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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER C. WATSON,

Petitioner,

No. CIV S-06-1966 MCE DAD P

vs.

B. CURRY, et al.,

Respondents.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

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Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has not paid the required filing fee or filed an application to proceed in forma pauperis. See 28 U.S.C. §§ 1914(a) & 1915(a).

Petitioner is challenging a judgment of conviction entered in the Sacramento County Superior Court on July 12, 1989. Petitioner alleges the following eighteen claims in a 107-page petition:

- A. Ground one: USE OF "OTHER CRIMES" JURY INSTRUCTIONS VIOLATES DUE PROCESS
- B. Ground two: CALIFORNIA'S SENTENCING SCHEMES VIOLATE THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT ENTRUSTS TO A JUDGE THE FINDING OF FACT(S) ENHANCING A DEFENDANT'S PENALTY BEYOND THE STATUTORY MAXIMUM. THE

1 CONSTITUTION MANDATES THAT ANY FACT THAT  
2 INCREASES THE PENALTY BEYOND THE STATUTORY  
MAXIMUM MUST BE PLEAD AND PROVED BY A JURY.

3 C. Ground three: THE STATE OF CALIFORNIA NEVER  
4 REVIEWED PETITIONER'S SENTENCE TO DETERMINE  
5 WHETHER THE SENTENCE IMPOSED IS DISPARATE IN  
COMPARISON WITH SENTENCES IMPOSED IN SIMILAR  
CASES, AS IS MANDATED BY LAW.

6 D. Ground four: NEW EVIDENCE HAS BEEN OBTAINED  
7 SOME YEARS AFTER THE CONVICTION WHICH  
ESTABLISHES PETITIONER'S FACTUAL INNOCENCE

8 E. Ground five: THE AMENDED COMPLAINT ALLEGED  
9 ONE PARTICULAR DATE FOR THE CRIME TO HAVE  
10 OCCURRED YET ALL TESTIMONY FAILED TO SUPPORT  
11 THAT DATE EFFECTIVELY ALTERED THE CHARGING  
TERMS OF THE AMENDMENT, THUS DESTROYING  
DEFENDANT'S RIGHT TO BE TRIED ONLY ON THE  
CHARGES SET FORTH IN THE INDICTMENT

12 F. Ground six: PROSECUTORIAL MISCONDUCT

13 G. Ground seven: TRIAL COURT ERRONEOUSLY  
14 INTERFERED WITH THE PRESENTATION OF THE  
DEFENSE BY REFUSING TO ALLOW THE PRESENTATION  
15 OF CHARACTER EVIDENCE ATTACKING THE  
CREDIBILITY OF THE COMPLAINING WITNESS

16 H. Ground eight: "Evidence of a person's general reputation with  
17 reference to his character or a trait of his character at a relevant  
time in the community in which he then resided or in a group with  
18 which he then habitually associated is not made inadmissible by  
the hearsay rule."

19 I. Ground nine: TRIAL COURT'S REFUSAL TO ALLOW AS  
20 EVIDENCE THE ENTIRE LETTER OF JULLIE [sic] TO HER  
MOTHER CONSTITUTED PREJUDICIAL ERROR

21 J. Ground ten: TRIAL COURT ERRED IN ALLOWING  
22 PROSECUTION WITNESS, SANDRA BAKER TO GIVE  
EXPERT TESTIMONY

23 K. Ground eleven: INEFFECTIVE ASSISTANCE OF  
24 COUNSEL

25 L. Ground twelve: EVIDENCE WAS INSUFFICIENT TO  
26 SUSTAIN CONVICTIONS ON COUNTS ONE THROUGH  
TWELVE

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1 M. Ground thirteen: THE PROSECUTION CHARGED  
2 PETITIONER ILLEGALLY WITH TIME BARRED CHARGES  
3 IN WHICH THE STATUE [sic] OF LIMITATIONS HAD  
4 EXPIRED ON THOSE CHARGES

5 N. Ground fourteen: THE PROSECUTION ILLEGAL [sic]  
6 CHARGED PETITIONER WITH FELONY CHILD  
7 MOLESTATION CHARGES INSTEAD OF MISDEMEANOR  
8 CHILD MOLESTATION

9 O. Ground fifteen: PROSECUTION USED PERJURED  
10 TESTIMONY, INTENTIONAL PERJURY, SUPPRESSING  
11 MATERIAL EVIDENCE AND USING FALSE TESTIMONY  
12 ALLOWING IT TO GO UNCORRECTED CAUSING  
13 PROSECUTORIAL MISCONDUCT

14 P. Ground sixteen: PETITIONER WAS ILLEGALLY  
15 CONVICTED OF A WRONGFUL DATE, BY PERJURED  
16 TESTIMONY AND SUPPRESSION OF EVIDENCE BY THE  
17 PROSECUTION

18 Q. Ground seventeen: PETITIONER WAS WRONGFULLY  
19 CONVICTED OF OTHER CRIMES. BASED ON  
20 PROSECUTOR'S KNOWING PRESENTATION OF FALSE  
21 EVIDENCE AND FAILURE TO CORRECT THE RECORD  
22 VIOLATES PETITIONER'S DUE PROCESS

23 (Pet. at pages electronically numbered 4-5 & 12-106.)

24 Petitioner previously challenged his 1989 Sacramento County judgment of  
25 conviction in case No. CIV S-00-2674 WBS DAD P, a federal habeas proceeding commenced on  
26 December 6, 2000. Petitioner alleged two grounds for relief in his previous petition:

Ground one: The trial court's adverse credible finding that the  
victim's recantation was incredible was an abuse of discretion.

Ground two: The trial court abused it's [sic] discretion by failing  
to hold an evidentiary hearing; thereby denying [sic] petitioner the  
chance to develop material facts.

(Pet. at 5.) Respondents' motion to dismiss the petition for failure to raise a proper federal  
question was granted on February 4, 2002, and the habeas petition was summarily dismissed.  
Petitioner did not appeal the decision.

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1 Petitioner's new habeas petition is a second or successive petition. "A claim  
2 presented in a second or successive habeas corpus application under section 2254 that was  
3 presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). A claim that was  
4 not presented in a prior application shall be dismissed, unless

5 (A) the applicant shows that the claim relies on a new rule of  
6 constitutional law, made retroactive to cases on collateral review  
by the Supreme Court, that was previously unavailable; or

7 (B)(i) the factual predicate for the claim could not have been  
8 discovered previously through the exercise of due diligence; and

9 (ii) the facts underlying the claim, if proven and viewed in light  
10 of the evidence as a whole, would be sufficient to establish by clear  
and convincing evidence that, but for constitutional error, no  
11 reasonable factfinder would have found the applicant guilty of the  
underlying offense.

12 28 U.S.C. § 2244(b)(2). Before a second or successive application permitted by § 2244(b)(2) can  
13 be filed in the district court, "the applicant shall move in the appropriate court of appeals for an  
14 order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

15 The claims alleged in petitioner's second habeas petition were not presented in his  
16 first petition. Petitioner has not obtained an order from the Ninth Circuit Court of Appeals  
17 authorizing this court to address any of the new claims. The undersigned will therefore  
18 recommend that this action be dismissed without prejudice so that petitioner may move in the  
19 Ninth Circuit Court of Appeals for an order authorizing this district court to consider a second  
20 habeas petition attacking petitioner's 1989 conviction.

21 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court is directed to  
22 serve a copy of this order and findings and recommendations upon Stanley Cross, Acting Senior  
23 Assistant Attorney General; and

24 IT IS RECOMMENDED that this action be dismissed without prejudice.

25 These findings and recommendations will be submitted to the United States  
26 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within

1 twenty days after being served with these findings and recommendations, petitioner may file  
2 written objections with the court. A document containing objections should be titled "Objections  
3 to Magistrate Judge's Findings and Recommendations." Petitioner is advised that failure to file  
4 objections within the specified time may, under certain circumstances, waive the right to appeal  
5 the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: September 8, 2006.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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