NO. 101025-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICK ANTHONY CLOUD,

Appellant.

PETITION FOR REVIEW FROM

No. 55709-6-II

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517

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I. INTRODUCTION

Petitioner Cloud's twin sister and her date Shacorry Lilly identified Cloud as the person who beat, robbed, and stabbed Lilly during an outing with the couple at a public park. Cloud pled guilty in 2016, stating that he had "intentionally assaulted" Lilly "with a deadly weapon—a pocketknife." The knife was never recovered. Several years later, Cloud demanded to test the knife for DNA evidence, making no effort to explain what this test could show if there were a knife to test.

Cloud admits that the court of appeals' decision turns solely on the fact that his single-sentence motion made no attempt to show that DNA evidence would demonstrate innocence on a more probable than not basis. However, he seeks a purely advisory opinion on a matter that is no case or controversy here. He fails to demonstrate any conflict with case law. The petition must be denied.

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II. RESTATEMENT OF THE ISSUES

A. Although neither the superior court nor the court of appeals discussed this question, the Petitioner asks this Court to answer whether post-conviction DNA motions are restricted to convictions that result from a trial. May this Court accept review of a question that is no part of the decision for which review is requested, where review cannot alter the outcome, and therefore solely for the purpose of issuing an advisory opinion on a nonjusticiable matter?

B. The court of appeals' opinion affirmed the denial of the motion for DNA testing, finding that the single-sentence motion did not explain or even mention why DNA evidence is material to the identity of the perpetrator and, therefore, does not satisfy the procedural and substantive requisites of the RCW 10.73.170. Has the petitioner demonstrated that this commonsense decision conflicts with any case law?

III. STATEMENT OF THE CASE

On August 19, 2015, the Defendant/Petitioner Patrick Anthony Cloud beat, stabbed, and robbed Shacorry Lilly in Manitou Park and then drove off in the victim's car. CP 4-5, 102 ("stabbed the victim three times in the neck and back, kicked and stomped him on his head and face" and stole "Mr. Lilly's wallet, cell phone, car keys, and car"). Mr. Lilly was then dating Cloud's twin sister, and the three had been hanging out at the

Park, talking and eating. CP 4. Both Cloud's twin sister and Mr. Lilly gave statements to the police describing how Cloud assaulted Lilly. CP 4-5. The attack left Lilly with a broken bone in his neck, and Cloud cut his own hand while wielding the knife. CP 5.

Cloud drove Lilly's car from the park to a home where he had been staying, gathered his clothes, and fled for Portland. CP 5. Thurston County deputies found Cloud and chased him at speeds approximating 110-120 mph. CP 4. Cloud crashed the car and ran. *Id*. He was captured after a K-9 track. *Id*. The knife was never recovered, lost somewhere between the park, the residence, and Cloud's flight from the wrecked car. CP 4-5, 105-06; State's Memorandum re. Appealability [Memo] at 2, 6, 9.

Cloud was charged with Assault 1-DW, Robbery 1-DW, and Attempting to Elude. CP 1-2. He pled guilty to Assault 1-DW and Attempting to Elude – thereby avoiding the robbery charge as well as a custodial assault charge in another case. CP 6-8, 11. His plea statement reads:

> on 8/19/15, in Pierce County, WA, I unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assaulted Shacorry Lilly with a deadly weapon, and in the commission thereof, I was armed with a deadly weapon—a pocketknife, thereby invoking provision of RCW 9.94A.530 and adding additional time to the presumptive sentence as provided in RCW 9.94A.533.

CP 18. Cloud was sentenced on June 2, 2016 and did not appeal. CP 21, 144-46; Memo, App. at 31.

Cloud's first personal restraint petition (arguing the knife was not a deadly weapon) was dismissed as time barred. CP 35-37, 146-47; Memo at 2 and at App. 31-32.

In 2020, Cloud filed motions asking the State to produce the knife and to submit it for post-conviction DNA testing under RCW 10.73.150. CP 91-100. The motions read <u>in their entirety</u>:

> Comes now the defendant, Patrick Anthony Cloud in the above styled and numbered cause number and respectfully request the Court to order the State of Washington to Reveal and Produce the Following:
>
> 1) The deadly weapon (knife) used to impose the [sentence enhancement] as well as the Washington Crime Laboratory Report Results from testing of the weapon.

CP 91, 96.

> Comes now the accused, Patrick Anthony Cloud and moves this Honorable Court to order post-conviction DNA testing of the weapon (knife) in the above case based on the likelihood that the results would demonstrate his innocence. RCW 10.73.150 and subsequently order an evidentiary hearing and discovery.

CP 93, 97.

The superior court denied the motions without comment, and Cloud appealed. CP 112-15.

The court of appeals affirmed, finding the superior court did not abuse its discretion, because the single-sentence motions "do[ ] not explain, or even mention why DNA evidence is material to the identity of the perpetrator." Op. at 6-7. The court did not "reach Cloud's other argument," that "DNA testing is available to him notwithstanding his guilty plea." Op. at 1.

IV. ARGUMENT

A. Cloud requests an improper advisory opinion of a non-justiciable controversy where no court decision turned on or even discussed the question of whether post-conviction DNA testing under RCW 10.73.170 is limited to convictions which result from a trial.

Cloud asks this Court to issue an advisory opinion on whether post-DNA testing is available under RCW 10.73.170

where the conviction results from a guilty plea and not a verdict after trial. Pet. at 2, 8-14. However, the Petitioner readily admits: "The Court [of appeals] … did not reach whether testing is available after a guilty plea." Pet. at 7 (citing Slip Op. at 1); *see also* Pet. at 14 ("[T]he Court of Appeals declined to reach this issue") (citing Slip. Op. at 1). Because this was no part of the court of appeals' decision, this Court cannot "review" something that is not there. RAP 13.3(a)(1); RAP 13.4(a) (discretionary review is review of the court of appeals' decision). The petition must be denied.

Cloud alleges that the *trial* court reached the issue. Pet. at 1, 8 (claiming "the trial court erred" "to the extent it denied [his] motion because he pleaded guilty"). There are two problems with this claim. First, discretionary review is not of any decision of the *trial* court, but of the decisions of the *court of appeals*. And second, there is no extent to which the question was relevant to the trial court's decision. The superior court did *not* deny the motion for the reason that Cloud had pled guilty. In a form order

transferring CrR 7.8 motions as personal restraint petitions, the superior court indicated that Cloud's various motions, including the motion for DNA testing, appeared to be time barred. CP 112-13. And in a handwritten order, the superior court simply wrote: "It is hereby ordered that the request for testing is denied." CP 114. Because the superior court denied his motion without comment, it is improper to review a reason that is not part of any court's decision. *See* Br. of Resp. at 27 ("This question was no decision of the lower court, and therefore not a question before this Court.").

Before the jurisdiction of a court may be invoked, there must be a justiciable controversy. U.S. CONST. art. III, § 2; *Coffman v. Breeze Corp.*, 323 U.S. 316, 324, 65 S. Ct. 298, 89 L. Ed. 264 (1945); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). A justiciable controversy is defined as "(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between

parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *Id.*

The petition does not discuss these factors. They are not met here. There is no actual dispute where neither the trial court nor the superior court have held Cloud is foreclosed from seeking DNA-testing due to his guilty plea. And Cloud's question is purely academic. This is especially true, because Cloud will not be renewing his claim with an improved motion where *there is no knife to test*.[1] If any of the four justiciability factors are not

[1] The Court of Appeals erroneously failed to consider the fact that there is no recovered knife to test. First, it is the defendant's burden to prove that testing would, more likely than not, prove his innocence. Therefore, it is his burden, not the State's, to prove evidence exists which can be tested. There is no record that the knife was ever recovered by law enforcement.

Second, the prosecutor has repeatedly signed under CR 11 that there is no recovered knife. This was repeatedly stated in the State's Memorandum re. Appealability. And in the Brief of Respondent, the Statement of the Case explains that "The prosecutor reviewed the 27 reports in discovery (inclusive of property logs, photographs, and forensic reports available in

met, "the court steps into the prohibited area of advisory opinions." *To-Ro Trade Shows*, 144 Wn.2d at 416. The long-standing rule is that this Court is not authorized to render advisory opinions or pronouncements upon abstract or speculative questions, especially absent a request from the Legislature. *Walker v. Munro*, 124 Wn.2d 402, 417-18, 879 P.2d 920 (1994).

The Court cannot accept review in the absence of any decision of the court of appeals to review. Review of this issue must be denied.

B. The court of appeals' decision does not conflict with any opinion of this Court.

Relying upon both *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012) and *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009), the court of appeals held that "Cloud's motion

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LINX) to ascertain that no knife was ever recovered. In drafting the State's Memorandum re. Appealability, the prosecutor also consulted with staff which consulted with law enforcement to verify that there were no other reports referencing any recovered knife." Cloud does not refute any of this.

fails to meet the burden of either the procedural or substantive requirements" of RCW 10.73.170. Op. at 5-6. Cloud alleges that the opinion is in conflict with the very cases it relies upon. Pet. at 18. There is no conflict.

1. Neither *Riofta* nor *Thompson* support an interpretation that Cloud's motion satisfied the procedural requirements of RCW 10.73.170.

Cloud claims that his motion satisfied RCW 10.73.170 (2)(a)(iii). Pet. at 16. In other words, his claim is that this language:

> Comes now the accused, Patrick Anthony Cloud and moves this Honorable Court to order post-conviction DNA testing of the weapon (knife) in the above case based on the likelihood that the results would demonstrate his innocence. RCW 10.73.150 and subsequently order an evidentiary hearing and discovery.

states that DNA testing "would provide significant new information." By no stretch of the imagination is that true.

Much of Cloud's argument is that the trial court was required to scour the trial file on his behalf, to make unjustified presumptions, and to make Cloud's arguments for him. Not only

is the court not required to do this, but it is ethically prohibited from doing this. CJC Canon 1.2; CJC Canon 2.2.

There is no reason that the court could or should have presumed from Cloud's motions (1) that the prosecution never tested any DNA on the pocketknife used to stab Mr. Lilly; (2) that the prosecution never made the knife available to the defense; or (3) even that there was a knife to be produced.

Cloud argues that a request for testing in and of itself demonstrates materiality. Pet. at 17-18. Of course, it does not. A request for testing is a request for testing. It demonstrates nothing at all.

Neither *Riofta* nor *Thompson* support Cloud's claim that a court may presume information that the Defendant has not provided, thereby effectively waiving the minimal statutory procedural obligations. The cases only note that subsection (2)(a)(iii) can be satisfied either by stating that *either* DNA testing would be more accurate *or* by stating that DNA testing would provide new information. *Thompson*, 173 Wn.2d at 876-

77; *Riofta*, 166 Wn.2d at 365-66. Cloud stated neither of these things in his motion.

The procedural requisites are few, and Cloud did not make the slightest effort to meet them.

2. No case cited by the petition supports an interpretation that Cloud's motion satisfied the substantive requirements of RCW 10.73.170.

A defendant's motion must "[e]xplain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement." RCW 10.73.170(2)(b). Cloud's motion makes no effort to comply with this requisite.

The statute permits the trial court to grant the motion "if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). The motion does not conform to subsection (2) as described *supra*. And it does not show a likelihood that DNA would demonstrate innocence. In fact, it makes no attempt at any demonstration.

Cloud argues that the court was required to consider his guilty plea and the probable cause statement. Pet. at 20. But neither document was attached to his motion. The court was, therefore, not required to consider them. Nor do they assist him.

Cloud argues that because he was convicted by guilty plea and not at trial, DNA testing necessarily raised a likelihood of innocence. Pet. at 20. In other words, he thinks the courts should assume all people who plead guilty have made false confessions. Neither *Thompson* nor *Riofta* support this bizarre reasoning.

Both the State and Cloud advised the court of appeals of the *Crumpton* presumption. Br. of Resp. at 18; Br. of App. at 20. The superior court must presume that a DNA result would indicate someone other than the Defendant. *State v. Crumpton*, 181 Wn.2d 252, 260-63, 332 P.3d 448 (2014). This presumption alone, of course, is not enough to demonstrate innocence on a more probable than not basis.

Both witnesses who identified the Defendant as the assailant knew Cloud well. CP 4-5. Even presuming the knife

only had some other person's DNA, this would not suggest someone else stabbed Mr. Lilly, because the assailant's DNA could have been lost and someone else's DNA could have been transferred. *Touch* DNA can be transferred easily and repeatedly such that finding someone's touch DNA does not suggest the person handled the knife much less stabbed someone with it.

The *Riofta* opinion recognized this in denying the defendant's motion for DNA testing. The presence of someone else's DNA on the white hat which the shooter dropped when he fled would not suggest innocence on a more probable than not basis, because someone else could have used the hat before the shooter. *Riofta*, 166 Wn.2d at 362, 370.

Finding someone else's touch DNA on a knife would be unremarkable because knives are "often used by multiple people and would have multiple sources of DNA." *State v. Allen*, 183 Wn. App. 1046 (2014) (unpublished, cited under GR 14.1 for persuasive value only) (denying motion for DNA testing).

The same is true of the unrecovered knife. Current methods of DNA analysis are so sensitive as to be able to obtain a profile from single cell. Janine Helmus, Thomas Bajanowski, & Micaela Poetsch, DNA transfer – a never ending story. A study on scenarios involving a second person as carrier, Int. J. Legal Med. vol. 130, no. 1: 121-5 (2016). Touch DNA is so easily transferred and re-transferred that its presence on an item is simply not very meaningful. Finding touch DNA may speak more to the donor's status as a high shedder. Ane Elida Fonnelop, et al., The Implications of Shedder Status and Background DNA on Direct and Secondary Transfer in an Attack Scenario, Forensic Science Int'l: Genetics, vol. 29, 48-60 (July 2017).

In a secondary transfer study, pairs of people shook hands for two minutes and then handled separate knives. Cynthia M. Cale, et al, Could Secondary DNA Transfer Falsely Place Someone at the Scene of a Crime?, J. Forensic Sci, vol. 61, no. 1: 196-203 (January 2016). The DNA of the other person was

transferred to the knife in 85% of cases. In fact, the DNA of this other person who had not handled the knife was falsely identified as the main or only contributor of DNA in 20% of the samples.

In a tertiary transfer study, Person One would rub a cotton cloth on his or her neck. Helmus, *supra*. Person Two would handle the cloth either with or without a glove. Then a different cloth or plastic would be rubbed over Person Two's hand. It was this last item (cloth or plastic) that was tested. In 40% of 180 samples, there was tertiary transfer of Person One's DNA where not only had Person One never touched the item, but Person One had never touched Person Two.

The Helmus study authors conclude, "DNA can be virtually transferred in so many different manners that it may be impossible to determine the way by which it was deposited on a distinct item, even if it is no problem to identify the DNA donor."

Cloud argues that "[i]t stands to reason that only the person who carried the knife and used it stab Mr. Lilly could have left traces of DNA on it." Pet. at 22. That is not reasonable, and

it is not the evidence. The probable cause statement does not say that the assailant made a knife from materials that no one else had ever handled and ever thereafter prevented anyone from handling the knife. It does not say that knife could not have received DNA via a secondary or tertiary transfer from the assailant's hand or another item stored at the bottom of Cloud's backpack go-bag. It does not say that the knife was discovered in a DNA-free location.

Cloud claims that a knife is a highly personal item that no one else would handle. Pet. at 21. This is not reasonable. Pocket knives are highly portable, taken out in public, displayed, passed around, and used and shared all the time such that they could easily carry a number of DNA profiles. This is even more true in consideration of Cloud's transient lifestyle. Cloud did not have a home; he lived out of a go-bag staying at various places. CP 5; Br. of Resp. at 25. People in Cloud's situation often carry knives to defend themselves and also need to share tools. It is

likely, therefore, that his knife was exposed to the transfer of a myriad of DNA and handled by other people.

If the weapon had been recovered after Cloud's flight through the woods, it may have picked up and/or shed DNA from Lilly's car, from the residence where Cloud was visiting with other people, from items in Cloud's bag, and anywhere along his flight through the woods. The assailant's DNA may have been lost and other DNA transferred.

Cloud compares his case with the stranger rape cases of *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012) and *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009)). Pet. at 21. Semen swabbed from a vagina or rectum is in no way comparable with touch DNA on a knife. Anyone may casually handle a knife without the owner's notice so as to leave or remove touch DNA. Semen, however, is not casually deposited in the protected, private areas of the body in a way that would go undetected. Moreover, in those cases, the victims were unable to identify the strangers who assaulted them by name or even

description. *Thompson*, 173 Wn.2d at 867-69; *Gray*, 151 Wn. App. at 765-66. Cloud was identified by his twin. It is absurd to compare Cloud's case with *Thompson* and *Gray*.

No case cited by Cloud conflicts with the court of appeals' commonsense opinion holding that the single-sentence motion did not meet the requisites of the statute.

V. CONCLUSION

This Court should deny discretionary review where Cloud has demonstrated no conflict with any case law and only seeks an improper advisory opinion which cannot affect his case.

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RESPECTFULLY SUBMITTED this 18th day of July, 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Teresa Chen
Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517
teresa.chen@piercecountywa.gov

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7/18/2022	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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