CORRECTED VERSION

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ISSUES TO DEVELOP AT TRIAL

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Please replace last month's newsletter with this version. With respect to the surcharge issue, we did not address People v. Jones, 26 N.Y.3d 730 (2016), which created a hurdle to defendants seeking deferral of mandatory surcharge at sentencing. Thanks to Alan Rosenthal and Bob Newman for pointing out the omission. Below we offer a suggestion for how to reconcile Jones with your client's desire for deferral.

- **A defendant facing a long prison term may be entitled to deferral of the mandatory fees, but he must make the request through a motion for resentencing pursuant to CPL § 420.10 (5). The fees are not subject to waiver.**

Clients are often very upset, understandably so, by the revenue-producing fees levied on them at sentencing. The current fees for all felonies are the mandatory surcharge fee ($300) and the crime victim assistance fee ($25). Many crimes will also require the imposition of a $50 DNA databank fee. Sex crime convictions will result in additional fees, some offenses fetching fees as high as $1000. Penal Law § 60.35 sets forth the fees.

In People v. Jones, 26 N.Y.3d 730 (2016), the Court of Appeals interpreted the series of interlocking "poorly drafted and difficult to follow" statutes which impose the obligation on defendants to pay mandatory surcharges and fees and specify the circumstances under which those assessments may be deferred.

The Court held that while the procedures for deferral are not limited to people sentenced to confinement for 60 days or less (thus rejecting the prosecution's reading of the statutes), defendants facing longer sentences are not eligible for deferral when sentence is imposed. Instead, the Court construed the relevant statutes to require a motion for resentencing pursuant to CPL § 420.10 (5), which could be made "at any time after the initial sentence has been imposed;" the motion did not have to await the defendant's release from confinement. 26 N.Y.3d at 736. The Court emphasized that granting such a request was neither "routine nor common," and would not be granted "except in the most unusual and exceptional of circumstances where a defendant's sources of income support a finding of inability to pay any portion of the surcharge." Id. at 740. If a court grants a deferral, it must place its reasons on record and issue a written order, which will be treated as a civil judgment. Id. at 733 (citing relevant statutes).

Practice Tip: Jones has made a hard ask even harder by erecting a procedural barrier to obtaining – indeed, even requesting — deferral of your client's mandatory surcharges in conjunction with sentencing. That said, we point you to Justice Daniel Conviser's thorough and thoughtful critique of Jones in People v. Tookes, 52 Misc.3d 956 (Sup.Ct. N.Y. Co. June 8, 2016). Beyond identifying certain analytical and practical flaws in the Jones decision, Justice Conviser notes, and it occurs to us as well, that a motion for resentencing could be brought essentially contemporaneously with sentencing. That is, as Justice Conviser wrote, it "might perhaps be as simple as a defense attorney, following the imposition of a sentence, saying something like 'I now move to resentence may client. In that resentencing we ask that his surcharges and fees be deferred.'" Id. at 968. That construction comports with the Jones Court's repeated observations that a deferral can be sought "at any time after sentencing, id. (citing Jones). Indeed, a later resentencing motion potentially gives rise to further confusion, as CPL § 420.10(5) (as Justice Conviser pointed out) contemplates a unitary procedure, while the Court of Appeals has held that the assessment of surcharges and fees are not part of a sentence. See People v. Guerrero, 12 N.Y.3d 45 (2009).

With that strategy in mind, we further suggest that deferral can perhaps become a bargaining chip in the plea bargaining process — it can potentially provide the benefit that seals the deal. That is, by bringing the court into the loop and previewing your intention to move for resentencing on the surcharge, you might have an arrow in your quiver for closing the deal with and for your client. You'll be in the best position to know if you have a judge/DA who will see deferral as a relatively modest concession for the larger benefit of a bargain. But with the option of moving for resentencing immediately following sentencing, you may have a way for deferral to factor into the bargaining process, to your client's advantage.

Beyond the procedural complicator of a resentencing motion, strict adherence to Jones by the lower courts would make it hard to prevail on the merits — an outcome Jones must have intended in employing the restrictive "unusual and exceptional" standard it did, a standard even more restrictive than the Legislature's "unreasonable hardship" language under CPL§ 420.40(2), that affords trial courts broad discretion when considering deferral requests of those sentenced to 60 days or less. Indeed, it is not clear who might qualify under the Jones standard, since every able-bodied inmate can presumably work and earn some prison income, as Justice Conviser also noted. That said, courts that, pre-Jones, provided deferral relief to defendants making a pittance while locked away may well continue to exercise their discretion to do so, whether by way of a defendant's "resentencing" motion or a motion to defer that is deemed such. In other words, the law is one thing, the practice on the ground is another.

The hard-hearted Jones decision has made the landscape for deferring mandatory surcharges a bit more bleak. But you should press the issue. For clients who are desperate for a deferral, you can, consistent with Jones, move for resentencing immediately following sentence, and marshal your client's circumstances as best as possible to try to show why your client is deserving of relief. You may have a sympathetic court. You can also counsel your client to bring a motion for deferral (styled as a resentencing motion) once he is confined and his circumstances become more concrete. While you should manage your client's expectations given the state of the law — and alert him that re-entering society with a civil judgment is not that great either — their

request may find traction with a sympathetic court loathe to give up its discretion in this area.

- **A defendant convicted of a controlled substance or marijuana offense can be judicially sentenced to a shock incarceration program if otherwise eligible. For those convicted of other offenses, DOCCS selects participants, although the court can make a recommendation.**

A shock incarceration program permits your client to serve six months in a shock incarceration facility, where he will undertake an intensive program of physical activity, regimentation, and programming. The eligibility requirements and disqualifiers are set out in Correction Law § 865(1). Defendants convicted of **controlled substance or marijuana offenses** can be **judicially sentenced** to shock under Penal Law § 60.04(7)(a) if they are otherwise eligible and upon defense motion. If granted, the court issues an order directing DOCCS to enroll the defendant in a shock program. For other otherwise eligible defendants, the court can recommend shock, but has no statutory authority to sentence the defendant to such. The defendant can apply for shock, and DOCCS selects participants. The procedures are set forth in Correction Law § 867.

Practice tip: Determine whether your client is eligible for a shock incarceration program and whether the court can impose it. If the court judicially imposes it under Penal Law § 60.04(7)(a), then, again, make sure the clerk checks the correct box on the Sentence and Commitment sheet, or remind the clerk to do so if it will be prepared later. If the clerk doesn't check the box "SHOCK INCARCERATION," then DOCCS will consider the court's intention to be only a recommendation and will not honor it; it will take appreciable time to sort things out.

On another practice note, consider whether your client's eligibility for shock incarceration could assist in plea negotiations. Participation in a shock program can be bargained away. Your otherwise eligible client can agree to waive any request to be sentenced to, recommended for, or considered for, a shock program in exchange for a particular sentence. Unlike consideration of youthful offender by the court, which a defendant cannot bargain away, the defendant has no right to participate in shock. See Correction Law § 867(5).

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case as to each and every element does not preserve a sufficiency issue for appeal.

- If the judge only takes objections at sidebar, or you've asked to approach to flesh out your objection, make sure the court reporter is recording the sidebars. It is on the attorney, not the judge, to ensure recordation, and, if not recorded, the issue will not be preserved for appeal. Alternatively, repeat your objection and the court's ruling, on the record, at the earliest