Supreme Court No. 93234-4
COA No. 33022-2-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

JEREMIAH RAY LOGAN,

Defendant/Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the Respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Defendant has filed a petition for review. Respondent seeks denial of Defendant's petition for review of the unpublished opinion issued by the Court of Appeals. *State v. Logan*, No. 33022-2-III, 2016 WL 1704665 (April 28, 2016).

III. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should accept review of Mr. Logan's case if none of the RAP 13.4(b) criteria are met where the Court of Appeals properly determined that the defendant invited error, if any, by failing to proffer a *Petrich* instruction, or object to the instructions prepared by the court?

2. Whether this Court should accept review of Mr. Logan's case if none of the RAP 13.4(b) criteria governing acceptance of review are met where no *Petrich* instruction was proffered by defense counsel as a trial tactic to mitigate the defendant's potential exposure to multiple additional charges and a potential exceptional sentence?

3. Whether this Court should accept review of Mr. Logan's case where the *Petrich* error, if any, was harmless due to the nature of the defendant's theory of the case and his general denial of the allegations as was discussed in this Court's decision in *State v. Camarillo*?

IV. STATEMENT OF THE CASE

Defendant/Petitioner was charged by information in Spokane County Superior Court with one count of second degree rape of a child and

one count of second degree child molestation, occurring on or about between September 15, 2011 and February 17, 2012. CP 1.

FACTUAL HISTORY

Twelve-year-old B.E.H. and her mother lived with the defendant and B.E.H.'s younger siblings. RP 78. Mr. Logan was B.E.H.'s stepfather, and had known B.E.H. for most of her life. RP 112. While Mrs. Logan was at work, B.E.H. and Mr. Logan cared for the younger children. RP 79, 81.

One night in late 2011, while Mrs. Logan was not at home, B.E.H. slept by the fireplace to keep warm. RP 115-116. Mr. Logan laid down next to her and touched her vagina with his hands, rubbing in a circular motion. RP 116-117. Mr. Logan told B.E.H. that she should not tell her mother about this incident because he did not want to ruin his relationship with Mrs. Logan. RP 118-119.

Mr. Logan also touched B.E.H. on other occasions, all occurring in the master bedroom of the residence. On one occasion, Mr. Logan left the master bedroom to take a shower, inviting B.E.H. to join him. RP 120. She did not join him, but stayed in the master bedroom playing on the only computer in the home. RP 113, 120. After Mr. Logan returned from the shower, he laid down on the bed, pulled B.E.H. from the computer chair, put his hands down her skirt, and again rubbed her vagina in a circular motion, penetrating her vagina with his fingers. RP 120-122.

On another occasion while her mother was away and while B.E.H. was playing on the computer, Mr. Logan again pulled up her skirt, placed his mouth on her vagina and touched her breasts. RP 123-124. There were also two other occasions where Mr. Logan again attempted to insert his penis into B.E.H.'s vagina, but she tensed up or cried because it hurt, which made him stop. RP 124-127.

One day Mrs. Logan came home to find B.E.H. alone in the master bedroom with Mr. Logan. Mrs. Logan had to unlock the door to the bedroom to gain access. RP 86. During the time that B.E.H. was in the locked bedroom with Mr. Logan, he again touched her vagina with his hands and told her not to tell her mother. RP 129. When Mrs. Logan entered the room, Mr. Logan pretended to sleep, and B.E.H. told her mother that her pants were unzipped because she had been watching pornography while he slept. RP 86.

One night, approximately one week later, B.E.H. took her siblings to a neighbor's house and finally reported the abuse.[1] RP 80, 135. The defendant denied any sexual contact with B.E.H. during his initial interviews with law enforcement, except for one occasion when he became

[1] Law enforcement officers testified that B.E.H. told them that Mr. Logan had sexually touched her ten to fifteen times during the three months preceding the date she reported the abuse. RP 159.

aroused as B.E.H. and her sister were "seesawing back and forth" on his lap. RP 41.

PROCEDURAL HISTORY

The defendant's case proceeded to trial on October 20, 2014. RP 4.

The State argued that the facts elicited at trial demonstrated "an ongoing course of conduct that started after [B.E.H.] began the seventh grade," RP 244, comprised of a "series of sexual interests by the defendant toward his stepdaughter." RP 248.

The defense argued that B.E.H. fabricated *all* of the allegations because she wanted to live with her biological father, theorizing she was tired of taking care of her younger siblings and helping with housework:

> [Y]ou heard from [B.E.H.] about the things she was required to do. Those were described by her parents as normal chores. The kids were given chores. [B.E.H.] was expected to do them... [B.E.H.] was extremely frustrated. She felt disrespected. She felt she wasn't getting any attention and that she was required to take care of her siblings.
>
> She was unappreciated. So she wanted to live with her dad ... But her mom wouldn't let her.
>
> ...
>
> So she figured out a way.
>
> Thirteen-year-old girl, teenage years, having trouble at home. What her parents thought was normal teenage behavior.
>
> Teenagers are disruptive. They don't like rules generally. But she did exactly what the stereotypes have told us. She

> accused her stepfather, Jeremiah Logan, of sexual abuse. And it worked. About three months later she moved in with her dad. And she's lived there ever since...
>
> ...
>
> So we're left with an allegation, just as we started with. And like every false rumor, the state and the witnesses have repeated it in an effort to give it credibility. But it is exactly what it was at the beginning of trial: It's an allegation, and nothing more. An allegation that was made for a purpose. And that purpose was successful. An accusation that has not been proven beyond a reasonable doubt. And has left several questions. An accusation that Mr. Logan sat on the stand and denied, whole-heartedly; absolutely not did he have any sexual contact, any sexual interest, any sexual intercourse with [B.E.H.]

RP 261-262; 267-268.

The jury ultimately returned unanimous verdicts of guilty for both counts, RP 275-279, and the defendant was sentenced to a low-end standard range sentence of 87 months for the charge of second degree child molestation and 210 months to life on the second degree child rape charge as that charge subjected him to the Indeterminate Sentence Review Board (ISRB). CP 103-136; RP 293.

The defendant timely appealed, and Division III of the Court of Appeals affirmed his conviction, holding that any alleged *Petrich*[2] error was

[2] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

invited by the defendant. *State v. Logan*, No. 33022-2-III, 2016 WL 1704665 at *3.

V. ARGUMENT

A party seeking discretionary review of a Court of Appeals decision must demonstrate one or more of the criteria that are required by RAP 13.4(b) in order for this Court to accept review. RAP 13.4(b); RAP 13.4(c)(7). Those criteria preclude review unless (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) if the case involves a significant question of law under the Constitution of the State of Washington or the United States; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4). The defendant's petition does not satisfy any of these required criteria.

A. IT IS WELL SETTLED IN WASHINGTON THAT THE PRINCIPLE OF INVITED ERROR APPLIES TO JURY INSTRUCTIONS, EVEN THOSE AFFECTING A CONSTITUTIONAL RIGHT.

The Court of Appeals properly determined that the lack of a *Petrich* instruction, if error, was invited by the defendant. *Logan*, No. 33022-2-III, 2016 WL1704665 at *3 ("We conclude that Mr. Logan, by proposing near identical instructions as those actually given by the trial court, by not proposing a *Petrich* instruction, and by not objecting to the court's

instructions, has invited the error he now raises. We decline to review this alleged error.")

At trial, the defendant proposed jury instructions for the trial court's consideration. CP 33-51. The defendant's proposed jury instructions included standard Washington Pattern Jury Instructions, including WPIC 3.01 (separate crimes are charged in each count and a verdict on one does not control a verdict on any other count), WPICs 44.15 and 44.25 ("to-convict" instructions on both second degree rape of a child and second degree child molestation, each requiring the jury to determine whether the acts occurred between "Fall 2011 and February 16, 2012"), and the concluding instruction, WPIC 151.00 (charging the jury that each juror must agree in order to reach a verdict), but did not include the now-complained-of *Petrich* instruction. The court prepared nearly identical jury instructions[3] to those proposed by the defendant, and when asked by the Court, whether he had any objection to those instructions, he affirmatively informed the court that he had "no exceptions or objections." RP 174.

Importantly, *every* other instruction proposed by the defendant was given, with minor additions. For instance, the Defendant proposed

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[3] The court instructed the jury with instructions that were nearly identical to those proposed by the defendant. The only instruction proposed by the defendant that was not given to the jury was WPIC 6.51 (Instruction on Expert Witness.) CP 43. No expert witness testified at trial, and therefore, this instruction was inapplicable.

WPIC 45.01 defining "sexual intercourse" but only included the first paragraph of approved language. CP 48. The court ultimately gave the full definitional instruction. CP 65. The only other significant variations between the defendant's proposed instructions and those given by the court are defendant did not include "domestic partnership" language in his "to convict" instructions, CP 45, 47, 64, 68; and the court gave, although defendant did not proffer, an instruction on out-of-court statements by the defendant, CP 61, an instruction regarding the weight to be given to evidence of defendant's prior convictions, CP 62, and an instruction defining the term "married," CP 66.

It has long been established in Washington that where a party invites an error, that error will not be reviewed on appeal. This Court unanimously held in *State v. Boyer* that "the instruction given is one which the defendant himself proposed. A party may not request an instruction and later complain on appeal that the requested instruction was given." 91 Wn.2d 342, 344-345, 588 P.2d 1151 (1979). This Court echoed this principle in *State v. Henderson*, in which it stated that the *Boyer* rule is the "established law of this State" and "has been regularly followed by this Court and our Court of Appeals." 114 Wn.2d 867, 870, 792 P.2d 514 (1990). This Court reiterated that, even where a constitutional issue is involved, invited error precludes judicial review. *Id.* at 871; *Boyer*, 91 Wn.2d at 345. Because this

court has previously determined that even constitutional "errors" are subject to the invited error doctrine, Mr. Logan's matter does not present a significant question of law under either the Federal or Washington State Constitutions. RAP 13.4(b)(3).

Specifically with regard to instances where a unanimity instruction may be required by *State v. Petrich*, the Court of Appeals has previously found invited error where a defendant requested the trial court not instruct the jury with a *Petrich* unanimity instruction. *State v. Carson*, 179 Wn. App. 961, 973-975, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207, 357 P.3d 1064 (2015). Additionally, where a defendant proposes or requests instructions that the court relies upon in instructing the jury, claim of error based upon those instructions will also be precluded by the invited error doctrine. *See State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010) (also noting that the defendant failed to object to the instructions given by the court, and therefore invited error by failing to comply with CrR 6.15(c)). The decisions in *Carson*, *Corbett*, and in Mr. Logan's case are wholly consistent with this court's jurisprudence on invited error. RAP 13.4(b)(1)-(2).

Defendant cites to the jurisprudence of *other* states on the invited error doctrine for the proposition that the Court of Appeals erred in finding that the doctrine applied to his case. *See* Pet. for Rev. at 9-11. However, as

noted by Justice Utter in his dissent in *Henderson*, *supra*, different states treat the doctrine of invited error differently – some "apply the rule either without exception or discussion," while other courts have concluded that the doctrine "cannot be without exception." *Henderson*, 114 Wn.2d at 873-874 (Utter, J. dissenting). Defendant's request that this Court grant him such an exception, especially where the lack of a defense request for a *Petrich* instruction is attributable to trial tactics, as discussed, *infra*, is a request that would effectively require this Court to significantly alter its prior jurisprudence. Such a request should not be indulged pursuant to the principle of stare decisis absent a "clear showing" that the established rule is both incorrect and harmful. *See, e.g., State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006); *Keene v. Edie*, 191 Wn.2d 822, 831, 935 P.2d 588 (1997) ("Courts do not overrule precedent lightly"). As Defendant has failed to demonstrate that the invited error doctrine, as established in Washington and as previously applied in *Petrich* cases, is both incorrect and harmful, this Court should decline to change its jurisprudence, especially in this case where the defendant agreed to the instructions as given by the court in order to mitigate his exposure to additional criminal penalties for additional counts, as discussed below.

Because the Court of Appeals decision below is wholly consistent with this Court's past jurisprudence, and the jurisprudence of the Court of

Appeals, defendant's argument does not satisfy the requirements of RAP 13.4(b), because he has not demonstrated that the Court of Appeals' decision in his case is one that is in conflict with a decision of this court, another decision of the Court of Appeals, is one that poses a significant question of law under the Constitution of our State or the Federal constitution, or is one that involves a substantial public interest that should be determined by this Court. Because the decision of the court below meets none of the RAP 13.4(b) requirements, this Court should decline review.

B. THE DEFENDANT'S ATTORNEY STRATEGICALLY DID NOT REQUEST A *PETRICH* INSTRUCTION DUE TO THE POTENTIAL FOR INCREASED INCARCERATION IF THE DEFENDANT WERE CONVICTED OF ADDITIONAL CURRENT OFFENSES.

As discussed above, and as argued by the State in the Court of Appeals, Mr. Logan failed to raise any *Petrich* issue at trial.[4] Mr. Logan's failure to timely raise the claim at trial is attributable to a legitimate trial tactic. This Court has previously held that the failure of defense counsel to request a *Petrich* instruction may be the result of a legitimate trial tactic.

[4] *See* Resp. Br. at 7-11, in which the State argued that defendant's claim of error was not a manifest error affecting a constitutional right, and therefore could not be raised for the first time on appeal under RAP 2.5. The State maintains that where, as here, the State argued in closing that the facts demonstrated an "ongoing course of criminal conduct" and where the defense argued that *none* of the sexual assaults occurred, the trial court need not have included a *Petrich* instruction sua sponte because it was not readily apparent that this was a "multiple acts case" as opposed to a "continuing course of conduct" case. *See Petrich*, 101 Wn.2d at 571-572.

Carson, 184 Wn.2d 207 (holding that in a multiple acts/multiple counts case where the State proposed a *Petrich* instruction, defense counsel's objection to the instruction was a legitimate trial tactic, finding that a *Petrich* instruction could be confusing and potentially prejudicial especially where the defense's theory of the case was that the allegations were altogether fabricated: "Here, defense counsel may reasonably have wished to avoid an argument that could be summarized as: '[a]ll the allegations are false – and even if they are not all false, you have to agree on which allegations are true' or 'Carson did not abuse C.C. – and even if he did, he not do it three separate times'"). As discussed in detail below, this was precisely Mr. Logan's defense – that B.E.H. fabricated all of the allegations so that she could live with her biological father.

In Mr. Logan's case, the jury instruction conference and objections to instructions occurred *before* the State rested. RP 174-175. A timely objection to the instructions should have occurred at the instruction conference. *See,* CrR 6.15 (c). In raising a *Petrich* issue *before* the close of the State's case, defense counsel would have necessarily exposed the defendant to the significant possibility that the State would move to amend the information to add additional counts of child molestation or child rape

pursuant to CrR 2.1(d).[5] Where a defendant, such as Mr. Logan, has an offender score above "9" under the Sentencing Reform Act (SRA), CP 106, the sentencing court could have imposed an exceptional sentence if it found that the defendant had committed multiple current offenses, and the defendant's high offender score resulted in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). If defense counsel had forced the *Petrich* issue and the court had permitted an amendment of the information and sentenced Mr. Logan to an exceptional sentence based on the numerous acts of sexual abuse against his stepdaughter, Mr. Logan would now be complaining of ineffective assistance of counsel for being left in a significantly worse position at the conclusion of trial than had counsel remained quiet on the *Petrich* issue, as she intentionally did here.

It is a sound tactical strategy for defense counsel to mitigate a defendant's potential exposure to additional incarceration. This is especially true in cases such as this and *Carson*, *supra*, where a *Petrich* instruction would conflict with the defense theory of the case – i.e. that the allegations were altogether fabricated by the victim and did not occur. The

[5] CrR 2.1(d) (formerly CrR 2.1(e)) "permits an amendment 'at any time before verdict or finding if substantial rights of the defendant are not prejudiced.' Amendments are addressed to the sound discretion of the trial court. *State v. Collins*, 45 Wn. App. 541, 551, 726 P.2d 491 (1986), *review denied*, 107 Wn.2d 1028 (1987)." *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224, 226 (1989).

Court should decline review of this alleged error as it was not only invited by the defendant, but also the result of a strategic decision by counsel aimed to protect the defendant from additional incarceration assuming his defense that B.E.H. fabricated all of the allegations failed.

C. THE FAILURE OF THE TRIAL COURT, IF ERROR, WAS HARMLESS UNDER THIS COURT'S LOGIC IN *STATE v. CAMARILLO* BECAUSE OF THE NATURE OF THE DEFENDANT'S DEFENSE AND THE LACK OF IMPEACHMENT OF THE STATE'S WITNESSES.

This Court has previously held that the failure of a trial court to give a *Petrich* instruction may be harmless error, dependent on the facts of the case. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990). In *Camarillo*, the defendant was charged with one count of indecent liberties that occurred over a one-year period of time. *Id.* at 62. The defendant claimed he was denied a fair trial because the State failed to elect which act of three acts it was relying upon to sustain a conviction for the offense. *Id.* As in this case, the defense counsel did not request the State to elect an act to sustain the conviction, nor did it request a unanimity instruction. *Id.*

The court reiterated that errors of constitutional proportions may be held harmless if the court is able to declare the error "harmless beyond a reasonable doubt." *Id.* at 64. Under this rubric, the court compared Camarillo's case to *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), its consolidated case, *State v. Coburn*, and *Petrich*, *supra*. In doing so, the

court observed that in *Kitchen*, the conviction was reversed because there was conflicting testimony as to each of the acts alleged and a rational juror could have entertained reasonable doubt as to whether more than one of them occurred. In *Coburn*, the Court reversed the conviction because the testimony of the child victim was impeached and because the jury heard testimony pertaining to Coburn's reputation in the community for truth, veracity and good morals, as well as conflicting testimony as to each of the acts alleged. *Kitchen*, 110 Wn.2d at 412. And, in *Petrich*, the defendant's conviction was similarly overturned due to confusion in the victim's testimony as to the date, place and "type of sexual contact" that took place. *Petrich*, 101 Wn.2d at 573.

However, in *Camarillo*, the nature of the defense was a "general denial" that the defendant had ever touched the victim as described in the victim's testimony. 115 Wn.2d at 68. This Court affirmed the Court of Appeals decision which had held:

> [B]ecause proof of substantially similar incidents relied upon a single witness' detailed, uncontroverted testimony and because Camarillo offered no evidence upon which the jury could discriminate between the incidents, a rational

> juror believing one of the incidents actually occurred would believe that the others occurred as well.

State v. Camarillo, 54 Wn. App. 821, 828, 776 P.2d 176 (1989). In affirming the Court of Appeals decision, this Court stated:

> We concur that the jury may consider the totality of the evidence of several incidents to ascertain whether there is proof beyond a reasonable doubt to substantiate guilt because of the acts constituting one incident and also to believe that if one happened, then all must have happened. The defendant testified on his own behalf and the elderly woman testified that she had never seen the defendant alone with the victim. The jury was free to believe the victim, disbelieve the defendant, and give no weight whatsoever to the seemingly irrelevant testimony of the woman. Credibility determinations are for the trier of fact and cannot be reviewed on appeal.

Camarillo, 115 Wn.2d at 71.

This case is similar to *Camarillo* and is dissimilar to *Kitchen*, *Coburn* and *Petrich*. The jury was presented with the defendant's total denial of *all* of the allegations levied against him, as discussed in detail above. In his testimony, Mr. Logan never addressed any of the specific incidents testified to by B.E.H., but rather indicated that he *never* touched his step-daughter. The *only* impeachment of B.E.H.'s testimony was the testimony of an 11-time felon, Mr. Logan, who had numerous crimes of dishonesty on his record, RP 210, and B.E.H.'s own testimony that she wanted to live with her biological father rather than with her mother and Mr. Logan; however, B.E.H. was able to clarify on re-direct examination

that she "did not make these things up" so that she could live with her father, and that she testified to all of these events "because [Mr. Logan] actually did" what she said. RP 150-151. Under the logic of *Camarillo*, any error would be harmless in this case.

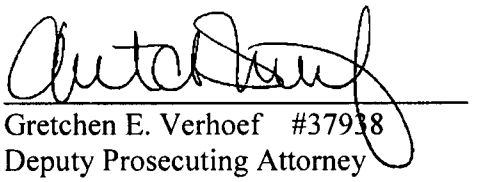
VI. CONCLUSION

For the reasons stated above and those presented in the Court of Appeals, but not reiterated here, Respondent requests this Court deny the petitioner's request for review. The defendant has failed to demonstrate that his case meets any of the RAP 13.4 criteria for review. The jurisprudence of this court has long-established that the doctrine of invited error applies to errors of constitutional magnitude, such as *Petrich* cases. Here, it was a tactical decision for counsel to not request a *Petrich* instruction, and to not object to the trial court's jury instructions because it potentially saved Mr. Logan from three to four additional sex offense convictions, which, with his offender score, could easily have opened him up to additional incarceration beyond the minimum low end sentence of 210 months (to life) he received at sentencing. This Court should decline review of Mr. Logan's case as the Court of Appeals properly decided it on invited error grounds,

and it does not present any significant question of law that demands any further review.

Respectfully submitted this 8 day of July 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEREMIAH RAY LOGAN, Appellant,	NO. 93234-4 COA NO. 33022-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 8, 2016, I mailed a copy of the Answer to Defendant's Petition For Review in this matter to:

Jeremiah Ray Logan #251125
1100 West Mallon Avenue
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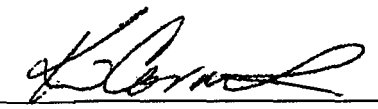
7/8/2016 (Date) Spokane, WA (Place)  (Signature)

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