To be argued by: Brendan O'Donnell
Time requested: 15 Minutes

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of
JASON GRANT,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78

-against-

DANIEL SENKOWSKI, Superintendent of Clinton Correctional Facility, and DONALD SELSKY, Director of Special Housing Unit,

Respondents.

BRIEF FOR APPELLANT JASON GRANT

Dated: September 18, 2000

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PRELIMINARY STATEMENT

This is an appeal from an order of the Appellate Division, Third Department, dated March 2, 2000, affirming a judgment of the Supreme Court, Albany County (Canfield, J.), which dismissed as untimely Appellant's Article 78 challenge to a prison disciplinary proceeding. This court granted leave to appeal by an order dated June 29, 2000.

Appellant, Jason Grant, is a prisoner in the custody of the New York State Department of Correctional Services (DOCS). Respondents are DOCS officials: Respondent Daniel Senkowski is the Superintendent of Clinton Correctional Facility at which the challenged hearing was held; Respondent Donald Selsky is the DOCS Director of Special Housing and Inmate Discipline, who reviewed and affirmed the hearing disposition on administrative appeal.

Grant, a pro se indigent inmate, placed his proposed order to show cause and Article 78 petition in the prison mail system on October 21,1998, five days before the Statute of Limitations was scheduled to expire. However, the order to show cause was not signed by a judge and was not filed with the clerk until after the Statute of Limitations would otherwise have expired. The Supreme Court dismissed the petition on Respondents' motion. On appeal, the Appellate Division, Third Department affirmed. Under virtually identical circumstances, the Appellate Division, Second Department, however, has deemed an Article 78 proceeding timely commenced under the mailbox-filing rule recognized by the United States Supreme Court in Houston v. Lack, 487 U.S. 266 (1988). *See* Matter of Mandala v. Jablonsky, 242 A.D.2d 271 (2nd Dept. 1997)

This Court has jurisdiction to consider the appeal pursuant to CPLR §5602 as it is taken from an order of the Appellate Division that finally determined the proceeding. The questions of law raised herein were preserved for this Court's review when Appellant opposed Respondents'

motion to dismiss in Supreme Court, Albany County (A42-A45), and then urged the Appellate Division to reverse the order dismissing the petition on the authority of Houston v. Lack and Mandala v. Jablonsky (A61-A70).

QUESTION PRESENTED

> Should appellant's Article 78 proceeding be deemed timely commenced where, before the statute of limitations expired, the pro se inmate-litigant delivered his proposed order to show cause and verified petition to prison authorities for mailing to the court?
>
> The courts below answered no.

STATEMENT OF FACTS

On April 6, 1998, while imprisoned at Clinton Correctional Facility, Jason Grant was charged with violating a prison rule prohibiting possession of a weapon (A13).[1] Grant was found guilty of the charge at a prison disciplinary hearing and was penalized with four months in the special housing unit, loss of privileges, and sixty days loss of good time (A14, A39). Grant filed an administrative appeal, and Respondent Donald Selsky affirmed the determination on June 24, 1998. (A14, A38). Grant received notice of Selsky's decision the next day, June 25, 1998 (A65), thus rendering the determination final and binding on Grant. *See* Matter of Biondo v. New York State Board of Parole, 60 N.Y.2d 832, 834 (1983). Pursuant to CPLR §217(1), the Statute of Limitations for Article 78 review of the determination was set to expire on October 25, 1998, four months from June 25, 1998. Because October 25, 1998 was a Sunday (A85), the limitations

[1] Numbers in parentheses followed by the letter "A" refer to pages of Appellant's Appendix, bound separately.

period would actually have expired, pursuant to the General Construction Law §25-a, on Monday, October 26, 1998.

On Wednesday, October 21, 1998, Grant deposited a proposed order to show cause and a verified Article 78 petition, addressed to the Supreme Court, Albany County, in the prison mailbox at Coxsackie Correctional Facility, where he had since been transferred (A43, A47).[2] A disbursement form authorizing prison officials to deduct the cost of return receipt postage from his inmate account accompanied Grant's papers (A54). However, prison officials did not then transfer Grant's legal papers to the U.S. Postal Service for delivery to the court. The prison business office did not approve the necessary postage disbursement form until Monday, October 26, 1998 (A54), and Grant's papers were not posted until later that day or the following day. As a result of this delay, Grant's papers arrived at the Albany County Courthouse, approximately 20 miles from Coxsackie, on Wednesday, October 28, 1998 (A46, A47).

Grant's proposed order to show cause was accompanied by a request for poor person relief, including an affidavit attesting to monthly income of $6.20 from prison wages (A9-A10). Although not required (or even authorized) to respond to Grant's ex parte application for poor person relief, the Albany County Attorney's Office advised the court by letter that it would not oppose Grant's request for poor person status (A32.1). Thereafter, on November 5, 1998, Supreme Court Justice Joseph Teresi signed an order to show cause (A5). For some reason, the clerk's office did not file the order and petition for another five days, until November 10, 1998 (A5). Thus, Grant's Article 78 petition was actually filed 20 days after he deposited it in the

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[2] Grant's response to the motion to dismiss in Supreme Court clarified that his papers were dated October 20, 1998, but mailed (i.e., placed in the facility mail) on October 21, 1998 (A43). In addition, both the certified mail return receipt form and the DOCS Disbursement Request form were dated October 21, 1998 (A47, A54). Therefore, the latter date must govern here.

Coxsackie prison mailbox, and 15 days after the Statute of Limitations would otherwise have expired.

Respondents moved to dismiss the petition as time-barred because Grant failed to file a signed order to show cause in the clerk's office within the limitations period (A35-A37). Grant opposed dismissal, citing his deposit of the appropriate legal papers in the prison mail system five days before the Statue of Limitations was scheduled to expire (A43). Grant argued he had no choice but to relinquish control and entrust his legal papers to the Respondents for delivery to the U.S. Postal Service, and that he should not be held responsible for Respondents' own delays in the processing and delivery of the order to show cause (A44). The Supreme Court, Albany County (Canfield, J), dismissed the petition, holding that it had "unfortunately" been filed after expiration of the limitations period (A57).

Grant filed a pro se appeal in the Appellate Division, Third Department (A59-A60). He urged the court to reverse and reinstate the petition, citing Houston v. Lack, 487 U.S. 266 (1988), wherein the Supreme Court held that a pro se prisoner's notice of appeal is deemed "filed" at the moment he delivers it to prison authorities for mailing to the court (A67). Grant also relied on Matter of Mandala v. Jablonsky, 242 A.D.2d 271 (2d Dept. 1997), which recognized that an unrepresented inmate's control over his legal papers ceases upon mailing, and held that a pro se inmate's Article 78 proceeding was timely commenced, even though the executed order to show cause was filed beyond the four-month limitations period (A69). Respondents maintained that "Mandala is not the law" in the Third Department and "should not be followed" (A83). They relied on Matter of Barrett v. Coughlin, 199 A.D.2d 653 (3d Dept. 1993), wherein the Third Department held the mailing of a proposed order to show cause by an inmate *one month* before the statutory deadline was insufficient to toll the Statute of Limitations when the order remained

unsigned until after the limitations period had expired (A81-A82). Respondents also contended that Mandala was distinguishable because it requires a pro se inmate to mail legal papers "in ample time to be signed and filed within the limitations period," and here petitioner mailed his papers "only five days before the limitations period expired" (A80).

The Appellate Division affirmed in a brief memorandum (A2-A3). The court held petitioner's Article 78 proceeding was not commenced until November 10, 1998, when the signed order to show cause and petition were filed in the Albany County Clerk's office (A3). The Court held that Grant's "placement of the unsigned order to show cause and petition in the facility mailbox only five days prior to expiration of the Statute of Limitations was clearly insufficient" (A3).

Grant retained pro bono counsel, and, by order dated June 29, 2000, the Court Appeals granted him permission to appeal (A1).

ARGUMENT

APPELLANT'S ARTICLE 78 PROCEEDING SHOULD BE DEEMED TIMELY COMMENCED BECAUSE, BEFORE THE STATUTE OF LIMITATIONS EXPIRED, THE PRO SE INMATE-LITIGANT DELIVERED HIS PROPOSED ORDER TO SHOW CAUSE AND VERIFIED PETITION TO PRISON AUTHORITIES FOR MAILING TO THE COURT.

Introduction

The basic purpose of a statute of limitations is to provide an orderly, rational and even-handed principle for measuring the timeliness of legal claims brought by aggrieved citizens -- rich and poor alike. Under the CPLR, the last day of a limitations period represents the date by which legal pleadings must be filed in the clerk's office to interpose a claim and toll the statute of limitations. For down-to-the-wire filing of claims, the courthouse doors remain open to would-be civil litigants until the last minute of the last day of a limitations period. Under the decision below, however, the full statutory limitations period is unavailable to indigent pro se inmates who seek to commence an Article 78 proceeding. Because an indigent pro se prisoner has no choice but to commence a special proceeding by order to show cause, and to do so through use of the mail, under the Third Department's reasoning, he must initiate the filing process some *unspecified* period of time before the Statute of Limitations expires. The inmate must then simply hope for the best because he will be held liable for any subsequent delays that result in actual filing of an *executed* order to show cause beyond the limitations period. In other words, under the decision below, an inmate's fundamental right of access to the courts is governed, not by a fixed, rational rule, but by the vagaries of the prison mail system, the U.S. Postal Service, and case processing by the courts. Worst of all, the Appellate Division's unsparing rule fails to provide a struggling pro se litigant with a clear answer to his most urgent procedural question: "What is the deadline for mailing my legal papers?"

Fortunately, there is a clear answer to this timeliness dilemma: the mailbox-filing rule for indigent pro se incarcerated litigants, first recognized by the United States Supreme Court in Houston v. Lack, 487 U.S. 266 (1988), and adopted by the Appellate Division, Second Department in Matter of Mandala v. Jablonsky, 242 A.D.2d 271 (2d Dept. 1997).

The mailbox filing rule safeguards a prisoner's right of access to the courts.

In Houston v. Lack, the Supreme Court held that a pro se prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the District Court. The Houston Court interpreted Federal Rule of Appellate Procedure 4(a)(1), which requires the "filing" of a notice of appeal within 30 days of the entry of the judgment appealed from. The prisoner in Houston, who was appealing from the dismissal of a habeas corpus petition, deposited his notice of appeal in the prison mail 27 days after the judgment, but it was not stamped "filed" by the court clerk until 31 days after the judgment was entered.

The Supreme Court held that the notice of appeal was timely because an incarcerated and unrepresented prisoner's situation is "unique" (at 270). The Court noted that, unlike other litigants, a prisoner cannot travel to the courthouse to ensure that the clerk receives and stamps his papers before the deadline. Unlike other litigants, a prisoner is forced to entrust his legal papers to the vagaries of the mail and the court's process. Unlike other litigants, a prisoner cannot place his legal papers directly into the hands of the United States Postal Service, but must entrust them to his own jailers "whom he cannot control or supervise and who may have every incentive to delay" (at 271). Nor can a prisoner take appropriate precautions, such as calling the court or by personally delivering his papers at the very last minute in the event the mail goes awry. The Court recognized that, by definition, a pro se prisoner couldn't rely on a lawyer to

take these precautions for him. The Court summed up the unique predicament of the incarcerated pro se litigant as follows:

> Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access – the prison authorities.

487 U.S. at 271.

Five years later, the United States Court of Appeals for the Second Circuit in Dory v. Ryan, 999 F.2d 679 (2nd Cir. 1993), extended Houston's so-called "mailbox-filing rule" to commencement of a civil action by a pro se incarcerated plaintiff. The plaintiff in Dory, like petitioner in the instant case, was a New York State inmate. He commenced an action under 42 U.S.C. §1983 against law enforcement officials, an action governed by a three-year Statute of Limitations. The limitations period expired on September 11, 1992, and the complaint was not physically filed with the court clerk until ten days later. Dory, however, had placed his complaint in the hands of DOCS officials for mailing on either August 31 or September 1, 1992.

Construing Federal Rule of Civil Procedure 5(e), the governing statute, the Second Circuit held that Houston's mailbox-filing rule should be extended to commencement of civil actions in the District Court by pro se prisoners. The Second Circuit held that the concerns underlying the Supreme Court's decision in Houston regarding notices of appeal were equally applicable to the filing of civil complaints by pro se prisoners. The Court relied on the unique obstacles facing pro se prison-litigants, concluding:

> The prisoner simply has no control over the processing of his complaint, and he should not be required to do more under Fed.R.Civ. P. 5(e) than turn his complaint over to prison officials within the statute of limitations period.

999 F.2d at 682. Every federal circuit court that has considered the issue has extended Houston's mailbox-filing rule to commencement of actions by pro se prisoner-plaintiffs under the Federal Rules of Civil Procedure, or to other civil proceedings.[3] The rule has also been adopted by a substantial number of state courts.[4]

There is a compelling need for a mailbox-filing rule in New York.

The reasoning of Houston and Dory should be applied to the facts in the instant case, and Grant's Article 78 petition should be deemed timely filed. The same concerns that prompted the Supreme Court to adopt a mailbox filing rule Houston, and the Second Circuit to extend the rule in Dory, are applicable to the commencement of Article 78 proceedings in New York Supreme Court by pro se prisoner-petitioners. Indeed, the need for a mailbox-filing rule for pro se inmate Article 78 proceedings is even more compelling because incarcerated litigants in New York face additional obstacles that were not addressed in Houston and Dory.

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[3] First Circuit: Morales-Rivera v. U.S., 184 F.3d 109 (1st Cir. 1999) (habeas corpus petitions); Second Circuit: Dory v. Ryan, 999 F.2d 679 (2nd Cir. 1993), modified on other grounds, 25 F.3d 81 (2nd Cir. 1994) (§1983 actions); Third Circuit: Burns v. Morton, 134 F.3d 109 (3rd Cir. 1998) (habeas corpus petitions); Fourth Circuit: Lewis v. Richmond City Police Department, 947 F.2d 733 (4th Cir. 1991) [§1983 and other actions filed under F.R.Civ.P. 5(e)]; Fifth Circuit: Spotville v. Cain, 149 F.3d 374 (5th Cir. 1998) (habeas corpus petitions), Cooper v. Brookshire, 70 F.3d 377 (5th Cir. 1995) (§1983 and other actions filed under F.R.Civ.P. 5(e)); Sixth Circuit: Gilbert v. Joyce, 129 F.2d 1263, 1997 WL 693564 (6th Cir. 1997) (unpublished opinion) (§1983 and other actions filed under F.R.Civ.P. 5(e)); Seventh Circuit: Jones v. Bertrand, 171 F.3d 499 (7th Cir. 1999) (habeas corpus petitions); Eighth Circuit: Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999) (habeas corpus petitions); Tenth Circuit: Hoggro v. Boone, 150 F.3d 1223, n. 3 (10th Cir. 1998) (habeas corpus petitions); Eleventh Circuit: Garvey v. Vaughn, 993 F.2d 776 (11th Cir. 1993) (§1983 actions and claims under Federal Tort Claims Act); D.C. Circuit: Anyanwutaku v. Moore, 151 F.3d 1053, 1058 (D.C. Cir. 1998) (assuming, without holding, that Houston applies to "all inmate pleadings").

[4] The following states have applied Houston's mailbox-filing rule to commencement of actions akin to New York's Article 78 proceeding or to other civil actions: Florida: Gonzalez v. State, 604 So.2d 874, 875-876 (Fla. Dist. Ct. App. 1992) ("[I]t is our opinion that the mailbox rule should not be limited solely to the filing of petitions or notices of appeal in court, but should instead be uniformly applied whenever a pro se inmate is required to use the U.S. Mail within a limited jurisdictional time frame.") Idaho: Munson v. State, 128 Idaho 639, 917 P.2d 796 (Idaho 1996) (petition for post-conviction relief); Kansas: Taylor v. McKune, 25 Kan.App.2d 283, 962 P.2d 566 (Kan.Ct.App. 1998) (habeas corpus petitions challenging prison disciplinary action); Louisiana: Tatum v. Lynn, 637 So.2d 796 (La. Ct. App. 1st Cir. 1994) (petition for review of agency decision); Mississippi: Sykes v. State, 757 So.2d 997 (Miss. 2000) (motion for post-conviction relief); Pennsylvania: Smith v. Pennsylvania Board of Probation and Parole, 546 Pa. 115, 683 A.2d 278 (Pa. 1996) (petition for judicial review of agency decision).

First, indigent pro se inmates in this State cannot initiate Article 78 proceedings by simply mailing a notice of petition to the clerk's office because they invariably lack funds to hire a process server, and, therefore, cannot comply with the CPLR's personal service requirement on the Attorney General and respondent (CPLR §§ 307, 403).[5] *See* Matter of Scott v. Coughlin, 111 A.D.2d 480 (3d Dept. 1985) (Absent issuance of order to show cause authorizing it, personal service by mail in lieu of personal service is jurisdictionally defective); Matter of King v. Gregoire, 90 A.D.2d 922 (3d Dept. 1982) (Due to poverty, inmates in state correctional facilities are unlikely to be capable of initiating proceedings by ordinary notice of petition).[6] Consequently, inmates are required to proceed by order to show cause, a process that can result in considerable, yet unpredictable, delays because prisoners are, of course, precluded from traveling to the courthouse to personally monitor the signing and filing of their legal papers.

Here, for example, the record reveals that even after actual receipt of Grant's legal papers by the court, the order to show cause was not signed and filed for almost two weeks [from October 28, 1998 (the date the court received Grant's papers) to November 10, 1998 (the date the signed order to show case was "filed" with the clerk)]. Longer delays in pro se prisoner cases are not uncommon. In Matter of Barrett v. Coughlin, 199 A.D.2d 653 (3d Dept. 1993), the proposed order to show cause was mailed by a pro se inmate-petitioner on April 29, 1992, approximately one month before the four-month Statute of Limitations was scheduled to expire. However, a judge did not sign the order until July 9, 1992, more that two months later. Despite

[5] Here, the sole reason cited by Grant in support of his request for an order to show cause was that he could not comply with the CPLR's personal service requirements and therefore needed permission to effect service by regular mail (A8). The order to show cause is also invariably used by inmates in New York to obtain poor person relief, or permission to pay a partial filing fee. *See* CPLR §§ 1101 (d), 1101 (f). However, it is the personal service requirement alone that mandates the issuance of an order to show cause in pro se prisoner cases.

[6] Under the Federal Rules of Civil Procedure, an inmate may effect service on the United States by registered or certified mail [FRCP 4 (i)].

this long delay, the pro se petition was dismissed as untimely, and the Appellate Division upheld the ruling.[7] Therefore, not only must incarcerated pro se litigants in New York contend with the vagaries of the prison mail system and of the United States Postal Service, their lawsuits are also vulnerable to dismissal as a result of delays that occur even *after* receipt of legal papers by the courts. *See e.g*. Matter of Erdheim v. Senkowski, 239 A.D.2d 686 (3d Dept. 1997) (Where proposed order to show cause was received by court clerk on April 30, 1996, 10 days before expiration of Statute of Limitations, and signed by a Supreme Court Justice May 9, 1996, one day before statutory deadline – petition was time-barred because Supreme Court clerk did not actually file executed order with County Clerk until May 13th – three days too late.)[8]

Further delay in the initial processing time of proposed orders to show cause is likely to result from the Legislature's recent elimination of traditional poor person relief for most pro se prisoner litigation. CPLR §1101(f) now imposes a minimum fee of $15 to $50 on indigent pro se prisoner-plaintiffs, and requires courts to closely scrutinize an inmate's prison trust account statement to establish a partial filing fee. Some Supreme Court Clerks now decline to even forward an inmate's proposed order to show cause to a judge for signature until a copy of the inmate's trust account statement has been obtained from correctional personnel – a process that may result in further delays in at least some cases.

In addition, the writing of an Article 78 petition demands considerably more legal skills, research and overall effort by an inmate than is required to prepare a simple notice of appeal, the legal document at issue in Houston v. Lack. An Article 78 petition must also be completed

[7] Barrett was decided under the former CPLR § 304, which measured commencement from the date of service. The case continues to be cited by the Third Department as authority under the commencement-by filing system. *See e.g*. Matter of Marcus v. NYS Div. of Parole, 264 A.D.2d 919 (3d Dept. 1999).

[8] The facts in Erdheim recounted here are supplemented by documents in the original record, relevant copies of which are included in Appellant's Appendix (A90-92).

within the extremely short time frame of four-months, far less than the three year Statute of Limitations at issue in Dory v. Ryan. For pro se inmate-litigants like Jason Grant, who are confined to Special Housing Units, there are even more hurdles to overcome in order to prepare and successfully file an Article 78 petition.

Like Grant, a great many pro se inmates who pursue Article 78 relief in New York seek to challenge a prison disciplinary proceeding where confinement in a special housing unit (SHU) has been ordered. Imprisonment in SHU is significantly more restrictive than confinement in the general prison population, and entails being locked in a cell 23 hours a day. *See* 7 N.Y.C.R.R. §§304.3, 304.5(a). SHU confinement restricts an inmate's access to legal materials and legal assistance, as SHU detainees cannot visit the library, where they would have direct access to legal research, legal forms, and assistance from inmate law clerks. Instead, they must submit written requests for legal materials and may wait up to 24 hours to receive them. *See* 7 N.Y.C.R.R. §§304.7(a), 304.7(a)(2). SHU detainees can receive no more than two items of legal material at a time, and may borrow them for no more than 24 hours. *See* 7 N.Y.C.R.R. §§304.7(a)(1), 304.7 (a)(3). No inmate advisors or law clerks are permitted to visit the SHU to provide direct assistance to the inmates confined there. *See* 7 N.Y.C.R.R. §304.7(c)

In the instant case, Grant was penalized by confinement in SHU for four months, with a release date of August 1, 1998 (A39). He was released as scheduled (A14), serving over one month in SHU while the short four-month limitations period (triggered on June 25, 1998) was ticking away. Another problem encountered by inmates, whether or not confined to SHU, is transfer to another prison without all of their personal property, including legal materials. An inmate may be transferred with only a certain portion of his personal property, with the rest remaining behind to catch up with him later, sometimes after a considerable period of delay. In

short, preparation and filing of a pro se Article 78 petition is almost never an easy proposition for an incarcerated layperson. The task should not be made even more difficult by the application of uncertain and inconsistent rules pertaining to filing deadlines for pro se prisoner pleadings.

The mailbox-filing rule responds to the practical difficulties facing would-be pro se incarcerated litigants by guaranteeing them access to the courts that is roughly equivalent to that available to the general public. It is a common-sense rule that recognizes the inherent limitations of incarcerated persons who seek to resolve their disputes within the civil justice system, but who cannot afford to retain a lawyer or secure direct access to a courthouse. It is also an easily administered rule that promotes consistency and fairness in the enforcement of a statute of limitations, and which effectively eliminates arbitrary and unequal treatment of similarly situated litigants. The date an inmate places his papers in the hands of prison authorities is readily identifiable – as it was in Grant's case – from the prison's own paperwork. *See* Dory v. Ryan, 999 F.2d at 681 (inmate's "argument substantiated by a copy of the Department of Correctional Services form demonstrating he had submitted legal papers to prison officials"); Houston v. Lack, 487 U.S. at 275 ("prison authorities . . . have well-developed procedures for recording the date and time at which they receive papers for mailing"). Contrary to Respondent's arguments below, there is no legitimate reason why a mailbox-filing rule should not be adopted in New York.

The CPLR posts no barrier to this Court's adoption of a mailbox-filing rule.

Respondents argued below that the federal mailbox-filing rule is inapposite because it operates pursuant to federal filing rules that are dissimilar to New York's commencement-by-filing statute, CPLR § 304 (A82). However, Dory v. Ryan involved a civil action governed by the Federal Rules of Civil Procedure, which, like CPLR § 304, provides that a lawsuit is

commenced by the filing of pleadings with the court. Federal Rule of Civil Procedure 3 states: "A civil action is commenced by filing a complaint with the court." In turn, Rule 5(e) provides in relevant part:

> The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court.

This statutory scheme for commencement of actions is similar to CPLR §304, which provides, inter alia:

> A special proceeding is commenced by filing a notice of petition or order to show cause and petition. For the purposes of this section . . . filing shall mean the delivery of the . . . order to show cause to the clerk of the court . . .

Indeed, the similarities in the statutory schemes are not coincidental, as the Legislature deliberately modeled the 1992 CPLR amendments that ushered in New York's commencement-by-filing system on the Federal Rules of Civil Procedure. *See* Matter of Fry v. Village of Tarrytown, 89 N.Y.2d 714, 721 (1997), citing Senate Mem. in Support, Bill Jacket, L. 1992, ch. 216, at 4 ("This bill would bring state practice more in line with federal practice.")

Therefore, with respect to the narrow issue in this case, there is no material difference between the federal scheme for commencement of civil actions under the Federal Rules of Civil Procedure, and the New York commencement-by-filing system. The only difference between the two statutes is that Federal Rule 5(e) uses the word "filing" to describe the transmittal of papers to the clerk, whereas CPLR § 304 uses the term "delivery" to describe the same event. There is nothing in CPLR § 304 that would preclude this Court from construing the date of "delivery" to refer to the date an inmate delivers legal papers to prison officials for mailing to the court. The meaning of "delivery" in CPLR § 304 is ambiguous, and this unresolved question of law was recognized by civil practice commentators soon after enactment of the commencement-

by-filing scheme in 1992. *See* e.g. Siegel's Prac. Rev. No. 3. at 2 (May 1993) (noting that consensus of case law seems to be that simple posting qualifies as a 'delivery' – but rhetorically asking readership, "Want to chance it?"); Alexander, Supp. Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR § 304.1, 1994 Pocket Part, at 39.[9] *See also* Enos v. City of Rochester, 206 A.D.2d 159, 161 (4th Dept. 1994) (describing proper construction of term "delivery" as a novel question that has "intrigued legal scholars") As the term "delivery" is not defined in the CPLR, it is clearly within this Court's authority to give the statute the common sense construction suggested by the mailbox-filing rule, and thereby avoid the arbitrary and unjust outcomes that are inevitable under the unsparing construction of the statute adopted by the Appellate Division, Third Department below. *See* McKinney's Consol. Laws of New York, Book 1, Statutes, § 141 ("In construing a statute which is ambiguous the construction to be adopted is the one which will not cause objectionable results."); *see also* CPLR § 104 ("The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.")

The Fourth Department's construction of the term "delivery" in Enos v. City of Rochester, 206 A.D.2d 159 (4th Dept. 1994) is not inconsistent with the interpretation Appellant now asks this Court to adopt for pro se Article 78 petitions by incarcerated litigants. In Enos, the Appellate Division held that a non-incarcerated litigant did not satisfy CPLR 304's "delivery" requirement by placing his summons and complaint in the mail addressed to the clerk of the court on the last day of the limitations period. Unlike the facts in the instant case, Enos involved

[9]"Most lawyers will probably take the delivery language of § 304 at face value and arrange to have the process and fee physically brought to the clerk's office. There does not appear to be any prohibition, however, on mailing the process and fee to the clerk. *In the case of mailing, should delivery be deemed to occur on the day of mailing or on the day of receipt by the clerk? The resolution of this issue could be critical, of course, if the mailing occurred before expiration of the statute of limitations but receipt occurred following expiration"* (emphasis added).

a plaintiff who was represented by counsel, and the action was governed by a far longer Statute of Limitations. But, far more importantly, the rationale for the Court's holding was the Legislature's addition of an alternative "safety valve" provision in CPLR § 304, which was expressly designed to provide ordinary civil litigants the ability to file an action or special proceeding at the very last moment. The section provides:

> Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action.

(CPLR § 304). The Fourth Department held that this "safety valve" provision in CPLR § 304 would be superfluous if the Legislature had intended to permit litigants to comply with the statutory requirement of "delivery" to the clerk by simply placing a summons and complaint in the mail on the last day of a limitations period.

CPLR § 304's safety valve provision is obviously unavailable to incarcerated pro se litigants, who have no direct access to a judge and no effective means to determine whether last-minute circumstances will prevent actual receipt of a signed order to show cause by the clerk's office within the formal limitations period. Thus, the holding in Enos simply underscores the basic premise of the mailbox-filing rule: that non-incarcerated civil litigants enjoy greater access to the courts, and that a more forgiving rule is necessary to place incarcerated pro se litigants on a relatively even playing field. Even if the holding in Enos is correct (an issue that need not be decided here), its rationale supports an alternative construction of the term "delivery" in the context of pro se prisoner Article 78 proceedings.

This Court should adopt the exception to Fry v. Village of Tarrytown recognized by the Appellate Division, Second Department in Matter of Mandala v. Jablonsky for incarcerated pro se litigants.

Appellant recognizes that a limited exception to this Court's holding in Matter of Fry v. Village of Tarrytown, 89 N.Y.2d 714 (1997), is necessary in order to accommodate the mailbox-filing rule for pro se inmate Article 78 petitions. Fry involved an ordinary civil litigant, whose attorney neglected to file a signed copy of an order to show cause with the clerk of the court. This Court held that the filing of the unexecuted order to show cause and accompanying petition was of "no legal effect" and did not satisfy the requirements of the commencement-by-filing statute. 89 N.Y.2d at 717. However, the Court went on to hold that the defective filing did not deprive the Supreme Court of subject matter jurisdiction, and that the defect was waived by the respondent's failure to object.

The fact that an indigent pro se incarcerated litigant must seek judicial approval before he can serve process by mail on his opponents is one of the principal reasons that a mailbox-filing rule is needed in New York. Therefore, because the order to show cause requirement is itself a principal source of the timeliness dilemma in the prisoner-litigant context, Fry's holding that an ordinary civil litigant must file an *executed* order to show cause to toll the Statute of Limitations should not, in fairness, be applied to Article 78 proceedings initiated by indigent pro se inmates. In such cases, the mailing of a proposed order to show cause and verified petition within the limitations period should be deemed a commencement of the proceeding for purposes of the Statute of Limitations. As Fry makes clear, there is no impediment to construing the CPLR in this manner because the filing of an executed order to show cause is not a prerequisite to the Supreme Court's exercise of subject matter jurisdiction. This is precisely the approach adopted

by the Appellate Division, Second Department in Matter of Mandala v. Jablonsky, 242 A.D.2d 271 (2d Dept. 1997).

In Mandala, a county jail inmate brought an Article 78 proceeding to challenge a disciplinary sanction. The inmate's papers – an unsigned order to show cause and verified petition – were mailed to the court on January 9, 1995, seven days before the Statute of Limitations would have expired. His papers were actually received by the court on January 12th, but were not signed and filed until January 18th, two days after the formal limitations period had expired.[10] The respondent moved to dismiss on the ground that the proceeding had not been timely commenced under CPLR § 304. The Supreme Court granted the motion to dismiss, but the Appellate Division reversed.

The Second Department acknowledged this Court's decision in Fry, but pointed out that the essentially helpless situation of a prisoner warranted a narrow exception to its holding:

> With respect to compliance with CPLR 304, the Court of Appeals has held [that] 'an unexecuted order is of no legal effect [and cannot] satisfy the provision of the commencement-by-filing statute requiring petitioner to file an order to show cause or a notice of petition along with the petition . . .
> However, the petitioner, a pro se prisoner, unlike other litigants, could not travel to the courthouse personally to see that the order to show cause was timely signed and filed. His control over the processing of his papers ceased when he mailed them (*see* Houston v. Lack, 487 US 266, 271-273)

(at 272). For this reason, the Second Department held the inmate's Article 78 proceeding should have been deemed timely commenced, notwithstanding his delivery within the formal limitations period of only a proposed order to show cause. The Second Department's decision in Mandala not only achieves a fair and just result, it is legally sound and should be adopted by this

[10] The facts in Mandala recounted here are supplemented by the unpublished decision of the lower court (A86-A89).

Court.

Mandala is consistent with the legislative scheme for court processing of pro se inmate litigation.

The narrow exception to Fry recognized in Mandala is entirely consistent with legislative design for court processing of pro se inmate legal papers. The language in CPLR § 1101 (f) strongly supports Mandala's holding that an inmate's delivery of an unexecuted order to show cause within the limitations period is sufficient to interpose a claim and toll the Statute of Limitations. The statute now provides that an indigent inmate may obtain an index number from the court clerk by simply filing a form affidavit attesting to his poor person status along with an "order to show cause." Significantly, in the context of this subdivision an "order to show cause" can refer only to an inmate's proposed order to show cause. The section directs an inmate to initially file his poor person affidavit "along with" the "order to show cause," a condition that would be literally impossible to comply with if the statute referred to an *executed* order to show cause (which, of course, the inmate would receive sometime later, after a judge had signed it). The statute directs the clerk to assign the case an index number and only then refer the inmate's poor person application to a judge for the establishment of a reduced filing fee and payment schedule.[11] In other words, the legislative scheme provides for the assignment of an index number, the key component of the commencement-by-filing system,[12] *prior to any judicial action* with respect to the inmate's poor person application *and* his proposed order to show

[11] The statute provides, in relevant part: "Notwithstanding any other provision of law to the contrary, a federal, state or local inmate under sentence for conviction of a crime may seek to *commence* his or her action or proceeding by paying a reduced filing fee . . . Such inmate shall file the form affidavit referred to in subdivision (d) of this section along with the summons and complaint or summons with notice or third-party summons and complaint or petition or notice of petition or *order to show cause*. . . *The case will be given an index number* if applicable, or, in courts other than the supreme or county courts, any necessary filing number *and the application will be submitted to a judge of the court* . . . (emphasis added).

[12] *See* Matter of Fry v. Tarrytown, 89 N.Y.2d at 719 (collection of index number filing fee represents state's principal interest in commencement-by-filing system)

cause.[13] Thus, the holding in Mandala is consistent with CPLR § 1101 (f), which clearly suggests, albeit inartfully, that the Legislature intended that a pro se inmate's filing of a proposed order to show cause be deemed sufficient for purposes of commencement and tolling of the Statute of Limitations. The statute, in fact, draws no distinction between proposed and executed orders in the context of the initial filing in pro se inmate cases.

A proposed order to show cause in pro se inmate cases is the functional equivalent of a notice of petition.

In practical terms, then, under CPLR § 1101 (f) and the Second Department's decision in Mandala a pro se inmate's proposed order to show cause is treated as the functional equivalent of a notice of petition for tolling purposes. This approach makes sense because, although the paper signed by a judge in pro se inmate Article 78 proceedings is denominated an "order to show cause," it has all the characteristics of a simple notice of petition, and none of the attributes of a "true" order to show cause brought by a represented party who has an option about the manner of commencement of a special proceeding. An ordinary civil litigant does not usually commence a special proceeding by order to show cause unless there is some compelling reason to do so, such as when a provisional remedy is being sought. (The petitioner in Fry, for example, apparently chose to proceed by order to show cause only because he had sought a temporary restraining order.) In normal circumstances, where routine notice issues are concerned (i.e. return date, service requirements), a notice of petition suffices to commence the proceeding. The form order to show cause in pro se inmate cases merely establishes a return date for the petition and, as a routine matter, authorizes an alternative method of service on the Attorney General and the

[13] As a practical matter, it appears that many court clerks await the justice's signature before assigning an index number. In the instant case, for example, the order to show cause -- a form order routinely used by the Supreme Court, Albany County in pro se prisoner cases -- includes a direction by the judge to the clerk of the court to assign an index number (A5). However, the legislative scheme clearly contemplates that an index number is to be assigned before referral of the inmate's legal papers to a judge for signature.

respondent. Like the order issued in the instant case, it typically consists of a court-generated form with blank spaces for the return date and the date by which service must be perfected (A4-5). Therefore, as the form order issued in pro se inmate Article 78 proceedings is, in substantive terms, the functional equivalent of a notice of petition, the narrow exception to Fry recognized by the Second Department in Mandala and embodied in CPLR § 1101 (f) makes perfect sense. In practical terms, the routine orders issued in these pro se cases are the "poor man's notice of petition," and they should be treated as such for purposes of tolling the Statute of Limitations.

It should be noted that the Second Department apparently stopped short of fully embracing the federal mailbox-filing rule in Mandala, and adopted a somewhat less protective (and less certain) rule that focuses on whether an inmate posted his legal papers in a sufficiently timely manner to be "signed and filed within the Statute of Limitations period." The Court held that the inmate's placement of his proposed order to show cause and verified petition in the mail seven days before expiration of the limitations period was "ample time," and reversed the order dismissing the petition.[14] If, for some reason, this Court should decide that pro se inmates should not be accorded the full benefit of the Statute of Limitations that the mailbox-filing rule is designed to extend to prisoners, the Second Department's less protective version of the rule should be adopted. Under that rule, petitioner is entitled to relief because he delivered his legal papers to prison officials five days before the statutory deadline, sufficient time to have been received and processed by the court. Cf. CPLR § 2103 (b) ("[W]here a period of time prescribed

[14] Although in Mandala the unexecuted order was *received* by the court before formal expiration of the Statute of Limitations, this fact was not important to the Court's rationale, which focused on the inmate's "loss of control over the processing of his papers" after mailing. *See* Sigel Prac. Rev. No. 80, at 4 (February 1999) [Describing holding in Mandala: "The filing of an unsigned order to show cause seeking to bring on a special proceeding has been held to constitute valid commencement of a special proceeding by a pro se prisoner. *More than that – the court held that mere posting of the order in time for its signing by a judge within the applicable statute of limitations does the job"* (emphasis added) (A94).

by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period.")

There is no practical alternative to a mailbox-filing rule that would safeguard a prisoner's fundamental right of access to the courts.

Finally, there is no practical alternative to a mailbox-filing rule that would adequately safeguard a prisoner's fundamental right of access to the courts. Short of establishing satellite clerks' offices in the prisons where inmates might have direct access to judges, the common-sense mailbox-filing rule is the only viable means of assuring even-handed application of the Statute of Limitations in Article 78 proceedings. It should be noted, however, that one possible approach periodically referred to by the Third Department is plainly flawed.

The Third Department has suggested that, when a pro se Article 78 petition is otherwise time-barred, case-by-case review might be available to determine whether prison officials "prevented" an inmate from filing in a timely manner. *See e.g.* Matter of Marcus v. NYS Division of Parole, 264 A.D.2d 919 (3d Dept. 1999); Matter of Shell v. McCray, 261 A.D.2d 664 (3d Dept. 1999). However, this approach to the dilemma of delayed filings begs the question because the Third Department has held that an inmate's mailing of legal papers as much as four weeks in advance of the statutory deadline, standing alone, is insufficient when actual filing has occurred beyond the limitations period. Matter of Barrett v. Coughlin, 199 A.D.2d 653 (3d Dept. 1993). Notably, the Third Department has never listed the factors that might qualify as exceptional circumstances under a case-by-case standard of review, and has never ruled in favor of an inmate on such a claim. Moreover, there is no obvious statutory mechanism for extension of the Statute of Limitations in the manner contemplated by this approach. Finally, case-by-case analysis of the timeliness issue would not only be burdensome to the courts, it would inevitably result in unequal treatment of similarly situated litigants. *See* Ross v. Artuz, 150 F.3d 97 (2d Cir.

1998) (uncertain grace period for filing of federal habeas corpus petitions by state inmates after enactment of Anti-Terrorism and Effective Death Penalty Act defined as "reasonable time" after passage of the Act rejected as "unworkable" -- vague filing deadline would provide no guidance to inmate-petitioners or trial courts and would result in arbitrary decisions on timeliness issue).

In Conclusion

In conclusion, there is a clear problem under the Appellate Division, Third Department's strict construction of the commencement-by-filing scheme as it pertains to pro se inmate Article 78 petitions.[15] The Statute of Limitations is short, and an inmate's need to initiate the special proceeding by order to show cause carries with it inevitable delays that a prisoner-litigant cannot control or accurately predict. The problem has resulted in obvious injustice that can be easily remedied by adoption of a mailbox-filing rule. Because the CPLR poses no barrier to the achievement of a fair and just outcome in this case, the order of the Appellate Division should be reversed and Appellant's petition should be reinstated.

[15] It should be noted that Appellant's arguments in support of a mailbox-filing rule are confined to the commencement of pro se Article 78 proceedings in the Supreme Court. A mailbox-filing rule might not be necessary in actions or proceedings that offer an alternative to the harsh outcome of outright dismissal. *See e.g.*Espinal v. State of New York, 159 Misc.2d 1051 (Court of Claims 1993) [mailbox rule unnecessary for inmate filings in Court of Claims – among other reasons cited was availability of motion for late filing under Court of Claims Act § 10 (6)].

CONCLUSION

The order of the Appellate Division should be reversed, Appellant's petition should be reinstated, and the matter should be remitted to the Albany County Supreme Court for an order requiring the Respondents to submit an answer.

Respectfully submitted,

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