

POST-CONVICTION DNA TESTING

Jessica Smith, UNC School of Government (April 2015)

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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. 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, 131 S. Ct. 1289, 1298-99 (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 ____, 131 S. Ct. at 1293 (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).
- 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). 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*, ___ N.C. App. ___, 761 S.E.2d 914, 922 (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) makes a showing of indigence and
- (2) sufficiently establishes that the DNA testing “may be material to the ... claim of wrongful conviction.”

G.S. 15A-269(c); *State v. Gardner*, ___ N.C. App. ___, 742 S.E.2d 352, 354-55 (2013) (so interpreting the statute). Appointment must be made in accordance with IDS rules. G.S. 15A-269(c).

The materiality requirement for appointment of counsel is identical to that required to grant the motion. *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355; see Section V.B.2 below (discussing materiality required to grant the motion). A defendant’s conclusory statement that the evidence is material is insufficient to warrant an appointment of counsel. *State v. Turner*, ___ N.C. App. ___, 768 S.E.2d 356, 359 (2015); *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 356.

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*, ___ N.C. App. at ___, 761 S.E.2d at 921 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*, ___ N.C. App. ___, 765 S.E.2d 74, 77 (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*, ___ N.C. App. at ___, 768 S.E.2d at 358 (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, ___ N.C. App. at ___, 765 S.E.2d at 77 (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. Turner*, ___ N.C. App. ___, 768 S.E.2d 356, 359 (2015); *see also Floyd*, ___ N.C. App. at ___, 765 S.E.2d at 76 (same as to the materiality requirement).
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 its disclosure to the defense would result in a different outcome in the jury's deliberation." *Floyd*, ___ N.C. App. ___, 765 S.E.2d at 76 (quoting *State v. Hewson*, 220 N.C. App. 117, 122 (2012) (emphasis removed)); *see generally* *United States v. Bagley*, 473 U.S. 667, 682 (1985) (in the discovery context, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). In this way the requirement of materiality may subsume 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. And under this definition, evidence may be relevant but not rise to the level of being material. *Floyd*, ___ N.C. App. at ___, 765 S.E.2d at 76.

The materiality requirement for granting the motion is identical to that required for appointment of counsel for indigent defendants who file testing motions. *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355; *see* Section IV above (discussing materiality required for appointment of counsel).

A conclusory statement that the testing is material is insufficient to carry the defendant's burden. *Turner*, ___ N.C. App. at ___, 768 S.E.2d

at 359 (the defendant's conclusory statement was insufficient to carry his burden under G.S. 15A-269); *State v. Foster*, 222 N.C. App. 199, 205 (2012); *see also Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 356 (conclusory statement did not establish materiality for appointment of counsel under the statute).

Sample cases assessing materiality include:

State v. Floyd, ___ N.C. App. ___, 765 S.E.2d 74 (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."** 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. *Collins*, ___ N.C. App. at ___, 761 S.E.2d

at 922. “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 require the trial court to make findings of fact. *Floyd*, ___ N.C. App. at ___, 765 S.E.2d at 76. 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.*
- 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). 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 require the judge to make findings of fact. *State v. Gardner*, ___ N.C. App. ___, 742 S.E.2d 352, 356-57 (2013) (the trial court did not err by failing to make specific findings of fact when denying the defendant’s request for post-conviction DNA testing).
- D. **Costs of Testing.** The statutory provisions regarding costs are inconsistent. G.S. 15A-270(b) provides that if the test results are unfavorable and the defendant is not indigent, the court must assess costs to the defendant. However, G.S. 15A-269(d) provides that the defendant bears the cost any DNA testing that is

ordered unless the defendant is indigent. The latter provision suggests that non-indigent defendants bear the cost of testing, regardless of whether the results are favorable or unfavorable; the former suggests that such a defendant bears the cost of testing only when the results are unfavorable.

- 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*, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 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). 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, which triggers its obligation to undertake these actions.
- 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 are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 354.
- 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).