Team 1R – Original

Docket No. 20 – 2388

IN THE

Supreme Court of the United States

SAMANTHA GOLD,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM 1
Counsel For The Respondent

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under the Federal Rule of Evidence 501 precludes the admission at trial of confidential communications that occurred during the course of a criminal defendant's psychotherapy treatment, where the defendant threatened serious harm to a third party and the threats were previously disclosed to law enforcement.

II. Whether the Fourth Amendment is violated when the government, relying on a private search, seizes and offers into evidence at trial files discovered on a defendant's computer without first obtaining a warrant and after conducting a broader search than the one conducted by the private party.

III. Whether the requirements of *Brady v. Maryland* are violated when the government fails to disclose potentially exculpatory information solely on the grounds that the information would be inadmissible at trial.

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The oral ruling of the United States District Court for the Eastern District of Boerum on Petitioner's motion to suppress has not been published but is contained in the record on pages 32-41. *United States v. Samantha Gold*, No. 17 CR 65 (E.D. Boerum 2018). The decision of the Fourteenth Circuit Court of Appeals has not been published but is contained in the record on pages 52-61. *Samantha Gold v. United States*, No. 19-142 (14th Cir. 2020).

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following constitutional provisions is provided below:

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Factual Background

Tiffany Driscoll, a 20-year-old college student at Joralemon University died on May 25, 2017. (R. at 13). Ms. Driscoll was found dead at her family's townhouse. (R. at 13). It was unclear at first, but toxicologists were able to confirm that Ms. Driscoll's death was caused by ingestion of chocolate strawberries that contained traces of strychnine. (R. at 14). After a warrant to search the Driscoll house was obtained the police realized the chocolate strawberries were mailed to her home. *Id*. On May 27, 2017, the FBI arrested Samantha Gold for the death of Ms. Driscoll. *Id*.

Gold, another student at Joralemon University, was charged with Murder by Mail, 18 U.S.C. Section 1716. *Id.*

After discovering that Gold had means and motive to kill the victim, the FBI made Gold their primary suspect. *Id*. In June and July of 2017, the FBI received information regarding two other suspects in connection to Ms. Driscoll's death. (R. at 11, 12). However, these suspects were ruled out because of the overwhelming evidence presented against Gold. On May 25, 2017 at approximately 1:15 PM, Gold's therapist Dr. Pollak called the Joralemon Police Department to inform them of a potential victim. (R. at 5). Dr. Pollak just finished a therapy session with Gold was alarmed by her behavior and conversations they were having during their session. *Id*. In Dr. Pollak's records, she indicated that Gold's condition was unkept, disheveled and agitated more so than usual. (R. at 3). Due to Dr. Pollak's duty to report, she scanned necessary information to the police so they could conduct a wellness and safety check on Gold. (R. at 19).

On May 25, 2017 at approximately 4:40 PM, Gold's roommate, Jennifer Wildaughter, brought a flash drive she compiled that contained documents from Gold's laptop. (R. at 6). An officer met with Ms. Wildaughter to discuss the contents of the flash drive and why she brought it to the station. *Id.* Ms. Wildaughter expressed that she was concerned about her roommate's recent behavior, she found alarming documents on the laptop and wanted to inform the police. *Id*.
Gold's laptop contained incriminating information that directly connects her to the crime. On Gold's laptop the police found a shipping confirmation receipt. (R. at 7). This receipt shows the details of a package scheduled to be delivered on May 25, 2017 to the address Ms. Driscoll was found dead. *Id*. The police also located a recipe for chocolate strawberries which included an

ingredient that was labeled "secret". (R. at 9). A note addressed to Ms. Driscoll, as well as information regarding strychnine was also found on the laptop. (R. at 9, 10).

II. Procedural History

Samantha Gold was charged with Murder by Mail, 18 U.S.C. Section 1716. Prior to a jury trial, Gold moved to suppress to pieces of evidence. (R. at 16). Gold's defense team moved to preclude the Government from calling Gold's therapist, Dr. Pollak, to testify against her and from introducing notes into evidence. *Id*. Gold also moved to suppress certain information seized illegally from Gold's laptop. *Id.* The United States District Court of the Eastern District of Boerum, denied both motions to suppress on all grounds. (R. at 41). Gold's defense team also filed a motion for post-conviction relief on the basis of two alleged *Brady* violations in the United States District Court of the Eastern District of Boerum. (R. at 42). The district court denied the motion for post-conviction relief. Gold appealed to the United States Court of Appeals for the Fourteenth Circuit. (R. at 50). The Court of Appeals affirmed the district court ruling. (R. at 57).

SUMMARY OF THE ARGUMENT

The psychotherapist-patient privilege does not preclude the testimony of Dr. Pollak. The dangerous patient exception to the psychotherapist privilege applies where the patient uttered serious threats intending to cause harm and disclosure of that communication was necessary to prevent that harm. Once the confidential communication has been disclosed, the confidential nature of the psychotherapist-patient relationship has been compromised. Consequently, there is no barrier preventing a psychotherapist from testifying to communications that gave rise to disclosure. In the present case, the defendant, Samantha Gold, made a serious threat to harm an individual, which concerned Dr. Pollak. As such, Dr. Pollak alerted the authorities in an attempt

to protect Tiffany Driscoll but it was too late. In a case such as this one, the dangerous patient exception would provide justice for the victim, but it would also prevent the patient, Samantha Gold, from causing more harm. Without recognition of the dangerous patient exception in a scenario such as this one, patients can become violent perpetrators and still confide in their therapist.

Furthermore, the search and subsequent seizure of the files located on the flash drive given to Office Yap was not a violation of the Fourth Amendment. Later use of the files recovered is admissible at trial does not constitute a violation of the Fourth Amendment. Officer Yap obtained files from the defendant's desktop only after a private search had been conducted of those files. Ms. Wildaughter, the defendant's roommate, searched the defendant's desktop, viewing several files contained within desktop folders. Officer Yap, based on experience and representation of the private searcher, Ms. Wildaughter, could be certain that a subsequent search would only confirm Ms. Wildaughter's suspicion. Additionally, Ms. Wildaughter frustrated the defendant's expectation of privacy. As a result, the defendant's expectation of privacy to the contents on her desktop had been compromised and any seizure of the files later used at trial did not greatly impact the privacy interest of the defendant.

Lastly, there is no *Brady* violation when the government failed to disclose information that would be inadmissible at trial. A critical aspect of *Brady* is that the information be material. As such, there needs to be a reasonable probability that the evidence the defendant argues if disclosed would have made a difference at trial. However, because the information defendant argues was suppressed would have been inadmissible at trial, there is no reasonable probability that the information would have made a difference in the result of defendant's trial. Moreover, there was

substantial evidence linking the defendant to the victim. The absence of the two reports defendant argues constitutes *Brady* would not have made a difference in light of the evidence presented.

ARGUMENT

I. THE PSYCHOTHERAPIST-PATIENT TESTIMONIAL PRIVILEGE DOES NOT PRECLUDE DR. POLLAK'S TESTIMONY ABOUT THE DEFENDANT'S CONFIDENTIAL COMMUNICATIONS BECAUSE THE DANGEROUS PATIENT EXCEPTION IS APPLICABLE.

Congress enacted Federal Rule of Evidence 501 to provide courts with the flexibility needed to develop rules of privilege on a case-by-case basis, while also allowing for the possibility of these rules to change. *Trammel v. United States*, 445 U.S. 40, 47 (1980). Federal Rules of Evidence 501 provides that:

> Except as otherwise . . . provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. R. Evid. 501. In *Jaffee v. Redmond*, the Supreme Court recognized the psychotherapist-patient privilege that protects confidential communications between a psychotherapist and his or her patient. *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996). Looking specifically to reason and experience, the Supreme Court found that confidential communication promotes sufficiently important interests, which outweigh the need for probative evidence. *Jaffee*, 518 U.S. at 10. The psychotherapist-patient privilege is based on the critical need for trust and confidence that is necessary for effective psychotherapy. *Id*. Disclosure of the kind of information revealed during a counseling session is likely to destroy the confidential relationship between therapist and patient, and consequently destroy the atmosphere that allows a patient to speak freely without embarrassment or shame. *Id*.

While, in *Jaffee*, the Supreme Court did not determine the exact parameters of the psychotherapist-patient privilege, it did acknowledge that "there are situations in which the privilege must give way." *Jaffee*, at 18. The Supreme Court explained that one of those situations may be the presence of a serious threat of harm to the patient or others that can only be prevented by the therapist's disclosure. *Id*. Following the ruling in *Jaffee*, several federal circuit courts of appeals have reached varying conclusions on whether an exception to the psychotherapist-patient exists, specifically in situations involving a dangerous patient as alluded to by the Supreme Court in *Jaffee*. Blake Hills, *The Cat Is Already Out of the Bag: Resolving the Circuit Split Over The Dangerous Patient Exception To The Psychotherapist-Patient Privilege*, 49 UNIV. BALT. L. REV. 153, 161 (2020). For example, at present, one circuit recognizes the dangerous patient exception, while three others do not. *Id*. Another circuit decided the issue of an exception to privilege on the doctrine of waiver, and district courts in the remaining sister circuits have recognized the exception. *Id*. This court should follow the Tenth Circuit Court of Appeals and recognize the dangerous patient exception.

1. The Fourteenth Circuit Rightfully Adopted The Dangerous Patient Exception.

By the time *Jaffee* reached the Supreme Court, many states had adopted the *Tarasoff* duty to report. This duty stemmed from a California Supreme Court decision in *Tarasoff v. Regents of the University of California*, in which the court held that "when a therapist determines . . . that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *Tarasoff v. Regents of University of California*, 551 P.2d 334, 340 (1976). The *Tarasoff* duty, which existed in some states for at least twenty years before *Jaffee*, differs from the dangerous patient exception because such exception

to an evidentiary privilege would allow psychotherapists to testify about threats in later prosecution of the patient. *United States v. Hayes*, 227 F.3d 578, 583-84 (2000). Consequently, before the Supreme Court delineated the dangerous patient exception in footnote 19 of *Jaffee*, psychotherapists already had a duty to report serious threats of harm made by their patients. Hills, at 173. However, the *Jaffee* Court failed to mention the *Tarasoff* duty to explain a situation in which an exception would apply, suggesting that such an exception to the privilege is distinct from the existing *Tarasoff* duty. *Id*. Furthermore, the language used by the Court which states: "the privilege must give way" is indicative that the Court was referring to an exception of an evidentiary privilege and not just the equivalent of the *Tarasoff* duty. *Id*. By not referring to the *Tarasoff* duty or out-of-court confidentiality in describing a scenario in which the psychotherapist-patient privilege must yield, the Court implies that an exception, unlike the *Tarasoff* duty, would allow in-court testimony. *Id*.

Pursuant to the intention and vision of the Supreme Court in *Jaffee*, the Tenth Circuit appropriately adopted the dangerous exception in *United States v. Glass*. *United States v. Glass*, 133 F.3d 1356 (1998). In *Glass*, the defendant made statements to his psychotherapist that he wanted to kill the President of the United States. *Glass*, 133 F.3d at 1357. In searching for the defendant, the Secret Service contacted the psychotherapist who disclosed the defendant's statements. *Id*. Consequently, the defendant was charged with knowingly and willingly threatening to kill the President of the United States. *Id*. However, the defendant challenged the use of his statements, arguing that these statements should be excluded as a violation of the psychotherapist-patient privilege. *Id*. The district court rejected this argument, finding that the defendant's statements fell within the exception of *Jaffee*'s footnote 19. *Id*. at 1356. The district court held that

"when there is an express threat to kill a third party by a person with an established history of mental disorder the psychotherapist-patient privilege is inapplicable." *Id*. at 1357. The Tenth Circuit not only agreed with the circuit court, but also posited that such an exception applies to civil and criminal cases. *Id*. at 1359-60. Relying on the Supreme Court's footnote in *Jaffee*, the Tenth Circuit in *Glass* held that a psychotherapist may testify about a threat made by a patient if the threat was serious when it was uttered, and its disclosure was the only means of averting harm when the disclosure was made. *Glass*, 133 F.3d at 1360.

In sum, the Tenth Circuit echoed the Supreme Court in *Jaffee*, explaining that the exception to the psychotherapist-patient privilege should be determined in a case-by-case basis. While the Tenth Circuit acknowledged the dangerous patient exception, it did not find that Mr. Glass' statements could be compelled for disclosure. *Glass*, 133 F.3d at 1360. Rather, the Tenth Circuit believed that with the facts available, the psychotherapist-patient privilege protected Mr. Glass' statements. *Id*. However, the Tenth Circuit remanded the case for further fact-finding to determine whether the threat was serious when uttered, and whether disclosure was the *only* way to prevent harm to the potential victim at the time of the disclosure. *Id*. As such, when the facts of the case presented show that a patient's communication to their therapist consist of a serious threat and disclosure of that communication was the only way to prevent the harm intended, the dangerous patient exception applies. In the facts presented to this court, it is clear that Samantha Gold cannot rely on the psychotherapist-patient privilege.

i. The Sixth, Eighth and Ninth Circuits Misinterpreted The Supreme Court's Footnote 19 in *Jaffee*.

Unlike the Tenth Circuit, the Sixth Circuit declined to adopt the dangerous patient exception, finding a marginal connection, at best, between a psychotherapist's disclosure of a

serious threat made by a patient, and the court's refusal to permit the therapist to testify about such a threat in the later prosecution of the patient. *United States v. Hayes*, 227 F.3d 578, 583-84. However, when a psychotherapist discloses to authorities a serious threat made by a patient, the therapist is destroying the confidentiality relationship that is to be protected by the psychotherapist-patient privilege. Once that relationship is destroyed, there is no rehabilitating the relationship by preventing the therapist from testifying. As such, once a therapist has complied with a *Tarasoff* duty, the therapist should be allowed to testify about the patient's statement communicating such threat. Hayes, 227 F.3d 578, 587-88 (Boggs, J., dissenting).

Additionally, the Sixth Circuit explains that adopting the dangerous patient exception would have a "deleterious effect on the atmosphere of confidence and trust in psychotherapist/patient relationship." *Hayes*, 227 F.3d 578, 584-85. Ultimately, the Sixth Circuit finds that the chilling effect that would result from advising patients that their statements may be used against them in a later criminal prosecution, is sufficient to reject the dangerous patient exception. *Hayes*, 227 F.3d 578, 585. Despite this contention by the Sixth Circuit, there is no empirical data that proves the accuracy of this statement. In fact, psychotherapists already have a professional duty to advise their patients that serious threats of harm will need to be disclosed to protect potential victims. *Hayes*, 227 F.3d 578, 583-84. Despite a psychotherapist's obligation to comply with the *Tarasoff* duty, empirical data does not suggest a breakdown in the psychotherapist-patient relationship. Rather, empirical data reveals that "only a small minority of clients and patients . . . [are] altogether deterred from consulting," and that only a "significant minority would be dissuaded from being completely candid" during a therapy appointment. Hills, at 178. Even more telling from the data available is the suggestion that breach of confidentiality

due to the *Tarasoff* duty does not impede on the psychotherapist-patient relationship so long as the patient was aware or informed of the duty to disclose. *Id*. This is evident in *Hayes*, where the patient continued to make serious threats in their therapy appointment despite receiving a warning from their therapist that the therapist had a duty to disclose. *Hayes*, 227 F.3d 578, 581.

Further, the Sixth Circuit concludes that a psychotherapist's testimony against her patient in a criminal prosecution "about statements made to the therapist by the patient for the purposes of treatment arguably serves a public end, but it is an end that does not justify the means." *Hayes*, 227 F.3d 578, 582. To this point, the Sixth Circuit concludes that the dangerous patient exception is not necessary for psychotherapist to comply with their professional responsibilities and would "seriously disserve the public end of improving the mental health" of individuals. *Id*. While it is true that a psychotherapist may comply with their professional responsibilities to protect potential victims without testifying in a patient's criminal prosecution, in some cases, a therapist will be too late, the harm will have been done, and there will be no justice for the victim without the testimony of the therapist. In such a scenario, competing public interests—safety from dangerous and harmful people and improving the mental health of a violent perpetrator—cannot not be served. *See* Hills, at 179. Failure to recognize the dangerous patient exception favors the mental health of a patient over community safety. *Id*.

The Eighth and Ninth Circuit have also misconstrued the *Jaffee* footnote and improperly failed to recognize a dangerous patient exception to the psychotherapist-patient privilege. In *United States v. Ghane*, during a visit to the hospital for suicidal thoughts, the defendant reported that in the event he committed suicide, he would use the cyanide he kept in his apartment. *United States v. Ghane*, 673 F.3d 771, 775. The defendant was then admitted to a psychiatric ward where

he received treatment from a clinical psychiatrist. *Id*. During the course of this treatment, the defendant disclosed to the psychiatrist his suicidal thoughts as well as thoughts of harming other individuals associated with the Army Corps of Engineers, and that he would commit these crimes with the chemicals in his possession. *Id at 776*. Consequently, the psychiatrist reported the defendant's threats to law enforcement and testified at trial under the dangerous patient exception to the psychotherapist-patient privilege. *Id*. Adopting the reasoning of the Sixth Circuit, the Eighth Circuit rejected the dangerous patient exception for two reasons. *Id*. at 785. First, it found that the dangerous patient exception has no connection to the duty to report threats under state law, and second, the dangerous patient exception would have a harmful effect on the confidence and trust necessary for the confidential relationship between therapist and patient. *Id*. at 785-86.

Like the Sixth and Eighth Circuits, the Ninth Circuit, in *United States v. Chase*, also declined to recognize a dangerous patient exception to the psychotherapist-patient privilege. *United States v. Chase*, 340 F.3d 978 (2003). In *Chase,* the defendant made threats to his psychiatrist during the course of his treatment. *United States v. Chase*, 340 F.3d 978, 979-81. The psychiatrist disclosed initial threats to law enforcement but continued to meet with the defendant. *Id*. At the next counseling session, the defendant made additional threats, such that the psychiatrist responded by notifying the defendant of her duty to inform the intended victims for their protection and reminding him that she would have to disclose to law enforcement once again. *Id*. This caused the defendant to continually call his psychiatrist, leaving voicemails and speaking to clinic telephone operators to reiterate his threat. *Id*. In the defendant's criminal proceeding, his psychiatrist was allowed to testify because the psychiatrist determined that the defendant's threats

were serious, harm was imminent, and disclosure was the only means to prevent the threatened harm. *Id*.

In *Chase*, the Ninth Circuit sided with the Sixth Circuit, rejecting the lower courts' reasoning for serval reasons. First, the Ninth Circuit distinguished between confidentiality and the testimonial privilege finding it significant that only one state has recognized a dangerous patient exception. *Chase*, 340 F.3d 978, 986. Additionally, the Ninth Circuit reasoned that a dangerous patient exception to the federal privilege would weaken state confidentiality laws because no parallel exception would exist at the state level. *Id*. Second, the dangerous patient exception was not part of the proposal of the psychotherapist-patient privilege when initially introduced to Congress. *Chase*, 340 F.3d 978, 989. Third, the Ninth Circuit found that the adverse effect the dangerous patient privilege would have on the "candor that the psychotherapist-patient privilege is meant to encourage," outweighed the potential victim's need for protection. *Chase*, 340 F.3d 978, 990. Lastly, the Ninth Circuit acknowledged that although disclosure of threats to the victim had obvious benefits, the subsequent testimony at trial did not share the same benefits if the patient was no longer dangerous at the time of trial. *Chase*, 340 F.3d 978, 986-87.

Overall, the Eighth and Ninth Circuits proffer similar reasoning to the Sixth Circuit in declining to adopt the dangerous patient exception. However, the Sixth, Eighth and Ninth Circuits fail to acknowledge that when a patient has uttered serious threats against an individual, especially after a psychiatrist has complied with her *Tarasoff* duty, and the patient carries out such threats, the patient has not only followed through with the harm but has become a dangerous person. A patient that has become a dangerous person, capable of serious crimes like murder, cannot be shielded by a federal privilege that is meant to serve the public good. *Jaffee*, 518 U.S. 1, 15.

In the present case, the defendant, Samantha Gold, was tried for death of Tiffany Driscoll. The dangerous patient exception can prevent the defendant from causing more harm and possibly killing another person. As such, this court should recognize a dangerous patient exception.

ii. The Defendant, Samantha Gold's, Statements Were Serious When Uttered And Disclosure Of These Statements Was The Only Way To Prevent Harm To Tiffany Driscoll At The Time Of Disclosure.

As stated in the Boerum Health and Safety Code § 711: Reporting Requirements for Mental Health Professionals, communications between a patient and a mental health professional are confidential expect where:

> (1) The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and
>
> (2) The mental health professional makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.

Applying this requirement to our case, the defendant verbally expressed a threat against an identifiable victim during her session with Dr. Pollak. (R. at 4). Dr. Pollak assessed the defendant's condition analyzing her body language, mood, physical appearance and judgment; with this information Dr. Pollak determined it was her duty to report the threat. (R. at 22). This section of the Boerum Health and Safety Code for mental health professionals is classified as a mandatory duty. Understanding this duty, Dr. Pollak informed law enforcement within a reasonable time and provided necessary information. (R. at 20).

The Sixth Circuit's reasoning for not adopting the dangerous-patient exception places mental health professionals in a discordant situation. As mentioned above the Sixth Circuit believes this exception would be harmful to the public as it relates to mental health. However, it would be a larger harm to the victim if the psychotherapist was not allowed or required to testify

about alarming conversations that took place during a therapy session. It is true that mental health professional's main priority is their client, but when their client has committed a heinous crime, in our case an alleged murder, FRE 501 should not stand in the way of that testimony being admitted into trial. For public policy reasons, privilege has been waived in certain circumstances, the Tenth Circuit understood that the value of a testimony such as Dr. Pollak's can be greater than confidential information protected under privilege, especially when confidentiality has already been breached by the reporting.

In our case, if the psychotherapist-patient privilege under FRE 501 bars the admission of communications that took place at the defendant's therapy session that would remove a portion of incriminating evidence needed for trial. Generally, the privilege would preclude the evidence as well as Dr. Pollak's testimony from being admitted into trial; however, the facts of this case would allow the exception to raised and be applied. (R. at 19). According to the records, the defendant posed an imminent threat to the victim. (R. at 19). The defendant's exact words being "I'm so angry! I'm going to kill her. I will take care of her and her precious HerbImmunity. After today, I'll never have to see or think about her again." (R. at 4). This statement and the defendant's behavior alone would be enough to invoke the dangerous patient exception, notwithstanding the defendant's diagnoses of Intermittent Explosive Disorder. (R. at 17). If the Court determines that the exception does not apply and bars the testimony, it will set the standard going forward that privilege outweighs probative evidence in a federal criminal trial.

Unlike the *U.S v. Glass* case, the facts of our case present a clear threat. The *Glass* opinion determined with the facts presented to the Court, the statements he made to this therapist were not compelled for disclosure, the Court was unsure whether the threat was serious when it was uttered.

Dr. Pollak was not unsure of the severity of threat made by the defendant. (R. at 5). Dr. Pollak observed the actions of the defendant, took thorough notes for reference and made the appropriate call to law enforcement. (R. at 5). The Tenth Circuit held that a psychotherapist may testify about a threat made by a patient if the threat was serious when it was uttered, and its disclosure was the only means of adverting harm when the disclosure was made. While the *Glass* case was not enough of a threat to invoke the dangerous patient exception, the defendant in this case posed an actual to the victim, enough to qualify Dr. Pollak to testify.

In light of the evidence, this court should follow the standard set by the Tenth Circuit. The dissent offered by Circuit Judge Cahill mentions the opinion of the *Jaffee* Case. He adds "if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation." (R. 57). While these conversations may be chilled if psychotherapist must inform their patients that they have a duty to report statements said as well as provide statements for a criminal proceeding, a chilled conversation does not outweigh the magnitude of evidence such as the evidence presented in our case. In order to effectively provide justice to the victim and the community, statements should not be withheld under the psychotherapist-patient evidentiary privilege. If statements were always guarded by this privilege, patients can essentially make a plethora of incriminating statements to their psychotherapist. These same patients could commit the crime that they mentioned to their psychotherapist. With no other evidence, expect the statements made to the psychotherapist, it would be challenging to prosecute that defendant with the Sixth Circuit's reasoning.

In the *Jaffee* case, the opinion acknowledges the psychotherapist-patient privilege while also leaving the door open for dangerous threats that may cause harm to the patient or others. *Jaffee*, 518 U.S. at 18. The Court explicitly mentions that there are situations in which the privilege must give way. *Id*. Turning to the present case, the facts presented would qualify as a dangerous situation in which the privilege must give way. The dissent would argue that there is no valid legal argument to waive this privilege. The dissent maintains that there is a separate and distinct difference between the psychotherapist's duty to report and allowing a psychotherapist to testify or provide confidential statements given during a session as evidence. The Sixth Circuit as well as the dissent would assert that the psychotherapist's duty concludes after they report necessary information to law enforcement. However, the majority opinion in the Court of Appeals case, explains that if the dangerous-patient exception became inapplicable after the death of a potential victim a dangerous patient could regain protection of the privilege by simply killing the victim. (R. at 53). By enforcing the psychotherapist-patient privilege and not allowing the psychotherapist to testify or provide evidence, the Court runs the risk of protecting a guilty defendant. The impact of Dr. Pollak's testimony would sway a jury and by invoking the privilege essentially obstructing justice.

In closing, the Court should affirm the Court of Appeals decision, admitting Dr. Pollak's testimony at trial. We agree that the psychotherapist-patient privilege is an important privilege under FRE 501; however, we also agree that there are circumstances that allow the privilege to be waived. The facts of our case meet the dangerous patient exception in relation to the privilege. Understanding there is a public interest factor that must be taken into account, once the privilege has been breached by reporting confidential statements to law enforcement, the Tenth Circuit

recognizing that there is no value in preserving the privilege as it relates to evidentiary privilege. On the other hand, the public interest is also at stake by not allowing evidence and testimony to be admitted that could potentially bring justice the harmed victim. For these reasons, the Court should affirm the lower court decision.

2. Even If The Fourteenth Circuit Does Not Recognize The Dangerous Patient Exception, Dr. Pollak's Testimony Is Still Admissible Because The Psychotherapist-Patient Exception Only Applies To Confidential Communication.

The Supreme Court, in *Jaffee*, held that a psychotherapist privilege covers *confidential* communications made to licensed psychiatrists, psychologists, and social workers. *Jaffee*, 518 U.S. 1, 15. However, when a patient makes a threat after being warned that such threat would have to be disclosed, the patient has no reasonable expectation that the statements made thereafter are confidential. *United States v. Auster*, 517 F.3d 312, 313-14. Although the Fifth Circuit in *United States v. Auster* did not explicitly adopt or declined to adopt the dangerous patient exception, it determined that the defendant waived his psychotherapist-patient privilege when he made a threat knowing that such threat would be disclosed to authority and therefore had no reasonable basis to conclude his statement was confidential. *Auster*, 517 F.3d 312, 313-14. The Fifth Circuit held that "where the confidentiality requirement has not been satisfied, they psychotherapist-patient privilege—as with other privileges—does not apply. *Auster*, 517 F.3d 312, 315.

The Court also acknowledged that, like other testimonial privileges, the patient may waive the protection. *Jaffee*, 518 U.S. 1, 15. As stated in *Jaffee*, and emphasized by the federal circuits faced with the psychotherapist-patient privilege, it is undisputed that the psychotherapist-patient privilege was recognized as a means to protect the privacy critical to an effective relationship between psychotherapist and patient that allows for open and honest communication. However,

like the attorney-client privilege, which can be waived when the communication was not made nor maintained in confidence, the psychotherapist-patient privilege can be waived when the patient makes threats after being warned that such threats will need to be reported. Hills, at 175. *See also* Hayes, 227 F.3d 578, 587-88 (Boggs, J., dissenting). In *Hayes*, the dissent reasoned that when the social worker specifically informed the patient of her duty to report otherwise confidential statements, the barrier preventing the social worker from testifying is destroyed. *Id*. Accordingly, once a patient has been put on notice, as is the case with psychotherapists' *Tarasoff* duty, "such tender concern for criminal evidence" is no required by common law. *Id*. Thus, even without a formal recognition of the dangerous patient exception, the psychotherapist-patient privilege only protects confidential communication in situations where the privilege has not been waived.

II. THE GOVERNMENT DID NOT VIOLATE THE DEFENDANT'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN IT CONDUCTED A SEARCH OF FILES LOCATED ON THE DEFENDANT'S DESKTOP BASED ON A PRIVATE PARTY SEARCH AND SUBSEQUENTLY USED THE FILES AS EVIDENCE AT TRIAL.

The Fourth Amendment protects individuals against arbitrary government intrusions and in doing so, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Further, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id*. Accordingly, a Fourth Amendment search occurs when the government obtains information by either physically intruding on a constitutionally protected area or invading a person's reasonable expectation of privacy. *United States v. Jones*, 565 U.S. 400, 407-08 (2012). Protections guaranteed by the Fourth Amendment extend to government action only and is "wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not

acting as an agent of the government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

1. The Government's Subsequent Broader Search Of A Private Party Search Did Not Infringe On The Defendant's Reasonable Expectation Of Privacy.

Under the Fourth Amendment, a search occurs when the government infringes on an individual's reasonable expectation of privacy. *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). The Supreme Court has long recognized that when an individual discloses private information to another individual, such individual has assumed the risk that his confidant will reveal that information to authorities which destroys any Fourth Amendment protections against the government's use of that information. *Jacobsen,* 466 U.S. at 117. As previously recognized by the Supreme Court, "once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *Id*. As such, when the government conducts a search on the heels of a private search, the scope of the private search will determine the legality of the subsequent search. *Jacobsen,* 466 U.S. at 116. Any additional search conducted by the government must be tested by the degree to which they exceeded the scope of the private search. *Id*. Furthermore, when the government uses information that has retained a reasonable expectation of privacy, the government has not acted on the basis of a private search and must obtain a warrant or has presumptively violated the Fourth Amendment. *Jacobsen,* 466 U.S. at 117-18. Thus, unless the government has the right to conduct an independent search, the government may not exceed the scope of the private search. *Id*.

i. The Private Search Doctrine With Respect To Digital Containers.

The private search doctrine as applied to digital containers presents an additional inquiry that has not been considered by this Court in traditional container scenarios like *Jacobsen* and its

progeny. When dealing with modern electronic devices, such as a laptop or cellphone, there is a heightened level of privacy concerns due to its ability to store extensive amount of personal information. *See* Riley v. California 573 U.S. 373 (2014). The Supreme Court, in *Riley v. California*, identified such concerns explaining that modern electronic devices "are not just another technological convenience" but rather these devices "reveal and hold, for many Americans, the privacies of life." *Riley*, 573 U.S. 373, 403.

In addition, a search of a digital container may not always present clear parameters. The circuits are split with respect to the scope of the private search doctrine as it applies to electronic devices. Isabella Blizard, *Comment: Phone Sweet Phone: The Future of the Private Search Doctrine Following Riley v. California*, 49 THE U. OF PAC. L. REV. 207, 216. The Sixth and Eleventh Circuit Court of Appeals have adopted a narrow approach while the Fifth and Seventh Circuit Court of Appeals have adopted a broad approach. *Id*. The narrow approach confines the government's search to the exact files opened during the private search. *Id*. at 225. Alternatively, the broad approach allows for authorities to search the digital container so long as they are not learning anything beyond what was previously learned during the private search. *Id*. at 219. The underlying cause for this split is clear: the narrow approach places greater emphasis on the heightened privacy interest present with electronic devices while the broader approach applies the traditional container analysis promulgated in *Jacobsen*. *Id*. at 219-20. Despite these differences, the broader approach is best suited to determine the scope of a private search involving digital containers because it remains faithful to *Jacobsen* while also considering the unique privacy implications of digital devices. *Id*. at 221.

ii. The Broader Conducted By Officer Yap Did Not Exceed The Scope Of The Private Search.

In *Jacobsen*, the Supreme Court found that because the federal agent had not learned anything more than he had previously learned from the private search and was merely "avoiding the risk of a flaw in the employees' recollection," the confirmatory examination conducted by the government did not constitute a Fourth Amendment violation. *United States v. Runyan*, 275 F.3d 449, 460 (5th Cir. 2001) (quoting *Jacobsen*, 466 U.S. at 115). The Court explained that "protecting against the risk of misdescription hardly advances any legitimate privacy interest." *Id*. Relying on this reasoning, the Firth Circuit conducted their own inquiry to determine whether the government exceeded the scope of a private search when the authorities did a more thorough search of defendant's floppy disks, CDs, ZIP disks. *Id*. at 453. Specifically, the Fifth Circuit was tasked with a question relevant to the case at hand: "whether a police search exceeds the scope of the private search when police examine more items within a particular container than did the private searchers." *Id*. at 461. The *Runyan* Court held that authorities do not exceed the scope of a private search when they examine *more* of the same materials examined by the private party, within a closed container. *Id*. at 465. The court reasoned that although individuals have an expectation of privacy in closed containers, that expectation of privacy is compromised when that container is opened and examined by private parties. *Id*. Consequently, each examination of a particular item within a container does not constitute a Fourth Amendment violation.

The Fifth Circuit, elaborating on *Jacobsen*, explained that "confirmation of prior knowledge does not constitute exceeding the scope of a private search." *Runyan*, 275 F.3d 449, 463. Accordingly, when there are several closed containers, a search of a container that was previously unopened by the private party does not exceed the scope of the initial search so long as law enforcement knew with substantial certainty, based on the statements of the private searchers,

their replication of the private search, and their expertise, what they would find inside. *Id*. Under this framework, law enforcement is not rewarded with any more knowledge than they already had from the underlying private search and thereby frustrates no expectation of privacy that has not already been frustrated. *Id*.

In the present case, the initial scope of the search is determined by Ms. Wildaughter's actions. Ms. Wildaughter conducted a search of the defendant's desktop files after the defendant's behavior raised concern. (R. 24). After observing the defendant get angry and state "I'd do anything to get out of this mess Tiff put me in," Ms. Wildaughter proceeded to search the defendant's computer which was lit up and unlocked. (R. 24). Ms. Wildaughter clicked on several files, including a folder titled "HerbImmunity," and three subfolders contained within, titled "Confirmations," "Customers," and "Receipts." (R. 24). Ms. Wildaughter continued her search by opening up several subfolders contained within the "Customers" folder including a "Tiffany Driscoll" subfolder and images contained therein. (R. 25). Lastly, Ms. Wildaughter review another subfolder titled "For Tiff" and viewed two files titled "Message to Tiffany" and "Market Stuff." (R. 25-26). Ms. Wildaughter then grabbed her flash drive and copied the defendant's desktop onto it. (R. 26). She then turned over the flash drive to Officer Yap explaining she had come across photographs of Tiffany, a short note to Tiffany, usernames and web addresses, and a reference to strychnine. (R. 26-27). Ms. Wildaughter explained that she was concerned the defendant was going to poison Tiffany and told the officer "everything is on there." (R. 27).

Based on Ms. Wildaughter's statements, Officer Yap was substantially certain that all other unopened files contained in the closed container (flash drive) would only confirm Ms. Wildaughter's suspicion—that defendant was planning to kill Tiffany Driscoll. Additionally, an

exact replication of Ms. Wildaughter's search would raise similar suspicion. Specifically, the photos in the closed container, reference to poison, and the behavior of the defendant as described by Ms. Wildaughter in combination with Officer's Yap expertise would provide substantial certainty that he would simply find more information confirming the knowledge he already had.

iii. The Sixth And Eleventh Circuit Improperly Narrowed *Jacobsen*.

The cases from the Sixth and Eleventh Circuit Court of Appeals, which adopt the narrow approach, is distinguishable from *Runyan* and *Jacobsen* specifically because it does not deal with a closed container but rather electronic devices such as a laptop and a cellphone. *United States v. Sparks*, 806 F.3d 1323, 1329; *United States v. Lichtenberger*, 786 F.3d 478, 479-81. The Eleventh Circuit, in *United States v. Sparks*, held that the government search of an unwatched video on the defendant's cellphone did violate the Fourth Amendment, reasoning that the officer's search was inconsistent with the *Riley v. California*. *Sparks*, 806 F.3d 1323, 1336. The Supreme Court in *Riley* held that when law enforcement seizes a cellphone incident to arrest, they must obtain a search warrant to search the contents of a cellphone and suggested that a warrant would specify the specific contents law enforcement intended to search. *Riley v. California*, 573 U.S. 373, 401-02. The court agreed that the tremendous storage capacity of a cellphone combined with the breath of information contained within a cellphone results in heightened expectation of privacy. *Sparks*, 806 F.3d 1323, 1336. Consequently, the Eleventh Circuit found that in context of a cellphone a search by a private party may destroy *some* Fourth Amendment protections, but it does not destroy Fourth Amendment protections to every single item contained in the cellphone. *Id*.

Similarly, the Sixth Circuit in *United States v. Lichtenberger* declined to adopt a broader approach to the private search doctrine. *United States v. Lichtenberger*, 786 F.3d 478. In

Lichtenberger, the defendant's girlfriend discovered numerous child pornography pictures on the defendant's personal laptop. *Lichtenberger*, 786 F.3d 478, 480. The defendant's girlfriend notified law enforcement and upon their arrival she showed them *some* of the photos she discovered on Lichtenberger's laptop. *Id*. The Sixth Circuit held that law enforcement's search of defendant's laptop exceeded the scope of private search, conducted by defendant's girlfriend earlier that day. *Id*. The Sixth Circuit reasoned that law enforcement's search exceeded the scope of the private search in large part because of the "extensive privacy interest at stake in a modern electronic device like a laptop." *Id* at 485. The Sixth Circuit also found the execution of law enforcement's search after arriving at the residence to weigh against the defendant. *Id*. Relying on *Riley v. California*, the Sixth Circuit distinguish physical containers from complex electronic devices. Id. at 487. The Sixth Circuit emphasized the nature of the electronic device "greatly increases the potential privacy interest at stake" thereby weighing in favor of protecting an individual's privacy interest. *Id*. at 488. Furthermore, the Sixth Circuit held that for a government search to be permissible under *Jacobsen*, the government had to be "virtually certain" that it would only find what had already been disclosed by the private search. *Id*. However, because a laptop has extensive storage capacity, the Sixth Circuit found that law enforcement could not be virtually certain its subsequent search would only reveal that which was already searched by the private party. *Id*. Ultimately, the Sixth Circuit's decision in *Lichtenberger* narrowed the private search doctrine to only those files viewed by the private party.

Unlike the Sixth and Eleventh Circuits, the present case does not involve a cellphone or a computer and as such, the heightened privacy concerns present when the narrow approach has been adopted does not exist here. Officer Yap received a closed container, the flash drive, from

Ms. Wildaughter. (R. at 26). The expectation of privacy to the contents of the flash drive had been frustrated when Ms. Wildaughter conducted a search of several files located on the defendant's desktop. (R. at 24-25). Furthermore, Ms. Wildaughter represented to Officer Yap that "everything is on there" indicating that a subsequent search would only confirm her concern that the defendant was trying to poison Tiffany Driscoll. (R. at 27). In the case at hand, the flash drive cannot be compared to an electronic device such as a cellphone or laptop but rather is distinguished due to is closed universe of information selected by the private party. Based on the representation of Ms. Wildaughter, Officer Yap could appropriately conclude that his search would confirm Ms. Wildaughter's statements and description. (R. at 27). Accordingly, Officer Yap's search of the flash drive did not constitute a search under the Fourth Amendment because the defendant's expectation was compromised by a private party search and the subsequent search that followed was a more thorough search of the flash drive.

2. The Government's Seizure Of Files Discovered On The Defendant's Computer And Subsequently Used At Trial Did Not Violate The Fourth Amendment Because The Seizure Was Reasonable.

In *Jacobsen*, the Supreme Court stated that a seizure that follows from a governmental search must weigh "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest challenged." *Jacobsen,* 466 U.S. at 125. A reasonable seizure or one that has only a *de minimis* impact on any protected property interest will withstand Fourth Amendment protections. *Id*. In the present case, Officer Yap conducted a subsequent search of a closed container with information provided to him by a private party that had already searched through the defendant's desktop files. (R. at 25-26). The defendant's privacy interest was frustrated by the search of Ms. Wildaughter and while this private

search may have not entailed a thorough search of each file located in the closed container, Officer Yap only needed to be substantially certain that his search would have confirmed the information provided by the private searcher.(R. at 24). In this case, Officer Yap did confirm the suspicion of Ms. Wildaughter by replicating her search and conducting a more thorough search of the closed container. As such, Officer Yap's seizure of the files has only a *de minimis* impact on the defendant's privacy interest and should therefore withstand Fourth Amendment Protections.

III. THE *BRADY V. MARYLAND* REQUIREMENTS WERE NOT VIOLATED WHEN THE GOVERNMENT CHOSE NOT TO PRESENT THE EVIDENCE IN QUESTION IN TRIAL; EVIDENCE MUST BE MATERIAL AND THE EVIDENCE WITHHELD DID NOT MEET THAT REQUIREMENT.

In *Brady v. Maryland*, the Supreme Court presented a discovery rule related to due process clause guaranteed by the Constitution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Court stated to prove a "*Brady* Violation" a defendant must prove that (1) "the prosecution suppressed evidence," (2) "the evidence was favorable to the defense," (3) "the evidence was material." *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). In *Kyles v. Whitley*, the Court stated that "evidence is considered 'material' under *Brady* 'only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). Since this ruling, lower courts have struggled with the intersection between evidence that is classified as material and inadmissible, for both trial and impeachment purposes under the *Brady* violation. However, in our case it is clear the evidence withheld does not meet the requirement of material and was deemed inadmissible.

1. Inadmissible Evidence, As A Matter Of Law Is Inadmissible At Trial Despite Of The Possible *Brady* Violation.

The issue presented to the Court is whether inadmissible evidence can ever form the basis of a *Brady* violation. In other words, the issue presented means can inadmissible evidence ever pass the materiality requirement of the *Brady* violation. The *Kyles* case clearly stated that material evidence exists when there is a reasonable probability that the evidence in question would have resulted in a different outcome. *Kyles,* 514 U.S. 419. However, before the prosecution can determine whether the evidence would result in a different outcome, all evidence used in trial must abide by the Federal Rules of Evidence. If the evidence is inadmissible for reasons outlined in the Federal Rules of Evidence, then it is possible that evidence is ruled out by the prosecution before they consider the *Brady* requirements.

In *Wood v. Bartholomew*, the Court goes into further detail regarding evidence that is deemed inadmissible. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). The Court outlines inadmissible evidence regarding *Brady* Violation and uses the Federal Rules of Evidence as the first trier and *Brady* requirements as the second trier in order to determine if there has been a *Brady* Violation. *Brady,* 373 U.S. 83, 87. In this case, the respondent would not have been able to present the evidence in trial during arguments or during witness questioning; therefore, the probability of that evidence having a reasonable effect on the outcome of the case was relatively low. The Court stated that "inadmissible evidence is 'as a matter of law, inadmissible for *Brady* purposes." *Id*.

Applying this reasoning to our case, the prosecution determined that the reports provided by the FBI were not reports that could be used in trial, both during argument and during witness questioning. (R. at 56). Amongst the *Brady* Requirements, the reports seem to meet the first two requirements, the FBI reports were suppressed by the prosecution and arguably, could be favorable to the defense since the reports mention two other possible suspects. However, the information

provided by the FBI reports were hearsay and lacked the foundation needed to be admitted into evidence at trial. The evidence in question would not meet the materiality requirement outlined in the *Brady* case because there is a low probability that the evidence presented would not reasonably change the outcome of the case.

2. Inadmissible Evidence Can Possibly Be Admitted; However, The Evidence Must Be Material.

The first, third and eleventh circuit are under the opinion that the Supreme Court case of *Wood v. Bartholomew* left room for inadmissible evidence being the basis for a *Brady* violation if the evidence would have led to the disclosure of the admissible evidence. *Wood*, 516 U.S. 1. Arguably, the first, third and eleventh circuit could apply this same reasoning to our issue presented to the court and accept the claim that inadmissible evidence could form the basis of a *Brady* violation. The defense could argue that the evidence that was withheld could possibly uncover evidence that would be useful to the defense. As mentioned in the dissent, Circuit Judge Cahill explains that by following this logic the defendant's defense team could have presented the 911 call that names two other suspects. While we agree that the 911 calls could have possibly been presented the evidence would still need to meet the requirement of materiality. With that, the evidence that was withheld in our case does not constitute a *Brady* violation.

In the eleventh circuit case*, Bradley v. Nagle*, the court ruled that there was no *Brady* violation. *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). Similarly to our case, the court was presented with a *Brady* violation claim. Bradley contended that the prosecution withheld evidence from the defense that was sufficiently prejudicial. *Id*. The evidence named other suspects and Bradley believed this warranted a new trial. *Id*. The three items of evidence were all inadmissible according to the Federal Rules of Evidence; however, the circuit court used the

underlying rule in *Wood v. Bartholomew* to determine if the inadmissible evidence, in this case, would have been disclosed to lead to admissible evidence. *Id*. *Wood*, 516 U.S. 1. While the court assessed this claim, they relied on the opinion of the *Spaziano v. Singletary* case that determined although the evidence is inadmissible, would it have led to the defense to some admissible material exculpatory evidence and the opinion of the *Kyles v. Whitley* case that determined that evidence related to a *Brady* violation should be reviewed collectively not item-by-item. *Spaziano v. Singletary,* 36 F.3d 1028 (11th Cir. 1994). *Kyles*, 514 U.S. 419. The circuit court found that the evidence, collectively, did not warrant a new trial. *Bradley*, 212 F.3d 559, 567. The court explained that Bradley's claim that he could uncover admissible evidence from the inadmissible evidence that was withheld was speculative and lacked confidence. *Id.* The evidence itself was likely fruitless and although it could be presented, it would not hold much weight. *Id*.

Applying this reasoning to our case, the same outcome would be expected. If the defendant's defense team can claim that the inadmissible evidence withheld by the prosecution could have led to admissible evidence, the court would find that the evidence is speculative. The FBI reports mention two other suspects, and the defense would argue that this evidence needed to be presented in court. (R. at 11-12). The first suspect was another HerbImmunity distributor, according to a claim Driscoll was in debt to, and the suspect was supposedly violent. (R. at 11). The second suspect was named in an anonymous voice message. (R. at 12). Both claims lack confidence and foundation. Understanding that the *Wood* case allows the defense to establish a "what if" scenario based on inadmissible evidence, the evidence that could be uncovered and admitted still needs to meet material evidence requirements. *Wood*, 516 U.S. 1.

3. It Must Be Reasonably Probable For The Inadmissible Evidence To Result In A Different Outcome Of The Case To Form A *Brady* Violation.

Rather than taking the fourth and eighth circuit approach of the treatment of inadmissible evidence by describing it as a matter of law to be inadmissible for *Brady* purposes, the fifth and sixth circuit are likely to different route. When determining whether inadmissible evidence could ever form the basis of a *Brady* violation, the fifth and sixth circuit are likely to review inadmissible evidence to decide whether the disclosure would have created a reasonable probability that the result of the proceeding would have been different. In the *Kyles* case, the court determined that in order to be deemed material under *Brady*, the evidence in question must be supported and reasonably probable. *Kyles,* 514 U.S. 419. The term reasonably probable has been consistently used in court to mean the jury or judge, in light of the newly admissible evidence, would have decided the case differently. Comparably to the first, third and eleventh circuit, these courts are willing to allow the evidence that was deemed inadmissible into court to be presented, opening the door for inadmissible evidence to be the basis of a *Brady* violation.

In *Henness v. Bagley*, the defense presented a number of informational summaries that were withheld by the prosecution. *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011). The court reviewed each summary individually to determine if it the evidence was speculative. *Id*. In this case, the summaries revealed evidence that was already known by the defense or evidence that was hearsay and lacked foundation. *Id.* As mentioned above, judges have allowed evidence to be admitted that may be regarded as hearsay but could be supported by other admissible evidence. *Henness*, however, could not make the connection to admissible evidence. *Id.* Taking into consideration the evidence as a whole, Circuit Judge Siler determined that if this evidence had been disclosed there was no reasonable probability that the case would have been decided differently. *Id*. Similarly to the *Giglio v. United States* case, the court determined that the material

exculpatory evidence that is needed to prove a *Brady* violation is evidence that would have undermined the confidence in the outcome of the trial. *Giglio v. United States*, 405 U.S. 150 (1972).

Likewise in our case, the court is presented with evidence that would not undermine the confidence of the previous trial. The evidence against the defendant far outweighs the evidence that was withheld. The photographs of the victim, references to rat poison on the defendant's computer and the therapy notes to name a few, are all items of evidence that are supported by foundation and admissible in court. (R. at 51, 3). The inadmissible evidence that the defense team would like to be considered to form a basis of a *Brady* claim are not material. The FBI reports are not likely to sway even one juror to the opposite side. The reports are speculative, at best and the Court has made it clear more than mere speculation not enough to lead to admissible evidence.

For the above reasons, no *Brady* violation has occurred. The prosecution withheld evidence that was inadmissible and proven to be immaterial. Regardless of the current circuit split the first, third, fourth, fifth, sixth, eighth and eleventh circuit would agree that no *Brady* violation took place in this case by applying their three different methods to determine if the inadmissible in this case can ever form the basis of a *Brady* violation.

CONCLUSION

For the foregoing reasons, Respondent, the United States of America, respectfully requests that this Court affirm the decision of the Fourteenth Circuit Court of Appeals and hold that: (1) the test testimony of Dr. Pollak is admissible; (2) the search and seizure were permissible and subsequent use of files at trial is admissible; (3) the FBI reports do not constitute a *Brady* violation.

Dated: February 15, 2021

Respectfully submitted,

TEAM 1
COUNSEL FOR RESPONDENT