## § 400.40 Procedure for determining prior convictions for the purpose of sentence in certain cases.

1. Applicability. Where a conviction is entered for an unclassified misdemeanor or for a traffic infraction and the authorized sentence depends upon whether the defendant has a previous judgment of conviction for an offense, or where a conviction is entered for a violation defined outside the penal law and the amount of the fine authorized by the law defining such violation depends upon whether the defendant has a previous judgment of conviction for an offense, such issue is determined as provided in this section.

2. Statement to be filed. If it appears that the defendant has a previous judgment of conviction and if the court is required, or in its discretion desires, to impose a sentence that would not be authorized in the absence of such previous judgment, a statement must be filed after conviction and before sentence setting forth the date and place of the previous judgment or judgments and the court must conduct a hearing to determine whether the defendant is the same person mentioned in the record of such judgment or judgments. In any case where an increased sentence is mandatory, the statement may be filed by the court or by the prosecutor. In any case where an increased sentence is discretionary, the statement may be filed only by the court.

3. Preliminary examination. The defendant must be given a copy of such statement and the court must ask him whether he admits or denies such prior judgment or judgments. If the defendant denies the same or remains mute, the court may proceed with the hearing and, where the increased sentence is mandatory, it must impose such.

4. 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.

5. Manner of conducting hearing. 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 convicted of any offense alleged in the statement must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to trial of the issue of guilt.