CAPITAL CASE
No. 21-7329

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

REPLY BRIEF FOR THE PETITIONER

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May 21, 2022

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REPLY BRIEF FOR THE PETITIONER

Thirteen days after the court of appeals issued its opinion, there was a significant intervening event: the Utah Supreme Court released a decision that contradicted the Tenth Circuit's interpretation of Utah state law. Von Taylor filed a petition for rehearing and/or rehearing en banc to afford the Tenth Circuit the opportunity to reconsider its holding in light of the newly issued decision, and alternatively suggested that the court of appeals certify a question to the state court. The court of appeals declined reconsideration or certification. This unusual circumstance, where a state court issued an opinion at odds with the federal court's interpretation of the state law, can most efficiently be cleared up by this Court certifying a question to the highest court of the state to resolve the ambiguity.

The Brief in Opposition is notable for what is *not* included. It never mentions *State* v. *Gonzales*, 56 P.3d 969 (Utah Ct. App. 2002), even though that lower state court opinion was the basis for the Tenth Circuit's holding. Pet. App. 25a–28a, 31a. The Brief also never discussed the substance of *State* v. *Eyre*, 500 P.3d 776 (Utah 2021), the critical decision released days after the Tenth Circuit's opinion. It is telling that the State does not want to discuss Utah law, which, as interpreted by the state's highest court, supports Mr. Taylor's arguments and the correctness of the district court's finding. In failing to address *Eyre*, the State does not meaningfully contest Mr. Taylor's arguments that the court of appeals misinterpreted state law.

I. Judicial estoppel does not apply to the circumstances of this case.

Judicial estoppel does not mean that because Mr. Taylor won in the district court he is prevented from

altering his argument in this Court. First, judicial estoppel is generally applied to factual assertions. See *BancInsure, Inc.* v. *FDIC*, 796 F.3d 1226, 1240 (10th Cir. 2015) ("[J]udicial estoppel only applies when the position to be estopped is one of fact, not one of law."); *Lowery* v. *Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) ("[T]he position sought to be estopped must be one of fact rather than law or legal theory.").

Second, even where courts have suggested that judicial estoppel may apply to legal assertions, an intervening change in law may excuse the inconsistent legal assertion. See *Jarrard* v. *CDI Telecomms., Inc.*, 408 F.3d 905, 915 (7th Cir. 2005) ("Judicial estoppel should not be used to work an injustice, particularly when the defendants' change in position resulted from circumstances outside their control -- namely, a change in controlling state law.") (internal citation omitted); *Longaberger Co.* v. *Kolt*, 586 F.3d 459, 470–471 (6th Cir. 2009) ("[J]udicial estoppel is not applicable where a party argues an inconsistent position based on a change in controlling law.").

Third, judicial estoppel typically applies when, among other things, a "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). No court has been misled by Mr. Taylor's legal arguments. The situation changed since the district court litigation that the State relies on, as the Utah Supreme Court issued a significant position in the interim, but even if it had not, his representation that the law is clear or is ambiguous is not determinative. Mr. Taylor cited all of

the relevant cases to the courts at each level and those courts read and interpreted the cases with doubtless little regard for his characterizations.

Finally, *New Hampshire* and the cases cited by this Court therein (*Davis* v. *Wakelee*, 156 U.S. 680 (1895) and *Pegram* v. *Herdrich*, 530 U.S. 211 (2000)), were very different from what is before this Court now. Each dealt with contradictory positions taken in different proceedings, not the arguments made as a case rises up the ladder in a single action. That is indicative of the normal application of judicial estoppel. See *Jarrard*, 408 F.3d at 914 ("the doctrine aims to prevent a party that prevails in one lawsuit on one ground from repudiating that same ground in another lawsuit.").

The State's arguments regarding waiver are equally unavailing. See Brief in Opposition at 17. Mr. Taylor had no cause to seek certification "from the beginning of his habeas proceedings" because the State had long taken the contrary position that Mr. Taylor never pled guilty as an accomplice (XIX Appx. 4646-47 (citation omitted) ("Taylor argues that charging an individual as a principal does not provide adequate notice that the State is actually pursuing an accomplice liability theory. This is irrelevant because the State was not pursuing an accomplice liability theory.").) See also Resp. App. 26a.

Now, having won in the court of appeals based on the court's finding that Mr. Taylor pled guilty as an accomplice, the State seeks the equitable remedy of estoppel despite having admitted in the district court that Mr. Taylor never pled guilty as such. Following its loss in the district court, the State changed its position on what Mr. Taylor pled guilty to. The State also for the first time—after fourteen years of federal court

litigation—argued that Mr. Taylor received notice that he was being charged with accomplice liability in the preliminary hearing. The majority of the State's arguments in the court of appeals were based on wholly new arguments that had never been made in the district court and reversals of its prior positions; yet, audaciously, the State asks this Court to avoid review based on an alleged change of position by Mr. Taylor.

II. Stare decisis favors certifying a question to the Utah Supreme Court.

Mr. Taylor's proposed rule is limited to the circumstances in this case, in which Utah's highest court announced a holding that was inconsistent with a lower state court opinion relied upon by the Tenth Circuit. Mr. Taylor clearly defined the confines of his request when he pointed out that, after *Eyre* "Utah's law is ambiguous in that the state's highest court has not yet clarified its application in a plea context" and requested a rule clarifying whether a federal court should certify a question to the highest court of the state when the substantive state law is ambiguous. Pet. 10. The State overstates the remedy Mr. Taylor is seeking. He does not seek to strip federal courts of their discretion to certify a question to the state courts, and there is no attempt to overturn existing precedent.

This Court's precedent supports the action requested by Mr. Taylor. In *McKesson* v. *Doe*, cited by both parties, this Court stressed "the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts." 141 S. Ct. 48, 51 (2020). As this Court previously held, certification "would seem particularly appropriate in view of the novelty of the question and the great unsettlement of [state] law," finding that "[w]hen federal judges in

[other jurisdictions] attempt to predict uncertain [state] law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974). The court of appeals is no better situated to ascertain matters of state law; yet, notably, the district court which sits in the jurisdiction interpreted the state law in favor of Mr. Taylor. That split bolsters the request for certification.

As to the State's other point that Mr. Taylor is only suggesting certification to "delay[] his death sentence" and that it "would improperly subvert [the] state's federalism interest" in avoiding "undue delay," the State's argument that it will be prejudiced by further delay is contradicted by its own admission that, "many defaulted and exhausted claims remain unaddressed by the district court and will require further proceedings below." See Brief in Opposition at 8 n.2. The minimal time that certification would add is negligible.

III. There is no unaddressed alternative holding by the court of appeals.

1. The State claims that there is an alternative holding that Mr. Taylor neglected to challenge, there is not. The State failed to properly identify the rule that Mr. Taylor proposes. Relying on the misidentification of the proposed rule, the State concluded Mr. Taylor's proposed rule would not result in relief because of a supposed alternative holding.

Mr. Taylor has not, as the State claims, proposed a rule that federal courts must *always* seek state court guidance on ambiguities in state law. He pointed out that the State and the Tenth Circuit relied upon *Gonzales*, a Utah lower court of appeals opinion that pre-

dated the Utah Supreme Court opinions in *In re D.B.*, 289 P.3d 459 (Utah 2012) and *Eyre*. Just days after the Tenth Circuit's opinion, the Utah Supreme Court directly held for the first time that "[t]he prosecution must show that the defendant's mental state meets the *mens rea* requirements of both the underlying crime *and* the accomplice liability statute." See *Eyre*, 500 P.3d at 782 (emphasis added). This was a critical clarification of state law requiring separate *mens rea* elements in Utah accomplice liability cases that the court of appeals never considered.[1]

Where the newly announced decision of the state's highest court was not previously available, a federal court should, at the very least, take a look at whether the new information would have impacted its decision. Mr. Taylor asked the court of appeals to revisit its prediction about what the Utah Supreme Court would hold in light of the new authority, or, in the alternative certify the question. Pet. App. 119a–142a. Both requests were declined. Pet. App. 117a. As it stands now, no federal or state court has reviewed Mr. Taylor's case in light of the holding in *Eyre*. However, *Eyre* indicates that the Utah Supreme Court's stance was correctly predicted by the federal district court sitting in that jurisdiction. Mr. Taylor is asking this Court whether *in this rare factual scenario*, the principles of federalism and comity enshrined in the Tenth Amendment required the court of appeals to revisit its prediction in light of *Eyre* or certify a question to the state.

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[1] Mr. Taylor has argued that the Utah law in existence prior to *Eyre* would lead to the holding in *Eyre*, but *Eyre* is the first time that the Utah Supreme Court detailed the separate elements for accomplice liability in this manner.

2. The Brief in Opposition ignores the ambiguity in Utah law regarding the requisite elements of accomplice liability after *Eyre*. The State submits that "[t]he Tenth Circuit alternatively held that Taylor got notice of potential accomplice liability." Brief in Opposition at 20. But Mr. Taylor's position is that he had to receive notice of *both* the potential that he was being charged with accomplice liability *and* the elements needed to establish that he was an accomplice. The proposed question for certification made that clear. Pet. at 15; Brief in Opposition at 20. The alleged "alternative basis" of the Tenth Circuit's opinion only goes to notice of potential accomplice liability, not the requisite notice to Mr. Taylor of the specific accomplice liability elements required by *Eyre*.

In Section III of its Brief in Opposition, the State erroneously announces that the panel had concluded that Mr. Taylor received "specific notice of liability as an accomplice *and the elements of accomplice liability*," but because there is no such latter finding, the State does not provide a citation to where it resides. See Brief in Opposition at 23, emphasis added.

3. The Tenth Circuit's holding focused exclusively on notice of potential accomplice liability under Utah law and did not address notice of the elements required to establish accomplice liability. At most, the court held that Mr. Taylor cannot now complain that he did not receive notice that the state was pursuing accomplice liability when he entered his plea. While Mr. Taylor maintains that neither the plea nor the preliminary hearing[2] provided adequate notice regarding

[2] In the preliminary hearing the State theorized that Mr. Taylor was a co-principal with Edward Deli, and that Mr. Deli may also have accomplice liability. If anything, the preliminary hearing cemented the idea that Mr. Taylor was charged only as a

whether the state was pursuing an accomplice liability conviction, that is not the issue underlying the sought *certiorari* request. The issue is whether Mr. Taylor also needed, under Utah law, actual notice of the requisite elements for accomplice liability before being able to plead guilty to such.

The court of appeals did not discuss the requisite elements as set forth in *Eyre* because it had not yet been decided. While the court twice mentioned the term "element" when quoting the plea (Pet. App. 15a, 31a), the plea language sought to establish co-principal liability, not accomplice liability. That is why the State argued below that it "did not pursue a conviction based on accomplice liability (XIX Appx. 4646)." See also Resp. App. 26a.

The Tenth Circuit's holding presumed, based on the Utah lower court of appeals opinion in *Gonzales*, that "accomplice liability [in Utah] is not a separate crime *with different elements*." Pet. App. 25a, emphasis added. Because the court of appeals steadfastly maintained that accomplice liability in Utah has no separate elements from principal liability, the court did not offer an "alternative basis" presuming notice of the requisite elements was provided. Nor did it make a finding that Mr. Taylor received notice of the requisite elements of accomplice liability.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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principal. Although the court *sua sponte* later referred to them both as accomplices to one another, that argument was never made by the State as to Mr. Taylor.

Respectfully submitted,

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