§ 400.19 Procedure for determining whether defendant is a second child sexual assault felony 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 felony offense for a sexual assault upon a child as defined in section 70.07 of the penal law has previously been convicted of a predicate felony for a sexual assault upon a child.

2. Statement to be filed. When information available to the people prior to the trial of a felony offense for a sexual assault against a child indicates that the defendant may have previously been subjected to a predicate felony conviction for a sexual assault against a child, a statement may be filed by the prosecutor at any time before trial commences setting forth the date and place of each alleged predicate felony conviction for a sexual assault against a child and a statement whether the defendant was eighteen years of age or older at the time of the commission of the predicate felony. Where the provisions of subparagraph (v) of paragraph (b) of subdivision one of section 70.06 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 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 felony conviction for a sexual assault upon a child and that the defendant was 18 years of age or older at the time of the commission of the predicate

felony, the court must enter such finding and when imposing sentence must sentence the defendant in accordance with the provisions of section 70.07 of the penal law.

5. Cases where further hearing is required. Where the defendant controverts an allegation in the statement, the court must proceed to hold a hearing.

6. 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 felony conviction for a sexual assault against a child as defined in subdivision two of section 70.07 of the penal law and that the defendant was 18 years of age or older at the time of the commission of the predicate felony 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) Regardless of whether the age of the victim is an element of the alleged predicate felony offense, where the defendant controverts an allegation that the victim of an alleged sexual assault upon a child was less than fifteen years old, the people may prove that the child was less than fifteen years old by any evidence admissible under the rules applicable to a trial of the issue of guilt. For purposes of determining whether a child was less than fifteen years old, the people shall not be required to prove that the defendant knew the child was less than fifteen years old at the time of the alleged sexual assault.

(c) 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 felony conviction for a sexual assault upon a child. 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.

(d) 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 felony conviction for a sexual assault against a child as defined in subdivision two of section 70.07 of the penal law and whether the defendant was 18 years of age or older at the time of the commission of the predicate felony.

7. Subsequent use of predicate felony conviction finding. Where a finding has been entered pursuant to this section, such finding shall be binding in any future proceeding in which the issue may arise.