

STATE OF NEW YORK

1343

2019-2020 Regular Sessions

IN SENATE

January 14, 2019

Introduced by Sen. BENJAMIN -- read twice and ordered printed, and when printed to be committed to the Committee on Crime Victims, Crime and Correction

AN ACT to amend the executive law and the penal law, in relation to revocation of presumptive release, parole, conditional release and post-release supervision

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 259 of the executive law is amended by adding two
2 new subdivisions 5 and 6 to read as follows:

3 5. "Releasee" means an individual released from an institution under
4 the jurisdiction of the department into the community on temporary
5 release, presumptive release, parole, conditional release, post-release
6 supervision or medical parole.

7 6. "Technical violation" means any violation of a condition of commu-
8 nity supervision other than an allegation of a criminal act that is
9 subsequently proven to be a conviction for a felony offense, or that is
10 subsequently proven to be a conviction for a misdemeanor offense that
11 includes the element of intent to commit the act against another person
12 and is charged pursuant to either section 121.11, 135.05 or 135.45 or
13 article 120 or 130 of the penal law.

14 § 2. Subdivision 3 of section 70.40 of the penal law, paragraphs (a)
15 and (b) as amended by section 127-h of subpart B of part C of chapter 62
16 of the laws of 2011 and paragraph (c) as amended by chapter 478 of the
17 laws of 1973, is amended and a new subdivision 4 is added to read as
18 follows:

19 3. Delinquency. (a) When a person is [~~alleged~~] found by clear and
20 convincing evidence to have violated the terms of presumptive release or
21 parole willfully for the purpose of permanently avoiding supervision by
22 failing to notify his or her community supervision officer of a change
23 in residence, failing to make office or written reports as directed, or

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 leaving the state of New York or any other state to which the releasee
2 is released or transferred, or any area defined in writing by his parole
3 officer, without permission, and the state board of parole has declared
4 such person to be delinquent, the declaration of delinquency shall
5 interrupt the person's sentence as of the date of the [~~delinquency~~]
6 issuance of a warrant pursuant to subparagraph (iv) of paragraph (a) of
7 subdivision three of section two hundred fifty-nine-i of the executive
8 law and such interruption shall continue until the return of the person
9 to an institution under the jurisdiction of the state department of
10 corrections and community supervision.

11 (b) When a person is [~~alleged~~] found by clear and convincing evidence
12 to have violated the terms of his or her conditional release or post-re-
13 lease supervision willfully for the purpose of permanently avoiding
14 supervision by failing to notify his or her community supervision offi-
15 cer of a change in residence, failure to make office or written reports
16 as directed, or leaving the state of New York or any other state to
17 which the releasee is released or transferred, or any area defined in
18 writing by his parole officer, without permission and has been declared
19 delinquent by the parole board or the local conditional release commis-
20 sion having supervision over such person, the declaration of delinquency
21 shall interrupt the period of supervision or post-release supervision as
22 of the date of the [~~delinquency~~] issuance of a warrant pursuant to
23 subparagraph (iv) of paragraph (a) of subdivision three of section two
24 hundred fifty-nine-i of the executive law. For a conditional release,
25 such interruption shall continue until [~~the return of the person to the~~
26 ~~institution from which he or she was released or, if he or she was~~
27 ~~released from an institution under the jurisdiction of the state depart-~~
28 ~~ment of corrections and community supervision, to an institution under~~
29 ~~the jurisdiction of that department. Upon such return, the person shall~~
30 ~~resume service of his or her sentence~~] execution of the warrant. For a
31 person released to post-release supervision, the provisions of section
32 70.45 of this article shall apply.

33 (c) Any time spent by a person in custody from the time of [~~delinquen-~~
34 ~~cy~~] execution of a warrant pursuant to paragraph (a) of subdivision
35 three of section two hundred fifty-nine-i of the executive law to the
36 time service of the sentence resumes shall be credited against the term
37 or maximum term of the interrupted sentence[~~, provided:~~

38 ~~(i) that such custody was due to an arrest or surrender based upon the~~
39 ~~delinquency; or~~

40 ~~(ii) that such custody arose from an arrest on another charge which~~
41 ~~culminated in a dismissal or an acquittal; or~~

42 ~~(iii) that such custody arose from an arrest on another charge which~~
43 ~~culminated in a conviction, but in such case, if a sentence of imprison-~~
44 ~~ment was imposed, the credit allowed shall be limited to the portion of~~
45 ~~the time spent in custody that exceeds the period, term or maximum term~~
46 ~~of imprisonment imposed for such conviction].~~

47 4. Earned time credits. (a) After a person has begun a period of
48 presumptive release, parole or conditional release pursuant to subdivi-
49 sions one or two of this section, such period shall be reduced by thirty
50 days for every thirty days that such person does not violate a condition
51 of his or her presumptive release, parole or conditional release,
52 provided the person is not subject to any sentence with a maximum term
53 of life imprisonment. Any such awarded earned time credits shall be
54 applied against such person's unserved portion of the maximum term,
55 aggregate maximum term or period of post-release supervision.

1 (b) Earned time credits may be withheld or revoked only for the thirty-day period commencing from the date of violative behavior sustained at a final revocation hearing. Earned time credits may not be earned during a period of incarceration imposed based on a sustained violation. A new thirty-day period shall commence on the day the period of incarceration ends or an order is issued restoring a person to supervision, whichever is earlier.

2 (c) When a person is subject to more than one period of presumptive release, parole, or conditional release, the reduction authorized in this subdivision shall be applied to every period of parole or conditional release to which the person is subject.

3 (d) Earned time credits shall be awarded to all people subject to parole or conditional release at the time this legislation becomes effective retroactive to the initial date the person began his or her earliest current period of parole or conditional release. The department shall have six months from the effective date of this subdivision to calculate all such retroactive earned time credits.

4 § 3. Paragraphs (d), (e) and (f) of subdivision 5 of section 70.45 of the penal law, as amended by section 127-j of subpart B of part C of chapter 62 of the laws of 2011, are amended and a new subdivision 6 is added to read as follows:

5 (d) When a person is [~~alleged~~] found by clear and convincing evidence to have violated a condition of post-release supervision willfully for the purpose of permanently avoiding supervision by failing to notify community supervision officer of a change in residence, failure to make office or written reports as directed, or leaving the state of New York or any other state to which the releasee is released or transferred, or any area defined in writing by his or her parole officer, without permission and the department of corrections and community supervision has declared such person to be delinquent: (i) [~~the declaration of delinquency shall interrupt the period of post-release supervision; (ii) such interruption shall continue until the person is restored to post-release supervision; (iii)~~] if the person is restored to post-release supervision without being returned to the department of corrections and community supervision, any time spent in custody from the date of delinquency until restoration to post-release supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any; and [~~(iv)~~] (ii) if the person is ordered returned to the department of corrections and community supervision, the person shall be required to serve the time assessment before being re-released to post-release supervision. [~~In the event the balance of the remaining period of post-release supervision is six months or less, such time assessment may be up to six months unless a longer period is authorized pursuant to subdivision one of this section. The~~] If the person is detained pursuant to paragraph (a) of subdivision three of section two hundred fifty-nine-i of the executive law pending preliminary or revocation hearings, the time assessment shall commence upon the execution of the warrant. If a warrant was executed pursuant to paragraph (a) of subdivision three of section two hundred fifty-nine-i of the executive law but a criminal court released the person pending preliminary or revocation hearings, the time assessment shall commence upon the issuance of a determination

1 after a final hearing that the person has violated one or more condi-
2 tions of community supervision, and shall include the time period
3 between execution of the warrant and release of the person pending
4 preliminary or revocation hearings. If a releasee is detained on bail
5 pursuant to section 530.10 of the criminal procedure law, the time
6 assessment shall include any time the releasee spent in such detention.
7 If a notice of violation was issued pursuant to subdivision three of
8 section two hundred fifty-nine-i of the executive law, the time assess-
9 ment shall commence upon the issuance of a determination after a final
10 hearing that the person has violated one or more conditions of super-
11 vision. While serving such assessment, the person shall not receive any
12 good behavior allowance pursuant to section eight hundred three of the
13 correction law. Any time spent in custody from the date of delinquency
14 until return to the department of corrections and community supervision
15 shall first be credited to the maximum or aggregate maximum term of the
16 sentence or sentences of imprisonment, but only to the extent authorized
17 by subdivision three of section 70.40 of this article. The maximum or
18 aggregate maximum term of the sentence or sentences of imprisonment
19 shall run while the person is serving such time assessment in the custo-
20 dy of the department of corrections and community supervision. Any time
21 spent in custody solely pursuant to such delinquency after completion of
22 the maximum or aggregate maximum term of the sentence or sentences of
23 imprisonment shall be credited to the period of post-release super-
24 vision, if any.

25 ~~[(e) Notwithstanding paragraph (d) of this subdivision, in the event a~~
26 ~~person is sentenced to one or more additional indeterminate or determi-~~
27 ~~nate term or terms of imprisonment prior to the completion of the period~~
28 ~~of post-release supervision, such period of post-release supervision~~
29 ~~shall be held in abeyance and the person shall be committed to the~~
30 ~~custody of the department of corrections and community supervision in~~
31 ~~accordance with the requirements of the prior and additional terms of~~
32 ~~imprisonment.~~

33 ~~(f) When a person serving a period of post-release supervision is~~
34 ~~returned to the department of corrections and community supervision~~
35 ~~pursuant to an additional consecutive sentence of imprisonment and with-~~
36 ~~out a declaration of delinquency, such period of post-release super-~~
37 ~~vision shall be held in abeyance while the person is in the custody of~~
38 ~~the department of corrections and community supervision. Such period of~~
39 ~~post-release supervision shall resume running upon the person's re-re-~~
40 ~~lease.]~~

41 6. Earned time credits. (a) After a person has begun a period of post-
42 release supervision pursuant to paragraph (a) of subdivision five of
43 this section, such period shall be reduced by thirty days for every
44 thirty days that the person does not violate a condition of post-release
45 supervision, provided the person is not subject to any sentence with a
46 maximum term of life imprisonment. Any such awarded earned time credits
47 shall be applied against the person's remaining portion of any maximum
48 term or aggregate maximum term.

49 (b) Earned time credits may be withheld or revoked only for the thir-
50 ty-day period commencing from the date of violative behavior sustained
51 at a final revocation hearing. Earned time credits may not be earned
52 during a period of incarceration imposed based on a sustained violation.
53 A new thirty-day period shall commence on the day the period of incar-
54 ceration ends or an order is issued restoring a person to supervision,
55 whichever is earlier.

1 (c) When a person is subject to more than one period of post-release
2 supervision, the reduction authorized in this subdivision shall be
3 applied to every period of post-release supervision to which the person
4 is subject.

5 (d) Earned time credits shall be awarded to all people subject to
6 post-release supervision at the time this legislation becomes effective
7 retroactive to the initial date the person began his earliest current
8 period of post-release supervision. The department shall have six
9 months from the effective date of this subdivision to calculate all such
10 retroactive earned time credits.

11 § 4. Subparagraph (i) of paragraph (a) of subdivision 3 of section
12 259-i of the executive law, as amended by chapter 545 of the laws of
13 2015, is amended and three new subparagraphs (iv), (v) and (vi) are
14 added to read as follows:

15 (i) If the parole officer having charge of a presumptively released,
16 paroled or conditionally released person or a person released to post-
17 release supervision or a person received under the uniform act for out-
18 of-state parolee supervision shall have reasonable cause to believe that
19 such person has lapsed into criminal ways [~~or company~~], or has violated
20 one or more conditions of his presumptive release, parole, conditional
21 release or post-release supervision, such parole officer shall report
22 such fact to a member of the board, or to any officer of the department
23 designated by the board, and thereupon a written notice of violation may
24 be issued, or if the person would be subject to reincarceration pursuant
25 to subparagraph (x) of paragraph (f) of this subdivision should the
26 violation be sustained at a final revocation hearing a warrant may be
27 issued for the retaking of such person and for his temporary detention
28 in accordance with the rules of the board unless such person has been
29 determined to be currently unfit to proceed to trial or is currently
30 subject to a temporary or final order of observation pursuant to article
31 seven hundred thirty of the criminal procedure law, in which case no
32 notice of violation or warrant shall be issued. The retaking and
33 detention of any such person may be further regulated by rules and regu-
34 lations of the department not inconsistent with this article. A warrant
35 issued pursuant to this section shall constitute sufficient authority to
36 the superintendent or other person in charge of any jail, penitentiary,
37 lockup or detention pen to whom it is delivered to hold in temporary
38 detention the person named therein[~~, except that a warrant issued with~~
39 ~~respect to a person who has been released on medical parole pursuant to~~
40 ~~section two hundred fifty nine r of this article and whose parole is~~
41 ~~being revoked pursuant to paragraph (h) of subdivision four of such~~
42 ~~section shall constitute authority for the immediate placement of the~~
43 ~~parolee only into imprisonment in the custody of the department to hold~~
44 ~~in temporary detention. A warrant issued pursuant to this section shall~~
45 ~~also constitute sufficient authority to the person in charge of a drug~~
46 ~~treatment campus, as defined in subdivision twenty of section two of the~~
47 ~~correction law, to hold the person named therein, in accordance with the~~
48 ~~procedural requirements of this section, for a period of at least ninety~~
49 ~~days to complete an intensive drug treatment program mandated by the~~
50 ~~board as an alternative to presumptive release or parole or conditional~~
51 ~~release revocation, or the revocation of post-release supervision, and~~
52 ~~shall also constitute sufficient authority for return of the person~~
53 ~~named therein to local custody to hold in temporary detention for~~
54 ~~further revocation proceedings in the event said person does not~~
55 ~~successfully complete the intensive drug treatment program. The board's~~
56 ~~rules shall provide for cancellation of delinquency and restoration to~~

~~supervision upon the successful completion of the program]~~ for up to twenty-four hours pending a recognizance hearing pursuant to subparagraph (iv) of this paragraph.

(iv) Upon execution of a warrant issued pursuant to this section, the authorized officer shall take the releasee to the local criminal court for a recognizance hearing. Such recognizance hearing shall commence within twenty-four hours of the execution of the warrant. At the hearing, the court shall consider all available evidence of the releasee's employment, family and community ties including length of residency in the community, history of reporting in a timely fashion to a parole or supervisory officer, and other indicators of stability. At the conclusion of the recognizance hearing, the court shall release the releasee on his or her own recognizance unless the court finds on the record that release on recognizance will not reasonably assure the releasee's appearance at subsequent preliminary or revocation hearings. In such instances, the court may order that the releasee abide by the least restrictive non-monetary condition or set of conditions in the community necessary to reasonably ensure the releasee's appearance at subsequent preliminary or revocation hearings. The releasee shall not be required to pay for any part of the cost of release under non-monetary conditions. The court may order that the releasee be detained pending preliminary or revocation hearings only upon a finding that the releasee currently presents a substantial risk of willfully failing to appear at the preliminary or revocation hearings and that no non-monetary condition or combination of conditions in the community will reasonably assure the releasee's appearance at the preliminary or revocation hearings.

(v) The alleged violator shall be permitted representation by counsel at the recognizance hearing. In any case, including when a court is called upon to evaluate the capacity of an alleged violator in a parole recognizance proceeding, where such person is financially unable to retain counsel, the criminal court of the city of New York, the county court or district court in the county where the violation is alleged to have occurred or where the hearing is held, shall assign counsel in accordance with the county or city plan for representation placed in operation pursuant to article eighteen-b of the county law.

(vi) If a releasee is brought to a criminal court due to an arrest for any felony or misdemeanor charge and a parole warrant has been issued, then the criminal court's order pursuant to section 510.30 of the criminal procedure law shall control in determining whether the releasee shall be detained pending a preliminary or revocation hearing. If the criminal court imposes bail pursuant to section 530.10 of the criminal procedure law, and the releasee-defendant secures release by paying bail or by operation of law, then the releasee shall not be detained further based solely on the parole warrant.

§ 5. Subparagraphs (i), (iii) and (iv) of paragraph (c) of subdivision 3 of section 259-i of the executive law, subparagraph (i) as amended by section 11 of part E of chapter 62 of the laws of 2003, and subparagraphs (iii) and (iv) as amended by section 1 of part E of chapter 56 of the laws of 2007, are amended and two new subparagraphs (ix) and (x) are added to read as follows:

(i) ~~[Within fifteen days after the warrant for retaking and temporary detention has been executed, unless the releasee has been convicted of a new crime committed while under presumptive release, parole, conditional release or post-release supervision, the board of parole shall afford the alleged presumptive release, parole, conditional release or post-re-~~

~~lease supervision violator a preliminary revocation hearing before a hearing officer designated by the board of parole. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator]~~ (A) For any alleged technical violation, if a notice of violation was issued or a person was released on recognizance pursuant to subparagraph (iv) of paragraph (a) of this subdivision, the department shall within ten days of the issuance of the notice of violation or the order of release on recognizance afford the person a preliminary revocation hearing before a hearing officer designated by the department. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator.

(B) For any alleged technical violation, if a court issued an order detaining a person pursuant to subparagraph (iv) of paragraph (a) of this subdivision and the person would be subject to reincarceration of up to thirty days or more pursuant to subparagraph (x) of paragraph (f) of this subdivision should the violation be sustained at a final revocation hearing, then within five days of the issuance of the order of detention the department shall afford such person a preliminary revocation hearing before a hearing officer designated by the department. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator.

(iii) ~~The alleged violator shall, [within three days of the execution of the warrant]~~ at the time a notice of violation is issued or at the time of a recognizance hearing, be given written notice of the time, place and purpose of the preliminary hearing ~~[unless he or she is detained pursuant to the provisions of subparagraph (iv) of paragraph (a) of this subdivision. In those instances, the alleged violator will be given written notice of the time, place and purpose of the hearing within five days of the execution of the warrant],~~ or if no preliminary hearing is required pursuant to this section, of the final revocation hearing. The notice shall state what conditions of presumptive release, parole, conditional release or post-release supervision are alleged to have been violated, and in what manner; that such person shall have the right to appear and speak in his or her own behalf; that he or she shall have the right to introduce letters and documents; that he or she may present witnesses who can give relevant information to the hearing officer; that he or she has the right to confront the witnesses against him or her; and that such person shall have the right to representation by counsel at any preliminary and final revocation hearings. Adverse witnesses may be compelled to attend the preliminary hearing unless the prisoner has been convicted of a new crime while on supervision or unless the hearing officer finds good cause for their non-attendance. As far as practicable or feasible, any additional documents having been collected or prepared that support the charge shall be delivered to the alleged violator.

(iv) ~~[The preliminary hearing shall be scheduled to take place no later than fifteen days from the date of execution of the warrant.]~~ The standard of proof at the preliminary hearing shall be probable cause to believe that the presumptive releasee, parolee, conditional releasee or person under post-release supervision has violated one or more conditions of his or her presumptive release, parole, conditional release or post-release supervision in an important respect. Proof of conviction of a crime committed while under supervision shall constitute probable cause for the purposes of this section.

(ix) If the hearing officer finds probable cause to believe that such person has violated one or more conditions of release in an important

1 respect, the releasee shall, at the conclusion of the preliminary hear-
2 ing be given written notice of the time, place and purpose of the final
3 revocation hearing. The notice shall state what conditions of community
4 supervision are alleged to have been violated, when, where and in what
5 manner; that such person shall have the right to representation by coun-
6 sel at any final revocation hearing; that such person shall have the
7 right to appear and speak in his or her own behalf; that he or she shall
8 have the right to introduce letters and documents; that he or she may
9 present witnesses who can give relevant information to the hearing offi-
10 cer; that he or she has the right to confront the witnesses against him
11 or her. As far as practicable or feasible, any additional documents
12 having been collected or prepared that support the charge shall be
13 delivered to the releasee. Adverse witnesses may be compelled to attend
14 the final revocation hearing unless the prisoner has been convicted of a
15 new crime while on supervision or unless the hearing officer finds good
16 cause for their non-attendance.

17 (x) The alleged violator shall be permitted representation by counsel
18 at the preliminary hearing. In any case, including when a court is
19 called upon to evaluate the capacity of an alleged violator in a parole
20 preliminary proceeding, where such person is financially unable to
21 retain counsel, the criminal court of the city of New York, the county
22 court or district court in the county where the violation is alleged to
23 have occurred or where the hearing is held, shall assign counsel in
24 accordance with the county or city plan for representation placed in
25 operation pursuant to article eighteen-b of the county law.

26 § 6. Paragraph (f) of subdivision 3 of section 259-i of the executive
27 law, as amended by section 11 of part E of chapter 62 of the laws of
28 2003, subparagraph (v) as amended and subparagraph (xii) as added by
29 chapter 545 of the laws of 2015 and subparagraph (x) as amended by
30 section 38-f-1 of subpart A of part C of chapter 62 of the laws of 2011,
31 is amended to read as follows:

32 (f) (i) ~~[Revocation hearings shall be scheduled to be held within~~
33 ~~ninety days of the probable cause determination]~~ For any releasee
34 charged with a violation:

35 (A) If a court issued an order detaining such person pursuant to
36 subparagraph (iv) of paragraph (a) of this subdivision and the person
37 would be subject to reincarceration of up to seven days pursuant to
38 subparagraph (x) of this paragraph should the violation be sustained at
39 a final revocation hearing, then within two days of the issuance of the
40 order of detention, the department shall afford such person a final
41 revocation hearing before a hearing officer designated by the depart-
42 ment. Such hearing officer shall not have had any prior supervisory
43 involvement over the alleged violator. No preliminary revocation hearing
44 shall be held in this instance.

45 (B) If a court issued an order detaining such person pursuant to
46 subparagraph (iv) of paragraph (a) of this subdivision and the person
47 would be subject to reincarceration of up to fifteen days pursuant to
48 subparagraph (x) of this paragraph should the violation be sustained at
49 a final revocation hearing, then within four days of the issuance of the
50 order of detention, the department shall afford such person a final
51 revocation hearing before a hearing officer designated by the depart-
52 ment. Such hearing officer shall not have had any prior supervisory
53 involvement over the alleged violator. No preliminary revocation hearing
54 shall be held in this instance.

55 (C) If a court issued an order detaining such person pursuant to
56 subparagraph (iv) of paragraph (a) of this subdivision and the person

1 would be subject to reincarceration of up to thirty days or more pursu-
2 ant to subparagraph (x) of this paragraph should the violation be
3 sustained at a final revocation hearing, then within fifteen days after
4 the issuance of the order of detention, the department shall afford such
5 person a final revocation hearing before a hearing officer designated by
6 the department. Such hearing officer shall not have had any prior super-
7 visory involvement over the alleged violator.

8 (D) If a notice of violation was issued or such person was released on
9 recognizance pursuant to subparagraph (iv) of paragraph (a) of this
10 subdivision, or the person is accused of a non-technical violation, the
11 department shall within thirty days of the issuance of the notice of
12 violation or the order of release on recognizance afford the person a
13 final revocation hearing before a hearing officer designated by the
14 department. Such hearing officer shall not have had any prior superviso-
15 ry involvement over the alleged violator.

16 (E) However, if an alleged violator requests and receives any post-
17 ponement of his revocation hearing, or consents to a postponed revoca-
18 tion proceeding initiated by the board, or if an alleged violator, by
19 his actions otherwise precludes the prompt conduct of such proceedings,
20 the time limit may be extended.

21 (ii) The revocation hearing shall be conducted by a presiding officer
22 who may be a member or a hearing officer designated by the board in
23 accordance with rules of the board.

24 (iii) Both the alleged violator and an attorney who has filed a notice
25 of appearance on his behalf in accordance with the rules of the board of
26 parole shall be given written notice of the date, place and time of the
27 hearing [~~as soon as possible but at least fourteen days prior to the~~
28 ~~scheduled date~~] pursuant to subparagraph (ix) of paragraph (c) of this
29 subdivision.

30 (iv) The alleged violator shall be given written notice of the rights
31 enumerated in subparagraph (iii) of paragraph (c) of this subdivision as
32 well as of his right to present mitigating evidence relevant to restora-
33 tion to presumptive release, parole, conditional release or post-release
34 supervision and his right to counsel.

35 (v) The alleged violator shall be permitted representation by counsel
36 at the revocation hearing. In any case, including when a superior court
37 is called upon to evaluate the capacity of an alleged violator in a
38 parole revocation proceeding, where such person is financially unable to
39 retain counsel, the criminal court of the city of New York, the county
40 court or district court in the county where the violation is alleged to
41 have occurred or where the hearing is held, shall assign counsel in
42 accordance with the county or city plan for representation placed in
43 operation pursuant to article eighteen-B of the county law. He or she
44 shall have the right to confront and cross-examine adverse witnesses,
45 unless there is good cause for their non-attendance as determined by the
46 presiding officer; present witnesses and documentary evidence in defense
47 of the charges; and present witnesses and documentary evidence relevant
48 to the question whether reincarceration of the alleged violator is
49 appropriate.

50 (vi) At the revocation hearing, the charges shall be read and the
51 alleged violator shall be permitted to plead not guilty, guilty, guilty
52 with explanation or to stand mute. As to each charge, evidence shall be
53 introduced through witnesses and documents, if any, in support of that
54 charge. At the conclusion of each witness's direct testimony, he shall
55 be made available for cross-examination. If the alleged violator intends
56 to present a defense to the charges or to present evidence of mitigating

1 circumstances, the alleged violator shall do so after presentation of
2 all the evidence in support of a violation of presumptive release,
3 parole, conditional release or post-release supervision.

4 (vii) All persons giving evidence at the revocation hearing shall be
5 sworn before giving any testimony as provided by law.

6 (viii) At the conclusion of the hearing the presiding officer may
7 sustain any or all of the violation charges or may dismiss any or all
8 violation charges. He may sustain a violation charge only if the charge
9 is supported by [~~a preponderance of the evidence adduced~~] clear and
10 convincing evidence. Conduct that formed the basis of a criminal case
11 shall not form a basis of a sustained parole violation if the criminal
12 court has adjudicated the matter with an acquittal, adjournment in
13 contemplation of dismissal, or violation.

14 (ix) If the presiding officer is not satisfied that there is [~~a~~
15 ~~preponderance of~~] clear and convincing evidence in support of the
16 violation, he shall dismiss the violation, cancel the delinquency and
17 restore the person to presumptive release, parole, conditional release
18 or post-release supervision.

19 (x) If the presiding officer is satisfied that there is [~~a preponder-~~
20 ~~ance of~~] clear and convincing evidence that the alleged violator
21 violated one or more conditions of release in an important respect, he
22 or she shall so find.

23 (xi) For each violation [~~so~~] found, the presiding officer may (A)
24 direct that the presumptive releasee, parolee, conditional releasee or
25 person serving a period of post-release supervision be restored to
26 supervision; (B) as an alternative to reincarceration, direct the
27 presumptive releasee, parolee, conditional releasee or person serving a
28 period of post-release supervision [~~be placed in a parole transition~~
29 ~~facility for a period not to exceed one hundred eighty days and subse-~~
30 ~~quent restoration to supervision~~] receive re-entry services in the
31 community from qualified nonprofit agencies; (C) in the case of presump-
32 tive releasees, parolees or conditional releasees, direct the violator's
33 reincarceration and fix a date for consideration by the board for re-re-
34 lease on presumptive release, or parole or conditional release, as the
35 case may be, subject to the following limitations: (1) for failing to
36 notify his or her community supervision officer of a change in residence
37 after a finding of clear and convincing evidence that the releasee acted
38 willfully for the purpose of permanently avoiding supervision; failure
39 to make office or written reports as directed after a finding of clear
40 and convincing evidence that the releasee acted willfully for the
41 purpose of permanently avoiding supervision; and leaving the state of
42 New York or any other state to which the releasee is released or trans-
43 ferred, or any area defined in writing by his parole officer, without
44 permission, after a finding of clear and convincing evidence that the
45 releasee acted willfully for the purpose of permanently avoiding super-
46 vision, up to seven days incarceration may be imposed for the first
47 violation, up to fifteen days incarceration may be imposed for the
48 second violation, and up to thirty days incarceration may be imposed for
49 the third or any subsequent violation; (2) for all other technical
50 violations no period of reincarceration may be imposed for the first and
51 second substantiated technical violations; up to seven days reincarcera-
52 tion may be imposed for the third substantiated technical violation; up
53 to fifteen days reincarceration may be imposed for the fourth substanti-
54 ated technical violation; up to thirty days reincarceration may be
55 imposed for the fifth and subsequent substantiated technical violations;
56 and (3) for non-technical violations, up to ninety days reincarceration

1 may be imposed; or (D) in the case of persons released to a period of
2 post-release supervision, direct the violator's reincarceration [~~up to~~
3 ~~the balance of the remaining period of post-release supervision, not to~~
4 ~~exceed five years; provided, however, that a defendant serving a term of~~
5 ~~post-release supervision for a conviction of a felony sex offense~~
6 ~~defined in section 70.80 of the penal law may be subject to a further~~
7 ~~period of imprisonment up to the balance of the remaining period of~~
8 ~~post-release supervision] subject to the following limitations: (1) for
9 failing to notify community supervision officer of a change in residence
10 after a finding of clear and convincing evidence that the releasee acted
11 willfully for the purpose of permanently avoiding supervision; failure
12 to make office or written reports as directed after a finding of clear
13 and convincing evidence that the releasee acted willfully for the
14 purpose of permanently avoiding supervision; and leaving the state of
15 New York or any other state to which the releasee is released or trans-
16 ferred, or any area defined in writing by his parole officer, without
17 permission, after a finding of clear and convincing evidence that the
18 releasee acted willfully for the purpose of permanently avoiding super-
19 vision, up to seven days incarceration may be imposed for the first
20 violation, up to fifteen days incarceration may be imposed for the
21 second violation, and up to thirty days incarceration may be imposed for
22 the third or any subsequent violation; (2) for all other technical
23 violations no period of reincarceration may be imposed for the first and
24 second substantiated technical violations; up to seven days reincarcera-
25 tion may be imposed for the third substantiated technical violation; up
26 to fifteen days reincarceration may be imposed for the fourth substanti-
27 ated technical violation; up to thirty days reincarceration may be
28 imposed for the fifth and subsequent substantiated technical violations;
29 and (3) for non-technical violations, up to ninety days reincarceration
30 may be imposed. If a warrant was executed pursuant to subparagraph (iv)
31 of paragraph (a) of this subdivision and the person was detained pursu-
32 ant to such subparagraph pending preliminary or revocation hearings, any
33 period of incarceration imposed pursuant to this paragraph shall be
34 counted from the date of the execution of the warrant. If a warrant was
35 executed pursuant to subparagraph (iv) of paragraph (a) of this subdivi-
36 sion but a criminal court released the person pending preliminary or
37 revocation hearings, any period of incarceration imposed pursuant to
38 this paragraph shall be counted from the date of issuance of a determi-
39 nation after a final hearing that the person has violated one or more
40 conditions of community supervision, and the time between execution of
41 the warrant and release of the person pending preliminary or revocation
42 hearings shall count toward the period of reincarceration imposed pursu-
43 ant to this paragraph. If a releasee is detained on bail pursuant to
44 section 530.10 of the criminal procedure law, any time the person spent
45 in detention on bail shall count towards any period of incarceration
46 imposed pursuant to this paragraph. In all cases, the presiding officer
47 shall impose the least restrictive reasonable sanction. Any periods of
48 reincarceration shall run concurrently if more than one violation is
49 adjudicated at a time. If a period of incarceration is imposed pursuant
50 to this paragraph, the releasee shall be released from custody upon
51 expiration of the period or the end of the releasee's period of communi-
52 ty supervision, whichever shall be sooner. For the violator serving an
53 indeterminate sentence who while re-incarcerated has not been found by
54 the department to have committed a serious disciplinary infraction, such
55 violator shall be re-released on the date fixed at the revocation hear-
56 ing. For the violator serving an indeterminate sentence who has been~~

1 found by the department to have committed a serious disciplinary infrac-
2 tion while re-incarcerated, the department shall refer the violator to
3 the board for consideration for re-release to community supervision.
4 Upon such referral the board may waive the personal interview between a
5 member or members of the board and the violator to determine the suit-
6 ability for re-release when the board directs that the violator be
7 re-released upon expiration of the time assessment. The board shall
8 retain the authority to suspend the date fixed for re-release based on
9 the violator's commission of a serious disciplinary infraction and shall
10 in such case require a personal interview be conducted within a reason-
11 able time between a panel of members of the board and the violator to
12 determine suitability for re-release. If an interview is required, the
13 board shall notify the violator in advance of the date and time of such
14 interview in accordance with the rules and regulations of the board.

15 ~~[(xii)]~~ (xii) If the presiding officer sustains any violations, he must
16 prepare a written statement, to be made available to the alleged viola-
17 tor and his counsel, indicating the evidence relied upon and the reasons
18 for revoking presumptive release, parole, conditional release or post-
19 release supervision, and for the disposition made.

20 ~~[(xiii)]~~ (xiii) If at any time during a revocation proceeding the
21 alleged violator, his or her counsel, or an employee of the department
22 contends, or if it reasonably appears to the hearing officer, that the
23 alleged violator is an incapacitated person as that term is defined in
24 subdivision one of section 730.10 of the criminal procedure law and no
25 judicial determination has been made that the alleged violator is an
26 incapacitated person, the revocation proceeding shall be temporarily
27 stayed until the superior court determines whether or not the person is
28 fit to proceed. The matter shall be promptly referred to the superior
29 court for determination of the alleged violator's fitness to proceed in
30 a manner consistent with the provisions of article seven hundred thirty
31 of the criminal procedure law, provided however that the superior court
32 shall immediately appoint counsel for any unrepresented alleged violator
33 eligible for appointed counsel under subparagraph (v) of this paragraph

34 ~~[(f) of subdivision three of section two hundred fifty-nine-i of this~~
35 ~~chapter]~~. The court shall decide whether or not the alleged violator is
36 incapacitated within thirty days of the referral from the hearing offi-
37 cer. If the court determines that the alleged violator is not an inca-
38 pacitated person, the court shall order that the matter be returned to
39 the board of parole for continuation and disposition of the revocation
40 proceeding. If the court determines that the alleged violator is an
41 incapacitated person and if no felony charges are pending against the
42 alleged violator, the court shall issue a final order of observation
43 committing such person to the custody of the commissioner of mental
44 health or the commissioner of developmental disabilities for care and
45 treatment in an appropriate institution in a manner consistent with
46 subdivision one of section 730.40 of the criminal procedure law. If a
47 final order of observation has been issued pursuant to this section, the
48 hearing officer shall dismiss the violation charges and such dismissal
49 shall act as a bar to any further proceeding under this section against
50 the alleged violator for such violations. If felony criminal charges are
51 pending at any time against an alleged violator who has been referred to
52 superior court for a fitness evaluation but before a determination of
53 fitness has been made pursuant to this section, the court shall decide
54 whether or not the alleged violator is incapacitated pursuant to article
55 seven hundred thirty of the criminal procedure law and the revocation
56 proceeding shall be held in abeyance until such decision has been

1 reached. The hearing officer shall adopt the capacity finding of the
2 court and either terminate the revocation process if an order of obser-
3 vation has been made by the court or proceed with the revocation hearing
4 if the alleged violator has been found not to be an incapacitated
5 person.

6 § 7. Section 259-i of the executive law is amended by adding a new
7 subdivision 9 to read as follows:

8 9. The board shall promulgate rules and regulations to facilitate the
9 presence of nonprofit service providers able to offer relevant communi-
10 ty-based services to releasees at all preliminary and final revocation
11 hearings for the purpose of helping people subject to community super-
12 vision successfully complete such supervision and avoid future such
13 supervision, and to help ensure presiding officers impose the least
14 restrictive reasonable sanction for any violation of community super-
15 vision.

16 § 8. This act shall take effect on the ninetieth day after it shall
17 have become a law. Effective immediately, the addition, amendment
18 and/or repeal of any rule or regulation necessary for the implementation
19 of this act on its effective date are authorized and directed to be made
20 and completed on or before such effective date.