

SUMMARY OF

LESS IS MORE

Bill Numbers: S1144A/A5576A

Sponsors: Senator Benjamin and Assembly Member Forrest

Bill text: <https://www.nysenate.gov/legislation/bills/2021/a5576/amendment/a>

The Less Is More Bill

- Provides Earned Time Credits so that people on parole who abide by the rules get 30 days off for every 30 days of compliance. These credits apply retroactively for up to two years of earned credit.
- Creates the right to counsel, discovery, heightened burden of proof, swift timeframes for hearings, and other procedural protections for individuals accused of violations that are not new crimes (technical violations). Some protections also apply to individuals accused of non-technical violations.
- Severely restricts the use of pre-adjudication detention for suspected technical violations.
- Eliminates incarceration for most technical violations.

Summary of Amendments to Less Is More Bill

The proposed bill was amended on June 7, 2021, with the following changes:

- The new version makes a clear distinction between new crimes (felony or misdemeanor) and other violations, which are defined as technical violations. In the old version, some misdemeanor crimes were included in the definition, which complicated things. Note that this means that behavior constituting a new crime, even without a new charge or conviction, will be treated differently.
- The amendments added a provision that limits retrospective earned time credits to only a two-year period. So, for example, a person who has already been on parole more than two years can only claim credit for two years of compliance.

Detailed Provisions of Less Is More Bill

New Legal Definitions

- Releasee – individuals released from a DOCCS facility on temporary release, presumptive release, parole, conditional release, post-release supervision (for individuals with determinate sentences), or medical parole;
- Technical violation – violation of conditions of community supervision “in an important respect” that would not constitute a new felony or misdemeanor*;
- Absconding – intentionally avoiding supervision by failing to maintain contact or communication with the releasee’s assigned community supervision officer or area bureau office or failing to notify of a change in address, and reasonable efforts by the supervision officer to re-engage have been unsuccessful.

***Amendment June 7, 2021:** Changed the definition of technical violations to distinguish such violations from all new felony and misdemeanor crimes, rather than including some misdemeanors that would qualify as technical violations.

Earned Time Credits

Under current laws, early termination of community supervision is available to a narrow category of individuals and is rarely utilized – leaving most individuals to serve out their lengthy periods of community supervision despite clear evidence of rehabilitation.

Under the Less is More Act:

- An individual on parole, conditional release, presumptive release, and post-release supervision shall have his or her period of supervision reduced by 30 days for every 30 days that the individual does not violate a condition of his or her community supervision (provided the individual does not have a maximum term of life imprisonment).
- Earned time credits are revoked for the 30-day period commencing after a technical violation is sustained at a final hearing, except that earned time credits may be withheld for the entire time an individual is considered to have absconded.
 - Earned time credit calculation resumes on the 31st day after a sustained violation or, if an individual is subject to reincarceration, on the day the individual is re-released to community supervision.
 - If an individual is serving more than one period of supervision, the earned time credits shall be applied to every period of parole or conditional release to which the person is subject.
 - Earned time credits will apply retroactively to any person subject to community supervision on the date the legislation takes effect. An individual is not eligible for retroactive earned time credits if supervision has been interrupted by a period of incarceration.
 - Retroactive earned time credits are permitted up to a maximum of two years.*

***Amendment June 7, 2021:** This limitation on the retroactive credits provision was not in the original bill this session. Note: To be clear, this does not mean that they are only “looking back” for two years to calculate earned time credits, but instead that retroactive earned credits cannot total more than two years. If a person on supervision at the time the Act goes into effect began

their supervision period seven years ago, earned time credit must still be calculated starting from seven years ago when their supervision commenced, but the releasee can only accrue a maximum of two years of earned time credit off the remainder of their supervision.

Pre-adjudication detention and arraignments

Under current law, any individual served with a warrant for a technical violation is detained pending a preliminary and final adjudication hearing. Bail and release on recognizance is not available as an alternative to detention. The Less is More Act drastically reduces the use of pre-adjudication detention.

Under the Less is More Act: If a community supervision officer has probable cause to believe an individual has committed a technical violation, the officer reports to the Board of Parole and a written notice is issued to the individual.

- If an alleged violation could result in incarceration, he or she must appear within 48 hours or a warrant may be issued and the person may be temporarily detained pending a recognizance hearing.
- If an alleged violation would not result in incarceration and the individual does not appear within 48 hours, the violation is deemed sustained and the non-incarceral consequences will be imposed. In these cases, the person can appeal.
- At recognizance hearings, the individual has the right to counsel. The court must release an individual on recognizance unless the court finds that (1) the individual represents a substantial risk of willfully failing to appear at the preliminary or final revocation hearing *and* (2) that no non-monetary conditions or combinations of conditions in the community will reasonably assure the individual's presence at subsequent hearings.
- At recognizance hearings, the Department of Corrections and Community Supervision has the burden to prove that the warrant was issued correctly.
- An individual has one month from the date of the notice to move to vacate the sustained violation if the individual can show that the notice was not properly served or his or her failure to appear was otherwise explainable.

Preliminary Hearing

Under current law, any individual served with a warrant for a technical violation must attend a preliminary hearing, to occur within fifteen days of the warrant. At this hearing, the hearing officer must find probable cause that a technical violation has occurred to trigger a final revocation hearing.

Under the Less is More Act:

- The burden of proof at preliminary hearings is raised to a preponderance of evidence that a technical violation has occurred.
- Individuals have the right and access to counsel during preliminary hearings.
- DOCCS is required to hold a preliminary hearing for individuals for whom a notice of violation (not a warrant) was issued or who were released on their own recognizance following a warrant within 10 days of the notice of violation or release on recognizance.
- If the individual has been detained, the preliminary hearing must take place within five days.

Final Revocation Hearing

Under current law, individuals accused of a technical violation face a revocation hearing that must occur within 90 days of the preliminary hearing. A technical violation is sustained if the presiding officer finds that there is a preponderance of evidence that a violation has occurred.

Under the Less is More Act:

- If an individual is detained after a preliminary hearing, then the individual shall have a final revocation hearing within 30 days of the issuance of the order of detention.
- If an individual is not detained, then the individual shall have a final revocation hearing within 45 days.
- A technical violation is sustained if the presiding officer is satisfied that there is clear and convincing evidence that the individual committed a technical violation of his or her conditions of supervision.

Incarceration for Technical Violations

Under current law, individuals found to have committed technical violations could be incarcerated for more than a year, depending on the severity of the violation.

- Under the Less is More Act:
- Incarceration shall not be imposed at all for certain first or second technical violations (except for certain sex offenders, and some people who violated driving under the influence laws and then used those prohibited substances, and a catch-all for “violations that cannot be addressed in the community and all reasonable community-based means to address the failure have been exhausted”);
- For individuals who have absconded:
 - Up to seven days for a first violation;
 - Up to 15 days for second violation; and
 - Up to 30 days for a third or subsequent violation.
- No incarceration is authorized even with sustained violations for violating curfew; drug and alcohol use when not involving a DUI; failing to notify parole officer of a change in employment or program status; failing to pay surcharges and fees; obtaining a driver's license or driving a car with a valid driver's license, unless these are prohibited by the person's conviction; failing to notify community supervision officer of most contacts with law enforcement.
- For other technical violations:
 - No incarceration for the first two violations.
 - Up to seven days for a third violation.
 - Up to 15 days for a fourth violation.
 - Up to 30 days for a fifth violation or additional violation beyond that.
 - If an individual was detained pending a preliminary and/or final hearing, time spent in detention will apply to their period of incarceration for a substantiated technical violation.

Due Process Protections that Apply to Both Technical and Non-Technical Violations

- Currently, releasees cannot appeal a non-technical violation finding. Under the Less is More Act, releasees have the right to appeal a sustained violation, even if the violation is non-technical.
- Hearings are currently held in carceral settings (jail and prison). Under the Less is More Act, both non-technical and technical violations proceedings must be held in a courthouse or a suitable office building / community facility that is *not* a correctional facility, detention center, or local correctional facility.
- A recognizance hearing to determine custody status must occur whether the violation is technical or non-technical.

Retroactivity

- Within 6 months of the effective date of the Act, the Department of Corrections and Community Supervision, in consultation with the Board of Parole, shall calculate and award all earned time credits to everyone serving a sentence subject to community supervision retroactive to the initial date the person began serving his or her earliest period of community supervision prior to any revocation.*
- Within 10 months of becoming law, the Dept. of Corrections and Community Supervision, in consultation with the Board of Parole, shall identify all individuals incarcerated for a sustained violation of community supervision and recalculate such individual's time assessment in accordance with the Act.

*Note: this appears to conflict with subsection (d) on p. 3, which specifies that “[t]he department shall calculate retroactive earned time credits within one year after the bill shall have become law...”