21-877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREDERICK ROBERSON, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

– v. –

ANDREW M. CUOMO, Governor of New York, in his official capacity; and TINA M. STANFORD, Chairperson of the New York State Board of Parole, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District Of New York

BRIEF FOR PLAINTIFF-APPELLANT

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Dated: June 30, 2021
New York, N.Y.

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PRELIMINARY STATEMENT

This case raises the novel issue of whether New York Board of Parole regulations mandating the detention of all people charged with violating any condition of their parole pending their final revocation hearing without an opportunity to be heard on their suitability for release violates the Due Process Clause. Each year, this mandatory detention regime causes thousands of people to be jailed for months prior to their revocation hearing, on the grounds of public safety, only for the Board to determine at their final parole revocation hearings that they pose no public safety risk and can be safely released to community supervision. Named plaintiff Frederick Roberson is a 58-year-old disabled veteran who was accused of non-criminal parole rule violations, and mandatorily jailed for months pending his final revocation hearing. More than 70% of people charged with such non-criminal rule violations are released back to community supervision at the final hearing when the Board does consider public safety. By the Board's own account, it ultimately finds that the majority of all people mandatorily detained, regardless of their parole charge, pose no public safety risk.

The mandatory detention of people on parole has devastating consequences for their employment, housing, familial relationships, and rehabilitation. The public also suffers because mandatory detention unnecessarily destabilizes the lives of people on parole and thus undermines their rehabilitation and public safety.

Under the balancing test for assessing due process claims established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the undisputed facts about the important liberty interests at stake and the severe consequences of detention, the risk of erroneous detention, and the public interest in a system that more fairly and accurately assesses risk and reduces the overwhelming costs of unnecessary incarceration, leads to the clear conclusion that people on parole must be afforded an opportunity to be meaningfully heard on their purported public safety risk.

The district court's contrary decision granting summary judgment in favor of the Board rests upon it misreading the law and reaching factual conclusions that have no basis in the record. The decision conflicts with decades-old Supreme Court precedent establishing that people have a due process right to meaningfully contest the factor upon which the deprivation of their liberty depends—in this case, public safety risk. This right to a meaningful opportunity to be heard to prevent the government's arbitrary deprivation of liberty is a fundamental principle of due process, and the district court's decision cannot be squared with this principle.

JURISDICTION

This case presents a challenge under the Due Process Clause of the Fourteenth Amendment and the district court had jurisdiction over the case pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). This Court has jurisdiction over the plaintiff's appeal of the district court's final decision pursuant to 28 U.S.C. § 1291. In the decision being appealed, the district court granted the defendants' motion for summary judgment and denied the plaintiff's cross-motion for summary judgment on the sole claim the plaintiff asserted in this case.

This appeal is timely. The district court issued its summary judgment order on March 10, 2021, and the plaintiff filed his notice of appeal on April 5, 2021. *See* 28 U.S.C. § 2107(a); Joint Appendix ("J.A.") 995–96.

ISSUES PRESENTED

1. Whether the district court erred in entering summary judgment for the defendants and holding that due process permits the mandatory detention of people on parole on public safety grounds pending final adjudication of their parole violation charge without affording them a meaningful opportunity to be heard on whether their release in fact poses a risk to the public.

2. Whether the district court erred in terminating the plaintiff's motion for class certification.

STATEMENT OF THE CASE

This case challenges the regulations of the New York Board of Parole (the "Board"), chaired by defendant Tina M. Stanford, requiring the mandatory detention of people on parole pending the final adjudication of their parole violation charge without providing them a meaningful opportunity to be heard on whether they can be safely released. Every year, this mandatory detention regime causes thousands of people to be jailed for months, only for the Board to determine at their final parole revocation hearings that they pose no public safety risk and can be safely released to community supervision. Named plaintiff Frederick Roberson initiated this action on April 3, 2020 in the Southern District by filing a class action complaint arguing that the Board's mandatory detention regime violates the due process rights of people on parole.[1] *See* District Ct. ECF No. 1; *see also* J.A. 10–33 (Amended Complaint). Mr. Roberson immediately moved for class certification on behalf of a putative class of people on parole who are or will be mandatorily detained in New York City. *See* District Ct. ECF Nos. 5–8.

Mr. Roberson and the putative class (the "plaintiffs") then moved for a preliminary injunction, which the district court denied on April 20, 2020. *See*

[1] This action was originally brought by named plaintiffs Michael Bergamaschi and Frederick Roberson, but Mr. Bergamaschi passed away on August 5, 2020 and was removed as a party plaintiff pursuant to the district court's summary judgment decision and order. *See* J.A. 950 n.1; S.P.A. 1 n.1.

Bergamaschi v. Cuomo, No. 20 CIV. 2817, 2020 WL 1910754 (S.D.N.Y. Apr. 20, 2020). The district court deferred ruling on the class certification motion until summary judgment. *See* District Ct. ECF No. 39 (docket text). The parties then engaged in discovery and filed cross-motions for summary judgment. *See* J.A. 34–35, 224–25. On March 10, 2021, Judge Colleen McMahon granted the Board's motion for summary judgment, denied the plaintiffs' cross-motion for summary judgment, and closed the case. *See Roberson v. Cuomo*, ---F. Supp. 3d---, No. 20 CIV. 2817, 2021 WL 918293 (S.D.N.Y. Mar. 10, 2021); *see also* J.A. 950–93; Special Appendix ("S.P.A.") 1–44 (Decision and Order on Summary Judgment). The district court did not rule on the merits of the class certification motion, and instead directed the clerk to mark that motion, and all other open motions, off the court's list of open motions and close the case. *Roberson*, 2021 WL 918293, at *24; J.A. 993; S.P.A. 44.[2]

STATEMENT OF FACTS

In support of its summary judgment motion, the Board submitted a statement of facts pursuant to Southern District of New York Local Rule 56.1, J.A. 211–23,

[2] On June 10, 2021, the New York State Legislature passed the Less Is More Act, a bill that would end the Board's mandatory detention regime if signed into law without modification. *See* S.B. 1144A, 2021–22 Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/s1144/. Governor Cuomo has not provided any indication to the public as to whether he intends to veto the bill, sign the bill with modifications, or sign the bill without any modifications.

the majority of which the plaintiffs disputed by citation to evidentiary materials, J.A. 367–89. In addition, the plaintiffs filed a Rule 56.1 counterstatement that disputed many of the facts asserted by the Board and asserted separate facts in support of their cross-motion for summary judgment, along with accompanying evidentiary materials. J.A. 367–400. In reply, the Board submitted its response pursuant to Rule 56.1. J.A. 828–53. Given that this appeal concerns a grant of summary judgment against the plaintiffs, the relevant facts before this Court are those asserted in the plaintiffs' Rule 56.1 counterstatement and those in the Board's statement that are not disputed, with all inferences drawn and ambiguities resolved in favor of the plaintiffs. *See Halo v. Yale Health Plan*, 819 F.3d 42, 47 (2d Cir. 2016).

I. New York Requires the Mandatory Detention of All Persons Awaiting a Final Parole Revocation Hearing.

Every year, New York's Board of Parole mandates jail on public safety grounds for thousands of people accused of violating conditions of parole until a final parole revocation hearing where the Board determines if the alleged violations occurred. J.A. 390, 392–93, 398 (Pls.' Counterstatement of Material Facts in Supp. of Pls.' Cross-Mot. for Summ. J. ("Facts") ¶¶ 59, 76–77, 115).

The Board requires that people released under its supervision follow a set of universal parole conditions, like reporting to their parole officer, and in some cases special parole conditions specific to each individual, such as a curfew or attendance at a treatment program. J.A. 390 (Facts ¶ 60). If parole officers believe that a parolee

has violated these conditions in an "important respect," a term the regulations do not define, they may seek a parole violation warrant after a case conference with the senior parole officer. J.A. 391 (Facts ¶¶ 65, 67). In the case conference, the parole officer and senior parole officer consider a number of factors without any input or explanation from the individual under parole, and the senior parole officer may issue a parole warrant requiring arrest and temporary detention in the local jail where the arrest took place. *See* J.A. 391–92 (Facts ¶¶ 63–70). Many of these warrants are issued for rule violations such as losing a job, or missing a counseling session or substance abuse programming meeting—actions that do not necessarily cause community harm or jeopardize public safety—and are known as technical violations. *See* J.A. 392 (Facts ¶ 72). Parole warrants are also issued to individuals accused of committing new crimes as a violation of parole, including minor misdemeanor crimes. *See* J.A. 391, 394 (Facts ¶¶ 69, 86).

Arrests—and subsequent mandatory detention—for charges of violating parole conditions occur for a wide range of non-criminal activity. *See* J.A. 390, 392 (Facts ¶¶ 60, 72). In 2018, 67% of parole warrants were issued for someone not being where they were supposed to be or for violating other rules of supervision. J.A. 392 (Facts ¶ 73). In 2019, the average length of incarceration for parolees detained in New York City jails for alleged technical parole violations was 63 days, and the average length of incarceration for parolees detained for new arrests was 136 days,

or over four months. J.A. 395 (Facts ¶ 94). For both groups, the overwhelming majority of those detained were Black or Latinx. J.A. 395 (Facts ¶ 95) (89% of those held on technical violation warrants and 91% of those held on warrants for new arrests were Black or Latinx).

After their arrest and detention, people on parole are entitled to a preliminary probable cause hearing where a hearing officer determines whether there is probable cause to believe that they violated a parole condition. J.A. 373 (Facts ¶¶ 8–9); S.P.A. 63 (N.Y. Exec. Law § 259-i(3)(c)(i), (iv)). Under the Board's mandatory detention regulations, each parolee for whom probable cause of an alleged violation is established or who waives their preliminary probable cause hearing is automatically detained pending their final revocation hearing. J.A. 392–93 (Facts ¶ 76); S.P.A. 48–49, 51 (9 N.Y. Comp. Codes R. & Regs. ("N.Y.C.R.R.") § 8005.7(a)(5) and 9 N.Y.C.R.R. § 8004.3(d)(1), which together mandate detention for parolees scheduled for a final revocation hearing). The only purpose of such detention is to maintain public safety. J.A. 392 (Facts ¶ 74). At the final revocation hearing, an administrative law judge ("ALJ"), a Board employee, determines whether the evidence demonstrates that the person has violated a parole condition, and if so, the appropriate response to the violation. J.A. 393 (Facts ¶¶ 78–79); S.P.A. 53–54 (9 N.Y.C.R.R. § 8005.20(c)); S.P.A. 66 (N.Y. Exec. Law § 259-i(3)(f)(x)).

II. Frederick Roberson and Samuel Murphy's Charges and Detention.

Named plaintiff Frederick Roberson and putative class member Samuel Murphy are two of the hundreds of people charged each year with technical parole violations and mandatorily detained pending their final revocation hearings. Mr. Roberson is a 58-year-old physically disabled veteran with a number of complicated medical ailments who has struggled with drug addiction for much of his life. J.A. 226–27 (Declaration of Frederick Roberson ("Roberson Decl.") ¶¶ 1–2, 4). While on parole, he attended a drug treatment program but eventually relapsed and stopped attending the program. J.A. 227 (Roberson Decl. ¶ 4). He was arrested at his home on a parole warrant and charged with several technical violations, including not completing or reporting a change in his drug treatment program, missing a curfew, and alleged drug use. *Id.* He was mandatorily detained for two months, during which he had to be hospitalized multiple times because his chronic pancreatitis was exacerbated and his legs became extremely swollen.[3] J.A. 226–27 (Roberson Decl. ¶¶ 2, 6).

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[3] Mr. Roberson was restored to supervision before his final revocation hearing when a New York State Supreme Court judge ordered the Board to release him in April 2020 due to the COVID-19 pandemic. *See* J.A. 227 (Roberson Decl. ¶ 5); District Ct. ECF No. 31 (Declaration of Philip Desgranges ¶ 4). He is on post-release supervision until March 3, 2022. *See* J.A. 231 (Roberson Decl., Ex. A).

When Mr. Roberson was incarcerated pending a final hearing, his disability-related Supplemental Security Income ("SSI") benefits were suspended. J.A. 227 (Roberson Decl. ¶ 7). During the time that it took to reapply after his release, the benefits remained suspended and he lost his income for three months, causing his family to fall three months behind on their mortgage payments. J.A. 227–28 (Roberson Decl. ¶¶ 7, 9).

Similarly, Mr. Murphy is a 56-year-old man with several disabilities, including near-total blindness and stage IV kidney disease. J.A. 233–34 (Declaration of Samuel Murphy ("Murphy Decl.") ¶¶ 1, 6). Mr. Murphy's parole officer directed him to live at a homeless shelter instead of with his sister or friend. *Id.* (Murphy Decl. ¶¶ 3,8). But Mr. Murphy witnessed behaviors at the shelter that made him feel unsafe. J.A. 233 (Murphy Decl. ¶ 3). After the shelter reported that he was not sleeping there, he was arrested on a parole warrant in February 2020 at his friend's home. *Id.* (Murphy Decl. ¶ 4). He was charged with several technical violations, including failing to report a change in address, curfew violations, and a missed office appointment. J.A. 234 (Murphy Decl. ¶ 5). Months later, after he was released back to parole, he was charged again with similar technical rule violations for residing with the same friend instead of at his assigned shelter. *Id.* (Murphy Decl. ¶¶ 8–10). He was then again mandatorily detained in August 2020 until his final hearing the next month where the ALJ sustained the technical violation charges and restored him

to community supervision. *Id.* (Murphy Decl. ¶¶ 10, 12). After this second re-incarceration, his parole officer finally allowed Mr. Murphy to stay at a different location, this time at a hotel set up as temporary shelter for people recently released from incarceration. *Id.* (Murphy Decl. ¶ 12).

When Mr. Murphy was incarcerated pending a final hearing, both his disability-related SSI and Supplemental Nutrition Assistance Program ("SNAP") benefits were automatically suspended. J.A. 235 (Murphy Decl. ¶ 16). Between the time he spent incarcerated and time spent reapplying for these benefits, he lost six months of income. *Id.* Without his SNAP benefits, Mr. Murphy had to rely on friends and the hotel for the homeless where he is staying for food. *Id*. (Murphy Decl. ¶¶ 16–17).

III. Most People Charged with Parole Violations Do Not Pose a Risk to Public Safety.

The cycle of mandatory detention pending a hearing on alleged technical violations followed by return to the community is not unique to Mr. Roberson and Mr. Murphy—the majority of people detained under this system are later determined, by the Board, not to pose a threat to public safety. An ALJ who sustains a parole violation at the final hearing must revoke the person's parole. *See* J.A. 393 (Facts ¶ 78); S.P.A. 53 (9 N.Y.C.R.R. § 8005.20(c)); S.P.A. 66 (N.Y. Exec. Law § 259-i(3)(f)(x), (xi)). The ALJ then orders a response ranging from incarceration in prison or placement in a drug treatment program to release back to community

supervision. *See* J.A. 393 (Facts ¶ 79); S.P.A. 53–54 (9 N.Y.C.R.R. § 8005.20(c)). After revoking parole, the ALJ can release the person back to community supervision only if the ALJ "concludes . . . that a restoration to supervision would not have an adverse effect on public safety." J.A. 393 (Facts ¶ 80); S.P.A. 56 (9 N.Y.C.R.R. § 8005.20(f)).[4] Thus, by definition, every person restored to supervision after a period of mandatory detention is found not to be a threat to public safety.

The majority of parolees detained in New York City are released back to community supervision at their final hearing based on the ALJ's determination that they do not pose a public safety risk. *See* J.A. 394 (Facts ¶¶ 86–89). For the period between March 1, 2019 and February 29, 2020, 52% of all final revocations hearings in New York City resulted in the person being released back to the community supervision. *Id.* (Facts ¶ 84). During that same period, 71% of final revocation hearings in New York City with technical parole violation warrants, 46% of hearings with an absconder warrant, and 55% of hearings with warrants for new arrests resulted in release to the community. *Id.* (Facts ¶¶ 85–87).

In March 2020, to reduce the spread of COVID-19 in correctional facilities, Governor Cuomo directed the Board to review for release all parolees incarcerated

[4] Both 9 N.Y.C.R.R. § 8005.20(f), which became effective on December 8, 2020, and its predecessor 9 N.Y.C.R.R. § 8005.20(c)(4), which was effective before that date, require that ALJs determine that a person's release "would not have an adverse effect on public safety" before they can order release.

on technical violation warrants. *See* J.A. 394–95 (Facts ¶ 90). The overarching requirement for discretionary release was whether parolees posed an undue risk to public safety such that they could be released back into the community. *See* J.A. 395 (Facts ¶ 91). After conducting this review, the Board determined that almost half of the parolees—760 out of 1534 people statewide (49.5%)—did not pose an undue risk to public safety and released them back into the community. *Id.* (Facts ¶ 92). In New York City, the Board estimated that 400 of the 600 alleged technical parole violators (66%) in mandatory detention could be released because they did not pose an undue risk to public safety. *Id.* (Facts ¶ 93).

SUMMARY OF THE ARGUMENT

Due process protects individuals from the government mistakenly depriving them of their liberty. In *Morrissey v. Brewer*, the Supreme Court held that people on parole are entitled to revocation hearings to ensure that their parole is not mistakenly revoked based on parole violations lacking "verified facts" or an exercise of discretion lacking "accurate knowledge of the parolee's behavior." 408 U.S. 471, 484 (1972). But *Morrissey* and its progeny have not addressed a regime requiring the mandatory detention of parolees on public safety grounds pending a final revocation hearing. Thus, the Supreme Court has not resolved the question raised here: what process is required to ensure that people on parole who do not pose a public safety risk are not mistakenly deprived of their liberty pending their final hearing. In *Mathews v. Eldridge*, the Supreme Court established the three-factor test for determining what due process requires in any given situation. 424 U.S. 319, 334–35 (1976). Whether New York's mandatory detention regime is constitutionally sufficient thus depends on the application of the *Mathews* test.

Applying *Mathews* to the undisputed facts here, each factor weighs in favor of finding that the Board's mandatory detention regime violates due process and that people on parole are entitled to a meaningful opportunity to be heard on their purported public safety risk. First, the undisputed facts demonstrate that the plaintiffs' conditional liberty, the private interest at stake, is valuable and that the

length and the severity of the deprivation of liberty is significant. Second, the undisputed facts demonstrate that the Board's failure to afford people on parole with a meaningful opportunity to be heard on their purported public safety risk results in the arbitrary and erroneous detention of large numbers of people who pose no risk. Third, the undisputed facts demonstrate that mandatory detention is counterproductive to the public's interests in public safety, the successful rehabilitation of parolees, and preserving scarce fiscal resources.

Following Supreme Court and this Court's precedent, this Court should find that the plaintiffs are entitled to judgment as a matter of law on their cross-motion for summary judgment because due process requires that people on parole are afforded a meaningful opportunity to be heard on the factor relevant to the deprivation of their liberty—in this case, their purported public safety risk—with sufficient safeguards to minimize the risk of erroneous detention.

ARGUMENT

This Court "review[s] a district court's decision to grant summary judgment *de novo*, construing the evidence in the light most favorable to the party against which summary judgment was granted and drawing all reasonable inferences in its favor." *Halo v. Yale Health Plan*, 819 F.3d 42, 47 (2d Cir. 2016) (quoting *Sec. Plans, Inc. v. CUNA Mut. Ins. Soc'y*, 769 F.3d 807, 815 (2d Cir. 2014)). "Summary judgment is only appropriate where there are no genuine issues of material fact, and

the moving party is entitled to judgment as a matter of law." *Kapps v. Wing*, 404 F.3d 105, 112 (2d Cir. 2005). "The same standard applies [to the plaintiffs' motion] where, as here, the parties filed cross-motions for summary judgment and the district court granted one motion, but denied the other." *BWP Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42, 47 (2d Cir. 2019) (internal quotation marks omitted).

I. PEOPLE ON PAROLE ARE ENTITLED TO AN OPPORTUNITY TO BE HEARD WHEN THE BOARD DEPRIVES THEM OF THEIR CONDITIONAL LIBERTY INTEREST ON PUBLIC SAFETY GROUNDS.

This case presents an important unresolved issue regarding the mandatory detention of individuals pending their parole revocation proceeding not addressed in *Morrissey v. Brewer* or its progeny. *See* 408 U.S. 471 (1972). The Supreme Court in *Morrissey* held that due process requires anyone accused of a parole violation be provided a preliminary probable cause hearing and a final revocation hearing to address the risk of erroneously re-incarcerating people innocent of any actual violation. *Id.* at 484–89. The *Morrissey* Court did not purport to address every due process issue implicated by the parole revocation process and, since that time, neither the Supreme Court nor this Court has addressed the constitutionality of a state's scheme requiring the mandatory detention, on public safety grounds, of every person accused of a parole violation until a final hearing on the merits of their alleged violation.

Presented with the first opportunity in nearly forty years to assess whether New York's mandatory parole detention regime comports with due process, the district court applied the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976),[5] to the summary judgment record and wrongly concluded that these factors—the strength of the plaintiffs' liberty interest, the risk of erroneous deprivation of liberty, and the public's interests in mandatory detention—weighed in favor of upholding the regime. To the contrary, each factor weighs strongly in favor of finding that the Board's mandatory detention scheme violates due process. The undisputed facts demonstrate that the risk and costs of erroneously detaining people who could be safely released pending their final parole hearing outweighs any fiscal and administrative burden of affording people an opportunity to be heard, especially taking into account the public savings that would result from reduced incarceration, and that such opportunities to be heard better serve the public's interest in public safety.

[5] The predicate question of "whether there exists a liberty or property interest" that the Due Process Clause protects, *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989), has been resolved by *Morrissey*. It is undisputed that "the liberty of a parolee . . . . must be seen as within the protection of the Fourteenth Amendment." *Morrissey*, 408 U.S. at 482; *see* J.A. 957–58; S.P.A. 8–9 (district court noting that "there is no dispute" as to this point).

A. Mandatory Detention Deprives the Plaintiffs of Their Conditional Liberty Interest.

It is undisputed that the Board's mandatory detention scheme deprives people on parole of their conditional liberty interest pending their final parole revocation hearing. J.A. 959; S.P.A. 10 (district court stating that the "parties agree that the private interest at issue is the [conditional] liberty interest of an alleged parole violator."). As the Supreme Court explained, the "liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. While this liberty interest is "conditional," it encompasses "many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.*; *see also Faheem-El v. Klincar*, 841 F.2d 712, 725 (7th Cir. 1988) (en banc) (cautioning that the "importance [of this conditional liberty interest] should not be underestimated"). The Supreme Court thus has determined that this conditional liberty is "valuable." *Morrissey*, 408 U.S. at 482.

The district court nonetheless decided that the private interest under the first *Mathews* factor tips "only slightly" in favor of the plaintiffs. J.A. 961; S.P.A. 12. In reaching this conclusion, the district court made two errors. First, the court improperly minimized the plaintiffs' liberty interest by inaccurately characterizing

mandatory detention of people accused of parole violations as "brief" and therefore unimportant, ignoring legal precedent and undisputed factual evidence of the catastrophic harm such detention causes. Second, the district court misread *Morrissey* dicta to implicitly bless mandatory detention of alleged parole violators, an interpretation that drifts far beyond the actual holding of that case and cannot be squared with the Supreme Court's and this Court's subsequent approach to assessing due process claims.

1. Mandatory Detention Pending a Final Parole Hearing Is Immensely Harmful to the Plaintiffs' Liberty Interest.

The district court improperly diminished the plaintiffs' liberty interest by mischaracterizing the "length of time that alleged parole violators are mandatorily detained," which averages three months, as "brief." J.A. 959–61; S.P.A. 10–12. Even if the length of mandatory detention could properly be described as "brief," that subjective assessment overlooks the immense harm these months of pre-hearing detention causes. By the Board's own admission, even short periods of detention for people awaiting their final parole hearing can cause people to lose their jobs and their housing, potentially leading to homelessness, and it interrupts their participation in rehabilitative programs. J.A. 700–01 (Deposition of Timothy O'Brien ("O'Brien Dep.") 162:20–163:4); *see also* J.A. 354 (Expert Report of David Muhammad ("Muhammad Report") at 3) (explaining how incarceration "often has devastating impacts on any individual parolee's housing, employment, and familial

relationships."). The experiences of the named plaintiff and putative class members in this case provide concrete illustrations of how mandatory detention derails people's lives. For example, Mr. Roberson, who is a veteran with physical disabilities and serious medical issues, lost three months of his disability-related benefits while he was detained, causing his family to fall behind on their mortgage payments and utility bills. J.A. 227–28 (Roberson Decl. ¶¶ 7, 9). Mr. Murphy, who also has disabilities and other medical issues, lost months of subsistence benefits while he was detained. J.A. 235 (Murphy Decl. ¶¶ 16–17).

Courts—including the Supreme Court—have acknowledged the weight of this harm. As the Supreme Court explained in the context of assessing the fairness of proceedings that resulted in a marginal over-calculation of a criminal defendant's custodial sentence, "[a]ny amount of actual jail time is significant[] and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (alterations, citations, and internal quotation marks omitted). For people on parole in particular, the Supreme Court has acknowledged that re-incarceration represents an "immediate disaster." *Wolff v. McDonnell*, 418 U.S. 539, 560–61 (1974); *see also Mental Hygiene Legal Serv. v. Spitzer*, No. 07 CIV. 2935 (GEL), 2007 WL 4115936, at *11, *14 (S.D.N.Y. Nov. 16, 2007) (referring to pre-hearing civil detention of parolees that "may last more

than 60 days" as a "substantial period" of detention and "potentially catastrophic" because the parolee serving as an intervenor "will likely lose his job and his house, and default on loans"), *aff'd sub nom*, *Mental Hygiene Legal Servs. v. Paterson*, No. 07-5548-CV, 2009 WL 579445 (2d Cir. Mar. 4, 2009); *Faheem-El*, 841 F.2d at 725 (observing that a "two month interim period" of detention pending a final hearing on a parole violation charge "can have a devastating effect on the life of a parolee and his or her family").

Thus, while the length of a deprivation of liberty is relevant as an indicator of relative harm, the undisputed facts demonstrate the catastrophic harm to people on parole of even "brief" periods of mandatory detention. This factor tips conclusively toward the plaintiffs because their conditional liberty interest is valuable and both the length and the severity of the detention is significant.

2. *Morrissey* Did Not Address Whether a Mandatory Parole Detention Scheme Premised on Public Safety Requires Granting Parolees an Opportunity to Be Heard on Whether They Are a Threat to Public Safety.

In weighing the first *Mathews* factor, the district court suggested that the Supreme Court's decision in *Morrissey* "blessed" mandatory detention of alleged parole violators pending a final parole hearing in a manner that guided its three-part *Mathews* analysis. J.A. 959–60; S.P.A. 10–11. This suggestion relies on a misreading of dicta that cannot be squared with subsequent Supreme Court precedent, including the approach to assessing due process clarified by the Court a

few years later in *Mathews*. *Morrissey* simply did not address the legal question presented by this case and, therefore, provides no basis to short-circuit the *Mathews* analysis.

In *Morrissey*, the petitioners were alleged to have violated the conditions of their parole and, based solely on the reports of their parole officers, the parole board revoked parole without any hearing. 408 U.S. at 472–73. The Supreme Court found the lack of any hearing to be a due process violation. *Id.* at 483–84. Following that decision, anyone accused of a parole violation must be afforded a preliminary probable cause hearing and a final revocation hearing "to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion [regarding whether a violation warrants re-incarceration] will be informed by an accurate knowledge of the parolee's behavior." *Id.* at 484.

The *Morrissey* Court did not address a system where people are mandatorily jailed until a hearing on the merits because there was no hearing on the merits at all. *See id.* at 472–74; *see also Faheem-El*, 841 F.2d at 724 & n.16 (noting that the issue of "what process, if any, is required to protect a parolee's liberty interest during the time between the preliminary revocation hearing and the final revocation hearing" was "not before the [*Morrissey*] Court"); J.A. 959; S.P.A. 10 (district court acknowledging that "the issue . . . was not before the Supreme Court in *Morrissey*"). While the lone dissenting justice urged the Court to address every procedural issue

implicated by the parole revocation process, the Court specifically refrained from doing so. *See Morrissey*, 408 U.S. at 489 (refraining from deciding whether a parolee in revocation proceedings is entitled to appointed counsel if indigent). Since *Morrissey*, the Supreme Court has addressed other due process questions regarding the revocation process that were left open by its decision requiring probable cause and final revocation hearings, *see, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (establishing when indigent parolees have the right to appointed counsel in the revocation process), but it has not addressed a state's scheme requiring the mandatory detention of every person on parole until a hearing on the merits of their alleged violations.

In dicta, the *Morrissey* Court stated that, at the preliminary hearing, "the [parole] officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." 408 U.S. at 487. This statement must be read to mean simply that a probable cause finding is a prerequisite to detention. That is, without probable cause, detention is not warranted. But it cannot be read to mean that the Court "blessed" a system of arbitrary and mandatory detention for months without any meaningful opportunity to contest the grounds for

that detention. *See* J.A. 959–60; S.P.A. 10–11.[6] Such a reading is contrary to the Supreme Court's long-held principle that, to satisfy due process, a hearing must be "appropriate to the nature of the case" and consider the factors relevant to the particular deprivation at issue. *See Bell v. Burson*, 402 U.S. 535, 535–36, 541–43 (1971) (holding that "the State may not, consistently with due process, eliminate consideration of [liability] in its [pre-deprivation] hearing" when liability is "an important factor in the State's determination to deprive [an uninsured driver involved in a car accident] of his licenses" (internal quotation marks omitted)); *see also infra* Part I.B.1.

[6] In relying on the *Morrissey* dicta to reject the plaintiffs' due process claim, the district court also pointed to Justice Douglas's dissent in that case. According to the district court, the dissent pressed the same arguments as the plaintiffs do here regarding the necessity of a hearing to determine whether detention pending a final revocation hearing is appropriate, and the fact that the *Morrissey* majority did not adopt Justice Douglas's view dooms the plaintiffs' argument. *See* J.A. 959, 961 n.6, 963 & n.8; S.P.A. 10, 12 n.6, 14 & n.8. But that is wrong. Justice Douglas espoused a much more aggressive position than the plaintiffs do: he asserted without qualification that "the parolee is entitled to the freedom granted a parolee until the results of the [final revocation] hearing are known." *Morrissey*, 408 U.S. at 500 (Douglas, J., dissenting). In other words, he believed the state may not detain an individual pending their final revocation hearing in any circumstance. That is not the plaintiffs' argument; the plaintiffs argue that due process requires a hearing addressing the factor the state cites to justify detention—which, in New York, means a hearing on whether the person is a threat to public safety, not merely a hearing on whether there is probable cause to believe the person violated a condition of parole. Thus, the *Morrissey* majority's rejection of Justice Douglas's view has no bearing on this case.

In this case, the factor relevant to detention is public safety, and yet the Board does not afford people on parole any opportunity to be heard on whether they would pose a risk to public safety if released pending their final hearing. A hearing that merely considers whether there is probable cause of an alleged parole violation is no substitute because a person on parole is entitled to know the public safety "case against him and opportunity to meet it." *See Mathews*, 424 U.S. at 348–49 (internal quotation marks omitted); *see also United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) (finding that due process prohibits the deprivation of a person's liberty without an opportunity to be heard "in respect of the matters upon which that liberty depends" (quoting *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903))).

Four years after *Morrissey*, in *Mathews*, the Supreme Court identified the three-factor balancing test that must be considered in ascertaining the appropriate process that is due. *See Mathews*, 424 U.S. at 334–35. *Mathews* sets the governing test, and thus the analysis of what due process requires in this case turns on the application of the *Mathews* factors to the particular facts of the mandatory detention scheme at hand. The dicta in *Morrissey* cannot provide a sufficient legal foundation to bypass a full *Mathews* analysis.

The Seventh Circuit is the only circuit court to have addressed a state's mandatory detention law under which "[a]ll parolees, regardless of the seriousness of [their] prior conviction or [their] alleged parole violation, are detained" prior to a

hearing on the merits and it applied *Mathews* to determine what due process requires. *Faheem-El*, 841 F.2d at 725. In *Faheem-El*, the en banc Seventh Circuit found that the *Morrissey* dicta did not suggest that probable cause of a parole violation was sufficient to sustain detention in a scheme where such "a determination . . . resulted in mandatory detention." *Id.* at 725 n.16. As the Seventh Circuit explained, *Morrissey* "presumed a system in which this probable cause determination would not necessarily result in incarceration pending the final revocation hearing"—a fact reflected in the Supreme Court's "statement that the officer at the preliminary hearing should also 'determine whether there is probable cause to *hold* the parolee for the final decision of the board on revocation,'" rather than merely determining whether there is probable cause of a parole violation. *Id.* (quoting *Morrissey*, 408 U.S. at 487). Accordingly, the Seventh Circuit determined that the *Mathews* test had to be applied to determine whether additional procedural safeguards were required.[7] *Id.* at 725.

[7] The Seventh Circuit found that the first two *Mathews* factors weighed in favor of the plaintiff class because the "importance [of the conditional liberty interest of people on parole] should not be underestimated" and because imposing mandatory detention pending a final revocation hearing "regardless of the seriousness of the . . . alleged parole violation . . . . smacks of arbitrariness." *Faheem-El*, 841 F.2d at 725–26 (internal quotation marks omitted). But the Seventh Circuit was ultimately unable to make a determination about what additional process was due because there was no evidence in the record about the burden the parole board would face if required to hold "release suitability hearings." *Id.* The court remanded the case, *see id.* at 727, but the parties settled and entered into a consent decree requiring that people accused of parole violations receive an individualized

In sum, *Morrissey*'s mandate of probable cause and final determination hearings does not speak to whether people accused of parole violations in New York are also entitled to be heard on whether their detention pending a final parole hearing is necessary for public safety.[8] New York's mandatory detention regime is arbitrary to the extent that it erroneously deprives people who are not a threat to public safety of their conditional liberty interest. Having established the strength of that interest, the question turns back to the application of the second and third *Mathews* factors.

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evaluation of their suitability for release pending their final revocation hearing—the very process the plaintiffs seek here, *see* Consent Decree ¶¶ 1–5, *Faheem-El v. Klincar*, No. 84-cv-2561 (N.D. Ill. Nov. 14, 1988), *available at* https://www.clearinghouse.net/chDocs/not_public/CJ-IL-0011-0001.pdf.

[8] Even if the *Morrissey* dicta could be read to allow mandatory detention pending the final hearing (which it cannot), it is not entitled to deference because this case implicates core constitutional rights. *See Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) (cautioning that dictum addressing constitutional rights "run[s] a high risk of error" because the parties and judges may not give thorough consideration to an issue that "will have no effect on the outcome of the case"); *Harpole v. Arkansas Dep't of Hum. Servs.*, 820 F.2d 923, 927 (8th Cir. 1987) (instructing that "an appellate court . . . should not rely solely on dicta, even Supreme Court dicta, when making decisions with constitutional implications"). Indeed, the constitutional right at stake here is the plaintiffs' interest in freedom from unjustified detention—"perhaps the most fundamental interest that the Due Process Clause protects." *See Francis v. Fiacco*, 942 F.3d 126, 141–42 (2d Cir. 2019).

B. The Board's Mandatory Detention Scheme Erroneously Incarcerates People Whom the Board Itself Has Determined Are Not a Risk to Public Safety and Additional Procedures Would Mitigate that Risk.

The second *Mathews* factor—the risk of erroneous deprivation—weighs heavily in the plaintiffs' favor. By categorically mandating detention in all cases, the Board guarantees that Mr. Roberson, Mr. Murphy, and thousands of others who pose no public safety risk and will eventually be released back to their community will nevertheless be stripped of their physical liberty for months pending a final revocation hearing. The district court dismissed this concern by defining "erroneous deprivation" in a manner that is not consistent with Supreme Court and this Court's precedent and by drawing the legally and factually indefensible conclusion that any parole rule violation demonstrates an inherent threat to public safety.

1. "Erroneous Deprivation" Is Defined By Reference to the State's Proffered Purpose for Detention—In This Case, Public Safety.

Whether a deprivation of physical liberty is "erroneous" or not depends on whether it serves the state's rationale for detention. It is well-established that due process provides protection from "the mistaken or unjustified deprivation of . . . liberty." *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *see also Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (explaining that due process protects against "simply mistaken deprivations"). This conclusion is grounded in the fundamental notion of due process as protection from "arbitrary" government action—deprivations of liberty unmoored

from the government's purported rationale for its actions. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

Following these principles, the Supreme Court has repeatedly held that a hearing is only adequate if it tests the state's application of its rationale for the deprivation at issue in the individual's case. For example, in *Bell v. Burson*, the Court held that where a statutory scheme made "[driver] liability an important factor in the State's determination to deprive [an uninsured driver involved in a car accident] of his licenses," the State could "not, consistently with due process, eliminate consideration of that factor in its [pre-suspension] hearing." 402 U.S. at 541–42; *see also Stanley v. Illinois*, 405 U.S. 645, 653 (1972) (calling the statutory scheme in *Bell* "repugnant to the Due Process Clause" because it enacted a deprivation "without reference to the very factor . . . that the State itself deemed fundamental to its statutory scheme"); *Schall v. Martin*, 467 U.S. 253, 255–57, 275–77 (1984) (finding procedures for detaining juveniles on public safety grounds pending trial were sufficient to prevent a high risk of error because the juveniles were provided *both* a probable cause hearing and a detention hearing where they could contest the government's public safety arguments).

As this Court likewise has explained, "where liberty is at stake, due process demands that the individual . . . be afforded the opportunity . . . to correct or contradict arguments or evidence offered by" the government in support of "the

matters upon which that liberty depends." *Abuhamra*, 389 F.3d at 322 (internal quotation marks omitted); *see also Faheem-El*, 841 F.2d at 726–27 (observing that the lack of any individualized evaluation of the appropriateness of detention pending the final revocation hearing "smacks of arbitrariness"); *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *12–15, *15 n.19 (finding that mandatory detention of people pending a civil commitment trial based on mere probable cause that they may be "sex offender[s] requiring civil management" provides insufficient protection against erroneous deprivation because people "are entitled to an individualized determination that they are in fact dangerous" and cannot be released pending trial), *aff'd sub nom*, *Mental Hygiene Legal Servs.*, 2009 WL 579445.[9]

In this case, it is undisputed that the Board's only interest in mandatory detention of people accused of parole violations is maintaining public safety. J.A. 971; S.P.A. 22 (district court observing that the governmental interest that the mandatory detention regime serves is "public safety"); *see also* J.A. 665 (O'Brien

[9] Similarly, this Court held that before New York City could suspend the licenses of taxi drivers charged with certain crimes for the stated purpose of preventing threats to public safety, due process required that the drivers be provided a hearing where they could "show that his or her particular licensure does not cause a threat to public safety." *Nnebe v. Daus*, 931 F.3d 66, 70, 83 (2d Cir. 2019). This Court similarly found that New York City's procedures for seizing the vehicles of people accused of crimes violated due process in part because the City considered probable cause of a qualifying crime justifying the initial seizure but not the probable validity of the continued retention of the vehicle. *Krimstock v. Kelly*, 306 F.3d 40, 49, 62–63 (2d Cir. 2002).

Dep. 35:3–24). Yet the Board never provides people on parole with a meaningful opportunity to be heard on their purported public safety risk, which is not considered at the preliminary hearing. J.A. 391 (Facts ¶ 68); *see also* S.P.A. 63–64 (N.Y. Exec. Law § 259-i(3)(c)(v)–(viii)).

The district court discounted the significance of this failure by concluding, as a matter of law, that "an '*erroneous* deprivation' within the meaning of *Mathews* occurs only when the State mandatorily detains an alleged parole violator who is ultimately found not to have violated any of the conditions of his or her parole." J.A. 963; S.P.A. 14. Contrary to the well-established due process principles in the cases cited above, this conclusion conflates the due process required to sustain a parole violation (procedures that ensure accurate parole violation findings) with the due process required to detain a person pending adjudication of that parole violation (procedures that ensure accurate findings that someone's pre-hearing release jeopardizes public safety). The district court thus failed to recognize that the Board's mandatory detention regime unconstitutionally deprives alleged parole violators of the opportunity to challenge the state's proffered basis for their detention.

Moreover, *Morrissey* makes clear that, even without a presumption of innocence, a parolee's conditional liberty interest does not evaporate as soon as they violate a condition of parole, however minor the violation. Because "not every violation of parole conditions automatically leads to revocation," the *Morrissey*

Court concluded that the "parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, *if he did, that circumstances in mitigation suggest that the violation does not warrant revocation*." 408 U.S. at 479, 488 (emphasis added). That is, a person on parole still has a valuable conditional liberty interest to assert even where a violation has been sustained.

This Court's holding in *United States v. Abuhamra* confirms that due process does not permit a decision maker to rely on a one-sided process even where there is no presumption of innocence. 389 F.3d 309 (2d Cir. 2004). In *Abuhamra*, this Court considered the government's use of an *ex parte* submission asserting that a convicted defendant posed a danger to the community to deny release on bail pending sentencing. *Id.* at 320–23. The post-verdict defendant was not entitled to a presumption of innocence and thus had "no *substantive* constitutional right to bail pending sentencing." *Id.* at 317 (emphasis added); *see also id.* at 318–19 (explaining that in the pre-trial context, however, "a defendant's liberty interest can implicate substantive as well as procedural rights"). But, like here, the defendant had a conditional liberty interest that entitled him to procedural due process protection. *See id.* at 318–19 (explaining that the statute permitting post-verdict release conferred a liberty interest "on satisfaction of the specified conditions").[10] Applying

[10] *Abuhamra* also demonstrates why the district court here was wrong in relying on this Court's statement in *Galante v. Warden*, 573 F.2d 707, 708 (2d Cir. 1977) (per curiam), that a parolee "no longer enjoys the benefit of a presumption of innocence

Mathews, this Court found a due process violation because the government's "one-sided" process denied the defendant an opportunity to be heard to "correct or contradict" the government's public safety arguments. *Id.* at 322–23 (internal quotation marks omitted). Despite his convicted status, the defendant was "entitled to some kind of hearing at which [his alleged public safety risk] can be fairly resolved." *Id.* at 320–21 (internal quotation marks omitted). The same is true here for people on parole who are automatically deprived of their conditional liberty pending their final hearing because the Board deems them to be public safety risks. Because that factor is never examined until the final hearing, there is significant risk of erroneous deprivation.

In *Faheem-El*, the Seventh Circuit directly addressed whether a probable cause hearing was sufficient to prevent the "inappropriate detention of parolees pending their final revocation hearing" and found that it was not. 841 F.2d at 725–26. The Seventh Circuit instead emphasized that there is "a substantial difference between the determination that there is probable cause to believe a condition of parole has been violated . . . and a determination that an individual should be detained pending his or her final revocation hearing." *Id.* at 725. Thus, as a matter

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and has no constitutional right to bail." *See* J.A. 955; S.P.A. 6. The plaintiffs do not seek a *substantive* due process right to bail; they seek *procedural* due process rules to protect them from arbitrary detention.

of law, a probable cause hearing alone is an insufficient protection when the government detains people for public safety reasons.

In sum, there is no legal support for the conclusion that "an 'erroneous deprivation' within the meaning of *Mathews* occurs only when the State mandatorily detains an alleged parole violator who is ultimately found not to have violated any of the conditions of his or her parole." *See* J.A. 963; S.P.A. 14. Although in the vast majority of cases where a preliminary hearing was held and probable cause found, at least one parole violation was sustained at the final revocation hearing, the preliminary hearing fails to take into account "the very factor . . . that the State itself deem[s] fundamental to its [detention] scheme"—public safety. *See Stanley*, 405 U.S. at 653; *see also* J.A. 665 (O'Brien Dep. 35:3–24).[11] The inadequacy of such process is reflected in the large numbers of people the Board ultimately releases at the final hearing because they are not risks to public safety, a category of error the district court wholly dismissed.

[11] The district court found that, even in the 1.5% of cases where no violation is sustained, that is "only arguably 'error'" because the evidentiary standard is less exacting at the preliminary hearing compared to the final hearing. J.A. 962; S.P.A. 13.

2. The Undisputed Evidence Establishes that the Majority of People Whom the Board Mandatorily Detains Are Not a Risk to Public Safety.

The Board's own data establishes that it mandatorily detains many people on public safety grounds whose release—in the Board's own view—does not pose any risk to public safety. Under the Board's regulations, once a person's violation is sustained, ALJs can only order the person's release to the community after finding that such release "would not have an adverse effect on public safety." J.A. 393 (Facts ¶ 80); S.P.A. 56 (9 N.Y.C.R.R. § 8005.20(f)). If the person is a threat to public safety, they must be returned to prison to continue to serve a custodial sentence in lieu of community supervision. *Id.* But the majority of final revocation hearings (52%) in New York City from March 1, 2019 to February 29, 2020 resulted in the person being released to the community based on exactly such a finding. J.A. 394 (Facts ¶ 84). During the same period, 71% of final revocation hearings in New York City with technical parole violation warrants, 46% of hearings with an absconder warrant, and 55% of hearings with warrants for new arrests resulted in release to the community.[12] *Id.* (Facts ¶¶ 85–87). Compared to the Illinois system the Seventh

[12] Data released by the New York City Mayor's Office of Criminal Justice ("MOCJ") for the 2019 calendar year further confirms these error rates. After the Board detained them for an average of 63 days in City jails, 64% of parolees accused of a technical parole violation in 2019 were released after their final hearing. *See* J.A. 260 (Mayor's Office of Criminal Justice, *Jail: State Parolees 2019* at 2 (2020)). For those whom the Board detained on a parole warrant based on new arrests, after an

Circuit considered in *Faheem-El*, the errors in New York's mandatory detention system are far more pronounced. The *majority* of New York's arrested parolees (52%) are released and continued on parole after their charges are sustained compared to the 5–11% at issue in *Faheem-El*, which led the Seventh Circuit to find an unacceptable rate of erroneous detention. *See* 841 F.2d at 726.

Beyond this data, a natural experiment during the height of the COVID-19 pandemic further demonstrates how mandatory detention results in arbitrary or erroneous detention of people who could be safely released, and how even a small amount of additional process would go some way toward reducing that risk. In the Spring of 2020, the Board conducted a discretionary review of people alleged to have committed technical parole violations to determine whether they could be released as a means of mitigating the rapid spread of COVID-19 in the City's jails. *See* J.A. 406–07 (Declaration of Anthony Annucci ("Annucci Decl.") ¶ 4); J.A. 430 (Anthony Annucci Memorandum); *see also* J.A. 525–26 (Department of Corrections and Community Supervision, *DOCCS COVID-19 Report* (2020)). The Board's criteria provided that people could only be released if the Board was satisfied they did not pose "an undue risk to public safety." J.A. 430 (Anthony Annucci Memorandum); *see also* J.A. 678 (O'Brien Dep. 98:12–19) ("Q. So, the purpose of

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average of 136 days in jail, 55% were released after their final hearing. *See* J.A. 261 (Mayor's Office of Criminal Justice, *Jail: State Parolees 2019* at 3 (2020)).

the individualized review was to ensure that DOCCS was only canceling parole warrants for individuals who do not present an undue risk to public safety; is that correct? A. I would say that's accurate.").

Pursuant to that review, the Board found that almost half of the people incarcerated under their mandatory detention scheme did not pose an undue risk to public safety.[13] J.A. 407 (Annucci Decl. ¶ 6); *see also* J.A. 525–26 (Department of Corrections and Community Supervision, *DOCCS COVID-19 Report* (2020)). The district court's and the state's effort to paint this determination as skewed by the emergency circumstances of the pandemic is belied by the undisputed evidence from the Board's own witnesses that passing a public safety assessment was a prerequisite for release. *See* J.A. 678 (O'Brien Dep. 98:12–19). Even if the exigencies of the pandemic somewhat relaxed the Board's standards for assessing public safety, that almost half the population considered were released under this program nonetheless demonstrates the propensity for its mandatory detention scheme to erroneously detain many hundreds of people and the need for a process with more integrity to ensure that accurate public-safety assessments are made.

[13] According to the MOCJ's data, 379 people who were detained on parole violations had their warrants lifted due to the Governor's COVID-19 release protocol between March 16, 2020 and April 30, 2020. *See* Mayor's Office of Criminal Justice, *NYC Criminal Justice System: COVID-19 Impact* (2020), https://criminaljustice.cityofnewyork.us/covid-19-impact/.

The district court dismissed all of this data with a sweeping conclusion that if there is probable cause that a person violated a condition of parole then "the relevant danger to society" is established because "any parole violation carries with it an inherent risk to public safety." J.A. 964, 968–69; S.P.A. 15, 19–20. But this finding—accompanied by no citation to any evidence in the record—fails as a matter of logic and fact.[14] Even the defendants did not make such a radical argument. To the contrary, the evidence in the record supported the opposite conclusion. As the plaintiffs' expert explained, "[f]ailure to strictly adhere to a long list of supervision rules does not equate to public safety risk. Missing a meeting with a parole officer or not attending a mandated life skills class does not suddenly make a parolee a greater risk to public safety." J.A. 346 (Declaration of David Muhammad ("Muhammad Decl.") ¶ 26). The Board's own practice of releasing the majority of people with a sustained parole violation because, pursuant to its own regulations, it found them not to present a public safety risk also supports this conclusion. *See supra* at 35–36. The district court dismissed this undisputed fact because "that is an

[14] The district court's conclusion that the Board's existing procedures are so "robust," fair, and reliable that a release suitability hearing would add no probable value is based on the same flawed premise that probable cause of a parole violation establishes "the relevant danger to society" for detention pending the final revocation hearing. *See* J.A. 968–69; S.P.A. 19–20. That premise lacks any basis in law and fails to draw reasonable inferences in favor of the plaintiffs.

assessment of future risk, made at the time of the final revocation hearing decision." J.A. 964; S.P.A. 15. Thus, by the district court's logic, probable cause of an *alleged* parole violation carries an inherent public safety risk, but a *sustained* parole violation does not. But there is simply no factual or logical basis for this position.[15]

In fact, *Morrissey* suggests just the opposite. The *Morrissey* Court explained that parole conditions serve a "dual purpose" to both prohibit certain "behavior . . . deemed dangerous to the restoration of the individual into normal society" and to provide the parole officer "with information about the parole[e] and an opportunity to advise him" through reporting mandates and requirements to seek permission or guidance "before doing many things." 408 U.S. at 478 (describing how parolees "must seek permission from their parole officers before . . . changing employment

[15] At a minimum, in finding that parolees pose an inherent public safety risk based on an alleged parole violation, the district court failed to draw reasonable inferences in the plaintiffs' favor regarding the public safety risk data and sworn testimony it submitted. In addition to the strained inference regarding the significance of the Board's release of convicted parole violators referenced in the text above, the district court dismissed the discretionary release data as irrelevant because the decision to release parolees during the pandemic does not "equate[] to a finding that these parolees would be deemed safe for release in normal times." J.A. 966; S.P.A. 17. But, as discussed above, the undisputed facts show that discretionary release during the pandemic hinged on public safety assessments, *see supra* at 36–37, and it is reasonable to infer, as this Court must, that people released during the pandemic based on a public safety review would also be released in normal times. While the evidence remains sufficient to warrant summary judgment for the plaintiffs, at a minimum this pattern of drawing inferences in favor of the Board requires reversal of the district court's summary judgment order.

or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness"). For this reason, the Court explained that "not every violation of parole conditions automatically leads to revocation." *Id.* at 479. Instead, parole is typically revoked only when "the violations are *serious and continuing* so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity." *Id.* (emphasis added). Because every parole violation does not inherently demonstrate that the parolee cannot safely remain in the community, parole boards that sustain a violation must ask: "[S]hould the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Id.* at 479–480. This is unsurprising because the purpose of parole "is to keep [people] in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." *Gagnon*, 411 U.S. at 785.

3. Additional Procedures Are Required to Reduce the Unacceptably High Risk of Erroneous Deprivations of Liberty.

Both the large numbers of people who are ultimately released after their final hearing and this discretionary review process demonstrate that the Board's mandatory detention regulations result in the unnecessary and erroneous incarceration of people who are ultimately deemed by the Board itself to not be a risk to public safety. The plaintiffs propose procedural safeguards that would add significant probable value in mitigating the risk of detaining people who do not pose

a public safety risk. Consistent with well-established law and even accounting for the conditional nature of the plaintiffs' liberty interest, due process requires the following additional safeguards to significantly mitigate the risk of detaining people who do not pose a public safety risk: (1) a prompt opportunity for people detained on parole warrants to be heard on their suitability for release and to rebut the Board's justifications for detention; (2) notice of when the Board will provide an opportunity to be heard and the reasons supporting the Board's request for detention; (3) a neutral decision-maker, such as someone from the Board not involved in the decision to arrest and detain the parolee; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. *See, e.g.*, *Morrissey*, 408 U.S. at 486–87, 489 (requiring similar protections at the preliminary and final hearings to ensure that the parole violation will be based on verified facts and an informed use of discretion); *Wolff*, 418 U.S. at 564–65 (requiring written decision-making to support disciplinary action against prisoners because "a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly").

These requirements of notice, an opportunity to be heard in a meaningful time and manner, and reasoned decision-making protect "against erroneous and unnecessary deprivations of liberty." *See Schall*, 467 U.S. at 274. Collectively

referred to as a "release suitability hearing," these safeguards are immensely valuable to preventing the erroneous detention of people alleged to have violated their parole conditions.

The Board claims its existing process provides a sufficient check on erroneous detention because, prior to obtaining a parole violation warrant, parole officers and senior parole officers must review six factors deemed relevant to public safety and only issue a warrant when they determine that a parolee poses a risk. *See* District Ct. ECF No. 62 at 10–11 (Defs.' Mem. of Law in Supp. of Mot. for Summ. J.). But fairness, which is the essence of due process, "can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Fuentes*, 407 U.S. at 81 (internal quotation marks omitted). The fact that large percentages of people on parole are ultimately found not be a public safety risk "weighs heavily against the defendants' argument that essentially automatic [deprivation], for a period of many months, are required to ensure public safety, and that no further review of individual cases is required by the constitutional guarantee of procedural fairness."[16] *See Nnebe*, 931 F.3d at 85 & n.23 (applying *Mathews* and finding an "unacceptably high risk of error" because the "vast majority" of suspended taxi drivers have their licenses reinstated because, "by the standard applied by the [regulatory agency] itself," the

[16] According to the plaintiffs' expert, these rates of release are "unheard of in other states and suggests a fundamental flaw in the New York State system." J.A. 360–61 (Muhammad Report at 9–10).

drivers do not pose a danger to the public). That New York's flawed system for assessing public safety risk produces such a high degree of error is predictable because "human error will inevitably occur" in a one-sided public safety review process. *See, e.g.*, *Meza v. Livingston*, 607 F.3d 392, 402–03, 409–10 (5th Cir. 2010) (finding that the Texas parole board's system for imposing sex offender conditions on parolees who were not convicted of a sex offense carries a "high risk" of error because the decisions are based on the review of a packet of information presented to the Board and "the parolee has no opportunity to correct false information or provide an explanation for any adverse information"); *see also Meza v. Livingston*, No. 09-50367, 2010 WL 6511727, at *7 (5th Cir. Oct. 19, 2010) (reaffirming same point on denial of rehearing).

C. Mandatory Detention Destabilizes Peoples' Lives in Ways Counterproductive to the Public's Interest and Is Costly for Local Governments and Their Taxpayers.

As the Supreme Court explained in *Mathews*, "[i]n striking the appropriate due process balance the final factor to be assessed is the public interest," including "the administrative burden and other societal costs" associated with the additional process. 424 U.S. at 347. The final *Mathews* factor accounts for the "Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources." *Id.* at 348. Here, this factor weighs decidedly in favor of the plaintiffs because mandatory detention is counterproductive to the public's interests in: (i)

public safety; (ii) the successful rehabilitation of parolees; and (iii) preserving scarce resources.

First, mandatory detention is counterproductive to the public's interest in public safety. By the Board's own admission, mandatory detention can result in unemployment, homelessness, and interruptions in anti-violence or similar treatment-focused programming. J.A. 700–01 (O'Brien Dep. 162:20–163:4). It is also undisputed that homelessness, unemployment, and the interruption of anti-violence programming have a negative effect on public safety. J.A. 694 (O'Brien Dep. 128:10–15). As the plaintiffs' expert explained, unnecessary incarceration can "destabilize families, disrupt employment, contribute to homelessness, and can lead to increased crime rates." J.A. 360 (Muhammad Report at 9). As a result, "[i]ncarcerating people who do not pose a genuine risk to public safety, whether accused of a technical violation or a new arrest, will likely *negatively* impact public safety." *Id.* (emphasis in original).

The district court agreed that "[t]here is no dispute that reincarceration may substantially disrupt a parolee's life." J.A. 977; S.P.A. 28. Nonetheless, it relied on disputed facts or failed to draw inferences in the plaintiffs' favor to conclude that this factor favors the Board. For example, the district court found that mandatory detention serves the public's interest in public safety because it "protect[s] society from those who will not" comply with parole rules. J.A. 971, 976–77; S.P.A. 22, 27–

28. But the court cites *no* undisputed evidence showing that failure to adhere to a long list of supervision rules equates to a risk for public safety because the plaintiffs introduced evidence to the contrary. *See* J.A. 346 (Muhammad Decl. ¶ 26); *see also* J.A. 394–95 (Facts ¶¶ 86–89, 90–93). Similarly, the district court found that "[t]he evidence suggests that DOCCS's pre-warrant review process weeds out any truly trivial violations before a parole warrant issues." J.A. 973; S.P.A. 24. But, once again, it cites *no* undisputed evidence for this claim. Moreover, even if the evidence merely "suggests" rather than proves this point, it is unclear how the Board could meet its burden here since this Court is obligated to draw all reasonable inferences in the plaintiffs' favor. *See Halo*, 819 F.3d at 47. The undisputed fact that the one-side pre-warrant review results in the mandatory detention of many people whom the Board itself ultimately finds do not present a danger to the public provides a sufficient basis to grant summary judgment to the plaintiffs; but even if that were not the case, the disputed facts about the fairness and efficacy of that process, and about the significance of technical rule violations in assessing threats to public safety, foreclose summary judgment for the defendants.

Second, beyond the question of public safety, mandatory detention does not advance, and likely hampers, the public's interest in the successful rehabilitation of parolees. As the Supreme Court explained, "[s]ociety has a stake in whatever may be the chance of restoring [a parolee] to normal and useful life within the law."

Morrissey, 408 U.S. at 484. The "substantially disrupt[ive]" effect of reincarceration is undisputed. J.A. 977; S.P.A. 28. Indeed, because incarceration causes a significant disruption of people's lives, this Court has found the government has a "paramount" interest in "minimizing the enormous impact of incarceration in cases where it serves no purpose." *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020); *see id.* at 855 (describing how incarceration "separates families and removes from the community breadwinners, caregivers, parents, siblings and employees"). By unnecessarily destabilizing the lives of parolees who can be safely released pending their final hearing (and, ultimately, are released post-hearing), mandatory detention is "counterproductive to the goal [of] rehabilitation." J.A. 360 (Muhammad Report at 9). As the *Morrissey* Court recognized, the public has a "stake" in the successful rehabilitation of parolees. 408 U.S. at 484. Thus, the undisputed fact that reincarceration disrupts rehabilitation further demonstrates that the mandatory detention of people who pose no public safety risk undermines the public's interest.

Third, mandatory detention is far more costly for taxpayers than any due process safeguards required to replace it. *Mathews* instructs that "the final factor to be assessed is the *public interest*," so as to include all of the public sector, including local governments. *See* 424 U.S. at 347–48 (emphasis added). Defining the public interest broadly in this manner prevents the State from exempting its policies from constitutional limitations simply by forcing local governments to foot the bill for its

erroneous decisions. Yet that is exactly what the State aims to do here. As the district court explained, the Board urged it to find that the cost-savings from replacing mandatory detention with a release hearing are irrelevant because "the cost of custodial care for alleged parole violators who are housed in local jails has been borne entirely by local governments, without any contribution or reimbursement by the State. It is an unfunded mandate not borne by the State of New York."[17] J.A. 983; S.P.A. 34. *Mathews* is dispositive in rejecting this approach. Because the public, through local governments and the taxpayers that fund them, bear the enormous fiscal costs of incarcerating alleged parole violators, their interest in "conserving scarce fiscal and administrative resources" is essential to the final *Mathews* factor. *See Mathews*, 424 U.S. at 348.

It is undisputed that, in 2019, the annual cost for incarcerating a person in New York City jails was $337,524. *See* J.A. 242 (Declaration of Jesse Barber ("Barber Decl.") ¶ 10) (citing report of the New York City Comptroller). The cost of incarcerating the 1,535 people who, on average, are detained on parole warrants in City jails in 2019 was $518,099,340 (including $222,765,840 for alleged technical

[17] It is undisputed that since the fiscal year 2009–2010, under state law, local governments must house alleged parole violators in their jails and bear the full costs for their detention. *See* J.A. 397–98 (Facts ¶¶ 109–11). As Governor Cuomo recognized, "[t]he enormous burden of unfunded . . . mandates is breaking the backs of taxpayers, counties and municipalities across the state." J.A. 563 (Press Release, Governor Andrew M. Cuomo, *Governor Cuomo Announces Members of the Mandate Relief Redesign Team* (Jan. 7, 2011)).

parole violators and $295,333,500 for parolees with new arrests). *See id.* If release hearings were to reduce the detained parolee population by 400 people each year (26% of the total parolee population)—the estimated number of alleged technical violators the Board released in April 2020 because they did not pose an undue risk to public safety—the City of New York would save approximately $135,009,600 annually. *See* J.A. 243 (Barber Decl. ¶ 12). This estimate of the number of people who would be released is low because the Board likely would have released more people from City jails if they had reviewed parolees with new arrests for release.[18]

Even accepting the Board's cost estimates for providing release hearings, those costs are significantly outweighed by the costs of incarceration the State externalizes onto New York City and other local governments across the state. The Board estimates that the annual cost of providing custody release hearings to all alleged parole violators is $32,308,589, and that there would be a one-time cost of $10,296,285 in the first year. J.A. 222 (Defs.' Rule 56.1 Statement ¶ 54). When comparing the annual cost savings of considering individuals for release *just* in New York City to the statewide cost of the release hearings, release hearings would

[18] While this case is on behalf of a putative class of people detained on parole warrants in New York City jails, the defendants have introduced statewide costs into evidence. *See* J.A. 222 (Defs.' Rule 56.1 Statement ¶ 54). When factoring in the savings from providing release hearings for alleged parole violators detained in local jails in New York's remaining 57 counties, the annual cost savings for taxpayers could be significantly larger. *See* J.A. 244 (Barber Decl. ¶ 13).

significantly reduce taxpayer costs. The public would save an estimated $92,404,726 in the first year and $102,701,011 in each subsequent year if the Board provided release hearings. *See* J.A. 245 (Barber Decl. ¶ 15). Adding in the estimated savings for localities across the state would only increase the net savings.

The district court ignored these substantial cost savings, concluding that cost savings overall are not relevant to the State's administrative and fiscal burden. J.A. 983–84; S.P.A. 34–35. But this remarkable conclusion is contrary to the plain language of *Mathews*, which includes monetary costs as part of conserving scare resources. *See* 424 U.S. 347–48. In any event, it is impossible to divorce the total cost of the Board's mandatory detention regime, and the savings that would be obtained by additional procedures to reduce the erroneous detention of those who are not a public safety risk, from the costs of adding more personnel and space for the type of hearings that they already conduct. The Board's assertions of burden are the costs of hiring additional staff and obtaining additional space—costs that will be substantially outweighed by the reduced fiscal burden of not detaining people in error.

Moreover, these are ordinary burdens that the Board is accustomed to providing in other contexts, and such burdens cannot outweigh the due process rights of people on parole. *See Fuentes*, 407 U.S. at 92 n.22 ("A . . . hearing always imposes some costs in time, effort, and expense, and it is often more efficient to

dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency. . . it is intended to protect the particular interests of the person." (citations omitted)); *see also Meza*, 2010 WL 6511727, at *14 ("[W]e do not find the additional costs imposed on the State to be overly burdensome given that these are the same protections the State is constitutionally required to provide to inmates facing the possible loss of good-time credits."). This Court has required procedural protections that inevitably result in some administrative burden for the government when weighty private interests are at stake, even when those interests did not implicate physical liberty. *See, e.g.*, *Krimstock*, 306 F.3d at 68–69 (ordering the city to provide prompt vehicle retention hearings for individuals whose vehicles are seized as alleged instrumentalities of crime). Given the important constitutional concerns presented in this case, the State's administrative burdens should be subordinated to preventing inappropriate detention.[19] *See Williams v. Illinois*, 399 U.S. 235, 245 (1970) (holding that constitutional imperatives "must have priority over the comfortable convenience of the status quo"); *see also Stanley*, 405 U.S. at

[19] Given that the federal government and numerous other states evaluate people accused of parole violations for release pending their final revocation hearings, the Board's claimed administrative inconvenience derived from providing release hearings cannot be deemed overly burdensome. *See, e.g.*, Fed. R. Crim. P. 32.1(a)(6); N.J. Stat. Ann. § 30:4-123.62(g) (West 2020); 37 Pa. Code § 71.3(10) (West 2020); Cal. Penal Code § 3000.08(c) (West 2017).

656 ("[T]he Constitution recognizes higher values than speed and efficiency," and "the Due Process Clause in particular . . . [was] designed to protect the fragile values of a vulnerable citizenry from the [government's] overbearing concern for efficiency and efficacy.").

* * *

As demonstrated above, the balancing of the private interests, risk of erroneous deprivation, and public interests, *see Mathews*, 424 U.S. at 335, requires that individuals charged with parole violations be provided with an opportunity to be heard on their suitability for release to prevent their erroneous detention for months on end. The district court erred in granting judgment for the Board. This Court should reverse the district court's decision and enter judgment as a matter of law for the plaintiffs.

II. THE COURT SHOULD DIRECT THE DISTRICT COURT TO CONSIDER ON REMAND THE CLASS CERTIFICATION MOTION.

Immediately after filing the class action complaint, named plaintiff Frederick Roberson moved to certify a class of "all people on parole in New York City who are or will be detained pending their final hearing on a parole warrant pursuant to 9 N.Y.C.R.R. § 8005.7(a)(5) and § 8004.3." District Ct. ECF No. 6 at 9 (Pls.' Mem. of Law in Supp. of Mot. for Class Certification). The district court deferred consideration of the class certification motion pending its ruling on the parties' summary judgment motions. *See* District Ct. ECF No. 39 (docket text). The district

court subsequently terminated the class certification motion upon granting summary judgment to the Board. J.A. 993; S.P.A. 44; *see also* District Ct. ECF. No. 86 (docket text "terminating [] Motion to Certify Class"). As set forth herein, this grant of summary judgment to the defendants and subsequent termination of the class certification motion was in error.

For the reasons articulated in the plaintiffs' class certification motion, the proposed class meets all the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, and class certification is essential to the fair and efficient adjudication of this matter. Because the district court did not address the substance of the class certification motion and did not make any findings of fact or conclusions of law, there is no merits ruling for this Court to review. Accordingly, this Court should remand so that the district court may consider the class certification motion on the merits in the first instance. *See, e.g.*, *Salazar v. King*, 822 F.3d 61, 72, 84 (2d Cir. 2016) (vacating district court judgment dismissing plaintiffs' complaint and ordering the district court on remand to "consider[] . . . plaintiffs' class certification motion," which the district court had denied as moot); *Krimstock*, 306 F.3d at 47, 70–71 (same).

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully urge the Court to reverse the district court's decision and order, deny the Board's motion for summary

judgment, and grant the plaintiffs' cross-motion for summary judgment, including the relief requested therein to enjoin the Board's mandatory detention scheme and to order the Board to provide the plaintiffs with the following process: (1) a prompt opportunity for people detained on parole warrants to be heard on their suitability for release and to rebut the Board's justifications for detention; (2) notice of when the Board will provide an opportunity to be heard and the reasons supporting the Board's request for detention; (3) a neutral decision-maker, which can be an administrative law judge; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. The plaintiffs further urge the Court to remand for the district court to address class certification in the first instance.

Dated: June 30, 2021
New York, N.Y.

Respectfully Submitted,

/s/ Philip Desgranges

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it contains 13,315 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

/s/ Philip Desgranges
Philip Desgranges

Counsel for Plaintiff-Appellant

21-877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREDERICK ROBERSON, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

– v. –

ANDREW M. CUOMO, Governor of New York, in his official capacity; and TINA M. STANFORD, Chairperson of the New York State Board of Parole, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District Of New York

SPECIAL APPENDIX (SPA1–68)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDERICK ROBERSON, on behalf of himself and all others similarly situated, Plaintiffs, -against- ANDREW M. CUOMO, Governor of New York, in his official capacity and TINA M. STANFORD, Chairperson of the New York State Board of Parole, in her official capacity Defendants.	No. 20 Civ. 2817 (CM)

DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT, AND AMENDING THE CAPTION IN THIS ACTION[1]

McMahon, C.J.:

In this case, named plaintiff Frederick Roberson and the putative class ("Plaintiffs") filed suit against Defendants Andrew M. Cuomo, Governor of the State of New York, and Tina M. Stanford, Chairperson of the New York State Board of Parole (the "Board") (collectively, "Defendants" or the "State") challenging the constitutionality of New York's regulations for the detention of parolees who are awaiting final parole revocation hearings due to alleged violations of the conditions of their release. The parties have cross-moved for summary judgment. (Dkt. Nos. 57, 65.) This Court previously denied Plaintiffs' motion for a preliminary injunction (Dkt. No. 33); familiarity with that decision is presumed.

[1] This case was original brought by Michael Bergamaschi and Frederick Roberson as a class action. (Compl., Dkt. No. 1.) A notice of suggestion of death was filed as to Mr. Bergamaschi September 17, 2020. (Dkt. No. 56.) The Court hereby orders that the caption be amended by removing Mr. Bergamaschi as a party plaintiff.

For the reasons outlined below, Defendants' motion is GRANTED, and Plaintiffs' cross motion is DENIED.

BACKGROUND

New York's Parole Revocation Procedures

Parole is an alternative method by which a prisoner may complete his or her sentence. Admission to parole does not terminate a prisoner's sentence; "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). These conditions restrict a parolee's activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. *Id.* at 478. A parole officer has the power to enforce the conditions of parole by revoking parole and returning the parolee to prison, but to do so, the officer must comply with minimum due process procedures, which the Supreme Court set forth in *Morrissey*: a preliminary hearing by someone other than the parole officer to confirm the existence of probable cause of a violation, and a final revocation hearing. Along with a majority of states, New York detains alleged parole violators pending their final revocation hearing if the parole warrant is not lifted at the preliminary hearing stage.

Not every violation of parole results in revocation. Before a decision is made to issue a parole violation warrant, the New York State Department of Corrections and Community Supervision ("DOCCS") conducts a thorough examination and evaluation of the alleged parole violation, including an assessment of the risk to the community posed by the parolee's release.[2]

[2] These facts are drawn from the declaration of Timothy O'Brien, the Director of Internal Operations for Community Supervision ("Community Supervision") with the DOCCS. (O'Brien Decl., Dkt. No. 59.) Plaintiffs quibble with Mr. O'Brien's testimony – not based on any inconsistencies, lack of credibility, or countervailing evidence, but based solely on their reading of DOCCS directives, New York Codes, Rules, and Regulations, and New York Executive Law. (*See* Pls.' Response to Defs.' Rule 56.1 Statement and Counterstatement of Additional Material Facts ("Pls.' Facts") at ¶¶ 1-6, Dkt. No. 71.) Such quibbling does not create a genuine dispute of fact as to Mr. O'Brien's testimony about what in fact occurs during DOCCS's parole revocation process.

This initial assessment is made by the parolee's parole officer, with the involvement of a Senior Parole Officer and the Bureau Chief in DOCCS's Community Supervision Unit. They evaluate factors including the nature of the conduct giving rise to the alleged violation; the nature of the parolee's underlying offense; the parolee's criminal history; the parolee's history of compliance or non-compliance with conditions of supervision; and the supervision level assigned to the parolee under the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") assessment tool. They also consider whether there is an opportunity to employ graduated sanctions or alterative measures to obtain a positive behavior outcome.

If, after reviewing these factors, the parole officer and his supervisors determine that a parolee's release would not pose a risk to public safety or to the parolee's health and welfare, or if they conclude that graduated sanctions or another alternative measure might result in a positive behavior outcome, the Senior Parole Officer does not issue the parole violation warrant. Otherwise, with the Bureau Chief's approval, the Senior Parole Officer will issue the parole warrant. Only if the alleged violation consists of a new criminal arrest, an alleged violation of law, or absconding from supervision may the Senior Parole Officer issue a warrant without the Bureau Chief's approval. N.Y. Exec. Law § 259-i(3)(a)(i); 9 N.Y.C.R.R. § 8004.2.

If a parole warrant issues, the parolee is arrested. As outlined at length in this Court's earlier opinion, the Executive Law and the New York Code of Rules and Regulations require that notice of the charged violation be given to the parolee within three days of initial detention. Unless the parolee has been convicted of a new crime, s/he has the right to a preliminary hearing before a hearing officer who has had no prior supervisory involvement over the alleged violator. That preliminary hearing must take place within 15 days following execution of the parole warrant. At the preliminary hearing, the hearing officer determines whether there exists probable cause that a

violation of release "in an important respect" has been committed. The parolee has the right to appear and to present witnesses and evidence on his behalf, as well as the right to confront and cross examine witnesses. The hearing officer must prepare a written decision stating the reasons for the determination and citing to the evidence on which the decision was made.

If the hearing officer finds that there is no probable cause to believe the parolee violated one or more conditions of release in an important respect, the officer must dismiss the violation charges and release the parolee back to supervision. If there is a finding of probable cause – either by determination at the preliminary hearing or the parolee's waiver of the right to a preliminary hearing – a final revocation hearing is scheduled to occur within 90 days.

Every parolee has the right to be represented by counsel at a final revocation hearing, and counsel are assigned to represent indigent parolees. Parolees have the right to compel witnesses to appear at the hearing and provide testimony, the right to subpoena and submit documentary evidence, the right to confront and cross examine witnesses called to testify against them, and the right to present evidence in mitigation for the purpose of being restored to supervision. At the final revocation hearing, an administrative law judge ("ALJ") determines whether or not there is a preponderance of the evidence that the alleged violator violated one or more conditions of release in an important respect. If not, the ALJ must dismiss the violation charges and release the parolee to supervision. If so, the ALJ must revoke the parolee's parole. After parole is revoked, the ALJ may restore the parolee to supervision, place the parolee in a transition facility, or reincarcerate the parolee. *See* N.Y. Exec. Law § 259-i(3)(e).

These procedures were adopted by New York State to comport with the due process requirements announced by the United States Supreme Court in 1972 in *Morrissey*. They have been repeatedly held to provide due process to persons accused of violating parole – an accusation

that, owing to the fact that the parolee is still serving his or her sentence, does not trigger "the full panoply of rights" that attach in the context of a criminal prosecution. *Morrissey*, 408 U.S. at 480.

None of these procedures is challenged as unconstitutional.

Plaintiffs' challenge addresses what happens to the parolee between the finding of probable cause at the preliminary hearing (or the waiver thereof) and the final revocation hearing.

Plaintiffs' Challenge to Mandatory Detention

Pursuant to Executive Law § 259-i(3), if a parole officer has probable cause to believe that a parolee has violated the terms and conditions of parole, a warrant may (not must) be issued for temporary detention in accordance with the rules of the Parole Board. However, at the preliminary hearing, if the hearing officer finds that there is probable cause to find that the alleged violator has violated one or more of the conditions of parole "in an important respect," s/he "*shall* direct that the alleged violator be held for further action." 9 N.Y.C.R.R. § 8005.7(a)(5) (emphasis added). Probable cause can be made in one of three ways: it can be determined at a preliminary hearing; will be presumed if the parolee waives a preliminary hearing; or must be found upon presentation of proof that the parolee has been convicted of a new crime while under supervision. The Board will only order a final revocation hearing for a parolee after a finding of probable cause if the parolee is in custody or has absconded. *See* 9 N.Y.C.R.R. § 8004.3(d)(1).

Read together, these regulations mandate detention for all parolees awaiting a final revocation hearing.

Plaintiffs allege that this mandatory detention scheme – which is in force in 30 of the 50 states, and which has been followed unchallenged for over four decades – is unconstitutional. Invoking 42 U.S.C. § 1983 and the Due Process Clause of the United States Constitution, they ask this Court to do what the legislature has thus far not chosen to do – craft some alternative to

mandatory detention, in the nature of a "bail-like" procedure that would require evaluation of a parolee's suitability for release pending the final revocation hearing, at which the parolee would have rights akin to those attendant on a bail hearing, including the right to present evidence to a neutral decision maker, who would have to conclude, in a reasoned decision, in writing or on the record, that the parolee presented a public safety or flight risk in order to justify detention pending the final hearing.

The State contends that, in form and substance, Plaintiffs are alleging that a bail hearing is constitutionally required for parole violators. The Court is hard-pressed to disagree with that assessment, as the standard proposed by Plaintiffs is identical to that for fixing bail when a person is charged with a crime in a federal (but not a state) court.[3] *See* 18 U.S.C. § 3142.

Procedural History

Plaintiffs moved for a preliminary injunction on April 6, 2020, shortly after the onset of the COVID-19 pandemic. Defendants did not cross-move for dismissal of the complaint, but urged that the precise question had already been considered and decided, in *Morrissey* and in other cases. *See Galante v. Warden, Metro. Corr. Ctr.*, 573 F.2d 707, 708 (2d Cir. 1977) ("[A] mandatory releasee . . . no longer enjoys the benefit of a presumption of innocence and has no constitutional right to bail."); *see also Calhoun v. New York State Div. of Parole Officers*, 999 F.2d 647, 652 (2d Cir. 1993) ("New York provides procedures for parole revocation that generally satisfy due process.").

[3] Unlike the federal standard for bail, the New York standard excludes consideration of the defendant's perceived future dangerousness or risk to public safety. The sole concern of New York's bail law is securing the defendant's return to court when required. N.Y. Crim. Proc. Law § 510.30. If there were probable cause to believe that a condition of parole had been violated, it is likely that detention would result under the New York standard, on the theory that a person who would violate his parole in a significant respect cannot be trusted to return to court. That is not, however, the standard that Plaintiffs propose.

On April 20, this Court issued an opinion denying the preliminary injunction motion ("P.I. Opinion"). (Dkt. No. 33.) I concluded that Plaintiffs had not come close to demonstrating a likelihood of success on the merits, especially in view of their request for a mandatory injunction against the State. However, finding no case (let alone a controlling case) that, *after consideration of the precise question*, rejected Plaintiffs' constitutional challenge to a mandatory detention scheme like New York's, I concluded that the constitutionality of New York's scheme had to be evaluated using the factors discussed in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) – a case decided four years after *Morrissey* that outlined how to evaluate a procedural due process challenge to "governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." In taking this course, I followed the view of a (bare) majority of the Seventh Circuit in an earlier case that challenged the constitutionality of an identical mandatory detention scheme, *Faheem-El v. Klincar*, 841 F.2d 712, 725 (7th Cir. 1988). I directed the parties to assemble a record that would allow the Court to undertake such an evaluation. (*See* Dkt. No. 39.)

After several months of discovery, the parties cross-moved for summary judgment.

DISCUSSION

Summary judgment is appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 822 F.3d 620, 631 n.12 (2d Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The movant bears the initial burden of demonstrating the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Victory v. Pataki*, 814 F.3d 47,

58–59 (2d Cir. 2016). Courts must construe the evidence and draw all reasonable inferences in the non-moving party's favor. *See Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 71–72 (2d Cir. 2016). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Pippins v. KPMG, LLP*, 759 F.3d 235, 252 (2d Cir. 2014) (internal quotation omitted).

"In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (internal citation omitted). "The non-movant then bears the burden of establishing the existence of elements essential to its case, which it would have to prove at trial. If no rational fact finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate." *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707, 710 (2d Cir. 1991) (internal citations omitted).

Plaintiffs assert a single cause of action: that Defendants' mandatory detention regulations, actions, and inactions violate the due process rights of people on parole in New York City who are subject to detention pending their final hearing on a parole warrant under the Fourteenth Amendment of the United States Constitution. (*See* Am. Compl. ("AC") ¶¶ 65, 70-71, Dkt. No. 38.) They seek a declaration that these regulations are unconstitutional, a permanent injunction thereof, and an order directing Defendants to conduct "suitability for release" hearings pending the final revocation hearing. (*Id.* at 23.)

In a suit brought to enforce procedural due process rights, "a court must determine (1) whether a [liberty or] property interest is implicated, and, if it is, (2) what process is due before the plaintiff may be deprived of that interest." *Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011)

(citing *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 313 (2d Cir. 2002)). In this case, as discussed below, there is no dispute that one enjoys a limited, conditional liberty interest while on parole. (*See* Defs.' Br. at 22-23, Dkt. No. 62.) Accordingly, this Court is called upon only to determine what process is due.

In *Mathews v. Eldridge* the Supreme Court identified three factors that should be considered in ascertaining what process is due to an individual in a particular circumstance: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335 (citations omitted).

Due process requires that an aggrieved party be given the right to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). However, "Due process does not, in all cases, require a hearing before the state *interferes* with a protected interest, so long as 'some form of hearing is [provided] before an individual is finally deprived'" of that interest. *Nnebe*, 644 F.3d at 158 (alterations and emphasis original) (quoting *Brody v. Vill. of Port Chester*, 434 F.3d 121, 134 (2d Cir. 2005) (quoting *Mathews*, 424 U.S. at 333)). "*Mathews* is the test for both when a hearing is required (i.e., pre- or post-deprivation) and what kind of procedure is due." *Nnebe*, 644 F.3d at 158 (quoting *Brody*, 434 F.3d at 135). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey*, 408 U.S. at 481).

Balancing the *Mathews* factors in light of the evidence presented by the parties, Defendants have the better of the argument.

I. A Parolee's Private Liberty Interest is Limited

The parties agree that the private interest at issue is the liberty interest of an alleged parole violator. They also agree that the Supreme Court has held that this liberty interest is a limited one: "not . . . the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey*, 408 U.S. at 480.

As this Court noted in its decision denying Plaintiffs' motion for a preliminary injunction, the issue of bail (or something like bail, such as pre-hearing release) for alleged parole violators was not before the Supreme Court in *Morrissey*. However, the *Morrissey* court expressly blessed a "parolee's continued detention and return to the state correctional institution pending the final decision" where there was "probable cause to hold the parolee for the final decision of the parole board on revocation" – *i.e.*, "whether there is probable cause to believe [the parolee] has committed a parole violation." 408 U.S. at 487. Only Justice Douglas, in a dissent joined by none of his colleagues, asserted that "the parolee is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board—or other authorized state agency—acts." *Morrissey*, 408 U.S. at 500 (Douglas, J., dissenting in part). That is simply not the law.

Additionally, the length of time that alleged parole violators are mandatorily detained after probable cause is found is not excessive. That, too, diminishes the liberty interest asserted by Plaintiffs in this case, because a limited "possible length of wrongful deprivation" narrows an already conditional liberty interest. *See Mathews*, 424 U.S. at 341.

"The possible length of wrongful deprivation of benefits (also) is an important factor in assessing the impact of official action on the private interests." *Id.* (internal alterations omitted) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)). Plaintiff Roberson brings this class action on behalf of those "detained pending their final hearing." (AC ¶ 65.) As explained above, alleged parole violators only proceed to a final hearing where this is a finding of probable cause – either

at a preliminary hearing, or because the parolee waives such a hearing. Thus, this lawsuit concerns only the period of detention between the date of the preliminary hearing[4] and the final hearing itself.

Under New York's regulations, a parolee's period of pre-hearing detention is limited to a maximum of 90 days by statute. That is a relatively short period of time. And New York pretty much adheres to that number; the average period of mandatory detention for all parole violators in New York City in 2019 was 90.77 days, regardless of the nature of their alleged violation.[5] While 90 days is three months – longer than the two months that the Supreme Court blessed in *Morrissey*, 408 U.S. at 488 – Plaintiffs declined the Court's invitation to amend their complaint to assert a claim that mandatory detention of more than two months (as opposed to all mandatory detentions before a final hearing) was unconstitutional. No such claim is being asserted in this case.

For many alleged paroled violators – especially those who, according to Plaintiffs, would be more amenable to pre-hearing release – the mandatory detention period is even shorter. In 2019, 62% of parolees were jailed on a parole warrant for what DOCCS refers to as a "technical" violation – conduct that violates the conditions of release, but that is not separately charged as a crime. Examples of "technical" violations include missing scheduled sessions with the parole officer, failing to attend mandated substance abuse programming, or communicating with victims of the parolee's crimes. The evidence shows that, in 2019, the average length of incarceration for parolees detained in New York City jails pending a final revocation hearing for "technical"

[4] A narrow category of putative class members is not entitled to a preliminary hearing: those who have been convicted of a misdemeanor while on parole that causes the parole violation (because the misdemeanor conviction establishes probable cause). (*See* AC ¶ 21.)

[5] This calculation is based on the average daily population and average length of stay of people charged with technical parole violations and pretrial detainees with parole violations tied to a new arrest in the Mayor's Office of Criminal Justice's 2020 Report. (Dkt. No. 68-2.)

violations was 63 days (two months) (Pls.' Facts ¶ 94) – precisely in line with the two month period that the Supreme Court viewed as tolerable in *Morrissey*. 408 U.S. at 488.[6]

When a parole violation is tied to a new arrest, as is the case in 38% of parole warrants, the average period of detention before the final hearing is longer – 136 days. But where there is probable cause to believe that a new crime has been committed, an alleged parole violator is less likely to assert credibly that s/he poses no danger to society or risk of flight – the two conditions that Plaintiffs want New York to apply in assessing amenability to pre-hearing release.

In any event, it is clear that the detention of parolees between their preliminary and final hearings is time-limited – *de jure*, for 90 days; *de facto*, on average, 91 days; and in cases of so-called "technical" violations, just 63 days.[7]

So the private interest under the first *Mathews* factor is a limited conditional liberty interest, and the "possible length of wrongful deprivation" is brief under Defendants' mandatory detention scheme. With the private liberty interest properly framed, it is apparent that the first *Mathews* factor tips slightly – but only slightly – in favor of Plaintiffs.

II. There is No Material Risk of an Erroneous Deprivation of a Parolee's Conditional Liberty Interest Under New York's Existing Parole Revocation Procedures, and No Probable Value of Adding a "Bail-Like" Proceeding

Both the State and the parolee have an interest in avoiding the erroneous revocation of parole. *Morrissey*, 408 U.S. at 484; *see U.S. ex rel. Carson v. Taylor*, 540 F.2d 1156, 1161 (2d Cir.

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[6] Significantly, the *Morrissey* court noted that "confinement" meant that the parolee could no longer "be gainfully employed" and was not "free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. As Plaintiffs argue, those same collateral harms result from the temporary loss of liberty attendant on pre-hearing detention. Yet the Supreme Court suggested, in the face of Justice Douglas's dissent, that this temporary loss of freedom *pendente lite* did not violate a parolee's liberty interest without due process.

[7] Plaintiff Roberson was incarcerated for two months. (*See* Roberson Decl. ¶ 5, Dkt. No. 66.) Putative class member Samuel Murphy was rearrested on February 12, 2020 and had a final hearing scheduled for March 27, but was released prior to his final hearing pursuant to a mass writ of habeas corpus. (*See* Murphy Decl. ¶¶ 4, 6, Dkt. No. 67.) Murphy was arrested on another parole warrant on August 20, 2020 and had his final parole hearing on September 20. (*Id.* ¶¶ 10, 12.)

1976). Thus, they also share an interest in avoiding the erroneous detention of alleged parole violators. However, Defendants' current procedures pose only a 1.5% risk of erroneous deprivation, and Plaintiffs' proposed bail-like "suitability for release" hearing does not include any additional procedure that would further mitigate that risk.

A. There is A Very Low Incidence of Erroneous Deprivation

The undisputed data submitted by Defendants establishes that erroneous probable cause findings – which lead to erroneous mandatory detention pending a final hearing – are rare under existing procedures. During the 12-month period between March 1, 2019 and February 29, 2020, the Bureau of Adjudication issued 3,334 final revocation hearing decisions in cases where a preliminary hearing was held and a finding of probable cause was made. Of those cases, only 51 (or 1.5%) resulted in none of the charged violations being sustained at final hearing. (Defs.' Rule 56.1 Statement ("Defs.' Facts") ¶ 55, Dkt. No. 61 (citing O'Brien Decl. ¶¶ 12-13, Dkt. No. 59)); *see* Pls.' Facts ¶ 55 (facts undisputed).) In other words, 98.5% of the time, where probable cause was found at a preliminary hearing, at least one of the alleged parole violations was sustained at the final hearing. Only in 1.5% of cases was probable cause found at the preliminary hearing, but no violation was sustained after a final revocation hearing. Even that is only arguably "error," since probable cause of a parole violation at the preliminary hearing is judged by a lesser evidentiary standard than is applied at a final revocation hearing, at which a violation must be proved by a preponderance of the evidence.

1. "Revoke and Restore" Determinations are not "Errors"

Plaintiffs do not dispute the accuracy of these numbers. Nonetheless, they urge that there is an erroneous deprivation of liberty in a far higher percentage of cases. They base this argument on the premise that a parolee whose parole is revoked after a final hearing was detained "in error" if s/he is restored to release rather than being reincarcerated.

I reject that premise.

The source of this argument is the following statement in the (bare) majority opinion of the Seventh Circuit, sitting en banc, in *Faheem-El*:

> These "errors" essentially fall in two categories. First, even if a parolee violates parole, not all violations result in revocation. Statistics calculated by the Board indicate that from 1982 to 1986, between 5% and 11% of parolees . . . did not have their parole revoked. Second, not all parolees are found to have violated parole at the final revocation hearing.

841 F.2d at 726.[8]

I disagree with this statement. As far as this Court is concerned, an "*erroneous* deprivation" within the meaning of *Mathews* occurs only when the State mandatorily detains an alleged parole violator who is ultimately found not to have violated any of the conditions of his or her parole. Deprivation is not "erroneous" if any charge is sustained at a final hearing. Every finding of a parole violation necessarily means that the parolee failed to abide by at least one of the conditions on which his or her liberty was contingent. No one who violates parole has, from the moment the violation is committed, a *right* to be at liberty – there is no presumption of innocence that disappears only upon conviction. Ergo, temporary incarceration pending a final hearing could not possibly have worked any constitutional liberty interest violation if, at that final hearing – as is true in 98.5% of cases – some violation of parole is sustained.

Plaintiffs' position is that the decision of an ALJ to restore a parole violator to supervision after sustaining a violation renders pre-hearing incarceration "erroneous." With respect, that is wrong. If detaining a parolee as to whom there exists probable cause to believe that s/he has committed a parole violation were constitutionally suspect, Justice Douglas's position in *Morrissey* would have triumphed. It did not.

[8] Justice Douglas would have agreed with that assessment; his eight *Morrissey* colleagues obviously would not have so agreed.

While that alone should end the argument, Plaintiffs insist that there must be error in detaining someone who is restored to parole after a violation is sustained, because an ALJ cannot "revoke and restore" without making a finding that the parolee poses no risk to public safety. But that is an assessment of future risk, made at the time of the final revocation hearing.

This argument is also logically fallacious, because a person under sentence after conviction of a crime who cannot or will not follow the rules presents a danger to society without more. The Supreme Court said as much in *Morrissey*:

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is *a risk that they will not be able to live in society without committing additional antisocial acts*.

408 U.S. at 483 (emphasis added). This risk gives the State "an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Id.* In other words, regardless of the risk a parolee poses going forward after a final revocation hearing, the predicate act – the violation of parole, which there is probable cause to believe the parolee has committed (and which, in almost every case, s/he has in fact committed) – carries with it a risk that the parolee cannot continuing living in society without threatening public safety by not following the rules.

Nor does the decision to "revoke and restore" necessarily mean that the adjudicated parole violation was not serious enough to warrant reincarceration. Just as "time served" can be an appropriate sentence after conviction of a crime, it can be an appropriate sentence for a parole violation. Any time served prior to a final revocation hearing is considered in determining the ultimate sentence to be imposed for the violation. Service of time pending a final revocation hearing is a matter in mitigation; and as the *Morrissey* court held, "The parolee must have an

opportunity to be heard and to show, if he can, that . . . if he did [violate the conditions of parole], that circumstances in mitigation suggest that the violation does not warrant revocation." 408 U.S. at 488. But the *Morrissey* court obviously believed that the moment at which such mitigating evidence became relevant for due process purposes was at the final revocation hearing – not at or near the time of a finding of probable cause. *See id.* at 487–88.

Plaintiffs argue that alleged parole violators who are ultimately returned to supervision are subject to a "perverse" practice of being deprived of more liberty before the charges against them are sustained than afterwards. (Pls.' Br. at 12). For this proposition they rely on *Mental Hygiene Legal Service v. Spitzer*, No. 07-cv-2935, 2007 WL 4115936, at *14 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom. Mental Hygiene Legal Services v. Paterson*, No. 07-5548-cv, 2009 WL 579445 (2d Cir. Mar. 4, 2009).

But *Mental Hygiene* is factually and logically inapposite. In *Mental Hygiene*, the plaintiffs, who had *completed* their sentences for sex offenses, were detained pending a post-sentence civil commitment hearing – not because they had committed some new offense or violated any condition of release, or even because they were found to be dangerous, but because they may have some sort of mental abnormality that requires civil management. *See id.* at *1, *11. Because their sentences had been fully served, they had an absolute liberty interest, not a conditional one. The *Mental Hygiene* court found it "perverse" that an individual who had completed his sentence on parole could be incarcerated pending a hearing on whether or not he needed continuing outpatient community treatment. *See id.* at *14.

Here, by contrast, Plaintiffs are still serving their sentences, so they are at all times subject to reincarceration. They are detained pending the final parole revocation hearing because there is probable cause to believe that they have violated the conditions of their early release – the very

conditions on which their conditional liberty depends – and to have done so "in an important respect."

2. COVID-19 Discretionary Releases Are Irrelevant

Plaintiffs also attempt to use COVID-specific numbers to illustrate that alleged parole violators have been erroneously detained. I find this evidence to be irrelevant.

Plaintiffs point to alleged technical parole violators who were released under an emergency directive to empty jails in response to the COVID-19 pandemic. Under this discretionary review, the Board determined that many could be released because they did not pose an "undue risk to public safety." (Annucci Decl. ¶ 4, Ex. 2, Dkt. No. 75-1; *see also* DOCCS COVID-19 Rep., Dkt. No. 75-6.) Thus, they argue, to the extent the Board considers a parolee's public safety risk prior to issuing a warrant, that process is not sufficient to meet due process.

This argument presumes that the decision to release parolees who pose no "undue risk to public safety" in the midst of a global health crisis equates to a finding that these parolees would be deemed safe for release in normal times, when state and national lockdowns have not closed businesses and significantly restricted travel, and when the threat of the rapid spread of an infection against which there is no defense does not loom over those in custody and the staff at those facilities. Many considerations have been altered by the health hazards of the pandemic. The parole violators who were released as a result of the pandemic were not released because of any constitutional liberty interest that they enjoyed; it was a matter of institutional grace during an unprecedented crisis.

Moreover, this argument is based on the same flawed premise discussed above: that the interim detention of a parolee who does not pose an "undue risk" to public safety has been "erroneously" detained. As explained above, this Court believes that the only error based on the conditional interest defined in *Morrissey* is the detention of a parolee whose violation of the

conditions of parole cannot be established by a preponderance of the evidence. Thus, these data are irrelevant to the Court's inquiry into whether any parolees were erroneously detained pending their final hearing.

In sum, the undisputed evidence establishes that there is very little risk of an erroneous deprivation of a parolee's limited and conditional liberty interest when detained pending a final revocation hearing. Plaintiffs have failed to present relevant evidence to the contrary.

B. No Probable Value of Bail-like Hearing

Mathews also requires this Court to consider "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry." 424 U.S. at 343 (citations omitted).

1. The Pre-Mandatory Detention Procedures are Fair and Reliable

The procedures afforded an alleged parole violator by New York State prior to parole revocation are robust. In *Morrissey*, the Supreme Court recognized that, when the conditions of parole are violated, "the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." 408 U.S. at 483. This public safety interest does not entitle a state to revoke parole – to deprive an individual of "conditional liberty," *id.* at 480 – without "some informal procedural guarantees," *id.* at 483. But New York affords due process protections that were fashioned shortly after *Morrissey* and in full conformity with the dictates of that decision. Ergo they are both fair and reliable.

New York reviews parole violations before a warrant issues, and only detains parolees pending a final hearing upon a finding of probable cause that the parolee has violated a condition of parole in an important respect. The *Morrissey* court assumed that "the parolee is arrested and

detained, usually at the direction of his parole officer," and due process required only that "some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available" – *i.e.*, the preliminary hearing. 408 U.S. at 485.

New York's pre-warrant review process exceeds the pre-warrant process envisioned by the *Morrissey* court. This process ensures that a warrant only issues after a determination is made that a parolee poses a risk to public safety or to his or her own health, and that lesser corrective measures will not suffice. Moreover, such a warrant, issued by a Senior Parole Officer, and often only with the approval of a Bureau Chief, only permits the detention of an alleged violator for 15 days, until a preliminary hearing can be held (or waived).

Plaintiffs attack the pre-warrant review process as one-sided, and therefore, unfair. But this process is more robust than arrest and detention "at the direction of [a parolee's] parole officer," because it also involves a Senior Parole Officer and a Bureau Chief – there are multiple layers of pre-arrest review.

Plaintiffs also argue that the pre-warrant review process is the *only* process afforded parolees before they are detained for 90 days. That is, of course, not true; there is a preliminary hearing, unless the parolee himself or herself waives it. Plaintiffs dismiss this because public safety is not considered at that stage; the only consideration is whether there is probable cause to believe that the parolee has violated one or more conditions of his or her release in an important respect. (*See* Pls.' Br. at 19.)

But this argument assumes the answer Plaintiffs want the Court to reach: namely, that parolees have a constitutional right to an assessment of risk to public safety. It also fails to take into account the fact that any parole violation carries with it an inherent risk to public safety,

because of the risk that the parolee cannot continuing living in society without obeying the rules that condition his or her liberty. *See Morrissey*, 408 U.S. at 483; *see also* Part II.A., *supra*. If no probable cause is found, the parole violation warrant is dismissed, and the parolee is released from jail. If there is probable cause to believe a parolee failed to abide by the conditions of release – the condition on which a parolee's liberty depends – the relevant danger to society (the danger inherent in any non-compliance with conditions) is established at a level sufficient to warrant the parolee's detention pending a final revocation hearing. And the risk that that decision will turn out to be erroneous is small to the vanishing point, because the evidence tells us that the final hearing almost always results in a finding that some violation occurred.

The existing procedures that proceed the detention of a parolee pending a final revocation hearing accord with *Morrissey* and are fair and reliable.

2. Plaintiffs' Proposed Additional Safeguards Add No Value

Plaintiffs propose the additional safeguard of a bail-like "release suitability hearing" to mitigate the risk of detaining parolees who do not pose a public safety risk. Specifically, they assert that due process requires:

> (1) a prompt hearing where the people detained on a parole warrant have an opportunity to be heard on their suitability for release and to rebut the Board's justifications for detention; (2) notice of when the Board will conduct this hearing and the reasons supporting the Board's request for detention; (3) a neutral decision-maker, such as someone from the Board not involved in the decision to arrest and detain the parolee; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing.

(Pls.' Br. at 15.) As explained in Plaintiffs' earlier briefing, they consider the following considerations relevant to a parolee's suitability for release: the seriousness of the alleged parole violation, the parolee's likelihood of returning for the final hearing (*i.e.*, flight risk), and whether the parolee poses a public safety risk. (*See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. at 20, 24-25; Dkt. No. 19.)

While Plaintiffs' proposed procedures may result in the release of more parolees, they do not serve to prevent the only relevant error – mandatory detention of a parolee who has not in fact violated a condition of release.

As the Supreme Court acknowledged in *Mathews*, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process." 424 U.S. at 344. In other words, the value of additional procedural safeguards is dependent on their ability to enhance truthfinding and minimize error. The bail-like hearing Plaintiffs propose would do neither.

As this Court has made abundantly clear, the only liberty interest Plaintiffs seek to protect is the conditional liberty interest of parolees as defined in *Morrissey*; and the only error this Court is concerned with is the State's mandatory detention of an alleged parole violator who is ultimately found not to have violated any of the conditions of parole. A parolee's suitability for release – which Plaintiffs have couched in terms of flight risk and public safety risk – has little to no bearing on whether s/he violated a condition of parole. "There can be a substantial difference between the determination that there is probable cause to believe a condition of parole has been violated (the issue at the preliminary revocation hearing) and a determination that an individual should be detained pending his or her final revocation hearing." *Faheem-El*, 841 F.2d at 725. In other words, the "process" Plaintiffs assert is "due" to parolees whose liberty interest is conditioned on their compliance with parole rules does not track that condition. Thus, it adds no value to the relevant inquiry, which is whether a parolee violated parole.

Plaintiffs also argue that release hearings would add "value" because they would avoid disruptions to a parolee's life and rehabilitation. Plaintiffs' expert, Mr. David Muhammad, opines that these disruptions can threaten public safety.[9] This policy argument has nothing to do with the

[9] Defendants argue that Mr. Muhammad's opinion that mandatory detention is "likely resulting in more crime, not less," (Muhammad Rep. at 9, Dkt. No. 69), is so devoid of a scientific basis and lacking in the "reasonable degree of

"process" parolees are due before they are detained, and therefore, is not relevant to the second *Mathews* factor. Any potential indirect positive externalities that may result if, as a result of this process, more alleged parole violators were released would only be relevant – if at all – to society's interest under the third *Mathews* factor. *See* Part III.A., *infra*.

Defendants have established by undisputed facts that there is only a *de minimis* risk of erroneous deprivation of the relevant liberty interest. There is no evidence that the proposed release suitability hearings would add value the existing procedures. Thus, the second *Mathews* factor weighs strongly in favor of Defendants.

III. The Government's Interest In Mandatory Detention *Pendente Lite* is Substantial

The third *Mathews* factor requires this Court to consider the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335. Mandatory detention serves the State's substantial interest in public safety and Plaintiffs' proposed release hearings would impose a significant burden on the State.

A. The State Has An Interest in Protecting the Public From Persons Who Do Not Comport Their Behavior with the Conditions of Their Parole

As the Supreme Court noted in *Morrissey*, the State has a strong public interest in ensuring that persons who are released on parole comply with the conditions of their release, and in protecting society from those who will not. The Supreme Court concluded that "the State's interests are several." *Morrissey*, 408 U.S. at 483. Specifically:

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper

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certainty" required of expert witnesses that it should be stricken. (*See* Defs.' Mot. to Strike, Dkt. No. 80.) As I am not persuaded by his arguments, there is no need to strike the testimony.

> imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Id. It was for that reason that the *Morrissey* court stated, albeit in *dicta*, that at the preliminary hearing, "the [hearing] officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. *Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision*." 408 U.S. at 487 (emphasis added).

This State interest is far from speculative. Parolees are still serving sentences following their conviction for crimes. Indeed, "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Id.* at 477. Unfortunately, many parolees prove themselves incapable of following the rules to which they are subject as a condition of their provisional liberty.

Data tracked by DOCCS's Division of Program, Planning, Research & Evaluation (the "DOCCS Table") shows that 23,275 inmates were released on parole and into community supervision during the calendar year 2016. (*See* Ex. A to O'Brien Decl., Dkt. No. 59-1.) Within 3 years of their release, 45% of this cohort (10,592 parolees) violated their parole and had one or more parole violation sustained against them at a final hearing. As mentioned above, where a parole violation is sustained, the ALJ must revoke the parolee's parole. The DOCCS Table shows that for the 10,592 parolees whose parole was revoked, there were 16,260 revocations within 3 years.[10]

At the final revocation hearing, after the ALJ sustains a violation and revokes parole, s/he must then determine the appropriate punishment – send the parolee back to prison ("revoke and

[10] As Plaintiffs correctly point out, there were 16,260 revocations for only 10,592 paroles, which necessarily means that many of the 10,592 parolees had their parole revoked more than once over the 3-year period.

return to prison"), or immediately restore the parolee to supervision ("revoke and restore"). The DOCCS Table shows how many of the 16,260 revocations were held within 1, 2, and 3, years of release, and how many of those revocations resulted in "revoke and return to prison" versus "revoke and restore."

- 46% of revocations (7,476) occurred within just one year of release on parole. The punishment for 6,118 of those 7,476 revocations was a return to prison after the final revocation hearing.

- Another 33% of revocations (5,345) occurred during the second year of release, and the punishment for 3,837 of that cohort included a return to prison.

- Another 21% of revocations (3,439) occurred during the third year of release, and the punishment for 2,442 of these included a return to prison.

In short, over the three-year period following their release on parole, over 76% of the final hearings for this cohort resulted in a return to prison.

Beyond noting an arithmetic error in Defendants' original conclusions from the DOCCS Table, Plaintiffs' remaining arguments all derive from their contention that those who commit "mere," "simple," "minor" "rule violations" (by which Plaintiffs mean "technical" parole violators) pose no danger to the public. But this contention flies in the face of *Morrissey*, common sense, and the undisputed evidence.

First and foremost, "technical" does not mean "simple" or "minor." Those words are not synonymous. "Technical" violations encompass a host of dangerous conduct, such as absconding, failing to appear, or communicating with victims of the parolee's crimes.

Second, there is no evidence that New York mandatorily detains anyone who is accused of anything that could be deemed "simple" or "minor." The evidence suggests that DOCCS's pre-warrant review process weeds out any truly trivial violations before a parole warrant issues, or includes them only in a warrant that alleges multiple violations.

Certainly named plaintiff Frederick Roberson was not violated for anything simple or minor; he was charged with failing to complete his drug treatment program, failing to notify his parole officer of a change in his treatment program status, and alleged drug use, among other things. Roberson admitted in his moving declaration that he stopped attending his drug treatment program and relapsed. (*See* Roberson Decl. ¶ 4, Dkt. No. 66.)

Putative class member Samuel Murphy has been arrested for violating his parole twice since 2020. Both times, he failed to return to his approved residence, violated his curfew, changed his residence without approval, and failed to report. (*See* Murphy Decl. ¶¶ 4-5, 8-10, Dkt. No. 67.)

Plaintiffs may think these are merely minor rule violations; this Court does not. I say before as I have said previously: the mere fact that there is probable cause to believe a parolee has failed to comport with the conditions of his or her release presents a compelling reason to detain the parolee pending a final revocation hearing – especially in light of the statistics showing the frequency (98.5%) with which alleged violations are sustained after a preliminary hearing. Plaintiffs' argument to the contrary flies in the face of *Morrissey*, wherein the Supreme Court expressly held that "conditions of parole . . . prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society." 408 U.S. at 478.

But in addition to breaking the rules, the commission of such violations makes it difficult for the parole officer to keep track of the individual, to assess progress and compliance, and to fulfill the necessary counseling and oversight function that were recognized by the Supreme Court as being extremely important to the parole process and society's interest in the successful rehabilitation of parolees. *See Morrissey*, 408 U.S. at 478, 484. It is easy to see why DOCCS considers these behaviors as violations "in an important respect." If there is probable cause to believe that a parolee is refusing to engage in rehabilitative endeavors like drug treatment, or is

staying out after curfew and not obtaining necessary permissions before engaging in certain behaviors, s/he is engaged in behaviors that are the antithesis of successful reintegration into an orderly society.

There is, therefore, no question that the State has a strong public safety interest in preventing persons who are released on parole and who violate the conditions of their release from remaining in society pending their final parole hearing. For that very reason, a parolee's liberty interest is always subject to revocation – whether permanently, as in *Morrissey*, or for a limited period of time pending their final hearing, as here – as long as the State provides "some informal procedural guarantees." *Morrissey*, 408 U.S. at 483.

In this case the procedural guarantees Defendants provide – DOCSS evaluation prior to issuing a warrant, a preliminary hearing within 15 days, and a swift final revocation hearing – are robust. They are designed to minimize any interruption in a parolee's life (1) in the highly unlikely event that s/he did not actually violate the conditions of parole, and (2) in the event that "time served" seems to the ALJ an appropriate sentence for a proven violation. But at the same time, they serve Defendants' interest in public safety.

Plaintiffs focus on the robustness of the first of these procedural guarantees: the pre-warrant evaluation of whether a parolee has violated parole "in an important respect." As explained at length above, *see New York Parole Revocation Procedures*, *supra* at pp. 2-5, DOCCS takes great care to issue parole violation warrants only to parolees who pose a risk to public safety or their own health and welfare. The pre-warrant review process is expressly tied to the State's interest in promoting public safety. As. Mr. O'Brien declared under penalty of perjury, DOCCS considers the level of risk a parolee's release poses to public safety or the parolee's health and welfare, and

the Senior Parole Officer will only issue a warrant where there is a determination that the parolee poses a risk to the public or her/himself. (O'Brien Decl. ¶¶ 1, 5.)

Plaintiffs' objection to Mr. O'Brien's testimony on this point (*see* n.2, *supra*) fails to create a genuine issue of material fact. They challenge whether the consideration of public safety in the pre-warrant review process necessarily establishes that detained parolees are public safety risks. But Plaintiffs do not challenge the veracity of Mr. O'Brien's declaration. They merely point out that pre-warrant review does not require a *specific* level of risk to proceed with issuing a parole warrant, and that the primary purpose of the pre-warrant review is to determine if a parolee has violated a condition of release. (*See* Pls.' Facts ¶ 1.)

Contrary to Plaintiffs' assertion, the pre-warrant review process involves more than a "generalized notion that a person presents some degree of potential danger." It also requires an assessment that graduated sanctions or another alternative measure would not result in a positive behavior outcome for the specific parolee. *Cf. Mental Hygiene*, 2007 WL 4115936, at *12. Plaintiffs' objection is no more than "some metaphysical doubt" about what the Board considers during its pre-warrant review, which "will not defeat an otherwise properly supported motion for summary judgment." *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (internal quotations and citations omitted).

Having failed to discredit the State's interest in public safety, Plaintiffs argue that mandatory detention of alleged parole violators negatively impacts public safety because it unnecessarily jeopardizes a parolee's reintegration into society. But this argument only works if one assumes the conclusion Plaintiffs are required to prove, which is that mandatory detention is unnecessary. It is not possible to make that assumption.

There is no dispute that reincarceration may substantially disrupt a parolee's life. But, as explained above, the very types of "technical" violations that Plaintiffs consider trivial are violations of rules that are designed specifically to assist with the reintegration of parolees into a law-abiding life in the wider society. When there is probable cause to believe that those rules have been violated – which means that there is probable cause to believe that the parole violator is not successfully reintegrating – it is entirely appropriate for society to protect itself, via temporary and short-term detention *pendente lite*, from the possibility of further disruption. If the data showed that parole warrants supported by probable cause were routinely dismissed following a final revocation hearing – or even dismissed in a significant percentage of cases – the parolee's limited conditional liberty interest would doubtless weigh more heavily in comparison to this societal interest. But the data show the contrary: parolees accused of violations supported by probable cause at the preliminary hearing are found to have violated their parole in some significant respect 98.5% of the time. Mandatory detention occurs only when there is a near certainty that parole has been violated.

Defendants have established, by undisputed evidence, that their current procedures serve the government interest in public safety – both when expressly considered at the pre-warrant review stage, and when considered by way of the probable cause determination that a parolee violated a condition of release at the preliminary hearing stage. This aspect of the third *Mathews* factor weighs strongly in their favor.

B. The Administrative and Fiscal Burden of Providing "Bail-Like" Hearings Would be Immense

Plaintiffs contend that the burden of holding their proposed "bail-like" hearings would be slight. Indeed, they argue that this determination could and should be made "at or near" the time

of the preliminary hearing that the State already affords to parolees, and suggest that this would entail no burden at all. (*See* Muhammad Rep. at 9.)

Plaintiffs are wrong.

The procedure proposed by Plaintiffs as constitutionally required would require the State both to expand the scope of the preliminary hearings it already holds and to hold an additional 11,000 or so hearings that are today not held because a large percentage of alleged parole violators waive their right to a preliminary "probable cause" hearing. Between March 1, 2019 and February 29, 2020, 14,392 parolees were detained pending a final hearing. 10,679 of those parolees – nearly 75% – waived their right to a preliminary hearing. As a result, the "bail-like" hearings that Plaintiffs seek could not be held in the context of a preliminary hearing before a preliminary hearing officer. Pre-hearing release reviews would require a new type of hearing for every detainee – not just those who elected to demand a preliminary hearing – at a new facility, staffed with new personnel.

The cost of holding an additional 10,679 hearings a year is far from negligible. The State estimates the costs of conducting release hearings for all of the nearly 14,400 alleged parole violators per year:

(a) $9.8 million in Year 1 to cover the cost of providing notice of such hearings and $8.6 million in each subsequent year. This number includes not only the cost of providing notice of the time and place of the hearing – an amount that has to be negligible, since this information could be included in the notice that outlines the charges against the parolee – but also the cost of preparing and providing the parolee with notice of the evidence that will be used to argue that s/he represents a flight risk or presents a danger to the community. Such evidence (which the State believes would take the form of reports) is not now prepared. Nearly all of this cost is attributable to the additional staff that would be required to evaluate parolees for possible pre-hearing release and prepare reports and recommendations addressing that issue; it includes salary, benefits and facilities, as well as associated costs (including interpreters, information technology and training).

(b) $12.8 million in Year 1 to cover the cost of conducting the additional hearings, and $12 million during each subsequent year. This includes the cost of hiring 15 Administrative Law Judges, 2 supervising Administrative Law Judges, 56 Community Supervisors and other DOCCS hearing-related personnel – $8.76 million in salary, benefits and other pay alone. It includes approximately $3.1 million per year for additional court reporters, interpreters, transportation, information technology, security equipment, travel expenses and supplies. It also includes the cost of finding, furnishing and maintaining additional hearing facilities for the DOCCS Downstate Region, where the principal hearing facility – the Donald Cranston Judicial Center on Rikers Island – is already operating at maximum capacity. The State estimates that the Bureau of Adjudications would need to conduct 5,121 new hearings for the Downstate Region alone, and these hearings would have to be held somewhere other than the Judicial Center on Rikers Island. The new facilities would cost nearly $842,000 in the first year, with annual costs of nearly $83,000 thereafter.

(c) Additionally, there would be new costs associated with the supervision of alleged parole violators released pending their final revocation hearing. Without knowing how many parolees would be "bailed," the State cannot quantify the exact cost: assuming a 5% release rate it is estimated to be between $800,000 and $850,000 per year; assuming a 25% release rate the cost would escalate to something like $4.7 million per year.

(d) Finally, the State would need to find additional facilities in which to conduct final revocation hearings for released parolees, as nearly all such hearings are currently held at the local correctional facilities where alleged parole violators are detained. The additional cost of conducting final revocation hearings for released parolees – whose hearings could not take place in jails – would include over $7.9 million in one-time costs to acquire and set up new hearing facilities and anywhere from $3.5-7.1 million (depending on the release rate) in annual costs to maintain those facilities and hire additional hearing officers and staff.

In short, the cost of implementing the proposed "bail-like" hearings would be enormous, ranging from $34.9 million to $42.6 million, depending on the release rate.

Plaintiffs have no real answer for these numbers; they fail to raise a genuine dispute of material fact – the *material* fact being that holding bail-type hearings for every person who is accused of violating parole would run into the tens of millions of dollars each year. Plaintiffs do bring three challenges to Defendants' cost estimates, but none is persuasive and none would lead to a substantial cost reduction if it were persuasive.

First, Plaintiffs challenge the cost of additional investigative staff to prepare reports about an alleged parole violator's suitability release. They argue that any costs spent towards an additional investigation would be redundant because parole officers are already required to investigate parole violations and document information that would be relevant to assessing risk to public safety in their Violation of Release Reports pursuant to DOCCS Directives 9050 and 9051.

But the reports that parole officers prepare in accordance with these directives contain no evaluation of either risk or flight or danger to the community; there is no evidence in the record that parole officers ever evaluate flight risk – one of the essential factors to be considered at the "bail-like" hearing Plaintiffs insist is constitutionally required. Yes, the parole officer, rather than some new DOCCS investigative officer, could expand her investigation and report under Directive Nos. 9050 and 9051 to comprehend these "bail" factors; but the added burden of that additional work would necessarily mean that DOCCS would require additional parole officers. The cost of training someone – parole officer or investigator – to research and evaluate these factors (factors that are investigated and evaluated by specially trained Pre-Trial Services Officers in the Federal criminal system) will always exist. The State may have overestimated that cost to the dollar, but Plaintiffs do not suggest that this cost would be anything but significant. Plaintiffs' argument based on their reading of the DOCCS directives does not create a genuine dispute of fact.

Second, Plaintiffs argue that the State could hire two fewer ALJs because it failed to account for two downstate ALJ vacancies. But that argument misreads the uncontradicted testimony of Chief ALJ Rhonda Tomlinson, who stated that the Adjudication Bureau needs to fill the two existing vacancies just to handle the current revocation hearings, before taking into account the additional workload of the proposed custody release hearings. (Tomlinson Dep. at 99, Dkt.

No.77-1.) Moreover, even if Plaintiffs were right, the cost of two fewer ALJs is trivial in comparison to the overall cost of the process that Plaintiffs ask this Court to impose on the State.

Third, Plaintiffs disagree with Defendants' assertion that every released parolee would need to be supervised at the highest level of supervision. (*See* Pls.' Facts ¶ 42.) Mr. Muhammad opines that the "best practice" used by other jurisdictions is to tailor the supervision level to the parolee's case. (*See* Muhammad Decl. ¶ 37.)

That, however, is not a decision for Plaintiffs or this Court to make. If there is probable cause to believe that someone has violated parole – whether probable cause was found at the preliminary hearing or in light of a new conviction, or is presumed because the preliminary hearing was waived – there is reason to believe that s/he cannot follow the terms of parole. That being so, DOCCS could well conclude, in an exercise of its administrative discretion, that the alleged parole violator – *who is not presumed innocent* – would require supervision at a high level. Mr. O'Brien testified that, as a matter of public policy, such supervision is necessary. (O'Brien Decl. ¶ 27.) The fact that Plaintiffs' so-called expert's judgment differs from Mr. O'Brien's is irrelevant. DOCCS and DOCCS alone is entitled to make the policy determination about the level of supervision of alleged parole violators released pending a final hearing, and that determination need not conform to Mr. Muhamad's view of what "best practices" might be.

In short, while Plaintiffs may not agree with Defendants about the precise cost of these additional hearings, they cannot and do not seriously contest that new hearings would be costly. The Court considers it established without contest that the cost would run into the tens of millions.

Plaintiffs' principal rebuttal to Defendants' cost argument on the third *Mathews* factor is not that the cost estimates are inaccurate, but rather, that any costs incurred from the release hearings are far outweighed by cost savings from incarcerating fewer parolees.

It is undisputed that the all-in annual cost of incarcerating someone in New York City jails in 2019 was $337,524. (*See* "Defs.' Resp." at ¶ 114, Dkt. No. 78.) Using that number, and a plug number of 400 parole violators who are incarcerated at any given time, Plaintiffs' witness Jesse Barber estimates that the City would save $135 million per year if that number of parole violators were released pending their revocation hearings. Since the State's highest estimate of the out of pocket cost of holding release hearings is a mere $42.6 million, Plaintiffs argue that the third *Mathews* factor tips decidedly in favor of the parolees and against Defendants. Specifically, Plaintiffs urge that the government has an interest in "conserving scarce fiscal and administrative resources," which weighs in favor of hearings that would promote release. *See Mathews*, 424 U.S. at 348.

Defendants criticize Plaintiffs' numbers for a variety of reasons. They argue that Barber's calculation is unreliable because the 400 number was chosen arbitrarily and has no basis in reality.[11] They point out that the State would incur additional administrative costs – costs that cannot be quantified – in addition to the out of pocket costs of holding hearings, thereby makes its estimate of the actual cost of those hearings far too low.

I take it as a given that it will generally be more expensive to incarcerate a person than to release that person, even at a high level of supervision. The data in the record in this case certainly confirm that proposition. So if a comparison between the out of pocket cost of keeping alleged parole violators in jail versus the cost savings from releasing them were an important issue for consideration, Plaintiffs would have a point.

[11] Defendants note that this number is based solely on the number of parolees released through the *ad hoc* review procedures adopted in response to the COVID-19 pandemic, which, as explained above, used a materially different standard than the standard that would apply at a custody release hearing.

This Court does not believe that such a comparison is determinative of – or even particularly relevant to – an assessment of the third *Mathews* factor. But I do not reach this conclusion for the reason advanced by Defendants.

As Defendants point out, since 2009, the cost of custodial care for alleged parole violators who are housed in local jails has been borne entirely by local governments, without any contribution or reimbursement by the State. It is an unfunded mandate not borne by the State of New York. As a result, Defendants urge that the State will save no money by releasing accused parole violators *pendente lite*; all savings will be realized by local governments. This allegedly renders Plaintiffs' comparative cost argument irrelevant. Defendants also note that the case on which Plaintiffs principally rely for the proposition that inter-governmental cost-shifting needs to be taken into account in assessing the third *Mathews* factor – *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1145 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *and aff'd as modified sub nom. ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) – does not involve shifting costs between different levels of government at all, but rather intra-governmental cost shifting among various departments within a single municipality.

I very much doubt whether the taxpayers of the State of New York – who are also the taxpayers of the several municipalities located within the State of New York – give a fig about which level of government is paying the cost of incarcerating alleged parole violators. They, the taxpayers, are on the hook for those costs, whichever municipality or agency ends up paying them.

But while I do not find Defendants' argument persuasive,[12] *Harris*, properly read, suggests that cost-shifting, wither intra- or inter-governmental, has no relevance when evaluating the third *Mathews* factor.

In *Harris*, the plaintiffs challenged the constitutionality of Harris County's cash bail system on the ground that it failed to protect the rights of poor persons accused of misdemeanors. *See* 251 F. Supp. 3d at 1133–34. The district court applied the *Mathews* balancing test to determine what process was due. It concluded that the first two *Mathews* factors favored the plaintiffs: misdemeanor defendants had a private interest in release from custody before trial, and the risk of erroneous deprivation of their liberty by imposing secured money bail was high. It then turned to the third *Mathews* factor – the Government interest. *See id.* at 1143–44.

The Harris County defendants argued that alternatives to detaining misdemeanor arrestees on secured financial conditions would be prohibitively expensive. The Harris County Director of Pretrial Services Kevin Banks testified that it would cost pretrial services $30 million annually to adopt the relief the plaintiffs sought – a number that vastly exceeded the county's pretrial services budget of $7.5 million. *See id.* at 1144. The district court concluded that this testimony was "far from credible" and involved numerous erroneous assumptions that "greatly overstated the costs," most particularly because Mr. Banks did not estimate the costs the county would save by detaining fewer people for shorter periods, which outweighed the added costs of supervising released arrestees. *See id.* at 1145. As a result, the district court concluded that the third *Mathews* factor also favored the plaintiffs, and entered a preliminary injunction barring the County from detaining indigent defendants who were otherwise eligible for release but who could not afford to post bond.

[12] For one thing, it is arguable that the localities are acting as agents of the State when temporarily incarcerating State prisoners pending parole revocation hearings, which would cause their costs – unfunded though the mandate be – to be attributable to the State.

The terms of the injunction required the County to verify an arrestee's ability to pay a secured financial condition of release by an affidavit and hold a bail hearing within 24 hours after a misdemeanor arrest. Based on the affidavit, an indigent defendant could only be held on an unsecured personal bond with nonfinancial conditions or a secured money bond for which the defendant could afford a commercial surety's premium. *See id.* at 1161–63.

After considerable procedural back and forth on appeal, the Fifth Circuit ultimately vacated the District Court's injunction as overbroad. *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018). The panel agreed that the County's cash bail procedures violated the plaintiffs' due process rights. *Id.* at 159. But when it came to assessing the government's interest, the Circuit was not interested in comparing the financial burdens of the due process hearings sought by plaintiffs against cost-savings that would result from releasing larger numbers of misdemeanor arrestees as required by the district court's injunction. That issue played no part in the Court of Appeals assessment of the third *Mathews* factor. Instead, the Court of Appeals noted that the government's interest in efficiency was "particularly important," and said, "The sheer number of bail hearings in Harris County each year—according to the court, over 50,000 people were arrested on misdemeanor charges in 2015—is a significant factor militating against overcorrection." *Id.* In light of this government interest – its interest in efficiency in light of the large number of misdemeanor arrests – the Circuit concluded that the numerous procedural protections required by the district court required were too onerous. *See id.* at 160. While agreeing that some relief in favor of the plaintiffs was warranted, the Fifth Circuit remanded the case so that the district court could tailor its injunction more narrowly. *Id*. at 166–67.

So far from establishing that the proper way to assess the third *Mathews* factor is to compare the cost of incarceration with the cost of holding "bail" hearings, *Harris*, as ultimately

decided by the Court of Appeals, suggests that comparing the cost of hearings against the cost savings from non-incarceration is not the relevant consideration (or perhaps even a relevant consideration). I suggest that, if the *Harris* court were confronted with this case, it would likely conclude that the sheer volume of new work that would result if Plaintiffs' proposal was adopted – a volume that, as I have already concluded, cannot be gainsaid – cuts in favor of the State when evaluating the third *Mathews* factor. Since in this case, unlike in *Harris*, the second *Mathews* factors also cuts in favor of Defendants, not Plaintiffs, it seems to me that *Harris* actually favors Defendants' position, rather than Plaintiffs'.

In this Circuit, Plaintiffs have found only one case that even mentions the concept of cost savings (not cost shifting) in the context of *Mathews* balancing. And when read carefully that case, too, suggests that Defendants have the better of argument on the third *Mathews* factor.

In *Velasco Lopez v. Decker*, 978 F.3d 842, 845 (2d Cir. 2020), the petitioner, a non-citizen, was detained for fourteen months while removal proceedings were pending against him. After being twice denied bail, he filed a habeas petition challenging the procedures of U.S. Immigration and Customs Enforcement's ("ICE") bond hearings as violative of due process – specifically, that the detainee bears the burden of demonstrating that s/he is not dangerous or a flight risk. *See id.* at 846–48, 849. My colleague, the Hon. Andrew L. Carter Jr., granted his petition and ordered a new bond hearing – one that shifted from the detainee to ICE the burden of proving, by clear and convincing evidence, that the petitioner was not a flight risk or a danger to the community. *See id.* at 848.

The Government appealed from the decision, arguing that the former bond hearing procedures were constitutionally adequate and that the district court erred by shifting the burden of proof. The Second Circuit affirmed the district court's judgment. *See id.* at 846.

The Court of Appeals used *Mathews* balancing to determine whether the petitioner's ongoing incarceration violated due process. *See id.* at 851–56. It noted the detainee's private liberty interest, and said that procedures that placed the burden of proving the detainee was not a flight risk or a danger to the community on the detainee "markedly increased the risk of error" of wrongful detention, since the detainee did not have access to the relevant evidence while the Government did. *Id.* at 851–53. Because months, or even years, ordinarily pass between arrest and the conduct of initial removal determination proceedings, the Second Circuit concluded that individuals *who were subject to prolonged detention* had to be afforded process over and above that provided in an ordinary bond hearing. The Court agreed with Judge Carter that a bond hearing at which the government bore the burden of proof would mitigate the risk of an extended erroneous detention. *See id.* at 854.

Assessing the third *Mathews* factor, the Circuit acknowledged the government's regulatory interest in detaining noncitizens pending their removal proceedings, but found that the government failed to articulate an interest in the *prolonged* detentions of noncitizens like the petitioner, who are neither dangerous nor a flight risk. *See id.* "On the contrary," the Circuit found that "shifting the burden of proof to the Government to justify continued detention promotes the Government's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Id.*

As in *Harris*, the Court of Appeals did not rely on the comparative cost of bail hearings versus incarceration in its discussion of *Mathews* balancing. In fact, nothing about the cost of incarceration appears in the text of the *Velasco Lopez* opinion at all. In a footnote, the court observed that the cost to taxpayers of the petitioner's lengthy detention had already mounted to about $60,000. *Id.* at 854 n.11. But saving that amount was not balanced against any countervailing

cost, as Plaintiffs ask the Court to do here. Rather, the Circuit concluded that shifting the burden of proof at the petitioner's bond hearing – an issue having nothing to do with the cost of either incarceration or a new bond hearing – would neither undermine any legitimate government interest nor entail an undue administrative burden. *See id.* at 854–55.

The reason why the *Velasco Lopez* court mentioned the cost of incarceration is important. It did so only to say that saving the cost of incarceration would promote the government's interest only "in cases where [incarceration] *serves no purpose*." *Id.* at 854 (emphasis added). The Circuit did not suggest that eliminating the cost of incarceration counterbalanced or outweighed such incarceration "where it advances a legitimate governmental purpose." *See id.*

I have already concluded that the mandatory detention of an alleged parole violator when there is probable cause to believe that a violation of parole has occurred serves a legitimate governmental purpose; it protects society from an individual who has not yet completed his sentence for proven criminal activity, and whose behavior has given rise to reason to believe that he cannot comply with the one and only condition of temporary liberty – obey all of the rules of your parole. Plaintiffs no doubt disagree that this is a legitimate governmental purpose, or one that prevents any danger to society. But that is why we have courts of appeal.

Significantly, the *Velasco Lopez* court also stated that, the longer detention continued, the greater need for the government to justify its continuation: "*While the Government's interest may have initially outweighed short-term deprivation of Velasco Lopez's liberty interests*, that balance shifted once his imprisonment became unduly prolonged," such that his "prolonged incarceration, which had continued for fifteen months without an end in sight or a determination that he was a danger or flight risk, violated due process." *Id.* at 855 (emphasis added). In other words, the Second Circuit recognized, as did the Supreme Court in *Morrissey*, that the state's interest in temporary

incarceration would outweigh an individual's liberty interest in the short term if there were reason to believe that the individual (who in our case is an alleged parole violator) has committed an infraction that subjected him or her to detention. Only when detention becomes "prolonged" does the calculus shift in favor of the accused.

It bears noting that the "prolonged" detention in Velasco Lopez's case was well more than a year and with no end in sight. In this case, by contrast, the detention of alleged parole violators after a finding of probable cause is not, and cannot be, "unduly prolonged," because New York's Parole regulations mandate that a final revocation hearing be held no more than 90 days after a finding of probable cause or a waiver of the preliminary hearing – which itself can occur no more than 15 days after the alleged violator is arrested on a parole warrant. As noted above, most of the mandatory detentions for technical violations – those that do not involve charges of new criminal activity – last no more than 63 days, a period of time that the Supreme Court in *Morrissey* did not find to be overly burdensome to the alleged parole violator. Even those parolees who are detained because they were arrested for new criminal behavior are mandatorily detained for an average of just four months – not fifteen.

Finally, in parole violation cases, there is always an end in sight, in the form of a final revocation hearing that must be held within a fixed period of time. This is precisely why Plaintiffs here have only a conditional liberty interest of which they can be deprived for only a short period of time. *See* Part I, *supra* at pp. 10-12. The mandatory detention of alleged parole violators under New York's scheme ends well before the balance between the government's interest and the parolee's conditional liberty interest starts to shift in favor of the parolee.

There may be exceptional cases where certain parolees are subject to prolonged detention, perhaps as long as fifteen months like the petitioner in *Velasco Lopez*. But those rare cases have

no relevance here. Plaintiffs challenge Defendants' mandatory detention policy as it applies to *all* parolees awaiting a final hearing, and expressly declined this Court's invitation to challenge the lawfulness of detention beyond 90 days. Global changes to "procedural due process rules are shaped by . . . the generality of cases, not the rare exceptions." *See Mathews*, 424 U.S. at 344. Any such parolees whose period of mandatory detention approaches the length of the detention in *Velasco Lopez* would be well advised to seek habeas relief.

In sum, New York's mandatory detention of alleged parole violators for the relatively brief period between the determination of probable cause and a final revocation hearing serves an important government purpose; is always for a limited period and never "without end in sight"; and turns out to be "erroneous" in a *de minimis* number of cases. The third *Mathews* factor, like the second, tilts decidedly in favor of Defendants. These two factors plainly outweigh Plaintiffs' conditional liberty interest – particularly since there is probable cause to believe that the condition on which liberty hinges has been violated.

All this being so, the detention of alleged parole violators pending their final revocation hearing does not violate due process; nor does due process require the State to conduct bail-like release hearings for these parolees.

* * * * * * * * * * *

At bottom, Plaintiffs' concerns are rooted in policy, not constitutional entitlement. Those concerns should be voiced to the legislature, not the courts. Just last year, New York enacted a sweeping bail reform that effectively eliminated cash bail for most persons charged with misdemeanors and nonviolent felonies. N.Y. Crim. Proc. Law § 530.20. This change has resulted in considerably more persons being admitted to bail in New York State when charged with crimes that, if committed by a parolee, would also constitute parole violations. This Court is not

insensitive to the irony that a parolee who committed such a crime might not be subject to pretrial detention pending the adjudication of that crime, but would be subject to mandatory detention pending the adjudication of the same conduct if it were charged as a parole violation. But it is not the province of this Court to reconcile this conflict unless the Constitution requires it. The Constitution does not.

Nevertheless, New York may soon provide parolees with bail-like "suitability for release" hearings. As Defendants correctly note, a bill is currently pending before the New York Legislature that would provide Plaintiffs the relief they seek. Indeed, even as this Court was finalizing its opinion, Senate Bill S1144 was assigned a "same as" bill in the Assembly – A5576. In other words, an identical bill about parole revocation is currently pending in both the Senate and the Assembly. That is an early sign that the bill may well pass both houses.

This Court expresses no view on whether or not such a bill would be sound policy. I conclude only that, as a matter of federal constitutional law, New York's mandatory detention of alleged parole violators pending their final revocation hearings does not deprive parolees of their liberty interest as defined in *Morrissey* without due process.

IV. The Suit Against Governor Cuomo is Barred under Eleventh Amendment Immunity

There remains one administrative matter to be addressed. Plaintiffs bring this suit against Governor Cuomo in his official capacity and Tina M. Stanford in her official capacity as Chairperson of the New York State Board of Parole. Ordinarily, a suit against a state official in his or her official capacity is deemed an action against the state itself, and Eleventh Amendment immunity applies. *Williams v. Marinelli*, No. 18-1263, 2021 WL 377791, at *6 n.13(2d Cir. Feb. 4, 2021). However, under the *Ex parte Young* exception to state sovereign immunity, state officials may be subject to actions seeking only prospective injunctive relief to prevent a continuing violation of federal law. *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371 (2d Cir.

2005) (discussing *Ex parte Young*, 209 U.S. 123, 160 (1908)). "[T]he state officer against whom a suit is brought 'must have some connection with the enforcement of the act' that is in continued violation of federal law." *In re Dairy Mart*, 411 F.3d at 372–73 (2d Cir. 2005) (quoting *Ex parte Young*, 209 U.S. at 154).

Here, Plaintiffs clearly seek prospective injunctive relief. But the parties dispute whether Governor Cuomo has a sufficient connection with the enforcement of the act at issue – the State's mandatory detention scheme under 9 N.Y.C.R.R. §§ 8004.3(d)(1), 8005.7(a)(5) – to qualify for the *Ex parte Young* exception.

Plaintiffs argue that Governor Cuomo has "assumed control over the enforcement of the Board's regulations during the coronavirus pandemic" by declaring a disaster emergency, suspending the enforcement of some parole revocation regulations, and directing DOCCS to review whether parolees detained on technical parole violations or absconding charges could be safely released. (*See* Pls. Br. at 24.) They are wrong.

Connection with the enforcement of an act that is a continuing violation of federal law includes "both a **particular duty to enforce the statute in question** and a demonstrated willingness to exercise that duty." *Citizens Union of City of New York v. Attorney Gen. of New York*, No. 16-cv-9592, 2017 WL 2984167, at *4 (S.D.N.Y. June 23, 2017) (emphasis original) (quoting *Kelly v. New York State Civil Serv. Comm'n*, No. 14-cv-716, 2015 WL 861744, at *3 (S.D.N.Y. Jan. 26, 2015), *aff'd sub nom. Kelly v. New York Civil Serv. Comm'n*, 632 F. App'x 17 (2d Cir. 2016)).

Governor Cuomo's general duty to execute the laws is not sufficient to make him a proper party. *See id.* To the extent he has played a role in the parole revocation process via executive orders and an emergency directive, it is the Parole Board or DOCCS – not Governor Cuomo – who

have promulgated and enforced all procedures related to the detention (or release) of alleged parole violators. *See Hund v. Cuomo*, No. 20-cv-1176, 2020 WL 6699524, at *5 (W.D.N.Y. Nov. 13, 2020). Moreover, far from *enforcing* the mandatory detention rule, Governor Cuomo's directive led to emergency *exceptions* to this rule. And in any event, as this Court made clear in its P.I. Opinion, Plaintiffs challenge regulations that have been in place for decades, not any pandemic-specific aspect of the parole revocation process like the discretionary release of parolees or delays in their hearings.

Here, New York's executive law expressly provides that the detention of alleged parole violators is regulated by the rules and regulations of the Parole Board. *See* N.Y. Exec. Law § 259-i(3)(a)(i). (*See also* Defs.' Facts ¶ 12.) And it is the Parole Board that has promulgated and enforced the mandatory detention regulations. Thus, while Chairperson Stanford is a proper defendant to this lawsuit, Governor Cuomo is not.

CONCLUSION

For reasons stated above, Defendants' motion for summary judgment is GRANTED. Plaintiffs' cross motion for summary judgment is DENIED.

This constitutes a written opinion and order of the Court. The Clerk of Court is directed to market the motions at Docket #s 5, 57, 64, 65, and 80 off the Court's list of open motions, to enter judgment for Defendants, and to close this case.

Dated: March 10, 2021
New York, New York

Chief Judge

BY ECF TO ALL PARTIES

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FREDERICK ROBERSON, on behalf of himself and all others similarly situated,

Plaintiffs,

-against-

ANDREW M. CUOMO, Governor of New York, in his official capacity and TINA M. STANFORD, Chairperson of the New York State Board of Parole, in her official capacity

Defendants.

----------X

20 **CIVIL** 2817 (CM)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Decision and Order dated March 10, 2021, Defendants' motion for summary judgment is GRANTED. Plaintiffs' cross motion for summary judgment is DENIED. Judgment is entered for Defendants' and this case is closed.

Dated: New York, New York
March 10, 2021

RUBY J. KRAJICK

Clerk of Court

BY: _____

Deputy Clerk

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through PL 117-17 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

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Compilation of Codes, Rules and Regulations of the State of New York
Title 9. Executive Department
Subtitle CC. Division of Parole
Part 8004. Revocation Process (Refs & Annos)

9 NYCRR 8004.3

Section 8004.3. Declaration and cancellation of delinquency

Currentness

(a) A declaration of delinquency may be issued by a board member or by a supervising parole officer (bureau chief) after receiving the violation of parole report, and after either:

(1) a waiver by the releasee of the preliminary hearing;

(2) a finding of probable cause at a preliminary hearing;

(3) a finding by a member or supervising parole officer (bureau chief) that there is reasonable cause to believe the releasee has absconded from supervision; or

(4) a finding that the releasee has been convicted of a new crime while under his/her present parole, conditional release or period of post release supervision.

(b) The date of delinquency is the earliest date that a violation of parole is alleged to have occurred. The declaration of delinquency, when issued, interrupts the sentence as of the date of the delinquency.

(c) The parole officer having charge of a releasee shall submit a violation of parole report to the Board of Parole or supervising parole officer (bureau chief) following a finding of probable cause at a preliminary hearing or following a waiver thereof; or where the parole officer has reasonable cause to believe that such person has absconded from supervision; or where the parole officer has reasonable cause to believe that the releasee has been convicted of a new crime committed while under his/her present parole, conditional release or period of post release supervision.

(d) Upon review of such report, one member of the board or supervising parole officer (bureau chief) may issue:

(1) a declaration of delinquency and, where the releasee is in custody, or where there is reasonable cause to believe the releasee has absconded, order:

(i) a final revocation hearing; or

(ii) where the releasee has waived a final revocation hearing so as to facilitate accelerated placement in a parole transition facility, order that the final hearing be held in abeyance pending said releasee's completion of the transition facility program or his removal therefrom; or

(2) with the concurrence of two other members, order such releasee restored to supervision under such circumstances as are deemed appropriate.

(e)

(1) Where a final revocation hearing has not yet commenced by the swearing of witnesses and the taking of testimony or evidence, delinquency may be cancelled and the warrant vacated by three members of the board or the administrative law judge, who shall state their reasons in writing for the cancellation at or before the time of the final hearing but prior to the swearing of witnesses and the taking of testimony or evidence. In cases where the alleged violator is serving a sentence for a felony offense under articles 125, 130, 135, 230, 235, 255, 263, 485 or 490 of the Penal Law, or where the violator had been granted early conditional parole for deportation only or conditional parole for deportation only pursuant to section 259-i (2) (d) of the Executive Law, such cancellation of delinquency can only be effectuated by the three members of the Board of Parole. Cancellation of delinquency under this subdivision shall not preclude a subsequent declaration of delinquency based on the same charges.

(2) A cancellation of delinquency may also be granted in accordance with paragraph (1) of this subdivision where such cancellation is contingent upon the successful completion of a treatment program of a specified duration. If so, such cancellation of delinquency shall not become effective until the occurrence of the contingent event. A cancellation of delinquency under this subdivision shall preclude a subsequent declaration of delinquency based on the same violation charges. However, the underlying charges and the cancellation of delinquency may be considered as facts relevant to disposition in any subsequent revocation proceeding.

(f) Where a revocation hearing has commenced by the swearing of witnesses and the taking of testimony or evidence, a declaration of delinquency may no longer be cancelled except following dismissal of all violation charges at the conclusion of a final revocation hearing. A cancellation of delinquency under this subdivision shall preclude a subsequent declaration of delinquency based upon the same violation charges.

(g) Final declaration of delinquency. Whenever a paroled or conditionally released person, or person serving a period of post release supervision, has been:

(1) convicted of a new felony committed while under his/her present parole, conditional release or period of post release supervision, and

(2) sentenced to an indeterminate or determinate term upon such conviction, the board may issue a final declaration of delinquency, in lieu of directing that a final hearing be held, which will have the effect of revoking such person's parole, conditional release or period of post release supervision. Any final declaration of delinquency that may be issued shall be so issued upon such person's reception at an institution under the jurisdiction of the Department of Corrections and Community Supervision pursuant to said new indeterminate or determinate sentence. The date of delinquency for the final declaration of delinquency by the board may be either the date of the commission of the new felony offense or the date of

sentencing for such offense. Subsequent to the issuance of the final declaration of delinquency, the inmate's next appearance before the board will be governed by the calculation of the minimum sentence, or the calculation of the aggregate minimum sentences, in accordance with applicable law.

Credits

Sec. filed March 23, 1978; amds. filed: Nov. 20, 1984 as emergency measure, expired 60 days after filing; Feb. 27, 1985; March 5, 1991 as emergency measure; April 16, 1991 as emergency measure; May 6, 1991; June 20, 1991; July 15, 1996; June 1, 2004 eff. July 12, 2004. Amended (a), (c)-(e); repealed (g), (h); added new (g); amd. filed Nov. 24, 2020 eff. Dec. 9, 2020.

Current with amendments included in the New York State Register, Volume XLIII, Issue 24 dated June 16, 2021. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.3, 9 NY ADC 8004.3

End of Document

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9 NYCRR 8005.7

Section 8005.7. Conduct of hearing

Currentness

(a) At the preliminary hearing, the preliminary hearing officer shall read each violation charge and the alleged violator shall plead not guilty, guilty, guilty with an explanation, or stand mute with respect to each charge.

(1) If the alleged violator at a preliminary hearing pleads guilty to the substance of any charge or an acceptable variation thereof, or admits charged conduct which is a violation of the conditions of release in an important respect, the preliminary hearing officer shall conclude the hearing.

(2) If the alleged violator pleads not guilty to the charges, or elects to stand mute, the preliminary hearing officer shall proceed to direct the presentation of evidence concerning a violation charge, receive statements of witnesses and documentary evidence on behalf of the alleged violator and allow cross-examination of those witnesses in attendance with respect to that charge.

(3) The standard of proof at the preliminary hearing shall be probable cause to believe that the releasee has violated one or more of the conditions of his release in an important respect. Proof of conviction of a crime committed subsequent to release on parole or conditional release shall constitute probable cause.

(4) The hearing shall conclude at such time as the preliminary hearing officer finds that there is probable cause to believe that the alleged violator has violated the conditions of his release in an important respect, or when all charges have been heard and no probable cause has been found.

(5) If the preliminary hearing officer finds that there is probable cause to believe that the alleged violator has violated one or more of the conditions of parole in an important respect, he shall direct that the alleged violator be held for further action pursuant to section 8004.3 of this Title.

(6) If the preliminary hearing officer finds that there is no probable cause to believe that the alleged violator has violated one or more of the conditions of his release in an important respect, he shall dismiss the notice of violation and direct such person be restored to supervision.

Credits

Sec. filed March 23, 1978 eff. March 23, 1978.

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Current with amendments included in the New York State Register, Volume XLIII, Issue 24 dated June 16, 2021. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.7, 9 NY ADC 8005.7

End of Document

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional by Mayfield v. Evans, N.Y.A.D. 1 Dept., Feb. 14, 2012

Compilation of Codes, Rules and Regulations of the State of New York
Title 9. Executive Department
Subtitle CC. Division of Parole
Part 8005. Revocation Hearings (Refs & Annos)
Final Revocation Hearings.

9 NYCRR 8005.20

Section 8005.20. Final revocation hearing determination

Currentness

[Note: See also preceding version of this section, in effect until 12/08/2020]

(a) If the presiding officer is not satisfied that there is a preponderance of evidence in support of any of the violation charges, they must dismiss the charges, cancel the delinquency and restore the releasee to supervision.

(b) If the presiding officer is satisfied that there is a preponderance of evidence in support of a violation charge or charges, and that the alleged violator violated one or more of the conditions of release in an important respect, they shall so find.

(c) Decisions to be made within parole revocation guidelines. Where one or more charges of violation are sustained pursuant to subdivision (b) of this section, the presiding officer shall revoke the violator's release. Upon a decision to revoke the violator's release and following consideration of mitigating and aggravating factors as set forth in subdivision (g) of this section, the presiding officer may: (i) restore such violator to supervision; (ii) direct that the violator be provided an alternative program pursuant to subdivision (e) of this section upon their return to a State correctional facility; or (iii), except with respect to those violators defined as Behavior Category 4, impose a time assessment without provision for an alternative program. For all cases, except as otherwise provided in subdivision (d) of this section, the presiding officer shall make a decision in accordance with the foregoing and pursuant to the following guidelines:

(1) For the following violators, defined as Behavior Category 1, if a time assessment is imposed without provision for an alternative program, it shall be for no less than 12 months and may be up to a hold to the maximum expiration of the sentence, provided, however, that a time assessment of no less than 10 months may be imposed in the event that the presiding officer concludes, upon consideration of all relevant circumstances and the factors set forth in subdivision (g) of this section, that such time assessment is more appropriate. Behavior Category 1 violators are those violators who engaged in current violative behavior, as established by a sustained violation charge, involving:

(i) The use or threatened use of a deadly weapon or dangerous instrument; or

(ii) The possession of a firearm; or

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(iii) The infliction or attempted infliction of physical injury upon another; or

(iv) A threat toward any Department of Corrections and Community Supervision staff or any police or peace officer; or

(v) A violation of an active order of protection or special condition of supervision prohibiting contact with an individual; or

(vi) Behavior that would be unlawful under provisions identified in Penal Law section 70.02 (violent felony offenses); or

(vii) Behavior that would be unlawful under articles 125, 130, 135, 230, 235, 255, 263, 485 or 490 of the Penal Law.

Notwithstanding the violation charges that might qualify the violator for this category, if the violator, the Department and the presiding officer agree, a disposition within this category may be imposed with a finding of guilt solely on a charge or charges other than that alleging a violation per subparagraph (i) through (vii) of this paragraph.

(2) For the following violators, defined as Behavior Category 2, if a time assessment is imposed without provision for an alternative program, it shall be for no less than 3 months and no more than 15 months except that a mitigating reduction of 3 months may be provided for an absconder who voluntarily surrendered and receives a time assessment of 6 months or more. Behavior Category 2 violators are those violators who absconded from community supervision as established by a sustained violation charge alleging a violation of condition number 3 of the standard conditions of release.

(3) For the following violators, defined as Behavior Category 3, if a time assessment is imposed without provision for an alternative program, it shall be for no less than 3 months and no more than 12 months. Behavior Category 3 violators are those violators who have engaged in criminal behavior other than that addressed in the Penal Law articles and sections referenced in paragraph (1) of this subdivision, or who have engaged in the following behavior: operating a vessel or motor vehicle while under the influence of or while ability was impaired by alcohol or drugs; unlawful possession of a weapon upon school grounds; criminal solicitation as a violation; harassment as a violation; hazing as a violation; or failing to respond to an appearance ticket. Notwithstanding the violation charges that might qualify the violator for this category, if the violator, the Department and the presiding officer agree, a disposition within this category may be imposed with a finding of guilt solely on a charge or charges other than that alleging an offense under state law.

(4) For the following violators, defined as Behavior Category 4, the presiding officer may restore such violator to supervision or direct that the violator be provided an alternative program pursuant to subdivision (e) of this section upon their return to a State correctional facility. Behavior Category 4 includes those violators who do not fall under Behavior Categories 1, 2 or 3 and are not deemed outside the guidelines pursuant to subdivision (d) of this section.

(d) Decisions made outside the guidelines. For the following violators, deemed outside the guidelines, where one or more charges of violation are sustained pursuant to subdivision (b) of this section, the presiding officer shall revoke the violator's release. Upon a decision to revoke the violator's release and following consideration of mitigating and aggravating factors, the presiding officer may: (i) restore such violator to supervision; (ii) direct that the violator be provided an alternative program upon their return to a State correctional facility pursuant to subdivision (e) of this section; or (iii) impose a time assessment without provision for an alternative program, which time assessment may be up to the maximum expiration of the sentence. For

those violators deemed outside the guidelines and found guilty of engaging in Behavior Category 1, 2 or 3 violative conduct, as the case may be, the minimum permissible time assessment, with or without provision for an alternative program, shall be the equivalent of the minimum permitted for such respective category and disposition. Violators deemed outside the guidelines include those who were:

(1) Released to community supervision where their underlying sentence was imposed upon conviction or adjudication for a Penal Law Article 130, 135, 230, 235, 255, 263, 485 or 490 offense;

(2) Sentenced to parole supervision pursuant to Criminal Procedure Law section 410.91, except that any such violator who has previously received and served a time assessment on their instant offense shall not be deemed outside the guidelines unless they fall under paragraph (5) of this subdivision;

(3) Granted early conditional parole for deportation only or conditional parole for deportation only by the Board of Parole; or

(4) Granted medical parole or compassionate release and have not, as of the date of delinquency, reached their parole eligibility date or conditional release date, whichever comes first. Revocation of release will not preclude such violator from reapplying for medical or compassionate release; or

(5) Found to have incurred two or more prior revocations since release to Community Supervision on their underlying sentence.

(e) Alternative program upon return to a Department correctional facility. For any parole violator, the presiding officer may, in the discretion of such officer, impose a time assessment and in their decision imposing such time assessment direct that the Department offer an alternative program to the violator upon their return to a State correctional facility, which will result in their immediate re-release to community supervision upon their successful completion of such program. This alternative program will be for a length of approximately 45 or 90 days, as determined by the presiding officer, except that the approximate 45-day program shall not be available to any violator who participated in or completed an alternative program, or had delinquency cancelled following completion of a diversion/treatment program, within the six months prior to the earliest date of the current alleged violation. The time assessment that shall be imposed with any provision for this alternative Department program will be in accordance with the foregoing and the following:

(1) For those violators within Behavior Category 1, the time assessment shall be for no less than 12 months and may be up to a hold to the maximum expiration of the sentence.

(2) For those violators within Behavior Category 2, the time assessment shall be for no less than 6 months and may be up to 15 months. A mitigating reduction of 3 months for a violator who voluntarily surrendered shall not be applied.

(3) For those violators within Behavior Category 3, the time assessment shall be 4 months in the event the alternative program is for an approximate length of 45 days, and in the event the alternative program is for an approximate length of 90 days the time assessment shall be for no less than 6 months and may be up to 12 months.

(4) For those violators within Behavior Category 4, the time assessment shall be 4 months in the event the alternative program is for an approximate length of 45 days, and 6 months in the event the alternative program is for an approximate length of 90 days.

(5) For those violators defined in subdivision (d) of this section as being outside the guidelines, the time assessment may be up to the maximum expiration of the sentence, and shall be for no less than 4 months in the event the alternative program is for an approximate length of 45 days, and no less than 6 months in the event the alternative program is for an approximate length of 90 days.

(f) Restoration to supervision in the community. No violator shall be restored to supervision in the community upon a decision revoking such violator's release unless the presiding officer concludes that such violator's needs, as related to the violative behavior, could be appropriately addressed in the community with community supervision and that a restoration to supervision would not have an adverse effect on public safety and public confidence in the integrity of the criminal justice system. The presiding officer may, when directing that the violator be restored to supervision, impose appropriate special conditions of release. Such conditions may be modified or removed, solely upon the initiation of the Department, by a member or members of the Board of Parole.

(g) Mitigating and aggravating factors. Where one or more charges of violation are sustained pursuant to subdivision (b) of this section and the violator's release is revoked, the resulting disposition shall be in the interests of public safety and justice. In all cases the presiding officer will consider mitigating and aggravating factors in determining whether to restore the violator to supervision, direct that the violator be provided an alternative program upon their return to a State correctional facility pursuant to subdivision (e) of this section, or impose a time assessment without provision for an alternative program, and in determining the length of any time assessment, as the case may be. These factors include, but are not limited to:

(1) Mitigating Factors:

(i) Length of time the violator has spent in custody due to the parole warrant

(ii) Violator has been deemed to have the lowest supervision risk level as determined by the assessment tool utilized by the Department

(iii) Violator was the primary caregiver of a dependent person immediately prior to having been incarcerated on the parole violation warrant, and if restored to supervision has a residence and means of support so that they would continue to care for the dependent person

(iv) Absconder who voluntarily surrendered on the current warrant

(v) A violator whose medical or psychiatric needs would be most appropriately and safely addressed through continued community supervision

(vi) No prior sustained violations on the instant offense term

(vii) Employed/attending school

(viii) Diligent program participation prior to current warrant issuance

(ix) Stable residence

(x) Lack of criminal history other than the instant offense

(xi) Length of time on supervision between last date of release and earliest date of current alleged violation

(xii) General adjustment to supervision

(xiii) Violator acknowledged responsibility for conduct

(xiv) Cooperation with law enforcement or a prosecutorial agency which the Department requests that the presiding officer consider as a mitigating factor

(2) Aggravating Factors:

(i) Violator has been deemed to have the highest supervision risk level as determined by the assessment tool utilized by the Department

(ii) Prior sustained violation(s)

(iii) Absconder who did not voluntarily surrender

(iv) Physical evasion of or physical resistance to a parole, police or peace officer

(v) Length of time on supervision between last date of release and earliest date of current alleged violation

(vi) Tampering with or removal of GPS/electronic monitoring device

(vii) Criminal history

(viii) Prior history of absconding

(ix) History of domestic violence

(x) General adjustment to supervision

(h) Decision. The decision made pursuant to subdivision (c) or (d) of this section shall be in writing, or stated on the record of the hearing, and shall state the evidence relied upon and the reasons for the revocation of community supervision, and the reasons for the disposition made.

(i) Notification. As soon as practicable after a violation hearing, the alleged violator and his attorney shall be advised in writing of the violation hearing decision, including the reason for the determination and the evidence relied upon.

(j) Placement in programs that are alternatives to reincarceration. A member or members of the board or presiding officer may direct that an alleged violator be placed in an alternative to reincarceration program for a specified period of time. Only a member or members of the board can direct that alleged violators serving sentences for felony offenses under articles 125, 130, 135, 230, 235, 255, 263, 485 or 490 of the Penal Law, or those alleged violators granted early conditional parole for deportation only or conditional parole for deportation only, be placed into an alternative to reincarceration program. Successful completion of the program prior to the commencement of a final revocation hearing will result in a cancellation of delinquency, as authorized by section 8004.3(e) of this Title. Following completion of a final hearing and revoking of the violator's release, and in accordance with applicable subdivisions of this section, restoration to a parole transition facility or other appropriate alternative to reincarceration program may be ordered by the presiding officer.

(k) A final decision made by a presiding officer pursuant to this section shall be binding in all instances and deemed a decision of the board for purposes of this Part.

Credits

Sec. filed March 23, 1978; amds. filed: Nov. 20, 1984 as emergency measure, expired 60 days after filing; Feb. 27, 1985; Jan. 13, 1992 as emergency measure; March 17, 1992; April 20, 1993 as emergency measure; June 22, 1993; Nov. 20, 1995 as emergency measure; Jan. 29, 1996; Dec. 24, 1996 as emergency measure; March 21, 1997 as emergency measure; May 20, 1997 as emergency measure; July 18, 1997 as emergency measure; Sept. 16, 1997 as emergency measure; Sept. 23, 1997; June 1, 2004 eff. July 12, 2004; amd. filed Dec. 23, 2019 eff. Dec. 8, 2020.

Current with amendments included in the New York State Register, Volume XLIII, Issue 25 dated June 23, 2021. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.20, 9 NY ADC 8005.20

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Executive Law (Refs & Annos)
Chapter Eighteen. Of the Consolidated Laws
Article 12-B. State Board of Parole (Refs & Annos)

McKinney's Executive Law § 259-i

§ 259-i. Procedures for the conduct of the work of the state board of parole

Effective: November 29, 2018
Currentness

1. Repealed by L.2011, c. 62, pt. c, subpt. A, § 38-f, eff. March 31, 2011.

2. Parole.

(a) [Eff. until Sept. 1, 2023, pursuant to L.1995, c. 3, § 74, par. d. See, also, par. (a) below.] (i) [Eff. until Sept. 1, 2021. See, also, subpar. (i) below.] Except as provided in subparagraph (ii) of this paragraph, at least one month prior to the date on which an inmate may be paroled pursuant to subdivision one of section 70.40 of the penal law, a member or members as determined by the rules of the board shall personally interview such inmate and determine whether he should be paroled in accordance with the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article. If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms. The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same. If the inmate is released, he shall be given a copy of the conditions of parole. Such conditions shall where appropriate, include a requirement that the parolee comply with any restitution order, mandatory surcharge, sex offender registration fee and DNA databank fee previously imposed by a court of competent jurisdiction that applies to the parolee. The conditions shall indicate which restitution collection agency established under subdivision eight of section 420.10 of the criminal procedure law, shall be responsible for collection of restitution, mandatory surcharge, sex offender registration fees and DNA databank fees as provided for in section 60.35 of the penal law and section eighteen hundred nine of the vehicle and traffic law.

(a) [Eff. until Sept. 1, 2023, pursuant to L.1995, c. 3, § 74, par. d. See, also, par. (a) below.] (i) [Eff. Sept. 1,2021. See, also, subpar. (i) above.] Except as provided in subparagraph (ii) of this paragraph, at least one month prior to the date on which an inmate may be paroled pursuant to subdivision one of section 70.40 of the penal law, a member or members as determined by the rules of the board shall personally interview such inmate and determine whether he or she should be paroled in accordance with the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article. If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms. The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same. If the inmate is released, he or she shall be given a copy of the conditions of parole. Such conditions shall where appropriate, include a requirement that the parolee comply with any restitution order, mandatory surcharge, sex offender

registration fee and DNA databank fee previously imposed by a court of competent jurisdiction that applies to the parolee. The conditions shall indicate which restitution collection agency established under subdivision eight of section 420.10 of the criminal procedure law, shall be responsible for collection of restitution, mandatory surcharge, sex offender registration fees and DNA databank fees as provided for in section 60.35 of the penal law and section eighteen hundred nine of the vehicle and traffic law. If the inmate is released, he or she shall also be notified in writing that his or her voting rights will be restored upon release.

(ii) Any inmate who is scheduled for presumptive release pursuant to section eight hundred six of the correction law shall not appear before the board as provided in subparagraph (i) of this paragraph unless such inmate's scheduled presumptive release is forfeited, canceled, or rescinded subsequently as provided in such law. In such event, the inmate shall appear before the board for release consideration as provided in subparagraph (i) of this paragraph as soon thereafter as is practicable.

(a) [Eff. Sept. 1, 2023, pursuant to L.1995, c. 3, § 74, par. d. See, also, par. (a) above.] At least one month prior to the expiration of the minimum period or periods of imprisonment fixed by the court or board, a member or members as determined by the rules of the board shall personally interview an inmate serving an indeterminate sentence and determine whether he or she should be paroled at the expiration of the minimum period or periods in accordance with the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c. If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms. The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same. If the inmate is released, he or she shall be given a copy of the conditions of parole. Such conditions shall where appropriate, include a requirement that the parolee comply with any restitution order and mandatory surcharge previously imposed by a court of competent jurisdiction that applies to the parolee. The conditions shall indicate which restitution collection agency established under subdivision eight of section 420.10 of the criminal procedure law, shall be responsible for collection of restitution and mandatory surcharge as provided for in section 60.35 of the penal law and section eighteen hundred nine of the vehicle and traffic law. If the inmate is released, he or she shall also be notified in writing that his or her voting rights will be restored upon release.

(b) Persons presumptively released, paroled, conditionally released or released to post-release supervision from an institution under the jurisdiction of the department, the department of mental hygiene or the office of children and family services shall, while on presumptive release, parole, conditional release or post-release supervision, be in the legal custody of the department until expiration of the maximum term or period of sentence, or expiration of the period of supervision, including any period of post-release supervision, or return to imprisonment in the custody of the department, as the case may be.

(c)(A) Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-

one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. The board shall provide toll free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of section 440.50 of the criminal procedure law, the parole board member shall present a written report of the statement to the parole board. A crime victim's representative shall mean the crime victim's closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim's representative may include information concerning threatening or intimidating conduct toward the victim, the victim's representative, or the victim's family, made by the person sentenced and occurring after the sentencing. Such information may include, but need not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced. Any statement by a victim or the victim's representative made to the board shall be maintained by the department in the file provided to the board when interviewing the inmate in consideration of release. A victim or victim's representative who has submitted a written request to the department for the transcript of such interview shall be provided such transcript as soon as it becomes available.

(B) Where a crime victim or victim's representative as defined in subparagraph (A) of this paragraph, or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's name and address confidential.

(d)(i) Notwithstanding the provisions of paragraphs (a), (b) and (c) of this subdivision, after the inmate has served his minimum period of imprisonment imposed by the court, or at any time after the inmate's period of imprisonment has commenced for an inmate serving a determinate or indeterminate term of imprisonment, provided that the inmate has had a final order of deportation issued against him and provided further that the inmate is not convicted of either an A-I felony offense other than an A-I felony offense as defined in article two hundred twenty of the penal law or a violent felony offense as defined in section 70.02 of the penal law, if the inmate is subject to deportation by the United States Bureau of Immigration and Customs Enforcement, in addition to the criteria set forth in paragraph (c) of this subdivision, the board may consider, as a factor warranting earlier release, the fact that such inmate will be deported, and may grant parole from an indeterminate sentence or release for deportation from a determinate sentence to such inmate conditioned specifically on his prompt deportation. The board may make such conditional grant of early parole from an indeterminate sentence or release for deportation from a determinate sentence only where it has received from the United States Bureau of Immigration and Customs Enforcement assurance (A) that an order of deportation will be executed or that proceedings will promptly be commenced for the purpose of deportation upon release of the inmate from the custody of the department of correctional services, and (B) that the inmate, if granted parole or release for deportation pursuant to this paragraph, will not be released from the custody of the United States Bureau of Immigration and Customs Enforcement, unless such release be as a result of deportation without providing the board a reasonable opportunity to arrange for execution of its warrant for the retaking of such person.

(ii) An inmate who has been granted parole from an indeterminate sentence or release for deportation from a determinate sentence pursuant to this paragraph shall be delivered to the custody of the United States Bureau of Immigration and Customs Enforcement along with the board's warrant for his retaking to be executed in the event of his release from such custody other than by deportation. In the event that such person is not deported, the board shall execute the warrant, effect his return to imprisonment in the custody of the department and within sixty days after such return, provided that the person is serving an indeterminate sentence and the minimum period of imprisonment has been served, personally interview him to determine whether he should be paroled in accordance with the provisions of paragraphs (a), (b) and (c) of this subdivision. The return of a person granted parole from an indeterminate sentence or release for deportation from a determinate sentence pursuant to this paragraph for the reason set forth herein shall not be deemed to be a parole delinquency and the interruptions specified in subdivision three of section 70.40 of the penal law shall not apply, but the time spent in the custody of the United States Bureau of

Immigration and Customs Enforcement shall be credited against the term of the sentence in accordance with the rules specified in paragraph (c) of that subdivision. Notwithstanding any other provision of law, any inmate granted parole from an indeterminate sentence or release for deportation from a determinate sentence pursuant to this paragraph who is subsequently committed to imprisonment in the custody of the department for a felony offense committed after release pursuant to this paragraph shall have his parole eligibility date on the indeterminate sentence for the new felony offense, or his conditional release date on the determinate sentence for the new felony offense, as the case may be, extended by the amount of time between the date on which such inmate was released from imprisonment in the custody of the department pursuant to this paragraph and the date on which such inmate would otherwise have completed service of the minimum period of imprisonment on the prior felony offense.

(e) Notwithstanding the requirements of paragraph (a) of this subdivision, the determination to parole an inmate who has successfully completed the shock incarceration program pursuant to section eight hundred sixty-seven of the correction law may be made without a personal interview of the inmate and shall be made in accordance with procedures set forth in the rules of the board. If parole is not granted, the time period for reconsideration shall not exceed the court imposed minimum.

3. Revocation of presumptive release, parole, conditional release and post-release supervision. (a)(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[1] shall have reasonable cause to believe that such person has lapsed into criminal ways or company, or has violated one or more conditions of his presumptive release, parole, conditional release or post-release supervision, such parole officer shall report such fact to a member of the board, or to any officer of the department designated by the board, and thereupon a warrant may be issued for the retaking of such person and for his temporary detention in accordance with the rules of the board unless such person has been determined to be currently unfit to proceed to trial or is currently subject to a temporary or final order of observation pursuant to article seven hundred thirty of the criminal procedure law, in which case no warrant shall be issued. The retaking and detention of any such person may be further regulated by rules and regulations of the department not inconsistent with this article. A warrant issued pursuant to this section shall constitute sufficient authority to the superintendent or other person in charge of any jail, penitentiary, lockup or detention pen to whom it is delivered to hold in temporary detention the person named therein; except that a warrant issued with respect to a person who has been released on medical parole pursuant to section two hundred fifty-nine-r of this article and whose parole is being revoked pursuant to paragraph (h) of subdivision four of such section shall constitute authority for the immediate placement of the parolee only into imprisonment in the custody of the department to hold in temporary detention. A warrant issued pursuant to this section shall also constitute sufficient authority to the person in charge of a drug treatment campus, as defined in subdivision twenty of section two of the correction law, to hold the person named therein, in accordance with the procedural requirements of this section, for a period of at least ninety days to complete an intensive drug treatment program mandated by the board as an alternative to presumptive release or parole or conditional release revocation, or the revocation of post-release supervision, and shall also constitute sufficient authority for return of the person named therein to local custody to hold in temporary detention for further revocation proceedings in the event said person does not successfully complete the intensive drug treatment program. The board's rules shall provide for cancellation of delinquency and restoration to supervision upon the successful completion of the program.

(ii) A warrant issued for a presumptive release, a parole, a conditional release or a post-release supervision violator may be executed by any parole officer or any officer authorized to serve criminal process or any peace officer, who is acting pursuant to his special duties, or police officer. Any such officer to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such person and having him detained as provided in this paragraph.

(iii) Where the alleged violator is detained in another state pursuant to such warrant and is not under parole supervision pursuant to the uniform act for out-of-state parolee supervision or where an alleged violator under parole supervision pursuant to the uniform act for out-of-state parolee supervision is detained in a state other than the receiving state, the warrant will not be

deemed to be executed until the alleged violator is detained exclusively on the basis of such warrant and the department has received notification that the alleged violator (A) has formally waived extradition to this state or (B) has been ordered extradited to this state pursuant to a judicial determination. The alleged violator will not be considered to be within the convenience and practical control of the department until the warrant is deemed to be executed.

(iv) Renumbered (iii) by L.2009, c. 56, pt. M, § 1, eff. April 7, 2009, deemed eff. April 1, 2009.

(b) A person who shall have been taken into custody pursuant to this subdivision for violation of one or more conditions of presumptive release, parole, conditional release or post-release supervision shall, insofar as practicable, be incarcerated in the county or city in which the arrest occurred.

(c) (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.

(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.

(iii) The alleged violator shall, within three days of the execution of the warrant, be given written notice of the time, place and purpose of the 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. The notice shall state what conditions of presumptive release, parole, conditional release or post-release supervision are alleged to have been violated, and in what manner; that such person shall have the right to appear and speak in his or her own behalf; that he or she shall have the right to introduce letters and documents; that he or she may present witnesses who can give relevant information to the hearing officer; that he or she has the right to confront the witnesses against him or her. Adverse witnesses may be compelled to attend the preliminary hearing unless the prisoner has been convicted of a new crime while on supervision or unless the hearing officer finds good cause for their non-attendance. As far as practicable or feasible, any additional documents having been collected or prepared that support the charge shall be delivered to the alleged violator.

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

(v) At the preliminary hearing, the hearing officer shall review the violation charges with the alleged violator, direct the presentation of evidence concerning the alleged violation, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross examination of those witnesses in attendance.

(vi) At the conclusion of the preliminary hearing, the hearing officer shall inform the alleged violator of his or her decision as to whether there is probable cause to believe that the presumptive releasee, parolee, conditional releasee or person on post-release supervision has violated one or more conditions of his or her release in an important respect. Based solely on the evidence adduced at the hearing, the hearing officer shall determine whether there is probable cause to believe that such person has violated his or her presumptive release, parole, conditional release or post-release supervision in an important respect. The hearing officer shall in writing state the reasons for his or her determination and the evidence relied on. A copy of the written findings shall be sent to both the alleged violator and his or her counsel.

(vii) If the hearing officer is satisfied that there is no probable cause to believe that such person has violated one or more conditions of release in an important respect, he or she shall dismiss the notice of violation and direct such person be restored to supervision.

(viii) If the hearing officer is satisfied that there is probable cause to believe that such person has violated one or more conditions of release in an important respect, he or she shall so find.

(d) [Eff. until Sept. 1, 2023, pursuant to L.1995, c. 3, § 74, par. d. See, also, par. (d) below.] If a finding of probable cause is made pursuant to this subdivision either by a determination at a preliminary hearing or by the waiver thereof, or if the releasee has been convicted of a new crime while under presumptive release, parole, conditional release or post-release supervision, the board's rules shall provide for (i) declaring such person to be delinquent as soon as practicable and shall require reasonable and appropriate action to make a final determination with respect to the alleged violation or (ii) ordering such person to be restored to presumptive release, parole, conditional release or post-release supervision under such circumstances as it may deem appropriate or (iii) when a presumptive releasee, parolee, conditional releasee or person on post-release supervision has been convicted of a new felony committed while under such supervision and a new indeterminate or determinate sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction and a copy of the commitment shall accompany said notification. The inmate's next appearance before the board shall be governed by the legal requirements of said new indeterminate or determinate sentence, or shall occur as soon after a final reversal of the conviction as is practicable.

(d) [Eff. Sept. 1, 2023. See, also, par. (d) above.] If a finding of probable cause is made pursuant to this subdivision either by determination at a preliminary hearing or by the waiver thereof, or if the releasee has been convicted of a new crime while under his present parole or conditional release supervision, the board's rules shall provide for (i) declaring such person to be delinquent as soon as practicable and shall require reasonable and appropriate action to make a final determination with respect to the alleged violation or (ii) ordering such person to be restored to parole supervision under such circumstances as it may deem appropriate or (iii) when a parolee or conditional releasee has been convicted of a new felony committed while under his present parole or conditional release supervision and a new indeterminate sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction and a copy of the commitment shall accompany said notification. The inmate's next appearance before the board shall be governed by the legal requirements of said new indeterminate sentence, or shall occur as soon after a final reversal of the conviction as is practicable.

(e)(i) If the alleged violator requests a local revocation hearing, he or she shall be given a revocation hearing reasonably near the place of the alleged violation or arrest if he or she has not been convicted of a crime committed while under supervision. However, the board may, on its own motion, designate a case for a local revocation hearing.

(ii) If there are two or more alleged violations, the hearing may be conducted near the place of the violation chiefly relied upon as a basis for the issuance of the warrant as determined by the board.

(iii) If a local revocation hearing is not ordered pursuant to subparagraph (i) of this paragraph the alleged violator shall be given a revocation hearing upon his or her return to a state correctional facility.

(f) (i) 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 revocation hearing, or consents to a postponed revocation proceeding initiated by the board, or if an alleged violator, by his actions otherwise precludes the prompt conduct of such proceedings, the time limit may be extended.

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

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

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

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

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

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

(viii) At the conclusion of the hearing the presiding officer may sustain any or all of the violation charges or may dismiss any or all violation charges. He may sustain a violation charge only if the charge is supported by a preponderance of the evidence adduced.

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

(x) If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he or she shall so find. For each violation so found, the presiding officer may (A) direct that the 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 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; (C) in the case of presumptive releasees, parolees or conditional releasees, direct the violator's reincarceration and fix a date for consideration by the board for re-release on presumptive release, or parole or conditional release, as the case may be; or (D) in the case of persons released to a period of post-release supervision, direct the violator's reincarceration up to the balance of the remaining period of post-release supervision, not to exceed five years; provided, however, that a defendant serving a term of post-release supervision for a conviction of a felony sex offense defined in section 70.80 of the penal law may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision. For the violator serving an indeterminate sentence who while reincarcerated 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 reincarcerated, 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) [Eff. until Sept. 1, 2021. See, also, subpar. (xi) below.] If the presiding officer sustains any violations, he must prepare a written statement, to be made available to the alleged violator and his counsel, indicating the evidence relied upon and the reasons for revoking presumptive release, parole, conditional release or post-release supervision, and for the disposition made.

(xi) [Eff. Sept. 1, 2021. See, also, subpar. (xi) above.] If the presiding officer sustains any violations, he or she 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) 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 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.

(g) Revocation of presumptive release, parole, conditional release or post-release supervision shall not prevent re-parole or re-release provided such re-parole or re-release is not inconsistent with any other provisions of law. When there has been a revocation of the period of post-release supervision imposed on a felony sex offender who owes three years or more on such period imposed pursuant to subdivision two-a of section 70.45 of the penal law, and a time assessment of three years or more has been imposed, the violator shall be reviewed by the board of parole and may be restored to post-release supervision only after serving three years of the time assessment, and only upon a determination by the board of parole made in accordance with the procedures set forth in this section. Even if the hearing officer has imposed a time assessment of a certain number of years of three years or more, the violator shall not be released at or before the expiration of that time assessment unless the board authorizes such release, the period of post-release supervision expires, or release is otherwise authorized by law. If a time assessment of less than three years was imposed upon such a defendant, the defendant shall be released upon the expiration of such time assessment, unless he or she is subject to further imprisonment or confinement under any other law.

(h) If the alleged violation is not sustained and the alleged violator is restored to supervision, the interruptions specified in subdivision three of section 70.40 of the penal law shall not apply, but the time spent in custody in any state or local correctional institution shall be credited against the term of the sentence in accordance with the rules specified in paragraph (c) of such subdivision.

(i) Where there is reasonable cause to believe that a presumptive releasee, parolee, conditional releasee or person under post-release supervision has absconded from supervision the board may declare such person to be delinquent. This paragraph shall not be construed to deny such person a preliminary revocation hearing upon his retaking, nor to relieve the department of any obligation it may have to exercise due diligence to retake the alleged absconder, nor to relieve the parolee or releasee of any obligation he may have to comply with the conditions of his release.

4. Appeals.

(a) Except for determinations made upon preliminary hearings upon allegations of violation of presumptive release, parole, conditional release or post-release supervision, all determinations made pursuant to this section may be appealed in accordance with rules promulgated by the board. Any board member who participated in the decision from which the appeal is taken may not participate in the resolution of that appeal. The rules of the board may specify a time within which any appeal shall be taken and resolved.

(b) Upon an appeal to the board, the inmate may be represented by an attorney. Where the inmate is financially unable to provide for his own attorney, upon request an attorney shall be assigned pursuant to the provisions of subparagraph (v) of paragraph (f) of subdivision three of this section.

(c) All board of parole administrative appeal findings and recommendations shall be published within one hundred twenty days of the determination on a publicly accessible website that includes a word-searchable database. The department of corrections and community supervision shall provide electronic or print copies of such findings and recommendations to all correctional facility law libraries on a quarterly basis. Copies of such individual findings and recommendations shall also be made available upon written request to the department of corrections and community supervision. Information which would reveal confidential material that may not be released pursuant to federal or state law shall be redacted from any such website or findings and recommendations.

5. Actions of the board. Any action by the board or by a hearing officer pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law.

6. Record of proceedings. (a)(i) The board shall provide for the making of a verbatim record of each parole release interview, except where a decision is made to release the inmate to parole supervision, and each preliminary and final revocation hearing, except when the decision of the presiding officer after such hearings result in a dismissal of all charged violations of parole, conditional release or post release supervision.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the board shall provide for the making of a verbatim record of each parole release interview in all proceedings where the inmate is a detained sex offender as such term is defined in subdivision (g) of section 10.03 of the mental hygiene law. Such record shall be provided to the office of mental health for use by the multidisciplinary staff and the case review panel pursuant to section 10.05 of the mental hygiene law.

(b) The chairman of the board of parole shall maintain records of all parole interviews and hearings for a period of twenty-five years from the date of the parole release interview or until expiration of the maximum term of sentence.

7. Deaf person before the board. Whenever any deaf person participates in an interview, parole release hearing, preliminary hearing or revocation hearing, there shall be appointed a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to and the statements or testimony of such deaf person. The department shall determine a reasonable fee for all such interpreting services, the cost of which shall be a charge upon the department.

8. Foreign born or non-English speaking person before the board. Upon notification from the department pursuant to section two hundred fifty-nine-e of this article, or upon the request of any foreign born or non-English speaking person who is scheduled to participate in an interview, parole release hearing, preliminary hearing or revocation hearing, there shall be appointed from

the New York state office of general services statewide administrative services contract, a qualified interpreter to interpret the proceedings to and the statements or testimony of such person. The board shall determine a reasonable fee for all such interpreting services, the cost of which shall be a charge upon the board of parole. No such request or appointment shall cause a delay of release from incarceration of such person.

Credits

(Added L.1977, c. 904, § 3. Amended L.1978, c. 499, § 3; L.1980, c. 76, § 1; L.1980, c. 412, § 1; L.1980, c. 843, § 62; L.1981, c. 430, § 2; L.1983, c. 417, § 2; L.1984, c. 238, § 1; L.1984, c. 413, §§ 1, 2; L.1984, c. 435, § 1; L.1985, c. 78, § 1; L.1985, c. 372, § 1; L.1985, c. 494, § 3; L.1986, c. 230, § 1; L.1986, c. 466, § 1; L.1987, c. 261, § 17; L.1987, c. 262, § 4; L.1987, c. 396, § 1; L.1989, c. 73, § 1; L.1989, c. 432, § 1; L.1991, c. 166, §§ 361 to 363; L.1991, c. 703, § 2; L.1992, c. 55, §§ 288, 294; L.1994, c. 559, § 2; L.1995, c. 3, §§ 39 to 42; L.1997, c. 581, § 1, eff. Jan. 1, 1998; L.1998, c. 1, §§ 26 to 39, eff. Aug. 6, 1998; L.1999, c. 40, § 1, eff. May 10, 1999; L.1999, c. 126, § 1, eff. June 29, 1999; L.2003, c. 62, pt. E, § 11, eff. May 15, 2003, deemed eff. April 1, 2003; L.2003, c. 62, pt. F, § 9, eff. May 15, 2003; L.2003, c. 62, pt. T, § 1, eff. May 15, 2003, deemed eff. April 1, 2003; L.2004, c. 56, pt. J, § 1, eff. Aug. 20, 2004; L.2007, c. 7, §§ 42 to 43-a, eff. April 13, 2007; L.2007, c. 56, pt. E, §§ 1 to 3, eff. April 9, 2007, deemed eff. April 1, 2007; L.2007, c. 239, § 1, eff. July 18, 2007; L.2009, c. 56, pt. M, § 1, eff. April 7, 2009, deemed eff. April 1, 2009; L.2009, c. 56, pt. AAA, § 12, eff. April 7, 2009; L.2011, c. 62, pt. C, subpt. A, §§ 38-f to 38-f-2, eff. March 31, 2011; L.2012, c. 363, § 1, eff. Aug. 31, 2012; L.2015, c. 545, §§ 1, 2, 4, eff. June 8, 2016; L.2016, c. 130, § 1, eff. Oct. 19, 2016; L.2016, c. 473, § 2, eff. March 8, 2017; L.2017, c. 9, § 1, eff. March 8, 2017; L.2017, c. 120, §§ 1, 2, eff. July 25, 2017; L.2017, c. 412, § 1, eff. Nov. 29, 2018; L.2018, c. 44, § 1, eff. Nov. 29, 2018; L.2021, c. 103, § 7; L.2021, c. 103, §§ 6, 8, eff. Sept. 1, 2021.)

Notes of Decisions (1284)

Footnotes

1 Executive Law § 259-m.

McKinney's Executive Law § 259-i, NY EXEC § 259-i

Current through L.2021, chapters 1 to 152. Some statute sections may be more current, see credits for details.