

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE  
DISCIPLINARY HEARING  
COMMISSION  
NORTH CAROLINA STATE BAR  
06 DHC

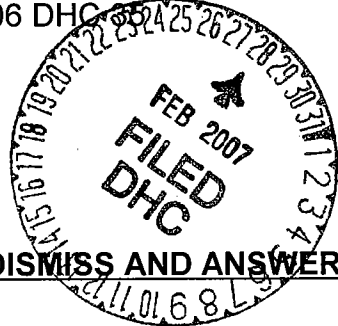
THE NORTH CAROLINA STATE BAR,

Plaintiff,

vs.

MICHAEL B. NIFONG,

Defendant.



MOTION TO DISMISS AND ANSWER

NOW COMES the defendant, by and through counsel, and answers the Amended Complaint of the plaintiff and alleges and says:

**FIRST DEFENSE**  
**MOTION TO DISMISS**  
**N.C. RULE OF CIVIL PROCEDURE 12(b)(6)**  
**FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

The defendant moves the court for entry of an Order dismissing the portions of the plaintiff's Amended Complaint as more specifically outlined in paragraphs (c) and (d) of the "Therefore" clause of said Amended Complaint. Plaintiff cannot establish as a matter of law that the defendant violated the provisions of the United States Constitution; N.C.G.S. § 15A-282, N.C.G.S. § 15A-903(a)(1) and N.C.G.S. § 15A-903(a)(2); or the June 22, 2006 Order. In support of said Motion, defendant alleges as follows:

1. 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 (Amended Complaint, paragraphs 254, 259, 261). The Amended Complaint fails to allege as of October 27, 2006, or as of the date of the filing of the Amended Complaint, that a trial was held or that a trial date had been scheduled. Consequently, plaintiff cannot establish that the "Duke lacrosse defendants'" due process rights to a fair trial were affected, and therefore plaintiff cannot establish as a matter of law that the "Duke lacrosse defendants'" constitutional rights were violated. "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that

the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . . But to reiterate a critical point, 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." See: United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392; 2399, 49 L.Ed 2d 342, 352 (1976). (See also: State v. Elliott, 360 N.C. 400, 415, 628 S.E.2d 735 (2006); State v. Spivey, 102 N.C.App. 640, 645, 404 S.E.2d 23, (1991));

2. N.C.G.S. § 15A-903(a)(2) provides that if the state reasonably expects to call an expert witness at trial, it shall give notice of this fact to the defendant. It further provides that a state's expert shall furnish to the defendant a report of the results of any examination or test conducted by said expert. Like the June 22, 2006 Order, which plaintiff contends was violated by the defendant, the statute further states: "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." (Emphasis added)

The plaintiff's Amended Complaint specifically alleges that at the hearing of September 22, 2006, the Duke lacrosse defendants stated that they were seeking the results of any tests finding DNA, even if the DNA did not match any of the Duke defendants or other individuals from whom the State had obtained DNA samples (Amended Complaint, paragraph 246). The Amended Complaint further alleges that the court entered an Order for the defendant to provide the complete file and underlying data from both the SBI and DSI (Amended Complaint, paragraph 253).

On October 27, 2006, Nifong provided 1844 pages of underlying documents and materials to the Duke defendants pursuant to the court's September 22, 2006 Order (Amended Complaint paragraph 254). After an extensive and exhaustive review of the documentation provided on October 27, 2006, counsel for the Duke defendants determined that DSI's report did not include the results of all DNA tests that DSI had performed and that the report excluded potentially exculpatory DNA test results and evidence (Amended Complaint, paragraph 259). The Duke defendant's filed a motion which set forth in detail the potentially exculpatory DNA test results and evidence not contained in the DSI report. "The focus of this motion was the existence of the potentially exculpatory DNA test results and their exclusion from DSI's report." (Emphasis added; Amended Complaint, paragraph 261). At the December 15, 2006 hearing, Dr. Meehan was examined about the results of his testing and his report (Amended Complaint, paragraph 267).

In short, the allegations contained in plaintiff's Amended Complaint reveal that the State had been provided an initial report of Dr. Meehan's examination of certain DNA evidence. Thereafter, consistent with N.C.G.S. § 15A-903(a)(2) and the June 22, 2006 Order of the Judge Ronald L. Stephens, and pursuant to the terms of the Order of September 22, 2006, the State provided the underlying data contained in the DSI file including reports of the results of all tests and examinations performed by DSI. From this information, the Duke defendants determined that these reports of the results of

tests and examinations revealed evidence that had potential exculpatory value. Counsel for the Duke defendants thereafter were allowed to examine Dr. Meehan about the results of the tests performed by DSI. Thus, the allegations of the Amended Complaint establish that at a reasonable time prior to trial, the Duke defendants knew of the existence of the "potentially exculpatory evidence".

"The purpose of the discovery procedure is to protect the defendant from unfair surprise. State v. Alston, 307 N.C. 321, 331, 298 S.E.2d 31 (1983). The allegations of the plaintiff's Amended Complaint conclusively establish that Nifong fully complied with the N.C.G.S. § 15A-903(a)(2) and the June 22, 2006 Order, and that the purpose of the discovery statutory procedures was accomplished. The discovery information was provided before a trial date had been set in accordance with the September 22, 2006 Order of Judge W. Osmond Smith, III.

3. Any allegations relating to plaintiff's claim that the defendant 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. Furthermore, the Amended Complaint fails to allege that the defendant was required by the June 22, 2006 Order or any other Order of the trial court to memorialize the oral statements made to him by Dr. Meehan.

4. N.C.G.S. §15A-282 only requires that the subject of a Nontestimonial Identification Order be provided "a copy of any reports of tests results as soon as the reports are available." However, said statute does not require the report to be in any particular format.

Based upon the foregoing, defendant submits that he is entitled to the entry of an Order dismissing the claims for relief requested in paragraphs (c) and (d) of the "Therefore" clause of plaintiff's Amended Complaint, as the allegations of the Amended Complaint establish as a matter of law that plaintiff is not entitled to the relief requested.

## **SECOND DEFENSE** **ANSWER**

The defendant answering the like numbered paragraph of the Amended Complaint alleges and says:

1. The allegations contained in paragraph 1 of the plaintiff's Amended Complaint are admitted.
2. The allegations contained in paragraph 2 of the plaintiff's Amended Complaint are admitted.

3. The allegations contained in paragraph 3 of the plaintiff's Amended Complaint are admitted.
4. The allegations contained in paragraph 4 of the plaintiff's Amended Complaint are admitted.
5. The allegations contained in paragraph 5 of the plaintiff's Amended Complaint are admitted.
6. The allegations contained in paragraph 6 of the plaintiff's Amended Complaint are admitted.
7. The allegations contained in paragraph 7 of the plaintiff's Amended Complaint are admitted.
8. Defendant admits that he did not learn of the case until after the NTO was granted and served on the forty-six Duke Lacrosse players. However, he denies that the Order was granted on March 22, 2006, as he believes the date was March 23, 2006.
9. The allegations contained in paragraph 9 of the plaintiff's Amended Complaint are admitted.

#### **Improper Pretrial Public Statements and Misrepresentations**

10. Defendant admits that from March 27, 2006 until approximately April 3, 2006, that he granted interviews to various news organizations, both print and television, about the "Duke lacrosse case". After April 3, 2006, the defendant attempted to limit comments about said case to arguments he made in open court, press releases issued from his office and responses to questions directed to him at public forums which he attended in Durham County. Furthermore, defendant may have made some comments about the case to local print media while discussing other matters. Defendant made the statements outlined in paragraphs 12 through 175 of the Amended Complaint at a time when there was an ongoing investigation relating to the facts contained in the Affidavit attached to the Application for Nontestimonial Identification Order, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A". The statements made between March 27, 2006 and April 3, 2006, were made at a time when no individual suspects had been identified and were an effort by the defendant to reassure the community that the case was being actively investigated by the Durham Police Department in an effort to obtain assistance in receiving evidence and information necessary to further the criminal investigation. Defendant further admits that at the time he made said statements that he did not fully understand the extent of the national

media interest in this particular investigation and as such, he did not comprehend the effect said statements may have on any matters related to the case. Defendant denies that any statements he made as further alleged in plaintiff's Amended Complaint were made with the intent of materially prejudicing an adjudicative proceeding which has resulted from said investigation. Defendant further denies that when he made the statements as alleged in the Amended Complaint, that he intended to heighten the public condemnation of an accused or that his actions were intended to heighten the public condemnation of an accused. Any remaining allegations contained in paragraph 10 of plaintiff's Amended Complaint are denied.

11. The allegations contained in paragraph 11 of the plaintiff's Amended Complaint are admitted. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 11.
12. It is admitted that in an effort to request assistance in obtaining evidence and information related to the investigation of the Duke lacrosse case, that defendant made comments relating to the Duke lacrosse team members' failure or refusal to cooperate with or make statements to law enforcement authorities. The defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 12. Any remaining allegations contained in paragraph 12 of plaintiff's Amended Complaint are denied.
13. Defendant admits he made statements to members of the news media consistent with the allegations contained in paragraph 13. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 13. Any remaining allegations contained in paragraph 13 of plaintiff's Amended Complaint are denied.
14. Defendant admits he made comments consistent with those outlined in paragraph 13 to a member or members of the news media. However, the defendant is without sufficient information at this point in time with which to form a belief as to the truth of the allegation that he made the statements outlined in paragraph 13 to a reporter for WRAL or whether they were made to another member of the news media and as such, that allegation is denied.
15. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 13 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.

16. Defendant admits that he made statements to members of the news media consistent with the quoted portion of paragraph 16. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 16. Any remaining allegations contained in paragraph 16 are denied.
17. Defendant admits that he made comments consistent with those outlined in paragraph 16 to a member or members of the news media. However, the defendant is without sufficient information at this point in time with which to form a belief as to the truth of the allegations that he made the statements outlined in paragraph 16 to a reporter for ABC 11 TV News or whether they were made to another member of the news media and as such, that allegation is denied.
18. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 16 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.
19. Defendant admits that the allegations contained in paragraph 19 of plaintiff's amended complaint are consistent with statements he made to the news media in the period of time from March 27, 2006 to April 3, 2006. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 19. Any remaining allegations contained in paragraph 19 of plaintiff's Amended Complaint are denied.
20. Defendant admits that he made comments consistent with those outlined in paragraph 19 to a member or members of the news media. However, the defendant is without sufficient information, at this point in time, with which to form a belief as to the truth of the allegations as to whether the statements outlined in paragraph 19 were made to a reporter for the New York Times or whether they were made to another member of the media and as such, that allegation is denied.
21. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 19 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.
22. Defendant admits that the allegations contained in paragraph 19 of plaintiff's amended complaint are consistent with statements he made to the news media in a period from March 27, 2006 to April 3, 2006. Defendant further incorporates his answer to paragraph 10 above in

response to the allegations of paragraph 22. Any remaining allegations contained in paragraph 22 of plaintiff's Amended Complaint are denied.

23. Defendant admits that he made comments consistent with those outlined in paragraph 22 to a member or members of the news media. However, the defendant is without sufficient information, at this point in time, with which to form a belief as to the truth of the allegations as to whether the statements outlined in paragraph 22 were made to a reporter for NBC 17 News or whether they were made to another member of the media and as such, that allegation is denied.
24. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 22 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.
25. Defendant admits that he made statements consistent to those outlined in paragraph 25 to the extent that he would consider charging individuals with aiding and abetting if the evidence supported said charges. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 25. Any remaining allegations contained in paragraph 25 are denied.
26. Defendant admits that he made comments consistent with those outlined in paragraph 25 to a member or members of the news media. However, the defendant is without sufficient information, at this point in time, with which to form a belief as to the truth of the allegations as to whether the statements outlined in paragraph 25 were made to a reporter for NBC 17 News or whether they were made to another member of the media and as such, that allegation is denied.
27. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 25 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.
28. Defendant admits that he made statements to members of the news media consistent with the allegations contained in paragraph 28. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 28. Any remaining allegations contained in paragraph 28 of plaintiff's Amended Complaint are denied.

29. Defendant admits that he made comments consistent with those outlined in paragraph 28 to a member or members of the news media. However, the defendant is without sufficient information, at this point in time, with which to form a belief as to the truth of the allegations as to whether the statements outlined in paragraph 28 were made to a reporter for The Herald Sun Newspaper or whether they were made to another member of the media and as such, that allegation is denied.
30. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 28 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.
31. Defendant admits that he made statements to members of the news media consistent with the allegations contained in paragraph 31. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 31. Any remaining allegations contained in paragraph 31 of plaintiff's Amended Complaint are denied.
32. Defendant admits that he made comments consistent with those outlined in paragraph 31 to a member or members of the news media. However, the defendant is without sufficient information, at this point in time, with which to form a belief as to the truth of the allegations as to whether the statements outlined in paragraph 31 were made to a reporter for CNN or whether they were made to another member of the media and as such, that allegation is denied.
33. Defendant at the present time has no specific recollection of the date on which the statements referenced in paragraph 31 were made to a member or members of the news media. However, he believes that any statements would have been made between March 27, 2006 and April 3, 2006 as outlined in paragraph 10 of the answer contained herein.
34. Defendant admits that he made statements to members of the news media consistent with the allegations contained in paragraph 34. Defendant further incorporates his answer to paragraph 10 above in response to the allegations of paragraph 34. Any remaining allegations contained in paragraph 34 of plaintiff's Amended Complaint are denied.
35. Defendant admits that he made comments consistent with those outlined in paragraph 34 to a member or members of the news media. However, the defendant is without sufficient information, at this point in time, with which to form a belief as to the truth of the allegations as to whether the statements outlined in paragraph 34 were made to Rene Syler of CBS