

RENDER UNTO CAESAR: MANDATORY SURCHARGES AND RELATED FEES

Thomas P. Franczyk

CLE Director

Assigned Counsel Program

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When a defendant is convicted of a criminal offense, whether felony, misdemeanor or violation, he/she is subject to an array of MANDATORY surcharges, crime victim assistance fees (CVF), DNA databank fees, and, if a sex offender (SO), a SO registration fee, and, for designated sex offenses (PL Art 130.00 crimes, Incest and Promoting Sexual Performance By a Child) a supplemental SO victim fee. (SEE PL 60.35).

While it may well be that crime does not pay (except for maybe a hired gun who never gets caught), it most certainly costs (whether in loss of liberty, livelihood and loved ones), and when it comes to surcharges and related fees attendant to a criminal conviction, the costs are UNWAIVABLE and, at best, may only be DEFERRED (and converted to a civil judgment) in RARE CASES upon a showing of UNREASONABLE (i.e. EXTREME) HARDSHIP on account of indigency bordering on destitution. (See *People v Jones* 26 NY3d 730 [2016]).

In *People v Parker* 183 Misc 2d 737 (Sup Ct Kings County 2000), the Court, citing the MANDATORY NATURE of surcharges (CPL 420.40[3]) which fund important criminal justice and victim-related services, was unmoved by the defendant's claim of hardship resulting from long-term homelessness and a 40% deduction of his jail-house income for payment of surcharges and gate fee (money paid to the inmate upon release) leaving a meager \$3.70 for himself. The court also took note of the fact that the State picks up the tab for the inmate's lodging, food, prison attire and apothecary needs, and concluded that the defendant failed to distinguish his predicament from that of any other inmate who had no job, or family or friends to look after him before going to prison. There was also no indication that further depleting his paltry prison funds adversely affected any family member who was dependent upon the defendant for financial support.

See also *People v Bennett* 2013 NY Slip Op 30676(U) (Sup Ct Kings County 2013): Defendant is not entitled to deferral of the surcharge simply for the asking but must demonstrate that it would impose an unreasonable hardship over and above that which is suffered by other indigent inmates. (citing *People v Kistner* 291 AD2d 856 [4th dep't 2002]). In *Bennett*, the defendant failed to demonstrate what monies were being taken from her, what other financial burdens were upon her or whether she had any outside support. Nor did she articulate any special needs that were unique to her situation.

Similarly, in *People v Hazel* 13 Misc 3d 728 (Sup Ct Bronx County 2006), the court, citing inter alia *People v Abdus-Samad* 274 AD2d 666 (3d dep't 2000), rejected the defendant's unsupported hardship claim that \$7.00 out of the \$8.00 he received every month was deducted for payment of the surcharge, leaving him with only 25 cents (but not accounting for the remaining 75 cents which the court noted

exceeded the cost of defendant's "necessary" commissary items). Nor did the defendant's claim of inability to purchase a toothbrush, soap and shampoo rise, in the court's view, to the level of unreasonable hardship. (See also *People v Neal* 2013 NY Slip Op 30074(U0 [Sup Ct Kings County 2013]).

Penal Law 60.35 requires that the court impose at sentencing the following surcharges and fees for a:

- i. Felony: \$300.00 surcharge and \$25.00 CVF;
 - ii. Misdemeanor: \$175.00 surcharge and \$25.00 CVF;
 - iii. Violation: \$95.00 surcharge and \$25.00 CVF;
 - iv. A convicted SO (Corr.Law187-a [2]) or Violent SO (CL168-a [3]) is also assessed a \$50.00 SO REGISTRATION FEE;
 - v. \$50.00 DNA data bank fee for designated offenses Exec Law 995[7] (in addition to the surcharge and CVF);
- b. Defendants convicted of felony or misdemeanor level sex offenses (PL Art 130.00), Incest 1st, 2nd, 3rd degrees (PL 255.25, 255.26, 255.27), are, in addition to the surcharge and CVF, subject to a \$1000.00 supplementary SO victim fee.

If the defendant is convicted of multiple crimes committed via one act or as part of a single transaction, or there are overlapping material elements, only one surcharge (and related fees) will be imposed upon the highest offense, but if the offenses consist of separate and distinct acts or criminal transactions, a surcharge is imposed for each offense. (See *People v Leung* 279 AD2d 480 [2d dep't 2001]).

Procedurally, per PL 60.35[3], the surcharge and related fees are paid to the clerk of the court who, within 10 days of the month after collection thereof, shall, depending on whether it is town or village court, either pay it to the state comptroller for deposit in the state treasury or, if any other court, to the state tax commissioner to the credit of the state criminal justice improvement account.

If the surcharge is not paid and the defendant is sentenced to a period of imprisonment, the court clerk must notify the superintendent (of a state correctional facility) or municipal official (of the local correctional facility where the defendant is confined) who, in turn, "SHALL cause any amount owing to be collected from such person DURING HIS/HER TERM of imprisonment from moneys to the credit of an INMATE'S FUND (i.e. money in his/her possession upon admission or received and deposited) or such moneys as MAY BE EARNED by (him/her) in a WORK RELEASE PROGRAM." (PL 60.35[5]). Surcharges are reportedly collected at a rate of 20% from inmate earnings and 50% from outside funds where there is only one payment obligation (*People v Hazel supra*).

Any monies thus collected are then forwarded to the state comptroller to the credit of the Criminal Justice Improvement account. (Sex offender fees are sent to the general fund but if the conviction was obtained in a town or village court, they are forwarded to the justice court where the conviction was obtained).

If a defendant is sentenced to a jail term that does not exceed 60 days, a town or village court MAY and all other courts MUST issue and serve the defendant with a SUMMONS (CPL 130.10) directing him/her to appear in court on the first available court date following expiration of 60 days during which the surcharge was unpaid.

The summons procedure is inapplicable to defendants who are sentenced to prison terms in excess of 60 days. They are governed by CPL 60.30 which recognizes the court's authority to order forfeiture of property, suspension/cancellation of a license, removal from office, and any other appropriate civil remedy.

A defendant in the former category (sentenced up to 60 days in jail) who seeks an order deferring the payment of the surcharge may either bring a motion (while still serving the sentence) or wait until the return date on the summons and address the matter at that time. In order to obtain an order of deferral, the defendant must present on the record "CREDIBLE AND VERIFIABLE INFORMATION establishing that the mandatory surcharge (and related fees) would, (in whole or in part) work an UNREASONABLE HARDSHIP (based on his/her indigence) on him/her or his/her IMMEDIATE FAMILY. (PL 60.35[2]. As noted above, this is no small task. In fact, the very next subdivision (PL60.35[3]), reminds the courts to be mindful of the MANDATORY NATURE of the surcharge when assessing the defendant's application.

On the off chance that the court grants the motion, it must do so in a WRITTEN ORDER with findings of fact upon which it is based. (PL60.35[4]). Such an order DOES NOT EXCUSE the obligation but rather DIRECTS THAT IT BE FILED AND ENTERED BY THE COUNTY CLERK as a CIVIL JUDGMENT pursuant to CPL 5016. It will then be DOCKETED as a MONEY JUDGMENT pursuant to CPLR 5018 (and subject to collection as such). This enables the defendant to avoid the prospect of further incarceration for non-payment (CPL 420.35[1]).

According to the Court of Appeals in *People v Jones supra*, a defendant who is imprisoned for a period in excess of 60 days who seeks deferral of the surcharge may bring a motion pursuant to CPL 420.10(5) for resentencing at any time while incarcerated (rather than wait until he/she is released), and request a HARDSHIP HEARING pursuant to CPL420.40. (In *Jones*, the Court rejected the defendant's argument that the lower court's denial of his request to defer his surcharge [upon his felony drug convictions] denied him due process).

Acknowledging the clear statutory prohibition against waivers of surcharges (CPL420.35[2] "under no circumstances shall [it] be waived"), the State's strong interest in RAISING REVENUE for criminal justice programs and victim services (*People v Barnes* 62 NY2d 702 [1984]), and shifting the costs from law-abiding taxpayers to those convicted of crimes (*People v Quinones* 95 NY2d 349 [2000]), the Court observed that the statutory scheme "contemplates that granting (a request for deferral of surcharges) is NEITHER ROUTINE NOR COMMON," and the fact of incarceration alone is not enough to support a claim of unreasonable hardship. To prevail, then, the defendant must provide credible and verifiable evidence that he has NO ABILITY TO PAY ANY PORTION OF THE SURCHARGE.

An experienced ACP attorney recently brought a motion in County Court (citing *People v Jones supra*) to defer payment of the surcharge until after release from prison on behalf of a client who was sentenced for Manslaughter consecutive to a sentence imposed in 2018 for an earlier conviction.

In his affidavit, the defendant averred that he has been in DOCCS custody for two years, has no personal or real property that could be liquidated to pay off his debts, and is without friends or family who could help him out financially. Any money in his prison account, he stated, is reserved for the purchase of food and personal hygiene products. In counsel's view, (adopted by one local

County Court but, unfortunately, not the one before whom his client recently appeared), inmates serving lengthy state prison sentences who are released (to parole) and then commit new crimes for which they receive a new consecutive sentence are, by and large, exceptionally indigent and therefore appropriate candidates for a deferral of their surcharges on the basis of unreasonable hardship.

As noted above, the bar for exceptional indigency appears to be exceptionally high and if a sentenced prisoner wishes to hold out any hope of deferring payment of the surcharge, he/she had better be prepared to provide credible and verifiable evidence of exactly how much money he/she has available to him/her from whatever sources (e.g. on account upon admission, work release income, family support etc), how much is deducted every month from his available funds (net amount remaining), and what he/she must purchase that is not already provided by the institution.

The inmate should also point out any other factors (e.g. additional expenses, adverse effect on immediate family or the absence of any family or other outside support). An unsupported plea of poverty will not suffice, and the inmate has to be able to set him/herself apart from “les autres miserables” as the poorest of the poor. Even then, Caesar is still likely to demand his rightful share, even if it means squeezing blood from a stone.