STATE OF NEW YORK

6263

2023-2024 Regular Sessions

IN SENATE

April 10, 2023

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

AN ACT to amend the executive law and the penal law, in relation to providing for the return of persons to custody for violations of conditions of presumptive release, parole, conditional release or post-release supervision; and to repeal certain provisions of such laws relating thereto

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

Section 1. Subdivisions 5, 6, 7, and 8 of section 259 of the executive law are REPEALED.

§ 2. Subdivision 4 of section 70.40 of the penal law is REPEALED.

§ 3. Subdivision 3 of section 70.40 of the penal law, as amended by chapter 427 of the laws of 2021, is amended 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 [~~releasee's appearance in response to a notice of violation or the date of the execution of a warrant, whichever is earlier~~] **return of the person to an institution under the jurisdiction of the state department of corrections and community supervision**.

(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 [~~releasee's appear-~~

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

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~~ance in response to a notice of violation or the date of the execution of a warrant, whichever is earlier~~] 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 the department. Upon such return, the person shall resume service of his or her sentence. 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 [~~execution of a warrant pursuant to paragraph (a) of subdivision three of section two hundred fifty-nine-i of the executive law~~] delinquency 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. Paragraph (d) of subdivision 5 of section 70.45 of the penal law, as amended by chapter 427 of the laws of 2021, 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. [~~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~~] **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** 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.

§ 5. Subparagraphs (iv), (v), (vi), (vii) and (viii) of paragraph (a) of subdivision 3 of section 259-i of the executive law are REPEALED.

§ 6. Subparagraph (i) of paragraph (a) of subdivision 3 of section 259-i of the executive law, as amended by chapter 427 of the laws of 2021, is amended 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 [~~probable~~] **reasonable** cause to believe that such person has [~~committed a technical violation~~] **lapsed into criminal ways or company, or has violated one or more conditions of his or her** 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 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 deci-~~

~~sion 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 **or her** temporary detention in accordance with the rules of the board[~~. However, if a releasee~~] **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 [~~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 [~~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~~]**; 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**.

§ 7. Subparagraphs (ix) and (x) of paragraph (c) of subdivision 3 of section 259-i of the executive law are REPEALED.

§ 8. Subparagraphs (i), (ii), (iii), and (iv) of paragraph (c) of subdivision 3 of section 259-i of the executive law, as amended by chapter 427 of the laws of 2021, are amended to read as follows:

(i) [~~(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~~] 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.

(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~~] 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.

(iii) The alleged violator shall, [~~at the time a notice of violation is issued or at the time of a recognizance hearing~~] within three days of the execution of the warrant, be given written notice of the time, place and purpose of the [~~preliminary~~] hearing[~~, or if no preliminary hearing is required pursuant to this section, of the final revocation hearing~~] unless he or she is detained pursuant to the provisions 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. The notice shall state what conditions of [~~community~~] presumptive release, parole, conditional release or post-release supervision are alleged to have been violated, and in what manner; that such person shall have the right to appear and speak in his or her own behalf; that he or she shall have the right to introduce letters and documents; that he or she may present witnesses

who can give relevant information to the hearing officer[~~; that he or she has the right to confront the witnesses against him or her; 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 [~~are relevant to~~] **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 [~~a preponderance of the evidence~~] **probable cause** to believe that the [~~releasee~~] **presumptive releasee, parolee, conditional releasee or person under post-release supervision** has violated one or more conditions of his or her [~~community~~] **presumptive release, parole, conditional release or post-release** supervision in an important respect. Proof of conviction of a crime committed while under supervision shall constitute [~~prima facie evidence of a violation of a condition of community supervision~~] **probable cause** for the purposes of this [~~subparagraph~~] **section**.

§ 9. Paragraph (f) of subdivision 3 of section 259-i of the executive law, as amended by chapter 427 of the laws of 2021, is amended to read as follows:

(f) (i) [~~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)~~] **Revocation hearings shall be scheduled to be held within ninety days of the probable cause determination.** 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 **or her** 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 [~~pursuant to subparagraph (ix) of paragraph (c) of this subdivision~~] **as soon as possible but at least fourteen days prior to the scheduled date**.

(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 [~~have a right to~~] **be permitted** 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 [~~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~~] **a preponderance of the evidence adduced**.

(ix) If the presiding officer is not satisfied that there is [~~clear and convincing~~] **a preponderance of** 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 [~~clear and convincing~~] a preponderance of 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 [~~releasee~~] presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision be restored to supervision; (B) as an alternative to reincarceration, direct the [~~releasee receive re-entry services in the community from qualified nonprofit agencies; or~~] presumptive releasee, parolee, conditional releasee, or person serving a period of post-release supervision to be placed in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; (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.

[~~(xiv)~~] **(xi)** If the presiding officer sustains any violations, 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, condi-

tional 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.

[~~(xv)~~] **(xii)** 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. 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.

§ 10. Subdivision 4-a of section 259-i of the executive law is REPEALED.

§ 11. Subdivision 9 of section 259-i of the executive law is REPEALED.

§ 12. This act shall take effect immediately.