

1 amended petition. (Doc. 33.) Those Findings and Recommendations were served upon all parties
2 and contained notice that any objections thereto were to be filed within twenty-one (21) days after
3 service. On February 12, 2024, Petitioner filed objections to the Findings and Recommendations.
4 (Doc. 34.) Petitioner’s objections largely reiterate arguments he raised in opposition to the
5 motion to dismiss. Respondent did not file a response to the objections.

6 In accordance with the provisions of 28 U.S.C. § 636 (b)(1), the Court has conducted a de
7 novo review of the case. Having carefully reviewed the entire file, including Petitioner's
8 objections, the Court adopts in the part the Findings and Recommendations. As to Ground Six,
9 the Court concludes that the Findings and Recommendations are supported by the record and
10 proper analysis, and the motion to dismiss is granted as to Ground Six. The Court denies in part
11 the motion to dismiss Ground Five. As to Ground Five, the Court finds that a sub-claim,
12 asserting ineffective assistance of trial counsel with respect to the alleged failure to present
13 evidence at trial that Petitioner’s confession was coerced, relates back to the timely-filed Ground
14 Two in Petitioner’s initial federal habeas petition (Doc. 1). Accordingly, the motion to dismiss
15 that sub-claim is denied. As to the remaining sub-claims in Ground Five, the Court concludes
16 that the Findings and Recommendations are supported by the record and proper analysis, and the
17 motion to dismiss is granted as to the remaining sub-claims.

18 **I. Tolling of the Limitation Period**

19 Petitioner argues that Grounds Five and Six are timely. Petitioner asserted Grounds Five
20 and Six in his initial federal habeas petition filed February 11, 2022, but simultaneously moved to
21 dismiss Grounds Five and Six and to stay federal proceedings while he exhausted state remedies
22 as to those grounds. (Docs. 1, 3.) The Court granted Petitioner’s motion to dismiss Grounds Five
23 and Six and stayed the federal proceedings pursuant to *Kelly v. Small*, 315 F.3d 1063 (9th Cir.
24 2003). (Doc. 9.) Through counsel, on January 18, 2022, Petitioner filed his initial state habeas
25 petition as to Grounds Five and Six.² By the time Petitioner filed that initial state habeas petition,
26 only 146 days remained in the federal limitations period under 28 U.S.C. § 2244(d). (Doc. 33 at

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28 ² Petitioner filed his initial state habeas petition in the Kern County Superior Court. (*See*
Docs. 23-12, 23-13.)

1 3.) The superior court denied the initial petition on March 2, 2022. Petitioner thereafter did not
2 file his second state habeas petition, in the appellate court, until September 12, 2022 – a gap of
3 193 days from March 2, 2022.

4 Under § 2244(d)(2), “[t]he time during which a properly filed application for State post-
5 conviction or other collateral review with respect to the pertinent judgment or claim is pending
6 shall not be counted toward any period of limitation under this subsection.” For the reasons
7 stated by the magistrate judge, Petitioner’s claims were not “pending” during this 193-day gap
8 period. The Court agrees with the Findings and Recommendations that Petitioner’s 193-day
9 delay between the denial of his initial state habeas petition and his filing of the second state
10 habeas petition was unreasonable, statutory tolling did not apply during this period, and the
11 second petition was untimely.

12 Petitioner does not dispute the 193-day gap delay between his state habeas petitions.
13 Rather, he argues that Grounds Five and Six are nonetheless timely because the first 120 days
14 should not be counted pursuant to *Robinson v. Lewis*, 9 Cal. 5th 883, 901 (Cal. 2020). Petitioner
15 misconstrues *Robinson*’s holding. In *Robinson*, the California Supreme Court found a safe harbor
16 for gap delays of 120 days or less. *Id.* However, the court made clear that gap delays longer than
17 120 days would remain subject to the normal analysis: “That is, we would consider whether,
18 under all of the circumstances, gap delay longer than 120 days constituted substantial delay and,
19 if so, whether the petitioner demonstrated good cause for the delay or an exception applied.” *Id.*
20 A gap of 193 days is a substantial delay and requires some good cause explanation. *See id.*
21 (allowing unexplained six-month gap delay would be “unduly generous”). Yet Petitioner offers
22 no explanation for his delay in filing the second state habeas petition, and his failure to establish
23 any good cause for the delay is fatal to his tolling argument.

24 Petitioner also argues that his claim of actual innocence excuses any untimeliness, but he
25 fails to identify any specific, new exculpatory evidence not introduced at trial. Petitioner fails to
26 make out a claim of actual innocence sufficient to avoid the limitations bar.

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1 **II. Relation Back**

2 Petitioner also argues Grounds Five and Six are based on the same core of operative facts
3 as his timely-filed Grounds One through Four and therefore relate back to Petitioner’s initial
4 federal habeas petition. The Court finds that Petitioner’s subclaim in Ground Five (asserting
5 ineffective assistance of counsel with respect to the alleged failure to present evidence at trial that
6 Petitioner’s confession was coerced), while presenting a different legal theory, is tied to the same
7 core of operative facts as Petitioner’s timely-filed Ground Two, which claimed that Petitioner’s
8 confession was coerced and was improperly admitted at trial in violation of the Fifth, Sixth, and
9 Fourteenth Amendments. *See, e.g., Nguyen v. Curry*, 736 F.3d 1287, 1296–97 (9th Cir. 2013)
10 (ineffective assistance claim based on failure to raise double jeopardy related back to timely-
11 raised substantive double jeopardy claim), *abrogation on other grounds recognized by Ross v.*
12 *Williams*, 950 F.3d 1160, 1168 (9th Cir. 2020) (en banc). Accordingly, the motion to dismiss is
13 denied as to this sub-claim in Ground Five.

14 Otherwise, for the reasons stated by the magistrate judge, Petitioner’s remaining
15 ineffective assistance of counsel sub-claims in Ground Five, and Ground Six in its entirety, do not
16 relate back to the original four claims, because they differ in both time and type from the original
17 claims. *See Schneider v. McDaniel*, 674 F.3d 1144, 1151–52 (9th Cir. 2012) (ineffective
18 assistance claim based on trial counsel’s failure to investigate and to move to sever pretrial did
19 not share common core of operative facts with petitioner’s new claim that court erred in denying
20 motion to sever during trial). Accordingly, the remaining sub-claims in Ground Five, and
21 Ground 6 in its entirety, are dismissed as untimely.

22 **III. Certificate of Appealability**

23 The Court declines to issue a certificate of appealability. A state prisoner seeking a writ
24 of habeas corpus has no absolute entitlement to appeal a district court’s denial or dismissal of his
25 claims, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S.
26 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate of
27 appealability is 28 U.S.C. § 2253, which provides:

- 28 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a

1 district judge, the final order shall be subject to review, on appeal, by the court of
2 appeals for the circuit in which the proceeding is held.

3 (b) There shall be no right of appeal from a final order in a proceeding to test
4 the validity of a warrant to remove to another district or place for commitment or
5 trial a person charged with a criminal offense against the United States, or to test
6 the validity of such person's detention pending removal proceedings.

7 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
8 appeal may not be taken to the court of appeals from—

9 (A) the final order in a habeas corpus proceeding in which the
10 detention complained of arises out of process issued by a State
11 court; or

12 (B) the final order in a proceeding under section 2255.

13 (2) A certificate of appealability may issue under paragraph (1) only if the
14 applicant has made a substantial showing of the denial of a constitutional
15 right.

16 (3) The certificate of appealability under paragraph (1) shall indicate which
17 specific issue or issues satisfy the showing required by paragraph (2).

18 If a court denies or dismisses with prejudice a petitioner's claim, the court may issue a
19 certificate of appealability only when a petitioner makes a substantial showing of the denial of a
20 constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must
21 establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition
22 should have been resolved in a different manner or that the issues presented were 'adequate to
23 deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
24 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

25 For the reasons stated above, the Court finds that Petitioner has not made the required
26 substantial showing of the denial of a constitutional right to justify the issuance of a certificate of
27 appealability. Reasonable jurists would not find the Court's determination debatable, wrong, or
28 deserving of encouragement to proceed further. Thus, the Court declines to issue a certificate of
29 appealability.

30 **IV. Conclusion**

31 Accordingly,

- 32 1. The Findings and Recommendations issued on January 22, 2024 (Doc. 33) are
33 ADOPTED IN PART.

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2. Respondent’s motion to dismiss (Doc. 28) is DENIED as to the sub-claim in Ground Five asserting ineffective assistance of counsel with respect to the alleged failure to present evidence at trial that Petitioner’s confession was coerced. The motion to dismiss is GRANTED as to all remaining sub-claims in Ground Five. The motion to dismiss is GRANTED as to Ground Six.
3. Ground Six, and the dismissed sub-claims in Ground Five, are DISMISSED from the petition with prejudice.
4. The Court declines to issue a certificate of appealability.
5. The matter is referred back to the magistrate judge for further proceedings.

IT IS SO ORDERED.

Dated: March 26, 2024



UNITED STATES DISTRICT JUDGE