

1020

2009-2010 Regular Sessions

I N S E N A T E

January 22, 2009

Introduced by Sen. KRUGER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law and the penal law, in relation to defining a second homicide offender and increasing the penalties upon conviction of any of certain homicide offenses after having previously been subject to a predicate conviction of any of such homicide offenses

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

1 Section 1. The criminal procedure law is amended by adding a new
2 section 400.17 to read as follows:
3 S 400.17 PROCEDURE FOR DETERMINING WHETHER DEFENDANT IS A SECOND HOMI-
4 CIDE OFFENDER.
5 1. APPLICABILITY. THE PROVISIONS OF THIS SECTION GOVERN THE PROCE-
6 DURE THAT MUST BE FOLLOWED IN ANY CASE WHERE IT APPEARS THAT A DEFENDANT
7 WHO STANDS CONVICTED OF MURDER IN THE FIRST DEGREE AS DEFINED IN SECTION
8 125.27 OF THE PENAL LAW, MURDER IN THE SECOND DEGREE AS DEFINED IN
9 SECTION 125.25 OF SUCH LAW, MANSLAUGHTER IN THE FIRST DEGREE AS DEFINED
10 IN SECTION 125.20 OF SUCH LAW, OR MANSLAUGHTER IN THE SECOND DEGREE AS
11 DEFINED IN SECTION 125.15 OF SUCH LAW, HAS PREVIOUSLY BEEN SUBJECTED TO
12 A PREDICATE HOMICIDE CONVICTION AS DEFINED IN SUBDIVISION TWO OF SECTION
13 70.09 OF THE PENAL LAW AND MAY BE A SECOND HOMICIDE OFFENDER.
14 2. STATEMENT TO BE FILED. WHEN INFORMATION AVAILABLE TO THE COURT OR
15 TO THE PEOPLE PRIOR TO SENTENCING FOR THE CRIMES OF MURDER IN THE FIRST
16 DEGREE AS DEFINED IN SECTION 125.27 OF THE PENAL LAW, MURDER IN THE
17 SECOND DEGREE AS DEFINED IN SECTION 125.25 OF SUCH LAW, MANSLAUGHTER IN
18 THE FIRST DEGREE AS DEFINED IN SECTION 125.20 OF SUCH LAW, OR
19 MANSLAUGHTER IN THE SECOND DEGREE AS DEFINED IN SECTION 125.15 OF SUCH
20 LAW, INDICATES THAT THE DEFENDANT MAY HAVE PREVIOUSLY BEEN SUBJECTED TO
21 A PREDICATE HOMICIDE CONVICTION, A STATEMENT MUST BE FILED BY THE PROSE-

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

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1 CUTOR BEFORE SENTENCE IS IMPOSED SETTING FORTH THE DATE AND PLACE OF
2 EACH ALLEGED PREDICATE HOMICIDE CONVICTION.

3 3. PRELIMINARY EXAMINATION. THE DEFENDANT MUST BE GIVEN A COPY OF
4 SUCH STATEMENT AND THE COURT MUST ASK HIM WHETHER HE WISHES TO CONTRO-
5 VERT ANY ALLEGATION MADE THEREIN. IF THE DEFENDANT WISHES TO CONTROVERT
6 ANY ALLEGATION IN THE STATEMENT, HE MUST SPECIFY THE PARTICULAR ALLEGA-
7 TION OR ALLEGATIONS HE WISHES TO CONTROVERT. UNCONTROVERTED ALLEGATIONS
8 IN THE STATEMENT SHALL BE DEEMED TO HAVE BEEN ADMITTED BY THE DEFENDANT.

9 4. CASES WHERE FURTHER HEARING IS NOT REQUIRED. WHERE THE UNCONTRO-
10 VERTED ALLEGATIONS IN THE STATEMENT ARE SUFFICIENT TO SUPPORT A FINDING
11 THAT THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE HOMICIDE CONVICTION
12 THE COURT MUST ENTER SUCH FINDING.

13 5. CASES WHERE FURTHER HEARING IS REQUIRED. WHERE THE DEFENDANT
14 CONTROVERTS AN ALLEGATION IN THE STATEMENT AND THE UNCONTROVERTED ALLE-
15 GATIONS IN SUCH STATEMENT ARE NOT SUFFICIENT TO SUPPORT A FINDING THAT
16 THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE HOMICIDE CONVICTION THE
17 COURT MUST PROCEED TO HOLD A HEARING.

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

22 7. MANNER OF CONDUCTING HEARING.

23 (A) A HEARING PURSUANT TO THIS SECTION MUST BE BEFORE THE COURT WITH-
24 OUT A JURY. THE BURDEN OF PROOF IS UPON THE PEOPLE AND A FINDING THAT
25 THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE HOMICIDE CONVICTION MUST
26 BE BASED UPON PROOF BEYOND A REASONABLE DOUBT BY EVIDENCE ADMISSIBLE
27 UNDER THE RULES APPLICABLE TO A TRIAL OF THE ISSUE OF GUILT.

28 (B) A PREVIOUS CONVICTION IN THIS OR ANY OTHER JURISDICTION WHICH WAS
29 OBTAINED IN VIOLATION OF THE RIGHTS OF THE DEFENDANT UNDER THE APPLICA-
30 BLE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES MUST NOT BE
31 COUNTED IN DETERMINING WHETHER THE DEFENDANT HAS BEEN SUBJECTED TO A
32 PREDICATE HOMICIDE CONVICTION. THE DEFENDANT MAY, AT ANY TIME DURING
33 THE COURSE OF THE HEARING HEREUNDER CONTROVERT AN ALLEGATION WITH
34 RESPECT TO SUCH CONVICTION IN THE STATEMENT ON THE GROUNDS THAT THE
35 CONVICTION WAS UNCONSTITUTIONALLY OBTAINED. FAILURE TO CHALLENGE THE
36 PREVIOUS CONVICTION IN THE MANNER PROVIDED IN THIS SUBDIVISION CONSTI-
37 TUTES A WAIVER ON THE PART OF THE DEFENDANT OF ANY ALLEGATION OF
38 UNCONSTITUTIONALITY UNLESS GOOD CAUSE BE SHOWN FOR SUCH FAILURE TO MAKE
39 TIMELY CHALLENGE.

40 (C) AT THE CONCLUSION OF THE HEARING THE COURT MUST MAKE A FINDING AS
41 TO WHETHER OR NOT THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE HOMI-
42 CIDE CONVICTION.

43 8. SUBSEQUENT USE OF PREDICATE HOMICIDE CONVICTION FINDING. WHERE A
44 FINDING HAS BEEN ENTERED PURSUANT TO THIS SECTION, SUCH FINDING SHALL BE
45 BINDING UPON THAT DEFENDANT IN ANY FUTURE PROCEEDING IN WHICH THE ISSUE
46 MAY ARISE.

47 S 2. The criminal procedure law is amended by adding a new section
48 400.18 to read as follows:

49 S 400.18 PROCEDURE FOR DETERMINING WHETHER DEFENDANT SHOULD BE SENTENCED
50 AS A SECOND HOMICIDE OFFENDER.

51 1. APPLICABILITY. THE PROVISIONS OF THIS SECTION GOVERN THE PROCE-
52 DURE THAT MUST BE FOLLOWED IN ORDER TO IMPOSE THE SECOND HOMICIDE OFFEN-
53 DER SENTENCE AUTHORIZED BY SUBDIVISION THREE OF SECTION 70.09 OF THE
54 PENAL LAW. SUCH SENTENCE MAY NOT BE IMPOSED UNLESS, BASED UPON EVIDENCE
55 IN THE RECORD OF A HEARING HELD PURSUANT TO THIS SECTION, THE COURT (A)
56 HAS FOUND THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AS DEFINED IN

1 SUBDIVISION ONE OF SECTION 70.09 OF THE PENAL LAW, AND (B) IS OF THE
2 OPINION THAT THE HISTORY AND CHARACTER OF THE DEFENDANT AND THE NATURE
3 AND CIRCUMSTANCES OF HIS CRIMINAL CONDUCT ARE SUCH THAT EXTENDED INCAR-
4 CERATION IN ADDITION TO LIFETIME SUPERVISION OF THE DEFENDANT ARE
5 WARRANTED TO BEST SERVE THE PUBLIC INTEREST.

6 2. AUTHORIZATION FOR HEARING. WHEN INFORMATION AVAILABLE TO THE
7 COURT PRIOR TO SENTENCING INDICATES THAT THE DEFENDANT IS A SECOND HOMI-
8 CIDE OFFENDER, AND WHEN, IN THE OPINION OF THE COURT, THE AVAILABLE
9 INFORMATION SHOWS THAT A SECOND HOMICIDE OFFENDER SENTENCE MAY BE
10 WARRANTED, THE COURT MAY ORDER A HEARING TO DETERMINE (A) WHETHER THE
11 DEFENDANT IS IN FACT A SECOND HOMICIDE OFFENDER, AND (B) IF SO, WHETHER
12 A SECOND HOMICIDE OFFENDER SENTENCE SHOULD BE IMPOSED.

13 3. ORDER DIRECTING A HEARING. AN ORDER DIRECTING A HEARING TO DETER-
14 MINE WHETHER THE DEFENDANT SHOULD BE SENTENCED AS A SECOND HOMICIDE
15 OFFENDER MUST BE FILED WITH THE CLERK OF THE COURT AND MUST SPECIFY A
16 DATE FOR THE HEARING NOT LESS THAN TWENTY DAYS FROM THE DATE THE ORDER
17 IS FILED. THE COURT MUST ANNEX TO AND FILE WITH THE ORDER A STATEMENT
18 SETTING FORTH THE FOLLOWING:

19 (A) THE DATES AND PLACES OF THE PREVIOUS CONVICTIONS WHICH RENDER THE
20 DEFENDANT A SECOND HOMICIDE OFFENDER AS DEFINED IN SUBDIVISION ONE OF
21 SECTION 70.09 OF THE PENAL LAW; AND

22 (B) THE FACTORS IN THE DEFENDANT'S BACKGROUND AND PRIOR CRIMINAL
23 CONDUCT WHICH THE COURT DEEMS RELEVANT FOR THE PURPOSE OF SENTENCING THE
24 DEFENDANT AS A SECOND HOMICIDE OFFENDER.

25 4. NOTICE OF HEARING. UPON RECEIPT OF THE ORDER AND STATEMENT OF THE
26 COURT, THE CLERK OF THE COURT MUST SEND A NOTICE OF HEARING TO THE
27 DEFENDANT, HIS COUNSEL AND THE DISTRICT ATTORNEY. SUCH NOTICE MUST
28 SPECIFY THE TIME AND PLACE OF THE HEARING AND THE FACT THAT THE PURPOSE
29 OF THE HEARING IS TO DETERMINE WHETHER OR NOT THE DEFENDANT SHOULD BE
30 SENTENCED AS A SECOND HOMICIDE OFFENDER. EACH NOTICE REQUIRED TO BE
31 SENT HEREUNDER MUST BE ACCOMPANIED BY A COPY OF THE STATEMENT OF THE
32 COURT.

33 5. BURDEN AND STANDARD OF PROOF; EVIDENCE. UPON ANY HEARING HELD
34 PURSUANT TO THIS SECTION THE BURDEN OF PROOF IS UPON THE PEOPLE. A
35 FINDING THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER, AS DEFINED IN
36 SUBDIVISION ONE OF SECTION 70.09 OF THE PENAL LAW, MUST BE BASED UPON
37 PROOF BEYOND A REASONABLE DOUBT BY EVIDENCE ADMISSIBLE UNDER THE RULES
38 APPLICABLE TO THE TRIAL OF THE ISSUE OF GUILT. MATTERS PERTAINING TO
39 THE DEFENDANT'S HISTORY AND CHARACTER AND THE NATURE AND CIRCUMSTANCES
40 OF HIS CRIMINAL CONDUCT MAY BE ESTABLISHED BY ANY RELEVANT EVIDENCE, NOT
41 LEGALLY PRIVILEGED, REGARDLESS OF ADMISSIBILITY UNDER THE EXCLUSIONARY
42 RULES OF EVIDENCE, AND THE STANDARD OF PROOF WITH RESPECT TO SUCH
43 MATTERS SHALL BE A PREPONDERANCE OF THE EVIDENCE.

44 6. CONSTITUTIONALITY OF PRIOR CONVICTIONS. A PREDICATE HOMICIDE
45 CONVICTION AS DEFINED IN SUBDIVISION TWO OF SECTION 70.09 OF THE PENAL
46 LAW, WHICH WAS OBTAINED IN VIOLATION OF THE RIGHTS OF THE DEFENDANT
47 UNDER THE APPLICABLE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES
48 MAY NOT BE COUNTED IN DETERMINING WHETHER THE DEFENDANT IS A SECOND
49 HOMICIDE OFFENDER. THE DEFENDANT MAY, AT ANY TIME DURING THE COURSE OF
50 THE HEARING HEREUNDER CONTROVERT AN ALLEGATION WITH RESPECT TO SUCH
51 CONVICTION IN THE STATEMENT OF THE COURT ON THE GROUNDS THAT THE
52 CONVICTION WAS UNCONSTITUTIONALLY OBTAINED. FAILURE TO CHALLENGE THE
53 PREVIOUS CONVICTION IN THE MANNER PROVIDED IN THIS SUBDIVISION CONSTI-
54 TUTES A WAIVER ON THE PART OF THE DEFENDANT OF ANY ALLEGATION OF
55 UNCONSTITUTIONALITY UNLESS GOOD CAUSE BE SHOWN FOR SUCH FAILURE TO MAKE
56 TIMELY CHALLENGE.

1 7. PRELIMINARY EXAMINATION. WHEN THE DEFENDANT APPEARS FOR THE HEAR-
2 ING THE COURT MUST ASK HIM WHETHER HE WISHES TO CONTROVERT ANY ALLEGA-
3 TION MADE IN THE STATEMENT PREPARED BY THE COURT, AND WHETHER HE WISHES
4 TO PRESENT EVIDENCE ON THE ISSUE OF WHETHER HE IS A SECOND HOMICIDE
5 OFFENDER OR ON THE QUESTION OF HIS BACKGROUND AND CRIMINAL CONDUCT. IF
6 THE DEFENDANT WISHES TO CONTROVERT ANY ALLEGATION IN THE STATEMENT OF
7 THE COURT, HE MUST SPECIFY THE PARTICULAR ALLEGATION OR ALLEGATIONS HE
8 WISHES TO CONTROVERT. IF HE WISHES TO PRESENT EVIDENCE IN HIS OWN
9 BEHALF, HE MUST SPECIFY THE NATURE OF SUCH EVIDENCE. UNCONTROVERTED
10 ALLEGATIONS IN THE STATEMENT OF THE COURT ARE DEEMED EVIDENCE IN THE
11 RECORD.

12 8. CASES WHERE FURTHER HEARING IS NOT REQUIRED. WHERE THE UNCONTRO-
13 VERTED ALLEGATIONS IN THE STATEMENT OF THE COURT ARE SUFFICIENT TO
14 SUPPORT A FINDING THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AND
15 THE COURT IS SATISFIED THAT (A) THE UNCONTROVERTED ALLEGATIONS WITH
16 RESPECT TO THE DEFENDANT'S BACKGROUND AND THE NATURE OF HIS PRIOR CRIMI-
17 NAL CONDUCT WARRANT SENTENCING THE DEFENDANT AS A SECOND HOMICIDE OFFEN-
18 DER, AND (B) THE DEFENDANT EITHER HAS NO RELEVANT EVIDENCE TO PRESENT OR
19 THE FACTS WHICH COULD BE ESTABLISHED THROUGH THE EVIDENCE OFFERED BY THE
20 DEFENDANT WOULD NOT AFFECT THE COURT'S DECISION, THE COURT MAY ENTER A
21 FINDING THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AND SENTENCE
22 HIM IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION THREE OF SECTION
23 70.09 OF THE PENAL LAW.

24 9. CASES WHERE FURTHER HEARING IS REQUIRED. WHERE THE DEFENDANT
25 CONTROVERTS AN ALLEGATION IN THE STATEMENT OF THE COURT AND THE UNCON-
26 TROVERTED ALLEGATIONS IN SUCH STATEMENT ARE NOT SUFFICIENT TO SUPPORT A
27 FINDING THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AS DEFINED IN
28 SUBDIVISION ONE OF SECTION 70.09 OF THE PENAL LAW, OR WHERE THE UNCON-
29 TROVERTED ALLEGATIONS WITH RESPECT TO THE DEFENDANT'S HISTORY AND THE
30 NATURE OF HIS PRIOR CRIMINAL CONDUCT DO NOT WARRANT SENTENCING HIM AS A
31 SECOND HOMICIDE OFFENDER, OR WHERE THE DEFENDANT HAS OFFERED TO PRESENT
32 EVIDENCE TO ESTABLISH FACTS THAT WOULD AFFECT THE COURT'S DECISION ON
33 THE QUESTION OF WHETHER A SECOND HOMICIDE OFFENDER SENTENCE IS
34 WARRANTED, THE COURT MAY FIX A DATE FOR A FURTHER HEARING. SUCH HEARING
35 SHALL BE BEFORE THE COURT WITHOUT A JURY AND EITHER PARTY MAY INTRODUCE
36 EVIDENCE WITH RESPECT TO THE CONTROVERTED ALLEGATIONS OR ANY OTHER
37 MATTER RELEVANT TO THE ISSUE OF WHETHER OR NOT THE DEFENDANT SHOULD BE
38 SENTENCED AS A SECOND HOMICIDE OFFENDER. AT THE CONCLUSION OF THE HEAR-
39 ING THE COURT MUST MAKE A FINDING AS TO WHETHER OR NOT THE DEFENDANT IS
40 A SECOND HOMICIDE OFFENDER AND, UPON A FINDING THAT HE IS SUCH, MUST
41 THEN MAKE SUCH FINDINGS OF FACT AS IT DEEMS RELEVANT TO THE QUESTION OF
42 WHETHER A SECOND HOMICIDE OFFENDER SENTENCE IS WARRANTED. IF THE COURT
43 BOTH FINDS THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AND IS OF
44 THE OPINION THAT A SECOND HOMICIDE OFFENDER SENTENCE IS WARRANTED, IT
45 MAY SENTENCE THE DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVI-
46 SION THREE OF SECTION 70.09 OF THE PENAL LAW.

47 10. TERMINATION OF HEARING. AT ANY TIME DURING THE PENDENCY OF A
48 HEARING PURSUANT TO THIS SECTION, THE COURT MAY, IN ITS DISCRETION,
49 TERMINATE THE HEARING WITHOUT MAKING ANY FINDING. IN SUCH CASE, UNLESS
50 THE COURT RECOMMENCES THE PROCEEDINGS AND MAKES THE NECESSARY FINDINGS,
51 THE DEFENDANT MAY NOT BE SENTENCED AS A SECOND HOMICIDE OFFENDER.

52 S 3. Section 400.22 of the criminal procedure law is amended to read
53 as follows:

54 S 400.22 Evidence of imprisonment.

55 The certificate of the commissioner of [correction] CORRECTIONAL
56 SERVICES or of the warden or other chief officer of any prison, or of

1 the superintendent or other chief officer of any penitentiary under the
2 seal of his office containing name of person, a statement of the court
3 in which conviction was had, the date and term of sentence, length of
4 time imprisoned, and date of discharge from prison or penitentiary,
5 shall be prima facie evidence of the imprisonment and discharge of any
6 person under the conviction stated and set forth in such certificate for
7 the purposes of any proceeding under section 400.17 OR 400.20.

8 S 4. The penal law is amended by adding a new section 70.09 to read
9 as follows:

10 S 70.09 SENTENCE OF IMPRISONMENT FOR A SECOND HOMICIDE OFFENDER.

11 1. DEFINITION OF A SECOND HOMICIDE OFFENDER. A SECOND HOMICIDE OFFEN-
12 DER IS A PERSON WHO STANDS CONVICTED OF ANY OFFENSE DEFINED UNDER
13 SECTION 125.27, 125.25, 125.20 OR 125.15 OF THIS CHAPTER AFTER HAVING
14 PREVIOUSLY BEEN SUBJECT TO A PREDICATE HOMICIDE CONVICTION.

15 2. PREDICATE HOMICIDE CONVICTION. FOR THE PURPOSES OF DETERMINING
16 WHETHER A PRIOR CONVICTION IS A PREDICATE HOMICIDE CONVICTION THE
17 CONVICTION MUST HAVE BEEN IN THIS STATE OF A FELONY AS DEFINED IN
18 SECTION 125.27, 125.25, 125.20 OR 125.15 OF THIS CHAPTER.

19 3. AUTHORIZED SENTENCE. WHEN THE COURT HAS FOUND, PURSUANT TO THE
20 PROVISIONS OF THE CRIMINAL PROCEDURE LAW, THAT A PERSON IS A SECOND
21 HOMICIDE OFFENDER THE COURT MUST IMPOSE AN INDETERMINATE SENTENCE OF
22 IMPRISONMENT. THE MAXIMUM TERM OF SUCH SENTENCE MUST BE LIFE IMPRISON-
23 MENT AND THE MINIMUM PERIOD OF IMPRISONMENT UNDER SUCH SENTENCE MUST BE
24 CONSECUTIVE TO ANY OTHER SENTENCE IMPOSED BY LAW AND SHALL BE FIXED BY
25 THE COURT IN ACCORDANCE WITH SUBDIVISION FOUR OF THIS SECTION.

26 4. MINIMUM PERIOD OF IMPRISONMENT. THE MINIMUM PERIOD OF IMPRISONMENT
27 UNDER AN INDETERMINATE SENTENCE FOR A SECOND HOMICIDE OFFENDER MUST BE
28 FIXED BY THE COURT AS FOLLOWS:

29 (A) FOR A CLASS A-I FELONY, THE TERM MUST BE AT LEAST THIRTY YEARS AND
30 MUST NOT EXCEED FIFTY YEARS;

31 (B) FOR A CLASS B FELONY, THE TERM MUST BE AT LEAST FIFTEEN YEARS AND
32 MUST NOT EXCEED THIRTY YEARS;

33 (C) FOR A CLASS C FELONY, THE TERM MUST BE AT LEAST TEN YEARS AND MUST
34 NOT EXCEED TWENTY YEARS.

35 S 5. This act shall take effect on the first of November next
36 succeeding the date on which it shall have become a law and shall apply
37 to offenses committed on or after such date.