Team 11R - 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 UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under 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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STATEMENT OF FACTS

I. Factual History

On the afternoon of May 25, 2017, Petitioner Samantha Gold visited her therapist, Dr. Chelsea Pollak, at the Joralemon Psychotherapy and Counseling Center. R. at 3. According to Dr. Pollak, the Petitioner suffered from Intermittent Explosive Disorder (IED), a condition characterized by frequent outbursts of aggressive or violent behavior. R. at 5. During her May 25th session with Dr. Pollak, the Petitioner expressed frustration about the debt she owed to a vitamin supplement company, HerbImmunity. Petitioner was recruited to work for HerbImmunity by her classmate at Joralemon University, Tiffany Driscoll. R. at 4. Dr. Pollak noted that the Petitioner seemed agitated and angry with Ms. Driscoll, and that the Petitioner stated she was going to "kill her." R. at 4. Because Dr. Pollak feared for the safety of Ms. Driscoll and the Petitioner, she notified the Joralemon Police Department of the Petitioner's threat. R. at 4, 5.

Upon receipt of the notice from Dr. Pollak, the Joralemon Police Department dispatched officers to Joralemon University, where both Petitioner and Ms. Driscoll were students. R. at 5. Officers first located the Petitioner and quickly determined, after observing her calm demeanor, that she was not a threat to herself or others. *Id.* The officers then located Ms. Driscoll and warned her about the threat, but she did not seem concerned. *Id.*

The same day, the Petitioner expressed her anger with Ms. Driscoll to her roommate, Jennifer Wildaughter. R. at 24. Ms. Wildaughter was aware of Petitioner's involvement with HerbImmunity and knew she was in substantial debt to the company. *Id.* After voicing her extreme frustration, the Petitioner abruptly ran out of the apartment, leaving her computer open and unlocked. *Id.* Concerned about the Petitioner's erratic behavior, Ms. Wildaughter decided to look through the computer. *Id.* Ms. Wildaughter browsed through folders on the Petitioner's desktop

until she found one labelled “HerbImmunity.” *Id.* Ms. Wildaughter opened the “HerbImmunity” folder and examined several of its subfolders. *Id*. at 24–26. In one subfolder, Ms. Wildaughter discovered several time-stamped photos of Ms. Driscoll. *Id.* at 25. They were taken from afar and seemingly without Ms. Driscoll’s knowledge. *Id.* One photo, taken through the window of a café, depicted Ms. Driscoll eating chocolate strawberries. *Id.* at 6. Another captured Ms. Driscoll’s father exiting the subway. *Id.* Some were even taken from across the street from Ms. Driscoll’s home and showed her unlocking her door and entering her house. *Id.* Ms. Wildaughter also discovered a short note written to Ms. Driscoll in the HerbImmunity folder. Apparently intended to accompany a gift, the note expressed the Petitioner’s appreciation for Ms. Driscoll’s “kindness.” *Id.* Finally, Ms. Wildaughter found a file containing “passwords and codes she did not understand” and a note about strychnine, a common rat poison. *Id.* Rattled, Ms. Wildaughter copied Petitioner’s entire desktop folder onto a flash drive and took it to the police station. *Id.* at 26.

When Ms. Wildaughter arrived at the Livingston Police Department, she gave the flash drive to Officer Aaron Yap, the department’s head of digital forensics. *Id*. at 6. She explained her fears to Officer Yap, telling him about the Petitioner’s involvement with HerbImmunity and the files she had viewed earlier on Petitioner’s computer. *Id*. at 28. Ms. Wildaughter told Officer Yap that “everything of concern” was on the flash drive. *Id*. at 6. Ms. Wildaughter left the police station and Officer Yap examined the flash drive’s contents. *Id*.

Although Ms. Wildaughter told Officer Yap about the concerning files she had found, she did not tell him where those files were located on the flash drive. *Id*. at 29. As Officer Yap searched the drive, he came across the files Ms. Wildaughter had described. *Id.* at 6. Officer Yap also found extra files on the drive that further confirmed Ms. Wildaughter’s fear that Petitioner planned to poison Ms. Driscoll. *Id.* Officer Yap immediately gave the flash drive to his supervisor. *Id.*

Ms. Driscoll was found dead in her father's Livingston home later that evening. R. at 13. While the authorities initially thought Ms. Driscoll suffered blunt force trauma to the head from a fall down the stairs, subsequent toxicology reports revealed strychnine, a rat poison, in her system. R. at 13–14. Authorities searched Ms. Driscoll's house pursuant to a warrant two days later. R. at 14. During the search, officers found an empty box and a note in Ms. Driscoll's bedroom garbage can. *Id.* Despite the positive message on the note, officers believed the box contained poisoned chocolate covered strawberries. *Id.*

The FBI received two independent tips in the course of its investigation into Ms. Driscoll's death. R. at 11–12. Special Agent Mary Baer received the first on June 2, 2017. R. at 11. The tip was from Chase Caplow, a student at Joralemon University who was involved with HerbImmunity. *Id.* During the interview, Caplow indicated that Ms. Driscoll was indebted to an upstream distributor within the company, Martin Brodie. *Id.* Caplow was not aware of the amount Driscoll owed to Brodie. *Id.* Caplow indicated that Brodie could be violent but that he had not personally witnessed any violence. *Id.*

Later that month, the FBI received a second anonymous tip that identified another suspect. R. at 10. The FBI conducted a preliminary investigation into the lead's veracity and dismissed it as unreliable. *Id.* Both parties have stipulated to the fact that the tips consisted of inadmissible hearsay. R. at 43. The government failed to disclose both reports. R. at 44.

II. Procedural History

The Petitioner was charged with violating 18 U.S.C. § 1716 (j)(2), (3). R. at. 1. Prior to trial, she filed a motion requesting:

1. the suppression of the material discovered by Officer Yap, and
2. an order precluding the Government from calling Dr. Pollak to testify.

R. at 16. After hearing testimony from Dr. Pollak and Ms. Wildaughter, as well as arguments on each point, the District Court denied the motion in full. R. at 40. Upon conviction, the Petitioner filed for post-conviction relief, alleging two *Brady* violations. R. at 43. After argument, the District Court denied the motion. R. at 48.

Ms. Gold appealed her case to the Fourteenth Circuit. R. at 51. It affirmed the District Court, holding that the private search doctrine permitted the scope of Officer Yap's search, no *Brady* violation occurred because the inadmissible evidence was not "material," and Dr. Pollak's testimony was admissible under the dangerous-patient exception to the psychotherapist privilege. R. at 51.

ARGUMENT

I. Dr. Pollak's testimony should be admissible at trial, because by notifying law enforcement of the Petitioner's threats, the privilege with regards to that information ceased to exist.

This Court should find that the psychotherapist-patient privilege ceased to exist at the moment Dr. Pollak informed law enforcement of the Petitioner's threat toward Ms. Driscoll. To remain intact, privileges require confidentiality. When Dr. Pollak shared the Petitioner's threats with authorities, their presence as a third party to the communication terminated the privilege. Because at this point the confidence of the patient is already broken, no further harm will be created by allowing the therapist to testify at trial. Further, the public's interest in admissible evidence at a criminal trial supports the admissibility of therapist testimony in these types of cases. Therefore, this Court should affirm the lower court's finding that Dr. Pollak's testimony was admissible.

Federal Rule of Evidence 501 provides that the law of privilege is not set in stone; courts have the ability to recognize privileges when "reason and experience" provide for the necessity of the privilege. FED. R. EVID. 501. In *Jaffee v. Redmond*, this Court recognized a privilege between

therapists and their patients. 518 U.S. 1 (1996). However, in creating the privilege, the *Jaffee* court kept open the possibility that there may be instances when that privilege must give way to the disclosure of certain information. *Id.* at n.19 ("[W]e 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 disclosure by the therapist."). Whether to allow a therapist's testimony at a patient's criminal trial has been hotly debated by federal courts, and the circuits are currently split on this issue.

The Tenth Circuit in particular has advocated for a "dangerous-patient exception" to the psychotherapist privilege. In *United States v. Glass*, the court held that a dangerous-patient exception to the privilege would apply if a threat was serious at the time of its utterance and the only means of averting the harm was to disclose the threat. 133 F.3d 1356 (10th Cir. 1998). In the present case, the lower courts held Dr. Pollak's testimony to be admissible at trial pursuant to this dangerous-patient exception. R. at 40–41, 51. This Court should find it unnecessary to even determine whether such an exception should apply; the analysis need not progress to that point. Instead, because the privilege between Dr. Pollak and the Petitioner ceased to exist the moment Dr. Pollak relayed the threat to law enforcement, it is clear that Dr. Pollak's testimony should be admissible at trial.

A. The psychotherapist-patient privilege ceased to exist when Dr. Pollak shared the threats with law enforcement.

A commonly cited justification for adopting evidentiary privileges is that they promote confidentiality in relationships where confidentiality is valued. For example, the attorney-client privilege attempts to facilitate open and honest communication between an attorney and her client. The priest-penitent privilege encourages the same type of openness and honesty. The

psychotherapist-patient privilege, no doubt, serves to facilitate that same function. One prominent cornerstone of each recognized evidentiary privilege is confidentiality.

While confidentiality is crucial to privileges, it is not absolute. In *Tarasoff v. Regents of University of California*, the Supreme Court of California created the well-accepted principle that a therapist has a duty, when her patient makes threats towards another, to take the necessary steps to warn the third party of those threats. 551 P.2d 334 (Cal. 1976). In *United States v. Auster*, the Fifth Circuit highlighted that therapists had a "*Tarasoff* duty to convey 'significant' 'threat[s] of physical violence' against 'clearly identified . . . victims,' and they also [had] an ethical duty to inform [the defendant] of that legal duty." 517 F.3d 312, 316 (5th Cir. 2008). In *Auster*, the court found that because the patient knew that his therapist had a duty to relay threats to third parties, he could not expect confidentiality with regard to threats that he made during treatment. Because he could not expect confidentiality for this particular information, the privilege did not exist in relation to the threats made by the defendant.

Like any other therapist, Dr. Pollak has an ethical duty to inform her patients of her duty to report specific threats made in the confines of treatment. Additionally, Dr. Pollak had a duty to report under § 711 of the Boerum Health and Safety Code.[1] BOERUM HEALTH & SAFETY CODE § 711. The moment Dr. Pollak informed law enforcement about the Petitioner's threats—an action

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[1] Section 711 of the Boerum Health and Safety Code is as follows:

1. Communications between a patient and a mental health professional are confidential except where:
    a. The patient has made an actual threat to physically harm either themselves or an identifiable victim(s); and
    b. 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.
2. Under such circumstances, mental health professionals must make a reasonable effort to communicate, in a timely manner, the threat to the victim and notify the law enforcement agency closest to the patient's or victim's residence and supply a requesting law enforcement agency with any information concerning the threat.
3. [omitted].

she was required to take—confidentiality between Dr. Pollak and the Petitioner ceased to exist. A third party was privy to the conversation at that point. The *Auster* court highlighted that the privilege created by *Jaffee* "covers *confidential* communications made to licensed psychiatrists and psychologists . . . ." 517 F.3d 312 (5th Cir. 2008) (emphasis in original). In *Auster*, the court held that when the patient knew his threats would be communicated to law enforcement, and the threats were then in fact conveyed, the requirement of confidentiality—required by the psychotherapist-patient privilege—was not met, and thus the privilege did not apply. Such is the case here. Because the privilege ceased to apply at the time of disclosure to law enforcement, this Court should find Dr. Pollak's testimony to be admissible.

B. Allowing Dr. Pollak to testify will not cause further damage to the psychotherapist-patient relationship.

Relationships among psychotherapists and patients will not be harmed by allowing therapists like Dr. Pollak to testify in court. Some circuits have expressed concern that therapist-patient relationships would be harmed if the patient knows her therapist would later be able to testify against her in a criminal proceeding. *See, e.g.*, *United States v. Ghane*, 673 F.3d 771, 785 (8th Cir. 2012) (court feared that an exception to the privilege would have a "deleterious effect on the 'confidence and trust' the Supreme Court held is implicit in the confidential relationship between the therapist and a patient") (citation omitted). However, an argument of this sort ignores the obvious. Because of the aforementioned *Tarasoff* duty, patients will know that their therapist will have to break confidentiality if they make threats of imminent harm towards themselves or others. Because this possibility always hangs in the balance, stating that a relationship would not be chilled by that knowledge but would be chilled by potential testimony is a difference without a distinction. The *Auster* court aptly stated, "this cost-benefit calculation is inapt where the patient already knows the confidence will not be kept." 517 F.3d at 318. It went on to state the following:

"Consider the marginal impact on effective therapy of allowing a statement into evidence that the patient knew would be communicated to third parties when he uttered it. In such a case, the 'atmosphere of confidence and trust' has already been severely undermined." *Id.* Continuing, the *Auster* court highlighted the very realistic probability that when the therapist fulfills this duty and acts to alert the third party to the threat, there is no guarantee, nor any requirement, that the recipient of the threat will keep that information confidential. *Id.* In fact, they almost certainly will not.

Another commonly cited justification for excluding psychotherapist testimony from a criminal trial is that such testimony may contribute to the patient's involuntary incarceration. *See, e.g.*, *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000). The *Hayes* court, while excluding testimony in criminal proceedings pursuant to the privilege, stated that it "[thought] the *Jaffee* footnote was referring to the fact that psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their 'duty to protect' the patient or identifiable third parties." *Id.* at 585. Therapists routinely testify against patients in proceedings which may result in involuntary civil commitment. Drawing a distinction between testimony that would lead to involuntary commitment in a mental health facility and testimony that would lead to involuntary commitment in a correctional institution is yet another distinction without a difference. In both cases, the patient is involuntarily losing her liberty. It is counterintuitive to think that a therapist-patient relationship would be further harmed by one form of testimony but not the other.

C. It is in the public's best interest to admit Dr. Pollak's testimony.

In *United States v. Bryan*, this Court stated that "[f]or more than three centuries, it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence."

339 U.S. 323, 331 (1950). Any kind of testimonial privilege has the potential to keep otherwise admissible evidence out of a trial; it is for this reason that privileges are not lightly adopted. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40 (1980). The public's right to evidence supports allowing Dr. Pollak, and other therapists in her position, to testify at a patient's criminal trial.

The issue of a therapist giving testimony commonly arises in cases involving patients who uttered threats towards third parties. *See, e.g.*, *United States v. Auster*, 517 F.3d 312 (5th Cir. 2008); *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998); *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012). In all of these types of cases, there is an inherent lack of substantial evidence, and allowing therapists to testify would promote public safety by removing potentially dangerous individuals from society. Indeed, even courts that have excluded the testimony of a therapist have acknowledged that such testimony could lead to incarcerations, which would serve the public interest because it would aid in neutralizing threats. *See, e.g.*, *Hayes*, 227 F.3d at 585 ("[A]s with involuntary hospitalization, incarceration would serve the 'public end' of neutralizing the threat posed by a patient . . . ."). There is no doubt that the mental health of the patient is important, but one must also consider the mental health and well-being of the person against whom a threat was made. Allowing a therapist to testify at a trial will not unduly dampen the relationship of the therapist and patient, as discussed above, but will result in the optimal attainment of safety for the public at large.

II. Officer Yap's search of the flash drive did not violate Petitioner's Fourth Amendment rights because her expectation of privacy in its content was already frustrated by Ms. Wildaughter's previous private search.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend IV. Under the Fourth Amendment, a "search" occurs when "an

expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). As this Court has long recognized, the Fourth Amendment applies only to government action. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The Amendment 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." *Jacobsen*, 466 U.S. 109 at 113–14 (internal quotations omitted).

This case involves two searches: one conducted by a private citizen, Ms. Wildaughter, and another conducted by the government. Ms. Wildaughter searched the Petitioner's desktop folder without the participation or knowledge of the government, and therefore, the Fourth Amendment does not apply to her search. Later, Officer Yap of the Livingston Police Department searched Ms. Wildaughter's flash drive containing the contents of the Petitioner's desktop folder. Ordinarily, a police search would fall under the Fourth Amendment. However, because Officer Yap's search was merely a repetition of Ms. Wildaughter's earlier search, the private search doctrine applies. Under the private search doctrine, a government official may conduct a warrantless search of a container if a private party previously searched, and therefore "frustrate[d] the original expectation of privacy" in that container. *Jacobsen*, 466 U.S. 109 at 117 (1984).

This Court's decision in *United States v. Jacobsen* establishes the groundwork for the modern private search doctrine. In *Jacobsen*, a group of FedEx employees inspected a damaged package pursuant to company policy. *Jacobsen*, 466 U.S. 109, 111 (1984). When the employees opened the package, they discovered three plastic bags containing white powder. *Id.* The employees closed the package and summoned a DEA agent. *Id.* Without a warrant, the agent searched the package and conducted a chemical field test of the white powder, which indicated

that the powder was cocaine. *Id.* at 112. The package's addressees were subsequently arrested. *Id.* The Court held that the DEA agent's warrantless search of the package and test of the white powder were constitutionally permissible under the private search doctrine. *Id*. at 126. According to the Court, the agent's actions "enabled him to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment." *Id.* at 109. The Court further instructed that "additional invasions of respondents' privacy by the DEA agent must be tested by the degree to which they exceeded the scope of the private search." *Id.*

Federal courts disagree about how to interpret *Jacobsen* in the context of digital storage devices. The Sixth and Eleventh Circuits have interpreted *Jacobsen* narrowly, holding that a government official may only click on the *exact* files or images that the private searcher viewed. *See United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015); *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015). The Fifth and Seventh Circuits read *Jacobsen* more broadly. These courts hold that once a digital storage device is examined by a private searcher, the device owner's expectation of privacy has been frustrated for the entire device. A government official may therefore conduct a warrantless search of the entire device. *See United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012). The Fourteenth Circuit adhered to this broad approach in its ruling below. For the following reasons, we urge this Court to adopt the broad approach and hold that Officer Yap's search of the flash drive was permissible under the private search doctrine.

A. This Court should adopt the broad approach to determining the scope of a private search of digital information.

This Court should adopt the broad approach followed by the Fifth and Seventh Circuits for two reasons. First, the broad approach follows this Court's decision in *United States v. Jacobsen*

more faithfully than the narrow approach. Second, the broad approach provides law enforcement and courts with realistic standards to follow in practice. While the narrow approach practically eliminates the private search doctrine in the digital context by excluding relevant evidence on which the private party did not click, the broad approach "strikes the appropriate balance between [a] defendant's remaining expectation of privacy after [a] private search and the additional invasion of that privacy by the government." *United States v. Gold*, No. 19-142 (14th Cir. 2020).

1. The broad approach is a more faithful interpretation of this Court's decision in *United States v. Jacobsen.*

The broad approach faithfully adheres to this Court's ruling in *United States v. Jacobsen*. *Jacobsen* established a flexible reasonableness-based inquiry into whether a police officer's search oversteps constitutional boundaries. Under this inquiry, "additional invasions of [a suspect's] privacy by [a] government agent [following a private search] must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115 (*citing Walter v. United States*, 447 U.S. 649 (1980)). *Jacobsen*'s "degree to which they exceeded the scope" test directs lower courts to conduct fact-based inquiries into the reasonableness of police officers' expansion of private searches. As the *Jacobsen* Court noted, "an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Jacobsen*, 466 U.S. at 115.

The narrow approach entirely disregards the principles of reasonableness underlying the *Jacobsen* decision. Instead, Courts adopting the narrow approach have developed their own strict "one-to-one match" tests, unsupported by this Court's jurisprudence. *United States v. Fall*, 955 F.3d 363, 370 (4th Cir. 2020). Under these tests, "[e]ven if the police's extension of the search is de minimis, it loses the protection of the private search exception." *Id.* One-to-one match requirements are unreasonable in the digital context. For example, a police officer may scroll

through child pornography thumbnails in a previously searched digital folder and click an image that the private citizen did not click in her earlier search. Under the narrow approach, that image would be subject to exclusion, even if the image's criminality was discernible in its smaller thumbnail format. This outcome runs counter to the notions of reasonableness expressed in *Jacobsen*.

Jacobsen directs courts to evaluate the facts and circumstances of each case to determine whether a police search merely confirms prior knowledge or leads to the discovery of entirely new information. Police searches that "enable [officers] to learn nothing that had not previously been learned during the private search" are constitutionally permissible. *Jacobsen*, 466 U.S. at 120. Here, Officer Yap merely confirmed information Ms. Wildaughter had already gathered and relayed to him—information indicating that the Petitioner intended to poison Ms. Driscoll. Although Officer Yap clicked on more individual files than Ms. Wildaughter opened during her search, the knowledge he gathered from his review of the flash drive was effectively identical to Ms. Wildaughter's knowledge. Under the facts of this case, it was entirely reasonable for Officer Yap to look through the whole flash drive. Officer Yap's search was especially reasonable given Ms. Wildaughter's statement that "everything" was on the flash drive. R. at 6, 27.

We concede that this Court may need to reevaluate how *Jacobsen* applies to smart phones and other devices with remote data access. As this Court acknowledged in *Riley v. California*, smart devices carry heightened privacy concerns that warrant careful attention to the balance between individual privacy and law enforcement needs. *Riley v. California*, 573 U.S. 373 (2014). However, the present case involves a flash drive, not a smart device. This Court therefore need not evaluate the application of *Jacobsen* in the smart device context today.

2. The broad approach establishes realistic guidelines for police, private citizens, and courts.

In addition to its faithfulness to *Jacobsen*, the broad approach establishes realistic standards for police, private searchers, and courts. As in every Fourth Amendment case, this Court "must take account of [the] practical realities" underlying the Fourth Amendment inquiry before it. *Wyoming v. Houghton*, 526 U.S. 295, 306 (1999). Here, practical reality dictates that police officers are unlikely to perfectly retrace private citizens' digital steps. Private citizens may forget which files they clicked on during their original search, and police officers may accidentally click into wrong folders as they search for specific files. The narrow approach leaves no room for these realistic human errors. Instead, the narrow approach requires a strict one-to-one match between the private searcher's and police officer's clicks. Such a stringent standard would lead to unnecessary exclusion of relevant evidence in criminal cases. The broad approach takes practical realities into account and guards against unnecessary exclusion of evidence.

As this Court has stated, any Fourth Amendment standard "should be workable for application by rank and file, trained police officers." *Illinois v. Andreas*, 463 U.S. 765, 772 (1983). The broad approach provides such a workable standard for police officers searching digital storage devices under the private search doctrine. Under the broad approach, police officers can search previously inspected digital storage devices without fear of overstepping constitutional boundaries. If this Court were to adopt the narrow approach, police would be hesitant to fully explore files—even files clearly containing criminal evidence—that the private searcher did not click. Thus, the narrow approach over-deters police and hampers law enforcement investigations. *Runyan*, 275 F.3d 449 at 465. As the Fifth Circuit noted in *Runyan*, this over-deterrence would lead police to "waste valuable time and resources obtaining warrants" out of fear they would "inadvertently violate the Fourth Amendment if they happened upon additional contraband that

the private searchers did not see." *Id.* A rule encouraging police officers to seek search warrants out of fear would waste scarce judicial resources and unduly burden law enforcement. The broad approach avoids these practical problems.

The broad approach also lessens the burden on private citizens conducting searches. Private citizens who discover digital evidence of a crime will likely struggle to recall which specific files they opened during their searches. This is especially true if the searchers experienced confusion, panic, or stress when they encountered the evidence. *See* Joyce Lacey & Craig Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 NAT. REV. NEUROSCI. 649 (2013) (noting that high levels of stress during an event can result in reduced memory of that event). Additionally, private searchers who scroll through large quantities of homogenous digital data during their searches will likely forget which specific files they clicked on. For example, the private searcher in *Lichtenberger* "was not sure at all" whether the child pornography images she had opened during her private search were the same images police later viewed because "there were hundreds of photographs in the folders she had accessed." *Lichtenberger*, 786 F.3d 478, 488–90 (6th Cir. 2015). Unless the law imposes a burden on private searchers to keep detailed logs of the exact files they clicked on, searchers will likely forget what they actually viewed. The broad approach eliminates the need for private parties to perfectly recall what they clicked on during their searches.

Thus, whereas the narrow approach is "impractical in application, failing to provide a workable accommodation between law enforcement needs and Fourth Amendment interests," *Kyllo v. United States*, 533 U.S. 27, 28 (2001), the broad approach strikes an appropriate balance between law enforcement and individual privacy interests. This Court should therefore adopt the broad approach.

B. This Court's decision in *Riley v. California* has no bearing on this case.

The circuits that have adopted the narrow approach in evaluating the scope of a private digital search rely heavily on this Court's decision in *Riley v. California*. In *Riley*, the Court established that police must secure a search warrant before searching a cell phone incident to an arrest. *Riley v. California*, 573 U.S. 373 (2014). The *Riley* decision narrowed this Court's earlier holding in *United States v. Robinson*, which granted police broad authority to search items found on an arrestee's person at the time of arrest. *See Robinson*, 414 U.S. 218 (1973). The *Riley* Court determined that the two main justifications underlying warrantless searches incident to arrest—the safety of police officers and the prevention of evidence destruction—are greatly diminished in the context of cell phones. *Riley*, 573 U.S. at 386. The individual's privacy interests, on the other hand, are significantly stronger in the context of cell phones than other types of property. *Id.* at 397. The Court concluded that because the interests of the individual outweigh the needs of law enforcement, police must secure a warrant before searching cell phones seized during arrests. *Id.* at 401.

Courts adopting the narrow approach assert that *Riley* stands for the broad proposition that individual privacy outweighs law enforcement interests in all cases involving digital data. *See Sparks*, 806 F.3d at 1336. However, *Riley* does not go that far. The scope of the Court's holding in *Riley* is limited in two significant respects.

First, *Riley* focuses solely on the search-incident-to-arrest warrant exception. In its analysis, the *Riley* Court focused entirely on the two justifications for the search-incident-to-arrest exception: the safety of police officers and the prevention of evidence destruction. *Riley*, 573 U.S. 373 at 385. The court explicitly acknowledged the limited scope of its analysis and holding, stating that "even though the search incident to arrest exception does not apply to cell phones, other case-

specific exceptions may still justify a warrantless search of a particular phone." *Id.* at 401–02. Thus, the Court unambiguously stated that *Riley* does not serve as a broad command in all Fourth Amendment cases involving digital data.

Second, *Riley*'s holding is specifically limited to smart phones equipped with remote data access. In its opinion, the *Riley* Court focused heavily on the ubiquitous use of cell phones, noting that "modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. The Court discussed the special features that make modern cell phones unique under the Fourth Amendment: internet browsing capabilities, GPS services, and mobile applications containing "detailed information about all aspects of a person's life." *Id.* at 396. The Court voiced particular concern about a smart phone's ability to "access data located elsewhere, at the tap of a screen." *Id.* at 373. Because the *Riley* Court's individual-privacy analysis focused almost exclusively on these unique attributes, lower courts have interpreted *Riley* as a holding narrowly applied to smart phones. *See, e.g., United States v. Johnson*, 875 F.3d 1265, 1274 (9th Cir. 2017) (noting *Riley*'s "emphasis on the almost *sui generis* nature of cell phones").

The digital storage device in this case—Ms. Wildaughter's flash drive—is not a smart phone, nor does it possess any of the capabilities that concerned the *Riley* court. Flash drives are simply portable storage devices, similar to CDs or floppy discs. *See Definition – USB Flash Drive*, TechTarget, https://searchstorage.techtarget.com/definition/USB-drive (last visited Feb. 12, 2021). Flash drives do not possess internet browsing capabilities, GPS services, or mobile applications. They have no ability to connect to data located elsewhere. The sole purpose of flash drives is to hold data, making them more akin to physical containers than to smart phones. Thus,

any invocation of *Riley,* which focuses heavily on the unique nature of smart phones, is plainly inappropriate in this case.

Because the broad approach faithfully adheres to this Court's ruling in *Jacobsen* and provides police and private searchers with realistic guidelines, this Court should adopt it. Although at first glance *Riley v. California* may seem relevant to this case, the *Riley* Court's analysis is expressly limited by facts not present in this case.

III. The Court should uphold the Fourteenth Circuit and hold that the nondisclosure of inadmissible FBI reports did not form the basis for a *Brady* claim.

The Court should uphold the decision of the Fourteenth Circuit Court of Appeals and find that the government's failure to disclose non-material information did not violate the requirements of *Brady v. Maryland.* This Court's jurisprudence in *Wood v. Bartholomew* demonstrates that inadmissible evidence can never form the basis of a *Brady* violation.

The Due Process Clause of the Fourteenth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const. amend. XIV. In *Brady v. Maryland,* the Court applied this maxim to exculpatory evidence withheld by the government during a criminal proceeding. 373 U.S. 83, 87 (1963). The *Brady* court held that the prosecution's suppression of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*

To establish a *Brady* violation, a defendant must prove that (1) "the prosecution suppressed evidence," (2) "the evidence was favorable to the defense," and (3) "the evidence was material." *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). 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) (internal citations and quotations omitted).

In June 2017, the FBI interviewed Chase Caplow. R. at 44. Mr. Caplow told investigators that the victim, Ms. Driscoll, was in debt to another HerbImmunity Distributor. R. at 44. Later that June, the FBI received a second anonymous tip that identified another suspect. R. at 10. The FBI conducted a preliminary investigation into the lead's veracity and dismissed it as unreliable. *Id*. As stipulated by both parties, both tips are inadmissible hearsay. R. at 43. The issue before the Court is whether inadmissible evidence can be "material" for *Brady* purposes. As Judge Restler noted in the Fourteenth Circuit opinion, there is no uniform circuit approach to this issue. We urge the Court to follow *Wood* and its Fourth, Eighth, and Fourteenth Circuit derivatives and hold that inadmissible evidence is per se immaterial for *Brady* purposes.

A. *Wood* and its progeny confirm that admissibility is a threshold requirement to fielding a *Brady* claim.

A careful reading of *Wood v. Bartholomew* and its Fourth and Eighth Circuit progeny confirm that inadmissible evidence is per se immaterial, and that inadmissibility is therefore a threshold requirement to fielding a *Brady* claim. 516 U.S. 1 (1995); *see also Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998).

In *Wood,* the defendant robbed a laundromat, killed the attendant, and was tried and convicted for murder. 516 U.S. at 2. Unbeknownst to the defendant, the prosecution had given polygraph tests to two witnesses that had testified against him. *Id.* During the polygraph tests, the examiner asked the witnesses a variety of questions, including but not limited to whether they had helped defendant commit the robbery, and whether they had ever handled the murder weapon. *Id.* at 4. The test results were inconclusive. *Id.* When the defendant discovered the existence of the polygraph tests, he filed a habeas action raising a *Brady* claim based on the prosecution's failure

to produce the results. *Id.* at 4–5. Presumably, the inconclusive polygraph results could create doubt in the minds of the jurors or open up some new avenue of investigation. *Id.* at 5.

The Ninth Circuit agreed. *Id.* at 2. The Supreme Court's response to the Ninth Circuit's holding formed the fault lines in *Brady* jurisprudence that underpin the contention between the State and the Petitioner in this case. The Fourth and Eighth Circuits, and now the Fourteenth, interpret *Wood* to mean that inadmissible evidence per se cannot form the basis of a *Brady* claim. A careful analysis of the *Wood* decision confirms the reasoning of those Circuits and demonstrates that admissibility is a threshold to materiality. Given the degree of contention between circuits, it is useful to examine larger segments of the Court's opinion:

> To begin with, on the Court of Appeals' own assumption, the polygraph results were inadmissible under state law, even for impeachment purposes, absent a stipulation by the parties, see 34 F.3d, at 875 (citing *State v. Ellison, supra*), and the parties do not contend otherwise. The information at issue here, then—the results of a polygraph examination of one of the witnesses—is not "evidence" at all. Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses.

Wood 516 U.S. at 6.

In its preliminary commentary on the *Brady* issue, the *Wood* court is clear. Inadmissible evidence is "not 'evidence' at all," and its nondisclosure cannot meet *Brady's* materiality requirement. The subsequent passage, which is dicta, shows the Court admonishing the Ninth Circuit.

> To get around this problem, the Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized. See 34 F.3d, at 875. Other than expressing a belief that in a deposition Rodney might have confessed to his involvement in the initial stages of the crime—a confession that itself would have been in no way inconsistent with respondent's guilt—the Court of Appeals did not specify what particular evidence it had in mind. Its judgment is based on mere speculation, in violation of the standards we have established.

Id.

The *Wood* opinion highlights the tenuous link between inadmissible evidence and *Brady* material. The Court repeats itself to emphasize that tenuity: the government's disclosure "might have led" to additional discovery, which "might have led" to additional evidence that "could have been" utilized. The Court conveys disdain for the Ninth Circuit's solution – a clearly speculative exercise that is notably similar to the approaches that the First, Third, and Eleventh Circuits have adopted and that the Petitioner advocates for in this case. Given the opinion's acerbic use of repetition, the court's dicta in this passage should be interpreted as an admonishment, not as the foundation for new law. Because the determination of whether inadmissible evidence might lead to additional evidence that can be utilized is so speculative, inadmissible evidence cannot be material and is per se an insufficient basis for a *Brady* claim. Holding otherwise merely because the inadmissible evidence might speculatively lead to admissible evidence is plainly contradictory to the *Wood* Court's intent.

The Fourth Circuit adopted the correct approach in *Hoke v. Netherland.* The defendant in *Hoke* was found guilty of capital murder in the commission of robbery, rape, and abduction, and was sentenced to death. 92 F.3d 1350, 1352–53 (4th Cir. 1996). After the trial concluded, the defendant discovered that the police failed to disclose interviews with three men who claimed they had engaged in consensual sex with the victim. *Id.* at 1354. Hoke believed that evidence of his victim's prior consensual sexual relationships could be important to establishing at trial that the victim had consented to having sex with him on the night of the murder. *Id.* at 1355. He hoped to use that evidence to overturn his rape conviction, which would—in conjunction with two other successful constitutional challenges to his abduction and robbery convictions—mean escaping his death sentence. *Id.* at 1358.

The district court overturned the rape conviction, holding that that the prosecution's failure to disclose the statements resulted in a *Brady* violation "because the [undisclosed] statements 'cast into serious doubt the Commonwealth's theory that the sexual encounter between [the victim] and Petitioner was non-consensual.'" *Id.* at 1356 (internal citation omitted). The Fourth Circuit vacated the district court's ruling and reinstated Hoke's rape conviction. *Id.* It found that because statements "may well have been inadmissible at trial," they were "as a matter of law, 'immaterial' for *Brady* purposes." *Id.* Like in *Wood,* the Fourth Circuit's subsequent consideration of the statements' materiality served to admonish the trial court's erroneous ruling. In *Madsen,* the Eighth Circuit likewise adopts this strategy and looks to materiality beyond admissibility only to admonish its lower court for attempting to "get around" the materiality issue based on "mere speculation." 137 F.3d at 604.

In this case, the Petitioner argues that the two undisclosed FBI reports are material because they were indicative of new suspects and therefore exculpatory. R. at 46. This argument must fail. Like in *Hoke,* both FBI reports are inadmissible hearsay, a fact stipulated by both parties. *Id*. *Wood* demonstrates that admissibility is a threshold to whether undisclosed evidence can form the basis of a *Brady* claim. Its progeny confirm that interpretation. Whether the reports might have led to admissible, material evidence is irrelevant. The link between the disclosure of inadmissible evidence and the discovery of actionable, admissible evidence is too attenuated to be violative of a defendant's due process rights. Accordingly, the Court should uphold the *Wood* decision and find that the undisclosed, inadmissible FBI reports were per se immaterial, did not violate defendant's due process rights, and cannot serve as the foundation for a *Brady* claim.

B. Modifying *Wood's* holding risks compromising judicial efficiency and is an inapposite solution to the problem of prosecutorial nondisclosure.

Straying from *Wood's* holding risks introducing inefficiencies to the judicial system that could compromise justice for all participants. The best solutions to prosecutorial nondisclosure likely originate within the walls of the prosecutor's office and not the courts.

The foundation of the *Brady* doctrine is the Fourteenth Amendment's Due Process Clause, which is ultimately rooted in concepts of equity and justice. *Brady,* 373 U.S. at 87. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* When other courts create law from the dicta in *Wood*, they are ostensibly attempting to alleviate some perceived injustice in the justice system. In fact, however, their rulings likely have an adverse impact on our system of the administration of justice and the fairness of criminal trials.

In cases like *Hoke* and *Wood,* convicted defendants often invoke the *Brady* doctrine. Given their apparent guilt, these attempts can be construed as an effort to impede justice. For example, the defendant in *Hoke* confessed at least three times to murdering and robbing his victim. *Id.* at 1352. His victim was found bound and gagged, and lying on her stomach, dead. *Id.* Her wrists were bound with a blue electrical cord from an electric clothes iron. *Id.* Her ankles were bound with a brown electrical extension cord. *Id.* Her mouth was gagged with "a pair of panties, which were tied around her head so tightly that they left an 'impression' on her face." *Id.* at 1352. Because he was charged with capital murder in the commission of robbery, abduction, and rape, escaping his death sentence hinged on overturning his robbery, abduction, and rape convictions. *Id.* at 1352. A *Brady* claim could solve one of the defendant's problems. Hoke needed a Hail Mary and the district court's misapplication of the *Wood* holding gave him one.

In cases like *Hoke* where guilty defendants fish for undisclosed, inadmissible, speculatively exculpatory evidence, the judiciary can become distracted by frivolous claims. That reduces the system's capacity to devote the requisite attention and resources to viable, resolvable issues. *Wood's* bright-line rule, when properly employed, prevents defendants from obstructing justice and improves outcomes across the judicial system. Ultimately, therefore, holding that inadmissible evidence is material if it at some point might speculatively lead to a different result at trial is an inefficient solution and will likely cause as many problems as it resolves.

Moreover, any problems that the criminal justice system has with nondisclosure of *Brady* material is likely better solved by solutions originating within the walls of the prosecutor's office. The prosecutor often has more access to information and resources than defendants. And prosecutors are responsible for reviewing information for disclosable *Brady* material. *Kyles,* 514 U.S. at 437. Prosecutors must accordingly exercise a great deal of care when performing their duties.

Attorneys, academics, judges, and even law students have expressed several ostensible solutions to the issue of prosecutorial nondisclosure. One solution is to simply require prosecutors to have an "open file" discovery policy. Blaise Niosi, *Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence is Material Under the Brady Rule,* 83 FORDHAM L. REV., 1499, 1535 (2014). Allowing defense counsel full access to information obtained by the prosecution would avoid *Brady* violations. *Id.* Another solution is to develop a permanent prosecutorial task force dedicated to managing disclosure practice. *Id.* at 1536. Both solutions provide a fix to the issue of prosecutorial nondisclosure of *Brady* material without handicapping the judiciary's ability to mete out justice efficiently and effectively.

In sum, unduly modifying *Wood's* holding beyond its original intent risks compromising justice for other participants of the criminal justice system and would not ultimately root out the core issue as effectively as could solutions originating from within the prosecutor's office.

C. If the Court does choose to consider this evidence, the Court should follow the First, Third, and Eleventh Circuit approach and find that the reports' disclosure would not have led directly to admissible evidence.

If the Court decides to consider this evidence, we urge the Court to follow the First, Third, and Eleventh Circuits and ask whether evidence's disclosure would have led directly to admissible evidence. *See, e.g.*, *Dennis v. Sec'y, Pa. Dep't of Corr.,* 834 F.3d 263, 310 (3d Cir. 2016)*; Ellsworth v. Warden,* 333 F.3d 1, 5 (1st Cir. 2003); *Wright v. Hopper,* 169 F.3d 679, 703. The Eleventh Circuit's approach in *Wright* presents a particularly good standard.
The defendant in *Wright* was sentenced to death after robbing an auto store and shooting both owners in the head. *Id.* at 698. The prosecution failed to disclose an inadmissible report claiming that someone other than the defendant owned the murder weapon, and that nondisclosure led to the *Brady* claim. *Id.* at 703.

The Eleventh Circuit confirmed that the defendant's due process rights had not been violated. *Id.* Reasoning that inadmissible evidence can be material if it leads directly to admissible evidence, the court determined that the appellant had failed to meet that burden. *Id.* It noted that because it was "unknown exactly what [the witness] would say," the defendant had necessarily "failed to prove what she would say is material." *Id.* It emphasized that a "court cannot speculate as to what evidence the defense might have found if the information had been disclosed," and that the "crucial inquiry is whether there is evidence in the record that establishes a 'reasonable probability' that the production of the inadmissible evidence would have resulted in a different outcome at trial. *Id.* at 703–04.

Like *Wright,* the tips in this case could not have led directly to admissible evidence. The Petitioner's claim that the undisclosed FBI tips were material because they led to additional suspects or provided motive is mere speculation, and she cannot demonstrate that the disclosure of the reports would have led to a different result at trial.

Both tips are unreliable. Among them, one was anonymous. R. at 12. In other contexts, this Court has recognized that anonymous tips "alone seldom demonstrates the informant's basis of knowledge or veracity." *Alabama v. White,* 496 U.S. 325, 329 (1990); *see also Florida v. J.L*., 529 U.S. 266, 270 (2000) (internal citations omitted). Moreover, the Sixth Circuit has recognized that in the *Brady* context prosecutors "are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of 'legitimate suspect[s].'" *Gumm v. Mitchell*, 775 F.3d 345, 364 (6th Cir. 2014), a policy consistent with notions of both due process and efficiency. Special Agent Mark St. Peters conducted a preliminary investigation into the anonymous tip's veracity and determined that the lead did not appear reliable. R. at 12. Like in *Wright,* there is no way for Petitioner to demonstrate what the anonymous tipster would have said. Had the tip been disclosed there is little chance that Petitioner would have been able to track the tipster down. Accordingly, the disclosure of the anonymous tip would have led neither to additional admissible evidence, nor to evidence that could have materially affected the trial's outcome.

The other tip came from Chase Caplow. R. at 11. Mr. Caplow was involved with the same multi-level marketing company as the victim. *Id.* Mr. Caplow told FBI Special Agent Mary Baer that the victim claimed she was indebted to HerbImmunity distributor Martin Brodie. *Id.* Mr. Caplow told the investigator that there were "rumors" that Brodie "could be" violent, but that he had "not witnessed any violence himself." *Id.* The Petitioner argues that this evidence

was potentially exculpatory because "the Government should have immediately recognized that someone Ms. Driscoll owed a large some of money to . . . clearly had the motive for murder." R. at 44. The facts do not indicate the sum of money owed to Mr. Brodie and Mr. Caplow was unaware of the amount. *Id.* Moreover, the tipster has no first-hand knowledge of Mr. Brodie's alleged violent tendencies. *Id.* Mr. Caplow does not present as a reliable source.

The FBI's decision to not spend its investigatory resources on these tips is unsurprising and not, like Petitioner claims, indicative of the Government's failure to follow up on additional leads. Like the Eleventh Circuit found in *Bradley v. Nagle,* there "must be more than mere speculation that the inadmissible evidence would have led directly to admissible evidence. 212 F.3d 559, 567 (11th Cir. 2000). In this case, the Petitioner offers no evidence that the FBI's judgment was incorrect. She merely speculates that the FBI erred and that the disclosure of the inadmissible reports might have led to actionable, admissible evidence.

Like in *Hoke, Wright,* and many other *Brady* cases, the evidence pointing to Petitioner's guilt is overwhelming – she had photos of the victim and her family at their home; a recipe for chocolate covered strawberries containing the poison strychnine that was used to murder the victim; her to-do list and research about various poisons and dosing; and her own therapist's notes and testimony. R. at 5–9. The undisclosed tips had little veracity, and there was no need for the government to rule out the alleged suspects with blood tests or confirmed alibis. There was little reason to suspect them in the first place. In the face of overwhelming evidence, the mere fact that Ms. Driscoll was in debt to another HerbImmunity distributor would not have led directly to admissible evidence, and there is nothing but speculation to indicate that it would have had any impact at all on a reasonable juror's conclusion about this case.

In sum, the Court should hold that inadmissible evidence is per se immaterial for *Brady* purposes. If the Court chooses to consider the evidence, then the Court should adopt the Eleventh Circuit approach and hold that the two inadmissible FBI reports do not meet *Brady's* materiality requirement because they would not have led directly to admissible evidence and could not have affected the outcome of the trial.

CONCLUSION

For the foregoing reasons, the Petitioner asks this Court to uphold the lower court's findings that Dr. Pollak's testimony is admissible, no Fourth Amendment violation occurred, and the evidence that was not disclosed did not form the basis for a *Brady* violation.

Respectfully submitted,

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