S T A T E O F N E W Y O R K

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I N A S S E M B L Y

July 6, 2010

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:

Section 1. The penal law is amended by adding a new section 70.11 to read as follows:

S 70.11 SENTENCE OF IMPRISONMENT FOR SECOND FIREARM OFFENDER.

1. DEFINITION OF SECOND FIREARM OFFENDER. (A) A SECOND FIREARM OFFENDER IS A PERSON WHO STANDS CONVICTED OF A FIREARM OFFENSE, DEFINED AS ANY OFFENSE DEFINED BY ARTICLE TWO HUNDRED SIXTY-FIVE OF THIS CHAPTER, AFTER HAVING PREVIOUSLY BEEN SUBJECTED TO A PREDICATE FIREARM CONVICTION AS DEFINED IN PARAGRAPH (B) OF THIS SUBDIVISION.

(B) FOR THE PURPOSE OF DETERMINING WHETHER A PRIOR CONVICTION IS A PREDICATE FIREARM CONVICTION THE FOLLOWING CRITERIA SHALL APPLY:

(I) THE CONVICTION MUST HAVE BEEN IN THIS STATE FOR ANY OFFENSE DEFINED BY ARTICLE TWO HUNDRED SIXTY-FIVE OF THIS CHAPTER;

(II) SENTENCE UPON SUCH PRIOR CONVICTION SHALL HAVE BEEN IMPOSED BEFORE COMMISSION OF THE PRESENT FIREARM OFFENSE;

(III) SUSPENDED SENTENCE, SUSPENDED EXECUTION OF SENTENCE, A SENTENCE OF PROBATION, A SENTENCE OF CONDITIONAL DISCHARGE OR OF UNCONDITIONAL DISCHARGE, AND A SENTENCE OF CERTIFICATION TO THE CARE AND CUSTODY OF THE DIVISION OF SUBSTANCE ABUSE SERVICES, SHALL BE DEEMED TO BE A SENTENCE;

(IV) EXCEPT AS PROVIDED IN SUBPARAGRAPH (V) OF THIS PARAGRAPH, SENTENCE MUST HAVE BEEN IMPOSED NOT MORE THAN TEN YEARS BEFORE COMMISSION OF THE FIREARM OFFENSE OF WHICH THE DEFENDANT PRESENTLY STANDS CONVICTED;

(V) IN CALCULATING THE TEN YEAR PERIOD UNDER SUBPARAGRAPH (IV) OF THIS PARAGRAPH, ANY PERIOD OF TIME DURING WHICH THE PERSON WAS INCARCERATED FOR ANY REASON BETWEEN THE TIME OF COMMISSION OF THE PREVIOUS 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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OFFENSE SHALL BE EXCLUDED AND SUCH TEN YEAR PERIOD SHALL BE EXTENDED BY A PERIOD OR PERIODS EQUAL TO THE TIME SERVED UNDER SUCH INCARCERATION;

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

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

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

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

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

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

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

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

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

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

S 215.10 Referral of selected felonies to dispute resolution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

S 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.