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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 MANUEL HERRERA-GARCIA,

12 Petitioner,

13 v.

14 UNKNOWN,<sup>1</sup>

15 Respondent.

Case No. 1:17-cv-00127-LJO-SAB-HC

FINDINGS AND RECOMMENDATION TO  
DISMISS WITHOUT PREJUDICE THE  
PETITION FOR WRIT OF HABEAS  
CORPUS

16  
17 Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28  
18 U.S.C. § 2254.

19 **I.**

20 **BACKGROUND**

21 On January 27, 2017, Petitioner filed the instant petition for writ of habeas corpus  
22 challenging his conviction in the Fresno County Superior Court for assault with a deadly  
23 weapon. (ECF No. 1 at 1–2).<sup>2</sup> On January 31, 2017, the Court ordered Petitioner to show cause  
24 why the petition should not be dismissed for failure to exhaust state judicial remedies. (ECF No.

25 \_\_\_\_\_  
26 <sup>1</sup> The Court notes that Petitioner has not named a proper Respondent, such as the warden of the facility in which he  
27 is held or the chief officer in charge of state penal institutions. See Rule 2(a), Rules Governing Section 2254 Cases;  
Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996). The  
28 Court previously gave Petitioner an opportunity to amend the name of Respondent, but Petitioner failed to do so.  
Moreover, amendment is futile because the Court recommends that the petition be dismissed for nonexhaustion.

<sup>2</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 4). On January 31, 2017, the order to show cause was served on Petitioner and contained notice  
2 that a response should be filed within thirty days of the date of service of the order. Over thirty  
3 days have passed and Petitioner has not responded to the Court’s order to show cause.

4 **II.**

5 **DISCUSSION**

6 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a  
7 habeas petition and allows a district court to dismiss a petition before the respondent is ordered  
8 to file a response, if it “plainly appears from the petition and any attached exhibits that the  
9 petitioner is not entitled to relief in the district court.”

10 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus  
11 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based  
12 on comity to the state court and gives the state court the initial opportunity to correct the state’s  
13 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.  
14 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by  
15 providing the highest state court with a full and fair opportunity to consider each claim before  
16 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.  
17 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

18 Here, the petition states that Petitioner did not appeal his conviction to the California  
19 Supreme Court or seek relief in any other proceeding in the California Supreme Court. (ECF No.  
20 1 at 2–4). It is possible that, contrary to what is stated in the petition, Petitioner presented all of  
21 his claims to the California Supreme Court. However, as Petitioner has not responded to the  
22 order to show cause, it appears that Petitioner failed to exhaust his claims in the instant petition.  
23 If Petitioner has not sought relief in the California Supreme Court, the Court cannot proceed to  
24 the merits of those claims. 28 U.S.C. § 2254(b)(1).

25 **III.**

26 **RECOMMENDATION**

27 Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas  
28 corpus be DISMISSED WITHOUT PREJUDICE for failure to exhaust state judicial remedies.

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

11 IT IS SO ORDERED.

12 Dated: March 23, 2017

13   
14 UNITED STATES MAGISTRATE JUDGE