No. 18-7667

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

MARION TAYLOR
Plaintiff

VS.

DARREL VANNOY, Warden
Louisiana State Penitentiary
Respondent

On Petition for a Writ Of Certiorari
to the
U.S. Court of Appeals. Fifth Circuit, No. 17-30993
Before: Dennis, Graves, Costa, Circuit Judges.

The U.S District Court, Eastern District of Louisiana
Before: Martin L.C. Feldman, District Judge.

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

Pro Se
Marion Taylor #558611
Westyard Oak-1
Louisiana State Penitentiary
Angola, Louisiana 70712

U.S. Solicitor General
Department of Justice Rm., 5614
950 Pennsylvania Ave, N.W.
Washington, DC 20530-0001

1-7-19

QUESTION PRESENTED

Whether the U.S. 5th Cir. Court of Appeals has so far departure from the accepted and usual course of judicial proceeding in light of, *Williams v. Taylor*, 120 S.Ct. 1495, 529 U.S. 362 (2000) (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989)), and sanction such an departure by the U.S. District Court (E.D.(La.)), as to call for an exercise of this Court's supervisory power, which the judicial power under section 2 of article 3 of the Constitution shall extend to a case in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to controversies which the United States shall be a party. *Muskrat v. U.S.*, 31 S.Ct. 250, 219 U.S. 346 (1911)(citing *Hayburn's Case*, 2 Dall. 409 (1792); *U.S. v. Ferreira*, 13 How. 40 (1851); *Gordon v. United States*, 117 U.S. 694 (1864); *Baltimore & O.R.Co. v. Interstate Commerce Commission*, 215 U.S. 216, 80 S.Ct. Rep 86 (1909); *Chisholm v. Georgia*, 2 Dall 432 (1793); *Osborn v. Bank of United States*, 9 Wheat. 819 (1824); *Cohens v. Commonwealth of Virginia*, 6 Wheat. 264, 387, 5 L.Ed. 257 (1821); *Chicago & G.T.R. Co., v. Wellman*, 143 U.S. 339, 12 S.Ct. Rep. 400 (1982).

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STATEMENT OF THE CASE

On June 24, 2008, the grand jury for the parish of Orleans returned an indictment which charged plaintiff and co-defendant Justin Collins with second degree murder of Jerome Sparkman on April 7, 2008, *See, Appx. (A)* On the morning of trial, the state filed a motion to take the testimony of one of the two witnesses by closed circuit television, which the Court denied. The State, however, applied for supervisory writ, which the State Fourth Circuit Court of Appeals granted. The Court of Appeal directed the trial court to conduct a hearing on the motion pursuant to **LSA-R.S. 15:283**. After the hearing, the trial judge ordered that the testimony of ten year-old Desmond Tillman would be taken through a one-way closed-circuit television.

The testimony presented by the state at trial was notable in that the only witnesses who provided direct testimony about the shooting where two children whose testimony at trial were marked by internal inconsistencies with statements given to law enforcement officers soon after the incident. One of them could not make an in-court identification at either a pre-trial motion hearing or at the trial itself. *id., Appx (B)*

The jury found both defendants guilty as charged and they appealed. On direct review the Louisiana Fourth Circuit in a consolidated proceeding, affirmed plaintiff's and Collins conviction by published decision issued on May 11, 2011. *id., Appx (C)* The Louisiana Supreme Court denied discretionary review. *id., Appx (D)*. No application for post-conviction relief was filed.[1]

On March 12, 2013, plaintiff, pro se,file an application for federal habeas relief *28 U.S.C. § 2254(d)(1)(2)* in the Eastern district of Louisiana. *Taylor v. Cain*, 13-462. On July 23, 2015, the district court adopted the Magistrate's report and recommendation and denied relief *2254(e)*

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1 Throughout the course of all federal/habeas proceeding and to this court plaintiff, himself, is the actual litigant of all the petitions filed to every court, also the petition at hand.

(1). The Court also declined to issue a Certificate of Appealability. Plaintiff filed a Notice of Appeal, July 31, 2015. *id, Appx. (E)*

On September 29, 2015, plaintiff, pro se, filed an application for a Certificate of Appealability with the United States 5th Circuit Court of Appeals appealing the district court's denial of habeas relief. *28 U.S.C. 2253(c)(1)(A)* Taylor v. Vannoy, 15-30689. On August 1, 2016, a three judge panel declined to issue a certificate, ruling that plaintiff did not satisfy § *2253(c)(2)*. On December 1, 2016, in a per curiam decision the court denied plaintiff panel rehearing rule 40 and en banc determination 35 as motion for reconsideration, ordered as denied. *id., Appx (F)(G)*

On February 14, 2014, plaintiff filed an petition for certiorari with this court which was consider as out-of-time. *id., Appx (H)*.

On July 3, 2014, plaintiff, pro se, moved to reopen the district court's previous judgment under federal rules of civil procedure *60(b)(3)*. On December 4, 2017, the district court deny plaintiff's motion for *60(b)(3)* for no finding of fraud and again adopted the Magistrate's report and recommendation *2254(e)(1)*. On December 20, 2017, a Notice of Appeal was filed with the district court. On February 22, 2018, the district court again declined to issue Certificate of Appealability. *id., Appx (I)*

On April 4, 2018, plaintiff, pro se, filed a second application for a Certificate of Appealability with the United States 5th Circuit Court of Appeals appealing the district court denial of his motion for *Rule 60(b)(3). 28 U.S.C. 2253(c)(1)(A),* Taylor v. Vannoy, No. 17-30993. On October 3, 2018, a three judge panel declined to issue a Certificate, ruling that the motion was second or successive *§ 2255* motion over which the district court lack Jurisdiction. On October

25, 2018, in a per curiam decision the court denied plaintiff panel rehearing Rule 40 as Motion for Reconsideration, ordered as denied. *id. Appx. (J)*

Thus, this petition is timely and properly filed before this Honorable Court within the 90 day's period of the following date.[2]

JURISDICTION

This court has Jurisdiction under § 1254(1) to review denials of application for Certificate of Appealability by a Circuit Judge or a panel of a court of appeals. *Hohn v. U.S.*, 118 S.Ct. 1969, 1970, 524 U.S. 236,237 (1998) (citing *Blyew v. United States* 13 Wall. 581, 595 (1871) "Cases" in the Court of Appeal which this court noted, "the words (Case) and (Cause) are constantly used as synonyms in statutes . . ., each meaning a proceeding in court, a suit, or action".)

ISSUE PRESENTED

The U.S. 5th Circuit Court of Appeals has so far departure from the accepted and usual course of judicial proceeding in light of, *Williams v. Taylor*, 120 S.Ct. 1495, 529 U.S. 362,(citing *Marbury v. Madison*, 1 Cranch 37, 177 (1803); *Teague v. Lane*, 489 U.S. at 288, 109 S.Ct. 1060 (1989)) and sanction such a departure by the U.S. District Court (E.D.(La.)), as to call for an exercise of this Court's supervisory power, which the judicial power under § 2 of article 3 of the Constitution shall extend to a case in law and equity, arising under the Constitution, the laws of the United States, and treaties made, and which shall be made, under their authority; to

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2 See in this connection, *Chicago & G.T.R. Co., v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. Rep. 400 402. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessary rests on the competency of the Legislature to so enact, the court must, in exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that,by means of a friendly suit, a party beaten in the Legislature could transfer to the courts an inquiry as to the Constitutionality of the Legislative act.

controversies which the United States shall be a party. *Muskrat v. U.S.*, 31 S.Ct. 250, 219 U.S. 346 (1911)(citing *Hayburn's Case*, 2 Dall. 409 (1792); *U.S. v. Ferreira*, 13 How. 40 (1851); *Gordon v. United States*, 117 U.S. 694 (1864); *Baltimore & O.R.Co. v. Interstate Commerce Commission*, 215 U.S. 216 80 S.Ct. Rep 86 (1909).

LAW AND ARGUMENT

Plaintiff contents that the U.S. District Court Judge, **Martin L.C. Feldman** § "F" and the U.S. Circuit Justice **Gregg J. Costa**, has failed to exercise their federal-question Jurisdiction under the 'Judicial Power" consonant with the statutory texts of *28 U.S.C. 2241(c)(3); 28 U.S.C. 2254 §§ (a) and (d)(1),*[3] . . .See, *Taylor v. Vannoy*, No. 17-30993 (5th Cir. 10/3/18); panel rehearing Rule 40 (5th Cir. 10/25/18) "judgment of Circuit Judges, **Dennis**, **Graves** and **Costa**, *PER CURIAM*: "ruling that plaintiff *Rule 60(b)(3)* motion was second or successive § 2255 motion over which the district court lacked Jurisdiction." citing *Gonzalez v. Crosby*, 545 U.S. 524, 529-32 (2005)[4] "Thus, reasonable jurists would not debate whether his claims are adequate to deserve encouragement to proceed further." citing *Slack v. McDaniel*, 529 U.S. 473, 484,(5th Cir. 2000). "Denying plaintiff motion for COA." See in light of; *Steel Co. v. Citizens for Better Environment*, 118 S.Ct. 1003, 1016 523 U.S. 83, 101-102 (1998). 'Hypothetical Jurisdiction produces nothing more than a hypothetical judgment - - which comes to the same thing as an advisory opinion, disapproved by this court from the beginning. *Muskrat v. U.S.*, 219 U.S. 346, 362, 31 S.Ct. 250, 256 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal

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3 See e.g., ***Burbank v. Cain,*** (E.D. (La.)) No. 06-2121 § "C", 2007 Lexis Nexis, pp. 4, .n. 12. (invoking 28 U.S.C. § 2241(c)(3); 2254 § (a)) ***Butcher v. Cain,*** 682 F.3d 400, at 402, 413-414 (5th Cir. 2012); Circuit Judge, Dennis: deliver opinion (invoking 28 U.S.C. §§ 2254(a), (d)(2)). . .

4 ***Id. Gonzalez v. Crosby;*** 125 S.Ct. at 2646 .n. 3., at. 529 .n. 3 . . . "The portion of § 2255 is similar to, and refers to, the statutory subsection applicable to second or successive § 2254 petitions, it is not identical . . .

niceties are at stake here.[5]

'Judicial Power,' says **Mr. Justice Miller**, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' **Miller, Const. 314**. 'The exercise of judicial power is limited to 'cases' and 'controversies' . . . A 'case' was defined by **Mr. Chief Justice Marshall** as early as the leading case of *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803), conferring this judicial power with the right to determine 'cases' and 'controversies', to be a suit instituted according to the regular course of judicial procedure; '**Mr. Justice Field**, at the circuit, **Re Pacific R. Commission, 32 Fed 241,255 (1887)**. The term 'controversies', includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall 431, 432, 2 U.S. 419, 432 (1793), **1 Tucker's Bl. Com. App. 420, 421** . "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are establish by law or custom for the protection or enforcement of rights or the prevention, redress, or punishment of wrongs." *Muskrat v. U.S.*, *supra*, at 356-360, 31 S.Ct. at 253-55; *Osborn v. Bank of United States*, 9 Wheat. 819 (1824); *Cohens v. Virginia*, 6 Wheat. 264 (1821); *Chicago & G.T.R. Co., v. Wellman*, 143 U.S. 339, 12 S.Ct. Rep. 400 (1982).*supra*.

Plaintiff motion for **Rule 60(b)(3)** applies to a defect in the integrity of the habeas proceeding under *2254(a)*. See *Williams v. Taylor*, 120 S.Ct. 1495, 1505, 529 U.S. 362, 378-79 (2000). "When federal judges exercise their federal question Jurisdiction under the "judicial

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5 The statutory and (especially) constitutional elements of Jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. See ***U.S. v. Richardson***, 418 U.S. 166, 179, 94 S.Ct. 2940, 2947-48 (1974); ***Schlesinger v. Reservists Comm. to Stop the War***, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935 (1974). (A court to pronounce upon the meaning or Constitutionality of state or federal law with no Jurisdiction to do so is, by very definition, for a court to act ultra vires'. ***Steel Co***, ***supra*** . . .

power" of *Article III* of the Constitution, to "say what the law is." citing *Marbury v. Madison, supra*, at 177. "At the core of this power is the federal court's independent responsibility - - independent from its coequal branches in the federal government, and independent from the separate authority of the several states - - to interpret federal law. *supra*, at 1503, 529 U.S., at 375, .n. 7. ((By Act of Congress) *2241(c)(3), 2254(a)).* Cf. *Grayton v. Ercole*, 691 F.3d 165, 169 (2012) (2254 et seq).

Likewise, his motion applies to a defect in the integrity of the habeas proceeding under *2254(d)(1)*, in reference to the clearly establish law requirement, "federal law", as determine by this court, which extents the principle of *Teague v. Lane*, 489 U.S. at 288, 109 S.Ct. 1060 (1989). See, *Williams, supra*, at. 1507, 529 U.S. at 381-382, by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ. 'Teague has demonstrated, rules of law may be sufficiently clear for habeas purpose even when they are expressed in terms of a generalized standard rather than as a bright - line rule.' As **Justice Kennedy** has explained:

"If the rule in question is one which of necessity require a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." *See, Appx. (K)* **(Brief in support of motion for (COA) pp. 1-4 of 12)** "The court's failure to conduct the proper inquiry in accordance with this court's decisions in light of *Synder v. Massachusetts*, 54 S.Ct. 330, 291 U.S. 97 (1984); *Johnson v. Zerbst*, 58 S.Ct. 1019 1024-25 306 U.S. 458, 466-69 (1938)." *Id.*, *Grayton v. Ercole*, 691 F.3d at 170, "Certain principle are fundamental enough that when new factual permutations arises,the necessity to apply the earlier rule will be beyond doubt." citing *Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S.Ct. 2140 (2004). (Brief of (COA) pp. 6-7 of 12) citing *Collins v. Cains*, No.

130251, 2013 WL 4891923 (E.D. (La.) 9/11/13) 'noting that this court has not consider a confrontation clause challenge of a one way closed circuit-television, in a murder case . . (et sgg) . . . *Collins*, *supra*, at 19, 'research has located no decisions by a federal habeas court that have addressed a *Sixth Amendment* challenge under a similar factual scenario'. . .*supra*, at 26, 'research has located no decisions by a federal habeas court that apply Craig to *Sixth Amendment* challenges to one-way closed-circuit testimony of a child witness in a murder case. . . Moreover, this court stated in *Williams*, *supra*, a rule designed for specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yield a result so novel that forges a new rule, one not dictate by precedent. *Wright v. West*, 505 U.S. 277, 308-309, 112 S.Ct. 2482 (1992) (opinion concurring in judgment).

The defective inquiry, *supra*, which is mandated by the amendment, relates to way in which a federal court exercise its duty to decide constitutional questions; the underlying grant of jurisdiction in *§ 2254(a)*, *Williams*, *supra*,at 375 .n. 7, which is at the core of this writ of certiorari: it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison*, *supra*, at 177; independent responsibility from its coequal branches in the federal government", (Brief of (COA) pp 4, n. 3. of 12) citing *Collins v. Cains*, *supra*,at 8-19, "that D. T. I's closed-circuit television testimony was permissible under *Craig* and its progeny and was not a violation of the confrontation clause...(etc)...'that any undermining of *Collins* right to confront D.T.I in person was harmless.', and independent from the separate authority of the state, (Brief of (COA)), *supra*, citing '*Taylor v. Cains*, 13-CV-462, 2015, at 19 (E.D. (La) 7/23/15)', 'deferring to the (La.) 4th Circuit Court of Appeals judgment,citing the four requirement of *Craig*,

supra, but applying the last requirement, pp. 15-16'.[6] (Brief of (COA)), citing *Norris v. Alabama*, 55 S.Ct. 579, 580, 294 U.S. 587, 590 (1935), "Whenever a conclusion of law of a State Court as to a federal right and finding of fact are so intermingled that the **(latter)** control the **(former)** . . . A construction of the **AEDPA** that would require the federal courts to cede this authority to the states would be inconsistence with the practice that federal judges have traditionally followed in discharging their duties under Article **III** of the Constitution. *Williams*, *supra*, at 379.

This Court predecessors enumerated in, *Muskrat v. U.S.* supra, at 254-255, 219 U.S. at 357-359 quoting. . .**Chief Justice Marshall**,who spoke for the court, was careful to point out that the right to declare an act of congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprang from the requirement that the court, in administering the law and pronouncing judgment between parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents, *supra*, at 358...of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question . . . **(etc)** . . . the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, said the chief justice, in *Osborn v. Bank of United States*, *supra*, 9 Wheat 819, speaking of the third article of the Constitution, conferring judicial power . ..**(etc)**. . . *Cohen v. Virginia* *supra*, 6 Wheat. 264, **Chief Justice Marshall**, amplifying and reasserting the doctrine of *Marbury v. Madison*,

6 A federal habeas court must defer to the state's court's decision rejecting the claim unless that decision is patent unreasonable. (quoting ***Butler v. McKellar***, 494 U.S. 407, at 422, 110 S.Ct. 1212 (1990) (Brennan, J., dissenting). ***William***, ***supra***, at 383-384.

supra. . . (etc) . . . likewise, *Marbury*, *supra*, at 180:

"Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution form no rule for his government? If it is closed upon him, and cannot be inspected by him?"

"If such be the real state of things, this is worse than solemn mockery, to proscribe, or to take this oath, becomes equally a crime."

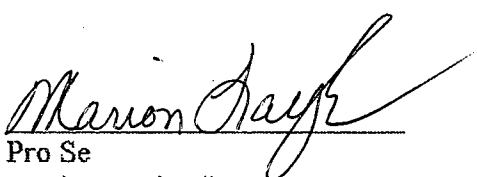
Jurisdiction was proper before the district court which plaintiff motion for **60(b)(3)** was a case of fraud upon the court, a defect in the integrity of the federal habeas proceeding, calling into question the very legitimacy of the district court judgment. (Brief of (COA) pp. 1-4, 7-9 of 12) citing *Collins v. Cains*, *supra*,at 34, .n. 33. . . . See, *Hazel-Atlas Glass v Hartford Empire*, 322 US. 238, 248, 64 S.Ct. 997, 1002 (1944). "Equitable relief against fraudulent judgments is not statutory creation."; *Steel Co. v. Citizens for Better Environment*, supra, at 102, 118 S.Ct., at 1016, "this to means cases and controversies of the sort traditionally amendable to and resolved by the judicial process." *Muskrat v. U.S.*, *supra*, at 356-357, 31 S.Ct. at 253-54. "Such a meaning is fairly implied by text, since otherwise the purport restriction upon the judicial power would scarcely be a restriction at all. . ." (Brief of (COA) pp. 7, .n. 8 of 12) 'citing *White v. Ragen*, 65 S.Ct. 978, 980-981, 324 U.S. 760, 763-764 (1945) sufficient to invoke corrective process in some court . . . Likewise, the rule also preserves parties opportunity to obtain vacatur of a judgment that is void, (Brief of (COA) pp. 8-9 of 12), for lack of subject - matter jurisdiction altogether deprives a federal court the power to adjudicate the rights of parties. See, *Gonzalez v. Crosby*, *supra*, at 534, 125 S.Ct. at 2649 (citing *Steel Co.*, *supra*, at 94, 101, 118 S.Ct. at 1016-1017) . . . "When no "claim" is presented, there is no basis for contending that the *Rule 60(b)*

motion should be treated like a habeas corpus application. *Gonzalez, supra*, at 533.

CONCLUSION

For the foregoing reasons this court should review this case through certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing facts, herein, are true and accurate set forth in this writ application and, thereby, serve a copy on this 16 day of January, 2019, on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001, in which an employee of the United States is a party.

Respectfully submitted,

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