

**CRIMINAL DIVERSION OF PRESCRIPTION MEDICATIONS
AND PRESCRIPTIONS IN THE THIRD DEGREE
(previous fourth degree conviction)
Penal Law § 178.15 (2)
Committed on or after Nov. 1, 1995**

No charge has been prepared for this offense, which elevates the crime of fourth degree "criminal diversion of prescription medications and prescriptions" under Penal Law § 178.10 to the third-degree felony when the defendant "has previously been convicted of the crime of criminal diversion of prescription medications and prescriptions in the fourth degree."

When the third degree crime is charged, the prior conviction element must be charged in a special information, and after the commencement of trial the defendant must be arraigned on the special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense.¹

If the defendant denies the element or remains mute, the court should use the charge for Criminal Diversion of Prescription Medications and Prescriptions in the Fourth Degree under Penal Law § 178.10 and add the following as element number 4:

4. That the defendant had previously been convicted of the crime of criminal diversion of prescription medications and prescriptions in the fourth degree.

¹ See CPL 200.60 and *People v Cooper*, 78 NY2d 476 (1991).