

The relevant procedural benchmarks are outlined in the below chart:

Date	Event	Inactivity Period
March 7, 1999	Judgment Entered	
	No Direct Appeal Filed Within 60-Day Time Limit for Seeking Direct Review	
May 6, 1999	Judgment Becomes Final ¹	
	NO ACTIVITY (Abandoned by Retained Counsel)	4 years, 10 mos., 27 days
May 6, 2000	Federal Habeas Filing Deadline Expires	
	NO ACTIVITY (Abandoned by Retained Counsel)	
April 2, 2004	First State Trial Court Habeas Petition Filed	
Unknown (but before 5/10/06)	First State Trial Court Habeas Petition Denied	
May 10, 2006	Second State Trial Court Habeas Petition Filed	
July 5, 2006	Second State Trial Court Habeas Petition Denied	
	NO ACTIVITY	5 years, 10 mos., 17 days
May 22, 2012	Third State Trial Court Habeas Petition Filed	
June 6, 2012	Third State Trial Court Habeas Petition Denied	
	NO ACTIVITY	4 years, 1 month, 22 days
July 28, 2016	Fourth State Trial Court Habeas Petition Filed	
Sept. 6, 2016	Fourth State Trial Court Habeas Petition Denied	
Sept. 14, 2016	State Court of Appeal Habeas Petition Filed	
Sept. 19, 2016	State Court of Appeal Habeas Petition Denied	
Oct. 24, 2016	State Supreme Court Habeas Petition Filed	
Dec. 14, 2016	State Supreme Court Habeas Petition Denied	
Dec. 19, 2016	Federal Habeas Petition Filed	

(ECF No. 28, at 2-3.)

In this Court’s first Report and Recommendation, the Court noted that Sundberg’s federal habeas petition was filed 16 years late, and that there was no basis for statutory

¹ Because Sundberg never tried to appeal to a “state court of last resort,” the U.S. Supreme Court “would have lacked jurisdiction over a petition for certiorari”; thus, the “90-day period for seeking certiorari” is ignored in determining when his judgment became final. *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) (citations omitted).

1 omitted). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high,
2 lest the exceptions swallow the rule.” *Id.* The petitioner “bears the burden of showing that
3 equitable tolling is appropriate.” *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026
4 (9th Cir. 2005) (citation omitted).

5 With these principles in mind, the Court addresses each of Sundberg’s arguments
6 for his delay in seeking federal habeas relief.

7 **A. Actual Innocence**

8 Sundberg asserts that he is actually innocent of attacking his father, which would
9 excuse his failure to file within the AEDPA’s statute of limitations. See *Lee v. Lampert*,
10 653 F.3d 929, 931 (9th Cir. 2011). To qualify under the actual-innocence doctrine, the
11 petitioner must supply “new reliable evidence—whether it be exculpatory scientific
12 evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not
13 presented at trial.” *Id.* at 938 (citation omitted). Petitioner then bears the burden of proving
14 that, “in light of the new evidence, no juror, acting reasonably, would have voted to find
15 him guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 329 (1995).

16 Sundberg’s actual-innocence claim fails at the very first step, as he offers no new
17 evidence whatsoever. Instead, he merely makes a few disparaging and uncorroborated
18 statements about the victim (his now deceased father) and argues that the trial evidence
19 failed to establish the necessary element of premeditation. (See ECF No. 1, at 11 (referring
20 to his father as “a 77 year old mental patient who refused to take his medication” who
21 “[m]ade up quite a story”); ECF No. 52, at 12.) None of this qualifies as “new reliable
22 evidence . . . that was not presented at trial.” See *Lee*, 653 F.3d at 938 (citation omitted).

23 Even if the Court deemed these contentions to be new evidence, there is nothing in
24 the record to support them. Sundberg offers nothing but unsupported allegations against
25 his father. Likewise, the Court has no basis to accept Sundberg’s claim that there was
26 insufficient premeditation evidence. He offers no guilt-phase transcripts, instead relying
27 only on what appears to be a preliminary-hearing transcript. According to his appointed
28 counsel, the relevant trial transcripts no longer exist, because “California only required [the

1 court reporter] to keep the stenographies for 10 years and these records were destroyed
2 years ago.” (ECF No. 45, at 3 n.14.)

3 Thus, Sundberg has failed to carry his burden of supplying new evidence that would
4 have stopped a reasonable fact finder from convicting him.

5 **B. Miscarriage of Justice**

6 Under the banner of the miscarriage of justice exception, Sundberg marches out
7 many procedural grievances with his state proceedings. But this doctrine applies only to
8 claims of actual innocence, not “procedural violations.” See *Johnson v. Knowles*, 541 F.3d
9 933, 937 (9th Cir. 2008). “Without any new evidence of innocence, even the existence of
10 a concededly meritorious constitutional violation is not in itself sufficient to establish a
11 miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.”
12 *Id.* at 935-36 (citation omitted).

13 Even if such procedural complaints could support equitable tolling, Sundberg fails
14 to identify any manifest injustice in the California state procedures. Each criticism, in fact,
15 seems to spring from a misunderstanding of California’s procedural safeguards regarding
16 an acquittal by reason of insanity. Because Sundberg places so much emphasis on these
17 alleged irregularities, the Court will review each of these miscarriage-of-justice complaints
18 in the context of the proceedings below.

19 **1. Guilt Phase—Right to Contest Factual Guilt**

20 First, Sundberg argues that by pleading not guilty by reason of insanity, “he was
21 conceding his factual guilt for the offense,” “waiving his right to trial,” and “removing any
22 possibility of judicial review of his factual guilt.” (ECF No. 45, at 5, 7; ECF No. 52, at 7.)
23 But Sundberg also asserts that he made alternative pleas of “not guilty” and “not guilty by
24 reason of insanity.” (ECF No. 1, at 2; ECF No. 14-5, at 2.) Upon such joint pleas, a
25 California state trial court “conducts a bifurcated trial and the issues of guilt and sanity are
26 separately tried. In the first phase of trial, the defendant is tried on his or her factual guilt
27 without reference to the insanity plea.” *People v. Dobson*, 161 Cal. App. 4th 1422, 1431
28 (2008) (citations omitted); see also Cal. Penal Code § 1026(a).

1 Here, Sundberg in fact received such a guilt-phase trial, which lasted two days. On
2 February 9, 1999, after Sundberg waived his right to a jury, the state court began a bench
3 trial on the issue of factual guilt. (See ECF No. 45-4, at 1, 3.) Four witnesses testified and
4 were examined, and both sides offered exhibits and stipulated to certain expert testimony.
5 (Id. at 3-4.) After the prosecution rested, Sundberg moved for a judgment of acquittal due
6 to an alleged lack of premeditation—an argument that goes to factual guilt—which the
7 court denied. (Id. at 4.) The guilt-phase trial continued on February 10. (ECF No. 45-4,
8 at 4; ECF No. 45-6, at 1.) Although the Minutes from the trial’s second day are not in the
9 record, the court presumably found Sundberg factually guilty, as it moved on to the sanity
10 phase on the third day, February 11. (See ECF No. 45-6, at 1.) So, notwithstanding
11 Sundberg’s arguments, he did not lose his opportunity to defend himself as to factual guilt.

12 **2. Conclusive Presumption of Sanity (During Guilt Phase, Not Sanity Phase)**

13 Next, Sundberg claims “structural error” because after an insanity plea, California
14 law “requires a conclusive presumption that a person was sane at the time of the offense.”
15 (ECF No. 45, at 3; ECF No. 52, at 11.) Relying on *Patterson v. Gomez*, 223 F.3d 959, 966
16 (9th Cir. 2000), Sundberg argues that this “is patently unconstitutional.” (ECF No. 45, at 3,
17 3 n.15; ECF No. 52, at 11.) But *Patterson* actually blessed this presumption in the context
18 of California’s bifurcated system of adjudicating guilt and sanity.² That is, it held that “the
19 trial court could have instructed the jury to presume that the defendant was sane,” so long
20 as it also took various steps to avoid jury confusion. *Patterson*, 223 F.3d at 967 (emphasis
21 added). For example, without proper explanation, the *Patterson* court feared that jurors
22 might incorrectly assume that the sanity presumption negated not just insanity, but also
23 lesser mental defects that defendants might rely on to undermine mens rea. *Id.* at 965.

24 These jury-confusion concerns are irrelevant here because Sundberg was tried by a
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26 ² The conclusive presumption of sanity only applies during the guilt-phase trial. Cal.
27 Penal Code § 1026(a). During the sanity phase, “the burden is upon the defendant to prove
28 by a preponderance of the evidence that he was insane at the time of the offense.” *Dobson*,
161 Cal. App. 4th at 1431.

1 judge alone, not a jury. Unlike Patterson, Sundberg’s fact finder is presumed to understand
2 all these legal nuances. See *Lambrix v. Singletary*, 520 U.S. 518, 531-32, 532 n.4 (1997)
3 (holding that judges, unlike jurors, “are presumed to know the law and to apply it in making
4 their decisions” (citation omitted)). Thus, while the judge conclusively presumed Sundberg
5 to be sane during the February 9-10 guilt phase, he obviously dropped this conclusive
6 presumption during the February 11 sanity phase, as the verdict was not guilty by reason
7 of insanity. (See ECF No. 45-6, at 1.)

8 **3. Consequences of Post-Acquittal Commitment**

9 In the way California deals with criminal defendants who are acquitted due to
10 insanity, Sundberg identifies two alleged structural errors. First, he believes that “the
11 insanity plea mandates the maximum term of incapacitation” and that his insanity finding
12 “would confine him for life.” (ECF No. 52, at 12-13.) He is wrong. Defendants found
13 not guilty by reason of insanity must be committed to a state hospital, but they may petition
14 for release due to restored sanity (or for outpatient placement) after 180 days. See *Dobson*,
15 161 Cal. App. 4th at 1432 (citing Cal. Penal Code § 1026.2(d)); Cal. Penal Code § 1601(a).
16 At worst, they will be released at the expiration of “the longest term of imprisonment which
17 could have been imposed for the offense or offenses of which the person was convicted.”
18 *Dobson*, 161 Cal. App. 4th at 1432 (citing Cal. Penal Code § 1026.5(a)(1)). The trial court
19 here correctly committed Sundberg to “the state mental hospital for a minimum term of
20 180 days and a maximum term of life,” plus six years. (ECF No. 45-6, at 3.)

21 Second, according to Sundberg, California law mandates that if he recovers his
22 sanity, he must still be “institutionalized until there is some right to a jury trial” or
23 “transferred to the sheriff for further judicial proceedings.” (ECF No. 45, at 7.) Again, he
24 misunderstands California law. “A successful insanity plea relieves the defendant of all
25 criminal responsibility.” *Dobson*, 161 Cal. App. 4th at 1432. An “insanity acquittee” has
26 nevertheless “demonstrated dangerousness,” and thus California law requires
27 “commitment of the defendant to a state hospital . . . for the purpose of treatment, not
28 punishment.” *Id.* (citations and quotation marks omitted). Because he is not criminally

1 responsible, if Sundberg secures release due to recovered sanity or if he qualifies for
2 outpatient placement, he would not face a jury trial or any further criminal judicial
3 proceedings.

4 **4. Right to Appeal**

5 Finally, Sundberg argues that he was “ineligible to appeal” his acquittal by reason
6 of insanity. (See ECF No. 52, at 7, 7 n.28.) While this was once true in California, it has
7 not been the law since 1968, long before Sundberg’s case. Sundberg relies on *People v.*
8 *Mallory*, 254 Cal. App. 2d 151 (1967), which held that “[a] commitment to a state hospital
9 after a finding of not guilty by reason of insanity is not appealable,” based on an old
10 statutory provision. *Id.* at 153. But a year after the *Mallory* decision, “the Legislature
11 amended that section to include a ‘commitment of a defendant for insanity’ as an
12 appealable final judgment.” *People v. Coleman*, 86 Cal. App. 3d 746, 750-51 (1978). This
13 was the case throughout Sundberg’s trial proceedings, and it is still the case today.
14 Compare Cal. Penal Code § 1237(a) (1995) (“An appeal may be taken by the defendant
15 . . . [f]rom . . . the commitment of a defendant for insanity. . . .”); with Cal. Penal Code
16 § 1237(a) (2016) (same). Indeed, the trial court here specifically advised Sundberg
17 “regarding his appeal rights.” (ECF No. 45-6, at 3.)

18 In any event, none of Sundberg’s procedural “miscarriage of justice” arguments,
19 individually or collectively, establish any procedural error whatsoever. Even if these
20 contentions amounted to procedural irregularity, it would not equitably toll his federal
21 habeas filing deadline, absent proof of actual innocence. See *Johnson*, 541 F.3d at 937.

22 **C. Unavailability of Legal File**

23 For some unspecified period, Sundberg alleges that he lacked access to his defense
24 attorney’s file and his case transcripts. “[I]t is ‘unrealistic to expect a habeas petitioner to
25 prepare and file a meaningful petition on his own within the limitations period’ without
26 access to his legal file.” *Espinoza-Matthews*, 432 F.3d at 1027-28 (alteration and citation
27 omitted). While this would satisfy the “extraordinary circumstance” prong of the equitable
28 tolling analysis, Sundberg still fails to show that he was “pursuing his rights diligently.”

1 See *Holland*, 560 U.S. at 645. He has not explained when he requested his case file, what
2 steps he took to secure it, or how this stopped him from filing his federal petition for over
3 16 years—especially since he successfully filed multiple state habeas petitions during this
4 same time frame. Indeed, his state petitions suggest that he had access to at least some case
5 materials. For instance, in his second state petition, Sundberg disputed evidence in minute
6 detail, including how many “drops of blood” were on a crime scene photograph, and
7 alleging that “the judge quoted from a falsified transcript of Dr. Fomaciari’s pre-trial
8 testimony.” (See ECF No. 1, at 28.)

9 **D. Denial of Transcripts**

10 On a similar note, Sundberg maintains that he “was denied even the transcripts of
11 his proceeding which is grounds for tolling.” (ECF No. 45, at 6, 6 n.27 (citations omitted).)
12 Yet the trial court explicitly ruled that “right of access of the Petitioner [to the transcripts]
13 is not being denied.” (ECF No. 45-5, at 2.) Rather, the court found that Sundberg “has not
14 provided any factual basis” for obtaining transcripts at taxpayer expense, and it refused to
15 provide him free copies until he made a sufficient factual showing. (Id. at 1.) In the
16 meantime, the court suggested that Sundberg “may have a friend or relative review the file
17 and have copies made of whatever is contained therein—for a fee.” (Id. at 2.) Sundberg has
18 not shown that he ever tried to make the required showing or pay the normal fees, so any
19 lack of transcripts cannot justify equitable tolling.

20 **E. Lack of Legal Training and Law Library**

21 Sundberg points to both his legal inexperience and his lack of access to a law library
22 to justify his cumulative decade of habeas inactivity. These common problems, however,
23 do not constitute extraordinary circumstances for equitable tolling, especially since these
24 same restrictions did not prevent Sundberg from filing multiple state petitions. See *Ramirez*
25 *v. Yates*, 570 F.3d 993, 998 (9th Cir. 2009) (rejecting equitable tolling based on lack of a
26 law library, when petitioner filed state petitions without access and he “offer[ed] no
27 explanation of how or why his restricted library access made it impossible for him to file a
28 timely § 2254 petition”).

1 **F. Mental Competency Examinations**

2 Sundberg also asserts that his pretrial proceedings justify equitable tolling of his
3 federal habeas deadline. Specifically, he was asked about the facts of his case in the mental
4 competency examinations before his trial, which he claims violated his Fifth Amendment
5 rights. Even assuming this were true, it would not justify equitable tolling: it is not an
6 extraordinary circumstance that prevented Sundberg from filing a habeas petition
7 sometime after his trial and commitment. See *Holland*, 560 U.S. at 649. At best, this point
8 might serve as an additional substantive claim for relief, but it does nothing to move the
9 needle on the question of timeliness or equitable tolling.

10 Even if the Court reinterprets this argument in the best possible light for
11 Sundberg—that is, his mental illness prevented him from filing a timely federal habeas
12 petition and the facts surrounding this mental competency examination are evidence of the
13 severity of his mental illness—he still fails to qualify for equitable tolling. “Petitioner has
14 not shown (or presented enough evidence to require an evidentiary hearing to determine)
15 that his mental and physical problems prevented him from filing his petition on time.”
16 *Tresevant v. Ryan*, No. CV-09-01255-PHX-ROS (MHB), 2010 WL 4960011, at *3
17 (D. Ariz. Dec. 1, 2010) (citation omitted). “A showing of mental illness (or physical
18 disabilities) alone will not necessarily toll the limitation period.” *Id.* Here, as in *Tresevant*,
19 Sundberg has “demonstrated his ability to manage his own affairs by, among other things,”
20 filing repeated state post-conviction petitions. See *id.* Also, Sundberg’s petition relies
21 heavily on the fact that he has “no severe mental illness” to support his contention that the
22 trial judge erred in finding him not guilty by reason of insanity, and he attached several
23 reports to his petition suggesting that the majority of those who examined him before his
24 trial concluded he had no severe mental illness. (ECF No. 1, at 10, 13.) So, he has not met
25 the heavy burden to justify equitable tolling.

26 **G. The Suspension Clause**

27 Next, Sundberg argues that the Constitution’s Suspension Clause bars this Court
28 from enforcing the statute of limitations against him. (See ECF No. 52, at 8-9); see also

1 U.S. Const. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended,
2 unless when in Cases of Rebellion or Invasion the public Safety may require it.”). To the
3 extent he is arguing that 28 U.S.C. § 2244(d)’s one-year limitation always constitutes a
4 violation of the Suspension Clause, he is wrong. See *Green v. White*, 223 F.3d 1001, 1003-
5 04 (9th Cir. 2000) (“We join other circuits that have considered this issue and hold that
6 [§ 2244(d)’s] one-year limitation does not constitute a per se violation of the Suspension
7 Clause.”). To the extent he is simply repackaging his equitable tolling argument as an
8 as-applied Suspension Clause argument, it is rejected for the same failure to show diligence
9 discussed throughout this opinion. See *Green*, 223 F.3d at 1004 (noting that the AEDPA’s
10 time limitation “does not violate the Suspension Clause” because, in part, it is “subject to
11 equitable tolling” if petitioners “diligently pursue [their] claims” (citation omitted)).

12 **H. Abandonment by Appellate Attorney**

13 Finally, Sundberg reiterates his claim that his appellate counsel abandoned him
14 without filing a direct appeal and was later disbarred for abandoning similar individuals.
15 As this Court previously recognized and the government concedes (see ECF No. 46, at 1),
16 this abandonment may qualify as a sufficiently extraordinary circumstance to meet one
17 prong of Holland’s equitable-tolling test. But Sundberg cannot meet the other prong of the
18 analysis: diligent pursuit of his rights. When Sundberg’s second state habeas petition was
19 denied in 2006, he certainly had the means to file a federal petition and he understood that
20 no one else would do it for him. Yet he waited nearly six years before filing his third state
21 petition, and then another four years before filing his fourth state petition. Even ignoring
22 all the other delays, this ten-year gap of inactivity—after Sundberg demonstrated an ability
23 to file his own collateral attacks—cannot qualify as diligent pursuit of his rights. See *Taylor*
24 *v. Filson*, 692 F. App’x 821, 822 (9th Cir. 2017) (denying equitable tolling, based in part
25 on the fact that the prisoner, who had “mental health issues,” had “filed two state post-
26 conviction actions, indicating that he had the means to file a federal action”).

27 Despite both Sundberg and his newly-appointed counsel filing several briefs seeking
28 equitable tolling since this Court’s last opinion, neither has explained this decade of delay

1 or provided evidence to show that Sundberg was diligently pursuing his rights during this
2 span. Sundberg mentions that, at some point during the 16-year post-commitment period,
3 the “public defender sent a large box of evidence to the innocence project” at his request
4 and that “they” (presumably the Innocence Project) worked on his “case for a number of
5 years” until they “ran out of funding.” (ECF No. 34, at 2.) At some point, he also “wrote
6 Innocence Matters,” “USC Law School,” the “ACLU,” and an attorney, but none were able
7 to take up his case.³ (Id.) But Sundberg does not identify when any of this happened, how
8 long it took, or what he did during his other years of inactivity. Without more, Sundberg
9 falls far short of his burden to produce evidence that he was diligent throughout the relevant
10 decade-long period of habeas inactivity.

11 **CONCLUSION**

12 Because Sundberg filed his federal habeas petition more than 16 years after the
13 statute of limitations expired, and insufficient tolling is available, this Court again
14 recommends that respondent’s motion to dismiss be **GRANTED** and that the petition be
15 **DISMISSED** with prejudice.

16 By March 13, 2019, the parties must file any objections to this report. See 28 U.S.C.
17 § 636(b)(1). Upon being served with any objections, the party receiving such objections
18 has 14 days to file any response. Fed. R. Civ. P. 72(b)(2).

19 Dated: February 27, 2019

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21 _____
22 Hon. Andrew G. Schopler
23 United States Magistrate Judge
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27
28 ³ In 2015, Sundberg also apparently sought help from Legal Services for Prisoners
with Children. (See ECF No. 1, at 12.)