

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

FRED DWAYNE GILBERT,

Petitioner,

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

VS.

S.R. MOORE, Warden,

Respondent.

ORDER

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

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

10
11 
12 LAWRENCE K. KARLTON
13 SENIOR JUDGE
14 UNITED STATES DISTRICT COURT