JUSTICE STRATEGIES
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EARLY RELEASE AND OTHER PRISON-BASED PROGRAMS: RECENT CHANGES AS A RESULT OF 2009 DRUG LAW REFORM ACT AND 2010 LEGISLATIVE CHANGES TO SHOCK, WILLARD, AND LCTA PROGRAMS.

Together, the 2009 Drug Law Reform Act and 2010 legislative changes to the Willard Drug Treatment program Shock Incarceration program have resulted in several significant changes to various Department of Correctional Services and Division of Parole programs. Defense lawyers should be aware of these changes to advocate effectively so that their clients are eligible for potential early release possibilities. These changes are described below.

Willard Drug Treatment/Parole Supervision Sentence (CPL §410.91):

A joint program between the Division of Parole (Parole), Department of Correctional Services (DOCS), and the Office of Alcoholism and Substance Abuse Services (OASAS), Willard was originally established to target certain class D and E second felony offenders whose criminal conduct is related to a substance abuse problem. Willard is a sentence of parole supervision, with the first ninety days spent in an intensive drug treatment program. Since its inception in 1995, Willard has been available to second felony offenders convicted of a "specified offense" as defined by CPL § 410.91(5), upon a finding that the defendant has a substance abuse history that is "a significant contributing factor" to his or her criminal conduct, that this substance abuse problem can be addressed by a period of parole supervision, and that "imposition of such a sentence would not have an adverse effect on public safety or public confidence in the integrity of the criminal justice system." CPL § 410.91(3). For class D felony offenders, under prior law, Willard was not available absent consent of the prosecution.

The drug law reform legislation makes several significant changes to CPL § 410.91;

1) The list of "specified offenses" is expanded to include burglary in the third degree, class C drug offenses, and first-time class B drug offenses.

Under the reform legislation, the following are now the "specified offenses" listed in CPL § 410.91(5), with the new offenses in italics:

- *burglary 3rd, PL 140.20*
- criminal mischief 3rd, PL 145.05
- criminal mischief 2nd, PL 145.10
- grand larceny 4th, PL 155.30 (excluding subdivisions 7 and 11)
- grand larceny 3rd, PL 155.35 (excluding offenses involving firearms, rifles and

shotguns)
• unauthorized use of a vehicle 2nd, PL 165.06
• criminal possession of stolen property 4th, PL 165.45 (excluding subdivisions 4 and 7)
• criminal possession of stolen property 3rd, PL 165.50 (excluding offenses involving firearms, rifles and shotguns)
• forgery 2nd, PL 170.10
• criminal possession of a forged instrument 2nd, PL 170.15
• unlawfully using slugs 1st, PL 170.60
• any attempt to commit any of the above-listed offenses
• any *class C*, D or E felony drug offense
• *any class B first-time felony drug offense*

2) Those who have been previously convicted of a Class B Article 220 offense are no longer excluded from Willard eligibility.

Old CPL § 410.91(2) excluded from Willard eligibility all defendants who had previously been convicted of a violent felony offense, a class A felony, and any class B felony. Under the 2009 amendments to this provision, those who have previously been convicted of a class B drug offense and sentenced pursuant PL § 70.70(2)(a) (first time felony offense) are no longer excluded from Willard eligibility.

3) District Attorney approval is no longer needed for class D felony offenders.

CPL § 410.91(4), which required District Attorney approval for class D felony offenders as a prerequisite for a Willard sentence, has been repealed. There is no longer any requirement that the prosecution consent to any Willard sentence.

4) Willard is now available to first time B felony drug offenders.

As explained above, Willard was originally established to target second felony offenders. Thus, subdivision 2 of CPL § 410.91, which generally defines Willard eligibility, formerly read as follows:

> A defendant is an "eligible defendant" for purposes of a sentence of parole supervision when such defendant is a *second* felony offender convicted of a specified offense... (Emphasis added)

With the 2009 drug law reform, the Legislature sought to expand sentencing options available to class B first-time felony drug offenders, and as described above, did so by making a Willard sentence available to this group of defendants. Willard is not viewed as a necessary option for class C, D, and E first-time felony drug offenders because other non-incarcerative and less restrictive sentencing options are available to such defendants. Indeed, the centerpiece of the 2009 drug law reform is judicial authorization for diversion to treatment for felony drug

offenders with an identified substance abuse problem.

In amending CPL § 410.91 to make Willard a sentencing option for class B first-time felony drug offenders, the Legislature added this category of offense to the list of "specified offenses" in subdivision 5 and then omitted the word "second" from subdivision 2, so that this provision now reads as follows:

> A defendant is an "eligible defendant" for purposes of a sentence of parole supervision when such defendant is a felony offender convicted of a specified offense....

As a result, this provision could be misinterpreted as providing that class C, D and E first time felony offenders convicted of one of the "specified offenses" in subsection (5) are eligible for Willard. For first time felony drug offenders, Willard is reserved only the more serious class B offenses.

5) Alternative to Willard for Individuals with Medical or Mental Health Issues: Correction Law § 2(20).

In addition to the changes described above, in May 2010, the Legislature again modified Willard (via updates to Correction Law § 2(20)) to allow for alternative-to-Willard programs for defendants with significant medical or mental health problems. Like the alternative-to-Shock program discussed further below, if a defendant sentenced to Willard "requires a degree of medical care or mental health care that cannot be provided at a drug treatment campus," DOCS must propose an alternative-to-Willard program. If the defendant agrees to participate in this program and successfully completes it, the defendant shall be treated the same as those who successfully complete the 90 day drug treatment program at Willard. If the defendant objects in writing to the proposed alternative-to-Willard program, DOCS must notify the sentencing judge of the proposed alternative, who shall then notify the prosecution and defense counsel. The defendant shall then appear before the sentencing judge, who shall consider any submission from the defendant, defense counsel, and prosecution and also provide the parties an opportunity to be heard on the issue. Ultimately, the sentencing judge may modify the sentence notwithstanding CPL § 430.10 (sentence may not be modified after the sentence has commenced).

Shock Incarceration Program (Correction Law §§ 865-867)

Started in 1987 as a Department of Correctional Services Program, Shock is a 6 month boot-camp-style program that provides intensive substance abuse treatment, education, and an opportunity for a significantly reduced prison sentences for those who successfully complete the program. Those who graduate from the Shock program are awarded an Earned Eligibility Certificate and immediately eligible for parole release (for those serving indeterminate sentences) or conditional release (for those serving determinate sentences). *See generally* Correction Law §§ 865-867. Until the 2009 and 2010 amendments, eligibility for Shock was determined only upon reception at a reception facility and inmates were eligible for Shock only if: within 3 years

of parole eligibility or conditional release at time of reception; at least 16 years of age and not yet 40 at time of reception; not convicted of an A-I felony, violent felony offense, homicide, specified sex offense, or escape or absconding offense; and had no prior conviction for a felony upon which a determinate or indeterminate sentence was imposed. Unlike Willard, decisions regarding placement in Shock were solely the province of DOCS, and sentencing judges had no authority to order defendants placed into the Shock program.

The 2009 and 2010 legislation have resulted in the following significant changes to Shock:

<u>1) Judicially Ordered Shock and Alternative to Shock Programs (PL § 60.04(7) and Correction Law § 867(2-a))</u>

Sentencing judges are now authorized to order Shock placement for those defendants convicted of a controlled substance or marijuana offense which requires a prison sentence. Defendants must still meet the eligibility requirements of the program outlined in Correction Law § 865(1) – that is, be the requisite age and not also be convicted of an A-I felony, violent felony offense, homicide, specified sex offenses, or an escape or absconding offense, and have not previously been convicted of an violent felony offense for which a determinate or indeterminate sentence was imposed.

Defense counsel should note a couple of important points about judicial Shock orders. First, such an order can be issued only upon motion of the defense. Penal Law § 60.04(7)(a). Second, as discussed below, amendments to Correction Law § 865(2) establish a new concept of "rolling admissions" into Shock. According to the statutory interpretation of both the Office of Court Administration (OCA) and DOCS, the rolling admissions established by amendments to Correction Law § 865(2) is applicable to judicially ordered Shock as well as those selected by DOCS without a judicial order. For example, a defendant who receives a 6 year determinate sentence is eligible for a judicial order of Shock, but will have to wait to be placed into the program until after she is within 3 years of her conditional release date.

If a judicially ordered Shock defendant is found ineligible for the program because of a medical or mental health condition, DOCS must propose an alternative-to-shock program. If the defendant agrees to participate in this program and successfully completes it, the defendant shall be treated the same as those who successfully complete the Shock program – that is, he or she shall be awarded an Earned Eligibility Certificate and be immediately eligible for conditional release. If the defendant objects in writing to the proposed alternative-to-shock program, DOCS must notify the sentencing judge of the proposed alternative, who shall then notify the prosecution and defense counsel. The defendant shall then appear before the sentencing judge, who shall consider any submission from the defendant, defense counsel, and prosecution and also provide the parties an opportunity to be heard on the issue. Ultimately, the sentencing judge may modify the sentence notwithstanding CPL § 430.10 (sentence may not be modified after the sentence has commenced).

2) Shock Eligibility Extended Beyond Reception: Rolling Admissions (Correction Law § 865(2))

The Budget Bill extends Shock eligibility beyond reception so that now inmates who were not eligible for Shock at reception because of the lengths of their sentences can *become* eligible for Shock once they are within three years of their parole eligibility (for those serving indeterminate sentences) or conditional release (for those serving determinate sentences). Thus, eligibility is now determined at reception facilities for new inmates *and* general confinement facilities for those who are approaching parole or conditional release.

3) Changes in Exclusions Based on Prior Criminal History (Correction Law § 865)

Prior to 2010, there were two types of exclusions based on prior criminal history. Specifically, individuals who had previously served a state sentence were excluded from Shock as were individuals convicted of a B felony drug offense who had previously been convicted of a violent felony offense. With the 2010 changes to Correction Law § 865, there is now only one exclusion based on prior criminal history – those who were previously convicted of a violent felony offense for which a determinate or indeterminate sentence was imposed (i.e., a state prison sentence), are not eligible for Shock. This change reflects the fact that with rolling admissions, Shock is no longer a program designed for those who are "new to prison."

4) Shock Eligibility: 50 is the New 40 (Correction Law § 865)

The Budget Bill also amends Correction Law § 865 (1) to extend the upper age limit for Shock eligibility from 40 to 50 years of age, proving yet again that 50 is the new 40. Now inmates are eligible for Shock as long as they have not achieved their 50th birthday at the point of eligibility, whether it is reception or a general confinement facility.

Comprehensive Alcohol and Substance Abuse Treatment (Correction Law § 2(18)):

The CASAT program is a three-phased comprehensive substance abuse treatment program that includes prison-based substance abuse treatment, work-release with a community-based treatment component, and parole with substance abuse aftercare. Generally, inmates are eligible for CASAT if eligible for Temporary Release, which means the inmate must be within two years of his or her parole or conditional release date. The 2004 DLRA expedited CASAT eligibility by 6 months for those convicted of a Penal Law Article 220 or 221 offense. However, the 2004 DLRA also included an often-overlooked, though fully enforced, provision requiring that second felony class B drug offenders must serve at least *18 months* of their sentence before achieving CASAT eligibility. This 18 month mandate has been halved so that now second felony class B drug offenders now must serve at least *nine months* of their sentence before achieving CASAT eligibility.

Limited Credit Time Allowance for Those Convicted of a Violent Felony Offense (Correction Law § 803-b)

For years advocates have called for the expansion of the merit time program so that people in prison serving non-drug determinate sentences could earn merit time in the same way as others serving indeterminate sentences and drug determinate sentences. It was also hoped that a person whose controlling sentence was a non-violent one would not be determined ineligible to earn merit time by a non-controlling sentence for a violent felony. The credit limited time allowance in the 2009 legislation, however, is nothing short of disappointing and will prove nearly impossible for inmates to achieve. This legislation amends the Correction Law by adding a new section 803-b, described below.

At the outset, section 803-b excludes individuals convicted of murder in the first degree, any sex offense, or any attempt or conspiracy to commit these offenses.

Otherwise, "eligible offenders" are defined as: 1) those subject to an indeterminate sentence for any class A-I felony other than criminal possession of a controlled substance in the first degree (PL § 220.21) or criminal sale of a controlled substance in the first degree (PL § 220.43), or any attempt or conspiracy to commit these offenses; 2) those subject to an indeterminate or determinate sentence imposed for a violent felony offense as listed in Penal Law § 70.02(1); and 3) those subject to an indeterminate or determinate sentence for any Penal Law Article 125 offense. A person is not eligible if he or she is returned to DOCS on a revocation of presumptive release, parole, conditional release, or post release supervision. Moreover, a person is eligible for only one limited credit time allowance, no matter how many sentences he or she is serving.

The effect of the limited credit time allowance differs depending on the type of sentence the individual is serving. Individuals serving an indeterminate life sentence are eligible for parole consideration 6 months prior to completion of their minimum term. All other individuals are eligible for conditional release 6 months prior to their regular conditional release date, provided of course, that DOCS determines that they have earned their full amount of good time. If this 6 month time allowance moves the individual's conditional release date to *before* his or her parole eligibility date, the limited credit time will essentially move the parole eligibility date up so that it coincides with the advanced conditional release date.

Actually earning this limited credit time allowance is no small feat. A person must achieve an Earned Eligibility Certificate in accordance with Correction Law § 805 and achieve "significant programmatic accomplishment" which is defined in Correction Law 803-b as: participation in at least two years of college programming; obtaining a masters or professional studies degree; successful participation as an inmate program associate for no less than two years; receiving certification from the State Department of Labor for successful participation in an apprenticeship program; successfully working as an inmate hospice aid for a period of two years; successfully working in DOCS industries' optical program for two years and receiving a certification from the American board of opticianry; receiving a Department of Labor asbestos

handling certificate and then working in DOCS industries' asbestos abatement program as a hazardous materials removal worker or group leader for 18 months; successfully completing the course requirements for and passing the minimum competency screening process performance examination for a sign language interpreter and then working as a sign language interpreter for one year; successfully working in the puppies behind bars program for two years. (Note: This list is current up until January 2011. It is worth reading the most recent version of Correction Law 803-b to determine if additional programs have been are added to this list).

As hard as it is to achieve the limited credit time allowance, it is very easy to lose. A person can be disqualified from eligibility for this time allowance by being deemed to have a "serious disciplinary infraction" or "overall poor institutional record"[1] or by being deemed to have filed a "frivolous lawsuit" as defined in CPLR 8303 or Fed. R. Civil Procedure, Rule 11. In addition, the DOCS Commissioner can revoke this limited credit time allowance for any disciplinary infraction or failure to successfully participate in the assigned work and treatment program, and this revocation can occur even after the individual has been awarded an Earned Eligibility Certificate.

New Parole Release Factor for Those Serving Old Rockefeller Indeterminate Sentences:

Executive Law § 259-i(2)(c)(A) lists the factors that the Parole Board must consider in deciding whether or not an individual is to be released to parole supervision. These factors are:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships 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 of correctional services and any recommendation regarding deportation made by the commissioner of the department of correctional services pursuant to section one hundred forty-seven of the correction law; and (v) any 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.

The 2009 legislation amends this provision by requiring the Parole Board to also consider the length of the determinate sentence individuals serving time for a drug offense would be serving if sentenced under the new provisions. Specifically, the Parole Board is now directed to also consider the following:

[1] The legislation requires the DOCS Commissioner to define "serious disciplinary infraction" and "overall poor institutional record," and states that these need not be defined the same as otherwise defined under regulations enacted pursuant to Correction Law § 803.

(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.

Medical Parole (Executive Law § 259-r)

Medical parole was originally implemented in 1992 for terminally ill individuals in DOCS's custody. *See* Executive Law § 259-r. Over the years, it has been primarily used by individuals over the age of 55, who are considered to have the lowest recidivism rates. As the prison population has aged, more and more imprisoned people are suffering from debilitating physical and cognitive impairments, increasing the costs associated with imprisonment.

The Legislature has sought to address these skyrocketing costs by expanding eligibility for medical parole and streamlining the application process. In general, the 2009 amendments to Executive Law § 259-r: authorize the release of individuals to parole supervision who suffer from significant and non-terminal conditions that render them so physically or cognitively debilitated that they do not present a danger to society; allows individuals who have been convicted of certain violent felonies to be eligible for medical parole consideration if they have served at least one-half of their sentence, except that inmates convicted of first-degree murder or an attempt or conspiracy to commit first-degree murder are not eligible; and allows individuals who are ambulatory, but who suffer from significant disabilities that limit their ability to perform significant normal activities of daily living to be eligible for consideration.

In deciding whether a client is eligible for medical parole, defense lawyers should read the amended provisions carefully.