STATE OF NEW YORK

1343--B

2019-2020 Regular Sessions

IN SENATE

January 14, 2019

Introduced by Sens. BENJAMIN, BAILEY, MONTGOMERY, MYRIE, RIVERA, SALAZAR, SERRANO -- read twice and ordered printed, and when printed to be committed to the Committee on Crime Victims, Crime and Correction -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the executive law and the penal law, in relation to revocation of community supervision

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

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

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

6. "Technical violation" means any violation of a condition of community supervision other than a conviction for a felony offense or that has been proven to be a misdemeanor offense under section 121.11, 135.05 or 135.45 or article 120 or 130 of the penal law.

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

3. Delinquency. (a) When a person is alleged to have violated the terms of presumptive release or parole **willfully for the purpose of permanently avoiding supervision by failing to notify his or her community supervision officer of a change in residence, failing 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**

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

LBD06090-05-9

any area defined in writing by his parole officer, without permission, and the state board of parole has declared such person to be delinquent, the declaration of delinquency shall interrupt the person's sentence as of the date of the delinquency and such interruption shall continue until the [~~return of the person to an institution under the jurisdiction of the state department of corrections and community supervision~~] execution of the warrant.

(b) When a person is alleged to have violated the terms of his or her conditional release or post-release supervision willfully for the purpose of permanently avoiding supervision by failing to notify his or her 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 parole officer, without permission and has been declared delinquent by the parole board or the local conditional release commission having supervision over such person, the declaration of delinquency shall interrupt the period of supervision or post-release supervision as of the date of the delinquency. For a conditional release, such interruption shall continue until the [~~return of the person to the institution from which he or she was released or, if he or she was released from an institution under the jurisdiction of the state department of corrections and community supervision, to an institution under the jurisdiction of that department. Upon such return, the person shall resume service of his or her sentence~~] execution of the warrant. For a person released to post-release supervision, the provisions of section 70.45 of this article shall apply.

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

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

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

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

4. Earned time credits. (a) After a person has begun a period of community supervision pursuant to this section and section 70.45 of this article, such period shall be reduced by thirty days for every thirty days that such person does not violate a condition of his or her community supervision, provided the person is not subject to any sentence with a maximum term of life imprisonment. The calculation of earned time credit periods shall begin on the releasee's first day of community supervision and shall be awarded after each completed thirty day period. Any such awarded earned time credits shall be applied against such person's unserved portion of the maximum term, aggregate maximum term or period of post-release supervision for any current sentence.

(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, except that earned time credits may be withheld or revoked for the entire time period during which a releasee

absconded from supervision, as sustained at a final revocation hearing, and as defined in subparagraph (xii) of paragraph (f) of subdivision three of section two hundred fifty-nine-i of the executive law. Earned time credits may not be earned during a period of incarceration imposed based on a sustained violation or new criminal conviction. After a sustained violation, the calculation of an earned time credit period shall recommence on the thirty-first day after the date of the violative behavior or, if the sustained violation resulted in a term of incarceration, on the day the releasee is restored to community supervision, whichever is later.

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

(d) Earned time credits shall be awarded to any person subject to community supervision at the time this legislation becomes effective retroactive to the initial date such person began his or her earliest current period of community supervision. If a releasee's current period of community supervision has been interrupted by a period of incarceration prior to the effective date of the chapter of the laws of two thousand nineteen which added this subdivision and any portion of such period of incarceration would have been ineligible for incarceration if such chapter of the laws of two thousand nineteen which added this subdivision had already been in effect, the department shall award retroactive earned time credits to the releasee for such ineligible portion of such period of incarceration. The department shall have six months from the effective date of this subdivision to calculate all retroactive earned time credits; however, the department of corrections and community supervision shall prioritize earned time credit calculations for releasees whose terms of community supervision are due to terminate before the conclusion of such six months. Retroactive earned time credits shall not be awarded to any releasee serving a term of incarceration for a sustained parole violation at the time of the effective date of the chapter of the laws of two thousand nineteen which added this subdivision until the releasee is returned to community supervision.

§ 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 to read as follows:

(d) When a person is alleged 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) 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 trial court released the person pending preliminary or revocation hearings, the time assessment shall commence upon the issuance of a determination after a final hearing that the person has violated one or more conditions of community supervision, and shall include the time period between execution of the warrant and release of the person pending preliminary or revocation hearings. If a releasee is detained on bail pursuant to section 530.10 of the criminal procedure law, the time assessment shall include any time the releasee spent in such detention. If a notice of violation was issued pursuant to subdivision three of section two hundred fifty-nine-i of the executive law, the time assessment shall commence upon the issuance of a determination after a final hearing that the person has violated one or more conditions of supervision. While serving such assessment, the person shall not receive any good behavior allowance pursuant to section eight hundred three of the correction law. Any time spent in custody from the date of delinquency until return to the department of corrections and community 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. The maximum or aggregate maximum term of the sentence or sentences of imprisonment shall run while the person is serving such time assessment in the custody of the department of corrections and community supervision. 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.

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

~~(f) When a person serving a period of post-release supervision is returned to the department of corrections and community supervision pursuant to an additional consecutive sentence of imprisonment and without a declaration of delinquency, such period of post-release supervision shall be held in abeyance while the person is in the custody of the department of corrections and community supervision. Such period of post-release supervision shall resume running upon the person's re-release.~~]

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

(i) If the parole officer having charge of a presumptively released, paroled or conditionally released person or a person released to post-release supervision or a person received under the uniform act for out-of-state parolee supervision shall have [~~reasonable~~] **probable** cause to believe that such person has lapsed into criminal ways [~~or company~~], or has violated one or more conditions of his presumptive release, parole, conditional release or post-release supervision, such parole officer shall report such fact to a member of the board, or to any officer of the department designated by the board, and thereupon **a written notice of violation may be issued, or if the person would be subject to reincarceration pursuant to subparagraph (x) of paragraph (f) of this subdivision should the violation be sustained at a final revocation hearing** a warrant may be issued for the retaking of such person and for his temporary detention in accordance with the rules of the board unless such person has been determined to be currently unfit to proceed to trial or is currently subject to a temporary or final order of observation pursuant to article seven hundred thirty of the criminal procedure law, in which case no **notice of violation or** warrant shall be issued. The retaking and detention of any such person may be further regulated by rules and regulations of the department not inconsistent with this article. A warrant issued pursuant to this section shall constitute sufficient authority to the superintendent or other person in charge of any jail, penitentiary, lockup or detention pen to whom it is delivered to hold in temporary detention the person named therein[~~; except that a warrant issued with respect to a person who has been released on medical parole pursuant to section two hundred fifty-nine-r of this article and whose parole is being revoked pursuant to paragraph (h) of subdivision four of such section shall constitute authority for the immediate placement of the parolee only into imprisonment in the custody of the department to hold in temporary detention. A warrant issued pursuant to this section shall also constitute sufficient authority to the person in charge of a drug treatment campus, as defined in subdivision twenty of section two of the correction law, to hold the person named therein, in accordance with the procedural requirements of this section, for a period of at least ninety days to complete an intensive drug treatment program mandated by the board as an alternative to presumptive release or parole or conditional release revocation, or the revocation of post-release supervision, and shall also constitute sufficient authority for return of the person named therein to local custody to hold in temporary detention for further revocation proceedings in the event said person does not successfully complete the intensive drug treatment program. The board's 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**. **No notice of violation or warrant shall be issued due to a releasee being in the company of or fraternizing with any person the releasee knows has a criminal record or knows has been adjudicated a youthful offender.**

(iv) Upon execution of a warrant issued pursuant to this section, the authorized officer shall take the releasee to the local trial court for a recognizance hearing. Such recognizance hearing shall commence within twenty-four hours of the execution of the warrant.

(v) At a recognizance hearing, the department shall have the burden to demonstrate to the court that the executed warrant was properly issued pursuant to this section and that the releasee is potentially subject to incarceration pursuant to paragraph (f) of this subdivision.

(vi) At a recognizance 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 or in writing that release on recognizance will not reasonably assure the releasee's appearance at subsequent preliminary or revocation hearings. In such instances, the court shall release the releasee under non-monetary conditions, selecting the least restrictive alternative conditions that will reasonably assure the releasee's appearance at subsequent preliminary or revocation hearings. The court shall explain its choice of alternative conditions on the record or in writing. 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 final revocation hearings only upon a finding that the releasee currently presents a substantial risk of willfully failing to appear at the preliminary or final 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 final revocation hearings.

(vii) The alleged violator shall have a right to 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 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.

(viii) If a releasee is brought to or appears in a trial court due to an arrest for any alleged felony or misdemeanor, and at any point the department issues a warrant for the same alleged criminal conduct, then the court's order pursuant to section 530.10 of the criminal procedure law shall control in determining whether the releasee shall be detained pending a preliminary or final revocation hearing, provided that at the time of the court's order, pursuant to section 530.10 of the criminal procedure law, the court was informed the releasee was subject to community supervision. Provided, however, that notwithstanding section 530.10 of the criminal procedure law, the court may order that the releasee be detained pending preliminary or final revocation hearings upon a finding on the record or in writing that the releasee currently presents a substantial risk of willfully failing to appear at the preliminary or final revocation hearings and that no non-monetary condition or combination of conditions in the community supervision will reasonably assure the releasee's appearance at the preliminary or final revocation hearings. 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 warrant issued by the department; provided, however, if the department issues a warrant for the same alleged criminal conduct after the court's order pursuant to section

530.10 of the criminal procedure law and the department can demonstrate that at the time of such court's order the court was not informed the releasee was subject to community supervision, then the court shall hold a recognizance hearing within twenty-four hours of the execution of the 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-release 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 for which 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. Such hearing shall not be held at a correctional facility, detention center or local correctional facility.

(B) For any alleged technical violation for which 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.

(C) For any alleged non-technical violation, within ten days of the execution of the warrant for the violation the department shall afford such person a preliminary 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~~] community 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~~] a preponderance of the evidence to believe that the [~~presumptive releasee, parolee, conditional releasee or person under post-release supervision~~] releasee has violated one or more conditions of his or her [~~presumptive release, parole, conditional release or post-release~~] community supervision in an important respect. Proof of conviction of a crime committed while under supervision shall constitute [~~probable cause~~] prima facie evidence of a violation of a condition of community supervision for the purposes of this section.

(ix) If the hearing officer finds by a preponderance of the evidence that such person has violated one or more conditions of community supervision in an important respect, the releasee shall, at the conclusion of the preliminary hearing be given written notice of the time, place and purpose of the final revocation hearing. The notice shall state what conditions of community supervision are alleged to have been violated, when, where and in what manner; that such person shall have the right to representation by counsel at any final revocation hearing; 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. As far as practicable or feasible, any additional documents having been collected or prepared that support the charge shall be delivered to the releasee. Adverse witnesses may be compelled to attend the final revocation 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.

(x) The alleged violator shall have a right to representation by counsel at the preliminary hearing. In any case, including when a court is called upon to evaluate the capacity of an alleged violator in a preliminary 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.

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

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

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

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

(C) If a court issued an order detaining such 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 this paragraph should the violation be sustained at a final revocation hearing, then within ten days after the issuance of the order of detention, the department shall afford such person a final revocation hearing in person before a hearing officer designated by the department. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator.

(D) If a notice of violation was issued or such person was released on recognizance pursuant to subparagraph (iv) of paragraph (a) of this subdivision the department shall within thirty days of the issuance of the notice of violation or the order of release on recognizance afford the person a final revocation hearing in person before a hearing officer designated by the department. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator. Such hearing shall not be held at a correctional facility, detention center or local correctional facility. The department shall have six months from the date of the effective date of the chapter of the laws of two thousand nineteen that amended this paragraph to begin to hold such hearings at allowable locations.

(E) If such person is accused of a non-technical violation, the department shall within thirty days of the execution of the warrant afford such person a final revocation hearing in person before a hearing officer designated by the department. Such hearing officer shall not have had any supervisory involvement over the alleged violator.

(F) However, if an alleged violator requests and receives any postponement of his revocation hearing, or consents to a postponed revocation proceeding initiated by the board, or if an alleged violator, by his actions otherwise precludes the prompt conduct of such proceedings, the time limit may be extended.

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

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

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

(v) The alleged violator shall [~~be permitted~~] **have a right to** representation by counsel at the revocation hearing. In any case, including when a superior court is called upon to evaluate the capacity of an alleged violator in a [~~parole~~] revocation 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. He or she shall have the right to confront and cross-examine adverse witnesses, unless there is good cause for their non-attendance as determined by the presiding officer; present witnesses and documentary evidence in defense of the charges; and present witnesses and documentary evidence relevant to the question whether reincarceration of the alleged violator is appropriate.

(vi) At the revocation hearing, the charges shall be read and the alleged violator shall be permitted to plead not guilty, guilty, guilty with explanation or to stand mute. As to each charge, evidence shall be introduced through witnesses and documents, if any, in support of that charge. At the conclusion of each witness's direct testimony, he shall be made available for cross-examination. If the alleged violator intends to present a defense to the charges or to present evidence of mitigating circumstances, the alleged violator shall do so after presentation of all the evidence in support of a violation of presumptive release, parole, conditional release or post-release supervision.

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

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

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

(x) If the presiding officer is satisfied that there is [~~a preponderance of~~] **clear and convincing** evidence that the alleged violator

violated one or more conditions of release in an important respect, he or she shall so find. For each violation found, other than absconding, the presiding officer shall direct that no earned time credits shall be awarded for the thirty day period commencing from the date of the sustained violation. For any absconding violation found, the presiding officer shall direct that no earned time credits shall be awarded for the entire time period during which a releasee was found to have absconded from supervision.

(xi) Incarceration shall not be imposed for any of the following violations: (A) positive drug test for drugs or a controlled substance without proper medical authorization, or possession of drug paraphernalia, unless the releasee is subject to community supervision due to a conviction for driving while ability impaired at least in part by drugs pursuant to section eleven hundred ninety-two of the vehicle and traffic law; (B) positive alcohol test or use or possession of alcohol, unless the releasee is subject to community supervision due to a conviction for driving while ability impaired at least in part by alcohol or while intoxicated pursuant to section eleven hundred ninety-two of the vehicle and traffic law; (C) failing to notify community supervision officer of a change in employment or program status; (D) failing to notify community supervision officer of a change in residence, absent clear and convincing evidence that the releasee acted willfully for the purpose of permanently avoiding supervision; (E) violating curfew; (F) failure to pay surcharges and fees, including fees imposed pursuant to section 60.35 of the penal law, sections eighteen hundred nine and eighteen hundred nine-c of the vehicle and traffic law, or section 27.12 of the parks, recreation and historic preservation law; (G) failure to make office or written reports as directed, absent clear and convincing evidence that the releasee acted willfully for the purpose of permanently avoiding supervision; (H) 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 parole officer, without permission, absent clear and convincing evidence that the releasee acted willfully for the purpose of permanently avoiding supervision; (I) failure to notify community supervision officer of contact with any law enforcement agency, absent clear and convincing evidence that the releasee intended to hide evidence of his or others' behavior that constitutes a violation of the penal law; (J) failure to obey special conditions of community supervision, absent clear and convincing evidence that the failure poses a substantial risk to public safety and cannot be addressed safely in the community including with counseling or programming; and (K) obtaining a driver's license or driving a car with a valid driver's license, unless either action is explicitly prohibited by the person's conviction.

(xii) For each violation [~~so~~] found, the presiding officer may (A) direct that the [~~presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision~~] releasee be restored to supervision; (B) as an alternative to reincarceration, direct the [~~presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision be placed in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision~~] releasee receive re-entry services in the community from qualified nonprofit agencies; (C) [~~in the case of presumptive releasees, parolees or conditional releasees,~~] direct the violator's reincarceration [~~and fix a date for consideration by the board for re-release on presumptive release, or parole or condi-~~

~~tional release, as the case may be; or (D) in the case of persons released to a period of post-release supervision, direct the violator's reincarceration up to the balance of the remaining period of post-release supervision, not to exceed five years; provided, however, that a defendant serving a term of post-release supervision for a conviction of a felony sex offense defined in section 70.80 of the penal law may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision~~], subject to the following limitations: (1) for absconding, which is defined as failing to notify his or her community supervision officer of a change in residence willfully for the purpose of permanently avoiding supervision; failure to make office or written reports as directed willfully for the purpose of permanently avoiding supervision; and 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 parole officer, without permission, willfully for the purpose of permanently avoiding supervision, up to seven days incarceration may be imposed for the first violation, up to fifteen days incarceration may be imposed for the second violation, and up to thirty days incarceration may be imposed for the third or any subsequent violation; (2) for all other technical violations for which incarceration may be imposed no period of reincarceration may be imposed for the first and second substantiated technical violations for which incarceration may be imposed; up to seven days reincarceration may be imposed for the third substantiated technical violation for which incarceration may be imposed; up to fifteen days reincarceration may be imposed for the fourth substantiated technical violation for which incarceration may be imposed; up to thirty days reincarceration may be imposed for the fifth and subsequent substantiated technical violations for which incarceration may be imposed; and (3) for non-technical violations, up to ninety days reincarceration may be imposed. If a warrant was executed pursuant to subparagraph (iv) of paragraph (a) of this subdivision and the person was detained pursuant to such subparagraph pending preliminary or revocation hearings, any period of incarceration imposed pursuant to this paragraph shall be counted from the date of the execution of the warrant. If a warrant was executed pursuant to subparagraph (iv) of paragraph (a) of this subdivision but a criminal court released the person pending preliminary or revocation hearings, any period of incarceration imposed pursuant to this paragraph shall be counted from the date of issuance of a determination after a final hearing that the person has violated one or more conditions of community supervision, and the time between execution of the warrant and release of the person pending preliminary or revocation hearings shall count toward the period of reincarceration imposed pursuant to this paragraph. If a releasee is detained on bail or committed to the custody of the sheriff pursuant to section 530.10 of the criminal procedure law, any time the person spent confined in jail shall count towards any period of incarceration imposed pursuant to this paragraph. In all cases, the presiding officer shall impose the least restrictive reasonable sanction. Any periods of reincarceration shall run concurrently if more than one violation is adjudicated. If a period of incarceration is imposed pursuant to this paragraph, the releasee shall be released from custody upon expiration of the period or the end of the releasee's period of community supervision, whichever shall be sooner. For the violator serving an indeterminate sentence who while re-incarcerated has not been found by the department to have committed a serious disciplinary infraction, such violator shall be re-released on the date fixed at the revocation hearing. For the

violator serving an indeterminate sentence who has been found by the department to have committed a serious disciplinary infraction while re-incarcerated, the department shall refer the violator to the board for consideration for re-release to community supervision. Upon such referral the board may waive the personal interview between a member or members of the board and the violator to determine the suitability for re-release when the board directs that the violator be re-released upon expiration of the time assessment. The board shall retain the authority to suspend the date fixed for re-release based on the violator's commission of a serious disciplinary infraction and shall in such case require a personal interview be conducted within a reasonable time between a panel of members of the board and the violator to determine suitability for re-release. If an interview is required, the board shall notify the violator in advance of the date and time of such interview in accordance with the rules and regulations of the board.

[~~(xi)~~] **(xiii)** If the presiding officer sustains any violations, he must prepare a written statement, to be made available to the alleged violator and his counsel, indicating the evidence relied upon and the reasons for revoking presumptive release, parole, conditional release or post-release supervision, and for the disposition made.

[~~(xii)~~] **(xiv)** If at any time during a revocation proceeding the alleged violator, his or her counsel, or an employee of the department contends, or if it reasonably appears to the hearing officer, that the alleged violator is an incapacitated person as that term is defined in subdivision one of section 730.10 of the criminal procedure law and no judicial determination has been made that the alleged violator is an incapacitated person, the revocation proceeding shall be temporarily stayed until the superior court determines whether or not the person is fit to proceed. The matter shall be promptly referred to the superior court for determination of the alleged violator's fitness to proceed in a manner consistent with the provisions of article seven hundred thirty of the criminal procedure law, provided however that the superior court shall immediately appoint counsel for any unrepresented alleged violator eligible for appointed counsel under subparagraph (v) of **this** paragraph [~~(f) of subdivision three of section two hundred fifty-nine-i of this chapter~~]. The court shall decide whether or not the alleged violator is incapacitated within thirty days of the referral from the hearing officer. If the court determines that the alleged violator is not an incapacitated person, the court shall order that the matter be returned to the board of parole for continuation and disposition of the revocation proceeding. If the court determines that the alleged violator is an incapacitated person and if no felony charges are pending against the alleged violator, the court shall issue a final order of observation committing such person to the custody of the commissioner of mental health or the commissioner of developmental disabilities for care and treatment in an appropriate institution in a manner consistent with subdivision one of section 730.40 of the criminal procedure law. If a final order of observation has been issued pursuant to this section, the hearing officer shall dismiss the violation charges and such dismissal shall act as a bar to any further proceeding under this section against the alleged violator for such violations. If felony criminal charges are pending at any time against an alleged violator who has been referred to superior court for a fitness evaluation but before a determination of fitness has been made pursuant to this section, the court shall decide whether or not the alleged violator is incapacitated pursuant to article seven hundred thirty of the criminal procedure law and the revocation

proceeding shall be held in abeyance until such decision has been reached. The hearing officer shall adopt the capacity finding of the court and either terminate the revocation process if an order of observation has been made by the court or proceed with the revocation hearing if the alleged violator has been found not to be an incapacitated person.

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

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

§ 8. This act shall take effect on the first of April next succeeding the date on which it shall have become a law; provided however the department of corrections and community supervision shall have six months from the effective date of this act to begin holding preliminary revocation hearings required by the amendments to paragraph (c) of subdivision 3 of section 259-i of the executive law made by section five of this act, including establishing preliminary revocation hearing facilities that are not at correctional facilities for people who are not detained pending their hearings. Provided further, however, that the board of parole shall have two months from the effective date of this act to identify each releasee incarcerated for a sustained parole violation and recalculate such releasee's sentence in accordance with this act. If no incarceration may be imposed pursuant to subparagraph (xi) of paragraph (f) of subdivision 3 of section 259-i of the executive law, as added by section six of this act, the board shall immediately restore the releasee to community supervision. If the releasee may be incarcerated for the sustained violation the board shall fix a new date for release pursuant to subparagraph (xii) of paragraph (f) of subdivision 3 of section 259-i of the executive law, as amended by section six of this act. If such release date has passed, the board shall immediately restore the releasee to community supervision. Provided further, however, the department of corrections and community supervision shall have six months from the effective date of this act to set up the final revocation hearing courtrooms that are not at correctional facilities for people who are not detained pending their hearing pursuant to the amendments to paragraph (f) of subdivision 3 of section 259-i of the executive law as made by section six of this act. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.