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Former Marine Sgt. Jose Luis Nazario, right, walks with his attorneys Douglas Applegate, left, and Emery Ledger, center, after making an appearance in federal court in Riverside in August 2007. (Associate Press Photo/The Press-Enterprise, Silvia Flores)

MILITARY: Acquitted former Marine recalls fear in Fallujah

By MARK WALKER - Staff Writer

A former Camp Pendleton Marine acquitted last week in the slaying of four detainees during a 2004 battle for the city of Fallujah, Iraq, says his most vivid memory of those days was "constant fear."

"We were running out of ammo and we weren't able to clear every house," Jose L. Nazario Jr. said Friday, one day after a U.S. District Court civilian jury declared him not guilty of manslaughter and related charges in the first-ever trial of its kind. "We were moving past buildings and structures where we could have been ambushed at any time."

It was that environment that Nazario confronted on the first of what would be 10 straight days of combat. But it would be that first day, his first time in combat, that would come back to haunt Nazario two years later.

The 28-year-old former sergeant from Camp Pendleton's 3rd Battalion, 1st Marine Regiment was indicted by a federal grand jury last year, accused of killing two of the detainees his squad encountered in a home they searched and directing junior Marines to kill two others.

He is the first former service member to be tried under the Military Extraterritorial Judicial Act authorized by Congress eight years ago. A provision allows federal prosecutions of people out of the military when accusations arise against them for actions during their active-duty years.

But the Nazario case was rife with problems for prosecutors. The government had no bodies, no names to attach to the dead, no complaining witnesses and no physical evidence of any kind.

What decision-makers in the Justice Department did have were statements from squad members that the detainees did not pose a threat when they were shot.

Faced with those statements, deciding to prosecute Nazario was based more on the moral and ethical imperative than overwhelming evidence, according to those who practice and study military law.

Civilian jurors

One military law expert said Nazario's case was exactly what the Military Extraterritorial Judicial Act was intended to cover.

"He could not be prosecuted in a military court-martial, so this was the only available option and it was perfectly appropriate for a civilian jury to hear the case," said Scott Silliman, a former U.S. Air Force attorney and Duke University law professor who heads its Center on Law, Ethics and National Security.

"Regardless of the verdict, the law worked in this case because an alleged crime was tried in court and a decision was reached."

Without the law, Nazario could not have been prosecuted by any court and that was not in the best interest of justice, he said.

Going into the case, Nazario's attorneys contended it was an inappropriate matter for a civilian jury. Without understanding the exigencies of the battlefield and the pressures troops faced, civilian jurors lacked the proper context, they argued.

On Friday, one of those attorneys reiterated that stance.

"The law has a devastating impact because the message it sends to troops is that you'd better be right because we are going to Monday-morning quarterback you for the rest of your life," said Joseph Preis, a former Marine who along with three other attorneys represented Nazario free of charge.

"We should be up front with recruits now and tell them we are going to give you a weapon, put you through hell and you better be aware that we are going to review every one of your actions in war and you could be charged with a crime years from now."

Preis said Nazario's legal team is considering asking Congress to amend the act so the military would be the only entity that can bring cases against former service members.

"It needs to be kept out of the civilian courts because it's just too difficult for jurors lacking military experience to be

put in that position," Preis said.

Silliman disagreed.

"There just aren't going to be very many cases like Nazario's," he said during a telephone interview. "The law worked as it was intended."

'Too far'

Bing West, a former Marine officer who has written three books on the Iraq war, including the just-released "The Strongest Tribe: War, Politics and the Endgame in Iraq," said the Nazario case and similar ones brought against troops from Camp Pendleton in recent months represent a disturbing trend.

"We have gone entirely too far," said West, a former assistant secretary of defense. "We are attempting to place the same requirements on our soldiers and Marines in war that we place on police officers in the U.S. You simply cannot fight a major war that way."

The prosecutions, most of which have ended in withdrawal or dismissal of charges or outright acquittals such as Nazario's, are having an effect on the battlefield, said West, who recently returned from Iraq.

"It's leading to serious skepticism on the part of those who have to fight," he said during a telephone interview Friday. "When you get onto the battlefield and there are thousands of enemy fighters not wearing any uniform, you can't apply the same standards that we expect of our police forces."

"It seems like we want our troops to issue Miranda warnings and then collect and bag evidence in order to show what they did was proper."

Carlsbad attorney David Brahms, a former Marine general who once was the service's top legal adviser, said he sees a larger message in the Nazario verdict.

"The mothers of America spoke," he said of the nine women on the panel, one of whom told reporters she and other jurors did not think it was right for civilians to be deciding Nazario's fate. "They said, 'We don't think our boys should be put in jeopardy this way.'"

More legal troubles?

In a highly emotional and unusual aftermath of the verdict, several jurors walked from the jury room moments after their verdict was announced into the courtroom to shake Nazario's hand and express their support to his mother.

"They said, 'God bless you, you've got your life back and thank you for serving our country,'" Nazario said.

Although acquitted in the manslaughter trial, Nazario's legal troubles may not be over. The two members of the squad he was leading when the slayings occurred face trials at Camp Pendleton on charges of murder and dereliction of duty. While Nazario faced the possibility of 10 years or more in prison, the men he led face a possible life prison term.

Those men, Sgts. Ryan Weemer and Jermaine Nelson, defied a subpoena ordering them to testify at Nazario's trial and were cited by U.S. District Judge Stephen Larson with criminal contempt of court. They face a Sept. 29 hearing

that will determine if that finding stands and what punishment they may face.

Now, legal experts say they fully expect Marine Corps prosecutors will subpoena Nazario and the Justice Department will issue him an immunity grant so that anything he might say cannot result in new charges against him. If he is subpoenaed, but refuses to testify, the experts say he could be held in contempt in federal court.

Unlike Nazario, Nelson and Weemer will have their cases heard by a military jury. And unlike in federal court where a unanimous decision was required of the 12 jurors, two-thirds of a military panel agreeing on guilt or innocence is sufficient to reach a verdict.

For at least a few hours on Friday, none of that much mattered for Nazario, a married father of a 2-year-old child. He was attending a celebration at his attorneys' Orange County offices and looking forward to being reunited with his wife and son in New York.

"I'm just looking forward to getting home and carrying on with my life," he said.

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