

How Staff Sgt. Bales' Lawyers are Fighting for His Life

Lawyers for Army Staff Sgt. Robert Bales, suspected of killing 16 Afghan civilians, will likely mount a two-pronged defense, military law experts say, attacking the evidence against him while also arguing that his reported combat injuries and mental trauma created diminished mental capacity.

Bales' civilian attorney, John Henry Browne, has suggested such an approach in his public comments on the case, in which the Army has identified the soldier as the lone suspect in the March 11 attack but not yet charged him.

"There's no forensic evidence, there's no medical examiner's evidence, there's no evidence about how many alleged victims or where those remains are," he told NBC Nightly News on Tuesday, adding that he intends to travel to Afghanistan to oversee his own investigation.

But he also stated that his client had "no memory" of the attack and suggested that could be from a concussive head injury. In comments to CBS News on Monday, he indicated he would make a "diminished capacity" argument rather than pursue an insanity defense.

Some military law experts interviewed by msnbc.com said they expect a legal pincer attack, in which the defense may try to win acquittal by attacking the evidence but have a fallback position aimed at winning a lesser sentence than the death penalty --

which Defense Secretary Leon Panetta has said could be sought in this case.

Military officials have said that after drinking at an Army outpost in southern Afghanistan on March 11, Bales, 38, crept away in the night to two nearby villages, where he shot his victims and set many of them on fire. Nine of the 16 victims were children, they said.

Gary Solis, former head of the Marine Corps' Military Law Branch and current adjunct professor of law at Georgetown Law School, said the fact that the crime occurred in a combat zone in a distant country complicates the task for prosecutors, who are expected to charge Bales with premeditated murder and other crimes.

To convict Bales of that charge, prosecutors would have to prove that people died, the means by which they died, that the accused is the person who used those means and had premeditated the offense, Solis said.

That would be no easy feat, given the possibility of numerous crime scene complications, he said.

"The prosecution is under additional burden in that they're trying a crime that happened ... 9,000 miles away," he said. "They have no bodies, they have no autopsies, they have no forensics, they have no photographs, they have no witnesses. There is no Afghan who is going to come here to testify against this guy, so how do they prove premeditation? It's going

to be a problem for them.”

Daniel Conway, a lawyer and former Marine staff sergeant who has been involved in battlefield investigations in Iraq and Afghanistan of alleged crimes by U.S. soldiers, said prosecuting Bales will be “exceptionally difficult.” Even establishing him as the gunman could be problematic, he said.

“It still remains to be seen whether any of these Afghan local nationals can actually identify Bales as the shooter,” he said. “Now there’s going to be some real linguistic divides here in terms of people’s ... ability to communicate what they saw but you may very well have the potential down the road for a defense that he didn’t do it.”

The physical evidence from combat zone crimes is similarly suspect, Conway said.

“In these combat zone cases, you have crime scenes that are contaminated almost instantly ... bodies are moved, forensic evidence is either contaminated or cleaned, there (are) typically no photographs that are taken of forensic value so you can’t necessarily go back and do a very thorough wound analysis,” he said, noting that it would be difficult to exhume the bodies if they have already been buried due to Islamic tradition.

“It’s not easy to separate the fact from the fiction in this kind of case,” he added.

If Bales’ case goes to trial, the defense will have an opportunity to react to the government’s case, because the Army presents first. That will enable his lawyers to decide whether to focus on attacking the evidence or arguing that Bales’ reported combat injuries and mental trauma from the battlefield created diminished mental capacity. Or, they may do both, Solis said.

“The government has to go first and it has to prove its case,” he said. “He’s going to be ready to take advantage of any chink in the government’s arguments that he perceives in addition to whatever argument he may have.”

Bales was on his fourth tour in a war zone since signing up for the Army after the 9/11 terrorist attacks in 2001. He had spent three years in Iraq on his previous tours, during which time he lost part of a foot and suffered a traumatic brain injury (TBI) due to a vehicle rollover, media reports say. Two days before he allegedly attacked the Afghan villagers, he saw the aftermath of a bombing in which a fellow soldier had his leg blown off, The Associated Press reported.

While an insanity defense remains possible, experts who spoke to msnbc.com note that winning such a case is extremely difficult in a military trial.

Unlike an “insanity defense,” where Bales would have to be shown not to have known right from wrong to be acquitted, “diminished capacity” is simply an argument that the crime was not premeditated and that mitigating factors should lessen his punishment.

“That’s very hard, so ... he might have to go with this diminished capacity,” Greg Rinckey, a former attorney with the U.S. Army’s Judge Advocate General Corps who is now managing partner of military law firm Tully Rinckey PLLC, said of an insanity defense. “Most of the cases that I’ve tried, that’s what we’ve went with is because we couldn’t get to ... the complete no mental responsibility or the capability to stand trial.”

Eugene R. Fidell, who teaches military justice at Yale Law School, said testimony indicating that Bales’ was afflicted by post-traumatic stress disorder, or PTSD, could be introduced at this juncture, but would be unlikely to result in acquittal.

“Maybe some psychiatrist will say he suffers from PTSD,” he said. “That’s not a defense – probably. There’s no case in which PTSD has given rise to a successful insanity defense in the military.”

Solis said Bales' lawyers would likely put the brain injury, the wounding of his comrade, the multiple deployments and his foot injury into the "diminished capacity argument box," with the traumatic brain injury (TBI) possibly being a strong element in support of that claim.

Afghan massacre by US soldier puts focus back on brain testing

"You can get a doctor who will come in there with a chart and ... show here's a normal brain and here's his brain getting TBI," he said. "So the jury's got something concrete ... that they can wrap their not guilty finding around," if that's how they're leaning.

Conway said doctors

compare traumatic brain injury to a "hardware" problem, whereas PTSD is more like a "software" issue.

Solis, the former head of the Marines law branch, said the horrific nature of the crime could ironically benefit Bales' defense.

"They're going to say, 'Would somebody in control of their facilities, somebody who didn't have diminished capacity have done something this wacky?'" he said. "The act itself is inherently supportive of a diminished capacity" argument.

As a result, he said, Bales' case might not even make it to a military courtroom. Perhaps a deal will be struck, or maybe mental health exams -- which could take months -- will show that Bales is not competent to stand trial.

But Conway, the former Marine who has been involved in high-profile military crime cases, including the 2005 killing by U.S. Marines of 24 unarmed Iraqi men, women and children in Haditha, Iraq, said the defense also runs a risk by telegraphing that it intends to argue diminished capacity.

"It's a two-edged sword. On the one hand, if they can prevent this from turning into a capital (death penalty) case, that's a huge victory," he said. "On the other hand, they're giving away the playbook and they don't have any access to the witnesses. So the government is going to be out talking to everybody trying to rebut the diminished capacity defense."

At the same time, a defense built on PTSD and brain injury is generally a tough sell in a military courtroom, Conway said.

"We have used it many times" to get charges reduced, he said. "I can tell you that it's hard to get a military jury to be sympathetic to these kinds of defenses because the way they look at it is, 'I've had multiple deployments, I've had multiple concussive events ... I've got family problems, and I didn't go out and do this.'"

"So you're going to have to be able to explain to the jury why this case is different from their own experiences in combat and that's going to be tough to do."