CAPITAL CASE
No. 21-

IN THE
Supreme Court of the United States

VON LESTER TAYLOR,
Petitioner,

v.

ROBERT POWELL, WARDEN
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal court violate principles of federalism and comity enshrined in the Tenth Amendment by selecting one possible interpretation of an ambiguous substantive state law rather than certifying a question to the highest court of the state?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Von Lester Taylor. Respondent is Robert Powell. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Utah, and the United States Court of Appeals for the Tenth Circuit:

Taylor v. *Crowther,* No. 2:07-CV-194-TC, 2020 WL 1158372 (D. Utah Mar. 10, 2020).

United States v. *Powell,* 7 F.4th 920 (July 30, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Von Lester Taylor respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2a–51a) is reported at 7 F.4th 920. The district court's order granting relief and vacating the conviction (App., *infra*, 53a–89a) is not published in the Federal Supplement, but is available at 2020 WL 1158372. The district court's order granting the evidentiary hearing (App., *infra*, 91a–115a) is not published in the Federal Supplement, but is available at 2017 WL 168871.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on July 30, 2021, and denied Von Taylor's petition for rehearing *en banc* on October 8, 2021 (App., *infra*, 117a). Two thirty day extensions of time to file this Petition were granted, on January 4, 2022 and January 27, 2022, respectively. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. X provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

A. Introduction

The Utah Supreme Court has not yet determined whether, in Utah, a plea of guilty to capital murder has different notice requirements dependent on whether the state is pursuing principal or accomplice liability. In this case, the Utah federal district court that regularly interprets Utah state law and the Tenth Circuit Court of Appeals disagreed on what, under Utah law, constitutes adequate notice to properly inform a plea bargaining defendant that they are pleading guilty to accomplice liability. While "[t]his Court rarely reviews a construction of state law . . . this case presents the rare situation in which [the Court] cannot rely on the construction and findings below." *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988). Whereas this Court has stated that it will normally defer to lower courts on state-law issues because "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States," here the lower courts are split. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985).

After substantial briefing on the topic, the federal court most familiar with Utah state law, the Utah District Court, determined that Mr. Taylor "did not have notice [of the elements of] accomplice liability" when he entered his plea. App., *infra*, 114a. Relying specifically on the statement from the Utah Supreme Court that "[c]harging an individual as a principal, *standing alone*, does *not* provide adequate notice that the State is *actually* pursuing an accomplice liability theory" (App., *infra*, 112a, emphasis in original), the district court found that, "[i]n *D.B.*, the Utah Supreme Court rejected an argument very similar to the one the State makes now." App., *infra*, 111a (citing *D.B.* v. *State*, 289 P.3d 459, 471 (Utah 2012)). The Tenth Circuit

panel, which included no Utah judges, curiously chose to rely on *State* v. *Gonzales*, 56 P.3d 969 (Utah Ct. App. 2002), a lower court of appeals decision that preceded *D.B.* and held differently. App., *infra*, 25a–28a.

Utah state law is clearly ambiguous on the notice requirement in a plea context; two federal courts examining the issue disagreed on its interpretation. Mr. Taylor therefore urges this Court to find that, where such ambiguity in state law exists and the State's highest court has not addressed the issue directly, a federal appeals court should certify the question to the highest court of the state rather than craft its own interpretation. Such a practice is favored by the Tenth Amendment, as it prevents federal actors from usurping powers classically retained by the states. In this capital case, this question of state law is a matter of life and death. Moreover, heightened reliability is necessary to avoid a scenario where Utah later clarifies its law in Mr. Taylor's favor, after his execution.

The principles of comity and federalism found in the Tenth Amendment require that the Utah Supreme Court decide the fate of its citizen—the only person believed to have ever gone to death row in Utah for accomplice liability.[1]

B. Factual Background

In the winter of 1990, Mr. Taylor and his co-defendant Edward Deli broke into an empty mountain cabin owned by the Tiede family. The next day Kaye Tiede, her mother Beth Potts, and Kaye's adult daughter Linae Tiede arrived at the cabin. Mr. Taylor, who

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[1] Mr. Taylor continues to contend that he did not plead guilty to accomplice liability, but the Tenth Circuit's opinion nonetheless rests on the conclusion that he in fact did plead guilty to accomplice liability.

possessed a .38 revolver, shot Kaye Tiede with a round of non-lethal birdshot. Mr. Deli fired several shots at Kaye Tiede and Beth Potts from a .44 magnum revolver. Both women died of multiple gunshot wounds. Shortly afterwards, Kaye Tiede's husband, Rolf Tiede, arrived with his daughter Tricia. Mr. Taylor shot Rolf Tiede with two non-lethal rounds of birdshot and the men kidnapped Linae and Tricia and fled. They were arrested minutes after leaving the cabin and charged with first degree murder. Neither Linae nor Tricia were physically harmed.

In 1991, after being misinformed that .38 bullets killed the women, Mr. Taylor pled guilty to two charges of capital murder for causing the deaths of Ms. Tiede and Ms. Potts. App., *infra*, 56a. He was subsequently sentenced to death by a jury in Utah state court. App., *infra*, 57a. He is currently incarcerated at the Utah State Prison and is awaiting execution.

Mr. Deli, on the other hand, went to trial on the same primary counts that Mr. Taylor was charged with. App., *infra*, 56a. The jury was instructed on both principal and accomplice liability and convicted Mr. Deli of the second degree murders of both women. He is currently serving a "natural life" sentence, which means he is parole eligible.

When Mr. Taylor was charged, the pertinent elements of first degree murder in Utah were as follows:

> (1) Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances:
>
> . . .
>
> (b) The homicide was committed incident to one act, scheme, course of conduct, or criminal episode

> during which two or more persons are killed.
>
> . . .
>
> (d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit . . . aggravated burglary, [or] burglary.

Utah Code Ann. § 76-5-202(1)(b), (d) (1990).

The Utah Code provided that accomplice liability may pertain to "[e]very person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense[.]" Utah Code Ann. § 76-2-202 (1990).

The state, however, did not charge Mr. Taylor with accomplice liability. Neither the Information nor the plea agreement specified the liability with which Mr. Taylor was charged. App., *infra*, 28a. Critically, Mr. Taylor was not given notice of the elements necessary for accomplice liability and did not plead to them.

In 2007, after completing his direct appeal and post-conviction collateral appeal in the state courts, Mr. Taylor petitioned the United States District Court in Utah, which ultimately granted habeas relief and vacated his conviction, but subsequently stayed the order pending appeal. The district court based its decision on procedurally defaulted portions of Mr. Taylor's claim of ineffective assistance of trial counsel for failure to investigate, which rendered the plea constitutionally inadequate.

Seeking to access procedurally defaulted claims, Mr. Taylor had argued that he is actually innocent of the two capital murders as a principal because ballistics and forensic evidence proved the fatal shots were most likely fired from Mr. Deli's .44 revolver. See App.,

infra, 18a ("[T]he district court found that Mr. Deli had been in possession of the .44 magnum revolver throughout the shootings. And the district court further concluded it was likely the bullets that killed Kaye and Beth were fired from that gun." (footnote omitted)). In opposition, the State argued that, because Mr. Taylor would nonetheless be guilty under an accomplice liability theory, he is not actually innocent of capital murder. App., *infra*, 20a. The district court found the State's argument unavailing because, in Utah, the crime of being "an accomplice to murder . . . is a different crime with different elements" than being a principal to murder. App., *infra*, 55a–56a.

In 2018, the district court held an evidentiary hearing that focused on determining which co-defendants' bullets actually caused the fatal wounds. After substantial discovery, including several depositions, and a three-day evidentiary hearing with expert testimony from two medical examiners and two ballistics experts, as well as testimony from co-defendant Deli, the district court concluded "that no reasonable, properly instructed juror, viewing the record, would have concluded beyond a reasonable doubt that Mr. Taylor fired the fatal shots that caused the deaths of Beth Potts and Kaye Tiede." App., *infra*, 67a. The Warden did not challenge that finding on appeal. Having accessed the actual innocence gateway afforded by *Schlup* v. *Delo*, 513 U.S. 298 (1995), the district court moved beyond the procedural default of Mr. Taylor's claim of ineffective assistance of counsel and addressed the merits. App., *infra*, 67a. Finding that Mr. Taylor's counsel was ineffective in failing to investigate the case and present informed advice to Mr. Taylor, the court subsequently vacated Mr. Taylor's sentence on the merits

of his ineffective assistance of counsel claim. App., *infra*, 89a.[2]

The State appealed to the Tenth Circuit, which reversed the district court's grant of relief and reinstated Mr. Taylor's conviction. App., *infra*, 39a. In doing so, the court did not address the claim of ineffective assistance of counsel and assumed arguendo that Mr. Taylor was innocent of murder as a principal. App., *infra*, 36a. The circuit court relied on a state appellate court ruling in holding that accomplice liability "is not a separate crime that needs to be charged separately." App., *infra*, 31a (citing *Gonzales*, 56 P.3d at 972).

Mr. Taylor petitioned the Tenth Circuit for rehearing and *en banc* consideration of the case in light of a subsequent Utah Supreme Court case that clarified different elements for principal and accomplice liability. App., *infra*, 119a–142a. The petition for rehearing was denied. App., *infra*, 117a.

REASON FOR GRANTING THE PETITION

THE TENTH CIRCUIT RULED ON AN AMBIGUOUS QUESTION OF UTAH SUBSTANTIVE CRIMINAL LAW INSTEAD OF CERTIFYING THE QUESTION TO UTAH'S HIGHEST COURT, VIOLATING BEDROCK CONSTITUTIONAL PRINCIPLES OF FEDERALISM AND COMITY

The Tenth Circuit is bound by the state courts' interpretation of the state's laws. *Chapman* v. *LeMaster*, 302 F.3d 1189, 1196 (10th Cir. 2002) ("On habeas review, however, the New Mexico courts' interpretation of the state felony murder statute is a matter of state

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[2] Mr. Taylor's counsel, based on his conduct in the penalty phase, was subsequently suspended from the practice of law by the Utah Supreme Court for three years and never practiced law again.

law binding on this court. . . . This is a determination of state law over which this court has no power to question."). This Court has repeatedly held that federal courts are bound to the interpretations made by state courts. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *United States* v. *Lopez*, 514 U.S. 549, 561 n.3, (1995) (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993)). It is long standing law that "[o]ur national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." *Screws* v. *United States*, 325 U.S. 91, 109 (1945) (plurality opinion). As this Court has noted, the Constitution "'leaves to the several States a residuary and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment." *New York* v. *United States*, 505 U.S. 144, 188 (1992) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)).

A federal court only ever engages in the task of analysis itself if a state's highest court has not spoken to an issue—and even then, the task is not to interpret the state statute itself, but to predict how the state's highest court would interpret it. See *Jordan* v. *Maxim Healthcare Servs.*, *Inc.*, 950 F.3d 724, 730–731 (10th Cir. 2020); *Mason* v. *American Emery Wheel Works*, 241 F.2d 906, 909–910 (1st Cir. 1957) (predicting, and deciding accordingly, that the Supreme Court of Mississippi would overrule a doctrine it had established decades prior given subsequent decisions and dicta).

The importance of this deference to state courts is obvious, but it bears repeating in this case: States are "laboratories for experimentation." *Fisher* v. *Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016) (citation omitted).

"Deference to state lawmaking allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Ariz. State Legis.* v. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (cleaned up) (citing *Bond* v. *United States*, 564 U.S. 211, 221 (2011)); see also *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2484 (2019) ("State governments were supposed to serve as 'laborator[ies]' of democracy") (alteration in original) (Gorsuch, J., dissenting) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) ("[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

Accomplice liability is a different path to liability for the same crime that can have a different set of acts constituting the crime and an additional *mens rea*. Indeed, how to treat notice and accomplice liability in pleas may be "far from clear," *id.*, but it is critically important that each state be permitted to decide for itself in order fulfill the Tenth Amendment's promise of state sovereignty. Compare, *e.g.*, *State* v. *Phillips*, 317 P.3d 236, 240–241 (Or. 2013) (*en banc*) (holding that, where the state seeks to hold a defendant liable

either as principal or aider and abettor, and an appropriate instruction is requested, jurors must be instructed that they must concur on each legislatively defined element necessary to find the defendant liable under one theory or the other) with *People* v. *Jenkins*, 997 P.2d 1044, 1129–1130 (Cal. 2000) (holding that jurors need not agree on whether the defendant is guilty under an accomplice liability or principal liability theory, and an accusatory pleading charging a defendant with murder does not need to specify the theory of murder on which the state will rely).

The Utah Supreme Court has twice touched upon the issues of principal versus accomplice liability notice, both times in a trial context. See *D.B.*, 289 P.3d at 465 and *State* v. *Eyre*, 500 P.3d 776, 782 (Utah 2021).[3] Utah's law is ambiguous in that the state's highest court has not yet clarified its application in a plea context. The Tenth Circuit elected to rely on a 2002 lower Utah Court of Appeals case to resolve Mr. Taylor's appeal. The question is whether the Tenth Circuit was correct in using its own analysis of Utah state law, based on a state lower court opinion predating relevant Utah Supreme Court decisions, to resolve a critical issue of substantive state law, rather than asking the Utah Supreme Court to resolve any lingering ambiguity.

The two federal courts to have visited the issue, the district court of Utah and the Tenth Circuit Court of

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[3] *Eyre* was issued on August 12, 2021, thirteen days after the Tenth Circuit's opinion issued in this case. In *Eyre*, the Court indirectly addressed notice through holding that the trial jury instructions were erroneous. Mr. Taylor unsuccessfully sought rehearing based on what he contended was confirmation from the Utah Supreme Court of his position regarding Utah state law requirements. (See App., *infra*, 119a–142a). Rehearing was denied. (See App., *infra*, 117a).

Appeals, split on their analysis. The district court, the court that most frequently addresses Utah state law, conducted its analysis based primarily on Utah Supreme Court precedent; the Tenth Circuit did not. The district court found that, in Utah, a defendant entering a plea as an accomplice must be separately charged or receive notice he is pleading as an accomplice. (App., *infra*, 110a–114a). Because the state failed to do either in Mr. Taylor's case, the district court granted habeas relief, vacating his death sentence. App., *infra*, 89a. The Tenth Circuit reversed, finding that accomplice and principal liabilities form one and the same crime, which need not be separately or specifically charged or noticed. App., *infra*, 2a–39a. That was despite the fact that accomplice liability in Utah requires elements that principal liability does not. *Eyre*, issued less than two weeks after the Tenth Circuit's opinion in this case, affirms the district court's analysis of Utah state law.

The problem here is not that the Tenth Circuit interpreted state law in a way that was contrary to Mr. Taylor's desired result. The problem is that the Tenth Circuit substituted its opinion for that of the Utah Supreme Court on an issue purely reserved to the state to determine. "[S]tate courts provide the authoritative adjudication of questions of state law." *Brockett*, 472 U.S. at 508 (O'Connor, J., concurring). The correct path here would have been to certify the specific question to the Utah Supreme Court in light of the context of a guilty plea. The Tenth Circuit gave short shrift to *D.B.*, in which the Utah Supreme Court recognized that different conduct distinguished accomplice liability from principal liability. See *D.B.*, 289 P.3d at 465 (accomplice liability in Utah "requires conduct different from direct commission of an offense before a defendant incurs accomplice liability."). Instead, the

Tenth Circuit relied on an older Utah appeals court decision to conclude that "accomplice liability is not a separate crime with different elements." App., *infra*, 25a (citing *Gonzales*, 56 P.3d at 972).[4] The distinctions between principal and accomplice liability in Utah were explicated and affirmed in *Eyre*, issued right after the Tenth Circuit's ruling against Mr. Taylor. Nevertheless, the Tenth Circuit denied Mr. Taylor's subsequent petition for rehearing in which he requested that the court certify the question to the Utah Supreme Court. App., *infra*, 117a, 126a, 128a, 138a. *Eyre* strongly indicates that Utah law requires separate notice within the context of guilty pleas due to the different elements involved.

> As anyone who has sat through the first day of an introductory course on criminal law knows, *mens rea* (or mental state) is typically a requisite of criminality. See, *e.g.*, *State* v. *Bird*, [345 P.3d 1141, 1145 (Utah 2015)] ("A mens rea element is an essential element of [an] offense." (alteration in original) (citation omitted) (internal quotation marks omitted)); *State* v. *Barela*, [349 P.3d 676, 681 (Utah 2015)] ("[O]ur criminal code requires proof of mens rea for each element of a non-strict liability crime.") . . . . But while most offenses require a showing of only one culpable mental state, accomplice liability requires at least two.

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[4] Since the issuance of *D.B.*, *Gonzales* has never been cited by the Utah Supreme Court or the Utah Court of Appeals for the premise that the Tenth Circuit relied on it for–that because accomplice liability is not a separate charge, it does not require notice. Any doubt as to that fact is negated by *Eyre*, as it explains the additional separate elements that accomplice liability incurs and makes it clear that the portion of *Gonzales* that the Tenth Circuit found important did not survive *D.B.*

Eyre, 500 P.3d at 781. See also *State* v. *Hummel*, 393 P.3d 314, 321 (Utah 2017) ("There is no such thing as an omnibus 'crime' in Utah. Our crimes are set out distinctly in our law, with different elements and distinct punishments for each offense.").

Multiple Utah Supreme Court decisions suggest Utah would take a position contrary to the one the Tenth Circuit reached. First, in *D.B.*, the Utah Supreme Court held that accomplice liability requires specific notice: "Charging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *D.B.*, 289 P.3d at 471. Second, in *Eyre* the Utah Supreme Court confirmed that accomplice liability and principal liability diverge on the *mens rea* requirement. Accomplice liability requires "the *mens rea* requirements of both the underlying crime *and* the accomplice liability statute," and the failure to instruct the jury as to this is reversible error. *Eyre*, 500 P.3d at 782 (emphasis in original). Even if Utah takes a path different from other states, that does not mean deference to Utah law is any less appropriate. This Court has a significant interest in seeing that Utah's unique position is respected, to preserve the state autonomy and comity upon which our federal system is grounded.

The two federal courts to address the issue did not agree on what Utah state law requires. The district court below held that, under Utah law, Mr. Taylor was not charged with accomplice liability and did not plead guilty to accomplice liability. App., *infra*, 66a (discussing the court's decision in the Jan. 17, 2017, Order & Mem. Decision Granting Evidentiary Hr'g at 1, 20–24 (App., *infra*, 110a–114a) (which in turn concluded that Mr. Taylor "did not have notice of accomplice liability") (App., *infra*, 114a)). In contrast, the Tenth Circuit

Court of Appeals held that Utah law does not require separate notice of accomplice liability, stating it "is not a separate crime with different elements" and relying on a Utah appellate court decision from 2002. App., *infra*, 25a.

Where federal courts have faced similar difficulties interpreting state laws, they certify. See, *e.g.*, *McKesson* v. *Doe*, 141 S. Ct. 48, 50 (2020) ("The dispute thus could be 'greatly simplifie[d]' by guidance from the Louisiana Supreme Court on the meaning of Louisiana law.") (alteration in original). "In furtherance of 'the interests of comity and federalism' that certification protects . . . the Utah courts should have the opportunity in the first instance to decide" whether Petitioner was properly on notice of his potential liability as an accomplice. *Garza* v. *Burnett*, 672 F.3d 1217, 1221–1222 (10th Cir. 2012). Utah provides for certification of questions of law, like many of its sister states. Utah Rules of App. Proc. 41(a). And the need is heightened where, as here, there are "novel issues of state law peculiarly calling for the exercise of judgment by the state courts." See *McKesson*, 141 S. Ct. at 51.

While the Utah Supreme Court's decisions in *D.B.* and *Eyre* indicate that the Tenth Circuit was simply wrong in its interpretation of Utah state law, Mr. Taylor is not seeking error correction. The larger issue here is federal courts' respect for state sovereignty. Out of respect for the State of Utah's right to have its laws differ from other states' laws, this Court should remand with instruction to certify to the Utah Supreme Court the question of whether, under Utah law, a defendant charged with murder in the first degree must be provided notice of the required elements of accomplice liability and plead guilty to those elements before he can be sentenced for first degree murder through accomplice liability.

Specifically, the certified question should identify the need for clarification by certifying a question such as:

> Under Utah law, if a defendant who is charged by Information with Criminal Homicide, Murder in the First Degree, but who is not specifically charged by Information as an accomplice, enters a plea of guilty to the Information charge of Criminal Homicide, must he first receive actual notice: 1) that the state is pursuing a conviction based on accomplice liability, and 2) of the additional elements required before he can be convicted and sentenced as an accomplice?

This question goes to the heart of a defendant's right to have "real notice of the true nature of the charge against" them, which is "the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941). If the Utah Supreme Court answers the question affirmatively, there can be no doubt that the execution of Mr. Taylor would be unconstitutional and a manifest injustice. The federal courts should not simply guess under such circumstances.

This Court has recognized that "[i]t would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim." *Houston* v. *Hill*, 482 U.S. 451, 471 (1987). The converse must also be true: it is appropriate for this Court to certify a question in a case where, as here, there is an uncertain question of state law whose resolution might affect the pending federal claim. Resolution of this uncertain question of state law by the Utah Supreme Court would resolve the claim before the federal courts. Moreover, it will determine whether Mr. Taylor, the only person believed ever to

have gone to death row in Utah for accomplice liability,[5] is executed without the state court having opined on the question that two federal courts have split in determining.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, or, in the alternative, the Court should summarily grant, vacate, and remand with an instruction to certify the question to the Utah Supreme Court or to reconsider the decision as this Court sees fit.

Respectfully submitted,

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[5] See footnote 1, *supra*.