

# Immigration Practice Tips

## Defense-Relevant Immigration News

by Saadia Aleem, Manny Vargas, and Marianne Yang  
of NYSDA's Immigrant Defense Project\* (IDP)

### ***US Supreme Court Finds Mandatory Detention of Deportable Immigrants with Criminal Convictions Constitutional During Immigration Proceedings.***

The Supreme Court held on Apr. 29, 2003, that it is constitutionally permissible for the government to deny noncitizens convicted of certain crimes release on bond pending completion of deportation or removal proceedings held after they are released from criminal custody. The 5-4 majority in *Demore v Kim* reversed the 9th Circuit Court of Appeals, which had found that Congress's 1996 mandatory detention provision violated the due process rights of lawful permanent resident immigrants. The *Kim* majority found that Congress was justified in requiring that immigrants who had been convicted of crimes be detained for the limited period of time necessary to complete their removal proceedings, and noted what the Court called Congress's authority to create immigration laws that would be "unacceptable if applied to citizens." 123 SCt 1708, 1717 (2003).

The holding means that most noncitizens convicted of crimes that subject them to removal will now be subject to mandatory detention by the federal government upon release from criminal custody. The mandatory detention provision covers lawful permanent resident immigrants ("green card" holders) convicted of any crime falling within certain grounds of criminal deportability. This includes an aggravated felony, two crimes involving moral turpitude, one crime involving moral turpitude for which the individual has been sentenced to a term of imprisonment of at least one year, a controlled substance offense, or a firearm offense. See INA 236(c); 8 USC 1226(c).

As a result of this decision, defense lawyers should advise their noncitizen clients that they may now face mandatory detention by the federal government after completion of their state or federal sentence. Unfortunately, immigration detention can mean additional months or, in some cases, years of federal custody in a detention facility—anywhere in the country. Most New York immigrants in federal immigration custody after completing a state criminal sentence are currently held in the federal detention facility in Batavia, New York, or in

\* The Immigrant Defense Project provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the IDP on Tuesdays and Thursdays from 1:30 p.m. to 4:30 p.m. at (212) 898-4132.

local jails or other facilities in New Jersey, Pennsylvania, or Louisiana.

If you have a client who has already been released from criminal custody, but who was released from immigration custody after a bond hearing, be aware that the federal immigration authorities have already begun to re-detain individuals who had been released after bond hearings held pursuant to lower court decisions that had found that the mandatory detention statute unconstitutional. As this was going to print, efforts to re-detain individuals were concentrated on the West Coast. If you have a New York client and want to determine his or her risk for re-detention, please contact our hotline, (212) 898-4132, for the latest developments.

### **New Address and Phone # for the IDP**

We continue to receive letters and phone calls directed to our old address. Please note current contact information:

**Immigrant Defense Project – NYSDA**  
**2 Washington Street, 7 North**  
**New York, NY 10004**  
**Hotline #: (212) 898-4132**

Lawyers seeking to avoid mandatory detention or re-detention of a noncitizen client should take note of the following aspects of the Supreme Court's decision:

- The court relied on the petitioner's concession of deportability during agency proceedings. Individuals who did not and do not concede deportability can argue that this case does not apply to them. As it is the government's responsibility to prove the deportability of a lawful permanent resident immigrant, this is one more reason for such an individual not to concede deportability during immigration removal proceedings.
- The decision leaves open the opportunity to challenge the applicability of the mandatory detention statute through a *Matter of Joseph* hearing. *Matter of Joseph* is a 1999 Board of Immigration Appeals (BIA) precedent decision holding that a lawful permanent resident will not be held in custody pursuant to the mandatory detention statute if the Immigration Judge or the BIA finds that the government is substantially unlikely to prevail on a charge of deportability. 22 I&N Dec. 799.
- The Court distinguishes this case from prior precedent limiting the government's authority to detain immigrants by finding that most immigrants are in custody for only a "brief period" (about 4 months). In fact, many immigrants are held in custody for significantly longer periods.

Such delay, sometimes the result of government postponements, could form the basis for seeking a client's release.

The American Immigration Law Foundation plans soon to circulate a practice advisory listing and detailing these and other arguments that may be raised to distinguish an individual's case from *Demore v Kim*. When completed, that practice advisory should be available at their website: [www.aifl.org](http://www.aifl.org).

### **2nd Circuit issues favorable decisions that reduce the likelihood that certain NY crimes will be deemed a "crime of violence."**

On Apr. 22, 2003, the 2nd Circuit ruled that a conviction under New York's 2nd degree manslaughter statute (Penal Law 125.15(1)) is not a "crime of violence" and therefore not an aggravated felony for immigration purposes. *Jobson v Ashcroft*, 326 F3d 367 (2d Cir. 2003). That same day, the court also ruled that a conviction under a Connecticut misdemeanor assault statute, which is materially identical to New York's misdemeanor simple assault statute (Penal Law 120.00[1]), is not a "crime of violence" and therefore not an aggravated felony for immigration purposes. *Chrzanoski v Ashcroft*, 327 F3d 188 (2d Cir. 2003).

Conviction of an aggravated felony generally results in the mandatory deportation of noncitizens from the United States. Together, *Jobson* and *Chrzanoski* dramatically reduce the likelihood that some other New York State convictions will be deemed aggravated felonies. See INA 101(a)(43)(F) (defining "aggravated felony" to include conviction of a "crime of violence" with a prison sentence of at least one year).

The decisions also reduce the likelihood that some New York State convictions arising from domestic violence situations will trigger the separate "crime of domestic violence" ground of deportability. See INA 237(a)(2)(E). Under the immigration laws, a crime cannot be a crime of domestic violence unless it is also a "crime of violence." For example, a conviction for simple assault against a spouse under Penal Law 120.00 will not be deemed a crime of domestic violence in the 2nd Circuit because, in light of *Chrzanoski*, it will not be deemed a crime of violence.

The immigration laws reference the following definition of "crime of violence" in the federal criminal code: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See 18 USC 16.

In *Jobson*, the 2nd Circuit interpreted the second prong

of the above definition to require that an offense pose a substantial risk that a defendant will *use physical force*, and that the risk is of an *intentional* use of that force. Applying a categorical approach, the court held that the minimum conduct necessary to violate the New York's 2nd degree manslaughter statute is not "by its nature" a crime of violence under that second prong of the definition for two reasons. First, the risk that a defendant will *use physical force* in the commission of an offense is materially different from the risk that an offense will result in physical injury. The state statute, however, requires only the latter; passive conduct or omissions alone are sufficient for a conviction under the statute. Second, an unintentional accident caused by mere recklessness, which would sustain a conviction under the state statute, cannot properly be said to involve a substantial risk that a defendant will *use physical force*.

In *Chrzanoski*, the court ruled that the Connecticut misdemeanor assault at issue is not a crime of violence under the first prong of the "crime of violence" definition because use of force is not an element. Again applying a categorical approach, the court reasoned that although that Connecticut statute requires proof that a defendant intentionally caused physical injury to another,\* the statute does not have as an element that the defendant *use physical force* to cause that injury, which is required by the first prong of the crime of violence definition.

NYSDA submitted an *amicus curiae* brief in support of the petitioner in *Jobson*. The brief was drafted, submitted, and argued before the 2d Circuit by Deirdre von Dornum, formerly of the law firm of Wilmer, Cutler & Pickering as *pro bono* counsel to NYSDA. The IDP also recruited *pro bono* co-counsel for the *Chrzanoski* case, Katherine Goldstein, also of the law firm of Wilmer, Cutler & Pickering.

**The Bottom Line:** These 2nd Circuit decisions are good news for criminal defense attorneys and their noncitizen clients. Conviction for New York 2nd degree manslaughter or 3rd degree assault will now certainly not be deemed a crime of violence aggravated felony or a crime of domestic violence that may trigger negative immigration consequences, at least in any case where removal proceedings take place within the 2nd Circuit. Moreover, many other New York convictions—for example, certain other assault and related offenses (menacing, endangerment, stalking), certain homicide and related offenses and certain criminal mischief and harassment offenses—are now less likely to be deemed crimes of violence or crimes of domestic violence in light of the recent decisions. Practitioners should be aware, however, that *Jobson* and *Chrzanoski* control only in the 2nd Circuit. A

\* As does subsection (1) of New York's misdemeanor simple assault statute.

client who ends up in removal proceedings outside of the jurisdiction of the 2nd Circuit may be subjected to a broader definition of “crime of violence.”

Any *misdemeanor* conviction under a New York statute that does not include as an element the use, attempted use, or threatened use of force (*e.g.* hitting, kicking, punching, etc.) should not be deemed a crime of violence aggravated felony in any case where removal proceedings take place within the 2nd Circuit, even if the sentence imposed for that conviction is unavoidably for the maximum one year. It also should not be deemed a crime of domestic violence ground of deportability. An element of causing physical injury or serious physical injury in any statute will not, by itself, be sufficient to satisfy the crime of violence definition, even if the statute requires the defendant’s intentional causation of that physical injury.

Any *felony* conviction under a New York statute must be analyzed under both prongs of the “crime of violence” definition. In light of *Chrzanoski* and *Jobson*, a conviction under a felony New York statute should not be deemed a crime of violence aggravated felony or a crime of domestic violence ground of deportability in any case where removal proceedings take place within the 2nd Circuit if (i) the statute does not include as an element the use, attempted use, or threatened use of force (*e.g.* hitting, kicking, punching, etc.) and (ii) the minimum conduct punishable under the statute does not inherently pose a substantial risk that a defendant will intentionally use physical force. Here also, an element of causing physical injury or serious physical injury in any statute should not be sufficient to satisfy the crime of violence definition, even if the statute requires the defendant’s intentional causation of that physical injury. In addition, a statute that requires a *mens rea* of less than “intentional” should not, by itself, be sufficient to satisfy the crime of violence definition.

Practitioners should be aware that even if a conviction may not trigger the crime of violence aggravated felony or the crime of domestic violence grounds of deportability, the same conviction might trigger another ground of removal, such as the “crime involving moral turpitude” ground.

For further guidance on whether a conviction under a particular New York statute may be a crime of violence aggravated felony or a crime of domestic violence in light of *Jobson* and *Chzranoski*, practitioners are urged to call the IDP hotline at 212-898-4132 (Tues./Thurs. 1:30-4:30 p.m.). Also, reference our Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses, available in PDF file format on our website at [www.nysda.org](http://www.nysda.org), listed under “Project Resources” of the “Immigrant Defense Project” page of the “NYSDA Resources” section.

### **2nd Circuit Upholds Dismissal of Illegal Reentry After Deportation Charge Based on a Finding of Fundamental Unfairness of the Prior Deportation Proceedings**

The 2nd Circuit upheld on May 15, 2003, an Eastern District of New York federal court order dismissing a federal indictment charging illegal reentry after deportation in a case where the defendant’s immigration lawyer in the prior deportation proceedings had failed to file an application for relief that might have prevented deportation. *US v Perez*, 3 US App. LEXIS 9412 (2d Cir. 2003).

Under the illegal reentry statute, a noncitizen may only succeed in his or her challenge of a deportation order as an element of illegal reentry if: (1) all administrative remedies have been exhausted; (2) the deportation proceeding improperly deprived the immigrant of an opportunity for judicial review; and (3) the entry of the deportation order was fundamentally unfair. *See* 8 USC 1226(d).

The 2nd Circuit found that the defendant, *Perez*, had met the two requirements set forth in its prior precedents to establish fundamental unfairness. One, there was a fundamental procedural error based on the ineffective assistance of his counsel in failing to timely file his application for relief in the deportation proceedings. Two, prejudice resulted from that error because *Perez* was eligible for the relief and could have made a strong showing in support of a grant of such relief. The court also found that this ineffective assistance of counsel effectively denied *Perez* the opportunity for judicial review. In addition, the Court found that, although *Perez* did not appeal his deportation order to the Board of Immigration Appeals (BIA), he had satisfied the exhaustion requirement by appealing the denial of his motion to reopen to the BIA. The fact that he did not explicitly state that he was claiming ineffective assistance of counsel was irrelevant for exhaustion purposes because the BIA was fully aware of *Perez*’s contention that his lawyer knew of the deadline for *Perez*’s application for discretionary relief from deportation.

In *Perez*, the 2nd Circuit reaffirmed its 1994 holding in *Rabiu v INS*, 41 F3d 879 (2d Cir. 1994) that failure of an attorney to file an application for discretionary relief, where the immigrant client had a *prima facie* case for such relief, constitutes ineffective assistance of counsel. In finding that this ineffective assistance of counsel improperly denied *Perez* the opportunity for judicial review of his deportation order, the court rejected the government’s attempt to distinguish *Rabiu* on the grounds that it involved a direct attack on appeal of a deportation order, not a collateral attack in subsequent illegal reentry criminal proceedings. Citing *United States v Mendoza-Lopez*, 481 US 828 (1987), in which the Supreme Court found troubling the use of the result of an administrative proceeding to establish an element of a criminal offense, the Court stated: “Accordingly, it would not be logical to subject a

## Immigration Practice Tips *concluded*

deportation order to less scrutiny in the criminal context than in the civil context of deportation, and we therefore hold that the standard of review is not higher on collateral attack than on direct attack.”

### **New York City Exempts Police Officers from New Immigrant Status Confidentiality Policy**

New York City announced on May 30, 2003 the issuance of Executive Order 34, a new immigrant status confidentiality policy that exempts police officers from its general prohibition against City employees inquiring into the immigration status of persons with whom they come into contact. The Order prohibits most other City employees from making such inquiry unless it is relevant to determining eligibility for a program, service, or benefit, relevant to the provision of City services, or otherwise required by law. Police are exempted from the order’s key provisions. Unfortunately for noncitizen City residents—whether they be suspects, witnesses, or even victims of crimes—this means that the City now has no official policy of protecting them from police questioning their immigration status or disclosure of their immigration status to federal immigration authorities.

### **IDP Pro Bono Counsel Meade Recognized by NYSBA for Work on Behalf of Immigrants**

On May 1, 2003, the New York State Bar Association (NYSBA) honored Christopher J. Meade of Wilmer Cutler & Pickering for his *pro bono* efforts in representing immigrants with criminal convictions. Meade has been at the forefront of defending the rights of immigrants in this country, a difficult task given the anti-immigrant sentiment enveloping much of the country. He has been nationally recognized for his expertise in retroactivity issues in immigration, and has been involved in impact litigation in the US Courts of Appeals for the 2nd, 3rd, and 4th Circuits to help immigrants with past criminal convictions apply for forms of discretionary relief that no longer exist, but that existed at the time of the criminal conduct. In a number of cases, Meade and his firm have submitted *amicus curiae* briefs on behalf of NYSDA’s IDP to help courts understand the impact of immigration laws on immigrants and their families. He has also worked closely with the Immigrants’ Rights Project of the American Civil Liberties Union in a number of pro-immigrants’ rights cases. In addition, Meade has recruited a number of excellent, conscientious lawyers from his firm to assist with what is often difficult and time consuming *pro bono* work. (See other Wilmer Cutler & Pickering efforts described above, p. 10.) ♪

\* As does subsection (1) of New York’s misdemeanor simple assault statute.

## Book Review

### **Criminal Law Slangage of New York**

By Glenn Edward Murray and  
Gary Muldoon  
Gould Publications, 2003  
120 pages  
\$17.95

By Ken Strutin\*

New York criminal practice abounds with acronyms, abbreviations, and terms of art. Defense lawyers familiar with ACD, DWI and 710.30 notices might find pause when they encounter a DRE (drug recognition examination)—which includes HGN (horizontal gaze nystagmus)—or the Green/Glover Test for assessing lesser-included offenses. A quick glance at *Criminal Law Slangage of New York* will awaken attorneys to gaps in their knowledge of working shorthand and the need for a good reference source to fill them. Two cicerones<sup>1</sup> of New York criminal practice, Glenn Edward Murray, author of *Collateral Consequences of Criminal Conduct* (NYSBA 1992) and Gary Muldoon, co-author of *Handling a Criminal Case in New York* (West Group 2002) pooled their vast experience and knowledge to bring this new, essential work into existence.

*Criminal Law Slangage* provides an easy method for deciphering New York criminal law expressions. Arranged in dictionary style, each entry includes a brief definition of the acronym or term, along with cites to legal and reference works. More than 500 expressions from AAB (the Administrative Adjudicative Bureau), to Zero Tolerance Law can be found. Written with the practitioner in mind, this collection of legal expressions serves double duty as an interpretative reference source and handy guide to essential concepts in New York criminal practice.

Defense attorneys will discover a constellation of interesting and useful legal terminology in *Criminal Law Slangage*. The book will help criminal lawyers expand their working vocabulary and provide fast reference to key cases and statutes. Here is a reference work to keep pace with the rapidly changing language of New York criminal law.

#### **Ordering Information:**

Gould Publications  
1-800-847-6502  
[www.gouldlaw.com](http://www.gouldlaw.com)

\* *Ken Strutin* is a legal information consultant for the New York State Defenders Association.

<sup>1</sup> Ed. note: A “cicerone” is a guide.