Team P10 – Original

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 United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER UNITED STATES OF AMERICA

Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501, which was afforded to Ms. Samantha Gold, should have precluded the admission at trial of Ms. Gold's confidential communications with her psychotherapist, since the alleged threats were already previously disclosed to law enforcement, and since the threats had already passed.

II. Whether the Government exceeded its authority and violated Ms. Gold's Fourth Amendment rights when it relied on a private search and seizure of Ms. Gold's laptop contents, wrongly conducted a broader search without first obtaining a warrant and introduced the unlawfully seized contents at trial.

III. Whether the Government violated the requirements of *Brady v. Maryland* when it failed to disclose potentially exculpatory information based on the impermissible and inappropriate assumption that such information would be inadmissible at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITES

STATE COURTS

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The District Court's Bench Opinion appears in the record at pages 30-49. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 50-59.

CONSTITUTIONAL PROVISIONS

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

A. Statement of the Facts

On June 6, 2017, the government indicted Samantha Gold for delivery by mail of an item with the intent to injure or kill, concerning the death of Tiffany Driscoll, according to 18 U.S.C.A. §§1716(j)(2)-(3)(West 2006); 18 U.S.C.A. §3551 (West 1990); R.1. Ms. Gold is a student at Joralemon University diagnosed with Intermittent Explosive Disorder ("IED"). R.3. IED is characterized by repeated episodes of aggressive, impulsive, or violent behavior. R.17. Beginning in 2015, Ms. Gold voluntarily and diligently sought Dr. Chelsea Pollak's help to better manage her disorder through weekly therapy sessions. *Id*. As a result of their therapy sessions, Dr. Pollack was able to treat Ms. Gold effectively. *Id*.

On May 25, 2017, Ms. Gold attended her weekly therapy session with Dr. Pollack, where she explained to Dr. Pollak that she was $2,000 in debt due to her involvement with a multi-level marketing group called HerbImmunity. R.3-4. Ms. Gold has previously confided in Dr. Pollack about her stress working with HerbImmunity. *Id*. at 18. Dr. Pollack assisted Ms. Gold in managing the job's stress and listening to the struggles Ms. Gold faced trying to sell the HerbImmunity products. Ms. Gold expressed her disappointment about this debt and said she was going to kill "her." R.21. However, Ms. Gold never mentioned to whom she directed her anger. R.22. Even though Dr. Pollak did not probe Ms. Gold for information or context about her alleged threat, she decided to contact the police after the session in compliance with the Boerum State Reporting Requirement. R.19. Dr. Pollak thought the disclosure was necessary because of Ms. Gold's diagnosis of IED. *Id*.

Officer Nicole Fuchs followed up on Dr. Pollack's call and visited Ms. Gold at her university dorm room. R.5. The police talked to Ms. Gold for 15 minutes and determined that she was calm,

rational, and posed no threat to herself nor Ms. Driscoll. *Id*. Officer Fuchs then contacted Ms. Driscoll and made her aware of the alleged threat made against her by Ms. Gold. *Id*. Ms. Driscoll reported that she was not concerned and felt safe. *Id*.

That same day, Jennifer Wildaughter, Ms. Gold's roommate, allegedly observed Ms. Gold returned home upset. R.24. In response, she decided to look through Ms. Gold's personal computer without permission. R.27. Ms. Wildaughter and Ms. Gold's living arrangement consisted of a shared suite but separate bedrooms. *Id*. In addition to separate bedrooms, Ms. Gold and her roommate did not share Ms. Gold's computer. *Id.* During Ms. Wildaughter's search of Ms. Gold's personal computer, she found a folder with documents about HerbImmunity. R.24. Within that folder were various subfolders, but Ms. Wildaughter only looked through the "Customers" and "Tiffany Driscoll" folder. R.25. She viewed files titled "Message to Tiffany" and "Market Stuff." *Id*. Forgetting that the girls had a problem with rats in their apartment, Ms. Wildaughter became concerned when she saw a reference to rat poison among Ms. Gold's personal files. R.29.

After Ms. Wildaughter concluded her invasive search on Ms. Gold's laptop, she took it upon herself to copy the entire contents of Ms. Gold's laptop onto a flash drive and brought it to the Livingston Police department. R.25. At the police station, Ms. Wildaughter spoke to Officer Aaron Yap, handed him the flash drive, and told him, "everything is on there." R.27. After Ms. Wildaughter left the police station, Officer Yap examined the entire flash drive. R.6 Officer Yap explained in his report that he opened and examined every document on the flash drive. *Id*. This search included Ms. Gold's personal photos, health insurance ID and every other intimate detail Ms. Gold kept on her computer. *Id*. After examining all of the documents, Officer Yap decided that Ms. Gold would attempt to harm Ms. Driscoll and informed his supervisor. *Id*. Once Officer Yap informed his supervisor, his role in the investigation was complete. *Id*.

On June 2, 2017, the FBI became involved in this case. R.11. Special Agent Mary Baer interviewed Chase Caplow in the FBI's course of investigation for the death of Ms. Driscoll. *Id*. Mr. Caplow was also involved with HerbImmunity. *Id*. He told the Special Agent that two weeks before her death, Ms. Driscoll confided in him and said that she owed money to an upstream distributor within the company name Martin Brodie. *Id*. Mr. Caplow also told investigators Mr. Brodie was known for being violent. *Id*. On June 7, 2017, the FBI received an anonymous phone call regarding Ms. Driscoll's death. R.12. The anonymous tipster alleged that Belinda Stevens was responsible for the death of Ms. Driscoll. *Id*. Ms. Stevens and Ms. Driscoll both worked for HerbImmunity. *Id*. The record reflects that follow-up investigations on these leads were "woefully inadequate." R.45. Additionally, the government failed to disclose the information in the FBI reports before Ms. Gold's trial. R.43.

B. Procedural History

The grand jury charged Ms. Gold with allegedly violating 18 U.S.C.A. §§1716(j)(2)-(3)(West 2006); 18 U.S.C.A. §3551 (West 1990); R.1. Before the grand jury proceeding, Ms. Gold filed a motion to suppress Dr. Pollak's testimony at trial and evidence seized by a warrantless search of Ms. Gold's computer files. R.16. The District Court for the Eastern District of Boerum denied the motion. R.40. The court decided three things: (1) to adopt the broader interpretation of the private search doctrine; (2) to recognize the "dangerous patient" exception; and (3) when Ms. Gold allegedly made threats during therapy, she broke the doctor-patient privilege. R.40-41.

After a hearing on the motion to suppress, the District Court allowed the government to use evidence obtained from the warrantless search of Ms. Gold's flash drive. R.31, 40. Additionally, it allowed Dr. Pollak to testify in court against Ms. Gold about confidential statements that are protected by the psychotherapist-patient privilege. R.35, 41. Following her conviction, Ms. Gold

filed a motion for a directed verdict or new trial because the government failed to disclose two suspects introduced during the F.B.I.'s investigation. R.42,43. The District Court denied the motion, holding that statements in the two reports were inadmissible hearsay and therefore could not form the basis for a *Brady* violation. R.42, 49. It additionally held that disclosure of the reports would not have changed the outcome of the trial. R.49.

On December 2, 2019, Ms. Gold argued on appeal to the United States Court of Appeals for the Fourteenth Circuit. R.50. Ms. Gold appealed the district court's denial of her motions to suppress and her motion for a directed verdict or new trial. R.52, 54-55. The Court of Appeals affirmed the decision of the District Court on all accounts. R.57. First, the court concluded that the dangerous-patient exception applies to testimonial privilege in federal court as it would to the "confidentiality covering psychotherapist-patient communications under state law." R.52. Next, the court adopted the broader approach to the private search doctrine reasoning that a narrow approach would impose "stringent" and "unrealistic guidelines on government agents." R.55. Finally, the court concluded that the two reports did not "meet the materiality requirement of a *Brady* claim." R.56. Circuit Judge Cahill dissented, holding that the court should reverse both of the District Court's denials. R.57.

The Supreme Court granted Ms. Gold's petition for a writ of certiorari on November 16, 2020, on three grounds. R.60. Firstly, the dangerous-patient exception should not apply to the psychotherapist-patient testimonial privilege. R.60. Secondly, the government violated Ms. Gold's Fourth Amendment right when they conducted a broader search on her flash drive than the one conducted by the private party. *Id*. And thirdly, the government violated *Brady v. Maryland's* requirements when they failed to disclose other suspects solely because it would be inadmissible at trial. *Id.*

STANDARD OF REVIEW

This Court should review the improper determinations of the lower court as well as the mixed questions of law and fact de novo. *Ornelas v. U.S.*, 517 U.S. 690 (1996). Moreover, the lower court "is not entitled to a presumption of correctness…and is open to review by federal courts." *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987). Consequently, all three issues on the record should be reviewed de novo.

SUMMARY OF THE ARGUMENT

Ms. Gold is entitled to a new trial or directed verdict because the lower court erroneously applied the dangerous patient exception to the psychotherapist-patient privilege; Ms. Gold's Fourth Amendment rights were violated by an overbroad search and warrantless seized of her personal computer files; and the government's failure to disclose two additional suspects, regardless of admissibility, forms a basis for a *Brady* violation.

The lower court improperly allowed Dr. Pollak to testify by applying the dangerous patient exception to the psychotherapist-patient privilege. The decision to adopt this exception was incorrect because the Federal Rules of Evidence allows a psychotherapist to testify in very limited circumstances. *Jaffee v. Redmond* established that a psychotherapist cannot share confidential communications made during the course of treatment. However, even if this Court ultimately decides to adopt the dangerous patient exception, the facts on the record fail the *Glass* test which determines the application of the exception. Allowing Dr. Pollack to testify in person at trial did not serve to protect a third-party from an alleged threat of harm therefore making its probative value minimal.

The Fourth Amendment protects the privacy rights of people by making it a requirement that law enforcement be armed with a warrant supported by probable cause before searching or arresting a suspect. When Ms. Gold's roommate handed the government a flash drive of the entire

contents of her computer, the police's search capacity was limited to the files viewed by Ms. Wildaughter. The moment Officer Yap's search exceeded those files, Ms. Gold's Fourth Amendments rights were violated.

Finally, the government committed a *Brady* violation by failing to disclose exculpatory evidence. At the time of Ms. Gold's indictment there was a potential suspect to the crime. A month after her indictment the FBI received a tip about another alternative culprit. Considering the government's weak case, which was founded upon a Fourth Amendment violation, this information was essential for Ms. Gold to develop against the government's accusations. Failing to share this information with the defense violated Ms. Gold's ability to have a fair trial and requires a new trial or directed verdict.

ARGUMENT

I. THE LOWER COURT ERRED IN ADOPTING THE DANGEROUS-PATIENT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT TESTIMONIAL PRIVILEGE UNDER RULE 501 OF THE FEDERAL RULES OF EVIDENCE WHEN IT COMPELLED A PSYCHOTHERAPIST TO TESTIFY ABOUT THE CONFIDENTIAL INFORMATION COMMUNICATED DURING THE COURSE OF TREATMENT.

The lower court's decision to allow Dr. Pollak to testify about confidential statements made during treatment was a reversible error. While the Federal Rules of Evidence (FRE) do not expressly provide a psychotherapist-patient privilege, this Court has interpreted such a privilege under FRE 501. ***See*** *Jaffee v. Redmond*, 518 U.S. 1 (1996). In addition to creating a psychotherapist-patient privilege, the *Jaffee* case included a mystifying footnote, the subject of heated debate among the Circuit Courts. The footnote reads as follows:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Id at 18 n.19.

At issue here is whether the lower court correctly applied the dangerous patient exception when it allowed Dr. Pollak to testify. To determine that, we first consider whether the language of footnote 19 extended the dangerous patient exception to allow a psychotherapist's testimony at a criminal trial. The Sixth, Eighth and Ninth Circuits depend on judicial interpretation, the legislature's draft of Rule 504, and underlying public policy. All three Circuits correctly held that the dangerous patient exception does not apply to the psychotherapist-patient privilege. Therefore, this Court should follow the Circuits' reasoning by reversing the lower court's decision and find that the dangerous patient exception does not apply.

A. The Reasoning Of The Sixth, Eighth, And Ninth Circuits That A Psychotherapist Is Not Allowed To Testify Against Their Client Is The Standard For Ms. Gold's Case.

A handful of circuits mistakenly link the "duty to protect," (*Tarasoff* Duty) with the psychotherapist-patient privilege. ***See*** *U.S. v. Glass*, 133 F.3d 1356 (10th Cir. 1998). The *Tarasoff* Duty, which is in effect throughout the country, was introduced in *Tarasoff v. Regents of the University of California*, which held that "once a therapist does determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." 551 P.2d 334, 345 (Cal. 1976). Depending on the nature of the case, the therapist's duty may include notifying the police, or warning the intended victim" of the imminent danger." *Ewing v. Goldstein*, 120 Cal. App. 4th 807, 815 (Cal. Ct. App. 2004). Additionally, States have found that even after a "mental health treatment provider warns threatened individuals and notifies law enforcement regarding threatening statements made in the course of a therapy session; the testimonial privilege remains intact." *People v. Kailey*, 333 P.3d 89, 92 (Colo. 2014).

The Dangerous Patient Exception is another name for the *Tarasoff* Duty and has been applied narrowly to the Psychotherapist-patient Privilege. *United States v. Chase*, 340 F.3d 978, 984, 992 (9th Cir. 2003)("Most states have a dangerous-patient exception to their psychotherapist-patient confidentiality laws."). There is currently a Circuit split regarding whether the Dangerous patient exception should extend to "the federal testimonial privilege…" *Id*. at 985. This Court should follow the Circuits that refuse to extend such an exception to the Psychotherapist-patient Privilege.

1. There is a distinction between a psychotherapist's duty to contact law enforcement and allowing disclosure of confidential conversations in a future criminal proceeding.

The Tenth Circuit improperly created a link between a therapist's *Tarasoff* duty and the psychotherapist-patient privilege. ***See*** *Glass*, 133 F.3d at 1356. In *United States v. Hayes*, the court reasoned, there is "only a marginal connection, if any at all" between a psychotherapist's *Tarasoff*

duty and dangerous patient exception. 227 F.3d 578, 583 (6th Cir. 2000). The *Tarasoff* duty exists to protect innocent third parties from a "reasonable" and imminent threat of harm. *Id*. at 584. Whereas, that same threat of harm likely subsides by the time court proceedings begin against the patient-defendant. *Id*. If Courts choose to link the two, they run the risk of confusing the issue because it devolves into a question of whether the psychotherapist acted "reasonably" before disclosing an alleged "serious threat." *Id*.

The lower court in the case at bar confused the issue when it used a statement from *People v. Kailey* to justify adopting the dangerous-patient exception. R.53. *Kailey* states that "cases involving the duty to warn are of a more serious sort... the duty does not come into play lightly" 333 P.3d 89,98. As used by the lower court, this statement implies that every state has an equally strict duty to warn requirement, and thus, analysis of the alleged threat need not go further. The lower court's reasoning is not the case. Texas, for example, does not recognize a duty to warn at all. *Thapar v. Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999). Pennsylvania, on the other hand, requires a "specific and immediate threat of serious bodily injury [that] has been conveyed by the patient to the professional regarding a specifically identified or readily identifiable victim" *Emerich v. Philadelphia Ctr. for Human Dev., Inc.*, 720 A.2d 1032 (Pa. 1998). Boerum, the state on the record here, requires an "actual threat" by the patient to harm "themselves or an identifiable victim(s)" and a "clinical judgment" of the patient's capability and likelihood of carrying out the threat. R.2. In a state like Texas, a case regarding the duty to warn would raise no more severe issues than any other criminal case, whereas, in a state like Boerum, it would. As a result, this method would produce erratic results because the standard of reasonableness varies by state.

Moreover, as the *Hayes* Court stated, "it would be rather perverse and unjust to condition the freedom of individuals on the competency of a treating psychotherapist." 227 F.3d at 584.

Therefore, conditioning psychotherapist-patient privilege on the *Tarasoff* duty is "unsound in theory and in practice" and this Court should not create this improper link. *Id*. The *Tarasoff* duty, which governs confidentiality, and the psychotherapist-patient privilege, which does not, are distinct. *Chase*, 340 F.3d at 986. The *Chase* Court agrees with and expands upon the findings in *Hayes* for two reasons. First, there is little connection between the "obligation to report a dangerous patient at the time the patient makes a threat... and the later operation of the federal testimonial privilege"; and second, reasonableness standards differ between states. *Id.* at 987.

The Court explains that the *Tarasoff* duty is forward looking and "justified on the grounds of protection." *Id*. The societal benefit of disclosing a dangerous patient when they have made their intentions to harm themselves or another person outweighs any damage it may cause to the psychotherapist-patient relationship. *Id*. On the other hand, testimony at a future criminal trial is retrospective and serves to provide proof. *Id*. As the Court states, "[t]here is not necessarily a connection between the goals of protection and proof" and therefore, the two should not be linked. *Id*.

The Court then compares the disclosure exception to confidentiality requirements in Washington and California. *Wash. Rev. Code §71.05.390(10)(*West 2014*); Cal. Evid. §1024* (West 1967). In *Chase*, the defendant would have been subject to completely different evidentiary rules. 340 F.3d 987. In Washington, his therapist could testify against him whereas in California he could not. *Id* at 988. The record in Ms. Gold's case shows that in Boerum, a therapist has permission to disclose conversations if the patient made an actual threat to physically harm either themselves or an identifiable victim(s). At which point, "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." *Boerum Health and Safety Code §711*;

R.2. Unlike the California exception discussed by the *Chase* court, there is no evidentiary dangerous-patient exception added to the rule. *Cal. Evid. §1024 (West 1967)*. And unlike the Washington exception also discussed by the *Chase* court, a therapist in Boerum must believe that the patient has the capability and likelihood of actually carrying out the threat. *Wash. Rev. Code §71.05.390(10)(*West 2014); R.2.

Ms. Gold, like the defendant in *Chase* would be subject to different evidentiary rules depending on which State she lived in. Dissimilarly to the defendant in *Chase*, Dr. Pollak could not testify against her in Washington because the rule requires "repeated harassment", and the record does not reflect that Ms. Gold did any such thing. R.4. However, like the defendant in *Chase*, Dr. Pollak could testify against her in California because the record shows that she was "concerned that [Ms. Gold] is going to harm Driscoll." *Id*.

Finally, Dr. Pollak could disclose Ms. Gold's alleged threat in Boerum because similar to California's requirement, she was "concerned that [Ms. Gold] is going to harm Driscoll." *Id*. However, she could not testify because, unlike the California code, the Boerum code does not contain a testimonial exception. R.2. Hinging the psychotherapist-patient privilege on the *Tarasoff* duty will result in varied outcomes in the federal system. *Chase*, 340 F.3d at 987. Therefore, the Court should aim for uniformity under FRE 501 and linking the psychotherapist-patient privilege to the *Tarasoff* duty, a state-managed duty does just the opposite.

The Fifth Circuit mistakenly goes as far as to say if a patient voices a threat to their therapist after being aware of the therapist's *Tarasoff* duty, the patient waives the psychotherapist-patient privilege. *U.S. v. Auster*, 517 F.3d 312 (5th Cir. 2008). The *Auster* Court reasoned that the patient "had no 'reasonable expectation of confidentiality,'... in [their] threatening statement, and without such a reasonable expectation, there is no privilege." *Auster*, 517 F.3d 312, 316 (5th Cir.

2008)(***citing*** *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir.1997)); ***accord.*** *Hayes*, 227 F.3d at 589 (Boggs, J., **dissenting**); *Chase*, 340 F.3d at 996 (Kleinfeld, J., **concurring**).

However, the majority opinion in *Chase* dispels this theory. The opinion relies on an unreasonable assumption that the patient "knows that a disclosure for one purpose (warning a potential target of violence) is a disclosure for all purposes (including incriminating testimony in a federal criminal trial)." *Chase*, 340 F.3d at 988. In the instant case, Dr. Pollak said she told Ms. Gold about her *Tarasoff* duty when they began their psychotherapist-patient relationship. R.21. However, she also admits that she did not warn Ms. Gold that statements made in the course of treatment could be used against her in a "subsequent criminal proceeding." R.21. As formerly established, linking confidentiality and privilege together is illogical. *Id* at 986. There is a big difference between "inform[ing] a patient of the "duty to protect" [and] "advis[ing] a patient that his "trusted" confidant may one day assist in procuring his conviction and incarceration." *Hayes*, 227 F.3d at 586.

Additionally, assuming the patient is knowledgeable about the *Tarasoff* duty and FRE 501, the *Tarasoff* duty will most likely govern their expectation. *Chase*, 340 F.3d at 988. So, a patient can expect "that a therapist may disclose threats in order to warn intended victims but may not testify to the threats in federal court..." *Id* at 988-989. The *Hayes* Court adds that "it is the patient, alone, who has the authority to waive... evidentiary privilege" and so, a therapist "must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient" in order to secure a valid waiver. 227 F.3d at 587. Distinguishable from the defendant in Hayes who "often suffer from serious mental and/or emotional disorder," Ms. Gold is a "calm and rational" college student. *Hayes*, 227 F.3d at 587, R.5. However, in that case, the psychologists gave the defendant "more than ample notice that they would testify against him in a criminal

proceeding." *Hayes*, 227 F.3d at 587. Whereas in this case, the record reflects that Dr. Pollak did not give Ms. Gold any notice that she would testify against her in a criminal proceeding. R.21.

While Ms. Gold did not need an explanation tailored to her unique needs, she cannot be expected to assume Dr. Pollak would testify against her in the future when she was never informed about such an invasion. A patient does not waive the psychotherapist-patient privilege when a patient makes alleged threats that trigger the *Tarasoff* duty; therefore, implementing a dangerous patient exception does not make sense.

B. Disclosure on the basis of a Tarasoff warning is not an exception under FRE 504.

The *Jaffee* Court relied on the language of Drafted FRE 504 as well as the Advisory Committee when creating the psychotherapist-patient privilege. *Jaffee,* 518 U.S. at 15. It did so because it agreed that "a psychotherapist-patient privilege will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth…'" *Id* (*citing Trammel v. United States,* 445 U.S., 40, 50 (1980)). Draft FRE 504 specifically identified the psychotherapist-patient privilege and provided only three exception: "(1) Proceedings for Hospitalization… (2) Examination by Order of Judge… (3) Condition an Element of Claim or Defense…". Therefore, this Court should once again turn to the language of Drafted FRE 504 when determining expectations to the psychotherapist-patient privilege.

The three exceptions expressly provided for do not apply to Ms. Gold. The proceeding for hospitalization and the examination by order of judge exceptions both require that the patient-defendant be evaluated involuntarily. The record reflects that the conversation in question did not occur in the "course of diagnosis or treatment" to determine Ms. Gold's need for hospitalization or as a result of a court ordered examination. *Fed. R. Evid. 504(d)(1)-(2)(proposed 1973)*, R.4. Dr. Pollak and Ms. Gold had been working together since 2015. R.17. Ms. Gold was diagnosed with

IED and Dr. Pollak began "effectively treating her through weekly psychotherapy sessions". *Id.* The conversation in question was one of those "weekly psychotherapy sessions" intended to address Ms. Gold's "anger management issues." R.17. The condition as an element of claim or defense exception does not apply to Ms. Gold because the record does not reflect that Ms. Gold relied on her diagnosis of IED to form a defense. *Fed. R. Evid. 504(d)(3)(proposed 1973).*Ms. Gold's only issue regarding her conversation with Dr. Pollak is that the dangerous patient exception should not be adopted and Dr. Pollak should not be allowed to testify about their communications. R.35. Therefore, none of the proposed exceptions to the psychotherapist-patient privilege apply to Ms. Gold.

Although Draft FRE 504 was never officially enforced, the Legislative history of Rule 501 makes it abundantly clear that Congress did not reject any of the specific draft provisions. *Fed. R. Evid. 501.* Rather, their goal was to leave room for "growth and development and for some applicability of state law." *Id.* The *Jaffee* Court was not the only court to rely on the language in Draft FRE 504. ***E.g.,*** *Chase*, 340 F.3d at 989-990; *Hayes*, 227 F.3d 578. According to the *Chase* Court*,* Draft FRE 504 is deserving of serious consideration and consultation because this Court favorably relied on it when creating the psychotherapist-patient privilege in *Jaffee.* 340 F.3d at 990. Further, the court in *U.S. v. Ghane* Court points out that this Court and the Eighth Circuit have "looked to proposed standards to inform the definition of the federal common law of privileges, despite the failure of Congress to enact such a detailed article on privileges." 673 F.3d 771, 782 (8th Cir. 2012).

When deciding whether to adopt exceptions to the psychotherapist-patient privilege, many Courts, including this very Court in *Jaffee*, turned to the Draft FREs for guidance, dubbing it "a useful starting place." *Ghane*, 673 F.3d at 782; ***see also*** *Chase,* 340 F.3d at 990, *Hayes*, 227 F.3d

578, *Jaffee*, 518 U.S. at 15, *In re Grand Jury Proceedings (Gregory P. Violette),* 183 F.3d 71, 77-78 (1st Cir. 1999)(consulting Draft FRE 504 in considering crime-fraud exception); *Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1450-1451 (10th Cir. 1990)(adopting "condition an element of a claim or defense" exception outlined in Draft FRE 504). It is important to note that Draft FRE 504 expressly detailed three exceptions where a psychotherapist could testify. It intentionally left out certain exceptions. Therefore, this Court should consult Draft FRE 504 and acknowledge that the dangerous-patient exception is one of the listed exceptions to the psychotherapist-patient privilege.

C. Even If The Court Chooses To Adopt The Dangerous Patient Exception, The Facts Of This Case Fail The *Glass* Test.

Should this Court decide to adopt the Tenth Circuit's view of the dangerous patient exception, Dr. Pollak still should not be allowed to testify. The *Glass* Court developed the following test to determine when the dangerous patient exception would apply to the psychotherapist-patient privilege: "[1] whether, in the context of [the] case, the threat was serious when it was uttered and [2] whether its disclosure was the only means of averting harm…" 133 F.3d at 1360.

First, Ms. Gold's alleged threat against Ms. Driscoll did not rise to the level of a serious threat. It appears from the different holdings in *Glass* and *Hardy* that a serious threat requires immediate disclosure by the therapist and specificity of the threat. *Glass*, 133 F.3d at 1359 (specific threat, ten-day gap between defendant's threat and therapist's disclosure to law enforcement did not demonstrate a serious threat); *United States v. Hardy,* 640 F. Supp. 2d 75, 80 (D. Me. 2009)(specific threat, five-month delay in arrest did not affect seriousness of defendant's threat in part because therapist disclosed the threat to Secret Services immediately after it was made).

In *Glass*, the therapist waited ten days before disclosing the defendant's threat to law enforcement whereas, in *Hardy*, the therapist disclosed the defendant's threat immediately after

they heard it. *Glass*, 133 F.3d at 1359, *Hardy,* 640 F. Supp. 2d at 80. This record is more like *Hardy* in terms of immediacy because Dr. Pollak disclosed Ms. Gold's alleged threat to law enforce right after Ms. Gold left her office. R.5. In *Hardy,* a security guard found a "large hunting knife" on the defendant's person when they searched him. 640 F. Supp. 2d at 77. The record does not reflect that Ms. Gold had or referenced any weapons or methods of allegedly kills Ms. Driscoll. Additionally, in *Hardy* the defendant specifically threated to "kill then-President Bush by cutting his head off and by shooting him," and in *Glass,* the defendant specifically threatened to "shoot Bill Clinton and Hilary." *Hardy*, 640 F. Supp. 2d at 77, *Glass*, 133 F.3d at 1357. Whereas, Ms. Gold did not specifically threaten to harm Ms. Driscoll, Dr. Pollak implied this information from her "volatile history" despite their shared efforts to overcome Ms. Gold IED. R.5,21-22. Dr. Pollak also admitted that she did not know whether the threat was serious or "simply an expression of frustration," and did not ask Ms. Gold to elaborate on her statements. R.22. Therefore, even though Dr. Pollak disclosed Ms. Gold's alleged threat to law enforcement, her threat did not rise to the level of specificity that both the *Glass* and *Hardy* case had.

Second, disclosure was not the only way to protect the Ms. Driscoll from alleged harm. The Court in *U.S. v. Highsmith* articulates that the second requirement of the *Glass* test, disclosure, has a "higher standard" than the *Tarasoff* duty. No. 07-80093-CR, 2007 WL 2406990 at *3 (S.D. Fla. Aug. 20, 2007). It requires disclosure to be the only way to prevent harm whereas the *Tarasoff* duty merely requires disclosure when it is "more likely than not that in the near future the patient will carry out that threat." *Id.* There, disclosure was not the only means of preventing harm because the defendant was in the hospital when he made the threat and any access to the outside world, including his weapons, could have been blocked via "involuntarily committed". *Id.* The record reflects that Ms. Gold did not check herself into a hospital as the defendant is *Highsmith* had. R.4.

Rather, Ms. Gold was attending one of her weekly meetings with Dr. Pollak designed to address her difficulties with anger management. R.17. In *Highsmith*, the therapists took additional steps to understand more about the defendant's threat against a judge whom he believed slighted him. *Highsmith,* 2007 WL 2406990 at *1. From those additional steps, therapists were able to discover exactly who the defendant wanted to harm and how. *Id.* Dissimilarly, Dr. Pollak failed to probe Ms. Gold for more information about the statements she made. R.22. Dr. Pollak did not know specifically who Ms. Gold was referring to when she made her statements or even what she meant by those statements. *Id.* Had she probed further; she may have been able to determine that Ms. Gold was simply expressing her frustration which would align with her psychotherapy goals. R.17,22.

Additionally, the day after disclosure of the threats to law enforcement, the defendant in *Highsmith* expressed that his thoughts of hurting himself or the judge were gone. *Highsmith,* 2007 WL 2406990 at *1. In the time that followed, the defendant's condition continued to improve and eventually he was discharged from the hospital. *Id.* Similarly, Officer Fuchs reported that when he went to Ms. Gold's room, she appeared "calm and rational". R.5. And after a 15-minute conversation, he determined that "she posed no threat to herself or to others." *Id.* Therefore, Dr. Pollak's failure to probe Ms. Gold for information and help her manage her feelings of frustration, like the defendant's confinement in *Highsmith*, does not show that disclosure was the only means of averting harm.

If this Court decides to adopt the Tenth Circuit's view of the dangerous patient exception, Dr. Pollak should not be allowed to testify because the facts in the record do not satisfy the *Glass* test.

II. MS. GOLD'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE GOVERNMENT CONDUCTED A BROADER SEARCH THAN THE INITIAL PRIVATE SEARCH AND THEN SEIZED HER PERSONAL COMPUTER FILES WITHOUT A WARRANT.

The Fourth Amendment guarantees individuals the "right…to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Furthermore, "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."

Justice Jackson writing for the court in *Johnson v. United States*, 333 U.S. 10, 13 (1948), explains that the purpose of the Fourth Amendment is not to deny law enforcement the support of the usual inferences which reasonable men draw from the evidence, but requires that a neutral and detached magistrate draw those inferences. The Court has recognized that the purpose of this amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials — *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967). The case before us requires that the Court find that Officer Yap of the Livingston Police Department violated Ms. Gold's Fourth Amendment rights. Officer Yap received a flash drive containing the entire contents of Ms. Gold's laptop due to a private search and seizure conducted by her roommate Ms. Jennifer Wildaughter. R.6. Officer Yap unlawfully examined every file contained on the flash drive exceeding the scope of Ms. Wildaughter's private search.

A search occurs within the Fourth Amendment's meaning when the government obtains information by either (1) physically trespassing upon private property or (2) intruding upon a sphere where an individual has a reasonable expectation of privacy. *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). In Carpenter, the type of search conducted was unlawful and violated the plaintiff's Fourth Amendment right, which is the same as what happened to Ms. Gold. This Court has determined that when an individual intends to keep something private, and society

recognizes her expectation as reasonable, Fourth Amendment protection applies. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). It is not hard to imagine that a person intends to keep the contents of their personal computer kept in their bedroom and not shared space private. Ms. Gold had a roommate and could have kept her laptop in a shared space. However, instead, she kept her laptop in her bedroom where she had exclusive dominion over. R.27. Ms. Gold is entitled to the Fourth Amendment's protection; she had a reasonable expectation of privacy that society recognizes as reasonable. The government action by Officer Yap expressly violated the "general rule that in cases where the securing of a warrant is reasonably practicable, it must be used." *Carroll v. United States*, 267 U.S. 132, 157 (1925).

A seizure of property occurs where there is some meaningful interference with an individual's possessory interests in that property. *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment protects unwarranted searches and seizures by creating a "right to privacy that is no less important than any other right carefully and particularly reserved to the people". *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). While Ms. Gold's physical laptop was not seized, the contents of her laptop were. R.25. Ms. Wilddaughter seized the contents of Ms. Gold's laptop when transferring the entirety of the laptop's contents onto the flash drive that she brought to the police. *Id.* Ms. Gold must be awarded the Fourth Amendment's protections, and the court must not allow evidence obtained unlawfully to be used against her.

A. Reasonable Expectation Of Privacy.

The Fourth Amendment protects people, not places. *Katz. v. United States*, 389 U.S. 347 (1967). What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections. *Id*. at 351. However, what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Id.* Ms. Gold was entitled to and had a reasonable expectation of privacy within her room and personal computer.

While Ms. Gold had a roommate, they shared neither a room nor a computer. 27. While her bedroom was accessible to her roommate, and it was not a shared space among the girls. *Id*. Therefore, the contents of Ms. Gold's computer were within her expectation of personal privacy as described by the court in *Katz*.

To challenge a search or seizure as a violation of the Fourth Amendment, a person must have had a subjective expectation of privacy in the place or property to be searched, which was objectively reasonable. *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990). Justice Harlan notably concurs with *Katz's* opinion and adds that a person must exhibit an actual (subjective) expectation of privacy. Second, that the expectation (objectively) be one that society is prepared to recognize as 'reasonable.' 389 U.S. at 360. Ms. Gold had a subjective expectation of privacy to the contents of her personal computer that was in her room at Joralemon University. R.27. Had Ms. Gold wanted to waive her privacy expectation in her laptop, she would have kept it in a shared space with her roommate. We know that Ms. Gold's expectation of privacy is reasonable because courts have recognized society's expectation of privacy on computers because "there is of course a reasonable expectation of privacy in their homes and in their belongings – including computers." *Guest v. Leis*, 255 F.3d 325, 334 (6th Cir. 2001).

B. Warrantless Searches.

Under the Fourth Amendment, police are required to obtain a warrant to perform a search or conduct a seizure lawfully. However, there are several exceptions to the law that allow the police to conduct warrantless searches. The plain view doctrine is an exception to the Fourth Amendment that allows police officers to seize evidence found in plain view during a lawful observation. This doctrine applies strictly to seizures of one's personal property. It typically arises out of instances where police have a warrant to search a given area for specified objects and come across some

other article of incriminating character in the course of the search. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

The Court in *Horton v. California*, 496 U.S. 128 (1990) provides a three-part test that needs to be met in order for a warrantless search to be lawful. First, to validate a warrantless seizure of incriminating evidence, the officer must not have violated the Fourth Amendment in arriving at the place from which the evidence could be viewed. *Id*. at 137. Second, the item must not only be in plain view, but its incriminating character must also be immediately apparent. *Id*. Finally, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right to access to the object itself. *Id*. This doctrine does not apply to our case as an exception to the violation of Ms. Gold's Fourth Amendment rights, and even if it did the Livingston police department would fail the test established in *Horton*. Ms. Wildaughter provided Officer Yap with a vague description of her findings failing to make any alleged incriminating character immediately apparent. R.6.

Probable cause is another instance where police can lawfully conduct warrantless searches. Probable cause exists where "the facts and circumstances within their (the officers') knowledge and which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll*, 267 U.S. at 136. Officer Yap needed to find Ms. Wildaughter's statements reasonably trustworthy for probable cause to apply and deem Officer Yap's search constitutional. Ms. Wildaughter told Officer Yap about a letter she found on Ms. Gold's laptop, photos of Ms. Driscoll, and a reference to rat poison. R.26. Ms. Wildaughter's vague description of her findings on Ms. Gold's laptop did not provide Officer Yap with the necessary probable cause to allow a warrantless search of Ms. Gold's laptop. R.6.

The private search doctrine is the final exception to the Fourth Amendment. The case before us requires the court to determine the appropriate application of the private search doctrine. The most modern definition of the private search doctrine stems from the case *United States v. Jacobsen*. The court in *Jacobsen* explains that the government cannot be found to have infringed upon any constitutionally protected privacy interest if that privacy interest had already been violated due to private conduct. 466 U.S. at 126. Ms. Gold had a reasonable expectation of privacy within her room and on her computer. However, the court must remember that the private search doctrine does not allow the government to exceed the scope of the private search. *Id.* at 116.

Ms. Gold's Fourth Amendment right was violated by Officer Yap of the Livingston Police department when he viewed all of the files on the flash drive containing the entire contents of Ms. Gold's computer was given to him by Ms. Wildaughter. R.6. Ms. Wildaughter conducted a minimal private search before deciding to go to the police with a flash drive containing the entirety of Ms. Gold's laptop. *Id*. Ms. Wildaughter only viewed the files in the folders "Tiffany Driscoll" and "Market Stuff." *Id*. Officer Yap then exceeded the scope of Ms. Wildaughter's private search when he took the flash drive and reviewed its entire contents including but not limited to personal photos, Ms. Gold's healthy insurance ID, and every other intimate detail of Ms. Gold's life. *Id*. Ms. Gold's reasonable expectation of privacy was violated by her roommate and further violated when Officer Yap viewed the contents on the flash drive that was outside the scope of the private search. *Id*. The search on the flash drive that exceeded the private search required a warrant, which he never requested nor received when analyzed under *Jacobsen*.

C. Ms. Gold's Fourth Amendment Right Was Violated When The Government Relied On A Private Search And Seizure When Offering Evidence At Trial That Was Discovered On Her Computer Without First Obtaining A Warrant.

A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *Jacobsen*, 466 U.S. at 113. Before us, the argument is not whether a search

occurred, rather the lawfulness of the search or lack thereof. The lower courts relied on the evidence unlawfully retrieved from Ms. Gold's laptop when finding her guilty of murder. R.6. The evidence that the government relied on was not obtained with a warrant and exceeded the private search scope, thereby violating the Fourth Amendment. *Id*.

The Eleventh Circuit in *United States v. Sparks* held that anything not seen by the private party was outside the private search scope. 806 F.3d 1323 (11th Cir. 2015). An Officer's examination must be "coextensive with the scope" of the private search. Officers must be "virtually certain" their actions will not uncover something of significance apart from what was reported. The court in *Sparks* then explains that a warrantless law-enforcement search conducted after a private search violates the Fourth Amendment only to the extent to which it is broader than the scope of the previously occurring private search. *Id*. at 1334.

The court in *Sparks* found that the police did exceed the scope of the private search, even though it did not change the outcome of the case. *Id*. at 1335. The court was nevertheless able to conclude that the police's unreasonable search did not affect the probable cause supporting two warrants' issuance. *Id*. at 1336. There was never any search warrant for the evidence in our case. The police did not feel the need to request a search warrant because they already had the computer's contents on the flash-drive they already possessed. R.6. The police exceeding the scope of the private search doctrine and not obtaining a warrant to exceed the search done by Ms. Wildaughter is a violation of the Fourth Amendment.

D. The Court Should Follow The Sixth Circuit's Narrow Interpretation Of The Private Search Doctrine And Find That The Livingston Police Department Conducted An Unconstitutional Search Of Ms. Gold's Computer.

The court in *Jacobsen* defines the private search doctrine but does not explain how the private search doctrine applies to digital containers. 466 U.S. 109. Therefore, the court must defer to the Sixth and Eleventh Circuit Court's narrow application of the private search doctrine and find

that the private party's search only removes an expectation for privacy for the specific items seen by the private party. Meaning, the government may only view the contents that the private searcher viewed. In this case, Ms. Wildaughter viewed a minimal amount of content on Ms. Gold's computer, yet she gave police access to all of the content on Ms. Gold's computer. R.6. Under this narrow interpretation of the private search doctrine, Officer Yap could only lawfully view the files titled "Message to Tiffany," "Market Stuff," and the file containing the reference to rat poison. R.29. The police, therefore, exceeded the scope of the private search doctrine resulting in a violation of Ms. Gold's Fourth Amendment right to be free from an unreasonable search by the government.

The Court must refer to *United States v. Richards*, where the defendant was found to have child porn in his rented storage unit by the rental owner when deciding the case before us. No. 07–5802, 2008 WL 4935965, at *1 (6th Cir. Nov. 18, 2008). The officers in *Richards* did not exceed the private search at any time when they were without a warrant. *Id*. at *3. The police looked into the unit, confirmed what the private searchers alleged, and then obtained a warrant to continue the search. *Id.* at *1. The owners of the storage unit initially invaded the defendant in *Richards'* expectation of privacy when conducting a private search. *Id*. Nevertheless, the police, in this case, were not found to violate the defendant in *Richard*s' Fourth Amendment right because they had warrants when they exceeded the scope of the private search. *Id*. at 483. Officer Yap would have needed to restrict his search of the flash drive to that of Ms. Wildaughter's when he was without a warrant. Because Officer Yap did not confirm what Ms. Wildaughter alleged and subsequently obtained a warrant to further the search on the flash drive, Ms. Gold's Fourth Amendment rights were violated.

The Sixth circuit in *U.S v. Litchtenberger*, reiterated that the government's ability to follow a warrantless follow-up search is expressly limited by the scope of the initial private search. 786 F.3d 478 (6th Circ. 2015). The court in *Litchtenberger* recognizes that there are extensive privacy interests at stake in a modern electronic device like a laptop. *Id*. Ms. Gold's laptop contained very personal and private contents, such as things relating to her work and school. R.29. The Sixth Circuit also recognizes that the search of physical spaces and the items they contain differ significantly from searches of complex electronic devices under the Fourth Amendment. *Litchtenberger*, 786 F.3d at 486. Because of the likelihood that an electronic device will contain 1) many kinds of data, 2) in vast amounts, and 3) corresponding to a long swath of time, officers must obtain a warrant before searching such a device incident to arrest. *Id*. at 488. The nature of the electronic device dramatically increases the potential privacy interests at stake, adding weight to one side of the scale while the other remains the same. *Id*. Because the search of Ms. Gold involves searching for an electronic device, there is an immense amount of potential privacy interests at stake and deserves a narrow application of the private search doctrine.

E. Even If This Court Adopts the Broader Interpretation Of The Private Search Doctrine, Ms. Gold's Constitutional Rights Were Violated.

Even if this court decides to follow the broader interpretation of the private search doctrine and its application to digital containers, the court will still find that Ms. Gold's Fourth Amendment rights were violated. The court in *Rann v. Atchison* found that police are permitted to open the "container" so long as they were "substantially certain" of its contents. 689 F.3d 832 (2012). Similarly, the Fifth Circuit also allows police officers to exceed the container's scope, but only if they are substantially certain of what is in the rest of the container based on the statements of the private searchers.

The purpose of the substantial certainty standard is to preserve the competing objectives underlying the Fourth Amendment's protection against warrantless police searches. *Id*. The standard of substantial certainty is met in the Atchison case when the victim of the sex crimes explained what was done to her. *Id*. The victim's statements led the police to be substantially certain that they were going to find videos of sexual assault and child pornography. *Id*. Unlike our case, the private searchers in Atchison did not come to their conclusions about the meaning of the contents they discovered. *Id*. *United States v. Runyan* further explores the private search doctrine and its application to digital containers. 275 F.3d 449 (5th Circ. 2001). In that case, the private searchers were people who physically saw images of child pornography on various floppy disks but did not view all the contents of the floppy disks. *Id*. at 453. Based on their statements to police, police were substantially certain that if they viewed the other images on the floppy disk, there would be more indications of child pornography. *Id*. After completing a wellness check on Ms. Gold, the only thing the police were substantially certain of was that she was calm and did not seem to be a danger to herself or Ms. Driscoll. R.5. The police were only able to base their opinions on the vague description of Ms. Gold's computer provided by Ms. Wildaughter.

There is a clear difference between *Runyan* and *Atchison* and the case at bar. In those cases, the private searchers were able to state to police what they discovered in their private search. The private searchers were fully aware of what they saw in their search and the meaning of their findings. Ms. Wildaughter was not entirely sure of the meaning of the files she viewed. They made her feel uneasy. R.26. In the above cases, the police were substantially certain that they would find more instances of child porn in both *Atchison* and *Runyan*. If the court decides to apply this interpretation of the private search doctrine, you will still find that Ms. Gold's Constitutional rights were violated.

III. THE GOVERNMENT'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE OF ALTERNATIVE CULPRITS WAS A BRADY VIOLATION, REGARDLESS OF ADMISSIBILITY.

The decision in *Brady v. Maryland* is "founded upon the most basic constitutional guarantee to a person accused of a crime: the right to due process of law and a fair trial." *Watkins v. Miller*, 92 F. Supp. 2d 824, 826 (S.D. Ind. 2000). The Supreme Court established, "as a matter of Federal constitutional law, that the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to [either to guilt or to punishment] the defense entitles the defendant to a new trial." *People v. Vilardi*, 76 N.Y.2d 67 (N.Y. 1990). Moreover, Brady established a three-part test for the defendant's claim to succeed; "(1) the prosecution suppressed or withheld evidence that (2) was favorable and (3) material to the defense." *Crivens v. Roth*, 172 F.3d 991, 996 (7th Cir. 1999).

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A showing of materiality "need not show that counsel's deficient conduct more likely than not altered the outcome in the outcome of the case" instead, "[t]he question is…whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. Ms. Gold was not informed of two other suspects under investigation by the FBI; one suspect was still under investigation four days before Ms. Gold's indictment, and the other was under investigation month after Ms. Gold was indicted. R.44. The Supreme Court's opinion in *Kyles* makes clear that evidence is material under Brady when the defense could have used it to "attack the reliability of the investigation." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.,* 834 F.3d 263, 308 (3d Cir. 2016)(***quoting*** *Kyles*, 514 U.S. at 446.). The holding in *Kyles*, (undisclosed evidence must be considered cumulatively to assess its ability to change the mind of at least one juror) further stated that evidence is material if "defense counsel could have used the

information at issue "to throw the reliability of the investigation into doubt and to sully the credibility" of the lead detective." 514 U.S. at 447. Alas, the FBI reports prepared before and after Ms. Gold's indictment provided opportunities the defense could "have pursue[d] strategies and preparations he was otherwise unequipped to pursue;" especially, due to the lack of evidence binding Ms. Gold to Ms. Driscoll's death.

The FBI created a report for each purported suspect; these materials were relevant to the FBI's arrest of Ms. Gold. R.14. The government's failure to share that other named suspects with viable motives had been brought to their attention, prevented Ms. Gold from refuting the validity of her arrest and the FBI's overall investigation. *Id*. On May 27, when the FBI arrested Ms. Gold, the Joralemon Journal published an article claiming that her arrest came "as a relief to FBI agents and Joralemon police detective because initially they were unable to find any physical evidence at the scene pointing to either the cause of death or a suspect." R.14. Therefore, Ms. Gold's arrest was hasty at best. *Id*. Even if the reports themselves were inadmissible at trial, Ms. Gold had the right to have performed her own investigation into the government's leads and determine if the information is beneficial during her defense. R.45.

Ultimately, comparing the FBI reports to the polygraph results at issue in *Wood v. Bartholomew*, 515 U.S. 1, 6 (1995) is improper. *Wood* held that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under *Brady*. *Wood*, 515 U.S. at 6. The lower court ruled the FBI reports were not *Brady* material because they were inadmissible hearsay; however, the reports did not become immaterial to the defense solely because of their grounding in hearsay. Hearsay is not per se inadmissible, nor is hearsay "not evidence at all." R.56. Rather, the test for admissibility of the reports is rooted in the Court's materiality analysis. ***See*** *Watkins,* 92 F. Supp. 2d at 845 (material evidence "need not be

directly admissible to qualify as Brady material…[but] there must be a readily discernible path between the material and its use either directly at trial or to discover and offer exculpatory evidence admissible at trial.).

A. Failure to Disclose Evidence Favorable to the Defendant, Even if Inadmissible at Trial, is a Sufficient Basis For a Brady Violation.

1. *Brady does not provide an exception to the prosecution's duty to disclose exculpatory material based on the evidence's admissibility in question.*

Since this Court's decision in *Brady* in 1963, this Court has never created an exception to a prosecution's duty to disclose under Brady because the exculpatory material was inadmissible at trial. In Ms. Gold's case, the lower court's ruling that the two FBI reports were not Brady material "because the respondent could have made no mention of them either during argument or while questioning witness," is a misreading of the *Wood v. Bartholomew* holding and undermines the integrity of the holding in *Brady*. 56. *Wood*, 516 U.S. at 6; ***see also*** *U.S. v. Agurs*, 427 U.S. 97, 100 (1976).

During Ms. Gold's motion for post-conviction relief, she alleged the suppression of the FBI reports constituted a *Brady* violation. 43. Squarely, she asserted the reports would directly lead to admissible evidence even if the reports themselves were inadmissible hearsay. *Id*. This interpretation of Brady is deeply rooted in *Brady*'s progeny. Since this Court has not held that admissibility is a factor in a *Brady* analysis, the Court must look to the pervasive number of lower court decisions that hold admissibility plays no role in a *Brady* analysis.

Nearly every circuit has decided that the admissibility of evidence does not annul a *Brady* violation. Below are only seven of the countless examples in contravention of the lower court's decision in Ms. Gold's case. R.56. ***See*** *Ellsworth v. Warden*, 333 F.3d 1, 4 (1st Cir. 2003)(hearsay evidence from the victim could have led to corroborating evidence); ***accord.*** *Mendez v. Artuz*, 303 F.3d 411 (2d Cir. 2002); ***see*** *Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991)(inadmissible

hearsay might have assisted defense to discover other evidence); *Sellers v. Estelle,* 651 F.2d 1074, 1076–77 (5th Cir. 1981)(suppressed police reports containing exculpatory evidence were material even if the reports themselves would be inadmissible at trial); *Barton v. Warden, S. Ohio Corr. Facility,* 786 F.3d 450, 465–66 (6th Cir. 2015)(inadmissible hearsay evidence would have led directly to admissible evidence); *United States v. Dimas*, 3 F.3d 1015, 1018 (7th Cir.1993)(citation omitted)(information is material if it consists of or would directly to admissible at trial).).

2. *Wood v. Bartholomew did not preclude material inadmissible evidence from Brady violations.*

This Court has never ruled that admissibility is a prong of a *Brady* determination; rather, the Court's past holdings imply a disinclination to add admissibility to the settled *Brady* doctrine. An example of this Court's resistance to adding an admissibility element is Justice Fortas's concurrence in *Giles v. State of Md.*, 386 U.S. 66 (1967). The *Giles* case involved petitioners who were convicted of raping a 16-year-old girl and subsequently brought a post-conviction petition alleging "that the prosecution denied them due process of law in violation of the Fourteenth Amendment by suppressing evidence favorable to them, and by the knowing use of perjured testimony against them." 386 U.S. at 68. The Court's majority remanded the case taking a "hands off" approach to allow the state court to rule on additional evidentiary hearings. *Id.* at 81.

Per contra, Justice Fortas unabashedly addressed the exact question of admissibility in his concurring opinion:

> I do not agree that the State may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial. The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.

386 U.S. 66, 98 (1967). Fortas's reasoning was taken a step further by the First Circuit in *Ellsworth*, 333 F.3d at 4.

Ellsworth's court ruled on the circuit "split on whether a petitioner can have a viable Brady claim if the withheld evidence itself is inadmissible. Most circuits addressing the issue have said yes if the withheld evidence would have led directly to material admissible evidence." 333 F.3d at 4. The court reasoned, "[G]iven the policy underlying Brady, we think it plain that evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." *Id*. Likewise, in a case analogous to Ms. Gold's, the Second Circuit determined that the prosecution's suppression of another's motive to kill the victim was a Brady violation. ***See*** *Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001). The Second Circuit also ruled on another issue that arose in Ms. Gold's case, admission of evidence that would have suggested alternative culprits. *Mendez*, 303 F.3d at 413 held, "The suppressed information would have allowed [the defendant] to challenge the state's motive theory…establish reasonable doubt in the jury's mind and develop a defense of an "alternative culprit."

Moreover, Ms. Gold should have been provided the information to allow the defense to conduct its own investigation into suspects named in the FBI reports. 45. Neither of the FBI reports describe the follow-up measures taken and whether the tips provided by informants were credible. *Id*. But the reports are still subject to Brady even if the FBI did not corroborate the tips. *Id*. Specifically, the Fourth Circuit held that the "Prosecution's actions stifled any efforts Petitioner could have made to corroborate the statements. Furthermore, the Court finds no legal authority that indicates exculpatory statements must be corroborated before they can be considered as Brady evidence." *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 553 (E.D. Va. 2011). Relying on *Wolfe*, Ms.

Gold was still entitled to the FBI reports because the defense had the right to investigate the exculpatory information.

Both the lower court and the government misapplied the holding in *Wood*, 516 U.S. 1. The Court did not rule on the admissibility of evidence as a *Brady's* requirement; the only conclusion reached by the Court held the witness's polygraph results were consistent with the defendant's preestablished defense and the results of the test were not exculpatory. *Id*. at 7. When the lower court questioned defense counsel whether the polygraph results would have affected cross-examination of the witness, counsel affirmatively stated his approach would not have differed if the polygraph results were previously disclosed. *Id.* Counsel admitted, "I would have liked to have known [the results], but I don't think it would have affected the outcome of the case." *Id*. at 11. *Wood*'s holding does not preclude inadmissible evidence from Brady inquiries rather the holding codifies the following test, "[H]ad [the evidence] been disclosed to the defense, [it] might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized." *Id.* at 6. Ultimately, the results were immaterial to the defense's case because nothing in the results, if further investigated, would uncover material exculpatory evidence. *Id.* at 5, 9. Unlike *Wood*, had the FBI reports been shared with the defense in Ms. Gold's case, the trial would have been different because "if provided during trial, [the reports] would have undermined the Prosecution's theory of the case." *Wolfe*, 819 F. Supp. 2d at 553.

The Ninth Circuit underwent a thorough analysis of various interpretations of evidence viable for a *Brady* claim in *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1200 (C.D. Cal. 1999). Defendants were charged with criminal securities fraud and moved for discovery regarding the prosecution's deals to an accomplice to trade leniency for the accomplice's testimony. *Id*. The court

decided the definition was "the government must disclose upon request all favorable evidence that is likely to lead to favorable evidence that would be admissible." *Id*. In explaining the holding the court provided examples where inadmissible evidence could lead to admissible evidence; "the defense might find some outside source of admissible evidence to corroborate the information it receives from the government…[d]efense counsel may elicit testimony from the cooperating witness based on the information; to the extent the information is inconsistent with the accomplice witness's trial testimony, the information may be admissible to impeach; and the information may be used to refresh a witness's recollection." *Id*. at 1203-04. Therefore, the court granted the defendant's motion for discovery.

This Court must settle the debate regarding admissibility and *Brady* evidence. Ultimately this Court must hold that a court does not need to undertake an admissibility analysis when evaluating *Brady* claims.

CONCLUSION

For the foregoing reasons, Petitioner, Ms. Gold, respectfully requests that this Court reverse the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

Team P10
Counsel for Petitioner