

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

STATE OF NORTH CAROLINA

v.

DAVID EVANS  
COLLIN FINNERTY &  
READE SELIGMANN.

FILED IN THE GENERAL COURT OF JUSTICE

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SUPERIOR COURT DIVISION

FILES 06 CRS 5582-5583,  
4332-4333, & 4335-4336

DURHAM COUNTY, C.S.C.

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**ADDENDUM TO  
MOTION TO COMPEL DISCOVERY:  
EXPERT D.N.A. ANALYSIS**

Pursuant to N.C.G.S. § 15A-282; § 15A-903(a)(1); § 15A-903(a)(2); the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and Sections 19 and 23 of Article I of the North Carolina Constitution, the Defendants jointly supplement their previously filed Motion To Compel Discovery: Expert D.N.A. Analysis as follows:

1. Most of the background facts supporting the requests herein were fully set out in the Defendants' Motion To Compel Discovery: Expert D.N.A. Analysis, filed December 13, 2006, and in sworn testimony before this Court by Dr. Brian Meehan, lab director of DNA Security, at a hearing on that Motion on December 15, 2006. The Defendants included a number of referenced attachments with that Motion, which were the subject of much of Dr. Meehan's testimony at the hearing. Following that testimony, on December 29, 2006, the Defendants filed a Notice of Intent To Present Expert Testimony in which they provided the State with notice of their intent to call Dr. Meehan as their expert witness regarding issues related to his laboratory's DNA work in these cases, as well as his communications with Durham County District Attorney Michael Nifong while that work was ongoing. The Defendants attached to their Notice the entirety of Dr. Meehan's testimony on December 15, 2006. The Defendants hereby incorporate all of those pleadings and their attachments by reference and, as such, will only recite those facts in this Addendum which are necessary to provide a context for the requests herein.

2. When DNA Security began its work in this case at the request of the Durham County District Attorney's Office, the lab initially focused on whether it could use its extraordinarily sensitive Y-STR DNA testing techniques to discover any specifically male DNA characteristics on the various rape kit items which were preserved as evidence within hours of the alleged sexual assault upon [REDACTED]. The assault was allegedly perpetrated by three attackers who had not used condoms, at least one of whom—and possibly all of whom—had ejaculated. The first order of business for DNA Security was, therefore, to generate 22 DNA extractions from the rape kit items, which the lab could then compare against reference DNA samples from known persons, including the Defendants and their teammates on the 2006 Duke University Men's Lacrosse Team. All 22 DNA extractions from those rape kit items are listed below, corresponding to their DNA Security agency item number:

- 15767 Sperm fraction from stain A from the rape kit panties (Item 15772)
- 15768 Sperm fraction from stain B from the rape kit panties (Item 15772)
- 15769 Sperm fraction from stain C from the rape kit panties (Item 15772)
- 15770 Sperm fraction from stain D from the rape kit panties (Item 15772)
- 15771 Sperm fraction from stain E from the rape kit panties (Item 15772)
- 15773 Sperm fraction from cheek scraping from the rape kit
- 15774 Sperm fraction from oral swabs from the rape kit
- 15775 Sperm fraction from vaginal swabs from the rape kit
- 15776 Sperm fraction from rectal swabs from the rape kit

- 15777 Epithelial fraction from stain A from rape kit panties (Item 15772)
- 15778 Epithelial fraction from stain B from rape kit panties (Item 15772)
- 15779 Epithelial fraction from stain C from rape kit panties (Item 15772)
- 15780 Epithelial fraction from stain D from rape kit panties (Item 15772)
- 15781 Epithelial fraction from stain E from rape kit panties (Item 15772)
- 15782 Epithelial fraction from cheek scraping from rape kit
- 15783 Epithelial fraction from oral swabs from rape kit
- 15784 Epithelial fraction from vaginal swabs from rape kit
- 15785 Epithelial fraction from rectal swabs from rape kit
- 15815 Section 1 swab of pubic region comb (Item 15801)
- 15816 Section 2 swab of pubic region comb (Item 15801)
- 15817 Section 3 swab of pubic region comb (Item 15801)
- 15818 Section 4 swab of pubic region comb (Item 15801)

3. In its report dated May 12, 2006, DNA Security only reported the results of 1 of those 22 tests. The lab reported that it had discovered DNA characteristics from one male on Item 15775, the sperm fraction of the vaginal swab, and that Matthew Murchison could not be excluded as the source of that DNA.

4. The essence of the Defendants' DNA Motion To Compel, filed on December 13, 2006, was that DNA Security failed to report the results of the remaining 21 tests of the rape kit items and that DNA Security's underlying data, provided to the Defendants on October 27, 2006, appeared to reflect that DNA Security had, in conducting those unreported tests in April 2006, discovered male DNA characteristics from **at least four men** across multiple rape kit items which did not match the Defendants, their lacrosse teammates, or anyone else who submitted a DNA reference sample in the investigation. Moreover, the only way the Defendants were able to identify those exculpatory findings was to analyze and cross-reference the 1,844 pages of documents provided without any explanation to the Defendants on October 27, 2006.

5. During his testimony on December 15, 2006, Dr. Meehan essentially confirmed the Defendants' analysis in their December 13 Motion To Compel. He testified that there were male DNA characteristics in the following DNA extractions from the rape kit items which did not match the Defendants, their lacrosse teammates, or anyone else who gave a reference DNA sample:

- a. Item 15767, the sperm fraction of Stain A from the rape kit panties (electropherograms generated by DNA Security and attached to the December 13 Motion reflect the DNA of **at least two men** in this extraction);
- b. Item 15777, the epithelial fraction of Stain A from the rape kit panties (electropherograms generated by DNA Security and attached to the December 13 Motion reflect the DNA of **at least four men** in this extraction);
- c. Item 15778, the epithelial fraction of Stain B from the rape kit panties (electropherograms generated by DNA Security and attached to the December 13 Motion reflect the DNA of **at least two men** in this extraction);
- d. Item 15780, the epithelial fraction of Stain D from the rape kit panties (electropherograms generated by DNA Security and attached to the December 13 Motion reflect the DNA of **at least two men** in this extraction);
- e. Item 15776, the sperm fraction from the rectal swab (electropherograms generated by DNA Security and attached to the December 13 Motion reflect the DNA of **at least one man** in this extraction); and
- f. Item 15816, the swabbing from Section 2 of the pubic hair comb (electropherograms generated by DNA Security and attached to the December 13 Motion reflect the DNA of **at least two men** in this extraction).

6. At the conclusion of Dr. Meehan's testimony on December 15, 2006—during which he repeatedly testified that he and Mr. Nifong reached an agreement to produce a report by DNA Security that would not include all the results of its testing, including the exculpatory findings in the preceding paragraph—this Court directly inquired of the Defendants whether they sought any additional relief based on Dr. Meehan's testimony and what transpired in court that day. Through counsel, the Defendants notified the Court that they anticipated seeking additional relief, but they requested the opportunity to review the transcript of the court proceedings before seeking such relief. The Court granted that request and recessed the proceedings regarding the DNA Motion To Compel.

7. On January 9, 2007, Dr. Meehan directly provided the Defendants with an "amended report" from DNA Security dated January 10, 2007. Attached to this Addendum as Attachment 1, it is identical to the previous (May 12) report, except the following language was substituted at the beginning of the "Results" section:

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 (item numbers 15719-15722, 15724-15733, 15735-15764, 15819, 15902) were being retained at DSI pending notification from the client (as of the May 12, 2006 original report). All individual DNA profiles and our complete case file in the matter were requested by our client in September 2006, cost was approved in October 2006, and all profiles and our complete case file was provided to the client in October 2006. Three of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below.

8. With that amended language, Dr. Meehan confirmed the discoveries highlighted by the Defendants in their December 13 Motion To Compel and *added* the following items to the list of DNA extractions from the rape kit items in which his lab discovered male DNA characteristics that did not match the Defendants, their lacrosse teammates, or anyone else who gave a reference DNA sample:

- a. Item 15817, the swabbing from Section 3 of the pubic region comb, for which electropherograms generated by DNA Security (*see Attachment 2*) reflect the DNA of **at least one man**; and
- b. Item 15818, the swabbing from Section 4 of the pubic region comb, for which electropherograms generated by DNA Security (*see Attachment 3*) reflect the DNA of **at least one man**.

9. However, Dr. Meehan failed to add the following item to the growing list of rape kit DNA extractions in which his lab discovered male DNA characteristics that did not match the Defendants, their lacrosse teammates, or anyone else who gave a reference DNA sample: Item 15785, the epithelial fraction from rectal swabs, for which electropherograms generated by DNA Security (*see Attachment 4*) reflect the DNA of **at least one man**. Moreover, there is a handwritten notation at the top of Attachment 4 indicating that the DNA "does not match" any of the reference samples, including the lacrosse players'. Finally, the male DNA characteristics in this rectal swab extraction *do not match* the male DNA characteristics in the sperm fraction rectal swab extraction (Item 15776, *see Attachment 5*), which collectively establishes that **DNA Security discovered the DNA of at least two males in the accuser's rectum that did not match the Defendants, their lacrosse teammates, or anyone else who provided a reference DNA sample.**

10. Thus, further review by the Defendants of the DNA Security Report (dated May 12, 2006), Dr. Meehan's sworn testimony before this Court (on December 15, 2006), the DNA Security Amended Report

(dated January 10, 2007), and the underlying DNA Security provided by the State to the Defendants (on October 27, 2006), definitively shows that **at least 11 of the 22 rape kit DNA extractions contained male DNA characteristics that did not match the Defendants**. Moreover, many of those extractions contained DNA characteristics from *multiple males* that did not match the Defendants, and some contained DNA characteristics from *at least four males* that did not match the Defendants, their lacrosse teammates, or anyone else who provided a reference swab.

11. Regarding any *additional* exculpatory male DNA that may have been discovered by DNA Security in the other half of the rape kit DNA extractions, *the Defendants are still in the dark*. Further review of the DNA Security data provided to the Defendants on October 27, 2006, shows that they are missing Y-filer (Y-STR) electropherograms for the remaining 11 rape kit item extractions:

- 15768 Sperm fraction from stain B from the rape kit panties (Item 15772)
- 15769 Sperm fraction from stain C from the rape kit panties (Item 15772)
- 15770 Sperm fraction from stain D from the rape kit panties (Item 15772)
- 15771 Sperm fraction from stain E from the rape kit panties (Item 15772)
- 15773 Sperm fraction from cheek scraping from the rape kit
- 15779 Epithelial fraction from stain C from rape kit panties (Item 15772)
- 15781 Epithelial fraction from stain E from rape kit panties (Item 15772)
- 15782 Epithelial fraction from cheek scraping from rape kit
- 15783 Epithelial fraction from oral swabs from rape kit
- 15784 Epithelial fraction from vaginal swabs from rape kit
- 15815 Section 1 swab of pubic region comb (Item 15801)

12. All of those items were analyzed by DNA Security in its work in this case, as reflected in Attachment 6, DNA Security Analysis Worksheet Number G-527. The worksheet lists the analyzed items by number, with frequent handwritten notations adjacent to the item numbers.

13. On that worksheet, the handwritten notation "No profile" appears next to many of the items for which the Defendants have not been provided electropherograms. While that notation may reflect the conclusion of someone at DNA Security that the item did not contain any male DNA characteristics, that conclusion cannot be trusted or confirmed without an independent review of the electropherogram itself. The reason is simple and undeniable: while the "No profile" notation appears next to Item 15780, the epithelial fraction from stain D from the rape kit panties, the Defendants identified that item in their December 13 Motion as one that appeared to contain the DNA of at least two unidentified males, and Dr. Meehan *confirmed that analysis* two days later in his sworn testimony before this Court. (See Attachment Z, excerpt of Dr. Meehan's testimony regarding Item 15780.) Accordingly, any handwritten notation of "no profile" on Attachment 6 is incorrect at worst and, at best, meaningless without an independent review of the corresponding electropherogram.

14. Also on that worksheet, the handwritten notation "3 peaks" appears next to Item 15779, the epithelial fraction from stain C from the rape kit panties. It is reasonable to presume that someone at DNA Security identified multiple male DNA peaks in that rape kit extraction, and it is undeniable from DNA Security's reports, as well as Dr. Meehan's own sworn testimony, that those characteristics did not match the Defendants, their lacrosse teammates, or anyone else who submitted a reference sample. Yet the Defendants have still not been provided with the electropherogram of that extraction, and that item was not included in Dr. Meehan's Amended DNA Security report as a specific item that contained male DNA characteristics which did not match any reference sample.

15. Thus, a collective review of all materials provided to the Defendants and information obtained by the Defendants about DNA Security's work shows that **at least 12 of the 22 rape kit DNA**

**extractions—in other words, over half of them—contained male DNA that did not match the Defendants.** Regarding one of those extractions *and 10 more*, the Defendants still have not been provided with all of the data underlying their analysis by DNA Security, and the statistical likelihood is that such data will show that there was *even more* exculpatory, unidentified male DNA discovered by DNA Security in the rape kit extractions that had, by January 12, 2007, *still* not been reported to the Defendants by Mr. Nifong and Dr. Meehan in any way.

16. On January 12, 2007, Mr. Nifong recused himself from prosecuting these matters and requested that the Special Prosecutions Section of the North Carolina Attorney General's Office assume the prosecution. The Attorney General granted the request, and the files were transferred from Mr. Nifong's office to the Special Prosecutions Section the following week. Before they received those files, the Special Prosecutions Section had no direct knowledge of, or involvement in, the investigation or prosecution of these matters.

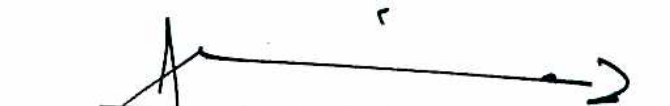
17. During an *in camera* meeting on January 30, 2007, upon motion of the new prosecutors and with the consent of the Defendants, this Court rescheduled dispositive pre-trial hearings from the week of February 7, 2007, to the week of May 7, 2007. Also during that meeting, the Defendants made it clear through their counsel to the new prosecutors and to this Court that they would, at the appropriate time following the initial review of these matters by the Special Prosecutions Section, be seeking all available relief under all applicable law regarding the DNA issues raised in their December 13 Motion and explored further during the December 15 hearing.


Wherefore, the Defendants hereby seek the following relief, provide the following notices, and preserve their rights as follows:

- a. The Defendants seek DNA Security's Y-filer electropherograms for the items listed in Paragraph 11 of this Addendum, which were not included in the materials provided to the Defendants on October 27, 2006;
- b. The Defendants memorialize and reiterate their intent to seek additional relief based on the issues raised in their December 13 Motion, the recessed December 15 hearing, and this Addendum; and
- c. The Defendants will not seek such additional relief or expect the new prosecutors to respond to the requests herein until they complete their initial review of these matters.

Respectfully submitted, this 27th day of February, 2007.

***For Defendant David Evans.***

  
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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing Addendum To Motion To Compel: Expert D.N.A. Analysis was duly served upon the State of North Carolina by hand-delivering a copy of same to Mr. James J. Coman and Ms. Mary Winstead, Special Prosecutions Section, North Carolina Attorney General's Office, Raleigh, North Carolina.

THIS the 27th day of February, 2007.

  
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Bradley Bannon