NO. 100116-9

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**SUPREME COURT OF THE**
**STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Petitioner,

v.

CESAR CHICAS CARBALLO,

Respondent.

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Appeal from Court of Appeals Cause No. 82054-1-I
The Honorable James Orlando
No. 17-1-00874-7

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# PETITION FOR REVIEW

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## I. INTRODUCTION

Immigrants, whether defendants, victims, or witnesses, face an often difficult time in court. Language difficulties, cultural issues due to an unfamiliarity with the laws and customs of this country, and even a fear of arrest by federal authorities in the courthouse itself can lead to a reluctance to appear in court and give truthful testimony. In addition, ever changing immigration policies and priorities can leave immigrants in a state of fear and confusion in a courthouse setting already beset with stress and anxiety.

This Court promulgated ER 413 to assuage some of this fear and uncertainty by setting forth a detailed and specific pretrial process to allow the trial court to determine whether issues pertaining to a participant's immigration status can be discussed in court and how. This rule helps ensure that immigrants will be listened to, despite potential issues of bias, and encourages them to attend court free of unnecessary fear.

Chicas Carballo failed to comply with any of the requirements of ER 413. Despite this failure, the trial court was willing to entertain his late oral request to examine a witness' immigration status. However, Chicas Carballo failed to provide, despite the trial court's invitation, additional information or argument to support his request and abandoned the issue.

Here, the Court of Appeals completely excused Chicas Carballo from following any of the procedural requirements of ER 413. It also

overlooked his failure to offer any additional information or argument to support his request by holding that a mere oral midtrial reference to ER 413 was enough to not only preserve the issue for appeal, but also transmogrify a claim of evidentiary error into a violation of the right to present a defense.

This Court should accept review to clarify whether a defendant can ignore the procedural requirements of ER 413, an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(4). This Court should also accept review because the Court of Appeals treatment of the trial court's denial without prejudice of Chicas Carballo's oral midtrial request to elicit evidence of Flores' immigration status as violative of his right to present defense raises a significant question of constitutional law. *See* RAP 13.4(b)(3).

## II. IDENTITY OF PETITIONER

Petitioner, the State of Washington, Respondent below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in section III of this Petition.

## III. COURT OF APPEALS' DECISION

Petitioner seeks review of the Court of Appeals published opinion in *State v. Carballo*, 17 Wn. App. 2d 337, 486 P.3d 142 (2021), which was filed on May 3, 2021, together with the Order Denying Motion for Reconsideration filed on July 21, 2021, in case number 82054-1-I. The

decision reversed convictions for first degree murder and conspiracy to commit first degree murder and held that the trial court violated Chicas Carballo's right to present a defense when it denied his midtrial oral request to elicit evidence of a witness' immigration status. App. at 1-11.

## IV. ISSUES PRESENTED FOR REVIEW

A. Should this Court accept review because the Court of Appeals' decision that the trial court erred in denying Chicas Carballo's oral midtrial request to elicit evidence of a witness' immigration status to demonstrate bias despite his failure to follow the procedural requirements of ER 413, a rule promulgated by this Court to address implicit bias and access to justice for immigrants, is an issue of substantial public interest?

B. Should this Court accept review because the Court of Appeals' decision that the trial court's denial without prejudice of Chicas Carballo's oral midtrial request to elicit evidence of a witness' immigration status was a violation of his right to present a defense raises a significant constitutional issue?

## V. STATEMENT OF THE CASE

Chicas Carballo and three accomplices murdered Samuel Cruces. The State charged Chicas Carballo with premeditated first degree murder, conspiracy to commit first degree murder, and second degree felony murder. CP 104-06. He was tried with one of his accomplices, codefendant Jose Ayala Reyes. CP 12; 2 RP 413.

Reyes' girlfriend, Karina Flores, was a witness to the events leading up to and after the murder, and her testimony provided direct evidence

against Chicas Carballo. She heard Chicas Carballo, whom she knew as "Tas," discuss killing Cruces with Reyes and two other men. 2 RP 1268-69, 1292, 1300-04, 1555, 1578-79. She left her apartment with the men and, with Chicas Carballo driving, went to the scene where the murder was going to take place. Flores was dropped off before they reached their destination and she walked home. 2 RP 1547-48, 1550-52, 1560.

Later that evening, Flores met up with Reyes at their apartment and she saw Chicas Carballo and the other two men leave in their vehicle, which had blood on the passenger side door. 2 RP 1558-59. Flores testified that Reyes told her how they killed Cruces. 2 RP 1576-77. Flores also provided receipts indicating that Reyes wired money to Chicas Carballo in California in the amounts of $200, $300, and $260 on June 6, June 25, and July 7, 2016, respectively, about two months after the April 28, 2016, murder of Cruces. 2 RP 1219, 1241-43.

During her interrogation by police in July 2016, Flores initially denied any knowledge of the murder and its perpetrators. Ex. 116, vol. I, at 1-165 (not admitted into evidence). During the interview, law enforcement officers made several statements to Flores, translated into Spanish, that referenced a previous investigation where a young person went to prison for 21 years, reminded her that in 21 years, she would be older than those

interviewing her, and advised her that she would go back to El Salvador after "jail." Ex. 116, vol. I, at 166-68.

Flores continued denying any knowledge of the murder for 66 pages of the interview transcript. After the detectives aggressively interrogated her, took her DNA (Ex. 116, vol. I, at 184-191), questioned whether she was pregnant (*id*. at 191-194), told her they could trace her phone (*id*. at 194-198), told her that Reyes admitted she was involved in the crime (*id*. at 199-204), and told her they would check her alibi (Ex. 116, vol. II, at 8-12), she finally changed her story and admitted her knowledge of events. *Id*. at 20.

Codefendant Reyes initially filed a motion under ER 413 in order to impeach Flores regarding pursuing a U-Visa. 2 RP 39, 66, 106-108. Reyes acknowledged that only a victim can apply for a U-Visa and that it was unclear whether Flores was a "victim" in this case. 2 RP 110-11. The court then denied the request without prejudice:

> I guess at this time I don't have enough to grant the request to go into it, so I would deny it subject to further argument, if something comes up that seems to make it relevant.

2 RP 111.

Later, during trial and prior to his cross-examination of Flores, counsel for Chicas Carballo asked the trial court if he could "go into" Flores' immigration issues:

> MR. HERSHMAN: By the way, if this is a good time to ask, in her transcribed statement to police one of the things the

police arguably threatened her with was deportation, immigration issues. Am I allowed to go into that? I don't want to violate an order of the Court.

THE COURT: I think we included no immigration discussions.

MR. JOHNSON: If that's the case unless there is further information about that's somehow relevant.

MR. HERSHMAN: Well, on behalf of Mr. Chicas-Carballo, I think it's very relevant that she would stick to her guns for 234 pages that she didn't know anything, and after threats of jail and immigration issues and leading questions she finally remembers something.

THE COURT: Well, the order that we previously entered in response to Mr. Ayala Reyes' motion to limit her testimony -- actually to limit questioning of that defendant regarding her immigration status. I denied a motion to allow that testimony without prejudice should additional evidence be provided. I'm not hearing any additional evidence. It sounds like the same issue as was already provided.

MR. HERSHMAN: It's in her statement.

THE COURT: Unless she says something different today, or the reason I made this up is because I was threatened by deportation, that wouldn't appear to be new information. I am concerned though what additional information she may now claim exists out there, so we need to talk about that as soon as you gather that.

MR. GREER: Just to be clear, this information all counsel had from the moment they got on the case and discovery was given in the statement. . . If there is any -- I don't know what specifics Mr. Hershman is referring to by page or anything else. But any sort of so-called threat officers make towards her the defense has had for quite a while, and it's not timely to bring it up at this point.

THE COURT: Well, let's go forward with this, and we may need to address Karina in a little more detail.

2 RP 1476-78.

Defense counsel never provided any additional information or argument to support his request that he be allowed to cross-examine Flores with her immigration status in an attempt to show bias. Counsel never even directed the trial court to the pages of Flores' interview transcript that purportedly support his request.

The jury convicted Chicas Carballo as charged. CP 55-56, 58-59, 61-62, 78. The Court of Appeals held that the trial court erred in denying Chicas Carballo's midtrial oral request to elicit evidence of Flores' immigration status to demonstrate bias and reversed his convictions for first degree murder and conspiracy to commit first degree murder.

## VI. ARGUMENT

### A. The Court of Appeals' decision eviscerates the procedural requirements of ER 413, a rule promulgated by this Court to specifically address implicit bias and access to justice for participants in the legal process who are immigrants.

This Court should accept review to clarify whether a defendant can ignore the procedural requirements of ER 413, a rule which was promulgated by this Court to specifically address implicit bias and access to justice for participants in the legal process who are immigrants. This is an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(4).

Washington courts have long recognized that evidence of a witness' undocumented status can be prejudicial and distract jurors from the important matters submitted for their determination. In *State v. Avendano-Lopez*, the court held that "appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose." 79 Wn. App. 706, 718, 904 P.2d 324 (1995). This Court has recognized that "[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010). Furthermore, "[t]he court, as the third, independent branch of government, is a sanctuary—a place where parties and witnesses must be free from interference and intimidation to present their claims and defenses." *Velazquez-Hernandez v. U.S. Immigr. & Customs Enf't*, 500 F. Supp. 3d 1132, 1145–46 (S.D. Cal. 2020).

> One of the main purposes of excluding evidence of immigration status is to avoid jury bias. . . While the federal courts, state courts, and legislatures have done robust work in addressing and attempting to eradicate explicit bias from the courtroom, they are still grappling with the best approach to tackle implicit bias.

LIMITATIONS OF WASHINGTON EVIDENCE RULE 413, 95 Wash. L. Rev. 429, 445 (March 2020).[1]

Cognizant that immigration issues, as they relate to bias and access to justice, are matters of great public concern, this Court promulgated ER 413 as a means to carefully balance competing interests. ER 413 took effect on September 1, 2018, and is the first of its kind in the nation.

According to the Drafters' Comment Accompanying Proposed ER 413, which was submitted by Columbia Legal Services, Northwest Immigrant Rights Project, Legal Voice, and the Washington Association of Prosecuting Attorneys,

> Immigration status evidence is of special concern in the context of criminal cases involving domestic violence, sexual assault, and trafficking in persons. Undocumented immigrant victims and witnesses, a disproportionate number of whom are women and children, are frequently uninformed, unfamiliar with, or simply confused about their legal rights, and the legal system. They are particularly vulnerable due to a variety of factors, including language barriers, separation from community, lack of understanding of United States laws, fear of deportation, cultural differences, and predatory offenders.

5A Wash. Prac., Evidence Law and Practice § 413.1 (6th ed.), § 413.1 Purpose and History of Rule 413. App. at 12-17.

[1] Attempts in Washington to address these issues include this Court's promulgation of GR 37, which seeks "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a).

In Washington, a court may admit evidence of immigration status only when the proponent of the evidence follows the procedure set forth in ER 413(a). *State v. Bedada*, 13 Wn. App. 2d 185, 194, 463 P.3d 125 (2020). This rule provides:

> (a) Criminal Cases; Evidence Generally Inadmissible. In any criminal matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607. The following procedure shall apply prior to any such proposed uses of immigration status evidence to show bias or prejudice of a witness:
>
> (1) *A written pretrial motion shall be made that includes an offer of proof of the relevancy of the proposed evidence*.
>
> (2) *The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated*.
>
> (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing outside the presence of the jury.
>
> (4) The court may admit evidence of immigration status to show bias or prejudice if it finds the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.
>
> (5) Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights.

ER 413(a) (emphasis added).

Here, the Court of Appeals acknowledged that Chicas Carballo did not follow the procedure set forth in ER 413 when he made a midtrial oral request to examine Flores regarding the supposed "threat" of deportation.

Specifically, the court stated, "While Chicas Carballo did not present a pretrial motion, or formally join in Ayala Reyes' motion, he did make his position known to the court at the time it was argued." *Carballo*, 17 Wn. App. 2d at 348. By equating "mak[ing] his position known" with the specific procedural requirements set forth in ER 413, the Court of Appeals essentially eviscerates the protections and careful balance of ER 413.

Even though Chicas Carballo failed to follow the procedural requirements of ER 413, the trial court nevertheless was open to hearing additional argument and information and "to talk about that as soon as you gather that" before making a final decision on his midtrial request. 2 RP 1476-78. However, Chicas Carballo never provided any citations or references to any parts of Flores' statement to support his request, nor did he provide any additional argument or information, despite the opportunity to do so. Rather, Chicas Carballo stood on his assertion that such information was "in [Flores'] statement" (2 RP 1476-78) and then appeared to abandon this issue.

Chicas Carballo's failure to meet the threshold requirements of the rule rendered it impossible for the trial court to engage in the balancing analysis required under ER 413(a)(4). First, he failed to set forth any offer of proof regarding Flores' actual immigration status. More importantly, he never offered any information or argument about how or why the detectives'

statements were, in fact, a threat to deport, which could have been adduced by requesting testimony by the law enforcement officers who interviewed Flores, and Flores herself regarding the context of the alleged "threat" as it related to her statements. Finally, Chicas Carballo failed to proffer what counsel would ask Flores and how he anticipated she would respond. Accordingly, the trial court was deprived of the ability to evaluate the materiality or potential prejudice of the purported evidence.

Although the Court of Appeals found that the parties knew all of the information that would have been ascertained if the procedural requirements of ER 413 had been followed (*Carballo*, 17 Wn. App. 2d at 351), this finding is belied by the record. The information the trial court had before it was defense counsel's vague request to "get into" the issue of immigration in an attempt to demonstrate that a "threat of deportation" was the impetus for Flores to change her statement. But what was lacking was any proof of Flores' actual immigration status, any information or argument regarding the context of any alleged "threat of deportation," including any issue with the interpretation or translation of the law enforcement officers' questions, and any proffer as to what counsel would ask Flores and how he anticipated she would respond.[2] Defense counsel had multiple

[2] Even the prosecutor was unsure of what, exactly, defense counsel was referring to. RP 1476-78 ("I don't know what specifics Mr. Hershman is referring to by page or anything else.").

opportunities to provide further argument and information at the trial court's invitation, but simply failed to do so. Given the trial court's expressed willingness to hear and evaluate additional argument and information, the Court of Appeals' conclusion that "The trial court appeared unwilling to engage in reweighing the relevance and potential prejudice when Chicas Carballo asserted that Flores' motive to lie, fear from a police threat based on her immigration status, was critical to his defense" (*Carballo*, 17 Wn. App. 2d at 352) is unsupported.

Moreover, in offering the evidence, Chicas Carballo had the burden to provide a written offer of proof, including affidavits, as to the relevance and reliability of the evidence. The Court of Appeals stated that "The trial court seems to have proceeded with caution in its application of the newly effective ER 413 and improperly placed the burden on Chicas Carballo. This was a misapplication of the standard." *Carballo*, 17 Wn. App. 2d at 354. But ER 413 specifically places this burden on the moving party.

In addition to making it impossible for the trial court to engage in the balancing test under ER 413(a)(4), Chicas Carballo's failure to meet the threshold requirements of ER 413 made it impossible for the Court of Appeals to engage in a de novo balancing without a complete record.[3] The

[3] The Court of Appeals seemed to acknowledge this difficulty. See *Caballo*, 17 Wn. App. 2d at 351, n. 9 ("Questions of one's immigration status, including eligibility for a benefit or risk of a particular consequence, are fact-specific and often highly nuanced.").

Court of Appeals' blind analysis without the benefit of the information required by ER 413, illustrates why the requirements are necessary. The Court of Appeals was left to speculate on the relevance and reliability of the evidence, especially as it relates to any possible chilling effect this opinion will have regarding access to justice.

The Court of Appeals' reliance on *State v. Grant*, 10 Wn. App. 468, 519 P.2d 261 (1974), and *State v. Orn*, 197 Wn.2d 343, 482 P.3d 913 (2021), to excuse Chicas Carballo from the procedural requirements of ER 413 (*Carballo*, 17 Wn. App. 2d at 348-350) is inapposite. Although the "rules which impose procedural requirements cannot be wielded as a sword by the State to defeat the constitutional rights of an accused in a criminal trial" (*Id*. at 349) and ER 413(a)(5) states that "[n]othing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights," the procedural requirements at issue in *Grant* (dealing with alibi witnesses) and *Orn* (dealing with confidential informants) are quite different than those required by ER 413, which requires a pretrial written motion. ER 413(a)(1).

Rather, the procedural requirements of ER 413 are more akin to those of Washington's Rape Shield Law set forth in RCW 9A.44.020, which regulates that admissibility of a victim's sexual behavior through a formal

pretrial procedure, including a pretrial written motion. RCW 9A.44.020(3)(a).[4] In that context, the United State Supreme Court has held:

> [T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas*, 483 U.S. 44, 55, 97 L. Ed. 2d 37, 107 S. Ct. 2704 [2711] (1987), *quoting Chambers v. Mississippi*, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 [1046] (1973). We have explained, for example, that "trial judges retain wide latitude" to limit reasonably a criminal defendant's right to cross-examine a witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 [1435] (1986).

*Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 114 L. Ed. 2d 205, 212 (1991).

Like the rape shield statute, the procedural requirements of ER 413 promote appropriate handling of sensitive evidence in the pretrial and trial processes and allow courts to balance important competing considerations of a defendant's constitutional right to confront and cross-examine witnesses against the State's interest in encouraging witnesses to testify.

For the foregoing reasons, this Court should accept review of the Court of Appeals' decision excusing Chicas Carballo from following the

[4] RCW 9A.44.020 states: "A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim."

procedural requirements of ER 413. This issue is of substantial public interest because this Court promulgated ER 413 to deal with the specific issues immigrants face as to bias and access to justice.

**B. The Court of Appeals' decision that the trial court violated Chicas Carballo's right to present a defense by denying without prejudice his oral midtrial request to elicit evidence of a witness' immigration is a significant issue of constitutional law.**

This Court should also accept review because the Court of Appeals treatment of the trial court's denial without prejudice of Chicas Carballo's oral midtrial request to elicit evidence of Flores' immigration status as violative of his right to present defense raises a significant question of constitutional law. *See* RAP 13.4(b)(3).

As set forth above, at trial, defense counsel sought to question Flores regarding her immigration status and the potential resulting bias that any "threat" of deportation had on her testimony. 2 RP 1476-78. The trial court and the parties treated this request as raising an ER 413 issue. The trial court denied this request without prejudice subject to any additional argument and information presented by the defense. 2 RP 1476-78. As the entirety of this discussion was under the aegis of ER 413, defense counsel never claimed that the trial court's decision violated Chicas Carballo's constitutional right to present a defense. Although ER 413 itself states that "[n]othing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights" (ER 413, subd.

5), by never providing any of the requested additional information or argument, much less raising a constitutional claim at trial which would have allowed the trial court to evaluate the constitutional issue and balance any competing factors in deciding admissibility, Chicas Carballo forfeited his ability to raise this constitutional claim on appeal.

Despite this forfeiture, the Court of Appeals not only entertained Chicas Carballo's claim of error, it treated the trial court's denial without prejudice of Chicas Carballo's oral midtrial request as implicating his constitutional right to present a defense. Although a defendant in a criminal trial has a constitutional right to present a defense (*State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)), this right is not absolute; a defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

If the defendant establishes minimal relevance, the burden shifts to the State "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). A trial court must then balance "the State's interest to

exclude prejudicial evidence ... against the defendant's need for the information sought," and may exclude such evidence only where "the State's interest outweighs the defendant's need." *Id*.

Here, as the constitutional right to present a defense was not raised at trial, even assuming the relevance of the substantive evidence at issue, the State never had an opportunity "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. Therefore, the Court of Appeals had no record upon which to properly review this claim. By concluding that the trial court's decision implicated Chicas Carballo's constitutional right to present a defense despite its forfeiture, the Court of Appeals in effect turns any claim of bias under ER 413 into a per se constitutional issue. This would effectively abrogate the entirety of ER 413, which carefully sets forth the process for admitting evidence of immigration status to show bias, and would render this rule null and void.

Chicas Carballo was able to present his defense theory at trial by thoroughly and extensively examining and challenging the credibility of Flores. 2 RP 1819-1922. Defense counsel questioned Flores about the pressure she was getting from Reyes' family to get him out of jail (2 RP 1871) and her fear of retaliation from Reyes (2 RP 1871). She stated that these were the only reasons she was afraid to tell the police the truth. 2 RP

1871. During this examination, Flores admitted numerous times that she did not always tell the truth to the law enforcement officers who interviewed her. *See, e.g.,* 2 RP 1825, 1844.

Moreover, during closing, counsel for Chicas Carballo was able to fully argue his defense that Flores was a liar. RP 2219, 2224 ("Ms. Flores . . . told every story imaginable in this case"), 2236 ("'Ms. Flores, why is it that you might say things that are untrue, in particular in this case?' She gave us seven reasons."), 2237-39, 2240-41 ("When Ms. Flores' freedom is threatened, she knows only the state has the power to imprison. . . She lied to the police for 234 pages, if you believe the state's theory, and no one was arrested for obstruction. She knows this. Is she telling the truth or merely adopting a version? I don't know, but I do know you can't believe her beyond a reasonable doubt"), 2242-48, 2254-65.

The trial court's denial without prejudice of Chicas Carballo's oral midtrial request to examine Flores' immigration status resulted in a forfeiture of his claim of error when he failed to provide any of the requested information or argument. Therefore, the Court of Appeals had an insufficient basis on which to examine Chicas Carballo's claim of error as violative of his constitutional right to present a defense. Moreover, Chicas Carballo was not precluded by any trial court error from fully presenting his defense and theory of the case to the jury. *See State v. Arndt*, 194 Wn.2d

784, 814, 453 P.3d 696 (2019) (holding that a defendant's right to present a defense is not violated if the trial court's evidentiary rulings did not limit the defendant's ability to present his entire defense, and the defendant is still able to present his theory of the case). Accordingly, this Court should accept review as the Court of Appeals' decision raises a significant issue of constitutional law under RAP 13.4(b)(3).

## VII. CONCLUSION

For the aforementioned reasons, Petitioner requests that this Court accept review of the Court of Appeals' decision in *State v. Carballo*.

RESPECTFULLY SUBMITTED this 20th day of August, 2021.

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Certificate of Service:
The undersigned certifies that on this day she delivered by E-file to Attorney of record 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.

*8-20-21* Date
*s/Therese Kahn* Signature

# APPENDIX

17 Wash.App.2d 337
Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
Cesar **Chicas** **CARBALLO**, Appellant.

No. 82054-1-I
|
FILED 5/3/2021

**Synopsis**

**Background:** Defendant and co-defendant were convicted in a joint trial in the Superior Court, Pierce County, No. 17-1-00874-7, James R. Orlando, J., of first degree murder and conspiracy to commit first degree murder. Defendant appealed.

**Holdings:** The Court of Appeals, Hazelrigg, J., held that:

[1] the trial court committed reversible error, in violation of defendant's Sixth Amendment right to present a defense, when it refused to allow defendant to cross-examine the State's key witness about her immigration status, as it related to a possible motive to lie, and

[2] the trial court's error in refusing to allow defendant to cross-examine the State's key witness about her immigration status, as it related to a possible motive to lie, was not harmless.

Reversed and remanded.

West Headnotes (18)

**[1] Criminal Law** Necessity and scope of proof
**Witnesses** Inquiry as to particular acts or facts tending to show interest or bias

The trial court committed reversible error, in violation of defendant's Sixth Amendment right to present a defense, when it refused to allow defendant to cross-examine the State's key witness about her immigration status, as it related to a possible motive to lie, in prosecution for first degree murder; witness was not a United States citizen, she conceded to lying and even went so far as admitting during cross-examination that she was fearful she might be arrested and that she was pregnant and did not "want something bad for [her] son," and during witness's initial interview with law enforcement she was threatened with deportation. U.S. Const. Amend. 6; Wash. R. Evid. 413.

**[2] Criminal Law** Cross-examination

The Court of Appeals reviews general limitations on the scope of cross-examination for abuse of discretion.

**[3] Criminal Law** Cross-examination

A trial court abuses its discretion if the ruling on limiting the scope of cross-examination is based on erroneous interpretation of the law or the court fails to recognize that it has discretion.

**[4] Criminal Law** Review De Novo

A claim for denial of one's Sixth Amendment right to put on a defense is reviewed de novo. U.S. Const. Amend. 6.

**[5] Constitutional Law** Rights to notice, hearing, and defense, in general

Right of accused in criminal trial to due process is, in essence, right to fair opportunity to defend against state's accusations. U.S. Const. Amend. 14.

[6] **Criminal Law** Relevancy in General

Evidence defendant seeks to admit must be of at least minimal relevance.

[7] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

If defendant's proposed evidence is relevant, it is prosecution's burden to establish that evidence is so prejudicial as to disrupt fairness of fact-finding process at trial.

[8] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

State's interest in excluding prejudicial evidence must be balanced against defendant's need for evidence proposed and relevant information can be withheld only if prosecution's interest outweighs defendant's need.

[9] **Criminal Law** Cross-examination and impeachment

Primary and most important component of right to confrontation is that of meaningful cross-examination of adverse witness; confrontation therefore helps assure accuracy of fact-finding process. U.S. Const. Amend. 6.

[10] **Criminal Law** Right of Accused to Confront Witnesses

Right to confront adverse witness must be zealously guarded. U.S. Const. Amend. 6.

[11] **Witnesses** Cross-Examination to Show Interest or Bias

Right to cross-examine for bias is especially important where that bias stems from witness's motive to cooperate with state.

[12] **Witnesses** Cross-Examination to Discredit Witness or Disparage Testimony in General
**Witnesses** Cross-Examination to Show Interest or Bias

The more essential the witness is to prosecution's case, the more latitude defense should be given to explore fundamental elements such as motive, bias, or credibility.

[13] **Criminal Law** Course and Conduct of Trial in General

Rules which impose procedural requirements cannot be wielded as a sword by the State to defeat the constitutional rights of an accused in a criminal trial.

  

[14] **Criminal Law**Provisional or conditional admission

The trial court erred when it relied on its earlier conditional ruling denying co-defendant's motion to introduce evidence of State witness's immigration status, and declined to conduct an independent analysis when ruling on defendant's mid-trial request to cross-examine State's witness about her immigration status, in murder prosecution; co-defendant argued in his pretrial motion that witness was motivated to lie in order to obtain an immigration benefit, while defendant argued in his midtrial motion that witness was motivated to lie based on the threat of negative immigration consequences communicated to her by law enforcement during her interrogation. Wash. R. Evid. 413.

[15] **Criminal Law**Necessity and scope of proof
**Criminal Law**Cross-examination and impeachment

The right to present evidence of a witness's bias is essential to the fundamental constitutional right of a criminal defendant to present a complete defense, which encompasses the right to confront and cross-examine adverse witnesses. U.S. Const. Amend. 6.

[16] **Criminal Law**Reception of evidence

Violation of the right to present a defense and to confront witnesses is constitutional error. U.S. Const. Amend. 6.

[17] **Criminal Law**Presumption as to Effect of Error; Burden

Constitutional error is presumed prejudicial and the State bears the burden of showing the error was harmless beyond a reasonable doubt.

[18] **Criminal Law**Witnesses
**Witnesses**Inquiry as to particular acts or facts tending to show interest or bias

The trial court's error in refusing to allow defendant to cross-examine the State's key witness about her immigration status, as it related to a possible motive to lie, was not harmless in prosecution for murder; co-defendant did not mention defendant as one of the perpetrators in his statement to police, there was no DNA or other physical evidence to connect defendant to the scene, he was not identified in the security footage that was introduced at trial, and the only person to implicate defendant was key witness. Wash. R. Evid. 413.

**144 Appeal from Pierce County Superior Court, Docket No: 17-1-00874-7, Honorable James R. Orlando, Judge

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PUBLISHED OPINION

  

Hazelrigg, J.

***340** ¶1 Cesar **Chicas Carballo** and his co-defendant were both convicted of first degree murder and conspiracy to commit first degree murder following a joint jury trial. The co-defendant's girlfriend was the key witness in the State's case and provided a detailed account of the crime and its planning. Requests from both defendants to cross-examine her about her immigration status as it related to a possible motive to lie were considered in the context of ER 413, but denied. **Chicas Carballo** appealed, arguing the court improperly allowed unredacted statements by his co-defendant in violation of **Chicas Carballo's** right to confrontation under Bruton v. United States.[1] He further asserts that the denial of his request to explore immigration matters as to this critical witness violated his Sixth Amendment right to present a defense. Because the court's rulings on the ER 413 issue constitute reversible error, we need not reach **Chicas Carballo's** other challenges on appeal. We reverse and remand for a new trial.

FACTS

¶2 In April of 2016, a couple saw a body on a street in Tacoma and called 911. Police responded to the area soon after and located a man, later identified as Samuel Cruces Vasquez, bleeding heavily, but alive. There was a sport utility vehicle (SUV) parked nearby that was still running with its driver door open and blood inside the vehicle. There was also a butterfly knife on the ground, blue latex gloves inside the SUV, and a shoe pinched between the SUV and another vehicle. Cruces Vasquez was later pronounced dead at the hospital.

¶3 About three weeks after the incident, a witness contacted police and told them what he had observed. The witness explained that he was driving when someone exited ***341** a car and signaled for him to stop. He stated that he kept driving out of safety concerns. He looked in his rearview mirror as he drove away and saw two people emerge from the ****145** vehicle. He said one of them beat the person who had signaled him to stop.

¶4 Surveillance footage from a nearby business captured some of the events that night. In one video, a woman, later identified as Mayra Karina Calderon Flores,[2] could be seen walking on the street and another individual later walked to the SUV. After that, there appeared to be movement inside the SUV. Cruces Vasquez could be seen exiting the SUV and was then run over by an unidentified car. The autopsy revealed Cruces Vasquez had been stabbed eight times and suffered blunt trauma injuries. Blood from the knife found on the ground matched Cruces Vasquez's DNA[3]. The shoe located between the vehicles was connected to Jose Jonael Ayala Reyes by his own admission and DNA from inside a latex glove found in the vehicle was identified as that of another man involved in the incident. None of the physical evidence collected in the case was linked to Cesar **Chicas Carballo**.

¶5 Investigation determined that Cruces Vasquez had clocked out of work at 10:10 p.m. on the night of the crime and that he had received numerous calls and texts from Ayala Reyes' phone number. Ayala Reyes and Cruces Vasquez had worked together at a pizza restaurant. Earlier in April, Cruces Vasquez' brother helped Ayala Reyes get a bus ticket to California. Ayala Reyes had told Cruces Vasquez' brother that he was in the MS-13[4] gang and that he provided money to people in California when he received his paychecks. He said the amounts were around $20 or $30. Ayala Reyes claimed the money was later sent by the gang members in California to El Salvador.

***342** ¶6 Ayala Reyes was taken into custody in July 2016. He admitted to being one of a number of participants in the stabbing of Cruces Vasquez, but didn't provide names of the others involved. Ayala Reyes acknowledged the knife found at the scene was his and that he had stabbed Cruces Vasquez one time in the leg, but denied killing him. He also claimed that Cruces Vasquez sold drugs.

¶7 Ayala Reyes was dating Flores. Flores was also questioned by police about the stabbing. After extensive police interrogation, Flores provided the street names of the individuals involved: Sombra, Tas, and Sicario. After police showed her a photo of **Chicas Carballo**, Flores identified him as the individual named Tas. Flores' identification of the suspects by name and photograph, and the further explanations she provided, did not occur until police threatened to arrest her and indicated she might be removed from the United States if she didn't tell them what occurred. Flores similarly identified Juan Jose Gaitan Vasquez as Sombra. The DNA from the blue gloves recovered at the crime scene was linked to Gaitan Vasquez and he separately pleaded guilty to charges stemming from Cruces Vasquez' death. A detective with the Tacoma Police Department later identified Sicario as Edenilson Misael Alfaro.

¶8 At trial, Flores testified that Ayala Reyes sent money to Sicario to support gang activity. She explained that he sent the money "[b]ecause of drugs ... [Ayala Reyes] had" and she later turned over money transfer receipts to law

enforcement. The receipts indicated that Ayala Reyes wired money to **Chicas Carballo** in California in amounts of $200, $300, and $260 on June 6, 25, and July 7 of 2016.

¶9 Flores testified that Ayala Reyes rented an apartment in April 2016 and that she was present in the apartment when she heard him talking with Tas, Sombra, and Sicario about killing Cruces Vasquez. Flores claimed that all of the individuals involved were members of MS-13. She described Sicario as the "main one." Flores had never ***343** seen Sicario prior to the date she heard them discussing the plan. She further testified that Ayala Reyes went to California a few weeks before the killing and met with Sicario because of drugs. She asserted that the apartment had been rented when Ayala Reyes returned from California specifically so that gang ****146** members could come there, but that it was also intended as the residence for her and Ayala Reyes.

¶10 Flores said on the day of the attack on Cruces Vasquez, Ayala Reyes was picked up by three men in a truck. She later went to the apartment and, while cooking for them, heard the four men discussing how they would kill Cruces Vasquez. She testified that Sombra said he was going to stab Cruces Vasquez. Ayala Reyes was to lure Cruces Vasquez by calling him. Flores claimed that Ayala Reyes and Sombra were to do the killing because they were not in the gang. The men grabbed gloves provided by Ayala Reyes. Flores said she had seen two knives; one a butterfly knife and the other a knife that Sombra passed around. The four men and Flores left the apartment to go to the location where the killing was to occur. She indicated that **Chicas Carballo** was the driver. Flores said that when the men left to meet Cruces Vasquez the night of the attack, she initially rode with them, but was dropped off before they reached their destination and she walked home.

¶11 Later that night, Flores went to the apartment to meet Ayala Reyes and saw Tas, Sombra, and Sicario leave in their vehicle. She observed blood on the passenger side door. Ayala Reyes recounted the killing to Flores claiming he stabbed Cruces Vasquez in the leg, that Sombra stabbed him in the neck, and that they beat him on the street, ultimately killing him. Flores thought the killing was because Cruces Vasquez sold drugs and that Ayala Reyes had killed him to be part of "La Mara."

¶12 In March of 2017, **Chicas Carballo** was interrogated by law enforcement in California. He maintained that he drove to Washington with two others based on an offer of a construction job. **Chicas Carballo** stated that he did not ***344** remember the specifics as to the timing or precise destination of the trip to Washington. He indicated one of the men was named "Juan," "Jose," or "Juan Jose," and that he met this man at MacArthur Park in Los Angeles when he was looking for work. He stated that he did not know the other individual who rode with them in the car and that when they arrived in Washington, Juan/Jose repeatedly called the man who was offering the construction job. **Chicas Carballo** said at one point he was told to wait in the car and that Juan/Jose left and came back, reporting that he could not reach the man offering the work. He said that the three men then went back to California. **Chicas Carballo** asserted that he had been tricked into going to Washington for work and denied knowing anything about the killing.

¶13 After denial of motions to sever their cases, **Chicas Carballo** and Ayala Reyes proceeded to a joint trial as co-defendants. **Chicas Carballo's** defense theory was that Flores lied and that the State had failed to prove beyond a reasonable doubt that he was involved in the killing. The jury returned guilty verdicts on all counts for both **Chicas Carballo** and Ayala Reyes.[56] The jury also returned special verdicts concluding that a deadly weapon was used in the commission of the crimes and finding a gang aggravator for the offenses. The court did not impose an exceptional sentence for **Chicas Carballo** based on the gang aggravator, but did impose a total of 608 months confinement, running the base sentence for the two serious violent offenses and their corresponding terms for deadly weapon enhancements consecutively. **Chicas Carballo** now appeals.

## *345 ANALYSIS

¶14 **Chicas Carballo** asserts that a violation of his right to confrontation by the trial court's failure to properly apply the Bruton test to Ayala Reyes' statements to police which were introduced at trial, violation of his Sixth Amendment right to present a defense due to improper application of ER 413, and cumulative error deprived him of a fair trial. In a statement of additional grounds for ****147** review, **Chicas Carballo** also claims that he is entitled to a new trial based on Flores' dishonesty. As we find the Sixth Amendment/ER 413 challenge dispositive, we need not reach the other assignments of error.[7]

[1] [2] [3] [4]¶15 **Chicas Carballo** avers that his Sixth Amendment right to present a defense was violated when the trial court refused to allow him to introduce evidence during her testimony of a potential motive for Flores to lie. This court reviews general limitations on the scope of cross-examination for abuse of discretion. State v. Lee,

188 Wash.2d 473, 486, 396 P.3d 316 (2017). A trial court necessarily abuses its discretion if the ruling is based on erroneous interpretation of the law or the court fails to recognize that it has discretion. State v. Gaines, 16 Wash. App. 2d 52, 57, 479 P.3d 735, 737 (2021). However, a claim for denial of one's Sixth Amendment right to put on a defense is reviewed de novo. State v. Jones, 168 Wash.2d 713, 719, 230 P.3d 576 (2010).

[5] [6] [7] [8]¶16 "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The evidence a defendant seeks to admit "must be of at least minimal relevance." ***346** State v. Darden, 145 Wash.2d 612, 622, 41 P.3d 1189 (2002). If the proposed evidence is relevant, it is the prosecution's burden to establish that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Jones, 168 Wash.2d at 720, 230 P.3d 576. The State's interest in excluding prejudicial evidence must be balanced against the defendant's need for the evidence proposed and relevant information can be withheld only if the pros[ ]ecution's interest outweighs the defendant's need. Id. "We must remember that 'the integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations." Id. (quoting State v. Hudlow, 99 Wash.2d 1, 14, 659 P.2d 514 (1983)). Our supreme court has "therefore noted that for evidence of high probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and [article I, section 22 of the Washington Constitution].' " Id. (quoting Hudlow, 99 Wash.2d at 16, 659 P.2d 514) (alterations in original).

[9] [10] [11] [12]¶17 The primary and most important component of the right to confrontation is that of meaningful cross-examination of an adverse witness. Darden, 145 Wash.2d at 620, 41 P.3d 1189. "Confrontation therefore helps assure the accuracy of the fact-finding process." Id. This right to confront must be "zealously guarded." Id. "The right to cross-examine for bias is especially important where ... that bias stems from a witness's motive to cooperate with the State." State v. Orn, 197 Wash. 2d 343, 482 P.3d 913, 919 (2021). "[T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, [or] credibility." Darden, 145 Wash.2d at 619, 41 P.3d 1189 (alterations in original).

¶18 Although **Chicas Carballo** was allowed to impeach Flores with various inconsistencies in her police interview and trial testimony, he was prevented from exploring her possible motive to lie. This left the State in a position in which it could shade the jury's perception of why Flores might change her story. The court, prosecution, and defense ***347** were all aware that Flores was not a United States citizen and therefore was subject to removal under federal immigration law. However, the trial court did not allow **Chicas Carballo** to cross-examine her about her immigration status as it related to a possible deportation threat by law enforcement that was uttered during her interrogation. Flores was an essential witness in the State's case against **Chicas Carballo**, particularly in light of the absence of any other direct evidence that connected him to the crimes.

¶19 Before trial, Ayala Reyes moved under ER 413 to introduce evidence of Flores' immigration ****148** status as motive to lie, but on a slightly different ground than later urged by **Chicas Carballo**. The trial court denied Ayala Reyes' motion, but indicated in its oral and written ruling that the matter could be revisited based on any additional evidence that came out at trial. **Chicas Carballo** did not present a pretrial motion, but the court based its denial of his midtrial request on its earlier ruling on Ayala Reyes' ER 413 motion, specifically referencing the consideration of additional evidence. The court stated "I denied a motion to allow that testimony without prejudice should additional evidence be provided. I'm not hearing any additional evidence. It sounds like the same issue as was already provided."

¶20 ER 413 had gone into effect approximately one month before the trial began. ER 413 provides:

> (a) Criminal Cases; Evidence Generally Inadmissible. In any criminal matter, evidence of a party's or a witness' immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607. The following procedure shall apply prior to any such proposed uses of immigration status evidence to show bias or prejudice of a witness:
>
> (1) A written pretrial motion shall be made that includes an offer of proof of the relevancy of the proposed evidence.
>
> ***348** (2) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
>
> (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing outside the presence of the jury.

  

(4) The court may admit evidence of immigration status to show bias or prejudice if it finds that the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.

(5) Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights.

¶21 While **Chicas Carballo** did not present a pretrial motion, or formally join in Ayala Reyes' motion, he did make his position known to the court at the time it was argued. The ruling on Ayala Reyes' motion was expressly left open for new evidence, but more importantly, by relying on it to deny **Chicas Carballo's** midtrial request to cross-examine Flores about her immigration status, the trial judge bound **Chicas Carballo** to both Ayala Reyes' motion and the court's ruling on such. This particular posture creates dissonance in the trial court's two separate rulings against **Chicas Carballo** on this issue. After trial, **Chicas Carballo** filed a motion for relief from judgment based in part on the court's denial of his midtrial request to examine Flores' immigration status. The judge denied the motion for relief from judgment on the basis that **Chicas Carballo** had failed to file a pretrial motion under ER 413, despite the fact that the judge had treated Ayala Reyes' motion as **Chicas Carballo's** for purposes of the midtrial ruling.

[13]¶22 We find guidance in an opinion by Division Two of this court in our review of evidentiary rulings in the context of the right to present a defense. In State v. Grant, the accused argued his right to put on a defense was violated when the trial court denied his request to present an alibi witness due to failure to strictly comply with the procedural ***349** requirements set out by statute.[8] 10 Wash. App. 468, 470–72, 519 P.2d 261 (1974). Prior to the start of trial, the prosecution made a timely demand for the identities of any alibi witnesses the defense expected to call. On the last day of the trial, defense sought to present testimony from newly discovered alibi witnesses. The trial court denied the request as untimely under the statute which imposed procedural requirements for alibi witnesses. Id. at 471–72, 519 P.2d 261. On review, the trial court's ruling was rejected on the basis that a procedural rule cannot be ****149** utilized to infringe on an individual's constitutional right to present a defense. Id. at 474–75, 519 P.2d 261. Division Two noted that the evidence sought by the defense was highly relevant, noting that it was "evidence which, on its face and if believed by a jury, would be seriously supportive of [Grant's] asserted alibi." Id. at 472, 519 P.2d 261. The court went on to

deem it imperative that in the absence of totally inexcusable neglect no criminal case should be submitted to the trier of the facts without all available material facts being made known to the trier of the facts, not only to the end that substantial justice shall be done, but also because in performing its high function in the best way, justice must satisfy the appearance of justice.

Id. at 474, 519 P.2d 261. Grant only reinforces that it has long been the law in our state that rules which impose procedural requirements cannot be wielded as a sword by the State to defeat the constitutional rights of an accused in a criminal trial.

¶23 After oral argument in this matter, our supreme court issued its opinion in State v. Orn, 482 P.3d 913. Orn was convicted of attempted first degree murder. Id. at 918. The victim testified at trial, but Orn's attempt to cross-examine him about bias was restricted by the trial court. Id. The victim had worked as a confidential informant for the Kent Police Department in exchange for law enforcement declining to refer certain felonies to the prosecutor for filing ***350** against him. Id. Orn's examination of the victim on this matter was limited to one question, which left the jury with incomplete information and potentially incorrect inferences from which to assess the witness' credibility. Id. at 918, 921. The victim was a key witness for the State as "the only testifying eyewitness to the shooting" and, as such, the Supreme Court found the trial court abused its discretion as to the evidentiary ruling, which resulted in a violation of Orn's Sixth Amendment rights. Id. at 921–22. However, the error was ultimately deemed harmless in light of the wealth of other "[u]ncontradicted evidence [which] linked Orn to the shooting." Id. at 923 (alterations in orginal).

¶24 As in Grant and Orn, the court here was aware that the evidence sought by the defense was highly relevant. **Chicas Carballo's** counsel made the midtrial request to explore Flores' immigration status after much of her direct examination had been presented. His request was discussed outside the presence of jury and he reiterated his specific focus on Flores' potential motive to lie based on threats of deportation by law enforcement during her original interview with detectives. The court indicated its position that no new information had been presented since it had issued the conditional ruling on Ayala Reyes' pretrial motion. **Chicas Carballo's** attorney responded by stating, "I think it's very relevant that she would stick to her guns for 234 pages [of transcribed statements] that she didn't know anything, and after threats of jail and immigration issues and leading questions[,] she finally remembers something."

¶25 The court stated it was unwilling to alter its prior ruling unless new information came to light, which clearly demonstrates that the first ruling was not final. In response to the midtrial request by **Chicas Carballo**, the court said, "Unless she says something different today, or the reason I made this up is because I was threatened by deportation, that wouldn't appear to be new information." The State appeared to recognize that some of the information about her status was already before the court and said ***351** Flores was unlikely to say anything because she was concerned about immigration issues. This comment by the State, coupled with its later request to explore Flores' status for different reasons in its own examination, suggests that this topic was highly relevant to the case and that **Chicas Carballo** should have been allowed to explore such in the furtherance of his defense. It also reinforces that the court and the State both had the benefit of the same information that would have been provided in an offer of proof if **Chicas Carballo** had precisely complied with the procedural requirements of ER 413. This further highlights the lack of prejudice to the State from **Chicas Carballo's** request to explore the motive to lie as it related to his ability to put on a defense.

****150** [14]¶26 In her testimony, Flores conceded to lying and even went so far as admitting during cross-examination that she was fearful she might be arrested and that she was pregnant and did not "want something bad for [her] son." Had she been confronted with the deportation threat and its applicability to her because of her immigration status, a jury could reasonably find that her fear of arrest and for her son's welfare was related to the threat of deportation by police and the corresponding risk of her son's birth in a country she had chosen to leave, rather than in the United States.[9] This is a powerful motive to lie, particularly after dishonesty had been demonstrated by extensive and effective impeachment of this critical witness. Without evidence of a possible motive for Flores' untruthfulness, the impeachment ***352** lacked its sting. This ruling also left the State in a much better position to suggest general fear as justification for her motive to change her story when talking to detectives, despite the fact that the court, State, and defense were all were aware that her immigration status was woven throughout the facts of the case. **Chicas Carballo** was deprived of the opportunity to introduce evidence to rebut or challenge the State's characterization of the reasons for her untruthfulness.

¶27 The trial court appeared unwilling to engage in reweighing the relevance and potential prejudice when **Chicas Carballo** asserted that Flores' motive to lie, fear from a police threat based on her immigration status, was critical to his defense. As with the evidence of bias in Orn and alibi testimony in Grant, the evidence **Chicas Carballo** sought was highly relevant and the prejudicial effect on the State was comparatively low in terms of the overall fairness of the trial. Further, concern as to prejudice is undercut by the fact that many of those involved in this case were immigrants. Even if not expressly identified as such to the jury, testimony by various witnesses about El Salvador and the fact that the defendants and Flores participated in the trial with the assistance of interpreters could have led any of the seated jurors to reasonably speculate that several of the trial participants may be immigrants. Therefore any fear of generalized anti-immigrant prejudice by the jury would cut against those parties equally, but most particularly against the defendants. The State recognized how integral immigration was to the case when it sought permission to discuss Flores' experiences in El Salvador prior to coming to the United States. However, the court warned that doing so would open the door for the defense to cross-examine her about her status, so the State withdrew its request. The mere fact of the State's request, and proffered reasoning, is telling as to the strong probative nature of this realm of testimony which was restricted by the trial court.

***353** ¶28 This court recently considered the denial of a defense request to introduce evidence of immigration status in State v. Bedada, 13 Wash. App. 2d 185, 463 P.3d 125 (2020). Bedada also involved a trial that occurred shortly after ER 413 had become effective. In that case, we considered the ability to present a defense in light of limits the court placed on cross-examination as to immigration status, concluding that the trial court failed to weigh the probative value against the prejudicial nature of such evidence. Id. In Bedada, the defendant sought to introduce evidence of his own immigration status in order to establish a motive to lie by the victim, his wife, based on her desire to have him removed from the country. Id. at 188–90, 463 P.3d 125. When first discussed in motions in limine, the trial court found that it would be unduly prejudicial to the State to have the defendant's immigration status ****151** known as the jury might focus on his potential deportation and did not find that the information was relevant. Id. at 190–91, 463 P.3d 125. Bedada did not file the requisite pretrial motion to introduce the evidence under ER 413. Id. at 195, 463 P.3d 125.

¶29 The issue was revisited during trial and defense explained the relevance was due to a motive to fabricate. However, the trial court indicated it was a balancing issue and that neither immigration status nor consequences were relevant. Id. at 191–92, 463 P.3d 125. We held that

the information was highly relevant and the trial court's failure to properly weigh the proffered evidence was an abuse of discretion. Id. at 204, 463 P.3d 125. Our analysis reinforced that the State bears the burden to establish that the evidence sought would be so prejudicial as to disrupt the fairness of the fact-finding process. Id. at 201, 463 P.3d 125. Like the case at hand, the trial court in Bedada provided no justification for its conclusion that the evidence was not relevant. Id. at 200, 463 P.3d 125.

¶30 As with Grant and Orn, Bedada also guides our review here. **Chicas Carballo** sought to introduce evidence of the key witness' motive to fabricate. The State even admitted in their closing that Flores did not voluntarily ***354** provide her story to police. As in Bedada, no one disputed whether the evidence was reliable and the trial court here similarly failed to engage in the necessary analysis. Id. at 201, 463 P.3d 125. The State does not argue prejudice in this case and focuses instead on the relevance of the information. The trial court seems to have proceeded with caution in its application of the newly effective ER 413 and improperly placed the burden on **Chicas Carballo**. This was a misapplication of the standard.

¶31 Additionally, the record before us demonstrates that there was no discussion of a limiting instruction as to the evidence sought by the defense, nor does it appear the final subsection of ER 413(a) was considered by the court in any of its rulings on the matter. ER 413(a)(5) provides, "Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights." The ability to provide the motive to fabricate after the key witness admits to being untruthful is critical for the defense in a case in which the State's theory relied so heavily on that witness' credibility. Flores was intimately involved with the co-defendant and was captured on security footage near the scene shortly before Cruces Vasquez was attacked. She was the only live witness whose credibility could be directly assessed by the jury and who tied **Chicas Carballo** to the events surrounding Cruces Vasquez' death. After defense attacked Flores' credibility in closing, the State focused its rebuttal argument on the various reasons she was credible, how she should be understood as truthful, and generally attempting to rehabilitate her after her admissions of lying to police.

[15] [16] [17]¶32 "[T]he right to present evidence of a witness's bias is essential to the fundamental constitutional right of a criminal defendant to present a complete defense, which encompasses the right to confront and cross-examine adverse witnesses." Orn, 482 P.3d at 919 (citing Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974); Chambers, 410 U.S. at 294, 93 S.Ct. 1038; Jones, 168 Wash.2d at 720, 230 P.3d 576; ***355** Darden, 145 Wash.2d at 620, 41 P.3d 1189). Violation of the right to present a defense and to confront witnesses is constitutional error. Jones, 168 Wash.2d at 724–25, 230 P.3d 576. "Constitutional error is presumed prejudicial and the State bears the burden of showing the error was harmless beyond a reasonable doubt." State v. Chambers, 197 Wash. App. 96, 128, 387 P.3d 1108 (2016).

[18]¶33 The State has not met its burden of establishing that the error was harmless. In Orn, the Supreme Court held that even if the key witness had not testified at all, in light of the entire record, the trial outcome would have been the same due to the "uncontradicted evidence" linking Orn to the crime. 482 P.3d at 923. The record before us, however, is strikingly different. Ayala Reyes did not expressly name **Chicas Carballo** as one of the perpetrators in his statements to police, there was no DNA or other physical evidence to connect **Chicas Carballo** to the scene, and he was not identified in the ****152** security footage that was introduced. At oral argument before this court, the State reiterated that Flores was the key witness to implicate **Chicas Carballo** in the murder. Absent Flores' testimony, the only evidence remaining as to **Chicas Carballo's** possible connection to the murder or conspiracy were phone records showing that he had communicated with Ayala Reyes and the money transfer receipts between them. As such, we cannot conclude that this error was harmless. In light of the violation of **Chicas Carballo's** right to present a defense, and State's failure to demonstrate that this error was harmless beyond a reasonable doubt, we reverse and remand for a new trial.

WE CONCUR:

Dwyer, J.

Appelwick, J.

**All Citations**

17 Wash.App.2d 337, 486 P.3d 142

Footnotes

  

1 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

2 Ms. Calderon Flores is referred to as Flores throughout the record. For clarity, we will use that portion of her last name to identify her as well.

3 Deoxyribonucleic Acid.

4 Mara Salvatrucha 13.

5 This included a separate count of second degree felony murder, which was later vacated on double jeopardy grounds.

6 This court recently affirmed Ayala Reyes' convictions in an unpublished opinion. State v. Ayala Reyes, No. 81393-5-I, 2020 WL 4282735 (Wash. Ct. App. July 27, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/813935.pdf.

7 If the State chooses to introduce Ayala Reyes' statements to police upon retrial, any potential Bruton issue could be comprehensively addressed in the trial court with briefing and proposed redactions, consistent with case law, which would provide a sufficient record for review on any subsequent appeal.

8 At the time of Grant, procedures as to alibi defenses were set out by statute. They are now contained in CrR 4.7(b)(2)(xii).

9 While it does not drive our analysis here, it is noteworthy that Ayala Reyes' pretrial motion under ER 413 was aimed at a different potential motive for Flores to lie; her possible receipt of an immigration benefit, specifically a U visa. **Chicas** **Carballo**, however, asserted Flores' motive to lie was based on the threat of a negative immigration consequence by way of deportation, communicated to her by law enforcement during her interrogation.
Questions of one's immigration status, including eligibility for a benefit or risk of a particular consequence, are fact-specific and often highly nuanced. For that reason alone, the trial court erred by not conducting an independent analysis of **Chicas** **Carballo's** midtrial request under ER 413, rather than relying upon its earlier conditional ruling on Ayala Reyes' motion.

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IN THE COURT OF THE APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>CESAR CHICAS CARBALLO,<br><br>Appellant. | ) | No. 82054-1-I<br><br>DIVISION ONE<br><br>ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING MOTION FOR EXTENSION OF TIME TO FILE ANSWER |

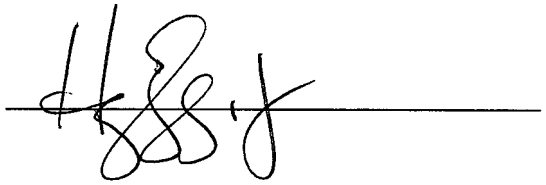
The respondent, State of Washington, filed a motion for reconsideration of the opinion filed on May 3, 2021. The appellant, Cesar Chicas Carballo, filed a motion for extension of time to file his answer to the motion from June 30, 2021 to July 2, 2021. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; it is further

ORDERED that the motion for an extension of time to file an answer has been granted; and it is further

ORDERED that the appellant's time for filing his answer has been extended to July 2, 2021.

FOR THE COURT:



# 5A Wash. Prac., Evidence Law and Practice § 413.1 (6th ed.)

**Washington Practice Series TM** | July 2020 Update

**Evidence Law and Practice**
Karl B. Tegland[a0]

**Chapter 4. Relevancy and Its Limits**

**Rule 413. Immigration Status**

**Author's Commentary**

## § 413.1 Purpose and History of Rule 413

ER 413 was adopted as a new rule in 2017. In the order adopting the rule, the Supreme Court specified that the rule will take effect on September 1, 2018.

When the rule was proposed to the Supreme Court in May of 2017, it was accompanied by the following drafters' comment.

**Drafters' Comment Accompanying Proposed ER 413**

**Submitted by Columbia Legal Services, Northwest Immigrant Rights Project, Legal Voice, and the Washington Association of Prosecuting Attorneys**

**A. Purpose**

The proposed rule would adopt a new Rule of Evidence 413Rule of Evidence 413 to apply to all civil and criminal cases in Washington.

Washington courts strive to provide equal access to all and to provide litigants with a fair and impartial trial.[1] One touchstone of a fair trial is an impartial trier of fact–a jury capable and willing to decide the case solely on the evidence before it.[2]

**Providing immigrants with access to** the **courts and a fair trial is essential for our justice system**. Census data shows the foreign-born share of Washington's population has doubled from 6.6 percent in 1990 to 13.5 percent in 2013.[3] As of 2011, Washington was home to 943,664 immigrants.[4] According to the governor's office, one in every seven people in the state are immigrants.[5]

Immigration status evidence is of special concern in the context of criminal cases involving domestic violence, sexual assault, and trafficking in persons. Undocumented immigrant victims and witnesses, a disproportionate number of whom are women and children, are frequently uninformed, unfamiliar with, or simply confused about their legal rights, and the legal system.[6] They are particularly vulnerable due to a variety of factors, including language barriers, separation from community, lack of understanding of United States laws, fear of deportation, cultural differences, and predatory offenders.[7] For many victims, the fear of being reported to immigration and fear of deportation are the most intimidating factor that kept battered immigrants from seeking

the services they needed.[8] The result is victims deterred from seeking criminal legal assistance, or even basic social services.

Since 2010, our Supreme Court has recognized that consideration of immigration status poses serious obstacles to our courts' ability to deliver a fair trial. "Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."[9] Fact finders may unwittingly make decisions based on prejudice if immigration status evidence is admitted. "[Q]uestions regarding a defendant's immigration status…appeal to the trier of fact's passion and prejudice.)"[10]

While *Salas* provides some direction to trial courts, it does not provide a uniform and comprehensive standard. In light of the "significant danger" that immigration status evidence poses to the fact-finding process, a court rule is needed.[11] This is true especially in light of a flurry of federal executive orders that have further inflamed the topic of immigration, resulting in an increased risk of prejudice caused by the admission of immigration status. Moreover, speculating whether a party might be deported in the future is not productive, especially in light of the complexity of federal immigration law and the lack of expertise of trial court judges in that area of the law.

Evidentiary rules restricting the introduction of prejudicial evidence are common. For over 100 years, our Supreme Court has prohibited the discussion of insurance coverage due to its prejudicial nature and propensity to "'confuse or inflame the minds of the jurors.'"[12] Based on studies that juries inflated damage awards when they know insurance covers the loss, the federal insurance exclusionary rule, Fed. R. of Evid. 411, was established "to ensure that juries base their verdicts upon legitimate grounds and not upon the improper notion that a judgment adverse to the defendant will be passed along to a 'deep pocket' insurance company."[13] In 1979, Washington adopted ER 411, which is identical to the federal rule.[14] Although ER 411 is directed only to the testimony of witnesses at trial, the cases make it clear that counsel should also avoid references to insurance during opening statements, closing arguments, and the like.[15]

The court and legislature have limited evidence of a victim's past sexual behavior or sexual predisposition in civil and criminal cases involving alleged sexual misconduct. For over 25 years, Evidence Rule 412 and RCW 9A.44.020 have regulated admissibility of a victim's sexual behavior through a formal pretrial procedure.[16] The procedural requirements promote appropriate handling of sensitive evidence in the pretrial and trial processes and allow courts to balance important competing considerations of a defendant's constitutional right to confront and cross-examine witnesses against the State's interest in encouraging rape victims to testify.[17]

Immigration *evidence,* due to its highly prejudicial impact on a fact finder's deliberative process, should receive treatment similar to ER 411 and ER 412. A new evidence rule, proposed ER 413, would limit the introduction of immigration evidence (with some exceptions) to ensure equal and impartial access to Washington's court system. The rule would give the judge discretion to review this evidence when it is directly probative to a particular case. Uniform standards set forth through a court rule address the implications of introducing immigration status as evidence, particularly in context of abuse, in order to most effectively administer a just decision. ER 413 provides clear guidance for evidence that is not just an issue of money, embarrassment, or shame, but is so sensitive that it poses potentially life altering consequences that serve to bar marginalized people from coming to court at all.

The new rule would promote equitable access to justice by removing the potential for racial and ethnic stereotyping that inevitably results from the unnecessary injection of immigration status evidence into the fact-finding process.[18] Just as ER 411 was adopted to protect insurance companies from inflated verdicts, and rape shield statutes afford protection to victims of sexual assault, proposed ER 413 is designed to protect Washington's immigrants and ensure they can obtain access to the justice system without fear of the legal process being overtaken by racial, ethnic, or anti-immigrant prejudice.

**B. Review by Section**

**Criminal Cases.** Subsection (a) provides that immigration status is inadmissible unless (1) status is an essential

fact to prove an element of a criminal offense or to defend against the alleged offense or (2) to show bias or prejudice of a witness for impeachment. The subsections of (a) set forth the procedures for using immigration status: (1) a written pretrial motion that includes an offer of proof (2) an affidavit supporting the offer of proof (3) a court hearing outside the presence of the jury if the offer of proof is sufficient (4) admissibility of immigration status to show bias or prejudice if the evidence is reliable and relevant and the probative value of the evidence outweighs the prejudice from immigration status. This procedure is similar to that adopted in RCW 9A.44.020 (3).

Subsection (a)(5) clarifies that subsection (a) shall not be construed to prohibit cross-examination regarding immigration status if doing so would violate a criminal defendant's constitutional rights. There is a similar provision in Fed. R. of Evid. 412(b)(l)(C).

**Civil Cases.** Subsection (b) provides that in a civil proceeding, immigration status evidence of a party or witness shall not be admissible except where immigration status is an element of a party's cause of action or where another exception to the general rule applies.

Subsection (b)(l) sets forth two limited circumstances where evidence of immigration status would be handled through a CR 59(h) motion. The proposed rule balances the concerns of prejudice against immigrants highlighted by the Supreme Court with the legitimate need of a defendant, in limited cases, to raise status issues where reinstatement or future lost wages are sought.

Parties would be permitted to submit to the court, through a post trial motion immigration status evidence under subsection (b)(l)(A), if an opposing party prevailed on a future lost earnings claim and that same party was subject to a final order of removal in immigration proceedings, a court may review such immigration status evidence to determine whether an adjustment in the future lost earnings award is appropriate. This is consistent with the Supreme Court's *Salas* decision, which held that evidence of a party's immigration status alone should not be considered in determining the value of a future lost wages award as the chance of detection and removal from the United States is low.[19]

Subsection (b)(1)(B) provides for a post trial review where the party seeks reinstatement to employment. This would permit review of immigration status where a party is awarded reinstatement to employment, in order to avoid potential conflict with federal law prohibiting the employment of undocumented persons.

Subsection (b)(2) provides the procedural mechanism whereby a party intending to offer such evidence under subsection (a) or (c) must file a written motion under seal pursuant to GR 15. The court must then hold an in camera hearing. If the court determines that the evidence may be used, it shall make findings of fact and conclusions of law regarding the use of that evidence. The papers and record of the hearing must be sealed, unless the court orders otherwise.

**C. Procedure Section**

Since 2014, attorneys concerned about the unfair and prejudicial use of evidence pertaining to immigration status in civil and criminal proceedings have worked on a proposed rule to address this systemic problem. In October of that year, the proponents submitted a draft proposed rule and GR 9 to the Washington State Bar Association (WSBA) Court Rules & Procedures Committee for review. Prior to submitting the proposal, Columbia Legal Services ran the proposal by advocates at the Northwest Justice Project, the Northwest Immigrant Rights Project, Legal Voice, and the Asian Pacific Institute on Gender-Based Violence. Additionally, the Washington Association of Prosecuting Attorneys gained the approval of all elected prosecuting attorneys within the state and obtained board approval to move forward with the proposal. In addition, the proposal was also run by advocates at the National Immigrant Women's Advocacy Project and Aequitas, and the proposal was shared with the American Bar Association Commission on Domestic and Sexual Violence.

The Washington Defender Association (WDA) was provided with a copy of the proposal as was the American

Civil Liberties Union (ACLU). WDA was and continues to be supportive of the civil portion of the proposal, but had significant reservations on the criminal side. The proposal was discussed at least twice on regularly scheduled WSBA Rules Committee meetings. The primary concern raised by the committee was the need for more specific language as to how and when the proposal would apply in criminal matters. We expect that the court will hear directly from them. At this point, we do not believe that any further changes would convince the defense bar to support the rule.

With that feedback in mind, the proponents went back to the drawing board. Throughout 2015, the proponents worked to develop language on the criminal portion of the proposal and ultimately decided to pull the proposal to allow stakeholders the necessary time to review and comment on the new language. Multiple stakeholders from the criminal defense bar were actively engaged, including the WDA, the ACLU, and the Washington Association of Criminal Defense Lawyers. An in-person meeting was held in the fall of 2015 to discuss the proposal in detail. At that meeting, those from the defense bar stated they would review the proposal and make recommendations to address their concerns. After several months of review, the WDA reported that no amendments would be proposed and the defense bar would continue to support the civil side of the proposal, but not the criminal side. In light of constitutional concerns raised by the defense bar, a specific provision was added to the proposal to ensure sixth Amendment rights were fully protected.[20]

During the summer of 2016, the WSDA Access to Justice Board (ATJ Board) agreed to review the revised proposal. Position statements were received from both the proponents and the opponents from the defense bar. That committee met multiple times to review the proposal, including a significant in-person meeting on November 4, 2016 where both the proponents and opponents made presentations. There was no opposition voiced at that meeting to the civil portion of the proposal. On February 9, the ATJ Board ultimately informed the proponents that there was "quick and strong unanimity that the proposal in the context of the civil litigation is appropriate." However, the ATJ Board stated it would not "support or oppose the ER 413 proposal in the context of criminal matters."

While the proposal was under review by the ATJ Board, the proponents re submitted it to the WSBA rules subcommittee for them to scrub the rule before sending it on to the Washington Supreme Court. That subcommittee reviewed the bill and sent it out for limited stakeholder review to members of the defense bar as well as immigration law practitioners. The subcommittee ultimately decided it could not simply scrub the rule and would need to go through a full vetting review. Given the length of time the proposal had been in the pipeline, the number of stakeholders who had already reviewed proposal, the widespread support for the civil portion of the rule, and the increased importance of need for such a proposal in our State, the proponents decided to request immediate review by the Supreme Court.



Footnotes

a0 Member Of The Washington Bar.

1 Federated Publ'ns, Inc. v. Swedberg, 96 Wash. 2d 13, 17, 633 P.2d 74 (1981) ("The right to trial by jury includes the right to an unbiased and unprejudiced jury.").

2 In re Elmore, 162 Wash. 2d 236, 267, 172 P.3d 335 (2007).

3 New Americans in Washington: The Political and Economic Power of Immigrants, Latinos, and Asians in the Evergreen State, Am. Immigration Council (Jan. 2015), https://www.americanimmigrationcouncil.org/research/new-americans-washington.

4 New Americans in Washington: The Political and Economic Power of Immigrants, Latinos, and Asians in the Evergreen State, Am. Immigration Council (Jan. 2015), https://www.americanimmigrationcouncil.org/research/new-americans-washington.

[5] Reaffirming Washington's Commitment to Tolerance, Diversity, and Inclusiveness, Wash. State Office of Governor, Executive Order No. 17-01 (Feb. 23, 2017).

[6] *See* Washington Courts Domestic Violence Bench Guide for Judicial Officers, App. F (2015); 22 U.S.C. § 7101(b)(20).

[7] *See* Washington Courts Domestic Violence Bench Guide for Judicial Officers, App. F (2015); 22 U.S.C. § 7101(b)(20).

[8] Giselle Hass, Mary Ann Dutton & Leslye Orloff, Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications, Int'l Review of Victimology 93 (2000). *See also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 stat. 1533 (2000); Mary Ann Dutton, Leslye Orloff & Giselle Aguilar Hass, Characteristics of Help-Seeking Behaviors Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 7 Geo. J. On Poverty L. & Pol'y 245, 293 (2000).
Numerous case history examples of how abusers use threats of deportation to silence victims were submitted to Congress in conjunction with the Violence against Women Acts of 1994 and 2000. *See generally* Leslye Orloff, Jessica Cundari & Erica Esterbrook, New Dangers for Battered Immigrants: The Untold Effects of the Demise of 245(i) (Ayuda 1999); Robin L. Camp et al., Untold Stories: Cases Documenting Abuse by U.S. Citizens and Lawful Residents of Immigrant Spouses, Family Violence Prevention Fund (1993). *See generally* Catherine Klein & Leslye Orloff, Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law; 21 Hofstra L. Rev. 804, 1025-26 (1993) (reconfirming that the Federal Violence Against Women Act (VAWA) provides "that all battered immigrant women have full access to protection orders, can report domestic violence crimes, and can have their abusers prosecuted in the same matter as any other battered woman even if they do not have legal immigration status.").

[9] Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 672, 230 P.3d 583 (2010).

[10] Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 672, 230 P.3d 583 (2010) (quoting State v. Avendano-Lopez, 79 Wash. App. 706, 719, 904 P.2d 324 (Div. 2 1995)). In *Salas,* the court found that "the risk of prejudice inherent in admitting immigration status [evidence is] great." *Salas,* 168 Wash. 2d at 673.

[11] *Salas,* Wash. 2d at 672.

[12] Lowset v. Seattle Lumber Co., 38 Wash. 290, 292, 80 P. 431 (1905) (quoting Iverson v. McDonnell, 36 Wash. 73, 76, 78 P. 202 (1904)); Stratton v. CH Nichols Lumber Co., 39 Wash. 323, 331–32, 81 P. 831 (1905) (raising insurance issues during voir dire required new trial).

[13] Alan Calnan, The Insurance Exchange Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?, 52 Ohio St. L.J. 1177, 1178 (1991).

[14] 5A Karl B. Tegland (etc.), Wash. Prac. Evidence Law and Practice § 411.1 (5th ed. 2001).

[15] 5A Karl B. Tegland (etc.), Wash. Prac. Evidence Law and Practice § 411.2 (5th ed. 2001). *See also* Thomas A. Doyle, Competing Concerns in Employment Litigation: How Courts are Managing Discovery of an Employee's Immigration Status, 28 ABA J. Lab. & Emp. L. 405 (2013).

[16] 5A Karl B. Tegland Wash. Prac. Evidence Law and Practice § 412.1 (6th ed. 2016). The drafter's comment to ER 412 when first proposed to the Washington Supreme Court in 1988 notes the Federal Rules of Evidence and Uniform Rules of Evidence each contain a rule that limits the admissibility of evidence of a sexual offense victim's past sexual behavior. 5A Karl B. Tegland, Washington Practice, Evidence Law and Practice § 412.3 (5th ed. 2007).
One of the other effects of the proposed rule could be to give judges an explicit basis in the Rules of Evidence for granting protective orders regarding discovery of immigration status. A protective order could be justified based on an argument that such discovery would not be "reasonably calculated to lead to the discovery of admissible evidence," CR 26(b)(1).

[17] 5A Karl B. Tegland Wash. Prac. Evidence Law and Practice § 412.3, 412.5 (6th ed. 2016).

[18] *See* TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 53 Tex. Sup. Ct. J. 431 (Tex. 2010) ("calling attention to [plaintiff's] illegal immigration status whenever he could…appeals to racial and ethnic prejudices [that]…cannot be tolerated because they undermine the very basis of our judicial process").

[19] Salas, 168 Wash. 2d at 669–70.

[20] U.S. Const. Amend. VI.

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# PIERCE COUNTY PROSECUTING ATTORNEY

## August 20, 2021 - 2:16 PM

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| **Appellate Court Case Number:** | 82054-1 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Cesar Chicas-Carballo, Appellant |
| **Superior Court Case Number:** | 17-1-00874-7 |

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