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SUPREME COURT
STATE OF WASHINGTON

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CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of
COREY BEITO,
Petitioner.

NO. 77973-2

NOTICE OF APPEARANCE
AND SUPPLEMENTAL PLEADING
IN SUPPORT OF DISCRETIONARY
REVIEW

1. IDENTITY OF MOVING PARTY

Corey Beito, Petitioner, seeks the relief designated in Part 2.

2. STATEMENT OF RELIEF REQUESTED

Permit undersigned counsel to appear. Permit counsel to file this supplemental pleading in support of discretionary review.

3. FACTS

Mr. Beito is currently serving a 504-month "exceptional" sentence imposed based on an aggravating factor, not included in his charging document, not admitted in his guilty plea, and found at sentencing by a judge.

It is undisputed that Beito's sentence was final prior to *Blakely v. Washington*, 542 U.S. 296 (2004). It is also undisputed that Beito did not knowingly waive his Sixth Amendment right to a jury trial on the "aggravating factor." Instead, his plea form told

1 Beito that he had no such right—that a judge would decide whether aggravating
2 circumstances existed.

3
4 Family members recently retained undersigned counsel to represent Mr. Beito.
5 Beito previously moved for appointment of counsel. He now withdraws that request.

6
7 4. ARGUMENT

8 *Introduction*

9 This Court should grant review, vacate the decision below, and either remand to
10 the Court of Appeals for consideration in light of *In re Restraint of Hall*, 163 Wn.2d 346,
11 181 P.3d 799 (2008), or reverse and remand for resentencing. In either event, Beito
12 should be resentenced to a standard range sentence.
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15 The Court of Appeals' decision dismissing this case conflicts with decisions of
16 this Court and presents significant state and federal constitutional questions. RAP 13.5A
17 (a) (1); 13.4 (b). Thus, Beito satisfies the requisite standards for granting review.

18 *The Sentencing Error in this Case Cannot Be Harmless.*

19
20 Beito was given an exceptional sentence under a statute in effect at the time
21 which required proof by a preponderance of the evidence and a determination of the
22 facts by a judge. In contrast, the Constitution requires proof beyond a reasonable doubt
23 and the right to a jury trial. *Blakely, supra*. *Blakely* was decided prior to the time
24 Beito's appeal was final.¹ Thus, the error in this case cannot be harmless—a point made
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30 ¹ For that reason, Beito was denied his federal and state constitutional right to effective assistance of counsel when appellate counsel failed to raise the Sixth Amendment claim in this Court before Beito's petition for review was decided. This is especially true given that the sentence was the only issue on appeal.

1 clear by this Court's recent decision in *Hall. Id., at 355* ("The exceptional sentencing
2 provisions in force at the time of Hall's offense explicitly assigned the trial court to find
3 aggravating circumstances by a preponderance of the evidence. As a result, it was
4 procedurally impossible for the jury to have made a beyond a reasonable doubt finding
5 on the aggravating circumstances in Hall's case. Therefore, we hold that the error in
6 Hall's case *cannot be harmless.*")(emphasis supplied).
7

8
9 *Hall* further explained: "The exceptional sentencing provisions in effect when Hall
10 committed his offense directed that the trial court find aggravating circumstances by a
11 preponderance of the evidence. The legislature's explicit assignment of the finding to the
12 trial court precluded assigning the finding to the jury. Its designation of the standard of
13 proof as a preponderance precluded requiring proof beyond a reasonable doubt. Since it
14 would have been procedurally impossible to obtain a constitutionally valid jury finding,
15 the error in this case cannot be deemed harmless." *Id.* at 351-2.
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19 The above statements apply with equal force to Beito. Beito was sentenced under
20 the same, invalid sentencing provisions. Thus, *Hall* mandates a finding of harm.
21

22 Further, because Beito did not stipulate "to both the facts supporting his
23 exceptional sentence and that there was a legal basis for the exceptional sentence," this is
24 not a case involving waiver. *State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006).
25

26 *Beito Was Not Charged With Any Aggravating Factor*
27

28 However, there is an additional reason precluding a finding of harmlessness in this
29 case. Beito was not charged with a crime that included an alleged aggravating factor.
30

1 It is well-established in this state that “(a)ll essential elements of a crime, statutory
2 or otherwise, must be included in a charging document in order to afford notice to an
3 accused of the nature and cause of the accusation against him.” *State v. Kjorsvik*, 117
4 Wn.2d 93, 97, 812 P.2d 86 (1991). “This conclusion is based on constitutional law and
5 court rule.” *Id.* Further, the federal constitutional guarantee of due process mandates that
6 a defendant cannot be sentenced for a crime never charged.
7

8
9 Beito’s position today is also consistent with long-standing state law. “Where a
10 factor aggravates an offense and causes the defendant to be subject to a greater
11 punishment than would otherwise be imposed, due process requires that the issue of
12 whether that factor is present, must be presented to the jury upon proper allegations and a
13 verdict thereon rendered before the court can impose the harsher penalty.” *State v. Nass*,
14 76 Wn.2d 368, 456 P.2d 347 (1969). “(I)n order to justify the imposition of the higher
15 sentence, it is necessary that the matter of aggravation relied upon as calling for such
16 sentence be charged in the indictment or complaint.” *Id.*
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21 Likewise, state law has consistently required the charging of a weapon or firearm
22 “enhancement” in an information. In *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073
23 (1972), the Washington Supreme Court held that the state’s intention to charge such an
24 “enhancement” should be set forth in the information. In *State v. Cosner*, 85 Wn.2d 45,
25 50-51, 530 P.2d 317 (1975), Justice Hamilton, writing for the court, said: “The appellate
26 courts of this state have held that when the State seeks to rely upon either RCW 9.41.025
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1 or RCW 9.95.040,²] or both, due process of law requires that the information contain
2 specific allegations to that effect, thus putting the accused person upon notice that
3 enhanced consequences will flow with a conviction.”

4
5 Notice, especially notice provided *after* conviction, is not enough. In *State v.*
6
7 *Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980), the State sought an enhanced sentence
8 based on the use of a deadly weapon during the crime. While the State did not amend the
9 information, it did file a notice of intent to seek the increased sentence. *Id.* at 387.
10
11 However, “neither the original nor the amended information contained an allegation of a
12 violation of RCW 9.41.025 or 9.95.040. No intention to seek an enhanced penalty under
13 any of the counts was indicated in either information.” *Id.* at 387. As a result, this Court
14 held that the State’s failure to charge the facts in the information was fatal, despite the
15 separate notice. “When prosecutors seek enhanced penalties, notice of their intent must
16 be set forth in the information.” *Id.* at 392. Relying on language from *Frazier*, the Court
17 held that the rule is “clear and easy to follow. When prosecutors seek enhanced
18 penalties, notice of their intent must be set forth in the information. Our concern is more
19 than infatuation with mere technical requirements.” *Id.*

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24 “Aggravating factors” function in the exact same manner as the nature of the
25 controlled substance in *Goodman*, or the nature of the weapon in *Theroff*, or the *mens rea*
26 requirement of premeditation separating first- and second-degree murder. Thus, it is
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30 ² Former RCW 9.41.025 and RCW 9.95.040 contained firearm and deadly weapon enhancements that preceded similar enhancements under the Sentence Reform Act.

1 “axiomatic” under Washington law that the failure to charge precludes the ability to
2 sentence based on that factor.

3
4 This Court’s recent decision in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276
5 (2008), is in accord. In that case, Recuenco was charged with assault with a deadly
6 weapon enhancement, and he was convicted of assault with a deadly weapon
7 enhancement, but he was erroneously sentenced with a firearm enhancement. “We
8 conclude it can never be harmless to sentence someone for a crime not charged, not
9 sought at trial, and not found by a jury. In this situation, harmless error analysis does not
10 apply.” *Id.* at 442. “Washington law requires the State to allege in the information the
11 crime which it seeks to establish. This includes sentencing enhancements.” *Id.* at 434.

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15 Because the information in this case did not include an aggravating factor, Beito
16 could not be sentenced for an uncharged crime—an error which is never harmless.

17
18 *The Current Statute Precludes Remand to Impanel a Jury*

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20 Finally, even assuming the application of RCW 9.94A.537(2) (and putting aside
21 the above argument), under the plain reading of that statute Beito cannot receive another
22 exceptional sentence.

23
24 The statute provides: “In any case where an exceptional sentence above the
25 standard range was imposed and where a new sentencing hearing is required, the superior
26 court may impanel a jury to consider any alleged aggravating circumstances listed in
27 RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous
28 sentence, at the new sentencing hearing.” In other words, the statute limits re-imposition
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1 of an exceptional sentence to those cases where the overturned sentence was based on an
2 aggravating circumstance currently listed in the statute.
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4 Here, the trial court found that Beito committed a rape of the child victim in
5 connection with his commission of the murder. That factor does not appear anywhere in
6 RCW 9.94A.535(3). Because the statute permits a jury to consider only an aggravator
7 specifically listed in the statutory scheme which was found previously, there is no
8 aggravator that a jury can consider. It is important to note that the trial court specifically
9 rejected the “deliberate cruelty” and “vulnerable victim” aggravators. *See* PRP
10
11 *rejected* the “deliberate cruelty” and “vulnerable victim” aggravators. *See* PRP
12 (Appendix H).
13

14 Thus, this Court should not only reverse Beito’s sentence, it should remand for
15 imposition of a “standard range” sentence.
16

17 5. CONCLUSION

18 Based on the above, this Court should accept review, vacate the Court of Appeals
19 decision, and either remand this case to that court in light of *Hall*, or vacate Beito’s
20 sentence and remand to the trial court for imposition of a standard range sentence.
21

22 DATED this 18th day of August, 2008.
23

24 _____
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Attached please find a notice of appearance and supplemental brief to be filed in the above-entitled case. I have sent a copy of this email, and the attachment, to opposing counsel.

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