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U.S.

Defense in Marathon Bombing Has Echo of Clarence Darrow

By KATHARINE Q. SEELYE MARCH 13, 2015

BOSTON — When Judy Clarke, the lead defense lawyer for Dzhokhar Tsarnaev, announced at the outset of his trial last week that her client was responsible for the Boston Marathon bombings, she was following a strategy laid out by Clarence Darrow almost a century ago.

Darrow, one of the most renowned criminal defense lawyers in American history, was representing two infamous child-killers in Chicago named Leopold and Loeb. He started with a guilty plea. That left him free to focus on his goal: saving them from the gallows.

He delivered an extraordinary 12-hour closing argument against the death penalty that left the judge in tears, after which he sentenced the pair to life in prison.

Ms. Clarke, a death penalty opponent, is similarly single-minded in seeking to save Mr. Tsarnaev. Every move she makes is aimed at trying to spare him from execution, including her blunt opening admission of who planted bombs at the 2013 marathon: “It was him.”

Although the analogy with Leopold and Loeb is not exact — Mr. Tsarnaev, 21, has not pleaded guilty, and he faces a jury, whereas Darrow argued to a judge — the strategy for saving him is striking and familiar. Defense lawyers in the most challenging death penalty cases often start by admitting a certain degree of guilt, then arguing that someone else deserves more of the blame.

That calibration of culpability shaped the legal strategy for Lee Malvo, the 17-year-old Beltway sniper, who along with an older accomplice killed 10 people in the Washington, D.C., area in 2002.

“We are not suggesting to you that they got the wrong man,” Mr. Malvo’s lawyer told the jury. Rather, the lawyer said, his client was heavily indoctrinated by a charismatic father figure who schooled him in the ways of murder — an approach, sometimes called the Svengali defense, that Ms. Clarke is employing as she casts Mr. Tsarnaev’s older brother as the mastermind in the marathon bombings.

The strategy worked for Mr. Malvo: He was sentenced to life in prison. And the odds suggest that could be Mr. Tsarnaev’s fate, too. Since 1988, of the cases in which juries in federal death penalty trials reached the point of choosing between life and death, they have opted for life 66 percent of the time, according to the Federal Death Penalty Resource Counsel Project.

Legal experts say it is easier for jurors to show mercy — what Darrow called “the highest attribute of man” — if they first see the defense accept responsibility.

“Admitting guilt is not being invented for the first time in this trial,” Eric M. Freedman, a death penalty specialist and law professor at Hofstra University, said of the Tsarnaev case. “In a capital case, a competent lawyer keeps his or her eye on the big picture, even if that means engaging in some well-planned strategic retreats.”

In her dramatic opening statement, Ms. Clarke told the jury that she was not contesting the who, what, where and when of the government’s case, only the why. The government had portrayed Mr. Tsarnaev as a radical jihadist bent on murder as retribution for the deaths of so many Muslims in American-led wars in Iraq and Afghanistan. By contrast, Ms. Clarke cast her client as a lost teenager who fell under the malevolent sway of his radicalized older brother, Tamerlan, who was killed during a manhunt after the bombing.

She did not change his plea to guilty, but in a bit of courtroom jujitsu, she said he would not sidestep responsibility for his crimes. He faces a 30-count indictment, which includes the marathon bombings, which killed three people, maimed 17 and injured 250 others, as well as the killing of an M.I.T. police officer, a carjacking and a shootout with the police.

Admitting to the crimes gave her the chance to build credibility with the jury. The evidence against Mr. Tsarnaev is so overwhelming, legal experts say, that she could appear disingenuous if she tried to deny it, and jurors would probably feel insulted and annoyed.

But admitting culpability in an opening statement is very different from formally pleading guilty.

Ms. Clarke has offered the government a guilty plea in exchange for a sentence of life in prison. But the government has spurned the offer. Prosecutors are insisting on pursuing the death penalty, and as long as that is the case, Mr. Tsarnaev has no incentive to change his plea.

Also, pleading guilty would close off his avenues of appeal.

And he has another subtler but equally compelling reason not to plead guilty: Doing so would abbreviate the jury's role. Some legal experts believe that if a jury is given the chance to find a defendant guilty, it can do so, feel it has done its job, and then be more likely to exercise leniency when it comes to sentencing.

"It is not very satisfying for the jury if you hand them a guilty plea and then ask for life," said Rosanna Cavallaro, a law professor at Suffolk University. "It leaves the jury feeling like, 'The only thing I've done as a juror is give you a break.'"

The government still has to prove its case beyond a reasonable doubt. And it seems to be trying to do so as zealously as if Ms. Clarke had never made her admission. Government witnesses have not scrimped on the details of the carnage at the marathon finish line, accounts that have moved many in the courtroom to tears.

In continuing its full case, the prosecution intends not only to prove guilt, but to justify why it is seeking the death penalty.

"In a run-of-the-mill criminal case, judges will often rush the government along, saying, 'Do you really need this witness?'" said Jeremy M. Sternberg, a former federal prosecutor in Boston and now a partner in the Boston office of the law firm Holland & Knight. "But that won't happen here. There's too much at stake."

Ms. Clarke is trying to use this phase of the trial to her advantage, planting seeds now that she hopes will bloom in the second phase, when she can explain her narrative more fully as the jury contemplates the sentence.

On Monday, for example, defense lawyers pressed one official to establish that Mr. Tsarnaev's brother was a few steps ahead of him as they walked down Boylston Street. This line of questioning might have suggested what little evidence the defense has to make its case, but at the same time, it helped reinforce the defense's theme that Tamerlan Tsarnaev was the leader.

On Tuesday, after the government suggested that posts from Dzhokhar Tsarnaev's Twitter account revealed him to be a jihadist, the defense showed that some of them were in fact lyrics from rap songs and from a show on Comedy Central — more reflective of Mr. Tsarnaev's college stoner culture than of a holy war.

Perhaps most significant, on Thursday, Dun Meng, the man who was carjacked, told jurors that Tamerlan Tsarnaev had bragged about committing the bombing and killing the M.I.T. police officer, and that, wielding a gun, Tamerlan had taken the lead in the carjacking. Under questioning by the defense, Mr. Meng said that he had never seen Dzhokhar Tsarnaev with a gun and that the first thing he had asked was whether he could play music on the car's sound system.

"What you want to be doing in the first phase is be consistent with the second phase so that by the time you get to the second phase, the jury is nodding in agreement and recognition," Mr. Freedman of Hofstra said.

Mr. Sternberg, the former prosecutor, said Ms. Clarke was "playing two chess games at once."

"The first is the guilt phase, but the long game is the penalty phase," he said. "The more she gets to talk in the guilt phase about his being brainwashed, or being a cipher, or not doing anything independently, she's got it on the jury's mind for the penalty phase. It's a chance to ring the Tamerlan bell twice."

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