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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint)
Petition of)
) No. 77973-2
)
) STATE'S SUPPLEMENTAL
) RESPONSE TO MOTION
) FOR DISCRETIONARY
) REVIEW
COREY BEITO,)
Petitioner.)
_____)

By ruling dated June 27, 2008, this Court requested that the State file a supplemental response to the pending Motion for Discretionary Review. For the reasons stated below, the State believes that the motion for discretionary review should be denied.

A. FACTS RELEVANT TO MOTION.

Corey Beito was charged by information with aggravated murder in the first degree for strangling 14-year-old Jessica Seim. PRP Appendix A.¹ In a taped statement to the police, Beito admitted to strangling the victim, whom he referred to as "just a baby" after having what he claimed was consensual sex with her.

¹ The relevant documents were appended to the PRP. These will be cited in this answer

PRP Appendix A. Evidence of sexual assault, in particular a vaginal abrasion, was found during the autopsy. PRP Appendix A.

Beito entered a plea of guilty to the charge of murder in the first degree. PRP Appendix B. In the plea form, Beito admitted to causing the death of the victim, and stated his wish to plead guilty to the reduced charge because of the substantial likelihood that a jury would find the murder to be premeditated. PRP Appendix B. In the plea, Beito agreed that "the Court may consider the certificate of probable cause as well as the terms of Appendix C to form a basis for my plea and my sentencing." PRP Appendix B (emphasis added).

The "Plea Agreement" attached to the Statement of Defendant On Plea of Guilty states, "[i]n accordance with RCW 9.94A.370 the parties have stipulated that the court, in sentencing, may consider as real and material facts information as follows: as set forth in the attached Appendix C." PRP Appendix B.

"Appendix C to Plea Agreement Re: Real Facts", signed by the prosecutor, defense counsel and Beito, states that "as part of the plea agreement, Real and Material facts establishing elements of a

as "PRP Appendix ___."

Rape First and Second Degree, and Rape of a Child in the Third Degree to be considered at sentencing are specifically stipulated to." PRP Appendix B (emphasis added). Pursuant to that document, the defendant acknowledged "[t]hat the crime of Rape of a Child Third Degree was committed," but disputed that the crimes of first or second degree rape were committed. PRP Appendix B. The parties stipulated that the court could consider Beito's statement to the police, the written statements of witnesses, the autopsy report and photos. PRP Appendix B. No testimony was presented at the sentencing hearing. PRP Appendix D.

The court imposed an exceptional sentence of 504 months, as recommended by the State and the Department of Corrections. PRP Appendix D. Counsel for Beito recommended a standard range sentence. PRP Appendix D. After several appeals, the 504-month sentence was affirmed. PRP Appendix I. Beito's petition for review was denied on September 8, 2004. PRP Appendix J.²

Beito subsequently filed this personal restraint petition,

² Thus, Beito's case was not final for purposes of retroactivity analysis when the Supreme Court issued its Blakely decision in June of 2004. See In re St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992).

alleging that imposition of an exceptional sentence based on judicial fact-finding violated the rule set forth in Blakely v. Washington, 524 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Court of Appeals dismissed the petition.

B. ARGUMENT.

PETITIONER HAS FAILED TO ESTABLISH THAT THE CONSTITUTIONAL ERROR THAT OCCURRED IN THIS CASE RESULTED IN ACTUAL AND SUBSTANTIAL PREJUDICE.

In dismissing Beito's petition, the Court of Appeals concluded that Beito could not challenge imposition of an exceptional sentence without seeking to withdraw his plea, relying on State v. Hagar, 126 Wn. App. 320, 105 P.3d 65 (2005), reversed, 158 Wn.2d 369, 144 P.3d 298 (2006).³ This Court reversed Hagar, and held that a defendant who pleads guilty with the understanding that the State will seek an exceptional sentence may challenge the imposition of an exceptional sentence pursuant

³ See also State v. Sulieman, 158 Wn.2d 280, 143 P.3d 795 (2006) (defendant who pled guilty may challenge imposition of exceptional sentence although defendant stipulated to facts at sentencing.)

to Blakely without seeking to withdraw the plea. Hagar, 144 P.3d at 300. However, in Hagar, this Court explicitly declined to address the question of whether such an error could be deemed harmless. Id. at 373, n. 2.

In light of this Court's decision in Hagar, the trial court's fact-finding in this case violated the rule set forth in Blakely and Beito may challenge the imposition of the exceptional sentence. The question for this Court is now whether the Blakely error was prejudicial. In a personal restraint petition, the petitioner bears the burden of showing that a constitutional error resulted in actual and substantial prejudice. State v. Brune, 45 Wn. App. 354, 363, 725 P.3d 454 (1986).

In In re Pers. Restraint of Hall, 163 Wn.2d 346, 181 P.3d 799 (2008), this Court held that where a defendant exercised his right to a jury trial, a Blakely error could not be deemed harmless because under the statutes existing at the time it would have been procedurally impossible to submit the aggravating facts to a jury for determination. See also State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007) (exceptional sentence imposed based on judicial

factfinding following jury trial could not be harmless). Beito's case is distinguishable from Hall because Beito waived his right to a jury trial. As noted by the United States Supreme Court in Blakely, "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2541, 159 L.Ed.2d 403 (2004). Because Beito waived his right to a jury, as contemplated in the Blakely decision, the lack of a procedure for submitting the aggravating facts to a jury should not serve as an impediment to conducting harmless error analysis.

Beito should be required to show actual and substantial prejudice by establishing that it is more likely than not that another factfinder would not have made the finding that the trial court made: that the rape was "so closely connected to the murder as to be considered 'part and parcel' of the same crime." See In re Sims, 118 Wn. App. 471, 476-77, 73 P.3d 398 (2003).

Significantly, Beito did not challenge the trial court's finding on direct appeal. See PRP Appendix G.

Beito has failed to establish that, more likely than not,

another factfinder would not have found Beito's admitted rape of the victim was not closely connected with the murder. Beito has failed to provide the appellate courts with any of the evidence to which Beito stipulated and on which the sentencing court relied in finding that the rape was closely related to the murder. As noted above, the parties stipulated that the court could consider Beito's statement to the police, the written statements of Michael Corbell, Mark Coffey and Nick Gaffe, the autopsy report and photos. PRP Appendix B. In order to make a determination as to whether there is a likelihood that another factfinder would not have found a connection between the rape and murder based on this evidence, this Court would have to review all the materials that were before the trial court. Beito has provided none of these materials. As such, he has failed to meet his burden of establishing actual and substantial prejudice resulting from the Blakely error.

C. CONCLUSION.

Beito has failed to establish constitutional error that resulted in actual and substantial prejudice. This personal restraint petition was properly dismissed. The motion for discretionary review should be denied.

DATED this 21st day of July, 2008.

Respectfully submitted,

DAN SATTERBERG
King County Prosecuting Attorney

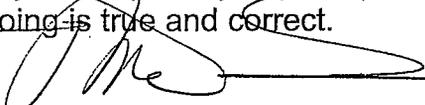
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CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Gregory Link, Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101, attorneys for the petitioner, containing a copy of the State's Supplemental Response to Motion for Discretionary Review in In re Pers. Restraint of Corey Beito, No. 77973-2, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



07-21-2008

Name
Done in Seattle, Washington

Date

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To: Summers, Ann
Subject: RE: In re Personal Restraint of Corey Beito, No. 77973-2

Rec. 7-21-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Summers, Ann [mailto:Ann.Summers@kingcounty.gov]
Sent: Monday, July 21, 2008 2:09 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: In re Personal Restraint of Corey Beito, No. 77973-2

Attached is the State's Supplemental Response to Motion for Discretionary Review, which is due today.
<<STATE'S SUPPLEMENTAL RESPONSE TO MOTION FOR DISCRETIONARY REVIEW.BEITO.pdf>>

Ann Summers
Senior Deputy Prosecuting Attorney