

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LEE WALDEN,

PETITIONER,

-vs-

DAVID SHINN,

RESPONDENT.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Without obtaining leave of the district court, Petitioner Robert Lee Walden voluntarily withdrew five timely-filed ineffective assistance of trial counsel claims from his habeas petition in an attempt to exhaust them in state court. Years later, when he moved to amend the petition to re-insert the claims, the district court denied the motion because the claims were untimely. Did the court below err in rejecting Walden's request for equitable tolling, made for the first time on appeal?

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STATEMENT OF THE CASE

In the spring and summer of 1991, Petitioner Robert Lee Walden embarked on a spree of sexual assaults in Tucson, Arizona, which culminated with the murder of M.B. *State v. Walden (Walden I)*, 905 P.2d 974, 982–83 (Ariz. 1995). After his apprehension and trial, a Pima County jury found Walden guilty as charged of fourteen felony counts: kidnapping, aggravated assault, sexual abuse, and sexual assault, committed against V.B. on May 4, 1991; first-degree burglary, kidnapping, sexual abuse, robbery, and two counts of sexual assault, committed against K.V. on May 15, 1991; and first-degree burglary, kidnapping, sexual assault, and first-degree murder, committed against M.B. on June 13, 1991. *Id.* A judge sentenced Walden to death for M.B.’s murder. *Id.* This case’s lengthy factual and procedural history is as follows.

A. *Facts of Walden’s crimes.*

V.B.: On May 4, 1991, V.B. arrived at an apartment complex where her friend lived. *Id.* at 982. She saw Walden standing by the complex’s swimming pool. *Id.* V.B.’s friend did not answer her door, so V.B. went back to her car to wait. *Id.* A few minutes later, V.B. again knocked on her friend’s door but her friend still did not answer. *Id.* As V.B. turned to leave, Walden rushed up behind her, held a knife to her throat, and threatened to kill her if she did not come with him. *Id.* He forced her into the complex’s laundry room and ordered her to disrobe. *Id.* V.B. refused, and Walden unzipped his pants and commanded her to perform fellatio. *Id.* Again, V.B. refused. *Id.* Walden then grabbed her and forcibly removed her clothing. *Id.* He held the knife against her neck while he touched her breasts and forced her to engage in intercourse.

Id. As he left the laundry room, Walden warned V.B. that he would return and kill her if she left. *Id.* He thereafter returned twice to the laundry room. *Id.* Eventually, V.B. ran to her car, drove home, and reported the rape. *Id.* Analysis of semen stains on V.B.'s clothing could not exclude Walden as the source. *Id.*

K.V.: Less than 2 weeks after V.B.'s assault, Walden knocked on the door of K.V.'s apartment, dressed in the uniform he wore for his job at a pest-control company. *Id.* Posing as a maintenance worker, Walden claimed to have been sent to repair the apartment's plumbing. *Id.* K.V. became suspicious when Walden asked her to follow him upstairs, and she tried to call her friend. *Id.* Walden grabbed K.V. and threatened to kill her if she screamed. *Id.* He attempted unsuccessfully to wrap a telephone cord around K.V.'s neck; he thereafter dragged her into a bathroom and attempted, again unsuccessfully, to wrap the cord from a hairdryer around her neck. *Id.*

Walden and K.V. continued to struggle, and Walden dragged her into the living room. *Id.* K.V. tried to flee the apartment, but Walden restrained her and kicked the door closed. *Id.* He then dragged K.V. upstairs and warned, "I'm going to kill you. I can do it." *Id.* Walden subdued K.V., forcing her to kneel on the bedroom floor as he tied her arms behind her back and blindfolded her. *Id.* He pushed K.V. to the floor, gagged her, tore her clothing, touched her breasts, digitally penetrated her, and forced her to engage in intercourse. *Id.*

K.V. managed to free her hands during the sexual assault, but Walden retied them and also bound her feet. *Id.* He then threatened to kill K.V. if she reported the assault, and warned that he knew everything about her. *Id.* at 982–83. Walden went

downstairs, and K.V. heard his keys jingling as he walked around the apartment. *Id.* at 983. He then returned to the bedroom, ran an object down K.V.'s back, claiming that it was a knife, and asked if K.V. wanted to "feel it harder." *Id.* Walden went downstairs again, and K.V. heard the apartment door open and close. *Id.* Shortly thereafter, Walden again returned to the bedroom, laughing, and mocked K.V., "I'm not gone yet, dummy, I'm still here. I'm watching you." *Id.* Finally, Walden left for good. *Id.* K.V. unbound and dressed herself and sought refuge in the apartment manager's office. *Id.* Analysis of semen stains on her clothing could not exclude Walden as the source. *Id.*

M.B.: Walden's next attack showed a marked escalation of violence. On the afternoon of June 13, 1991, Elaine Jordan saw Walden at an apartment complex near the one where K.V. lived. *Id.* The complex was also near Walden's own residence. *Id.* Jordan believed Walden was a maintenance worker because he wore a uniform and carried equipment. *Id.*

About an hour later, M.B.'s husband returned to their apartment in the same complex. *Id.* The front door stood open. *Id.* Inside, he discovered M.B. lying dead in the bedroom, face down in a pool of blood. *Id.* She was nude from the waist down. *Id.* She had died from strangulation, and had also suffered two deep cuts to her throat. *Id.* Additionally, she had been struck repeatedly with a blunt instrument and her neck and chest were scraped. *Id.* Walden could not be excluded as the source of semen in M.B.'s vagina. *Id.* In addition, police found his fingerprint on the nightstand in M.B.'s bedroom. *Id.*

B. *Trial and sentencing.*

In July 1992, a jury found Walden guilty as charged. *Id.* At sentencing, the court found that the State had proved three capital aggravating factors beyond a reasonable doubt: (1) Walden had previously been convicted of offenses for which sentences of life imprisonment could be imposed under Arizona law, *see* A.R.S. § 13–703(F)(1) (1991)¹; (2) Walden had previously been convicted of felonies involving the use or threat of violence on another person, *see* A.R.S. § 13–703(F)(2); and (3) Walden murdered M.B. in an especially cruel, heinous, or depraved manner, *see* A.R.S. § 13–703(F)(6). *Id.* The court found Walden’s mitigation insufficiently substantial to warrant leniency and sentenced him to death for M.B.’s murder. *Id.*

C. *Direct appeal.*

On direct appeal, the Arizona Supreme Court rejected Walden’s claims and affirmed his convictions and sentences. *Walden I*, 905 P.2d at 982–1002. In addition to analyzing Walden’s properly presented claims of error, the court independently reviewed the evidence of aggravating and mitigating circumstances and—with the exception of striking Walden’s 1990 aggravated assault conviction as a basis for the A.R.S. § 13–703(F)(2) aggravator and striking witness elimination as a basis for the A.R.S. § 13–703(F)(6) aggravator—affirmed the trial court’s findings of aggravating factors. *Id.* at 982–1002. The court found Walden’s mitigation insufficiently

¹ Unless otherwise noted, Respondent’s citations refer to the 1991 version of Arizona’s sentencing statutes, which was in effect at the time Walden murdered M.B.

substantial to warrant leniency and affirmed his death sentence. *Id.* This Court denied certiorari. *Walden v. Arizona*, 517 U.S. 1146 (1996) (mem.).

D. *Post-conviction and federal habeas proceedings.*

After his direct appeal, Walden filed a state petition for post-conviction relief raising claims that are not relevant to the issue here. *Walden v. Shinn (Walden II)*, 990 F.3d 1183, 1192 (9th Cir. 2021). The state courts denied relief. *Id.*

Walden then initiated federal habeas corpus proceedings in the district court in November 1999. *Id.* At the outset of the proceedings, the district court issued orders directing that Walden’s habeas petition must “include all known claims of constitutional error or deprivation.” *Id.* Walden filed an amended habeas petition which, among other claims, included five ineffective assistance of trial counsel claims, including a claim that sentencing counsel was ineffective for failing to thoroughly investigate and present mitigation. *Id.* at 1193.

After filing the petition, Walden filed a court-ordered statement of exhaustion, identifying “when and where each ground of relief raised in the amended habeas petition was presented in the state courts.” *Id.* On the same day he filed the statement of exhaustion and without seeking leave of court, Walden withdrew the ineffective assistance of trial counsel claims from his petition, stating that he was presenting those claims in state court. *Id.* At the same time, Walden’s federal habeas counsel filed a notice of post-conviction relief in state court listing those claims. *Id.*

The state court dismissed Walden’s post-conviction proceeding in July 2002, finding that “Walden’s newly-presented mitigation evidence did not ‘show by clear and

convincing evidence that no reasonable judge would have sentenced him to death””; and that Walden’s ineffective assistance claims were precluded under Arizona Rule of Criminal Procedure 32.2(a)(3) because they should have been raised in his first post-conviction relief proceeding. *Id.* The Arizona Supreme Court denied review. *Id.*

Three months after the state post-conviction proceeding concluded, and almost four years after originally withdrawing the ineffective assistance claims from his habeas petition, Walden moved for leave to amend his habeas petition to reintroduce those claims. *Id.* The district court denied the motion, finding that amendment would be futile and that Walden had unduly delayed seeking amendment. *Id.*

The court found that amendment was futile because the claims were procedurally defaulted by Walden’s failure to raise them in his initial state post-conviction relief proceeding and that post-conviction counsel’s ineffectiveness in failing to present the claims could not excuse the default under *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). *Walden II*, 990 F.3d at 1193–94. Regarding undue delay, the district court disagreed with Walden’s contention that he had no choice but to withdraw his unexhausted ineffective assistance claims. *Id.* at 1194. The court found that the claims “‘were not truly unexhausted,’ but rather ‘technically exhausted and procedurally defaulted’; therefore, Walden should have left the claims in the petition and briefed whether he could ‘overcome any alleged default of the Withdrawn Claims.’” *Id.* But “[i]nstead of ‘complying with the court’s order to include all of his known claims in his Amended Petition,’ Walden, ‘without leave of the court,’ ‘withdrew the claims and filed a successive PCR petition.’” *Id.* Then, “[f]our years later, he sought ‘to

add them again in the same procedural posture as when they were withdrawn—procedurally defaulted.” *Id.* The district court thus found that Walden “made a tactical decision to circumvent the process established by the rules and the court,” thereby establishing undue delay. *Id.*

While Walden appealed the district court’s denial of relief, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012). *Walden II*, 990 F.3d at 1194. The Ninth Circuit subsequently granted Walden’s motion for a limited remand for the district court to reconsider his ineffective assistance claims in light of *Martinez*. *Id.* During the remand, Walden sought to excuse the procedural default of his ineffective assistance claims under *Martinez*. *Id.* The district court found, however, that amendment to add the claims to the habeas petition remained futile despite *Martinez* because the claims were untimely under 28 U.S.C. § 2244(d), and because Walden failed to raise “any grounds for equitable tolling’.” The court also found that his claims did not relate back under Rule 15(c) to any timely claim. *Id.* The district court also “reaffirmed its prior finding ‘regarding Walden’s tactical decision to circumvent the court’s process’ by withdrawing his IAC claims, ‘resulting in undue delay.’” *Id.*

On appeal, the Ninth Circuit agreed with the district court that amendment was futile because the ineffective assistance claims were untimely and did not relate back to any timely claim under Rule 15(c). *Id.* at 1202–03. However, Walden also argued, for the first time on appeal, that he should receive equitable tolling. *Id.* at 1203.

Reviewing for plain error because Walden did not raise the issue in the district court, the Ninth Circuit concluded that Walden was not entitled to equitable tolling.

Id. at 1203–04. First, the court found that there was no plain error in not applying equitable tolling because Walden had not exercised due diligence. *Id.* at 1203. As the district court had noted, “instead of complying with the [district] court’s order and attempting to establish cause and prejudice to excuse the procedural defaults, Walden voluntarily withdrew the claims without leave of court.” *Id.* Thus, “following his conviction in 1992, Walden did not assert the IAC claims in state court,” but instead “he first asserted them in federal court eight years later, then withdrew them, then attempted to reassert them four years later.” *Id.* The Ninth Circuit concluded that the record supported the district court’s finding that Walden failed to exercise due diligence and thus the district court did not plainly err in not applying equitable tolling. *Id.*

The court also rejected Walden’s argument that he was entitled to equitable tolling under *Williams v. Filson*, 908 F.3d 546 (9th Cir. 2018), decided after the district court’s order on remand. *Id.* In *Williams*, the Ninth Circuit held that a petitioner was entitled to equitable tolling where he had reasonably assumed that claims in his amended petition would relate back to his original petition “based on the then-unsettled state of the law regarding the relation-back standard in habeas cases.” *Walden II*, at 1203–04 (citing *Williams*, 908 F.3d at 559–61). The court found *Williams* distinguishable from Walden’s case because existing law at the time Walden withdrew his claims created no “reasonable expectation that the district court would later deem those claims related to the remaining claims under Rule 15(c).” *Id.* at 1204. The court noted that in February 1999, before Walden withdrew the claims, other circuits

(though not yet including the Ninth) began “imposing a more restrictive reading of Rule 15(c)” resulting in “a rapidly-emerging circuit-level consensus that ‘transaction or ‘occurrence’ in Rule 15(c) did not broadly refer to a petitioner’s conviction and trial.” *Id.* Thus, the court concluded, “Walden’s counsel, unlike Williams’s, had ample ‘reason to suspect that Rule 15(c) would pose an obstacle to consideration of newly added claims in an amended petition.” *Id.* (quoting *Williams*, 908 F.3d at 560).

The Ninth Circuit additionally found *Williams* distinguishable because, unlike in that case, the State in Walden’s case contested his diligence in pursuing his rights between expiration of the limitations period and attempting to add his ineffective assistance claims and because, unlike in *Williams*, the district court in Walden’s case did not authorize, nor did the State consent to, amendment. *Id.* “To the contrary, the district court here ordered Walden to file, by a deadline well within the limitations period, an amended petition asserting ‘all known claims of constitutional error or deprivation.” *Id.* Walden now seeks certiorari review of the Ninth Circuit’s decision denying him equitable tolling.

REASON FOR DENYING THE WRIT

This Court grants certiorari “only for compelling reasons,” Sup. Ct. R. 10, and Walden has presented no such reason. In particular, Walden has not established that the Ninth Circuit has “entered a decision in conflict with the decision of another United States court of appeals.” Sup. Ct. R. 10(a). Rather, Walden “assert[s] error consist[ing] of erroneous factual findings [and] the misapplication of a properly stated rule of law,” for which this Court “rarely grant[s]” certiorari review. Sup. Ct. R. 10. Because Walden merely seeks correction of the Ninth Circuit’s perceived error, this Court should deny the petition.

A habeas petitioner is entitled to equitable tolling of 28 U.S.C. § 2244(d)’s statute of limitations “only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Several circuits, including the Second, Ninth, and Tenth, have held that a petitioner who has diligently pursued his rights can demonstrate extraordinary circumstances by showing that he reasonably “relie[d] on the unsettled state of the law ... in deciding when to file his petition.”² *Williams*, 908 F.3d at 560; *see also York v. Galetka*, 314 F.3d 522 (10th Cir. 2003); *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002).

² Before *Williams*, the Ninth Circuit had also held that a petitioner “can demonstrate an extraordinary circumstance ... by showing that he relied on controlling circuit precedent to file what he thought would be a timely federal petition, only to see the circuit precedent subsequently overruled, thereby rendering his petition untimely.” *Williams*, 908 F.3d at 558.

Walden argues that the decision below created a split with the Second and Tenth Circuits by holding that a petitioner’s reliance on unsettled circuit precedent is not reasonable (and therefore does not establish extraordinary circumstances for equitable tolling) if out-of-circuit decisions suggest the petitioner’s filing may not be timely. Pet. at 17–18, 22–27. As a preliminary matter, Walden waived his request for equitable tolling by failing to argue it in the district court. For that reason alone, this Court should deny certiorari.

Even if Walden did not waive the issue, the decision below creates no circuit split. *Williams*, which holds consistently with *York* and *Rodriguez* that a diligent petitioner may receive equitable tolling if his “reliance on the unsettled state of the law [was] reasonable during the time period in question,” 908 F.3d at 560, remains controlling precedent in the Ninth Circuit. *See Walden II*, 990 F.3d at 1203–04 (applying *Williams* to Walden’s assertion he was entitled to equitable tolling).

Moreover, the Ninth Circuit correctly applied that rule. The court concluded that Walden’s case was distinguishable from *Williams* for at least three reasons: (1) “unlike in *Williams*, based on a survey of the law as it stood in October 2000—when Walden withdrew his IAC claims—there was not a reasonable expectation that the district court would later deem those claims related to the remaining claims under Rule 15(c)”; (2) “in *Williams*, unlike the situation here, the State did not contest Williams’ diligence in pursuing his rights in the year between the end of the limitations period and the filing of his amended petition”; and (3) “unlike the situation in *Williams*, the district court here did not authorize, nor did the State consent to amendment

outside the limitations period.” *Walden II*, 990 F.3d at 1204. And rather than comply with the district court’s order requiring him to include all known claims in a timely filed petition and address all issues related to exhaustion and procedural default, Walden instead withdrew the claims at issue without leave of court in a misguided attempt to exhaust them in state court. The Ninth Circuit found that these facts “support[] the district court’s conclusion that Walden had not exercised due diligence, and there was no plain error in not applying the doctrine of equitable tolling.” *Walden II*, 990 F.3d at 1203. The fact that the Ninth Circuit found Walden’s case distinguishable from *Williams* does not warrant this Court’s intervention.

I. WALDEN WAIVED HIS REQUEST FOR EQUITABLE TOLLING BY FAILING TO RAISE IT IN DISTRICT COURT.

Walden did not seek equitable tolling in the district court, much less assert in that court that he had relied to his detriment on purported confusion in relation-back case law. *See* Pet. App’x 62 (“Petitioner does not assert that he has any grounds for equitable tolling.”). Rather, in response to the State’s assertion that his ineffective assistance claims were untimely, he argued that the statute of limitations and Federal Rule of Civil Procedure 15(c) should not apply for equitable reasons, merely because he had invoked the *Martinez* pathway around procedural default. Pet. App’x 53–54. Only when appealing the district court’s denial of habeas relief in the Ninth Circuit did Walden advance the argument that he should be entitled to equitable tolling for his untimely ineffective assistance claims. *See Walden II*, 990 F.3d 1183, 1203 (9th Cir. 2021) (“We also deny Walden’s belated request for equitable tolling—made for the first time on appeal.”).

Though the court below reviewed Walden’s request for equitable tolling for plain error, *id.* at 1203, Walden waived any right to equitable tolling by failing to present it to the district court. *See, e.g., Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (appellate courts “will not ... review an issue not raised below unless necessary to prevent manifest injustice”) (quotation omitted). Because Walden waived his request for equitable tolling by failing to present it to the district court, this Court should deny certiorari.

II. *WILLIAMS* REMAINS NINTH CIRCUIT PRECEDENT AND THERE IS NO CIRCUIT SPLIT.

Walden argues that the Ninth Circuit’s decision creates a split with the Tenth Circuit’s opinion in *York*, 314 F.3d 522, and the Second Circuit’s in *Rodriguez*, 303 F.3d 435. He is incorrect. Here, the Ninth Circuit applied *Williams*, 908 F.3d 546, a decision that reaches a holding consistent with *York* and *Rodriguez*, but found it distinguishable. The decision below thus did not create any circuit split that would warrant this Court’s intervention.

In *York*, the habeas petition was dismissed for failure to exhaust all claims at a time when existing circuit law was unsettled whether a pending federal habeas petition tolled AEDPA’s one-year statute of limitations under 28 U.S.C. § 2244(d)(2). 314 F.3d at 527–28. Then, over a year after the petitioner had exhausted his claims and filed the operative habeas petition, this Court decided *Duncan v. Walker*, 533 U.S. 167 (2001), which held that a federal habeas petition does not toll the statute of limitations. Observing that concurring justices in *Duncan* had suggested equitable tolling might be appropriate to relieve petitioners of the consequences of its holding

had their cases been dismissed before the decision, the Tenth Circuit concluded that the petitioner was entitled to equitable tolling. *York*, 314 F.3d at 527–28. In reaching that conclusion, the court noted that the petitioner had diligently pursued his claims, *Duncan* was decided after the operative habeas petition was filed, and the law on the issue had been unsettled before that decision. *Id.* at 528.

Similarly, in *Rodriguez*, the original, timely habeas petition was dismissed in order to exhaust state remedies, and the petitioner’s subsequent, operative habeas petition was rendered untimely by the rule announced *Duncan*. 303 F.3d at 437. Had the district court stayed the original petition pending exhaustion rather than dismissing it, the operative petition would still have been before the court under a timely filing. *Id.* at 439. Under these circumstances, the Second Circuit remanded the case to the district court to determine whether the petitioner should receive equitable tolling. *Id.*

In *Williams*, the prisoner filed an original, timely pro se habeas petition after which the district court issued a detailed scheduling order outlining the procedures for filing an amended petition following appointment of counsel and resolution of discovery issues. *Id.* at 556. With the district court’s permission, the prisoner filed an amended petition (now represented by counsel) over 18 months after the original petition, which raised a number of new claims not included in the original petition. *Williams*, 903 F.3d at 556, 557. Applying the narrow construction of relation back announced in *Mayle v. Felix*, 545 U.S. 644 (2005), which was decided five years *after* the prisoner filed his amended petition, the district court found a number of the claims in the amended

petition untimely because they did not relate back to the claims included in the original petition. *Id.* at 558.

The Ninth Circuit concluded that Williams was entitled to equitable tolling of the time between the district court's initial status conference and the filing of the amended petition. *Id.* Relying on the Tenth Circuit's decision in *York*, the Ninth Circuit held that "equitable tolling may be granted when a petitioner relies on the unsettled state of the law (rather than on controlling circuit precedent) in deciding when to file his petition." *Id.* at 559. The court found that the petitioner's reliance on the unsettled state of the law was reasonable because his counsel "had no reason to suspect that Rule 15(c) would pose an obstacle to consideration of newly added claims in an amended petition" and because the district court and the state shared counsel's assumption "that newly added claims in an amended petition would relate back to the original petition." *Id.* at 560–61. "In sum, it was not until the Supreme Court decided *Mayle* in 2005 that anyone involved in this case suggested that the newly added claims might not relate back and could therefore be deemed untimely." *Id.* at 561. Under those circumstances, the Ninth Circuit concluded that the petitioner was entitled to equitable tolling.

Walden argues that the decision below creates a circuit split with *York* and *Rodriguez* because, like in those cases, Ninth Circuit precedent governing relation back was unsettled at the time he withdrew his unexhausted ineffective assistance claims. Pet. at 22. But there is no circuit split here because *Williams*, which is not only consistent with *York* and *Rodriguez*, but was in fact based in large part on *York's*

reasoning, remains controlling precedent in the Ninth Circuit. The court below applied *Williams*' rule regarding reliance on unsettled circuit precedent, but found Walden's case distinguishable, for several reasons. *Walden II*, 990 F.3d at 1203–04. Walden's actual complaint, therefore, is with the Ninth Circuit's conclusion that his case was distinguishable from *Williams*, not that the decision below created a circuit split. There being no circuit split for this Court to resolve, Walden's certiorari request amounts to ordinary error correction unworthy of this Court's attention.

III. THE COURT BELOW CORRECTLY CONCLUDED THAT WALDEN IS NOT ENTITLED TO EQUITABLE TOLLING.

Finally, the court below correctly distinguished Walden's case from *Williams*. First, unlike in *Williams*, the district court here did not authorize Walden to amend his habeas petition outside the limitations period. In fact, the opposite occurred: the court twice directed Walden to include "all known claims" in his petition and notified him that that it would presume that he had deliberately waived any omitted claim. Pet. App'x 45–46. Walden nonetheless elected to withdraw his claims without leave of court and without any reasonable expectation that the court would permit them to be amended back into the petition. *Walden II*, 990 F.3d at 1203. Ultimately, the court concluded that Walden had made "a tactical decision to circumvent the process established by the rules and this Court." Pet. App'x 47. Walden therefore cannot show reasonable reliance under *Williams*.³

³ Walden's claimed reliance on unsettled law in withdrawing the petition is even less compelling than *Williams*' because, as the Ninth Circuit noted, federal circuit courts first began applying a restrictive interpretation of relation-back in February 1999—before Walden withdrew his claims. *See Williams*, 908 F.3d at 560.

Nor could Walden show that any detrimental reliance “prevented timely filing.” *Holland*, 560 U.S. at 649; *see also Pace*, 544 U.S. at 418. Walden originally filed all five disputed claims in a timely habeas petition, thereby proving that there was no filing barrier. The claims’ untimeliness resulted entirely from Walden’s voluntary decision to withdraw them from the petition after the filing period had expired. This strategic misstep did not constitute an extraordinary circumstance that prevented timely filing. *See Holland*, 560 U.S. at 651–52 (holding that ordinary attorney errors, such as missing a filing deadline, do not warrant equitable tolling and a prisoner must instead show extraordinary attorney error); *Miranda v. Castro*, 292 F.3d 1063, 1068 (9th Cir. 2002) (attorney’s miscalculation of filing deadline is not an extraordinary circumstance).

Second, equitable tolling’s diligence requirement was undisputed in *Williams*, 908 F.3d at 558. In this case, as stated above, Walden timely filed the claims at issue, suggesting diligence during the filing period; however, that diligence is irrelevant because Walden withdrew the claims after the limitations period had already elapsed. And even if Walden had time remaining in his limitations period when he withdrew the claims, he did not act diligently in attempting to amend them back into the habeas petition after the tolling period from the successive state post-conviction proceedings ended, instead waiting nearly 3 months to make that effort. As a result, both the district court and the Ninth Circuit correctly concluded that Walden did not exercise due diligence in asserting his claims. *Walden II*, 990 F.3d at 1203. Under these

circumstances, the court below correctly concluded that *Williams* is inapplicable to Walden's case and that he is not entitled to equitable tolling.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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