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

1957

2011-2012 Regular Sessions

I N  S E N A T E

January 14, 2011

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:

Section 1. 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 HOMICIDE 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 MURDER IN THE FIRST DEGREE AS DEFINED IN SECTION 125.27 OF THE PENAL LAW, MURDER IN THE SECOND DEGREE AS DEFINED IN SECTION 125.25 OF SUCH LAW, MANSLAUGHTER IN THE FIRST DEGREE AS DEFINED IN SECTION 125.20 OF SUCH LAW, OR MANSLAUGHTER IN THE SECOND DEGREE AS DEFINED IN SECTION 125.15 OF SUCH LAW, HAS PREVIOUSLY BEEN SUBJECTED TO A PREDICATE HOMICIDE CONVICTION AS DEFINED IN SUBDIVISION TWO OF SECTION 70.09 OF THE PENAL LAW AND MAY BE A SECOND HOMICIDE OFFENDER.

2. STATEMENT TO BE FILED. WHEN INFORMATION AVAILABLE TO THE COURT OR TO THE PEOPLE PRIOR TO SENTENCING FOR THE CRIMES OF MURDER IN THE FIRST DEGREE AS DEFINED IN SECTION 125.27 OF THE PENAL LAW, MURDER IN THE SECOND DEGREE AS DEFINED IN SECTION 125.25 OF SUCH LAW, MANSLAUGHTER IN THE FIRST DEGREE AS DEFINED IN SECTION 125.20 OF SUCH LAW, OR MANSLAUGHTER IN THE SECOND DEGREE AS DEFINED IN SECTION 125.15 OF SUCH LAW, INDICATES THAT THE DEFENDANT MAY HAVE PREVIOUSLY BEEN SUBJECTED TO 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.

LBD06788-01-1

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

3. PRELIMINARY EXAMINATION. THE DEFENDANT MUST BE GIVEN A COPY OF SUCH STATEMENT AND THE COURT MUST ASK HIM WHETHER HE WISHES TO CONTROVERT ANY ALLEGATION MADE THEREIN. IF THE DEFENDANT WISHES TO CONTROVERT ANY ALLEGATION IN THE STATEMENT, HE MUST SPECIFY THE PARTICULAR ALLEGATION OR ALLEGATIONS HE 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 HOMICIDE CONVICTION THE COURT MUST ENTER SUCH FINDING.

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 HOMICIDE 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 A JURY. THE BURDEN OF PROOF IS UPON THE PEOPLE AND A FINDING THAT THE DEFENDANT HAS BEEN SUBJECTED TO A PREDICATE HOMICIDE 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 HOMICIDE 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 IN THIS SUBDIVISION 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 HOMICIDE CONVICTION.

8. SUBSEQUENT USE OF PREDICATE HOMICIDE 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 2. The criminal procedure law is amended by adding a new section 400.18 to read as follows:

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

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

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

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

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

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

(B) THE FACTORS IN THE DEFENDANT'S BACKGROUND AND PRIOR CRIMINAL CONDUCT WHICH THE COURT DEEMS RELEVANT FOR THE PURPOSE OF SENTENCING THE DEFENDANT AS A SECOND HOMICIDE 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 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 SECOND HOMICIDE 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 SECOND HOMICIDE OFFENDER, AS DEFINED IN SUBDIVISION ONE OF SECTION 70.09 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 CRIMINAL CONDUCT 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 PREDICATE HOMICIDE CONVICTION AS DEFINED IN SUBDIVISION TWO OF SECTION 70.09 OF THE PENAL LAW, 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 SECOND HOMICIDE 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 IN THIS SUBDIVISION 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 WHETHER HE WISHES TO CONTROVERT ANY ALLEGATION MADE IN THE STATEMENT PREPARED BY THE COURT, AND WHETHER HE WISHES TO PRESENT EVIDENCE ON THE ISSUE OF WHETHER HE IS A SECOND HOMICIDE OFFENDER OR ON THE QUESTION OF HIS BACKGROUND AND CRIMINAL CONDUCT. IF THE DEFENDANT WISHES TO CONTROVERT ANY ALLEGATION IN THE STATEMENT OF THE COURT, HE MUST SPECIFY THE PARTICULAR ALLEGATION OR ALLEGATIONS HE WISHES TO CONTROVERT. IF HE WISHES TO PRESENT EVIDENCE IN HIS OWN BEHALF, HE 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 SECOND HOMICIDE OFFENDER AND THE COURT IS SATISFIED THAT (A) THE UNCONTROVERTED ALLEGATIONS WITH RESPECT TO THE DEFENDANT'S BACKGROUND AND THE NATURE OF HIS PRIOR CRIMINAL CONDUCT WARRANT SENTENCING THE DEFENDANT AS A SECOND HOMICIDE 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 NOT AFFECT THE COURT'S DECISION, THE COURT MAY ENTER A FINDING THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AND SENTENCE HIM IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION THREE OF SECTION 70.09 OF THE PENAL LAW.

9. CASES WHERE FURTHER HEARING IS REQUIRED. WHERE THE DEFENDANT CONTROVERTS AN ALLEGATION IN THE STATEMENT OF THE COURT AND THE UNCONTROVERTED ALLEGATIONS IN SUCH STATEMENT ARE NOT SUFFICIENT TO SUPPORT A FINDING THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AS DEFINED IN SUBDIVISION ONE OF SECTION 70.09 OF THE PENAL LAW, OR WHERE THE UNCONTROVERTED ALLEGATIONS WITH RESPECT TO THE DEFENDANT'S HISTORY AND THE NATURE OF HIS PRIOR CRIMINAL CONDUCT DO NOT WARRANT SENTENCING HIM AS A SECOND HOMICIDE OFFENDER, OR WHERE THE DEFENDANT HAS OFFERED TO PRESENT EVIDENCE TO ESTABLISH FACTS THAT WOULD AFFECT THE COURT'S DECISION ON THE QUESTION OF WHETHER A SECOND HOMICIDE OFFENDER SENTENCE IS WARRANTED, THE COURT MAY FIX A DATE FOR A FURTHER HEARING. SUCH HEARING SHALL BE BEFORE THE COURT WITHOUT A JURY AND EITHER PARTY MAY INTRODUCE EVIDENCE WITH RESPECT TO THE CONTROVERTED ALLEGATIONS OR ANY OTHER MATTER RELEVANT TO THE ISSUE OF WHETHER OR NOT THE DEFENDANT SHOULD BE SENTENCED AS A SECOND HOMICIDE OFFENDER. AT THE CONCLUSION OF THE HEARING THE COURT MUST MAKE A FINDING AS TO WHETHER OR NOT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AND, UPON A FINDING THAT HE IS SUCH, MUST THEN MAKE SUCH FINDINGS OF FACT AS IT DEEMS RELEVANT TO THE QUESTION OF WHETHER A SECOND HOMICIDE OFFENDER SENTENCE IS WARRANTED. IF THE COURT BOTH FINDS THAT THE DEFENDANT IS A SECOND HOMICIDE OFFENDER AND IS OF THE OPINION THAT A SECOND HOMICIDE OFFENDER SENTENCE IS WARRANTED, IT MAY SENTENCE THE DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION THREE OF SECTION 70.09 OF THE PENAL LAW.

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

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

S 400.22 Evidence of imprisonment.

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

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

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

S 70.09 SENTENCE OF IMPRISONMENT FOR A SECOND HOMICIDE OFFENDER.

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

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

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

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

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

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

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

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