Supreme Court No. 1029063
Court of Appeals No. 37522-6-III

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

GUSTAVO TAPIA RODRIGUEZ,
Appellant.

RESPONSE TO PETITION FOR REVIEW

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1. IDENTITY OF RESPONDENT

The State of Washington seeks the relief designated in part 2 of this response.

2. STATEMENT OF RELIEF SOUGHT

The petition for review should be denied.

3. ISSUE PRESENTED FOR REVIEW

Should the automatic reversal rule of *State v. Zamora* be applied to the actions of defense counsel when such a rule would incentivize appeals to racial bias?

4. STATEMENT OF THE CASE

Eustolia Campuzano had broken up with Arturo Sosa. RP 2099. Her friend, Paula Rodriguez Cuevas knew some people who could do something to scare Arturo Sosa. RP 2103, 2207. They went there and met Rodriguez Cuevas' boyfriend, Gutierrez. RP 2103. Later the five men came to Rodriguez Cuevas' home and talked about a plan to scare Sosa. RP 2109. Campuzano went with four of the men and they waited outside

Sosa's home, followed Barrientos' car and she was with them during the kidnapping and shooting. RP 2115-26.

In December 2016, Jose Rafael Cano Barrientos (Rafa) lived in Othello, WA, but worked in Royal City. RP 808. He had a Ford Explorer with a Herbalife sticker on it. *Id.* Eustolia Campuzano was Sosa's ex-wife. They broke up in approximately November of 2016. RP 809. At about 4 am on December 9th, Sosa and Mr. Barrientos headed to work. RP 810. The weather was cold and there was some snow on the ground. *Id.* Another car came up behind them and was flashing its lights at them for a minute or two. RP 810. Mr. Barrientos pulled over, thinking something might be wrong with his car. RP 811. A GMC Yukon pulled up behind them and two strangers approached on either side of Mr. Barrientos' car. *Id.* The strangers pointed guns at the two men in the car, ordered them out and made them kneel between the two vehicles. RP 812. The men were talking about cars going by

and decided to put Mr. Barrientos and Sosa back in Mr. Barrientos' vehicle. *Id.* at 814.

Mr. Barrientos was loaded first into the back passenger door, followed by Sosa and then one of the assailants. RP 815. Mr. Barrientos was forced to sit on a child seat that was in the back seat behind the driver. *Id.* Another person got into the driver's seat of Mr. Barrientos' car. RP 816. They drove down the road for a short period of time before Sosa and Mr. Barrientos began struggling with the person in the back seat over the gun. RP 818. Mr. Barrientos saw the driver trying to turn around with another gun, so he attacked the driver, trying to choke him. *Id.* The driver bit Mr. Barrientos, then shot him in the chest/shoulder. *Id.* Mr. Barrientos fell down between the front seats and heard other shots. RP 819. The driver pulled over and he and the person in the back left the car. Mr. Barrientos came to and tried to call 911. Shortly after, members of Mr. Barrientos' family showed up, followed by police officers. RP 820.

The police seized Mr. Barrientos' vehicle. RP 745. A crime scene team was called out to examine the victim's vehicle. RP 749. The team found a .45 caliber shell casing on the driver's seat. RP 770. There was also a .45 caliber shell between the dashboard and the window. RP 788. There was a .40 caliber casing on the floorboard. RP 788, 1139. A third .45 shell casing was found at the scene. RP 1290-91. The .45 caliber casings were fired from the same firearm. RP 1580. Fingerprint lifts were taken from the rear portion of the rear passenger side door. RP 794. A DNA swab was taken from the front passenger side door handle. RP 794-5. That DNA swab had Gutierrez' DNA on it. RP 1326. Gustavo Tapia's fingerprint was found on the rear passenger door of the vehicle. RP 1688.

Mr. Julio Albarran Varona testified for the State. RP 909. He had previously testified in another murder case involving the same group. *State v. Villanueva*, 15 Wn. App. 2nd 1054 (2020)(unpublished). He and Fernando Gutierrez

(Zapatoes), along with some others, worked for Gustavo Tapia. RP 913-14. A few weeks before the homicide two women came to the trailer where the group that worked for Mr. Tapia was living. RP 916. Mr. Gutierrez told Mr. Albarran Varona that they were going to do a job to beat up a guy who had assaulted one of the women. RP 917. Mr. Albarran Varona had a .40 cal. pistol, and later acquired a .223 rifle. RP 919. The group drove to Othello to a house. Mr. Albarran Varona went to see his girlfriend for a while. RP 920. About an hour and a half after he got back, the group left again, along with one of the women. RP 921. Mr. Tapia had a .45 pistol with him, and Mr. Gutierrez had a .40 pistol. *Id.* They left in Mr. Tapia's Chevy Tahoe. RP 922. They went to a house, parked and watched it. RP 922. The group followed a vehicle with a Herbalife sticker on it when it left the house. RP 924. They followed the car for about half an hour. RP 924. Tapia was driving and started flashing his lights to get the car to stop. RP 925. It eventually stopped and Mr. Tapia approached the car on

the driver's side, with Mr. Gutierrez approaching on the passenger side, both of them had guns out. RP 925. They forced the two people out of the car, made them kneel on the side of the road, and racked their guns. RP 926, 982. Mr. Tapia and Mr. Gutierrez were going to shoot them, but Mr. Albarran Varona became concerned about cars going by on the road, and so they decided to put them back in their car. RP 927. Both of them were put in the back seat, along with Mr. Tapia. RP 928. Mr. Albarran Varona drove. After they had driven for a minute or two the fight broke out. RP 931. Mr. Tapia shot and killed one of the men with his .45, while Mr. Albarran Varona shot the other one with his .40.

During cross-examination of Mr. Albarran Varona's defense counsel asked about his discussions with his counsel and the facts of the case. RP 947. He also enquired about false identification documents that Mr. Albarran Varona obtained when he came into the country. RP 969.

This was an unusual case in that the State made its agreement with Mr. Albarran Varona based on the prior case, and did not share the information about what it knew with Mr. Albarran Varona's attorney prior to the free talk. RP 1007, 1011. The State called the attorney, Smitty Hagopian. At the time of the trial Mr. Hagopian had worked for the Douglas County Prosecutor's office for one month. RP 1009. Prior to that he had been a defense attorney for 28 years. *Id.* During cross examination Mr. Hagopian described how Mr. Albarran Varona was extremely reluctant to cooperate with the State for fear of being killed. RP 1042.

During motions in limine Mr. Gutierrez' attorney indicated he would be inquiring about the surviving victim's immigration status and U-visa request. RP 29, 51. During cross-examination, Mr. Cano Barrientos was asked if he was an illegal immigrant and then defense counsel ceased his examination. It was only after the State objected that defense counsel belatedly tied the issue to a U-visa request. RP 897-98.

The State planned on introducing Mr. Tapia's fingerprint card from when he was booked into the jail. That card contained a false name, that defense counsel asked to be redacted, and a false place of birth, in Brownsville, TX, that defense counsel strongly objected to redacting. RP 1201-02, 1243-47. It was only after the State brought in evidence that Mr. Tapia was not born in the United States that the Court excluded the evidence. RP 1250-62.

5. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mr. Tapia's attorney attempted to exploit potential juror bias. He now complains about it. However, any error was invited. The invited error can be overcome by a demonstration of ineffective assistance of counsel. However, ineffective assistance of counsel requires that the defendant show that counsel was not acting with reasonable competence and that there is a reasonable probability that without counsel's malfeasance, the result of the trial would have been different. Mr. Tapia only argues that counsel was unreasonable, he does

not argue there was any prejudice. Instead he argues that there should be no showing of prejudice required under *State v. Zamora*, 199 Wn.2d 698, 701, 512 P.3d 512, 515 (2022). This argument misreads Zamora, encourages appeals to racial bias, and interferes with defendant's constitutional rights. The Court of Appeals was correct, and this petition should be rejected.

A. The alleged error was invited.

Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *Matter of Dependency of A.L.K.*, 196 Wn.2d 686, 694–95, 478 P.3d 63, 67 (2020) (citing *In re Det. of Rushton*, 190 Wn. App. 358, 372, 359 P.3d 935 (2015)). To determine whether the doctrine applies, the court considers "whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it." *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) (plurality opinion); *see also In re Pers. Restraint of*

Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000) (requiring knowing and voluntary action for invited error).

As the Court of Appeals found, and Mr. Tapia does not dispute in this petition, Mr. Tapia's counsel attempted to play to anti-immigrant bias by ensuring the State's witnesses were portrayed as undocumented immigrants, and attempting to portray Mr. Tapia as being born in the U.S. Here the defendant materially contributed and attempted to benefit from the alleged error of seating the allegedly biased juror. Therefore this complaint falls clearly under the invited error doctrine. Even constitutional error cannot be complained of on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514, 516 (1990). See also *In re Copland*, 176 Wn. App. 432, 442, 309 P.3d 626, 631 (2013)

B. Mr. Tapia does not establish ineffective assistance of counsel.

Invited error, however, does not preclude a claim that counsel was ineffective in inviting the error. *State v. Kyllo*, 166

Wn.2d 856, 861, 215 P.3d 177, 180 (2009). "To establish ineffective assistance of counsel the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant." *Id.* at 862, citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Tapia says that appeals to racial bias, assuming that is what occurred, are deficient performance by the defense attorney. Perhaps so, perhaps not. They are definitely offensive, but a zealous defense attorney is sometimes called upon to do offensive things. What Mr. Tapia does not allege, in any way, is that counsel's alleged unprofessional conduct prejudiced him. The prejudice prong requires the defendant to prove that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. Mr. Tapia does not even try to meet this prong. Instead he argues that the automatic reversal standard of *State v. Zamora* should be applied.

C. Applying the automatic reversal standard to defense counsel's actions would interfere with the defendant's right to present a defense and encourage appeals to racial bias. It should be rejected.

In *Zamora* the Court applied the GR 37 standard to a prosecutor's actions. The Court applied a standard as to whether an objective observer could view the prosecutor's questions and comments as an appeal to bias. *Zamora*, 199 Wn.2d at 718. The Court ruled that if this standard was satisfied, reversal was automatic without an ability to show the error was harmless. *Id.* The reason for this automatic reversal was the need to deter a prosecutor from engaging in appeals to racial bias. *Id*. at 722.

However, because of different incentives and the vagueness of the rule, such a rule applied to defense counsel would be counterproductive. The GR 37 rule is an over inclusive blunderbuss. In its quest to root out appeals to racial bias it also disallows many legitimate arguments and issues. In cases subsequent to *Zamora,* it has become clear that no one

can find a clear line between legitimate advocacy and appeals to racial bias that can be applied consistently. Even the nine justices of the Washington Supreme Court cannot agree. *State v. Bagby*, 200 Wn.2d 777, 780, 522 P.3d 982, 986 (2023)(Four justice lead opinion holding discussion of a dog is an appeal to racial bias, five justice concurring opinion holding it is not in context). *Henderson v. Thompson*, 200 Wn.2d 417, 447, 518 P.3d 1011, 1029 (2022), *cert. denied*, 143 S. Ct. 2412, 216 L. Ed. 2d 1276 (2023); Statement respecting denial of certiorari, Alito J. 600 U.S. ___ (2023)[1](two Washington Supreme Court justice dissent describing certain impeachment tactics as legitimate, while the majority opinion considered them appeals to racial bias, two U.S. Supreme Court justices considering all the tactics as the normal part of legitimate argument, and restricting a parties ability to raise normal arguments because they could be considered appeals to racial bias to raise serious

[1] https://www.supremecourt.gov/opinions/22pdf/22-823_m648.pdf (last visited May 24, 2024)

questions under the due process and equal protection clauses of the Fourteenth Amendment). *State v. Loring*, 39282-1-III, 2024 WL 2074738 (Wash. Ct. App. May 9, 2024)(unpublished). (Two judges finding the use of the term "Gorilla pimp" reasonable in context, one disagreeing). *State v. Hernandez*, 544 P.3d 542 (Wash. Ct. App. 2024), *as revised* (June 4, 2024)(two judges finding no basis for GR 37 challenge, dissenting judge finding a reasonable observer could find racial bias.)

Because the GR 37 standard is drastically over inclusive to its purpose it often comes into conflict in application with other constitutional rights. These can include the equal protection and due process clauses of the 14th amendment. See *Henderson v. Thompson*, Statement respecting denial of certiorari, Alito, J. In this case Mr. Tapia's argument brings the GR 37 standard into conflict with the constitutional right to control and present his defense. The Court in *Zamora* specifically stated "the Constitution at times demands that

defendants be permitted to ask questions about racial bias during voir dire in an effort to ensure individuals who sit on juries are free from racial bias." *Id.* At 522. Yet Mr. Tapia says defense counsel should not be allowed to ask, and if they do the case should be reversed. Thus Mr. Tapia's proposed rule to prevent defense counsel from asking about immigration issues flies directly in the face of the right to control and present a defense.

Because the GR 37 standard is a "could" standard, it is entirely possible for an argument to exist in two states at once. A reasonable objective observer could consider the argument an appeal to racial bias, while also considering an argument a legitimate tactic, even one constitutionally required to be allowed. This type of Schrodinger's cat argument exists until the appellate court observes it and places it in one state or the other. An example of this type of argument exists in this case. Mr. Tapia introduced evidence that the State's cooperating witness, Mr. Albarron Varona, had a fake social security card

and a fake permanent residency card. RP 951. The State objected to the introduction of evidence about the fake cards as not probative in this case. RP 957. The trial court ruled, under ER 608 and *State v. Johnson*, 90 Wn. App. 54, 71, 950 P.2d 981, 990 (1998), that the prior use of an alias or false identification was admissible for impeachment purposes. The Court also focused on the fact that Mr. Alabrran Verona's testimony and credibility were central to the case. RP 961.

In hindsight and in the context of this case a reasonable objective observer could, and probably would, conclude that the primary purpose of the introduction of the evidence about these false documents was to show that Mr. Alabrran Verona was an undocumented immigrant, not to impeach his truthfulness. On the other hand if the Court had refused to allow the impeachment Mr. Tapia would now be complaining about his right to present his defense and confront witnesses against him. The trial court was understandably concerned about the defense's ability to provide impeachment evidence of a primary

State's witness. Because there is a strong argument that such evidence was required to be admitted to allow Mr. Tapia to present his defense, and strong evidence that it violated the GR 37 standard, the GR 37 standard has to yield to the federal constitutional right.

Mr. Tapia now asks for the second best outcome he can achieve from a trial, the granting of a new trial, based on his counsel's appeal to arguable racial bias. The *Zamora* court adopted the automatic reversal standard to deter prosecutors from engaging in such appeals. *Zamora*, 199 Wn.2d at 722. It is easy to see how an automatic reversal standard is an incentive to prosecutors to stay well clear of any implication of racial bias, even to the point of compromising the truth seeking function of a trial. However, what is a deterrent to prosecutors may very well be an incentive to defense counsel. After an acquittal, a new trial is the best outcome a defense attorney can hope to achieve. It requires the State to reveal its hand, gives the defendant a second chance at a plea agreement after seeing

the likelihood of conviction at trial and requires the State to spend more resources to retry the case. If Mr. Tapia's rule is adopted It would almost be mal practice for defense counsel not to try to try to invoke racial bias in the hopes of guaranteeing a reversal in the event of a conviction.

Nor would things like professional sanctions through the bar act as a deterrent. As discussed above, the GR 37 standard has a lot of vagueness about whether it applies in any given situation, and even more in whether it has to be subordinated to other higher constitutional imperatives. The standard admits there may be an appropriate motivation in the attorney's mind, but the action will be disallowed if an objective observer could consider it motivated by racial bias. The State Bar, correctly, gives the benefit of the doubt to attorneys presenting an argument. If a defense attorney plausibly argues that the defendant's rights would be violated if he followed the GR 37 "could" rule the bar could not and should not impose sanctions, even if a court later disagreed with that position.

The automatic reversal rule in *Zamora* is designed to ensure prosecutors stay well away from the line of appealing to racial bias. Applying that rule to defense attorney conduct, as Mr. Tapia suggests, encourages defense attorneys to get as close to the line as possible, or even over the line, with reversal a positive consequence for them. Mr. Tapia's proposed rule would only encourage appeals to inappropriate racial bias. It should be rejected.

D. The juror's answers were equivocal enough not to require judicial dismissal

A trial judge walks a tightrope in a trial. He must monitor for fairness, yet not interfere with a parties' presentation of their case. The juror's statements here did not show unequivocal bias, and were not more biased than other jurors whom courts have allowed to remain on juries. In *State v. Lawler*, 194 Wn. App. 275, 279, 374 P.3d 278, 280 (2016), the juror, in response to the prosecutor's questioning, stated "I

don't see how I could be objective with all that past experience." When the prosecutor asked juror 23 if he could set his personal experiences aside and follow the trial court's instruction, he replied, "Honestly, I think that would be a pain in the neck, you know. I don't think I would be able to do that with all these experiences." *Id.* at 279-80. In *State v. Hernandez*, 544 P.3d 542 (Wash. Ct. App. 2024), *as revised* (June 4, 2024) the trial judge denied a motion to dismiss for cause when the ultimate question and answer were:

> Q: So would you be able to be open minded with those officers who testify in this trial despite your bad experience with the officer who pulled you over at that time?
>
> A: It would be difficult. *But I would say no, to be honest.*

The juror did later admit that not all officers were the same.

In *State v. Gutierrez*, 22 Wn. App. 2d 815, 818, 513 P.3d 812, 814 (2022), the case relied upon by Mr. Tapia in this case, the concluding discussion between defense counsel and the juror was:

> PROSPECTIVE JUROR NUMBER 16: If I didn't know then I would have—I guess no reason to question that, I guess, if he was a U.S. citizen or not. If he's not a U.S. citizen he's already guilty. He shouldn't be here.
> [DEFENSE COUNSEL]: Well, fair enough. That's a good point. But you wouldn't be saying then if he's not a citizen, he's guilty of the charges here, the robbery, the assault, the possession of a gun, you wouldn't be saying that because that's wholly separate, right?
> PROSPECTIVE JUROR NUMBER 16: Yes. Yeah. I mean, if I don't know—I just—that would be—that wouldn't be part of the—my answer for it. So, yeah.

In this (the Tapia) case the juror's comments were equivocal, he said, he was "ready to listen." He said it might be problematic to set aside any bias against an unlawful immigrant, not that it would be problematic. He also said there was information that could change his mind. While the differences are nuanced, this case clearly falls into the *Lawler* and *Hernandez* side of the line regarding juror expressions of bias, that would not be a mandatory dismissal for cause, even without a motion by a defense attorney.

This case does not conflict with *Zamora* or *Gutierrez*. *Zamora* was expressly concerned with State appeals to bias. To adopt Mr. Tapia's proposed rule would actually incentivize appeals to bias, contrary to the goals of *Zamora*. Nor does the case conflict with *Guiterrez*. The issues of whether and when a judge should interfere with jury selection are fact based and nuanced. This case clearly falls along the *Lawler Hernandez* side of the line, and this case is distinguishable from *Gutierrez* on the facts. Nor does this case raise an issue of significant public concern. Unlike *Zamora* this is not the State allegedly appealing to unwarranted bias. The petition should be denied.

6. CONCLUSION

Mr. Tapia claims his attorney was unreasonable for appealing to anti-immigrant bias. But he does not claim there was any prejudice. Nor could he given the number of eye witnesses and physical evidence, including Mr. Tapia's fingerprint on the door frame of the victim vehicle. *Zamora's* automatic reversal standard in this case would conflict with the

very purpose it was instituted for, as it would incentivize appeals to racial bias. This case does not meet any of the requirements of RAP 13.4. The petition for review should be denied.

This document contains 3,898 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 17th day of June, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the State's Response to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: June 17, 2024

Maggie Perez

GRANT COUNTY PROSECUTOR'S OFFICE

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