CONTINUING LEGAL EDUCATION
Fall 2010

December 6, 2010

Ethical Considerations When Representing Clients with Mental Health Issues

Risa Gerson, Esq.

SPONSORED BY:
APPELLATE DIVISION, FIRST AND SECOND JUDICIAL DEPARTMENTS
IN CONJUNCTION WITH THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK

Representing Clients With Mental Health Issues

Criminal Procedure Law Article 730 1
Sets out the definition of an incapacitated person and the procedures to be followed when a defendant is adjudicated an incapacitated person

Case Study: People v. Jackson
Findings and Order of Retention, February 24, 2003 14
Justice McLaughlin's decision finding that although the defendant understood the roles of the principle participants in the court process, he was unable to meaningfully assist an attorney in defending against the charges

Case Study: People v. Jackson
Retention Hearing, February 3, 2005 17
Testimony of John Jackson, in which he explains that he wants to pursue the defense that post-hypnotic suggestion compelled him to kill the victim

Criminal Procedure Law Section 250.10 47
Sets out the notice requirements to be followed when the defense intends to offer evidence that the defendant suffered from a mental disease or defect

C

Effective:[See Text Amendments]

Mckinney's Consolidated Laws of New York AnnotatedCurrentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)
→ § 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 or defect lacks capacity to understand the proceedings against him or to assist in his 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 is an incapacitated person.

3. "Commissioner" means the state commissioner 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 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 is an incapacitated person, or (c) the director of community mental health services.

5. "Qualified psychiatrist" means a physician 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" means a person who is registered as a certified psychologist under article one hundred fifty-three of the education law.

7. "Psychiatric examiner" means a qualified psychiatrist or a certified psychologist who has been designated by a director to examine a defendant pursuant to an order of examination.

8. "Examination report" means a report made by a psychiatric examiner wherein he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his 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.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.1973, c. 195, § 11; L.1974, c. 615, § 11; L.1974, c. 629, §§ 5, 6; L.1976, c. 435, § 4; L.1987, c. 440, § 1; L.1994, c. 566, § 1.)

HISTORICAL AND STATUTORY NOTES

1995 Main Volume

1994 Amendments. Subd. 2. L.1994, c. 566, § 1, eff. July 26, 1994, expanded definition to include an order by a family court wherein a juvenile delinquency proceeding is pending, and omitted language which referred to the person to be examined as defendant.

1987 Amendments. Subd. 3. L.1987, c. 440, § 1, eff. Apr. 1, 1988, substituted definition of the term "commissioner" as meaning either the state commissioner of mental health or the state commissioner of mental retardation and developmental disabilities for former definition of that term as meaning the state commissioner of mental hygiene.

Subd. 4, cl. (a). L.1987, c. 440, § 1, eff. Apr. 1, 1988, substituted definition of director as meaning, in part, 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 developmental disabilities for former definition of that term as meaning, in part, the director of a state hospital operated by the department of mental hygiene.

Derivation. See Derivation note preceding this section.

PRACTICE COMMENTARIES

1995 Main Volume

C

Effective:[See Text Amendments]

Mckinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)
→ § 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 may be one, to examine the defendant to determine if he 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. The court may authorize a psychiatrist or psychologist 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 was theretofore released on bail or on his 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 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 judgment should be administered.

5. Each psychiatric examiner, after he has completed his 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 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 for the purpose of the examination or treatment shall be inadmissible in evidence against him in any criminal action on any issue other than that of his 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 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 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 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 available to conduct examinations under the criminal procedure law in such county, in which event he 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 maintenance therein and of returning him shall, when approved by the court, be a charge of the county in which the defendant is being tried.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.1971, c. 884, § 6; L.1972, c. 692, § 1; L.1989, c. 693, § 2.)

HISTORICAL AND STATUTORY NOTES

1995 Main Volume

1989 Amendments. Subd. 1. L.1989, c. 693, § 2, eff. July 22, 1989, substituted reference to psychiatric examiners for reference to psychiatrists; and deleted provision which authorized director to designate one qualified psychiatrist and one certified psychologist when of the opinion that defendant might be mentally defective.

Subd. 5. L.1989, c. 693, § 2, eff. July 22, 1989, substituted reference to psychiatric examiner for reference to psychiatrist.

Derivation. See Derivation note preceding CPL 730.10.

PRACTICE COMMENTARIES

1995 Main Volume

by Peter Preiser

C

Effective:|See Text Amendments|

Mckinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)
→ § 730.30 Fitness to proceed; order of examination

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 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.

2. When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by the defendant or by the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed; if the court is not so satisfied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director.

3. When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity and it must conduct such hearing upon motion therefor by the defendant or by the district attorney.

4. When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.1974, c. 629, § 7.)

HISTORICAL AND STATUTORY NOTES

C

Effective: August 6, 2008

Mckinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)
→ § 730.40 Fitness to proceed; local criminal court accusatory instrument

1. When a local criminal 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 must proceed. If it is satisfied that the defendant is an incapacitated person, or if no motion for such a hearing is made, such court must issue a final or temporary order of observation committing him 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 the 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. When a local criminal court accusatory instrument other than a felony complaint has been filed against the defendant, such court must issue a final order of observation; when a felony complaint has been filed against the defendant, such court must issue a temporary order of observation, except that, with the consent of the district attorney, it may issue a final order of observation.

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 custody on such expiration date. Upon receipt of such certification, the court must dismiss the felony complaint filed against the defendant.

3. When a local criminal court has issued an order of examination or a temporary order of observation, and when the charge or charges contained in the accusatory instrument are subsequently presented to a grand jury, such grand jury need not hear the defendant pursuant to section 190.50 unless, upon application by defendant to the superior court that impaneled such grand jury, the superior court determines that the defendant is not an incapacitated person.

4. When an indictment is filed against a defendant after a local criminal court has issued an order of examination and before it has issued a final or temporary order of observation, the defendant must be promptly arraigned upon the indictment, and the proceedings in the local criminal court shall thereupon terminate for all purposes. The district attorney must notify the local criminal court of such arraignment, and such court must thereupon dismiss the accusatory instrument filed in such court against the defendant. If the director has submitted the examination reports to the local criminal court, such court must forward them to the superior court in which the indictment was filed. If the director has

not submitted such reports to the local criminal court, he must submit them to the superior court in which the indictment was filed.

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 is confined and bring him 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.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.2008, c. 231, § 1, eff. Aug. 6, 2008.)

HISTORICAL AND STATUTORY NOTES

2010 Electronic Pocket Part Update

L.2008, c. 231 legislation

Subd. 1. L.2008, c. 231, § 1, inserted ", 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."

1995 Main Volume

Derivation

See Derivation note preceding CPL 730.10.

SUPPLEMENTARY PRACTICE COMMENTARIES

2010 Electronic Pocket Part Update

C

Effective: August 6, 2008

Mckinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)
→ § 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 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 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 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 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 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 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 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, [FN1] 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 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 was convicted.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.1972, c. 810, § 1; L.1974, c. 629, § 8; L.1985, c. 789, § 48; L.2008, c. 231, § 2, eff. Aug. 6, 2008.)

[FN1] June 2, 1972.

HISTORICAL AND STATUTORY NOTES

2010 Electronic Pocket Part Update

L.2008, c. 231 legislation

Subd. 1. L.2008, c. 231, § 2, inserted ", 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,".

C

Effective: August 6, 2008

Mckinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)
→ § 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 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 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.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.1973, c. 195, § 12; L.1974, c. 629, §§ 9, 10; L.1980, c. 549, §§ 2, 3; L.1981, c. 791, § 1; L.1984, c. 57, § 1; L.1985, c. 789, § 49; L.1987, c. 440, § 2; L.2008, c. 231, § 3, eff. Aug. 6, 2008.)

HISTORICAL AND STATUTORY NOTES

2010 Electronic Pocket Part Update

L.2008, c. 231 legislation

Subd. 1. L.2008, c. 231, § 3, inserted ", 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."

Subd. 3. L.2008, c. 231, § 3, rewrote subd. 3, which had read:

"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. 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."

McKinney's CPL § 730.60

1995 Main Volume

Derivation

See Derivation note preceding CPL 730.10.

Transfer of Mentally Ill Inmates in Custody of Institutions in Department of Correctional Services to Institutions in Department of Mental Hygiene. For transfer of persons in custody in institutions of the Department of Correctional Services on May 30, 1974, pursuant to this article, to an appropriate institution of the Department of Mental Hygiene as soon as practical after May 30, 1974, but not later than Apr. 1, 1975, see section 12 of L.1974, c. 629, eff. May 30, 1974, set out as a note under Correction Law § 438.

SUPPLEMENTARY PRACTICE COMMENTARIES

2010 Electronic Pocket Part Update

by Peter Preiser

2008

Subdivisions one and three of this section were amended in 2008 to create some flexibility for the Commissioner when ascertaining the appropriate hospital for care and custody of criminal defendants unable to stand trial due to mental incapacity committed to the Commissioner and held under a final order of observation that terminated the criminal action. The amendment authorizes the Commissioner to enter into agreements with private licensed hospital facilities for care and treatment of any such individual. A similar amendment was inserted in §§ 730.40 [1], 730.50 [1].

PRACTICE COMMENTARIES

1995 Main Volume

by Peter Preiser

This section deals with the incidents of custody following commitment under an order of observation. It also provides in subdivision five a window for premature termination of the criminal proceeding under special circumstances.

Particular attention should be accorded subdivision six, which was amended significantly in 1980 and 1981. The original practice commentaries on those revisions by Judge Bellacosa furnish a complete description of the

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 93

----------x

PEOPLE OF THE STATE OF NEW YORK

- against -

JOHN JACKSON,

Defendant.

FINDINGS AND
ORDER OF RETENTION
Ind. No. 11990/91

----------x

EDWARD J. McLAUGHLIN, J.:

On February 19, 2003, the court held a retention hearing, pursuant to CPL 730.50 (3) to determine whether defendant remains an incapacitated person requiring his being kept within the custody of the Commissioner of Mental Health for two more years or whether, after approximately eleven years of confinement by the Commissioner, he is fit. Despite the defendant's familiarity with and understanding of the roles of the principal participants in the court process, he cannot, in his present condition, meaningfully assist an attorney in defending against the murder charge for which he was indicted in 1991. He, therefore, continues to be an incapacitated person and consequently must be the subject of a further retention order committing him for an additional two years to the Commissioner of Mental Health.

At the hearing, the People called Dr. Raphael Morris, a psychiatric expert on staff at Kirby Psychiatric Hospital. The court credits his testimony. Although Dr. Morris had seen the defendant frequently at Kirby, he has had little or no verbal or psychiatric interaction with the defendant. Nevertheless, Dr. Morris participated in the hospital staff's assessment of the defendant for this hearing. He also had adequate familiarity with the records of defendant Jackson's twenty years of periodic psychiatric care. Many of these records were admitted at the

hearing. Dr. Morris described defendant as a paranoid schizophrenic who has grandiose delusions, a persecution complex, feels he is not ill, and who is prone to discontinue his medications. He agreed that defendant has at times improved slightly. The defendant has been deemed fit two times within the past six or so years, only to relapse upon transfer to the City Corrections system where he failed to take his medication.

Dr. Morris acknowledged that Mr. Jackson readily understood the roles of the prosecutor, jury, judge, and defense attorney. He testified, however, that defendant's unwavering desire to employ a defense of post-hypnotic suggestion makes him unable to assist meaningfully in his defense. The defendant refuses to consider meaningfully any defense other than post-hypnotic suggestion. The court initially did not consider this supposed problem as an insurmountable impediment to fitness. But Mr. Jackson's testimony made that conclusion inescapable.

Fitness to proceed to trial and having a mental illness are not inconsistent. The defendant testified that he ardently wants to defend against the murder charge, claiming that he killed the victim, Mr. Jones, because of post-hypnotic suggestion. Mr. Jackson is unfazed by the absence of any evidence that he was ever in a hypnotic state, undaunted by the fact that he does not know who made the murderous suggestions or what the commands were given to him. He remains convinced that his inability to specify the commands, under which he murdered, results from amnesia and insists that, if he were not poor, he could hire an attorney who would pursue his defense as he wants and obtain an expert on hypnosis who could establish his defense. Furthermore, he emotionally claimed that parts of his psychiatric records that were favorable to him had been stolen and that the Kirby staff was lying about his condition.

The defendant's position and reasoning is circular. He claims to be one of the 20% of the world's population who unknowingly have been hypnotized. He attributes his lack of

knowledge to his having amnesia, and asserts that he must have amnesia otherwise he would be able to remember the post-hypnotic suggestions that triggered his fatal assault of Mr. Jones and thereby be in a better position to establish his post-hypnotic suggestion defense.

Defense attorneys ethically can argue positions that are based exclusively on a client's version of an event even though there is no support for that position. That, however, is not the situation here. The post-hypnotic suggestion defense is, according to Dr. Morris and the Kirby staff, a figment of Mr. Jackson's creation. Mr. Jackson reads extensively about hypnosis, has an extensive file on the subject and apparently can quote portions of People v Hughes, 59 NY2d 523 (1983). But there is no basis for the defense apart from his mental illness. His defense is illusory having no more basis in fact than a perjured defense. Consequently, he is not able to participate and assist in any meaningful or helpful way in his defense. He is still an incapacitated person.

EDWARD J. McLAUGHLIN
J.

Dated: New York, New York

February 24, 2003

MR. BERNSTEIN: May I inquire, your Honor?

THE COURT: Go ahead.

MR. BERNSTEIN: Thank you.

DIRECT EXAMINATION

BY MR. BERNSTEIN:

Q. Mr. Jackson.

A. Yes.

Q. First, what charges are you currently facing?

A. Murder in the second degree.

Q. And do you know what the maximum penalty for that charge is?

A. Yes.

Twenty-five to life.

Q. Now, if His honor were to find you fit to proceed today, do you know what would happen next?

A. I'd be transferred down to Rikers Island and speak to another attorney, criminal defense attorney, and we would hatch out what kind of defense or-- or no defense. Plea bargain.

Q. If you were to go to trial --

THE COURT: Slow down counsel.

MR. BERNSTEIN: Sorry, your Honor.

Q. If you were to go to trial, do you

understand what the --

If you were to go to trial, do you understand what the role of the prosecutor would be?

A. The prosecutor? He prosecutes.

Q. Do you understand what the role of --

You just said--

Do you know what the role of the defense attorney would be?

A. The-the-the-the-the defense attorney would be to defend the defendant.

Q. And do you understand what the role of the jury is?

A. Bring back the guilty or not guilty plea.

Q. Do you understand what the role of the judge would be?

A. He's legal -- legal referee.

Q. You said you would have to work with an attorney; correct?

A. Yes.

Q. If you brought up post-hypnotic defense with the attorney, and he researched it and told you that it was not a viable defense, what would you then do?

A. I would do as I told Mr. Morgan in that

49-page letter that I wrote him.

THE COURT: I'm missing what your client is saying.

Could you ask him to slow down?

THE DEFENDANT: No problem at all.

THE COURT: Could you wait one second.

THE DEFENDANT: A 49-page letter.

I wrote more than that.

I had a letter dated December 2, 2001 concerning the case, a 49-page letter where I told him that if nothing else, that I would plea bargain the case if I could go to trial.

Q. So if that defense were available, you will be available to plea bargain.

Do you understand what a plea bargain is?

A. Yes.

This would be a plea of guilty for less time.

Q. If you plea bargain, do you understand that you give up certain rights?

A. My right to a trial.

It is as if I went to trial.

Q. Now, how many attorneys have you had concerning this charge?

A. Three.

Q. And have you mentioned this defense of post-hypnotic suggestion?

A. Yes.

Q. Have any of them looked into it as being a viable defense?

A. None of them.

All three of them said no, just -- just on the face of it.

Q. And you heard the doctor testify that you're unable to even discuss anything outside of this; is that true?

A. That's not true.

As a matter of fact, there is a letter that I have in my hand dated November 18, 2004 whereas I -- whereas I tell him in so many words I would like to discuss hypnosis, the hypnosis as a defense and to -- and to be interviewed by an expert in hypnosis.

Q. To your knowledge, has any doctor at Kirby that's been treating you ever looked into -- ever looked into what you're saying?

A. Dr. Hagerty was an expert in hypnosis, and she approved me.

Q. The doctor found you fit?

A. Yes. Yes. Yes, she was.

THE COURT: Go ahead, counsel.

MR. BERNSTEIN: Just a moment, your Honor.

I'm trying to --

Q. Has Dr. Chukwoucha, as he testified to, has he discussed anything -- discussed this defense with you?

A. Not at all.

As a matter of fact, he's been -- he's been against me. I can't understand that.

Since -- since I went to Cornell, I'm a graduate of the school of chemical engineering.

Why can't we communicate's known as a hatchetman (sic).

Q. Now, Mr. Jackson--

THE COURT: What do you mean he's known as a hatchet man?

THE DEFENDANT: He lies against us.

THE COURT: He what?

THE DEFENDANT: He lies against us.

THE COURT: Who do you mean by "us."

THE WITNESS: The inmates.

As a matter of fact, I have a letter here dated July 30, 2003 from Aaron David, Esquire. He claims he can't help us with

respect to psychiatrists, like check with a--he's lying on us.

THE COURT: How did he lie against you about other inmates?

THE DEFENDANT: Well, for example, he say well, like, that he has to bring up safety all the time. Safety wasn't called.

THE COURT: I missed what you're saying.

THE WITNESS: Okay.

Safety. Safety, or like the guards or--or guards at Kirby.

THE COURT: Yeah.

THE DEFENDANT: If you're a Judge and you heard that the guards at Kirby have had to be called or brought up three or four times against the inmate, then you're going to assume that that inmate is dangerous.

Chukwuocha is very good at what he's doing.

We was hoping to turn him around, but he's not turning around.

THE COURT: Who's not turning around?

THE DEFENDANT: Dr. Chukwuocha.

THE COURT: I don't understand.

Are you saying that he calls out the

guards with respect to inmates?

THE DEFENDANT: He'll tell the judge this, but in all reality, it wasn't done.

THE COURT: He'll tell the Judge what?

THE DEFENDANT: That the guards --that the safety had to be called, and in three instances, concerning a particular inmate.

THE COURT: I see.

In other words with respect to an inmate who's -- who's the subject of a proceeding like this?

THE DEFENDANT: Yes.

THE COURT: You've saying you've been told by those inmates that the doctor told the judge that the guards had to be called, when in fact they didn't have to be called?

THE DEFENDANT: They weren't called.

THE COURT: When in fact they weren't called?

THE DEFENDANT: Yes.

THE COURT: You're saying he lies about that?

THE DEFENDANT: Yes, he does.

He lies, period.

THE COURT: He lies period.

What -- did he did he lie today?

THE DEFENDANT: Yes, he has.

THE COURT: About what, sir?

THE DEFENDANT: For example, I coaxed him and told him that I wanted to speak to him.

As I said, I like talking psychologically. I have with me a new basis for the -- not the basis but the particular facts considering hypnosis.

I wanted to show him, but he's so negative it's a shame what he's said -- somebody whispering in my ear. Somebody has to whisper in order to give me those suggestions, but I haven't caught anybody.

THE COURT: But has it been going on?

THE DEFENDANT: Yes.

THE COURT: When is the last time that it happened?

THE DEFENDANT: Before I left Kirby.

THE COURT: Before you left Kirby?

THE DEFENDANT: Yes.

THE COURT: Before you left Kirby to come here today?

THE DEFENDANT: No.

I was at Rikers Island before.

THE COURT: In other words, before you left Kirby to go to Rikers Island?

THE DEFENDANT: Yes.

THE COURT: And how often would you say this is going on where people are whispering?

THE DEFENDANT: Okay.

A post-hypnotic suggestion could happen a lifetime, a couple of months, weeks, or years.

So therefore, like, you can structure it within an hour, hour and a half to make it last for maybe a couple of weeks.

Okay?

THE COURT: Yeah.

THE DEFENDANT: That's what can happen. Now, I have what is called a hundred percent amnesias that I will not remember anybody giving me the instructions.

THE COURT: Mmm-hmmm (sic).

THE DEFENDANT: And henceforth, like, they can victimize me and I wouldn't know when or for how long a period of time.

And it's something which is like-- which is not a ready-known fact.

For example, it's called sleep suggestion. I have it here for you.

THE COURT: I want to hear it from you though.

THE DEFENDANT: It's called sleep suggestion such that if some people are going into sleep and coming out of sleep, can be given hypnotic suggestion without induction. Okay.

And, like, this is potinent (sic) as if induction occurs or perhaps even more so.

Okay. Now, if a person has a hundred percent amnesia, he'll wake up, feel fine. Nothing until it's just a start.

Two things. I asked to be tested since 1992. Dr. Watson, to have him pull the tests of such was never done.

THE COURT: Tested for what?

THE DEFENDANT: Sensibility suggestion and the hypnogogy (sic) state of sleep.

Second of all, I had asked for it to be stopped.

THE COURT: For what to be stopped?

THE DEFENDANT: For anybody to be able to victimize me.

THE COURT: How would you propose that be done?

THE DEFENDANT: By giving me hypnotic

suggestions in that state.

THE DEFENDANT: It says such inside here that it can be done.

And this was available at New York State Psychiatric Institute at 1051 Riverside Drive.

THE COURT: Let me ask you a question.

I apologize.

As things now stand -- as things now stand, if you were to -- if I were to restore you to this case and you were to have your lawyer, your defense lawyer, okay?

THE DEFENDANT: All right.

THE COURT: Wouldn't it be correct that there would be no way to guard during the time that it takes to prepare the case, there would be no way to guard against your being the victim of post-hypnotic suggestion again?

THE DEFENDANT: Yes, there is.

THE COURT: How would that happen?

THE DEFENDANT: Well, it says inside of here -- it says inside of here that it was stopped. Okay.

So I'm assuming that the person gave competent suggestions in order to close-up his sensibility to suggestion.

THE COURT: Stopping it by counter post-hypnotic suggestion; is that what you're saying?

THE DEFENDANT: Yes.

I'm going to leave this for you.

THE COURT: You don't--

Let's finish this discussion, then maybe I'll take a look at it.

So in other words, what you're saying is that you'd be able to work with your lawyer if someone would give you counter post-hypnotic suggestion in order to make you immune from other post-hypnotic suggestion?

THE DEFENDANT: -- don't even have to do that.

All they have to do is ensure no one's giving me the suggestion.

You see what I'm saying.

THE COURT: How does anybody assure you of that, that no one's giving you suggestions?

THE DEFENDANT: By me not hearing or seeing things.

THE COURT: At the moment, you're telling me that you are regularly being victimized by having people give you post-hypnotic suggestion,

right?

THE DEFENDANT: This was at Kirby.

As a matter of fact, the treatment new about it. I discussed it.

THE COURT: So you're saying this is not happening at Rikers Island.

This only happened at Kirby?

THE DEFENDANT: Yes.

I discussed this with Dr. Checkelbaum (sic), a treatment team leader, who knew what was going on.

The treatment team leader didn't want to get sued. So he didn't give me but so many details. But he knew what was going on.

I brought into a treatment team and I got silenced. I wrote letters.

I have letters here.

THE COURT: Sir, let me ask you something.

If a defense lawyer wanted to advance for you a defense that at the time of the commission of this offense you were suffering from a mental illness which caused the offense, would you -- if the defense lawyer wanted to advance that defense, would you agree to it?

THE DEFENDANT: Not blindly.

We weighing probabilities, as I will explain.

Your Honor, I also tried to file a preliminary injunction temporary retaining (sic) orders against Kirby. Unfortunately it got lost.

THE COURT: Would you consider with a defense lawyer any other defense?

THE DEFENDANT: Your Honor, I've looked at this since 1991.

And let's say I would take extreme-- emotionally extreme emotion. Whatever.

THE COURT: Disturbance?

THE DEFENDANT: That will give me twenty-five years to life. I'm a second-ime loser.

Besides that, you want the best defense that goes along with the circumstances of the case.

THE COURT: Well --

But as I understand it, you said that the circumstances of the case are that you were the victim of post-hypnotic suggestion.

That's why you find yourself in this predicament?

THE DEFENDANT: Yes. Yes, sir it is.

THE COURT: Well, that's that's all you're saying. That's really all the defense lawyer has to work with. Nothing else.

THE DEFENDANT: No. No. No.

Like uniqueness in the way the suggestions were given, the statements made as to how the crime happened, it can say what the tradition says as to how this crime happened.

The literature as espoused by Wells, he was, at Cirrus U in his hypnotic ways commission out of crimes (sic).

The cookbook recipe how these types of crimes, this is what happens when you compare this with grand jury testimony.

THE COURT: Counsel, before you ask another question, can I see the article that the defendant so much wanted me to look at?

And would you -- I apologize for the long interruption -- but you can continue.

I'll try not to interrupt again.

MR. BERNSTEIN: No problem, your Honor.

Just to follow up on that Mr. Jackson, you've just testified that you would want your defense attorney to read literature and other

stuff that you had provided him; correct?

THE WITNESS: Yes.

THE DEFENDANT: Yes, and that he would have to consult, of course, with an expert on hypnosis.

MR. BERNSTEIN: You say the defense attorney does all that for you, and then comes back and say, Mr. Jackson, I've looked at everything you've told me to.

You've consulted an expert?

THE DEFENDANT: Mmm-hmmm (sic).

MR. BERNSTEIN: I don't think this defense would work in this case, what would you do?

THE DEFENDANT: I'll have to go for the plea bargain.

MR. BERNSTEIN: So you would be willing to consider options if your attorney tells you, after due diligence, that this defense won't work?

THE DEFENDANT: Yes.

At the same time -- at the same time, don't forget, like, I've written a variety of letters out to Mr. Morgan asking for his cooperation showing where the testimony of

certain People was perjured -- was perjured, and how they victimized me through the years and that no one don't believe me. No one helped me.

Q. The last thing Mr. Jackson, I just wanted to clear up one thing.

You've been -- you've been at Kirby for thirteen years?

A. Yes.

Q. How many different types of medication have you taken, psychotropic medication have you taken?

A. Six to eight.

But you see, like, put it this way: We went through all the medication I could walk into voluntarily. Nothing happened. They give me new medication. Nothing happened.

Why don't they test me?

Q. Also, have there been periods you have not been on medication?

A. Yes.

MR. BERNSTEIN: I have nothing further, your Honor.

THE COURT: Do you wish to inquire?

MR. KONOWITZ: Nothing, your Honor.

No questions.

THE COURT: Does the defendant have

assigned counsel for the criminal case?

MR. BRENSTEIN: I do not believe he does at this time, your Honor.

THE DEFENDANT: If I had, your Honor, I would have written to him and seen if we could have reached some kind of acord.

THE COURT: Give me a minute.

(Pause)

THE COURT: Whos is the last counsel of record?

Has he ever had counsel of record?

THE DEFENDANT: Mr. Jaffe.

THE COURT: Robert Jaffe?

THE DEFENDANT: Yes.

As a matter of fact, your Honor, um, Mr. Jaffe and I reached an accord too as I was going to take a particular plea bargain.

THE COURT: You were going to what?

THE DEFENDANT: We had reached an accord where I was going to get a plea bargain or go to trial on a lesser offense.

Come to find out, even if I had taken a particular plea bargain, I would have gotten twenty-five years to life.

THE COURT: Yeah.

THE COURT: I mean, what makes you think they would give you a bargain?

You're charged with murder. The district attorney could just easily ask that you plead guilt to the charges.

If the district attorney asked that, would you do that?

THE DEFENDANT: I hear you. I understand.

THE COURT: What do you understand?

I mean, if your lawyer came to you and said to you, look, this defense is not going to work. Right? Are you actually prepared to plead guilty to the charge of murder, knowing that you could receive anywhere between fifteen and twenty-five years at the minimum, and life at the maximum.

THE DEFENDANT: The last plea bargain I was given was 23 years.

THE COURT: All right.

Even if it's 23 years, whatever, is offered, right, would you really be prepared to do that? Is that what you're telling me, if this defense didn't succeed?

THE DEFENDANT: Yes. Yes.

THE DEFENDANT: I still -- underneath the two, three rule to where it's like, um, I'dbe out within a year.

THE COURT: No. That's not correct.

THE DEFENDANT: Somewhere around there.

THE COURT: Sir, if you were to get a sentence of 23 to life --

THE DEFENDANT: No. 23 years.

THE COURT: Of 23 years --

Well, I don't know if that was the offer, if the offer was 23 years.

THE DEFENDANT: Mr. Jaffe knows about it.

THE COURT: First of all, it has to be an indeterminant sentence.

You're saying Mr. Jaffe knows you were offered 23 years?

THE DEFENDANT: He came to me with the offer 23 years.

THE COURT: He couldn't have just said 23 years. It had to be 23 to something or something to 23.

THE DEFENDANT: If it was 23 to life, your Honor, I'd tell him take me to trial anyway.

THE DEFENDANT: I understand what you mean by indeterminant, saying that it has to be something to life.

THE COURT: Let me see the lawyers please.

(Whereupon, there was an off the record discussion.)

THE COURT: I've had a conference with the attorneys at the bench.

And I want the record to show, and everybody to know, what it is that we talked about.

And -- and I won't -- I'm not going to repeat it verbatim, but I'll try and accurately summarize what said.

I think that it has been a long time since the defendant has spoken to a defense lawyer to represent him in the criminal case.

Certainly he has competent counsel here with respect to the mental hygiene issues.

But with respect to the criminal case, the problem that I have here is that I have a qualified psychiatrist who says that the defendant is delusional and schizophrenic and suffers from mental illness -- put it that

way-- which in his estimation interferes with the defendant's ability to assist counsel.

Now, I think the given here -- and I don't think that the lawyers disagree with me when we discussed this at the bench -- the given here is not everybody with a mental illness is unable to assist their counsel in the preparation of a defense, or, better put, in the proper resolution of the case.

I dare say a very substantial number of defendants come before me who suffer from mental illnesses of one kind or another, but they don't interfere.

It is this good doctor's opinion that it would interfere with his ability to assist counsel because he sees that the defendant's -- he sees that the defendant has a fixation with post-hypnotic suggestion. And he believes that, as he described it to me, that that fixation gets -- it interferes with a logical conversation regarding the details of the defendant's case.

I appreciate that judgment, but I have to wonder what a truly competent defense counsel would say about that.

THE COURT: There's no doubt in my mind that the defendant's claims are unusual. They're out-of-the-ordinary.

They're the kinds of claims which most of us would be taking things for granted as we do most of us would say are certainly out of step with our reality and seem irrational.

But I don't know that a competent-- truly competent defense counsel wouldn't allow the defendant to -- wouldn't be open to all of the possibilities that the defendant is proposing, and wouldn't be unwilling to -- and would be unwilling to pursue these extraordinary notions that the defendant has to their ultimate conclusion.

And it may be that that attorney -- if the attorney does the things that attorneys do or that the attorney believes is sensible to do, it may well be that the attorney may come back and say, yes. I believe that there's a defense of extreme emotional disturbance, or the defense it lacks of responsibility, or it may be that the attorney may say to the defendant, this is getting you absolutely nowhere, and no one will back up any of the things you have to say.

Or, it may be -- and then we may see where the case will go then, or it may be that the defense attorney in discussing the details of this defense with the defendant may find what the psychiatrist has found, that the defendant's fixations are such as to interfere with his or her ability to construct a plan of action for the defendant.

I just -- feel that that should be explored by a defense lawyer before I make any ultimate decision.

I told the lawyers at the bench and this is the first -- I have another case coming up which is not quite the same -- but which is really similar, again, a defendant who's being returned from Kirby, who insists on a particular defense in a criminal case which -- and refuses to admit to the possibility that any other defense or any other possible course of action might exist.

He insists on a particular course of action.

And the question is, does that make a person unable to assist counsel?

I'm really not certain that it does and

this case is very, very much like that other case -- which has yet to be heard by me.

In that, the defendant has a fixation. I am not certain that necessarily requires that the defendant concede to other possibilities or give up his fixation.

It's a very thin line here between fitness and non-fitness, and that's because I've seen an extraordinary number of defendants come up with some very preposterous defenses and have lawyers pursue them.

And in fact, in an incredible number of cases -- and I hesitate to find unfit every defendant who comes along with a preposterous-- with what the rest of the world thinks is a preposterous defense.

I think that the determination as to whether the defense is so preposterous and the fixation so great that it interferes with the ability to assist is a determination that has to be ultimately, jointly made by not just the psychiatrist, but the defense counsel as well.

So what I'm going to do is this: I'm going to reserve decision and I'm going to have

an attorney from the homicide panel speak to the defendant.

I'm going to encourage the attorney to speak to both the attorney general and to counsel, to the psychiatrist who have testified here, to the defendant, clearly to go over with the defendant the details, the details of the defendant's defense.

Remember now -- okay.

This is not about -- this is not about post-hypnotic suggestion in general. This is about whether post-hypnotic suggestion affected the defendant's behavior in this case? Did it cause him to commit a crime? Did it not cause him?

If he admits that he committed a crime, what role did it play in the commission of that crime.

If the defendant denies committing the crime, then it becomes irrelevant. If the defendant believes he's subject to post-hypnotics.

Is it interfering with the defendant's ability to have a coherent and logical conversation with his attorney.

THE COURT: Those are the things that I want the defense counsel to explore and I want to assign somebody new who doesn't know the defendant and who's good and serious and who will give the defendant's statements to him or her serious consideration.

And then I want that attorney to tell me hey I can do this, or no, this is improbable. We can't do this, and then I'll have a much better idea.

See, the problem that I have here is I'm coming in at the tail end of something.

Ordinarily, when I issue a 730 commitment, I have a defense lawyer who begins by telling me that he or she is having problems speaking to their client, tells me why, offers/ states reasons, I have the defendant before me and can often either verify those reasons.

Then I have the defendant examined by two examining psychiatrists. And then, if there's no objection, the defendant is committed.

What's happening here is the reverse. The defendant's already been committed. I have a psychiatrist who's saying, well, I think he's

still ill and not fit, but I don't have a defense lawyer on the other side to tell me in my conversations with this man.

This is what I am. This is what I'm learning. This is what I'm seeing. And I really think I ought to have that.

So I'm reserving decision. I'm going to ask that a member of the homicide panel be assigned and I think I'm going to put the case down for next Wednesday.

I think we can get a homicide panel attorney by Wednesday.

I will speak to the attorney. Then I'll have the attorney talk to the defendant and everybody else.

And then next Wednesday, I'll pick a date by which I can have some report, if you will, and conference that attorney.

I will have the attorney advise or the clerk advise the rest of you of that date.

And perhaps on that date, once the attorney feels that he or she is familiar enough to be able to address the subject, we can take this matter up again.

MR. KONOWITZ: With respect to my

schedule, I'm supposed to be in court in the Bronx.

THE COURT: You don't have to be here.

Wednesday morning is simply for me. I would like the defendant here Wednesday morning. And I want 18B counsel here, that is no say homicide panel counsel here Monday morning.

And then, after that, we'll take it from there.

I'll talk to the attorney. The attorney will say, well I need two weeks, three weeks, or whatever it happens to be.

The attorney will then discuss this with everybody who's available, especially the defendant;

We'll pursue whatever it is that he or she believes needs to be pursued.

Then we can schedule a date when everybody else can come back.

One last thing. The Attorney General's concerned because the defendant just started a course of treatment.

My view is this: If the defendant turns out in the end to be unfit, then it is more than likely, it is certain that he will be

recommitted, and then it is more than likely there will be ample time for that course of treatment to be renewed and to have the six months or more that's necessary to evaluate it right. And if the defendant turns out to be fit, to proceed. Then it doesn't really make much difference okay?

So I will have the defendant produced here on Wednesday morning, and we'll have the homicide panel make an assignment.

I'll talk to the clerk about that in a minute.

Thank you all very much. Thank you, Doctor.

MR. BERNSTEIN: Thank you, your Honor.

THE DEFENDANT: Thank you, your Honor.

CERTIFIED TO BE A TRUE RECORD

BENITA WHITAKER SENIOR COURT REPORTER

C

Effective:[See Text Amendments]

Mckinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Parttwo. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 250. Pre-Trial Notices of Defenses (Refs & Annos)
→ § 250.10 Notice of intent to proffer psychiatric evidence; examination of defendant upon application of prosecutor

1. As used in this section, the term "psychiatric evidence" means:

(a) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect.

(b) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25 of the penal law and paragraph (a) of subdivision two of section 125.27 of the penal law.

(c) Evidence of mental disease or defect to be offered by the defendant in connection with any other defense not specified in the preceding paragraphs.

2. Psychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence.

3. When a defendant, pursuant to subdivision two of this section, serves notice of intent to present psychiatric evidence, the district attorney may apply to the court, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist or licensed psychologist as defined in article one hundred fifty-three of the education law designated by the district attorney. If the application is granted, the psychiatrist or psychologist designated to conduct the examination must notify the district attorney and counsel for the defendant of the time and place of the examination. Defendant has a right to have his counsel present at such examination. The district attorney may also be present. The role of each counsel at such examination is that of an observer, and neither counsel shall be permitted to take an active role at the examination.

4. After the conclusion of the examination, the psychiatrist or psychologist must promptly prepare a written report of his

findings and evaluation. A copy of such report must be made available to the district attorney and to the counsel for the defendant. No transcript or recording of the examination is required, but if one is made, it shall be made available to both parties prior to the trial.

5. If the court finds that the defendant has willfully refused to cooperate fully in the examination ordered pursuant to subdivision three of this section it may preclude introduction of testimony by a psychiatrist or psychologist concerning mental disease or defect of the defendant at trial. Where, however, the defendant has other proof of his affirmative defense, and the court has found that the defendant did not submit to or cooperate fully in the examination ordered by the court, this other evidence, if otherwise competent, shall be admissible. In such case, the court must instruct the jury that the defendant did not submit to or cooperate fully in the pre-trial psychiatric examination ordered by the court pursuant to subdivision three of this section and that such failure may be considered in determining the merits of the affirmative defense.

CREDIT(S)

(L.1970, c. 996, § 1. Amended L.1980, c. 548, § 7; L.1982, c. 558, § 9; L.1984, c. 668, §§ 6, 7.)

HISTORICAL AND STATUTORY NOTES

2002 Main Volume

L.1984, c. 668 legislation

Subd. 1, par. (a). L.1984, c. 668, § 6, inserted "affirmative".

Subd. 5. L.1984, c. 668, § 7, inserted "affirmative" in two instances.

Derivation

Code Crim.Proc. 1881, § 336, added L.1963, c. 595; amended L.1967, c. 681, § 53, derived from former § 336, repealed L.1963, c. 595.

PRACTICE COMMENTARIES

2002 Main Volume

by Peter Preiser