsel



KYLE R. SAMPSON
Civilian Defense Counsel



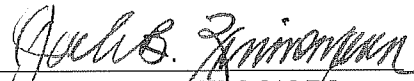
THOMAS L. CLARK
CPT, JA
Senior Defense Counsel



NICHOLAS O. ANDERSON
CPT, JA
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy of the above on the Trial Counsel by e-mail on 21 April 2009.



JACK B. ZIMMERMANN
Lead Civilian Defense Counsel

I had been contacted before trial by Jack Zimmermann, one of the lawyers for First Lieutenant Behenna and told him the same thing. I was set to travel to Fort Campbell on Wednesday, February 25, 2009, to return on Friday, February 27, 2009. I was called and asked to come a day earlier, which I did. I sat in on the testimony of Dr. Paul Radelat and Mr. Tom Bevel. They testified on Wednesday.

At a recess on Wednesday, I was in the prosecutor's office in room 13 in the courthouse. While talking with Dr. Berg about the bullet wounds Ali Mansur received, Dr. Berg gave me information I previously did not have. Dr Berg told me that the wound trajectories for both the chest wound and the head wound were horizontal and essentially parallel.

After thinking about this new information I did a demonstration to show the only logical explanation which was consistent with the autopsy findings, the bloodstains, the final resting position of the body, and the time between shots. I had Sergeant MacCauley stand directly in front of me, and facing me. I asked him to raise his right arm a little and then I poked my right index finger in to the right side of his chest under his arm and said, "Bang! You have just been shot, so drop down." The sergeant dropped to his knees and as his head passed in front of my finger I said, "Bang! You have been shot again." I remarked that this was consistent with the wound trajectories and the bloodstain patterns on the floor, and the testimony of Dr. Radelat and Mr. Bevel, and that while highly unlikely, it was the only logical explanation consistent with the physical evidence. All three prosecutors, Captains Poirier, Roberts, and Elbert were present when I gave this demonstration and informed them of my opinion.

On Thursday morning during one of the breaks I examined the 9mm bullet and saw it had struck a hard object while traveling backwards. This is consistent with the bullet tumbling as it exited one of Ali Mansur's wounds. The uniformity of the extruded lead into a disk-like

configuration shows it was traveling in a horizontal trajectory if the surface it struck was a flat, very coarse, vertical surface. Logically, that could have been the culvert's concrete wall..

On Thursday afternoon, the day after this demonstration, I listened to Lt. Behenna testify. I had seen no written statement made by him. This was the first time I learned what he said had happened. After Lt. Behenna described the shooting, I turned to Dr. Berg and told him, "That is exactly what I told you guys yesterday." There was a recess about 5:00 pm and Lt. Behenna was still on the witness stand. I was told by Captain Poirier that I would not be needed, and a flight was arranged for me for that evening. I told Captains Poirier and Roberts that I could stay another day if necessary. They told me my testimony would not be needed and I could leave to get my flight.

When I went back to room 13 to get my hat, coat, and briefcase the captains on the prosecution team were already in that room. As I gathered my things I reminded them that although the scenario I had presented to them the day before was unlikely, it still was the only theory I could develop that was consistent with the physical evidence. It was also exactly the way Lt. Behenna had described the events. Their reaction was noticeably cold. I went back into the courtroom and went over to Jack Zimmermann. As I was putting on my coat I remarked that I was sorry I was leaving because I would have made a good witness for him. He asked why, and I told him I was a government expert, and could not discuss it with him until after the trial. He asked me not to leave but I did. I did not believe it would have been proper for me to have told Attorney Zimmermann any more than I did. I was not "eager to communicate" with him or I would have told him my concern at that time on Thursday.

I expected that the prosecutors would tell Mr. Zimmermann what I had told them. When I was released without being called as a defense witness, and had returned to Corning, New

York, I was concerned. I consulted two friends, a Supreme Court judge and a lawyer, and decided to check with Captain Poirier to ensure she had passed on the opinion I had given the prosecutors Thursday afternoon when I was getting my hat, coat, and briefcase.

From reading the judge's ruling, I believe the misunderstandings may have resulted from the way I interpreted the questions asked during my telephone testimony on Saturday, February 28, 2009.

When I testified that I told Dr. Berg, "That is exactly what I told you guys yesterday," and did not remember telling my reaction to any other person, I meant right there at that moment in the courtroom. There was no one else but Dr. Berg sitting nearby who had witnessed my demonstration the day before. The prosecutors were at counsel table then.

However, at the next recess, when I went to get my hat, coat, and briefcase, I specifically told the three prosecutors in their office in room 13 the same thing I told Dr. Berg. As I testified on February 28, 2009, "And as I was leaving I told the prosecuting group, I said, "That was exactly what I told you."

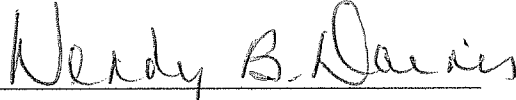
I do not feel that it is fair to put the opinion I related to Dr. Berg and Captains Poirier, Roberts, and Elbert on Thursday in quotation marks. Until Wednesday afternoon I had not been told the wound trajectories for both shots were horizontal and parallel. I had not been provided the bullet to examine. The scientific process required me to consider the physical and medical evidence in reaching my final conclusion. That is why I wanted to see the bullet on Thursday. When I heard Lt. Behenna describe what happened, I did not say other witnesses were lying, or that my conclusion was based on my opinion of the Lieutenant's credibility. My expert opinion was based on the fact that the Lieutenant's description as to how the shooting occurred fit the physical evidence.

I have consulted and testified in many trials, and I know what exculpatory evidence is. I firmly believe the jury should have heard my testimony. I submit this affidavit in the interest of justice.

I know that this affidavit and my telephone testimony differ from what the court heard from the prosecution. I take my oath seriously, and this is the truth. I told the prosecutors on Thursday that what Lt. Behenna had just described is exactly what I had demonstrated to them before I knew what Lt. Behenna would say. I told them this before I made my remark to Mr. Zimmermann on my way out of the courthouse. I am quite willing to take a polygraph if anyone thinks it is necessary.


HERBERT LEON MACDONELL

SWORN TO AND SUBSCRIBED before me on this 20 day of April, 2009.


Notary Public in and for
the State of New York

WENDY B. DAINES
Notary Public to the State of New York
STEUBEN COUNTY
Commission Expires Aug. 24 2009

Appendix to Affidavit regarding the Behenna Case.

MATERIALS RECEIVED ON 16 DECEMBER 2008 FROM CAPTAIN MEGAN POIRIER

- 1) Photographs of the Scene. Source: 1Lt Justin Johnson. Date 16 June 2008.**
- 2) Photographs of the Scene. Source: CID Special Agents Mark Pezel and James Carsten. Date 18 June 2008.**
- 3) Photographs of the Scene. Source: CID Special Agents Mark Pezel and James Carsten. Date 18 June 2008.**
- 4) Photographs of the Scene. Source: CID Special Agents Mark Pezel and James Carsten. Date 18 June 2008.**
- 5) Photographs of Blood Spatter. Source: Ms. Barbara Livreri. Date 11 August 2008.**
- 6) Photographs of Blood Spatter and Report. Source: Ms. Barbara Livreri. Date 11 August 2008.**
- 7) Photographs of Body. Source: Mansur Family. These pictures were delivered to SGT Teresa Tennyson at FOB Summerall, Iraq, by a close friend of Ali Mansur Muhammed. They were burned to the same DVD that contains the cell phone video of the crime scene. Date: Unknown.**
- 8) Photographs of Evidence Collected from the Scene. Source: CID Special Agents Mark Pezel and James Carsten. Collectors: I LT Marwan Amad Khalaf (Grenade Piece and Shell Casing – 17 May 2008) and 1LT Justin Johnson (Bullet and Shell Casing 16 June 2008)**
- 9) Photographs of Evidence Collected from the Scene. Source: CID Special Agents Mark Pezel and James Carsten. Collectors: I LT Marwan Amad Khalaf (Grenade Piece and Shell Casing – 17 May 2008) and 1LT Justin Johnson (Bullet and Shell Casing 16 June 2008)**

10) Autopsy Reports. Iraqi Examiner: Dr. Eada Aswad (17 May 2008). Dr. Edward Reedy and Dr. Jerry Spenser of the Armed Forces Institute of Pathology produced a report based on the documentary evidence available at the time, including the video of the scene and the photographs supplied by Ali Mansur's family. They did not examine the body itself.

11) A DVD labeled: "U.S. v. BEHENNA, U.S. V. WARNER, 12 DEC 08.

**MATERIALS RECEIVED ON 29 JANUARY 2009
FROM CAPTAIN MEGAN POIRIER**

- 1) Synopsis of the eyewitness testimony.
- 2) Dr. Eada Aswad's testimony, 22 Sep 2008.
- 3) 1LT Johnson's Testimony, 21 Sep 2008.
- 4) LT Marwan, testimony, no date.
- 5) Harry.s testimony, 13 Sep 2008
- 6) Harry's testimony, 22 Sep 2008