NO. 101025-7
COA NO. 55709-6-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICK ANTHONY CLOUD,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

Post-conviction DNA testing is vital for identifying cases where a person serves time for a crime they did not commit, whether that person falsely pleaded guilty or was wrongly found guilty after a trial. In denying testing to Patrick Cloud, the trial court erroneously endorsed the prosecution's argument his guilty plea made DNA testing unavailable.

Mr. Cloud's motion complied with the "lenient" statutory requirements and showed a favorable DNA result would raise a reasonable probability of innocence. The Court of Appeals's contrary conclusion contradicts this Court's precedent, as well as its own.

B. IDENTITY OF PETITIONER

Petitioner Patrick Cloud asks for review of the decision affirming the denial of his motion for post-conviction DNA testing.

C. COURT OF APPEALS DECISION

Mr. Cloud seeks review of the unpublished decision in *State v. Cloud*, No. 55709-6-II (Wash. Ct. App. May 17, 2022).

D. ISSUES PRESENTED FOR REVIEW

1. RCW 10.73.170 makes testing available to any "person convicted of a felony in a Washington state court," whether or not the conviction followed a trial. The rights Mr. Cloud waived by pleading guilty do not include the right to seek DNA testing after conviction. The trial court erred to the extent it denied Mr. Cloud's motion because he pleaded guilty, raising an issue of substantial public interest.

2. The pocketknife used in the crime was not tested before. Testing it now would reveal significant new information about the user's identity. Testing raises a reasonable probability Mr. Cloud is innocent

because a result showing Mr. Cloud's DNA was absent and another person's was present would tend to rule him out. The Court of Appeals's contrary conclusion contradicts its precedent and that of this Court.

E. STATEMENT OF THE CASE

The prosecution charged Mr. Cloud and his sister, Shae Cloud, with first-degree assault and robbery, with deadly weapon enhancements on both counts. CP 1–2. The prosecution also alleged Mr. Cloud attempted to elude a police vehicle. CP 2–3.

According to the prosecution's probable cause statement, Shacorry Lilly told police he was hanging out with Mr. Cloud and Ms. Cloud when someone stabbed him from behind. CP 4. The attacker drove away in Mr. Lilly's car. CP 4. Mr. Lilly believed the attacker was Mr. Cloud and thought Ms. Cloud may have helped him. CP 4. Ms. Cloud admitted she left

with Mr. Cloud in Mr. Lilly's car but asserted Mr. Cloud threatened to kill her if she did not. CP 5.

Mr. Cloud pleaded guilty to first-degree assault and attempting to elude. 4/15/16 RP 9.[1] In exchange, the prosecution dismissed the robbery count and a charge in another case. 4/15/16 RP 3–4; CP 11.

As a factual basis for his plea, Mr. Cloud admitted that he

> 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 pocket knife . . . .

CP 18. He denied his sister had anything to do with the attack. CP 18.

In his guilty plea statement, Mr. Cloud acknowledged he would waive his right to a trial and

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[1] "4/15/16 RP" refers to the verbatim report of proceedings held on April 15, 2016.

other attendant rights. CP 8–9. He also understood he would waive his "right to appeal a finding of guilt after a trial as well as other pretrial motions such as time for trial challenges and suppression issues." CP 9. He did not waive the right to pursue any other form of post-conviction relief. CP 8–9.

At sentencing, Mr. Cloud received a document titled "Advice of Right To Appeal." CP 127. The notice made clear the only appellate rights Mr. Cloud waived were those listed in his guilty plea statement. CP 127. He retained the "right to appeal rulings on other post convictions [sic] motions" listed in RAP 2.2. CP 127.

The trial court accepted Mr. Cloud's guilty plea. 4/15/16 RP 9. It sentenced Mr. Cloud to a total term of confinement of 195 months. 6/2/16 RP 21.

Several years later, Mr. Cloud moved the trial court for post-conviction DNA testing of the

pocketknife under RCW 10.73.170. CP 93. According to Mr. Cloud, testing the knife would likely "demonstrate his innocence." CP 93. On the same day, Mr. Cloud moved for an order requiring the prosecution to make the knife and any prior testing results available to him, indicating the prosecution had not done so before his conviction. CP 91.

The prosecution filed an opposition to Mr. Cloud's motion for DNA testing. CP 101. Without citing any statutory language, it argued that post-conviction DNA testing is categorically unavailable to people who pleaded guilty. CP 104–05.

The trial court denied Mr. Cloud's motion. CP 114. It made no findings and gave no reasons. CP 114.

The Court of Appeals affirmed. The Court held Mr. Cloud's motion did not meet the statute's procedural requirements because it did not explain

why DNA testing was "material to the identity of the perpetrator," overlooking the clear implication that any DNA on the knife would bear on who used it to attack Mr. Lilly. Slip op. at 6–7. The Court also disregarded this Court's precedent holding a DNA test provides significant new information if evidence likely bearing DNA has not previously been tested. *Id.* The Court resolved the appeal only on this basis and did not reach whether testing is available after a guilty plea. *Id.* at 1.

F. WHY THIS COURT SHOULD ACCEPT REVIEW

RCW 10.73.170 permits a person convicted of a felony to apply for post-conviction DNA testing. The Legislature enacted the statute "as a way to ensure an innocent person is not in jail," *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448 (2014), because "the State has convicted the wrong person," *State v. Gray*, 151 Wn. App. 762, 774, 215 P.3d 961 (2009).

1. **The availability of post-conviction DNA testing to people who plead guilty is a matter of public importance.**

The "argumentation of the parties" defines the scope of issues on appeal. *Clark Cty. v. W. Wash. Growth Mgmt. Hearings Rev. Bd.*, 177 Wn.2d 136, 144, 298 P.3d 704 (2013). Though the trial court gave no reasons for denying Mr. Cloud's motion, the prosecution devoted most of its brief in that court to argue testing under RCW 10.73.170 is limited to people convicted after a trial. CP 104–05. To the extent the trial court denied Mr. Cloud's motion on this basis, it acted contrary to the statute's plain text and the plain terms of Mr. Cloud's guilty plea statement.

a. The statute's text demonstrates the Legislature's intent to make testing available to persons convicted based on a guilty plea.

Post-conviction DNA testing is available to any "person convicted of a felony in a Washington state

court who currently is serving a term of imprisonment." RCW 10.73.170(1). The statute does not specify that convicted persons who pleaded guilty cannot request testing, nor does it limit testing to persons convicted following a trial. *Id.* In fact, the statute does not contain the word "trial."

"Where the Legislature omits language from a statute," courts do not read the omitted words into the law. *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). If the Legislature wanted to restrict testing to people convicted after a trial, "it knew how to say it." *State v. Slattum*, 173 Wn. App. 640, 655–56, 295 P.3d 788 (2013). Even if the statute is ambiguous, the rule of lenity requires courts to interpret it "strictly against the State." *Id.* at 659, 662.

To the extent the court determined post-conviction DNA testing is categorically unavailable to

convicted persons who pleaded guilty, the court applied an incorrect legal standard and abused its discretion. *Crumpton*, 181 Wn.2d at 264.

b. Mr. Cloud did not waive the statutory right to move for post-conviction DNA testing merely by pleading guilty.

Mr. Cloud relinquished a suite of rights by pleading guilty, including the right to a trial and appeal. CP 8–9, 104–05; *State v. Cater*, 186 Wn. App. 384, 392, 345 P.3d 843 (2015). However, Mr. Cloud did not waive the right to seek post-conviction DNA testing by pleading guilty. CP 9.

The "Advice of Right To Appeal" Mr. Cloud received made doubly clear that he waived only the trial and appellate rights listed in his guilty plea statement. CP 8–9, 127. The document noted Mr. Cloud retained the right to appeal "rulings on other post convictions [sic] motions" listed in RAP 2.2. CP

127. This right to review includes "[a]ny final order made after judgment that affects a substantial right," RAP 2.2(a)(13), such as an order denying a motion for DNA testing, *State v. Thompson*, 155 Wn. App. 294, 298 & n.2, 229 P.3d 901 (2010), *aff'd*, 173 Wn.2d 865, 271 P.3d 204 (2012).[2]

Mr. Cloud did not waive the right to move for post-conviction DNA testing. His guilty plea does not bar a motion under RCW 10.73.170.

c. Permitting convicted persons who plead guilty to move for testing advances the statute's purpose of preventing the imprisonment of innocent people.

"[A]t times, innocent people can and do confess to crimes they did not commit." *Thompson*, 173 Wn.2d at

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[2] The Court of Appeals correctly held the prosecution waived any argument an order denying a motion for DNA testing is not appealable as of right. Slip op. at 4. A Commissioner ruled the order was appealable, and the prosecution did not move to modify that ruling. *Id.*; RAP 17.7(a).

872 n.1 (quoting amici brief). Innocent people feel compelled to plead guilty for many reasons, such as obtaining immediate release or avoiding the risk of a harsher sentence should they wrongly be convicted at trial. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 173 (2014).

In dozens of cases, DNA and other evidence exonerated innocent people who pleaded guilty. Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 UC Irvine L. Rev. 671, 673 (2020); The Innocence Project, When the Innocent Plead Guilty (2009), https://innocenceproject.org/when-the-innocent-plead-guilty/. At least one case occurred in Washington, where a young man pleaded no contest to burglary, and a DNA test under RCW 10.73.170 later excluded him as the perpetrator. Miller, *supra*, at

687–88 & n.145; The Nat'l Registry of Exonerations, Michael Washington (Aug. 8, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5185. As Figure 1 shows, in 2016, almost half of all exonerations followed guilty pleas.

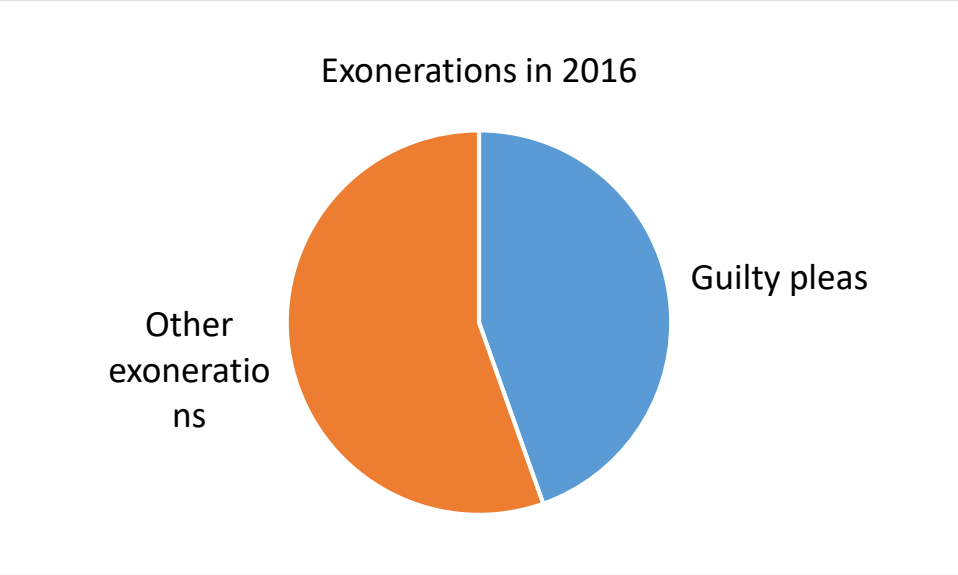

Figure 1. 74 of 166 exonerations in 2016 followed a guilty plea. *See* The Nat'l Registry of Exonerations, Exonerations in 2016 1–2 (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf.

Making DNA testing available after a guilty plea furthers the statute's purpose of "ensur[ing] an

innocent person is not in jail." *Crumpton*, 181 Wn.2d at 258; *see In re Pers. Restraint of Bradford*, 140 Wn. App. 124, 131–32, 165 P.3d 31 (2007) (granting a new trial, despite a confession, where new DNA evidence excluded the petitioner).

Due to the many innocent people compelled to plead guilty in our criminal legal system, the availability of DNA testing after a guilty plea is a matter of substantial public importance. RAP 13.4(b)(4). Nevertheless, the Court of Appeals declined to reach this issue. Slip op. at 1. This Court should grant review.

2. The Court of Appeals contravened this Court's precedent when it held Mr. Cloud's motion for post-conviction DNA testing did not fulfill the statutory requirements.

A motion under RCW 10.73.170 must advance one or more of three listed reasons why the court should permit DNA testing. RCW 10.73.170(2)(a)(i)–

(iii). DNA evidence must also be "material to the identity of the perpetrator." RCW 10.73.170(b).[3] Where a movant meets these requirements, the court must grant the motion if it finds a reasonable likelihood that DNA testing would show the person is innocent. RCW 10.73.170(3); *Gray*, 151 Wn. App. at 774.

a. DNA testing of the pocketknife would reveal significant new information about the attacker's identity.

RCW 10.73.170(2)(a) and (b) impose "lenient" procedural requirements that pertain only to "the motion's form and content." *Thompson*, 155 Wn. App. at 301 (quoting *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009)); *Gray*, 151 Wn. App. at 768;. Mr. Cloud's motion meets the requirements if it states that

[3] A convicted person must also meet any "other procedural requirements established by court rule." RCW 10.73.170(2)(c). The prosecution did not argue Mr. Cloud did not comply with court rules. CP 101–06.

testing "would provide significant new information" and be "material" to the perpetrator's identity. RCW 10.73.170(2)(a)(iii), (2)(b); *Riofta*, 166 Wn.2d at 365–66.

According to this Court's precedent, DNA testing provides significant new information where evidence that likely bears traces of DNA was not tested before conviction. *See Thompson*, 173 Wn.2d at 876 (vaginal swab from rape victim); *see also Gray*, 151 Wn. App. at 770–71 (hairs removed from victims). This is so whether or not DNA testing could have been carried out before the conviction. *Riofta*, 166 Wn.2d at 366.

Because the prosecution never tested any DNA on the pocketknife used to stab Mr. Lilly, performing such a test would reveal significant new information. *Thompson*, 173 Wn.2d at 876; *Riofta*, 166 Wn.2d at 366; *Gray*, 151 Wn. App. at 770–71. Mr. Cloud's motion, read together with his concurrent motion for

production of the knife, demonstrates the prosecution never made the knife available to the defense, suggesting the knife was never submitted for DNA testing. CP 91, 93. Identifying the DNA on the knife may reveal someone else handled it—or confirm Mr. Cloud did so.

For the same reason, identifying the source of any DNA on the knife is material to the identity of the perpetrator of the assault against Mr. Lilly. RCW 10.73.170(2)(b).

The Court of Appeals's sole reason for affirming the trial court's order was that Mr. Cloud's motion "does not explain, or even mention[,] why DNA evidence is material to the identity of the perpetrator." Slip op. at 6. The Court's reasoning is flawed because, as noted, the materiality of the DNA on the knife necessarily follows from Mr. Cloud's request to test it,

the statement in his concurrent motion that the knife was never made available, and the nature of the crime.

The Court of Appeals disregards this Court's precedent that testing would reveal "significant new information" if an item likely bearing DNA was not tested. *Thompson*, 173 Wn.2d at 876; RAP 13.4(b)(1). It also ignores this Court's precedent that the statute's procedural requirements are "lenient." *Riofta*, 166 Wn.2d at 367; RAP 13.4(b)(1). And the availability of DNA testing to people wrongly convicted of crimes is a matter of public importance. RAP 13.4(b)(4). This court should grant review.

b. A favorable test of the pocketknife would raise a reasonable probability Mr. Cloud is innocent.

The trial court must grant a motion for DNA testing that complies with the procedural requirements if "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 convicted person need only show a "reasonable probability" that someone else committed the crime. *Gray*, 151 Wn. App. at 774 (quoting *Riofta*, 166 Wn.2d at 367–68).

In determining whether DNA testing would raise a reasonable probability a wrongful conviction occurred, the trial court must presume the results would be favorable to the convicted person. *Crumpton*, 181 Wn.2d at 264. The court must then consider the presumably favorable DNA test results alongside the other evidence presented before the conviction. *Gray*, 151 Wn. App. at 774.

Where the convicted person pleaded guilty, that evidence is limited to the facts the trial court could consult in finding a factual basis for the plea. *See* CrR 4.2(d) (court must find a factual basis); *In re Pers.*

Restraint of Fuamaila, 131 Wn. App. 908, 924, 131 P.3d 318 (2006) (court must make the materials it relies on part of the record).

Though the Court of Appeals asserted Mr. Cloud's motion did not raise a reasonable likelihood of innocence, its opinion contains no reasoning on this point. Slip op. at 6–7. In fact, the opposite is true.

The trial court accepted Mr. Cloud's plea based on his admission he assaulted Mr. Lilly with "a pocket knife." 4/15/16 RP 8–9, CP 18. The statement of probable cause was also part of the record. CP 4–5. The trial court therefore was required to consider Mr. Cloud's admission and the probable cause statement in determining whether the results of DNA testing would raise a likelihood Mr. Cloud is innocent. *Thompson*, 173 Wn.2d at 873–74. The trial court also was required to presume the results would be favorable—i.e., that

another person's DNA was on the knife and Mr. Cloud's was not. *Crumpton*, 181 Wn.2d at 264.

Mr. Cloud's motion establishes a reasonable probability of his innocence because only one person handled the knife, and a favorable DNA test would exclude him as the attacker. *See Thompson*, 173 Wn.2d at 875. There was only one source of evidence to test in *Thompson*: the person who raped the victim. *Id.* A favorable test result would exclude the convicted person as the rapist, establishing a likelihood the person was innocent. *Id.*; *Gray*, 151 Wn. App. at 774.

As in *Thompson*, the only potential source of DNA to test is the person who used the knife to attack Mr. Lilly. Together, Mr. Lilly's and Ms. Cloud's statements to police establish that only one person stabbed Mr. Lilly. CP 4–5. The attacker used a pocketknife, a personal item kept in one's pocket. CP

18. It stands to reason that only the person who carried the knife and used it to stab Mr. Lilly could have left traces of DNA on it. The absence of Mr. Cloud's DNA and the presence of another person's DNA on the knife handle therefore would exclude Mr. Cloud as the attacker.[4] *See Thompson*, 173 Wn.2d at 875.

Though Mr. Cloud's admission that he stabbed Mr. Lilly is powerful evidence of his guilt, it does not preclude a finding that a favorable DNA result would likely show he is innocent. "Many innocent individuals have been exonerated through postconviction DNA tests, including some who had overwhelming evidence indicating guilt." *Crumpton*, 181 Wn.2d at 261–62. Indeed, false confessions are among the most common

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[4] The Court of Appeals correctly rejected the prosecution's argument the knife was never recovered and is therefore impossible to test. Slip op. at 5 n.4. The prosecution presented no evidence of this fact, either in the trial court of the Court of Appeals. *Id.*

reasons for wrongful convictions. Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 88 (2008); *see Bradford*, 140 Wn. App. at 131–32 (granting a new trial based on DNA evidence despite a confession).

G. CONCLUSION

This Court should grant Mr. Cloud's petition for review.

Pursuant to RAP 18.17(c)(10), the undersigned certifies this petition for review contains 3,153 words.

DATED this 16th day of June, 2022.

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APPENDIX

Filed
Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PATRICK ANTHONY CLOUD, Appellant.	No. 55709-6-II UNPUBLISHED OPINION

WORSWICK, J. — Patrick Anthony Cloud appeals the trial court's order denying his motion for post-conviction DNA testing. In 2016, Cloud pleaded guilty to first degree assault and attempting to elude a police vehicle. Cloud requested DNA testing on the knife used to stab his victim. Cloud argues that the trial court abused its discretion when it denied his motion because his motion fulfilled the requirements for obtaining post-conviction DNA testing under RCW 10.73.170, and DNA testing is available to him notwithstanding his guilty plea. The State argues that Cloud cannot appeal the trial court's order denying post-conviction DNA testing as a matter of right. We hold that Cloud has a right to appeal the trial court's order, but that Cloud's motion did not fulfill the statutory requirements to obtain post-conviction DNA testing. Accordingly, we do not reach Cloud's other argument. We affirm.

FACTS

In August 2015, Cloud assaulted Shacorry Lilly with a pocket knife. Cloud's sister Shae Cloud was also present at the assault. Cloud and Shae then fled from the scene in a vehicle and refused to stop for pursuing police.[1]

The State charged Cloud with one count of first degree assault with a deadly weapon, one count of first degree robbery, and one count of attempting to elude a police vehicle. The State later filed an amended information that removed the first degree robbery charge. Cloud then pled guilty to first degree assault with a deadly weapon sentence enhancement and attempting to elude a pursuing police vehicle.

In his statement of plea of guilty, Cloud initialed that he waived "[t]he right to appeal a finding of guilt after a trial as well as other pretrial motions such as time for trial challenges and suppression issues." Clerk's Papers (CP) at 9. Cloud also submitted a statement regarding the factual basis for the plea. Regarding the first degree assault charge, he stated:

> [O]n 8/19/15; in Pierce County, WA, I unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assaulted [Lilly] with a deadly weapon, and in the commission thereof, I was armed with a deadly weapon–a pocket knife, thereby invoking provisions of RCW 9.94A.530 and adding additional time to the presumptive sentence as provided in RCW 9.94A.533. As for my sister [Shea,] she had nothing to do with the assault, nor did she know it was going to occur.

CP at 18.

At the sentencing hearing, Cloud stated that he was "sincerely . . . sorry for the pain and the destruction that [he had] caused to [Lilly]," and asked for forgiveness. Verbatim Report of

[1] We use Shae Cloud's first name to avoid confusion. No disrespect is intended.

Proceedings (VRP) (June 2, 2016) at 18-19. He also apologized to Shae for "putting her in the situation that [he] did." VRP (June 2, 2016) at 19. Lilly also made a statement to the court. In addition to describing the life-changing injuries he suffered from the eight stab wounds, Lilly explained that he had known Cloud before the assault, and had been trying to assist him the night of the unprovoked attack.

The trial court sentenced Cloud to 195 months and an additional 36 months of community custody. The Court informed Cloud he had "a right to appeal rulings on other post convictions motions as listed in Rules of Appellate Procedure 2.2." Supp. CP at 127.

In November 2020, Cloud filed a pro se motion for post-conviction DNA testing. Cloud's full motion read: "Comes now accused, Patrick Anthony Cloud, and moves this Honorable Court to order port-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."[2] CP at 93.

The State responded to Cloud's motion and argued that Cloud waived his right to challenge the determination of his guilt when he pled guilty, that Cloud's motion was not in the form required by RCW 10.73.170(2), and that Cloud failed to demonstrate how DNA testing would show his innocence on a more probable than not basis. The trial court denied Cloud's motion.[3]

[2] RCW 10.73.150 provides for the right to counsel.

[3] Our record on appeal does not include a verbatim report of proceedings for this hearing. The body of the order states in its entirety, "It is hereby ordered that the request for DNA testing is denied." CP at 114.

Cloud filed a notice of appeal. Because the trial court entered no findings, we placed this case on the motion docket to determine appealability without oral argument. Letter on Appealability, No. 55709-6-II (Wash. Ct. App. May 12, 2021). The State filed a memorandum regarding appealability, arguing Cloud could not appeal as a matter of right. State's Memorandum Re Appealability, No 55709-6-II (Wash. Ct. App. May 19, 2021). A commissioner of this court ruled that the "order denying post-conviction DNA testing is appealable as a matter of right." Notation Ruling, No. 55709-6-II (Wash. Ct. App. June 29, 2021). The State did not file a motion to modify the commissioner's ruling.

ANALYSIS

I. APPEALABILITY

As an initial matter, the State argues that the commissioner of this court erred when he ruled that Cloud could appeal the trial court's order denying post-conviction DNA testing as a matter of right. We do not consider this argument.

Under RAP 17.7(a), an aggrieved person may object to a commissioner's ruling only by a motion to modify the ruling, which must by served and filed not later than 30 days after the ruling is filed. If an aggrieved party fails to file a motion for modification, the commissioner's decision becomes our final decision. *In re Det. of Broer*, 93 Wn. App. 852, 857, 957 P.2d 281 (1998), *amended on recons. sub nom. Broer v. State*, 973 P.2d 1074 (Wash. Ct. App. 1999). This court's commissioner filed his ruling on June 29, 2021. The State did not file a motion to modify that ruling. Accordingly, we do not consider this argument.

II. DNA TESTING REQUEST REQUIREMENTS UNDER RCW 10.73.170

Cloud argues that the trial court abused its discretion when it denied his motion for post-conviction DNA testing of the pocket knife. The State argues that Cloud's motion does not satisfy the statutory requirements that would mandate DNA testing under RCW 10.73.170.[4] We agree with the State.

We review a trial court's ruling on a motion for post-conviction DNA testing for abuse of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable, or it bases its decision on untenable or unreasonable grounds. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). We may affirm on any basis supported by the record on appeal. *State v. Poston*, 138 Wn. App. 898, 905, 158 P.3d 1286 (2007).

The post-conviction DNA testing statute, RCW 10.73.170, allows a convicted person serving a prison sentence to request post-conviction DNA testing. The statute imposes both substantive and procedural requirements. *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009).

[4] The State also argues that Cloud cannot obtain DNA testing because the pocket knife was never recovered and is not available to be tested. If true, this would mean Cloud's case is moot. Despite asking the trial court to take judicial notice of this fact, Cloud now argues on appeal that the State points to no *evidence* in the record that it did not recover the knife–instead pointing only to the State's earlier arguments that it did not recover a knife. Arguments are not evidence. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018). The State could have resolved this issue by filing a declaration below, but it appears none was filed. Thus, we cannot hold that this case is moot.

Under the statute, the motion for DNA testing must state that (1) "[t]he court ruled that DNA testing did not meet acceptable scientific standards," (2) the DNA testing technology was not sufficiently developed to test the relevant DNA, or (3) new DNA testing would be significantly more accurate or would "provide significant new information." RCW 10.73.170(2)(a)(i)-(iii). The motion must also "[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). Once these requirements are met, the superior court "shall grant [the] motion . . . [if] 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).

In reviewing whether a motion for post-conviction DNA satisfies the substantive requirement, we presume the DNA test results would be favorable to the convicted person and ask whether the newly discovered, favorable DNA test results, in light of all of the evidence presented at trial, would raise the likelihood that the convicted person is innocent on a more probable than not basis. *Riofta,* 166 Wn.2d at 367-68. Cloud's motion fails to meet the burden of either the procedural or substantive requirements.

Cloud's motion stated only that "the results [of DNA testing] would demonstrate his innocence." CP at 93. Cloud does not explain, or even mention why DNA evidence is material to the identity of the perpetrator. This motion does not meet the procedural requirements of

RCW 10.73.170(2). Thus, the trial court's decision to deny the motion for post-conviction DNA testing was not manifestly unreasonable, and consequently the trial court did not abuse its discretion. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Cruser, A.C.J.

Veljacic, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 55709-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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