



# The Price of a Ribbon: Murder

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**Haytham Faraj, TLC July '09**

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## PROLOGUE

In the early morning hours of April 26, 2006, a squad of Marines with the Third Battalion Fifth Marines which is based at Camp Pendleton, California, shot and killed a man whom they claimed was planting an improvised explosive device on a road near the small hamlet of Hamdaniya in Iraq. A few days after the killing eight members of the squad who had been present at the ambush site on April 26, 2006, were arrested and flown back to Camp Pendleton to face trial by court-martial. The squad members faced charges of first degree murder, conspiracy, kidnapping, larceny, obstruction of justice and false statements. The following is a story of the killing and the aftermath. The story is told from several different perspectives. I have sought to tell the story from the perspective of the victim, Mr. Hashim Ibrahim Awad, my client, Trent Thomas and myself. The purpose of telling the story from different perspectives is to capture the fundamental principles of the TLC method, the role reversal. By reversing roles with the various characters, I was able to discover the story from a variety of perspectives that enriched my understanding of the full narrative and enabled me to find a bona fide antagonist rather than impose an antagonist based on whom I believed the antagonist should be.

### I.

Hashim Ibrahim Awad lived a semi-peaceful existence with his wife and 11 children in the small village of Hamdaniya in Iraq. He had been an Iraqi police officer and was now retired. He enjoyed passing his days with his kids and grandkids. He also liked catching up on the latest news and town gossip with friends while sipping the highly sweetened tea ubiquitous at all social gatherings in Iraq.

There was a shortage of everything now. But, somehow, Mr. Awad and his family managed to have enough tea to enjoy a few cups of it throughout the day and to be able to offer it to visi-

tors. Unfortunately, the sugar to sweeten the tea was much less plentiful. Life had become exceedingly difficult after the U.S. invasion of Iraq. That's not to say that it was easy before. Life under Saddam had become intolerable starting in 1980 when Saddam decided to invade Iran. That war brought the country to its knees and destroyed the hopes and dreams of a generation, snuffing out the lives of over a million young men conscripted by the mad-man to fight his war. Then, after that war ended, Saddam made another psychotic decision to invade Kuwait. That invasion brought the wrath of the United States and the rest of the world.

While the loss of life to combat was not as high as those suffered during the war with Iran, this war completely annihilated the country's infrastructure. Gone were the bridges, the power plants, the national museum and monuments that bore witness to the world of the great civilizations that existed upon this land beginning with the Mesopotamians. This was the cradle of civilization. People existed here before recorded history. The American war on Iraq along with the eight years of war with Iran turned Iraq from being one of the most advanced civil societies in the Arab World to one of its least advanced.

Mr. Awad did not hate the United States but he did not like it either. He preferred that they would just leave Iraq alone. If Saddam upset America, then they should just kill him. He believed and knew America is capable of doing anything it wants. So if the Americans really wanted to get rid of Saddam, they could. American soldiers seemed to be everywhere. They even knew about private phone calls. Besides, Saddam was their man when he was fighting Iran and paying the price with Iraqi lives.

To Mr. Awad, the American soldiers occupying Iraq were bullies, often rude, displayed an open hostility to most Iraqis especially young men whom they called military aged males (MAMs); they acted with belligerence, and when threatened or attacked, ruthlessly retaliated by opening fire on everything within sight. At this rate, thought Mr. Awad, by the time Iraq

gets the democracy America wants to give them, there will not be any Iraqis to see it. Americans were trigger happy and had no respect for human life.

Mr. Awad could not understand why Americans always believed that people in the town knew of the Al-Qaeda whereabouts. There is no Al-Qaeda in Iraq. Those people come from Saudi Arabia, America's great friend in the Middle East. And if Saudis kill Americans, then America should take it up with the Saudis or invade Saudi Arabia. Mr. Awad believed America should leave Iraq alone and go to Saudi Arabia to find out who attacked them. But this was war was not about Terrorism. It was about oil. The American government might be able to fool its own people but they could not fool the Iraqi people. Iraqis have never been Al-Qaeda. That is not the kind of Islam followed in Iraq and the American government knew it.

Thoughts of Iraq and what had become of Iraq occupied Hashim Awad's mind as he sat in his sparsely furnished living room in an ancient lounge chair that seemed to lump in all the right places to comfortably embrace him. Mr. Awad had gained a few pounds since retirement, mainly in his mid section, but managed to remain in decent shape. He felt the nagging old ache in his left leg as his grandson Hashim climbed up to sit in his lap. He adored little Hashim who, consistent with Arab tradition, carried his name, as the first son of his oldest son Ibrahim. As little Hashim adjusted into a comfortable position on his grandfather's lap, Mr. Awad rubbed his aching leg and reflected on what had become of his country. *What had they done to lose God's favor?* He stopped his mind from further blasphemous inquiry and uttered the words "al-hamdu-li-lah" (thank god). *Things were bad but they could be worse.* And as the Quran says "do not hate anything, perhaps it is better for you."

During his thirty years of service with the Iraqi police, Hashim Awad suffered an injury to his left leg that partially disabled it and limited his mobility. The leg was more a nuisance than anything. It restricted his ability to be as active as he is used to. At night, during the hot summer months while his family climbed to the roof of their one story cinder block house to escape the summer heat and sleep, he had to remain inside the house because he could not climb the narrow steep stairs. On the evening of April 25, 2006, as the family climbed to the roof of the house to sleep, Hashim Awad placed his thin foam mattress in the corner of the living room, laid down, and waited for the terrible heat to dissipate a little so he could sleep. It was going to be another long hot summer especially without electricity. *Damn Saddam and damn the Americans*, he thought.

## II.

This was not Third Squad's first deployment to a war zone together. But they did have a new untested squad leader and a few new "boots"<sup>1</sup> who had never even deployed before. The squad leader, Hutchins, had never been tested in combat but was charismatic and easygoing. The veterans liked him and, more importantly, trusted him.

The last time this squad deployed, they were in the thick of the heaviest urban combat the Marine Corps had engaged in

since the legendary battles of Hue City in Vietnam. They fought in the Battle of Fallujah. Many military historians determined that the battle of Fallujah was much more intense and deadly than the battle for Hue City. Hue City Marines did not face Improvised Explosive Devices "IEDs" or anything of the sort in their battles with the Viet Cong. Hue City combat pitted one force against another in a built up environment which on its own creates an intense combat environment. The Marines of Fallujah had to fight a determined enemy that deployed modern sophisticated weapons, innovative battle tactics that used supporting over watch positions that covered different firing positions, in a built-up area, and those damnable IEDs.

Corporal Trent Thomas hated the IEDs. He had no problem fighting and understood that he might never return home to his family. He had no problem with that. That's life, the life of a warrior; but he did not want to get blown up by an IED. He really hated those things because they just seemed unfair. They made him angry and made him hate the people that planted them. In fact, he hated all Iraqis because he sensed that they knew where the IEDs were being planted but would not tell them. *Did they not understand that he was there, far away from his family and home for them, to give them freedom, liberty and democracy like President Bush said?* And as the President said: "you're either with us or with the terrorists." The Iraqi people did not seem to be supportive of the American forces which meant that they are with the terrorists. He came to Iraq ready to lay his life for the values the President spoke about; yet the Iraqi people showed no appreciation. Trent Thomas was happy with one thing with this deployment: it was quiet, and he liked it that way.

On the afternoon of April 25, 2006, as Trent laid down to get some rest before the mission that evening, he hoped that this deployment would continue to be quiet. He had experienced enough combat, and seen enough buddies get killed and maimed, in the last deployment to last him a lifetime. He did not desire any more action and was perfectly happy with the way things are in their zone—quiet.

Their zone included the town of Hamdaniya and its surrounding area. Hamdaniya presented a big contrast against Fallujah. People here were not exactly friendly, but they also were not hostile. There were bad guys of course, but thank God not many IEDs. Thomas' unit had been out on patrol a few times and they had yet to get hit. The unit adjacent to them took a bad IED in March of 2006 and lost a couple of guys. 3/5's zone, Trent's unit, was still quiet.

*Only another six or so weeks*, Trent thought, *and this will be all over.* He would return home to his wife and family and have some down time. Trent was ready for it. He did not want to say it around the guys in the squad because he did not want them to think he was dropping his pack or that he did not want to fight. Once you have been in the fight, you understand. But these guys did not and could not be made to understand until they got some of that experience themselves. The only other person in the squad who could relate is Marshall Magincalda.

Marshall Magincalda (Magic) was Trent's closest friend in the squad. They fought together side-by-side in Fallujah and had

both been bloodied. They saved each other's lives and had become blood brothers. They discussed the return home and their plans after the Corps. Magic was fairly certain he would get out and go to college. Trent was not sure but he believed that he might want to stay in the Marine Corps and make a career of it. They did not speak of these things to the boots in the squad, as the boots needed to remain focused and alert; nor was it discussed with Larry Hutchins, the squad leader. Hutchins was a sergeant but had never been in combat and was eager to get some action, perhaps too eager sometimes. Hutchins was very interested in earning the Combat Action Ribbon so that he might join his rightful place among warriors. Trent and Magic felt his eagerness to get into some sort of firefight before they returned. They sensed that Hutchins' eagerness to fight might conflict with their eagerness to return home. Thus they generally kept the discussions of return among themselves.

### III.

As infantrymen, Trent, Magic and other members of the squad were affectionately called "grunts." Grunts rarely received medals or recognition for their actions. Their officers—the guys who write the medal nominations—were too busy planning, preparing and leading to find the time to write medal recommendations. Occasionally a grunt would do the extra-extra-extraordinary and would get nominated for a medal and some colored ribbon. That was the exception, however. Grunts live their grunt lives engaging in heroic actions. Doing something extraordinary is rarely ever noticed and recognition is never expected. They embrace the motto coined by Admiral Nimitz during World War II "[a]mong Marines...uncommon valor is a common virtue."<sup>2</sup>

There is one piece of recognition, though, that every grunt desires. It doesn't even come with a medal. It's just a piece of colored ribbon: yellow, orange and blue. It signifies that the wearer engaged in hostile action with an enemy. The ribbon is known as the Combat Action Ribbon and few grunts who deploy to Iraq fail to qualify for it. It appeared that this tour was going to be the first one when a Combat Action Ribbon would not be earned by the Marines of Third Squad. And Sergeant Larry Hutchins wanted one more than anything.

Larry Hutchins was becoming impatient. They were well into their fourth month of deployment with no real fighting yet. Pretty soon the squad and the entire platoon would be moved to a safer area to begin to prepare to return to the U.S. When that happened, the opportunity to earn that warrior badge of honor, the Combat Action Ribbon, would be gone, perhaps forever.

Hutchins thought of ways that the squad could do something to allow them to see combat. He often spoke to his Platoon Commander, Lieutenant Phan, about tactical movements and

ways to flush out the bad guys. Hutchins thought Lieutenant Phan was a good guy. He hated the Iraqis just like he did. He knew that they could not be trusted. Lieutenant Phan may not have any more combat experience than Hutchins did, but he was proving his mettle by picking up some of these Iraqi military aged males (MAMs) and extracting intelligence from them. On numerous occasions, Hutchins watched as Lieutenant Phan interrogated MAMs and used techniques that Hutchins sensed were probably illegal; *but who cares*, he thought. *Fuck'em. They're all terrorists or will become terrorists and everyone one knew it.*

The problem was, even though Hutchins knew all the Iraqi MAMs were either terrorists or sympathizers, he could not simply arrest or kill people. The leadership and authorities demanded that anyone arrested must be surrendered with either an arrest warrant or evidence proving the crime. Hutchins despised the police procedures they had to operate under. *I am a Marine not a cop. I joined the Marine Corps to fight and kill.* He wanted his opportunity to kill a terrorist and to get his Combat Action Ribbon. *Tonight would be a good opportunity*, thought Hutchins. They would be setting an ambush just outside Hamdaniya. *Maybe we can get Gowad.*

### IV.

Trent Thomas, Marshall Magincalda and the rest of the junior Marines of Third Squad arrived at the ambush site near the tiny hamlet of Hamdaniya on the night of April 25, 2006, they were preparing for another boring and sleepless night. Ambushes typically are boring because, usually, nothing happens. "Nothing happening" is actually the rule rather than the exception. But Hutchins

What type of defense could there be to these crimes? This murderer executed a helpless man without any cause or justification. How do I explain what I am doing to my friends and family? This is worse than My Lai. At least at My Lai the murderers could use anger as an excuse to mitigate their conduct. This unit was not attacked. They simply wanted to kill.

had something else in mind.

They had been to this hamlet many times before. They suspected that there are probably some bad guys there, but the bad guys had learned not to challenge the Marines. The Army units in the next sector-over were getting beat-up by IEDs. They constantly suffered IED attacks and a high casualty rate. In contrast, the Marines had established a strong presence and had made it clear that they would not tolerate being probed, tested or attacked. The locals learned quickly that the guys in the tan outfits were serious. They labeled them "tan devils" and stayed clear of them.<sup>3</sup>

The Marines of Third Squad, laying in ambush near Hamdaniya on the night of April 25 and the early morning of April 26, knew that the attackers of the Army came from their sector. The Marines had discovered a massive arms cache in an open area behind the houses in the hamlet, and they had reliable intelligence that the attacks were planned and carried out by people from their sector. The suspect responsible for the attack is a man by the name of Gowad; but he was elusive and always a step ahead of the Marines. Third Squad knew where Gowad

lived, and had questioned him on more than one occasion, but was never able to catch him with any evidence that could prove his guilt in court. The Marines had even arrested Gowad once, but were forced to release him a few days later because they did not produce sufficient evidence for the Iraqi court to keep him locked up.

## V.

“That’s a stupid idea. Why the fuck would we do that?” said Magincalda. “This way we’ll get rid of Gowad once and for all,” replied Hutchins.

Thomas wavered. He agreed with Magic when Magic spoke; then agreed with Hutchins when Hutchins replied. The junior members of the squad were not privy to this plan. Hutchins took Magic and Thomas aside to brief them on the night’s actions. Magic, Thomas and the Corpsman, “Doc” Bacos, would leave the ambush site, grab Gowad, and bring him to a large shallow hole in the road left by an old IED. There, Gowad would be bound and left until the three rejoined the squad in the ambush site. Once all squad members are back together in the ambush site, they would all orient on Gowad and open fire together as Hutchins calls in a report that they were in view of a terrorist digging a hole to plant an IED in the road. The plan would get rid of Gowad once and for all, maybe earn the squad a few medals and certainly a Combat Action Ribbon for everyone including Hutchins.

Magincalda did not like it. Thomas was not crazy about the idea, *but who the hell am I to question my squad leader*. Besides, getting rid of Gowad cannot be a bad thing. “Well, what if we don’t find Gowad?” said Magincalda. “Grab someone else” said Hutchins. “They’re all terrorists anyway.”

At around 11:30 p.m. on April 26, Magincalda, Thomas and Doc Bacos left the ambush site and headed for Gowad’s house. They walked slowly but deliberately the few hundred meters on the road towards the small hamlet until they reached the house. After knocking and inspecting the house by looking through its windows, they realized that it was empty. Falling back on the alternate plan, they went to the house next door.

## VI.

The knocking rustled Hashim Ibrahim Awad from his restless sleep. It was still hot and the warm still air inside the house made sleeping difficult. He struggled to stand up and to steady himself on his feeble leg. He suspected the Americans were on another one of their middle-of-the-night searches. He thought he would open the door and cooperate so that he could quickly return to his limp mattress to steal whatever rest it could still offer. The women and children were awakened by the knocking as well. They knew the routine. They would remain in place as their father let the Americans in.

Hashim Awad opened the door to the three Americans. To him, American soldiers always looked like alien beings. They seemed so much bigger and more powerful than normal people and with their night goggles that allowed them to see as well at night as during the day. Awad wondered if they could see

through walls. *They probably could*, he thought, as he attempted to communicate with the men in the door.

The three men stood there with their automatic guns and their armored vests and helmets looking imposing and impenetrable. “Come outside sir,” one of them said. “No English,” said Awad shaking his head from side to side, indicating he did not understand. Thomas stepped forward and guided Awad outside the house. On the roof above, the women and children looked on. Terror gripped them. The Americans are taking their father away again. *I wonder how long he’ll be gone this time*, they collectively thought.

Mr. Awad stepped forward and began to walk with the Marines. While Bacos remained with him, Thomas and Magincalda went to grab a shovel and an AK-47 automatic assault rifle from other houses nearby. (In Iraq, every house had an AK-47. The Americans permitted it.) The plan hatched by Hutchins required that they plant a shovel and an AK-47 to make it look like the person was in fact digging a hole.

Mr. Awad began to slowly shuffle along the road guided by the Marines. His disabled leg made the walk exceedingly difficult and slow. *There will not be any sleep tonight*, he thought, as he wondered how long it will take them to release him this time. Last time they took him in, it took them three days to finally let him go.

It took more than 30 minutes to cover the 800 or so meter distance to the ambush site. They moved slowly because Mr. Awad could scarcely do more than shuffle along. Finally they reached the hole in the road. Once at the hole, Magic and Thomas bound Mr. Awad’s feet and placed him in the hole as Doc Bacos looked on. They placed the shovel in the hole next to him and began to head in the direction of the awaiting squad. They called Hutchins by radio to tell him that they were about to reenter friendly lines.

Once they reestablished contact with their squad in the ambush site, Hutchins called in a report to his higher headquarters and reported an armed man digging an IED hole in the road. That statement was the cue for Magincalda to point the AK-47 into the air and break the quiet stillness of the warm night with cracks of machine gun fire to simulate taking fire from the terrorist on the road ... which they did.

On the roof, Hashim Awad’s family heard the gunfire and wondered what was going on. *Someone must have ambushed the Americans*, they thought. They prayed for their father’s safety.

The report of the Ak-47 was the initiating signal for the squad that was now oriented on the disabled and confused Hashim Awad struggling to break the zip-ties around his legs and arms to escape the hole.

Thomas fired first with his M-16 semi-automatic rifle. He also directed the other Marines in the squad to fire upon the man in the road with their M-16 rifles and their M-249 squad automatic weapons.<sup>4</sup> The junior Marines in the squad fired in a massive volley of automatic fire on the bounded man in the road believing him to be the hated Gowad.

On the road, sensing perfidy, betrayal and imminent mortal danger, the disabled man struggled to free himself. He managed

to leave the hole, but his crippled leg would not cooperate. He had moved fifteen or so feet when the first bullet tore through his weakened body. He fell but continued to try and escape the bullets. Mr. Awad got up to run on legs that would no longer cooperate. It did not matter. He could not outrun the bullets. They were faster than he. They caught him and began to claim what was not theirs to claim. Bullets riddled his body. He was still alive when the squad of eight Marines rose from their positions and advanced towards him.

Hashim Awad could not understand. He prayed to God for forgiveness. He was not feeling pain but was in the deepest abyss of anguish over his family and kids. How would they survive? *Do not hate anything; perhaps it is better for you*, he thought.

Thomas aimed and took a last shot at Hashim Awad killing him. Hashim Awad felt nothing. Mr. Awad's brain had ceased to register physical pain. Thomas coldly removed the tie from Mr. Awad's hands as the squad looked on. The Marines struck a cordon around the body as Hutchins called in a false report of a dead terrorist.

Finally, Hutchins was eligible to receive the Combat Action Ribbon.

## VII.

"I detest you and your actions. I have no desire to represent you." I said to Thomas. The attorney interview room at the Camp Pendleton Brig is a small windowless room about eight feet by eight. I had been assigned to the case despite my protests. I was against this goddamn war and had no desire to represent its war criminals, especially war criminals from the very unit I had served with as a young Marine. I could not believe that I had the poor luck of getting this case. *What the hell was I supposed to do it with it?* "What the fuck were you thinking? Do you have anything to say?" I said to Thomas who sat in a chair across from me in the small stuffy room. He looked down at his feet in silence.

Thomas was dressed in a blue coverall which indicated he is in pretrial status. I could not understand how this lithe, clean-cut black kid could commit such an act of violence against a man who caused him no harm. I struggled with my emotions. I wanted to hate him but he was likeable and respectful. The kid had kind eyes that spoke of gentle demeanor incapable of committing the evil act he was accused of. But I had also read the investigation which included his confessions. He had admitted that he did what he was accused of, and his conduct was devoid of all human kindness.

*What type of defense could there be to these crimes? This murderer executed a helpless man without any cause or justification. How do I explain what I am doing to my friends and family? This is worse than My Lai.<sup>5</sup> At least at My Lai the murderers could use anger as an excuse to mitigate their conduct. This unit was not attacked. They simply wanted to kill.* My head was full of these thoughts and others that threatened to rob me of any peace of mind, forever, if I defend this murderer.

By the time I was assigned to represent Thomas, he had confessed to investigators in Iraq, in a letter to his wife that was intercepted by jail authorities and on a video he prepared for his

wife in Iraq. He had admitted to the unjustified murder. The case appeared to be ripe for a plea deal. And Thomas was already expecting a deal based in discussions with a civilian lawyer that his family had retained. The Government made it clear that a quick plea agreement along with an agreement to cooperate by testifying against the other squad members would be looked upon favorably but that the offer is evanescent. They needed only one or two cooperating witnesses since they already had confessions from everyone except Magincalda. The first one or two to agree to cooperate and plead guilty would get a favorable deal. The remainder could plead guilty to first degree murder and face life without parole. A failure to plead guilty will result in a capital referral to court-martial. My civilian co-counsel had already explained the legal landscape to Thomas to prepare him for the plea agreement. This was to be my first murder case. I felt deep reservations about the case and the client and was happy to go along with the recommendations of my civilian co-counsel.

My co-counsel was a civilian lawyer who had far more experience than I. He wanted me to help him negotiate a deal. I was only too happy to help the murderer plead guilty. A deal would give me the out I was looking for. Besides, I was the military attorney, meaning my role would only be as second chair.

But as soon as negotiations on a plea agreement started we hit a major obstacle. Thomas was willing to plead guilty, but he refused to testify against the other Marines in the squad and especially Magincalda. Without an agreement to cooperate, the Government refused to accept any agreement to plead guilty. I worked on Thomas, worked on negotiating a deal and began to prep because it appeared that there is a chance that we would not get an agreement.

The case was going to be referred capital. I attended courses on capital litigation. And the more I learned the more I realized I was way over my head. This is not territory for me, at least not yet and certainly not this case with facts that challenged my most fundamental beliefs. Nonetheless, I had a duty to represent the murderer. I learned to ignore my contempt of him and his actions and to delve into his background. I attempted to see him as something more than the embodiment of his monstrous act. Meeting his mother and sister helped me see him as more human than I was willing to admit. I was gaining good evidence for a sentencing case but I was still feeling disconnected and distant.

In short, I did not care.

## VIII.

My introduction to the TLC method began the day I met Joseph Low (Joey). It was early December 2005, as I watched Joey take apart a woman who had alleged that she had been raped. It seemed to me that he had been in the room with her and the defendant or at least had access to her head. I was intrigued. At the conclusion of his cross-examination, after a break, I walked up to introduce myself and quickly learned that we had something in common. He had been an enlisted Marine, as I had been. That seemingly minor fact created an instant bond between us and raised his credibility in my eyes. I had been a Marine for over nineteen years at that point and had led hundreds of men

in and out of combat. I had learned to evaluate people. Most successful lawyers I had met tended to be boastful and arrogant. Watching them wax eloquent about their skills and legal prowess reminded me of some sage advice I had once received from a commander of mine whose creased face carried tales of experiences and wars in distant lands that gave him wisdom far beyond his years; he said to me “as you go out to the fleet remember that the spouting whale gets the harpoon.” Most successful lawyers I had met were spouting whales. But here was this successful yet unpretentious, talented yet humble, lawyer and former Marine who was doing something unique and infinitely human.

True, I was now a lawyer, but I had learned something fundamental about human beings in my many years in the Marine Corps: people rarely do what they do not wish to do. I had to learn to understand people’s needs in order to persuade them to do what I wanted them to do. I had learned to lead. And here was Joey leading witnesses to where they did not want to go and to do what they did not want to do. We became friends and he began to mentor me in the techniques he used. Joey undertook to teach me some of the TLC techniques, as he did with many other lawyers in the defense office at Camp Pendleton. He recommended books and came around to patiently assist attorneys in preparing their cases. He gave of his time and his gifts with unhesitating vigor. The more I was exposed to the TLC techniques, the more I wanted to learn.

My opportunity to learn and meet some of the masters of the TLC techniques came in the early Spring of 2007 when Joey coordinated a seminar to assist the military attorneys defending what came to be known as “the Pendleton 8” in 2007. The seminar was staffed by Gerry Spence, Milton Grimes, Jim Nugent, Joshua Karton and Joey. It was transformational: I discovered what it is that moves me. For this case, I learned that I did not really care about Thomas or the story. I let my anger at the war and at politics cloud my judgment about my professional and personal obligations to Thomas. Reflecting on what I had learned at the seminar, I realized that I had to either fully and truly represent this young man, or get off the case. *If I am going to represent him then I had to do it to the best of my abilities which meant I better learn to care.*

My lack of caring for Thomas came from my inability to discover the story. I needed to discover the full story and not merely the facts Thomas regurgitated. I filed a motion to have Thomas brought to my office three days a week and began to work on discovering the story by doing role reversals and reenactments.

I discovered that Thomas’ platoon commander, Lt Nathan Phan, had engaged in a series of war crimes that included extra-judicial punishment, torture, and violence against captured Iraqis. That discovery led to uncovering a chain of other incidents that based on my military experience could set the stage for an argument that the toxic command climate within the unit led to the killing. Command climate is a term used by military leaders to describe the leadership environment within a particular unit. A unit with a competent, disciplined, law-abiding leader results in a competent disciplined law abiding unit. A unit

with a rogue incompetent leader may result in a rogue unit.<sup>6</sup> In working on discovery of Thomas’ story, I learned to care about a young man who clearly, to me, had become a victim of circumstances beyond his control. In contrast to Lieutenant Phan, Thomas’ platoon commander in the previous deployment maintained discipline and a commitment to the unit’s obligations to the laws of land warfare by constant vigilant-leadership that aimed to eliminate illegal conduct. He constantly reminded his Marines of their obligations under the law and why they must treat the populace in a humane and respectful manner. Under his leadership the unit participated in some of the heaviest combat of the entire Iraq war yet never violated the rules of engagement. Under Phan’s leadership, the same unit’s conduct stood in stark contrast in a much more benign combat environment.

In my journey to caring, I also discovered in Thomas a young man who was easily persuaded. He had suffered a Traumatic Brain Injury (TBI) during a previous deployment that impacted his ability to control his impulses and rational thought processes. His brain injury along with his military training which demanded instant unquestioning obedience to orders diminished his capacity to reasonably distinguish unlawful from lawful orders.

The result meant that he was easily persuaded by, and unquestioningly succumbed to, authority figures. Tell him to jump off a bridge and he just might if he trusts the person giving the command. The murderer became a likeable, humorous, affable young man who simply desired to please by demonstrating his disciplined obedience to orders and his commitment to accomplishing any mission he is tasked with because success in the military means you do what authority commands you to do.

As a child and a young man, Thomas overcame significant adversity, poverty, hardship, and the pull of the streets. “When we were in St. Louis my mother lost her job for a few years.” He said to me one day as we were discussing his childhood. “We lived in abandoned houses. We had no running water or electricity. I had to protect my little sister when my mother would leave to look for work or to go to some temporary job. I also had to fight the bums and druggies who tried to come in to the abandoned house we lived in. We didn’t have a bathroom to take showers or wash in; we had to ‘shit’ in plastic bags and put the bags outside.”

I found in Thomas a humanity that had thus far eluded me. This Trent Thomas was a peaceful young boy who desired nothing more than to make a better life for himself and his family. He cared about people. He loved his family and they loved him back. He was gentle and thoughtful and human. He joined the armed forces in the belief that he could improve his station in life.

But the same government that betrayed him as a child would also betray him as an adult by sending him to fight an illegal and unjust war in a morally grueling environment under an incompetent leader after suffering a brain injury. It is the same Government that was spending a billion dollars a week on war but refused to spend the money to hire the psychologists and psychiatrists necessary to diagnose and treat the casualties of its

war. Thomas' and Awad appeared to have more in common than either could have realized. They were both victims of the same immoral, inhumane, and callous political and economic policies that abandoned Thomas as a child and demanded he go to wage war as an adult in a distant land against a people who had never harmed him as the price of the promise of future social acceptance and economic opportunity.

As we continued to work on Thomas, I also worked on me. I attended a psychodrama regional at the ranch. It was my first full experience with psychodrama. I imagine that my experience must have been similar to the first experience of others with psychodrama: it was uncomfortable and surreal. But I had decided to embrace everything TLC had to offer; and if the self-conscious discomfort of psychodrama is a part of it, then I would embrace it as well. Discomfort was something I was used to as a Marine. And long ago I had learned that discomfort taught me more about myself than any comfort I had experienced. The discomfort of the psychodrama was going to pave the way to a path of self discovery that would also eventually lead to discovering and understanding the complex story of Trent Thomas. It would be a story of command failures, grievous officer misconduct, untreated brain injury, and a person humanized by his capacity for unconditional love.

I also began to explore the story from Hashim Awad's perspective. I reversed with Awad and felt his terror as he was led away from his house and the emotional shelter provided by the love from his family. I experienced his horror as he lay in the hole when the shower of lead tore through the darkness to steal his life.

On many nights I lay in bed awake thinking about Mr. Awad and his family. Often I would awaken with a singular thought of Awad's final horrible moments. I did so much role reversing with Thomas and Awad that I sometimes wondered whether I was causing myself some post traumatic stress because I began to lose sleep or awaken gripped by the horror of disturbing dreams.

I also continued to uncover evidence of Lieutenant Phan's war crimes. And through role reversal enabled by my own psychodrama and experience as a Marine I stumbled upon the heroic actions of Thomas and Magincalda in Fallujah and the strict adherence to a code of conduct and the law of war during a previous deployment under the leadership of a commander who showed humanity to the Iraqis, respected the rule of law and set an example for his men to follow. Neither Thomas nor Magincalda would freely speak about their actions in Fallujah. Only reluctantly did they divulge how they had been wounded and saved each other's lives while under fire. I had finally uncovered the full story. It was a story of brotherhood, heroic actions, and a leader's betrayal; and it demanded to be told.

## IX.

"I don't think we should try for a plea agreement." I said over dinner late one night during the early summer of 2007 to my co-counsel. "

What do you mean," he responded.

"I believe I can win this" I replied.

"I can't agree to that," he said.

"You don't understand this case" I told him. "I can win it."

We continued to disagree. I finally told him that we should let the client make the decision: it is his decision to make anyway. I grabbed my cell phone and called Trent at the military brig at Camp Pendleton at 9:00 p.m. The case manager was unavailable but I persuaded the brig supervisor to bring Trent to the phone. When Trent came to the phone, I said "Trent, We've been discussing the case and I don't think you should plead guilty tomorrow. I believe I can win this."

"Really?" he responded excitedly.

"Yes. I believe that." I said.

By this point in our relationship, Trent fully trusted me. We had spent countless hours and days together discovering his story, and working to uncover and reveal layers of trauma and conflict in his life. We became friends. We were again brothers-in-arms who shared the legendary heritage of the Fifth Marine regiment.

"Sir, I can't tell you how happy I am. I didn't want to plead guilty anyway. I trust you, sir," he replied.

My co-counsel decided to allow me to take the lead because

If I am going to represent him then I had to do it to the best of my abilities which meant I better learn to care.

he had focused on a plea agreement and felt unprepared to try the case. I took over and began to prepare for trial. My trial preparations included lengthy sessions of scene settings and role reversals with extensive surplus reality that aimed to ensure nothing was overlooked. I role reversed with Lieutenant Phan and Sgt

Hutchins. I spoke to Magincalda and participated in some of his team's trial preparations.

And I discovered in Lieutenant Phan a man who was unsure of himself. Fear drove him to behave badly and to set a poor example. I had been a platoon commander. I understood the overwhelming pressure from the responsibility of caring for the well being of more than 40 men in a combat environment, the dreadful obligation of having to write a letter to a mother to inform her that her son would not be returning. I understood Phan's pressures but I also realized his grave failures. He lacked the moral courage to do the right thing because it was just easier to do the wrong thing. And he did the wrong thing because Phan's senior leadership failed to properly support him, supervise him and ensure that he provided proper leadership to his men. In the failure of Phan and his senior leadership to provide oversight and guidance, I found a theory of defense that a military jury could identify with because I knew I would have identified with it.

## X.

Trial began in early July of 2007 and lasted three weeks. The Government called dozens of witnesses. Forensic scientists and scene reconstructionists of all sorts testified. Experts on the law of land warfare testified. The Government presented an excel-

lent case but did not call Phan. I was going to have to call him. I preferred to cross him. That's how I had prepared. I called Phan in my case.

I began slowly. I felt his fear. I reversed with him. I used him to tell a story that led the jury find him responsible for the poor command climate and ultimately the murder without me ever having to accuse him. His weak character became obvious but without me attacking. Phan could not lash out at me because I did not attack him. I helped him tell his story, the story that I discovered and the story he really wanted to share because I made it safe for him to share it by demonstrating understanding and by affirming his feelings. The safety I provided allowed him to admit to his own failures, to acknowledge how those failures would have impacted Thomas.

He admitted to his own crimes and a failure to demonstrate courage and leadership when he was told by Hutchins of a plan to arrest and perhaps kill Gowad. Phan said nothing to Hutchins. But in his silence, he endorsed Hutchins' plan.

As I continued in my direct of Phan, I sensed the anger of the jury with Phan. Like me, they began to care about Thomas. They were ready to become the leaders that Thomas was entitled to have. The jury took on the responsibility for protecting Thomas—I could tell by their questions to Phan at the conclusion of the direct and cross.<sup>7</sup> I sensed the jury's anger at Phan. I also recognized that in their anger at Phan came caring for, and understanding of, Thomas.

The next two witnesses were a forensic psychologist and psychiatrist. They spoke of Thomas' childhood and his combat related Traumatic Brain Injury. The difficult childhood and the trauma to his head left him with a tendency to follow the lead of people he trusts. Unlike Magincalda who immediately saw Hutchins' idea as a bad one, Thomas embraced it because it came from Hutchins.

On July 27, 2007, the jury returned a verdict of not guilty on all murder and conspiracy charges. The jury found Trent Thomas guilty of theft of a shovel and a false statement.

In military trials, sentencing is imposed by the jury. I asked the jury to give Trent back to his Mother, wife and sister. I asked them to let the conviction and the 16 months he had already served in prison serve as his sentence. I told them that I was afraid to let Thomas go but expressed confidence that they would protect him and give him back to his family. I felt fear, the terrible fear every criminal defense lawyer feels before the jury assumes responsibility for the client. I shared with them what I felt. Their eyes told me they understood. Trent would be safe.

After several hours of deliberations on a sentence, they jury gave Thomas exactly what I had asked for. The jurors sentenced Thomas to no confinement and gave him a Bad Conduct Discharge. The Government had asked for a fifteen year sentence and a dishonorable discharge. The jury also made a unique recommendation that demonstrated that caring really is contagious. On the verdict form they specifically recommended that Trent Thomas be afforded health care benefits to treat his PTSD and TBI.

Trent went home with his wife and mother that evening after nearly 16 months of confinement in addition to the six months he spent in Iraq before his arrest. ☺

## ENDNOTES

- 1 The term "boot" is commonly used by senior Marines to refer to junior Marines. In combat, the term boot refers to someone who has not been tested under fire.
- 2 Admiral Chester Nimitz was the commander of amphibious forces during the invasion of the Japanese island of Iwo Jima in February of 1945. In commenting on the actions of Marines on the island he said "Among the Marines serving on Iwo island, uncommon valor was a common virtue."
- 3 Marines wear a camouflage uniform that is tan color with a digital computer generated camouflage pattern. The Army wears the exact digitally created camouflage pattern but with gray-green in color.
- 4 The M-249 squad automatic weapon, also known as the SAW is a light machine gun that is capable of firing 1100 rounds per minute.
- 5 See footnote 6, *infra*.
- 6 The My Lai massacre in Vietnam resulted from the rogue actions of a unit leader, Lieutenant William Calley, who established a command climate that dehumanized the Vietnamese people. The members of Third Squad and others in the platoon commanded by LT Phan referred to Iraqi as cock roaches. The dehumanization of the Iraqi people was a direct result of Lt Phan's aberrant leadership and rogue conduct.
- 7 The Procedural Rules for Court-Martial permit juries to ask questions of witnesses. Jurors write down their questions on papers provided by the court and submit them to the judge for review. The judge then passes the questions to the prosecution and defense who have a right to raise objections in writing on the same paper. The judge then reviews the questions and reads it to the witness unless there is an objection that or she agrees with.

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