## § 400.21 Procedure for determining whether defendant is a second felony offender or a second felony drug 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 has previously been convicted of a predicate felony and may be a second felony offender as defined in section 70.06 of the penal law or a second felony drug offender as defined in either paragraph (b) of subdivision one of section 70.70 of the penal law, or paragraph (b) of subdivision one of section 70.71 of the penal law.

2. Statement to be filed. When information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction and whether the predicate felony conviction was a violent felony as that term is defined in subdivision one of section 70.02 of the penal law, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or death was authorized and is authorized in this state regardless of whether such sentence was imposed. 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 state or local incarcerating agency 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 or her whether he or she 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 the court must enter such finding, including a finding that the predicate felony conviction was of a violent felony as that term is defined in subdivision one of section 70.02 of the penal law, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or death was authorized and is authorized in this state regardless of whether such sentence was imposed, and when imposing sentence must sentence the defendant in accordance with the applicable provisions of section 70.06, 70.70 or 70.71 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 such a predicate felony 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 such a predicate felony 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

such a predicate felony 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 felony conviction, including a finding as to whether or not the predicate felony conviction was of a violent felony as that term is defined in subdivision one of section 70.02 of the penal law, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or death was authorized and is authorized in this state regardless of whether such sentence was imposed.

8. Subsequent use of predicate felony 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.