



# The 20th Annual Immigration Law Update

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

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## Developments in Removal Grounds and Aggravated Felony Provisions

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## INS HYPOTHETICALS FOR AILA CONFERENCE

### HYPO I

Tina Spice is a native and citizen of the United Kingdom who entered the United States on January 20, 1976, as a lawful permanent resident. She was convicted in the State of Florida in 1988, after pleading no contest to filing a fraudulent insurance claim in violation of section 817.234 of the Florida Statutes. The information alleged that Ms. Spice had filed an insurance claim with her insurance company informing them that her car had been stolen and that she had paid \$17,000, when in fact she had only paid \$10 for it. The insurance company did not pay the claim. In 1980, Ms. Spice was convicted again. This time in the United States District Court for the Southern District of Florida for misappropriation of postal funds, theft of mail matter by a postal employee, and stealing and converting a blank money order from the United States Postal Service in violation of 18 U.S.C. 1709 and 1711. The INS has issued a Notice to Appear charging Ms. Spice with being subject to removal pursuant to sections 237(a)(2)(A)(ii) and 237 (a)(2)(A)(iii). Ms. Spice's attorney concedes that she is subject to removal under section 237(a)(2)(A)(ii), but disputes that she is an aggravated felon under section 237 (a)(2)(A)(iii).

### HYPO II

Helmut Shultz is a native and citizen of Germany who last entered the United States as a lawful permanent resident on July 23, 1980. On September 22, 1992, he was convicted in the US District Court for the Southern District of Florida of three counts of intent to defraud and affecting interstate commerce through the use of an unauthorized access device, to wit credit cards in violation of 18 USC 1029(a)(2). The amount of the loss to the victim, Miami Bank, was \$25,000. As part of the judgment and conviction Mr. Shultz was required to make restitution to Miami Bank which he did. The INS issued an NTA charging Mr. Shultz as being subject to removal pursuant to 237(a)(2)(A)(iii).

Mikhael is a citizen of the Ukraine. He is Jewish. Mikhael entered the United States with a refugee visa in June of 1990. He received the visa based on persecution he suffered on account of his Jewish religion. In 1991, he adjusted his status to that of lawful permanent resident. He received a roll-back date of June 1990. Mikhael still has nightmares and suffers from depression and nervousness because of the harrassment and discrimination he suffered while living in Ukraine.

In 1992, he married a U.S. citizen.

In June of 1993, he was convicted of DUI in Miami, Florida.

In June of 1997, he was convicted of his second DUI in Miami, Florida. He was sentenced to eight (8) months in prison.

Mikhael was released from prison in June of 1998. He was so distraught that he argued with his wife. He was arrested for domestic violence. His wife loves him very much, though, and she did not want to press charges. The State Attorneys Office put Mikhael in a domestic violence p.t.i. program, and the charges were dismissed after he successfully completed the program.

Mikhael was arrested in December of 1998 for carrying a concealed weapon. Essentially, he had purchased a gun at a pawnshop, and did not get a concealed firearm permit. He told the police that he was afraid because of traumatic events he suffered in Ukraine. The last few weeks, he thought skinheads were following him. This is why he was carrying the gun. He was sentenced to time served and had to forfeit his gun.

In January of 1999, the I.N.S. picks up Mikhael and detains him at Krome. He is placed in removal proceedings.

Mikhael is charged with the following sections of law:

Section 237(a)(2)(C) - firearms offense

Section 237(a)(2)(E) - domestic violence conviction

**QUESTIONS:**

Is Mikhael eligible for a bond hearing under section 236?

Does Mikhael have a "conviction" under section 237(a)(2)(E) ?

If he is found deportable for the firearms offense, what relief is he eligible for?

Assume that Mikhael was convicted of a third DUI and sentenced to one year in prison. The I.N.S. charges him with an aggravated felony offense, arguing that this is a crime of violence under sections 237(a)(2)(iii) and 101(a)(43)(F).

Is his third DUI in the State of Florida a crime of violence?

Assuming the Judge finds that the third DUI is an aggravated felony, what relief is Mikhael now eligible for?

PROBLEM "A"

On Sunday, April 12, 1992, Jean (known as Johnny in South Florida) B. Goode, Donald Due Wright and several friends were engaged in various games of chance behind the Shiloh/Gethsemane Church of the Plentiful. About 7:00PM, a confrontation occurred among the participants. The Respondent, Mr. Goode and the victim, Mr. Wright (are Haitian Nationals and Lawful Permanent Residents, -LPRs-). The confrontation became extremely emotional and finally, violent. The two friends simultaneously pulled weapons from their waistcoats and started shooting at each other. Jean B. Goode was struck in the leg and shoulder. Donald Due Wright was struck in the chest. Both men were rushed to the Good Samaritan Hospital for treatment, however, Mr. Wright expired there from wounds inflicted by Mr. Goode. Mr. Goode was later charged with Second Degree Murder of Mr. Wright. Mr. Goode was found guilty as charged and sentenced to 5 years followed by one year of probation. Mr. Goode finished his sentence and was turned over to the Immigration and Naturalization Service based upon an INS Detainer.

The Respondent was charged in Removal Proceedings with being an Aggravated Felon under Section 101(a)(43) of the Act.

The Respondent's attorney, Sam Shady (of the famous Shady lawyer family of California) moves to terminate the Proceedings and also for an immediate Bond Hearing.

You are the Immigration Judge - What do you do?

A) Terminate?: (YES) (NO)  
Why?:

B) Grant Bond?: (YES) (NO)  
Porque?:

PROBLEM "B"

The Honorable Immigration Judge, Wak E. Wanda-Wisdom, rightly or wrongly, decides that the Respondent, Mr. Goode, is not eligible for Bond and will not terminate the proceedings. Furthermore, the Immigration Judge ruled that the Respondent was Removable as charged. Immediately, Mr. Shady informs the court that the Respondent fears returning to Haiti because of Political reasons, (he was the driver of Col Cedras), and also for religious reasons. Mr. Goode was a lay minister in his church in Haiti which was a VOODOO Sect opposed by Father Aristoad, the Titular head of the Haitian Government. Mr. Shady also points out that his client has been a Lawful Permanent Resident since 1982. Accordingly, he also seeks a Waiver under Section 212(c) and Cancellation of Removal.

The Trial Attorney, Clair Cleveir, feeling pretty confident after prevailing on the previous rulings, jumps to her feet in opposition. She moves to pretermite Asylum and Withholding of Removal. Furthermore, she prays that all relief be denied and asks for an immediate order of Removability.

You are the Judge:

Pretermite Asylum: (Yes) (No)  
Why:

Pretermite Withholding: (Yes) (No)  
Why:

Pretermite 212(c): (Yes) (No)  
Why:

Cancellation of Removal 240A(a): (Yes) (No)  
Why:

Cancellation of Removal 240A(b): (Yes) (No)  
Why:

PROBLEM "C"

Same fact situation except Mr. Goode copped a plea to manslaughter and was sentenced to Probation.

The Respondent is charged as follows:

The Service alleges that you:

- I. You are not a citizen or national of the United States;
- II. You are a native of Haiti and a citizen of Haiti;
- III. You entered the United States at or near Unknown on or about Unknown;
- IV. You were not then admitted or paroled after inspection by an Immigration Officer;
- V. On January 1, 1982, your status was adjusted to that of a Lawfully Admitted Permanent Resident;
- VI. You were, On December 22, 1992, convicted in the Circuit Court, Tenth Judicial Circuit in and for Hardee County, Florida for the offense of Manslaughter, in violation of Florida Statute 782.07(Case #92-166CF);
- VII. In the commission of this offense, you did unlawfully kill another human by shooting the victim with a firearm, to wit: a .38 caliber pistol, in violation of law.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(C) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device (as defined in Section 921(a) of Title 18, United States Code).

The Respondent plead guilty to the lesser included offense of Manslaughter and was sentenced to probation.

The Honorable Judge Wisdom concludes that Mr. Goode is deportable as charged. Mr. Shady designates Haiti as the country of Deportation/Removability as asks for cancellation of Removal under Section 240A(a). Ms. Clair Cleveir (Trial Attorney) moves to pretermite.

You, wearing Judge Wisdom's robes, must now decide.

Is the Respondent eligible for Cancellation of Removal?: (Yes) (No)

Why:

HYPOTHESIS VII

#### PROBLEM "D"

Same facts, allegations and charges as problem "C".

The Respondent moves to terminate on the grounds that the Florida Statute under which he was convicted does not have "use of a firearm" as an element of the statute. The Respondent avers that he is not deportable under 237(a)(2)(C), because removability is based on use, or possession of a firearm.

Based upon the limited facts that you have:

Terminate?: (Yes) (No)

Why?:

**Hypothetical-Drug possessions.**

**David Druggee**, a thirty-five year lawful permanent resident alien who has had that status since age 2, was arrested for violation of Florida Statutes 893.13(6)(b) [Possession of not more than 20 grams of cannabis] in 1997 and again in 1998. In 1997 he was in possession of five grams and in 1998 he was in possession of 3 grams.

The statute classifies the crime as a first degree misdemeanor. Florida Statutes section 775.082 provides for a definite term of imprisonment not exceeding one year.

Being smart, **David Druggee** consulted each time with **J. Shyster Loophole, III**, a well-known member of the criminal defense bar who has a smattering of knowledge about the immigration laws. He informed **Druggee** in 1997 that the entry of a withhold of adjudication of guilt for simple possession of marihuana for one's own personal use is not an event that would give rise to a deportable offense so there could be absolutely no harm to his immigration status in having the adjudication withheld. Based on this advice **Druggee** agreed to enter a plea of *nolo contendere*. Adjudication was withheld and he was sentenced to one year probation.

In 1998 **J. Shyster Loophole, III**, encouraged **David Druggee** to quickly dispose of the case, since **Loophole** was about to leave for a conference entitled *Immigration law for Dummies*. The prosecutor offered **Druggee** to recommend a sentence of time served (one day) in exchange for a guilty plea and a judgment of conviction. **Loophole** told **Druggee** that this conviction for simple possession of cannabis would not render him removable since this "one conviction" would not be considered a deportable ground, and in any event these two "offenses could not logically have any grave consequences under the immigration laws. **Druggee** agreed to the deal and he was convicted and sentenced to "time served" (one day).

The INS finds out about **Druggee's** criminal justice system encounters and arrests and detains **Druggee** and commences removal proceedings, charging **Druggee** with being removable based on section 237(a)(2)(iii)-"convicted at any time after admission of an aggravated felony.

The INS is represented by ADC **Abby Abbott** and the respondent by **Clementina Costello**.

- (1) What arguments do you think should be advanced by **Abbott** and **Costello** regarding the charge of deportability?
- (2) What would be the decision if you were the immigration judge?
- (3) Would the decision be any different if the two convictions for immigration purposes were entered in 1986 and 1987 instead of 1997 and 1998 and removal proceedings were instituted in 1995 ?
- (4) Regarding number "(3)" above, would your answer be different if the immigration proceedings had commenced prior to March 1, 1991?
- (5) To what effect is INA 237(a)(2)(B)'s exception to deportability for a "single offense involving for one's own use of 30 grams or less of marijuana"?

## AGGRAVATED FELONY

Section 101(a) (43) The term “aggravated felony” means-

- (A) murder, rape, or sexual abuse of a minor;
- (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);
- (C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);
- (D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000.00;
- (E) an offense described in-
  - (i) section 842(h) or (i) of title 18, United States Code, or section 844(d),(e),(f),(g),(h), or (i) of that title (relating to explosive material offenses);
  - (ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses);
  - (iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);
- (F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment[is] at least one year;
- (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment[is] at least one year;
- (H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);
- (I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);
- (J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses) for which a sentence of one year imprisonment or more may be imposed;
- (K) an offense that-
  - (i) relates to owning, controlling, managing, or supervising of a prostitution business;

- (ii) is described in section 2421, 2422, or 2423, of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
  - (iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18, United States Code (relating to peonage, slavery, and involuntary servitude);
- (L) an offense described in-
  - (i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage or 2381 or 2382 (relating to treason) of title 18, United States code;
  - (ii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover intelligence agents); or
  - (iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);
- (M) an offense that-
  - (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or\
  - (ii) is described in section 7201 of the Internal Revenue code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;
- (N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;
- (O) an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;
- (P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act.
- (Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

- (R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;
- (S) an offense relating to obstruction of justice, perjury or subordination of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
- (T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and
- (U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

**18 § 1029. Fraud and related activity in connection with access devices**

(a) Whoever—

(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

(2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period;

(3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices;

(4) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;

(5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to

**18 § 1709**

**§ 1709. Theft of mail matter by officer or employee**

Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or of the Postal Service; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined under this title or imprisoned not more than five years, or both.

**§ 1711. Misappropriation of postal funds**

Whoever, being a Postal Service officer or employee, loans, uses, pledges, hypothecates, or converts his own use, or deposits in any bank, or exchanges other funds or property, except as authorized by law, any money or property coming into his hands under his control in any manner, in the execution under color of his office, employment, or service, whether or not the same shall be the money property of the United States; or fails or refuses to remit to or deposit in the Treasury of the United States or in a designated depository, or to account or turn over to the proper officer or agent, any such money or property, when required to do so by law, the regulations of the Postal Service, or upon demand or order of the Postal Service, either directly through a duly authorized officer or agent, is guilty of embezzlement; and every such person, as well as every other person advising or knowingly participating therein, shall be fined under this title or in a sum equal to the amount or value of the money or property embezzled, whichever is greater, or imprisoned not more than ten years, or both; but if the amount or value thereof does not exceed \$1,000, he shall be fined under this title or imprisoned not more than one year or both.

This section shall not prohibit any Postal Service officer or employee from depositing, under the direction of the Postal Service, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as Postal Service officer or employee, any funds in his charge, nor prevent him from negotiating drafts or other evidences of debt through such bank, or through United States disbursing officers, or otherwise, when instructed or required so to do by the Postal Service, for the purpose of remitting surplus funds from one post office to another.

### 236 APPREHENSION AND DETENTION OF ALIENS

SEC. 236<sup>108</sup>. [8 U.S.C. 1226] (a) ARREST, DETENTION, AND RELEASE.—On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) REVOCATION OF BOND OR PAROLE.—The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) DETENTION OF CRIMINAL ALIENS.—

(1) CUSTODY.—The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2) [1182],

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) [1227],

(C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence<sup>109</sup> to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

<sup>108</sup> Former section 236 of INA deleted by §303 of IIRIRA. Effective on "title III-A" effective date. See Appendix A. Section 303(b)(2) of IIRIRA provides the Attorney General with an optional delay of the effective date of the custody provisions of this section if the Attorney General notifies in writing the Committees on the Judiciary of the House and Senate regarding custody space and personnel deficiencies. On October 9, 1996, the Commissioner so notified the committees. See Appendix E. Section 303(b)(3) provides for transition for aliens regarding mandatory custody. See Appendix C for full text of §303(b)(2) and (3).

<sup>109</sup> See. Should read "sentenced". Typo in § 303 of IIRIRA.

(2) RELEASE.—The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) IDENTIFICATION OF CRIMINAL ALIENS.—(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) JUDICIAL REVIEW.—The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

#### 237 GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 237<sup>110</sup> [8 U.S.C. 1227]

(a) CLASSES OF DEPORTABLE ALIENS.—Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) INADMISSIBLE AT TIME OF ENTRY OR OF ADJUSTMENT OF STATUS OR VIOLATES STATUS.—

(A) INADMISSIBLE ALIENS.—Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

<sup>110</sup> Former INA section 237 repealed by § 305 of IIRJRA. Former section 241 of the INA was redesignated as section 237 by section 305(a)(2) of IIRJRA and moved accordingly. Several conforming amendments were made to subsection (a) regarding terminology (derivative of deportation & exclusion) by § 301(d) of IIRJRA.

## 21 § 844. Penalties for simple possession

### (a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958f of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic or chemical, offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

**§ 851. Proceedings to establish prior convictions****Information filed by United States attorney**

(a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

**Affirmation or denial of previous conviction**

(b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

**Denial; written response; hearing**

(c)(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

**Imposition of sentence**

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to imposed sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.