

COURT OF APPEALS
STATE OF NEW YORK

IVEY WALTON, RAMONA AUSTIN,	:	
JOANN HARRIS, the OFFICE OF THE	:	App. Div. No. 98700 (Third Dept.)
APPELLATE DEFENDER, and the	:	
NEW YORK STATE DEFENDERS	:	Supreme Court Index No. 04-1048
ASSOCIATION,	:	(Albany County)
	:	
Petitioners-Appellants,	:	AFFIRMATION IN SUPPORT
	:	OF MOTION PURSUANT TO
-against-	:	SECTION 500.23 OF RULES OF
	:	PRACTICE FOR LEAVE TO
THE NEW YORK STATE	:	FILE AMICI CURIAE BRIEF
DEPARTMENT OF CORRECTIONAL	:	WITH SUPPLEMENTARY
SERVICES, and MCI WORLDCOM	:	APPENDIX
COMMUNICATIONS, Inc., now doing	:	
business as Verizon Business Services,	:	
	:	
Respondents-Respondents.	:	

KEITH M. DONOGHUE, an attorney duly admitted to the practice of law in the State of New York, affirms under penalty of perjury as follows:

1. I am an associate of the firm **KRAMER LEVIN NAFTALIS & FRANKEL LLP**, attorneys for Amicus Curiae The Sentencing Project.
2. I make this affirmation in support of Amicus Curiae's motion pursuant to Section 500.23 of the Rules of Practice of this Court for leave to file a brief, with supplementary appendix, in the above-captioned matter. The brief is joined by

seventeen additional amici, whose several interests in the subject matter of this appeal are set forth below.

3. Leave should be granted because the Amici Curiae can identify arguments that might otherwise escape the Court's consideration, and have done so in the brief submitted herewith.

4. Specifically, as set out in the brief, Amici Curiae relate research findings demonstrating the significance, as a matter of public policy, of telephone communications between prisoners and their family members, partners, and other intimate relations. These research findings are not discussed in the briefs of any party to this appeal.

5. In connection with Amici Curiae's argument, the brief also discusses precedents of this Court relating to the consideration which may be given to public policy in deciding the questions of timeliness raised by this appeal. These precedents and their import are not discussed in the parties' briefs.

6. In addition to identifying research findings, law, and argument that might otherwise escape the Court's consideration, the brief submitted herewith would be of assistance to the Court in consequence of the long experience of Amici Curiae in advocating on behalf of prisoners and former prisoners. Many of the Amici

Curiae have observed first-hand the impact of correctional telephone policies on the interests of inmates, their family members, and the public. In light of that experience, Amici Curiae unanimously urge reversal of the decision of the Appellate Division, for the reasons set out more fully in the brief.

7. The long experience of Amici Curiae is evident on review of each organization's particular advocacy and service work. Undersigned counsel hereby relates representations set forth in written statements received from authorized representatives of each of the Amici Curiae:

a. The Sentencing Project is a national non-profit organization engaged in research and advocacy regarding criminal justice policy. It promotes policies and practices that facilitate family connections during a period of incarceration and that contribute to the reentry process from prison to the community.

b. The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation formed to assist African Americans in securing their rights by the prosecution of lawsuits. LDF has a long-standing concern with the criminal justice system in general, and the rights and privileges of prisoners in particular. It litigated challenges to prison discipline in Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973); to prison mail censorship policies in Procurier v. Martinez, 416 U.S.

396 (1974); to prison overcrowding in Costello v. Wainwright, 430 U.S. 325 (1977), and Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975); and to limitations on prisoner access to medical treatment in Costello, supra. Given its expertise, LDF believes its perspective would be helpful to the Court in resolving the issues presented in this case.

c. The National Association of Criminal Defense Lawyers (“NACDL”) is the preeminent organization in the United States advancing the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL’s 13,000 direct members – and more than 75 state and local affiliate organizations with another 28,000 members – include private criminal defense lawyers, public defenders, active duty military defense counsel, law professors, and judges committed to preserving fairness within America’s criminal justice system. NACDL has an interest in educating the courts concerning the cost to its members’ clients of communicating with post-conviction counsel and in preserving the right to counsel in connection with appeals, C.P.L. Art. 440 motions, and habeas corpus petitions.

d. The New York State Association of Criminal Defense Lawyers (“NYSACDL”) is a non-profit membership organization of more than 800

attorneys who practice criminal defense law in the trial and appellate courts of this State. Founded in 1986, NYSACDL is an affiliate of NACDL. Its purpose is to assist, educate, and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional standing. NYSACDL seeks to preserve the right to counsel and to facilitate prisoners' ability to communicate with their attorneys. NYSACDL has often appeared before this Court as an amicus curiae, either separately or jointly with NACDL.

e. Since its founding in 1844, The Women's Prison Association ("WPA") has provided social services to women involved in the criminal justice system to aid them in achieving law-abiding, self-sufficient, and rewarding lives in the community. Based in New York City, WPA provides direct assistance to more than 2,500 New York women and their families each year by offering an integrated continuum of services in response to five key areas of need: livelihood, housing, family preservation, health and well-being, and criminal justice compliance. WPA works with women while they are incarcerated and in the community. Through its Institute on Women & Criminal Justice, the organization also seeks to help other jurisdictions deal with the dramatic increase in the number of incarcerated women—757% nationally since 1977; 17% in the five year period

1999-2004. WPA is particularly concerned about the hardship experienced by children of incarcerated parents and the caregivers of those children. Over 65% of incarcerated women have minor children at home, with an average of 2.4 children each. These children live with other family members, occasionally with their father, and with non-family caregivers. Large telephone surcharges create strains on these households. The WPA is aware of instances when efforts to maintain contact with an incarcerated person has resulted in the termination of phone service and/or an inability to pay other bills, sometimes even rent and utilities. Further, lack of contact can further damage children who have already experienced trauma and instability. Increased contact with an incarcerated parent can help children (and those who care for them) move ahead in constructive ways.

f. Established by the Vera Institute of Justice in 1973, the Legal Action Center (“LAC”) is the only non-profit law and policy organization in the United States whose sole mission is to fight discrimination against people with criminal records, histories of addiction, or HIV/AIDS, and to advocate for sound public policies in these areas. Based in New York City, the LAC launched its National H.I.R.E. Network project in 2001 with a mission to increase employment opportunities for qualified people with criminal records by improving employment policies and practices and changing public opinion through advocacy and effective

public policy campaigns. The LAC has found jobseekers with criminal records to face myriad barriers to entry into the labor force based on lack of identification, hard and soft skills, financial resources, work history and education. It opposes correctional policies that impose financial burdens on the families of incarcerated men and women because they strain family ties and add to the hurdles which former prisoners must overcome to become productive working and tax-paying members of society.

g. The Fortune Society was founded in 1967 to help former prisoners returning from incarceration become productive members of their communities. During the past 39 years, its services have evolved to address multiple issues confronting the criminal justice population, including career development, education, health services, substance abuse treatment, housing, and family services. Through this service model, Fortune assists nearly 4,000 men and women in the New York City metropolitan area. Its work with this population is enhanced by the fact that nearly all of its front line staff were formerly incarcerated themselves. Thus, the organization is particularly knowledgeable about the devastating effects that incarceration can have upon spouses, parents, and children. Fortune has witnessed (and for many of its staff, experienced) the additional hardship that high telephone surcharges can have on families of prisoners.

Families are unable to afford the high surcharges on calls, which may turn the physical distance between prisoners and their loved ones into emotional distance as well. In Fortune's experience, the lack of contact with an incarcerated father or mother can have dire emotional consequences for children, and can be one of many factors contributing to a cycle of crime and incarceration.

h. 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 an immediate criminal case, but a host of issues that drive its clients into the criminal justice system. Based on its work with clients, the Bronx Defenders believes that staying connected to families is a significant support for clients while they are incarcerated, and a critical component of their reentry. The Bronx Defenders does not believe its clients should be charged more than the average consumer to call their loved ones.

i. The Center for Community Alternatives ("CCA") is a not-for-profit organization founded in 1981 as New York State's first alternative-to-incarceration agency. CCA provides reentry services and a range of alternative to incarceration programs for youth and adults who would otherwise be incarcerated. These services are rooted in the understanding that successful reintegration requires

connections to one's community and one's family. Through these services, as well as policy work, training, and technical assistance, CCA fosters individual transformation, system improvements, and community and professional support for reintegration.

j. Citizens United for Rehabilitation of Errants ("CURE") is an international grassroots organization with chapters in most of the fifty states. The organization has some 20,000 members, comprising family members of prisoners, former prisoners, and prisoners themselves. Its New York State and Colorado chapters join the umbrella organization in support of the position urged in the Brief of Amici curiae. CURE NY advocates for a restorative justice approach and for policies that link those in prison with their families and with programs of reintegration in their communities. Colorado-CURE works diligently to provide information and support to prisoners and their families and loved ones.

k. The Justice Policy Institute ("JPI") is a non-profit research and public policy organization dedicated to ending society's reliance on incarceration and promoting effective and just solutions to social problems. Since 1997, JPI has worked to enhance the public dialog on incarceration through accessible research, public education, and communications advocacy.

l. The Southern Tier Advocacy & Mitigation Project, Incorporated (“S.T.A.M.P.”), is a defender-based criminal justice resource center located in Ithaca, New York. S.T.A.M.P.’s work empowers communities to re-assume control over delinquency and crime by reducing over-reliance on policing, supervision, detention, and incarceration which disregards individual needs, erodes community assets, and undermines public safety. S.T.A.M.P. supports petitioners-appellants because keeping families connected by telephone promotes self-respect, empowerment, leadership, and self-determination among young people, adults, and families disproportionately and adversely affected by criminal justice policies.

m. The Equal Justice Initiative of Alabama (“EJI”) is a private, non-profit organization that provides legal assistance to death row prisoners, people wrongly convicted, and others who have been imprisoned. Its work has focused on issues that disadvantage the poor or people of color, with particular emphasis on policies that foster hopelessness in communities that have been burdened and marginalized by the criminal justice system. EJI has frequently challenged and reported on the problems of poor prisoners and families resulting from excessive and costly telephone rates, which have blocked communication, undermined crucial support needed by prisoners, and greatly contributed to the despair and frustration of many.

It believes reform in this area is crucial to improve the effectiveness and rehabilitative potential of incarceration.

n. The Parolee Human Rights Project of the New York City AIDS Housing Network fights for the human rights of prisoners, parolees, and their affected communities.

o. AdvoCare, Inc. ("AdvoCare") is a national, non-profit, membership organization that is part of a national effort to reduce crime through criminal justice reform. AdvoCare's goals are: (i) to provide assistance to prisoners and ex-offenders in the form of education and employment referrals; (ii) to provide prisoners, family members of prisoners, and others with updates on legal issues regarding prison conditions and criminal legislation; (iii) to provide a periodic newsletter to those concerned with prison related legal issues; and (iv) to provide a link with other nonprofit organizations. In working on reentry initiatives, AdvoCare has found that meaningful family contact is a major factor in promoting positive reentry and reducing recidivism.

p. Voice of the Ex-Offender (V.O.T.E.), based in New Orleans, is a non-profit organization that educates, organizes, and mobilizes formerly incarcerated persons around their right to vote. V.O.T.E. has participated in the organizing of a

telephone boycott inside Louisiana prisons. It is currently partnering with another organization to create job opportunities for those being released from incarceration.

q. The Community HIV/AIDS Mobilization Project (“CHAMP”) is a national activist organization building and expanding a strong AIDS movement in the United States. Based in New York City, CHAMP believes that the impact of incarceration and a lack of drug treatment, affordable housing, and access to healthcare are conditions that facilitate HIV infection in our communities. One fifth of HIV-positive prisoners in the nation reside in New York State, and seven percent of persons incarcerated in the State are living with HIV. CHAMP considers access to treatment and prevention information, emotional support, and maintenance of social ties for HIV-positive inmates to be basic rights that are necessary in the fight against the AIDS epidemic.

r. The Real Cost of Prisons Project, based in Northampton, Mass., brings together justice activists, political economists, artists, policy researchers and people directly experiencing the impact of mass incarceration to create workshops and materials which explore both the immediate and long-term costs of incarceration on individuals, their families, communities, and the nation. The Real Cost of Prisons Project addresses a broad range of issues relating to incarceration, including obstacles faced by people who are incarcerated – especially women with

children – in efforts to maintain meaningful family contact; the negative consequences for prisoners and their families of siting prisons far from urban areas; and hundreds of other challenges which hinder rather than help those coming home after incarceration.

8. Amici Curiae submit herewith a proposed supplementary appendix to serve the Court's convenience by permitting immediate access to certain materials cited in the brief of Amici Curiae, as described more particularly in the subsections that follow. Undersigned counsel affirms on information and belief that the records included in the supplementary appendix are true and correct copies of:

a. Glenn Goord, "Transitional Services Program – A Seamless Transition from Prison to the Community," in Reentry Best Practices: Directors' Perspectives (Reginald A. Wilkinson ed., 2004).

b. Paul Esmond, "Families Struggle to Maintain Contact with Loved Ones in State Prisons," Legis. Gazette, June 13, 2005.

c. Excerpt from Paige M. Harrison & Allen J. Beck, Prison and Jail Inmates at Midyear 2005 (U.S. Dep't of Justice, Bureau of Justice Statistics, May 2006).

d. Excerpt from Thomas P. Bonczar, Prevalence of Imprisonment in the

U.S. Population, 1974-2001 (U.S. Dep't of Justice, Bureau of Justice Statistics, Aug. 2003).

e. Excerpt from New York State Criminal Justice Performance Management: 2005 Crimestat Report (Chauncey G. Parker, Director of Criminal Justice, Feb. 9, 2006).

f. Marta Nelson et al., "The First Month Out: Post-Incarceration Experiences in New York City" (Vera Institute of Justice, Sept. 1999).

g. Policy Matters: Coming Home... and Staying There (Policy Research Institute for the Region, Spring 2006).

h. Excerpt from Norman Holt & Donald Miller, "Explorations in Inmate-Family Relationships" (California Dep't of Corrections, Research Div., Research Report No. 46, Jan. 1972).

i. Excerpt from Daniel P. LeClair, "The Effect of Community Reintegration on Rates of Recidivism: A Statistical Overview of Data for the Years 1971 Through 1983," (Mass. Dep't of Correction, Feb.-March 1986).

j. Excerpt from Patrick A. Langan & David J. Levin, Recidivism of Prisoners Released in 1994 (U.S. Dep't of Justice, Bureau of Justice Statistics, June 2002).

k. Excerpt from "Understanding the Challenges of Prisoner Reentry:

Research Findings from the Urban Institute's Prisoner Reentry Portfolio" (Urban Institute, Justice Policy Ctr., Jan. 2006)

- l. National Governors Association, "Issue Brief: Improving Prisoner Reentry Through Strategic Policy Innovations" (Sept. 2005).
- m. Excerpt from "HUB System: Profile of Inmate Population Under Custody on January 1, 2006" (New York State Department of Correctional Services, June 2006).
- n. Excerpt from Mike Bobbitt & Marta Nelson, "The Front Line: Building Programs that Recognize Families' Role in Reentry" (Vera Institute of Justice, Sept. 2004).
- o. Excerpt from Christopher J. Mumola, Incarcerated Parents & Their Children (U.S. Dep't of Justice, Bureau of Justice Statistics, Aug. 2000).
- p. Excerpt from James P. Lynch & William J. Sabol, "Prisoner Reentry in Perspective" (Urban Institute, Justice Policy Ctr., 3 Crim. Policy Rep., Sept. 2001).
- q. Excerpt from Dina Rose et al., Drugs, Incarceration and Neighborhood Life: The Impact of Reintegrating Offenders into the Community (Final Grant Report to National Institute of Justice, Doc. No. 195173, July 3, 2002).

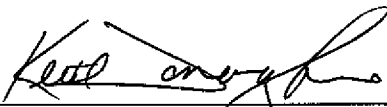
- r. Excerpt from New York State Department of Correctional Services, Prison Safety in New York (2006)
- s. Paul Esmond, "Democrats' Bill Would Lower Phone Costs for Inmates," Legis. Gazette, May 16, 2005.
- t. Excerpt from Maintaining Family Contact When a Family Member Goes to Prison (Florida House of Representatives, Justice Council, Committee on Corrections, Nov. 1998).
- u. John Sullivan, "New York State Earns Top Dollar From Collect Calls by Its Inmates," N.Y. Times, Nov. 30, 1999, A1.
- v. Catriona Stuart, "Wives See Wrong Numbers on Phone Bills for Inmates," N.Y. Sun, Jan. 21, 2005.
- w. American Bar Ass'n, House of Delegates, Recommendation (Aug. 8-9, 2005) with Criminal Justice Section, Report (Aug. 2005).
- x. Declaration of Dr. Creasie Finney Hairston (March 8, 2004), in Matter of Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, F.C.C. Doc. No. 96-128.
- y. American Correctional Ass'n, Policy Statement: Public Correctional Policy on Adult/Juvenile Offender Access to Telephones (as amended Feb. 1, 2006).

z. Excerpt from Commission on Safety and Abuse in America's Prisons, Report: Confronting Confinement (Vera Institute for Justice, June 2006).

aa. U.S. Dep't of Justice, Bureau of Justice Assistance, FY 2006 Prisoner Reentry Initiative Grant Awards.

Dated: New York, New York
November 30, 2006

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