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8	UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
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11	NEAL O'NEILL,	No. 2:17-cv-2094 AC P
12	Petitioner,	
13	V.	ORDER
14	THE STATE OF CALIFORNIA,	
15	Respondent.	
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17	Petitioner is a state prisoner without counsel seeking a writ of habeas corpus pursuant to	
18	28 U.S.C. § 2254. He has filed a lengthy petition (ECF No. 2) which, for the reasons identified	
19	below, fails to state cognizable federal claims. <sup>1</sup> Petitioner will be afforded an opportunity to	
20	show cause as to why this petition should not be recommended for dismissal on that basis. He	
21	has also filed an application to proceed in forma pauperis which makes the required showing and	
22	will be granted. ECF No. 2.	
23	I. Legal Standards	
24	The court must dismiss a habeas petition or portion thereof if the prisoner raises claims	
25	that are legally "frivolous or malicious" or fail to state a basis on which habeas relief may be	
26	$\frac{1}{1}$ The court notes that petitioner has two other habeas petitions pending in this district. See	
27	O'Neill v. California Department of Corrections et al, 2:17-cv-01669-KJN; O'Neill v. The State	
28	of California, 2:17-cv-02104-KJN. These petitions appear to concern the same underlying conviction as the instant petition, but neither has been screened at the time of this order.	
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granted. 28 U.S.C. § 1915A(b)(1),(2). The court must dismiss a habeas petition "[i]f it plainly
 appears from the petition and any attached exhibits that the petitioner is not entitled to relief[.]"
 Rule 4 Governing Section 2254 Cases.

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## II. Background

Petitioner was convicted of driving under the influence with prior offenses on January 21,
2014 in the El Dorado County Superior Court. ECF No. 1 at 1. He accepted a plea agreement,
pled guilty, and was given a five year prison sentence. Id. He now raises the following claims:
(1) that he was threatened with an eight year sentence if he did not accept the plea agreement; (2)
his trial attorney refused to file a "writ of habeas mandate" when the trial court denied petitioner's
motion to dismiss; and (3) his direct appeal challenged only the application of pre-sentence
credits; it failed to challenge his underlying conviction. Id. at 4-5.

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## III. Analysis

### A. Threat of an Eight Year Sentence

A petitioner's rights are not violated where prosecutors threaten him with a longer
sentence in order to persuade him to accept a plea deal. The Ninth Circuit has noted that
"[p]rosecutors often threaten increased charges and, if a guilty plea is not forthcoming, make
good on that threat . . . [s]uch prosecutorial actions as part of plea negotiations do not violate due
process." <u>United States v. Gastelum-Almeida</u>, 298 F.3d 1167, 1172 (9th Cir. 2002).

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#### **B.** Trial Counsel's Failure to File a Writ of Habeas

It is unclear what petitioner means by a "writ of habeas mandate." To the extent he is arguing that his trial counsel should have filed a writ of mandate challenging a denial of a motion to dismiss that occurred prior to his guilty plea, that claim is barred. In <u>Tollett v. Henderson</u>, the Supreme Court held that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S. 258, 267 (1973).

To the extent petitioner is challenging trial counsel's failure to file a petition for habeas
corpus after he was convicted, that claim is non-cognizable. The federal statute providing for

habeas review of state convictions prohibits claims based on the ineffectiveness of counsel during
 "State collateral post-conviction proceedings." 28 U.S.C. § 2254(i) (stating that "[t]he
 ineffectiveness or incompetence of counsel during Federal or State post-conviction proceedings
 shall not be a ground for relief in a proceeding arising under section 2254.").

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## C. Failure to Challenge Underlying Conviction on Direct Appeal

Petitioner claims that he was denied his right of appeal insofar as his direct appeal
challenged only the application of pre-sentence credits and not the underlying conviction itself.
The court will construe this as an ineffectiveness claim against his appellate counsel. As noted
above, petitioner entered a guilty plea. Thus, it is unclear what basis his appellate counsel could
have had to challenge the validity of his conviction. See Boag v. Raines, 769 F.2d 1341, 1344
(9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective
assistance."). Petitioner may better explain the basis for this claim in his response to this order.

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#### IV. Conclusion

Rather than recommending that this petition be dismissed immediately, the court will
afford petitioner an opportunity to show cause, in writing, why his petition should not be
dismissed for the reasons identified above.

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It is HEREBY ORDERED that:

Petitioner's application to proceed in forma pauperis (ECF No. 2) is granted; and
 Petitioner has thirty days from the date of this order's entry to show cause, in
 writing, why his petition should not be dismissed for failure to state a cognizable claim.
 DATED: October 17, 2017

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ALLISON CLAIRE UNITED STATES MAGISTRATE JUDGE