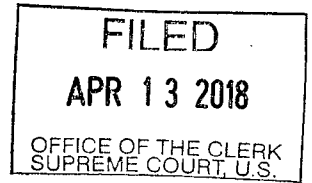


No. 17-7886



In The

Supreme Court Of The United States

In re

Allen Fitzgerald calton

Petition For Rehearing

Allen Fitzgerald Calton #1123880
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Pro Se

Questions Presented on Petition For Rehearing

- (1) Is the Supreme Court while acting as a district court when exercising its original habeas corpus petition jurisdiction. Jurisdiction also foreclosed like all other federal courts who would also lack jurisdiction to resolve second or successive petitions filed pursuant to 28 U.S.C § 2254. If this court determines like any other federal court that neither of the gateway provisions of 28 U.S.C. § 2244(b) have been satisfied due to the statute being a jurisdictional bar "if neither of its standards can be met? As this court implicitly implied in *Felkner V Turpin* 116 S.ct 2333,2339 (1996) (That §§ 2244(b)(1) and (2) apply without qualification to any and all second or successive habeas applications filed in the district court under § 2254 whether or not we're bound by these restrictions they certainly inform our consideration of original habeas petitions). Also see *Herrera V Collins* 506 U.S. 390,430 (1993)(Blackmun J. dissenting)(Stating "When the Supreme Court acts as a district court it is also bound by the rules that governs a district court). Cf. *In re Davis* 130 S.ct 1,2-4 (2009)(Scalia J. dissenting) at n.*(Stating "§ 2254(d)(1) covers all federal petitions including original petitions filed in this court).
- (2) Is it constitutionally comporting that death penalty cases i.e. petitioners sentenced to death receive favorable treatment from the Supreme Court. Than the lesser degree of constitutional protection afforded to non-capital cases or should capital and non-capital cases have no significant constitutional difference between them. See *Williams V New York* 337 U.S. 241 (1949) Also See *Griffin V Illinois* 351 U.S. 12,17 (1956)(The central aim of our judicial system is that all people charged with crime, so far as the law is concerned, stand equally before the bar of justice in EVERY AMERICAN COURT)

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§ 2244(b)(2)(B) Is Unconstitutional "As Applied" Because It Precludes All Federal Court Jurisdiction Including The Supreme Court In Violation of 5th Amdt.

Allen Fitzgerald Calton [hereafter Calton] the petitioner/applicant a U.S. citizen invokes the U.S. Constitution generally which trumps all other sources of law, Federal and State statutes alike. No federal, state or local government official, agency, agent or court has the authority to violate the constitution. This applies to Congress in place on April 24, 1996 that enacted AEDPA. This is so because Art I which established Congress ensured Congress had limitations. In particular Art I § 9 Cl.2 reads: The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. The 5th amendment applies to the federal government and its agents exercising federal authority. See *Edmonson V Leesville Concrete Co.* 500 U.S. 614,616 (1991). The 5th amendment contains an equal protection component prohibiting Congress from discriminating between individuals and groups. See *Bolling V Sharpe* 347 U.S. 497 (1954). The equal protection clause of the 5th amendment commands the federal government shall not deny any U.S. citizen the equal protection of the law. Which is essentially a direction that all U.S. citizens similarly situated should be treated alike. See *Plyler U.S. V Doe* 457 U.S. 202,216 (1982). A violation of equal protection occurs when the federal government or its agent treats someone differently than someone similarly situated. Cf. *Cleburne V Clerburne Living Center Inc* 105 S.ct 3249,3254 (1985). Although equal laws and not equal results under the law are guaranteed by the 5th amendment. See *Personnel Adm'r of Mass. V Feeney* 99 S.ct 2282,2293. Calton has and retains his substantive constitutional right to be treated equally by all laws of the U.S. as a U.S. citizen. Cf. *Cleburne Living Center, Inc.*

105 S.ct at 3258 (Recognizing that the mentally retarded, like others have and retain their substantive constitutional rights in addition to the right to be treated equally by the law). When pleading an equal protection violation its sometimes necessary to allege the existence of similarly situated group that was treated differently. E.g. if a plaintiff seeks to prove selective prosecution on the basis of race, he must show that similarly situated individuals of a different race were not prosecuted. See U.S. V Armstrong 517 U.S. 456,465 (1996). Although equal protection claims are often based on suspect classifications such as race, the equal protection clause also prohibits government officials from selectively applying the law in a discriminatory way. See Snowden V Hughes 321 U.S. 1, 8 (1944). There must be shown the element of intent or purposeful discrimination. Id. at 8. What a legislation is up to, may be plain from the results its actions achieve. See Cramer V U.S. 325 U.S. 1,32-33 (1945) Congress intentionally meant to discriminate against certain certain prisoners despite those prisoners similarly to Calton who can establish their innocence under the miscarriage of justice exception but not § 2244(b) and those prisoners would not be able to obtain a merits review on the claims in the federal court. See Stewart V U.S. 646 F3d 856, 860 (11th Cir 2011)(referencing Congress clear intention to limit second or successive attempts to post-conviction relief). It is also clear the Supreme Court is partial to death penalty cases and value preserving their rights over noncapital cases. Death Row petitioner Troy Davis petitioned the court to exercise its original jurisdiction. The court made clear that it hinged its decision to exercise its original jurisdiction because the case was sufficiently "exceptional" because to put an innocent man to death clearly provides adequate justification for holding an evidentiary hearing. See In re Davis 103 S.ct 1 (2009)(Remanding an "original" habeas peti-

tion to district court for fact finding on innocence claim and adjudication on merits if proper). However Calton situated quite similarly to Davis both petitioned this court to establish their innocence after being denied leave to file a petition in the district court. Unlike Davis, Calton had made a prima facie showing of innocence under *Schlup V Delo* 513 U.S. 298 (1995). In addition to the fact Calton's trial was tainted with constitutional violations. Where as Justice Scalia noted Davis had a trial untainted by constitutional defect. See *In re Davis* 130 S.ct at 2 (Scalia J. dissenting). But since Calton like many convicted felons has a noncapital case his case did not warrant anything other than a without more denial merely signed by the clerk with no Justice's signature or review. It's no less unconstitutional to imprison an innocent man than it is to put an innocent man to death. See *Herrera V Collins* 506 U.S. 390,432 n.2 (1993)(Blackmun J. dissenting)(Explaining that it may violate the constitution to imprison someone who is actually innocent); *Robinson V California* 370 U.S. 660, 667 (1962)(Even one day in prison would be cruel and unusual punishment for the crime of having the common cold); *Pottinger V City of Miami* 810 F Supp 1551, 1565 (Fla S.D (1992)(Finding that a person may not convicted under the 8th amendment for innocent conduct). The adverse consequence Calton has sustained as a result of § 2244(b)(2)(B) is the statute has foreclosed all federal court jurisdiction over Calton's claims. Including the Supreme Court. This Court has long held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule is known as the Fundamental Miscarriage of Justice Exception and is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors don't result in the conviction of innocent persons. See *Mc Cleskey V*

Zant 499 U.S. 467,502 (1991). § 2244(b)(2)(B) is an unconstitutional suspension of the writ "As Applied" to the facts and circumstances here. Because even the Supreme Court's jurisdiction has been foreclosed by the statute. § 2244(b)(2)(B) is a jurisdictional bar to all federal courts including the supreme court when it acts as a district court if it also determines as any other court that the innocence gateway of § 2244(b)(2)(B) has not been met. Cf U.S. V Lopez 577 F3d 1053,1066 n.12 (9th Cir 2009)(Noting § 2255(h) is a jurisdictional bar); U.S. V Flores 135 F3d 1000,1002 n.7 (5th Cir 1998)(Explaining that because of the similarities of the actions brought pursuant to § 2254 and § 2255, the courts have read them in pari materia); Steel Co. V Citizens For Better Env't 523 U.S. 83, 94 (1998)(Federal courts cannot assume their jurisdiction in order to resolve a case on the merits "because it carries the court beyond the bounds of authorized judicial action" and this offends fundamental principle of separation of powers). Without jurisdiction a court cannot proceed at all in a case. Id. Also see Herrera 506 at 430 (Blackmun J dissenting)(Stating "When the supreme court acts as a district court it is also bound by rules that governs a district court) Cf In re Davis at n.* (Scalia J dissenting)(§ 2254(d)(1) covers all federal petitions including original petitions filed in this court). And that is why this court concluded in Felkner V Turpin 116 S.Ct 2333 (1996) "That §§ 2244(b)(1) and (2) apply without qualification to any and all second or successive habeas applications filed in the district court under § 2254. Whether or not we're bound by these restrictions they certainly inform our consideration of original habeas petitions). This authority makes clear that when Calton filed his petition in this court . The court never had jurisdiction if it did not determine that Calton had met the § 2244(b)(2)(B) innocence gateway and that is why it denied Calton's petition without more i.e. a procedural denial without res judicata

consequences. Thus distinguishing § 2254(d)(1) which is constitutional because it merely modifies preconditions for relief rather than foreclosing all federal court jurisdiction from § 2244(b)(2)(B) which is unconstitutional "As Applied" here because it has foreclosed the district court and this court when it acts as a district court from having jurisdiction over Calton's claims since he cannot meet § 2244(b)(2)(B) gatekeeping provision. See *Crater V Galaza* 491 F3d 1119,1125 (9th Cir 2007)(Holding § 2254(d)(1)'s restriction on habeas relief to state court decisions that are contrary to or unreasonable application of clearly established federal law is not unconstitutional suspension of the writ, because it modifies preconditions for relief rather than foreclosing all jurisdiction to review). The 9th circuit noted that whether the writ has been suspended here is whether Calton's prima facie showing of innocence under the fundamental miscarriage of justice exception would allow the supreme court to entertain Calton's instant claims with res judicata consequences in the exercise of the court's original jurisdiction. Cf *Martinez-Villareal V Stewart* 118 F3d 628,637 (9th Cir 1997)(Whether the writ has been suspended depends upon whether or not the supreme court may entertain a colorable competency claim in the exercise of its jurisdiction to hear original habeas applications). Continuing my imprisonment due to § 2244(b)(2)(B) has foreclosed all federal court jurisdiction is offensive to due process and equal protection as guaranteed by the 5th, 6th, 8th and 14th amendments. See *Herrera* 506 U.S. at 407-08 (Applying *Medina* to post conviction relief for actual innocence); *Pennsylvania V Finley* 481 U.S. 551,556 (1987)(Post conviction procedures are constitutional if they comport with fundamental fairness). This court recognizes that due process protects individuals against two types of government action so called "substantive due process" prevents the government from engaging in conduct that shocks

the conscience. See *Rochin V California* 342 U.S. 165,172 (1952) or interference with rights implicit in the ordered liberty. See *Palko V Connecticut* 302 U.S. 319,325-26 (1937). The substantive due process was meant to secure the individual from arbitrary exercise of powers of government. See *Daniel V Williams* 106 S.Ct 662,665 (1986). It concerns the deliberate decision of government officials as Congress to deprive a person of their liberty. Even when government action that deprives a person of their liberty survives substantive due process it still must be implemented in a fair manner. See *Matthews V Eldridge* 424 U.S. 319 335 (1976). This requirement is known as procedural due process. See *Salerno V U.S.* 107 2095,2101 (1987). Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss. See *Joint Anti Fascist Refugee Committee V Mc Grath* 341 U.S. 123,168 (1951). Due Process is flexible and calls for such procedural protections as a situation demands. See *Morrissey V Brewer* 408 U.S. 471, 481 (1972). "Consideration of what procedures due process may require under the circumstances must begin with a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action. *Id.* at 481. AEDPA'S scant legislative history, consisting of three paragraphs in a single conference committee report, suggests Congress was concerned primarily with federal habeas review of capital cases. See H.R.Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944 (stating that the bill "incorporates reforms to surb the abuse of statutory writ of habeas corpus, and to address the acute problem of unnecessary delay and abuse in capital cases"). It cannot be said that Calton has abused the writ nor can it be said he is delaying the execution of justice or the carrying out of his sentence. Assesssing the risk of an erroneous deprivation of Calton's private interest to be free from an uncon-

stitutional loss of liberty and right to contest the same through the great writ. Against the societal interest in finality and comity. Which must yield to a fundamental unjust imprisonment. See *Engle V Isaac* 456 U.S. 107,135 (1981). To achieve justice here the fundamental miscarriage of justice exception should be utilized as a procedural safeguard. To permit Calton the opportunity to establish his unjust incarceration. See *Matthews* 424 U.S. at 335 (Noting due process clause requires an assessment of inter alia, the risk of an erroneous deprivation of liberty interest and probable value, if any of additional or substantive procedural safe guard). The miscarriage of justice exception is altogether consistent with AEDPA'S central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence. See *Calderon V Thompson* 523 U.S. 538,558 (1998); *House V Bell* 126 S.ct 2064,2077 (2206)(Schlup standard is very demanding and permits review only in the extraordinary case). Given that Calton has already established his actual innocence under "Schlup" in the Texas Court of Criminal Appeals [Hereafter C.C.A.] to have his otherwise barred claims reviewed on the merits by the Texas Court of last resort. Which adopted the federal fundamental miscarriage of justice exception as its own and as a guide in resolution of subsequent state applications. See *Ex Parte Brooks* 219 Sw3d 396,399 (Tex.Crim.App. 2007)(The subsequent application provision of T.C.C.P. Art. 1107 and 11.071 were enacted in response to *Schlup V Delo*). Calton's prima facie showing of innocence under *Schlup*, supra in the C.C.A. is to be accorded a presumption of correctness. See *Reed V Stephens* 739 F3d 753,768 (5th Cir 2014)(Citing *Sharpe V Bell* 593 F3d 372,379 (4th Cir 2009)(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 findings of

facts not be casually set aside); Goldblum v Klem 510 F3d 204,212,221 n.13(3d Cir 2007)(Applying presumption of correctness under § 2254(e)(1) in resolving Schlup Claim). Thus as a matter of law Calton could reasonably establish his innocence under Schlup in a federal court. Therefore I have been injured by the operation of § 2244(b)(2)(B) as established by the 5th Circuit's denial of affording Calton leave to file a subsequent petition. See Attachment "A" attached to original petition on file herein. In addition to this court's summary denial of Calton's original petition to this court on 3-19-18. Which in all probability was due to this court being guided by § 2244(b)(2)(B) in denying relief. See Felkner 116 S.Ct at 2339 (§§ 2244(b)(1) and (2) apply without qualification to any and all "second or successive" habeas applications filed in the district court under § 2254. Whether or not we are bound by these restrictions they certainly inform our consideration of original habeas petitions). Which establishes Calton's constitutional "As Applied" challenge to § 2244(b)(2)(B) has merit and should be resolved because he's shown that he has been injured by the operation of § 2244(b)(2)(B). This is so because Calton has and can reasonably meet if afforded the opportunity to do so the Schlup standard in the federal court also as he did in the C.C.A. if afforded the opportunity to do so. In other words Calton can meet Pre-AEDPA law gateway provisions but it has been determined that Calton cannot meet Post-AEDPA gateway provisions foreclosing all federal court jurisdiction over Calton's claims. When challenging the constitutionality of a statute, it is incumbent upon the party raising the issue to show that in its operation the statute is unconstitutional to him in his situation. It must be shown that he is injured or that his rights are abrogated in the application of the statute. See Tileston v Ullman 318 U.S. 44 (1943); South Florida Free Beaches Inc v City of Miami 754 F2d 608,612 (11th Cir 1984)(Declining to address whether

a statute was constitutional because any resolution would not affect the outcome of the case). Cf *In re Sonshine* 132 F3d 1133,1134 (6th Cir 1997)(Noting that retroactive effect exists, only where the difference matters between Pre-AEDPA and Post-AEDPA standard). The without more denial by this court merely bearing the signature of clerk Scott Harris and not a justice cannot suffice to sustain § 2244(b)(2)(B) against Calton's "As Applied" constitutional attack. Cf *Martinez-Villareal* 118 F3d at 631 n.3 (We reject the suggestion that direct review by the Supreme Court suffices to sustain § 2244(b)(2)(B) against a constitutional attack). The summary denial by this court was not an adequate form of collateral review and was more akin to a procedural dismissal and tantamount to no federal review from the only federal court I could bring my constitutional claims to. Cf *Swain V Pressly* 430 U.S. 372,381 (1977)(Certiorari does not amount to an adequate form of collateral review). The suspension clause prevents congress from withdrawing the supreme court's jurisdiction to make a dispositive ruling when this is the only federal court that Calton could bring his claims to. Cf *Boumediene V Bush* 553 U.S. 723,787-92 (2008)(The suspension clause forbids congress from withdrawing jurisdiction when a federal court is the only court where a prisoner can bring a habeas petition). This court is constitutionally empowered by Art III to render a dispositive judgment. Cf. *Plaut V Spendrift Farm Inc* 115 S.ct 1449,1452-53 (1995). In the alternative it should ensure that one is had if necessary after a hearing on the matter upon transfer to the district court. See *In re Davis* 130 S.ct 1-2 (using original habeas jurisdiction to transfer petition to a district court for evidentiary hearing on actual innocence and adjudication on the merits if appropriate). Although inferior Art III courts derive their jurisdiction from Congress. See *Sheldon V Sill* 49 U.S. (8 How) 441,448-49 (1850)(Congress, having power to establish

the courts must define their respective jurisdiction. Courts have no jurisdiction but such as statute confers). Congress cannot constitutionally trump this court's constitutional powers and its jurisdiction derived directly from the constitution. See *Kline V Burke Const. Co.* 260 U.S. 226, 234 (1922)(Only the jurisdiction of the supreme court is derived directly from the constitution). And that is why this court addresses what is constitutionally compelled. See *U.S. V Cronin* 104 S.Ct 2037, 2050 n.40 (1984)(We consider in this case only the commands of the constitution. We do not address what is prudent or appropriate but what is constitutionally compelled). The procedural hurdle of § 2244(b)(2) (B) cannot be constitutionally "Applied" when doing so will eviscerate Calton's fundamental right to be tried by a fair and impartial judge. Cf. *In re Hill* 715 F3d 284, 304-05 (11th Cir 1013)(Barkett J dissenting)(I cannot see how any procedural rule, even AEDPA'S bar to subsequent applications can be constitutionally enforced when doing so will eviscerate the constitutionally protected right that a juvenile, mentally retarded, or insane offender cannot be executed). If the supreme court said what it meant and meant what it said. A defendant tried by a partial judge is entitled to have his conviction set aside no matter how strong the evidence is against him. See *Tumey V Ohio* 273 U.S. 510, 535 (1927); *Arizona V Fulminante* 499 U.S. 279, 308 (1991). And Calton has shown beyond any reasonable doubt that his trial judge suppressed the instrumentality of self-defense theory i.e. a "Butcher Knife" that was seized by police unbeknownst to Calton. The due process requirement for a fair trial is too demanding to let stand the decision of a trial governed by a bias judge who dishonestly suppresses evidence of innocence. See *Edwards V Balisok* 117 S.Ct 1584, 1588 (1997). A congressional act cannot be constitutionally "Applied" to trump one of the most fundamental if not the most fundamental constitutional right under the law.

Cf. In re Hill 715 F3d at 307 (Barkett J dissenting)(If the supreme court means that the mentally retarded cannot be executed, a congressional act cannot be applied to trump Hill's constitutional right not to be executed). § 2244(b)(2) (B) as a procedural rule may not operate to deny or prevent the remedy to a constitutional violation. Cf. State V Mc Pherson 851 Sw2d 846,850 (Tex.Crim. App. 1976)(The 8th amendment takes precedence over T.C.C.P. Art 37.07 § 1(a)); Whitmore V State 570 Sw2d 889 (Tex.Crim.App. 1976)(In some cases where an accused's constitutional rights are in conflict with a valid procedural rule of law the procedural rule must yield to superior constitutional right). And of course this reasoning would apply with great force if Calton were under a sentence of death and had been tried by a bias judge. If that were the case relief would be a foregone conclusion. This is so because as noted above the court recognizes and treats death penalty case differently and favorably. See e.g. Gardner V Florida 97 S.ct 1197, 1204 n.7 (1971) and cases cited therein establishing the same. This ought not be so and had not always been so. In 1949 when Williams V New York 337 U.S. 241 (1940) was decided, no significant constitutional difference between death penalty and lesser punishment for crime had been expressly recognized by this court. In other words at that time I would've had my case transferred to a Dist.Ct. like Troy Davis. Because at that time capital and noncapital cases had equal access to and equal protection by the constitution. The judicial scrutiny and painstaking review this court affords to a capital case should also be afforded to Calton under the facts and circumstances here. As Justice Brennan made clear "The central aim of our judicial system is that all people charged with crime, so far as the law is concerned, stand equally before the bar of justice in every American court. See U.S. V Mac Collum 426 U.S. 317,330 (1976)(Citing Griffin V Illinois 351 U.S. 12,17

(1976)). For this country is a country dedicated to affording equal justice to all and special privileges to known in the administration of criminal law. See Griffin 351 U.S. at 19. That is why the "Williams" court had it right in 1949. Because no U.S. citizen is entitled to better treatment or to have a favorable application of the law under a death sentence notwithstanding. Calton's right to a fair trial and liberty interest to be free from an unlawful imprisonment is no less important to society than an innocent man be put to death. That concern is reflected in the fundamental value determination of society that it is far worse to convict an innocent man than it is to let a guilty man go free. See In re Winship 397 U.S. 358,372 (1970)(Harlan J. concurring).

Before AEDAPA's passage, if the prosecution failed to disclose Brady evidence until after an initial petition's resolution the petitioner could then raise the Brady claim in a second-in-time petition so as long as it was not barred by the abuse-of-the-writ doctrine. Applying the prejudice analysis in Strickler, courts could reach the merits of these Brady claims only when the suppressed evidence was material, and would have to dismiss as an abuse-of-the-writ meritless claims that did not establish materiality. See Strickler V. Greene 527 U.S. 263,296 (1999). Before AEDPA federal courts generally would have been able to reach the merits and reach every meritorious Brady claim presented in subsequent petitions when the "Cause" prong of the abuse of the writ doctrine was also satisfied. See Lopez 577 F3d at 1064. Under § 2244(b)(2)(B) federal courts including this court have lacked jurisdiction to consider Calton's Brady claim because these courts have determined that Calton has not met § 2244(b)(2)(B). If § 2244(b)(2)(B) applies literally to every second-in-time Brady claim, federal courts including this court are unable to resolve an entire subset of meritorious Brady claims: such as those presented here where Calton has conclusively

shown the "Butcher Knife" establishes a reasonable probability of a different result and is material under Brady and that is why the c.C.A addressed Calton's Brady claims on the merits. However Calton cannot show § 2244(b)(2)(B)'S more demanding prejudice standard that the "Butcher Knife" establishes by clear and convincing evidence but for a constitutional violation no reasonable factfinder would have found guilt. This broad rule under which all second-in-time Brady claims would be subject to § 2244(b)(2)(B), would completely foreclose federal review of some meritorious Brady claims and reward prosecutors for failing to meet their constitutional disclosure obligation under Brady. See Lopez 577 F3d at 1064-65 (Noting Lopez and Amici are correct the broad rule the government advocates, under which all all second-in-time Brady claims would be subject to § 2255(h)(1), would completely foreclose federal review of some meritorious Brady claims and reward prosecutors for failing to meet their constitutional disclosure obligation under Brady). The court noted this seems a perverse result and a departure from this court's precedence abuse-of-the-writ jurisprudence. Id. at 1065(Citing Strickler 527 U.S. at 296). Barring these Brady claims would promote finality one of AEDPA'S purposes but it would do so at the expense of foreclosing all federal court including the Supreme Court's review of meritorious Brady claims that could not have been presented any sooner certainly not an AEDPA goal. Id at 1065. Under certain circumstances "the constitutional requirement of due process is a requirement of judicial process. See Crowell V Benson 52 S.ct 285,306 (1932). A citizen who claims his liberty is being infringed is entitled upon habeas to the opportunity of a judicial determination of the facts. And so highly is this liberty prize, that the opportunity must be accorded to any resident of the U.S. who claims to be a citizen. See St. Joseph Stock-yard Co. V U.S. 298 U.S. 38, 77 (1936). The fundamental requirement of due

process as guaranteed by the 5th amendment is the opportunity to be heard in a meaningful manner. See *Matthew* 424 U.S. at 333. One of the most deeply rooted engrained principle in Anglo-American jurisprudence requires that an official entrusted with finding facts must hear the testimony on which his findings will be based. As explained in *Swisher V Brady* 438 U.S. 204,229-233 (1978)(dissenting opinion). "our constitutional tradition rejects the notion that factual finding in criminal cases may be made by an official who acts in isolation and on the basis of a cold record. The principle that "that the one who decides must hear," See *Morgan V U.S.* 298 U.S. 468,481 (1936). Is supported by two distinct rationales. First, judicial factfinding based on a written record carries an intolerably high risk of error. Any experienced lawyer is aware that findings of fact frequently rest on impression of demeanor and other factors which do not appear on the face of the record. See *U.S. v Raddatz* 100 S.Ct 2406,2423 (1980). As this court stated in *Holiday V Johnson* 313 U.S. 342,352 (1941) "One of the essential elements of determination of crucial facts is the weighing and appraising of the testimony". The principle is not based solely on the constitutional interest in accurate factfinding. It also derives from the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts to the official entrusted with judging its accuracy. The due process clause promotes participation and dialogue in the decision making process. See *Marshall V Jerrico Inc.* 446 U.S. 238,242 (1980). This ensures that individuals adversely affected by governmental action may confront the ultimate decision maker and thus play some part in formulation the ultimate decision. See *Carey V Piphus* 435 U.S. 247 (1978). In this respect, the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity. See

Mc Grath 341 U.S. at 170. Although federal courts on habeas are not obliged to examine the facts independently in every case under Townsend V Sain 372 U.S. 293 (1963). Due to state court findings of fact are accorded deference by federal courts. However, this court should take judicial notice that there were no fact findings made by any state court in resolution of Calton's claims. Thus no federal deference is owed here. See Lewis V Dretke 355 F3d 364,366 (5th Cir 2003) (Citing Perillo V Johnson 79 F3d 441,446 (5th Cir 1996)(Because the state court did not make and factual findings regarding these claims when they were raised in state court, no deference is owed to the state court's resolution of the claim). As this court has emphasized the vindication of constitutional rights more frequently depend on findings of fact than abstract principles of law. See Speiser V Randee 357 U.S. 513,520 (1958). Under the standards of Matthews 424 U.S. at 335 due process requires that Calton be afforded an evidentiary hearing to establish his innocence. Cf. Raddatz 100 S.Ct at 2418 (Under the standards set out in "Matthews" due process requires a district court to rehear crucial witnesses when, as here, a suppression hearing turns on credibility); Schlup 513 U.S. at 332 (Noting "The fact intensive nature of the innocence inquiry case should be remanded to district court where testimony can be taken from few key witnesses). Finally Calton has been limited to supporting his actual innocence contention with only the affidavit of Shelli Pryor which establishes that a "Butcher Knife" unbeknownst to Calton was seized by police. "Affidavits are disfavored because affiant's statements are obtained without benefit of cross-examination and opportunity to make credibility determinations. See Herrera 506 U.S. at 417.

PRAYER

Wherefore, premises considered, Calton Respectfully Prays and move the court to rescind its order denying relief and transfer case to a district court.

Respectfully Submitted,

Allen Fitzgerald Calton
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Petitioner's Certificate Pursuant To Supreme Court Rule 44(2)

Now comes petitioner Allen Fitzgerald Calton #1123880, incarcerated at the Stiles Unit, in Jefferson County, Texas and hereby declare and state under the penalty of perjury pursuant to 28 U.S.C. § 1746 that the accompanying petition for rehearing signed into effect by Calton on May 9, 2018 contains substantial grounds of intervening circumstances and in addition to other substantial grounds and contentions not previously presented. The statement contain herein are true and correct and are based upon personal knowledge.

Executed on May 9, 2018 under the authority of 28 U.S.C. § 1746. May 9, 2018
Date

Allen Fitzgerald Calton
Allen Fitzgerald calton

Petitioner's Certificate Pursuant To Supreme Court Rule 44(1)

Now Comes petitioner Allen Fitzgerald Calton #1123880, incarcerated at the Stiles Unit, In jefferson County, Texas, and hereby declare and state under the penalty of perjury pursuant to 28 U.S.C § 1746 that the accompanying petition For Rehearing signed into effect by Calton on May 9, 2018 is hereby being presented in good faith and not for the purpose for delay and it is being submitted in the interest of justice. The Statements contained herein are true and correct and are based upon personal knowledge.

Executed on May 9, 2018 under the authority of 28 U.S.C. 1746 . May 9, 2018
Date

Allen Fitzgerald Calton
Allen Fitzgerald Calton