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POWER OF APPELLATE DIVISION TO REVIEW AN INDETERMINATE SENTENCE

The imposition of an indeterminate sentence is always reviewable by the Appellate Division,³⁰ but the Appellate Division may not *reduce* such a sentence to the minimum determinate term for that offense.³¹ This is because the Appellate Division has no power to reduce a sentence imposed to one lighter than the minimum penalty provided for that offense,³² and an indeterminate sentence is the minimum penalty provided by law.³³ It is also because there can be no indulgence in the presumption that the sentencing court imposed a sentence to serve an indeterminate term as a punishment more severe than the minimum determinate term.³⁴

*People v. Zuckerman*³⁵ recently determined that, although the Appellate Division has no power to review an indeterminate sentence when it is excessive if the defendant seeks a *reduction* of that sentence, it can review an indeterminate sentence when it is excessive if the defendant seeks a *suspension*, because the Appellate Division's power to review an indeterminate sentence depends entirely on the defendant's choice of remedy, and not on whether the sentence is appropriate.³⁶

Since the Appellate Division may not only suspend but may vacate an indeterminate sentence, where it is inappropriate,³⁷ its lack of power to review an indeterminate sentence is apparently confined to the single instance where the defendant seeks a reduction of his indeterminate sentence.

DEFENDANT SERVING INDETERMINATE SENTENCE CAN BE SENTENCED TO STATE PRISON

A defendant cannot be sentenced to a State prison if the minimum sentence which can be imposed upon him is less than a year,³⁸ nor can he be sentenced to a county penal institution if the maximum sentence which can be imposed upon him is more than a year.³⁹ Although a defendant sentenced to an indeterminate term apparently cannot be sentenced to either place because his minimum sentence is less than a year and his maximum sentence is more than a year,⁴⁰ Section 212 of the Correctional Law provides that every person sentenced to an indeterminate term and confined to a State prison must

30. *People v. Gross*, 5 N.Y.2d 131, 181 N.Y.S.2d 499 (1959).

31. *People v. Porfido*, 279 App. Div. 1036, 112 N.Y.S.2d 110 (2d Dep't 1952).

32. N.Y. CODE CRIM. PROC. § 543.

33. The Parole Commission may release or parole a prisoner immediately upon commitment. N.Y. CORRECTIONAL LAW §§ 203-204.

34. *People v. Porfido*, *supra* note 31.

35. 5 N.Y.2d 401, 185 N.Y.S.2d 8 (1959).

36. The Appellate Division erroneously interpreted the *Porfido* case as holding that it lacked the power to review the indeterminate sentence because it was excessive, without distinguishing that case on the choice of remedy sought.

37. *People v. Moran*, 281 App. Div. 865, 119 N.Y.S.2d 441 (1st Dep't), *aff'd* 306 N.Y. 662, 116 N.E.2d 496 (1953).

38. N.Y. PEN. LAW § 2182(2).

39. N.Y. PEN. LAW §§ 2181, 2182(1).

40. Defendant in this case was sentenced to a term of one day to life.