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SUPREME COURT
STATE OF WASHINGTON

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8 **IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

9
10 In re Personal Restraint Petition of
11 **COREY BEITO,**
12 Petitioner.

NO. 77973-2

PETITIONER'S SURREPLY

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15 **I. INTRODUCTION**

16 As part of his guilty plea, Mr. Beito and the State entered into an agreement which
17 permitted the State to argue for an exceptional sentence, but which did not limit Mr.
18 Beito's right to argue against that sentence (*i.e.*, in support of a standard range
19 sentence)—at sentencing, on appeal, or in a collateral attack. Thus, Beito's current PRP
20 does not violate any of the terms of the plea agreement and the State does not argue
21 otherwise. Just as importantly, Beito does not seek rescission of his plea of guilty.

22 Nevertheless, the State now argues that reversing Mr. Beito's exceptional sentence
23 would violate some unidentified, yet indivisible portion of the plea agreement. The State
24 is mistaken as this Court has squarely held in *State v. Hagar*, 158 Wn.2d 369, 144 P.3d
25 298 (2006) and *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006). Because Beito
26 has not breached the plea agreement, rescission is improper.
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PETITIONER'S SURREPLY--1

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1 II. ARGUMENT

2 A. Introduction

3
4 Corey Beito pleaded guilty to murder and waived his statutory right to make the
5 State prove “real facts” at sentencing but did not stipulate to an exceptional sentence and
6 did not waive his constitutional right to a jury determination of aggravating factors. In
7 addition, Beito did not waive his right to attack his exceptional sentence in the appellate
8 courts. In fact, the State does not argue that Mr. Beito’s current PRP violates any of the
9 terms of his plea agreement.
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12 Without a breach, rescission is not a remedy.

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14 B. Summary of Facts and Procedural History

15 As part of the plea agreement, Mr. Beito stipulated to certain “real facts.” As the
16 Court of Appeals explained on direct appeal:
17

18 As part of the plea, Beito agreed that the State could recommend an exceptional
19 sentence but expressly reserved the right to appeal such a sentence. For purposes
20 of sentencing, Beito stipulated that the court could consider facts that established
21 third degree child rape, and first and second degree rape. He also stipulated that
22 third degree child rape had in fact occurred but expressly denied that there was a
23 forcible rape. Finally, Beito stipulated that the sentencing court could consider the
24 certification of probable cause, his own statements contained in the discovery,
certain witness statements and reports, and ‘{a}dditional evidence that is offered
and accepted by the court{.}’

25 *State v. Beito*, 106 Wn. App. 1023, not reported in P.3d, 2001 WL 537850 (2001).

26
27 After the prosecutor argued for an exceptional sentence:

28 Beito's counsel agreed that the rape of a child had occurred, but argued that it was
29 a legally insufficient ground in itself and was of diminished significance to any
30 other ground because J.S. was living as an adult. He argued against each of the
State's other proposed reasons. The sentencing judge found that ‘rape of a child,
based on a stipulation’ was sufficient to support an exceptional sentence.

1 *Id.*

2
3 The trial court imposed an exceptional sentence of 504 months, citing “rape of a
4 child” as the single aggravating factor. Beito appealed, arguing that the facts did not
5 support the exceptional sentence because the sentencing court did not find a sufficient
6 nexus between the rape and murder to justify an exceptional sentence.
7

8 The State first argued that Beito had waived the issue by not objecting. The Court
9 of Appeals disagreed: “Beito specifically reserved the right to appeal an exceptional
10 sentence at the time of his plea. He did not waive his right to dispute a connection
11 between the rape and the murder on appeal and accordingly we consider his argument on
12 the merits.” *Id.*
13

14
15 The State argued then, *as they do now*, that there is no other reasonable
16 interpretation of the evidence except that the two crimes are connected. While
17 recognizing that the sentencing court, as the finder of fact, “was entitled to draw
18 inferences from circumstantial evidence and to determine whether it believed the parts of
19 Beito's confession claiming that the murder was completely unrelated to the sexual
20 intercourse,” the Court concluded that it was not that Court's function to supply
21 “missing” findings—“even when the record would support the findings without taking
22 additional evidence.” *Id.* In other words, the Court of Appeals concluded that judicial
23 fact-finding was necessary to the imposition of an exceptional sentence—a point
24 affirmatively argued by the State in that court.
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1 On remand, *after finding a factual connection between the rape and murder*, the
2 sentencing court again imposed a 504-month exceptional sentence. *See State v. Beito*,
3 113 Wn. App. 1042, not reported in P.3d, 2002 WL 31059931 (2002).¹
4

5 Thus, it is clear that the Beito's sentencing court was required to make a factual
6 determination before legally concluding that an exceptional sentence was appropriate. It
7 is also clear that the plea agreement did not preclude Beito from challenging either
8 element.
9

10
11 C. Beito Challenges the Legality of His Exceptional Sentence—Not His
12 Factual Stipulation

13 As in the *Blakely* case itself, Beito is not seeking to set aside his plea, but merely
14 to overturn his unconstitutional exceptional sentence.
15

16 The previous appellate decisions in this case have made it clear that the trial
17 court's exceptional sentence depended on trial court fact-finding. Indeed, the case was
18 remanded by the Court of Appeals after the first appeal for that exact purpose.
19

20 Likewise, Beito's plea statement told him a judge, not a jury, would decide
21 whether to impose an exceptional sentence. Beito was not asked to waive his right to a
22 jury determination of facts necessary to impose an exceptional sentence. This Court has
23 made it clear that, despite the Constitutional jury trial requirement, it would have violated
24 state law to submit aggravating circumstances to a jury to be determined beyond a
25 reasonable doubt at the time of Beito's plea. Therefore, the error in this case cannot be
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30 ¹ The Court of Appeals reversed Beito's sentence a second time—this time because the trial court has miscalculated his offender score. Beito's exceptional sentence was appealed on additional time. This time the Court of Appeals

1 harmless. *In re Restraint Petition of Hall*, 163 Wn.2d 346, 181 P.3d 799 (2008). Since it
2 would have been procedurally impossible to obtain a constitutionally valid jury finding,
3 this Court concluded the error cannot be deemed harmless. “Where the legislature has
4 directed that the court, not the jury, will make a finding, and has established that the
5 standard of proof shall be a preponderance of the evidence, rather than beyond a
6 reasonable doubt, the quantum of evidence introduced to support the finding is
7 immaterial--the error cannot be harmless.” *Id.* at 354. This Court continued:
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11 The exceptional sentencing provisions in force at the time of Hall's offense
12 explicitly assigned the trial court to find aggravating circumstances by a
13 preponderance of the evidence. As a result, it was procedurally impossible for the
14 jury to have made a beyond a reasonable doubt finding on the aggravating
15 circumstances in Hall's case. Therefore, we hold that the error in Hall's case
16 cannot be harmless.

17 *Id.* at 355.

18 D. *Hagar, Suleiman, and Ermels Control the Outcome of this Case*

19 This Court has recently decided two cases that are directly on point and one that is
20 easily distinguished, but which provides additional support for Beito's argument: *State v.*
21 *Hagar*, 158 Wn.2d 369, 144 P.3d 298 (2006); *State v. Suleiman*, 158 Wn.2d 280, 143
22 P.3d 795 (2006); and *State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006). Those cases
23 squarely control the outcome of this case.
24

25
26 In *Hagar*, the defendant stipulated to certain facts but did not stipulate that the
27 crimes constituted a “major economic offense.” The trial court imposed an exceptional
28 sentence of 30 months, well outside the standard range of three to nine months, based on
29

30 affirmed. This Court denied review on September 8, 2004—several months after *Blakely* was decided. *State v.*

1 its finding that Hagar had committed a major economic offense. When *Blakely* was
2 decided, it was legally clear that Hagar's sentence was unconstitutional because the
3 exceptional sentence was predicated on an unstipulated fact that was not found by a jury
4 beyond a reasonable doubt.
5

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7 This court was then asked to determine if a defendant who pleads guilty pursuant
8 to a plea bargain and who stipulates to "real facts" for sentencing purposes may
9 successfully pursue a *Blakely* challenge. 158 Wn.2d at 371. The Court of Appeals
10 affirmed Hagar's sentence, finding his stipulation to the real facts was an integral part of
11 the plea agreement and was not shown to be divisible—*i.e.*, *the argument advanced by*
12 *the State in its surresponse*. This Court explicitly rejected that conclusion: "However,
13 whether the stipulation is divisible is irrelevant here because Hagar need not challenge
14 his stipulation in order to establish that a *Blakely* violation occurred. Even assuming
15 Hagar's stipulation is valid, the trial court still engaged in improper *Blakely* fact finding
16 when it found the crimes constituted a 'major economic offense.'" *Id.* at 374.
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21 The State does not attempt to distinguish the facts of Hagar from the instant case.
22 In fact, the State expressly states that it is *not* contending "that Beito must challenge his
23 stipulation to establish a *Blakely* violation." *Surreesponse*, p. 23. However, given the
24 State's appropriate additional concession that the decision in *Hagar* turned on the fact
25 that Hagar "did not need to challenge his stipulation to real facts in order to establish a
26 constitutional violation," the cases are indistinguishable. *Id.*
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Beito, 152 Wn.2d 1003, 101 P.3d 865 (2004).

1 This case is also controlled by *Suleiman, supra*, a case cited only in passing by the
2 State in its surreply.
3

4 In *Suleiman*, as part of a plea agreement the parties stipulated that the facts set
5 forth in the certification for determination of probable cause and the prosecutor's
6 summary were "real and material facts for purposes of this sentencing." However, like
7 Beito, Suleiman did not waive his right to appeal an exceptional sentence. Instead,
8 Suleiman appealed, arguing the trial court erred in imposing an exceptional sentence
9 based on *Blakely*, which was decided before Suleiman's appeal was final.
10

11 In this Court, the State argued that Suleiman "should not be allowed to enjoy the
12 benefit of his plea agreement without suffering the consequences of his stipulation, and
13 thus, Suleiman cannot challenge his exceptional sentence without challenging his *entire*
14 plea agreement." *Id.* at 293. This Court rejected the State's argument because any
15 "expectation" the State had was only contingent, as the sentencing judge was not a party
16 to the plea agreement and the State had no enforceable right to an exceptional sentence.
17 *Id.* "Even if we assume in this case that Suleiman's stipulation is entirely valid, the trial
18 court *still* engaged in improper *Blakely* fact finding." *Id.* This Court concluded:
19 "Simply put, Suleiman need not challenge his stipulation *at all* in order to establish that a
20 *Blakely* violation occurred in this case." *Id.* at 294.
21

22 Given the State's concession that Beito need not challenge his stipulation either,
23 *Suleiman* controls.
24

25 The direct application of *Hagar* and *Suleiman* to this case is reinforced by a
26 distinguishable case: *State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006).
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1 Joshua Ermels pleaded guilty to manslaughter in the second degree. As part of his
2 plea agreement, Ermels stipulated to facts supporting an exceptional sentence, *and* he
3 stipulated that there was a legal basis for an exceptional sentence. He also specifically
4 waived his right to appeal the basis for and propriety of an exceptional sentence.
5

6
7 Ermels nevertheless appealed, arguing (post-*Blakely*) to the Court of Appeals he
8 had not knowingly, intelligently, and voluntarily waived his right to appeal or his right to
9 have a jury find the facts necessary to support his exceptional sentence. This Court
10 distinguished *Ermels* from its companion case: *Suleiman*.
11

12 However, Ermels does not argue that his exceptional sentence relies on improper
13 *Blakely* fact finding; instead he contends that the waivers set forth in the plea
14 agreement are not valid.

15 *Id.* at 539.

16
17 This Court concluded that because Ermels stipulated to the all the facts necessary
18 to his exceptional sentence *and* that there was a legal basis for an exceptional sentence he
19 could not challenge his exceptional sentence without challenging the entire plea. For the
20 same reason, this Court held that Ermels could not challenge the validity of his appeal
21 waiver without challenging his entire plea. *Id.* at 540-41. “Ermels’ limited request for
22 remedy is fatal because it does not appear that he can challenge the validity of his
23 exceptional sentence without challenging the validity of the entire plea.” *Id.* at 540.²
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² For the first time in his supplemental brief, Ermels contended that his waiver of his right to appeal was ambiguous. This Court refused to consider that argument, noting: “We need not address issues raised for the first time in supplemental briefing. RAP 13.7(b).”

1 Here, Beito need not challenge his stipulation in order to challenge his sentence—
2 an uncontested point. Thus, *Ermels* is easily distinguished.
3

4 Read together, *Hagar*, *Suleiman*, and *Ermels* mandate reversal of Beito's sentence,
5 but not his plea agreement or conviction.
6

7 E. This Court Should Not Overrule Precedent

8 Although the State suggests that it is distinguishing *Hagar* when it argues that this
9 Court should fashion a new remedy by remanding this case to the trial court where Beito
10 can seek only to withdraw his guilty plea, in reality the State asks this Court to overrule
11 that decision, as well as *Suleiman*. In order to overrule past precedent there must be “a
12 clear showing that an established rule is incorrect and harmful.” *State v. Berlin*, 133
13 Wash.2d 541, 547, 947 P.2d 700 (1997). The State does not even attempt to make this
14 showing.
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18 In this PRP, Beito challenges only the result that he was always permitted to
19 challenge. He does not challenge any aspect of his plea agreement. He does not
20 challenge the validity of his conviction. “Correcting an erroneous sentence in excess of
21 statutory authority does not affect the finality of that portion of the judgment and
22 sentence that was correct and valid when imposed.” *In re Restraint of Goodwin*, 146
23 Wn.2d 861, 877, 50 P.3d 618 (2002).
24
25

26 F. Remand for Resentencing

27
28 When this Court reverses an exceptional sentence, it's normal remedy is to
29 remand for resentencing without reaching the issue of whether another exceptional
30 sentence can be imposed. See *State v. Eggleston*, 164 Wn.2d 61, 77, 187 P.3d 233

1 (2008); *State v. Doney*, 165 Wn.2d 400, 198 P.3d 483 (2008). Thus, this Court has left
2 open the question of whether RCW 9.94A.537 can constitutionally be applied at
3 resentencing following reversal of a sentence imposed before its enactment. Thus, the
4 State's claim of "frustrated purpose" may not apply in most cases.
5

6
7 However, in this case the State apparently concedes that the statute precludes
8 imposition of another exceptional sentence. RCW 9.94A.537(2) limits a resentencing
9 jury "to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3),
10 that were relied upon by the superior court in imposing the previous sentence." The sole
11 aggravating circumstance relied on by the judge in this case (rape), is not a statutorily
12 approved aggravator. Thus, Beito cannot be sentenced to another exceptional sentence.
13
14 However, the State's "frustration" with the Legislature cannot be transferred to Beito,
15 who is simply making the arguments the State agreed he could make when it signed the
16 plea agreement.
17
18

19 III. CONCLUSION

20
21 There can be little question that the failure to anticipate *Blakely*, not to mention
22 the various post-*Blakely* legislative efforts, has left numerous parties frustrated—on both
23 sides of the aisle.
24

25 However, legally speaking, this case breaks no new ground. Instead, it involves
26 the straightforward application of legal principles developed in the wake of *Blakely*.
27
28 Because the State does not even attempt to show why those cases should be overruled,
29 they should be applied and Beito's sentence reversed. This case should then be remanded
30 for resentencing.

1 DATED this 11th day of May, 2009.

2
3 /s/ Jeffrey E. Ellis
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To: Jeff Ellis; jim.whisman@kingcounty.gov
Cc: ann.summers@kingcounty.gov
Subject: RE: PRP of Beito, No. 77973-2

Rec. 5-11-09

From: Jeff Ellis [mailto:ellis_jeff@hotmail.com]
Sent: Monday, May 11, 2009 12:38 PM
To: OFFICE RECEPTIONIST, CLERK; jim.whisman@kingcounty.gov
Cc: ann.summers@kingcounty.gov
Subject: RE: PRP of Beito, No. 77973-2

Enclosed please find Mr. Beito's surreply for filing. I have served opposing counsel with a copy of this document by simultaneously sending this email to Mr. Whisman and Ms. Summers, with the document attached.

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Subject: RE: PRP of Beito, No. 77973-2
Date: Tue, 28 Apr 2009 13:01:54 -0700
From: SUPREME@COURTS.WA.GOV
To: Jim.Whisman@kingcounty.gov
CC: ellis_jeff@hotmail.com; Ann.Summers@kingcounty.gov

Rec'd 4/28/09

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To: OFFICE RECEPTIONIST, CLERK
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Subject: PRP of Beito, No. 77973-2

Dear Supreme Court Clerk,

Attached is the State's response to Beito's motion to strike and / or motion to file a surreply. Counsel is copied on this message. Please let me know if there are any difficulties with this filing.

James M. Whisman
Senior Deputy Prosecuting Attorney
Appellate Unit Chair

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