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Sniper Trial Defense Is Likely to Focus on Trying to Avoid Death Penalty, Experts Say

By JAMES DAO

When lawyers for John A. Muhammad present their opening statements in the Washington-area sniper trial on Monday, they are likely to begin a defense that is less about proving their client innocent than keeping him alive, legal scholars and defense lawyers say.

Mr. Muhammad has pleaded not guilty to charges that he murdered a Maryland man, Dean H. Meyers, at a Virginia gas station last October. If found guilty, he could face the death penalty under two Virginia laws.

Many defense lawyers and legal scholars say the prosecution's evidence against Mr. Muhammad, though largely circumstantial, appears compelling, potentially placing the defendant at the scene of several shootings and tying him to the high-powered rifle used in the killings.

Moreover, the intensity of the news coverage of the three-week rampage, combined with the fact that there have been no similar shootings since Mr. Muhammad and his co-defendant, Lee Malvo, were arrested, have created a powerful perception that the pair was responsible for the crimes, experts said.

As a result, the experts said, it may be extremely hard for Mr. Muhammad's three lawyers to persuade a jury that their client had nothing to do with the killings. Instead, they said, the defense may largely concede that Mr. Muhammad played a role, but raise questions about what that role was in an effort to reduce his sentence to life in prison without parole.

"It's going to be pretty tough to show he wasn't there," said James O. Broccoletti, a defense lawyer from Norfolk who has handled 50 capital murder cases. "It's a strong circumstantial case that he was involved. The question is going to be the degree of his involvement."

The prosecution has said it will try to show that Mr. Muhammad, 42, was the brains and chief instigator of the 13 shootings -- 10 fatal -- in the Washington area, while Mr. Malvo, 17 at the time, was merely a junior accomplice under his sway.

Calling Mr. Muhammad the "captain" of a "killing team," commonwealth attorneys have charged him under two death penalty statutes. One makes the willful, deliberate and premeditated killing of more than one person in a three-year period a capital offense.

The second makes it a capital crime to kill a person during an act of terrorism intended to intimidate citizens or influence their government. The prosecution has charged that Mr. Muhammad sought to extort \$10 million from the government in exchange for ending the killings.

The antiterrorism law is crucial to the prosecution's death penalty case because it provides an exemption from what is known as Virginia's triggerman rule, which requires that a defendant be the immediate perpetrator of a killing in order to be sentenced to death.

The antiterrorism law gets around the triggerman rule by authorizing the death penalty for a person who ordered an underling to kill as part of a terrorist scheme. The exemption is important to prosecutors

because they appear to lack clear evidence that Mr. Muhammad fired the weapon that killed Mr. Meyers.

Mr. Muhammad's lawyers have argued that Mr. Malvo fired that shot, and the prosecution has hinted that they might be right. But prosecutors are trying to build a case that Mr. Muhammad effectively ordered Mr. Malvo to fire the killing shot, and so deserves death.

"Even assuming that Mr. Malvo pulled the trigger, Mr. Muhammad was still an active participant, enabling him to commit the crimes," Commonwealth Attorney Paul B. Ebert, the lead prosecutor, said in *The Washington Post*.

Mr. Muhammad's lawyers have begun countering those charges by arguing that their client did not control Mr. Malvo. During jury selection over the past week they foreshadowed this argument, asking potential jurors if they could consider the idea that a teenager could act independently of an older man.

The defense has also argued that the antiterrorism law was devised to fight highly structured terrorist organizations like Hamas or Al Qaeda, and not a two-man team in which the older man was more of a father figure than a commanding officer.

"The defense view is that this provision is about organizational structure and not psychological relations," said Richard J. Bonnie, a law professor and death penalty expert at the University of Virginia.

Finally, Mr. Muhammad's lawyers will probably contend that without evidence that Mr. Muhammad fired the rifle, the jury cannot find him guilty of capital murder under the state's multiple-murder law.

But implicit in all those defenses is the possibility that Mr. Muhammad was somehow involved in the shootings. The prosecution's evidence may have forced the defense to concede that point, experts said.

"The evidence is going to be overwhelmingly that he committed some crime," said Andrew A. Protogyrou, a defense lawyer from Norfolk who has handled 30 capital murder cases. "So then the question becomes: how do you try to mitigate the sentence?"

The commonwealth's evidence is likely to include the blue Chevrolet Caprice, seemingly modified to conceal a shooter, that Mr. Muhammad and Mr. Malvo were arrested in last October; a laptop computer found in the car that had maps and a diary that seemed to place the pair at the scene of several shootings; and a Bushmaster hunting rifle, also found in the car, that investigators say has been linked by ballistics tests to the bullets that killed Mr. Meyers and other sniper victims.

Scott E. Sundby, a law professor and death penalty expert at Washington & Lee University's School of Law, said that defense lawyers who faced powerful evidence against their clients risked losing credibility with juries if they tried to argue innocence.

What many lawyers do in such cases is "plead guilt slowly," Mr. Sundby said. That is, they gradually acknowledge their client's culpability during the trial, while also introducing arguments for why the penalty should be life in prison.

That may be what Mr. Muhammad's lawyers have already begun to do, he said. "The most successful defenses in sentencing were those that from the very first day assumed they'd be arguing death and life to the jury," Mr. Sundby said. "Even in the guilt phase, the strategy was geared toward convincing the jury to come back to life."