NO. 103771-6

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,
Respondent,

v.

THOMAS BOARDMAN,
Petitioner.

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ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 57793-3-II
Kitsap County Superior Court No. 17-1-01192-2

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# ANSWER TO PETITION FOR REVIEW

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| SERVICE | | |
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| | Gregory C. Link, Jessica C. Wolfe, WAP<br>1511 Third Ave. Ste. 610<br>Seattle, WA 98101<br>Email: greg@washapp.org | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.<br>DATED January 24, 2025, Port Orchard, WA<br>**Original e-filed at the Supreme Court; Copy as at left.**<br>**Office ID #91103** kcpa@kitsap.gov |

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## I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney John L. Cross.

## II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Boardman*, No. 57793-3-II, filed December 10, 2024, a copy of which is attached to the petition for review.

## III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that CrR 4.7 does not impose a discovery obligation on the state to provided Boardman with discovery post-conviction and that Boardman failed to show the required good cause for discovery under appellate rules. Boardman argues only RAP 13.4(b)(2), asserting that the present decision "is in conflict with a published decision of the Court of Appeals." The

question presented is thus whether this Court should decline to accept review because that criterion is not met.

## IV. STATEMENT OF THE CASE

Boardman pled guilty to first degree child rape. *See* Order Dismissing Petition, April 29, 2024, No. 59404-8-II. No appeal was taken. Each of Boardman's attempts to collaterally attack his conviction have failed. The most recent petition rejected various substantive claims, including ineffective assistance of counsel, because the claims are time barred. Id.

Here, Boardman properly asked the trial court to order his trial attorney to provide his file. At hearing on the motion, the trial court noted the presence of Boardman's trial attorney and that that attorney had provided a copy of his file to Boardman. RP 4. His attorney stated that his entire "unredacted" file had been sent to both an attorney and to Boardman. RP 11. Here, Boardman admits that he received this file.

But in addition, Boardman sought extensive discovery

from the state. The requests, without repeating each, range from information that would never be in the state's possession to nonsense like any and all information about the judgment and sentence in the case. CP 6-10. The motion alleges generally that the information sought is necessary "[f]or purposes of pending collateral attack." CP 10.

The trial court heard arguments that the state should provide discovery. Boardman again alleged that the discovery is needed for preparation of post-conviction litigation. RP 5. He alleged no fact that he hopes to find that would support a collateral attack on the judgment and sentence. The trial court ruled that Boardman sought relief under the "rules of discovery" and "under that theory of law" the motion was denied. RP 12.

On direct appeal, the Court of Appeals affirmed the trial court.

## V. ARGUMENT

**THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THE DECISION IS CORRECT AND THE DECISION IN IN ACCORD WITH OTHER DECISIONS OF THE COURT OF APPEALS ADDRESSING THE SAME ISSUE.**

***1. The decision below was correct on the record presented.***

Below Boardman argued both that CrR 4.7 provides for discovery obligations even after conviction and that he had met the standards to establish a discovery obligation in a collateral attack proceeding. Slip. Op. at 2. The Court properly applied abuse of discretion to the superior court's discovery ruling but reviewed the question of the applicability of the court rule to the present facts de novo. Id.

The Court below first observed that Boardman's interpretation of CrR 4.7 "has already been rejected multiple times." Slip. Op. at 2. The Court cited *State v. Albright*, 25 Wn. App. 2d 840, 842, 525 P.3d 984, *review denied*, 1 Wn.3d 1023 (2023), where Division Three of the Court of Appeals squarely

held that "the State's discovery obligations end once a person is convicted." Id. Division Two cited its own prior decision in *State v. Asaeli*, 17 Wn. App. 2d 697, 491 P.3d 245, *review denied*, 198 Wn.2d 1026 (2021), there holding that CrR 4.7 imposes no further obligation after trial. The Court below found that Boardman failed to persuade that Court that these precedents do not control the question.

Second, the Court below rejected Boardman's claim that due process entitled him to post-conviction discovery. Slip. Op. at 3. The Court cited the rule:

> [f]rom a due process standpoint, prisoners seeking post[]conviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief.

*In re Personal Restraint of Gentry,* 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999). On this record, the Court held

> it is Boardman's burden to show that he has good cause to believe the discovery would prove entitlement to relief, and, beyond just generally alleging that he needed the materials to support a future personal restraint petition, he made no effort to do so below.

Slip. Op. at 3. Thus, Boardman's due process claim was rejected because he failed to establish "good cause to believe discovery would prove entitlement to relief." Id.

A prisoner sought discovery under CrR 4.7 years after conviction in *State v. Asaeli,* 17 Wn. App.2d 697, 491 P.3d 245 (2021) *review denied* 198 Wn.2d 1026 (2021). The Court of Appeals affirmed the trial court's denial of the motion. 17 Wn. App.2d at 700. The Court applied abuse of discretion as the standard of review but added that "whether a court rule applies to a particular fact scenario is a question of law we review de novo." *Asaeli,* 17 Wn. App.2d at 699.

The *Asaeli* Court held: "We conclude that CrR 4.7 does not apply to postconviction proceedings." Id. The Court noted that due process does not entitle a prisoner to discovery "as a matter of ordinary course" but "only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief." Id.

Boardman claims that the *Asaeli* court got it wrong by failing to note that "CrR 4.7 contains no temporal limitations on its reach." Petition at 3. In fact, the *Asaeli* Court properly placed rule 4.7 in its context—the title "Procedures Prior to Trial" in Title 4 of the Superior Court Criminal Rules "indicates that the Supreme Court intended CrR 4.7 to apply to pretrial discovery procedures, not after a defendant has been convicted." 17 Wn. App.2d at 700.

*State v. Albright,* 25 Wn. App.2d 840, 525 P.3d 984 (2023) *review denied* 1 Wn.3d 1023 (2023) reached the same conclusion. Albright pled guilty to first degree assault and sought post-conviction discovery under CrR 4.7. 25 Wn. App.2d at 841. Here, as well as reliance on the court rule, Albright argued that the holding *State v. Padgett*, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018), concerning defense counsel's post-conviction obligations, should apply to the prosecution.

The *Albright* Court disagreed with the *Asaeli* Court's

scope of the rule holding because some of the provisions of CrR 4.7 apply to situations during trial, not just pretrial. 4 Wn. App.2d at 843, ftnt. 3. But that observation did not change the conclusion that "court rules such as CrR 4.7 do not govern a defendant's request for postconviction discovery from the State." 25 Wn. App.2d at 843

Moreover, the procedural posture of the case makes it unlikely that Boardman can find entitlement to relief. Boardman's guilty plea matters. By entering a plea agreement with the state and pleading guilty, Boardman waived appeal of pretrial discovery claims. In plea bargaining, "a condition insisted on by the State that requires a defendant to give up a constitutional right does not, by itself, violate due process" and the "theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights." *State v. Moen*, 150 Wn.2d 221, 230-31, 76 P.3d 721 (2003); *see also, State v. Shelmidine,* 166 Wn. App. 107, 269 P.3d 362 (2012) (counsel not ineffective for counselling guilty plea without knowing identity

of, or having interviewed, state's confidential informant).

By his guilty plea, Boardman waived his right to trial and, since there was no trial, he waived all attendant trial rights. "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *United States v. Ruiz*, 536 U.S. 622, 628, 122 S. Ct. 2450, 153 L.Ed.2d 586 (2002). In *Ruiz,* a plea bargain where the prosecution withheld impeachment evidence and "information the government had regarding any affirmative defense [defendant] would raise at trial" was not unconstitutional. 536 U.S. at 633; *see also In re Keene*, 95 Wn.2d 203, 205, 622 P.2d 360 (1980) (a guilty plea does not preclude an appeal as to the circumstances under which the plea was made but does preclude an appeal as to pretrial rulings); *State v. Bailey*, 53 Wn. App. 905, 907, 771 P.2d 766 (1989) ("A voluntary guilty plea waives all defenses other than that the complaint, information, or indictment charges no offense.").

Boardman's ability to collaterally attack evidentiary issues that may underlying his judgment and sentence is seriously limited. Where nothing was litigated at trial, it cannot be established that something was erroneously litigated. Moreover, as can be seen in the disposition of Boardman's most recent collateral attack, most if not all such claims are subject to the time-bar in RCW 10.73.090(1). Order of April 29, 2024, *supra.*

Finally, with no reference to *State v. Albright, supra,* Boardman argues that the cases are inconsistent with cases establishing defense counsel's postconviction obligations-- *State v. Padgett*, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018) and *State v. Murry*, 24 Wn. App. 2d 940, 948, 523 P.3d 794 (2023).

In the present case, the Cout of Appeals correctly noted that *Padgett* and *Murry* resolve a different question: "those cases are inapplicable because they address defense counsel's obligations to their clients, not the State's discovery obligations." Slip. Op. at 3, ftnt. 1. The *Albright* Court held that *Padget* obligates defense counsel to provide copies of her file upon

request primarily because of counsel's ongoing duty to her client under RPC 1.16(d). However,

> The State, on the other hand, does not have obligations to criminally accused persons akin to those of legal counsel. In a criminal case, the State is the defendant's party opponent. The State has an obligation to produce discovery during the pendency of a criminal case. See CrR 4.7(a); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This is a fundamental component of litigation, civil or criminal. But once a case is over, the State's ordinary discovery obligations end. This is true even if a conviction is appealed or challenged through a personal restraint petition.

*Albright,* 25 Wn. App.2d at 842 (footnote omitted).

There is no conflict in the decisions of the appellate courts. Defense counsel is obligated by professional ethics to provide her file upon the client's request postconviction. Compliance will include those materials that defense counsel received pretrial under CrR 4.7 as well as, for instance, investigative materials generated by the defense and not shared with the prosecution. The state as party opponent has no such ethical obligations.

No conflict in published cases is shown. Boardman argues no other reason for review. The courts below, including the

present court, provide well-reasoned decisions that squarely resolve the issue. Review is unnecessary and should be denied.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Boardman's petition for review.

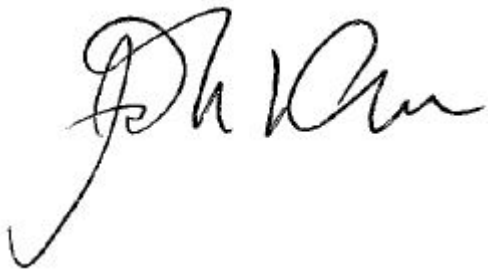
## I. CERTIFICATION

This document contains 1911 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED January 24, 2025.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



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# KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

## January 24, 2025 - 12:49 PM

### Transmittal Information

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| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 103,771-6 |
| **Appellate Court Case Title:** | State of Washington v. Thomas Russell Boardman |
| **Superior Court Case Number:** | 17-1-01192-2 |

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