

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

ANTONIO STACKER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

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PETITIONER'S APPENDIX

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COMES NOW, Petitioner Antonio Stacker, by and through his counsel of record, Doris Randle-Holt, Federal Public Defender for the Western District of Tennessee, by Mary Jermann-Robinson, Assistant Federal Defender, pursuant to Supreme Court Rule 14.1(h)(i), and submits the following Appendix A for this Court's review with his Petition for Writ of Certiorari.

Dated this 25th day of April, 2018.

Respectfully submitted,

Mary C. Jermann-Robinson  
Doris A. Randle-Holt  
Federal Public Defender for the  
Western District of Tennessee  
By: Mary C. Jermann-Robinson  
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## **APPENDIX A**



Neutral

As of: April 19, 2018 4:30 PM Z

**United States v. Stacker**

United States Court of Appeals for the Sixth Circuit

March 26, 2018, Filed

No. 16-6721

**Reporter**

2018 U.S. App. LEXIS 7628 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellee, v. ANTONIO  
STACKER, aka Antonio Watkins,  
Defendant-Appellant.

**Notice:** NOT RECOMMENDED FOR  
FULL-TEXT PUBLICATION. *SIXTH  
CIRCUIT RULE 28* LIMITS CITATION  
TO SPECIFIC SITUATIONS. PLEASE  
SEE *RULE 28* BEFORE CITING IN A  
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MUST BE SERVED ON OTHER  
PARTIES AND THE COURT. THIS  
NOTICE IS TO BE PROMINENTLY  
DISPLAYED IF THIS DECISION IS  
REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM  
THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT  
OF TENNESSEE.

United States v. Stacker, 2017 U.S. App.  
LEXIS 21229 (6th Cir. Ky., Sept. 27, 2017)

**Case Summary**

**Overview**

**HOLDINGS:** [1]-In an action where defendant was convicted for being a felon in possession of a firearm, the government's timing in producing defendant's girlfriend's grand jury testimony indicating defendant had not possessed a gun after defendant informed the district court of his intention to advance a self-defense justification did not support relief because the prejudice inquiry of a Brady violation did not extend to assessments of the impact that the suppression might have had on subsequent trial strategy; [2]-Admission of an officer's testimony that 25 minutes after the incident she had overheard the girlfriend tell her mother that defendant had pulled a gun on her was proper as an excited utterance under *Fed. R. Evid. 803(2)* because the district court's conclusion did not give rise to a firm conviction that a clear error of judgment was committed.

**Outcome**

Orders affirmed.

**LexisNexis® Headnotes**

Criminal Law &  
 Procedure > ... > Discovery &  
 Inspection > Brady  
 Materials > Appellate Review

Criminal Law &  
 Procedure > ... > Discovery &  
 Inspection > Brady Materials > Duty of  
 Disclosure

Criminal Law &  
 Procedure > Appeals > Standards of  
 Review > De Novo Review

Criminal Law &  
 Procedure > ... > Discovery &  
 Inspection > Brady Materials > Brady  
 Claims

#### **HNI[⚡] Brady Materials, Appellate Review**

A reviewing court reviews de novo the district court's determination as to the existence of a Brady violation. Brady imposes on prosecutors a broad obligation to disclose exculpatory evidence. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Brady generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose. However, untimely disclosure does violate Brady when the delay itself causes prejudice.

Criminal Law &  
 Procedure > ... > Discovery &  
 Inspection > Brady Materials > Brady  
 Claims

Criminal Law &  
 Procedure > Trials > Jencks Act > Scope

#### **HN2[⚡] Brady Materials, Brady Claims**

Under the *Jencks Act*, 18 U.S.C.S. § 3500, the government may not be compelled before trial to supply the defense with any material statement made by a witness to the government that is signed or otherwise verified by the declarant. When Brady material sought by a defendant is covered by the *Jencks Act*, the terms of that Act govern the timing of the government's disclosure, and the evidence is properly disclosed only after testimony at trial.

Criminal Law &  
 Procedure > Trials > Jencks Act

#### **HN3[⚡] Trials, Jencks Act**

The purpose of the *Jencks Act* is to protect potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial.

Criminal Law &  
 Procedure > ... > Discovery &  
 Inspection > Brady Materials > Brady  
 Claims

#### **HN4[⚡] Brady Materials, Brady Claims**

In the context of a Brady violation, 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. The 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.

Criminal Law &  
Procedure > ... > Discovery &  
Inspection > Brady Materials > Brady  
Claims

#### **HN5[⚡] Brady Materials, Brady Claims**

In the context of a Brady violation, the prejudice inquiry does not extend to assessments of the impact that the suppression may have had on Defendants' subsequent trial strategy.

Legal Ethics > Professional  
Conduct > Tribunals

#### **HN6[⚡] Professional Conduct, Tribunals**

That counsel has a duty of candor under the Tennessee Rules of Professional Conduct is beyond dispute. Tenn. Sup. Ct. R. Prof. Conduct 8, 3.3(a)-(c).

Criminal Law & Procedure > ... > Grand  
Juries > Evidence Before Grand  
Jury > Use in Subsequent Proceedings

Evidence > ... > Hearsay > Exceptions >  
Former Testimony of Unavailable

Declarants

#### **HN7[⚡] Evidence Before Grand Jury, Use in Subsequent Proceedings**

Grand jury testimony is admissible hearsay when the witness is unavailable and the testimony possesses circumstantial guarantees of trustworthiness.

Criminal Law &  
Procedure > ... > Standards of  
Review > Abuse of  
Discretion > Evidence

Evidence > ... > Exceptions > Spontaneo  
us Statements > Excited Utterances

#### **HN8[⚡] Abuse of Discretion, Evidence**

In the context of the admission of a phone call as an excited utterance, a reviewing court reviews the district court's decision for an abuse of discretion. An abuse of discretion occurs when a ruling is based on an error of law or a clearly erroneous finding of fact, or when the reviewing court is otherwise left with the definite and firm conviction that the district court committed a clear error of judgment.

Evidence > ... > Exceptions > Spontaneo  
us Statements > Excited Utterances

#### **HN9[⚡] Spontaneous Statements, Excited Utterances**

Excited utterances relating to a startling event or condition are admissible when made while the declarant was under the

stress of excitement caused by the event or condition. *Fed. R. Evid. 803(2)*. First, there must be an event startling enough to cause nervous excitement. Second, the statement must be made before there is time to contrive or misrepresent. And, third, the statement must be made while the person is under the stress of the excitement caused by the event.

**Counsel:** For United States of America, Plaintiff - Appellee: Calvin David Biggers Jr., Kevin G. Ritz, Assistant U.S. Attorney, Bridgett Stigger, Office of the U.S. Attorney, Memphis, TN.

For Antonio Stacker, Defendant - Appellant: Mary C. Jermann-Robinson, Assistant Federal Public Defender, Federal Public Defender, Memphis, TN.

**Judges:** Before: McKEAGUE and WHITE, Circuit Judges; HOOD, District Judge.\*

## Opinion

### ORDER

Antonio Stacker, a federal prisoner proceeding through counsel, appeals from the district court's orders denying his motions to dismiss and for a new trial following his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

On October 18, 2015, Ladeidra Conley walked to her car to go to church. She heard her neighbor, Keona Gorman, calling her name from Gorman's third-floor balcony. Gorman told Conley that Stacker, Gorman's boyfriend, had taken her cell phone and was inside the apartment with a gun. Conley called the police.

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

Leading up to trial, the parties discussed a plea agreement. While negotiating, Stacker disclosed a notarized written statement by Gorman stating that the gun was hers and that she had pointed it at Stacker because he had taken her cell phone when he noticed she had received texts from an ex-boyfriend. Gorman wrote that Stacker immediately dispossessed her of the gun, unloaded it, placed the gun and ammunition on the kitchen counter, and left with her phone. Gorman wrote that she quickly became concerned because the gun was unregistered and that she threw it off of her balcony and into the adjacent grassy area. No plea agreement was reached.

Four days before trial, Stacker voluntarily informed the court he intended to advance a self-defense justification, which required him to admit to possessing the gun. The

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\* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

next day—the Friday before trial—the government produced a transcript [\*3] of Gorman's grand jury testimony. Gorman had testified before the grand jury that Stacker had never possessed the gun. Stacker moved to dismiss the indictment on the basis that the government had violated its obligation to disclose all material exculpatory evidence, pursuant to Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Stacker's counsel argued that, had he known of Gorman's testimony, he would not have turned over Gorman's sworn statement or advanced a self-defense justification, but would have directly attacked the government's ability to prove possession. The district court held that the government had violated *Brady* and that the violation prejudiced Stacker, but determined that the prejudice was insufficient to warrant dismissal. Instead, the court prohibited the government from using Gorman's sworn statement unless Stacker introduced it himself.

At trial, Officer Jade Griffin, who had responded to the call and was inside Gorman's apartment immediately after Stacker fled, testified that about twenty-five minutes after she arrived on the scene she overheard Gorman calling her mother and telling her that Stacker had pulled a gun on her. The defense objected on hearsay grounds, but the court admitted the testimony under the [\*4] excited utterance exception.

Stacker took the stand and presented his self-defense narrative. Although Gorman initially intended to invoke her *Fifth Amendment* right to avoid testifying, she

decided to take the stand at the end of trial. Her testimony followed the narrative presented in her sworn statement—that the gun was hers, that she had retrieved it and pointed it at Stacker, and that he had possessed it only long enough to unload it and place it on the counter. The jury voted to convict.

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

On the basis of that revelation, Stacker filed a second motion to dismiss or, in the alternative, for acquittal. He argued again 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 [\*5] argue that he had not possessed the gun. The district court denied relief, holding that, even if the defense was ethically barred from arguing that 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. "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."

Stacker filed a motion for a new trial, challenging the court's reasoning that he could have simply foregone any defense and held the government to its proof. He 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.'" Stacker sought a new trial with new counsel who would not have been ethically bound by Stacker's self-defense declaration.

The district court incorporated [\*6] the reasoning from its denial of 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." Stacker was ultimately sentenced to seventy months in prison to be followed by three years of supervised release.

Stacker now appeals, arguing that the prejudice flowing from the government's *Brady* violation justifies dismissal, acquittal, or a new trial, and that the district court erred in admitting Officer Griffin's hearsay testimony regarding Gorman's telephone conversation with her mother.

**HNI** [¶] We review de novo the district court's determination as to the existence of a *Brady* violation. See *United States v. Warshak*, 631 F.3d 266, 300 (6th Cir. 2010). *Brady* imposes on prosecutors a

"broad obligation to disclose exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281-82. "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure [\*7] to disclose." *United States v. Blood*, 435 F.3d 612, 627 (6th Cir. 2006) (quoting *United States v. Bencs*, 28 F.3d 555, 560-61 (6th Cir. 1994)). However, untimely disclosure does violate *Brady* "when the delay itself causes prejudice." *Id.*

The government first argues that its timing was authorized by the *Jencks Act*, 18 U.S.C. § 3500. **HN2** [¶] Under the Act, the government may not be compelled before trial "to supply the defense with any material statement made by a witness to the government that is signed or otherwise verified by the declarant." *United States v. Davis*, 306 F.3d 398, 421 (6th Cir. 2002). "When *Brady* material sought by a defendant is covered by the *Jencks Act*[,] . . . the terms of that Act govern the timing of the government's disclosure," and the evidence is "properly disclosed [only] after testimony at trial." *Bencs*, 28 F.3d at 561 (citing *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988)).

But this argument rings hollow in light of the government's pre-trial disclosure of

Gorman's grand jury testimony. HN3[↑] The purpose of the *Jencks Act* is to protect "potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial." *Presser*, 844 F.2d at 1285. The government's decision to disclose the material before Gorman testified clearly indicates that intimidation was not a concern. It cannot now use the Act as post-hoc rationalization for failing to meet its obligation under *Brady*.

The remaining question is whether the delayed disclosure [\*8] prejudiced Stacker. If so, Stacker has made a prima facie case of a *Brady* violation and is entitled to some relief, up to and including a new trial.

HN4[↑] 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." *Strickler*, 527 U.S. at 289. "[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.* at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

Stacker's prejudice argument boils down to a single point: he would have been acquitted if he had not presented a self-defense justification. More broadly, he asserts that, had he known about 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.

To the first point, the government argues that strategic prejudice is not enough. The government is correct: HN5[↑] "the prejudice inquiry 'does not extend to assessments of the impact that the suppression may have had on [Defendants'] subsequent trial strategy.'" [\*9] *United States v. Fields*, 763 F.3d 443, 461 (6th Cir. 2014) (alteration in original) (quoting *Smith v. Metrish*, 436 F. App'x 554, 564 (6th Cir. 2011)). Stacker argues that *Fields* turned on the defendants' failure to sufficiently explain how their strategy would have changed. It is true that in *Fields* "[defendants] claim[ed] that, armed with [the *Brady* material], they would have crafted a different defense strategy for trial, [but they] offer[ed] no further specifics." *Id.* at 460-61. But Stacker takes that sentence out of context. Indeed, this court cited the limitation on strategic prejudice as an entirely separate basis to reject the defendants' argument. *Id.* at 461.

On the second point, the government responds that "Stacker is simply wrong that vague 'ethical considerations' somehow trumped his rights to pursue whatever defense he wanted to." Instead, the government argues, Stacker could have chosen to remain silent and simply put the government to its proof. But this is an empty choice: had he remained silent, the government would never have called Gorman to testify. It would have merely presented Conley's testimony that Gorman yelled from the balcony for help and Officer Griffin's testimony that she overheard Gorman tell her mother that Stacker had a

gun. At that point, Stacker's only effective defense would be to [\*10] contradict those statements with Gorman's sworn statement, obliterating the district court's attempt to reverse the prejudice.

Still, the government is correct that Stacker does not show that his counsel was ethically precluded from abandoning the self-defense theory and using the grand jury testimony to attack the government's case-in-chief. HN6[⚡] That counsel has a duty of candor under the Tennessee Rules of Professional Conduct is beyond dispute, *see* Tenn. Sup. Ct. R. 8, RPC 3.3(a)-(c), but Stacker simply fails to show how presenting Gorman's grand jury testimony would have run afoul of that duty. Indeed, such a conclusion follows only if counsel learned during trial preparations that Stacker did in fact possess the gun, in which case the government's delay would have no bearing on counsel's ethical obligations to avoid presenting Gorman's grand jury testimony. So 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 Stacker could have directly contradicted the government's case by moving to admit Gorman's grand jury testimony as hearsay—just as the government had done with Officer Griffin's and Conley's [\*11] statements. *See United States v. Barlow*, 693 F.2d 954, 961-62 (6th Cir. 1982) (holding that HN7[⚡] grand jury testimony was admissible hearsay when the witness is unavailable and the testimony possesses "circumstantial guarantees of trustworthiness"). Given the district court's

order prohibiting the government from introducing Gorman's sworn statement, the case would have been submitted to the jury without any eye-witness testimony that Stacker possessed the gun—the result Stacker sought in a new trial. Stacker therefore fails to show that the government's delay supports relief.

Stacker also argues the district court erred in admitting Gorman's phone call as an excited utterance. HN8[⚡] We review the district court's decision for an abuse of discretion. United States v. Arnold, 486 F.3d 177, 184 (6th Cir. 2007). "An abuse of discretion occurs when a ruling is based on an error of law or a clearly erroneous finding of fact, or when the reviewing court is otherwise left with the definite and firm conviction that the district court committed a clear error of judgment." United States v. Kerley, 784 F.3d 327, 347 (6th Cir. 2015) (quoting United States v. Kumar, 750 F.3d 563, 566 (6th Cir. 2014)).

HN9[⚡] Excited utterances "relat[ing] to a startling event or condition" are admissible when "made while the declarant was under the stress of excitement caused by the event or condition." Arnold, 486 F.3d at 184 (quoting Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1057 (6th Cir. 1983)); FED. R. EVID. 803(2). "First, there must be an event startling enough [\*12] to cause nervous excitement. Second, the statement must be made before there is time to contrive or misrepresent. And, third, the statement must be made while the person is under the stress of the excitement caused by the event." *Id.* (quoting Haggins, 715 F.2d at 1057).

Stacker's primary argument is that twenty-five minutes elapsed between his flight and the phone call. Officers were present throughout that time, and Gorman was aware that Stacker was in police custody. Thus, Stacker argues, "any statement [Gorman] made would be the result of reflective thought, not a spontaneous reaction." But Stacker's conclusion relies on his interpretation of the relevant facts. And considering that Gorman had allegedly just been held at gunpoint, the district court's alternative conclusion does not give rise to a "definite and firm conviction that the district court committed a clear error of judgment." Kerley, 784 F.3d at 347.

Accordingly, we **AFFIRM** the district court's orders.