**12.21 Controlled Substance—Statutory Enhancement Based on Prior Serious Drug Felony or Serious Violent Felony**

**Comment**

The First Step Act of 2018 (“FSA”) changed the law on sentencing enhancements for drug crimes pursuant to 21 U.S.C.§§ 841, 851. Prior to the FSA, 21 U.S.C. § 841(b) provided for enhanced mandatory minimums (or increased maximums) for those defendants who had a prior conviction for a “felony drug offense.” For the statutory enhancement to apply under this prior scheme, the government had to simply prove the fact of the prior conviction. 21 U.S.C. § 802(44).

In *Apprendi v. United States*, 530 U.S. 466, 490 (2000), the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The Court explained that recidivism, or “the fact of a prior conviction,” is “an exceptional departure from” and a "narrow exception to the general rule” that requires the jury to find such facts. *Id.* at 487, 490. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which created this narrow exception, has been questioned by the Supreme Court but not overturned. When the FSA was enacted, it replaced “felony drug offense” with “serious drug felony,” as one type of requisite prior conviction for the enhancement to apply. *See* 21 U.S.C.§ 841(b)(1)(A). A “serious drug felony” is a “serious drug offense” as defined in 18 U.S.C. § 924(e)(2) and one for which (1) “the offender served a term of imprisonment of more than 12 months,” and (2) “the offender’s release from any term of imprisonment was within 15 years of the commencement of the instant offense.” 21 U.S.C. § 802(57). In addition, the FSA added that a “serious violent felony” would qualify for the enhancement; the prior offense must be a “serious violent felony” as defined in 18 U.S.C. § 3559(c)(2) and one in which “the offender served a term of imprisonment of more than 12 months.” 21 U.S.C. § 802(58). But the FSA did not change 21 U.S.C. § 851, which provides that the facts related to a prior conviction shall be determined by the court without a jury. Pursuant to *Almendarez-Torres*, a judge, and not a jury, could make the determination whether there was a qualifying prior felony conviction. However, the FSA altered the type of proof required to trigger enhanced mandatory sentences under § 841(b)(1)(A) and (B) for serious drug felonies and added the serious violent felony provision. Note, however, that § 841(b)(1)(C) and (D) were not altered by the FSA and those provisions continue to require a prior conviction for a “felony drug offense” for the sentencing enhancement to apply, such that *Almendarez-Torres* would continue to apply.

Neither the Supreme Court nor the Ninth Circuit has addressed whether the *Almendarez-Torres* exception applies in a post-FSA world, when a defendant contests, factually and legally, whether a prior conviction qualifies as a “serious drug felony” or a “serious violent felony.” Other courts are currently divided on whether the additional facts regarding the prior conviction must be submitted to a jury or if they can be determined by the court at sentencing. *See United States v. Fields*, 435 F. Supp. 3d 761 (E.D. Ky. 2020), *vacated and remanded*, 44 F.4th 490 (6th Cir. 2022), *and* *aff’d in part, vacated in part on other grounds, and remanded*, 53 F.4th 1027 (6th Cir. 2022) (holding that the jury, and not the judge, is required to make findings about the length of a defendant’s prior imprisonment and the 15-year release window for a prior drug offense); *United States v. Fields*, 53 F.4th 1027, 1036-38 (6th Cir. 2022) (stating in dicta that lower court’s finding that jury must decide the two factual predicates for a serious drug offense as “intuitive” and “persuasive,” but ultimately not deciding the issue because the two factual predicates “were actually submitted to the jury,” so defendant “suffered no personal constitutional violation”); *United States v. Ruiz*, Case No. 1:21-CR-426-MLB, 2023 WL 3562970, at \*5 (N.D. Ga. May 19, 2023) (indicating that “a jury will likely have to decide whether [the defendant] served a term of imprisonment of more than 12 months,” the factual predicate for a “serious violent felony”); *United States v. Delpriore*, Case No. 3:18-cr-00136-SLG, 2023 WL 4735031, at \*5 (D. Alaska Mar. 20, 2023) (granting defendant’s motion to strike the enhanced statutory penalty because the government failed to submit the issue to a jury and prove beyond a reasonable doubt the two factual predicates of a “serious drug felony”); *but see United States v. Lee*, Case No. 7:18-CR-153-FL-1, 2021 WL 640028, at \*5-7 (E.D.N.C. Feb. 18, 2021) (holding that the two factual predicates are “encompasse[d]” within “the fact ‘of a prior conviction’” so as to fall within the *Apprendi* exception); *United States v. Fitch*, Case No. 1:19-CR-30-HAB, 2022 WL 1165000, at \*2 (N.D. Ind. Apr. 19, 2022) (holding that the two factual predicates for a “serious drug felony” “fall under the umbrella of ‘fact[s] of a prior conviction’” and did not need to be submitted to a jury (alteration in the original)).

A trial judge may consider whether to ask the jury to decide whether the prior conviction meets the current statutory criteria, after a finding of guilty on the new drug charge and before the defendant files a response to the government’s information identifying a prior conviction.  *See* 21 U.S.C. § 851(a)(1), (c)(1).

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