

ARTICLE 730--MENTAL DISEASE OR DEFECT  
EXCLUDING FITNESS TO PROCEED

Section

- 730.10 Fitness to proceed; definitions.  
730.20 Fitness to proceed; generally.  
730.30 Fitness to proceed; order of examination.  
730.40 Fitness to proceed; local criminal court accusatory instrument.  
730.50 Fitness to proceed; indictment.  
730.60 Fitness to proceed; procedure following custody by commissioner.  
730.70 Fitness to proceed; procedure following termination of custody by commissioner.

§ 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.

*demonstrably  
false...  
see below...  
KBS*

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.

These plea standards can be met. YES

§ 220.15 Plea; plea of not responsible by reason of mental disease or defect.

1. The defendant may, with both the permission of the court and the consent of the people, enter a plea of not responsible by reason of mental disease or defect to the entire indictment. The district attorney must state to the court either orally on the record or in a writing filed with the court that the people consent to the entry of such plea and that the people are satisfied that the affirmative defense of lack of criminal responsibility by reason of mental disease or defect would be proven by the defendant at a trial by a preponderance of the evidence. The district attorney must further state to the court in detail the evidence available to the people with respect to the offense or offenses charged in the indictment, including all psychiatric evidence available or known to the people. If necessary, the court may conduct a hearing before accepting such plea. The district attorney must further state to the court the reasons for recommending such plea. The reasons shall be stated in detail and not in conclusory terms.

2. Counsel for the defendant must state that in his opinion defendant has the capacity to understand the proceedings and to assist in his own defense and that the defendant understands the consequences of a plea of not responsible by reason of mental disease or defect. Counsel for the defendant must further state whether in his opinion defendant has any viable defense to the offense or offenses charged in the indictment other than the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. Counsel for the defendant must further state in detail the psychiatric evidence available to the defendant with respect to such latter affirmative defense.

yes: necessity defense

3. Before accepting a plea of not responsible by reason of mental disease or defect, the court must address the defendant in open court and determine that he understands each of the following:

✓(a) The nature of the charge to which the plea is offered, and the consequences of such plea;

✓(b) That he has the right to plead not guilty or to persist in that plea if it has already been entered;

✓(c) That he has the right to be tried by a jury, the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself;

✓(d) That if he pleads not responsible by reason of mental disease or defect there will be no trial with respect to the charges contained in the indictment, so that by offering such plea he waives the right to such trial;

✓(e) That if he pleads not responsible by reason of mental disease or defect the court will ask him questions about the offense or offenses charged in the indictment and that he will thereby waive his right not to be compelled to incriminate himself; and

✓(f) That the acceptance of a plea of not responsible by reason of mental disease or defect is the equivalent of a verdict of not responsible by reason of mental disease or defect after trial.

4. The court shall not accept a plea of not responsible by reason of mental disease or defect without first determining that there is a factual basis for such plea. The court must address the defendant personally in open court and determine that the plea is voluntary,



knowingly made, and not the result of force, threats, or promises. The court must inquire whether the defendant's willingness to plead results from prior discussions between the district attorney and counsel for the defendant. The court must be satisfied that the defendant understands the proceedings against him, has sufficient capacity to assist in his own defense and understands the consequences of a plea of not responsible by reason of mental disease or defect. The court may make such inquiry as it deems necessary or appropriate for the purpose of making the determinations required by this section.

True  
False

5. Before accepting a plea of not responsible by reason of mental disease or defect, the court must find and state each of the following on the record in detail and not in conclusory terms:

✓(a) That it is satisfied that each element of the offense or offenses charged in the indictment would be established beyond a reasonable doubt at a trial;

✓(b) That the affirmative defense of lack of criminal responsibility by reason of mental disease or defect would be proven by the defendant at a trial by a preponderance of the evidence;

✓(c) That the defendant has the capacity to understand the proceedings against him and to assist in his own defense;

✓(d) That such plea by the defendant is knowingly and voluntarily made and that there is a factual basis for the plea;

✓(e) That the acceptance of such plea is required in the interest of the public in the effective administration of justice.

6. When a plea of not responsible by reason of mental disease or defect is accepted by the court and recorded upon the minutes, the provisions of section 330.20 of this chapter shall govern all subsequent proceedings against the defendant.

Minimum Conditions for release: 3 years under outpatient supervision if not mentally ill, may be (re)committed.

ARTICLE 330-PROCEEDINGS FROM VERDICT  
TO SENTENCE

Section

330.10 Disposition of defendant after verdict of acquittal.

330.20 Procedure following verdict or plea of not responsible by reason of mental disease or defect.

330.25 Removal after verdict.

330.30 Motion to set aside verdict; grounds for.

330.40 Motion to set aside verdict; procedure.

330.50 Motion to set aside verdict; order granting motion.

(This could be unconditional)

also, but I find that unlikely...)

§ 330.20 Procedure following verdict or plea of not responsible by reason of mental disease or defect.

1. Definition of terms. As used in this section, the following terms shall have the following meanings:

(a) "Commissioner" means the state commissioner of mental health or the state commissioner of mental retardation and developmental disability.

(b) "Secure facility" means a facility within the state office of mental health or the state office of mental retardation and developmental disabilities which is staffed with personnel adequately trained in security methods and is so equipped as to minimize the risk or danger of escapes, and which has been so specifically designated by the commissioner.

(c) "Dangerous mental disorder" means: (i) that a defendant currently suffers from a "mental illness" as that term is defined in subdivision twenty of section 1.03 of the mental hygiene law, and (ii) that because of such condition he currently constitutes a physical danger to himself or others.

(d) "Mentally ill" means that a defendant currently suffers from a mental illness for which care and treatment as a patient, in the in-patient services of a psychiatric center under the jurisdiction of the state office of mental health, is essential to such defendant's welfare and that his judgment is so impaired that he is unable to understand the need for such care and treatment; and, where a defendant is mentally retarded, the term "mentally ill" shall also mean, for purposes of this section, that the defendant is in need of care and treatment as a resident in the in-patient services of a developmental center or other residential facility for the mentally retarded and developmentally disabled under the jurisdiction of the state office of mental retardation and developmental disabilities.

(e) "Examination order" means an order directed to the commissioner requiring that a defendant submit to a psychiatric examination to determine whether the defendant has a dangerous mental disorder, or if he does not have dangerous mental disorder, whether he is mentally ill.

(f) "Commitment order" or "recommitment order" means an order committing a defendant to the custody of the commissioner for confinement in a secure facility for care and treatment for six months from the date of the order.

(g) "First retention order" means an order which is effective at the expiration of the period prescribed in a commitment order for a



recommitment order, authorizing continued custody of a defendant by the commissioner for a period not to exceed one year.

(h) "Second retention order" means an order which is effective at the expiration of the period prescribed in a first retention order, authorizing continued custody of a defendant by the commissioner for a period not to exceed two years.

(i) "Subsequent retention order" means an order which is effective at the expiration of the period prescribed in a second retention order or a prior subsequent retention order authorizing continued custody of a defendant by the commissioner for a period not to exceed two years.

(j) "Retention order" means a first retention order, a second retention order or a subsequent retention order.

(k) "Furlough order" means an order directing the commissioner to allow a defendant in confinement pursuant to a commitment order, recommitment order or retention order to temporarily leave the facility for a period not exceeding fourteen days, either with or without the constant supervision of one or more employees of the facility.

(l) "Transfer order" means an order directing the commissioner to transfer a defendant from a secure facility to a non-secure facility under the jurisdiction of the commissioner or to any non-secure facility designated by the commissioner.

(m) "Release order" means an order directing the commissioner to terminate a defendant's in-patient status without terminating the commissioner's responsibility for the defendant.

(n) "Discharge order" means an order terminating an order of conditions or unconditionally discharging a defendant from supervision under the provisions of this section.

(o) "Order of conditions" means an order directing a defendant to comply with this prescribed treatment plan, or any other condition which the court determines to be reasonably necessary or appropriate, and, in addition, where a defendant is in custody of the commissioner, not to leave the facility without authorization. The order shall be valid for five years from the date of its issuance, except that, for good cause shown, the court may extend the period for an additional five years.

(p) "District attorney" means the office which prosecuted the criminal action resulting in the verdict or plea of not responsible by reason of mental disease or defect.

(q) "Qualified psychiatrist" means a physician who (i) is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or (ii) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

(r) "Licensed psychologist" means a person who is registered as a psychologist under article one hundred fifty-three of the education law.

(s) "Psychiatric examiner" means a qualified psychiatrist or a licensed psychologist who has been designated by the commissioner to examine a defendant pursuant to this section, and such designee need not be an employee of the department of mental hygiene.

2. Examination order; psychiatric examiners. Upon entry of a verdict of not responsible by reason of mental disease or defect, or upon the acceptance of a plea of not responsible by reason of mental disease or defect, the court must immediately issue an examination order. Upon receipt of such order, the commissioner must designate two qualified

psychiatric examiners to conduct the examination to examine the defendant. 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 suffering from a dangerous mental disorder or to be mentally ill or retarded. The court may authorize a psychiatrist or psychologist retained by a defendant to be present at such examination. The clerk of the court must promptly forward a copy of the examination order to the mental hygiene legal service and such service may thereafter participate in all subsequent proceedings under this section.

3. Examination order; place of examination. Upon issuing an examination order, the court must, except as otherwise provided in this subdivision, direct that the defendant be committed to a secure facility designated by the commissioner as the place for such psychiatric examination. The sheriff must hold the defendant in custody pending such designation by the commissioner, and when notified of the designation, the sheriff must promptly deliver the defendant to such secure facility. When the defendant is not in custody at the time of such verdict or plea, because he was previously released on bail or on his own recognizance, the court, in its discretion, may direct that such examination be conducted on an out-patient basis, and at such time and place as the commissioner shall designate. If, however, the commissioner informs the court that confinement of the defendant is necessary for an effective examination, the court must direct that the defendant be confined in a facility designated by the commissioner until the examination is completed.

4. Examination order, duration. Confinement in a secure facility pursuant to an examination order shall be for a period not exceeding thirty days, except that, upon application of the commissioner, the court may authorize confinement for an additional period not exceeding thirty days when a longer period is necessary to complete the examination. If the initial hearing required by subdivision six of this section has not commenced prior to the termination of such examination period, the commissioner shall retain custody of the defendant in such secure facility until custody is transferred to the sheriff in the manner prescribed in subdivision six of this section. During the period of such confinement, the physician in charge of the facility 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. If the court has directed that the examination be conducted on an out-patient basis, the examination shall be completed within thirty days after the defendant has first reported to the place designated by the commissioner, except that, upon application of the commissioner, the court may extend such period for a reasonable time if a longer period is necessary to complete the examination.

5. Examination order; reports. After he has completed his examination of the defendant, each psychiatric examiner must promptly prepare a report of his findings and evaluation concerning the defendant's mental condition, and submit such report to the commissioner. If the psychiatric examiners differ in their opinion as to whether the defendant is mentally ill or is suffering from a dangerous mental disorder, the commissioner must designate another psychiatric examiner to examine the defendant. Upon receipt of the examination reports, the



commissioner must submit them to the court that issued the examination order. If the court is not satisfied with the findings of these psychiatric examiners, the court may designate one or more additional psychiatric examiners pursuant to subdivision fifteen of this section. The court must furnish a copy of the reports to the district attorney, counsel for the defendant and the mental hygiene legal service.

6. Initial hearing; commitment order. After the examination reports are submitted, the court must, within ten days of the receipt of such reports, conduct an initial hearing to determine the defendant's present mental condition. If the defendant is in the custody of the commissioner pursuant to an examination order, the court must direct the sheriff to obtain custody of the defendant from the commissioner and to confine the defendant pending further order of the court, except that the court may direct the sheriff to confine the defendant in an institution located near the place where the court sits if that institution has been designated by the commissioner as suitable for the temporary and secure detention of mentally disabled persons. At such initial hearing, the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. If the court finds that the defendant has a dangerous mental disorder, it must issue a commitment order. If the court finds that the defendant does not have a dangerous mental disorder but is mentally ill, the provisions of subdivision seven of this section shall apply.

7. Initial hearing civil commitment and order of conditions. If, at the conclusion of the initial hearing conducted pursuant to subdivision six of this section, the court finds that the defendant is mentally ill but does not have a dangerous mental disorder, the provisions of articles nine or fifteen of the mental hygiene law shall apply at that stage of the proceedings and at all subsequent proceedings. Having found that the defendant is mentally ill, the court must issue an order of conditions and an order committing the defendant to the custody of the commissioner. The latter order shall be deemed an order made pursuant to the mental hygiene law and not pursuant to this section, and further retention, conditional release or discharge of such defendant shall be in accordance with the provisions of the mental hygiene law. If, at the conclusion of the initial hearing, the court finds that the defendant does not have a dangerous mental disorder and is not mentally ill, the court must discharge the defendant either unconditionally or subject to an order of conditions.

8. First retention order. When a defendant is in the custody of the commissioner pursuant to a commitment order, the commissioner must, at least thirty days prior to the expiration of the period prescribed in the order, apply to the court that issued the order, or to a superior court in the county where the secure facility is located, for a first retention order or a release order. The commissioner must give written

notice of the application to the district attorney, the defendant, counsel for the defendant, and the mental hygiene legal service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine whether the defendant has a dangerous mental disorder, and it must conduct such hearing if a demand therefor is made by the district attorney, the defendant, counsel for the defendant, or the mental hygiene legal service within ten days from the date that



notice of the application was given to them. If such a hearing is held on an application for retention, the commissioner must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. The district attorney shall be entitled to appear and present evidence at such hearing. If such a hearing is held on an application for release, the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. If the court finds that the defendant has a dangerous mental disorder it must issue a first retention order. If the court finds that the defendant is mentally ill but does not have a dangerous mental disorder, it must issue a first retention order and, pursuant to subdivision eleven of this section, a transfer order and an order of conditions. If the court finds that the defendant does not have a dangerous mental disorder and is not mentally ill, it must issue a release order and an order of conditions pursuant to subdivision twelve of this section.

9. Second and subsequent retention orders. When a defendant is in the custody of the commissioner pursuant to a first retention order, the commissioner must, at least thirty days prior to the expiration of the period prescribed in the order, apply to the court that issued the order, or to a superior court in the county where the facility is located, for a second retention order or a release order. The commissioner must give written notice of the application to the district attorney, the defendant, counsel for the defendant, and the mental hygiene legal service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine whether the defendant has a dangerous mental disorder, and it must conduct such hearing if a demand therefor is made by the district attorney, the defendant, counsel for the defendant, or the mental hygiene legal service within ten days from the date that notice of the application was given to them. If such a hearing is held on an application for retention, the commissioner must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. The district attorney shall be entitled to appear and present evidence at such hearing. If such a hearing is held on an application for release, the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. If the court finds that the defendant has a dangerous mental disorder it must issue a second retention order. If the court finds that the defendant is mentally ill but does not have a dangerous mental disorder, it must issue a second retention order and, pursuant to subdivision eleven of this section, a transfer order and an order of conditions. If the court finds that the defendant does not have a dangerous mental disorder and is not mentally ill, it must issue a release order and an order of conditions pursuant to subdivision twelve of this section. When a defendant is in the custody of the commissioner prior to the expiration of the period prescribed in a second retention order, the procedures set forth in this subdivision for the issuance of a second retention order shall govern the application for and the issuance of any subsequent retention order.

10. Furlough order. The commissioner may apply for a furlough order, pursuant to this subdivision, when a defendant is in his custody pursuant to a commitment order, recommitment order, or retention order

and the commissioner is of the view that, consistent with the public safety and welfare of the community and the defendant, the clinical condition of the defendant warrants a granting of the privileges authorized by a furlough order. The application for a furlough order may be made to the court that issued the commitment order, or to a superior court in the county where the secure facility is located. The commissioner must give ten days written notice to the district attorney, the defendant, counsel for the defendant, and the mental hygiene legal service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine whether the application should be granted, and must conduct such hearing if a demand therefor is made by the district attorney. If the court finds that the issuance of a furlough order is consistent with the public safety and welfare of the community and the defendant, and that the clinical condition of the defendant warrants a granting of the privileges authorized by a furlough order, the court must grant the application and issue a furlough order containing any terms and conditions that the court deems necessary or appropriate. If the defendant fails to return to the secure facility at the time specified in the furlough order, then, for purposes of subdivision nineteen of this section, he shall be deemed to have escaped.

11. Transfer order and order of conditions. The commissioner may apply for a transfer order, pursuant to this subdivision, when a defendant is in his custody pursuant to a retention order or a recommitment order, and the commissioner is of the view that the defendant does not have a dangerous mental disorder or that, consistent with the public safety and welfare of the community and the defendant, the clinical condition of the defendant warrants his transfer from a secure facility to a non-secure facility under the jurisdiction of the commissioner or to any non-secure facility designated by the commissioner. The application for a transfer order may be made to the court that issued the order under which the defendant is then in custody, or to a superior court in the county where the secure facility is located. The commissioner must give ten days written notice to the district attorney, the defendant, counsel for the defendant, and the mental hygiene legal service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine whether the application should be granted, and must conduct such hearing if the demand therefor is made by the district attorney. At such hearing, the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or that the issuance of a transfer order is inconsistent with the public safety and welfare of the community. The court must grant the application and issue a transfer order if the court finds that the defendant does not have a dangerous mental disorder, or if the court finds that the issuance of a transfer order is consistent with the public safety and welfare of the community and the defendant and that the clinical condition of the defendant, warrants his transfer from a secure facility to a non-secure facility. A court must also issue a transfer order when, in connection with an application for a first retention order pursuant to subdivision eight of this section or a second or subsequent retention order pursuant to subdivision nine of this section, it finds that a defendant is mentally ill but does not have a dangerous mental disorder. Whenever a court issues a transfer order it must also issue an order of



conditions.

12. Release order and order of conditions. The commissioner may apply for a release order, pursuant to this subdivision, when a defendant is in his custody pursuant to a retention order or recommitment order, and the commissioner is of the view that the defendant no longer has a dangerous mental disorder and is no longer mentally ill. The application for a release order may be made to the court that issued the order under which the defendant is then in custody, or to a superior court in the county where the facility is located. The application must contain a description of the defendant's current mental condition, the past course of treatment, a history of the defendant's conduct subsequent to his commitment, a written service plan for continued treatment which shall include the information specified in subdivision (g) of section 29.15 of the mental hygiene law, and a detailed statement of the extent to which supervision of the defendant after release is proposed. The commissioner must give ten days written notice to the district attorney, the defendant, counsel for the defendant, and the mental hygiene legal service. Upon receipt of such application, the court must promptly conduct a hearing to determine the defendant's present mental condition. At such hearing, the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. If the court finds that the defendant has a dangerous mental disorder, it must deny the application for a release order. If the court finds that the defendant does not have a dangerous mental disorder but is mentally ill, it must issue a transfer order pursuant to subdivision eleven of this section if the defendant is then confined in a secure facility. If the court finds that the defendant does not have a dangerous mental disorder and is not mentally ill, it must grant the application and issue a release order. A court must also issue a release order when, in connection with an application for a first retention order pursuant to subdivision eight of this section or a second or subsequent retention order pursuant to subdivision nine of this section, it finds that the defendant does not have a dangerous mental disorder and is not mentally ill. Whenever a court issues a release order it must also issue an order of conditions. If the court has previously issued a transfer order and an order of conditions, it must issue a new order of conditions upon issuing a release order. The order of conditions issued in conjunction with a release order shall incorporate a written service plan prepared by a psychiatrist familiar with the defendant's case history and approved by the court, and shall contain any conditions that the court determines to be reasonably necessary or appropriate. It shall be the responsibility of the commissioner to determine that such defendant is receiving the services specified in the written service plan and is complying with any conditions specified in such plan and the order of conditions.

13. Discharge order. The commissioner may apply for a discharge order, pursuant to this subdivision, when a defendant has been continuously on an out-patient status for three years or more pursuant to a release order, and the commissioner is of the view that the defendant no longer has a dangerous mental disorder and is no longer mentally ill and that the issuance of a discharge order is consistent with the public safety and welfare of the community and the defendant. The application for a discharge order may be made to the court that issued the release order,

or to a superior court in the county where the defendant is then residing. The commissioner must give ten days written notice to the district attorney, the defendant, counsel for the defendant, and the mental hygiene legal service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine whether the application should be granted, and must conduct such hearing if a demand therefor is made by the district attorney. The court must grant the application and issue a discharge order if the court finds that the defendant has been continuously on an out-patient status for three years or more, that he does not have a dangerous mental disorder and is not mentally ill, and that the issuance of the discharge order is consistent

14. Recommitment order. At any time during the period covered by an order of conditions an application may be made by the commissioner or the district attorney to the court that issued such order, or to a superior court in the county where the defendant is then residing, for a recommitment order when the applicant is of the view that the defendant has a dangerous mental disorder. The applicant must give written notice of the application to the defendant, counsel for the defendant, and the mental hygiene legal service, and if the applicant is the commissioner he must give such notice to the district attorney or if the applicant is the district attorney he must give such notice to the commissioner. Upon receipt of such application the court must order the defendant to appear before it for a hearing to determine if the defendant has a dangerous mental disorder. Such order may be in the form of a written notice, specifying the time and place of appearance, served personally upon the defendant, or mailed to his last known address, as the court may direct. If the defendant fails to appear in court as directed, the court may issue a warrant to an appropriate peace officer directing him to take the defendant into custody and bring him before the court. In such circumstance, the court may direct that the defendant be confined in an appropriate institution located near the place where the court sits. The court must conduct a hearing to determine whether the defendant has a dangerous mental disorder. At such hearing, the applicant, whether he be the commissioner or the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder. If the applicant is the commissioner, the district attorney shall be entitled to appear and present evidence at such hearing; if the applicant is the district attorney, the commissioner shall be entitled to appear and present evidence at such hearing. If the court finds that the defendant has a dangerous mental disorder, it must issue a recommitment order. When a defendant is in the custody of the commissioner pursuant to a recommitment order, the procedures set forth in subdivisions eight and nine of this section for the issuance of retention orders shall govern the application for and the issuance of a first retention order, a second retention order, and subsequent retention orders.

15. Designation of psychiatric examiners. If, at any hearing conducted under this section to determine the defendant's present mental condition, the court is not satisfied with the findings of the psychiatric examiners, the court may direct the commissioner to designate one or more additional psychiatric examiners to conduct an examination of the defendant and submit a report of their findings. In



addition, the court may on its own motion, or upon request of a party, may designate one or more psychiatric examiners to examine the defendant and submit a report of their findings. The district attorney may apply to the court for an order directing that the defendant submit to an examination by a psychiatric examiner designated by the district attorney, and such psychiatric examiner may testify at the hearing.

16. Rehearing and review. Any defendant who is in the custody of the commissioner pursuant to a commitment order, a retention order, or a recommitment order, if dissatisfied with such order, may, within thirty days after the making of such order, obtain a rehearing and review of the proceedings and of such order in accordance with the provisions of section 9.35 or 15.35 of the mental hygiene law.

17. Rights of defendants. Subject to the limitations and provisions of this section, a defendant committed to the custody of the commissioner pursuant to this section shall have the rights granted to patients under the mental hygiene law.

18. Notwithstanding any other provision of law, no person confined by reason of a commitment order, recommitment order or retention order to a secure facility may be discharged or released unless the commissioner shall deliver written notice, at least four days excluding Saturdays, Sundays and holidays, in advance of such discharge or release to all of the following:

(a) the district attorney.

(b) the police department having jurisdiction of the area to which the defendant is to be discharged or released.

(c) any other person the court may designate.

The notices required by this subdivision shall be given by the facility staff physician who was treating the defendant or, if unavailable, by the defendant's treatment team leader, but if neither is immediately available, notice must be given by some other member of the clinical staff of the facility. Such notice must be given by any means reasonably calculated to give prompt actual notice.

19. Escape from custody; notice requirements. If a defendant is in the custody of the commissioner pursuant to an order issued under this section, and such defendant escapes from custody, immediate notice of such escape shall be given by the department facility staff to: (a) the district attorney, (b) the superintendent of state police, (c) the sheriff of the county where the escape occurred, (d) the police department having jurisdiction of the area where the escape occurred, (e) any person the facility staff believes to be in danger, and (f) any law enforcement agency and any person the facility staff believes would be able to apprise such endangered person that the defendant has escaped from the facility. Such notice shall be given as soon as the facility staff know that the defendant has escaped from the facility and shall include such information as will adequately identify the defendant and the person or persons believed to be in danger and the nature of the danger. The notices required by this subdivision shall be given by the facility staff physician who was treating the defendant or, if unavailable, by the defendant's treatment team leader, but if neither is immediately available, notice must be given by some other member of the clinical staff of the facility. Such notice must be given by any means reasonably calculated to give prompt actual notice. The defendant may be apprehended, restrained, transported to, and returned to the facility

from which he escaped by any peace officer, and it shall be the duty of the officer to assist any representative of the commissioner to take the defendant into custody upon the request of such representative.

20. Required affidavit. No application may be made by the commissioner under this section without an accompanying affidavit from at least one psychiatric examiner supportive of relief requested in the application, which affidavit shall be served on all parties entitled to receive the notice of application. Such affidavit shall set forth the defendant's clinical diagnosis, a detailed analysis of his or her mental condition which caused the psychiatric examiner to formulate an opinion, and the opinion of the psychiatric examiner with respect to the defendant. Any application submitted without the required affidavit shall be dismissed by the court.

21. Appeals. (a) A party to proceedings conducted in accordance with the provisions of this section may take an appeal to an intermediate appellate court by permission of the intermediate appellate court as follows:

(i) the commissioner may appeal from any release order, retention order, transfer order, discharge order, order of conditions, or recommitment order, for which he has not applied;

(ii) a defendant, or the mental hygiene legal service on his or her behalf, may appeal from any commitment order, retention order, recommitment order, or, if the defendant has obtained a rehearing and review of any such order pursuant to subdivision sixteen of this section, from an order, not otherwise appealable as of right, issued in accordance with the provisions of section 9.35 or 15.35 of the mental hygiene law authorizing continued retention under the original order, provided, however, that a defendant who takes an appeal from a commitment order, retention order, or recommitment order may not subsequently obtain a rehearing and review of such order pursuant to subdivision sixteen of this section;

(iii) the district attorney may appeal from any release order, transfer order, discharge order, order of conditions, furlough order, or order denying an application for a recommitment order which he opposed.

(b) An aggrieved party may appeal from a final order of the intermediate appellate court to the court of appeals by permission of the intermediate appellate court granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the intermediate appellate court or upon direct application.

(c) An appeal taken under this subdivision shall be deemed civil in nature, and shall be governed by the laws and rules applicable to civil appeals; provided, however, that a stay of the order appealed from must be obtained in accordance with the provisions of paragraph (d) hereof.

(d) The court from or to which an appeal is taken may stay all proceedings to enforce the order appealed from pending an appeal or determination on a motion for permission to appeal, or may grant a limited stay, except that only the court to which an appeal is taken may vacate, limit, or modify a stay previously granted. If the order appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the court to which the appeal was taken. If a motion is made for permission to appeal from such an order, before the expiration of the five days, the stay, or any other



stay granted pending determination of the motion for permission to appeal, shall:

(i) if the motion is granted, continue until five days after the appeal is determined; or

(ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.