

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN BLAKENEY - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

STEVEN BLAKENEY, Reg. No. 42856-044

F.C.I. ELKTON, P.O. BOX 10

LISBON, OH 44432

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QUESTION(S) PRESENTED

The Petitioner, Steven Blakeney, as a police detective, following a directive from the prosecuting attorney, effected the arrest of Nakisha Ford, a political candidate, with several other police officers on March 31, 2013, giving rise to the Government's 2015 criminal indictment in this politically charged criminal case. Petitioner was the only officer indicted and convicted of criminal charges, and now prays this Honorable Court grants Certiorari and answers these questions of great importance for all law enforcement officers across the United States of America.

1. Can a police officer acting in good faith establish legal probable cause to arrest a person if the original reason that brought that officer to the scene involved alleged police misconduct?

2. Can a supervisory police officer be found guilty of falsification of a record (18 U.S.C. § 1519) for approving a subordinate officer's police report if the supervisory officer did not review nor sign off on the report, nor incorporate the alleged false report into his own report?

3. Did the Eighth Circuit Court of Appeals abuse its discretion when it opined the defendant conspired with a specific individual after the Government AFFIRMED to the District Court that individual was not a co-conspirator, in conjunction with the District Court's factual finding that individual was not a co-conspirator?

4. Does an alleged threat by a police officer to unlawfully arrest and incarcerate an individual, if that individual refuses to commit an illegal act as instructed by the officer, negate that threatened individual's conspiratorial intent in a conspiracy?

5. Is a defendant's right to a fair trial violated when the district court communicates with a deliberating jury in the absence of the defendant, by denying a jury request concerning a vital issue in the case, and only allowing the defendant an opportunity to object to its response after the Court answered the jury?

6. Is a defendant's right to a fair trial violated when the district court provides a wrong answer to a jury's question during their deliberation?

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APPENDIX D	Pine Lawn Prosecuting Attorney Anthony Gray's September 26, 2017, deposition testimony showing he made the sole decision to arrest Ford at the Pine Lawn Market before any alleged misconduct by petitioner that led to Ford's alleged illegal arrest.
APPENDIX E	Pine Lawn Chief of Police Rickey Collins' April 6, 2017, affidavit showing the U.S. Attorney used a non-public, unofficial police report to convict the petitioner of falsification of a record codified at 18 U.S.C. § 1519.

APPENDIX F

Motion granted by the District Court on February 28, 2018,
taking judicial notice of the monumental differences between
a Pine Lawn Wanted and a Pine Lawn Arrest Warrant.

APPENDIX G

Missouri State Statute, Police Powers of Arrest, 2013,
RSMO 544.216.

JURISDICTION

The United States Court of Appeals decided Petitioner's case on December 11, 2017.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 2, 2018, and a copy of the order denying rehearing appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and has been designated for publication but is not yet reported.

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REASONS FOR GRANTING THE WRIT

Granting Certiorari is warranted in this case because the Eighth Circuit Court of Appeals created an intra-circuit split decision in this case that now lawfully changes when a police officer can develop probable cause for a legal arrest that is in direct conflict with Supreme Court precedent. The Eighth Circuit overlooked several crucial facts and passed, without analysis, on several arguments made by Blakeney which warrant reversal. Specifically, a police officer can make a lawful arrest if an officer had untainted and reliable probable cause at the moment of an individual's arrest.

The Eighth Circuit failed to answer questions of exceptional importance under federal law which also warranted reversal. Specifically, whether coercion involving the loss of one's freedom due to threat of unlawful arrest and incarceration negates the meeting of the minds requirement for a conspiracy, and whether the attenuation doctrine applies as a defense to a charge of Deprivation of Rights under Color of Law, which appears to be a matter of first impression. The defendant was denied a right to a fair trial when the district court communicated with the jury during its deliberation in the absence of the defendant, only informing the defendant of that communication with the jury after the court's response to the jury's question, resulting in the court's answer to the jury's question being erroneous.

Most shocking to the conscience in this case, after the petitioner had been incarcerated for eleven (11) months, the Pine Lawn Prosecuting Attorney, Anthony Gray, who was not called as a witness at trial for the prosecution or defense, gave sworn testimony on September 26, 2017, in an unrelated matter that he alone made the decision to arrest Nakisha Ford on March 31, 2013, at the Pine Lawn Market. Appendix D. Gray further testified that petitioner did not make the decision to arrest Ford. This sworn testimony completely undermines the judgment against the petitioner.

Another giant red flag in this case is that the chief of the Pine Lawn Police Department where Blakeney was employed executed an affidavit on April 6, 2017, stating the Pine Lawn Police Report that the U.S. Attorney's Office had used to convict petitioner of falsification of a record in accordance with 18 U.S.C. § 1519 was not an official record of the Pine Lawn Police Department, nor available to the public. Appendix E.

These facts and questions of exceptional importance apply to Blakeney's case and need to be reviewed and answered by this Honorable Court through granting Certiorari in this case of national importance to all law enforcement officials throughout the United States of America.

Additionally, the Eighth Circuit Court of Appeals' opinion in this case used factually incorrect information that appears to have been borrowed from the Government's reply brief from petitioner's direct appeal. This has resulted in a factually unsupported and erroneous opinion being rendered by the Eighth Circuit Court of Appeals.

STATEMENT OF THE CASE

In this politically charged and highly publicized case, the Government charged Steven Blakeney by Indictment with one count of Conspiracy Against Rights in violation of 18 U.S.C. § 241 (Count I), one count of Deprivation of Rights under Color of Law in violation of 18 U.S.C. § 242 (Count II), and one count of Falsification of Records in violation of 18 U.S.C. § 1519 (Count III). Count I alleged that Blakeney conspired with A.S. (A.S. refers to Akram Samad, "Sam," brother to Mazen Samad, "Mario," owner of the Pine Lawn Market) and others known and unknown to arrest Nakisha Ford based on false allegations and without probable cause by having an arrest warrant issued for Nakisha Ford's arrest. Count II alleged that Blakeney, under color of law, willfully deprived Ford of her right to be free from unreasonable seizure by causing her to be arrested by warrant based on false allegations and without probable cause. Count III alleged that Blakeney falsified Pine Lawn Police Department Incident Report # 13-1337 to obtain an arrest warrant for Ford through Prosecutor Anthony Gray. Blakeney entered a plea of not guilty to all charges, and the case proceeded to trial by jury.

In 2013, Pine Lawn Mayor Sylvester Caldwell was running for re-election against Nakisha Ford. Leading up to the mayoral election, Blakeney, a Pine Lawn police detective, went to the Pine Lawn Market to see if he could hang a campaign sign for Caldwell's re-election after speaking with Akram "Sam" Samad, the store's manager. Blakeney hung the sign in the store's window on the door. The sign contained a large mugshot of Ford and stated that she had just previously been arrested for assaulting and interfering with a police officer. It contained various other arrests and allegations regarding Ford's past in the City of Pine Lawn.

On March 31, 2013, Mazen "Mario" Samad, the owner of the Pine Lawn Market,

and April Brooks, the store cashier, were working at the Pine Lawn Market. Ford came to the store and caused a disturbance over the sign. Specifically, she spoke loudly, threatened to sue the business, and ultimately removed the sign from the store window and left. As the cashier, Brooks was positioned by the store's front door and clearly witnessed the entire incident. Initially, Mario refused to take the sign down. However, after Ford threatened him with a lawsuit, Mario told her that she could take the sign down because he did not want any more trouble. Mario was also afraid that Ford would retaliate against him if she were elected mayor.

After Ford took the sign, Blakeney came to the store and asked Mario about who removed the sign. At first, Blakeney thought Mario removed the sign, but Mario told him that Ford had removed the sign. Blakeney asked to review the security footage where he saw Ford taking the sign. Blakeney left the store and then returned to the store with additional officers when Sam came to the store later and called 9-1-1 to report Ford's earlier misconduct. Officer Jesse Brock, independent of Blakeney, interviewed Mario and Brooks regarding the incident at the market. Pine Lawn Prosecuting Attorney Anthony Gray responded to the scene as well to review the security footage at the market. After reviewing the footage, Gray, the prosecuting attorney, authorized charges for disorderly conduct and stealing under \$500 at the Pine Lawn Market before any alleged misconduct by Blakeney occurred at the Police Station where Sam and Mario now allege they were made to lie in their written statements to police. Conversely, based on Prosecutor Gray's authorization of criminal charges for disorderly conduct and stealing at the market, Officer Brock himself entered a wanted for the questioning of Ford. A "wanted" in Missouri does not authorize an officer to arrest or criminally charge a person. No arrest warrant issued for Ford. At the station, Mario and Sam made written statements regarding the incident

through Mohammad Samad, Sam's son, because he could write in English. Both Mario and Sam could not write in English as English was their second language. Mario and Sam told Mohammad exactly what to write and reported what happened in a police station interview room which was recorded and preserved as evidence. At trial, three years later, both Mario and Sam now allege that Blakeney made them make these false allegations against Ford in their written statements at the police station. After Mohammad wrote these statements, Mario and Sam each signed the statements in the presence of a police officer under penalty of perjury. Officer Brock wrote the only police report regarding this case.

In the evening time, Patrol Officer Brock, Chief of Police Collins, Detective Blakeney, Supervising Patrol Officer Struckhoff, Patrol Officer Harrington, and Prosecutor Gray responded to Ford's residence based on the wanted for questioning. After Ford answered the door, Ford DENIED taking the sign from the store. This false statement by Ford was captured on police body camera and preserved as evidence. Officer Brock then placed Ford under arrest, after she made this false statement to him, for disorderly conduct and for stealing under \$500. Approximately six hours after Ford's arrest, Ford was released on a summons after posting a \$750 bond. Ford's case was certified to St. Louis County state court for trial, out of the City of Pine Lawn's venue. Before her trial, the stealing charge was dismissed, and the disorderly conduct was amended to littering by Prosecutor Gray. Ford, through her retained attorney, pled guilty to the amended charge of littering and paid the maximum fine of \$500.

During deliberations at Blakeney's trial, the jury sent two questions to the District Court. The first one was about which document in evidence Blakeney allegedly falsified. The District Court responded by referring them back to the evidence and the instructions submitted. However, it's factual the court's instructions failed to answer the jury's question; and there were many police

documents entered into evidence that Blakeney allegedly falsified. The second jury question: The district court responded to the jury outside the presence of Blakeney and his attorney on a vital issue in this case regarding the jury's request to review the trial transcripts of three government witnesses, the crux of the government's case, that spoke English only as a second language. The district court denied the jury's minute request to review approximately 181 pages of testimony. The district court notified Blakeney's attorney after the court had already responded to the jury in writing telling the jury there was no transcript to review without an explanation. This response to the jury is problematic because the district court's answer to the jury was erroneous and the jury had already been given this instruction by the time the court asked Blakeney's attorney if he had an objection to it. Soon thereafter, the jury returned a guilty verdict for all three counts after the hotly contested trial. The District Court then sentenced Blakeney to 51 months imprisonment, with credit for five months on home detention, followed by three years of supervised release.

Blakeney appealed his conviction to the Eighth Circuit raising several points regarding the sufficiency of the evidence, evidentiary rulings, Government's comment during closing argument, and questions submitted by the jury. The Eighth Circuit denied all points of error and affirmed Blakeney's conviction, creating an intra-circuit split on a police officer's lawful ability to make an arrest. Blakeney now petitions the Court to grant Certiorari.

ARGUMENT

The Eighth Circuit abused its discretion in passing on Blakeney's monumental argument that he did not conspire with the Samad brothers and finding that Blakeney conspired with Mayor Caldwell after the District Court made a finding that there was insufficient evidence to prove Caldwell was a co-conspirator.

No conspiracy with Caldwell

Blakeney's trial focused on whether he allegedly conspired with Sam to deprive Ford of her rights. Prior to the presentation of evidence, Blakeney had a concern before trial and on the record that the Government may attempt to allege Caldwell as a potential conspirator. After Blakeney raised this concern to the district court, the district court held a bench conference where the court, the Government, and Defense Counsel discussed this issue, and during this conversation, the following occurred: (Wright, Defense; Harris, Government):

MR. WRIGHT: So the charge here in this matter of this trial involves a conspiracy.

THE COURT: Right.

MR. WRIGHT: And the conspiracy, I think, is as many people as they want to say are involved in this.

THE COURT: But the conspiracy, though, I thought was with the store owners and managers.

MR. HARRIS: Right.

Tr. Vol. II, pg. 10-11.

The Government concisely affirmed here to the Court and to Blakeney that Caldwell was not a potential conspirator, and that neither the Indictment, nor the Government's opening statement, made any reference to Caldwell as a possible co-conspirator. In fact, at the beginning of Blakeney's trial, the Government

moved the Court to limit Blakeney from adducing any evidence about Caldwell, and the District Court granted the Government's request. Blakeney was bound by the Court's ruling not to bring up Caldwell during his trial. This representation affected the fairness and integrity of the trial because the Government surprisingly named Caldwell as Blakeney's co-conspirator for the first time during the very last part of their closing argument, after just reminding the jury again that Caldwell was in federal prison. At this time, Blakeney could not adduce any evidence to combat this allegation because the jury retired to deliberate immediately following the Government naming Caldwell as a co-conspirator.

A conspiracy is an "agreement among the conspirators." United States v. Falcone, 311 U.S. 205, 210, 61 S. Ct. 204, 85 L.Ed. 128 (1940). And, if there is no meeting of the minds, there is no conspiracy. See, Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965). "[W]hen the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, 'substantial evidence' should be the test rather than 'slight evidence' or 'slight connection.'" United States v. Kimmons, 917 F.2d 1011, 1015 (7th Cir. 1990). The piling of inference upon inference is not sufficient in a criminal case where innocence until proven guilty reigns supreme. *Id.*

While an argument may be inferred from the defendant's acts or other circumstantial evidence, "simple knowledge, approval of, or acquiescence in the object or purpose of conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient." United States v. Lennick, 18 F.3d 814, 818 (9th Cir. 1994). The Government must not only show that Blakeney allegedly set in motion a scheme to deprive Ford of her rights, but also that he and other individuals agreed for this to happen. *Id.*

At trial, the Government adduced absolutely no evidence that Blakeney and Caldwell entered into an agreement to deprive Ford of her rights. The Eighth

Circuit opined that sufficient evidence existed to find Caldwell and Blakeney conspired because: (1) Blakeney supported Caldwell in the mayoral race; (2) Caldwell had motive to sabotage Ford's chances in the election; (3) Blakeney allegedly arranged for the Samad brothers to talk with Caldwell during their interviews; and (4) Caldwell arranged for Blakeney to take the Samad brothers to court. Opinion, pg. 6.

This evidence is clearly insufficient to find a conspiracy, and the Eighth Circuit's decision ignores basic crucial facts. First, prior to any alleged Caldwell involvement, Prosecutor Gray authorized charges for disorderly conduct and stealing against Ford at the Pine Lawn Market. The only evidence connecting Blakeney and Caldwell, prior to the authorization of charges, was that Blakeney supported Caldwell and hung his campaign sign. Second, the trial record shows that Sam testified that Blakeney never took him to court, and did not show up when Caldwell had allegedly arranged him to. If Blakeney and Caldwell were conspiring, taking Sam to court to testify against Ford would have been the most important component of the conspiracy. Blakeney, by not doing this, demonstrates that he and Caldwell were not conspiring at all. Further, if Caldwell was a conspirator, the Government would have most certainly charged and prosecuted both him and Blakeney with the conspiracy offense.

Based on the Eighth Circuit's ruling, Blakeney should be allowed to present evidence and confront witnesses about whether a conspiracy existed between him and Caldwell. The Government's pre-trial position on Caldwell and the District Court's ruling barring Blakeney from bringing up Caldwell at trial frustrated this. Now, Blakeney's conspiracy conviction rests on insufficient evidence, and he was deprived of the opportunity to defend himself regarding a conspiracy with Caldwell that Blakeney was told did not exist by the Government at the beginning of his trial. Moreover, the District Court found in its sentencing

ruling there was insufficient evidence to prove Caldwell was a co-conspirator.

Threat of deprivation of liberty negates conspiracy

In abusing its discretion by finding that a conspiracy existed between Blakeney and Caldwell, the Eighth Circuit passed on the ultimate and most important question at trial, whether Blakeney conspired with Sam. Aside from not proving whether any meeting of the minds occurred between Blakeney and Sam, Blakeney's alleged threat to arrest Sam if he did not call 9-1-1 to report Ford's fake misconduct, if one believes the Government's evidence, this truly negated Sam's alleged conspiratorial intent. On appeal, Blakeney argues that Sam only feigned acquiescence to the conspiracy because he faced losing his freedom by being wrongly incarcerated. See, United States v. Valle, 807 F.3d 508, 522 (2d Cir. 2015) (when one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone). The Government argued that only a "well-grounded apprehension of death or serious bodily injury" negates conspiratorial intent. See, United States v. Wint, 974 F.2d 961, 968-69 (8th Cir. 1992).

The evidence regarding a conspiracy focused only on Sam and Blakeney, and Sam was the only conspirator specifically named in the Indictment. While the Indictment included the language "others known and unknown," the Government's very own pre-trial affirmance and position on the record that the conspiracy was between Blakeney and the "store owners and managers" confirms that Sam, not Caldwell, was the alleged conspirator. The question of whether the alleged threat of arrest and loss of freedom by Blakeney negated Sam's conspiratorial intent is a question of the most exceptional importance and needs to be answered by granting Certiorari.

The Eighth Circuit created an intra-circuit split in holding that sufficient evidence existed to convict Blakeney of Deprivation of Rights under Color of Law, though the evidence showed that Ford's arrest was justified by her primary criminal charge of disorderly conduct, and her arrest was sufficiently attenuated from any alleged wrongdoing by Blakeney.

The Eighth Circuit opinion raises two serious concerns under this point. First, the Eighth Circuit's opinion overlooks crucial facts that clearly justified Ford's arrest for disorderly conduct, and it overlooks Officer Brock's testimony that is memorialized in the trial transcripts. Specifically, Brock testified that he had taken April Brooks and Mario's statements at the market, not Blakeney. Second, the Eighth Circuit did not affirmatively state whether the attenuation doctrine applies as a defense to the charge of Deprivation of Rights under Color of Law which is a question of exceptional importance that has not been answered, but needs to be, because Officer Brock developed independent probable cause to arrest Ford on March 31, 2013.

A Legal Arrest

While the Eighth Circuit's opinion focuses on the allegedly false stealing charge, it was Ford's primary charge of disorderly conduct that carries the day. Officer Brock testified at trial that he independently interviewed April Brooks, the store's cashier, an independent witness, and Mario, the store owner, who both told him that Ford caused a disturbance, threatened to sue the business, spoke loudly, and ultimately removed the sign from the Pine Lawn Market.

Nothing about Ford's conduct in the Pine Lawn Market on March 31, 2013, was orderly, and it would be disingenuous to suggest otherwise. Because her disorderly conduct that day justified her arrest by itself, she did not suffer any deprivation of rights. Therefore, insufficient evidence exists to convict Blakeney of Deprivation of Rights under Color of Law, as the Eighth Circuit has opined.

The Attenuation Doctrine

Blakeney has been unable to find, and the Eighth Circuit did not cite, any caselaw that supports or contradicts his position that the attenuation doctrine applies as a defense to the charge of Deprivation of Rights under Color of Law. This appears to be a matter of first impression that needs to be answered by the Court granting Certiorari.

District courts and courts of appeals routinely find that an illegal arrest or illegally seized evidence can be attenuated by the development of probable cause independently of the illegality. See, e.g., United States v. Romel, 2001 U.S. Dist. LEXIS 23262 at *16 (D. Neb. March 15, 2001); United States v. Ibarra-Sanchez, 199 F.3d 753, 761-62 (5th Cir. 1999); United States v. Edwards, 103 F.3d 90, 94 (10th Cir. 1996); United States v. Cherry, 794 F.2d 201, 206 (5th Cir. 1986); and United States v. Manuel, 706 F.2d 908, 911-12 (9th Cir. 1983). "[T]he more apt question in a case of an initially illegal police action is whether, granting establishment of the primary illegality, the [arrest] to which objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." United States v. Faulkner, 636 F.3d 1009, 1016 (8th Cir. 2011). When determining whether the taint of an illegal action has been purged, the Court must consider: (1) the temporal proximity of the illegal action; (2) the presence of intervening circumstances; and (3) the purpose or flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L.Ed. 2d 416 (1975). If independent probable cause to arrest is developed, no deprivation of rights occurs.

There is no doubt that Officer Brock developed independent probable cause to arrest Ford while on scene investigating at the Pine Lawn Market. Even if

Blakeney's allegedly unlawful conduct (Blakeney did not act unlawfully in any way and has vigorously maintained his innocence.) dispatched Officer Brock to the scene, Ford's arrest was justified and sufficiently "attenuated" by Officer Brock's independent on-scene development of probable cause following his interviews of Mario and Brooks. Blakeney is the only officer alleged to have committed any type of misconduct. Moreover, Officer Brock's on-the-scene assessment of probable cause has historically provided legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest. Gerstein v. Pugh, 420 U.S. 103, 114-15, 95 S. Ct. 854, 43 L.Ed. 2d 54 (1975). Although not mentioned in the Eighth Circuit's opinion, but crucial to Ford's arrest, is the undisputed historical fact that Ford lied to Officer Brock at her residence just prior to being arrested when she told Brock that she did not take the sign from the market. In doing so, Ford provided a knowingly false statement to Officer Brock. This false statement by Ford alone bolsters the fact that Brock's independent probable cause existed to take Ford into custody at that moment when Ford lied to Brock. Ford was attempting to misdirect and obstruct Brock's investigation -- a crime in and of itself.

Further, Prosecutor Gray, undisputed by the Government, authorized charges for disorderly conduct and stealing against Ford after reviewing the store's surveillance footage at the Pine Lawn Market. It is also undisputed that these charges were authorized prior to any allegedly false reports made at the police station by the Samad brothers. It was Prosecutor Gray, not Blakeney, who caused the wanted for questioning to be issued for Ford resulting in Ford's arrest at her residence after she lied to Officer Brock about removing the sign from the market. The Government adduced no evidence that, without Prosecutor Gray's authorization, Blakeney would have himself, or through Brock, arrested Ford

for disorderly conduct and stealing. The Eighth Circuit opinion in this case concerning Ford's arrest created an intra-circuit split and is in direct conflict with longtime standing Supreme Court precedent governing lawful police powers of arrest.

For these reasons, Blakeney asks the Court to grant Certiorari to decide whether Ford's disorderly conduct justified her arrest and to answer the question of whether the attenuation doctrine applies as a defense to the charge of Deprivation of Rights under Color of Law in this case.

The Eighth Circuit erred in holding that the District Court did not plainly err in admitting Government's Exhibit 16 because its admission violated the best evidence rule in that it was not a duplicate that accurately reflected the original copy of the final approved report.

The best evidence rule provides that an original copy of a writing is required in order to prove its content unless these rules or a federal statute provide otherwise. Fed. R. Evid. 1002. A duplicate is admissible to the same extent as the original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original. Fed. R. Evid. 1003. The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing. United States v. Trotter, 837 F.3d 864, 867 (8th Cir. 2016).

The Indictment alleged that Blakeney falsified Report # 13-1337. However, the document submitted was an unsigned Xeroxed copy of Report # 13-1337. The issue with an unsigned Xeroxed copy of a police report is that it is not the final, approved copy. Without Blakeney's signature affixed to the report itself, as was required by police department policy, there is no way to verify

that Blakeney himself approved any of the statements contained in Brock's police report. Officer Brock did not testify that Government's Exhibit 16 was the same as his final copy, creating some kind of foundation, and Brock did not testify that Blakeney actually approved Report # 13-1337, just that he "usually" does.

The best evidence to determine whether Report # 13-1337 was falsified is the original, final, approved and signed copy or an exact duplicate of the report that accurately represents the original, as the Federal Rules of Evidence stipulates.

The Eighth Circuit relies on United States v. Moyer, erroneously, to support its contention that Blakeney can be found guilty of approving Brock's report even if he did not sign the police report. Opinion, pg. 8. This is erroneous. Moyer is clearly distinguishable. In Moyer, the jury learned that the defendant reviewed and incorporated a subordinate's report into his own report, which contained false information. United States v. Moyer, 674 F.3d 192, 207 (3d Cir. 2012). The jury also heard evidence from which it could reasonably infer that the defendant knew the information in the report was false. Id. Conversely, Brock wrote the only report regarding this incident. Blakeney never reviewed and incorporated Brock's report in his own police report because Blakeney did not write one. The evidence did not even show that Blakeney reviewed or approved Brock's report, only that he usually does. This incident was far from usual. Because the evidence does not show that Blakeney either incorporated the report in his report or approved Brock's report, Moyer is simply inapplicable to this case.

Without the original document, or an exact duplicate copy, the report's alleged falsified content cannot be proven, and the Government cannot prove beyond a reasonable doubt that Blakeney falsified Report # 13-1337. For these reasons, Blakeney asks the Court to grant Certiorari to decide this question of exceptional importance on whether Blakeney, as a police officer, can approve a

subordinate's report without signing it or reviewing it and whether the best evidence rule was violated by not admitting the original, or an exact duplicate that represented the original, of the final, approved, and signed copy of Report # 13-1337.

The Eighth Circuit abused its discretion in holding that the District Court properly responded to the jury's question during deliberations, "[w]hich document in evidence are we talking about[,]" because it is factual the jury instructions submitted at the conclusion of the case did not answer their question, as the Eighth Circuit Court of Appeals opined. **The District Court wrongfully answered the jury.**

Upon receipt of questions from a deliberating jury, it is incumbent upon the District Court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. United States v. Combs, 33 F.3d 667, 669-70 (6th Cir. 1994). The District Court must be meticulous in preparing supplemental instructions, taking pains to adequately explain the point that is obviously troubling the jury. *Id.* When a jury explicitly requests supplemental instructions, a District Court must take great care to ensure that any supplemental instructions are accurate, clear, neutral, and non-prejudicial. *Id.* "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-13, 90 L. Ed. 350, 66 S. Ct. 402 (1946). And the District Court must not allow that confusion to persist; it must respond appropriately. See, Alcindore v. United States, 818 A.2d 152, 155-56 (D.C. 2003). The response to a jury request for supplemental instructions is within the District Court's discretion. United States v. Morrison, 332 F.3d 530, 532 (8th Cir. 2003).

During deliberations, the jury submitted the following question:

"We are confused as to what falsifying a document means. Which document in evidence are we talking about? Does falsifying a document mean that the person has to actually fill out the document themselves [sic]? Can they just witness the document, not sign it, and have falsified it? Are they falsified by the defendant if he doesn't sign them but only witnesses them being filled out? And if the person is the approving officer and signs a document, has he falsified it?" Tr. Vol. IV, pg. 64.

The District Court erred in responding, "[y]ou are to be guided solely by the evidence submitted and the Court's instructions." Tr. Vol. IV, pg. 65. This response is more than problematic. Blakeney acknowledges that the District Court read the Indictment at the beginning of the four day trial which did name the police report as the allegedly falsified document. However, throughout the trial, numerous other police reports and documents were admitted into evidence, including: Sam's statement (Exhibit 9), Mario's statement (Exhibit 11), the wanted entry (Exhibit 15), and the police report (Exhibit 16). The Government continuously alleged that Blakeney provided false information for each of these documents throughout Blakeney's trial. By the time it came to deliberate on the fourth day of trial, the jury was just plain confused.

The Eighth Circuit found that "[t]he jury instructions included a verbatim recitation of the indictment, which specified that Blakeney was charged with falsifying police report 13-1337." Opinion, pg. 12. This is simply not true. The instructions submitted to the jury for deliberations did not answer their question. The instructions did not mention the police report or any document that Blakeney allegedly falsified. Doc. 50, pg. 16. The Eighth Circuit did not acknowledge this fact. It cannot be said with certainty that the jury found Blakeney guilty of falsifying only the police report as the Government charged, especially given that Sam and Mario accused Blakeney at trial many

times over of forcing them to make false written statements on police report forms.

Because of the jury's clear and obvious confusion, the District Court should have provided a supplemental instruction naming the exact document Blakeney allegedly falsified. Not doing so seriously affected Blakeney's substantial rights and deprived him of a fair trial. For these reasons, the Eighth Circuit abused its discretion in concluding that the District Court did not plainly err in referring the jury back to the instructions submitted that had no answer for the jury. Blakeney asks the Court to grant Certiorari to decide this question of exceptional importance.

The Court of Appeals erred in finding the District Court did not err in instructing the jury outside the presence of Blakeney with regard to their minute request for the 181 pages of transcripts of three of the Government's witnesses because Fed.R.Crim.P. 43(a) dictates that the defendant is required to be present at every stage of the trial and the District Court's instruction to the jury that no transcript was available for their review was erroneous and prejudiced Blakeney denying him a fair trial as guaranteed by the Sixth Amendment.

The District Court erred in instructing the jury outside of Blakeney's presence.

In a felony case, it is without question that the defendant is required to be present at every stage of the trial except when he voluntarily absents himself. Fed. R. Crim. P. 43 and Evans v. United States, 284 F.2d 393, 394 (6th Cir. 1960)(reversing defendant's conviction because the instructions given did not relate to trivial, insubstantial matters, but involved vital issues in the case). It is even error for the District Court to instruct the jury in the absence of the defendant even though his counsel was present. *Id.* A defendant is entitled to be present in the courtroom when additional instructions are

given to the jury by the District Court. Id. at 395. A defendant has the right to see and observe the manner in which the proceedings are being conducted and to consult with his counsel. Id. If a defendant is present, he can object to any part of the instructions and the District Court would then have the opportunity for correcting the instructions if it deemed advisable to do so. Id. Communications between the District Court and the jury are presumed prejudicial and can only be overcome by evidence of a clear lack of prejudice. Rice v. United States, 356 F.2d 709, 716-17 (8th Cir. 1966)(reversing defendant's conviction because no evidence suggested that the defendants were not prejudiced by the district court's instruction made in their absence).

Blakeney was not present at either of the two jury questions responded to by the District Court. Moreover, during deliberations, the jury asked the court to review the testimony of Sam, Mario, and Mohammed, presumably because they were difficult to understand as English is their second language. It is undisputed that Blakeney was not present when the District Court instructed the jury that "there is no transcript of the testimony to read." Tr. Vol. IV, pg. 65. Presuming prejudice in the District Court's instruction, this Court's inquiry turns on whether there is any evidence that indicates a clear lack of prejudice. See, Rice, 356 F.2d at 716-17. No clear lack of prejudice exists in this case. Blakeney most certainly would have objected to this instruction at the time, and before it was sent to the jury, and requested the District Court order the transcript of only 181 pages be prepared for the jury or to have the stenographer's notes read back to the jury, as has been done many times before. And/or, the jury could have listened to the witnesses' testimony by playing back the audio recording of the testimony recorded by the District Court.

Further, as argued *infra*, the District Court's instruction was just plain erroneous. An erroneous instruction being sent to the jury undoubtedly prejudices Blakeney and denies him a fair trial. The Eighth Circuit Court of Appeals opined

that Blakeney was not prejudiced because the District Court provided him an opportunity to object or suggest another response once the district judge "track[ed] down everybody." Opinion, pg. 13. This is just not true. The District Court had already responded in writing to the jury's question before the District Court notified Blakeney's counsel of the jury's question. And, the District Court only provided Blakeney an opportunity to object after the jury had already received the court's answer to their question. And, the answer from the District Court was erroneous. There was a transcript of the testimony taken of the three witnesses they wished to review.

The District Court erred in instructing the jury that no transcript was available.

A trial judge has broad discretion in deciding whether to accede to a jury's request for a reading of testimony. United States v. Zarintash, 736 F.2d 66, 69-70 (3d Cir. 1984). But this discretion is based upon a limited, twofold rationale. *Id.* First, that requests to read the testimony may slow the trial where the requested testimony is lengthy. *Id.* Second, that reading only a portion of the testimony may cause the jury to give that portion undue emphasis. *Id.* Thus, a District Court abuses its discretion where the refusal to read the requested testimony is not supported by one of these reasons. *Id.*

The District Court did not provide the jury with either of these rationales, or any other reason, for not providing the transcript in Blakeney's case. The District Court's denial of the jury's request prejudiced Blakeney because the three witnesses spoke broken English and their testimony that they wished to review was the crux of the Government's case. The request was not even unreasonable as portions of the transcript were not lengthy, only totaling approximately 181 pages. The proceedings could have been delayed for a short while for preparation of the transcripts or the court reporter could have read the transcript from the stenographer notes or the jury could have listened to

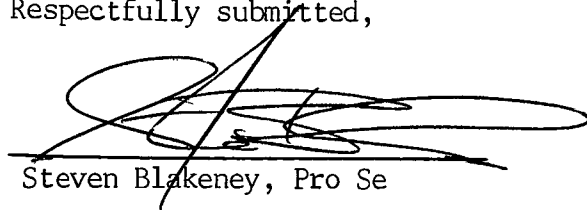
audio recordings of the witnesses because the court records them. Reviewing the requested testimony would have aided the jury in determining that no conspiracy existed and that Sam, Mario, and Mohammed (Sam's son) were unreliable witnesses who changed their stories depending on whoever was in power in Pine Lawn at the time. The testimony requested by the jury was favorable to the defendant because it highlighted the witnesses in consistent statements and that was exculpatory for Blakeney.

Because the District Court's instruction violated Blakeney's right to a fair trial, and providing the instruction in his absence was not harmless error, Blakeney asks this Court to grant Certiorari and vacate his sentence, set aside his conviction, and remand this case for a new trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'S. Blakeney', written over a horizontal line.

Steven Blakeney, Pro Se

Date: APR. 13, 2018