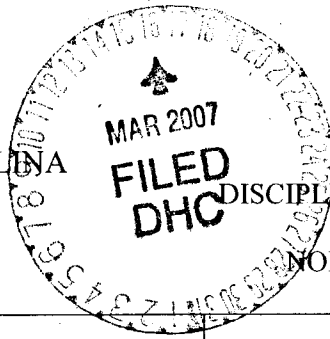


STATE OF NORTH CAROLINA  
WAKE COUNTY



BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
06 DHC 35

THE NORTH CAROLINA STATE BAR,  
Plaintiff

v.

MICHAEL B. NIFONG, Attorney,  
Defendant.

MEMORANDUM OF LAW IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS

### INTRODUCTION

On February 28, 2007, Defendant Nifong filed his responsive pleading which included a motion to dismiss portions of Plaintiff's Amended Complaint. Nifong moves to dismiss the allegations contained in paragraphs (c) and (d) of the "Therefore" clause of Plaintiff's Amended Complaint, on grounds that the State Bar cannot establish as a matter of law that Nifong violated: (1) the provisions of the United States Constitution; (2) N.C.G.S. § 15A-282; (3) N.C.G.S. §§ 15A-903(a)(1) & (a)(2); or (4) the Durham County Superior Court's June 22, 2006 and September 22, 2006 Orders.

The portions of the Amended Complaint Nifong seeks to have dismissed allege that Nifong violated Rules 3.4(d) and 3.8(d) of the Rules of Professional Conduct. Nifong's conduct prior to November 16, 2006 was governed by the former versions of Rules 3.4(d) and 3.8(d). On November 16, 2006 and thereafter, Nifong's conduct was governed by the current versions of Rules 3.4(d) and 3.8(d).

### FACTUAL BACKGROUND

The allegations in the State Bar's complaint, which must be accepted as true for the purpose of Defendant's motion, establish the following facts. During the investigation of the Duke Lacrosse rape case, various pieces of evidence were collected for later DNA testing, including false fingernails collected from 610 North Buchanan Street, specimens from the alleged victim's rape kit, and DNA samples from 46 members of the Duke University men's lacrosse team (collectively, "lacrosse players") obtained pursuant to a Nontestimonial Identification Order (NTO) sought by Nifong's office. In the application seeking the NTO, Nifong's office 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." (Plaintiff's Amended Complaint, ¶ 182-89)

The State Bureau of Investigation laboratory (“SBI lab”) examined the items from the rape kit and was unable to find any semen, blood, or saliva on those items. On April 5, 2006, Nifong’s office sought and obtained an Order permitting transfer of the evidence to DNA Security, Inc. (DSI) for more sensitive DNA testing. As justification for its Order, the Court noted that the additional testing was “believed to be material and relevant to this investigation, and 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.” (§ 192-97)

The rape kit items, DNA samples collected from the lacrosse players pursuant to the NTO, and other evidence were subsequently transferred to DSI, which began testing and analysis on those items. In its initial testing, DSI found DNA characteristics from up to four different males on several pieces of evidence from the rape kit. By April 10, 2006, DSI had analyzed the DNA characteristics from at least some of the evidence items from the rape kit containing multiple male DNA characteristics and compared them with the specimens from the lacrosse players, none of which matched the DNA it had analyzed. (§ 198-201)

On April 10, 2006, Nifong met with Dr. Brian Meehan, president and director of DSI, and two Durham Police Department (“DPD”) officers at the DSI office. At that meeting, Dr. Meehan discussed with Nifong the results of the analyses performed by DSI to that point, including the analysis of the rape kit items. (§ 202-03)

On April 17, 2006, Nifong sought and obtained indictments against Collin Finnerty and Reade Seligman for first-degree rape, first-degree sex offense, and kidnapping. (The indicted lacrosse players are hereafter referred to collectively as “the Duke Defendants”). On April 19, 2006, counsel for Reade Seligman served Nifong with a request for discovery material, including witness statements, the results of any tests, all DNA analysis, and any exculpatory information. (§ 204-07)

By April 20, 2006, DSI had found DNA characteristics from multiple males on at least one additional piece of evidence from the rape kit and had determined that none of the DNA from multiple males found on items from the rape kit matched any of the lacrosse players, including the two players who had already been indicted. (§ 209)

On April 21, 2006, Nifong again met with Dr. Meehan and the two DPD officers to discuss all of the results of the DNA testing and analyses performed by DSI to date. At this April 21 meeting, Dr. Meehan told Nifong: (a) that DNA from multiple males had been found on several items from the rape kit, and (b) that all of the lacrosse players, including the two players who had already been indicted, were excluded as possible contributors of this DNA because none of their DNA profiles matched or were consistent with any of the multiple DNA specimens found on the rape kit items. The evidence and information from DSI disclosed to Nifong at the April 21, 2006 meeting (hereinafter referred to as “potentially exculpatory DNA test results” or “potentially exculpatory DNA evidence”) was potentially exculpatory of the Duke Defendants. (§ 210-12)

During one of their meetings in April, Nifong instructed Dr. Meehan to prepare a report concerning the DNA testing by DSI that did not include all of the results of the tests and examinations performed by DSI, but instead included only tests for which DNA found on evidence items matched or was consistent with DNA from known reference specimens, the so-called “positive results.” Nifong’s instruction to Dr. Meehan regarding the report meant that the potentially exculpatory DNA evidence and test results would not be included in DSI’s report and, therefore, would not be provided to the Duke Defendants or the other lacrosse player suspects. (§ 213-15)

On May 12, 2006, Nifong again met with Dr. Meehan and discussed the results of DSI’s testing that had been completed by that point. On that date, consistent with Nifong’s prior instruction, Dr. Meehan provided Nifong a ten-page report which set forth the results of tests on only three evidence specimens: Two fingernail specimens collected from 610 North Buchanan Street that were at least partially consistent with the DNA profile of two un-indicted lacrosse players and a specimen from the vaginal swab of the rape kit that was consistent with the DNA profile of the alleged victim’s boyfriend. The report contained no reference to any of the multiple unidentified male DNA, even though it listed the evidence items on which DSI had discovered this evidence. The report contained no statement indicating that DSI had discovered multiple male DNA characteristics on any evidence specimen other than the three specifically set forth in the report. (§ 216-20)

Nifong personally received DSI’s report from Dr. Meehan and later that day provided it to counsel for the two Duke Defendants who had been indicted and counsel for Dave Evans, among others. When he received DSI’s report and provided it to counsel for the Duke Defendants, Nifong had just met with Dr. Meehan and was fully aware of the test results that were omitted from the DSI report, including the potentially exculpatory DNA test results. Three days later, Nifong sought and obtained an indictment against Dave Evans for first-degree rape, first-degree sex offense, and kidnapping. (§ 221-23)

On May 17, Duke Defendant Collin Finnerty served discovery requests on Nifong, which specifically asked that any expert witness “prepare, and furnish to the defendant, a report of the results of *any* (not only the ones about which the expert expects to testify) examinations or tests conducted by the expert.” On May 18, 2006, Nifong provided various discovery materials to all three Duke Defendants, including another copy of the ten-page DSI report, in connection with a hearing in the case on that same day. The discovery materials Nifong provided on May 18 did not include any underlying data or information concerning DSI’s testing and analysis. The materials Nifong provided also did not include any information indicating the presence of the potentially exculpatory DNA evidence or test results. Nifong also did not provide any written or recorded memorialization of the substance of Dr. Meehan’s statements made during his meetings with Nifong in April and May 2006 concerning the results of all DSI’s tests and examinations, including the exculpatory DNA test results (hereafter, “memorializations of Dr. Meehan’s oral statements”). (§ 224-26)

On June 19, 2006, counsel for the Duke Defendants requested various materials from Nifong, including a report or written statement of the meeting between Nifong and Dr. Meehan to discuss the DNA test results. This request was addressed at a hearing before the Court on June 22, 2006, at which Nifong represented to the Court and to opposing counsel that no information beyond what was in DSI's report had been discussed at his meetings with Dr. Meehan. (¶ 238-41)

After the June 22 hearing, the Court entered an Order directing Nifong to provide the Duke Defendants with, among other things: (1) "results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant," (2) statements of any witnesses taken during the investigation, with oral statements to be reduced to written or recorded form, and (3) a report of the results of any examinations or tests conducted by any expert witness the State reasonably expected to call as a witness at trial. (¶ 243)

On August 31, 2006, the Duke Defendants collectively filed a Joint Omnibus Motion to Compel Discovery. This motion sought, among other things, the complete file and all underlying data regarding DSI's work and the substance of any discoverable comments made by Dr. Meehan during his meetings with Nifong on April 10, April 21, and May 12, 2006. These discovery requests were addressed by the Court at a hearing on September 22, 2006, in which counsel for the Duke Defendants specifically stated that they were seeking the results of any tests finding any additional DNA on the alleged victim even if it did not match any of the Duke Defendants or other individuals for whom the State had provided DNA specimens to the experts. (¶ 244-46)

In response to a question from the Court at the September 22 hearing, Nifong represented that DSI's report encompassed all tests performed by DSI and everything discussed at his meetings with Dr. Meehan in April and May 2006. The Court ordered Nifong to provide the Duke Defendants the complete file and underlying data from DSI. (¶ 247-53)

On October 27, 2006, Nifong provided 1,844 pages of underlying documents and materials to the Duke Defendants pursuant to the Court's September 22, 2006 Order, but did not provide a complete report from DSI setting forth the results of all of its tests and examinations, including the potentially exculpatory DNA test results, nor did he provide memorializations of Dr. Meehan's oral statements concerning the results of all examinations and tests conducted by DSI. (¶ 254-58)

From at least May 12, 2006 through January 12, 2007, when he recused himself from the prosecution of the criminal cases, Nifong never provided the Duke Defendants a complete report setting forth the results of all examinations and tests conducted by Dr. Meehan or others at DSI, nor did Nifong ever provide the Duke Defendants memorializations of Dr. Meehan's oral statements concerning the results of all examinations and tests conducted by DSI in written, recorded or any other form. (¶ 275-77)

With respect to the conduct described above, the State Bar alleges that Nifong violated the Rules of Professional Conduct in effect at the time by: (a) not providing to the Duke Defendants a complete report setting forth the results of all tests or examinations conducted by DSI, including the potentially exculpatory DNA test results and evidence; and (b) not providing memorializations of Dr. Meehan's oral statements concerning the results of all examinations and tests conducted by DSI in written, recorded or any other form, despite repeated requests by the Duke Defendants and Orders from the Court on these subjects.

### **THE STANDARD ON A MOTION TO DISMISS**

The question before the court on a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997). “Rule 12(b)(6) ‘generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.’” *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970)). Dismissal is only proper

when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

*Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). A motion to dismiss should not be granted “unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Sutton*, 277 N.C. at 103, 176 S.E.2d at 166.

In his motion to dismiss, Nifong urges the DHC to undertake statutory construction, interpretation of case law, and semantic hair-splitting. These are not appropriate tasks for the tribunal in ruling on a Rule 12(b)(6) motion. By definition, if the applicable law is subject to various interpretations, any one of which provides a legal basis for the plaintiff's claim, dismissal under 12(b)(6) is inappropriate. *See, e.g., Meyer*, 347 N.C. at 111, 489 S.E.2d at 888 (noting that dismissal under 12(b)(6) is inappropriate if “relief may be granted *under some legal theory*”) (emphasis added). The allegations of

Plaintiff's Amended Complaint, treated as true and if proven, state a violation of the Rules of Professional Conduct. Nifong cannot demonstrate that the face of the Amended Complaint "discloses an insurmountable bar to recovery." Because Nifong has failed to sustain his burden, the motion to dismiss should be denied.

**NIFONG DOES NOT SEEK DISMISSAL OF THE ALLEGED VIOLATIONS OF  
THE RULES OF PROFESSIONAL CONDUCT**

As a preliminary matter, the only claims upon which "relief may be granted" in this proceeding are those involving the Rules of Professional Conduct, as the DHC is a tribunal of limited authority. *See* N.C.G.S. § 84-28.1 (2007). In his motion to dismiss, Nifong does not argue that Plaintiff failed to allege sufficient facts to support the claim that Nifong violated the Rules of Professional Conduct as alleged in paragraphs (c) and (d) of the "Therefore" clause of the Amended Complaint. Nifong challenges the claims set forth in paragraphs (c) and (d) of the "Therefore" clause on grounds that the State Bar allegedly cannot establish that Nifong violated the United States Constitution, various sections of the North Carolina General Statutes, or two Durham County Superior Court Orders.

Plaintiff's substantive claims in paragraphs (c) and (d) are that Nifong violated Rules 3.4 and 3.8 of the Rules of Professional Conduct. A violation of Rule 3.4 occurs where a lawyer fails "to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." The former version of Rule 3.8, which was in effect until November 16, 2006, required a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused." A prosecutor's compliance or non-compliance with statute, constitutional provision, or court order *is not* determinative of whether disclosure under former Rule 3.8 was "timely." In order to prove a violation of Rule 3.4 or the former version of Rule 3.8, it is not necessary to show that the lawyer violated any statute, constitutional provision, or court order. Thus, the viability of the claimed Rule violations in paragraph (c) and in paragraph (d)(ii) are wholly independent of Plaintiff's additional allegations that Nifong's conduct also violated the U.S. Constitution, the General Statutes, and the Court Orders.

For the foregoing reasons, the allegations contained in paragraphs (c) and (d)(ii) of the “Therefore” clause of Plaintiff’s Amended Complaint state claims or violations upon which relief can be granted and Defendant’s motion to dismiss should be denied as to paragraphs (c) and (d)(ii).

Paragraph (d)(i) of the “Therefore” clause of the Amended Complaint alleges that Nifong violated the current version of Rule 3.8(d), which requires a prosecutor to “after reasonably diligent inquiry, 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.” The only one of Plaintiff’s claims to which the arguments contained in Nifong’s motion to dismiss are conceivably relevant is the allegation in Paragraph (d)(i). Nonetheless, the allegations in the Amended Complaint, taken as true, demonstrate that Nifong was required, under either “applicable law, rules of procedure, or court opinions” to provide a complete report to the Duke Defendants of all tests performed by DSI and a memorialization of Dr. Meehan’s oral statements. Accordingly, and for the specific reasons discussed below, Defendant’s motion to dismiss should also be denied as to Paragraph (d)(i) of the “Therefore” clause of the Amended Complaint.

**PLAINTIFF ALLEGED SUFFICIENT FACTS TO SHOW NIFONG VIOLATED  
THE UNITED STATES CONSTITUTION**

Nifong contends that the facts alleged in Plaintiff’s Amended Complaint are insufficient to establish that he violated the constitutional rights of the Duke Defendants.

First, Nifong argues that the “allegations of the Amended Complaint establish that the defendant did in fact provide the ‘Duke lacrosse defendants,’ through discovery, a report of the results of all tests and examinations performed by DSI as of October 27, 2006.” (Emphasis added). This statement mischaracterizes the factual allegations of the Amended Complaint. In the paragraphs of the Amended Complaint cited by Nifong in support of this argument, the State Bar alleges that Nifong provided the Duke Defendants with “1,844 pages of underlying documents and material” (paragraph 254), “documentation” (paragraph 259), and “results and evidence” which had been *expressly*

*excluded from the DSI report* provided by Nifong (paragraph 261). The 1,844 pages of raw data provided to the Duke Defendants by Nifong were not a “report” of the results of all tests and examinations performed by DSI; they were *the results themselves*, without the benefit of summary, explanation or interpretation by the State’s expert. As such, the allegations in the Amended Complaint do not, as Nifong contends, establish that he provided the Duke Defendants with a “report” of DSI’s tests and examinations.

Second, Nifong argues that because the Amended Complaint “fails to allege . . . that a trial was held or that a trial date had been scheduled,” the State Bar “cannot establish that the ‘Duke lacrosse defendants’” due process rights to a fair trial were affected.” Nifong cites no legal authority for this proposed bright-line rule. According to Nifong, because his ongoing refusal to disclose exculpatory evidence to the Duke Defendants occurred before a trial date was set, the defendants’ right to a fair trial was not compromised and thus, Nifong did not violate their constitutional rights. This argument conflates the issue of whether a constitutional violation *occurred* with the issue of whether such a violation is *grounds for reversal* of a conviction.

In support of his argument, Nifong cites *United States v. Argurs*, 427 U.S. 97 (1976), and *State v. Elliot*, 360 N.C. 400, 628 S.E.2d 735 (2006). These cases discuss a criminal defendant’s constitutional right to disclosure of exculpatory evidence by the State, as initially articulated in *Brady v. Maryland*, 373 U.S. 83 (1963). In *State v. Elliot*, the North Carolina Supreme Court stated:

A prosecutor does have a duty . . . to provide a defendant with evidence favorable to him or her that is material as to guilt or punishment. To establish a *Brady* violation, defendant must show the evidence was favorable, material, and would have affected the outcome of the trial. Even if the information must be disclosed, “a *Brady* violation may not constitute error if the favorable evidence is provided in time for the defendant to make effective use of it.”

*Elliot*, 360 N.C. at 415, 628 S.E.2d at 745-46 (quoting *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002)) (internal citations omitted). The state Supreme Court in *Elliot* (and previously in *Berry*) indicated that even where a *Brady* violation (i.e. suppression by the prosecution of evidence favorable to the accused) occurs, it *may not constitute reversible error* if the State provides the exculpatory evidence to the defendant sufficiently in advance of trial. *See also State v. Spivey*, 102 N.C. App. 640, 646, 404

S.E.2d 23, 26 (1991) (“While we strongly disapprove of delayed disclosure of *Brady* materials, that alone is not always grounds for reversal.”). Conversely, the fact that a constitutional violation does not require reversal of a conviction does not mean the violation did not occur.

A careful reading of *United States v. Argurs* does not support Nifong’s argument that he didn’t violate the Duke Defendants’ constitutional rights. The portion of the *Argurs* decision quoted by Nifong in his motion is inapposite to Nifong’s conduct as alleged in Plaintiff’s Amended Complaint. In *Argurs*, the U.S. Supreme Court carefully distinguished between situations in which the defendant makes either a generic request for exculpatory matter or no request at all, and instances “in which specific information has been requested by the defense.” 427 U.S. at 106. Where the defendant doesn’t request discovery or requests unspecified exculpatory information, the Court held that “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” 427 U.S. at 107.

In contrast, where a defendant’s request “[gives] the prosecutor notice of exactly what the defense desire[s],” and

the subject matter of [the defendant’s] request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

*Id.* The Duke Defendants made repeated, specific requests to Nifong for material potentially exculpatory information, so under the *Argurs* analysis, his conduct falls into the “seldom, if ever, excusable” category. Accordingly, the facts as alleged in Plaintiff’s Amended Complaint are sufficient to support the allegation that Nifong violated the due process clause of the U.S. Constitution.

For the foregoing reasons, paragraph (d)(i) of the “Therefore” clause of Plaintiff’s Amended Complaint states a claim upon which relief can be granted and Defendant’s motion to dismiss should be denied.

**PLAINTIFF ALLEGED SUFFICIENT FACTS TO SHOW NIFONG VIOLATED**  
**N.C.G.S. §§ 15A-903(a)(1) & (a)(2)**

Nifong contends that the State Bar's allegation that he was "required to provide a memorialization of the substance of his conversations with Dr. Meehan is contrary to the provisions of N.C.G.S. § 15A-903(a)(1) and N.C.G.S. § 15A-904." (Defendant's Motion to Dismiss and Answer ¶ 3). Nifong also contends that the facts alleged in Plaintiff's Amended Complaint are insufficient to establish that he violated N.C.G.S. § 15A-903(a)(2) because Nifong provided the Duke Defendants with "an initial report of Dr. Meehan's examination of certain DNA evidence" and later provided them "the underlying data contained in the DSI file."

The relevant subsections of North Carolina's "open file discovery law," General Statutes Section 15A-903, state:

- (a) Upon motion of the defendant, the court must order the State to:
  - (1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded form. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.
  - (2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C.G.S. § 15A-903 (2007).

Dr. Meehan was a witness for the State, and during his meetings with Nifong in April and May 2006, he made various oral statements regarding the results of DSI's DNA testing on evidence in the criminal case against the Duke Defendants. Pursuant to § 15A-

903(a), Nifong was required to provide to the defense “witness statements . . . results of tests and examinations, or any other matter or evidence obtained during the investigation.” “Oral statements” were required to be “in written or recorded form.” Plaintiff’s Amended Complaint alleges that Nifong failed to provide the Duke Defendants, at any time, with a memorialization of Dr. Meehan’s oral statements during the April and May 2006 meetings with Nifong. Unlike subsection (a)(2), which indicates that the State must “furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court,” subsection (a)(1) does not link the time at which the State must provide discovery materials to the time of trial. Accordingly, the State Bar’s allegation that Nifong *never* provided a memorialization of Dr. Meehan’s statements to the Duke Defendants is sufficient to support a violation of Rule 3.8(d) regardless of whether or not a trial date had been scheduled. In light of the plain language of § 15A-903(a)(1), this allegation is sufficient to state a claim upon which relief can be granted.

According to Nifong’s own motion, the allegations in Plaintiff’s Amended Complaint reveal the following: In May 2006, Nifong provided the Duke Defendants with “an initial report of Dr. Meehan’s examination of certain DNA evidence” and in October 2006 he provided them “the underlying data contained in the DSI file.” Nifong argues that in so doing, he satisfied the requirements of § 15A-903(a)(2). This subsection requires that an expert “witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert.” N.C.G.S. § 15A-903(a)(2) (emphasis added). The ten-page DSI report provided by Nifong to the Duke Defendants in May 2006 does not meet the requirements of subsection (a)(2) because it reported only on “certain” DNA test results, not “any” tests conducted by the expert.

Under § 15A-903(a)(2), the issue is not whether a defendant is able to surmise—from a massive amount of raw data—whether the expert uncovered potentially exculpatory evidence, but whether a “report of the results” was *furnished to the defendant by the State*. Again, the 1,844 pages of raw data provided to the Duke Defendants by Nifong, more than five months after he provided the 10-page DSI report, were not a “report” of the results of any examinations or tests performed by DSI; they

were *the results themselves*, without the benefit of summary, explanation or interpretation by the State's expert. Consequently, the State Bar's allegation that Nifong eventually provided the Duke Defendants with "the underlying data contained in the DSI file" in no way conflicts with the State Bar's claim that Nifong violated subsection 15A-903(a)(2).

Although Nifong's motion to dismiss makes passing reference to N.C.G.S. § 15A-904, that section is inapplicable to the facts as alleged in the Amended Complaint. Section 15A-904 is intended to expressly exempt attorney work product from the discoverable materials set forth in § 15A-903. *See* N.C.G.S. § 15A-904 (2007), Official Commentary. Nifong does not contend, nor did the facts alleged by the State Bar suggest, that a complete report of DSI's test results or a memorialization of Dr. Meehan's oral statements would constitute work product, so no further discussion of § 15A-904 is warranted.

For the foregoing reasons, paragraph (d)(i) of the "Therefore" clause of Plaintiff's Amended Complaint is supported by sufficient factual allegations to state a claim upon which relief can be granted, and Defendant's motion to dismiss should be denied.

**PLAINTIFF ALLEGED SUFFICIENT FACTS TO SHOW NIFONG VIOLATED  
THE JUNE 22 AND SEPTEMBER 22 COURT ORDERS**

Nifong contends that the facts alleged in Plaintiff's Amended Complaint are insufficient to establish that he violated the Court's June 22, 2006 and September 22, 2006 Orders because Nifong provided the Duke Defendants with "an initial report of Dr. Meehan's examination of certain DNA evidence" and later provided them "the underlying data contained in the DSI file." Nifong also contends the State Bar has failed to allege that he was required by any court order to provide a memorialization of the substance of his conversations with Dr. Meehan.

In addressing Nifong's specific contentions regarding compliance with the Court's Orders, it is worth noting that the content of each Order was based on Nifong's misrepresentations to the Court as alleged in the Amended Complaint. Therefore, Nifong is effectively arguing that he can make false statements to a court which result in the entry of an order, and then use the order that is based on his misrepresentations to claim he committed no discovery violation.

In May 2006, Nifong filed with the Court written responses to the Duke Defendants' discovery requests, in which he stated: "The State is not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant[s]." At a May 18, 2006 hearing, the Court asked Nifong if he had provided the Duke Defendants all discovery materials. In response to the Court's inquiry, Nifong stated: "I've turned over everything I have." On June 22, 2006, the Court held a hearing on the Duke Defendants' request for various material including a report or written statement of the meetings between Nifong and Dr. Meehan to discuss the DNA test results. In response to this request and to the Court's inquiry, Nifong represented that no information beyond what was in the ten-page DSI report was discussed at the meeting with Dr. Meehan. Nifong represented to the Court: "That's pretty much correct, your Honor. We received the reports, which [opposing counsel] has received, and we talked about how we would likely use that, and that's what we did."

Based on Nifong's misrepresentations at the June 22 hearing, the Court entered an Order directing Nifong to provide the Duke Defendants with all discovery material covered by N.C.G.S. § 15A-903(a). The language of the Court's June 22 Order was identical to that of §§ 15A-903(a)(1) and (a)(2). Because the June 22, 2006 Order required disclosure of all material covered under §§ 15A-903(a)(1) & (a)(2), the allegations of Plaintiff's Amended Complaint are sufficient to show that Nifong violated the June 22 Order for the same reasons set forth in the discussion of § 15A-903 above. The June 22 Court Order did not specifically require Nifong to provide a memorialization of Dr. Meehan's oral statements because Nifong had repeatedly misrepresented to the Court that no additional discoverable material had been discussed, and that the requested memorialization would be redundant with the DSI report already provided to the defense.

On August 31, 2006, the Duke Defendants collectively filed their Joint Omnibus Motion to Compel discovery which was addressed by the Court at a hearing on September 22, 2006. In response to a question from the Court at the hearing, Nifong represented that the ten-page DSI report encompassed all tests performed by DSI and everything discussed at his meetings with Dr. Meehan in April and May 2006. Immediately thereafter, Nifong and the Court had the following exchange regarding the Duke Defendants' request for memorializations of Dr. Meehan's oral statements:

Court: "So you represent there are no other statements from Dr. Meehan?"

Nifong: "No other statements. No other statements made to me."

Based on Nifong's misrepresentation that "Dr. Meehan said nothing during those meetings beyond what was encompassed in the final report of [DSI] dated May 12, 2006," the Court found that there were no additional discoverable statements by Dr. Meehan for the State to produce. Based on his continuing misrepresentations, the Court did not specifically order Nifong to provide the defense with memorializations of Dr. Meehan's oral statements. In his motion, Nifong now seeks to have a claim that he violated the Rules of Professional Conduct dismissed on the grounds that his successful deception of the Court resulted in a Court Order which did not specifically require him to provide memorializations of Dr. Meehan's statements.

The Court's September 22, 2006 Order granted the Duke Defendants' request for all "underlying data and notes regarding all physical evidence[,] testing[,] and analysis done by [DSI]." *See id.*, ¶ 11. The Court's Order required Nifong to provide "the complete files of all activities conducted by all persons at [DSI] in relation to any evidence submitted to [DSI] for any purpose" in the case to the Duke Defendants. Given the comprehensive nature of the production ordered by the Court, it is unlikely that the Court would have failed to require Nifong to produce memorializations of Dr. Meehan's oral statements absent Nifong's express misrepresentations on that topic.

For the foregoing reasons, paragraph (d)(i) of the "Therefore" clause of Plaintiff's Amended Complaint states a violation upon which relief can be granted and Defendant's motion to dismiss should be denied.

**PLAINTIFF ALLEGED SUFFICIENT FACTS TO SHOW NIFONG VIOLATED  
N.C.G.S. § 15A-282**

Nifong contends that the State Bar did not allege sufficient facts to show that Nifong violated N.C.G.S. § 15A-282. Specifically, Nifong argues that he did not violate N.C.G.S. § 15A-282's requirement that any person subject to an NTO "must be provided with a copy of any reports of test results as soon as the reports are available" because the statute "does not require the report to be in any particular format." (Defendant's Motion to Dismiss and Answer ¶ 4).

The allegations in the Amended Complaint involve the *content and timing* of information provided by Nifong to the subjects of the NTO, not the “format” in which the disclosures were made. Section 15A-282 is unambiguous: *Anyone* subject to an NTO *must* be given any report of test results *as soon as such a report is available*. DSI’s testing was complete, and thus a report of all the results—including the potentially exculpatory DNA test results—was available on May 12, 2006. The fact that Nifong only directed Dr. Meehan to prepare a partial report does not mean that a comprehensive report was unavailable: Such an assertion is tantamount to declaring that suppressed evidence simply does not exist. From May 12 through October 27, 2006, the only information provided by Nifong to the subjects of the NTO regarding DSI’s DNA testing was the ten-page report containing only “positive” results.

Even if one were willing to assume for the sake of argument that the 1,844 pages of underlying data provided to the Duke Defendants on October 27 was a “report,” the information contained therein had been available since May 12, and was not given to the Duke Defendants until more than five months later pursuant to a motion to compel over an objection. The State Bar has alleged that Nifong *never* provided the subjects of the NTO with a full report of test results as required by the statute. Whether or not one is willing to characterize the 1,844 pages of data as a “report,” which it is not, the allegations of the Amended Complaint show that Nifong did not provide the subjects of the NTO with a report of all tests results “as soon as the reports [we]re available” as required by N.C.G.S. § 15A-282. He also never provided this data to the remaining 43 players subject to the NTO.

For the foregoing reasons, paragraph (d)(i) of the “Therefore” clause of Plaintiff’s Amended Complaint states a claim upon which relief can be granted and Defendant’s motion to dismiss should be denied.

### CONCLUSION

Defendant’s motion seeks to have the DHC conclude that it violates none of the Rules of Professional Conduct for him to:

(1) discuss and be keenly aware of potentially exculpatory DNA test results and direct or agree that those results would not be contained in a report provided to indicted defendants and other named suspects, and

(2) successfully and repeatedly deceive courts into entering orders finding falsely that he had had no previous discussions about these potentially exculpatory DNA test results, because . . .

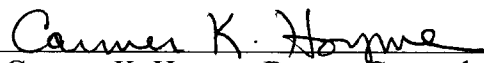
. . . over five months later and pursuant to a court order to compel, he ultimately provided the defendants almost 2,000 pages of underlying data without any report. In essence Defendant argues that, court orders and very specific discovery requests notwithstanding, he had absolute discretion to withhold potentially exculpatory information of which he was fully aware until some unspecified time prior to trial without violating the Rules of Professional Conduct. Defendant's contention that he was under no obligation to provide the information because no trial date was set necessarily implies that he was also entitled to withhold and never disclose potentially exculpatory information in any case that settled prior to trial. These precepts, if accepted, would apply not only to Defendant but to all other prosecutors and must be rejected.

Defendant's conduct, as set forth in the Amended Complaint, violates Rule 3.4 and the previous version of Rule 3.8, and certainly states a violation under the current Rule 3.8 and the State's open file discovery statutes. For the foregoing reasons, Defendant's motion to dismiss should be denied.

This the 16<sup>th</sup> day of March, 2007.



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon all parties by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

David B. Freedman & Dudley A. Witt  
Crumpler Freedman Parker & Witt  
301 North Main Street, Suite 1100  
Winston-Salem, NC 27101

This the 16<sup>th</sup> day of March, 2007.

A handwritten signature in black ink, appearing to read 'K. E. Jean', written over a horizontal line.

Katherine E. Jean, Counsel  
The North Carolina State Bar