No. 21–6015

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

Robert Walden demonstrated in his petition that the Ninth Circuit's application of equitable tolling splits from the Second and Tenth Circuits and conflicts with *Holland v. Florida*, 560 U.S. 631 (2010). Respondent David Shinn attempts to erase the split by describing the relevant decisions from each circuit at only the highest level of generality. He then disputes the appropriateness of equitable tolling based on a materially incomplete and misleading characterization of the facts, procedural history, and governing law. These efforts fail.

The circuit courts are divided over an issue of nationwide import. The Ninth Circuit's approach to equitable tolling demands more of habeas petitioners than *Holland* requires. And in this capital case, the difference between the improper standard in the Ninth Circuit and the proper standard in the Second and Tenth Circuits is a matter of life and death. Under these circumstances, the Court's intervention is warranted. *See* Supr. Ct. R. 10.

I. Respondent ignores the pertinent circuit split by overgeneralizing the relevant appellate court decisions and mischaracterizing Walden's argument

Respondent's assertion that the Ninth Circuit has not split from the approach to equitable tolling adopted by the Second and Tenth Circuits requires reading each decision at only the highest level of generality and ignoring the pertinent consideration in Walden's petition: how each court treats out-of-circuit developments

when assessing the reasonableness of a habeas petitioner's reliance on unsettled law. That consideration demonstrates that the Ninth Circuit's decisions in *Williams v. Filson*, 908 F.3d 546 (9th Cir. 2018), and in Walden's case created and then entrenched a split with the Second and Tenth Circuits, as reflected in *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002), and *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003).

The parties agree that the Second, Ninth, and Tenth Circuits generally permit equitable tolling when a petitioner relies on favorable but unsettled circuit law and that reliance is upended by subsequent legal developments. Walden's petition demonstrated that, in assessing the reasonableness of a petitioner's reliance on unsettled circuit law, however, out-of-circuit developments are irrelevant in the Second and Tenth Circuits but dispositive in the Ninth Circuit. To that end, Walden described the legal landscape facing the petitioners in *York* and *Rodriguez*, illustrating that the Second and Tenth Circuits evaluate the reasonableness of a petitioner's actions without regard to adverse developments beyond their borders.

Respondent simply ignores this discussion. He summarizes *York* and *Rodriguez* in two paragraphs demonstrating that the Second and Tenth Circuits permit equitable tolling for habeas petitions retroactively rendered untimely by *Duncan v. Walker*, 533 U.S. 167 (2001). But Respondent never acknowledges that, at the time the petitioners in *York* and *Rodriguez* made strategic choices about how to

prosecute their habeas cases, decisions outside the Second and Tenth Circuits adopted the statutory tolling rule announced by *Duncan*. Had the petitioners in *Rodriguez* and *York* looked beyond their respective circuits, as the Ninth Circuit required the petitioner to do in *Williams* and below, they would have discovered cases undermining their reliance on the unsettled law at home. Under the Ninth Circuit's approach, equitable tolling would not have been available to the petitioners in *Rodriguez* and *York*.

Respondent ignores this point entirely, and instead mischaracterizes Walden's argument. According to Respondent, "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." (Brief in Opposition ("BIO") at 15.) Once Respondent misstates Walden's argument by omitting the material circumstances he emphasized about *Rodriguez* and *York*, Respondent easily concludes that "there is no circuit split." (BIO at 15.) Only by erecting a strawman can Respondent so easily knock it down.

Of course, Walden did not argue that the decision below creates a circuit split with *York* and *Rodriguez* because in each case the petitioners acted in reliance on unsettled circuit law. He argued that in *Williams* and *Walden* the Ninth Circuit created and then entrenched a split with the Second and Tenth Circuits over the role

of out-of-circuit developments in evaluating the reasonableness of the petitioners' reliance.[1] The petitioners in *York* and *Rodriguez* were not expected to canvass out-of-circuit decisions before they acted in conformity with unsettled yet favorable circuit law. Like the petitioner in *Williams*, however, Walden was. On the circuit split Walden actually discussed, Respondent says nothing.

II. Respondent's opposition to equitable tolling is no basis to deny review

The split Walden raises between the Ninth Circuit and the Second and Tenth Circuits is a compelling reason to grant review. *See* Supr. Ct. R. 10(a). For that reason, a writ of certiorari is warranted irrespective of Respondent's conclusion that Walden is not entitled to equitable tolling.

But Respondent is incorrect. Initially, Respondent fails to dispute most of the points making equitable tolling appropriate here. Respondent does not dispute that both parties thought Walden's claims were unexhausted when he withdrew them from his federal habeas petition to pursue them in state court. Respondent also does not dispute that if Walden did not withdraw them from the federal petition, those claims were subject to dismissal whether they were unexhausted or, instead, technically exhausted and procedurally defaulted—or that if they were unexhausted,

[1] For this reason, it is unresponsive to answer that "there is no circuit split because *Williams* . . . remains controlling precedent in the Ninth Circuit." (BIO at 15–16.) Because *Williams*, like the decision below, conflicts with *York* and *Rodriguez* and requires more of petitioners than demanded by *Holland*, this observations supports Walden's argument rather than Respondent's.

Walden risked a dismissal of his entire petition. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982). Further, Respondent does not dispute that there was a viable path to merits review of those claims through a second state postconviction proceeding, or that Walden litigated the exhaustion proceeding in state court diligently. And Respondent does not dispute that both parties and the district court assumed Walden's withdrawn claims were timely when he sought to amend them back into the federal petition in 2004. Finally, Respondent does not dispute that Walden's claims would have been timely but for application of the narrow construction of the relation-back requirement this Court announced several years after he withdrew them. Respondent's silence on these points all but concedes that Walden satisfied equitable tolling's requirements of diligence and extraordinary circumstances. *Cf. York*, 314 F.3d at 527–28; *Rodriguez*, 303 F.3d at 438–39.

Ignoring all these factors supporting equitable tolling, Respondent instead asserts that tolling is improper because Walden "elected to withdraw his claims without leave of court" when he returned to state court to exhaust them. (BIO at 16.) But there is nothing improper about a habeas petitioner unilaterally amending his petition to delete claims for relief he believes are unexhausted. That is his right. *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)).

Next, Respondent observes that Walden originally included his subsequently withdrawn claims in a timely filed petition, thus disputing that his reliance on the law predating *Mayle v. Felix*, 545 U.S. 644 (2005), "prevented timely filing." *Holland*, 560 U.S. at 649. Equitable tolling is appropriate even when timely filing is technically possible, however, so long as the petitioner's strategic determination to delay presenting the claims was reasonable. *Fue v. Biter*, 842 F.3d 650, 657 (9th Cir. 2016) (en banc) (rejecting "impossibility" requirement for equitable tolling as inconsistent with *Holland*); *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008) ("The fact that Harris *could* have filed a timely federal habeas petition at a certain point in time is not dispositive. The critical fact here is that Harris relied on good faith on then-binding circuit precedent in making his tactical decision to delay filing a federal habeas petition.").

Relatedly, Respondent also asserts that the "claims' untimeliness resulted entirely from Walden's voluntary decision to withdraw them from the petition after the filing period had expired." (BIO at 17.) Respondent is mistaken. Had this Court not reversed the Ninth Circuit's petitioner-friendly construction of the relation-back requirement in *Mayle*, Walden's claims would have been timely. The best evidence of this conclusion is that when Walden initially sought to amend the claims back into the petition in 2004—before *Mayle* was decided—neither Respondent nor the district court suggested the claims were untimely.

And even if Walden's decision to withdraw the claims was a necessary but insufficient cause of their untimeliness, this is no basis to deny tolling. Respondent's argument to the contrary requires equating a reasonable strategic determination that turns out to be unsuccessful—here, Walden's decisions to withdraw his claims and pursue them in state court—with "ordinary attorney errors" like miscalculating or otherwise missing a filing deadline, which do not generally warrant tolling. (BIO at 17 (citing *Holland*, 560 U.S. at 651–52, and *Miranda v. Castro*, 292 F.3d 1063, 1068 (9th Cir. 2002)).) The equivalence is false. Relying in good faith on unsettled or binding law that is subsequently clarified or reversed to the petitioner's detriment is not the same as negligently missing a filing deadline. *Harris*, 515 F.3d at 1055. Indeed, that Walden's actions were strategic rather than "the result of oversight, miscalculation or negligence" militates in favor of tolling, not against it. *Id.* ("Harris presumably chose his tactical strategy precisely *because* he believed that . . . he could pursue his relief in state courts without jeopardizing his ability to file a federal habeas petition.").

Respondent's diligence arguments can also be dismissed. Respondent does not dispute that Walden was diligent before originally filing his claims, nor that he was diligent while prosecuting his second postconviction proceedings in the state court.[2]

[2] Respondent criticizes Walden for moving to amend the claims back into the federal habeas petition "almost four years after originally withdrawing" them. (BIO at 6.) Because Respondent does not contest that Walden was diligent during the state-court proceedings, however, the length of those proceedings is immaterial.

Instead, Respondent disputes that Walden was diligent because he waited "nearly 3 months" after the conclusion of the second state postconviction proceedings before attempting to amend his claims back into the federal petition. (BIO at 17.) Respondent offers nothing but the decision below to support the proposition that this three-month period indicates a lack of diligence. Nor does Respondent acknowledge the pragmatic circumstances justifying this brief delay in returning to federal court: Walden's sentencing-related claims were stayed during nearly the entire three-month period in light of *Ring v. Arizona*, 536 U.S. 584 (2002). Once the stay was lifted, within two weeks Walden moved to amend his claims back into the federal petition.

III. No forfeiture justifies denial of certiorari

Respondent asserts that Walden waived his request for equitable tolling by failing to raise it in the district court. (BIO at 12.) This argument need not detain the Court. There was no reason for Walden to seek tolling when he returned to federal court in 2004—at that time neither Respondent nor the district court invoked timeliness as a basis to deny Walden's requested amendment. And when Walden returned to the district court in 2014 on a limited remand, the Ninth Circuit had not yet permitted equitable tolling for petitioners who had detrimentally relied on unsettled law. Walden's equitable tolling argument did not become available until the Ninth Circuit decided *Williams* in November 2018—after proceedings in the district court concluded—and held as a matter of first impression that reliance on

unsettled law (rather than on controlling law) could justify tolling. *Williams*, 908 F.3d at 559.

Further, the court below did not find the equitable tolling argument waived. Instead, the Ninth Circuit addressed Walden's equitable tolling argument on its merits, albeit reviewing for plain error. For both reasons, Respondent has not demonstrated that any forfeiture makes this case an improper vehicle for resolving the circuit split Walden has raised.

CONCLUSION

Respondent has failed to rebut Walden's showing that the Ninth Circuit's decision below entrenched a split with the Second and Tenth Circuits over how to apply equitable tolling. Nor has Respondent overcome Walden's showing that, properly applied, tolling is appropriate here. Walden therefore requests that the Court grant a writ of certiorari and reverse the judgment of the Ninth Circuit.

Respectfully submitted: December 1, 2021.

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