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## Criminal Law—Form of Remedy from Illegal Sentence; Use of Indeterminate Term

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by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

In *People v. Carroll*,<sup>19</sup> the defendant, brought to trial on an indictment charging him with grand larceny in the second degree, waived jury trial. A written stipulation signed by defendant and his counsel, citing the constitutional provision and stating defendant's name, indictment number, the waiver, and a recital of full knowledge was entered into. The district attorney objected to the waiver on the ground that no legislative enactment had been made pursuant to the constitutional provision. The case proceeded without a jury, however, over his objection.

To test the court's power to accept the waiver, the charge was re-presented to the Grand Jury which handed down a second indictment upon the same facts and for the same crime. Upon arraignment the defendant pleaded not guilty and moved to dismiss the second indictment on the grounds of former jeopardy. The motion was granted and was subsequently unanimously affirmed by the Appellate Division from which decision appeal was taken.

The Court of Appeals, speaking of the rule of construction to be applied to constitutional provisions, stated: "When this language is clear and leads to no absurd conclusion there is no occasion, and indeed, it would be improper to search beyond the instrument for an assumed intent."<sup>20</sup> Since the form of the waiver was indicated for criminal cases and the grant of authority to the legislature phrased permissively, the section logically would seem self-executing. Further, in construing constitutional provisions as between being self-executing or merely general directions for subsequent legislation the rule is now in favor of self-executing provisions.<sup>21</sup> Reviewing the history of the amendment the Court found substantial evidence that the amendment was intended to be self-executing. Accordingly, the Court found the procedural detail sufficient without supplemental legislation and thus affirmed the lower courts.

#### Form of Remedy from Illegal Sentence; Use of Indeterminate Term

Habeas corpus is ordinarily an appropriate remedy, with respect to the judgment or sentence where and only where the court was without jurisdiction in

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19. 3 N.Y.2d 686, 171 N.Y.S.2d 812 (1958).

20. Citing: *Latting v. Cordell*, 197 Okl. 369, 172 P.2d 397 (1946); *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953); *McKinney*, CONST. RULES OF INTERPRETATION, part 1, p. 5.

21. *State ex rel Russell v. Bliss*, 156 Ohio St. 147, 101 N.E.2d 289 (1951); *Morgan v. Board of Supervisors*, 67 Ariz. 133, 192 P.2d 236 (1948); *State ex rel Noe v. Knop*, La.App., 190 So. 135 (1939).

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rendering the judgment or exceeded its power in passing sentence.<sup>22</sup> The application of this concept was at issue in *People v. Silbergliitt*.<sup>23</sup>

The legislature in order to give offenders convicted of certain crimes a better opportunity for rehabilitation, enacted section 203 of the Correction Law which provides for commitment in a reformatory rather than a penal institution. This section provides for what is known as an indeterminate sentence which is often longer in duration (maximum of three years) than the appropriate sentence under the Penal Law. Subsection (e) (3) of section 203 provides: "This article shall not apply to any person who is: . . . *mentally or physically incapable of being substantially benefited* by being committed to a correctional and reformatory institution" (emphasis added).

The Court in the instant case recognized that the indeterminate sentence is often used as an additional penalty rather than a rehabilitation measure. In the *Silbergliitt* case, the defendant, berated in most certain terms, could, on the basis of the judge's remarks, be characterized as incorrigible. Nonetheless, he was sentenced to an indeterminate term. After one year a habeas corpus action was brought which led to this appeal.<sup>24</sup>

The Supreme Court<sup>25</sup> dismissed the writ holding that the sentence itself indicates an implicit finding that the defendant was capable of substantial benefit. The Appellate Division<sup>26</sup> affirmed the holding of the Supreme Court and further found that since there was no issue as to jurisdiction of the subject matter and the person, habeas corpus was not the proper remedy.<sup>27</sup>

The Court of Appeals held that habeas corpus will not lie since the court had jurisdiction of the person, jurisdiction of the crime charged, and *the power to impose the sentence which was meted out*. The issue is said to be that of power to sentence, but it is not discussed how this power can be retained after an express finding that the prerequisite facts outlined in the statute were not present. The Court of Appeals and the Appellate Division cite cases to the effect that habeas corpus is not appropriate to raise objections based upon facts such as defendant being defrauded into pleading guilty, being convicted by perjured evidence, or being convicted due to suppression of evidence.<sup>28</sup> The Court seems purposely to

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22. *People v. Martin*, 286 N.Y. 27, 35 N.E.2d 636 (1941), *reversing* 261 App.Div. 865, 24 N.Y.S.2d 729 (3d Dep't 1941).

23. 4 N.Y.2d 59, 172 N.Y.S.2d 145 (1958).

24. For discussion of why one year delay was necessary, see *People v. Silbergliitt*, 5 Misc.2d 502, 159 N.Y.S.2d 628 (Sup.Ct. 1956).

25. 5 Misc.2d 133, 159 N.Y.S.2d 1009 (Sup.Ct. 1957).

26. 3 A.D.2d 966, 163 N.Y.S.2d 435 (1st Dep't 1957).

27. *Morhous v. New York Supreme Court*, 293 N.Y. 131, 56 N.E.2d 79 (1944).

28. *Hogan v. New York Supreme Court*, 295 N.Y. 92, 65 N.E.2d 181 (1946); see note 27 *supra*.

avoid discussion of the basis for the retention of power to sentence which it states to be the key to the problem; cases cited do not illuminate its opinion.

The Court by its language avoids the Supreme Court holding. It is mentioned in passing that defendant's counsel argued the invalidity of sentence. Since controverted issues of fact can not be properly raised by habeas corpus,<sup>29</sup> this could be grounds for the majority position. However, the opinion does not seem to make this clear.

Recognizing that the defendant has a remedy by appeal, the majority seems to be avoiding a close examination of the question of jurisdiction. Judge Eder, in *People ex rel. Travatello v. Ashworth*,<sup>30</sup> compellingly argued a practically identical case on the issue of jurisdiction and concluded the judge had lost his power to sentence under section 203 by finding the defendant incapable of substantial benefit. The Appellate Division reversed with no opinion, leaving the void unfilled. Now, the majority in this case has filled the void, but has left the basis of decision unclear.

The dissent concerns itself primarily with the Supreme Court's position that the sentence creates an irrebutable presumption the court has correctly determined the defendant's character under the statute. Reviewing cases in this area, the dissent concludes that there has always been absent an explicit finding as to the defendant's character such as is present in this case.<sup>31</sup> It argues that once the court has taken upon itself to publicly determine the character of the defendant, it is bound by the determination in pronouncing sentence. If it pronounces a sentence inconsistent with its own findings, its sentence is void since the legislative grant of power under the statute is no longer present. While the dissent argues its primary point well, it does not go into the ramifications of holding a judge to his presentence proclamations as to defendant's character. Berating is quite common in many courts; if these tirades are seriously construed it might adversely affect the very purpose of the statute at hand. The strong word is not always appropriately followed by the harsh sentence.

If penal reform were as advanced as the well-intending legislature's statute, this problem would not be so acute. Since it is not, the indeterminate sentence is today an effective means of "stiffening sentence."

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29. See note 27 *supra*; also *People v. Lambert*, 237 App.Div. 39, 260 N.Y. Supp. 678 (1932); *aff'd*, 26 N.Y. 511, 188 N.E. 42 (1933).

30. 182 Misc. 52, 43 N.Y.S.2d 397 (Sup.Ct. 1943); *rev'd* 268 App.Div. 892, 51 N.Y.S.2d 87 (1st Dep't 1944).

31. *People v. Thompson*, 251 N.Y. 428, 167 N.E. 575 (1929).