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

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I N S E N A T E

(PREFILED)

January 5, 2011

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:

Section 1. The penal law is amended by adding a new section 70.16 to read as follows:

S 70.16 SENTENCE OF IMPRISONMENT FOR PERSISTENT MISDEMEANOR OFFENDER.

1. DEFINITION OF PERSISTENT MISDEMEANOR OFFENDER.

(A) A PERSISTENT MISDEMEANOR OFFENDER IS A PERSON WHO STANDS CONVICTED OF A MISDEMEANOR AFTER HAVING PREVIOUSLY BEEN CONVICTED OF FIVE OR MORE CRIMES, AS PROVIDED IN PARAGRAPH (B) OF THIS SUBDIVISION.

(B) A PREVIOUS CRIMINAL CONVICTION WITHIN THE MEANING OF PARAGRAPH (A) OF THIS SUBDIVISION IS A CONVICTION OF A CRIME IN THIS STATE, PROVIDED:

(I) THAT A SENTENCE FOR SUCH CONVICTION WAS IMPOSED THEREFOR; AND

(II) THAT THE DEFENDANT WAS SENTENCED FOR SUCH CONVICTION PRIOR TO THE DATE OF COMMISSION OF THE PRESENT MISDEMEANOR; AND

(III) SUBJECT TO THE PERIOD OF TIME EXCLUDED PURSUANT TO THE PROVISIONS OF PARAGRAPH (C) OF THIS SUBDIVISION, THAT THE DEFENDANT WAS SENTENCED FOR SUCH CONVICTION NO MORE THAN FIVE YEARS PRIOR TO THE DATE OF COMMISSION OF THE PRESENT MISDEMEANOR; AND

(IV) THAT THE DEFENDANT WAS NOT PARDONED ON THE GROUNDS OF INNOCENCE.

(C) ANY PERIOD OF TIME DURING WHICH THE DEFENDANT WAS INCARCERATED FOR ANY REASON BETWEEN THE DATE OF COMMISSION OF THE PREVIOUS CRIME AND THE DATE OF COMMISSION OF THE PRESENT MISDEMEANOR SHALL NOT COUNT AS TIME WHICH HAS ELAPSED IN DETERMINING THE FIVE YEAR PERIOD WITHIN WHICH THE DEFENDANT MUST HAVE BEEN SENTENCED FOR THE PREVIOUS CRIME UNDER SUBPARAGRAPH (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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SHALL BE EXTENDED BY SUCH PERIOD OR PERIODS OF TIME SERVED IN INCARCERATION.

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

2. AUTHORIZED SENTENCE. WHEN THE COURT HAS FOUND, PURSUANT TO THE PROVISIONS OF THE CRIMINAL PROCEDURE LAW, THAT A PERSON IS A PERSISTENT MISDEMEANOR OFFENDER, THE COURT MUST IMPOSE A DEFINITE SENTENCE OF IMPRISONMENT, THE TERM OF WHICH SHALL BE FIXED BY THE COURT AT NO LESS THAN THIRTY DAYS AND NO MORE THAN ONE YEAR, AND MAY IMPOSE ANY SENTENCE AUTHORIZED BY LAW OTHER THAN AND IN ADDITION TO SUCH SENTENCE OF IMPRISONMENT. IN FIXING THE LENGTH OF THE TERM OF SUCH DEFINITE PERIOD OF IMPRISONMENT TO WHICH THE COURT MUST SENTENCE THE DEFENDANT UPON A FINDING THAT SUCH PERSON IS A PERSISTENT MISDEMEANOR OFFENDER, THE COURT SHALL CONSIDER THE HISTORY AND CHARACTER OF THE DEFENDANT AND THE NATURE AND CIRCUMSTANCES OF SUCH PERSON'S CRIMINAL CONDUCT AND SHALL SENTENCE THE DEFENDANT TO A TERM HAVING A LENGTH, WITHIN THE FOREGOING PRESCRIBED LIMITS, THAT WILL BEST SERVE THE PUBLIC INTEREST.

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

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

1. APPLICABILITY. THE PROVISIONS OF THIS SECTION GOVERN THE PROCEDURE THAT MUST BE FOLLOWED IN ORDER TO IMPOSE THE PERSISTENT MISDEMEANOR OFFENDER SENTENCE AUTHORIZED BY SUBDIVISION TWO OF SECTION 70.16 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 PERSISTENT MISDEMEANOR OFFENDER AS DEFINED IN SUBDIVISION ONE OF SECTION 70.16 OF THE PENAL LAW, AND (B) HAS CONSIDERED THE HISTORY AND CHARACTER OF THE DEFENDANT AND THE NATURE AND CIRCUMSTANCES OF HIS OR HER CRIMINAL CONDUCT, AS WELL AS THE PUBLIC INTEREST, IN DETERMINING THE LENGTH OF THE DEFINITE SENTENCE TO BE IMPOSED WITHIN THE LIMITS PRESCRIBED BY SUBDIVISION TWO OF SECTION 70.16 OF THE PENAL LAW.

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

NOT AFFECT THE COURT'S DECISION, THE COURT MAY ENTER A FINDING THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER AND SENTENCE HIM OR HER IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION TWO OF SECTION 70.16 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 PERSISTENT MISDEMEANOR OFFENDER AS DEFINED IN SUBDIVISION ONE OF SECTION 70.16 OF THE PENAL LAW, OR WHERE THE UNCONTROVERTED ALLEGATIONS WITH RESPECT TO THE DEFENDANT'S HISTORY AND THE NATURE OF HIS OR HER PRIOR CRIMINAL CONDUCT, AS WELL AS THE PUBLIC INTEREST, WARRANT SENTENCING HIM OR HER TO A LESSER TERM OF IMPRISONMENT AS A PERSISTENT MISDEMEANOR OFFENDER, WITHIN THE TERM LIMITS PRESCRIBED BY LAW, 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 PERSISTENT MISDEMEANOR 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 PERSISTENT MISDEMEANOR OFFENDER AND ON THE ISSUE OF THE LENGTH OF SUCH SENTENCE. AT THE CONCLUSION OF THE HEARING THE COURT MUST MAKE A FINDING AS TO WHETHER OR NOT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER AND, UPON A FINDING THAT HE OR SHE IS SUCH, MUST THEN MAKE SUCH FINDINGS OF FACT AS IT DEEMS RELEVANT TO THE QUESTION OF WHAT LENGTH OF PERSISTENT MISDEMEANOR OFFENDER INCARCERATION SENTENCE IS WARRANTED, AND WHAT OTHER SENTENCE AUTHORIZED BY LAW SHOULD BE IMPOSED. IF THE COURT FINDS THAT THE DEFENDANT IS A PERSISTENT MISDEMEANOR OFFENDER, IT MAY SENTENCE THE DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION TWO OF SECTION 70.16 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 PERSISTENT MISDEMEANOR OFFENDER.

S 3. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.