

## POST-CONVICTION DNA TESTING

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- I. Basis of the Right to Testing.** The North Carolina General Statutes provide a state law right for post-conviction DNA testing of biological evidence, in certain circumstances. G.S. 15A-269, -270, and -270.1 set out the procedures for such testing, and those procedures are discussed in detail in the sections that follow. *See generally* State v. Shaw, 259 N.C. App. 703, 706 (2018) (trial court must apply procedures and analysis provided by G.S. 15A-269 to post-conviction motions for DNA testing and may not supplant the procedures with those applicable to motions for appropriate relief). Note however that in *District Attorney's Office v. Osborne*, 557 U.S. 52, 72-74 (2009), the United States Supreme Court held that a defendant whose criminal conviction has become final does not have a substantive due process right to gain access to evidence so that it can be subjected to DNA testing to attempt to prove innocence. The Court also rejected the lower's court's holding that the state procedures for post-conviction relief at issue violated the defendant's procedural due process rights. *Id.* at 69-71. In *Skinner v. Switzer*, 562 U.S. 521, 534 (2011), a later case, the Court held that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert a claim under 42 U.S.C. § 1983. However, the Court noted that *Osborne* severely limits the federal action a state prisoner may bring for DNA testing, stating: "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." 562 U.S. at 525 (internal citation omitted).
- II. Defendant's Motion.** The proceeding typically begins when the defendant makes a motion, in the trial court that entered judgment, for DNA testing of biological evidence. G.S. 15A-269(a). In *State v. Alexander*, 380 N.C. 572 (2022), the North Carolina

Supreme Court held that a defendant who has entered a guilty plea is not precluded from making a motion for DNA testing under G.S. 15A-269(a). See 380 N.C. at 587-96 (rejecting State's argument that language in the statute, including references in G.S. 15A-269(a)(1) to the "defendant's defense" and in G.S. 15A-269(b)(2) to "the verdict," should be interpreted as limiting relief to defendants who are convicted at trial). A trial court lacks jurisdiction to rule on a motion that is filed after its jurisdiction has been divested under G.S. 15A-1448 by a notice of direct appeal in the case. *State v. Briggs*, 257 N.C. App. 500, 504-05 (2018). *Cf. State v. Lebeau*, 271 N.C. App. 111, 113-14 (2020) (discussing when, precisely, jurisdiction is divested under G.S. 15A-1448).

**A. Not For Showing Lack of Biological Evidence.** The statute does not authorize testing to establish the lack of biological material e.g., the lack of semen on a rape victim's clothes. *State v. Brown*, 170 N.C. App. 601, 608-09 (2005); *State v. Randall*, 259 N.C. App. 885, 889 (2018). Put another way, the statute provides for the testing of biological evidence, not for the testing of any evidence to establish the lack of biological material. *Id.*; see also *State v. Collins*, 234 N.C. App. 398, 409-10 (2014) (so interpreting *Brown* and distinguishing *Brown* from the case before it where the defendant sought testing on biological samples taken into evidence and was not seeking testing to show a lack of DNA evidence).

**III. Testing By Consent.** Post-conviction testing can be initiated without a defense motion. Specifically, a defendant and the State may consent to and conduct post-conviction DNA testing by agreement, without the filing of a motion. G.S. 15A-269(h).

**IV. Counsel.** The court must appoint counsel for a defendant only if the defendant

- (1) is indigent and
- (2) makes a showing that the DNA testing "may be material to the . . . claim of wrongful conviction."

G.S. 15A-269(c); *State v. Cox*, 245 N.C. App. 307, 312 (2016) (so interpreting the statute). Appointment must be made in accordance with IDS rules. G.S. 15A-269(c).

The showing concerning materiality that an indigent defendant must make for appointment of counsel is a lesser burden than that required to grant the motion. *State v. Byers*, 375 N.C. 386, 396-97 (2020). As set out above, under G.S. 15A-269(c), a defendant is entitled to appointment of counsel upon a showing that the requested DNA testing "may be material" to his or her claim of wrongful conviction. In contrast, under G.S. 15A-269(a) and (b), a trial court must grant the motion only when it determines that such testing "is material" to the defendant's claim of wrongful conviction. The legislature's varying use of the terms "is" and "may be" to modify the term "material" indicates a lesser burden for appointment of counsel than for granting the motion. *Byers*, 375 N.C. at 396-97. For purposes of both appointment of counsel and granting the motion, the term "material" refers to the existence of "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 391 (quoting *State v. Lane*, 370 N.C. 508, 519 (2018)). See also Section V.B.2 below (discussing materiality required to grant the motion). A defendant's conclusory statement of the materiality of evidence is insufficient to warrant an appointment of counsel. See *Cox*, 245 N.C. App. at 312 (conclusory statement was insufficient for appointment of counsel; note that an analysis of materiality in *Cox* relied on North Carolina Court of Appeals precedent that later was overruled by *Byers*, 375 N.C. at 397-97 (2020)).

If counsel is appointed, the court may wish to have counsel file an amended motion so that the defendant's arguments for testing are asserted as clearly as possible. *See, e.g., Collins*, 234 N.C. App. at 409 n.8 (noting that the defendant's amendments to his pro se motion, filed after counsel was appointed, were permissible).

## V. Evaluating and Ruling on the Motion.

**A. Hearing.** While a trial court may conduct an evidentiary hearing on the defendant's motion, it is not required to do so. *State v. Floyd*, 237 N.C. App. 300, 302-03 (2014). In fact the Court of Appeals has affirmed denials of motions for post-conviction testing where the trial court did not conduct any hearing. *Id.* (so noting); *see Turner*, 239 N.C. App. at 452 (trial court denied the motion without a hearing). It has offered this clarification on when a hearing is necessary:

We hold that for motions brought under [G.S.] 15A-269, a trial court is not required to conduct an evidentiary hearing where it can determine from the trial record and the information in the motion that the defendant has failed to meet his burden of showing any evidence resulting from the DNA testing being sought would be material. A trial court is not required to conduct an evidentiary hearing on the motion where the moving defendant fails to describe the nature of the evidence he would present at such a hearing which would indicate that a reasonable probability exists that the DNA testing sought would produce evidence that would be material to his defense.

*Floyd*, 237 N.C. App. at 303 (going on to hold that an evidentiary hearing was not required in that case).

Post-test hearings are discussed in Section VIII below.

**B. Standard.** The court must grant the defendant's motion (and if the testing complies with FBI requirements, require the running of any profiles obtained from the testing) if:

- (1) the evidence is material;
- (2) the evidence is related to the investigation or prosecution that resulted in the judgment;
- (3) the evidence either was not previously DNA tested or, if it was, the requested test would yield "results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results";
- (4) if the testing being requested had been conducted on the evidence, there is a reasonable probability that the verdict would have been more favorable to the defendant; *and*
- (5) the defendant has signed a sworn affidavit of innocence.

G.S. 15A-269(b).

**1. Burden on the Defendant.** The defendant bears the burden of proving by the preponderance of the evidence every fact to support the motion.

State v. Lane, 370 N.C. 508, 518 (2018); State v. Turner, 239 N.C. App. 450, 453-54 (2015); *Floyd*, 237 N.C. App. at 301.

2. **Materiality.** Echoing the materiality standard that applies in *Brady* discovery issues, our courts have held that evidence is material for purposes of the post-conviction DNA testing statute if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Lane*, 370 N.C. at 519 (so stating and noting that General Assembly appeared to have adopted *Brady* standard in G.S. 15A-269(b)); State v. Byers, 375 N.C. 386, 393-94 (2020) (same). In this way the requirement of materiality subsumes the fourth requirement above — that if the testing being requested had been conducted, there is a reasonable probability that the verdict would have been more favorable to the defendant. *Lane*, 370 N.C. at 519 (explaining that G.S. 15A-269(b)(2) describes the materiality standard referenced in G.S. 15A-269(a)(1) and that the standard essentially is equivalent to that of *Brady*). Under this definition, evidence may be relevant but not rise to the level of being material. *Floyd*, 237 N.C. App. at 302; see also State v. Randall, 259 N.C. App. 885, 889 (2018) (evidence that may have been relevant at trial was not material for purposes of post-conviction DNA testing). In cases involving jury trials, a determination of materiality “hinges upon whether the evidence would have affected the jury’s deliberations.” *Lane*, 370 N.C. at 519. In the context of a capital case, a court considering materiality must assess whether the evidence “would have changed the jury’s verdict in either the guilt or sentencing phases.” *Id.* In cases involving a guilty plea, the applicable standard is whether “there is a reasonable probability that DNA testing would have produced a different outcome; for example, that the defendant would not have pleaded guilty *and otherwise would not have been found guilty.*” State v. Alexander, 380 N.C. 572, 597 (2022) (quotation omitted; emphasis in original); *Randall*, 259 N.C. App. at 887.

Regardless of whether a motion follows a trial or a plea, a court’s determination of materiality must be made in the context of the entire record, including, for example, the strength of the evidence against a defendant, the value to a defendant of a favorable test result, and the circumstances surrounding a defendant’s guilty plea. See, e.g., *Byers*, 375 N.C. at 398-99 (testing not material where evidence against the defendant was overwhelming); *Lane*, 370 N.C. 520-24 (testing not material; evidence against the defendant was overwhelming; defendant would not be excluded as perpetrator even if test results were favorable; aggravating factors supporting jury’s recommendation of death sentence still would exist even if test results were favorable); *Alexander*, 380 N.C. at 601-04 (testing not material where favorable results would have little bearing on defendant’s involvement in the crimes); *Randall*, 259 N.C. App. at 889 (testing not material where defendant confessed to crimes and entered guilty plea freely, understandingly, and voluntarily with assistance of counsel).

As noted in Section IV above, the term “material” has the same meaning throughout G.S. 15A-269, but a defendant must show that testing “is material” to his or her defense to compel a trial court to grant a motion while needing only to show that testing “may be material” in order to be appointed counsel.

A conclusory statement that the testing is material is insufficient to carry the defendant's burden. *Byers*, 375 N.C. at 395 (defendant did not meet burden where he offered "conclusory and vague statements without evidentiary foundation"); *Randall*, 259 N.C. App. at 888; *Turner*, 239 N.C. App. at 454; *State v. Foster*, 222 N.C. App. 199, 205 (2012).

Sample cases assessing materiality include:

*State v. Alexander*, 380 N.C. 572 (2022) (the defendant failed to prove materiality where he pleaded guilty to robbing and murdering the manager of an Amoco service station; the defendant sought testing of shell casings discovered at the Amoco for the presence of third-party DNA; the court reasoned that the defendant failed to show materiality because presence of third-party DNA would not tend to undercut the credibility of eyewitness testimony identifying the defendant offered by the State at the time of the plea, nor would it tend to exculpate the defendant as the eyewitness testified to having seen another man leave the scene along with the defendant)

*State v. Lane*, 370 N.C. 508 (2018) (the defendant failed to prove materiality where he was convicted of and sentenced to death for murder, kidnapping, and child sex offenses; the defendant sought testing of hair samples found in the trash bag in which the victim's body was discovered; the court reasoned that the defendant failed to show materiality as to the jury's determination of guilt, (1) because of the overwhelming evidence against him at trial, including his confession, physical evidence connecting the victim to the defendant's home, and eyewitness testimony connecting the defendant's moped to the disposal of the victim's body, and (2) because even if testing revealed that the hairs did not belong to the defendant or the victim that result would not exculpate him because of the possibility that the victim's body and the hairs came to be in the trash bag at different times; as to the punishment phase, the defendant failed to show materiality because the aggravating factors found by the jury still would exist even if an additional perpetrator was involved in the crimes)

*State v. Floyd*, 237 N.C. App. 300 (2014) (the defendant failed to prove materiality where he was convicted of murdering his wife, whose body was discovered in a utility shop behind their home; the defendant sought DNA testing of five cigarettes and a beer can found in the utility shop, arguing that Karen Fowler, with whom the defendant had an affair, or her sons committed the murder; the defendant asserted that testing may show the presence of DNA from Fowler or her sons at the scene; the defendant failed to prove the materiality of the sought-for evidence, given the overwhelming evidence of guilt and the fact that DNA testing would not reveal who brought the items into the utility shop or when they were left there; the court noted: "[w]hile the results from DNA testing might be considered 'relevant,' had

they been offered at trial, they are not 'material' in this postconviction setting”).

*State v. Hewson*, 220 N.C. App. 117, 122-24 (2012) (in this case involving murder and other charges, the trial court did not err by denying the defendant’s motion for DNA testing; the defendant argued that the State’s evidence at trial put him outside the house when the shots were fired, and this fact supported its allegation of shooting into occupied property as an underlying felony for felony murder and its theory of premeditation and deliberation; the defendant asserted that blood on his pants was never tested; he further contended that if DNA evidence indicated the blood belonged to the victim, the defendant could argue that he was in close proximity to the victim, that he did not shoot from outside the residence, and that he would have the basis for a heat-of-passion defense to first-degree murder; the court rejected this argument, concluding that the evidence submitted by defendant in support of his motion supported the jury’s verdict and did not support a jury instruction on the heat-of-passion defense, noting: “Defendant’s contention that he was in close proximity to the victim at some point, even if supported by DNA evidence, does not minimize the significance of or otherwise refute the substantial evidence that defendant fired a gun into occupied property and that the victim suffered fatal gunshot wounds as a result.”).

3. **“Significantly More Accurate and Probative” or “Reasonable Probability of Contradicting Prior Test Results.”** In cases involving evidence that was tested previously, a mere conclusory statement that the requested testing is “significantly more accurate and probative of the identity of the perpetrator or accomplice or ha[s] a reasonable probability of contradicting prior test results” is insufficient to carry the defendant’s burden. *State v. Collins*, 234 N.C. App. 398, 411-12 (2014). “Rather, the defendant must provide *specific reasons*” why this is the case. *Id.*

- C. **Order.** When ruling on the defendant’s motion, the statute does not explicitly require the trial court to make specific findings of fact. *Floyd*, 237 N.C. App. at 302. As our courts have stated: “A trial court’s order is sufficient so long as it states that the court reviewed the defendant’s motion, cites the statutory requirements for granting the motion, and concludes that the defendant failed to show that all the required conditions were met.” *Id.* Regardless of the minimal requirement for a sufficient order, trial courts often do make findings of fact when ruling on motions for testing. See, e.g., *Lane*, 370 N.C. at 519-20 (noting that trial court made multiple findings of fact related to its conclusion that the defendant had failed to demonstrate materiality of testing); *Byers*, 375 N.C. at 400 (trial court did not err in its finding that evidence against the defendant was “overwhelming” which supported its conclusion that the defendant had failed to demonstrate materiality of testing). As noted in Section XI. below, on appeal whatever findings of fact a trial court makes in denying a motion for DNA testing are reviewed for abuse of discretion and conclusions of law are reviewed *de novo*.

- VI. Time For and Method of Testing.** If testing is ordered, it must be done “as soon as practicable.” G.S. 15A-269(e). The testing must be conducted by a NC State Crime Laboratory approved testing facility, mutually agreed upon by the parties and approved by the court. G.S. 15A-269(b1). If the parties cannot agree on a testing facility, the court designates the facility, after giving the parties a reasonable opportunity to be heard on the issue. *Id.*
- VII. “Time Out” for Testing.** If a miscarriage of justice will otherwise occur and “DNA testing is necessary in the interests of justice,” the court must “order a delay of the proceedings or execution of the sentence pending the DNA testing.” G.S. 15A-269(e).
- VIII. Post-Test Hearing.** Upon receiving the test results, the court must hold a hearing. G.S. 15A-270(a).
- A. Rules of Evidence Apply.** The rules of evidence apply to proceedings related to post-conviction motions for DNA testing. *State v. Foster*, 222 N.C. App. 199, 203 (2012).
- B. Determination.** The purpose of the hearing is to “determine if the results are unfavorable or favorable to the defendant.” G.S. 15A-270(a); *see also State v. Norman*, 202 N.C. App. 329, 331-32 (2010) (noting that statute provides no standard or guidance for determining whether results are “favorable” or “unfavorable”). If the results are unfavorable to the defendant, the court must dismiss the motion. G.S. 15A-270(b). If the results are favorable to the defendant, the court “shall enter any order that serves the interests of justice,” including one that:
- vacates and sets aside the judgment,
  - discharges an in-custody defendant,
  - resentences the defendant, or
  - grants a new trial.
- G.S. 15A-270(c).
- C. Judge’s Order.** Unlike other post-conviction procedures, such as those that apply to orders on motions for appropriate relief entered after evidentiary hearings, the DNA testing statute does not explicitly require the judge to make specific findings of fact. While there is no case law on the issue, the determination of favorability required by G.S. 15A-270(a) presumably is a conclusion of law that should be supported by findings of fact, at least as a best practice even if not required by statute. *Cf. State v. Saults*, 299 N.C. 319 (1980) (stating generally that findings of fact must support and justify a conclusion of law); *State v. Norman*, 202 N.C. App. 329, 331-32 (noting that G.S. 15A-270 lacks procedural specificity). Note, however, that a defendant has no right to appeal a trial court’s order on the favorability of DNA testing results, as discussed in Section XI. below.
- D. Costs of Testing.** G.S. 15A-269(d) provides that the defendant bears the cost of any DNA testing that is ordered unless the defendant is indigent, in which event the State bears the cost. In clear harmony with this general directive, in cases where the court finds test results to be unfavorable to the defendant, G.S. 15A-270(b) mandates that the cost of testing be assessed to the defendant unless he

or she is indigent. However, in cases where the court finds test results to be favorable to the defendant, G.S. 15A-270(c) authorizes the court to enter “any order that serves the interests of justice” and does not explicitly require that such an order assess the cost of testing to the defendant, regardless of the defendant’s indigency status. Given that broad authority to enter an order serving the interests of justice, it is arguable that a court has discretion to waive the imposition of testing costs for a non-indigent defendant when the results are favorable to him or her.

- IX. Responsibilities of Custodial Agency.** Upon receiving a motion for post-conviction DNA testing, the custodial agency must “inventory the evidence pertaining to [the] case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the [defendant], and the court.” G.S. 15A-269(f); *State v. Doisey*, 240 N.C. App. 441, 445 (2015) (a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence; a defendant who requests DNA testing under G.S. 15A-269 need not make any additional written request for an inventory of biological evidence); *State v. Randall*, 259 N.C. App. 885, 890 (2018) (same; *citing Doisey*). However, because the statute does not require service of the motion on the custodial agency, it is not clear how that agency will receive the motion that triggers its obligation to undertake these actions. *Cf. State v. Tilghman*, 261 N.C. App. 716, 723 (2018) (statute is silent as to who bears the burden of serving the motion on the custodial agency); *Randall* 259 N.C. App. at 890 (noting that the State contacted the relevant law enforcement agency to notify the agency of the defendant’s motion).
- X. State’s Responsibilities to Victims.** Upon receiving a motion for post-conviction DNA testing, the State must, “upon request, reactivate any victim services for the victim of the crime being investigated during the reinvestigation of the case and pendency of the proceedings.” G.S. 15A-269(g). The provision does not specify who may make the request.
- XI. Appeal.** G.S. 15A-270.1 provides that a defendant may appeal an order denying a motion for testing. *See Hewson*, 220 N.C. App. at 121 (recognizing the defendant’s right to appeal). The court must appoint counsel for the appeal in accordance with IDS rules, upon a finding of indigency. G.S. 15A-270.1. On appeal of an order denying a motion for DNA testing, the trial court’s findings of fact (if made) are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. *State v. Lane*, 370 N.C. 508, 517 (2018); *State v. Alexander*, 380 N.C. 572, 582 (2022). The Court of Appeals has held that the procedures of *Anders v. California*, 386 U.S. 738 (1967) (describing appellate counsel’s duties upon making a determination that meritorious arguments for relief on appeal do not exist) apply to appeals pursuant to G.S. 15A-270.1 notwithstanding the fact that the right to appeal is a statutory rather than constitutional right. *State v. Velasquez-Cardenas*, 259 N.C. App. 211, 225 (2018).
- A defendant has no right to appeal the trial court’s order denying relief following a hearing to evaluate the results of any testing ordered. *State v. Norman*, 202 N.C. App. 329, 334 (2010).



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