

COURT OF APPEALS
STATE OF NEW YORK

A.D., Third Dept. Docket
No.98700

-----X
IVEY WALTON, et al.

Appellants,

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et al.

Respondents.
-----X

BRIEF OF *AMICI CURIAE* THE LEGAL AID SOCIETY OF THE CITY
OF NEW YORK, CENTER FOR LAW AND SOCIAL JUSTICE OF
MEDGAR EVERS COLLEGE, AND THE BRONX DEFENDERS, IN
SUPPORT OF APPELLANTS

STEVEN BANKS
JOHN BOSTON
MILTON ZELERMYER
The Legal Aid Society
Prisoners' Rights Project
199 Water Street, 6th Floor
New York, NY10038
(212) 577-3530

ESMERALDA SIMMONS, Director
Center for Law and Social Justice

ROBIN STEINBERG
The Bronx Defenders

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	5
ARGUMENT	6

TABLE OF AUTHORITIES

CASES

<i>Allen v. Blum</i> , 58 N.Y.2d 954 (1983)	9
<i>Burke v. Sugarman</i> , 35 N.Y.2d 39 (1974)	8, 10
<i>In the Matter of Cahill v. Public Service Commission</i> , 113 A.D.2d 603 (3d Dept. 1986), <i>aff'd on other grounds</i> , 69 N.Y.2d 265 (1986)	9
<i>In the Matter of Zuckerman v. Board of Education</i> , 44 N.Y.2d 336 (1978)	9

OTHER SOURCES

New York State Bar Association, <i>RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY</i> (May 2006)	9
New York State Dept. of Correctional Services, <i>HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2006</i> (June 2006)	7

INTEREST OF *AMICI CURIAE*

The Legal Aid Society is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for 130 years. Through its **Prisoners' Rights Project (PRP)**, the Society seeks to ensure that prisoners are afforded full protection of their legal rights. The Society advocates and litigates on behalf of prisoners in New York State prisons and New York City jails, and where necessary, engages in class action litigation to remedy unconstitutional, unlawful, and inhumane prison conditions, including inadequate medical and mental health treatment, mistreatment, brutality, and sexual abuse of prisoners, and discrimination based on disability. In PRP's capacity as counsel and advocate, we rely heavily on telephonic communication with state prisoners, many of whom have poor to no writing and reading ability and cannot communicate effectively in writing.

There are two organizational appellants - Office of the Appellate Defender (OAD) and New York State Defenders Association (NYSDA). The Legal Aid Society is also an organization but differs from OAD and NYSDA in that we represent prisoners in class actions and other types of challenges to unconstitutional or unlawful conditions of confinement. PRP's state prison litigation docket includes: *Amador v. Andrews*, 03 Civ. 0650 (S.D.N.Y.) (sexual assault of women prisoners by correctional officers); *Milburn v. Goord*, 79 Civ. 5077 (S.D.N.Y.) (medical care at

Green Haven Correctional Facility); *Inmates of NYS with HIV v. Pataki, et al.*, 90 CV 252 (N.D.N.Y.) (statewide action challenging medical treatment for HIV-positive prisoners); *Rosario v. Department of Correctional Services*, 03 Civ. 0859 (S.D.N.Y.) (Americans with Disabilities Act and Rehabilitation Act challenges to exclusion of disabled prisoners from programming); *Clarkson v. Coughlin*, 91 Civ. 1972 (S.D.N.Y.) (failure to provide reasonable accommodations for hearing impaired prisoners); *Disability Advocates, Inc. v. Office of Mental Health*, 02 CV 4002 (S.D.N.Y.) (challenge to adequacy of mental health treatment); *Anderson v. Goord*, 87 CV 141 (N.D.N.Y.) (challenge to adequacy of mental health treatment for prisoners in disciplinary housing units at Attica and Auburn Correctional Facilities). In these cases collectively, PRP represents many thousands of prisoners throughout the state prison system.

In addition to litigation, in its role as advocate and advisor to incarcerated individuals, PRP receives correspondence and collect calls from inmates all across New York State, from virtually all correctional facilities. PRP's provision of services to prisoners has been affected adversely by the exorbitant telephone charges and by the vagaries of MCI's billing practices related to receipt of collect calls from inmates in state correctional facilities, particularly arbitrary monetary limits which lead to

telephone service blockages. Such limits are reached in an accelerated fashion due to the inflated rates imposed on the bill payer.

The original petition in the action below sought class certification, and if the case is reversed, remanded, and permitted to go forward, and if the class is certified as defined in the petition, The Legal Aid Society would be a member of the class.¹

On July 5, 2006, this Court granted The Legal Aid Society's motion for leave to appear *amicus curiae* in support of appellant's motion for leave to appeal and accepted as filed the brief submitted with that motion. The Legal Aid Society previously participated as *amicus curiae* in *Sanchez v. State of New York*, 99 N.Y.2d 247 (2002).

The **Center for Law and Social Justice (CLSJ)** is a unit in the School of Professional and Community Development at Medgar Evers College of the City University of New York. Founded in 1985 by means of a New York State legislative grant, the mission of CLSJ is provide quality advocacy, training, and expert services in a personal manner to people of African descent and the disenfranchised. CLSJ seeks to accomplish its mission by conducting research and initiating advocacy

¹Paragraph 67 of the Verified Petition defines the class as "Bill payers who from April 1, 1996 to the present have been billed for collect calls from inmates confined in DOCS facilities."

projects and litigation on behalf of community organizations and groups that promote human, national and international understanding. CLSJ sponsors advocacy projects and litigation in areas as diverse as housing and employment, police and racial violence, public education, voting rights, immigration, and United States human rights violations.

Many of the individuals who seek legal advice or other assistance from CLSJ were formerly incarcerated or have family members who are incarcerated. CLSJ also regularly receives correspondence from prisoners seeking legal assistance. Through its Creating Justice Project, CLSJ works to educate incarcerated persons awaiting trial and formerly incarcerated persons about their voting rights, as well as the community generally. CLSJ served as co-counsel to the plaintiffs in *Hayden v. Pataki*, 99 F.3d 305 (2d Cir. 2006), which challenged, *inter alia*, the denial of the right to vote of incarcerated persons and parolees.

The Bronx Defenders is a holistic public defender office that brings together interdisciplinary work groups combining criminal defense and civil lawyers, client advocates, investigators, and family court advocates in order to address not just the immediate criminal case, but the host of issues that drive its clients into the criminal justice system. Based on its work with its clients, The Bronx Defenders know that staying connected to families provides significant support for its clients while they

are incarcerated and serves as a critical component of their re-entry. The Bronx Defenders do not believe its incarcerated clients should be charged more than the average consumer to call their loved ones.

STATEMENT OF THE CASE

This case involves the extraordinarily high collect call telephone rates paid by family members, friends, attorneys and other advocates, including The Legal Aid Society, and other recipients of telephone calls from prisoners in the custody of the New York State Department of Correctional Services (DOCS). The rates are higher than any collect call rates paid by anyone else in the State under any circumstances to our knowledge, as a result of a commission paid by the telephone carrier to DOCS, which comprises 57.5% of the total cost of the calls.

We rely upon the statement of facts and procedural history as set forth in appellants' Brief, at pages 4 through 9. On January 19, 2006, the Appellate Division, Third Department, affirmed the judgment of Supreme Court, Albany County, which granted respondents' motion to dismiss. The Appellate Division held that any challenge to the rates must be pursued via Article 78 proceeding rather than declaratory judgment action, and had to have been brought within four months of the initial approval of the rates, notwithstanding that some of the plaintiffs were not affected by them during that brief period and had no opportunity to bring such a

challenge, even though they must now pay the rates as long as they are in effect. Appellants' motion for permission to appeal was granted on July 5, 2006. On the same day, this Court granted the motion of The Legal Aid Society to appear *Amicus Curiae* in support of appellants' motion for permission to appeal and accepted the *Amicus* brief in support of appellants' motion. Oral argument is calendared for January 9, 2007.

ARGUMENT

The Court should reverse the Judgment of the Appellate Division, Third Department. The decision below protects a practice that unfairly and disproportionately impacts poor or low-income individuals and families, and impairs the ability of legal services organizations to provide representation, legal advice, and other assistance to prisoners.

The telephone system, access to which is controlled by the Department of Correctional Services (DOCS), is frequently the most effective and practical, if not exclusive, means by which state prisoners contact and communicate with PRP staff. Approximately half (48.5%) of the New York State prison population lacks a high school or GED diploma.² Twenty (20) percent of the population possess a reading

²NYSDOCS population on January 1, 2006, was 62,553.

ability below a sixth-grade level, and 34.4% read at or below an eighth-grade level. NYSDOCS, *HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2006* (June 2006), at 45-47. Most New York State prisoners are incarcerated in prisons too remote for PRP staff, and other New York City-based legal services and prisoner advocacy organizations, to visit. There are seventy DOCS facilities, but only seven are located in the New York City hub, comprising only 6% of the prison population. Bedford Hills Correctional Facility for women and Sing Sing Correctional Facility for men, both situated in Westchester County, are the only New York State maximum security prisons within a seventy-mile driving distance from our offices in New York City.

PRP accepts collect calls from New York State prisoners who are clients in our litigation or are seeking advice and information regarding their rights. Performance of this part of our practice has a costly impact. Accounting records of The Legal Aid Society show that since January 1, 2002, \$47,965 has been paid to MCI in payment for collect calls accepted from DOCS prisoners. Based on the 57.5% commission rate, The Legal Aid Society, in providing services to state inmates, has thus provided a subsidy to DOCS operating funds amounting to \$27,580.

Our principal concern as *amici curiae* is that the lower courts employed an incorrect legal standard that would, if permitted to stand, preclude judicial review of

meritorious claims of unlawful or unconstitutional practices and policies of state agencies and their officials, which contributes in this case to higher costs of doing business, diminished ability to provide services, drastic reduction in the opportunities for prisoners and their families to maintain contact, and severe impairment of the ability of prisoners to re-enter and re-integrate into society.

With regard to the statute of limitations issues presented here, appellants are correct that the Appellate Division's holdings – that continuing billings constituted mere effects of past wrongful conduct rather than unlawful acts themselves, and that a State agency's unlawful collection of money was not a proper subject for a declaratory judgment action – ignored settled law from this Court as well as its own precedent in misapprehending and misapplying the continuing violation doctrine and the distinctions between Article 78 certiorari actions and declaratory judgment actions. *Burke v. Sugarman*, 35 N.Y.2d 39, 45 (1974) (Article 78 challenge to unlawful promotion practices was not untimely because “failure to comply with constitutional requirements [was] a continuing and unconstitutional wrong”); *In the Matter of Cahill v. Public Service Commission*, 113 A.D.2d 603 (3d Dept. 1986), *aff'd on other grounds*, 69 N.Y.2d 265 (1986) (challenge to constitutionality of PSC policy and rate order allowing pass through to telephone customers of charitable contributions was timely because of “continuing violation”); *Allen v. Blum*, 58

N.Y.2d 954, 956 (1983) (declaratory judgment action, rather than Article 78 is appropriate vehicle for challenge to agency’s continuing policy); *In the Matter of Zuckerman v. Board of Education*, 44 N.Y.2d 336, 343-344 (1978) (same).

We rely on appellants’ arguments with respect to the merits of the questions presented. Our interest as *amicus* is with the practical impact of the decisions below, both of which gave extremely short shrift to the statute of limitations issues, particularly the application of the continuing violation doctrine. These decisions effectively insulate the DOCS-MCI contract from challenge by thousands of recipients of collect telephone calls from state prisoners. Many of these recipients have not had, and will never have, an opportunity to be heard on the prison telephone rate issues because they were not wronged by them during the narrow four-month window allowed by the decision below. As a result, the families and friends of state prisoners – who are, disproportionately, members of the State’s poorest communities³ – have no meaningful recourse although they are charged the highest long distance telephone rates in the State.

³See New York State Bar Association, *RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY* (May 2006), at 48-49 (“Over 80% of those charged with crimes are indigent - too poor to afford an attorney The neighborhoods from which most people on parole come suffer starkly lower household income, high rates of single parent households, and high rates of poverty.”)

The error below should be corrected in order to cure substantial injustice and because the incorrect application of the continuing violation doctrine is likely to give rise to continuing injustices. This Court's view with regard to the misapplication of standing doctrine applies with equal force to the misapplication here of statute of limitations doctrine: "[Actions] which may be contrary to law will be effectively insulated from public scrutiny, judicial oversight, and perhaps any review whatsoever. Moreover, restriction on standing is largely of judicial creation, often used to avoid difficult issues or unpleasant results" *Burke v. Sugarman*, 35 N.Y.2d at 45. We urge the Court to perform its critical role by stating (or restating) the correct standard with respect to the applicable statute of limitations, and, by doing so, to prevent continuing injustice.

In a case of this magnitude, with significant economic and social impact, the judgment of the Appellate Division, which ignored its own precedent, in turn based on long-standing decisions of this Court, should be reversed.

Dated: November 30, 2006

Respectfully submitted

STEVEN BANKS
JOHN BOSTON
MILTON ZELERMYER
The Legal Aid Society
Prisoners' Rights Project
199 Water Street, 6th Floor
New York, NY10038
Phone: (212) 577-3530
Fax: (212) 509-8433

ESMERALDA SIMMONS, Esq., Director
Center for Law and Social Justice
Medgar Evers College
1150 Carroll Street
Brooklyn, New York 11225
Phone: (718) 270-6297
Fax: (718) 270-6190

ROBIN STEINBERG, Esq.
The Bronx Defenders
860 Courtlandt Avenue
Bronx, NY 10451
Phone: (718) 838-7878
Fax: (718) 665-0100