S T A T E O F N E W Y O R K

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:

Section 1. Section 730.10 of the criminal procedure law, subdivision 2 as amended by chapter 566 of the laws of 1994, subdivisions 3 and 4 as amended by chapter 440 of the laws of 1987, subdivision 5 as amended by chapter 435 of the laws of 1976, subdivisions 6, 7 and 8 as renumbered by chapter 629 of the laws of 1974, and subdivision 8 as separately amended by chapters 615 and 629 of the laws of 1974, is amended to read as follows:

S 730.10 Fitness to proceed; definitions.

As used in this article, the following terms have the following meanings:

1. "Incapacitated person" means a defendant who as a result of mental [disease] ILLNESS or [defect] DEVELOPMENTAL DISABILITY lacks capacity to understand the proceedings against him OR HER or to assist in his OR HER own defense.

2. "Order of examination" means an order issued to an appropriate director by a criminal court wherein a criminal action is pending against a defendant, or by a family court pursuant to section 322.1 of the family court act wherein a juvenile delinquency proceeding is pending against a juvenile, directing that such person be examined for the 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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3. "Commissioner" means the state commissioner of THE OFFICE OF mental health or the state commissioner of [mental retardation and] developmental disabilities.

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

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

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

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

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

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

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

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

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

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

S 730.20 Fitness to proceed; generally.

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

of persons alleged to be mentally ill or [mentally defective] DEVELOPMENTALLY DISABLED. The court may authorize a psychiatrist [or], psychologist, LICENSED CLINICAL SOCIAL WORKER OR QUALIFIED NURSE PRACTITIONER retained by the defendant to be present at such examination.

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

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

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

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

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

7. A psychiatric examiner is entitled to his OR HER reasonable traveling expenses, a fee of fifty dollars for each examination of a defendant and a fee of fifty dollars for each appearance at a court hearing or trial but not exceeding two hundred dollars in fees for examination and testimony in any one case; except that if such psychiatric examiner be an employee of the state of New York he OR SHE shall be entitled only to reasonable traveling expenses, unless such psychiatric examiner makes the examination or appears at a court hearing or trial outside his OR 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. When a superior court, following a hearing conducted pursuant to subdivision three or four of section 730.30, is satisfied that the defendant is not an incapacitated person, the criminal action against him OR HER must proceed. If it is satisfied that the defendant is an incapacitated person, or if no motion for such a hearing is made, it must adjudicate him OR HER an incapacitated person, and must issue a final order of observation or an order of commitment. When the indictment does not charge a felony or when the defendant has been convicted of an offense other than a felony, such court (a) must issue a final order of observation committing the defendant to the custody of the commissioner for care and treatment in an appropriate institution for a period not to exceed ninety days from the date of such order, provided, however, that the commissioner may designate an appropriate hospital for placement of a defendant for whom a final order of observation has been issued, where such hospital is licensed by the office of mental health and has agreed to accept, upon referral by the commissioner, defendants subject to final orders of observation issued under this subdivision, and (b) must dismiss the indictment 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 indictment. When the indictment charges a felony or when the defendant has been convicted of a felony, it must issue an order of commitment committing the defendant to the custody of the commissioner for care and treatment in an appropriate institution for a period not to exceed one year from the date of such order. Upon the issuance of an order of commitment, the court must exonerate the defendant's bail if he OR SHE was previously at liberty on bail.

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

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

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

4. When a defendant is in the custody of the commissioner at the expiration of the authorized period prescribed in the last order of retention, the criminal action pending against him OR HER in the superior 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 indictment, and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such indictment.

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

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

S 730.60 Fitness to proceed; procedure following custody by commissioner.

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

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

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

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

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

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

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

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

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

(2) The superintendent of state police;

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

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

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

(6) Any other person the court may designate.

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

(b) The notice required by this subdivision shall also be given immediately upon the departure of such committed person from the commissioner's actual custody, without proper authorization. Nothing in this subdivision shall be construed to impair any other right or duty regarding any notice or hearing contained in any other provision of law.

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

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

S 7. Section 730.70 of the criminal procedure law, as amended by chapter 629 of the laws of 1974, is amended to read as follows:

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

When a defendant is in the custody of the commissioner on the expiration date of a final or temporary order of observation or an order of commitment, or on the expiration date of the last order of retention, or on the date an order dismissing an indictment is served upon the commissioner, the superintendent of the institution in which the defendant is confined may retain him OR HER for care and treatment for a period of thirty days from such date.

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

S 8. This act shall take effect immediately.