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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 2

ANTHONY JONES,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 04, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 JUDGE PIGOTT: Ms. Schwarz, welcome.

2 MS. SCHWARZ: Yes, good afternoon. And  
3 welcome to the new year. I'm going to reserve two  
4 minutes for rebuttal.

5 JUDGE PIGOTT: All right. Please proceed.

6 MS. SCHWARZ: Subdivision 1 of Criminal  
7 Procedure Law 420.40 provides that hardship deferral  
8 of surcharges are available to all defendants  
9 receiving mandatory surcharges at sentencing.  
10 Knowing this, it should be clear that the legislature  
11 did not intend to create two classes of cases.

12 JUDGE ABDUS-SALAAM: Counsel, don't we have  
13 to look at 60.30 and 420 - - - don't we have to look  
14 at 60 - - - don't we have to look at 60.35 when we  
15 also look at 420.10 or 420.40?

16 MS. SCHWARZ: Yes. And 60.35(8), the  
17 latter part of that subdivision, deals directly with  
18 non-summons cases, cases where the defendant is  
19 sentenced to more than sixty days.

20 JUDGE ABDUS-SALAAM: Was your client  
21 sentenced to more than sixty days?

22 MS. SCHWARZ: Yes, he was. He was  
23 sentenced to six months.

24 JUDGE ABDUS-SALAAM: So don't we have to  
25 look at both statutes - - -

1 MS. SCHWARZ: Yes.

2 JUDGE ABDUS-SALAAM: - - - not just the  
3 one?

4 MS. SCHWARZ: Yes. And I - - - and both  
5 statutes support a conclusion that the court has - -  
6 - has the power, at sentencing, to conduct hardship  
7 hearings for those cases that do not get a summons  
8 for sixty days later. In other words, cases where  
9 defendants are sentenced to more than sixty days - -  
10 -

11 JUDGE ABDUS-SALAAM: So your - - - your  
12 position is that no summons has to be first served on  
13 a defendant before a court can hear a hardship?

14 MS. SCHWARZ: Well, C - - - C.P.L.  
15 420.40(2) spells out a procedure for cases where the  
16 sentence is sixty days or less.

17 JUDGE ABDUS-SALAAM: Um-hum.

18 MS. SCHWARZ: And in those cases, it's  
19 required that the court simultaneously at sentence  
20 issue a summons. During that sixty-day period, it's  
21 sort of like a grace period. During that - - -

22 JUDGE RIVERA: Why is that? I saw that in  
23 your - - - why is that a grace period?

24 MS. SCHWARZ: Well, during - - -

25 JUDGE RIVERA: Don't the statutes require

1           that they start collecting, if there is anything to  
2           be collected, while someone is incarcerated? Why - -  
3           - why doesn't that apply to - - - to the client or a  
4           defendant who's less than sixty days?

5                       MS. SCHWARZ: Because - - - because Penal  
6           Law 60.35(5), which deals with the collection of  
7           incarcerated defendants - - -

8                       JUDGE RIVERA: Yeah.

9                       MS. SCHWARZ: - - - states that it is  
10          immediate collection for those defendants where  
11          payment is due. But in the cases where a summons is  
12          issued, those cases - - - the payment is not due - -  
13          -

14                      JUDGE RIVERA: No, no, no, no. No, no, no,  
15          no. No. 60.35(8) says that - - - the summons is  
16          issued if after - - - and applies and they have to  
17          show up if after sixty days from the date it was  
18          imposed it remains unpaid. Doesn't that mean that  
19          the defendant could indeed pay or that while they're  
20          incarcerated money could be collected from their  
21          account?

22                      MS. SCHWARZ: It says where they have  
23          failed to pay the mandatory surcharge. In these  
24          cases, they have - - - in cases where a summons is  
25          issued, they haven't failed to pay. They - - - they

1 still have the right - - -

2 JUDGE RIVERA: I'm sorry, what line are you  
3 - - - are you look - - - read - - -

4 MS. SCHWARZ: So in subdivision (5) it says  
5 when a person who's incar - - - is convicted of a  
6 crime or violation and sentenced to a term of  
7 imprisonment, has failed to pay the - - -

8 JUDGE RIVERA: No, no, no. I'm looking at  
9 60.35(8) that deals with the summonses.

10 MS. SCHWARZ: So in that case, you're - - -  
11 where are you looking at, Your Honor?

12 JUDGE RIVERA: It says at the - - - at the  
13 time the mandatory surcharge is imposed, courts shall  
14 issue and cause to be served upon the person required  
15 to pay the mandatory surcharge - - -

16 MS. SCHWARZ: A summons - - -

17 JUDGE RIVERA: - - - a summons directing  
18 that they appear before the court regarding the  
19 payment of the surcharge, if after sixty days - - -  
20 obviously I'm not reading about - - -

21 MS. SCHWARZ: Yes.

22 THE COURT: - - - the other types of fees,  
23 only the mandatory surcharge - - - if after sixty  
24 days from the date it was imposed, it remains unpaid.

25 MS. SCHWARZ: Okay, so - - -

1                   JUDGE RIVERA: So they, of course,  
2 voluntarily could pay. But my question is, does this  
3 - - - are you reading this to mean that they're also  
4 excluded from the other statutory provisions that  
5 require that if they have any money, it be taken from  
6 their inmate account?

7                   MS. SCHWARZ: Yes.

8                   JUDGE RIVERA: What you're calling that  
9 grace period?

10                  MS. SCHWARZ: Yes. And that's because of  
11 60.35(5) - - -

12                  JUDGE RIVERA: Okay.

13                  MS. SCHWARZ: - - - which only authorizes  
14 the collection from inmate funds when the person has  
15 failed to pay the mandatory surcharge. So - - -

16                  JUDGE PIGOTT: Well, the - - - it seemed,  
17 if you look at the legislative history of this whole  
18 thing, that the legislature is getting a little  
19 peeved at the courts for waiving these fees on a  
20 fairly regular basis. In fact, if you - - - if you  
21 look at the legislative history, it was talking about  
22 how like eighty percent of the - - - of the fees were  
23 being waived by courts, and they seemed to get pretty  
24 upset by that, and they therefore said we can't waive  
25 them - - - courts can't waive them anymore. They can

1 defer them only. Right?

2 MS. SCHWARZ: Correct.

3 JUDGE PIGOTT: All right.

4 MS. SCHWARZ: And - - - and the - - - so  
5 this isn't a waiver. But it is a deferral.

6 JUDGE PIGOTT: But what's the point of  
7 making an application for a deferral until after you  
8 get out? It would - - - it would seem to me it would  
9 defeat the whole purpose of the statute to say well,  
10 you can defer it during the twenty-five to life that  
11 you're doing on this case, and then we'll take it up  
12 in the event that you somehow get out?

13 MS. SCHWARZ: Well, the deferral would only  
14 be granted if the - - - the individual can  
15 demonstrate by credible and verifiable information  
16 that collection of the surcharge would cause an  
17 unreasonable hardship to that individual or his or  
18 her immediate family.

19 JUDGE STEIN: Well, why would - - - you  
20 talked about creating two separate classes. But  
21 under your interpretation, then the - - - the person  
22 that's going to be incarcerated for more than sixty  
23 days gets an immediate hearing, whether he or she has  
24 attempted to pay or not, whereas the person who's  
25 going to be incarcerated for less than sixty days

1 gets this grace period. Why would that be?

2 MS. SCHWARZ: Because the individual who is  
3 issued a summons doesn't need to make payment until  
4 the sixty days. And in the summons part, they have  
5 the right - - -

6 JUDGE RIVERA: But I don't see - - -

7 MS. SCHWARZ: - - - to a hardship deferral  
8 - - -

9 JUDGE RIVERA: - - - I'm sorry. I'm going  
10 - - - I just don't - - - I'm still unclear how you  
11 read the statutes to say that because 60.35(8) allows  
12 the court to issue this summons, that they're going  
13 to appear if they haven't paid, means that - - - that  
14 they don't have to pay, number one; or number two,  
15 that they can't have their account credited, right,  
16 the money taken out of their prisoner account.

17 MS. SCHWARZ: And that's because Penal Law  
18 60.35(5) - - -

19 JUDGE RIVERA: I know, you've said that.  
20 But I don't see - - - I need you to explain that. In  
21 35(5) all it says is someone who hasn't paid. So I'm  
22 at sentencing. I don't pay. I now go to jail. What  
23 - - - what in the statute says that they can't  
24 collect from my inmate account, if there's anything  
25 to collect? Granted, if there's nothing to collect,

1 it can't collect anything.

2 MS. SCHWARZ: Because the summons is the  
3 summons to pay. So they have the sixty days to come  
4 up with the payment.

5 JUDGE RIVERA: The summons is to show up -  
6 - - is to show up if you have not paid.

7 MS. SCHWARZ: Or pay it in full, if they  
8 do. So if they pay in full, they're done. But they  
9 - - - they - - - it isn't due until sixty days later.  
10 It's treated as a sixty-day - - -

11 JUDGE ABDUS-SALAAM: Counsel, are you - - -

12 MS. SCHWARZ: - - - grace period.

13 JUDGE ABDUS-SALAAM: - - - this is - - -  
14 this is where - - -

15 MS. SCHWARZ: Whereas - - -

16 JUDGE ABDUS-SALAAM: - - - I'm a little  
17 confused. You're saying that the summons is issued  
18 at sentencing. But the statute seems to say that the  
19 summons is issued if one has failed to pay after  
20 sixty days.

21 MS. SCHWARZ: No. The - - - the statute  
22 which is 60.35(8) - - -

23 JUDGE ABDUS-SALAAM: 8, right.

24 MS. SCHWARZ: - - - says that at  
25 sentencing, if the sentence is sixty days or less, at

1 that time, they're required to issue a summons. The  
2 summons basically says you have sixty days to make  
3 payment in full, and then you don't have to come back  
4 to court. But if day sixty arrives and you still  
5 haven't made payment, you have to come into court and  
6 ask for the surcharge deferral hearing or make some  
7 pay - - - partial payment and get an adjourn date.  
8 And that's how it - - - it's interpreted.

9 But what happens with those individuals who  
10 are sentenced to more than sixty days, C.P.L.  
11 60.35(5) says - - - says that they are immediately  
12 due. And so that means when they go to the confining  
13 facility, the facility - - -

14 JUDGE PIGOTT: Well, but that - - -

15 MS. SCHWARZ: - - - can immediately begin  
16 to take the funds out of their inmate accounts.

17 JUDGE PIGOTT: That's what I understood  
18 Judge Stein to be asking. You're - - - you're saying  
19 that the - - - the lesser sentenced people don't have  
20 to pay. They - - - they have this grace period of  
21 some sort, when in fact, I think they do have to pay.  
22 And if they don't pay it, then they're going to get -  
23 - - then the summons is going to be issued after  
24 sixty.

25 Is it your experience that when - - - when

1 someone is sentenced to a period of incarceration of  
2 sixty days or less, that at that time, somebody - - -  
3 I don't know who it would be - - - but somebody then  
4 says, by the way, as you're on your way to jail,  
5 here's a summons for the amount of the surcharge? It  
6 happens at the sentence?

7 MS. SCHWARZ: At sentencing. That's what  
8 the statute requires.

9 JUDGE PIGOTT: I'm asking you in your  
10 experience? In other words, if you're in court, I  
11 would be surprised if - - - if I'm standing there  
12 with my client and he just gets, let's say forty-five  
13 days on a DWI, and someone said, and by the way,  
14 here's a summons for the - - - the surcharge.

15 MS. SCHWARZ: Yeah.

16 JUDGE PIGOTT: I'd be wondering who the - -  
17 - who the - - - who's the lawyer that's now suing my  
18 client for that, and what do I have to do to properly  
19 represent my client at that time?

20 MS. SCHWARZ: I - - - I can't say how it's  
21 - - - the paperwork is distributed. But I do know  
22 that that's what the statute indicates. And so what  
23 happens is those people sentenced to sixty days or  
24 less are given additional paperwork and said you must  
25 make payment of your mandatory surcharges in the

1 summons part, sixty days later. So anyone who's  
2 sentenced to - - -

3 JUDGE FAHEY: But aren't we stuck if  
4 there's a legislative logic for the sixty-day  
5 distinction for minor crimes as opposed to anything  
6 more than sixty days? I - - - I would say anything  
7 above a B misdemeanor, but that may not be the case.  
8 But anyway, anything beyond sixty days, if there's a  
9 legislative logic to what they're doing, then aren't  
10 we stuck? We don't really have any discretion here  
11 to go beyond that?

12 MS. SCHWARZ: Well, the statutes give  
13 authority for entertaining deferral hearings at  
14 sentencing for those individuals who are sentenced to  
15 more than - - - than sixty days. And that's through  
16 the - - - Penal Law 60.30 gives full civil authority  
17 to the sentencing court.

18 So what's really - - -

19 JUDGE PIGOTT: But that seems to be - - -

20 MS. SCHWARZ: - - - happen - - -

21 JUDGE PIGOTT: Pardon me. But that seemed  
22 to read that they can impose more of a civil penalty,  
23 not that they could re - - - forgive one.

24 MS. SCHWARZ: Well, the - - -

25 JUDGE FAHEY: I don't know if I - - -

1           that's a - - - I don't know if I agree with that  
2           reading of it.

3                       MS. SCHWARZ: Well, the - - - the provision  
4           does say that they have the power to impose  
5           appropriate orders as a part of the judgment of  
6           conviction. And - - -

7                       JUDGE FAHEY: All right. That isn't the  
8           same as deferring a mandatory fee. That - - - those  
9           are a little bit - - - that's something a little bit  
10          different. So assume that that's the case - - - I  
11          disagree with you about that - - - then what's the  
12          only other way that this court could address this  
13          issue? It seems to me that we'd have to look to the  
14          - - - to the intent of the legislature and say  
15          there's no logical basis for this sixty-day  
16          distinction.

17                      MS. SCHWARZ: Well, I think that the intent  
18          of the legislature was to make sure that the  
19          mandatory nature of the surcharges was honored.

20                      JUDGE FAHEY: Right. They were trying to  
21          cut out - - -

22                      MS. SCHWARZ: So those individuals - - -

23                      JUDGE FAHEY: Slow down. They were trying  
24          to cut out all the wiggle room for the courts. I  
25          understand that. But my question, I guess, to you

1 is, can you point to something in the legislative  
2 history that you think would allow us to draw that  
3 distinction?

4 MS. SCHWARZ: Well, I think that the  
5 absence of any express language creating the  
6 distinction or explaining why sixty days was the  
7 magic number where you have the right to hardship  
8 deferral or where you don't, that's the - - - it's  
9 utterly silent.

10 I believe the reason they created this  
11 summons part was to make those individuals who were  
12 sentenced to sixty days or less to really have to  
13 struggle and come up with the money. And if they  
14 can't at sixty days, then they have to go back to  
15 court and make that application.

16 JUDGE FAHEY: Well - - -

17 MS. SCHWARZ: So that might encourage  
18 people - - -

19 JUDGE FAHEY: It's true.

20 MS. SCHWARZ: - - - to comply. Whereas - -  
21 -

22 JUDGE STEIN: But why wouldn't they make  
23 that same requirement of somebody that's going to  
24 prison for a longer time?

25 MS. SCHWARZ: Well, the problem - - - the

1 best - - - an illustration here explains it. Someone  
2 who's sentenced to sixty days versus someone who's  
3 sentenced to sixty-one days. The - - - the person  
4 who's sentenced to sixty-one - - - sixty days doesn't  
5 have to pay the surcharge - - -

6 JUDGE STEIN: Well - - -

7 MS. SCHWARZ: - - - until - - - and then  
8 goes to court at the summons part and asks for his  
9 hardship deferral. The person who's sixty - - -

10 JUDGE RIVERA: Isn't it a civil judgment  
11 against them?

12 MS. SCHWARZ: The - - -

13 JUDGE RIVERA: Doesn't it stand as a civil  
14 judgment when they don't pay that day at sentencing?  
15 I guess I'm not understanding the sixty-day grace  
16 period.

17 MS. SCHWARZ: Well, I - - -

18 JUDGE RIVERA: But I'll ask - - - I'll ask  
19 the People about that.

20 MS. SCHWARZ: The statutes do authorize  
21 imprisonment for failure to pay the surcharges. So  
22 that's why there's a distinction between entering  
23 judgment which is what would happen if the court  
24 found that there was substantial hardship and granted  
25 deferral.

1 JUDGE RIVERA: Um-hum.

2 JUDGE PIGOTT: Ms. Bautista - - -

3 MS. SCHWARZ: So there's a - - -

4 JUDGE PIGOTT: - - - Ms. Bautista's  
5 chomping at the bit to say something. So why don't  
6 we excuse you and ask her to - - -

7 MS. SCHWARZ: Thank you.

8 JUDGE PIGOTT: Thank you.

9 Good afternoon, Ms. Bautista.

10 MS. BAUTISTA: Good afternoon, Judge  
11 Pigott. Good afternoon, Your Honors. May it please  
12 the court, my name is Sheila Bautista, and I  
13 represent the People in this case.

14 Your Honors, the legislature's priority  
15 with respect to the mandatory surcharge is its  
16 imposition and collection. The statutes clearly  
17 state that it's - - - it is to be imposed at  
18 sentencing then collected from the defendant's inmate  
19 account regardless of the length of his sentence.

20 JUDGE RIVERA: So there's no grace period?

21 MS. BAUTISTA: There's no grace period.

22 The plain language of 60.35(5) directs that the  
23 superintendent of the facility or the municipal  
24 official collect the money from the inmate's account,  
25 which contemplates by designating a superintendent or

1 a municipal official, that contemplates jail terms or  
2 state prison terms.

3 So it's the People's position that there is  
4 no grace period. 60.35(5) says - - -

5 JUDGE ABDUS-SALAAM: But is it your  
6 experience, though, counsel, that the summons is  
7 issued at sentencing for those who are sentenced to  
8 sixty days or less?

9 MS. BAUTISTA: Your Honor, I - - - I don't  
10 have experience in the trial courts. However, our  
11 reading of the statute is that 60.35(8) which talks  
12 about the summonses, our reading is that it should be  
13 issued at sentencing if the defendant hasn't paid.

14 JUDGE PIGOTT: That's the troubling part.  
15 It - - - it was described, I guess, in the notes, as  
16 poorly drafted and difficult to follow, I think - - -  
17 yes, and difficult to follow. That's the way - - -

18 MS. BAUTISTA: Well - - - well, it's clear  
19 from the - - -

20 JUDGE PIGOTT: Well, what I wanted to say  
21 then is that we have a - - - we have a poorly  
22 drafted, difficult to follow statute, and no one  
23 seems to have any experience with exactly what  
24 happens here, particularly with respect to the sixty  
25 days or less. Because sixty days and beyond, I - - -

1 I don't think - - - Ms. Schwarz refers to sixty-one  
2 days. But I picture the person who gets paid - - -  
3 gets three-and-a-half to seven or twenty-five to  
4 life. I mean, I doubt that they care too much about  
5 what the surcharge is, except that it's coming out of  
6 their monthly thing. But on the sixty and less, I  
7 just have no feel for that, and you - - - you don't  
8 either, on how - - - how the summons part is supposed  
9 to work?

10 MS. BAUTISTA: Your Honor, the statute  
11 states that the summons is to be issued - - -

12 JUDGE PIGOTT: I'm aware of that. But I -  
13 - - but I'm curious as to how that happens. I - - -  
14 I'm trying to picture the defendant standing there.  
15 Sort of, by the way, on your way to jail, here's a  
16 summons. You've got twenty days to answer. Or  
17 you've got sixty days to answer. Or the plaintiff is  
18 so and so, and by the way, criminal defense lawyer,  
19 you're now his civil defense lawyer. You have to  
20 defend him on this civil action that's being brought  
21 against him for the surcharge. I - - - I'm just  
22 curious as to how it operates.

23 MS. BAUTISTA: Unfortunately, Your Honor, I  
24 don't have that in this record, because this  
25 defendant was sentenced to greater than sixty days.

1 And our - - - our position is that here - - -

2 JUDGE FAHEY: Yeah, but - - - but isn't  
3 what would normally happen - - -

4 JUDGE RIVERA: Well, perhaps you can bring  
5 some clarity to what the summons - - - as the statute  
6 - - - is supposed to say.

7 MS. BAUTISTA: A sum - - -

8 JUDGE RIVERA: What is - - - how is it  
9 supposed to work?

10 MS. BAUTISTA: - - - a sum - - - a summons  
11 should be issued, and it tells the defendant that if  
12 you have not paid within sixty days, you must appear  
13 on this date sixty days after the imposition of the -  
14 - -

15 JUDGE RIVERA: And if you have paid - - -

16 MS. BAUTISTA: - - - mandatory surcharge.

17 JUDGE RIVERA: - - - you provide some kind  
18 of proof so that you don't have to show up, or you  
19 could show up with the proof?

20 MS. BAUTISTA: That's my understanding.

21 That - - - it's - - - that's if it's unpaid. If it's  
22 paid - - -

23 JUDGE STEIN: It's an enforcement  
24 mechanism.

25 MS. BAUTISTA: - - - then - - -

1                   JUDGE STEIN:  It's not a you-get-sixty-  
2                   days.  It's you better pay, but if you haven't in  
3                   sixty days, you better show up in court and make an  
4                   argument why - - - why it should be deferred.

5                   MS. BAUTISTA:  Correct.

6                   JUDGE STEIN:  Correct?

7                   MS. BAUTISTA:  Correct.

8                   JUDGE FAHEY:  I thought - - - in Buffalo  
9                   the court clerk sends them out.  I was actually on  
10                  city court before the old days.  And Judge Pigott is  
11                  right, we did try to defer or waive every fee that we  
12                  could.  Usually, when you're giving someone some  
13                  serious time, it seemed like the height of cruelty to  
14                  - - - to add a - - - a financial penalty to people  
15                  that couldn't pay it at the end of giving them the  
16                  time.  So it's true.  We - - - we would try to waive  
17                  them all the time.  I think that eighty percent is  
18                  probably low.  It's probably near ninety percent if  
19                  they could get away with it.

20                  But - - - so these laws were passed,  
21                  actually, while I was in city court, and they were  
22                  passed to do exactly what you argue, which is to make  
23                  sure that there was no more wiggle room for the  
24                  courts to be able to do this.

25                  But the way the process works, at least it

1 did then when I was still there, is that the court  
2 clerk would send out a summons subsequent to the  
3 sentencing for the sixty-day people, and they would  
4 get a notice, either pay it or appear at such at such  
5 date. And then they just rolled them forward. They  
6 just rolled forward all the time. So - - -

7 MS. BAUTISTA: But this - - - this - - -

8 JUDGE FAHEY: Pretty straightforward.

9 MS. BAUTISTA: - - - and it just all goes  
10 to show, though, that the deferral is not available  
11 at sentencing, which is the issue in this case.

12 With all due respect, the practice of the  
13 judges, the legislature made clear, they didn't want  
14 the judges to exercise that judicial discretion at -  
15 - -

16 JUDGE STEIN: You concede that this could  
17 result in, you know, somebody applying post-  
18 sentencing, and then having to bring them back into  
19 court, and - - - you know, all that additional  
20 bureaucracy or whatever you want to call it?

21 MS. BAUTISTA: Well, Your Honor, there are  
22 three main reasons why a deferral at sentencing  
23 shouldn't be made available. As a practical matter,  
24 a defendant would have - - - wouldn't be able to show  
25 at sentencing that he suffers an undue hardship from

1 the mandatory surcharge, because he has not yet begun  
2 his incarceratory sentence.

3 JUDGE PIGOTT: Well, to pick up one of the  
4 things that Judge Fahey is saying, if you're - - - if  
5 you've got assigned counsel or the public defender  
6 representing you in city court or somewhere else,  
7 because you do not have sufficient funds to hire a  
8 lawyer, it's a pretty good indication that you're  
9 probably going to have trouble making - - - paying  
10 this mandatory surcharge. I would think that would  
11 be the application that would be made.

12 MS. BAUTISTA: But Your Honor, also making  
13 it available at sentencing - - - making the deferral  
14 available at sentencing would preclude the DOCS from  
15 collecting it from the defendant, which would  
16 conflict with the mandate that it be collected from  
17 him while he's incarcerated.

18 JUDGE PIGOTT: Well, DOCS - - - DOCS is  
19 only a year or more. If you - - - if you've got  
20 sixty days, you're going to be doing local time. And  
21 that won't be DOCS, that would be - - - I guess as  
22 Judge Fahey's indicating, somehow the city court does  
23 it.

24 MS. BAUTISTA: And if - - - if - - - but if  
25 deferral would be available at sentencing for this

1           defendant, then the city - - - the city authorities  
2           would not be collecting from his inmate account, as  
3           60.35(5) mandates. It would conflict with that  
4           mandate and it would - - - as a practical matter, it  
5           would - - - the deferral would amount to the waiver  
6           that the legislature tried so hard to curb by making  
7           the mandatory surcharge mandatory and waivers totally  
8           unavailable.

9                         Because if deferral were available at  
10           sentencing, either City or DOCS would not collect  
11           anymore. That would amount to - - -

12                         JUDGE FAHEY: But the process has been  
13           created.

14                         MS. BAUTISTA: - - - a waiver.

15                         JUDGE FAHEY: Let me ask a question in  
16           honor of Judge Lippman. Does this seem fair?  
17           Because what you - - - what the process has created,  
18           just from a fairness point of view. And this is - -  
19           - and the People, of course are concerned about this  
20           too. Does it seem fair that you've created a process  
21           which has eliminated waivers, but by law has to have  
22           a deferral?

23                         We all agree that there's no way you can  
24           escape some form of a deferral in this by  
25           constitutional law. So if a deferral is required,

1           you've created a deferral process which in essence is  
2           impossible to apply for once you've started to become  
3           incarcerated and you don't have counsel assigned to  
4           you anymore, and you're always post-sentence. Do you  
5           see what I'm saying?

6                     MS. BAUTISTA: Yes. Yes, Your Honor.

7                     JUDGE FAHEY: Yeah.

8                     MS. BAUTISTA: It does seem fair. Because  
9           while the person is incra - - - incarcerated he has  
10          opportunities to earn money to - - - to pay the  
11          mandatory surcharge. He can participate in incentive  
12          programs, rehabilitation. These are incentives for  
13          him to take classes or work or - - -

14                    JUDGE FAHEY: But - - -

15                    MS. BAUTISTA: - - - things - - -

16                    JUDGE FAHEY: - - - but my point is not  
17          that. My point - - - I agree with you. The  
18          collection process is - - - it is what it is. It's  
19          certainly - - - there's nothing unfair about that.  
20          The question is whether or not the virtual  
21          elimination of deferral is fair. And that's what  
22          this seems to do. This process seems to virtually  
23          eliminate deferral for anyone who's sentenced to any  
24          crime more than a B misdemeanor.

25                    MS. BAUTISTA: Yes, because it - - - it's -

1 - - the legislature saw fit to make this surcharge  
2 mandatory.

3 JUDGE FAHEY: Um-hum.

4 MS. BAUTISTA: And that - - - that's what  
5 the legislature said. And it's clear from their  
6 statute that this is a mandatory surcharge that can  
7 never be waived, and the defendant - - -

8 JUDGE RIVERA: Well, could the legislature  
9 have actually written into the statute: "and it  
10 cannot be deferred"?

11 MS. BAUTISTA: It - - - it - - - there is a  
12 deferral process.

13 JUDGE RIVERA: I understand.

14 MS. BAUTISTA: There is a deferral process.

15 JUDGE RIVERA: That wasn't my question.

16 MS. BAUTISTA: Right.

17 JUDGE RIVERA: Could the legislature have  
18 chosen to even remove the opportunity for deferral -  
19 - - for deferment?

20 MS. BAUTISTA: They could have - - - they  
21 could have. But they didn't, because it - - - it is  
22 still available. But it's clearly not available at  
23 sentencing, because the only deferral process that  
24 they describe is not available to people - - - for  
25 the people who are sentenced to less than sixty days,

1           it's not available until they're out - - - until  
2           they've served their time.

3                       So there is a deferral process, it's just  
4           not available at sentencing, because it - - - it  
5           conflicts with - - -

6                       JUDGE ABDUS-SALAAM:   The summons.  I'm - -  
7           - I'm still curious about the summons, counsel.  For  
8           someone who's sentenced to more than sixty days, is a  
9           summons issued at sentencing, or is it only issued  
10          after the person has - - - well, or it won't be  
11          issued for someone whose sixty days - - - whose  
12          sentence is more than sixty days because they'll be  
13          incarcerated and the statute won't allow them to be  
14          summonsed while they're incarcerated, correct?

15                      MS. BAUTISTA:   Correct.  My understanding  
16          is that the summons is not issued to a - - - to the  
17          defendants who are sentenced to greater than sixty  
18          days.  But our position is that for persons sentenced  
19          later, they still have a deferral mechanism under  
20          420.10(5).

21                      JUDGE ABDUS-SALAAM:   But that mechanism  
22          requires them to bring a motion to be resentenced?

23                      MS. BAUTISTA:   Correct.

24                      JUDGE ABDUS-SALAAM:   And when they're - - -  
25          they move to be resentenced, what are - - - what are

1 the mechanisms available for deferral for them?

2 MS. BAUTISTA: The resentencing motion?

3 JUDGE ABDUS-SALAAM: Yes.

4 MS. BAUTISTA: It would - - - they would  
5 have to make a showing of undue hardship such - - -  
6 similar to what the defendants sentenced to less than  
7 sixty days show. They would have to make that  
8 showing. Upon that showing, the court could decide  
9 whether or not to defer the judgment. It would  
10 become a civil judgment.

11 JUDGE ABDUS-SALAAM: So it's just a matter  
12 of when they can make this request to be considered  
13 for a deferral?

14 MS. BAUTISTA: Correct. And - - -

15 JUDGE ABDUS-SALAAM: Not whether they can  
16 ask for a deferral?

17 MS. BAUTISTA: Correct. Our position is a  
18 deferral is available to all defendants, just not at  
19 sentencing.

20 JUDGE RIVERA: Where - - - where is that  
21 standard you just set out for those who are  
22 incarcerated over sixty days?

23 MS. BAUTISTA: Section 420.35 says that the  
24 provisions of 420.10 are - - - are applicable to the  
25 mandatory surcharge. And there's - - - 420.10(5) has

1 a resentencing provision.

2 JUDGE RIVERA: Um-hum.

3 MS. BAUTISTA: So since 60.35(8) doesn't  
4 make it available to the defendants sentenced to  
5 greater than six - - - than sixty days, we look to  
6 420.10 for those defendants.

7 JUDGE RIVERA: And - - - and you're saying  
8 420.10 uses the language of unreasonable hardship  
9 that you find in 420.42?

10 MS. BAUTISTA: It - - -

11 THE COURT: That applies to those under  
12 sixty days' incarceration?

13 MS. BAUTISTA: - - - it uses a similar - -  
14 - it uses a similar language. It also says that  
15 incarceration alone is not a showing of - - -

16 JUDGE RIVERA: Yes, I know that.

17 MS. BAUTISTA: - - - unreasonable hardship.  
18 So if you look at 420.10(5) and (6) functionally,  
19 those are the equivalent of a 420.40(5) deferral  
20 hearing that's available to the defendants who are  
21 sentenced to less than sixty days.

22 JUDGE RIVERA: All right.

23 MS. BAUTISTA: So in a nutshell, that's our  
24 - - - that's our position. Our position is that  
25 deferral's available, just not at sentencing.

1           Because if so, it would conflict with the mandate to  
2           collect and it would contravene the legislature's  
3           intent to curb judicial discretion to grant relief  
4           from the mandatory surcharge.

5                   JUDGE RIVERA:   So what hap - - - let me  
6           just ask you.   I'm - - - I've been given the three-  
7           and-a-half to seven - - - I think that's what Judge  
8           Pigott mentioned before - - - and I don't have a  
9           penny to my name.   So I'm going in.   And obviously  
10          DOCs is now going to collect from my fund whenever  
11          any money goes into the fund.   Is there a civil  
12          judgment that's been imposed?

13                   MS. BAUTISTA:   If - - - has it been  
14          deferred?   Has it - - -

15                   JUDGE RIVERA:   At sentencing or whenever -  
16          - - shortly thereafter?   Is it now a civil judgment  
17          that I'm paying off?   What am I paying off?

18                   MS. BAUTISTA:   You're - - - you're paying  
19          the mandatory surcharge.

20                   JUDGE RIVERA:   So it's not a civil judgment  
21          as in a - - -

22                   MS. BAUTISTA:   No.

23                   JUDGE RIVERA:   - - - lien under the  
24          C.P.L.R.

25                   MS. BAUTISTA:   No.

1 JUDGE RIVERA: Because there are provisions  
2 for making these things - - -

3 MS. BAUTISTA: It is - - -

4 JUDGE RIVERA: - - - civil judgments.

5 MS. BAUTISTA: Correct. It's a mandatory  
6 surcharge, and it does not become a civil judgment  
7 until the sentencing court notifies the clerk of  
8 court.

9 JUDGE RIVERA: Um-hum. So since - - -  
10 since DOCS is collecting whatever amount it may be  
11 collecting, even twenty-five cents a month - - -

12 MS. BAUTISTA: It's twenty percent.

13 JUDGE RIVERA: - - - it will not be - - -  
14 whatever amount it - - - well, depending on the  
15 amount that I've got. It will not be converted to  
16 that civil judgment?

17 MS. BAUTISTA: Not while they're  
18 incarcerated. But at the end of a person's  
19 incarceration, DOCS tells the sentencing court  
20 whether or not the defendant has paid the mandatory  
21 surcharge - - - let me see if I can find that. I  
22 believe it's a directive. It's a DOCS directive. 2  
23 - - - DOCS Directive 2788 at pages 8 to 9. DOCS  
24 tells the sentencing court whether or not the  
25 surcharge has been paid. And in turn, the sentencing

1 court tells the State whether the mandatory surcharge  
2 has been paid or not.

3 My understanding is the sentencing court  
4 can enter a civil judgment if a mandatory surcharge  
5 hasn't been paid under C.P.L. 420.10(6). But it  
6 doesn't become a civil judgment until he gets out, is  
7 my understanding.

8 JUDGE RIVERA: Until release.

9 MS. BAUTISTA: Right.

10 JUDGE RIVERA: Thank you.

11 JUDGE PIGOTT: Thank you, Ms. Bautista.

12 MS. BAUTISTA: Thank you.

13 JUDGE PIGOTT: Ms. Schwarz, you want to  
14 straighten us out?

15 MS. SCHWARZ: I'll try. There's been a lot  
16 of questions about how the summons would work when  
17 someone is serving a shorter-than-sixty-day sentence.  
18 And I've seen that happen in criminal court. I can  
19 tell you they are told about what to do. There's  
20 paperwork processed by the clerk. But it's not  
21 delivered to the defendant until they're released.  
22 At least that's how it happens in Manhattan criminal  
23 court.

24 JUDGE FAHEY: Well, that would be only for  
25 over sixty days. Yeah. Other than that, they - - -

1           they just - - - just mail it to them and they appear.

2                   MS. SCHWARZ:   But - - - and - - - and a  
3           very similar procedure is used in the compliance  
4           parts where defendants have to go to a drug treatment  
5           program or whatever they're told they must return to  
6           court with compliance paperwork and to pay their  
7           surcharges.

8                   JUDGE PIGOTT:   But the bottom line, I  
9           think, as Ms. Bautista was pointing out, is that the  
10          legislature seems to have done everything in their  
11          power to make sure that we do not do anything but  
12          make sure these things get collected.

13                   MS. SCHWARZ:   I have to respectfully  
14          disagree, because yes they said no waiver.   But we're  
15          saying it's imposed.   It's just that it's deferred.  
16          And certainly the legislature has said the opposite,  
17          because they created C.P.L. 420.40 and the whole  
18          point - - -

19                   JUDGE ABDUS-SALAAM:   Someone - - - counsel,  
20          if someone is doing - - -

21                   MS. SCHWARZ:   - - - of that is deferral.  
22          So they've said its' - - -

23                   JUDGE ABDUS-SALAAM:   - - - so if someone is  
24          doing three to seven, and it's deferred while they're  
25          in prison, does that mean that the State or the City

1 has to wait for seven years if they're going to do  
2 the full time before the mandatory surcharge can be  
3 collected, even though the inmate could be earning  
4 whatever amount - - - I know it's not a lot - - - but  
5 earning something in prison?

6 MS. SCHWARZ: Well, before deferral would  
7 be granted, the court would have to be convinced that  
8 this individual was under such terrible, serious  
9 financial hardship that they could - - - that  
10 imposition of the surcharge would cause an  
11 unreasonable hardship to him or his family. And that  
12 would be - - - is a very difficult burden for him to  
13 make.

14 JUDGE ABDUS-SALAAM: Isn't the legisla - -  
15 -

16 MS. SCHWARZ: Or her.

17 JUDGE ABDUS-SALAAM: - - - isn't the  
18 legislation somewhat of a presumption that if you're  
19 going to prison for more than sixty days, as I  
20 believe the ADA just mentioned, you will have the  
21 ability to earn something while you're in prison, so  
22 the hardship won't be as hard or as difficult as  
23 someone who will get out in sixty days or less?

24 MS. SCHWARZ: Not all - - - not every  
25 individual is eligible for - - - for work. There are

1 people with medical conditions. There are people  
2 with serious financial obligations, court-ordered or  
3 otherwise, who aren't able to make those payments.  
4 So I think what the legislature - - -

5 JUDGE RIVERA: So then nothing is collected  
6 against them. And there's no civil judgment against  
7 them. Isn't what the legislature - - - it appears  
8 from these statutes - - - is saying is if you're in  
9 jail and you're collecting money or money is put into  
10 your account - - - as I read the statutes also if you  
11 receive money from someone and it goes into your  
12 account - - - that's fair game? They can collect off  
13 that too to pay the surcharge.

14 Okay. So if you've got funds, we've got  
15 victims who - - - and victim services we're trying to  
16 fund as the State, we're going to - - - we're going  
17 to collect while you're in jail. Isn't that what  
18 these statutes are saying? Regardless of whether or  
19 not anyone in this courtroom might have made that  
20 choice, that appears to be the legislative choice, is  
21 it not?

22 MS. SCHWARZ: Yes. However, they provide -  
23 - - this legislature provided for deferral in the  
24 unusual circumstance where someone's small pittance  
25 of money they earn while in prison isn't even going

1 to be enough for them to buy a toothbrush. And those  
2 people should be able to have equal access for  
3 fairness purposes, to request deferral.

4 Now, the three-and-a-half to seven person's  
5 going to have a hard - - -

6 JUDGE STEIN: Well, as I understand it,  
7 they can. They just can't do it at sentencing.

8 MS. SCHWARZ: But at - - - if they don't do  
9 it at sent - - - the only way to have a level playing  
10 field is for them to have it at sentencing, because  
11 at sentencing, as soon as they're sentenced, the  
12 courts can start withdrawing funds. So they're going  
13 to have funds withdrawn while - - -

14 JUDGE RIVERA: Your concern is you - - -

15 MS. SCHWARZ: - - - pending - - -

16 JUDGE RIVERA: - - - don't want someone  
17 who's incarcerated to have their inmate account  
18 drained. I - - - I get your argument, but - - -

19 MS. SCHWARZ: Especially these extremely -  
20 - -

21 JUDGE RIVERA: Yes, I get your argument.

22 MS. SCHWARZ: - - - indigent - - -

23 JUDGE RIVERA: The question is whether or  
24 not you can read the statutes that way. And it seems  
25 pretty clear, the statute is saying you collect from

1 the minute they walk into the - - - to be  
2 incarcerated.

3 MS. SCHWARZ: I would just urge the court  
4 to - - -

5 JUDGE RIVERA: That we can start the  
6 collection process.

7 MS. SCHWARZ: It's when they fail to pay.  
8 And the - - - a defendant who's issued a summons  
9 hasn't failed to pay until it's time to return for  
10 the summons. They are given a grace period of sixty  
11 days in order to make payment one way or the other.  
12 And it's not until sixty days later that they fail to  
13 pay. Whereas those people sentenced to more than  
14 sixty days, the - - - it's due immediately. So  
15 that's the distinction.

16 And in order for the statute to be applied  
17 fairly to all individuals, the - - - the only way  
18 that - - -

19 JUDGE RIVERA: Would it be fairly applied  
20 if we said that everybody is subject to have  
21 immediate collection upon incarceration. If we  
22 disagreed with you on this grace period, is that then  
23 a fair application? Again, it may be harsh; you may  
24 disagree with it, but it may be the legislative poi -  
25 - - choice.

1 MS. SCHWARZ: Well, I don't think you could  
2 read 60.35(5) as saying that. So - - -

3 JUDGE PIGOTT: We'll - - - we'll take a  
4 look at it. I think your time has expired. But I  
5 appreciate your time. Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Anthony Jones, No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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