No. 23-5903

IN THE SUPREME COURT OF THE UNITED STATES

NATHAN RUSSELL CATES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly determined that Federal Rule of Criminal Procedure 16 did not entitle petitioner to demand additional historical records establishing a drug-detection dog's reliability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A52) is reported at 73 F.4th 795. The order of the district court (Pet. App. A5-A17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2023. On September 27, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including November 8, 2023. The petition for a writ of certiorari was filed on October 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Judgment 1. The district court sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A18-A52.

1. While conducting a drug interdiction detail in Laramie County, Wyoming Highway Patrol Trooper Scott Neilson saw petitioner driving down Interstate 80 by himself in a Ford Explorer SUV with New York license plates. Pet. App. A19-A20. Noting that petitioner appeared "very rigid" as he drove past Neilson's patrol car, Trooper Neilson attempted to catch up to the SUV so that he could run the plates and observe any traffic violations. Id. at A6; see id. at A20. When Trooper Neilson caught up, petitioner took an exit ramp. Id. at A20. Trooper Neilson followed, observed petitioner speeding, and stopped petitioner in a parking lot. Ibid.

Petitioner informed Trooper Neilson that the SUV was a rental vehicle and that the rental contract might be on his phone. Pet. App. A20. Aware from experience that retrieving rental agreements from a phone could be time consuming, Trooper Neilson asked petitioner to join him in his patrol car while petitioner looked. Ibid. During the conversation, Trooper Neilson noticed a butane

lighter refueling cannister in petitioner's SUV, which Trooper Neilson knew could be used to heat methamphetamine into vapors to smoke. Id. at A7; see id. at A21. Trooper Neilson also observed that the back seats of the SUV were folded down to make room for several duffel bags; that petitioner's hand was trembling while he tried to operate his phone; and that petitioner was unable or unwilling to make "decent eye contact." Id. at A21 (citation omitted).

When he returned to the patrol car with petitioner, Trooper Neilson sent a message requesting that another Trooper, Andrew Jackson, run a drug-detection dog around the exterior of petitioner's vehicle. Pet. App. A21. Trooper Jackson arrived with his dog, May, shortly thereafter. Id. at A22. Trooper Neilson later testified that "immediately upon seeing Trooper Jackson and May, [petitioner] dropped his phone into his lap and began taking extremely long, deep breaths and appeared like he might be sick." Id. at A9. May alerted at both the driver's side door and the passenger's side door. Id. at A22. Trooper Neilson then searched the vehicle and found approximately 48 pounds of methamphetamine and 30 pounds of marijuana. Id. at A23.

2. A grand jury in the District of Wyoming returned an indictment charging petitioner with possessing 500 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and possessing tetrahydrocannabinol

with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Indictment 1.

Petitioner moved to suppress the evidence seized from his SUV. Pet. App. A23. Petitioner asserted, inter alia, that May's alerts did not provide probable cause to search the vehicle. Id. at A23-A24. Petitioner observed that the government had produced evidence showing that May had been certified to perform drug-detection work by the California Narcotics Canine Association (CNCA) on the day of the search, but had not provided additional records about May's training and deployment. Ibid. During the suppression hearing, the government supplemented the certification evidence with testimony from Trooper Jackson, including descriptions of the certification process and ongoing training. 2/8/22 Tr. (Tr.) 81-97, 107-118 (testimony of Trooper Jackson).

The testimony established that May, who was purchased in 2015 from a company that provided her initial instruction, had been certified (along with her handler, Trooper Jackson) by the CNCA to detect odors of marijuana, cocaine, methamphetamine, and heroin each year that she had been with the Wyoming Highway Patrol -- with the last recertification occurring on the morning of the day of the traffic stop (May 11, 2021). Pet. App. A26-A27; Tr. 81, 84-86. And as to that day-of recertification, Trooper Jackson specifically confirmed that May had passed without any false alerts. Pet. App. A27; Tr. 88-89. Trooper Jackson also explained that the Wyoming Highway Patrol additionally conducts its own

internal assessment each year, with the most recent assessment occurring in the fall of 2020, and that May had passed that assessment as well. Pet. App. A27; Tr. 90-91.

During cross-examination, defense counsel elicited that Trooper Jackson prepares monthly logs documenting his training activities with May and also maintains monthly field-performance logs that track how many times May was used in the field, whether May alerted, and whether any narcotics were found. Pet. App. A27-A28; Tr. 94-97. Petitioner then moved to obtain those reports, but the district court found that petitioner had not made a threshold showing, through witness testimony or tendered evidence, of a question about the validity or reliability of May's certification that would justify their production. Pet. App. A28; Tr. 97-107.

The district court then later denied petitioner's motion to suppress, finding that May's alert provided probable cause to search petitioner's car. Pet. App. A5-A17. The court explained that the testimony and documentary evidence established that May and Trooper Jackson had "successfully completed training courses as documented." Id. at A15. The court observed, in particular, that petitioner's cross-examination "did not elicit any testimony that would cast doubt on the reliability of the CNCA training and certification for May and Trooper Jackson." Id. at A15-A16. And the court accordingly found that petitioner "did not raise any doubt regarding the reliability of May's training or her alerts in

this instance to warrant production of further documentation regarding May's training or performance." Id. at A16 (citing Florida v. Harris, 568 U.S. 237, 247-248 (2013)).

Petitioner thereafter entered a conditional guilty plea to the methamphetamine count, reserving his right to appeal the district court's denial of his motion to suppress. Pet. App. A30.

3. The court of appeals affirmed. Pet. App. A18-A52. On the issue of whether petitioner had been entitled to additional production under Federal Rule of Criminal Procedure 16, the court of appeals explained that "the district court did not abuse its discretion in determining that [petitioner] failed to meet his burden" to "'make a prima facie showing of materiality.'" Pet. App. A51 (citation omitted).

The court of appeals explained that "[a]lthough the materiality standard is not a heavy burden, the government need disclose Rule 16 material only if it enables the defendant significantly to alter the quantum of proof in his favor." Pet. App. A45 (quoting United States v. Graham, 83 F.3d 1466, 1474 (D.C. Cir. 1996), cert. denied, 519 U.S. 1132 (1997)) (brackets omitted). And the court determined that on the facts of this case, the district court did not abuse its discretion in finding that the records petitioner sought would not have aided his defense, because the government had established through testimony and documentary evidence that there was "sufficient reason to trust [May's] alert." Id. at A51 (quoting Harris, 568 U.S. at 246). The court observed,

in particular, that Trooper Jackson testified that May had successfully completed her CNCA certification for various narcotics on the morning of the stop without any false alerts, and that petitioner had not identified any reason to believe that the records he sought to obtain might show that May was unreliable on the date of the traffic stop or in general. Id. at A51-A52.

The court of appeals disagreed with petitioner's claim that this Court's decision in Florida v. Harris invariably compels the production of historical records every time a defendant challenges a drug-detecting dog's reliability. Pet. App. A46-A50. In Harris, this Court rejected the Florida Supreme Court's view that in cases involving the alert of a drug-detection dog, the Fourth Amendment requires the prosecution to present "an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability" for a probable-cause finding. 568 U.S. at 240; see id. at 242-243. The Court instead held that the prosecution could show that it was reasonable to trust a dog's alert in a myriad of ways, including by introducing "evidence of a dog's satisfactory performance in a certification or training program." Id. at 246. And the court of appeals here observed that while Harris "may speak to the relevance of historical canine documents, * * * it does not discuss the case-by-case materiality of such records under Rule 16," but "[i]n fact" stated that a trial court "'should allow the parties to make their best case, consistent with the usual rules of criminal procedure.'" Pet.

App. A47 (quoting Harris, 568 U.S. at 247) (emphasis added by court of appeals).

The court of appeals disagreed with petitioner's contention that his case was materially similar to cases in which the Second and Ninth Circuits required the production of certain canine performance records. Pet. App. A48. The court of appeals explained that "[u]nlike the district court in" United States v. Foreste, 780 F.3d 518 (2d Cir. 2015), the decision of the district court here had not relied on "sweeping generalizations" that field-performance records could never be "relevant to [a dog's] reliability," but was instead grounded in a case-specific determination that there was no reason here to "doubt * * * May's reliability." Pet. App. A48-A49. And while the court of appeals acknowledged that "Ninth Circuit precedent requires disclosure of a specific set of historical and canine records," it observed that "unlike the dog in" United States v. Thomas, 726 F.3d 1086 (9th Cir. 2013), cert. denied, 572 U.S. 1108 (2014), the training certificate in this case gave "no indication that May's performance was 'marginal' in any manner." Pet. App. A50 (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 6-7) that Federal Rule of Criminal Procedure 16 entitles a criminal defendant to comprehensive discovery about a drug-detection dog's training and field performance in every case where a search is performed following the dog's alert to the presence of controlled substances,

regardless of whether there is any basis to believe that that additional evidence will cast doubt on the dog's reliability. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Accordingly, no further review is warranted.

1. a. Under Federal Rule of Criminal Procedure 16, a defendant has the right to discovery of "books, papers, documents, [or] data" that are "within the government's possession, custody, or control" in three enumerated circumstances. Fed. R. Crim. P. 16(a)(1)(E). Two of those circumstances (that "the item was obtained from or belongs to the defendant" or that "the government intends to use the item in its case-in-chief at trial," see Fed. R. Crim. P. 16(a)(1)(E)(ii) and (iii)) are not relevant here. And the third circumstance is limited to cases in which "the item is material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(i).

In accord with the specific language of the Rule, a defendant seeking discovery on that basis bears the burden of "mak[ing] a prima facie showing of materiality." 2 Charles Alan Wright & Peter J. Henning, Federal Practice and Procedure § 254, at 113-114 (4th ed. 2009) (Federal Practice and Procedure); see id. at 113-114 & n.14 (collecting cases); 5 Wayne R. LaFave et al., Criminal Procedure § 20.3(g), at 486 (4th ed. 2015) (Criminal Procedure) ("[T]he burden is on the defendant to demonstrate the requisite

materiality."); 25 Moore's Federal Practice § 616.05[1][b][i], at 616-51 to 616-53 (Matthew Bender 3d ed. 2023) (Moore's Federal Practice) ("The burden is on the defendant to demonstrate that a requested item meets the standard of materiality."). Unless he carries that burden, he cannot establish that his request falls within the text of the Rule.

The courts of appeals have accordingly recognized with "remarkable uniformity" that, for purposes of Rule 16, "a showing of materiality requires 'some indication' that pretrial disclosure of the information sought 'would have enabled the defendant significantly to alter the quantum of proof in his favor.'" United States v. Goris, 876 F.3d 40, 44-45 (1st Cir. 2017) (quoting United States v. Ross, 511 F.2d 757, 762 (5th Cir.), cert. denied, 423 U.S. 836 (1975)), cert. denied, 138 S. Ct. 2011 (2018); see ibid. (collecting cases); Federal Practice and Procedure § 254, at 114-115 (repeating same standard). Thus, "'[m]ateriality is not established by a general description of the documents sought or by a conclusory argument that the requested information is material to the defense,'" and a "blanket request for all relevant evidence is insufficient." Moore's Federal Practice § 616.05[1][b][i], at 616-53 to 616-54 (citation omitted); see Criminal Procedure § 20.3(g), at 486 ("[T]he use of the term 'material' suggests that there must be some showing of potential significance for the defense, going beyond mere relevancy.").

"Instead, the defense must make a specific request for items with an explanation of how the items will be 'helpful to the defense.'" Moore's Federal Practice § 616.05[1][b][i], at 616-54. And in particular, "[w]here the defense is seeking documents not specifically tied to its case in order to establish a general weakness in the prosecution's presentation (e.g., a credibility problem for its chief witness), courts will commonly require that the defense show some grounding for believing that line of inquiry could be productive." Criminal Procedure § 20.3(g), at 487-488; see, e.g., United States v. Harney, 934 F.3d 502, 507-508 (6th Cir. 2019) (explaining that government was not required to produce information about computer networking technique used to identify defendant because the defendant failed to "show, with more than conclusory arguments, that the information will help him combat the government's case against him as to one of the charged crimes") (citation omitted).

b. Petitioner errs in suggesting (Pet. 6) that this Court's decision in Florida v. Harris, 568 U.S 237 (2013), overrides the textual materiality requirement when a defendant seeks records about a drug-detection dog in support of a motion to suppress evidence. To the contrary, "Harris explains that when a state or federal court is tasked with evaluating a defendant's challenge to the reliability of a dog's alert, '[t]he court should allow the parties to make their best case, consistent with the usual rules of criminal procedure.'" Pet. App. A47 (quoting Harris, 568 U.S.

at 247) (emphasis in court of appeals' opinion). Harris is in no way an end-around to the strictures of Rule 16. Thus, even assuming that contesting a suppression motion is "preparing the defense" that might trigger discovery obligations under Rule 16, the Rule would still require that the requested records be "material to" that effort. Fed. R. Crim. P. 16(a)(1)(E)(i); cf. Fed. Crim. P. 16(a)(1)(E)(ii) (focusing on evidence "at trial").

Indeed, if anything, the Court's decision in Harris suggests that detailed records of the sort that petitioner seeks here ordinarily are not material to the probable-cause determination, and thus ordinarily are not subject to discovery under Rule 16 or analogous state rules of criminal discovery. While acknowledging that records "of the dog's (or handler's) history in the field * * * may sometimes be relevant" in assessing probable cause, Harris, 568 U.S. at 247 (emphasis added), the Court explained that "in most cases they have relatively limited import," id. at 245. That understanding is inconsistent with petitioner's view (Pet. 6-7) that such records are always material and thus subject to automatic disclosure under Rule 16.

The Court also emphasized that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust [the dog's] alert" without the need for additional records. Harris, 568 U.S. at 246; see Pet. App. A51-A52 (discussing evidence of May's certification). And while the Court stated that a defendant "must

have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses," Harris, 568 U.S. at 247, the Court did not indicate that detailed training and field-performance records will ordinarily be material to that inquiry. The Court instead highlighted witness testimony (either direct testimony of defense witnesses or cross-examination of government witnesses) as the standard means of challenging the effectiveness of a dog's training. See ibid.; cf. ibid. ("The defendant can ask the handler, if the handler is on the stand, about field performance, and then the court can give that answer whatever weight is appropriate.") (brackets and citation omitted).

Therefore, as with any other discovery request under Rule 16(a)(1)(E), a defendant who seeks to obtain canine-history records from the government must point to "'some indication' that pretrial disclosure of" those records will "'significantly * * * alter the quantum of proof in his favor.'" Goris, 876 F.3d at 45 (citation omitted); see pp. 9-11, supra. A defendant could potentially do so through, for example, testimony that the particular records at issue would contain evidence that the dog and its handler did not perform satisfactorily in a recent assessment of their capabilities in a controlled setting. Cf. United States v. Thomas, 726 F.3d 1086, 1096-1097 (9th Cir. 2013) (concluding that district court should have ordered production of unredacted training records where testimony at the suppression

hearing revealed that the drug-detection team achieved a "marginal performance" in "search skills" in a controlled evaluation and that "if the redactions were lifted," the records would likely contain "critiques of the team's competence"), cert. denied, 572 U.S. 1108 (2014). Or he could present "his own fact or expert witnesses," Harris, 568 U.S. at 247, to raise doubt about the adequacy of the "certification or training program" identified by the government, id. at 246. But as with other records sought under Rule 16, it is not enough simply to offer a "conclusory argument that the requested information is material to the defense," without any case-specific indication that the canine-history records would actually be helpful to the defendant. Moore's Federal Practice § 616.05[1][b][i], at 616-54 (citation omitted).

c. The court of appeals correctly found no abuse of discretion in the district court's application of well-settled Rule 16 standards here. See Pet. App. A44-A52. As the court of appeals observed, "the government provided both testimony and documentary evidence that May, and her trainer, Trooper Jackson, were properly certified at the time of [petitioner's] traffic stop." Id. at A51. That "'evidence of [May's] satisfactory performance in a certification or training program,' * * * in turn, 'provide[d] sufficient reason to trust h[er] alert.'" Ibid. (quoting Harris, 568 U.S. at 246) (brackets in original). And petitioner identified no basis for believing that the additional

records he sought would cast any doubt on May's reliability. See ibid.

Nothing in the sworn testimony that petitioner elicited during cross-examination of May's handler, Trooper Jackson, suggested that May had been unreliable in the past. See Pet. App. A52. Nor did petitioner present any fact or expert witnesses of his own to suggest that CNCA was not a reputable certifying authority, or that the training methods Jackson described were likely to lead to false alerts. Thus here, as in other circumstances, "[t]he district court did not abuse its discretion in holding that the discovery sought was immaterial and 'essentially a fishing trip,'" United States v. Kienast, 907 F.3d 522, 530 (7th Cir. 2018) (rejecting similar argument in different circumstances), cert. denied, 139 S. Ct. 1639 (2019).

2. As the court of appeals explained (Pet. App. A48-A50), and contrary to petitioner's contention (Pet. 4-6), the circumstances of this case differ from the circumstances at issue in the Second Circuit's decision in United States v. Foreste, 780 F.3d 518 (2015), and the Ninth Circuit's decision in United States v. Thomas, supra. Some broad language in those decisions may lead those circuits to, at some point, require extensive discovery of drug-detecting dog records in every case where a defendant requests it. See Foreste, 780 F.3d at 528-529 (indicating that a "dog's field performance records are relevant" and discoverable in a challenge to "'the adequacy of a certification or training

program'" or "'how the dog (or handler) performed'") (citation omitted); Thomas, 726 F.3d at 1096 (reciting pre-Harris circuit precedent for proposition that production of various materials is "'mandatory' when the government seeks to rely on a dog alert as the evidentiary basis for its search") (quoting United States v. Cortez-Rocha, 394 F.3d 1115, 1118 n.1 (9th Cir.), cert. denied, 546 U.S. 849 (2005)). But neither decision itself goes that far.

As the court of appeals explained, the district court in Foreste erred by making "sweeping generalizations" that field-performance records can never be "relevant to [a dog's] reliability." Pet. App. A48-A49 (citing Foreste, 780 F.3d at 529). The Second Circuit then determined that the district court's "erroneous view of the law" required reversal, Foreste, 780 F.3d at 529. And in Thomas, the defendant presented evidence that the drug-detection dog and its handler had been "one-tenth of a point" away from receiving a "'a failing score'" on an examination of search skills, as well as cross-examination testimony from the "K9 Coordinator for the Border Patrol conced[ing]" that materials that had been withheld during discovery would likely enable the defendant to mount "critiques of the team's competence as well as discussions about areas for improvement." Thomas, 726 F.3d at 1096-1097. While viewing pre-Harris precedent to require production under Rule 16, the court rejected the government's reliance on the law-enforcement privilege against discovery on the ground that the defendant had made a showing "beyond 'mere

suspicion' that the undisclosed evidence will be helpful in his criminal case." Id. at 1097 (citation).

The decision below did not view either the Second or Ninth Circuit to always require, in every case, production of a drug-detection dog's records, even where the defendant cannot make any case-specific showing of materiality. To the extent that those courts' decisions would require that, they would conflict with Rule 16 -- and the uniform authority interpreting its text to require a prima facie showing of materiality -- in a manner not required by Harris. And particularly in the absence of a robust effort by either court to reconcile such a blanket approach with the Rule, any disagreement in the courts of appeals does not warrant this Court's review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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