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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
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11 JASON DOUGLAS McEVOY,

No. CIV S-08-2245-FCD-CMK-P

12 Petitioner,

13 vs.

ORDER

14 SALAZAR,

15 Respondent.  
16 \_\_\_\_\_/

17 Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of  
18 habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States  
19 Magistrate Judge pursuant to Eastern District of California local rules.

20 On December 29, 2008, the Magistrate Judge filed findings and recommendations  
21 herein which were served on the parties and which contained notice that the parties may file  
22 objections within a specified time. Timely objections to the findings and recommendations have  
23 been filed.

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1 In his objections, petitioner states that his claim is based on Cunningham v.  
2 California, 127 S.Ct. 856 (2007), and that the Magistrate Judge erred by not referencing that case  
3 in the findings and recommendations. The holding in Cunningham, however, does not alter the  
4 Magistrate Judge's analysis or conclusion that petitioner's claims are plainly meritless because  
5 petitioner's upper term sentence was based on facts found by the jury.

6 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-  
7 304, this court has conducted a de novo review of this case. Having carefully reviewed the  
8 entire file, the court finds the findings and recommendations to be supported by the record and  
9 by proper analysis.

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The findings and recommendations filed December 29, 2008, are adopted  
12 in full;
- 13 2. This action is summarily dismissed; and
- 14 3. The Clerk of the Court is directed to enter judgment of dismissal and close  
15 this file.

16 DATED: January 23, 2009.

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18 FRANK C. DAMRELL, JR.  
19 UNITED STATES DISTRICT JUDGE  
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