STATE OF NEW YORK

5576--A

2021-2022 Regular Sessions

IN ASSEMBLY

February 19, 2021

Introduced by M. of A. FORREST, HUNTER, RICHARDSON, NIOU, SEPTIMO, MAMDANI, BURDICK, GONZALEZ-ROJAS, JACKSON, GALLAGHER, KELLES, MITAYNES, MEEKS, CLARK, EPSTEIN, SIMON, HEVESI, BARRON, ANDERSON, WEPRIN, TAYLOR, O'DONNELL, QUART, L. ROSENTHAL, ABINANTI, CARROLL, GOTTFRIED, DICKENS, AUBRY, DINOWITZ, BICHOTTE HERMELYN, CRUZ, SEAWRIGHT, PAULIN, WALKER, COOK, OTIS, REYES, BRONSON, PERRY, BURGOS, VANEL, LUPARDO, CAHILL, LAVINE, FAHY, DE LA ROSA, GALEF, RODRIGUEZ, BARRETT, HYNDMAN, SOLAGES, FRONTUS, McDONALD, J. D. RIVERA, DAVILA, PRETLOW, STECK, KIM, JOYNER, JEAN-PIERRE, PICHARDO, J. RIVERA, DARLING, FERNANDEZ -- Multi-Sponsored by -- M. of A. THIELE, ZINERMAN -- read once and referred to the Committee on Correction -- 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 four new subdivisions 5, 6, 7, and 8 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 conduct that violates a condition of community supervision in an important respect, other than the commission of a new felony or misdemeanor offense under the penal law.

7. "Non-technical violation" means: (a) the commission of a new felony or misdemeanor offense; or (b) conduct by a releasee who is serving a sentence for an offense defined in article 130 of the penal law or section 255.26 or 255.27 of such law, and such conduct violated a

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

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specific condition reasonably related to such offense and efforts to protect the public from the commission of a repeat of such offense.

8. "Absconding" means intentionally avoiding supervision by failing to maintain contact or communication with the releasee's assigned community supervision officer or area bureau office and to notify his or her assigned community supervision officer or area bureau office of a change in residence, and reasonable efforts by the assigned community supervision officer to re-engage the releasee have been unsuccessful.

§ 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 by absconding, 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~~] releasee's appearance in response to a notice of violation or the date of the execution of a warrant, whichever is earlier.

(b) When a person is alleged to have violated the terms of his or her conditional release or post-release supervision by absconding 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~~] releasee's appearance in response to a notice of violation or the date of the execution of a warrant, whichever is earlier. 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) Any person subject to community supervision shall be awarded earned time credits. 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

in compliance with the terms of their community supervision. 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. Persons subject to a sentence with a maximum term of life imprisonment or lifetime supervision shall not be eligible to receive earned time credits under this section.

(b) After a person has begun a period of community supervision pursuant to this section and section 70.45 of this article, such period of community supervision shall be reduced by thirty days for every thirty days that such person does not violate a condition of and remains in compliance with all conditions of his or her community supervision, provided, however, that the person is not subject to any sentence with a maximum term of life imprisonment or lifetime supervision. When a person is subject to more than one period of community supervision, the reduction authorized in this subdivision shall be applied to every such period of parole or conditional release to which the person is subject.

(c) Retroactive earned time credits shall be awarded to eligible persons subject to community supervision at the time this legislation becomes effective, provided, however, that the maximum allowable retroactive earned time credit awarded shall not exceed a period of two years. Retroactive earned time credits shall not be awarded to any releasee serving a term of reincarceration for a sustained parole violation at the time of the effective date of the chapter of the laws of two thousand twenty-one that added this subdivision until the releasee is returned to community supervision. Persons subject to a sentence with a maximum term of life imprisonment or lifetime supervision shall not be eligible to receive retroactive earned time credits under this section.

(d) If a releasee's current period of community supervision has been interrupted by a period of reincarceration prior to the effective date of the chapter of the laws of two thousand twenty-one that added this subdivision, no earned time credits shall be awarded for such period of reincarceration. The department shall calculate retroactive earned time credits within one year after the bill shall have become law and shall prioritize earned time credit calculations for releasees whose terms of community supervision are due to terminate before June first, two thousand twenty-two.

(e) Earned time credits may be withheld or revoked for the thirty-day period commencing from the date of violative behavior as sustained at a final revocation hearing, or for the period during which a releasee absconded from supervision, as sustained at a final revocation hearing. Earned time credits may not be earned and shall be suspended: (i) during a period of reincarceration imposed for any sustained violation; (ii) during the period in which the individual has absconded; or (iii) pending the outcome of a preliminary or final revocation hearing. If, at the preliminary hearing, there is no finding by a preponderance of the evidence of a violation of a condition of release in an important respect or a violation is not sustained at the final revocation hearing, then the individual shall be deemed to have been in compliance with the terms of release and shall be awarded earned time credits from the period in which the accrual was suspended. If a violation is sustained, 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 or conviction resulted in a term of reincarceration,

on the day the releasee is restored to community supervision, whichever is later.

(f) At least every one hundred eighty days from the first date of a person's release to community supervision, and every one hundred eighty days thereafter, the department of corrections and community supervision shall provide each person on community supervision a report indicating the total earned time credits received, the total earned time credits received in the prior one hundred eighty days, the total earned time credits withheld, the total earned time credits withheld in the prior one hundred eighty days, the total amount of time reduced from the person's sentence, and the person's earliest release date based on the amount of earned time credits received. The department shall provide the report in written or electronic form.

§ 3. Paragraph (d) 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, is amended to read as follows:

(d) When a person is alleged to have violated a condition of post-release supervision by absconding 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 a preliminary or final revocation hearing, the time assessment imposed following such hearing 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 court released the person pending a preliminary or final revocation hearing, 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 in an important respect, and shall include the time period between execution of the warrant and release of the person pending a preliminary or final revocation hearing. If a releasee is committed to the custody of the sheriff pursuant to article five hundred thirty of the criminal procedure law, the time assessment, if any, shall include any time the releasee spent in such custody. 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.

§ 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~~] **committed a technical violation**, 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 according to the terms of subparagraph (iii) of paragraph (c) of this subdivision, and shall be promptly served upon such person. If the releasee has failed to appear as directed in response to a notice of violation and has failed to appear voluntarily within forty-eight hours after such time and the person would be subject to incarceration pursuant to subparagraph (xii) 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 pending a recognizance hearing in accordance with the rules of the board. If the person has intentionally failed to appear as directed in response to a notice of violation and has intentionally failed to appear voluntarily within forty-eight hours after such time and the person would not be subject to incarceration pursuant to paragraph (f) of this subdivision should the violation be sustained at a final revocation hearing, no warrant shall issue and the violation shall be deemed sustained. Notice of that decision shall be promptly served upon the releasee. In such case, within one month of the date the notice of decision was served upon the releasee, the releasee may move to vacate such a sustained violation if the releasee can show by a preponderance of the evidence that the notice of violation was not properly served or the failure to appear was otherwise excusable. If the parole officer having charge of a person under community supervision shall have probable cause to believe that such person has committed a non-technical violation, 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 notice of violation may be issued or** 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~~]**. However, if a releasee** 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 issuance of a notice of violation, service of a notice of violation, service of a notice of decision, and the retaking and detention of any [~~such~~] person for whom a warrant has been issued pursuant to this subparagraph 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~~] pending a recognizance hearing pursuant to subparagraph (iv) of this paragraph. It shall not be a condition of parole nor may a notice of violation or a warrant 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 or due to conduct related to cannabis that is lawful pursuant to the laws of New York.

(iv) Notwithstanding the provisions of any other law, upon execution of a warrant issued pursuant to this section for any releasee alleged to have committed a violation of a condition of release in an important respect in the city of New York, the authorized officer shall present the releasee to the criminal court of the city of New York or the supreme court criminal term in the county where the violation is alleged to have been committed for a recognizance hearing within twenty-four hours of the execution of the warrant. If no such court of record is available to conduct any business of any type within twenty-four hours of the execution of the warrant, the recognizance hearing shall commence on the next day such a court in the jurisdiction is available to conduct any business of any type. For any releasee alleged to have committed a violation of a condition of release in an important respect outside of the city of New York, the authorized officer shall present the releasee to a county court, district court or city court in the county or city where the violation is alleged to have been committed for a recognizance hearing. If no such court of record is available to conduct any business of any type within twenty-four hours of the execution of the

warrant, the recognizance hearing shall commence on the next day such court is available to conduct any business of any type.

(v) At a recognizance hearing, the department shall have the burden of demonstrating to the court that the executed warrant was properly issued and served pursuant to this section. The department shall be responsible for presenting information to the court regarding the alleged violation and the releasee's community supervision record. If the alleged violation is the subject of a pending criminal prosecution, the department shall coordinate with the office of the district attorney to ensure information regarding the alleged violation and the releasee's community supervision record is presented to the court. At a recognizance hearing, the department shall have the burden of demonstrating to the court that the executed warrant was properly issued and served pursuant to this section. The department shall be responsible for presenting information to the court regarding the alleged violation and the releasee's community supervision record. If the alleged violation is the subject of a pending criminal prosecution, the department shall coordinate with the office of the district attorney to ensure information regarding the alleged violation and the releasee's community supervision record is presented to the court.

(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 may order that the releasee be detained pending a preliminary or final revocation hearing 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 hearing. Otherwise, the court shall release the releasee on the least restrictive non-monetary conditions that will reasonably assure the releasee's appearance at subsequent preliminary or revocation hearings, with a presumption of release on recognizance. The court shall explain its decision on the record or in writing. If non-monetary conditions of release are imposed, the releasee shall not be required to pay for any part of the cost of such conditions.

(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 to participate in a recognizance proceeding, where such person is financially unable to retain counsel, the court in which any criminal case against the individual is pending, or if there is no such case pending, 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 to be 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 the violation charge involves conduct that would constitute a new felony or misdemeanor offense, such recognizance hearing may be held at the same time as a proceeding pursuant to article five hundred thirty of the criminal procedure law for any warrants issued by the department prior to such proceeding. If at the proceeding pursuant to article five hundred thirty of the criminal procedure law the court imposes bail on the new alleged criminal offense or commits the releasee

to the custody of the sheriff pursuant to article five hundred thirty of the criminal procedure law and the releasee secures release by paying bail or under non-monetary conditions or by operation of law, then the releasee shall not be detained further based solely on the warrant issued by the department. If the department issues a warrant for a non-technical violation for alleged criminal conduct that has already been the subject of a court's order pursuant to article five hundred thirty of the criminal procedure law, then within twenty-four hours of execution of the warrant the releasee shall be provided a recognizance hearing pursuant to this subparagraph, provided, however, that if no court as defined in subparagraph (iv) of this paragraph is available to conduct any business of any type within twenty-four hours of the execution of the warrant, then the recognizance hearing shall commence on the next day such court is available to conduct any business of any type.

§ 5. Subparagraphs (i), (ii), (iii) and (iv) of paragraph (c) of subdivision 3 of section 259-i of the executive law, subparagraphs (i) and (ii) 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. The hearing shall be scheduled and held in a courthouse, in cooperation with the chief administrator of the courts and the chief administrator's designees, provided, however, that if such a courthouse is not reasonably available for such hearing, the department may designate a suitable office or other similar facility that is not a correctional facility, detention center or local correctional facility for such hearing.

(B) For any alleged violation for which a court issued an order detaining a person, within five days of the issuance of such order to detain or execution of a 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. For any alleged violation for which a person was released on recognizance, within ten days of the issuance of the order of release on recognizance, the department shall afford such person a preliminary revocation hearing.

[~~(ii) The preliminary presumptive release, parole, conditional release or post-release supervision revocation hearing shall be conducted at an~~

~~appropriate correctional facility, or such other place reasonably close to the area in which the alleged violation occurred as the board may designate.~~] (ii) The preliminary presumptive release, parole, conditional release or post-release supervision revocation hearing shall be scheduled and held in a courthouse, in cooperation with the chief administrator of the courts and the chief administrator's designees, provided, however, that if such a courthouse is not reasonably available for such hearing, the department may designate a suitable office or other similar facility that is not a correctional facility, detention center or local correctional facility for such hearing.

(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; that such person shall have the right to representation by counsel at any preliminary and final revocation hearings; and the name and contact details for institutional defenders or assigned private counsel, as applicable. 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~~] are relevant to 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~~] subparagraph.

(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; and the name and contact details for institutional defenders or assigned private counsel, as applicable. Any additional documents having been collected or prepared that support the charges 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, subparagraph (x) as amended by section 38-f-1 of subpart A of part C of chapter 62 of the laws of 2011 and subparagraph (xi) as amended by chapter 103 of the laws of 2021, 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 at a preliminary hearing:

(A) If a court issued an order detaining a person after a finding by a preponderance of the evidence that such person committed a violation then within thirty days of the finding by a preponderance of the evidence determination at the preliminary hearing, 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.

(B) (1) If a notice of violation was issued or such person was released on recognizance the department shall within forty-five days of the issuance of the notice of violation or the order of release on recognizance afford the person a final 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.

(2) The final revocation hearing shall not be held at a correctional facility, detention center or local correctional facility. Such hearing shall be scheduled and held in a courthouse, in cooperation with the chief administrator of the courts and the chief administrator's designees, provided, however, that if such a courthouse is not reasonably available for such hearing, the department may designate a suitable office or other similar facility that is not a correctional facility, detention center or local correctional facility for such hearing.

(3) The department shall have six months from the date of the effective date of the chapter of the laws of two thousand twenty-one that amended this paragraph to begin to hold such hearings at allowable locations.

(C) However, if an alleged violator requests and receives any postponement of his or her 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 **or her** 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 **or her** right to present mitigating evidence relevant to restoration to presumptive release, parole, conditional release or post-release supervision and his **or her** 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 **or she** 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 **or she** 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 **or she** 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 sustained technical violation 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 technical violation, except as provided in subparagraph (xii) of this paragraph.

(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; or (C) [~~in the case of presumptive releasees, parolees or conditional releasees,~~] direct the violator's reincarceration and for non-technical violations fix a date for consideration by the board for re-release on presumptive release, or parole or conditional release, as the case may be; or (D) for non-technical violations 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, shall apply for technical violations; and the following limitations:

(1) Absconding. For absconding up to seven days reincarceration may be imposed for the first violation, up to fifteen days reincarceration may be imposed for the second violation, and up to thirty days reincarceration may be imposed for the third or any subsequent violation;

(2) Sanctions for certain technical violations. Reincarceration shall not be imposed for a sustained technical violation that involves: (a) violating curfew; (b) alcohol use, provided however that incarceration is permissible for alcohol use if the person is subject to community supervision due to a conviction for driving under the influence of alcohol; (c) drug use, provided, however incarceration is permissible for drug use if the person is subject to community supervision due to a conviction for driving under the influence of drugs; (d) failing to notify parole officer of a change in employment or program status; (e) failing to pay surcharges and fees; (f) obtaining a driver's license or driving a car with a valid driver's license, provided however incarceration is permissible if either action is explicitly prohibited by the person's conviction; (g) failing to notify community supervision officer of contact with any law enforcement agency, provided however, incarceration is permissible if the person intended to hide illegal behavior; (h) failing to obey other special conditions, provided however that incar-

ceration is permissible if the failure cannot be addressed in the community and all reasonable community-based means to address the failure have been exhausted; and

(3) Sanctions for all other technical violations. For all other technical violations, 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.

(xiii) If a warrant was executed pursuant to subparagraph (iv) of paragraph (a) of this subdivision by a criminal court and the court released the person pending a preliminary or final revocation hearing, any period of reincarceration imposed pursuant to this paragraph shall be counted from the date of issuance of a determination after a final revocation 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 a preliminary or final revocation hearing shall count toward any period of reincarceration imposed pursuant to this paragraph. If a releasee is committed to the custody of the sheriff pursuant to article five hundred thirty of the criminal procedure law, any time the person spent confined in a correctional facility or local correctional facility shall be credited toward any period of reincarceration imposed pursuant to this paragraph. In all cases, the presiding officer shall impose the least restrictive reasonable sanction. Any periods of reincarceration imposed pursuant to this section shall run concurrently if more than one violation is sustained. If a period of reincarceration 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)~~] (xiv) If the presiding officer sustains any violations, [~~he or she~~] such officer must prepare a written statement, to be made available to the alleged violator and his or her 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. The presiding officer shall also advise the alleged violator in a written statement that revocation will result in loss of the right to vote while he or she is serving the remainder of his or her felony sentence in a correctional facility and that the right to vote will be restored upon his or her release.

[~~(xii)~~] (xv) 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 4-a to read as follows:

4-a. Appeals from non-technical violation findings. (a) Notwithstanding the provisions of any other law, when in a violation proceeding brought pursuant to this section, any of the charges sustained by the hearing officer would constitute a misdemeanor or felony if such charge were or had been brought in a criminal court, the releasee may, in lieu of an administrative appeal to the board pursuant to subdivision four of

this section, appeal such determination to the lowest level of the following courts serving the jurisdiction in which the hearing was held or in which any such sustained conduct was alleged to have occurred: city court, district court, county court or supreme court; provided, however, that if any such misdemeanor or felony charge was prosecuted in any city, district, county or supreme court, such appeal shall be filed in that court.

(b) The appeal shall be commenced by the filing of a notice of appeal in the same manner as an appeal to the appellate division as set forth in paragraphs (a), (b), (d) and (e) of subdivision one and subdivision six of section 460.10 of the criminal procedure law. Counsel shall be assigned to the individual, if unable to afford counsel, by the court before which the appeal is taken or is to be taken. Such court may stay such determination pending the appeal, in a manner consistent with the provisions of section 460.50 of the criminal procedure law or as otherwise authorized. Within thirty days after receiving such a notice of appeal, the board shall serve on the individual or counsel and file with such court a transcript of the proceedings before the hearing officer prepared pursuant to paragraph (a) of subdivision six of this section, and copies of the documents, photographs and records considered by the hearing officer, and provide access to any other evidence considered by the hearing officer who made such determination.

(c) The appeal shall be perfected in the manner set forth in section 460.70 of the criminal procedure law, other provisions of law generally applicable to criminal appeals, and authorized rules implementing this section promulgated by the chief administrator of the courts. The department shall have responsibility for presenting the department's position through any submissions to the court on the appeal. The department shall coordinate with relevant district attorneys to ensure appropriate information may be provided to the court. The district attorney of the jurisdiction may appear on any such appeal without the necessity of a motion or order of the court.

(d) On such appeal, the reviewing city, district, county or supreme court shall consider de novo the issues raised by the appellant, including but not limited to the following: (a) whether any sustained violation charge should have been sustained; (b) whether reduction or dismissal of the alleged violation charge or charges is warranted, in accordance with the principles set forth in section 170.40 or section 210.40 of the criminal procedure law or otherwise; and (c) whether any time assessment and other authorized sanction imposed by the hearing officer should be vacated, reduced or, notwithstanding any law, rule or regulation to the contrary, ordered to run concurrently with any other sentence, time assessment, or period of reincarceration imposed.

§ 8. 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.

§ 9. Severability. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review, the

judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this act directly involved in the controversy in which the judgment shall have been rendered.

§ 10. This act shall take effect March 1, 2022; provided, however, that the amendments made to subparagraph (xi) of paragraph (f) of subdivision 3 of section 259-i of the executive law made by section six of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2021 takes effect; provided however, within six months of such effective date, the department of corrections and community supervision in consultation with the board of parole shall calculate and award all earned time credits pursuant to subdivision 4 of section 70.40 of the penal law as added by section two of this act to all persons serving a sentence subject to community supervision at the time this legislation becomes law retroactive to the initial date such person began his or her earliest period of community supervision prior to any revocation of community supervision. Provided further, however, within ten months of becoming law the department of corrections and community supervision in consultation with the board of parole shall identify all individuals incarcerated for a sustained violation of community supervision and recalculate such individual's time assessment in accordance with 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 to be made and completed on or before such effective date.