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

ROBEY HAIRSTON,

Petitioner,

v.

DAVID R. ZULFA, et al.,

Respondents.

Case No. 1:18-cv-01194-LJO-SAB-HC

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

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

**I.**

**BACKGROUND**

Petitioner is currently incarcerated at North Kern State Prison serving a four-year sentence for assault and battery. (ECF No. 1 at 1).<sup>1</sup> On August 27, 2018, Petitioner filed the instant petition for writ of habeas corpus challenging his conviction. (ECF No. 1). On September 6, 2018, the Court ordered Petitioner to show cause why the petition should not be dismissed without prejudice for failure to exhaust state judicial remedies. (ECF No. 6). The order to show cause was served on Petitioner and contained notice that a response should be filed within thirty days of the date of service of the order. Over thirty days have passed and Petitioner has not responded to the Court’s order to show cause.

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

1 **II.**

2 **DISCUSSION**

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

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

15 The petition states that Petitioner appealed the judgment of conviction, but it is unclear  
16 whether Petitioner sought relief in the California Supreme Court. (ECF No. 1 at 1–3, 5). It is  
17 possible that Petitioner presented all of his claims to the California Supreme Court and failed to  
18 indicate this to the Court. However, as Petitioner has not responded to the order to show cause, it  
19 appears that Petitioner failed to exhaust the claims raised in the instant petition. If Petitioner has  
20 not sought relief in the California Supreme Court, the Court cannot proceed to the merits of those  
21 claims. 28 U.S.C. § 2254(b)(1).

22 **III.**

23 **RECOMMENDATION**

24 Accordingly, the undersigned HEREBY RECOMMENDS that the petition for writ of  
25 habeas corpus be DISMISSED WITHOUT PREJUDICE for failure to exhaust state judicial  
26 remedies.

27 This Findings and Recommendation is submitted to the United States District Court  
28 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304

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

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10 IT IS SO ORDERED.

11 Dated: November 7, 2018

  
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UNITED STATES MAGISTRATE JUDGE