

**Relevancy of a Victim’s Immigration Status in State Criminal Court Proceedings**

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## I. INTRODUCTION

This publication provides prosecutors with case law and statutory analysis regarding when and under what circumstances a victim's immigration status is considered relevant or irrelevant in a criminal case.<sup>1</sup> Several states have codified relevancy rules about immigration status, but the application of these rules is minimal in criminal cases, especially when victims have sought immigration relief based on their victimization.

This publication is divided into three parts. First, it will provide analysis of how courts across the country handle evidence of a victim's immigration status generally. Second, we address how courts treat a witness's immigration status evidence in criminal proceedings, in particular. Third, in conclusion the publication offers prosecutors "silver lining" strategies and refers prosecutors to other useful existing resources written by the National Immigrant Women's Advocacy Project.<sup>2</sup>

## II. PROSECUTING CASES INVOLVING IMMIGRANT VICTIMS OF CRIME

The admission of a victim's immigration status should be addressed during pretrial litigation. As part of this litigation, prosecutors will likely prepare and respond to motions regarding discovery, relevancy, and admissibility. During pretrial proceedings, prosecutors must comply with their discovery and due process responsibilities while ethically protecting witnesses' privacy and the confidentiality of certain records.<sup>3</sup> Beyond discovery, prosecutors must analyze a case to determine if and how a victim's immigration status is relevant. This analysis should include both legal and strategic considerations, while balancing victim safety concerns.

Prosecutors may initially view evidence of a victim's immigration status as negative or adverse evidence. However, there are some compelling reasons why prosecutors may want to bring up immigration status in their case-in-chief. Prosecutors should analyze the facts of their case and determine if the victim's immigration status is relevant to the charged crime. For example, did the defendant choose to abuse, exploit, or harm the victim *because* the victim was vulnerable due to their immigration status? The victim's immigration status may be relevant to why the crime was not immediately reported to police or it may explain why the victim was reluctant to participate in the investigation and prosecution. The defendant may have counted on

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<sup>1</sup>This memo will focus on victims, but the analysis for the admissibility of witnesses' immigration status is likely the same or similar. In contrast, this memo does not analyze the admissibility of a defendant's immigration status, which is rarely admissible.

<sup>2</sup> See *Training Tools for Prosecutors on the U Visa, VAWA and Criminal Court Discovery*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Feb. 2022), available at <https://niwaplibrary.wcl.american.edu/prosecutors-tools>.

<sup>3</sup> For a discussion of how Violence Against Women Act confidentiality laws (8 U.S.C. 1367) limit discovery of information about the existence of, decisions made in, and information contained in a crime victim's immigration case, see Jane Anderson et al., *VAWA Confidentiality and Criminal Cases: How Prosecutors Should Respond to Discovery Attempts for Protected Information*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Jul. 24, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/discovery-and-vawa-confidentiality-tool-final-7-24-17>; Limayli Huguet et al., *Quick Reference Guide for Judges: VAWA Confidentiality and Discovery Related Case Law*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Jul. 24, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-discovery-cases-judicial>.

the victim not coming forward or not being believed if they did. It is also incredibly common that offenders will use a victim's precarious immigration status to assert power and control or force, fraud, and coercion, typically with threats of deportation, inability to work legally, family separation, and other immigration-related threats.<sup>4</sup>

When the prosecution seeks to introduce evidence of the victim's immigration status to prove an element of the crime, provide context for the victim's behavior, or for other permissible reasons, the court will typically not be involved in determining the relevancy of the victim's immigration status. However, if the defense is seeking to introduce the victim's status over the objection of the prosecution, then the court will analyze the relevancy and admission of a victim's immigration status by assessing if it is relevant to the charged crimes and if it goes to the victim's bias or motive to lie. This publication addresses the question of relevancy of a victim's immigration status in two main scenarios where the prosecutor is NOT seeking to admit evidence of immigration status: (1) when the victim has not sought any form of immigration relief related to the criminal case and (2) when the victim is seeking or has received a U Visa.<sup>5</sup>

1. Relevancy when the prosecutor is not admitting evidence of immigration status and the victim has not sought any form of immigration relief related to the criminal case

Evidence is generally deemed relevant if it, “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”<sup>6</sup> Any analysis would include consideration of whether the evidence – in this case, the victim's immigration status – makes any fact at issue more or less probable, including any defenses asserted. As stated above, the prosecution will typically not have to make these arguments when they are the ones seeking to introduce this evidence to argue that the defendant specifically selected a particular victim because of their immigration status, if the crime involves immigration-related abuse, or when the immigrant status explains victim behavior, including delayed disclosure of the crime,<sup>7</sup> recantation, and/or minimizing the facts of the crime.<sup>8</sup>

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<sup>4</sup> Stacey Ivie, Detective, Michael LaRiviere, Antonio Flores, Leslye E. Orloff, and Nawal H. Ammar, *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, POLICE CHIEF MAGAZINE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 34-40 (April 2018), available at [https://niwaplibrary.wcl.american.edu/pubs/policechief\\_april-2018\\_building-trust-immigrant-victims](https://niwaplibrary.wcl.american.edu/pubs/policechief_april-2018_building-trust-immigrant-victims).

<sup>5</sup> This analysis will likely be analogous when a witness is seeking or has received a T Visa or Continued Presence particularly when as in U visa cases the victim has sought a T visa declaration or government assistance in filing for continued presence. However, when a victim or witness has sought or received other forms of immigration relief that do not require involvement of law enforcement or prosecutors as certifiers, the analysis may be different. Examples include when a victim of domestic violence or child abuse has filed for or been granted a VAWA self-petition, VAWA cancellation of removal or Special Immigrant Juvenile Status. Please contact NIWAP for further technical assistance.

<sup>6</sup> FRE 401 Test for Relevant Evidence; state evidence codes generally mirror the federal definition.

<sup>7</sup> “Ultimately, the U visa is relevant to a wide swath of the undocumented immigrant population because they are oftentimes victims of the enumerated crimes against which the program protects.” See Joey Hipolito, *Illegal Aliens or Deserving Victims: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153 (2010).

<sup>8</sup> Jane Anderson, Benish Anver, and Leslye E. Orloff, *What's Immigration Status Got to Do with it? Prosecution Strategies Involving Undocumented Victims* (2017), available at <https://niwaplibrary.wcl.american.edu/pubs/pretrial-strategies-7-24-17-final-with-logos>.

The real question is whether the defense is allowed to introduce evidence of the victim's immigration status when the prosecution is not seeking to introduce it or the prosecution is asking for it to be excluded. In that case, the defense should be able to articulate why and how the victim's status is relevant beyond merely wanting to prejudice the jury. One case from the Court of Appeal of California, *People v. Gomez*, stated the reasoning behind this practice is that, "admitting evidence of the immigration status of a witness exposes a person who has not been charged with wrongdoing to devastating immigration consequences, and it also risks that sentiments about undocumented immigration will distract jurors from their fact-finding responsibilities."<sup>9</sup>

In some cases the defense may argue that the mere fact that the victim is in the United States without being documented makes the victim less credible. Other times, the defense may argue that the victim is testifying for the prosecution to curry general favorability for future, unspecified goodwill related to a potential immigration case. Prosecutors should counter both of these explanations.

However, when the prosecution has promised favorable treatment in an immigration case – even if not a U Visa – that promise and the victim's status would be relevant. *See State v. Sanchez-Medina*, where the New Jersey Superior Court emphasized concerns of prejudice regarding a jury's knowledge of a party's immigration status,<sup>10</sup> but ultimately held that immigration status was relevant when the prosecution promised the witness's "favorable immigration treatment in exchange for truthful testimony" in which case "a jury would be entitled to assess the witness's credibility in light of that promise."<sup>11</sup> In that case, the analysis was more akin to one that would be done where the victim had sought a U Visa certification from a law enforcement or prosecution official or a judge.

The defense may also argue that a victim has motive to lie because the alleged crime could be a basis for a U Visa application, but this proves irrelevant where the victim has not actually applied for a U Visa. *State v. Lopez* is an example of how the North Carolina Appeals Court applied their state evidence relevancy test to hold that witness's immigration evidence was not pertinent to the defense's legal theory.<sup>12</sup> Lopez was charged with statutory sexual offense and taking indecent liberty with a six-year-old child. Lopez argued that the child's mother alleged this offense so that the mother could apply for a U Visa, and inquiry into the mother's status was relevant to proving whether the sexual abuse occurred. The victim and her mother were non-U.S. citizens. The Defense's *voir dire* of the victim's mother inquired into the mother's and child's immigration status only and did not develop any discussion whether the mother applied for a U Visa. The State did not bring up the child's or mother's immigration status. In fact, no U Visa application was ever filed, and the State never discussed the U Visa process with the mother. On appeal, Lopez argued differently, asserting he had a right to question the mother

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<sup>9</sup> *People v. Gomez*, No. A154053, 2019 Cal. App. Unpub. LEXIS 6614 (Cal., Sep. 30, 2019).

<sup>10</sup> *State v. Sanchez-Medina*, 231 N.J. 452, 452-470 (N.J. Sup. Ct. 2018).

<sup>11</sup> *State v. Sanchez-Medina*, 231 N.J. 452, 463 (N.J. Sup. Ct. 2018).

<sup>12</sup> *State v. Lopez*, 852 S.E.2d 658, 660 (N.C. Ct. App. 2020).

about her immigration status because, "she may have had a motive to instigate, encourage, coach, or embellish allegations of abuse to avoid possible deportation because she was an illegal immigrant."<sup>13</sup> The appellate court held that uncovering the mother's undocumented status was irrelevant to prove the child's mother had a motive to fabricate the crime particularly because the mother had not applied for a U Visa.<sup>14</sup> Even where a parent has applied for a U Visa, which is a fairly frequent scenario, courts have found that a parent's U Visa application is not relevant to whether a child was a victim.

Another example of where evidence of immigration status may be used to impeach the immigrant victim's credibility on cross-examination also highlights a scenario where the victim actively sought immigration relief; this time under the Violence Against Women Act (VAWA)<sup>15</sup> rather than for a U Visa. In *Salazar v. State*<sup>16</sup>, the Georgia appeals court affirmed that Salazar was permitted to cross-examine the victim about his immigration status to show bias and suggest that a victim lied about the charges to improve his immigration status. In this case the alleged victim applied for immigration relief under VAWA. Again, this analysis is similar to one that would be considered in a case where the victim sought a U Visa because the VAWA process may be initiated after the applicant has been the victim of a crime. Both U Visa and VAWA applicants may rely on their reporting of the crime to secure immigration relief, which means that immigration status could be deemed relevant in these types of cases.

When the victim has not sought specific immigration relief based on their victimization, their immigration is not generally relevant. In part, this is because there is a general acknowledgment among some federal and state courts, both in criminal and civil trials, that inquiries into a testifying witness's immigrant status impose a chilling effect upon the testifier.<sup>17</sup> This "chilling effect" is best described by the U.S. Court of Appeals Ninth Circuit as, "[the] fear that [a non-US citizen's] immigration status would be changed, or that their status would reveal the immigration problems of their family or friends."<sup>18</sup> In recent years, there has been more attention on how immigration-related inquiries discourage immigrant victims from reporting crimes perpetrated against them.<sup>19</sup> Courts have acknowledged the potential risks of criminal prosecution and deportation that accompany disclosure of undocumented immigrant status,

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<sup>13</sup> *Lopez* 852 S.E.2d at 661

<sup>14</sup> *Lopez* 852 S.E.2d at 661.

<sup>15</sup> A VAWA self-petition may be filed by an immigrant who was the victim of battering or extreme cruelty perpetrated by the immigrant's U.S. citizen or lawful permanent resident spouse, parent or step-parent. Parents who are battered or subjected to extreme cruelty but their over 21 year old citizen children are also eligible. See Moira Fisher Preda et al., *Preparing the VAWA Self-Petition and Applying for Residence*, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2013), available at <https://niwaplibrary.wcl.american.edu/pubs/ch3-3-selfpetitionprep>.

<sup>16</sup> 722 S.E.2d 901, 904 (Ga. App. Ct. Feb. 9, 2012).

<sup>17</sup> Compare *People v. Gomez*, No. A154053, 2019 Cal. App. Unpub. LEXIS 6614 (Cal., Sep. 30, 2019) ("requiring a crime victim to testify about his or her immigration status absent some concrete reason to do so could have a **chilling effect** on the prosecution of crimes and administration of justice.") with *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) ("the **chilling effect** such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest") and *United States EEOC v. Global Horizons, Inc.*, Civil No. 11-00257, U.S. Dis. Ct. for Dis. Of Hawaii, (Dec. 21, 2012) (EEOC Mem. In Supp. Of Mot. At 2-3) ("the Court finds that the potential **chilling and prejudicial effect** of disclosure outweighs the potential value that the immigration status information might hold for impeachment purposes.").

<sup>18</sup> *Rivera*, 364 F.3d. at 1065.

<sup>19</sup> See John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' On Crime Reporting*, NPR, (Mar. 25, 2017), <https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting>.

which in turn dissuades victims from coming forward for fear that they will be punished.<sup>20</sup> In cases of civil trials for employment discrimination, the Ninth Circuit also stated that, “while documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to [ICE] and they will be subjected to deportation proceedings or criminal prosecution.”<sup>21</sup> The substantial burden that accompanies revealing undocumented immigration status has been found by many courts to substantially outweigh the benefit of permitting the admission of this evidence.

Evidence of immigration status may be relevant but still inadmissible because it unfairly prejudices the testifying party. For example, in *Pennsylvania v. Velasco*, defense counsel was barred from bringing in evidence of the victim’s immigration status without a factual basis supporting their assumption that the victim fabricated the rape charges to preserve her ability to remain in the States.<sup>22</sup> The trial court excluded Velasco's proffered testimony regarding the victim's immigration status because, while relevant, its unfairly prejudicial nature outweighed its probative value. Moreover, the victim testified that, since her rape, she had not filed any immigration paperwork to change her status; therefore, there was no factual basis for Velasco's theory of fabrication. The Appeals Court affirmed the lower court's decision.

2. Relevancy when the prosecutor is not admitting evidence of immigration status but the victim is seeking or has received a U Visa

Where the victim has sought a U Visa, the victim’s immigration status is generally admissible as it is relevant evidence of the victim's motive to lie about the alleged crime. Defense counsel might form their legal theory or impeach the witness's credibility by explicitly or implicitly arguing that the victim had some prior knowledge of the U Visa process and made up the allegations charged to receive a U Visa. The defense could also argue that the victim is exaggerating the facts to ensure that they are able to get the police or prosecution to sign off on a U Visa certification. It would not be unusual for the defense to paint the entire process as an easy way for the victim to get citizenship and related benefits. Both of these arguments are likely permissible defenses where a victim has sought a U Visa.<sup>23</sup>

a. *Admissibility rulings for impeachment purposes*

When a victim has sought a U Visa, courts will generally allow the defense to cross-examine the victim regarding motive to lie. Where cross-examination was limited at the trial

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<sup>20</sup> See *Rivera*, 364 F.3d. at 1064-65; *United States EEOC*, Civil No. 11-00257.

<sup>21</sup> See *Rivera*, 364 F.3d. at 1064.

<sup>22</sup> *Pennsylvania v. Velasco*, No. 423 MDA 2019, 2019 WL 6358998 (Pa. Super. Ct. Nov. 27, 2019).

<sup>23</sup> NOTE: The prosecution has an ethical responsibility to disclose that a victim has sought a U Visa even if the U Visa certification has not been signed. This is one reason why law enforcement and prosecutors should not delay certifying in cases where cases are still pending. To learn more about the benefits of certifying early, please contact NIWAP. See also Jane Anderson et al., *Certifying Early: When Should You Sign a U or T Visa Certification for a Victim?* NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT (NIWAP) (Jul. 24, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/certifying-early-7-24-17-final-w-logo>.

level, cases have been reversed. For example, in *People v. Hernandez*, the appeals court admitted evidence of a victim's immigration circumstances for impeachment purposes because the record sufficiently revealed victim's motive to lie.<sup>24</sup> In this case, Hernandez assaulted the victim.<sup>25</sup> Before trial, the prosecution informed defense counsel that the victim asked law enforcement about obtaining a U Visa. The appeals court reversed the trial court's judgment and held the trial court abused its discretion in prohibiting cross-examination of the witness regarding his U Visa interests.<sup>26</sup> Defense counsel confirmed she intended to cross-examine the witness because the information was probative and relevant to his motivation for testifying. The trial court denied the Defense's request for a pretrial evidentiary hearing. At the trial, the trial court denied defense counsel's renewed request to cross-examine the witness regarding whether Sergio had a motive to lie or exaggerate about the charged offenses to obtain a U Visa. The appeals court held that the record demonstrated that it was reasonable to infer the victim may have exaggerated or lied about his assault to obtain a U Visa.<sup>27</sup>

Where the victim has no knowledge of the U Visa process prior to trial, courts may determine that immigration evidence is not be admissible since there is no motive to lie if the victim is unaware of any benefit that may be related to participating in the investigation and trial. In *New Jersey v. Simm*, the victim, a twenty-four-year-old non-citizen, testified to his undocumented status and illegal entry into the United States when he was sixteen years old.<sup>28</sup> He also testified that he was unaware of the U Visa prior to the start of trial and did not know he could obtain legal immigration status in exchange for his trial testimony.<sup>29</sup> The trial judge found the victim credible and excluded any questioning regarding whether the State had offered to help him obtain a U Visa in exchange for testimony against Simm because it was not relevant.<sup>30</sup> The trial judge reasoned that since he found credible the victim's testimony that he did not know about the U Visa and that the police officers never discussed his's immigration status, that it was not possible for law enforcement to make any promise in exchange for testimony.<sup>31</sup> The appeals court affirmed the trial judge's exclusion and stated, "it was appropriate for the judge to evaluate the credibility of the alleged agreement to make sure that a baseless assertion by the defense would not infect the jury's fair consideration of the evidence."<sup>32</sup>

Where a case hinges on the witness's credibility because there is a lack of physical evidence, *State v. Perez* shows immigration evidence may be admissible.<sup>33</sup> The South Carolina Supreme Court permitted the Defendant to question State's witnesses on any potential bias crucial to the defense's claim. Here, Perez sexually abused Minor 1 and Minor 2; consequently,

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<sup>24</sup> *People v. Hernandez*, No. G05605, 2019 Cal. App. Unpub. LEXIS 5217\* (Cal. Ct. App. Aug. 06, 2019).

<sup>25</sup> *People v. Hernandez*, No. G05605, 2019 Cal. App. Unpub. LEXIS 5217\* (Cal. Ct. App. Aug. 06, 2019).

<sup>26</sup> *People v. Hernandez*, No. G05605, 2019 Cal. App. Unpub. LEXIS 5217\* 20 (Cal. Ct. App. Aug. 06, 2019).

<sup>27</sup> See also *People v. Villa*, 270 Cal.Rptr.3d 46, 50 (Cal. Ct. App. Oct. 16, 2020) (holding that evidence of victim Jane Doe's U-Visa application was relevant for impeachment purposes because it suggested Doe's motive to lie or exaggerate about her abuse.)

<sup>28</sup> *State v. Simm*, No. A-4423-16T3, 2018 WL 6816667 (N.J. Super. Ct. App. Div., Dec. 28, 2018).

<sup>29</sup> *State v. Simm*, 2018 WL 6816667 at 1.

<sup>30</sup> *State v. Simm*, 2018 WL 6816667 at 1.

<sup>31</sup> *State v. Simm*, 2018 WL 6816667 at 1.

<sup>32</sup> *State v. Simm*, 2018 WL 6816667 at 5.

<sup>33</sup> *State v. Perez*, 816 S.E.2d 550 (S.C. 2018) (citing also *Romero-Perez v. Commonwealth*, 492 S.W.3d 902, 906 (Ky. Ct. App. 2016)).

their respective mothers applied for U Visas. The South Dakota Supreme Court affirmed that evidence of a U Visa application was relevant because "the prosecution could incentivize the victim to fabricate allegations or embellish their testimony" in order for their U visa to be granted.<sup>34</sup> Moreover, preventing Perez from eliciting testimony about the mothers' U Visa applications kept him "from establishing a full picture of the witnesses' biases."<sup>35</sup>

Some courts have taken a more conservative view when it comes to admitting evidence of the victim's immigration status and evidence of a U Visa application. In these cases, the court found that there needed to be a showing of whether there is a logical connection between the victim's immigration status and the victim's motivation before making a relevancy determination. In *Quiroz v. Texas*<sup>36</sup>, the appellate court affirmed a trial judge's citation of the *Irby v. State* reasoning and concluded that a defendant could not cross-examine a victim about her immigration status and application for a U Visa unless there was a showing of "a logical connection between Rodriguez's vulnerable status [her immigration status] and her potential motive for testifying in this case."<sup>37</sup> *Irby* states that for a witness who has a "vulnerable status" (i.e. they may be undocumented in the country unlawfully), the cross-examiner must show some "causal connection" between the witness's "vulnerable relationship" and the witness's testimony."<sup>38</sup> Since a person can apply for the U Visa without needing to testify, the trial judge concluded, "unless you can make a showing that the Feds are going to grant it [the U Visa] based on her testimony, then you can't make a showing that it's affecting her testimony." Since Quiroz failed to establish a logical connection between Rodriguez's immigration status and her potential biased motive to testify against the defendant, Quiroz appellate court found that the trial court was right to limit the cross-examination.

### III. SPECIFIC EVIDENTIARY RULES

Beyond the general relevancy rule, there are some specific relevancy rules codified in some evidence codes. For example, "Rape Shield" rules are relevancy statutes that specifically codify that a victim's manner of dress and sexual history are generally not relevant.<sup>39</sup> Another analogous situation is the codification in certain evidence codes, that a defendant's prior acts of sexual or domestic violence are relevant in prosecutions for the same type of criminal activity. As of the writing of this memorandum, three states have codified rules related to the relevancy of a victim or witness's immigration status. These statutes have wide applicability in civil cases and more narrow applicability in criminal cases as discussed below. The Washington rule on a victim or witness's immigration status is very similar to the implementation of rape shield laws in many jurisdictions.

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<sup>34</sup> *Perez*, 816 S.E.2d 550 at 500.

<sup>35</sup> *Perez*, 816 S.E.2d 550 at 500.

<sup>36</sup> *Quiroz v. State*, 2018 Tex. App. LEXIS 5302\* 1, 5-6 (Tex. App. July 12, 2018).

<sup>37</sup> *Quiroz v. State* 2018 Tex. App. LEXIS 5302\* at 5.

<sup>38</sup> *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim.App.2010).

<sup>39</sup> See, e.g., CA. EVID. §§ 782, 1103(c)(2) (2022).

#### **IV. STATE LEGISLATURES' EFFORTS TO ADDRESS RELEVANCY THROUGH EVIDENCE RULES – THREE STATES HAVE CODIFIED RELEVANCY RULES ABOUT IMMIGRATION.**

Washington, and Pennsylvania have codified relevancy rules about immigration. The common thread underscores an intent to narrowly use immigration evidence in criminal cases.

##### 1. Washington Evidence Rule 413

Washington Evidence Rule 413 (hereinafter "WA Rule 413") applies to both civil and criminal cases and has three goals:

- (1) Protect immigrant defendants from prejudice;
- (2) Provide greater access to the criminal justice system for immigrant victims; and
- (3) Protect all defendant's due process right to confrontation.

WA Rule 413 addresses both the interests of immigrant crime victims' access to the criminal justice system and an immigrant defendant's constitutional protections. In this publication, we will focus on goals two and three (greater access to the justice system for victims and defendant's due process right) and how WA Rule 413 is balanced by the Rule's exceptions.

This rule came into effect September 1, 2018. The Washington Association of Prosecuting Attorneys and Columbia Legal Services submitted their proposal to adopt WA Rule 413 and cited to the Washington Supreme Court's recognition of how evidence of immigration status prevents the court's ability to deliver a fair trial. This rule was proposed in order to "presumptively bar the introduction of immigration evidence (with limited exceptions) to ensure equal and impartial access to Washington's court system."<sup>40</sup> The rule was designed to protect immigrants residing in Washington from harmful racial and ethnic stereotyping and ensure that immigrants can "obtain redress without fear of the legal process being overtaken by racial, ethnic, or anti-immigrant prejudice."<sup>41</sup> In the criminal context, the rule was created to address the reality that immigrant crime victims are disproportionately targeted because of language barriers, fear of exposure to deportation, and distrust towards law enforcement. WA Rule 413 codified when immigration status should be admissible and, in doing so, recognizes there are circumstances where immigration status is relevant and should be admissible in criminal proceedings.<sup>42</sup> The rule was likened to a rape shield law, a means of clear guidance on how to specifically analyze relevancy in the context of a victim's immigration status.

Under the Washington Rule there are three categories of circumstances in which evidence of immigration status may be proffered:

- (1) When immigration status is an essential element of the claim, charge, or defense;
- (2) When it shows witness bias or prejudice;

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<sup>40</sup> Wash. R. Evid. 413 (Columbia Legal Services and Washington Ass'n of Prosecuting Attorneys, Proposal to Adopt XXXX).

<sup>41</sup> Proposed Wash. R. Evid. 413.

<sup>42</sup> Proposed Wash. R. Evid. 413.

(3) All other instances.<sup>43</sup>

Exception (2) “when it shows witness bias or prejudice” is likely applicable in all cases where a victim has sought a U Visa. This may be applicable when the defense argues that the victim-witness has improper motive to accuse or her testimony is biased by her knowledge of the immigration consequences/benefits of testifying. The court in *Bedada*, identified Evi. R. 413(a)(4) does not automatically admit proffered evidence demonstrating a witness’s bias or prejudice. Rather, the rule provides that immigration-related evidence is admitted “if [the court] finds that the evidence is *reliable and relevant*, and that its *probative value outweighs the prejudicial nature* of evidence of immigration status.”<sup>44</sup> The appeals court in *Bedada* articulates the rule’s limiting instruction, “the introduction of evidence of immigration status does not result in an unfair trial when the evidence is presented for sufficiently weighty reasons.”<sup>45</sup>

The trial court in *Bedada* dealt with the new Wa Evi. R. 413. *Bedada* was an Ethiopian immigrant charged with assault, felony harassment, witness intimidation, and witness tampering. The domestic violence victim, *Bedada*'s wife, *Rahel Haile*, emigrated to the States with her husband and eventually became a United States citizen while *Bedada* remained a non-citizen resident. WA Rule 413 came into effect when *Bedada*'s trial commenced on September 4, 2018. *Bedada* argued evidence of *Haile*'s knowledge of *Bedada*'s immigration status and of the consequences of *Bedada*'s potential deportation were relevant to show the victim's motive to lie about the domestic violence. The Appeals Court employed WA Rule 413 to determine whether the superior court erred in excluding *Bedada*'s proffered evidence concerning *Haile*'s immigration status and history. It held that the trial court abused its discretion when it excluded the evidence, and that the *Bedada*'s proffered evidence was not highly relevant.<sup>46</sup>

A recent case further tests the contours of WA Rule 413 by ruling about when immigration status is permissible in a criminal trial. *Cesar Chicas Carballo* stood trial for first degree murder and conspiracy and was convicted of first degree murder.<sup>47</sup> He appealed his conviction before the court of appeals, including on the basis that *Carballo* was denied an opportunity to cross-examine the State's key witnesses, *Mayra Karina Calderon Flores*, on her immigration status. *Reyes* dated *Carballo*'s codefendant. The record revealed that *Flores* did not identify the suspects or share what she knew until police threatened to arrest her and deport her from the United States during her interrogation. At trial, there was minimal direct evidence connecting *Carballo* to the crime. Despite all parties at trial knowing that *Flores* was not a U.S. citizen and subject to removal, and *Carballo*'s limited cross-examination of *Flores*' prior inconsistent statements, the trial judge prevented any questioning of *Flores*' motive to lie. *Carballo* argued that the evidence of *Flores*' immigration status was highly relevant<sup>48</sup> because *Flores* only “remembered” after threats of deportation. No other direct evidence tied *Carballo* to

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<sup>43</sup> *State v. Bedada*, 463 P.3d 125, 128 (Wash. App. May 11, 2020).

<sup>44</sup> Wash. R. Evid. 413 (emphasis added).

<sup>45</sup> *Bedada*, 463 P.3d at 131.

<sup>46</sup> *Bedada*, 463 P.3d at 134.

<sup>47</sup> *State v. Chicas Carballo*, 486 P.3d 142, 142 (Wash. Ct. App. Mar. 9, 2021).

<sup>48</sup> See *State v. Orn*, 482 P.3d 913, 918 (Wash. Mar. 18, 2021); *State v. Grant*, 519 P.2d 261 (Wash. Ct. App. Jan. 22, 1974).

the crime. Trial court refrained from permitting the introduction of evidence unless new material was introduced. Washington Appeals Court held the trial court misapplied WA Rule 413 in harmless error and improperly placed the burden on Chicas Carballo.<sup>49</sup> Instead, the trial court should have permitted evidence of Flores' immigration status because it was highly relevant, credible evidence, and there was no other direct evidence connecting Carballo to the crime.

Category 3's "all other instances" has not yet been expounded by the Washington Appeals court. One might surmise that it is a catch-all exception for Rule 413's general exclusion of immigration evidence.

## 2. Pennsylvania Rule of Evidence 413

On May 1, 2022, the Supreme Court of Pennsylvania Committee on Rules of Evidence published Pennsylvania Rule of Evidence 413 (Pa.R.E. 413). Pa.R.E. 413 is modeled after WA Rule 413 (establishing that a person is not prohibited from voluntarily revealing his or her immigration status in civil court). Pennsylvania's rule is structured similar to Washington's rule. Both statutes separately address criminal cases' general exclusions and exceptions and the exceptions and exclusions that apply in civil matters. Pa.R.E. 413 additionally requires that the proponent give notice to the opponent of the proponent's intent to introduce evidence of immigration status.<sup>50</sup> Pa.R.E. 413's general prohibition of immigration-related evidence has an exception when the purpose is "to show bias or prejudice of a witness pursuant to Rule 607."<sup>51</sup> The rule is limited to trial evidentiary proceedings and not discovery.<sup>52</sup> Pa.R.E. 413(d) permits voluntary revelation of an individual's immigration status to the court in both criminal and civil cases.<sup>53</sup> The voluntary revelation made by the individual or the individual's attorney must pertain to the individual's immigration status.

The statute admits that relevant and prejudicial immigration status has been used in practice and proposed this rule in order to "avoid potential intimidation of witnesses for fear of deportation."<sup>54</sup> Instead, this rule is intended to limit the admissibility of immigration-related evidence to only the rule's stated purpose.

## V. THE "SILVER LINING"

Prosecutors should be prepared to address the victim's immigration status at trial, especially when the victim has sought or received an immigration benefit related to their victimization. There are various strategies to exclude evidence of the victim's immigration status where the victim was unaware that they could receive an immigration benefit in exchange for testimony, where the victim's application for an immigration benefit is ultimately irrelevant,

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<sup>49</sup> *Chicas Carballo*, 486 P.3d 142 at 152.

<sup>50</sup> Pa.R.E. 413.

<sup>51</sup> Pa.R.E. 413(b).

<sup>52</sup> Pa.R.E. 413.

<sup>53</sup> Pa.R.E. 413(d).

<sup>54</sup> Pa.R.E. 413.

or where a child is a victim and the parent has sought an immigration benefit. Prosecutors should note the court's analysis in cases where the victim has sought a U Visa and make similar arguments in cases where there is no evidence that the victims was motivated to disclose or participate in the investigation and prosecution in order to receive a U Visa certification.

Prosecutors and allied professionals should also be mindful that defense tactics related uncovering the victim's immigration status and related documentation can escalate to harassment or intimidation where the defense overtly or covertly threatens the victim with deportation or criminal prosecution. In cases where the defense has crossed the line from zealous representation to harassment or threats, then prosecutors should be prepared to take action as appropriate.<sup>55</sup>

A victim's immigration status can impact that victim's role in a criminal case far beyond the introduction of immigration status evidence at trial. Prosecutors should be prepared to address the intricacies and specific complexities of working with immigrant victims in order to pursue just outcomes. For more information on how immigration status may impact a victim's role in a criminal case, see "What's Immigration Status Got to Do with It? Prosecution Strategies for Cases Involving Undocumented Victims."<sup>56</sup>

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<sup>55</sup> NIWAP has publications that address this issue including when and whether Rule 11 or similar state rules apply. See Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (2014), available at <https://niwaplibrary.wcl.american.edu/pubs/ch3-vawa-confidentiality-history-purpose> (sample motion in limine and motions for a protective order).

<sup>56</sup> See Jane Anderson, Benish Anver & Leslye E. Orloff, *What's Immigration Status Got to Do with It? Prosecution Strategies for Cases Involving Undocumented Victims*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) (Jul. 24, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/whats-immigration-status-got-to-do-with-it-undocumented-prosecution-case-strategies>