

6563

2013-2014 Regular Sessions

I N A S S E M B L Y

April 9, 2013

Introduced by M. of A. ORTIZ, CYMBROWITZ, LUPARDO, LAVINE, MONTESANO --
Multi-Sponsored by -- M. of A. BRENNAN, PERRY, PRETLOW -- 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 ASSEM-
BLY, 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 and 7 as renumbered by
5 chapter 629 of the laws of 1974, subdivision 8 as separately amended by
6 chapters 615 and 629 of the laws of 1974 and subdivision 9 as added by
7 section 1 of part Q of chapter 56 of the laws of 2012, is amended to
8 read as follows:
9 S 730.10 Fitness to proceed; definitions.
10 As used in this article, the following terms have the following mean-
11 ings:
12 1. "Incapacitated person" means a defendant who as a result of mental
13 [disease] ILLNESS or [defect] DEVELOPMENTAL DISABILITY lacks capacity to
14 understand the proceedings against him OR HER or to assist in his OR HER
15 own defense.
16 2. "Order of examination" means an order issued to an appropriate
17 director by a criminal court wherein a criminal action is pending
18 against a defendant, or by a family court pursuant to section 322.1 of
19 the family court act wherein a juvenile delinquency proceeding is pend-
20 ing against a juvenile, directing that such person be examined for the
21 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 [9.] 11. "Appropriate institution" means: (a) a hospital operated by
45 the office of mental health or a developmental center operated by the
46 office for people with developmental disabilities; or (b) a hospital
47 licensed by the department of health which operates a psychiatric unit
48 licensed by the office of mental health, as determined by the commis-
49 sioner provided, however, that any such hospital that is not operated by
50 the state shall qualify as an "appropriate institution" only pursuant to
51 the terms of an agreement between the commissioner and the hospital.
52 Nothing in this article shall be construed as requiring a hospital to
53 consent to providing care and treatment to an incapacitated person at
54 such hospital.

55 S 2. Section 730.20 of the criminal procedure law, subdivisions 1 and
56 5 as amended by chapter 693 of the laws of 1989 and subdivision 7 as

1 amended by chapter 692 of the laws of 1972, is amended to read as
2 follows:

3 S 730.20 Fitness to proceed; generally.

4 1. The appropriate director to whom a criminal court issues an order
5 of examination must be determined in accordance with rules jointly
6 adopted by the judicial conference and the commissioner. Upon receipt
7 of an examination order, the director must designate two qualified
8 psychiatric examiners, of whom he OR SHE may be one, to examine the
9 defendant to determine if he OR SHE is an incapacitated person. In
10 conducting their examination, the psychiatric examiners may employ any
11 method which is accepted by the medical profession for the examination
12 of persons alleged to be mentally ill or [mentally defective] DEVELOP-
13 MENTALLY DISABLED. The court may authorize a psychiatrist [or],
14 psychologist, LICENSED CLINICAL SOCIAL WORKER OR QUALIFIED NURSE PRACTI-
15 TIONER retained by the defendant to be present at such examination.

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

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

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

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

52 6. When a defendant is subjected to examination pursuant to an order
53 issued by a criminal court in accordance with this article, any state-
54 ment made by [him] SUCH DEFENDANT for the purpose of the examination or
55 treatment shall be inadmissible in evidence against [him] SUCH DEFENDANT
56 in any criminal action on any issue other than that of his OR HER mental

1 condition, but such statement is admissible upon that issue whether or
2 not it would otherwise be deemed a privileged communication.

3 7. A psychiatric examiner is entitled to his OR HER reasonable trav-
4 eling expenses, a fee of fifty dollars for each examination of a defend-
5 ant and a fee of fifty dollars for each appearance at a court hearing or
6 trial but not exceeding two hundred dollars in fees for examination and
7 testimony in any one case; except that if such psychiatric examiner be
8 an employee of the state of New York he OR SHE shall be entitled only to
9 reasonable traveling expenses, unless such psychiatric examiner makes
10 the examination or appears at a court hearing or trial outside his OR
11 HER hours of state employment in a county in which the director of
12 community [mental health] services certifies to the fiscal officer ther-
13 eof that there is a shortage of qualified [psychiatrists] PSYCHIATRIC
14 EXAMINERS available to conduct examinations under the criminal procedure
15 law in such county, in which event he OR SHE shall be entitled to the
16 foregoing fees and reasonable traveling expenses. Such fees and travel-
17 ing expenses and the costs of sending a defendant to another place of
18 detention or to a hospital for examination, of his OR HER maintenance
19 therein and of returning [him] SUCH DEFENDANT shall, when approved by
20 the court, be a charge of the county in which the defendant is being
21 tried.

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

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

31 S 4. Subdivision 5 of section 730.40 of the criminal procedure law is
32 amended to read as follows:

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

51 S 5. Subdivisions 2, 3, 4 and 5 of section 730.50 of the criminal
52 procedure law, subdivision 2 as amended by chapter 789 of the laws of
53 1985 and subdivision 5 as amended by chapter 629 of the laws of 1974,
54 are amended to read as follows:

55 2. When a defendant is in the custody of the commissioner immediately
56 prior to the expiration of the period prescribed in a temporary order of

1 commitment and the superintendent of the institution wherein the defend-
2 ant is confined is of the opinion that the defendant continues to be an
3 incapacitated person, such superintendent must apply to the court that
4 issued such order for an order of retention. Such application must be
5 made within sixty days prior to the expiration of such period on forms
6 that have been jointly adopted by the judicial conference and the
7 commissioner. The superintendent must give written notice of the appli-
8 cation to the defendant and to the mental hygiene legal service. Upon
9 receipt of such application, the court may, on its own motion, conduct a
10 hearing to determine the issue of capacity, and it must conduct such
11 hearing if a demand therefor is made by the defendant or the mental
12 hygiene legal service within ten days from the date that notice of the
13 application was given them. If, at the conclusion of a hearing conducted
14 pursuant to this subdivision, the court is satisfied that the defendant
15 is no longer an incapacitated person, the criminal action against him
16 must proceed. If it is satisfied that the defendant continues to be an
17 incapacitated person, or if no demand for a hearing is made, the court
18 must adjudicate him OR HER AS an incapacitated person and must issue an
19 order of retention which shall authorize continued custody of the
20 defendant by the commissioner for a period not to exceed one year.

21 3. When a defendant is in the custody of the commissioner immediately
22 prior to the expiration of the period prescribed in the first order of
23 retention, the procedure set forth in subdivision two OF THIS SECTION
24 shall govern the application for and the issuance of any subsequent
25 order of retention, except that any subsequent orders of retention must
26 be for periods not to exceed two years each; provided, however, that the
27 aggregate of the periods prescribed in the temporary order of commit-
28 ment, the first order of retention and all subsequent orders of
29 retention must not exceed two-thirds of the authorized maximum term of
30 imprisonment for the highest class felony charged in the indictment or
31 for the highest class felony of which he OR SHE was convicted.

32 4. When a defendant is in the custody of the commissioner at the expi-
33 ration of the authorized period prescribed in the last order of
34 retention, the criminal action pending against him OR HER in the superi-
35 or court that issued such order shall terminate for all purposes, and
36 the commissioner must promptly certify to such court and to the appro-
37 priate district attorney that the defendant was in his OR HER custody on
38 such expiration date. Upon receipt of such certification, the court must
39 dismiss the indictment, and such dismissal constitutes a bar to any
40 further prosecution of the charge or charges contained in such indict-
41 ment.

42 5. When, on the effective date of this subdivision, any defendant
43 remains in the custody of the commissioner pursuant to an order issued
44 under former code of criminal procedure section six hundred sixty-two-b,
45 the superintendent or director of the institution where such defendant
46 is confined shall, if he OR SHE believes that the defendant continues to
47 be an incapacitated person, apply forthwith to a court of record in the
48 county where the institution is located for an order of retention. The
49 procedures for obtaining any order pursuant to this subdivision shall be
50 in accordance with the provisions of subdivisions two, three and four of
51 this section, except that the period of retention pursuant to the first
52 order obtained under this subdivision shall be for not more than one
53 year and any subsequent orders of retention must be for periods not to
54 exceed two years each; provided, however, that the aggregate of the time
55 spent in the custody of the commissioner pursuant to any order issued in
56 accordance with the provisions of former code of criminal procedure

1 section six hundred sixty-two-b and the periods prescribed by the first
2 order obtained under this subdivision and all subsequent orders of
3 retention must not exceed two-thirds of the authorized maximum term of
4 imprisonment for the highest class felony charged in the indictment or
5 the highest class felony of which he OR SHE was convicted.

6 S 6. Section 730.60 of the criminal procedure law, subdivisions 1 and
7 3 as amended by chapter 231 of the laws of 2008, subdivision 2 as
8 amended by chapter 57 of the laws of 1984, subdivisions 4 and 5 as
9 renumbered by chapter 629 of the laws of 1974, subdivision 6 as added by
10 chapter 549 of the laws of 1980 and paragraphs (a) and (b) of subdivi-
11 sion 6 as amended by chapter 7 of the laws of 2013, is amended to read
12 as follows:

13 S 730.60 Fitness to proceed; procedure following custody by commission-
14 er.

15 1. When a local criminal court issues a final or temporary order of
16 observation or an order of commitment, it must forward such order and a
17 copy of the examination reports and the accusatory instrument to the
18 commissioner, and, if available, a copy of the pre-sentence report. Upon
19 receipt thereof, the commissioner must designate an appropriate institu-
20 tion operated by the department of mental hygiene in which the defendant
21 is to be placed, provided, however, that the commissioner may designate
22 an appropriate hospital for placement of a defendant for whom a final
23 order of observation has been issued, where such hospital is licensed by
24 the office of mental health and has agreed to accept, upon referral by
25 the commissioner, defendants subject to final orders of observation
26 issued under this subdivision. The sheriff must hold the defendant in
27 custody pending such designation by the commissioner, and when notified
28 of the designation, the sheriff must deliver the defendant to the super-
29 intendent of such institution. The superintendent must promptly inform
30 the appropriate director of the mental hygiene legal service of the
31 defendant's admission to such institution. If a defendant escapes from
32 the custody of the commissioner, the escape shall interrupt the period
33 prescribed in any order of observation, commitment or retention, and
34 such interruption shall continue until the defendant is returned to the
35 custody of the commissioner.

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

53 3. When a defendant is in the custody of the commissioner pursuant to
54 an order issued in accordance with this article, the commissioner may
55 transfer him OR HER to any appropriate institution operated by the
56 department of mental hygiene, provided, however, that the commissioner

1 may designate an appropriate hospital for placement of a defendant for
2 whom a final order of observation has been issued, where such hospital
3 is licensed by the office of mental health and has agreed to accept,
4 upon referral by the commissioner, defendants subject to final orders of
5 observation issued under this section. The commissioner may discharge a
6 defendant in his OR HER custody under a final order of observation at
7 any time prior to the expiration date of such order, or otherwise treat
8 or transfer such defendant in the same manner as if he OR SHE were a
9 patient not in confinement under a criminal court order.

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

20 5. When a defendant is in the custody of the commissioner pursuant to
21 an order of commitment or an order of retention, the superior court that
22 issued such order may, upon motion of the defendant, and with the
23 consent of the district attorney, dismiss the indictment when the court
24 is satisfied that (a) the defendant is a resident or citizen of another
25 state or country and that he OR SHE will be removed thereto upon
26 dismissal of the indictment, or (b) the defendant has been continuously
27 confined in the custody of the commissioner for a period of more than
28 two years. Before granting a motion under this subdivision, the court
29 must be further satisfied that dismissal of the indictment is consistent
30 with the ends of justice and that custody of the defendant by the
31 commissioner pursuant to an order of commitment or an order of retention
32 is not necessary for the protection of the public and that care and
33 treatment can be effectively administered to the defendant without the
34 necessity of such order. If the court enters an order of dismissal under
35 this subdivision, it must set forth in the record the reasons for such
36 action, and must direct that such order of dismissal be served upon the
37 commissioner. The dismissal of an indictment pursuant to this subdivi-
38 sion constitutes a bar to any further prosecution of the charge or
39 charges contained in such indictment.

40 6. (a) Notwithstanding any other provision of law, no person committed
41 to the custody of the commissioner pursuant to this article, or contin-
42 uously thereafter retained in such custody, shall be discharged,
43 released on condition or placed in any less secure facility or on any
44 less restrictive status, including, but not limited to vacations,
45 furloughs and temporary passes, unless the commissioner or his or her
46 designee, which may include the director of an appropriate institution,
47 shall deliver written notice, at least four days, excluding Saturdays,
48 Sundays and holidays, in advance of the change of such committed
49 person's facility or status, or in the case of a person committed pursu-
50 ant to a final order of observation written notice upon discharge of
51 such committed person, to all of the following:

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

54 (2) The superintendent of state police;

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

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

3 (5) Any person who may reasonably be expected to be the victim of any
4 assault or any violent felony offense, as defined in the penal law, or
5 any offense listed in section 530.11 of this part which would be carried
6 out by the committed person; provided that the person who reasonably may
7 be expected to be a victim does not need to be a member of the same
8 family or household as the committed person; and

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

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

12 (b) The notice required by this subdivision shall also be given imme-
13 diately upon the departure of such committed person from the actual
14 custody of the commissioner or an appropriate institution, without prop-
15 er authorization. Nothing in this subdivision shall be construed to
16 impair any other right or duty regarding any notice or hearing contained
17 in any other provision of law.

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

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

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

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

42 When a defendant is in the custody of the commissioner on the expira-
43 tion date of a final or temporary order of observation or an order of
44 commitment, or on the expiration date of the last order of retention, or
45 on the date an order dismissing an indictment is served upon the commis-
46 sioner, the superintendent of the institution in which the defendant is
47 confined may retain him OR HER for care and treatment for a period of
48 thirty days from such date.

49 If the superintendent determines that the defendant is so mentally ill
50 or [mentally defective] DEVELOPMENTALLY DISABLED as to require continued
51 care and treatment in an institution, he OR SHE may, before the expira-
52 tion of such thirty day period, apply for an order of certification in
53 the manner prescribed in section 31.33 of the mental hygiene law.

54 S 8. This act shall take effect immediately.