CAPITAL CASE

No. 21-7329

IN THE

Supreme Court of the United States

VON LESTER TAYLOR, *Petitioner,*

vs.

ROBERT POWELL, WARDEN, *Respondent.*

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Would a rule requiring certification of a state-law question to the state courts only after prolonged federal habeas litigation interfere with the Tenth Amendment's protection of a State's right to execute a criminal judgment that its appellate courts have already affirmed, particularly where the party hoping to benefit from the certification waited to argue that it was necessary only after losing on a federal appellate court's reading of state law?

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Respondent, Robert Powell, Warden of the Utah State Prison, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Von Lester Taylor.

STATEMENT OF THE CASE

Taylor pleaded guilty to capital murder for the 1990 home-invasion murders of Beth Potts and Kaye Tiede, and a jury sentenced him to death. On habeas review, the federal district court found Taylor "actually innocent" of capital murder under *Schlup v. Delo*, 513 U.S. 298, 327 (1995), thus permitting consideration of a defaulted claim of ineffective assistance of trial counsel. Pet. App. 54a n.2, 65a-67a. The district court granted Taylor a writ of habeas corpus. *Id.* at 89a. Respondent appealed, and the court of appeals reversed. *Id.* at 2a. The court of appeals denied Taylor's petition for rehearing and rehearing en banc. *Id.* at 117a.

1. In December of 1990, the Tiede family was spending the holidays in a family cabin in the mountains outside of Salt Lake City. Pet. App. 10a. On December 21, the family took an overnight trip to Salt Lake City to do some Christmas shopping. *Id.* While the family was gone, Taylor and his accomplice Edward Deli broke into the cabin. They chose to spend the night. *Id.*

Kaye Tiede; her husband, Rolf; their daughters, Linae and Tricia; and her elderly, partially blind mother, Beth Potts returned the next day. *Id.* Recent snow forced the family to use snowmobiles to get from the road to the cabin. *Id.* Rolf and Tricia left to pick up one of the snowmobiles from a repair shop. *Id.* Kaye, Linae, and Beth took the other two snowmobiles and went to the cabin. *Id.* Linae entered first.

Taylor approached her at gunpoint and ordered her to tell him who else was with her. *Id*. Linae responded that Kaye and Beth were. *Id*. Taylor ordered all three of them into the cabin. *Id*. Once all three were there, Taylor and Deli held them at gunpoint. After a short exchange, Linae saw Taylor shoot Kaye and heard her mother say "I've been shot." *Id*. Linae then turned away from the violence and did not see what happened next, but she heard the shooting continue. *Id*. at 11a. When the shooting ended, Kaye and Beth lay dead on the floor. *Id*. Kaye had been shot three times (twice with bullets that went through her chest and upper torso and once with birdshot pellets that caused small wounds around her left arm and neck), as had Beth (twice in the chest and once in the head). *Id*. It is well-established that on the day of the murders, Taylor possessed a .38 special revolver and Deli a .44 magnum revolver, the bullets from which were recovered at the scene. *Id*.[1]

After shooting Kaye and Beth, Taylor and Deli tied Linae up and brought her to one of the cabin's bedrooms. *Id*. They told Linae that she would be coming with them when they left. *Id.* Linae also testified that Deli told Mr. Taylor at one point "we need to reload." *Id*. She later overheard Taylor telling Deli that "he needed help with the bodies" to "throw them over the balcony." *Id*. Finally, she heard Taylor tell Deli

[1] Taylor's Petition states that he fired only "non-lethal birdshot." Pet. 4. While Respondent disagrees with this and the district court's finding that Taylor did not likely fire the fatal shots, Respondent did not challenge those findings on appeal because they were irrelevant to the specific issue—whether the district court erroneously failed to consider Taylor's guilt as an accomplice. Guilt as an accomplice would have made Taylor fully culpable for capital murder if he (1) aided the person who caused the death, and (2) he either (a) intended that the victims die or (b) understood the circumstances and was reasonably certain that the victims would die. Utah Code § 76-2-202; *State v. Briggs*, 197 P.3d 628, 632 (Utah 2008).

that "he had to shoot [one of the women] in the head twice." *Id*. Beth died of a gunshot wound to the head. *Id*.

About two hours after the initial shooting, Tricia and Rolf arrived at the house. *Id*. Taylor instructed Deli to shoot Rolf. *Id*. When Deli hesitated, Taylor shot Rolf twice in the head and left him for dead in the cabin. *Id*.

Taylor and Deli then spread gasoline around the cabin and attempted to set fire to it. *Id*. at 12a. The two men then used the family's snowmobiles to drive themselves, Linae, and Tricia down to the road to the family's car. *Id*. Despite the two gunshot wounds, Rolf survived. *Id*. He made his way down to the road where he encountered his half-brother. *Id*. The men contacted the Summit County Sheriff's Department. *Id*. Following a high-speed chase, officers apprehended Taylor and Deli. *Id*. Linae and Tricia were released unharmed. *Id*. Police found the bodies of Kaye and Beth on the cabin's balcony, covered by a blanket. *Id*.

Taylor and Deli were each charged with, among other things, two counts of capital homicide for the murders of Kaye and Beth. For that charge, the Information stated that "VON LESTER TAYLOR and EDWARD STEVEN DELI, did intentionally or knowingly, cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons, to wit: Beth Potts and Kaye Tiede, were killed." *Id*. at 12a-13a. The Information contained an identical second count for the death of Kaye Tiede. *Id*. at 13a.

The state held a preliminary hearing to determine whether probable cause existed to bind the men over for arraignment and trial. *Id*. At this hearing, attorneys for Taylor and Deli both argued it was not clear who had fired the fatal shots that killed Kaye and Beth. *Id*. Nonetheless, the state court concluded that probable cause existed as to both men. *Id*. The court believed the evidence was adequate to show "that each to the other, acted with the mental state required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information." *Id*.

Taylor initially pursued insanity as a defense. *Id*. During his mental evaluation, he told the psychiatrist he had committed both murders. *Id*. (When asked whether he believed himself to be insane, Taylor responded, "No, but how can you determine? I shot two people with no motive, out of cold blood, with my gun, then with [Deli]'s." *Id*. at 13a-14a.) After the interview, the examining doctors concluded Taylor was legally sane. *Id*. at 14a.

The state then offered Taylor a guilty plea—he would plead guilty to the two counts of capital murder and, in exchange, the remainder of the charges against him would be dropped. *Id*. Although Taylor's attorney told Taylor that the state's case against him was strong, his attorney still encouraged him to proceed to trial. *Id*. At a hearing on his performance, Taylor's counsel provided his reasons for giving this advice: "This is a capital homicide case. His options are—worst option is death penalty. As far as I was concerned, it was going to trial. You didn't have an option."

Id. Despite this advice from his attorney, Taylor accepted the state's offer. *Id*. According to the Utah Supreme Court, Taylor chose to plead guilty "because he did not want to put his family and the victims through a trial and he did not want to testify against Deli." *State v. Taylor* (*Taylor I*), 947 P.2d 681, 684 (Utah 1997).

The plea agreement listed the crimes as "Criminal Homicide, Murder in the First Degree as charged in Count[s] I ... and II." Pet. App. 14a. The plea then provided a description of each count: "the defendant, Von Lester Taylor, did intentionally or knowingly cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons ... were killed." count was the same, simply replacing Beth with Kaye. *Id*. at 15a. The plea then stated, "My conduct, and the conduct of other persons for which I am criminally liable, that constitute the elements of the crime charged are as follows[,]" then described that conduct in the following manner:

> On the 22nd day of December, 1990, in Summit County, State of Utah, I, Von Lester Taylor, in conjunction with Edward Steven Deli unlawfully entered the cabin belonging to Rolf Tiede. When Kaye Tiede and Beth Potts returned to the cabin, I, Von Lester Taylor, and my co-defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts by shooting them with firearms.

Id.

Having pleaded guilty, Taylor then proceeded to the penalty phase of his proceedings. *Id*. After hearing testimony and arguments, a jury ultimately sentenced Taylor to death for the murders. *Id*.

The Utah Supreme Court affirmed Taylor's conviction and sentence. *Taylor I*, 947 P.2d 681, *cert. denied*, *Taylor v. Utah*, 525 U.S. 833 (1998).

Taylor filed a petition for post-conviction relief in state court, which was denied on summary judgment; the Utah Supreme Court affirmed. *Taylor v. State*, 156 P.3d 739 (Utah 2007) (*Taylor II*).

2. Taylor filed a federal habeas corpus petition in 2007. A *Rhines* stay was granted while Taylor returned to state court to attempt to raise unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 275-78 (2005). Taylor's successive state post-conviction petition was dismissed on procedural grounds and the Utah Supreme Court affirmed. *Taylor v. State*, 270 P.3d 471 (Utah 2012), *cert. denied, Taylor v. Utah*, 568 U.S. 851 (2012) (*Taylor III*).

Upon his return to federal court, Taylor moved for an evidentiary hearing. Among other things, Taylor asserted that he was entitled to a *Schlup* hearing to prove his actual innocence to overcome the procedural default on other claims. Taylor theorized that he could prove *Schlup* innocence if he could prove he did not fire a fatal shot. Pet. App. 91a-115a.

Respondent argued that even if Taylor could prove that he fired no fatal shot, he could not be "entirely" "factually" innocent of capital murder because he would still be guilty of capital murder based on his participation as an accomplice and therefore subject to the death penalty under Utah law.

After briefing was complete and over Respondent's objection, the district court ordered an evidentiary hearing to determine whether Taylor could prove that he was

actually innocent. Pet. App. 91a-115a ("Schlup Order"). The court reasoned that Taylor's proffer could establish his actual innocence "of the crime to which he pleaded—capital murder as a principal"—regardless of "any crime to which he could have been convicted of had he gone to trial and been put on notice." Pet. App. 114a. The court expressly concluded that Taylor was not put on notice of potential accomplice culpability and did not plead guilty as an accomplice. And because the court linked Petitioner's potential *Schlup* innocence to its narrow reading of his plea, it concluded that Taylor need only "undermine[]" "the legitimacy of his guilty plea." Pet. App. 100a.

Following three days of expert testimony, including firearms and toolmarks examiners and medical examiners, together with depositions and documentary evidence, the district court concluded that Petitioner was actually innocent. *See* Pet. App. 77a-79a. The district court believed 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." *Id*. at 77a. And since Taylor fired no fatal shots, the court ruled, "no reasonable juror, conscientiously following the appropriate instructions requiring proof beyond a reasonable doubt, would have voted to convict Mr. Taylor of the charges to which he pleaded, capital murder *as a principal*." Pet. App. 67a (emphasis added).

The district court then entered its final ruling granting Taylor's second amended petition and granting a writ of habeas corpus. Pet. App. 53a-89a.[2] The

[2] The district court stayed any decision on Taylor's alternative cause and prejudice arguments to excuse his defaults until after its ruling on the *Schlup* factual innocence issue. ECF No. 255:58,84.

district court therefore granted Taylor a writ of habeas corpus and "vacated" Taylor's criminal judgment. Pet. App. 89a.

3. Respondent appealed from both the district court's *Schlup* Order granting an evidentiary hearing and its final judgment granting a writ of habeas corpus, but accepted for the sake of argument that Taylor did not fire the fatal shots. Pet. App. 20a. Respondent argued that "Taylor pleaded guilty to the two counts of capital murder generally, not under a specific theory of liability." *Id.* at 20a (*Taylor v. Powell*, 7 F.4th 920, 932 (10th Cir. 2021) (*Taylor IV*)). Respondent continued "that because Mr. Taylor cannot establish actual innocence as both a principal and an accomplice, his claims for relief remain procedurally defaulted and" the court of appeals "cannot consider them." *Id.* Taylor argued, however, that under Utah Supreme Court precedent, the law in Utah was clear that accomplice murder and principal murder "are, in fact, separate crimes," and that he had notice of potential liability for and pleaded only to principal murder. Resp. App. 36a. Therefore, according to Taylor, the district court correctly concluded that he only had to prove that he was innocent of principal murder, and that he had met that burden.

A Tenth Circuit panel unanimously held that the district court erred when it concluded that Taylor was or could be actually innocent of the crime of conviction—capital murder. Pet. App. 5a. It first concluded that the district court erred by limiting its *Schlup* analysis to whether Petitioner was innocent of principal liability without also considering his guilt as an accomplice. *Id.* It rejected Taylor's reading of Utah

Thus, many defaulted and exhausted claims remain unaddressed by the district court and will require further proceedings below.

law and held that "[u]nder Utah law…principal and accomplice liability are theories of guilt, not distinct crimes. Mr. Taylor pleaded guilty to two counts of capital murder—thus, evidence that he committed the crimes as either a principal or an accomplice would have been adequate to prove his guilt." *Id*. at 5a. Since Petitioner did "not deny he actively participated in the murders," he "is not innocent, in any sense of the word." *Id*. (quotations and citation omitted). And "[g]iven that accomplice liability is a theory of guilt rather than a distinct crime, the state need not provide the same level of notice as when it charges a defendant with a substantive crime." *Id*. at 26a.

The panel alternatively ruled that "the plea agreement and proceedings contained language indicating Mr. Taylor was being treated as both a principal and an accomplice to the murders." Pet. App. 31a. It emphasized Petitioner's plea form accepting responsibility for "'[m]y conduct, *and the conduct of other persons for which I am criminally liable*,'" and the plea form's factual basis which recited that "'*I, Von Lester Taylor, and my co-defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts* by shooting them with firearms.'" *Id*. (emphasis in opinion). "This," combined with the facts of Petitioner's undisputed involvement in the murders, "is accomplice liability of the clearest kind." *Id*. at 38a. Finally, the court emphasized the preliminary hearing, where the magistrate "explained that probable cause existed to continue holding Mr. Taylor based on accomplice liability." *Id*. at 32a. "In doing so, his language reflected Utah's statute on accomplice liability: 'each [defendant] to the other, acted with the mental state

required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information.'" *Id.*

The concurrence emphasized the latter point even more forcefully. *See id.* at 40a-51a (Briscoe, J., concurring). Judge Briscoe recited arguments and rulings from the preliminary hearing leading to the conclusion that "the record firmly establishes that Taylor received both constructive and actual notice of the possibility that the State might pursue a theory of accomplice liability." *Id.* at 47a.

Because the district court artificially restricted its *Schlup* analysis to only one theory of guilt, and Taylor "failed" to prove innocence "of the substantive crime of capital murder," the panel reversed the district court's *Schlup* Order, declined to reach the defaulted ineffective assistance claim, and reversed the grant of the writ. *Id.* at 38a-39a.

Taylor moved for rehearing and en banc consideration (Pet. App. 119a) arguing in part that new case law out of the Utah Supreme Court verified Taylor's reading of Utah law on accomplice liability. Pet. App. 125a (citing *State v. Eyre*, 500 P.3d 776 (Utah 2021)). Taylor argued that in light of that new case, Utah law so clearly favored Taylor's position that "maintaining the Panel's decision would be an affront to Utah law." *Id.* at 126a. Although Taylor maintained that *Eyre* confirmed his and the district's construction of Utah law, he added that if the Tenth Circuit still disagreed, it "should grant rehearing and certify a question to the Utah Supreme Court for clarification of Utah law on this critical issue." Pet. App. 126a. This was the first time

that Taylor floated the possibility of certification, and even then, it was offered as an alternative to his insistence that Utah law was clear.

The Tenth Circuit unanimously denied Taylor's petition for rehearing and request for en banc consideration. Pet. App. 117a.

REASONS FOR DENYING THE WRIT

Taylor asks the Court to grant review to adopt a rule that the deference federal courts owe to state courts on the interpretation of their laws requires federal courts to certify a question of ambiguous state law to the state court (1) even though no party asked for certification, (2) even though both parties argued that the law was clear enough for the federal court to apply, and (3) irrespective of how long the state has been prohibited from executing a presumptively valid sentence while federal habeas review has been pending.

The Court should deny the petition. First, if the Court were to grant to review, it should not reach the merits of Taylor's question presented. Taylor should be estopped from arguing that Utah law includes some uncertainty about the notice requirements before a person may be held accountable as either a principal or an accomplice. Throughout the proceedings below, Taylor argued that Utah law was clear that guilt for murder as a principal or as an accomplice are two separate crimes that require separate notice of which crime the State would pursue and of the elements of each. Indeed, even after the Tenth Circuit held that Utah law was clear that accomplice and principal liability were not two separate crimes with separate notice requirements, Taylor maintained that there was no ambiguity but merely

argued that if the Tenth Circuit disagreed, then that the issue could be certified back to the Utah Supreme Court to weigh in. Taylor should not be permitted to reverse course and now argue that Utah law is ambiguous.

Second, a rule requiring certification after federal habeas litigation had prevented the State from executing its presumptively valid sentence for 15 years would subvert, not serve, the virtues of federalism. Indeed, Taylor's new rule would require overturning this Court's precedent that recognizes federal courts' discretion to certify state-law questions based on cooperative judicial federalism.

Third, this case presents a poor vehicle to address the issue Taylor wants to raise because his petition challenges only one basis for the Tenth Circuit's reversal, leaving an independent basis untouched. He says that the Tenth Circuit should have certified to the Utah Supreme Court whether Utah law entitled him to notice of possible accomplice liability. But getting an answer to that question won't help him because he ignores that the Tenth Circuit also reversed on the independent basis that he got the notice of possible accomplice liability he says his charges required.

I. Taylor should be estopped from pressing for a rule that federal courts must always ask state courts to resolve ambiguities in their laws because Taylor successfully argued that Utah law was clear enough for the federal courts to apply it without state-court clarification.

1.a. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (cleaned up). "This rule, known as

judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (cleaned up).

These rules "do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* at 751; *see also id.* at 750 (stating "judicial estoppel is an equitable doctrine invoked by a court at its discretion," and its rules "are probably not reducible to any general formulation of principle") (quotations and citations omitted). Rather, the equitable doctrine of judicial estoppel "forbids use of intentional self-contradiction as a means of obtaining unfair advantage." *Id.* at 751 (cleaned up). Were the Court to countenance a party "persuading a court to accept that party's earlier position," then "judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* at 750 (quotation and citation omitted).

Judicial estoppel's purposes are "to protect the integrity of the judicial process," to "prohibit[] parties from deliberately changing positions according to the exigencies of the moment," and "to prevent the perversion of the judicial process." *Id.* at 749-50 (quotations and citations omitted).

Even where a litigant cannot be estopped from raising a claim, his failure to raise the issue below may nevertheless bar it. "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Oloano*, 507 U.S. 725, 731 (1993) (quotations and citation omitted).

1.b. Judicial estoppel should preclude reaching the merits of the question Taylor asks this Court to review. Taylor asks the Court to answer whether "principles of federalism and comity enshrined in the Tenth Amendment" require federal courts to "certify[] a question to the highest court of the state" where state law is "ambiguous." Pet. at (i). He says that applying that proposed rule here means that the Tenth Circuit should have asked the Utah Supreme Court to clarify the notice requirements before a defendant could be criminally liable as an accomplice. *Id.* at 11.

But in the lower courts, Taylor steadfastly maintained that Utah law on that issue was clear enough for the federal courts to apply without state-court clarification until that position no longer so served his ends. He convinced the district court that Utah law was *clear* and in his favor. He pursued that same course in the court of appeals, again arguing that Utah law unambiguously establishes separate crimes requiring separate notice before pleading guilty to murder as either an accomplice or a principal. The panel agreed with Taylor's premise that Utah law was clear enough for the panel to apply without guidance from the Utah Supreme Court. But it disagreed that the law was in Taylor's favor. It was not until he had been denied all relief on his premise that the law was clearly in his favor that he crafted a contradictory position in this petition to avoid or at least, postpone the loss that was rooted in his first position.

In the district court, Taylor briefed the issue of accomplice versus principal liability in support of his request for an evidentiary hearing. Resp. App. 73a. He cited Utah statutory and case law, arguing "Accomplice liability is a separate charge for which Mr. Taylor was not convicted." *Id*. at 80a (citing Utah Code § 76-2-202 and *In*

re D.B., 289 P.3d 459, 471 (Utah 2012)). He challenged the State's argument that his "plea to capital murder encompasses a conviction to accomplice liability" as "*an impossibility* under the laws of Utah." *Id.* at 81a (emphasis added)). He never once argued, or even posited the possibility, that Utah law on this point was unclear. Nor did he ever suggest that the district court should have sought clarification from the Utah Supreme Court.

The district court accepted Taylor's invitation to apply Utah law without state-court clarification. And that position worked in his favor—the district court ruled that accomplice murder and principal murder are separate crimes requiring separate notice and pleading under Utah law. Pet. App. 110a-114a. That ruling led to a finding of *Schlup* actual innocence, which in turn opened the door to review of a defaulted claim that the court relied on to grant a writ of habeas corpus. *Id.* at 89a, 110a-114a.

In his merits brief in the Tenth Circuit, Taylor maintained his position that Utah law was clear and that the panel could apply it without clarification from the state courts. Resp. App. 1a-72a. He again argued that Utah law clearly establishes separate crimes for murder as an accomplice or as a principal, requiring separate notice. *Id.* at 36a. He quoted Utah's accomplice-liability statute (Utah Code § 76-2-202) and argued that its "language *makes clear* that accomplice liability requires proof of specific elements separate from the associated principal offense." Resp. App. 22a (emphasis added). And he argued that Utah Supreme Court precedent "*necessarily* concluded that" accomplice liability and principal liability "are, in fact, separate crimes." *Id.* (emphasis added) (citing *In re D.B.*, 289 P.3d 459, 471 (Utah 2012)).

This time, however, Taylor's long-held position that Utah law was clear, and that the federal courts could apply it without state-court clarification did not serve his interests. The panel accepted his invitation to apply Utah law without state-court guidance. But it disagreed with Taylor's and the district court's construction of Utah law. Just as Taylor did, the panel relied on Utah's accomplice-liability statute and Utah precedent but concluded "that accomplice liability is a theory of guilt rather than a distinct crime." The panel reversed because Taylor was plainly guilty as an accomplice. Pet. App. 26a.

Even in his rehearing petition, Taylor maintained that Utah law was clear. He cited *State v. Eyre*, 500 P.3d 776 (Utah 2021), a recent Utah Supreme Court opinion, for the proposition that the Utah court had once again confirmed his view of Utah law. Pet. App. 125a (arguing "*Eyre makes it clear* that contrary to the Panel's opinion, accomplice liability requires proof of additional and essential elements that principal liability does not require") (emphasis added). Taylor suggested certification only in the alternative if the court of appeals had any "doubt about the impact of *Eyre*"—though in his view, Utah law was already clear. *Id.* at 126a.

So while Taylor now argues that the correct path would have been to ask the Utah courts for guidance on Utah law, he never told the district court or the Tenth Circuit that it was required to take that path. Indeed, Taylor never argued the new rule that Taylor posits here—that the Tenth Amendment *requires* certification. The Tenth Circuit was never presented with nor given an opportunity to consider this new rule. And Taylor hasn't supported his new-found view that Utah law may have been ambiguous. He points to the differing constructions given by the district court and the appellate court as evidence of an ambiguity. But his premise presupposes that

both readings were fair. Instead, the appellate decision reached the opposite conclusion—the law was clear and the district court's construction was wrong. That's not evidence of an ambiguity. That's just an appellate error correction on how to apply Utah law.

Because his position that Utah law was clear and that the federal courts could apply it without state-court guidance no longer serves his interests, Taylor now takes a contradictory position. Taylor should be estopped from this about-face. Allowing Taylor to change positions now will prejudice the State. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quotations and citation omitted). "It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (quotations and citation omitted). The longer federal habeas lasts, the greater the intrusion into Utah's interest in executing a sentence that the Utah Supreme Court has upheld three times.

Here, Taylor could have asked for certification to clarify Utah law from the beginning of his habeas proceedings. Had he done so, that clarification could have been accomplished long ago. He chose instead to invite the federal courts to apply Utah law without clarification, asking for it now only after 15 years of federal habeas review. He should be estopped from seeking any further federal intrusion in the Utah "significant interest in repose" for litigation that concluded in its courts many years ago.

II. Adopting the rule Taylor asks this court to grant review to adopt would subvert, not serve, the principles of federalism and comity enshrined in the Tenth Amendment.

Taylor argues that the Tenth Amendment's principles of federalism and comity obliged the court of appeals to give the state court first crack at construing Utah law. And he asks the Court to grant review to adopt a rule that a federal court must always certify questions of unclear state law to fulfill that obligation.

But what he hasn't acknowledged is that getting to this result would require overturning precedent. "Certification is by no means 'obligatory' merely because state law is unsettled; the choice instead rests 'in the sound discretion of the federal court.'" *McKesson v. Doe*, 141 S. Ct. 48, 51, 208 L. Ed. 2d 158 (2020). Taylor is asking this Court to now take that discretion away. And while he points to "principles of federalism and comity enshrined in the Tenth Amendment" as a reason to take that discretion away, that, too, would require overturning *McKesson*. *McKesson* rooted its holding that certification is discretionary in its recognition that "[o]ur system of 'cooperative judicial *federalism'* presumes federal and state courts alike are competent to apply federal and state law." *Id.* (emphasis added). So again, to take away the discretion to certify a question to the state courts, the Court would also have to eliminate the presumption that the Tenth Circuit was "competent to apply" Utah law. Taylor never explains why, under the principles of stare decisis, this Court should overturn its existing precedent.

Even if the Court were writing on a clean slate, Taylor still has shown that the rule he asks for would further the respect for the state courts that federalism requires. Rather, it would do the opposite.

Certainly, federalism and comity often require litigants to first present claims grounded in state law to the state courts. But the sovereign State's right to first

adjudication is only one facet of federalism enshrined in the structure of the Constitution. Taylor's argument for late-in-the-day certification violates the equally important value of finality in litigation that is also implicit in federalism.

The Tenth Amendment "reserve[s] to the States" the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. The "federal system recognizes the independent power of a State to articulate societal norms through criminal law." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (quotations and citation omitted). And the state is the ultimate authority on what its criminal laws mean. *New York v. Ferber*, 458 U.S. 747, 767 (1982) (stating "the construction that a state court gives a state statute is not a matter subject to our review"). So in appropriate circumstances, comity would be served by certifying a question to the state courts to clarify the meaning of its laws.

But an equally important value in federalism is the ability of a state to execute on its presumptively valid sentences. "[T]he power of a State to pass laws means little if the State cannot enforce them." *Thompson*, 523 U.S. at 556 (quotations and citation omitted). And as addressed in the prior point, prolonged federal habeas review "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," and "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quotations and citation omitted).

Taylor's argument presupposes that the interest in the state weighing in on a point of state law is always paramount, no matter how late in the day the state court's

clarification is sought. But such a rule completely disregards the equally important interest in finality.

And this case illustrates the point—Taylor did not suggest the need for state-court clarification until his other strategies failed and certification could best serve his interest in delaying his death sentence. The comity interest in the Utah Supreme Court answering questions of Utah law may have been more useful had Taylor sought certification early in the district court. But adopting Taylor's rule that the comity-interest is always paramount would improperly subvert a state's federalism interest in executing a presumptively valid sentence without undue delay.

The Court should deny review. The new rule Taylor asks the Court to adopt—that a state's interest in weighing in on what its law means will always override its interest in executing its presumptively valid sentences—subverts rather than serves the interest of comity and federalism enshrined in the Tenth Amendment.

III. This case is a poor vehicle for assessing whether to adopt the rule Taylor proposes because granting review and adopting the rule would not entitle him to relief—it would leave untouched an alternative basis for the Tenth Circuit's holding against him.

Taylor asks for review to adopt a rule that federal courts must always ask the state courts for guidance on ambiguities in state law. And the ambiguity he says the federal courts should have sought clarification on was whether, before Utah seeks to hold someone accountable as an accomplice, a defendant "must [] 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?" Pet. 15. But granting review and adopting that rule would not change the outcome of his appeal. The Tenth Circuit alternatively held that Taylor got notice of potential accomplice liability.

The panel first held that the correct reading of Utah law is that "principal and accomplice liability are theories of guilt, not distinct crimes." Pet. App. 5a. The panel continued that Taylor pleaded guilty to two counts of capital murder—thus, evidence that he committed the crimes as either a principal or an accomplice would have been adequate to prove his guilt," and since Taylor did "not deny he actively participated in the murders," he "is not innocent, in any sense of the word." *Id.* (quotations and citation omitted). And "[g]iven that accomplice liability is a theory of guilt rather than a distinct crime, the state need not provide the same level of notice as when it charges a defendant with a substantive crime." *Id.* at 26a.

Taylor says the panel "simply guess[ed]" at the notice Utah law requires. Pet. 15. And he asks this Court to adopt a rule that would have required the panel to send the case back to the Utah courts to clarify that issue. But even if the Court granted review and adopted that rule, it would leave the Tenth Circuit's reversal untouched. The panel's decision against Taylor rests on an independent basis that Taylor has not asked the Court to address.

The panel also held that Taylor actually *received* the separate notice he says the Utah court should have been asked to clarify he was entitled to under Utah law. The panel held that "the plea agreement and proceedings contained language indicating Mr. Taylor was being treated as both a principal and an accomplice to the murders." Pet. App. 31a. The court emphasized Taylor's plea form, where he accepted responsibility both for "My conduct, *and the conduct of other persons for which I am criminally liable*, that constitute the elements of the crime charged are as follows[.]" *Id.* (emphasis in opinion). It further emphasized Taylor's recitation in the plea form of the joint nature of the double homicide, where "*I, Von Lester Taylor, and my co-*

defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts by shooting them with firearms." *Id*. (emphasis in opinion). Finally, the court emphasized the preliminary hearing, where the magistrate "explained that probable cause existed to continue holding Mr. Taylor based on accomplice liability." *Id.* at 32a. "In doing so, his language reflected Utah's statute on accomplice liability: 'each [defendant] to the other, acted with the mental state required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information.'" *Id.*

In her concurrence, Judge Briscoe "fully agree[d] with the majority that Mr. Taylor's actual innocence gateway claim lacks merit." Pet. App. 40a (Briscoe, J., concurring)). She wrote separately to emphasize that, *inter alia*, "the record firmly establishes that Taylor received both constructive *and actual notice* of the possibility that the State might pursue a theory of accomplice liability." *Id.* at 47a (emphasis added). She provided further details from the preliminary hearing, where Petitioner's counsel moved to dismiss the murder counts, "as an early preview of the same evidentiary issues that Taylor presently raises," because the evidence did not show whose bullets caused the fatal wounds. *Id.* Judge Briscoe recited the prosecutor's rebuttal argument citing Utah's accomplice-liability statute, "which, as previously discussed, outlines the concepts of principal and accomplice liability for criminal offenses." *Id.* at 48a. "The prosecutor in turn stated that 'there should be no question in the Court's mind that these gentlemen were acting in concert with one another, this was a joint enterprise' and that, under [the accomplice-liability statute], 'they [we]re both culpable.'" *Id.* (footnote omitted).

Thus, the panel held that Taylor got the very notice he says the Utah court should have been asked to clarify whether he needed: specific notice of liability as an accomplice and the elements of accomplice liability. Granting review to adopt a rule that the Utah court should have been asked whether notice was required—when that notice was actually given—would not change the outcome in the Tenth Circuit. The Court should not grant review to address an issue that will not change the outcome of the appeal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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