

No.

Supreme Court of the United States

SAMUEL TURNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

COMES NOW PETITIONER Samuel Turner and submits the attached appendix pursuant to Supreme Court Rules.

Samuel Turner
Petitioner
13254-047
P.O. Box 725
Edgefield, SC 29824

Date: _____

APPENDIX A
ORDER & JUDGMENT OF THE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
DATED 8-16-19

United States v. Turner

United States Court of Appeals for the Eighth Circuit

May 15, 2019, Submitted; August 16, 2019, Filed

No. 18-2262

Reporter

934 F.3d 794 *; 2019 U.S. App. LEXIS 24491 **; 2019 WL 3849560

United States of America, Plaintiff - Appellee v.
Samuel Turner, Defendant - Appellant

Opinion by: MELLOYfv

Opinion

Subsequent History: Rehearing denied by United States v. Turner, 2019 U.S. App. LEXIS 29464 (8th Cir. Neb., Sept. 30, 2019)

Prior History: [**1] Appeal from United States District Court for the District of Nebraska - Lincoln.

United States v. Turner, 2018 U.S. Dist. LEXIS 20023 (D. Neb., Feb. 7, 2018)

Counsel: For United States of America, Plaintiff - Appellee: Sara Elizabeth Fullerton, Assistant U.S. Attorney, U.S. Attorney's Office, Lincoln, NE.

Samuel Turner, Defendant - Appellant, Pro se, Edgefield, SC.

For Samuel Turner, Defendant - Appellant: Darik J. Von Loh, Hernandez & Frantz, Lincoln, NE.

Judges: Before COLLOTON, MELLOY, and SHEPHERD, Circuit Judges.

[*796] MELLOY, Circuit Judge.

At approximately 11:30 p.m. on August 9, 2017, a dispatcher alerted Lincoln Police Department ("LPD") Officer Christopher Monico to a possible disturbance near the trailer court where Defendant Samuel Turner lives. As Monico drove through Turner's trailer court looking for a suspect, Monico observed a woman standing next to a cluster of mailboxes and stopped to talk to her. The woman was Kimberlie Bridges, an acquaintance of Turner's and the mother of his child. Officer Craig Price arrived on the scene shortly thereafter to serve as backup.

While Monico and Price were talking to Bridges, Turner walked over to them. As Turner approached, Monico shined a flashlight on Turner and asked him about the reported disturbance. Turner asked Monico to [**2] lower the flashlight because it was in his face. As Monico did so, he saw that Turner was standing on what looked like a bag containing a large quantity of methamphetamine.

Monico ordered Turner and Bridges to place their hands on a nearby vehicle. Turner did not comply. The officers approached Turner. As they did, Turner reached down, touched the bag of methamphetamine, and attempted to grab it. The

Turner Exhibit A1

officers physically seized him and, after some resistance, handcuffed him and placed him in a cruiser. As they did, Turner stated that the "dope" was not his.

A second bag of methamphetamine was discovered near Bridges. Price secured the bag. He and Monico arrested Bridges. They then searched Turner and found, among other things, a cell phone, which Turner said was his.

A few days later, Monico asked Officer Corey Weinmaster to process Turner's cell phone pursuant to a search warrant. Weinmaster extracted information from the phone, including photographs and text messages. The photographs included one of Turner, two of cash in different denominations, and a screenshot of a text-message conversation between two people. The conversation ended with a message that said, in part, "[S]am said you [*3] better bring him his money stop playing games with ppl." The text messages included one sent from Turner's phone which told the recipient to pick up a pool and to "[b]ring that money." A second outgoing message made a reference to the intended recipient exchanging sexual favors for "dope." A third outgoing message said, "Hey this is sam calling see if you got that money."

Turner was indicted on October 17, 2017, and charged with knowingly and intentionally possessing with intent to distribute five or more grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1). He subsequently pled not guilty at an initial appearance.

Turner filed a motion "to suppress [his] stop and subsequent arrest." He claimed that Monico and Price lacked a reasonable suspicion to detain and question him when they stopped near his house to investigate the disturbance. A magistrate judge conducted a suppression hearing, finding that: (1) the officers had not seized Turner when they questioned him about the disturbance; and (2) they had a right to detain Turner when they found what looked like a bag of methamphetamine under his

foot. The district court,¹ at the magistrate judge's recommendation, denied the motion.

[*797] Turner also filed [**4] a motion requesting that the court issue a subpoena duces tecum. Turner sought "investigative reports and materials prepared by [the LPD]" about "calls" officers made to his "home at the time of his arrest," "calls" they made at his home over "the two days prior" to his arrest, and "calls" they made "to [his] trailer court or [the] immediately surrounding area." Turner claimed that the reports would provide "exculpatory evidence" because they would show that he had not been trafficking drugs and that someone else may have dropped the bag of methamphetamine. The district court denied Turner's motion for a subpoena after a hearing.

The district court then held a three-day jury trial in February 2018. Monico and Price testified about the events of August 9, 2017, as described above. A forensic scientist testified that the bag found under Turner's foot contained more than thirty grams of actual methamphetamine. Weinmaster described how he extracted materials from Turner's phone and what he extracted. Over Turner's objections—Turner claimed that the exhibits consisted of inadmissible hearsay and were not properly authenticated—the photographs and text messages were admitted into evidence. [**5] Weinmaster stated that by looking at the exhibits alone, he could not tell whether the pictures originated on Turner's phone or were sent to it. Weinmaster could, however, tell that the text messages had been sent from the phone. He and two officers from the LPD's drug unit testified that the photographs and text messages were significant because they contained images and language often found on drug dealers' phones.

Other officers described an interview they conducted with Turner after he was arrested and had waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

¹ The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

(1966). The officers described how Turner confessed to being a methamphetamine user and told them that they might find evidence of people contacting him about drugs on his cell phone. Yet another officer testified that the amount of methamphetamine found under Turner's foot was "a seller quantity of methamphetamine."

At the conclusion of the government's evidence, Turner moved to dismiss, but the district court denied his motion. Turner called witnesses who did not materially refute the evidence proffered by the government² and then moved for a judgment of acquittal. The district court denied the motion and instructed the jury. The jury deliberated and returned [**6] with a guilty verdict. A few months later, the district court sentenced Turner to 360 months' imprisonment and eight years of supervised release. Turner timely appealed.

Turner argues that the district court erred in denying his motion to suppress. After de novo review, see United States v. Hayden, 759 F.3d 842, 846 (8th Cir. 2014), we disagree. An officer may generally approach an individual and ask him questions, even when the officer does not have a basis for suspecting that the individual has committed or is committing a crime, so long as the officer "do[es] not convey a message that compliance with [his] request[] is required." United States v. Cook, 842 F.3d 597, 600 (8th Cir. 2016) (quoting Florida v. Bostick, 501 U.S. 429, 435, 111 S. Ct. 2382, 115 L. Ed. 2d 389 [**798] (1991)). Furthermore, if in the process of questioning the individual the officer develops a reasonable suspicion or probable cause to believe that a crime is being committed by that individual, the officer may take further, reasonable action to confirm or dispel that suspicion or probable cause. See Hayden, 759 F.3d at 847 (holding that officers did not violate the Fourth Amendment when they

seized and searched a man after a consensual encounter because they had developed a "reasonable suspicion that criminal activity was afoot"). That is exactly what happened here. Moreover, nothing in the record suggests Officers Monico and Price did anything [**7] while they were questioning Turner to convey the message that his compliance was required. Cf. id. ("[S]hining a flashlight to illuminate a person in the darkness is not a coercive act that communicates an official order to stop or comply."). Consequently, the district court did not err in denying Turner's motion to suppress.

Turner likewise argues that the district court erred in denying his motion for a subpoena duces tecum. We review such denials for an abuse of discretion. United States v. Bailey, 700 F.3d 1149, 1152 (8th Cir. 2012). A party requesting a subpoena duces tecum "must identify the documents [requested] with adequate specificity and show that the documents are relevant and admissible." United States v. Bradford, 806 F.3d 1151, 1155 (8th Cir. 2015). Turner did not identify the specific reports he sought in his motion for a subpoena. Instead, he broadly asked for "investigative reports and materials" about police "calls" to his "home at the time of" and "for the two days prior" to his arrest as well as to the "trailer court or [the] immediately surrounding area." We hold, therefore, that the district court did not abuse its discretion in denying the motion.

Turner argues that the district court erred in admitting the text messages and photographs extracted from his phone into evidence. He [**8] claims that they lacked foundation because they were not properly authenticated. He also claims that they contain inadmissible hearsay. "[W]e review a district court's evidentiary rulings for an abuse of discretion." United States v. Guzman, 926 F.3d 991, 999 (8th Cir. 2019).

Regarding Turner's authentication argument, we hold that the government met its burden of "produc[ing] evidence sufficient to support a

² One of Turner's witnesses did offer an exculpatory explanation for the text that referred to picking up a pool. The witness's testimony, however, did not contradict Monico's and Price's description of events the night Turner was arrested nor any of the other testimonies given.

finding" that the items were what the government claimed they were (i.e., text messages and photographs from Turner's phone). Fed. R. Evid. 901(a). Turner said the phone was his. The text messages and photographs were extracted from the phone. Officer Weinmaster testified about the extraction process. And at least one of the texts said "this is sam." These factors together provide a rational basis for believing that the text messages and photographs were Turner's, which is all that is required to clear the low bar for authenticating evidence, see United States v. Needham, 852 F.3d 830, 836 (8th Cir. 2017) ("The party authenticating the exhibit need only prove a rational basis for that party's claim that the document is what it is asserted to be." (internal quotation marks and citation omitted)).

Regarding Turner's hearsay argument, we hold that the text messages and the photographs of Turner and the cash do not contain [**9] inadmissible hearsay. The text messages contain statements by an opposing party, which means they are not hearsay. See Fed. R. Evid. 801(d)(2). The photographs of Turner and the cash are images, not statements, so they too are not hearsay. See id. 801(c) ("Hearsay" means a *statement* that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers [**799] in evidence to prove the truth of the matter asserted in the statement." (emphasis added)); id. 801(a) (defining the term "statement").

Moreover, even assuming for the sake of argument that the screenshot of the text-message conversation contains inadmissible hearsay, we hold that admitting it was harmless. See Needham, 852 F.3d at 837 (holding that the admission of certain screenshots "would have been harmless and could not have substantially influenced the jury's verdict . . . because of the overwhelming evidence provided by the government of [the defendant's] guilt" (internal quotation marks and citation omitted)). The government produced overwhelming evidence that Turner possessed five or more grams of methamphetamine with the intent to distribute. We

therefore decline to reverse on evidentiary grounds.

For similar reasons, we also hold that the jury's [**10] verdict was supported by sufficient evidence. See 8th Cir. R. 47B. Accordingly, we affirm the judgment of the district court.

End of Document

APPENDIX B
JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
ENTERED 5-18-18

UNITED STATES DISTRICT COURT

for the
District of Nebraska

UNITED STATES OF AMERICA

v.

SAMUEL TURNER

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:17CR3121-001
USM Number: 13254-047

Darik J. Von Loh
Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count I of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section & Nature of Offense

21:841(a)(1) and 841(b)(1) POSSESSION WITH INTENT TO
DISTRIBUTE 5 GRAMS OR MORE OF METHAMPHETAMINE
ACTUAL, WITH PRIOR FELONY DRUG CONVICTION

Offense Ended

August 9, 2017

Count

1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☐ Count(s) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

May 17, 2018

Date of Imposition of Sentence:

s/ Richard G. Kopf
Senior United States District Judge

May 18, 2018

Date

DEFENDANT: SAMUEL TURNER
CASE NUMBER: 4:17CR3121-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **three hundred sixty (360) months**.

☒ The Court makes the following recommendations to the Bureau of Prisons:

1. In the strongest possible terms that the defendant be enrolled in the Intensive Drug Treatment Program (RDAP) of the Bureau of Prisons.
2. In the strongest possible terms that the defendant receive vocational education while incarcerated.
3. That the defendant receive credit for time served from 08/09/2017 until 05/17/2018 for official detention on a related case and this case.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: SAMUEL TURNER
CASE NUMBER: 4:17CR3121-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **eight (8) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to

DEFENDANT: SAMUEL TURNER

CASE NUMBER: 4:17CR3121-001

unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

- a. You must not purchase or possess, use, distribute, or administer any alcohol, just the same as any other narcotic or controlled substance.
- b. You must submit your person, residence, office, or vehicle to a search conducted by a United States Probation Officer at any time; failure to submit to a search may be grounds for revocation; you must warn any other residents that the premises may be subject to searches pursuant to this condition.
- c. You must attend, pay for and successfully complete any diagnostic evaluations, treatment or counseling programs, or approved support groups (e.g., AA/NA) for alcohol and/or controlled substance abuse, as directed by the probation officer.
- f. You must attend, successfully complete, and pay for any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer.
- n. You must provide the probation officer with access to any requested financial information.
- zz. You must report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 100 Centennial Mall North, 530 U.S. Courthouse, Lincoln, Nebraska, (402)437-1920, within seventy-two (72) hours of being placed on probation or release from confinement and, thereafter, as directed by the probation officer.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: SAMUEL TURNER

CASE NUMBER: 4:17CR3121-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100			

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Totals			

☐ Restitution amount ordered pursuant to plea agreement \$

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: SAMUEL TURNER
CASE NUMBER: 4:17CR3121-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$100 due immediately.
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Without limiting the foregoing, and following release from prison, the defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of \$100 or 3% of the defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the defendant shall be responsible for providing proof of payment to the probation officer as directed.

The criminal monetary penalty is due in full on the date of the judgment. The defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

All financial penalty payments are to be made to the Clerk of the U. S. District Court, 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102-1322.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Turner Exhibit B6

AO245B(Rev 02/16) Judgment in a Criminal Case

Judgment Page 7 of 7

DEFENDANT: SAMUEL TURNER
CASE NUMBER: 4:17CR3121-001

CLERK'S OFFICE USE ONLY:

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the United States District Court for the District of Nebraska.

Date Filed: _____

DENISE M. LUCKS, CLERK

By _____ Deputy Clerk

Turner Exhibit B7

APPENDIX C
ORDER OF THE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
DATED 9-30-19

United States v. Turner

United States Court of Appeals for the Eighth Circuit

September 30, 2019, Decided

No: 18-2262

Reporter

2019 U.S. App. LEXIS 29464 *

United States of America, Appellee v. Samuel
Turner, Appellant

Prior History: [*1] Appeal from U.S. District
Court for the District of Nebraska - Lincoln. (4:17-
cr-03121-RGK-1).

United States v. Turner, 934 F.3d 794, 2019 U.S.
App. LEXIS 24491 (8th Cir. Neb., Aug. 16, 2019)

Counsel: United States of America, Plaintiff -
Appellee: Sara Elizabeth Fullerton, Assistant U.S.
Attorney, U.S. Attorney's Office, Lincoln, NE.

Samuel Turner, Defendant - Appellant, Pro se,
Edgefield, SC.

For Samuel Turner, Defendant - Appellant: Darik J.
Von Loh, Hernandez & Frantz, Lincoln, NE.

Opinion

ORDER

The petition for rehearing by the panel is denied.

APPENDIX D
USDC MAG R&R (DENY MOTION TO SUPPRESS)
ENTERED 1-12-18

United States v. Turner

United States District Court for the District of Nebraska

January 12, 2018, Decided; January 12, 2018, Filed

4:17CR3121

Reporter

2018 U.S. Dist. LEXIS 5649 *; 2018 WL 400760

UNITED STATES OF AMERICA, Plaintiff, vs.
SAMUEL TURNER, Defendant.

Subsequent History: Motion denied by United States v. Turner, 2018 U.S. Dist. LEXIS 20023 (D. Neb., Feb. 7, 2018)

Later proceeding at United States v. Turner, 2019 U.S. Dist. LEXIS 192849 (D. Neb., Oct. 25, 2019)

Counsel: [*1] For Samuel Turner, Defendant:
John C. Vanderslice, FEDERAL PUBLIC
DEFENDER'S OFFICE - LINCOLN, Lincoln, NE.

For USA, Plaintiff: Sara E. Fullerton, U.S.
ATTORNEY'S OFFICE - LINCOLN, Lincoln, NE.

Judges: Cheryl R. Zwart, United States Magistrate
Judge.

Opinion by: Cheryl R. Zwart

Opinion

MEMORANDUM AND ORDER

Defendant has moved in limine to exclude evidence regarding Amanda G. Kuhn and any testimony this witness may provide on behalf of the government, (Filing No. 22), and for an order permitting Defendant to subpoena the Lincoln Police Department's records for its investigation of Kimberly E. Bridges, (Filing No. 26). For the reasons stated below, these motions will be denied.

STATEMENT OF FACTS

Defendant is charged with knowingly and intentionally possessing with the intent to distribute five grams or more of methamphetamine on August 9, 2017. (Filing No. 1). He initially appeared before the undersigned magistrate judge on November 15, 2017. A case progression order was entered which set a January 16, 2018 trial date, and a pretrial motion deadline of December 15, 2017.

The charges against Defendant arise from the August 9, 2017 arrest of both Defendant and Kimberlie Bridges by the Lincoln Police Department ("LPD"). Defendant [*2] states both arrests were based on the same facts, but unlike Defendant, Bridges was charged with only possession of a controlled substance, for which she is never faced federal charges, and the state charges against her were dismissed.

Based on the disparity in charges filed against Defendant and Bridges, Defendant believes the LPD records of its investigation against Bridges will include exculpatory information relevant to the charges against Defendant and records useful to impeach of the government's witnesses. (Filing No. 27). To that end, Defendant requests leave to subpoena the LPD Records Custodian for

Turner Exhibit D1

production of "all investigative reports regarding Kimberlie E. Bridges regarding her arrest on August 9, 2017," and the subsequent investigation related to that arrest. (Filing No. 26-2).

Defendant also claims that just prior to 5:00 p.m. on December 14, 2017, the government emailed to defense counsel four additional discovery documents regarding the testimony of Amanda G. Kuhn. Defendant states these documents were available to the government as early as June 30, 2017. The documents included plea agreements signed by Kuhn, (Filing No. 32 at CM/ECF p. 2), and reports of her proffer [*3] interviews. The interview statements were not transcribed or verbatim, and they were not written, signed or adopted by Kuhn. (Filing No. 32, at CM/ECF p. 3).¹

ANALYSIS

A) Motion in Limine—Testimony of and Evidence Regarding Amanda G. Kuhn.

Defendant's motion in limine states documents regarding Kuhn were untimely disclosed under Rule 16, Defendant was prejudiced by this delay, and Kuhn's testimony and any evidence about her must be excluded at trial. (Filing No. 22). Defendant's brief further states the government's December 14, 2017 document disclosure was untimely under the Jencks Act and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

1) Plea Agreements.

As noted by the government, Kuhn's plea agreements are Rule 16 materials. The government argues that even assuming it violated the disclosure timing requirements of Rule 16, Kuhn's testimony cannot be excluded as untimely disclosed because

Defendant has failed to show any resulting prejudice. (Filing No. 32, at CM/ECF p. 3).

Assuming a discovery violation occurred, before imposing a sanction for untimely disclosure, the court must consider: 1) whether the Government acted in bad faith and why production was delayed; 2) whether Defendant was prejudiced; and (3) whether any lesser sanction is appropriate to secure the [*4] government's timely compliance in the future. *United States v. Altman*, 507 F.3d 678, 680 (8th Cir. 2007).

As to the issue of prejudice, Defendant argues that as to documents first disclosed on December 14, 2017, he was unable to review those documents and then timely file pretrial motions before the December 15, 2017 deadline. But Defendant never moved to continue the pretrial motion deadline, and he has not explained what motions he would have filed had Kuhn's plea agreements been received earlier. Kuhn's plea agreements were disclosed on December 14, 2017, more than a month before the then-scheduled trial, and that trial has now been continued to conduct an evidentiary hearing on Defendant's motion to suppress. Under such circumstances, Defendant cannot show he is unable to adequately plan and prepare for trial due to the untimely disclosure of Kuhn's plea agreements. *Altman*, 507 F.3d at 680 (holding district court abused its discretion by excluding untimely disclosed testimony where the defense had four days to prepare). And even assuming the government failed to timely disclose the plea agreements, excluding Kuhn's testimony as a sanction for that delay would be unduly harsh and unjust. The plea agreements will not be excluded for alleged untimely disclosure [*5] under Rule 16.

2) Statements.

Citing Rule 16, the Jencks Act, and *Brady*, Defendant argues Kuhn's testimony must be stricken because the documents summarizing her proffer interviews were untimely disclosed.

i. Rule 16 and the Jencks Act.

¹ The alleged late-disclosed documents are not specifically described by Defendant. As such, Defendant has failed to provide a threshold evidentiary showing to support his motion in limine. But rather than denying Defendant's motion outright, the court relies on the document descriptions within the government's briefing.

Rule 16 does not authorize "the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Fed. R. Crim. P. 16(a)(2). As defined under 18 U.S.C. § 3500 (the "Jencks Act"), the documents at issue are not statements subject to the Act's disclosure requirements: They are not transcribed or verbatim statements; statements written, signed or otherwise adopted by Kuhn; or statements reciting or summarizing her grand jury testimony. 18 U.S.C. § 3500(e). Rather, "[t]he reports were written by law enforcement officers from their notes regarding [Kuhn's proffer] interviews." (Filing No. 32, at CM/ECF p. 3).

Moreover, "[i]n any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." 18 U.S.C.A. § 3500 (a). "[A]lthough in many cases the government [*6] freely discloses Jencks Act material to the defense in advance of trial, . . . the government may not be required to do so." *United States v. Wilson*, 102 F.3d 968, 971-2 (8th Cir. 1996)(citing *United States v. White*, 750 F.2d 726, 729 (8th Cir.1984).

So even assuming Kuhn's proffer interview documents are considered Jencks Act statements, the government was not required to disclose those documents before Kuhn testifies. With Kuhn's proffer statements disclosed more than a month before trial, Kuhn's testimony will not be excluded as untimely disclosed in violation of the Jencks Act or Rule 16.

ii. Brady v. Maryland.

Brady requires disclosure of all exculpatory information in the possession of or reasonably available to the prosecution. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). When filing a motion alleging the government has withheld Brady materials,

Defendant must show the information at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; the evidence was suppressed by the government, either willfully or inadvertently; and prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *U.S. v. Krauth*, 769 F.2d 473, 476 (8th Cir. 1985).

Defendant has failed to show Kuhn's proffer interview statements were exculpatory: The government affirmatively states that "[t]he information contained within the witness's statements contained only incriminating, not exculpatory information." (Filing No. 32, [*7] at CM/ECF p. 4). Defendant cannot show the government failed to disclose the statements: He received them more than a month before trial. And for the same reasons, Defendant cannot show any prejudice arising from an alleged late receipt of Kuhn's proffer statements. Defendant is not entitled to an order excluding Kuhn's testimony under Brady.

B) Motion for Issuance of Subpoena—LPD Investigative Records regarding Kimberlie E. Bridges.

1) Procedural Issue.

Pursuant to the court's progression order, "[t]he filing, briefing, and hearing of pretrial motions, including ex parte motions and applications, shall be governed by NECrimR 12.1 - 12.5." See Filing No. 14, ¶ 3. Nebraska Criminal Rule 12.3(b)(3) states:

In the case of a motion seeking discovery or disclosure of evidence, the motion must include a statement verifying that counsel for the moving party has conferred with opposing counsel in person or by telephone in a good-faith effort to resolve by agreement the issues raised by the motion and that the parties have been unable to reach such an agreement.

NECrimR 12.3(b)(3). The court's progression order further emphasizes this meet and confer

requirement, and its application to Defendant's pending motion for issuance of a subpoena, stating: [*8]

In the event that any motions are filed seeking . . . discovery of facts, documents, or evidence, including *Brady* material, as part of the motion the moving party shall recite that counsel for the movant has spoken with opposing counsel regarding the subject of the motion in an attempt to reach agreement without the involvement of the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of any such conferences.

See Filing No. 14, ¶ 3(b).

NECrimR 12.3(b)(3) and the above-quoted language of the court's progression order require the parties to attempt to resolve discovery disputes before seeking court assistance. Counsel and the parties are more informed than the court concerning the disputed issues and the discovery exchanged, and are therefore better equipped to engage in informed discussions which could potentially resolve disputes over pretrial disclosures of information. Although court intervention is sometimes necessary, the laboring oar for resolving discovery disputes should, and under this court's rules and progression order, does rest in the first instance with the parties. Requiring the parties to engage in good faith discussions before filing [*9] discovery motions allows for faster case progression and a more efficient use of judicial and attorney resources.

Defendant's motion to issue a subpoena does not state that the parties attempted to resolve this discovery dispute before Defendant filed his motion. Failing to comply with the meet and confer obligation is a sufficient basis, in and of itself, to deny Defendant's motion for issuance of a subpoena.

2) Substantive law.

Citing Rule 17(c) of the Federal Rules of Criminal

Procedure, Defendant requests leave to subpoena LPD records, arguing:

The investigative reports and materials prepared by Lincoln Police Department on their state prosecution of Defendant's co-defendant Kimberly E. Bridges contain investigative work on Defendant's case that (1) may not have been disclosed to the federal prosecutors; (2) and may contain exculpatory evidence in favor of the Defendant; [and this] information would be admissible for impeachment purposes of witnesses, as well as provide witnesses whose attendance at trial may require subpoena.

(Filing No. 26).

Rule 17(c) "was not intended to provide an additional means of discovery." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879 (1951). To be granted leave to serve a subpoena duces tecum for production of documents in a criminal case, "the moving party must show [*10] that the subpoenaed document (1) is relevant, (2) is admissible, and (3) has been requested with adequate specificity." *United States v. Hardy*, 224 F.3d 752, 755 (8th Cir. 2000). The relevance and specificity elements require more than the title of a document and a suggestion of what the document may say. *United States v. Bradford*, 806 F.3d 1151, 1155 (8th Cir. 2015) (citing *United States v. Stevenson*, 727 F.3d 826, 831 (8th Cir. 2013)). A defendant's "mere hope" that the requested documents may prove useful at trial is insufficient to support a subpoena to produce documents. *Id.*

Here, Defendant claims the federal prosecutor may be withholding evidence, that evidence may favor the Defendant, and receiving the LPD investigative file for Bridges may close that possible informational gap. In support of this claim, Defendant argues the factual basis for the indictment against him is virtually indistinguishable from the facts supporting Bridges' arrest. But, while he is facing a federal indictment, the state charges against Bridges were dismissed and no federal charges were ever alleged. Thus, Defendant

believes something is missing from the government's disclosures, and this unknown missing information may be relevant to defending against the federal charges Defendant is facing and/or may be useful during cross-examination of the government's witnesses. (Filing No. [*11] 27, at CM/ECF p. 4).

agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.

Defendant has failed to show anything other than a "mere hope" that the LPD investigative file of Kimberly E. Bridges will provide evidence relevant to Defendant's case. And the need for evidence to impeach witnesses is generally insufficient to support a Rule 17(c) subpoena for document production in advance of trial. *United States v. Nixon*, 418 U.S. 683, 701, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Hardy*, 224 F.3d at 755. As such, Defendant has failed to make the requisite showing for issuance of a Rule 17(c) subpoena for the LPD investigative file of Kimberly E. Bridges. His motion for leave to serve the proposed subpoena will be denied.

End of Document

Accordingly,

IT IS ORDERED:

- 1) Defendant's motion in limine to exclude evidence regarding Amanda G. Kuhn and any testimony this witness may provide on behalf of the government, (Filing No. 22), is denied.
- 2) Defendant's Motion to Subpoena LPD's records of its investigation of Kimberly E. Bridges, (Filing No. 26), is denied.

January 12, 2018.

BY THE COURT:

/s/ Cheryl R. Zwart

United States Magistrate Judge

* This opinion may contain hyperlinks to other documents or Web sites. The U.S. District Court for the District of Nebraska does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. [*12] Likewise, the court has no

APPENDIX E
USDC ORDER DENYING MOTION TO SUPPRESS
ENTERED 2-7-18

United States v. Turner

United States District Court for the District of Nebraska

February 7, 2018, Decided; February 7, 2018, Filed

4:17CR3121

Reporter

2018 U.S. Dist. LEXIS 20023 *

UNITED STATES OF AMERICA, Plaintiff, v.
SAMUEL TURNER, Defendant.

Subsequent History: Affirmed by United States v. Turner, 934 F.3d 794, 2019 U.S. App. LEXIS 24491 (8th Cir. Neb., Aug. 16, 2019)

Prior History: United States v. Turner, 2018 U.S. Dist. LEXIS 5649 (D. Neb., Jan. 12, 2018)

Counsel: [*1] For Samuel Turner, Defendant:
John C. Vanderslice, FEDERAL PUBLIC
DEFENDER'S OFFICE - LINCOLN, Lincoln, NE.

For USA, Plaintiff: Sara E. Fullerton, U.S.
ATTORNEY'S OFFICE - LINCOLN, Lincoln, NE.

Judges: Richard G. Kopf, Senior United States
District Judge.

Opinion by: Richard G. Kopf

Opinion

MEMORANDUM AND ORDER

At the conclusion of a suppression hearing on January 16, 2018, Magistrate Judge Cheryl R. Zwart, on the record, made certain findings of fact (Filing No. 42) and recommended that Defendant's Motion to Suppress (Filing No. 20) be denied. No objections to the Findings and Recommendation were filed within 14 days following the filing of the transcript of the hearing, as instructed by Judge Zwart and as specified by 28 U.S.C. § 636(b).

I have conducted a de novo review of the record. I find that inasmuch as the Magistrate Judge has fully, carefully, and correctly found the facts and applied the law, the Findings and Recommendation should be adopted and Defendant's motion to suppress should be denied. Accordingly,

IT IS ORDERED:

1. The Magistrate Judge's Findings and Recommendation (Filing No. 42 at CM/ECF pp. 55-57) are adopted.
2. Defendant's Motion to Suppress (Filing No. 20) is denied.

DATED this 7th day of February, 2018.

BY THE COURT: [*2]

/s/ Richard G. Kopf

Senior United States District Judge

End of Document

APPENDIX F
USDC ORDER DENYING SUBPOENA DUCES TECUM
ENTERED 1-12-18

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAMUEL TURNER,

Defendant.

4:17CR3121

MEMORANDUM AND ORDER

Defendant has moved in limine to exclude evidence regarding Amanda G. Kuhn and any testimony this witness may provide on behalf of the government, (Filing No. 22), and for an order permitting Defendant to subpoena the Lincoln Police Department's records for its investigation of Kimberly E. Bridges, (Filing No. 26). For the reasons stated below, these motions will be denied.

STATEMENT OF FACTS

Defendant is charged with knowingly and intentionally possessing with the intent to distribute five grams or more of methamphetamine on August 9, 2017. (Filing No. 1). He initially appeared before the undersigned magistrate judge on November 15, 2017. A case progression order was entered which set a January 16, 2018 trial date, and a pretrial motion deadline of December 15, 2017.

The charges against Defendant arise from the August 9, 2017 arrest of both Defendant and Kimberlie Bridges by the Lincoln Police Department ("LPD"). Defendant states both arrests were based on the same facts, but unlike Defendant, Bridges was charged with only possession of a controlled substance,

for which she is never faced federal charges, and the state charges against her were dismissed.

Based on the disparity in charges filed against Defendant and Bridges, Defendant believes the LPD records of its investigation against Bridges will include exculpatory information relevant to the charges against Defendant and records useful to impeach of the government's witnesses. (Filing No. 27). To that end, Defendant requests leave to subpoena the LPD Records Custodian for production of "all investigative reports regarding Kimberlie E. Bridges regarding her arrest on August 9, 2017," and the subsequent investigation related to that arrest. (Filing No. 26-2).

Defendant also claims that just prior to 5:00 p.m. on December 14, 2017, the government emailed to defense counsel four additional discovery documents regarding the testimony of Amanda G. Kuhn. Defendant states these documents were available to the government as early as June 30, 2017. The documents included plea agreements signed by Kuhn, (Filing No. 32 at CM/ECF p. 2), and reports of her proffer interviews. The interview statements were not transcribed or verbatim, and they were not written, signed or adopted by Kuhn. (Filing No. 32, at CM/ECF p. 3).¹

¹ The alleged late-disclosed documents are not specifically described by Defendant. As such, Defendant has failed to provide a threshold evidentiary showing to support his motion in limine. But rather than denying Defendant's motion outright, the court relies on the document descriptions within the government's briefing.

ANALYSIS

A) Motion in Limine—Testimony of and Evidence Regarding Amanda G. Kuhn.

Defendant's motion in limine states documents regarding Kuhn were untimely disclosed under Rule 16, Defendant was prejudiced by this delay, and Kuhn's testimony and any evidence about her must be excluded at trial. (Filing No. 22). Defendant's brief further states the government's December 14, 2017 document disclosure was untimely under the Jencks Act and Brady v. Maryland, 373 U.S. 83 (1963).

1) Plea Agreements.

As noted by the government, Kuhn's plea agreements are Rule 16 materials. The government argues that even assuming it violated the disclosure timing requirements of Rule 16, Kuhn's testimony cannot be excluded as untimely disclosed because Defendant has failed to show any resulting prejudice. (Filing No. 32, at CM/ECF p. 3).

Assuming a discovery violation occurred, before imposing a sanction for untimely disclosure, the court must consider: 1) whether the Government acted in bad faith and why production was delayed; 2) whether Defendant was prejudiced; and (3) whether any lesser sanction is appropriate to secure the government's timely compliance in the future. United States v. Altman, 507 F.3d 678, 680 (8th Cir. 2007).

As to the issue of prejudice, Defendant argues that as to documents first disclosed on December 14, 2017, he was unable to review those documents and then timely file pretrial motions before the December 15, 2017 deadline. But Defendant never moved to continue the pretrial motion deadline, and he has not explained what motions he would have filed had Kuhn's plea agreements been received earlier. Kuhn's plea agreements were disclosed on December 14, 2017, more than a month before the then-scheduled trial, and that trial has now been continued to conduct an evidentiary hearing on Defendant's motion to suppress. Under such circumstances, Defendant cannot show he is unable to adequately plan and prepare for trial due to the untimely disclosure of Kuhn's plea agreements. Altman, 507 F.3d at 680 (holding district court abused its discretion by excluding untimely disclosed testimony where the defense had four days to prepare). And even assuming the government failed to timely disclose the plea agreements, excluding Kuhn's testimony as a sanction for that delay would be unduly harsh and unjust. The plea agreements will not be excluded for alleged untimely disclosure under Rule 16.

2) Statements.

Citing Rule 16, the Jencks Act, and Brady, Defendant argues Kuhn's testimony must be stricken because the documents summarizing her proffer interviews were untimely disclosed.

i. Rule 16 and the Jencks Act.

Rule 16 does not authorize "the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Fed. R. Crim. P. 16(a)(2). As defined under 18 U.S.C. § 3500 (the "Jencks Act"), the documents at issue are not statements subject the Act's disclosure requirements: They are not transcribed or verbatim statements; statements written, signed or otherwise adopted by Kuhn; or statements reciting or summarizing her grand jury testimony. 18 U.S.C. § 3500(e). Rather, "[t]he reports were written by law enforcement officers from their notes regarding [Kuhn's proffer] interviews." (Filing No. 32, at CM/ECF p. 3).

Moreover, "[i]n any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." 18 U.S.C.A. § 3500 (a). "[A]lthough in many cases the government freely discloses Jencks Act material to the defense in advance of trial, . . . the government may not be required to do so." United States v. Wilson, 102 F.3d 968, 971-2 (8th Cir. 1996)(citing United States v. White, 750 F.2d 726, 729 (8th Cir.1984).

So even assuming Kuhn's proffer interview documents are considered Jencks Act statements, the government was not required to disclose those documents before Kuhn testifies. With Kuhn's proffer statements disclosed more

than a month before trial, Kuhn's testimony will not be excluded as untimely disclosed in violation of the Jencks Act or Rule 16.

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Brady requires disclosure of all exculpatory information in the possession of or reasonably available to the prosecution. Brady v. Maryland, 373 U.S. 83 (1963). When filing a motion alleging the government has withheld Brady materials, Defendant must show the information at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; the evidence was suppressed by the government, either willfully or inadvertently; and prejudice ensued. Strickler v. Greene, 527 U.S. 263, 281–82 (1999); U.S. v. Krauth, 769 F.2d 473, 476 (8th Cir. 1985).

Defendant has failed to show Kuhn's proffer interview statements were exculpatory: The government affirmatively states that "[t]he information contained within the witness's statements contained only incriminating, not exculpatory information." (Filing No. 32, at CM/ECF p. 4). Defendant cannot show the government failed to disclose the statements: He received them more than a month before trial. And for the same reasons, Defendant cannot show any prejudice arising from an alleged late receipt of Kuhn's proffer statements. Defendant is not entitled to an order excluding Kuhn's testimony under Brady.

B) Motion for Issuance of Subpoena—LPD Investigative Records regarding Kimberlie E. Bridges.

1) Procedural Issue.

Pursuant to the court's progression order, "[t]he filing, briefing, and hearing of pretrial motions, including ex parte motions and applications, shall be governed by NECrimR 12.1 - 12.5." See Filing No. 14, ¶ 3. Nebraska Criminal Rule 12.3(b)(3) states:

in the case of a motion seeking discovery or disclosure of evidence, the motion must include a statement verifying that counsel for the moving party has conferred with opposing counsel in person or by telephone in a good-faith effort to resolve by agreement the issues raised by the motion and that the parties have been unable to reach such an agreement.

NECrimR 12.3(b)(3). The court's progression order further emphasizes this meet and confer requirement, and its application to Defendant's pending motion for issuance of a subpoena, stating:

In the event that any motions are filed seeking . . . discovery of facts, documents, or evidence, including *Brady* material, as part of the motion the moving party shall recite that counsel for the movant has spoken with opposing counsel regarding the subject of the motion in an attempt to reach agreement without the involvement of the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of any such conferences.

See Filing No. 14, ¶ 3(b).

NECrimR 12.3(b)(3) and the above-quoted language of the court's progression order require the parties to attempt to resolve discovery disputes

before seeking court assistance. Counsel and the parties are more informed than the court concerning the disputed issues and the discovery exchanged, and are therefore better equipped to engage in informed discussions which could potentially resolve disputes over pretrial disclosures of information. Although court intervention is sometimes necessary, the laboring oar for resolving discovery disputes should, and under this court's rules and progression order, does rest in the first instance with the parties. Requiring the parties to engage in good faith discussions before filing discovery motions allows for faster case progression and a more efficient use of judicial and attorney resources.

Defendant's motion to issue a subpoena does not state that the parties attempted to resolve this discovery dispute before Defendant filed his motion. Failing to comply with the meet and confer obligation is a sufficient basis, in and of itself, to deny Defendant's motion for issuance of a subpoena.

2) Substantive law.

Citing Rule 17(c) of the Federal Rules of Criminal Procedure, Defendant requests leave to subpoena LPD records, arguing:

The investigative reports and materials prepared by Lincoln Police Department on their state prosecution of Defendant's co-defendant Kimberly E. Bridges contain investigative work on Defendant's case that (1) may not have been disclosed to the federal prosecutors; (2) and may contain exculpatory evidence in favor of the Defendant; [and this] information would be admissible for impeachment purposes of witnesses, as well as provide witnesses whose attendance at trial may require subpoena.

(Filing No. 26).

Rule 17(c) “was not intended to provide an additional means of discovery.” Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951). To be granted leave to serve a subpoena duces tecum for production of documents in a criminal case, “the moving party must show that the subpoenaed document (1) is relevant, (2) is admissible, and (3) has been requested with adequate specificity.” United States v. Hardy, 224 F.3d 752, 755 (8th Cir. 2000). The relevance and specificity elements require more than the title of a document and a suggestion of what the document may say. United States v. Bradford, 806 F.3d 1151, 1155 (8th Cir. 2015) (citing United States v. Stevenson, 727 F.3d 826, 831 (8th Cir. 2013)). A defendant’s “mere hope” that the requested documents may prove useful at trial is insufficient to support a subpoena to produce documents. Id.

Here, Defendant claims the federal prosecutor may be withholding evidence, that evidence may favor the Defendant, and receiving the LPD investigative file for Bridges may close that possible informational gap. In support of this claim, Defendant argues the factual basis for the indictment against him is virtually indistinguishable from the facts supporting Bridges’ arrest. But, while he is facing a federal indictment, the state charges against Bridges were dismissed and no federal charges were ever alleged. Thus, Defendant believes something is missing from the government’s disclosures, and this unknown missing information may be relevant to defending against the federal charges Defendant is facing and/or may be useful during cross-examination of the government’s witnesses. (Filing No. 27, at CM/ECF p. 4).

Defendant has failed to show anything other than a "mere hope" that the LPD investigative file of Kimberly E. Bridges will provide evidence relevant to Defendant's case. And the need for evidence to impeach witnesses is generally insufficient to support a Rule 17(c) subpoena for document production in advance of trial. United States v. Nixon, 418 U.S. 683, 701 (1974); Hardy, 224 F.3d at 755. As such, Defendant has failed to make the requisite showing for issuance of a Rule 17(c) subpoena for the LPD investigative file of Kimberly E. Bridges. His motion for leave to serve the proposed subpoena will be denied.

Accordingly,

IT IS ORDERED:

- 1) Defendant's motion in limine to exclude evidence regarding Amanda G. Kuhn and any testimony this witness may provide on behalf of the government, (Filing No. 22), is denied.
- 2) Defendant's Motion to Subpoena LPD's records of its investigation of Kimberly E. Bridges, (Filing No. 26), is denied.

January 12, 2018.

BY THE COURT:

s/ Cheryl R. Zwart

United States Magistrate Judge

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