

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

PRELIMINARY STATEMENT..... 1

FACTS AND PROCEDURAL HISTORY..... 2

ARGUMENT..... 6

 I. New Jersey Rules Of Evidence Prohibit Introduction Of
 "Other Crimes" Evidence Except Under Extremely
 Limited Circumstances. 6

 A. In a State Criminal Proceeding, Evidence of Federal
 Immigration Status Is Rarely Probative of a
 Relevant Substantive Issue..... 7

 B. Evidence of Criminal Defendant-witness' Federal
 Immigration Status Does Not Constitute Permissible
 Impeachment Under N.J.R.E. 607..... 11

 1. Impeachment by Establishing "Bias" Related to
 a Witness' Federal Immigration Status Is
 Irrelevant in this Case and in Other Cases
 Where the Witness is a State Criminal
 Defendant..... 15

 2. Absent an Actual Criminal Conviction,
 Evidence of a Witness' Federal Immigration
 Status is Not Admissible..... 17

 3. In a State Criminal Proceeding, Evidence of a
 Witness' Federal Immigration Status Would
 Rarely Constitute a Prior Inconsistent
 Statement on a Relevant Factual Issue..... 18

 4. Evidence Of A Witness' Federal Immigration
 Status Is Irrelevant to the Witness' Capacity
 To Perceive, Recollect And Communicate..... 20

 II. Under N.J.R.E. 403, the Probative Value of a Criminal
 Defendant's Immigration Status Is Presumptively
 Outweighed by its Prejudicial Effect. 21

 A. Evidence About Sanchez-Medina's Federal Immigration
 Status Was Irrelevant for Any Purpose in this State

Criminal Proceeding.....	21
B. Evidence about a Witness' Immigration Status Is Inherently Prejudicial.....	22
III. This Court Should Establish Clear Standards Defining the Rare Instances in Which Evidence of a Witness' Federal Immigration Status Is Admissible.	28
A. The Jury Instruction Did Not and Could Not Cure the Prejudicial Effect of Admitting the Evidence of Immigration Status.....	28
1. The Jury Instruction Was Not Curative, but Rather Exacerbated the Error.	28
2. Even a Direct Instruction to Disregard the Evidence of Immigration Status Would Not Have Purged the Prejudicial Effect.	31
B. The Procedures Outlined in the Model Jury Charge Adopted by the Model Criminal Jury Charge Committee Should Be Reaffirmed and Explained.....	34
CONCLUSION.....	37

TABLE OF AUTHORITIES

Cases

Andrade v. Walgreens-OptionCare, Inc., 784 F. Supp. 2d 533, 535 (E.D. Pa. 2011); 25

Ayala v. Lee, 215 Md. App. 457 (Md. Ct. Spec. App. 2013) 26

Castro-Carvache v. I.N.S., 911 F. Supp. 843 (E.D. Pa. 1995) 14

Figeroa v. I.N.S., 886 F.2d 76 (4th Cir. 1989)..... 14

Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286 (2006) 12

Furst v. Einstein Moomjy, Inc., 182 N.J. 1 (2004)..... 21

Gonzalez v. City of Franklin, 403 N.W.2d 747 (Wis. 1987) 26

Hernandez v. Paicius, 109 Cal. App. 4th 452, 134 Cal. Rptr. 2d 756 (2003) 14

Mischalski v. Ford Motor Co., 935 F. Supp. 203 (E.D.N.Y. 1996) 14

Old Chief v. United States, 519 U.S. 172 (1997)..... 1

Olden v. Kentucky, 488 U.S. 227 (1988)..... 15

People v. Turcios, 593 N.E.2d 907 (Ill. App. Ct. 1992)..... 16

Riascos v. State, 792 S.W.2d 754 (Tex. App. 1990)..... 26

Salas v. Hi-Tech Erectors, 230 P.3d 583 (Wash. 2010)..... 26

Serrano v. Underground Utilities Corp., 407 N.J. Super. 253 (App. Div. 2009) 20, 27, 35

State v. Ascolese, 59 N.J. Super. 393 (App. Div. 1960)..... 8

State v. Avendano-Lopez, 904 P.2d 324 (Wash. Ct. App. 1995) 26

State v. Buckley, 216 N.J. 249 (2013)..... 21

<i>State v. Cofield</i> , 127 N.J. 328 (1992).....	6, 7, 10
<i>State v. G.S.</i> , 145 N.J. 460 (1996).....	23
<i>State v. Gibbons</i> , 105 N.J. 67 (1987).....	23
<i>State v. Gross</i> , 121 N.J. 1 (1990).....	18, 19
<i>State v. J.M.</i> , 225 N.J. 146 (2016).....	9, 36
<i>State v. Marrero</i> , 148 N.J. 469 (1997).....	23
<i>State v. Reddish</i> , 181 N.J. 553 (2004).....	8
<i>State v. Sanchez-Medina</i> , No. A-4779-13T1 (App. Div. Jun. 14, 2016).....	4, 5, 6, 30
<i>State v. Stevens</i> , 115 N.J. 289 (1989).....	8, 25, 33
<i>State v. Vallejo</i> , 198 N.J. 122 (2009).....	23
<i>State v. Vandeweaghe</i> , 351 N.J. Super. 467 (App. Div. 2002).....	33
<i>TXI Transp. Co. v. Hughes</i> , 306 S.W.3d 230 (Tex. 2010).....	13, 14
<i>United States v. Almeida-Perez</i> , 549 F.3d 1162 (8th Cir. 2008).....	25
<i>United States v. Diaz</i> , 494 F.3d 221, 226 (1st Cir. 2007).....	25
<i>United States v. Moccia</i> , 681 F.2d 61 (1 st Cir. 1982).....	1
<i>Uto v. Job Site Servs. Inc.</i> , 269 F.R.D. 209, 211 (E.D.N.Y. 2010).....	25
<i>Zeng Liu v. Donna Karan Int'l, Inc.</i> , 207 F. Supp. 2d 191 (S.D.N.Y. 2002).....	26

Statutes

18 U.S.C. § 1001.....	17
18 U.S.C. § 3231.....	9
18 U.S.C. § 3282.....	18
18 U.S.C. § 911.....	17

18 U.S.C. §§ 1341-43.....	17
18 U.S.C. §§ 1542, 1543, 1544, 1546.....	17
26 U.S.C. §§ 7203, 7206.....	17
8 U.S.C. § 1325.....	17
8 U.S.C. § 1326.....	17

Other Authorities

Biunno, Weissbard & Zegas, N.J. EVIDENCE RULES ANNOTATED (2016 ed.).....	13
Caleb E. Mason, <i>The Use of Immigration Status in Cross-Examination of Witnesses: Scope, Limits, Objections</i> , 33 AM. J. TRIAL ADVOCACY 549 (2010)	11
D. Ivers, <i>Illegal Immigrant Charged With Ambushing, Sexually Assaulting Women In Dumont, Englewood, NJ</i> Advance Media for nj.com, 08/15/12	3
David Alan Sklansky, <i>Evidentiary Instructions and the Jury as Other</i> , 65 STAN. L. REV. 407 (2013)	32
<i>Dumont PD: Man Arrested In Connection To Rape, Sexual Assaults</i> , News12nj.com.....	3
Gabriel J. Chin, <i>Illegal Entry as Crime, Deportation and Punishment</i> , 58 UCLA L. REV. 1417 (2011).....	33
Imwinkelried, <i>The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition</i> , 51 Ohio St. L.J. 575 (1990).....	7
J. Demarco, <i>Jurors Convict Bergenfield Day Laborer in Dumont, Englewood Sex Assaults</i> , Hackensack Daily Voice, 11/7/2013	2
Model Criminal Jury Charge, <i>Credibility - Immigration Consequences Of Testimony</i> , rev. 6/6/2016.....	30, 31, 34, 35
Pew Research Center, <i>Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change</i>	

<i>Through 2065: Views of Immigration's Impact on U.S. Society Mixed</i> (Sep. 28, 2015)	24
Pew Research Center, <i>Modes of Entry for the Unauthorized Migrant Population</i> (2006)	18
Sharon Wolf & David A. Montgomery, <i>Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors</i> , 7 J. APPLIED SOC. PSYCHOL. 205 (1977)	33
Stephen H. Legomsky, <i>The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms</i> , 64 WASH & LEE L. REV. 469 (2007)	24
Xia Wang, <i>Undocumented Immigrants as Perceived Criminal Threat: A Test of the Minority Threat Perspective</i> , 50 CRIMINOLOGY 743 (2012)	23

Rules

Fed. R. Evid. 404(b).....	7
Fed. R. Evid. 608(b).....	12
Fed. R. Evid. 801(d)(1)(A).....	19
N.J.R.E. 104(a).....	35
N.J.R.E. 401.....	21
N.J.R.E. 402.....	22
N.J.R.E. 403.....	22, 27
N.J.R.E. 404(b).....	7, 9
N.J.R.E. 607.....	14, 15, 18
N.J.R.E. 608(a).....	13
N.J.R.E. 608(b).....	12, 13
N.J.R.E. 609.....	15, 17
N.J.R.E. 803(a)(1).....	18

PRELIMINARY STATEMENT

Amicus Curiae American Civil Liberties Union of New Jersey respectfully submits this brief in support of Petitioner– Defendant Alexis Sanchez-Medina in the above captioned matter. Amicus’s discussion is focused on the use of defendant Sanchez-Medina’s federal immigration status as impeachment evidence.

Common law and modern rules of evidence have long either prohibited or severely limited the use of “character evidence,” and in particular evidence of prior “bad” behavior, especially in order to establish a propensity to act consistent with those past acts. The danger the courts seek to avoid lies in “generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).” *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997). Thus, “the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.” *Id.* at 181 (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)).

This danger of misuse is all the more acute under the circumstances in this case, where the evidence of past conduct that was introduced – illegal entry into the United States under

federal immigration law – is extraneous to the relevant issues being tried in a state criminal proceeding, and where the dangers of arousing public passion and prejudice against undocumented immigrants are clear and palpable. Amicus ACLU-NJ therefore urges this Court to use this case to make clear that, except in rare and clearly defined circumstances, the immigration status of a state criminal defendant shall not be introduced into evidence, whether by cross-examination or otherwise.

FACTS AND PROCEDURAL HISTORY¹

The charges against Mr. Sanchez-Medina stem from a number of reported incidents of sexual assaults by an unknown assailant in Bergen County that occurred between July 27 and Aug. 10, 2012, which, according to the assistant prosecutor, caused a “climate of fear . . . throughout the community.” J. Demarco, *Jurors Convict Bergenfield Day Laborer in Dumont, Englewood Sex Assaults*, Hackensack Daily Voice, 11/7/2013 (available at <http://hackensack.dailyvoice.com/police-fire/jurors-convict-bergenfield-day-laborer-in-dumont-englewood-sex-assaults/632702/>).

After police investigation, Alexis Sanchez-Medina was

¹ For purposes of conciseness, the Facts and Procedural History sections are consolidated in this brief.

arrested on August 15, 2012, in connection with these incidents. At the time of his arrest, various press reports identified Mr. Sanchez-Medina as an "illegal immigrant." See D. Ivers, *Illegal Immigrant Charged With Ambushing, Sexually Assaulting Women In Dumont, Englewood*, NJ Advance Media for nj.com, 08/15/12 (available at http://www.nj.com/bergen/index.ssf/2012/08/illegal_immigrant_charged_with_ambushing_sexually_assaulting_women_in_dumont_englewood.html; *Dumont PD: Man Arrested In Connection To Rape, Sexual Assaults*, News12nj.com, available at <http://newjersey.news12.com/news/dumont-pd-man-arrested-in-connection-to-rape-sexual-assaults-1.3965273>).

Sanchez-Medina was indicted and tried on six counts of various grades of sexual offenses against four women, R.D., D.J., A.M., and A.B., ranging from second-degree sexual assault upon D.J. and A.B., second degree attempted sexual assault upon R.D. and A.M., and fourth-degree criminal sexual contact with R.D. and D.J. Sanchez-Medina maintains that he was Identification of the assailant was a key issue in the case, and indeed appears to have occupied most of the trial.²

Mr. Sanchez-Medina chose to take the witness stand in his own defense. During the course of cross-examination by the

² Since the record in this case is impounded Amicus ACLU-NJ does not have access to the trial transcript, and thus draws its description of the proceedings at trial from the Appellate Division's opinion.

prosecutor, the prosecutor asked him if he had entered the United States illegally. Defendant's attorney objected to the question, but the trial judge noted at side bar that his illegal immigration status related generally to "obeying the rules of society." *State v. Sanchez-Medina*, No. A-4779-13T1, type op. at 7-8 (App. Div. Jun. 14, 2016) (per curiam). The trial judge then overruled the objection and allowed the prosecutor to ask the question. Sanchez-Medina then testified he entered the United States illegally in 2008, in search of work. *Id.* at 8.

At the end of Sanchez-Medina's testimony, the trial judge told the jury:

You heard testimony from the defendant and there was a reference to his illegal status. You're not to use that as proof of guilt[] concerning the offenses listed in the indictment. You can, however, use that information to test the credibility of the defendant as to whether or not he follows the rules of society and therefore it could make a difference concerning the issue of credibility, but not as proof of the underlying offenses.

In his final instructions to the jury, however, the trial judge superseded her original instruction and replaced it with the following:

Before I get into the substantive portion with the charges and the verdict sheet[,] earlier I gave you an instruction as to [the] immigration status of the defendant. I want you to disregard the earlier instruction and completely focus on this particular limiting instruction slash charge.

You have heard evidence that the defendant is in this country illegally. You may not use the mere fact that the defendant may be illegally in the country to conclude that he is less likely to comply with our society's rules and therefore committed the crimes in the indictment.

Id. at 17-18.

After deliberation, the jury acquitted Sanchez-Medina of attempted sexual assault, as charged in count one, but guilty of the lesser-included offense of simple assault of R.D. The jury found defendant guilty of criminal sexual contact with R.D., as charged in count two, and attempted sexual assault upon D.J. under count three. The jury also found defendant guilty of sexual contact with D.J. as charged in count four. On count five, the jury acquitted Sanchez-Medina of attempted sexual assault, but guilty of the lesser-included offense of attempted simple assault upon A.M. In addition, on count six, the jury found him guilty of sexual assault upon A.B. Thereafter, the court sentenced to an aggregate term of 18.5 years of incarceration, with 13.6 years of parole ineligibility.

On review by the Appellate Division, the State acknowledged that the assistant prosecutor should not have elicited testimony as to defendant's illegal entry into the United States. The State contended, however, that the trial judge's final instructions cured any possible prejudice that might have resulted otherwise. The Appellate Division agreed. Although it

found the trial judge's instructions to be "flawed," the lower court nevertheless found that they were "sufficient to eliminate any prejudice that might have resulted from the erroneous admission of evidence regarding defendant's illegal entry into the United States." *Id.* at 18.

The Appellate Division rejected most of defendant's other contentions, but agreed that the jury had been erroneously charged on count three, attempted sexual assault against D.J., and therefore vacated that part of the conviction and remanded for a new trial on that count.

A petition for writ of certification to this Court followed, which was granted on October 14, 2016.

ARGUMENT

Although the State acknowledged below, and the Appellate Division agreed, that it was error for the trial judge to admit evidence regarding Sanchez-Medina's illegal entry into the United States, the importance of this case warrants a full description of the significance of that error.

I. NEW JERSEY RULES OF EVIDENCE PROHIBIT INTRODUCTION OF "OTHER CRIMES" EVIDENCE EXCEPT UNDER EXTREMELY LIMITED CIRCUMSTANCES.

"The admissibility of uncharged misconduct has been described as 'the single most important issue in contemporary criminal evidence law.'" *State v. Cofield*, 127 N.J. 328, 335

(1992) (quoting Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 576 (1990)). "The analogous Federal Rule of Evidence 404(b) has 'generated more published opinions than any other subsection of the Federal Rules . . . [and] errors in the introduction of uncharged misconduct are the most frequent basis for reversal in criminal cases.'" *Cofield*, 127 N.J. at 335 (quoting Imwinkelried, 51 Ohio St. L.J. at 577).

Whether or not Sanchez-Medina legally entered the United States in 2008 is obviously not an issue that is germane to a criminal trial for sexual assault heard in the Superior Court of New Jersey. The dangers of allowing evidence of such past conduct exclusively regulated by federal immigration law to color a state criminal prosecution are serious and manifold.

A. *In a State Criminal Proceeding, Evidence of Federal Immigration Status Is Rarely Probative of a Relevant Substantive Issue.*

As a general matter, it is axiomatic that evidence of past culpable conduct, whether labelled as "bad acts", "other-crimes evidence", "uncharged misconduct" or otherwise, is not admissible to show "propensity" that would establish that a witness, and especially a criminal defendant, acted in conformity with that disposition. Thus, N.J.R.E. 404(b) specifically provides:

Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The basis of this Rule is "to avoid confusion, unfair surprise and prejudice." *State v. Stevens*, 115 N.J. 289, 300 (1989) (discussing predecessor Evid. R. 55). "[P]roof of a previous crime will distract the jury, leading them to forego an independent analysis of the evidence and to rely merely on the tendency they possess in common with most people of saying 'once a thief—always a thief' . . ." *Stevens*, 115 N.J. at 300 (quoting *State v. Ascolese*, 59 N.J. Super. 393, 397 (App. Div. 1960)). As this Court has observed, "other-crime evidence has a unique tendency to turn a jury against the defendant and poses a distinct risk" of distracting the jury from an independent consideration of the evidence that bears directly on guilt itself." *State v. Reddish*, 181 N.J. 553, 608 (2004) (internal quotation marks and citations omitted).

It is therefore beyond dispute that evidence of unlawful presence in the United States under federal immigration law is inadmissible to support the inference that Sanchez-Medina committed the crimes of which he was accused in this matter, i.e. various forms of sexual assault. While it is true that

such "other-crimes" evidence may be admitted "for other purposes," such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, it is also required that "the material fact sought to be proved must be one that is *actually in dispute*[".]" *State v. J.M.*, 225 N.J. 146, 160 (2016) (emphasis added). Thus, in *State v. J.M.*, this Court recently noted that extrinsic evidence of prior sexual assaults was not admissible when defendant maintained that the sexual assault never occurred, and thus the issues of motive, intent, absence of mistake, or plan was not a "genuinely contested" issue. 225 N.J. at 160.

In this case, the prosecutor does not even contend that evidence of Sanchez-Medina's federal immigration status was probative of some similar factual issue permitted under N.J.R.E. 404(b). Since enforcement and criminal prosecution of federal immigration laws would lie within exclusive federal jurisdiction (18 U.S.C. § 3231),³ a defendant's federal immigration status would be directly relevant in a state criminal proceeding only in those rare situations in which a state criminal statute incorporated federal law as a necessary ingredient. One could hypothecate, for instance, a case of theft by deception in which

³ "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

eligibility for certain State funds was dependent upon lawful presence, and thus where inquiry into defendant's immigration status would be relevant to motive, knowledge, intent or some other aspect of *mens rea*. Similarly, a defendant's undocumented immigration status might establish knowledge or motive for very specific criminal actions sounding in false documents or false claims that were clearly intended to disguise that status. But apart from those very fact-specific examples, federal immigration status is generally irrelevant to a state criminal proceeding.

In this case, there is utterly no relationship between Mr. Sanchez-Medina's illegal entry into the United States, and the crimes for which he was being tried – sexual assault. Here, where Mr. Sanchez-Medina's defense is one of mistaken identity, the usual elements related to *mens rea* – motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident – are simply not at issue. *See, State v. Cofield*, 127 N.J. at 338 (“We reemphasize . . . that the material issue must be genuinely disputed”). Even if they were, it is beyond rational understanding how the act of illegal entry into the United States in 2008 would have any bearing on Mr. Sanchez's state of mind in a prosecution for sexual assaults in 2012. *See id.* at 334 (other-crimes evidence must be similar in kind and reasonably close in time to the offense charged).

B. Evidence of Criminal Defendant-witness' Federal Immigration Status Does Not Constitute Permissible Impeachment Under N.J.R.E. 607.

The apparent purpose of the prosecutor in eliciting testimony regarding Mr. Sanchez-Medina's immigration status was not as proof of a substantive factual issue in genuine dispute in this case, but rather as impeachment his credibility once he chose to waive his Fifth Amendment rights and take the stand as a witness. See generally, Caleb E. Mason, *The Use of Immigration Status in Cross-Examination of Witnesses: Scope, Limits, Objections*, 33 AM. J. TRIAL ADV. 549 (2010) (discussing at length the use of witness' immigrates status as impeachment under Federal Rules of Evidence).

It is important to note at the outset that the New Jersey Rules of Evidence differ markedly from the Federal Rules of Evidence on the extent to which they allow a witness to be impeached by asking on cross-examination about specific instances of the witness' prior conduct that may indicate the witness' dishonest character. Federal Rule of Evidence 608(b) provides that:

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness. *But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:*

(1) *the witness*; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness' character for truthfulness.

Fed. R. Evid. 608(b) (emphasis added).

In contrast, New Jersey Rule of Evidence 608(b) permits such impeachment only in one limited circumstance not relevant here:

(b) The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.

N.J.R.E. 608(b). *See, Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 309 n.9 (2006) (noting that "[u]nlike the New Jersey [evidence] rule, however, the federal [evidence] rule permits broad questioning of all witnesses, including character witnesses, regarding prior instances of conduct on cross-examination"). The 1991 Supreme Court Committee Comment explains:

Although this rule follows the formulation of Fed. R. Evid. 608, it retains present New Jersey practice by rejecting the provision of paragraph (b) of the federal rule which permits limited admissibility of specific instances of conduct on cross-examination. N.J. Evid. R. 22(d), followed by this rule, prohibited "specific instances of conduct" proof in any form if introduced to prove a trait of character. Thus, this

rule is consistent in philosophy and effect with the choice made in respect of Rule 405(a), namely adopting the state rather than the federal analogue. It is the Committee's view that Rule 607 affords sufficient scope for the effective impeachment of credibility.

Biunno, Weissbard & Zegas, N.J. EVIDENCE RULES ANNOTATED p.612 (2016 ed.).

Thus, apart from one narrow exception not pertinent here (false accusation of a similar crime) N.J.R.E. 608(b) does not provide for impeachment by cross-examination about prior instances of conduct, and indeed N.J.R.E. 608(a) provides that "Except as otherwise provided by Rule 609 and by paragraph (b) of this rule, a trait of character cannot be proved by specific instances of conduct."

Courts of other states whose rules of evidence are similar to New Jersey's have explicitly rejected the use of immigration status as a permissible method of impeachment. For instance, in *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010), the Texas Supreme Court noted that Texas Rule of Evidence 608(b) "reflects a general aversion in Texas to the use of specific instances of conduct for impeachment." The Texas court therefore held, in a civil vehicular wrongful death action, that evidence of plaintiffs' immigration status could not be admitted for purposes of impeachment. "Texas civil courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness."

TXI Transp. Co., 306 S.W.3d at 242. See also, *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 207-08 (E.D.N.Y. 1996) ("Ford has cited no authority, and the court is aware of none, to support the conclusion that the status of being an illegal alien impugns one's credibility. Thus, by itself, such evidence is not admissible for impeachment purposes."); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 134 Cal. Rptr. 2d 756, 761-62 (Ct. App. 2003) (finding immigration status evidence inadmissible to attack a party's credibility); See generally, *Castro-Carvache v. I.N.S.*, 911 F. Supp. 843, 852 (E.D. Pa. 1995) ("[A]n individual's status as an alien, legal or otherwise, however, does not entitle the Board to brand him a liar."); *Figeroa v. I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989) (accord).

N.J.R.E. 607 therefore provides the remaining residual mechanism for impeachment.⁴ Although Rule 607 does not formally

⁴ Except as otherwise provided by Rules 405 and 608, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, except that the party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) or the judge finds that the party calling the witness was surprised. A prior consistent statement shall not be admitted to support the credibility of a witness except to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive and except as otherwise provided by the law of evidence.

prescribe an exhaustive list of proper methods of impeachment, almost all impeachment falls within one of the following categories: (1) evidence of witness bias or motive, (2) evidence of the witness' conviction of a crime as further regulated by N.J.R.E. 609, (3) specific contradiction of the witness' testimony, (4) evidence of prior inconsistent statements, and (5) evidence that challenges the witness' capacity to perceive, recollect and communicate. In the context of this case, and of a state criminal proceeding generally, however, inquiry into the defendant's immigration status would not serve any of the foregoing methods of impeachment.

1. Impeachment by Establishing "Bias" Related to a Witness' Federal Immigration Status Is Irrelevant in this Case and in Other Cases Where the Witness is a State Criminal Defendant.

First, it is true that the possible bias of a witness is the proper subject of impeachment, and indeed a criminal defendant has a constitutional right under the Sixth Amendment to expose such bias. *See, Olden v. Kentucky*, 488 U.S. 227, 231 (1988). Thus, the credibility of a witness *for the prosecution* arguably might be impeached by showing that he was an undocumented immigrant, if it could establish a motive to curry favor with the government in exchange for the testimony. *See,*

N.J.R.E. 607.

People v. Turcios, 593 N.E.2d 907, 919 (Ill. App. Ct. 1992) ("An illegal alien might be vulnerable to pressure, real or imagined from the authorities. Thus, a defendant can present the residency status of the State's witness and argue bias if the witness was in fact an illegal alien.") Or a witness might fear retribution that unless she testifies favorably to a party, that party will take some action that could lead to deportation. An undocumented immigrant "tenant called as a witness against her landlord, or an employee called as a witness against her employer, might have reason to fear retaliation," and thus the witnesses' immigration status may be relevant to show bias. Mason, 33 AM. J. TRIAL ADV. at 566.

But in a case where the defendant is *himself* the witness, this type of potential bias is obviously not at issue, since a defendant testifying at his own trial is not thereby trying to curry favor with the prosecution. Apart from the obvious bias of *all* defendants-witnesses that is inherent in their desire to avoid criminal conviction – an incentive that is readily apparent to a jury under any circumstances – a defendant-witness' immigration status would not demonstrate any *additional* incentive to tilt her testimony in her favor. The immigration status of a state criminal defendant is therefore not admissible impeachment evidence of that defendant as a witness.

2. Absent an Actual Criminal Conviction, Evidence of a Witness' Federal Immigration Status is Not Admissible.

The New Jersey Rules of Evidence provides that, "For the purpose of affecting the credibility of any witness, the witness' conviction of a crime, subject to Rule 403, *must be admitted* unless excluded by the judge pursuant to Section (b) of this rule." N.J.R.E. 609. The *status* of being an undocumented immigrant is itself not a crime, but defendant Sanchez-Medina apparently admitted to conduct, i.e. illegal entry into the United States, that is a federal misdemeanor. 8 U.S.C. § 1325.⁵

The prerequisite to this type of impeachment evidence, however, is that there be an actual conviction, not merely

⁵ Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1325.

Other possible federal criminal sanctions related to immigration status include re-entry after deportation (8 U.S.C. § 1326), failure to register as an alien (8 U.S.C. § 1302), employment-related fraud (18 U.S.C. §§ 1341-43), false claim to United States citizenship (18 U.S.C. § 911), false statement to a federal official (18 U.S.C. § 1001), passport fraud (18 U.S.C. §§ 1542, 1543, 1544, 1546), and tax evasion (26 U.S.C. §§ 7203, 7206). *See generally*, Mason, 33 AM. J. TRIAL ADV. at 572.

admission of conduct that might provide the basis of a future prosecution and conviction. And the reality is that, as is apparently true for Mr. Sanchez-Medina, the vast majority of undocumented immigrants who enter the United States illegally are not prosecuted, and at most are subjected to the civil remedy of removal (deportation). (In Mr. Sanchez-Medina's case, the five year statute of limitations that applies to illegal entry, 18 U.S.C. § 3282, would have expired by the time of his trial.)

Moreover, almost half of the undocumented immigrants in the United States entered legally and then overstayed their visas. Pew Research Center, *Modes of Entry for the Unauthorized Migrant Population* (2006) (available at <http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/>). There is therefore no judgment of conviction that can be used against "overstayers" for purposes of impeachment.

3. In a State Criminal Proceeding, Evidence of a Witness' Federal Immigration Status Would Rarely Constitute a Prior Inconsistent Statement on a Relevant Factual Issue.

Under New Jersey Rules of Evidence, use of prior inconsistent statements by a witness is admissible "not only for impeachment purposes [under N.J.R.E. 607] but also for substantive value, provided that the witness is available for cross-examination." *State v. Gross*, 121 N.J. 1, 8 (1990). See generally, N.J.R.E. 803(a)(1)(witness prior inconsistent

statement admissible if "contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability"); *but see* Fed. R. Evid. 801(d)(1)(A) (prior inconsistent statement by witness is not hearsay only if it "was given under penalty of perjury at a trial.").

This Court has established a comprehensive set of fifteen factors to be considered to determine whether the circumstances establish the prior statement's reliability. *Gross*, 121 N.J. at 10. But before engaging in the complex analysis required under *Gross*, one must first pose and answer the basic question: with what trial testimony is the proffered statement inconsistent? Before evidence of a defendant-witness' immigration status is admissible as a prior inconsistent statement, the defendant must first have testified about his immigration status at trial. Likewise, the inquiry into immigration status does not impeach the witness through contradiction, since Sanchez-Medina had not made any statement about his status during his trial testimony. There is no indication that Mr. Sanchez-Medina ever made any statement about his immigration status on direct examination, and indeed it would be somewhat unfathomable why he would choose to do so.

As noted *supra* p.7 (Part I.A.) evidence of federal immigration status is rarely relevant in a state criminal

proceeding, and therefore there would be no reason to expect a witness to testify about that status sua sponte.

If, for the sake of argument, such falsehoods [regarding immigration status] were characterized as "prior inconsistent statements" admissible under *Evidence Rule 607*, that begs the question of what relevant testimony could be elicited at trial as a predicate to enable defense counsel to show such contradictions. For instance, we fail to see how defense counsel would have any relevant and admissible grounds to ask a plaintiff in this case at trial "What is your Social Security number?" in the hopes of laying a foundation to then confront that same plaintiff with an inconsistent Social Security number that he or she presented at an earlier time.

Serrano v. Underground Utilities Corp., 407 N.J. Super. 253, 278-79 (App. Div. 2009) (upholding, in civil discovery dispute, protective order preventing discovery of plaintiffs' immigration status absent particularized showing that it was reasonably calculated to obtain relevant and admissible evidence bearing upon plaintiffs' credibility).

It therefore follows that, absent a rare, particularized setting that calls for direct testimony by a defendant-witness about his immigration status in a state proceeding, evidence regarding that status would not be admissible impeachment evidence as a prior inconsistent statement or contradiction.

4. Evidence Of A Witness' Federal Immigration Status Is Irrelevant to the Witness' Capacity To Perceive, Recollect And Communicate.

Finally, it is self-evident that a witness' immigration status is completely irrelevant to his capacity to perceive,

recollect, communicate, or otherwise make use of cognitive or sensory skills and abilities, and thus presents no opportunity to impeach the witness' testimony on those grounds.

II. UNDER N.J.R.E. 403, THE PROBATIVE VALUE OF A CRIMINAL DEFENDANT'S IMMIGRATION STATUS IS PRESUMPTIVELY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

Although New Jersey courts have yet to publish an opinion applying the test required under N.J.R.E. 403, which balances the probative value of utilizing immigration status against its prejudicial effect, Amicus ACLU-NJ contends that, under these circumstances, the remoteness and inherently prejudicial effect on the jury of disclosing that the defendant illegally entered the United States substantially outweighs any minimal probative value.

A. Evidence About Sanchez-Medina's Federal Immigration Status Was Irrelevant for Any Purpose in this State Criminal Proceeding.

The probative value of evidence is "the tendency of evidence to establish the proposition that it is offered to prove." *State v. Buckley*, 216 N.J. 249, 261 (2013). In determining probative value, the inquiry should focus upon "the logical connection between the proffered evidence and a fact in issue." *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 15 (2004). See generally, N.J.R.E. 401 ("'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of

consequence to the determination of the action.”).

As demonstrated in Part I *supra*, however, there is no “logical connection” between evidence of defendant Sanchez-Medina’s immigration status and any relevant factual proposition at issue in this case. Defendant’s immigration status is not relevant to any substantive issue in this prosecution for sexual assault (Part I.A. *supra*), nor is it even minimally relevant to impeach Mr. Sanchez-Medina’s testimony as a witness (Part I.B. *supra*).

Thus, it appears that admission of evidence of Sanchez-Medina’s immigration status does not even meet the threshold requirement of relevance under N.J.R.E. 402.

B. Evidence about a Witness’ Immigration Status Is Inherently Prejudicial.

Even assuming arguendo that the State were able to articulate some colorable probative value associated with defendant’s immigration status, the obvious and palpable prejudicial effect that such evidence would have on the jury leads to the conclusion that it “is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.” N.J.R.E. 403.

In the first place, as a general matter, “Other-crimes evidence is considered highly prejudicial.” *State v. Vallejo*,

198 N.J. 122, 133 (2009). The "prejudice of other-crime evidence is its tendency to demonstrate a criminal predisposition; therefore, it poses a distinct risk that it will distract a jury from an independent consideration of the evidence that bears directly on guilt itself." *State v. G.S.*, 145 N.J. 460, 468 (1996); *see also, State v. Gibbons*, 105 N.J. 67, 77 (1987)(discussing the prejudicial dangers of other-crime evidence). Thus, this Court "has imposed a high standard for the admission of other-crime evidence because of its potentiality to cause unfair prejudice." *State v. Marrero*, 148 N.J. 469, 490 (1997).

Moreover, this evidence is likely to trigger a particularly virulent and patent hostility that significant segments of the public harbor towards the immigrant community, and particularly the undocumented immigrant community. "Although the weight of evidence suggests that immigration does not cause more crime, this finding has not, it seems, affected public perceptions of immigrant criminality *because public opinion about immigrants seems to be driven more by stereotype than by empirical fact.*" Xia Wang, *Undocumented Immigrants as Perceived Criminal Threat: A Test of the Minority Threat Perspective*, 50 *CRIMINOLOGY* 743, 744 (2012) (emphasis added). Similarly, Professor Stephen H. Legomsky notes:

Despite clear evidence that immigrants are generally less likely than the native-born to engage in criminal behavior, public opinion polls historically, and today, reveal precisely the opposite perceptions. In poll after poll, the public perceives a positive correlation between immigration and crime. *Statements by public figures, especially politicians, often reinforce this perception.*

Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 507 (2007) (emphasis added). This public hostility to undocumented immigrants has not abated, particularly in the vortex of current political discourse. As the respected Pew Research Center recently reported:

[F]ully half of U.S. adults say that immigrants make American society worse when it comes to crime, while just 7% say they are making things better and 41% say they are not having much effect. Similarly, 50% say immigrants are hurting the American economy, significantly more than say they're making it better (28%) or not having much effect (20%).

Pew Research Center, *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065: Views of Immigration's Impact on U.S. Society Mixed*, p.57 (Sep. 28, 2015) (http://www.pewhispanic.org/files/2015/09/2015-09-28_modern-immigration-wave_REPORT.pdf).

Given the negative association that many members of the public incorrectly make between immigrant status and criminality, the prejudicial effect of adducing evidence of a defendant's immigration status in a state criminal trial is

clear. The risk is high that jury members would "forego an independent analysis of the evidence and [] rely merely on the tendency they possess in common with most people of saying 'once a thief—always a thief' . . ." *Stevens*, 115 N.J. at 300. "[T]he use of such evidence is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage." *United States v. Almeida-Perez*, 549 F.3d 1162, 1174 (8th Cir. 2008)(citing Fed. R. Evid. 403).

"Many courts have opined that references to a party's immigration status expose that party to a substantial risk of unfair prejudice." *Andrade v. Walgreens-OptionCare, Inc.*, 784 F. Supp. 2d 533, 535 (E.D. Pa. 2011); *United States v. Diaz*, 494 F.3d 221, 226 (1st Cir. 2007) ("We accept the notion, as does the government, that evidence of a defendant's illegal immigration status carries with it the potential for prejudice."); *Uto v. Job Site Servs. Inc.*, 269 F.R.D. 209, 211 (E.D.N.Y. 2010) ("Even where it is arguable that information concerning a plaintiff's immigration status may be relevant, courts have generally held that 'the potential for prejudice far outweighs whatever minimal probative value such information would have.'").

It is therefore not surprising that courts across the country, under their versions of Rule 403, have balanced the

relevance and prejudice of allowing evidence of immigration status, and typically find that the prejudicial effect greatly outweighs the probative value. "Immigration status is prejudicial in that it "introduces a factor into the case that might encourage the jury to dislike or disapprove of [a party] independent of the merits." *Ayala v. Lee*, 215 Md. App. 457, 478 (Md. Ct. Spec. App. 2013); *Salas v. Hi-Tech Erectors*, 230 P.3d 583 (Wash. 2010) (even though immigration status might be relevant in civil case on issue of future earnings, evidence was excluded due to prejudicial effect); *State v. Avendano-Lopez*, 904 P.2d 324, 331 (Wash. Ct. App. 1995) (in state criminal proceeding, prosecutor's question to defendant "You are not legal in this country, are you?" was "grossly improper" and prejudicial); *Gonzalez v. City of Franklin*, 403 N.W.2d 747 (Wis. 1987) (admission of immigration status has "obvious prejudicial effect."). See also *Riascos v. State*, 792 S.W.2d 754 (Tex. App. 1990) (defense counsel provided ineffective assistance when failed to object prosecutor's references to the defendant's nationality and immigration status because they were so pervasive and prejudicial). Cf. *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, (S.D.N.Y. 2002) (denying discovery related to plaintiffs' immigration status, when the risk of injury, the danger of intimidation, and the danger of destroying the cause of action, would inhibit plaintiffs in pursuing their

rights to the plaintiffs if such information were disclosed outweighs the need for its disclosure.).

As the Appellate Division has noted in the context of a civil case, "undue prejudice would be unavoidable if the jurors learned that any of the plaintiffs were illegal immigrant workers. Their illegal status in this country is very likely to trigger negative sentiments in the minds of some jurors." *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 274 (App. Div. 2009). Given that the prejudicial effect of inquiry into a witness' immigration status in a state proceeding (whether civil or criminal) is inherently high, and the probative value of such evidence is in most cases minimal if not non-existent, Amicus ACLU-NJ agrees with Judge Carchman in his concurring opinion in *Serrano*:

I urge that we go further and suggest that the proper methodology for balancing the Evidence Rule 403 factors is to start with a presumption that any inquiry into matters of immigration status is not appropriate and place the burden on the proponent to demonstrate, beyond the issue of credibility, why such inquiry is germane to the issues in dispute.

Serrano, 407 N.J. Super. at 285 (Carchman, J.A.D., concurring). Creating such a presumption would both send a clear signal to counsel and give clear guidance to trial courts on how to strike the proper balance under N.J. Evid. 403 in this problematic situation.

III. THIS COURT SHOULD ESTABLISH CLEAR STANDARDS DEFINING THE RARE INSTANCES IN WHICH EVIDENCE OF A WITNESS' FEDERAL IMMIGRATION STATUS IS ADMISSIBLE.

The Appellate Division's opinion wisely did not attempt to justify the admission into evidence of defendant's immigration status, but rather found that the curative instruction eventually given by the trial judge essentially rendered the error harmless. Amicus ACLU-NJ respectfully but vigorously disagrees, and indeed suggests that this case demonstrates why this Court should provide clear procedural and substantive guidance to the lower courts on how to handle attempts to proffer evidence of the immigration status of a witness.

A. *The Jury Instruction Did Not and Could Not Cure the Prejudicial Effect of Admitting the Evidence of Immigration Status.*

The trial judge made two attempts to cure the prejudicial effect of allowing the inquiry into Sanchez-Medina's illegal entry into the United States. Neither was effective, and indeed may have created further confusion.

1. *The Jury Instruction Was Not Curative, but Rather Exacerbated the Error.*

The first instruction given by the trial judge at the close of defendant's testimony warned the jury "not to use [evidence of immigration status] as proof of guilt concerning the offenses listed in the indictment." Nevertheless, the trial judge stated that the jury was permitted to use such evidence as an

indication of "whether or not he follows *the rules of society*," which the judge said "could make a difference concerning the issue of credibility."

Before the final charge, however, the trial judge perhaps realized that the original instruction might be reasonably interpreted to allow the jury to do precisely what N.J.R.E. 404(b) expressly forbids, use the evidence of prior conduct to establish propensity towards criminality – i.e. propensity to disregard the "rules of society." The trial judge therefore instructed the jury to disregard the first instruction entirely, but replaced it with an instruction that merely stated in the negative that "You may not use the mere fact that the defendant may be illegally in the country to conclude that he is less likely to *comply with our society's rules* and therefore committed the crimes in the indictment."

Thus, compliance with society's rules, which was a benchmark of *credibility* in the first and discarded instruction, was redefined as an aspect of the prohibited inquiry into *propensity* in the second and final instruction.⁶

⁶ The model charge recently published by the Model Criminal Jury Charge Committee re-establishes the link between credibility and compliance with the "rules of society."

You may not use the mere fact that [name of witness(es)] may not be a legal resident of the United States to conclude that [he/she/they] [is/are] less likely to *comply with our society's rules* and,

The resulting effect of these confusing instructions upon a lay jury is that they were only told what the evidence could *not* be used for. But the jury was not told to *disregard* the evidence. The jury was therefore left to speculate on what the evidence of immigration status *could* be used for. As best as Amicus ACLU-NJ can speculate, the trial judge, and perhaps also the Appellate Division, thought the evidence of immigration status could still be used to impeach credibility (once "credibility" was disassociated from compliance with the "rules of society").

The Appellate Division's position is difficult to describe, since it stated both that the admission of the evidence was "erroneous" and that the final instruction that limited – but did not completely disallow – the evidence of immigration status was "flawed." *State v. Sanchez-Medina*, No. A-4779-13T1, type op. at 18 (App. Div. Jun. 14, 2016). On the other hand, the Appellate Division concluded that these "flawed" instructions "were sufficient to eliminate any prejudice that might have

therefore, more likely to ignore the oath requiring truthfulness on the witness stand. Indeed, that [name of witness(es)] may be here in violation of federal immigration laws does not, in and of itself, affect [his/her/their] credibility.

Credibility - Immigration Consequences Of Testimony,

<http://www.judiciary.state.nj.us/criminal/charges/credimm.pdf>.

resulted from the erroneous admission of evidence regarding defendant's illegal entry into the United States."

If the upshot of the Appellate Division's ruling was that the admission of the immigration status evidence, although erroneous, was "harmless error," then Amicus ACLU-NJ disagrees that the prejudicial effect of the evidence was successfully purged, as discussed *supra* p.22 (Part II.B.)

If the ruling below was that the evidence of immigration status was admissible for the limited purpose of impeaching credibility, then Amicus ACLU-NJ also disagrees, for the reasons stated *supra* p.11 (Part I.B.), as does this Court's Model Criminal Jury Charge Committee (see *supra* note 6 ("that [name of witness(es)] may be here in violation of federal immigration laws does not, in and of itself, affect [his/her/their] credibility"). But more to the point for this discussion, it is unclear how the jury could ever properly navigate its way out of the confusion left by these shifting and incomplete instructions, and determine what to make of this evidence one way or another. Such a state of indirection exacerbates the prejudicial effect of the evidence.

2. Even a Direct Instruction to Disregard the Evidence of Immigration Status Would Not Have Purged the Prejudicial Effect.

Even if the trial judge had given a clear and unequivocal instruction to *disregard* the prosecutor's inquiry into

defendant's immigration status, once the jury is exposed to such prejudicial evidence, any attempt to "unring the bell" is unlikely to be effective. In discussing the two types of evidentiary instructions typically given to juries – one to completely disregard evidence, and the other limit the use of evidence for certain purposes – Professor David Alan Sklansky stated bluntly in his seminal law review article on this topic that:

There are two well-known facts about evidentiary instructions of both varieties. The first is that our system relies heavily on these instructions. *The second is that they do not work.* Courts "presume" that juries follow evidentiary instructions, as well as other instructions from the judge. This presumption is often said to be a "premise upon which our jury system is founded." But the presumption is also widely acknowledged to be false, a kind of professional myth. The most frequently quoted assessment of evidentiary instructions is Justice Jackson's: "*The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.*" Juries are "presumed" to follow evidentiary instructions not because we believe that they really do, but because trusting them to do so is a practical necessity.

David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408-09 (2013) (footnotes and citations omitted) (surveying empirical studies on effects of curative instructions to jury). See, Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock*

Jurors, 7 J. APPLIED SOC. PSYCHOL. 205 (1977) (mock juror study indicated when judge specifically admonished the jurors to disregard inadmissible testimony, their verdicts were influenced in the direction of that testimony.); Gabriel J. Chin, *Illegal Entry as Crime, Deportation and Punishment*, 58 UCLA L. REV. 1417, 1427 n.52 (2011) ("There is reason to doubt that juries follow limiting or curative instructions").

Where, as here, the court improperly admits inadmissible character evidence, the jury has been irreversibly exposed to evidence of an unduly prejudicial nature that may preclude defendant from receiving a fair trial. "Once the jury has heard the [prejudicial evidence], it is very difficult to unring the bell with a cautionary instruction that the weight of the expert's opinion is dependent upon the facts upon which it is based." *State v. Vandeweaghe*, 351 N.J. Super. 467, 482 (App. Div. 2002). Anticipating such circumstances, "the judge should consider excluding the evidence under [N.J.R.E. 403] because, in the absence of substantive proof, its probative value is substantially diminished by the risk of undue prejudice." *Vandeweaghe*, 351 N.J. Super. at 482. "[T]he inherently prejudicial nature of such [other-crime] evidence casts doubt on a jury's ability to follow even the most precise limiting instruction." *State v. Stevens*, 115 N.J. 289, 309 (1989). "[S]trict compliance with such a "limiting" instruction is an

extraordinarily difficult task for the average juror." *Id.* at 304.

Unfortunately, under these circumstances, the damage was done once the jury was exposed to the prejudicial evidence, and no instruction, no matter how emphatic, could restore the status quo ante.

B. The Procedures Outlined in the Model Jury Charge Adopted by the Model Criminal Jury Charge Committee Should Be Reaffirmed and Explained.

As this Court is no doubt aware, its Model Criminal Jury Charge Committee recently published a revised model charge explaining the permissible use, if any, of evidence related to a witness' immigration status. See *supra* note 6 ("Credibility - Immigration Consequences Of Testimony," revised Jun. 6, 2016). The model charge makes clear that generally a jury may not infer from evidence of immigration status that the witness is "less likely to comply with our society's rules and, therefore, more likely to ignore the oath requiring truthfulness on the witness stand." The model charge makes clear that the fact that "[name of witness(es)] may be here in violation of federal immigration laws does not, in and of itself, affect [his/her/their] credibility." To the extent that the model charge contemplates ever permitting evidence of immigration status, it focuses on the discrete situation in which immigration status might be used to impeach the credibility of a witness whose "testimony was

influenced by the hope or expectation for any favorable treatment or reward such as delaying or avoiding removal from the United States by federal immigration authorities." As discussed *supra* p.15 (Part I.B.1), Amicus ACLU-NJ agrees that immigration status might, in certain cases, be admissible to establish witness bias and thus impeach the witness' credibility, although that use does not arise in criminal matters in which the defendant is the witness.

Amicus would like to commend to the Court's favorable attention the Committee's procedural warning, contained in footnote 1:

Before this charge is given, the Court should first determine in a hearing outside of the presence of the jury that the probative value of disclosing the immigration status of a witness outweighs the likely prejudice to that witness from that disclosure so that defendant's right to a fair trial by confronting that witness must prevail. *N.J.R.E.* 104, 403, and 404(b). See also *Serrano v. Underground Utils. Corporation*, 407 N.J. Super. 253, 273 (App. Div. 2009).

As this case amply demonstrates, much judicial effort and resources can be saved, and protections against unfair prejudice established, by adopting the procedural safeguard recommended by the Committee. ACLU-NJ urges this Court to take the opportunity afforded by this case to announce a general procedure that, before any party seeks to adduce evidence of the immigration status of any witness or party at trial, the trial judge must conduct a hearing pursuant to *N.J.R.E.* 104(a), to determine

whether the inherent prejudicial effect associated with inquiry into federal immigration status outweighs its probative value under N.J.R.E. 403.

Moreover, in the context of a state criminal proceeding in which the prosecutor seeks to adduce evidence of defendant's immigration status, because the risk of prejudice is so inherently high, and the probative value usually minimal, Amicus ACLU-NJ believes it is appropriate for this Court, as it has done in similar situations, to impose the *burden on the prosecution* to establish that the Rule 403 balance operates in its favor. As this Court has held, "the party seeking to admit other-crimes evidence bears the burden of establishing that the probative value of the evidence is not outweighed by its apparent prejudice." *State v. J.M.*, 225 N.J. 146, 158 (2016). It is therefore appropriate that the same allocation of evidentiary burden apply here and in similar cases.

CONCLUSION

There will no doubt be many fora in which the public may ventilate their opinions and attitudes towards this nation's immigration policies. A state court adjudicating a criminal case, however, is emphatically not one of them. For the reasons set forth herein, Amicus ACLU of New Jersey respectfully urges this Court to reverse the judgment of the Appellate Division below, and remand this matter for a new trial. Moreover, ACLU-NJ respectfully urges this Court to adopt clear procedures limiting the use of immigration status, as described above.

December 28, 2016.

Respectfully submitted,



EDWARD BAROCAS
JEANNE LOCICERO
ALEXANDER SHALOM
American Civil Liberties Union of
New Jersey Foundation
Post Office Box 32159
89 Market St., 7th Floor
Newark, New Jersey 07102
973-854-1717

RONALD K. CHEN
Rutgers Constitutional Rights
Clinic, Atty No. 02719-1983
Center for Law & Justice
123 Washington St.
Newark, NJ 07102
(973) 353-5551

*Attorney for Amicus Curiae**

Of Counsel and On the Brief.

- * Counsel is grateful to Annabel Pollioni and Michael Sheflin, students in the Rutgers Constitutional Rights Clinic, for their assistance in the preparation of this brief.