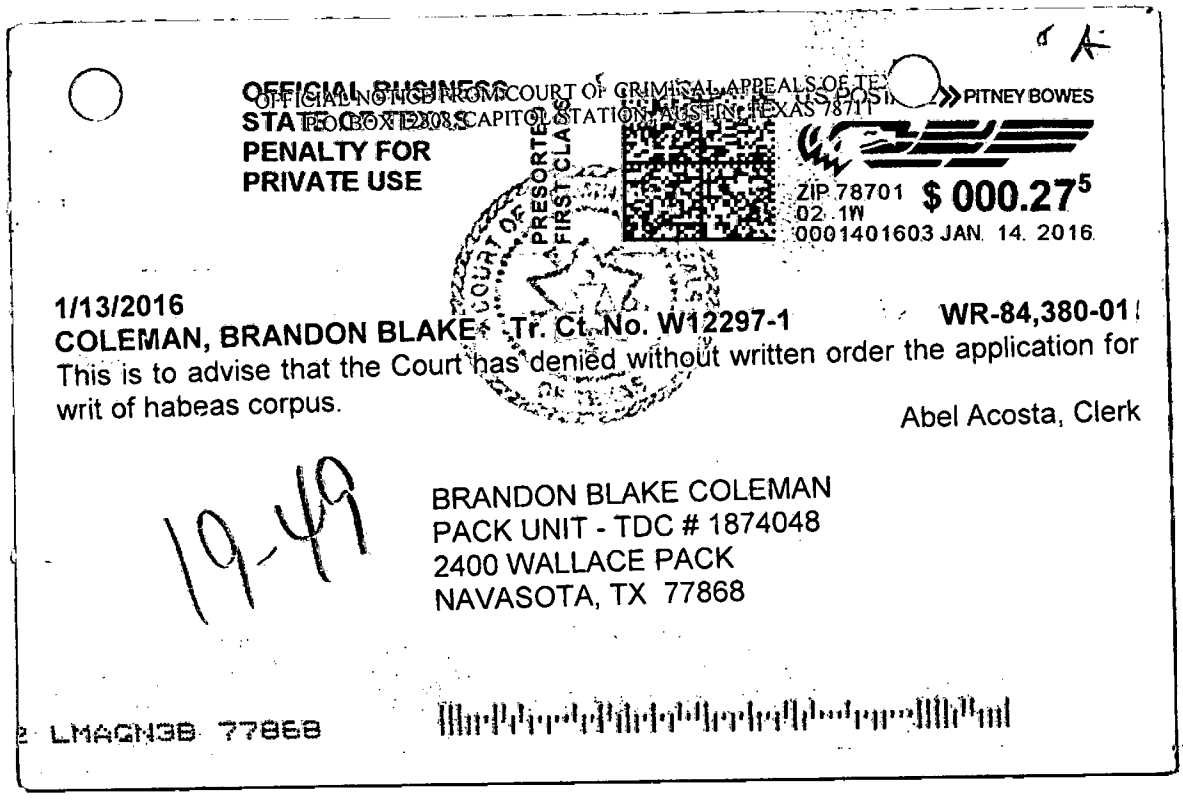

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1/13/2016
COLEMAN, BRANDON BLAKE Tr. Ct. No. W12297-1 WR-84,380-01
This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Abel Acosta, Clerk

19-49

BRANDON BLAKE COLEMAN
PACK UNIT - TDC # 1874048
2400 WALLACE PACK
NAVASOTA, TX 77868

LMAQN3B 77868

APPENDIX A

APPENDIX B

R&C 1-17-17 B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRANDON BLAKE COLEMAN,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 4:16-CV-314-Y
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

OPINION AND ORDER

Before the Court is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Brandon Blake Coleman, a state prisoner, against Lorie Davis, director of the Texas Department of Criminal Justice, Correctional Institutions Division, Respondent. After having considered the pleadings and relief sought by Petitioner, the Court has concluded that the petition should be dismissed as time-barred.

I. FACTUAL AND PROCEDURAL HISTORY

In October 2012 Petitioner was charged in the 355th Judicial District Court, Hood County, Texas, Case No. CR12297, in a five-count indictment with one count of indecency with a child, "SW16,"[1] by touching her breast with his hand (count one); two counts of indecency with a child, "CB16," by touching her breast and sexual

[1]The pseudonyms used in the indictment are used in this Opinion and Order.

organ with his hand and one count of improperly photographing "CB16" without her consent (counts two, three and four); and one count of sexual assault of "MW19" by penetrating her sexual organ with his finger without her consent (count five). (Adm. R., WR-84,380-01 Writ (hereafter referred to as "SH02"), 28-29, ECF No. 13-5.) The indictment also included two enhancement and one habitual counts. (*Id.* at 30-31.) On July 29, 2013, pursuant to a plea agreement, the state moved to dismiss counts three and four and abandoned the enhancement and habitual counts; Petitioner waived a jury trial and entered guilty pleas to counts one, two, and five; and the trial court assessed his punishment at 20 years' confinement for each offense, the sentences to run concurrently. (*Id.* at 35-54.) Petitioner did not directly appeal the trial court's "Judgment of Conviction"; thus, the judgment became final thirty days later, on August 28, 2013. *See* TEX. R. APP. P. 26.2(a)(1).

On March 24, 2015, Petitioner filed a motion for DNA testing under chapter 64 of the Texas Code of Criminal Procedure in the trial court, which was denied on April 23, 2015. (SH02 at 59, ECF NO. 13-5.) Thereafter, Petitioner filed two state habeas applications challenging his convictions. The first, filed on November 23, 2015,[2] was denied by the Texas Court of Criminal

[2]A prisoner's state habeas application is deemed filed when placed in the prison mailing system. *Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013). Petitioner's state applications do not provide the date Petitioner placed the documents in the prison mailing system but do reflect the dates they were signed by Petitioner. Therefore, for purposes of this Opinion and Order, the state applications are deemed filed on those dates, respectively.

Appeals on January 13, 2016, without written order. (*Id.* at 21; "Action Taken," ECF No. 13-4.) The second, filed on February 16, 2016, was dismissed by the Texas Court of Criminal Appeals on April 6, 2016, as successive. (Adm. R., WR-84,380-02 Writ, 21, ECF No. 13-7; "Action Taken," ECF No. 13-6.) Petitioner filed this federal petition for writ of habeas corpus on April 21, 2016.[3]

II. ISSUES

Petitioner raises the following grounds for habeas relief:

(1) His guilty plea was involuntary (ground one);

(2) He received ineffective assistance of counsel at trial (grounds two and three); and

(3) The prosecution withheld exculpatory evidence (ground four).

(Pet. at 6-7, ECF No. 1.)[4]

III. STATUE OF LIMITATIONS

Respondent believes the petition is time-barred and has moved for dismissal. (Resp't's Answer at 4-10.) Title 28 U.S.C. § 2244(d) imposes a one-year statute of limitations for filing a petition for federal habeas corpus relief. Section 2244(d) provides:

---

[3]Similarly, a federal habeas petition filed by a prisoner is deemed filed when the petition is placed in the prison mail system for mailing. *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998).

[4]To the extent Petitioner claims the state courts improperly adjudicated his state habeas applications, the Fifth Circuit has repeatedly held that defects in state habeas proceedings are not cognizable in a federal habeas petition under § 2254. *See Rudd v. Johnson*, 256 F.3d 317, 319-20 (5th Cir.), *cert. denied*, 534 U.S. 1001 (2001). Petitioner's argument to the contrary is not persuasive. (Pet'r's Mem. 9, ECF No. 2.)

(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.

Id. § 2244(d)(1)-(2).

With limited exceptions not applicable here, the limitations period begins to run from the date on which the challenged "judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" under subsection (A). Thus, in this case, the judgment of conviction became final and the one-year limitations period began to run upon expiration of the time that Petitioner had for filing a timely notice of appeal on August 28,

2013, and closed one year later on August 28, 2014, absent any applicable tolling. *See* TEX. R. APP. P. 26.2; *Caldwell v. Dretke*, 429 F.3d 521, 528-30 (5th Cir. 2005).

Petitioner's motion for DNA testing and his state habeas applications filed after limitations had already expired did not operate to toll the limitations period under § 2244(d)(2). *Hutson v. Quarterman*, 508 F.3d 236, 240 (5th Cir. 2010); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Therefore, Petitioner's federal petition filed on April 21, 2016, is untimely unless Petitioner is entitled to tolling as a matter of equity.

Equitable tolling of the statute of limitations is permitted only in rare and exceptional circumstances when an extraordinary factor beyond a petitioner's control prevents him from filing in a timely manner or he can make a convincing showing that he is actually innocent of the crime for which he was convicted. *McQuiggin v. Perkins*, — U.S. —, 133 S. Ct. 1924, 1928 (2013); *Holland v. Florida*, 560 U.S. 631 , 649 (2010). A petitioner attempting to make a showing of actual innocence is required to produce "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence"—sufficient to persuade the district court that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 133 S. Ct. at 1928 (quoting *Schup v. Delo*, 513 U.S. 298, 329 (1995)).

Although actual innocence, if proved, can overcome the statute of limitations, Petitioner waived his claim by entering a voluntary and knowing guilty plea to the offense. *McQuiggin,* 133 S. Ct. at 1928. *See also United States v. Vanchaik-Molinar,* 195 Fed. Appx. 262, 2006 WL 2474048, at *1 (5th Cir. 2006) ("A voluntary guilty plea waives all non-jurisdictional defects that occurred prior to the plea and precludes consideration of a claim challenging the sufficiency of the evidence."). Even if *McQuiggin* applies in the context of a guilty plea, a voluntary and knowing guilty plea is sufficient evidence, standing alone, to support a conviction. *Smith v. McCotter,* 786 F.2d 697, 702 (5th Cir. 1986). Petitioner claims that his guilty pleas were involuntary because his trial counsel and the prosecutor, who were aware of the DNA results, conspired to withhold the results from him so that he would accept the plea offer. (Pet. 6, ECF No. 1.) However, there is no evidence whatsoever in the record to support this assertion or to otherwise rebut the presumption of regularity of the state's documentary record of the plea proceedings. Conclusory claims and bald assertions on a critical issue lack probative evidentiary value. *Koch v. Puckett,* 907 F.2d 524, 530 (5th Cir. 1990); *Ross v. Estelle,* 694 F.2d 1008, 1011 (5th Cir. 1983).

In any event, Petitioner has not made a colorable showing that he is actually innocent in light of "new evidence." In an apparent attempt to trigger subsections (B) or (D), above, or warrant

equitable tolling, Petitioner asserts that his petition is based on exculpatory, newly discovered evidence—DNA test results for two of the victims excluding him as a DNA contributor to DNA material found on the breasts of the victims—that was not investigated by his trial counsel and that was withheld by the prosecution. (Mot. to Supp., Attachs., ECF No. 7; Pet'r's Objection 1, ECF No. 14.) Petitioner acknowledges that his DNA sample was taken before trial in 2012 and that the DNA reports were completed on September 14, 2012, and March 5, 2013, but asserts, without explanation or proof of any kind, that he did not receive the results until June 30, 2015. (Pet'r's Mem. 7, ECF No. 2.) As previously stated, conclusory claims and bald assertions on a critical issue lack probative evidentiary value. *Koch,* 907 F.2d at 530; *Ross,* 694 F.2d at 1011.

Nor are the DNA results sufficient to persuade this Court that no juror, acting reasonably, would have voted to find Petitioner guilty beyond a reasonable doubt. *McQuiggin,* 133 S. Ct at 1928. To the contrary, in denying Petitioner's motion for DNA testing, the trial court found that DNA evidence had been previously subjected to DNA testing and that no exculpatory results were obtained. (Clerk's R. 67, ECF No. 13-5.) Further, as noted by Respondent, the DNA results are not "new evidence," are largely inconclusive, and could have been obtained by Petitioner before his conviction became final; the results pertain to only two, "SW16" and "MW19," of the three victims; the results are arguably exculpatory only as to "SW16" and

are irrelevant to the charged offense as to "MW19"; and there is no evidence regarding how much time elapsed between the commission of the offenses and the collection of the samples. (Resp't's Answer 7-9, ECF No. 12 (record citations omitted).) Finally, the Court recognizes that the type of crimes involved in this case are unlikely to produce specimens from the perpetrator capable of facilitating DNA matching or producing any evidence probative or material to guilt or innocence.

In conclusion, Petitioner has failed to trigger subsections (B) or (D) of the statutory provision or demonstrate exceptional circumstances warranting equitable tolling. Accordingly, his federal petition was due on or before August 28, 2014, and thus his petition filed on April 21, 2016, is untimely.

For the reasons discussed here, Respondent's motion is GRANTED, and Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED as time-barred. A certificate of appealability is DENIED.

SIGNED January 11, 2017.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

Rec 3/10/17 C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRANDON BLAKE COLEMAN,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 4:16-CV-314-Y
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Petitioner, Brandon Blake Coleman, has filed a motion for relief from judgment under Rule 60(b)(2) and (6). (Mot., ECF No. 18.) On January 11, 2017, this Court dismissed Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 as time-barred. (Mem. Op. & J., ECF Nos. 16 & 17.)

To the extent Petitioner reasserts his claims to set aside his convictions raised in his federal habeas petition, instead of challenging this Court's dismissal of his petition on limitations grounds, the motion is, in substance, a second or successive § 2254 petition and must be dismissed. 28 U.S.C. § 2244(b)(1); *Gonzalez v. Grosby*, 532 U.S. 524, 532 (2005).

To the extent Petitioner claims he is entitled to relief from judgment under Rule 60(b)(2) based on newly discovered evidence-*e.g.*, DNA results for two of the three victims excluding him as a DNA contributor to DNA material found on the breasts of the

victims--he is not entitled to relief. The DNA results he relies upon were known to Petitioner at the time his federal petition was filed and Petitioner relied heavily on the DNA results in support of the claims raised in his federal petition. Thus, they are not "newly discovered evidence" within the meaning of Rule 60(b)(2).

Nor is Petitioner entitled to relief from judgment under Rule 60(b)(6), the catch-all provision. Petitioner complains of various defects in the state habeas proceedings, however, as acknowledged by Petitioner, such errors do not serve as a basis for federal habeas relief. This is so because an attack on a state habeas proceeding "is an attack on a proceeding collateral to the detention and not the detention itself." *Millard v. Lynaugh,* 810 F.2d 1403, 1410 (5th Cir.), *cert. denied,* 484 U.S. 838 (1987); *Duff-Smith v. Collins,* 973 F.2d 1175, 1182 (5th Cir. 1992) ("infirmities in state habeas proceedings do not constitute grounds for federal habeas relief"), *cert. denied,* 507 U.S. 1056 (1993).

Therefore, to the extent Petitioner reasserts his substantive claims challenging his state-court convictions, Petitioner's Rule 60(b) motion is DISMISSED as successive. In all other respects, the motion is DENIED.

A movant may not appeal a final order in a habeas-corpus proceeding, including an order on a motion for relief from a judgment, "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). A certificate of

appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In cases where a district court rejects a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To warrant a grant of the certificate as to claims that the district court rejects solely on procedural grounds, the movant must show both 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.* Here, reasonable jurists would not debate the Court's procedural ruling and/or its conclusion that Petitioner's motion does not meet the criteria for obtaining relief under Rule 60(b)(2) and (6). Accordingly, Petitioner is not entitled to a certificate of appealability.

SIGNED March 7, 2017.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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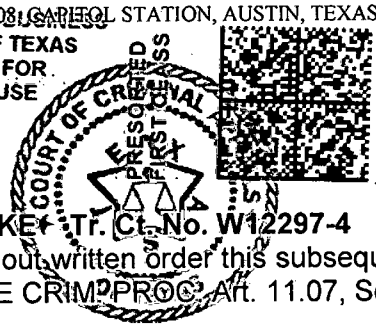

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8/7/2019
COLEMAN, BRANDON BLAKE Tr. Ct. No. **W12297-4** **WR-84,380-05**
The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

17-38

BRANDON BLAKE COLEMAN
PACK UNIT - TDC # 1874048
2400 WALLACE PACK
NAVASOTA, TX 77868

77868

APPENDIX D

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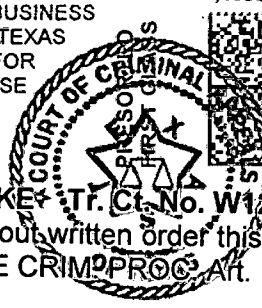

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COLEMAN, BRANDON BLAKE Tr. Ct. No. W12297-5 **WR-84,380-08**

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

15-4

BRANDON BLAKE COLEMAN
PACK UNIT - TDC # 1874048
2400 WALLACE PACK
NAVASOTA, TX 77868

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APPENDIX E

APPENDIX F

Fifth Amendment, U.S. Constitution:

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, U.S. Constitution:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

Texas Rules of Appellate Procedure:

Rule 25.2 - Criminal Cases.

(a) Rights to appeal.

(2) Of the defendant. A defendant in a criminal case has the right of appeal under Code of Criminal procedure article 44.02 and these rules. The trial court shall enter a certificate of the defendant's right of appeal each time it enters a judgment of guilt or other appealable order. In a plea bargain case - that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant.

- a defendant may

APPENDIX H

Texas Code of Criminal Procedure.

Article 11.07, procedure after conviction w/o death penalty.

Sec. 1. This article establishes the procedures for an appliction for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county the offense has been committed.

Sec. 3. (a) after final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, by secure electronic mail, or by personal service to the attorney representing the state in that court, who shall answer the application not later that the 15th day after the date the copy of the application is received. matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement of any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date, upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of testing if the applicant retains counsel for purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. an attorney so appointed shall be compensated as provided in article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this

article to prepare a transcript within 15 days of its conclusion. On completion of the transcript, the reporter shall immediately transmit the transcript to the clerk of the convicting court. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the CCA, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

(e) For purposes of subsection (d), "additional forensic testing" does not include forensic DNA testing provided for in Chapter 64.

Sec. 4 (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient facts establishing that:

(1) The current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

(2) By a preponderence of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilt beyond a reasonable doubt.

(b) For purposes of subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

APPENDIX I

Texas Code of Criminal procedure.

Article 44.02 Defendant may appeal.

A defendant in any criminal action has the right of appeal under the rules hereafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. This article in no way affects appeals pursuant to Article 44.17 of this Chapter.

APPENDIX J

Texas Code of Criminal Procedure.

Article 64.01. Motion

(a) In this section, "biological material":

(1) means an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cell, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing; and

(2) includes the contents of a sexual assault evidence collection kit.

(a-1) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material. The motion must be accompanied by an affidivit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by subsection (a-1) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.