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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
7

8 JOSEPH HASKELL MAINE,

9 Petitioner,

10 v.

11 FRAUENHEIM,¹

12 Respondent.

Case No. 1:19-cv-00862-DAD-SAB-HC

FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT'S MOTION TO
DISMISS

ORDER DIRECTING CLERK OF COURT
TO AMEND CAPTION

(ECF No. 13)

13
14 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
15 pursuant to 28 U.S.C. § 2254.

16 **I.**

17 **BACKGROUND**

18 Petitioner was convicted by a jury in the Kern County Superior Court of two counts of
19 second-degree murder (counts 1 and 2), gross vehicular manslaughter while intoxicated (count
20 3), and misdemeanor driving without a valid license (count 6). Petitioner was sentenced to an
21 imprisonment term of: fifteen years to life on count 1; a concurrent fifteen years to life on count
22 2; and ten years plus two years on count 3, which was stayed. (LDs² 1, 2). On April 13, 2018, the
23 California Court of Appeal, Fifth Appellate District remanded the matter for the trial court to
24 correct a clerical error in the abstract of judgment and in all other respects affirmed the
25 judgment. (LD 2). On May 15, 2018, Petitioner filed a petition for review in the California
26 Supreme Court, which denied the petition on June 20, 2018. (LDs 3, 4).

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28 ¹ The correct spelling of Respondent's last name is Frauenheim. (ECF No. 13 at 1 n.1).

² "LD" refers to the documents lodged by Respondent on August 21, 2019. (ECF No. 14).

1 Petitioner filed a state habeas petition and a petition for resentencing in the Kern County
2 Superior Court. Petitioner also filed a notice of appeal in the California Court of Appeal of the
3 denial of his resentencing petition. (ECF No. 13 at 2 n.2).³ Petitioner did not file any state habeas
4 petitions challenging his convictions and sentence in the California Supreme Court. (Id. at 2).

5 On May 7, 2019, Petitioner filed the instant federal petition for writ of habeas corpus.
6 (ECF No. 1). In the petition, Petitioner asserts the following claims for relief: (1) ineffective
7 assistance of counsel for failing to excuse a juror who was a family member of the victim; (2)
8 denial of a fair trial because a family member of the victim was on the jury; (3) ineffective
9 assistance of counsel for failing to excuse a juror who knew the victim and the mother who was
10 also in the car at the time of the accident; and (4) denial of a fair trial because a member of the
11 jury knew the victim and the mother. (ECF No. 1 at 3–6).

12 On August 21, 2019, Respondent filed a motion to dismiss the petition as unexhausted.
13 (ECF No. 13). To date, Petitioner has not filed any opposition or statement of non-opposition to
14 the motion to dismiss, and the time for doing so has passed.

15 II.

16 DISCUSSION

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

25 Respondent has lodged state court records that demonstrate Petitioner only presented two
26 instructional error claims in his petition for review filed in the California Supreme Court. (LD 3).
27 Given that Petitioner has not sought relief in the California Supreme Court on any of the claims

28 ³ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 raised in the instant petition, this Court cannot proceed to the merits of said claims. 28 U.S.C.
2 § 2254(b)(1).

3 **III.**

4 **RECOMMENDATION & ORDER**

5 Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

- 6 1. Respondent’s motion to dismiss (ECF No. 13) be GRANTED; and
7 2. The petition for writ of habeas corpus be DISMISSED WITHOUT PREJUDICE for
8 failure to exhaust state judicial remedies.

9 Further, the Clerk of Court is DIRECTED to amend the caption to reflect “Frauenheim”
10 as Respondent.

11 This Findings and Recommendation is submitted to the assigned United States District
12 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
13 Rules of Practice for the United States District Court, Eastern District of California. Within
14 **THIRTY (30)** days after service of the Findings and Recommendation, any party may file
15 written objections with the court and serve a copy on all parties. Such a document should be
16 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the
17 objections shall be served and filed within fourteen (14) days after service of the objections. The
18 assigned United States District Court Judge will then review the Magistrate Judge’s ruling
19 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
20 the specified time may waive the right to appeal the District Court’s order. Wilkerson v.
21 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
22 Cir. 1991)).

23 IT IS SO ORDERED.

24 Dated: November 18, 2019

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26 _____
27 UNITED STATES MAGISTRATE JUDGE
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