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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

TERRY K PLEASANT,  
Petitioner,  
v.  
D. DAYES,  
Respondent.

Case No. 1:15-cv-00339-AWI-SAB-HC  
FINDINGS AND RECOMMENDATION  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On February 25, 2015, Petitioner filed the instant petition for writ of habeas corpus challenging his 2013 conviction in Merced County Superior Court for criminal threat, battery, and assault. Petitioner alleges ineffective assistance of counsel by his trial counsel and his appellate counsel. (ECF No. 1 at 5-7).<sup>1</sup>

**I.**  
**DISCUSSION**

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it

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<sup>1</sup> Page numbers refer to the page numbers stamped by ECF at the top of the page.

1 plainly appears from the petition . . . that the petitioner is not entitled to relief." See Rule 4 of the  
2 Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990).

3 A petitioner who is in state custody and wishes to collaterally challenge his conviction by  
4 a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).  
5 The exhaustion doctrine is based on comity to the state court and gives the state court the initial  
6 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501  
7 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,  
8 1163 (9th Cir. 1988).

9 A petitioner can satisfy the exhaustion requirement by providing the highest state court  
10 with a full and fair opportunity to consider each claim before presenting it to the federal court.  
11 Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971);  
12 Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest  
13 state court was given a full and fair opportunity to hear a claim if the petitioner has presented the  
14 highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis);  
15 Kenney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992) (factual basis).

16 Additionally, the petitioner must have specifically told the state court that he was raising  
17 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,  
18 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th  
19 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States  
20 Supreme Court reiterated the rule as follows:

21 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that  
22 exhaustion of state remedies requires that petitioners "fairly  
23 presen[t]" federal claims to the state courts in order to give the  
24 State the "'opportunity to pass upon and correct alleged violations  
25 of the prisoners' federal rights" (some internal quotation marks  
26 omitted). If state courts are to be given the opportunity to correct  
27 alleged violations of prisoners' federal rights, they must surely be  
28 alerted to the fact that the prisoners are asserting claims under the  
United States Constitution. If a habeas petitioner wishes to claim  
that an evidentiary ruling at a state court trial denied him the due  
process of law guaranteed by the Fourteenth Amendment, he must  
say so, not only in federal court, but in state court.

Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

1 Our rule is that a state prisoner has not "fairly presented" (and thus  
2 exhausted) his federal claims in state court unless he specifically  
3 indicated to that court that those claims were based on federal law.  
4 See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000).  
5 Since the Supreme Court's decision in Duncan, this court has held  
6 that the petitioner must make the federal basis of the claim explicit  
7 either by citing federal law or the decisions of federal courts, even  
8 if the federal basis is "self-evident," Gatlin v. Madding, 189 F.3d  
9 882, 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7  
10 . . . (1982), or the underlying claim would be decided under state  
11 law on the same considerations that would control resolution of the  
12 claim on federal grounds. Hiiivala v. Wood, 195 F3d 1098, 1106-  
13 07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th  
14 Cir. 1996); . . . .

15 In Johnson, we explained that the petitioner must alert the state  
16 court to the fact that the relevant claim is a federal one without  
17 regard to how similar the state and federal standards for reviewing  
18 the claim may be or how obvious the violation of federal law is.

19 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000).

20 In the instant petition, Petitioner has not sought review for his claims in the California  
21 Supreme Court. Petitioner argues two grounds for relief in the instant petition. In his first  
22 ground for relief, Petitioner alleges ineffective assistance of counsel by his trial counsel. In his  
23 second ground for relief, Petitioner alleges ineffective assistance of counsel by his appellate  
24 counsel. Petitioner states that he filed a habeas petition in the Fifth Appellate District of the  
25 Court of Appeal of the State of California that raised both grounds for relief. However,  
26 Petitioner did not raise these claims before the California Supreme Court. Petitioner indicates  
27 that he did not appeal his habeas petition to the highest state court or file any habeas petitions in  
28 the highest state court and that he "believed the Supreme Court of California would have denied  
review of the above petitions." (ECF No. 1 at 5). As Petitioner has not sought review in the  
California Supreme Court, the Court cannot proceed to the merits of his claims, and the petition  
must be dismissed without prejudice. See 28 U.S.C. § 2254(b)(1).

## 24 II.

### 25 RECOMMENDATION

26 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas  
27 corpus be DISMISSED WITHOUT PREJUDICE for failure to exhaust state remedies. This  
28

1 Findings and Recommendation is submitted to assigned United States District Court Judge,  
2 pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules for the  
3 United States District Court, Eastern District of California. Within thirty (30) days after service  
4 of the Findings and Recommendation, Petitioner may file written objections with the court and  
5 serve a copy on all parties. Such a document should be captioned “Objections to Magistrate  
6 Judge’s Findings and Recommendation.” The Court will then review the Magistrate Judge’s  
7 ruling pursuant to 28 U.S.C. § 636(b)(1)(C). Petitioner is advised that failure to file objections  
8 within the specified time may waive the right to appeal the District Court’s order. Wilkerson v.  
9 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th  
10 Cir. 1991)).

11  
12 IT IS SO ORDERED.

13 Dated: May 7, 2015

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16 UNITED STATES MAGISTRATE JUDGE  
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