##### STATE OF NORTH CAROLINA COUNTY OF DURHAM

**STATE OF NORTH CAROLINA**

**v.**

##### DAVID EVANS COLLIN FINNERTY & READE SELIGMANN

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#### DURHAM COUNTY. C.S.C.

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**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DMSION FILES 06 CRS 5582-5583,**

4332-4333, & 4335-4336

**MOTION FOR SANCTIONS**

NOW COME the Defendants, through undersigned counsel, and move this Honorable Court to sanction Michael B. Nifong personally by (a) holding him in criminal contempt of court for his misconduct before this Court on September 22, 2006, and December 15, 2006, as described in this Motion; (b) assessing costs associated with the Defendants' extensive and wholly avoidable pursuit and identification of exculpatory DNA evidence from April to December of 2006, as set out in this Motion, and (c) imposing any other sanctions or discipline which this Court deems appropriate.

For the relevant period of time referenced in this Motion, Mr. Nifong was the Durham County District Attorney and, in that capacity, personally engaged in a pattern of official prosecutorial misconduct which violated at least a dozen laws, rules, and court orders designed to protect due process and the pursuit of truth in the above-captioned criminal investigation and prosecution, including:

1. The provisions of the United States Constitution and North Carolina Constitution which require the timely disclosure of exculpatory evidence to the Defendants;
2. G.S. § 15A-282, which requires reports of results of nontestimonial identification procedures to be provided to the Defendants "as soon as the reports are available";
3. G.S. § 15A-903(a)(l), which requires the disclosure of "results of tests and examinations" conducted in the course of a felony criminal investigation and prosecution;
4. G.S. § 15A-903(a)(l), which requires the disclosure of statements of witnesses and "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant";
5. The provision of§ 15A-903(a)(2) which requires, as it relates to any expert the State may call at trial, the disclosure of "a report of the results of any examinations or tests conducted by the expert'';
6. The written Order signed by Judge Ronald Stephens in open court on June 22, 2006, requiring the disclosure of discoverable evidence to the Defendants;
7. The oral Order entered by Judge W. Osmond Smith III in open court on September 22, 2006, directing Mr. Nifong to satisfy his continuing statutory and Constitutional duties to disclose evidence to the Defendants and to abide by the Rules of Professional Conduct for prosecutors regarding such disclosures;
8. The Order entered by Judge Smith on September 22, 2006, requiring compliance by all lawyers in this matter with all applicable Rules of Professional Conduct;
9. Ru.le 3.8 of the North Carolina Rules of Professional Conduct, which requires timely disclosure by the prosecutor in a criminal case of all materials required to be disclosed by statute and the Constitutions;
10. The provision of Rule 3.3(a)(l) which prohibits false statements of material fact by a lawyer to a tribunal;
11. The provision of Rule 3.3(a)(l) which requires a lawyer to correct false

statements of material fact previously made to the tribunal by the lawyer; and

1. The provisions of G.S. § SA-ll(a) which define acts of criminal contempt of court.

Based on those multiple violations, the Defendants respectfully request the relief sought in this Motion under the following authority:

1. G.S. § SA-11 *et seq.,* which sets out this Court's criminal contempt powers;
2. G.S. § 15A-910(a), which allows this Court to exercise its contempt powers for violations of the open-file discovery laws;
3. Section .0102(c) of the Rules and Regulations of the North Carolina State Bar, which affords this Court concurrent jurisdiction to impose discipline on lawyers for violating the Rules of Professional Conduct; and
4. This Court's inherent judicial authority to do all things reasonably necessary for the proper administration of justice.

SUMMARY OF MOTION

On March 14, 2006, physical evidence was collected from the accuser in this case as a result of her allegation that three white men had sexually assaulted her at 610 N. Buchanan Boulevard, where, it would later be learned, the captains of the 2006 Duke University Men's Lacrosse Team had hosted a team party only hours earlier. The accuser said that two of her attackers put their penises in her anus and vagina, with probably one and possibly the other having ejaculated, while the third attacker placed his penis in her mouth while ejaculating. She repeatedly stated that no condoms were used by any of her attackers. Accordingly, a "rape kit'' was generated, preserving evidence from the accuser's mouth, vagina, anus, and pubic region, along with the panties and other clothing she was wearing at the time of the alleged assault.

On March 23, 2006, the State of North Carolina successfully petitioned the Durham County Superior Court to order all 46 white members of the lacrosse team to submit DNA samples for comparison testing against the rape kit items. The State obtained its order by promising the Court that "the DNA evidence requested will immediately rule out any innocent persons and show conclusive evidence as to who the suspect(s) are in the alleged violent attack upon [the] victim."

The next day, March 24, 2006, Durham County District Attorney Michael B. Nifong took over the factual investigation and prosecution of these matters, and he began a pattern of official misconduct regarding DNA evidence in this case that violated nearly every rule and law put in place by the Constitutions, General Statutes, and Rules of Professional Conduct that are designed to protect due process and the pursuit of truth in criminal investigations and prosecutions.

In March and April of 2006, when Mr. Nifong learned that the rape kit items failed to show the presence of semen but did show the presence of DNA from multiple males who have, to this day, not been identified in the investigation, he misled the public by suggesting that condoms were used by the alleged attackers and that there was no DNA evidence discovered for comparison purposes.

In April of 2006, when Mr. Nifong learned that a private lab he retained to do additional DNA testing in the case had discovered DNA from multiple unidentified males on the rape kit items, Mr. Nifong collaborated with the lab's director to produce a report that did not include all of the lab's test results, including those exculpatory rape kit findings.

For the next seven months, Mr. Nifong engaged in a pattern of official misconduct that continued to conceal the existence of that exculpatory evidence from the Defendants. The pattern included *multiple* material misrepresentations to *multiple* courts on *multiple* occasions, and it represented a continuing and ongoing violation of the *multiple* Constitutional, statutory, ethical, and court-ordered duties imposed on

Mr. Nifong in this case regarding that evidence.

When the Defendants finally discovered the withheld exculpatory evidence in December of 2006, Mr. Nifong then told *multiple* different stories about what he knew, when he knew it, and why the evidence was withheld. After representing to this Court that he did not know about the exculpatory test results until December 13, 2006, he later admitted in comments to the media and the North Carolina State Bar that he knew about the results in April of 2006, but he gave *multiple* conflicting reasons for why they were not provided to the Defendants. Each one of Mr. Nifong's stories is demonstrably incredible and contradicted by the other, as well as the record evidence on the subject.

As the sole representative of the State of North Carolina in the prosecution of these matters for the relevant time period, Mr. Nifong's pattern of prosecutorial misconduct regarding the DNA evidence in this case is so extensive-and occurred across so much time and on so many different fields of legal and ethical obligation-that the sheer scope of it shocks the conscience and defies any notion of accident or negligence. Accordingly, the Defendants respectfully submit that the appropriate remedy is to sanction Mr. Nifong personally and hold him in criminal contempt.

**INITIAL ALLEGATIONS. INVESTIGATION. AND EVIDENCE COLLECTION**

1. This case arose in the early morning hours of March 14, 2006, when Crystal Mangum alleged that she was physically and sexually assaulted just hours earlier inside the residential home at 610 North Buchanan Boulevard in Durham, North Carolina. She eventually claimed that the assault occurred in a bathroom at the residence over a 30-minute time period and involved multiple white males who physically assaulted her and raped her vaginally, anally, and orally without condoms.1 In response to questions posed separately by medical personnel and law enforcement officers, the accuser would also say the last time she had consensual sexual intercourse before March 13 was approximately a week earlier, with Matthew Murchison.2
2. The Durham Police Department (DPD) would soon learn that 610 N. Buchanan was rented by three captains of the 2006 Duke University Men's Lacrosse team and that the captains had hosted a party at the residence that night for many of the team members. The accuser was one of two strippers hired to perform at the party.
3. On March 14, 2006, within hours of the alleged assault, Crystal Mangum was at the Duke Hospital Emergency Room being examined by a number of medical professionals. During that time, Sexual Assault Nurse Examiner (SANE) Tara Levicy and Dr. Julie Manly performed a standardized Sexual Assault Exam Report and generated a number of evidentiary items commonly called a "rape kit."
4. The Sexual Assault Exam Report completed on the morning of March 14, 2006, memorialized the first detailed interview of Crystal Mangum about the alleged sexual assault. During that interview, the accuser told Nurse Levicy that one of her attackers put his "private part in me and did not use a condom."3 She claimed that another attacker "put his private part in my butt."4 Nurse Levicy noted elsewhere in the Report that the accuser was allegedly "vaginally, rectally, and orally assaulted," with "no

condoms used.'5'

Of the "Yes," "No," and "Not sure" boxes available to answer the question in yet

another section of the Report, Nurse Levicy checked "No" to the question: "Was a condom used during

1 ***See* Attachment 1, BS 551. This Motion will cite discovery documents using the format "BS** xx." **Some of the referenced documents will also be attached to this Motion, for the convenience of the Court.**

2 **Attachment 1, BS 551 (Sexual Assault Exam Report completed by Nurse Levicy on March 14, 2006, filed under seal); and**

**Attachment 2, BS 1216 (Inv. Ben Himan's typewritten notes of an interview of Crystal Mangum on March 21, 2006).**

'Attachment 1, BS 538. 'Attachment 1, BS 539. 5 **Attachment 1, BS 551.**

the assault?',<; Asked whether her attackers penetrated her vagina, anus, and mouth, Crystal Mangum said "yes" to all.7 Asked whether her attackers ejaculated in her vagina, anus, and mouth, Crystal Mangum said "yes" regarding the mouth and "unsure" regarding the vagina and anus.8

1. Thus, in no less than three separate places in the Sexual Assault Exam Report was the recordation of Crystal Mangum's unequivocal claim that no condoms were used during a sexual assault upon her by three men who had variously placed their penises in or about her vagina, anus, and mouth, at least one of whom, and possibly all of whom, had ejaculated.
2. In addition to interviewing the accuser on March 14, 2006, within hours of the alleged sexual assault, Nurse Levicy also assisted Dr. Julie Manly in generating the "rape kit." The rape kit contained cheek scrapings, oral swabs and smears, vaginal swabs and smears, rectal swabs and smears, a pubic hair combing, and a pair of white panties collected from the accuser that morning. Also collected from the accuser were four items of clothing: a pair of red lace underwear, a red lace halter top, a white knit skirt, and a white knit top. The items were transferred to the Durham Police Department that day and logged into evidentiary custody.9
3. On March 15, 2006, Sgt. Mark Gottlieb of the Durham Police Department became the officer in charge of supervising the investigation into Crystal Mangum's allegations.10 On the morning of March 16, 2006, Sgt. Gottlieb assigned the lead investigator role to Inv. Ben Himan and advised all other investigators to coordinate their case activities with Inv. Himan.11
4. On March 16, 2006, Sgt. Gottlieb and Inv. Himan interviewed Crystal Mangum. It was the second detailed interview of her about the alleged assault. During the interview, she told Sgt. Gottlieb and Inv. Himan that she had been sexually assaulted three nights earlier by three persons in a bathroom at 610 N. Buchanan. She accused two of the attackers of placing their penises in her anus and vagina, stating her belief that at least one had ejaculated, and she accused the third attacker of placing his penis in her mouth while he ejaculatedY She said that the attack occurred over a 30-minute time frame."
5. After interviewing Crystal Mangum on March 16, 2006, Sgt. Gottlieb and Inv. Himan drafted a probable cause affidavit in which they stated that Crystal Mangum "reported she was sexually assaulted for an approximate 30 minute time period by three males" who "sexually assaulted her anally, vaginally and orally" in a bathroom at 610 N. Buchanan.14 Those sworn representations were used by Sgt. Gottlieb and Inv. Himan to obtain a search warrant for 610 N. Buchanan. Among other evidentiary items specifically sought by Sgt. Gottlieb and Inv. Himan in the application for the search warrant: "any DNA evidence to include hair, semen, blood, salvia [sic] related to the suspects and victim.''15
6. On the night of March 16, 2006, Durham Police executed the search warrant at 610 N. Buchanan. DPD Crime Scene Investigator Angela Ashby led the trace and forensic evidence search and collection. Among many other items, she collected five false fingernails found in the trash can in one of the bathrooms at the residence: two were unpainted and had not been previously applied, while three were painted red and had been previously applied. All five false fingernails were bagged together and

6 **Attachment 1, BS 551.**

7 Attachment 1, BS 551. 'Attachment 1, BS 551.

'BS 1712.

10 BS 1816.

11 BS 1816.

12 Attachment 2, BS 1208.

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**Attachment 3, BS 1292 (contemporaneous handwritten notes of Inv. Himan regarding his and Sgt. Gottlieb's interview of Crystal**

Mangum on March 16, 2006).

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15 **Attachment 4 (Attachment for Application for Search Warrant for 610 N. Buchanan executed March 16, 2006), BS 199. Attachment 4, BS 196.**

collectively given the ageney identifier DPD Item 31.16 She also collected an unpainted, previously unapplied false fingernail found on a CPU ( computer) tower in one of the bedrooms in the residence1.7

1. Also on the night of March 16, 2006, all three residents of 610 N. Buchanan-lacrosse team co-captains Dave Evans, Dan Flannery, and Matt Zash-voluntarily assisted law enforcement in the execution of the search warrant at their home and then offered to assist the police in any other way requested. Without contacting their parents or attorneys, all three young men accompanied officers to the police station and voluntarily provided oral and written statements about the night of March 13, 2006, and the party attended by many members of the 2006 Duke University Men's Lacrosse Team. After giving an oral statement to Inv. Himan and then drafting a 9-page handwritten statement, Dave Evans volunteered to take a polygraph examination. Sgt. Gottlieb explained to Dave that DNA tests were "more accurate" than polygraph tests and asked Dave if he would be willing to submit a DNA sample for comparison testing purposes. Dave readily agreed, as did Dan Flannery and Matt Zash.
2. On March 23, 2006, the State of North Carolina sought and obtained from Durham County Superior Court Judge Ronald Stephens a nontestimonial identification order requiring all 46 white members of the 2006 Duke University Men's Lacrosse Team to submit DNA samples. The sworn probable cause affidavit and application signed by Inv. Himan and Durham County Assistant District Attorney David Saacks sought "swabbings of the mouth to provide DNA evidence for a link between the victim and suspects" which would "be of material aid in determining whether [the subjects of the order] committed the offense[s]" alleged.18 The State's application stated that Crystal Mangum reported being "raped and sexually assaulted ... anally, vaginally, and orally ... for an approximate 30 minute time period by ... three males."19 The State averred that "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 vaginally and anally." 20 In the concluding paragraph of its application, the State unequivocally represented that "the DNA evidence requested will immediately rule out any innocent persons, and show conclusive evidence as to who the suspect(s) are in the alleged violent attack upon this victim."21 Judge Stephens signed the order, and all 46 white members of the lacrosse team submitted to the order without challenge, providing DNA reference samples in the form of cheek swabs.
3. On March 24, 2006, Captain Lamb of the Durham Police Department met with Sgt. Gottlieb and advised him that Durham County District Attorney Michael B. Nifong would be prosecuting any criminal charges that may arise from the investigation and that he would also be taking over the factual investigation from the Police Department. Captain Lamb advised Sgt. Gottlieb "to continue with [the] investigation, but to go through Mr. Nifong for any directions as to how to conduct matters in the case."22

16 **BS 1717 & 1743. CSI Ashby generated a drawing of 610 N. Buchanan and labeled each room. The bathroom where the five false fingernails were recovered from the trash can was labeled "Bathroom B." That bathroom was regularly used by co-residents (and lacrosse team co-captains) Dave Evans and Matt Zash.**

**Crystal Mangum claimed in her statements to Nurse Levicy on March 14 and Sgt. Gottlieb and Inv. Himan on March 16 that she lost several false fingernails during the alleged assault. According to the sworn probable cause affidavit in support of the search warrant application for 610 N. Buchanan, she claimed to have been "hit, kicked, and strangled during the ... approximate 30 minute time period" of the assault, and "she attempted to defend herself, but was overpowered" (Attachment 4, BS 199).**

17 **BS 1743. The bedroom-labeled "Bedroom 3" on CSI Ashby's drawing-belonged to Dave Evans.**

18 **Attachment 5 (Application for Nontestimonial Identification Order dated March 23, 2006), BS 454.**

"Attachment 5, BS 460.

20 **Attachment 5, BS 460.**

21 **Attachment 5, BS 461.**

22 Attachment 6 (Typed report of activities of Sgt. Mark Gottlieb on March 24 and 27. 2006), BS 1823.

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**THE DISTRICT ATTORNEY: MICHAEL B. NIFONG**

1. When he took over the factual investigation in this case, Durham County District Attorney Michael Nifong had been a prosecutor in that office for over 25 years. Between 1979 and 1999, he reportedly tried 300 felony jury trials. After 1999, Mr. Nifong substituted much of his courtroom time for administrative duties and policy developments in the Durham County District Attorney's Office.
2. However, Mr. Nifong still remained involved in some felony matters after 1999, including the 2000 prosecution of Leroy Samuels for first-degree rape, first-degree sexual offense, first-degree kidnapping, and first-degree burglary that arose after a woman was reportedly raped in the Trinity Park area of Durham in February 2000. After Mr. Samuels was reportedly identified by a number of eyewitnesses, including the victim herself, as being near the scene of the assault, he was charged in April 2000 and jailed for three months under a $150,000 bond. During that time, the lab at the North Carolina State Bureau of Investigation, at the request of the Durham County District Attorney's Office, performed DNA comparison analysis of vaginal swabs and a shirt obtained from the victim, as well as reference samples from the victim and Mr. Samuels. In July 2000, the SBI lab issued its final report of that analysis, stating that male DNA had been identified on the vaginal swabs and shirt that did not match Mr. Samuels. Mr. Nifong, then Chief Assistant District Attorney for Durham County, *immediate4'dismissed* the charges against Mr. Samuels. In fact, Mr. Nifong dismissed the charges *before* the SBI lab report had even been formally drafted; and, in filling out the dismissal forms, he wrote:

##### "Results of DNA testing exclude defendant as perpetrator of this

crime."23

1. Mr. Nifong was elevated to his current position of Durham County District Attorney in April 2005, when he was appointed to the posltion by Governor Michael F. Easley after Durham's preceding elected District Attorney, The Honorable James Hardin, vacated that position to accept a judicial appointment. In May 2006, Mr. Nifong won the Democratic primary election for Durham County District Attorney, and, in November 2006, he won the general election for Durham County District Attorney.
2. During his campaign in 2006, Mr. Nifong maintained a website that included a recitation of his personal policy about readily providing all information gathered in an investigation to criminal defendants. He personally wrote that he had "never understood why any prosecutor would try to gain an advantage at trial by concealing evidence from the defendant. After all, if the information in question is damaging to the State's case, then the defendant is clearly entitled to have it; if it is not damaging to the State's case, why should it matter if he gets it?"24
3. Mr. Nifong echoed that general sentiment to this Court on September 22, 2006:

##### 23 years before it was required by the State of North Carolina, I had the policy of giving open-file discovery in all my cases. That is now a requirement for all DAs in the State of North Carolina.25

1. Mr. Nifong reiterated that sentiment in representations to this Court on October 27, 2006:

**[R]egardless of my personal policy about always providing everything for 28 years,** there is nothing to provide involving the April 11 conversation [ with the accuser].26

23 **This dismissal forms (dated July 7, 2000) are attached as Attachment 7. The report of the S8I lab's DNA analysis in that case (dated July 17, 2000) is attached under seal as Attachment 8, with the name of the victim redacted by undersigned counsel. A contemporaneous article from the Raleigh *News* & *Observer* about the case is attached to this Motion as Attachment 9.**

24 **The website,** [**www.mikenifongda.com,**](http://www.mikenifongda.com/) **is no longer active as of the writing of this Motion.**

25 **Attachment 39 (Transcript of September 22 Hearing), Tr.81 (emphasis added).**

26 **Attachment 41 (Transcript of October 27 Hearing), Tr.16-17 (emphasis added).**

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**THE INVESTIGATION UNDER MR. NIFONG**

1. On March 27, 2006, Mr. Nifong met for the first time at length with both Sgt. Gottlieb and Inv. Himan, who briefed him about the to-date investigation.27 That same day, Mr. Nifong began a series of dozens of public comments about the investigation and prosecution of this case in which he repeatedly stated his absolute confidence that the accuser had been the victim of a racially-motivated gang rape at 610 N. Buchanan Boulevard.28
2. Also on March 27, 2006, the rape kit items and DNA samples from the white lacrosse players were delivered by DPD/CSI Angela Ashby to Agent Rachel Winn in the Serology Section of the SBI lab.29
3. On March 28, 2006, in response to a question about when he might charge anyone in the investigation, Mr. Nifong responded, "There won't be any arrests before next week. I **have decided not to make arrests until DNA evidence is back.'" 0**
4. Also on March 28, 2006, during an interview with Dan Abrams of MSNBC, Mr. Nifong stated, **"We are awaiting DNA results from tests that have been done so far. We expect those next week, and depending on the results of that, it may be necessary to extend the scope of the search, but we at least have an idea of the direction which that would go We hope that**

##### there will be DNA evidence that will be relevant to the case. We cannot know that for certain until all of the evidence has been tested."31

1. Also on March 28, 2006, Agent Winn examined the vaginal smears, oral smears, rectal smears, and panties from the rape kit, none of which showed the presence of semen, blood, or saliva. Accordingly, she did not forward any of those items to the DNA Section for further testing. 32 She did, however, forward the swabs containing the DNA reference samples from the lacrosse players."
2. On March 29, 2006, roughly 24 hours after Agent Winn discovered that there was no semen on the rape kit items, Mr. Nifong for the first time publicly suggested that condoms had been used during the alleged sexual assault. When commenting to a Raleigh *News* & *Observer* reporter on the potential results of DNA testing in the case, Mr. Nifong said "that even if DNA results, which are expected as early as next week, do not match team members, no one is necessarily exonerated. **The attackers could have used condoms** or might not have been team members, Nifong said."34
3. That same day, Mr. Nifong once again publicly stated that he had no doubt the accuser in this case was raped, and, as the basis of that certainty, specifically cited a personal review of her Duke

27 Attachment 6.

28 The North Carolina State Bar later reviewed those comments and found probable cause to believe that, in making many of them,

Mr. Nifong umade extrajudicial statements he knew or reasonably should have known would be disseminated by means of public communication and would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter in violation of Rule 3.6(a)"; that Mr. Nifong "made extrajudicial statements that had a substantial likelihood of heightening public condemnation of the accused in violation of Rule 3.8(f)"; and that Mr. Nifong "engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)." *See* Attachment 48, The North Carolina State Bar v. Michael B. Nifong, 06 DHC 35, Amended Complaint filed January 24, 2007. On June 16, 2007, the Disciplinary Hearing Commission (DHC) found those violations had been proved by clear, cogent, and convincing evidence. Later that same day, the DHC disbarred Mr. Nifong based on that misconduct and other misconduct committed during his prosecution of these cases.

"BS 4435-4437.

30 Attachment 10, "Broadhead: No Duke Lacrosse Until Rape Investigation Complete," NBC17.com, March 28, 2006 (emphasis added).

31 Attachment 11, Transcript of uThe Abrams Report," MSNBC, originally broadcast on March 28, 2006 (updated on March 29,

2006)(emphasis added).

32 Attachment 12 (Bench notes of S8I Agent Rachel Winn regarding her examination of rape kit items for the presence of semen on March 28, 2006), BS 4443-4445.

"BS 4446-4449.

34 Attachment 13, "Lacrosse players' lawyers object," Raleigh *News* & *Observer,* March 30, 2006 (emphasis added).

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Hospital Emergency Room medical records: **"My reading of the report of the emergency room nurse** would indicate that some type of sexual assault did in fact take place."35

1. On March 30, 2006, Mr. Nifong appeared on the nationally broadcast CBS morning program "The Early Show" and once again stated that there was "no doubt" a sexual assault took place. He again referred specifically to the accuser's treatment at Duke Hospital on March 14, 2006, seeming to emphasize the work and report of Nurse Tara Levicy. "The victim was examined at Duke University Medical Center **by a nurse who was specially trained in sexual assault cases,"** Mr. Nifong said, "and the investigation at that time was certainly consistent with a sexual assault having taken place, as was the victim's demeanor at the time of the examination." 36
2. That same day, March 30, 2006, Mr. Nifong had a conversation with Agent Jennifer Leyn in the DNA section about the status of the SBI lab's testing of evidentiary items in the case.37
3. That afternoon, Mr. Nifong once again publicly suggested that condoms were used during the alleged assault. He told MSNBC's Dan Abrams:

Obviously the first step that is involved in DNA testing is determining whether or not there is any DNA evidence that is left with the victim that does not belong to her, and so the initial tests are to determine whether or not DNA foreign to the victim can be detected on the samples that are taken from her body. Now, if there is no DNA left, then there is obviously nothing to compare. **For instance, if a condom were used, then we might expect that there would not be any DNA evidence recovered from say a vaginal swab.**38

1. The next day, April 1, 2006, Mr. Nifong once again mentioned condom use by the alleged attackers, albeit in a slightly different context: "Two days [after the initial 911 call], officers searched the home. Police have said they used those two days to interview the victim, witnesses and residents of the house to build probable cause for a search warrant. Nifong would not comment on why the delay happened, but he said that because of it, investigators could have missed some evidence. **For instance, if condoms were used, Nifong said, those would have been gone before the search.**39
2. That same week, Mr. Nifong would once again publicly suggest that condoms had been used during the alleged attack. On April 11, 2006, the Charlotte *Observer* quoted Mr. Nifong as follows: **"'I would not be surprised if condoms were used,'** Nifong said in an interview *last month.* **'Probably an exotic dancer would not be your first choice for unprotected sex.""'°**
3. Of course, as Mr. Nifong was well aware, the report by SANE Nurse Tara Levicy from her examination and interview of Crystal Mangum on March 14, 2006, reflected in multiple different places the accuser's unequivocal claim that no condoms were used by any of her three alleged attackers; her claim that she had been\_ penetrated vaginally and anally by more than one penis, at least one of which probably ejaculated; and her claim that she had been orally penetrated by another penis during ejaculation.41 He was also aware, from his debriefing by Sgt. Gottlieb and Inv. Himan on March 27, 2006, that Crystal Mangum told them on March 16 that two of the attackers placed their penises in her anus

35 **Attachment 14, "Duke President Calls Alleged Slurs 'Disgusting' Before Student March; Durham DA: 'Some Type of Sexual**

Assault Did In Fact Take Place,"' WRALcom, March 29, 2006 (emphasis added).

36 **Attachment 15, "DA Stands Behind Duke Rape Charge," CBSNews.com, March 30, 2006 (emphasis added).**

"BS 4498.

38 **Attachment 16, Transcript of "The Abrams Report," MSNBC, originally broadcast on March 31, 2006 (updated on April 3,**

2006)(emphasis added).

39 **Attachment 17, "Any lacrosse charges 10 days away,n Raleigh *News* & *Observer,* April 1, 2006 (emphasis added).**

40 **Attachment 18, "No match in Duke DNA tests," Charlotte *Observer,* April 11, 2006 (emphasis added). *See* Attachment 48, pp. 11**

and 30.

41 **Attachment 1; see a/so Paragraph 4 above and accompanying footnotes.**

and vagina, stating her belief that at least one had ejaculated, and that the third attacker placed his penis in her mouth while he ejaculated4.2

1. On April 4, 2006, notwithstanding his recent public effort to suggest that condoms were used, Mr. Nifong was still very interested in identifying DNA trace evidence on various evidentiary items, including the rape kit items. That afternoon, Mr. Nifong met with Sgt. Gottlieb and Inv. Michelle Soucie to receive an oral report of the results of a PowerPoint photo lineup conducted earlier that day in which the accuser reportedly identified with 100% certainty Defendants Reade Seligmann and Collin Finnerty as her attackers, but only identified Defendant Dave Evans with 90% certainty, if he had a mustache.43 Following discussions with Mr. Nifong that afternoon, Investigator Michelle Soucie first contacted Dr. Brian Meehan, president and director of DNA Security, a private laboratory in Burlington, North Carolina. Dr. Meehan said that his lab could perform Y-chromosome, or Y-STR DNA testing, which is more sensitive than the autosomal DNA testing that the SBI lab was limited to performing.44 Dr. Meehan indicated that DNA Security would be willing to work with the State on pricing, because "they would really like to be

involved in [the] case."45 Inv. Soucie then reported the substance of her conversations with Dr. Meehan to Mr. Nifong.46

1. The next day, April 5, 2006, the State sought and obtained an order from Judge Ronald Stephens to allow for the transfer of the rape kit items to DNA Security for Y-chromosome DNA testin g.47 In doing so, the State informed the Court:

Tests conducted by the S.B.I. laboratory failed to reveal the presence of semen on swabs from the rape kit or the victim's underwear. In cases without semen present, it is sometimes possible to extract useful DNA samples for comparison purposes using a technique known as Y STR. This technique isolates cells containing a Y chromosome from the entire sample, which must have been contributed by a male person. The S.B.I. laboratory is not equipped to conduct Y STR DNA analysis. DNA Security is a private laboratory in Burlington, North Carolina that can conduct Y STR DNA analysis and has agreed to undertake this analysis in an expedited manner.

In issuing the Order that allowed for DNA Security's work, Judge Stephens specifically stated that ***"any* male cells found among the victim's swabs from the rape kit can be evidence of an assault and may lead to the identification of the perpetrator."48**

1. On April 6, 2006, the rape kit items and reference DNA samples for Crystal Mangum and the lacrosse players were all transferred from Agent Leyn back to DPD/CSI Ashby,49 who transferred them to DNA Security.50
2. On April 7, 2006, DNA Security produced sperm-fraction and non-sperm (epithelial) fraction DNA extractions from the rape kit panties, cheek scrapings, oral swabs, vaginal swabs, and rectal swabs

42 **Attachment 2, Attachment 3, and Attachment 6; *see also* Paragraph 8 above and accompanying footnotes.**

43 **For a more detailed analysis of this procedure and issues related to this alleged identification, *see* the Defendants' Motion To Suppress The Alleged "Identification" of the Defendants by the Accuser, filed on December 14, 2006, and the Defendants' First Supplement To Motion To Suppress The Alleged "Identification" of the Defendants by the Accuser, filed on January 11, 2007, and set for hearing before this Court on May 7, 2007.**

44 **Attachment 19 (Inv. Michelle Soucie's handwritten notes of her activities on April 4, 2006), BS 1606.**

"'Attachment 19, BS 1607. "Attachment 19, BS 1607.

47 **Attachment 20 (State's Petition for order directing Y-STR testing of certain items of evidence by DNA Security, April 4, 2006).**

48 **Attachment 21 (Order of Judge Ronald Stephens granting State's petition for Y-STR testing of certain items of evidence by DNA**

Security, April 5, 2006)(emphasis added).

49 **BS 4782.**

50 **BS 2644-2650. Dave Evans' reference sample was given the DNA Security agency identifier 15723. Reade Seligmann's sample**

**was given the identifier 15725. Collin Finnerty's sample was given the identifier 15758. The accuser's known blood sample was given the identifier 15765.**

from the rape kit, assigning them item numbers specific to that lab.51

1. Also on April 7, 2006, DNA Security performed seratic PSA presumptive tests for the presence of semen on the rape kit items, and all were negative.52
2. On April 8, 9, and 10, 2006, DNA Security performed analyses of the rape kit items that resulted in the following conclusions regarding male DNA characteristics identified on those items:
	1. On Item 15780, the epithelial fraction of Stain D from the rape kit panties, DNA Security identified DNA characteristics from **at least two males.** With 100% scientific certainty, the Defendants in this case, their teammates on the 2006 Duke University Men's Lacrosse Team, and all others from whom reference DNA samples were obtained during the investigation were excluded as the source(s) of that DNA material.53
	2. On Item 15767, the sperm fraction of Stain A from the rape kit panties, DNA Security identified DNA characteristics from **at least two males.** With 100% scientific certainty, the Defendants in this case, their teammates on the 2006 Duke University Men's Lacrosse Team, and all others from whom reference DNA samples were obtained during the investigation were excluded as the source(s) of that DNA material.54
	3. On Item 15776, the sperm fraction from the rectal swab, DNA Security identified DNA characteristics from **at least one male.** With 100% scientific certainty, the Defendants in this case, their teammates on the 2006 Duke University Men's Lacrosse Team, and all others from whom reference DNA samples were obtained during the investigation were excluded as the source of that DNA material.55
	4. On Item 15777, the epithelial fraction of Stain A from the rape kit panties, DNA Security identified DNA characteristics from **at least four males.** With 100% scientific certainty, the Defendants in this case, their teammates on the 2006 Duke University Men's Lacrosse Team, and all others from whom reference DNA samples were obtained during the investigation were excluded as the source(s) of that DNA material5.6
	5. On Item 15778, the epithelial fraction of Stain B from the rape kit panties, DNA Security identified DNA characteristics from **at least two males.** With 100% scientific certainty, the Defendants in this case, their teammates on the 2006 Duke University Men's Lacrosse Team, and all others from whom reference DNA samples were obtained during the investigation were excluded as the source(s) of that DNA material5.7
3. On April 10, 2006, Dr. Meehan met with Mr. Nifong, Inv. Himan, and Sgt. Gottlieb at DNA Security's lab in Burlington. Dr. Meehan orally reported the results of all to-date analyses by his lab,

51 BS 1687-1689, 2651-2653, and BS 2992.

52 BS 123 and 2983-2991.

53 **Attachment 44 (Transcript of December 15 Hearing), Tr.20-27.**

54 **Attachment 44, Tr.27-32.**

55 **Attachment 44, Tr.32-34.**

56 **Attachment 44, Tr.34-35.**

57 **Attachment 44, Tr.36.**

including the exculpatory results referenced in the preceding paragraph.58

1. Also on April 10, 2006, Mr. Nifong provided the Defendants in this case with the final report of the SBI lab's DNA analysis in the case. Attorneys representing a number of players-including undersigned counsel Wade Smith, Joe Cheshire, and Brad Bannon-announced to the public the results of the SBI lab's analysis: namely, that no DNA from any of the players was found on the accuser's rape kit items or clothing; that DNA from one of the residents of 610 N. Buchanan was found on a towel in the house; and that DNA from another resident of 610 N. Buchanan was found on the floor in one of the bathrooms in the house. It should be noted that the SBI lab report, consistent with the agency's standard reporting practices, listed the results of *all* of its DNA analysis and findings, even where the lab was unable to identify the source of DNA material. For example, in addition to identifying the major DNA contributors on the towel (Dave Evans), the Bathroom B floor swab (Matt Zash), and the combined fingernail extraction (Crystal Mangum), the SBI DNA lab discovered DNA characteristics from other people on all of those items. Even though those "minor'' DNA characteristics did not match any of the lacrosse players or other reference sample contributor, the SBI lab nevertheless *reported* the discovery of those characteristics *and* either (a) the fact that they did not match any of the reference samples (regarding the towel and the floor swab); or (b) the fact that the lab could not make a comparison conclusion either way (regarding the *multiple* additional sources of DNA in the combined fingernail extraction). Notably, the SBI lab

did all of those things without publishing any individual's specific DNA characteristci s.59

1. On April 11, 2006, just 24 hours after Dr. Meehan orally reported to Mr. Nifong that DNA evidence from multiple males had been left behind on multiple rape kit items but did not match the lacrosse players, Mr. Nifong made public comments suggesting that DNA testing in this case had failed to reveal the presence of *any* DNA in the case, implying that there was an absence of evidence that could be compared to reference samples for purposes of inclusion or exclusion. At a forum at North Carolina Central University on April 11, 2006, Mr. Nifong said:

I read the comments in the paper this morning from [defense attorneys), and I saw one comment from a North Carolina Central University student [who] actually made a lot more sense than all of those attorneys. Her comment is, about the absence of the DNA, **'It doesn't mean nothing happened; it just means nothing was left behind,'** which is the case in 75 to 80 percent of all sexual assaults. [Applause] DNA results can often be helpful, but, you know, I've been doing this for a long time, and for most of the years I've been doing this, we didn't have DNA. We had to deal with sexual assault cases the good old-fashioned way. Witnesses got on the stand and told what happened to them. **And the thing about DNA is, is not only that it can point the finger to who the guilty people are, but *it can also tell us who the guilty people are not.60***

1. Mr. Nifong's representation about the "absence of the DNA" to approximately 700 people at a televised forum at North Carolina Central University on April 11, 2006, was consistent with what he had told a national audience on the Dan Abrams show on March 31, 2006: **"If there is no DNA left, then there is obviously nothing to compare. For instance, if a condom were used, then we might expect that there would not be any DNA evidence recovered from say a vaginal swab.''61**

58 **Attachment 44, Tr.42 44 and 46. Mr. Nifong also stated in previous court settings that he discussed the testing with Dr. Meehan, and this Court found as fact in its Omnibus Discovery Order of September 22, 2006, that "[the] meeting[ ] involved the State's request for YSTR DNA testing, *Dr. Meehan's report of the results of those tests,* and a discussion of how the State intended to use those results in the course of a trial of these matters." *See* Attachment 37 (Transcript of June 22 Hearing), Tr.16 and 20 21; Attachment 39 (Transcript of September 22 Hearing), Tr.27-29; and Attachment 40 (Order Regarding Defendants' Joint Omnibus Motion To Compel Discovery** And Addendum), 1!4 (emphasis added).

59 **The report of the S8I lab's DNA analysis is attached to this Motion as Attachment 22.**

60 **A video of this entire forum is available online at** [**www.wral.com/news/local/video/1091582**](http://www.wral.com/news/local/video/1091582) **(emphasis added).**

61 **Attachment 16 (emphasis added).**

1. On April 12, 2006, Mr. Nifong sent a letter to counsel for a number of the lacrosse players who had submitted to the nontestimonial identification procedures of March 23, 2006. Mr. Nifong stated in the letter that he was aware of his statutory duty to provide reports of the results of tests conducted on any evidence obtained as a result of nontestimonial identification procedures.62
2. On April 17, 2006, based solely on the strength of Crystal Mangum's 100% certain "identification" of them as two of her attackers during the April 4 PowerPoint lineup, Mr. Nifong indicted Reade Seligmann and Collin Finnerty for first-degree rape, first-degree sexual offense, and kidnapping. At the time, Mr. Nifong knew that Crystal Mangum had alleged that she was raped vaginally and anally by two attackers who did not wear condoms, at least one of whom probably ejaculated, and that she was also raped orally by a third attacker who did not use a condom and ejaculated. He also knew that extraordinarily sensitive DNA testing he personally requested revealed the presence of multiple male DNA characteristics on the rape kit items. He also knew that those tests excluded, with 100% scientific certainty, Reade Seligmann and Collin Finnerty-as well as the remaining lacrosse players-as sources of those multiple male DNA characteristics.63
3. Notably, Mr. Nifong chose not to indict Dave Evans on April 17, 2006, specifically stating in a press release that it had been his "hope to be able to charge all three assailants at the same time"; however, *"the evidence available to me at this moment does not permit that' '"4* The evidence available to

Mr. Nifong at that moment included the accuser's PowerPoint "identification," as well as the results of all tests completed by the State Bureau of Investigation, including its DNA testing. Mr. Nifong then went on

to say that "investigation into the identity of the third assailant will continue in the hope that he can also be identified *with certainty'."'5*

1. The same day Mr. Nifong issued that public statement, DNA Security was identifying *even more* male DNA characteristics on the rape kit items that did not match Reade Seligmann, Collin Finnerty, Dave Evans, or any of their lacrosse teammates. On April 18 and 19, 2006, DNA Security analyzed swabbings from four sections of the rape kit pubic hair comb, resulting in the following conclusions:
	1. On Item 15816, the swabbing from Section 2 of the pubic hair comb, DNA Security identified DNA characteristics from **at least two males.** With 100% scientific certainty, the Defendants in this case, their teammates on the 2006 Duke University Men's Lacrosse Team, and all others from whom reference DNA samples were obtained during the investigation were excluded as the source(s) of that DNA material.66
	2. One source of the male DNA characteristics on Item 15816, the swabbing from section 2 of the pubic hair comb, was possibly Dr. Meehan himself. Given the sensitivity of the type of DNA testing performed by DNA Security, and despite precautions taken by lab personnel to avoid contamination, DNA from a single human cell, or even less than a single cell, may be transferred from the lab analyst to an evidentiary item and yield DNA characteristics from that analyst on that evidentiary item.67

62 **Attachment 23. Mr. Nifong specifically cited G.S. § 15A-282, which states that "[a] person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available (emphasis added).**

63 **Attachment 46, "Charges of Rape Against 3 at Duke Are Dropped," New York *Times,* December 23, 2006 (emphasis added)("Mr.**

**Nifong acknowledged knowing about those test results before any players were indicted last spring. He also acknowledged that the results were relevant and 'potentially exculpatory.'").**

64 Attachment 24 (Statement To The Public by Mike Nifong dated April 18, 2006)(emphasis added).

65 Attachment 24 (emphasis added).

66 **Attachment 44, Tr.37-39.**

67 **Attachment 44, Tr.70-73 (Dr. Meehan testified, "Now, do I doubt that it's from me? To be honest with you, no, I don't.").**

12

1. On April 20 or 21, 2006, Dr. Meehan again met with Mr. Nifong, Inv. Himan, and Sgt. Gottlieb at DNA Security's lab in Burlington. Dr. Meehan orally reported the results of all to-date analyses by his lab, including those referenced in the preceding paragraph.68
2. Thus, by April 21, 2006, Mr. Nifong was aware that DNA Security's analysis of the rape kit items revealed the presence of multiple male DNA characteristics on multiple rape kit items that did not match the lacrosse players or anyone else who had submitted a reference sample in the investigation. As a prosecutor who had promptly dismissed rape charges in the past based on DNA analysis that excluded the charged suspect as source of male DNA on the rape kit items, Mr. Nifong was also well aware of the obviously exculpatory nature of those findings.69
3. Even if Mr. Nifong had not acknowledged his belief in the exculpatory nature of such findings by dismissing the Leroy Samuels case in 2000, and then acknowledged his belief in the exculpatory nature of the exclusionary DNA Security findings in *this* case,7° it would be difficult to find any actually and intellectually honest practitioner of criminal law who would doubt the obviously exculpatory nature of the undisclosed DNA Security test results in this case. The presence of DNA characteristics of at least four men across multiple rape kit items that did not match the Defendants tends to negate their guilt in this particular case, under these particular allegations, on a number of different levels. For example:
	1. It shows that there was not an "absence of evidence" or "nothing left behind" in this case which precluded DNA comparison for inclusion or exclusion purposes. Rather, there was an abundance of DNA evidence-far beyond the sole reported characteristics of Matthew Murchison on the vaginal swab-that completely excluded the Defendants and Mr. Murchison.
	2. It shows that DNA Security testing was so sensitive in this case that it detected male DNA characteristics from at least four people other than Matthew Murchison on the rape kit items which completely excluded the Defendants, in a case where the accuser alleged that at least two of them put their penises in her vagina and rectum, with at least one and possibly both of them ejaculating.
	3. It tends to impeach the credibility of the accuser's claims, in response to questions from both hospital personnel and law enforcement, that the last consensual sexual encounter she had before March 13 was a week before, with Matthew Murchison.
	4. In the event that the State might allege that "diffuse edema of the vaginal walls" is evidence of non-consensual sexual contact/' the presence of multiple male DNA characteristics on the rape kit items tends to establish extensive consensual sexual activity which would readily explain that finding.
4. Nevertheless, at some point during his multiple meetings and conversations with Dr. Meehan, Mr. Nifong arrived at an intentional agreement with Dr. Meehan to produce a report of DNA Security's

68 **Attachment 44, Tr.47. Mr. Nifong also stated in previous court settings that he discussed the testing with Dr. Meehan, and this Court found as fact in its Omnibus Discovery Order of September 22, 2006, that u[the] meeting[ ] involved the State's request for YSTR DNA testing, *Dr. Meehan's report of the results of those tests,* and a discussion of how the State intended to use those results in the course of a** trial of these matters." *See* Attachment 37, Tr.16 and 20-21; Attachment 39, Tr.27-29; and Attachment 40, 4 (emphasis added).

69 ***See* Paragraph 15 above and accompanying footnotes and referenced attachments. *See* a/so Attachment 46: "Mr. Nifong**

**acknowledged knowing about those test results before any players were indicted last spring. He also acknowledged that the results were relevant and 'potentially exculpatory.'" *See also* Attachment 47: *'"Obviously,* anything that is not DNA from the people who are charged is potentially exculpatory infonnation,' [Mr. Nifong] said" (emphasis added).**

70 ***See* Footnote 69 above.**

71 **Attachment 1, BS 548.**

work that did not include results of all tests performed by DNA Security, including the obviously exculpatory findings summarized in Paragraphs 38, 46, and 49 of this Motion.72

1. Moreover, while he was arriving at that agreement, which assured the production of a report by DNA Security that did not disclose all of the exculpatory results of its DNA testing, Mr. Nifong publicly disparaged what he characterized as strategically selective disclosure of DNA test results by defense attorneys. In yet another interview with WRAL on May 3, 2006, Mr. Nifong publicly stated:

My guess is that there are many questions that many people are asking that they would not be asking if they saw the results They're not things that the defense

releases unless they unquestionably support their positions. ... So the fact that they're making statements about what the reports are saying, and not actually showing the reports, should in and of itself raise some red flags.73

1. Moreover, on May 11, 2006, the Durham *Herald-Sun* published an article citing several "well­ placed" but unnamed "sources" who told the newspaper that DNA Security's testing had identified "tissue" found "under the fingernails" of the accuser that was "consistent" with the DNA profile of a lacrosse player who had not been indicted. At the time, no report had been produced by DNA Security except the oral reports provided to Mr. Nifong, Sgt. Gottlieb, and Inv. Himan referenced above, and the article did not mention anything about the identification by DNA Security of multiple male DNA characteristics on multiple rape kit items .that did not match any of the lacrosse players, including Collin Finnerty and Reade Seligmann.74
2. On May 12, 2006, Mr. Nifong returned to DNA Security with Inv. Himan one last time. There, he once again discussed the results of all of the lab's testing. He also received the 10-page report produced by DNA Security of its work in the case and discussed with Dr. Meehan how he would use the results at tria l.75 The report of DNA Security dated May 12, 2006, was the only written report that DNA Security would produce of its work in the year 2006, and it is attached to this Motion as Attachment 28.76
3. Page 5 of the report begins a section entitled **"Results of DNA analysis,"** which continues with these two sentences: "Individual DNA profiles for non-probative evidence specimens and suspect reference specimens are being retained at DSI pending notification of the client. Three of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below."77 Dr. Meehan would later identify Mr. Nifong as "the client"78 in that formula and define "probative" not as an objective term of art used in the world of forensic science reporting or the practice of criminal law, but as a subjective term he (Dr. Meehan) used to paraphrase the limited reporting formula itself79- a formula that he and Mr. Nifong had agreed upon but had never defined for anyone else. Dr. Meehan would later concede that the use of this formula and language was "inappropriate" and did not clearly convey the entirety of his laboratory's findings.80

72 **Dr. Meehan confirmed this agreement in over half a dozen exchanges with defense counsel during his sworn·testimony before**

this Court on December 15, 2006. See Attachment 44, Tr.23-24, 40-41, 59-62, 64-65, 66-67, 82-83, and 85.

73 **Attachment 26, "Initial DNA Test Results May Not Tell Whole Story, DA Says," WRAL.com, May 3, 2006.**

74 **Attachment 27, "First DNA Link Possible in Lacrosse Case," Durham *Herald-Sun,* May 11, 2006. The article used to appear at**

[**http://www.herald-sun.com/durham/4-733481.html,**](http://www.herald-sun.com/durham/4-733481.html) **but it is no longer available online.**

75 **Mr. Nifong has stated in previous court settings that he discussed all of the test results with Dr. Meehan, and this Court found as fact in its Omnibus Discovery Order of September 22, 2006, that "[the] meeting[ ] involved the State's request for YSTR DNA testing, *Dr.***

***Meehan's report of the results of those tests,* and a discussion of how the State intended to use those results in the course of a trial of**

these matters." See Attachment 37, Tr.16 and 20-21; Attachment 39, Tr.27-29; and Attachment 40, **1)4** (emphasis added).

76 **Pursuant to the Court's Order of September 22, 2006, the Defendants have redacted any reference in the report to specific DNA alleles that would identify the full DNA profile of anyone who is not directly involved in the litigation of these matters.**

77 **Attachment 28, BS 127 (emphasis in original).**

"Attachment 44, Tr.24, 30, 52, 65, and 89.

79 ***See* Attachment 44, Tr.64, where Dr. Meehan testified, "Well, I explained how that process evolved, that we limited the scope of this report to only that evidence that, *in my words, in my terms,* was probative" (emphasis added).**

80 ***See* Amended DNA Security Report dated January 10, 2007, which is attached to this Motion as Attachment 49.**

1. **By definition, application of that limited reporting formula-which was the product of an intentional agreement with Mr. Nifong-concealed the complete results of "any examinations or tests conducted by" DNA Security, and it *specifically concealed the existence of the obviously exculpatory evidence discussed above. 81***
2. The limited reporting formula also violated the standard protocols of DNA Security itself, which-like North Carolina's open-file discovery laws, the FBI's DNA Quality Assurance Audit Standard 11.1.2, and the accreditation standards of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board-require the disclosure of the results of all DNA tests in any report produced by the lab.82
3. Applying the intentionally limited reporting formula, DNA Security's report stated results of only three of its comparison analyses: (1) Dave Evans *and 14 other males* in the Y-STR database used by DNA Security could not be absolutely matched or absolutely excluded as a contributor to the multiple-male DNA mixture identified by DNA Security in the combined DNA extraction from the three painted false fingernails seized from the trash can in his bathroom at 610 N. Buchanan; (2) Kevin Coleman could not be excluded as the single-male contributor to the DNA characteristics identified on an unpainted false fingernail taken from the top of a CPU tower in Dave Evans' bedroom at 610 N. Buchanan; and (3) Matthew Murchison could not be excluded as the single-male contributor to the DNA characteristics identified on the vaginal swab from the rape kit.83
4. Applying the intentionally limited reporting formula, DNA Security's report *still* included the names of every single lacrosse player who submitted a reference sample and clearly identified those individuals as ***"suspect*** reference specimens."84 It is, therefore, patently ridiculous to suggest that the intentionally limited reporting formula was the product of any intent to protect the privacy of those players or withhold the name of any player whose DNA did not match any DNA found on an evidentiary item. If that "privacy" argument were actually true, the May 12 report would have only listed the names of Dave Evans and Kevin Coleman.
5. Applying the intentionally limited reporting formula, DNA Security's report *still* included the DNA characteristics of as-yet unidentified persons. For example, when reporting about the combined fingernail analysis, DNA Security listed not only the DNA characteristics which were reportedly consistent with those of Dave Evans, but also the DNA characteristics of **at least two other men** who, to this day, have not been identified by DNA Security, by police, or-in *any*telling of the tale-by Crystal Mangum as her alleged attackers.85 Thus, putting aside the perplexing theory that you could violate any known individual's privacy by publishing DNA characteristics that, to this day, have not been associated with any

81 Reade Seligmann and Collin Finnerty had been indicted at this time, thus triggering the State's responsibilities under the state and federal Constitutions regarding the disclosure of exculpatory evidence (often called *uarady* material") gathered in an investigation, as well as the State's responsibilities under our open-file discovery laws, which specifically require the State to provide the Defendant with "a report of the results of fil1Y examinations or tests conducted by [an] expert'' if the State intends to call that expert at trial; *see*

N.C.G.S. § 15A-903(a)(2)(emphasis added). ln fact, at the time Mr. Nifong retrieved this report from Dr. Meehan, which limited the scope of the reporting to necessarily omit exculpatory evidence, Reade Seligmann had already filed and served upon Mr. Nifong a request for voluntary discovery which specifically cited *Brady* and its progeny and quoted directly from § 15A-903(a)(2); *see also* Attachment 25, Request For, Or Alternative Motion For, Discovery. served on the State on April 19, 2006, and filed with the Durham County Clerk of Court on April 21, 2006.

82 Attachment 44, Tr.66, where Dr. Meehan acknowledged under oath the violation of his own lab protocol on issuing reports. That

protocol tracks the language of Standard 11.1.2 of the FBI DNA Quality Assurance Audit Document (Issue Date 07/04 (Rev #6)). Shortly before it began its work in this case, DNA Security submitted to such an audit as part of its requirement to maintain accreditation by the American Society of Criminal Lab Directors/Laboratory Accreditation Board (ASCLD/LAB). *See* BS 3937 for the ortion of the audit wherein this standard was checked.

Attachment 28, BS 127-132.

84 Attachment 28, BS 125-127 (emphasis added). Items 15719 through 15764 are the lacrosse players' reference samples.

85 Attachment 28, BS 127. The Y-Chromosome STR Analysis chart clearly reflects alleles for at least three separate males at 10 of the 16 loci and at least two separate males at 3 of the remaining 6 loci. While DNA Security concluded that Dave Evans could not be excluded as a contributor to that mixture. the language of the intentionally limited reporting foITTJula necessarily implies that the

combined fingernail DNA mixture contains DNA from at least two other men who are not the lacrosse players or anyone else from whom a reference sample was obtained in the investigation.

known individual, DNA Security's report *did* publish DNA characteristics that have, to this day, not been associated with any such known individual. It is, therefore, doubly absurd to suggest that the intentionally limited reporting formula was the product of any intent to protect the privacy of as-yet unidentified individuals whose DNA characteristics were found on multiple evidentiary items. If that "privacy" argument were actually true, the May 12 report would not have listed the unidentified male DNA characteristics reportedly found in the combined fingernail DNA mixture.

1. In fact, the credibility of the "privacy" argument-which would later be advanced by Dr. Meehan in multiple exchanges with defense counsel during his sworn testimony on December 15, 2006,86 and adopted by Mr. Nifong following that testimony, as the primary purpose behind their collaborative effort to produce a report that did not include the exculpatory results-was best addressed by Dr. Meehan himself during that testimony:

### MR. BANNON:

**DR. MEEHAN:**

[W]hose privacy would it have violated if you had simply reported the male DNA characteristics found on multiple rape kit items from multiple different males who you didn't have reference swabs for? Whose privacy would it violate?

That, that wouldn't have violated anybody's privacy.87

1. Regarding Mr. Nifong's role in formulating it, the "privacy" argument is even more ridiculous in light of Mr. Nifong's contemporaneous public statements disparaging the lacrosse players, 88 all of whose names, he well knew, had already been made public as a result of the very nontestimonial identification procedures his office employed to obtain the reference samples that allowed DNA Security to perform its comparison analysis. Moreover, as Mr. Nifong would make clear in a pleading less than a week later, he was well aware that the decision to withhold information from the Defendants under any type of privacy protection theory was not his to make under our open-file discovery law; rather, our law requires the State to petition *the Court* for protective orders, which Mr. Nifong chose not to do in this case:

1. A copy of the State's entire file regarding this case, as received and compiled by this office as of this date is being provided to the Defendant along with a copy of this response, except for any materials or information covered by a protective order if notice is given in paragraph 4 below.

# \*\*\*

\_ 4. If marked, the State is hereby providing notice to the Defendant pursuant to

N.C.G.S. 15A-908(a) of the entry of an ex parte discovery protective order which denies or limits the disclosure of certain information. As authorized by the statute, and ordered by the Court, the subject matter of this protective order is not to be disclosed.89

1. Fully knowing it "wouldn't have violated anybody's privacy" to report that the DNA of already named suspects did not match DNA found from at least four males across multiple rape kit items, Mr. Nifong nevertheless agreed that DNA Security would produce a deficient report of its testing using a reporting formula whose application would conceal-and, in fact, *did*conceal-those exculpatory results.
2. On May 12, 2006, Mr. Nifong provided the deficient report to the Defendants. The report intentionally included the conclusion that Dave Evans *may* have been one of the three *otherwise unidentified* males whose DNA characteristics were found on fingernails taken out of his bathroom trash

"Attachment 44, Tr.23-24, 41, 60-61, 66-67, and 82-83.

87 **Attachment 44, Tr.61.**

88 ***See* Footnote 28 and accompanying text and referenced attachments; *see also* Attachment 48.**

89 **Attachment 30.**

can on March 16, 2006.90 The report intentionally excluded the conclusions that neither Dave Evans nor Collin Finnerty nor Reade Seligmann was one of the (at least) four unidentified males whose DNA characteristics were found on the various rape kit items.

1. Three days later, on May 15, 2006, Mr. Nifong-who had previously publicly stated that Crystal Mangum's Powerpoint "identification" of Dave Evans, as well as the SBI lab's work in the case, did not provide the State with sufficient evidence to "permit'' Dave's indictment91- used the work and deficient report of DNA Security to indict him for first-degree rape, first-degree sexual offense, and kidnapping.
2. Three days after that, on May 18, 2006, Mr. Nifong provided a duplicate copy of the deficient report to the Defendants, with other discovery, and affirmatively represented to defense counsel and the Court that he was aware of no other exculpatory evidence in the case.92 It was the first of many material misrepresentations by Mr. Nifong to the Court, the Defendants, and the public on that subject.

**MR. NIFONG'S MULTIPLE DUTIES & OBLIGATIONS**

1. Before turning to the individual statutes, Constitutional laws, Rules of Professional Conduct, and Orders in this case that relate to this Court's analysis of t.he breadth of transgressions and remedies associated with the official treatment of DNA Security's complete test results, it should be noted that District Attorney Michael Nifong was, for the time period addressed in this Motion, the sole representative of the State of North Carolina in the prosecution of the above-referenced matters. Therefore, whether this Motion is referring to "Mr. Nifong" or "the Durham County District Attorney" or "the prosecutor in this case" or "the State of North Carolina," they are legally one and the same for purposes of the rights afforded to the Defendants and the duties imposed upon the prosecution that are relevant to this Motion.
2. By the time Mr. Nifong added Dave Evans to the formal prosecution of these matters, he was under a statutory obligation to provide a report of the results of all of DNA Security's testing to all three Defendants in this case, regardless of their exculpatory nature. Given that DNA Security's tests were based on DNA samples obtained from the Defendants pursuant to a nontestimonial identification procedure, the North Carolina Criminal Procedure Act required the immediate provision of the reports to the Defendants: "A person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available.'"' With actual contemporaneous knowledge of that statutory obligation,94 Mr. Nifong violated that statute when he knowingly failed to produce a report of DNA Security's tests that included *all* of the test results, which had *al/been* orally reported to Mr. Nifong by May 12, 2006.
3. As the sole representative of the State of North Carolina in this prosecution, Mr. Nifong was

'° Attachment 28, BS 127-128.

91 **Attachment 24.**

92 **Attachment 30 (Response to Defendants' Request for Voluntary Discovery Statutory Notices, and Reciproal Motions, seived on**

the Defendants and filed with the Court on May 18, 2006).

93 ***See* G.S. § 15A-282. The nontestimonial identification (NTID) procedures and standards for evidence collection and reporting set forth in Article 14 of the Criminal Procedure Act are separate from the warrant requirements set by Article 11 of the Act and the state**

**and federal Constitutions. Rather than the "probable cause" required by the warrant requirements, the NTID procedures require only "reasonable grounds" to suspect that the subject of the procedure committed the offense. *See* § 15A-273. Accordingly, people in North Carolina whose biological material is seized for testing purposes pursuant to the reduced-standard NTlD procedures have more rights as it relates to receiving reports of test results than those whose biological material is seized pursuant to the higher­ standard warrant procedures. The latter do not have any independent statutory entitlement to the results of those tests, while the fom,er are entitled by North Carolina law to "a copy of *any* reports of tests results as *soon* as *the reports are available." See*** § **15A-282 (emphasis added). While "copy" seems to suggest a written report, the legislature, when drafting the NTID procedures that would subject North Carolina's citizens to lower standards of evidence collection and government intrusion, surely did not contemplate a scenario where representatives of the government would be infom,ed of the results of all testing and then collaborate with representatives of the testing facilities to produce a written report that only listed a small percentage of those results.**

94 **Attachment 23.**

also under an affirmative Constitutional duty, regardless of whether any of the Defendants made a

specific request, to provide timely disclosure of the exculpatory results of DNA Security's tests to the Defendants in this case. *See Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States,* 405 U.S. 150 (1972); and *Kyles v. Whitley,* 514 U.S. 419 (1995). Notably, the Supreme Court recently summarized the

prosecutor's duty as it relates to the disclosure of *Brady* material as follows:

**A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.** "Ordinarily we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations to refain from improper methods to secure a conviction ... plainly resting upon the prosecuting attorney will be faithfully observed." **Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.** The practice of the careful prosecutor should not be discouraged.

*Banks v. Dretke,* 540 U.S. 668 (citations omitted)(emphasis added). With actual contemporaneous knowledge of his Constitutional duty under *Brady* and its progeny, and actual contemporaneous knowledge of all of the exculpatory results of DNA Security's testing, Mr. Nifong violated that duty when he knowingly produced only the May 12 written report of DNA Security's testing in this case, which failed to report *all* of those exculpatory results.

1. As the sole representative of the State of North Carolina in this prosecution, Mr. Nifong also had a personal ethical duty to provide a report of the results of DNA Security's exculpatory testing results to the Defendants in this case. Rule 3.8 of the North Carolina Rules of Professional Conduct requires prosecutors to make "timely disclosure" to the defense of "all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions, including all evidence or information known to the prosecutor that tends to negate the guilt of the accused." Comment 4 further provides that "[e]very prosecutor should be aware of the discovery requirements established by statutory law and case law"; the Comment then specifically cites *Brady, Giglio,* and *Kyles v. Whitley.* With actual contemporaneous knowledge of that ethical duty, and actual contemporaneous knowledge of all of the exculpatory results of DNA Security's testing, Mr. Nifong knowingly violated that duty when he knowingly produced only the May 12 written report of DNA Security's testing in this case, which failed to report *all* of those exculpatory results.
2. As soon as the Defendants voluntarily requested discovery in this case pursuant to G.S. § 15A- 903(a)(l),95 Mr. Nifong assumed several additional legal obligations to provide the Defendants with the substance of the exculpatory DNA Security test results which were orally reported to Mr. Nifong, Sgt. Gottlieb, and Inv. Himan during April and May. Specifically, § 15A-903(a)(l) requires the disclosure of all "witness statements" (specifically requiring "oral statements" to be reduced to "written or recorded form"); the "results of tests and examinations" conducted in the investigation; and "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." With actual contemporaneous knowledge of those statutory duties, and actual contemporaneous knowledge of all of the exculpatory results of DNA Security's testing, Mr. Nifong knowingly violated that duty when he knowingly produced only the May 12 written report of DNA Security's testing in this case, which failed to report *all* of the "results of tests and examinations" conducted by DNA Security and, specifically, the exculpatory results reported to Mr. Nifong, Sgt. Gottlieb, and Inv. Himan in April and May of 2006.
3. On May 18, 2006, when he gave notice of the State's intent to call Dr. Meehan as an expert

95 **Reade Seligmann made such a request on April 19, 2006 *(see* Attachment 25). Collin Finnerty made such a request on May 17, 2006 *(see* Attachment 29). Dave Evans made such a request on May 26, 2006 *(see* Attachment 33).**

witness at trial, Mr. Nifong assumed yet another legal obligation to provide the Defendants with the results of all of DNA Security's testing, including all exculpatory results. G.S. § 15A-903(a)(2) specifically requires the State to furnish the Defendants under that circumstance with "a report of the results of **any** examinations or tests conducted by the expert" (emphasis added). With actual contemporaneous knowledge that DNA Security's May 12 report did not include all of its test results, including the exculpatory rape kit results described above, Mr. Nifong knowingly violated that duty when he provided the Defendants that same day with a duplicate copy of DNA Security's report of May 12, 2006, and *nothing else from DNA Security.*

1. Finally, on June 22, 2006, Mr. Nifong assumed yet another legal obligation to provide to the Defendants the results of all DNA Security's testing, as well as the substance of Dr. Meehan's oral statements to Mr. Nifong, Sgt. Gottlieb, and Inv. Himan in April and May of 2006 about the exculpatory nature of the rape kit test results. During an administrative setting of these cases before the Honorable Ronald Stephens, the Court considered Collin Finnerty's First Motion To Compel Discovery, filed and served on Mr. Nifong on May 17, 2006. The Motion cited *Brady, Giglio, Kyles v. Whitley,* and Rule 3.8(d) of the North Carolina Rules of Professional Conduct when specifically requesting the disclosure of exculpatory evidence. The Motion tracked the language of§ 15A-903(a)(l) when requesting "results of tests and examinations" conducted in the course of the investigation, as well as witness statements and "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." Regarding any experts the State might call at trial, the Motion tracked the language of § 15A-903(a)(2) when requesting a report of the results of any examinations or tests conducted by the experts. Notably, the Motion specifically added this express language to the request for results: **"not only the ones about which the expert expects to testify."96** On June 22, 2006, Mr. Nifong specifically addressed that Motion, prompting this exchange:

**MR. NIFONG:**

**MR. COTTER:**

The first motion to compel discovery, in essence, requests that the Court enter into an order that tells the State to comply with the discovery statute. I have no objection to that and the defendants have prepared an order for the Court's signature that does that.

May I approach?

**JUDGE STEPHENS:Yes.** Basically, paragraphs one, two, and three are pretty much right out of the statute.

**MR. COTTER:** That's right, and then I think we ask for *Brady* material also.

**JUDGE STEPHENS:AII** right. The Court is going to allow that motion noting that the prosecutor has no objection to it in its form and the Court signs your order.97

Judge Stephens then signed an Order directing Mr. Nifong to provide the defense with "results of tests and examinations" conducted in the investigation; statements of any witnesses taken during the investigation, with oral statements reduced to written or recorded form; and reports of results of any examinations or tests conducted by any expert witness the State expected to call as a witness at trial. 98

1. Thus, in this case, as it relates to the complete results of all of DNA Security's tests, including all of the exculpatory results, Mr. Nifong was under more than half a dozen legal and ethical duties to provide those entire results, and all but one of those duties had been clearly defined as of May 18, 2006.

96 **Attachment 29.**

97 **Attachment 37, Tr.3 4.**

98 **Attachment 31.**

###### 19

Nevertheless, Mr. Nifong would fail to meet those duties for the subsequent eight months.

1. Moreover, Mr. Nifong would make multiple misrepresentations to multiple Courts, including this Court, about his failure to disclose those results, thus violating yet another ethical duty imposed on all lawyers by Rule 3.3(a)(1) of the North Carolina Rules of Professional Conduct: **"A lawyer shall not knowingly make a false statement of material fact or law to a tribunal *or* fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."** Comment 3 clearly states:

**An assertion purporting to be on the lawyer's own knowledge, as in** ... ***a statement in open court,* may properly be made *only* when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where *failure to make a disclosure is the equivalent of an affirmative misrepresentation.***

**MR. NIFONG'S MULTIPLE VIOLATIONS & MISREPRESENTATIONS**

1. To appreciate the full scope of the controlling authority violated in this case by Mr. Nifong through his designed failure to disclose the exculpatory evidence identified by DNA Security, as well as his repeated misrepresentations on that subject, it is important to note that there are two separate "types" of evidence involved in the analysis: (1) broadly, the results of all tests performed by DNA Security, regardless of their exculpatory character; and (2) specifically, the exculpatory evidence that DNA Security identified. There are also two separate tracks upon which the Defendants repeatedly sought that evidence from May to October of 2006: (1) by requesting that Mr. Nifong meet his various statutory and Constitutional obligations by providing a report of the results of all tests conducted by DNA Security; and (2) by requesting the substance of discoverable and non-privileged statements made by Dr. Meehan in his meetings with Mr. Nifong, Inv. Himan, and Sgt. Gottlieb in April and May of 2006.
2. Mr. Nifong's violations and misrepresentations regarding DNA Security's work began on May 18, 2006. At that time, he had been served with requests for voluntary discovery by Defendants Reade Seligmann and Collin Finnerty, both of which specifically requested compliance with the multiple statutory obligations regarding the DNA Security work, the latter of which specifically requested all results of any expert testing, "not only the ones about which the expert expects to testify.' ,99 That day, having been served with those requests, Mr. Nifong provided the Defendants with a duplicate copy of the deficient DNA Security report, along with other initial discovery items, and presented the Defendants with a pleading, which he had also filed with the Court, in which he represented that

##### The State is not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant. Should we learn of the existence of any such material or information in the exercise of due diligence, we will notify the Defendant.100

Judge Stephens also directly asked Mr. Nifong in that hearing whether he had turned over all the information he had to the Defendants, and Mr. Nifong responded,

##### I've turned over everything I have.101

1. Mr. Nifong made those representations to the Court and the Defendants within days of

99 **Reade Seligmann and Collin Finnerty made their requests on April 19, 2006 (Attachment 25), and May 17, 2006 (Attachment 29).**

100 Attachment 30, 3 (emphasis added).

101 **Attachment 32 (Transcript of May 18 Hearing), Tr. 22-23 (emphasis added).**

meeting with Dr. Meehan and receiving a report he knew concealed the existence of exculpatory evidence, a report he also knew would be the only evidence provided to the Defendants of DNA Security's work in the case.

1. Because Mr. Nifong had also, with that same pleading on May 18, given notice of his intent to present Dr. Meehan as an expert witness at trial in these matters, Mr. Nifong's actions and misrepresentations to the court on May 18, 2006, violated:

The provisions of the United States Constitution and North Carolina Constitution which require timely disclosure of exculpatory evidence to the Defendant;

N.C.G.S. § lSA-282, which requires the reports of results of nontestimonial identification procedures to be provided to the Defendants "as soon as they are available";

N.C.G.S. § 15A-903(a)(l), which requires the disclosure of "results of tests and examinations" conducted in the investigation, as well as statements of witnesses and "any other. matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant";

N.C.G.S. § 15A-903(a)(2), which requires, as it relates to any expert the State may call at trial, the disclosure of "a report of the results of any examinations· or tests conducted by the expert";

Rule 3.8 of the North Carolina Rules of Professional Conduct, which requires timely disclosure by the prosecutor in a criminal case of all materials required to be disclosed by statute and the Constitutions; and

Rule 3.3(a)(l) of the North Carolina Rules of Professional Conduct, which prohibits false statements of material fact by a lawyer to a tribunal.

1. On June 19, 2006, Mr. Nifong issued a press release in response to an article that had recently appeared in *Newsweek* magazine. The press release attached an e-mail he had written on June 13, 2006, to a reporter who was working on that article. In the e-mail, Mr. Nifong accused defense attorneys of misleading and lying to the public about the evidence in the case and specifically mentioned DNA evidence, once again accusing defense attorneys of selectively disclosing DNA test results:

What has surprised me is the utter lack of degree of any skepticism on the part of the national media with respect to the claims of the defense attorneys, many of which are misleading and some of which are absolutely false. As an example, when those attorneys held press conferences to announce the first round of DNA testing "completely exonerated" the players (a claim that, on its face, is rather preposterous), I saw not one single report that any reporter had actually seen the test results (none of them had), or had asked to see them and had that request denied (which is what happened to those who bothered to ask). Now you are going over "documents" in that case. Where did you get them? What other documents did they not show you?102

1. On June 22, 2006, some 72 hours after issuing that press release accusing defense attorneys of hiding information from the public about DNA testing in the case, Mr. Nifong walked into court and continued his own personal pattern of hiding information about DNA testing in the case and making

102 **Attachment** 35.

misrepresentations to the Court and to the Defendants on that subject. Earlier that week, undersigned counsel Joe Cheshire and Brad Bannon sent Mr. Nifong a letter asking him to be ready to address the general motions flied by all Defendants regarding discovery issues and went on to list a number of specific items. 103 That numbered list included "8. A report of the meeting on April 10, 2006, among you, Inv. Himan, Sgt. Gottlieb, and Brian Meehan of DNA Securities, Inc." At the administrative hearing of these matters on June 22, 2006, Item 8 was specifically addressed in exchanges among the Honorable Ronald Stephens, Mr. Nifong, and Mr. Cheshire:

**MR. NIFONG:** Item number eight, a report of the meeting on April 10, 2006, among you, referring to me, Investigator Himan, Sergeant Gottlieb, and Brian Meehan of DNA Security, Inc. At this particular meeting, Your Honor, we were given copies of the DNA Security report, which has previously been furnished to the defense team, and we discussed how we would be using those items and that report and that investigation at trial. **Those items are not discoverable, no report has been generated. The report itself they have. The discussions are not available.**

**JUDGE STEPHENS:We'II** note your position on that.104

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**MR. CHESHIRE:** As far as eight and nine, there's similar arguments I would like to make to the Court. I understand what Mr. Nifong said about eight and that is the report of a meeting on April 10th among Mr. Nifong, Investigator Himan, Sergeant Gottlieb, and Brian Meehan, and as I understand what he says, there was no discussion at all that wasn't attorney work product at that meeting.

**MR. NIFONG:** That's pretty much correct, Your Honor. **We received the reports, *which he has received,*** and we talked about how we would likely use that, and that's what we did.105

## \*\*\*

**MR. CHESHIRE:** It's very difficult for me, although I take Mr. Nifong as an officer of the Court at his word, to believe that there was no discussion at all as it relates to that testing or anything else that could possibly not be work product.106

1. Mr. Cheshire's skepticism was well-placed. As the foregoing paragraphs and their referenced source material clearly demonstrate, Mr. Nifong made those representations to the Court and the Defendants less than two months after that meeting on April 10, 2006, in which he had discussed the initial exculpatory findings of DNA Security regarding the rape kit items, and less than one month after meeting with Dr. Meehan and receiving a report that, by design and with the express agreement of Mr.

103 **Attachment 36 (Letter from Joe Cheshire and Brad Bannon to Mike Nifong dated June 19, 2006). It should also be noted that Dave Evans had, since his indictment after Collin Finnerty and Reade Seligmann, joined them in filing a separate request for voluntary discovery (see Attachment 33, David Evans' Request For Discovery and Motion To Compel, served and file-stamped May 26, 2006). On June 15, 2006, Dave Evans had also filed and served upon Mr. Nifong a Supplemental Discovery Motion which highlighted the conflict between then-to-date discovery and Mr. Nifong's comments about reading certain medical reports and suggesting that condoms had been used during the alleged attack *(see* Attachment 34).**

104 **Attachment 37 (Transcript of June 22 Hearing), Tr.16-17 (emphasis added).**

105 **Attachment 37, Tr.20-21 (emphasis added).**

106 **Attachment 37, Tr.21-22.**

Nifong, concealed the existence of those and other exculpatory findings by DNA Security. Moreover, since Mr. Nifong had not contacted Dr. Meehan after meeting with him to receive the limited report on May 12, 2006, and since Mr. Nifong had personally reviewed the additional discovery items provided on June 22, 2006,107 he knew that the Defendants had not, in fact "received the reports" that DNA Security had provided to Mr. Nifong orally about all of its test results, including the exculpatory results. Mr. Nifong also knew that the exculpatory results discussed at the April 10, 2006, meeting with Dr. Meehan were, in fact,

"discoverable," under multiple legal and ethical authorities, including yet another authority that had been added since the hearing on May 18, 2006: namely, the Order signed by Judge Stephens *just moments earlier* directing Mr. Nifong to provide all evidence to which the Defendants were entitled under *Brady* and its progeny, under§ 15A-903(a)(1), and under§ 15A-903(a)(2)1.08

1. Thus, Mr. Nifong's actions and misrepresentations to the court on June 22, 2006, violated:

The provisions of the United States Constitution and North Carolina Constitution which require timely disclosure of exculpatory evidence to the Defendant;

N.C.G.S. § lSA-282, which requires the reports of results of nontestimonial identification procedures to be provided to the Defendants "as soon as they are available";

N.C.G.S. § 15A-903(a)(1), which requires the disclosure of "results of tests and examinations" conducted in the investigation, as well as statements of witnesses and "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant'';

N.C.G.S. § 15A-903(a)(2), which requires, as it relates to any expert the State may call at trial, the disclosure of "a report of the results of any examinations or tests conducted by the expert";

The specific Order entered by Judge Ronald Stephens that same day, directing Mr. Nifong to provide all exculpatory evidence and everything discoverable under North Carolina's open-file discovery laws;1°9

Rule 3.8 of the North Carolina Rules of Professional Conduct, which requires timely disclosure by the prosecutor in a criminal case of all materials required to be disclosed by statute and the Constitutions; and

Rule 3.3(a)(1) of the North Carolina Rules of Professional Conduct, which prohibits false statements of material fact by a lawyer to a tribunal.

1. Mr. Nifong's violations and misrepresentations to the Court and the Defendants on the subject continued at the hearing on September 22, 2006. The Defendants had, collectively, filed a Joint Omnibus

107 **On September 22, 2006, Mr. Nifong told this Court that, since the initial production of discovery on May 18, 2006, "I have been responsible for all additional discovery myself and have gone through everything myself." *See* Attachment 39 (Transcript of September 22 Hearing), Tr.15 (emphasis added).**

108 **Attachment 31. *See also* Paragraph 72 above and accompanying footnotes.**

109 **It should also be noted that, when counsel for Dave Evans asked the Court to direct Mr. Nifong to certify that he had complied**

**with the open-file discovery statutes, Judge Stephens denied that specific request but clearly directed Mr. Nifong, on the record in open court, to comply with his statutory duties under the open file discovery laws: "We'll note that he is required to comply with the statute as written, and I expect him to comply with the statute as written." *See* Attachment 37, Tr.25. This Court would issue a similar order to Mr. Nifong from the bench on September 22, 2006, reminding him of his "continuing duty to disclose as he's required to by the statute, by the Constitutions of the United States and the State of North Carolina and the cases interpreting those Constitutions and the cases interpreting the statutes and the Rules of Professional Conduct for lawyers and prosecutors. And he's under continuing duty to do that and I'll ask that he be considered under continuing duty to verify that he's complied with those responsibilities." *See* Attachment 39, Tr.71.**

Motion To Compel Discovery on August 31, 2006, which listed a number of specifically sought items, including the complete file and underlying data regarding the SBI lab's work110 and DNA Security's work,111 and the substance of any discoverable comments made to or by Dr. Meehan during his meetings with Mr. Nifong, Sgt. Gottlieb, and Inv. Himan on April 10, April 20 or 21, and May 12, 2006.112 Each of those specific requests was considered at the hearing in turn.

1. Regarding the Defendants' request for the substance of any discoverable statements by Dr. Meehan at his meetings with Mr. Nifong, Sgt. Gottlieb, and Inv. Himan on April 10, April 20 or 21, and May 12, 2006,113 defense counsel traced the procedural and factual background regarding those meetings and the Defendants' previous requests for discoverable statements from those meetings, which was followed by this exchange:

##### MR. NIFONG:

**JUDGE SMITH: MR. NIFONG:**

**JUDGE SMITH:**

And once again, Your Honor, we explained to Mr. Meehan what kind of testing we wanted done and he already had obviously the information from the State Bureau of Investigation lab because that had been passed on to him about why we needed additional testing done, specifically, that the SBI lab was not equipped to do what's called YSTR testing, which is a specialized form of DNA testing that first isolates out the male fraction, that is, the Y chromosome from any sample because that particular portion of that sample could only have been left by a male.

##### And so we discussed with him why we wanted that done in this case and he assured us that he could do it. When we went back to get the results, he provided us results which were given to them on the same day. And on that day, we explained to him how we would be using him in the course of trial. We did not ask any questions because the information was there in the summary he had given us. It was pretty clear. He provided that to us. We looked over it. And we didn't have any questions about what was there. There's really nothing to provide.

**So his report encompasses it all?**

His report encompasses ever-because we didn't-they apparently think that everybody I speak to about, I talk about the facts of the case. And that's just, that would be counterproductive. It did not happen here. We told him why we wanted the YSTR testing done. He gave us the report at a later date. We told him how we intended to use it at trial. That is something that they'll be able to see and of course they'll have the opportunity to cross-examine Dr. Meehan about everything at trial. He will, in fact, be a witness.

##### So you represent there are no other statements from Dr. Meehan?

110 **Attachment 38, 1J35.**

111 **Attachment 38, 1J36.**

112 **Attachment 38, 1f29.**

113 **Attachment 38, 1f29.**

##### MR. NIFONG: No other statements. No other statements made to me.114

1. In short, Mr. Nifong represented to the Defendants and the Court that the Defendants had received everything discoverable from DNA Security's work in the case, and from Mr. Nifong's meetings with Dr. Meehan, when they received the May 12 report by DNA Security. Mr. Nifong made those representations fully knowing that the report did not include all of the results of DNA Security's work in the case and omitted multiple exculpatory findings by DNA Security. Thus, Mr. Nifong's actions and misrepresentations to the Court on September 22, 2006, about those meetings-just like his actions and misrepresentations on June 22, 2006, on the same subject-violated:

The provisions of the United States Constitution and North Carolina Constitution which require timely disclosure of exculpatory evidence to the Defendant;

N.C.G.S. § 15A-282, which requires the reports of results of nontestimonial identification procedures to be provided to the Defendants "as soon as they are available";

N.C.G.S. § 15A-903(a)(1), which requires the disclosure of "results of tests and examinations" conducted in the investigation, as well as statements of witnesses and "any other matter or evidence obtained during the investigation of the *offenses* alleged to have been committed by the defendant";

N.C.G.S. § 15A-903(a)(2), which requires, as it relates to any expert the State may call at trial, the disclosure of "a report of the results of any examinations or tests conducted by the expert";

The specific Order entered by Judge Ronald Stephens on June 22, 2006, directing Mr. Nifong to provide all exculpatory evidence and everything discoverable under North Carolina's open-file discovery laws;

Rule 3.8 of the North Carolina Rules of Professional Conduct, which requires timely disclosure by the prosecutor in a criminal case of all materials required to be disclosed by statute and the Constitutions; and

Rule 3.3(a)(1) of the North Carolina Rules of Professional Conduct, which prohibits false statements of material fact by a lawyer to a tribunal.

1. The matter of DNA Security's work was addressed elsewhere in the September 22 hearing when the Court considered the Defendants' motion to compel production of all of DNA Security's data underlying its work in the case. Instead of indicating that such materials would be readily provided to the Defendants, Mr. Nifong initially mocked the request:

**I have to note the irony in both Items 35 and 36 of the defense attorneys seeking information that is what we call the witch-hunt list for DNA testing, all of the ways that you can attack DNA testing to show that it's unreliable or was done poorly in this instance.** Because on every occasion where the results of these tests were provided to the defense attorneys, they called press conferences and told everybody who would listen that the DNA absolutely exonerated every person involved in the case. So it's interesting now

114 **Attachment 39, Tr.27-28 (emphasis added).**

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that they are trying to get the information to dispute those results 115

Mr. Nifong's clear-and deceptive-implication to the Court was that there was nothing to be discovered in the work of DNA Security that had not been provided in the May 12 report, except for information sometimes used by Defendants to challenge the credibility of DNA test results.

1. Mr. Nifong then addressed the actual substance of the requests for the underlying data of the SBI lab and DNA Security. He readily agreed to the bulk of the request for the SBI lab's work. However, when it came time to address the same request for DNA Security's work, Mr. Nifong said, "[M]y response is slightly different because this is a private lab with relatively limited resources and not a state lab. Mr.

Meehan did provide *at my request* a response for the Court."116 Mr. Nifong then read the letter he

requested from Dr. Meehan that voiced privacy and costs concerns regarding the production sought by the Defendants.117 After reading that letter, Mr. Nifong said to the Court, "[O]bviously, if they want to have this information, the Court will probably order that they receive it. *I take no position on that But again,* these are attorneys who are already on record as saying that these tests cleared their clients. And now they want to spend an additional $4,035 of the State's money to investigative further."118

1. Mr. Nifong's "slightly different" treatment of the request for DNA Security's underlying data should not be lost on this Court. Mr. Nifong knew DNA Security had identified exculpatory evidence that had not been provided to the Defendants. Instead of making those results immediately known to the Defendants in May, when the Defendants had all filed requests for voluntary discovery; or in June, when Judge Stephens ordered him to do so and when the Defendants specifically asked for reports of the discoverable substance of his meetings with Dr. Meehan; or in August, when the Defendants filed their joint motion to compel discovery in this case, specifically (again) seeking the substance of his meetings with Dr. Meehan and the underlying data of DNA Security; or September, when the Defendants were before this Court on a motion to compel, Mr. Nifong mocked the requests, falsely represented that there was nothing discoverable that the Defendants did not already have in DNA Security's May 12 report, and said that he would "take no position" on the request for underlying data *except* to read a letter that voiced concerns about the production and to complain about the cost to taxpayers of the production.
2. *Any resistance whatsoever* by Mr. Nifong to the Defendants' request for DNA Security's underlying data was a separate violation of the multiple duties imposed by law upon the State regarding its duty to provide all of DNA Security's test results, including the exculpatory results. After all, Mr. Nifong knew, as Dr. Meehan would later acknowledge in sworn testimony on December 15, 2006, that *the only way* at that point for the Defendants to discover all of the results of DNA Security's testing, including the exculpatory rape kit findings, was a thorough review of the underlying data from DNA Security:

##### MR. COONEY:

**DR. MEEHAN: MR. COONEY: DR. MEEHAN: MR. COONEY:**

And in order for Reade Seligmann or Collin Finnerty or Dave Evans to have found the results of the tests that excluded them, they needed to go through those six inches of paper to find them; isn't that correct?

That is correct.

Because you hadn't put them in the report; is that fair? That is fair.

If you had been requested by representatives of the State of

115 **Attachment** 39, **Tr.45 (emphasis added).**

116 **Attachment 39, Tr.50 (emphasis added).**

117 **Attachment 39, Tr.50-51.**

118 **Attachment 39, Tr.51 (emphasis added).**

DR. MEEHAN:

North Carolina at any time after May 12 to prepare a report reporting on the results of all of your tests and examinations, would you have done so?

Absolutely.' 19

1. Mr. Nifong also generally addressed the issue of whether he had provided all discovery information to the Defendants during this exchange at the hearing on September 22, 2006:

MR. BANNON:

**MR. NIFONG:**

**MR. BANNON:**

**JUDGE SMITH: MR. BANNON:**

**JUDGE SMITH:**

**MR. BANNON:**

The final item is essentially a representation either to the Court or on the record or by affidavit by the State through Mr. Nifong, the prosecution, that it has read and reviewed the entire investigative file in this case and provided all discoverable materials to the defendants. I believe he's made that representation a number of times.

No. I have represented before that I have not read every document in the investigative file. I do not intend to read every document in the investigative file because many of the documents in the investigative file have nothing to do with this case. They were items that were collected. For instance, I am not going to read the biographies of every member of the Duke lacrosse team. I will not promise the Court to do that. But they are in the discovery materials in this case because they were collected. I am, I will tell the Court that I am furnishing everything that is brought to me by the police department and everything that is brought to me by my investigator. I make a copy. I have a special place where that goes. I number the pages individually myself, and those case, those items were all turned over. But I'm not going to certify to the Court or to the defendant or to anyone else that I'm going to read irrelevant material that's contained in the investigation file just because it's there.

I'm not sure, Your Honor, how someone would know something is irrelevant until someone reads it to know whether it's irrelevant. In any event-

Is there any requirement that the district attorney read?

Well, Your Honor, the United States Supreme Court in *Kyles*

*v. Whitley* requires prosecutors, puts an affirmative duty on prosecutors to read their entire files.

I'm saying if he's given it to you, is there a requirement that he certify to you that he read it?

Well, I suppose if he would prefer to certify that all materials have been given to us and all materials that have been gathered in an investigation have been given to us and that

119 **Attachment 44, Tr.86.**

he hasn't reviewed them, that would be satisfactory to what we need.

JUDGE SMITH:

Well, he's under continuing duty to disclose as he's required to by the statute, by the constitutions of the United States and the State of North Carolina and the cases interpreting those constitutions and the cases interpreting the statutes and the Rules of Professional Conduct for lawyers and prosecutors. And he's under continuing duty to do that and I'll ask that he be considered under continuing duty to verify that he's complied with those responsibilities.120

1. Moments after that exchange, in which he was ordered to comply with his statutory and Constitutional duties to provide all discoverable information to the Defendants, this exchange occurred as it specifically related to the results of DNA Security's testing:

**MR. KINGSBERY:** And then lastly, Your Honor, with respect to paragraphs 35 and 36 dealing with the DNA testing. I just want to make sure that the discovery that we're requesting is not being misconstrued and therefore limited in the State's response. Obviously, since Collin Finnerty's DNA did not appear anywhere on the alleged victim, we're not seeking to challenge those DNA results. And I want to make sure the State understands our motion to compel discovery is not limited to some request for information to challenge those results. There was DNA found on the alleged victim. It was none of these Defendants. And the reason that the State's experts found that was because that perpetrator's DNA was submitted by the State to these experts. There may be additional male DNA that was recovered and analyzed and found by these experts, but they couldn't match it with anyone because the State hasn't given the identities to the DNA experts. And this is my point: We're seeking information of any additional DNA that was found on this alleged victim even though it doesn't match any of these Defendants. And I want to make sure that the State understands our request for discovery is not limited to simply things that have to do with these Defendants or the list of individuals that the State provided to the experts. And I bring this up, because I believe I heard Mr. Nifong say today that he's got some correspondence or communication from his experts which limits what's in the reports to the Defendants and to those thought to be linked. And if there are additional male DNA present on this victim, I want to make sure that everyone understands that our discovery motion asks for that material as well.

**JUDGE SMITH:** Well, I think it's pretty broadly stated in your request. And I understand the State's, SB! lab as well as the private lab will

120 **Attachment** 39, **Tr.69-71. Mr. Nifong had also been directed by Judge Stephens to satisfy his continuing duty to disclose and the other provisions of the open-file discovery laws on June 22, 2006 *(see* Attachment 37, Tr.7-8 and 25).**

comply with that request.121

1. Mr. Nifong remained silent in the face of that direct request for information about unidentified male DNA found by DNA Security, and, when he would finally provide the 1,844 pages of underlying materials to the Defendants on October 27, 2006, they would not include any supplemental report or indication that DNA Security had, in fact, found DNA characteristics from at least four unidentified males on the rape kit items that did not match the Defendants, their teammates on the 2006 Duke University Men's Lacrosse team, or anyone else who had submitted a reference sample in the investigation. Instead, the Defendants would have to review those materials one page at a time and cross-reference them to discover the exculpatory results that had been withheld from them for over six months.
2. Accordingly, Mr. Nifong's actions and statements in response to the Defendants' request for the underlying data of DNA Security by motion on August 31, 2006; his representations on the subject to this Court on September 22, 2006; and his provision of the underlying materials to the Defendants on October 27, 2006, violated:

The provisions of the United States Constitution and North Carolina Constitution which require timely disclosure of exculpatory evidence to the Defendant;

N.C.G.S. § lSA-282, which requires the reports of results of nontestimonial identification procedures to be provided to the Defendants "as soon as they are available";

N.C.G.S. § 15A-903(a)(l), which requires the disclosure of "results of tests and examinations" conducted in the investigation, as well as statements of witnesses and "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant";

N.C.G.S. § 15A-903(a)(2), which requires, as it relates to any expert the State may call at trial, the disclosure of "a report of the results of any examinations or tests conducted by the expert";

The specific written Order entered by Judge Ronald Stephens on June 22, 2006, directing Mr. Nifong to provide all exculpatory evidence and everything discoverable under North Carolina's open-file discovery laws;

The specific oral Order entered by this Court on September 22, 2006, directing Mr. Nifong to satisfy his continuing statutory and Constitutional duties to disclose evidence to the Defendants and to abide by the North Carolina Rules of Professional Conduct for lawyers and prosecutors regarding such disclosures;

Rule 3.8 of the North Carolina Rules of Professional Conduct, which requires timely disclosure by the prosecutor in a criminal case of all materials required to be disclosed by statute and the Constitutions; and

Rule 3.3(a)(l) of the North Carolina Rules of Professional Conduct, which prohibits false statements of material fact by a lawyer to a tribunal.

1. At the hearing on September 22, 2006, this Court accepted Mr. Nifong's representations that nothing discoverable had occurred in the meetings with Dr. Meehan that was not memorialized in DNA Security's report, and the Court ordered the State to provide the Defendants with the underlying data

121 **Attachment** 39, **Tr.73-74.**

from DNA Security by October 20, 2006.

1. On October 20, 2006, Mr. Nifong called undersigned counsel Brad Bannon and informed him that the DNA Security materials had been delivered to his office but were rather voluminous. Mr. Bannon agreed to let defense co-counsel know that the materials would be provided in some manner to the Defendants by the District Attorney the following week.
2. On October 27, 2006, Mr. Nifong provided the underlying data from DNA Security, which included some 1,844 pages of documents, including hundreds of pages of raw data regarding the hundreds of tests performed by DNA Security in the case. The materials produced by the State from DNA Security were not accompanied by any report of any additional conclusions made by DNA Security about its testing. The materials were given to the Defendants with no interpretive explanation whatsoever.
3. Also on October 27, 2006, this Court signed an Order Regarding Defendants' Joint Omnibus Motion To Compel Discovery And Addendum, *nunc pro tune* September 22, 2006,122 which memorialized the Court's rulings that day on the Defendants' Joint Omnibus Motion To Compel Discovery.
4. On December 13, 2006, after an extensive and exhaustive review of those documents, the Defendants filed their Motion To Compel Discovery: Expert D.N.A. Analysis. The Motion set out, for the first time in writing, the breadth of the exculpatory results of DNA Security's work which had been reported to Mr. Nifong eight months earlier and repeatedly withheld by Mr. Nifong from the Defendants throughout that period of time. Mr. Nifong would, in response to that revelation, continue his pattern of misrepresentation on the subject.

**MR. NIFONG'S RESPONSE TO THE D.N.A. TEST RESULTS REVELATION**

1. The gravamen of the Defendants' Motion To Compel Discovery: Expert D.N.A. Analysis, which is attached to this Motion as Attachment 42, has been thoroughly discussed above: namely, that DNA Security identified male DNA characteristics from at least four men across multiple rape kit items in April 2006 that did not match the lacrosse players or anyone else who had submitted a reference sample; that DNA Security failed to report those exculpatory findings in the report it produced on May 12, 2006; that the Defendants had not been provided with any other information about DNA Security's work in the case; and that the only way the Defendants were able to identify the exculpatory findings of DNA Security was to analyze and cross-reference the 1,844 pages of documents provided on October 27, 2006.
2. Mr. Nifong's initial response to that Motion was to claim to this Court on the record in chambers on December 15, 2006, that he knew nothing about the results, but that the Defendants had raised very important questions in the Motion that they were entitled to explore immediately. Referring to the Motion as a "report," Mr. Nifong stated to this Court:

##### I just, in terms of the discovery issues, frankly, you know, I got the report and I was, like, *whoa.* So I immediately faxed a copy to Dr. Meehan and said, "Read this, and I'll call you in the morning and get your opinions about this." And we discussed it and I said, "This is a major issue for the defense. They're entitled to hear about it, and I think it needs to be addressed right away. And so that's what we're going to try to do, okay."123

122 **Attachment 40.**

123 **Attachment 43 (Transcript of Hearing *In Camera* on December 15), Tr.10-12 (emphasis added). While this Court initially sealed the transcript of the entire *in camera* hearing, the Court unsealed the attached portion of that hearing on June 14, 2007.**

###### 30

1. Moments later, Mr. Nifong reiterated his position of ignorance about the exculpatory test results in the courtroom. After defense counsel summarized the issues raised in the Motion, Mr. Nifong stated to this Court:

**The first I heard of this particular situation was when I was served with these reports-this motion on Wednesday of this week.** And it was accompanied by a request from Mr. Bannon that we deal with the matters today, if possible. **The nature of the subject matter in this motion is obviously very important.** I contacted Dr. Meehan. First, I faxed him a copy of the motion for him to read and then I contacted him the next morning, which would have been yesterday morning, and told him that because of the nature of the items that were raised, I **did feel it was appropriate to address these right away.**

# \*\*\*

**The State agrees that these are matters of importance to the case. They are items of importance, because it's crucial that everybody have access to all of the evidence in this case.** And for that reason, Dr. Meehan is present.124

1. With no prior notice given to the Defendants, and no further explanation or initial questioning of Dr. Meehan, Mr. Nifong then called Dr. Meehan to the witness stand and tendered him for examination by the Defendants. Under oath, Dr. Meehan then stated, confirmed, and reiterated-over and over again-that, contrary to what Mr. Nifong had just represented to this Court *in camera* and in open court, Dr. Meehan had shared the exculpatory results of DNA Security's testing with Mr. Nifong in April,125 and he and Mr. Nifong reached an agreement to employ a reporting standard that would, by its definition, conceal the existence of DNA Security's exculpatory findings regarding the rape kit items.126 When pressed for an explanation for why he had violated his own laboratory protocols and industry practices by producing a report that did not list all the results of his tests, Dr. Meehan repeatedly explained that the decision was fueled by a concern for the privacy of the lacrosse players127 and indicated that it was his intent, by using the introductory language in the results section, to convey that other results existed.128
2. At the conclusion of that testimony, Mr. Nifong was questioned outside the courtroom by members of the press about the subject of Dr. Meehan's testimony and the unreported exculpatory results of DNA Security's testing. In a televised statement that was widely reported in the print media, Mr. Nifong effectively recanted his dual representations to this Court just a few hours earlier, admitted that he knew about the exculpatory results, and admitted that he agreed with Dr. Meehan to produce a report that omitted those results. In short, Mr. Nifong told a *completely different story,* which would comport with Dr. Meehan's intervening sworn testimony.

##### And *we* were trying to, just as Dr. Meehan said, trying to avoid dragging any names through the mud but at the same time his report made it clear that all of the information was available if they wanted it and they have every word of it.129

1. Six days later, Mr. Nifong's story would change yet again. On Thursday, December 21, 2006, Mr. Nifong gave a three-hour interview to reporters for the New York *77mes.* In that interview, Mr. Nifong abandoned his "ignorance" defense and his "knowing/privacy" defense and mounted a completely separate "knowing/negligence" defense:

124 **Attachment 44, Tr.14-16 (emphasis added).**

125 **See Paragraphs 38 39 and 46-47 and accompanying footnotes and referenced attachments.**

126 ***See* Paragraph 50 and accompanying footnotes and referenced attachments.**

127 ***See* Paragraph 60 and accompanying footnotes and referenced attachments.**

128 ***See* Paragraphs 50 and 54 and accompanying footnotes and referenced attachments.**

129 **Attachment 45 (emphasis added).**

###### 31

On Thursday, **Mr. Nifong acknowledged knowing about those test results before any players were indicted last spring. He also acknowledged that the results were relevant and "potentially exculpatory,"** and he said he should have given the results to the defense before May 18, the day he signed a pleading that said "the state is not aware of any additional material or information which may be exculpatory in nature."

But Mr. Nifong denied the defense team's contention that he had deliberately tried to hide the results or delay their release. **Mr. Nifong, who is personally overseeing this case, said that given the volume of evidence he had not realized that he had failed to turn over those specific DNA test results.** "That wasn't something I was concentrating on," he said.130

Still, Mr. Nifong conceded he erred in not providing all of Mr. Meehan's test results to defense lawyers months earlier than he did. **"Obviously, anything that is not DNA from the people who are charged is potentially exculpatory information." 131**

1. Thus, in the course of a week, Mr. Nifong told three diametrically opposed stories about his knowledge of the exculpatory DNA test results, which can accurately be paraphrased as follows:

*First Storv: Ignorance Defense*

I did not know about the potentially exculpatory results or that the Defendants had not been provided with the results until December 13, 2006, when I received their Motion, and I immediately took steps to clear it up by having Dr. Meehan here to testify.

*Second Storv: Knowinq/PrivacvDefense + No Harm/No Foul*

I knew about the potentially exculpatory results all along, and I knew the Defendants did not have those results, because I agreed with Dr. Meehan to produce a report that would exclude those results under a theory that it protected the privacy of the players; regardless, the Defendants have the results now.

*Third Storv: Knowinq/Neqliqence Defense + No Harm/No Foul*

I knew about the potentially exculpatory results all along, but I did not realize that I had failed to disclose them to the Defendants; regardless, the Defendants have the results now.

1. The fact that those stories are so diametrically opposed demonstrates that Mr. Nifong was simply continuing a pattern of deception about the DNA evidence in this case that he began nearly nine months earlier, on March 29, 2006, when he first began to suggest to the public that the failure to find a DNA link between the lacrosse players and the accuser's rape kit items was because condoms were used (when he knew the accuser said they were not) or because there was no DNA on those items sufficient for comparison purposes (when he knew DNA Security had found DNA on items that did not match the players). That pattern continued through the spring, summer, and fall, when he engaged in the repeated misrepresentations and violations detailed in this Motion.
2. Moreover, each of Mr. Nifong's individual defenses to his failure to meet his myriad legal and

130 **Attachment 46 (emphasis added).**

131 **Attachment 47 (emphasis added).**

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ethical duties to disclose the DNA Security results is, even without reference to his contradictory statements on that subject, not worthy of belief.

***Ignorance Defense.*** Mr. Nifong's first story is belied by the record evidence of his multiple meetings with Dr. Meehan in April and May of 2006 in which both Dr. Meehan and Mr. Nifong have agreed that they discussed the results of all of DNA Security's tests. It is also belied by the fact that Mr. Nifong reached an agreement with Dr. Meehan to limit the report of DNA Security by application of a formula that would necessarily exclude the exculpatory reports.

***Knowing/Privacy Defense.*** Mr. Nifong's second story is belied by the simple fact that the names of the lacrosse players were all listed as suspects in the DNA Security report, as well as his personal knowledge that they had all been publicly named when the nontestimonial identification order was returned and published, as well as his own public comments disparaging the lacrosse team, challenging their manhood, criticizing them for hiding behind parents and lawyers, mocking them for obtaining the advice of counsel, promising the world that he wouldn't let them get away with raping a black girl from Durham, and the list goes on.

***Negligence Defense.*** Mr. Nifong's third story is belied by the record evidence of the Defendants' repeated requests for the results of all tests by DNA Security *and* the discoverable substance of his meetings with Dr. Meehan, and Mr. Nifong's repeated representations that the Defendants were not entitled to anything from DNA Security that was not included in the May 12 report-which he knew, by operation of his agreement with Dr. Meehan, omitted the exculpatory results he discussed with Dr. Meehan in April and May. The notion that Mr. Nifong was not focused on this case is also belied by the facts that he decided to prosecute the case himself, personally took over the direction of the factual investigation from the Durham Police Department on March 24, 2006, and began conducting dozens of press interviews about the case just days later. As it relates to the particular issue of DNA test results, Mr. Nifong's claim of ignorance or negligence is belied by his multiple conversations with SBI lab personnel about the DNA testing, multiple conversations and meetings with Dr. Meehan about the DNA testing, multiple public comments about the status of DNA testing in the case, his personal involvement in developing the standard of reporting by DNA Security, his personal retrieval of the DNA Security report from Dr. Meehan on May 12, 2006, and his delivery of the report to the Defendants that same day.

1. On December 22, 2006, just one week after the Defendants revealed the previously withheld existence in the rape kit of DNA belonging to multiple unidentified males, Mr. Nifong dismissed the first­ degree rape charges against them. As the basis for the dismissal, Mr. Nifong cited an interview of Ms. Mangum conducted by his office's investigator, Linwood Wilson, six days after the December 15 hearing. It was the first substantive interview his office conducted of the accuser in this case in the nine months since the initial accusation. At the time of the accusation, Ms. Mangum gave multiple oral statements to hospital personnel, SANE Nurse Tara Levicy, and law enforcement personnel, as well as a handwritten statement, in which she repeatedly stated that her attackers used penises, without condoms, to penetrate her vaginally and anally. However, in the interview conducted six days after the December 15 hearing (which revealed the existence of the withheld exculpatory DNA test results from the rape kit), Ms. Mangum reportedly claimed, for the first time, according to Mr. Wilson, that she could no longer recall whether her attackers used their penises. Mr. Nifong cited that reported lack of certainty and the absence of any physical evidence to corroborate the use of a penis as the basis for dismissing the first-degree rape charge, but he let the remaining charges of first-degree sex *offense* and kidnapping stand.

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1. On January 24, 2007, the North Carolina State Bar Grievance Committee filed an Amended Complaint against Mr. Nifong upon the finding of probable cause that, by engaging in many of the activities referenced in this Motion, Mr. Nifong failed to provide potentially exculpatory DNA evidence to the Defendants as required by various Constitutional and statutory laws cited herein and made multiple misrepresentations and false statements on the subject to the Court and undersigned counsel along the way.132
2. The State Bar Grievance Committee also found probable cause to believe that Mr. Nifong made false statements to the State Bar when responding to the Grievance Committee's letter of notice and substance of grievance alleging that he failed to provide the exculpatory DNA evidence and falsely stated to this Court on December lS, 2006, that he did not know the exculpatory test results were missing from the DNA Security report until he received the Defendants' Motion on December 13, 2006.133 According to the Amended Complaint, Mr. Nifong sent two responsive letters to the Committee on December 28, 2006, and January 16, 2007.134 In those letters, Mr. Nifong apparently gave yet another explanation for his conduct, a sort of "pot luck" explanation that drew on some elements from his previous explanations and discarded others.
3. Mr. Nifong's response to the Grievance Committee was that he had discussed all of DNA Security's test results, including the potentially exculpatory test results, with Dr. Meehan in April and May of 2006;135 that he did agree to limit the information in DNA Security's report based on privacy concerns of releasing names and DNA profiles of the lacrosse players and others who had provided reference samples;136 but that he did not have an agreement with Dr. Meehan to exclude the potentially exculpatory DNA test results from DNA Security's report; 137 that he did not realize that the potentially exculpatory DNA test results were excluded from the DNA Security report until he received the Defendants' Motion on December 13, 2006;138 and that, when he stated to this Court on December 15, 2006, that "The first I heard of this particular situation was when I was served with these reports-this Motion on Wednesday of this week," the "particular situation" he was referencing was the Defendants' allegation that an attempt had been made to conceal the evidence from them.139 Like Mr. Nifong's other contradictory explanations, his reported explanation to the State Bar cannot survive this Court's scrutiny.
4. As previously stated in this Motion, the privacy argument is facially absurd, given Mr. Nifong's disparaging public comments about the lacrosse players and his knowledge that all of their names had been made public with the filing of public court documents related to the nontestimonial identification procedures, and given the fact that the DNA Security report itself (a) clearly listed the names of all lacrosse players *and identified them as suspects,* and (b) clearly listed the specific DNA characteristics of persons who were never charged in the case.140
5. Mr. Nifong's denial of an agreement with Dr. Meehan to limit the report in a way that would necessarily omit the unreported exculpatory DNA test results not only contradicted half a dozen sworn representations by Dr. Meehan on December 15, 2006, but also contradicted Mr. Nifong's own behavior that day inside and outside the courtroom. Under approximately 90 minutes of questioning by defense counsel Brad Bannon and Jim Cooney, Dr. Meehan stated over and over again that he had reached an agreement with Mr. Nifong to use a reporting formula that would, by definition, not include all of the DNA

132 **See pages 16-27 of Attachment 48, The North Carolina State Bar v. Michael B. Nifong. 06 DHC** 35, **Amended Complaint filed**

January 24, 2007.

"' Attachment 48, p.27, 1)279. 134 Attachment 48, p.28, 1)280. " Attachment 48, p.28, 1)281.

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"' Attachment 48, p.28, 1)283.

137 Attachment 48, p.28, 1)282.

138 **Attachment 48, p.29, ,r287.**

139 **Attachment 48, p.29, ,r289.**

140 **See Paragraphs 58-61 and accompanying footnotes and referenced attachments.**

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Security test results, including the exculpatory rape kit findings.141 The final one of those exchanges:

**MR. COONEY:**

**DR. MEEHAN: MR.COONEY:**

**DR. MEEHAN:**

\*\*\*\*

### MR. COONEY:

**DR. MEEHAN:**

Did your report set forth the results of all of the tests and examinations that you conducted in this case?

No. It was limited to only some results.

Okay. And that was an intentional limitation arrived at between you and representatives of the State of North Carolina not to report on the results of all examinations and tests that you did in this case?

Yes.

If you had been requested by representatives of the State of North Carolina at any time after May 12 to prepare a report reporting on the results of all of your tests and examinations, would you have done so?

Absolutely.142

Shortly after that exchange, Mr. Nifong was given the opportunity to question Dr. Meehan and say anything he wanted to say to this Court on the subject. After asking Dr. Meehan to re-read the limited reporting formula they had concocted for the DNA Security report, Mr. Nifong engaged in this exchange with Dr. Meehan:

### MR. NIFONG:

**DR. MEEHAN: MR. NIFONG:**

**DR. MEEHAN: MR. NIFONG: DR. MEEHAN:**

Now, had you found consistent profiles from, say, a dozen samples, would you have written a sentence, "Three of the reference samples are consistent?"

No. It would say "a dozen."

Although certainly the fact that you wrote "three" would be true if you'd actually found a dozen?

Yeah, it would. But I-

***It would just be less than the full truth, wouldn't it?***

Yes.143

After that implied concession that he and Dr. Meehan had agreed to produce a report that would include "less than the full truth," Mr. Nifong then engaged in this exchange with Dr. Meehan:

### MR. NIFONG: DR. MEEHAN:

Did you attempt to put in less than the full truth with respect to this?

No.

"' *See* Attachment 44. Tr.23-24. 40-41, 59-62, 64-65, 66-67. 82-83, and 85.

142 **Attachment 44, Tr.85M86.**

'"' Attachment 44, Tr.90 (emphasis added).

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##### MR. NIFONG:

**DR. MEEHAN:**

**MR. NIFONG: DR. MEEHAN:**

So would it be a fair reading of your statement, "Three of the reference specimens are consistent," to infer from that that none of the other ones were consistent?

I think that would be fair. I think that's what we intended in that statement.

Did anyone *ever* tell you to conceal or hide any of your results from anybody?

No.'44

1. Apparently, Mr. Nifong was only concerned with clarifying the fact that he *never* personally uttered the magic words: "Hide exculpatory evidence." **But at no point in Mr. Nifong's questioning of Dr. Meehan or his remarks to the Court on December 15, 2006, did he challenge Dr. Meehan's repeated sworn representations that he and Mr. Nifong agreed to a limited reporting formula that would, and did, *do just that:.* hide exculpatory evidence. Quite the contrary, Mr. Nifong *adopted* Dr. Meehan's explanation and testimony in public comments after the hearing.145**
2. Mr. Nifong's explanation to the State Bar that he did not realize the exculpatory test results were not included in the May 12 DNA Security report is equally unworthy of belief. First, that explanation contradicts everything he did and said inside and outside the courtroom on December 15, 2006, as discussed in the preceding paragraphs. Secondly, if that were the case, and if Mr. Nifong were acting in good faith and consistent with his myriad legal and ethical obligations, Mr. Nifong would have immediately been clear on that subject with this Court and undersigned counsel at the beginning of the court proceedings on December 15, 2006. He would have conceded that the Defendants' analysis in the December 13 Motion was correct; that the May 12 DNA Security report did not contain the exculpatory test results identified by the Defendants in their December 13 Motion; that he had contacted Dr. Meehan about producing a fully truthful and accurate report; and that Dr. Meehan was present to answer any additional questions the Defendants or the Court might have about this obvious violation of the law. Instead, Mr. Nifong said the December 13 Motion was the first he heard about "this particular situation" and then, with no prior notice to undersigned counsel, called Dr. Meehan to the witness stand and simply tendered him without any such concession or explanation for examination by the Defendants.

##### Thus, if Mr. Nifong's response to the Grievance Committee is to be believed, then even on December 15, 2006, he was sti//violating his legal and ethical obligations by playing hide and seek with the exculpatory DNA evidence and making the Defendants pry it out of Dr. Meehan on the witness stand, when it should have been provided to the Defendants seven months earlier, when it was clearly provided to Mr. Nifong.

1. But everyone who sat *in camera* with Mr. Nifong knew exactly what he meant to imply when he represented to Your Honor, there and again just moments later in open court, that the December 13 Motion was "the first I heard of this particular situation" and then followed those representations with acknowledgments of how serious the situation was, which is why he immediately called Dr. Meehan to address the situation.146 In response to the State Bar's substance of grievance alleging that those

statements were false and material misrepresentations to this Court, Mr. Nifong apparently wrote that what he meant by "this particular situation" was not the existence of the exculpatory DNA test results *or* the State's failure to provide those results to the Defendants, but the Defendants' specific accusation that

the failure was an intentional act by Mr. Nifong. Of course, the problem with that after-the-fact

144 **Attachment 44, Tr.90.**

145 **Attachment 45, "Lab Chief: Nifong Said Don't Report All DNA Data," Raleigh *News* & *Observer,* December 16, 2006.**

146 **Attachment 43, Tr.10-12; Attachment 44, Tr.14-16.**

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explanation is that Mr. Nifong did not say anything to this Court or defense counsel in those exchanges about being wrongly accused of intentionally withholding evidence. And the bigger problem is that *the Defendants never made that accusation,* in the December 13 Motion or in Mr. Bannon's opening remarks on December 15, 2006. That is undoubtedly why the Grievance Committee of the North Carolina State Bar found probable cause to believe that Mr. Nifong's remarks to the Court that day were "misrepresentations and false statements of material fact to a tribunal"147 and that his explanations to the Grievance Committee about those remarks "were knowingly false statements of material fact made in connection with a disciplinary matt er."148

1. In short, none of Mr. Nifong's contradictory explanations for his failure to disdose the exculpatory evidence is credible, and the fact that each contradicts the other is the best evidence yet that his treatment of the DNA evidence in this case was unethical and illegal as discussed above.
2. Moreover, Mr. Nifong's *in camera* and open court representations to this Court on December 15, 2006, stating that he was unaware of the exculpatory results of DNA Security's testing until he received the Defendant's Motion on December 13, 2006, were blatant violations of Rule 3.3(a)(l), which prohibits false statements of material fact by a lawyer to a tribunal. The violations were made all the more egregious by Mr. Nifong's public comments, made just hours and days later, that he was, in fact, aware of the exculpatory findings, and either (a) knowingly failed to report them pursuant to an agreement with Dr. Meehan to preserve the players' privacy; or (b) negligently failed to report them because he was focused on other matters.
3. Mr. Nifong's failure, to this day, to correct those multiple misrepresentations to the Court is, itself, a separate violation of Rule 3.3(a)(l): "A lawyer shall not ... *fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."* Likewise, if Mr. Nifong had actually believed that Dr. Meehan repeatedly perjured himself by stating under oath on December 15, 2006, that he reached an agreement with Mr. Nifong to limit the DNA Security report in a way that would necessarily omit the production of exculpatory evidence, then Mr. Nifong's failure to correct Dr. Meehan's testimony on December 15, 2006, *or to this day,* is a separate and continuing violation of Rule 3.3(a)(3):

A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If ... a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

1. On January 12, 2007, after being charged by the North Carolina State Bar Grievance Committee with ethical violations related to his handling of these matters, Mr. Nifong recused himself from the prosecution of these cases. On behalf of the Special Prosecutions Section of the North Carolina Attorney General's Office, Special Prosecutors Jim Coman and Mary Winstead were assigned to prosecute the case and began an exhaustive review and additional investigation of the allegations.
2. On January 30, 2007, during an in camera meeting before this Court with Mr. Coman and Ms. Winstead, this Court inquired of undersigned counsel about whether they intended to seek any additional relief based on the events which transpired before the Court on December 15, 2006. Undersigned counsel made it clear that they would, at the appropriate time following the initial review of these matters by the Special Prosecutors, be seeking all available relief under all applicable laws, rules, and court orders relating to the DNA issues raised in their December 13 Motion and further explored in the December 15 Hearing. That conversation was memorialized, and that intention reiterated, in the Defendants' Addendum to Motion To Compel Discovery: Expert DNA Analysis, filed with this Court on February 27, 2007.

"'Attachment 48, p.25, 1!266. "' Attachment 48, p.29, 1!291.

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1. On April 11, 2007, upon the recommendation of Mr. Coman and Ms. Winstead at the conclusion of their exhaustive review of this case, the North Carolina Attorney General dismissed the above-referenced charges and declared the factual innocence of David Evans, Collin Finnerty, and Reade Seligmann. That action rendered moot any request for sanctions by this Court against the State of North Carolina based on Mr. Nifong's misconduct described herein; however, it did not strip this Court of its authority to sanction Mr. Nifong personally.
2. From June 12 to June 16, 2007, Mr. Nifong was tried in the matter of North Carolina State Bar v. Michael B. Nifong, pursuant to the Amended Complaint attached to this Motion. Following those proceedings, the Disciplinary Hearing Commission panel unanimously found by clear, cogent, and convincing evidence that Mr. Nifong knowingly made multiple false statements of material fact to various parties, including the Court, and engaged in fraud, dishonesty, and deceit in the prosecution of these matters as follows:
	1. When Mr. Nifong told defense counsel that he had provided them with all of the results of DNA Security's testing in the May 12 report, he knowingly made a false statement of material fact to a third person in connection with litigation (Rule 4.1), and he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 8.4(c)).
	2. When Mr. Nifong made representations to the Court that he had provided the substance of all of Dr. Meehan's discoverable statements to the Defendants when he provided them with the May 12 DNA Security report, he knowingly made a false statement of material fact to a tribunal (Rule 3.3(a)(l)), and he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 8.4(c)).
	3. When Mr. Nifong told this Court on December 15, 2006, that he was not aware of the exculpatory DNA Security test results or the fact that they had not previously been reported to the Defendants, he knowingly made a false statement of material fact to a tribunal (Rule 3.3(a)(l)), and he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 8.4(c)).
	4. When Mr. Nifong stated to the Grievance Committee that he did not realize the exculpatory DNA Security test results were not included in the May 12 report, he knowingly made a false statement of material fact in connection with a disciplinary matter (Rule 8.l(a)), and he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 8.4(c)).
	5. When Mr. Nifong stated to the Grievance Committee that his remarks about the "first I heard of this," which he made to this Court on December 15, 2006, were in response to the implication that he had intentionally withheld the exculpatory DNA test results, he knowingly made a false statement of material fact in connection with a disciplinary matter (Rule 8.l(a)), and he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 8.4(c)).
3. In doing so, the Disciplinary Hearing Commission also found that Mr. Nifong had engaged in conduct prejudicial to the administration of justice (Rule 8.4(d)), and the panel unanimously entered an order of disbarment.

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AUTHORITY TO IMPOSE SANCTIONS AND GRANT REMEDIES

1. Before turning to the specific laws and rules which provide this Court with authority to sanction Mr. Nifong personally, it should be reiterated that the Defendants, through their counsel, specifically informed this Court on December 15, 2006 (in open court); January 30, 2007 (in an *in camera* meeting with newly appointed Special Prosecutors Jim Coman and Mary Winstead); and February 27, 2007 (in their Addendum to Motion To Compel Discovery: Expert DNA Analysis), that they intended to request additional relief based on Mr. Nifong's misconduct described herein, but they specifically asked to defer any such request until reviewing the full record and until the newly appointed Special Prosecutors completed their investigation and review of the case. While the Attorney General's dismissal of the charges and exoneration of the Defendants on April 11, 2007, rendered moot any request for sanctions against the State of North Carolina related to the trial of the criminal cases, this Court may still sanction Mr. Nifong personally for his misconduct described herein, under the various authorities stated below.
2. Regarding violations of the Defendants' open-file discovery rights in Article 48 of the North Carolina Criminal Procedure Act, §15A-910(a) provides: "if at any time during the course of the

proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court ***in addition to exercising its contempt powers*** may ... enter other appropriate orders." Section 15A-910(b) further provides: "prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the

circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Arti cle."149

1. Regarding the violations of this Court's processes and orders, the General Statutes provide this Court with criminal contempt powers to vindicate the dignity and authority of the Court. *Gay/on v. Stutts,* 241 N.C. 120, 84 S.E.2d 822 (1954). G.S. § 5A-11 lists examples of criminal contempt: (1) willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority; (2) willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution; (3) willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction; and (4) willful or grossly negligent failure to comply with the practices of the court resulting in substantial interference with the business of the court.150 G.S. § 5A-13 defines a *direct* criminal contempt act as one committed within the sight or hearing of a presiding judicial official, in the room where proceedings are being held before the court, which is likely to interrupt or interfere with matters then before the court; every other criminal contempt act is *indirect 151* While§ 5A-13(a) allows courts to punish direct criminal contempt acts summarily,§ 5A- 13(b) requires courts to punish indirect criminal contempt acts only pursuant to the plenary proceedings set out in § 5A-15.152 The maximum punishments allowed for criminal contempt are defined in § 5A-12.
2. Regarding violations of the North Carolina Rules of Professional Conduct, in addition to the concurrent jurisdiction shared by this Court with the North Carolina State Bar to regulate lawyer conduct under the Rules, this Court entered an Order on September 22, 2006, directing all lawyers in these matters to comply with the letter and spirit of the Rules, which include Rule 3.3 (Candor Toward The Tribunal), Rule 4.1 (Truthfulness in Statements To Others), Rule 3.8 (Special Responsibilities of a Prosecutor), and Rule 8.4 (Misconduct).
3. Finally, even where the law does not speak to a certain subject or remedy, this Court has the inherent judicial authority to do all things reasonably necessary for the proper administration of justice. *State v. Buckner,* 351 N.C. 401 (2000); *State v. Vestal,* 131 N.C. App. 756 (1998).

149 **The trial court has discretion iri detennining the applicable sanction, State v. Quarg, 334 NC 92, 103 (1993).**

150 N.C.G.S. § 5A-11(a)(2). (3). (6), and (7).

151 N.C.G.S. § 5A-13.

152 N.C.G.S. § 5A-13 and -15.

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**CONCLUSION & PRAYER FOR RELIEF**

1. It is not necessary at this point to repeat or belabor the facts that have been set out at length and in great detail in this Motion and supported by multiple referenced sources, many of which are attached. Those facts speak loudly for themselves, and they should shock the conscience of anyone interested in the general administration of criminal justice in the State of North Carolina, as well as these particular cases. Those facts trace a very clear pattern of prosecutorial misconduct by Mr. Nifong regarding DNA evidence in this case that began on March 29, 2006, and continues to this day.
2. Viewing the totality of the circumstances and the unquestionable materiality of the subject matter addressed in this Motion, the question for this Court is not so much whether Mr. Nifong violated the various laws, orders, and rules in effect in our State and in this case designed to protect the process and the rights of the Defendants. Indeed, the pattern of misconduct is so extensive-and occurred across so much time and on so many different fields of legal and ethical obligation-that the sheer scope of it shocks the conscience and defies any notion of accident or negligence. Thus, the real question for this Court is what to do about it.
3. It should be noted at this point that our legislature has vested trial courts in this State with the discretion to impose dramatic remedies not just for statutory and Constitutional violations related to the failure to disclose evidence, but also for statutory and Constitutional violations related to the collection of evidence. Thus, not only does our law require the suppression of any evidence obtained in violation of the United States Constitution and North Carolina Constitution, it requires the suppression of any evidence obtained as a result of a substantial violation of the Criminal Procedure Act. In making those determinations, trial courts are urged to consider the extent of the State's "deviation from lawful conduct," "the extent to which the violation was willful," and "the extent to which exclusion will tend to deter future violations of [the Criminal Procedure Act]."153 Thus, our legislature has made it clear that violations of rights afforded by the Criminal Procedure Act are no less important than violations of rights afforded by our Constitutions when it comes to addressing violations of the rights of people subject to prosecutorial authority in this State.
4. Likewise, the legislature has made it clear that courts may and, in some cases, must impose dramatic remedies for dramatic violations. The violations in this case were so outrageous and extensive that they demand the most dramatic remedy our law allows. Had these matters still been pending, the remedy sought in the cause would have certainly been dismissal of these charges. Indeed, it is the only specific remedy enumerated in our open-file discovery law that would have made any sense in this context or corresponded in any way to the breadth of Mr. Nifong's violations acting on behalf of the State. After all, the Defendants would have hardly asked this Court to suppress or prohibit the introduction of the exculpatory DNA test results that took them nine months to obtain from the State of North Carolina.
5. But this Court's action upon Mr. Nifong's many violations should not be limited to now-moot procedural sanctions against the State of North Carolina for actions he took in his representative capacity. These Defendants and their undersigned counsel respectfully submit that this Court should sanction Mr. Nifong personally by holding him in criminal contempt of court and imposing the reasonable costs incurred by the Defendants to pursue and identify the exculpatory DNA Security test results in this case. As the only person who knew about both the exculpatory results and the Defendants' unquestionable entitlement to those results under multiple laws and rules in May of 2006, Mr. Nifong knowingly took steps, over and over again, that would conceal them-steps that did, *in fact,* conceal them. He knowingly made misrepresentations of material fact on the subject to multiple judges, including this Honorable Court on September 22, 2006, and December 15, 2006, and he knowingly made misrepresentations of material fact on the subject to undersigned counsel.

'" N.C.G.S. § 15A-974.

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1. In short, Mr. Nifong knowingly played a game of hide and seek and seek and seek and seek with the Defendants and the Court regarding unquestionably exculpatory evidence, and he should be made to pay for the absolutely unnecessary and extensive effort put forth by the Defendants to obtain and finally identify that information throughout May, June, July, August, September, October, November, and December of 2006.

WHEREFORE, pursuant to the authority cited herein and based on the foregoing, the Defendants respectfully request that this Honorable Court entertain the following relief as it relates to Michael B. Nifong personally:

* 1. Enter an Order holding Mr. Nifong in criminal contempt of court;
	2. Enter an Order directing Mr. Nifong to pay for reasonable costs incurred by the Defendants to pursue and identify the exculpatory results of DNA Security's testing in this case; and
	3. Take any other action against Mr. Nifong, including those afforded by this Court's criminal contempt powers, which the Court finds appropriate.

RESPECTFULLY REQUESTED, this 22nd day of June, 2007.

*For Defendant David Evans.*

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**J l.**

Bradley Bannon

State Bar Number 24106

CHESHIRE PARKER SCHNEIDER BRYAN & VITALE

133 Fayetteville Street, Suite 500 Raleigh, North carolina 27601 Telephone: 919.833.3114

*For Defendant Reade Seligmanrr.*

WOMBLE CARLYLE SANDRIDGE & RICE

One Wachovia Center, Suite 3500 301 South College Street Charlotte, North Carolina 28202 Phone: 704.331.4980

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*For Defendant Collin Finnerty.*

**bloJ. &. '::tt-.**

Wade M. Smith

State Bar No. 4075

THARRINGTON SMITH

209 Fayetteville Street Post Office Box 1151

Raleigh, North Carolina 27602 Phone: 919.821.4711

***w 0-***

State Bar No. 8708

WILLIAM J. COTTER, P.A.

3003 Chapel Hill Road Post Office Box 3507

Durham, North Carolina 27702 Phone: 919.489.0339

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing Motion For Sanctions was duly served upon the following:

Mr. Michael B. Nifong 615 November Drive

Durham, North Carolina 27712

Mr. James J. Coman Ms. Mary Winstead

North Carolina Department of Justice Special Prosecutions Section

P.O. Box 629

Raleigh, North Carolina 27602 THIS the 22nd day of June, 2007.

*Via U.S. Mail*

*Via Hand Delivery*

Bradley Bannon

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