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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

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STATE OF WASHINGTON, RESPONDENT

v.

DAVID WILLIAM CARSON, APPELLANT

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Review of Court of Appeals #43359-1-II  
Appeal from the Superior Court of Pierce County  
The Honorable Ronald E. Culpepper

No. 10-1-04754-1

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**Supplemental Brief of Respondent**

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MARK LINDQUIST  
Prosecuting Attorney

By  
Thomas C. Roberts  
Deputy Prosecuting Attorney  
WSB # 17442

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant met his burden to demonstrate that his counsel's performance was both deficient and prejudicial to his defense where counsel's performance may be characterized as legitimate trial tactics?
2. Where a defense counsel rejects a proposed *Petrich* instruction, is such an action *per se* ineffective assistance of counsel?
3. Where a defense counsel rejects a proposed *Petrich* instruction, is such an action *per se* ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On November 9, 2010, the Pierce County Prosecuting Attorney (State) charged David William Carson, the defendant, with one count of rape of a child in the first degree, and one count of child molestation in the first degree. CP 1–2. The State later amended defendant's charges to three counts of child molestation in the first degree. CP 9–10.

Jury trial began on February 16, 2012, before the Honorable Ronald E. Culpepper. RP 89. When reviewing the jury instructions

proposed by the parties, the defendant objected to the giving of a *Petrich* instruction. Defense counsel explained his reason as because he was concerned that such an instruction would confuse the jury. RP 404–10.

The trial court granted defendant's motion over the State's objection. RP 409–10. The jury found defendant guilty as charged. CP 75–77. On April 27, 2012, the court sentenced defendant to 105 months to life in custody. CP 105 (Judgment and sentence, paragraph 4.5).

## 2. Facts

During the spring of 2009, the defendant moved in with his friend D. H. and D.H.'s fiancé, Ms. H. RP 147, 303. Ms. H.'s children, a five year-old son (C.C.), her two-year old son, and her one-year old daughter also lived in the house. RP 100, 144–45. In exchange for living space, defendant gave the family part of his food stamp allowance, paid a small rent, provided childcare, and performed chores around the home. RP 152, 304–05. The defendant moved out of the home in May 2010, after having a disagreement with Mr. H., the father of the children. RP 198.

In August 2010, Ms. H. and her children were traveling in their car to see a family friend. RP 162–63. While traveling, C.C. repeatedly tried getting Ms. H.'s attention over the noise from the other children. RP 163–64. When Ms. H. finally responded, C.C. told her that the defendant had tried putting his penis in C.C.'s anus. RP 164. Startled, Ms. H. pulled over,

got out of her vehicle, called Mr. H., and then drove to her destination where she called the police. RP 165–68. While driving, C.C. explained that defendant had placed C.C.'s hands behind his back, zip-tied them with plastic ties, and put duct tape over his mouth during the incident. RP 168.

Shortly thereafter in a forensic interview, C.C. told Cornelia Thomas, a forensic interviewer at Mary Bridge Child Advocacy Center, that defendant had tried putting his penis in C.C.'s "bottom," which C.C. clarified as his anus by pointing to it during the interview, in Ms. H.'s bedroom and again in C.C.'s bedroom. RP 246; Ex. 5 (13:55:29, 13:59:15, 14:03:00–14:06:30, 14:11:45, 14:18:00–14:20:30). C.C. explained that on a different occasion, defendant had "twisted" C.C.'s penis in the bathroom. Ex. 5 (13:55:29–13:56:10, 14:02:38, 14:08:55). C.C. also told Michele Breland, a nurse at Mary Bridge who performed a physical examination on C.C., that when defendant tried putting his penis in him, it felt "[k]ind of crazy and gross and it made me feel like I had to go to the bathroom." RP 366, 385, 389. Similar to his statements to Mr. Thomas, C.C. told Ms. Breland that defendant had twisted his penis. RP 391.

When the defendant met with Pierce County Sheriff's Department Detective Thomas Catey for an interview regarding C.C.'s statements above, he denied the allegations. RP 194–96. The defendant claimed that Mr. and Ms. H. were fabricating the story because they were angry at him for moving out of the home. RP 199–200.

At trial, C.C., although slightly more vague than how he described the acts to his mother and forensic interviewers, testified that defendant had once put his hands on C.C.'s penis, and on other occasions placed his penis on C.C.'s anus in several rooms throughout the house. RP 106–17. Similar to what C.C. had told his mother in the car, C.C. stated that on one occasion defendant tied C.C.'s hands with plastic ties, put duct tape on C.C.'s mouth, and placed his penis in C.C.'s anus. RP 112–17.

C. ARGUMENT.

1. DEFENDANT FAILS TO DEMONSTRATE THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT, AND THAT THE PERFORMANCE PREJUDICED THE DEFENDANT.

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution<sup>1</sup>. See, *Strickland v. Washington*, 466 U.S. 668, 685-687, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.*, at 684. In *Strickland*, the Supreme Court summarized:

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<sup>1</sup> There is a similar right under Article I, §22 of the Washington Constitution. However, our Supreme Court has reserved judgment on whether the right under the State Constitution is more expansive. See, *State v. Fitzsimmons*, 94 Wn. 2d 858, 859, 620 P. 2d 999 (1980).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

*Id.*, at 686.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, at 687; *State v. Thomas*, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987). “Surmounting Strickland’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

- a. Rejecting a *Petrich*<sup>2</sup> instruction was not deficient performance where it was part of an overall trial strategy.

Counsel’s performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel’s performance was not deficient. *Id.* The court reviews counsel’s performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–35. Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177

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<sup>2</sup> *State v. Petrich*, 101 Wn. 2d 566, 683 P. 2d 173 (1984).

(2009); *McFarland*, 127 Wn.2d at 336. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690. The issue in such a review is not whether the defense strategy was risky, successful, popular, or uncommon. The question is: was it *reasonable under the circumstances*; in other words, a *legitimate* strategy?

Recently, this Court considered the performance of counsel where he had used an equally risky strategy. In *State v. Grier*, 171 Wn. 2d 17, 246 P. 3d 1260 (2011), the Court considered the strategy of “acquittal only”, an “all or nothing” argument rejecting instructions on lesser-included offenses of murder. This Court found such a strategy, while risky, reasonable under the circumstances of the case, and the desires of the defendant. *Id.*, at 43.

Representation of a defendant in a sexual abuse case who lives with the victim presents particular challenges. In such “resident molester” cases, the central issue is most often credibility; because identity and opportunity are nearly a given. General testimony can be sufficient to sustain a conviction and the use of that testimony does not constitute a due process violation. *See, State v. Brown*, 55 Wn. App. 738, 748, 780 P.2d 880 (1989); *State v. Hayes*, 81 Wn. App. 425, 435, 914 P.2d 788 (1996). In *Brown*, the court found sufficient evidence to convict on molestation charges despite the lack of specificity in the child victim's testimony,

noting that memory problems can arise when the accused has ‘virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time.’ 55 Wn. App. at 746–747.

Similarly, in *Hayes*, the defendant was charged with four counts of rape of a child, his daughter. 81 Wn. App. at 427. Citing *Brown*, the Court held that “generic” testimony, or testimony that generally described the frequency of particular acts, such as “sometimes,” and “just about every day” was sufficient to support convictions on multiple counts. *Hayes*, at 435.

Where, as in the present case, the defense is general denial: “It didn’t happen”; the danger for such a defendant is that if the jury “reasonably believed that one incident happened, it must have believed each of the incidents happened.” *State v. Bobenhouse*, 166 Wn.2d 881, 895, 214 P. 3d 907 (2009). Similarly here, the defense counsel could be concerned with a result similar to *Brown* or *Hayes*. If the jury believed the victim’s testimony that frequent acts of intercourse or molestation occurred, there was no particular reason for a juror to believe that some particular act of rape occurred but some other act of rape did not.

Here, defense counsel was presented with a client accused as a “resident molester”, and one child victim. Counsel chose to attack all of the allegations at once, as a whole, instead of incident by incident. The

theory was that none of the allegations could be believed because they were all manufactured by the victim's parents, in particular the father. It is conceivable that defense counsel believed that it was not to defendant's advantage for the jury to consider the allegations separately, as the jury might find one or more to be credible.

Here, the defense theory challenged the credibility, and therefore the sufficiency of evidence. So, it is also conceivable that, in declining the instruction, the defense attempted to force the State to choose which specific acts it was relying upon, in the belief that the State would be unable to sufficiently support separate and discrete events. *See, State v. Edwards*, 171 Wn. App. 379, 401, 294 P. 3d 708 (2012).

In *Edwards*, the State charged the defendant with four counts of first degree child molestation. The jury convicted Edwards of only counts I and II. The trial court vacated Edwards's conviction on count II because of insufficient evidence. *Id.*, at 386. The Court of Appeals agreed with the trial court that the evidence did not clearly delineate between specific and distinct incidents of sexual abuse during the charging period. *Id.*, at 401.

Here, defense counsel had a specific theory of the case and strategy that he articulated to the court. When explaining the relevance of the testimony of a proposed defense witness, defense counsel stated the theory: that the victim's parents put the victim up to the accusations out of revenge and retaliation against the defendant. 3 RP 263-264. Defense

counsel's closing argument bore out this same theme: "This case is about credibility, motive, and revenge." 4 RP 444. Counsel went on to describe the victim's father as a controlling personality who would not tolerate the defendant to go against his wishes or interests. 4 RP 445. Counsel further argued that the victim feared his father and would do as the father said. 4 RP 447. Counsel vigorously challenged the victim's credibility, pointing out the inconsistent accounts the victim had given of the alleged events. 4 RP 450-451. Counsel described the victim's accounts as an "inconsistent, jumbled, confusing mess". 4 RP 454. In concluding, he argued that there was not enough evidence for three counts, or any count. 4 RP 457.

The decision not to request a unanimity instruction was part of that legitimate trial strategy. When the State proposed the unanimity instruction at trial, defense counsel objected because he believed the instruction would have unnecessarily confused the jury:

Generally, when you read the comments to the Petrich instruction, it doesn't apply, as I understand it, to multi-count cases because the way it's read could confuse the jury. Normally it's when you have one count but you have like six possible acts that could have accounted for.

Say, for example, hypothetically the State charged him with one count of child molestation and yet the child describes perhaps an incident in one bedroom, something in an office, and something in another bedroom. The jury, under Petrich, would have to decide which of those one acts unanimously do they agree on to support the charge beyond a reasonable doubt.

It becomes a problem when you have multiple counts because look what it says in the second sentence:

"To convict the defendant on any count of child molestation, one particular act of child molestation in the first degree must be proved beyond a reasonable doubt."

The reason that comment is there and even though the jury is given Instruction 3.01, that each count is to be considered by you separately and your verdict on one doesn't affect your verdict on the other, the reason that they give you that little warning under the comment is to *avoid the possibility that, well, if you find that he committed one act, then he must have committed all the counts.*

So I elected, when reading the comment, when reading and looking at this case, saying we're going to confuse the heck out of this jury and *there's a possibility they could be misled into thinking that this means to convict him on any count, they must agree on, at least, one act.*

RP 405–06 (emphasis added).

After hearing argument, the trial court asked defense counsel three times whether he objected to the *Petrich* instruction. RP 408. In response to each of those inquiries defense counsel requested the court not to give the instruction. RP 408–09. Defense counsel made it clear that he strategically opted not to offer a *Petrich* instruction because he feared the jury would convict defendant of three counts of molestation if they found evidence to support only a single act.

b. Defense counsel's strategy did not waive the defendant's right to a unanimous verdict.

The dissenting opinion here in the Court of Appeals reasoned that, by rejecting the *Petrich* instruction, "defense counsel unilaterally waived Carson's right to a unanimous verdict". *State v. Carson*, 179 Wn. App.

961, 983, 320 P.3d 185 (2014) (Worswick, J., dissenting). Judge Worswick wrote that “defense counsel's waiver of Carson's right to a unanimous verdict is *per se* unreasonable.” *Id.* However, as will be pointed out below, the strategy did not waive the defendant’s right to a unanimous verdict.

In *Strickland*, the United States Supreme Court rejected *per se* rules on the subject of performance by defense counsel and recognized the difficult and varied decisions that different cases present to defense counsel:

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable

importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

*Strickland*, 466 U.S. at 688-689 (additional internal cites omitted).

This Court has also pointed out that the issues of ineffective assistance of counsel are “generally not amenable to *per se* rules.” *Grier*, 171 Wn. 2d at 34, quoting *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). If, indeed, declining a *Petrich* instruction is *per se* unreasonable, and therefore deficient, this might be used as a strategy in itself: decline the instruction and be guaranteed a new trial in the event of a conviction.

However, by rejecting the *Petrich* instruction, defense counsel did not waive the defendant’s right to a unanimous verdict. Jury unanimity is mandatory, but a *Petrich* instruction is not. A defendant's constitutional rights are protected when *either* the State elects which acts the jury should rely on to convict, or the trial court offers a specific instruction. *Petrich*, 101 Wn.2d at 570-572; *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P. 2d 105 (1988).

Here, in closing argument, the State elected the specific events that it was relying on regarding the charges. The State pointed out the evidence that the defendant had twisted the victim’s penis in the bathroom on one occasion. 4 RP 427. While acknowledging that there were different accounts of anal rape or molestation, the State asked the jury to focus on

two specific ones: the incident that occurred in the victim's mother's room, when he was zip-tied and gagged (4 RP 428); and the incident where the victim was wearing jeans and boxer shorts and the defendant bent him over and had him look at a "spider-man" blanket. 4 RP 430. Where the State elected these three specific events, the defendant's right to a unanimous verdict was protected.

The dissenting opinion raised another issue when it stated that a defendant may not waive his right to a unanimous verdict. *Carson*, 179 at 983, citing *State v. Noyes*, 69 Wn. 2d 441, 418 P. 2d 471 (1966). Whether a defendant may truly waive a unanimous verdict has not been addressed by this Court. In *Noyes*, the defendant was charged with second-degree murder. Noyes had a jury trial where he argued that the gun went off accidentally during a struggle with the deceased. *Id.*, at 442. The jury deadlocked at 11-1 to acquit. Noyes moved to waive a unanimous verdict at that point to accept the "verdict" of not guilty. The Supreme Court summarily rejected this as without merit. *Id.*, at 446. The Court did not engage in any substantive analysis of the issue. There was not even any citation to the federal or State Constitutions.

One day, upon the advice of counsel, a criminal defendant might move to waive a unanimous verdict. At that time, the trial court, and this Court in review, will have to determine if the defendant may waive that right; whether it was a valid waiver; and whether, based upon the

circumstances of the case and the totality of the record, defense counsel's strategy was reasonable and therefore legitimate.

However, this issue is unnecessary to the determination of this case. As pointed out above, defense counsel did not waive the defendant's right to a unanimous verdict. Further, the record does not reflect an intentional, knowing, and voluntary waiver, or even attempted waiver, of the right to a unanimous verdict. Therefore, the issue has not been properly raised and preserved for review.

Defense counsel had a cohesive, legitimate trial strategy. The record shows that he ably represented the defendant in a factually difficult and challenging case. Had the defendant been acquitted, counsel would likely have been congratulated by his peers for a thoughtful legal and forensic strategy. The fact that he was unsuccessful does not mean that he was incompetent, or even ineffective. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Defense counsel's performance was not deficient under the law. *See, McFarland*, 127 Wn.2d at 336.

c. Rejecting the *Petrich* instruction was not prejudicial.

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but

for counsel's unprofessional errors. *McFarland*, 127 Wn.2d at 335. When a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

Here, the defendant cannot demonstrate prejudice because, as argued above, the case law is clear that a defendant's constitutional rights are protected when either the State elects which acts the jury should rely on to convict, or the trial court gives an appropriate instruction. *Petrich*, 101 Wn.2d at 570-572; *State v. Kitchen*, 110 Wn.2d at 411. The defendant's right to a fair trial was not prejudiced because the State expressly elected three particular acts as the basis for the charges.

The defendant's right to a unanimous jury was not prejudiced. The defendant must also show a reasonable probability that, had defense counsel agreed to the *Petrich* instruction, the outcome of the proceedings would have been different; i.e., the defendant would have been acquitted. The defendant cannot demonstrate this either.

The defendant cannot show prejudice because the evidence supported the jury's determinations, and the jury unanimously convicted defendant of all three counts of molestation. First, the evidence showed that defendant had twisted C.C.'s penis in the bathroom. RP 391; Ex. 5 (13:55:29–13:56:10, 14:02:38, 14:08:55). Second, there was evidence that on only one occasion in Ms. H.'s room, defendant tied C.C.'s hands with

plastic ties, put duct tape on C.C.'s mouth, and put his penis on C.C.'s anus. RP 116, 168, 246; Ex. 5 (13:55:29–14:06:30, 14:11:45, 14:14:10, 14:27:50). Finally, the evidence showed that defendant had undressed C.C. in C.C.'s room and asked C.C. to look at a Spiderman blanket while he again put his penis on C.C.'s anus. RP 127; Ex. 5 (13:58:15, 14:11:45, 14:18:00–14:20:00). These three events involved unique circumstances (i.e., defendant twisting C.C.'s penis, the duct tape and zip ties, and the Spiderman blanket) which the prosecutor relied on to distinguish the basis for each of defendant's charges.

The defendant sustained no prejudice because a *Petrich* instruction was not required in order to protect his right to a unanimous verdict in this case. Moreover, the evidence from trial supported the three acts the jury was asked to consider during deliberations.

2. THE DEFENDANT MAY RAISE THE *PETRICH* INSTRUCTION ISSUE FOR THE FIRST TIME ON APPEAL REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL.

Generally, “[A] party may not request an instruction and later complain on appeal that the requested instruction was given.” *Seattle v. Patu*, 147 Wn. 2d 717, 721, 58 P.3d 273 (2002), quoting *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)(additional internal citations omitted). Even where the challenge to a jury instruction raises a

constitutional issue, the courts will not consider it if the defendant himself proposed the instruction. *See, Studd, supra; State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 143 (2005). *See, State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

However, a defendant may raise this issue in the context of ineffective assistance of counsel. If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. *Kyllo*, 166 Wn. 2d at 861, citing *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Kyllo argued that, the “act on appearances” instruction, (WPIC 17.04) proposed by his attorney improperly lowered the State's burden of proof, thereby violating his right to due process. He maintained that counsel's representation was ineffective because his counsel proposed an instruction which had contained superseded language requiring the danger of “great bodily harm” instead of mere “injury”. Counsel went on to argue that Kyllo was entitled to the defense of self-defense only if he reasonably believed he was in danger of death or grievous bodily harm. *Kyllo*, 166Wn. 2d at 861. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *Id.*, at 862.

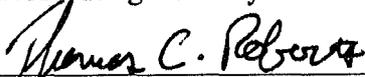
D. CONCLUSION.

Defense counsel's decision to reject a *Petrich* instruction was part of a cogent, coherent trial strategy. It was a reasonable, although perhaps risky, strategy. Therefore, the defendant cannot demonstrate deficiency of counsel or prejudice.

The State respectfully requests that the decision of the Court of Appeals, and the conviction, be affirmed.

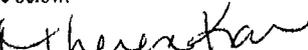
DATED: October 17, 2014.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
Thomas C. Roberts  
Deputy Prosecuting Attorney  
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~ES~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-17-14   
Date Signature

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Please see attached the State's Supplemental Response Brief in the below matter.

St. v. Carson  
No. 90308-5  
Submitted by: T. Roberts  
WSB # 17442

Please call me if you have any questions at 253/798-7426.

Therese Kahn  
Legal Assistant to T. Roberts