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

GREGORY BARNES WATSON,

Petitioner,

No. CIV S-08-0453 WBS DAD P

vs.

EDMUND G. BROWN, et al.,

Respondents.

FINDINGS & RECOMMENDATIONS

_____/

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis is granted. See 28 U.S.C. § 1915(a).

The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus involving the same conviction and sentence at issue in this case. The previous application was filed on December 2, 2002, and was dismissed on March 31, 2005, as barred by the statute of limitations set forth at 28 U.S.C. § 2244(d)(1). Before petitioner can proceed with the instant application he must move in the United States Court of Appeals for the

1 Ninth Circuit for an order authorizing the district court to consider the application. 28 U.S.C.
2 § 2244(b)(3). See also McNabb v. Yates 576 F.3d 1028, 1029 (9th Cir. 2009) (“We hold that
3 the dismissal of a habeas petition as untimely constitutes a disposition on the merits and that a
4 further petition challenging the same conviction would be “second or successive” for purposes of
5 28 U.S.C. § 2244(b)”). Therefore, petitioner's application must be dismissed without prejudice
6 to its refiling upon obtaining authorization to proceed from the United States Court of Appeals
7 for the Ninth Circuit.

8 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed
9 without prejudice.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
12 days after being served with these findings and recommendations, petitioner may file written
13 objections with the court. The document should be captioned “Objections to Magistrate Judge's
14 Findings and Recommendations.” Petitioner is advised that failure to file objections within the
15 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
16 F.2d 1153 (9th Cir. 1991).

17 DATED: September 30, 2009.

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20 _____
21 DALE A. DROZD
22 UNITED STATES MAGISTRATE JUDGE

21 DAD:8
22 watson453.suc