

No. **21-6879**

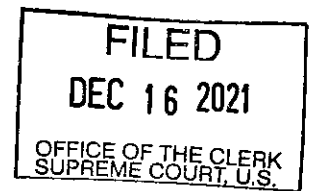
ORIGINAL

In The

Supreme Court of The ~~United~~ States

In re

Allen "F" Catton



Omnibus Petition Under Section 1651 For Appellate Review and Section 2241 Petition For Writ of Habeas Corpus For Appellate Review of The Fifth Circuit U.S. Court of Appeals Appeals Denial of Leave to File A successive writ

Allen "F" Catton #1123880
Connally Unit
899 FM 632
Kenedy, Texas 78119

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Omnibus Petition under Section 1651 For Appellate Review and Section
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Allen "F" Calton #11233880
Connally Unit
899 FM 632
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Life Sentence Case

Questions Presented

Allen "F" Calton [Hereafter referred to as Calton] habeas petition presents exceptional circumstances. Since Calton's conviction for attempted murder. New substantial evidence of Calton's innocence has been discovered. In particular a 'Butcher Knife' which was the instrumentality of Calton's Self-Defense Theory at trial. Despite this substantial new evidence of his innocence, no court has ever held a hearing to assess this new evidence that establishes Calton's innocence.

The Questions Presented are:

1. Whether transfer to the district court for hearing pursuant to the court's original habeas jurisdiction is warranted in the exceptional Life sentence case where the petitioner has raised a substantial case of innocence. Yet no state or federal court has held an evidentiary hearing to examine his new evidence?
2. Whether transfer to the district court for hearing pursuant to the court's original habeas jurisdiction is warranted in the exceptional Life Sentence case where the petitioner can establish 'Cause' and 'Prejudice' for failing to raise the claim earlier. Yet no state or federal court has held an evidentiary hearing to examine his new evidence or resolve the fact issues?
3. When state courts have adopted the Federal miscarriage of Justice exception as a guide as their own, in resolution of subsequent state applications. When a petitioner establishes a prima facie showing of innocence in the state courts to have his otherwise barred constitutional claims reviewed on the merits there. Does the Federal Court accord deference and the presumption of correctness to those findings made in the state court under this court's precedent and AEDPA?

Parties To The Proceedings Below

This petition stems from a habeas Corpus proceeding in which petitioner, Allen "F" Calton [hereafter referred to as Calton], was the movant before the United States Court of Appeals for the Fifth Circuit. Calton is a prisoner sentenced to Life and in the custody of Bobby Lumpkin, the Director of the Texas Department of Criminal Justice.

List Of All Proceedings In State and Federal Courts

- (1) Court: Texas Court of Criminal Appeals
Nature of Proceeding: Petition For writ of Habeas Corpus
Docket Number: 65,590-22
Caption: Ex Parte Allen "F" Calton
Judgment Date: 7-12-17
- (2) Court: U.S. Supreme Court
Nature of Proceeding: Petition For writ of Certiorari
Docket Number: No. 20-5125
Caption: In re Allen "F" Calton
Judgment Date: 10-5-20
- (3) Court: U.S. Court of Appeals Fifth Circuit
Nature of Proceeding: Original Petition For writ of Habeas Corpus converted to a motion For Leave To file successive Petition
Docket Number: No. 21-10295
Caption: In re Allen "F" Calton
Judgment Date: 4-26-21

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Petition For A Writ of Habeas Corpus

Petitioner Allen "F" Catton respectfully requests that this Justice transfer for hearing and determination his application for habeas corpus to the district court in accordance with his or her authority under 28 U.S.C. § 2241 (b)

Opinions Below

The Opinion of The United States Fifth Circuit Court of Appeals denial of Catton's Petition For writ of Habeas Corpus under 28 U.S.C. § 2241. That was deemed by the Court as an application For Leave To file a successive petition in the District Court and denied on 4-26-21 appears in petitioner's Affidavit Index of Appendices In Support of His Petition For writ of Habeas Corpus [Hereafter referred to as "app"] at Appendix "A" app. p. 1-3 and is unpublished

The Opinion of the State of Texas Court of Last Resort in Criminal Law matters appears at Appendix "B" app. p. 4 and is unpublished

Statement of Jurisdiction

The order of the Fifth Circuit Court of Appeals denying authorization to file a successive petition was entered on April 26, 2021. The Circuit Justices jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the U.S. Constitution.

Relevant Constitutional and Statutory Provisions

The Fourteenth Amendment of The United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The Eighth Amendment of The United States Constitution states, in relevant part: "Nor cruel and unusual punishments inflicted."

28 U.S.C § 2241 (2021) Appendix "C"

28 U.S.C § 2244 (2021) Appendix "D"

28 U.S.C § 2254 (2021) Appendix "E"

28 U.S.C § 1651 (2021) Appendix "ZZZ"

Statement Of Facts

(A) Facts Establishing The materiality of The 'Butcher Knife' To The Defense

(1) On 4-24-02 officer Raley of the City Of Garland Police Department [Hereafter Garland P.D.] seized a 'Butcher Knife' found in the vehicle Calton fired the shot from in self-defense. That struck the victim after the victim cut Calton with the 'Butcher Knife' while Calton sat in his parked vehicle. See App. "F" app. p. 10

(2) The 'Butcher Knife' seized by police belonged to the victim Everett Charles Angle [Hereafter victim] he was brandishing toward Calton in a threatening manner while leaning and reaching inside the driver's side window of Calton's parked vehicle while Calton sat in the driver's side seat. See App "G" app. p. 11-12, App "H" (Calton's Affidavit) app. p. 14-15; App "I" TSFV8 p. 163-164 app. p. 19

(3) The 'Butcher Knife' was the instrumentality of Calton's "Self-Defense

theory the jury was charged on at trial. See App. "H" app. p. 14-15 Ln 5-7 App. "J" TSF V8 p. 223-224 app. p. 24

(4) Due to the victim while appearing to Calton to be arguing over money. Was brandishing a sharp object toward Calton in a threatening manner. While leaning and reaching through the driver's side front window of Calton's parked vehicle. While Calton sat in the driver's side front seat. See App. "G" app. p. 12; App. "I" app. p. 19 TSF V8 p. 163-164 app. p. 19; App. "H" app. p. 14-15 Ln. 5-7

(5) In response to this apparent attack Calton grabbed the blade of the 'Butcher Knife' and was cut by the victim in the process. See App. "G" app. p. 12; App. "H" app. p. 14-15 Ln. 5-7

(6) In response to being cut by the victim with the 'Butcher Knife' Calton shot the victim one time in self-defense. See App. "H" app. p. 14-15 Ln. 5-7; App. "K" app. p. 26; App. "L" app. p. 27

(7) The materiality of the 'Butcher Knife' seized by police is established due to the fact that it would have corroborated Calton's self-serving statement to police. Where Calton stated: "The victim was reaching inside of Calton's vehicle with a sharp object that Calton grabbed and was cut with on his right hand. See App. "G" app. p. 12.

(8) The materiality of the 'Butcher Knife' seized by police is further established due to it would have corroborated Calton's self-serving testimony at trial where Calton testified: "The victim was trying to cut me with a knife that I grabbed the blade of and was cut by that was recovered by police. See App. "K" TSF V8 p. 181-182 app. p. 26

(9) The jury was charged on self-defense but the defense could not be established nor invested with viability sans the 'Butcher Knife' See App. "J" TSF V8 p. 223-224 app. p. 24

(10) Especially in light of the state's cross-examination of Calton and its closing argument both referring to the matter and implying that if a 'Butcher Knife' existed and played a role in the offense. Calton would

have issued a subpoena for the 'Butcher Knife' and presented it at trial. See App. "K" TSF V8 p. 215-216 app. p. 21; App. "M" TSF V9 p. 9-10 app. p. 29

(11) The materiality of the 'Butcher Knife' is also established by the fact that had it been admitted into evidence would have allowed the jury to ascertain for themselves the deadly nature of the 'Butcher Knife'. Had the jury been able to examine the 'Butcher Knife' for themselves at trial. Would have allowed the jury to reasonably conclude that the victim did in fact have the capability of causing serious bodily injury or death to Catton. While possessing an instrument such as a 'Butcher Knife'. See App. "G" app. p. 12; App. "K" app. p. 26 TSF V8 p. 181-182

(12) In other words a defendant in Texas cannot establish the justification defense or self-defense/deadly force unless the defendant shows that the victim was capable of and first used or attempted to use deadly force against the defendant to justify the defendant's response thereto. The ability to admit an instrument such as a 'Butcher Knife' into evidence would have allowed an expert's testimony to establish its deadly nature. See App. "G" app. p. 12; App. "K" app. p. TSF V8 p. 181-182 app. p. 26

(13) In turn makes clear that since the jury was foreclosed from having the opportunity to personally examine the 'Butcher Knife' for themselves. Precluded their opportunity to reasonably determine whether the victim even had the ability to use or attempt to use deadly force against Catton as Catton had alleged at trial. To justify Catton's use of deadly force in response to the victim's use or attempted use of deadly force. See App. "G" app. p. 12; App. "K" TSF V8 p. 181-182 app. p. 26

(14) Since a 'Butcher Knife' is not a deadly weapon per se in Texas, the defendant's burden at trial includes establishing that a victim did indeed have the capability to use or attempt to use deadly force. In the defendant's attempt to establish his justification for the use of deadly force against another. The defendant's burden then in turn includes establishing the victim was not only capable of using or attempting to use deadly force. But also used or attempted to use deadly force, To justify defendant's use of deadly force. See App. "G" app. p. 12;

App. "K" TSF V8 p. 181-182 app. p. 26

(15) Due to a 'Knife' in Texas is not a deadly weapon per se essentially requires that a showing must be made to establish a deadly characteristics and deadly nature nature. Sans the 'Butcher Knife's' at trial Catton was foreclosed the opportunity to do so. Driving home the point that the 'Butcher Knife' was material to Catton's defense and makes clear Catton's defense was prejudiced due to the suppression of the 'Butcher Knife' by police. Precluded the jury from finding Catton not guilty due to having justification for committing the offense due to meeting the use or attempted use of deadly force the victim used with his own use of deadly force. Catton used by shooting the victim one time.

(B) Facts Supporting The Intentional Suppression of The 'Butcher Knife'

(16) Concealed from Catton by the state and Police was that the 'Butcher Knife' had been in the possession of the Garland P.D. up until 2-17-05 which was at least (9) nine months after Catton's 5-10-04 thru 5-21-04 trial. See App. "N" app. p. 31-51; App. "H" app. p. 15-16 Ln. 9-10; App. "H" app. p. 17-18 Ln. 16-17; App. "N" app. p. 35-36

(17) On 5-13-04 in the middle of trial during the testimony of Garland P.D. Records Custodian Cynthia Trimbell. Catton received the arrest records that contained "The Police Report" that memorialized unbeknownst to Catton that Garland P.D. had seized a 'Butcher Knife'. See App. "O" TSF V5 p. 37-38 app. p. 53; App. "P" app. p. 54-111. In particular see Id at p. 58 and p. 98

(18) Later that same day on 5-13-04 Catton had a subpoena issued for the Garland P.D. Evidence Custodian to produce the 'Butcher Knife' in court in - starter. To permit Catton to use the 'Butcher Knife' at trial as the instrumentality of his self-defense defensive theory. See App. "H" app. p. 14-15 Ln. 8-9 App. "Q" app. p. 112-114

(19) The Garland P.D. evidence custodian at the time in question namely Police officer Michael G. Clark #2769 shows up at trial sans the 'Butcher Knife' on 5-17-04 and states: "There is no 'Butcher Knife' in possession

Of Police. 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 Catton for. See App. "H" app. p. 18 Ln. 17.

(20) 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. records custodian Shelli Pryor's affidavit dated 3-20-17. See App. "N" app. p. 35-36. Also see "The Polke Report" App. "F" app. p. 10; App. "P" app. p. 58 and 98

(21) Not only is it well established that the 'Butcher Knife' was in possession of Garland P.D. before, during and for at least (9) nine months after Catton's trial. Garland P.D. records custodian Shelli Pryor prepared a "Chain of Custody Advance sheet" from the Garland P.D. pertaining to the 'Butcher Knife' in question. This evidence establishes that police officer Michael G. Clark #2769 took possession of the 'Butcher Knife' on 5-17-04. Alleging at that time to Garland P.D. evidence room personnel that he was required to produce the 'Butcher Knife' at Catton's Trial. See App. "R" app. p. 115-116.

(22) Catton could not make a viable open records request to obtain the "Chain of Custody Advanced sheet" pertaining to the 'Butcher Knife' in question or any other viable open record request for that matter before 2017. At which time Deadrion Tutt came into Catton's life and offered to help with legal matters in 2018 and made an open record request with the Garland P.D. on 7-16-18. See App. "H" app. p. 13-14 Ln. 3-4; App. "S" app. p. 117.

(23) Officer Clark #2769 after taking possession of the 'Butcher Knife' on 5-17-04 for the purpose of producing it at Catton's trial as subpoena compelled in compliance to the subpoena Catton had issued for the production of the 'Butcher Knife' at trial instanter. See App. "Q" app. p. 112-114

(24) Officer Clark #2769 did not produce the 'Butcher Knife' at trial

on 5-17-04 or at any time during trial as subpoena compelled. But instead officer Clark # 2769 after taking care, custody and control of the 'Butcher Knife' on 5-17-04 situated it at some secret remote place for over (S) five months. See App. "H" app. p. 18 Ln. 17. officer Clark # 2769 did so as a ruse to make it appear to Garland P.D. evidence room personnel. That the 'Butcher Knife' had indeed been utilized in a criminal proceeding. Which was the reason officer Clark # 2769 took possession of the 'Butcher Knife' when he removed it from the evidence room on 5-17-04. For the over (S) five month period it was checked out of the Garland P.D. evidence room. See App. "R" app. p. 116

(25) Garland P.D. officer Lucas shape corroborated the blatant lie told by officer Clark # 2769. When officer shape testified: "There was no indication the 'Knife' was logged into the evidence room. See App. "T" TSF v4 p. 49 app. p. 118

(26) Officer shape 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. evidence room. See App "U" TSF V p. 59-60 app. p. 119

(C) Facts Establishing Due Diligence Was Exhibited To Discover The Claim

(27) Calton made several open records requests prior to trial through his court appointed investigators to no avail to obtain "The Police Report" from The Garland P.D. that unbeknownst to Calton memorialized police had seized a 'Butcher Knife'. See App. "V" PSF 1-16-04 V. 1 of 1 p. 21-22 app. p. 121-122

(28) Calton filed two different Brady motions in an attempt to discover favorable evidence in the possession of the state or any state's agent that was unknown to the defense. These motions were granted by the state trial court on 7-2-03 and 1-8-04 respectively ordering the state to make any and all such evidence made known

to the defense. See App. "W" app. p. 124-126; App. "X" app. p. 127-129

(29) Catton tried to have a subpoena issued pretrial compelling the arrest records of Catton in the possession of the Garland P.D. to be turned over directly to the defense. That contained "The Police Report" unbeknownst to Catton that memorialized police had seized a "Butcher Knife". However the trial court denied Catton's subpoena request. See App. "Y" PSF 1-8-04 p. 12 app. p. 130

(30) Catton tried to obtain "The Police Report" under the authority of Tex. Code Crim. Proc. Art. 39.14 that unbeknownst to Catton memorialized police had seized a 'Butcher Knife'. However Catton's discovery request was only granted by the trial court pursuant to Tex. Rules of Evidence Rule 615. In other words such records would not be made available until a witness on the witness stand relevant to the "Police Report" was to be cross-examined by the defense. See App. "V" PSF 1-16-04 p. 23 app. p. 123

(31) On 4-26-04 the trial court relented its subpoena request denial to Catton to the extent that the trial court would issue the subpoena for the records from the Garland P.D. pertaining to Catton's arrest that contained "The Police Report" that unbeknownst to Catton memorialized police had seized a 'Butcher Knife'. For the records to be turned over directly to the trial court for the trial court's in camera review. For the trial court in its in camera review to make a determination if anything in said records would be relevant and favorable to Catton's defense. See App. "Z" PSF 4-26-04 p. 7 app. p. 132

(32) Also on 4-26-04 which was two weeks before Catton's 5-10-04 trial date. Catton informed the trial court and state's attorney by stating: "And also there seems to be a problem with a knife. It is ultimately evidence. I haven't been able to find out if there was a knife in Garland or not, and I need to know within two weeks because I am going to need to prepare if there is or if there is not a knife --". See App. "H" app. p. 14-15 Ln. 5-7; App. "2" PSF 4-26-04 p. 6-7 app. p. 131-132

(33) Catton after putting the trial court and state's attorney on petition For Writ of Habeas Corpus p. 8 of 40

direct notice on 4-26-04 of his unawareness of the 'Butcher Knife' in the possession of the Garland P.D. There was at the insistence of the trial court an off the record colloquy between the state and defense. See App. "X" PSF 4-26-04 V.1 of 1 p.7 app.p.132

(34) The Off the record colloquy at the insistence of the trial Court, Consisted of the trial Court ordering the prosecutor to produce the 'Butcher Knife' to the defense and the prosecutor's response there-to stated: "Judge our investigation indicates there is no 'Knife' in possession of police. See App. "H" app.p. 17 Ln.14-15. Although the trial judge reviewed records that contained "The Police Report" that memorialized Police seized a 'Butcher Knife' the judge never put Catton on notice of the same at anytime. Id app.p. 15 Ln.9

(35) Catton made several open records requests post-trial beginning in the fall of 2004 to no avail to discover the 'Butcher Knife.' See App. "H" app.p. 14 Ln.4; App. "AA" thru "DD" app.p. 133-136

(36) The Garland P.D. nor the City of Garland has never responded to any of Cattons open records requests. See App. "H" app.p.14 Ln.4

(37) This is in all probability due to the Section 1983 federal Civil Rights lawsuit Catton filed against the Garland P.D., the City of Garland, and individual police officers. See App. "U" TSF V4 p.62-63 app.p.120

(38) Alternatively Garland P.D.'s and the City of Garland's failure to respond to Catton's open records requests could have been due to a governmental body in Texas is not required to respond or comply with a request for information from an inmate or their agent, other than the inmate's attorney. See App. "EE" app.p. 137

(39) After exhibiting due diligence to discover the factual predicate of the instant claim as described herein, Catton used 'maximum Feasible Diligence' by filing a frivolous motion under Tex. Code Crim. Proc. Art.64.01 as a fishing expedition to circumvent Tex. Gov't Code Section 552.028 that had foreclosed Catton the opportunity to discover the claim at all relevant times before, during and after trial due to his continued incarceration since 4-23-02. See App. "H" app.p. 18 Ln.18; Also see

State's response thereto. See App. "N" app. p. 31-51

(40) Catton upon receipt of the state's response to his Art. 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 Catton's May 10, 2004 trial. See App. "H" app. p. 18 Ln. 18; App. "N" app. p. 31-51. In particular see Shelli Pryors Affidavit establish the same. Id at p. 35-36

(41) Although Mrs Pryors Affidavit indicates all property seized by Garland P.D. related to Catton's arrest on 4-23-02 was released to Lt. Van Cleave on 2-17-05 for Civil Court. See App "N" app. p. 35-36. The only evidence seized by Garland P.D. in reference to Catton's arrest on 4-23-02 was a 'Butcher Knife' Id at p. 35-36; App. "F" app. p. 10; App. "P" app. p. 58 and 98

(D) Additional Facts On Habeas and Facts Established at Trial

The statement of facts regarding the trial will necessarily be referenced as follows as referenced above in sections (A) thru (C). 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 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 App. "FF" app. p. 138-147. This accidental ingestion of an unknown substance affected Catton's blood sugar level had dropped so low that he went into convulsions and required hospitalization emergency care on that occasion and another. See "App" GG" TSF-VI p. 41-44 app. p. 148; App. "HH" app. p. 149-153; App. "II" TSF-VI p. 99 app. p. 154. On 4-23-02 at 9 A.M. Catton drove to the victim'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 App "G" app. p. 12. The victim testified that he was cooking when Catton

arrived. See App. "JJ" TSF V3 p. 20-22 app. p. 155-156. The 'Butcher Knife' seized out of Calton's vehicle by police belonged to the victim he was utilizing to cook his dinner when Calton arrived at the victim's residence. The victim testified he engaged in conversation with Calton. See App. "JJ" TSF V3 p. 23-24 app. p. 156. States witness Craig Tate testified the victim was leaning inside of Calton's vehicle while conversing with Calton. See App. "I" TSF V8 p. 163-164 app. p. 19. The victim testified that he had a cocaine problem. See App. "JJ" TSF V3 p. 30 app. p. 158. The victim testified he had a drug problem during the time of the offense. See App. "KK" TSF V3 p. 48 app. p. 159. An excerpt from the victim'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 App. "LL" app. p. 160-161. Due to the victim's aggressive and fearless behavior fueled by his cocaine use and abuse led Calton to reasonably believe despite his mental and physical infirmities caused by hypoglycemia that the victim was attempting to use and used deadly force against Calton while the victim was leaning and reaching inside Calton's parked vehicle brandishing a 'Butcher Knife' in a threatening manner toward Calton, which resulted in Calton to grab the blade of the 'Butcher Knife' in an attempt to ward off the apparent attack. Upon grabbing the blade the victim cut Calton. See App. "G" app. p. 12; App. "K" TSF V8 p. 181-182 app. p. 26. In this sequence of events Calton grabbed the victim's gun he always possessed in a gun holster. See App. "mm" TSF V4 p. 140 app. p. 162. And shot the victim one time with the victim's own gun in response to being cut by the victim with the "Butcher Knife" in question. See App. "J" TSF V8 p. 209 app. p. 20; App. "K" TSF V8 p. 181-182 app. p. 26; App. "L" TSF V6 p. 72 app. p. 27. Marcus Heard testified that while selling crack cocaine out of his residence the victim would wear a firearm in a gun-holster. See "mm" TSF V4 p. 140 app. p. 162. Mr. Heard purchased crack cocaine from the victim for years and smoked the purchased crack cocaine at the victim's residence and would observe the victim in possession of a firearm at all times. Id. at p. 139-140 app. p. 162. The victim was a habitual crack cocaine dealer in addition to his crack cocaine use and abuse. The victim 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 2-21-03. Where police were seeking for and found crack cocaine and even seized a firearm in a gunholster on one occasion. See Search Warrant Returns. App. "NN" thru "RR" app. p. 163-168. The police seizing a pistol and a gunholster corroborates Mr. Heard's testimony that the victim kept a pistol at all times on his side. See App. "MM" TSF V4 p. 139-140 app. p. 162; App. "OO" app. p. 164. Mr. Heard was such a frequent visitor at the victim's residence as Mr. Heard's testimony above established. Mr. Heard was actually present during an actual search warrant execution at the victim's residence on 4-21-99 and was arrested along with the victim that day. See App. "NN" app. p. 163. About 50 miles away from the crime scene Calton was observed by police officer James Puckett driving in an erratic and unsafe manner through a school parking lot. See App. "SS" TSF VS p. 74-75 app. p. 169. 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 78 app. p. 105. Calton was driving erratic because he thought someone else was in the vehicle also who he thought was trying to kill him at the time. Due to the same Calton made a 911 phone call at a pay phone seconds before officer Puckett initiated a traffic stop. Calton stated to the 911 call taker: "Someone is trying to kill me". See App. "TT" app. p. 171-173. Officer Puckett testified that Calton's driving during the police chase was unlike someone who was trying to get away from police. Due to Calton was merely driving going back and forth, going here and there and to officer Puckett's it appeared as though Calton was confused. See App. "UU" TSF VS p. 96-97 app. p. 174-175. Police observations describing Calton's behavior at the arrest scene about two hours after the offense occurred memorialized: His bizarre behavior, confusion, appearing distracted, passiveness and uncooperativeness. It was also noted that Calton was experiencing head pain and dizziness. See App. "VV" TSF V4 p. 19-20 app. p. 183; App. "WW" app. p. 185-188. Although Calton also appeared intoxicated at the time he did not smell of alcohol. See App. "XX" TSF VS p. 87 app. p. 189. Nor was Calton charged with being under the influence of drugs or alcohol. See App. "YY" TSF V4 p. 72

app. p. 190. Defense Expert Dr. Roy Cavaino testified that appearing intoxicated is a sign of hypoglycemia. So too are confusion, abnormal behavior and dizziness. See App. "ZZ" TSFVS p. 117 and 123 app. p. 191-192. Dr. Cavaino testified that after reviewing the police observation screening form that memorialized Calton's behavior according to a police officer's personal observations about two hours after the offense, opined that the same suggested Calton was experiencing hypoglycemia. Id at p. 124 app. p. 192. State's Expert Joe Snow testified that the screening form memorializing Calton's behavior also suggested hypoglycemia. See App. "AAA" TSFV6 p. 61-62 app. p. 193. Paramedic Frank Simon testified that if the blood sugar level falls low enough it can lead to an epileptic seizure. See App. "BBB" TSFV7 p. 27 app. p. 194. Paramedic William Johnson testified the epileptic seizure Calton sustained mere hours after the offense was caused by an extremely low blood sugar level that was below 25. See App. "GG" TSFV7 p. 43-44 app. p. 148. Expert testimony at trial established a normal blood sugar level is between 80-120. See App. "uu" TSFVS p. 105 app. p. 177. Calton testified that about a week before the offense he began experiencing dizziness, headaches and felt abnormal. See App. "CCC" TSFV8 p. 196 app. p. 195. Calton testified that his recollection about a week before the offense up until about three weeks after is vague and filled with events that are not true and consists of events that Calton considered were psychotic episodes. See App. "K" TSFV8 p. 180-182 app. p. 25-26; App. "DDD" TSFV8 p. 168-170 app. p. 196. Although Calton described his experiences at the time as psychotic episodes it was undoubtedly Hypoglycemic States causing confusion that Calton experienced at the time. As a direct result of Calton's accidental ingestion of an unknown substance on 4-8-02 that burned Calton's throat going down. Which was about two weeks before the 4-23-02 offense date and about a week before Calton started feeling the effects of his accidental ingestion of an unknown substance. See App. "FF" app. p. 138-147. The accidental ingestion of an unknown substance disrupted the proper regulation of Calton's blood sugar level between 4-16-02 and 5-14-02. As established by Calton's hospitalization

for Hypoglycemia hours after the offense on 4-24-02 and again on 5-14-02. These dates 4-8-02, 4-16-02, 4-24-02 and 5-14-02 bookend the 4-23-02 offense date. See App "HH" app. p. 149-153; App "II" TSF V4 p. 99. Due to the disruption of Calton's blood sugar level and the improper regulation of the same at the time. Doctors requested that Calton's blood sugar level be monitored twice daily. See App "UU" TSF V5 p. 101-109 app. p. 175-178. Kewanda Lawson testified that on 4-16-02 Calton was not acting himself and seemed to be experiencing confusion. See App "EEE" TSF V4 p. 83 app. p. 197. Ms Lawson testified that Calton's condition deteriorated after 4-16-02 up until the offense date on 4-23-02 and that it appeared to her that Calton was in a state of confusion. Id at p. 85 app. p. 198. Ernest Knox testified that on 4-16-02 he noticed Calton's confused state and that Calton at times did not appear to know what was going on. See App "FFF" TSF V7 p. 3-4 app. p. 199. Mr. Knox testified that Calton's condition deteriorated from 4-16-02 up until the offense date of 4-23-02 that Mr. Knox described as a state of confusion. Id at p. 5. Id at 200. Defense expert Dr. Cavano testified that an individual can be capable of actions and may not be consciously aware of what he is doing and may not have knowledge of events that occurred while in a hypoglycemic state. See App. "ZZ" TSF V5 p. 119-120 app. p. 191. State's expert Dr. Jack Price a forensic psychologist with a doctorate degree was hired by the state to evaluate Calton's mental processes at the time of the offense. Prior to personally evaluating Calton Dr. Price reviewed certain documents to permit him to form his expert opinion. See App. "GGG" TSF V8 p. 17-20 app. p. 201. Dr. Price testified despite Calton's mental and physical infirmities caused by hypoglycemia despite Calton'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. 204. Dr. Price's testimony made clear that Calton did not reveal any significant symptoms of mental illness at the time of the offense. Id. at 29-30 app. p. 204. Dr. Price's testimony also made clear despite Calton's mental and physical infirmities caused by hypoglycemia resulting in Calton to experience confusion, bizarre behavior and hallucinations. Did not preclude Calton from having the sufficient mental capacity to reasonably

believe that the crack cocaine fueled victim brandishing a 'Butcher Knife' toward Catton in a threatening manner was attempting to use and used deadly force against Catton by cutting Catton. In turn justifying Catton's use of deadly force to meet a reasonable apprehension of deadly force if not an actual use or attempt to use deadly force by the victim. 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 App. "J" TSF v8 p.224 App. p. 24. The Trial court's certainty that the evidence raised the justification defense withstood prosecutor's David Hagerman's vehement objection that the evidence did not raise self-defense/deadly force defensive theory. For which said objection lodged by prosecutor was rightfully overruled by the trial court judge. Id at p.221 app. p. 24.

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 false '3shot Theory' and 'made up motive' that the state knew were both false and were hinged on the victim's misleading testimony. The victim testified: Catton opened his car door, stepped out in front of the victim, put the gun over the victim's eye and fired the first shot. After the first shot the victim testified that he went down on one knee. And while on one knee he testified that Catton placed the gun up to the back of his head and fired a second shot. The victim concluded his testimony on how the offense allegedly took place by testifying after Catton fired the second shot. The victim was lying on his back and Catton walked up, stood over him and stuck the gun up to his head and fired a third and final shot. See App "JJ" TSF v3 p.26-27 app. p.157. When asked how many times he was shot the victim lied when he stated: "Three times" Id at p.27 app. p.157. The

emergency room doctor's testimony establishes the victim was treated for one gunshot wound. See App "L" TSF V6 p. 72 app. p. 27. As an impermissible plea for sympathy the victim lied by testifying that he lost consciousness after being shot. See App "KK" TSF V3 p. 47 app. p. 159. Ten minutes after the offense in response to paramedic Joe Snow's 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 App "HHH" TSF V6 p. 53 app. p. 205. 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 which established that the victim was treated for the only one gunshot wound he sustained, making clear the victim was only shot one time and making clear there was only one shot fired by Carter in self-defense. See App "L" TSF V6 p. 72 app. p. 27. In turn the same exposes the state's fraudulent '3 shot theory'. How can a denial of "loss of consciousness" and "thinkin 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 at the time the victim made the statements "denying a loss of consciousness" and "thinking he heard one shot", made to the paramedic while he treated the victim. The paramedic noted at the time that the victim was alert, lucid and oriented. See App "HHH" TSF V6 p. 53 app. p. 205. 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 the jury, see *Kyles v Whitley* 115 S.Ct 1555, 1571 (1995) ("Evolution over time of a given witness's description can be fatal to its reliability"). The state in its attempt to preserve the false '3 shot theory' put on the record the following morning after the victim had testified the previous afternoon by stating: "The victim Everett Angle was sick yesterday after he testified. He has now been admitted to the hospital to have an emergency surgery". See App "VV" TSF V4 p. 4 app. p. 179. This lie was exposed to the truth by state's attorney Charles Bradenberg's statement during summations stating: "The victim Chuck Angle is sitting back here". See App "M" TSF V9 p. 8 app. p. 28.

Thus after both sides had rested and closed. With the defense having no opportunity to impeach the fabricated '3ShotTheory' hinged on the victim's false testimony. The victim suddenly recovers from his alleged sudden illness and hospitalization. Additionally in an attempt to conceal the fraudulent '3ShotTheory' the state subpoenaed an irrelevant set of medstar Ambulance Service medical records for treatment rendered to the victim on 2-16-02. See App "III" app. p. 206-208. In addition to the relevant 4-23-02 offense date medical records. See App "JJJ" app. p. 209-213. The state's diabolical play was to provide the irrelevant 2-16-02 records to Catton. Which is Catton even came about totally irrelevant medical records memorializing treatment rendered to the victim over two months before the offense occurred. Which begs the question if the state was not intending to conceal the relevant 4-23-02 medical records dated 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 App "JJJ" app. p. 209. 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 Catton to impeach and correct the victim's false testimony. The state's mere possession of the victim's medical records records and providing Catton a copy of the same for treatment rendered to the victim on 2-16-02. Which was over (2) 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 '3ShotTheory'. 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 state's fabricated false '3ShotTheory'. 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 App. "KKK" TSF V3 p. 162 214. 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 to Tex. Code. Crim Proc. Art. 24.12. Catton knowing the state had something to hide

is the reason why Calton subpoenaed Mr. Snow as a defense witness. See App. "LLL" TSF V6 p. 31-32 app. p. 215. Also see *U.S. v Jordan* 49 F3d 152, 158 (5th Cir 1995) ("recognizing both parties implied that failing to call witness indicates that 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 App. "LLL" TSF V6 p. 36 app. p. 216. 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 its summations stating: "Defendant comes around shoots him once in the face, stands over him, shoots him two more times". See App. "MMM" TSF V9 p. 36 app. p. 217. 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 [4th Dist] 1997) ("Recognizing closing argument is area where trial strategy is most evident"). The state by 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) ("Decrying prosecutors consistent and repeated misrepresentation that paint stains were actually blood"). As the Supreme Court made clear long ago "all perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." See *In re Michael* 326 U.S. 224, 227 (1945). In addition to the false '3shot Theory' the state also fabricated a 'made up motive' it also 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," "Never mentioned his name?" A. "No." "You ever mention Allen's name to them?" A. "No". See App "NNN" BRF 5-1-02 V.1aF1 p. 80 app.p. 218. Prosecutor David Haterman represented the state at Calton's "Bail Hearing" and again at Calton's trial and knew or should have known the victim's testimony establishing motive was false. Id at p.81-82 app.p. 219-220. 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's 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 # 960. See App "PP" app.p. 166. The victim testified that Mr. menefee was like a roommate and was at the victim's residence most of the time. See App "OOO" TSF V3 p.56 app.p. 221. Assuming erguendo 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 false '3 shot theory'. With both being predicated on false facts. Says the "made up motive" there was no other reasonable explanation for Calton to have committed the offense as established by the victim's testimony. The victim testified that there was no animosity that existed between him and Calton or any bad blood. See App. "OOO" TSF V3 p.59-61 app.p. 222-223. So motive notwithstanding its falsity became a necessity to give the state's case some teeth. Cf House v Bell 126 S.Ct 2064, 2079 (2006) (Recognizing when identity motive is key.) In Texas a motive when presented to a jury tends to raise an inference that the accused had a motive to commit the crime alleged. See Crone v state 786 sw2d 338, 349-50

(Tex. Crim. App. 1990). A motive in Texas is also a circumstantial indicating guilt. See *Harris v State* 727 S.W.2d 537, 542 (Tex. Crim. App. 1987). At trial the victim also lied about his inclination to possess a firearm. On cross-examination 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 App. "OOO" TSF V3 p.62 app. p.223. Calton knew this was a lie and tried to refresh the victim's memory with this question: Q "During the search warrant execution on the residence no gun was ever found?" State's Attorney Hagerman objected. Id. at p.62 app. p.223. Mr. Hagerman also knew the victim was lying hence the objection. This is so due to Mr. Hagerman provided the defense the search warrant returns establishing the victim was a gun toting prolific crack cocaine who was shot one time with his own gun by Calton in self-defense by Calton. See App. "J" TSF V8 p.209 app. p.20; App. "NN" thru "RR" app. p.163-168; App. "PPP" PSF 1-16-04 v. 1061 p.8-9 app. p.224-225. Also see *Caesar v State* 939 S.W.2d 778, 781 (Tex. App. Houston [14th Dist.] 1997) ("Appellant engaged in a fight with victim, appellant lost his own gun in the struggle. Appellant was able to obtain the victim's gun") *Van Bracke v State* 179 S.W.3d 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 App. "QQQ" app. p.226-229. 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 App. "LL" app. p.160-161. Cf. *Castenada v State* 23 S.W.3d 216, 219 (Tex. App. El Paso 2000) ("Prosecutor conceding the 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 the Supreme Court Justice 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 characteristics. In turn affording the jury to reasonably find Calton was justified in using deadly force to meet the victim's use or attempted use of deadly force he used on Calton with the 'Butcher Knife' a deadly weapon. which establishes the 'Butcher Knife's' critical and material nature to Calton's self-defense theory at trial. See Hicks v State 837 SW2d 686, 690 (Tex. App. Houston [1st Dist.] 1992) ("Sgt. Cranshaw 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. 2005) ("Testimony describing the switchblade 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"). In application of the factual innocence test all of the above facts must be considered. See Schlup v Delo 513 U.S. 298, 327-28 (1995)

Reasons For Granting The Writ

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." See *Ex parte Fahey* 322 U.S. 258, 260 (1947). Title 28 U.S.C. 2244(b)(3)(E) prevents this court from reviewing the court of appeals' order denying Calton leave to file a second habeas petition by appeal or writ of Certiorari. The provision, however, has not repealed this court's authority to entertain original habeas petitions. See *Felker v Turpin* 518 U.S. 651, 660 (1996), nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b). Rule 20 of this court requires a petitioner seeking a writ of habeas Corpus demonstrate that

(1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power" and (3) "the writ will be in aid of the Court's appellate jurisdiction,". Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "informed" by 28 USC § 2244(b). See *Felker*, 518 U.S. at 662-63. There are several additional reasons for granting the writ which Catton will take in turn. First Catton has not received his one fair opportunity to seek habeas corpus relief from a federal forum. Due to the state's suppression of evidence that was in possession of a state's agent. That was not discovered by Catton until after the resolution of his initial Federal habeas petition. See *Banister v Davis* 140 S.Ct 1698, 1702 (2000) ("A state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction"). Since no other Federal Court jurisdiction exists at this juncture the Supreme Court must exercise its original habeas jurisdiction as a quasi-appellate review function in resolution of the 5th Circuit's 4-26-21 Opinion denying Catton leave to file a second petition. See Appendix "A" app. p 1-3. Also see *Felker* 518 U.S. 660. Cf. *Mackey v United States* 401 U.S. 667, 685-87 (1971). If this court does not exercise jurisdiction and transfer the petition to the district court, Catton would be remediless in the federal forum and this cannot 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 questions adjudicated") (Citing *Salinger v Loisel* 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. 715 (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)). The Court concluded: "A federal court should entertain his petition for habeas corpus else he would be remediless". *Id.* at 118. As the Supreme Court has repeatedly stated: "State Courts cannot have the last say on constitutional claims. See *Brown v Allen* 344 U.S. 443 (1953); *Fay v Noia* 372 U.S. 391 (1963) and *Kaufman v United States* 394 U.S. 217 (1969). In those cases there was no assumption with respect to the construction of the habeas statute, but reasoned decisions that those policies were an insufficient justification for shutting the federal door to litigants with federal constitutional claims in light of the countervailing consideration as "the necessity that a federal forum have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federal created rights, and the institutional constraints on this court's certiorari jurisdiction to review state convictions". See *Kaufman* 394 U.S. at 225-226. The court continued by stating: "The provision of federal collateral remedies rests more fundamentally upon recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief". *Id.* at 226. Also see generally *Fay*, *supra*, *Townsend*, *supra*. See also *Brown* 344 U.S. at 508 ("No binding weight is to be attached to the state determinations. The Congressional requirement is greater. The state cannot have the last say when it, though on fair consideration of what procedurally may be deemed fairness, may have misconceived a federal constitutional right"); *Stone v Powell* 428 U.S. 465, 527 (1976) (Brenan, J. dissenting) ("But the prior determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the state would have the final say, which Congress, by the act of 1867, provided it shouldn't have") (Citing *Brown* 344 U.S. at 500). In *Townsend v Sain* 372 U.S. 293 (1963) overruled in part by *Reevey v Tamayo-Reyes* 504 U.S. 1,

5 (1992), the Supreme Court set down the circumstances under which a federal court must review constitutional claims: "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trial of fact did not afford the habeas applicant a full and fair fact hearing. Id at 313. At common law habeas corpus is a writ of right; it issues immediately upon showing of some ground for its issuance. See *Ex Parte Burford* 3 Cranch 448 (1806); *Ex Parte Bollman* 8 U.S. 75 (1807); *Gooden v The Prerogative Writs*, 32 N.Z. L.J. 199, 214 (1956); *Dicey, Law of The Constitution* 211 (6th ed 1902). As this Court made clear: "In our federal system in which the federal courts are ultimate arbiters of federal constitutional rights, at most justify the postponement, not abrogation, of federal jurisdiction". See *Francis v Henderson* 425 U.S. 536, 547 (1976) (Brennan J. dissenting). The jurisdiction bestowed upon this Court cannot be declined once it has been invoked. See *New Orleans Public Service Inc v Council of The City of New Orleans* 109 S.Ct 2506, 2513 (1989) ("We have no right to decline the exercise of jurisdiction which is given, that to usurp that which is not given. The one or the other would be treason to the constitution") (citing *Cohens v Virginia* 19 U.S. 264, 404 (1821)). The Court continued by making clear: "The Courts of the United States are bound to proceed to judgment and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction" Id at 2513 (citing *Chicot v Sherwood* 148 U.S. 529, 534 (1894)). The functional equivalent appeal process via

this court's exercise of its original habeas jurisdiction to review courts of appeals resolution of prisoners seeking leave to file a second or successive petition with the District Courts cannot be properly denied here. Cf. *Id.* at 2513 ("When a federal court is properly appealed to in a case over which it has by law jurisdiction . . . The right of a party plaintiff to choose a federal court where there is a choice cannot properly be denied") (Citing *Willcox v. Consolidated Gas Co.* 212 U.S. 19, 40 (1919)). Also see *Willis v. Coastal Corp.* 112 S.Ct. 1076, 1079 (1992) ("Federal Courts are not free to extend by rule the judicial power of the United States described in Article III of the Constitution"); *Ex rel. Turner v. Williams* 194 U.S. 279, 295 (1905) (Brewer, J. concurring) ("The courts may and must, when properly called on by the petition for writ of habeas corpus to examine and determine the rights of an individual restrained of personal liberty to be discharged"). Simply put this Court must exercise its original habeas jurisdiction here that's been properly invoked and transfer the cause to the district court for judicial process in compliance with due process. See *Crowell v. Benson* 285 U.S. 22, 87 (1932) (Brandeis J., dissenting) ("under certain circumstances the constitutional requirement of due process is requirement of judicial process"). Due process law consists of all those guarantees which are implicit in the concept of ordered liberty. See *Palko v. Connecticut* 302 U.S. 319, 325 (1937). The principle must be applied afresh in every case. Cf. *Wolf v. Colorado* 338 U.S. 25, 27 (1949). Although 28 U.S.C. § 2244(b) stripped the district court of jurisdiction from entertaining a successive petition filed originally with that court. Section 2244(b) in compliance with the 5th and 14th amendments and Art. I, §9, Cl.2 did not take away Calton's substantive right to the writ. Section 2244(b) merely removed jurisdiction from the district court and changed the tribunal to file a successive petition to the supreme court. For petitioner's who can meet the miscarriage of justice exception but who could not meet the more onerous actual innocence exception found in sec-

tion 2244(b) to obtain leave from the Court of Appeals to file a successive petition in the district. See *Hamdan v Runsfeld* 548 U.S. 557, 576-577 (2006) ("We have explained that unlike other intervening changes in the law, a jurisdiction conferring or jurisdiction stripping statute usually takes away no substantive right but simply changes the tribunal that is to hear the case") (citing *Hallowell v Commons* 239 U.S. 506, 508 (1916)). The same further establishes Calton is entitled to a meaningful remedy. See *Marbury v Madison* 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . and with every right, there must be a remedy"). Finally all of the above is applicable here notwithstanding this is a successive habeas proceeding. See *Salinger v Loisel* 265 U.S. 224 (1924) (Since it is settled law that accused has the right to apply for successive writs, it cannot be that exercise of that lawful right can be nullified by naming that act an abuse process"). Also see *Sanders v United States* 373 U.S. 1, 10 (1963) (It held "that a habeas court must adjudicate even a successive habeas petition when required to do so by the 'ends of justice'"); see also *McCleskey v Zant* 499 U.S. 462 (1991); *Murray v Carrier* 477 U.S. 478 (1986); *Kuhlmann v Wilson* 477 U.S. 436 (1986); *Wainwright v Sykes* 433 U.S. 72 (1977); *Schup*, supra. Calton's last hope for an evidentiary hearing to prove his innocence in light of the constitutional error lies with this court. His case presents exceptional circumstances that warrant exercise of this court's discretionary powers. And for all those reasons the Court should Grant the writ and transfer the case.

II Statement of Reasons For Not Filing In The District Court

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242 Calton states that he has not applied to the district court because the circuit court prohibited such an application. See

Appendix "A" app. p. 1-3. Calton exhausted his state remedies for the claims he raises herein. See Appendix "B" app. p. 4. The Texas Board of Pardons and Paroles will not consider a "petition for Clemency," "Petition For Pardon For Innocence" or a Petition For Full Pardon. Due to the fact that Calton could not obtain. Though not from a lack of trying a written recommendation of at least two current trial officials of the Court of conviction, with one trial official submitting documentary evidence of actual innocence; or a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence. As required by Chapter 143, Executive Clemency Rules §§ 143.1; 143.2. See Appendix "SSS" app. p. 231-232. Since Calton has exhausted all of the state remedies reasonably available to him and was denied permission by the Court of Appeals to file a second habeas petition. Establishes Calton cannot obtain relief in any other form or any other court.

III The Exceptional Circumstances of This Case Warrant The Exercise of The U.S. Supreme Court's Original Jurisdiction

The Texas Court of Criminal Appeals [Hereafter T.C.C.A.] denied Calton relief on his subsequent state habeas application without an evidentiary hearing for unexplained reasons i.e. without a written opinion or written order. See Appendix "B" app. p. 4. However the T.C.C.A. determined that Calton made an initial prima facie showing of actual innocence under the federal miscarriage of justice exception, which the T.C.C.A. adopted as its own. In its resolution of subsequent state applications, which allowed Calton to have his otherwise barred constitutional claims to be reviewed on the merits by the T.C.C.A.

(A) The 'Butcher Knife' as New Discovered Evidence which
Was The Instrumentality of Calton's Self Defense Theory At
Trial That Establishes Calton's Innocence Is Rare and Exceptional

Calton's constitutional claims are not based on innocence, but rather on his contention that the withholding of evidence by police denied him all of the panoply of protections offered to criminal defendants by the constitution. See *Schlup*, supra. Calton is offering his claim of "innocence" to obtain postconviction 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 313-16. If this standard is met review is mandatory on Calton's claims. See *Id.* at 316 (suggesting that court has held manifest miscarriage doctrine to be mandatory, not discretionary: "If a petitioner . . . presents sufficient evidence of innocence . . . the petitioner should be allowed to pass through the gateway and argue the merits") 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 F3d 106, 108 (5th Cir 1995). 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); *Bousley v U.S.* 523 U.S. 614, 623 (1991) ("Actual Innocence" means "factual innocence", is not merely legal insufficiency); *Sawyer v Whitley* 112 S.Ct 2514, 2519 (1992) ("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 of 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 evidence, the trier of facts would have entertained a reasonable doubt as to the defendant's guilt"). Calton's defense at trial was that he was justified in committing the offense under self-defense. See Tex. Penal Code §§ 9.31; 9.32. The evidence at trial raised self-defense and the jury was charged thereon. See Appendix "J" TSPV p. 224 app. p. 24. Calton's contention is that his innocence via self-defense in light of *Finley v. Johnson* 243 F.3d 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 F.3d 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 not have accepted does not meet the requirement for showing of 'Actual Innocence' because there is no claim the defendant did not actually commit the acts of 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 221-22. The 'Necessity' defense in '*Finley*' and Calton's 'Self-defense' are

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both found in chapter nine of the Texas penal code which outlines justifications absolving a defendant in Texas of criminal responsibility. §§ 9.22, 9.31 and 9.32. Also 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 Tex. Penal Code"). Thus no less than the 5th circuit determined that 'Finley' made a sufficient showing of 'factual innocence' via the Texas defense of 'Necessity'. So too should this court find that 'Calton' has made a sufficient showing of 'factual innocence' via the Texas defense of 'self-defense'. Calton conceded at trial to having committed the act. However he's actually innocent of attempted murder. Due to Calton had justification to commit the act under Texas Penal Code § 9.32. Due to prior to Calton shooting the victim the victim first tried to stab Calton and subsequently cut Calton's hand with the 'Butcher Knife' in question. When Calton grabbed the blade warding off the apparent attack. See Appendix "G" app. p. 12; Appendix "K" TSFV8 p. 181-182 app. p. 26. Also see *Ransom v Johnson* 126 F3d 716, 724 (5th Cir 1997) ("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 discovery of the 'Butcher Knife' establishes that Calton has met the actual innocence federal miscarriage of justice exception. Additional support for Calton's actual innocence contention via self-defense can be found in *Fairman v Anderson*, supra. In 'Fairman' the petitioner's claim of self-defense 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 innocence because belief in the eyewitness 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. If a picture is worth a thousand words. The critical nature of the 'Butcher Knife' as the instrumentality of Calton's self-defense theory at trial. Had

it been available for trial and examined by the jury was worth an acquittal. The age old adage 'seeing is believing' carries great weight. See *Robertson v State* 137 SW3d 807, 813 (Tex. App. Waco 2004) (Gray J., dissenting) ("If anyone has any question that the knife at issue is a deadly weapon all he or she has to do is examine it"); *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. 2005) (Testimony describing the switchblade 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"). Especially in light of Calton's testimony at trial where he stated that police had recovered the 'knife' the victim cut Calton with prior to Calton shooting the victim. See Appendix "K" TSF V8 p. 181-182 app. p. 26. And due to the fact that the state's summations implied if a 'Butcher Knife' had been seized by police and played a role in the offense Calton would have produced it at trial. See Appendix "M" TSF V9 p. 9-10 app. p. 29. In light of the same sans the 'Butcher Knife' at trial made Calton's self-defense theory at trial dubious at best. See *Fairman* 188 F3d at 648 (Jones, J. dissenting) ("Questioning the reasonableness of the case in part because the weapon used by the victim, a purportedly long 'Butcher Knife' was never found"); *Varquez v State* 2 SW3d 355, 358-359 (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 victim was never recovered"). In light of the state's fraudulent case that's been exposed herein coupled with the 'Butcher Knife' as new evidence establishes Calton's 'factual innocence' in light of the constitutional error and thus meets the requisite probability that Calton is

actually innocent under his self-defense contention at trial. See Schlup 513 U.S. 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 F.2d 491, 495 (5th Cir. 1993) ("Kirkpatrick's claim of self-defense would establish a lack of criminal responsibility under the test announced in Sawyer v. Whitley 945 F.2d 812 (5th Cir. 1992) aff'd 112 S.Ct. 2514, 2522 (1992). Additionally Calton's prima facie showing of actual innocence excuses any and all procedural default in this habeas proceeding. See McQuiggins v. Perkins 133 S.Ct. 1924, 1927 (2013) (Actual Innocence, if proved, serves as a gateway through which petitioner may pass whether the impediment is procedural default bar as it was in [Schlup's successive petitions] or [House's state procedural default] or as in this case, expiration of the statute of limitation"). Finally the Supreme Court has also made clear of the rare and exceptional circumstance of meeting the Schlup standard. See House 541 U.S. at 538 ("The Schlup standard is demanding and permits review only in the 'extraordinary' case"). And since Calton met the Schlup standard in the subsequent state habeas proceeding. It is to be assumed that he has met it in the federal court because those findings in state court are accorded deference and the presumption of correctness here as will be shown below.

(B) Calton's Prima Facie Showing of Actual Innocence Under Schlup made in the State Courts Below is Accorded Deference And The Presumption of Correctness in the Federal Courts

It is undisputed that Calton made a prima facie showing of Actual Innocence under the Federal miscarriage of Justice Exception reaffirmed by this court in Schlup, supra in the state subsequent habeas proceedings below. The 74th Texas Legislature enacted and codified the abuse of writ doctrine in 1995 that's used in

Federal Practice. See *Ex Parte Brooks* 219 SW3d 396, 399 (Tex. Crim. App. 2007) ("The Texas subsequent applications provisions in Articles 11.07 and 11.071 were enacted by the Texas legislature in response to *Schup v Delo*"). The T.C.C.A. in turn adopted the federal miscarriage of justice exception as its own as a guide in that court's resolution of subsequent state applications under T.C.C.P. Art. 11.07. See *Id.* at 399-401 ("We conclude that an application must accompany constitutional claim with a prima facie showing of actual innocence in order to satisfy the requirements of Art. 11.07 § 4(a)(2)). When the T.C.C.A. denied Calton's subsequent state application on the merits on 7-12-17 establishes that Calton met the 'Schup' supra standard. See Appendix "B" app. p. 4. The 'denial' of relief by the T.C.C.A. serves under Texas law to dispose of the merits of the habeas claim unlike a 'dismissal'. See *Jackson v Johnson* 150 F3d 520, 524 (5th Cir 1998) (citing *Ex Parte Torres* 943 SW2d 469, 472 (Tex. Crim. App. 1997)) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits"). Despite the summary denial of Calton's subsequent state application without evidentiary hearing or written findings of facts or conclusions of law made by the trial court. The findings by the state courts that Calton made a prima facie showing of actual innocence to have his otherwise barred constitutional claims to be reviewed on the merits there. Are to be accorded deference and the presumption of correctness in the Federal Forums. See *Valdez v Cockrell* 294 F3d 941, 951 (5th Cir 2001) (Held that "the presumption of correctness that attaches to state court findings of fact under AEDPA applies even in cases where the petitioner was denied a full and fair hearing in state court"). In Texas the T.C.C.A. is the ultimate fact-finder on habeas. See *Ex Parte Flores* 387 SW3d 626, 634-35 (Tex. Crim. App. 2012) (Court acts as 'the ultimate fact-finder' when the lower court's findings do not resolve the necessary factual issues"). As such the deference and presumption of correctness that is accorded to the trial court findings

are also accorded to the TCCA's findings. See *Sumner v Mata* 455 U.S. 591, 592-93 (1982) (per curiam); *Sumner v Mata* 449 U.S. 539, 546-47 (1981) (Held "that appellate court's findings are entitled to the same respect trial judge's findings receive"). The T.C.C.A.'s previous determination that Calton made a prima facie showing of Actual Innocence under *Schlup*, supra to have his otherwise barred constitutional claims to reviewed on the merits in the subsequent state court habeas proceeding below. Should not be casually set aside. See *Sharp v Bell* 593 F.3d 372, 379 (4th Cir 2010) ("where a state court looks at the same body of relevant evidence and applies essentially the same legal standard to that evidence that the federal court does under *Schlup*, § 2254(e)(1) requires that the state court's findings of fact not be casually set aside") Also see *Goldblum v Klen* 510 F.3d 204, 212, 221 n.13 (3d Cir 2007) (Applying presumption of correctness under § 2254(e)(1) in resolving *Schlup* claim"); *Reed v Stephens* 739 F.3d 753, 772 and n.8 (5th Cir 2008) (same) Cf *Graves v Cockrell* 351 F.3d 143, 151 (5th Cir 2003) (Applying § 2254(e)(1)'s presumption in the context of free-standing actual innocence claim") All of which read together establishes Calton's prima facie showing under *Schlup*, supra in the state subsequent habeas proceeding previously made by Calton is to be accorded deference and the presumption of correctness in the federal court.

(C) meeting The 'Cause' and 'Prejudice' standard Is Rare and Exceptional

Although it is undisputed that Calton made a prima facie showing of 'Actual Innocence' under *Schlup*, supra, in the subsequent state habeas proceeding as determined by the T.C.C.A. and those findings are to be accorded deference and the presumption of correctness in this federal habeas proceeding under 28 U.S.C. § 2254(e)(1). The Supreme court has instructed that "a federal forum faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address other grounds for cause to ex-

cuse the procedural default". See *Oretke v Haley* 541 U.S. 356, 394-95 (2004) ("expressing concern that permitting consideration of actual innocence in that without first considering other ways of reaching the merits of petitioner's claim would license district courts to riddle the cause and prejudice standard with ad hoc exceptions"). The court's instructions in *Oretke*, suggests that an evaluation of whether Calton can show 'Cause' and 'Prejudice' sufficient to excuse procedural default on his claims before his actual innocence contention can be addressed. However, resolution of either standard must be made in the district court. See *Alexander v Whitley* 940 F.2d 946, 948 (5th Cir 1991) ("The primary responsibility for deciding whether a petitioner has abused the writ is the district courts"); *Bousley* 523 U.S. at 623 ("Remanding for *Schlup* issue when district court failed to address it". Calton can undoubtedly establish 'Cause' and 'Prejudice' due to his previous prima facie showing of actual innocence under *Schlup*, supra. Due to the Supreme Court made clear. This avoidance principle was implicit in *Murray* where the Supreme Court expressed confidence that for the most part, victims of fundamental miscarriage of justice will meet the 'Cause' and 'Prejudice' standard. 477 U.S. at 495-496 (Quoting *Engle v Isaac* 456 U.S. 107, 135 (1982))

(D) Calton Sustained 'Cause' due To Government Interference

This court has stated: "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with state's procedural rule. A showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under the standard" see *Murray* 477 U.S. at 488. The allegations Calton makes are the sort that have

led to a finding of Cause by this court. See petition, *supra* at pages 5-7. Also see *Amadeo v Zant* 486 U.S. 214, 222 (1988) ("finding cause when county officials concealed evidence"); *Kirkpatrick v Whitley*, *supra* ("finding cause when evidence was suppressed"); *Forman v Smith* 633 F.2d 634, 641 (2d Cir 1980) ("Affirming principle that police officer made a misleading statement would be 'cause' for not raising claim on direct appeal.")

(E) Calton Sustained 'Prejudice' Due The Suppression of The 'Butcher Knife'

To overcome a procedural default a habeas petitioner in addition to 'cause' must also demonstrate 'actual prejudice' as a result of the alleged constitutional violations. See *Coleman v Thompson* 501 U.S. 722, 745 (1991). This court explained that the prejudice inquiry mirrors the materiality prong of the underlying 'Brady' claim Calton raises herein. See *Strickler v Greene* 119 S.Ct. 1936, 1949 (1999) ("In this case 'cause and prejudice' parallel two of the three components of the alleged violation itself"). The 'Butcher Knife' was material to Calton's defense due to had it been available for trial it would have invested Calton's self-defense with merit due to it qualifies as a deadly weapon, as any other object, whenever it is made, adopted or manifestly designed for the purpose of inflicting death or serious bodily injury. See *Thomas v State* 821 SW2d 616, 620 (Tex. Crim. App. 1991); Tex. Penal Code § 1.07(a)(iii)(B) ("A 'deadly weapon' means (A) a firearm or anything manifestly designed, made, or adopted for the purpose of inflicting death or serious bodily injury or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury"). In Texas a knife may be a deadly weapon depending on its size, shape, sharpness, the manner of use or intended use and its capacity of causing death or serious bodily injury. See *Blain v State* 647 SW2d 293, 294 (Tex. Crim. App. 1983). However, a knife is not a deadly weapon *per se*. See *Thomas* 821 SW2d at 620. Thus Calton had the burden at trial to substantiate his justification to use deadly force. Thus Calton had to

establish the victim was capable of and used or attempted to use deadly force against Calton in order to justify Calton's use of deadly force in response thereto. The best evidence to have done so was to admit the 'Butcher Knife' into evidence. Cf. *Revell v State* 885 S.W.2d 206, 209 (Tex. App. Dallas 1994) ("when an indictment alleges that appellant used or exhibited a deadly weapon, to-wit: a knife, the evidence must establish that the knife was in fact deadly"); The 'Butcher Knife' admitted into evidence would have allowed the jury to examine it and determine for themselves its deadly nature. See *Robertson* 137 S.W.3d at 813 (Gray J. dissenting (stating "If anyone has any question that the knife at issue is a deadly weapon all he or she has to do is examine it"); *Robertson* 163 S.W.3d at 931, 934 ("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 weapon had physical characteristics that revealed its deadly nature"); *Hicks* 832 S.W.2d at 690 (Sgt. Crenshaw testified the knife admitted into evidence could easily injure or kill someone. The suppression of the 'Butcher Knife' prejudiced Calton's defense as shown herein due to its absence precluded Calton from establishing his innocence. See *In re Vial* 115 F.3d 1192, 1201 n.* (4th Cir 1997) (Hall, J. dissenting) ("No error is more prejudicial than one that deprives an innocent man of his liberty")

III The Court of Appeals Erred In Barring Calton's Subsequent Petition

The 5th Circuit denied Calton permission to file a subsequent petition, holding that he "failed to meet the procedural requirements of 28 U.S.C. § 2244 (b)(2)". Although the procedural requirements "inform" this court's consideration of original habeas petitions, this court has not decided whether it is bound by them. See *Felker* 518 U.S. at 663 (pre-terminating the question of whether court is bound by § 2244 (b)(2) finding that those provisions "inform" its decision). The purposes of § 2244

that "informs" this Court's consideration of Calton's petition are twofold: section 2244(b)(2)(B)(i) requires that the petitioner diligently discover and present the new evidence in his first habeas petition. Calton cannot be faulted for failing to do so here where the evidence was in the possession of the police a state's agent. See Strickler 119 S.Ct at 1951 ("In the context of a Brady claim, a defendant cannot conduct the 'reasonable and diligent investigation mandated by *McCleskey v Zant*' to preclude a finding of procedural default when the evidence is in the hands of the state"). Section 2244(b)(2)(B)(i) requires that the claim raised in a second petition "impugn" the reliability of the underlying conviction. Calton's innocence claim under 'Schup' does exactly that. See petition, supra at pages 2-21.

III. Calton's Subsequent Petition meets The Requirement of 28 U.S.C. § 2254

(A) Calton is entitled to An Evidentiary Hearing

If this court transfers Calton's habeas petition to the district court, Calton would be entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2). Subject to the requirements of § 2254, a federal evidentiary hearing is required "unless the state-court trier of fact has after a full hearing reliably found the relevant facts. See *Townsend* 372 U.S. at 313 (overruled on other grounds). Section 2254(e)(2) does not preclude an evidentiary hearing here because Calton has consistently, but unsuccessfully, sought an evidentiary hearing to prove his innocence in state court. Section 2254(e)(2) bars an evidentiary hearing only to prisoners who have failed to develop the factual basis of a claim in state court proceedings. In *Williams v Taylor*, this court held that a petitioner who did not receive a hearing in state court may receive an evidentiary hearing in federal court "unless there is a lack of diligence, or some greater fault, attributable to the petitioner or his counsel" 529 U.S. 420, 435 (2000). The court held that "diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law" *Id.* To no avail, Calton asserted his innocence and

requested an evidentiary hearing at every level of the state habeas proceedings. See Appendix "TTT" app. p. 233-237. Additionally Calton alleged facts in his subsequent state application that, if true, undermined confidence in the verdict. This too entitled Calton to a hearing. In Texas when an applicant seeking relief based on a claim of innocence demonstrates that Newly Discovered Evidence and facts, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is possible that the verdict would be different. The habeas court must give the applicant a forum and an opportunity to present evidence. See *Ex Parte Elizondo* 947 SW2d 202, 213 (Tex. Crim. App. 1996) (Citing state ex rel Holmes 885 SW2d 389, 2 Tex. Crim. App. 1994).

II 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. See *Brady v Maryland* 373 U.S. 83, 87 (1963). There are three elements to a Brady claim: (1) the evidence must be favorable to the accused; (2) the evidence must have been suppressed by the state; and (3) the evidence must be "material", i.e. prejudice must have ensued from its non-disclosure. See *Banks v Oretke* 540 U.S. 668, 691 (2004). What could be more prejudicial to one's defense than to have the instrumentality of said defense intentionally suppressed by police? Which in turn rendered the defense inviable as a matter of law. The first part of the test has been met due to the 'Butcher Knife' was favorable in that it was the instrumentality to Calton's self-defense theory at trial. The second part of the test has been met. Due to the fact that police checked the 'Butcher Knife' out of the police's evidence room on 5-17-04 for Calton's trial. See Appendix "R" app. p. 116. In response to a defense subpoena. See Appendix "Q" app. p. 112-114. However the police shows up in court sans the "Butcher Knife" 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 "H" app.p.18 Ln.17. A Brady suppression also occurs when the government fails to turn over evidence that was known only police and not the prosecutor. See *Youngblood v West Virginia* 547 U.S. 867, 869-870 (2006); *Kyles v Whitley* 514 U.S. 419, 438 (1995). In *U.S. v Bagley* this 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. 473 U.S. 669, 682 (1985). Since the 'Butcher Knife' was an indispensable part of a viable deadly force defensive theory under Texas Penal Code § 9.32. Without the 'Butcher Knife' at trial to permit Calton to establish the victim was capable of causing serious bodily injury or death to Calton with the 'Butcher Knife' in the manner of its use or attempted use of it by the victim toward Calton. made Calton'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) use of deadly force was reasonably believed to be immediately necessary to protect the defendant against another's use or attempted use of unlawful deadly force. See Texas Penal Code §§ 9.31; 9.32.

CONCLUSION

The petition for a writ of habeas corpus should be transferred to the district court for a hearing and determination. and Respondent ordered to show cause.

Respectfully Submitted,
Allen "F" Calton

Verification

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 9-2-21 Allen "F" Calton

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