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

9 FRED DWAYNE GILBERT,

10 Petitioner,

No. 2:08-cv-1119 LKK JFM (HC)

11 vs.

12 S.R. MOORE, Warden,

13 Respondent.

ORDER

14 \_\_\_\_\_/  
15 Petitioner, a state prisoner proceeding pro se, has filed this application for a writ  
16 of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States  
17 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.


18 On October 3, 2008, the magistrate judge filed findings and recommendations  
19 herein which were served on all parties and which contained notice to all parties that any  
20 objections to the findings and recommendations were to be filed within twenty days. Petitioner  
21 has filed objections to the findings and recommendations. Petitioner now claims he has  
22 exhausted his state court remedies even though his direct appeal is still pending. Even if  
23 petitioner is correct, the pendency of his direct appeal in the state appellate court precludes the  
24 exercise of jurisdiction over his federal habeas corpus action at this time. See Sherwood v.  
25 Tompkins, 716 F.2d 632, 634 (9th Cir. 1983); see also Drury v. Cox, 457 F.2d 764, 765 (9th Cir.  
26 1972).

1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-  
2 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire  
3 file, the court finds the findings and recommendations to be supported by the record and by  
4 proper analysis.

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. The findings and recommendations filed October 3, 2008, are adopted in full;
- 7 2. Respondent's August 1, 2008 motion to dismiss is granted (docket no. 12); and
- 8 3. This action is dismissed without prejudice.

9 DATED: January 27, 2009.

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12 LAWRENCE K. KARLTON  
13 SENIOR JUDGE  
14 UNITED STATES DISTRICT COURT  
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