### STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

### XXXX COURT DIVISION

### COUNTY OF XXXX 15 CRS 000000

### STATE OF NORTH CAROLINA )

### )

### v. ) MOTION FOR PRESERVATION

### ) OF ANY AND ALL EVIDENCE

### XXXX, )

### )

### Defendant. )

### NOW COMES the Defendant, by and through the undersigned counsel, XXXX, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article 1 §§ 19 and 23 of the North Carolina Constitution; Article 48 of the North Carolina General Statutes; N.C. Gen. Stat. §§ 15A-501(6), 15A-903, 15A-268, 15A-1415(f); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and its progeny, *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed. 2d 281 (1988) and its progeny, and *State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008) and its progeny, and hereby requests that this Honorable Court enter an Order commanding all law enforcement officers, employees, agents and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters to preserve and retain any and all evidence obtained in the investigation of these matters.

### Such evidence shall include, but is not limited to, all files, notes, audio or video recordings, and any and all physical evidence, including but not limited to, hair, fibers, other trace evidence, fingerprints and other latent evidence, biological specimens including the body of any decedent, clothing, firearms and projectiles, other weapons, vehicles, suspected controlled substances and packaging, computer or other digital evidence, and any and all other physical evidence that has been or will be collected in this case.

### The Defendant further requests that this Honorable Court order all law enforcement agencies to release to the prosecution for disclosure to the defense all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. §15A-501(6). In support of the foregoing Motion, the Defendant states unto the Court as follows:

### The materials the Defendant seeks to have preserved are discoverable under Article 48 of the North Carolina General Statutes.

### At the filing of this motion, the defense has not been provided with discovery, as the Defendant has not been indicted for the offenses for which he has been arrested.

### N.C. Gen. Stat. § 15A-501(6) states:

### Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer…must make available to the State on a timely basis all materials and information acquired in the course of all felony investigations. This responsibility is a continuing and affirmative duty.

### N.C. Gen. Stat. § 15A-903(a)(1) states:

### Upon motion of the defendant, the court must…make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term “file” includes the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

### In order for the Defendant to be afforded his statutory right to inspect and copy all evidence under N.C. Gen. Stat. § 15A-903(a)(1), the evidence must be available to the Defendant for inspection.

### N.C. Gen. Stat. § 15A-268 states:

[A] custodial agency shall preserve any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution. Evidence shall be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence…The duty to preserve may not be waived knowingly and voluntarily by a defendant, without a court proceeding.

1. N.C .Gen. Stat. § 15A-1415(f), in addressing discovery requirements in post-conviction proceedings in superior court, states in part:

…The State, to the extent allowed by law, shall make available to the defendant’s counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the Defendant…

1. Upon information and belief, the State may seek forensic analysis/testing of physical evidence. If it is reasonable to expect thatsuch testing would entirely consume an item of evidence or consume enough of the evidence so as to preclude additional testing, prior to such testing being conducted, any laboratory or expert conducting such testing should notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence. Upon such notification, the laboratory or expert shall not conduct any further testing of said evidence until receipt of an Order from the Court allowing further testing. Within 30 days of receiving such notification, the prosecution and the defense shall submit proposals for how such testing should be conducted such that the Defendant’s right to view and test such evidence, under the case law cited in the preamble to this Motion, is preserved. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

### In order to ensure all evidence is available and not inadvertently destroyed, the Court should enter an Order requiring law enforcement to preserve any and all evidence associated with these matters.

### The interests of justice and the rights of the Defendant require the preservation of all evidence connected with these matters and, as such, the Court should enter an Order requiring that any and all evidence in these matters be preserved.

### The defense hereby places the State on notice that the defense is demanding the preservation of any and all evidence in these matters in order that the State will have notice of the defense’s demand and will not be able to assert the doctrine of “bad faith,”[[1]](#footnote-1) in the event any unwarranted loss or destruction of documentation or evidence occurs.

### WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

### That the Court enter an Order commanding all law enforcement agencies, officers, employees, agents and/or attorneys including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters to preserve and retain any and all evidence in this case; and

### That the Court enter an Order commanding the prosecution to provide all law enforcement agencies, officers, employees, agents, and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters with any orders directing the preservation and retention of any and all evidence in this case; and

### That the Court order any laboratory or expert conducting any testing on any evidence, which would consume or preclude additional testing, to notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence using the following contact information;

**Defense Attorney (name)**

**Mailing Address or Email address**

**Prosecutor (name)**

**Mailing Address or Email address**

Upon such notification, the laboratory or expert shall not conduct any further testing of said evidence until receipt of an Order from the Court allowing further testing.

### That the Court order that within 30 days of receiving such notification as set forth in paragraph three (3) above, the prosecution and the defense shall be required to submit proposals for how such testing should be conducted. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

### [The State Crime Lab’s legal counsel can be served by mail using the following address:

### NC State Crime Laboratory, Lab Legal Counsel

### 121 East Tryon Road

### Raleigh NC 27603]

### That the Court order that within 30 days of receiving the proposals set forth in paragraph four (4) above, any agency that wishes to be heard about the proposals shall submit any comments to the Court with service to the prosecution and defense;

### That the Court order that upon receipt of the comments referenced in paragraph five (5) above, the Court will hold a hearing to determine what if any further Orders are necessary to facilitate forensic testing. The parties shall ensure that the testing laboratory or expert is notified of the hearing;

### That the Court order that any destruction, total consumption (or consumption that would preclude additional testing), or loss of any evidence (regardless of the intent or nature of the conduct resulting in the destruction, total consumption, or loss of any evidence), may be deemed a violation of the Court’s order to preserve any and all evidence, and such conduct may warrant at least an instruction to any jury, impaneled to try these matters, on the spoliation of evidence, if not dismissal of the charges.

### For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

### This the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Attorney Name

### Bar Number

### Address

### The undersigned attorney certifies that this motion and proposed order have been served on the State Crime Lab’s legal counsel [or lab director if a lab other than the State Crime Lab is to perform the testing] and

### [The State Crime Lab’s legal counsel can be served by mailing the motion and proposed order to:

### NC State Crime Laboratory, Lab Legal Counsel

### 121 East Tryon Road

### Raleigh NC 27603]

### (Check any that apply after speaking with NCSCL Lab Legal Counsel.)

### \_\_\_ The State Crime Lab received a copy of the motion and proposed order.

### \_\_\_ The State Crime Lab wishes to be heard prior to the entry of any order.

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Signed and certified as true

### STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

### XXXX COURT DIVISION

### COUNTY OF XXXX 15 CRS 000000

### STATE OF NORTH CAROLINA )

### ) ORDER ALLOWING

### v. ) MOTION FOR PRESERVATION

### ) OF ANY AND ALL EVIDENCE

### XXXX, )

### Defendant. )

### THIS MATTER having come before the undersigned Judge, presiding at the \_\_\_\_\_\_\_\_\_\_, session of Criminal XXXX Court for the County of XXXX, pursuant to the Defendant’s *Motion for Preservation of Any and All Evidence*, which was filed on \_\_\_\_\_\_\_\_\_;

### AND THE COURT, finding that at the time this matter was presented to the Court, the State of North Carolina was represented by Assistant District Attorney \_\_\_\_\_\_\_\_\_\_\_, and the Defendant was represented by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and the North Carolina State Crime Laboratory was served with the Motion For Preservation of Any and All Evidence and noted that there was no objection to the Order;

### AND THE COURT, after determining that it has jurisdiction over the subject matter and the parties, after considering the Defendant’s Motion, and after noting that the prosecution has no objection to granting of the Motion, finds that the Defendant’s *Motion for Preservation of Any and All Evidence* should be allowed;

### IT IS THEREFORE ORDERED that

### All law enforcement officers, employees, agents, and attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters shall preserve and retain any and all evidence in this case;

### The prosecution shall provide all law enforcement agencies, officers, employees, agents, and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters with any orders directing the preservation and retention of any and all evidence in this case;

### Any laboratory or expert conducting any testing on any evidence, which would result in consuming or precluding additional testing, shall notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence using the following contact information;

**Defense Attorney (name)**

**Mailing Address or Email address**

**Prosecutor (name)**

**Mailing Address or Email address**

Upon such notification, the laboratory or expert shall not conduct any further testing of said evidence until receipt of an Order from the Court allowing further testing.

### Within 30 days of receiving such notification as set forth in paragraph three (3) above, the prosecution and the defense shall be required to submit proposals for how such testing should be conducted. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

### [The State Crime Lab’s legal counsel can be served by mail using the following address:

### NC State Crime Laboratory, Lab Legal Counsel

### 121 East Tryon Road

### Raleigh NC 27603]

### Within 30 days of receiving the proposals set forth in paragraph four (4), any agency that wishes to be heard about the proposals shall submit any comments to the Court with service to the prosecution and defense;

### Upon receipt of the comments referenced in paragraph five (5) the Court will hold a hearing to determine what if any further Orders are necessary to facilitate forensic testing. The parties shall ensure that the testing laboratory or expert is notified of the hearing;

### Any destruction, total consumption (or consumption that would preclude additional testing), or loss of any evidence (regardless of the intent or nature of the conduct resulting in the destruction, total consumption, or loss of any evidence), may be deemed a violation of the Court’s order to preserve any and all evidence, and such conduct may warrant at least an instruction to any jury, impaneled to try these matters, on the spoliation of evidence, if not dismissal of the charges.

### This the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

### \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Presiding Judge

### Appendix:

### The parties may want to consider using one of more of these options if testing would consume the entire sample:

### Allow the Defendant (i.e., defense counsel and defense expert(s)) to view the item of evidence and photograph prior to testing. The item shall be viewed and photographed in accordance with any required procedures and policies of the agency in possession of the items at the time of inspection to ensure the integrity of the item(s);

### Request that the lab analyst or expert photograph the item of evidence prior to testing;

### Allow the Defendant’s expert to observe any testing that is conducted (this option is objectionable to the State Crime Laboratory);

### Send the item to an agreed-upon independent lab for testing;

### Allow the State Crime Laboratory to consume portions of the evidence or the evidence items entirely if such consumption is necessary to complete the forensic testing.

1. See ***Arizona v. Youngblood,*** 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). [↑](#footnote-ref-1)