No. 95498-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ENCARNACION SALAS IV,

Respondent/Cross-Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

ANSWER TO STATE'S PETITION FOR DISCRETIONARY REVIEW AND CROSS-PETITION

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A. INTRODUCTION

Charged with murder, Encarnacion Salas unsuccessfully pleaded self-defense. Based on ineffective assistance of counsel, prosecutorial misconduct, and cumulative error, the Court of Appeals reversed Mr. Salas's conviction. The State seeks discretionary review. Because the Court of Appeals' decision is not in conflict with precedent and there is no issue of substantial public interest, this Court should deny review. If review is granted, the Court should grant review on the additional issues presented in this cross-petition.

B. RESTATEMENT OF ISSUES

1. To provide effective assistance, defense counsel must research the law. Trial counsel sought to exclude statements Mr. Salas made to hospital staff. But he failed to argue that Mr. Salas's statement were privileged. This argument was supported by two on-point opinions by the Court of Appeals. Due to counsel's failure, Mr. Salas's statements were admitted at trial and used to persuade the jury to convict him. In applying well-established precedent, did the Court of Appeals correctly hold Mr. Salas was deprived of his right to effective assistance of counsel?

2. "If you can't say it, don't display it."[1] During closing argument,

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[1] State v. Salas, 1 Wn. App. 2d. 931, 945, 408 P.3d 383 (2018) (quoting Kyle C. Reeves, PowerPoint in Court: The Devil's Own Device, or A Potent Prosecution Tool?, 48-DEC Prosecutor 26, 33 (2014)).

the prosecutor presented a slide juxtaposing a grim photo of Mr. Salas (akin to a mugshot) with a flattering photo of the decedent posing with a group of cartoon characters at a theme park. The prosecutor ended with an in life-photo of the decedent enjoying himself at a Ferris wheel ride. These slides communicated not only a covert emotional appeal to the jury but also an improper character-based propensity argument. Did the Court of Appeals properly hold that the slideshow constituted misconduct depriving Mr. Salas of his right to a fair trial?

C. ADDITIONAL ISSUES FOR REVIEW

3. It is misconduct for a prosecutor to give her personal opinion. On rebuttal during closing arguments, the prosecutor gave her personal opinion that it would be a "cop-out" for the jury to find Mr. Salas guilty of manslaughter rather than murder. Other jurisdictions have held such "cop-out" comments to be improper. The Court of Appeals held the comment was improper, but ruled reversal was not warranted based on this comment alone. If review is granted, should this Court review this ruling?

4. A party may "open the door" to otherwise inadmissible evidence if a topic is raised during examination and it would be unfair to not permit further inquiry. During trial, the State asked the decedent's friend how the decedent acted socially, eliciting testimony that he was flirty, friendly, and "just liked to have a good time." So that the jury was not left with a false

picture, defense counsel sought to elicit evidence that the friend knew the decedent to be aggressive, particularly when intoxicated. Did the Court of Appeals err in ruling the door had not been opened to rebuttal evidence?

5. Did cumulative error deprive Mr. Salas of his right to a fair trial?

D. STATEMENT OF THE CASE

In October 2014, Encarnacion Salas, Jr., called "EJ" by his friends and family, lived in Lynnwood with his two aunts, Ruby and Cristal Salas. RP 443, 1273.[2] Mr. Salas, who was in his early twenties, had moved to Washington about a year earlier. RP 473, 1272. He made friends with Jesse Lopez, an older man in his mid-30s who lived at the same apartment complex with his mother. CP 209; RP 352-53, 396. They frequently visited each other and both enjoyed alcohol and marijuana. RP 357, 493, 1274-75.

Mr. Lopez was sexually interested in men and was described as "flirty" by his friend, Ralph Frescas. See RP 942-44. Mr. Frescas had sexual encounters with Mr. Lopez twice in late summer 2014. RP 943, 937-38.

Mr. Lopez made sexual advances on Mr. Salas in August 2014. RP

[2] The Opening Brief contains a more extensive recitation of the facts.

1275, 1292. Mr. Salas told Mr. Lopez he was uncomfortable and not ready. RP 1292. Mr. Salas described his relationship with Mr. Lopez as being homosexual afterward. RP 1292. Mr. Salas testified that he felt conflicted about the relationship. RP 1339.

On Friday, October 24, 2014, around 9:00 p.m., Mr. Lopez contacted Mr. Salas, asking about drinking and smoking. RP 1007. Mr. Salas went over to Mr. Lopez's apartment, where they drank. RP 1276-77. He brought his backpack, which contained alcohol and his knife. RP 1276, 1312. Mr. Salas, who enjoyed the outdoors and was from Texas, regularly carried a knife with him. RP 465, 483-84, 500, 1280

Mr. Salas testified that they drank for around two to three hours. RP 1277. Ms. Salas took his knife out so that Mr. Lopez could show him how to twirl it. RP 1281, 1318. The mood was good, but changed when Mr. Lopez started to make sexual advances. RP 1277-78. Mr. Salas told Mr. Lopez this made him uncomfortable. RP 1277. The mood improved, but again soured when they went out to the balcony. RP 1278. There, Mr. Lopez grabbed Mr. Salas's genital area. RP 1278-79. Mr. Salas yelled at Mr. Lopez and told him to stop. 1279. Mr. Lopez then hit Mr. Salas with what Mr. Salas thought was a bong, but was actually his knife. RP 1280.

A struggle ensued. RP 1281-82. Eventually, Mr. Salas got his knife back, but Mr. Lopez kept trying to get it. RP 1283. Mr. Salas thought if

Mr. Lopez got the knife, he would kill him. RP 1282. Mr. Lopez kept coming at him, so Mr. Salas used the knife to defend himself. RP 1282-83. During the struggle, Mr. Lopez fell in the kitchen. RP 1283-84. Seeing blood everywhere and Mr. Lopez bleeding from the neck, Mr. Salas at first decided to apply pressure to the wound. RP 1283-84. Mr. Lopez's mother then appeared and started to pull him away. RP 1323. Mr. Salas went to the front door, grabbed his backpack, and then left out the balcony, climbing down from the third story to the ground level. RP 1284.

Ms. Lopez's testimony differed. That night, she saw Mr. Salas and Mr. Lopez in the kitchen area when she got out of the shower. RP 363-66. Mr. Lopez was drinking. RP 366. She went to her room. RP 364. After hearing loud noises, she came out and saw Mr. Lopez and Mr. Salas struggling at the balcony door. RP 368. Mr. Salas appeared to be trying to pull Mr. Lopez outside and Mr. Lopez was resisting. RP 368-69. Mr. Lopez had blood on his arm. RP 369. She pulled Mr. Lopez inside and they went to the kitchen. RP 369-70. She did not see any weapon. RP 370.

Ms. Lopez recalled that Mr. Salas went to the front door and put on his backpack and shoes. RP 371. She followed and asked whether Mr. Salas was going to help her. RP 372. She heard Mr. Lopez fall in the kitchen and cry for help. RP 372. Mr. Salas then purportedly took off his shoes and backpack, and removed something from the backpack. RP 372-

73. He then knelt over Mr. Lopez, and started making motions resembling cutting over Mr. Lopez's neck. RP 389. In her signed statement, Ms. Lopez stated she did not see what Mr. Salas was doing. RP 678. Ms. Lopez tried to stop Mr. Salas by grabbing his ears and nose. RP 385-87, 685-86. Mr. Salas then ran outside to the balcony. RP 387. Ms. Lopez closed the sliding glass door and locked it. RP 387.

Law enforcement and paramedics arrived shortly thereafter. RP 391, 422. Mr. Lopez was deceased. RP 410-11, 422. According to the autopsy, Mr. Lopez bled to death, having six stab wounds and nine cuts. RP 1042, 1045. He had a blood alcohol level of .24. RP 1091.

Mr. Salas testified that he wanted to get away from the whole mess. RP 1286. He recalled walking down a road and stopping to lie down in some bushes. RP 1286. He was bleeding. RP 1286. When he woke up, he started to walk back in the direction of the apartments. RP 1286. After getting a ride from some friendly people, Mr. Salas returned to his apartment. RP 759, 1287.

The police arrested Mr. Salas at his apartment. RP 794, 926. Mr. Salas asked to speak with an attorney. CP 188 (FF 1(B)(q-r)). A medical unit evaluated Mr. Salas. RP 855, 866. A medic saw that Mr. Salas had a very large laceration on his arm under a bandage. RP 865. He recommended that Mr. Salas be taken to a hospital. RP 867. The police

took Mr. Salas to the hospital, but did not put him in touch with an attorney despite public defenders being available by phone. 9/3/15RP 27, 33, 36-37. Handcuffed and in the presence of an officer, Mr. Salas answered separate inquires by a nurse and a doctor as to how he was wounded. CP 189 (FF (1(C)(hh, jj, mm)). To the nurse, he responded "I don't know, from barbed wire or a tree." 9/3/15RP 41; CP 189 (FF 1(C)(jj)). To the doctor, Mr. Salas purportedly chuckled and said, "I killed someone." 9/3/15RP 43.

The State charged Mr. Salas with first-degree murder. CP 169, 193, 213. Before trial, defense counsel moved to exclude the statements Mr. Salas made to the doctor and nurse on the basis that their admission would violate Mr. Salas's right against self-incrimination. CP 202-05. The court denied the motion. CP 186-192.

The court instructed the jury on the lesser included offenses of second-degree murder, first-degree manslaughter, and second-degree manslaughter. CP 46, 48, 50. During closing arguments, the court overruled Mr. Salas's objection to the prosecutor's slideshow. RP 1383-84. Mr. Salas argued he had acted in self-defense and, alternatively, that the evidence proved only manslaughter. RP 1400-13. On rebuttal, the prosecutor opined that a conviction for manslaughter would be a "cop-out." RP 1413. The jury convicted Mr. Salas of the lesser offense of

second-degree murder. CP 30, 33-34.

The Court of Appeals reversed the conviction on three grounds: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; and (3) cumulative error. The State seeks discretionary review. Mr. Salas asks that review be denied. Alternatively, he asks that the Court grant review on the additional issues presented in the appeal.

E. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

1. Under precedent, Mr. Salas's statements to hospital staff were privileged. Consistent with this precedent, the Court of Appeals held that counsel was ineffective for failing to move to exclude the statements as privileged. Review should be denied.

The physician-patient privilege shields statements made by the patient during treatment from disclosure. This privilege extends to agents of the physician, which includes officers present for security purposes. For nearly a half a century, this has been the settled law in Washington. In holding that Mr. Salas was deprived of his right to effective assistance of counsel, the Court of Appeals properly applied the law of privileges. This Court should deny review and not disturb settled law.

Before trial, defense counsel moved to exclude the statements that Mr. Salas made to a doctor and nurse during his treatment at the hospital. CP 202. He unsuccessfully argued they should be excluded under a

Miranda[3] theory. CP 203-05; 9/3/15RP 61; CP 190 (FF 1 (C)(ss)).

Counsel sought exclusion on the wrong theory. Mr. Salas's statements were privileged under the physician-patient and nurse-patient confidentiality statutes. RCW 5.60.060(4); 5.62.020. These statutes apply in criminal proceedings. RCW 10.58.010; State v. Gibson, 3 Wn. App. 596, 598, 476 P.2d 727 (1970). Statements made by a patient which were necessary so that the patient receive treatment or professional advice are covered. Gibson, 3 Wn. App. at 598.

The privilege is not destroyed by the presence of a third party if that party's presence is necessary. Gibson, 3 Wn. App. at 599. The third party is the agent of the physician to which the privilege extends. Id. at 599-600. This includes police officers who are necessarily present when an arrested person is brought for medical treatment. Id.

The foregoing rules were set out in Gibson, an opinion authored by the late Justice Robert Utter, then a judge on the Court of Appeals. There, a defendant was arrested in relation to an investigation into an assault and then taken for medical treatment because he had severe burns. Gibson, 3 Wn. App. at 597. An officer was present when the doctor saw the defendant and asked him how and when he was burned. Id. The trial court

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

admitted the officer's testimony about what the defendant said to the doctor. Id. Gibson held the statements were inadmissible under the physician-patient privilege. Id. The officer was deemed to be the physician's agent. Id. at 730. Under similar facts, the Court of Appeals adhered to Gibson in a 2006 case. State v. Godsey. 131 Wn. App. 278, 283-86, 127 P.2d 11 (2006) (defendant's answers to hospital personnel about drug use were privileged and right was violated by officers' testimony at trial about what defendant said).

Similar to Gibson and Godsey, Mr. Salas was detained by law enforcement and taken to a hospital for medical treatment. CP 189 (1(C)(dd-gg)). An officer accompanied Mr. Salas "for safety and security reasons" and was present when he was treated first by a nurse and then by a doctor. CP 189-90 (1(C) (hh-ii, ll)). During the examinations, Mr. Salas answered questions from the nurse and doctor about how he received the laceration on his arm. CP 189-90 (1(C) (jj, mm)). Under precedent, the officer was an agent of the medical staff. Godsey, 131 Wn. App. at 286; Gibson, 3 Wn. App. at 599-600.

As determined by the Court of Appeals, trial counsel's failure to seek exclusion based on Mr. Salas's statements being privileged

constituted ineffective assistance of counsel.[4] Salas, 1 Wn. App. 2d at.947-52. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Here, trial counsel failed to research the relevant law of privileges. Otherwise, he would have raised Gibson and Godsey to support his argument that Mr. Salas's statements should be excluded. This was deficient performance. Salas, 1 Wn. App. 2d. at 951. Because the deficient performance was prejudicial, the Court of Appeals reversed. Id. at 951-52.

In seeking review, the State challenges only the determination that counsel's performance was deficient. The State contends that Gibson and Godsey are in conflict with this Court's decision in State v. Post, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992). Post involved the psychologist-patient privilege. Post, 118 Wn.2d at 612. In an opinion by Justice Utter, who was the author of Gibson, this Court held the privilege did not apply under the facts of that case. The Court reasoned that any subjective expectation of privacy by the defendant was unreasonable under the circumstances. Id. at 613. The psychologist told the defendant "that the interview would not be confidential." Id. at 613. And the purpose of the interview was to provide information to state agents who would be

[4] To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

monitoring the defendant. Id.

Unlike Post, Mr. Salas was receiving medical treatment. He was not told that his statements would not be privileged. The purpose of Mr. Salas speaking to medical staff was so they could treat his injuries.

The State asserts there is no evidence concerning Mr. Salas's subjective expectations. But while subjective expectations are relevant, Post states the inquiry is primarily objective. Id. at 612. It is well established that communications with medical professionals, such as doctors and nurses, are generally confidential. This is an ancient norm. See Loudon v. Mhyre, 110 Wn.2d 675, 679, 756 P.2d 138 (1988) (recognizing that the "close confidential relationship [between physician and patient] is recognized by the Hippocratic Oath and in the ethical guidelines of the American Medical Association."). Given this fundamental tradition, it is objectively reasonable to conclude that Mr. Salas intended his communications to be privileged. Contrary to the State's argument, patients seeing their doctor need not express a desire for their statements to be privileged before the privilege applies. State v. Miller, 105 Wash. 475, 480, 178 P. 459 (1919) (privilege would apply even to patient who could not speak); Gibson, 3 Wn. App. at 598 (no formal proof necessary for privilege to apply).

The State essentially seeks to make the privilege inapplicable to

injured persons arrested by the police. This is untenable. To maintain their right to silence, injured persons would have to not cooperate with medical staff during treatment. Of course, many of these injured person will assist medical staff in their treatment and would effectively forfeit their constitutional right against self-incrimination (as the State wants).

Even if this Court were inclined to disturb settled law, Mr. Salas's claim of ineffective assistance would remain valid because the reasonableness of counsel's conduct is judged *at the time of the alleged ineffectiveness*. Kyllo, 166 Wn.2d at 868 ("there was relevant case law at the time of trial that counsel should have discovered."); State v. Brown, 159 Wn. App. 366, 373, 245 P.3d 776 (2011). Thus, it is generally not ineffective to fail to anticipate a change in the law. Brown, 159 Wn. App. at 372-73. When counsel sought to exclude the statements, precedent would have compelled the court to exclude the statements as privileged. Therefore, Mr. Salas was deprived of effective assistance when counsel failed to argue his statements to medical staff were privileged.

Contrary to the State's argument, Gibson and Godsey are not in conflict with Post. RAP 13.4(b)(1). As for the couple of out-of-state cases cited by the State, they are not relevant to the RAP 13.4(b) criteria governing review. See RAP 13.4(b). And the issue is not one of substantial public interest. RAP 13.4(b)(4). Gibson has been the law in

Washington for nearly half a century. The Court should deny review.

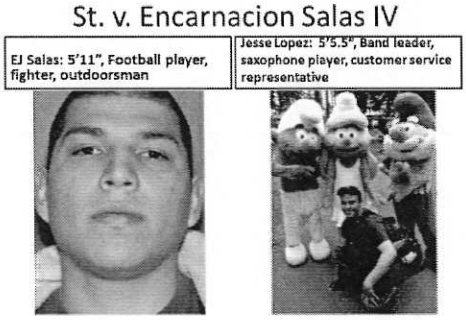
2. In holding that the prosecutor committed misconduct during closing using a slideshow, the Court of Appeals correctly applied this Court's precedent. Review should be denied.

In holding that the prosecutor committed misconduct through the use of a slideshow during closing, the Court of Appeals faithfully applied this Court's recent precedents on the issue. The State does not argue the decision is in conflict with precedent. Because this Court has already provided the necessary clarity, there no substantial public interest in this Court opining on the issue yet again. Review should be denied.

The use of multimedia slides during closing summations may constitute prosecutorial misconduct. State v. Walker, 182 Wn.2d 463, 468, 341 P.3d 976 (2015); In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 699, 286 P.3d 673 (2012). Images can be used to evoke powerful emotional reactions, which can improperly inflame the passions and prejudice of a jury. Glasmann, 175 Wn.2d at 708-09 & 709 n.4; Walker, 182 Wn.2d at 468. The juxtapositioning of images poses a particular risk. Walker, 182 Wn.2d at 478 & n.4. Moreover, PowerPoint presentations cannot be used make arguments that would be improper if spoken aloud. Salas, 1 Wn. App. 2d. at 945 ("If you can't say it, don't display it.").[5]

[5] (quoting Kyle C. Reeves, PowerPoint in Court: The Devil's Own Device, or A Potent Prosecution Tool?, 48-DEC Prosecutor 26, 33 (2014)).

During closing argument and in the first slide, the prosecutor presented an unflattering and grim picture of Mr. Salas (not unlike a mugshot) with a smiling Mr. Lopez at a theme park with three Smurfs.[6] The slide contained captions recounting the height of the two men along with activities they had engaged in, but omitted their respective weights:



Ex. 464, Slide 1. The prosecutor ended her argument with a picture of Mr. Lopez smiling and embracing Cristal Salas at a Ferris wheel:

Ex. 464, slide 22. To maximize the emotional appeal, the prosecutor

[6] See https://en.wikipedia.org/wiki/The_Smurfs.

displayed the image for at least a minute (about three pages of transcripts) while completing her argument. RP 1397-1400, 1402.[7]

Mr. Salas objected to the prosecutor's slideshow during closing argument, citing this Court's opinion in Walker, but his objection was overruled. RP 1376-83. Applying well-established precedent, the Court of Appeals correctly held the slides constituted prosecutorial misconduct. Salas, 1 Wn. App. 2d. at 944-46.

First, the Court of Appeals correctly recognized that, as in Walker, the juxtaposing of the photos was improper. Id. at 945. In Walker, slides juxtaposed a mugshot with an in-life photo of the victim. Walker, 182 Wn.2d at 474. Similarly, the first slide juxtaposed a photo of Mr. Salas (akin to a mugshot) with a picture of Mr. Lopez crouching on the ground surrounded by Smurfs at an amusement park. Moreover, the emotional appeal was reinforced by the last slide, which as in Walker, showed an in-life photo of the purported victim.

Second, the Court of Appeals recognized the slides were improper because the prosecutor was using them to make a character based propensity argument, an argument she could not properly make aloud:

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[7] All three photos were admitted into evidence, but the prosecutor altered them by cropping them. Compare Exs. 34, 52, 436 with Ex. 464. Altered versions of admitted evidence are improper. Walker, 182 Wn.2d at 478.

> The juxtaposition of images and captions in the first slide communicates what the prosecutor could not, and did not, argue aloud: Salas was by nature an aggressive and intimidating person, and therefore had no reason to fear Lopez, who by nature was childlike and submissive. The prosecutor in effect used the slide to prove the character of the two men "in order to show action in conformity therewith," improper under ER 404(b).

Salas, 1 Wn. App. 2d. at 945-46.

The State argues that the Court of Appeals condemned the prosecution for presenting a slide that compared the physical and martial prowess of Mr. Salas and the decedent. PDR at 9-10. This is untrue. Salas, 1 Wn. App. 2d. at 945 (recognizing size was relevant, but noting the captions omitted fact that two men were of a comparable weight). What the Court of Appeals condemned was what this Court condemned in Walker: the improper juxtaposing of photos in a manner designed to make an emotional appeal to the jury. Salas, 1 Wn. App. 2d. at 945. And the idea slideshows are improper if they make improper arguments is not new. Walker, 182 Wn.2d at 480 ("nothing new about the idea that purported visual aids can cross the line into unadmitted evidence").

Because the trial court improperly overruled Mr. Salas's objection to the slideshow and there was a substantial chance the outcome would have been different absent the misconduct, the Court of Appeals reversed the conviction. Id. at 947.

In asking for review, the State contends only that the issue is one of substantial public interest meriting review because more clarity is needed. The many opinions on prosecutorial misconduct provide clarity. In short, emotional appeals to the jury are improper. And, "If you can't say it, don't display it." Review should be denied.

F. IF REVIEW IS GRANTED, THE COURT SHOULD ALSO REVIEW THREE ADDITIONAL ISSUES.

If the Court grants review, the Court should grant review on the following three issues.

First, Mr. Salas presented an additional claim of prosecutorial misconduct. During closing argument and at the very outset of the prosecutor's rebuttal, the prosecutor expressed her personal opinion to the jury that it would be a "cop-out" to convict Mr. Salas of manslaughter rather than murder. Personal opinions on guilt are improper. State v. Case, 49 Wn.2d 66, 70, 298 P.2d 500 (1956). Similar "cop-out" arguments have been held improper in other jurisdictions. People v. Howard, 232 Ill. App. 3d 386, 390, 597 N.E.2d 703 (Ill. App. Ct. 1992); Taylor v. State, 640 So. 2d 1127, 1133-34 (Fla. Dist. Ct. App. 1994). The Court of Appeals agreed that the prosecutor's "cop-out" comment was improper, but nevertheless held "[r]eversal is not warranted based on this comment alone." Salas, 1 Wn. App. 2d. at 939.

Although not objected to, the "cop-out" comment was flagrant and ill-intentioned. It came during rebuttal and struck at the defense's key alternative argument that the killing was reckless rather than intentional. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (comments made during rebuttal are more likely to be prejudicial). If review is granted, this Court should review the prejudicial effect of the prosecutor's improper "cop-out" comment.[8] RAP 13.4(b)(4).

Relatedly, the Court of Appeals reasoned cumulative error entitled Mr. Salas to a new trial. Salas, 1 Wn. App. 2d. at 952. The Court reasoned the prejudice from the meritorious claims of ineffective assistance of counsel and prosecutorial misconduct deprived Mr. Salas of his right to a fair trial. Consideration of this issue is necessary to properly adjudicate Mr. Salas's case on review.

Finally, the Court of Appeals rejected Mr. Salas's claim that the trial court erred in limiting his cross-examination of Ralph Fresca, a friend of Mr. Lopez. Mr. Fresca had sexual encounters with Mr. Lopez. RP 943-44. The prosecutor asked Mr. Fresca on direct examination how Mr. Lopez acted socially, which elicited testimony that Mr. Lopez was simply a "friendly" and "flirty" person who "liked to have a good time." RP 941-

[8] The State does not seek review on the Court of Appeals' holding that the "cop-out" comment was improper.

43. Mr. Salas, however, was not allowed to inquire into Mr. Lopez's reputation of being physically and sexually aggressive when intoxicated, or what being "flirty" consisted of. RP 950-51, 955-56. Because the State opened the door to this topic and the jury was left with a false impression about Mr. Lopez, the trial court erred. State v. Gefeller, 76 Wn.2d 499, 455, 458 P.2d 17 (1969) (setting out the "opened the door" rule).[9] Br. of App. at 42-48; Reply Br. at 10-13. Review is warranted because the Court of Appeals' contrary conclusion conflicts with precedent. RAP 13.4(b)(1), (2).

G. CONCLUSION

For the foregoing reasons, Mr. Salas asks that the Court deny the State's petition for review. If the petition for review is granted, Mr. Salas asks that the Court grant his cross-petition and review the three other issues.

Respectfully submitted this 22nd day of March, 2018.

/s Richard W. Lechich
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[9] State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008) ("Once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence."), disapproved on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 95498-4**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 22, 2018
Washington Appellate Project

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