No. _____

In The
Supreme Court of the United States

STEVEN P. BLAKENEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

KEVIN L. SCHRIENER
COUNSEL OF RECORD FOR THE PETITIONER
LAW & SCHRIENER LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
314-721-7095 – telephone
314-863-7096 – fax
kschriener@schrienerlaw.com

QUESTIONS PRESENTED FOR REVIEW

The Eighth Circuit Court of Appeals denied Blakeney's Application for a Certificate of Appealability (COA) following the district court's denial of his § 2255 motion without an evidentiary hearing. Prior to denying Blakeney's COA application, the Eighth Circuit ordered the government to file a response to Blakeney's COA application. This order came after Blakeney's COA application had been pending for almost four months. Two days after the government filed its response, the Eighth Circuit summarily denied Blakeney's COA application. The question presented is:

Whether this Court should summarily reverse the Eighth Circuit's denial of a COA where the underlying issues were clearly debatable by jurists of reason?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties appear in the case caption on the cover page of this petition.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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In The

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Steven P. Blakeney respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered in this case.

OPINIONS BELOW

The order of the Eighth Circuit denying Dibble a certificate of appealability is printed at Appendix (hereinafter "App.") App. 1a. The memorandum and order of the district court denying § 2255 relief is printed beginning at App. 2a.

JURISDICTION

The judgment of the Eighth Court of Appeals was entered on April 29, 2021, denying Blakeney a certificate of appealability. That court denied Blakeney's timely filed petition for rehearing or, in the alternative, for rehearing *en banc* out, on August 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1257 to review this petition. Blakeney's petition for certiorari is due on November 15, 2021. *See* Rule 13.1.

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

The Sixth Amendment to the United States Constitution provides: “No person shall ... be deprived of life, liberty, or property, without due process of law.”

U.S. Const. Amend. XIV

The Fourteenth Amendment to the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2255(b)

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before

a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate

which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

A. Introduction

In July 2015, Petitioner Steven Blakeney, a former decorated police officer, was indicated in federal court for civil rights offenses in violation of 18 U.S.C. §§ 241 and 242, and falsification of a record in violation of 18 U.S.C. § 1519, as the result of the arrest Nakisha Ford in the City of Pine Lawn, Missouri on March 31, 2013.

The indictment alleged in Count One that Blakeney conspired with Akram Samad, "and others known and unknown" to violate the Constitutional rights of Nakisha Ford by causing her to be arrested based on false allegations and without probable cause. In Count Two the indictment alleged that Blakeney, while acting under color of law, deprived Ford of her Constitutional rights by causing her arrest based on false allegations and without probable cause. In Count Three, the indictment alleged that Blakeney knowingly falsified the police report related to Ford's arrest with intent to impede, obstruct, and influence, and in contemplation of the investigation of the matter of Ford's arrest.

Trial

At trial, the government called six witnesses: Mazen "Mario" Samad, Akram "Sam" Samad, Mohammad Samad, Allen Lawson, a former Pine Lawn

police officer, Jesse Brock, another former Pine Lawn police officer, and Nakisha Ford. The government did not call Pine Lawn prosecutor Anthony Gray.

Mazen "Mario" Samad testified that he owned the Pine Lawn Food Market, and that his brother, Akram "Sam" Samad helped him run the store. In March of 2013, there was an election coming up for mayor of Pine Lawn. Sylvester Caldwell, the current mayor, was running for re-election. Nakisha Ford was running against him. "Mario" claimed that Steven Blakeney put up a Sylvester Caldwell sign in the Pine Lawn Market, as well as second sign, which depicted Nakisha Ford. He also testified that Blakeney told him that he had to allow Blakeney to put the sign up, because Blakeney was "in charge" of Pine Lawn.

"Mario" testified that Blakeney instructed him to call 911 if anyone took the Nakisha Ford sign down. On March 31, 2013, two days before the election, Nakisha Ford came to Pine Lawn Market. She asked "Mario," to take down the sign. Mario refused, but claimed that he allowed Ford to take the sign down herself. Ford told Mario that she was going to sue Pine Lawn. After Ford left, "Mario" did not call anyone, including his brother or the police. Although he claimed that he did not try to get the sign back, he acknowledged that the security video depicted him following Ford out of the store. "Mario" testified that later that afternoon, Blakeney came to the store with another officer and asked who took

the sign down and when he learned that it was Nakisha Ford he was "screaming." "Mario" claimed that he let Blakeney view the security tape only after Blakeney cleared some of the police cars out of the parking lot. Blakeney and "Mario" argued about calling "Mario"'s brother. Eventually Blakeney contacted him, and "Mario"'s brother "Sam" came to the store. Blakeney and "Sam" spoke outside the store. Blakeney viewed the video. "Sam" called "911." Blakeney left and then returned with other officers. Later "Mario" went to the police station "to make a fake report." "Mario"'s nephew, Mohammed, did the actual writing of the report, while "Mario" and Mohammed were in an interview room with Blakeney and other officers.

"Mario" testified that a number of statements in the document he signed were untrue and that Blakeney forced him to include those statements. These included the statements that Ford caused a disturbance, that she tore the sign off, and that "Mario" and his brother made clear that they were not supporting her. "Mario" was eventually subpoenaed to go to Nakisha Ford's court date, but he did not go because he felt badly about the whole thing. "Mario" testified that he never spoke with Pine Lawn Prosecutor Anthony Gray about the incident.

Akram "Sam" Samad testified that three days before the election, Blakeney came to the Market and hung the Nakisha Ford sign. "Sam" further testified that

Blakeney said: "I will promise everybody if remove this sign I will lock him up because I have a lot of power in Pine Lawn."

On the afternoon of March 31, 2013, “Sam” received a series of calls and texts from Blakeney telling him to come to the Pine Lawn Market. “Sam” claimed that when he arrived at the store, Blakeney took him outside and told him to call “911.” “Sam” also claimed that Blakeney pulled something out of his pocket and threatened to put it in “Sam”’s trunk and get him 10 to 20 years in jail if he did not call “911.” “Sam” then went in the store and called “911” reporting that he had put the sign in the window and that it had been stolen. After the “911” call, police officers, including Blakeney, arrived at the store. The prosecutor, Anthony Gray, was also present. ”Sam” never spoke to Gray while Gray was at the store.

“Sam” claimed that Blakeney told him to come to the police station to write a statement. When “Sam” told Blakeney that he could not write English, Blakeney told him to bring his son, Mohammed, with him. “Sam” and Mohammed went to the police station. At the station, “Sam” met with mayor Caldwell, a sergeant, and officer Struckhoff. “Sam” claimed that Blakeney told him what to put in the report. “Sam” went into a room with Mohammed, who wrote out the statement. Struckhoff, a lieutenant, and a sergeant were with them in the room

when the statement was written out. The statement said that Ford had come into the store and took down the sign. Sam" admitted that Mayor Caldwell gave him the sign and told him: "Don't say I gave you the sign. Say you came to Pine Lawn and got it."

Mohammad Samad testified. Hid testimony was broadly consistent with the testimony of "Sam" and "Mario." He claimed that he met with Blakeney before he wrote out the statement, and that Blakeney told him what to say.

Allen Lawson testified as follows. He was a Pine Lawn police officer from 2011 to 2013. He was a patrolman, and Blakeney, who was first a corporal, then a sergeant, was his supervisor. On Sunday, March 31, 2013, in the evening, Lawson, who was off-duty, received a call from Blakeney, who told Lawson that he needed Lawson to be at work to "pull video." Lawson then drove, as directed by Blakeney, to the Pine Lawn Market. After Lawson arrived at Pine Lawn Market, Blakeney told him that there was a "situation" with a woman named Nakisha Ford. Blakeney asked Lawson to "pull" video from certain time frames on a videotape, and gave him a list of times. Aside from Blakeney, there were a few Pine Lawn officers present. Lawson did not remember most of the ones who were there. Chief Collins, "kind of a nebulous entity," might have been present at either the market or the police station. Officers Brock and Harrington were present at some

point, as well as prosecutor Anthony Gray.

Lawson testified that "everything had to go through" Anthony Gray because he was the city prosecutor and the chief law enforcement officer on the scene. Lawson recalled Blakeney at one point speaking on the phone with someone he "assumed"was Mayor Caldwell, not "asking for permission" but giving the person a "heads up" of what was going on. Lawson went to a DVR system in the back room of the Pine Lawn Market and pulled the video off the DVR and put it on a jump drive. He did not interview any witnesses. At trial, he did not remember the contents of the videos. Lawson made three DVD copies of the videos, two for the station, and one for sergeant Blakeney.

Jessie Brock testified that when he worked at the Pine Lawn police department, his supervisor was sergeant Blakeney. On March 31, 2013, Brock received a call from Blakeney, directing him to go to a Conoco gas station. When he arrived he saw Blakeney at the Pine Lawn Market. Blakeney told him about the report of Nakisha Ford taking a sign. Brock believed that the matter was "not that big a deal," and told Blakeney and another officer, Struckhoff, that he thought the matter should be handled by the Board of Elections. After leaving, Brock was again dispatched back to the Pine Lawn Market at 6:35 p.m. Blakeney was at the market, as was "Sam," "Mario," and April Brooks. Other officers were "in and

out." "Sam" wanted to report that a sign had been stolen. Brock spoke to "Mario" and April Brooks about what had happened. Blakeney and Anthony Gray both told Brock that there "was enough" to arrest Nakisha Ford for "stealing under 500 and disorderly conduct." Brock went to the police station and started writing a police report on the incident. He was told to write the report by Steven Blakeney. Brock testified that Anthony Gray had the authority to issue charges and that Gray authorized the charges against Nakisha Ford.

When Brock got to the police station, he started writing the police report on the ITI computer system. Blakeney denigrated the way Brock wrote the report and told that he did not know how to handle a "big case," and that this was a "big case." Blakeney then told Brock everything that "Sam" had said. All of the information Brock put in the report was provided by Blakeney. Brock claimed that Blakeney as supervising officer approved the report." Brock responded that "we all got in the cars and went over to her residence." The people who went to Nakisha Ford's residence were Brock, Blakeney, Gray, Harrington, Struckhoff, and Chief Collins. According to Brock, "we" arrested Nakisha Ford and placed her in custody. Brock could not recall if anyone said anything about giving Ms. Ford a summons instead of arresting her.

Nakisha Ford testified that in 2013, she ran for mayor of the City of Pine Lawn against Sylvester Caldwell. On March 31, of 2013, two days before the election, Ford went to the Pine Lawn Market. She went to the Market because she had been told that a "slanderous" paper had been posted on the door of the Pine Lawn Market. Ford arrived at the market and asked for the manager. She asked "Mario" if he would take the sign down or she could take the sign down. She took the sign down. She claimed that she had permission to take the sign down. Ford admitted that the video showed "Mario" coming out of the store and speaking with her after she took down the sign.. She did not remember the subject of their discussion. She admitted that she initially told the arresting officers that she did not take the sign down when, in fact, she had taken the sign down. Ford admitted that she was charged with theft and disorderly conduct and eventually pled guilty to littering.

After Ford's testimony, the government rested. Blakeney did not call witnesses or present a case. The jury returned guilty verdicts on all three counts. The district court sentenced Mr. Blakeney to 51 months in prison with a three-year term of supervised release to follow.

Appeal

Blakeney filed a timely appeal to the Eighth Circuit challenging the sufficiency of the evidence, two evidentiary rulings, a statement made by the Government during closing argument, and the district court's responses to questions presented by the jury during deliberation. The Eighth Circuit affirmed his convictions. *See United States v. Blakeney,* 876 F.3d 1126 (8th Cir. 2017). Blakeney filed a *pro se* petition for writ of certiorari in this Court which was denied. *United States v. Blakeney,* 139 S. Ct. 98 (Oct. 1, 2018).

Section 2255 Motion

On January 21, 2019. Blakeney filed a timely motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. In his § 2255 motion, Blakeney alleged that trial counsel was ineffective for: (1) failing to investigate and call several material witnesses; (2) injecting the contents of a poster depicting the complaining witness and failing to call a witness to contradict her testimony; (3) failing to move to dismiss the indictment based on either a fatal variance or a constructive amendment; and (4) failing to ensure Blakeney's presence when the trial judge responded to the jury's questions. Also, Blakeney alleged that appellate counsel was ineffective for failing to raise on appeal the issue of the fatal variance or constructive amendment. Finally, Blakeney raised a *Brady* claim regarding the

nondisclosure of the of the original Pine Lawn police report.

The government filed its response to the motion, and Blakeney filed a reply to the response. The government sought and was granted leave to file a sur-reply to Blakeney's reply. Blakeney then sought and was granted leave to file a response to the government's sur-reply. Also, Blakeney sought to expand the record with unredacted FBI reports that he only recently retained from the government. On July 29, 2020, United States District Judge Stephen N. Limbaugh, Jr. denied Blakeney's § 2255 motion. In addition, the motion court denied Blakeney's motions for discovery, and to expand the record. His memorandum and order were silent regarding Blakeney's request for an evidentiary hearing. On August 7, 2020, Blakeney filed a timely notice of appeal. Because the district court failed to rule on whether Blakeney's § 2255 motion was entitled to a certificate of appealability, this Court remanded this appeal to the district court for the limited purpose of ruling on the COA. On August 12, 2020, the district court entered an amended judgment in which he denied Blakeney a certificate of appealability because he had not made a substantial showing of the denial of a constitutional right. Out of an abundance of caution, Blakeney filed a notice of appeal on August 25, 2020, from the amended judgment.

Application in the Eighth Circuit for a COA

In his timely application before the Eighth Circuit for the issuance of a COA, Blakeney raised, among others, the following issues:

1. Whether he is entitled to a COA on the issue whether the district court erred in denying his Sixth Amendment claim that his counsel was ineffective for failing to call the Pine Lawn prosecutor, Anthony Gray, as a witness at trial?

2. Whether he is entitled to a COA on the issue whether the district court abused it discretion in denying a hearing on his ineffective assistance of counsel claim for failing to call the Pine Lawn prosecutor, Anthony Gray, as a witness at trial?

The Eighth Circuit issued no opinion as to why it why it was denying Blakeney's COA application on these issues. Also, it denied his timely filed motion for panel and/or en banc rehearing.

REASON FOR GRANTING THE WRIT

The Eighth Circuit's denial of a COA so clearly misapprehends the governing standard as to call for summary reversal.[1]

The threshold for a certificate of appealability is very low—as the Court has had to remind lower federal courts from time to time. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003); *Tennard v. Dretke*, 542 U.S. 274, 289 (2004); *Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Buck v. Davis*, 137 S. Ct. 759, 767, 780 (2017); *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam). *See also McGee v. McFadden*, 139 S. Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting from denial of certiorari), *reh'g denied*, No. 18-7277, 2019 WL 4923611 (U.S. Oct. 7, 2019).

Blakeney is entitled to one if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do that, he needs to show that at least one reasonable jurist could "disagree with the district court's resolution of his constitutional claims," or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). In a word, his claim just needs to be "debatable" id. at 774—a modest standard he can meet even if "every jurist of reason might agree [he] will not prevail," *id.* But review of Blakeney's ienffective assistance claim is yet more

[1]It would appear that the Eighth Circuit recognized that Blakeney's claims were debatable as it ordered the government to respond tohis COA application.

forgiving because it was aimed not at winning ultimate relief but at securing an evidentiary hearing.

That Blakeney meets these relatively modest requirements is easily debatable. Because the Eighth Circuit panel's contrary, unreasoned denial "departs in so stark a manner" from the modest standards that governed Blakeney's request, *Erickson v. Pardus*, 551 U.S. 89, 90 (2007), the Court should grant certiorari review and summarily reverse.

In *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017), this Court rejected the reasoning of the Fifth Circuit in denying a COA, holding that the court had improperly reviewed the merits of the claim:

> The court below phrased its determination in proper terms-that jurists of reason would not debate that Buck should be denied relief, 623 Fed. Appx., at 674-but it reached that conclusion only after essentially deciding the case on the merits. . . . We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Miller-El*, 537 U.S., at 327, 348, 123 S.Ct. 1029.

A. The Eighth Circuit's COA denial is clearly wrong.

1. It's at least "debatable" that Blakeney should have received an evidentiary hearing

Blakeney requested an evidentiary on his claims in both his initial § 2255 motion and in his reply. Regardless of such a request, § 2255 requires a hearing

unless the moving papers demonstrate *conclusively* that relief not warranted. The district court, however, made no ruling as to whether an evidentiary hearing was necessary in this case and proceeded to the merits of Blakeney's grounds for relief. Inexplicably, in the district court's discussion of the ineffective assistance of counsel standard and Blakeney's ground for relief regarding trial counsel's failure to call witnesses, the district court cited to cases in which an evidentiary hearing was held either in state or federal court prior to a decision on the merits. Under § 2255, a hearing "may be denied only if `the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief.'" *Saunders v. United States*, 236 F.3d 950, 952 (8th Cir.) (quoting 28 U.S.C. § 2255), cert. denied, 533 U.S. 917, 121 S.Ct. 2524, 150 L.Ed.2d 696 (2001).

The appellate court reviews for an abuse of discretion the district court's decision to deny such a hearing, but this review requires *de novo* consideration of the validity of the ineffective assistance of counsel claims as a matter of law in order to decide if an evidentiary hearing in the district court is warranted. *Id.* "In some cases, the clarity of the existing record on appeal makes an evidentiary hearing unnecessary," but "[a]bsent such clarity, an evidentiary hearing is required." *Latorre v. United States*, 193 F.3d 1035, 1038 (8th Cir. 1999). Blakeney's ineffective assistance of counsel claim for failing to call the Pine Lawn

prosecutor as a witness is not rebutted by the record and given its fact intensive nature deserved an evidentiary hearing. Trial counsel was neither deposed nor did he give an affidavit in Blakeney's § 2255 proceedings. Thus, his motivation for not calling Gray as a witness is unknown. A certificate of appealability is warranted because jurist of reason would find it debatable whether Blakeney was entitled to an evidentiary hearing.

2. It's at least "debatable" that Blakeney's *Strickland* claim that trial counsel was ineffective for failing to call Gray asa witness at trial is colorable.

In denying Blakeney's claim that trial counsel was ineffective for failing to investigate and call material witnesses, the district court found that trial counsel's performance was not deficient under *Strickland v. Washington,* 466 U.S. 668 (1984). Again, nowhere in the district court's memorandum did it explain why this claim was not deserving of an evidentiary hearing. Instead of holding an evidentiary hearing to develop facts as to trial counsel's decision for not investigating or calling Anthony Gray, the district court provided its own post hoc rationalization of counsel's conduct which it cannot do. *See Wiggins v. Smith*, 539 U.S. at 526-27 (2003). Also, the district court ignored Blakeney's allegations as to trial counsel's ineffectiveness. Contrary to Blakeney's pleadings in his § 2255 motion which are taken as true, *see Koskela v. United States,* 235 F.3d 1148,

1149 (8th Cir. 2001), the district court found that Blakeney had failed to point to trial counsel's "ignorance or inattentiveness, but instead resolves to second-guess the apparent strategic reasons [trial counsel] chose not to call these witnesses." (App. 20a). Blakeney discussed Gray with trial counsel prior to trial. Trial counsel promised Blakeney that he would call him and other witnesses, however, no witnesses were called on his behalf. Blakeney set out in his § 2255 motion the benefit Gray would have had to his case. Although the district court was correct in that trial counsel was aware of these witnesses, the government presented no evidence in its response to Blakeney's § 2255 motion from trial counsel why Gray was not called or if he even investigated his testimony.

The need for an evidentiary hearing was clear because Blakeney's claim cannot be refuted by the record. Also, after the filing of Blakeney's § 2255 motion, it was discovered through a civil deposition of Anthony Gray that trial counsel had not even contacted him prior to trial to find out what his potential testimony would be and whether he could aid in Blakeney's defense. Because no evidentiary hearing was held, it is unknown why trial cousnel failed to even do reasonable investigation of these witnesses. *See Strickland v. Washington,* 466 U.S. 668, 690–91 (1984). Again, the district court applied its own pro hac

rationalization as to why trial counsel did not call Gray.[2]

Regarding Gray, the district court discounted his recent civil deposition in which he testified that it was his sole decision and not Blakeney's decision to arrest Nakisha Ford. The district court found that Gray's recent deposition was unavailable to trial counsel at the time of trial and presumably offered little in the way of establishing an ineffective assistance of counsel claim. Contrary to the district court's finding, Gray's testimony was available at the time of Blakeney's trial but trial counsel failed to investigate and interview Gray. If an evidentiary hearing had been held, Gray would have testified to the facts set out in his deposition.

Specifically, Gray testified in his deposition, among other things, that: (1) "when Blakeney called me, he was very hands-off about it. His attitude was, 'Take a look at it, tell me what you think,' and basically threw it on me;" (2) he gave

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[2]This Court has held in several cases that the habeas court's commission is not to invent strategic reasons or accept any strategy counsel could have followed, without regard to what actually happened; when a petitioner shows that counsel's actions actually resulted from in-attention or neglect, rather than reasoned judgment, the petitioner has rebutted the presumption of strategy, even if the government offers a possible strategic reason that could have, but did not, prompt counsel's course of action. *Rompilla v. Beard*, 545 U.S. 374, 395-96, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (O'Connor, J., concurring); *Wiggins v. Smith*, 539 U.S. 510, 526-27, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574 (1986).

Ford the opportunity to explain why she took the sign down prior to her arrest and she "flat-out denied removing it" to him; (3) it was his decision to prosecute Ford and that it was in line with his prior prosecutorial decisions which numbered in the hundreds; (4) he is an experienced municipal prosecutor who took this situation very seriously because an election was looming and "[i]t was a really hot button;" (5) the City of Pine Lawn is a "really busy city with a lot going on, " in fact it was so busy that he had "a take-home car" and had "been on a lot of arrests;" (6) he denied with being part of any conspiracy; (7) he had no knowledge of any conversations between Blakeney and the Samads or the existence of video encouraging them to "go with the story; " (8) after reviewing the surveillance video at the Pine Lawn Market while interviewing "Mario" Samad, he made the sole decision to charge Ford while still present at the Pine Lawn Market; (8) Blakeney "went by the book;" (9) he made the decision to arrest Ford before the Samads were interviewed at the City of Pine Lawn Police Department and without input from Blakeney.

Given the above testimony that Gray would have given if called at trial, reasonable jurist would differ as whether trial counsel was ineffective not to call him or, at least, whether Blakeney should have had an evidentiary hearing. Furthermore, Gray was a lawyer, prosecutor, and prior police officer with no

criminal history and had no prior inconsistent statements. Gray would have made an excellent witness. Again, trial counsel did not even contact Gray.

After discounting trial counsel's deficient performance, the district court then found Gray's prior testimony in another civil suit inconsistent with his recent deposition testimony. A reading of the prior deposition, however, indicated that Gray's testimony was consistent with his prior testimony. On the same pages that the district court quotes, Gray testified that he made the decision to arrest Nakisha Ford. As a result of that decision, the police arrested Nakisha Ford because he said he would prosecute her. Finally, the district court gave great weight to the Eighth Circuit opinion in Blakeney's direct appeal in that it "expressly noted Wright's (trial counsel) awareness of a possible Blakeney-Caldwell Conspiracy" and that language of the indictment which states that prior to Ford's arrest that Gray went to her address on the false allegations of Blakeney. (App. 8a). Because there was no evidentiary hearing, it is unknown what trial counsel would have testified to that he was aware of and why he made a decision not to call and investigate Gray. Again, the district court provided its own pro hac rationalization for trial counsel finding that he would not have wanted to call Gray because it did not answer the ultimate question whether Blakeney influenced Gray's decision and that Gray would have been cross-examined on this issue. In Gray's latest

deposition, he put to rest the district court's rationalization for trial counsel's failure to call hin. Gray testified that he made the sole decision to arrest Ford without input from Blakeney. Also, he testified that there was no conspiracy. If Blakeney's trial counsel had only interviewed Gray, he would have learned of Gray's strength as a witness. Trial counsel had no strategic reason not to interview Gray and call him as a witness. Blakeney has made a substantial showing that trial counsel violated his constitutional rights when he failed to interview and call Gray at trial.

CONCLUSION

For the foregoing reasons, this Court should grant Blakeney's petition for a writ of certiorari, reverse, and remand to the Eighth Circuit.

Respectfully submitted,

KEVIN L. SCHRIENER
Counsel of Record for Petitioner
LAW & SCHRIENER LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
314-721-7095 – telephone
kschriener@schrienerlaw.com

November 15, 3021.