WHEN A CLIENT IS UNFIT TO BE TRIED

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Representing criminal defendants can undoubtedly be challenging with clients who have their wits about them but believe (whether by quirk of personality, force of intellect or custodial education), that they know it all (or know better), when it comes to defending their case. On the other hand, clients who, because of mental illness or cognitive defect, lack the mental acuity to understand what they are charged with, let alone communicate coherently with counsel to assist in their own defense, present an entirely different challenge that requires an understanding of Article 730 of the Criminal Procedure Law (CPL).

The basic premise underlying CPL 730 is that competence (or fitness) is a condition precedent to being subject to prosecution for a crime. (People v Wilboiner 2012 NY Slip Op. 22006 [Crim. Ct. of City of NY]) and requiring an accused person to defend against charges that he cannot even comprehend violates his/her right to due process of law. (Medina v California 505 US 437 [1992], People v Lewis 95 NY2d 539 [2000]).

The statute provides a procedural mechanism for assessing the mental capacity of a defendant to stand trial (or otherwise be criminally adjudicated), and determining whether the prosecution can go forward (where the defendant is found to be fit to proceed), or be suspended (in the case of a felony) until the defendant is restored to competence while confined in an appropriate psychiatric institution, or terminated (in the case of a misdemeanor) with a final order of observation which confines the defendant to the custody of the State Commissioner of Mental Health (MH), for 90 days (subject to further civil confinement or outpatient treatment under the Mental Hygiene Law).

Though largely based on psychiatric (or psychological) reports and testimony (in the event of a hearing), the determination of competency is a not a medical call, but rather, a legal one consigned to the sound discretion of the trial court. (People v Phillips 16 NY3d 510 [2011]).

SOME DEFINITIONS:

CPL 730.10(1) defines an INCAPACITATED PERSON (IP) as someone who, as a result of mental disease or defect, lacks the capacity to understand the proceedings against him/her or to assist in his/her own defense.

The statute does not define “mental disease or defect,” but it is generally considered to include diagnoses of mental illness of one type or another (e.g. schizophrenia), serious developmental and/or intellectual disabilities and cognitive deficits (See article Appearing in New York Law Journal 2017 by Katherine Bajak, Mental Health Specialist/Attorney for NY County Defender Services).

ORDER OF EXAMINATION (OE) (CPL 730.10[2]): An order by a criminal court where an action is pending (or by a Family Court per FCA 322.1 where a juvenile proceeding is pending), directing that the accused be examined to determine whether he/she is an incapacitated person.

COMMISSIONER (CPL 730.10[3]): Includes the State Commissioner of the Office of Mental Health (OMH) or of the Office of Mental Retardation/Developmental Disabilities (OMR/DD).

DIRECTOR (CPL 730.10[4]): includes the director of a state hospital operated by OMH/OMR/DD) or of a hospital operated by a local government of the state that is certified by the Commissioner to have adequate facilities to to conduct competency examinations or the Director of Community Mental Health Services (CMHS).

QUALIFIED PSYCHIATRIST (CPL 730.10[5]): a physician who is certified (or eligible to be certified) as a diplomate of the American Board of Psychiatry/Neurology or certified (or eligible) by the American Osteopathic Board of Neurology.

CERTIFIED PSYCHOLOGIST (CPL 730.10[6]): a person so registered under Education Law (EL) 153.

PSYCHIATRIC EXAMINER (PE) (CPL 730.10[7]): a qualified psychiatrist or certified psychologist DESIGNATED BY THE DIRECTOR to examine a defendant pursuant to an order of examination.

EXAMINATION REPORT (CPL 710.30[8]): report of PE which: describes the nature/extent of the exam; sets forth a diagnosis/prognosis; an opinion whether the defendant is an IP with a detailed statement of reasons (including particular reference to those aspects of the proceedings which the defendant cannot understand).

APPROPRIATE INSTITUTION (CPL 710.30[9]): a hospital operated by the OMH which operates a duly licensed psychiatric unit or, if not state operated, operates pursuant to agreement with the Commissioner of OMH.

How a case proceeds under Article 730 is determined in large measure by whether the defendant is charged with a misdemeanor or a felony, and in the latter case, whether or not the defendant has been indicted. In either case, though, whenever the court believes, (based on information from counsel, the prosecutor, the defendant's history or its own observations), that the defendant MAY BE an IP, it MUST issue an ORDER OF EXAMINATION. (CPL 730.30[1]).

If a court suspects that the defendant may be incapacitated, it may ask basic questions of him/her to get a sense of his/her grasp of the proceedings, the participants in them, and the charges that he/she is facing: "Mr/Ms Smith, do you know where you are right now, why you're here, what you're charged with, what that means including the possible consequences of conviction, who your lawyer is, what his/her role is, what the prosecutor's role is in the proceedings and that of the judge?" The court may also ask the defendant to provide biographical information including family background, education, employment history and whether he/she has ever been diagnosed with and/or treated for a mental illness.

While the defendant's responses to such questions may not be determinative of the need for psychiatric examinations, they can at least provide some preliminary indication whether the defendant is a genuine mental case or a possible malingerer/manipulator who is seeking to frustrate or delay the administration of justice.

Upon receipt of the court's order of examination, the appropriate director MUST DESIGNATE TWO QUALIFIED PE'S (whether psychiatrists, psychologists or one of each), to examine the defendant to determine his/her competency. They may use any examination method approved by the medical profession for assessing those believed to be mentally ill or defective (CPL 720.20[1]).

It should be noted that the defendant has the right to retain (or if indigent, have assigned), his/her own psychiatrist/psychologist TO BE PRESENT at such an examination(s), and also to help him challenge the State-designated experts and to testify at a competency hearing that may be ordered by the court either on its own motion or upon the request of the defendant or the People. (See People v Christopher [.22 Caliber Killer] 65 NY 2d 417 [1986]; People v Gonzalez 132 MIsc 2d 1004 [Sup. Ct. crim Term 1986[): "...a rule of law which would ensure that a defendant's right to a hearing to contest the psychiatric determination of the director's designees but would deny him the right to present his own psychiatric testimony would be a contradiction in terms."(citing People v Christopher supra at p.424).

Pursuant to CPL 730.20(2), if the defendant is at liberty on bail or recognizance, the court may direct that the examination be conducted on an OUTPATIENT basis at a time and location designated by the director. HOWEVER, if the director advises the court that 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.

Hospital confinement, however, should not exceed 30 days unless the director persuades the court that more time (up to 30 more days) is needed to complete the examinations (CPL 730.20[4]). During such confinement, the doctor in charge of the hospital may authorize the administration of emergency psychiatric medications or other therapeutic treatment as is required in the doctor's judgment.

An interesting question is whether a defendant who is charged with a NON-QUALIFYING offense (misdemeanor or felony) for purposes of monetary bail (see CPL 510.10[4]) (i.e. who otherwise would have to be released O.R. or on least restrictive non-monetary conditions [CPL 510.10[1]), can be remanded pursuant to CPL 730 for purposes of a competency exam?

Some cases predating the 2019 Bail Reform Act (e.g. People v Wilboiner supra and People v Giannnelli 189 Misc 2d 366, 367-368 [Justice Ct. Westchester County 2001]) suggest that the answer is YES (i.e. D can be confined) because a court may, where the director deems it necessary for an effective exam (CPL 730.20[2], (and the court has good reason to believe that the defendant will not appear voluntarily), take steps to ensure that that defendant is present for the examinations as required. (In People v Wilboiner supra, the court ordered a forensic examination and remanded the defendant after he was picked up on a bench warrant after missing a schedule court date. Defense counsel did not object until the first scheduled return date when the examinations reports were not yet completed).

It should also be noted that the new bail laws do not appear to disturb or otherwise limit the court's authority under Article 730 to effectuate its purposes and procedures. Nevertheless, in cases where a defendant is charged with a non-qualifying offense, counsel should argue vigorously in favor of release on non-monetary conditions (510.10[3]) including out-patient attendance at a competency examination at the time and place designated by the director. If the there is any doubt as to the

defendant's likelihood of attending on his/her own, counsel could recommend that the defendant be released under the supervision of a pre-trial services agency (PTSA) (CPL 510.45) that could help ensure his/her attendance as required.

Counsel should also argue that only persistent and willful failure to appear (CPL 530.60 [2][b]), demonstrated by clear and convincing evidence at a hearing can justify confining the defendant, but it is unlikely that a court will afford the defendant more than one opportunity (if that) to attend a competency examination of his own accord (especially if he/she appears to be on some other planet), before confining him under CPL 730.20(2) for that purpose.

Where the defendant is already in custody, the examination is held where he/she is confined unless the director believes that a hospital setting is necessary for an effective examination. If so, the sheriff must deliver the defendant to the designated hospital and hold him/her there, under guard, until the examination is completed. (CPL 730.20[3]).

Pursuant to CPL 730.20(5), each PE must promptly submit a report to the director, who, in turn will forward them to the court and counsel. If the two PE'S disagree whether the defendant is an IP, (i.e. one YES and one NO), the director must DESIGNATE ANOTHER qualified PE to examine D and provide an opinion on competency.

It should be noted that any STATEMENTS MADE BY THE DEFENDANT during an examination (whether privileged or not), are admissible in a criminal proceeding, BUT ONLY on the issue of his mental condition at the time of his examination. They are NOT ADMISSIBLE for any other purpose. (CPL 730.20[6]).

Psychiatric Examiners (who are NYS employees) are entitled to receive up to $250.00 for travel and expenses (including $50.00 for each court appearance for a hearing or trial) unless their work is conducted outside state hours or they have to travel out-of-county to do their work due to a shortage of PE'S. (CPL 730.20[7])

ORDER OF EXAMINATION:

CPL 730.30(1): At any time after arraignment on an accusatory instrument (AI) (excluding a felony complaint [FC]), and before sentencing, (or, any time after arraignment on a FC but before the case is held for the grand jury), the court where the case is pending MUST issue an OE when it is of the opinion that the defendant MAY BE an IP.

2. If both PE'S agree that the defendant (D) is NOT an IP (i.e. is competent to proceed), the Court MAY, ON ITS OWN MOTION, (or, if the defendant or the People so request), CONDUCT A HEARING on the issue of competency. If after such hearing, (or if no hearing was requested or ordered), the court concludes that D is competent, the prosecution must go forward. But if the court is still NOT SATISFIED that D is competent, it MUST ISSUE A FURTHER EXAMINATION ORDER directing the D be evaluated by different PE'S designated by the director.

3. When the PE'S both agree that D IS NOT COMPETENT to proceed, the court MAY, on its own motion, conduct a hearing to determine D'S capacity, and MUST DO SO upon motion of D or the People.

4.If the PE reports are NOT IN AGREEMENT on competency, the court MUST CONDUCT a hearing.

Though the statute is silent on this point, the BURDEN OF PROOF to establish that D is NOT FIT TO PROCEED IS ON THE PEOPLE. (People v Christopher supra. See also People v Gibbons 63 Misc 2d 350 [Sup. Ct. Bronx County 1970]): D must first come forward with some evidence to show lack of capacity but the ultimate burden of persuasion rests with the People).

CPL 730.40 FITNESS/LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS:

1. If, after a hearing per CPL 730.30(3)or(4), the local court concludes that D is NOT an IP (i.e. is competent to proceed), the prosecution must proceed. But, if the court concludes that D is an IP (i.e. is not competent), (or no motion for a hearing is made), the court MUST ISSUE A FINAL ORDER OF OBSERVATION (FO/OBS.), committing D to the CUSTODY OF THE CMH FOR CARE/TREATMENT (C/T) IN AN APPROPRIATE INSTITUTION (including an OMH licensed hospital that has agreed to accept such referrals), for up to 90 days. Where the AI is a MISDEMEANOR INFORMATION (MI) or MISDEMEANOR COMPLAINT (MI) the court MUST ISSUE A FO/OBS. When the AI is a FELONY COMPLAINT (FC), the court must issue a TEMPORARY ORDER OF OBSERVATION (TO/OBS.) committing D to the CMH'S custody for C/T in an appropriate institution (or, where appropriate, to outpatient treatment under the CMH'S care), for up to 90 days. UPON CONSENT OF THE PEOPLE, the court MAY ISSUE A FO/OBS. (Counsel should press for this relief when the felony charges are not too serious and it is apparent that D is not likely to be found competent).

2. When the court issues a FO/OBS., it MUST DISMISS THE (MISD) AI and there can be NO FURTHER PROSECUTION of the charges contained in the AI. Where D is in CMH'S custody per a FO/OBS., the CMH must CERTIFY to the court that it has complied with the notice provisions of CPL 730.60. Where D is in CMH custody at the expiration of a TO/OBS., the local court proceedings SHALL TERMINATE for all purposes and the CMH must CERTIFY to the court and to the DA that D was in CMH custody at such time. Upon receipt of such certification, the local court MUST DISMISS the FC. (BUT THIS DOES NOT MEAN THAT THE FELONY PROSECUTION IS NECESSARILY OVER).

3. Where the local court issues an EO or a TO/OBS., and the charges are SUBSEQUENTLY PRESENTED TO THE GJ, the GJ NEED NOT HEAR FROM D (per CPL 190.50), unless the Superior Court which empaneled the GJ determines that D is fit to proceed.

4. Where D is INDICTED after a local court issues an EO (and BEFORE the local court has issued a FO/OBS. (i.e.upon a MISD INFO) or a TO/OBS., (upon a felony complaint), D must be PROMPTLY ARRAIGNED on the indictment and the local court proceedings SHALL TERMINATE for all purposes. The DA must notify the local court which must dismiss the AI that was filed therein. (If the local court has received the examination reports, it must forward them to the superior court).

5. Where an indictment is TIMELY FILED (i.e. within six months after the period prescribed in the TO/OBS. issued by the local court,), the superior court must direct the sheriff to bring the defendant from the institution where he/she is confined to court for ARRAIGNMENT ON THE INDICTMENT which nullifies the TO/OBS and any other MHL order issued after expiration of the period prescribed in the TO/OBS. (NB: ABSENT A SHOWING OF GOOD CAUSE, an Indictment that is returned outside this time frame is SUBJECT TO DISMISSAL ON SPEEDY TRIAL GROUNDS).

CPL 730.50 FITNESS TO PROCEED/INDICTMENT:

1. If a superior court is satisfied after a competency hearing that D is fit to proceed, the prosecution must forge ahead. However, if D is found to be incapacitated, (or no demand for a hearing is made), the court must issue either a FO/OBS (in the rare case where the indictment charges only a MISD or D is convicted of a MISD.as a lesser included offense), or an ORDER OF COMMITMENT (OC), where the indictment (as is most often the case), charges (or D is convicted of) a FELONY. If a FO/OBS (upon a misdemeanor) issues, the defendant will be committed to the custody of the CMH for 90 days and the indictment will be DISMISSED with prejudice. Upon issuance of such order, the DA shall immediately provide the CMH with a list of the names and contact information of anyone who is reasonably believed to be the victim of an assault, other crime of violence or family offense (CPL 530.11). When D is discharged from confinement pursuant to a FO/OBS., the CMH must certify that he/she has complied with the notice requirements of CPL 730.60. Where the indictment charges (or D is convicted of) a FELONY, the court must issue an OC committing D to the custody of CMH for care/treatment in an appropriate institution (or, with the DA'S consent, on an outpatient basis), for up to ONE YEAR. (If D was at liberty on bail and he/she is so committed, the bail must be exonerated [but not necessarily where D is being treated on an outpatient basis]).
2. When a OC is about to expire and the CMH believes that D is still an IP, the CMH must, within 60 days of the end of the OC confinement period, apply IN WRITING to the court (upon NOTICE to D and counsel), for a RETENTION ORDER (RO). Upon receipt, the court MAY conduct a COMPETENCY HEARING on its own motion and MUST do so upon request of D or the People IF such request was made WITHIN 10 days of receipt of notice of the application for retention. If the court concludes post hearing that D is no longer an IP, the criminal action must proceed. However, if D is still found to be an IP, the court must issue a RETENTION (RO), authorizing continued custody of D with the CMH up to ONE YEAR.

3. Immediately before expiration of the first retention order (where D is still in CMH custody), the CMH may (upon the same notice requirements), apply for subsequent RO'S which may not exceed TWO YEARS EACH. WHEN DOESTHE PROSECUTION EVER END IF D IS NOT FIT TO PROCEED? When D has spent TWO-THIRDS of the authorized MAXIMUM TERM of imprisonment for the HIGHEST LEVEL FELONY COUNT charged in the indictment (factoring in the aggregate of time spent in CMH custody under the CO and RO'S issued under CPL 730), and D is still in CMH custody when the last RO expires, the criminal action SHALL TERMINATE and, upon CMH certification of such custody to the court and DA, the court MUST DISMISS THE INDICTMENT (with prejudice). Whether or not D is released upon dismissal of the indictment will depend upon whether D has been converted to CIVIL COMMITMENT STATUS under MHL Article 9 (or Article 10 if D qualifies as a designated Sex Offender with a mental abnormality who was found to be an IP), and whether he was confined or released for treatment on an outpatient basis. In cases where D still requires institutional confinement and treatment after all CPL 730.50 proceedings have been exhausted, the appropriate director may move to keep D confined for another 30 days (CPL730.70) if he/she believes that D is so mentally ill or defective as to require continued institutional

care and treatment, the CMH, as noted above, may also pursue civil commitment proceedings under the MHL if it hasn't done so already.

WHAT IF THERE IS NO REASONABLE CHANCE THAT D WILL BE FOUND FIT TO PROCEED?

In Jackson v Indiana 406 US 716, 738 (1972), the Supreme Court held that "...a person charged ...with a criminal offense who is committed solely on account of his incapacity to proceed to trial CANNOT BE HELD for more than the reasonable period of time necessary to determine whether there is a SUBSTANTIAL PROBABILITY that he/(she) will attain capacity in the FORESEEABLE FUTURE." Where the court finds that there is no such probability, DUE PROCESS REQUIRES that the state institute CIVIL COMMITMENT PROCEDURES that would apply to the indefinite commitment of any other citizen. Otherwise, the state would be required to release the defendant. (Where there remains hope for restoring competency, the purpose of confinement [and care/treatment) is to bring the defendant back to wellness so that the criminal process can pick up where it left off).

The Jackson Court reasoned that requiring the state in such cases to pursue civil commitment (even before the criminal commitment procedures have expired), protects the liberty interests of mentally ill persons held in criminal custody, having been charged but incapable of being adjudicated, and serves to ensure that the nature and duration of such confinement bears some reasonable relationship to the purposes of for which it was imposed (i.e. to restore D to competence).

In People v Egle 56 Misc 3d 1141 (Sup. Ct. Kings County 2017), the court noted that CPL Article 730 applies Jackson in principle by capping D'S period of criminal confinement to two-thirds the maximum period of imprisonment on the highest count before the state must take steps toward civil confinement, but does not preclude such action sooner (whether on motion of the state or the defendant) where it is evident that D'S chances of regaining competency are slim to nil. (citing People v Schaffer 86 NY2d 460 [1995]).

It should be noted however, that under Egle, D did not have the right to remain in criminal custody (so as to run up two-thirds of his maximum seven year potential sentence for Assault 2d degree), and prevent the state from moving to convert him from criminal (CPL) status to civil (MHL) status under Jackson when it was clear that he would never achieve competency. It is also worth noting that once civil status is granted and D is no longer under Article 730 commitment authority, he/she no longer accumulates "custodial credit" toward eventual mandatory release, nor is he/she entitled to automatic dismissal of the criminal charge(s) under CPL 730.50(4). (See People v Lewis 95 NY2d 539 [2000]).

PROCEDURE FOLLOWING CUSTODY BY THE CMH:

1. When the local court issues a final/temporary order of observation or order of commitment, it must forward such order (along with the examination reports, accusatory instrument and pre-sentence report [if applicable]), to the CMH who must designate an appropriate institution operated by the DMH (or hospital per agreement with DMH), where D is to be placed with a final order of observation. The sheriff must deliver D held in custody to the superintendent of the institution (SI). The SI must, in turn, notify MHLS of D'S admission. (If D escapes, the period of observation/commitment/retention is interrupted until D is returned).

2. Where D is in CMH custody pursuant to a TO/OBS., or OC or RO, the CRIMINAL ACTION IS SUSPENDED until the SI determines that D is NO LONGER AN IP. If so, the SI must notify the Court and DA in writing of its determination. The court must then proceed in accordance with CPL 730.30(2). But, if the court is satisfied that D is still an IP, and upon CONSENT OF ALL PARTIES, it may ORDER D RETURNED to the institution where D was confined under the previous order. ('Upon return, D has the same rights as before).

3. Where D is in CMH custody under this Article, the CMH may TRANSFER D to any appropriate institution operated by the DMH (but may designate an appropriate hospital for placement of a D subject to a FO/OBS.THE CMH MAY DISCHARGE A D IN HIS/HER CUSTODY UNDER A FO/OBS. (MISD.),AT ANY TIME PRIOR TO THE EXPIRATION OF SUCH ORDER OR OTHERWISE TREAT/TRANSFER D AS IF HE/SHE WERE A PATIENT NOT IN CONFINEMENT PURSUANT TO A CRIM9NAL COURT ORDER.

4. Where D is in custody pursuant to a OC or RO, he/she may make any authorized motion which can be determined without his personal participation. If denied, it must be without prejudice after the criminal action is directed to proceed. If the court dismisses an indictment without leave to re-present to a new Grand Jury, the court must direct service of the dismissal order on the CMH.

5. Where D is in custody pursuant to a OC or RO, the superior court may, on D'S motion, with consent of the People, DISMISS the indictment where the court is satisfied that: a. D is a resident of another state/country and will be removed thereto upon dismissal; b. D has been continuously confined for over two years; c. The court is satisfied that such dismissal will serve the ends of justice; d. control/custody of D is not necessary for public protection and e. care/treatment can be effectively administered to D without the need for an order directing same. The court must set forth its reasons for such dismissal on the record and there can no further prosecution of the charge(s) contained in the indictment.

6. Notwithstanding any other section, no committed/continuously retained person under this Article shall be discharged, released, placed in a less secure facility or in less restrictive status unless the CMH delivers WRITTEN NOTICE at least FOUR DAYS (excluding weekends and holidays), ahead of the time of D'S change of status/location, or if D is subject to a FO/OBS., WRITTEN NOTICE OF DISCHARGE to: 1.the DA; 2. the Superintendent of the State Police; 3. the Sheriff of the County of the facility where D is located; 4. P.D. with jurisdiction where the facility is located; 5. any person reasonably believed to be a victim of an assault, violent crime or family offense (CPL 530.11) and 6. anyone else the court designates.

Such notice must be REASONABLY CALCULATED to give PROMPT ACTUAL NOTICE and is required if D leaves a facility without authority. When the DA receives notice (and D is on a FO/OBS.), he/she MAY APPLY TO THE SUPERIOR COURT WITHIN 30 DAYS OF RECEIPT OF NOTICE for an ORDER DIRECTING A HEARING to DETERMINE IF D IS A DANGER TO HIM/HERSELF OR OTHERS.

Such hearing should be held within ten days and if D is found to be dangerous, the court shall order that he/she be RETAINED up to SIX MONTHS while his/her current mental status is determined. The DA and D'S Counsel are entitled to review D'S clinical records in connection with the hearing.

POSTSCRIPT:

People sometimes confuse a defendant's incompetency to proceed with the adjudicative process with the lack of criminal responsibility for the crime charged. The former, as discussed above, addresses the defendant's PRESENT INABILITY to be criminally prosecuted because of mental disease or defect which prevents him/her from understanding the proceedings or assisting in his/her defense. The latter is an AFFIRMATIVE DEFENSE that the defendant, due to a mental disease or defect, AT THE TIME OF THE OFFENSE, lacked substantial capacity to know or appreciate either the nature and consequences of his/her conduct or that such conduct was wrong. (PL 40.15).

Defendants who wish to assert a claim of "NOT RESPONSIBLE" at trial cannot do so if they are ruled to be incapacitated to stand trial in the first place. On the other hand, not every defendant who suffers from a mental disease or defect is found unfit to be tried. (Nor can every incompetent defendant whose fitness is restored assert a lack of criminal responsibility for the crime charged).

Understanding the difference between fitness to proceed and lack of criminal responsibility (both of which involve mental disease or defect), represents just one of many challenges facing counsel who represent clients suffering from mental illness or other cognitive defects. Counsel must also be able to navigate the procedural pathways of Article 730 and appreciate the impact of such proceedings not only on the client's mental health but on his/her liberty in the long run.