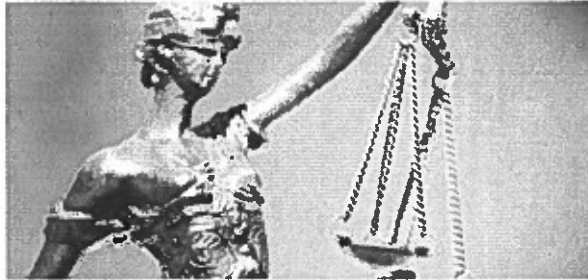




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CPL ARTICLE 730 AND CAPACITY TO PROCEED A Guide for Practicing Attorneys

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Mr. Arcidiacono is a member of the District Attorney's Association, State of New York and is currently Chairman of that Association's Mental Health Sub-committee. He is a member of that organization's Legislative Committee and serves as a Legislative Secretary, as well as a member of the Best Practices Subcommittee. He is also on the Board of Directors of the Suffolk County Criminal Bar Association.

In 2012 he was named to the American Bar Association, Criminal Justice Section Mental Health Standards Task Force. In 2013 he was appointed the Criminal Justice Section's Liaison to the ABA's Commission on Disability Rights, and in July, 2015 was appointed as Co-Chair of the Criminal Justice Section's Mental Health Committee. In October, 2016 he represented the ABA as an NGO observer at the terror trial proceedings being conducted at Guantanamo Bay, Cuba.

He has lectured extensively for the Suffolk County District Attorney's Office and for the New York Prosecutor's Training Institute on a variety of criminal law topics. In 2010 and 2011 he presented lectures for the Division of Criminal Justice Services to police officers around NY State on new Identification Procedures developed by the NYS District Attorney's Association. In 2006 he authored a short article for the Empire State Prosecutor, "Civil Commitment: Using Existing Law to Mandate In-Custody Psychiatric Treatment for Sexually Violent Predators."

Mr. Arcidiacono graduated cum laude from Hamilton College in 1978, and received his law degree in 1982 from Washington and Lee University School of Law, where in his third year he was a Burks Scholar Teaching Fellow. In 1999 he received a Distinguished Advocacy Award from the Suffolk County District Attorney's Office, and in 2001 his office presented him with a Distinguished Service Award for his work as Attorney-in-Charge of its Forensic Unit. In 2008 he received the New York Prosecutor's Training Institute's Appellate Prosecutor of the Year Award. Mr. Arcidiacono is married and the proud father of three boys.

**CPL Article 730 And Capacity To Proceed – A
Guide For Practicing Attorneys**

by

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Since laws change very often and vary from jurisdiction to jurisdiction, it is very important to check the timeliness and applicability of the laws and holdings contained herein.

I. Introduction

A. Mental States for Competency, NRRMDD, and Post Judgment CPL §330.20 Proceedings.

- Mental Illness alone is not sufficient to establish competency, insanity or current dangerousness.
- Mental Retardation, [as defined in the DSM IV], and Mental Illness are Medical Terms
- Competency, Mental Disease or Defect, and Dangerous Mental Disorder [as defined in CPL §330.20 (1)(c)] are legal concepts
- While the legal concepts may overlap with the medical concepts, they are not the same.

B. The Insanity Defense and Extreme Emotional Disturbance concern a defendant's mental state at the time of the crime. Fitness to proceed [competency/capacity] refers to defendant's mental state from arraignment through imposition of sentence. CPL §730.30. They are distinct concepts with different definitions. *See, e.g., Practice Commentaries, Preiser, CPL § 730.60.*

C. Post Adjudication proceedings under CPL §330.20 concern the defendant's current (post plea/verdict) mental condition

II. Selected Definitions

A. **"Mental illness'** means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation." Mental Hygiene Law §1.03(20) [*see also*, Corrections Law §508 (3)(b)(ii)- same definition, minus "and rehabilitation"].

B. Fitness to Proceed [Competency] - C.P.L. §730.10(l) - **"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"

C. **Mental Disease or Defect** [Insanity Defense] Penal Law §40.15 - an affirmative defense. When the defendant engaged in the proscribed conduct he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect he lacked substantial capacity to know or appreciate either:

- (1) The nature and consequences of his act: **or**
- (2) That such conduct was wrong

D. CPL § 330.20- Post Acquittal Proceedings

CPL § 330.20(1)(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.

CPL §330.20(1)(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”

Correction Law §508(3)(b)(iii) - “**In need of involuntary care and treatment**” shall mean that a person has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgement is so impaired that he is unable to understand the need for such care and treatment.”

III. Fitness to Proceed - CPL Article 730

A. Statutory Definition

“**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” - CPL §730.10 (1)

B. Competency is a Constitutional Right – an individual has a due process right to assist in his own defense and understand the nature of the charges against him.

Medina v. California, 112 S.Ct. 2572 (1992)

Pate v. Robinson, 383 U.S. 375, 378 (1966)

C. Competency under Article 730 applies from time of initial charging through sentencing [CPL 730.30]

D. One 730 exam may not suffice – defendant may slip in and out of competency during the course of hearings, trial, penalty phase and sentencing

E. If the Court has reason to believe defendant may be an incapacitated person, it must order an exam - CPL 730.30(1)

People v. Tortorici, 92 N.Y.2d 757, 765 (1999)
People v. Armlin, 37 N.Y.2d 167 (1975)
See, *People v. Minckler*, 149 A.D.3d 1526 (4th Dept. 2017) (Court abused its discretion by failing to Order CPL 730 Competency exam, *inter alia*, in light of frequency and nature of defendant's outbursts, his belief that he was Santa Claus, and People's concern about defendant's capacity prior to trial).

F. Additional Considerations

- defendant is presumed competent
People v. Tortorici, 92 N.Y.2d 757 (1999); *People v. Gelikkaya*, 84 N.Y.2d 456 (1994).
People v. Stone, 22 N.Y.3d 520 (2014)- "...In New York, this baseline mental capacity standard has been codified at CPL 730.10(1). The People must establish competency to stand trial by a preponderance of the evidence (*People v. Mendez*, 1 N.Y.3d 15, 19, 769 N.Y.S.2d 162, 801 N.E.2d 382 [2003]). But the burden arises only when there is some basis to question defendant's mental capacity because the People are otherwise entitled to rely on the presumption that a defendant is competent to proceed (*People v. Gelikkaya*, 84 N.Y.2d 456, 618 N.Y.S.2d 895, 643 N.E.2d 517 [1994])."
- *People v. Spencer*, 156 A.D.3d 731 (2nd Dept. 2017)
- not entitled as of right to a hearing if Court is satisfied from available information that there is no proper basis for questioning defendant's sanity
 - See, *People v. Davis*, 149 A.D.3d 451 (1st Dept. 2017).
- a prior history of psychiatric illness does not, in itself, call into question defendant's competence
- *People v. Park*, 159 A.D.3d 1132 (3rd Dept. 2018); *People v. Passaro*, 86 A.D.3d 717 (3rd Dept. 2011); see, *People v. Manzanales*, ___ A.D.3d (2nd Dept. 2019) [decided March 6, 2019]; *People v. Findley*, 160 A.D.3d 492, 493 (1st Dept. 2018).
- whether to order a hearing rests in the sound discretion of the trial court.

People v. Stone, 22 N.Y.3d 520 (2014)
People v. Tortorici, 92 N.Y.2d 757 (1999)
People v. Morris, 126 A.D.3d 1370 (4th Dept. 2015)
People v. Bryant, 117 A.D.3d 1591 (4th Dept. 2014)

G. Court does not have to order Article 730 exam simply because defendant requests one.

People v. Gensler, 72 N.Y.2d 239 (1988), *cert. denied*, 488 U.S. 932 (1988)
People v. Greco, 177 A.D.2d 648 (2nd Dept. 1991), *app. denied*, 79 N.Y.2d 857 (1991)

People v. Kontis, 159 A.D.2d 590 (2nd Dept. 1990)

People v. Salladen, 50 A.D.2d 765, 766 (1st Dept. 1975), *aff'd*, 42 N.Y.2d 914 (1977)

H. Court does not have to *sua sponte* order an examination if under the circumstances there is no basis to do so.

People v. Padilla, 151 A.D.3d 1700 (4th Dept. 2017) (“To the extent that defendant contends that the court *sua sponte* should have ordered a competency evaluation pursuant to CPL article 730, we reject that contention. ‘There is no evidence in the record that would have warranted the court to question defendant’s competency or ability to understand the nature of the proceedings or the charge [] [quoting *People v. Dunn*, 261 A.D.2d 940, 941, *lv. denied*, 94 N.Y.2d 822]’”).

People v. Thomas, 139 A.D.3d 986, 987 (2nd Dept 2016):

“Supreme Court was not required to *sua sponte* direct a competency examination pursuant to CPL 730.30 (*see People v. Monk*, 29 A.D.3d 605, 815 N.Y.S.2d 130; *People v. Eherts*, 21 A.D.3d 905, 906, 800 N.Y.S.2d 514; *People v. Graham*, 272 A.D.2d 479, 479–480, 708 N.Y.S.2d 336).”

IV. The Competency Hearing

A. Burden of Proof – At a hearing, the People have the burden to show by a fair preponderance of the evidence that defendant is not incapacitated

People v. Phillips, 16 N.Y.3d 510, 528 (2011) [citing *People v. Mendez*, 1 N.Y.3d 15, 19 (2003)]

People v. Tortorici, 92 N.Y.2d 757, 770 (1999)

People v. Christopher, 65 N.Y.2d 417, 424-425 (1985)

B. Competency is a judicial, not a medical determination.

People v. Phillips, 16 N.Y.3d 510 (2011)

People v. Tortorici, 92 N.Y.2d 757, 770 (1999)

But Cf. *Lovell v. Goodman*, 305 A.D.2d 314 (1st Dept. 2003)[CPLR Art. 78 granted where two examiners found defendant incompetent, third examiner opined strong possibility petitioner’s mental state a result of organic illness – held Court should have adjudicated petitioner incapacitated instead of directing neurological testing]; *Mollen v. Mathews*, 269 A.D.2d 42 (3rd Dept. 2000) [where defendant was already found incapacitated and committed under C.P.L. §730.60 (2) and where unanimous psychiatric opinion was that defendant was not an incapacitated person, Court had no discretion to find defendant incapacitated, but rather could only order the action to proceed or issue a further examination order. C.P.L. §730.30 (2)].

- **Finding of Competency** is within sound discretion of the trial Court. *People v. Phillips*, 16 N.Y.3d 510, 517 (2011)[citing *People v. Mendez*, 1 N.Y.3d 15, 20 (2003); see *People v. Morgan*, 87 N.Y.2d878, 880 (1995)]

C. Information obtained for the 730 exam can only be used on the issue of capacity, it cannot be used at trial. CPL §730.20(6).

D. Court appoints two doctors, who come from Community Mental Health.

E. Court may subsequently direct additional examinations. C.P.L. §730.30(2).

F. Article 730 – Psychiatric Examiners

“**Qualified psychiatrist**’ means a physician who (a) is a diplomat 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.” – CPL §730.10(5)

“**Certified Psychologist**’ means a person who is registered as a certified psychologist under article one hundred fifty-three of the education law.” – CPL §730.10(6)

“**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.” – CPL §730.10(7)

G. Both prosecution and defense can request opportunity to have defendant examined by an examiner of their own choosing.

See, People v. Del Rio, 220 A.D.2d 122 (2nd Dept. 1996)

H. **Place of examination**

Defendant in Custody - the examination must be conducted either at the place where defendant is being held in custody; or if director determines hospital confinement is necessary, the sheriff must deliver defendant to hospital designated by director for the examination. C.P.L. §730.20 (3)

Defendant out of Custody – Court may direct out-patient exam at place designated by the Director; or if Director informs Court hospital confinement is necessary, Court may order defendant confined in hospital designated by Director until completion of the exam. CPL §730.20 (2)

- Exam may not be held in the District Attorney's Office – *People v. McCabe*, 87 A.D.2d 852 (2nd Dept. 1982); see CPL 730.20 (3).

I. Standard And Factors To Consider

Dusky v. United States, 362 U.S. 402 (1960)
People v. Francabandera, 33 N.Y.2d 429, 436 (1974)
see also, People v. Picozzi, 106 A.D.2d 413
(2nd Dept. 1984), *lv. denied*, 64 N.Y.2d 1137 (1985)

(1) The Court should consider the following factors:

- whether defendant is oriented as to time and place
- is able to perceive, recall, relate
- has an understanding of the process of the trial and the roles of Judge, jury, prosecutor and defense attorney
- can establish a working relationship with his attorney
- has sufficient intelligence and judgment to listen to advice of counsel, and, based on that advice, appreciate (without necessarily adopting) that one course of conduct may be more beneficial to him than another
- is sufficiently stable to enable him to withstand the stresses of the trial without suffering a serious prolonged or permanent breakdown.

People v. Picozzi, 106 A.D.2d 413 (2nd Dept. 1984), *lv. denied*, 64 N.Y.2d 1137 (1985).

People v. Babcock, ___ A.D.3d ___ (3rd Dept. 2017), 2017 WL 3080582. (“The key inquiry in determining whether a criminal defendant is fit for trial is whether he or she has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding – and whether he or she has a rational as well as factual understanding of the proceedings against him or her’ (*People v. Phillips*, 16 N.Y.3d 510, 516 [2011][internal quotation marks, brackets and citation omitted]...)”).

J. Medication Induced Competency – a defendant does not have to be competent independent of medication.

People v. Williams, 144 A.D.2d 402 (2nd Dept. 1988)

- Defendant was diagnosed with chronic paranoid schizophrenia and was receiving anti-psychotic drug Thorazine which suppressed his psychosis. Since defendant could assist in his own defense, trial court did not err by finding him competent.

See also, People v. Lopez, 160 A.D.2d 355 (1st Dept. 1990), *app. denied*, 76 N.Y.2d 791 (1991).

(1) A New Standard for Medication Induced Competency?

Sell v. United States, 539 U.S. 166 (2003) -

Medicated competence by psychotropic drugs does not violate 5th A.d. Due Process, but only if:

- treatment medically appropriate
- substantially unlikely to have side effects that might undermine fair trial
- necessary to further important trial-related government interests

K. Developmental Disability alone is not necessarily sufficient for finding of incapacity.

- Mentally retarded defendants found incompetent
See, e.g. Jackson v. Indiana, 406 U.S. 715 (1972);
People v. Villanueva, 139 Misc.2d 751 (N.Y.Sup.Ct. 1988);
People v. Santos, 127 Misc.2d 63 (N.Y.Sup.Ct. 1985)
- Mildly Mentally retarded defendant found competent
-see, e.g. People v. Bronson, 115 A.D.2d 484 (2nd Dept. 1985)

L. Counsel's decision not to request a C.P.L. §730 examination not ineffective assistance where counsel placed defendant's mental health issues before the Court, and defendant's behavior did not indicate incapacity. *See, e.g. People v. Borom*, 55 A.D.3d 1041 (3rd Dept. 2008).

M. Reconstruction competency hearing is "constitutionally permissible where contemporaneous medical evidence, affording 'a plenary inquiry into [the] defendant's competency' during the relevant proceeding, is available [citations omitted]" *People v. Galea*, 54 A.D.3d 686 (2nd Dept. 2008).

N. If local criminal court orders C.P.L. 730 examination, County Court is not relieved of completing the examination once it obtains jurisdiction [citations omitted]. *People v. Hasenflue*, 24 A.D.3d 1017 (3rd Dept. 2005). "A reconstruction hearing generally is the proper remedy for the violation of CPL article 730, but 'we are unable to determine on the record before us whether a meaningful reconstruction hearing is feasible' (*People v. Greene*,

38 A.D.3d 1338, 1339, *lv. dismissed* 11 N.Y.3d 788)...” *People v. Pett*, 148 A.D.3d 1524 (4th Dept. 2017).

V. Procedure Following Determination of Unfitness to Proceed

A. If defendant is found incapacitated, defendant is committed to the custody of the NYS Commissioner of Mental Health. Effect and duration of confinement depend upon the charges at the time incapacity is found.

B. Misdemeanors

- Court signs final order of observation- [CPL 730.40]
- Charge is dismissed by operation of law
- Order of protection not obtainable
- Defendant confined in a hospital for up to 90 days
- Any subsequent proceedings are civil
- If defendant is discharged, released, or placed in a less restrictive confinement District Attorney may apply for hearing CPL 730.60(6)(c)]

C. Felonies - Pre-indictment

- Court issues a temporary order of observation, or, if consented to by District Attorney, a final order of observation - CPL §730.40(1)
- At expiration of temporary order of observation, proceeding in local criminal court terminates but People may still present charges to Grand Jury within six months of expiration of temporary order of observation - CPL §730.40(2),(5)
- Case may be presented to Grand Jury during defendant’s incapacity, and Grand Jury need not hear defendant pursuant to CPL §190.50 - CPL §730.40(3)

D. Felonies - Post-indictment

- Court issues Order of Commitment committing defendant to custody of the Commissioner of Mental Health for a period not to exceed one year - CPL§730.50(1)
- If Defendant is still not competent at expiration of Order of Commitment, court may issue retention order and subsequent retention orders of two year periods - CPL §730.50(1)
- The aggregate period of the retention orders “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.

N.B. The Statute does not define 2/3 of life without parole or 2/3 of death

- While defendant is in the custody of the Commissioner of Mental Health, the pending criminal action is suspended - CPL §730.60(2)
- At the expiration of the last authorized retention order, the Court must dismiss the indictment and the dismissal is a bar to any further prosecution of the charge or charges in the indictment CPL §730.50(4)

E. Obtaining Psychiatric Records For CPL §730 Retention Hearings

- Hirschfeld v. Stone* – Federal Lawsuit
- By settlement, limits contents of report
- Consider asking for Court Order to obtain complete records
- HIPAA

F. While defendant is in the custody of the Commissioner of Mental Health, the pending criminal action is suspended – CPL 730.60(2)

G. At the expiration of the last authorized retention order, the Court must dismiss the indictment and the dismissal is a bar to any further prosecution of the charge or charges in the indictment – CPL 730.50(4)

H. *Jackson* Issues - If defendant is incompetent, and the court determines that he will not, in the near future become competent, and is not making progress towards that goal, the court must Order that the Commissioner either release defendant or seek to civilly commit him pursuant to Mental Hygiene Law Article 9 or 15

Jackson v. Indiana, 406 U.S. 715 (1972)

People v. Schaffer, 86 N.Y.2d 460 (1995)

- Release under *Jackson* does not *per se* affect the pendency of the indictment.
People v. Schaffer, supra at 468
- Prosecution may still proceed if defendant becomes competent
- Dismissal of charge because defendant is incompetent is not a ground for dismissal under CPL 210.40
People v. Schaffer, 86 N.Y.2d 460, 464 (1995)
- Court may entertain a *Jackson* motion immediately upon determination of incapacity under Article 730
Schaffer, supra
- *Jackson* time does not count towards 2/3 dismissal rule
People v. Lewis, 95 N.Y.2d 539 (2000)

I. Additional Issues

- (1) Lack of capacity at time of confession
 - People v. Adams*, 26 N.Y.2d 129
 - Blackburn v. Alabama*, 361 U.S. 199
 - Colorado v. Connelly*, 479 U.S. 157
- (2) Capacity of Witness to Testify at Trial
- (3) Capacity of Defendant to Be Extradited
- (4) Capacity of Defendant to Give a Confession
- (5) Capacity of Witness to Testify in the Grand Jury
 - People v. Gelikkaya*, 84 N.Y.2d 456 (1994)
 - People v. Cunningham*, 201 A.D.2d 496 (2nd Dept. 1994)

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