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**IN THE
SUPREME COURT OF THE UNITED STATES**

ANOTNIO STACKER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a significant change in trial strategy that is instigated by unfairly delayed disclosure of material evidence favorable to the defense so as to prevent its effective use at trial can ever be deemed sufficiently prejudicial so as to constitute a violation of a defendant's constitutional right to due process pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

LIST OF PARTIES

All parties to the proceeding are identified in the style of the case.

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¹ Available at: <https://www.tnwd.uscourts.gov/pdf/content/LocalRules.pdf> \

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears in Appendix A to this Petition.

JURISDICTION

On March 26, 2018 a three-judge panel of the Sixth Circuit Court of Appeals entered its opinion in United States v. Stacker, No. 16-6721, 2018 U.S. App. LEXIS 7628 (6th Cir. Mar. 26, 2018). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

“No person shall be . . . deprived of life, liberty, or property, without due process of law.”

U.S. Const. Amend. V.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

In October 2015, Ladeidra Conley left her apartment to go to church. See Stacker, 2018 U.S. App. LEXIS 7628, at *1. She heard her neighbor, Keona Gorman, calling her from Gorman's third-floor balcony. Id. Ms. Gorman told Ms. Conley that Mr. Stacker, Gorman's boyfriend, had taken her cell phone and was inside the apartment with a gun. Id. Conley called the police. Id.

Mr. Stacker fled in his car. Id. After a brief chase, he pulled into a parking lot, turned off the car, and a police officer apprehended him. Id. at *1-2. The officer recovered Ms. Gorman's cell phone, and another officer, retracing Mr. Stacker's route, found a loaded handgun in a grassy area next to the apartment complex. Id. at *2. A grand jury indicted Mr. Stacker for being a felon in possession of a firearm. Id.

Prior to trial, the prosecution provided its discovery production pursuant to Fed. R. Crim. P. 16. The document production included a copy of the arrest ticket and the affidavit of complaint containing Ms. Gorman's statements accusing Mr. Stacker of pointing a firearm at her. The discovery response provided that the prosecution was aware of its disclosure obligations under Brady.

The prosecution later supplemented its discovery production with a written statement taken by law enforcement officers on the date of the incident, which was consistent with the arrest ticket and affidavit of complaint that was in the initial discovery disclosure. About two weeks later, the prosecution again supplemented its Rule 16 discovery response to include information relevant to the 911 call and dispatch event chronology underlying the case. The Government again averred that it was cognizant of its obligations under Brady.

Meanwhile, following the initial discovery production, the prosecution and defense entered into plea negotiations. In an effort to settle the case, the defense disclosed a notarized written

statement obtained from Ms. Gorman during the defense's own investigation. In the statement, Ms. Gorman disclosed that she actually threatened Mr. Stacker with the firearm, and that he gained temporary possession of the weapon to disarm her. Stacker, 2018 U.S. App. LEXIS 7628, at *2. Ms. Gorman's statement provided that after he took the gun from her, Mr. Stacker removed the ammunition clip, put it on the kitchen counter, and left with her cell phone. Id. Ms. Gorman's statement also said that she then went to the patio, saw one of her neighbors and told her to phone 911 because Mr. Stacker had a gun. Ms. Gorman stated that she watched as the police arrived and Mr. Stacker left the scene. She then became scared that she would go to jail because the gun was not registered, and so she threw the gun over her apartment railing into the grass. Id. She claimed she was upset and afraid at the time, and so she lied and said that the gun belonged to Mr. Stacker.

Four days before trial, Mr. Stacker notified the court he intended to advance a self-defense justification, which required him to admit to possessing the gun. Id. The next afternoon, less than one business day prior to the start of trial, the prosecution produced a transcript of Ms. Gorman's grand jury testimony. Id. at *2-3. Before the grand jury, Ms. Gorman had testified that Mr. Stacker never possessed the gun. Id. at *3.

Mr. Stacker moved to dismiss the indictment on the basis that the prosecution had violated its obligation to disclose all material exculpatory evidence, pursuant to Brady. Id. Undersigned counsel argued that had she known of Ms. Gorman's grand jury testimony, she would not have turned over Ms. Gorman's sworn statement or advanced a self-defense justification defense. Id. Instead, she would have directly attacked the prosecution's ability to prove possession. Id.

The district court took up this motion on the first day of trial. The defense explained that by the time the grand jury testimony was received, Ms. Gorman had stopped talking with the defense, and she was avoiding service as a witness. The defense thus could not explore the

difference between the grand jury testimony where Ms. Gorman said Mr. Stacker did not have a firearm at all, versus her notarized statement to the defense that he temporarily possessed it to disarm her. The delay of disclosure resulted in a situation where no further investigation was possible, which was highly prejudicial since the information was material to guilt.

The defense also pointed out that it had turned over Ms. Gorman's notarized statement recanting her earlier statements to police to the prosecution almost immediately upon receipt. The defense observed that disclosure of Ms. Gorman's notarized statement would not have been produced so readily had the defense been aware of the grand jury testimony. This is because the defense would have had the ability to rely on the grand jury testimony to point out a problem with the prosecution's case (i.e., difficulty establishing possession) during plea negotiations.

The defense also noted that the prosecution was in possession of the grand jury testimony from the inception of the case, and held it while the defense produced Ms. Gorman's notarized statement in a good faith effort to settle. The defense averred that Ms. Gorman's notarized statement never would have been turned over to the prosecution had the defense been aware that the prosecution was not reciprocating by producing Ms. Gorman's other exculpatory statement. The defense also alerted the district court that even the United States Attorney General's own manual said that because non-production of Brady material constitutes a due process violation, it should be turned over reasonably promptly after discovery.

Finally, the defense averred that the difference between the grand jury testimony and the notarized statement obtained by the defense (i.e., Mr. Stacker never possessed a firearm, versus he temporarily possessed it to disarm Ms. Gorman) made a huge difference in terms of trial strategy. Because the defense only had the notarized statement from Ms. Gorman in its possession until the eve of trial, the defense strategy was to raise the justification defense. Such defense would have

been unnecessary if no one ever saw Mr. Stacker in possession of a firearm. The defense explained that with the grand jury statement that Mr. Stacker never had a gun, the burden of proof beyond a reasonable doubt that Mr. Stacker possessed a firearm would have remained with the prosecution. Without having the discovery, the defense was prejudiced by assuming an affirmative defense burden of proof for justification. Delay changed what the defense did in terms of discovery disclosure, disclosure for plea deal purposes, investigation going forward, and defense trial strategy. Thus, the delay of disclosure changed everything for the defense.

The district court held that the prosecution had indeed violated Brady and that the violation prejudiced Mr. Stacker because up until the eve of trial, he had prepared a justification defense based on what was available, not what should have been available. See Stacker, 2018 U.S. App. LEXIS, at *3. The court determined, however, that the prejudice was insufficient to warrant dismissal. Id. Instead, the court prohibited the prosecution from using Ms. Gorman's sworn statement unless Mr. Stacker introduced it himself. Id. The district court believed that this put the defense in the same position it would have otherwise been in had Ms. Gorman's grand jury testimony been timely produced.

Before jury selection began, Ms. Gorman was called as a witness. The court wanted to ensure that Ms. Gorman had representation because of her conflicting statements, one of them sworn before the court. The court offered to appoint a lawyer for Ms. Gorman and Ms. Gorman accepted. Ms. Gorman was instructed to meet with the appointed lawyer while the trial proceeded through jury selection.

After jury selection, the appointed counsel reported that Ms. Gorman had elected not to testify, asserting her Fifth Amendment right against self-incrimination. See Stacker, 2018 U.S. App. LEXIS 7628, at *4. The defense thereafter gave an opening statement that relied upon the

justification facts contained in Ms. Gorman's notarized statement, at that point in the trial believing that Ms. Gorman would not testify and that Mr. Stacker would necessarily have to take the stand as a witness to properly enter them into evidence.

Mr. Stacker took the stand and presented his self-defense testimony. Id. Although Ms. Gorman initially intended to invoke her Fifth Amendment right to avoid testifying, she decided to take the stand at the end of trial. Id. Her testimony followed the narrative presented in her sworn statement -- that the gun was hers, that she had retrieved it and pointed it at Mr. Stacker, and that he had possessed it only long enough to unload it and place it on the counter. Id. The jury nonetheless found Mr. Stacker guilty of being in illegal possession of the firearm. Id.

Within hours of the verdict, a juror contacted Mr. Stacker via social media to say that the jury did not believe the prosecution had proved possession and that the guilty verdict was based solely on his admission that he had possessed the gun. Id. Another juror contacted defense counsel and confirmed that the guilty verdict turned on Mr. Stacker's admission that he possessed the gun after taking it from Ms. Gorman. Id.

On the basis of these revelations, Mr. Stacker filed a second motion to dismiss or, in the alternative, for acquittal. Id. He continued his argument that he would not have advanced the self-defense theory had Gorman's grand jury testimony been timely disclosed, and that once he declared his intent to do so, his counsel could not ethically argue that he had not possessed the gun. Id. at *4-5. The district court denied relief, holding that, even if the defense was ethically barred from arguing that Mr. Stacker never possessed the gun, "counsel would not have run afoul of those obligations by simply holding the Government to its burden" of proving the elements of the crime. Id. at *5. "Any prejudice established by Defendant's post-trial juror statements," the court reasoned, "was therefore the result of Defendant's decision to pursue that defense even after

receiving the Brady material, not the impermissible prejudice flowing from the Brady violation.” Id.

Mr. Stacker then filed a motion for a new trial, challenging the district court’s reasoning that he could have simply foregone any defense and held the prosecution to its proof. Id. Mr. Stacker argued the holding diminished his Sixth Amendment right to present a defense, asserting that “[a]s a direct result of the Brady violation, [he] no longer could present any defense,” and his counsel would be “relegated to no opening statement, or to an opening statement comprised of ‘they cannot bear their burden.’” Id. Mr. Stacker sought a new trial with new counsel who would not have been ethically bound by the self-defense declaration. Id.

The district court incorporated its reasoning from its denial of Mr. Stacker’s second motion to dismiss and denied the motion for a new trial, holding that “any prejudice suffered by Defendant is insufficient to warrant a new trial in this matter.” Id. at *5-6. Mr. Stacker was ultimately sentenced to seventy months in prison to be followed by three years of supervised release. Id. at *6.

Mr. Stacker appealed, arguing that the prejudice flowing from the prosecution’s Brady violation warranted dismissal, acquittal, or a new trial. Id. Relying upon this Court’s opinion in Strickler v. Greene, 527 U.S. 263, 281 (1999), Mr. Stacker’s panel noted that there are three components of a true Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice must have ensued. Id. at *6-7 (citing Strickler, 527 U.S. at 281-82). The panel also noted that untimely disclosure does violate Brady when the delay itself causes prejudice. Id. at *7 (quotations and citation omitted). There was no question for the panel that the prosecution did not meet its

obligation under Brady. Id. The question in Mr. Stacker’s case was whether he had shown sufficient prejudice.

The panel correctly stated that a defendant establishes prejudice by showing that “‘there is a reasonable probability’ that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.” Id. (quoting Strickler, 527 U.S. at 289). The panel went on: “[T]he question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” Id. (quoting Strickler, 527 U.S. at 290).

The panel found that Mr. Stacker’s prejudice argument boiled down to a single point: he would have been acquitted if he had not presented a self-defense justification. Id. at *8. More broadly, the panel found that he was asserting that had he known about Ms. Gorman’s grand jury testimony, he would not have chosen to pursue a self-defense strategy and, second, that once he notified the court of his intent to do so, his counsel was ethically obligated to proceed with that theory. Id.

To the first point, the panel noted the prosecution’s argument that strategic prejudice is not enough, and found it correct. Id. Quoting Sixth Circuit precedent, the panel observed: “the prejudice inquiry ‘does not extend to assessments of the impact that the suppression may have had on [Defendants’] subsequent trial strategy.’” Id. at *8-9 (quoting United States v. Fields, 763 F.3d 443, 461 (6th Cir. 2014) (alteration in original)). Though Mr. Stacker had distinguished Fields, arguing that the case turned on the defendants failure to sufficiently explain how their strategy would have changed, the panel found that Mr. Stacker took the case out of context because Fields’ limitation on strategic prejudice was itself a separate basis for rejecting the argument. Id. (citing Fields, 763 F.3d at 461).

On the second point, the panel found that Mr. Stacker had not shown that his counsel was ethically precluded from abandoning the self-defense theory and using Ms. Gorman's grand jury testimony to attack the prosecution's case-in chief. Id. at *10. Noting defense counsel's duty of candor under the Tennessee Rules of Professional Conduct ("RPC"), see Tenn. Sup. Ct. R. 8, RPC 3.3(a)-(c), the panel held that Mr. Stacker failed to show how presenting Ms. Gorman's grand jury testimony would have run afoul of that duty. Id. The panel believed that such a conclusion would only follow if counsel learned during trial preparations that Mr. Stacker did in fact possess the gun, in which case the prosecution's delay would have no bearing on counsel's ethical obligations to avoid presenting Ms. Gorman's grand jury testimony. Id. So, according to the panel, either the rules prohibited presentation of the testimony and thus the delay had no prejudicial effect, or they did not prohibit presentation of the testimony and Mr. Stacker could have directly contradicted the prosecution's case by moving to admit Ms. Gorman's grand jury testimony as hearsay. Id. at *10-11 (citing United States v. Barlow, 693 F.2d 954, 961-62 (6th Cir. 1982) (holding that grand jury testimony was admissible hearsay when the witness is unavailable and the testimony possesses "circumstantial guarantees of trustworthiness")). The panel reasoned that, given the district court's order prohibiting the prosecution from introducing Ms. Gorman's sworn statement, the case would have been submitted to the jury without any eye-witness testimony that Mr. Stacker possessed the gun -- the result Mr. Stacker sought in a new trial. Id. On this basis, the panel found that Mr. Stacker failed to show that the prosecution's delay supported relief.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because a panel of the Sixth Circuit has entered a decision in conflict with other United States Courts of Appeals on the same important matter, and has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. According to the Sixth Circuit, Brady's prejudice inquiry for delayed disclosure of probative evidence does not ever extend to assessment of the impact that improper suppression of Brady evidence may have on a defendant's trial strategy. Every other circuit to have considered this issue, however, takes into account that delayed disclosure may have a material bearing on the defense's preparation and presentation of its case such that a Brady violation in the form of delayed disclosure could cause prejudice where the defendant is prevented from making effective use of the evidence. United States v. Sterling, 724 F.3d 482, 511 (4th Cir. 2013) ("When the government's contumacious conduct involves a delay in producing discovery, rather than a failure to turn over required materials, the relevant inquiry is whether the defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case."); United States v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009) ("If a defendant could never make out a Brady violation on the basis of the effect of delay on his trial preparation and strategy, this would create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information."); Beilanski v. Cty. of Kane, 550 F.3d 632, 645 (7th Cir. 2008) (noting a defendant receives a fair trial as long as disclosure is made before it is too late for the defendant to make use of any benefits of the evidence); Leka v. Portuonde, 257 F.3d 89, 101-02 (2d Cir. 2001) (explaining that some Brady material must be disclosed in enough time prior to trial to aid the

defense's trial preparation and avoid throwing existing strategies and preparation into disarray); Blake v. Kemp, 758 F.2d 523, 532 n.10 (11th Cir. 1985) ("In some instances [disclosure of Brady material during trial] may be sufficient. However . . . some [Brady] material must be disclosed earlier. This is because of the importance of some information to adequate trial preparation."); United States v. Ingraldi, 793 F.2d 408, 411-12 (1st Cir. 1986) ("When the issue is one of delayed disclosure rather than of nondisclosure, however, the test is whether defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case."); United States v. McKinney, 758 F.2d 1036, 1050 (5th Cir. 1985) ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been."); United States v. Kaplan, 554 F.2d 577, 580 (3d Cir. 1977) ("If exculpatory [Brady] evidence can be effectively presented at trial and the defendant is not prevented by lack of time to make needed investigation, there is no reversible prosecutorial conduct in ill-timed presentation."); United States v. Miller, 529 F.2d 1125, 1128 (9th Cir. 1976) (when there is a belated disclosure, the inquiry on appeal is "whether the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial.); United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir.) ("disclosure by the government must be made at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case . . ."), cert. denied, 429 U.S. 924 (1976).

Additionally, this Court's own Brady jurisprudence does not present the rule that the Sixth Circuit has promulgated. Instead, this Court's jurisprudence provides that evidence is material where there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that had the evidence been disclosed to the defense, the result of the proceeding

would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985). This Court has made no distinction between suppression of the evidence as effecting trial strategy or any other type of impact upon the trial, requiring only the requisite probability showing that a fair trial was not had because of the suppression of evidence. Indeed, as will be shown, suppression of probative evidence that effects trial strategy can deprive a defendant of his right to a fair trial just as much as any other form of Brady violation in the right circumstances. Those circumstances occurred in this case, but with the Sixth Circuit's rule barring consideration of the Brady violation, Mr. Stacker remains imprisoned as the result of a trial which, had the favorable evidence been disclosed, puts the whole case in such a different light as to undermine confidence in the verdict. Because this rule is being imposed across the entire Sixth Circuit, but no other, it requires this Court's immediate attention and correction.

Under Brady, prosecutors are responsible for disclosing evidence that is both favorable to the accused and material either to guilt or to punishment. Bagley, 473 U.S. at 674. This is true irrespective of the prosecution's good or bad faith in suppressing the evidence. Brady, 373 U.S. at 87; see also Giglio v. United States, 405 U.S. 150, 153-154 (1972) (clarifying that Brady's rule applies to evidence undermining witness credibility). Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)). Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. United States v. Agurs, 427 U.S. 97, 104 (1976). The constitutional duty of disclosure is violated where the omission is of sufficient significance to result in the denial of a defendant's right to a fair trial. Id. at 108.

A Brady violation has three elements: (1) the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the prosecution must have willfully or inadvertently suppressed the evidence; and (3) the suppression must have prejudiced the defendant. Strickler, 527 U.S. at 281-82. The Sixth Circuit has held that Brady does not apply to delayed disclosure of exculpatory evidence, but only to a complete failure to disclose. United States v. Davis, 306 F.3d 398, 421 (6th Cir. 2002). The Sixth Circuit will only find a Brady violation on delayed disclosure if the defendant can show prejudice. Id. The Sixth Circuit has agreed with the tenet the Brady doctrine is violated when the prosecution fails to disclose material evidence in time for a defendant to make effective use of it at trial. See, e.g., United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988). Yet, the Circuit has developed a Brady rule that the prejudice inquiry for delayed disclosure does not extend to assessments of the impact that suppression may have had on a defendant's subsequent trial strategy See Stacker, 2018 U.S. App. LEXIS 7628, at *8-9. This is logically inconsistent.

The Sixth Circuit's strange rule finds its origins in cases such as Joseph v. Coyle, 469 F.3d 441 (6th Cir. 2006). There, a three-judge panel stated in a footnote that some circuits had phrased the delayed-disclosure test in terms of the defendant's ability to prepare for trial. See Coyle, 469 F.3d 473 n.23. The Coyle panel then stated that the Sixth Circuit had never endorsed such a formulation, and then, relying on a footnote from this Court's Agurs opinion, recognized what it termed as this Court's "explicit rejection" of the argument that "the [materiality] standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." Id. (quoting Agurs, 427 U.S. at 112 n.120) (citing Norris v. Schotten, 146 F.3d 314, 334 (6th Cir. 1998) (relying on same footnote from Agurs); United States v. Bencs, 28 F.3d 555, 560 n.5 (6th Cir. 1994) (relying on same footnote in Agurs)).

In the first instance, it is difficult to see how multiple footnote dicta, even a footnote carrying the auspices of this great Court, can become controlling authority for a Circuit rule implicating such an important constitutional issue. But, more importantly, the overriding concern when it comes to the proper standard of materiality at trial for this Court has always been whether there is justice in the finding of guilt. Agurs, 427 U.S. at 112. This Court has never said that Brady's prejudice inquiry does not extend to assessment of the impact that suppression of evidence may have had on a defendant's subsequent trial strategy.

Instead, this Court's precedent suggests that the impact upon trial strategy is a relevant concern in the Brady inquiry. For instance, in Wood v. Bartholomew, 516 U.S. 1 (1995), this Court did not fault with the Ninth Circuit for analyzing whether suppression of the evidence in issue -- results of a polygraph test of one of the witnesses -- affected trial strategy. See 516 U.S. at 6. Instead, this Court itself analyzed the defendant's trial strategy, which was to attempt to discredit the witness who had taken the polygraph exam. Id. Because the strategy did not involve deposing the witness, and since polygraph results were otherwise inadmissible, this Court found that suppression of the polygraph results could not have affected counsel's trial strategy with regard to the defendant's pre-established defense. Id. Hence, in Wood, this Court concluded that it was not "reasonably likely" that disclosure of the polygraph results would have resulted in a different outcome at trial because even without the testimony, the case against the defendant was over-whelming. Id. at 8.

In contrast, in Mr. Stacker's case, the late disclosure necessitated a change in trial strategy just prior to trial that affected the outcome of the case. On direct appeal, Mr. Stacker exhaustively explained how the late disclosure in his case wound up changing his trial strategy, believing the panel might distinguish Sixth Circuit precedent because in prior cases, the defendants had failed

to offer specific examples of how they would have crafted different defense strategies had the late-disclosed evidence been available. See United States v. Stacker, No. 16-6721, Appellant's Principal Brief, 2017 WL 106209, at *35-45 (filed Jan. 5, 2017). The panel, however, found that Mr. Stacker took the argument out of context, noting that the case he relied upon addressed the limitation on strategic prejudice as an entirely separate basis to reject the defendant's argument. Stacker, 2018 U.S. App. LEXIS 7628, at *9. Hence, the Sixth Circuit remains wedded to the rule that Brady's prejudice inquiry does not extend to assessment of the impact that suppression has on a defendant's subsequent trial strategy. Id. at *8-9.

The Sixth Circuit's rule also does not square with this Court's recognition that, "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." Cone v. Bell, 556 U.S. 449, 470 n.15 (2009). In Cone, this Court took note of ABA Model Rule of Professional Conduct 3.8(d) (2008), and took the opportunity to reiterate that a prudent prosecutor should err in the side of transparency, resolving doubtful questions in favor of disclosure. Id.

The local rules for the Federal District Court for the Western District of Tennessee provide that all attorneys practicing before the court shall comply with the Tennessee Rules of Professional Conduct as currently promulgated and amended by the Supreme Court of Tennessee. See Fed. Dist. Ct. W. Dist. Tenn., LR 83.4(g). Tennessee Rule of Professional Conduct ("RPC") 3.8(d) is identical the ABA Model Rule of Professional Conduct 3.8(d) discussed in Cone. See Tenn. Sup. Ct. R. 8, RPC 3.8(d). Moreover, the Tennessee Board of Professional Responsibility has issued a formal ethics opinion that provides that Tenn. RPC 3.8(d) is a separate prosecutorial ethical obligation that is broader and extends beyond Brady -- it is not coextensive with a prosecutor's

legal disclosure obligations. See Tenn. Brd. Prof'l Responsibility, Formal Ethics Op. No. 2017-F-163 (Mar. 15, 2018). That formal ethics opinion is consistent with this Court's jurisprudence, and that of almost all other circuits, providing that timely disclosure means that information must be made early enough that the information can be used effectively. Id. Further, because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practicable. Id.

The formal ethics opinion goes on to provide that the most significant purpose for which disclosure must be made would be to enable defense counsel to advise the defendant regarding whether to plead guilty. Id. Because the defendant's decision might be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case, timely disclosure would require the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding. Id. Recall that Mr. Stacker disclosed the sworn statement he had received from Ms. Gorman in an effort to settle the case with a plea deal. Rather than reciprocate at that time by producing Ms. Gorman's grand jury testimony, the prosecution used the information against Mr. Stacker so that it could maintain the upper hand during plea negotiations. This eventually led to the choice of trial because the terms offered by the prosecution were so unfavorable. When the case did not settle, and without that information, Mr. Stacker was left to formulate the best trial strategy he could. In such circumstances, it hard to discern a difference between the defense's ability to evaluate the strengths of the prosecution's case for guilty plea purposes versus trial purposes. In fact, the suppressed evidence became more crucial once the plea negotiations broke down and the case was proceeding to trial.

While Brady admittedly is not a canon of prosecutorial ethics, this Court has always been concerned that it enforce the threshold requirements of the Due Process Clause. However, where, as here, the prosecution deliberately delays disclosure of obviously favorable material evidence such that it destroys confidence in the outcome of the trial, this Court has found that the prosecution's responsibility is inescapable. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

The panel noted Mr. Stacker's own ethical conundrum that, once he gave notice that he would be using the self-defense justification strategy at trial, his counsel was ethically bound by the canon of candor toward the tribunal. See Stacker, 2018 U.S. App. LEXIS 7628, at *10. The panel dealt with this by averring that presenting Ms. Gorman's grand jury testimony as a defense would not have run afoul of this ethical duty. Id. The panel reasoned this would only be true if in fact, counsel learned that Mr. Stacker indeed possessed the firearm (because in her grand jury testimony, Ms. Gorman testified that she never saw Mr. Stacker with a firearm). Id. Such reasoning fails to account for the fact that counsel did indeed learn that Mr. Stacker did temporarily possess the gun to remove it from Ms. Gorman. This is precisely why the jury said they convicted Mr. Stacker. Had the grand jury testimony been timely disclosed, counsel would not have pursued further investigation and would likely never have found a need to obtain Ms. Gorman's sworn statement for purposes of plea negotiations. Counsel would have instead been in a very strong negating position because the only other eyewitness to the events of the day had recanted her account of those events. The prosecution simply did not want Mr. Stacker to ever be this position, as evidenced by its repeated efforts to lull Mr. Stacker by averring it was aware of its Brady obligations, while withholding material evidence. The prosecution forgot that its duty to disclose material evidence favorable to the accused is rooted in the premise that the sovereign's ultimate

interest in criminal prosecution is not to maximize convictions for their own sake, but to ensure that “justice shall be done.” Agurs, 427 U.S. 111.

This Court has advised that because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. Agurs, 427 U.S. at 108. Mr. Stacker’s case models this warning because the significance of this item of evidence was of sufficient significance to result in complete alteration of trial preparation and strategy, thereby denying Mr. Stacker’s right to a fair trial. This is particularly true where, as here, the verdict was already of questionable validity, and so even additional evidence of relatively minor importance might be sufficient to create reasonable doubt. Id. at 113.

In the end, it eviscerates the purpose of the Brady rule and encourages gamesmanship to allow the prosecution to postpone disclosures to the last minute. As the Second Circuit noted in Leka, 257 F.3d at 101, the belated disclosure of Brady material “tend[s] to throw existing strategies and [trial] preparation into disarray.” It becomes “difficult [to] assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available.” Id.; see also United States v. Devin, 918 F.2d 280, 290 (1st Cir. 1990) (explaining that a Brady violation would occur if delayed disclosure altered defense strategy and timely disclosure would likely have resulted in a more effective strategy). The Sixth Circuit’s rule that a defendant can never make out a Brady violation on the basis of the effect of delay on his trial preparation and strategy creates dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information. It is not hard to imagine the circumstances in which the belated revelation

of Brady material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on. These all happened in this case. To force defendants to bear these costs without recourse offends the notion of a fair trial, which underlies this Court's Brady jurisprudence. Mr. Stacker therefore respectfully requests this Court to intervene and grant certiorari to remedy the situation in the Sixth Circuit.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 25th day of April, 2018.

Respectfully submitted,

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