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STATE OF WASHINGTON
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NO. 56432-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD KINGSLEY,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APEALS, DIVISION II
Court of Appeals No. 54787-2-II
Clallam County Superior Court No. 17-1-00352-1

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court to deny review of the Court of Appeals decision in *State v. Kingsley*, No. 54787-2-II (Mar. 15, 2022), a copy of which is attached to the petition for review.¹

The Court of Appeals, Division II, in conformity with well-established principles held that Kingsley's insufficiency of evidence argument failed because the trial court found that all essential elements of the crime of Child Molestation in the First Degree were proven at the bench trial and the trial court's finding that Kingsley had sexual contact with E.P. was

¹ See also *State v. Kingsley*, 2022 WL 782373, at *1 (Wn. App. Div. 2, 2022).

supported by substantial evidence. *State v. Kingsley*, 2022 WL 782373, at *7 (Wn. App. Div. 2, 2022).

The Court of Appeals also held that the trial court did not impermissibly tailor its late findings to the issues on appeal and Kingsley was not prejudiced “[b]ecause there was sufficient evidence to prove sexual contact and because the trial court's later written findings properly conveyed the trial court's findings at the time of trial.” *Id.* at *8.

Finally, the Court of Appeals found that “it is clear that Kingsley's use of a position of trust to facilitate the crime was the trial court's reason for the exceptional sentence” and that was an acceptable reason for an exceptional sentence. *Id.* at *9 (citing RCW 9.94A.353(3)(n)). The Court held further that the trial court did not err by imposing the exceptional sentence without using the words “substantial and compelling” “[b]ecause it is clear that the sentencing court imposed the exceptional sentence for a permissible reason and incorporated its written findings regarding that reason into the judgment and

sentence. *Id.* (citing RCW 9.94A.535(3)(n); *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011)).

III. COUNTERSTATEMENT OF THE ISSUES

1. The Court of Appeals, without addressing issues initially raised on appeal, remanded the case to the trial court to comply with CrR 6.1(d) and enter written findings of fact and conclusions of law of the bench trial. The Court of Appeals found that the late findings and conclusions address the each element of Child Molestation as required and that they were consistent with the trial court's oral ruling at the time of trial. Should this Court should decline to accept review because the petition fails to establish that the Court of Appeal's decision conflicts with *State v. Head*, 136 Wn.2d 619, 621, 964 P.2d 1187 (1998) which holds that the remedy for failure to enter writing findings after a bench trial is to remand the case for entry of findings?

2. Whether this Court should decline to accept review of the exceptional sentence because it was imposed for a reason set forth in RCW 9.94A.535(3) as an aggravating factor that justifies an exceptional sentence and this Court has already held in *State v. Mutch* that a sentencing court is not required to use the precise phrase “substantial and compelling” in its written findings of fact and conclusions of law? 171 Wn.2d 646, 661, 254 P.3d 803 (2011).

IV. STATEMENT OF THE CASE²

E.P., an eight year old female, was in her bed when Donald Kingsley, a longtime and close family friend and babysitter, entered the bedroom and touched her private parts as she was trying to sleep. RP I 194, 218. Kingsley stuck his hand under E.P.’s shorts and rubbed and penetrated her private parts

² References to the record in this brief appear as “RP I and CP I” from the first appeal no. 51748-5-II and “RP II and CP II” from the current appeal cause no. 54787-2-II.

and then left the room. RP I 200–204, 290. E.P. got up to go sleep on the couch with her older sister and Kingsley came in again. RP I 204. Kingsley began touching E.P. again but E.P. slapped his hands away and told him to go away. RP I 204.

The State charged the defendant with Rape of a Child in the First Degree and Child Molestation in the First Degree, both with special allegations of abuse of a position of trust. CP I 158.

Kingsley waived his right to a jury (CP I 66) and during the bench trial E.P.'s forensic child interview conducted by Detective Erick Smith was admitted in evidence as State's Ex. 1. RP I 184. Kingsley's conversation with E.P.'s father, recorded by means of a covert wire, was also admitted in evidence as State's Ex. 2. RP I 239. Live testimony consisted of E.P.'s testimony. RP I 290–93.

Detective Eric Smith interviewed E.P. on Aug. 25, 2017. RP I 174, 182. E.P. told Det. Smith that her babysitter Donnie was touching her private parts when she was trying to sleep the night before. RP I 194. That night, after E.P. and her siblings

went to bed after watching movies, she got up to use the restroom and then went back to bed. RP I 194. Then Donnie came into the bedroom when she was sleeping with her siblings and he started touching her private parts. RP I 194. Donnie started messing around with her by sticking his hand in her pants and then moving his hand different ways. RP I 202, 203. While Kingsley was rubbing E.P. with one hand, E.P. said he had his other hand on his own leg. RP I 214. E.P. clarified that Kingsley was rubbing her private parts under her underwear in a way that one would rub a wasp sting. RP I 213–14, 226.

E.P. said that Donnie then left the room and came back but she had moved to the couch to sleep with her older sister. RP I 204, 205. Donnie tried to touch her again and rubbed her over her blanket when she slapped his hand away and told him to go away. RP I 205, 228. E.P. reported what Kingsley did to her mother the next morning. RP I 210.

On Sept. 6, Det. Smith obtained a wire order to authorize the covert recording of a conversation between Mr. Parker

(E.P.'s father) and Kingsley. RP I 230. The conversation was recorded on Sept. 7, 2017, with Mr. Parker wearing a wire. RP I 231, 241–42.

In the recorded conversation, Kingsley admitted to Mr. Parker that the prior Thursday when he stayed the night at Mr. Parker's house (RP I 242), Kingsley did touch E.P. and probably in a way that E.P. claimed. RP I 254. Mr. Parker pointed out to Kingsley that Kingsley had been "part of the family" 16 plus years. RP I 242. Kingsley denied touching E.P. at first and claimed he went into their bedroom to get them to quiet down and go to sleep. RP I 243–44. Kingsley affirmed that he wanted to continue to be part of the family. RP I 244.

Kingsley eventually admitted that he touched E.P. "down there" and made full skin contact "down there" and "rubbed" her and put his hands inside her although he didn't go very far. RP I 255. Kingsley told Mr. Parker that he did not intend to hurt E.P. or anybody and that he felt bad about it. RP I 254, 256. Kingsley affirmed that it only happened with E.P. and not with

any of Mr. Parker's other children. RP I 256. Kingsley offered that he would get counseling in order to assure Mr. Parker that it was not going to happen later down the road with someone else's child. RP I 256.

At trial, E.P. testified consistently with her recorded interview:

That I was covered and then he left the room and he came back later and rubbed on the blanket again in the same spot and then he put his hand underneath the blanket and then started to rub on my private parts and then he stuck his hands inside my pants and stuck it deep inside my girl part and just started rubbing.

RP I 290.

E.P. clarified again that Kingsley had his hands under her clothes as he touched her skin and penetrated her and rubbed her. RP I 291–92. She also testified that after she moved to the couch to sleep with her sister, Kingsley came back again and tried to touch her until she told Kingsley to go away. RP I 293.

The trial court found Kingsley guilty of Child Molestation in the First Degree and guilty of the aggravating

factor of abuse of a position of trust, but not guilty of Rape of a Child in the First Degree. RP I 413–18.

Trial Court’s Oral Findings September 23, 2018 (RP I 415–17)

The trial court’s oral findings at the conclusion of the bench trial were as follows:

“Now, in regard to the other charge, this court can find that this child, which the court found to be competent to testify, made statements that were not long after the incident, in fact, the very first thing she did when her mom was available to her, she disclosed what happened, she disclosed the incident, she disclosed the rubbing, she disclosed what happened in what words an eight year old would use to do so. Her mom looked for even, tried to convince her, well, couldn’t it have been something else, could it have been touching in some other way, was this some sort of innocent thing? She was adamant it was not innocent touching. This is an eight year old, it’s never happened before but she knew it was wrong and she went to her

mother, she went to her father, told him a similar story, not as specific and the parent's did what is the appropriate thing to do which is to go to law enforcement and then law enforcement did the forensic interview and during the forensic interview she made it very clear that there was touching in her private areas, that he did these things and in that time she did not disclose anything more than would meet the burden to find that there was molestation. The defense basically says, well, maybe she made this up or she was sleeping or that she didn't understand what was happening. No, I find that she was molested and I also find that Mr. Kingsley, when he was confronted by father, when he had this opportunity to talk about the event and father, Jeremiah, asked him questions and tried to pin him down to what happened. I don't see that interview or that colloquy that they had with each other as being in anyway intimidating or that he would have felt threatened by that because as the way I see it, that happened, he had an opportunity to go outside, smoke a cigarette, he finished his beer, this was a conversation

between two longtime friends, there was no indication that he feared anything and then when-- I mean, I guess the father did say, well, if you're not gonna admit it, I'm still gonna go to the police because this happened and then suggest that well, I still have the clothes she was wearing and there's possibly DNA evidence and then all of a sudden, okay, I touched her, you know, I did this and it happened like she says and, you know, I didn't go very far, I felt bad about it. He readdressed his remorse and he acknowledged that he rubbed her and so I can find beyond a reasonable doubt that molestation occurred, so I find him guilty of Child Molestation as filed in the information."

At sentencing, the trial court imposed an exceptional sentence upward of 70 months to life. CP I 29, 30. The court entered written findings that the defendant used his position of trust to facilitate the commission of the crime of Child Molestation in the First Degree. CP I 45, 46.

In Kingsley's first appeal under Washington Court of Appeals cause no. 51748-5-II (hereinafter "Br. of Appellant I") Kingsley argued that there was insufficient evidence that he touched E.P. for purposes of sexual gratification. Kingsley also argued that the court erred by imposing the exceptional sentence upward on the basis that he used his position of trust to aid in committing the crime because he was not technically babysitting on the night in question as the parents were home. Br. of Appellant I at 23.

Without addressing the issues raised in Kingsley's appeal, the Court of Appeals remanded the case back to the Clallam County Superior Court to enter findings of fact and conclusions of law on the bench trial as required under CrR 6.1(d).

On remand, the trial court entered findings of fact and conclusions of law for the bench trial. CP II 12–13. A new judgment and sentence with the same terms was filed along

with the same written findings for the exceptional sentence. CP
II 15, 31.

V. ARGUMENT

A. THE PETITION FOR REVIEW FAILS TO ESTABLISH ANY OF THE CRITERIA GOVERNING THIS COURT'S ACCEPTANCE OF REVIEW.

RAP 13.4(b) sets forth the considerations governing this
Court's acceptance of review:

A petition for review will be accepted by the Supreme
Court only:

If the decision of the Court of Appeals is in conflict with
a decision by the Supreme Court; or

If the decision of the Court of Appeals is in conflict with
a decision of another division of the Court of Appeals; or

If a significant question of law under the Constitution of
the State of Washington or of the United States is
involved; or

If the petition involves an issue of substantial public
interest that should be determined by the Supreme Court.

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- 1. The petition should be denied because the late findings of fact and conclusions of law were consistent with the trial court's oral ruling at the time of trial and were supported by substantial evidence.**

The petitioner claims that the Court of Appeals decision conflicts with *State v. Head* and argues that the Court of Appeals *sua sponte* remanded the case for entry of findings without first addressing an issue raised on appeal regarding the claim of insufficient evidence to prove sexual gratification. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998); Br. of Petitioner at 14, 18.

State v. Head holds that “failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) *requires remand* for entry of written findings and conclusions.” 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (emphasis added).

In accordance with *State v. Head*, the Court of Appeals did exactly what it was supposed to do and waited for the completed findings before addressing any issues raised on appeal.

Furthermore, there was no prejudice from alleged improper tailoring because the findings were consistent with the trial court's oral ruling regarding the element of sexual contact and the facts supporting that element. It is clear that "sexual gratification" is not an essential element, but rather, is a definitional term clarifying the meaning of the essential element of "sexual contact." *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

The additional findings that the touching was "for the purpose of sexual gratification" and that "the defendant's touch was sexual in nature" flow naturally from the oral findings that Kingsley rubbed E.P. in her vaginal area and E.P. was adamant that the touching was not innocent and she knew it was wrong. Thus the findings and conclusions were based on evidence already taken and there was no prejudice to Kingsley. *See Head*, 136 Wn.2d at 625 (citing *State v. Alvarez*, 128 Wn.2d 1, 20-21, 904 P.2d 754 (1995); *State v. Souza*, 60 Wn. App. 534, 805 P.2d 237 (1991)).

Therefore, the Court of Appeals decision did not conflict with *State v. Head* and review should be denied.

- 2. The petition should be denied because the written findings for the exceptional sentence show that it was imposed for a reason authorized by RCW 9.94A.535(3) and the sentence is not rendered invalid for lack of the exact words “substantial and compelling” in the judgment and sentence.**

The petitioner argues that the exceptional sentence should be reversed because trial court did not find there was “substantial and compelling” reason justifying the exceptional sentence.

The trial court found that the offender used his position of trust to facilitate the commission of the crime of Child Molestation in the First Degree. CP II 31, 32. This statutory aggravating factor justifies the imposition of an exceptional sentence. Therefore the trial court’s finding was a “written finding of a substantial and compelling factor, justifying an exceptional sentence, in satisfaction of RCW 9.94A.535.” *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (holding

that the trial court's written finding that the defendant's high offender score will result in current offenses going unpunished, a statutory aggravating factor, was a written finding of a substantial and compelling factor, justifying an exceptional sentence).

Because the trial court entered a written finding of a substantial and compelling factor, the Court of Appeals decision does not conflict with *State v. Friedlund*, which holds that written findings are required when a court imposes an exceptional sentence. *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

Therefore this Court should deny review.

VI. CONCLUSION

Review of the Court of Appeals decision is not warranted under RAP 13.4(b) because Kingsley has not established that the Court of Appeals decision conflicts a decision of this Court or another division of the Court of Appeals. Further, Kingsley

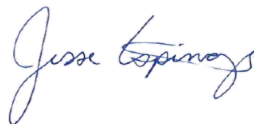
fails to establish that this case raises an issue of substantial public interest that should be decided by this Court.

For the foregoing reasons, the State respectfully requests that the Court deny Kingsley's Petition for Review.

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Respectfully submitted this 13th day of May, 2022.

MARK B. NICHOLS
Prosecuting Attorney

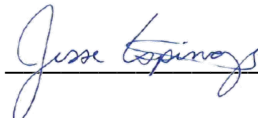
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JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Nancy Collins on May 13, 2022.

MARK B. NICHOLS, Prosecutor

A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive style and is positioned above a solid horizontal line.

Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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