§ 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 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 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 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 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 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 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 may make any motion authorized by this chapter which is susceptible of fair determination without his 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 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 or his or her designee, which may include the director of an appropriate institution, 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, or in the case of a person committed pursuant to a final order of observation written notice upon discharge of such committed person, 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, or any offense listed in section 530.11 of this part which would be carried out by the committed person; provided that the person who reasonably may be expected to be a victim does not need to be a member of the same

family or household as 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 actual custody of the commissioner or an appropriate institution, 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 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 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 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.