

## Hasan's Attorney Has Limited Options

Veteran military attorneys say they think a capital murder trial is a virtual certainty for Maj. Nidal Malik Hasan, the Army psychiatrist charged with killing 13 people and wounding 32 others last year in a rampage at Fort Hood.

They will also tell you that his defense team, led by one-time Army judge John Galligan, has limited options, given the weight of eyewitness testimony — all geared to saving him from being executed.

Military rules forbid Hasan from pleading guilty in a capital case. But he might admit his guilt at the start of the trial in order to show contrition and counter the prosecution's plans to put on a series of damaging witnesses.

The strategy is a variation of the “naked plea,” or “cold plea,” which allows defendants to admit guilt without cutting a deal with prosecutors. It is a strategy that can test the nerves of a professional gambler in the best of times because the jury goes straight to deliberations, followed by sentencing if they reach a guilty verdict.

In Hasan's case, that could be a death sentence.

“It's the best evidence of contrition because you argue to the jury that he got nothing in exchange for pleading guilty. He's doing it because of his genuine regret, his remorse,” Geoffrey Corn, a professor at South Texas College of Law, explained.

“He doesn't want to put the victims through any more testimony. He doesn't want to put the government through any more expense. He is ready to accept responsibility,” Corn added. “I think it's incredibly unlikely, but it would be a bombshell, right?”

Commanders have not decided if the case will go to trial, but Corn; longtime military attorney Frank Spinner; and Albany, N.Y., lawyer Greg Rinckey; think it is inevitable.

Once in court, they agree, Hasan will have an uphill battle in undermining the prosecution's case, which will be largely built on eyewitness testimony.

Galligan would not talk about his options. But the three attorneys agree that Hasan could claim insanity, or that he suffered from a diminished mental capacity at the time of the shootings.

There is also an argument that Hasan's superiors failed to act after seeing red flags. That is likely to come in the sentencing phase, where evidence of Hasan's state of mind could be used counter the prosecution's contention that he was fully responsible.

“If all else fails, attack the chain of command,” said Corn, a retired lieutenant colonel who was the Army's law of war expert for a year.

“It's been all over the news that the military health system is breaking down,” said Rinckey, a sixyear Army JAG Corps veteran. “I think that is one of the things he is going to say here, he was crying for help.”

Only two days after closing Hasan's evidentiary hearing earlier this month, Col. James Pohl recommended that he face court-martial and possibly the death penalty because he found "reasonable grounds to believe an aggravating factor exists" in the case. The killing of 13 people would be a possible factor.

Galligan said there should be no trial until he receives evidence crucial to his case, including a declassified intelligence inquiry ordered by President Barack Obama. He said prosecutors also have failed to turn over a report on an investigation into the actions of Walter Reed officials when Hasan was assigned there.

"You're seeing the worst of the military justice system playing an evil hand in this case," Galligan said.

Prosecutors brought 56 witnesses to the stand over nine days. They sketched a picture of Hasan as a cold, calculating killer who methodically gunned down soldiers and civilians. Galligan, who suggested that his client shot randomly, closed out his case in just four minutes.

A cold plea usually allows defendants to admit the allegations are true. But since court-martial rules prohibit guilty pleas in capital cases, Hasan has to find a way to achieve the same effect without pleading guilty.

Corn said judicial rules allow a way for Hasan to do that. "He would offer to stipulate to the fact of his guilt."

Hasan then probably would offer a written statement.

That would transform a trial expected to last weeks into one that wraps up in hours or days. But prosecutors would have to sign off on Hasan's stipulation.

"You can try to stipulate, but the government can refuse," Spinner said.

The insanity defense hinges on examinations that would show Hasan suffered from mental disease. Corn said no one will know if that defense will be made until close to the trial, but warned Hasan could opt to reject it.

"Galligan could tell him 100 times, 'This is your best chance,'" Corn said "He could say no." The defense could claim that Hasan suffered from diminished mental capacity, but that, too, requires expert or medical evidence the prosecution could refute.

While Galligan said his client fired randomly, some witnesses testified that Hasan used a laser designator to aim at the heads of troops.

That testimony partly explains why the defense has few good options in a high-stakes case. "When I hear random, what I hear is a guy is driving by a crowd in a car and is just shooting without aiming," Spinner said. "I would consider that random. But when you're actually pointing a gun at a specific person at their head or heart, there's nothing random about that."