

No. 20-5125

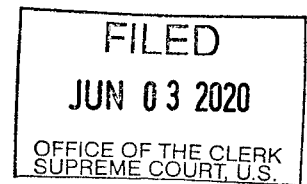
ORIGINAL

In The

Supreme Court Of The United States

In re

Allen "F" Calton



Petition For An original Writ Of Habeas Corpus

Allen "F" Calton # 1123880
Connally Unit
899 FM 632
Kenedy, Texas
Pro Se

Questions Presented

- (1) Whether the resolution of petitioner's Brady Violation claim by the state courts resulted in a decision that was 'contrary to' or involved an unreasonable application of clearly established federal law, as determined by the U.S. Supreme Court. In violation of the 14th amendt.
- (2) Whether the resolution of petitioner's Brady Violation claim by the state courts resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. In violation of the 14th amendt.
- (3) Whether the state court remedy of habeas corpus afforded to petitioner was seriously inadequate in that the state court proceeding did not afford petitioner a full and fair adjudication of federal contentions raised by affording petitioner an evidentiary hearing as promulgated by this Court in *Townsend v Sain* 372 U.S. 293 (1963). In violation of the 14th amendment.

List of Parties

Petitioner

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Respondent

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List of Parties

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Opinions Below

The Opinion of the United States Court of Fifth Circuit denial of leave to file a second or successive petition appears at Appendix "I" app. p. 14-15 and is unpublished.

The Opinion of The Texas state Court of Last Resort in Criminal Law matters Appears at Appendix "A" app. p.1 and is unpublished

The Opinion of The State trial Court ordering that the Writ Transcript be forwarded to the Texas State Court of Last Resort in criminal Law matters Appears at Appendix "B" app. p. 2

The Response To Petitioner's state Application For Writ of Habeas Corpus by the Tarrant County District Attorney office Appears at Appendix "ZZZ" app. p. 227-232

Jurisdiction

Jurisdiction is invoked in this Court Pursuant to 28 U.S.C. Section 1651 (a); 28 U.S.C. Section 2241 (b); 28 U.S.C § 2254 (a) and U.S. Constitution Article III due to Petitioner has exhausted all other remedies at law and if this court does not exercise its original habeas corpus jurisdiction or alternatively transfer the instant case to the U.S. District Court in Fort Worth, Texas, Petitioner would be remediless and that ought not be so. See *Ex Parte Hawk* 321 U.S. 114, 118 (1944) ("Where the state Courts have considered and adjudicated the merits of his contentions, and this court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated"). (Citing *Salinger v Laisel* 265 U.S. 224, 230-232). But where resort to

state court remedies has failed to afford a full and fair adjudication of federal contentions raised, either because the state affords no remedy. *Id.* at 118 (citing *Mooney v Holohan* 294 U.S. 115 (1935)). or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate. *Id.* at 118 (citing *Moore v Dempsey* 261 U.S. 86 (1923)). A federal Court should entertain his petition for habeas corpus, else he would be remediless. *Id.* at 118. And since Petitioner cannot bring his claims in a federal court other than the U.S. Supreme Court in this court's exercise of its original habeas corpus jurisdiction or there would be a suspension of the great writ. In light of the fact that there has been no rebellion or invasion. See U.S. Const. Art. I §9 cl.2 "The privilege of the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it". *Id.* cf. *Martinez-Villareal v Stewart* 118 F3d 628, 631 (9th Cir 1997) ("Whether the writ has been suspended depends on whether or not the Supreme Court may entertain a colorable competency claim in the exercise of its jurisdiction to hear original jurisdiction petitions"). See *Davis v Terry* 625 F3d 716, 719 (11th Cir 2010) ("Agreeing with district court that Davis could only bring his claim under Supreme Court's original jurisdiction because he exhausted his other avenues of relief"); *Ex Parte Hudgings* 249 U.S. 379, 379 (1919) ("Holding that no other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this court"); *Herb v Pitcairn* 324 U.S. 117, 125-26 (1945) ("Court has power to correct state judgments to the extent that they incorrectly adjudicate federal rights"). As the statement of the case, herein establishes, Petitioner has not by passed any available remedies before seeking habeas corpus relief here. And as shown below the state court's judgment in resolution of petitioner's Brady Claim was objectively unreasonable.

and thus there was an incorrect adjudgment of petitioners' clearly established federal rights.

Constitutional and statutory Provisions Involved

U.S. Const. Art. I § 9 Cl. 2

The Privilege of The writ of Habeas Corpus Shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.

U.S. Const. Art. III

§ 1. The judicial power of the United States, shall be vested in one Supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme Court and and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

§ 2. The judicial power shall extend to cases in law and equity, arising under this constitution, the law of the United States, and treaties made, or which shall be made, under their authority.

(Remaining Part of § Deleted)

The Crux of this case involves Amendment XIV to the United States Constitution which provides :

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States"); nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The XIV Amendment is enforced by Title 28, Section 1651(a) United States Code which provides:

The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The XIV Amendment is enforced by Title 28, Section 2241(b) United States Code which provides:

The Supreme Court, any justice thereof and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

The XIV Amendment is enforced by Title 28, Section 2254(a) United States Code which provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

Statement Of The Case

Allen "F" Calton, the petitioner [hereafter referred to as Calton]

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was convicted by a jury of attempted murder, and after being found to be a habitual offender, was sentenced by the jury to life confinement. See Petitioner's Affidavit Index Of Appendix In Support Of His Petitions on file herein [Hereafter referred to as "app"] at Appendix "E" app. p. 8-9. The Court of Appeals For The Second District Of Texas overruled Calton's three points of error and affirmed his conviction. See Calton v State, 2005 WL 3082202 (Tex. App. Fort Worth November 17, 2005 pet withdrawn) (Not designated for publication) Calton filed his initial Application For writ Of habeas which was denied on the merits. See Ex Parte Calton, No. WR-65,590-07. Calton filed a second or successive state Application For writ of habeas Corpus on 5-26-17. The same was denied by the Court of Criminal Appeals in Texas on 7-12-17. Without written order, written findings of fact and conclusions of law submitted by the trial court or an evidentiary hearing. See Ex Parte Calton WR-65,590-22. Also See Appendix "A" app. p. 1. The Texas Court of Criminal Appeals [Hereafter referred to as T.C.C.A.] also dismissed an original Jurisdiction Constitutional Petition For writ Of Habeas Corpus filed directly with the T.C.C.A. See Appendix "G" app. p. 12 For order pertaining to Ex Parte Calton WR-65,590-27. Finally the T.C.C.A. denied Calton leave to file an original Jurisdiction Constitutional Petition For writ Of Habeas Corpus filed directly with the T.C.C.A. See Appendix "H" app. p. 13. These Original jurisdictions Petitions were resolved by the T.C.C.A. on 1-29-20 and 4-29-20 respectively. Calton filed his initial Federal Habeas Corpus petition on or about 8-8-07 that was adversely resolved on 12-1-08. See Calton v Quarterman, Civil Action No. 4:07-cv-471-Y, 2008 WL 5083022 (N.D. Tex. Dec. 1, 2008). Finally before seeking leave to file the instant petition in this court. Calton sought leave from the Fifth Circuit U.S. Court of Appeals to file a second or successive Petition For writ of Habeas Corpus in the U.S. District Court in Fort Worth, Texas. Leave was denied by the Fifth Circuit.

on 11-26-19. see *In re Catton* U.S.C.A. No. 19-11206. Also See Appendix "I" app. p. 14-15.

Federal Questions Were Raised In The State Court of Last Resort

The Federal Question sought to be reviewed here on habeas Corpus were raised in the trial court by filing a Post-Abuse Application For Writ Of Habeas Corpus under T.C.C.P. Art. 11.07 on 5-26-17. By raising the underlying claim in question under *Kyles v Whitley* 115 S.Ct 1555 (1995) and the U.S. Constitution 14th amendment. See Appendix "J" app. p. 16-37. In particular see app. p. 21-22. Catton also sought an evidentiary hearing on his claims pursuant to *Townsend v Sain* 372 U.S. 293 (1963) in the trial court on 5-26-17. See Appendix "K" app. p. 38-42. However the trial court was foreclosed from passing judgment on said application and Catton's motion for An evidentiary Hearing. Due to the abuse of writ order that had been previously entered against Catton by the T.C.C.A. on 5-28-08. See Appendix "F" app. p. 10-11. Due to the fact that Catton had been previously cited for abuse of the writ limited the trial court's duty to entering a finding establishing the same and ordering the district clerk to forward the writ transcript to the T.C.C.A. The trial court entered such findings and order on 6-13-17. See Appendix "B" app. p. 2. After receiving the writ transcript the T.C.C.A. determined that Catton had raised cognizable claims due to the same alleged U.S. Constitutional 14th Amendment Due Process Violation claims. In Addition the T.C.C.A. determined Catton not only showed 'good cause' for allowing a re-filing of his post-abuse T.C.C.P. Art. 11.07 application. But that Catton also stated facts that if were true would entitle him to relief. The T.C.C.A. by affording Catton a merits review also makes clear that Catton had made a prima facie showing of actual innocence. As established by the fact that the T.C.C.A. reviewed and denied Catton's otherwise barred constitutional claims on the merits on 7-12-17. See Appendix "A" app. p. 1

In Texas when the T.C.C.A. denies a claim without written order it is a merits review. See Jackson v Johnson 150 F3d 520, 524 (5th Cir 1998) ("Noting the denial of relief by the Texas Court of Criminal Appeals serves, under Texas Law to dispose of the merits of a particular claim") (Citing Ex Parte Torres 943 SW2d 469, 472 (Tex. Crim. App. 1996) ("In our writ jurisprudence a 'denial' signifies that we addressed and rejected the merits of a particular claim"). The Texas Subsequent Writ Provision was enacted by the Texas Legislature in response to Schlup v Delo 513 U.S. 298 (1995). In other words Texas adopted the Federal miscarriage of Justice Exception as its own as a guide in resolving state Applications alleging a U.S. Constitutional violation has resulted in the conviction of one who is actually innocent. See Ex Parte Brooks 219 SW3d 396, 398-401 (Tex. Crim. App. 2007).

(A)

Statement of Pertinent Facts

- (1) On 4-24-02 Officer Riley of the City of Garland Police Department [Hereafter Garland P.D.] seized a 'Butcher Knife' found in the vehicle Catton was arrested in after the offense was committed. See Appendix "M" app. p. 65
- (2) The 'Butcher Knife' seized by police belonged to the victim Everett Charles Angle [Hereafter Angle] that Angle was brandishing in a threatening manner while leaning and reaching inside the driver's side window of Catton's parked vehicle while Catton sat in the driver's side seat. See Appendix "N" app. p. 66-67; Appendix "O" Catton's Affidavit app. p. 69-70 Ln. 5-7; Appendix "P" TSF V8 p. 163-164 app. p. 74
- (3) The 'Butcher Knife' was the instrumentality of Catton's "No mental State Defense" and "Self Defense" defensive theories the jury was charged on. See Appendix "O" app. p. 69-70; Appendix "Q" TSF V8 p. 223-224 app. p. 78

(4) Due to Angle while appearing to be arguing over money was brandishing a sharp object toward Calton in a threatening manner while reaching through the driver's side front window of Calton's parked vehicle while Calton sat in the driver's side front seat. See Appendix "N" app. p. 67; Appendix "O" app. p. 69-70 Ln. 5-7; Appendix "P" TSF V8 p. 163-164 app. p. 74

(5) In response to this apparent attack Calton grabbed the blade of the 'Butcher Knife' and was cut by Angle. See Appendix "N" app. p. 67; Appendix "O" app. p. 69-70 Ln. 5-7.

(6) In response to being cut by Angle with the 'Butcher Knife' Calton shot Angle one time in self-defense. See Appendix "O" app. p. 69-70 Ln. 5-7; Appendix "R" TSF V8 p. 181-182 app. p. 80; Appendix "S" TSF V6 p. 72 app. p. 81

(7) Concealed from Calton by police was that the 'Butcher Knife' had been in the possession of the Garland Police Department up until 2-17-05 which was at least (9) nine months after Calton's 5-10-04 trial date. See Appendix "T" app. p. 82-102; Appendix "O" app. p. 79 Ln. 9; Appendix "O" app. p. 71 Ln. 10; Appendix "O" app. p. 72 Ln. 16

(8) Calton upon receipt of the states Response to his Tex. Code Crim. Proc. Article 64.01 motion on 3-29-17 became aware that police possessed the 'Butcher Knife' before, during and for at least (9) nine months after Calton's May 10, 2004 trial. See Appendix "O" app. p. 73 Ln. 18; Appendix "T" app. p. 82-102. In particular see Shelli Pryors affidavit establishing the same. Id. app. p. 86-87

(9) Although Ms. Pryor's Affidavit indicates all property seized by Garland P.O. related to Calton's arrest on 4-23-02. Was released to Lt. Van Cleave on 2-17-05 for Civil Court. See Appendix "T" app. p. 87. The only evidence seized by Garland P.O. in reference to that agency's arrest of Calton

- On 4-23-02 was a 'Butcher Knife'. See Appendix "M" app. p.4.
- (10) Calton used Tex. Code Crim. Proc. Article 64.01 as a fishing expedition to circumvent Tex. Gov't. Code section 552.028 in search of the truth about the 'Butcher Knife'. See Appendix "O" app. p.73 Ln.18
- (11) Calton made several open records requests post-trial beginning in the fall of 2004 to no avail to discover the 'Butcher Knife'. See Appendix "O" app. p.69 Ln.4; Appendix "U"- "X" app p.103-106
- (12) The Garland P.D. or the City of Garland has never responded to any of Calton's Open records request. See Appendix "O" app. p.69 Ln.4
- (13) This is in all probability due to the Section 1983 Federal Civil Rights lawsuit Calton filed against Garland P.D. the City of Garland and several individual police officers. See Appendix "Y" TSF V4 p.62-63 app. p.108
- (14) Alternatively Garland P.D. and the City of Garland non-response to Calton's open records requests could have been due to a governmental body in Texas is not required to comply with a request for information from an inmate or their agent, other than the inmate's attorney. See Appendix "Z" app p.109. Although this alternative is highly unlikely so in light of Calton's Section 1983 lawsuit against the city of Garland Texas and Police officers and jailers thereof. See Appendix "Y" TSF V4 p.62-63 app. p.108
- (15) Calton filed two different Brady motions in an attempt to discover favorable evidence in the possession of the state or an agent of the state that was unknown to the defense that both were granted by the trial Court on 7-2-03 and 1-8-04 respectively. See Appendix "AA" and "BB" app. p.110-115.
- (16) Calton tried to have a subpoena issued pretrial compelling the arrest records of Calton in the possession of the Garland P.D. to be turned directly to the defense. That

Contained "The Police Report" that memorialized police had seized a 'Butcher Knife'. However the trial court denied Calton's Subpoena request. See Appendix "C" PSF 1-8-04 p.12 app. p.116

(17) Calton tried to obtain "The Police Report" under the authority of Tex. Code Crim. Proc. Article 39.14 that memorialized police had seized a 'Butcher Knife'. However Calton's discovery request was only granted by the Trial Court pursuant to Tex. Rules of Evidence Rule 615. See Appendix "DD" PSF 1-16-04 V.1of1 p.23 app. p.119

(18) Calton tried the open records provisions prior to trial through his court appointed investigators to no avail to obtain "The Police Report" from the Garland P.D. that memorialized police had seized a 'Butcher Knife'. See Appendix "DD" PSF 1-16-04 V.1of1 p.21-22 app. p.117-118.

(19) On 4-26-04 the trial relented its subpoena request denial to the extent that the court would issue the subpoena for records from the Garland P.D. pertaining to Calton's arrest. That contained "The Police Report" that memorialized police had a 'Butcher Knife'. For the records to be turned over directly to the trial court for the trial courts in camera review. For the trial court to determine if anything contained in said records was relevant to Calton's defense. See Appendix "EE" PSF 4-26-04 V.1of1 p.7 app. p.121

(20) Also on 4-26-04 which was two week before Calton's 5-10-04 trial date Calton informed the trial court and state's attorney that: "Although Calton had yet to find out he needed to know for trial preparation if there is or is not a knife in the Garland P.D. evidence room. See Appendix "O" app. p. 69-70 Ln. 5-7; Appendix "EE" PSF V.1of1 4-26-04 p.6-7 app. p. 120-121

(21) After putting the trial court and state's attorney on direct

notice of Catton's unawareness of the 'Butcher Knife' in the possession of the Garland P.D. on 4-26-04. There was an off the record colloquy at the trial court's insistence between the state and defense. See Appendix "EE" PSF 4-26-04 V. 10 of 1 p. 7 app. p. 121

(22) The colloquy consisted of the trial court ordering the prosecutor to produce the 'Butcher Knife' to the defense and the prosecutor's response: "Judge our investigation indications there is no 'Knife' in possession of police related to the offense". See Appendix "O" app. p. 72 Ln. 14-15

(23) The 'Butcher Knife' seized by police would have corroborated Catton's statement to police. Where Catton stated: "Angle was reaching inside of Catton's vehicle with a sharp object that Catton grabbed and was cut with. See Appendix "N" app. p. 67

(24) The 'Butcher Knife' seized by police would have corroborated Catton's trial testimony. Where Catton testified: "The victim Everett Angle was trying to cut me with a knife that I grabbed out of his hand that ended up in my car that was recovered by police officers. See Appendix "R" TSF V8 p. 181-182 app. p. 80

(25) The jury was charged on self-defense but the defense wasn't fully advanced or viable sans the 'Butcher Knife' See Appendix "Q" TSF V8 p. 223-224 app. p. 78

(26) Especially in light of the state's cross-examination of Catton and its closing argument both referencing the matter that implied if a 'Butcher Knife' existed and played a role in the offense. Catton would have issued a subpoena for the 'Butcher Knife' and presented it at trial. See Appendix "Q" TSF V8 215-216 app. p. 76; Appendix "FF" TSF V9 p. 9-10 app. p. 123

(27) On 5-13-04 in the middle of trial Catton received "The Police Report" that memorialized that a 'Butcher Knife' had

been seized by the Garland Police Department. See Appendix "GG" TSF VS p. 37-38 app. p. 126

(28) That same day on 5-13-04 Calton had a subpoena issued to Garland P.D. evidence custodian to produce the 'Butcher Knife' in court instant. For the same to be utilized at trial as the instrumentality of Calton's self-defense theory. See Ex "O" app. p. 69-70 Ln. 5-7; Appendix "HH" app. p. 127-129

(29) The Garland P.D. evidence custodian at the time in question namely Police officer Michael G. Clark #2769 shows up at trial says the 'Butcher Knife' On 5-17-04 and states: 'Although a 'Butcher Knife' was recovered there were no records that indicates it was logged into the evidence room. Due to the 'Butcher Knife' was not used during the commission of the evading arrest offense Garland P.D. arrested Calton for. See Appendix "O" app. p. 73 Ln. 17

(30) This was a blatant lie told by officer Clark #2769 and the intentional suppression of the 'Butcher Knife' in question by police. As established by Garland P.D. evidence custodian in 2017 Shelli Pryor's affidavit makes clear dated 3-20-17. See Appendix "T" app. p. 86-87. Also see "The Police Report" at Appendix "M" app. p. 65

(31) In fact not only was the 'Butcher Knife' in the police's possession at the time of Calton's May 10, 2004 trial. Garland P.D. evidence custodian Shelli Pryor prepared a "Chain of Custody sheet" from the Garland P.D. pertaining to the 'Butcher Knife' in question. That establishes officer Clark #2769 took possession of the 'Butcher Knife' on 5-17-04. Alleging to evidence room personnel that he was doing so for Calton's trial. See Appendix "XXX" app. p. 225

(32) However Officer Clark #2769 did not produce the 'Butcher Knife' at trial. Instead officer Clark #2769 after taking care, custody and control of the 'Butcher Knife' situated the 'Butcher Knife' in some secret remote place. officer Clark #2769

did so as a ruse to make it appear to Garland P.D. evidence room personnel. That the 'Butcher Knife' had been utilized in a court proceeding for the over (5) months period it was allegedly removed from the evidence for court purposes. As Officer Clark alleged on 5-17-04 when he checked the 'Butcher Knife' out for court on 5-17-04 and back in from court on 10-26-04. See Appendix "XXX" app p. 225

(33) Garland P.D. Officer Shupe corroborated the blatant lie told by Officer Clark #2769 when Officer Shupe testified: "There was no indication the 'Knife' was logged into the property room. See Appendix "II" TSF V4 p. 49 app. p. 130

(34) Officer Shupe of the Garland P.D. also corroborated the Garland P.D.'s evidence custodian officer Clark's #2769 statement by testifying: "Since the 'Butcher Knife' was not used during the commission of the evading arrest offense. It would not be logged into the Garland P.D. property room. See Appendix "Y" TSF V4 p. 59-60 app. p. 107

(35) The intentional suppression of the 'Butcher Knife' by Police precluded the jury from reasonably finding Calton acted in self-defense by shooting the victim one time. See Appendix "O" app. p. 69-70 Ln. 5-7; Appendix "S" TSF V6 p. 72 app. p. 81

(36) Had the 'Butcher Knife' been admitted into evidence the only rational verdict would have been not guilty. Thus the guilty verdict is invalid and should be invalidated. Due to the error contributed to Calton's conviction and prevented Calton from establishing his actual innocence by self-defense. Due to Calton's use of deadly force when he shot the victim one time was in direct response to the victim's use and attempted use of deadly force the victim used on Calton with the 'Butcher Knife' prior to Calton shooting the victim one time in self-defense. See Appendix "O" app. p. 69-70 Ln. 5-7; Appendix "S" TSF V6 p. 72 app. p. 81

(B) Summary of Additional Relevant Facts and Facts Established At Trial

The statement of facts regarding the trial will necessarily be referenced as follows as referenced above in the "State Habeas Facts" above in subsection (A). Referred to as "TSF" followed by the Volume and page number. Since the factual overview will also involve facts developed at the 5-1-02 Motion To Deny Bail Hearing and the four separate pretrial hearings. They will be referenced to as "BSF" and "PSF" respectively followed by the date, volume and page number. On 4-8-02 Catton after accidentally drinking an unknown substance went to the hospital for treatment. See Appendix "JJ" app. p. 131-140. This accidental ingestion of an unknown substance affected Catton's blood sugar level. In turn affecting him mentally and physically. Although Catton has never been diagnosed with diabetes he was rushed by ambulance to two different hospital on two different occasions due to a severely abnormal low blood sugar level i.e. Hypoglycemia. See Appendix "KK" app. p. 141-146; Appendix "CC" TSF V4 p. 99 app. p. 147. The First hospital visit on 4-24-02 was about twelve hours after the offense occurred. At which time Catton's blood sugar level had dropped so low that he went into convulsions. See Appendix "MM" TSF V4 p. 41-44 app. p. 148. On 4-23-02 at about 9pm Catton drove to the victim Angle's residence. Due to mental and physical infirmities caused by Hypoglycemia at that time. Catton also thought someone else was in his vehicle that night. However there was not. See Appendix "N" app. p. 67. Angle testified that he was cooking when Catton arrived. See Appendix "NN" TSF V3 p. 20-22 app. p. 149-150. The 'Butcher Knife' seized out of Catton's vehicle by police belonged to Angle he utilized to cook his dinner at the time Catton arrived to Angle's residence. Angle testified he engaged in conversation with Catton. See Appendix "NN" TSF V3 p. 23-24 app. p. 151. States witness Craig Tate testified Angle was leaning inside of Catton's vehicle while this con-

versation took place. See Appendix "P" TSF V8 p.163-164 app. p.174. Angle testified he had a cocaine problem. See Appendix "UU" TSF V3 p.30 app. p.152. Angle testified he had a drug problem at the time of the offense. See Appendix "OO" TSF V3 p.48 app. p.153. An excerpt from Angle's medical records for treatment he received for his gunshot wound that night on 4-23-02 proves he had cocaine in his system at the time of the offense. See Appendix "PP" app. p.154-155. Due to the victim Angle's aggressive and fearless behavior fueled by his cocaine use and abuse led Catton to reasonably believe despite his mental and physical infirmities caused by Hypoglycemia that Angle was attempting to use and used deadly force against Catton while leaning inside Catton's parked vehicle brandishing a 'Butcher Knife' in a threatening and subsequently cutting Catton. Due to the victim's influence under cocaine at that time. Which resulted in Catton to grab the blade of the 'Butcher Knife' in an attempt to ward off the apparent attack. Upon grabbing the blade Angle cut Catton. See Appendix "D" app. p.67; Appendix "R" TSF V8 p.181-182 app. p.80. In this sequence of events Catton grabbed the victim Angle's gun he always possessed in a gun holster. See Appendix "QQ" TSF V4 p.140 app. p.156. And shot Angle one time with Angle's own gun after being cut by Angle with the 'Butcher Knife' in question. See Appendix "Q" TSF V8 p.209 app. p.75; Appendix "R" TSF V8 p.181-182 app. p.80; Appendix "S" TSF V.6 p.72 app. p.81. Marcus Heard testified that while selling crack cocaine out of his residence Angle would wear a firearm in a gunholster. See Appendix "QQ" TSF V4 p.140 app. p.156. Mr. Heard purchased crack cocaine from Angle for years and smoked the purchased crack cocaine at Angle's residence and would observe Angle in possession of a firearm at all times. Id at p.139-140 app. p.156. Angle was a habitual crack cocaine dealer in addition to his crack cocaine use and abuse. Angle had no less than five search warrants executed at his residence on 4-21-99, 11-6-00, 3-6-01, 4-11-02, and 2-23-03. Where police were seeking for and found crack cocaine and even seized a firearm in a gunholster. See Search Warrant Returns Appendix "RR" thru "VV" app. p.157-162.

The police seizing a pistol and a gunholster corroborates Mr. Heard's testimony that the victim Angle kept a pistol at all times on his side. See Appendix "QQ" TSF V4 p.139-140 app. p.156; Appendix "SS" app. p.158. Mr. Heard was such a frequent visitor at Angle's residence as Mr. Heard's testimony above established. That Mr. Heard was present during an actual search warrant execution at Angle's residence on 4-21-99 and Mr. Heard was arrested along with Angle that day. See Appendix "RR" app. p. 157. Fifty miles away from the crime scene Calton was observed by Police officer James Puckett driving in an erratic and unsafe manner. See Appendix "WW" TSF V5 p.74-75 app. p.163. Officer Puckett's observation of Calton's driving led him to initiate a police stop that led to Calton's arrest two hours after the offense. Id. at p.78 app. p. 164. Calton was driving erratic because he thought someone else was in the vehicle with him trying to kill him. Due to the same Calton made a 911 phone call in Garbnd, Tex. prior to officer Puckett initiating the traffic stop and Calton stated to the call taker: "Someone is trying to kill me". See Appendix "XX" app. p.165-167. Officer Puckett testified that Calton's driving during the police chase was unlike someone who was trying to get away from police. Because Calton was merely going back and forth, going here and there and to officer Puckett it seemed as though Calton was confused. See Appendix "YY" TSF V5 p.96-97 app. p. 168-169. Police observations describing Calton's behavior at the arrest scene two hours after the offense noted: bizarre behavior, confusion, appeared distracted; passiveness and uncooperative. As well as Calton was experiencing head pain and dizziness. See Appendix "ZZ" TSF V4 p.19-20 app. p.177; Appendix "AAA" app. p.179-182. Although Calton appeared intoxicated at the time he did not smell of alcohol. See Appendix "BBB" TSF V5 p.87 app. p.183. Nor was Calton charged with OWI or OUI. See Appendix "CCC" TSF V4 p.72 app. p.184. Defense Expert Dr. Roy Cavano testified that appearing intoxicated is a sign of Hypoglycemia. As well as confusion, abnormal behavior and dizziness. See Appendix "DDD"

TSF V5 p.117 and p.123 app. p. 185-186. Dr. Cavaino testified that after reviewing the police observation screening form that memorialized Carlton's behavior according to police personal observations about two hour after the offense suggested Hypoglycemia. See Appendix "DDD" TSF V5 p.124 app. p.186. State's expert Joe Snow testified that the screening suggested Hypoglycemia. See Appendix "EEE" TSF V6 p.61-62 app.p. 187. Paramedic Frank Simon testified that if the blood sugar level falls low enough it can lead to an epileptic seizure. See Appendix "FFF" TSF V7 p.27 app. 189. Paramedics William Johnson testified the epileptic seizure Carlton sustained mere hours after the offense was caused by an extremely low blood sugar level that was below 25. See Appendix "MM" TSF V7 p.43-44 app.p.148. Expert testimony at trial established a normal blood sugar level is between 80-120. See Appendix "YY" TSF V5 p.105 app.171. Carlton testified that about a week before the offense he began experiencing dizziness, headaches and felt abnormal. See Appendix "GGG" TSF V8 p.196 app. p.190. Carlton testified that his recollection about a week before offense up until about three weeks after is vague and filled with events that are not true and consists of events that Carlton considered were psychotic episodes. See Appendix "R" TSF V8 p.180-182 app.p. 79-80; Appendix "HHH" TSF p.168-170 app.p.191. Although Carlton described his experiences at the time as psychotic episodes it was undoubtedly Hypoglycemic states causing confusion that Carlton was experiencing at the time. As a direct result of Carlton's accidental ingestion of an unknown substance on 4-8-02 that burned Carlton's throat going down. Which was about two weeks before the 4-23-02 offense date. See Appendix "JJ" app. p.131-140. The accidental ingestion of an unknown substance disrupted the proper regulation of Carlton's blood sugar level between 4-16-02 and 5-14-02. As established by Carlton's hospitalization for Hypoglycemia hours after the offense on 4-24-02 and again on 5-14-02. Dates that bookend the 4-23-02 offense date. See Appendix "KK" app.p. 141-146; Appendix "LL" TSF V4 p99 app.p.147

Due to the disruption of Carlton's blood sugar level and the proper regulation of the same at the time doctors requested his blood sugar level be monitored twice daily. See Appendix "YY" TSF VS p.101-109 app. p.169-172. Kewanda Lawson testified that on 4-16-02 Carlton was not acting himself and seemed to be experiencing confusion. See Appendix "III" TSF V4 p.83 app. p.192. MS. Lawson testified that Carlton's condition deteriorated after 4-16-02 up until the offense date of 4-23-02 and that it appeared to her that Carlton was in a state of confusion. Id at p.85 app. p.193. Ernest Knox testified that on 4-16-02 he noticed Carlton's confused state and that Carlton at times did not appear to know what was going on. See Appendix "JJJ" TSF V7 p.3-4 app. p.194. Mr. Knox testified that Carlton's condition deteriorated from 4-16-02 up until the offense date of 4-23-02 that Mr. Knox described as a confused state. Id. at p.5 app. p.195. Defense expert Dr. Cavaiño testified that a person can be capable of actions and not be consciously aware of what he is doing and may not have knowledge of events that occurred while in a Hypoglycemic state. See Appendix "000" TSF VS p.119-120 app. p.185. The victim Angle testified that at the time of the offense that Carlton had all of his mental faculties. See Appendix "NN" TSF V3 p.24 app. p.150. State's expert Dr. Jack Price a forensic psychologist with a doctorate degree was hired by the State to evaluate Carlton's mental processes at the time of the offense. Prior to personally evaluating Carlton Dr. Price reviewed certain documents to permit him to form his expert opinion. See Appendix "KKK" TSF V8 p.17-20 app. p.196. Dr. Price testified despite Carlton's mental and physical infirmities caused by hypoglycemia he was not suffering from some type of psychotic episode or psychotic state at the time of the offense. Id at p.29-30 app. p.199. Dr. Price's testimony made clear that Carlton did not reveal any significant symptoms of mental illness at the time of the offense. Id. at p.29-30 app. p.199. Dr. Price's testimony also made clear despite Carlton mental and physical infirmities caused by hypoglycemia resulting in Carlton to experience confusion, bizarre be-

havior and hallucination. Did not preclude Catton from having the sufficient mental capacity to reasonably believe that the crack cocaine fueled victim with the 'Butcher Knife' in his hands was attempting to use and used deadly force against Catton. In turn justifying Catton's use of deadly force to meet deadly force. Driving home the point that indeed the evidence at trial reasonably raised all elements of a deadly force/self-defense theory including a "Reasonable Belief" is substantiated by the trial court's charge to the jury on self-defense. see Appendix "Q" TSF v8 p.224 app. p. 78. The Trial Court's certainty that the evidence raised the justification defense withstood prosecutor's David Hagerman vehement objection that the evidence did not raise self-defense/deadly force defensive theory. For which said objection lodged by the prosecutor the trial court judge rightfully overruled. Id at p.221 app. p.78

Reasons For Granting The Writ

Here Catton calls into question the state court's resolution of his Brady claim under both 28 U.S.C. § 2254(d)(1) and (2). Under 'AEDPA', this court cannot grant Catton habeas relief here in connection with any claim that was adjudicated on the merits in state proceeding, unless the adjudication of that claim either: (1) resulted in a decision that was 'contrary to' or involved an unreasonable application of, clearly established federal law, as determined by this court (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See *Brown v Payton* 125 S.Ct 1432, 1438 (2005). Under the 'contrary to' clause, a federal habeas court may grant relief if (1) the state arrives at a conclusion opposite to that reached by this court on a question of law or (2) the state decides a case differently than this court on a set of materially indistinguishable facts. See *Mitchell v Espinoza* 124 S.Ct 7, 10 (2003).

("A state court's decision is contrary to our clearly established law if it applies a rule that contradicts the governing law set forth in our cases or it confronts a set of facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from our precedent") Since Calton is challenging state court factual findings would generally require him to establish by clear and convincing evidence the state's findings were erroneous. See *Schiro v Landrigan* 127 S.Ct 1933, 1939-40 (2007). However the deferential standards set forth by AEDPA do not apply. Since there were no state court findings of fact in resolution of Calton's Brady claim. See *Perillo v Johnson* 79 F3d 441, 446 (5th Cir 1996) ("Because the state court did not make any factual findings regarding these claims when they were raised in state habeas application, no deference is owed to the state court's resolution of the instant claim"). And a state court's finding on materiality in a prosecution misconduct allegation is also not entitled to deference by a federal court under § 2254 (d) because such findings is a mixed question of law and fact. See *Wilson v Whitley* 28 F3d 433, 437 (5th Cir 1994).

Clearly Established Federal Law Requires State To Disclose Favorable Evidence

The suppression by the state of favorable evidence upon request violates due process where the evidence is material to either guilt or punishment irrespective of good or bad faith of the prosecution. See *Brady v Maryland* 373 U.S. 83, 87 (1963). "Brady", applies even when there has been no request by the accused. See *Banks v Dretke* 540 U.S. 668, 690 (2004). Under clearly established Supreme Court precedent, there are three elements to a Brady claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) the evidence must be "material", i.e. prejudice must have ensued from its non-disclosure. *Id.* at 591. What could be more prejudicial to one's defense than to have the instrumentality of

Said defense intentionally suppressed by police. That rendered the defense inviable as a matter of law? The duty imposed by "Brady" is not merely a negative prohibition against the prosecutor's active concealment of exculpatory evidence, it imposes an affirmative duty on the prosecution to disclose to the defense all such evidence in the possession of "those acting on the government's behalf". See *Kyles v Whitley* 115 S.Ct 1555, 1557 (1995). The first part of the test has been met. Due to the fact that officer Clark checked the 'Butcher Knife' out of the police evidence room on 5-17-04 for Calton's trial. See Appendix "XXX" app. p. 225. In response to a defense subpoena compelling the 'Butcher Knife' to be produced at trial. See Appendix "HH" app. p. 127-129. However, Police shows up in court without it and lies to the defense by stating: "There was not a 'Butcher Knife' in the police's possession at the time of trial". See Appendix "O" app. p. 73 Ln. 19. It is no answer that the prosecutor did not participate in the police's intentional suppression of evidence. See *Kyles* 115 S.Ct at 1567-68; *U.S. v Antone* 603 F.2d 546, 549 (5th Cir 1979) ("Imputing knowledge of State's investigators to federal prosecutors in determining there was a Brady violation"); *Johnson v State* 917 S.W.2d 135, 138 (Tex App. Fort Worth 1996) ("Information possessed by an agent of the state is attributed to the prosecutor"), Favorable evidence is any evidence that if disclosed and used effectively, it may make the difference between conviction and acquittal. See *Thomas v State* 841 S.W.2d 399, 405 (Tex Crim App. 1992) ("Exculpatory evidence is evidence that tends to justify, excuse or clear the defendant from alleged fault or guilt") (citing *U.S. v Bagley* 473 U.S. 667, 676 (1985)). The 'Butcher Knife' as the instrumentality of Calton's self-defense theory was not merely favorable evidence. It was an indispensable part of a viable deadly force defensive theory under Texas Penal Code § 9.32. Without the 'Butcher Knife' in the victim's hands and establishing the same was capable of causing death and/or serious bodily injury to Calton in its use or manner of use by the victim, made Calton's force disproportionate as a matter of law when Calton used deadly force by shooting the victim one time. Thus the second part of the test has

been met. Finally a determination must be made on whether if the 'Butcher Knife' had it been available at trial would it have created a probability sufficient to undermine the confidence in the outcome of the proceeding. In other words was the 'Butcher Knife' as the instrumentality of Catton's defensive theory material. See Thomas 841 sw2d at 404. To make this determination this court decides if the 'Butcher Knife' had been disclosed and used effectively would it have made the difference between conviction and acquittal. Id at 403-05. In 'Bagley' the court explained that evidence is material within the meaning of 'Brady' when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. See Bagley 493 U.S. at 682. In other words altering at least one jurors assessment regarding Catton's self-defense defensive theory. See Cane v Bell 129 S.Ct 1769, 1773 (2009). Put differently, the question is not whether Catton would more likely than not have received a different verdict with the 'Butcher Knife', but whether in its absence received a fair trial, understood as a trial resulting in a verdict worthy of confidence. See Kyles 115 S.Ct. at 1566 ("we need to be convinced only that the governments evidentiary suppression undermines confidence in the outcome of trial"); Weary v Cain 136 S.Ct 1002, 1006 (2016) ("To prevail on his Brady Claim, Weary need not show that he "more likely than not would have been acquitted had the new evidence been admitted") (Citing Smith v Cain 132 U.S. 627, 630 (2012)). In a materiality determination courts also consider the probability adverse affect the intentional suppression of the 'Butcher Knife' had on Catton's preparation and presentation of his case. See Ex Parte Mitchell 853 sw2d 1, 5 (Tex. crim. App. 1993) ("In determining materiality we also consider the potentially adverse affect that non-disclosure of East and Stroud's evidence had on the defense counsels presentation of applicants case"); Bagley 493 U.S. at 682 ("Recognizing a prosecutors incomplete response to a request for Brady material could cause defense counsel to abandon lines of independent investigation, defenses or trial strategies that it otherwise would have pursued"); Mitchell 853 sw2d at 5 ("Suppression of favorable evidence hampered defense counsels ability to prepare defense

that would have created reasonable doubt"). Catton all but abandoned his self-defense theory due to the non-disclosure of the 'Butcher Knife' and primarily focused instead on an 'Automatism Defense'. As established by his opening statement to the jury. See Appendix "ZZ" TSF VU p. 5-7 app. p. 174. A defense that was inviable as established by the jury verdict explicitly rejecting it by their finding of guilt. The intentional suppression of the 'Butcher Knife' is a 'smoking gun' of its materiality. See U.S. v Jackson 780 F2d 1305, 1311 n.4 (7th Cir 1986) ("we are doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believes it could affect the outcome of trial"); Tulamante v Romero 620 F2d 784, 788 (1980) (Good or bad faith of prosecutor may play role in materiality determination for Brady purposes"). A showing of materiality does not require demonstration by preponderance that disclosure of the 'Butcher Knife' would have resulted ultimately in Catton's acquittal [whether based on the presence of reasonable doubt or acceptance of an explanation of the crime that does not inculpate him] see Kyles 115 S.Ct 1565-66 ("The reversal of conviction is required upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict") (Citing Bagley at 682) ("adopting - formulation announced in Strickland v Washington 466 U.S. 668 (1984)). Bagley's touchstone of materiality is a reasonable probability of a different result, and the adjective is important. Id at 1566. The question is not whether Catton would more likely than not have received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Id. at 1566. The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. Which requires no demonstration that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. Id at 1566. The third as-

pect is once a reviewing court applying 'Bagley' has found a constitutional error there is no need for further harmless error review. *Id.* at 1566. The final aspect of 'Bagley' materiality concerns the prosecution which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net affect of all such evidence and disclosure when the point of 'reasonable probability' is reached. *Id.* This means the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. *Id.* at 1566. But whether the prosecutor succeeds or fails to disclose in good or bad faith. *Id.* (citing *Brady* at 87). The prosecution's responsibility for failing to disclose known favorable evidence rising to material level of importance is inescapable. *Id.* at 1567-68. The 'Butcher Knife' was material due to was an indispensable component of a viable self defense / deadly force defensive theory and had it been available for trial would have allowed Carlton to establish that the 'Butcher Knife' wielding victim in a crack cocaine fueled state was capable of causing serious bodily injury or death. 'Serious Bodily Injury' is an injury that creates a substantial risk of death or that causes death, serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. See Tex. Penal Code Section 1.07(a)(4b). Thus the 'Butcher Knife' an instrument surely capable of causing death or serious bodily injury in the victim's hands while he was under the influence of crack cocaine. See *Hicks v State* 837 SW2d 686, 690 (Tex. App. Houston [1st Dist.] 1992) ("Sgt. Crenshaw testified that the knife admitted into evidence could easily injure or kill someone") Cf *Robertson v State* 163 SW3d 730, 731, 734 (Tex. Crim. App. App. 2005) ("Testimony describing the switch blade knife not necessary to support deadly weapon finding because it was admitted into evidence and factfinder had the opportunity to examine the weapon and ascertain for itself whether the weapon had physical characteristics that revealed its deadly nature"). Also see Appendix "PP" app. p. 154-155; Appendix "RR" thru "VV" app. p. 156-162. Would bolster Carlton's contention that he was justified in using dead-

ly force to meet the victim's use or attempted use of deadly force the victim used on Calton with the 'Butcher Knife' when he tried to stab and subsequently cut Calton prior to Calton shooting him one time in response. See Tex. Pen. Code 9.01 (3) ("Defining 'deadly force' as force intended or known by the actor to cause or in the manner of its use or intended use or capable of causing death or serious bodily injury"). It is undisputed that the 'Butcher Knife' was capable of causing the impairment of a bodily member. As established by the fact that Calton's cuts to his right hand sustained when he grabbed the 'Butcher Knife' warding off the apparent attack, were substantial enough that the injury prevented Calton from writing his statement to police three days after the offense and therefore Detective Hardy wrote the statement due to Calton's injury. See Appendix "N" app. p. 66-67. Also see *Ransome v Johnson* 126 F.3d 716, 724 (5th Cir 1997) ("Recognizing the wounds to Pequero's left hand were consistent with defensive wounds as Pequero attempted to ward off the attack"). See also *Acosta v State* 179 S.W.2d 870 (Tex 1945) ("We are inclined to believe that all mankind know that death can be inflicted by a razor in the hands of a grown man"); *Cruz v State* 576 S.W.2d 841, 842 (Tex. Crim. App. 1979) ("The Knife was capable of inflicting serious bodily injury or death especially when she sustained cuts in the neck and chest"); *Hayes v State* 728 S.W.2d 804, 804 (Tex. Crim. App. 1987) ("Holding a coke bottle can be a deadly weapon, if used as a club"). At trial Calton testified: "The victim tried to stab him and cut him with a knife. That he grabbed out of the victim's hand warding off the attack that ended up in Calton's car. Where the shooting took place that was recovered by police officer". See Appendix "R" TSF V8 p. 181-182 app. p. 80. This testimony in Texas establishes an implied threat perceived by Calton and shows Calton was justified in using deadly force and if the 'Butcher Knife' had been presented at trial. Any reasonable factfinder would have found likewise. Cf *Tisdale v State* 686 S.W.2d 110, 115 (Tex. Crim. App. 1985) ("The evidence presented shows that appellant's use of the knife was by showing it to his victim. This is established by direct evidence. Appellant's actions were perceived

by Pressly as an implied threat, and the finder of fact could properly find likewise"). In Texas the manner of use is the most important criterion. See *Domingue v State* 598 SW2d 285, 286 (Tex. Crim. App. 1980) ("Scissors in the manner of its intended use was deadly weapon"). This Texas authority when read together establishes as a matter of law the victim not only had the capability to use deadly force but used deadly force for with an instrument in Texas that readily classifies as a deadly weapon. In turn makes clear the 'Butcher Knife' was material to Calton's claim. See *Perzovechia v Wainwright* 658 F.2d 337, 340 (5th Cir 1980). ("Federal Courts are generally compelled to defer to state courts interpretation of its own criminal laws, rules of evidence and rules of criminal procedure"). Sans the 'Butcher Knife' Calton had nothing to corroborate his self serving testimony: "That he was cut by the victim with a knife police had recovered". See Appendix "R" TSF V8 p.181 app. p. 80. There were no photos of Calton's injuries. No did Calton have medical records documenting his injuries. Due to Calton's combative behavior hospital officials could not treat him and had him removed from the hospital before treatment could be rendered to his hand. See Appendix "22" TSF V4 p.23 app. p.178. And of course due to the police intentionally suppressed the 'Butcher Knife' Calton could not present it at trial either as the best evidence in support of his defense. See *Arizona v Fulminante* 499 U.S. 279, 298 (1991) ("Evidence not merely cumulative if it corroborates other evidence that is unbelievable on its own"). Calton's testimony that police had recovered a 'knife' and then his failure to produce it at trial. Was the 'functional equivalent' to a 'speaking silence' that is prejudicial as a matter of law. Cf *Harris v Reed* 858 F.2d 1619 (1st Cir 1988) ("Failure to produce expert witness in support of defense theory introduced in opening statement is a 'speaking silence' that is prejudicial as a matter of law"). Especially when the prosecutor brought the matter to the jury's attention as a direct attack on Calton's failure to produce the 'Butcher Knife' when the prosecutor's closing argument implied: "That if a 'knife' had been seized by police and played a role in the offense

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Calton would have subpoenaed it and produced it at trial. See Appendix "FF" TSF v9 p.9-10 app.p.123. In light of Calton's testimony referring to a 'knife' that he alleged he was cut with that was seized by police. And his failure to produce it at trial and the state's summation bringing the same to the jury's attention. Left the jury reasonably questioning. Where is the 'knife'? Thus the jury had good reason to find Calton's self-defense theory dubious at best. Since Calton failed to produce the knife he said he was cut with and said was seized by police. Thus there was a negative inference against Calton based upon his failure to produce the 'Butcher Knife' at trial. Cf. *Stewart v Wolfenberger* 468 F3d 338, 358 (6th Cir 2006) ("The jury anticipated more than one alibi witness considering the substance of the alibi: Plus the jury surely wondered where the witnesses were, especially Mrs. Richardson who had been named on petitioner's notice of alibi and who Mr. Engle specifically mentioned at least at voir dire. There was a negative inference against petitioner based on their absence. Give the absence of these witnesses, the jury had good reason to find petitioner's alibi dubious"). Also Cf. *Id.* at 359 ("The prosecutor emphasized the lack of the alibi witnesses during the cross-examination of a witness"). Due to the deliberate suppression of the 'Butcher Knife'. Calton could not convince the jury of the reasonableness of his actions in shooting the victim one time. When Calton lacked the victim's deadly weapon to do so, which is why the jury reasonably rejected Calton's self-defense theory as established by their verdict of guilt. *Fairman v Anderson* 188 F3d 635, 648 (5th Cir 1998) (Jones, J. dissenting) ("Questioning the reasonableness of the case in part because the victim's weapon a purportedly long 'Butcher Knife' was never found"); *Vasquez v State* 2 sw3d 355, 358-59 (Tex. App. San Antonio 1999) ("Concluding the jury could find force used by defendant not necessary to protect against use of force when victim suffered multiple stab wounds and weapon allegedly used by victim was never found"). In the absence of the

'Butcher Knife' to establish the victim's use or attempted use of deadly force in turn made Catton's use of deadly force disproportionate as a matter of law. Section 9.32 provides the use of deadly force is justified in self-defense only when three conditions are present: (1) The defendant would have been justified in using force under section 9.31; (2) a reasonable person in the defendant's position would not have retreated and (3) the use of deadly force was reasonably believed to be immediately necessary to protect the defendant against another's use or attempted use of unlawful force. See Tex. Penal Code §§ 9.31 and 9.32. The trial evidence established the victim was brandishing a 'Butcher Knife' in a threatening manner, while leaning inside the driver's side window of Catton's parked vehicle, while Catton sat in the driver's side seat. See Appendix "N" app. p. 66-67; Appendix "P" TSF v8 p163-164 app. p. 74; Appendix "R" TSF v8 p. 81-182 app. p. 80. This is some evidence that Catton's could not have retreated. See *Halbert v State* 881sw2d 121, 125 (Tex. App. Houston [1st Dist.] 1994 pet. ref'd) ("Some evidence of inability to retreat is all that is necessary"); *Hinojosa v State* 744sw2d 319, 322 (Tex. App. Corpus Christi 1988, pet. ref'd) ("Jury could have concluded that defendant did not have clear avenue of escape where evidence showed the defendant was in open lot facing an armed aggressor"). The 'Butcher Knife' an instrument capable of causing death or serious bodily injury was the necessary component to establish the victim's use and attempted use of deadly force he used against Catton. Establishing its materiality to the defense beyond a reasonable doubt. The materiality of the 'Butcher Knife' is undisputedly established due to had it been available for trial would bolster a defense that would not merely raise doubt about Catton's guilt. If believed by jury a § 9.32 defense in Texas directly exonerates an accused. Cf. *Montgomery v Peterson* 846 F2d 407, 415 (7th Cir 1988) ("Recognizing the clerk's testimony provided petitioner with an untainted alibi defense. As such, it did not merely raise doubt about petitioner's guilt, if believed by the jury would have directly exonerated him of the crime."). Although the 'Butcher Knife' tends to exonerate Catton. It is not necessary to establish a Brady violation that

the exculpatory evidence be certain to exonerate, only that it may do so if used effectively. See Bagley 473 U.S. at 676; Thomas 841 S.W.2d at 405 n.8 ("To require that favorable evidence conclusively exonerate a defendant would be inconsistent with Brady because it would establish such a high standard of materiality as to foreclose all but the egregious case of withheld evidence"). It is fundamental to the discovery rule of Brady, *supra* that the materiality of a failure to disclose favorable evidence must be evaluated in the context of the entire record. See Bagley 473 U.S. at 683 and there must be an examination of the error in the context of the overall strength of the state's case. *Id.* This court should take judicial notice of the complete statement of facts on file herein to permit the entire record review. It is Carlton's burden to show in light of all the evidence, including the state's evidence in particular the false '3shot Theory' and 'made up motive'. As well as the evidence untainted by the Brady violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding guilt. *Id.* at 682. In light of the state's fabricated '3shot Theory' and 'made up motive'. The state's trial evidence resembles a house of cards built on the jury crediting the state's sponsored false '3shot Theory' and 'made up motive'. Rather than Carlton's self-defense theory that would have buttressed to viability had the 'Butcher Knife' been available for trial. Cf. Weary 136 S.Ct. at 1006 ("Beyond doubt, the newly revealed evidence suffices to undermine confidence in Weary's conviction. The state's trial evidence resembles a house of cards built on the jury crediting Scott's account rather than Weary's alibi") (citing *U.S. v. Agurs* 427 U.S. 97, 113 (1976) ("If the verdict is already of questionable validity, additional evidence of relative minor importance might be sufficient to create reasonable doubt")). Also see *Mitchell* 853 S.W.2d at 5 ("If verdict is weakly supported by the record it is more likely to be affected by the non-disclosure of favorable evidence, such as that of shroud, than if it was strongly supported"). Even if the jury armed with knowledge of the 'Butcher Knife' the instrumenta-

lity of Calton's self-defense at trial as new evidence could have voted to convict Calton, this court or any other reasonable jurist, would have no confidence that it would have done so in light of the fabricated '3shot Theory' and 'made up motive'. Cf. Weary 136 S.Ct. at 1007 ("Even if the jury - armed with all of this new evidence - could have voted to convict Weary, we have no confidence that it would have done so") (Citing Smith v Cain 132 S.Ct. 627, 635 (2012)). Because the verdict was weakly supported by fabricated facts knowingly proffered by the state and the 'Butcher Knife' was the linchpin of a viable Tex. Pen. Code § 9.32 defense. Establishes Calton has carried his burden to establish the weakness of the state's case below. See Petition infra at pages 31-36. In turn will allow this court to reasonably conclude failure to disclose the 'Butcher Knife' created a probability sufficient to undermine confidence in the outcome of Calton's trial. See Kyles 115 S.Ct. at 1569 ("In this case disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.") The genius of Brady and perhaps the reason it has lent its name to whole category of constitutional claims lies in its recognition that certain material conduct [such as the intentional suppression of the 'Butcher Knife' here by Police] renders the trial 'ipso facto' substantively unfair. See Brady 373 U.S. at 87-88. where the misconduct is present post-conviction relief is mandatory. Id. An individual may not be imprisoned where the fairness of his trial is in question. Id. at 86-87.

The Probable Impact of The 'Butcher Knife' With The Exposure of The False '3shot Theory' and Sans the 'made up motive' Upon The Persuasiveness of The State's Case As A Whole Now In That Light

The state's case was based on a 'made up motive' and a false '3shot Theory' the state knew was false that was hinged on the victim's misleading testimony. The victim testified: "Calton opened his car door, stepped out in front of the victim, put the gun over the victim's eye and fired the first shot. The victim then testified that he went down on one knee. And

While on one knee Catton placed the gun up to the back of his head and fired a second shot. Then while he was on his back. The victim testified that Catton walked up, stood over him and stuck the gun up to his head and fired a third shot. See Appendix "NN" TSF V3 p.26-27 app. p.151. When asked how many times he was shot the victim lied when he stated: "Three Times" Id. at p.27 app. p.151. The emergency room doctor's testimony establishes the victim was treated for one gunshot wound. See Appendix "S" TSF V6 p.72 app. p.81. As an impermissible plea for sympathy the victim also lied and testified that he lost consciousness. See Appendix "OO" TSF V3 p.47 app. p.151. Ten minutes after the offense in response to paramedic Joe Snow questions. The victim denied a loss of consciousness. And when the paramedic asked how many times he was shot? The victim answered: "I think I heard one shot". See Appendix "LL" TSF V6 p.53 app. p.200. The victim's excited utterance and/or dying declaration is the most reliable evidence concerning the amount of shots fired and exactly how many times the victim was shot. And the same corroborates the doctor's testimony that the victim was treated for one gunshot wound. See Appendix "S" TSF V6 p.72 app. p.81. In turn also exposes the state's fraudulent '3shot theory'. How can a denial of "loss of consciousness" and "thinking you heard one shot" morph into the victim's trial testimony paraphrased above? One thing for certain the gunshot wound did not affect the victim's ability to recall the offense. Due to after the victim made the statement "denying a loss of consciousness" and thinking he heard one shot". The paramedic determined the victim was alert, lucid and oriented at the time. See Appendix "LL" TSF V6 p.53 app. p.200. Establishing the victim's gunshot wound did not affect his ability to recall the offense and making clear the victim's testimony was the willful intent to mislead. See Rules 115.5(c) at 1571 ("Evolution over time of a given witness's description can be fatal to its reliability"). The state in an attempt to preserve its false '3shot theory' put on the record the following morning after the victim testified by stating: "Everette Angle was sick yesterday after he testified. He has now been admitted to the hospital to have an emergency surgery". See Appendix "ZZ" TSF V4 app. p.173. This lie by the state was exposed to the truth by state's attorney Charles Braderberg statement during summations stating:

"Chuck Angle who is sitting back here". See Appendix "FF" TSF V9 p.8 app. p.122. Thus after both sides had rested and closed, with the defense having having no chance to correct the fabricated '3shot Theory' hinged on the victim's false testimony. The victim recovers from his alleged sudden sickness and hospitalization. Additionally subpoenaed an irrelevant set of medstar Ambulance service medical records for treatment rendered to the victim on 2-16-02. See Appendix "mmm" app. p.201-203. In addition to the relevant 4-23-02 offense date medical records. See Appendix "NNN" app. p. 204-208. The State's diabolical plan was to provide the irrelevant 2-16-02 records to Calton, which is how Calton came about the victim's medical records for treatment rendered to the victim over two months before the offense. Which begs the question if the state was not intending to conceal the relevant 4-23-02 medical records. Then why did the state provide Calton the victim's medical records dated 2-16-02 concerning irrelevant health issues the victim had on 2-16-02 and not concerning his gunshot wound treatment rendered on 4-23-02. The reason the state suppressed the relevant 4-23-02 medical records was due to said medical records memorialized the victim's statement to the paramedic: "I think I heard one shot". See Appendix "NNN" app. p. 204. Had the defense been timely provided the relevant 4-23-02 medical records prior to the victim's testimony and alleged hospitalization, would have allowed Calton to impeach and correct the victim's false testimony. The state's possession of the victim's medical records and providing Calton a copy of the same for treatment rendered to the victim on 2-16-02, which was over two months before the offense date of 4-23-02 is a smoking gun establishing prosecutorial misconduct. But there's additional proof the state sponsored the false '3shot Theory'. The failure to call paramedic Joe Snow as a state's witness drives this point home. Mr. Snow was the author of the relevant 4-23-02 medical records that refutes the states fabricated false '3shot Theory'. Which was the reason the state did not call Mr. Snow as a state's witness. The state closed on 5-11-04 before calling Mr. Snow and stated: "Mr. Snow is

Supposed to be here. He's the paramedic that attended the scene". See Appendix "000" TSF V3 p.162 app. p.209. The state did not intend to call Mr. Snow and that's why the state did not exercise due diligence to compel Mr. Snow's attendance pursuant Tex. Code Crim. Pro. Art. 24.12. Knowing the state had something to hide is why Calton subpoenaed Mr. Snow as a defense. See Appendix "PPP" TSF V6 p.31-32 app. p.210. Also see U.S. v Jordan 49 F3d 152,158 (5th Cir 1995) ("recognizing both parties implied that failing to call witness indicates that the witness would hurt the others case respectively"). It wasn't until Mr. Snow testified late in trial that Calton finally received the relevant 4-23-02 medical records. As established by Calton's statement upon belated receipt of the same at trial: "Your honor, I was supposed to get this I never received it". See Appendix "PPP" TSF V6 p.36 app. p.211. However Calton was unable to effectively utilize the medical records due to the victim's alleged hospitalization. The state not only suppressed records that would have exposed the falsity of its case. The state compounded the error by arguing the false '3shot Theory' during summations stating: "Defendant comes around shoots him once in the face. stands over him, shoots him two more times". See Appendix "QQQ" TSF V9 p.36 app p.212. Thus rather than a mere omission, there was an additional error of commission. The state's argument during summations referring to false testimony reinforced the deception. See U.S. v Barham 595 F2d 231, 243 n.17 (5th Cir 1979). The state's closing argument makes clear it hinged its case on the false '3shot Theory'. See Flemming v State 949 SW2d 876, 881 (Tex App. Houston [14th Dist] 1997) ("Recognizing closing argument is area where trial strategy is most evident"). Referring to fabricated facts to the jury in summations is a violation of Due Process within itself. See Chapman v California 386 U.S. 18 (1967). The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence. See Miller v Pate 386 U.S. 1, 6 (1967) ("Deceiving prosecutor's consistent and repeated misrepresentation that paint stains were actually blood"). In addition to the false '3shot Theory' the state also fabricated a 'made up motive' it knew was false. By eliciting false testimony alleging the reason Calton committed the offense was due to word had got back to Calton that the victim had allegedly confirmed

to a detective of Calton's possible involvement in a murder. However the victim's testimony at Calton's "Hearing To Deny Bail" establishes that Calton's name never came up during the victim's and detective's conversation. The victim was cross-examined: Q. "Did detective Boetcher or detective Myers ever mention anything to you about Calton?" A. "No"; Q. "Never mentioned his name?" A. "No"; Q. "You ever mention Allen's name to them?" A. "No". See Appendix "RRR" BSF 5-1-02 V. 1 of 1 p. 80 app. p. 213. Prosecutor David Haterman represented the state at Calton's "Bail Hearing" and again at Calton's trial and knew or should have shown the victim's testimony establishing motive was false. Id at p. 81-82 app. p. 214-215. Additional proof the motive was false is the fact Kevin Black Menefee who allegedly confirmed to Calton the victim had spoken to police about Calton possible involvement in a murder lived with the victim at the time and received mail at the victim's residence as established by F.W.P.D. search warrant return #8960. See Appendix "TT" app. p. 160. The victim testified that Mr. Menefee was like a roommate and was at the victim's residence most of the time. See Appendix "SSS" TSF V3 p. 56 app. p. 216. Assuming arguendo Calton's name did in fact come up in the conversation between the victim and the detective and Mr. Menefee found out about the victim's mentioning of Calton's possible involvement in a murder to the detective would Mr. Menefee who lived with the victim at the time of the offense go to Calton and tell him about the matter? In light of Mr. Menefee's living arrangements. Highly unlikely. The 'made up motive' was also detrimental to Calton's defense on par with the '3 Shot Theory'. With both being predicated on fake facts. A motive when presented to a jury tends to raise an inference that the accused had a motive to commit the crime alleged. See *Cone v State* 786 SW2d 338, 349-50 (Tex Crim App 1990). A motive is also a circumstance indicating guilt. See *Harris v State* 727 SW2d 537, 542 (Tex. Crim. App. 1987). At trial the victim also lied about his inclination to possess a firearm. Calton asked the victim: Q. "In the five years that you lived at 1744 Wiseman Ave. has there ever been a firearm at the residence?" A. "No" See Appendix "TTT" TSF V3 p. 62 app. p. 217. Calton knew this was a lie and tried to refresh the victim's memory with

this question; Q. "During the search warrant execution at the residence no gun was ever found?" State's Attorney Hagerman objected Id at p.62 app.p.217. Mr. Hagerman also knew the victim was lying, hence the objection. Due to Mr. Hagerman provided the defense the search warrant returns establishing the victim was a gun toting prolific crack cocaine dealer who was shot one time in self-defense with his own gun. See Appendix "Q" TSF V8 p.209 app. p.75; Appendix "RR" thru "VV" app. p.157-162; Appendix "UUU" PSF 1-16-04 U.1 of 1 p.8-9 app. p.218-219. Also see *Cesar v State* 939 SW2d 778, 781 (Tex. App. Houston [14th Dist] 1997) ("Appellant engaged in a fight with victim, appellant lost his own gun in the struggle. However appellant was able to obtain the victim's gun in the struggle and shot victim with victim own gun"); *Van Brackle v State* 179 SW3d 708, 711-12 (Tex. App. Austin 2005) ("Appellant wrestled with victim for victim's gun, got control of victim's gun and shot victim with victim's own gun"). Finally the only eye witness to the offense Craig Tate and the victim are both prolific crack cocaine dealers, users and abusers. Mr. Tate was caught by police discarding a used syringe noted as Exhibit #1 in a police report. When Mr. Tate was designated as arrested person #3 in the same police report. Memorializing a search warrant execution at the victim's residence on 4-11-02 days within the 4-23-02 offense date. See Appendix "VVV" app. p.220-223. The victim's medical records for his gunshot wound treatment on 4-23-02, proves cocaine was in the victim's system the night of the offense. See Appendix "PP" app. p.154-155. Cf *Castereda v State* 23 SW3d 216, 219 (Tex. App. El Paso 2000) ("Prosecutor conceding that admitted cocaine use on the night in question effects credibility"). With the state's false '3 shot theory' and 'made up motive' now exposed to the truth. With this Court evaluating the same in light of the probable impact of the 'Butcher Knife' at trial upon the persuasiveness of the state's case that's now been exposed for what it was i.e. a fraud upon the court. The 'Butcher Knife' at trial and admitted into evidence would have allowed the jury to examine it and determine for themselves its deadly nature. In turn affording the jury to reasonably find Calton was justified in using deadly force. Which establishes the 'Butcher Knife's critical and material nature to the defense.

Which substantiates his Brady violation contention above. See Hicks 837 S.W.2d at 690 ("Sgt. Crenshaw testified that the knife admitted into evidence could easily injure or kill someone"). Cf. Robertson 163 S.W.3d at 731, 734 (Testimony describing the switchblade knife not necessary to support deadly weapon finding because it was admitted into evidence and fact-finder had the opportunity to examine the weapon and ascertain for itself whether the weapon had physical characteristics that revealed its deadly nature").

A Strong Showing of Highly Probative Facts To A Defensive Theory If Accepted By Jury Results In Acquittal Meets Actual Innocence Exception

Calton's constitutional claim is not based on his innocence, but rather on his contention that the suppression of evidence by the police denied him all of the parity offered to criminal defendants by the constitution. See Schlup 513 U.S. at 314. Thus Calton is offering his claim of innocence only to obtain post conviction hearing on the merits of his constitutional claims bringing him within a 'narrow class of cases' which implicate a fundamental miscarriage of justice. Id. at 313-316. In order for successive petition to survive dismissal Calton must show "the facts underlying the claim if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. See Johnson v Oretke 442 F.3d 901, 911 (5th Cir 2006) (citing § 2244(b)(2)(B)(ii)). This standard has been described as a "strict form of innocence roughly equivalent to this court's definition of 'innocence' or manifest miscarriage of justice in 'Sawyer v Whitley' Id at 911 (citing Sawyer v Whitley 112 S.Ct 2514 (1992)). This court and the 5th circuit said to meet the fundamental miscarriage of justice exception a petitioner must make a persuasive showing that he is actually innocent of the charges against him. See Coleman v Thompson 501 U.S. 722, 750 (1991); Ward v Cain 53 F.3d 106, 108 (5th Cir 1995). To establish a fundamental miscarriage of justice a petitioner must show a colorable claim

for actual innocence. *Schlup, supra*; *Bousley v U.S.* 523 U.S. 614, 623 (1991) ("Actual Innocence" means "Factual Innocence" not merely legal insufficiency); *Earp v Oronski* 431 F3d 1158, 1163 (9th Cir 2005) ("In stating a 'colorable claim', a petitioner is merely required to allege facts, which if true would entitle him to relief"). Essentially, the petitioner must show as a factual matter, he did not commit the crime for which he was convicted. See *Fairman v Anderson* 188 F3d 635, 644 (5th Cir 1999); *Sawyer* 112 S.Ct at 2519 ("In order to satisfy the 'miscarriage of justice' test, the petitioner must supplement his constitutional claim with a colorable showing of factual innocence"). To satisfy the "factual innocence" standard, a petitioner must establish a fair probability that, considering all the evidence now available, the trier of fact would have entertained a reasonable doubt as to defendant's guilt. *Id.* at 2517-19 ("Holding that 'factual innocence' means a fair probability that, in light of all the evidence, the trier of facts would have entertained a reasonable doubt as to defendant's guilt"). Calton's defense at trial was the Texas justification defense of self-defense. In Texas, Texas Penal Code § 9.02 explains that it is a defense to prosecution that the conduct in question is justified. See *Giesburg v State* 984 SW2d 245, 248 n.2 (Tex Crim App. 1998) ("Noting that justifications for conduct are set out in Chapter Nine of Texas Penal Code"). Texas penal Chapter Nine outlines justifications absolving a defendant of criminal responsibility. Such as public duty, necessity, self-defense and defense of a third person. See *Id.* Also see Texas Penal Code §§ 9.02, 9.21-22, 9.31-9.33. In support of Calton's contention that he is 'factually innocent', Pursuant to self-defense theory at trial. That is now bolstered by the newly discovered 'Butcher knife' the instrumentality of said defense. Is *Finley v Johnson* 243 F3d 215 (5th Cir 2001). In 'Finley' the accused pointed to new evidence which is both undisputed and highly probative of his affirmative defense of 'Necessity' under Texas Penal Code § 9.22. which would have significantly bolstered 'Finley's' necessity defense. See *Finley* 243 F3d at 221. Although the district court concluded that 'Finley' was unable to meet the miscarriage of justice exception because he never denied that he abducted the victim. The district court reasoned that merely showing facts

which supported a defense of necessity which the jury might or might have accepted does not meet the requirement for showing 'Actual Innocence' because there is no claim the defendant did not actually commit the acts which he is accused. Id at 220. The 5th Circuit found that a troublesome proposition due to Finley's defense was that, although he committed the acts alleged against him, he was innocent of the crime of Kidnapping because he reasonably believed his acts were immediately necessary to avoid imminent harm to Tower's wife and daughter. Id at 220. Under these circumstances, the 5th Circuit held, the district court's conclusion that 'Finley' cannot show 'Actual Innocence' seems too restrictive interpretation of the requirement. Id. at 221. The 5th Circuit concluded that showing facts which are highly probative of an affirmative defense which if accepted by a jury would result in an acquittal constitutes a sufficient showing of 'Actual Innocence' to exempt petitioner's claim from procedural default. Id at 221-222. Here Calton conceded that he committed the act. However, Calton is actually innocent of attempted murder. Due to Calton had justification to commit the act and thus he is absolved of criminal responsibility under Tex. Per. Code §§ 9.31, 9.32. Due to the fact prior to shooting the victim the victim first tried to stab Calton and actually cut Calton with the 'Butcher Knife' in question. When Calton grabbed the blade of the 'Butcher Knife' warding off the attack. see Appendix "R" TSF V8 p181-182 app. p. 80. Also see Ransome v Johnson 126 F3d 716, 724 (5th Cir 1999) ("Recognizing the wounds to Peguero left hand were consistent with defensive wounds as Peguero attempted to ward off the attack"). Calton's self-defense theory at trial that's now bolstered by the 'Butcher Knife' to the extent that Calton has met the actual innocence exception of § 2244 (b)(2)(B) is also supported by Fairman v Anderson, supra. In 'Fairman' the petitioner's claim of self-defense claim at trial was supported years later by an eye witness who recanted his earlier trial testimony to the contrary. See Fairman 188 F3d at 644. The 5th circuit held that the petitioner satisfied the 'Ward', supra threshold for showing actual in-

nocera because belief in the eye witness testimony confirms the petitioner's claim of self-defense such that it was not just possible but more likely than not no reasonable juror would have convicted him. Id at 644. Had the jury been able to examine the 'Butcher Knife' and indeed knew that a 'Butcher Knife' played a role in the offense, would have directly supported Calton's self-defense theory at trial to the extent that it was not just merely more likely than not but highly probable no reasonable juror would have convicted Calton. Cf Fairman 188 F3d at 644. Especially in light of Calton's testimony where he alleged that police had recovered the 'Butcher Knife' the victim cut him with prior to Calton shooting the victim one time in self-defense see Appendix "R" TSF V8 p.181-182 app. p.80. Coupled with the fact that the state's argument during summations implied if a 'knife' was seized by police and played a role in the offense, Calton would have had a subpoena issued for it and produced it at trial. See Appendix "FF" TSF V9 p.9-10 app. p.123; Also see Fairman 188 F3d at 648 (Jones, J. dissenting) ("Questioning the reasonableness of the case in part because the weapon purportedly a long 'Butcher Knife' the victim allegedly possessed was never found"); Vasquez v State 2 SW3d 355, 358-59 (Tex. App. San Antonio 1999) ("Concluding the jury could find force used by defendant not necessary to protect against victim's use of force when victim suffered multiple stab wounds and weapon allegedly used by the victim was never found."). In light of the state's fraudulent case that's been exposed herein. See petition, supra p.30-36. The 'Butcher Knife' is the new critical physical evidence that establishes Calton's factual innocence in light of the due process constitutional error and thus meets the requisite probability under under § 2244 (b)(2)(B) that Calton is actually innocent under his self-defense theory. Cf Fairman 188 F3d at 644 (Quoting Schlup at 327) ("To mount a claim of Actual Innocence petitioner must support his allegations of constitutional error with reliable evidence, whether it be exculpatory, scientific, trustworthy eyewitness accounts or critical

physical evidence that wasn't presented at trial"); Kirkpatrick v Whitley 992 F2d 491, 495 (5th Cir 1993) ("Kirkpatrick's claim of self-defense would establish a lack of criminal responsibility under the announced in Sawyer v Whitley 945 F2d 812 (5th Cir 1991) aff'd 112 S.Ct 2514, 2522 (1992). Additionally under Federal Law a due process violation voids the conviction and thus establishes actual innocence. See Ex Parte Young 418 Sw2d 824, 826 (Tex crim App 1967) ("A judgment of conviction obtained in violation of due process is void for want of jurisdiction of the court to enter such judgment") (Citing Fay v Noia 372 U.S. 391, 414 (1963) ("That the complaint is of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void") ("Quoting Moore v Dempsey, supra). Making clear a void conviction is the functional equivalent of being convicted under 'void statute'. Cf Reyes - Requena v U.S. 243 F3d 893, 903-04 (5th Cir 2004) ("Although courts have framed the Actual Innocence factor differently the incarceration of one whose conduct is not criminally inherently results in a complete miscarriage of justice"). Although Catton discovered the newly discovered evidence i.e. the 'Butcher Knife' on 3-29-17. Due to meeting the miscarriage of justice exception above. AEDPA's one year limitation is inapplicable. See Mc Quiggin v Perkins 133 S.Ct 1924, 1934 (2013) ("To invoke the miscarriage of justice exception to AEDPA's statute of limitations a petitioner must show it is more likely than not no reasonable juror would have convicted him in light of the new evidence")

Conclusion - Prayer

The Petition For Writ of Habeas Corpus should be granted or the Petition should be transferred for hearing and determination by a district court.

Verification

Respectfully Submitted

Allen "F" Catton

I declare under the penalty of perjury pursuant to 28 USC § 1746 that the foregoing facts are true and correct and are based on personal knowledge
 Executed on Date: July 13, 2020 Allen "F" Catton