Jeff Deskovic

The Role Of The Media In Setting The Stage For Wrongful Convictions

It is with good reason that criminal defendant is to be considered innocent until proven guilty. It is only through this approach that the chances for justice to occur are maximized. Too often, however, the media disregards this principal, and instead produces articles which presume guilt, and are one-sided; statements that are uttered by the prosecution and the police are taken as gospel. And, the articles that are written are slanted, written as though the media is taking on a pro-prosecution advocacy role, as though they know all that there is to know about a case, rather than remaining neutral, and cautious, scrutinizing, and looking for alternative explanations for evidence while writing a balanced story. This type of news coverage is by no means harmless.

It is often experienced by the accused as an out-of-control feeling in which there is the experience that the entire world is against them. In this environment the accused must defend himself against serious charges which often carry lengthy prison sentences, while, at the same time, being aware of the chilling reality that what is going on outside of the courtroom often affects what is going on inside of it.

For example, a judge can be influenced and caused to make rulings of law which make it likely that a guilty verdict will result at trial. Potential jurors can hear about a case prior to being selected with the result that they are swayed before hearing evidence, despite denying hearing about it during the selection process.

As a trial progresses, it is a fiction to believe that jurors always obey a judge's instructions that they should not read about the case. Sometimes a prosecutor could feel pressure from the environment and not extend a plea bargain offer which he or she feels would serve the ends of justice; or press for a lengthier sentence at a sentencing hearing. A judge could wind up imposing a lengthier sentence because of the media coverage.

Although a prosecutor could him, or herself, get swept up by the environment, as I mentioned above, at other times they are the author and architect of such coverage, when they are using cases for political purposes. One of the better-known examples of this was the case Duke Lacrosse Players case. In an article *Justice Denied* by Rachel Smolken, she wrote: "*As Reade Seligmann choked back tears on the witness stand, the 21-year-old Duke University lacrosse player dubbed 'Flustered' by teammates was poised, compelling and clearly hurting. He told of a world turned 'upside down' and of experiencing 'as lonely of a feeling as you can ever imagine' after he was indicted for allegedly raping a stripper at a team party on March 13, 2006. He described the stinging slights from former friends, the terrifying death threats--and the inescapable media horde.*" All told, somewhere between one to three hundred guilt presumption-oriented media pieces were either written or aired.

Taken from **Wikipedia** and the **Durham In Wonderland Blog** written by KC Johnson**,** the facts of the case are as follows: "*In March 2006 Crystal Gail Mangum, an African American stripper and escort falsely accused three white members of Duke University's lacrosse team- Reade Seligmann, Collin Finnerty, and David Evans, of raping her at a party held at the house of two of the teams captains in Durham, North Carolina on March 13, 2006. On April 11, 2007, North Carolina Attorney General Roy Cooper dropped all charges and declared the three players innocent. Cooper stated that the charged players were victims of a 'tragic rush to accuse.' District Attorney Mike Nifong assumed personal control of an ongoing—and scarcely begun—police investigation fundamentally transformed the case. Appointed to the office in 2005 despite a pattern of emotionally unstable behavior during his half-decade sojourn in Traffic Court, Nifong appeared destined for defeat in the upcoming Democratic primary. By late February, Nifong's fundraising had dried up and he resorted to personal loans to his campaign kept his candidacy afloat. Under personal, financial, and political pressure—and perhaps even, at first, believing that a crime occurred—Nifong seized the opportunity to exploit the case. He quickly secured a court order demanding that the players submit DNA samples and photos. That motion was fraudulent in that: Nifong claimed that the players called each other by first-name aliases and uniform numbers at the party; no evidence existed for either claim; Nifong withheld from the court that the accuser had failed to identify any suspects in an official photo lineup; Nifong falsely promised the court that negative DNA tests would 'immediately rule out any innocent persons.' Confident that DNA would 'show conclusive evidence as to who the suspect(s) are in the alleged violent attack upon this victim,' the D.A. launched a publicity barrage that seemed unrelated to any legitimate law enforcement purpose but did much to boost his name recognition in the run-up to the primary.*

Though Section 3.8 (f) of the North Carolina Code of Professional Responsibility requires prosecutors to 'refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused,' Nifong gave dozens of interviews. He termed the players 'hooligans' whose 'daddies' would buy them expensive lawyers. He made a host of statements not backed by items in police files. He made a public statement to the effect that 'One would wonder why one needs an attorney if one was not charged and had not done anything wrong.' And, in a blatant bid for the African American vote, he deliberately exaggerated the racial element of the alleged attack. As he basked in the media spotlight, Nifong learned that contrary to his assurances, the DNA results would be negative. But he refused to discard the case for lack of evidence, and instead instructed police to conduct another lineup. Only this time, he would ensure that the accuser identified someone. In violation of Durham policies, the lineup would be confined to suspects—now all 46 white players on the team. In further violation of procedures, the accuser would be told that the lineup contained no fillers. And overriding yet another procedure, the lead investigator for the case would oversee the array. Duke Law professor James Coleman, former chief counsel to the House Ethics Committee, later wrote that these Nifong mandated procedural irregularities 'strongly suggested that the purpose of the identification process was to give the alleged victim an opportunity to pick three members of the lacrosse team who could be charged. Any three students would do; there could be no wrong choice.'

In the lineup, Mangum identified the three suspects, with varying degrees of certainty. Her performance gave no indication that she was a reliable eyewitness. After having not recognized him at all on March 21, she now claimed that Evans attacked her, and that he had a mustache—even though he didn't have one. She claimed to be 100% certain that Seligmann attacked her—even though three weeks earlier, she said she was only 70% sure that Seligmann even attended the party. Indeed, the only player that the accuser twice identified as attending the party with 100% certainty wasn't even in Durham that night.

Nifong ignored this litany of transparent inconsistencies. With knowledge

that the DNA tests were negative and surely understanding that his procedurally dubious identification would not survive close scrutiny, Nifong fanned the flames of public indignation. In this critical period, Nifong had three indispensable allies: The media—first the N&O, and, after March 27, the national networks and especially the Times—uncritically accepted his version of events, framing the story as a morality tale of white, rich, athletic excess, exploiting a poor, black, demure mother of two; Among what New York's Kurt Andersen has termed the Duke faculty's 'loopy left,' the players were guilty until proven innocent. In late March, Houston Baker, a professor of English and Afro-American Studies, issued a public letter denouncing the 'abhorrent sexual assault, verbal racial violence, and drunken white male privilege loosed amongst us' and demanding the 'immediate dismissals' of 'the team itself and its players.' A week later, on April 6, 88 members of Duke's arts and sciences faculty signed a public statement saying 'thank you' to campus demonstrators who had, among other things, carried a banner reading 'CASTRATE' outside the lacrosse players' rented house, distributed a 'wanted' poster of the lacrosse players, and publicly branded the players 'rapists', and placed placed an ad in a newspaper thanking protesters 'for not waiting and for making yourselves heard.'

By contrast, no Duke professor publicly criticized Nifong's conduct until months later. Brodhead failed to resist his faculty's assault on due process. Moreover, whether intended or not, his actions fortified a public image of guilt. On March 25, in an unprecedented move, the president canceled (at the last minute) the lacrosse team's game against Georgetown, citing underage drinking at the party. Then, after the April 5 release of the McFadyen email, Brodhead demanded Lacrosse Coach Mike Pressler's resignation, cancelled the lacrosse season, and issued a statement anchored by a lament on the evils of rape—at a time when the players were firmly denying any sexual contact, much less rape. These moves enjoyed enthusiastic support from Board of Trustees chairman Robert Steel."

Rachel Smolken wrote that *CNN's "Nancy Grace particularly distinguished herself, in a negative sense, with her mean-spirited comments about the athletes. Every piece of defense evidence that established innocence, 'she spun as further evidence of guilt,' Taylor says. 'Or as, That just goes to show you how defense lawyers lie.'"* On another occasion, referring to whether any Duke Lacrosse games would be missed, she made an on air statement that *"I'm so glad they didn't miss a lacrosse game over a little thing like gang rape!"*

As KC Johnson writes in Durham In Wonderland, "*Often prosecutorial misconduct becomes intertwined with the slanted media coverage. On December of 2007 the North Carolina bar filed ethics charges against Nifong over his conduct in the case, accusing him of making public statements that were prejudicial to the administration of justice and of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The 17-page document accuses Nifong of violating four rules of professional conduct, listing more than 100 examples of statements he made to the media. On January 24, 2007, The North Carolina State Bar filed a second round of ethics charges against Nifong for a systematic abuse of prosecutorial discretion that was prejudicial to the administration of justice when he withheld DNA evidence to mislead the court. In a five-day proceeding in late June, the Disciplinary Hearings Commission of the State Bar found him guilty on 27 of 32 counts of ethical improprieties. He was disbarred and forced to resign as DA. In late August, Judge Smith found him guilty of criminal contempt for lying to the court about his conversations with Meehan; Nifong was sentenced to a day in jail. And, in early 2008, he declared bankruptcy to avoid a civil suit filed by the falsely accused students against him, the city of Durham, and Meehan.*

On April 11, 2007, Attorney General Roy Cooper announced the results of his office's investigation. Not only would all charges be dropped, but the three players were declared "innocent" victims of a "rogue prosecutor."

Analysis

As I stated above, slanted, prejudicial, and guilt-presuming articles are not harmless. Instead, they set the environment in which, and the stage on which, a case is tried. The turning of community sentiment against the defendant sets a terrible context through which a case proceeds through the process. What goes on outside of the courtroom is as much a factor in determining how a case turns out as what goes on inside of the courtroom.

I can personally attest to the frightening feeling of being an innocent defendant in a guilt-presumptive media environment such as I described above. During the time period in which I was going to trial, all of the news media coverage, save for one story, was slanted against me.

In the Duke Lacrosse Case, the prosecutor both started, and kept, the media witch hunt going for his own political purposes. He wanted to generate free advertisement and get elected. The media went along for the ride by not simply reporting facts and remaining neutral; instead, in effect, becoming advocates in an environment in which the presumption of innocence went out the window.

Unbelievable as it may seem, in a variety of ways, the Duke Players were lucky. Firstly, their parents were wealthy thus enabling them to hire quality attorneys. Secondly, it is almost unheard of for an Attorney General, as in their case, to intervene in a case and then dismiss the charges. Thirdly, the players were never wrongfully convicted and sent to prison. Fourthly, the Attorney General did not simply dismiss the charges, but he declared them to be "innocent".

In the usual scenario, poor defendants, relying on public defenders, would have been found guilty; would have remained publicly excoriated; and would have been sent to prison to serve lengthy prison terms where they would never have been heard from again, unless a miracle occurred and they somehow were able to obtain quality representation and ultimately prove their innocence.

Understanding what went wrong in an individual case is only part of what needs to occur. Coming up with a way forward which would prevent it's reoccurrence is an important second step. In the article *Justice Delayed*, Smolkin asked what the media should learn from the Duke case. Stuart Taylor, a columnist who is also an attorney, says *"Read the damn motions."* He goes on to say, *"If you're covering a case, don't just wait for somebody to call a press conference. Read the documents."* He advises reporters to look beyond the rhetoric. *"We should never take a prosecutor's word as fact."* Conversely, don't disregard defense assertions as necessarily false.

Taylor goes on to say, *"Yes, many defense lawyers will say almost anything to get their clients off most of the time, but don't just ignore what they say, look at what they're telling you. And do they have the evidence to back it up?"*

Defense attorney Jim Cooney adds, *"The national media seems to believe balance requires them to report anything someone says, whether it's true or not." The fact-checking aspect of reporting,"* he says, *"seems to have fallen by the wayside."*

Later in that same article Smolkin quotes Ruth Sheehan, who wrote numerous guilt-presuming articles about the Duke players, saying, *"I will approach cases in a different manner now. I will be much more cautious. I had a visceral reaction to that case as it was being described by the prosecutor."* Therefore, the media should try not to have an emotional reaction to a case by viewing it through the prism of their own experience.

In my opinion, these suggestions are good. However, I would add that the media should remember that there is a reason that defendants are presumed innocent, and this needs to be given more than just lip service. I also believe that although oftentimes defense attorneys can make things difficult by their silence, they can get beyond this silence by paying attention to the cross examinations that the lawyers are doing and what points they are making through it, as well as opening statements and closing arguments.

I also think that it is important that writers remain neutral and do not turn into advocates when they write. There is a difference between writing a story on a case when the evidence is in as opposed to covering ongoing court proceedings. Reporters should not be above writing a correction or an apology if it is needed, and such apology or correction should be given the same prominence as the original story, not hidden in the back section of the newspaper. ■