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NO. 99930-9

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SALOFI ASAELI,

Petitioner.

Pierce County Superior Court Cause No. 04-1-05087-3
Court of Appeals Cause No. 54035-5-II

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Thirteen years after Benjamin Asaeli was convicted of murder, assault, and possession of a stolen firearm, he filed a CrR 4.7 motion in the superior court requesting extensive discovery from the State. The superior court concluded that CrR 4.7 does not apply to postconviction proceedings and denied his motion. The Court of Appeals affirmed.

The Court of Appeals properly concluded that CrR 4.7 does not apply to postconviction proceedings. Title 4 indicates that the rules within the title, including CrR 4.7, apply to “Procedures Prior to Trial”. Nothing in the Court of Appeals’ decision indicates that the State’s discovery obligations under CrR 4.7 stop applying at the start of trial as Asaeli claims. CrR 4.7(h)(2) provides a continuing duty to disclose material and information throughout trial. The decision of the Court of Appeals does not alter this duty.

The Court of Appeals properly concluded that Asaeli failed to show good cause for obtaining discovery and correctly held that the superior court did not err in denying his motion for discovery filed thirteen years after he was convicted at trial. The Court of Appeals’ decision does not conflict with any decision of this Court or with a published decision of the Court of

Appeals and does not raise a significant issue of constitutional law. This Court should deny review under RAP 13.4(b)(1), (b)(2), and (b)(3).

II. RESTATEMENT OF THE ISSUES

- A. Should this Court deny review where the Court of Appeals properly concluded that CrR 4.7 does not apply to postconviction proceedings and where this decision does not conflict with any decision of this Court or the Court of Appeals?
- B. Should this Court deny review where the Court of Appeals properly concluded that CrR 4.7 does not apply to postconviction motions for discovery and where the decision does not improperly limit the scope of CrR 4.7 or raise a significant issue of constitutional law under RAP 13.4(b)(3)?

III. STATEMENT OF THE CASE

In 2006, a jury found Benjamin Asaeli guilty of murder in the first degree by extreme indifference while armed with a firearm, second-degree felony murder while armed with a firearm, assault in the first degree while armed with a firearm, and possession of a stolen firearm. CP 24-31; *see also* CP 20-23, 34. His convictions were affirmed on appeal. *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009) (*Asaeli I*). His judgment became final on November 17, 2009—when the court issued the mandate. *See* CP 47-48; *see also* RCW 10.73.090(3)(b) (judgment becomes final when appellate court issues its mandate disposing of the direct appeal).

In 2019, thirteen years after trial and ten years after his judgment became final, Asaeli filed a motion in the superior court for extensive

discovery under CrR 4.7. *See* CP 1-3. He requested: (1) all correspondence between the prosecution and defense; (2) all documents showing proof of his criminal history; (3) physical or tangible objects in the State’s possession that may be relevant to his guilt or innocence; (4) all documents that question or raise doubts about the accuracy or reliability of any scientific and/or expert testing; (5) criminal records of all State witnesses, including pending charges against the witnesses; (6) any evidence that may undermine the credibility of any State witness; (7) all exculpatory evidence the State and its agents possess; (8) any mitigating evidence regarding his guilt or punishment; and (9) any statements of witnesses not called by the State during its case-in-chief. CP 1.

The superior court denied Asaeli’s motion for discovery, concluding that CrR 4.7 applies to pretrial discovery procedures and not to postconviction proceedings. CP 7-8. Asaeli appealed the order, and the Court of Appeals affirmed. The Court of Appeals concluded that “CrR 4.7 does not apply to postconviction proceedings” and held that the superior court did not err in denying Asaeli’s motion for discovery materials filed thirteen years after he was convicted at trial. *State v. Asaeli*, No. 54035-5-II, 491 P.3d 245 (2021) (*Asaeli II*).¹

¹ The opinion was filed on May 25, 2021 and publication was ordered on July 13, 2021.

IV. ARGUMENT

A. The Court of Appeals properly concluded that CrR 4.7 does not apply to postconviction proceedings, and this decision does not conflict with any decision of this Court or the Court of Appeals.

The Court of Appeals' decision that CrR 4.7 does not apply to postconviction proceedings does not conflict with any decision of this Court or with any published decision of the Court of Appeals. This Court should deny review under RAP 13.4(b)(1) and (b)(2).

The scope of discovery is within the sound discretion of the superior court, and the decisions of the superior court will not be disturbed absent a manifest abuse of discretion. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). The discovery provisions of the Superior Court Criminal Rules, CrR 4.7, guide the superior court in the exercise of discretion over discovery. *Yates*, 111 Wn.2d at 797. CrR 4.7 is a reciprocal discovery rule that contains the prosecutor's and defendant's obligations for discovery. *Yates*, 111 Wn.2d at 797.

The meaning of a court rule, like a statute, is a question of law subject to de novo review. *State v. Reisert*, 16 Wn. App. 2d 321, 324, 480 P.3d 1151 (2021), *review denied*, --- P.3d ----, 2021 WL 3524058 (Aug. 11, 2021). Courts interpret court rules the same way they interpret statutes, using the tools of statutory construction. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108 (2016). The goal of statutory interpretation is to discern

and implement the legislature’s intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Courts begin with the plain language of the rule. *Otton*, 185 Wn.2d at 681. Plain language does not require construction. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Courts assume the legislature “means exactly what it says.” *Id.* “Plain meaning is discerned from the language, the statute’s context, related provisions, and the statutory scheme as a whole.” *Wrigley v. State*, 195 Wn.2d 65, 71, 455 P.3d 1138 (2020). If the plain language is unambiguous, then the court’s inquiry is at an end, and the statute or rule should be enforced in accordance with its plain meaning. *See Armendariz*, 160 Wn.2d at 110.

Here, the Court of Appeals accurately stated that “[w]hen words in a court rule are plain and unambiguous, further interpretation is not necessary and we apply the court rule as written.” *See Asaeli II*, 491 P.3d at 247. The Court of Appeals properly determined that it “may look to the rule’s title to assist in interpreting a court rule.” *See id.* (citing *Reisert*, 16 Wn. App. 2d at 325).

Separate titles of the Superior Court Criminal Rules apply to different stages of the proceedings: Title 4 applies to “Procedures Prior to Trial”, Title 6 applies to “Procedures at Trial”, and Title 7 applies to “Procedures Following Conviction”. These titles are a substantive part of

the rules and are useful in statutory interpretation. *See Reisert*, 16 Wn. App. 2d at 325-26. Title 4, which includes CrR 4.7, indicates that it applies to “Procedures Prior to trial.” Nothing in the rules suggests that the titles are not part of the rules. *See Reisert*, 16 Wn. App. 2d at 325. Thus, CrR 4.7 involves discovery prior to trial. The Court of Appeals correctly concluded that “CrR 4.7 does not apply to postconviction proceedings.” *See Asaeli II*, 491 P.3d at 247. As the court properly explained, Title 4 indicates that the Supreme Court “intended CrR 4.7 to apply to pretrial discovery procedures, not after a defendant has been convicted.” *See Asaeli II*, 491 P.3d at 247.

Asaeli argues that CrR 4.7 creates a continuing duty to disclose information and that the Court of Appeals erred by not extending CrR 4.7 to postconviction proceedings. Petition at 3-4. But this duty does not apply indefinitely. CrR 4.7(h)(2) indicates that the rule continues to apply throughout trial. CrR 4.7(h)(2), titled “Continuing Duty To Disclose”, creates an ongoing duty to disclose additional material or information “which is subject to disclosure” both before and during trial:

If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

CrR 4.7(h)(2). This rule provides that the State has a continuing duty to disclose discoverable information before and during trial. *See State v. Greiff*, 141 Wn.2d 910, 919, 10 P.3d 390 (2000); *see also State v. Brush*, 32 Wn. App. 445, 455, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983) (discussing prosecutor’s ongoing duty to promptly furnish evidence to the defense even when discovered during trial). The decision of the Court of Appeals is consistent with this rule.

Asaeli claims that the Court of Appeals concludes that “the rule does not apply once trial has begun” and that this “new interpretation of the rule” contradicts this Court’s decisions and creates an issue of significant constitutional import. Petition at 1-2. Asaeli misconstrues the court’s opinion. The Court of Appeals did not conclude, or even suggest, that CrR 4.7 stops applying once trial begins. Rather, the court concluded that CrR 4.7 does not apply to *postconviction* proceedings and that Asaeli has not shown a due process right to *postconviction* discovery. This is not a new interpretation of the rule and does not conflict with Washington law.

Further, Asaeli’s reliance on *Greiff* is misplaced. In *Greiff*, the Court concluded that the State violated CrR 4.7 by failing to notify the defendant of a significant change in an officer’s testimony prior to trial. *Greiff*, 141 Wn.2d at 919-20. *Greiff* involved discoverable information that the State knew about *prior to* trial. Here, Asaeli made a broad and extensive

discovery request for materials and information thirteen years after he was convicted at trial. The Court of Appeals' decision does not conflict with *Greiff*.

CrR 4.7 is a pretrial mechanism to facilitate litigation and preserve a defendant's rights while preparing for trial. This Court has stated that the principles underlying CrR 4.7 apply to discovery prior to trial:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, *discovery prior to trial* should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

Yates, 111 Wn.2d at 797 (emphasis added) (quoting Criminal Rules Task Force, *Washington Proposed Rules of Criminal Procedure 77* (West Pub'g Co. ed. 1971)). Nothing in CrR 4.7 indicates an intent to apply to postconviction proceedings.

From a due process standpoint, defendants seeking postconviction relief are not entitled to discovery as a matter of ordinary course and are limited to discovery only to the extent they can show good cause to believe the discovery would entitle them to relief. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999). Courts do not condone postconviction fishing expeditions to pore over every aspect of the case. *See id.* at 394. Here, the Court of Appeals properly concluded that CrR 4.7 does

not apply to postconviction proceedings. The court's decision does not conflict with Washington law.

Relying only on *State v. Padgett*, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018), Asaeli claims that "courts have regularly applied the provisions of CrR 4.7 after convictions." Petition at 3. Although he did not rely on this case below, he now claims that the Court of Appeals "makes no effort" to explain why some provisions of the rule apply after trial while others do not. Even if Asaeli had raised *Padgett* below, this case is inapposite.

In *Padgett*, the defendant filed a motion to compel production of his client file and discovery materials while his direct appeal was pending. *Padgett*, 4 Wn. App. 2d at 852-53. The issue in *Padgett* was whether a criminal defendant is entitled to a copy of his client file. *Id.* at 854.

The rules of professional conduct *require* defense counsel to surrender "papers and property to which the client is entitled" upon termination of representation unless retention is "permitted by other law." RPC 1.16(d). The Washington State Bar Association (WSBA) has issued an ethics advisory opinion interpreting RPC 1.16(d) to mean "unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request" at the conclusion of representation. *Padgett*, 4 Wn. App. 2d at 854 (quoting WSBA Rules of Prof'l Conduct Comm., *Advisory Op.*

181 (rev. 2009)). In *Padgett*, the applicability of CrR 4.7(h)(3), which involves custody of materials within the attorney's possession, was limited to any redactions necessary to protect against the dissemination of sensitive or confidential information. *See Padgett*, 4 Wn. App. 2d at 854-55.

Unlike *Padgett*, Asaeli did not request his client file. Rather, Asaeli made a broad and extensive request for discovery in the State's possession that went even beyond the scope of CrR 4.7. *See* CP 1. And Asaeli filed his motion thirteen years after he was convicted at trial and ten years after his judgment became final. *Padgett* filed his motion to compel production of his client file while his direct appeal was pending and was based on an entirely different rule. It is not inconsistent for a rule that places restrictions on the distribution of discovery from a client's file to continue to apply postconviction while also providing that the rule does not allow for new, open-ended discovery in postconviction proceedings. The State's continuing duty to disclose materials and information does not extend eternally to postconviction proceedings. *Padgett* does not hold otherwise. The decision of the Court of Appeals does not conflict with *Padgett*.

The Court of Appeals' decision does not conflict with any decision of this Court under RAP 13.4(b)(1). And it does not conflict with a published decision of the Court of Appeals under RAP 13.4(b)(2). Asaeli fails to show a basis for review. This Court should deny review.

B. The decision of the Court of Appeals does not improperly limit the scope CrR 4.7 and does not raise a significant question of constitutional law.

Without any explanation or citation to authority, Asaeli claims that limiting CrR 4.7 to pretrial proceedings increases the likelihood of *Brady*² violations. He claims that if the discovery obligations under CrR 4.7 is “artificially truncated at the start of trial, the scope and number of constitutional violations will only increase.” Petition at 5. But nothing in the Court of Appeals’ decision stops CrR 4.7 discovery obligations at the start of trial. The court’s interpretation of CrR 4.7 does not raise a significant issue of constitutional law under RAP 13.4(b)(3). This Court should deny review.

This Court should reject Asaeli’s attempt to turn the applicability of a discovery rule into an issue of constitutional significance. There is no due process right to discovery as a matter of ordinary course during postconviction proceedings. *Gentry*, 137 Wn.2d at 390-91. Rather, discovery requests are limited to situations where the petitioner can show good cause to believe the discovery would entitle him to relief. *Gentry*, 137 Wn.2d at 391. Here, Asaeli failed to show good cause to believe the discovery would entitle him to any relief. In fact, he did not even attempt to make such a showing. Rather, he simply requested an order directing the

² *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

State to produce the materials. And his discovery request went beyond even the scope of CrR 4.7 with no explanation as to why he was entitled to such discovery. The decision of the Court of Appeals affirming the trial court's denial of his motion—filed thirteen years after trial—comports with due process.

Title 7, which is labeled “Procedures Following Conviction”, allows motions for a new trial under CrR 7.5 and motions for relief from judgment under CrR 7.8 due to mistakes, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or any other reason justifying relief. Asaeli did not file a motion under Title 7. Rather, he filed a motion under CrR 4.7, which only applies to procedures prior to trial. The superior court's denial of this motion does not raise a significant constitutional issue under RAP 13.4(b)(3).

Nothing in the Court of Appeals' decision implicates constitutional concerns. The Court of Appeals concluded that “CrR 4.7 does not apply to postconviction proceedings” and that “[n]othing in CrR 4.7 states or even suggests that its provisions apply *after conviction*.” *Asaeli II*, 491 P.3d at 247 (emphasis added). Nothing in the Court of Appeals' decision states, or even suggests, that the State's discovery obligations end at the start of a trial as Asaeli claims.

As the Court of Appeals explained, Asaeli filed his motion thirteen years after he was convicted at trial and failed to show good cause for obtaining discovery. *Asaeli II*, 491 P.3d at 247. He made a broad request for extensive discovery without any showing of materiality or good cause to believe the discovery would entitle him to relief. Neither the court rules nor the constitution allows for such a fishing expedition. The Court of Appeals properly concluded that the superior court did not err in denying Asaeli's CrR 4.7 motion for discovery thirteen years after trial. *See id.* There is no basis for review.

Nothing in the Court of Appeals' decision changes the State's discovery obligations under CrR 4.7. Asaeli cites no authority indicating that he is entitled to embark on a fishing expedition for discovery more than a decade after trial. The purpose of *Brady* is to preserve the fairness of criminal trials. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011).

To establish a *Brady* violation, a defendant must demonstrate three necessary elements: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Mullen*, 171 Wn.2d at 895. Evidence is prejudicial if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been

different. *Id.* at 897. *Brady* governs the State's disclosure obligations and does not provide the proper analytical framework to analyze any-and-all evidence discovered after trial. *Mullen*, 171 Wn.2d at 902.

Here, Asaeli does not allege that a *Brady* violation occurred. Those concerns are simply not present. Yet Asaeli seeks review alleging concerns about *Brady* violations and claiming that the court's decision creates serious doubts as to the constitutionality of CrR 4.7. But Asaeli's concerns are based on a misinterpretation of the court's decision. The Court of Appeals' decision does not stop the State's discovery obligations at the start of trial as he claims.

Rather, the Court of Appeals properly concluded that "CrR 4.7 does not apply to postconviction proceedings." *See Asaeli II*, 491 P.3d at 247. And the Court of Appeals properly concluded that the superior court did not err by denying Asaeli's postconviction motion for discovery under CrR 4.7, which he filed thirteen years after he was convicted at trial. *See Asaeli II*, 491 P.3d at 247. Asaeli did not even attempt to show good cause for his extensive discovery request, which included all correspondence between the parties, all evidence in the State's possession, all documents showing his criminal history, all documents questioning the accuracy or reliability of any scientific or expert testing, all criminal records of all State witnesses (including any pending charges), all evidence that may undermine the

credibility of any State witness, all exculpatory and mitigating evidence, and any statements from non-testifying State witnesses. *See* CP 1. Nothing in the Court of Appeals’ decision “will invite constitutional violations” as Asaeli suggests. The court’s interpretation of CrR 4.7 does not raise a significant issue of constitutional law under RAP 13.4(b)(3), and this Court should deny review.

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 30th day of August, 2021.

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