

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Robert Lee Walden, Petitioner,

vs.

David Shinn, Respondent.

****CAPITAL CASE****

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Equitable tolling is available to excuse an untimely claim for habeas relief if a petitioner shows extraordinary circumstances and reasonable diligence. *Holland v. Florida*, 560 U.S. 631 (2010). The Second, Ninth, and Tenth Circuit Courts of Appeals permit equitable tolling when a petitioner relies on potentially favorable but unsettled circuit law and that reliance is upended by subsequent legal developments. But they are divided over whether tolling is appropriate where out-of-circuit cases might have foreshadowed those developments. Compare *Williams v. Filson*, 908 F.3d 546 (9th Cir. 2018), with *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003), and *Rodriguez v. Bennett*, 303 F.3d 435 (2nd Cir. 2002). The question presented is whether the Ninth Circuit contravened *Holland* and entrenched a split with the Second and Tenth Circuits in concluding that equitable tolling is unavailable if, at the time of a petitioner's reliance on unsettled circuit law, out-of-circuit cases existed that might have augured a change in controlling precedent retroactively rendering his claim untimely.

PARTIES TO THE PROCEEDING

The petitioner (and petitioner-appellant below) is condemned prisoner Robert Lee Walden. The respondent (and respondent-appellee below) is David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry.

STATEMENT OF RELATED PROCEEDINGS

Walden v. Shinn, No. 08-99012 (United States Court of Appeals for the Ninth Circuit) (order denying rehearing filed on May 19, 2021; opinion affirming denial of petition for writ of habeas corpus filed on March 12, 2021).

Walden v. Ryan, No. 4:99-CV-00559-RCC (United States District Court for the District of Arizona) (judgment denying habeas relief on limited remand filed on November 15, 2017; initial judgment denying petition for writ of habeas corpus filed on May 6, 2008; order denying motion to amend petition for writ of habeas corpus filed on March 29, 2005).

State v. Walden, No. CR-03-0263-PC (Arizona Supreme Court) (denial of petition for review of second postconviction proceeding filed on April 19, 2004).

State v. Walden, No. CR-99-0191-PC (Arizona Supreme Court) (denial of petition for review of first postconviction proceeding filed on October 28, 1999).

State v. Walden, No. CR-92-0530-AP (Arizona Supreme Court) (opinion affirming convictions and sentences on direct appeal filed on October 10, 1995).

State v. Walden, No. CR-34752 (Pima County Superior Court) (denial of second petition for postconviction relief filed on July 2, 2002; denial of first petition for postconviction relief filed on January 5, 1999; judgments of guilt and sentences entered on December 9, 1992).

Walden v. Arizona, No. 95-8188 (United States Supreme Court) (order denying petition for writ of certiorari filed on April 15, 1996).

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT OF RELATED PROCEEDINGS	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	3
INTRODUCTION	4
STATEMENT OF THE CASE.....	6
I. Walden’s appointed trial attorney rendered constitutionally ineffective assistance, and his appointed counsel in initial state collateral-review proceedings neglected to raise this substantial claim	6
II. Facing a certain procedural dismissal of his ineffective-assistance-of-counsel claim in federal habeas proceedings, Walden withdrew the claim from his petition and returned to state court to exhaust it, under circumstances in which he could reasonably anticipate amending it back into the federal proceedings without timeliness problems	7
III. Subsequent changes to the law upended Walden’s reliance and retroactively rendered his ineffective-assistance-of-counsel claim untimely.....	13
REASONS FOR GRANTING CERTIORARI.....	16
The Ninth Circuit contravened <i>Holland</i> and entrenched a split with the Second and Tenth Circuits by concluding that, to warrant equitable tolling, a habeas petitioner may not rely on unsettled circuit law but instead must canvass out-of-circuit cases and then speculate as to anticipated changes in controlling precedent.....	16

I.	The Second and Tenth Circuits permit equitable tolling when a habeas petitioner relies on unsettled circuit precedent and that reliance is upended by subsequent changes in the law	18
II.	The Ninth Circuit requires petitioners seeking equitable tolling to canvass out-of-circuit decisions and speculate about possible changes to controlling law	22
III.	The Ninth Circuit’s rule splits from the Second and Tenth Circuits and contravenes <i>Holland</i>	24
CONCLUSION.....		27
APPENDIX		
Appendix A	Opinion Affirming Denial of Petition for Writ of Habeas Corpus, <i>Walden v. Shinn</i> , No. 08-99012 (9th Cir. Mar. 12, 2021).....	App. 1
Appendix B	Order Denying Reconsideration of Remanded Claims, <i>Walden v. Ryan</i> , No. 4:99-CV-00559-RCC (D. Ariz. Nov. 15, 2012)	App. 42
Appendix C	Memorandum of Decision and Order Denying Petition for Writ of Habeas Corpus, <i>Walden v. Schriro</i> , No. 4:99-CV-00559-RCC (D. Ariz. May 6, 2008)	App. 77
Appendix D	Order Denying Motion to Amend Petition for Writ of Habeas Corpus, <i>Walden v. Schriro</i> , No. 4:99-CV-00559-RCC (D. Ariz. Mar. 29, 2005).....	App. 144
Appendix E	Order Denying Petition for Review, <i>State v. Walden</i> , No. CR-03-0263-PC (Ariz. Sup. Ct. Apr. 20, 2004).....	App. 156
Appendix F	Order Denying Petition for Postconviction Relief, <i>State v. Walden</i> , No. CR-34752 (Pima Cnty. Super. Ct. July 2, 2002).....	App. 157
Appendix G	Order Denying Petition for Review, <i>State v. Walden</i> , No. CR-99-0191-PC (Ariz. Sup. Ct. Oct. 28, 1999)	App. 167

Appendix H	Order Denying Petition for Postconviction Relief, <i>State v. Walden</i> , No. CR-34752 (Pima Cnty. Super. Ct. Jan. 5, 1999).....	App. 168
Appendix I	Opinion Affirming Convictions and Sentences, <i>State v. Walden</i> , No. CR-92-0530-AP (Ariz. Sup. Ct. Oct. 10, 1995)	App. 172
Appendix J	Order Denying Petition for Rehearing and for Rehearing En Banc, <i>Walden v. Shinn</i> , No. 08-99012 (9th Cir. May 19, 2021)	App. 228

TABLE OF AUTHORITIES

Cases

<i>Anthony v. Cambra</i> , 236 F.3d 568 (9th Cir. 2000)	<i>passim</i>
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	9, 13
<i>Davenport v. United States</i> , 217 F.3d 1341 (11th Cir. 2000)	23, 26
<i>Duncan v. Henry</i> , 513 U.S. 364 (1995)	8, 19, 21
<i>Felix v. Mayle</i> , 379 F.3d 612 (9th Cir. 2004)	<i>passim</i>
<i>Grooms v. Johnson</i> , 208 F.3d 488 (5th Cir. 1999)	19
<i>Harrison v. Galaza</i> , No. C98–3371, 1999 WL 58594 (N.D. Cal. Feb. 4, 1999)	20, 21
<i>Holland v. Florida</i> , 560 U.S. 631 (2010)	<i>passim</i>
<i>Holmes v. Spencer</i> , 685 F.3d 51 (1st Cir. 2012)	17
<i>Jones v. Morton</i> , 195 F.3d 153 (3d Cir. 1999)	19
<i>Kern Oil & Ref. Co. v. Tenneco Oil Co.</i> , 840 F.2d 730 (9th Cir. 1988)	10, 22
<i>Kethley v. Berge</i> , 14 F. Supp. 2d 1077 (E.D. Wis. 1998)	19, 21
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	7, 9, 13, 14

<i>Maryland v. Kulbicki</i> , 577 U.S. 1 (2015)	25
<i>Mayle v. Felix</i> , 545 U.S. 644 (2005)	5, 10, 14
<i>Munchinski v. Wilson</i> , 694 F.3d 308 (3d Cir. 2012).....	24
<i>Stewart v. Smith</i> , 46 P.3d 1067 (Ariz. 2002)	8
<i>Ramos–Martinez v. United States</i> , 638 F.3d 315 (1st Cir. 2011).....	24
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	11
<i>Rodriguez v. Bennett</i> , 303 F.3d 435 (2nd Cir. 2002).....	20, 21, 22, 27
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982)	4, 8, 25
<i>Smith v. Stewart</i> , 241 F.3d 1191 (9th Cir. 2001)	9
<i>Sperling v. White</i> , 30 F. Supp. 2d 1246 (C.D. Cal. 1998).....	19, 21
<i>State v. French</i> , 7 P.3d 128 (Ariz. Ct. App. 2000)	8, 9
<i>State v. Walden</i> , 905 P.2d 974 (Ariz. 1995)	1
<i>Thomas v. Att’y Gen.</i> , 992 F.3d 1162 (11th Cir. 2021)	25
<i>United States v. Craycraft</i> , 167 F.3d 451 (8th Cir. 1999)	23, 26

<i>United States v. Duffus</i> , 174 F.3d 333 (3d Cir. 1999)	23, 26
<i>United States v. Pittman</i> , 209 F.3d 314 (4th Cir. 2000)	23, 26
<i>Vincze v. Hickman</i> , No. Civ. S–98–044, 1999 WL 68330 (E.D. Cal. Jan. 13, 1999)	20, 21
<i>Walden v. Schriro</i> , No. 4:99-CV-00559-TUC-RCC, 2008 WL 2026217 (D. Ariz. May 9, 2008)	1
<i>Walden v. Shinn</i> , 990 F.3d 1183 (9th Cir. 2021)	1
<i>Williams v. Filson</i> , 908 F.3d 546 (9th Cir. 2018)	10, 23
<i>Zarvela v. Artuz</i> , 254 F.3d 374 (2d Cir. 2001)	25

Constitutional Provisions

U.S. Const. amend. VI	3, 7
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Statutes

28 U.S.C. § 1254	2, 3
28 U.S.C. § 2241(a)	3, 13
28 U.S.C. § 2244(d)	<i>passim</i>
28 U.S.C. § 2253(a)	3, 13

Rules

Federal Rule of Civil Procedure 15	<i>passim</i>
Supreme Court Rule 10(a), (c)	16
Supreme Court Rule 30.1	2

Other Authorities

James Wm. Moore et al., <i>Moore's Federal Practice</i> § 15.19[1] (3d ed. 1999)	11, 22
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PETITION FOR A WRIT OF CERTIORARI

Robert Lee Walden, an Arizona death-row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit affirming the U.S. District Court for the District of Arizona's denial of his petition for a writ of habeas corpus.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the denial of Walden's petition for a writ of habeas corpus is reported at *Walden v. Shinn*, 990 F.3d 1183 (9th Cir. 2021), and included in the Appendix at App. 1–41. The Ninth Circuit's unreported order denying Walden's petition for rehearing is included in the Appendix at App. 228. The initial U.S. District Court order denying Walden's petition for writ of habeas corpus is available at *Walden v. Schriro*, No. 4:99-CV-00559-TUC-RCC, 2008 WL 2026217 (D. Ariz. May 9, 2008), and included in the Appendix at App. 77–143. The unreported U.S. District Court order denying reconsideration after a limited remand is included in the Appendix at App. 42–76. The unreported U.S. District Court order denying Walden's motion to amend his petition is included in the Appendix at App. 144–55.

The opinion of the Arizona Supreme Court affirming Walden's convictions and sentences on direct appeal is reported at *State v. Walden*, 905 P.2d 974 (Ariz. 1995), and included in the Appendix at App. 172–227. The state trial court's unreported denial of Walden's first petition for postconviction relief is included in the Appendix

at App. 168–71. The Arizona Supreme Court’s unreported summary denial of Walden’s petition for review of the first postconviction proceeding is included in the Appendix at App. 167. The state trial court’s unreported denial of Walden’s second petition for postconviction relief is included in the Appendix at App. 157–66. The Arizona Supreme Court’s unreported summary denial of Walden’s petition for review of the second postconviction proceeding is included in the Appendix at App. 156.

STATEMENT OF JURISDICTION

On March 12, 2021, the Ninth Circuit entered an order affirming the U.S. District Court’s denial of Walden’s petition for writ of habeas corpus. (App. 1–41.) Walden timely petitioned for rehearing, which the Ninth Circuit denied on May 19, 2021. (App. 228.) Pursuant to this Court’s Order Regarding Filing Deadlines, 589 U.S. ____ (order dated March 19, 2020), and Order Rescinding Prior COVID Orders, 594 U.S. ____ (order dated July 19, 2021), the deadline for Walden to petition for a writ of certiorari was extended to 150 days from the date the Ninth Circuit denied his timely request for rehearing. One-hundred and fifty days from May 19, 2021, is October 16, 2021, which is a Saturday, extending the deadline to Monday, October 18, 2021. *See* Supreme Court Rule 30.1. Walden now timely files this petition asking the Court to review the judgment of the Ninth Circuit affirming the denial of habeas relief. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. § 2241(a)

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions

28 U.S.C. § 2244(d)

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2253(a)

In a habeas corpus proceeding . . . before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

INTRODUCTION

Petitioner Robert Lee Walden has a substantial claim that his trial attorney failed to discover and present compelling mitigation, and as a result that counsel was constitutionally ineffective. The lawyer who represented Walden in initial and unsuccessful collateral-review proceedings in state court neglected to raise this ineffective-assistance-of-counsel (IAC) claim. Thus, when Walden timely filed his federal habeas petition, the parties understood that the claim was unexhausted. Reasonably perceiving an avenue of possible relief through a return to state court, and facing a procedural dismissal of his claim if he remained in federal court, Walden withdrew the claim from his habeas petition to exhaust it. *See Rose v. Lundy*, 455 U.S. 509 (1982).

At that time, in October 2000, the law in the Ninth Circuit was still unsettled as to whether the relation-back requirement in Federal Rule of Civil Procedure 15(c) would allow amending an otherwise-untimely claim back into the petition after exhausting it. A reasonable petitioner could conclude that Rule 15(c) would accommodate such an amendment. Although the Ninth Circuit had not yet construed the relation-back rule in the habeas context, in ordinary civil proceedings it was interpreted expansively. In subsequent cases, the Ninth Circuit vindicated Walden's understanding that his newly exhausted claim would relate back. *Felix v. Mayle*, 379

F.3d 612 (9th Cir. 2004), *rev'd*, *Mayle v. Felix*, 545 U.S. 644 (2005); *Anthony v. Cambra*, 236 F.3d 568, 576–77 (9th Cir. 2000).

Several years after Walden acted on that understanding, however, this Court announced a narrower interpretation of Rule 15(c). *Mayle*, 545 U.S. at 650. After *Mayle*, the lower courts relied on this narrower interpretation to find Walden’s claim untimely.

In the Second and Tenth Circuit Courts of Appeals, Walden’s reliance on the unsettled state of the relation-back doctrine at the time of his decisionmaking would justify equitable tolling to excuse the retroactive untimeliness of his claim. In the Ninth Circuit, however, a habeas petitioner’s similar reliance justifies tolling *only* if no out-of-circuit cases exist that might presage an unfavorable transformation in controlling precedent. Imposing that rule here, the Ninth Circuit held that Walden’s reliance on the unsettled law of relation back within its borders was unreasonable because the law in *other* circuits foreshadowed the narrower construction of Rule 15(c) this Court later adopted in *Mayle*.

The decision below therefore entrenched a split between the Ninth Circuit and the Second and Tenth Circuits. Further, the Ninth Circuit rule contravened *Holland v. Florida*, 560 U.S. 631, 653 (2010), requiring more of Walden to justify equitable tolling than this Court permits. Because the Ninth Circuit has drifted from its sister

circuits and adopted a rule that is incompatible with *Holland*, this Court's intervention is warranted.

STATEMENT OF THE CASE

I. Walden's appointed trial attorney rendered constitutionally ineffective assistance, and his appointed counsel in initial state collateral-review proceedings neglected to raise this substantial claim

In 1992 an Arizona jury found Walden guilty of first-degree murder arising from sexual assaults of three women, one of whom was killed. Walden was sentenced to death. (ER 1853–57.)¹ Owing to Walden's constitutionally ineffective appointed counsel, however, the sentencer was deprived of readily available evidence that would have mitigated his sentence—namely, that Walden's childhood was marred by traumatic childhood molestation by family members, including his older sister, maternal aunt, and father, who was a convicted pedophile. (ER 988–89.)²

¹ "ER" refers to the excerpts of record filed in support of Walden's appeal to the Ninth Circuit.

² Walden's father molested his siblings, other children in the extended family, and boys residing in the neighborhood where young Walden lived. (ER 1017–62, 1002–03, 1008–09, 1014, 1018, 1021.) Walden's own account of his father's incestual relations with him are chilling. (ER 988.) Sexual perversion was not limited to Walden's paternal line: Child sexual abuse also pervaded Walden's maternal lineage. His maternal grandfather sexually molested several of his children, and he encouraged them to have sex with each other while he watched. (ER 988.) Unsurprisingly, Walden's mother engaged in sexually inappropriate behavior in the presence of her children. (ER 989.) When she caught Walden and his older sister fighting, she would force the two children to kneel on the floor, hold hands, and kiss each other on the lips. (ER 990.)

The discovery of Walden's traumatic childhood led to the unearthing of compelling mental-health evidence, which established the causal link between Walden's sexual victimization, the development of mental illness, and his eventual criminal offending. (ER 987–99.) Because of trial counsel's ineffective investigation, the sentencer imposed the penalty of death based on an utterly misleading picture of Walden's background and moral culpability. (ER 1853–57.)

Given the deficiencies in his trial counsel's performance, Walden needed the services of an effective attorney who could challenge that incompetence and present the fruits of an adequate investigation in an initial postconviction proceeding, where Arizona channels claims of ineffective assistance of counsel. *See Martinez v. Ryan*, 566 U.S. 1 (2012). Instead, after his convictions and sentences were affirmed on direct appeal (App. 172–227), the lawyer who was appointed to represent Walden filed a 13-page petition raising a single, unrelated claim (ER 1819–31). The Arizona courts were given no opportunity to remediate the denial of Walden's Sixth Amendment right to effective assistance of trial counsel.

II. Facing a certain procedural dismissal of his ineffective-assistance-of-counsel claim in federal habeas proceedings, Walden withdrew the claim from his petition and returned to state court to exhaust it, under circumstances in which he could reasonably anticipate amending it back into the federal proceedings without timeliness problems

Consequently, when Walden filed his operative federal habeas petition in August 2000 challenging, *inter alia*, his trial counsel's failure to investigate and present mitigation (ER 1803), the subject IAC claim had not been presented in state

court. Under these circumstances, both parties reasonably perceived that the IAC claim was unexhausted. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). (Dist. Ct. Doc. No. 105 at 5 (Respondents acknowledging claim was unexhausted at this time)).³ Under then-governing law, Walden would need to withdraw his IAC claim or suffer dismissal of his entire petition. *Rose v. Lundy*, 455 U.S. 509 (1982) (imposing total-exhaustion rule); *Anthony v. Cambra*, 236 F.3d 568, 573 (9th Cir. 2000) (“[A] federal habeas petitioner has a right to amend a mixed petition to delete unexhausted claims as an alternative to suffering a dismissal.” (internal quotation marks omitted)).

Walden therefore withdrew his IAC claim and sought to exhaust it in state court through a second postconviction petition. This was no exercise in futility. At the time, an IAC claim presented for the first time in a second state postconviction petition might be reviewed based on the ineffective assistance of initial postconviction counsel. *State v. French*, 7 P.3d 128, 130 (Ariz. Ct. App. 2000), *disapproved of by Stewart v. Smith*, 46 P.3d 1067 (Ariz. 2002). Indeed, when Walden’s second state postconviction petition was denied, one Arizona Supreme Court justice voted to review it, despite the fact that it contained claims that had not been raised in his first postconviction proceeding. (App. 156.) And even if the Arizona courts found the IAC claim precluded under state rules requiring that all claims be raised in the initial petition, at the time there was legal authority supporting the argument that

³ Citations to documents from the district court and Ninth Circuit dockets will reflect the docket number and appear as “Dist. Ct. Doc. No.” or “Ninth Cir. Doc. No.”

application of the state procedural bar would not foreclose federal merits review of Walden’s IAC claim once the claim had been exhausted in state court. *Smith v. Stewart*, 241 F.3d 1191, 1197 (9th Cir. 2001), *rev’d*, 536 U.S. 856 (2002).⁴

Critically, even if Walden did not obtain relief in the second state postconviction proceeding, the law remained unsettled as to whether the statute of limitations in 28 U.S.C. § 2244(d) would prevent amending the newly exhausted IAC claim back into his federal habeas petition. Federal Rule of Civil Procedure 15 allows an amendment to relate back to a timely filing when the new, otherwise-untimely claim “arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. P. 15(c)(1). For several reasons, when Walden withdrew his IAC claim to exhaust it, he could reasonably expect that Rule 15(c) would accommodate any future attempt to amend the claim back into the federal proceedings.

⁴ Several years after Walden withdrew the IAC claim to exhaust it in state court, the district court concluded that the claim was technically exhausted when originally pleaded because no remedies remained available in state court, and therefore it was procedurally defaulted. (ER 165.) As reflected in *State v. French*, 7 P.3d 128, 130 (Ariz. Ct. App. 2000), and the vote of one Arizona Supreme Court justice to review Walden’s second postconviction petition (App. 156), that outcome was not foreordained in the fall of 2000. But the possibility in 2000 that the federal court would find the claim procedurally defaulted further militated in favor of withdrawing it and returning to state court. Because *Martinez v. Ryan*, 566 U.S. 1 (2012), had not been decided, postconviction counsel’s ineffectiveness could not excuse a default. See *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). Thus, whether the IAC claim was unexhausted or technically exhausted and procedurally defaulted, federal court was a dead end.

In October 2000, when Walden withdrew his IAC claim, this Court had not yet imposed the narrow construction of the “conduct, transaction, or occurrence” language announced in *Mayle v. Felix*, 545 U.S. 644 (2005). Although the Ninth Circuit also had not yet construed Rule 15 in the habeas context, in other civil litigation the court interpreted the relation-back requirement broadly, permitting amendment even when the new claim rested on a different legal theory about which the defendant had no notice. *See Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 736 (9th Cir. 1988).

Further, “Rule 15(c)’s reference to ‘transaction’ or ‘occurrence’ could plausibly be read in the federal habeas context to refer to the petitioner’s conviction and trial.” *Williams v. Filson*, 908 F.3d 546, 560 (9th Cir. 2018). Thus, prior to this Court’s decision in *Mayle*, “habeas practitioners reasonably assumed that newly added claims would relate back to the original petition so long as the claims arose out of the same trial and conviction challenged in the original petition.” *Id.*

Finally, adding to Walden’s belief that the claim could be added via amendment, here the State *did* have notice of Walden’s claim because he raised it in his timely petition, albeit in an unexhausted form. *See Anthony*, 236 F.3d at 577 & n.3 (“[A]s a leading treatise explains, ‘[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of

limitation requires.” (quoting James Wm. Moore et al., *Moore’s Federal Practice* § 15.19[1] (3d ed. 1999)).

In sum, given the legal landscape Walden faced in late 2000, leaving his IAC claim in the federal petition would result in a procedural dismissal, while withdrawing it and pursuing the claim in state court offered a viable path forward. Rather than acquiesce to forfeiture of a substantial IAC claim, Walden decided to withdraw his unexhausted claim, pursue it in state court, and then amend the claim back into his federal petition, reflecting diligent pursuit of his rights.

Back in the Arizona state courts, Walden prosecuted his second postconviction proceedings diligently. (ER 1768.) After obtaining appointed counsel and reasonable extensions of time, he filed a second postconviction petition challenging trial counsel’s performance and submitted supporting evidence the state courts had never reviewed. In July 2002, a state trial court denied his IAC claim, finding it precluded for failure to raise in the initial postconviction proceeding. (App. 163–64.) Walden timely sought discretionary review in the Arizona Supreme Court, which declined review in April 2004 over a notation of dissent. (App. 156.)

During this period, Walden’s federal habeas proceedings were largely dormant. (ER 2787–89). His sentencing-related claims had been held in abeyance pending a decision in *Ring v. Arizona*, 536 U.S. 584 (2002). The federal *Ring* stay was lifted in

July 2004 (ER 2789), just three months after the Arizona Supreme Court declined review of Walden's second postconviction proceeding (App. 156).

Within two weeks, Walden returned to federal court and sought leave to amend the IAC claim back into his habeas petition. (ER 2789.) By then, his case for relation back had strengthened. In December 2000, just two months after Walden withdrew the IAC claim to exhaust it, the Ninth Circuit held that newly exhausted claims could relate back to the unexhausted versions of the same claims raised in a timely petition, since under those circumstances "the central policy of Rule 15(c)" is satisfied. *Anthony*, 236 F.3d at 576. When newly exhausted claims have been included "(in unexhausted form)" in a timely petition, the State "clearly ha[s] prior notice" of them and of the petitioner's "intention to raise them at the earliest possible time." *Id.* at 577. As in *Anthony*, Walden's IAC claim had been included in his timely petition (ER 1803–04), bolstering his expectation that Rule 15(c) would permit amendment.

Then, in August 2004, the Ninth Circuit joined the Seventh Circuit in holding that the same approach to relation back in ordinary civil litigation applied in habeas proceedings. *See Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *rev'd*, *Mayle*, 545 U.S. 644. As long as the new claim arose from the petitioner's trial or sentencing proceeding, it would relate back to timely filed claims arising from the same. *See id.* at 615 ("It unduly strains the usual meaning of 'conduct, transaction, or occurrence'

to regard a criminal trial and conviction as a series of perhaps hundreds of individual occurrences.”).

Given these developments, it was no surprise that Respondents did not raise timeliness or relation back as an obstacle to Walden’s requested 2004 amendment, even though the one-year statute of limitations in 28 U.S.C. § 2244(d) had expired; nor is it surprising that the district court likewise did not invoke the statute of limitations. (App. 144–55.) Instead, relying on the state court’s procedural bar, the district court ruled that the IAC claim was defaulted and, consistent with then-governing law, that postconviction counsel’s ineffectiveness could not excuse the default. (App. 147 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).) The district court denied amendment (App. 155) and, in 2008, denied the remaining claims in Walden’s petition, exercising the jurisdiction vested in it by 28 U.S.C. § 2241(a) (App. 77–143).

III. Subsequent changes to the law upended Walden’s reliance and retroactively rendered his ineffective-assistance-of-counsel claim untimely

Walden appealed to the Ninth Circuit, which took jurisdiction under 28 U.S.C. § 2253(a). During the pendency of the appeal, this Court decided *Martinez v. Ryan*, which created a narrow exception to *Coleman*, allowing petitioners like Walden to overcome procedural default upon a showing that ineffective state postconviction counsel failed to raise a substantial IAC claim. 566 U.S. at 9. *Martinez* called into question the district court’s earlier denial of Walden’s motion to amend his habeas

petition on grounds that his ineffective assistance claim had been irretrievably defaulted. Therefore, at Walden's request, the Ninth Circuit remanded his case so the district court could reconsider its earlier denial of Walden's motion to amend in light of *Martinez*. (Ninth Cir. Doc. No. 48.)

Between the time the district court denied the amendment on procedural-default grounds in early 2005 and its reconsideration of the amendment in 2017, the law on relation back had changed. This Court had decided *Mayle*, 545 U.S. 644, limiting relation back of amendments under Rule 15(c). Relying on *Mayle*, the district court in 2017 sidestepped the Ninth Circuit's directive to reconsider the IAC claim in light of *Martinez* and instead found that the claim did not relate back to Walden's timely petition. (App. 53–62.) The district court rejected Walden's argument that equity foreclosed application of the relation-back doctrine to bar his claim. (App. 54–55.)

Walden returned to the Ninth Circuit, obtained a certificate of appealability as to whether the district court erred in denying relief on the IAC claim, and sought equitable tolling to excuse the claim's untimeliness under *Holland v. Florida*, 560 U.S. 631 (2010). He argued that he had pursued his rights with reasonable diligence given the legal landscape as it existed at the time he had to make strategic judgments about how to prosecute his case. (Ninth Cir. Doc. No. 75 at 71–81; Ninth Cir. Doc. No. 100 at 22–25.) Taking the law as it was in October 2000, it was conscientious to

pursue reasonably available alternatives rather than simply submit to a procedural dismissal.

Further, Walden argued that extraordinary circumstances caused the untimeliness of his claim. He had relied on unsettled yet favorable law in withdrawing his IAC claim from the federal petition to pursue it in state court, and latter-day legal developments, primarily this Court's decision in *Mayle*, had upended that reliance and retroactively rendered his claim untimely. (Ninth Cir. Doc. No. 132 at 3–6.) Walden also demonstrated that his reliance was reasonable: The State did not raise untimeliness when he initially sought to amend the newly exhausted claim back into the petition, and at the time of the district court's initial ruling in early 2005, it was bound by Ninth Circuit law that had developed in a way that was consistent with Walden's strategy to exhaust his IAC claim and amend it back into his federal petition. (Ninth Cir. Doc. No. 133 at 6.)

In sum, Walden had accurately forecasted the favorable circuit precedent before it settled. It could not be said that his reliance on then-existing law was unreasonable or that his actions reflected a lack of diligence.

Nonetheless, a three-judge panel of the Ninth Circuit declined to grant equitable tolling. (App. 36–38.) Of note, the Ninth Circuit observed that at the time Walden withdrew the IAC claim from his federal petition in October 2000, four *other* circuits had begun to impose the restrictive reading of Rule 15(c)'s relation-back

requirement adopted in *Mayle*. (App. 37–38.) Ignoring its own relation-back precedents, which had aligned with Walden’s expectations of the developing law, the panel held that “given a rapidly-emerging circuit-level consensus” on this point, Walden “had ample reason to suspect that Rule 15(c) would pose an obstacle to consideration of newly added claims in an amended petition.” (App. 38 (internal quotation marks omitted).) On May 19, 2021, the Ninth Circuit denied Walden’s request for rehearing. (App. 228.)

Because the Ninth Circuit denied equitable tolling, no court has ever considered the merits of Walden’s substantial IAC claim and the corresponding showing that confidence in the sentencing decision has been demonstrably undermined.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit contravened *Holland* and entrenched a split with the Second and Tenth Circuits by concluding that, to warrant equitable tolling, a habeas petitioner may not rely on unsettled circuit law but instead must canvass out-of-circuit cases and then speculate as to anticipated changes in controlling precedent.

The Ninth Circuit Court of Appeals “has decided an important federal question in a way that conflicts with relevant decisions of this Court” and “with the decision of another United States court of appeals on the same important matter.” Supreme Court Rule 10(a), (c).

Over a decade ago, this Court held that “the diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.” *Holland*, 560 U.S. at 653. Interpreting this mandate, the lower courts have held that equitable tolling may be warranted when habeas petitioners pursue their rights in a way that is reasonable under the circumstances, even if that strategy is retroactively revealed to be mistaken or improper. *E.g.*, *Holmes v. Spencer*, 685 F.3d 51, 63 (1st Cir. 2012). To justify equitable tolling, habeas petitioners like Walden must act reasonably, not presciently.

As a corollary, and as discussed further below, the Second and Tenth Circuit Courts of Appeals have recognized that reliance on unsettled circuit law may be reasonable and give rise to equitable tolling even if that law is in tension with the rules of other circuits and is subsequently revised in a way that retroactively renders a habeas petitioner’s claim untimely. That is sensible. After all, any reasonable habeas petitioner and his counsel will pursue opportunities available under circuit law. No reasonable petitioner or his counsel would forego an avenue of possible relief simply because the law in *other* circuits *might* portend a change foreclosing that avenue.

The Ninth Circuit takes an approach that is contrary to this sensible rule. In the Ninth Circuit, equitable tolling under these circumstances may be available *only* if there are no developments outside the circuit suggesting that its own law might

change. A habeas petitioner may not rely on favorable, unsettled law of the circuit in making strategic choices. Petitioners like Walden must canvass cases in other circuits and predict whether they herald a change in the law that would upend his reliance and render his claims retroactively untimely. As the following discussion demonstrates, that approach contravenes *Holland*.

I. The Second and Tenth Circuits permit equitable tolling when a habeas petitioner relies on unsettled circuit precedent and that reliance is upended by subsequent changes in the law

In *York v. Galetka*, the Tenth Circuit confronted a habeas petitioner, York, who had suffered dismissal of a timely federal habeas petition for failure to exhaust. 314 F.3d 522, 526 (10th Cir. 2003). York went back to state court for exhaustion and then returned to federal court and filed the operative habeas petition. That petition was timely only if his prior federal habeas petition justified tolling under 28 U.S.C. § 2244(d)(2), which stops the running of the statute of limitations in § 2244(d) during the pendency of a properly filed petition for collateral review.

York's reliance on statutory tolling to exhaust his habeas claims and then bring them back to federal court was not inconsistent with Tenth Circuit law, which was unsettled as to whether § 2244(d)(2) permitted statutory tolling during the pendency of *federal* collateral review. *York*, 314 F.3d at 526. But "[u]nbeknownst to him, or for that matter to anyone conversant with Tenth Circuit jurisprudence on tolling of the AEDPA statute of limitations, York was in trouble." *Id.* After York filed the operative federal habeas petition, this Court held in *Duncan v. Walker* that only a properly

initiated *state* collateral-review proceeding justifies tolling under § 2244(d)(2)—a federal habeas proceeding does not. 533 U.S. 167, 172–82 (2001). Because York was not entitled to statutory tolling during the pendency of his earlier habeas petition, his operative petition was untimely. *York*, 314 F.3d at 527 (observing that York “had been trapped by the effect of *Duncan* on a prior dismissal”).

The Tenth Circuit granted York equitable tolling to excuse the untimeliness. *York*, 314 F.3d at 527–28. *Duncan* was not decided until after York filed his operative petition; the language of § 2244(d)(2) was ambiguous; and the law in the Tenth Circuit had been unsettled. *Id.* at 528. Indeed, after York’s relevant decisionmaking but before *Duncan*, the Tenth Circuit had adopted the favorable interpretation of § 2244(d)(2) that would have made York’s petition timely. *Id.* at 527–28. The fact that *Duncan* rendered York retroactively mistaken about the timeliness of his petition was no basis to conclude that he lacked diligence or his actions were unreasonable. *Id.* at 528.

Notably, at the time York made the relevant strategic determinations, in early 2000, two other circuits had already rejected the Tenth Circuit’s construction of § 2244(d)(2) and instead adopted the interpretation this Court would subsequently endorse in *Duncan*. See *Grooms v. Johnson*, 208 F.3d 488 (5th Cir. 1999); *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999). So had several district courts. *Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998); *Kethley v. Berge*, 14 F. Supp. 2d 1077,

1079 (E.D. Wis. 1998); *Harrison v. Galaza*, No. C98–3371, 1999 WL 58594, at *2 (N.D. Cal. Feb. 4, 1999); *Vincze v. Hickman*, No. Civ. S–98–044, 1999 WL 68330, at *1 (E.D. Cal. Jan. 13, 1999). Nonetheless, the Tenth Circuit had no trouble concluding that York was entitled to equitable tolling. York’s diligence was evaluated in light of the opportunity created for him by unsettled Tenth Circuit law. Unlike the rule imposed on Walden by the Ninth Circuit, York was not expected to discover and rely on out-of-circuit cases that augured a potential adverse effect on his strategy—the retroactive untimeliness of his petition.

The Second Circuit addressed a similar situation in *Rodriguez v. Bennett*, 303 F.3d 435 (2nd Cir. 2002). The petitioner, Rodriguez, requested to withdraw his timely initial habeas petition to exhaust state remedies. When he returned to federal court after exhaustion, his second habeas petition was timely only if the statute of limitations was tolled for the period during which his initial petition was pending. *Id.* at 437. At the time Rodriguez had requested withdrawal of his federal petition, the law of the Second Circuit was also unsettled as to whether statutory tolling under § 2244(d)(2) was available during the pendency of federal collateral review. *Id.*

Like York, Rodriguez’s reliance on unsettled circuit law was initially vindicated. By the time the district court ruled on the timeliness of his second habeas petition, the Second Circuit had aligned with the Tenth Circuit’s approach to § 2244(d)(2), pursuant to which Rodriguez’s petition was timely. The same day the

district court ruled on his second petition, however, this Court decided *Duncan*, pursuant to which Rodriguez's petition became untimely. *Id.* at 437–38. The district court therefore revised its ruling and dismissed Rodriguez's petition as time barred. *Id.* at 438.

Like the Tenth Circuit, the Second Circuit recognized the unfairness to a diligent petitioner who found his claims retroactively time barred based on a change in the law. *Rodriguez*, 303 F.3d at 438–39. And, also like the Tenth, the development of a consensus outside the Second Circuit at the time Rodriguez made his strategic decision to seek withdrawal of his federal petition did not undermine the appropriateness of tolling. Although the Third and Fifth Circuits had not yet adopted the interpretation of § 2244(d)(2) that *Duncan* endorsed when Rodriguez requested that his first federal petition be withdrawn in May 1999, several district courts had. *Sperling*, 30 F. Supp. 2d at 1250; *Kethley*, 14 F. Supp. 2d at 1079; *Harrison*, 1999 WL 58594, at *2; *Vincze*, 1999 WL 68330, at *1. Again, unlike the rule the Ninth Circuit imposed on Walden, Rodriguez was not expected to canvass decisions outside the Second Circuit and then speculate whether future legal developments might undermine a potential avenue for relief or anticipate a change in the law pursuant to which his claims would become untimely. The Second Circuit recognized that reasonable petitioners pursue strategies available under the law as they find it.

II. The Ninth Circuit requires petitioners seeking equitable tolling to canvass out-of-circuit decisions and speculate about possible changes to controlling law

The decision in *Walden*'s case shows how the Ninth Circuit is at odds with the sensible approach the Second and Tenth Circuits have taken. At the time *Walden* withdrew the IAC claim that he and the State perceived was unexhausted so that he could pursue it in state court, Ninth Circuit law governing relation back was unsettled. There was no circuit precedent suggesting that the relation-back requirement would prevent amending his claim back into the federal petition. To the contrary, the broad, ambiguous language in Rule 15(c), its expansive application in ordinary civil litigation, and the rationale of ensuring notice to the defendant all pointed toward its liberal application in the habeas context. *See Kern Oil & Ref. Co.*, 840 F.2d at 736; *see also* James Wm. Moore et al., *Moore's Federal Practice* § 15.19[1] (3d ed. 1999)).

Further, as in *York* and *Rodriguez*, the relevant circuit law initially developed favorably to *Walden*, vindicating the reasonableness of his strategy. Within two months of *Walden*'s decision to withdraw the IAC claim and pursue it in state court, the Ninth Circuit decided *Anthony*, observing that the “central policy of Rule 15(c)” in the habeas context was ensuring notice to respondents and permitting a newly exhausted claim to relate back to its timely but unexhausted predecessor. 236 F.3d at 576–77. Then, in 2004, the Ninth Circuit joined the Seventh Circuit in construing the “conduct, transaction, or occurrence” language in Rule 15(c) favorably for habeas

petitioners. *Felix*, 379 F.3d at 615. These decisions reflect that Walden’s expectation that he would be able to amend his petition under Rule 15(c) was not only reasonable—it was correct, albeit temporarily. This Court’s subsequent decision in *Mayle* upended his reliance and retroactively rendered his claim untimely.

The Ninth Circuit observed, however, that by the time Walden’s statute of limitations expired four *other* circuits had interpreted “transaction” and “occurrence” in Rule 15(c) restrictively, as this Court did in *Mayle*. In February 1999, the Eighth Circuit interpreted Rule 15(c) narrowly in *United States v. Craycraft*, 167 F.3d 451. In quick succession came *United States v. Duffus*, 174 F.3d 333 (3d Cir. 1999), *United States v. Pittman*, 209 F.3d 314 (4th Cir. 2000), and *Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000).

Ignoring its own decisions in *Anthony* and *Felix*, which respectively distinguished and conflicted with these four decisions, the Ninth Circuit concluded that, to warrant equitable tolling, Walden must have canvassed the law outside the Ninth Circuit, reviewed these decisions taking a different approach to relation back that this Court would later conclude were better reasoned, and acted in accordance with them. (App. 37–38.) Given the developments in other circuits, the court concluded that Walden “had ample reason to suspect that Rule 15(c) would pose an obstacle to reconsideration of newly added claims in an amended petition.” (App. 38 (internal quotation marks omitted).) *See also Williams*, 908 F.3d at 560 (taking the

same approach but reaching the opposite conclusion because the petitioner had relied on the unsettled Ninth Circuit law regarding relation back before these four out-of-circuit cases were decided).

III. The Ninth Circuit’s rule splits from the Second and Tenth Circuits and contravenes *Holland*

The Ninth Circuit therefore stands apart from the Second and Tenth Circuits in requiring litigants to eschew opportunities arising from unsettled circuit law and instead, as a precondition for equitable tolling, to act in conformance with possible changes in the law based on out-of-circuit cases. Such a requirement is fundamentally at odds with *Holland*’s directive that equitable tolling does not mandate maximum feasible diligence. Because the diligence requirement “does not demand a showing that the petitioner left no stone unturned,” *Munchinski v. Wilson*, 694 F.3d 308, 330 (3d Cir. 2012) (quoting *Ramos–Martinez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011)), the Second and Tenth Circuits correctly have not insisted that habeas petitioners search beyond their borders for adverse decisions and choose a course of action based on how controlling law might evolve. Instead, those circuits acknowledge that reasonably diligent petitioners make judgments about how best to advance their interests in light of the legal landscape they face, while the law is still developing. The Second and Tenth Circuits’ approach is therefore more faithful to *Holland*.

Their approach is also more consistent with the foundational principles that the reasonableness of an attorney’s actions is measured in view of the circumstances

as they existed at the time of her conduct rather than latter-day developments, *cf. Maryland v. Kulbicki*, 577 U.S. 1, 4 (2015) (counsel not ineffective for failure to anticipate advances in forensic science), and that the duty of loyalty requires pursuit of her client’s interests in light of the law that is extant, not inchoate, *cf. Thomas v. Att’y Gen.*, 992 F.3d 1162, 1184 (11th Cir. 2021) (equitable tolling warranted where counsel purposely filed untimely habeas petition to test the constitutionality of the statute of limitations). The Ninth Circuit’s rule subverts these principles. It requires Walden’s counsel to have foregone an avenue of potential relief based on the possibility that out-of-circuit developments presaged a change in controlling precedent blocking that avenue.

Had the Ninth Circuit correctly applied *Holland* and the rule adopted in the Second and Tenth Circuits, Walden would be entitled to equitable tolling. At the time he withdrew his IAC claim to pursue it in state court, that course of action was reasonable. Both parties believed the claim was unexhausted, in which case Walden faced the certainty of a procedural dismissal of his IAC claim under *Rose*, 455 U.S. 509. Under those circumstances, taking his claim back to state court for exhaustion was quintessentially diligent, as was his reasonably prompt return to federal court upon the conclusion of state-court proceedings. *See Zarvela v. Artuz*, 254 F.3d 374, 382 (2d Cir. 2001) (“Prompt action by the petitioner to initiate exhaustion and return to federal court after its completion serves as the functional equivalent of the

‘reasonable diligence’ that has long been a prerequisite to equitable tolling of limitations periods.”).⁵

The unsettled state of the law regarding relation back made that tack even more reasonable, and it set the stage for the extraordinary circumstances *Holland* also requires. In late 2000, Walden could expect that if he obtained an unfavorable ruling from the Arizona courts, it would be possible to amend the claim back into his federal petition. The favorable developments in circuit law, notably *Anthony* and *Felix*, vindicated that expectation and reinforced the reasonableness of Walden’s strategy.

Indeed, *Anthony* distinguished the same four out-of-circuit relation-back cases on which the Ninth Circuit relied in Walden’s case because those decisions had “specifically relied on the absence of notice to the state regarding the content of the proposed amendments as grounds for denying the motions” to amend. *Anthony*, 236 F.3d at 577 & n.5 (distinguishing *Craycraft*, *Duffus*, *Davenport*, and *Pittman*). If Walden had developed any doubts about relying on his understanding of relation back based on the emergence of these four cases, *Anthony* would have quickly assuaged them. His reasonable reliance on then-existing Ninth Circuit law was upended only

⁵ And, if the IAC claim was technically exhausted, contrary to the views of the parties, then the claim was irretrievably defaulted and subject to a procedural dismissal on that basis, further militating in favor of pursuing alternatives in state court. See *supra* note 4.

by this Court's decision in *Mayle*, which retroactively rendered Walden's claim untimely.

Under these circumstances, equitable tolling should be available. *York*, 314 F.3d at 527–28; *Rodriguez*, 303 F.3d at 438–39.

CONCLUSION

Because the Ninth Circuit has decided an important federal question in a way that conflicts with *Holland* and deepened a split with the Second and Tenth Circuits, this Court's intervention is warranted. Walden requests that the Court grant certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted: October 14, 2021.

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