

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 22 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CARMON E. WARREN,

Petitioner - Appellant,

v.

A. K. SCRIBNER,

Respondent - Appellee.

No. 06-16212

D.C. No. CV-02-05779-SBA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Submitted October 18, 2007**
San Francisco, California

Before: ALARCON and TALLMAN, Circuit Judges, and DUFFY***, Senior
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Kevin Thomas Duffy, Senior United States District
Judge for the Southern District of New York, sitting by designation.

California state prisoner Carmon E. Warren appeals the district court's dismissal as untimely of his 28 U.S.C. Section 2254 petition for a writ of habeas corpus challenging his conviction for second-degree robbery with use of a firearm.

1. The district court correctly concluded that Warren was neither entitled to tolling of the limitation period under 28 U.S.C. § 2244(d)(1)(B) nor equitable tolling during the time in which he sought records from the state court pursuant to the California Public Records Act, Cal. Gov't. Code § 6250 *et seq.* Section 2244(d)(1)(B) suspends the limitation period when an impediment created by "State action in violation of the laws of the United States" prevents the petitioner from timely filing his application for a writ of habeas corpus. *Loyd v. Van Natta*, 296 F.3d 630, 633 (7th Cir. 2002). Here, Warren has not established that the delay in processing the information request *prevented* him from timely filing his petition. In all events, the documentation he sought was not critical to his ability to file. *See* Rule 2(c), Rules Governing Section 2254 Cases in the United States District Courts (requiring a habeas petitioner only to "set forth in summary form the facts supporting each of the grounds" for relief).

Warren has not demonstrated that extraordinary circumstances beyond his control prevented him from timely filing his petition that would qualify him for equitable tolling. *Laws v. LaMarque*, 351 F.3d 919, 922 (9th Cir. 2003). On direct

appeal, the California Court of Appeal fully credited the uncertified documents that Warren submitted indicating that the victim previously had been convicted of drunk driving. It was therefore unnecessary for Warren to obtain the official documents through an information request in order to exhaust his claim of prosecutorial misconduct.

2. The district court appropriately rejected Warren's contention that he was entitled to equitable tolling while administratively segregated. Because Warren was sentenced on May 21, 1999 and not segregated until June 19, 2002, he had sufficient time to ascertain the limitation period in his case. Notably, during that period, Warren competently filed state habeas petitions and the information request referenced above. Similarly, since a unit librarian made visits, albeit irregularly, on a weekly basis and took requests, Warren had access to legal materials that would have aided him in determining when to file his petition, even though it took the librarian a week to follow through with any requests. Finally, Warren's separation from his legal materials while in segregation was not caused by prison officials, but because he had given his habeas petition to another inmate for typing. *See Marsh v. Soares*, 223 F.3d 1217, 1220-21 (10th Cir. 2000) (reasoning that an inmate law clerk's incompetence did not give rise to extraordinary circumstances). The record therefore does not support a finding that there were extraordinary

circumstances beyond Warren's control that prevented him from timely filing his federal habeas petition. *Laws*, 351 F.3d at 922.

3. The district court properly determined that Warren was ineligible for tolling under 28 U.S.C. § 2244(d)(2) while his second-filed petition for state habeas relief was pending. State collateral proceedings are only pending within the meaning of section 2244(d)(2) during the "intervals between a lower court decision and the filing of a new petition in a higher court." *Carey v. Saffold*, 536 U.S. 214, 223 (2002). A federal habeas petitioner is entitled to tolling when he is "invoking one complete round of the State's established appellate review process" in order to exhaust state court remedies. *Id.* at 220. As a result, Mullins second-filed petition in the California Court of Appeal following the denial by the same court of his initial petition was not the filing of "a new petition in a *higher* court." *Id.* at 223 (emphasis added). The limitation period therefore was not subject to statutory tolling during the pendency of the second petition. *See King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003).

AFFIRMED.