

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).

