STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF DURHAM 06 DEC 15 AM 8:26 FILE NOS. 06 CRS 4334-36
DURHAM COUNTY, C.S.C.

STATE OF NORTH CAROLINA)
BY)
v.)
)
READE WILLIAM SELIGMANN,)
)
Defendant.)

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF DURHAM FILE NOS. 06 CRS 4331-33

STATE OF NORTH CAROLINA)
)
v.)
)
COLLIN FINNERTY,)
)
Defendant.)

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF DURHAM FILE NOS. 06 CRS 5581-83

STATE OF NORTH CAROLINA)
)
v.)
)
DAVID EVANS,)
)
Defendant.)

"DURHAM DA: 'SOME TYPE OF SEXUAL ASSAULT DID IN FACT TAKE PLACE'"
- Headline on WRALTV March 29, 2006.

"'The contempt that was shown for the victim, based on her race was totally abhorrent,' Nifong said. . . . 'My guess is that some of this stonewall of silence that we have seen may tend to crumble once charges start to come out." *District Attorney quoted on ABCTV11 on March 27, 2006.*

"'I would like to think that somebody [not involved in the attack] has the human decency to call up and say, "What am I doing covering up for a bunch of hooligans?"'" *District Attorney on March 28, 2006 quoted in the News & Observer on April 10, 2006.*

"'The circumstances of the rape indicated a deep racial motivation for some of the things that were done,' Nifong said. 'It makes a crime that is, by nature, one of the most offensive and invasive even more so.'" *District Attorney quoted on WRALTV on March 29, 2006.*

"'The reason that I took this case is because this case says something about Durham that I'm not going to let be said,' said Nifong. 'I'm not going to allow Durham's view in the minds of the world to be a bunch of lacrosse players at Duke raping a black girl from Durham.'" *District Attorney quoted on WRALTV on April 12, 2006.*

"[The Defendants should be prosecuted] whether it happened or not. It would be justice for things that happened in the past."- *Chan Hall, Chairman of Legislative Affairs Committee, Student Government at NCCU quoted in Newsweek May 1, 2006.*

"The players maintained an aura of sweet innocence with [the] reporter . . . . Most of Durham knew the lacrosse players were no choirboys, as '60 Minutes' tried to portray them. . . . Roberts [the second dancer] was separated from the accuser for at least two periods of five to 10 minutes. We still haven't heard why an assault couldn't have occurred during those gaps. . . . Does Durham really want a prosecutor who won't stand up for an alleged victim, even if she ranks near the bottom of society?" *Editorial in Herald-Sun October 17, 2006.*

"Hopefully justice is blind when it is time to carry out the proper punishment for what has been committed, and perhaps what has not been committed." *Pastor John Bennett quoted in the Herald-Sun October 16, 2006.*

"'If you got money, you can basically buy your way out of anything. Are you going to stand for [the accuser] or are you going to stand with the people who have money?'" *Eugene Gordon quoted in News & Observer October 25, 2006.*

"Charlette Jenkins, 54, isn't surprised at the poll results. She thinks the lacrosse situation tapped into some people's long-held resentments toward Duke. 'Rich kids are always buying their way out,' said Jenkins, who is black, 'Residents are saying, "You're not going to buy yourself out of it this time."'" *News & Observer October 25, 2006.*

"[T]hey [the District Attorney's election opponents] have endeavored to make this election something it is not: a referendum on a single case that [they] view as a threat to their sense of entitlement and that they do not trust a jury of Durham citizens to decide." *Email from District Attorney to "Friends, Supporters, and Volunteers" November 5, 2006.*

"'This goes to show that justice can't be bought by a bunch of rich white boys from New York,' said Harris Johnson, a former state Democratic party official and Durham resident for 56 years. 'Duke has a habit of sweeping things under the carpet. I guess this goes to show that no matter how much money you have, Durham is owned by its citizens." *Commenting on the District Attorney Election Results in The Chronicle November 8, 2006.*

"Furthermore, with an upcoming trial that is sure to draw major media attention, it would be better for the players to have an opportunity to prove their innocence at trial." *Editorial, Herald-Sun November 8, 2006 (emphasis supplied).*

MOTION TO CHANGE VENUE

NOW COME the Defendants in the above-captioned matters, pursuant to G.S. §15A-957, the Fourth, Fifth, Sixth, Eight and Fourteenth Amendments to the U.S. Constitution, and the coordinate rights established under the North Carolina Constitution, and move this Court to change the venue in these cases. The grounds for this Motion are that there exists within this County among a significant percentage of residents so great a prejudice against the Defendants that they cannot obtain a fair and impartial trial and that a Jury selected from this County will be unable to deliberate on the evidence presented in the courtroom, free from outside influence. These grounds demonstrate that a trial in these cases in this County will violate the fair and impartial trial guarantee established by G.S. §15A-1957, will violate the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, will violate the Jury Clause of the Sixth and Fourteenth Amendments to the U.S Constitution, will violate the Cruel and Unusual Punishment Clause of the Eighth and Fourteenth Amendments to the U.S. Constitution, and will violate the coordinate rights established by the North Carolina Constitution.

Summary of Motion

The cases before this Court are the most heavily publicized cases in the history of North Carolina. Literally hundreds of thousands of news accounts have been published about these cases, news reports that have been local, national, and even international. Consequently, it is unlikely that there is a single jurisdiction in this State into which this publicity has not spread.

The Defendants do not seek to change venue in these cases merely because there has been publicity, nor do they seek trial in a location in which no publicity has

occurred. Rather, what the Defendants seek, and what they are entitled to under the Constitution, is a trial in a community which has not been polarized by pretrial publicity or torn apart by the circumstances of these cases. Regrettably, Durham is not that community.

In Durham, largely as a response to an unprecedented series of public statements by the District Attorney and Durham Police Department, there have been street demonstrations and vigils, the only daily newspaper of significant circulation has published more than 295 articles and 20 unsigned editorials concerning these cases, the African-American community has marched for the accuser and demanded "justice" for her, and the largest employer in the County - - Duke University - - has through at least 88 of its faculty members denounced the Defendants.

Simply put, the extensive and prejudicial pretrial statements by representatives of the State has served to create a mix of racial, class, gender and institutional conflict that has torn Durham apart. It has left in its wake a community that is highly polarized; one in which a large majority of residents has already formed opinions about the guilt or innocence of the Defendants.

The Defendants are not entitled to a Jury that will acquit them, nor is the State entitled to a Jury that will convict. The Defendants are entitled to a Jury whose members have not formed preconceived opinions about these cases. They are further entitled to a jury that can deliberate in a community in which significant outside forces will not have an impact on the its deliberations or its verdict. In short, the Defendants are entitled not only to an impartial jury, but also to a process in which that Jury may deliberate freely without undue pressure from outside influences. That Jury, and that process, no longer exists in this County.

Fact Supporting Motion

The Actions of the State

1. The Defendants are charged with First Degree Rape, First Degree Sexual Offense and First-Degree Kidnapping that is claimed to have occurred at 610 N. Buchanan Avenue in the early morning hours of March 14, 2006.

2. In the days and weeks following the accuser's initial claim of rape - - and until the time a final indictment was issued in this case in May 2006 - - the State of North Carolina, through the District Attorney and the Durham Police Department embarked on an unprecedented course of public statements. These public statements created substantial prejudice in the community against the Defendants and, indeed, inflamed members of this community. The District Attorney, in one interview, estimated by early April - - or approximately three weeks into this case - - he had granted 70 interviews and spent more than 40 hours being interviewed by various media outlets and papers. **News and Observer, June 15, 2006; Herald-Sun April 4, 2006.**

3. In these interviews the District Attorney expressed his opinion that a rape had occurred, that the rape was motivated by race, and that those who committed the rape were "hooligans." Typical of these comments was the one given in a televised interview on March 29 in which the District Attorney opined that, "'[t]he circumstances of the rape indicated a deep racial motivation for some of the things that were done,' Nifong said. 'It makes a crime that is, by nature, one of the most offensive and invasive even more so.'" District Attorney quoted on **WRALTV on March 29, 2006**. In the course of these interviews, the District Attorney compared the accuser's claims to cross-burnings and a quadruple homicide. **News and Observer, April 10, 2006.** He further speculated the facts of the case, claiming the assaults took place in a manner contradicted by the accuser's own statements.

4. At a public meeting at North Carolina Central University attended by at least 700 people, the District Attorney stated:

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

District Attorney quoted on **WRALTV on April 12, 2006**.

5. The District Attorney made multiple comments on the evidence, first indicating that DNA would plainly identify the perpetrators and exonerate the innocent, **Non-Testimonial Identification Order, March 23, 2006 at 3**, 10, then arguing that DNA evidence meant nothing in exonerating those under suspicion. **News and Observer, March 30, 2006; "The Abrams Report," MSNBC, March 31, 2006; Herald-Sun, April 11, 2006.** The District Attorney speculated that condoms were used when the medical records clearly revealed that the accuser said that no condoms were used and that at least one, and likely more, of the assailants ejaculated. **News and Observer, March 30, 2006 and August 6, 2006; Herald-Sun, April 11, 2006 and June 16, 2006; "The Abrams Report," MSNBC, March 31, 2006**. The District Attorney contended that the accuser broke her fingernails when scratching one of the attackers and then asserted that the attackers were wearing long sleeves or jackets, despite photographic evidence showing that this was not true. **"The Abrams Report," MSNBC, March 31, 2006.**

6. In conjunction with these statements, the Durham Police Department circulated a poster in the community with a picture of the Duke Lacrosse team, accusing them of being complicit in a rape and asking that residents come forward with information. **Herald-Sun, May 26, 2006** and **July 9, 2006.** The poster offered a money reward for "clues" and claimed that the accuser "was sodomized, raped, assaulted and robbed" by the entire Lacrosse team. The Durham Police Department first denied that any such poster had been circulated; it later conceded that a "flier" had been circulated but was "toned-down" by April 10 "so it didn't sound as if anyone was presumed guilty before being tried." The Durham Police Department later claimed that the "flier" was

distributed by CrimeStoppers and was therefore not governed by the general orders regulating the conduct of the Department.

7. The District Attorney took over day-to-day responsibility for the investigation into the accuser's claims on March 24, 2006. **Discovery at 1823.** The next day, March 25, 2006, the Durham Police Department announced that "all members [of the lacrosse team] refused to cooperate with the investigation" when police initially came to the house at 610 N. Buchanan on March 15, 2006. **Herald-Sun, March 25, 2006.** In fact, this statement was deliberately misleading -- all three captains of the Duke Lacrosse team who rented the house allowed the officers to enter and then cooperated fully, providing written statements to police and voluntarily agreeing to provide DNA evidence and take polygraphs. Nonetheless, the police claimed that this "refusal" required that non-testimonial identification orders be secured. Police went so far as to assert that "it was 'unfortunate' that police had to go to such lengths, but that the team members 'denied participating or knowing anything.'"

8. The response to this misleading statement was immediate throughout the community and intensified the media response. That evening a candlelight vigil was held in front of 610 N. Buchanan in which 75 people appeared holding candles in a "show of support" for the accuser. **Herald-Sun, March 26, 2006.** One protester commented that she attended the vigil "to protest 'the wall of silence' she feels the Duke athletes were standing behind," while another said "if there were 40 of them there, somebody must know something." The news account further noted that "[s]everal people making comments on the e-mail bulletin boards cited Saturday's Herald-Sun article, in which police said all members of the team had refused to cooperate in the investigation of the alleged attack." Fourteen hours later, another protest occurred in front of 610 N. Buchanan, one that was watched by two members of the Durham City Council:

> During the earlier part of the protest, Durham City Council members Eugene Brown and Mike Woodward watched from the East Campus wall across the street.
>
> "This is tragic and deplorable," Brown said of the alleged attack. "The wall of silence hopefully will be lifted soon."
>
> The latter remark was a reference to police comments that every member of the team had refused to cooperate in the criminal investigation. Three of the team captains reportedly live at 610 N. Buchanan Blvd.

Herald-Sun, March 27, 2006.

9. The claim that a "wall of silence" had surrounded the investigation was repeated by the District Attorney on both March 27 and March 28. "'The contempt that was shown for the victim, based on her race was totally abhorrent,' Nifong said. . . . 'My guess is that some of this stonewall of silence that we have seen may tend to

crumble once charges start to come out." District Attorney quoted on **ABCTV11 on March 27, 2006.** "'I would like to think that somebody [not involved in the attack] has the human decency to call up and say, "What am I doing covering up for a bunch of hooligans?"'" District Attorney on March 28, 2006 quoted in the **News & Observer on April 10, 2006.** On March 28, 2006, the **Herald-Sun** editorialized that:

> the alleged crime isn't the only outrage. It's also outrageous that not a single person in the house felt compelled to step forward and tell the truth about what happened. And these are our best and brightest, America's future leaders? When did we stop teaching right from wrong?

10. It was not until March 29, 2006, that police admitted that when they came to 610 N. Buchanan on March 16 that the three captains who lived at the house volunteered to go to the police substation and then to the Duke University Medical Center where they, again, volunteered to provide "suspect test kits." **Herald-Sun, March 30, 2006.**

The Response of the Media

11. As a direct result of the interviews and public statements made by the State within the first 30 days of this case, a media "feeding frenzy" developed. As of mid-November, ABC News had mentioned this case 102,000 times, CBS had mentioned this case 294,000 times, NBC had mentioned this case 244,000 times and CNN had approximately 577,000 references to this case. *The New York Times* had written 99 separate articles about this case and *Newsweek Magazine* had published at least 76 articles concerning this case. The *Durham Herald-Sun*, the only daily newspaper of general circulation in Durham County, had published more than 295 articles, editorials and letters about this case over a six-month period.

The Response of the Community

Community Demonstrations

12. As a result of the pre-indictment statements by the State, protests broke out across the community condemning the Defendants. Several protests were held in front of 610 N. Buchanan within the first few weeks following these allegations. In all, approximately 10 protests have taken place at that location since late March. The "Call for Action," that organized the early protests included "facts" that were taken verbatim from statements of the District Attorney and his office --"facts" which the District Attorney has now apparently conceded are no longer correct.[1]

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[1] Specifically, while the District Attorney's office initially claimed that the assault took place over a period of more than 30 minutes, when confronted with Reade Seligmann's alibi making it impossible for this to have occurred -- and for Reade Seligmann to have been a participant -- the District Attorney indicated that he would not be "surprised" if the assault took place in less than 10 minutes.

"UPDATE -- WAKE UP CALL AGAINST RAPE (3/26/06)

by anonymous • Saturday March 25, 2006 at 10:55 PM

"In the early hours of March 14 at 610 N. Buchanan Blvd. two black women went to work as exotic dancers for a Duke Lacrosse Team party. The women were surrounded and had racial slurs flung at them by the aggressive men. The two dancers tried to leave but were coaxed to return. One of the women was pulled into a bathroom and raped, sodomized, and beaten by at least three white men for over half an hour. The accusations are first-degree rape, kidnapping, assault by strangulation and robbery, but the members of the Duke Lacrosse Team are maintaining a strict code of silence. Y'all, a sister- an NCCU student and a mom of two- has been brutally assaulted, and we need to get together and make a big noise! A group of concerned Durham residents are planning a Wake-Up Call against Sexual Assault on 9AM Sunday (*tomorrow! *) outside 610 Buchanan Blvd. This is a *peaceful* protest at the house where the rape occurred. Duke officials say the house is rented by three lacrosse team captains. We will not be trespassing onto the property- we will line up along the sidewalk without blocking it. Dress warmly, bring your whole family and bring pots and pans and things to bang them with! We are having a "Cacerolazo," or a pots & pans protest, because it is a tool women all over the world use to call out sexual assaulters. Show up on time! If the police inform us that neighbors feel we are disturbing the peace, we will quietly disperse. We are hitting the ground running on this one, so please call at least one person tonight and pass the word on your neighborhood listservers."

13. Based on media accounts, more than 250 people attended the early protests and, when protesters discovered that no one was living any longer at 610 N. Buchanan, they marched to a house rented by other members of the Duke Lacrosse team. The protesters chanted "shame" and held signs that read: "Real men don't protect rapists," "You can't rape and run," and "It's Sunday morning, time to confess." The organizer of the one of the protests claimed that "rapes are happening off East Campus [the location of 610 N. Buchanan] at the hands of Duke students. . . . We are here to break the silence around sexual assault and violence." The crowds further chanted:

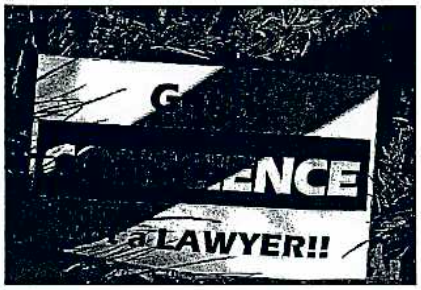
Who's being Silent?
They're being silent!

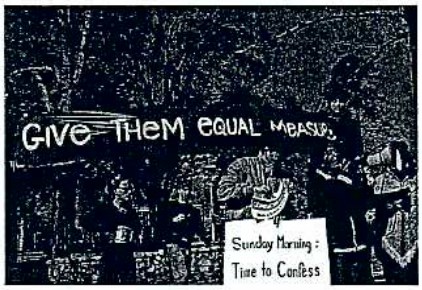
Whose protecting rapists?
They're protecting rapists!

So, who are the rapists?
They must be the rapists!

Out of the house!
Out of the town!

We don't want you around!





14. In late March a "Take Back the Night" rally and march on the Duke University campus included the distribution of anonymous fliers that were placed on automobiles -- these fliers contained the photographs of all of the members of the Duke Lacrosse team, and, according to media reports, "urged the players to tell what they know about the incident." **News and Observer, March 30, 2006.**

15. As late as October 19, 2006, a candlelight vigil in recognition of National Domestic Violence Awareness Month was scheduled in front of 610 N. Buchanan in which the "names of people who lost their lives to domestic violence over the year" were read aloud. **ABCTV11, "Domestic Violence Vigil Set in Durham," October 19, 2006.**

Statements of Public Officials

16. At a demonstration at 610 N. Buchanan on April 1, 2006, two school board members and a former member of the City Council who was running for the State House appeared. **Herald-Sun April 2, 2006.** The two members of the school board commented:

> "You've got white kids here at an elite university, and they get all the attention," [Steve] Matherly said. "Our kids are poor black kids in the Durham schools. Their lives have been ruined by years and years of being racially targeted."

> The alleged victim -- like [Jackie] Wagstaff, a single mother and a "nontraditional" student going back to college at NCCU -- "could have been any female," Wagstaff said.

17. On April 3, 2006, the **Herald-Sun** published a "guest column" by the Director of the Durham Human Relations Department. In that column, he wrote that:

> I am sincerely saddened by the alleged gang rape at a Duke lacrosse team party. My heart goes out to the victim and her family. I pray for her and hope that she can begin the recovery process soon.
>
> . . . .
>
> Let's demonstrate to the world that this type of behavior will not be tolerated here in Durham. Let the media carry the message across the country.

18. At a Durham City Council meeting on April 6, 2006, members of the City Council commented that "For years [the team] has been a ticking time bomb that has not been dismantled." **Herald-Sun April 7, 2006.** Another commented that "the allegations 'are both appalling and horrific,'" while a third "termed them 'abhorrent and disgusting.'" Still another expressed "concern" that there would not be DNA matched to the players because others may have been at the party; he was assured that there were "experienced police investigators who will get through the evidence." City Council members had earlier appeared at one of the many protests at 610 N. Buchanan, one stating that the "wall of silence" was "tragic and deplorable," and the other stating that "[i]t's horrible about the incident. . . . [a]ny violence against women should not be tolerated.' **Herald-Sun March 27, 2006.**

19. On April 14, 2006, the **Herald-Sun** published a column written by a columnist identified as "an emergency judge throughout the state." In that column, the columnist wrote about the case that:

> We can be thankful. Thankful for the fact that we are in a society where one black woman can make her voice be heard. This huge, nationwide response has been caused by the claims of one black woman. It was not long ago that a black woman who claimed to be raped by a white male had little or no chance to proceed with her case.

The Response of Members of the African-American Community

20. As a direct result of the extensive public statements made by the State about the accuser's claims -- and specifically the repeated references to the racial aspects of these claims -- many in the African-American community in Durham became outraged.

21. On March 31, 2006, the **Herald-Sun** reported on the reaction of students at North Carolina Central University (NCCU). It noted that one of the students, a junior from Durham who was running for Vice-President of the student government association, was organizing a March on Duke University: "It seems like Duke is trying to sweep these things under the rug." The article noted that a member of the Durham School Board was nearby and nodded during this statement. "Both said the investigation would be proceeding differently if the victim had been white and suspects black. 'Right now, it's all talk and no action,' [the student] said. 'I don't think true justice will come out of it.'" The next week, at least three separate groups at NCCU held several events in response to the rape allegations. **Herald-Sun April 1, 2006.**

22. These comments were echoed by other NCCU students. As reported by the **Herald-Sun** on April 4, 2006, one student stated that "[a] lot of people are saying that if the roles were reversed, if it was our football team and a white stripper, it would've been solved by now." The student continued: "If no one is charged, I believe there is going to be some racial tension." The same article noted that the president of the student government told one gathering that "[i]f she's [the accuser] here, if she's here, she needs to know we love her. . . . And what's done in the dark will come out in the light."

23. On April 7, 2006, the President of the State Conference of the NAACP held a news conference in front of the Durham County Judicial Building. In it he announced that "[w]e are in the middle of a community and legal crisis." **Herald-Sun April 7, 2006.** Speakers at the news conference "expressed concern about the truth being covered up by the lacrosse team's mass of lawyers. 'All this money, all this cover-up, that's why we're not getting anywhere.'" Another speaker declared that "'[i]t's a hate crime and they [the players] made it a race issue when they called her what they did,' she added as the audience applauded loudly."

24. Subsequently, on April 9, 2006, at still another rally at 610 N. Buchanan, Bishop John Bennett claimed that, "[i]f truth be told, if it was another ethnic group they would have been charged and a high bond set." **Herald-Sun April 10, 2006.** During that demonstration close to 100 people "nearly all of them black and most of whom appeared to have come straight from the church, yelled along with Bennett as he pointed to the house and shouted, 'Why?'" Bishop Bennett continued, noting that "until justice is served, the house at 610 N. Buchanan will remain a symbol of a system that 'caters to and protects the rich.'"

25. In an interview on MSNBC, the assistant editor of the "Campus Echo," -- the student newspaper at NCCU -- revealed that among "the people in the community," it was the belief that the **entire** lacrosse team should have been arrested: "the overall feel is that they want, you know, the team should have been arrested." **"The Abrams Report," MSNBC, April 11, 2006.** That same day, when it was revealed that the DNA tests performed by the State Bureau of Investigation had not found any DNA from any of the lacrosse players in or on the accuser, the **Herald-Sun** quoted the accuser's mother as stating that the SBI lab "must have tampered with [the results] or something."

That same day, a senior at NCCU was quoted as saying that "the DNA tests took a suspiciously long time and that the results did not surprise him, 'dealing with this racist system.'" **Herald-Sun April 11, 2006.**

26. On April 16, 2006, interviews with those in the African-American community conducted by the **Herald-Sun** included one woman who said that "'I think something did happen in that house. As far as racial [aspects are concerned], if they don't do something about it, there is going to be a big mess. I wouldn't say so far as a riot.'"

27. On April 18, 2006, the **Herald-Sun** published a column by a person identified as a "scholar-in-residence" at NCCU. In that column, the author wrote that:

> What happened on Buchanan Boulevard did not begin on Buchanan Boulevard. Rather, it began decades earlier in organized institutions within the lacrosse players' respective communities. What is termed "the Duke culture" is American culture.
>
> The stereotypes and images of all minorities are indexed to words such as exotic, greasy, lazy, noble savage, smart promiscuous, crime and poverty. The words are deeply imbedded into the American psyche. Sociologically, they project an image of dependency, vulnerability, cultural inferiority, and, at the same time, the exalt the sanctification of whiteness, which is power.

28. On April 19, 2006, the **Herald-Sun** reported on the arrests of Reade Seligmann and Collin Finnerty. In one article, it quoted from a press release issued by the Chancellor of NCCU in which he wrote: "Our hearts continue to go out to the young lady as she goes through this process. We will continue to do everything that we can to support her." In another article, the President of the NAACP announced that his group would "monitor the work of investigators and prosecutors as the case against . . . Collin Finnerty and Reade Seligmann moves forward." He then stated: "the allegations against the pair 'suggest a downward spiral from privilege and advantage to decadence and deviance." **Herald-Sun, April 19, 2006.**

29. The next day, the NAACP sponsored a "mass prayer meeting" at the Ebenezer Missionary Baptist Church. According to an article published in the **Herald-Sun** on April 21, 2006, the audience included members of 35 congregations. It noted that part of the prayer meeting included a "breakdown" of the case by the NAACP attorney:

> Barber's comments followed a breakdown of the case by NAACP lawyer Al McSurely, who characterized District Attorney Mike Nifong as an 'honest' public servant, and the accused members of the lacrosse team as 'white boys mainly from the North who started drinking beer at 2 p.m.'

> McSurely said the players' defense attorney would be quick to roll out complex, 'minute-by-minute accounts of the night of March 13-14, verified by ATM receipts and testimonies of cab drivers in an effort to obscure what really happened -- a crime that, in his estimation, probably took only 10 minutes.
>
> 'That's all it takes. . . . I won't say anymore on that," McSurely said.

The article further noted that when a request was made for "even-handed justice," it was met by laughter and giggles.

30. The Rev. Jesse Jackson came to Durham to assist in the African-American community's response; he immediately pledged to fund a scholarship for the accuser to North Carolina Central University. **Newsweek Magazine, May 1, 2006.**

31. The New Black Panther Party for Self-Defense also led a protest march. The head of the New Black Panther Party, Malik Zulu Shabazz, spoke directly with the District Attorney and claimed that they discussed the case at "some length." **News and Observer May 2, 2006**. On April 27, 2006, the National Field Marshall for the New Black Panther Party reported that the accuser had received death threats. **Herald-Sun.** The article further noted that the New Black Panther Party was handing out brochures that asked "Had enough of disrespect and racism from Duke University" and showed photographs of Reade Seligmann and Collin Finnerty. In connection with a demonstration that took place on May 1, 2006, at 610 N. Buchanan, the New Black Panther Party issued eight demands which included the demand "that defendants Collin Finnerty and Reade Seligmann be found guilty." **Herald-Sun, May 2, 2006.** During the course of the demonstration, Malik Shabazz, an attorney, led the following chant:

> "How do you find the two defendants in this case?" Shabazz shouted.
>
> "Guilty," the crowd shouted back.

Among the demonstrators noted to be present was "activist Victoria Peterson," the co-chairman of the District Attorney's citizen's committee.

32. During the course of Reade Seligmann's initial appearance in this case, he was met by a mob including members of the New Black Panthers Party; once in the courtroom one of the members of the New Black Panthers Party told Reade Seligmann that he was "a dead man walking." Nothing of significance was done in response to this threat; indeed, the person who made the threat was not even removed from the courtroom.

33. Since that time, the District Attorney has claimed that his political opponents see this prosecution "as a threat to their sense of entitlement," a theme that has been repeated by prominent members of the African-American community. One commented that the Defendants should be prosecuted "whether it happened or not. It

would be justice for things that happened in the past," **Newsweek Magazine, May 1, 2006**, and that "[t]his is a race issue . . . [p]eople at Duke have a lot of money on their side," **Newsweek Magazine, May 1, 2006.** The Bishop of the Church of Apostolic Revival International openly worried about civil unrest "if people don't think the victim is treated fairly."

34. On May 25, 2006, the attorney for the NAACP announced that he intended to seek a "gag order" in these cases, claiming that defense attorneys were violating the ethical rules of the North Carolina State Bar. **Herald-Sun May 25, 2006.** The same article quoted a journalist with a predominantly African-American newspaper as saying that "[w]e are seeing powerful forces trying to remove that right [to have the accuser's allegations tried] from her." This claim was repeated by the attorney for the NAACP the next day at a conference in Durham. **Herald-Sun May 26, 2006.**

35. The NAACP Chapter in Durham County has included on its website a "Duke Lacrosse Update: Crimes and Torts committed by Duke Lacrosse Team Players on 3/13 and 3/14 as Reported in the press, mainly from the Three Players' Defense Attorneys." **NAACP Website.** The "Update" then lists 82 separate paragraphs of "evidence" which it claims proves that the Defendants were guilty of these and other crimes. This "evidence" includes the following posted "facts":

> "After Duke outlawed drinking on campus, some its more affluent white students merely rented or bought a nearby satellite "frat" or "party" or "team" house, to hold keg parties and hire female dancers for stag parties. A recent UNC study found that only about one out of three students took part in the binge-drinking parties held at these satellite party houses that are found near both Duke and UNC-CH. These satellite party houses have no means of direct control by the Universities, although they are the scenes of massive underage drinking, date-rapes, and other sexual assaults. Although some of the satellite party houses are informally sponsored by fraternities or athletic teams (such as 610 Buchanan Street in Durham), the University maintains it has no authority or legal liability for the acts of its students at these houses. " **Paragraph 4.**
>
> "The satellite party houses, although owned or rented by Duke students, are not under the jurisdiction of the Duke police. Thus, if a Duke coed were to be given a date-rape drug at a party in one of these houses, and was gang-raped, Duke police and Duke would not have to report this in the annual sexual assault reports that Federal Law mandates." **Paragraph 5.**
>
> 'During the early morning hours, according to notes of the different police officers and staff at the ER, [redacted] account of the rape included an accusation that Ms. Roberts had urged her to have sex with her and with the men, and that [redacted]. was taken into the bathroom and raped anally,

vaginally and orally, and the three men used racial and sexual slurs during the assault." **Paragraph 51.**

"The serial killer in American Psycho followed a similar pattern with his female victims.' **Paragraph 52.**

'Mr. Evans consulted with his father, a Washington, D. C. lawyer, who in turn, hired one of the best criminal lawyers in North Carolina and a man with good skills at working the media, Joseph Cheshire. Cheshire had close working relationships with one of the best investigative reporters in North Carolina, Joe Neff. Cheshire and Neff together had pieced together enough evidence to help get Cheshire's client, Alan Gell, exonerated for a crime that a jury had convicted him of, and sentenced him to the death penalty." **Paragraph 60.**

"The Evans family and other parents who had watched their boys play Lacrosse for Landon Prep school in the Montgomery county suburb immediately worked out an arrangement with Robert Bennett, a powerful D.C. lawyer who had represented Pres. Bill Clinton against the accusation of sexual harassment by a state employee in Arkansas, Ms. Paula Jones. Mr. Bennett and other supporters of Pres. Clinton spent much time and energy trashing Ms. Jones. In fact, one of the favorite names for her was "Trailer Park Trash." Ms. Jones had not brought criminal charges against Pres. Clinton for the alleged advances he made toward her -- she had merely sued him in civil court for violating her rights under Title VII of the Civil Rights Act.' **Paragraph 61.**

'The cousin of [redacted] has reported that Duke supporters have approached her with an offer of $2 million if she will retract her testimony. Other people who have access to [redacted] also have reported being approached with offers of huge sums of money if the case will go away. Sam Hall, the communications director for the Duke Alumni Affairs, checked with other officials to see whether Duke Alums had made such an offer. Mr. Hall told the press that 'We have no information about that. I think there's been a rumor of it since the beginning, but I've never heard it discussed.'" **Paragraph 65.**

"The defense lawyers are paid large fees to zealously represent their clients. A tactic in every sexual assault case is to intimidate the survivor/witness of the attack into refusing to testify. As part of this tactic, they released their photos of the dancer, they have dug up old stories about how she was traumatized as a teen-ager, and have tried to put her past character on trial, knowing well her past sexual history is off limits before the jury." **Paragraph 74.**

"The strategy of the Duke 3 Support Group is as old as sex. Attack the survivors, the vulnerable women. Trash them to re-traumatize them. First the night of the assault, and then every night after on the TV talk shows, the blogs, and on the front pages of the press -- trying to bludgeon them into to being afraid to testify." **Paragraph 75.**

"The three defendants they have two mountains to climb. First, they must deflect public attention from their boorish, racist, and illegal behavior by mounting outlandish attacks on the survivor and the D.A. Second, they must deal with a mountain of physical evidence, that is corroborated by, we have reason to believe, accounts of some of the men who were at the party who have cooperated with the police and the D.A. from early on.' **Paragraph 78.**

36. Since the re-election of the District Attorney, members of the African-American community have announced: "'This goes to show that justice can't be bought by a bunch of rich white boys from New York,' said Harris Johnson, a former state Democratic party official and Durham resident for 56 years. 'Duke has a habit of sweeping things under the carpet. I guess this goes to show that no matter how much money you have, Durham is owned by its citizens." **The Chronicle November 8, 2006.**

The Response of Duke University

37. In response to the accuser's claims and the unprecedented media campaign by the State, employees and faculty members of the largest employer in this County -- Duke University -- have repeatedly condemned the Defendants.

38. On March 29, Prof. Houston Baker, a member of the Departments of English and African-American Studies, released a public letter denouncing the "abhorrent sexual assault, verbal racial violence, and drunken white male privilege loosed amongst us." He stated that "male athletes" were "veritably given license to rape, maraud, deploy hate speech, and feel proud of themselves in the bargain."

39. Two days later, on March 31, 2006, Prof. William Chafe, a member of the History Department and former dean of the faculty, published a guest column in the **Duke Chronicle** describing the "events that occurred on Buchanan Boulevard" as "part of a deep and troubling history" in which "sex and race have always interacted in a vicious chemistry of power. Emmett Till was brutalized and lynched in Mississippi in 1954 for allegedly speaking with too easy familiarity to a white woman storekeeper."

40. On April 6, 2006, 88 members of the Duke University faculty endorsed a public statement denouncing the Defendants. The statement asserted unequivocally that something must have "happened" to the accuser, that these members of the faculty had committed themselves to "turning up the volume," and said "thank you" to the protesters who had participated in the protests noted above and who were

distributing "wanted" posters of the Duke Lacrosse team throughout the community. The faculty members endorsing this public statement included some of the most well-known members of the Duke faculty and even department heads: three academic departments and thirteen of the university's academic programs formally endorsed the statement. **List of Individual Names.** Professor Peter Wood, another member of the History Department, later claimed in media interviews that the lacrosse players at Duke -- and thus the Defendants -- were "[c]ynical, arrogant, callous, dismissive -- you could say openly hostile." [2]

41. Since that time, members of the Duke faculty have written numerous editorials and letters in the Herald-Sun, in which they have congratulated the District Attorney for indicting the players, **"Don't be too Quick to Toss Lacrosse Case," November 12, 2006,** claimed that there is "secret racism" underlying the claimed actions of the Defendants, **"Secret Racism Underlying Lacrosse Case," October 29, 2006,** suggested that the accuser be paid $3 Million for a dismissal of the case. **"Pay Off Lacrosse Case," November 8, 2006**, and claimed that "[a]n arrogant sense of victimization and entitlement seems to have replaced any semblance of clear thinking or self-reflection in Duke sports circles." **"A Grand Show of Arrogance by Duke Athletics," September 15, 2006.**

42. The Canon of the Duke University Chapel published an editorial -- based upon a sermon preached in the Chapel -- in which he said facts of this case were the "disturbingly extensive experience of sexual violence, of abiding racism, of crimes rarely reported and perpetrators seldom named, confronted, or convicted, of lives deeply scarred, of hurt and pain long suppressed." **"A Time to Talk at Duke," April 9, 2006.** He concluded that "[t]he last week has exposed the reality that sexual practices are an area where some male students are accustomed to manipulating, exploiting and terrorizing women all the time -- and that this has been accepted by many as a given."

43. The Website of the Department of Women's Studies at Duke University now features an article written by Prof. Karla Holloway entitled: **"Coda: Bodies of Evidence."** In it, she wrote, in part:

> When things go wrong, when sports teams beget bawdy behavior and debasement of other human beings, the bodies left on the line often have little in common with those enclosed in the protective veneer of the world of college athletics. At Duke University this past spring, the bodies left to the trauma of a campus brought to its knees by members of Duke University's Lacrosse team were African American and women. I use the kneeling metaphor with deliberate intent. It was precisely this demeanor towards women and girls that mattered here. The Lacrosse team's notion of who was in service of whom and the presumption of privilege that their

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[2] Reade Seligmann took a course entitled "Era of American Revolution," from this faculty member. He was awarded an "B" for his work in that course.

elite sports' performance had earned seemed their entitlement as well to behaving badly and without concern for consequence.

. . . .

Those injured by this affair, including the student and the other young woman who were invited to dance under false pretenses and then racially (at least) abused, as well as Duke's campus and Durham's communities, are bodies left on the line -- vulnerable to a social review that has been mixed with insensitive ridicule as well as reasoned empathy.

*The Response of the Durham **Herald-Sun**[3]*

44. The only daily newspaper of any significant circulation serving Durham County is the Durham *Herald-Sun.* The circulation of the *Herald-Sun* is approximately 44,000 households in a county of approximately 240,000.

45. As noted above, the *Herald-Sun* has published more than 295 articles, columns, editorials and letters concerning this case.

46. The *Herald-Sun* has published approximately 20 unsigned editorials concerning this case in the last six months. In addition, its editor, Bob Ashley, has separately published a number of opinion columns concerning this case. The *Herald-Sun* has also published a substantial number of "guest" opinion columns on its editorial pages, some of which have been specifically noted throughout this Motion.

*The **Herald-Sun**'s Editorial Positions*

47. In its editorial positions, the *Herald-Sun* has relentlessly condemned the Duke Lacrosse team and encouraged a prosecution of the Defendants in these cases.

48. In its first significant editorial on these cases, the *Herald-Sun* stated that not only had a crime occurred, but that those present during the crime were guilty of an additional "outrage" by not confessing to the crime:

Outrage at Duke Lacrosse Players

"Get a conscience, not a lawyer," read signs waved in front of the house [610 N. Buchanan] on Sunday. We agree that the alleged crime isn't the only outrage. It's also outrageous that not a single person who was in the house felt compelled to step forward and tell the truth about what

[3] Attached to this Motion as Exhibit 1 are the articles cited in this Motion, including the articles from the *Herald-Sun.* Exhibit 2 contains all of the articles published by the *Herald-Sun* concerning these cases through November 16, 2006.

> happened. And these are our best and brightest, America's future leaders? When did we stop teaching right from wrong? **March 28, 2006.**

49. The *Herald-Sun* further editorialized that charges of attempted murder should be added in the wake of an email written by a member of the Lacrosse team who has never been charged with a crime in this case: "But even so, the note has serious consequences, perhaps giving Durham police reason to add conspiracy to commit murder to the list of charges being weighed in the rape investigation." **April 7, 2006.**

50. The *Herald-Sun* has further editorialized that the Lacrosse team was "out of control," **April 12, 2006,** that it had a reputation for "loud, obnoxious partying and belligerent behavior" and only had "themselves to blame for the current trouble," **March 30, 2006**, that the Lacrosse team threw "drunken parties" and that "obnoxious behavior [was] favored by the lacrosse team," **April 16, 2006**, that the Lacrosse team had a history of "loutish behavior," **April 27, 2006,** that if the "rape allegations had not been acted on . . . would the lacrosse team have faced any serious discipline," **May 10, 2006**, and that the rape allegations are a "throwback to a bygone era" of a "culture of alcohol abuse and an arrogant, macho attitude among some male students," **May 18, 2006**.

51. The *Herald-Sun* has also repeatedly claimed that the District Attorney must have compelling evidence that has not yet been revealed, evidence that justifies its positions:

> But even in the wake of compelling DNA evidence, those who would echo team members' attorneys and declare the case shut would be smart to wait to see what District Attorney Mike Nifong has up his sleeve. Nifong was convinced early on that a crime occurred and he has not ruled out filing charges. **April 12, 2006**
>
> Nifong, by most accounts, has assembled a dedicated and capable staff . . . . he will now have the opportunity to lead it as duly elected district attorney. Durham's court system needs a DA who is aggressive, consistent, thorough and fair. We congratulate Mike Nifong . . . . **May 4, 2006.**
>
> Nifong is a prosecutor with 27 years of experience in Durham. As such, we imagine he knows when evidence supports an accusation and when it doesn't. We also imagine there is evidence he hasn't revealed yet. And we have to assume that Nifong believes the case is strong enough to pursue. In that case, what choice does he have? **May 19, 2006.**

> How much more evidence can possibly be gathered about that tawdry night on Buchanan Boulevard? The defense says it's ready, and the prosecution should be ready as well.
>
> . . . .
>
> Nifong's critics have questioned everything from his character to his legal savvy. We think that the 25-year veteran of the prosecutor's office must have some evidence, or he would have dropped the case long ago. Since Nifong seems determined to have a trial, let's get on with it, preferably before November. It's time to lay the cards on the table. **July 2, 2006.**

52. In contrast to its position concerning the evidence possessed by the State, the *Herald-Sun* has consistently and openly mocked any claim of innocence made by the Defendants and repeatedly claimed they are privileged persons with expensive lawyers:

> Many of our readers are absolutely convinced beyond any reasonable doubt that the alleged victim is lying about what took place March 13-14 at 610 Buchanan Blvd. And it's probably pretty safe to say that many of them formed their opinions about the case after hearing persuasive defense attorneys do what they are paid well to do -- defend their clients. **May 26, 2006.**
>
> The players were white and privileged. The alleged victim was black and less well-off. . . .
>
> . . . . We may have been angry about the drunken parties and obnoxious behavior favored by the lacrosse team. But that doesn't mean we want players to be wrongly convicted of rape. Nor, if the allegations prove to have substance, do we want the guilty to get away with it because they can afford expensive lawyers. **April 16, 2006.**
>
> It's not difficult to conclude that indictments against two Duke lacrosse players were sealed as a courtesy to the players and their families that other defendants would not normally receive. . . .
>
> . . . .
>
> It's true that the media circus often casts Durham and Duke University in an unflattering, unbalanced light. That's no reason to add more fuel to the fire by giving credence to the charge that these defendants, due to their economic status, are getting preferential treatment. **April 20, 2006.**
>
> Evans seemed sincere and steadfast, and we felt sympathy for him, as did many others. Unfortunately, one strong speech and claims of passing

a polygraph test aren't proof of innocence. Nor are many statements by defense attorneys that, unsurprisingly, portray the defendants as blameless and play down anything damaging. **May 19, 2006.**

Many TVs in the Triangle will be tuned to "60 Minutes" Sunday when correspondent Ed Bradley will report a segment about the infamous Duke lacrosse case. That doesn't mean we'll learn much that has not already been explored in the intensive nationwide coverage of the case.

The three defendants will be interviewed and, we're sure, will profess their innocence. **October 14, 2006.**

The players maintained an aura of sweet innocence with reporter Ed Bradley either downplaying or ignoring conflicting evidence. . . .

Most of Durham knew the lacrosse players were no choirboys, as "60 Minutes" tried to portray them. . . .

. . . Roberts was separated from the accuser for at least two periods of five to 10 minutes. We still haven't heard why an assault couldn't have occurred during those gaps. **October 17, 2006.**

53. Finally, while paying lip service to the fact that the Defendants should only be convicted in a courtroom based upon evidence that proves guilt, the *Herald-Sun*'s editorial position has been clear that it is only "possible" that the crimes did not occur and that it is up to the Defendants to prove their innocence:

> ***We acknowledge that there certainly exists the possibility that the alleged victim, who was hired to strip at a wild lacrosse party, isn't being truthful*** about what happened in the bathroom. (She contends that she was raped, robbed and beaten that regrettable night.) But how anyone who was not present in the bathroom can claim to know for certain that the three lacrosse players accused of rape are innocent isn't being honest. **May 26, 2006.**
>
> Furthermore, with an upcoming trial that is sure to draw major media attention, ***it would be better for the players to have an opportunity to prove their innocence at trial.*** **November 9, 2006.**

(emphases provided).

The Opinions of Columnists in the ***Herald-Sun***

54. The themes and attitudes expressed in the unsigned editorials of the *Herald-Sun* have been reflected and often magnified by the "opinion" columns that the *Herald-Sun* has chosen to publish.

55. On April 17, 2006, the ***Herald-Sun*** published a column written by the pastor of St. Peter's United Methodist Church in Morehead City. It began by claiming: "At the end of Lent 2006, the Duke University lacrosse team's disgusting behavior and alleged crimes have forced the entire Duke community into the difficult Lenten practice of self examination." It continued:

> This university-based self-examination started with questions: How could these sordid incidents have happened? Why did they occur? What personal and social harms did they inflict?
>
> . . . .
>
> First, there is the dimension of personal morality and immorality. The personal immorality of the lacrosse players -- the drunkenness, the sexual degradation, the racism, the violent threats, the conspiratorial silence -- deserve decisive denunciation by leaders within the Duke community. These were not trivial, little mistakes. They were gross immoralities.

56. A week later, the editor of the *Herald-Sun* wrote in his opinion column that "many are frustrated with the off-campus reputation of some students, including without dispute many member of the lacrosse team, for whom late parties and disdain bordering on contempt for the neighbors is common."

57. Following the indictment of Dave Evans, the ***Herald-Sun*** chose to publish an opinion column on May 17, 2006, in which the author, commenting on Evans' statement that he was innocent, wrote:

> We'll see what David Evans does, along with the other two rape suspects, should the case make it to trial. We'll see how brave they are then. If they are innocent of any crime, perhaps each should sit down in the witness box, raise the right hand and swear to tell the truth, and then tell all of it.
>
> . . . .
>
> I hope all three suspects will be as outspoken before a jury as their lawyers will be. These children of apparent privilege will certainly have the privilege to decline, but let's just see if their confidence extends to cross-examination. The victim will have no choice but to speak if she wants to make her case and win it.

58. On May 31, 2006, in another opinion column, the author asked what the Defendants will be doing until a trial, noting that "[m]aybe the cynics are right in saying anybody whose mama and daddy can keep them out of jail on a $400,000 bond doesn't have to worry about a job." The columnist then noted:

> But that's what can happen when you don't keep your nose clean. Whether or not he's [Dave Evans] shaved his would-be incriminating mustache in the days since a stripper claimed he attacked her . . . .
>
> . . . .
>
> But I have to ask: What if the accuser's lying?
>
> Wait a minute, now! Don't throw a brick at me. The operative word here is "if." I can just as easily ask, "What if the white boys did do it to her?" It cuts both ways.
>
> . . . .
>
> The lacrosse boys brought it on themselves, though -- even if the accuser's lying.

59. Subsequently, on July 23, 2006, the editor of the ***Herald-Sun*** wrote that "barely a day goes by that we don't worry about the impact of the coverage that is, after all, being driven by events. We've tried to consistently remind that all the facts aren't out, and that the defense attorneys are releasing just fragments of the total evidence they choose to make public." On **August 20, 2006**, the editor wrote in another opinion column that "Students at Duke will be watched" and went on to add that "the Duke students' return is watched with particular wariness this year."

60. On November 1, 2006, the *Herald-Sun* chose to publish a "guest" editorial column entitled, "Give Nifong Credit for Believing Accuser." **November 1, 2006.** The columnist, a resident of Durham, wrote:

> A few months ago a black stripper said she'd been raped by the Duke lacrosse team at a team party.
>
> And - - the District Attorney believed her. Experienced as a litigator, he had every reason to. . . .
>
> . . . .
>
> In fact, most of the town and most of the Duke campus were entirely ready to believe that these young men had done such a thing. They were notorious for their drinking, their sexual excess, their arrogance. They were literally a public nuisance - - the source of many neighborhood complaints. When the DA indicted them, it would have been quite accurate to say "they asked for it." Because they had, for years.

> It's tempting to wish the DA had stayed quieter about it, but a fair amount of good has come of the ruckus. Duke has taken a more serious look at campus behavior than ever before. So are a lot of other universities all over the country, because, reprehensible as the Duke laxers' general behavior is, they are far from unique. They acted as they did because their society encouraged them too [sic].
>
> That's us.
>
> If you are one who is sorry for the laxers, ask yourself how we all, through our treatment of athletes, our embrace of out-of-control behavior, our deathly notions of proving manhood, contributed to their upbringing.
>
> Don't blame the DA because he believed her. I promise you that it is a whole lot better than what happened in the good old days.

61. In the weeks since the election, the *Herald-Sun* has published "guest" columns entitled, "Don't Be Too Quick to Toss Lacrosse Case," **November 12, 2006,**[4] and "Lacrosse Players Far From Innocent," **November 19, 2006.** Both columns are riddled with hearsay, innuendo, and factual inconsistencies -- yet were published apparently without even a minimum of "fact-checking" by the *Herald-Sun.*

62. For example, the column published by the *Herald-Sun* on in its Sunday issue on November 19, 2006, purports to "rebut" statements made by the attorney for Dave Evans. It begins:

> For every smug remark by a smug, white attorney representing a smug, white lacrosse player, there is a woman cringing.

The "columnist" then proceeds to argue that "[m]uch of the emphasis on this 'innocence' has ignored the gender and racial prejudice of the March 13 party. If nothing else, Nifong is holding the lacrosse players accountable for that and as a woman at Duke who knows just how much these men get away with, I'm thankful." In short, the columnist published by the *Herald-Sun* argued that regardless of whether the Defendants are innocent of the crimes charged or not, they should be convicted of rape because of "gender and racial prejudice" and because she "knows" how much "these men" get away with. The zeal to convict the Defendants for their alleged behavior, whether a crime occurred or not, is made plain in the next paragraph:

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[4] The author of this column later wrote a letter retracting this column to the **Herald-Sun** on December 1, 2006. However, and despite this retraction, the **Herald-Sun** continues to post this column on its website, makes no note of the fact that the author has retracted it, and has taken the retraction letter off of its website.

> A rape may not have occurred on March 13, but as a woman on Duke's campus, as a women's studies major and as an activist for survivors of sexual assault, I assure Mr. Cheshire that these men are not innocent, nor are they upstanding citizens of Duke or Durham law [sic].[5]

The columnist for the *Herald-Sun* then argues that "[i]f things went the 'right' and 'just' way, as Cheshire argues they should have, the lacrosse players would be quickly excused of their actions. Nifong might not be in the right, legally, but that doesn't mean he's not doing the right thing."

The Effect on this Community

63. The effect of the State's public pronouncements on this case, aided by the reaction of many in the Durham community, Duke University, and the *Herald-Sun*, has been to tear apart this community, polarizing it in its opinions about this case.

64. The deep divisions in this community surrounding this case have been acknowledged by the District Attorney himself. In an interview with the Associated Press on October 30, 2006, the District Attorney observed that while he could make these cases "go away pretty easily . . . . with the stroke of a pen. ***But that does nothing to address the underlying divisions that have been revealed. My personal feeling is the first step to addressing those divisions is addressing this case.***" **Herald-Sun, October 30, 2006.** Earlier, in a campaign appearance before the Rotary and Kiwanis Club, the District Attorney declared: ***"If a case is of such significance that people in the community are divided or up in arms over the existence of that case, then that in and of itself is an indication that a case needs to be tried."***

Venue Must Be Changed in These Cases

65. The constitutional guarantee of a fair trial, one in which a case is decided on its facts and not on community opinion, is not a new or recent development. One hundred years ago, Justice Oliver Wendell Holmes wrote that:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. Colorado, 205 U.S. 454, 462 (1907). For more than half a century, it has been the law that no person can be punished for a crime without "a charge fairly made

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[5] In fact, Reade Seligmann had no arrest record -- or indeed any kind of police record or official student disciplinary record -- prior to his indictment in these cases. In the Spring Semester 2006, Reade Seligmann -- despite this ongoing "investigation" -- achieved a 3.5 grade point average, and qualified for a second time for the All-ACC Academic Team.

and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." **Chambers v. Florida, 309 U.S. 227, 236-37 (1940).** Forty-five years ago, in setting aside a conviction based upon the failure to change venue, the Court wrote: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." **Irvin v. Dowd, 366 U.S. 717, 728 (1961).**

66. The leading case on the interplay of due process and the fair trial guarantee with prejudicial publicity and preformed community opinion remains **Sheppard v. Maxwell, 384 U.S. 333 (1966).** In overturning the conviction of the Defendant, the Court wrote:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abides, or transfer it to another county not so permeated with publicity.

384 U.S. at 362-363. Sheppard's formulation that due process requires an impartial jury "free from outside influences," and that a Defendant must simply show a "reasonable likelihood" that a fair trial cannot be had without the necessity for particularized prejudice, was explicitly adopted in **State v. Jarrett, 309 N.C. 239, 254-55 (1983).**

67. In Sheppard, the Defendant was convicted of murdering his wife amidst "massive, pervasive and prejudicial publicity," which included a coroner's inquest attended by the media, sensational headlines and articles documenting inadmissible evidence, and statements by agents of the prosecution detailing their opinions about the evidence and the strength of the case. 384 U.S. at 335, 338-42.

68. Since Sheppard, the courts have developed a number of criteria to measure those instances in which the right to a fair trial has been jeopardized. These include:

> 1. Did the publicity in question accurately report only the typical public information about the factual allegations of the charges, **see State v. Jerrett, 309 N.C. at 251; State v. Gallagher, 313 N.C. 132, 137 (1985),** or did the publicity "contain matters which could not have been admitted into evidence," **State v. Abbott, 320 N.C. 475, 480 (1987),** or which were "inaccurate or untrue." **State v. Scarborough, 92 N.C. App. 422, 424 (1988) rev'd on other grounds 324 N.C. 542 (1989).**

2. Did the publicity focus on the defendant as opposed to the circumstances of the crime, **see United States v. Maldonado-Rivera, 922 F.2d 934, 967 (2nd Cir. 1990).**

3. Was the publicity generated by agents of the State, **see United States v. Bakker, 925 F.2d 728, 733 (4th Cir. 1991) ("In deciding whether to presume prejudice based on pre-trial publicity, a court can consider the source of that publicity"); Maldonado-Rivera, 922 F.2d at 967.**

4. Was the publicity "inflammatory," **see State v. Hunt, 323 N.C. 407, 415 (1988), vacated on other grounds, 494 U.S. 1022 (1990) reinstated and remanded, 330 N.C. 501 (1992).**

69. These criteria are amply met in this case. The publicity surrounding this case, and particularly the extensive reporting, opinions and editorials published by the *Herald-Sun* often focused on the Defendants, rather than the circumstances of the crime. The reporting contained matters that were not true, published the personal opinions of the District Attorney as to whether a rape had occurred -- a matter that will be hotly contested at trial -- and repeatedly referred to the Defendants as "privileged" and "white" while emphasizing that the accuser was African-American and "less well off." The publicity in the *Herald-Sun* has also repeatedly raised the question of whether the Defendants' attorneys are "well-paid" and "expensive" and has repeated time and again claims that the Lacrosse team was "out of control" and engaged in reckless behavior. The response of the community in general, and the African-American community in particular, demonstrates the inflammatory nature of this publicity, and the damage that it has caused in this community. Finally, while the State will argue that much of the publicity has been generated recently by the Defendants, the simple fact remains that had the District Attorney and the Durham Police Department not become involved in a media "feeding frenzy" about this case before the investigation was complete, there would have been no protests in the streets nor inflammatory media - - both were first set and then stoked by the more than 70 interviews given by the State in this case.

70. Under circumstances that pale in comparison to the inflammatory publicity in Durham County in this case, courts in this State have not hesitated to order venue changed. Thus, in **State v. Jerrett,** the Court *reversed* the trial court's refusal to change venue. There the Defendant presented 8 newspaper accounts and evidence of radio broadcasts -- articles and broadcasts that were "factual, informative, and non-inflammatory in nature." 309 N.C. at 251. Nonetheless, because the Defendant also presented evidence that was "clearly sufficient to show that there was considerable discussion of this case throughout Allegheny County" and that every witness who testified "indicated that they believed it would be extremely difficult, if not impossible, to select a jury comprised of individuals who had not heard about the case," the Court ruled as a matter of law that venue should have been changed. Similarly, in **United States v. Abbott Laboratories, 505 F.2d 565, 569 (4th Cir. 1974),** the Fourth Circuit

found that statements by the Government linking a misbranding of drugs to up to 50 deaths was so inflammatory and had received such widespread publicity that a change in venue was appropriate as a matter of law (reversing trial court's decision to dismiss indictment as a consequence of prejudicial and inflammatory pretrial publicity).

71. Finally, the fact that some members of the community may have not yet formed a firm opinion about the outcome of the case does not erase the significance of the fact that a majority have, and that *voir dire* is a particularly ineffective way to uncover which prospective jurors may in fact be unbiased. Precisely this point was made in **United States v. Tokars, 839 F. Supp. 1578 (N.D. Ga. 1993)**. In that murder case, a public opinion survey revealed that 69% of the respondents had "heard or read 'a great deal' regarding the death of [the victim]; 17.1% have heard 'a fair amount.'" The survey further found that nearly two-thirds of the respondents had formed an opinion about guilt. 839 F. Supp. at 1583. Despite the fact that "the Northern District of Georgia contains Atlanta, Georgia -- a very large, metropolitan, populous city" and that the survey indicated that "sufficient unbiased jurors exist in the North District of Georgia from which to select a jury panel," venue was nonetheless changed: "Where the negative publicity has been so intense . . . the difficult task would be ascertaining which prospective jurors are in fact unbiased." 839 F. Supp. at 1584.

72. However, the most significant factor in this case concerns the trial -- and particularly the deliberations of the Jury -- itself. As a consequence of the inflammatory publicity in this case, significant segments of this community have taken clear and entrenched positions about the guilt or innocence of the Defendants. Any Jury that could be seated from this community will be subjected to enormous and conflicting pressures from this community. These pressures will necessarily invade and infect the deliberations in this case, whether it be as a consequence of the media or community opinion and discussion. Indeed, given the street demonstrations that have already taken place in this community over this case, there is a very real prospect of a Jury deliberating in an atmosphere of demonstration, protest and unrest. It is axiomatic that in order to have a constitutionally fair trial, a Jury must be permitted to deliberate in an atmosphere that is free from outside influence and pressure. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.").

73. No other community within the area has experienced street protests about this case, a stream of prejudicial and inflammatory statements by faculty members of the largest employer in the County, a parade of editorials from the only newspaper of general circulation based in the County supporting the prosecution and attacking the Defendants, or had significant segments of its population openly and uncritically embrace the accuser's version of events. Moving this case to another community will remove each of these outside influences from any role in the deliberations of the Jury. Trial in another county, by residents of another county, would also eliminate any potential influence on -- or even action against -- jurors returning to their community and explaining their verdict.

this case before 12 members of a different community and in a different place. In that way, all parties -- and frankly all members of Durham County -- will be assured that the verdict reached will be the result of the evidence and rule of law, uninfluenced by outside or community pressures.

WHEREFORE the Defendants pray that:

1. This Court Order that venue be changed in this case as provided for under North Carolina law;

2. This Court order such further relief as it deems just and appropriate.

This 15th day of December 2006.

James P. Cooney III
State Bar No. 12140
J. Kirk Osborn

Womble Carlyle Sandridge & Rice, PLLC
One Wachovia Center, Suite 3500
301 South College Street
Charlotte, NC 28202-6037
Telephone: 704.331.4980

Attorney for Defendant Reade William Seligmann

Wade M. Smith
State Bar No. 4075
Doug Kingsbery
State Bar No. 9307

Tharrington Smith
Post Office Box 1151
Raleigh, NC 27602
Telephone: 919.821.4711

William J. Cotter
State Bar No. 8708

William J. Cotter, P.A.
3003 Chapel Hill Road
Post Office Box 3507
Durham, NC 27702
Telephone: 919.489.0339

Attorneys for Defendant Collin Finnerty

Joseph B. Cheshire, V
State Bar No. 5543
Bradley Bannon
State Bar No. 24106

Cheshire, Parker, Schneider, Bryan & Vitale
Post Office Box 1029
Raleigh, NC 27602-1029
Telephone: 919.833.3114

Attorneys for Defendant David Evans

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **MOTION TO CHANGE VENUE** was served on the State of North Carolina by hand delivering a copy in open court to District Attorney Michael B. Nifong.

This 15th day of December, 2006.

James P. Cooney III