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MILITARY: Civilian jury deliberating fate of former Marine

By MARK WALKER - Staff Writers

RIVERSIDE ---- The slaying of four unarmed captives during a 2004 battle for the Iraqi city of Fallujah violated the law of war and requires that a former Marine sergeant be found guilty of manslaughter, a federal prosecutor argued Wednesday.

Assistant U.S. Attorney Jerry Behnke told the jury of nine women and three men who heard the five-day trial of Jose L. Nazario Jr. that the slayings cannot go unpunished.

Jurors deliberated a little more than two hours Wednesday afternoon before being sent home for the night.

During his final arguments, Behnke said that what happened inside a Fallujah house shortly after the battle got under way ignored the laws governing armed conflict, laws he stressed the Marines had been taught to obey.

"Adherence to those rules is very important to the military, to the Marine Corps and to this nation," he said. "If acts like these are not held accountable, then we as a nation have failed."

Nazario, 28, is charged with manslaughter and with leading two other members of his Camp Pendleton squad in the slayings that investigators say took place the morning of Nov. 9, 2004. The bodies of the alleged victims have not been found.

The case has sweeping implications. Defense attorneys say it could affect troops on the battlefield; the prosecution says it is about U.S. morality in war.

Nazario is the first former service member to be tried before a civilian jury for an alleged crime occurring on an overseas battlefield. He was out of the service and not subject to prosecution in military court when the incident came to light, leaving the U.S. attorney as the only entity that could prosecute.

Nazario's attorney, Kevin McDermott, told jurors the government failed to prove there were any killings, failed to produce any forensic evidence of any homicides and had not been able to show any offense was committed.

The prosecution also was unable to disprove hostile intent by the detainees, McDermott said.

"There wasn't a single witness in that living room or kitchen that can tell you these individuals did not exhibit a

hostile act or hostile intent," he said.

When the Marines entered the home, they found four "warm" AK-47 assault rifles and an odor of spent gunpowder, McDermott said.

"That house was the definition of hostile intent," he said.

During the trial, three former squad members testified they heard gunshots inside the home and then saw Nazario and two other Marines standing over dead bodies.

The defense never called Nazario or any other witness, instead relying on its contention that the government failed to prove its case beyond a reasonable doubt.

Both sides agreed that the case has meaning far beyond Nazario, who appeared in court Wednesday in a gray suit with a U.S. flag pinned to his lapel.

"We never want anyone ever to second-guess what they were doing," McDermott said of the troops' battlefield decisions. "Your decision is of phenomenal significance to my client and those like him. Do not make it harder for those young men like him."

Behnke stressed that the case was not a referendum on the war in Iraq.

"When the defendant took one of those men into a room and killed him, that was not part of the mission," he said.

Behnke said the testimony of three squad members, each of whom said he heard gunshots and then saw the four detained men dead, was sufficient evidence for a guilty finding.

"They all remembered the same things," he said of the witnesses, rebutting McDermott's earlier assertion those men had confused what happened inside the home.

"We have credible, powerful eyewitness testimony of what occurred in that house," he said. "What happened is those Marines took control of those four men and then executed them."

Nazario is being prosecuted under the Military Extraterritorial Judicial Act, which allows the government to bring cases against former service members for crimes occurring outside the U.S. His case is the first to reach trial since the act was approved by Congress in 2000.

Two of the men he led at Fallujah, Sgts. Ryan Weemer and Jermaine Nelson, face murder and dereliction of duty charges in military court at Camp Pendleton.

Each refused to testify against Nazario last week and were found in criminal contempt by U.S. District Court Judge Stephen Larson, who is presiding over Nazario's trial.

The last government evidence offered at the trial was the playing of a taped phone call between Nazario and Sgt. Nelson recorded by the Naval Criminal Investigative Service as part of its investigation.

On the tape, Nelson, who was then cooperating with investigators, is heard asking Nazario: "Who gave us the orders to kill those four?"

Nazario replies: "I did."

Nazario then explained to Nelson that they could not take time to process the four Iraqis as prisoners because "we were moving."

Nelson and Weemer face a Sept. 29 hearing before Larson to determine what punishment they will face for refusing to testify last week.

Nazario's jury is scheduled to resume its deliberations at 9 a.m. Thursday.

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