Post-Conviction DNA Testing: Selected Issues

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Introduction. Post-conviction DNA testing is a powerful tool for the exoneration of the wrongly convicted. According to the Innocence Project, to date there have been 362 exonerations based on DNA testing nationwide.[1] Prominent DNA exonerations in North Carolina include Ronald Cotton, exonerated of rape after 10 years,[2] and Daryl Hunt, exonerated of rape and murder after nearly 20 years.[3]

The Supreme Court of the United States has ruled that there is no federal due process right to post-conviction DNA testing, at least when there are adequate avenues for post-conviction relief under state law. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009). However, recognizing the importance of DNA testing, all 50 states and the federal government have enacted procedures governing post-conviction DNA testing,[4] though the procedures vary considerably.[5] In 2001, the General Assembly enacted G.S. 15A-269 ("Request for postconviction DNA testing") and G.S. 15A-270 ("Post-test procedures") to provide a statutory framework for post-conviction DNA testing in North Carolina.

Statutory summary. Under G.S. 15A-269, a defendant is entitled to post-conviction DNA testing if:

- The evidence is "material to the defendant's defense," meaning that "[i]f the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant"
- The evidence was not DNA tested previously, or significantly better tests are now available
- The defendant has signed a sworn affidavit of innocence

An indigent defendant is entitled to the appointment of counsel in connection with a motion for testing "upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction."

The statute also contains an inventory requirement: "Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that 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 petitioner, and the court."

If a court orders testing, G.S. 15A-270 governs what happens when the testing has been completed. In brief, the judge must hold a hearing and either dismiss the motion (if the results are unfavorable to the

[1] https://www.innocenceproject.org/dna-exonerations-in-the-united-states/
[2] https://www.innocenceproject.org/cases/ronald-cotton/
[3] https://en.wikipedia.org/wiki/Darryl_Hunt
[4] https://www.innocenceproject.org/access-post-conviction-dna-testing/; https://law.scu.edu/northern-california-innocence-project/post-conviction-dna-testing-laws-enacted-in-all-50-states/.
[5] http://www.ncsl.org/Documents/cj/PostConvictionDNATesting.pdf (noting that some states restrict testing to defendants convicted of certain crimes; that states have different standards of proof for when testing should be allowed; that states take different approaches to guilty plea cases; and so on).

defendant) or "enter any order that serves the interests of justice" (if the results are favorable to the defendant).

Key issues. Although the statute has been in place for 17 years and the appellate division has decided dozens of cases interpreting it, several key issues remain unresolved or only partly resolved.

The materiality standard. The issue that is the focus of most litigation under the statute is materiality. The statute requires materiality, *see* G.S. 15A-269(a)(1), and effectively defines materiality to mean that "[i]f the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant," G.S. 15A-269(b)(2).

In *State v. Lane*, 370 N.C. 508 (2018), the court held that this standard is the same as the materiality standard of *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, evidence is material if there is a reasonable probability that the evidence would have changed the outcome of the proceeding.

Applying the *Brady* standard to post-conviction DNA testing is difficult. Normally, when a court is considering an alleged *Brady* violation, it is clear how significant the undisclosed evidence is and how it fits together with other evidence in the case. For example, if the state fails to disclose that an eyewitness identified someone other than the defendant as the perpetrator of a crime, a court would determine whether that evidence is material by asking whether it is reasonably likely that the jury would have acquitted the defendant if presented with the eyewitness's testimony. In doing so, the court would be able to review the eyewitness's statement and, if necessary, hear his or her testimony.

Deciding whether untested DNA evidence is material is inherently more challenging. Because the decision is made before the test results are known, it is akin to deciding whether the state's failure to disclose a witness is material without knowing what the witness would say.

There are two ways to conceptualize the materiality standard as it applies to untested DNA evidence:

1. *Evidence is material if the defendant can show that there is a reasonable likelihood that the outcome of a new trial would be different if the results of the test turn out to be favorable to the defendant.* A court applying this standard would assume arguendo that the results will be favorable and would ask whether those favorable results would be reasonably likely to change the outcome of the case. The answer may be no, for example, when a defendant requests testing of evidence that is not clearly indicative of the identity of the perpetrator,[6] or when other evidence of a defendant's guilt is overwhelming.
2. *Evidence is material if a defendant can show both (a) that it is reasonably likely that the results of the test will be favorable, and (b) that favorable results would create a reasonable likelihood that the outcome of a new trial would be different.* A court applying this standard would not assume arguendo that the results will be favorable, but rather would require the defendant to show that they are reasonably likely to be favorable before moving on to ask whether favorable results would be reasonably likely to change the outcome of the case.[7]

[6] For example, in *State v. Lane*, 370 N.C. 508 (2018), the defendant requested testing of several hairs found on or near the victim's body. But the body had been dumped in a creek and remained there for several days, so all sorts of things were on or near the body that may not have come from the murderer.

[7] *See* Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Posconviction DNA Testing Statutes and Legislative Recommendations*, 59 Drake L. Rev. 799 (2011) (describing these competing interpretations).

North Carolina's appellate courts have not clearly endorsed one approach or the other.[8]

The post-conviction DNA statutes in most other states contain some form of a materiality requirement. Most other states have adopted the first interpretation set forth above.[9] Commentators also generally support the first approach. They argue that it is unreasonable to expect a defendant to establish, before the evidence has been tested, that test results are reasonably likely to be favorable:

> [The second approach described above] makes it very difficult to win a postconviction testing motion when there has already been a determination . . . that the defendant was guilty beyond a reasonable doubt. . . . [U]nder [this] analysis, the only inmates who would be able to meet the requirement would be those inmates who do not need postconviction DNA testing [because] . . . the judge is already convinced of innocence regardless of the testing.[10]

However, one could argue that the second approach set forth above is more consistent with the language of North Carolina's statute, which asks whether "testing" would be reasonably likely to change the outcome of the case, not whether a favorable test result would do so. Furthermore, the second approach may be more effective at screening out frivolous motions where there is no doubt that the defendant was the perpetrator. Ultimately, choosing an interpretation requires balancing the competing interests of accuracy and finality.[11]

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[8] In *State v. Lane*, 370 N.C. 508 (2018), the court made two statements that could be interpreted as endorsing the first approach. At one point, the court wrote that "even if the samples were tested and produced a 'favorable' result to defendant . . . it is not reasonably likely that such a finding would change the verdict." At another juncture, the court stated that "there is not a reasonable probability that even a 'favorable' result . . . would result in 'a more favorable outcome for defendant' in a new trial." These passages may suggest that a court should assume that test results will be favorable when determining materiality. However, it is also possible that the court was merely emphasizing that the defendant would not have been entitled to relief even under the most generous possible assumptions.

[9] *See, e.g.,* 42 Pa. Stat. § 9543.1 (defendant must establish a prima facie case that testing, "assuming exculpatory results," would establish innocence); Or. Stat. 138.692(4)(d) (court shall order testing if, in part, "There is a reasonable possibility, assuming exculpatory results, that the testing would lead to a finding that the person is actually innocent"); *Richardson v. Superior Court*, 77 Cal. Rptr. 3d 226 (Cal. 2008) (analyzing whether testing is required by asking whether there is a reasonable probability of a different outcome "assuming a DNA test result favorable to the defendant"); *Pegues v. State*, 518 S.W.2d 529 (Tex. Ct. App. 2017) (although the evidence of the defendant's guilt was extremely strong and it appeared unlikely that testing would lead to favorable results, "[t]he issue is not whether the State presented ample evidence of the defendant's guilt but, instead, whether exculpatory DNA test results—excluding the defendant as the source of the material—would establish . . . that the defendant was not the assailant and, therefore, would not have been convicted"); *State v. Crumpton*, 332 P.3d 448 (Wash. 2014) (agreeing with the defendant that "in deciding whether to grant a motion for postconviction DNA testing, the court should presume that the DNA results would be favorable to the defendant"); *Lambert v. State*, __ P.3d __, 2018 WL 6005629 (Alaska Ct. App. Nov. 16, 2018) ("[T]he defendant need not show any likelihood that the DNA results will actually be favorable to his claim of innocence. Instead, he need only show that, assuming the results are as favorable as the defendant has shown they could be, these favorable results would raise 'a reasonable probability' that the outcome of the defendant's trial would be different."). *But cf. Johnson v. State*, 157 S.W.3d 151 (Ark. 2004) ("We do not believe . . . that testing should be authorized regardless of the slight chance it may yield a favorable result.").

[10] Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Posconviction DNA Testing Statutes and Legislative Recommendations*, 59 Drake L. Rev. 799 (2011).

[11] *See generally District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009) (noting that "[t]he availability of technologies not available at trial cannot mean that every criminal conviction . . . is suddenly in

Whatever the proper interpretation of the materiality standard, to meet it a defendant must do more than merely assert that the evidence is material. *See, e.g., State v. Turner*, 239 N.C. App. 450 (N.C. Ct. App. 2015) (affirming a superior court judge's denial of counsel and denial of post-conviction DNA testing of a rape kit based on a lack of materiality; the defendant's motion was insufficient where it stated, without elucidation, that "the requested DNA testing is material to defendant[']s defense"); *State v. Gardner*, 227 N.C. App. 364 (2013) (defendant convicted of statutory rape failed to show materiality where he filed a fill-in-the-blanks motion asserting only that testing rape kits, a teddy bear, clothing, and other items "is material to the defendant's defense," with no explanation of what the state's evidence at trial was or how the evidence in question was pertinent to the case). Presumably, some explanation of how the evidence fits into the case and would be interpreted by a finder of fact is required. However, the cases to date have not clearly stated what a defendant must do to establish materiality. For further discussion of this point, see the last paragraph under *Standard for appointment of counsel*, below.

Application of the materiality standard to guilty plea cases. The state has sometimes argued that it is impossible for a defendant to establish materiality in a case in which the defendant pled guilty. *See, e.g., State v. Cox*, 245 N.C. App. 307 (2016) (noting the state's argument but declining to address it). The appellate courts came close to endorsing that view in *State v. Sayre*, __ N.C. App. __, 803 S.E.2d 699 (2017) (unpublished), *aff'd per curiam*, __ N.C. __, 818 S.E.2d 101 (2018). *Sayre* was a sexual assault case. The defendant pled guilty and later sought to locate and test several items of evidence. A superior court judge denied the motion for lack of materiality, and the court of appeals agreed, despite the defendant's claim that "the results would prove that the Defendant is not the perpetrator of the crimes." The court of appeals stated in part that "by . . . pleading guilty, defendant presented no 'defense'" to which the testing could be material.

However, the court of appeals later pulled back from this suggestion. In *State v. Randall*, __ N.C. App. __, 817 S.E.2d 219 (2018), the court stated:

> Defendant pleaded guilty. We acknowledge the inherent difficulty in establishing . . . materiality . . . for a defendant who pleaded guilty: a defendant must show that there is a reasonable probability that DNA testing would have produced a different outcome; for example, that Defendant would not have pleaded guilty *and otherwise would not have been found guilty*. However, we do not believe that the statute was intended to completely forestall the filing of a such a motion where a defendant did, in fact, enter a plea of guilty. The trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is "material."

Similarly, in *State v. Millhouse*, __ N.C. App. __, 820 S.E.2d 128 (2018) (unpublished), the court noted that *Sayre* addresses materiality in the context of a defendant who pleads guilty, but does not fully "articulate[] how the materiality standard applies." The *Millhouse* court reasoned that "a defendant who has pleaded guilty bears an increased burden to show materiality" compared to one who was convicted

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doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice").

at trial, but is not completely barred from establishing materiality. *See also State v. Tilghman*, __ N.C. App. __, __ S.E.2d __, 2018 WL 4700630 (Oct. 2, 2018) (similar).

Completely prohibiting post-conviction DNA testing in guilty plea cases may be undesirable from a policy perspective given that more than 10 percent of DNA exonerations involve guilty pleas.[12]

Standard for appointment of counsel. Under G.S. 15A-269(c):

> In accordance with rules adopted by the Office of Indigent Defense Services,[13] the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with rules adopted by the Office of Indigent Defense Services upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

Although one could read the first sentence of subsection (c) to require the appointment of counsel for *any* indigent defendant who files under the statute, the court of appeals has held that the two sentences should be read together and that appointment is required only for an indigent defendant who makes a sufficient showing of materiality. *See State v. Gardner*, 227 N.C. App. 364 (2013).

As to the requisite showing of materiality, the statute's use of the phrase "*may be* material" (emphasis supplied) might be interpreted to create a lower hurdle for appointment of counsel than the showing of materiality that is required before a court must order testing. Such a reading would be rational, in that it would allow a relatively large number of defendants access to an attorney to help develop and present their claims, yet would limit testing to those cases that appeared most promising.[14] However, the court of appeals seems to have rejected that interpretation. *See id.* ("[W]e reject [d]efendant's contention that the threshold materiality requirement for the appointment of counsel . . . is less demanding than that required for actually ordering DNA testing . . . and hold that, in order to support the appointment of counsel . . . a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy [G.S.] 15A–269(a)(1)).". At the same time, the *Gardner* opinion also states that counsel will need to "demonstrat[e] that the defendant's allegation of materiality is factually and legally valid," suggesting that there will still be work for counsel to do and that the threshold for ordering testing may in some regard be different than that for the appointment of counsel.

Many appellate cases have found appointment of counsel to be unnecessary due to insufficient allegations of materiality. *See, e.g., State v. Cox*, 245 N.C. App. 307 (2016) ("conclusory and incomplete" statement of materiality insufficient to warrant appointment of counsel); *State v. Romero*, 240 N.C. App. 90 (2015) (unpublished) (rape defendant's assertion that testing of blanket, underwear, and other items was necessary "to prove the fact the defendant [was] NOT the perpetrator of the crime" not sufficient

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[12] https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (stating that 40 out of 362 DNA exonerations to date involved guilty pleas)

[13] As of December 2018, IDS has not adopted any rules regarding the appointment of counsel in these cases.

[14] One unpublished case along these lines *State v. Ovando*, 241 N.C. App. 176 (2015) (unpublished). The court there seems to have suggested that a presumption of favorability applies at the appointment of counsel stage, but not when determining whether testing should be required: "Post-conviction DNA testing is permitted only if the defendant shows that the biological evidence to be tested *is material to his defense*. Similarly, appointment of counsel is permitted only if the defendant shows that the allegations in his motion, *if true, would be material to his defense.*" (Emphasis supplied).

to require appointment of counsel); *State v. McPhaul*, __ N.C. App. __, 812 S.E.2d 728 (2018) (unpublished) (similar); *State v. Turner*, 239 N.C. App. 450 (2015) (similar).

The inventory requirement. One of the most perplexing provisions of G.S. 15A-269 is the inventory provision in subsection (f): "Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that 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 petitioner, and the court." The provision is confusing because a "custodial agency" is not a party to the criminal case and so need not be served with a motion for post-conviction DNA testing. It is unclear whether the General Assembly intended for the defendant to provide a copy of the motion to the relevant agency or agencies, or whether the court or the state ought to do so. *See State v. Tilghman,* __ N.C. App. __, __ S.E.2d __, 2018 WL 4700630 (Oct. 2, 2018) ("The statute is silent as to whether a defendant or the trial court bears the burden of serving the motion for inventory on the custodial agency."). *Cf. State v. Millhouse*, __ N.C. App. __, 820 S.E.2d 128 (2018) (unpublished) (noting that "[d]efendant argues that under [G.S.] 15A-269(f), upon the filing of his motion, there was a duty on the trial court to serve the motion on custodial agencies and receive the items from those agencies," but declining to address the issue). One appellate opinion seems to suggest that the burden ought not rest on the defendant, suggesting that the court or the state may wish to alert custodial agencies when relevant motions are filed. *See State v. Doisey*, 240 N.C. App. 441 (2015) ("[A] request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence . . . . Thus, a defendant who requests DNA testing under [G.S.] 15A–269 need not make any additional written request for an inventory of biological evidence. . . . [A] request for DNA testing triggers an automatic requirement for the custodial agency to prepare an inventory, with no further request or action by a defendant needed.").

Another question regarding the inventory requirement is what is subject to the inventory. The statute requires that the agency "inventory the evidence pertaining to [the] case," which could be read to encompass all the evidence in the case, including things like photographs, phone records, and witness statements. However, the statute also references "the items of physical evidence," and it is physical evidence that is most pertinent to possible DNA testing. An agency unsure of the scope of the inventory may wish to seek clarification from a court.

Finally, it is worth noting that a defendant may also request an inventory of relevant biological evidence from a custodial agency under G.S. 15A-268(a7). The court of appeals has required strict compliance: the defendant must request an "inventory," not merely ask that an agency locate and preserve evidence, and the request must be made to the agency, not the court. *See State v. Tilghman,* __ N.C. App. __, __ S.E.2d __, 2018 WL 4700630 (Oct. 2, 2018).