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## Prosecutor's Silence on Duke Rape Case Leaves Public With Plenty of Questions

By DUFF WILSON AND JONATHAN D. GLATER  
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When a woman hired to dance at a Duke University lacrosse team party claimed that members of the team raped her, Michael B. Nifong, the district attorney for Durham County, responded with an aggressive, unflinching and very public investigation.

"There's no doubt in my mind that she was raped and assaulted at this location," Mr. Nifong said on national television after the case surfaced in March. Mr. Nifong called other lacrosse players "hooligans" who had aided, abetted or covered up for the rapists. Local police officers seemed equally certain that they had a horrific crime to solve.

But in the intervening months, the case has come to appear far less robust. Three players have been indicted, but evidence that has surfaced, much of it turned over to defense lawyers by prosecutors and then filed in court with defense motions, has thrown the woman's claims into doubt. Mr. Nifong, so vocal at first, has refused to speak publicly about the case since the beginning of April.

The result is a growing perception of a case in trouble. Increasingly, the onus is on the district attorney. People in Durham are asking what Mr. Nifong is up to, whether his prosecution was influenced by politics -- he was in the midst of a campaign when the case began -- and what other evidence he might have.

"I have no doubt that Mike believes her," said H. Wood Vann, a lawyer in Durham who once represented the woman in a joy-riding case and has also done general legal work for her parents. Mr. Vann said that he wanted to give her the benefit of the doubt but that few other people in town do, and he added that many wonder why Mr. Nifong persists.

"At some point in time he's going to have to get to a tipping point," Mr. Vann said. "His case is going to hell in public opinion. He's suffering death by a thousand cuts."

Mr. Nifong's silence makes it impossible to evaluate the case as a whole. Certainly some evidence has not been revealed -- the next hearing is set for June 22 -- and the defense has released evidence selectively, presumably showing only those parts that strengthen its public position.

DNA samples from the woman and 46 players, which Mr. Nifong had said would identify the suspects, turned up no matches. Other DNA evidence proved inconclusive. Defense lawyers provided time-stamped photographs from the party to rebut the woman's assertion of a 30-minute rape.

Just this week, defense lawyers introduced records of interviews of a dancer hired to perform with the woman; the second dancer said they had been together at the party for all but five minutes and that any claim of rape was nonsense. [The second dancer has more recently said she is not so sure, and her lawyer, Mark Simeon, said on Saturday that her earlier comments were an off-the-cuff reaction to a question from the police.]

But because the judge who issued search warrants did not know of the contradictory statements, defense lawyers now argue, all of that evidence should be excluded at trial.

The rape accusation was leveled by a 27-year-old college student, an exotic dancer hired to perform at the team party on March 13. She was to be paid \$400 to dance for two hours, but left early and without most of the money in an unexplained state of apparent intoxication as some of the students shouted racial taunts. Those facts are uncontested.

The woman is black; the students are white. In Durham and in the Duke community, the case has touched historically tender nerves of race, sex and class.

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Mr. Nifong has said a judge would have to send the case to a jury if it had two main elements: medical evidence of rape and positive identification of the suspects. Each element has come under question, amid attacks on the woman's credibility and on the characterization of the medical evidence by the police.

"It is an extremely difficult kind of case," said Kim Forde-Mazrui, a law professor at the University of Virginia. "It's very difficult to win. It will turn so much on credibility."

Some experts say the identification procedure was fatally flawed. The woman was shown only photographs of Duke lacrosse players. Justice Department and Durham police guidelines recommend using at least five "filler" photographs of uninvolved people for each possible suspect.

The woman identified two of the suspects -- Reade Seligmann and Collin Finnerty -- with 100 percent certainty and the other, David Evans, with 90 percent certainty, according to a transcript of the photo identification session.

Mr. Evans's lawyers, Joseph B. Cheshire V and Brad Bannon, said that the woman did not identify Mr. Evans in an earlier photo lineup and that she falsely claimed he had a mustache. Mr. Evans has passed a polygraph test administered by an expert hired by his lawyers.

Mr. Nifong released 1,278 pages of investigative material to the defense lawyers on May 18, saying it was everything he had. There is nothing there, defense lawyers now say, to show evidence of a crime but the woman's own story, which they said had changed frequently and did not fit any plausible timeline.

"Out of those 1,300 pages, I'd be surprised if 200 of them relate to this case at all," Mr. Cheshire said. "The discovery is actually very minuscule, and there's absolutely nothing in it that impacts negatively on the defendants in any way, shape or form."

At the same time, the defense lawyers have declined requests to release the district attorney's investigative file, which they are free to do.

Medical evidence is always crucial in rape cases. Durham police affidavits filed to obtain search warrants said, "Medical records and interviews that were obtained by a subpoena revealed the victim had signs, symptoms and injuries consistent with being raped and sexually assaulted."

But defense lawyers say the records reveal no such thing. This week, two of the lawyers, J. Kirk Osborn and Ernest L. Conner Jr., attached the 23 pages of medical reports to a motion. The records were sealed, but the lawyers described them in an affidavit, saying the sexual assault nurse had not concluded that the woman's injuries were consistent with rape. The nurse described a swelling of the woman's vaginal area and said the woman had suffered a traumatic experience. The lawyers said such swelling could have been caused by the woman's menstrual cycle or by sexual activities with other men.

Sexual assault nurse examiners are taught not to say whether they think injuries are consistent with rape or sexual assault, because those are legal terms, not medical terms, said Debbie Flowers, a veteran sexual assault nurse in Chapel Hill.

The lawyers attached a five-page handwritten statement given to the police by Jarriel L. Johnson, 32, of Raleigh, describing his driving the woman around the Raleigh-Durham area the weekend before the lacrosse team party. He said she met with clients at three hotels in the area. The exact nature of the meetings was not disclosed.

The woman told the police that she had performed for a man and a woman at a hotel using a small vibrator. Mr. Johnson, reached on Thursday, hung up when a reporter identified himself.

But the biggest obstacle may be the lack of DNA evidence. Though the results, released by defense lawyers on April 10, showed no matches, Mr. Nifong suggested that condoms could have limited available evidence. But this week, it was disclosed that the woman had told hospital personnel that no condoms were used.

A further analysis showed that some DNA on her artificial fingernail might match Mr. Evans's. But it could also match many other men. The fingernail was recovered from a garbage can in Mr. Evans's house.

Defense lawyers released a series of time-stamped photographs of the woman at the party showing no more than 11 minutes unaccounted for. Mr. Seligmann produced

cellphone records, a taxi driver's testimony, receipts and an electronic card key entry to his dormitory room to show that he left the party not long after midnight, when the rape would have had to have occurred.

"I'm not saying any of this is a silver bullet," one defense lawyer, Kerry Sutton, said this week, "but with all this combined, it's a silver mortar."

An article in Essence magazine, based on interviews with the woman's parents, said that the woman reported another gang rape 10 years ago. She filed a report saying three young men beat and raped her three years earlier, when she was 14. Neither she nor the local police followed up on that report.

Her parents, longtime Durham residents, say they believe their daughter.

Her father, in an interview on Wednesday, said she was in no condition to testify.

Some critics of the case wonder why Mr. Nifong has taken it so far. Some think it was political: Mr. Nifong, a 27-year prosecutor who was appointed district attorney last year, was running in his first election campaign when the case surfaced. He narrowly won election to a new four-year term in May. Mr. Osborn and Mr. Conner accused him of "zeal to make national headlines and win a hotly contested primary."

Several lawyers who know Mr. Nifong say he is no showboat and is a highly ethical prosecutor. But other lawyers said he was too rigid, too inflexible. Julian Mack, a lawyer in Durham who represented a member of the lacrosse team who was not charged, said: "He jumps to conclusions, makes up his mind, and that's it. His personality is that he's very stubborn."

Mr. Vann said Mr. Nifong could drop the case, but the political price would be high. "He'd have hell to pay from the African-American community," he said. "They'd say, 'Give her her day in court. What do you have to lose? If you lose, at least the jury made the decision.' So he's kind of stuck."