

**Matter of Ruiz v New York State Comptroller**

2007 NY Slip Op 33497(U)

October 26, 2007

Supreme Court, Albany County

Docket Number: 0347207/2007

Judge: George B. Ceresia

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In The Matter of EDGAR RUIZ,

Petitioner,

-against-

NEW YORK STATE COMPTROLLER;  
NEW YORK STATE DEPARTMENT  
OF CORRECTIONS

Respondent,

For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-07-ST7768 Index No. 3472-07

Appearances: Edgar Ruiz  
Petitioner, Pro Se  
Riverview Correctional Facility  
P.O. Box 247  
Ogdensburg, New York 13669

Andrew M. Cuomo  
Attorney General  
State of New York  
Attorney For Respondents  
The Capitol  
Albany, New York 12224-0341  
(Kelly L. Munkwitz,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

On October 6, 1999 Petitioner was convicted of two counts of Criminal Sale of a Controlled Substance in the 3<sup>rd</sup> Degree. Petitioner was sentenced to two concurrent sentences of four to eight years and was ordered to provide the Department of Correctional Services (DOCS) with a sample of his DNA. On May 11, 2006 petitioner was once again convicted of two counts of Criminal Sale of a Controlled Substance, this time in the 4<sup>th</sup> Degree, charged in two separate indictments. He was sentenced to two terms of three and a half years to run concurrently. As part of his sentence the petitioner was ordered to pay a Mandatory Surcharge fee of \$250.00, a Crime Victim Assistance fee of \$20.00, and a \$50.00 DNA Database Registration fee for each count.

Following transfer to State custody, the Department of Correctional Services began to withdraw funds from the petitioner's inmate account to pay the surcharge and fees. The petitioner filed a grievance challenging the imposition of the DNA Databank Registration fees because his DNA had already been on file by reason of the 1999 conviction. The inmate grievance review committee denied the grievance, informing him that "the databank fee is imposed upon every conviction for a DNA eligible offense." On administrative appeal, the Superintendent of Gouvernor Correctional Facility reached the same conclusion. In affirming the decision of the inmate grievance review committee, the Superintendent wrote that "the databank fee is imposed upon every conviction for a DNA eligible offense" and that the "fee is not solely for the cost associated with taking of the DNA sample, but for the maintenance of the databank as well."

Following these decisions, the petitioner appealed to the Central Office Review Committee (CORC) which upheld the decision of the inmate grievance review committee. The petitioner then commenced the instant CPLR Article 78 proceeding to challenge the foregoing determinations, as well as the legality of the imposition of the DNA Database Registration fees. The petitioner seeks an order preventing DOCS from withdrawing any more money from his inmate account, and to reimburse him for the funds that have already been removed.

The respondents assert in their affirmation that the allegations made by the petitioner are entirely conclusory and speculative and must therefore be denied. The respondents further assert that judicial review of an administrative determination is limited to whether the respondents acted arbitrarily or capriciously, and in this instance, this is not the case.

A review of the papers submitted to the Court reveals that this petition is without merit, and therefore petitioner's proceeding must be dismissed.

The Legislature has determined that people convicted of certain designated crimes should be required to pay a number of different fees, and it has adopted legislation that makes the imposition of some of these fees mandatory. On May 15, 2003 the legislature added an amendment to Section 60.35 of the New York State Penal Law, which made criminals convicted of certain crimes subject to a \$50.00 DNA Database Registration fee. Penal Law §60.35 states:

“1.(a) Except as provided in section eighteen hundred nine of the vehicle and traffic law and section 27.12 of

the parks, recreation and historic preservation law, whenever proceedings in an administrative tribunal or a court of this state result in a conviction for a felony, a misdemeanor, or a violation, as these terms are defined in section 10.00 of this chapter, there shall be levied at sentencing a mandatory surcharge, sex offender registration fee, DNA databank fee and a crime victim assistance fee in addition to any sentence required or permitted by law, in accordance with the following schedule: . . .

(v) a person convicted of a designated offense as defined by subdivision seven of section nine hundred ninety-five of the executive law shall, in addition to a mandatory surcharge and crime victim assistance fee, pay a DNA databank fee of fifty dollars.”

New York Executive Law § 995 (7) (b) defines a “designated offender” as a person convicted of:

“criminal possession of a controlled substance in the first degree, as define in section 220.21 of the penal law; criminal possession of a controlled substance in the second degree, as defined in section 220.18 of the penal law; criminal sale of a controlled substance, as defined in article 220 of the penal law; or grand larceny in the fourth degree, as defined in subdivision five of section 155.30 of the penal law . . .”

Here, the petitioner was convicted of two counts of Criminal Sale of a Controlled Substance in the 4<sup>th</sup> Degree, and is therefore defined as a “designated offender” under New York’s Executive Law. This designation subjects the petitioner to the \$50.00 fees imposed by section 60.35 of the New York State Penal Law.

Notwithstanding the foregoing, the petitioner asserts that he should not be required to pay DNA Database Registration fees because his DNA is already on file with the Department of Corrections. The statutory language, however, does not support this position. The legislature made it clear in CPL § 420.35 (2) that the DNA Database fee is a mandatory part of the sentence for a “designated offender” as defined by New York Executive Law § 995 (7) (b). CPL § 420.35 (2) states that:

“Under no circumstances shall the mandatory surcharge, sex offender registration fee, DNA databank fee or the crime victim assistance fee be waived provided, however, that a court may waive the crime assistance fee if such defendant is an eligible youth as defined in subdivision two of section 720.10 of this chapter, and the imposition of such fee would work an unreasonable hardship on the defendant, his or her immediate family, or any other person who is dependent on such defendant for financial support.”

In addition, a review of § 60.35(2) of the Penal Law reveals that the Legislature considered the fairness of imposing multiple DNA Databank Registration fees upon a single defendant. As evidenced by the language in § 60.35(2), the Legislature created only one exception to the mandatory imposition of a DNA Databank Registration fee, which was in the circumstance where an individual has been:

“convicted of two or more designated offenses, as defined by subdivision seven of section nine hundred ninety-five of the executive law, committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the court shall

impose only one DNA databank fee.”

Here, an examination of the petitioner’s Crime and Sentencing Information reveals that the petitioner was convicted of two crimes which were committed on two different days and which were contained in two different indictments. Since these convictions did not arise from the same act or omission, the petitioner’s case does not fall within the exception to the mandatory imposition of the DNA Databank Registration fee listed in § 60.35 (2) of the Penal Law.

In People v Vail (20 AD3d 590 [3d Dept., 2005]), a case very similar to the one at bar, the Appellate Division dealt with the same issue that the petitioner is raising here. There, the Court held that “County Court did not err in imposing a DNA database fee even though a DNA sample had been previously taken from him [Vail] as a result of his prior convictions given that such convictions predated the enactment of the legislation establishing such a fee . . .” (People v Vail, supra, at 591). Here, while the petitioner did have his DNA taken from him on January 3, 2001, like Vail, his DNA was taken prior to the enactment of Penal Law §60.35(1)(a)(v) (May 15, 2003). Therefore the imposition of the fees was proper.

Petitioner also challenges the authority of the Department of Correctional Services to withdraw the funds from his inmate account. Notably however, § 60.35 (5) (a)<sup>1</sup> of the

---

<sup>1</sup>“When a person who is convicted of a crime or violation and sentenced to a term of imprisonment has failed to pay the mandatory surcharge, sex offender registration fee, DNA databank fee, crime victim assistance fee or supplemental sex offender victim fee required by this section, the clerk of the court that rendered the conviction shall notify the superintendent or the municipal official of the facility where the person is confined. The superintendent or the municipal official shall cause any amount owing to be collected from such person during his or

Penal Law imposes a duty upon the Superintendents of correctional facilities to collect fees imposed upon inmates at their sentencing if such fees are not otherwise paid.

Lastly, a review of the petition reveals that, in addition to challenging the collection of the DNA Databank Registration fees by the Department of Corrections, the petitioner also seems to be challenging the legality of actions of the sentencing court in imposing the subject fees as a part of his sentence. To the extent that this is the case, it is the Court's view that the proper procedure would have been either to appeal the sentence as unlawful, or file a CPL § 440.20 motion with the sentencing court to set aside the sentence.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

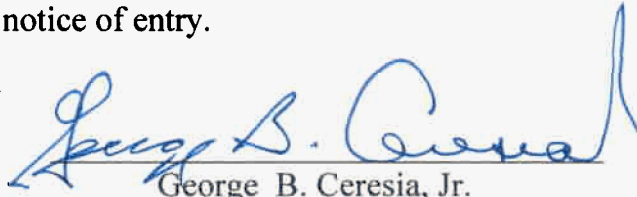
This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondents, who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of

---

her term of imprisonment from moneys to the credit of an inmates' fund or such moneys as may be earned by a person in a work release program pursuant to section eight hundred sixty of the corrections law. . ." (Penal Law § 60.35 [a] [a]).

this Decision/Order/Judgment with notice of entry.

Dated:           October 26, 2007  
                  Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1.     Petitioner's Order to Show Cause dated May 10, 2007, Petition, Supporting Papers and Exhibits.
2.     Respondent's, Answer dated August 30, 2007, Supporting Papers and Exhibits.
3.     Affirmation of Kelly L. Munkwitz, Esq., dated August 30, 2007
4.     Petitioner's Opposition to Answer dated September 20, 2007