

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Tasha Michelle Blackbrun — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Courts Of Appeals For The Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

What constitutes communicating a plea, and does counsel have an obligation to recommend accepting a plea, or rejecting a plea and proceeding to trial?

INTERESTED PARTIES

BARRY SULLIVAN	CO-DEFENDANT
BIVENS SONJA J.	MAGISTRATE JUDGE
CINDY POWELL	ATTORNEY
GLORIA BEDWELL	ASSISTANT UNITED STATES ATTORNEY
HAAS SR. THOMAS M.	RETAINED TRIAL ATTORNEY
HUGHS W. GREGORY	APPOINTED APPELLATE ATTORNEY
MADDEN PETER J.	FEDERAL PUBLIC DEFENDER'S OFFICE
MURRAY P. BRADLEY	CJA
OVERSTREET ADAM	ASSISTANT UNITED STATES ATTORNEY
STEELE WILLIAM H.	TRIAL?SENTENCING JUDGE
TIEMANN FRED	FEDERAL PUBLIC DEFENDER'S OFFICE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

No:

TASHA MICHELLE BLACKBURN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Tasha Michelle Blackburn respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in the case number 17-13268-D in that court on March 23, 2018, which affirmed the judgment of the United States District Court for the Southern District of Alabama.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Alabama, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on March 23, 2018. This petition is timely filed pursuant to SUP.CT.R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner does not intend to rely on any statutory provisions, other than the Sixth Amendment to the Constitution.

STATEMENT OF THE CASE

A federal grand jury in the Southern District of Alabama returned an Indictment against Tasha Blackburn, charging her in a two count indictment. Count one was conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 846, and in count two with possession of pseudoephedrine with knowledge that it would be used to manufacture a controlled substance in violation of 21 U.S.C. § 841(c)(2). The court initially appointed an assistant federal public defender, Fred Tiemann, to represent Blackburn; however, Tiemann withdrew his representation because a colleague in his office represented an individual who was expected to provide testimony against Blackburn.

Brad Murray was then appointed to represent Blackburn on September 28, 2008. Less than a month later, on October 16, 2008, Murray filed a motion to withdraw his representation because Blackburn had retained Thomas Haas to represent her. The motion was granted, and Haas assumed representation of Blackburn. Blackburn proceeded to trial in March 2009, and she was found guilty of Conspiracy to distribute methamphetamine. The court sentenced Blackburn to 300 months imprisonment.

Haas withdrew his representation of Blackburn, and Greg Hughes was appointed to represent her on appeal. On appeal, Blackburn argued that the district court erred in denying a motion to suppress and admitting certain testimony at trial. The Eleventh Circuit court of appeals rejected the argument and affirmed her conviction and sentence.

Proceeding pro se, Blackburn filed a 28 U.S.C. § 2255 motion. Blackburn claimed that her former counsel failed to communicate a favorable plea agreement offered by the government.

The presiding Magistrate Judge set a hearing to: determine whether (1) Blackburn was advised of the plea offer, and (2) is so, whether Blackburn was advised of the advantages and disadvantages of the plea offer, including the sentencing implications, and whether Blackburn rejected the plea offer.

At the hearing, Blackburn called her former attorney, Brad Murray, as a witness. Murray testified that he took over Blackburns case on October 3, 2008, and the prosecuting AUSA forwarded him a proposed plea agreement on October 3, 2008. On October 6, 2008 Brad Murray forwarded a letter to Blackburn- it read:

"Here are some documents the prosecutor sent me last week in hopes that you would reconsider a Plea Agreement. I can not advise you to accept a plea deal at this point, but I forward these documents to you for your review. As we discussed on Friday, I plan to dig a little deeper into all of the facts and law on your case and come meet you later this week to discuss status and the prospects for trial or plea. I look forward to meeting with you".

The documents mailed to Blackburn was discovery. On October 8, 2008, Murray met with Blackburn, who was being housed in a residential drug treatment facility. Murray 'believed' that he provided Blackburn a copy of the plea agreement at the meeting but he could not be completely certain. Blackburn testified that he did not have the plea agreement and was unwilling to discuss it, because he wasn't yet familiar with the case, and couldn't advise to accept or reject it, until he had an opportunity to review the discovery.

After another discussion with her attorney, and further discussion with Blackburn's father, they agreed to hire Thomas Haas. Blackburn notified Brad Murray October 10, 2008, that she was retaining new counsel. Thomas Haas. Thomas Haas was never called to testify at the hearing, despite Blackburn's request to do so.

The district judge ultimately denied Blackburns § 2255. Blackburn appealed the decision and was granted a COA to explore whether her former counselor Thomas Haas rendered ineffective assistance of counsel for failing to present the plea agreement. Both parties submitted briefs, and there was not a further evidentiary hearing. During the time that the case was remanded back to the sentencing court, her former attorney Thomas Haas died. Blackburn nor the prosecutor could obtain information from Haas under the remand. Nevertheless, both parties briefed, and the sentencing court denied relief. Blackburn requested another COA, which was denied on March 23, 2018. The Eleventh Circuit claimed incorrectly that Brad Murray 'showed Blackburn a copy of the plea offer during their first meeting". This was not Brad Murray's testimony. He testified that he discussed the plea offer, but could not recall if he showed her the plea agreement. He also testified and sent a letter that he couldn't recommend taking the plea offer, because he had not yet received all the discovery.

The question before this court is Whether Counsel Renders Ineffective Counsel When He Fails to Show The Defendant The Plea Agreement, and Walks Her Through The Various Elements of the Agreement?

REASON FOR GRANTING THE WRIT

WHAT CONSTITUTES COMMUNICATING A PLEA, AND DOES COUNSEL
HAVE AN OBLIGATION TO RECOMMEND ACCEPTING A PLEA, OR REJECTING
A PLEA AND PROCEEDING TO TRIAL?

This case is about what constitutes 'communicating a plea agreement' offered by the government. Tasha Blackburn has routinely claimed that her trial counsel never showed her the government's plea agreement, and he never communicated the details of the plea, nor would he recommend accepting or rejecting the plea agreement. Blackburn believes the lower court is incorrect, when they made the ruling that attorney Brad Murray communicated the government's plea agreement.

A hearing on Blackburn's § 2255, demonstrated that Murrays testimony was noncommittal, and uncertain about whether he provided the plea agreement to Blackburn, and his letter of October 06, 2008 which Murray encapsulates the meeting and discussions held with Blackburn but what is also important, is that Murray stated in writing that he couldn't recommend to accept or reject a plea. Blackburn now asks what constitutes 'communicating a plea'. Does this include a recommendation to accept or reject a plea? Does it include sitting with a criminal defendant and walking them through each paragraph of the agreement?

The Supreme Court in Strickland v Washington, 466 US 668, 104 S CT 2052, 80 L Ed 2d 674 (1984) set the standard for assessing claims of ineffective assistance of counsel. This court held that legal representation violates the Sixth Amendment if it falls "below an objective standard of reasonableness" as indicated by "prevailing professional norms" and the defendant suffers prejudice as a result.

This directs the criminal defendant to first look at the ABA in their respective area, to find out what constitutes communicating a plea and what the norm would be. In this case the defendant is at a loss for an answer. The ABA in Alabama does not direct attorney's on how to communicate a plea agreement. Blackburn next turns to the past legal decisions. These decisions do not shed any light on what constitutes 'communicating a plea'.

In Missouri v Frye, 182 L Ed 2d 379, 566 US 134 (2012) the court held that defense counsel's allowing a plea offer to expire without advising accused of offer to constitute denial of effective counsel required under the Sixth Amendment. The court explained that a defendant must show a reasonable probability that the end result of the criminal process would have been favorable. Blackburn's case did not have an expired plea, and this case doesn't speak to how the attorney was required to advise his client. The court stated that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.

Brad Murray's testimony and documentation shows that Murray held a discussion with the prosecution about a plea agreement, and that he discussed the possibility of a plea. But that conversation was never revisited, his documentation shows that he forwarded to Blackburn discovery, and that he couldn't recommend that she accept or reject the plea until he had time to review discovery. Blackburn is of the opinion that Murray's testimony was not advising her that a plea agreement existed. That in general he couldn't advise her to plead guilty or proceed to trial until he had an opportunity to review the case.

In Hill v Lockhart, 474 US 52, 106 S Ct. 366, 88 L Ed 2d 203, the court looked at whether attorney misinformation about his parole eligibility rendered ineffective assistance. Blackburn's case does not fall into this category either, although she argues that misadvise and counsel's inability to recommend acceptance could be viewed in the same light.

The Supreme Court in Lee v United States, 137 S Ct 1958, 198 L Ed 2d 476 (2017) discussed counsel's erroneous advice, he would have rejected a guilty plea because deportation was the determinative issue in his decision to plead guilty.

In each of these cases, the court looked at different aspects of communicating a plea agreement. Missouri v Frye, no communication of expired plea, Hill v Lockhart, there was misinformation about parole, Lee v United States, there was erroneous advise about deporation. Padilla looked at counsel's failure to inform the defendant of collateral consequences. These cases each had a failure to communicate something important to the criminal defendant, which resulted in prejudice.

Tasha Blackburn was prejudiced because her attorney Brad Murray never showed her the government's plea agreement, and never went through the details of what that plea encompassed, and then was unable to recommend whether to accept or reject the plea, that only he viewed. This too prejudiced Tasha Blackburn because she would have been sentenced to 5 years instead of the 30 years she received.

Several lower courts address types of communication they wish to see in their districts. In United States v Petters 986 F. Supp 1077, (8th Cir. 2013), the court of appeals comes close to describing

communication in its opinion of a formal plea offer. They stated, "While no hard and fast rule exists, Frye made clear that the presence of something written is a crucial fact when determining whether a formal plea offer has been tendered by the government. This case speaks to the government's formal written plea offer to defense counsel. It doesn't speak to how defense counsel communicates to his client the written agreement. In this case, the government denied in § 2255 that they ever offered an agreement, repeatedly calling it the "mystery plea" until Blackburn was able to locate the agreement and produce it to the court.

The Eighth circuit also looked at a case United States v Strothers, 509 F. Appx 571 (8th Cir. 2013) where the defendant claimed a plea offer was provided by the government and his defense counsel had failed to communicate the AUSA's offer to him. In rejecting Strothers claim the eighth circuit concluded that the 'offer' was, "made known to him". The eighth circuit concluded in Fleetwood that/ [he] received effective counsel because his pretrial counsel 'conveyed' the government's plea offer. Fleetwood v United States, 618 Fed Appx 874 (8th Cir. 2015). Again, it's not clear what constitutes 'made known to him' or 'conveyed'. Neither of these terms suggest a level of adequate communication that a criminal defendant could use to make a decision, on going to trial, or accepting a plea agreement.

The Seventh Circuit described communication as mischaracterization, when in Julian v Bartley, 495 F. 3d 487, 495 (7th Cir. 2007) the court said an attorney's performance is deficient if the attorney grossly mischaracterizes the evidence or advises a client to reject a plea offer and go to trial in the face of overwhelming evidence.

The Eleventh Circuit in Diaz said "Counsel has an obligation to consult, with his client on important decisions and to keep him informed of important developments in the course of a prosecution." Diaz, 930 F.2d 832 (11th Cir. 1991) See Also: Cook v United States, 613 Fed Appx 860 (11th Cir. 2015).

The Eleventh Circuits decision here, conflict with their decision in Diaz. Because Brad Murray couldn't testify that he provided Blackburn the plea agreement, and his written letter of October 6, 2008 makes clear that Murray could not recommend a plea.

"Here are some documents the prosecutor sent me last week in hopes that you would reconsider a plea agreement. I can not advise you to accept a plea deal at this point, but I forward these documents to you for your review. As we discussed on Friday, I plan to dig a little deeper into all of the facts and law on your case and come meet you later this week to discuss status and the prospects for trial or plea. I look forward to meeting with you".

Brad Murray was Blackburn's attorney for one month. Murray never provided his successor the plea agreement. He also never made a recommendation to accept the plea agreement, and he never showed the written agreement to Blackburn. Unit Blackburn presented the court the agreement in § 2255, the government denied its existence calling it a "mystery plea".

For these reasons, Tasha Blackburn believes this court should Grant Certiorari to Define What Constitutes Communicating A Plea Offer.

CONCLUSION

Based on the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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May 3, 2018