



**WILLARD ELIGIBILITY:
UNDERSTANDING THE LIMITATION
“SUBJECT TO AN UNDISCHARGED TERM OF PRISON”**

Criminal Procedure Law (CPL) § 410.91(2), which defines those who are eligible for a sentence of Willard, excludes those who are “subject to an undischarged term of incarceration.” On its face, this limitation seems to apply to those who are under parole supervision when convicted of the Willard eligible offense. Yet, Willard has traditionally been imposed for parole violators, so if read in this manner, this limitation makes no sense.

In fact, this language was never intended to exclude from Willard eligibility those who were on parole at the time of commission of the Willard eligible offense. When he was Deputy Commissioner and Counsel for the Department of Correctional Services, Anthony Annucci reiterated this point in a letter to the Office of Court Administration, stating as follows: *“The language in question was never intended to exclude from Willard the defendant who is on parole or conditional release from a prior term of imprisonment when the present crime is committed, and is otherwise eligible to receive a sentence of parole supervision.”*

In enacting the 2004 Drug Law Reform Act (L. 2004, ch. 738), the Legislature sought to clarify this limitation as well by changing Penal Law § 70.06(7) to eliminate the language “subject to an undischarged term of imprisonment” and to substitute the clarifying language “is not under the jurisdiction of or awaiting delivery to the department of correctional services.” Thus, Penal Law § 70.06(7) now provides that only those who are in state prison or “awaiting delivery” to the Department of Correctional Services for another crime are excluded from Willard eligibility. It can only be assumed that the failure to similarly change this language in CPL § 410.91 was a legislative oversight. Nonetheless, the changes to Penal Law § 70.06(7) makes it clear that only those who commit a new crime while in state prison or who commit a new crime while having just been sentenced to state prison (and are awaiting delivery to the Department of Correctional Services) are ineligible for Willard.