

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-10965

In re: ALLEN FITZGERALD CALTON,

Movant

Motion for an order authorizing
the United States District Court for the
Northern District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before DAVIS, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Allen Fitzgerald Calton, Texas prisoner # 1123880, moves this court for authorization to file a successive 28 U.S.C. § 2254 application challenging his conviction for attempted murder. He argues that he should be permitted to bring a successive § 2254 application because he has obtained the knife underlying his theory of self-defense. Further, he argues that he is innocent and that 28 U.S.C. § 2244(b) is unconstitutional.

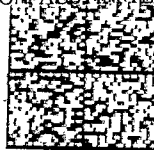
Calton fails to make the prima facie showing for authorization to file a successive § 2254 application. See § 2244(b)(2), (b)(3)(C). Calton's assertion of innocence is also unavailing. See *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928, 1935 (2013); see also *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). His constitutional challenge to § 2244(b) is without merit. See *Graham v. Johnson*, 168 F.3d 762, 787-88 (5th Cir. 1999). IT IS ORDERED that Calton's motion for authorization to file a successive § 2254 habeas application is DENIED.

Appendix "A" at 1

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CALTON, ALLEN FITZGERALD Tr. Ct. No. C-213-011065-0843168-M WR-
65,590-22

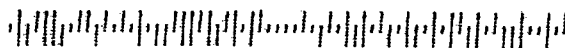
On this day, this Court has denied applicant's "APPLICANT'S MOTION FOR
EXPANSION OF THE RECORD".

Deana Williamson, Clerk

ALLEN FITZGERALD CALTON
STILES UNIT - TDC # 1123880
3060 FM 3514
BEAUMONT, TX 77705

4F3-61B

EMAGNAB 77705



Appendix "B" at 2

JUN 14 2017

NO. C-213-011065-0843168-M

TIME 5:59
BY [Signature] DEPUTY

EX PARTE

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IN THE 213TH JUDICIAL
DISTRICT COURT OF
TARRANT COUNTY, TEXAS

ALLEN F. CALTON

FINDING

1. The Court finds that the Court of Criminal Appeals has previously declared that the applicant has abused the article 11.07 writ of habeas corpus process.

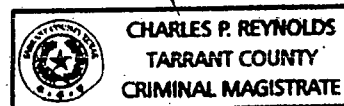
ORDER

1. The Court directs the Clerk of this Court to file this finding and transmit it along with the Writ Transcript to the Clerk of the Court of Criminal Appeals of Texas as required by law.

2. The Court directs the Clerk of this Court to furnish a copy of this order to the applicant, Mr. Allen F. Calton, TDCJ-ID #01123880, Stiles Unit, 3060 FM 3514; Beaumont, Texas 77705; and to the post-conviction unit of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this 13th day of June 2017

[Signature]
JUDGE PRESIDING



Appendix "C" at 3

NO. C-213-011065-0843168-M

JUN 05 2017

EX PARTE

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IN THE 213TH JUDICIAL DEPUTY

DISTRICT COURT OF

ALLEN F. CALTON

TARRANT COUNTY, TEXAS

STATE'S REPLY TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, and denies generally the allegations in the instant application for writ of habeas corpus. The State presents the following information to the Court:

The Case in Brief/Procedural History:

The applicant was convicted by a jury of attempted murder. See Judgment. After finding that the applicant was a habitual offender, the jury sentenced him to life confinement. See Judgment.

The Court of Appeals for the Second District of Texas overruled the applicant'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).

The applicant has filed twelve prior applications for writ of habeas

Appendix "D" at 4

COPY

corpus. See *Ex parte Calton*, Nos. C-213-007618-0843168-A, C-213-008058-0843168-B, C-213-008124-0843168-C, C-213-008158-0843168-D, C-213-008358-0843168-E, C-213-008382-0843168-F, C-213-008423-843168-G, C-213-009679-0843168-H, C-213-009849-0843168-I, C-213-010015-0843168-J, C-213-010079-0843168-K & C-213-010797-0843168-L The Court of Criminal Appeals denied the applicant's original writ application on its merits. See *Ex parte Calton*, No. WR-65,590-07. The Court dismissed the applicant's next five writ applications because they did not meet the subsequent writ requirements. See *Ex parte Calton*, Nos. WR-65,590-08 WR-65,590-09, WR-65,590-10, WR-65,590-11 & WR-65,590-12.

In resolving the applicant's seventh writ application, the Court of Criminal Appeals found that the applicant had abused the writ of habeas corpus process. See *Ex parte Calton*, No. WR-65,590-13. The Court has declined to take any action on his last five writ applications based on its previously-entered abuse of writ order. See *Ex parte Calton*, Nos. WR-65,590-14, WR-65,590-15, WR-65,590-16, WR-65,590-17 & WR-65,590-21.

Discussion:

In cases where the Court of Criminal Appeals has declared that an

Appendix "D" at 5

applicant has abused the article 11.07 writ of habeas corpus process, a trial court has a limited responsibility:

1. The trial court should not consider the merits of any application for writ of habeas corpus filed by that applicant.
2. The trial court should review the application and make findings that this applicant has abused the writ of habeas corpus process in the past.
3. The trial court should direct the district clerk to forward the writ transcript to the Court of Criminal Appeals so that the Court can conduct its automatic review.

Ex parte Dora, 548 S.W.2d 392, 394 (Tex. Crim. App. 1977). Determination of whether an applicant has established "good cause" for filing a post-abuse writ application is a matter for the Court of Criminal Appeals. See *Ex parte Dora*, 548 S.W.2d at 394.¹

Since there is no doubt that the Court of Criminal Appeals has

1 In cases where it has previously determined that an applicant has abused the writ process, the Court of Criminal Appeals has the following responsibility:

- Upon receiving the writ transcript from the trial court, the Court reviews the applicant's allegations of "good cause" for allowing a re-filing of the application, and if applicant has "stated facts, which, if true, would entitle him to relief," then order the application be filed and considered on its merits.
- If the Court determines that the applicant has established "good cause" for allowing a re-filing, it will remand the petition to the trial court for fact-finding since it is not a fact-finding agency.
- If the Court determines that the applicant has not established "good cause" for allowing a re-filing, or if his factual allegations concerning good cause are clearly without merit upon their face, then the application is not filed or otherwise considered.

See *Ex parte Dora*, 548 S.W.2d at 394.

previously declared that the applicant has abused the article 11.07 writ of habeas corpus process, this Court should enter such a finding and direct that this writ transcript be forwarded to the Court of Criminal Appeals for its consideration.

WHEREFORE, PREMISES CONSIDERED, the State prays the Court enter a finding that the find that the applicant has previously been found to have abused the writ process.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

DEBRA WINDSOR
Chief, Post-Conviction

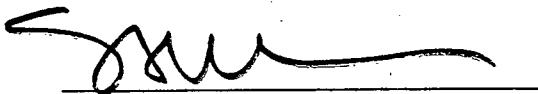


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State Bar No. 04656510

Appendix at 7

CERTIFICATE OF SERVICE

A true copy of the above State's Reply has been mailed to the applicant, Mr. Allen F. Calton, TDCJ-ID #01123880, Stiles Unit, 3060 FM 3514; Beaumont, Texas 77705, on this, the 5th of June, 2017.


STEVEN W. CONDER

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 73.1(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 73.1(d) because it contains approximately 682 words, excluding any exempted parts, as computed by Word 2010, the computer program used to prepare the document.


STEVEN W. CONDER

c18.calton allen f.wr/011065

Appendix "D" at 8

**Additional material
from this filing is
available in the
Clerk's Office.**