

Less is More (S. 1144-A; L 2021, ch 427)

Signed on September 17, 2021

Legislation Primer

Definitions [Executive Law 259]

- Absconding** means intentional failure to maintain contact/communication with supervision officer, failure to update address, and unsuccessful reasonable efforts to re-engage by officer
- Technical violation** means **any conduct that violates a condition of supervision in an important respect, other than the commission of a new penal law crime**
- Non-technical violations** means either **the commission of a new crime¹ or for a client on supervision due to a sex offense² or incest³ conviction, conduct that violated a specific condition of release that reasonably relates to efforts to protect the public from the commission of a similar repeat offense**
- Covers any client on parole, medical parole, post-release supervision, or conditional, presumptive, or temporary release
- Parole conditions must not include a ban on being in the company of or fraternizing with any person the release knows has a criminal record or knows has been adjudicated a youthful offender or due to conduct related to cannabis that is lawful under New York State Law. Also, such conduct cannot be the basis of a notice of violation or warrant. [Exec L 259-i(3)(i)]

Due Process

For technical violations [Exec L 259-i(3)(a)(i)]

- If accused of a technical violation, client must be promptly served a written notice to appear for a preliminary hearing.
- Client remains at liberty for that hearing.
- Standard has changed from parole officer needing **reasonable cause to probable cause**
- Cause has to be for the new definition of technical violation, not the old language of “lap[sing] into criminal ways or company”]
- If the client doesn’t appear after 48 hours of the scheduled hearing and *the client is subject to incarceration*,⁴ a warrant can be issued and the client can be detained until the recognizance hearing**
- If the client doesn’t appear after 48 hours of the scheduled hearing and *the client is not subject to incarceration*, no warrant can be issued, but the violation is sustained**
- The client has a month after that to argue that they either were not properly served the notice of decision or that the failure to appear was excusable

For non-technical violations [Exec L 259-i(3)(a)(i)]

- If PO has probable cause, warrant can be issued and client can be detained pending a recognizance hearing

¹ Note that this definition does not specify penal law crime, just any felony or misdemeanor

² Anything in P.L. article 130

³ P.L. 255.56 or 255.57

⁴ See “Incarceration” section below [Exec L 259-i(f)(xi), (xii)]

Recognizance Hearing

-If a warrant has been issued, a hearing must happen within 24 hours (or “the next day” the local court is open to hear “any business of any type”) [Exec L 259-i(3)(iv)]

-While the legislation does not articulate a remedy for failure to hold a hearing on a timely basis, there are possible litigation strategies to address the delay.

-In NYC, hearing is in criminal court or supreme court; outside NYC, hearing is in a court of record (county, district, or city court; not a town or village court)

-If the alleged violation could constitute a new criminal charge, the bail hearing on that charge can happen simultaneously to the hearing on the parole warrant

-It’s the department’s obligation to present information on the alleged violation, proper issuance and service, and if a pending criminal prosecution, to offer information jointly with DA’s office. [Exec L 259-i(3)(v)]

-Department must also show client’s community supervision record

-Court must consider indicators of stability, including employment record, family and community ties, history of reporting [Exec L 259-i(3)(vi)]

-If court finds that client presents a **substantial risk of willfully failing to appear at preliminary or final revocation hearing** *and* that **no non-monetary condition or combination of conditions in the community would reasonably assure appearance**, court can detain client.

-If court cannot make that finding, client must be released **on least restrictive non-monetary conditions that will reasonably assure appearance**, with a **presumption of RoR**.

-if non-monetary conditions are imposed, client can’t be required to pay for any part

-Right to counsel applies, court must assign counsel for those eligible under County Law art 18-B. [Exec L 259-i(3)(vii)]

-If bail or non-monetary conditions are set on a new criminal charge, and client makes bail or is accepted into the non-monetary conditions, **the parole warrant cannot continue to hold client in by itself**. [Exec L 259-i(3)(viii)]

After Recognizance Hearing

-For any technical violation, preliminary hearing must happen **within 10 days** of the issuance of the violation notice or RoR [Exec L 259-i(3)(c)(i)(A)]

-Hearing must happen at a courthouse, or else an office or facility that is not a correctional facility or detention center

-For a violation where client is being held, preliminary hearing must happen **within 5 days** [Exec L 259-i(3)(c)(i)(B)]

-That hearing must also happen at a courthouse, or else an office or facility other than a correctional facility or detention center

-Client must be given written notice of their preliminary hearing either when notice of violation is issued or at recognizance hearing [Exec L 259-i(3)(c)(iii)]

-That notice must state which conditions of release are alleged to have been violated, explain right to counsel, right to present witnesses and introduce documents, confrontation rights, and contact details for local defenders or assigned counsel.

Preliminary Hearing [Exec L 259-i(3)(c)(ix)]

-Standard of proof is now **preponderance** of the evidence that client has violated one or more conditions **in an important respect** (was probable cause)

-**Proof of conviction of a crime committed while under supervision is now prima facie evidence of a violation** (was also probable cause)

- Right to assigned counsel at a preliminary hearing is added [Exec L 259-i(3)(c)(x)]
- At conclusion of preliminary hearing, client must receive similar written notice of final revocation hearing
- Nonprofit service providers should be made available to offer community-based forms of release [Exec L 259-i(9)]

Final Revocation Hearing [Exec L 259-i(3)(f)]

- If client is held after PH, final revocation hearing must happen **within 30 days**⁵ (so overall 35 days from issuance of violation notice or recognizance hearing)
- If client is ROR'd, final revocation hearing must happen **within 45 days**
 - Client can request extensions of any hearing deadlines
- Similar restrictions on location for revocation hearing - if not courthouse, not a correctional facility or detention center [Exec L 259-i(3)(f)(i)(B)(2)]
- Standard of proof is now **clear and convincing evidence that supports the charges** [Exec L 259-i(3)(f)(ix), (x)]
- Conduct that formed the basis of an arrest cannot form the basis of a sustained violation if the court has adjudicated the matter with an acquittal, ACD, or violation** [Exec L 259-i(f)(viii)]
- If a parole violation is found, judge can:
 - release client and restore to supervision;
 - mandate re-entry services from nonprofit service providers in the community;
 - for non-technical violations, detain client and schedule date for consideration of release via parole board, conditional release, etc; or
 - for non-technical violations **or** clients with technical violations on PRS for felony sex offenses, re-incarcerate up to the time owed on PRS, not to exceed 5 years
- Nonprofit service providers should be made available to offer community-based forms of release [Exec L 259-i(9)]

Sanctions

Incarceration [Exec L 259-i(f)(xi), (xii)]

- Incarceration cannot be imposed for any technical violation, including curfew, alcohol and drug use (unless part of supervision based on DWI conviction), failure to notify for change of employment, failure to notify of contact with law enforcement⁶, obtaining a driver's license, [Exec L 259-i(f)(xii)(2)] except for:**
 - clients on PRS for a felony sex offense** (permissible up to the full balance of the remaining PRS time, not to exceed 5 years)
 - clients who have been found to have absconded, first violation re-incarceration allowed up to 7 days, second violation up to 15 days, third violation and beyond up to 30 days [Exec L 259-i(f)(xii)(1)]
 - clients who have been found to violate **any other technical violation, for a third time**, re-incarceration is allowed up to 7 days on the third substantiated violation, up to 15 days on the fourth, and up to 30 days for the fifth and beyond [Exec L 259-i(f)(xii)(3)]
- Any time client has spent in on the violation, either while waiting for recognizance hearing or if they've been held for duration, is credited towards any re-incarceration sanction [Exec L 259-i(f)(xiii)]

⁵ Unclear if this applies any time client is held, or only if client is held as result of PH

⁶ Unless client is trying to hide "illegal behavior"

- All time runs concurrently if there is more than one sustained violation
- Least restrictive reasonable sanction must be imposed
- Anyone currently incarcerated for a sustained violation of supervision must have their sentence recalculated within 10 months of the legislation becoming law** (so by January 2023)

Appeals [Exec L 259-i(4-a)]

- If any of the sustained violations constitute a crime, client can forgo administrative appeal to the board and instead appeal to the court specified in subdivision 4-a
- Same notice of appeal limitations apply
- Right to counsel
- Within 30 days of notice of appeal, client and counsel must receive transcript and any supporting documents considered by the hearing court
- DA can appear on appeal instead of department
- Appeal standard is de novo, court must consider whether the violation should in fact have been sustained and whether any given sanctions should be vacated or reduced**

Time Credits [P.L. 70.40(4)]

- If client is on community supervision, for every 30 days with no violation, client can receive 30 days of “earned time credits” taken off the back end of client’s supervision period.
 - Unless client is on lifetime supervision, in which case client are not entitled to credits
 - Credit applies to each form of supervision client is on
- Can be applied retroactively, with a maximum earned time credit of 2 years
 - All retroactive awards must be calculated by six months of the legislation’s effective date (so by September 2022)
- Client can’t earn time credits while a) re-incarcerated, b) absconded, or c) pending a hearing
- If no violation is shown by a preponderance at the hearing, client earn the time credits retroactively.
- Twice a year client owed a report of how many earned time credits received

Implementation

- The primary effective date is March 1, 2022. See The Legal Aid Society’s separate memo on the effective date for technical violations.
- Other deadlines are included above in relevant sections