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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL EVANS,) Case No. CV 99-11245 DDP (EE)
)
Petitioner,) **ORDER REJECTING IN PART REPORT**
) **AND RECOMMENDATION OF**
v.) **UNITED STATES MAGISTRATE JUDGE**
)
)
R.Q. HICKMAN,)
)
Respondent.)
_____)

Petitioner Michael Evans, a state prisoner, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The United States Magistrate Judge filed a report and recommendation finding that the petition is time-barred. Having conducted a de novo review of the matter pursuant to 28 U.S.C. § 636(b)(1)(C), the Court rejects the report in part and refers the matter back to the Magistrate Judge for further proceedings.

I. Background

The petitioner was convicted of second-degree burglary and petty theft in Los Angeles County Superior Court in 1996. (Answer, Case No. CV 99-0073 DDP (EE), Ex. A.) The charges stemmed from a shoplifting incident involving four bottles of shampoo. (Id. Ex. C.) The trial court found that the petitioner had also suffered two prior felony robbery convictions. (Id. Ex. A.) Pursuant to

1 California's Three Strikes Law, the petitioner was sentenced to a
2 term of 25 years to life. (Id.) In December 1997, the California
3 Court of Appeal affirmed the conviction and sentence. (Id. Ex. C.)
4 On February 18, 1998, the California Supreme Court denied review.
5 (Id. Ex. E.)

6 On January 6, 1999, the petitioner filed his first federal
7 habeas petition in this Court. Evans v. Hubbard, Case No. CV 99-
8 0073 DDP (EE).¹ The Court found that three of the four claims
9 raised in that petition were unexhausted. On June 15, 1999, at the
10 petitioner's election, the petition was dismissed without prejudice
11 for failure to exhaust available state remedies.

12 On October 27, 1999, the petitioner filed the instant
13 petition. In response to a Court order, the petitioner elected to
14 amend his petition to delete one unexhausted claim. His first
15 amended petition, filed on December 29, 1999, alleges two grounds
16 for relief: (1) that the trial court abused its discretion in
17 refusing to instruct the jury on the lesser-included offense of
18 attempted petty theft; and (2) that the petitioner's sentence
19 constitutes cruel and unusual punishment under the Eighth
20 Amendment.

21 The respondent filed an answer, contending that the petition
22 is time-barred by the applicable one-year statute of limitations.
23 (Answer to First Am. Pet.) Specifically, the respondent argues
24 that the filing of a prior federal habeas petition does not toll
25 the running of the limitations period. (Id. at 6-22.) The
26 respondent also argues that the petitioner failed to exhaust

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28 ¹ Pursuant to Federal Rule of Evidence 201, the Court takes
judicial notice of the pleadings and orders in that prior case.

1 available state remedies as to Ground 1. The petitioner filed a
2 traverse, citing equitable tolling and the relation-back doctrine.

3 Pursuant to 28 U.S.C. § 636(b)(1)(B), the matter was referred
4 to the Honorable Elgin Edwards, United States Magistrate Judge. On
5 April 25, 2000, the Magistrate Judge filed a report and
6 recommendation, recommending that the petition be dismissed with
7 prejudice. The Magistrate Judge rejected the arguments raised in
8 the petitioner's traverse, and concluded that the petition is time-
9 barred by the applicable one-year statute of limitations. In light
10 of this finding, the Magistrate Judge declined to reach the
11 exhaustion issue. On May 22, 2000, the Magistrate Judge submitted
12 a final report and recommendation to the Court, finding that the
13 statute of limitations is not tolled by the filing of a federal
14 habeas petition.

15 The Court accepts the Magistrate Judge's findings regarding
16 equitable tolling and the relation-back doctrine. However, the
17 Court respectfully disagrees with the Magistrate Judge's statutory
18 tolling analysis. Accordingly, the Court rejects the report in
19 part and refers the matter back to the Magistrate Judge for further
20 proceedings.

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22 **II. Discussion**

23 Under the Antiterrorism and Effective Death Penalty Act of
24 1996 ("AEDPA"), federal habeas petitions are subject to a one-year
25 limitations period. See 28 U.S.C. § 2244(d)(1). However, the
26 limitations period is tolled during the time that "a properly filed
27 application for State post-conviction or other collateral review
28 . . . is pending." 28 U.S.C. § 2244(d)(2).

1 In the petitioner's case, the one-year period began to run on
2 May 19, 1998, ninety days after the California Supreme Court denied
3 his petition for review. See Bowen v. Roe, 188 F.3d 1157, 1158-59
4 (9th Cir. 1999). Absent statutory or equitable tolling, the
5 limitations period expired on May 18, 1999. The instant petition
6 was filed 162 days later, on October 27, 1999. However, the
7 petitioner's first habeas petition was pending for slightly longer
8 than that 162-day period.² Accordingly, if the statute of
9 limitations were tolled by the filing of the first federal
10 petition, the instant petition would be timely.

11 In his final report and recommendation, the Magistrate Judge
12 found that statutory tolling does not apply to periods of prior
13 federal habeas review. This issue turns on the proper construction
14 of the statutory phrase, "State post-conviction or other collateral
15 review." 28 U.S.C. § 2244(d)(2).

16 As noted in the Magistrate Judge's report, the courts are in
17 disagreement as to this issue. The Third, Fifth, and Tenth
18 Circuits, as well as several district courts in this circuit, have
19 held that the word "State" modifies both the phrase
20 "post-conviction [review]" and the phrase "other collateral
21 review." See Jones v. Morton, 195 F.3d 153, 158-59 (3d Cir. 1999);
22 Ott v. Johnson, 192 F.3d 510, 513 n.10 (5th Cir. 1999); Rhine v.
23 Boone, 182 F.3d 1153, 1156 (10th Cir. 1999); Sperling v. White, 30

25 ² The petitioner's first federal habeas petition was pending
26 in this Court for 163 days, between January 6 and June 18, 1999.
27 Accordingly, for purposes of this order, the Court need not adjust
28 the relevant dates under the "mailbox" rule for pro se prisoners.
Under that rule, a habeas petition is deemed filed on the date that
it is delivered to prison authorities. See Saffold v. Newland, No.
99-15541, 2000 WL 973282 at *4 (9th Cir. July 17, 2000).

1 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998). Under this construction,
2 the limitations period is tolled only during the pursuit of state
3 procedures or habeas remedies.

4 In Sperling, for example, the court found that this
5 construction accorded with a "natural reading" of the statute and
6 with clear congressional intent. See Sperling, 30 F. Supp. 2d at
7 1250-53; accord Jones, 195 F.3d at 159 (relying primarily on
8 Sperling). The court found that a contrary reading would strain
9 the plain meaning of the words and would render the word "State"
10 mere surplusage. See Sperling, 30 F. Supp. 2d at 1250-51. The
11 court noted that, under its reading, the phrase "other collateral
12 review" could refer to non-judicial state post-conviction remedies
13 such as state petitions for clemency. See id. at 1251. Finally,
14 the court found that its reading best served the object and policy
15 of AEDPA, by placing strict time limits on federal habeas review
16 and according genuine finality to state convictions. See id. at
17 1251-52.

18 The Ninth Circuit has not addressed the issue. However, the
19 Second Circuit and one district court in this circuit, also relying
20 on a "natural reading" of the statute, have adopted a contrary
21 position. See Walker v. Artuz, 208 F.3d 357 (2d Cir. 2000);
22 Barrett v. Yearwood, 63 F. Supp. 2d 1245 (E.D. Cal. 1999). In
23 Walker, for example, the Second Circuit found that the Sperling
24 court's reading would result in the ungainly construction "State
25 . . . other collateral review." See Walker, 208 F.3d at 360. The
26 Second Circuit also rejected the Sperling court's limitation of the
27 term "collateral review," noting that the phrases "post-conviction
28 . . . review" and "other collateral review" could both encompass

1 habeas review as well as clemency petitions. See id. Finally, the
2 Second Circuit disagreed with the argument that its reading
3 frustrated the purposes of AEDPA. Rather, the Second Circuit
4 reasoned that applying tolling during periods of federal habeas
5 review promotes efficiency, encourages the prompt filing of federal
6 habeas petitions, and "avoids penalizing state prisoners who
7 properly have filed federal habeas petitions and are awaiting a
8 response from the court." See id. at 361.

9 The Court finds the Second Circuit's reasoning to be
10 persuasive, as well as consistent with the plain meaning of the
11 statute and the overall purposes of AEDPA. Accordingly, the Court
12 respectfully disagrees with the Magistrate Judge's statutory
13 tolling analysis. The Court holds that, under 22 U.S.C.
14 § 2244(d)(2), the one-year limitations period is tolled during the
15 pendency of federal habeas review. The instant habeas petition was
16 thus timely filed.

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1 **III. Conclusion**

2 For the reasons set forth above, the Court rejects in part the
3 Magistrate Judge's report and recommendation. The matter is
4 referred back to the Magistrate Judge for further proceedings. The
5 clerk shall serve this order on all parties or counsel of record.

6 IT IS SO ORDERED.

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9 Dated: _____

DEAN D. PREGERSON
United States District Judge

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