

THE BAHA MOUSA PUBLIC INQUIRY

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VICTIMS’ RESPONSE: PAYNE SUBMISSIONS

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1. This document sets out the victims’ response to the closing submissions made on behalf of Payne. The victims cross-refer to their own opening and closing submissions as “VOS” and “VCS” respectively, followed by the relevant Part and paragraph number(s).
2. The victims’ main submissions in relation to this witness can be found at the following places in their own written documents: VCS Pt II [291-330], [428] and [446].
3. The victims do not accept Payne’s evidence or arguments that the reality of the Fallon and Crowcroft stag has been varnished or exaggerated by the detainees.<sup>1</sup> The extent of the violence during the day time on the first day is dealt with at VCS Pt II [112-150].
4. Contrary to Payne’s suggestion that the hoods seen in the TDF video were folded over, and not double hoods,<sup>2</sup> the detainees’ evidence that they had more than one hood put on them during the first day is confirmed by a number of soldier witnesses.<sup>3</sup>
5. The evidence to contradict Payne’s suggestion that he ensured that D006 was given medical attention on the afternoon of the first day or at any time prior to the visit of Sgt Winstanley on the second day can be found at VCS Pt II [259] and [365].<sup>4</sup>
6. Contrary to Payne’s submissions that his conduct on the Monday night involved the use of proportionate force to preempt a genuine escape attempt,<sup>5</sup> see VCS Pt II [391-327]. Even if this was Payne’s perception, the degree of force used was objectively perverse.

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<sup>1</sup> SUB000006 (i) and (iii).

<sup>2</sup> SUB000022 [3.55].

<sup>3</sup> See, for example, Fallon BMI02586 [25], Reader BMI03391 [31] and Davies BMI04208 [11] and CM 85/50/25 to 51/2.

<sup>4</sup> There is a typo in the text of the penultimate line VCS [365]. It should say “Sunday” and not “Monday”.

<sup>5</sup> SUB000010 (ii) and SUB000034 [3.99].

As to the concoction of the escape narrative more generally see VCS Pt II [281-283], [326] and [336-340].

7. Payne’s critique of Cooper’s description of the final beating of Baha Mousa is that, if true, it could only have involved skull injuries, which did not occur.<sup>6</sup> Two explanations are possible. The first is that any type of head injury has simply been imagined by Cooper because Payne originally suggested an excuse of the detainee accidentally hitting his head. The second alternative explanation is that with the hood back on, Payne was hitting the face of Baha Mousa against the wall and floor as opposed to the skull. There are serious injuries to the face of Baha Mousa that are far more extreme than those to any of the other detainees and indicate blunt impacts to the face and parts of the head in the final beating.<sup>7</sup>
8. Contrary to the suggestion that the expert evidence is “agreed” that this was a death that was caused by postural or restraint asphyxia,<sup>8</sup> for reasons set out in VCS [328-330], the victims do not regard this matter as agreed in this way. Both experts accepted during oral evidence that the post mortem evidence could indicate a cause of death activated by a further beating and not just a restraint related activity. The whole concept of restraint or positional asphyxia assumes a perpetrator’s narrative, grounding the debate in terms of reasonable care in the use of justifiable force, rather than something more serious that the victims submit occurred here.
9. It follows that the key issue between the victims and this core participant is that in the final struggle, he suggests that “he did no more and no less than he was required to do.”<sup>9</sup> For reasons summarized at VCS Pt II [428] the victims submit that at the point of Baha Mousa’s death, Payne was the principal party in the use of unjustifiable and dangerous violence against a man who was into his second day of torture. During the course of that final beating Payne used force with the intention of causing serious bodily harm.

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<sup>6</sup> SUB000033 [3.98].

<sup>7</sup> James BMI04472 and BMI31/10-6 – 11/3 and 34/1-12.

<sup>8</sup> SUB000010 (iv).

<sup>9</sup> SUB000040 [5.6].

10. As to the citations of features of the evidence of soldiers who spoke well of Payne's character,<sup>10</sup> the victims accept that there is a risk that Payne has been victimized after the event under review in this Inquiry. Clearly Payne's individual wrongdoing has been used by others in an attempt to reduce understanding of the broader individual and systemic causes of the abuse. At the same time (and as acknowledged<sup>11</sup>), there were existing questions regarding Payne's capacity to take largely unsupervised responsibility for the TDF, about which the chain of command should have been on notice.<sup>12</sup> More generally, Forster-Knight accepted that Regimental Provost staff were not necessarily suited (by way of training or independence) to making a leap from being responsible for disciplining their own soldiers in peace time to holding responsibility for organizing the guard of enemy prisoners during hostile operations.<sup>13</sup>

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9 July 2010

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<sup>10</sup> SUB000012 [3.4].

<sup>11</sup> SUB000013 [3.5].

<sup>12</sup> Royce BMI03171 [103-4], Briscoe MOD048600 [2.8] and BMI43/146/2-14 and Quegan BMI00274 [14].

<sup>13</sup> BMI05881 [23], BMI74/15/12 – 17/1 and 59/13 to 61/12.