APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13268-D

TASHA MICHELLE BLACKBURN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

ORDER:

Tasha Michelle Blackburn is a federal prisoner serving a 300-month sentence after a jury found her guilty of conspiracy to possess with intent to distribute over 50 grams of methamphetamine. In her motion to vacate under 28 U.S.C. § 2255, she alleged ineffective assistance of counsel by her pretrial attorney, Mr. Murray, and her trial counsel, Mr. Haas. Mr. Murray and Ms. Blackburn testified at an evidentiary hearing. On remand from this Court, the Magistrate Judge recommended the District Court deny Ms. Blackburn's § 2255 motion. The District Court adopted the recommendation over Ms. Blackburn's

objections, denied the § 2255 motion, and denied a certificate of appealability ("COA"). Ms. Blackburn now moves for a COA and for leave to proceed in forma pauperis ("IFP") from this Court.

I.

To get a COA, a § 2255 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts will grant a COA if the petitioner can show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603–04 (2000) (quotation omitted).

To prove ineffective assistance of counsel, the petitioner must show that her attorney's performance was deficient and that the deficient performance prejudiced her. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). An attorney's performance is deficient if it falls below "the range of competence demanded of attorneys in criminal cases." Id. (quotation omitted). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065. Prejudice means "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.

A defendant has a right to effective assistance of counsel when deciding whether to accept a plea offer. Padilla v. Kentucky, 559 U.S. 356, 364, 130 S. Ct. 1473, 1480–81 (2010). "[A]s a general rule, 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." Missouri v. Frye, 566 U.S. 134, 145, 132 S. Ct. 1399, 1408 (2012). "To show prejudice . . . where a plea offer lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability" that (1) "they would have accepted the plea offer had they been afforded effective assistance of counsel," (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Id. at 147, 132 S. Ct. at 1409.

Also, a factfinder's determination that a particular witness is or is not credible is given "substantial deference" in a § 2255 proceeding. Rivers v. United States, 777 F.3d 1306, 1316 (11th Cir. 2015) (quotation omitted). This Court will not "disturb a credibility determination unless it is so inconsistent or improbable on its face that no reasonable factfinder could accept it." Id. at 1317 (quotation omitted).

II.

A. MR. MURRAY

Before Ms. Blackburn's trial, the government presented a written offer for her guilty plea in exchange for the government's recommendation that she receive either a sentence at the low end of the applicable guideline range or a downward-departure sentence. Ms. Blackburn argued that Mr. Murray's conduct was deficient because he failed to show her the plea offer and discuss with her the consequences of accepting or rejecting it. She testified that she would have accepted the offer had she known about it.

Mr. Murray testified during the evidentiary hearing that he showed Ms. Blackburn a copy of the plea offer during their first meeting. He testified that he talked to Ms. Blackburn about the offer, the government's evidence against her, and the charges against her. He also explained the risks of going to trial and the benefits of accepting the plea offer, the mandatory-minimum five-year sentence that she was facing, the Sentencing Guidelines, and the credit that she could receive for accepting responsibility and cooperating with the government if she pled. Mr. Murray said that Ms. Blackburn was "adamant" that she would not plead guilty; her father and her substance-abuse counselor also told him that she would not plead guilty; and her counselor told him that Ms. Blackburn would be getting an attorney who would take the case to trial and called Mr. Haas for that purpose.

The Magistrate Judge found that Mr. Murray's testimony was credible and that Ms. Blackburn's testimony that they did not discuss a plea offer "was inconsistent and not plausible." The Magistrate Judge's credibility determinations are not inconsistent or improbable and are due substantial deference. See Rivers, 777 F.3d at 1316-17. Ms. Blackburn acknowledged that things were "foggy" during her first meeting with Mr. Murray, which occurred while she was undergoing treatment for her drug addiction, and that they went over some "papers" during the meeting. She also admitted that she remembered hearing or talking about a plea offer at some point. She said she told Mr. Murray she did not "want to discuss any of it" and that she "had no interest in doing anything at that time other than getting through [her treatment] program and getting clean."

Ms. Blackburn cannot show that Mr. Murray's conduct was deficient with respect to the plea offer. She also cannot show that she was prejudiced because she cannot demonstrate a reasonable probability that she would have accepted the plea offer. See Frye, 566 U.S. at 147, 132 S. Ct. at 1409. Reasonable jurists would not debate the District Court's denial of Ms. Blackburn's claim that Mr. Murray provided ineffective assistance. See Slack, 529 U.S. at 484, 120 S. Ct. at 1603–04.

B. MR. HAAS

Ms. Blackburn argued that Mr. Haas's conduct was deficient because he also failed to present the plea offer to her; discuss with her the implications of accepting

and rejecting the offer; and incorrectly advised her that she could not be convicted of conspiracy to possess with intent to distribute methamphetamine. Ms. Blackburn says that she would have pled guilty if Mr. Haas had not performed deficiently.

Even if Mr. Haas's conduct was deficient, Ms. Blackburn cannot demonstrate ineffective assistance of counsel because she cannot show prejudice. Mr. Murray's testimony, as well as her own, show there is not a reasonable probability that she would have accepted the plea offer even if it had been presented to her and discussed with her, and she had been correctly advised on the conspiracy charge. See Frye, 566 U.S. at 147, 132 S. Ct. at 1409. First, the Magistrate Judge found that Mr. Murray credibly testified that he showed Ms. Blackburn a copy of the written plea offer, discussed the offer and its pros and cons with her, as well as explained the charges and the government's evidence against her. The Magistrate Judge also found that Mr. Murray credibly testified that Ms. Blackburn then rejected the offer, terminated Mr. Murray's representation because she did not want to plead, and retained Mr. Haas because she believed that he would take her case to trial. The Magistrate Judge then found that Ms. Blackburn's testimony that she would have accepted the plea offer but for Mr. Haas's deficient conduct was not credible since Mr. Murray did all the things she alleges Mr. Haas failed to do and Ms. Blackburn still rejected the plea offer.

Beyond that, the Magistrate Judge noted that throughout the proceedings—from the pretrial phase all the way through even the evidentiary hearing on Ms. Blackburn's § 2255 motion—Ms. Blackburn only admitted that she was a drug user, despite the fact that she was charged and convicted of being a drug distributor. The Magistrate Judge found this also undermined Ms. Blackburn's testimony that she would have accepted the plea offer, since the offer depended on her admitting she was a drug distributor. Again, the Magistrate Judge's credibility determinations are not inconsistent or improbable and are given substantial deference. See Rivers, 777 F.3d at 1316-17. Because Ms. Blackburn cannot show that she was prejudiced, reasonable jurists would not debate the District Court's rejection of her claim that Mr. Haas provided ineffective assistance. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064 (requiring a showing of both deficient performance and prejudice to prove ineffective assistance of counsel); see also Slack, 529 U.S. at 484, 120 S. Ct. at 1603–04.

Ms. Blackburn's motion for a COA is DENIED. Her motion for leave to proceed on appeal IFP is DENIED AS MOOT.

Bobby B. Martin

UNITED STATES CIRCUIT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TASHA MICHELLE BLACKBURN, #10417-003	*	
Petitioner,	*	
	*	
vs.	*	CRIMINAL NO.08-00256-WS
	*	CIVIL ACTION NO.11-00727-WS-B
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

Pending before the Court are Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, motion to supplement, and replies to Respondent's responses (Docs. 195, 201, 202, 214) and Respondent's responses in opposition to the motion to vacate and the motion to supplement (Docs. 198, 211). In her motion to vacate, Blackburn has raised four claims: (1) trial counsel was ineffective because he was unprepared for trial and failed to object; (2) appellate counsel was ineffective for failing to communicate with client during the pendency of appeal and abandoning multiple claims on direct appeal; (3) appellate counsel was ineffective for failing to petition the United States Supreme Court for a writ of certiorari; and (4) former trial counsel was ineffective in failing to communicate a favorable plea offer to Petitioner. (Doc. 199 at 4-5, 8-11).

Based upon a careful review of the record, the undersigned

has determined that the record is adequate to dispose of claims one, two, and three; thus, no evidentiary hearing is required as to those claims. However, the same is not true with respect to the issue raised in claim four. In § 2255 proceedings, an evidentiary hearing is not required in every case. For instance, "a district court need not hold an evidentiary hearing for 'patently frivolous claims or those which are based upon unsupported generalizations' or 'where the petitioner's allegations are affirmatively contradicted by the record.'" Greer v. United States, 354 Fed. App'x 417, 419 (11th Cir. 2009) (quoting Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989)). However, if the petitioner alleges facts that, if true, would entitle her to relief, a district court should order an evidentiary hearing. Greer, 354 Fed. App'x at 419 (citing Aron v. United States, 291 F.3d 708, 714-15 (11th Cir. 2002)).

In claim four, Blackburn alleges that her former trial counsel, Bradley Murray, Esq., was ineffective for failing to communicate to her a favorable plea agreement offered by the government. (Doc. 202 at 5; Doc. 195 at 5, 10). Specifically, Blackburn claims that after her trial, she learned from Mr. Murray "that the Government had offered a favorable negotiated plea agreement deal that trial counsel failed to ever communication" to her. (Doc. 195 at 5). Further, Blackburn contends that he failed to communicate the plea offer to her

because "by that point" he was "agrivated (sp) with her and the prospects for this trial." (Id.). In a motion for leave to supplement, Blackburn attaches a copy of the plea agreement signed by the Government. (Doc. 202).

In its responses in opposition (Docs. 198, 211) the Government contends that Blackburn is not entitled to relief because she has failed to prove prejudice resulting from Mr. Murray's alleged failure to communicate the plea deal. (Id.). Blackburn claims however that she was prejudiced by her attorney's failure to communicate the plea offer because she "attempted to cooperate at all stages" and the plea offer provided for a potential motion for downward departure and a motion for low-end guideline sentencing if she cooperated. (Doc. 214 at 4, 8-9). Additionally, Blackburn contends that "others connected with buying and selling methamphetamine with [her] receive[d] [] favorable plea[s] and lower sentences", with release dates ranging from one day imprisonment to only a few years, compared to her twenty-five (25) year sentence. (Id., at 8). According to Blackburn, for these reasons, she would have taken the plea and averted a trial. Blackburn contends that she has been prejudiced because by going to trial, she ended up with a sentence that was substantially longer than the sentences received by her co-defendants who entered guilty pleas. (Id., at 7).

In Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), the Supreme Court held that the Sixth Amendment right to effective assistance of counsel extends to plea negotiations. Frye, 132 S. Ct. at 1404-08; Lafler, 132 S. Ct. at 1384. Thus, criminal defendants are "entitled to the effective assistance of competent counsel" during plea negotiations. Lafler, 132 S. Ct. at 1384 (internal quotation marks omitted). "[D]efense 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." Frye, 132 S. Ct. at 1408. The Supreme Court of the United States has further held:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id., 132 S. Ct. at 1409.

As noted *supra*, Blackburn asserts that her former counsel, Mr. Murray, during the period he acted as her trial counsel, failed to advise her of a plea offer, that she would have taken

the offer, and that she has been prejudiced as a result. While the Government contends that Blackburn has not been prejudice, the undersigned finds that questions of fact remain as to this claim.

An evidentiary hearing is warranted to determine whether (1) Blackburn was advised of the plea offer, and (2) if so, whether Blackburn was advised of the advantages and disadvantages of the plea offer, including its sentencing implications, and whether Blackburn rejected the plea offer. Furthermore, evidence regarding whether prejudice resulted from counsel's purported deficient performance in failing to advise Blackburn of the plea offer shall be presented at the hearing. Specifically, evidence regarding whether a reasonable probability exists that Blackburn would have accepted the plea offer had she been advised of it and whether the plea would have been entered without the prosecution canceling it or this Court refusing to accept it shall be developed. To this end, the parties may present any evidence concerning whether Blackburn was advised of and rejected the plea offer, and whether she can establish prejudice as required under Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies..." Rule 8(c) of the Rules Governing § 2255 Motions.

The record reflects that although Blackburn was represented by retained counsel at trial, it was previously determined that she qualifies for appointment of counsel due to her financial situation, and she was appointed counsel in connection with her direct appeal. Accordingly, the Court hereby appoints CJA Panel Attorney Neil Hanley to represent Blackburn at the evidentiary hearing, which is confined to claim four.

For the reasons stated above, it is hereby ORDERED (1) that this matter is hereby set for an evidentiary hearing, on the limited issue raised in Blackburn's claim four, as discussed herein, before the undersigned Magistrate Judge on **July 8, 2014**, at 10:00 a.m. in Courtroom 1A, U.S. Courthouse, Mobile, Alabama; and (2) that CJA Attorney Neil Hanley is appointed as counsel to represent Blackburn at the evidentiary hearing.

The United States Marshal or his Deputy is ORDERED to produce Defendant for the above-referenced hearing.

DONE this **28th** day of **April, 2014.**

/s/ SONJA F. BIVINS
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TASHA MICHELLE BLACKBURN,	*	
	*	
Petitioner,	*	**CRIMINAL NO. 08-00256-WS-B-2**
	*	**CIVIL ACTION NO. 11-0727-WS-B**
vs.	*	
	*	
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, the Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is **ADOPTED** as the opinion of this Court. It is **ORDERED** that Blackburn's Motion To Vacate, Set Aside, Or Correct Sentence under § 2255 (Doc. 195) be **DENIED**, and that Blackburn is not entitled to the issuance of a certificate of appealability or to proceed *in forma pauperis* on appeal.

DONE 3rd day of July, 2017.

s/WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TASHA MICHELLE BLACKBURN,	*	
	*	
Petitioner,	*	
	*	CIVIL ACTION NO. 11-00727-WS-B
vs.	*	CRIMINAL NO. 08-00256-WS-B
	*	
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

REPORT AND RECOMMENDATION

This matter is before the Court following a remand from the Eleventh Circuit Court of Appeals. (Doc. 256). The Court remanded the case for consideration of Petitioner Tasha Michelle Blackburn's claim that attorney Tom Haas rendered ineffective assistance of counsel. Specifically, the appeals court identified the following issues for resolution: whether Haas rendered ineffective assistance of counsel by (1) failing to discuss with Blackburn the government's plea offer and inform her of the benefits of accepting it; (2) failing to inform Blackburn of the potential results of proceeding to trial rather than pleading guilty, even assuming Haas lacked access to the government's plea offer; and (3) wrongly advising Blackburn that she could not be convicted of conspiracy to possess with intent to distribute. (Id. at 3).

Following remand, the parties were afforded an opportunity to

submit supplemental briefing on the above-referenced issues. (Doc. 258). In the Government's supplemental brief (doc. 259), the Government argues that at the evidentiary hearing conducted on July 8, 2014, Blackburn's testimony focused on attorney Brad Murray's performance, and did not identify any alleged ineffective assistance by trial counsel Tom Haas. According to the Government, Blackburn has failed to carry her burden of establishing that Haas was ineffective, and has also failed to establish that she was prejudiced because through all stages of her prosecution, she continued to insist that she was innocent. (Id.).

In her supplemental brief (doc. 261), Blackburn contends that Haas' legal strategy was based on "a complete lack of understanding of the law on conspiracy" and that she relied on his advice and proceeded to trial. Blackburn contends that a new evidentiary hearing is required to resolve questions regarding Haas' performance and strategy, and to determine whether he received the plea agreement from either Murray or from the Government. (Id.).

Based on a review of the parties' supplemental submissions, the evidence tendered at the prior evidentiary hearing conducted on July 8, 2014, and the case file, the undersigned finds that a new evidentiary hearing is not required to resolve the issues before the court.

I. BACKGROUND

A federal grand jury returned an indictment against Blackburn and her co-Defendant Barry Jay Sullivan in July 2008. (Doc. 1). Blackburn was charged in count one of the indictment with conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 846, and in count two, she was charged 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). (Id.) The Court initially appointed Fred Tiemann, an assistant Federal Defender, to represent Blackburn; however, Tiemann requested permission to withdraw on the ground that a colleague in his office was representing an individual who was expected to provide testimony implicating Blackburn. (Docs. 16, 46).

As a result, Tiemann was permitted to withdraw, and Paul Bradley Murray was appointed to represent Blackburn on September 28, 2008. (Docs. 48, 49). Less than a month later, on October 16, 2008, Murray filed a motion to withdraw on the ground that Blackburn had retained Tom Haas to represent her. (Doc. 62). Murray's motion was granted, and Haas assumed representation of Blackburn in October 2008. (Doc. 67). Following a jury trial, Blackburn was convicted

of conspiring to distribute 50 grams or more of methamphetamine1, and on August 3, 2009, she was sentenced to 300 months in prison, followed by three years of supervised release.[2] (Doc. 143).

Haas requested and was granted permission to withdraw, and Greg Hughes was appointed to represent Blackburn on appeal. (Docs. 173, 174, 175). In an opinion and judgment dated September 30, 2010, the Eleventh Circuit affirmed Blackburn's conviction and sentence.[3](Doc. 190).

Proceeding *pro se*, Blackburn timely filed a motion to vacate her sentence, and argued that her sentence should be set aside due to ineffective assistance rendered by Brad Murray, her former trial counsel, Tom Haas, her trial counsel, and Greg Hughes, her counsel on appeal. (Doc. 195). Blackburn set forth various alleged instances of ineffective assistance of counsel, including claims that her counsel continually pressured her to enter a guilty plea, and that her counsel failed to communicate to her a proposed plea agreement offered by the Government prior to her proceeding to trial. (Id.).

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[1] Before trial, the Government's oral motion to dismiss count two of the indictment was granted. (Doc. 203)

[2] The judgment was entered on August 24, 2014. (Id.)

[3] On appeal, Blackburn argued that the Court erred in denying her motion to suppress and in permitting a police officer to testify as an expert during the trial. (Doc. 190)

In opposing Blackburn's motion, the Government contended that Blackburn failed to establish the existence of a plea agreement, and further failed to demonstrate that she was prejudiced by the performance of her attorneys, because throughout the proceedings, she insisted upon her innocence and on going to trial. (Doc. 198).

Blackburn filed a plea agreement that she obtained from Murray in 2012, and asserted that she learned from her former counsel that the Government had communicated a favorable plea agreement that her trial counsel failed to communicate to her. (Doc. 202 at 4-5). In another filing, Blackburn asserted that she was prejudiced by her counsel's failure to communicate the plea offer to her. (Doc. 214 at 3-4). She also argued that due to circumstances beyond Tiemann and Murray's control, the plea agreement was not communicated or explained to her; however, such does not excuse Haas' failure to go over the plea agreement with her, and "his erroneous advice that using and selling drugs to others who also use and sell drugs is not a conspiracy." (Doc. 214 at 10).

Due to the conflict regarding the existence of a plea agreement, and what was communicated to Blackburn regarding the plea agreement, an evidentiary hearing was scheduled for July 8, 2014, and Cindy Powell was appointed to represent Blackburn at the hearing. (Docs. 215, 220, 233). Blackburn testified at the July

8, 2014 hearing as did her former counsel, Paul Murray. (Doc. 249). While Murray provided testimony that was consistent with his billing records, Blackburn's testimony was replete with inconsistencies and at odds with some of her written submissions.

According to Blackburn, at some point, she talked with each of her attorneys about entering a guilty plea, but not a plea agreement or her options. (Id. at 67). She also testified that her initial counsel, Fred Tiemann, discussed the Government's evidence against her and the sentencing guidelines. (Id. at 45-46). She further testified that Tiemann may have encouraged her to enter a guilty plea at the beginning when they were going over everything. (Id. at 66).

Blackburn acknowledged that after Tiemann was permitted to withdraw from her case due to a conflict, she received a letter from Murray dated October 6, 2008. (Id. at 49, 70, Doc. 233-2). In the letter, Murray states that he is enclosing documents that the prosecutor sent him in hopes that Blackburn would reconsider a plea agreement. (Doc. 233-2). Murray also indicates, in the letter, that he cannot advise Blackburn to accept a plea deal at that point, but he wants to dig deeper into the facts and law of her case, and meet with her later in the week to discuss the status and the prospects for trial or a plea. (Id.).

According to Blackburn, Murray met with her on two occasions while she was in a local residential drug treatment facility. (Doc. 249 at 69). Blackburn testified that only she and Murray were present during their initial meeting. At the October 8, 2008 meeting, Murray showed Blackburn a lot of documents and evidence, including photographs capturing her. (Id. at 48, 66-67). Blackburn testified, at one point, that Murray did not discuss the existence of a plea agreement with her. (Id. at 48). She later testified that Murray told her that the prosecutor had sent over a plea agreement, and that the plea agreement may have been in the documents Murray provided to her during the meeting; however, Murray did not explain the agreement to her or discuss the pros and cons of accepting the plea agreement versus going to trial. (Doc. 249 at 52-53, 56, 66-67, 69). Blackburn further testified that Murray told her that he needed more time to review the case, and that if after looking at the evidence, it pointed towards a plea, he would let her know that she needed to take a plea. (Id. at 52, 56). According to Blackburn, she did not read the plea agreement for herself until Murray sent it to her, at her request, several years later, in May 2012. (Id. at 51). Blackburn testified that she did not want to discuss anything because she was a "mess, was in the early phases

of drug treatment", and wanted to focus on her treatment.[4] (Id. at 70). She also acknowledged that she did not remember a "whole lot" about her meeting with Murray. (Id. at 72).

With respect to her second meeting with Murray, Blackburn testified that Murray showed up at the treatment center unannounced, and he kept trying to get her to sign a speedy trial waiver. (Id. at 53-56, 71-72). Blackburn testified that her treatment counselor was present at the meeting, and was upset because Murray had showed up unannounced in violation of the treatment center rules. (Id.) Blackburn also testified that Murray was adamant that she needed to sign a speedy trial waiver, and that during the meeting, her counselor picked up the telephone, and called another attorney, Tom Haas. According to Blackburn, Haas advised her against signing the speedy trial waiver, and also told her that he would call her father to make payment arrangements so that he could represent her. (Id.). Blackburn denied that Murray was terminated because she and her family believed he was pressuring her to enter a guilty plea. (Id.). She testified that Haas was retained because he was friends with her counselor and her counselor told her that he was the best

[4]According to Blackburn, she entered treatment at the Home of Grace on August 28, 2008, and her initial meeting with Murray occurred more than a month later on October 8, 2008. (Doc. 249 at 53).

and that he could help her. (Id. at 71-72, 82-83). She also testified that she advised Murray that "she had no interest in doing anything" at that point other than completing the drug treatment program. (Id. at 53-56).

According to Blackburn, during Haas' representation of her, he never mentioned the plea agreement to her, and she does not know whether the plea agreement was passed along to him. (Id. at 62). Blackburn also testified that Haas told her that it was not a conspiracy to purchase drugs from someone or for someone to distribute drugs. (Id. at 72). Blackburn further testified that knowing what she knows now, she would have accepted the plea offer and would have cooperated. (Id. at 57). According to Blackburn, if Haas or someone had explained to her that the Government was not only willing to recommend a sentence at the low end of the guidelines, but was also willing to consider a 5k reduction if she cooperated, she would have accepted the plea offer and would have cooperated. (Id. at 56-57, 78).

Blackburn testified that *after* her conviction, but before she was sentenced, she wrote letters to the prosecutor in an attempt to cooperate, and that the prosecutor arranged for Blackburn to meet with the case agent. (Id. at 57, 73). Blackburn further testified that at the meeting, she provided information regarding other

individuals; however, the prosecutor told her that she was still attempting to portray herself as a victim, and was unwilling to accept responsibility for her role in the drug conspiracy; thus, her offer to cooperate was rejected. (Id. at 57-60, 73-75).

Throughout Blackburn's hearing testimony, she repeatedly stated that from day one, she readily admitted that she purchased drugs, and she never denied being a drug user. (Id. at 61, 71, 73). Blackburn also testified that had she been given the opportunity to accept the Government's plea offer, she would have received a substantially shorter sentence. (Id. at 50, 57, 73).

As noted, Murray, who at the time of the hearing was an experienced criminal attorney with over twenty years of service on this Court's Criminal Justice Act panel of attorneys, also testified at the hearing. (Id. at 19). Murray testified and presented corroborating billing records reflecting that shortly after being appointed to represent Blackburn, he traveled to a residential treatment center to meet with her on October 8, 2008 and October 10, 2008. (Doc. 233-7; Doc. 249 at 14-19, 20-27). According to Murray, prior to his initial meeting with Blackburn, he had received a written plea agreement from the prosecutor who suggested that Blackburn reconsider the Government's plea offer. (Doc. 233-1). Murray testified that he gave to Blackburn documents received from

the Government, and during his initial meeting with her at the treatment facility, he went over the discovery with her, and explained that a conspiracy requires an agreement-- an overt act, and that if a person is found to be a member of a conspiracy, that person can be held responsible for what everybody else in the conspiracy does. (Doc. 249 at 14-18, 20-27, 35-42). He testified that he also discussed with Blackburn the terms of the plea agreement, the pros and cons of accepting the plea agreement, and Blackburn's sentencing guidelines; however, he did not make a recommendation to her at that time because he was still familiarizing himself with the facts of the case. (Id.). According to Murray, he was too new to the case to make a plea recommendation at that point. (Id.) Murray testified that not only was Blackburn adamant that she was not going to enter a guilty plea, but Blackburn's father also called him, and said that he understood Murray was trying to pressure Blackburn to plead guilty; however, she was not going to do so. Murray stated that he explained to Blackburn's father that he was not trying to pressure her to enter a guilty plea, but was instead trying to get her to think about her options. (Id. at 30-31)

Murray testified that during his second meeting with Blackburn, her counselor was present, and she made clear to him that Blackburn

needed a lawyer who would not force her to enter a guilty plea, but would instead take her case to trial. (Id. at 28-39). Murray stated that in his presence, the counselor telephoned another attorney, Tom Haas, and discussed with Haas representing Blackburn. Murray stated that he explained to Haas that he was planning to seek a continuance since he had just recently been appointed to the case, and that he needed Blackburn to execute a speedy trial waiver so that they would have more time to become familiar with the case. (Id.). According to Murray, Haas advised Blackburn not to sign the waiver, and told her that he would contact her father about making payment arrangements. Murray testified that since Blackburn had opted to have Haas represent her, he requested permission to withdraw. He also testified that he gave Haas his case file, and that the plea agreement was likely included. (Id.)

Based on the record before the court, including evidence gleaned during the evidentiary hearing, the undersigned found that Blackburn has failed to establish that Murray failed to communicate the plea offer to her, and that she further failed to establish that she would have accepted the offer. The undersigned thereafter issued a report and recommendation recommending that Blackburn's petition be denied because she failed to establish her ineffective assistance of counsel claims. (Doc. 237). The report and recommendation was

adopted by the Court; however, as noted *supra*, the case has been remanded to this Court to address Blackburn's claims that Tom Haas rendered ineffective assistance of counsel. (Docs. 237, 239, 240, 256).

II. STANDARDS OF REVIEW

Courts and the public can presume that a defendant stands fairly and finally convicted after conviction and exhaustion or waiver of any right to appeal. See United States v Frady, 456 U.S. 152, 164, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). However, 28 U.S.C. § 2255 provides a vehicle by which federal defendants in custody may attack the validity of their sentences. A defendant seeking relief under § 2255 must prove: (1) the sentence violated the Constitution or laws of the United States; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence imposed exceeded the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. Such collateral relief is an extraordinary remedy which "may not do service for a [] [direct] appeal." Frady, 456 U.S. at 165. Consequently, '[i]f issues are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later collateral attack. . .A defendant is, of course, entitled to a hearing of his claims, but not to duplicate hearings.

The appellate process does not permit reruns." Moore v. United States, 598 F. 2d 439, 441 (5th Cir. 1979).

To prevail on an ineffective of assistance claim, Blackburn must satisfy the familiar two-part test established in Strickland v. Washington, 466 U.S. 668,104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). First, she must demonstrate that Tom Haas made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Id. at 687. There is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance; thus, counsel's performance is deficient only if it falls below the wide range of competence demanded of lawyers in criminal cases. Id. at 689. A petitioner must also show that she suffered prejudice as a result of the deficient performance. Id. at 687. In other words, Blackburn must show that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. A habeas petitioner claiming ineffective assistance of counsel must carry her burden on both Strickland prongs, and a court need not address both prongs if the petitioner does not make a sufficient showing on one. See id. at 697; Johnson v. Alabama, 256 F. 3d 1156, 1176 (11th Cir. 2001).

In Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), the Supreme Court clarified that the Sixth Amendment right to effective assistance of counsel under Strickland extends to the negotiation and consideration of plea offers that lapse or are rejected. See Frye, 132 S. Ct. at 1404-08; see also Lafler, 132 S. Ct. at 1384. The Court held that counsel has a "duty to communicate formal offers from the prosecution to accept a plea," and that, in general, where such an offer is not communicated to the defendant, counsel "[does] not render the effective assistance the Constitution requires." Frye, 132 S. Ct. at 1408. The Court also held that, in order to show prejudice under Strickland's two-part test, a petitioner must show a reasonable probability that but for counsel's ineffectiveness: (1) "the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) "the court would have accepted its terms"; and (3) "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler, 132 S. Ct. at 1385; see Frye, 132 S. Ct. at 1409.

III. DISCUSSION

The gist of Blackburn's contention is that but for the erroneous advice that Haas gave her about the conspiracy charge and his failure to advise her of the Government's plea offer, and the pros and cons of proceeding to trial, she would have entered a guilty plea, and would have received a substantially lower sentence. As a preliminary matter, the undersigned observes that there is nothing before the Court that suggests, let alone establishes, that the Government renewed its plea offer after Tom Haas assumed representation of Blackburn in this case. While it is clear that the Government tendered a written plea offer to Murray during his representation of Blackburn and suggested that he discuss with her reconsidering a plea offer, the credible evidence establishes that Blackburn rejected the offer, and that Murray communicated such to the prosecutor. (Doc. 249 at 36). There is nothing before the Court suggesting that the Government ever renewed the offer.

Moreover, the undersigned finds that assuming *arguendo* that Blackburn can establish that Haas' performance was deficient[5], with respect to either his alleged advice regarding conspiracy or his

[5] The record does not contain any sworn testimony from attorney Thomas Haas, and the Court takes judicial notice of the fact that he passed away on March 17, 2017. http://obits.al.com/obituaries/mobile/obituary.aspx?n=thomas-haas&pid=184574855

remembered very little about her initial meeting with Murray. (Id. at 7). The Court can only surmise that once Murray outlined to Blackburn the Government's discovery, the nature of a conspiracy, what Blackburn was facing if she was convicted, and the pros and cons of the Government's plea agreement, she came away from the meeting believing he was encouraging her to enter a guilty plea. So, rather than sign a speedy trial waiver, which would have afforded Murray and her more time to review the case and make a decision about trial or other resolution, she chose to terminate Murray and retain Haas because she believed Haas would take her case to trial.

Interestingly, in Blackburn's §2255 filings, she asserted that she had learned from her former counsel that the government had communicated a favorable plea agreement that her trial counsel failed to communicate to her[6]. (Doc. 202 at 3). She also testified

[6] The undersigned finds it noteworthy that in at least two of Blackburn's §2255 filings, she contended that her trial counsel repeatedly encouraged her to enter a guilty plea. (Doc. 195 at 9, Doc. 202 at 5). In fact, Blackburn went as far as to assert that throughout the pretrial period, her trial counsel operated under the premise that she "would eventually plead out." (Doc. 195 at 9). Blackburn has since sought to distance herself from these statements because they are at direct odds with her contention that Haas advised her that you could not be convicted of a conspiracy for using and or selling drugs. It is nonsensical that he would have continually encouraged Blackburn to enter a guilty plea while also advising her that she could not be convicted of a conspiracy. It instead strongly suggests that as was the case with Murray, Blackburn likewise conveyed to Haas that she was not interested in entering a guilty

at the evidentiary hearing that but for Haas' failure to tell her about the plea agreement, the pros and cons of the agreement, and his erroneous advise regarding conspiracy, she would have accepted the agreement, and would have ended up with a substantially shorter sentence. Notwithstanding her assertions, the credible evidence clearly establishes that Murray did in fact communicate the plea agreement to Blackburn, as well as the applicable sentencing guidelines, the nature of a conspiracy, and the pros and cons of the Government's plea agreement, and rather than allow Murray to seek additional time so they could consider the agreement and prepare for trial if necessary, Blackburn terminated him because she was adamant that she was not going to enter a guilty plea[7]. Thus, her assertion that if Haas had provided her with the very information that the Court finds Murray had already provided to her, she would have opted to accept the plea agreement is simply not credible given her termination of Murray because she perceived that he wanted her

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plea and insisted on proceeding to trial. This is particularly true given the credible evidence that Murray discussed the Government's plea offer with Blackburn, including the pros and cons of proceeding to trial, and she terminated his services because she believed he was pressuring her to enter a guilty plea.

[7] Blackburn also testified that her initial counsel, Fred Tiemann, went over the Government's evidence and the sentencing guidelines with her, and he probably encouraged her to enter a guilty plea. (Doc. 249 at 45-46, 66).

to enter a guilty plea, and she wanted an attorney who would take her case to trial. Accordingly, the undersigned finds that Blackburn has not established prejudice because even in the absence of Haas' alleged deficient performance, it is clear that Blackburn was insistent on going to trial.

Finally, the overwhelming evidence before the Court reflects that Blackburn rejected the Government's plea offer and was insistent on going to trial in this case because she viewed herself as a mere drug user rather than as a major drug dealer. See Osley v. United States, 751 F.3d 1214, 1224 (11th Cir. 2014)(While the petitioner's denial of guilt is not dispositive on the question of whether he would have accepted the government's plea, it is nonetheless a relevant consideration.) At the evidentiary hearing, Blackburn testified that after her conviction, she reached out to the prosecutor in an attempt to cooperate. In letters to the prosecutor, Blackburn indicated that she had useful information concerning others. The prosecutor arranged for Blackburn to meet with the case agent; however, nothing came of the meeting because notwithstanding the strong evidence against Blackburn at trial, she continued to downplay her role in the drug conspiracy, and continued to insist that she was a mere user as opposed to a drug dealer. As a result, the prosecutor concluded that Blackburn would not be a

credible witness given her refusal to acknowledge her role as a drug dealer.

Also, at Blackburn's sentencing hearing, the Court observed that throughout the proceedings, Blackburn refused to cooperate and take responsibility for her actions, and instead, persisted in downplaying her role in the drug distribution conspiracy. (Doc. 184-4 at 34). Further, in Blackburn's habeas submissions to this Court, and at the evidentiary hearing, she has repeatedly asserted that from day one, she was willing to admit that she was a drug user, and that she brought drugs. Blackburn's assertions continue to fall short of acknowledging that she was not a mere drug user, buying drugs for personal use, but she was a drug dealer in a drug distribution ring that sold and distributed a large volume of drugs. Given Blackburn's unwillingness or inability to acknowledge her true role in the drug trade, it is clear that she could not have entered into a plea agreement that the Government was willing to accept. Thus, she cannot establish prejudice with respect to Tom Haas's alleged deficient performance, and her claim is due to be dismissed as a result.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings, the undersigned recommends that no certificate of

appealability should be issued in this case. 28 U.S.C. foll. § 2255, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petition is being denied on procedural grounds without reaching the merits of an underlying constitutional claim, "a COA should issue [only] when the prisoner shows . . . 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." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

No Certificate of Appealability is warranted in this case. For the reasons discussed above, no reasonable jurist could conclude that this Court is in error in dismissing Blackburn's petition or that she should be allowed to proceed further. See Slack, 529 U.S. at 484 ("Where a plain procedural bar is present and the district

court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."). It is thus recommended that the Court deny any request for a Certificate of Appealability.

V. CONCLUSION

For the foregoing reasons, it is recommended that Blackburn's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 195) be DENIED, that this action be dismissed, and that judgment be entered in favor of Respondent, the United States of America, and against Petitioner, Tasha Michelle Blackburn. The undersigned Magistrate Judge further opines that Blackburn is not entitled to issuance of a Certificate of Appealability, and as a result, she should not be permitted to appeal *in forma pauperis*.

Notice of Right to File Objections

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); S.D. ALA. L.R. 72.4. In order to be specific, an objection must identify the specific finding or recommendation

to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this **25th** day of **May, 2017.**

/s/SONJA F. BIVINS
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TASHA MICHELLE BLACKBURN,	*
	*
Petitioner,	*
	* **CIVIL ACTION NO. 11-00272-WS-B**
vs.	* **CRIMINAL NO. 08-00256-WS-B**
	*
UNITED STATES OF AMERICA,	*
	*
Respondent.	*

REPORT AND RECOMMENDATION

This matter is before the Court on Petitioner Tasha Michelle Blackburn's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. 195).[1] In her motion, Blackburn raises a number of claims of ineffective assistance of counsel by her trial and appellate counsel. Upon review of Blackburn's petition and supporting memorandums and documents (Docs. 195, 201, 214), and the United States responses in opposition (Docs. 198, 211), the undersigned determined that an evidentiary hearing was required to resolve Blackburn's claim that her former trial counsel failed to communicate to her a favorable plea offer that had been extended by the Government. Counsel was appointed to represent Blackburn for the evidentiary hearing, which was conducted before

[1] This action has been referred to the undersigned Magistrate Judge for entry of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

the undersigned Magistrate Judge on July 8, 2014. Based upon the evidence presented at the hearing and upon consideration of Blackburn's petition, supporting memorandums and documents, the United States responses in opposition, and all other pertinent portions of the record, it is recommended that Blackburn's petition be **DENIED.**

I. BACKGROUND

A federal grand jury returned an indictment against Blackburn and her co-Defendant Barry Jay Sullivan in July 2008. (Doc. 1). Blackburn was charged in count one of the indictment with conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 846, and in count two, she was charged 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). (Id.). The Court initially appointed Fred Tiemann, an assistant federal defender, to represent Blackburn; however, Tiemann requested permission to withdraw on the ground that a colleague in his office was representing an individual who was expected to provide testimony against Blackburn. (Docs. 16, 46). As a result, Tiemann was permitted to withdraw and Paul Murray was appointed to represent Blackburn on September 28, 2008. (Doc. 49). Less than a month later, on October 16, 2008, Murray filed a motion

to withdraw on the ground that Blackburn had retained Thomas Haas to represent her. (Doc. 62). Murray's motion was granted and Haas assumed representation of Blackburn. Following a jury trial, Blackburn was convicted of conspiring to distribute 50 grams or more of methamphetamine[2], and on August 3, 2009, she was sentenced to 300 months in prison.[3] (Doc. 143). Haas requested and was granted permission to withdraw and Gregory Hughes was appointed to represent Blackburn on appeal. (Docs. 173, 175).

On appeal, Blackburn argued that the trial court erred by denying her motion to suppress evidence seized from her bedroom, and by permitting a police officer, Jeffrey Stone, "to provide his opinions regarding the significance of certain items - a gas torch, digital scales, crystal methamphetamine and a piece of paper with the figure '1700' written on it - that were seized from the bedroom shared by Blackburn and her boyfriend and co-defendant Sullivan. The Eleventh Circuit rejected both of Blackburn's claims, and affirmed her conviction and sentence in an unpublished opinion and judgment that was entered on September 30, 2010. (Doc. 190).

With respect to Blackburn's claim regarding officer Jeffrey

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[2] Before trial, the Government's oral motion to dismiss count two of the indictment was granted. (Doc. 203).

[3] The judgment was entered on August 24, 2009. (Id.).

Stone, the appellate court held that although Stone's testimony was expert in nature, "the [district] court did not abuse its discretion in denying Blackburn and [her co-defendant's] motions to strike [Stone's] testimony on the ground that it invaded the province of the jury, or amounted to improper speculation."[4] (Id. at 32). The Eleventh Circuit's mandate issued on November 9, 2010. (Doc. 190). Blackburn did not seek further review by the Supreme Court.

Proceeding pro se, Blackburn timely filed the instant petition on December 8, 2011.[5] (Doc. 195). Blackburn seeks to have her conviction and sentence set aside on the grounds of ineffective

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[4] With respect to Blackburn's suppression claim, the Court held that:

> Although officers would not have searched Blackburn's home but for Entrekin's illegal traffic stop, the relevant analysis does not focus on "but for" causation. *See id.*, 502 F.3d at 1309. Rather, because Blackburn had several opportunities to refuse consent, had been informed of her Fourth Amendment rights before the officers searched her bedroom, and was not subjected to flagrant police conduct, her consent was not tainted by the illegal traffic stop, and the district court did not err in denying her motion to suppress the evidence found in her bedroom. *See id.* at 1309-12, 1314.

[5] Although the petition was received by the Clerk's Office and docketed on December 14, 2011, the date it was given to prison officials for mailing is deemed the filing date absent contrary evidence. Houston v. Lack, 487 U.S. 266, 271-71, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988); Adams v. United States, 173 F. 3d 1339, 1340-41 (11th Cir. 1999).

assistance rendered by Brad Murray, her former trial counsel, Tom Haas, her trial counsel, and Greg Hughes, her counsel on appeal. Blackburn's ineffective assistance claims are based on the following grounds:

1) her trial counsel was "wholly unprepared for trial (Doc. 195 at 4);

2) her trial counsel "failed to properly preserve objections in the suppression hearing" (Id.);

3) her trial counsel "failed to investigate defense claims raised by his client" (Id.);

4) her trial counsel "failed to locate potential witnesses" (Id.);

5) her trial counsel had no "defense plan in place" (Id.);

6) her trial counsel failed to object that Officer Stone "was offering expert testimony without the required 'expertise' " (Id.);

7) With the exception of the motion to suppress, her trial counsel "failed to file any pretrial motions" (Id.);

8) her trial counsel failed to file "proper objections to the presentence report (Doc. 195 at 4, 10);

9) her trial counsel "failed to investigate defenses raised by his client (Id. at 9);

10) her trial counsel failed "to present character witnesses at penalty phase" (Id.);

11) her trial counsel failed to "properly cross-examine relevant witness testimony" (Id.);

12) her trial counsel "offered no relevant objection to

items considered Crawford material" (Id.);

13) her trial counsel "failed to effectively communicate to his client the multiple options available to her" through pleading guilty (Id. at 10);

14) her trial counsel failed to file a motion for bifurcation from her co-defendant (Id. at 11);

15) her former trial counsel failed to communicate to her a proposed plea agreement that was offered by the Government, and that was favorable to her (Id. at 10); and

16) her appellate counsel abandoned multiple claims on appeal. (Id. at 4)

In the Government's response to Blackburn's petition, the Government argues that Blackburn's claims of ineffective assistance of trial and appellate counsel are vague and generalized, and that she does not even attempt to prove how she was prejudiced by the asserted transgressions of her trial nor appellate counsel. The Government contends that on the one hand, Blackburn complains that her "[c]ounsel continually encouraged [her]to enter a guilty plea . . . [y]et, on the other hand, she complains that she was not informed of the 'multiple options available to' her." (Doc. 198 at 6).

II. STANDARDS OF REVIEW

Courts and the public can presume that a defendant stands fairly and finally convicted after conviction and exhaustion or

waiver of any right to appeal. See United States v Frady, 456 U.S. 152, 164, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). However, 28 U.S.C. § 2255 provides a vehicle by which federal defendants in custody may attack the validity of their sentences. A defendant seeking relief under § 2255 must prove: (1) the sentence violated the Constitution or laws of the United States; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence imposed exceeded the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. Such collateral relief is an extraordinary remedy which "may not do service for a [] [direct] appeal." Frady, 456 U.S. at 165. Consequently, "[i]f issues are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later collateral attack . . . A defendant is, of course, entitled to a hearing of his claims, but not to duplicate hearings. The appellate process does not permit reruns." Moore v. United States, 598 F.2d 439, 441 (5th Cir. 1979).

To prove ineffective assistance of counsel, petitioners must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) which requires a petitioner to show (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment[,] meaning that counsel's representation fell below an objective standard of reasonableness," Id. at 687-88, and (2) that counsel's deficient performance prejudiced the petitioner by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Strickland established a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." Id., see also Payne v. United States, 566 F 3d 1276, 1277 (11th Cir. 2009) ("a court must avoid 'the distorting effects of hindsight' and must 'evaluate the conduct from counsel's perspective at the time'"). The Eleventh Circuit has observed with respect to § 2255 petitioners' exacting burden, "the cases in which habeas petitioners can properly prevail . . . are few and far between." Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc).

III. DISCUSSION

A. Plea Offer

As noted supra, Blackburn has alleged numerous instances in which her attorneys provided ineffective assistance of counsel. Turning first to Blackburn's contention that her former trial counsel, Paul Murray, failed to communicate a favorable plea offer to her, the undersigned notes that an evidentiary hearing was conducted on July 8, 2014 to resolve this claim. Blackburn was appointed counsel and she testified at the hearing. (Docs. 215, 220). Also testifying at the hearing was Blackburn's former trial attorney, Paul Murray. Blackburn testified that after Fred Tiemann, her initial attorney, was permitted to withdraw from her case due to a conflict, Murray advised her that he had been appointed to represent her, and he met with her on two occasions while she was in a local residential drug treatment facility. According to Blackburn, only she and Murray were present during her initial meeting with Murray. At the meeting, Murray showed her a lot of documents and went over the evidence with her. Blackburn testified that the plea agreement may have been in the documents, but she was in the early phases of drug treatment and was a "mess."[6] She also

[6] On direct examination, Blackburn testified that Murray did not show her the plea agreement and did not discuss it with her. On

testified that Murray did not discuss the pros and cons of accepting the plea agreement with her, and that he kept saying that he had just gotten into the case, and that he needed more time. Blackburn further testified that she did not have a chance to read the plea agreement until 2012 *after* she was sentenced, when her family assisted her in securing a copy of the agreement from Murray's office.

Blackburn testified that during her second meeting with Murray, he showed up at the treatment center unannounced and he kept trying to get her to sign a speedy trial waiver. According to Blackburn, her treatment counselor was present at the meeting and was upset because Murray had showed up unannounced in violation of the treatment center rules. Blackburn testified that Murray was adamant that she needed to sign a speedy trial waiver and that during the meeting, her counselor picked up the telephone, and called another attorney, Tom Haas. According to Blackburn, Haas advised her not to sign the waiver, and also told her that he would call her father to make payment arrangements so that he could represent her. Blackburn testified that if she had been informed of the plea offer back in 2008, she would have accepted the plea offer, would

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cross-examination, Blackburn indicated that the plea agreement may have been in the papers that he showed to her; but she was only focused on her treatment at that point.

have cooperated, and would have received a sentence that was substantially shorter than the 300 months that she received following her trial.

As noted, Murray, who is experienced in handling criminal matters in federal court and has served on the Criminal Justice Act panel of attorneys in this district for over twenty years, also testified at the hearing. Murray testified and presented corroborating billing records that reflect that shortly after being appointed to represent Blackburn, he traveled to the treatment center to meet with her on October 8, 2008 and October 10, 2008. (Doc. 233-7). According to Murray, he had received a written plea agreement from the Government prior to his first meeting with Blackburn, and during the initial meeting with her, he went over the discovery with her, as well as the plea agreement. (Doc. 233-1). Murray testified without contradiction that while he discussed with Blackburn the pros and cons of accepting the plea agreement and the sentencing guidelines, he did not make a recommendation to her at that time because he was still going through the discovery and familiarizing himself with the facts of the case. According to Murray, he was too new to the case to recommend that Blackburn take a plea agreement. Murray testified that not only was Blackburn adamant that she was not going to plead guilty, but after the meeting,

Blackburn's father called him, and said that he understood Murray was trying to force Blackburn to plead guilty, and that she was not going to do so. Murray stated that he explained to Blackburn's father that he was not trying to get her to enter a guilty plea, but was instead trying to get her to think about her options.

Murray testified that during his second meeting with Blackburn, her counselor was present, and she made clear to him that Blackburn needed a lawyer who would not force her to enter a guilty plea, but would instead take her case to trial. Murray stated that in his presence, the counselor telephoned another attorney, Tom Haas, and discussed with Haas representing Blackburn. Murray stated that he explained that he was planning to seek a continuance since he had just recently been appointed to the case and that he needed Blackburn to execute a speedy trial waiver so that they would have more time to become familiar with the case. According to Murray, Haas advised Blackburn not to sign the waiver, and told her that he would contact her father about making payment arrangements. Murray testified that since Blackburn had opted to have Haas represent her, he requested permission to withdraw.

In Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), the Supreme Court clarified that the Sixth Amendment right to

effective assistance of counsel under Strickland extends to the negotiation and consideration of plea offers that lapse or are rejected. See Frye, 132 S. Ct. at 1404-08; see also Lafler, 132 S. Ct. at 1384. The Court held that counsel has a "duty to communicate formal offers from the prosecution to accept a plea," and that, in general, where such an offer is not communicated to the defendant, counsel "[does] not render the effective assistance the Constitution requires." Frye, 132 S. Ct. at 1408. The Court also held that, in order to show prejudice under Strickland's two-part test, a defendant must demonstrate a reasonable probability that: (1) she would have accepted a plea offer but for counsel's ineffective assistance; and (2) the plea would have resulted in a lesser charge or a lower sentence. Frye, 132 S. Ct. at 1409; see also Lafler, 132 S. Ct. at 1391 (concluding that the defendant had met those two requirements).

Based on the record before the court, including evidence gleaned during the evidentiary hearing, the undersigned finds that Blackburn has failed to establish that Murray failed to communicate the plea offer to her and has further failed to establish that she would have accepted the offer. During the hearing, Murray provided credible testimony that during the short period that he represented Blackburn, he provided her with a copy of the Government's written

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plea offer, and discussed the offer with her, including the pros and cons of accepting the offer. He also testified that he did not make a recommendation to Blackburn because he was new to the case, and was still attempting to familiarize himself with the facts and the evidence when Blackburn and her family opted to retain counsel for her because of their belief that he was attempting to coerce her to enter into a guilty plea. While Murray provided straightforward testimony, along with corroborating billing records, Blackburn's testimony was inconsistent and not plausible. On direct examination, Blackburn testified that Murray did not show the plea agreement to her, but on cross-examination, Blackburn acknowledged that the plea agreement could have been in some of the paperwork that Murray showed her at their initial meeting, and that she was very preoccupied with completing the drug treatment program; thus, she could not recall everything that Murray discussed with her. Additionally, Blackburn never denied Murray's assertion that although she had been provided court appointed counsel, she and her family retained new counsel because they believed that Murray was attempting to force her to enter a guilty plea.

Moreover, aside from Blackburn's self-serving assertions, she offered no evidence that she would have accepted the plea offer. In fact, these self-serving assertions are clearly belied by her

habeas petition wherein she expressly asserts that her trial counsel "continually encouraged the Petitioner to enter a guilty plea." (Doc. 195 at 13). Moreover, the evidence reflects that throughout the proceedings, Blackburn took the position that she was a drug user, and was not a part of the drug conspiracy as charged. In fact, at her sentencing, Judge Steele observed that throughout the proceedings, Blackburn refused to cooperate and take responsibility never asked for her actions, and indeed, persisted in downplaying her role in the drug conspiracy. (Doc. 184-4 at 34). Accordingly, based on the record before the Court, the undersigned finds that Blackburn's claim that Murray provided ineffective assistance of counsel with regard to the plea offer is due to be denied.

B. Other Ineffective Assistance of Counsel Claims

Blackburn's other ineffective assistance of counsel claims are also due to be denied. The other ineffective assistance of counsel claims raised by Blackburn nearly mirror those that were raised by her co-defendant, Barry Jay Sullivan, in his habeas petition, and rejected by the Court as lacking in merit. See United States v. Sullivan, 2014 U.S. Dist. LEXIS 61470 (S.D. Ala. Feb. 26, 2014), *adopted by* Sullivan v. United States, 2014 U.S. Dist. LEXIS 64875 (S.D. Ala. May 12, 2014). As noted supra, in order for Blackburn to establish ineffective assistance of counsel, she "must show that

h[er] attorney's performance was deficient and that the deficiency was prejudicial." Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990). However, "[c]onclusory allegations of ineffective assistance are insufficient." Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992), *quoting* United States v. Lawson, 947 F.2d 849, 853 (7th Cir. 1991). With respect to her remaining claims, Blackburn has neither shown that her counsel's performance was deficient nor has she shown that she was in any manner prejudiced by the alleged deficiency. Aside from her conclusory assertions, Blackburn has not set forth any factual basis for her contention that counsel was ineffective. For example, although she contends that her trial counsel failed to "preserve objections in the suppression hearing," she does not identify the objections she alleges were abandoned. (Doc. 195 at 4). Also, while Blackburn contends that her trial counsel failed to locate "potential witnesses," she does not identify the "potential witnesses," nor does she include a summary of the testimony they would have likely provided. (Id.). Further, while Blackburn contends that her counsel failed to investigate "defense claims raised by his client," (id. at 4), she does not detail the alleged defenses nor provide any information that suggests that they were at all plausible.

Blackburn further argues that her trial counsel failed to raise

proper objection to the presentence report and failed to seek a bifurcation of her case from that of her co-defendant. (Id. at 4, 11). However, Blackburn does not specify the manner in which her presentence report was incorrect nor does she set forth any facts that would warrant bifurcation. Blackburn also contends that her trial counsel "offered no relevant objection to various items considered *Crawford* material during the course of the trial and sentencing," but she fails to identify what "material" she is referring to or show the grounds on which it may be declared objectionable.[7] (Id. at 9).

[7] Like her co-defendant, Sullivan, Blackburn does not describe the materials she contends are objectionable, but instead asserts, "Attorney's failure to object to the introduction of scientific evidence that resulted in defendant's conviction for first degree murder was ineffective assistance." (Doc. at 195 at 9, citing Chatom, 858 F. 2d 1479 (11th Cir. 1988)). As observed by the Court in Sullivan:

> The test at issue in Chatom was an atomic absorption test (i.e. gun residue test), as to which the Eleventh Circuit held that the conditions under which the test's administration occurred were "questionable at best" and that this evidence was the most damaging to the defendant in this "circumstantial evidence" case. 858 F. 2d at 1485-86. Upon review of the evidence presented in this case, the undersigned finds no test results similar to the one at issue in Chatom and no other evidence, which could be considered questionable, but lacking any objection raised at trial.

Sullivan, 2014 U.S. Dist. LEXIS 61470, at *6 n.5 (S.D. Ala. Feb. 26, 2014).

Moreover, while Blackburn contends that her trial counsel failed to raise the issue of whether Officer Stone possessed the required expertise, the record reflects that her trial counsel did in fact object to Officer Stone's testimony during trial. (Doc. 180 at 37, 38, 41, 42, 43, 48, 49, 50-54, 56-59, 66). Also, on appeal, the Eleventh Circuit addressed Officer Stone's testimony, and held that although Officer Stone's testimony was expert in nature, "the [district] court did not abuse its discretion in denying Blackburn's and Sullivan's motions to strike [Stone's] testimony on the ground that it invaded the province of the jury, or amounted to improper speculation." (Doc. 190 at 32). "Under the 'law of the case' doctrine, the 'findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.'" Heathcoat v. Potts, 905 F.2d 367, 370 (11th Cir. 1990) (*quoting* Westbrook v. Zant, 743 F.2d 764, 768 (11th Cir. 1984) (*quoting* Dorsey v. Continental Casualty Co., 730 F.2d 675, 678 (11th Cir. 1984)). "The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal." Schiavo ex rel. Schindler v. Shiavo, 403 F.3d 1289, 1291 (11th Cir. 2005). In light of the Eleventh Circuit's finding, it is clear that even if Blackburn's counsel had failed to object to

Officer Stone's testimony, an allegation not borne out by the record, such conduct would not have constituted ineffective assistance of counsel as the law is clear that "failure to raise nonmeritorious issues does not constitute ineffective assistance of counsel." Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994).

Finally, Blackburn contends that her counsel was ineffective because he did not adhere to her request that he file a petition for "writ of habeas corpus" to the United States Supreme Court and did not explain why he refused to do so." (Doc. 195 at 5). The Government asserts that because "certiorari review is discretionary, and there is no legal right to it . . . there is no right to effective assistance of counsel on discretionary review." (Doc. 198 at 9). The Government is correct that the right to effective assistance of counsel is dependent on the right to counsel itself. Evitts v. Lucey, 469 U.S. 387, 397 n.7, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (*citing* Wainwright v. Torna, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982). In an unpublished opinion, the Eleventh Circuit held that , "[a defendant's] appellate attorney cannot be deemed to have acted ineffectively for failing to file a petition for a writ of certiorari because there is no right under the Sixth Amendment to counsel to pursue a discretionary

application for review in the Supreme Court." Richards v. United States, 406 Fed. Appx. 447, 447 (11th Cir. 2010). Given that certiorari is discretionary, and Blackburn had no right to counsel at that stage, her ineffective assistance of counsel claim related to her certiorari claim is without merit. However, even if Blackburn had a right to counsel at that stage, she failed to allege or demonstrate that the writ would have issued but for her counsel's conduct. Accordingly, this claim likewise fails.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings, the undersigned recommends that no certificate of appealability should be issued in this case. 28 U.S.C. foll. § 2255, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petition is being denied on procedural grounds without reaching the merits of an

underlying constitutional claim, "a COA should issue [only] when the prisoner shows . . . 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." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

No Certificate of Appealability is warranted in this case. For the reasons discussed above, no reasonable jurist could conclude that this Court is in error in dismissing Blackburn's petition or that she should be allowed to proceed further. See Slack, 529 U.S. at 484 ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."). It is thus recommended that the Court deny any request for a Certificate of Appealability.

V. CONCLUSION

For the foregoing reasons, it is recommended that Blackburn's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 195) be DENIED, that this action be dismissed, and that judgment be entered in favor of Respondent, the United States of America, and against

Petitioner, Tasha Michelle Blackburn. The undersigned Magistrate Judge further opines that Blackburn is not entitled to issuance of a Certificate of Appealability, and as a result, she should not be permitted to appeal in forma pauperis.

Notice of Right to File Objections

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); S.D. ALA. L.R. 72.4. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this **14th** day of **January, 2015.**

/s/ SONJA F. BIVINS
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.