UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEFFREY A. WALKER	:	
v.	:	CIV. NO. 3:94CV2018 (AHN)
DETECTIVE DAVID JASTREMSKI, ET AL	:	

RECOMMENDED RULING ON REMAND

This case was remanded by the Court of Appeals to determine whether the pro se prisoner mail-box rule enunciated in Houston v. Lack, 487 U.S. 266 (1988), should apply to requests for collateral documents, or a different rule such as equitable tolling should apply. "Such a different rule would presumably consider a requestor‹s possible dilatory conduct along with the difficulties caused by the requestor‹s imprisonment in determining whether principles of equitable tolling applied." Walker v. Jastremski, 274 F.3d 652, 654 (2d Cir. 2001). "The issue of the applicability of Houston to requests for collateral documents is one of first impression in this Circuit, as is the question of how the fact of incarceration affects equitable tolling in the absence of a Houston rule." Id., 274 F.3d at 654-55.

Undisputed Facts

The following facts were found after an evidentiary hearing on September 28, 2000, Walker v. Jastremski, No. Civ. 3:94CV2018, 2001 WL 202063 (D. Conn. Jan. 23, 2001). Also considered were the parties‹ briefs[1] and the transcript of the September 28, 2000 hearing. [Doc. #92].

1. Jeffrey A. Walker was arraigned at Milford Superior Court on March 7, 1991, on one count of larceny in the second degree and one count of conspiracy to commit larceny in the second degree in violation of Conn. Gen. Stat. §53a-123.

2. Attorney Frank Halloran, then an assistant public defender, was appointed to represent Walker on March 7, 1991.

3. At an April 16, 1991 hearing before Superior Court Judge Mancini, Walker presented his faulty identification defense to Judge Mancini. The Court read from a "report" prepared by Mr. Walker,

> COURT: "On April 5th, I appeared before Judge Mancini, at which time the issue came up about my description. The alleged victim made a Photo I.D. procedure. The victim stated that the man in question was being six foot-three. I remind the Court I am still six foot-four, six foot-seven."

[1]Considered were plaintiff‹s memorandum of law [Doc. #106]; defendant Halloran‹s memorandum of law [Doc. #111]; defendants‹ Jastremski and Buerer‹s memorandum of law [Doc. #113]; and plaintiff‹s reply memorandum [Doc. #112].

MR. WALKER: No, five-seven.

MR. HALLORAN: Five foot-seven.

COURT: I mean five foot-seven. "And don‹t wear bi-focal glasses. Judge Mancini reduced my bond from fifteen thousand to fifty dollars. And tried to make sure I don‹t grow anymore." You haven‹t grown have you?

MR. WALKER: No Your Honor.

COURT: Alright. "Now I asked to produce sets of photos for the victim to look at." Has that been done?

MR. HALLORAN: There is one photo array in the State‹s file Your Honor. We believe there was some other attempt at a photographic identification made by the complainant in this matter, which the Police claim was unsuccessful.

COURT: What do you say Mr. Halloran, [are] his rights being deprived?

MR. HALLORAN: Your Honor I agree that issues can come up repeatedly in my discussions with the State‹s Attorney. The description of the perpetrator in this matter was six-three, . . . wearing bi-focals. My client does not have perfect vision, but he can read and see without glasses.

. . . .

MR. HALLORAN: He is also five-seven and not six-three. . . .

4. Addressing Attorney Halloran, Judge Mancini stated,

THE COURT: For me the problem in this case is not [Walker] and not you and not me. It is the State‹s fault. This man protested vehemently that he is not six foot-four or was. That he was not the party. And I ordered an

identification of all the photos. And it hasn‹t been done yet, why?

MR. GAETANO: I thought it had been done Your Honor.

THE COURT: Case dismissed.

[Doc. #106, Ex. C at 3-5].

5. Plaintiff‹s criminal case was dismissed on April 16, 1991. Judge Mancini noted on the record how "inept the State‹s Attorney was in this case." Id. at 5.

6. Plaintiff delivered his Motion for the Production of Records to prison officials on February 8, 1994,[2] requesting copies of the information, arrest warrant application and a transcript of the April 16, 1991 hearing before Judge Mancini, along with an Application for Waiver of Fees.

7. The motions were properly addressed to the Clerk of the Court, Milford Superior Court. Plaintiff provided a copy of his receipt for certified-mail stamp dated February 8, 1994, by the United States Postal Service in White Deer, Pennsylvania [Doc. #112, Ex. A].

8. The motions reached the Milford Superior Court sometime in late

[2]The Second Circuit noted that Walker presented new evidence on appeal that he mailed his motion to the Milford Superior Court Clerk on February 8, 1994, Walker, 274 F. 3d at 655 n.2. Plaintiff appended a copy of his return mail receipt, date stamped by the United States Postal Service on February 8, 1994, addressed to Clerk of Court Milford Superior Court. [Doc. #112 at Ex. A].

April 1994.

9. Walker received copies of the requested information, including the arrest warrant, on May 9, 1994.

10. "Absent tolling the latest date on which Walker could have filed a timely complaint was April 16, 1994." Walker v. Jastremski, 159 F.3d 117, 119 (2d Cir. 1998).

11. Plaintiff‹s federal complaint was filed June 8, 1994, when he delivered it to prison officials for mailing.

12. Plaintiff was aware that he filed his complaint after the statute of limitations period had run. The complaint states "NOTE: This action may be beyond the statue [sic] of limitations, however, petitioner only recently discovered that he had a constitutional right to sue for damages." [9/28/00 Hrg., Pl. Ex. D];

13. No exhibits were appended to plaintiff‹s complaint.

Prior Access to Arrest Warrant and Case Information[3]

The evidence adduced at the hearing established that Mr. Walker had access to the arrest warrant application during the pendency of his criminal case in 1991.

Defendant's Exhibit 3 is an undated handwritten document

[3]Walker v. Jastremski, No. Civ. 3:94CV2018, 2002 WL 202063, *4-6 (D. Conn. 2001).

entitled "questions," which plaintiff testified he prepared. [Def. Ex. 3 is appended to Doc. #113].

Although plaintiff testified that "[t]his document was written by me May 13, 1994, in Allenwood, after I received the documents from the court in my motion request for disclosure" [Tr. at 24], and that he did not provide it to Attorney Halloran [Tr. at 137], the Court credits Attorney Halloran's testimony that he provided Walker with a copy of the arrest warrant during his representation of Walker in 1991 and that Walker provided him with a copy of plaintiff's handwritten "questions" during the same time period. Plaintiff's handwritten "questions" is an undated document. [Def. Ex. 3].

Plaintiff testified that the last time he saw Attorney Halloran, before this September 28, 2000 hearing, was on April 16, 1991, the day his criminal case was dismissed. [Tr. at 25]. Similarly, Attorney Halloran testified that he had "no recollection of any communication from, to, or with, Mr. Walker since April 16, 1991."[4] [Tr. at 105].

Attorney Halloran testified,

> Q: Now, do you have any independent recollection of giving Mr. Walker a copy of the warrant in this case?
>
> A: I do not.

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[4]Attorney Halloran "guesstimated" that as a public defender he appears in court "with anywhere from five to ten clients per day." [Tr. at 127].

> Q: Did a review of your file indicate that it was likely you did give him a copy of that warrant?
>
> A: There's very little doubt in my mind that Mr. Walker was given a copy of the arrest warrant in this case.
>
> Q: And what leads you to believe that you gave Mr. Walker a copy of the arrest warrant?
>
> A: Well, there are two factors which lead me strongly to believe he was in possession of the warrant in question. Number one, it is my custom and habit to provide clients with copies of arrest warrants on the first date available, sometimes at arraignment court if its available to me at that time, but more - its common to provide it on the first court date after arraignment to a client. It's a practice that I've had for many, many, many years as a public defender.
>
> More importantly, and more probative is, upon review of my file and the contents of my file, there is a communication from Mr. Walker that I found inside of the file, which makes many references, verbatim references, to language that is contained in the arrest warrant affidavit application.

[Tr. 93-94]. Halloran reiterated, "there is very, very strong evidence to suggest that I was in possession of that document on or before April 16, 1991, as testified to on direct examination." [Tr. at 125].

Attorney Halloran further testified that, "[o]n April 16, 1991, I turned the file over to my secretary and did not see it again until I was notified by the Attorney General's office that a lawsuit was pending." [Tr. at 95]. When Halloran retrieved the file in 1994, it

contained a copy of the warrant and the information charging document, a copy of a motion for court ordered line-up and a copy of plaintiff's handwritten series of questions.[5] Id. at 97, 101.

Question Two from Exhibit 3, in plaintiff's handwriting, states in part,

> Detective Leiutenant [sic] Charles Beurer stated that Mr. Walker also know to keep company with a female matching the description of the alleged aforementioned black female perpetrator. . . .

[Def. Ex. 3 at question 2].

The arrest warrant dated December 10, 1990 states at paragraph 6,

> That Detective Leiutenant [sic] Charles Beurer . . .stated that he had knowledge of a certain Jeffrey Walker, who was . . . also known to keep company with a female matching the description of the aforementioned black female perpetrator. . . .

[Def. Ex. 1 at ¶6]. Attorney Halloran testified that, comparing these passages in defendants' exhibits 1 & 3, "roughly" 25 words of

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[5]Defendants' exhibit 3, plaintiff's handwritten questions, is a copy of the document found in Attorney Halloran's criminal file on Walker. [Tr. at 139]. Attorney Halloran testified that the original document of plaintiff's handwritten questions is contained in his file. "It's actually in handwriting on original non-copy paper, on lined paper." [Tr. at 140]. He further stated that he did not receive this original from Assistant Attorney General Sharon Hartley. Rather, he copied the original document [Exhibit 3] contained in his files and sent it to A.A.G.s Hartley and Emons at their request along with other documents contained in the public defender file. [Tr. 144-45].

the text are the same.

Question 2 further states

> "Mr. Halloran I'd like you to file a Motion of Discovery in my behalf, and a Motion to Supress identification procedures and a Motion to Dismiss all charges against me."[6]

(emphasis in original).

> Detective Leiutenant [sic] Charles Beurer of the West Haven Police Department when appraised of the foregoing facts and circumstances state that he had knowledge of a certain Jeffrey Walker who was last known to reside in West Haven, Connecticut, as being involved in this type of activity.

[Def. Ex. 3 at Question 2].

The arrest warrant similarly states at paragraph 6,

> That Detective Leiutenant [sic] Charles Beurer of the West Haven Police Department, when appraised of the foregoing facts and circumstances, stated that he had knowledge of a certain Jeffrey Walker, who was last known to reside in West Haven, Connecticut, as being involved in this type of activity.

[Def. Ex. 1 at ¶6]. Halloran testified that the passages in

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[6]Halloran testified that he prepared a motion for court order for line-up, dated April 16, 1991. [Def. Ex. 9]. At the September 2000, hearing, Halloran could not recall whether the motion was ever filed with the court, as the case was dismissed on April 16, 1991. [Tr. at 116-117]. On cross examination by Mr. Walker, Halloran further stated, "I don't have an independent recollection, but on a referral to my notes, it would lead me to conclude that you and I conferred about the filing of some sort of attack on the identification measures that the prosecution or the police used to try to arrest you." [Tr. at 126].

defendant's exhibit 1 are "parroted exactly" in exhibit 3.[7] [Tr. at 99].

Plaintiff's Question 2 continues,

> Mr. Halloran I know that a lie detector test is not admissible in a court of law, but I'd be willing to take that test to prove to the Court that I'm innocent and have no knowledge of this alleged crime prior to the statement you gave me to read.
>
> Mr. Halloran I can't seem to understand whats going on here with this alleged Mr. Tjandra Tedja . . . He is the one should be in front of this Court facing charges, "not me." Who in this world would leave $7,000 in a car with total strangers, this guy has to be a moron and if his allegation is true or if this person really exist[s], cause I don't believe the story and I will go to any extreme to prove my innocense.

[Def. Ex. 3 at Question 2].

Attorney Halloran also testified that,

> Q: And isn't it correct that it was Mr. Walker who asked you to verify whether or not, as indicated in the warrant, that the perpetrator had a heavy Jamaican accent?
>
> A: my recollection is Mr. Walker pointing out to me that the warrant - that absent from the warrant is that the perpetrator had a Jamaican accent, and this was another issue and identification which I am now recalling he pointed out, and I made a note of it and told my investigator to try to check this out.

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[7]The Court notes that even the misspelling of lieutenant is the same in both documents.

[Tr. at 103].[8]

Plaintiff was present at the hearing on April 16, 1991 and handed a "report" to Judge Mancini that was read into the record.

DISCUSSION

Plaintiff argues that "the instant litigation presents a classic situation that the Supreme Court sought to prevent when it promulgated the tolling rule announced in Houston v. Lack, 487 U.S. 266 (1988)." [Doc. #106 at 4]. Walker contends that "he is entitled to the benefits of Houston v. Lack's equitable tolling provisions and general equitable tolling law for the time period during which he

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[8]Defendant's exhibit 11 is a letter, dated April 2, 1991, from Thomas Candia, an investigator assigned to the public defenders office and utilized by Attorney Halloran, to Tjandra Tedja, evidencing his efforts to contact the complainant or victim to determine from the victim some of the allegations contained in the warrant. [Tr. at 103-104].

On cross examination, Attorney Halloran testified,

> I asked our investigator to try to obtain an interview with the alleged complainant, or alleged victim, because I saw immediately prior to meeting you, and then it was confirmed after meeting you, that there was significant problems with the state's case against you - the prosecution's case against you on the element of identification, and I asked him to try to get an interview with the complaining person because the complaining person identified someone with characteristics very different from you.

[Tr. at 120].

waited to receive court documents necessary to fully understand the nature of the instant cause of action." Id. at 5. Plaintiff interprets Houston broadly as creating "an equitable tolling rule for pro se prisoners in order to prevent them from being disadvantaged due to delay occasioned by no fault of their own," id. at 6, and "the desire to place the pro se prisoner litigant on equal footing with other litigants." Id. at 8.

Limiting Houston to Pro Se Prisoner District Court Filings

Plaintiff argues that, "there is no sound reason for allowing Houston to apply to the initial filing of a complaint but not to the filing of a motion for the production of relevant records that is necessary before a complaint can be filed." [Doc. #112 at 3]. Walker contends that if he had "not been incarcerated, he could easily have gone to the Milford Superior Court and handed his production request to Eileen Whelan on February 1994", and if he "were not imprisoned, he could have monitored Ms. Whelan‹s progress in retrieving the requested documents if they need arose." [Doc. #106 at 10].

The facts of this case do not compel an extension of Houston‹s "mail-box" rule to pro se prisoner requests for copies of pre-complaint documents. See Gerrets v Futell, No. CIV.A. 01-3080, 2002 WL 63541, *2 (E.D. La. Jan. 16, 2002) (holding that the prisoner‹s "motion for a free copy of his guilty plea and sentencing transcript

on January 7, 1998 . . . does not qualify as an ‹. . . application for State post-conviction or other collateral review . . .‹ so as to toll the limitation period under Section 2244(d)(2) because it was preliminary in nature and did not directly call into question Gerrets‹ conviction and sentence." A broader application of Houston‹s "mail-box" rule, beyond pro se prisoner district court filings, could arguably result in tolling for any number of requests or acts made to third parties that are traditionally considered pre-complaint preparation such as exhaustion requirements under the PLRA, and/or routine requests for copies of documents such as arrest reports, disciplinary reports, medical records, accident reports, incident reports, which is clearly beyond the scope of Houston. In this manner, prisoners could easily circumvent statutes of limitations.

This is not a situation where a pro se prisoner was ignorant of the facts or the legal issues. The record establishes that in April 1991: (1) Walker had a copy of his arrest warrant and was aware of its contents; (2) he had identified all the parties he would later name as defendants; (3) he had identified in his "questions," and in a letter/report to Judge Mancini, the issues of false identification and improper photo identification; and (4) when Walker filed his complaint, he believed it to be untimely when it was provided to prison officials for filing on June 8, 1994.

Defendants argue "there is no legal or equitable basis to

extend Houston to toll the statute of limitations." [Doc. #111 at 7-8]. "First, Mr. Walker‹s motion for production of records, . . . was not a legal pleading, but a request for collateral documents. Nor was his motion pursuant to any court or statutory deadline for which the mailbox rule is limited." Id. at 7. Second, "it was plaintiff‹s own dilatory conduct . . . which was the major contributing cause for his missing the statute of limitations deadline, rather than any delay caused by prison officials." Id.

Plaintiff cites no legal authority from another district court that supports the application of Houston‹s "mail-box" rule to pro se prisoner pre-complaint requests for documents. Rather, the cases cited by plaintiff all involve inter-prison mail delay for filing of district court documents. See Doc. #112 at 2-3, 6. In those cases, Houston applied because the delay was due to prison officials and the filings were made to the district court. [Doc. #111 at 6]. See Knickerbocker v. Artuz, 198 F. Supp.2d 415, 418 (S.D.N.Y. 2002) ("[T]he Notice of Appeal is not a motion. The notice indicates an intention to seek relief--reversal of a lower court's decree-- but it does not in and of itself request any relief, with respect to the time of its filing or otherwise. As a matter of policy, it would be unwise to construe these sort of documents as motions. Doing so would open the door to a floodgate of litigation over whether ministerial papers that are routinely filed in the Clerk's

office--documents that are ordinarily of no concern to judges, and that may not even be forwarded to chambers--should be parsed to see if circumstances warrant transforming them into sub silentio applications for relief from some procedural defect that cannot be cured. Both this Court and the Court of Appeals have recognized that pro se litigants must comply with the Federal Rules of Civil and Appellate Procedure, as well as with various technical requirements, such as filing deadlines and statutes of limitations, with which they ordinarily might not be familiar. While pro se litigants are entitled to some leeway in pleading, stretching the concept of a 'motion' to encompass papers that are manifestly not motions in order to redress perceived inequities is more leeway than this Court is prepared to give."); Donovan v. Maine, 276 F.3d 87, 93 (1st Cir. 2002) (rejecting argument for equitable tolling premised on delay in obtaining transcripts of the evidentiary hearing held in state superior court, finding that the transcripts were not necessary in order to file a federal habeas application); Jhad v. Hvass, 267 F.3d 803, 806 (8th Cir. 2001) ("lack of access to trial transcript does not preclude prisoner from commencing post-conviction proceeding and therefore does not warrant equitable tolling); see supra Gerrets v Futell, No. CIV.A. 01-3080, 2002 WL 63541, *2 (E.D. La. Jan. 16, 2002). Plaintiff‹s submission of the USPS receipt for certified mail indicates that his motions were mailed the same day he provided them

to prison officials for mailing. Therefore, this case does not involve inter-prison mail delay and, as previously stated, this case does not involve a mailing to the district court.

Although Walker did not have control over the delay involved in getting copies of the documents from the Clerk of Court at Milford Superior Court, he did have control over when he requested the documents, February 8, 1994, two months before the statute of limitations expired, and he did control the decision to wait for the documents to arrive before filing a complaint at the District Court.[9] Several courts have held that Houston does not apply when a document request is sent to a third party and not the court. Paige v. U.S., 171 F.3d 559, (8th Cir. 1999) (declining to extend Houston, the court held that "[a]lthough [plaintiff] had no control over the mail delay, he chose to have his brother draft his motion and to wait for that draft‹s arrival in the mail despite the impending due date . . . . We simply find no authority for extending the prison mailbox rule beyond a prisoner‹s mailings to the district court clerk."); Knickerbocker v. Artuz, 198 F. Supp. 2d 415, 417 (S.D.N.Y. 2000) (Court of Appeals held "prison mailbox rule established in Houston does not apply where a pro se prisoner delivers his notice of appeal to someone outside the prison system for forwarding to the Court Clerk."); Cook v.

[9]Plaintiff could have filed a timely complaint with notice pleading and amended the complaint after receipt of the transcript.

Stegall, 295 F.3d 517, 521 (6th Cir. 2002) ("we hold that the common law mailbox rule is inapplicable to the mailing of habeas petitions to third parties, as intermediaries, who then mail them to the court for filing."); U.S. v. Cicero, 214 F.3d 199, 205 (D.C. Cir. 2000) (plaintiff entrusted his legal documents to a third party at his peril); Gomez v. Castro, 47 Fed. Appx. 821, 822, 2002 WL 31073491, *1 (9th Cir. Sept. 17, 2002) (because plaintiff mailed state habeas petition to a third party for forwarding to the court, he was not entitled to the benefit of the prison mailbox rule under Houston, and was not entitled to equitable tolling as he failed to demonstrate "extraordinary circumstance beyond his control").

The Houston Court recognized that, unlike a non-incarcerated person, when a prisoner hands an otherwise timely pleading to prison officials for mailing, it is no longer in his control. Houston, 487 U.S. at 271. Plaintiff had control over when he would request the documents over a three year period. His motion for production was handed to prison officials and mailed the very same day. This case does not implicate the actions of prison officials, or involve delay attributable to prison authorities. Rather, the facts of this case highlight plaintiff‹s own dilatory conduct. Walker offered no explanation or extraordinary circumstance for why he waited until February 1994 to make his request for documents. The three year statute of limitations provided ample time for a pro se prisoner to

request such pre-complaint documents. Absent some sufficiently extraordinary set of circumstances, the court will not credit plaintiff with a tolling period for the processing of his request for copies of documents at the Milford Superior Court and declines to extend Houston under these facts.

Equitable Tolling

Plaintiff premises his claim for equitable tolling on the delay in receiving documents from the Milford Superior Court. The doctrine of equitable tolling, however, is exceedingly narrow.

Generally, equitable tolling is difficult to attain as it is reserved for "rare and exceptional circumstance[s]." Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000). Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances. Courts apply the doctrine "as a matter of fairness" where a plaintiff has been "prevented in some extraordinary way from exercising his rights, or has asserted his rights in the wrong forum." Patraker v. The Council on the Environment of New York City, No. 02CIV7382, 2003 WL 22336829, *2-3 (S.D.N.Y. Oct. 14, 2003) (citations omitted). Equitable tolling will stay running of a statutory period "only so long as the plaintiff has exercised reasonable care and diligence and if through no fault or lack of diligence on the plaintiff‹s part he was unable to sue before." Id.

As set forth above, Walker has failed to show that his incarceration rendered him unable to pursue his legal rights and has not shown any extraordinary circumstances to justify an equitable tolling of the limitations period.

In April 1991, plaintiff knew the facts supporting his claims

of ineffective assistance of counsel, false arrest, submission of a false affidavit in support of his arrest warrant, improper identification procedures, and malicious prosecution. He was present at the hearing dismissing the charges in April 1991. Plaintiff had three years to request copies of the information, arrest warrant and affidavit and April 16, 1991 hearing transcript. See Donovan v. Maine, 276 F.3d 87, 93 (1st Cir. 2002) (finding the delay in obtaining the transcript of the evidentiary hearing held in the superior court "was unfortunate-but largely beside the point. After all, the district court explicitly found that the petitioner did not need that transcript in order to file a federal habeas corpus application and this finding has deep roots in the record."). While the requested documents provided factual support for Walker‹s claims, they did not contain factual information not already known to plaintiff. See U.S. v. Tamfu, 3:99CR0279, 2002 WL 31452410, *5 (N.D. Tex. Oct. 5, 2002) ("Movant‹s pending request under FOIA/PA does not alter the Court‹s finding that the movant knew or should have known with the exercise of due diligence the factual bases for his current Brady claim . . . ."). Indeed, Walker does not argue that the he obtained "newly discovered evidence" from these documents, as he was present at his April 1991 hearing, he had obtained the arrest warrant in 1991 and had successfully advocated on his behalf at the hearing dismissing the charges. Tamfu, 2002 WL 31452410, *5 (a request for

documents "does not impact the limitations period, until the movant has actually obtained newly discovered evidence that could not have been discovered earlier thorough the exercise of due diligence.").

Similarly, equitable tolling of the limitations period is not warranted due to plaintiff‹s unfamiliarity with the law. It is well-settled that "ignorance of the law" does not entitle a pro se prisoner to equitable tolling. See Cox v. Edwards, No. 02CIV7076, 2003 WL 2221059, *3 (S.D.N.Y. Sept. 26, 2003); Huang v. United States, Nos. 03CV3755, 91CR827, 2003 WL 22272584,*2 (S.D.N.Y. Oct. 2, 2003) ("The district courts in the Southern District have unanimously found that inability to speak English and lack of familiarity with the legal system are not "rare and exceptional" circumstances, and thus are not grounds for equitable tolling."). There is little doubt that plaintiff knew the statute of limitations was running.[10] Walker‹s "excuse" of "only recently discover[ing] that he had a constitutional right to sue for damages" is quite different from a claim that he was missing the underlying information necessary to assert a cause of action, and does not meet the test for "rare and exceptional circumstances." Walker‹s failure to exercise due diligence over three years precludes equitable tolling.

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[10]The complaint states "NOTE: This action may be beyond the statue [sic] of limitations, however, petitioner only recently discovered that he had a constitutional right to sue for damages." [9/28/00 Hrg., Pl. Ex. D].

This Court need not decide whether a district court could ever apply equitable tolling to a request for copies of pre-litigation documents. However, here Walker has not established the existence of exceptional circumstances beyond his control that made it impossible for him to send out his request earlier or to timely file a complaint that would warrant equitable tolling; nor has he established that the Superior Court delay in providing the documents impeded his ability to file in any way.

CONCLUSION

The Court finds that the principles of Houston v. Lack do not apply to the pro se prisoner‹s request for copies of pre-complaint documents. The Court also finds that equitable tolling does not apply to the facts of this case. Accordingly, plaintiff‹s June 8, 1994 complaint was untimely and should be dismissed.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989)(per curiam); F.D.I.C. v. Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

ENTERED at Bridgeport this 12th day of March 2004.

___/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE