



## Post-Conviction DNA Testing Heats Up

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**Categories :** [Evidence](#), [Procedure](#), [Uncategorized](#)

**Tagged as :** [DNA](#), [postconviction](#)

**Date :** June 5, 2009

*Editor's note: A previous post concerning a United States Supreme Court case about post-conviction DNA testing appears [here](#).*

Recently, I've been getting a lot of calls about requests for post-conviction DNA testing. Since there seems to be a bit of confusion about how these requests should be made and handled, I thought it might be helpful to set out the relevant procedures. I've tried to address all of the questions that folks have asked me about but if I've missed something, let me know.

**Generally.** G.S. 15A-269, -270, and -270.1 set out the procedures for a defendant's post-conviction request for DNA testing of biological evidence. Requests for post-conviction DNA testing should be made pursuant to these provisions, not the motion for appropriate relief procedures.

**Initiation of the proceeding.** The proceeding begins when the defendant makes a motion, in the trial court that entered judgment, for DNA testing of biological evidence.

**Counsel.** The court must appoint counsel for indigent defendants. The statute does not indicate when counsel should be appointed. The most plausible options seem to be: (1) appoint counsel only after testing is ordered; or (2) appoint counsel upon the filing of the motion. If the court chooses the second option, it may wish to have counsel file an amended motion so that the defendant's arguments for testing are asserted as clearly as possible.

**Evaluating the motion.** The statute does not say whether a hearing is required on the motion; the statute only mentions post-test hearings, discussed below. The statute says that the court must grant the defendant's motion if:

- The evidence is material;
- The evidence is related to the investigation or prosecution that resulted in the judgment;
- The evidence either was not previously DNA tested or, if it was tested, the requested test would provide 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;
- 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*
- The defendant has signed a sworn affidavit of innocence.

*State v. Brown*, 170 N.C. App. 601 (2005), suggests that 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. *Brown* explained that the statute provides for the testing of biological evidence, not for the testing of any evidence to establish the lack of biological material.

**Time for and method of testing.** If testing is ordered, it must be done as soon as practicable. The statute does not state whether the testing must be done by the SBI or whether the testing may be done at some other facility of the defendant's choosing. This omission is surprising given that the related provision in G.S. 15A-267, dealing with pretrial defense motions for DNA testing of biological material, expressly identifies the SBI as the entity to perform the DNA testing and DNA database comparisons.

**"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.

**Post-test hearing.** Upon receiving the test results, the court must hold a hearing to determine if the results are unfavorable or favorable to the defendant. If the results are unfavorable to the defendant, the court must dismiss the motion. 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, resentsences the defendant, or grants a new trial.

**Costs of testing.** The statutory provisions regarding costs are inconsistent. G.S. 15A-270 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 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.

**Appeal.** G.S. 15A-270.1 provides that a defendant may appeal an order denying a motion for testing.