

34. Following the accuser's interview by Inv. Himan and Sgt. Gottlieb, Inv. RD Clayton of the Durham Police Department was asked to conduct a photo identification procedure with the accuser. He was accompanied by a female investigator, Inv. Michelle Soucie. Inv. Clayton was provided with 4 photo arrays; he did not prepare the arrays, nor did he know the status of the persons in the arrays. [Discovery at 1667](#). The first round of discovery provided by the State on May 18, 2006, contained forms signed by the accuser concerning the identification procedure. [Discovery at 414, 407, 384 391, and 392](#). The only detailed narrative of this procedure appears in an undated and unsigned report prepared by Inv. Clayton and provided to the Defendants on June 22, 2006, in the second round of discovery.² [Discovery at 1667-68](#).

35. Sgt. Gottlieb had worked with other investigators on the morning of March 16 to compile photographs of the members of the Duke Lacrosse team; these were prepared from a disc provided by the Duke Police Department. [Discovery at 1816](#). Sgt. Gottlieb instructed Inv. Soucie to place these photographs into arrays; only members of the Duke Lacrosse team were placed in the photo arrays that were to be shown to the accuser. The arrays were constructed so that each array contained a player named "Matt," "Adam," or "Brett." [Discovery at 1818](#).

36. Inv. Clayton's report indicates that he arrived at the accuser's home at approximately 7:00 pm, less than 72 hours after the claimed assault. He had 4 photo arrays in 4 folders, each labeled "A," "B," "C," and "D." Each photo array contained six photographs. The forms provided to the Defendants on May 18, 2006, reflect that the accuser was asked to identify the "person you saw sexually assaulted you." [See, e.g., Discovery at 384](#). The undated report produced by the State on June 22, 2006, claims that Inv. Clayton instructed the accuser that:

I informed her that if she did recognize a person in the photo in array [sic] to be as descriptive as possible regarding the details of that person. I then told her to use a scale from 1 –10 if she was able to recognize the person. 1 being the least and 10 being the highest. I gave her an example as 10 being that she positively recognized the person on the photo 100%. Each photo was displayed for 30 seconds. I showed her one photo at a time. After a photo was displayed I did go back to any pervious [sic] displayed photos in the array.

37. Photo Array "A" contained the photographs of Glenn Nick, Kevin Coleman, Matt Zash, John Walsh, Reade Seligmann and Dan Oppedisano. [Discovery at 408-413](#). When first shown Photo Array "A," according to Inv. Soucie's notes, the accuser remarked that this was "harder" than she thought it would be. [Discovery at 1315](#). According to the later produced report by Inv. Clayton, "in photo array (A) she stated that the people in the

² Subsequently, the State produced a copy of this same report; however, this particular copy appeared on a form entitled "Case Supplemental Report" and was dated July 6, 2006. [Discovery at 1900-03](#).

photos looked alike.”³ Nonetheless, the accuser “was able to select photo #5 (7 – 10) 70% [Reade Seligmann]. She could not remember where exactly she saw #[5] at the party.” [Discovery at 1667.](#)

38. Thus, according to Inv. Clayton’s report, while the accuser was 70% sure that she recognized Reade Seligmann from his photograph, she could not recall where he was at the party. The accuser was not shown a picture of Collin Finnerty, presumably because he did not match any of the descriptions given by the her on March 16.

39. According to Inv. Clayton’s report, the accuser recognized with 100% certainty Fred Krom (B-1), Nick O’Hara (C-5), Kevin Meyer (C-6) and Brad Ross (D-1). [Discovery at 1667; 401-06, 378-84, 385-90.](#) Despite her claim that she was 100% confident that she saw Brad Ross at the party, investigators would later learn that Brad Ross was in Raleigh, North Carolina, on the campus of North Carolina State University in Suite 303c in Metcalf Hall during the party. [Discovery at 747-51.](#)

40. According to Inv. Clayton’s late produced report, of the 24 members of the Lacrosse Team shown to the accuser on March 16, 2006, the accuser did not identify a single person as one of her attackers. [Discovery at 1667, 392.](#)

41. On March 16, 2006, Dave Evans was one of the three captains who provided voluntary statements and physical evidence to the police. As part of the information he voluntarily gave to police, Dave Evans provided a list of people he recalled attending the party on March 13 and 14, 2006. Among the individuals listed, were “2” or “3” “fraternity guys” one of whom was named “Blake.” [Discovery at 767-68.](#) Thus, as of March 16, 2006, investigators were aware that white males other than members of the Duke lacrosse team attended the party.

42. On March 20, 2006, and following the failed attempt to identify the attackers from the initial four photo arrays, Inv. Himan spoke with Kim Pittman, the dancer the accuser identified as “Nikki.” Ms. Pittman told Inv. Himan that “she heard that [the accuser] was sexually assaulted, which she stated is a ‘crock’ and that she was with her the whole time until she left. And the only time she was alone was when she would not leave and that time period was less than five minutes.” [Discovery at 1213.](#)

43. On March 21, 2006, eight days after the claimed assault, investigators created two additional photo arrays which were labeled “E” and “F.” Like arrays “A” through “D,” these two arrays contained only pictures of members of the Duke Lacrosse team.

³ According to Prof. Farb, in an identification procedure, “the people should be as similar-looking (in appearance, dress, and the like) as possible under the circumstances.” *Arrest, Search, and Investigation in North Carolina* (3rd Ed. 2003), “Line-ups and Other Identification Procedures” at p. 211. General Order 4077 reflects this concern and requires, when followed, that “[f]illers should resemble the witness’s description of the perpetrator in significant features.” See Paragraph 72 *infra*.

Each array consisted of six photographs. [Discovery at 371-77, 393-400](#). Inv. Clayton then showed her the arrays “E” and “F” containing the pictures of Mike Cataloni, Jay Jennison, Peter Lamade, Dan Flannery, Rob Wellington, K.J. Sauer, Erik Henkelman, Zack Greer, Mike Ward, Dan Theodoridis, Dave Evans and William Woolcott. Despite being shown the arrays twice, the accuser did not identify any person who was her attacker. [Discovery at 376, 399, 1667](#).

44. Specifically, the accuser did not recognize Dave Evans during the March 21, 2006 photo array. The accuser was not shown a picture of Collin Finnerty, presumably because he did not match any of the descriptions given by her on March 16.

45. That same day, and following photo arrays of March 16 and March 21, Investigators Himan and Clayton spoke with the accuser. They “asked her questions trying to follow up on a better description of the suspects. ***She was unable to remember anything further about the suspects.***” [Discovery at 1216](#) (emphasis supplied).

46. On March 28, 2006, Inv. Himan spoke with Blake Boehmler, a white male student at Duke University. [Discovery at 1224](#). Boehmler was not a member of the Duke Lacrosse team. He advised Inv. Himan that he was invited to attend the party at 610 N. Buchanan, attended the party, and left after an argument began between the dancers and people at the party. Boehmler told Inv. Himan that he left with another white male, Brent Saeli, who was not a member of the Duke Lacrosse team. [Discovery at 1224](#). Investigators subsequently confirmed that Brent Saeli attended the party by interviewing him. [Discovery at 1235](#).

47. Thus, as of March 28, 2006, the State had confirmed what it had been told by Dave Evans -- that at least two of the people who attended the party on March 13, 2006, were not members of the Duke Lacrosse team.

The Physical Evidence Findings and Lab Testing

48. During the time that, according to Inv. Clayton’s narrative, the accuser was unable to identify any of her attackers from the photo arrays shown to her by police, investigators were collecting physical evidence from 610 N. Buchanan Street, from the accuser, and from the members of the Duke Lacrosse team.

49. Specifically, and under a search warrant, investigators processed the house at 610 N. Buchanan Street, seeking trace evidence that would indicate that a rape had occurred. Such evidence would include hairs, fibers, bodily fluids, semen, blood and DNA of the claimed attackers and of the accuser. Specifically, and in an effort to corroborate the accuser’s claims about “Adam” -- who had committed oral rape and whose fluid the accuser had spit onto the toilet or floor of the bathroom -- swabbings were taken of the toilet and floor area of 610 N. Buchanan. Additional evidence including trace evidence, cloths, clothing and other material was also seized.

50. Similarly, and while she was in the Emergency Department at the Duke University Medical Center, vaginal, anal and mouth swabs were obtained from the accuser. The accuser's clothing was collected, including her panties. Pubic combings were performed on the accuser in an effort to locate foreign hairs, foreign pubic hairs, or other trace evidence.

51. Finally, on March 23, 2006, and under a Non-Testimonial Identification Order, the 46 white members of the Duke Lacrosse team were identified, photographed and had DNA swabbings taken from them for the purpose of comparing their profiles to trace evidence collected from the accuser and from 610 N. Buchanan.

52. In the course of securing the Non-Testimonial Identification Order, the State of North Carolina represented that negative DNA testing would "immediately rule out any innocent persons." [Discovery at 300.](#)

53. The physical evidence collected -- to the extent it was to be analyzed for hairs, fibers, blood, semen, DNA or other trace evidence -- was packaged and transported to the State Bureau of Investigation Crime Laboratory. The DNA samples obtained from the Lacrosse Team and the accuser were also transported to the SBI Crime Laboratory. All such evidence had been received by March 28, 2006.

54. On March 28, 2006, Agent Rachel Winn examined the vaginal swabs and smears, the oral swabs and smears, the rectal swabs and smears, the accuser's panties, and other items of the accuser's clothing. [Discovery at 4443, 4444, 4445, 4450.](#)

55. Testing of the accuser's clothing using generally accepted laboratory techniques revealed that no seminal fluid was on her clothing. [Discovery at 1699-1702.](#)

56. Testing of the vaginal swabs taken from the accuser using generally accepted laboratory techniques revealed that no seminal fluid was in her vagina.

57. Testing of the rectal swabs taken from the accuser using generally accepted laboratory techniques revealed that no seminal fluid was in her rectum.

58. Testing of the oral swabs taken from the accuser using generally accepted laboratory techniques revealed that no seminal fluid was in her mouth.

59. Testing of the accuser's clothing using generally accepted laboratory techniques failed to reveal the presence of blood, foreign pubic hairs, head hairs, body hairs or fibers.

60. Testing of the vaginal, rectal and oral swabs using generally accepted laboratory techniques failed to reveal the presence of blood.

61. The pubic combing performed during the rape examination at the Duke University Emergency Rooms did not reveal any foreign pubic hairs, head hairs, body hairs or fibers.

62. Upon information and belief, as of March 30, 2006, the State was aware of these findings. Further, as of March 30, 2006, the State was aware that the absence of seminal fluid on or in the accuser, the absence of seminal fluid on her clothing, the absence of foreign pubic, head or body hairs on the accuser or on or in her clothing, and the absence of blood from the accuser or on her clothing, made it highly unlikely that DNA would be identified from these pieces of evidence.

(a) On March 30, 2006, in a statement published in *The News & Observer*, the District Attorney -- who a week earlier had represented to the court that negative DNA testing would "immediately rule out any innocent persons" -- made the following comment: "How does DNA exonerate you? It's either a match or there's not a match," Nifong said. ". . . if the only thing that we ever have in this case is DNA, then we wouldn't have a case." [N&O March 30, 2006](#).

(b) On March 30, 2006, and in a separate interview with *The New York Times*, the District Attorney stated: "I would not be surprised if condoms were used." [NYT March 30, 2006](#). In fact, the accuser had denied condom use and told nurses and physicians at the Duke University Medical Center, Inv. Himan and Sgt. Gottlieb that the attackers had ejaculated. The District Attorney continued, telling other media outlets that: "The statements that [the team] makes are inconsistent with the physical evidence in this case They don't want to admit to the enormity of what they have done."

*D. The PowerPoint Identification and the Accuser's Final Version of Events
(March 31 through April 6)*

63. On March 31, 2006, Sgt. Gottlieb and Inv. Himan met with the District Attorney to discuss doing further photographic identifications using what Sgt. Gottlieb called "the mug shot type photographs" of the Lacrosse team obtained on March 23, 2006. [Discovery at 1825](#).

64. As of March 31, 2006, the State was aware that the accuser, according to Inv. Clayton's report, had failed to identify a single person as an attacker after reviewing photographs of approximately 36 lacrosse players. The State was further aware that two white males were at the party who were not members of the lacrosse team. On information and belief, the State knew that no semen, saliva or blood had been found on or in the accuser, or on or in her clothing, and that there were no hairs or other trace evidence that linked any person to a sexual assault on the accuser. Finally, as evidenced by the public comments of the District Attorney, given the absence of seminal fluid, saliva and blood, the State appeared to be aware that there was a high likelihood that no DNA evidence would

be found on any of the swabs or smears taken from the accuser on the night that she was examined, at least through this conventional DNA testing.

The PowerPoint Identification

65. During the course of the meeting among Inv. Himan, Sgt. Gottlieb and the District Attorney, the District Attorney “suggested we put together the mug shot type photographs into a group since we are under the impression the players at the party were members of the Duke Lacrosse Team, and instead of doing a line up or photographic array, we would merely ask the victim to look at each picture and see if she recalled seeing the individuals at the party.” [Discovery at 1825](#).

66. As of March 31, and since March 24, 2006, the District Attorney had been “running” the investigation, and Sgt. Gottlieb and Inv. Himan had been directed by their superior officers “to go through [the District Attorney] for any directions as to how to conduct matters in this case.” [Discovery at 1823](#).

67. Following the meeting of March 31 in which the District Attorney directed that only photographs of the Lacrosse team be shown to the accuser, Sgt. Gottlieb assisted Inv. Himan and another investigator in placing all of the pictures of the Lacrosse team into a “PowerPoint” format so that they could be displayed to the accuser. [Discovery at 1825; 14 - 107](#).

68. All 46 white members of the Duke Lacrosse team were placed in the PowerPoint display. Despite the fact that the State was aware that two white males who did not play lacrosse had attended the party -- investigators had interviewed one and had the name of the other -- these two white males were not included in the PowerPoint display. Indeed, these two white males were never subjected to a Non-testimonial Identification Order nor were asked to voluntarily be photographed for potential identification by the accuser.

69. Thereafter, on April 4, 2006, the accuser was brought to the Durham Police Department to view the PowerPoint photographs. Before viewing the photographs, however, the accuser was told by Sgt. Gottlieb that “we were going to sit in the far side of the room at the desk and look at **people we had reason to believe attended the party**.” [Discovery at 1826 \(emphasis supplied\)](#). Sgt. Gottlieb, who was supervising the investigation for the Durham Police Department and who had put together the PowerPoint photographs, presided over the process; Inv. Himan who was the lead Durham Police Department investigator in charge of the case, also sat in on the identification process. Sgt. Gottlieb -- contrary to both the practice employed at the earlier photo arrays and the procedures of the Durham Police Department -- then told the accuser that it was “important” for her to say whether she recalled “seeing any of the persons to be shown and to describe what they were doing.” [Discovery at 109](#).

70. According to an in-court representation made by the District Attorney on October 27, 2006, during the course of meeting with the accuser on April 11, the District Attorney concluded that she was “too traumatized” to speak of the events of March 13 and 14.⁴ [Transcript at 6](#). The PowerPoint identification procedure that the District Attorney directed police to employ took place one week *earlier*.

71. At the time that this PowerPoint identification was conducted, and at the time that the District Attorney directed that the accused be shown pictures of only members of the Duke Lacrosse team, the Durham Police Department had in place “General Order 4077” relating to Eyewitness Identification and, specifically, Photographic arrays. [General Order 4077](#).

72. General Order 4077 provided, in relevant part, that “photographic arrays should adhere to the following set of guidelines”:

(a) “Use an independent administrator. It is preferable that the individual conducting the photographic array should be someone who does not know which member of the photographic array is the suspect. There should not be anyone present during the array procedure who knows the suspect’s identity. Only when resources make this practice prohibitive should an independent administrator not be utilized.”

(b) “Include a minimum of five fillers (non-suspects).”

(c) “If there is more than one suspect that fits the description of the perpetrator, there can be more than one suspect in the photographic array; however, the number of fillers should be increased to a minimum of five per suspect.”

73. The PowerPoint procedure suggested by the District Attorney and conducted by the Durham Police Department on April 4, 2006, violated General Order 4077 and the policy and procedures of the Durham Police Department.

74. By its terms, General Order 4077 was “based upon recommendations published by the North Carolina Actual Innocence Commission which are endorsed by the Education and Training Committee of the North Carolina Criminal Justice Education and Training Standards Commission.” [General Order 4077](#).⁵

⁴ The day after determining that he could not interview the accuser because she was too “traumatized,” the District Attorney authorized that indictments against Reade Seligmann and Collin Finnerty be sealed once issued by the grand jury.

⁵ General Order 4077 is similar to the procedures employed by many metropolitan police departments throughout this State. For example, the Hickory Police Department utilizes the guidelines recommended by the Actual Innocence Commission including the administration of the identification by someone who is not familiar with the case and the use of 7 “fillers” for each suspect. The Asheville Police Department similarly uses the Actual Innocence

75. The recommendations of the Actual Innocence Commission, in turn, provide, in relevant part, that:

(a) “Use an independent administrator. The individual conducting the photo or live lineup should be someone who does not know which member of the lineup is the suspect. . . . Technological tools, such as computer programs that can run photo lineups and record witness identifications without the presence of an investigator, may assist agencies with resource constraints.”

(b) “Include a minimum of seven fillers (non-suspects) per photo identification procedure and five for live lineups.”

(c) “If there is more than one suspect that fits the description of the perpetrator, there can be more than one suspect in the lineup; however, the number of fillers should be increased to a minimum of seven. . . . By keeping the proportion of fillers to suspects constant, the reliability of the identification remains constant.”

(d) “An independent administrator is the preferred administrator for both sequential and simultaneous presentations. Because there is a greater risk that an administrator may convey unintentional cues during sequential presentations, sequential presentation should only be used if the identification procedure is being conducted by an independent administrator. If an independent administrator is not available, simultaneous presentation of individuals/photos is necessary.”

(e) “Administrators should avoid making any comments during the selection procedure and should be aware that witnesses can perceive such things as unintentional voice inflection or prolonged eye contact as messages regarding their selection.”

(f) “Witnesses should be instructed as follows prior to the lineup: *For sequential presentation:*

In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. . . .

Commission Guidelines including the use of an “independent” administrator and 5 “fillers” per suspect. Indeed, the Guidelines of the Actual Innocence Commission appear to be the policy in whole or in part in Burlington, Chapel Hill, Spencer, Tarboro, Cary, Gastonia, Jacksonville, Rocky Mount, Fayetteville and Raleigh.

You should not feel like you have to make an identification. This procedure is important to the investigation whether or not you identify someone.

76. The PowerPoint procedure utilized on April 4, 2006, did not follow or conform to the recommendations of the Actual Innocence Commission.

77. The PowerPoint procedure was videotaped and a transcript of that videotape was prepared. [Discovery at 1827-39](#).

78. During the course of the PowerPoint procedure, the accuser was shown 46 photos in a sequential manner. The accuser:

- (a) Identified **four** of the players as looking like her **three** attackers:
 - (1) Image 4 Matthew Wilson -- "He looked like Bret but I'm not sure One of the guys that assaulted me"; [Discovery at 1828-29](#); [Video clip](#)
 - (2) Image 5 Dave Evans -- "He looks like one of the guys who assaulted me sort [of]. . . . He looks just like him without the mustache About 90%"; [Discovery at 1829](#); [Video clip](#). Dave Evans has never had a mustache.
 - (3) Image 7 Reade Seligmann -- "He looks like one of the guys who assaulted me 100%. . . . He was the one that was standing in front of me . . . um . . . that made me perform oral sex on him"; [Discovery at 1829-30](#); [Video clip](#) and,
 - (4) Image 40 Collin Finnerty -- "He is the guy who assaulted me He put his penis in my anus and my vagina The second one 100%." [Discovery at 1838](#); [Video clip](#).
- (b) Identified Brad Ross (Image 9) as being at the party "standing outside talking to the other dancer." [Discovery at 1830](#). Brad Ross did not attend the party and was in a dorm room at North Carolina State University in Raleigh during the party. [Discovery at 747-51](#).
- (c) Identified Chris Loftus (Image 26) as being at the party, "in the living room Sitting down. . . . I meant the master bedroom." [Discovery at 1834-35](#). Chris Loftus left the party before the accuser arrived and was with his girlfriend in his dorm room, having entered the dorm using his card reader at 10:59 pm. [Discovery at 859](#).

- (d) Did not recognize three persons who she recognized and identified on the photo arrays shown to her on March 16: Fred Krom (Image 30), [Discovery at 1835, 1667](#); Nick O'Hara (Image 27), [Discovery at 1835, 1667](#); and, Kevin Mayer (Image 41), [Discovery at 1838, 1667](#).
- (e) Claimed to recognize twelve persons who she failed to recognize when shown pictures on the photo arrays on March 16 and 21; Dave Evans (Image 5), William Woolcott (Image 3), Matt Wilson (Image 4), Adam Langley (Image 11), Glen Nick (Image 13), Eric Henkelmen (Image 15), Dan Flannery (Image 17), Peter Lamade (Image 20), John Walsh (Image 21), Ben Koesterer (Image 31), Josh Covelski (Image 37), and Kyle Dowd (Image 38).
- (f) Claimed to recognize Tony McDevitt (Image 34) as the person who made the comment about the broomstick. [Discovery at 1836](#). Investigators knew at that time that the comment was made by Peter Lamade (Image 20) -- a person that the accuser claimed she only saw "sitting in the kitchen Um, making a drink." [Discovery at 767](#); [Discovery at 1833](#).

A **complete transcript** and copy of the **videotape** of this PowerPoint Identification is attached to this Motion.