

COURT OF APPEALS  
STATE OF NEW YORK

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IVEY WALTON, et al. :  
: :  
Appellants, :  
: : A.D, Third Dept. Docket  
-against- : # 98700  
: :  
NEW YORK STATE DEPARTMENT :  
OF CORRECTIONAL SERVICES, et al. :  
: :  
Respondents. :  
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**BRIEF OF PROPOSED AMICUS CURIE,  
THE INNOCENCE PROJECT, INC., AND  
THE INCARCERATED MOTHERS PROGRAM**

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## STATEMENT OF INTEREST

*Amici*, The Innocence Project, Inc., is a nonprofit legal clinic and criminal justice resource center. Founded by Prof. Barry Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the litigation model that has to date exonerated 187 innocent persons by post-conviction DNA testing and served as counsel in the majority of those cases. As such the Project has represented innocent members of society affected by the New York State Department of Correctional Services' (hereinafter "NYSDOCS" or "DOCS") 'surcharge' levied against family members who pay for the collect calls their loved ones make from prison. These family members have made deep financial and personal sacrifices to maintain telephone contact with incarcerated relatives ultimately proven innocent by DNA evidence. The Project currently represents clients in New York State Correctional facilities, who have maintained their innocence (some for decades), and are trying to obtain biological evidence that may exonerate them.

*Amici* also include The Incarcerated Mothers Program (hereinafter "IMP"). IMP is a program of Edwin Gould Services for Children and

Families, which has 65 years of experience, and is currently one of the largest minority administered foster care agencies in New York City. Edwin Gould also provides permanency services, post-adoption services, residential services, intermediate care services, health and mental care, preventive services, domestic violence services, job readiness training and supportive services for families affected by maternal incarceration.<sup>1</sup> IMP joins this brief as an organization that advocates on behalf of the children of current incarcerated and their caretakers, who pay for the collect phone calls that enable these children to preserve a relationship with their incarcerated mothers and fathers.

Both organizations maintain extensive relationships with the incarcerated and their families and thought it necessary to address some of the legal issues raised in the Courts below. *Amici* hope that their real world experiences will enable the court to understand the human issues underlying the legal analyses and to comprehend the severity of the actual injuries the DOCS ‘surcharge’ causes to the families of prisoners. Significantly, the First Amendment and Taxations issues involved in the current phone policies will likely be repeated in subsequent phone contracts, should those concerns not be addressed by this court. We write then to detail the drastic

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<sup>1</sup> See “Incarcerated Mothers Program Objectives and Descriptions” (hereinafter, “IMP Objectives and Descriptions” at 1. Submitted herewith as Attachment A.

effects the current contract has had on the ability of families to communicate with loved ones who are incarcerated.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Incarcerated individuals comprise a particularly vulnerable population that faces obvious barriers to maintaining connections with family members in the community. Maintaining these connections, however, is absolutely essential to ensuring the integrity of the family unit for the obvious benefit of the inmate, family, as well as society. Indeed, numerous studies have shown that close family ties help reduce inmate recidivism. Because other avenues of communication in prison are greatly limited, the telephone provides inmates and their *families* with the most effective means of maintaining their relationships. *Amici* overwhelmingly attest to the direct, positive correlation between telephone usage and subsequent quality and quantity of familial relations. It is clear from *amici's* experiences that MCI WorldCom Telecommunications, Inc.'s (hereinafter "MCI") exorbitant fee hike in 2003 represented an unconstitutional restriction on the ability of incarcerated individuals and their families to communicate by imposing a financial burden so great as to render reasonably regular telephone contact impossible for many inmates. The subsequent adverse effects of this illegal tax on the quality of familial relationships and transitions post-release are easily

evident. Furthermore, it is clear that the DOCS ‘surcharge’ is actually an illegal tax, making the fact that it violates the family members’ First Amendment rights even more unacceptable. For these reasons, *amici* respectfully urge this Court to reverse the Appellate Division’s decision.

### **STATEMENT OF THE CASE**

We incorporate by reference the statement of facts and procedural history set forth in Appellant’s brief.

### **ARGUMENT**

#### **I. The Constitution Provides for the Preservation of Familial Relationships During Incarceration.**

##### **a. Despite Some Limitations, First Amendment Protections of Inmate-Family Communication Exist and Work to Preserve the Integrity of the Family Unit.**

It is widely recognized that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 [1987]. Rather, courts have found that “a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,” *Pell v. Procunier*, 417 U.S. 817, 822 [1974], including *the right to communicate with family and friends*. See *Morgan v. LaVallee*, 526 F.2d 221, 225 [2<sup>nd</sup> Cir. 1975]. Commensurate with an inmate’s freedom

to maintain contact with “family and friends,” the courts protect free citizens’ abilities to “exercis[e] their own constitutional rights by reaching out to those on the ‘inside.’” *Thornburgh v. Abbott*, 490 U.S. 401, 407 [1989]. This doctrine is of particular importance in the instant case, as the First Amendment rights implicated by the DOCS tax are not just those belonging to prisoners, but, more importantly, those of the *non-incarcerated* family members of inmates to communicate with their loved ones in jail.

This right to communication, limited only when in conflict with legitimate governmental concerns, helps to preserve familial relationships both for the sake of the prisoners and their family members. The Supreme Court has long recognized that “certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs [].” *Roberts v. United States Jaycees*, 468 U.S. 609, 618 [1984]. Moreover, “the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others.” *Id.* at 619. For inmates, the circumstances of their incarceration naturally limit their ability to maintain these “close ties” with family members, and serve to make the connections that they are able to preserve all the more precious. The most dramatic evidence arises in the medical literature on prison suicides: inmates

incur a greater risk of suicide than the general population, and in one recent study of over 3,000 inmates, a perceived lack of social support significantly increased an inmate's likelihood of attempting suicide by more than thirty-fold.<sup>2</sup>

Communication with loved ones not only mitigates the unnecessary suffering experienced during incarceration, but also lends itself to improved re-assimilation of the former inmate back into the family and community at large upon release. There is little, if any, disagreement that the “[p]reservation of the family unit is important to the reintegration of the confined person and decreases the possibility of recidivism upon release [ ]. [V]isitation has demonstrated positive effects on a confined person's ability to adjust to life while confined as well as his ability to adjust to life upon release....” *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 468 [1989](Marshall, J. dissenting), *citing* National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-115, Comment (1979). *See also, id. citing* National Sheriffs’ Association, *Inmates’ Legal Rights* 67 (rev. ed. 1987) (visits “with family, friends and others [are] important if the inmate is to retain his ties to the

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<sup>2</sup> See R. Jenkins, D. Bhugra, H. Meltzer, N. Singleton, P. Bebbington, T. Brugha, J. Coid, M. Farrell, G. Lewis & J. Paton, “Psychiatric and social aspects of suicidal behavior in prisons.” 35 *Psychological Medicine* at 257-69 (2005).

community and his knowledge of what the free society is like”); U.S. Dept. of Justice, *Federal Standards for Prisons and Jails*, Standard 12.12, Discussion (1980) (“Visiting is an important element in maintaining inmates’ contact with outside society.”); ABA Standards for Criminal Justice 23-6.2, Commentary (2d ed. 1980) (“Because almost all inmates ultimately will be returned to the community at the expiration of their terms, it is important to preserve, wherever possible, family and community ties.”); National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 2.17, Commentary (1973) (“Strained ties with family and friends increase the difficulty of making the eventual transition back to the community.”); *Thornburgh v. Abbott*, 490 U.S. at 407 (“Access [to prisons] is essential ... to families and friends of prisoners who seek to sustain relationships with them....”). *See also* K. Casey-Acevedo & T. Bakken, “Visiting women in prison: Who visits and who cares?” 34 *Journal of Offender Rehabilitation* at 67-86 (2002) (noting visitation can help foster prison adjustment and lead to better societal adjustment after prison). “Consistent with this view, numerous governmental and private organizations which deal closely with correctional institutions have promulgated standards designed to maximize contact between family members and inmates.” *Kentucky*, 490 U.S. at 469.



The effect of a mother's incarceration on her children is particularly devastating. Beyond the immense damage to children's emotional and physical well-being that can result from instability and long-term separation lies a pronounced risk of losing these children to the criminal justice system and substance abuse.<sup>3</sup> Research has shown that children of incarcerated parents are seven times more likely to become involved in the juvenile and adult criminal justice systems.<sup>4</sup> However, research has also demonstrated that preserving the parent-child relationship through continued contact *while the parent is incarcerated* can be truly helpful to a children's development. It allows them to feel loved rather than abandoned or rejected.<sup>5</sup> Furthermore, a positive parent-child relationship has been definitively shown to contribute to inmates' rehabilitation.<sup>6</sup> Therefore, it is undeniable that extensive contact is optimal not only for the benefit of the inmates and their children, but also society at large so that the cycle of incarceration does not continue.

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<sup>3</sup> IMP Objectives and Descriptions at 3, *supra* note 1.

<sup>4</sup> *Id. citing* US Department of Health & Human Services Program Announcement No. ACYF/FYSB 2003-02), "What are the effects of incarceration on the child?" at 4.

<sup>5</sup> *Id. at 2 citing* Lois E. Wright and Cynthia B, Seymour. "Working With Children and Families Separated by Incarceration" 60-61, CWLA Press, Washington, DC (2000).

<sup>6</sup> *Id.*

**II. Prisoners Have a First Amendment Right to Make Telephone Calls; Exorbitant Rates May Not Be Charged so as to Deprive Access by Prisoners.**

**a. Telephone Calls are an Incomparable Method of Communication Between Family Members and Inmates and Essential to Preserving the Family Unit**

Several federal circuits agree that “there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone [by prisoners], and [] such use is protected by the First Amendment.” *Johnson v. Galli*, 596 F.Supp.135, 138 [D.Nev.1984]. *See also Washington v. Reno*, 35 F.3d 1093, 1100 [6<sup>th</sup> Cir. 1994]; *Johnson v. California*, 207 F.3d 650,656 [9<sup>th</sup> Cir. 2000]; *Strandberg v. City of Helena*, 791 F.2d 744, 747 [9<sup>th</sup> Cir. 1986]; *Hutchings v. Corum*, 501 F.Supp. 1276, 1296 [W.D.Mo.1980]; *Moore v. Janing*, 427 F.Supp. 567, 576 [D. Neb.1976]. The reasoning behind specifically preserving a prisoner’s right to exercise his First Amendment right to telephone use is abundantly clear: while letter-writing and visitation also allow for meaningful emotional connections between inmates and family members, the unique nature of a telephone call offers an unparalleled opportunity to preserve the integrity of the family unit while in prison.

First, it is impossible to recreate the instantaneous nature of telephone communication; while letter-writing and visits provide family news and offer personal interaction, for prisoners they are intermittent and in some instances, non-existent. *Amici* who are exonerees personally recall how important it was during times of sadness, stress or excitement to be able to reach out *at that moment* to their family members by phone, instead of waiting weeks for a letter to arrive or for a proscribed visiting day.

For those *amici* who are younger children – approximately 13,000 New York children currently have a mother in jail or prison and 58% of these children are under the age of ten<sup>7</sup>– letter writing is nearly impossible. If such children need to communicate with a parent by mail, they must have an intermediary write their thoughts for them and read to them any response. Needless to say, such communication completely destroys the confidentiality and quality of parent-child communication. For infants and toddlers who do not have a full grasp of language, this limited form of communication by letter is truly unavailable. However, even the youngest child can still communicate with their parent by phone – *amici* are aware of examples of incarcerated mothers who call every evening to sing to their babies the same

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<sup>7</sup> *Id* at 2 citing Julie Kowitz & The Women in Prison Project of the Correctional Association, (forthcoming 2003) “The Collision of Child Welfare and the Incarceration of Women in New York”

lullaby, and to say goodnight to older children. It is impossible to minimize the impact of such constant vocal contact at a young age, and it is unquestionably the kind that cannot be duplicated by a letter. For older children, *amici* aver that being able to deal with *real issues in real time* is imperative for the preservation of the parent-child role: if a child has a disciplinary issue at school, or any other problem that requires parental attention, by the time a letter reaches the incarcerated parent and he/she authors a response, the issue has become stale or may have worsened.

Furthermore, while telephones were readily accessible to *amici*, there were often serious limitations on family members' ability to physically visit an incarcerated relative. Many family members reported living a *considerable distance* from the correctional institution, which either prohibited them from visiting on a regular basis, or in some cases, at all. In New York State, for example, the physical distance between most prisoners and family members means that in order to maintain communication, phone calls are a necessity: more than 80% of the state's prisoners come from poor New York City neighborhoods, while two-thirds of prison facilities are located *three hours or more* from New York City.<sup>8</sup> This distance demands

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<sup>8</sup> See Claudio Cabrera, "Punishing Phone Call Tax For Families of Incarcerated," *Amsterdam News*, February 8, 2006. Available at

that many relatives of inmates plan for an entire day's absence from normal routines to make the six hour round trip, taking time off of work, finding childcare, and paying for transportation, food, and lodging.<sup>9</sup> Given these dramatic hurdles to physical visitation, it is unsurprising that New York prisoners reportedly completed nearly seven million collect phone calls between September 2001 and August 2002, totaling more than 124 million minutes of talk time.<sup>10</sup> Furthermore, it is extremely unlikely that the caregiver of a child with an incarcerated parent will facilitate visitations to the prisons or jails. Indeed, approximately one-half of all incarcerated parents receive no visits from their children, and others receive only infrequent visits.<sup>11</sup>

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<http://www.indypressny.org/article.php3?ArticleID=2489> (last visited November 29, 2006).

<sup>9</sup> See Johnna Christian, "Riding the Bus: Barriers to Prison Visitation and Family Management Strategies," 21 *Journal of Contemporary Criminal Justice*, No. 1 at 31-48 (February 2005) ("The costs associated with one visit are a minimum of \$80 and could easily be twice that amount. This is assuming that there is only one family member visiting and does not include other expenses such as childcare. In addition to these monetary costs, the journey to a visit is extremely tiring and time consuming. [] Buses to the farthest facilities leave New York around 9:00 PM to arrive in time for visiting hours at 9:00 AM the next morning.)

<sup>10</sup> See New York State Department of Correctional Services Position Paper "Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All," at 1 (August 2003) available at <http://www.docs.state.ny.us/PressRel/phoneinfo.pdf> (last visited November 29, 2006) (hereinafter "DOCS Position Paper").

<sup>11</sup> IMP Objectives and Descriptions at 2, *citing* Lois E. Wright and Cynthia B. Seymour. "Working With Children and Families Separated by Incarceration" 60-61, CWLA Press, Washington, DC (2000).

Ironically, DOCS agrees with *amici* that telephone access for inmates is a crucial aspect of maintaining family connections. In their 2003 press release entitled, “Inmate pay phone access fosters family ties, enhances security for all,<sup>12</sup>” DOCS asserts: “At first blush, one would be hard pressed to identify the debate [on controls on phones and commissions]: since studies have shown maintenance of family ties reduces recidivism, it would seem allowing inmates such a privilege [use of telephones] would benefit all New Yorkers.”<sup>13</sup>

**b. The Imposition of DOCS’ Unlawful Tax Violated the First Amendment Rights of Members of *Amici* By Deterring Telephone Communication, and Through the Imposition of Financial Hardship on the Families of Exonerees**

Members of *amici* who are exonerees and relatives of those incarcerated in New York State on or after November 2003, have collectively experienced the unlawful burdening of their rights to familial association through the imposition of the DOCS tax. This tax had the practical effect of impeding communication concerning constitutionally sacred issues such as health care, parenting and other critical family issues. *Amici* wholeheartedly agree with appellants that the DOCS tax violates the free speech and associational rights guaranteed by the New York State

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<sup>12</sup> DOCS Position Paper at 1.

<sup>13</sup> *Id.*

Constitution Art I §8 because it: (i) has no association with any legitimate security concerns; (ii) imposes an excessive fee on Appellants' expressive activity that bears no relationship to regulatory costs, and (iii) burdens the ability of inmates and their family members to maintain contact without implicating safety concerns. *See* Appellants' Brief (hereinafter "Ap. Br.") at 44. Furthermore, *amici* assert that because there are no equivalent means of communication available to inmates that can preserve familial relationships in the way that the telephone can, the imposition of the DOCS' tax on telephone calls creates a unique burden on prisoners and their families.

**i. The Appropriate Standard for Review is Traditional First Amendment Analysis.**

As noted above in Section I(a), *supra*, it is the First Amendment rights of the family members who choose to accept the collect calls and subsequently pay for them that are truly implicated by the imposition of the illegal DOCS tax. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 414 [1974](requiring a challenged regulation be no more than "generally necessary" to a legitimate governmental interest) *See also Thornburgh*, 490 U.S. at 412 (n.10) *citing Houchins v. KQED, Inc.*, 438 U.S. 1, 12 [1978] (plurality opinion)(distinguishing *Martinez* as dealing with outsiders' right to *receive* communications from inside the prison, as opposed to outsiders' right to prison access).

This assertion by no means seeks to obfuscate the reality that these affected individuals are in communication with incarcerated individuals and that some deference to the security and management needs of correctional authorities is warranted. The rub in the instant case is that *no security concerns are implicated by the DOCS tax*. The tax in this case should, therefore, not be analyzed under the more deferential *Turner* standard, in which the court found the standard for review of prison regulations to be one in which “the regulation is valid if it is reasonably related to legitimate penological interests” because “such a standard is necessary if ‘prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.’” *Turner*, 482 U.S. at 89.

DOCS would have this Court believe that the fact that Appellants are not inmates should be of absolutely no consequence to the deference level applied to the instant case. *See* Respondent’s Reply Memorandum of Law (hereinafter “Res. Mem. of Law”) at 4. In defense of this position, DOCS cites three cases where courts apply the *Turner* standard to prison regulations, despite the claims having been brought by some one other than an inmate. *See Thornburgh*, 490 U.S. at 401; *See also, Overton v. Bazzetta*, 539 US 126 [2003]; *Hernandez v. McGinnis*, 272 F. Supp.2d 223 [W.D.N.Y. 2003].



The *Thornburgh* decision, however, is inapposite. While that case overruled the *Martinez* standard to the extent that it applied to incoming mail, it did not do so concerning outgoing mail. *See Thornburgh*, 490 U.S. at 414. Present in the former are security concerns which require deference to prison officials. *Id.* at 408–10. Those concerns are not as acute concerning outgoing mail, and for those correspondences the heightened scrutiny in *Martinez* went unchallenged.

The deference standard applied in *Thornburgh* is not afforded to prison officials simply for the asking. Rather, it is rooted in concerns peculiar to institutional security. *Thornburgh* involved the Court’s review of prison regulations that, pursuant to specified criteria, “authorized wardens to reject an incoming publication if it is found to be detrimental to [] security.” *Id.* at 401. In its decision, the Court maintained that the rule enunciated in *Turner* was founded in a prison’s security interest and in a warden’s expertise within that peculiar context: “we have been sensitive to the delicate balance that prison administrators must strike between order and security of the internal prison environment and the legitimate demands of those on the ‘outside’ who seek to enter that environment, in person or through written word.” *Id.* at 407. Deference was rooted in the concern “that certain proposed interactions, though seemingly innocuous to laymen, have

potential significant implications for the order and security of prison.” *Id.* at 408. Noting the “difficult and delicate problems of prison management,” the Court ceded deference to prison officials “who, **in the interest of security**, regulate the relations between prisoners and the outside world.” *Id.* (emphasis added). Security concerns were at issue in *Thornburgh* because the publications received from the outside could be circulated within the prisons: “The problem is not ... the individual reading the materials in most cases. The problem is the material getting into the prison.” *Id.* at 413. The Court made clear that such deference was not to be extended beyond its moorings in the security interests of prisons, and parsed out a distinction between incoming and outgoing communications, which did not pose such a threat:

Furthermore, we acknowledge today that the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence. As we have observed, outgoing correspondence was central to our focus in *Martinez*. The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. *Id.* at 414.

Both *Overton v. Bazetta*, and *Hernandez v. McGinnis*, like *Thornburgh*, are cases that apply the *Turner* standard to security concerns and, like *Thornburgh*, have no application to the concerns before this Court. Rather, the danger posed here is not the phone communications between

loved ones and inmates, but Respondent's expansive reading of the government's power to restrict protected speech. The restriction placed on First Amendment speech here is a surcharge (or, as put less politely by the *Byrd* Court, "a kickback," *Byrd v. Goord*, 2005 WL 2086321 at \*9) imposed so that DOCS may generate revenue for its Family Benefit Fund. It does not set out to restrict speech that threatens the prison environment, but arbitrarily constricts all speech for which an exorbitant fee is not paid. While security concerns may be within the purview of wardens, raising funds from society is not. Matters of raising revenues or taxing the public must be done with a particularized concern for which segment of the citizenry is to pay the surcharge or tax. Such concerns are particularly acute when they limit First Amendment expression and, consequently, lend little room for deference when unelected government officials, inexperienced in such matters, are levying the fee.

The restrictions on such expression here are nearly bottomless. They are the product of an exclusive contract with MCI. The fees are not tied to the phone rate. The Public Service Corporation (hereinafter "PSC"), which found only 42.5% of the total charge to be reasonable, lacks the jurisdiction to review the other 57.5%. Untied to the costs of services, subsequent contracts and kickbacks can endlessly tighten the noose on First Amendment

speech, tying surcharges for phone use to ever-expanding, yet uncanalized, claims for general prison funds. Importantly, the officials who set these fees are not answerable to the PSC or the electorate.

Simply put, the principles of taxation and equitable burdening of the citizenry are far beyond the scope of the prison authority's experience.

Rather, it is the legislature and the Court's domain to determine what constitutes a fair tax. As there are no security concerns associated with the DOCS tax,<sup>14</sup> this Court should be advised by cases such as *Pitts v.*

*Thornburgh*, 866 F.2d 1450 [DC Cir. 1989]. There, the D.C. Circuit found that *Turner* applied only "to cases involving regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prisons." *Id.* at 1453. Similar to the instant case, the regulation in *Pitts v. Thornburgh* "challenge[d] general budgetary and policy choices," not security concerns, and the court found it appropriate to apply traditional intermediate scrutiny in analyzing the validity of the regulation. *Id.* at 1454. *See also Beauchamp v. Murphy*, 37 F.3d 700, 704 [1<sup>st</sup> Cir. 1994]; *Jordan v. Gardner*, 986 F.2d 1521, 1530 [9<sup>th</sup> Cir. 1993].

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<sup>14</sup> DOCS attempts a weak connection between some inmates' use of telephones for criminal enterprises and the need for DOCS to address such security concerns. Res. Mem. of Law at 5. But, the contract, purely a revenue raising devise, simply does not address these concerns. Because it cannot justify the connection between the tax, which applies to every phone call, and any criminal use of telephones their arguments for a lesser standard must fail.

The 57.5% surcharge, or unlawful tax, simply cannot withstand scrutiny. The surcharge itself unduly restricts protected speech and is unrelated to the cost of the phone service. *Amici* are thus arbitrarily denied access to loved ones who are in prison (and who may well be in pursuit of their liberty through our court system, *supra* at 33 to 49) based on fees that are imposed at the whim of unelected government officials negotiating an exclusive contract. As Appellant’s Brief (Ap. Br. at 45) makes plain, “while government may assess a fee to recoup the costs incurred in regulating expressive activity, *Cox v. New Hampshire*, 312 US 569, 577 [1941], it may not impose a fee that bears no relationship to those cost.” (*See Murdock v. Pennsylvania*, 319 U.S. 105 [1943].”

**ii. Even though Turner is The Incorrect Standard, and More Permissive to Correctional Authorities, the DOCS’ Tax *Still* Fails to Survive its Deferential Analysis**

Even if the Court believes that the applicable standard is that articulated in *Turner v. Safley*, the DOCS’ tax still cannot survive its deferential analysis. Specifically, the *Turner* standard asks: (i) whether there is a rational connection between the regulation and the government interest; (ii) whether there are alternative means available to the prisoner of exercising the affected right; (iii) the impact accommodation of the

constitutional right will have on guards and other inmates; and (iv) that the absence of ready alternatives is evidence of a regulation's reasonableness. *Johnson v. Wilkinson*, No. 94-3016, 1994 U.S. App. LEXIS 33844, at \*9 [6th Cir. Nov. 30, 1994] (*quoting Turner*, 482 U.S. at 89-91). First, as Appellants correctly assert, the court need not engage in extensive analysis or balancing as the DOCS tax does not relate to the functioning of a prison. Ap. Br. at 48. Indeed, this issue was already correctly resolved by the court in *Byrd v. Goord* which found, when examining *precisely the same tax* at issue in the present case that:

Although under *Turner*, prison regulations are upheld, despite their infringing character, if they are "reasonably related to legitimate penological interests," 482 U.S. at 89, the 58.5% commission here is not such a prison regulation. [] Receiving an alleged "kickback" from an additional fee added to the reasonable rate for collect calls, made by inmates to family members and those individuals providing counseling and professional services, is neither a rule nor regulation related to the functioning of a prison. *Byrd*, 2005 WL 2086321 at \*9.

Secondly, as demonstrated in Section II, *supra*, and by the case examples below, the telephone is an irreplaceable means of communication and was often the only method whereby *amici* were able to maintain familial relationships. It is irrefutable that we live in a telephone-oriented society. The overwhelming prevalence, usage and affordability of cell phones, pay phones, and land lines, make it impossible to underestimate the importance

of phone contact to modern communication. Although one might plead that letter writing still exists as an alternative to telephone communication, it is simply not an excessive statement to say that as a society we simply no longer use the post for primary communication, as the quality of telephone communication – encompassing both verbal and auditory information exchanged in real time – dwarfs that of letter-writing.<sup>15</sup> Furthermore, relying on letter writing to communicate effectively is not an option for inmates or family members who suffer from any one of a host of common medical conditions that would complicate or preclude writing: physically limiting conditions like arthritis, peripheral neuropathy (commonly associated with diabetes), carpal tunnel syndrome, parkinsonism, tremor, and stroke; conditions that limit visual acuity such as macular degeneration and cataracts; or other conditions such as dyslexia or mental retardation. In addition, educational deficiencies, such as illiteracy, would greatly limit the ability to communicate with the same fluency as by telephone. Finally, as outlined in Section II, *supra*, visiting is often impossible for many of the relatives of prisoners. Therefore, because there was no other way for family members to communicate with inmates by telephone except via the

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<sup>15</sup> The United States Postal Service has reported sharp declines in revenue and First Class Mail volume, which it expects to continue because of the substitution of electronic technologies for traditional mail. *See* <http://www.usps.com/financials/pdf/Q12004QtrlyReport.pdf>. (last visited November 29, 2006)

MCI/DOCS system, there truly are no legitimate alternative means of exercising those rights.

There would be no adverse impact related to the suspension of the tax on either the guards or the inmates as there *are absolutely no identifiable security or safety concerns* associated with its imposition. *See Byrd, 2005 WL 2086321 at \*9* (finding that the same tax “does not involve matters of security or safety, which have traditionally been held to the *Turner* standard”). Rather, one can only envision the positive benefits associated with eliminating the tax, such as fewer inmate grievances regarding the cost of phone calls and thus less anger at the correctional institution, as well as less tension between family and inmates. The Court’s elimination of the tax would maximize the ability of inmates to use telephones to contact their relatives, increasing the value of phone privileges to inmates. Since both *amici* and the DOC already believe that “the possibility of losing phone privileges [seems] to aid in fostering positive inmate behavior and maintaining prison security,”<sup>16</sup> eliminating the tax and increasing the desirability of that privilege would actually make the prison safer for both correctional officers and inmates.

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<sup>16</sup> *See* DOCS Position Paper, note 4 *supra*, at 1.



Furthermore, it is impossible to underestimate the importance of phone privileges in reducing recidivistic behavior. As noted above in section I, *supra*, numerous studies have shown that constant contact between inmates and family is integral to keeping a former prisoner from re-offending. *Amici*, who work with inmates who are also parents, are particularly aware of the power this connection can have in determining whether an inmate will return to prison. *Amici* aver that former inmates convicted for drug offenses who have children will often cite their family as a reason to make sure they stay out of trouble. *Amici* believe that those inmates who best preserve the parent-child relationship while in prison, who speak to their children by telephone constantly and stay present in their lives, are the ones post-release, who stay clean and rehabilitate most successfully.

*Amici* also agree with Appellants that there are easy alternatives to the current system engaged in by the DOCS – most obviously, the same system with the same security measures, but minus the DOCS tax. Ap. Br. at 49. Appellants also offer several other plausible alternatives, such as a debit card system (currently utilized by the Federal Bureau of Prisons), which would also satisfy the security concerns addressed by the collect call system. *Id.* at 49–50.

Finally, it should be of particular concern to the Court that the impact on Appellants' First Amendment rights is directly correlative with their financial affluence. While more wealthy families will be able to absorb the cost of the tax and ostensibly enjoy unfettered phone communication with their incarcerated relatives, the poor, who compose the majority of the inmate population, are disproportionately affected by this tax. This systematic discrimination against efforts by the relatively disadvantaged to communicate with their families cannot be abided. In the past, the Supreme Court has taken such considerations into account in adjudicating the First Amendment rights of the financially deprived. *See, e.g., Martin v. Struthers*, 319 U.S. 141, 146 [1943] (striking down ban on door-to-door distribution of circulars in part because the mode of distribution was "essential to the poorly financed causes of [the speakers]"); *Marsh v. Alabama*, 326 U.S. 501 [1946].

**c. The Imposition of the DOCS' Backdoor Tax Used To Fund Other Government Programs is a Violation of the Separation of Power Doctrine and Due Process Rights.**

The impermissible restrictions on the First Amendment described above become even more indefensible when coupled with the reality that the DOCS surcharge is actually a backdoor tax. Indeed, given the DOCS' belief in the importance of family in successful rehabilitation, and their recognition of the "legitimate needs of the inmates and their loved ones [to

communicate],”<sup>17</sup> it seems stunning that they would choose to place on the backs of some of the poorest of New York State taxpayers an additional, unlegislated and illegal tax that irreparably damages their ability to maintain communication. *Amici* fully agree with appellants’ assertions that the DOCS telephone tax is: (i) an unlegislated tax in violation of Articles I, III and XVI of the State Constitution; (ii) a taking of Appellants’ property without due process of law in violation of Article I Sections 6 and 8 of the State Constitution; (iii) a violation of Appellants’ right to equal protection guaranteed by Article I, Section 11 of the State Constitution; and (iv) a violation of Appellants’ speech and association rights guaranteed by Article I, Section 8 of the State Constitution.

**i. The DOCS Surcharge is an Illegal Backdoor Tax that Violates Separation of Powers and Due Process**

DOCS does not contest that through its contract with MCI, “New York’s taxpayers [are paid] a commission rate equal to 57.5 percent of the gross profits on calls placed through its system” and that to finance this “commission,” the family members of inmates are assessed an additional surcharge of \$3.00 for every call accepted. (R.33). This money is then remitted to DOCS and used to pay in small part for the operation and maintenance of phone equipment, but primarily to “finance some inmate

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<sup>17</sup> *Id.*

privileges for which taxpayers and legislators have expressed an unwillingness to spend tax dollars.”<sup>18</sup>

First, it is abundantly evident that the DOCS fee should be characterized as a tax, rather than a fee or a commission. The distinction between taxes and fees has been addressed in numerous Federal and New York cases. “One of the characteristics of a tax as opposed to a fee is that a tax is an exaction for public purposes rather than a voluntary payment for a private benefit.” *Kessler v. Hevesi*, 2006 WL 1915115 at \*7 [N.Y. Sup. June 28, 2006] citing *In re Jenny Lynn Min Co*, 780 F.2d 585, 589 [6th Cir.1986]; see also *US v. City of Huntington, West Virginia*, 999 F.2d 71, 73 [4th Cir. 1993] (“[u]ser fees are payments given in return for a government-provided benefit”).

New York law is consistent with the standard set forth in the Federal courts. *Id.* “Simply stated, taxes are burdens of a pecuniary nature imposed for the purpose of defraying the costs of government services generally ... while fees have been characterized as the visitation of the costs of special services upon the one who derives a benefit from them.” *New York Telephone Co v. City of Amsterdam*, 200 A.D.2d 315, 317 [3rd Dept 1994], quoting *Jewish Reconstructionist Synagogue of North Shore, Inc v.*

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<sup>18</sup> *Id.* at 4.

*Incorporated Village of Roslyn Harbor*, 40 N.Y.2d 158, 163 [1976], and citing *Joslin v. Regan*, 63 A.D.2d 466 [4th Dept 1978], aff'd 48 N.Y.2d 746 [1979].

Several factors help establish that the surcharge at issue in the instant case is a tax rather than a fee. First, “this is not a situation where an individual requests a service from the government and voluntarily pays money in order to receive that service, *which service is of direct benefit to the individual rather than to society as a whole.*” *Kessler*, 2006 WL 1915115 at \*9 (emphasis added). Rather “the surcharge is clearly an enforced contribution intended to raise revenue for the purpose of defraying government costs generally and benefiting society as whole.” *Id. See also, New York Telephone Co v. City of Amsterdam*, 200 A.D.2d 315, 317 [3rd Dept 1994]. Indeed, only 1.5% of the revenue that DOCS receives from the surcharge is used to cover costs related to the operation of the prison telephone system. (R.102). The State admits that the existence of the Family Benefit Fund (to which the remaining 98.5% of the profits from the surcharge are allocated), “allows the state budget to address a second area: financing some inmate privileges for which taxpayers and legislators have expressed an unwillingness to spend tax dollars.”<sup>19</sup> Clearly then the DOCS

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<sup>19</sup> *Id.*

surcharge is a tax directly related to defraying general government costs for which the legislature would otherwise have to expend money from other budgetary resources.

**ii. The DOCS Tax Violates Separation of Powers and the Right to Due Process of Law.**

It is black letter law that the power to tax lies solely with the legislature. *NY Const, art III, §1; art XVI*. Although the legislature has the right to delegate tax powers to legislative bodies of municipalities and quasi-municipal corporations (*see Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie*, 81 NY2d 574 [1993] ), there is no evidence that the legislature has, by general law, delegated to the DOC the ability to raise revenue through taxation. Because the DOCS tax is unauthorized by the legislature, it violates the doctrine of separation of powers. *See Yonkers Racing Corp. v. State*, 131 AD2d 565 [1987].

Furthermore, *amici* completely agree with Appellants that “the tax also violates Appellants’ due process rights due to its unfettered nature and discriminatory application.” Ap. Br. at 40. First, in order to be compliant with due process requirements, a tax must be “accompanied by proper guidelines set by the legislature.” *Id.* Because the DOCS tax was never established by the legislature, there is absolutely no legislative oversight of

the amount of tax that can be levied.<sup>20</sup> The result is that DOCS is free to assess *any* amount that it chooses under the appellation of a “commission.” Indeed, the 57.5% “commission” appropriated by DOCS today could just as easily become 58% or 90% or 200% within the next few years as perceived “budgetary” needs dictate. It is quite easy to envision multiple scenarios in which the number of DOCS programs funded by the surcharge could be expanded to pay for any need that arises, or to cover budgetary shortfalls or fiscal mismanagement. For example, DOCS may eventually be required to fund a union pay increase or make capital improvements to its facilities, but not have set aside sufficient resources to do so. By simply using the tax to defray the cost, DOCS can create additional room in its own budget to pay for its expenditures, as well any frivolous or secondary desires (new uniforms, company cars) it chooses. If this Court approves the tax, it will be in essence providing DOCS with a blank check to fund whatever programs it desires, without the normal limitations placed on such expenditures by the will of the people and their elected representatives, and on the backs of the family members who have no choice but to pay, lest they lose connection with their loved ones in prison.

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<sup>20</sup> The Public Service Commission (hereinafter “PSC”), the agency that residents of New York State rely on to protect them from unfair phone rates, has also decided that it has no authority to regulate the ‘commission’ in question.

Further adding to the tax's constitutional infirmity is the fact that the family members of inmates who pay the tax do not receive *any unique benefit* from the Family Benefit Fund; rather, they pay additional monies for the general operating expenses of the DOCS so that it can fund programs without having to dip into its own coffers. Needless to say, there is *no logical connection* between the assessment of the DOCS tax for collect calls and the allocation of revenue by DOCS, making the tax constitutionally impermissible. *See, e.g., Foss v. City of Rochester*, 65 NY2d 247 [1985].

**d. Violation of Equal Protection Clause.**

A final disturbing consequence of the DOCS tax is that some of the poorest and most vulnerable members of the electorate are being used to pay for DOCS general expenditures so as to reduce the burden of other taxpayers. The equal protection clause forbids the selection of individuals for "discriminatory treatment by subjecting [them] to taxes not imposed by others of the same class." *Allegheny Pittsburgh Coal Co. v. County Comm'r*, 488 US 336, 345 [1989]. By creating two classes of taxpayers -- one that pays for additional Family Benefit Fund programs and another that does not -- without any legitimate state interest, DOCS has definitively implicated the equal protection rights of appellants.



If the classification burdens a fundamental right, “it must withstand strict scrutiny and is void unless necessary to promote a compelling State interest and narrowly tailored to achieve that purpose.” *Golden v. Clark*, 76 NY2d 618, 623 [1990]. As described in Section II (b), *supra*, amici have shown that the DOCS tax burdens the First Amendment rights of prisoners and their families. Not only has DOCS failed to articulate a “compelling state interest” related to the differing tax burdens, but DOCS also fails to state even a rational basis for the enactment. *Id.* at 624 (“If plaintiffs’ fundamental rights are not impaired, then the provision may be sustained if there is a rational basis for its enactment.”). As the *Byrd* Court explained, when examining the same tax at issue in the instant case:

The state defendants have offered no rational basis to justify placing the burden of this additional commission solely on the friends and families of inmates, and those individuals providing counseling and professional services, thereby charging them more per call than similarly situated collect call recipients.  
*Byrd*, 2005 WL 2086321 at \*9

This constitutional violation is particularly egregious. Not only can most of the family members of inmates ill afford any additional financial burdens; they are often singularly ill-equipped to protest the imposition an illegal tax. First, the family members of inmates often lack access to legal or political representation, as lawyers associated with their relatives’ cases (typically the only legal counsel with whom they are familiar) have moved

on to new clients. More importantly, most family members are highly reticent to lodge complaints against DOCS. They carry with them the devastating stigma of being associated with a convicted criminal, and often fear reprisals against their incarcerated relatives based on their advocacy against DOCS. The result is that most of these families suffer in silence, leaving them no choice but to either pay the bills or lose communication with their loved ones behind bars.

**e. Case Examples**

The following examples offer (i) the cases of five exonerees and their family members who directly experienced the DOCS tax in question, and (ii) the cases of two exonerees who, although not directly affected by the DOCS tax, have experienced the importance of telephone contact in maintaining family connections.

**i. The Experiences of Exonerees Incarcerated in New York On and After November 2003 Demonstrate How That Increase Dramatically Impacted the Quality of Their Communications with Family Members, and, Ultimately, Their Relationships and Life in Prison and After Exoneration.**

**a. Barry Gibbs**

On March 25, 1988, after a jury trial, Barry Gibbs was convicted of Murder in the 2<sup>nd</sup> Degree, and sentenced to twenty years to life. Barry was

painfully aware when the collect call increase came into effect because it made a difficult situation worse. His cash-strapped parents were sick, elderly, living on a fixed income, and could already barely afford to accept his single thirty-minute phone call each month. They corresponded primarily by mail, but Barry found it a poor substitute for those rare telephone calls. For Barry, just to hear his parents' voices meant everything, particularly when their health declined. He could tell how his mother was feeling through her voice: when it would quiver he would know she was doing poorly, or when it was strong he could tell she was feeling better. In fact, telephone calls were essentially the only time he had any personal contact with his parents. Due to their physical and financial limitations they were rarely able to visit and the last time they saw Barry before his release was 1995. Needless to say, when Barry was finally exonerated in September 2005, his transition back to society was both painful and difficult. His mother had died eight months before his release, his father passed away two months post-release. He had lost contact with almost all his other family members and friends, many of whom could only afford the call once a month. That frequency was painfully inadequate in the context of his mother's illness and death. Not surprisingly, Barry feels like everything has been taken away from him because of his wrongful incarceration, a tragic

situation exacerbated by the high cost of collect phone calls from New York State prison, which limited his ability to communicate and maintain relationships with the friends and family he would need most after his release.

**b. Jeff Deskovic**

In January 1991, 18-year-old Jeff Deskovic was convicted by jury of the 1st degree rape and 2nd degree murder of a 15-year-old classmate, despite DNA results showing that he was not the source of semen in the victim's rape kit. In January 2006, the Innocence Project took on Jeff's case. The semen from the rape kit was tested with newer technology for entry into the New York State DNA databank of convicted felons. In September 2006, the DNA profile was matched to convicted murderer Steven Cunningham, who was in prison for strangling the sister of his live-in girlfriend. On September 20, 2006, Jeff was released from prison when his conviction was overturned. Following an apology from the Assistant District Attorney, the court dismissed Jeff's indictment on the grounds of actual innocence on November 2, 2006.

Throughout the sixteen years that Jeff was incarcerated, he tried desperately to remain in contact with his family and friends. Like so many other prisoners, he found that letters were insufficient to provide him with

the emotional connections he needed. By the time letters were exchanged with his family, the thoughts and information contained within were no longer current. Also, the great distance between his family's residences and his correctional facilities meant that visits were infrequent, especially from his mother, whose vehicle (the only way she was able to travel to his prisons) was in constant need of repairs that she could ill afford to make. Ultimately, Jeff discovered that the best way for him to keep in contact with his family was by telephone. It was an easy, rewarding, and convenient method of contact that could still bridge what he sometimes felt to be a growing distance between himself and his family members. However, because cost was already an issue for both his family members and friends, when MCI prices suddenly skyrocketed in November 2003, communicating by telephone actually became painful. Jeff would feel guilty and inadequate when he would call, knowing how much it cost his family each month to accept the charges and recognizing that he had no money of his own to help subsidize the bills. This guilt would be reinforced when his mother, who was living on a fixed income, told him not to call as often or for so long. The result was that when Jeff called his family, specifically his mother, he would already have a list in his head of things he needed to discuss, so that he could fit everything he needed to say into as short a time as possible and

minimize the cost of the call. Ultimately, the most common subject of discussion became the work that Jeff needed family members, particularly his mother, to accomplish for his ongoing legal battles, and leaving little time to discuss personal issues. Jeff believes his relationship with his mother suffered greatly during this time. She would often ask him why he didn't ask about her life or tell her more about what was going on with him, faulting him for only wanting to talk about what he needed her to do for him. The high cost of phone service drove other cost-conscious family members, particularly his aunts and uncles, to refuse to accept his collect calls. The loss of the ability to contact these loved ones caused the relationships to wither, which hurt him greatly.

Not surprisingly, adapting to life post-release has been difficult for Jeff. He doesn't feel as though his family knows who he is as a person, nor does he feel that he knows them the way he would want. The long years of communication difficulties – caused in chief by the high cost of phone calls – have left Jeff without a vital support structure to help him adjust to a world that he doesn't quite understand.

### **c. Douglas Warney**

Douglas Warney was convicted in 1997 of second degree murder and sentenced to 25 years to life in prison. The Innocence Project and Donald M.

Thompson began working on Douglas' case in 2004 and sought DNA testing of blood from the remaining evidence. The DNA profile recovered from biological material matched Eldred Johnson, Jr., a New York state inmate already serving a life sentence for other crimes, who eventually confessed to the murder for which Douglas was sentenced. On May 16, 2006, Douglas' conviction was vacated and he was released from prison.

While he was incarcerated, Douglas had particular need for family support due to his limited education, mental health issues, and other illnesses brought on by advanced AIDS. However, his Rochester-based family was sorely curtailed in their ability to travel the long distances required to visit him. For example, when Douglas was incarcerated at the Clinton Correction Facility, his family would have to drive eight hours each way in order to visit him. These long car rides were particularly difficult for his sister Audrey -- who suffered such severe chronic back pain that she required surgery while her brother was in prison -- and for his mother, who was diabetic and suffered from urinary retention. The visits were understandably infrequent. Furthermore, phone calls, although extremely desirable, were often cost-prohibitive -- even before the MCI rate hike in November 2003. Because of her limited single income, Audrey was unable to maintain long distance phone service and could only communicate with her brother by

mail. Douglas was occasionally able to call his other sister, Debbie, but she had to ask her brother to keep his phone conversations limited to ten minutes or less, so that she could afford to pay her phone bill at the end of the month. There were also instances where Douglas would call other family members, only to have his phone calls refused, he was told, because of the high cost.

Because of the limited contact that Douglas had with family members, his readjustment to society has been understandably difficult. The inability of the family to afford his phone calls made Douglas feel like they had abandoned him while he was in prison, and, according to both Audrey and Douglas, he needed time to work out his anger at the family when he was exonerated. Douglas, Debbie and Audrey agree that because most of their contact was in writing, they were unable to experience the same level of emotional contact they would have had if they had been able to speak more often by telephone. Audrey particularly feels like it was “hard when Douglas came out because [she] hadn’t been able to talk to him [by telephone] in prison.”

#### **d. Scott Fappiano**

In 1985, Scott Fappiano was convicted of the brutal rape and assault of the wife of a New York City police officer. He spent the next 21 years in a host of New York State correctional institutions until post-conviction DNA



testing proved his innocence in 2006. Scott, who remained steadfast in his belief that he would someday be vindicated, worked assiduously throughout his incarceration to make sure that he remained deeply connected to his large family and his Brooklyn and Staten Island community, so that when he did go home, the passing time would not erode his ability to re-assimilate.

However, because Scott was, for the most part, incarcerated in upstate New York facilities – some more than 8 hours outside the city by car -- family members – especially his mother, Rose, who suffers from emphysema– were severely limited in their ability to visit him. Indeed, Mrs. Fappiano would have to rely on family members for rides in order to visit her son, because she was unable to transport her oxygen tank by bus. Scott also felt that letters, while always welcome, didn't provide him with the kind of interaction he needed to remain a real presence in his family; a phone call or a visit was “a thousand times more personal,” allowing him to directly feel the emotion of the person with whom he was communicating. Furthermore, he found the mail to be frustratingly slow; often by the time a letter arrived – whether it was bringing family news or an update about his fight for innocence – its content had been superceded by an intervening event. It was ultimately through frequent collect phone calls to his extended and close kin that Scott discovered a milieu he felt allowed him to really *participate* in his

family, and stay fully present in a world he anticipated someday rejoining. Indeed, relatives were often stunned by the fact that Scott knew more about current family events than they did, and actually received some of their neighborhood gossip from him.

Accordingly, Scott and his family were drastically affected by the increased cost of collect calls around November 2003. Rose Fappiano suddenly found herself paying approximately \$50.00 more per month per phone call and, due to her limited finances, was forced to ask Scott not to call as frequently. The result was that Mrs. Fappiano experienced episodes of panic during Scott's prolonged absences from calling, because she had no other immediate way of knowing that he was all right. Scott tried not to call his mother so often, because he too worried about the increased cost. Further complicating his contact with family members was the fact that MCI would block collect calls to persons who were late in paying their telephone bill -- an amazingly common occurrence after the rate hike. Indeed, Scott remembers that at one time, each of the 15 members of his call list was blocked from receiving his phone calls.

**e. Alan Newton**

In May 1985, Alan Newton was convicted of rape, robbery, and assault charges stemming from a brutal attack on a young woman in the

Bronx. In 2005, at the Innocence Project's request, the district attorney's office located the victim's rape kit after an exhaustive search. Post-conviction DNA testing on the remaining biological material proved conclusively that Alan was not the perpetrator of this crime. Alan was exonerated in July 2006 after spending 22 years in prison for a crime he did not commit.

During his many years of wrongful incarceration, the telephone became a "life line" for Alan. It allowed him to preserve his tight knit family connections in prison in a way for which other methods of communication available to him – writing or visitation – fell short. For example, when there were feelings or emotions that he needed to unburden, a phone call from home was like "a personal touch" that was both immediate and heartwarming. Over the telephone, Alan was able to learn about the minutiae of everyday events, help resolve disagreements between family members as they occurred, and keep abreast of the important occurrences in his family's life.

Although Alan enjoyed receiving mail, he would dread the wait that a response to one of his letters would require – after sending a letter he would often feel himself "burning up" with worry that there would be no response at all. A letter also lacked the spontaneity of a phone call, and Alan felt as if

he was better able to express his fears, anxieties, as well as his love for his family, when he was able to talk to them – rather than trying to capture those powerful sentiments by letter. Furthermore, although visits from relatives were an irreplaceable aspect of maintaining familial connections, the physical distance between his relatives' homes in New York City and his upstate prison facilities meant that visits were sporadic, and for some of his more elderly relatives, impossible. Indeed, when Alan was incarcerated in Attica, he actually discouraged family members from visiting him at all, because he was reticent to have his loved ones travel the 16 hour round trip between the prison and their homes, only to arrive at a facility always ill-equipped to handle the number of visitors, and have their visiting time drastically curtailed.

Not surprisingly, before, and even more so after the MCI rate hikes in 2003, the high cost of telephone service severely limited the Newton's ability to preserve their deep family ties. Raymond Newton, one of Alan's brothers, recalls spending as much as \$125.00 per month on telephone calls solely from Alan – the same amount he spent on his car payment -- and paying other bills, such as credit cards, late so that he could keep the phone active. Despite his best efforts to maintain an open phone line for his brother, both through setting money aside for this purpose and contacting

MCI multiple times regarding charges he believed were extraneous, he reports that it became too much, and he stopped paying his MCI bill. As a result, around 1999, Raymond's ability to receive collect calls from New York State prisons was discontinued. That left Alan's other brother Anthony ("Tony"), responsible for making sure that Alan always had a phone that he could call. Tony remembers promising Alan that "if I don't do anything else, I'm going to keep the phone on for you." That promise was sorely tested after the rate hike in November 2003, when skyrocketing prices made it difficult for Tony, and the rest of Alan's family who could still receive phone calls, to afford service. Alan learned that the best way to help his family was to become disciplined about spreading his phone calls throughout his large family – calling his brother one week, a nephew or niece the next, and allowing them to pass information to the rest of the family. The result was that Alan was able to experience with his family the changes they went through during his incarceration and to be present and active to the fullest extent possible in their lives. Indeed, Alan remembers that speaking to his family by telephone was often "the next best thing to being home."

- ii. The general experiences of exonerees and their families demonstrate the importance of phone communication to maintaining family connections.**

**a. Eddie James Lowrey**

In 1981, nineteen-year-old Eddie James Lowery became a suspect in the rape and assault of an elderly woman after being involved in a traffic accident near the victim's house. He was convicted in January 1982 of rape, aggravated burglary, and aggravated battery and sentenced to 11 years to life in prison. He served 10 years of that sentence and was released on parole in 1991. Lowery was able to procure DNA testing on the remaining biological evidence in 2002, and was excluded from being the contributor. In April 2003, the District Court of Riley County, Kansas, vacated the judgment and conviction based on these results.

Because Eddie was incarcerated in Kansas and his family resided on the West Coast, visits from his family were almost impossible – indeed, his parents didn't visit him until his fourth year of incarceration – so there was no way for him to enjoy any sort of intimate family contact, except to speak to his relatives by telephone and by sending and receiving letters. Although Eddie cherished the letters he received – sometimes reading them three or four times -- it was through phone calls, and being able to hear his parents' voices that he felt truly able to separate himself from the prison mentality he had been forced to adopt, and relate to his parents as a son, instead of an inmate. It is unsurprising, therefore, that Eddie characterizes his collect calls

from prison as a “life support system” and credits them with saving his relationship with his parents.

**b. John Restivo**

In 1986, John Restivo was convicted of the rape and murder of a sixteen-year-old girl in Lynbrook, New York. After spending almost seventeen years in prison, John was released on June 11, 2003, after biological evidence preserved from the crime scene excluded him as the perpetrator of the crime.

For John's mother, Frida Restivo, the seventeen years of his incarceration felt like a prison sentence for her as well. She was constantly worried about the well-being of her son – she feared there might be reprisals against him by other inmates him due to the nature of his crime (his conviction was for the violent rape and murder of a teenage girl), and she worried that his incarceration might alter him into a person that she would no longer recognize. Further exacerbating her anxiety was the fact that during his incarceration at the Clinton Correctional Facility, she was separated from her son by almost a sixteen hour round trip drive. As a result, she was able to visit him only once in the initial four to five years of his incarceration. Although she was finally able to visit him on a more frequent basis after his transfer to the Green Haven Correctional Facility, she believes that they might have lost touch with each other had she not had the ability to



speak to him by telephone throughout his incarceration. Frida relished those occasional phone calls – especially since hearing his voice on the telephone would temporarily assuage her anxiety and allow her to peacefully enjoy her mother-son relationship with him. Because of the immense value that she placed on those phone calls, Frida, a widow on a fixed income, sometimes ate nothing but soup and hot dogs to make sure that she would be able to pay her phone bills, which were in the hundreds of dollars. John notes that life post-exoneration was difficult – he emerged into a totally different world replete with technology he was unfamiliar with, cultural references he didn't understand, and insecurity about what he was going to do with the rest of his life. John credits the strong relationship he maintained with his family in prison, for making sure that this difficult transition was successful, and relied on their love and patience to help him make that difficult adjustment.

## CONCLUSION

For the foregoing reasons, *amici* urge this court to reverse the decision of the appellate court, and grant the relief sought in Appellant's Brief.

Dated: December 1, 2006  
New York, New York

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