APPENDIX

(A) United States Court of Appeals for Fifth Circuit
Denial of Certificate of Appealability

(B) Petitioner's Application for Certificate of Appealability with Memorandum of Law

(C) Decision of the United States District Court Western District of Waco,Texas Final Judgment

(D) Order of the United States District Court Western District of Texas Waco.

All other (Documents needed in this case to assist Petitioner could not be accomplished by petitioner due to his indigency. He ask that the Court requests any further material needed to remand this case to the Fifth Circuit Court of Appeals for a Evidentiary Hearing in the interest of justice.

Appendix (A)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50551

A True Copy
Certified order issued Mar 01, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

HILARIO SANCHEZ,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Hilario Sanchez, Texas prisoner # 01682415, filed a 28 U.S.C. § 2254 application challenging his murder conviction and 25-year sentence. The district court dismissed his application as time barred. Sanchez now seeks a certificate of appealability (COA) to appeal that ruling, and he asks for this court's leave to appeal in forma pauperis (IFP).

To receive a COA, Sanchez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because the district court rejected his habeas application on a procedural ground, he must show, in part, that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Sanchez lists five issues that he wishes to argue on appeal. However, his COA motion includes no argument that the district court erred by dismissing his claims as time barred. As Sanchez has not briefed any challenge to the time-bar dismissal, that issue is now deemed abandoned. *See Hernandez v. Thaler*, 630 F.3d 420, 426 n.24 (5th Cir. 2011).

Because Sanchez has not demonstrated that jurists of reason would find the district court's procedural ruling debatable, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484. Sanchez's motion for leave to appeal IFP is also DENIED.

STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

HILARIO SANCHEZ	§	
	§	
V.	§	**W-14-CA-157-RP**
	§	
LORIE DAVIS	§	

FINAL JUDGMENT

Before the Court is the above styled and numbered cause. On this date, the Court dismissed with prejudice Petitioner Hilario Sanchez's Application for Habeas Corpus Relief. The Court further determined that a certificate of appealability shall not be issued. Accordingly, as all issues in the cause have been resolved, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is therefore **ORDERED** that Petitioner Hilario Sanchez's Application for Habeas Corpus Relief is hereby **DISMISSED WITH PREJUDICE AS TIME-BARRED.**

It is finally **ORDERED** that the above styled and numbered cause is hereby **CLOSED.**

SIGNED on May 31, 2017.

ROBERT L. PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

HILARIO SANCHEZ,	§	
TDCJ #1682415,	§	
Petitioner,	§	
	§	
V.	§	**W-14-CA-157-RP**
	§	
LORIE DAVIS[1],	§	
Respondent.	§	
	§	

ORDER

Before the Court is Petitioner Hilario Sanchez's federal Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (Doc. 1); Petitioner's Supplement (Doc. 17); Respondent's Response (Doc. 22); and Petitioner's Reply (Doc. 29). Petitioner is presently confined in the Eastham Unit of the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ-CID"). Petitioner has paid the requisite filing fee and is proceeding before the Court *pro se*. For the reasons set forth below, the Court finds that Petitioner's Application should be dismissed with prejudice as time-barred.

BACKGROUND

The Director has custody of Petitioner pursuant to a judgment and sentence from the 19th Judicial District Court of McLennan County, Texas, acting as a juvenile court in Cause No. 98-20-J. *Ex parte Sanchez*, Appl. No. 81,091-01 at 37-38. Petitioner stipulated to the evidence against him and pleaded guilty to murder. *Id.* at 35-40. The Stipulation of Evidence provided, in part:

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[1] The previous named respondent in this action was William Stephens. On May 1, 2016, Lorie Davis succeeded Stephens as Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Under Rule 25(d) of the Federal Rules of Civil Procedure, Davis is automatically substituted as a party.

> I hereby stipulate and understand that the Assistant District Attorney will recommend to this Court a disposition of twenty-five (25) years confinement, to be served at the Texas Youth Commission with a *possible transfer, upon hearing*, to the Texas Department of Criminal Justice at any time after my sixteenth birthday, to serve the remainder of my term of confinement.

Id. at 36 (emphasis supplied). On February 9, 1998, the McLennan County district court committed Petitioner into the custody of the Texas Youth Commission (TYC) for a term of twenty-five years. *Id.* at 39-40. As part of the plea, Petitioner waived his right to a direct appeal. *Id.* at 33. Thus, he did not file an appeal.

On October 22, 2002, Petitioner was paroled from the custody of the TYC and transferred to the "custody of the [TDCJ's] Parole Division [to] remain in legal custody of the state but amenable to the order and conditions of the Board of Pardons and Paroles." (Doc. 22, Ex. A at Ex. B, "Certificate of Transfer"); *Ex parte Sanchez*, Appl. No. 81,091-01 at 19. On December 22, 2010, Petitioner was placed in the custody of the TDCJ-CID following a conviction for possession of a controlled substance. (Doc. 22, Ex. A, Affidavit of Charley Valdez). On August 10, 2011, the Texas Board of Pardons and Paroles ("BPP") revoked Petitioner's parole.[2] On January 21, 2014, Petitioner filed a state application of writ of habeas corpus. *Ex parte Sanchez*, Appl. No. 81,091-01 at 12.[3] On April 2, 2014, the Texas Court of Criminal Appeals denied the application without a written order. *Id.* at Action Taken Sheet.

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[2] The Affidavit of Charley Valdez states Petitioner's parole on cause number 98-20-J was revoked on August 10, 2011. *See* Doc. 22, Ex. A, Affidavit of Charley Valdez. However, the record reflects the hearing took place on August 1, 2011. *See id.* at Ex. C, "Hearing Report." For Petitioner's benefit, the Court will use the August 10, 2011 date.

[3] The prison mailbox rule applies to state habeas applications. *See Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013). Petitioner signed and dated his application on January 21, 2014. Petitioner's state application could not have been filed any earlier than January 21, 2014.

Petitioner filed his federal habeas corpus Application on May 15, 2014[4] (Doc. 1 at 10), asserting the following grounds for relief:

(1) Petitioner is actually innocent in connection with his murder conviction (Ground One); and

(2) Petitioner involuntarily and unintelligently waived his rights and entered into a stipulation in connection with his guilty plea in that he "was never informed of the fact that he could be transferred to the authority and jurisdiction of the TDCJ-CID and/or its Board of Pardons and Paroles without a hearing with an attorney to represent him at such hearing" (Ground Two).

Id. at 7. Petitioner's Grounds One and Two were presented as Grounds Three and Four on page seven of his federal habeas application form. Petitioner failed to include page six of the standard application form–the page that provides space for Petitioner to state his claims for Grounds One and Two. Because Petitioner did not indicate whether he inadvertently omitted page six, Judge Walter S. Smith, Jr., the judge previously assigned to this case, construed the grounds for relief as Grounds One and Two. (Doc. 14, n. 2).

Respondent moved to dismiss on the grounds that Petitioner's claims are unexhausted, procedurally barred, and, further, that Petitioner's Application is time-barred. (Doc. 12). Judge Smith found that Petitioner successfully exhausted his claims in Ground Two. (Doc. 14 at 4-7). However, Judge Smith concluded that Petitioner did not present his actual innocence claim in Ground One to the Texas Court of Criminal Appeals, and thus Ground One is unexhausted, procedurally barred, and without merit because freestanding claims of actual innocence fail to state a claim for relief on

[4] *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (for purposes of determining the timeliness of a pro se inmate's federal petition under AEDPA, a federal petition is considered "filed" on the date the inmate delivers the papers to prison authorities for mailing). The instant Petition could not have been "filed" any sooner than May 15, 2014, the date Petitioner certifies he placed it in the prison mailing system. (Doc. 1 at 10).

federal habeas review. *Id.* Accordingly, Judge Smith granted the motion to dismiss as to Ground One.

Judge Smith next considered whether Petitioner's Application is barred by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA's") one-year statute of limitations for federal habeas corpus petitions brought pursuant to § 2254. *Id.* at 7. Judge Smith concluded that, in this case, the McLennan County district court convicted Petitioner of murder on February 9, 1998. *Id.* at 8. His judgment of conviction became final on March 11, 1998, due to Petitioner's failure to file a notice of appeal. *Id.* Thus, Judge Smith concluded, the one-year limitations period would expire on March 11, 1999, unless a later date served to trigger the limitations period. *Id.*

In response, Petitioner argued that a later date controlled with respect to triggering the one-year limitations period. Petitioner asserted he was not aware of and could not have discovered through the exercise of due diligence the factual predicate of his claims until September 9, 2013. Judge Smith's order summarized Petitioner's allegations with evidence in support:

> (1) on October 22, 2002, Petitioner was paroled from his 1998 juvenile murder conviction and discharged from the TYC (Doc. 8, Ex. C);
>
> (2) on October 26, 2010, Petitioner was convicted of possession of a controlled substance and sentenced to five years in the TDCJ (Doc. 8, Ex. D);
>
> (3) On May 11, 2011, Petitioner received notification from the State Counsel for Offenders that his TDCJ records had been changed to reflect that his parole from the 1998 juvenile conviction was not revoked and that he was only confined at the TDCJ based on the 2010 drug possession conviction (Doc. 8, Ex. E); and

(4) by Commitment Inquiry dated September 9, 2013, however, Petitioner learned that he was being confined at the TDCJ based solely[5] on his 1998 juvenile conviction.

Id. at 8-9. Based on that evidence, Judge Smith concluded that Petitioner did not learn of his transfer into TDCJ custody based on his 1998 juvenile conviction until September 9, 2013. *Id.* at 9. Judge Smith reasoned that, before being paroled from his 1999 juvenile conviction on October 22, 2002, Petitioner had been in the custody of the TYC, thus Petitioner could not have discovered with due diligence the factual predicate of his claims in Ground Two until September 9, 2013, when he learned about his transfer into TDCJ custody based solely on his 1998 juvenile conviction. *Id.* Thus, Judge Smith held that, for purposes of Petitioner's claims in Ground Two, the one-year limitations period commenced on September 9, 2013, making the instant federal application, filed May 15, 2014, timely. *Id.* Accordingly, Judge Smith denied Respondent's motion to dismiss as to Ground Two and ordered Respondent to file a supplemental response addressing the merits of Petitioner's claims asserted in Ground Two. *Id.*

Petitioner subsequently filed a motion seeking to supplement the record with the missing sixth page of his standard form habeas application. Judge Smith granted the motion and ordered Respondent to file a supplemental response addressing the merits of Petitioner's claims in Ground Two and the claims advanced in page six of the application. Collectively, Petitioner's Application asserts the following claims:

(1) Petitioner is being illegally confined by TDCJ-CID in violation of his due process rights because he never received an "adult" conviction in

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[5] Although Judge Smith found that the September 9, 2013 Commitment Inquiry established Petitioner was being confined at the TDCJ-CID based "solely" on his 1998 juvenile conviction, the Inquiry states Petitioner was being confined pursuant to the 1998 juvenile conviction as well as the 2010 conviction for possession of a controlled substance. (Doc. 8, Ex. B).

> case #98-20-J, no judicial authority has authorized the TDCJ-CID and/or its Board of Pardons and Paroles to transfer Petitioner to the jurisdiction of TDCJ-CID, and Petitioner never received any notice of transfer to TDCJ-CID, nor was he provided a hearing with an attorney;
>
> (2) TDCJ-CID and/or its Board of Pardons and Paroles are illegally confining Petitioner without jurisdiction because TDCJ-CID has never been authorized by any court to transfer Petitioner to TDCJ-CID or its Board of Pardons and Paroles; and
>
> (3) Petitioner's stipulation and waiver of rights in case #98-20-J was unintelligently and involuntarily made because Petitioner was never informed of the fact that he could be transferred to the authority and jurisdiction of TDCJ-CID and/or its Board of Pardons and Paroles without a hearing with an attorney present. (Originally Ground Two).

(Doc. 17; Doc. 1 at 7). On September 4, 2015, Respondent filed a Supplemental Response arguing Petitioner was not entitled to a hearing upon release to parole and, further, that Petitioner's application should be dismissed as time-barred. (Doc. 22). On November 20, 2015, Petitioner filed a Reply. (Doc. 29).

DISCUSSION

Any § 2254 petition filed after April 24, 1996, is subject to the mandates of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320 (1997). The AEDPA reads as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2). Petitioner's claims are time-barred. In this case, the McLennan County district court convicted Petitioner of murder on February 9, 1998. *Ex parte Sanchez*, Appl. No. 81,091-01 at 35-40. His judgment of conviction became final on March 11, 1998, due to his failure to file a notice of appeal. TEX. R. APP. PROC. 26.2(a)(1) (directing that defendants must file a notice of appeal "within 30 days after the day sentence is imposed or suspended in open court"). Thus, pursuant to § (d)(1)(A), the one-year limitations period expired on March 11, 1999, absent tolling or a later date controlling pursuant to § (d)(1)(D). *See Scott v. Johnson*, 227 F.3d 260, 262 (5th Cir. 2000) (when a petitioner fails to appeal, the one-year limitations period begins to run from the expiration of the time to appeal).

In light of the evidence submitted along with Respondent's Supplemental Response, Petitioner's assertion that, pursuant to § (d)(1)(D), he did not discover the factual predicate of his claims until September 9, 2013, is contradicted by the record. The factual predicate date for Petitioner's claims regarding his transfer from the TYC to the supervision of the BPP without a hearing is October 22, 2002. On that date, Petitioner signed documents indicating he was aware that he was being placed in the custody of the Parole Division and would be committed to TDCJ-CID

upon revocation. (Doc. 22, Ex. A at Ex. B). Thus, Petitioner had until October 22, 2003, to file a federal petition for writ of habeas corpus asserting those claims.

The factual predicate date for Petitioner's claims that he was transferred into the custody of the TDCJ-CID without a hearing is August 10, 2011, the day of his parole revocation hearing. *Id.* Accordingly, the statute of limitations for these claims expired on August 10, 2012. Petitioner's state application for habeas corpus, filed on January 21, 2014, did not toll the limitations period because it was filed after the statute of limitations expired. Accordingly, the instant Application, filed on May 15, 2014, is untimely.

CONCLUSION

For the reasons discussed herein, Petitioner's claims are time-barred and dismissal is proper.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a

district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court shall not issue a certificate of appealability.

It is therefore **ORDERED** that Petitioner's Application for Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE** as time-barred.

It is finally **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED on May 31, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

HILARIO SANCHEZ	§	
	§	
V.	§	**W-14-CA-157-RP**
	§	
LORIE DAVIS	§	

FINAL JUDGMENT

Before the Court is the above styled and numbered cause. On this date, the Court dismissed with prejudice Petitioner Hilario Sanchez's Application for Habeas Corpus Relief. The Court further determined that a certificate of appealability shall not be issued. Accordingly, as all issues in the cause have been resolved, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is therefore **ORDERED** that Petitioner Hilario Sanchez's Application for Habeas Corpus Relief is hereby **DISMISSED WITH PREJUDICE AS TIME-BARRED**.

It is finally **ORDERED** that the above styled and numbered cause is hereby **CLOSED**.

SIGNED on May 31, 2017.

ROBERT L. PITMAN
UNITED STATES DISTRICT JUDGE

Appendix (D)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

HILARIO SANCHEZ, TDCJ # 1682415, Petitioner, v. WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	Civil No. W-14-CA-157

Jun 22nd 2015

ORDER

Petitioner has submitted the instant application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. He has paid the $5.00 filing fee and is proceeding *pro se*. Before the Court is Respondent's Motion to Dismiss the application (Doc. 17).

I. Background

Petitioner currently is incarcerated in the Texas Department of Criminal Justice, Correctional Institutions Division pursuant to a judgment and sentence from the 19th Judicial District Court of McLennan County, Texas, acting as a juvenile court in Cause No. 98-20-J. (*See Ex parte Sanchez*, No. 81,901-01 at 37). Petitioner stipulated to the evidence against him and pled guilty to murder. (*Id.* at 35-40). On February 9, 1998, the McLennan County district court committed Petitioner into the

custody of the Texas Youth Commission for a term of twenty-five years. (*Id.* at 40). As part of his plea, Petitioner waived his right to a direct appeal. (*Id.* at 33).

On October 22, 2002, Petitioner was paroled from the custody of the Texas Youth Commission ("TYC"). (*Id.* at 19). On December 22, 2010, Petitioner was placed in TDCJ custody, after which the Texas Board of Pardons and Paroles ("Board") revoked Petitioner's parole following a conviction for possession of a controlled substance,. (*Id.* at 21-22).

On January 21, 2014, Petitioner filed a state application for a writ of habeas corpus. (*Id.* at 2-12). Petitioner asserted the following grounds for relief:

(1) the TDCJ, through the Board, is illegally confining Petitioner without jurisdiction based on a discharged juvenile conviction;

(2) the TDCJ and the Board is holding Petitioner in custody in violation of his due process rights;

(3) Petitioner's sentence on the murder charge is void; and

(4) Petitioner involuntarily and unintelligently waived "his rights to confrontation, self-incrimination, to compel witnesses, and to a trial by jury" in that he "was not informed that his sentence could be transferred to the [TDCJ] or that he could be placed on adult parole without being afforded a hearing with an attorney representing him."

(*Id.* at 6-9). On April 2, 2014, the TCCA denied this application without a written order. (*Id.* at cover).

Petitioner filed his federal habeas corpus application on May 15, 2014.[1] (Doc. 1 at 10). He asserts the following grounds for relief:

(1) Petitioner is actually innocent in connection with his murder conviction (Ground One); and

(2) Petitioner involuntarily and unintelligently waived his rights and entered into a stipulation in connection with his guilty plea in that he "was never informed of the fact that he could be transferred to the authority and jurisdiction of the [TDCJ] and/or its [Board] without a hearing with an attorney to represent him at such hearing" (Ground Two).

(*Id.* at 7).[2]

Respondent has submitted a Motion to Dismiss. (Doc. 12). Respondent contends that: (1) Petitioner's grounds for relief are unexhausted and procedurally barred from federal review; (2) the instant application is time barred. (*Id.* at 3-10). Petitioner asserts in reply that his claim in Ground Two was properly exhausted. (Doc. 13 at 1-2). While acknowledging that his actual innocence claim was unexhausted, Petitioner contends that such claim "opens the gateway for this Court

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[1] *See Spotville v. Cain,* 149 F.3d 374, 375 (5th Cir. 1998)("We hold that the habeas corpus petition of a *pro se* prisoner litigant is filed for purposes of determining the applicability of the AEDPA at the time the petitioner tenders the petition to prison officials for mailing.").

[2] Petitioner's two grounds for relief are presented as grounds three and four on page 7 of his federal habeas application form. (Doc. 1 at 7). Petitioner has failed to include page 6 of his application form. That page of the form provides space for Petitioner to provide his claims for grounds one and two. Petitioner, however, has not indicated whether he inadvertently omitted page 6 or intended to bring any additional grounds for relief.

to entertain all of his claims." (*Id.* at 2). Finally, Petitioner contends that the instant application has been filed in a timely manner. (*Id.* at 3).

II. Discussion

A. Failure to Exhaust and Procedural Default

Respondent contends in his Motion to Dismiss that Petitioner's grounds for relief are unexhausted and procedurally barred from federal review. A fundamental prerequisite to federal habeas relief under § 2254 is the exhaustion of all claims in state court prior to requesting federal collateral relief, and a federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (citing *Rose v. Lundy,* 455 U.S. 509, 519-20 (1982)); *see also* 28 U.S.C. § 2254(b)(1)(A) (writ shall not be granted unless it appears that the applicant has exhausted state remedies). In Texas, a state prisoner may satisfy the exhaustion requirement by presenting his claims to the TCCA in either a petition for discretionary review following a direct appeal or a post-conviction habeas corpus proceeding under Article 11.07 of the Texas Code of Criminal Procedure. *See Anderson v. Johnson*, 338 F.3d 382, 388 n.22 (5th Cir. 2003).

Furthermore, to satisfy the exhaustion requirement, a petitioner must have presented his claims to the state courts in a procedurally correct manner. *Castille v. Peoples,* 489 U.S. 346, 351 (1989); *Satterwhite v. Lynaugh,* 886 F.2d 90, 92-93 (5th Cir. 1989). The state court system must have been apprised of the same facts and legal theories upon which a petitioner bases his federal habeas claims. *See*

Picard v. Connor, 404 U.S. 270, 276 (1971) ("Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). A procedural default for purposes of federal habeas corpus relief occurs when the petitioner fails to exhaust state remedies and the state court to which the petitioner would be required to meet the exhaustion requirement would now deem the claims procedurally barred. *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995) (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)).

The Court will first consider Petitioner's claim in Ground Two. Petitioner asserts in Ground Two that he involuntarily and unintelligently waived his rights and entered into a stipulation in connection with his guilty plea in that he "was never informed of the fact that he could be transferred to the authority and jurisdiction of the [TDCJ] and/or its [Board] without a hearing with an attorney to represent him at such hearing." (Doc. 1 at 7). A review of Petitioner's state habeas proceeding reveals that he fairly presented this claim as part of his state habeas application. (*See Ex parte Sanchez*, No. 81,901-01 at 6-10). The TCCA ultimately denied Petitioner's state habeas application without a hearing. (*Id.* at cover). The Court concludes, therefore, that Petitioner successfully exhausted his claim in Ground Two and that it should not be procedurally barred from federal review.

Petitioner, however, acknowledges that he did not present his actual innocence claim in Ground One to the TCCA. The Court, therefore, finds Petitioner's claim in Ground Two to be unexhausted. Any subsequent state application for habeas relief raising this unexhausted claim will be subject to dismissal for abuse of

the writ. *See Nobles v. Johnson,* 127 F.3d 409, 423 (5th Cir. 1997) ("The Texas abuse-of-writ doctrine [footnote omitted] prohibits a second habeas petition, absent a showing of cause, if the applicant urges grounds therein that could have been, but were not, raised in his first habeas petition). The abuse of the writ doctrine represents an adequate state procedural bar for purposes of federal habeas review. *Id.*

When the ground upon which a petitioner relies for federal habeas relief was not exhausted in the state courts and state procedural rules would bar subsequent presentation of the argument, a federal habeas court may not consider the claim absent proof of "cause" and "prejudice" or a "miscarriage of justice." *Little v. Johnson,* 162 F.3d 855, 859 (5th Cir. 1998). *See Coleman v. Thompson,* 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). Petitioner presents nothing to persuade the Court that his unexhausted claim in Ground One should be reviewed.

Even if Ground One is not barred from federal habeas review, it is nevertheless without merit. Freestanding claims of actual innocence fail to state a claim in federal habeas corpus actions. *Foster v. Quarterman,* 466 F.3d 359, 367 (5th Cir. 2006) ("[A]ctual-innocence is *not* an independently cognizable federal-

habeas claim.") (emphasis in original). Accordingly, Petitioner is not entitled to federal habeas relief as to his claim in Ground One.

B. Statute of Limitations

The Court next considers whether Petitioner's federal habeas application is untimely with respect to his remaining claim in Ground Two. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), applies to this action. *See Lindh v. Murphy*, 521 U.S. 320 (1997). The AEDPA sets forth a one-year statute of limitations for federal habeas petitions brought pursuant to § 2254. The one-year limitation period runs from the latest of:

> (A) the date on which judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The date upon which the one-year limitation period begins to run in most cases is the date the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. §

2244(d)(1)(A). In this case, the McLennan County district court convicted Petitioner of murder on February 9, 1998. (Doc. 1 at 2). His judgment of conviction became final on March 11, 1998, due to Petitioner's failure to file a notice of appeal. TEX. R. APP. PROC. 26.2(a)(1) (directing that defendants must file a notice of appeal "within 30 days after the day sentence is imposed or suspended in open court"). Pursuant to § 2244(d)(1)(A), the one-year limitation period would expire on March 11, 1999. *See Scott v. Johnson*, 227 F.3d 260, 262 (5th Cir. 2000) (explaining that when a petitioner fails to appeal, the one-year limitations period begins to run from the expiration of the time to appeal).

Petitioner asserts that, pursuant to § 2244(d)(1)(D), a later date controls with respect to triggering the one-year limitation period. Specifically, Petitioner contends that he was not aware of and could not have discovered, through the exercise of due diligence, the factual predicate of his claims until September 9, 2013.[3] (Doc. 8 at 1-3; Doc. 13 at 3). Petitioner presents the following evidence in support:

(1) on October 22, 2002, Petitioner was paroled from his 1998 juvenile murder conviction and discharged from the TYC (Doc. 8, Ex. C);

(2) on October 26, 2010, Petitioner was convicted of possession of a controlled substance and sentenced to five years in the TDCJ (Doc. 8, Ex. D);

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[3] In this case, there is nothing in the record to suggest: that there was any unconstitutional State action which impeded the Petitioner's ability to timely file the instant federal petition; or that his claims concern any right newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review. 28 U.S.C. §§ 2244(d)(1)(B) and (C).

(3) on May 11, 2011, Petitioner received notification from the State Counsel for Offenders that his TDCJ records had been changed to reflect that his parole from the 1998 juvenile conviction was not revoked and that he was only confined at the TDCJ based on the 2010 drug possession conviction (Doc. 8, Ex. E); and

(4) by Commitment Inquiry dated September 9, 2013, however, Petitioner learned that he was being confined at the TDCJ based solely on his 1998 juvenile conviction.

Upon careful review of the record, the Court finds that Petitioner did not learn of his transfer into TDCJ custody based on his 1998 juvenile conviction until September 9, 2013. Before being paroled from his 1998 juvenile conviction on October 22, 2002, Petitioner had been in the custody of the TYC. The Court agrees with Petitioner that he could not have discovered with due diligence the factual predicate of his claims in Ground Two until September 9, 2013, when he learned about his transfer into TDCJ custody based solely on his 1998 juvenile conviction. There is no evidence that Petitioner had ever known before September 9, 2013, that such a transfer could occur without a hearing and without an attorney present. Thus, for purposes of Petitioner's claims in Ground Two, the one-year limitation period commenced on September 9, 2013. Petitioner, therefore, filed the instant application in a timely manner on May 15, 2014.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Respondent's Motion to Dismiss the application (Doc. 12) is **GRANTED in part and DENIED in part.** Respondent's Motion to Dismiss is **GRANTED** to the extent that Petitioner's actual innocence claim in Ground One is

DENIED and **DISMISSED** as both procedurally barred and without merit. Respondent's motion is **DENIED** in all other respects. It is further

ORDERED that Respondent shall have through and including June 8, 2015, to: (1) submit a supplemental response addressing the merits of Petitioner's claims in Ground Two; and (2) provide the Court with any additional relevant State court records pertaining to Petitioner's claims in Ground Two. It is further

ORDERED Petitioner shall have through and including July 8, 2015, to file his reply to Respondent's supplemental response.

SIGNED this 7th day of May, 2015.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE