

643

2011-2012 Regular Sessions

I N   S E N A T E

(PREFILED)

January 5, 2011

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Introduced by Sens. GOLDEN, DeFRANCISCO, JOHNSON, RANZENHOFER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to sentence for persistent misdemeanor 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 70.16 to  
2     read as follows:  
3     S 70.16 SENTENCE OF IMPRISONMENT FOR PERSISTENT MISDEMEANOR OFFENDER.  
4     1. DEFINITION OF PERSISTENT MISDEMEANOR OFFENDER.  
5     (A) A PERSISTENT MISDEMEANOR OFFENDER IS A PERSON WHO STANDS CONVICTED  
6     OF A MISDEMEANOR AFTER HAVING PREVIOUSLY BEEN CONVICTED OF FIVE OR MORE  
7     CRIMES, AS PROVIDED IN PARAGRAPH (B) OF THIS SUBDIVISION.  
8     (B) A PREVIOUS CRIMINAL CONVICTION WITHIN THE MEANING OF PARAGRAPH (A)  
9     OF THIS SUBDIVISION IS A CONVICTION OF A CRIME IN THIS STATE, PROVIDED:  
10    (I) THAT A SENTENCE FOR SUCH CONVICTION WAS IMPOSED THEREFOR; AND  
11    (II) THAT THE DEFENDANT WAS SENTENCED FOR SUCH CONVICTION PRIOR TO THE  
12    DATE OF COMMISSION OF THE PRESENT MISDEMEANOR; AND  
13    (III) SUBJECT TO THE PERIOD OF TIME EXCLUDED PURSUANT TO THE  
14    PROVISIONS OF PARAGRAPH (C) OF THIS SUBDIVISION, THAT THE DEFENDANT WAS  
15    SENTENCED FOR SUCH CONVICTION NO MORE THAN FIVE YEARS PRIOR TO THE DATE  
16    OF COMMISSION OF THE PRESENT MISDEMEANOR; AND  
17    (IV) THAT THE DEFENDANT WAS NOT PARDONED ON THE GROUNDS OF INNOCENCE.  
18    (C) ANY PERIOD OF TIME DURING WHICH THE DEFENDANT WAS INCARCERATED FOR  
19    ANY REASON BETWEEN THE DATE OF COMMISSION OF THE PREVIOUS CRIME AND THE  
20    DATE OF COMMISSION OF THE PRESENT MISDEMEANOR SHALL NOT COUNT AS TIME  
21    WHICH HAS ELAPSED IN DETERMINING THE FIVE YEAR PERIOD WITHIN WHICH THE  
22    DEFENDANT MUST HAVE BEEN SENTENCED FOR THE PREVIOUS CRIME UNDER SUBPARA-  
23    GRAPH (III) OF PARAGRAPH (B) OF THIS SUBDIVISION; SUCH FIVE YEAR PERIOD

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

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1 SHALL BE EXTENDED BY SUCH PERIOD OR PERIODS OF TIME SERVED IN INCARCERA-  
2 TION.

3 (D) THE TERM "SENTENCE", WHEN REFERRING TO THE SENTENCE FOR A PREVIOUS  
4 CRIMINAL CONVICTION WITHIN THE MEANING OF PARAGRAPH (B) OF THIS SUBDIVI-  
5 SION, SHALL INCLUDE BUT NOT BE LIMITED TO: A SUSPENDED SENTENCE; A  
6 SUSPENDED EXECUTION OF SENTENCE; A SENTENCE OF PROBATION; A SENTENCE OF  
7 CONDITIONAL DISCHARGE OR OF UNCONDITIONAL DISCHARGE; A SENTENCE OF  
8 CERTIFICATION TO THE CARE AND CUSTODY OF THE OFFICE OF ALCOHOLISM AND  
9 SUBSTANCE ABUSE SERVICES; OR A SENTENCE OF ANY COMBINATION OF ONE OR  
10 MORE OF THE FOREGOING SENTENCES.

11 2. AUTHORIZED SENTENCE. WHEN THE COURT HAS FOUND, PURSUANT TO THE  
12 PROVISIONS OF THE CRIMINAL PROCEDURE LAW, THAT A PERSON IS A PERSISTENT  
13 MISDEMEANOR OFFENDER, THE COURT MUST IMPOSE A DEFINITE SENTENCE OF  
14 IMPRISONMENT, THE TERM OF WHICH SHALL BE FIXED BY THE COURT AT NO LESS  
15 THAN THIRTY DAYS AND NO MORE THAN ONE YEAR, AND MAY IMPOSE ANY SENTENCE  
16 AUTHORIZED BY LAW OTHER THAN AND IN ADDITION TO SUCH SENTENCE OF IMPRI-  
17 SONMENT. IN FIXING THE LENGTH OF THE TERM OF SUCH DEFINITE PERIOD OF  
18 IMPRISONMENT TO WHICH THE COURT MUST SENTENCE THE DEFENDANT UPON A FIND-  
19 ING THAT SUCH PERSON IS A PERSISTENT MISDEMEANOR OFFENDER, THE COURT  
20 SHALL CONSIDER THE HISTORY AND CHARACTER OF THE DEFENDANT AND THE NATURE  
21 AND CIRCUMSTANCES OF SUCH PERSON'S CRIMINAL CONDUCT AND SHALL SENTENCE  
22 THE DEFENDANT TO A TERM HAVING A LENGTH, WITHIN THE FOREGOING PRESCRIBED  
23 LIMITS, THAT WILL BEST SERVE THE PUBLIC INTEREST.

24 S 2. The criminal procedure law is amended by adding a new section  
25 400.14 to read as follows:

26 S 400.14 PROCEDURE FOR DETERMINING WHETHER DEFENDANT SHOULD BE  
27 SENTENCED AS A PERSISTENT MISDEMEANOR OFFENDER.

28 1. APPLICABILITY. THE PROVISIONS OF THIS SECTION GOVERN THE PROCEDURE  
29 THAT MUST BE FOLLOWED IN ORDER TO IMPOSE THE PERSISTENT MISDEMEANOR  
30 OFFENDER SENTENCE AUTHORIZED BY SUBDIVISION TWO OF SECTION 70.16 OF THE  
31 PENAL LAW. SUCH SENTENCE MAY NOT BE IMPOSED UNLESS, BASED UPON EVIDENCE  
32 IN THE RECORD OF A HEARING HELD PURSUANT TO THIS SECTION, THE COURT (A)  
33 HAS FOUND THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER AS  
34 DEFINED IN SUBDIVISION ONE OF SECTION 70.16 OF THE PENAL LAW, AND (B)  
35 HAS CONSIDERED THE HISTORY AND CHARACTER OF THE DEFENDANT AND THE NATURE  
36 AND CIRCUMSTANCES OF HIS OR HER CRIMINAL CONDUCT, AS WELL AS THE PUBLIC  
37 INTEREST, IN DETERMINING THE LENGTH OF THE DEFINITE SENTENCE TO BE  
38 IMPOSED WITHIN THE LIMITS PRESCRIBED BY SUBDIVISION TWO OF SECTION 70.16  
39 OF THE PENAL LAW.

40 2. AUTHORIZATION FOR HEARING. WHEN INFORMATION AVAILABLE TO THE COURT  
41 PRIOR TO SENTENCING INDICATES THAT THE DEFENDANT IS A PERSISTENT MISDE-  
42 MEANOR OFFENDER, AND WHEN, IN THE OPINION OF THE COURT, THE AVAILABLE  
43 INFORMATION SHOWS THAT A PERSISTENT MISDEMEANOR OFFENDER SENTENCE MAY BE  
44 WARRANTED, THE COURT MAY ORDER A HEARING TO DETERMINE (A) WHETHER THE  
45 DEFENDANT IS IN FACT A PERSISTENT MISDEMEANOR OFFENDER, AND (B) IF SO,  
46 WHETHER A PERSISTENT MISDEMEANOR OFFENDER SENTENCE SHOULD BE IMPOSED.

47 3. ORDER DIRECTING A HEARING. AN ORDER DIRECTING A HEARING TO DETER-  
48 MINE WHETHER THE DEFENDANT SHOULD BE SENTENCED AS A PERSISTENT MISDEMEA-  
49 NOR OFFENDER MUST BE FILED WITH THE CLERK OF THE COURT AND MUST SPECIFY  
50 A DATE FOR THE HEARING NOT LESS THAN TWENTY DAYS FROM THE DATE THE ORDER  
51 IS FILED. THE COURT MUST ANNEX TO AND FILE WITH THE ORDER A STATEMENT  
52 SETTING FORTH THE FOLLOWING:

53 (A) THE DATES AND PLACES OF THE PREVIOUS CONVICTIONS WHICH RENDER THE  
54 DEFENDANT A PERSISTENT MISDEMEANOR OFFENDER AS DEFINED IN SUBDIVISION  
55 ONE OF SECTION 70.16 OF THE PENAL LAW; AND

(B) THE FACTORS IN THE DEFENDANT'S BACKGROUND AND PRIOR CRIMINAL CONDUCT, AS WELL AS THE PUBLIC INTEREST, WHICH THE COURT DEEMS RELEVANT FOR THE PURPOSE OF SENTENCING THE DEFENDANT AS A PERSISTENT MISDEMEANOR OFFENDER.

4. NOTICE OF HEARING. UPON RECEIPT OF THE ORDER AND STATEMENT OF THE COURT, THE CLERK OF THE COURT MUST SEND A NOTICE OF HEARING TO THE DEFENDANT, HIS OR HER COUNSEL AND THE DISTRICT ATTORNEY. SUCH NOTICE MUST SPECIFY THE TIME AND PLACE OF THE HEARING AND THE FACT THAT THE PURPOSE OF THE HEARING IS TO DETERMINE WHETHER OR NOT THE DEFENDANT SHOULD BE SENTENCED AS A PERSISTENT MISDEMEANOR OFFENDER. EACH NOTICE REQUIRED TO BE SENT HEREUNDER MUST BE ACCOMPANIED BY A COPY OF THE STATEMENT OF THE COURT.

5. BURDEN AND STANDARD OF PROOF; EVIDENCE. UPON ANY HEARING HELD PURSUANT TO THIS SECTION THE BURDEN OF PROOF IS UPON THE PEOPLE. A FINDING THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER, AS DEFINED IN SUBDIVISION ONE OF SECTION 70.16 OF THE PENAL LAW, MUST BE BASED UPON PROOF BEYOND A REASONABLE DOUBT BY EVIDENCE ADMISSIBLE UNDER THE RULES APPLICABLE TO THE TRIAL OF THE ISSUE OF GUILT. MATTERS PERTAINING TO THE DEFENDANT'S HISTORY AND CHARACTER AND THE NATURE AND CIRCUMSTANCES OF HIS OR HER CRIMINAL CONDUCT, AS WELL AS THE PUBLIC INTEREST, MAY BE ESTABLISHED BY ANY RELEVANT EVIDENCE, NOT LEGALLY PRIVILEGED, REGARDLESS OF ADMISSIBILITY UNDER THE EXCLUSIONARY RULES OF EVIDENCE, AND THE STANDARD OF PROOF WITH RESPECT TO SUCH MATTERS SHALL BE A PREPONDERANCE OF THE EVIDENCE.

6. CONSTITUTIONALITY OF PRIOR CONVICTIONS. 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 MAY NOT BE COUNTED IN DETERMINING WHETHER THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER. THE DEFENDANT MAY, AT ANY TIME DURING THE COURSE OF THE HEARING HEREUNDER CONTROVERT AN ALLEGATION WITH RESPECT TO SUCH CONVICTION IN THE STATEMENT OF THE COURT 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.

7. PRELIMINARY EXAMINATION. WHEN THE DEFENDANT APPEARS FOR THE HEARING THE COURT MUST ASK HIM OR HER WHETHER HE OR SHE WISHES TO CONTROVERT ANY ALLEGATION MADE IN THE STATEMENT PREPARED BY THE COURT, AND WHETHER HE OR SHE WISHES TO PRESENT EVIDENCE ON THE ISSUE OF WHETHER HE OR SHE IS A PERSISTENT MISDEMEANOR OFFENDER OR ON THE QUESTION OF HIS OR HER BACKGROUND AND CRIMINAL CONDUCT. IF THE DEFENDANT WISHES TO CONTROVERT ANY ALLEGATION IN THE STATEMENT OF THE COURT, HE OR SHE MUST SPECIFY THE PARTICULAR ALLEGATION OR ALLEGATIONS HE OR SHE WISHES TO CONTROVERT. IF HE OR SHE WISHES TO PRESENT EVIDENCE IN HIS OR HER OWN BEHALF, HE OR SHE MUST SPECIFY THE NATURE OF SUCH EVIDENCE. UNCONTROVERTED ALLEGATIONS IN THE STATEMENT OF THE COURT ARE DEEMED EVIDENCE IN THE RECORD.

8. CASES WHERE FURTHER HEARING IS NOT REQUIRED. WHERE THE UNCONTROVERTED ALLEGATIONS IN THE STATEMENT OF THE COURT ARE SUFFICIENT TO SUPPORT A FINDING THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER AND THE COURT IS SATISFIED THAT (A) THE UNCONTROVERTED ALLEGATIONS WITH RESPECT TO THE DEFENDANT'S BACKGROUND AND THE NATURE OF HIS OR HER PRIOR CRIMINAL CONDUCT, AS WELL AS THE PUBLIC INTEREST, WARRANT SENTENCING THE DEFENDANT AS A PERSISTENT MISDEMEANOR OFFENDER, AND (B) THE DEFENDANT EITHER HAS NO RELEVANT EVIDENCE TO PRESENT OR THE FACTS WHICH COULD BE ESTABLISHED THROUGH THE EVIDENCE OFFERED BY THE DEFENDANT WOULD

1 NOT AFFECT THE COURT'S DECISION, THE COURT MAY ENTER A FINDING THAT THE  
2 DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER AND SENTENCE HIM OR HER  
3 IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION TWO OF SECTION 70.16 OF  
4 THE PENAL LAW.

5 9. CASES WHERE FURTHER HEARING IS REQUIRED. WHERE THE DEFENDANT  
6 CONTROVERTS AN ALLEGATION IN THE STATEMENT OF THE COURT AND THE UNCON-  
7 TROVERTED ALLEGATIONS IN SUCH STATEMENT ARE NOT SUFFICIENT TO SUPPORT A  
8 FINDING THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER AS  
9 DEFINED IN SUBDIVISION ONE OF SECTION 70.16 OF THE PENAL LAW, OR WHERE  
10 THE UNCONTROVERTED ALLEGATIONS WITH RESPECT TO THE DEFENDANT'S HISTORY  
11 AND THE NATURE OF HIS OR HER PRIOR CRIMINAL CONDUCT, AS WELL AS THE  
12 PUBLIC INTEREST, WARRANT SENTENCING HIM OR HER TO A LESSER TERM OF  
13 IMPRISONMENT AS A PERSISTENT MISDEMEANOR OFFENDER, WITHIN THE TERM  
14 LIMITS PRESCRIBED BY LAW, OR WHERE THE DEFENDANT HAS OFFERED TO PRESENT  
15 EVIDENCE TO ESTABLISH FACTS THAT WOULD AFFECT THE COURT'S DECISION ON  
16 THE QUESTION OF WHETHER A PERSISTENT MISDEMEANOR OFFENDER SENTENCE IS  
17 WARRANTED, THE COURT MAY FIX A DATE FOR A FURTHER HEARING. SUCH HEARING  
18 SHALL BE BEFORE THE COURT WITHOUT A JURY AND EITHER PARTY MAY INTRODUCE  
19 EVIDENCE WITH RESPECT TO THE CONTROVERTED ALLEGATIONS OR ANY OTHER  
20 MATTER RELEVANT TO THE ISSUE OF WHETHER OR NOT THE DEFENDANT SHOULD BE  
21 SENTENCED AS A PERSISTENT MISDEMEANOR OFFENDER AND ON THE ISSUE OF THE  
22 LENGTH OF SUCH SENTENCE. AT THE CONCLUSION OF THE HEARING THE COURT  
23 MUST MAKE A FINDING AS TO WHETHER OR NOT THE DEFENDANT IS A PERSISTENT  
24 MISDEMEANOR OFFENDER AND, UPON A FINDING THAT HE OR SHE IS SUCH, MUST  
25 THEN MAKE SUCH FINDINGS OF FACT AS IT DEEMS RELEVANT TO THE QUESTION OF  
26 WHAT LENGTH OF PERSISTENT MISDEMEANOR OFFENDER INCARCERATION SENTENCE IS  
27 WARRANTED, AND WHAT OTHER SENTENCE AUTHORIZED BY LAW SHOULD BE IMPOSED.  
28 IF THE COURT FINDS THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFEN-  
29 DER, IT MAY SENTENCE THE DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF  
30 SUBDIVISION TWO OF SECTION 70.16 OF THE PENAL LAW.

31 10. TERMINATION OF HEARING. AT ANY TIME DURING THE PENDENCY OF A HEAR-  
32 ING PURSUANT TO THIS SECTION, THE COURT MAY, IN ITS DISCRETION, TERMI-  
33 NATE THE HEARING WITHOUT MAKING ANY FINDING. IN SUCH CASE, UNLESS THE  
34 COURT RECOMMENCES THE PROCEEDINGS AND MAKES THE NECESSARY FINDINGS, THE  
35 DEFENDANT MAY NOT BE SENTENCED AS A PERSISTENT MISDEMEANOR OFFENDER.

36 S 3. This act shall take effect on the first of November next succeed-  
37 ing the date on which it shall have become a law.