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EXCULPATORY EVIDENCE, ETHICS, AND THE ROAD TO THE DISBARMENT OF MIKE NIFONG: THE CRITICAL IMPORTANCE OF FULL OPEN-FILE DISCOVERY

Robert P. Mosteller[*]

INTRODUCTION

What has come to be known as the Duke Lacrosse case began in the spring of 2006 with allegations of a racially motivated gang rape. It ended a little more than a year later with the exoneration of three players, who had been indicted, and the disbarment and resignation of Durham County District Attorney Michael Nifong, who had pressed the baseless case forward with reckless abandon. In this Article, I examine the disciplinary charges brought by the North Carolina State Bar against Nifong for failure to disclose potentially exculpatory evidence, two other disciplinary actions that preceded Nifong's case, and the discovery reforms that stand at the heart of the effort to do justice in the associated criminal prosecutions.

The State Bar's ethics case against Nifong is unusual in many ways, including the filing of disciplinary charges against a prosecutor before the criminal trial commenced, the clarity of the violations, and the violation of both the prosecutor's obligation to disclose potentially exculpatory DNA evidence and to refrain from improper pretrial publicity. As global as Nifong's ethics violations were, the case illustrates the importance of specific duties rather than broad precepts for the imposition of professional discipline.

Rather than focusing initially or exclusively on the national spectacle that became the disbarment of Michael Nifong, I examine a series of three disciplinary cases brought by the North Carolina State Bar from 2004 to 2007 against prosecutors and begin with two cases and earlier associated reforms that I believe helped pave the way to Nifong's disbarment. The first case involved Special Prosecutors David Hoke and Debra C. Graves of the North Carolina Attorney General's Office, who were reprimanded in the

[*] Chadwick Professor of Law, Duke University School of Law. I would like to thank Ken Broun, Erwin Chemerinsky, Paul Haagen, Mike Howell, David Levi, Daniel Mosteller, Theresa Newman, Jeff Powell, Rich Rosen, Mike Tigar, and Fred Zacharias for their comments on an earlier draft of this article, Gretchen Engel, Allison Rice, and John Rubin for their advice, and Allison Hester-Haddad for her help as research assistant.

fall of 2004[1] for withholding exculpatory information in the 1998 murder trial of James Alan Gell, in which he was convicted and sentenced to death. The second involved District Attorney Kenneth Honeycutt and Assistant District Attorney Scott Brewer, who were charged with withholding exculpatory evidence in the 1995 murder trial of Jonathan Gregory Hoffman, who was similarly convicted and sentenced to death. The disciplinary charges against Honeycutt and Brewer were dismissed on technical grounds in the spring of 2006 at the outset of the disciplinary hearing proceedings.[2] I then examine the disciplinary proceeding against District Attorney Michael Nifong for improper pretrial publicity and withholding potentially exculpatory DNA evidence in the Duke Lacrosse case, which resulted in his disbarment in June 2007.[3]

The Duke Lacrosse case, which Nifong prosecuted, is widely seen as a fiasco,[4] with extremely serious ethics violations that had numerous harmful consequences, among which were the effect of the charges on the lives of the three Duke Lacrosse players and their families.[5] Remarkably, the Gell and Hoffman cases, although far less well known, are at least its rivals if not worse. Indeed, with regard to the consequences of the prosecutors' actions to the men charged, they far exceed those in the Duke Lacrosse case. These two prosecutions resulted in the convictions of two men for capital

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[1] The order of discipline was announced, as is typical, at the end of the proceedings, which were conducted on September 23 and 24, 2004. Order of Discipline, N.C. State Bar v. Hoke, No. 04 DHC 15 (Disciplinary Hearing Comm'n of the N.C. State Bar Dec. 2, 2004) (on file with author) [hereinafter Hoke & Graves Disciplinary Order]. The written order setting out the Disciplinary Hearing Committee's reasoning and the formal written reprimand were filed on December 2, 2004. Reprimand, *Hoke*, No. 04 DHC 15 (on file with author) [Hereinafter Hoke & Graves Reprimand].

[2] Proceedings were held on January 5 and 20, 2006, and the written order was entered on April 4, 2006. Memorandum and Order on Defendant's Motions to Dismiss, N.C. State Bar v. Brewer, No. 05 DHC 37 (Disciplinary Hearing Comm'n of the N.C. State Bar Apr. 4, 2006) (on file with author) [hereinafter Brewer & Honeycutt Bar Dismissal Order].

[3] Proceedings were held from June 12 through June 16, 2007, and the written order was entered on July 10, 2007. Findings of Fact, Conclusions of Law and Order of Discipline at 1, 24, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 10, 2007) (on file with author) [hereinafter Nifong Bar Order]. An amended order was filed on July 24, 2007. Amended Findings of Fact, Conclusions of Law and Order of Discipline at 24, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 24, 2007) (on file with author) [hereinafter Amended Nifong Bar Order].

[4] Excerpt Transcript, Findings of Fact and Conclusions of Law, Order of Discipline at 16, 29 (June 16, 2007), *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Excerpt Transcript Findings of Fact] (showing that Disciplinary Hearing Committee Chairman F. Lane Williamson twice used the term "fiasco" to describe Nifong's handling of the case).

[5] *See, e.g.*, *David Evans Sr. State Bar Testimony* (WRAL television broadcast June 16, 2007), *available at* http://www.wral.com/news/local/video/1507000/ (father of accused player Dave Evans); *Mary Ellen Finnerty State Bar Testimony* (WRAL television broadcast June 16, 2007), *available at* http://www.wral.com/news/local/video/1507031/ (mother of accused player Collin Finnerty); *Reade Seligmann Full Testimony* (WRAL television broadcast June 15, 2007), *available at* http://www.wral.com/news/local/video/1503575/.

murder and years of imprisonment, much of it on North Carolina's death row. Moreover, clearly in Gell, and arguably in Hoffman, the sweep of the exculpatory information withheld was also greater, although in neither of those cases were the prosecutors found to have knowingly withheld the evidence.[6]

These cases, including Nifong's disbarment, demonstrate the difficulties inherent in professional discipline of prosecutors, even in clear cases of ethical misconduct. The ethical duty to "do justice" is hardly a real source of discipline for two reasons. First, it applies to difficult to judge determinations—the fundamentally discretionary decisions of whether to charge and prosecute and other broad judgments about how to conduct the prosecution. Second, proving the requisite knowledge or intent by the prosecutor is inherently difficult both practically and theoretically. Even as to the somewhat more concrete duty to disclose exculpatory information, many of those same difficulties of characterization, knowledge, and intent make professional discipline problematic. These cases in general, and the success in the Nifong case in particular, show the importance of concrete standards of conduct, such as an obligation of full disclosure, which apply to the mundane details of the investigation as well as the exculpatory. Such requirements have the definite advantage that they can be enforced in the first instance without relying on a prosecutor to recognize, or a trial court to find, the exculpatory potential in material in the investigative file.

While many observers believed that the rigor of the disciplinary proceedings in Nifong's case was at least in part influenced by the limited punishment imposed against Hoke and Graves and the total failure to discipline Honeycutt and Brewer,[7] those cases at most established an atmosphere conducive to Bar action. Far more important was a revision of discovery rules occasioned by the first of those cases, the Gell prosecution, which led to the exoneration of the charged players and the discipline of Nifong by opening

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[6] In his explanation of the discipline imposed on Nifong, Disciplinary Hearing Committee Chairman F. Lane Williamson addressed both of these cases, noting that while the potential impact was greater, the lack of allegation and proof of intentional wrongdoing in one case and a procedural Bar in the other meant very different outcomes from the Bar's disciplinary process. Excerpt Transcript Findings of Fact, *supra* note 4, at 24-26.

[7] Letter from Michael B. Nifong, Durham County Dist. Attorney, to Katherine E. Jean, Counsel, N.C. State Bar, 7 (Dec. 28, 2006), Exhibit 233, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter First Nifong Response to Jean] (responding to Bar's Letter of Notice and Substance of Grievance and stating that "[f]or some time now, the 'word on the street' in prosecutorial circles has been that the North Carolina State Bar, stung by the criticism resulting from past decisions involving former prosecutors with names like Hoke and Graves and Honeycutt and Brewer, is looking for a prosecutor of which to make an example"); Anne Blythe & Joseph Neff, *Nifong, Bar Will Both Be Judged: Recent Lapses Put Regulators on Spot*, NEWS & OBSERVER (Raleigh, N.C.), June 10, 2007, at A1 (making reference to the "tepid prosecution" of the prosecutors in the Gell case and the dismissal on technical grounds in the Hoffman case and arguing that those cases put pressure on the Bar to "get it right" when disciplining Nifong).

the prosecutor's files. Gell's new trial[8] and exoneration was itself the consequence of enactment of an earlier, more limited open-file discovery statute for post-conviction review in capital cases. Such discovery rules are not at all couched in ethical precepts. Indeed, they are roughly the opposite in that they do not rely on the ethical judgment of a prosecutor involved in a fiercely competitive adversary trial process to determine what is exculpatory. Instead, they impose a blanket rule of general disclosure.

The three cases discussed in this Article reflect North Carolina's experience with a dramatic change in criminal discovery. In two steps, the state moved from a highly traditional, restrictive discovery procedure that guaranteed only minimal disclosure to the defense of the prosecution's evidence to a statute that entitles the defense to relatively full access to both prosecution and law enforcement files.

In Part I, I discuss the disciplinary action that arose from the prosecution of Alan Gell in 2002 for capital murder. I first describe how an open-file discovery law applicable to post-conviction proceedings in death penalty cases contributed to the discovery of the critical exculpatory evidence that led both to reversal of Gell's conviction and to disciplinary action against Hoke and Graves, who prosecuted him. Gell's acquittal in a retrial where the exculpatory evidence was presented produced, in turn, the passage of a similar full open-file discovery law broadly applicable in the trial of all felony cases.[9] The disciplinary proceedings led to an order of reprimand against these two prosecutors, and the outrage that followed what was seen as lenient treatment led to disciplinary rule reform as well.

In Part II, I describe the exculpatory evidence found during post-conviction proceedings related to the 1996 trial of Jonathan Gregory Hoffman for capital murder and the ethics proceedings against the attorneys who secured that conviction. The charges were dismissed for technical reasons for failure to file charges within the "statute of limitations." These proceed-

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[8] The granting of a new trial for Hoffman, which ultimately resulted in dismissal of charges, was also in part the consequence of evidence found as a result of this new law as well. *See* Affidavit of Robert H. Hale, Jr. Regarding Sealed File of Porter Materials at 1-3, Exhibit 4.11, Third Amendment to Defendant's Motion for Appropriate Relief, State v. Hoffman, No. 95 CRS 15695 (N.C. Super. Ct. Apr. 30, 2004) (on file with author) [hereinafter Exhibits to Third Amended Hoffman MAR] (describing comparison of the prosecution's files with sealed material presented to Judge William H. Helms, which revealed that prosecutors withheld notes from several meetings with a government witness who was offered various inducements in exchange for testimony). Although the prosecutor did not concede innocence, as Hoffman's defense claims, he dismissed charges against Hoffman in December 2007 because he concluded he had insufficient evidence to continue the prosecution. *See* Emily C. Achenbaum, *A Murder Case Dissolves*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 12, 2007, at A1 (explaining that the star witness against Hoffman, Johnell Porter, had told a newspaper reporter that he made up his testimony and a second witness had died).

[9] *See* N.C. GEN. STAT. § 15A-901 (2006) (making the discovery statutes applicable to cases within the original jurisdiction of the superior court, which excludes most misdemeanors).

ings have no direct link to the discipline against Nifong, but they show other impediments to successful professional discipline against prosecutors.

The Gell and Hoffman prosecutions also are part of a larger, troubling critique of the constitutional doctrine that requires the prosecution to provide exculpatory evidence to the defense, known generally as the *Brady* doctrine.[10] The doctrine does not work very well as a disclosure device. Beginning in 1998, including Gell and Hoffman, ten death penalty cases in North Carolina have been reversed after trial because of prosecution failures to provide *Brady* information. All involved cases were tried before the first open-file law went into effect, and all were reversed after the files of the prosecution and law enforcement were opened.[11]

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[10] The doctrine takes its name from *Brady v. Maryland*, 373 U.S. 83, 86 (1963), where the United States Supreme Court held that the Due Process Clause requires the prosecution to provide exculpatory evidence to the defense.

[11] State v. Canady, 559 S.E.2d 762, 767 (N.C. 2002) (ordering new trial because the State failed to disclose the name of the confidential informant who implicated persons other than client in the murders); State v. Chapman, Nos. 92-CRS 18186, 93 CRS 11980, slip op. at 184-85 (N.C. Super. Ct. Nov. 6, 2007) (on file with author) (vacating murder convictions resulting in death penalty case based, inter alia, on violations of *Brady* and *Napue v Illinois*, 360 U.S. 264 (1959)); State v. Walker, Nos. 92 CRS 20762, 70920, slip op. at 39-42 (N.C. Super. Ct. May 15, 2006) (on file with author) (reversing conviction and vacating death sentence for violations of *Brady* and *Napue*); State v. Pinch, Nos. 80 CRS 16429-30, slip op. at 53-62 (N.C. Super. Ct. Mar. 30, 2005) (on file with author) (reversing convictions and vacating death sentences for violation of *Brady* and other errors); State v. Hamilton, No. 95 CRS 1670, slip op. at 14-16 (N.C. Super. Ct. Apr. 22, 2003) (on file with author) (ordering new trial because the State failed to disclose evidence that sole witness against client testified in hopes of a deal from the prosecution); State v. Bishop, Nos. 93 CRS 20410-23, slip op. at 19 (N.C. Super. Ct. Jan. 10, 2000) (on file with author) (ordering new trial for due process violation where the State failed to disclose evidence that placed client elsewhere at the time of the crime and contradicted key informant's testimony); State v. Munsey, No. 93 CRS 4078, slip op. at 23-25 (N.C. Super. Ct. May 14, 1999) (on file with author) (ordering new trial for due process violation where the State failed to disclose evidence that key witness against client had fabricated his story); State v. Womble, Nos. 93 CRS 1992-93, slip op. at 1 (N.C. Super. Ct. July 22, 1998) (on file with author) (ordering new trial for due process violation where the State failed to disclose evidence concerning victim's time of death inconsistent with evidence presented at trial). *See also* Joseph Neff & Andrea Weigl, *Withheld Evidence Leads to New Trials*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 1, 2005, at A18 (discussing briefly reversals in the Bishop, Canady, Hamilton, Munsey, Bishop, and Womble cases). Although a few of these cases come from the same judicial district (for example, the Hoffman case is from Union County and the Hamilton case is from Richmond County) and thus involved the same prosecutors, they generally are spread across the state and involve different prosecutors.

Not all of these reversals were produced by the new discovery law applicable to death penalty cases. *See, e.g.*, *Canady*, 559 S.E.2d at 767 (reversing case on direct appeal due to the State's failure to disclose potentially exculpatory evidence). Moreover, relief was occasionally reversed on *Brady* grounds before the new law. *See, e.g.*, McDowell v. Dixon, 858 F.2d 945, 950 (4th Cir. 1988) (ordering new trial for black defendant because State failed to disclose evidence that eyewitness initially told law enforcement authorities that the perpetrator was white); State v. Oliver, No. 78 CRS 25575, slip op. at 56 (N.C. Super Ct. Jan. 25, 1994) (on file with author) (ordering new sentencing hearing because the State failed to disclose impeaching evidence regarding the key eyewitness' identification of the defendant as gunman). I am keenly aware that *Brady* had utility before the new law because I represented

In Part III, I describe the most important events in the Duke Lacrosse case that led to ethics charges against Nifong and his ultimate disbarment. Although almost completely separate from his failure to provide exculpatory DNA evidence, Nifong was also charged with improper pretrial publicity. The North Carolina State Bar's decision to file disciplinary charges based on that conduct before the trial in the rape prosecution commenced played a critical role in altering the path of the case. However, in this part, I concentrate on the painstaking steps that the defense took to have the data behind those conclusions disclosed and the role of disclosure statutes in their success.

In Part IV, I argue that the message of these cases is the paramount importance of a broad and sure disclosure requirement in criminal cases that, in the first instance, helps prevent failures of ethical standards from ever occurring because little opportunity is allowed for misjudging what is potentially exculpatory evidence. Where an initial failure occurs, such provisions also assist the court and opposing counsel in learning of the failure at a relatively early stage in the proceeding. The competitive process of the adversary criminal trial presents inherent challenges to the critical but vague duty "to do justice." More concrete, specific, and mundane rules of discovery are the best alternative. As is obvious, full discovery of all evidence in the files of the prosecutor and investigative agencies also discloses exculpatory evidence as required by the Constitution and completely satisfies the related ethical command.

I. DISCIPLINARY ACTION AGAINST SPECIAL PROSECUTORS DAVID HOKE AND DEBRA C. GRAVES ARISING FROM THE CAPITAL PROSECUTION OF ALAN GELL

A. An Open-File Discovery Statute for Post-Conviction Litigation in Death Penalty Cases that Begins the Process

The path that ultimately led to disciplinary action against Nifong began with a discovery law that the North Carolina legislature enacted in 1996, which was applicable only to defendants convicted of capital murder and sentenced to death. North Carolina General Statutes § 15A-1415(f)

John Oliver, whose life was spared because the trial court found a *Brady* violation long before the new discovery law was enacted. However, during the decades prior to the passage of the new law, only that case and one other death penalty case (McDowell) were reversed on *Brady* grounds, which contrasts with ten reversals in a little more than a decade after the discovery law became effective. Although these are small numbers, and the difference in numbers certainly could be explained by other factors, I argue that the increase in reversals strongly suggests that *Brady* became far more meaningful after defense attorneys gained automatic access to the full files of the prosecution and investigative agents to examine them for potentially exculpatory evidence.

provides that in such cases "[t]he State, to the extent allowed by law, shall make available to the capital defendant's counsel *the complete files* of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[12]

This provision may be called "open-file discovery," which is accurate in one sense, but it provides far more than simply a requirement of the prosecutor to open his or her files. It entitles the defense also to have access to law enforcement files where evidence that even the prosecutor did not know about may be found. I therefore call the provision "*full* open-file discovery."

The statute was enacted as "An Act to Expedite the Postconviction Process in North Carolina."[13] Its theory, as stated by the North Carolina Supreme Court, was to provide "early and full disclosure to counsel for capital defendants so that they may raise all potential claims in a single motion for appropriate relief."[14] In the major test of the statute's meaning, the State argued for a narrow construction, contending the work product privilege protected much of the prosecution's files.[15]

The North Carolina Supreme Court rejected this argument, giving the statute's disclosure requirements an extremely broad reading and giving a narrow construction to work product protection. It stated that the prosecution could withhold "only specific types of information which the State is elsewhere prohibited by law from disclosing."[16] The Supreme Court agreed with the trial judge that this statute "provides for broader discovery for a capital defendant's counsel in the post conviction review process than previously existed."[17]

This was North Carolina's first experience with full open-file discovery in criminal cases. It changed the landscape for defendants who had been convicted of capital murder and sentenced to death as described in the introduction.

Specifically, it opened the investigative files in the prosecution of Alan Gell, who was sentenced to death at his initial trial in 1998. The files contained extraordinary exculpatory evidence—indeed, evidence that appeared to show Gell was an innocent man who had spent nine years in prison and half of that on death row.[18]

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12 N.C. GEN. STAT. § 15A-1415(f) (2006) (emphasis added).

13 State v. Bates, 497 S.E.2d 276, 277-78 (N.C. 1998) (noting the title of the act, which was ratified by the North Carolina legislature on June 21, 1996).

14 *Id.* at 281.

15 *Id.* at 277-78.

16 *Id.* at 279 (citing N.C. GEN. STAT. § 15A-904(b)). The court cited the prohibition against the disclosure of confidential juvenile records without court order as an example of the type of exception contemplated by the statute. *Id.*

17 *Id.* at 280 (quoting order of Superior Court Judge Melzer A. Morgan, Jr.).

18 Joseph Neff, *False Actions Charged in Trial: Gell's Prosecutors Face Bar Inquiry*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 9, 2004.

B. The Gell Conviction and Grant of a New Trial During Post-Conviction Proceedings

On April 14, 1995, the decomposing body of Allen Jenkins was discovered in his home in the small town of Aulander in northeastern North Carolina.[19] Alan Gell was arrested and charged with Jenkins's murder. He was convicted based exclusively on the testimony of Crystal Morris and Shanna Hall (ages 15 and 16), who themselves admitted involvement in the murder.[20] Morris and Hall told investigators that they accompanied Gell to rob Jenkins and that the robbery-turned-murder occurred on April 3, 1995. That date was important in that Gell could not have committed the murder thereafter because he was either out of the state or in jail on other charges until Jenkins' body was found.[21]

In 1998, Gell was tried, convicted of capital murder, and sentenced to death.[22] In October 2000, the full file was delivered by the State to Gell's lawyers pursuant to the broad discovery law applicable on post-conviction review in death sentence cases. In the boxes of material, the lawyers found exculpatory information of two types that led to a new trial. They found interview reports by State Bureau of Investigation agents with multiple witnesses who stated they had seen the decedent alive after April 3.[23] These included statements from the decedent's brother, his across-the-street neighbor, and a life-long friend.[24] As the subsequent trial showed, a number of these witnesses continued to believe they saw Jenkins alive after April 3 and so testified.[25] They also found a secretly recorded conversation between

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19 Hoke & Graves Disciplinary Order, *supra* note 1, ¶ 5.

20 Report to the North Carolina State Bar Disciplinary Review Committee at 1-2 (July 15, 2005) (on file with author) [hereinafter Disciplinary Review Committee Report] ("There was no other evidence linking Gell to the crime.").

Both Morris and Hall entered guilty pleas to second degree murder and received nine year sentences in exchange for testifying. Anna Griffin, *Death Row Interrupted: Alan Gell Was Condemned for a Crime He Didn't Commit. He's Free Now, and There's Something He Has to Do*, CHARLOTTE OBSERVER (N.C.), Jan. 23, 2005, at 1E. Neff put the sentence at ten rather than nine years. Neff, *supra* note 18.

21 Estes Thompson, *Ex-Death Row Inmate Acquitted*, HOUSTON CHRON., Feb. 19, 2004, at A3.

22 Joseph Neff, *Investigator in Gell Case Blames Prosecutors*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 18, 2005, at B7.

23 *See* Hoke & Graves Disciplinary Order, *supra* note 1, ¶¶ 26, 30; Griffin, *supra* note 20.

24 Joseph Neff, *Chapter 1: Who Killed Allen Ray Jenkins?*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 8, 2002, http://newsobserver.com/news/crime_safety/deathrow/story/192028.html; Neff, *supra* note 18.

25 *See* Cal Bryant, *Unanswered Questions*, ROANOKE-CHOWAN NEWS HERALD (N.C.), Feb. 24, 2004, http://www.roanoke-chowannewsherald.com/articles/2004/02/23/opinion/column.txt (noting the role of the witnesses on retrial who said they saw Jenkins alive after April 3 as part of the extremely convincing case for acquittal on retrial); Joseph Neff, *Lawyers Put Focus on Agent: Gell Prosecutors Deny Holding Data*, NEWS & OBSERVER (Raleigh, N.C.), May 22, 2004, at A1 (noting the "critical" value of the withheld witness statements and taped conversation for the jury in acquitting Gell).

Crystal Morris and her then-boyfriend in which Shanna Hall occasionally participated and, most significantly, in which Morris stated that she needed to "make up a story" to tell the police regarding the murder.[26]

On December 9, 2002, Superior Court Judge Cy A. Grant, after a brief hearing, ruled from the bench that Gell should receive a new trial.[27] In his three-page written order signed a week later, Judge Grant found that the State had failed to provide evidence of two types: first, statements to investigators by a number of witnesses that they had seen the victim alive after April 3, 1995, and second, the secret tape recording of two of the state's witnesses.[28] He ruled that the statements and tape recording were exculpatory and material.[29] In his order, Judge Grant made no reference to the knowledge or intent of the prosecutors, stating only that the trial judge had ordered the State to produce for *in camera* inspection by the court the statements of all witnesses who saw the victim alive after April 3, and that the State "did not comply with the trial court's order."[30]

The Attorney General decided to retry Gell.[31] After retrial, Gell was acquitted on February 18, 2004 on the first vote by his jury.[32]

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[26] The taped conversation was a May 1995 telephone conversation between Crystal Morris and Gary Scott, her boyfriend at the time, which was recorded at the direction of SBI Agent Dwight Ransome. Answer ¶ 8(a), N.C. State Bar v. Hoke, No. 04 DHC 15 (Disciplinary Hearing Comm'n of the N.C. State Bar Apr. 23, 2004) (on file with author) [hereinafter Hoke & Graves Answer]. The tape also included statements made by Shanna Hall, who can be heard on the tape yelling to Morris and Scott. *See* Motion for Appropriate Relief ¶¶ 143-145, 147, North Carolina v. James Alan Gell, Nos. 95 CRS 1884, 1393-40, 2322, July 30, 2001 (on file with author). In the conversation, Morris made the "make up a story" comment. Neff, *supra* note 25.

[27] Griffin, *supra* note 20.

[28] *Id.* ¶¶ 17, 19-22, State v. Gell, Nos. 95 CRS 1884, 1939-40, 2322 (N.C. Super. Ct. Dec. 16, 2002) (on file with author). The order was entered by Cy A. Grant. *Id.* at 3.

[29] *Id.* at 2.

[30] *Id.* ¶¶ 15-17.

On November 26, 2003, Judge Grant entered another order denying "as a matter of law" Gell's motion to dismiss the prosecution based on grounds of prosecutorial misconduct. Order Denying Motion to Dismiss, *Gell*, Nos. 95 CRS 1884, 1939-40, 2322 (on file with author). Hoke and Graves noted that litigation and attached the order to their answer, Hoke & Graves Answer, *supra* note 26, at 24-25 & Exhibit E, apparently arguing that Judge Grant's order constituted, by inference, a ruling that their misconduct was not intentional.

[31] Jim Coman, who later helped lead the investigation of the Duke Lacrosse case for the Attorney General, was one of the two Special Prosecutors who handled Gell's retrial for the state. *See* Joseph Neff, *Duke Prosecutor Treads Familiar Ground*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 21, 2007, at A1 (noting that Coman was lead prosecutor in the Gell case and that some of the same defense attorneys who had attempted to persuade him to drop those charges represented players charged in the Duke Lacrosse case).

[32] *See* Joseph Neff, *Haunted, Gell Moves On*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 27, 2005, at D1; Neff, *supra* note 25 (noting the first-ballot acquittal).

C. Disciplinary Proceedings Against Former Special Prosecutors Hoke and Graves

In March 2004, the Bar filed disciplinary charges against David Hoke and Debra Graves,[33] the two attorneys who prosecuted Gell originally.[34] Neither was still with the attorney general's office.[35]

As noted above, the undisclosed exculpatory information was of two types. One involved statements from people who stated they had seen the victim alive after April 3, 1995. As part of pretrial proceedings, and without specific reference to this issue, the trial court entered an order on September 7, 1997 for the prosecution to produce all exculpatory evidence.[36] Despite the court's initial order, no statements had been turned over.[37] Shortly before trial began, Gell's defense counsel read in a local paper that three people had seen Jenkins in a nearby town a week after the date on which the prosecution contended he had been killed,[38] and he filed a second request for exculpatory information, specifically requesting witness statements of all witnesses who saw the victim alive after the critical date.[39]

On February 2, 1998, when the motion was addressed in court, the prosecutors responded that they were aware that statements had been made by people who reported seeing the decedent alive after April 3.[40] However, those witnesses had been re-interviewed and had said they could not be specific on the time, so the prosecutors did not feel the statements were

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33 Complaint at 1, N.C. State Bar v. Hoke, No. 04 DHC 15 (Disciplinary Hearing Comm'n of the N.C. State Bar Mar. 29, 2004) (on file with author) [hereinafter Hoke Bar Complaint].

34 Hoke and Graves from the Attorney General's office handled the case because the local district attorney's office developed a conflict of interest when a new attorney was hired from the firm that was representing Gell. Letter from District David H. Beard, Jr., Dist. Attorney for Bertie County, to Bill Ferrell, N.C. Senior Deputy Attorney Gen. at 1-2 (Jan. 2, 1996), Hoke & Graves Answer, *supra* note 26, Exhibit A.

35 By that time, Hoke was assistant director of the North Carolina Administrative Office of the Courts, which oversees operation of the state's court system and Graves was a federal public defender in Raleigh, North Carolina. Charles Delafuente, *Minimum Punishment Puts State Bar on Trial: Two Prosecutors Reprimanded for Withholding Evidence in Capital Case*, 3 No. 44 A.B.A. J. E-Rep. 5 (Nov. 5, 2004), *available at* 3 No. 44 ABAJEREP 5 (Westlaw).

36 Hoke & Graves Bar Complaint, *supra* note 33, ¶ 6; Order ¶ 9, State v. Gell, Nos. 95 CRS 1884, 1939-40, 2322 (N.C. Super. Ct. Dec. 16, 2002) (on file with author); Hoke & Graves Answer, *supra* note 26, ¶ 7 (quoting the language of Judge Grant's generally phrased *Brady* order entered as an oral ruling from the bench).

37 Hoke & Graves Bar Complaint, *supra* note 33, ¶ 14.

38 Motion for Production of Exculpatory Evidence ¶ 5, State v. Gell, Nos. 95 CRS 1884, 1939-40, 2322 (N.C. Super. Ct. Jan. 30, 1998) (on file with author) [hereinafter Gell Motion for Production]; Joseph Neff, *Chapter 3: Gell Defense Left in the Dark*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 10, 2002, http://www.newsobserver.com/news/crime_safety/deathrow/series/story/301508.html.

39 Hoke & Graves Bar Complaint, *supra* note 33, ¶ 13. This motion was filed on January 30, 1998. Gell Motion For Production, *supra* note 38, at 1 (showing time stamp).

40 Hoke & Graves Bar Complaint, *supra* note 33, ¶ 14.

exculpatory.[41] At the conclusion of the hearing, the trial court ordered the prosecutors to produce "the statements of any witness who allegedly saw the deceased after the date of the 3rd day of April, 1995, and let me review them."[42] After conferring with the lead investigator in the case, State Bureau of Investigation ("SBI") Agent Dwight Ransome, the prosecutors gave statements regarding nine witnesses to the judge.[43] In fact, at that time, the files contained statements from 18 witnesses who had said they saw the decedent alive after April 3.[44] Several days later, another statement was located by the investigator and given to defense counsel.[45] This left undisclosed statements regarding 8 witnesses.[46]

The second type of potentially exculpatory evidence found by the judge and covered by the Bar's Complaint was the withholding of a tape recorded conversation involving the two key prosecution witnesses, Morris and Hall. It was withheld "even though the recording contained matter that the court later concluded was exculpatory as a matter of law and was required to be disclosed under the orders of the court and the constitutional obligations of the State."[47]

As to the undisclosed witness statements, the prosecutors responded that they were unaware that the date of death was an issue in the case until the morning of February 2, 1998.[48] They initially contended that the file they used, which they had received from the local District Attorney, did not contain all the witness interviews that were in the SBI file,[49] although they acknowledged they had received the full SBI file.[50] Thus, as to the witness statements regarding seeing the decedent after April 3, they were unsure which of those statements might have been in their working file, but they argued they would likely not have recognized the potential exculpatory nature of the statements had they seen them because they were unaware the actual date of death was at issue.[51] They responded that, after they received the specific directive regarding these statements, they relied upon Agent Ransome to review the files and to provide copies of the relevant state-

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41 Hoke & Graves Disciplinary Order, *supra* note 1, ¶ 24.

42 *Id*. ¶ 25.

43 *Id*. ¶ 27.

44 *Id*. ¶ 26.

45 *Id*. ¶ 31.

46 *Id*. ¶ 27.

47 Hoke & Graves Bar Complaint, *supra* note 33, ¶ 22.

48 Hoke & Graves Answer, *supra* note 26, ¶ 5.

49 *Id*. ¶ 3.

50 Amended Answer ¶ 1, N.C. State Bar v. Hoke, No. 04 DHC 15 (Disciplinary Hearing Comm'n of the N.C. State Bar Sept. 9, 2004) (on file with author) [hereinafter Hoke & Graves Amended Answer].

51 Hoke & Graves Answer, *supra* note 26, ¶ 8(b).

ments, and, therefore, their failure to comply with the orders was "unintentional and inadvertent on their part."[52]

With regard to the recorded statement, they asserted they had not listened to the tape recording, but acknowledged knowing of the content of the transcript of it. They asserted that they believed it not to be *Brady* material:

> [I]t was their opinion that the *transcript* of that conversation which they had received did not qualify as *Brady* material, and since they were not intending to offer the tape itself, or a copy of the transcript of that conversation, as evidence at trial, they did not believe that they were required to produce that in response to a *Brady* Order. While they both recognized that the transcript of that conversation *could, and more likely than not, would* be of help in cross-examining Ms. Morris, it was not their belief that it was *Brady* material that was referred to in Judge Grant's Order.[53]
>
> . . . .
>
> Upon reviewing the transcription of the tape in preparation for trial from late 1996 up to 1998, it was the Defendants' belief that this transcript did not contain "exculpatory" evidence for Ms. [sic] Gell, but, at best, constituted ammunition for impeachment on cross-examination of either Ms. Morris or Ms. Hall at trial. Since there was never a Motion filed in this matter pursuant to *Giglio v. United States* which would have called for such a disclosure, these Defendants did not believe they were under any obligation to produce this document to counsel for Mr. Gell.[54]

At the Disciplinary Hearing Committee proceedings in September 2004, the lawyers representing the North Carolina State Bar relied exclusively on the Complaint and the deposition of the prosecutors. They chose not to call any witnesses, which they explained was for strategic reasons since they believed the prosecutors had admitted conduct necessary to establish the charges.[55] The defense called numerous witnesses.

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52 *Id.*; Hoke & Graves Amended Answer, *supra* note 50, ¶ 2.

53 Hoke & Graves Answer, *supra* note 26, ¶ 8(a) (emphasis in original).

54 Hoke & Graves Answer, *supra* note 26, ¶ 22. In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court first held that failure to provide information regarding an agreement with the government about future prosecution was important to credibility and failure to produce it violated the Due Process Clause, *id.* at 154-55 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). In *United States v. Bagley*, 473 U.S. 667 (1985), the Court cited its decision in *Giglio* in stating that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule," *id.* at 676. Indeed, the Court stated that it "has rejected any . . . distinction between exculpatory evidence and impeachment evidence. *Id.*

The inept efforts of the State to support the position that impeaching evidence was not *Brady* information was remarkable. Initially, Jim Coman, a major figure in the Attorney General's office who prosecuted Gell at the retrial and who served as Special Prosecutor in the Duke Lacrosse case stated under oath that the Attorney General's policy was not to treat impeaching evidence as *Brady* evidence. Joseph Neff, *N.C. Prosecutors Stifled Evidence*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 19, 2004, at A1. He subsequently recanted his statement. *Id.*

55 Disciplinary Review Committee Report, *supra* note 20, at 4.

The Disciplinary Hearing Committee generally accepted the factual claims of the defendants.[56] It, however, found violations of the prosecutors' duty to produce "evidence or information known to the prosecution that tends to negate the guilt of the accused" under then existing North Carolina Rule 3.8(d),[57] which tracked Model Rule 3.8(d).[58] In reaching this conclusion, the panel made a somewhat innovative ruling that the prosecutors "had a duty under the Rules of Professional Conduct and existing case law to know the contents of the investigation files in the possession of the State and its agents."[59] The same conduct was found to be conduct prejudicial to the administration of justice under North Carolina Rule 8.4.[60] It also found a failure to supervise the conduct of a non-lawyer (Agent Ransome), which it concluded was a violation of North Carolina Rule 5.3.[61] The State Bar Complaint had also alleged that the prosecutors *knowingly* made a false statement of material fact to the court in violation of North Carolina Rule 3.3,[62] but the Disciplinary Hearing Committee did not find that violation.[63]

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56 Apparently, if witnesses had been called, some of them would have contradicted their explanations. Hoke and Graves asserted that they believed they need not provide witness statements since Beard had already provided the statements to defense counsel through his open-file policy, Hoke & Graves Answer, *supra* note 26, at 2, 19, and that the file Beard delivered to the attorney general's office was incomplete, *id.* at 3. Beard would have contradicted those claims. Joseph Neff, *Bar Set to Defend Its Ruling: Historic Hearing Slated in Gell Case*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 19, 2004, at A1. Hoke and Graves also claimed that they did not know the date of death was at issue until the day of trial. Hoke & Graves Answer, *supra* note 26, ¶ 5. Likewise, Dr. M.G.F. Gilliand, the medical examiner, would have contradicted that assertion by the prosecutors. Neff, *supra*. *See generally* Disciplinary Review Committee Report, *supra* note 20, ¶¶ 11-12 (noting concerns about investigation in (1) not reviewing the original Gell prosecution files, (2) not interviewing or calling the former District Attorney once Hoke and Graves suggested he did not transmit witness statements to them, and (3) not considering using information from the medial examiner to challenge the credibility of Gell's prosecutor's, although the Committee believed these failures did not affect the hearing outcome). *But see* Joseph Neff, *Gell's Suit Gets a Boost: Ex-DA: Evidence Was Hidden*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 3, 2007 (describing allegations by Gell's attorneys in on-going civil suit, derived in part from a deposition of David Beard, the original prosecutor, that the defendant in the suit, SBI agent Dwight Ransome, kept exculpatory information from Hoke and Graves); *infra* note 303.

57 N.C. REVISED RULES OF PROF'L CONDUCT R. 3.8(d) (2006).

58 *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1983).

59 Hoke & Graves Disciplinary Order, *supra* note 1, Conclusions of Law ¶ 2(a).

60 *Id*. ¶ 2(c).

61 *Id*. ¶ 2(b).

62 Hoke & Graves Bar Complaint, *supra* note 33, ¶ 23(a) (alleging that "[b]y representing to the court that the State had produced all exculpatory witness statements pursuant to a direct order of the court when the Defendants knew or should have known that the statement was false, Defendants knowingly made a false statement of material fact to a tribunal in violation of Rule 3.3(a)(1) and engaged in conduct involving misrepresentation in violation of Rule 8.4(c)").

63 Disciplinary Review Committee Report, *supra* note 20, at 4.

The Disciplinary Hearing Committee imposed a reprimand—a relatively mild form of punishment.[64] In that reprimand, it stated that there was "no clear, cogent, and convincing evidence that [the prosecutors'] conduct was intentional."[65]

The disciplinary hearing and its result created a furor among members of the legal profession in North Carolina. Protests over the action swamped the State Bar President Dudley Humphrey. In response, the State Bar scheduled an unprecedented public meeting the next month to explain its action to critics.[66] However, the meeting did little to resolve complaints.[67] University of North Carolina Law Professor Rich Rosen called the public hearing "a whitewash of a whitewash" and characterized the presentation of the chair of the State Bar Grievance Committee as "a filibuster."[68] No questions were taken from the floor, and Rosen found the presentation a justification rather than an explanation.[69]

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64 *Cf.* Delafuente, *supra* note 35 (stating that the punishment was "the lightest penalty available"). The Disciplinary Hearing Committee had available two milder forms of punishment: an admonition, *see* N.C. GEN. STAT. § 84-28(c)(4)-(5) (2006) (describing a reprimand as more serious than an admonition), and a letter of warning, *see* N.C. STATE BAR R. 1B.0103(30) (2003) (describing a letter of warning as a written communication regarding "an unintentional, minor, or technical violation of the Rules of Professional Conduct [that] may be the basis for discipline if continued or repeated").

As noted by Joseph Neff, a long-time reporter for the *The News & Observer*, even before the hearing was conducted, substantial Bar discipline has not been the order of the day for prosecutorial misconduct. Neff, *supra* note 18. "In four decades of disciplining lawyers, the State Bar has punished only two prosecutors for withholding evidence. Both were put on a form of probation, in which they could continue to practice law as long as they broke no more laws and consulted with a mentor." *Id.* One such disciplinary action involved Gary B. Goodman who secured a death sentence against Stephen Mark Bishop that was vacated because of a *Brady* violation. *See* Memorandum Order and Final Opinion at 21, State v. Bishop, Nos. 93 CRS 20410-23, slip op. at 21 (N.C. Super. Ct. Jan. 10, 2000) (on file with author). For this and two other *Brady* violations, Goodman's license was suspended for two years. Order of Discipline, Conclusions of Law ¶ 2, N.C. State Bar v. Goodman, No. 00 DHC 29 (Disciplinary Hearing Comm'n of the N.C. State Bar Mar. 26, 2001) (on file with author). However, his suspension was stayed based on several compliance conditions, which included no further violation of the North Carolina State Bar and Discipline Rules and consulting with a mentor once a month during the stayed suspension. *Id.* Order of Discipline ¶ 1.

65 Hoke & Graves Reprimand, *supra* note 1.

The Bar's report, while not explicitly disputing that a non-intentional ethical violation occurred, does note that the prosecutors "made a conscious decision to *not* turn over the transcript to defense counsel, believing it was not properly *Brady* material." Disciplinary Review Committee Report, *supra* note 20, at 4. Moreover, Hoke's sworn statement, elicited by the Bar's lawyer on cross-examination, indicated that in 1993 he had been admonished by a judge in a murder trial when he "told the judge he didn't turn it over because it was 'impeaching evidence, not exculpatory evidence.'" Neff, *supra* note 54.

66 Neff, *supra* note 56.

67 Joseph Neff, *Bar Hearing Provokes More Anger*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 21, 2004, at B1.

68 Delafuente, *supra* note 35.

69 *Id.*

D. Disciplinary Rule Reform

The State Bar responded to the continuing controversy by announcing in December 2004 the formation of a special committee to review the disciplinary action and to examine whether ethics rules or disciplinary procedures should be revised.[70] The resulting Disciplinary Review Committee Report stated that Rule 3.8 of the North Carolina Rules of Professional Conduct "does not make the failure to provide what is known as *Brady* material unethical unless such material deals directly with innocence or mitigation; nor does it require that the prosecution diligently seek out such information."[71] The first part of that statement—that *Brady* material must directly deal with innocence or mitigation—appears to be an overstatement of the clarity of the exculpatory quality of the evidence since Rule 3.8(d) requires disclosure of evidence that simply "tends to negate the guilt of the accused."[72] The second part—that the prosecution can be willfully ignorant—was rejected, as the committee noted, by the Disciplinary Hearing Committee's decision. The Report recommended changes in the disciplinary rule relating to the *Brady* duty. It specifically proposed a duty by prosecutors to "inquire into and search for the existence of such material in order to fulfill their ethical obligations."[73]

As a result of the disciplinary action in the Gell case, the North Carolina State Bar amended the provision defining the duty of the prosecutor

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70 Press Release, N.C. State Bar, State Bar Forms Disciplinary Committee,(Dec. 13, 2004) (on file with author); *see also* Joseph Neff et al., *Hoke-Graves Case Prompts State Bar Review*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 19, 2005, at B5 (describing work of special committee charged with examining how the State Bar handled the Hoke and Graves disciplinary hearing).

71 Disciplinary Review Committee Report, *supra* note 20, at 9.

72 The committee perhaps was referring to an argument related to the materiality concept of *Brady*. *See infra* note 185. Former Supreme Court Justice Robert Orr argued before the review committee that the prosecutors did not err in withholding the tape recorded statement of the key witnesses regarding making up a story for the police because "'had this issue reached the N.C. Supreme Court, failure to turn it [the tape] over' would not have won Gell a new trial." Neff, *supra* note 22. While the disciplinary rule has no requirement that the evidence be such that it would likely have affected the outcome of the trial through its requirement of a knowing violation, it does effectively have a requirement that the exculpatory quality be clear enough that it can be discerned by the prosecutor.

Prosecutors sometimes make a related argument that they may withhold apparently helpful evidence to the defense (arguably exculpatory evidence) because they judge it to be non-material in that it would not be sufficiently likely effect the trial outcome for the Constitution to mandate disclosure. As to the constitutional doctrine, that argument is theoretically sound, but it would appear to be problematic in many cases as a practical matter. It would appear difficult for a prosecutor at the discovery stage to have confidence in how evidence that is facially helpful to the defense would affect the outcome of the future trial as the actual evidence unfolds there. In some cases at least, this argument is likely more a retrospective excuse for the nondisclosure rather than a carefully considered reason. Materiality is not apparently an excuse under the ethics rules.

73 Disciplinary Review Committee Report, *supra* note 20, at 12.

under Rule 3.8(d), effective November 16, 2006.[74] It changed the Disciplinary Rule in two ways. First, the introductory phrase "after reasonably diligent inquiry" was added at the beginning of Rule 3.8(d), which imposes a requirement of diligence to learn of potentially exculpatory information. Second, it expanded the ethical duty of disclosure beyond "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" to include a duty to "make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions."

E. Discovery Reform

The Gell case also prompted the North Carolina Legislature to create a vastly different discovery regime. After the acquittal of Alan Gell, politically powerful State Senator Tony Rand gave the organizations representing the prosecutors and defense attorneys an ultimatum: Work out an open file discovery bill or the legislature would pass one on its own.[75] The adversaries hammered out a deal.[76]

Prior to the changes described above, North Carolina had quite limited criminal discovery system, which historically was the pattern across the nation. Criminal discovery has lagged behind civil discovery throughout our nation's history. In many ways, having a narrower discovery system in criminal cases where the stakes are often higher than in civil cases seems backwards if, as is ordinarily assumed, discovery is a way to improve accuracy. However, more restrictive criminal discovery has been the result reached based on asserted differences between civil and criminal trials.

The various substantive positions in the historical debate have been developed at length. I will only briefly summarize them here. The side opposing broader discovery, which in the main means broader disclosure by

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[74] As amended, Rule 3.8(d) reads in full:

> *after reasonably diligent inquiry*, make timely disclosure to the defense of *all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including* all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigation information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

N.C. REVISED RULES OF PROF'L CONDUCT R. 3.8(d) (2006) (amended provisions emphasized).

[75] Joseph Neff, *"Open File" Law Gives Defense a Tool to Force Out Evidence*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 12, 2007, at A18 (describing receipt of 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 that discovery law!!'" and setting out the history that led to the discovery statute).

[76] *Id.*; *see also* Matthew Eisley, *Three Bills Push N.C. Prosecutors to Share Evidence*, NEWS & OBSERVER (Raleigh, N.C.), May 29, 2004, at A1 (noting impact of *Gell* case); Matthew Eisley, *"We're Going to Have Fairer Trials,"* NEWS & OBSERVER (Raleigh, N.C.), July 13, 2004, at B1 (same).

the prosecution, advances three arguments: first, broader discovery permits criminal defendants to develop effective perjured testimony to meet the revealed details the prosecution will offer; second, broad disclosures will reveal identifying information regarding prosecution witnesses and will permit witness intimidation; and third, because the defendant is protected by the Fifth Amendment, reciprocal disclosures required of the defense will inevitably be more limited.[77] Further summarized, the traditional argument against further discovery is that broader discovery tilts the balance of advantage, which already favors the defendant because of various procedural protections such as the requirement of proof beyond a reasonable doubt, too far or unfairly to the benefit of the defendant.

The response of those favoring more liberal discovery has been to make an offer to provide rather broad reciprocal defense discovery and to mount the same basic argument that prevailed in civil discovery that openness leads to greater accuracy.[78] Although the justifications are complex and multifaceted, the general result has been a modest but steady movement in the direction of liberalization in criminal discovery over the decades.[79]

Recently, as illustrated in North Carolina, the proponents of liberal discovery have supported their arguments by forceful arguments regarding the need to protect innocent individuals, as the Gell case and subsequently the Duke Lacrosse case illustrate. One cannot be certain of the origins of the current innocence movement, but it certainly gathered strength from a set of exonerations that came from DNA evidence applied to convictions obtained before such technology was available.[80] Arguments about innocence certainly do not answer all the arguments about balance of advantage, which I do not mean to dismiss out of hand, against broader discovery and a movement toward full open-file discovery. However, concerns for the innocent are a powerful counterweight.

One of the most famous statements/rants against broad discovery in criminal cases came from Judge Learned Hand: "Why . . . [the defendant] should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."[81] Gell lived what Hand asserted was an unreal dream. Proof of innocent defendants being convicted have at least somewhat altered perceptions, and Hand's statement is somewhat a relic of the past. In its strident form at least, it could not survive the DNA exonera-

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77 *See generally* 4 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 20.1(b) (2d ed. 1999).

78 *See generally id.* § 20.1(b), (d).

79 *See generally id.* § 20.1(c) (noting that "proponents of liberal defense discovery have been the clear 'winners'").

80 *See* Robert P. Mosteller, *Evidence History, the New Trace Evidence, and Rumblings in the Future of Proof*, 3 OHIO ST. J. CRIM. L. 523, 535-36 (2006).

81 United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

tions of the 1990s, and I contend it would not be the sentiment of those who watched the Duke Lacrosse case unfold.

Over the past several decades, the debate regarding the scope of discovery has resulted in a range of statutory provisions across the nation. They may be visualized as having on one side the basic federal model of Rule 16,[82] which provides that the defendants, other than their own statements and criminal record, are entitled to a limited list of evidence that is either material to the defense or that the prosecution intends to introduce in its case in chief.[83] On the other end of the spectrum are states that have adopted various versions of the American Bar Association's proposed standards.[84] Although operating with its own quite distinctive system, Florida's system has long been seen as providing the most extensive range of information for the defense.[85]

Professor Jerold Israel has noted that the Second Edition of the ABA Standards proposed open-file discovery that "extended to 'all the material and information within the prosecutor's possession or control.' So far, however, not even the most liberal discovery jurisdiction has been willing to adopt such an open-ended provision . . . ."[86] Although North Carolina used slightly different wording, it enacted an expansive open-file discovery law.[87] It moved, first as to death penalty cases on post-conviction review

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82 FED. R. CRIM. P. 16.

83 FED. R. CRIM. P. 16(a) (allowing disclosure under specified provisions of documents and objects, reports of examinations and tests, and expert witnesses but allowing discovery of the statements of government witnesses only under the "Jencks Act," 18 U.S.C. § 3500 (1970), which provides them only after the witness testifies at trial).

84 *See* ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL (1st ed. 1970); ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL (2d ed. 1980); ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

85 *See, e.g.*, Tamara L. Graham, Comment, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 339-42 (2005) (describing Florida as being at the liberal end of the scale in providing discovery for the defense and Virginia at the other, still following the traditional model of quite limited discovery).

I have something of a confession to offer with regard to discovery. In my first article as an academic, I argued against imposing reciprocal discovery on the defense, which is a component of the North Carolina system and most that are liberally oriented. Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986). A mandatory reciprocal system can take from the defense its ability to maintain control of the product of its investigation without providing many benefits. *See* Graham, *supra*, at 340-41. The North Carolina system imposes reciprocal duties on the defense, but it provides substantial benefits in return. Even from the perspective that I adopted in *Tilting the Adversarial Balance*, the balance of costs to benefits for the typical defendant and for accuracy of results comes out well.

86 4 LAFAVE, *supra* note 77, § 20.1(c). The North Carolina statute attempts to deal with problems that may occur regarding the meaning of "within the prosecutor's possession or control" by the statutory requirement that the prosecution to provide the defense with law enforcement files and by subsequent legislation enforcing the responsibility of law enforcement to provide those files to the prosecution. *See infra* notes 87-92 and accompanying text.

87 *See* N.C. GEN. STAT. § 15A-903 (2005).

and then as to all defendants, from a very traditional jurisdiction with limited discovery[88] to very near the other end of the discovery spectrum.

The new discovery law enacted after Gell's acquittal requires that, upon motion, the court must order the prosecution to "[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[89] The term "file" is broadly defined to include statements by defendants or codefendants and "witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation . . . ."[90] It mandates that "[o]ral statements shall be in written or recorded form."[91] Like the provision enacted earlier that was applicable to post-conviction litigation in death penalty cases, this is "full open-file discovery" in the sense that the prosecution is responsible for providing the defense, not only with the material that it has in its file, but also with relevant materials in the files of law enforcement agencies, which it may never have seen or possessed.[92]

As to experts, the statute requires that the prosecution give the defendant notice of any expert it reasonably expects to call as a witness, and it requires that the expert prepare, and the prosecution furnish to the defendant, "a report of the results of any examinations or tests conducted by the expert" and the "expert's curriculum vitae, the expert's opinion, and the

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88 *See, e.g.*, State v. Hardy, 235 S.E.2d 828, 839-42 (N.C. 1977) (describing the origins of the State's discovery law in the federal discovery rule and limitations on disclosure statements of prosecution witnesses); State v. Cunningham, 423 S.E.2d 802, 808-09 (N.C. Ct. App. 1992) (describing the close relationship between the North Carolina's discovery system and Federal Rule 16).

89 § 15A-903 (a)(1). For a summary of its provisions, see John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, 2004 ADMIN. JUST. BULL 6, 4-6, *available at* http://www.iogcriminal.unc.edu/aoj.htm.

90 § 15A-903 (a)(1).

91 *Id.* In *State v. Shannon*, 642 S.E.2d 516 (N.C. Ct. App. 2007), the North Carolina Court of Appeals rejected the State's argument for a narrow construction of the term "statement" and held that it applied, *inter alia*, to oral statements made by witnesses to prosecutors, which they are required to take down in written form and produce under the new discovery statute, *id.* at 522-26. The Disciplinary Hearing Committee concluded that Nifong did not violate one of the charges against him that related to his failure to record the statements made by Dr. Meehan during their meetings because he may have been relying on the Attorney General's position that the statute did not require a prosecutor to make such recordings. Excerpt Transcript Findings of Fact, *supra* note 4, at 7-8. *But see* Amended Nifong Bar Order, *supra* note 3, Conclusions of Law (c), at 21 (concluding that Nifong violated former Rule 3.4(d) because he failed to provide defendants with a complete report that included written or recorded memorializations of certain oral statements).

92 Effective December 2007, a new provision was added to the statute, § 15A 903(c), which provides, "Upon request by the State, a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a)." 2007 N.C. Sess. Laws 183. The statute gives force to the prosecution's request for investigative agency files.

underlying basis for that opinion."[93] The notice and the materials are to be furnished "within a reasonable time prior to trial, as specified by the court."[94]

The effect of the law, combined with the ethics requirement of making "timely disclosure to the defense of all evidence or information required to be disclosed by applicable law,"[95] is to add specificity to the disclosure requirements of the disciplinary rules. Rather than exculpatory information, which may be disputed, the law and the disciplinary rule now require the production of the full files of the prosecution and investigative agencies.

II. DISCIPLINARY ACTION AGAINST DISTRICT ATTORNEY KENNETH HONEYCUTT AND ASSISTANT DISTRICT ATTORNEY SCOTT BREWER ARISING FROM THE CAPITAL PROSECUTION OF JONATHAN GREGORY HOFFMAN

The second of the three ethics prosecutions in recent years against prosecutors has less direct pertinence to the discipline of Nifong than the Gell matter, but it illustrates some important common elements and highlights some frequent difficulties with disciplinary actions against prosecutors.

The disciplinary action against former District Attorney Kenneth Honeycutt and former Assistant District Attorney Scott Brewer,[96] prosecutors for a group of four counties just east of Charlotte,[97] arose from their prosecution of Jonathan Gregory Hoffman. Hoffman was charged with capital murder for the November 1995 shotgun slaying of Marshville jewelry store owner Danny Cook.[98] The disciplinary charge was, in essence, that the two prosecutors misrepresented the extent of the inducements given to an important witness for the prosecution, Johnell Porter,[99] who was facing a significant period of incarceration for separate criminal conduct.

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93 § 15A-903(a)(2).

94 *Id.*

95 N.C. REVISED RULES OF PROF'L CONDUCT R. 3.8(d) (2006).

96 Complaint ¶ 7, N.C. State Bar v. Brewer, No. 05 DHC 37 (Disciplinary Hearing Comm'n of the N.C. State Bar Aug. 30, 2005) (on file with author) [hereinafter Brewer & Honeycutt Bar Complaint]. By the time the complaint was dismissed on "statute of limitations" grounds in January 2006, Honeycutt was in private practice in Union County and Brewer was a state district court judge in Rockingham, North Carolina. Joseph Neff, *Invalid Rule Spares Former Prosecutors from Discipline*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 21, 2006, at A1.

97 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 4 (noting that both men practiced in the 20th Judicial District, which is made up of Anson, Richmond, Stanley, and Union counties).

98 *Id.* ¶ 6.

99 In his testimony at Porter's sentencing hearing in federal court, Honeycutt testified that "without him [Porter], we do not believe we would have had the successful prosecution." Transcript of Sentencing Proceedings ¶¶ 4-5, United States v. Porter, No. 3:95CR190-02 (W.D.N.C. Nov. 25, 1996) (on file with author). In his letter to the federal prosecutor, Honeycutt likewise wrote: "Porter made a force-

At the time of the negotiations for his testimony, Porter was awaiting sentencing in federal court in the Western District of North Carolina (Charlotte) after entering a guilty plea to robbing a bank in the Charlotte suburb of Huntersville.[100] He was facing a presumptively consecutive sentence in South Carolina on an earlier conviction.[101] Finally, he had been involved in drug related offenses and a number of other crimes in the Charlotte area and faced possible prosecution.[102] Porter, who is Hoffman's cousin, ultimately agreed to testify against Hoffman. He testified that Hoffman had admitted committing the murder.[103]

All the parties agree that at a meeting on October 17, 1996, "Porter agreed to testify against Hoffman and [then-District Attorney] Honeycutt agreed to testify at Porter's federal sentencing hearing regarding Porter's 'substantial assistance.'" This agreement was made in writing, and a copy provided to Hoffman's attorney before trial.[104]

The Bar Complaint alleges that prior to trial, the trial court had entered an order requiring disclosure of promises or inducements to prosecution witnesses[105] and that, in response, at the start of the trial, Honeycutt in-

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ful and compelling witness. A conviction in this case would probably not have been possible but for Johnell Porter's testimony." Letter from Kenneth W. Honeycutt, Dist. Attorney for Union County, to Brian Whisler, Assistant U.S. Attorney at 2 (Nov. 19, 1996), Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.40.

100 Order, Findings of Fact ¶¶ 5-6, State v. Hoffman, Nos. 95 CRS 15695-97 (N.C. Super. Ct. Apr. 30, 2004) (on file with author) [hereinafter Hoffman New Trial Order]; Third Amendment to Defendant's Motion for Appropriate Relief at 22, *Hoffman*, Nos. 95 CRS 15695-97 (N.C. Super. Ct. Oct. 9, 2003) (on file with author) [hereinafter Third Amendment to Hoffman MAR].

101 *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(a) (2006) (requiring that the federal sentence run consecutively to that of the instant offense when the instant offense was committed after sentencing in the unrelated case).

102 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 11. The Bar asserted that the South Carolina charge was pending. *Id.* Honeycutt's Answer asserted that Porter had already been sentenced in the South Carolina case, had been erroneously released, and had been notified that he would be required to serve the remainder of that sentence. Answer, Affirmative Defenses, and Motion to Dismiss of Kenneth W. Honeycutt ¶ 5(b), N.C. State Bar v. Brewer, No. 05 DHC 37 (Disciplinary Hearing Comm'n of the N.C. State Bar Oct. 27, 2005) (on file with author) [hereinafter Honeycutt Answer]. The Bar alleged that at the time of the negotiation, Porter was facing drug-related charges in Mecklenburg County. Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 11. Honeycutt's Answer asserts that while he did not know of the charges, records indicate that they were dismissed on October 9, 1996, and thus would have been pending at the time of the October 4 meeting, but not at the time of the October 17 meeting. Honeycutt Answer, *supra*, ¶ 5(c).

Regardless of the technical accuracy or inaccuracy of the State Bar's pleading, Porter had extensive state and federal exposure to prosecution. During his testimony against Hoffman, Porter confessed to numerous armed robberies and attempted robberies, multiple crimes involving possession of a firearm, cocaine sale, and credit card fraud. Third Amendment to Hoffman MAR, *supra* note 100, at 62 (reciting offense and setting out page references to Porter's testimony).

103 N.C. State Bar v. Brewer, 644 S.E.2d 573, 575 (N.C. Ct. App. 2007).

104 *Id.* at 574.

105 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 25.

formed the trial court, in Brewer's presence, that the State had revealed its only concessions and immunity agreement made to Porter in exchange for Porter's testimony, which consisted of Honeycutt's commitment to testify at Porter's federal sentencing hearing that Porter had provided the prosecution with "substantial assistance."[106] Porter then testified at trial that the only concession he was granted in exchange for his testimony was that agreement,[107] and during closing argument Honeycutt and Brewer made this same representation.[108] A jury convicted Hoffman of first-degree murder on November 13, 1996, sentencing him to death the next day.[109]

The North Carolina State Bar's principal claim was that Honeycutt and Brewer made four additional promises to Porter to secure Porter's testimony and concealed these from his defense counsel. Specifically, the Bar alleged that Honeycutt (with Brewer's knowledge and complicity) promised Porter: (1) immunity from federal prosecution on other alleged offenses (other than murder), (2) assistance in having a sentence on an unrelated conviction in the South Carolina state system to run concurrently with his federal bank robbery sentence, (3) immunity from prosecution in the Charlotte area for pending or not yet charged cases, and (4) assistance in benefiting financially from a reward fund established by the friends and relatives of the victim.[110]

The Bar Complaint alleged that all these commitments, which were explicit, were made at an October 17, 1996 meeting with Porter at the Mecklenburg County jail that included Brewer, Honeycutt, Brian Whisler, the Assistant United States Attorney handling Porter's federal bank robbery case, and Aaron Michael, Porter's defense attorney in that case.[111] The facts supporting these charges came to light in the post-conviction review of Hoffman's death sentence. In a series of amended complaints, counsel for

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[106] *Id.* ¶ 46.

[107] Porter's description of the deal was elicited by a series of leading questions. For example, "Does this agreement, State's Exhibit 34, set forth all of the conditions and all concessions or promises that have been made to you about testifying in this case?" (objection overruled) and "And that is what is essentially contained in State's exhibit 34?" Trial Transcript of October 31, 1996 at 1664-65, Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.10(e).

[108] Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 46.

For example, in his closing argument, Brewer told the jury that Porter "told you things he hasn't been charged with. That which he has no deals on, no deals of any sort." Trial Transcript of November 12, 1996 at 2494, Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.10(g).

[109] N.C. State Bar v. Brewer, 644 S.E.2d 573, 575 (N.C. Ct. App. 2007).

[110] Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 2. The complaint alleged:

> Honeycutt indicated that Porter would be rewarded for his cooperation in the Hoffman trial. The 'rewards' offered by Honeycutt included immunity from state and federal prosecution for other offenses, assistance obtaining payment from the South Carolina reward fund and a downward departure on Porter's federal bank robbery sentence. Honeycutt also agreed to help Porter with Porter's South Carolina conviction and sentence in return for Porter's testimony against Hoffman.

Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 28.

[111] Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶¶ 27-28.

Hoffman catalogued the discovery of additional promises and inducements beyond the disclosed agreement for Honeycutt to testify at the federal sentencing regarding Porter "substantial assistance."[112]

Because no trial occurred on the disciplinary charges, the strength of the State Bar's claim that Honeycutt made explicit promises, a contention that would have turned on credibility determinations, has not been adjudicated.[113] Honeycutt's Answer to the Complaint strongly contests the allegations, arguing, *inter alia*, that SBI Agent Tony Underwood was also present at that meeting and stated in an affidavit filed with the State Bar that the alleged promises were not made.[114] The State Bar Complaint does not give the source of its evidence that explicit commitments were made at that meeting. However, attached to the third amendment to Hoffman's post-conviction petition, called in North Carolina a Motion for Appropriate Relief [MAR], is an affidavit of Porter's defense counsel in the federal prosecution, Aaron E. Michel.[115] Michel was undoubtedly the source.[116]

In that affidavit regarding the October 17, 1996 meeting, which he attended, Michel states:

> Mr. Honeycutt said, in so many words, that Mr. Porter could rely on them to reward his cooperation. This reward included the downward departure in his federal sentence, efforts to help him with his South Carolina conviction and sentence, the reward money Mr. Ferris [the reward fund administrator] was holding, and immunity from both state and federal prosecution. Mr. Porter agreed to these terms and the same day I called the prosecutor in Chester County [South Carolina] and the South Carolina Department of Corrections about his South Carolina conviction, and talked to Mr. Ferris about the reward money. I also exchanged messages with Mr. Whisler to report my efforts concerning concessions from South Carolina.[117]

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112 *Brewer*, 644 S.E.2d at 575. The third amendment to Hoffman's post-conviction pleading, which in North Carolina is called a Motion for Appropriate Relief (MAR), was filed on October 9, 2003. *Id.* The MAR alleged, *inter alia*, that Honeycutt and Brewer had presented false testimony and had failed to correct Porter's false testimony. *Id.*

113 On July 25, 2007, a Special Prosecutor assigned to determine whether criminal charges should be brought against Honeycutt and Brewer based on the conduct alleged in the State Bar Complaint issued his report, declining to prosecute. Report of the Special Prosecutor Howard R. Greeson Jr. at 26, 38 (July 25, 2007) (on file with author) [hereinafter Special Prosecutor's Report]. The Special Prosecutor stated that any prosecution would turn on the credibility of Aaron Michel, Porter's defense attorney, and cites the lack of ability to corroborate his assertions as a major reason why he determined no charges should be brought. *Id.* at 26-34. In conclusion, the Special Prosecutor stated that "it has not been with the purview of this report to indicate or intimate that the accusations were true or untrue—only whether they could be proven beyond a reasonable doubt," which he determined "highly unlikely." *Id.* at 39.

114 Honeycutt Answer, *supra* note 102, ¶ 21.

115 Affidavit of Aaron E. Michel (Sept. 12, 2003), Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.9A [hereinafter Michel Affidavit].

116 *See* Special Prosecutor's Report, *supra* note 113, at 26 (describing Michel as the witness upon whose credibility the prosecution would turn and Porter as a supporting, but compromised, witness).

117 Michel Affidavit, *supra* note 115, at 6-7.

The State Bar's allegations were also supported by circumstantial evidence. First, the Bar Complaint notes that Brian Whisler, the Assistant United States Attorney, wrote an immunity letter to Porter on October 21, 1996, which was not disclosed to defense counsel.[118] This letter was written four days after the meeting at the Mecklenburg County jail. Second, his federal sentence and his South Carolina sentence were set to run concurrently.[119] Third, the charges pending against Porter in Mecklenburg County were dismissed and no new charges were filed.[120] In addition, in November 1996, Honeycutt wrote to the South Carolina reward fund regarding Porter's assistance, and he received a substantial sum from the fund.[121]

As a separate allegation of wrongdoing, which also provides circumstantial support for the central allegation of an explicit commitment to Porter, the Bar Complaint notes that on October 30 and October 31, 1996, Judge William H. Helms ordered Honeycutt and Brewer to provide the court with copies of "'any statements of any kind that [Porter] had made . . . whether it's in written form, tape recorded or any other form' including Honeycutt's own interview notes."[122] It alleges that the two prosecutors did not comply and further charges that they falsely told the judge that they had done so.[123]

The State Bar bases these additional charges on five documents involving a number of additional contacts with Porter. Four are notes of law enforcement and prosecutorial interviews or meetings with Porter on March 29, September 6, October 4, and October 17, 1996,[124] which were not pro-

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118 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶¶ 31, 33.

119 *Id.* ¶ 50.

120 *Id.* ¶ 52.

121 *Id.* ¶¶ 48, 51. The exact amount is not given in any available document. Porter would say no more than that it was "less than $10,000" to Hoffman's defense. Affidavit of Elizabeth Hambourger ¶ 7 (July 29, 1999), Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4 (memorializing July 26, 1999 interview with Porter).

122 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 37. The quotation shown came from the October 31 statement of Judge Helms. Trial Transcript of October 31, 1996 at 1631-32, Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.10(d); *see also* Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 36 (referring to a similar direction of the judge on October 30, 1996); Trial Transcript of October 30, 1996 at 1589, Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.10(c) (showing Judge Helms' direction that "[i]f he [Porter] made any statement that was recorded in any fashion give it to them").

123 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 34 (alleging that the prosecutors did not reveal notes regarding contacts with Porter on March 29, September 6, October 4, and October 17 to Hoffman's attorneys); *id.* ¶ 38 (alleging that Brewer, in Honeycutt's presence, falsely told the trial judge that the State had provided defense counsel with all statements made by Porter and Honeycutt's notes); *id.* Charges ¶¶ (d)-(e) (alleging rule violations based on this conduct).

124 *Id.* Exhibits 1-3 (showing notes of March 29, September 6, and October 4, 1996 contacts); Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.18 (showing notes of October 17, 1996 contact). Although none of these notes indicate any additional deal had been made, they do show

vided to the judge in response to his directives.[125] Moreover, the final sentence was omitted from the version of a four-page typed document regarding an early October 1996 meeting with Porter that was provided to the judge.[126] Under the heading of "Things To Do Ref. Porter," the omitted sentence reads: "Meet With Us Att. And Get Some Concessions Made To Porter In The Event He Testifies."[127] That sentence appeared in a different version of that same document that post-conviction counsel found when inspecting the prosecutors' files provided in discovery.[128] A blank space appears in its place in the version provided to Judge Helms.[129]

Honeycutt and Brewer denied that they knew of the federal immunity agreement until after the Hoffman trial.[130] They did acknowledge that Honeycutt told Porter that if he testified truthfully Honeycutt would report his assistance to the Reward Fund but argued he had no control over the Fund and his statement was the same as made to any witness for the State who inquired about the Fund.[131]

Porter's concerns with other legal problems, such as the South Carolina sentence, and his various concerns regarding the federal case.

125 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 38 (alleging that Brewer, in Honeycutt's presence, falsely told the trial judge that the State had provided defense counsel with all statements made by Porter and Honeycutt's notes).

126 *Id*. Exhibit 5, at 4; *see also id.* ¶ 40 (describing the copy produced as redacted, Brewer & Honeycutt Bar Exhibit 4, and the version shown in the text as from the unredacted version, Exhibit 5); *id*. ¶ 41(noting failure to tell the trial judge and defense counsel of redaction); *id*. Charges ¶ (g) (alleging disciplinary violation based on this conduct).

There is some dispute as to the date of the meeting covered by this document. It clearly states that it is an "Interview with Porter on October 5." *Id.* Exhibit 4, at 1. Honeycutt contends that the notes in Exhibits 4 and 5 that are labeled are in fact notes that combine meetings on two different days, October 3 and 4, combined with his own "to do" list. Honeycutt Answer, *supra* note 102, at 19-21; *see also* Motions Dismiss and Answer of Scott T. Brewer at 19-22, N.C. State Bar v. Brewer, No. 05 DHC 37 (Disciplinary Hearing Comm'n of the N.C. State Bar Oct. 21, 2005) (on file with author) [hereinafter Brewer Answer]. The Special Prosecutor states that his investigation determined the date of the meeting was October 4, 1996 and that it was typed on October 5. Special Prosecutor's Report, *supra* note 113, at 18.

127 Brewer & Honeycutt Bar Complaint, *supra* note 96, Exhibit 5, at 4.

128 *Id. Compare id.* (complete version), *with id.* Exhibit 4, at 4 (incomplete version). The "redacted" version was found by post-conviction counsel in the sealed materials submitted to Judge Helms, while the "unredacted" version was found in the DA file. Affidavit of Robert H. Hale, Jr. Regarding Sealed File of Porter Materials ¶¶ 4, 9(b) (Sept. 29, 2003), Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.11.

Honeycutt responded that the entries at issue were more or less a "to do list" that was changed as items were completed and that the particular entry regarding a meeting with the federal prosecutor was accomplished by the subsequent October 17 meeting where the "substantial assistance" agreement was reached. Honeycutt Answer, *supra* note 102, at 20-22.

129 Brewer & Honeycutt Bar Complaint, *supra* note 96, Exhibit 4, at 4.

130 Honeycutt Answer, *supra* note 102, ¶ 24; Brewer Answer, *supra* note 126, ¶27.

131 Honeycutt Answer, *supra* note 102, ¶ 16; Brewer Answer, *supra* note 126, ¶33.

The two prosecutors also argued that the order to disclose inducements to witnesses was narrower than alleged by the Bar. Brewer notes that the State Bar Complaint asserts it is referring to a court order, but it is in fact quoting the defense motion that requested the "details of any promises or indications of actual or possible immunity, leniency, favorable treatment or other consideration whatsoever or any inducements or threats" by federal or state agents to prosecution witnesses.[132] However, the trial judge declined to so order and instead restricted the mandate just to "any promise of immunity."[133] Honeycutt argued that the "State Bar rules in effect at the time did not place upon a prosecutor an affirmative duty to turn over impeachment material."[134] With respect to the order of Judge Helms, Honeycutt argued that no signed order was entered by the trial court and that the transcript revealed that "if there was an order it was so ambiguous that Honeycutt could not have intentionally violated [its] terms."[135]

When contrasted with the litigation for a new trial on *Brady* grounds, the State Bar Complaint shows something of the different nature of ethics allegations and appears to illustrate an "easy out" for trial courts examining the legal, as opposed to the ethical, claim. Superior Court Judge W. Erwin Spainhour conducted a hearing on Hoffman's Motion for Appropriate Relief on April 26, 2004.[136] In an order signed on April 30, 2004, he granted a new trial because Hoffman's trial attorney was unaware of the federal immunity granted to Porter, even though the judge found as fact that neither Honeycutt nor Brewer knew of the grant of federal immunity either.[137] Judge Spainhour's order stated that relief was to be granted despite lack of

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132 Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶ 25.

133 Brewer Answer, *supra* note 126, ¶ 25.

134 Honeycutt Answer, *supra* note 102, ¶ 13.

135 *Id.* ¶¶ 13, 27.

136 Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 13.

137 Hoffman New Trial Order, *supra* note 100, Findings of Fact ¶¶ 9-11, Conclusions of Law ¶ 4. *See also* N.C. State Bar v. Brewer, 644 S.E.2d 573, 575 (N.C. Ct. App. 2007).

In making this finding, the trial court went beyond the advice given by Special Deputy Attorney General Jill Ledford Cheek regarding the order. In a letter submitted by fax to the judge, Cheek cited contested matters of fact which she believed made certain findings of fact inappropriate on a summary adjudication. Letter from Jill Ledford Cheek, N.C. Special Deputy Attorney Gen., to the Honorable W. Erwin Spainhour, N.C. Superior Court Judge (Apr. 29, 2004) (on file with author). She submitted a revised proposed order to the judge and explained, "Finding of Fact No. 10 in the submitted Order is controverted by the defense and accordingly, I have deleted that finding in my proposed Order . . . ." *Id.* Judge Spainhour nevertheless included that paragraph, which reads, "Neither District Attorney Honeycutt nor Assistant District Attorney Brewer sought, requested, or participated in any discussions regarding the federal immunity agreement." Hoffman New Trial Order, *supra* note 100, Findings of Fact ¶ 10.

Charges against Hoffman were ultimately dismissed because the prosecutor concluded he had insufficient evidence. *See* Emily C. Achenbaum, *A Murder Case Dissolves*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 12, 2007, at A1.

specific knowledge because knowledge was imputed as a matter of law to the prosecutor.[138]

On the feature of the prosecutor's knowledge, the *Brady* doctrine, which does not require that the prosecutor know of the exculpatory evidence, is broader than the ethical obligation of prosecutors. Rule 3.8(d), the applicable rule, requires disclosure of "all evidence information or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."[139] It is that knowledge requirement that the Disciplinary Hearing Committee in Hoke and Graves softened by finding a violation based on a non-delegable legal duty of a prosecutor to know the contents of his or her files and which the revised rule speaks to in requiring a "diligent inquiry."[140] The Honeycutt and Brewer Disciplinary Hearing Committee thus refused to dismiss an alternative ground for discipline that was based on the prosecutors' implied knowledge that Porter had been negotiating with federal authorities and deliberately avoiding inquiry into whether Porter had received concessions from the federal prosecutor.[141] The revised version of Rule 3.8(d), effective in November 2006, writes that result into the rule's language itself.[142]

The substance of the charges in the Bar Complaint against Honeycutt and Brewer was not litigated. Rather, it was dismissed because of the viola-

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138 Hoffman New Trial Order, *supra* note 100, Findings of Fact ¶¶ 9-11, Conclusions of Law ¶ 4; *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) (establishing that prosecutors are charged with knowledge of others in the prosecution).

Honeycutt and Brewer argued that the court's finding of fact that they had no knowledge of the federal immunity agreement meant that the disciplinary charge had to be dismissed. Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 13-14. The Disciplinary Hearing Committee rejected that argument because the Bar has concurrent jurisdiction and a superior court judge has no authority to preempt Bar discipline. *Id.* 14-16.

139 N.C. REVISED RULES OF PROF'L CONDUCT R. 3.8(d) (2006); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 714 (1987) (noting that the due process rules are in at least one sense broader than the ethical rules because they can be violated "even if the prosecutor did not know that the evidence was false or that the exculpatory evidence existed).

140 The *Brady* doctrine contains a materiality requirement. Rosen, *supra* note 139. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court found that the following materiality standard applied regardless of whether the defense made a *Brady* argument and regardless of the specificity of any request made: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome," *id.* 682. The Disciplinary Hearing Committee's opinion noted that the ethical requirement was on another dimension broader than the *Brady* doctrine in that the ethical rule does not include the materiality requirement of the *Brady* doctrine. Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 15 & 20 n.9. ("Therefore, an immaterial but intentional—nondisclosure of exculpatory evidence by a prosecutor could be found to be a violation of the ethical rule and still not violate *Brady*.").

141 Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 16-17. This is the Bar's Second Claim for Relief. Brewer & Honeycutt Bar Complaint, *supra* note 96, ¶¶ 53-55.

142 N.C. REVISED RULES OF PROF'L CONDUCT R. 3.8(d).

tion of what was effectively a statute of limitations provision.[143] The relevant provisions of the Bar rules had recently been amended to add a provision establishing a statute of limitations.[144] That provision was first construed in litigating this complaint.

The revised rule sets a general limitation on the filing of grievances at six years from the "accrual of the offense," and for offenses "the discovery of which has been prevented by the concealment of the accused lawyer," an additional one-year period after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, "whichever is later."[145] The panel concluded that since the attorney for the aggrieved party, Hoffman, discovered the offense no later than February 2001, the grievance was filed too late when the Bar opened grievance files in November (Honeycutt) and December (Brewer) 2003, even though the Bar had no knowledge of them until one of its lawyers read an article regarding the Hoffman case published by the *News & Observer* on November 2, 2003.[146] This interpretation and the dismissal of the complaint were affirmed on appeal by the North Carolina Court of Appeals.[147]

The circumstances that led to this ruling show that sometimes the strategic interests of the criminal defendant are at odds with promptly pursuing an ethics complaint. Counsel for Hoffman stated in a newspaper article that he did not complain to the Bar prior to securing a favorable ruling on his client's habeas motion out of concern that it would not be in Hoffman's interest to pursue a State Bar grievance against Honeycutt while they were trying to win his agreement to grant the motion for a new trial.[148]

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143 Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 3-10.

144 *Id.* at 3-4.

145 N.C. STATE BAR R. 1B.0111(e) (2003).

146 Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 3-10. One of the key points is whether "whichever is later" could be interpreted as "whichever is latest" since three possible dates were given. The panel and the Court of Appeals ruled against the broader interpretation. N.C. State Bar v. Brewer, 644 S.E.2d 573, 577-78 (N.C. Ct. App. 2007).

147 *Brewer*, 644 S.E.2d at 577-78. Another argument by the Bar for extension of the period of time allowed for filing of the complaint was based on its contention that the violation involved felonious criminal conduct, for which no limitation period applied. The Disciplinary Hearing Commission panel rejected that argument on the extremely technical ground that the rule was not published in the North Carolina Reports as required for promulgation of a new Bar rule under N.C. GEN. STAT. § 84-21. Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 10-13. The appellate court affirmed the panel's decision. *Brewer*, 644 S.E.2d at 578-79.

148 Joseph Neff, *Former State Lawyers Cleared*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 7, 2006, at B1. The article states:

> The panel determined that to be February 2002, one year after Hoffman's lawyer filed documents in court alleging withheld evidence. Mike Howell, one of Hoffman's lawyers, said he was disappointed by the ruling. "It is one of the worst cases of prosecutorial misconduct I've ever heard of," Howell said. "They lied to try to put a man to death, and then lied to cover it up, and they still won't admit it."
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> Howell said he and his co-counsel, Rob Hale of Raleigh, didn't have enough evidence to file a grievance until late summer 2003, after they found witnesses and documents to corroborate the charges

III. DISCIPLINARY ACTION AGAINST DISTRICT ATTORNEY MICHAEL NIFONG ARISING FROM PROCEEDINGS AGAINST DAVE EVANS, COLLIN FINNERTY, AND READE SELIGMANN IN THE DUKE LACROSSE CASE

A. *The Potentially Exculpatory Information and Nifong's Failure of Immediate Disclosure*

On the late evening of March 13 and extending until sometime shortly after midnight on the morning of March 14, 2006, the co-captains of the men's Duke Lacrosse team held a party at a house located at 610 North Buchanan Boulevard in Durham, North Carolina, where three players resided.[149] In a momentous decision, they decided to have strippers dance at the party, and that afternoon called an escort service asking that two strippers be sent to the Buchanan address.[150] Sometime between 11:00 and midnight, the two strippers arrived.[151]

The dancing did not go well from the very start.[152] One of the dancers, Crystal Mangum, appeared to be staggering.[153] At one point, the dancers fell to the floor.[154] A player made a crude remark about the use of a broomstick as a sexual object, which provoked the dancers to leave the living room where the performance was taking place and go to the bathroom where earlier they had changed clothes.[155] Later, without resuming the dance routine, the two left the residence and departed by car, exchanging insults with some of the players.[156]

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of prosecutorial misconduct. Howell said they held off complaining until May 2004, after Honeycutt agreed that Hoffman deserved a new trial. Filing a grievance earlier would have put Honeycutt on the defensive, and the prosecutor would never have agreed to a new trial, Howell said. "A grievance was not in Mr. Hoffman's interest before then," Howell said. "Still, I'm glad Jonathan Hoffman is alive. He might be dead if we didn't find the evidence." *Id.*; *see also* Brewer & Honeycutt Bar Dismissal Order, *supra* note 2, at 19 n.4. Defense counsel concern that instituting disciplinary proceedings may harm the client's interest has been offered as a general reason why professional discipline against prosecutors is apparently relatively infrequent. *See infra* notes 311-13 and accompanying text.

149 Summary of Conclusions from the Office of the N.C. Attorney Gen. at 5, State v. Seligmann, Nos. 06 CRS 4332-36, 5582-83 (N.C. Super. Ct. Apr. 11, 2007) (on file with author) [hereinafter Attorney General's Report]; Joseph Neff & Anne Blythe, *Team Party Turned Sour Early*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 28, 2007, at A18.

150 Attorney General's Report, *supra* note 149.

151 *Id.*

152 *See id.*

153 *Id.*

154 *Id.*

155 *Id.* at 5-6.

156 Attorney General's Report, *supra* note 149, at 6-8.

Sometime later, police were called to an all-night grocery store parking lot and examined Mangum, who appeared to be unconscious.[157] She was taken to a local agency that offers services that include help to intoxicated individuals.[158] There, in response to a question about whether she was raped, Mangum said for the first time that she had been.[159] She was taken to the Duke University Medical Center Emergency Room and was later examined by a Sexual Assault Nurse Examiner (SANE).[160] She gave her story of being raped and sexually assaulted in the bathroom of the players' residence by three men.[161] During the first 36 hours, she gave a number of somewhat different versions,[162] but the one that seemed to be the central one was that she was sexually assaulted by "Adam," "Matt," and "Bret."[163] She described penetration of her vagina, anus, and mouth, observed ejaculation as to some activity, and stated that no condoms were used.[164]

Although the initial officer, Sergeant John C. Shelton, was skeptical of the rape accusation,[165] the SANE nurse, Tracy Levicy, had observed tenderness during the examination and expressions of pain during the vaginal examination, had found Mangum's behavior and the examination "consistent with sexual assault," and said as much to both Investigator Benjamin Himan on March 16 and Sergeant Mark Gottlieb on March 21, 2006.[166] Also, while not made by the SANE nurse and therefore not a "forensic finding," Dr. Manly, who had performed an examination of Mangum before Levicy spoke to her at the local agency, had observed "diffuse edema of the vaginal walls,"[167] which was consistent with sexual trauma, although not at all unique to it.

On March 23, 2006, the police sought what in North Carolina is called a Nontestimonial Identification Order[168] to secure from all the 46 Caucasian members of the Duke Lacrosse team: (1) "mug shot" photos; (2) photos of

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157 *Id.* at 8.

158 *Id.*

159 *Id.*

160 *Id.* at 18.

161 *Id.*

162 *See* Motion to Suppress the Alleged "Identification" of the Defendants by the Accuser ¶ 7, State v. Seligmann, Nos. 06 CRS 4331-36, 5581-83 (N.C. Super. Ct. Dec. 14, 2006) (on file with author) (describing the multiple and varying descriptions given by Mangum during the first 36 hours after the alleged rape).

163 Attorney General's Report, *supra* note 149, at 6-8.

164 *Id.*

165 *See* Joseph Neff, *Lacrosse Probe Has Much Fodder*, NEWS & OBSERVER (Raleigh, N.C.), July. 1, 2007, at A3 (describing Shelton's skepticism of Mangum's account, which included him announcing loudly at the Duke Hospital Emergency Room, "I think she's lying").

166 Tara Levicy Statement (Jan. 10, 2007), Exhibit 15, *Nifong*, No. 06 DHC 35 (on file with author).

167 *Id*.

168 *See* N.C. GEN. STAT. §§ 15A-271 to -282 (2006) (setting out limits on such orders and procedures, including disclosure provisions, regarding them).

"torso and upper extremities" to show any injuries; and (3) DNA obtained from mouth swabbings.[169] Mangum had described the three attackers as white, and as a result, the one black member of the team was not named in the order. Nifong first learned of the rape allegation when he saw a copy of this order at the office copier.[170] He decided to take over the investigation of the case, which he did the next day.[171]

The "rape kit" from Mangum's examination collected on March 14, 2006, items of evidence seized in the search of 610 North Buchanan Street on March 16, 2006, and the DNA swabbings from the 46 players were initially sent to the State Bureau of Investigation (SBI) Laboratory.[172] On March 30, 2006, Nifong learned that no blood, semen, or saliva was found on any of the "rape kit" items.[173] He also learned that a mixture of DNA was found on one of Mangum's false fingernails, which was recovered from the trash can in the bathroom where the rape allegedly occurred.[174]

On April 4, 2006, Investigator Michelle Soucie contacted Dr. Brian Meehan, president and director of DNA Security, Inc. (DSI) in Burlington, North Carolina and learned that his lab could perform more sophisticated or sensitive DNA testing than the SBI lab.[175] This includes "Y chromosome DNA testing."[176] "Y chromosome DNA testing" can frequently effectively separate male from female DNA. On April 5, 2006, Nifong obtained an

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169 Application for Nontestimonial Identification Order, In the Matter of: 610 N. Buchanan Blvd. Durham, NC 27701, Exhibit 203, *Nifong*, No. 06 DHC 35 (on file with author).

170 Joseph Neff, *Quest to Convict Hid a Lack of Evidence*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 14, 2007, at A1 (describing Nifong learning of case on March 23, 2006 when he found a copy of the DNA order (Nontestimonial Identification Order) on the office copy machine and the next day telling the Durham police he was taking over the investigation).

171 *See* Amended Complaint ¶ 190, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Amended Nifong Bar Complaint]; *see also* Supplemental Case notes for: Sgt. M.D. Gottlieb at 6, Exhibit 204, *Nifong*, No. 06 DHC 35 (on file with author) (describing Captain 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").

172 *See* Attachment for Application for Search Warrant at 1, In Matter of: 610 N. Buchanan Blvd., Durham, NC 27701 (N.C. Dist. Ct. Mar. 16, 2006), Exhibit 7, *Nifong*, No. 06 DHC 35 (on file with author). The SBI DNA report indicates items, such as a white bath towel from and five false fingernails from the trash can in "bathroom B" that was obtained through this search. North Carolina State Bureau of Investigation Department of Justice Raleigh Laboratory Report at 2-3 (Apr. 10, 2006), Exhibit 209, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter SBI DNA Report].

173 Amended Nifong Bar Order, *supra* note 3, ¶ 36. *See also* Deposition of Michael B. Nifong at 188-90 (May 17, 2006), *Nifong*, No. 06 DHC 35 (on file with author); Excerpt Transcript of Testimony of Jennifer Leyn at 9-13 (June 13, 2007), *Nifong*, 06 DHC 35 (on file with author) (describing March 30, 2006 telephone conversation with Nifong); Telephone Log of Conference Call on March 30, 2006 between SBI Technicians and Nifong, Exhibit 9, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Telephone Log].

174 Telephone Log, *supra* note 173.

175 Pretrial Order, Exhibit A, Stipulated Undisputed Facts ¶¶ 96-97 (June 12, 2006), Exhibit 1, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Nifong Bar Stipulations].

176 *Id.*

order transferring the evidence from the SBI lab to DSI, stating in support of that order that the purpose was to search for useful information on Mangum's "rape kit" items.[177] The test later became useful with respect to the false fingernail found in the trash can of the bathroom where the rape allegedly occurred.

On April 10, April 21, and May 12, 2006, Nifong, along with Durham Police Investigator Himan and Sergeant Gottlieb, traveled to Burlington and met with Dr. Meehan.[178] 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.[179] By April 20, 2006 further testing revealed DNA characteristics from additional males on another item from the "rape kit" and that the Duke players had all been excluded as possible sources of that DNA.[180]

This information is obviously potentially exculpatory in two ways. First, no matches from the DNA of any of the 46 players were found. That suggests, but does not establish, that no rape occurred. It is relatively strong evidence of innocence given Magnum's statements that no condoms were used. Second, foreign DNA was found, which is exculpatory as well. That evidence would have been strongest in its exculpatory impact for three charged players if the DNA had definitely incriminated three different Duke Lacrosse players in the rape.[181] Mangum stated that three and only three,

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177 Petition, In Re: Criminal Investigation, 610 North Buchanan Blvd., Durham, North Carolina (N.C. Super. Ct. Apr. 5, 2006), Exhibit 207, *Nifong*, No. 06 DHC 36 (on file with author); Order, In Re: Criminal Investigation, 610 North Buchanan Blvd., Durham, North Carolina (N.C. Super. Ct. Apr. 5, 2006), Exhibit 207, *Nifong*, No. 06 DHC 36 (on file with author). The "rape kit" contains swabs and smears taken from the mouth, vagina, and anus, public hair combings, and panties. SBI DNA Report, *supra* note 172, at 1.

178 Amended Nifong Bar Complaint, *supra* note 171 ¶¶ 202, 210, 216.

179 *Id.* ¶¶ 200-01.

180 *Id.* ¶¶ 208-09.

181 Some of the exculpatory DNA results were known by DSI and presented to Nifong before evidence was first presented to the grand jury on April 17, 2006 and indictments returned against the first two charged players, Reade Seligmann and Collin Finnerty. *See* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337, 1372 (2007). Before May 15, 2006, when evidence was presented to the grand jury and an indictment was returned against Dave Evans, the third player, further exculpatory results had been obtained and presented to Nifong. *Id.* at 1373. Before indictments were returned against the specific players, DNA evidence definitely linking any specific three Duke lacrosse player to the rape would have been exculpatory as to all the other team members. The failure of the prosecution to demand an adequate basis of evidence to prosecute that led to the charges against the three players effectively put virtually every member of the team at some risk of indictment upon the misfortune of being selected by Mangum from one of the arrays presented to her that included only Duke lacrosse players. *See generally id.* at 1365-1412 (describing the identification process and arguing that the most fundamental ethical transgression in the case was the prosecutor's failure to meet the basic duty to "do justice" as particularly manifest in the failings of the identification procedures).

men assaulted her at the lacrosse party, and none of the players had an innocent explanation for how his DNA could have gotten onto "rape kit" items given the intimate nature of the contact required. However, the results, even if not showing sexual activity with other Duke lacrosse players, were still exculpatory in that they suggested sexual contact with multiple males, and they would help explain the only physical finding that supported the rape allegation—the vaginal swelling that could have been produced by sexual contact.

Meehan kept no notes of the meetings with Nifong. However, in his testimony before the Disciplinary Hearing Committee, he stated that at each of the meetings he described the test results obtained, and thus Nifong would have known on April 10, 2006 about the foreign male DNA that could not have belonged to any Duke Lacrosse player, and on April 21, 2006 about additional foreign male DNA that could not have belonged to any Duke Lacrosse player. He described Nifong's request for a written report of the positive matches, which did not include a report of the potentially exculpatory information of the male DNA that was not from a Duke Lacrosse player. In his Disciplinary Hearing Committee testimony, Meehan stated that he had not been told to exclude anything but rather only to include the positive matches, which effectively excluded the exculpatory information.[182]

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182 Excerpt Transcript of Testimony of Dr. Brian Meehan at 67 (June 13, 2007), *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Meehan Testimony] (stating that Nifong was requesting "a report that illustrated the match that we had identified, as well as any other matches"); *id.* at 90 (stating that "he conveyed to us . . . that . . . he had a proceeding coming up which he would need a report that specifically addressed the matches that were identified to date").

In testimony Meehan gave at the December 15, 2006 hearing on the defendants' motion regarding this exculpatory information, the following exchange occurred between him and Jim Cooney, lead counsel for Seligmann, who asked the following questions:

> Q. Did your report set forth the results of all of the tests and examinations that you conducted in this case?
>
> A. No. It was limited to only some results.
>
> Q. Okay. And that was an intentional limitation arrived at between you and representatives of the State of North Carolina not to report on the results of all examinations and tests that you did in his case?
>
> A. Yes.

Transcript of December 15, 2006 Hearing at 85, State v. Finnerty, Nos. 06 CRS 4331-36, 5582-83 (N.C. Super Ct. Dec. 15, 2006), Exhibit 230, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Transcript of December 15, 2006 Hearing]; *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 A1. Meehan contradicted that statement in his testimony before the Disciplinary Hearing Committee. Meehan Testimony, *supra*, at 178 ("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 Nifong requested Meehan to refrain from voluntarily giving relevant information to another party under Rule 3.4(f), Excerpt Transcript Findings of Fact, *supra* note 4, at 10, likely because of that change in testimony and because of similar statements made in other parts of the December 15, 2006 hearing.

Regardless of the explanation, the DSI Report dated May 12, 2006 presents only the results of three positive matches, which occupy most of the final six of the ten pages in the report. These are: DNA characteristics partially consistent with the DNA of David Evans found on a false fingernail from the bathroom where the rape allegedly occurred; DNA characteristics that more fully matched another Duke Lacrosse player but were still incomplete found on a false fingernail recovered from another part of the house; and "a sperm fraction from the vaginal swab that was consistent with the DNA profile of the alleged victim's boyfriend."[183]

Nifong had an ethical duty under Rule 3.8(d) to provide the exculpatory information in a timely fashion, which is not explained further by the rule, but lacks any suggestion that prolonged unjustified delay is authorized.[184] A generous interpretation of his constitutional duty should have produced prompt disclosure, but due process is violated only if the informa-

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183 Nifong Bar Stipulations, *supra* note 175, ¶ 110; *see also* Report of DNA Security, Inc. at 6-10 (May 12, 2006), Exhibit 214, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter DSI Report].

184 The disciplinary rule's requirement of "timely" disclosure could be interpreted to mean the same as *Brady*, *see supra* note 10 and accompanying text, although the wording is not directly linked to the trial and therefore would seem to require greater promptness. The immediacy of duty could be stated more clearly as was done in the ABA's Standards for Criminal Justice, which define as unethical an intentional failure to disclose "at the earliest feasible opportunity." ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.11(a) (3d ed. 1993); *see also* Rosen, *supra* note 139, at 711-12. Despite the failure to be more specific, the timeliness requirement makes no reference to use at trial. The Disciplinary Hearing Committee in the Duke Lacrosse case rejected a related argument that the disciplinary rule depended on a due process violation, which in turn required that the evidence not be available for trial. *See* Motion to Dismiss and Answer ¶¶ 1-2, *Nifong*, No. 06 DHC 35 (on file with author) (making this argument); Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 8-9, *Nifong*, No. 06 DHC 35 (on file with author) (arguing against it).

Assistant District Attorney Marsha Goodenow testified that the proper practice was to turn over exculpatory information immediately. *See* Anne Blythe et al., *Prosecutor: Nifong Did It All Wrong*, NEWS & OBSERVER (Raleigh, N.C.), June 15, 2007, at A1; *see also* Excerpt Transcript of Testimony of Michael B. Nifong at 255 (Jun. 15, 2007), *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Nifong Testimony] (showing discussion between cross-examiner recounting Goodenow's testimony and Nifong, who disagreed that there was an obligation of immediate disclosure). Immediate disclosure indeed sounds like proper practice, but the interpretation of the timing requirement of the disciplinary rule is, perhaps, a more substantial issue than it was considered by the Nifong panel in the absence of more concrete direction than the word "timely" in the rule.

Certainly the ethical rule can be broader than the constitutional requirement, but the ethical rule appears to have grown from the constitutional doctrine. The provision "make timely disclosure" is taken directly from the ABA's Model Rule. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2002). If the ethical requirement is to differ from the constitutional doctrine from which it is derived or if a definite meaning is to be given to the apparently indefinite phrase "make timely disclosure," I suggest these actions should come through actions of the rule drafting authority in the form of a change in the rule rather than by an interpretation of an individual disciplinary hearing panel. *Cf.* D.C. RULES OF PROF'L CONDUCT R. 3.8(e) (2007) (stating that a prosecutor shall not "[i]ntentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible").

tion is not provided in time for effective use at trial.[185] Assuming he had not violated the constitutional requirement, Nifong had surely failed the related ethical duty. In past years, discovery of such a failure and professional discipline would have been largely left to chance. In the next Section, I describe the end of that journey in December 2006 and work through the path to disclosure, which, because of the breadth of North Carolina's open-file discovery law and the quality of counsel in this case, was not the matter of chance it would have been earlier.

Meehan testified that the other, non-positive, results were referenced in the highlighted portion of the following paragraph of his report, which appeared at the top of page five under the heading "Results of DNA analysis":

> *Individual DNA profiles for non-probative evidence specimens* and suspect reference specimens are being retained at DSI pending notification of the client. Three of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below.[186]

In January 2007, Meehan provided a modified report in which that first sentence was expanded to two and modified. The first sentence, which supposedly covered the same results as in the above italicized words, is shown below:

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185 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* 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* 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* 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) (noting that the Supreme Court has regarded *Brady* as a "trial right" that is "satisfied so long as disclosure is made in time for effective use at that stage"); Robert G. Movillo et al., *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 168-69 (2005) (describing "in sufficient time to allow the defendant to use the evidence effectively" as the timing requirement of *Brady*).

In general, the constitutional rule is both broader and narrower than the ethical rule. The ethical rule is broader in not requiring materiality. Rosen, *supra* note 139, at 714; *see also* Kyles v. Whitley, 514 U.S. 419, 436-37 (1995) (noting that the obligations under Rule 3.8(d) of the ABA's Model Rule of Professional Conduct and Standard 3.3-11(a) of the ABA's Standards for Criminal Justice are broader than the constitutional disclosure obligation under *Brady* and *Bagley*, which are "not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense"). 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. Rosen, *supra* note 139, at 714.

186 DSI Report, *supra* note 183, at 5 (emphasis added).

> Individual DNA profiles for evidence specimens (item numbers 15772, 15776, 15785, 15816-15818) *consistent with male profiles that did not match DNA profiles from any reference specimens* and DNA profiles for reference specimens . . . were being retained at DSI pending notification from the client[187]

The difference in the italicized language is striking. Elsewhere in the report these specimen numbers are identified as obtained from the panties, the rectal swabs, and the combing of the pubic area.[188] The language of the first report suggests inconsequential results; the revised report's language speaks of significant and exculpatory conclusions.

B. The Road to Disclosure and the Critical Role of the Full Open-File Discovery Law

In the Bar's Complaint and the findings of the Disciplinary Hearing Committee that heard the case, five legal bases for disclosure are cited: (1) the relatively new North Carolina full open-file discovery statute, which requires memoranda to be prepared of witness interviews and the preparation and disclosure of expert witness reports;[189] (2) the requirements of the Nontestimonial Identification statute, which requires the disclosure to subjects of the order of all results;[190] (3) the June 22, 2006 discovery order; (4) the requirement under the United States Constitution to disclose exculpatory evidence; and (5) Ethical Rule 3.8(d), which requires immediate disclosure of evidence potentially favorable to the defendant.[191] The Bar also charged Nifong with making intentionally false statements of material fact to the trial court, to opposing counsel, and to the Bar, and alleged that this conduct involved dishonesty, fraud, deceit, or misrepresentation.[192] The Disciplinary Hearing Committee found violations of most of the charges involved, covering nine disciplinary rules.[193]

Defense counsel cited these five bases for discovery in their efforts to secure disclosure and all played some role in the unfolding process. Although the disclosure obligation that is part of the statutory requirement of the Nontestimonial Identification procedure began the process, an examination of the process that led to the ultimate disclosure of the exculpatory

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187 Amended Report of DNA Security, Inc. at 5 (Jan. 12, 2007), Exhibit 240, *Nifong*, No. 06 DHC 35 (on file with author) (entire sentence emphasized in original).

188 *Id.* at 2-3. Item 15772 is identified as obtained from the panties, Item 15776 is identified as a "sperm fraction" and Item 15785 as an "[e]pithelial fraction" of the rectal swabs, and Items 15816-18 are from the combing of the pubic area. *Id.*

189 Amended Nifong Bar Complaint, *supra* note 171, ¶ 227 (citing N.C. GEN. STAT. §15A-903(a)(1)-(2)).

190 *Id.* (citing N.C. GEN. STAT. § 15A-282).

191 *Id.* Charges ¶ d(i)-(ii).

192 *Id.* Charges ¶¶ (e)-(g).

193 Amended Nifong Bar Order, *supra* note 3, at 20-22.

information and the imposition of serious professional disciplinary sanctions against Nifong shows that the lion's share of the work was done by the discovery statute. Its routine application produced the basis for further requests, and its standard requirement of full disclosure established an expectation of compliance that the trial judge treated as routine. The persistent work of excellent counsel moved the process of further disclosure forward step by step and established, in the process, a record of Nifong's deceptive statements in court that was at the center of his undoing.

1. Initial Discovery Requests

On April 6, 2006, before any charges were filed, an attorney representing 33 of the players wrote Nifong and demanded information about any identifications secured using the photos taken and the results of any analysis conducted regarding the DNA from the swabbings.[194] Such disclosure is required by the North Carolina statute that authorizes the court to enter an order such as the one requiring the Duke Lacrosse players to have their pictures and DNA samples taken.[195] On April 12, 2006, Nifong wrote to a list of eleven attorneys responding to this and likely other requests. He acknowledged that he was aware of his duties under the referenced statute to provide a report of the identification procedure. He indicated he would provide the written report immediately upon receipt of it, as he had done with respect to the SBI DNA report when he received it on April 10, 2006.[196] Apparently, this Nontestimonial Identification statute is the reason Nifong requested a written report from Meehan, who understood it was needed for some court proceeding.[197]

Two days after being indicted, on April 19, 2006, Seligmann's counsel filed a discovery motion requesting compliance with the discovery statute and requesting specifically all DNA analysis and any exculpatory information.[198] On April 26, 2006, Finnerty's counsel filed a request for voluntary discovery, which also requested exculpatory evidence and asked that the prosecution give notice as to any expert expected to be called at trial and

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194 Letter from Robert C. Ekstrand, Attorney, to Michael B. Nifong, Durham County Dist. Attorney at 1-3 (Apr. 6, 2006), Exhibit 206, *Nifong*, No. 06 DHC 35 (on file with author).

195 These are called Nontestimonial Identification Orders. *See* N.C. GEN. STAT. §§ 15A-271 to -282 (2007). The disclosure provision is found in section 282.

196 Letter from Michel B. Nifong, Durham County District Attorney, to Glen Bachman et al. at 1 (April 12, 2006), Exhibit 211, *Nifong*, No. 06 DHC 35 (on file with author).

197 *See* Meehan Testimony *supra* note 182, at 67, 90 (indicating report was needed for some unidentified upcoming hearing).

198 Request for, or Alternative Motion for, Discovery at 1-5, State v. Seligmann, Nos. 06 CRS 4334-36 (N.C. Super. Ct. Apr. 19, 2006), Exhibit 212, *Nifong*, No. 06 DHC 35 (on file with author).

furnish reports of those experts.[199] Then on May 17, 2006, Finnerty's counsel filed the first of a series of motions to compel discovery. The first motion requested exculpatory information as well, but more specifically demanded 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."[200]

2. May 18, 2006 Written Response and Court Proceedings

On May 18, 2006, in a written pleading responding to the request for voluntary discovery that accompanied the delivery of 1,278 pages of discovery, Nifong stated: "The State is not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant."[201] He also gave notice of nine potential experts, which included Meehan, his language tracking the elements of the discovery provisions regarding experts.[202] 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."[203] Plainly, his two statements that he had turned over all exculpatory evidence and all evidence that he had were untrue, as the Disciplinary Hearing Committee found.[204]

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199 Request for Voluntary Discovery, State v. Finnerty, Nos. 06 CRS 4331-33 (N.C. Super. Ct. Apr. 26, 2006), Exhibit 215(a), *Nifong*, No. 06 DHC 35 (on file with author).

200 Defendant's First Motion to Compel Discovery at 3, *Finnerty*, Nos. 06 CRS 4331-33, Exhibit 215(b), *Nifong*, No. 06 DHC 35 (on file with author).

Finnerty's second through fifth motions to compel discovery were filed between May 25 and June 9, 2006 and dealt with different specific types of evidence. *See* Exhibits 215(c)-(f), *Nifong*, No. 06 DHC 35 (on file with author). For example, the second motion focused on the accusing witness' statements. Defendant's Second Motion to Compel Discovery at 1, 3, *Finnerty*, Nos. 06 CRS 4331-33, Exhibit 215(c), *Nifong*, No. 06 DHC 35 (on file with author).

201 Response to Defendant's Request for Voluntary Discovery, Statutory Notices, and Reciprocal Motions ¶ 3, State v. Evans, Nos. 06 CRS 5581-83 (N.C. Super. Ct. May 18, 2006), Exhibit 216(a), *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Discovery Response]. Nifong provided identical responses to Finnerty and Seligman in separate pleadings. *See* Exhibits 216(b)-(c), *Nifong*, No. 06 DHC 35 (on file with author).

202 Discovery Response, *supra* note 201, ¶ 5. The notice also listed R.W. Scales, another employee of DSI. *Id.*

203 Transcript of May 18, 2006 Hearing at 22-23, State v. Evans, Nos. 06 CRS 5583, 4331-36 (N.C. Super. Ct. May 18, 2007), Exhibit 217, *Nifong*, No. 06 DHC 35 (on file with author). In the prosecution of Jonathan Hoffman, the Assistant District Attorney made almost precisely the same statement: "I have given them everything that I have." Trial Transcript of October 30, 2006 at 1589, Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.10(c).

204 Amended Nifong Bar Order, *supra* note 3, ¶ 72 (finding written discovery responses to have been "intentional misrepresentations and intentional false statements of material fact to opposing counsel and to the Court"); *id.* ¶ 74 (finding Nifong's response to the trial judge to have been "a misrepresentation and a false statement of material fact").

3. June 22, 2006 Discovery Order and Court Proceeding

On June 19, 2006, Joe Cheshire, lead counsel for Evans, based in part on the discovery provided to that point, requested by letter a report of what transpired at the meeting on April 10, 2006 involving Nifong, Investigator Himan, Sergeant Gottlieb, and Meehan.[205] The discovery statute requires that memoranda be prepared of witness conversations,[206] and Cheshire was asking that it be produced. At the next court hearing on June 22, 2006, this request was covered and Nifong represented and reiterated that nothing beyond the information in the report was discussed other than conversations regarding how the report would be used in court, which he asserted was "not discoverable."[207] In response to the counsel's request and the trial court's inquiry, Nifong represented that nothing beyond the information in the report was discussed with Meehan, which was false.[208] Cheshire pressed the issue, indicating some skepticism that nothing beyond the narrow definition of work product described by Nifong had been covered, and asked the trial court to require the preparation of written reports of the conversation to be submitted to the court for in camera review.[209] The judge denied the request.[210]

Also, at the hearing, a proposed discovery order was discussed, which Nifong understood "in essence . . . requests that the Court enter an order that tells the State to comply with the discovery statute," which Nifong did not object to being entered.[211] The court correctly noted that the order tracked the statute.[212] The judge signed the order.[213] The statute and the order 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"[214] and, as to witnesses the State expects to call, to provide "results of any examinations or tests conducted by the expert."[215]

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205 Letter from Joseph B. Cheshire, V, Attorney, to Michael B. Nifong, Durham County Dist. Attorney ¶ 8 (June 19, 2006), Exhibit 220, *Nifong*, No. 06 DHC 35 (on file with author).

206 N.C. GEN. STAT. § 15A-903(a)(1) (2007) (covering oral statements).

207 Transcript of June 22, 2006 Hearing at 16, *Evans*, Nos. 06 CRS 5581-83, 4331-33, Exhibit 222, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Transcript of June 22, 2006 Hearing].

208 Amended Nifong Bar Complaint, *supra* note 171, ¶¶ 240-41; *see also* Amended Nifong Bar Order, *supra* note 3, ¶ 80 (finding representation to the trial court to have been "intentional misrepresentations and intentional false statements of material fact to the Court and to opposing counsel").

209 Transcript of June 22, 2006 Hearing, *supra* note 207, at 21-23.

210 *Id.* at 23.

211 *Id.* at 3.

212 *Id.*

213 Order ¶ 2, State v. Finnerty, Nos. 06 CRS 4331-33 (N.C. Super. Ct. June 22, 2006), Exhibit 221, *Nifong*, No. 06 DHC 35 (on file with author).

214 *Id.* ¶ 1.

215 *Id.* ¶ 2.

4. September 22, 2006 Court Proceeding

On August 31, 2006, counsel for the three defendants jointly filed a discovery motion.[216] The discovery materials obtained to that point prompted more specific follow-up requests in a number of areas, and one of those concerned the interactions with Meehan. The motion, *inter alia*, set out the chronology of the three meetings with Meehan,[217] and it asked for two types of disclosures regarding DSI testing. First, it renewed Cheshire's request that the oral statements, now understood to be made at three meetings, be put into written form, and coupled it with a *Brady* request.[218] Second, the motion asked for "the complete file and all underlying data regarding DSI's work."[219]

The hearing on that motion was held on September 22, 2006 before a different judge, W. Osmond Smith III, who had been specially assigned to handle the case. Brad Bannon, another of Evans' attorneys, addressed the meetings with Meehan revealed by discovery already produced and renewed the prior request for disclosure of the substance of the conversations at those meeting.[220] At the hearing, Nifong represented that the DSI report encompassed all tests performed and everything discussed at his meetings with Meehan. He had an exchange with the trial judge, which began by the judge asking, "So his report encompasses it all?"[221] Nifong began to answer, "His report encompasses ever— . . . "[222] but he was apparently interrupted. The judge asked the question somewhat differently the second time: "So you represent there are no other statements from Dr. Meehan?"[223] Nifong replied: "No other statements. No other statements made to me."[224] Bannon inquired: "Just so I'm clear, Mr. Nifong is representing that the facts of the case weren't discussed in those meetings."[225] And once again, Nifong falsely replied: "That is correct . . . ."[226] Based on Nifong's re-

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216 Joint Omnibus Motion to Compel Discovery ¶ 40, State v. Evans, Nos. 06 CRS 5581-83, 4331-36 (N.C. Super. Ct. Aug. 31, 2006), Exhibit 223, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Joint Motion to Compel].

217 *Id.* ¶¶ 7-8.

218 *Id.* ¶¶ 28-29.

219 Amended Nifong Bar Complaint, *supra* note 171, ¶ 244. A similar request regarding underlying data was made about the SBI testing. Joint Motion to Compel, *supra* note 216, ¶ 35.

220 Transcript of September 22, 2006 Hearing *supra* note 207, at 24-27, State v. Finnerty, Nos. 06 CRS 4331-36, 5582-83 (N.C. Super. Ct. Sept. 22, 2006), Exhibit 225, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Transcript of September 22, 2006 Hearing].

221 *Id.* at 27.

222 *Id.*

223 *Id.* at 28.

224 *Id.*

225 *Id.*

226 Transcript of September 22, 2006 Hearing, *supra* note 220, at 27-28. The Disciplinary Hearing Committee found that Nifong's responses to the judge's questions at the September 22 hearing were

sponse, the trial court required no further disclosure of the substance of those conversations.[227]

Later in the hearing, the request for the underlying data from DSI was discussed. Nifong read a letter from Meehan raising cost and privacy concerns regarding non-defendants who might be connected with Mangum by DNA evidence.[228] The court granted the discovery request with a protective order directing protection of privacy rights and with reasonable costs paid by the State.[229]

Finally on the DNA matter, Douglas Kingsbury, one of the attorneys representing Finnerty, returned to the discovery request regarding the underlying data to the SBI and DSI testing of DNA. Without knowing the exculpatory results that had not been disclosed, he could hardly have been more on point:

> I just want to make sure that the discovery that we're requesting is not being misconstrued and therefore limited in the state's response . . . . There may be additional male DNA that was recovered and analyzed and found by these experts but they couldn't match it with anyone because the state hasn't given the identities to the DNA experts. And this is my point: We're seeking information of any additional DNA that was found on this alleged victim even though it doesn't match any of these defendants.[230]

The court demurred, stating that the discovery request was broadly stated, with the implication being that the specific request was included, and announced a break.[231] Nifong, who had been put squarely on notice that the results of foreign male DNA were being requested and that Kingsbury was apparently not aware of them, made no comment before or after that break.[232]

"intentional misrepresentations and intentional false statements of material fact to the Court and to opposing counsel." Amended Nifong Bar Order, *supra* note 3, ¶ 88. Similarly, in a subsequent separate criminal contempt proceeding, the trial court concluded that in answering the judge's questions, "Nifong willfully and intentionally made false statements of material fact." Order and Judgment of Contempt and Sentence at 4, *In re* Nifong, No. 07 CRS 10467 (N.C. Super. Ct. Aug. 31, 2007) (on file with author) [hereinafter Nifong Criminal Contempt Order].

227 Transcript of September 22, 2006 Hearing, *supra* note 220, at 28.

228 *Id.* at 49-51.

229 *Id.* at 53.

230 *Id.* at 73-74.

231 *Id.* at 74.

232 *See id.* at 74-75.

5. October 27, 2006 Delivery of DSI Data, Attorney Bannon's Discovery of Exculpatory Results, and Precisely Pointed Disclosure Demand

At the next court hearing on October 27, 2006, Nifong provided 1,844 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.[233] The raw and unexplained data was thus provided only a little more than a week before election day in the hotly contested Durham District Attorney's race in which Nifong was a candidate, and substantial evaluation would be required to understand its significance, no doubt too late to have any impact on the election.[234]

There may be no connection between the delayed DNA disclosure and the election. However, the Disciplinary Hearing Committee found that it was the primary election in the contest for district attorney that motivated Nifong's violation of pretrial publicity constraints.[235] My suggestion is that the same motivation, extended to the general election, may have prompted Nifong's failure to disclose or his delay in disclosing the DNA results. The motivation should have become weaker after the primary, but it continued and provides a plausible explanation for this conduct.

In his testimony before the Disciplinary Hearing Committee, attorney Brad Bannon described the 60 to 100 hours he spent learning the basics of DNA analysis in an effort to understand the significance of the results for his client, Dave Evans, whose DNA was consistent with, but only inconclusively matched, an incomplete DNA profile recovered from the accuser's

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233 Amended Nifong Bar Complaint, *supra* note 171, ¶¶ 254-55.

234 Nifong won the Democratic primary in May 2006. Anne Blythe & Benjamin Niolet, *DA Petition Drives Crawl in Durham Challenges*, NEWS & OBSERVER (Raleigh, N.C.), June 21, 2006, at A1. By mid-June, Nifong, who had no formal opposition, had acquired two opponents who started petition campaigns to be placed on the November ballot. *Id.* One of those, Durham County Commissioner Lewis Cheek, a Democrat, acquired enough signatures to be placed on the ballot. Benjamin Niolet, *Cheek Passes on Run for DA: Even if Elected, Says He Won't Serve*, NEWS & OBSERVER (Raleigh, N.C.), July 28, 2006, at B1. Cheek 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. *Id.* Despite having no formal active opponent, the campaign continued with a somewhat spirited tone. *See* Benjamin Niolet, *Voting Takes a Spirited Tone: Volunteer Put on a Party in Durham*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 5, 2006, at B1. Nifong won the general election on November 7, 2006 with a 10% margin over Cheek, although he garnered less than half the votes cast. Benjamin Niolet et al., *Nifong Fends Off Two Challengers*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 8, 2006, at A1. He received 49% of the vote, to 39% for Cheek, and 12% for various write-in candidates. *Id.*

235 "[A]t that time he was facing a primary . . . . [W]e can draw no other conclusion but that those initial statements that he made were to further his political ambition." Excerpt Transcript Findings of Fact, *supra* note 4, at 17. For a discussion of the political context of Nifong's public statements, see Mosteller, *supra* note 181, at 1354-57.

false fingernail found in a trash can of the bathroom where the rape allegedly occurred.[236] He recounted that while he was not looking for this result because he did not anticipate it, he discovered in that examination of the data that foreign male DNA existed on the samples that was inconsistent with the DNA of each of the 46 Duke Lacrosse players and was therefore exculpatory.[237]

Few defense attorneys, most of whom like Bannon have minimal scientific training, would have had the ability to do what he did even if they had the perseverance and could commit that amount of time to the task, which he believed was only gaining a better understanding of incriminating but ambiguous scientific results.[238] Next, Bannon effectively assembled the full report based on DSI's data on his own, and he presented those conclusions to experts to verify that he was accurately describing the conclusions to be drawn from that data.[239] The product was included in a 17-page motion to compel additional discovery regarding expert DNA analysis, which was filed on December 13, 2006, well after Nifong's successful reelection.[240]

The motion catalogued that: (1) on April 8-10, 2006, DSI conducted tests and concluded that multiple foreign (male) DNA sources that did not match Duke players were found on the rectal swabs and panties in the "rape kit" and that on April 10, Nifong met with Meehan at DSI;[241] and (2) on April 18-19, 2006, DSI concluded that additional multiple foreign (male) DNA sources that did not match any Duke player was found on the pubic hair combings and that on April 20 or 21, Nifong again met with Meehan at

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236 *Brad Bannon on Uncovering Unreported DNA Evidence* (WRAL television broadcast June 14, 2007) [hereinafter *Bannon Unreported DNA Evidence*], *available at* http://www.wral.com/news/local/video/1500655/.

237 *Id.*

238 Issues of ability and resources are both involved. When the case was dismissed and the players declared innocent, Reade Seligmann noted the importance of having the resources to contest the charges. *See* Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, Apr. 12, 2007, at A1 ("'This entire experience has opened my eyes up to a tragic world of injustice I never knew existed . . . . If police officers and a district attorney can systematically railroad us with absolutely no evidence whatsoever, I can't imagine what they'd do to people who do not have the resources to defend themselves.'"). Obviously, many criminal defendants do not have that luxury. Moreover, the ability to decipher the data usually requires specialized expertise.

A point to take from the Duke Lacrosse case is that for indigent defendants, trial courts should freely grant requests for expert services to help the defense understand the significance of the evidence. Disclosure of data under *Brady* means little if it cannot be understood. Moreover, if as this case demonstrates, prosecutors may not flag the significance of the data, ready access to expertise is the only meaningful alternative.

239 *Bannon Unreported DNA Evidence*, *supra* note 236.

240 Motion to Compel Discovery: Expert D.N.A. Analysis, State v. Evans, Nos. 06 CRS 5581-83, 4331-36 (N.C. Super. Ct. Dec. 13, 2006), Exhibit 229, *Nifong*, No. 06 DHC 35 (on file with author) [hereinafter Motion to Compel DNA Analysis].

241 *Id.* at 5-7. The motion lists results from five differently numbered items. *Id.* at 5-6.

DSI.[242] The motion argued that the prosecution had failed to provide a report from the State's expert as required by the discovery statute and potentially exculpatory evidence as required by the United States Constitution.[243] It asked the court to order, *inter alia*, the production of a report by DSI setting out the results of its analysis, the testimony of Meehan, and "[a]ny other Order this Court finds appropriate in the interest of justice."[244]

6. The Decisive December 15, 2006 Court Proceedings

Early in the hearing on that motion conducted on December 15, 2006, Nifong made the somewhat cryptic statement that "[t]he first that I heard of this particular situation was when I was served with these reports—this motion on Wednesday of this week."[245] He then called Meehan of DSI to the stand and, without asking any questions on direct, tendered him to the defense for cross-examination.[246]

Bannon examined Meehan first for an extended period. He ultimately asked Meehan whether "male DNA . . . found on multiple items from a rape kit [is] not probative evidence?"[247] Meehan responded:

> No, that's not a general rule, okay. This report was a specific report at the request and in discussions with Mr. Nifong that we would report only specimens that matched evidence items. Only, we would only disclose or show on our report those reference specimens that matched evidence items. So that's all that's here.[248]

Jim Cooney, lead counsel for Seligmann, then examined Meehan briefly. He first clarified Meehan's description of some of the DNA profiles

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242 *Id.* at 8-9.

243 *Id.* at 14-15.

244 *Id.* at 15-16.

245 Transcript of December 15, 2006 Hearing, *supra* note 182, at 14. In chambers before the hearing, Nifong again ambiguously stated:

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

Excerpt of Transcript of Proceeding in Chambers at 12, State v. Finnerty, Nos. 06 CRS 4331-36, 5582-83 (N.C. Super. Ct. Dec. 15, 2006), Exhibit 251, *Nifong*, No. 06 DHC 35 (on file with author). The Disciplinary Hearing Committee found that Nifong's representations that he was unaware of the potentially exculpatory DNA results and their exclusion from DSI's report were "intentional misrepresentations and intentional false statements of material fact to the Court and to opposing counsel." Amended Nifong Bar Order, *supra* note 3, ¶ 96.

246 Transcript of December 15, 2006 Hearing, *supra* note 182, at 16-17.

247 *Id.* at 59.

248 *Id.* at 59-60.

as "weak," but that even with regard to "weak profiles," when a subject is excluded, the conclusion is with "a hundred percent scientific certainty" as applied to the conclusion that "none of the players match a profile."[249] Cooney then returned to Bannon's subject of the limited nature of the report, asking:

> Q. Did your report set forth the results of all of the tests and examinations that you conducted in this case?
>
> A. No. It was limited to only some results.
>
> Q. Okay. And that was an intentional limitation arrived at between you and representatives of the State of North Carolina not to report on the results of all examinations and tests that you did in his case?
>
> A. Yes.[250]

At the close of Meehan's testimony, the defense indicated it would "probably have additional motions," but wanted an opportunity to review the transcript[251] and evaluate options before it asked for further relief.[252] As described in the next section, events moved with great speed after this hearing. Prompted by the North Carolina State Bar initiating disciplinary action, Nifong withdrew from the case less than a month later, which was before the next scheduled court hearing.

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[249] *Id.* at 77-78.

[250] *Id.* at 85. *See also* Neff et al, *supra* note 182. Meehan softened his statements somewhat in his testimony before the Disciplinary Hearing Committee indicating that he anticipated a later more complete report and that the May 12, 2006 was prepared only as an interim report. *See* Meehan Testimony, *supra* note 182, at 66-69 (testifying that it was the only interim report he had ever been asked to prepare). However, after all testing was completed, Meehan called Nifong to inquire whether he wanted a final report but was told that he did not want one prepared. *Id.* at 97-98 (describing contact with Investigator Benjamin Himan in July 2006 after all the results were completed in which he asked if a final report was desired and Himan responding after consulting Nifong that he "would not need to issue a report"). The Committee's Chairman was not impressed with the details of Meehan's testimony, calling him at one point "Mr. Obfuscation" and describing him as an "'erratic witness at best.'" Benjamin Niolet & Joseph Neff, *Other Reputations Rose and Fell, Too*, News & Observer (Raleigh, N.C.), June 19, 2007, http://www.newsobserver.com/news/crime_safety/duke_lacrosse/story/608853.html. But apparently because of Meehan's testimony, it did not find that Nifong requested him to refrain from voluntarily giving relevant information to another party under Rule 3.4(f) of the Revised Rues of Professional Conduct, Excerpt Transcript Findings of Fact, *supra* note 4, at 10, likely because of that change in testimony.

[251] Transcript of December 15, 2006 Hearing, *supra* note 182, at 93.

[252] *Bannon Unreported DNA Evidence*, *supra* note 236 (describing judgment to review other statements by Nifong before determining what, if any, allegations to make and remedies to seek based on his failure to provide exculpatory DNA evidence).

It was not until June 2007, after dismissal of charges and Nifong's disbarment, that attorneys for the three indicted players returned to the matters covered in the hearing. They filed a motion for criminal contempt with the trial judge,[253] and the trial judge found probable cause focused on the charge that Nifong willfully made false statements to the court on September 22, 2006 in representing that all DNA evidence had been previously provided.[254] In August 2007, Nifong was convicted of criminal contempt and sentenced to jail for a day.[255]

C. Bar Proceedings Against Nifong and the End of Criminal Prosecution in the Duke Lacrosse Case

After the defense motion was filed on December 13, 2006 and the revelations at the hearing two days later regarding undisclosed potentially exculpatory DNA evidence, events regarding the professional discipline of Michael Nifong unfolded rapidly. The criminal case was effectively taken from his hands because of a clear conflict of interest when the initial complaint by North Carolina was filed on December 28, 2006,[256] and he was officially off the case as a result of his recusal approximately two weeks later.[257]

On December 19, 2006, only four days after the hearing, the Bar sent a Letter of Notice to Nifong regarding failure to disclose the potentially exculpatory DNA evidence, instructions to Meehan to prepare a report that would not include such evidence, and previous false representations to the trial court that he did not know of such potentially exculpatory results.[258] At

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253 Anne Blythe & Joseph Neff, *Contempt Accusations Loom*, NEWS & OBSERVER (Raleigh, N.C.), June 23, 2007, at A20.

254 Anne Blythe, *Nifong Doesn't Appear at Hearing*, NEWS & OBSERVER (Raleigh, N.C.), June 22, 2007, at B1.

255 On August 30, 2007 after a one day trial, Judge Osmond Smith found Nifong guilty of criminal contempt, concluding that, as to the statements made to the court on September 22, 2006 that he had supplied all DNA results, Nifong was aware that DNA results had not been provided and in so asserting that he "willfully and intentionally made false statements of material fact . . . ." Nifong Criminal Contempt Order, *supra* note 226, at 4. As punishment, the court sentenced Nifong to one day of imprisonment. *Id.* at 6.

256 Press Release, L. Thomas Lunsford II, Executive Dir. of the N.C. State Bar, State Bar Files Amended Complaint Against the Former Prosecutor in the Duke Lacrosse Case at 2 (Jan. 24, 2007) [hereinafter State Bar Files Amended Complaint], *available at* http://www.ncbar.com/Nifong_release.pdf (noting that the original complaint was filed on December 28, 2006).

257 *See* Attorney General's Report, *supra* note 151, at 2 (indicating that Nifong formally requested that the Attorney General assume responsibility for the case on January 12, 2007 and that the Attorney General accepted it the next day).

258 Letter of Notice from Katherine E. Jean, Counsel, N.C. State Bar, to Michael B. Nifong, Durham County Dist. Attorney (Dec. 19, 2006), Exhibit 231, *Nifong*, No. 06 DHC 35 (on file with author). Nifong responded on December 28, 2006. First Nifong Response to Jean, *supra* note 7. The Bar sent

its quarterly meeting on January 18, 2007, the Bar's Grievance Committee found probable cause to refer these additional charges to the Disciplinary Hearing Commission for trial.[259] The State Bar's Amended Complaint was filed on January 24, 2007.[260]

However, these were not the charges that caused Nifong to ask the Attorney General to assume responsibility for the case and to recuse himself. Instead, those charges related to improper pretrial publicity,[261] which were alleged to have a substantial likelihood of materially prejudicing the adjudicative proceeding and of heightening public condemnation of the accused in violation of Rules 3.6(a) and 3.8(f).[262] The offensive statements were of three basic types. First, Nifong asserted confidence that a rape had occurred; second, he asserted that the Duke Lacrosse players had unified to withhold the truth; and third, he emphasized that the crime involved racist aspects.[263] Nifong began making these statements on Monday, March 27, 2006, the same day that he was briefed by the investigation officers on the facts of the case,[264] and continued in a particularly intense barrage for the rest of that week.[265] By his own admission, Nifong gave fifty to seventy interviews during that period,[266] and he devoted more than forty hours to reporters.[267] While the pace of comments decreased, they did not cease. The

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him a follow-up letter on January 5, 2007 asking for clarification on several points. Letter from Katherine E. Jean, Counsel, N.C. State Bar, to Michael B. Nifong, Durham County Dist. Attorney (Jan. 5, 2007), Exhibit 232, *Nifong*, No. 06 DHC 35 (on file with author). Nifong responded on January 16, 2007. Letter from Michael B. Nifong, Durham County Dist. Attorney, to Katherine E. Jean, Counsel, N.C. State Bar (Jan. 16, 2007), Exhibit 234, *Nifong*, No. 06 DHC 35 (on file with author).

259 State Bar Files Amended Complaint, *supra* note 256.

260 *Id*. at 1.

261 For a more complete examination of the basis for these charges, see Mosteller, *supra* note 181, at 1348-57.

262 The Bar Complaint also alleged that some of these statements involved dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct. *See* Amended Nifong Bar Complaint, *supra* note 171, ¶ 291(a)-(b). This characterization of the statements was among the few that the Disciplinary Hearing Committee rejected. *See* Excerpt Transcript Findings of Fact, *supra* note 4, at 5-6.

263 Mosteller, *supra* note 181, at 1350-52.

264 Amended Nifong Bar Complaint, *supra* note 171, ¶¶ 9-10.

265 *See* (second) Exhibit A, Chronological Stipulated Undisputed Facts ¶¶ 25-75, Exhibit 1, *Nifong*, No. 06 DHC 35 (on file with author) (setting out nine statements made "on or before" March 27, 2006, ten statements made "on or before" March 28, 2006, four statements made "on or before" March 29, 2006, twelve statements made "on or before" March 30, 2006, seven statements made "on or before" March 31, 2006, and two statements made "on or before" April 1, 2006).

266 Joseph Neff, *Nifong Conduct Rebuked Early*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 15, 2007, at A1.

267 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.

statements were made to both local and national media and included newspapers and other print media and television.[268]

On August 21, 2006, the Bar sent a Letter of Notice to Nifong alleging these violations, which it supported by a long list of his statements to the press that began on March 27, 2006 and continued through the middle of June 2006,[269] and as directed, Nifong responded promptly.[270] On October 19, 2006, a sixteen-member subcommittee of the Grievance Committee charged with initial consideration of the allegations against Nifong met to deliberate whether to recommend to the full Grievance Committee that a complaint should be filed based on improper pretrial publicity.[271] The subcommittee's vote was unanimous to recommend filing the complaint.[272] It then considered whether to recommend waiting to file the ethics complaint until the criminal charges had been resolved against the three players, or to file it without delay.[273] That was a more difficult issue for the group, and the vote resulted in a tie, with the committee chair, Jim Fox, then casting the decisive vote to proceed immediately.[274] Later that same day, the full Grievance Committee, which consists of forty-two members, voted unanimously to proceed without delay to file the grievance.[275] That complaint, which relates to the improper pretrial publicity, was filed on December 28, 2006 once the Bar Counsel had completed its formal preparation.[276]

Disciplinary Hearing Committee Chairman F. Lane Williamson called this a "controversial decision."[277] He explained, "It was certainly unprecedented that the State Bar would take disciplinary action against a prosecutor

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268 From March through April 2006, Nifong made statements to the following broadcast media: CBS, CNN, ESPN, MSNBC, WRAL News, MABC 11 TV News, and NBC 17 News. Amended Nifong Bar Complaint, *supra* note 219, ¶¶ 10-181. He also made statements to the following print media: *Durham Herald-Sun*, *News & Observer*, *Charlotte Observer*, *New York Times*, *USA Today*, and *Newsweek*. *Id.*

269 Letter of Notice from Katherine E. Jean, Acting Co-Counsel, N.C. State Bar , to Michael B. Nifong, Durham County Dist. Attorney at 1 & Exhibit A (Aug. 21, 2006), Exhibit 247, *Nifong*, No. 06 DHC 35 (on file with author).

270 Letter from Michael B. Nifong, Durham County Dist. Attorney, to Margaret Cloutier, Acting Co-Counsel, N.C. State Bar (Aug. 29, 2006), Exhibit 248, *Nifong*, No. 06 DHC 35 (on file with author).

271 Letter from Wade Smith, Counsel for Collin Finnerty, to author (Nov 13, 2007) (on file with author) (describing the step-by-step decision process to file the initial grievance).

272 *Id*.

273 *Id.*

274 Joseph Neff & Anne Blythe, *Outcome Turned on Close Calls*, NEWS & OBSERVER (Raleigh, N.C.), June 17, 2007, at A8. (describing the tie-breaking vote).

275 Letter from Katherine E. Jean, Counsel, N.C. State Bar, to author at 2 (Sept. 13, 2007) (on file with author) (describing the general make-up and procedure of Grievance Committee and its subcommittees).

276 *Id*. (noting preparation time for complaint after the full Grievance Committee finds probable cause and refers the case to the Disciplinary Hearing Commission for trial and describing general procedure of Grievance Committee).

277 Excerpt Transcript Findings of Fact, *supra* note 4, at 21.

during the pendency of the case, when indeed the presiding judge had concurrent and coextensive disciplinary jurisdiction."[278] He noted that this filing led Nifong to recuse himself, and while he was not privy to the decision, he was confident it "was a matter of serious debate as to whether to do that . . . because that [action] in itself took the justice system off track."[279]

Indeed, the flow of events was rapid after the complaint was filed on December 28, 2006.[280] The next day, the North Carolina Conference of District Attorneys asked that Nifong step down.[281] Nifong testified that he realized its filing meant that he had to recuse himself because he had a conflict of interest, not being able to both defend himself and prosecute the case.[282] Nifong met with Crystal Mangum on January 11, 2007[283] and determined that she wanted to proceed with the prosecution.[284] The next day, he asked the Attorney General to assume responsibility for the case,[285] and on January 13, 2007, Attorney General Roy Cooper accepted the request.[286]

Three months later, the Attorney General announced that as a result of the investigation of two special prosecutors from his office, Jim Coman and Mary Winstead, he was dismissing charges and had determined that Seligmann, Finnerty, and Evans are innocent.[287] In June, after a five-day hearing, the Disciplinary Hearing Committee found that Nifong had committed the vast bulk of the charged offenses, which were based on eleven different

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278 *Id.*

279 *Id.*

280 State Bar Files Amended Complaint, *supra* note 256.

281 Eric Ferreri, *Defense Claims Nifong's Witness*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 30, 2006, at B1; *see also* Lara Setrakian, *DAs Call for Prosecutor in Duke Lacrosse Case to Step Down*, ABC NEWS, Dec. 29, 2006, http://abcnews.go.com/US/LegalCenter/story?id=2760232 (describing the North Carolina Conference of District Attorneys' statement that "'it is in the interest of justice and effective administration of justice that Mr. Nifong immediately withdraw and recuse himself from the prosecution'" as "yet another moral blow for Durham County").

During the Nifong disciplinary hearing, Thomas Anglim, an assistant district attorney from Washington, North Carolina testified that Nifong's conduct had made jurors in his cases skeptical of the honesty of the State's evidence. His testimony was offered to show the widespread disrespect Nifong's conduct had brought to the administration of justice, which prosecutors felt acutely. I watched the live televised disciplinary hearing on June 15, 2007, and the statements about Mr. Anglim's testimony are based on my personal recollections from that day.

Anecdotal evidence suggests that Nifong's dishonest conduct has affected jury's perceptions of prosecutors across the country. *See* Benjamin Niolet, *Lacrosse Case Leaving Mark in Courts*, NEWS & OBSERVER (Raleigh, N.C.), May 27, 2007, at B1 (recounting stories of the impact of the case in North Carolina and in other states).

282 Nifong Testimony, *supra* note 184, at 174-75.

283 March 20, 2006-January 14, 2007 Calendar of Michael B. Nifong, Exhibit 16, *Nifong*, No. 06 DHC 35 (on file with author) (indicating a meeting with "Crystal" at 2:00 p.m. on January 11,2007).

284 Nifong Testimony, *supra* note 184, at 181.

285 *Id.* at 180.

286 Attorney General's Report, *supra* note 151, at 2.

287 Written Comments by Attorney Gen. Roy Cooper (Apr. 11, 2007) (on file with author).

provisions of the disciplinary rules.[288] With regard to the DNA evidence, it found that Nifong violated applicable law, court rulings, and disciplinary rules related to his failure to provide discovery and disclosure of potentially exculpatory evidence as required by the Revised Rules of Professional Conduct.[289] It also found that he made false statements of material fact to the trial court, opposing counsel, and the Grievance Committee regarding the potentially exculpatory evidence.[290]

IV. LESSONS IN PROFESSIONAL DISCIPLINE FROM NORTH CAROLINA CASE STUDIES

A. Full Open-File Discovery, Not Brady, Is the Workhorse and the Star

The Gell, Hoffman, and Duke Lacrosse cases are examined here as disciplinary cases. As matters of constitutional law, the prosecutors' conduct implicates a body of law under the Due Process Clause that requires the prosecution to disclose evidence that is potentially helpful to the defense as to either guilt or punishment, which is frequently called the *Brady* doctrine.[291]

These cases in fact involve different elements of that doctrine. Gell itself covers two somewhat different types of violations. First, the statements of witnesses that the murder victim was alive at a time that proved Gell could not have committed the murder are evidence of innocence. As such, that evidence would fall directly under the *Brady* case.[292] Another element

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288 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 N.C. REVISED RULES OF PROF'L CONDUCT (2006). Excerpt Transcript Findings of Fact, *supra* note 4, at 4-15. The initial written order omitted reference to Rule 3.4(c). Nifong Bar Order, *supra* note 3, Conclusions of Law ¶¶ (a)-(g). In response to an e-mail I wrote to the State Bar pointing out the discrepancy, the oversight was corrected and the order amended. Joseph Neff, *Nifong Sends in His License*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 15, 2007, at A1.

289 Amended Nifong Bar Order, *supra* note 3, Conclusions of Law ¶¶ (c)-(d); Excerpt Transcript Findings of Fact, *supra* note 4, at 6-10.

Nifong had defended the charge in part on the grounds that he had not read the DSI report between May 12, 2006 when he received it and December 13, 2006 when he was served with the defense motion that stated the exculpatory foreign DNA results had not been disclosed. Nifong Testimony *supra* note 184, at 141-42, 246, 263, 269. The Disciplinary Hearing Committee rejected his claim, finding that he was aware that the written report did not reveal that information. Amended Nifong Bar Order, *supra* note 3, ¶ 71.

290 Amended Nifong Bar Order, *supra* note 3, Conclusions of Law ¶¶ (d)-(h); Excerpt Transcript Findings of Fact *supra* note 4, at 10-14.

291 Brady v. Maryland, 373 U.S. 83 (1963).

292 The *Brady* case involved evidence that did not show innocence of the crime but went only to sentencing. *Id.* at 84. However, it tended to show that Brady's co-defendant, not Brady, was the actual murderer and thus Brady was "innocent" of performing the act. *Id.* (focusing on the one withheld confession by the co-defendant Boblit in which he admitted the actual act of murder).

of the Gell case—the failure to disclose the impeaching statement of a prosecution witness regarding her need to "make up" a story—moves into another slightly different area of impeaching evidence that was recognized explicitly in *Giglio v. United States*[293] as falling within the due process command.[294] There is no need to clearly distinguish between evidence affirmatively showing innocence and impeaching evidence, and the evidence in the Duke Lacrosse case of foreign male DNA on the accuser's panties and other items from the "rape kit" can be seen as falling in either or both categories, although it is most clearly evidence that impeaches the story and the significance of the physical symptoms of the accuser.

The evidence in the Hoffman case comes within the due process doctrine and is similar to elements in the other cases in that it is impeaching, but it is also somewhat distinct. The evidence involves inducements given by a prosecutor or prosecutors to a "cooperating witness" to secure his testimony against the defendant. This evidence can be (merely) impeaching evidence if not disclosed and/or it can involve presentation of perjured testimony under an even older line of Supreme Court cases beginning with *Napue v. Illinois*.[295] The distinction between those two types of violations is, in essence, the distinction between the Superior Court judge's granting a new trial and the disciplinary complaint, which alleged intentional wrongful action and deceptive conduct by the prosecutors. Because of the termination of the disciplinary case on technical grounds, there is no resolution of the conflicting positions.

Disclosure in these cases did not turn on the above-described distinctions in constitutional doctrine. Indeed, disclosure did not result from *Brady* at all. Instead, it was the consequence of discovery requirements, and the most important lesson that comes from these cases is the critical importance of full open-file discovery as an aid to justice. Once full disclosure was made in Gell and Hoffman, the convictions could not stand, and after full disclosure in the Duke Lacrosse case, District Attorney Nifong was, in short order, off the prosecution. The disciplinary proceedings were more complicated, but the success or failure of the disciplinary actions should not be the message.

In Gell and Hoffman, correcting the criminal justice system mistakes occurred only after conviction during state "habeas" proceedings. This was because North Carolina had only adopted a broad discovery rule for death penalty cases when examined after conviction. In the Duke Lacrosse case, a similarly broad provision was applicable to trial proceedings. Although it took some substantial effort to secure the information, ultimately the broad

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[293] 405 U.S. 150 (1972).

[294] *Id.* at 154-55 (referring to the importance of the witness' credibility and the applicability of the due process doctrine to such evidence).

[295] 360 U.S. 264 (1959).

command of the discovery statute meant that the critical data came into the defense's possession earlier in the process—before trial.

The largest and most important message of these cases is that full disclosure solves, or at least helps solve, *Brady* issues. With regard to all these cases, there is no clear indication that any evidence was given to the defense because the prosecutor chose to provide exculpatory evidence or any court ordered the production of *Brady* evidence. As best I can determine, even in the Duke Lacrosse case, I can find no discretionary ruling that the trial court made in terms of discovery that was tilted in favor of the defense. Rather, the judges accepted the representations of the prosecutor and denied the innovative or unusual requests of the defense.[296] The judges only granted what the discovery law required and did so in step by step fashion as the defense demonstrated the existence of the evidence and the law's application to it.

What we collectively call the *Brady* doctrine was the legal basis for relief in Gell and Hoffman. However, the Due Process Clause had no direct role in producing the evidence. The workhorse and the star were the mundane discovery laws.

In its alternative form of an intentional presentation of false evidence regarding the inducements given to the witness, the Hoffman case is somewhat different. There, what discovery reveals will often be less decisive. This is because the evidence of violation is not separate from the prosecutors. The critical evidence is not, as in the Gell case, the statement of other witnesses given to SBI agents or tape recorded, nor is it the conclusions and data of scientific experts, as in the Duke Lacrosse case. Rather, it is the work of prosecutors in their own conversations with the witness, which itself can be straightforward in significance when promises are clear or can be the subject of interpretation and dispute when the inducements, if they exist, are ambiguous or vague. Evidence of wrongdoing in which the prosecutor is directly involved will rarely be recorded in easily discoverable documents. As in Hoffman, full discovery will help, but often much additional investigation by the defense will be required.

Brady and related doctrines are important but did not unearth the evidence in the three cases described. Moreover, although they have some effect on prosecutorial conduct, their purpose is not to provide "a code of ethics for prosecutors," but rather the Due Process Clause is concerned "with the manner in which persons are deprived of their liberty."[297] Thus, a prosecutor's decision not to disclose arguably exculpatory evidence under *Brady* is not judged directly as to the correctness of the determination that

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[296] Part of the reason for such judicial action is that the trial court typically must expect the lawyers to "act in good faith," as Judge Helms stated in refusing a defense request for more extensive examination of the files. Trial Transcript of October 30, 1996 at 1589, Exhibits to Third Amended Hoffman MAR, *supra* note 8, Exhibit 4.10(c).

[297] Mabry v. Johnson, 467 U.S. 504, 511 (1984).

the evidence is exculpatory. Rather, that decision is reviewed only after it is "filtered through" the trial of the case under the doctrine's materiality requirement, and the decision is frequently affected by the strength of the other evidence in the case. Moreover, the question is typically examined only after a jury has convicted the defendant, with the understandable impact that that result has on courts to affirm in the interest of finality.[298]

B. The Difficult Issues of Prosecutor's Intent and Knowledge as to Disciplinary Action for Failure to Provide Potentially Exculpatory Evidence

Ethical principles, *Brady*, and our adversary system require a prosecutor to operate with a type of split personality. An important aspirational principle of the American public prosecutor is that he or she should first seek justice rather than being motivated simply to win the case. A subpart of that command is that the prosecutor should not charge or convict an innocent person. Often this command is stated in terms of the importance of the prosecutor reaching his or her own conclusion about the guilt of the defendant. Unless convinced that the defendant is guilty to some level of subjective certainty (probable cause, beyond a reasonable doubt, moral certainty), the prosecutor should not proceed. In a moment I will suggest the weakness of that command, but here I want to affirm that, as someone who worked for seven years as a public defender, I strongly believe that principle is of fundamental importance to the criminal justice system.

However, for a prosecutor who has reached the conclusion that the accused is guilty, which obviously should be updated as new evidence is received, there can be no true exculpatory evidence. If it is truly exculpatory, the case should be dismissed, or that thought should be seriously entertained. Otherwise, the evidence must be not really exculpatory, and therefore, is simply useful ammunition for the defense in the adversary battle of the criminal trial.[299] Once the sweep of evidence has been examined and the prosecutor is committed to the rightness of the prosecution, *Brady* is not felt as a moral command, unless something stunning is observed. It is rather part of the requirements of the job, and making close calls in favor of con-

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298 *See* Rosen *supra* note 139, at 707-08 (arguing that the doctrine makes sense as a matter fairness to the individual but that it is accordingly a poor vehicle for deterring prosecutors from suppressing evidence).

299 This observation about the almost inherent "schizophrenia" of *Brady* is frequently noted. *See, e.g.*, Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 653-54 (2002) (describing the mental process of a prosecutor who includes the materiality requirement of *Brady* as "a Zen-like state of harmonizing objective and subjective beliefs, simultaneously recognizing that the evidence creates a reasonable probability that a reasonable jury will entertain a reasonable doubt while still subjectively believing that continued prosecution is warranted").

victing the guilty. This perspective, which produced the wrong calls, is more understandable, if still unacceptable under the rules of professional responsibility and the commands of due process. Add in the adversarial nature of our criminal trial system, and one should anticipate that mistakes will be made. With this mindset, one can imagine in particular how not revealing *all* the details of a negotiation with a recalcitrant witness, who is offered the opportunity to have her criminal responsibility reduced in order to motivate the witness to testify against a guilty murderer, might be tempting if some of the inducements were vague or contingent.

The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment. It does not require a prosecutor to make difficult discretionary decisions. The prosecutors in Gell and Hoffman asserted they made no choice at all because they did not know of the exculpatory evidence, and even Nifong claimed that he did not know the foreign DNA evidence had not been disclosed. The circumstantial evidence from these cases suggests, however, that in at least one case, and perhaps more, a choice was made and it was incorrect. Disclosing all evidence, or realistically moving strongly in that direction, means that most *Brady* evidence will be disclosed as part of the routine.

In Gell, the prosecutors asserted that they did not know about the evidence in their files that was potentially helpful to the defense, and in Hoffman, the prosecutors claimed that they did not know what inducements others had given, effectively what was in another government officer's files. Nifong somewhat grudgingly acknowledged that he knew of the potentially exculpatory evidence,[300] but then made the more limited and less credible claim that he did not know that Meehan's report had omitted it.[301]

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300 *See* Nifong Testimony *supra* note 184, at 283-84 ("There's no question it's potentially exculpatory."); *id.* at 289 (stating that he thought he had agreed that the foreign male DNA was "potentially exculpatory"). In his initial response to the Bar, Nifong characterized the foreign male DNA as "non-inculpatory" rather than "specifically exculpatory." Exhibit 233, *supra* note 7, at 3. 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 character, but recognized his responsibility for disclosure under the discovery statute. *See* Nifong Testimony *supra* note 184, at 289-90. He contended that when he heard of the evidence from Dr. Meehan, he did not appreciate that it had any significance as exculpatory evidence. *See id.* (answering that when he met with Meehan he did not recognize it as "specifically exculpatory" and indeed "didn't think it proved anything at all in this case, in light of the profession of the victim and also in light of the fact that no determination, no conclusion could be drawn about where the evidence came from, how long it had been there or anything like that"); *id.* at 291 ("I didn't think it proved anything at all about the facts and circumstance of what occurred on March 13th and 14th, that evening."); *id.* at 298 ("[I]t did not occur to me that that DNA belonged to the perpetrators.").

301 *See* Nifong Testimony *supra* note 184, at 141-42, 246, 263, 269 (claiming he had not read the DSI report between May 12, 2006 and December 13, 2006 when he received the defense motion setting out that the foreign male DNA had not been disclosed or had not read it with any appreciation of that issue).

The disciplinary rule requires proof of the content of the mind of another, and proof of knowledge is generally difficult. Given the assumption that prosecutors have already morally decided that the defendant is guilty, the claim that they did not see and recognize the exculpatory evidence is somewhat more plausible. Also, the chance of perceiving their exculpatory quality is diminished because documents that appear unhelpful to the prosecution are generally likely to receive far less attention than those that are recognized as incriminating the defendant.

In all three cases, defense attorneys, through inquiries and demands, brought attention to the specific type of information that was ultimately found. Calling attention to the issue did not produce results, however. No decision of a trial court turned on the specific request. Instead, it was the discovery mandate, made effective by repeated specific requests, that opened the door to disclosure.

C. Proof of Knowledge of Potentially Exculpatory Evidence for Disciplinary Action

The Gell case taught the difficulty of proving that the prosecutors in charge of his prosecution knew the contents of the investigative files. The quantity of material overlooked, and some of the evidence that other, albeit self-interested, witnesses would have offered if asked, strains the credulity of the claim of lack of knowledge and intent.[302] However, counsel for the State Bar may well have acted with appropriate restraint as prosecutors charged themselves with "doing justice" and refrained from pursuing a claim of intentional wrongdoing lest they pursue a potentially unsupported charge.[303] In any case, the Bar's decision not to litigate the claim more aggressively doomed any effort to establish more serious violations.

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302 *See supra* note 56 (discussing evidence potentially in conflict with the claims of lack of knowledge and intent).

303 A recent filing in the Gell's pending civil case against some of those involved in the investigation contends that intentional withholding of exculpatory evidence was done by SBI agent Dwight Ransome, rather than by Hoke and Graves. *See* Joseph Neff, *Gell's Suit Gets a Boost: Ex-DA: Evidence Was Hidden*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 3, 2007, at A1 (describing allegations derived from a deposition of the original prosecutor, David Beard, that the key government witnesses were dissuaded from their inclination change their story in a meeting with him and SBI agent Dwight Ransome, which was not disclosed either the Hoke and Graves or to Gell's defense attorneys); Memorandum in Support of Motion to Reopen Deposition of Defendant Dwight Ransome, Gell v. Ransome, No. 2:05-CV-21-FL, (E.D.N.C. July 24, 2007) (on file with author). The allegations in this pleading argue that the focus of intentional wrongdoing, which the large body of undisclosed exculpatory evidence suggests, would appropriately have been directed at an investigator, Ransome, rather than at the special prosecutors, Hoke and Graves. *Id*. at 1-4.

The uncertainty regarding knowledge and responsibility of the various actors involved in this investigation and prosecution illustrates one of the difficulties of establishing knowledge of wrongdoing by a particular prosecutor, which is generally required for disciplinary action and particularly for impo-

From the perspective of professional discipline, the decision of the Disciplinary Hearing Committee in Gell increased the likelihood of proof of a violation in concluding that ignorance of the contents of the file was not a complete defense and that prosecutors have "a duty under the Rules of Professional Conduct and existing case law to know the contents of the investigation files in the possession of the State and its agents."[304] The results of the Disciplinary Review Committee appointed in the wake of the Gell case, which produced the modification of Rule 3.8(d) to require disclosure of potentially exculpatory evidence "after reasonably diligent inquiry"[305] solidified that result.

One substantial question is what these changes do, not to professional discipline per se, which is not generally considered an end in itself, but far more critical to the disclosure of potentially exculpatory evidence. Professor Fred Zacharias, who writes frequently about professional discipline and the discipline of prosecutors, has suggested a number of reasons why discipline is infrequent.[306] One of those is the availability of alternative judicial remedies for some violations.[307] He sees a potential inverse relationship between disciplinary action and legal relief for the defendant. He assumes that disciplinary agencies may be deterred from action because they fear that courts may be less willing to provide judicial relief if such relief almost automatically results in disciplinary action against prosecutors (or defense attorneys for ineffective assistance).[308]

From a policy objective, one should worry about a change in disciplinary rules that could have a negative effect on the willingness of courts to reverse convictions based on a *Brady* violation even though the change makes professional discipline of prosecutors for such violations more likely. Fortunately, I believe that at least in the form and in the context that these changes have occurred in North Carolina, they are likely to be beneficial rather than deleterious to effective production of exculpatory informa-

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sition of serious sanctions. Even more powerfully, the uncertainty underlines the importance of *full* open-file discovery rather that simply access to the trial prosecutor's files so that the defense is assured access to, not only the immediate prosecutor's files, but also to those of other investigative and prosecutorial agents who have been involved in the case.

304 Hoke & Graves Disciplinary Order, *supra* note 1, Conclusion of Law ¶ 2(a).

305 Whether this apparently admirable change in Rule 3.8(d) will make it less likely that courts will reverse convictions on the basis of *Brady* violations because finding such a violation will now be more likely to result in professional discipline of the prosecutor in charge is yet to be seen. Fortunately, the change in the ethics rule occurred in an environment of broad discovery, which should limit the number of cases where discovery of exculpatory information occurs after conviction and effectively reduce the opportunity for prosecutorial misconduct.

306 Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.L. REV. 721 (2001).

307 *Id.* at 758 (arguing that as long as alternative remedies such as exclusion of evidence and appellate reversal are sufficient to signal that the conduct is wrong and to discourage future violations, disciplinary agencies may perceive little marginal benefit taking disciplinary action).

308 *Id.* at 754. Zacharias assumes the same would apply to findings of ineffective assistance of counsel against defense attorneys. *Id.*

tion and accurate judicial rulings when the constitutional command is not followed. First, in the absence of intent, the sanction will be the limited one of at most a reprimand. Second, the judicial ruling that the evidence is not material does not eliminate the ethical violation, and a trial court's statement that evidence has no exculpatory potential is both unlikely and should carry little weight if the undisclosed evidence is like that impeaching the star witnesses in Gell, the inducements given to the "cooperating witness" in Hoffman, or the foreign DNA in the Duke Lacrosse case. Also, the full open-file discovery rule provides the default position, which is that all evidence is disclosed, that vastly reduces the incentive for non-disclosure and the potential efficacy of any effort to withhold.

D. General Factors Affecting Discipline of Prosecutors

Obviously, before the bar can institute action, it must learn of the misconduct, which usually depends upon the complaint of a third party, and because prosecutors lack dissatisfied clients to make such complaints, many violations will go unnoticed.[309] Criminal defendants have large incentives to complain about the person who heads their prosecution, and their claims should be discounted by the bar as a result.[310] Defense counsel in criminal cases are pushed in several directions. In many situations, defense attorneys will be deterred from filing or notifying the bar of a prosecutor's ethical misconduct because, as in the Hoffman case,[311] taking such action may be viewed as more likely to hurt the defendants' interests than aid them.[312] Also, counsel may feel the negative impact personally in that instituting disciplinary proceedings may antagonize a frequent opponent, without much chance of success based on the understood history of infrequent or tepid discipline of prosecutors.[313] On the other hand, if notifying the bar of a violation would produce a public bar proceeding, defense counsel has a strong incentive to file the complaint and thereby gain an adversarial advantage by affecting public opinion in the fairness of the proceedings and by potentially disqualifying the prosecutor.

Given this latter strategic defense incentive, the bar must have some concern with its timing in filing of complaints. Zacharias believes the result

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309 *Id.* at 749.

310 *Id.* at 749 n.100, 758-59 & n.131.

311 *See supra* note 148 and accompanying text.

312 *See* Zacharias, *supra* note 306, at 749-50 & n.101 (noting that while defense counsel frequently file pleadings alleging prosecutorial misconduct, taking action that results in disciplinary proceedings is far more unusual because of not only its potential to harm the client but also to antagonize what is likely a frequent opponent); *see also* Rosen, *supra* note 139, at 735 (noting the disincentives of sensible defense counsel given the small chance of success in securing professional discipline and the negative potential impact of filing a charge on client's interest and the lawyer's continued criminal law practice).

313 Zacharias, *supra* note 306, at 749.

is that many times disciplinary agencies do not entertain the complaint until the criminal case has been completed. If the disciplinary committees do in fact take such a position, defense counsel will, in turn, lose much of their interest in filing complaints and suffering the potential consequences without case-related benefits.[314]

In the Duke Lacrosse case, the North Carolina State Bar publicly initiated proceedings against Nifong in December 2006 and precipitated Nifong's withdrawal from the case. That cannot be expected to be a frequent result, although in the Duke Lacrosse case, it was clearly the right decision. One assumes, whether or not formal rules dictate caution, prudential concerns will.

Nifong's discipline notwithstanding, withholding potentially exculpatory information typically comes to the attention of disciplinary authorities only after trial and after the publication of an opinion reversing a conviction for a constitutional violation of *Brady*.[315] Post-conviction disclosure of the violation means that a disciplinary agency typically is not faced with an issue of whether instituting disciplinary action against the prosecutor will interfere with the initial trial. However, it can affect a retrial. The impact, other than by way of publicity that may affect juror perception,[316] is likely less substantial because of another factor that Zacharias believes generally moderates the rigor of discipline against prosecutors. Career prosecutors are in the minority so that a prosecutor who committed an ethical violation is often no longer serving as a prosecutor,[317] particularly if a number of years have passed, as is typically the case, when the violation is discovered during post-conviction proceedings.

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[314] *Id.* at 749-50 n.100, 758-59; *see also id.* at 762 (noting that this concern can even encourage delay in disciplinary action until after the completion of appellate review).

[315] *Id.* at 759, 669-70.

[316] Because charges against Hoffman were dismissed because the prosecutor concluded he had insufficient evidence to conduct the retrial, *see* Emily C. Achenbaum, *A Murder Case Dissolves*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 12, 2007, at A1, the publicity surrounding the filing and dismissal of disciplinary proceedings against the prosecutors could not have affected the jury, although it likely helped produce media interest that led to the key witness' statement to a newspaper reporter that he had made up his story against Hoffman. *See id*. The larger impact, not only on publicity, but on creation of evidence should likely be with the disciplinary hearing itself, and no evidentiary hearing was ever conducted for the prosecutors in the *Hoffman* case. The disciplinary hearing for the prosecutors in *Gell* did not take place until after the retrial had been completed, and the State Bar called no witnesses.

[317] Zacharias, *supra* note 306, at 762. When the disciplinary proceeding was conducted for the prosecutors in the Hoffman case years after the failure to provide exculpatory information occurred, they were no longer serving in that capacity. *See* Neff, *supra* note 96, at A1.

One of the reasons Zacharias believes disciplinary agencies are less inclined to impose discipline is that the prosecutor who committed the offense is no longer in a position of public responsibility as a prosecutor. *Id.* That rationale would be only partly applicable in part in Gell and Hoffman in that all the attorneys were no longer prosecutors, but Hoke and Brewer had assumed other important positions in the criminal justice system. Nifong, by contrast, was still in office as District Attorney with no indications of intending to depart voluntarily when he was disciplined.

Zacharias also notes that disciplinary agencies are more hesitant to act against prosecutors as the result of the general recognition that the electoral process provides an alternative check on misconduct and specific concern about disciplinary action affecting political campaigns.[318] Moreover, they understand that some violations, such as pretrial publicity, are frequently driven by excessive zeal in the pursuit of the public good that makes the violation somewhat less blameworthy.[319] By contrast, if the conduct is motivated by venal incentives, disciplinary action is more likely.[320] Under Zacharias' general analysis, the circumstances surrounding the pretrial publicity in the Duke Lacrosse case were tailored to induce action by the Bar. Although not directly securing a financial benefit, as is the most frequent venal incentive, Nifong was apparently acting, not out of an excess of zeal, but in his personal interest, and he did so in a way that made the electoral check on misconduct less likely to be effective.[321]

E. Inadequacy of Professional Discipline to Rectify Inadequacies of Brady

At the beginning of this Part, I developed the evidence from Gell and Hoffman that the *Brady* responsibility on prosecutors and/or *Brady* demands are inadequate to produce disclosure of exculpatory information. The succeeding sections demonstrate why, even if *Brady* violations are unearthed, professional discipline is unlikely, and if forthcoming, is likely to result in only modest sanctions because of the difficulty of proof of the intent of the prosecutor. While the theoretical reach of professional disciplinary rules is broader than the *Brady* doctrine, the practicalities of professional discipline renders them generally narrower in actual application.

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318 *Id.* at 761.

319 *Id.* at 757.

320 *See id.* at 745-46, 757 (giving the examples of actions such as bribery and embezzlement that are taken for financial gain).

321 In his statement explaining the result, Disciplinary Hearing Committee Chairman F. Lane Williamson stated that "we can draw no other conclusion but that those initial statements were to further his political ambition." Excerpt Transcript Findings of Fact, *supra* note 4, at 17. For a discussion of the political context of Nifong's public statements, see Mosteller, *supra* note 181, at 1354-57.

Zacharias argues that, because it is readily observable, improper pretrial publicity is not constrained by the difficulty of the bar learning of the violation and thus the minimal discipline that disciplinary authorities have imposed on such conduct is inexplicable and unjustified, particularly because no other agency—not internal discipline by the prosecutor's office or effective judicial action—is likely to impose discipline. Zacharias, *supra* note 306, at 769 & nn.167-68 (assuming that office policy likely supported the publicity for the benefits in the litigation or in office image, and as to judicial action, noting that while contempt is a possible remedy, more likely it is a less directly effective remedy such as change of venue). For Zacharias, the discipline imposed on Nifong based on improper pretrial publicity should be the case that proves the rule.

As a result, I contend we cannot theoretically depend upon the broader scope of professional disciplinary rules and/or the threat of bar sanctions directly upon the prosecutor to enhance the effectiveness of *Brady*'s legal requirements. Although the legal and ethical rules regarding exculpatory information, both separately and operating together, are extraordinarily helpful, they are far from fully effective in producing such information to the defendant.

CONCLUSION

Nifong's misconduct may be unique in its breadth and clarity. However, he is far from unique among prosecutors in failing to disclose not only arguably exculpatory information, but exculpatory evidence that is material to guilt under *Brady* and therefore requires reversal and the granting of a new trial.

In this article, I examined two other cases that resulted in reversals of first degree murder convictions that produced death sentences and professional disciplinary actions—the Gell case that spawned the Hoke and Graves disciplinary action and the Hoffman prosecution that produced the truncated disciplinary proceeding against Honeycutt and Brewer. Both involved *Brady* violations in death penalty cases. In ten cases since 1998, including Gell and Hoffman, defendants who had been sent to death row had their cases reversed and new trials granted because of violations of the obligation under *Brady* to produce exculpatory evidence.[322]

It is hard to imagine that any prosecutor would work to convict and sentence to death a defendant whom the prosecutor believed to be innocent. Undoubtedly, in each of these death penalty cases, the prosecutors believed their public duty was to convict a real murderer, who was a grave threat to society.[323] They either did not see the exculpatory evidence, they did not recognize its exculpatory value, or they believed the evidence was not material under *Brady*.

Many examples could be given of a prosecutor who apparently had such a perspective, but among the North Carolina cases noted in this article, one of the clearest comes from *McDowell v. Dixon*.[324] In that case, the Fourth Circuit ordered a new trial for McDowell, a black defendant, because the prosecutor failed to disclose evidence that an eyewitness initially

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322 *See supra* note 11; *see also* Neff & Weigl, *supra* note 11 (listing five additional reversals on *Brady* grounds from 1998 to 2003).

323 Professor Richard Moran indicates that his study of 124 exonerations of death row inmates from 1973 to 2007 showed that 80 resulted from intentional actions, not good faith mistakes, and that some resulted from criminal justice officials acting with what they considered good intentions to ensure the conviction of a person they thought was guilty. Richard Moran, Op-Ed., *The Presence of Malice*, N.Y. TIMES, Aug. 2, 2007, at A17.

324 858 F.2d 945 (4th Cir. 1988).

told law enforcement authorities that the perpetrator was white.[325] The prosecutor testified that he had read the files containing the variant racial description but did not disclose that description because he did not consider the various descriptions exculpatory.[326] That is an extraordinary judgment.

Since we must assume that the prosecutors were personally convinced of the guilt of each of these defendants, obviously to them the undisclosed evidence was not truly exculpatory for that would have meant that their judgment on guilt was wrong. In this context, if they recognized the exculpatory potential at all, they may have been playing the adversarial game to win. Wanting to win a conviction of a ruthless murderer is hardly a fault.[327] For whatever reason, these prosecutors (or the investigators supporting them) failed a critical test. The number of failures in such serious cases suggests that perhaps the law and ethical provisions require too much of mortals in the fierce battle of high stakes criminal litigation.

In Nifong's case, the North Carolina State Bar "stepped to the plate," and its disciplinary process soundly responded by judging and punishing his misconduct in failing to disclose exculpatory DNA evidence. Perhaps the severity of the sanction will send a strong message to other prosecutors and deter any thought of less than full disclosure of potentially helpful evidence and information for the defense in the future.

However, in his letter to the Bar responding to its initial notice regarding his failure to disclose potentially exculpatory evidence, Nifong recounted that among prosecutorial circles the "word on the street" was that the Bar was looking to impose harsh punishment on a prosecutor to make up for recent failures in the Gell and Hoffman cases.[328] He thus indicated that he was aware from conversations in prosecutorial circles that the Bar was likely looking for an opportunity to impose firm discipline. Yet, his letter demonstrates that even awareness of this pointed message did not stop his misconduct.

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325 *Id.* at 949-50.

326 Brief for Petitioner-Appellant at 25-26, *McDowell*, 858 F.2d 945 (No. 87-4006) (on file with author) (citing the hearing transcript for the prosecutor's assessment that he saw nothing exculpatory in the files); State v. McDowell, Nos. 1979 CRS15665-66, slip op. at 23 (N.C. Super. Ct. Dec. 12, 1984) (on file with author) (stating that the prosecutor "did not consider the various descriptions contained in police reports to be exculpatory to the defendant"). On appeal, the State argued that initial description of the assailant as white was not material because the badly injured victim was "semi-conscious" at the time she gave it. *McDowell*, 858 F.2d at 950.

327 This perceived phenomenon has been described somewhat differently by other authors. *See, e.g.*, Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); Kevin A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL. 2 (2007).

328 *See* First Nifong Response to Jean, *supra* note 7 (stating that "[f]or some time now, the 'word on the street' in prosecutorial circles has been that the North Carolina State Bar, stung by the criticism resulting from past decisions involving former prosecutors with names like Hoke and Graves and Brewer and Honeycutt, is looking for a prosecutor of which to make an example").

The disbarment of Nifong will likely help. The sanction imposed sends a strong message, and surely it will encourage future disclosures of potentially exculpatory evidence. However, the message to be taken from North Carolina's experience, including both its failures and triumphs in prosecutorial discipline, is that broad disclosure laws make the real difference. The ethics process helped produce important reforms, but in the end, the disciplinary process was the beneficiary of the information flow the discovery laws initiated. I do not ignore the costs of full open-file discovery, but the benefits to the innocent are very real. Clearly, the path to the successful discipline of Nifong followed the road opened by the broad statutory discovery mandates, first in death sentence cases during post-conviction proceedings and then in all felony cases at trial.