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SUPREME COURT  
STATE OF WASHINGTON  
3/6/2023 3:50 PM  
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CLERK

NO. 1014350

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

NATHAN CHAVEZ,

Petitioner.

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ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 55702-9-II  
Clallam County Superior Court No. 17-1-00046-8

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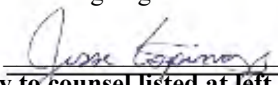
ANSWER TO PETITION FOR REVIEW

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<b>SERVICE</b>	Nathan Chavez 191 Constantine Way Aberdeen, WA 98520	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 6, 2023, Port Angeles, WA  <b>Original e-filed at the Supreme Court; Copy to counsel listed at left.</b>
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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. Chavez*, No. 55702-9-II (Oct. 4, 2022), a copy of which is attached to the petition for review.

The Court of Appeals, in conformity with well-established principles held that “the superior court appropriately utilized the free crimes aggravator when it ran the sentences for some counts consecutively to account for all of Chavez’s criminal conduct during resentencing.” The Court of Appeals also held that “the sentence imposed by the superior court is not clearly excessive.”

//

### **III. COUNTERSTATEMENT OF THE ISSUES**

The question presented is whether this Court should decline to accept review of the claim that the sentence exceeds the statutory maximum sentence when the issue was not properly raised and was not addressed below?

### **IV. STATEMENT OF THE CASE**

The State charged Chavez with five counts of Rape of a Child in the Third Degree and one count of Child Molestation in the Third Degree, along with a special allegation that Chavez used his position of trust for counts I through IV. CP 89 (sixth amended criminal information). The State also charged Chavez with Tampering with a Witness. *Id.*

On June 7, 2018, a jury found Chavez guilty of four counts of Rape of a Child in the Third Degree, Child Molestation in the Third Degree, Witness Tampering, and the special allegations of abuse of trust for three counts of Rape of a Child in the Third Degree. CP 61–62. The jury found Chavez

not guilty of count V, Rape of a Child in the Third Degree. CP 12–13, 62.

At sentencing, the trial court imposed an exceptional sentence upward, sentencing Chavez to 137 months in prison. CP 66–67.

Chavez challenged the exceptional sentence on appeal. Chavez argued that there was insufficient evidence of the aggravating factor of abuse of trust and that the court erred by relying upon the free crimes doctrine to impose an exceptional sentence. *State v. Chavez*, 13 Wn. App.2d 1131, 2020 WL 4194604, at \*6 (2020). The Chavez Court found as follows:

With respect to Mr. Chavez's challenge to the exceptional sentence, we agree with Mr. Chavez that there was insufficient evidence that he used a position of trust to facilitate the commission of some of the rapes. But the trial court also announced a “free crimes” rationale for imposing an exceptional sentence, and *the same exceptional sentence could properly have been imposed for free crimes reasons alone*. Since the court's intention was not clear, we remand for resentencing.

*State v. Chavez*, 2020 WL 4194604, at \*1 (emphasis added).

On resentencing, the trial court stated, “But frankly, my sentencing originally was primarily because of the free crimes aggravator and it still is today.” RP 31.

The court imposed the same 137-month exceptional sentence it had originally imposed. RP 31. Chavez appealed the new sentence arguing that it was clearly excessive and shocking because the trial court, applying the free crimes aggravator, imposed a sentence that was more than double the standard sentence range. *See* Br. of Appellant at 3, 6.

The Court of Appeals affirmed the sentence. Chavez seeks review arguing that the trial court imposed a sentence that exceeded the statutory maximum.

## V. ARGUMENT

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

Under RAP 13.4(b), 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.

- 1. The Court should deny review of the claim that the trial court imposed a sentence that exceeded the statutory maximum because the issue was not raised below.**

“This [C]ourt does not generally consider issues raised for the first time in a petition for review.” *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (citing *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993)).

On appeal, Chavez claimed the trial court imposed an exceptional sentence that was shocking and excessive because it was more than double the standard range. Chavez did not raise the issue that the sentence exceeded the statutory maximum, and this issue was not reviewed below.



Therefore, Chavez attempts to raise this issue for the first time in a petition for review and this Court should deny review.

## VI. CONCLUSION

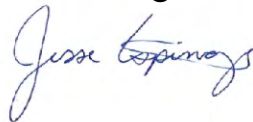
Chavez is not seeking review of the Court of Appeals decision. Rather, Chavez is asking this court to address a new issue not raised below.

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

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DATED March 6, 2023.

Respectfully submitted,  
MARK B. NICHOLS  
Prosecuting Attorney

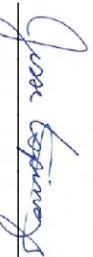


JESSE ESPINOZA  
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Deputy Prosecuting Attorney

## 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 or mailed to Nathan Chavez on March 6, 2023.

MARK B. NICHOLS,  
Prosecutor

  
\_\_\_\_\_  
Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

**March 06, 2023 - 3:50 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 101,435-0  
**Appellate Court Case Title:** State of Washington v. Nathan A. Chavez  
**Superior Court Case Number:** 17-1-00046-8

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