

## CPL ARTICLE 730: MENTAL UNFITNESS.

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INCAPACITATED = unable to understand proceedings; assist with own defense.

Order of Examination for person believed to be incapacitated can be issued by Criminal or Family Court; and specifies Director of: OMH/OMRDD State hospital (or local governmental hospital so certified); OR Community Mental Health Service.

Examination shall be by two Psychological Examiners; either Qualified Psychiatrist (diplomate of American Board, or certified by Osteopathic Board); or Certified Psychologist (pursuant to Education Law). The Director picks the examiners, may designate him/her self as one such.

Examination of non-committed defendant may be out-patient, however Court can order confinement to hospital on recommendation of Director. Else where defendant in Sheriff's custody, MUST be delivered to hospital - and maintained under guard - if Director determines to be necessary.

Hospital confinement shall be no more than 30 days, Court may direct an additional 30-day period if necessary. Physician-in-charge can have emergency treatment administered to defendant if required.

The examiners shall send their reports to the director, and the director forwards them to the Court. Court copies report to counsel only. Form of reports provided to Court shall be determined by State Administrator in conjunction with Commissioner of OMH/OMRDD; number of copies required to be sent shall be set solely by State Administrator. If the examiners reports do not concur, Director can designate 1 more examiner.

No statements made during exam by defendant shall be admissible in any court proceeding, except that even otherwise privileged statements are allowed to be used for the issue of capacity.

Examiners are entitled to reasonable traveling expenses. Non-State-employed examiners are also entitled to \$50 fee per defendant, as well as \$50 per court appearance. State employees are generally only entitled to traveling expenses; but can be entitled to fee as well when doing exam/appearance "off-hours", IF local county Director of Community Mental Health Service certifies to Fiscal Officer that there is a shortage of examiners. Costs of exam - as well as for transporting defendant - shall be charge against the county where trial is pending, upon approval by such court.

Any time between arraignment and sentence (or after arraignment on felony complaint and prior to Grand Jury action) ,Local Criminal Court - when feels that defendant is incapacitated - MUST order exam.

If the two examiners reports are not unanimous as regards defendant's incapacity, Court shall hold hearing. If both examiners concur that defendant is NOT incapacitated: Court may hold hearing on own motion, MUST upon party's request. If after hearing the Court still believes defendant to be incapacitated; shall order new exam, before two different examiners which Director shall designate. Else if Court agrees that defendant not incapacitated, shall proceed with criminal action.

If Local Criminal Court is satisfied with examiners report that defendant IS incapacitated, and there are no felony charges, MUST issue Final Observation order good for period of 90 days. If felony charges: MUST issue Temporary Observation order (also 90 days), but may issue final upon District Attorney's consent.

Criminal proceeding MUST be dismissed with prejudice upon issuance of Final Observation order; must also dismiss case upon expiration of temporary period of Commissioner certifies that defendant is still under care.

If Grand Jury action commences upon felony complaint, while defendant under observation or examination pursuant to Local Criminal Court order: Grand Jury need not hear from defendant; except where such defendant applies to impaneling Superior Court and is found not to be incapacitated.

An indictment against defendant under examination by Local Criminal Court, if timely - within 6 months of exam order - shall result in Superior Court ordering Sheriff to take custody of defendant at institution. Following arraignment in Superior Court, and once Local Criminal Court's exam order period has expired, such order shall be nullified. Untimely indictments must be dismissed, except for "good cause".

Following indictment, if Superior Court is satisfied that defendant is incapacitated: shall upon non-felony charges issue Final Observation order for 90 days and dismiss action with prejudice; else upon felony charges shall issue Order of Commitment good for 1 year, and must exonerate bail (if any).

If defendant be so committed, Superintendent of facility shall commence retention proceedings within 60 days before expiration thereof. Application shall be on forms developed by Judicial Conference and Commissioner jointly; and must be noticed to defendant, as well as Mental Hygiene Legal Service. Court may hold hearing regarding application; MUST upon request of Defendant/Legal Service made within 10 days of receiving application.

If defendant still incapacitated, may be retained for an additional year. Subsequent retentions are governed by the above procedures, but extend for 2 years; EXCEPT: aggregate may not exceed 2/3rds of allowable prison sentence otherwise authorized for underlying felony. If at any time prior to expiration defendant should be found to be no longer incapacitated, criminal action shall proceed. Else must be dismissed with prejudice upon expiration of maximum allowed retention period, if Commissioner certifies that

defendant is still under care.

Together with any Observation or Commitment order, Commissioner shall also be provided the examination reports, as well as pre-sentence report (if available). Commissioner shall designate the institution whereat to lodge the defendant; Sheriff shall hold defendant pending transfer, then deliver to Superintendent of facility. Upon receipt of defendant, Superintendent shall inform the Mental Hygiene Legal Service Director. Any escape of defendant from facility tolls period of commitment until return.

If during the period of Commitment - or Temporary Observation - while criminal proceedings are suspended, the Commissioner shall determine the defendant to no longer be incapacitated, shall notify the District Attorney and Court in writing. Court may hold hearing regarding such determination, **MUST** on party's request. If satisfied as to defendant's current capacity, shall resume criminal case; **ELSE**: order new observation. **EXCEPT**: if Court, Defendant, and D.A. all consent that defendant still incapacitated, Court may return defendant to institution for the remaining term of the original order.

While defendant is in Commissioner's custody, can nevertheless make any motion to the Court which can be fairly determined without his/her personal participation; however any denial is subject to renewal upon release.

Superior Court can dismiss a criminal action - with prejudice - upon motion and with D.A.'s consent while defendant is in Commissioner's custody, **IF**: 1) non-resident defendant will leave State after discharge; **OR** 2) defendant has been with Commissioner for more than 2 years. Court must be satisfied that detention not necessary for public protection; that dismissal is in interests of justice; and that necessary treatment will continue absent order. Court must state reasons on record.

Any dismissal of underlying criminal action where defendant institutionalized, without re-submission of charges, shall be noticed to the Commissioner.

Commissioner may transfer or discharge any defendant under a Final observation order.

Commissioner can **NOT** release/transfer defendant - nor allow furlough/vacation - without first providing 4 days notice (exclusive of weekends, holidays) to: D.A. of county where commitment court located; State Police Superintendent; local police department and Sheriff of facility locale; as well as any potential assault victim, and any party designated by the Court. Commissioner shall also *immediately* notice the above parties upon **unauthorized** leave of defendant.

Within 3 days of receiving Commissioner's notice regarding defendant on Final Observation or Commitment, District Attorney can apply to Superior Court for hearing that defendant poses danger to self/others. Such hearing only upon Court's order, specifying date within 10 days; such order may also direct no change in defendant's status. D.A. and defendant's counsel entitled to clinical records for use at hearing. Upon

finding by Court that defendant poses a danger, can return defendant to Commissioner under same status as before, for no more than 6 months.

Absent any further order, Commissioner in own discretion can retain defendant up to 30 days after expiration of period or dismissal of underlying action; may then also apply pursuant to Mental Hygiene Law for mandated treatment of still mentally ill defendant.