

## THE DUKE LACROSSE CASE, INNOCENCE, AND FALSE IDENTIFICATIONS: A FUNDAMENTAL FAILURE TO “DO JUSTICE”

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### INTRODUCTION

The Duke lacrosse case was a disaster—a caricature. The case, which involved false rape charges against three Duke University lacrosse players, began with gang rape allegations by an exotic dancer at a team party in March 2006 and ended with the declaration of their innocence in April 2007 and the disbarment of Durham County District Attorney Mike Nifong in June of that year. Often a full examination of the facts of a notorious case reveals that events were ambiguous and the reality is not as bad as early reports suggested. This case does not fit that pattern; it gets worse on inspection. At the end of a five-day disciplinary hearing, Lane Williamson, chair of the North Carolina State Bar’s hearing panel, called the case a “fiasco”<sup>1</sup> and reiterated the term, giving assurance that it was “not too strong a word.”<sup>2</sup> He was clearly right, and could well have added adjectives.

The fiasco centered around the conduct of Nifong. At the beginning of Williamson’s explanation of why the panel unanimously voted to disbar Nifong, the harshest punishment possible, he described the situation “in which . . . [Nifong’s] self-interest collided with a very volatile mix of race, sex and class, a situation that if it were applied in a John Grisham novel would be considered to be perhaps too contrived.”<sup>3</sup> In April 2007, North Carolina Attorney General Roy Cooper ended the criminal prosecution. In a news conference, he announced that all charges had been dropped and that his investigation had found that the three indicted players were innocent.

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1. Statement of F. Lane Williamson, Excerpt of Transcript of Disciplinary Hearing Commission at 16, *N.C. State Bar v. Nifong*, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter *Williamson Statement*] (on file with author).

2. *Id.* at 29.

3. *Id.* at 17.

Cooper described Nifong as a “rogue prosecutor”<sup>4</sup> who “pushed forward unchecked”<sup>5</sup> and called the case “the tragic result of a rush to accuse and a failure to verify serious allegations.”<sup>6</sup>

Nifong had important help from the accuser, Crystal Mangum. Mangum’s story of rape and kidnapping was a total fabrication—either a hoax or a false allegation based on delusion. Mangum’s separate conduct does not diminish Nifong’s responsibility as the public prosecutor controlling the case, and, indeed, it made his ethical duty to do justice even more important. Instead, Nifong either vitally aided a hoax or caused an unfortunate delusion to have serious societal and legal ramifications.

A rogue district attorney and an accuser either perpetrating a hoax or suffering from a delusion is indeed a confluence of unusual factors.<sup>7</sup> The ethics rulings resulting from this case regarding the established charges of improper pretrial statements by Nifong, his failure to disclose DNA evidence that tended to negate guilt, and his deceptive statements to the trial court, lawyers, and the bar are instructive.<sup>8</sup> However, broad generalization from the rulings is likely to be of limited value because the factors that produced this disaster in combination with the clarity of proof will likely not be seen again soon.

In Part I, I set out the actual events of March 13 to 14, 2006, when the alleged rape occurred (as found by the attorney general) and the reasons for which he dismissed all charges and declared the players, Reade Seligmann, Collin Finnerty, and Dave Evans, innocent. This narrative serves as the backdrop for ethics charges against Nifong and the ensuing disciplinary action. I then sketch the contours of the two sets of ethical violations charged and largely found valid against Nifong, resulting in his disbarment: the first set alleged improper prejudicial pretrial publicity and the second charged that Nifong withheld exculpatory DNA information, failed to

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4. Duff Wilson & David Barstow, *Duke Prosecutor Throws Out Case Against Players*, N.Y. Times, Apr. 12, 2007, at A1.

5. Memorandum from Roy Cooper, Att’y Gen., Comments on State v. Finnerty, Evans, Seligmann 2 (Apr. 11, 2007) (on file with author).

6. *Id.* at 1.

7. In cataloging the ways the case is unusual, I put at the top of the list (1) the obvious lack of prosecutorial merit, and (2) a clear violation of both the prohibition of prejudicial pretrial public statements and a well-documented, knowing violation of the prosecutor’s obligation to disclose potentially exculpatory evidence. Obvious lack of merit likely was a function of the fact that no crime occurred, as well as the high quality of defense counsel, which no doubt also contributed to documentation regarding Mike Nifong’s violation of the prosecutor’s duty to provide potentially exculpatory evidence to the defense. Although the clarity of proof of Nifong’s knowledge and intent in violating his duty to provide exculpatory information is indeed unusual, I do not find this case at all unusual with regards to the significance of the evidence withheld. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo. Mason L. Rev. (forthcoming Jan. 2008) (discussing cases where death sentences were reversed on grounds of withheld exculpatory information).

8. See Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Amended Nifong Bar Order] (on file with author).

provide required discovery, and then made deceptive statements covering up both those failures.<sup>9</sup>

In Parts II and III, I reach my major focus. I examine conduct that was not the subject of any ethics charge or adjudication, but which largely occurred chronologically between the two sets of offenses described earlier. I first examine, in general, the prosecutor's ethical duty to avoid charging and prosecuting the innocent. I contend that Nifong's failures under this general duty, which is central to the role of the public prosecutor, were equally or more serious than his duty to provide exculpatory information. I then examine a specific manifestation of his failure to "do justice" in the form of the "all suspect" identification procedure designed by Nifong, which produced the bogus evidence that enabled him to charge the innocent.

The North Carolina State Bar charged Nifong with violations of eleven different provisions of its Rules of Professional Conduct.<sup>10</sup> In Part II, I

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9. The Disciplinary Hearing Commission found that Nifong repeatedly made such "misrepresentations," "intentional misrepresentations," "false statements," and "intentional false statements" of material fact. *Id.* para. 72, at 13 (referring to a written discovery response to opposing counsel and the trial court on May 18, 2006); *id.* para. 75, at 13 (referring to statements made to Judge Ronald Stephens on June 22, 2006); *id.* para. 80, at 14 (referring to statements made to Judge Stephens on September 22, 2006); *id.* para. 88, at 15 (referring to statements made to Judge Osmond Smith on September 22, 2006); *id.* para. 88, at 15 (referring to statements made to Judge Smith on September 22, 2006); *id.* para. 96, at 17 (referring to statements made to opposing counsel and Judge Smith on December 15, 2006); *id.* paras. 110, 113, at 19 (referring to statements made in response to the North Carolina State Bar Grievance Committee).

Although not available to the hearing panel because the contempt trial occurred on August 30, 2007, after the disciplinary proceedings had been completed, Judge Smith found Nifong guilty of criminal contempt based on his statements to the court on September 22, 2006, asserting that he had supplied all DNA results. Judge Smith found that at the time Nifong made the statements, he was aware that DNA results had not been provided and that in asserting that all results had been provided Nifong "willfully and intentionally made false statements of material fact." Order and Judgment of Contempt and Sentence, *In re Nifong*, paras. 2-4, 6, at 3-4, No. 07 CRS 10467 (N.C. Super. Ct. Aug. 31, 2007).

10. In its oral finding, the panel found violations of Rules 3.3(a)(1), 3.4(c), 3.4(d), 3.4(d)(3), 3.6(a), 3.8(d), 3.8(f), 4.1, 8.1(a), 8.4(c), and 8.4(d) of the North Carolina State Bar Revised Rules of Professional Conduct and/or the North Carolina State Bar Revised Rules of Professional Conduct as amended (effective Nov. 16, 2006). See Williamson Statement, *supra* note 1, at 4-15. In the panel's initial written order entered on July 10, 2007, it omitted reference to Rule 3.4(c). Findings of Fact, Conclusions of Law and Order of Discipline at 20-22, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) (on file with author). In response to an e-mail I wrote to the State Bar pointing out the discrepancy, the oversight was corrected and the order amended. See Amended Nifong Bar Order, *supra* note 8, conclusions of law para. (b), at 20; Joseph Neff, *Nifong Sends in His Bar License*, News & Observer (Raleigh, N.C.), Aug. 15, 2007, at A1. This means that, while Nifong was charged with violating eleven provisions, he was found to have violated ten, though he violated two of those provisions both before (3.4(d) and 3.8(d)) and after amendment (3.4(d)(3) and 3.8(d)). The only provision of the Rules of Professional Conduct charged but not found is 3.4(f). Compare Amended Complaint at 29-30, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) [hereinafter Amended Nifong Bar Complaint] (on file with author), with Amended Nifong Bar Order, *supra* note 8, conclusions of law paras. (a)-(h), at 20-22.

focus on the fact that no charge was brought based on the prosecutor's overarching duty "to do" or "to seek justice." North Carolina adopted the American Bar Association (ABA) Model Rules provisions on the "Special Responsibilities of a Prosecutor" and, along with the vast majority of other states, its Rule 3.8(a).<sup>11</sup> That provision sets out the single direct command of the responsibility not to prosecute the innocent: "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."<sup>12</sup> Nifong was not charged with violating this Rule, and I conclude that it is unclear that he could have been shown to have violated it even in this outrageous case. As the only embodiment of the duty not to prosecute the innocent, the Rule is on its face woefully inadequate and appears to be largely unenforceable.

In Part III, I turn to the type of enforceable rule that would protect the innocent from unsubstantiated prosecution. It is not an ethical rule at all, but rather a set of identification procedures that are designed to ensure accuracy and protect innocence. I begin by carefully examining the photographic identification process Nifong recommended, which produced the "evidence" that permitted indictment and prosecution. That process did virtually nothing to protect innocence, facilitated the continued maintenance of a totally false allegation that was either hoax or delusion, and enabled the ensuing prosecution.

Current constitutional doctrine under the Due Process Clause offers some control on suggestive identification procedures. Although somewhat more enforceable than the broadly phrased ethics rule, this body of law is practically worthless in most cases and does not serve as an effective guarantee against prosecuting the innocent. I describe efforts arising from DNA exonerations and the innocence movement to create guidelines that improve accuracy in identification. The result has been a set of guidelines designed to improve the accuracy and fairness of eyewitness identifications. This case demonstrates the importance of turning those guidelines into legally enforceable standards.

The Duke lacrosse case is extraordinary both in the clarity of its facts and in the violation of the prosecutor's fundamental duty to do justice. The laborious process that led to unearthing Nifong's failure to provide potentially exculpatory evidence to the defense and the ensuing disciplinary action illustrate the difficulty of enforcing this well-recognized duty, which

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11. See Model Rules of Prof'l Conduct R. 3.8(a) (2007); Revised Rules of Prof'l Conduct of the N.C. State Bar R. 3.8(a) (2007). The North Carolina Code and American Bar Association (ABA) Code are identical. In addition to North Carolina, forty states have adopted this provision verbatim, three have minor variations, and six follow the similar provisions of the predecessor Model Code, under which there is only one substantial variation. See *infra* notes 138–141 and accompanying text.

12. Revised Rules of Prof'l Conduct of the N.C. State Bar R. 3.8(a).

is a relatively specific manifestation of the general duty to do justice.<sup>13</sup> The case shows once again the need for concrete rules.<sup>14</sup> Although they are often poor approximations of the ethical duty, such rules help describe and enforce a modicum of fair conduct as a guide for law enforcement and prosecutors during an investigation and prosecution, and they provide a baseline measure for retrospective review of system failures.

In Part IV, I argue that the guidelines for conducting identification procedures be given the force of law backed by automatic exclusion of out-of-court identifications for significant violations. In appropriate cases, where accuracy is sufficiently undermined and conviction of the innocent threatened, I contend their violation should result in exclusion of all identification evidence.

## I. THE DUKE LACROSSE CASE

### A. *The Event*

The events of the Duke lacrosse party are now clear in essential detail.<sup>15</sup> We are fortunate that both the North Carolina attorney general and the

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13. See Mosteller, *supra* note 7, pt. I.E (discussing the development of discovery obligations that provided the foundation upon which disclosure of Nifong's misbehavior was based).

14. See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 50, 107 n.259 (1991) (describing the general purpose of the article as highlighting "a need for precise ethical directives" and explaining that while case studies suggest the "do justice" standard is taken seriously by many prosecutors resulting in "drastic steps to protect defendants' rights," the presence of a "high-minded but overly general 'justice' rule masks the difficulty of regulating prosecutorial" conduct); see also Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 Fordham L. Rev. 1493, 1536-37 (2007) (suggesting the need for concrete standards for the "do justice" ethics standard in the area of scientific evidence); cf. Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1492 (recognizing the need for specific guidance for prosecutors as to the use of high-tech evidence and stricter legislative and administrative standards while arguing principally for more attention by prosecutors and their peers and supervisors to their ethical duty to do justice).

15. The historical record is clear that no sexual assault of any type occurred at 610 North Buchanan Street on the night of March 13 to 14, 2006, involving Crystal Mangum. Nevertheless, Mangum appears to continue to believe otherwise. Attorney General Roy Cooper stated in his news conference dismissing charges against the three players that Mangum would not be prosecuted and that his investigators "think that she may actually believe the many different stories that she has been telling." Samiha Khanna, *Contradictions Tore Case Apart*, News & Observer (Raleigh, N.C.), Apr. 12, 2007, at 1A. During his testimony at the bar hearing, Nifong stated he believed some type of sexual misconduct involving Mangum occurred. See Williamson Statement, *supra* note 1, at 18 (taking note of Nifong's testimony that he still believes in discredited facts). However, at the initial hearing on criminal contempt charges filed against Nifong, he acknowledged that there was no credible evidence that any crime was committed by the three players against Mangum. See Anne Blythe, *Nifong Makes Unequivocal Apology for Duke Lacrosse Case*, News & Observer (Raleigh, N.C.), July 27, 2007, at 1A.

North Carolina State Bar's Disciplinary Hearing Commission prepared somewhat detailed written findings that a jury trial would not have provided.

I include the summary, with minor editing, from the attorney general's Summary of Conclusions as a factual baseline for the consideration of the ethics charges brought against Nifong. It is based on witness interviews and review of photographic, video, and documentary evidence conducted by prosecutors from that office.

On March 13, 2006 a party hosted by three Duke University students took place at 610 N. Buchanan Blvd. in Durham, NC. The three students, Dan Flannery, David Evans and Matt Zash, were members of Duke's lacrosse team and residents of the house. Approximately 40 other students attended the party; most, but not all, were also team members.

Sometime in the afternoon on March 13, one of the party hosts, Dan Flannery, called an escort service. The host did not provide his real name nor did he tell the service that 40 people would be at the party. He asked for two white dancers to come to 610 N. Buchanan Blvd. at 11 p.m. to entertain for a small bachelor party at the house.

The escort service arranged for two dancers, the accusing witness [Crystal Gail Mangum]<sup>16</sup> and a woman who used the name "Nikki" for the escort service [Kim Pittman],<sup>17</sup> to go to 610 N. Buchanan Blvd. at 11 p.m. The two dancers did not know each other. Neither was Caucasian.

Pittman arrived at the house by herself shortly after 11 p.m. She was met by Flannery and was there for at least 30 minutes waiting for the other dancer, who was the accusing witness, to arrive. She did not allege that anything inappropriate happened to her while she was waiting during this time.

Beginning at 11:10 p.m., Flannery called the escort service three times seeking to learn the whereabouts of the other dancer. . . . At approximately 11:40 p.m., Mangum was dropped off by her driver at 610 N. Buchanan Blvd.<sup>18</sup> Mangum was described as being unsteady on her

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16. Although their identities are widely publicized, the attorney general's report does not use the real names of either the "accusing witness" or "Nikki," the other dancer. *See* Office of the Att'y Gen. of N.C., Durham County Superior Court case file Nos. 06 CRS 4332-4336, 5582-5583, at 5 (2005) [hereinafter Attorney General's Report] (on file with author). I substitute their real names throughout and omit brackets ordinarily used to show alteration.

17. In some sources, Kim Pittman is referred to as Kim Roberts.

18. To help establish the time of her arrival, the attorney general's report notes that Mangum received four incoming calls and made one outgoing call on her cellular telephone from 11:11 p.m. until 11:36 p.m. and that her driver, upon leaving her at the Buchanan Street house, drove to a nearby gas station and paid for a drink at approximately 11:43 p.m. *See* Attorney General's Report, *supra* note 16, at 5.

The attorney general's report used the phone call records and time-verified pictorial evidence for various individuals at the party in combination with other time-stamped video and electronic data to establish with certainty the conclusion that no protracted rape as initially described by the accuser was possible and to corroborate the fact that no sexual

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feet from the time she arrived and throughout the rest of her time at the house. . . .

Each of the dancers was paid \$400 in cash. Flannery showed both dancers to a bathroom to get ready for their dancing. Pittman was in her street clothes and needed to change. Mangum had arrived in an outfit she wore to perform. The host informed the other party attendees that the dancers were not Caucasian and asked if they still wanted the women to perform. The consensus was to have them perform. The dancers, meanwhile, were not expecting a 40-person party, but instead, a small bachelor party. However, they consented to perform.

Sometime just before midnight, the two dancers entered the living room to begin their performance for the party attendees. While performing, Mangum appeared to be unsteady on her feet and fell to the ground. During the performance, there was sexual banter involving the use of sex toys between Pittman and some of the party attendees. This culminated in one of the attendees holding up a broomstick and suggesting its use as a sexual object for the dancers. Pittman was angered by this comment and the performance abruptly ended. After 12:04 a.m., the dancers left the room and retreated to the back of the house.

They were followed by David Evans, Dan Flannery, and possibly others who tried to assuage their feelings about the broomstick comment while pointing out that the party attendees had paid \$800 for only a brief performance. The dancers returned to the bathroom where they had left their belongings. The two women remained in the bathroom alone together for a period of time.

At approximately 12:05 a.m., just after the dancing ended, Reade Seligmann, began using his cell phone and initiated a series of phone calls to his girlfriend and others. At 12:14 a.m., he called a taxi cab company to pick him up. He and another party attendee then walked around the corner and got into a cab at approximately 12:19 a.m.<sup>19</sup>

There was a range of other activities going on by the party attendees during this time. In addition to Seligmann, Collin Finnerty and other attendees decided to leave after the dancing ended. Others stayed and expressed displeasure at having paid money for a short performance that was expected to have lasted for two hours, and wanted a refund or a

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offense at all occurred involving those accused. This use of “digital trace evidence” is one example of what I see as a new type of “trace evidence” that will play an increasingly important role in convictions and exonerations. See Robert P. Mosteller, *Evidence History, the New Trace Evidence, and Rumbblings in the Future of Proof*, 3 Ohio St. J. Crim. L. 523, 534–37 (2006).

19. The attorney general’s report recounts the basic details of Reade Seligmann’s alibi information, indicating that the cab driver took him and another party attendee to an automatic teller machine, arriving at approximately 12:24 a.m., then took them to a take-out restaurant, and finally back to Seligmann’s dormitory, which he entered at 12:46 a.m. See Attorney General’s Report, *supra* note 16, at 6.

continuation of the performance. Some party attendees were milling around both inside and outside the house.

The dancers eventually left the bathroom and went to the back yard together. Flannery went outside to talk with them. He urged them to come back into the house to continue the performance. He apologized for the comment that was made during the performance. The dancers went to Pittman's car. David Evans and others came to the car and talked with them.

Inside the house, some of the party attendees continued to express their displeasure with the truncated performance. Some said they had been cheated. Two of the attendees, while using the bathroom, noticed that one of the dancers had left her cosmetics bag behind in the bathroom. Each separately took money out of the bag and were told by Flannery and Evans to return the money to the bag. During this time, more attendees were leaving the house to go elsewhere.

The dancers had a conversation at the car. Then they both re-entered the house through the back door. Once inside the house, other attendees apologized to the dancers for the earlier comments. The individual who earlier held up the broomstick then approached the dancers which caused Pittman to become angry again, and the dancers went back into the bathroom alone together and refused to come out.

Flannery tried again to coax the dancers out of the bathroom. Zash and Evans began to encourage everyone else to leave. During this time, Zash said he wanted everyone out of the house because he was concerned that excessive noise would prompt neighbors to complain to police. Flannery continued to talk to the dancers, who were alone together in the bathroom, in an attempt to get them to leave the house.

While the dancers were still at the house, Collin Finnerty walked to 1105 Urban Street, a nearby house rented by other Duke students. . . .<sup>20</sup>

The dancers opened the bathroom door and left 610 N. Buchanan Blvd. for the second time through the back door sometime before 12:30 a.m. Pittman and Flannery together walked to her car parked on the street in front of the house. Mangum remained behind outside the house. With both dancers and most of the party attendees out of the house, Zash locked the door of the back porch of the house to prevent Mangum or anyone else from re-entering the house. Mangum began banging on the door to get in. Zash refused to open the door.

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20. The attorney general's report also notes Collin Finnerty's alibi information, indicating that at 12:22 a.m. Finnerty made a two-minute call to a fellow lacrosse player using his cell phone. At 12:27 a.m., another lacrosse player called Finnerty's cell phone looking for him. Finnerty told the player that he was at 1105 Urban Street, and that the player then walked to the house and met Finnerty there. Then Finnerty called Domino's Pizza at 12:30 a.m. and again at 12:33 a.m. Finnerty and three other players walked from 1105 Urban Street to Cosmic Cantina restaurant where they ordered food and paid at 12:56 a.m. *See id.* at 7.



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At 12:26 a.m., Mangum placed a telephone call to the escort service. Moments later, at 12:30 a.m., she was observed and photographed outside the house on the back porch steps, smiling and rummaging through Evans' shaving kit. Under her arm is her cosmetic bag containing an object that appears to be her cell phone.

Other party attendees outside the house at the same time observed her behavior. She was overheard talking incoherently, apparently to no one in particular. In a video recorded at 12:31:26 a.m., she is talking to one of the party attendees saying "I'm a cop" and making other comments which were difficult to understand. The video also shows the difficulty she was experiencing with her balance as she attempted to walk from the back porch down the stairs, as well as her attempt to engage in a disjointed conversation with party attendees who were nearby.

At 12:34 a.m., while Flannery and Pittman were in the front of 610 N. Buchanan Blvd. and Mangum was outside the house as previously described, Evans called his girlfriend and spoke with her for approximately 16 minutes.

At 12:37 a.m. Mangum was observed and photographed lying in a prone position on the back porch. Flannery was called by other attendees from the rear of the house and told that there was a problem. Flannery left Pittman and returned to the back of the house where he observed Mangum lying in the position described above. Flannery then assisted Mangum in walking from the back porch to Pittman's car where she was placed in the front seat by Flannery. Both dancers were in the car at 12:42 a.m.

After Mangum was placed in Pittman's car, Pittman yelled a sexually and racially based comment at a group of party attendees standing across the street near the wall to East Campus at the university. One or more of the party responded with racial epithets. After this exchange, Pittman drove away with Mangum in her car. At approximately 12:53 a.m., Pittman called 911 to report that a group of white men were yelling racial comments at passersby outside of North Buchanan Boulevard.

The two dancers arrived at a Kroger grocery store in Durham. Mangum refused to get out of Pittman's car and appeared to be unconscious. Pittman went in to the Kroger store and requested a security guard to notify the Durham Police Department. At 1:22 a.m., such a call was received at the 911 center.<sup>21</sup>

The chronology then describes the first contact by Sergeant John C. Shelton of the Durham Police Department with the apparently unconscious victim and his direction to take her to Durham Center Access, an organization that offers, inter alia, assistance for substance abuse.<sup>22</sup> When asked by a nurse there whether she had been raped, Mangum answered

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21. *See id.* at 5–8.

22. *Id.* at 8.

affirmatively, the first such indication.<sup>23</sup> After being taken to Duke University Medical Center emergency room, she recanted, then reasserted that she had been raped.<sup>24</sup> The watch commander advised Shelton to treat it as a rape investigation,<sup>25</sup> and further examinations and the investigation ensued.

B. *The Attorney General's Declaration that the Defendants Were Innocent and Dismissal of Charges*

In an action that was highly unusual,<sup>26</sup> on December 28, 2006,<sup>27</sup> the North Carolina State Bar filed a disciplinary complaint against the prosecutor while the initial trial proceedings were pending.<sup>28</sup> The complaint alleged that Nifong made improper pretrial public statements and misrepresentations. The principal allegations involved his pretrial statements to the press. Nifong's statements were alleged to violate disciplinary rules that prohibit a prosecutor from making statements before trial that he knows or should have known would have a substantial likelihood of materially prejudicing the adjudicative proceeding or of heightening public condemnation of the accused.<sup>29</sup> As a result of the filing

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23. *Id.*

24. *Id.* at 9.

25. *See id.*

26. Lane Williamson noted both the controversial and unprecedented nature of the North Carolina State Bar's decision to take disciplinary action during the pendency of the case given the fact that the presiding judge had coextensive disciplinary jurisdiction. Williamson Statement, *supra* note 1, at 21. Williamson appropriately credits the State Bar's action with starting the alternative system of justice in this case. *Id.* at 20–21.

27. Matt Dees, *Nifong Broke Rules, Bar Alleges*, News & Observer (Raleigh, N.C.), Dec. 29, 2006, at 1A.

28. On October 19, 2006, the sixteen-member subcommittee of the North Carolina Bar Grievance Committee, charged with examining Nifong's pretrial publicity, voted unanimously to recommend to the full Grievance Committee that a complaint be filed against him. The same subcommittee then considered whether to file the complaint before the criminal charges were resolved against the charged defendants, or to wait until their conclusion. The initial vote was tied and was then broken by Chairman Jim Fox in favor of recommending that filing of the complaint not be delayed. Later that same day, the full forty-two-member Grievance Committee voted unanimously to accept both recommendations. Letter from Wade Smith, Lead Counsel for Collin Finnerty, to author (Nov. 13, 2007) (on file with author). The complaint was filed in December 2006 after it was prepared by bar counsel. Letter from Katherine E. Jean, Counsel, N.C. State Bar, to author 2 (Sept. 13, 2007) (on file with author) (explaining the general procedures of the Grievance Committee and the process of filing the formal complaint once the Grievance Committee finds probable cause and directs that a complaint be filed); *see also* Joseph Neff & Anne Blythe, *Outcome Turned On Close Calls*, News & Observer (Raleigh, N.C.), June 17, 2007, at 8A (describing the decision by a subcommittee of the bar's Grievance Committee on the tie-breaking vote of Chairman Jim Fox to file disciplinary charges, charges that forced Nifong's recusal, but misreporting the timing of that vote).

29. *See* Amended Nifong Bar Complaint, *supra* note 10, at 29. Some of the statements made to the press were also alleged to have involved dishonesty and misrepresentations of fact. *Id.* at 30.

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of the bar complaint, Nifong asked the North Carolina attorney general's office to assume responsibility for prosecuting the cases.<sup>30</sup>

After several months and on the basis of an examination of the investigative files and witness interviews, special prosecutors from the North Carolina attorney general's office developed the narrative set out above. As the report specifically states, the flow of events provided "no opportunity for an attack to occur for even 10 minutes, much less the 20 or 30 minutes as alleged."<sup>31</sup> The attorney general's office not only dismissed the charges but also concluded, "[b]ased on the significant inconsistencies between the evidence and the various accounts given by the accusing witness, the Attorney General and his prosecutors determined that the three individuals were innocent of the criminal charges . . . ."<sup>32</sup>

The rest of the report describes specific and general weaknesses in the case. Its bullet-point summary of the list of reasons the charges were dismissed follows:

- The accusing witness's testimony regarding the alleged assault would have been contradicted by other evidence in the case from numerous sources;
- The accusing witness's testimony regarding the alleged assault and the events leading up to and following the allegations would have been contradicted by significantly different versions of events she told over the past year;
- No testimony or physical evidence would have corroborated her testimony;
- The accused individuals were identified through questionable photographic procedures;
- Credible and verifiable evidence demonstrated that the accused individuals could not have participated in an attack during the time it was alleged to have occurred;
- The accusing witness's credibility would have been suspect based on previous encounters with law enforcement, her medical history and inconsistencies within her statements.<sup>33</sup>

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30. See Attorney General's Report, *supra* note 16, at 3.

31. *Id.* at 19.

32. *Id.* at 21.

33. *Id.* at 2. Under the heading "The Determination to Dismiss the Charges," the attorney general's report provides an additional summary, presented as follows:

- The special prosecutors' investigation revealed multiple and significant inconsistencies and contradictions in the case, and no evidence to corroborate the accusing witness's versions of the events:
- No DNA evidence confirmed her stories. Any DNA evidence that might arguably support her stories is subject to a reasonable alternative explanation.

## II. ETHICS VIOLATIONS THAT WERE ALLEGED AND FOUND

A. *Ethics Violations Based on Improper Pretrial Publicity*

Nifong learned of the Duke lacrosse case investigation on March 23, 2006.<sup>34</sup> The next day he took charge of the case.<sup>35</sup> A few days later, on March 27, 2006, the primary investigative officers briefed Nifong on the case, and within hours of that briefing, he began to make statements to the media that had a profound effect.

## 1. Improper Pretrial Publicity and Its Impact

In its initial ethics complaint filed on December 28, 2006, the North Carolina State Bar charged violations regarding forty-nine different pretrial statements to media. All of the statements were alleged to violate two ethical provisions by “hav[ing] a substantial likelihood of materially prejudicing an adjudicative proceeding . . . in violation of Rule 3.6(a)

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- No medical evidence confirmed her stories. The SANE [Sexual Assault Nurse Examiner] based her opinion that the exam was consistent with what the accusing witness was reporting largely on the accusing witness’s demeanor and complaints of pain rather than on objective evidence.
  - No other witness confirmed her stories. No one at the house that night has come forward to support her stories and the other dancer has given conflicting accounts of the evening. In one account to ABC News, [Kim Pittman] asserted that the accusing witness told her to put marks on her. Her varied accounts show her as a witness who would not be helpful to the prosecution.
  - The accusing witness’s accounts of the story changed significantly. Even in the face of facts that contradicted her stories, the accusing witness was unwilling to acknowledge in meetings with the special prosecutors that she might be mistaken about the identification of the defendants.

*Id.* at 20.

34. Joseph Neff, *Nifong’s Quest to Convict Hid a Lack of Evidence*, News & Observer (Raleigh, N.C.), Apr. 14, 2007, at 1A (describing that Nifong learned of the case on March 23, 2006, when he found a copy of the DNA order (the nontestimonial identification order) on the office copy machine). The bar found that Nifong learned of the case on March 24, 2006. See Amended Nifong Bar Order, *supra* note 8, para. 11, at 3.

35. Amended Nifong Bar Order, *supra* note 8, para. 12, at 3; Amended Nifong Bar Complaint, *supra* note 10, para. 190, at 17; Pretrial Order, Exhibit A, Stipulated Undisputed Facts para. 81, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Nifong Bar Stipulations] (on file with author); see also Supplemental Case notes for Sgt. M.D. Gottlieb at 6, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Sgt. Gottlieb’s Supplemental Report] (on file with author) (describing Captain Jeff Lamb’s instructions on March 24, 2006, to “continue with our investigation, but to go through Mr. Nifong for any directions as to how to conduct matters in this case”); Neff, *supra* note 34 (describing Nifong telling the Durham police that he was taking over the investigation on March 24, 2006).

and . . . of heightening public condemnation of the accused in violation of Rule 3.8(f).”<sup>36</sup>

Among the statements, ten were alleged to be improper commentary on the team members’ failure or refusal to give information to law enforcement authorities and their invocation of their constitutional rights.<sup>37</sup> Another ten were alleged to be “improper commentary on [his] opinion about the guilt of the accused and/or about his opinion that a crime had occurred.”<sup>38</sup> Finally, the bar listed statements that particularly heightened public condemnation of the accused, many of which asserted a racial motivation for the attack.<sup>39</sup>

Nifong began making these statements on Monday, March 27, 2006, within hours of receiving his initial briefing on the case from Sergeant Mark Gottlieb and Investigator Benjamin Himan,<sup>40</sup> and continued in a particularly intense barrage for the rest of that week.<sup>41</sup> On April 3, 2006, Nifong told the press that he had devoted more than forty hours to reporters in recent days, and that he would henceforth decline to grant interviews.<sup>42</sup> Nifong estimated he gave fifty to seventy interviews in that first week.<sup>43</sup> After that, the pace of his comments decreased, but did not cease.

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36. Amended Nifong Bar Complaint, *supra* note 10, charge (a), at 29. The bar also alleged that two of these statements, which asserted that the perpetrators may have used condoms, were not supported by any statements of the victim and constituted dishonesty or misrepresentations in violation of disciplinary Rule 8.4(c). *Id.* paras. 114–19, at 10–11, conclusions of law (b), at 30. This last charge was the only allegation concerning pretrial publicity that the hearing panel ruled was not proven. Williamson Statement, *supra* note 1, at 5–6.

37. Amended Nifong Bar Complaint, *supra* note 10, para. 43, at 5 (referencing paras. 13–42, at 2–5, in the Amended Bar Complaint, which cited Nifong’s improper comments to the news media about the lacrosse team members’ “failure or refusal to make a statement to law enforcement authorities”).

38. *Id.* para. 109, at 10 (referencing paras. 78–106, at 8–10, in the Amended Bar Complaint, which cited to Nifong’s improper comments in the news media about the guilt of the accused and his “opinion that a crime had occurred”).

39. *Id.* para. 178, at 15 (referencing paras. 142–77, at 13–15, in the Amended Bar Complaint, which noted Nifong’s comments to the news media “that had a substantial likelihood of heightening public condemnation of the accused”).

40. Amended Nifong Bar Order, *supra* note 8, para. 16, at 3; Amended Nifong Bar Complaint, *supra* note 10, para. 10, at 2; *see* Nifong Bar Stipulation, *supra* note 35, paras. 19, 22.

41. *See* (Second) Exhibit A, Chronological Stipulated Undisputed Facts, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author) (setting out nine statements made “on or before” March 27, 2006, paras. 25–33; twelve statements made “on or before” March 28, 2006, paras. 36–47; six statements made “on or before” March 29, 2006, paras. 49–53; twelve statements made “on or before” March 30, 2006, paras. 55–66; seven statements made “on or before” March 31, 2006, paras. 67–73; and two statements made “on or before” April 1, 2006, paras. 74–75).

42. John Stevenson, *DA Halting Interviews Until Update; Nifong: No More Info on Alleged Rape for Now*, Herald-Sun (Durham, N.C.), Apr. 4, 2006, at A1.

43. Joseph Neff, *Nifong Conduct Rebuked Early*, News & Observer (Raleigh, N.C.), Jan. 15, 2007, at 1A.

Statements were made to both local and national media, including newspapers and other print media and television.<sup>44</sup>

Nifong defended his statements to the press that the players were not giving information to the police and were engaging in a conspiracy of silence on the ground that he was seeking information from the community.<sup>45</sup> Among the statements' effects was to offer an explanation as to why no incriminating information was coming from others at the party and to discount team members' denials. Examples from this set of statements follow:

[T]here are three people who went into the bathroom with the young lady, and whether the other people there knew what was going on at the time, they do now and have not come forward. I'm disappointed that no one has been enough of a man to come forward. And if they would have spoken up at the time, this may never have happened.<sup>46</sup>

I would like to think that somebody who was not in the bathroom has the human decency to call up and say, "What am I doing covering up for a bunch of hooligans?" . . . I'd like to be able to think that there were some people in that house that were not involved in this and were as horrified by it as the rest of us are.<sup>47</sup>

I would like to think that somebody [not involved in the attack] has the human decency to call up and say, "What am I doing covering up for a bunch of hooligans?"<sup>48</sup>

[M]y guess is that some of this stonewall of silence that we have seen may tend to crumble once charges start to come out.<sup>49</sup>

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44. Nifong made statements to the following television media: WRAL News (Raleigh, N.C.) in March and May 2006; ABC 11 TV News (Raleigh and Durham, N.C.) in March and April 2006; NBC 17 News (Durham, N.C.); CNN; CBS Early Show; ESPN; and MSNBC.

He also made statements to the following print media: *The Durham Herald-Sun*, *The News & Observer* (Raleigh, N.C.), *The Charlotte Observer*, *The New York Times*, *USA Today*, and *Newsweek*.

45. Excerpt Transcript of Testimony of Michael B. Nifong at 29–33, 203–05, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) [hereinafter Nifong Transcript] (on file with author) (making this argument); Motion to Dismiss and Answer para. 10, at 4, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) (on file with author) (arguing that his reason for making the statements was "in an effort to obtain assistance in receiving evidence and information necessary to further the criminal investigation").

46. Viv Bernstein & Joe Drape, *Rape Allegation Against Athletes Is Roiling Duke*, N.Y. Times, Mar. 29, 2006, at A1; see also Amended Nifong Bar Complaint, *supra* note 10, para. 19, at 3.

47. Amended Nifong Bar Complaint, *supra* note 10, para. 137, at 12; Anne Blythe & Jane Stancill, *Duke Puts Lacrosse Games On Hold*, News & Observer (Raleigh, N.C.), Mar. 29, 2006, at 1A.

48. Amended Nifong Bar Complaint, *supra* note 10, para. 137, at 12; Benjamin Niolet, *Spotlight New Place for Nifong*, News & Observer (Raleigh, N.C.), Apr. 10, 2006, at 1A.

49. Amended Nifong Bar Complaint, *supra* note 10, para. 16, at 3; Nifong Bar Stipulation, *supra* note 35, para. 16; Exhibit 101, 03/27/06—ABC 11—Alleged Rape—Racial

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Other statements conveyed Nifong's certainty that a crime occurred, many of which also added the particularly outrageous charge that the crime was racially motivated. The foreseeable impact of the racial allegation, in particular, was obvious. Below are some of these statements:

[T]he thing that most of us found so abhorrent, and the reason I decided to take it over myself, was the combination gang-like rape activity accompanied by the racial slurs and general racial hostility.<sup>50</sup>

The reason that I took this case is because this case says something about Durham that I'm not going to let be said . . . . I'm not going to let Durham's view in the minds of the world to be a bunch of lacrosse players from Duke raping a black girl in Durham.<sup>51</sup>

[T]he circumstances of the rape indicated a deep racial motivation for some of the things that were done. It makes a crime that is by its nature one of the most offensive and invasive even more so.<sup>52</sup>

[I]n this case, where you have the act of rape—essentially a gang rape—is bad enough in and of itself, but when it's made with racial epithets against the victim, I mean, it's just absolutely unconscionable . . . . [T]he contempt that was shown for the victim, based on her race was totally abhorrent. It adds another layer of reprehensibility, to a crime that is already reprehensible.<sup>53</sup>

While the statements asserting racial motivation were particularly evocative, Nifong's assertion of certainty had a more subtle but powerful impact. During his testimony before the Disciplinary Hearing Commission, Brad Bannon, an attorney who represented Dave Evans and who discovered the exculpatory DNA in the background data supplied by the prosecutor, stated that numerous lawyers told him that surely Nifong would not have made statements with such certainty if he did not have substantial evidence.<sup>54</sup> Bannon said that when he heard those accusations, his first

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Angle, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) (on file with author).

50. Amended Nifong Bar Complaint, *supra* note 10, para. 151, at 13; Nifong Bar Stipulation, *supra* note 35, para. 70; Bernstein & Drape, *supra* note 46.

51. Amended Nifong Bar Complaint, *supra* note 10, para. 175, at 15; Nifong Bar Stipulation, *supra* note 35, para. 78; Benjamin Niolet, *DA's Conduct Draws Retort*, News & Observer (Raleigh, N.C.), Apr. 13, 2006, at 1A. The statement appears to have been made at a campaign forum sponsored by the Durham/Orange Women Attorneys and the Young Lawyers Division of the Durham County Bar Association. The same article stated that, "[i]n the early days of the investigation, Nifong said he was confident that DNA tests of the players would point to the guilty party. When tests showed no DNA matches, Nifong revealed that weeks after the attack, the woman identified one of her attackers." *Id.*

52. Amended Nifong Bar Complaint, *supra* note 10, para. 154, at 14; Nifong Bar Stipulation, *supra* note 35, para. 71; *NBC TV17 News* (NBC television broadcast Mar. 28, 2006).

53. Amended Nifong Bar Complaint, *supra* note 10, paras. 142, 145, at 13; Nifong Bar Stipulation, *supra* note 35, paras. 66, 67; Exhibit 101, *supra* note 49.

54. Videotape: Testimony of Attorney Bradley Bannon (June 13, 2007), at BB1 6:15–6:50 (on file with author).

reaction was that they were outrageous, but his second reaction was, “Wow, there must have been a rape that happened at that house that night.”<sup>55</sup>

In his explanation of Nifong’s disbarment, Disciplinary Hearing Commission chair Williamson observed,

[D]ue to the initial strong statements, unequivocal statements, made by Mr. Nifong there was a deception perpetrated upon the public, and many people were made to look foolish, because they simply accepted that if this prosecutor said it was true, it must be true. We all think back to those early days in the Spring of last year, and you think of how public opinion was so overwhelmingly against these defendants.<sup>56</sup>

## 2. The Community Environment and Apparent Corroboration

The fact that District Attorney Nifong himself made the statements and that they were strongly positive assertions of guilt had a profound impact. These statements had even more power initially because in some quarters of the community they landed on receptive ears, and they seemed in the early days after the media barrage to receive some indirect corroboration.

Nothing like an alleged gang rape involving Duke students or athletes had occurred before, but other stories of boorish Duke student behavior had been in the local press, generally involving alcohol and rowdy parties.<sup>57</sup> Indeed, because of past complaints by community members in the area of

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55. Anne Blythe et al., *Panel Presses DNA Expert*, News & Observer (Raleigh, N.C.), June 14, 2007, at 1A.

56. Williamson Statement, *supra* note 1, at 23–24. I found Bannon’s second reaction particularly apt because as both a member of the community and a former public defender, it was my personal reaction. I had worked briefly with Nifong when I placed students with the district attorney’s office in Durham, and I had found him to be straightforward and competent. When he made the early definitive statements that three players had raped an exotic dancer at the party, I assumed he must have additional information beyond what was in the public domain. I continued to listen for that solid information of guilt, and at some point, I concluded that it must simply not exist. My arrival at that conclusion—that the charges might well be questionable and then that they were likely baseless—took some time. It is a path that many traveled, I believe, moving at varying speeds. Most of us, however, started with the point of implicit acceptance of the validity of the accusation based on Nifong’s unequivocal and repeated assertions, in part because he was the Durham district attorney.

Statements by a prosecutor may be particularly powerful in the local community since even in the case of “national” stories the focus of the local media may be different and more carefully tailored to intensely felt concerns. *See* United States v. McVeigh, 918 F. Supp. 1467, 1471–72 (W.D. Okla. 1996) (describing expert testimony on differences in local media coverage in the wake of the Oklahoma City bombing case and its impact on jurors in Oklahoma, which supported change of venue, despite the existence of broad national coverage of the case that affected every jurisdiction).

57. *See, e.g.*, Margie Fishman & Janell Ross, *Duke Revelers Untamed*, News & Observer (Raleigh, N.C.), Jan. 30, 2005, at 1A (describing noisy parties and rude behavior, and conflict with neighbors over student behavior in neighborhoods near campus, and quoting one neighbor as saying, “They’re Duke Students. They think they’re above the law.”).



town where the alleged assault occurred, Duke University had recently purchased fifteen houses, including the one where the lacrosse party occurred,<sup>58</sup> but had not yet secured new occupants.

After the rape charge became public, one article in a local newspaper quoted Bettie Crigler, who lives behind and to the side of the 610 Buchanan Street house, as saying, “I’m sort of assuming it happened . . . because they’ve been such arrogant kids . . . . If you ask them to be quiet, they shout unpleasant things at you, and I’m white.”<sup>59</sup>

The case on its face involved issues of sexual violence and race. The alleged crime was a gang rape. The victim was a black single mother who attended North Carolina Central University, and the alleged perpetrators were white. The news accounts quickly included racial epithets as an explicit part of the event. According to Jason Bissey, a neighbor, one guy yelled, “Thank your grandpa for my nice cotton shirt.”<sup>60</sup> On March 31, the local newspapers reported that a woman called police at 12:53 a.m. on March 14, 2006, and reported that a white man at 610 North Buchanan Boulevard, the address of the party, yelled a racial slur at her and a black friend as they passed the house.<sup>61</sup>

On April 6, 2006, news articles noted a vile e-mail sent by one member of the team shortly after the alleged event that described killing and skinning strippers and his sexual self-gratification.<sup>62</sup> It appeared to

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58. Andrew Davis & Galen Vaisman, *Rowdy Behavior Typical of LAX Players*, *Chronicle* (Duke Univ.), Apr. 17, 2006, at 1.

59. Paul Bonner, *Town-Gown Tensions Roil Trinity Park: Latent Grievances Resurrected as Gang-Rape Allegations Linger*, *Herald-Sun* (Durham, N.C.), Apr. 1, 2006, <http://www.herald-sun.com/durham/4-719619.html>. In her statement, Bettie Crigler explicitly added that she was not saying the charges were true: “But I don’t know that. How can you know until the DNA has been assessed?” *Id.* The article notes that the latter remark was a reference to the victim’s statements to police that the attackers used racial slurs. *Id.*

60. Samiha Khanna & Anne Blythe, *Dancer Gives Details of Ordeal*, *News & Observer* (Raleigh, N.C.), Mar. 25, 2006, at 1A; Samiha Khanna, *In Lacrosse Case, Any Charges 10 Days Away*, *News & Observer* (Raleigh, N.C.), Apr. 1, 2006, at 1A.

61. Samiha Khanna, *Police Arrived at a Quiet House*, *News & Observer* (Raleigh, N.C.), Mar. 31, 2006, at 1A. It was later determined that the other dancer, Kim Pittman, made the call. *See* Handwritten Statement by Kim M. Pittman at 5, *N.C. State Bar v. Nifong*, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author) (describing the players yelling more explicit racial slurs at the dancers and Pittman’s call to the police as she drove away from the house where the party occurred); Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 8 (stating in the note for March 31, 2006, that Pittman confirmed that she made the call).

62. Leaving out its most sickening content, the e-mail stated, “[T]omorrow night, after tonight’s show, ive decided to have some strippers over . . . . However there will be no nudity. i plan on killing the bitches as soon as the walk in and proceding to cut their skin off.” Benjamin Niolet et al., *Message Spoke of ‘Killing,’* *News & Observer* (Raleigh, N.C.), Apr. 6, 2006, at 1A; *see also* Rocky Rosen & John Stevenson, *E-Mail Rocks Duke Campus; Coach, Player, Season Gone*, *Herald-Sun* (Durham, N.C.), Apr. 6, 2006, at A1 (referring indirectly to the sexual element of the e-mail). Durham attorney Robert Ekstrand, who represented a number of players, described the e-mail’s language as “vile” but argued that it was consistent with innocence. Duff Wilson & Viv Bernstein, *Duke Cancels Season and Begins Inquiries*, *N.Y. Times*, Apr. 6, 2006, at D1.

corroborate the worst images of the team and, indirectly, the accusations themselves.

On April 9, 2006, *The Raleigh News & Observer* reported that since 1999, forty-one of the Duke lacrosse players—about thirty-one percent—had been charged with a variety of rowdy and drunken acts and that sixteen of the players on the current roster had been arrested in the past three years.<sup>63</sup> On April 17, 2006, the Duke University student newspaper, *The Chronicle*, ran its version of the same article, citing in addition players' acts of arrogance, public urination, kicking out a door, and turning the football tailgate from "a small pre-game gathering to a campus-wide drinking event."<sup>64</sup> The information that the lacrosse team had accumulated a large number of arrests for alcohol-related misbehavior was characterized by some as a stereotype of out-of-control jocks with a sense of entitlement.<sup>65</sup>

### 3. Nifong's Motivation: Taking Advantage of a Racially Charged Rape Allegation in the Midst of an Uphill Political Campaign?

I suspect that at the very beginning, Nifong believed that a rape had taken place; no one disputed his statement that Sexual Assault Nurse Examiner (SANE) Tara Levicy, Investigator Benjamin Himan, and Sergeant Mark Gottlieb found the accuser credible.<sup>66</sup> Announcing that belief immediately to the press was another matter. However, doing so had potentially powerful political benefits. Like in a B-grade movie, Nifong's motivation appears to have been built, at least in part, upon a crass political calculation that led him to pursue charges without being constrained by the real possibility of innocence. The sequence of facts certainly supports that conclusion on the basis of circumstantial evidence, and hearing panel chair

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Almost three months later, news articles announced that the player who the university had suspended for sending the e-mail had been reinstated. The reinstatement letter explained that Duke administrators concluded the e-mail was a takeoff of a novel, *American Psycho*, and was in poor taste but was an attempt at humor. Anne Blythe, *Player Who Sent Message Is Reinstated at Duke*, *News & Observer* (Raleigh, N.C.), June 30, 2006, at 1B.

63. Jim Nesbitt, Benjamin Niolet & Lorenzo Perez, *Team Has Swagged for Years*, *News & Observer* (Raleigh, N.C.), Apr. 9, 2006, at 1A.

64. Davis & Vaisman, *supra* note 58, at 1.

65. A late March article that talked of a group of twenty lacrosse players downing shots of alcohol, chanting "Duke Lacrosse!," and talking about how the alleged rape "is ruining our season" appeared to demonstrate that the team members "just didn't get it." John Stevenson, Paul Bonner & Rachel Bernstein, *Team's DNA Results May Be Ready in a Week; District Attorney Will Handle Gang-Rape Case*, *Herald Sun* (Durham, N.C.), Mar. 28, 2006, at A1.

66. Nifong acknowledged that the initial officer to have contact with Mangum, Sergeant John C. Shelton, questioned her credibility and the validity of the charges. Nifong gave greater weight to the opinions of three others who had early contact with Mangum. See Nifong Transcript, *supra* note 45, at 53 (describing Investigator Benjamin Himan, Sergeant Mark Gottlieb, and SANE nurse Tara Levicy as finding the victim believable); *id.* at 170–71 (noting that only Sergeant Shelton doubted the victim); *id.* at 304 (answering that he personally believed a rape took place based on the views of Himan, Gottlieb, and, through them, Levicy).

Williamson concluded as much: “[A]t that time he was facing a primary, and, yes, he was politically naive. But we can draw no other conclusion but that those initial statements that he made were to further his political ambition.”<sup>67</sup>

District attorneys in North Carolina, as in many states, are elected. Nifong had been appointed in April 2005 to the remainder of the unexpired term of elected District Attorney Jim Hardin when Hardin was appointed to be a superior court judge.<sup>68</sup> At the time he became involved in the prosecution and made the statements that the bar alleged violated ethical rules, Nifong was embroiled in a tough primary campaign against a former assistant district attorney from the same office, Freda Black.<sup>69</sup> He had asked for Black’s resignation when he had assumed the position of district attorney.<sup>70</sup> The accepted reality during the bar hearing was that Nifong understood that if Black were elected, he would no longer have a job.

We do not have direct knowledge of how Nifong thought the campaign was going when he started the media barrage. Accepted wisdom is that, before the lacrosse case, Freda Black was the candidate with the greatest name recognition, having fairly recently helped successfully prosecute another high profile case.<sup>71</sup> A poll produced for the Freda Black campaign that coincidentally was taken on March 27, 2006, the day Nifong’s public statements began, supports that conventional wisdom. It showed her with a substantial lead, giving her 37%, 20% for Nifong, with Keith Bishop a distant third at 3%.<sup>72</sup>

Nifong’s campaign manager for the primary, Jackie Brown, described Nifong’s discussions with her in January 2006 when she was deciding whether to handle the campaign. He indicated an interest in holding the district attorney job for one term, for economic reasons. By serving as district attorney for five years, which election would guarantee, he would qualify for an additional \$15,000 per year in retirement benefits, which would add considerably to the regular state retirement plan for which he would otherwise qualify.<sup>73</sup>

In late March, Nifong called Brown, who was out of town, to tell her he was going to be on the news regarding the Duke lacrosse case. She counseled caution until they determined how it would affect the campaign. Nifong appeared on several news shows that day. When Brown returned to

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67. Williamson Statement, *supra* note 1, at 17.

68. Benjamin Niolet & Michael Biesecker, *No Concession Yet in DA Race*, News & Observer (Raleigh, N.C.), May 4, 2006, at 1A.

69. Neff, *supra* note 34.

70. Niolet & Biesecker, *supra* note 68.

71. Michael Biesecker, *Nifong’s Opponent Takes a Swing*, News & Observer (Raleigh, N.C.), Apr. 19, 2006, at 14A. The case involved the prosecution and conviction of Michael Peterson for the murder of his wife. *Id.*

72. See Dixon Black Voter Survey at 1, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author); Nifong Transcript, *supra* note 45, at 219–22.

73. Neff, *supra* note 34.

Durham, she found satellite trucks in the courthouse parking lot. When she was able to reach Nifong, she said, “You don’t have any idea what the impact is going to be on your campaign.” Nifong responded, “I’m getting a million dollars of free advertisements.”<sup>74</sup>

Hearing panel chair Williamson suggested that having begun the publicity barrage, Nifong came to believe what he hoped the facts actually were.<sup>75</sup> Whether or not that conclusion is true, once he started the process of publicity, Nifong was wedded to those facts unless he was willing to incur significant political damage.

Both of his opponents, Freda Black, who is white, and Keith Bishop, who is African-American, criticized him for his highly public handling of the case. Black called it “unethical and improper.”<sup>76</sup> Bishop, who initially criticized Nifong’s high visibility during the case,<sup>77</sup> complimented him for making good on his public promise to make arrests when indictments were returned against Seligmann and Finnerty.<sup>78</sup> However, Bishop later resumed his criticism of the publicity: “He [Nifong] should not have jumped the gun and put the issue in the public as he did.”<sup>79</sup>

Nifong won the primary, which was held on May 2, 2006. He finished with 45.2% of the vote, compared to 41.5% for Freda Black, and 13.3% for Keith Bishop.<sup>80</sup> The results showed that Nifong won his narrow victory—883 votes<sup>81</sup>—on the basis of strong support from the black community, where he commanded a plurality. Among African-American voters, Nifong received 44%, compared to 25.2% for Freda Black and 30.8% for Keith Bishop. Of other voters, Freda Black received the majority and held a small lead over Nifong. The breakdown of non-African-American voters was 46.2% for Nifong, 50.6% for Freda Black, and 3.2% for Keith Bishop.<sup>82</sup>

If Nifong’s strategy was to gain an advantage in the black community with his statements and with the indictment, the strategy appears to have

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74. *Id.*

75. Williamson Statement, *supra* note 1, at 17–18 (“And having once [made the initial statements to the press], and having seen the facts as he hoped they would be, in his mind the facts remained that way in the face of developing evidence that that was not in fact the case.”).

76. *News: DA Changed Bond Status for Second Dancer*, News & Observer (Raleigh, N.C.), Apr. 22, 2006, at 16A; *see also* Biesecker, *supra* note 71 (noting Freda Black’s criticism of Nifong’s divisiveness and the publicity).

77. Niolet, *supra* note 51 (describing criticism by both Freda Black and Keith Bishop during the candidates’ forum).

78. Michael Biesecker, *Nifong’s Opponent Takes a Swing*, News & Observer (Raleigh, N.C.), Apr. 19, 2006, at 14A.

79. *News: DA Changed Bond Status for Second Dancer*, *supra* note 76.

80. Michael Biesecker, *Study Says Black Vote Aided Nifong*, News & Observer (Raleigh, N.C.), May 6, 2006, at 1B.

81. Michael Biesecker, *Black Yields in DA Contest*, News & Observer (Raleigh, N.C.), May 7, 2006, at 3B. The 883 votes was more than three times the amount required by state law to avoid a recount. *Id.*

82. Biesecker, *supra* note 80 (detailing statistical analysis conducted by Vanderbilt University political science professor Christian Grose based on all voting results from all Durham precincts and federal demographic data).

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worked. He received strong support within the black community despite the Durham Committee on the Affairs of Black People endorsing Keith Bishop, an endorsement that typically has substantial impact.<sup>83</sup>

Many attributed this result to his actions in the Duke lacrosse case:

“The Duke lacrosse case was the overwhelming issue,” said Philip Cousin, a longtime Durham Committee member who is also a Durham County commissioner and the minister at St. Joseph’s AME Church. “I think a lot of people thought there wouldn’t be any arrests. When Nifong came through with the indictments, that indicated to the black community he would be fair.”<sup>84</sup>

Normally, winning the Democratic primary in Durham is the equivalent of winning the general election. In this election, this presumption should have been prohibitively strong because Nifong had no Republican challenger.<sup>85</sup> If political motivations had driven his actions, and if Nifong ever thought of backing away from his comments and commitment to prosecute the case after his victory in the primary, he had only a brief window of opportunity. By mid-June, two opponents had started petition campaigns to be placed on the November ballot.<sup>86</sup> One of those, Durham County Commissioner Lewis Cheek, a Democrat, succeeded. He ultimately decided he would not serve, but his name remained on the ballot, and in announcing that he would ask the governor to appoint someone else if he were elected, Cheek served as something of a surrogate opponent along with others who organized write-in campaigns.<sup>87</sup>

Despite having no formal active opponent, Nifong continued the campaign with a somewhat spirited tone.<sup>88</sup> Nifong won the general election by 10%, although he garnered less than half the votes cast. He received 49% of the vote, compared to 39% for Cheek, and 12% for various write-in candidates.<sup>89</sup>

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83. *Id.*

84. *Id.*

85. Michel Biesecker & Stanley B. Chambers, Jr., *DA Campaign May Be Reality*, News & Observer (Raleigh, N.C.), June 30, 2006, at 1B.

86. Anne Blythe & Benjamin Niolet, *DA Petition Drives Crawl in Durham Challenge*, News & Observer (Raleigh, N.C.), June 21, 2006, at 1A.

87. Benjamin Niolet, *Cheek Passes On Run for DA*, News & Observer (Raleigh, N.C.), July 28, 2006, at 1B.

88. Benjamin Niolet, *Voting Takes a Spirited Tone*, News & Observer (Raleigh, N.C.), Nov. 5, 2006, at 1B.

89. Benjamin Niolet et al., *Nifong Fends Off Two Challengers*, News & Observer (Raleigh, N.C.), Nov. 8, 2006, at 1A.

B. *Ethics Violation Based on the Failure to Disclose Exculpatory DNA Evidence and Required Discovery and Misrepresentations Made Regarding Those Failures*<sup>90</sup>

On January 24, 2007, the North Carolina State Bar amended its complaint to add the following charges: Nifong failed to disclose potentially exculpatory information regarding male DNA on items in the accuser's rape examination kit; he did not comply with discovery and disclosure requirements; and he made false statements to opposing counsel, the court, and the bar regarding the DNA.<sup>91</sup> As damaging as the pretrial publicity charges were, these were far more serious charges, particularly the intentional deception of the trial court.

The charges arose from DNA evidence secured from the forty-six Caucasian members of the team on March 23, 2006, pursuant to what in North Carolina is called a Nontestimonial Identification Order.<sup>92</sup> Both photographs and material for DNA testing were obtained on that date. The DNA from the players was sent to the State Bureau of Investigation (SBI) lab for comparison with evidence from the victim's rape kit, which was collected during the examination on the morning of March 14, 2006; additionally, items obtained during execution of a search warrant for the 610 North Buchanan residence on March 16, 2006, were also sent to the lab. Among the items seized during the search were two false fingernails, including one which was found in the trash can of the bathroom where the rape allegedly occurred.<sup>93</sup> By March 28, 2006, the lab had determined that it could not find any semen, blood, or saliva on the rape kit items.<sup>94</sup> On March 30, 2006, Nifong was informed of that important result in a telephone call,<sup>95</sup> and he was told that those items from Mangum would not be subject to DNA testing, but that other evidence recovered in the search of the residence would be.<sup>96</sup>

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90. For a somewhat more complete treatment of the basis for the charges relating to Nifong's failure to disclose potentially exculpatory DNA evidence, see Mosteller, *supra* note 7, pt. III.

91. Amended Nifong Bar Complaint, *supra* note 10, paras. 182–291, at 16–32. The Disciplinary Hearing Commission found that Nifong committed numerous violations related to the exculpatory material, but in particular the panel found that he made numerous false and deceptive statements denying the existence of exculpatory material or covering up his failure to provide the evidence. *See supra* note 9.

92. N.C. Gen. Stat. §§ 15A-271–15A-282 (2005); *see* Amended Nifong Bar Complaint, *supra* note 10, para. 188, at 16.

93. *See* Amended Nifong Bar Complaint, *supra* note 10, para. 186, at 16.

94. *Id.* para. 192, at 17.

95. Amended Nifong Bar Order, *supra* note 8, para. 36, at 6 (finding that the State Bureau of Investigation (SBI) notified Nifong that it was unable to find semen, blood, or saliva on any items from the rape kit).

96. *See* Testimony of Jennifer Leyn at 9–12, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) [hereinafter Leyn Testimony] (on file with author) (describing March 30, 2006, telephone conversation with Nifong in which he was told that no item from the rape kit would be submitted for DNA testing but that cuttings from a bath towel, several swabs from the bathroom floor, and

In order to get more sophisticated testing on the rape kit items and to separate a mixture of DNA noted by the SBI lab, Nifong had the evidence items sent to DNA Security, Inc., (DSI) in Burlington, North Carolina shortly after April 5, 2006.<sup>97</sup> On April 10, April 21, and May 12, 2006, Nifong, along with Durham Police Investigator Himan and Sergeant Gottlieb, traveled to Burlington, North Carolina, and met with Dr. Brian Meehan, president and director of DSI.

Before April 10, DSI had determined that DNA from up to four different males had been found on items from the rape kit and that all the Duke lacrosse samples had been excluded as possible sources of that foreign male DNA.<sup>98</sup> By April 20, 2006, further testing revealed DNA characteristics from additional males on another item of the rape kit and that the Duke players had all been excluded as possible sources of that DNA.<sup>99</sup> The foreign male DNA information was potentially exculpatory, a fact that Nifong did not deny at the disciplinary hearing,<sup>100</sup> and Meehan informed Nifong of those results when they met.<sup>101</sup> For example, the evidence suggested multiple recent sexual contacts, which could explain the swelling found during Mangum's medical examination.

During one of these meetings, Nifong and Meehan agreed that only the results of DNA matches between the evidence items and reference specimens would be reported. The report prepared and presented to Nifong at the May 12, 2006, meeting thus included only information regarding three individuals. Two were matches between DNA found on two fingernails and the reference samples from Dave Evans, a Duke lacrosse player who was subsequently indicted, and another unindicted player who

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fingernails would be); Phone Logs of Conference Call on March 30, 2006, between SBI Technicians and Nifong, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007); Deposition of Michael B. Nifong at 188–91, N.C. State Bar v. Michel B. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) [hereinafter Nifong Deposition] (on file with author).

97. An order allowing the transfer to DNA Security, Inc., (DSI) was secured on April 5, 2006. Amended Nifong Bar Complaint, *supra* note 10, para. 196, at 17.

98. *Id.* paras. 200–02, at 18.

99. *Id.* paras. 208–09, at 18–19.

100. See Nifong Transcript, *supra* note 45, at 284, 289. In his initial response to the bar, Nifong characterized the foreign male DNA as “non-inculpatory” rather than “specifically exculpatory.” Amended Nifong Bar Order, *supra* note 8, para. 107, at 18; Letter from Michael B. Nifong to Katherine E. Jean (Dec. 28, 2006) at 3, 7, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) (on file with author). Nifong used some of the same qualifying language regarding the exculpatory nature of the DNA evidence in his testimony and only grudgingly accepted that it was potentially exculpatory in character, but recognized his responsibility to disclose the evidence under the discovery statute. He contended that at the time he heard of the evidence from Dr. Brian Meehan, he did appreciate that it had significance as exculpatory evidence. See Nifong Transcript, *supra* note 45, at 285–93.

101. Amended Nifong Bar Complaint, *supra* note 10, paras. 203, 211, at 18–19.

was never charged.<sup>102</sup> The third involved “a sperm fraction from the vaginal swab that was consistent with the DNA profile of the alleged victim’s boyfriend.”<sup>103</sup> The report, which was presented to the attorneys for the indicted players, did not state that DNA from other males who were not Duke lacrosse players was found. Its only reference to these results was the apparently misleading statement that “[i]ndividual DNA profiles for non-probative evidence specimens and suspect reference specimens are being retained at DSI pending notification of the client.”<sup>104</sup>

Nifong had an ethical duty under Rule 3.8(d) to provide the exculpatory information in a timely fashion, and although the Rule does not elaborate on this duty, it nonetheless lacks any suggestion that prolonged unjustified delay is authorized. The constitutional duty should produce prompt disclosure, but is only violated if the information is not provided in time for effective use at trial.<sup>105</sup> Nifong had no substantive reason for delay, and

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102. The second false fingernail was found in another room in the house, and the accuser had not in any way identified this player as being involved. Charges were not pursued against that other player.

103. Amended Nifong Bar Complaint, *supra* note 10, paras. 217–18, at 20.

104. DNA Security, Inc. Report, DSI # 20629, at 5, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author).

105. When *Brady* material must be disclosed is a function of the doctrine’s materiality requirement. The materiality requirement looks not to disclosure but to the retrospective impact on the outcome at a past trial, which is particularly unfortunate when *Brady* is considered as a discovery tool. *See, e.g.*, John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 Emory L.J. 437, 443 (2001) (describing the general conclusion of scholars regarding the unfortunate aspects of *Brady*’s retrospective “bad timing” on the doctrine as an effective disclosure device before trial). It also means that the disciplinary rule is more demanding in terms of timing, which for *Brady* is violated only if the information is provided too late for effective trial use. *See, e.g.*, Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L. Rev. 1379, 1421 n.221 (2000) (describing “in sufficient time to allow the defendant to use the evidence effectively” as the timing requirement of *Brady*); Robert G. Morvillo et al., *Motion Denied: Systematic Impediments to White Collar Criminal Defendants’ Trial Preparation*, 42 Am. Crim. L. Rev. 157, 169 (2005) (same).

Nifong disagreed with the testimony of Assistant District Attorney Marsha Goodenow that he had an obligation to turn over exculpatory information immediately. *See* Nifong Transcript, *supra* note 45, at 255 (recounting discussion between cross-examiner recounting Goodenow’s testimony and Nifong, who disagreed that there was an obligation of immediate disclosure); *see also* Anne Blythe, Joseph Neff & Benjamin Niolet, *Charlotte Prosecutor: Nifong Did It All Wrong*, News & Observer (Raleigh, N.C.), June 15, 2007, at 1A. Immediate disclosure may be the proper practice, but the interpretation of the timing requirement of the disciplinary rule would be a substantial issue under different facts in the absence of more concrete direction than the word “timely” in the rule.

Certainly the general ethical rule can be broader than the constitutional requirement, but that rule appears to have grown from the constitutional doctrine, and North Carolina’s provision “make timely disclosure” is taken directly from the ABA’s Model Rule. *See* Model Rules of Prof’l Conduct R. 3.8(d) (2006). If a definite meaning is to be given to that apparently indefinite term, a statement to that effect by the rule-drafting authority is warranted rather than the interpretation of an individual panel. *See* D.C. Rules of Prof’l Conduct R. 3.8(e) (2000) (using the language “[i]ntentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible”).



thus in not providing the defense with notice of the potentially exculpatory evidence in a reasonable period of time, he had clearly failed to fulfill that ethical duty.

Under earlier discovery law, disclosure of such a failure and ensuing professional discipline would have been largely left to chance. However, because of the breadth of information that the prosecution is obligated to disclose under North Carolina's relatively new open-file discovery law<sup>106</sup> and the high quality of defense counsel opposing Nifong, the disclosure process moved relentlessly forward. Disclosure requirements prompted additional specific discovery requests, which were incorporated into a court order and made even more specific through a series of in-court exchanges regarding discovery received and further discovery sought. In the end, Nifong produced the underlying DNA data, albeit without a report explaining its significance, which opened the road to the players' exoneration and his disbarment.

Two days after being indicted, on April 19, 2006, Reade Seligmann's counsel filed a discovery motion requesting all DNA analysis and any exculpatory information.<sup>107</sup> On May 17, 2006, Collin Finnerty's counsel prepared a discovery motion requesting 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."<sup>108</sup> On May 18, 2006, with regard to discovery, Nifong stated in a written pleading that "[t]he State is not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant."<sup>109</sup> And orally at the hearing conducted that day, when asked by the court about whether he had provided all the discovery materials to the defendants, Nifong responded, "I've turned over everything I have."<sup>110</sup>

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In general, the constitutional rule is both broader and narrower than the ethical rule. It is broader in not requiring materiality. *See* *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995) (noting that the obligations under rules of professional conduct and the ABA Standards for Criminal Justice are broader than the due process doctrine); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 714 (1987). The disciplinary rule is narrower in that it requires a knowing violation by the prosecutor, whereas the constitutional rule is violated by failing to disclose information held by other investigative agents even though entirely unknown to the prosecutor. *Id.* at 714.

106. N.C. Gen. Stat. § 15A-903 (2004). The discovery law was enacted in the wake of the acquittal on retrial of Allen Gell, who had been sentenced to death at his initial trial but whose conviction had been reversed based on a violation of *Brady*. Joseph Neff, 'Open File' Law Gives Defense a Tool to Force Out Evidence, *News & Observer* (Raleigh, N.C.), Apr. 12, 2007, at 18A (describing receipt of a handwritten letter from Alan Gell to *The News & Observer* in which Gell stated, "I feel like each [Duke lacrosse] player needs to send me a thank-you card for making the discovery law!!!").

107. Amended Nifong Bar Complaint, *supra* note 10, para. 207, at 18.

108. *Id.* para. 224, at 21.

109. *Id.* para. 230, at 21.

110. *Id.* paras. 234–35, at 22.

On June 19, 2006, defense counsel, based in part on the discovery provided to that point, asked in writing for further information on what had transpired in Nifong's meeting with Meehan.<sup>111</sup> At the next court hearing on June 22, 2006, in response to counsel's request and the trial court's inquiry, Nifong represented that nothing beyond the information in the report was discussed with Meehan.<sup>112</sup> The discovery order entered at that hearing required Nifong, *inter alia*, to provide "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."<sup>113</sup>

On August 31, 2006, counsel for the three defendants jointly filed a discovery motion. The discovery received to that point prompted more specific follow-up requests for disclosure. The motion asked, *inter alia*, for the complete file and all underlying data regarding DSI's work and the substance of any discoverable comments made by Meehan during his meetings with Nifong on April 10, April 21, and May 12, 2006.<sup>114</sup> At the hearing on that motion on September 22, 2006, counsel for one of the defendants specifically requested the results of any tests finding any additional DNA on the alleged victim even if it did not match any of the defendants or other individuals for whom DNA specimens had been provided to the expert.<sup>115</sup> At that hearing, Nifong represented that the DSI report encompassed all tests performed and everything discussed at the meetings with Meehan. Nifong had an exchange with the trial judge: "So you represent there are no other statements from Dr. Meehan?" Mr. Nifong: "No other statements. No other statements made to me."<sup>116</sup>

At the next court hearing on October 27, 2006, Nifong provided 1844 pages of underlying data and materials related to DSI's tests and examinations, but, critically, he did not add any explanatory material or otherwise point out the exculpatory results that the underlying data showed, if examined carefully and understood.<sup>117</sup> Some of the most impressive testimony at the disciplinary hearing came from attorney Brad Bannon, one of the lawyers representing Dave Evans, as he described his discovery within the obscure data. He recounted spending between sixty and one hundred hours learning about the specialized tests used by DSI and slogging through the material. When he began his work, he was not focused on finding male DNA that did not belong to one of the defendants since he did

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111. *Id.* para. 238, at 22.

112. *Id.* paras. 239-41, at 22.

113. *Id.* para. 243, at 23.

114. *Id.* para. 244, at 23.

115. *Id.* para. 246, at 23.

116. Transcript of September 22, 2006, Hearing at 27-28, *State v. Finnerty*, Nos. 06 CRS 4331-33, 06 CRS 4334-36, 06 CRS 5581-83 (N.C. Super. Ct. Sept. 22, 2006) [hereinafter Transcript of September 22, 2006, Hearing] (on file with author); Amended Nifong Bar Complaint, *supra* note 10, paras. 247-48, at 23.

117. Amended Nifong Bar Complaint, *supra* note 10, paras. 254-55, at 24.

not know that such evidence existed. Rather, he was examining the documents to understand the process that allowed the separation of male from female DNA on the false fingernail found in the bathroom trash can, which produced male DNA consistent with his client's DNA and the significance of that incomplete match. He testified that he found the exculpatory information by accident.<sup>118</sup>

On December 13, 2006, the defendants filed a motion to compel additional discovery related to the exculpatory DNA results, with Bannon's understanding of the exculpatory results carefully detailed in the motion.<sup>119</sup> At the hearing on that motion, Nifong made statements to the effect that this was the first time he had heard of this information, which appeared to be an assertion that he was previously unaware of the potentially exculpatory results or of their exclusion from the report.<sup>120</sup>

Nifong called Meehan to the stand and without asking any questions on direct, tendered him to the defense for cross-examination. At the end of the examination, first by Bannon and then by Jim Cooney, lead counsel for Seligmann, Meehan stated that he had been instructed by Nifong to omit those exculpatory results from the report.<sup>121</sup>

The complaint and the bar's findings set out five legal bases for Nifong's duty to disclose the DNA test results: (1) the requirements of the Nontestimonial Identification Statute, which requires the disclosure of all

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118. Videotape: Testimony of attorney Bradley Bannon (June 14, 2007), at BB3 0:00–6:00 (on file with author).

119. Amended Nifong Bar Complaint, *supra* note 10, paras. 260–62, at 25.

120. Amended Nifong Bar Order, *supra* note 8, para. 96, at 17 (concluding that Nifong represented one or the other of these points by his comments and that they were intentional misrepresentations); Amended Nifong Bar Complaint, *supra* note 10, para. 264, at 25. Nifong stated, “The first that I heard of this particular situation was when I was served with these reports—this motion on Wednesday of this week.” Transcript of December 15, 2006, Hearing at 14, *State v. Finnerty*, Nos. 06 CRS 4331-33, 06 CRS 4334-36, 06 CRS 5581-83 (N.C. Super. Ct. Dec. 15, 2006) [hereinafter Transcript of December 15, 2006, Hearing] (on file with author).

121. In his testimony at the December 15, 2006, hearing, Meehan stated that the failure to report was the result of an intentional decision by Meehan and Nifong not to report. *See* Transcript of December 15, 2006, Hearing, *supra* note 120, at 85 (“Q. . . . 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? A. Yes.”); *see also* Joseph Neff et al, *Lab Chief: Nifong Said Don't Report All DNA Data*, News & Observer (Raleigh, N.C.), Dec. 16, 2006, at 1A. Meehan softened that statement somewhat in his testimony before the Disciplinary Hearing Commission through widely varying testimony, which included contradictory versions. *See* Transcript of Testimony of Dr. Brian Meehan at 178, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) (on file with author) (“I tried to make that clear in my testimony on December 15th, and it wasn't heard . . . . Mr. Nifong never, never specifically requested that I include specific information or exclude specific information on this report, which was a [sic] interim report.”). The panel did not find that he requested Meehan to refrain from voluntarily giving relevant information to another party under Rule 3.4(f), likely because of that change in testimony. Williamson Statement, *supra* note 1, at 10.

results;<sup>122</sup> (2) the relatively new North Carolina open-file discovery law that requires memoranda to be prepared of witness interviews and the preparation and disclosure of expert witness reports;<sup>123</sup> (3) the June 22, 2006, discovery order; (4) the requirement under the U.S. Constitution to disclose exculpatory evidence; and (5) Ethical Rule 3.8(d), which requires immediate disclosure of evidence potentially favorable to the defendant.<sup>124</sup> The bar also charged Nifong with making intentionally false statements of material fact to the court and to the bar and alleged that his conduct involved dishonesty, fraud, deceit, or misrepresentation. The Disciplinary Hearing Commission panel found that Nifong committed most of the violations charged, finding violations of eight disciplinary rules.<sup>125</sup>

As to withholding the exculpatory DNA results, one of Nifong's arguments was that this could not have been purposeful since he turned over the underlying data, which contained that material. Although one cannot know why he did what he did, a couple of points provide an interesting basis for speculation. He did not turn over the massive amount of material, 1844 pages, to the defense until October 27, 2006, only ten days before election day. That timing meant that any discovery of the significance of the data and disclosure thereof would likely occur after election day. Moreover, as disciplinary hearing panel chair Williamson suggested in his questioning during closing argument, there was no certainty that the exculpatory result would ever be deciphered from the mass of data but for Brad Bannon's persistent efforts.<sup>126</sup> If purposeful, which it appears to have been, the decision may have been made with the hope that the case would be dismissed before disclosure or discovery occurred. I believe it is absolutely clear that no conviction could reasonably be expected from the incredibly weak evidence in this case. Thus, there would never be any reason for examination of his files on postconviction review. Indeed, if the case had made it to the hearing on the motion to suppress identification evidence, the reliability of the identification was so shaky that it would have been dismissed at that point.

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122. Amended Nifong Bar Complaint, *supra* note 10, para. 227, at 21 (citing N.C. Gen. Stat. § 15A-282 (2005)).

123. *Id.* (citing N.C. Gen. Stat. § 15A-903(a)(1) (covering oral statements) and N.C. Gen. Stat. § 15A-903(a)(2) (covering preparation and disclosure of expert reports)).

124. Amended Nifong Bar Complaint, *supra* note 10, charges (d)(i), at 30–31.

125. The panel found the DNA-related conduct and statements violated Rules 3.3(a)(1), 3.4(c), 3.4(d), 3.4(d)(3), 3.6(a), 3.8(d), 3.8(f), 4.1, 8.1(a), and 8.4(c) of the Revised Rules of Professional Conduct before and/or after the 2006 amendments. *See* Amended Nifong Bar Order, *supra* note 8, conclusions of law paras. (a)–(g), at 20–22. As noted earlier, the panel found that Nifong made numerous false and deceptive statements to opposing counsel, the court, and the bar grievance committee. *See supra* note 9. Finally, it found that his conduct separately, and as a pattern, violated Rule 8.4(d). Amended Nifong Bar Order, *supra* note 8, conclusions of law para. (h), at 22.

126. Videotape: Interchange between David B. Freedman and F. Lane Williamson (June 16, 2007), at 12:07–08 p.m. (on file with author).

### III. THE UNCHARGED ETHICS VIOLATION: THE FAILURE TO DO JUSTICE BY NIFONG'S INDICTMENT AND PROSECUTION OF THE INNOCENT

#### A. *The Prosecutor's Duty to Do or to Seek Justice*

A fundamental ethical duty of a prosecutor is described generally as a "duty to seek justice"<sup>127</sup> or "to 'do justice.'"<sup>128</sup> What this duty means in the myriad situations that arise in criminal cases is not clearly defined, and the duty would effectively be unenforceable as a rule of professional responsibility. However, as an aspirational statement and a moral guide for prosecutors, it is central to our conception of a public prosecutor.

One of the best-known articulations of this basic duty is found in *Berger v. United States*<sup>129</sup>:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>130</sup>

Within the *Berger* quotation and numerous others made over time by courts and commentators<sup>131</sup> are two themes: (1) a duty not to prosecute or convict

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127. Model Code of Prof'l Responsibility EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

128. See generally Zacharias, *supra* note 14, at 46.

129. 295 U.S. 78 (1935).

130. *Id.* at 88.

131. See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 613–18 (1999) (developing the historical outline of the prosecutor's special duty). Green cites among his sources a series of cases from Michigan. See, e.g., *People v. Cahoon*, 50 N.W. 384, 385 (Mich. 1891) (describing the public prosecutor as acting in a "quasi judicial capacity"); *Meister v. People*, 31 Mich. 99, 101–06 (1875) (contending that the duty of the public prosecutor is like that of the judge); *Wellar v. People*, 30 Mich. 16, 22–23 (1874) (noting the public prosecutor differs from a plaintiff's attorney in having a duty to protect the guilty as well as prosecute the guilty); *Hurd v. People*, 25 Mich. 405, 415–16 (1872) (including in the public prosecutor's duty both the obligation not to convict the innocent and, regardless of the strength of the prosecutor's belief in the guilt of the defendant, not to use improper means to achieve a conviction); see also George Sharswood, *An Essay: Professional Ethics* 92–94 (Fred B. Rothman & Co. 5th ed. 1993) (1884) (arguing that while defense attorneys are entitled to defend someone they believe to be guilty, prosecutors, who are given broad discretion, should be impartial and should never seek to convict any defendant known or believed to be innocent).

the innocent,<sup>132</sup> and (2) a duty to prosecute fairly those who are charged with a crime.

In turn, the basis for the public prosecutor's special duty is found in two propositions. One is the great power that the prosecutor commands as the representative of the sovereign, including the awesome power to bring criminal charges.<sup>133</sup> The other is that, as the representative of the sovereign, the prosecutor represents various constituencies. Although the prosecutor's greatest practical duty as a litigant is to the accuser, the prosecutor's duty also protects the public's interest, which includes the interest of all those charged with fair treatment, and he or she should particularly consider the interest of those who, although innocent, are charged. Obviously, the public is not served by prosecuting or convicting the innocent.<sup>134</sup>

However that duty is defined and whatever its precise origins, all agree that the prosecutor has a special duty not to prosecute the innocent.<sup>135</sup> Indeed, Doug Brocker, lead "prosecutor" for the North Carolina State Bar, began his closing argument by arguing that, as district attorney, Nifong "is a minister of justice and not simply an advocate" whose "most important duty and responsibility is to seek justice, not merely to convict" and that "this responsibility . . . is the most fundamental to our entire system of justice."<sup>136</sup> As is often the case, however, the devil is in the details, and

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132. Avoiding overly harsh sentences for the guilty is a component of this element of the special duty. *See* Green, *supra* note 131, at 637.

133. Zacharias, *supra* note 14, at 58–59 (giving emphasis to the "power" justification, stating "the fear of unfettered prosecutorial power is the impetus for the special ethical obligation"); *see also* Green, *supra* note 131, at 629–33 (noting that the argument that the special duty derives from the great power of the prosecutor is particularly persuasive as to the powers to bring criminal charges or use the grand jury that only prosecutors possess, but otherwise contesting "power" as the prime justification for the special ethical duty); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 408 (noting both power and constituency justifications).

134. *See* Green, *supra* note 131, at 633–37 (emphasizing the prosecutor's special role as representative of the sovereign, whose interest is in achieving justice); *see also* Hurd, 25 Mich. at 415 (making the specific argument that the "prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent"); Zacharias, *supra* note 14, at 57–58 (noting also the influence of the multiple constituencies argument).

135. *See* Green, *supra* note 131, at 634–35. As discussed later, I do not list it as the most fundamental duty. I agree that for a prosecutor to prosecute someone that he or she knows is innocent is the gravest violation. However, I do not believe the duty to avoid such prosecutions is more fundamental than the duty to prosecute those believed to be guilty fairly. This is because in most situations, the prosecutor cannot know the truth. Thus, if the prosecutor makes a personal judgment on the suspect's guilt before moving forward with the prosecution while conducting a good faith examination of the case, he or she acts only as a partial protector of justice. If a prosecutor concludes the defendant is guilty, he or she may be wrong. Thus, beyond their corrosive effect upon the justice system and the rule of law, using unfair methods to convict someone the prosecutor believes to be guilty may result in a miscarriage of justice.

136. Videotape: Argument of Douglas J. Brocker (June 16, 2007), at 9:11 a.m. (on file with author).

particularly the details of how that basic ethics precept is embodied in an enforceable rule.

Rule 3.8(a) of the North Carolina Revised Rules of Professional Conduct states that “[t]he prosecutor in a criminal case [shall] . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>137</sup> This provision is taken directly from the Model Rules and is identical to the rule in forty other states.<sup>138</sup> Only a few variations exist among the remaining nine states, three that are clarifying,<sup>139</sup> and the other six still using some variation of the very similar provision contained in the earlier Model Code.<sup>140</sup> Only a single jurisdiction, the District of Columbia, has a significantly different standard.<sup>141</sup>

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137. Revised Rules of Prof'l Conduct of the N.C. State Bar R. 3.8(a) (2007). The commands of this Rule are clearly “not the same thing as prohibiting a prosecution of someone whom the prosecutor believes to be innocent.” Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 Geo. Wash. L. Rev. 1, 40 (2005).

138. See Model Rules of Prof'l Conduct R. 3.8(a) (1983). The identical provisions are Ala. Rules of Prof'l Conduct R. 3.8(a) (2007); Alaska Rules of Prof'l Conduct R. 3.8(a) (2007); Ariz. Rules of Prof'l Conduct R. 3.8(a) (2003); Ark. Rules of Prof'l Conduct R. 3.8(a) (2005); Colo. Rules of Prof'l Conduct R. 3.8(a) (1997); Conn. Rules of Prof'l Conduct R. 3.8(1) (2007); Del. Lawyers' Rules of Prof'l Conduct R. 3.8(a) (2005); Fla. Rules of Prof'l Conduct R. 4-3.8(a) (1993); Ga. Rules of Prof'l Conduct R. 3.8(a) (2001); Idaho Rules of Prof'l Conduct R. 3.8(a) (2007); Ind. Rules of Prof'l Conduct R. 3.8(a) (2005); Kan. Rules of Prof'l Conduct R. 3.8(a) (2007); Ky. Rules of Prof'l Conduct R. 3.8(a) (1997); La. Rules of Prof'l Conduct R. 3.8(a) (2007); Md. Lawyers' Rules of Prof'l Conduct R. 3.8(a) (2005); Mass. Rules of Prof'l Conduct R. 3.8(a) (2007); Mich. Rules of Prof'l Conduct R. 3.8(a) (2004); Minn. Rules of Prof'l Conduct R. 3.8(a) (2005); Miss. Rules of Prof'l Conduct R. 3.8(a) (2007); Mo. Rules of Prof'l Conduct R. 4-3.8(a) (2007); Mont. Rules of Prof'l Conduct R. 3.8(a) (2007); Neb. Rules of Prof'l Conduct R. 3.8(a) (2007); Nev. Rules of Prof'l Conduct R. 3.8(a) (2006); N.H. Rules of Prof'l Conduct R. 3.8(a) (2006); N.J. Code of Prof'l Conduct R. 3.8(a) (2007); N.M. Rules of Prof'l Conduct R. 16-308(a) (2005); N.D. Rules of Prof'l Conduct R. 3.8(a) (1987); Okla. Rules of Prof'l Conduct R. 3.8(a) (1997); Or. Rules of Prof'l Conduct R. 3.8(a) (2006); Pa. Rules of Prof'l Conduct R. 3.8(a) (2007); R.I. Rules of Prof'l Conduct R. 3.8(a) (2005); S.C. Rules of Prof'l Conduct R. 3.8(a) (2004); S.D. Rules of Prof'l Conduct R. 3.8(a) (2001); Tenn. Rules of Prof'l Conduct R. 3.8(a) (2007); Tex. Disciplinary Rules of Prof'l Conduct R. 3.09(a) (2007); Utah Rules of Prof'l Conduct R. 3.8(a) (2006); Vt. Rules of Prof'l Conduct R. 3.8(a) (2007); Wash. Rules of Prof'l Conduct R. 3.8(a) (2007); W. Va. Rules of Prof'l Conduct R. 3.8(a) (2007); Wyo. Rules of Prof'l Conduct for Attorneys at Law R. 3.8(a) (2007).

139. The rule clarification, in effect in three states, applies to both instituting and maintaining charges. See Ohio Rules of Prof'l Conduct R. 3.8(a) (2007) (including the language “pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause”); Va. Rules of Prof'l Conduct R. 3.8(a) (2007) (including the language “not file or maintain a charge that the prosecutor knows is not supported by probable cause”); Wis. Rules of Prof'l Conduct for Attorneys R. 20:3.8(a) (2007) (“A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.”).

140. See Cal. Rules of Prof'l Conduct R. 5-110 (2005) (including the language “not institute or cause to be instituted criminal charges when the [prosecuting attorney] knows or should know that the charges are not supported by probable cause”); Haw. Rules of Prof'l Conduct R. 3.8(a) (2007) (including the language “not institute or cause to be instituted criminal charges when [the prosecuting attorney] knows or it is obvious that the charges are not supported by probable cause”); Ill. Rules of Prof'l Conduct R. 3.8(b) (2007) (including the language “not institute or cause to be instituted criminal charges when [the prosecuting

This generally followed standard is very limited indeed. First, it requires only that the prosecution be supported by probable cause. Second, it sets a very high standard on the mental element, imposing a duty to refrain from prosecuting only when the prosecutor “knows” that probable cause is lacking. Finally, it imposes no duty of thorough inquiry into the facts and no responsibility of independent investigation.<sup>142</sup>

Occasionally, standards other than probable cause<sup>143</sup> are suggested for the requisite support for guilt of the person to be charged and prosecuted. Two major alternatives are offered: sufficient evidence to support a conviction and the prosecutor’s personal belief in proof beyond a reasonable doubt.<sup>144</sup>

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attorney] knows or reasonably should know that the charges are not supported by probable cause”); Iowa Rules of Prof’l Conduct R. 32:3.8(a) (2005) (including the language “refrain from prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause”); Me. Code of Prof’l Responsibility R. 3.7(i)(1) (2007) (including the language “not institute or cause to be instituted criminal charges when the lawyer knows, or it is obvious, that the charges are not supported by probable cause”); N.Y. Code of Prof’l Responsibility DR 7-103 (2007) (including the language “not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause”). These provisions are variants on the ABA’s Model Code. See Model Code of Prof’l Responsibility Canon 7-103(A) (1969) (“A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.”).

141. District of Columbia R. 3.8(b) tracks the basic Model Rule provision with a small variation. It states that the prosecutor shall not “[f]ile in court or maintain a charge that the prosecutor knows is not supported by probable cause.” D.C. Rules of Prof’l Conduct R. 3.8(b) (2007). More significantly, Rule 3.8(c) states that the prosecutor shall not “[p]rosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt.” *Id.* R. 3.8(c).

142. Professor Green has noted in a more limited context the lack of an “obligation on prosecutors to ensure the truthfulness of their evidence beyond advocates’ ordinary duty to avoid knowingly offering false evidence.” Bruce A. Green, *Prosecutors’ Professional Independence: Reflections on Garcetti v. Ceballos*, *Crim. Just.*, Summer 2007, at 4, 7.

143. As Professor Uviller stated, “The standard of probable cause does not require exacting judgment from the prosecutor, for it does not entail great certainty concerning the underlying truth of the matter; ‘probable cause’ may be predicated on hearsay, and, indeed, does not even import a substantial likelihood of guilt.” H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 *Mich. L. Rev.* 1145, 1156 (1973).

Professor Fred Zacharias argues that rules, such as the prohibition in Rule 3.8(a) against pursuing charges that lack probable cause, involve areas of discretion and likely disagreement among reasonable observers. Thus, as to such rules, “so long as some evidence supports a criminal charge, observers typically disagree over the propriety . . . .” Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. Rev.* 721, 736 (2001).

144. Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 *Geo. J. Legal Ethics* 309, 337 (2001) (describing the source and nature of the prosecutor’s “duty to prejudge truth”); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 *U. Ill. L. Rev.* 1573, 1588–89 (describing the limited scope of the Model Rule 3.8(a) probable cause standard and noting alternatives).

The United States Attorneys’ Manual effectively adopts the first of the two alternative standards set out above. It mandates that a federal prosecutor should commence or



Although a few of the alternatives use an objective standard,<sup>145</sup> that is not the trend in the law, and the commentators who argue for a more vigorous protection for potentially innocent defendants do not advocate substituting an objective standard or modifying the knowledge requirement of the rule. Instead, in an apparent effort to set the aspirational duty at a high level—to emphasize the personal responsibility of the prosecutor—the suggestions typically state the prosecutor’s duty in subjective terms and emphasize the prosecutor’s moral judgment. For example, Professor Bennett Gershman argues for a very high standard, contending that “a responsible prosecutor should be morally certain that the defendant is guilty and that criminal punishment is appropriate.”<sup>146</sup> An often used, less demanding formulation is that the prosecution should not proceed as an ethical matter unless he or she is “personally convinced of the defendant’s guilt.”<sup>147</sup>

A third formulation, which requires the least of the prosecutor, introduces something of a responsibility of independent investigation as a partial constraint. Professor Richard Uviller argues that the prosecutor can prosecute a case without a personal belief in the guilt of the accused if the prosecutor determines that the jury could fairly find either way, letting the jury decide guilt or innocence.<sup>148</sup> Uviller, whose aspirational standard is the least demanding, would effectively require additional scrutiny through

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recommend prosecution only “if he/she believes that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.” See U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.220(A) (2007), [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.220](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.220).

The reason a trial-related burden is used in making the charging decision is explained by the comment to this section, which is captioned “Grounds for Commencing or Declining Prosecution.” The comment explains that, “both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.” *Id.* § 9-27.220(B) cmt. The U.S. Attorneys’ Manual is an important internal directive by the preeminent prosecutor’s office in the United States. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 St. Thomas L. Rev. 69, 77 (1995) (noting that for the most part the manual usefully addresses issues not covered by the ethics codes but does not generally have an external effect). It does not, however, affect externally enforceable ethics rules and, as noted earlier, only the District of Columbia imposes a standard related to the sufficiency of the evidence at trial for continuing the prosecution after the defendant has been charged. See *supra* note 141.

145. For example, the Model Code provision and the rules of the six states use that or a similar objective standard in addition to knowledge. See *supra* note 140. The later drafted Model Rules abandoned it. See Model Rules of Prof’l Conduct R. 3.8(a) (2007).

146. Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 Fordham Urb. L.J. 513, 524 (1993).

147. Gershman, *supra* note 144, at 338.

148. See Uviller, *supra* note 143, at 1159; see also Gershman, *supra* note 144, at 338–39. Professor Uviller has argued that, if the prosecutor, “from all he knows of the case, believes that there is a substantial likelihood that the defendant is innocent of the charge, he should, of course, not prosecute.” Uviller, *supra* note 143, at 1159. However, as Professor Gershman suggests, it is not clear that the evidence being in equipoise and the prosecutor harboring a substantial doubt are not incompatible, and therefore under Uviller’s standard the prosecutor might ethically decide to go forward. Gershman, *supra* note 144, at 339.

his practically oriented description of a prosecutor's proper perspective in deciding whether to charge the accused: the "mindset of the true skeptic, the inquisitive neutral."<sup>149</sup> The "alert prosecutor" will not automatically process what the police officer presents as ready for grand jury indictment or the filing of an information: "At the very least, the complainant should be interviewed first hand."<sup>150</sup>

By contrast, none of the adopted or proposed ethical standards imposes a requirement of investigation or inquiry to inform the prosecutor's judgment. Although on a somewhat different dimension, the ABA Prosecution Functions Standards would impose one additional duty at the charging stage: a prosecutor shall not "knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense."<sup>151</sup> Thus, it would require that in satisfying the formal burden of establishing probable cause to charge the defendant through the grand jury, the prosecutor provide the grand jury with information known to the prosecutor that would undercut that determination.

Without a duty of systematic inquiry and of independent evaluation of matters such as witness credibility that will sometimes require investigation, crafting an effective and enforceable rule for avoiding prosecution of the innocent would be impossible. The North Carolina Rule has no requirement of investigation, and as a result it does not mandate that the prosecutor's assessment of whether probable cause is lacking be based on a fair review of the evidence.

Such a duty of investigation might seem reasonable to impose, but it is practically unworkable as a general standard in criminal cases. The Duke lacrosse case is obviously atypical in a number of ways, but one of the most mundane of those is that it commanded substantial attention, energy, and resources from the police and prosecutors. It might be possible to impose a duty of inquiry, evaluation, and independent investigation on prosecutors in high profile cases. However, if the ethical rule applied across the board to all cases, which includes a multitude of misdemeanor and low-grade felony cases, a requirement of due diligence by the prosecutor would have a major impact on prosecutorial resources. Generally, the vast majority of criminal prosecutions are brought in state courts where resources for prosecutors are

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149. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695, 1704 (2000).

150. *Id.* at 1703.

151. Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-3.6(b) (3d ed. 1993). See generally Joy, *supra* note 133, at 419. In *United States v. Williams*, the Supreme Court held that the prosecutor had no duty even to present known exculpatory information to the grand jury as a matter of constitutional law. 504 U.S. 36, 44–45 (1992). Nevertheless, the U.S. Attorneys' Manual at that time required an obligation as a matter of policy to present "substantial evidence which directly negates the guilt of a subject." See Uviller, *supra* note 149, at 1706 n.21, 1710–11 (discussing the possibility of appellate reference of violations of the policy to the Office of Professional Responsibility for review).

stretched thin. The Duke lacrosse case is the extreme aberration in terms of attention and resources.

Many misdemeanor cases are tried by prosecutors meeting witnesses for the first time shortly before trial, often just before they take the stand. The time for independent evaluation is virtually nonexistent. Many of these cases are effectively evaluated only by the police officer who handled the investigation of the case, an investigation which is also frequently quite limited. Many felony prosecutions have only slightly more prosecutorial oversight. I am confident there is currently nothing close to a baseline of independent prosecutorial evaluation of credibility of all critical witnesses in all criminal cases. To impose it would require a massive increase in resources.

For policy reasons, we should aspire to far more in the most problematic cases—independent factual investigation by the prosecutor. The prosecutor's possible civil liability conflicts with this policy preference. Although civil suits against prosecutors are rare, they are most likely in extremely problematic cases, such as the Duke lacrosse case. On October 5, 2007, the three players filed suit against the City of Durham, various City officials and police officers, and Nifong.<sup>152</sup> Immunity from civil liability may turn on whether the challenged conduct was prosecutorial or investigative in nature. As to true prosecutorial duties, a prosecutor has absolute immunity. Although the line between prosecution and investigation is unclear, when the prosecutor becomes involved in precharge investigation, the immunity is potentially qualified.<sup>153</sup> The same is true for legal advice to the police about investigative practices.<sup>154</sup>

B. *Weakness of the Disciplinary Rule Based on the Duty to Seek Justice as Illustrated by the Duke Lacrosse Case*

Disciplinary proceedings against Nifong in the Duke lacrosse case demonstrate the weakness of the specific rule derived from the fundamental duty of the prosecutor to seek justice, and, under that duty, not to prosecute the innocent. As noted earlier, Doug Brocker, counsel for the North

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152. See Joseph Neff, *Duke Lacrosse Players File Civil Rights Suit*, News & Observer (Raleigh, N.C.), Oct. 5, 2007, at 1A (describing the 162-page civil complaint alleging sweeping violations of players' civil rights by Nifong, various Durham police officers and officials, and the DNA lab); Civil Complaint, *Evans v. City of Durham*, No. 07-739 (M.D.N.C. Oct. 5, 2007) [hereinafter *Nifong Civil Complaint*] (on file with author).

153. See *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (ruling that a prosecutor does not have absolute immunity for involvement in investigation to determine whether probable cause exists, which in that case concerned securing expert evidence that purported to find a match between the defendant's boot and a bloody print left at the murder scene). In the civil suit, Nifong is sued individually and, for example, with respect to the claims of conspiracy to violate civil rights, "in his official capacity with respect to Durham Police." *Nifong Civil Complaint*, *supra* note 152, at 118, 120, 122, 123.

154. See *Burns v. Reed*, 500 U.S. 478 (1991) (ruling that a prosecutor does not have absolute immunity in giving legal advice to the police, in a case which involved the propriety of hypnotizing a suspect).

Carolina State Bar, began his closing argument with the statement that the “most important duty and responsibility is to seek justice, not merely to convict,”<sup>155</sup> and much of the evidence presented by the bar in the disciplinary proceeding seemed directed to that issue.<sup>156</sup> Although charges were brought against Nifong under eleven disciplinary rules, no charge was based on Rule 3.8(a), which commands that the prosecutor is to refrain from prosecuting a charge known not to be supported by probable cause. The absence of the charge, of course, does not mean that it could not have been proven if lodged, but it is likely it would have failed.

If the charge could not be proven under the facts of the Duke lacrosse case, then we have strong evidence of the weakness of the standard as a basis for professional discipline. Again, this is not to diminish the importance of the ethical precept as central to the operation of our justice system or as a statement of an aspirational goal for prosecutors. Indeed, my judgment is that the tragedy of this case flows from Nifong’s basic failure to “do justice” at this fundamental level.

On April 17, 2006, when testimony was presented to the grand jury and the first indictments were returned against Seligmann and Finnerty, the investigation had developed evidence, most of which Nifong was shown to have personally known: (1) the accusing witness, Crystal Mangum, had made a number of inconsistent statements about the event;<sup>157</sup> (2) her medical records showed that she had a history of serious mental health problems, including a diagnosis that she suffered from bipolar disorder;<sup>158</sup> (3) at least three players had given statements to the police that the complainant’s version was wildly inconsistent with the facts and that none of the men at the party had provided statements indicating an assault

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155. Videotape: Argument of Douglas J. Brocker (June 16, 2007), at 9:11 a.m. (on file with author).

156. See, e.g., Testimony of Benjamin Himan at 62–66, 97–106, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Himan Transcript] (on file with author) (describing Nifong’s statement, “You know, we’re f - - ked,” when first briefed about the case regarding its weaknesses and Himan’s own misgivings about indicting Seligmann, and [Himan’s] personal efforts to contact players’ attorneys to try to avoid an erroneous indictment); Amended Nifong Bar Order, *supra* note 8, paras. 14, 15, at 3 (describing weaknesses of the case discussed with Nifong along with the “we’re f - - ked” comment and the assessment that the case would be very hard to win in court); see also Anne Blythe & Sarah Ovaska, *Nifong Had Doubts, Witness Says*, News & Observer (Raleigh, N.C.), June 13, 2007, at 1A.

157. Amended Nifong Bar Order, *supra* note 8, para. 14, at 3 (noting weaknesses told to Nifong at his initial briefing by the investigating officers, which included the accuser’s inconsistent statements and changes in story, the fact that the other dancer disputed the story of the alleged attack, and the cooperation by the three team captains and their denial that an attack occurred).

158. See Craig Jarvis, *Mangum’s Life: Conflict, Contradictions; Accuser Struggled with Mental Illness, Alcohol*, News & Observer (Raleigh, N.C.), Apr. 13, 2007, at 1A (describing a variety of contacts with mental health facilities and frequent bizarre behavior); Himan Transcript, *supra* note 156, at 66–69, 229 (describing University of North Carolina hospital records that showed her bipolar diagnosis and long psychological history and indicating that Himan kept Nifong informed about such information as he gathered it).

occurred; (4) no DNA evidence recovered from the rape kit matched any of the players; (5) although no blood, saliva, or semen was present, DNA from males other than the players (the players had been excluded as possible sources of this male DNA) was found on items from the rape kit, and apparently semen from the victim's boyfriend that was likely several days old was found there; (6) the other exotic dancer had made one statement that the accuser's statement was "a crock"—that the rape event did not happen; (7) the accuser had failed to identify Seligmann as a perpetrator at the first identification procedure on March 16, 2006, identifying him merely as someone who had been at the party; and (8) the accuser had a criminal conviction history. By May 15, 2006, when evidence was presented to the grand jury and an indictment was returned against Evans, the prosecutor had received rather substantial digital evidence that demonstrated Seligmann had a strong alibi, which did not go directly to Evans's guilt, but it did undercut the accuracy of the accuser's earlier identification of another defendant and thereby suggested her unreliability.

In support of the charges, Nifong had (1) a finding by the examining doctor during the initial medical examination on March 14, 2006, of some vaginal swelling, and the SANE nurse's perception that the accuser's conduct was consistent with sexual victimization; (2) the accuser's April 4, 2006, "certain" identification of Seligmann and Finnerty and ninety percent certain identification of Evans;<sup>159</sup> and (3) a partial DNA match of Dave Evans's DNA with DNA on Mangum's fake fingernail found in the trash can of the bathroom where she said the rape occurred.

During his testimony before the Disciplinary Hearing Commission, Nifong did not deny that he had a duty of independent evaluation in cases he prosecuted. He made no admission with respect to a need to speak with the accusing witness; indeed, he had not spoken with Mangum until January, after his decision to recuse himself. Nor did he acknowledge an obligation to meet with defense counsel or their clients to evaluate their defense. However, he claimed that he operated under the policy that he had to be "personally persuaded" of the defendants' guilt in order to go forward, and claimed that he was.<sup>160</sup> He was not asked about and did not address the probable cause standard.<sup>161</sup>

In terms of an evaluation of the evidence, he explained that despite all the contrary evidence, the testimony of the complaining witness that a rape took place would be sufficient to get the case to the jury. He rested his belief in the charge on the assessments of Officer Himan and Sergeant

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159. As discussed in Part III, the significance of these identifications was badly undercut by the fact that they were made from a group of forty-six photographs that Sergeant Gottlieb told Mangum contained those the police believed were at the party.

160. See Nifong Transcript, *supra* note 45, at 196; see also *id.* at 304 (testifying that he personally believed the rape occurred based on views of Himan, Gottlieb, and Leyn).

161. *Id.* at 304.

Gottlieb, who had interviewed Mangum,<sup>162</sup> and the examining nurse, who completed the rape kit, that the accuser was credible. He generally explained away the inconsistent versions of the story given by the accuser on the basis of her postrape trauma or interviewer ineptitude or error.<sup>163</sup>

In jurisdictions with grand juries, the standard of knowledge that probable cause is lacking would be difficult to establish conceptually as to the evidence actually presented to a grand jury that indicted the defendant. The probable cause standard should be met by the judgment of that body, which is given the responsibility to make the charging decision. Of course, reliance on the indictment is not apt if the grand jury was not presented with evidence that the prosecutor knows undercuts probable cause.

North Carolina grand juries are very different from the better-known federal grand juries. Except when authorized by a three-judge panel for the prosecution of drug distribution or continuing criminal enterprises,<sup>164</sup> North Carolina grand jury proceedings are not transcribed and the prosecutor cannot attend and examine witnesses.<sup>165</sup>

Thus, disciplining Nifong for a lack of probable cause would have been particularly difficult in North Carolina because what was or was not presented at the grand jury is legally unknowable, and both Nifong and Investigator Himan testified that the prosecutor had given no instructions on what to say or not say to the grand jury. The grand jury returned a true bill,

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162. Nifong acknowledged that Sergeant John C. Shelton, who had early contact with the accuser, did not believe her allegations of rape. *See id.* at 170.

163. *See id.* at 143–45 (describing his perception of her trauma when first meeting Mangum); *id.* at 150–52 (discussing the interviewer misunderstanding and error).

164. N.C. Gen. Stat. § 15A-622(h) (2005) (providing special grand jury proceedings upon the authorization of a panel of three judges for violations of N.C. Gen. Stat. § 90-95(h) (drug distribution) and N.C. Gen. Stat. § 90-95.1 (continuing criminal enterprise)).

165. N.C. Gen. Stat. § 15A-623(h) (authorizing in special grand jury proceedings for a prosecutor to be present to examine witnesses and a court reporter to transcribe the proceedings). This means that in a rape case, such as the Duke lacrosse case, a North Carolina prosecutor is not allowed to be present in the grand jury and does not question witnesses there. The statute does not permit a court reporter to be present to transcribe the proceedings. *See* N.C. Gen. Stat. § 15A-623(d). Moreover, all those who appear before the grand jury, including witnesses, are prohibited from revealing “anything which transpires during any of its sessions.” N.C. Gen. Stat. § 15A-623(e). In Nifong’s disciplinary hearing, the chair asked Investigator Himan what he said, in general terms, to the grand jury. Himan’s attorney stopped the examination, informing Williamson that Himan could not answer without violating the statute. Himan Testimony, *supra* note 156, at 222 (“Other than saying he told the truth as he knew it, he can’t say anything else.”). The U.S. Supreme Court has ruled that a state may not, under the First Amendment, prohibit a witness from voluntarily revealing what he or she said before the grand jury after the grand jury’s term has expired. *See* *Butterworth v. Smith*, 494 U.S. 624 (1990). Given that Himan did not assert his First Amendment interest in divulging the information, the issue does not appear to be answered by *Butterworth*.

It is difficult to take a commitment not to prosecute the innocent very seriously when all that is required is probable cause and the probable cause finding comes in the form of the “rubber stamp” of a grand jury indictment. Taking the commitment seriously is particularly difficult under the North Carolina formulation of the grand jury, which makes determining the inadequacy of an indictment difficult if not impossible.

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indicating that probable cause existed as a matter of law. Of course, information that the prosecutor learned that was unavailable to any witness appearing before the grand jury would be fair game for a contrary argument, but establishing what he knew that the investigating officer, who testified, did not know would be difficult.

Yet, based on what Nifong knew, it is difficult to understand how he could have formed an independent belief in the players' guilt. The attorney general's lengthy list of reasons to question the accuser's version of events makes objectively based belief in guilt quite difficult. Indeed, it appears that the attorney general's report makes an effort to avoid overstatement and thus may be modest in its presentation. When one examines the mass of questions regarding the accuser's reliability presented by the defendants' motions to suppress identification, objective belief in guilt becomes even less supportable.

For example, here is an advocate's construction of the initial conflicts in statements by the accuser:

Within the first 36 hours of the events in this case, the accuser denied being raped, claimed she was raped by 20 men, then 5 men, then 2 men and then 3 men, claimed that she was carried against her will from a car by Nikki and "Brett," claimed that she was dancing with three other women, multiple other women and then only one other woman, denied ever being struck with fists, claimed that Matt was getting married, told the forensic nurse that Matt raped her vaginally and orally, that Adam raped her anally, and did not mention Brett raping her, while telling other personnel that Brett raped her vaginally without mentioning either Matt or Adam.<sup>166</sup>

Thus, the reasonableness of any belief Nifong might claim in guilt is hard to accept, but he claimed it. He claims to have been "personally persuaded" of guilt upon the assessment by experienced professionals in the credibility of the accuser's story of rape.<sup>167</sup> I have found no extant rule that allows effective challenge to the subjective claim of belief in guilt that evidence shows to be objectively unsupported. However, the standard is even more forgiving—in order to have violated Rule 3.8(a), Nifong had to know that probable cause did not exist. I doubt that proof of a violation of the ethics rule under that standard could have been sustained. My central point is that, if I am even arguably correct on these facts, the standard has virtually no practical impact as a source of potential discipline.

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166. Motion to Suppress the Alleged "Identification" of the Defendants by the Accuser, para. 16, at 7, *State v. Seligmann*, Nos. 06 CRS 4334-36, 06 CRS 4331-33, 06 CRS 5581-83 (N.C. Super. Ct. Dec. 14, 2006) [hereinafter Motion to Suppress Identification] (on file with author) (describing the multiple and varying descriptions given by Mangum during the first thirty-six hours after the alleged rape).

167. See Nifong Transcript, *supra* note 45, at 196 (testifying that his standard for prosecution is being "personally persuaded" of guilt); *id.* at 304 (testifying that he personally believed a rape occurred based on the opinions of Himan and Gottlieb and through them the opinion of the SANE nurse).

C. *A More Realistic but Still Practically Unenforceable Duty of Skeptical Evaluation in Appropriate Cases—And Nifong's Failing Performance*

Professor Richard Uviller believed that the effective standard for prosecution allowed a prosecutor to move forward with a case where the evidence was in equipoise. However, he argued that in evaluating the case, the prosecutor should examine it with “the mindset of the true skeptic, the inquisitive neutral.”<sup>168</sup> That is a very modest standard, and like the other standards, it is unenforceable but still an essential part of a fair justice system. It is a responsibility that Nifong failed miserably to fulfill.

A prosecutor should have no duty to listen to all defense evidence nor to interview every important witness or even every complaining witness in every case. However, he or she should have that moral and ethical duty to do so in appropriate cases. The responsibility to exercise careful judgment binds those to whom our justice system gives such power and such discretion.

Not the least in this group of “appropriate cases” are those where the actual prospect of an unjust prosecution is brought to the attention of the prosecutor. That Nifong knew no probable cause existed in this case is not clearly established. However, that he had abundant notice of the problematic nature of the case is undeniable.

The accusing witness in the case was a witness with enormous, obvious flaws. She was known to have a criminal and mental health history. She had given wildly conflicting statements to various individuals during the first thirty-six hours after the alleged incident, as described above. Physical evidence of trauma supported the charge, but it was ambiguous evidence at best. The men who resided at the house all stated that absolutely no sexual activity took place, and their description of the events left no possible time for it to have occurred. All this was known to the prosecutor. Nifong was thus on notice that there was a real possibility that no crime occurred—the possibility that the allegations of a sexual assault was a hoax or a delusion.

Nifong may have believed the accuser initially and may have had an admirable instinct not to abandon the prosecution simply because charges would be difficult to prove with such a compromised accuser—exotic dancers with criminal histories can be raped and deserve a prosecutor's best effort at securing justice.<sup>169</sup> Thus, absent the publicity campaign, pursuing the investigation further cannot be faulted. However, soon after Nifong became involved, chances for concrete corroboration began to disappear. After the order for nontestimonial evidence was executed, for example, the police knew that none of the Duke lacrosse players had incriminating

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168. Uviller, *supra* note 149, at 1704.

169. After asserting that Nifong believed a crime had occurred at the party, David Freedman argued in his opening statement before the Disciplinary Hearing Commission, “It is not unethical to pursue what someone may believe may be an unwinnable case.” Blythe & Ovaska, *supra* note 156; *see also* Videotape: Opening Argument of David B. Freedman (June 12, 2007), at FO min. 1:14 (on file with author).



scratches on their bodies. Before Nifong's conversation on March 30, 2006, with the SBI lab technician and before he learned of the initial negative results on the rape kit items, he may reasonably have believed there was a good possibility that DNA evidence would show that a crime took place. Any DNA from the players linked to sexual activity with Mangum would have changed everything. It would have proven that the players' overall version of events was a fabrication and provided an identification of those involved. A noncriminal explanation for sexual activity would have been possible, but a difficult "about face" would have been required to establish the defense of consent after the initial claim that no sexual activity whatsoever occurred.

However, after his conversation with the SBI lab technician, the prospect of strong proof of guilt through DNA virtually disappeared. The SBI lab found no sperm or semen and would not send the rape kit items for DNA processing.<sup>170</sup> Some hope existed for significant incriminating results from the items recovered in the search of the house at 610 North Buchanan, and perhaps more sophisticated testing could reveal DNA associated with the defendants on some significant evidence item, but initial SBI testing gave no reason to believe such evidence would be found.

Accordingly, a hoax or delusion had not been ruled out, and at what is usually a more mundane level, the case was going to turn largely on Mangum's identifications of the attackers. Indeed, during his testimony in his subsequent trial on criminal contempt charges, Nifong said as much. He acknowledged that after he talked with Jennifer Leyn he concluded, "This had been a non-ejaculatory event . . . There was no semen left during the course of the assault . . . in which case it would become an eyewitness case."<sup>171</sup>

Eyewitness identifications, which are critically important to prosecutions, are sometimes inaccurate and are a notorious source of unjust convictions.<sup>172</sup> In most cases, however, eyewitness identification evidence does not stand alone; it is corroborated by other evidence. The problems

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170. See Leyn Testimony, *supra* note 96, at 9–11 (describing the March 30, 2006, telephone conversation with Nifong in which SBI told him the rape kit items would not be submitted for DNA testing because no sperm or semen was found); Phone Logs of Conference Call on March 30, 2006, between SBI Technicians and Nifong, *supra* note 96, at 102; Nifong Deposition, *supra* note 96, at 188–90.

171. Ann Blythe & Joseph Neff, *Nifong Gets 24 Hours in Jail for Contempt*, News & Observer (Raleigh, N.C.), Sept. 1, 2007, at 1A.

172. A frequently quoted observation from the U.S. Supreme Court is that "the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Compare Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 Ind. L. Rev. 271, 271 (2007) (observing that, "[b]y most accounts," mistaken identification is the leading cause of unjust convictions in the United States), with Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 Am. Crim. L. Rev. 1, 1–4 (2007) (describing the widespread claim among practitioners that eyewitness identification is the single largest cause of false convictions, but generally arguing that erroneous testimony as to conversations is likely a larger cause).

typically occur when that corroboration is ambiguous. I cannot say what Nifong knew, but my experience as a defense attorney with the Washington, D.C., Public Defender Services was that everyone in the criminal justice system—prosecutors, judges, and defense counsel—understood the extraordinary dangers posed by a one-witness identification without clear corroboration.

Many times the identification procedure will occur when the prosecutor has no control in setting up the procedures. In other situations, a prosecutor might assume he or she has solid, independent corroboration and therefore does not worry greatly about an upcoming identification procedure.<sup>173</sup>

The description of the lack of independent evidence of guilt set out above is a prelude to the discussion in the next part of the identification procedures that resulted in the indictments of the defendants. My contention is that Nifong's organization of the identification procedure and use of the evidence developed in it constituted a failure of his duty to do justice. On March 30, 2006, Nifong was informed by the SBI that DNA evidence on the rape kit did not reveal the presence of saliva, blood, or semen. He then knew it was likely he would get no solidly incriminating scientific evidence. The next day, Nifong directed the police on how to perform the identification procedures.

As of that date, Nifong knew the basic point that the police had already shown the accuser thirty-six of the forty-six Caucasian lacrosse players,<sup>174</sup> and she had picked no one. As a matter of chance, since she had seen over two-thirds of the players, she should have seen two of the attackers, and indeed, she ultimately identified two whose photos she had already viewed.<sup>175</sup> Any identification procedure at this point was likely problematic, but Nifong directed the police to put the forty-six photos of the

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173. Often, even if corroboration does not presently exist, it might be forthcoming. The police often do not know when they conduct a showup shortly after a crime occurred, or when they put together a less than ideal photographic array to get an arrest warrant, that other solid evidence of guilt will not be found. For example, physical evidence linking the defendant to the crime may be discovered on his person or in his home; some forensic evidence, such as fingerprints, may be produced; he may confess to the police; and while not ideal corroboration, he may make an incriminating admission to a jailhouse informant.

174. See Deposition of Mark D. Gottlieb at 118, 128–29, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) [hereinafter Sgt. Gottlieb Deposition] (on file with author) (stating that Nifong knew that arrays A through F had been shown and no one had been picked); Nifong Transcript, *supra* note 45, at 45–46 (acknowledging that he knew that a number of arrays of photos had been shown and that Mangum had picked no one as her attacker, but that he was uncertain as to how many arrays or photos had been displayed). In fact, none of the suspects or “fillers” were repeated, so Mangum had been shown thirty-six separate players. Durham Police Dep't Sequential Photographic Identification at array A–F, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007). It is unclear whether Nifong knew that no picture was repeated, but he clearly knew that a substantial majority of the players on the team had been displayed without Mangum making any selection.

175. She viewed a photograph of Seligmann on March 16, 2006, and a photograph of Evans on March 21, 2006.

players “into a group,” show them to the accuser, and “see if she recalled seeing the individuals at the party.”<sup>176</sup>

A prosecutor with “a mindset of the true skeptic, the inquisitive neutral” would not have organized the procedure that was utilized. Regardless of whether it was suggestive, it provided the investigation with no real test of the accuracy of the accuser’s identification. Furthermore, it did nothing to rule out a hoax or delusion. Indeed, it enabled the hoax or delusion to proceed.<sup>177</sup>

The facts show that the “do justice” precept was violated in the most fundamental way in this case, and our ethical rules to enforce it are completely inadequate. The next section shows that, in the main, the constitutional doctrines constraining suggestive identifications are a mismatch for the true injustice that occurred in the Duke lacrosse case and are so toothless that they offer no protection except in the truly extraordinary case. The critical importance of the “do justice” concept and its unenforceability, as illustrated by this case, should move us to implement enforceable rules for identification that speak to reducing erroneous identifications.

#### IV. PROSECUTOR’S DUTY TO DO JUSTICE AND IDENTIFICATION PROCEDURES IN THE DUKE LACROSSE CASE

The final identification procedure used in the Duke lacrosse case is rightfully subject to criticism. It was outrageous. However, the most powerful criticism requires a careful dissection of the facts.

##### A. *Analyzing a Counterfactual Situation*

The constitutional doctrine that covers identification evidence under the Due Process Clause is largely a mismatch for the Duke lacrosse case because it is designed to prevent suggestive police procedures from creating irreparable mistaken identification. That doctrine is predicated on the premise that a crime occurred and that the victim’s memory of it is subject

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176. Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 8 (describing Nifong’s instructions on March 31, 2006, for conduct of identification procedure).

177. As discussed further below, it is fortunate that the police were inaccurate in their statement that the pictures were of those at the party. Some of those in the forty-six photographs were not at the party, and although Nifong ignored the information, it helped show that the accuser was inaccurate. For example, Mangum stated both during the March 16, 2006, and the April 4, 2006, identification procedures that she recognized one player (Brad Ross) as being at the party. However, he was in Raleigh on that evening. Motion to Suppress Identification, *supra* note 166, para. 39, at 12 (indicating photo numbers selected on March 16, 2006); *id.* (stating he was at the party and was seen talking to the other dancer); Letter from Robert C. Ekstrand, Attorney, to Michael B. Nifong (Apr. 6, 2006), N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Ekstrand Letter to Nifong] (on file with author) (providing documentation of presence in Raleigh).

to distortion by police procedures. Those are assumptions that are counterfactual to this case.

We now know that there was no rape. It was therefore impossible for the police to conduct procedures to create an irreparable mistaken identification; there was no identification to be made. The accused has no true image of her attackers in her mind that could be distorted by police procedures so that the image shown by the police replaces the true image. If this was a hoax rather than a delusion, Mangum was selecting people to accuse falsely. None of the U.S. Supreme Court case law remotely addresses such a situation. The established doctrine can provide some aid if the procedures are extremely ineptly conducted or if, as in this case, factors indicating the witness's reliability are absent, but the doctrine is designed to fit facts that are fundamentally counterfactual to those here.

Why Mangum had so much difficulty making the bogus<sup>178</sup> identification is something of a mystery on the facts as we now understand them. All agree that she and a number of Duke lacrosse players were at the party together on March 13 to 14, 2006. Thus, in terms of picking out three men to accuse, she should have been able to do so relatively easily since she had been there and had conversations with several players. Despite the fact she had seen many of their faces, she did not make identifications of anyone until the third time she looked at photographs. Why this is the case, we will likely never know. Perhaps her memory of the night was badly distorted by alcohol or drugs. She misidentified the player who made the broomstick comment, which all agreed was made.<sup>179</sup> Perhaps she was ready to allege a false assault generally but reticent to accuse any particular person.

Perhaps rather than a hoax, she was delusional, as suggested by the attorney general's comments. As a layman with regard to mental abnormalities, I have no way to know whether delusions generally or Mangum's likely delusion was particularly susceptible or particularly impervious to suggestion. Although for different reasons than for a hoax, the due process identification suppression doctrine is not tailored to control the formulation of a delusional memory or designed to ensure that a delusional witness is revealed.

#### B. *The General Dimensions and Woeful Inadequacy of Due Process Identification Doctrine*

The constitutional doctrine generally applicable to identification procedures focuses on suggestive identification procedures; it is housed in the Due Process Clause of the Fifth and Fourteenth Amendments. This

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178. I use the term "bogus" rather than "false" because "false identification" is often used to describe misidentifications by real victims.

179. Motion to Suppress Identification, *supra* note 166, para. 78(f), at 19. Mangum identified another person as the source of the broomstick comment. She thought the person who investigators had identified as having made the comment had been sitting in the kitchen making a drink. *Id.*

doctrine provides extremely weak protection. It focuses on police misconduct that suggests to the crime victim or witness which suspect to pick. The chief impermissible agent is the suggestiveness of the procedure used by the police to indicate to the witness which suspect or suspects to select.

As will be discussed in Part IV.D, aspects of the Duke lacrosse case identification procedure were suggestive. However, the most troubling failing, which is likely the source of critics' intuitive sense of unfairness, was the failure of those procedures to meaningfully separate an accurate identification from an inaccurate one and to guard against giving a nonvictim the opportunity to perpetuate a hoax or to proceed with a prosecution based on a delusional belief of guilt.

The due process doctrine is largely a mismatch for that problem. Its focus is instead on preventing the police from purposefully or inadvertently suggesting to a willing but honest victim or witness of a real crime that a particular individual should be picked. The law's test has in mind the accepted psychological process whereby a true but imperfect human memory of a stranger's face is replaced by another image seen during identification procedures that the victim/witness subsequently believes is genuine.

#### 1. The Due Process Doctrine Against Impermissibly Suggestive Identification Procedures

The due process doctrine was born in 1967 with *Stovall v. Denno*.<sup>180</sup> There the Court recognized a basis for attacking an identification separate from the ground it announced in *United States v. Wade*.<sup>181</sup> In *Stovall*, which involved admission of testimony regarding an out-of-court identification as well as an in-court identification,<sup>182</sup> the Court recognized that an identification should be suppressed if the confrontation with the witness was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."<sup>183</sup> However, while it recognized the doctrine, the *Stovall* Court applied it under a totality of the circumstances test and denied relief even though the procedure was clearly suggestive.

Theodore Stovall was presented to the victim while handcuffed to one of five police officers who brought him into the victim's hospital room. Moreover, the Court noted that he was "the only Negro in the room."<sup>184</sup> Despite the suggestiveness of the procedure, the Court denied relief because

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180. 388 U.S. 293 (1967).

181. 388 U.S. 218 (1967) (finding a Sixth Amendment right to counsel at lineups); *see also* *Gilbert v. California*, 388 U.S. 263 (1967) (developing some dimensions and recognizing some limitations of the Sixth Amendment right).

182. *Stovall*, 388 U.S. at 296.

183. *Id.* at 301–02.

184. *Id.* at 295.

it concluded that conducting the identification procedure quickly was imperative. The victim was the only person who could identify the perpetrator and, having received eleven stab wounds during the assault that had killed her husband,<sup>185</sup> no one knew how long she would live. Under these circumstances, arranging a lineup at the police station was not feasible,<sup>186</sup> and under the totality of the circumstances, the identification was found to be constitutionally proper.<sup>187</sup>

The next year, the Supreme Court decided *Simmons v. United States*, which involved only the admission of in-court identifications.<sup>188</sup> In *Simmons*, Federal Bureau of Investigation agents obtained a number of snapshots of Thomas Simmons and another man, William Andrews, the day following a bank robbery. Later that same day they showed six pictures “consisting mostly of group photographs of Andrews, Simmons, and others” separately to five bank employees.<sup>189</sup> Pictures of Simmons and Andrews each appeared several times in the series.<sup>190</sup> Each of the witnesses identified Simmons and no one identified Andrews.<sup>191</sup> The Court noted that the chance of mistaken identification increases if the picture of a single individual recurs,<sup>192</sup> and it found the identification procedure to have fallen “short of the ideal” in that it would have been preferable for there to have been “proportionally fewer pictures of Simmons” among the photos shown.<sup>193</sup> The Court nevertheless found that the identification procedure used did not violate due process, which it articulated as requiring exclusion of the in-court identification “only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”<sup>194</sup>

The standard articulated was almost the same as in *Stovall* but changed the degree of linkage between suggestiveness and irreparable mistaken identification from “conducive to” in *Stovall* to “as to give rise to a very substantial likelihood of” in *Simmons*.<sup>195</sup> The Court listed a number of

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185. *Id.*

186. *Id.* at 302.

187. *Id.*

188. *Simmons v. United States*, 390 U.S. 377, 381 (1968).

189. *Id.* at 382.

190. *Id.* at 385.

191. *Id.*

192. *Id.* at 383 (citing Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* (1965)).

193. *Id.* at 386 n.6 (citing Wall, *supra* note 192; Williams, *Identification Parades*, 1955 *Crim. L. Rev.* 525 (1955)).

194. *Id.* at 384.

195. This subtle shift effectively provided the foundation for a systemic restriction of the doctrine later in *Manson v. Brathwaite*, 432 U.S. 98 (1977). Lower courts for a time explained the more exacting *Simmons* standard based on its consideration of only an in-court identification, which involved at least a determination of whether such identification rested on an independent source and thus included reliability factors. *See, e.g.*, *Brathwaite v. Manson*, 527 F.2d 363, 370–71 (2d Cir. 1975), *rev'd*, *Manson v. Brathwaite*, 432 U.S. 98 (1977).

factors, such as the opportunity of the witnesses to view the suspects in a well-lit bank for five minutes, the certainty of the five witnesses, the fact pictures were shown to the witnesses separately, and the freshness of their memories, which the Court stated “leave little room for doubt that the identification of Simmons was correct.”<sup>196</sup>

In 1969, the Court decided *Foster v. California*,<sup>197</sup> the only case in which it excluded an identification based on due process. Walter Foster was charged with armed robbery. After he was arrested, the lone witness to the robbery was called to the police station to view a lineup, which consisted of three men.<sup>198</sup> The Court stated that Foster “stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber.”<sup>199</sup> After viewing this suggestive lineup, the witness could not positively identify the robber but “thought” Foster was the man.<sup>200</sup>

As the Court stated,

When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. . . . Even after this the witness’ identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. . . . This finally produced a definite identification.

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact “the man.” In effect, the police repeatedly said to the witness, “This is the man.” . . . This procedure so undermined the reliability of the eyewitness identification as to violate due process.<sup>201</sup>

*Foster* does not tell us anything about the quality of the witness’s opportunity to observe, but its suggestiveness is rather outrageous. As noted earlier, *Foster* is the only case where the Supreme Court has suppressed an identification on this theory. It is thus the high-water mark of due process suppression in the Supreme Court, and its extreme character has not been helpful. One article written not long after *Foster* noted that thus far the “courts’ performance has been very disappointing” in suppressing suggestive identifications with only the “most flagrantly unfair procedures” invalidated and observed that “courts generally have displayed a marked unwillingness to condemn any procedure where the suggestion

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196. *Simmons*, 390 U.S. at 385.

197. 394 U.S. 440 (1969).

198. *Id.* at 441.

199. *Id.* at 443. The Court described Walter Foster as a relatively tall man—close to six feet in height—whereas the other two were short—five feet five or five feet six inches tall. *Id.* at 441.

200. *Id.*

201. *Id.* at 443 (emphasis added).

was any less blatant than” in *Foster*.<sup>202</sup> That observation seems accurate as well today.<sup>203</sup>

The subsequent Supreme Court cases have, if anything, made the prospects for exclusion even worse. *Neil v. Biggers*<sup>204</sup> and *Manson v. Brathwaite*,<sup>205</sup> decided more than thirty years ago, ended the development of the law.<sup>206</sup> In both, the identification procedures were extremely suggestive and in neither was conducting such procedures necessary. In *Biggers*, approximately seven months after the victim was raped, the police called her to the police station where she viewed the defendant presented alone. There was some justification for the failure to arrange a multiperson lineup in that the police expressed a difficulty in finding others who generally fit his “unusual physical description.”<sup>207</sup> However, because *Biggers* was being held on other charges, there was no urgent need for quick action as in *Stovall*, and the district court found that the use of the less reliable showup was unnecessary.<sup>208</sup>

In *Brathwaite*, the witness was an undercover officer who had bought drugs through a door that had been opened approximately twelve to eighteen inches.<sup>209</sup> In response to the undercover officer’s description, another officer obtained a photograph of the defendant from police records and left that single picture on the undercover officer’s desk. The undercover officer viewed the photograph alone when he returned to his office two days after the purchase and identified the defendant as the drug seller.<sup>210</sup> The state agreed that the procedures in the case were suggestive because only one photograph was shown and unnecessary because there was no emergency or exigent circumstances.<sup>211</sup>

Because the *Biggers* identification procedures and trial had occurred before *Stovall* was decided, it might have been based on less exacting doctrines, as the police lacked notice that suggestiveness was

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202. Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. Pa. L. Rev. 1079, 1126–27 (1973).

203. See generally Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109, 126–32 (2006) (describing the lax state of contemporary enforcement of the due process suggestiveness doctrine under *Brathwaite*).

204. 409 U.S. 188 (1972).

205. 432 U.S. 98 (1977).

206. *Watkins v. Sowders*, 449 U.S. 341 (1981), is technically the Court’s last word on due process suggestiveness. It dealt only with a procedural issue, but made the law worse. It ruled that the identification suppression issue need not be conducted as a separate hearing outside the presence of the jury, as required for confession suppression, rather than in the trial itself. *Id.* at 346–49.

207. *Biggers*, 409 U.S. at 195.

208. *Id.* at 198–99. A showup generally involves the display of the suspect or suspects without others to the witness, as was done in *Biggers* by two detectives walking the suspect past the victim, who had been called to the police station for the purpose of viewing the suspect. *Id.* at 195.

209. *Brathwaite*, 432 U.S. at 100.

210. *Id.* at 101.

211. *Id.* at 110.



constitutionally problematic at the time the identification procedure was conducted. By contrast, *Brathwaite* was a post-*Stovall* case, and thus in a different procedural posture, and further it involved both out-of-court identification evidence and an in-court identification.<sup>212</sup> *Brathwaite* adopted the *Biggers* standards and made them generally applicable.

In *Biggers*, the Court, quoting *Simmons*, saw the key legal issue as whether “there is ‘a very substantial likelihood of irreparable misidentification.’”<sup>213</sup> *Brathwaite* declared the *Biggers* test to be the standard for testing all identifications:

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony . . . . The factors to be considered are set out in *Biggers*. . . . These include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.<sup>214</sup>

Under this balancing test, the Court found both identifications constitutionally permissible despite the suggestive procedures. Accepting the suggestivity, the Court went through the five factors. Because *Biggers*, like the Duke lacrosse case, involved a rape, I note some of the specific factors from that case. The Court’s treatment of these five factors is set out below:

The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant’s approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had ‘no doubt’ that respondent was the person who raped her. . . . The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face ‘I don’t think I could ever forget.’ . . .

There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no

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212. *Id.* at 102–03. The prosecution’s introduction of the out-of-court identification distinguishes *Brathwaite* from *Simmons*. See *Simmons*, 390 U.S. at 381; *supra* note 195 (discussing the potential significance of this distinction).

213. *Brathwaite*, 432 U.S. at 116 (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

214. *Id.* at 114. Numbers are added in brackets to the five factors for clarity.

previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification.<sup>215</sup>

Beyond establishing a general standard, the *Brathwaite* Court ruled that lower courts were not to automatically exclude out-of-court identifications based on unnecessary suggestivity and that suppression of such identifications based on suggestivity alone was not necessary to deter improper police conduct in conducting these procedures.<sup>216</sup> The Court concluded that the only basis for exclusion is “a very substantial likelihood of irreparable misidentification,” which looks to reliability. The upshot of the ruling is that suppression is an all-or-nothing proposition. Either the suggestive procedures lead to “a very substantial likelihood of irreparable misidentification,” under which both the out-of-court identification and the in-court identification are suppressed, or neither is suppressed.<sup>217</sup>

The balancing process is between the suggestiveness of police procedures and a group of factors that indicate the identification is nevertheless not unreliable. It means, as *Brathwaite* and *Biggers* demonstrate, even a very suggestive procedure will be saved if the victim had a good opportunity to observe the perpetrator(s). The list of factors and the totality of circumstances approach mean that all the indicators of reliability (or unreliability) can be counted upon and combined. It makes the decision process very much a discretionary judgment by the trial judge.

## 2. The Difficulty of Imposing the Draconian Remedy of Excluding All the Victim’s Identification Testimony

The practical result of the broad discretion of the trial court inherent in the multifactor balancing process in combination with the all-or-nothing approach to exclusion is a paucity of decisions finding a due process suggestivity violation and excluding the identification evidence. If a violation is found under *Brathwaite*, the witness or, most poignantly, the victim is not allowed to identify the defendant in the courtroom.

As Professor Rich Rosen has written,

This places an almost intolerable burden on an (often elected) trial judge who must not only find that the identification procedure was so flawed that the witness cannot be believed, but then has to tell the witness, often the victim of the crime, that she will not even be allowed to tell the jury

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215. *Neil v. Biggers*, 409 U.S. 188, 200–01 (1972).

216. *Brathwaite*, 432 U.S. at 109–114.

217. The Court does not put this conclusion into so many words, but it is the unmistakable result of its rejection of the per se approach that some courts previously used to exclude out-of-court identifications because they were obtained by unnecessarily suggestive procedures, *id.* at 110–14, and its embrace of a single standard of reliability in determining admissibility. *Id.* at 116 (citing *Simmons v. United States*, 390 U.S. 377 (1908)).

what she honestly believes she saw. This would be a difficult thing to tell any witness, but imagine looking a rape victim in the eye, one who swears that she can identify the man who violated her, and telling that woman she will not even be allowed to tell her story to a jury. It is no wonder that few identifications have been suppressed for due process violations.<sup>218</sup>

### 3. The Prohibition Against the “Pick This Man” Suggestion

The archetype for the due process suggestiveness doctrine is an encounter that occurs between strangers over a brief period of time and under conditions of poor visibility and high stress. The individual may be only a witness or she may also be a victim—let us assume the latter. If a weak opportunity to observe is combined with police identification procedures that suggest the perpetrator, as illustrated by *Foster*'s figurative statements “this is the man,” the identification may be suppressed.

This scenario assumes that the victim has a memory of the person's face, but that the memory is weak because of the circumstances of the encounter. The accepted psychological view, upon which the suggestiveness doctrine is based, is that this memory is not only weak but is malleable.<sup>219</sup> The fear is that in the identification process, if that process is suggestive, the memory of the victim of the perpetrator's face will be replaced with the face of a person she has been shown as suspect during the identification procedures.

In addition to the draconian nature of the only remaining remedy, due process suppression is likely inhibited by the recognition that virtually all police-organized identifications have some suggestive elements. In *Coleman v. Alabama*,<sup>220</sup> the Supreme Court recounted that the witness testified that, when the police asked him to go to the city jail for a lineup, “he ‘took [it] for granted’ that the police had caught his assailants.”<sup>221</sup> In part for this reason, courts have found little reason to suppress when the police merely add to that suggestivity their statement that the suspect is in

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218. Richard A. Rosen, *Reflections on Innocence*, 2006 Wis. L. Rev. 237, 251.

219. Human memory is not as fully reproductive as a videotape of an event would be but instead is partially constructive and as a result malleable. See, e.g., Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* ch. 2–3 (3d ed. 1997); C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychol. 714, 720 (1994) (“The confidence that eyewitnesses express in their identifications is extremely malleable as a function of what they are led to believe about the identification decision of a co-witness.”); O’Toole & Shay, *supra* note 203, at 118 (describing human memory and perception for identification purposes as unlike a video recorder and instead as both subjective and malleable); Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374 (1998) (“[A] casual comment from a lineup administrator following eyewitnesses’ identifications can have dramatic effects on their reconstructions of the witnessing and identification experience.”).

220. 399 U.S. 1 (1970).

221. *Id.* at 6.

the array, which most socially adept witnesses already assume when they are called to the police station to view a formally organized in-person lineup or when the investigating officer drives to their home or office to display a set of photographs.<sup>222</sup>

There are, of course, degrees of difference between the strength of the suggestion. Some scholars argue, for example, that witnesses likely feel more pressure to pick someone at a lineup identification procedure where a group of suspects are assembled for viewing than they do at what is called a “showup,” which typically involves display of one or more suspects individually to the witness shortly after the crime occurs.<sup>223</sup> Moreover, it is clear that a statement to pick someone from a photo display or lineup is suggestive. However, the moderating argument is that the chances of picking the wrong person are distributed across the number of participants in a multiperson display.<sup>224</sup>

In *Foster*, the one case where the Court suppressed the witness’s identification, the message of the police by the way the suspect stood out in the first array, his presentation alone, and then repeating him alone in a subsequent multiperson display was to “pick this man.” Although the Court has not ranked suggestiveness or described officially its archetypal case, such repeated suggestion focused on a particular suspect is the prime candidate for due process condemnation.

### C. *The Innocence Movement’s Alternative to the Due Process Paradigm*

The due process doctrine is triggered by police procedures that are suggestive. In this context, the due process suggestiveness doctrine provides some modest help in ensuring reliability, but because of its constitutional base, it is centered on protecting against government action that denies such reliability. A wide variety of practices may be suggestive,

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222. See, e.g., *United States v. Gambrill*, 449 F.2d 1148, 1151 n.3 (D.C. Cir. 1971) (“Law enforcement personnel should avoid telling a witness that a definite suspect is in a lineup but it is not absolutely impermissible. Such statement has some degree of suggestiveness and, depending upon the surrounding circumstances, may be a factor to be considered in determining whether the lineup was unduly suggestive. It must be recognized, however, that any witness to a crime who is called upon to view a police lineup must realize that he would not be asked to view the lineup if there were not some person there whom the authorities suspected. To ignore this fact is to underestimate average intelligence. Thus, telling this to a witness may in many instances be relatively harmless.”); *State v. Reed*, 757 A.2d 482, 491–92 (Conn. 2000) (employing this reasoning and treating a statement regarding presence of suspect in group as minor suggestiveness factor).

223. See Richard Gonzalez, Phoebe C. Ellsworth & Maceo Pembroke, *Response Bias in Lineups and Showups*, 64 J. Personality & Soc. Psychol. 525, 536 (1993). In both laboratory studies and in the field, subjects are far more likely to pick out a member of a lineup than of a showup, speculating that witnesses approach showups more cautiously. *Id.* The authors found that, as to lineups, witnesses see their task as picking the person who most resembles the suspect rather than the absolute judgment of whether the person shown is the same person, and that the real-world pressure from the police that is somehow communicated to pick someone at the later-stage lineup is substantial. *Id.*

224. See, e.g., *id.* at 527.

but the very suggestive procedures in *Foster*, *Brathwaite*, and *Biggers* that focused on a single individual would be the type of action that would presumably most warrant suppression.

The innocence movement, fueled by the exoneration of a large number of convicted defendants shown by DNA evidence to be innocent, took the discussion and analysis in a different direction. It focused on misidentifications and on accuracy in identification procedures. Sometimes those errors are caused by improper police conduct, and generally police procedures play some role, but an incorrect identification can easily occur in the absence of much, if any, governmental suggestivity. This movement leads to an alternative way of examining the propriety of identifications. This discussion is therefore not an extension of the criticism developed above of the due process identification doctrine. Rather, it is largely an alternative perspective.

1. The General Illustration of the Preference for Sequential as Opposed to Simultaneous Display of Photographs

Professor Gary Wells participated in shaping the reforms that came from the DNA exonerations, and he is a frequent and prominent commentator on its theoretical underpinnings.<sup>225</sup> His treatment of the difference between simultaneous displays of photographs and sequential displays, the superiority of the latter, and the centrality of that distinction to this new focus is revealing.

Imagine a group of six photographs. Assume that they are assembled in as nonsuggestive a manner as possible. Those shown in the photographs all generally match the victim's description of the perpetrator given shortly after a criminal offense, and the format and general appearance of the photos are similar. Assume also that the photos are shown by a person who has no knowledge of the case or of the suspect's identity (double-blind procedure) and that the witness is cautioned that the perpetrator may not be in the array.

This procedure contains precious little suggestiveness. As described below, psychological studies show that whether the array is shown simultaneously rather than sequentially increases in a subtle but important way the pressure on the witness to make a selection. However, it is hard to imagine a court would suppress this otherwise exemplary procedure if challenged under the Due Process Clause if the photos were shown simultaneously rather than sequentially. Nevertheless, Wells sees the distinction between simultaneous and sequential as very important because it affects the accuracy of the identification.

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<sup>225</sup> For example, he was a member of the National Institute of Justice Planning Panel whose work resulted in the U.S. Department of Justice's *Eyewitness Evidence: A Guide for Law Enforcement*. See Nat'l Inst. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999) [hereinafter *NIJ Guide*], available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

Wells explains that when a witness looks at a simultaneous display, he or she has a tendency to select the person who looks most like the offender in the group. On first examination (and certainly for due process purposes), this “relative-judgment” process seems sensible and nonproblematic.<sup>226</sup> The problem, however, is that in every array, one person looks more like the perpetrator than the others as a matter of relative judgment; witnesses have a tendency to pick someone; and if the perpetrator is not present, they continue to pick the person in the group that most resembles the victim’s memory of the perpetrator. Moreover, they often confuse this relative judgment with recognition memory.<sup>227</sup> Controlled studies show that the process of the witness actually selecting someone, the person who looks most like the perpetrator, continues at a relatively high, although diminished, rate when the perpetrator is not among those displayed.<sup>228</sup> Examination of DNA exonerations has shown that in a majority of the cases the actual perpetrator was not in the array when the innocent person was selected.<sup>229</sup>

The psychological process of identification is quite different for sequential displays of photographs where the subject is shown one photograph at a time and must give a “yes,” “no,” or “not sure” answer before the next photograph is displayed. Under that process, the witness is not able to compare the photos to one another and sets higher criteria for making an identification.<sup>230</sup> The process of selection is more of an absolute judgment of match with the memory of the perpetrator rather than a relative one of greatest similarity among those displayed.

Wells argues that sequential procedures are particularly important and that field studies have shown the procedure is not very costly in terms of identifications lost as compared to simultaneous presentations, some of which would have been accurate in identifying perpetrators. Moreover, those identified in a sequential array are more likely to be the actual culprits.<sup>231</sup>

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226. See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 618.

227. *Id.* at 618–19.

228. *Id.* at 619. Wells describes one controlled experiment in which 38% of witnesses picked the person not the perpetrator but looking most like the perpetrator when the real perpetrator was not present, as opposed to 13% of the time when the perpetrator was present. *Id.* In addition, 21% picked no one in the procedure where the perpetrator was present, and 32% picked no one when the perpetrator was removed. *Id.*

229. *Id.* at 620.

230. *Id.* at 625–26. The witness can mentally compare the photograph to those presented before, but does not know whether the next photograph will be a better match. Under the sequential procedures, the witness is not supposed to be told he or she is viewing the final photograph. *Id.* Professor Wells notes that if a witness is allowed to go through the photos a second time, it effectively turns a sequential presentation into a simultaneous process since the witness can presumably largely remember and therefore mentally compare them during the second viewing. *Id.* at 627.

231. *Id.* at 626–27.

If the identification procedure is only mildly suggestive or not suggestive at all, suppression under the Due Process Clause will not be a real prospect, particularly if a witness professes certainty of her identification, which *Brathwaite* recognized as a factor supporting reliability. Unfortunately, psychological studies show that certainty is only weakly correlated with accuracy.<sup>232</sup> Moreover, certainty can be the product of the identification procedure itself and can grow over time without the victim realizing it.<sup>233</sup>

Based on the problems of false identifications and building from empirical research on ways to improve identification procedures, recommendations were made for proper protocols for conducting identification procedures. In 1999, the National Institute of Justice guide was published.<sup>234</sup> It recommends recording all descriptions given and all identification procedures; providing witness instructions, which include a statement that the suspect may not be in the group; and sequential presentation of suspects or photos. It also suggests moving toward a situation where the person administering the process does not know the suspect.<sup>235</sup>

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232. *Id.* at 620–21 (recounting that the combination of large numbers of studies shows that the correlation between accuracy and certainty is only .40 (1.0 indicating perfect correlation), showing that while a confident witness is more likely to be accurate than an unconfident witness, the relationship is not very strong).

233. *Id.* at 621 (describing how positive feedback on the results of the identification procedure can cause the witness to become confident of what was initially only a tentative identification without recognition of that process). The psychological literature on eyewitness identification is extraordinarily extensive. I have only touched the surface and did so largely through one prominent figure, Professor Wells. My point was to illustrate a vastly different perspective on identification procedures linked to the message from DNA exonerations and the heightened concern with innocence. The innocence movement brought attention to misidentifications, whether or not resulting from highly suggestive procedures. The emphasis was not on the improper governmental conduct, which was not necessarily even present. It focused instead on accuracy and the avoidance of some miscarriage of justice by following better procedures.

234. NIJ Guide, *supra* note 225; see also U.S. Dep't of Justice, Nat'l Inst. of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003), available at <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

235. NIJ Guide, *supra* note 225, at 9; Rosen, *supra* note 218, at 257–58.

Researchers have generally<sup>236</sup> settled on six recommendations: (1) only one suspect should be in each lineup or photo array; (2) the suspect should not “stand out”; (3) the witness should be cautioned that the perpetrator might not be in the lineup or array; (4) those in the lineup or array should be displayed sequentially rather than simultaneously; (5) the person who administers the identification procedure should not know whether the suspect is in the lineup or array and certainly should be ignorant of the identity of the suspect (“double-blind testing”); and (6) a statement regarding the witness’s confidence should be collected at the time any identification is made.<sup>237</sup>

In 2001, the attorney general of New Jersey directed all law enforcement agencies in the state to adopt procedures based on guidelines that incorporated these basic principles.<sup>238</sup> Wisconsin’s attorney general has proposed similar procedures.<sup>239</sup> In 2003, after consulting with experts and New Jersey officials, the North Carolina Commission on Actual Innocence proposed similar guidelines.<sup>240</sup> As with the others, the North Carolina guidelines are stated as only promoting more accurate procedures and are not intended to create legally enforceable standards or result in exclusion of identification evidence.<sup>241</sup>

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236. Not all experts agree on all these features. In particular, some question the superiority of sequential to simultaneous display procedures. *See, e.g.*, Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 127–36 (1995) (reviewing a dozen experimental studies “involving more than 1,800 participants [that] have compared the impact of sequential versus simultaneous presentations on identification performance” and concluding “the traditional method of simultaneous presentation carries no benefit in terms of correct identifications when perpetrators are present in an array”); Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 *Psychol. Pub. Pol’y & L.* 394 (2006) (arguing that simultaneous procedures are superior to sequential procedures under many policy assumptions). This limited debate should be resolved as research continues, including analysis of results of practices in the field. *See, e.g.*, Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 *Cardozo Pub. L. Pol’y & Ethics J.* 381, 410–13 (2006) (finding field results consistent with laboratory research indicating superiority of sequential identification procedures). Despite the criticisms, the overwhelming weight of scientific opinion remains that in most situations double-blind sequential methods are superior to simultaneous ones in avoiding wrongful convictions, and I see no reason to alter that view until and unless further research demonstrates otherwise.

237. Wells, *supra* note 226, at 623–31.

238. *See* Dep’t of Law and Pub. Safety, Office of the Att’y Gen. of N.J., *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (2001), *available at* <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

239. Wis. Dep’t of Justice Bureau of Training and Standards for Criminal Justice, Office of the Att’y Gen. of Wis., *Model Policy and Procedure for Eyewitness Identification* 3 (2005), *available at* <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>.

240. N.C. Actual Innocence Comm’n, *Recommendations for Eyewitness Identification* (2003), *available at* <http://www.aoc.state.nc.us/www/ids/News%20&%20Updates/Eyewitness%20ID.pdf>.

241. *Id.* at 1. The guidelines state, “The recommendations made herein are not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” *Id.*



## 2. The Specific Illustration of the “All Suspects” Photo Display

The identification procedure used in the Duke lacrosse case involved a so-called “all-suspects” photograph procedure, and in the next section, I examine the specifics of that procedure. Here, I examine generally the problems with an all-suspect identification procedure.

Professor Wells has particular criticism for procedures in which multiple suspects are included in the array or where the array is composed entirely of suspects.<sup>242</sup> As he approaches the subject, the criticism is not because an all-suspect model violates due process.<sup>243</sup> Although he does not say so explicitly, Wells’s analysis assumes that the fact that the array is composed only of suspects is not communicated to the witness. As developed below, the procedure creates additional damage if its all-suspect nature is communicated to or known by the witness, as occurred in the Duke lacrosse case procedure.

Let us first consider such an all-suspects array where that fact is not communicated to the witness. In their analysis of the problematic nature of the all-suspect procedure, Wells and John Turtle assert that such a

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242. Wells, *supra* note 226, at 618.

243. A handful of cases has examined multiple- or all-suspect identification procedures and has found no violation of due process suggestiveness for various reasons. Only one case clearly involved communication to witnesses of the fact that multiple suspects would be displayed. In *United States v. Rodriguez*, 363 F. Supp. 499 (D.P.R. 1973), after the arrest of twenty-nine people in a courtroom altercation, all those arrested were displayed in lineups of four individuals. A police officer filler was added to each lineup, but the court assumed it likely that many of the fillers were known to the witnesses and treated the lineups as effectively all-suspect identifications. At the end of the process, six of the twenty-nine were identified and indicted. The court relied in part on the need for fast action to sort the guilty from the others who had been arrested, and while it “frown[ed]” upon the practice, it did not find a violation of due process. *Id.* at 500–03.

*McNeary v. Stone*, 482 F.2d 804 (9th Cir. 1973), is ambiguous on the witness’s knowledge. A bartender who had been robbed by three men was shown only the pictures of three men arrested in a nearly identical robbery and picked the defendant some time later. The facts do not indicate whether the victim was told that the photos came from another robbery arrest. The court found the final showing of three photos improper but not alone sufficient to find that the entire process gave rise to a substantial likelihood of irreparable misidentification. *Id.* at 805–06.

The facts of *United States v. McCray*, 948 F. Supp. 620 (E.D. Tex. 1996), present a display that is most similar in terms of the preparation of the array, but there is no indication that the composition was communicated to the witness. There, an all-suspect photo array was used and the defendant was selected. The court was troubled by the concept that anyone selected would be the “right choice,” and treated the all-suspect character of the array as suggestive. After the balancing process, however, it found no violation of due process. *Id.* at 622–24.

In *United States v. Snead*, 447 F. Supp. 1321, 1326 (E.D. Pa. 1978), the court stated, without any suggestion that the witness knew of the practice, that placing photographs of four suspects along with photographs of ten other individuals of similar age and appearance to the suspects was not impressively suggestive. The treatment of the issue in *United States v. Reid*, 527 F.2d 380 (2d Cir. 1975), is extremely brief. Without giving any reason to believe the witness knew the presence of another suspect in the lineup, it stated the practice did not “negate the propriety of the procedure.” *Id.* at 384.

construction of the array has no impact on suggestiveness.<sup>244</sup> Rather, the problem they criticize is in the inferiority of the multiple- or all-suspect lineup in producing information.<sup>245</sup>

Compare in your mind three photo arrays each containing six individuals. As with the imaginary array described earlier, make it as nonsuggestive as possible in appearance and arrange the procedures for the display to be fair and nonsuggestive. Assume the crime is a liquor store robbery in a major city. Assume three photographic arrays containing one common photo, which is picked each time, and five other photos that are of different men in each array but are indistinguishable in that they all equally match the description and equally resemble the common photo. Assume the police tell the victim nothing about any of those whose pictures are in the arrays.

Assume the same suspect is in each array based on criminal record, residence nearby, and a general match to the relatively general description. In the first array, all but the man whose photo was picked are nonsuspect fillers in that the officer has checked and found that all have airtight alibis since they were in jail at the time of the robbery. In the second, all the other photos are of suspects as well in that all have criminal records of having committed an armed robbery in the general vicinity of the liquor store, have no apparent alibi, and match the general description of the robber. In the third, the other individuals are not suspects in the officer's mind; he just picked them from the robbery section's file pool of photos, but he has no idea whether they have alibis.

In the first procedure—the single-suspect procedure—if the witness picks a filler, the error is harmless in that the person picked will not be prosecuted.<sup>246</sup> Indeed, one can see the purpose of the lineup as being a test of whether the witness can pick the suspect as the perpetrator rather than identifying a filler.<sup>247</sup> The police do not *know* independently whether a person picked is guilty or not. Thus, the selection of the suspect may be an

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244. See generally Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 *Psychol. Bull.* 320, 326, 329 (1986). Wells and Turtle state,

It is interesting to note the implications of the fact that the lineup models differ profoundly at the level of lineup-wise error rate but not at the level of posterior probabilities of false identification for a given suspect. One implication of this is that a defendant has no argument for his defense on the basis of police having used an all-suspect model rather than a single-suspect model. It cannot be said that the individual suspect's degree of protection or due process is jeopardized by the lineup model being used. Perhaps this is why courts have never addressed the issue.

*Id.* at 329.

245. The authors state, “[T]he fact that the single suspect model partitions eyewitness identification errors into foil identifications and false identifications (whereas every identification error is a false identification with the all-suspect model) has important implications for the overall expected rate of false identifications.” *Id.* at 326.

246. Professors Wells and Turtle use the term “foil” rather than filler to describe this function. *Id.* at 321.

247. Wells, *supra* note 226, at 618 & n.13.

accurate or an inaccurate identification. In single-suspect procedures, however, many errors of mistaken witnesses are detected as the result of picking someone who could not have committed the crime. Every pick of a filler is recognized as a mistake and is harmless, not a misidentification, since the person mistakenly chosen will not be prosecuted.

In the second array, the all-suspect identification procedure, there is no test in the sense of determining whether the witness can pick the suspect or will pick a filler. The witness cannot get a wrong answer. Anyone picked would be presumed to have committed the offense and would be prosecuted. As a result, an error by a witness who “is merely guessing or has a weak memory” will not be discovered through the picking process when that person picks a filler, as he or she is likely to do.<sup>248</sup>

The third array shows something of the ambiguity of what constitutes a “suspect.” The officer had no specific reason to suspect any one of these individuals but he did not know they were eliminated from commission of the offense, and in coming from robbery squad files, the photos had a somewhat higher than ordinary likelihood of being of the perpetrator. My experience from practice in Washington, D.C., was that occasionally there was other evidence, after investigation, supporting the guilt of fillers who were picked and charged. Wells describes the function of a “foil” as one who will not be prosecuted if selected, thereby producing information on accuracy. This function of the “filler” or “foil” suggests that fillers should not only not be prime suspects but also should be individuals entirely eliminated from suspicion.<sup>249</sup>

Note that these procedures differ none at all with respect to suggestiveness. However, they differ extraordinarily with regard to how much information they potentially provide regarding accuracy and whether they imperil the innocent.

#### D. *The Identification Procedures in the Duke Lacrosse Case*

##### 1. Procedures and Police Justification

Effective February 1, 2006, the Durham Police Department adopted General Order 4077, which was based on the North Carolina Actual Innocence Commission guidelines.<sup>250</sup> According to the Durham Police

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248. *Id.* at 618 n.13.

249. My experience, albeit dated, was that many times the circumstances of picking the photos would produce this result. For example, while the suspect’s photo was generally taken at the time of an arrest, the filler photos were often accumulated over a period of time, meaning that those individuals were often much older than the person described by the victim and many had been convicted of earlier offenses and were in prison with an “airtight” alibi.

250. General Order 4077, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author); *see also* Memorandum from Steven W. Chalmers, Chief of Police of Durham, to Patrick W. Baker,

Department, they complied with the protocol for the first two identification procedures on March 16 and March 21, 2006.<sup>251</sup>

Crystal Mangum had stated the names used by her attackers were “Brett,” “Adam,” and “Matt.” On March 16, 2006, Sergeant Gottlieb directed the police to put together photo arrays based on potential suspect names of Adam, Brett, and Matt.<sup>252</sup> The police examined the Duke lacrosse team photos for individuals with those names. They found one with the name of “Brett,” one with a similar sounding name of “Breck,” one with the name of “Adam,” and three with the name of “Matt.” However, they focused on Matt Zash, who was a tenant of the house.<sup>253</sup>

They assembled four photo arrays with one suspect in each and five “fillers.” However, all of the fillers were Duke lacrosse players whose photos were taken from the Duke lacrosse team photo. Whether Mangum knew or presumed these were all Duke lacrosse players is not known. No Duke name or logo appeared on the V-neck, which was all the clothing shown in the photo,<sup>254</sup> so there was no direct indication. On the other hand, the clothing was identical, and the V-neck and fabric suggested the common uniforms of a team. The police department defended the selection on the basis that it meant all were similarly dressed. The department claims that the fillers were selected to resemble the targets.<sup>255</sup>

The arrays were identified by the letters A through D with photo array A for “Matt,” B for “Adam,” C for “Brett,” and D for “Matt” again,<sup>256</sup> since three of the lacrosse team members were named Matt.<sup>257</sup> Reade Seligmann was a “filler” in A. According to Investigator Michelle Soucie’s report, the accuser remarked that “this is harder than I thought.”<sup>258</sup> According to Investigator Richard Clayton’s report, “[I]n photo array (A) she stated that the people in the photos looked alike.”<sup>259</sup> From photo array A, she selected Seligmann’s photo, stating she was seventy percent sure that she recognized

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City Manager of Durham 4 (May 11, 2007) [hereinafter Chalmers Memorandum] (on file with author).

251. Chalmers Memorandum, *supra* note 250, at 3–4; *see also* Memorandum from Patrick W. Baker, City Manager of Durham, to Steven W. Chalmers, Chief of Police of Durham 3 (May 11, 2007) [hereinafter Baker Memorandum] (on file with author).

252. Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 3 (describing instructions to Investigator Michelle Soucie to assemble photo arrays on March 16, 2006).

253. Chalmers Memorandum, *supra* note 250, at 3.

254. *See, e.g.*, Durham Police Dep’t Sequential Photographic Identification, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (photos of array A used on March 16, 2006).

255. Chalmers Memorandum, *supra* note 250, at 3–4.

256. Joseph Neff, *Duke Lacrosse Files Show Gaps in DA’s Case*, News & Observer (Raleigh, N.C.), Aug. 6, 2006, at 1A.

257. Chalmers Memorandum, *supra* note 250, at 3.

258. Investigator Michelle Soucie’s Supplemental Report, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author).

259. Supplemental Case Report of Investigator R.D. Clayton at 1, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Clayton’s Supplemental Report] (on file with author).

him from the party, but was not sure “where exactly she saw [him] at the party.”<sup>260</sup> The accuser picked out four others whom she said she was certain were at the party.<sup>261</sup> The result was that after displaying pictures of over half the team to Mangum—a total of twenty-four photos—the police had no identification of anyone allegedly involved in the rape.

The Durham police explained that they then focused on the two other team members who were tenants of the house and who were at the party, Dave Evans and Dan Flannery, as suspects. A picture of the third tenant, Matt Zash, had been shown in array A, and Mangum had said nothing about him.<sup>262</sup> They had become suspicious that false names had been used, understanding that Flannery had used a somewhat altered name in hiring the dancers (“Flanagan”). They put together two more photo arrays, which they showed on March 21, 2006. The fillers were selected in the same way, from the Duke lacrosse team photo, with five fillers per array. Neither of the other individuals ultimately picked, Seligmann and Finnerty, were in these arrays.<sup>263</sup>

Although she viewed his photo twice, Mangum did not identify Evans nor anyone else from these arrays.<sup>264</sup> At this point, Mangum had been shown thirty-six of the forty-six Duke lacrosse players’ photographs and had not identified anyone.<sup>265</sup>

On March 31, 2006, Investigator Hinman and Sergeant Gottlieb met with Nifong. During that meeting, Nifong suggested showing Mangum the photos taken as a result of the nontestimonial identification order under which the forty-six white players on the team were required to be photographed.<sup>266</sup> According to the police, Nifong suggested that the

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260. *Id.* at 1–2.

261. *See* Neff, *supra* note 256; *see also* Clayton’s Supplemental Report, *supra* note 259, at 2. The four were Fred Krom, Nick O’Hara, Kevin Meyer, and Brad Ross. *See* Motion to Suppress Identification, *supra* note 166, at 12 (pictures in array). Investigators would later learn that Ross was not at the party, being in Raleigh on that night. *See* Ekstrand Letter to Nifong, *supra* note 177, at 1–3 (providing documentation of presence in Raleigh).

262. Motion to Suppress Identification, *supra* note 166, para. 37, at 11 (indicating only her pick of photo number five, which was of Seligmann).

263. *Id.* para. 43, at 12.

264. *See* Attorney General’s Report, *supra* note 16, at 10; Clayton’s Supplemental Report, *supra* note 259, at 2 (explaining that during the March 21, 2006, procedure Mangum asked to look at both of the photo arrays a second time but was unable to identify anyone).

265. As noted earlier, none of the photos was repeated. *See supra* note 174.

266. Many explanations for use of these photographs were given. Among them was that the initial photos from the team web site were so “military like” or so similar that it was difficult to see them as individuals. *See* Sgt. Gottlieb Deposition, *supra* note 174, at 118 (referring to “‘military like’ appearance”); Nifong Deposition, *supra* note 96, at 169–70 (indicating that Investigator Himan or Sergeant Gottlieb had informed Nifong that “they could not really tell one player from another” in the photographs they had); Nifong Transcript, *supra* note 45, at 45 (recounting that one officer told him that the pictures of the players the police had obtained from the Duke web site all “looked alike”); Himan Transcript, *supra* note 156, at 200 (explaining that one of the reasons for securing the photos through the nontestimonial identification order was that the players looked different at the time of the incident than they did in the photos the police had at that moment).

pictures be shown to Mangum to “see if she could provide any additional information or details about the night in question. Investigators hoped that this would develop some leads, such as potential witnesses . . .” They claimed they also wanted to use the photos and her memory of that evening to “help establish that she was not impaired by a memory altering substance which would then assist in gauging the reliability of [her] allegations.”<sup>267</sup>

The police admitted that the procedure did not comply with department policy regarding identification procedures but explained that they did not intend nor expect her to positively identify her attackers during this procedure.<sup>268</sup> They claimed in essence that they did not intend it to be an identification procedure and therefore did not attempt to comply with General Order 4077.<sup>269</sup>

This excuse is weak. Mangum was instructed that she would be viewing the people the police “had reason to believe attended the party” and that she was to indicate “any type of interactions she may have had or observed with a particular individual,”<sup>270</sup> which includes interaction during the rape. Moreover, the procedures were being videotaped with two cameras,<sup>271</sup> which were visible to Mangum,<sup>272</sup> and might have suggested to her that her identification of the attackers was expected. The police may have been surprised that she identified anyone since she had previously failed to do so, but nothing about their conduct indicated this procedure did not have the potential to be an identification procedure.

On that occasion, the police did not use double-blind procedures. Gottlieb is the person who instructed Mangum that she would “look at people we had reason to believe attended the party.”<sup>273</sup>

Mangum made four identifications of photos that she connected to the rape:

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267. Chalmers Memorandum, *supra* note 250, at 5.

268. Baker Memorandum, *supra* note 251, at 2–3.

269. Sergeant Gottlieb lamely offered the explanation that General Order 4077 was not applicable because they had no individual suspects. *See* Sgt. Gottlieb Deposition, *supra* note 174, at 123. Also, he gave an explanation for showing large numbers of individuals from the same group that in other circumstances has some validity. It is the same concept as using a yearbook as the basis of an identification if the victim of an armed robbery states that the perpetrator wore a particular school’s jacket. *Id.*

270. Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 8, 9 (describing in notes for March 31, 2006, suggestions from Nifong and his rationale for showing photos).

271. Gottlieb indicated in his notes that the procedures were being videotaped for court purposes (“so potential Jurors . . . could witness both the victim, her reactions, and the photographs in real time”), which is at least apparently contrary to his contention that he was not conducting an identification procedure. Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 9.

272. *See* Sgt. Gottlieb’s Deposition, *supra* note 174, at 125 (answering that Mangum could see the camera and observing that it was behind him); Himan Transcript, *supra* note 156, at 77 (stating that Mangum was aware of the camera photographing her during this procedure).

273. Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 9.

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- First, she made a tentative identification of photo number four, Matthew Wilson, stating, “He looked like Bret[t] but I’m not sure.”<sup>274</sup> Gottlieb asked whether this Brett was one of the guys that assaulted her and she responded, “Um hum.”<sup>275</sup>
- She picked the next photo shown to her, number five, Dave Evans, stating that “[h]e looks like one of the guys who assaulted me sort [sic].” Sergeant Gottlieb asked how sure she was, and Mangum responded, “He looks just like him without the mustache.” After asking for and getting confirmation that “the person had a mustache,” Gottlieb asked her for her degree of certainty (“percentage wise”). Mangum said, “About 90%.”<sup>276</sup>
- Only two photos later, number seven, she picked Reade Seligmann, stating that “[h]e looks like one of the guys who assaulted me.” In response to a question about “how sure,” she said, “100%.”<sup>277</sup> Gottlieb then asked how he assaulted her, to which Mangum answered, “He was the one that was standing in front of me . . . that made me perform oral sex on him.”<sup>278</sup>
- Finally, thirty-three photos later, she picked photo number forty, Collin Finnerty: “He is the guy who assaulted me.” When asked by Gottlieb what he did, Mangum asserted, “He put his penis in my anus and my vagina.” Gottlieb inquired whether he was the first or second to do that, to which she answered, “The second.” Mangum indicated in response to another question from Gottlieb that Finnerty was not the one who strangled her.<sup>279</sup>

## 2. Due Process Analysis

### a. *Suggestiveness of Procedures*

The procedures used involved two types of suggestivity in the classic sense. The first applied to all three of the individuals picked. Mangum was informed that she would be viewing people the police had reason to believe attended the party.<sup>280</sup> Thus police stated directly that she would be viewing partygoers and implicitly only partygoers—thus only potential suspects.<sup>281</sup>

Statements or suggestions by the police that the suspect is among those displayed obviously makes it more likely that the witness will select

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274. *Id.* at 11.

275. *Id.*

276. *Id.*

277. *Id.* at 12.

278. *Id.*

279. *Id.* at 20.

280. *Id.* at 9. Nifong knew that Mangum would be informed that she was viewing the people whom police believed were at the party. *See* Sgt. Gottlieb Deposition, *supra* note 174, at 120–21, 126.

281. The police statement suggests that Mangum would be viewing a set of people who were all suspects and that she would be viewing the entire group of suspects.

someone. This type of suggestivity is present in most procedures, although it was communicated explicitly and therefore more strongly in this case. On the other hand, the suggestivity as to any particular individual was reduced because all the pictures looked identical in format and were very similar in many aspects of physical appearance, such as age, and thus gave no indication that the police suspected any one or ones in specific. This procedure differed strongly from the “pick this man” aspect of *Brathwaite*’s one-photo display of a single suspect.

The other type of suggestion came from the repetition of some of the pictures shown. Repetition did not, however, point toward a narrow subgroup. On March 16, 2006, Seligmann’s photo was shown to Mangum as a “filler” in array A, one of the “Matt” arrays. At that time, Mangum selected his photograph, stating she was seventy percent confident Seligmann was at the party, and she selected four other players as definitely attending the party.<sup>282</sup> Evans’s picture was included as a suspect photo in one of the arrays shown on March 21, 2006. She looked at those arrays twice, but picked no one.<sup>283</sup> Finnerty’s photo had not been previously shown to Mangum, and as to him, this type of suggestion was absent. Thus, Mangum had been shown Seligmann’s and Evans’s photos previously, but they stood in similar positions to many other members of the team whose photos were included in these same photo arrays.<sup>284</sup>

Since the Supreme Court has not described in detail what psychological theory of suggestiveness its due process analysis embraces,<sup>285</sup> a careful comparison of levels of constitutionally cognizable harm or suggestiveness in various procedures cannot be confidently done. However, if the

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282. See Clayton’s Supplemental Report, *supra* note 259, at 1–2.

283. *Id.* at 2.

284. Like Seligmann’s photo, the photos of twenty-three others had been shown to Mangum on March 16, 2006; she had picked a total of five individuals on that day that she recognized as attending the party, and she had been 100% sure of seeing the other four. Like Evans’s photo, the photos of eleven others had been shown to Mangum on March 21, 2006. *Id.* at 1–2.

285. The Court has frequently stated its concern with the almost inherent unreliability of eyewitness identification. See, e.g., *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” (citations omitted)). The Court has occasionally cited scholars about general factors that make an eyewitness more suggestive. In *Simmons v. United States*, the Court noted that the danger of misidentification is increased if the police repeatedly show a picture of the same person or it is emphasized in some way or if they state they have other evidence indicating that one of the persons pictured committed the offense. 390 U.S. 377, 383–84 (1968) (citing Wall, *supra* note 192, at 74–77, 82–83); see also *Moore v. Illinois*, 434 U.S. 220, 229 (1977) (stating that “a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup”) (citing, *inter alia*, Glanville Williams & H.A. Hammelmann, *Identification Parades-I*, 1963 Crim. L. Rev. 479, 480–81); Wall, *supra* note 192, at 27–40). The Court has also recognized that, “[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” *Simmons*, 390 U.S. at 383–84 (citing Wall, *supra* note 192, at 68–70). However, it has not gone further in providing a way to calibrate improper suggestiveness.



reliability factors had been strong, I contend this degree of suggestivity on April 4, 2006, would not have resulted in suppression. The strength of the direction to pick a particular suspect is hardly in the category of *Brathwaite's* showing of one suspect's photo to the witness or *Foster's* repeatedly presenting the same suspect to the witness.

On the other hand, the procedures did clearly involve some level of police-organized suggestiveness. Suppression under the Due Process Clause would have depended on the other factors. *Brathwaite* establishes those as (1) opportunity to observe the criminal, (2) degree of attention, (3) accuracy of prior descriptions of the criminal, (4) level of certainty in picking the suspect, and (5) time between the event and the identification.

In a rape case that in fact occurred as Mangum described, her testimony could have been very strong on factors (1) and (2), opportunity to observe and attention level, as they were in *Biggers*, also a rape case. Her level of certainty, factor (4), was stated at 100% for Seligmann and Finnerty, and 90% for Evans. The period of time, factor (5), between the event and the identification was a little over two weeks, far less than the eight-month span in *Biggers*, but still not immediate. This factor likely would not count strongly in either direction. In the ordinary case with a confident witness, the victim's strong opportunity to observe three men at close range in a lighted bathroom while she was raped would provide the type of reliability that would allow the prosecution to prevail.

b. *Factors Showing the (Un)Reliability of the Identification*

The identification procedure in this case differed from most, likely not in suggestivity, but rather in the lack of reliability factors that generally swing the balance against suppression but would have had the opposite effect in this case. Disciplinary Hearing Commission panel chair Williamson stated in his closing comments that he believed it "reasonably clear" that Mangum's identification would have been suppressed had the motion to suppress been litigated in February 2007 as initially scheduled.<sup>286</sup> The defense motion to suppress is masterful. While it describes the suggestivity, it concentrates on the shifting versions given by the accuser of the events and the strong reasons to doubt a rape took place at all. The burden of the argument is that the story, which includes the identification, is simply not reliable.

The *Brathwaite* factors do not directly invite such an argument, but they leave room for it. Some of the defense evidence clearly fits under factor (3), the accuracy of descriptions. Mangum apparently gave no description of her attackers until March 16, 2006, when she was interviewed by Himan and Gottlieb. Himan's handwritten notes give descriptions of three men.<sup>287</sup>

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286. Williamson Statement, *supra* note 1, at 22.

287. All were described earlier as white males. "Adam"—"short, red cheeks," brown "fluffy hair," and "chubby face"; "Matt"—"heavy set," "260-270," "short hair cut";

None fit Finnerty well at all. “Matt” is described as weighing 260 to 270 pounds, which fits none of the three.<sup>288</sup> Gottlieb took no notes of the interview and typed his notes regarding it as late as July 2006.<sup>289</sup> His typed notes gave almost completely different descriptions from Himan.<sup>290</sup> These descriptions better match the suspects. One of them could be Finnerty,<sup>291</sup> and no one is described as being 260 and 270 pounds.<sup>292</sup> In Gottlieb’s version, these descriptions are not associated with particular names. At the minimum, Mangum seems to have given two very different sets of descriptions. Her statement when picking Evans that the man who raped her had a mustache<sup>293</sup> adds a descriptive feature that had not previously been given. Moreover, that feature does not match Evans’s actual appearance at the time of the party. His defense produced photographs taken shortly before and after the party showing Evans without a mustache either time.<sup>294</sup>

On December 21, 2006, an investigator for the district attorney’s office, Linwood Wilson, interviewed Mangum.<sup>295</sup> The defense based a supplement to the suppression motion on the victim’s radically different version of the events that came out of that interview. That interview, which the defense alleged conveniently modified the victim’s time line of events

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“Brett”—“chubby,” “saw a picture of him” [apparently in the house]. Handwritten Notes of Investigator Benjamin W. Himan at 3–4, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) (on file with author).

288. *Id.*

289. See Joseph Neff, *Lacrosse Probe Has Much Fodder*, News & Observer (Raleigh, N.C.), July 1, 2007, at 1B; see also Sgt. Gottlieb Deposition, *supra* note 174, at 26 (testifying he had only three pages of handwritten notes); *id.* at 28 (testifying that sometimes he wrote notes on a board, of which he assumed Himan was taking photos before they were erased but photos were not being taken); *id.* at 29 (testifying that his typed notes were in part prepared “initially” and part done “afterwards”); *id.* at 34 (testifying that he first typed up his notes from the early contact with Mangum after the indictment); *id.* at 39 (testifying that he “did a lot of typing during that last week” when the notes were turned in).

290. No names were given. “She described the three men as 1) W/M, young, blonde hair, baby faced, tall and lean, 2) W/M, medium height (5’8”+ with Himan’s build), dark hair medium build, and had red (rose colored) cheeks, and the third suspect as being a W/M, 6+ feet, large build, with dark hair.” Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 2 (describing the conversation on March 16, 2006, with Mangum).

291. Gottlieb’s description of suspect number one matches Finnerty’s general description. See Joseph Neff, *Cop Says Nurse Found Trauma in Duke Case*, News & Observer (Raleigh, N.C.), Aug. 27, 2006, at 1A (noting that the description of the tall, lean, baby-faced attacker in Gottlieb’s typed notes matches Finnerty but that police did not show his picture to Mangum in displays presented on March 16 and 21).

292. Sgt. Gottlieb’s Supplemental Report, *supra* note 35, at 2.

293. *Id.* at 11.

294. Motion to Suppress Identification, *supra* note 166, para. 138, at 34–35 and accompanying photographs.

295. Investigative Report, Interview of Crystal Mangum by Investigator Linwood E. Wilson at 1, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007) [hereinafter Wilson Interview of Mangum] (on file with author).

in a way that avoided Seligmann's alibi evidence<sup>296</sup> and altered Evans's mustache to a "5 o'clock shadow,"<sup>297</sup> also changed the roles given to the three attackers. However, with regard to the due process test, the interview arguably obliterated any reliability that might be based on correspondence between Sergeant Gottlieb's description of the attackers because, in changing and confusing roles of the attacker, it was now impossible to know what past descriptions meant.<sup>298</sup>

Since the motion to suppress identification was never heard, we cannot know how it would have been decided. The trial judge is the finder of fact, which includes determining the credibility of the witness. Based on medical history and the description of Mangum given in the attorney general's report,<sup>299</sup> there is strong reason to believe that the judge would have found her version of events lacking credibility. If he so found, or if he otherwise found the evidence regarding reliability to be deficient, he had a doctrinal basis in due process suggestibility law to suppress Mangum's out-of-court and in-court identification. Then the case would have to be dismissed.

### 3. Failure of Procedures to Fulfill the Prosecutor's Duty to Do Justice

The due process-based analysis misses the more significant flaw in the identification procedure. It was toward this other type of problem that most of the implicit criticism was focused, even if it sometimes couched the objections in terms of suggestiveness. The attorney general's report notes that due to failure to use nonsuspect fillers, the procedures used violated Durham Police Department policy.<sup>300</sup> Psychologists Wells and Brian Cutler criticized the process for the failure to include nonsuspects or fillers and having the critical identification procedure conducted by someone

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296. Videotape: Testimony of Reade W. Seligmann (June 15, 2007), at RS 55:00–56:30 (on file with author) (describing how the new version appeared to the defense team to conveniently reduce the significance of his announced alibi and eliminated the significance of the lack of DNA evidence); Joseph Neff, *To the End, the Account Continues to Change*, News & Observer (Raleigh, N.C.), Apr. 18, 2007, at 1A (describing Linwood Wilson as emerging "with a story rich with new or previously unknown details that were, at first glance, favorable to the prosecution"). On June 25, 2007, the new acting district attorney, Jim Hardin, terminated Wilson's employment with the Durham County district attorney's office. See Anne Blythe, *Durham DA's Investigator Jobless*, News & Observer (Raleigh, N.C.), June 26, 2007, at 3B.

297. See Wilson Interview of Mangum, *supra* note 295, at 5.

298. First Supplement to Motion to Suppress the Alleged "Identification" of the Defendants by the Accuser, paras. 64–73, at 17–18, *State v. Seligmann*, Nos. 06 CRS 4333-36, 06 CRS 4332-33, 06 CRS 5582-83 (N.C. Super. Ct. Jan. 11, 2007) (on file with author) (arguing that with the confusion of roles it is hopeless to make sense of the descriptions previously given).

299. See Attorney General's Report, *supra* note 16, at 14–15 (noting serious credibility issues).

300. *Id.* at 11.

directly involved in the investigation.<sup>301</sup> They criticized the procedure's poor execution primarily for tending to yield "uncertain or misleading results"<sup>302</sup> and for not helping to "rule out the other nuisance or extraneous results."<sup>303</sup>

The Durham Police Department's internal analysis of its role in the Duke lacrosse case, which was issued in April 2007, is properly criticized for many failings.<sup>304</sup> However, I find the department's own perspective on the most serious flaw in the identification procedure to be quite perceptive:

[R]egardless of our intentions, the April 4 photo process created the opportunity for the false allegations to be specifically linked to Evans, Seligmann and Finnerty . . . . Given the ultimate use of the results of showing the witness those pictures on that day, we regret the . . . creation of the opportunity to perpetuate false charges against these individuals.<sup>305</sup>

The due process suggestiveness doctrine has a goal of reliability, but it is focused on avoiding irreparable mistaken identification that is created by police action that purposefully or inadvertently suggests to the witness whom to pick. It presumes that a crime took place and that the victim or witness is honestly attempting to pick the perpetrator. It is not principally designed to test witness honesty.

The procedures developed by the innocence movement go further and attempt to avoid mistakes even when they are not based on suggestiveness by the police. Again, these procedures are not focused on the witness who is falsely attempting to perpetrate a hoax or the deluded and delusional witness, but in ensuring accuracy they have that effect.

Telling most witnesses that the suspects are among the photos to be displayed would have the impact of encouraging identification and is therefore damaging to all those in the array.<sup>306</sup> Giving this information to a questionable witness is a recipe for the disaster that occurred.

As to the earlier identification procedures, the Durham Police Department got its argument about fillers only partially right. I believe the

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301. Joseph Neff, *Experts: Lacrosse IDs Likely Tainted*, News & Observer (Raleigh, N.C.), Oct. 8, 2006, at 1A.

302. *Id.* (quoting Professor Wells).

303. *Id.* (quoting Professor Cutler).

It is not so clear that the use of Gottlieb, who was associated with the investigation, to conduct the process provided much potential to taint it as is sometimes the case because there were no clear suspects here, in contrast with many cases. The police seemed to have little basis to suspect one member of the team over another, although they did have some information regarding players who were not in attendance. Where a clear suspect exists, the danger of suggestion is strongest.

304. The City of Durham created a committee to review the conduct of the police during the investigation and prosecution. See Neff, *supra* note 289.

305. Baker Memorandum, *supra* note 251, at 3. I omitted "inadvertent" as in "inadvertent creation of the opportunity" from the second sentence and inserted ellipses because I am not confident the word is totally accurate if applied to all those involved.

306. In this case, the statement was likely understood that all the Duke lacrosse players at the party were suspects and therefore all of that group and only that group was included.

definition of fillers based on Wells's theory of separating harmless mistakes from misidentifications is that a filler should be someone who will not be charged if identified.<sup>307</sup> Even though they had a theory under which one person was a suspect, the theory was so weak, particularly as to the March 21, 2006, arrays where the two men who lived in the house were the "suspects," that anyone picked, including those intended to be fillers, had a good chance of being charged. Whether that would have been the police position, that is certainly what Nifong's later conduct shows he would have done. Thus, these purported fillers were not appropriately selected by the police.

Fortunately for justice, there were fillers in the strong functional sense of the term—people who could not have done the crime—both in the earlier arrays and in the final group of forty-six photos shown to Mangum on April 4, 2006. All forty-six photos were of Duke lacrosse players, but not all of those players attended the party.<sup>308</sup> Even though they were all lacrosse players, those who were not in attendance were functionally fillers. Mangum incorrectly picked one of those fillers, Brad Ross, not as an attacker but as someone who she remembered was at the party. Information about her lack of accuracy was gained. However, even though there may have been some photos that functioned as fillers, their number was inadequate.<sup>309</sup>

In terms of Nifong's ethical responsibility to "do justice," he did not give full play to the function of the filler, which was demonstrated by his disregard for Seligmann's alibi. Wells's assumptions for innocent fillers did not occur: when the error is demonstrated, the prosecution does not pursue the charges. Seligmann had been at the party, but at the relevant time when the rape was alleged to have occurred, he was absent. Thus, his

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307. See Wells & Turtle, *supra* note 244, at 321.

308. A handful of team members did not attend. The three team captains gave statements to the police, and each listed those he remembered being present. Those numbers varied. See Exhibit 12, 3/17/06 Voluntary Statements, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007) (on file with author) (indicating that Matthew Zash listed thirty-three, that David Evans listed forty, and that Daniel Patrick Flannery listed thirty-six). Cumulatively, they indicated six of the Caucasian players did not attend the party. See Wilson & Bernstein, *supra* note 62. They omitted Seligmann, who was at the party for a period of time. Sgt. Gottlieb Deposition, *supra* note 174, at 146–47 (explaining that only after the indictment did they learn of Seligmann's presence from a photo of the party displayed by a local attorney).

309. The Durham identification procedure protocol, General Order 4077, makes no exception for cases with a large number of suspects. See General Order 4077, *supra* note 250, at 1 (permitting the placement of more than one suspect in an array but requiring at least the addition of five more fillers for each suspect added). Wells, in a theoretical article about the need for fillers, suggested flexibility when a number of suspects are involved. He gave the example of the practical difficulty in a case with six suspects of conducting six separate lineups and argued that a "mixed model" with six suspects and six foils could improve the "lineup-wise error rate" significantly. Wells & Turtle, *supra* note 244, at 326–28. Also, at some point, with thirty- or forty-member lineups, a form of interference more profoundly affects "hit rates," and although he does not develop the implications, he suggests such situations be treated as "a mugshot task" and not as a live lineup. *Id.* at 328.

photo should have been recognized as an inadvertent filler. He was indicted anyway, and the prosecutor refused or showed no interest in the alibi.<sup>310</sup> Appropriate skepticism would have resulted in further investigation and no indictment and prosecution.

The systemic error in this case, however, occurred earlier: it was in showing a group of photos that included all Duke lacrosse players, the vast majority of whom were at the party and therefore potential suspects.<sup>311</sup> If, as a matter of chance, the accuser picked three players who attended the party, they would be charged. The procedure permitted a hoax or false allegation based on delusion to continue. Nifong did not yet know that no incriminating DNA evidence would be found, particularly if special testing were used. However, on March 30, 2006, the day before he suggested the unusual identification procedures,<sup>312</sup> he had been told in a phone call from the SBI lab that, as to the primary testing, no incriminating semen or sperm was present on the rape kit items and that these items would not be submitted for DNA analysis.<sup>313</sup> He should have been on alert that he needed corroboration for a witness with a challengeable background and, more importantly, to give him assurance that a crime occurred. Precisely what information Nifong knew cannot be determined, but he was told that

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310. Attorneys Kirk Osborn and Jim Cooney, both representing Seligmann, described being rebuffed by Nifong or his assistant when they offered or began discussing their client's very substantial alibi evidence. See Benjamin Niolet & Michael Biesecker, *DA: I Haven't Heard Accuser's Account*, News & Observer (Raleigh, N.C.), Oct. 28, 2006, at 12A (describing Osborn's unsuccessful efforts shortly after the indictment to meet with Nifong to discuss the alibi); see also Joseph Neff, *Undisclosed DNA Results Go Public in Courtroom*, News & Observer (Raleigh, N.C.), Apr. 17, 2007, at 1A (describing Cooney's encounter). Instead, Seligmann testified that Nifong sneered or chuckled when Osborn mentioned his alibi at an early hearing. Videotape: Testimony of Reade W. Seligmann (June 15, 2007), at RS 49:00–53:00 (on file with author). Finnerty also had substantial alibi information that he presented to the special prosecutors for the attorney general's investigation. I do not include him above because he did not present it to Nifong, but he likely would have done so had Nifong shown a willingness to be persuaded that he, too, was effectively an innocent "foil."

311. At this point in the investigation, the police had a list of names from three of the players of those who were and were not at the party. However, the police did not fully credit that information as accurate and so, while they believed some were absent, they did not know at the time of the April 4, 2006, photo display that any of them were clearly excluded as suspects.

312. On March 31, 2006, Nifong gave directions regarding this identification procedure to Sergeant Gottlieb. See Sgt. Gottlieb's Supplemental Report, *supra* note 35, at 8 (describing Nifong's instructions on March 31, 2006, for conduct of identification procedure). The previous day, on March 30, 2006, Nifong was given these results in a conference call with SBI technicians. See Leyn Testimony, *supra* note 96, at 9–11 (describing a March 30, 2006, telephone call in which she provided these results to Nifong); Phone Logs of Conference Call on March 30, 2006, between SBI Technicians and Nifong, *supra* note 96; Nifong Deposition, *supra* note 96, at 188–90; see also Joseph Neff, *DNA Tests Provide Clues Nifong Never Pursued*, News & Observer (Raleigh, N.C.), Apr. 16, 2007, at 1A (assuming Nifong was informed on March 30 of the results given his suggestion the next day in a public forum that condoms may have been used).

313. See Amended Nifong Bar Order, *supra* note 8, para. 36, at 6 (finding that SBI notified Nifong on this date that it was unable to find semen, blood, or saliva on any of these items).

Mangum had given conflicting versions of the event and that she had diagnosed mental problems. She had given no physical description of the three (or more) attackers before March 16, 2006, and after that date, the descriptions had not been used to focus on any suspects. She had viewed over two-thirds of the team without making identifications, including all those with the same names as the attackers used and all three of the players who lived at the house.

Nifong clearly had to know that, if possible, he needed identification evidence that was at least somewhat independently reliable, and the procedure he set in motion could not provide it.<sup>314</sup> Indeed, given that he had been informed by the attorney for Seligmann that his client had documentary evidence of an alibi, not to mention the other errors by the accuser regarding others at the party, the integrity of all the results should have been understood to have suffered serious damage.<sup>315</sup>

V. CONCLUSION—A LIMITED BUT IMPORTANT REMEDY: LEGAL ENFORCEMENT OF IDENTIFICATION PROTOCOLS DESIGNED TO ENSURE ACCURACY AND PROTECT THE INNOCENT

The identification procedure and ensuing indictment is a concrete example of Nifong's failure to follow the essential ethical command of prosecutors "to do justice": not to continue a prosecution unless the prosecutor has sufficient assurance of the guilt of the accused. Whatever the level of assurance or personal commitment required, Nifong's conduct should be found lacking in this case. The identification had no independent standing. When he secured it, he need not have expected it to be suppressed under due process, but he should have recognized that it had virtually no real value as evidence of any player's guilt because of the badly flawed procedures used.

As the Durham Police Department noted in defending its practices, the identification procedures are based upon recommendations of the North Carolina Actual Innocence Commission, which states that the procedures are "not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."<sup>316</sup> As a consequence, deviation from them does

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314. As noted earlier, Nifong knew that Mangum would be informed she was viewing the people whom police believed were at the party. *See* Sgt. Gottlieb Deposition, *supra* note 174, at 120–21, 126.

315. For example, Mangum on two separate occasions identified one player as being at the party who was in fact in Raleigh on that night and misidentified the person who made the crude remark regarding the use of the broom as a sex object. Neff, *supra* note 301; *see also* Motion to Suppress Identification, *supra* note 166, para. 78(f), at 19. She placed the person whom investigators had identified as having actually made that comment instead as sitting in the kitchen making a drink. *Id.*; *see* Sgt. Gottlieb's Supplemental Report, *supra* note 35, at 15, 18.

316. Chalmers Memorandum, *supra* note 250, at 5 (quoting N.C. Actual Innocence Comm'n, *supra* note 240, at 1).

not mean suppression should occur; indeed, a violation of the policies apparently does not even have evidentiary value.

Regardless of its aberrant facts, the Duke lacrosse case teaches an important lesson regarding identification procedures: more than just actions that relate to the due process standard can deny justice. I assume that prosecutors generally do not violate their most basic duty to “do justice” and accusers do not often attempt to perpetuate frauds or suffer from a total and persistent delusion,<sup>317</sup> and it should be rare that both happen simultaneously in the same case. But here we have one such case.

This case demonstrates the paramount need for concrete, enforceable rules. As bad as Nifong’s conduct was, he was not charged with and likely could not have been found to have violated the most fundamental ethical principles that should guide prosecutorial conduct. These precepts are extremely difficult or impossible to enforce since they are either very general in nature or not directly incorporated in any disciplinary rule. This case should give impetus to change identification guidelines into enforceable rules with the consequence that violation results in suppression of the out-of-court identification that results.<sup>318</sup>

Indeed, shortly after the conclusion of the Nifong disciplinary case, the North Carolina legislature enacted legislation that wrote the innocence commission’s procedures into affirmative law.<sup>319</sup> The bill’s easy passage

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317. Among the many who suffer from this fiasco are the victims of rape, whose reports will likely now be viewed more skeptically. I have focused here on the innocent. The justice system must protect victims and efforts should be made not to let Nifong’s reckless action harm sexual-abuse victims in an overreaction. See generally Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 Fordham L. Rev. 1585 (discussing the difficulties of protecting rape victims while insuring justice to the defendant).

318. See Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, Crim. Just., Summer 2005, at 39, 53 (arguing that violation of certain well-documented identification procedures should presumptively constitute a due process violation); see also Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030, 1063–65 (2001) (arguing that the new procedures to help ensure accurate identification are prime candidates for new prophylactic rules of exclusion).

319. Titled the Eyewitness Identification Reform Act, 2007 N.C. Sess. Laws 421 (to be codified at N.C. Gen. Stat. § 15A-284.52), which will become effective March 1, 2008, establishes detailed identification procedures for displaying a group of people or photos to a witness. Section (b) mandates that “[l]ineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements.” Those requirements include (1) use of “an independent administrator” or a specified alternative method, including an automated or random display system, that achieves neutrality, *id.* §§ (a)(3), (b)(1), (c); (2) sequential display of people or pictures, *id.* § (b)(2); (3) predisplay instructions to the eyewitness, which includes a warning that “[t]he perpetrator might or might not be presented in the lineup,” “[t]he lineup administrator does not know the suspect’s identity,” and “[t]he eyewitness should not feel compelled to make an identification,” *id.* § (b)(3); (4) inclusion of at least five fillers who generally resemble the eyewitness’s description of the perpetrator, *id.* § (b)(5); (5) placement of only one suspect in a display, *id.* § (b)(10); (6) documentation by the person administering the procedure of the eyewitness’s own words as to the degree of certainty of the eyewitness as to any identification made, *id.* § (b)(12); and (7) videotaping of procedures unless not practical, with audio taping then required unless it too is not practical, in which case written



was attributed to the reactions to the Nifong case, but it grew out of broader concerns with misidentifications and punishment of several innocent defendants who were exonerated by DNA evidence.<sup>320</sup>

The legislation is at least a good first step and probably much more. Similar legislation should be adopted in other jurisdictions to give concrete form to part of the prosecutor's duty to "do justice" in the context of identification evidence. By converting what had previously been only guidelines into required procedures that all state, county, and local law enforcement officers must follow,<sup>321</sup> the law takes the most important step. It mandates fairer and more accurate police procedures that not only help to control suggestiveness but also to increase accuracy. If the change in law enforcement conduct described in the legislation actually occurs, which should be assumed given the broad support for the reforms and the mandatory nature of the charge, the most important step will have been taken. For instance, the law requires a "double-blind" identification procedure,<sup>322</sup> which by itself eliminates much potential for inadvertent or purposeful coaching.

The one substantial question that remains for the North Carolina legislation is whether its three remedies are specific enough and go far enough. These remedies are (1) a requirement that failure to comply with any of the procedures is to be "considered by the court in adjudicating motions to suppress eyewitness identification"; (2) admission of evidence of such failure as evidence for the jury to consider regarding a claim of misidentification; and (3) a requirement that, where evidence of compliance or noncompliance has been presented, the court is to instruct the jury that it may consider such evidence to determine reliability of the identifications.<sup>323</sup>

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documentation is to be provided both of the reasons for lack of mechanical recording and of the details of the procedure, *id.* § (b)(14). The statute defines a "filler" as a "person not suspected of an offense." *Id.* § (a)(2).

320. See Titan Barksdale, *New Lineup Rules Pass*, News & Observer (Raleigh, N.C.), July 24, 2007, at 1A (describing legislation passed in response to the wrongful convictions of Darryl Hunt, Ronald Cotton, and Lesly Jean—a bill sponsor's client who had spent ten years in prison as a result of mistaken identification before he was exonerated by DNA—and as affected in timing and aided in gaining consensus by the Duke lacrosse case).

321. See 2007 N.C. Sess. Laws 421 (to be codified at N.C. Gen. Stat. § 15A-284.52(b)). In 2007, other states adopted legislation creating or requiring the formulation of similar identification procedures to be used throughout the enacting state. See, e.g., Md. Code Ann., Pub. Safety § 3-506 (2007); W. Va. Code § 62-1E-1-3 (2007)). However, unlike the North Carolina statute, none of the enacted procedures that I have located specify any legal consequences for their violation.

322. See N.C. Gen. Stat. § 15A-284.52(a)(3), (b)(1) (to be codified Mar. 1, 2008).

323. The remedies provision, 2007 N.C. Sess. Laws 421 (to be codified at N.C. Gen. Stat. § 15A-284.52(d)), states,

All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:

- (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.

My main concern is with the first of these remedies, consideration of noncompliance in connection with a motion to suppress identification. However, I begin with the last two, which are simple but important. When the required procedures are not followed, admission of evidence about the failure coupled with an instruction to the jury should have an impact. Of course, we cannot be confident that juries will be affected, but the fairness and accuracy message delivered by the evidence and the instruction would be one that should intuitively appeal to the jurors' common sense, and it should resonate with any other uncertainties regarding guilt present in the evidence. Courts should also go further and allow admission of expert witnesses when the procedures have been violated to explain to the jury dangers inherent in improper practices.<sup>324</sup> Expert explanation combined with instructions has in other areas been shown to be critical to juries' giving appropriate attention to flaws in the circumstances of the identification.<sup>325</sup>

The exclusionary remedy should be understood to include two elements that are not part of current suggestiveness law under the Due Process Clause of the U.S. Constitution.<sup>326</sup> First, the remedy for a violation of the statute should alter *Brathwaite's* rule of an all-or-nothing approach to identification suppression, which too often results in nothing being suppressed despite a suggestive out-of-court identification procedure. Before the Supreme Court's decision in *Brathwaite*, some courts employed

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- (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.
  - (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

324. Psychological research indicates that the traditional jury instructions on the weaknesses of eyewitness identification have virtually no impact on the jury's actual evaluation of problematic characteristics of an identification, whereas expert testimony has some appreciable effect in sensitizing jurors to the relevant issues. *See, e.g.,* Cutler & Penrod, *supra* note 236, at 264, 268; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 *Psychol. Pub. Pol'y & L.* 817, 834, 840-41 (1995). Where the defendant is indigent, the court should provide funds to secure expert assistance.

325. There is some suggestion that jury instruction is an important supplement to expert testimony in educating jurors on the weaknesses of eyewitness identification. *See* Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 *J. Applied Psychol.* 524, 537-38 (2004) (finding importance in jury instructions summarizing expert's points).

326. The North Carolina legislation is not clear on this point. Legislatures in other jurisdictions should make clear that noncompliance with required identification procedures stands as an additional ground for suppression. In North Carolina, courts should adopt this same interpretation. There is solid basis to do so in the clearly mandated procedures and the failure of the statute to specify that due process suggestiveness is the sole basis for exclusion. Indeed, interpreting the statute to limit suppression to the U.S. Constitution would be illogical. The North Carolina legislature has absolutely no ability to affect the interpretation of the U.S. Constitution by establishing mandatory identification procedures.

what was called a “per se approach,” under which an out-of-court identification was suppressed automatically if it had been obtained through unnecessarily suggestive confrontation procedures, even if the court ruled the in-court identification admissible under reliability analysis. The per se approach was justified under a dual rationale of eliminating evidence of uncertain reliability given the “awful risks of misidentification” and deterring misconduct by police and prosecutors.<sup>327</sup>

Exclusion of the out-of-court identification should be reestablished as the automatic or per se remedy for a material violation of the procedures set out in the bill. This remedy would be, of course, only of limited value to the defendant if the in-court identification is still admitted,<sup>328</sup> but it is of some benefit in denying the prosecution admission of the often more impressive out-of-court identification,<sup>329</sup> and the occasional suppression of some evidence for violations of mandated procedures will have the salutary effect of encouraging compliance. Perhaps Due Process Clause suggestibility law would still be as much of a wasteland as it currently is if the per se remedy had been maintained, but there is strong reason to believe that it would have been marginally more effective. The mistake of eliminating that partial remedy, which is correctable under the new grounds provided by the statutory command, should be remedied.

Importantly, the new legislation should be understood to create an additional statutory basis for exclusion that goes beyond due process suggestiveness. If suggestiveness under the Constitution remains the only legal basis for exclusion, then the suppression remedy is likely to be ineffective after including consideration of the violation of the mandated procedures in most situations. This is because of the fundamental difficulty of meeting the onerous requirements of the due process suggestivity doctrine. The new legislation should instead be understood to authorize exclusion of more than just identifications that are so impermissibly

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327. *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977) (quoting *Brathwaite v. Manson*, 527 F.2d 363, 371 (2d Cir. 1975)); see *supra* note 217 and accompanying text.

328. Exclusion of the out-of-court identification does have the benefit to the defense of taking away the more impressive evidence of identification. An in-court identification of the defendant sitting at counsel table may make for a dramatic moment, but picking the defendant out while (typically) he sits with counsel at the defense table is figuratively like “shooting fish in a barrel.” It has little probative value and is assumed to receive a discount by jurors.

329. Out-of-court identifications are admitted under the hearsay rule as independent evidence and stand as an exception to the general principle that a party may not bolster its own witness until attacked. The rationale flows from the self-impeaching quality of an in-court identification of the defendant sitting at counsel table, which is usually similar to “shooting fish in a barrel.” See, e.g., *People v. Gould*, 354 P.2d 865, 867 (Cal. 1960) (noting the basis for admission of an out-of-court identification in the absence of impeachment and over a hearsay objection is its superior quality to the in-court identification); 2 McCormick on Evidence § 251 (6th ed. 2006) (recognizing the unsatisfactory nature of an identification in the courtroom). The out-of-court identification typically provides more independent value. Thus, denying the prosecution that evidence of the out-of-court identification, even if the weaker in-court identification is permitted, should be of some value to the defense and its avoidance should be of interest to the prosecution.

suggestive as to give rise to a substantial likelihood of irreparable mistaken identification. It should also authorize exclusion of identification procedures that clearly violate the legally mandated procedures and, as a result, threaten accuracy and fairness, imperiling the innocent. At least exclusion of the out-of-court identification should be authorized even if due process is not violated.

In appropriate cases, as with the due process suggestiveness doctrine, exclusion of all identification evidence (the in-court as well as the out-of-court identification) from the affected witness should be the authorized remedy for violation of the procedures as well. Such a remedy would likely remain a rarity for the practical reason, if no other, that, as noted earlier, courts find difficulty excluding the identification testimony of a victim or key witness.<sup>330</sup> These practical pressures will continue to operate in much the same way even if suppression is considered under a new rationale. However, at least to some small extent, exclusion of all identification evidence from a witness may be more palatable when done to protect the innocent and guard against inaccuracy. The finding required to support suppression may be easier in that it will not require a conclusion that the witness's memory is likely irreparably distorted so as to lead to misidentification, but only a recognition that the process that violated the statute's commands was one known to have a very high likelihood of producing mistakes.

If the identification suppression hearing had been held in the Duke lacrosse case, Mangum's entire identification testimony might well have been suppressed, as a rare exception in the body of due process suppression law. Thus, in a truly extraordinary case, current doctrine is capable of yielding such a result. However, suppression would have been more appropriate on the new ground that the faulty identification procedure posed a threat to accuracy and to the innocent. Ensuring better identification procedures, a new way to examine the propriety of those procedures, and a varied set of remedies should be one of the lasting consequences of the Duke lacrosse case to take a limited but important step toward justice.

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330. *See supra* note 218 and accompanying text.