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I N   A S S E M B L Y

July 6, 2010

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Introduced by COMMITTEE ON RULES -- (at request of M. of A. Fields) --  
read once and referred to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in  
relation to second firearm offenders

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. The penal law is amended by adding a new section 70.11 to  
2     read as follows:  
3     S 70.11 SENTENCE OF IMPRISONMENT FOR SECOND FIREARM OFFENDER.  
4     1. DEFINITION OF SECOND FIREARM OFFENDER. (A) A SECOND FIREARM OFFEN-  
5     DER IS A PERSON WHO STANDS CONVICTED OF A FIREARM OFFENSE, DEFINED AS  
6     ANY OFFENSE DEFINED BY ARTICLE TWO HUNDRED SIXTY-FIVE OF THIS CHAPTER,  
7     AFTER HAVING PREVIOUSLY BEEN SUBJECTED TO A PREDICATE FIREARM CONVICTION  
8     AS DEFINED IN PARAGRAPH (B) OF THIS SUBDIVISION.  
9     (B) FOR THE PURPOSE OF DETERMINING WHETHER A PRIOR CONVICTION IS A  
10    PREDICATE FIREARM CONVICTION THE FOLLOWING CRITERIA SHALL APPLY:  
11    (I) THE CONVICTION MUST HAVE BEEN IN THIS STATE FOR ANY OFFENSE  
12    DEFINED BY ARTICLE TWO HUNDRED SIXTY-FIVE OF THIS CHAPTER;  
13    (II) SENTENCE UPON SUCH PRIOR CONVICTION SHALL HAVE BEEN IMPOSED  
14    BEFORE COMMISSION OF THE PRESENT FIREARM OFFENSE;  
15    (III) SUSPENDED SENTENCE, SUSPENDED EXECUTION OF SENTENCE, A SENTENCE  
16    OF PROBATION, A SENTENCE OF CONDITIONAL DISCHARGE OR OF UNCONDITIONAL  
17    DISCHARGE, AND A SENTENCE OF CERTIFICATION TO THE CARE AND CUSTODY OF  
18    THE DIVISION OF SUBSTANCE ABUSE SERVICES, SHALL BE DEEMED TO BE A  
19    SENTENCE;  
20    (IV) EXCEPT AS PROVIDED IN SUBPARAGRAPH (V) OF THIS PARAGRAPH,  
21    SENTENCE MUST HAVE BEEN IMPOSED NOT MORE THAN TEN YEARS BEFORE COMMIS-  
22    SION OF THE FIREARM OFFENSE OF WHICH THE DEFENDANT PRESENTLY STANDS  
23    CONVICTED;  
24    (V) IN CALCULATING THE TEN YEAR PERIOD UNDER SUBPARAGRAPH (IV) OF  
25    THIS PARAGRAPH, ANY PERIOD OF TIME DURING WHICH THE PERSON WAS INCARCER-  
26    ATED FOR ANY REASON BETWEEN THE TIME OF COMMISSION OF THE PREVIOUS  
27    FIREARM OFFENSE AND THE TIME OF COMMISSION OF THE PRESENT FIREARM

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 OFFENSE SHALL BE EXCLUDED AND SUCH TEN YEAR PERIOD SHALL BE EXTENDED BY  
2 A PERIOD OR PERIODS EQUAL TO THE TIME SERVED UNDER SUCH INCARCERATION;

3 (VI) AN OFFENSE FOR WHICH THE DEFENDANT HAS BEEN PARDONED ON THE  
4 GROUND OF INNOCENCE SHALL NOT BE DEEMED A PREDICATE FIREARM CONVICTION.

5 2. AUTHORIZED SENTENCE. WHEN THE COURT HAS FOUND, PURSUANT TO THE  
6 PROVISIONS OF THE CRIMINAL PROCEDURE LAW, THAT A PERSON IS A SECOND  
7 FIREARM OFFENDER THE COURT MUST IMPOSE AN INDETERMINATE SENTENCE OF  
8 IMPRISONMENT. EXCEPT WHERE SUCH SENTENCE IS IMPOSED IN ACCORDANCE WITH  
9 THE PROVISIONS OF SECTION 70.10 OF THIS ARTICLE, THE MAXIMUM TERM OF  
10 SUCH SENTENCE MUST BE IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION  
11 THREE OF THIS SECTION AND THE MINIMUM PERIOD OF IMPRISONMENT UNDER SUCH  
12 SENTENCE MUST BE IN ACCORDANCE WITH SUBDIVISION FOUR OF THIS SECTION.

13 3. MAXIMUM TERM OF SENTENCE. THE MAXIMUM TERM OF AN INDETERMINATE  
14 SENTENCE FOR A SECOND FIREARM OFFENDER MUST BE FIXED BY THE COURT AS  
15 FOLLOWS:

16 (A) FOR A CLASS A FELONY, THE TERM MUST BE AT LEAST TWENTY-FIVE YEARS  
17 AND MUST NOT EXCEED FIFTY YEARS;

18 (B) FOR A CLASS B FELONY, THE TERM MUST BE AT LEAST TWELVE YEARS AND  
19 MUST NOT EXCEED TWENTY-FIVE YEARS;

20 (C) FOR A CLASS C FELONY, THE TERM MUST BE AT LEAST EIGHT YEARS AND  
21 MUST NOT EXCEED FIFTEEN YEARS;

22 (D) FOR A CLASS D FELONY, THE TERM MUST BE AT LEAST FIVE YEARS AND  
23 MUST NOT EXCEED SEVEN YEARS; AND

24 (E) FOR A CLASS E FELONY, THE TERM MUST BE AT LEAST FOUR YEARS.

25 4. MINIMUM PERIOD OF IMPRISONMENT. THE MINIMUM PERIOD OF IMPRISONMENT  
26 UNDER AN INDETERMINATE SENTENCE FOR A SECOND VIOLENT FELONY OFFENDER  
27 MUST BE FIXED BY THE COURT AT ONE-HALF OF THE MAXIMUM TERM IMPOSED AND  
28 MUST BE SPECIFIED IN THE SENTENCE.

29 S 2. Section 215.10 of the criminal procedure law, as added by chapter  
30 837 of the laws of 1986, is amended to read as follows:

31 S 215.10 Referral of selected felonies to dispute resolution.

32 Upon or after arraignment in a local criminal court upon a felony  
33 complaint, or upon or after arraignment in a superior court upon an  
34 indictment or superior court information, and before final disposition  
35 thereof, the court, with the consent of the people and of the defendant,  
36 and with reasonable notice to the victim and an opportunity for the  
37 victim to be heard, may order that the action be adjourned in contem-  
38 plation of dismissal, for the purpose of referring the action to a  
39 community dispute center established pursuant to article twenty-one-A of  
40 the judiciary law. Provided, however, that the court may not order any  
41 action adjourned in contemplation of dismissal if the defendant is  
42 charged therein with: (i) a class A felony, or (ii) a violent felony  
43 offense as defined in section 70.02 of the penal law, or (iii) any drug  
44 offense as defined in article two hundred twenty of the penal law, or  
45 (iv) a felony upon the conviction of which defendant must be sentenced  
46 as a second felony offender, a second violent felony offender, [or] a  
47 persistent violent felony offender, OR A SECOND FIREARM OFFENDER pursu-  
48 ant to sections 70.06, 70.04 [and], 70.08 AND 70.11 of the penal law, or  
49 a felony upon the conviction of which defendant may be sentenced as a  
50 persistent felony offender pursuant to section 70.10 of such law.

51 S 3. The criminal procedure law is amended by adding a new section  
52 400.17 to read as follows:

53 S 400.17 PROCEDURE FOR DETERMINING WHETHER DEFENDANT IS A SECOND FIREARM  
54 OFFENDER.

55 1. APPLICABILITY. THE PROVISIONS OF THIS SECTION GOVERN THE PROCEDURE  
56 THAT MUST BE FOLLOWED IN ANY CASE WHERE IT APPEARS THAT A DEFENDANT WHO

1 STANDS CONVICTED OF A FIREARM OFFENSE AS DEFINED IN SUBDIVISION ONE OF  
2 SECTION 70.11 OF THE PENAL LAW HAS PREVIOUSLY BEEN SUBJECTED TO A PREDI-  
3 CATE FIREARM CONVICTION AS DEFINED IN PARAGRAPH (B) OF SUBDIVISION ONE  
4 OF SECTION 70.11 OF THE PENAL LAW AND MAY BE A SECOND FIREARM OFFENDER.

5 2. STATEMENT TO BE FILED. WHEN INFORMATION AVAILABLE TO THE COURT OR  
6 TO THE PEOPLE PRIOR TO SENTENCING FOR A FIREARM OFFENSE INDICATES THAT  
7 THE DEFENDANT MAY HAVE PREVIOUSLY BEEN SUBJECTED TO A PREDICATE FIREARM  
8 CONVICTION, A STATEMENT MUST BE FILED BY THE PROSECUTOR BEFORE SENTENCE  
9 IS IMPOSED SETTING FORTH THE DATE AND PLACE OF EACH ALLEGED PREDICATE  
10 FIREARM CONVICTION. WHERE THE PROVISIONS OF SUBPARAGRAPH (V) OF PARA-  
11 GRAPH (B) OF SUBDIVISION ONE OF SECTION 70.11 OF THE PENAL LAW APPLY,  
12 SUCH STATEMENT ALSO SHALL SET FORTH THE DATE OF COMMENCEMENT AND THE  
13 DATE OF TERMINATION AS WELL AS THE PLACE OF IMPRISONMENT FOR EACH PERIOD  
14 OF INCARCERATION TO BE USED FOR TOLLING OF THE TEN YEAR LIMITATION SET  
15 FORTH IN SUBPARAGRAPH (IV) OF PARAGRAPH (B) OF SUCH SUBDIVISION.

16 3. PRELIMINARY EXAMINATION. THE DEFENDANT MUST BE GIVEN A COPY OF SUCH  
17 STATEMENT AND THE COURT MUST ASK THE DEFENDANT WHETHER HE OR SHE WISHES  
18 TO CONTROVERT ANY ALLEGATION MADE THEREIN. IF THE DEFENDANT WISHES TO  
19 CONTROVERT ANY ALLEGATION IN THE STATEMENT, HE OR SHE MUST SPECIFY THE  
20 PARTICULAR ALLEGATION OR ALLEGATIONS HE OR SHE WISHES TO CONTROVERT.  
21 UNCONTROVERTED ALLEGATIONS IN THE STATEMENT SHALL BE DEEMED TO HAVE BEEN  
22 ADMITTED BY THE DEFENDANT.

23 4. CASES WHERE FURTHER HEARING IS NOT REQUIRED. WHERE THE UNCONTRO-  
24 VERTED ALLEGATIONS IN THE STATEMENT ARE SUFFICIENT TO SUPPORT A FINDING  
25 THAT THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE FIREARM CONVICTION  
26 THE COURT MUST ENTER SUCH FINDING AND WHEN IMPOSING SENTENCE MUST  
27 SENTENCE THE DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF SECTION  
28 70.11 OF THE PENAL LAW.

29 5. CASES WHERE FURTHER HEARING IS REQUIRED. WHERE THE DEFENDANT  
30 CONTROVERTS AN ALLEGATION IN THE STATEMENT AND THE UNCONTROVERTED ALLE-  
31 GATIONS IN SUCH STATEMENT ARE NOT SUFFICIENT TO SUPPORT A FINDING THAT  
32 THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE FIREARM CONVICTION THE  
33 COURT MUST PROCEED TO HOLD A HEARING.

34 6. TIME FOR HEARING. IN ANY CASE WHERE A COPY OF THE STATEMENT WAS NOT  
35 RECEIVED BY THE DEFENDANT AT LEAST TWO DAYS PRIOR TO THE PRELIMINARY  
36 EXAMINATION, THE COURT MUST UPON REQUEST OF THE DEFENDANT GRANT AN  
37 ADJOURNMENT OF AT LEAST TWO DAYS BEFORE PROCEEDING WITH THE HEARING.

38 7. MANNER OF CONDUCTING HEARING. (A) A HEARING PURSUANT TO THIS  
39 SECTION MUST BE BEFORE THE COURT WITHOUT JURY. THE BURDEN OF PROOF IS  
40 UPON THE PEOPLE AND A FINDING THAT THE DEFENDANT HAS BEEN SUBJECTED TO A  
41 PREDICATE FIREARM CONVICTION MUST BE BASED UPON PROOF BEYOND A REASON-  
42 ABLE DOUBT BY EVIDENCE ADMISSIBLE UNDER THE RULES APPLICABLE TO A TRIAL  
43 OF THE ISSUE OF GUILT.

44 (B) A PREVIOUS CONVICTION IN THIS OR ANY OTHER JURISDICTION WHICH WAS  
45 OBTAINED IN VIOLATION OF THE RIGHTS OF THE DEFENDANT UNDER THE APPLICA-  
46 BLE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES MUST NOT BE  
47 COUNTED IN DETERMINING WHETHER THE DEFENDANT HAS BEEN SUBJECTED TO A  
48 PREDICATE FIREARM CONVICTION. THE DEFENDANT MAY, AT ANY TIME DURING THE  
49 COURSE OF THE HEARING HEREUNDER CONTROVERT AN ALLEGATION WITH RESPECT TO  
50 SUCH CONVICTION IN THE STATEMENT ON THE GROUNDS THAT THE CONVICTION WAS  
51 UNCONSTITUTIONALLY OBTAINED. FAILURE TO CHALLENGE THE PREVIOUS  
52 CONVICTION IN THE MANNER PROVIDED HEREIN CONSTITUTES A WAIVER ON THE  
53 PART OF THE DEFENDANT OF ANY ALLEGATION OF UNCONSTITUTIONALITY UNLESS  
54 GOOD CAUSE BE SHOWN FOR SUCH FAILURE TO MAKE TIMELY CHALLENGE.

1 (C) AT THE CONCLUSION OF THE HEARING THE COURT MUST MAKE A FINDING AS  
2 TO WHETHER OR NOT THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE  
3 FIREARM CONVICTION.

4 8. SUBSEQUENT USE OF PREDICATE FIREARM CONVICTION FINDING. WHERE A  
5 FINDING HAS BEEN ENTERED PURSUANT TO THIS SECTION, SUCH FINDING SHALL BE  
6 BINDING UPON THAT DEFENDANT IN ANY FUTURE PROCEEDING IN WHICH THE ISSUE  
7 MAY ARISE.

8 S 4. This act shall take effect on the first of November next succeed-  
9 ing the date on which it shall have become a law.