

1 granted. 28 U.S.C. § 1915A(b)(1),(2). The court must dismiss a habeas petition “[i]f it plainly
2 appears from the petition and any attached exhibits that the petitioner is not entitled to relief[.]”
3 Rule 4 Governing Section 2254 Cases.

4 **II. Background**

5 Petitioner was convicted of driving under the influence with prior offenses on January 21,
6 2014 in the El Dorado County Superior Court. ECF No. 1 at 1. He accepted a plea agreement,
7 pled guilty, and was given a five year prison sentence. *Id.* He now raises the following claims:
8 (1) that he was threatened with an eight year sentence if he did not accept the plea agreement; (2)
9 his trial attorney refused to file a “writ of habeas mandate” when the trial court denied petitioner’s
10 motion to dismiss; and (3) his direct appeal challenged only the application of pre-sentence
11 credits; it failed to challenge his underlying conviction. *Id.* at 4-5.

12 **III. Analysis**

13 **A. Threat of an Eight Year Sentence**

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

19 **B. Trial Counsel’s Failure to File a Writ of Habeas**

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

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

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

5 **C. Failure to Challenge Underlying Conviction on Direct Appeal**

6 Petitioner claims that he was denied his right of appeal insofar as his direct appeal
7 challenged only the application of pre-sentence credits and not the underlying conviction itself.
8 The court will construe this as an ineffectiveness claim against his appellate counsel. As noted
9 above, petitioner entered a guilty plea. Thus, it is unclear what basis his appellate counsel could
10 have had to challenge the validity of his conviction. See Boag v. Raines, 769 F.2d 1341, 1344
11 (9th Cir. 1985) (“Failure to raise a meritless argument does not constitute ineffective
12 assistance.”). Petitioner may better explain the basis for this claim in his response to this order.

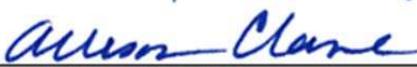
13 **IV. Conclusion**

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

17 It is HEREBY ORDERED that:

- 18 1. Petitioner’s application to proceed in forma pauperis (ECF No. 2) is granted; and
- 19 2. Petitioner has thirty days from the date of this order’s entry to show cause, in
20 writing, why his petition should not be dismissed for failure to state a cognizable claim.

21 DATED: October 17, 2017

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23 ALLISON CLAIRE
24 UNITED STATES MAGISTRATE JUDGE
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