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Immigration Cases Notes for Massachusetts Criminal Defense Attorneys
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From the U.S. Supreme Court:

Kawashima v. Holder, 2012 U.S. LEXIS 1084 (Feb. 21, 2012)

Mr. and Mrs. Kawashima, permanent residents of the U.S. since 1984, were convicted of federal tax offenses. Mr. Kawashima was convicted of willfully making and subscribing a false tax return, and Mrs. Kawashima was convicted of aiding and assisting in the preparation of a false tax return.

In a 6-3 decision authored by Justice Thomas, the Supreme Court affirmed that these offenses were aggravated felonies under 8 U.S.C. §1101(a)(43)(M)(i), a category of offenses involving fraud or deceit in which the loss to the victim exceeded $10,000. The Court held that although these offenses do not explicitly contain an element of deceit or fraud, this particular category of aggravated felonies only requires that the offense contain elements that "necessarily entail fraudulent or deceitful conduct." The Court also rejected the argument that because clause (ii) of subsection (M) independently makes certain tax crimes aggravated felonies, clause (i) could not be read to include tax crimes. It held that the clauses were not mutually exclusive, and that clause (ii) was merely Congress' way of emphasizing that tax evasion offenses were to be included as aggravated felonies.

Practice Note: For Massachusetts state practitioners' purposes, this case mainly serves as a cautionary tale about long-time permanent residents convicted of relatively minor offenses. As Justice Ginsburg notes in her dissent, this category of aggravated felonies includes both felonies and misdemeanors and is extremely broad. The Kawashimas were permanent residents for twenty-eight years. Now, regardless of the amount of time they have lived in the U.S., their family ties, medical conditions, and the hardship they might suffer by having to return to their native country after all these years, they are facing automatic deportation and permanent exile from the United States.

For more on the "human side" of this case, please read this recent LA Times article on the Kawashimas: http://www.latimes.com/news/local/la-me-0226-deport-tax-20120226,0,2010800.story.

From the Board of Immigration Appeals:

Matter of Castro-Rodriguez, 25 I&N Dec. 698 (BIA, Feb. 14, 2012)

Mr. Castro, a permanent resident, was convicted of the Virginia offense of misdemeanor possession with the intent to distribute less than one-half ounce of marijuana. He was placed in removal proceedings and the Government argued that the offense was an aggravated felony under 8 U.S.C. §1101(a)(43)(B), a category involving drug trafficking crimes. Under federal immigration law, drug trafficking crimes include any offense that contains an element of distribution, including possession with intent to distribute, regardless of whether the state classifies it as a felony or misdemeanor. However, there is an exception for people who distributed a "small" amount of marijuana for no remuneration. See 21 USC §841(b)(4). If the offense meets the exception, it is not an aggravated felony, and thus does not carry the added penalties and restrictions of aggravated felonies. Mr. Castro argued that because his offense fell within the exception, he had not been convicted of an aggravated felony.

The BIA agreed that such an exception applied to the drug trafficking category of aggravated felonies. It thus upheld and clarified its prior decision of *Matter of Aruna*, which had a similar holding. The BIA then held that it was Mr. Castro's burden to demonstrate, by a preponderance of the evidence, that his offense was for a small amount of marijuana for no remuneration. Parting course with its holding in *Aruna*, the court held that Mr. Castro was allowed to use evidence beyond the record of conviction to meet his burden. (In other words, the modified categorical approach did not apply to this particular inquiry). It held that a general rule of thumb was that 30 grams or less of marijuana could be considered a small amount of marijuana, except if aggravating circumstances were present. It remanded the case for more evidence pertaining to remuneration.

Practice Note: This case applies to the Massachusetts offenses of possession with intent to distribute a Class D substance, and distribution of a Class D substance where marijuana is involved (first offense only for either offense). G.L. c. 94C, §32C(a). The case is particularly timely in light of the SJC's recent decision in *Commonwealth v. Keefner*, 2012 Mass. LEXIS 29 (Feb. 13, 2012). That case held that the Massachusetts offense of possession with intent to distribute one ounce or less of marijuana remained valid, even in light of the decriminalization of simple possession of one ounce or less of marijuana. *Keefner* confirms that it remains possible to be convicted of possession with intent to distribute a small amount of marijuana for no remuneration in Massachusetts. If a defendant is convicted of either of these Massachusetts offenses, he can avoid classification as an aggravated felony in immigration proceedings if he proves with "any probative evidence" that he distributed or intended to distribute a small amount of marijuana for no remuneration.

A defense attorney who cannot avoid a conviction for this offense could protect her client by making it clear on the record of conviction (through the plea colloquy, jury instructions, etc.) the amount possessed and that there was no remuneration. By avoiding an aggravated felony finding, the defendant would avoid the particularly severe immigration consequences that aggravated felonies carry, and may be eligible for several defenses to deportation that are not available to those with aggravated felonies on their records.