IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50770

CRAIG MACK,

Petitioner-Appellant

v.

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

Respondent-Appellee

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

O R D E R:

Craig Mack, Texas prisoner # 612010, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his conviction for two counts of evading arrest or detention with a vehicle. He argues that (1) the trial court did not have jurisdiction because the charged offenses were improperly classified as felonies; (2) all three of his trial attorneys were ineffective because they failed to put on a defense, failed to file pretrial motions, and gave Mack false legal advice; and (3) the trial court abused its discretion by denying his motion to represent himself.

For the first time in his COA motion, Mack argues that the State did not disclose certain offense reports in violation of *Brady v. Maryland*, 373 U.S. 83

(1963). This court will not consider an issue raised for the first time in a COA motion. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

In the district court, Mack argued that the trial court lacked jurisdiction in part because the trial court arbitrarily excluded all blacks from the grand jury. He did not raise this issue in his COA motion. Therefore, Mack has abandoned it by failing to brief it adequately on appeal. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999).

A COA will issue if Mack makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). This standard is satisfied when the COA applicant shows that reasonable jurists would find the district court's decision to deny relief debatable or wrong, *see Slack*, 529 U.S. at 484, or "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). He has not made the required showing concerning the above claims. Accordingly, Mack's COA motion is DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

R 06/19/2018

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

CRAIG MACK	§	
	§	
V.	§	**6-15-CA-0236-RP**
	§	
LORIE DAVIS	§	

JUDGMENT

BE IT REMEMBERED on this day the Court issued its order denying Petitioner's application under 28 U.S.C. § 2254 against Respondent, and thereafter the Court renders the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that Petitioner's application under 28 U.S.C. § 2254 against Respondent is **DENIED**.

SIGNED on August 4, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

R 08/09/2017

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

CRAIG MACK	§	
	§	
V.	§	**6-15-CA-0236-RP**
	§	
LORIE DAVIS	§	

ORDER

Petitioner, proceeding pro se, was granted leave to proceed in this matter *in forma pauperis*. Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (Docket Entry "DE" 1); Respondent's Answer (DE 14); and Petitioner's Reply (DE 16). Also before the Court is Petitioner's Motion for Reformation of Sentence (DE 18). For the reasons set forth below Petitioner's application for writ of habeas corpus is **denied**.

STATEMENT OF THE CASE

Respondent has custody of Petitioner pursuant to judgments and sentences entered by the 54th District Court of McLennan County, Texas. Petitioner pleaded guilty to two counts of evading arrest or detention with a vehicle, and was sentenced to concurrent terms of 18 years' imprisonment.[1] Petitioner asserts he is entitled to habeas relief because the indictments were defective, because he was denied the effective assistance of counsel, and because he was denied his right to self-representation.

A. Petitioner's state criminal proceedings

A grand jury indictment returned November 20, 2013, in Cause No. 2013-002073-C2, charged Petitioner with evading arrest or detention with a vehicle on or about August 14, 2013. (DE

[1] Petitioner is also serving a life sentence pursuant to a 1991 conviction for delivery of cocaine.

15-8 at 41).[2] A grand jury indictment returned November 20, 2013, in Cause No. 2013-002331-C2, charged Petitioner with evading arrest or detention with a vehicle on or about July 22, 2013 (DE 15-12 at 80). The indictments further alleged a prior conviction for enhancement purposes, i.e., Petitioner's 1992 conviction on a charge of delivery of cocaine. (DE 15-8 at 41; DE 15-12 at 80). The indictments also alleged Petitioner was a habitual offender, asserting that Petitioner had been convicted of burglary of a habitation in 1990. (DE 15-8 at 42; DE 15-12 at 81).

On or about June 19, 2014, Petitioner signed written plea agreements and entered guilty pleas in both cases. (DE 15-8 at 45; DE 15-12 at 87). In return for Petitioner's guilty pleas the State agreed to waive the habitual offender charge and to not prosecute Petitioner on an additional charge of evading arrest on foot. (DE 15-8 at 43, 51; DE 15-12 at 83, 88).

Each written plea agreement stated:

> AND I, CRAIG E MACK, joined by J.R. VICHA, and with my attorney's consent and approval, in writing, and in open court, knowingly, freely and voluntarily:
>
> ***
>
> WAIVE my right to be tried by a Jury, pursuant to Art. 1.13, Tex. Code of Crim. Proc., and respectfully REQUEST the Court to hear all evidence in the case against me and act as a finder of fact, receive my plea of GUILTY before the Court, find me GUILTY (or defer a finding of guilt, as the Court deems proper), and assess my punishment without a Jury . . .

(DE 15-8 at 46; DE 15-12 at 85). Petitioner also waived his right to an appeal. (DE 15-8 at 52; DE 15-12 at 91). Petitioner pleaded true to the enhancement paragraphs and was sentenced to concurrent terms of 18 years' imprisonment pursuant to each conviction. (DE 15-8 at 50; DE 15-12 at 89).

On November 20, 2014, Petitioner filed a motion for self-representation, and he appealed the denial of that motion in the Court of Appeals. (DE 15-8 at 54-55; DE 15-12 at 91-92). The appellate

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[2] The State Court Habeas Record is lodged at CM/ECF docket entry 15.

court dismissed the claim for want of jurisdiction. *Ex parte Mack*, 10-14-00356-CR, 2014 WL 7013941, at *1 (Tex. App.—Waco 2014, no pet.). The Texas Court of Appeals found:

> Craig Mack has filed a "motion for self-representation" and supporting affidavit that seeks what is in effect post-conviction habeas relief. He alleges ineffective assistance of counsel in connection with his felony plea bargain and denial of his alleged attempts to represent himself. Among other things, he seeks a right to appeal. An intermediate court of appeals has no jurisdiction over a post-conviction application for writ of habeas corpus in a felony case. . . . Because we have no jurisdiction over what is in effect a post-conviction habeas corpus proceeding in a felony case, we dismiss Mack's motion.

Id. Petitioner challenged this decision by mandamus, (DE 15-5 at 1-5), and the Texas Court of Criminal Appeals denied the writ. (DE 15-4).

Petitioner filed an application for state habeas relief in 2013-2331-C2 and 2013-2073-C2A on or about March 25, 2015. (DE 15-8 at 4-36 (No. WR-31,203-05); DE 15-12 at 4-38 (No. WR-31, 203-06)).[3] Petitioner asserted the trial court did not have jurisdiction and that it abused its discretion by failing to address Petitioner's pretrial motions. (DE 15-12 at 42-43). Petitioner also argued he was denied his right to the effective assistance of trial counsel because counsel: "(a) gave incorrect advice concerning relevant legal issues, (b) failed to put on a defense, and (c) failed to file pretrial motions." (DE 15-12 at 45).

The state habeas court designated the issue of ineffective assistance of counsel for further resolution. (DE 15-12 at 45). Petitioner's trial counsel filed an affidavit in the state habeas action, stating:

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[3] Although Petitioner filed separate habeas applications, both of which appear in the State Habeas Corpus Record, there is only one answer, one designation of issues, one affidavit by trial counsel, and one findings of fact and conclusions of law in the State Habeas Corpus Record lodged at CM/ECF docket entry 15.

Mr. Mack was facing a punishment range of 25 to Life. The instant offense, [e]vading arrest in a motor vehicle, is a 3rd Degree felony. Mr. Mack has two prior felony convictions in sequence which enhanced his punishment range to 25 to Life. The plea agreement I was able to secure for Mr. Mack was 7 years less than the minimum punishment allowed by law in his case. As part of the plea agreement, the state waived one of the enhancement paragraphs so that the plea would be within the legal punishment range. [Once] the state waived one paragraph, the range went from 25 to life down to 2 [to] 20 years in TDC. If Mr. Mack would have turned down the plea offer of 18, the state would have proceeded to trial in the case as indicted, as a 25 to life range. I explained this to Mr. Mack at length, and by the time he pled, he conveyed to me that he fully understood and wanted to take the 18 year offer. I at no time felt that he did not want to accept the 18 year offer, in fact, Mr. Mack asked me to get the plea set as soon as possible so that he could get out of the county jail and on to TDC.

b. Waiver of appeal and other rights

It is my opinion that Mr. Mack agreed to and fully understood the waivers that he signed and agreed to. I went over the paperwork in great detail with Mr. Mack the day of the plea. He seemed very aware of what he was signing and asked questions about each page he signed. Each time he signed he was fully aware of what he was signing and seemed quite pleased that we were able to secure him a plea that was 7 years below the minimum. Further, after signing the paperwork with me, Mr. Mack was admonished about all the rights he was waiving. This was done by the Judge and on the record. Mr. Mack again stated that he understood and wished to proceed. At no time did I get any indication that he was not aware of what he was doing or agreeing to. The fact that he had to waive appeal as part of the plea agreement was fully explained to Mr. Mack numerous times before he pled.

c. Pre-trial motions

The motions Mr. Mack requested were, in my professional opinion, without merit and did not need to be filed. I explained each motion he requested to him, one by one, and why they were without merit. Mr. Mack also explained that both prior attorneys on the case felt the same way. I carefully evaluated the merits of each requested motion before making a decision on them. In my opinion, proceeding in any other way, other than how we did proceed, would have resulted in Mr. Mack receiving more time in prison than he pled to.

(DE 15-12 at 49-50).

Petitioner filed a second application for state habeas relief on May 8, 2015. (DE 15-14 at 4-21). The state trial court found the application raised issues identical to those in his prior petition,

which was then pending in the Court of Criminal Appeals. (DE 15-14 at 44). The Court of Criminal Appeals denied Petitioner's initial and successive applications for a state writ of habeas corpus without written order on June 3, 2015. (DE 15-6; DE 15-9; DE 15-13; DE 15-15).

B. Petitioner's claims for federal habeas relief.

Petitioner alleges that he is entitled to habeas relief because:

1. The trial court did not have jurisdiction because the charged offenses were improperly classified as felonies and because the trial court "arbitrarily" excluded "all blacks" from the grand jury. (DE 1 at 6-7);

2. He was denied the effective assistance of counsel because all three of his appointed counsel failed to put on a defense, failed to file pretrial motions, and gave Petitioner "false" legal advice. (DE 7-8); and

3. The trial court abused its discretion by denying his motion to represent himself. (DE 1 at 7-9).

Respondent allows that the petition is timely and is not successive. (DE 14 at 4). Respondent also allows that Petitioner exhausted his federal habeas claims in the state courts. *Id.*

ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court summarized the basic principles established by the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act in *Harrington v. Richter*, 562 U.S. 86, 97–100 (2011). The Supreme Court noted that the starting point for any federal court reviewing a state conviction is 28 U.S.C. § 2254(d), which states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Court stated that "[b]y its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington*, 562 U.S. at 98.

Section 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the state court's decision "was contrary to" federal law as clearly established by the holdings of the Supreme Court; (2) when the state court's decision involved an "unreasonable application" of such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Id.* at 100, *citing* 28 U.S.C. § 2254(d), *and Williams v. Taylor*, 529 U.S. 362, 412 (2000). Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Mitchell v. Esparza*, 540 U.S. 12, 10 (2003). Under the unreasonable application clause of § 2254(d)(1), a federal court may grant the writ "if the state court identifies the correct governing legal principle from . . . [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the

prisoner's case." *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (quotation and citation omitted).

Section 2254(e)(1) requires a federal court to presume state court factual determinations to be correct, although a petitioner can rebut the presumption by clear and convincing evidence. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). The Supreme Court has "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2)." *Wood v. Allen*, 558 U.S. 290, 300 (2010). The Fifth Circuit has held that, while section 2254(e)(1)'s clear and convincing standard governs a state court's resolution of "particular factual issues," the unreasonable determination standard of section 2254(d)(2) governs "the state court's decision as a whole." *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011).

This standard of review applies to Petitioner's federal habeas claims notwithstanding the fact that the Texas Court of Criminal Appeals' decision denying relief in Petitioner's state habeas action was unexplained. Although the state court did not make explicit findings, that does not mean the court "merely arrived at a legal conclusion" unworthy of the presumption of correctness. *Cantu v. Collins*, 967 F.2d 1006, 1015 (5th Cir. 1992), *citing Marshall v. Lonberger*, 459 U.S. 422, 433-34 (1983). If a state court summarily denies a petitioner's claim, the Court's authority under AEDPA is limited to determining the reasonableness of the ultimate decision. *Charles v. Thaler*, 629 F.3d 494, 498-09 (5th Cir. 2011); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002). When state habeas relief is denied without an opinion, the Court must assume that the state court applied the proper "clearly established Federal law," and then determine whether the state court decision was "contrary to" or "an objectively unreasonable application of" that law. *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).

B. Merits

A valid guilty plea bars habeas relief on non-jurisdictional claims related to the alleged violation of constitutional rights that arise prior to the entry of that plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Because a guilty plea constitutes a waiver of constitutional rights, "it must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."*McMann v. Richardson*, 397 U.S. 759, 766 (1970).

Petitioner signed written guilty pleas in Cause No. 2013-2073-C2 and Cause No. 2013-2331-C2, averring:

> I understand the minimum and maximum punishment, I understand that I have the right to remain silent, that anything I say can be used against me, that I have the right to confront witnesses, that I have the right to be tried upon an indictment, I state that I am totally satisfied with the representation given to me by my attorney, and that my attorney has provided fully effective and competent representation.

(DE 15-12 at 85; DE 15-8 at 46). Each written plea agreement further stated Petitioner was "knowingly, freely and voluntarily"entering his guilty pleas. (DE 15-8 at 46; DE 15-12 at 85). The trial court found:

> Defendant understands the nature of the charge against him, and . . . he has been warned by the Court of the consequences of the plea entered herein, including the minimum and maximum punishment provided by law. . . the Court, therefore, finds such plea of GUILTY, and all waivers, agreements, consents, and stipulations contained therein to be freely and voluntarily made . . .

(DE 15-8 at 48; DE 15-12 at 85-87).

Although court records alone may be insufficient to establish a waiver of fundamental constitutional rights if they are ambiguous, *Williford v. Estelle*, 672 F.2d 552, 554 (5th Cir. 1982), the record in this case does not suffer from ambiguity. Petitioner's statements at the time of his pleas are substantial and unambiguous evidence of the voluntary nature of his pleas. *Blackledge v. Allison*,

431 U.S. 63, 74 (1977). A defendant's avowal that he understands the nature of the charges against him and the nature of the constitutional rights he is waiving, and that his plea is freely and voluntarily made, creates a presumption that his plea is valid. *Matthew v. Johnson*, 201 F.3d 353, 366 (5th Cir. 2000); *DeVille v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994). And the written guilty plea forms signed by Petitioner are prima facie proof of the knowing and intelligent nature of his guilty pleas. *Theriot v. Whitley*, 18 F.3d 311, 314 (5th Cir. 1994), *citing Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir. 1986).

The record does not suggest that Petitioner pleaded guilty involuntarily or for some improperly coercive reason; by entering guilty pleas, Petitioner reduced the potential sentences for each conviction below the statutory minimum, a rational decision. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."); *Uresti v. Lynaugh*, 821 F.2d 1099, 1101-02 (5th Cir. 1987).

Accordingly, Petitioner's guilty pleas were knowing and voluntary, and constitute a valid waiver of the rights specified in the plea agreement.

1. Petitioner asserts the trial court did not have jurisdiction because the charged offenses were improperly classified as felonies and because the trial court "arbitrarily" excluded "all blacks" from the grand jury.

Petitioner did waive his right to challenge the indictments in his plea agreements:

> [I] WAIVE any right I may have to be prosecuted by a Grand Jury Indictment and announce my election and consent to be charged by an Information, where trial is not by Indictment. If the Court rejects the plea bargain in this case, if any, and I withdraw of my plea of GUILTY, I agree that prosecution can continue upon the Indictment filed herein.

[I] WAIVE, under Article 1.14, Tex. Code of Crim. Proc., all rights given to me by law, whether of form, substance or procedure, including any defect, error or irregularity of form or substance in the Indictment. . .

(DE 15-8 at 46; DE 15-12 at 85).

A federal habeas claim of a defective indictment is not necessarily waived by a guilty plea. *Uresti*, 821 F.2d at 1102. Nonetheless, a state defendant does not have a federal constitutional right to be charged by indictment. *Id.* The deficiency of a state indictment provides a basis for federal habeas corpus relief only when the indictment was so defective that it deprived the convicting court of jurisdiction. *Williams v. Collins*, 16 F.3d 626, 637 (5th Cir. 1994). State law dictates whether a state indictment is sufficient to confer a court with jurisdiction. *Id.* The district courts are "required to accord due deference to the state's interpretation of its own law that a defect of substance in an indictment does not deprive a state trial court of jurisdiction." *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994) (citations omitted). Because the state courts addressed the sufficiency of Petitioner's indictments in his state habeas action and denied relief, this Court must reject this claim.

With regard to Petitioner's claim that all African Americans were excluded from the grand jury, a state defendant does have a Sixth Amendment and Equal Protection right to be "tried" by a jury "from which all members of his class are not systematically excluded." *Goins v. Allgood*, 391 F.2d 692, 697 (5th Cir. 1968). *See also Vasquez v. Hillery*, 474 U.S. 254, 261 (1986). However, in both *Goins* and *Vasquez* it was undisputed that there had been a systematic exclusion of African Americans from the grand jury. Petitioner makes only a conclusory allegation that all African Americans were excluded from the grand jury. Conclusory allegations of purposeful discrimination are insufficient to sustain a claim for federal habeas relief. *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987); *Beazley v. Johnson*, 242 F.3d 248, 270 (5th Cir. 2001).

2. Ineffective assistance of counsel

By voluntarily pleading guilty, a criminal defendant foregoes all precedent claims for relief including claims for ineffective assistance of counsel, except those alleging that the ineffectiveness rendered the guilty plea involuntary. *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983). Ineffective assistance of counsel claims in the context of a guilty plea are governed by the United States Supreme Court's opinion in *Hill v. Lockhart*, which adopted the two-part *Strickland* test. 474 U.S. 52, 58 (1985), *citing Strickland v. Washington*, 466 U.S. 668 (1984). A habeas petitioner challenging his guilty plea must show that the advice he received from his counsel with regard to his guilty plea was not "within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 56, *quoting McMann v. Richardson*, 397 U.S. 759, 771 (1970). The petitioner must also establish that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. Petitioner bears the burden of establishing that the state court's denial of his ineffective assistance of counsel claims was an unreasonable application of federal law or that the decision was based on an unreasonable determination of the facts in light of the evidence presented at his state habeas action. *Clark v. Thaler*, 673 F.3d 410, 416 (5th Cir. 2012).

In the context of a guilty plea, an attorney's advice "need not be perfect, but it must be reasonably competent." *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) (citation omitted). A petitioner must show that "the advice he received from [his attorney] during the course of the representation and concerning the guilty plea was not 'within the range of competence demanded of attorneys in criminal cases.'" *Smith*, 711 F.2d at 682, *quoting Tollett*, 411 U.S. at 266. With regard to the prejudice prong of the *Strickland* test when the defendant pleads guilty, even "where counsel

has rendered totally ineffective assistance to a defendant entering a guilty plea, the conviction should be upheld if the plea was voluntary. In such a case there is no actual and substantial disadvantage to the defense." *DeVille v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994).

Petitioner has not established that his guilty pleas were other than knowing or voluntary. Petitioner averred at the time he entered his pleas that he was satisfied with his counsel's representation. Petitioner has not established a reasonable probability that, but for his counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Petitioner faced a substantially greater sentence had he elected to proceed to trial. The state trial court found credible the statement's of Petitioner's counsel with regard to Petitioner's desire to enter his guilty pleas.

Petitioner has not established by clear and convincing evidence that the state court's determination of the facts was unreasonable in light of the evidence presented in his state court proceedings. Accordingly, the state court's denial of Petitioner's ineffective assistance of counsel claims was not an unreasonable application of *Hill*, and Petitioner is not entitled to federal habeas relief on his claims that his attorney was ineffective.

3. Denial of right to self-representation

Petitioner asserts that his second appointed counsel filed a motion to withdraw in response to Petitioner's motion to represent himself. Petitioner alleges that, at a hearing, the trial court granted the motion to withdraw and then denied the motion for self-representation without a written order or independent hearing. Petitioner further alleges that the trial court then "forced" Petitioner to accept a third appointed counsel. (DE 1 at 7).

The right to self-representation, once asserted, may be waived through a defendant's subsequent behavior. "Even if defendant requests to represent himself . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir.1982) (en banc). The right to self-representation has been found to be waived "when after requesting permission to represent himself, [the defendant] allowed appointed counsel to plea bargain on his behalf and accepted the terms of the bargain." *Id.* at 610-11. In *United States v. Montgomery*, a factual similar case, the Tenth Circuit Court of Appeals held that allowing appointed counsel to conduct plea bargaining demonstrated that a defendant "was no longer asserting his right to represent himself," and that the waiver of self-representation was "further evidenced by the fact that he accepted all of the benefits of the plea bargaining by entering a plea of guilty . . ." 529 F.2d 1404, 1406 (10th Cir. 1976).

The state court's decision denying relief on Petitioner's claim that he was denied his right to self-representation was not clearly contrary to or an unreasonable application of federal law, which allows that a defendant may waive this right by utilizing counsel to negotiate a favorable plea agreement. Therefore, Petitioner is not entitled to habeas relief on this claim.

C. Motion for Reformation of Sentence

In his motion at Docket Entry 18, Petitioner re-casts his claim of a deficient indictment as one alleging he was improperly sentenced, and reasserts that he was denied the effective assistance of counsel because his pre-trial counsel failed to assert error in the indictments. (DE 18 at 1-2, 5). Petitioner argues that he was denied an evidentiary hearing on these issues by the state courts and seeks an evidentiary hearing in this Court. (DE 18 at 2).

Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner developed the factual basis of his habeas claims in the state court proceedings; the arguments regarding his federal habeas claims were presented to the state court in Petitioner's application for a state writ of habeas corpus.

"[O]nce a petitioner overcomes the obstacles of § 2254(e)(2), under Rule 8 of the Rules Governing § 2254 Cases, the district court retains discretion over the decision to grant an evidentiary hearing." *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir. 2000). "In determining whether to grant a hearing, under Rule 8(a) of the Habeas Court Rules the judge must review the answer [and] any transcripts and records of state-court proceedings . . . to determine whether an evidentiary hearing is warranted." *Richards v. Quarterman*, 566 F.3d 553, 562-63 (5th Cir. 2009) (internal quotations omitted). In making this determination, the Court must consider whether an evidentiary hearing could "enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 563.

Petitioner's claims were rejected on the merits by the Texas Court of Criminal Appeals after the state trial court made findings of fact and conclusions of law with regard to these claims.

Petitioner is not entitled to an evidentiary hearing for the purpose of further developing any of his claims. *Segundo v. Davis*, 831 F.3d at 345, 352 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1068 (2017). Accordingly, Petitioner's request for an evidentiary hearing should be denied.

CONCLUSION

Petitioner has not established that he was denied the effective assistance of counsel in his guilty plea proceedings. The state court's determination that the indictments were sufficient to confer jurisdiction, a matter of state law, is entitled to deference. The state court's conclusion that Petitioner was not deprived of his right to self-representation was not clearly contrary to or an unreasonable application of federal law. Accordingly, Petitioner is not entitled to federal habeas relief on these claims.

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 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, 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 the Application for Writ of Habeas Corpus [Docket Entry 1], docketed July 17, 2015, is **DENIED**.

It is further ORDERED that Petitioner's Motion for Reformation of Sentence (Docket Entry 18] is **DENIED**.

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

SIGNED on August 4, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE