§ 440.46 Motion for resentence; certain controlled substance offenders.

1. Any person in the custody of the department of corrections and community supervision convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

2. As part of any such application, the defendant may also move to be resentenced to a determinate sentence in accordance with section 70.70 of the penal law for any one or more class C, D, or E felony offenses defined in article two hundred twenty or two hundred twenty-one of the penal law, the sentence or sentences for which were imposed by the sentencing court at the same time or were included in the same order of commitment as such class B felony.

3. The provisions of section twenty-three of chapter seven hundred thirty-eight of the laws of two thousand four shall govern the proceedings on and determination of a motion brought pursuant to this section; provided, however that the court's consideration of the institutional record of confinement of such person shall include but not be limited to such person's participation in or willingness to participate in treatment or other programming while incarcerated and such person's disciplinary history. The fact that a person may have been unable to participate in treatment or other programming while incarcerated despite such person's willingness to do so shall not be considered a negative factor in determining a motion pursuant to this section.

4. Subdivision one of section seven hundred seventeen and subdivision four of section seven hundred twenty-two of the county law, and the related provisions of article eighteen-A of such law, shall apply to the preparation of and proceedings on motions pursuant to this section,

including any appeals.

5. The provisions of this section shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense. For purposes of this subdivision, an "exclusion offense" is:

(a) a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was: (i) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; or

(b) a second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for which the person has previously been adjudicated.