

DEFENDANTS' OBJECTION TO EARLY DISPOSAL OF BIOLOGICAL EVIDENCE

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- I. Generally.** G.S. 15A-268 specifies the period for which evidence containing biological evidence, including fingerprints, must be preserved and provides a procedure for early disposal of biological evidence by a custodial agency. This section discusses that procedure.
- II. Defendant's Objection Triggers Hearing.** The statute provides that the custodial agency must notify the district attorney of its intent to dispose of the evidence, who in turn must give written notice to the defendant (if convicted of a felony and still incarcerated), the defendant's counsel of record, and the Office of Indigent Defense Services. G.S. 15A-268(b). The AOC has developed a form, AOC-G-153, to be used in connection with the statutorily mandated notice. If the defendant files a timely written request that the evidence not be destroyed, a court hearing must be held. G.S. 15A-268(d).
- III. Hearing and Determination.** After a hearing held in response to a defendant's request that the evidence not be destroyed, the court may order the entity to dispose of evidence if the court finds, by a preponderance, that the evidence:
- has no significant value for biological analysis and should be returned to its rightful owner, destroyed, used for training purposes, or otherwise disposed of as provided by law; *or*
 - may have value for biological analysis but is of a size, bulk, or physical character as to render retention impracticable or that it should be returned to its rightful owner.

G.S. 15A-268(d).

- A. Form Order.** The AOC has developed a form, AOC-G-154 to be used for issuing the order.
- B. Special Disposition.** If the court finds that the evidence may have value for biological analysis but is of a size, bulk or physical character as to render retention impracticable or that it should be returned to its rightful owner, the court order allowing disposition must require the custodial agency to return the evidence to the collecting agency. G.S. 15A-268(e). Before returning or disposing of the evidence, the collecting agency must take "reasonable measures to remove or preserve portions of evidence likely to contain biological evidence" through cutting, swabs, etc. in a quantity that will allow for DNA testing. *Id.* "The court may provide [a] defendant an opportunity to take reasonable measures to preserve the evidence." *Id.*

- IV. Appeal.** The court order regarding disposition of evidence is final and appealable. G.S. 15A-268(f).
- A. Time for Appeal.** Defendant has 30 days to appeal. *Id.*
- B. No Destruction Pending Appeal.** The custodial agency may not destroy evidence while an appeal is pending. *Id.*