An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-829

Filed: 7 August 2018

Randolph County, No. 01 CRS 56902

STATE OF NORTH CAROLINA

v.

EDWARD TYRONE CHEEK

Appeal by Defendant from order entered 22 February 2017 by Judge Vance Bradford Long in Superior Court, Randolph County. Heard in the Court of Appeals 4 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

McGEE, Judge.

Edward Tyrone Cheek ("Defendant") was convicted by a jury of first-degree murder on 18 March 2004. The trial court subsequently sentenced Defendant to life imprisonment without parole. Defendant exhausted his right to appeal after this Court affirmed the trial court's ruling and our Supreme Court declined to exercise its

discretionary review. *State v. Cheek*, 170 N.C. App. 437, 613 S.E.2d 752 (unpublished) *disc. review denied* 359 N.C. 854, 619 S.E.2d 851 (2005). Defendant filed a *pro se* motion to locate and preserve evidence and for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2015) on 3 August 2016. The trial court entered an order denying Defendant's motion on 22 February 2017. Defendant appeals.

I. Factual and Prodedual History

Defendant was indicted on 4 March 2002 for the murder of Willie Dee Tinnin, Jr. ("Tinnin"). Defendant shot and killed Tinnin in front of several witnesses during an altercation. Evidence presented at trial indicated that Defendant and Tinnin each had a gun at the beginning of the altercation, but that Tinnin placed his gun in his car after a witness urged the two men to calm down. Defendant confessed to shooting and killing Tinnin, despite knowing that Tinnin had placed his gun in the car, but nonetheless claimed that he feared for his life. A jury found Defendant guilty of first-degree murder and Defendant was sentenced to life imprisonment without parole. Defendant appealed, and this Court found no error. *Cheek*, 170 N.C. App. 437, 613 S.E.2d 752. For a more thorough statement of the facts giving rise to Defendant's conviction, refer to that opinion.

Defendant filed a *pro se* motion to locate and preserve evidence pursuant to N.C. Gen. Stat. § 15A-269(f) (2015) and for DNA testing pursuant to N.C.G.S. § 15A-

269(a) on 3 August 2016. Defendant requested DNA testing of Tinnin's gun, Defendant's gun, bullets removed from Tinnin's body, shell casings, and two pieces of clothing. Defendant claimed that the items were either not previously subjected to testing or could be subjected to more accurate testing. The trial court, without a hearing, denied Defendant's motion for DNA testing, but ordered that all evidence held by the police department and clerk of court be preserved. Defendant filed a *pro se* notice of appeal on 9 March 2017 pursuant to N.C. Gen. Stat. § 15A-270.1 (2015).

Counsel appointed to represent Defendant on appeal has filed a brief pursuant to *Anders v. California*, 368 U.S. 738, 18 L. Ed. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), after being unable to identify any issue with sufficient merit so as to make a non-frivolous argument for relief and has asked this Court to review the record for any possible prejudicial error. Counsel has shown to the satisfaction of this Court that she has complied with the requirements of *Anders* and *Kinch*, by advising Defendant of his right to file written arguments with this Court and by providing him with the documents necessary for him to do so. Defendant has not filed any written arguments on his own behalf with this Court and a reasonable time in which he could have done so has passed. Defendant's notice of appeal was not timely filed and, therefore, failed to fully comply with the requirements of N.C. R. App. P. 4. Defendant, however, has filed an alternative petition for writ of

certiorari acknowledging the deficiencies. In the interest of justice, we hereby allow his petition.

II. Analysis

The State argues that *Anders* procedures do not apply to post-conviction proceedings. For the reasons stated in *State v. Velasquez-Cardenas*, ___ N.C. App. ___, ___ S.E.2d ___ (2018) (COA17-422), the State's argument is without merit. "[W]e hold that *Anders* procedures apply to appeals pursuant to N.C.G.S. § 15A–270.1." *Id.* at ___, ___ S.E.2d at ___.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom or whether the appeal is wholly frivolous. Based on our review, we agree with Defendant's counsel that Defendant's appeal is wholly frivolous.

A defendant seeking relief under N.C. Gen. Stat. § 15A-269 must demonstrate that the evidence in question is "material to the defendant's defense." N.C. Gen. Stat. § 15A–269(a)(1) (2015). A defendant bears the burden of showing materiality. *State v. Gardner*, ___ N.C. App. ___, ___, 742 S.E.2d 352, 356 (2013). In *State v. Cox*, this Court held that,

> [d]efendant's burden to show materiality requires more than the conclusory statement that [t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense[,] . . . . the defendant must provide specific reasons that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or

> accomplice or that there is a reasonable probability of contradicting the previous test results.

245 N.C. App. 307, 312, 781 S.E.2d 865, 868-69 (internal citations and quotations omitted). "Favorable evidence is *material* if there is a reasonable probability that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Hewson*, 220 N.C. App. 117, 122, 725 S.E.2d 53, 56 (2012) (emphasis in original) (citations and internal quotations omitted).

In Defendant's motion for post-conviction DNA testing, he states that the evidence should be tested for DNA because "the results would prove that [] Defendant was not the perpetrator of the crime [he] allegedly committed" and that DNA testing would "prove that [] Defendant re-acted in self[-]defense, and in fact, . . . would prove beyond a reasonable doubt that [] Defendant had been attacked prior to his [d]efense." Defendant provides no explanation as to how further DNA testing would exonerate him in light of the evidence presented at trial. Accordingly, Defendant has failed to show that any DNA testing would be material to his defense. Therefore, we conclude Defendant's appeal is wholly frivolous.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).