

1 withdraw his unexhausted claims and the Petition now was dismissed as a mixed
2 petition, the dismissal should be with prejudice because any amended petition filed
3 hereafter by petitioner would be time barred. Accordingly, the Magistrate Judge
4 recommended that this action be dismissed with prejudice for failure to exhaust state
5 remedies unless petitioner withdrew his unexhausted claims within thirty (30) days
6 and elected to proceed solely on his remaining exhausted claims.

7 On March 6, 2015, petitioner filed an “Objection and Reply” to the Report and
8 Recommendation.

9 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition and all the
10 records and files herein, including the Report and Recommendation of the Magistrate
11 Judge, and petitioner’s objections thereto. The gravamen of petitioner’s objections
12 is that he satisfied the exhaustion of state remedies requirement with respect to
13 Grounds Two, Three, Four, Six, Nine, and Twelve of the Petition when he claimed in
14 his first California Supreme Court habeas petition that his appellate counsel had
15 rendered ineffective assistance in failing to raise on direct appeal substantive claims
16 generally corresponding to Grounds Two, Three, Four, Six, Nine, and Twelve of the
17 Petition. However, the Court concurs with the Magistrate Judge that those ineffective
18 assistance of appellate counsel subclaims are insufficient to satisfy the exhaustion of
19 state remedies requirement with respect to the underlying substantive claims. The
20 Court concurs. See, e.g., Rose v. Palmateer, 395 F.3d 1108, 1112 (9th Cir. 2005)
21 (“[A]lthough Rose’s Fifth Amendment claim is related to his claim of ineffective
22 assistance, he did not fairly present the Fifth Amendment claim to the state courts
23 when he merely discussed it as one of several issues which were handled ineffectively
24 by his trial and appellate counsel. While admittedly related, they are distinct claims
25 with separate elements of proof, and each claim should have been separately and
26 specifically presented to the state courts.”), cert. denied, 545 U.S. 1144 (2005); Ruffin
27 v. Director Nevada Dept. of Corrections, 2011 WL 2433805, at *6 (D. Nev. June 23,
28 2011) (“Neither a claim of ineffective assistance of counsel nor a cumulative error

1 claim exhausts an underlying independent substantive claim. Petitioner never
2 presented the independent substantive claims in Ground 4 as independent substantive
3 claims based upon federal constitutional law.”); Ray v. Cate, 2011 WL 1464940, at
4 *3 (N.D. Cal. Apr. 15, 2011) (“A claim that trial and/or appellate counsel was
5 ineffective in failing to raise a claim in the state courts does not fairly present the
6 underlying claim to the state court.”); Meza v. Schroeder, 2010 WL 1381095, at *7
7 (D. Ariz. Mar. 9, 2010) (“Any exhaustion of the ineffective assistance of counsel
8 claim does not exhaust the underlying constitutional claim.”), Report and
9 Recommendation Adopted by 2010 WL 1381150 (D. Ariz. Mar. 31, 2010).

10 Accordingly, having made a de novo determination of those portions of the
11 Report and Recommendation to which objections have been made, the Court accepts
12 the findings of the Magistrate Judge regarding the exhaustion of state remedies issue.

13 However, based on petitioner’s statement in his objections that he “plans to
14 proceed with the permitted claims--[Grounds] One, Five, Seven, Eight, Ten, Eleven,
15 Thirteen [and] Fourteen, and will withdraw any claims that the Court cannot accept,
16 with objection,” the Court will now deem petitioner’s unexhausted claims to be
17 withdrawn and order respondent to file an Answer addressing the merits of Grounds
18 One, Five, Seven, Eight, Ten, Eleven, Thirteen and Fourteen of the Petition within
19 forty-five (45) days.²

20 IT IS SO ORDERED.

21 3/17/15

22 DATED: _____



23
24
25 DALE S. FISCHER
UNITED STATES DISTRICT JUDGE

26 _____
27 ² The Court is not foreclosing respondent from reasserting the statute of
28 limitations as an affirmative defense in the Answer.