

## MEMORANDUM

To: Neal Puckett  
Fax (202)

From: John Thornton

Re: US v Wuterich

Since we spoke on the telephone a couple of nights ago, I've been thinking about your upcoming hearing. I faxed you some material, but some of that was partially undigested ruminations. I'll try to be more coherent.

I think it's hopeless to try to keep out the photographs. And I don't think the photographs hurt you. They show dead people, of course, but they don't contribute meaningfully in Brady and Maloney's reconstruction. Certainly Brady and Maloney and Rouse rely on them, but for the most part Brady and Maloney and Rouse tell us what the photographs show, rather than what the photographs mean. What I'm trying to say is that the photographs are descriptive, but they aren't the photographs that Brady and Maloney and Rouse would desire in attempting a reconstruction.

And I think it's hopeless to try to keep Brady and Maloney off the stand. They have the degrees, they belong to the correct professional organizations, they have the experience, they have attended relevant classes, they have published. My suggestion is that you not expend your capital on trying to keep them from testifying at the court martial, but rather that you use the in limine hearing to set them up for cross examination at the court martial.

Dr. Rouse is somewhat different. And I'm not quite certain of how best to deal with her. Certainly she has the qualifications to examine bodies, do autopsies, and render opinions. It isn't clear whether she, or anyone else for that matter, is qualified to look at "snapshots" and, having pretended the photographic review is the same as an autopsy, render definitive opinions. In her training at AFIP, how much time was spent in looking at "snapshots" of trauma victims and rendering opinions? If she did that at all in her training, which I suspect is doubtful, then how did she fare when the actual facts were revealed to her? You might be able to prevent her from testifying, but . . . .

The whole Haditha thing is a colossal clusterfuck, and I think it is in Wuterich's interests to convey that to the jury. Uncertainties are piled on uncertainties which are piled on other uncertainties, and Dr. Rouse may actually be valuable to you in showing just how tenuous any opinion regarding reconstruction would be. For example, we know there are profound differences between Dr. Rouse's conclusions and the observations by the Iraqi nurse. Can we resolve those differences? We cannot. We have one person looking at the bodies, and one person looking at pictures of the bodies. Which is correct? We don't know, and more relevant, we will never know. We don't have a means (in your words, a toolbox of methods) of resolving the issue of gunshot wounds. So anything that is opined here will be, and should be, clouded by some doubt.

If Dr. Rouse testifies at the court martial, there are some issues that you would want to raise with her. I'll explain those when we meet on the 25<sup>th</sup>.

With respect to Brady and Maloney . . . I think they are vulnerable, but I would suggest that you defer revealing that until the court martial. I think you would be much better off setting them up at

the in limine hearing, and then pushing on the weaknesses in what they have done at the court martial.

Brady and Maloney have looked at the tapestry from the back side. The tapestry of the roadside and that of House 2 do not have the clarity that we would wish. ("We" meaning everyone). Maloney speaks of a jigsaw puzzle with half the pieces missing.

There are standards for the processing of crime scenes. They weren't applied to Haditha. If the roadside, House 1, House 2, etc., are to be considered as crime scenes, then they weren't processed in accordance with universally accepted standards for crime scene processing. If the scenes weren't processed properly as crime scenes, then we must pay a bill for the failure to do so. (Again, the "we" here means everyone. Presently, Sgt. Wuterich is being presented with that bill).

Brady and Maloney are certain to agree that they were constrained from doing all of the things that would typically be done in the processing of a crime scene. (They only had 7 minutes in House 2 to complete their examination, and no time at all to deal with the roadside site). Brady and Maloney didn't do the scene processing. With respect to crime scene processing, no one did it.

When we meet on the 25<sup>th</sup> we can go over the coulda-woulda-shoulda, the duties of the first responder, the duties of the crime scene investigator, the documentation of the scene, the collection of evidence, the GIFT principle, what potential information might be supplied by laboratory testing, etc.

For the hearing next week, I would suggest keeping Brady and Maloney's testimony brief and crisp, but here is what I would like to see developed in their testimony:

With respect to physical evidence, Haditha poses some unique problems in reconstructing the events of the incident.

Many of those problems reflect that this was a combat setting, and the Marines did not have the luxury of being able to "freeze the scene" and call for crime scene investigators. (Such as Brady and Maloney).

Exigencies of the situation resulted in the inevitable loss of physical evidence that might have assisted in a reconstruction of the factual circumstances at the time of the incident. (For example, collection of cartridge cases in House 2).

Exigencies of the situation even resulted in the scene being given short shrift when NCIS viewed the scene on 29 March 2006. (7 minutes for House 2, no minutes for roadside scene)

To these exigencies are added some operational ones, such as a failure to have autopsies performed on the victims.

To these exigencies are added some cultural ones, such as the refusal by the Iraqi families to have the victims disinterred.

I think you could use the hearing to pinion Brady and Maloney on these issues, to prevent them from wiggling around them at the court martial. I would be astonished if they didn't readily agree to the statements above. (If they did, they would be setting their hand against everything that crime scene investigators hold dear).

Then, I would ask a series of questions to have Brady and Maloney commit to being scientists. I would not ask them whether their actions were in consonance with the scientific method. I would safe that for the court martial. I would see their questioning along the lines of the following:

- Q: You have a Master of Forensic Science Degree, is that not correct?
- Q: Forensic Science being one of a large number of scientific disciplines . . . chemistry, physics, biology, geology, for example?
- Q: Would you agree that if there is no science, there can be no forensic science?
- Q: So there is a scientific aspect to your work, is there not?

When we meet on the 25<sup>th</sup>, we can discuss how to proceed from there. What I'm getting at, is that if they claim to be forensic scientists, and employ science in what they do, then they are obligated to employ the scientific method. (In short, one cannot be a "scientist" and not use the scientific method). The scientific method involves forming hypotheses, and then testing those hypotheses. The scientific method is not simply stating a hypothesis and then walking away from it, without extrinsic support and without proof.

Brady and Maloney are vulnerable here. They have advanced opinions (i.e., hypotheses), but then were unable or unwilling to test those hypotheses). At the court martial, you will be able to develop this in front of the jury.

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