

CPL ARTICLE 400: PRE-SENTENCING.

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Court MAY hold one or more pre-sentence conferences. MUST be in open court or chambers. Reasonable notice shall be afforded district attorney and defendant's counsel; Court may hold conference without the defendant, or defendant may be directed to appear.

Court may hold summary hearing during conference, and can take testimony under oath. Court may have some or all of the proceedings recorded stenographically, any such record then becomes part of the pre-sentence report.

The Court can place defendant on "interim" probation [not more than 1 year], and adjourn sentencing. Court SHALL in such instance consider the defendant's record of compliance.

Where defendant is to be sentenced as 2nd or Persistent Violent Felony Offender: Prosecutor shall file statement regarding date/place/nature of prior predicate violent felony. If such predicate more than 10 years previously, must include the facility, as well as dates of commencement/termination for any term of imprisonment which would toll the time limit.

Evidence of prior imprisonment can be Certificate of Commissioner of Corrections or of prison Warden/pentitentiary Superindendant, if such person's name be on certificate, and sealed. Statement of court specifying date of conviction, term of imprisonment, and when discharged also prima facie evidence.

Defendant shall receive such statement at least 2 days prior to preliminary examination, else such must be adjourned on request. Any allegations not controverted by defendant are deemed admitted. Hearing shall be held only when uncontroverted allegations are not sufficient to base finding upon. Hearing is without a jury, and the burden is on the People to prove beyond reasonable doubt; all evidence must be of the type legally admissible where establishing guilt generally. Convictions in other jurisdictions are valid if not against U.S. Constitution, however if defendant does not challenge = waiver. Court's finding is binding on future proceedings.

2nd Felony or Drug Felony hearing shall be on Prosecutor's statement received by defendant at least 2 days before. Finding shall specify if predicate is also violent (felonies of other jurisdictions are deemed violent in nature if satisfy all elements specified in Penal Law; and carry sentence of prison > 1 year, OR death).

Where defendant to be sentenced as 2nd Child Sex Assault Offender: Prosecutor's statement shall state that defendant was over 18 at the time of previous predicate commission. There is **no** requirement herein for defendant to receive statement at least 2 days prior to hearing as above. Regardless of whether the age of the victim was a proven

element of the predicate crime, if the defendant now disputes it, People must prove that child was under 15 (NOT need to prove that defendant actually knew).

Hearing for sentencing of defendant as Persistent Felony Offender shall be by order of the Court - filed with clerk - specifying hearing date at least 20 days after filing. Statement of the Court is annexed thereto. Clerk shall notice district attorney, as well as defendant & counsel of the time/place/purpose of hearing. Burden of proof is on People; prior predicates must be proven beyond reasonable doubt. However: any other factors regarding the defendant's history need only be proven by preponderance; and *any* relevant evidence may be adduced. Defendant must at preliminary exam specify nature of evidence intended to be presented on own behalf; Court need not hold hearing if uncontraverted allegations are sufficient to render finding, and where defendant's proposed evidence would not affect such decision. Court may also terminate hearing without finding, but cannot then so sentence defendant as "persistent".

If defendant is to be fined an amount based upon gain from crime: order of Court filed with clerk, setting hearing date within 10 days. Clerk notices District Attorney, plus Defendant & Counsel of time/place/purpose of hearing. Burden on People = preponderance; *any* relevant evidence is allowed. Court may terminate hearing without finding, but cannot then fine defendant.

Where sentence on Unclassified Misdemeanor; Traffic Infraction; or non-Penal Law Violation will be based upon a prior conviction: if sentence would be mandatory = Statement by Court or D.A.; where such sentence discretionary = **ONLY** by Court. Defendant must receive statement at least 2 days prior to hearing; no jury; burden on People = beyond reasonable doubt; only legally admissible evidence allowed.

MURDER 1:

Upon conviction for murder in the first degree - if People do not seek the death penalty - defendant shall be sentenced to prison. ELSE: separate proceeding to determine sentence.

No pre-sentence report is necessary unless defendant will noly be sentenced to prison.

Hearing shall be before the same jury that convicted defendant; unless for good cause extraordinary circumstances (including prejudice to either party) it be discharged and a new jury impaneled. If the original jury: Court shall examine each juror individually and apart from other jurors as to impartiality; shall discharge if unfit, and replace with alternate. If no alternates remain, **MUST** discharge entire old jury and impanel new.

At hearing, only aggravating factors originally proven at trial beyond reasonable

doubt shall be considered. Except that People may adduce evidence of aggravating factor of 2 prior separate convictions within 10 year period (exclusive of time defendant incarcerated) of: non-P.L. 220 Class A felony; Class B violent; any armed felony; or where element was infliction/attempted infliction of serious physical injury or death [other State's conviction upon such elements valid if allowable sentence = prison > 1 year]. Defendant must be reasonably noticed by people of intent to introduce aggravating factors. Aggravating factors are only to be considered at sentencing allowed if accepted by unanimous jury.

Defendant can also present mitigating factors, including hearsay evidence; People may then rebut, but only with legally admissible evidence. Mitigating factors include: no violent criminal history; mentally retarded or impaired capacity at time of commission; was then under duress; only minor participant in another party's commission of crime; was mentally/emotionally disturbed, or on alcohol/drugs.

Parties may make summations: People go first; defendant last. Jury is charged with unanimously determining between choice of death, or life imprisonment without parole. If no accord reached, Court shall sentence defendant to a minimum of 20/25 years; maximum = life.

The Court of Appeals shall adopt rules regarding forms for jury to record findings.

If the Court upon motion of defendant sets aside a jury's death sentence, must allow People at least 10 days to appeal; appeal then taken stays new sentencing hearing.

Defendant can motion at any time for hearing to determine whether mentally retarded = "significant sub-average intellect" + adaptive behavior deficits manifesting *prior* to 18th birthday. Hearing is without jury.

Within "reasonable" time before any hearing herein, each side must provide disclosure (unless such already provided ***and*** subject to protective order); any evidence newly discovered thereafter must also be promptly disclosed.

Each party shall also reasonably notice opposition of intent to introduce psychiatric evidence; evidence not noticed is precluded until notice then be provided. Court can also sanction attorney failing to timely notice; attorney personally liable, can't be reimbursed. If defendant notices such psychiatric evidence, People may apply to Court for order to have defendant examined. If Court grants, People to schedule time/place. If defendant fails to comply: on Prosecutor's request, Court **shall** so inform jury of fact.

Exam shall be recorded, transcripts provided to defendant and D.A. Counsel has right to be present at exam. District Attorney shall promptly provide written findings of exam to defendant. Defendant's statements at exam are inadmissible for *any* proceedings **except**: as to whether defendant is retarded **OR** as mitigating factors (even normally privileged statements then admissible).

If defendant's motion for determination of retardation is made *before* trial commences, hearing must conclude before trial can start; if defendant is found to be retarded and subsequently convicted, shall be sentenced to prison without separate proceeding.

If motion made after conviction: with consent of both parties hearing may be held contemporaneously with sentencing; however Court shall defer any finding until *after* death sentence. If defendant then determined to be retarded, Court must set aside death sentence and imprison defendant.

Upon any determination that defendant is retarded, Court must allow People at least 10 days to appeal; appeal so taken stays sentencing. Court of Appeals shall by rule provide for expedited hearings of death penalty proceedings.

EXCEPTION: Where defendant murdered a Corrections employee while residing in such facility, retardation finding shall **NOT** set aside death sentence.