13-P

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 THEUNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 13
Attorneys for Petitioner

ORIGINAL BRIEF

QUESTIONS PRESENTED

I. Whether the psychotherapist-patient testimonial privilege under Federal Rule of Evidence 501 protects the therapist from breaching confidentiality to testify against their patient in a criminal proceeding, if the privilege was previously broken in order to disclose a potential threat to law enforcement.

II. Whether a citizen's Fourth Amendment protection against capricious government intrusion is violated when the government warrantlessly conducts a search broader in scope than the initial private search of a citizen's digital information.

III. Whether the government violated the requirements of *Brady v. Maryland*, and the constitutional protections it provides, by suppressing material, exculpatory information solely on the grounds that the information would be inadmissible at trial.

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The Fourteenth Circuit's decision is unpublished but is reproduced in the Record on pages 50-59. The order number of the opinion is No. 19-142. The District Court's oral ruling on Petitioner's motions to suppress is unpublished but is reproduced in the Record on pages 40-41. The District Court's order following the hearing is unpublished but is reproduced in the Record on pages 48-49. The number of the Order is 17-CR-651.

CONSTITUTIONAL PROVISION

U.S. Constitution Amend. IV 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.

STATEMENT OF THE CASE

I. Statement of the Facts

On May 25, 2017, Joralemon University student Tiffany Driscoll was reported dead after being found at the bottom of the stairs of her father's townhouse. R. at 13. A subsequent search of the Driscoll home revealed evidence suggesting she had been poisoned. R. at 14. Toxicology reports showed traces of strychnine, a poison used primarily as a pesticide to kill rats, in her system. *Id.* The poison had allegedly been injected into strawberries that were mailed to Ms. Driscoll's apartment in a fruit gift basket. *Id.* On May 27, 2017, Samantha Gold, a fellow Joralemon student, was arrested in connection with the death of Ms. Driscoll and charged with murder by mail. *Id.*

Psychiatrist Testimony

In 2016, Ms. Gold was recruited by Ms. Driscoll to join HerbImmunity, a multi-level marketing organization which many students described as "nothing more than a pyramid scheme." R. at 13, 14. Ms. Driscoll persuaded Ms. Gold to invest $2,000 in the product, but Ms. Gold only made single sale. R. at 14. Ms. Gold was distressed by her increasing debt from her involvement in HerbImmunity, and felt as if she had been tricked and taken advantage of by Ms. Driscoll. R. at 4. Ms. Driscoll had induced Ms. Gold to participate in this losing venture and was herself in debt from the pyramid scheme. R. at 4, 11. Ms. Gold confided in her psychiatrist, Dr. Chelsea Pollak, about these issues. R. at 4. Dr. Pollak has been treating Ms. Gold since 2015 and was able to "effectively treat" Ms. Gold through their weekly sessions. R. at 17.

During Ms. Gold's therapy session on the afternoon of May 25, 2017, she expressed to Dr. Pollak that she no longer wished to be involved in the pyramid scheme and wanted to cut off communication with Ms. Driscoll. R. at 4. After the session, Dr. Pollak called the Joralemon Police Department to report a dangerous patient, pursuant to her duty to report under Boerum Health and Safety Code § 711. R. at 2, 5. Dr. Pollak reported that she was worried for Ms. Gold's safety, as well as for the safety of Ms. Driscoll, because Ms. Gold had made allegedly threatening statements and appeared more disheveled than normal at this session. R. at 4, 5. As a result, officers were dispatched to the Joralemon University. R. at 5. They went first to Ms. Gold's dormitory. *Id.* Ms. Gold answered the door and appeared "calm and rational." *Id.* After talking with Ms. Gold for 15 minutes, the officers determined that she "posed no threat to herself or to others." *Id.* As a precautionary measure, the officers contacted the University administration to check on Ms. Driscoll who was currently in class. *Id.* The officers concluded their wellness check after determining that Ms. Driscoll was not in any imminent danger but

warned her that there had been a threat reported regarding her safety. *Id.* Ms. Driscoll expressed no concern and promptly returned to class. *Id.*

Dr. Pollak testified at trial about certain threatening statements allegedly made by Ms. Gold about Ms. Driscoll. R. at 19. While Dr. Pollak believes she advised Ms. Gold of Dr. Pollak's legal duty to warn a potential victim in the event of the disclosure of a serious threat or harm, Ms. Gold was never given any warning that her statements may be used against her in a criminal proceeding. R. at 21. Dr. Pollak stated that "patients may be more reluctant to share certain thoughts or urges with [her] if they know that [she] may be required to testify about the content of [their] therapy sessions." *Id.* Dr. Pollak recognized that warning a patient that their statements may be used against them in a subsequent criminal prosecution is distinct from a psychotherapist's mandated duty to protect following a disclosure of a serious threat. *Id.*

Flash Drive

On May 25, 2017, several hours after the police had conducted a wellness check at Joralemon University, Jennifer Wildaughter, Ms. Gold's roommate at the time, went to the Livingston Police Department with concerns regarding information she had found on Ms. Gold's laptop computer. R. at 6. Ms. Wildaughter met with Officer Aaron Yap, head of the digital forensics department. *Id.* Ms. Wildaughter explained to Officer Yap that she had noticed that Ms. Wildaughter had been angry as of late because of her debt to HerbImmunity, and particularly upset with Ms. Driscoll who had lured her into the company. *Id.* According to Ms. Wildaughter, that afternoon Ms. Gold had come home extremely distressed and subsequently ran out of the apartment. *Id.* Ms. Wildaughter then went to Ms. Gold's desk where she had left her laptop open and began probing through all of Ms. Gold's documents and files until she came across a few that she described as "concerning." *Id.* She then copied the entire contents of Ms. Gold's laptop

onto a flash drive, despite only looking through some of the folders. *Id.* She provided this flash drive to Officer Yap. *Id.*

Ms. Wildaughter described to Officer Yap which specific documents and images she had viewed on the flash drive. *Id.* Once she left the precinct and without obtaining a warrant, Officer Yap immediately conducted a thorough examination of the flash drive's contents, viewing the entire contents of Ms. Gold's personal computer. *Id.* He clicked on the "photos" folder which contained only "personal photos unrelated to the photographs Ms. Wildaughter had mentioned." *Id.* He then continued to open and inspect every subfolder on the drive, regardless of whether the name of the thumbnail seemed relevant to the situation he was investigating. *Id.*

II. Procedural History

Petitioner Samantha Gold was charged with Delivery by Mail of An Item With Intent to Kill or Injure in violation of 18 U.S. C. §1716. R. at 1, 14. Ms. Gold argued that introduction of (1) testimony of her psychiatrist, Dr. Chelsea Pollak, and (2) digital information obtained from the flash drive violated her Fourth Amendment right against unreasonable search and seizure. The District Court denied both motions to suppress. R. at 31, 35. After trial, Ms. Gold also filed a motion for post-conviction relief on the basis of two *Brady* violations. R. at 43. The District Court denied Ms. Gold's motion. R. at 48-49. Ms. Gold then appealed the District Court's rulings to the United States Court of Appeals for the Fourteenth Circuit. R. at 51. The Fourteenth Circuit affirmed the District Court's rulings on all three issues. *Id.* Ms. Gold appeals these rulings and upon grant of *writ of certiorari*, this Court reviews the decision of the Fourteenth Circuit *de novo*. R. at 60.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because (1) Dr. Pollak's statements against her patient Ms. Gold are inadmissible because of the psychotherapist-patient testimonial privilege; (2) the information obtained from Ms. Gold's desktop are inadmissible because the government's search improperly exceeded the scope of the initial private search; and (3) the government committed a *Brady* violation in failing to disclose material, exculpatory information to Ms. Gold prior to trial.

First, the psychotherapist-patient testimonial privilege was created to preserve the sanctity of therapist-patient relationship. While a therapist has a legal duty to report if a patient makes a serious threat to physically harm themselves or an identifiable victim, such a duty is distinct from the punitive nature of a dangerous-patient exception. Adoption of such an exception would have a detrimental effect on the individual therapist-patient relationship, as well as the overall health of our society. Further, Ms. Gold never waived her psychotherapist-patient privilege. Accordingly, this Court should reverse the lower court's decision and reject the dangerous-patient exception to the psychotherapist-patient privilege.

Second, the Fourth Amendment was created to safeguard individual privacy against capricious government invasions. While the private search doctrine provides the government with a limited opportunity to benefit from evidence obtained by a private party, the government cannot exceed the scope of that initial search absent a warrant. Ms. Wildaughter illegally copied Ms. Gold's entire desktop and delivered it to the police who failed to obtain a warrant before rifling through her information, folder by folder. Instead of limiting his search according to the initial private search, Officer Yap viewed the entire contents of Ms. Gold's entire computer—

including sensitive budget, tax, and health information. R. at 6-10. Such an invasion is a gross abuse of governmental authority, which the Fourth Amendment was enacted to restrain.

Third, the government violated Ms. Gold's due process rights by suppressing material, exculpatory evidence that could have been helpful to Ms. Gold's defense. To establish a *Brady* violation, a defendant must show that (1) the prosecution suppressed the evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material. Evidence is material if there is a "reasonable probability" that had the government disclosed it to the defense, it would have undermined confidence in the outcome of the trial and led to a different result. The government suppressed evidence of two alternate suspects in this case. Had Ms. Gold had access to these leads, it is reasonably probable that presenting the jury with such information would have weakened its confidence in the prosecution's case and resulted in a different outcome. It is contrary to the goals of justice and fairness underlying *Brady* to provide the government with the unregulated discretion to decide whether to disclose evidence favorable to the defense. For these reasons, this Court should reverse the Fourteenth Circuit on all three issues.

ARGUMENT

I. THE GOVERNMENT CANNOT CIRCUMVENT THE WELL-ESTABLISHED PSYCHOTHERAPIST-PATIENT EVIDENTIARY PRIVILEGE BY ASSERTING A DANGEROUS-PATIENT EXCEPTION.

Both the Court and Congress have recognized that there are substantial interests that necessitate certain exemptions from giving testimony, even if testimony should generally be given when possible. *Bryan*, 339 at 331; FED. R. EVID. 501. These exemptions, or privileges, "presuppose[] a very real interest to be protected," that "outweigh[s] the public interest in the search for truth." *Bryan*, 339 U.S. at 331. This was certainly the case when this Court recognized the psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). This Court held

that this privilege is "rooted in the imperative need for confidence and trust" between the patient and therapist, thereby outweighing the principle of presumptive admissibility. *Id.* at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Both "reason and experience" dictate that this privilege is "a public good of transcendent importance" that should only give way if absolutely necessary. *Id.* at 10-11.

Courts have typically interpreted this to mean that a therapist may breach this confidentiality when confronted with a duty to protect the patient or other identifiable at-risk parties. *Currie v. United States*, 836 F.2d 209 (4th Cir. 1987); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003); *United States v. Auster*, 517 F.3d 312 (5th Cir. 2008). This duty narrows these breaches of confidentiality to circumstances that have a protective purpose. *Chase*, 340 F.3d at 990. A dangerous-patient exception may appear to be in line with this purpose, but in practice, the exception primarily serves to punish mental health patients. *Id.* Breaching confidentiality for the purposes of punishing, and ultimately incarcerating, a mental health patient would have a detrimental impact on the therapist-patient relationship. *United States v. Hayes*, 227 F.3d 578, 584 (6th Cir. 2000). Additionally, such an impact would have wide-reaching consequences affecting not just a private interest, but a public interest as well. *Id.* While it is possible to waive the protections offered by the psychotherapist-patient privilege and allow the testimony, merely consenting to a therapist's warning of a duty to protect does not give a therapist blanket consent to disclose all confidential communications in any situation. *Id.* at 586.

Therefore, this Court should reject the dangerous-patient exception to the psychotherapist-patient testimonial privilege for three reasons. First, allowing a therapist to testify would serve a primarily punitive, not protective, purpose that would negate the interests kept safe by this privilege. Second, giving credence to this exception would result in a deleterious effect on both

the therapist-patient relationship and society as a whole. And third, Ms. Gold did not explicitly, nor implicitly, waive this psychotherapist-patient privilege and allow Dr. Pollak's testimony.

A. The Predominantly Punitive Purpose of a Dangerous-Patient Exception is Distinct from the Protective Purpose of a Therapist's Duty to Report.

Following the Supreme Court of California in its landmark holding *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), many jurisdictions have imposed a limited exemption—the duty to protect—to the confidential communications between the therapist and patient when necessary to protect the patient or at-risk, identifiable third parties. *Currie*, 836 F.2d 209; *Chase*, 340 F.3d 978; *Auster*, 517 F.3d 312. If a patient threatens to harm themselves or someone else and disclosure is the only means of averting that harm, a breach of confidentiality is justified on the "ground of protection." *Chase*, 340 F.3d at 987. This disclosure is permitted because the "benefit of disclosing the existence of a dangerous patient outweighs the private and public cost of the deleterious effect on the psychotherapist-patient relationship." *Id.*

The state of Boerum has also codified this *Tarasoff* duty to protect into its law in its "Boerum Health and Safety Code § 711." R. at 2. The statute dictates that "communications between a patient and mental health professional are confidential except where … an actual threat to physically harm" has been made. *Id.* The statute mandates three exceptions to the general rule of confidentiality when a patient has made this threat: (1) to communicate the threat to the victim; (2) to notify law enforcement; and (3) to supply the law enforcement agency with any information related to the threat. *Id.* The textualist canon *expressio unius est exlusio alterius* asserts that the legislature was intentional in choosing what to include in its statute and anything not specifically listed is not an exception to this breach of confidentiality. Similarly, based on the foundational jurisprudence, the purpose of this statute is unambiguously to protect both the patient and potential third parties.

This Court left open the possibility of potential exceptions to the psychotherapist-patient testimonial privilege distinct from the exceptions imposed on the psychotherapist-patient confidential relationship.[1] However, this Court—as an adjudicator, not a legislator—should not read into the statute a broader array of exceptions than intended. Any potential "situations in which the privilege must give way" should serve the same protective purpose as those delineated in the statute. *Id.* For example, the Fifth, Sixth, Eighth, and Ninth Circuit Courts of Appeals have all recognized that the involuntary commitment of a patient is a logical and necessary extension of the duty to protect. *Auster*, 517 F.3d 312; *Hayes*, 227 F.3d 578; *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012); *Chase*, 340 F.3d 978. [2] In these instances, the testimonial privilege will give way if a therapist needs to testify in these civil commitment proceedings to continue the patient's care and protect individuals from harm. *Ghane*, 673 F.3d at 786. Because this testimony is in line with a duty to protect, this is the type of situation the *Jaffee* Court implied would allow for disclosure by the therapist. *Id.*

While the circuit courts are in agreement that the duty to protect extends to civil involuntary commitment proceedings, there is a circuit split on whether a "dangerous-patient exception" should be given to criminal proceedings as well. *Auster*, 517 F.3d 312 (recognizing dangerous-patient exception); *Hayes*, 227 F.3d 578 (rejecting dangerous-patient exception); *Ghane*, 673 F.3d 771 (rejecting dangerous-patient exception); *Chase*, 340 F.3d 978 (rejecting dangerous-patient exception); *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998)

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[1] In *Jaffee*, this Court stated, in a footnote, that "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…." *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996).

[2] The Judicial Conference Advisory Committee in its Proposed Federal Rules of Evidence set forth nine testimonial privileges, including a psychotherapist-patient privilege. *United States v. Chase*, 340 F.3d 978, 989 (9th Cir. 2003). Under these Proposed Rules, a psychotherapist is permitted to breach this privilege only under three exceptions; the first of which is "proceedings to hospitalize a patient for mental illness." *Id.* What was conspicuously, and likely deliberately, absent from these exceptions was a "dangerous-patient exception." *Id.*

(recognizing dangerous-patient exception). The majority of circuits have held it should not extend to criminal proceedings, finding "only a marginal connection" between the therapist notifying a third party of a threat and participating in the prosecution of their patient by testifying about the threat. *Hayes*, 227 F.3d at 583-84; *Ghane*, 673 F.3d at 785; *Chase*, 340 F.3d at 987.

Additionally, while the *Tarasoff* disclosure serves a public end by protecting from a potentially dangerous patient, this is not the case with a dangerous-patient testimonial exception because "by the time of trial the patient is stable and harmless." *Chase*, 340 F.3d at 987. However, the courts cannot similarly justify, under this protection rationale, breaching privilege to punish, prosecute, and incarcerate a patient who is no longer a potential threat. *Id.*; *Hayes*, 227 F.3d at 585.

Therefore, this Court should reject the dangerous-patient exception to the psychotherapist-patient privilege, because allowing a psychotherapist to testify in their patient's prosecution serves a primarily punitive purpose—as opposed to the protective purpose prescribed to the aforementioned exceptions.

B. There Would be a Deleterious Effect on the Therapist-Patient Relationship, and an Even Greater Impact on Society as a Whole, if the Court Creates a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege.

Baked into this Court's jurisprudence is a fundamental understanding that "every exemption from testifying or producing records … presupposes a very real interest to be protected." *United States v. Bryan*, 339 U.S. 323, 332 (1950). To disregard this "very real interest" in favor of a dangerous-patient exception would have a detrimental impact on both the patient and society at large. *Id.*

In *Jaffee,* this Court noted that rejecting the psychotherapist-patient privilege would surely chill confidential conversations, especially if it is likely that a disclosure will result in

litigation. 518 U.S. at 11-12. An "atmosphere of confidence and trust" is crucial to a psychotherapist relationship; chilling, and likely terminating, that open dialogue could cause irreparable damage. *Id.* at 10. While the initial *Tarasoff* disclosure could damage the therapist-patient relationship, the requisite trust will likely remain intact if the therapist is disclosing only for protective, as opposed to punitive, purposes. *Chase*, 340 F.3d at 990. The Fifth Circuit, in contrast, asserted that a therapist's testimony is unlikely to chill the patient's willingness to speak candidly if the *Tarasoff* disclosure has not already done so. *Auster*, 517 F.3d at 318. However, majority circuits hold that an additional warning regarding the patient's statements being used against them in a subsequent criminal prosecution would likely "chill… open dialogue," thus severely undermining the effectiveness of the psychotherapist-patient relationship. *Chase*, 340 F.3d at 990 (citing *Hayes*, 227 F.3d at 585); *Jaffee*, 518 U.S. at 6. Patients seeking help will find their speech stifled by a fear of disclosure in a subsequent prosecution; thereby, impeding the psychotherapist's "unique opportunity" to treat the patient's problems. *Chase*, 340 F.3d at 989.

Dr. Pollak, Ms. Gold's psychiatrist, similarly supports the assertion that warning a patient that their statements may be used against them in a subsequent criminal prosecution is distinct from a psychotherapist's mandated duty to protect following a disclosure of a serious threat. R. at 21. Dr. Pollak states that it is her "standard practice" to advise patients immediately of this duty to protect. *Id.* There is no evidence to suggest that this advisement significantly dissuades patients from confiding in her. *Id.* In fact, Ms. Gold's choice to candidly confide in Dr. Pollak, indicates that she trusted Dr. Pollak, despite the advisement. R. at 19. Dr. Pollak's testimony suggests that may not have been the case had she also warned her about a potential for disclosure at a criminal prosecution. R. at 21. Dr. Pollak asserts that "patients may be more reluctant to share certain thoughts or urges with [her] if they know that I may be required to testify about the

content of our therapy sessions. *Id.* Dr. Pollak maintains that she was able to "effectively treat" Ms. Gold through her weekly therapy sessions. R. at 17. Without this atmosphere of disclosure, patients could very likely miss out on opportunities for breakthroughs and treatment such as Ms. Gold had with Dr. Pollak. *Id.*

Damaging this confidence and trust implicit to the psychotherapist-patient relationship impacts far more than just the individual patient. *Jaffee*, 518 U.S. at 11. The deteriorating mental health of individuals unable to get the help they need would bleed into the fabric of our society. This Court held fundamental to its ruling in *Jaffee* that "the mental health of our citizenry … is … of transcendent importance." 518 U.S. at 11. In order to keep our society from hemorrhaging, this Court must prioritize the needs of its people by rejecting the dangerous-patient exception.

Furthermore, contrary to the Fifth Circuit's claim, jeopardizing the health of our society cannot be justified by the "marginal increase in the admissibility of probative evidence in criminal proceedings." *Auster*, 517 F.3d at 319. The Fifth Circuit suggests that, in these cases, "the cost-benefit scales favor disclosure." *Id.* But this analysis is faulty for three reasons. First, this language indicates the implementation of a balancing test, something this Court has specifically rejected when analyzing the privilege. *Jaffee*, 518 U.S. at 17. Second, as previously mentioned, damaging the trust and confidence of the psychotherapist-patient relationship prevents patients from seeking the treatment they need, thus disintegrating the mental health of our citizenry. *Id.* at 11. And third, as a result of this chilling effect, "much of the desirable evidence to which litigants… seek access… is unlikely to come into being," thereby serving "no greater truth-seeking function than if it had been spoken and privileged." *Id.* at 12. Therefore, this Court should not ignore a public good of such importance in exchange for the "marginal increase" in the potential to prosecute, and thus incarcerate, mental health patients.

Although incarcerating people with severe mental health disorders is one way of handling issues related to mental health, "treatment is a longer-lasting and more effective solution." *Chase*, 340 F.3d at 991. In contrast, with a carceral approach, the patient's mental health is likely to deteriorate significantly, and "a stigma certainly attaches after the patient's sentence is served." *Ghane*, 673 F.3d at 786 (citing *Hayes*, 227 F.3d at 585). In addition to those harms, a criminal conviction creates additional obstacles to the patient's ability to successfully reenter society, including obtaining employment and housing.[3] Therefore, the person seeking help is left with two choices: (1) risk incarceration, the possibility of great barriers to the job and housing market, and public embarrassment or disgrace, or (2) forgo treatment. Both of these options lead to the deterioration of the "mental health of our citizenry"—a great price to pay in exchange for a modest evidentiary benefit. *Jaffee*, 518 U.S. at 11.

Contrarily, the courts in the minority incorrectly assert that if a psychotherapist is already subjected to a *Tarasoff* disclosure, there is only a "marginal increase … in effective therapy… achieved by privileging psychotherapist-patient communications at trial." *Auster*, 517 F.3d at 319; *Glass*, 133 F.3d 1356. Based primarily on this Court's dictum in the *Jaffee* footnote, these courts argue that the dangerous-patient exception therefore should apply in criminal proceedings. *Auster*, 517 F.3d 312; *Glass*, 133 F.3d 1356. However, this overexpansive interpretation degrades the protective function of the exceptions to this privilege—dispensing with the health of our patients and community in favor of punishment.

The Fifth Circuit further alleges that criminal incarceration is not significantly distinct from involuntary civil commitment, and thus both should permit psychotherapist testimony, not

[3] "Those with criminal records may be ineligible for many federally funded health and welfare benefits, food stamps, and federal education assistance. They may be denied the right to vote, to enlist in the military, or to obtain… jobs. And… they may be denied both public and private housing." Valerie Schneider, The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact, 93 Ind. L.J. 421, 428 (2018).

just the latter. *Auster*, 517 F.3d at 319. However, this interpretation fails to appreciate the nuances and variances between our civil and criminal legal systems. Even if the patient initially rejects the mandated hospitalization, the purpose of this proceeding is to protect the patient and possible at-risk third parties while potentially improving the patient's mental state. *Hayes*, 227 F.3d at 585. Furthermore, this involuntary hospitalization will not impact job or housing prospects,[4] nor would it "leave a stigma after the stay concludes." *Id.*

Permitting the criminal prosecution and incarceration of any individual that the government perceives as a threat is a treacherous and slippery slope to fall down. A precedent that allows for the government to reach into the private thoughts of its citizens by way of their therapist would open the door to intractable abuses of power.

In order to prevent irreparable damage to the mental health of our citizenry by impairing the atmosphere of trust and confidence imperative to a psychotherapist-patient relationship, this Court must reject a dangerous-patient exception to the psychotherapist-patient privilege.

C. Ms. Gold did not Waive her Psychotherapist-Patient Privilege; therefore, the Court Should Not Allow Dr. Pollak's Testimony.

Although it is true that a patient may "voluntarily and knowingly relinquish[]" the psychotherapist-patient privilege, *United States v. Bolander*, 722 F.3d 199, 223 (4th Cir. 2013); *Hayes*, 227 F.3d at 586, Ms. Gold did not waive her privilege in this case. In order to explicitly waive one's privilege, the disclosure must be "clearly expressed" and the patient should be "unambiguously aware" of the conditions. *United States v. Lara*, 850 F.3d 686, 691 (4th Cir. 2017). In *Lara*, the patient signed a form stating that "'whatever [Lara] tell[s] a therapist… is not privileged or private,' and that he agreed to 'waive any and all such rights of confidentiality

[4] The Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally protects all "individually identifiable health information," including mental health, from disclosure. 45 C.F.R. § 164.502 (2021).

which may exist by statute or rule of law.'" *Id.* at 698. Accordingly, the court held that Lara affirmatively waived any psychotherapist-patient privilege by signing these, and other, forms. *Id.* at 688. Ms. Gold signed no such forms, nor did she make any affirmative statements waiving her psychotherapist-patient privilege. Therefore, her statements to her psychiatrist should still be privileged and protected.

Courts have also established a handful of ways in which a patient could implicitly waive her psychotherapist-patient privilege, including: (1) putting her mental health at issue, (2) failing to previously assert the privilege in court, or (3) disclosing her statements to unrelated third parties. *Simon v. Cook*, 261 F.App'x 873, 886 (6th Cir. 2008) (holding that a case that turned on whether the defendant had probable cause to believe that the plaintiff was mentally ill and dangerous clearly put the plaintiff's mental state at issue); *Bolander*, 722 F.3d at 223 ("A waiver may occur when the substance of therapy sessions is disclosed to unrelated third parties… or when the privilege is not properly asserted during testimony"). None of these circumstances apply to the case at bar. Ms. Gold did not put her mental health at issue, she did not fail to timely assert the privilege, nor did she disclose her statements to unrelated third parties; therefore, the privilege must hold.

Circuits have repeatedly rejected a "constructive waiver" theory that assumes a warning of disclosure for one purpose implicitly waives the psychotherapist-patient privilege for all purposes. *Hayes*, 227 F.3d at 586; *Ghane*, 673 F.3d at 786-87 (holding that although the therapist advised the patient that legal authorities would be notified regarding any general threats, the patient was not informed that consent to such disclosure would allow his statements to be used against him in a subsequent criminal trial); *Chase*, 340 F.3d at 988 (finding that this theory "relies … on a fiction that the patient knows that disclosure for one purpose … is a disclosure for

all purposes"). In *Hayes*, the court held that it is "one thing to inform a patient of the 'duty to protect'; it is quite another to advise a patient that his 'trusted' confidant may one day assist in procuring his conviction and incarceration." 227 F.3d at 586. Therefore, because "none of Hayes's psychotherapists ever informed him of the possibility that they might testify against him," the court found that he did not "'knowingly' or 'voluntarily' waive[] his right to assert the psychotherapist/patient privilege." *Id.*

The Fifth Circuit held that a disclosure under the *Tarasoff* duty removes any reasonable expectation of confidentiality, and "without such a reasonable expectation, there is no privilege." *Auster*, 517 F.3d at 316. The court bases this opinion in part on the idea that the patient can logically conclude that the "details of therapy will be spread to more than just the target of the threat" because there is "no obligation that the target keep the *Tarasoff* warning confidential." *Id.* at 318. However, this analysis fails to consider how evidentiary rules regarding the admission of hearsay can greatly impact whether or not these statements would be admissible in court.[5] It is possible that this type of disclosure could still result in harmful community gossip. However, statements passed from person to person through a mass game of telephone would likely not be admissible in a trial that puts a patient's freedom on the line. Therefore, the Fifth Circuit's argument that confidentiality is destroyed as a result of a *Tarasoff* warning is without merit.

Ms. Gold was only informed of Dr. Pollak's duty to protect and was never given any warning that her statements may be used against her in a criminal proceeding; thus, she did not waive the psychotherapist-patient privilege. R. at 21. Therefore, this Court should bar testimony from Dr. Pollak in this case.

[5] Federal Rules of Evidence Rule 805 states that "hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements confirms with an exception the rule." FED. R. EVID. 805. Therefore, each new layer of hearsay makes it increasingly difficult to admit the evidence, as each time a new person asserts the statement it must fall under a hearsay exception.

II. MS. GOLD'S FOURTH AMENDMENT RIGHT WAS VIOLATED WHEN THE GOVERNMENT DELIBERATELY BROADENED THE SCOPE OF THE INITIAL PRIVATE SEARCH OF MS. GOLD'S DIGITAL INFORMATION.

Citizen protection against unreasonable search and seizure is developed from the axiom that "A man's home is his castle." *Minnesota v. Carter*, 525 U.S. 83, 94 (1998). The Framers of the Constitution created the Fourth Amendment to protect the people from unfettered government invasion by guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects." U.S CONST. amend. IV.

A Fourth Amendment search occurs when the government violates an individual's subjective expectation of privacy that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 351 (1967). A search conducted without a warrant is presumptively unreasonable, and therefore unconstitutional, unless it falls within one of the narrows exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971). One such exception is the private search doctrine, which authorizes the warrantless search and seizure of property that has been previously searched by a private individual. *United States v. Jacobsen*, 466 U.S. 109, 118-20 (1984).

The private search doctrine permits the government to use illegally obtained evidence as long as it receives the evidence from a private party and was not involved in the private search. *Id.* at 115. In applying this doctrine, the additional invasions of privacy by the government agent "must be tested by the degree to which they exceed[] the scope of the private search." *Id.* The critical measures of whether a government search exceeded the scope of the earlier private search are: (1) how much information the government stands to gain when it re-examines the evidence and (2) how certain the government is regarding what it will find. *Id.* at 119-20; *United States v. Bowers*, 594 F.3d 522, 526 (6th Cir. 2010).

In this case, the government exceeded the scope of the private search doctrine and thereby conducted an unconstitutional search of Ms. Gold's personal digital information.

A. The Government Stands to Gain A Tremendous Amount of Information from Searching the Flash Drive.

In regard to the first measure, the private search doctrine provides that the government may conduct a warrantless search following a search conducted by a private party, as long as the government does not expand the scope of the private search. *Walter v. United States*, 447 U.S. 649, 657-58 (1980). The rationale underlying this doctrine is that the private search destroys the individual's reasonable expectation of privacy in the subject of the search and, once this has occurred, the Fourth Amendment does not prohibit government use of this unprotected information. *Jacobsen*, 466 U.S. at 117.

The government violates the Fourth Amendment when they expand the scope of the government search to include items with an unfrustrated expectation of privacy. *Walter*, 447 U.S. at 651. For example, in *Walter*, packages containing pornographic filmstrips were shipped to the wrong address where unintended recipients opened and examined the descriptive labels and explicit drawings on the outside of the films. *Id.* at 651-52. The recipients then turned the packages over to the FBI who warrantlessly viewed the films. *Id.* at 652. This Court held that the search was unconstitutional because the private search only partially frustrated the defendant's expectation of privacy in the contents of the package, "but did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." *Id.* at 651.

Following this precedent, the Sixth and Eleventh Circuits adopted this narrow approach to the private search doctrine and extended it to searches of modern digital devices. *United States v. Lichtenberger*, 786 F.3d 478, 490-91 (6th Cir. 2015) (applying the private search doctrine to the search of a laptop computer); *United States v. Sparks*, 806 F.3d 1323, 1331 (11th Cir. 2015)

(applying the private search doctrine to the search of a cellphone). The courts favored an approach that recognizes that private searches can partially frustrate—without completely destroying—an expectation of privacy in a digital device by viewing only some of the files it contains. *Lichtenberger*, 786 F.3d at 490-91; *Sparks*, 806 F.3d at 1331. Such an approach addresses the concerns this Court expressed in *Riley v. California*, 573 U.S. 373, 395 (2014) regarding the ability of digital devices to collect and store "many distinct types of information" that "reveal much more in combination than any isolated record." This Court's approach in *Riley* suggested that it would not formalistically apply existing Fourth Amendment exceptions to digital searches. *Id.* Accordingly, the narrow approach emphasizes the increased privacy concerns of modern digital devices and promotes new private search rules specifically designed to accommodate the unique complexities of electronic devices.

The narrow approach accounts for the virtually unlimited storage capacity of a modern hard drive. Ms. Gold's privacy interest in her personal information—information completely unrelated to the government's case about Ms. Driscoll—had not been completely compromised by the illegal private search conducted by her roommate at the time, Ms. Wildaughter. Ms. Wildaughter frustrated, but did not completely destroy, the expectation of privacy in the computer files when she opened Ms. Gold's laptop and viewed some of the contents of the computer's files. R. at 6. Ms. Wildaughter viewed Ms. Gold's desktop, browsed through several documents and files, and then "copied the *entire* desktop onto a flash drive." *Id.* (emphasis added). The constitutionally-protected expectation of privacy remained in the many files that Ms. Wildaughter did not open, and Officer Yap's warrantless government search invaded that "unfrustrated" expectation of privacy. After speaking with Ms. Wildaughter, Officer Yap immediately examined the contents of the flash drive in its entirety. R. at 6. Officer Yap stated

that he saw "personal photos unrelated to the photographs Ms. Wildaughter had mentioned" and "look[ed] into the content of every subfolder." *Id.*

Alternatively, the broad approach employed by the Fifth and Seventh Circuits contends that once a private party opens a container, the owner's expectation of privacy is frustrated for the entire contents of the container. *United States v. Runyan*, 275 F.3d 449, 464-65 (5th Cir. 2001) (holding that the officer did not exceed the scope of the initial private search by viewing files on floppy disks that a private party had opened, despite the private party viewing different files); *Rann v. Atchison*, 689 F.3d 832, 836-38 (7th Cir. 2012) (extending the holding in *Runyan* to modern digital devices with much larger storage capacities). The broad approach mistakenly analogizes a digital device to a closed container and allows the government to search the entire device if a private party has examined even a single file on the device. *Runyan*, 275 F.3d at 464-65; *Rann*, 689 F.3d at 836-38.

The Fifth and Seventh Circuits fail to account for the fundamental differences between physical containers and digital devices in their implementation of the broad approach. The virtually unlimited storage capacity of a modern hard drive is not easily comparable to that of a physical container such as a backpack or suitcase.[6] Following this Court's holding in *Riley v. California*, the Sixth and Eleventh Circuits emphasized the significant increase in the privacy interests at stake when handling inherently personal, modern digital devices, such as cell phones and computers, that have the potential to expose a person's entire personal life by viewing files

[6] A USB flash drive can hold 128 gigabytes of storage. *See* Christopher Barnatt, *Computer Storage*, EXPLAININGCOMPUTERS.COM, http://explainingcomputers.com/storage.html (last visited Feb. 10, 2021). One gigabyte consists of approximately 1000 megabytes. An average digital photograph file could contain anywhere from 1 megabyte to tens of megabytes in size. This means that one file on a flash drive may take up about 0.0000167% of the storage capacity on the device. https://www.flashbay.com/support/faq/usb-drive-data-capacity. Under the broad approach, the government can warrantlessly gain access to potentially thousands of photos after a private party found just one incriminating image.

stored on the device. *Lichtenberger*, 786 F.3d at 489; *Sparks*, 806 F.3d at 1336. Not only would the broad approach have devastating implications for individual privacy interests, but it could also greatly invade the privacy of innocent third parties whose private information may be contained within those files. Thus, it is important to distinguish between the limited contents of a physical container and the virtually limitless contents of a digital device as "[t]he reality of modern data storage is that the possibilities are expansive." *Lichtenberger*, 786 F.3d at 489.

The broad approach would have devastating implications for individual privacy interests as digital devices can contain a tremendous amount of other information beyond the intended scope of the search. In many cases, unrelated innocent personal information may be intermingled with the information obtained in a police investigation. *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009). A hard drive of a computer is "the digital equivalent of its owner's home, capable of holding a universe of private information." *Id.* This gives the government an unjustifiable opportunity to invade upon hundreds, even thousands of documents, that should not fall within the confines of the private search doctrine. The flash drive Ms. Wildaughter showed to the police contained a copy of Ms. Gold's entire desktop. R. at 6. These files included, among other things, personal photos unrelated to the Driscoll case, usernames and passwords, health insurance information, and personal budget reports—some of the most personal digital information an individual possesses. R. at 6-10. This Court should find that Officer Yap's warrantless search of the entire contents of the flash drive, vastly beyond the scope of the public search doctrine, was a violation of Ms. Gold's Fourth Amendment right.

Therefore, this Court should instead adopt the narrow approach to the private search doctrine, which affords individuals the privacy guaranteed to them by the Fourth Amendment.

B. The Government Cannot Be Certain About What They Will Find from Searching the Contents of the Flash Drive.

The second measure for determining whether a government search exceeded the scope of the earlier private search—how certain the government is regarding what it will find—directs courts to inquire whether the government learned something from its search that it otherwise could not have learned from the private searcher's testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information. *Jacobsen*, 466 U.S. at 118-120. In *Jacobsen*, this Court found that the government agent's removal of cocaine from a damaged package that had previously been inspected by private employees remained within the scope of the initial search because the agent was simply confirming what the employees had told him and there was a "virtual certainty" that he was going to find contraband and little else in the package. *Id.* In accordance with this holding, the Sixth and Eleventh Circuits adopted the virtual certainty standard. *Lichtenberger*, 786 F.3d at 489-91; *Sparks*, 806 F.3d at 1335. Alternatively, the Fifth and Seventh Circuits interpreted *Jacobsen* to mean that officers need only "substantial certainty," based on private searchers' statements, to justify expansion of the initial search. *Runyan*, 275 F.3d at 464-65; *Rann*, 689 F.3d at 836-38.

To address modern considerations under the Fourth Amendment, the Sixth and Eleventh Circuits have applied the *Jacobsen* virtual certainty standard to searches of contemporary electronic devices. *Lichtenberger*, 786 F.3d at 489-91; *Sparks*, 806 F.3d at 1335 (holding that the officer's examination must be coextensive with the scope of the private search and officers must be virtually certain their actions will not uncover something of significance apart from what was reported). In *Lichtenberger*, the defendant was arrested for failing to register as a sex offender. 786 F.3d at 479. After his arrest, the defendant's girlfriend hacked into his personal laptop where she discovered child pornography. *Id.* at 480. She brought the laptop to the police and showed

them some of the images on the laptop. *Id.* The officers subsequently opened several additional files. *Id.* The court held that the officers exceeded the scope of the private search by opening more files on the computer than were opened during the private search. *Id.* at 485. The court explained that there was a real possibility that, in exceeding the scope of the girlfriend's search, the officer could have discovered something else on the defendant's laptop that was "private, legal, and unrelated to the allegations prompting the search." *Id.* at 488-89. This is precisely the kind of discovery this Court sought to avoid in articulating its test under *Jacobsen*. *Id.*

In this case, the record demonstrates that Office Yap clearly lacked the virtual certainty needed to view the contents of the flash drive. R. at 6. While Ms. Wildaughter mentioned to Officer Yap a few of the specific files and images that she opened, nothing in the record indicates that she showed him where those specific documents could be found. *Id.* Further, after Ms. Wildaughter left, Officer Yap immediately opened every single file on the device. *Id.* He searched through everything on the flash drive, completely disregarding whether it had been viewed during the private search. *Id.* Unlike the private search of a single mail package in *Jacobsen* where the entire contents of the package were immediately apparent, 466 U.S. 109, the contents of the flash drive were not immediately apparent to Officer Yap. R. at 6. Ms. Wildaughter had hastily and illegally copied Ms. Gold's entire desktop onto a flash drive without having any idea herself about the nature or extent of its contents. *Id.*

As an alternative to the *Jacobsen* "virtual certainty" standard, the Fifth and Seventh Circuits follow a "substantial certainty" standard. *Runyan*, 275 F.3d at 464-65; *Rann*, 689 F.3d at 836-38. Under this standard, with its lower threshold, the government does not exceed the scope of a prior private search by examining a closed container that was not opened by the private searchers if they are "already substantially certain of what is inside the container based on the

statements of the private searches, their replication of the private search, and their expertise." *Runyan*, 275 F.3d. at 463-65 (holding the police were substantially certain of the contents of the container based on the conversations with defendant's ex-wife and her friends and therefore the scope of the private search was not exceeded). In *Rann*, a 15-year-old victim of child pornography reported the defendant to the police. 689 F.3d at 834. After being interviewed, she went home to retrieve a memory card containing evidence to support her allegations and her mother, the defendant's wife, brought a computer zip drive with similarly incriminating evidence. *Id.* While the police failed to obtain a warrant before searching the devices, the court held that the government searches were nonetheless permissible. *Id.* at 838. The court reasoned that because the victim and her mother knew what was on the digital devices when they provided them to the police, the police were "substantially certain" about the contents of the devices. *Id.*

Even if this Court employed the substantial certainty standard, the government's warrantless search of the flash drive was still unconstitutional. While the substantial certainty standard is undoubtedly a lower threshold than the virtual certainty standard, the former still requires that government agents demonstrate considerable confidence in their knowledge of the contents of the subject of the search. In *Rann*, the police were able to point to evidence that led them to conclude that the private parties knew exactly what was on the digital devices and had reason to believe nothing unrelated was on them. 689 F.3d at 834. This is distinguishable from the case at bar. Here, Officer Yap had no way of knowing what else was on the flash drive, besides Ms. Wildaughter's equivocal comment that "everything of concern was on this drive." R. at 6. Ms. Gold's entire desktop had been copied onto the flash drive, so the possibility of Officer Yap having substantial certainty regarding all that was on the flash drive is near impossible. R. at 6-10. In fact, immediately after accessing the flash drive, Officer Yap viewed "personal photos

unrelated to the photographs Ms. Wildaughter had mentioned." R. at 7-8. From the moment his search began, it is clear that Officer Yap could not have predicted what he would find. R. at 6. Despite his work experience, Officer Yap did not ask Ms. Wildaughter the specific contents of the flash drive she brought in, or specifically what she saw and where she saw it. *Id.* Ms. Gold's files that Officer Yap thoroughly combed through could have contained explicit photos of the defendant: "legal, unrelated to the crime alleged, and the most private sort of images." *Lichtenberger*, 786 F.3d at 489. In addition, other private documents, such as bank statements, personal communications, and "internet search histories containing anything from defendant's medical history to his choice of restaurant" could have also been uncovered during the search. *Id.*

It is contrary to the goals of the Fourth Amendment to adopt an excessively broad approach that would attenuate the warrant requirement when the privacy interests are so great. The private search doctrine is already an exception to the warrant requirement, permitting the government access to evidence provided by private citizens that would normally not be available to them. Such an exception is justifiable so long as there are restrictions in place to limit the extent of such government intrusion. The broad approach would result in an excessive invasion of privacy and encourage an undesirable type of police activity that is broad and unrestricted. "[T]he Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *Missouri v. McNeely*, 569 U.S. 141, 158 (2013). Officer Yap's intrusive search is exactly the kind of extralegal activity from which we must protect our citizenry.

The security of citizens' privacy from arbitrary government intrusion is at the core of the Fourth Amendment and fundamental to a free society. This Court should adopt an approach which provides officers with enough leeway to access places where relevant evidence may be

found, yet not so broad that officers can easily and strategically circumvent the warrant requirement. *Riley* signals a trend that the Court will favor privacy interests in digitally stored information when there is little justification or need for a warrantless search.

In light of the strictly circumstantial information available at the time the search was conducted, the strong privacy interests at stake, and the absence of a threat to government interests, this Court should conclude that Officer Yap's warrantless review of Ms. Gold's flash drive exceeded the scope of the private search Ms. Wildaughter had conducted earlier that day, and therefore violated Ms. Gold's Fourth Amendment right to be free from an unreasonable search and seizure. In order to protect the people from unregulated government intrusion into their most intimately held information, this Court should adopt the narrow approach to the private search doctrine.

III. THE GOVERNMENT COMMITTED A *BRADY* VIOLATION WHEN IT FAILED TO DISCLOSE MATERIAL, EXCULPATORY INFORMATION TO MS. GOLD BEFORE HER TRIAL.

"Society wins its point whenever justice is done its citizens in the court." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (citing Frederick William Lehmann). This principle, inscribed on the wall of the Department of Justice, was the foundation upon which this Court's landmark decision in *Brady v. Maryland* was born. *Id.* In *Brady*, this Court held that the government violates a person's constitutional due process rights when it suppresses evidence material to the outcome of the case. *Id.* It is not the role of the prosecutor to play architect of the proceeding—preselecting which pieces of evidence will construct a conviction. *Id.* at 88. Our administration and standards of justice "suffer[] when any accused is treated unfairly." *Id.* at 87.

In order to prevent this miscarriage of justice, courts have created a three-prong test to establish a *Brady* violation. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 284–85 (3d Cir.

2016); *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). A defendant must prove that (1) "the prosecution suppressed the evidence," (2) "the evidence was favorable to the defense," and (3) "the evidence was material." *Erickson*, 561 F.3d at 1163. In the case at bar, the government did not supply Ms. Gold with the evidence in question. R. at 45. Furthermore, evidence containing information on two additional suspects is clearly favorable to the defense. R. at 47. Therefore, this Court need only address whether the suppressed evidence was material.

This Court has determined that evidence is material if there is a "reasonable probability" that had the government disclosed it to the defense, it would have "undermine[d] confidence in the outcome of the trial," and led to a different result. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The admissibility of this evidence is not determinative of its materiality. *Dennis*, 834 F.3d at 310. The majority view among the courts of appeals is that the government's suppression of inadmissible evidence is still violative of a defendant's constitutional rights if the suppressed information could have led to the discovery of admissible evidence. *United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014) (listing cases).

This Court should grant Ms. Gold's motion for post-conviction relief under *Brady* for two main reasons. First, the suppressed evidence is material because it is reasonably probable that presenting the jury with two additional suspects would have shaken their confidence in the prosecution's case and a different verdict would have been reached. Second, the fact that this evidence arose from inadmissible hearsay does not preclude Ms. Gold's *Brady* claim.

A. The Government Violated Ms. Gold's Constitutional Due Process Rights by Suppressing Material, Exculpatory Evidence.

In determining what the standard of materiality should be for claimants alleging a *Brady* violation, this Court explicitly stated that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have

resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. This Court additionally denounces a "sufficiency of evidence test." See *id.* (holding that a defendant does not need to demonstrate that the remaining evidence, after discounting the inculpatory evidence in light of the undisclosed information, is sufficient to convict). Nevertheless, this Court clarifies that mere speculation that the suppressed evidence impacted the outcome of the trial does not establish the requisite materiality in a *Brady* claim. *United States v. Agurs*, 427 U.S. 97, 109–10 (1976). Thus, this Court found itself in the position of Goldilocks; with one approach too burdensome, and the other too permissive, this Court settled on an approach it determined was "just right."

Under this balanced approach, the defendant is entitled to relief if the disclosure of suppressed evidence would have created a "reasonable probability" of a different result. *Kyles*, 514 U.S. at 434. In other words, constitutional error occurs if the government's evidentiary suppression "undermines confidence in the outcome of the trial," and creates a reasonable doubt. *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Although this "reasonable probability" approach is theoretically sound, in practice, courts have found that this standard fails to assuage these constitutional violations. *Morales*, 746 F.3d at 311. While there is a clear, "affirmative duty to disclose evidence favorable to a defendant," *Kyles*, 514 U.S. at 432, and any "prudent prosecutor [would] resolve doubtful questions in favor of disclosure," *Agurs*, 427 U.S. at 108, there is often no consequence for prosecutors who infringe upon this fundamental protection. *Morales*, 746 F.3d at 311. Furthermore, allowing prosecutors to be the gatekeepers of this evidence, as opposed to the courts, "is anathema to the goals of fairness and justice motivating *Brady*." *Dennis*, 834 F.3d at 307. A standard that gives this much power to the prosecution, with no accountability if that power is abused, usurps the "quest for truth" essential to a criminal trial. *Morales*, 746 F.3d at 311; *Madsen v. Dormire*, 137

F.3d 602, 605 (8th Cir. 1998). Therefore, this Court should realign the standard of materiality to correspond with the purpose of *Brady*—to effectively safeguard the constitutional due process rights of our citizens and prevent governmental abuse.

Even if this Court maintains the "reasonable probability" standard of materiality, it should find Ms. Gold entitled to relief under *Brady*. The government failed to disclose two additional suspects: (1) a reportedly violent, pyramid scheme distributor to whom Ms. Driscoll was indebted, and (2) an additional person involved in the pyramid scheme. R. at 11-14. Disclosure of this evidence to Ms. Gold would have undermined the jury's confidence in the prosecution's case and created a reasonable probability that a different verdict would have been reached. Thus, because of the government's *Brady* violation, this Court should grant Ms. Gold's request for a directed verdict or new trial.

B. The Government Committed a *Brady* Violation by Suppressing Evidence Pertaining to Two Additional Suspects, Regardless of the Fact that this Evidence May Be Inadmissible Hearsay.

At the very core of Supreme Court *Brady* jurisprudence is the focus on "the benefits of disclosure to the defense, not admissibility." *Dennis*, 834 F.3d at 309. Adding an admissibility prong to the Court's three-part test would improperly shift that focus. *Id.* at 310. This Court has not yet explicitly ruled on whether inadmissible evidence is allowed in a *Brady* inquiry as a matter of law. However, this Court's analysis of materiality when addressing inadmissible evidence implies the possibility that this evidence can be used for *Brady* claims. *Wood v. Bartholomew*, 516 U.S. 1, 7 (1995); *Cone v. Bell*, 556 U.S. 449, 470–71 (2009) (considering suppressed evidence for the purposes of a *Brady* inquiry even though the evidence was not necessarily admissible). "If admissible evidence could never form the basis of a *Brady* claim, the Court's examination of the issue would have ended when it noted that the test results were

inadmissible." *Dennis*, 834 F.3d at 308. In *Wood*, despite this Court's finding that the polygraph test was not evidence at all, and therefore was inadmissible, it still continued its *Brady* analysis. 516 U.S. at 7. Thus, this Court's lack of explicit precedent does not rule out a defendant's ability to use inadmissible evidence for *Brady* purposes.

The majority of circuits addressing this issue follow this interpretation of the *Brady* and *Wood* decisions—providing for the inclusion of inadmissible evidence. *Morales*, 746 F.3d at 314 (citing the First, Second, Third, Sixth, and Eleventh Circuits). These circuits have held that the government's suppression of inadmissible evidence is still violative of a defendant's constitutional rights if the suppressed information could have led to the discovery of admissible evidence. *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (collecting cases). For example, with written inadmissible hearsay statements, defense counsel can interview the declarant and potentially put them on the witness stand. *Ellsworth*, 331 F.3d at 5. Although the Federal Rules of Evidence would bar testimony regarding the written statement,[7] it would not bar witness testimony based on firsthand knowledge. *Id.* In *Ellsworth*, the court held that a note containing evidence indicating the victim's accusations were false was allowed under a *Brady* claim, despite its inadmissibility as hearsay. *Id.* at 4-5. Had disclosure taken place before trial, the defense would have had the opportunity to find witnesses to testify to the truth of the statements in the note, thus sidestepping the hearsay issue. *Id.* at 5.

Similarly, a defendant could use inadmissible evidence referencing an alternate suspect to find admissible evidence that would support an "other person" defense—casting reasonable doubt on the defendant's guilt. *Dennis*, 834 F.3d at 311; *United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995) (holding that an investigative report concerning an alternate suspect could be

[7] Rule 801 of the Federal Rules of Evidence defines hearsay as a statement, including a written statement, that the declarant does not make while testifying and a party offers for the truth of the assertion. *See* FED. R. EVID. 801.

material despite the report's inadmissibility, but ultimately denying the allegation for other reasons). In *Dennis,* the government suppressed several documents (the "Frazier documents") relating to a tip identifying an alternate suspect as the killer. 834 F.3d at 276-77. The court held that the Frazier documents were material under *Brady* because disclosure would have impacted defense preparation and cross-examination, and had the jury been subjected to this "'other person' defense, the result of the proceeding would have been different." *Id.* at 311. However, a potential defense based on the suppressed evidence could be unpersuasive if there was substantial physical evidence tying a defendant to the crime or absolving an alternate suspect. *Wood*, 516 U.S. at 8; *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 200) (serology evidence and alibis proved that the three other potential leads were not legitimate suspects).

Another permitted justification for using inadmissible evidence under a *Brady* inquiry is to attack the reliability of the investigation. *Kyles*, 514 U.S. at 446-47 (finding that disclosure of a third party's self-incriminating statements would have allowed the defense to argue that the police were guilty of negligence); *Dennis*, 834 F.3d at 308. The court in *Dennis* also held that the disclosure of the Frazier documents would also have impacted the investigative activities, not only to pursue other strategies related to the additional suspect, but also "to challenge detectives at trial regarding their paltry investigation of the lead." 834 F.3d at 311. The prosecution cannot hide behind the claim that a lead is "fruitless" if they failed to "rigorously purse[]" that lead. *Dennis,* 834 F.3d at 307. In such a situation, the defendant is entitled to the disclosure to pursue the lead themself, or "inform[] the jury of the police's misguided focus on [the defendant] and failure to pursue the lead." *Id.*

The evidence regarding the two additional suspects in the case should have been disclosed to Ms. Gold under *Brady*, regardless of its inadmissibility. Similar to the suppression

of the Frazier documents in *Dennis*, 834 F.3d at 311, the government's withholding of material evidence in this case deprived Ms. Gold of the opportunity to assert an "other person" defense. The interview with Chase Caplow and the anonymous 911 call, though inadmissible in and of themselves, would have impacted Ms. Gold's investigative abilities, defense preparation, and witness examination. R. at 11-12. Mr. Caplow, in his interview with the government, indicated that Ms. Driscoll, the victim, owed money to Martin Brodie, an upstream distributor that worked for the same "pyramid scheme" HerbImmunity. R. at 11, 13. According to Mr. Caplow, this potential perpetrator not only had a motive to kill Ms. Driscoll, but he had a reputation for being violent.[8] R. at 11. Thus, this "other person" defense could have created the requisite "reasonable probability" that the jury's confidence in the verdict would have been undermined. The same logic follows for the additional suspect named in the 911 call. R. at 12.

Additionally, per this Court's reasoning in *Kyles*, 514 U.S. at 446-7, Ms. Gold would have been able to challenge the validity of the investigation had the government properly disclosed the evidence. The government cannot absolve itself of its constitutional duty to disclose this evidence by claiming that the evidence is weak. Without a legitimate investigation, it is irresponsible to conclude that the leads stemming from the potential suspects are fruitless. Neither Special Agent Mary Bauer, nor Special Agent Mark St. Peters, provided any evidence of a rigorous pursuit of these leads. R. at 11-12. Agent St. Peters claims he "conducted a preliminary investigation," but it is unclear what that investigation entailed as he chose not to follow-up on the lead. R. at 12. Similarly, Agent Bauer states in her report a "plan to interview [the suspect] and determine if this information requires further investigation." R. at 11. There has been no evidence of this interview, or any further investigation, suggesting that Agent Bauer did

[8] Per Rule 803(21), reputation concerning character is not excluded by the rule against hearsay. FED. R. EVID. 803.

not pursue this lead at all, let alone pursue it rigorously. Despite the lack of physical evidence at the scene, the government seems content, relieved even, to be able to pin this offense on Ms. Gold. R. at 14. However, our Constitution does not allow the government to cut corners and violate due process rights "to simply win convictions." *Gold v. United States*, No. 19-142 (14th Cir. 2020) (Cahill, J., dissenting). It is a "prosecutor's job to seek justice." *Id.* Because the government failed to do so, Ms. Gold has a right to present this failure to the jury.

In holding that inadmissible evidence is barred under a *Brady* claim as a matter of law, the minority circuits misinterpret this Court's analysis in *Wood*. *See Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); *Madsen*, 137 F.3d at 604. Furthermore, both the Fourth and Eighth Circuit rejected the *Brady* claims for an amalgamation of reasons; whether the evidence was admissible was not dispositive in these cases. *Hoke*, 92 F.3d 1350 (finding no *Brady* violation because the defense could have found the information themselves); *Madsen*, 137 F.3d 602 (holding that there was no *Brady* violation because the evidence was neither exculpatory, nor could it be used to impeach). Therefore, Ms. Gold has legitimate *Brady* claims.

CONCLUSION

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

Respectfully submitted,

Team 13
Counsel for Petitioner