

S. 3884

A. 6149

2011-2012 Regular Sessions

S E N A T E - A S S E M B L Y

March 8, 2011

IN SENATE -- Introduced by Sen. McDONALD -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY -- Introduced by M. of A. ORTIZ -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to increasing the availability of professionals to perform evaluations regarding a defendant's fitness to proceed to trial in a criminal proceeding

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 730.10 of the criminal procedure law, subdivision 2
2 as amended by chapter 566 of the laws of 1994, subdivisions 3 and 4 as
3 amended by chapter 440 of the laws of 1987, subdivision 5 as amended by
4 chapter 435 of the laws of 1976, subdivisions 6, 7 and 8 as renumbered
5 by chapter 629 of the laws of 1974, and subdivision 8 as separately
6 amended by chapters 615 and 629 of the laws of 1974, is amended to read
7 as follows:
8 S 730.10 Fitness to proceed; definitions.
9 As used in this article, the following terms have the following mean-
10 ings:
11 1. "Incapacitated person" means a defendant who as a result of mental
12 [disease] ILLNESS or [defect] DEVELOPMENTAL DISABILITY lacks capacity to
13 understand the proceedings against him OR HER or to assist in his OR HER
14 own defense.
15 2. "Order of examination" means an order issued to an appropriate
16 director by a criminal court wherein a criminal action is pending
17 against a defendant, or by a family court pursuant to section 322.1 of
18 the family court act wherein a juvenile delinquency proceeding is pend-
19 ing against a juvenile, directing that such person be examined for the
20 purpose of determining if he OR SHE is an incapacitated person.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 3. "Commissioner" means the state commissioner of THE OFFICE OF mental
2 health or the state commissioner of [mental retardation and] develop-
3 mental disabilities.

4 4. "Director" means (a) the director of a state hospital operated by
5 the office of mental health or the director of a developmental center
6 operated by the office [of mental retardation and] FOR PEOPLE WITH
7 developmental disabilities, or (b) the director of a hospital operated
8 by any local government of the state that has been certified by the
9 commissioner as having adequate facilities to examine a defendant to
10 determine if he OR SHE is an incapacitated person, or (c) the director
11 of community [mental health] services UNDER ARTICLE FORTY-ONE OF THE
12 MENTAL HYGIENE LAW.

13 5. "Qualified psychiatrist" means a physician LICENSED UNDER ARTICLE
14 ONE HUNDRED THIRTY-ONE OF THE EDUCATION LAW who:

15 (a) is a diplomate of the American board of psychiatry and neurology
16 or is eligible to be certified by that board; or,

17 (b) is certified by the American osteopathic board of neurology and
18 psychiatry or is eligible to be certified by that board.

19 6. "[Certified psychologist] PSYCHOLOGIST" means a person who is
20 [registered] LICENSED as a [certified] psychologist under article one
21 hundred fifty-three of the education law.

22 7. "LICENSED CLINICAL SOCIAL WORKER" MEANS A PERSON WHO IS LICENSED AS
23 A LICENSED CLINICAL SOCIAL WORKER UNDER ARTICLE ONE HUNDRED FIFTY-FOUR
24 OF THE EDUCATION LAW.

25 8. "QUALIFIED NURSE PRACTITIONER" MEANS A PERSON WHO IS CERTIFIED AS A
26 NURSE PRACTITIONER UNDER ARTICLE ONE HUNDRED THIRTY-NINE OF THE EDUCA-
27 TION LAW WITHIN THE SPECIALTY AREA OF PSYCHIATRY.

28 9. "Psychiatric examiner" means a qualified psychiatrist [or a certi-
29 fied] A psychologist, A LICENSED CLINICAL SOCIAL WORKER OR A QUALIFIED
30 NURSE PRACTITIONER who has been designated by a director to examine a
31 defendant pursuant to an order of examination.

32 [8.] 10. "Examination report" means a report made by a psychiatric
33 examiner wherein he OR SHE sets forth [his] SUCH EXAMINER'S opinion as
34 to whether the defendant is or is not an incapacitated person, the
35 nature and extent of [his] THE examination and, if [he] THE EXAMINER
36 finds that the defendant is an incapacitated person, [his] SUCH EXAMIN-
37 ER'S diagnosis and prognosis and a detailed statement of the reasons for
38 [his] SUCH opinion by making particular reference to those aspects of
39 the proceedings wherein the defendant lacks capacity to understand or to
40 assist in his OR HER own defense. The state administrator and the
41 commissioner must jointly adopt the form of the examination report; and
42 the state administrator shall prescribe the number of copies thereof
43 that must be submitted to the court by the director.

44 S 2. Section 730.20 of the criminal procedure law, subdivisions 1 and
45 5 as amended by chapter 693 of the laws of 1989 and subdivision 7 as
46 amended by chapter 692 of the laws of 1972, is amended to read as
47 follows:

48 S 730.20 Fitness to proceed; generally.

49 1. The appropriate director to whom a criminal court issues an order
50 of examination must be determined in accordance with rules jointly
51 adopted by the judicial conference and the commissioner. Upon receipt
52 of an examination order, the director must designate two qualified
53 psychiatric examiners, of whom he OR SHE may be one, to examine the
54 defendant to determine if he OR SHE is an incapacitated person. In
55 conducting their examination, the psychiatric examiners may employ any
56 method which is accepted by the medical profession for the examination

1 of persons alleged to be mentally ill or [mentally defective] DEVELOP-
2 MENTALLY DISABLED. The court may authorize a psychiatrist [or],
3 psychologist, LICENSED CLINICAL SOCIAL WORKER OR QUALIFIED NURSE PRACTI-
4 TIONER retained by the defendant to be present at such examination.

5 2. When the defendant is not in custody at the time a court issues an
6 order of examination, because he OR SHE was theretofore released on bail
7 or on his OR HER own recognizance, the court may direct that the exam-
8 ination be conducted on an out-patient basis, and at such time and place
9 as the director shall designate. If, however, the director informs the
10 court that hospital confinement of the defendant is necessary for an
11 effective examination, the court may direct that the defendant be
12 confined in a hospital designated by the director until the examination
13 is completed.

14 3. When the defendant is in custody at the time a court issues an
15 order of examination, the examination must be conducted at the place
16 where the defendant is being held in custody. If, however, the director
17 determines that hospital confinement of the defendant is necessary for
18 an effective examination, the sheriff must deliver the defendant to a
19 hospital designated by the director and hold [him] THE DEFENDANT in
20 custody therein, under sufficient guard, until the examination is
21 completed.

22 4. Hospital confinement under subdivisions two and three shall be for
23 a period not exceeding thirty days, except that, upon application of the
24 director, the court may authorize confinement for an additional period
25 not exceeding thirty days if it is satisfied that a longer period is
26 necessary to complete the examination. During the period of hospital
27 confinement, the physician in charge of the hospital may administer or
28 cause to be administered to the defendant such emergency psychiatric,
29 medical or other therapeutic treatment as in his OR HER judgment should
30 be administered.

31 5. Each psychiatric examiner, after he OR SHE has completed his OR
32 HER examination of the defendant, must promptly prepare an examination
33 report and submit it to the director. If the psychiatric examiners are
34 not unanimous in their opinion as to whether the defendant is or is not
35 an incapacitated person, the director must designate another qualified
36 psychiatric examiner to examine the defendant to determine if he OR SHE
37 is an incapacitated person. Upon receipt of the examination reports,
38 the director must submit them to the court that issued the order of
39 examination. The court must furnish a copy of the reports to counsel
40 for the defendant and to the district attorney.

41 6. When a defendant is subjected to examination pursuant to an order
42 issued by a criminal court in accordance with this article, any state-
43 ment made by [him] SUCH DEFENDANT for the purpose of the examination or
44 treatment shall be inadmissible in evidence against [him] SUCH DEFENDANT
45 in any criminal action on any issue other than that of his OR HER mental
46 condition, but such statement is admissible upon that issue whether or
47 not it would otherwise be deemed a privileged communication.

48 7. A psychiatric examiner is entitled to his OR HER reasonable trav-
49 eling expenses, a fee of fifty dollars for each examination of a defend-
50 ant and a fee of fifty dollars for each appearance at a court hearing or
51 trial but not exceeding two hundred dollars in fees for examination and
52 testimony in any one case; except that if such psychiatric examiner be
53 an employee of the state of New York he OR SHE shall be entitled only to
54 reasonable traveling expenses, unless such psychiatric examiner makes
55 the examination or appears at a court hearing or trial outside his OR
56 HER hours of state employment in a county in which the director of

community [mental health] services certifies to the fiscal officer thereof that there is a shortage of qualified [psychiatrists] PSYCHIATRIC EXAMINERS available to conduct examinations under the criminal procedure law in such county, in which event he OR SHE shall be entitled to the foregoing fees and reasonable traveling expenses. Such fees and traveling expenses and the costs of sending a defendant to another place of detention or to a hospital for examination, of his OR HER maintenance therein and of returning [him] SUCH DEFENDANT shall, when approved by the court, be a charge of the county in which the defendant is being tried.

S 3. Subdivision 1 of section 730.30 of the criminal procedure law is amended to read as follows:

1. At any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he OR SHE is held for the action of the grand jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person.

S 4. Subdivisions 2 and 5 of section 730.40 of the criminal procedure law are amended to read as follows:

2. When a local criminal court has issued a final order of observation, it must dismiss the accusatory instrument filed in such court against the defendant and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such accusatory instrument. When the defendant is in the custody of the commissioner at the expiration of the period prescribed in a temporary order of observation, the proceedings in the local criminal court that issued such order shall terminate for all purposes and the commissioner must promptly certify to such court and to the appropriate district attorney that the defendant was in his OR HER custody on such expiration date. Upon receipt of such certification, the court must dismiss the felony complaint filed against the defendant.

5. When an indictment is timely filed against the defendant after the issuance of a temporary order of observation or after the expiration of the period prescribed in such order, the superior court in which such indictment is filed must direct the sheriff to take custody of the defendant at the institution in which he OR SHE is confined and bring him OR HER before the court for arraignment upon the indictment. After the defendant is arraigned upon the indictment, such temporary order of observation or any order issued pursuant to the mental hygiene law after the expiration of the period prescribed in the temporary order of observation shall be deemed nullified. Notwithstanding any other provision of law, an indictment filed in a superior court against a defendant for a crime charged in the felony complaint is not timely for the purpose of this subdivision if it is filed more than six months after the expiration of the period prescribed in a temporary order of observation issued by a local criminal court wherein such felony complaint was pending. An untimely indictment must be dismissed by the superior court unless such court is satisfied that there was good cause for the delay in filing such indictment.

S 5. Section 730.50 of the criminal procedure law, subdivision 1 as amended by chapter 231 of the laws of 2008, subdivision 2 as amended by chapter 789 of the laws of 1985 and subdivision 5 as amended by chapter 629 of the laws of 1974, is amended to read as follows:

S 730.50 Fitness to proceed; indictment.

1 1. When a superior court, following a hearing conducted pursuant to
2 subdivision three or four of section 730.30, is satisfied that the
3 defendant is not an incapacitated person, the criminal action against
4 him OR HER must proceed. If it is satisfied that the defendant is an
5 incapacitated person, or if no motion for such a hearing is made, it
6 must adjudicate him OR HER an incapacitated person, and must issue a
7 final order of observation or an order of commitment. When the indict-
8 ment does not charge a felony or when the defendant has been convicted
9 of an offense other than a felony, such court (a) must issue a final
10 order of observation committing the defendant to the custody of the
11 commissioner for care and treatment in an appropriate institution for a
12 period not to exceed ninety days from the date of such order, provided,
13 however, that the commissioner may designate an appropriate hospital for
14 placement of a defendant for whom a final order of observation has been
15 issued, where such hospital is licensed by the office of mental health
16 and has agreed to accept, upon referral by the commissioner, defendants
17 subject to final orders of observation issued under this subdivision,
18 and (b) must dismiss the indictment filed in such court against the
19 defendant, and such dismissal constitutes a bar to any further prose-
20 cution of the charge or charges contained in such indictment. When the
21 indictment charges a felony or when the defendant has been convicted of
22 a felony, it must issue an order of commitment committing the defendant
23 to the custody of the commissioner for care and treatment in an appro-
24 priate institution for a period not to exceed one year from the date of
25 such order. Upon the issuance of an order of commitment, the court must
26 exonerate the defendant's bail if he OR SHE was previously at liberty on
27 bail.

28 2. When a defendant is in the custody of the commissioner immediately
29 prior to the expiration of the period prescribed in a temporary order of
30 commitment and the superintendent of the institution wherein the defend-
31 ant is confined is of the opinion that the defendant continues to be an
32 incapacitated person, such superintendent must apply to the court that
33 issued such order for an order of retention. Such application must be
34 made within sixty days prior to the expiration of such period on forms
35 that have been jointly adopted by the judicial conference and the
36 commissioner. The superintendent must give written notice of the appli-
37 cation to the defendant and to the mental hygiene legal service. Upon
38 receipt of such application, the court may, on its own motion, conduct a
39 hearing to determine the issue of capacity, and it must conduct such
40 hearing if a demand therefor is made by the defendant or the mental
41 hygiene legal service within ten days from the date that notice of the
42 application was given them. If, at the conclusion of a hearing conducted
43 pursuant to this subdivision, the court is satisfied that the defendant
44 is no longer an incapacitated person, the criminal action against him
45 must proceed. If it is satisfied that the defendant continues to be an
46 incapacitated person, or if no demand for a hearing is made, the court
47 must adjudicate him OR HER AS an incapacitated person and must issue an
48 order of retention which shall authorize continued custody of the
49 defendant by the commissioner for a period not to exceed one year.

50 3. When a defendant is in the custody of the commissioner immediately
51 prior to the expiration of the period prescribed in the first order of
52 retention, the procedure set forth in subdivision two shall govern the
53 application for and the issuance of any subsequent order of retention,
54 except that any subsequent orders of retention must be for periods not
55 to exceed two years each; provided, however, that the aggregate of the
56 periods prescribed in the temporary order of commitment, the first order

1 of retention and all subsequent orders of retention must not exceed
2 two-thirds of the authorized maximum term of imprisonment for the high-
3 est class felony charged in the indictment or for the highest class
4 felony of which he OR SHE was convicted.

5 4. When a defendant is in the custody of the commissioner at the expi-
6 ration of the authorized period prescribed in the last order of
7 retention, the criminal action pending against him OR HER in the superi-
8 or court that issued such order shall terminate for all purposes, and
9 the commissioner must promptly certify to such court and to the appro-
10 priate district attorney that the defendant was in his OR HER custody on
11 such expiration date. Upon receipt of such certification, the court must
12 dismiss the indictment, and such dismissal constitutes a bar to any
13 further prosecution of the charge or charges contained in such indict-
14 ment.

15 5. When, on the effective date of this subdivision, any defendant
16 remains in the custody of the commissioner pursuant to an order issued
17 under former code of criminal procedure section six hundred sixty-two-b,
18 the superintendent or director of the institution where such defendant
19 is confined shall, if he OR SHE believes that the defendant continues to
20 be an incapacitated person, apply forthwith to a court of record in the
21 county where the institution is located for an order of retention. The
22 procedures for obtaining any order pursuant to this subdivision shall be
23 in accordance with the provisions of subdivisions two, three and four of
24 this section, except that the period of retention pursuant to the first
25 order obtained under this subdivision shall be for not more than one
26 year and any subsequent orders of retention must be for periods not to
27 exceed two years each; provided, however, that the aggregate of the time
28 spent in the custody of the commissioner pursuant to any order issued in
29 accordance with the provisions of former code of criminal procedure
30 section six hundred sixty-two-b and the periods prescribed by the first
31 order obtained under this subdivision and all subsequent orders of
32 retention must not exceed two-thirds of the authorized maximum term of
33 imprisonment for the highest class felony charged in the indictment or
34 the highest class felony of which he OR SHE was convicted.

35 S 6. Section 730.60 of the criminal procedure law, subdivisions 1 and
36 3 as amended by chapter 231 of the laws of 2008, subdivision 2 as
37 amended by chapter 57 of the laws of 1984, subdivisions 4 and 5 as
38 renumbered by chapter 629 of the laws of 1974, subdivision 6 as added by
39 chapter 549 of the laws of 1980 and the opening paragraph of paragraph
40 (a) of subdivision 6 as amended by chapter 440 of the laws of 1987, is
41 amended to read as follows:

42 S 730.60 Fitness to proceed; procedure following custody by commission-
43 er.

44 1. When a local criminal court issues a final or temporary order of
45 observation or an order of commitment, it must forward such order and a
46 copy of the examination reports and the accusatory instrument to the
47 commissioner, and, if available, a copy of the pre-sentence report. Upon
48 receipt thereof, the commissioner must designate an appropriate institu-
49 tion operated by the department of mental hygiene in which the defendant
50 is to be placed, provided, however, that the commissioner may designate
51 an appropriate hospital for placement of a defendant for whom a final
52 order of observation has been issued, where such hospital is licensed by
53 the office of mental health and has agreed to accept, upon referral by
54 the commissioner, defendants subject to final orders of observation
55 issued under this subdivision. The sheriff must hold the defendant in
56 custody pending such designation by the commissioner, and when notified

1 of the designation, the sheriff must deliver the defendant to the super-
2 intendent of such institution. The superintendent must promptly inform
3 the appropriate director of the mental hygiene legal service of the
4 defendant's admission to such institution. If a defendant escapes from
5 the custody of the commissioner, the escape shall interrupt the period
6 prescribed in any order of observation, commitment or retention, and
7 such interruption shall continue until the defendant is returned to the
8 custody of the commissioner.

9 2. Except as otherwise provided in subdivisions four and five, when a
10 defendant is in the custody of the commissioner pursuant to a temporary
11 order of observation or an order of commitment or an order of retention,
12 the criminal action pending against the defendant in the court that
13 issued such order is suspended until the superintendent of the institu-
14 tion in which the defendant is confined determines that he OR SHE is no
15 longer an incapacitated person. In that event, the court that issued
16 such order and the appropriate district attorney must be notified, in
17 writing, by the superintendent of his OR HER determination. The court
18 must thereupon proceed in accordance with the provisions of subdivision
19 two of section 730.30 of this chapter; provided, however, if the court
20 is satisfied that the defendant remains an incapacitated person, and
21 upon consent of all parties, the court may order the return of the
22 defendant to the institution in which he OR SHE had been confined for
23 such period of time as was authorized by the prior order of commitment
24 or order of retention. Upon such return, the defendant shall have all
25 rights and privileges accorded by the provisions of this article.

26 3. When a defendant is in the custody of the commissioner pursuant to
27 an order issued in accordance with this article, the commissioner may
28 transfer him OR HER to any appropriate institution operated by the
29 department of mental hygiene, provided, however, that the commissioner
30 may designate an appropriate hospital for placement of a defendant for
31 whom a final order of observation has been issued, where such hospital
32 is licensed by the office of mental health and has agreed to accept,
33 upon referral by the commissioner, defendants subject to final orders of
34 observation issued under this section. The commissioner may discharge a
35 defendant in his OR HER custody under a final order of observation at
36 any time prior to the expiration date of such order, or otherwise treat
37 or transfer such defendant in the same manner as if he OR SHE were a
38 patient not in confinement under a criminal court order.

39 4. When a defendant is in the custody of the commissioner pursuant to
40 an order of commitment or an order of retention, he OR SHE may make any
41 motion authorized by this chapter which is susceptible of fair determi-
42 nation without his OR HER personal participation. If the court denies
43 any such motion it must be without prejudice to a renewal thereof after
44 the criminal action against the defendant has been ordered to proceed.
45 If the court enters an order dismissing the indictment and does not
46 direct that the charge or charges be resubmitted to a grand jury, the
47 court must direct that such order of dismissal be served upon the
48 commissioner.

49 5. When a defendant is in the custody of the commissioner pursuant to
50 an order of commitment or an order of retention, the superior court that
51 issued such order may, upon motion of the defendant, and with the
52 consent of the district attorney, dismiss the indictment when the court
53 is satisfied that (a) the defendant is a resident or citizen of another
54 state or country and that he OR SHE will be removed thereto upon
55 dismissal of the indictment, or (b) the defendant has been continuously
56 confined in the custody of the commissioner for a period of more than

1 two years. Before granting a motion under this subdivision, the court
2 must be further satisfied that dismissal of the indictment is consistent
3 with the ends of justice and that custody of the defendant by the
4 commissioner pursuant to an order of commitment or an order of retention
5 is not necessary for the protection of the public and that care and
6 treatment can be effectively administered to the defendant without the
7 necessity of such order. If the court enters an order of dismissal under
8 this subdivision, it must set forth in the record the reasons for such
9 action, and must direct that such order of dismissal be served upon the
10 commissioner. The dismissal of an indictment pursuant to this subdivi-
11 sion constitutes a bar to any further prosecution of the charge or
12 charges contained in such indictment.

13 6. (a) Notwithstanding any other provision of law, no person committed
14 to the custody of the commissioner pursuant to this article, or contin-
15 uously thereafter retained in such custody, shall be discharged,
16 released on condition or placed in any less secure facility or on any
17 less restrictive status, including, but not limited to vacations,
18 furloughs and temporary passes, unless the commissioner shall deliver
19 written notice, at least four days, excluding Saturdays, Sundays and
20 holidays, in advance of the change of such committed person's facility
21 or status, to all of the following:

22 (1) The district attorney of the county from which such person was
23 committed;

24 (2) The superintendent of state police;

25 (3) The sheriff of the county where the facility is located;

26 (4) The police department having jurisdiction of the area where the
27 facility is located;

28 (5) Any person who may reasonably be expected to be the victim of any
29 assault or any violent felony offense, as defined in the penal law,
30 which would be carried out by the committed person; and

31 (6) Any other person the court may designate.

32 Said notice may be given by any means reasonably calculated to give
33 prompt actual notice.

34 (b) The notice required by this subdivision shall also be given imme-
35 diately upon the departure of such committed person from the commis-
36 sioner's actual custody, without proper authorization. Nothing in this
37 subdivision shall be construed to impair any other right or duty regard-
38 ing any notice or hearing contained in any other provision of law.

39 (c) Whenever a district attorney has received the notice described in
40 this subdivision, and the defendant is in the custody of the commis-
41 sioner pursuant to a final order of observation or an order of commitment,
42 he OR SHE may apply within three days of receipt of such notice to a
43 superior court, for an order directing a hearing to be held to determine
44 whether such committed person is a danger to himself, HERSELF or others.
45 Such hearing shall be held within ten days following the issuance of
46 such order. Such order may provide that there shall be no further change
47 in the committed person's facility or status until the hearing. Upon a
48 finding that the committed person is a danger to himself, HERSELF or
49 others, the court shall issue an order to the commissioner authorizing
50 retention of the committed person in the status existing at the time
51 notice was given hereunder, for a specified period, not to exceed six
52 months. The district attorney and the committed person's attorney shall
53 be entitled to the committed person's clinical records in the commis-
54 sioner's custody, upon the issuance of an order directing a hearing to
55 be held.

1 (d) Nothing in this subdivision shall be construed to impair any other
2 right or duty regarding any notice or hearing contained in any other
3 provision of law.

4 S 7. Section 730.70 of the criminal procedure law, as amended by chap-
5 ter 629 of the laws of 1974, is amended to read as follows:

6 S 730.70 Fitness to proceed; procedure following termination of custody
7 by commissioner.

8 When a defendant is in the custody of the commissioner on the expira-
9 tion date of a final or temporary order of observation or an order of
10 commitment, or on the expiration date of the last order of retention, or
11 on the date an order dismissing an indictment is served upon the commis-
12 sioner, the superintendent of the institution in which the defendant is
13 confined may retain him OR HER for care and treatment for a period of
14 thirty days from such date.

15 If the superintendent determines that the defendant is so mentally ill
16 or mentally defective as to require continued care and treatment in an
17 institution, he OR SHE may, before the expiration of such thirty day
18 period, apply for an order of certification in the manner prescribed in
19 section 31.33 of the mental hygiene law.

20 S 8. This act shall take effect immediately.